

Fall 12-1-2016

## Attempt, Merger, and Transferred Intent

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### Recommended Citation

Nancy Ehrenreich, *Attempt, Merger, and Transferred Intent*, 82 Brook. L. Rev. (2017).

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# Attempt, Merger, and Transferred Intent

*Nancy Ehrenreich*<sup>†</sup>

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<sup>†</sup> Professor of Law, University of Denver Sturm College of Law. I am grateful for feedback from Joshua Dressler, George Thomas, Jessica West, and Peter Westen, as well as from members of the Rocky Mountain Collective on Race, Place, and Law who attended a Work in Progress presentation on this project, including Tanya Bartholomew, César Cuahtémoc García Hernández, Margaret Kwoka, Christopher Lasch, Tom Romero, Catherine Smith, and Robin Walker Sterling. Excellent research assistance was provided by Sarah Bryant, J.D., D.U. Sturm College of Law, 2015; Diane Burkhardt, Acting Library Director, D.U. Sturm College of Law; Ellen Giarratana, J.D., D.U. Sturm College of Law, 2016; Henry Holithron, J.D. expected, 2018, DU Sturm College of Law, and Julie Marling, J.D., D.U. Sturm College of Law, 2016. All errors of course are mine.



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## INTRODUCTION

Recent years have seen a dramatic expansion in the transferred-intent doctrine<sup>1</sup>—which, in its basic form, allows an actor with bad aim who kills an unintended victim (instead of the intended target) to be punished for murder. One central extension of the doctrine involves allowing attempted murder liability as to the *intended* target to be imposed along with transferred-intent murder as to the *unintended* (actual) victim. Consider, for example, the following hypothetical:

*Hidden Child:* *A* intends to shoot her partner, *B*, and has acquired a gun for that purpose. Believing their child, *C*, is at a neighbor's house for a play date, *A* goes into the living room where *B* is reading a newspaper on the couch, aims, and shoots. Unbeknownst to either parent, *C* has already come home, and is playing behind the living room curtains. *A*'s shot misses *B* but kills *C*. *A* loves *C* very much and had absolutely no harmful intent towards the child. Through application of the transferred-intent doctrine, *A* is convicted of the murder of *C*. She is also convicted of attempted murder of *B*. The mens rea for both crimes is supplied by *A*'s initial intent to kill *B*.<sup>2</sup>

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<sup>1</sup> In the absence of an empirical study, it is difficult to establish the precise time frame of this expansion. However, the fact that many of the relevant cases date from the 1980s or later supports the assertion that these extensions are of relatively recent vintage. See cases cited in JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 126–27 & n.56 (5th ed. 2009).

<sup>2</sup> This hypothetical is loosely based on one used by Peter Westen. See Peter K. Westen, *The Significance of Transferred Intent*, 7 CRIM. L. & PHIL. 321, 331 (2013); cf. *Timbu Kolian v The Queen* (1968) 119 CLR 47 (Austl.), cited in A. J. Ashworth, *Transferred Malice and Punishment for Unforeseen Consequences*, in RESHAPING THE CRIMINAL LAW 83 n.28 (P. R. Glazebrook ed., 1978) (*D* tried to hit his wife with a stick, but hit instead their child whom she carried in her arms and who was invisible to *D* because of darkness.). The transferred-intent rule would apply here regardless of whether *A* had any idea that the child was behind the curtains, or even whether any reasonable person would have been aware of that risk. For discussion of bad aim scenarios involving less sympathetic actors, and of alternative punishments that could be imposed for the additional harm sometimes caused by defendants in such scenarios, see *infra* Section I.C.1.

Critics have indicted courts for “duplicating” an actor’s initial intent to kill in this way (as well as in other similar variations),<sup>3</sup> concluding that punishing twice for one culpable intent represents an inappropriate expansion of the transferred-intent doctrine.<sup>4</sup> Such expansions, they have argued, impose punishment disproportionate to culpability,<sup>5</sup> punish for purely accidental harm,<sup>6</sup> and fail to distinguish between foreseeable and unforeseeable victims.<sup>7</sup> However, little attention has been paid to another flaw in attempt-related expansions of transferred intent (TI): imposing attempt liability in TI cases will often violate the merger doctrine.<sup>8</sup>

It is well established that an attempt to commit a given crime “merges” into the completed offense, resulting in punishment only for the latter.<sup>9</sup> The rule mandating merger thus essentially operates to prohibit a double conviction—a conviction of both attempt and the completed offense—based on the same conduct by the defendant.<sup>10</sup> If the actor is convicted of the underlying offense, she may not also be convicted of attempt to commit that offense (or vice versa).<sup>11</sup> In explaining the merger doctrine, it has been said that “the successful commission of the target crime logically includes an attempt to commit it.”<sup>12</sup> Thus, while attempt is not always explicitly so labeled, it essentially

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<sup>3</sup> See *infra* Section I.C.2.a.

<sup>4</sup> See, e.g., Westen, *supra* note 2, at 339–40.

<sup>5</sup> The difference in punishment can be significant. In Illinois, to take just one example, punishment for attempted murder can add six to thirty years to an already heavy first degree murder sentence of twenty to sixty years. 720 ILL. COMP. STAT. 5/8-4(c)(1) (2012); 730 ILL. COMP. STAT. 5/5-4.5-25(a) (2012); 730 ILL. COMP. STAT. 5/5-4.5-20(a) (2013). Of course, the impact of additional convictions is increased if the sentences for murder and attempt run consecutively, as opposed to concurrently.

<sup>6</sup> Anthony M. Dillof, *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*, 1 BUFF. CRIM. L. REV. 501, 526–28 (1998).

<sup>7</sup> Westen, *supra* note 2, at 341.

<sup>8</sup> See *id.* at 340 (briefly mentioning that such cases violate merger rule); see Dillof, *supra* note 6, at 506–07 (making same argument in passing).

<sup>9</sup> DRESSLER, *supra* note 1, at 381–82.

<sup>10</sup> *Id.* at 381 (“[I]f a person commits the target offense, she may *not* be convicted of both it and the criminal attempt. If she was charged with the target offense, and the jury convicts her of this offense, the criminal attempt ‘merges’ with the substantive crime; the lesser offense of attempt is absorbed by the greater one.” (footnote omitted)).

<sup>11</sup> In terms of how this would work at trial, if *A* is charged with intentionally killing *B* and the jury concludes that *A* intentionally and proximately caused *B*’s death, *A* will be convicted of murder but cannot also be convicted of attempt. However, if *A* (still charged with murder) is found *not* to have proximately caused *B*’s death (e.g., the connection was too attenuated), then *A* can instead be convicted of attempt (as long as the evidence so warrants). See WAYNE R. LAFAVE, CRIMINAL LAW 610 (4th ed. 2003). The reverse, of course, is not true. Even if the evidence adduced at trial establishes all the elements of the underlying crime, an individual indicted only for attempt cannot be convicted of the completed offense. *Id.* at 610–11.

<sup>12</sup> DRESSLER, *supra* note 1, at 381.

functions like a lesser included offense (LIO),<sup>13</sup> and the merger of attempt is one instance of the broader principle that lesser included crimes merge into the higher offense.

Since attempt is a heightened-intent crime (requiring proof of specific intent at common law and purpose under the Model Penal Code<sup>14</sup>), the merger issue only arises, of course, where *A*'s act of killing was *intentional*. In cases of depraved heart murder or manslaughter, no attempted murder charge would be possible to begin with for lack of adequate mens rea. In the transferred-intent context, however, an (intentional) attempt to kill results in the death of an unintended victim—raising the issue of whether the attempt as to the first victim merges into the completed crime involving the second.

Thus, the potential violation of the merger rule represents an important argument against imposing attempt liability in TI cases. This article contends that the merger rule prohibits the practice of allowing conviction of an actor for both murder of an unintended victim and attempted murder as to the original target, whenever the attempt and murder charges flow from the same conduct by the defendant. While the harm represented by the attempt on the intended victim's life (in addition to the death of the unintended victim) may partially explain courts' failure to apply the merger doctrine in those situations, at least three important policy justifications for merger mediate against subjecting the defendant to the significant increase in punishment that results when such an attempt is not merged into the completed offense.<sup>15</sup> Where *A* accidentally kills *C* instead of *B*, and is convicted via transferred intent of murdering *C*, merger should prohibit convicting *A* of attempting to murder *B*.<sup>16</sup>

Consider, for example, the implications of the merger rule for the *Hidden Child* hypothetical above. Suppose that *A* had successfully killed her partner *B*, rather than her child. She would not have been convicted of attempted murder as well as murder. The attempt on *B* would simply "merge" into the homicide.<sup>17</sup> Yet, even though *A* had exactly the same intent

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<sup>13</sup> Thus, some state statutes defining lesser included offenses specifically list attempt as an LIO. See, e.g., KAN. STAT. ANN. § 21-5109(b)(3) (2015). For further discussion of attempt as a lesser included offense, see *infra* Section II.B.3.

<sup>14</sup> See DRESSLER, *supra* note 1, at 391; MODEL PENAL CODE § 5.01(1) (AM. LAW INST. 1985).

<sup>15</sup> See *infra* Section II.B.

<sup>16</sup> As will be discussed further herein, the intent towards *B* should also not be duplicated to impose transferred-intent-based liability for attempted murder of bystanders. Those attempts should also merge into the murder that actually occurs. See *infra* Section II.B.

<sup>17</sup> For a discussion of the minority definition of attempt, which requires that the completed crime was *not* completed, see *infra* Section II.A.1.

under both versions of the facts (the intent to kill *B*, her partner), if her aim is off (as originally posited) the expansion of transferred intent considered here would allow her to be convicted of two serious crimes, instead of one.<sup>18</sup> Her original intent could be used to convict her of attempted murder of her partner *and* it could also be used a second time (duplicated) in order to transfer that intent to convict her of murdering the unintended victim (her child).

This article concludes that the merger rule is best understood as prohibiting such uses of duplicated intent. Just as merger bars a single intent to kill from producing liability for both attempt and murder in the basic merger case, where the intended victim is killed, it similarly bars double liability in situations such as the *Hidden Child* hypothetical, where the unintended victim is killed, as well as in other attempt-related expansions of the transferred-intent doctrine.<sup>19</sup>

Enforcement of the merger rule in these situations would not undermine the transferred-intent doctrine itself. That doctrine was originally created to prevent an individual's bad aim from allowing him to escape liability for a death caused when he acted intending to kill a human being.<sup>20</sup> The doctrine is intended to impose the punishment that would have been imposed had the intended act been completed—not to significantly *increase* punishment beyond what commission of the intended crime would have produced.<sup>21</sup> Therefore, any alleged attempt premised upon the actor's original intent to kill, and stemming from the same conduct that caused the death of the unintended victim, should merge into the (transferred-intent-based) murder charge, just as it merges into the direct murder of the intended victim in ordinary TI cases.<sup>22</sup>

Part I of this article provides a brief overview of the operation of, and rationales for, the transferred-intent doctrine, both in its basic form and under the more controversial extensions involving attempt liability—often via duplicated intent. It then

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<sup>18</sup> See *e.g.*, *People v. Scott*, 927 P.2d 288, 292–94 (Cal. 1996) (rejecting defendant's argument that he was prosecuted as though "he intended to kill two people rather than one").

<sup>19</sup> See discussion *infra* Sections II.A.3, II.B.

<sup>20</sup> See discussion *infra* Section I.A.

<sup>21</sup> See discussion *infra* Section I.A.

<sup>22</sup> For discussion of other permutations of the expansion of transferred-intent liability via attempt charges, see *infra* Section I.C.1. For example, in cases where A successfully killed the intended victim, thereby making transferred intent unnecessary, some prosecutors have nevertheless argued that courts should also allow an additional charge of attempted murder of C. See, *e.g.*, *People v. Bland*, 48 P.3d 1107, 1119 (Cal. 2002) (holding attempt liability not available).

canvasses the leading cases and representative samples of the scholarship addressing those expansions.

Part II begins with a brief historical overview of the merger-of-attempt rule, noting that its current use is rather undertheorized. Next, explaining the merger doctrine's connections to the law of lesser included offenses and to double jeopardy jurisprudence,<sup>23</sup> this part draws on those parallels to suggest three modern rationales for the merger rule. As to each rationale, it considers whether that justification for merger applies with equal force in the transferred-intent context. Finding that, to varying extents, each of the justifications for using merger is implicated in TI cases as well, this part concludes that many of the recent expansions of attempt liability in the TI context violate the merger rule. The article ends with a brief conclusion.

## I. TRANSFERRED INTENT, DUPLICATED INTENT, AND ATTEMPT

Before discussing whether attempt liability in transferred-intent contexts violates the merger doctrine, it is helpful to review the basic operation and scope of the transferred-intent rule itself, to note some relevant doctrinal issues with which TI scholars grapple, and to describe recent extensions of the doctrine that allow multiple-crime and attempt-based liability in TI cases.

### A. *Overview of Transferred Intent: Basic Operation and Rationales*

The transferred-intent doctrine has been in existence since the sixteenth century.<sup>24</sup> Although there is “no canonical statement”<sup>25</sup> of the rule, it can be generally described as imposing liability on an actor who intends to kill or injure one person, but accidentally kills or injures a different, unintended victim. Thus, in the basic case of the doctrine, the “bad aim” case, *A* shoots at *B*, intending to kill him, but misses and kills *C*, standing next to *B*. As anyone who has survived the first year or two of law school will know, the doctrine operates to “transfer” *A*'s original intent (to kill *B*) to *C*, thereby providing the

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<sup>23</sup> As will be discussed further herein, the double jeopardy doctrine covers both multiple punishments (imposing more than one punishment within the same trial) and successive prosecutions (imposing more than one punishment in separate trials). Only the former is implicated by the issues addressed in this article. See *infra* Section I.B.3.

<sup>24</sup> DRESSLER, *supra* note 1, at 124.

<sup>25</sup> Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65, 66 (1996).

culpable intent necessary to convict *A* of murder.<sup>26</sup> Thus, the culpable intent towards *B* is combined with causing the requisite harm to *C* to form a completed crime. Widely recognized as a legal fiction,<sup>27</sup> and considered by a number of scholars to be unnecessary,<sup>28</sup> the doctrine nevertheless appears to be universally followed.<sup>29</sup>

The concept of “transferring” intent was originally proposed as a solution to the perception that it would otherwise be impossible to convict *A* of murder in bad aim situations. However, as Peter Westen has pointed out, the identification of this “problem” actually involved two separate assumptions.<sup>30</sup> The first was a *descriptive* assumption: that an intent (e.g., to kill) in the criminal law must be proven *as to the particular victim* who was killed, so that *A* can only be convicted of *C*’s murder if she intended to kill *C*.<sup>31</sup> That description of how the criminal law actually operates was then combined with a second, *normative*, assumption: that *A* nevertheless *should be* convicted of murder in such situations. The doctrine was—and is—justified on the normative grounds that it is only fair to subject the intentional actor to the same punishment he would have received had he successfully completed the crime he intended to commit.<sup>32</sup> In the murder example, since *A* had made a culpable choice to take a life, this reasoning goes, it is appropriate that he should be punished for murder when he does exactly that. Put differently, the doctrine does not allow

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<sup>26</sup> Of course, the actus reus of causing a death must also be proven to make out the completed crime.

<sup>27</sup> DRESSLER, *supra* note 1, at 124 (*A*’s intent is not something concrete that can actually be *moved to C*).

<sup>28</sup> See discussion *infra* note 35 and accompanying text.

<sup>29</sup> This author could find no mention in any source consulted of any jurisdiction that does *not* follow the doctrine. Transferred intent applies in any intent-based offense, and some jurisdictions allow the transfer of other mens rea (such as recklessness or even negligence) as well. Westen, *supra* note 2, at 325. However, for simplicity’s sake this article discusses intent-based offenses only, and within that grouping, will focus on the most commonly discussed type of transferred-intent case: intent-to-kill murder.

<sup>30</sup> Westen, *supra* note 2, at 326–27.

<sup>31</sup> Scholars have contested the descriptive accuracy of this assumption. See, e.g., Husak, *supra* note 25, at 73–74. For further discussion of the implications of the debate over how to define intent under the TI doctrine, see *infra* Section I.B.2.

<sup>32</sup> “[T]he purpose of the transferred intent doctrine is to put the ‘bad aim’ wrongdoer in the same position he would have found himself if his aim had been good. The doctrine is meant to result in punishment proportional to the wrongdoer’s culpability.” DRESSLER, *supra* note 1, at 127. The concern with proportionate punishment underlying the doctrine might have been due in part to the fact that, at the time, the original attempt itself would only have been punished, at most, as a misdemeanor. Ashworth, *supra* note 2, at 79; see also *People v. Scott*, 927 P.2d 288, 292 (Cal. 1996) (Transferred intent “connotes a *policy*—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.”).

an actor to escape punishment merely because he accidentally harmed a person different from the intended target.<sup>33</sup> To fail to impose murder liability in such a case would be to benefit the defendant merely because he had bad aim, allowing differential treatment of equally culpable individuals based on the “luck” factor of whether each was a good shot.

To summarize, the combination of these two assumptions—one descriptive (criminal law rules preclude murder liability without the use of transferred intent), and one normative (the actor deserves to be punished as a murderer)—led to the creation of the transferred-intent doctrine. Given the descriptive assumption that the criminal law required “particular” intent, TI was necessary to generate the outcome that was assumed to be normatively preferable: convicting the actor of murder. However, as will be discussed further below, modern scholarship has taken issue with both of these assumptions.

### *B. Relevant Doctrinal Issues*

Several doctrinal issues within transferred-intent law raise questions about the wisdom of broadening the doctrine in the ways mentioned above.<sup>34</sup> This section examines in more detail the descriptive and normative assumptions underlying the TI rule, arguing that weaknesses in both mediate against broadening the doctrine’s reach. Subsection 1 describes current disputes about whether the law really requires particular intent, as the TI doctrine posits, or instead merely impersonal intent—thereby raising questions about the validity of the

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<sup>33</sup> Dressler calls this the “necessity argument”: “[T]he bad aimer should not avoid conviction for intent-to-kill homicide simply because he killed the ‘wrong person,’ i.e., someone he did not intend to kill.” DRESSLER, *supra* note 1, at 124; *see also* *Ford v. Maryland*, 625 A.2d 984, 998 (Md. 1993) (“The function of the transferred intent doctrine [in first degree murder cases] is to insure the adequate punishment of those who accidentally kill innocent bystanders, while failing to kill their intended victims. But for the transferred intent doctrine, such people could escape punishment for murder, even though they deliberately and premeditatedly killed—because of their ‘lucky’ mistake. The transferred intent doctrine is borne of the sound judicial intuition that such a defendant is no less culpable than a murderer whose aim is good. It insures that such a defendant will not be allowed to defend against a murder charge by claiming to have made a mistake of identity, a poor aim or the like.” (alteration in original)). *But see* *Henry v. Maryland*, 19 A.3d 944 (Md. 2011) (quoting *People v. Birreuta*, 162 Cal. Rptr. 635 (Cal. Ct. App. 1984), *overruled on other grounds by* *People v. Flood*, 957 P.2d 869 (Cal. 1998)) (disapproving *Ford’s* use of necessity argument to prohibit application of transferred intent where defendant killed intended as well as unintended victim).

<sup>34</sup> I refer here to two types of cases: First, those under which the doctrine has been expanded to allow the classic “bad aim” killer to be convicted not only of transferred-intent murder but also of attempted murder of the intended victim. And second, those cases allowing multiple convictions of attempted murder for a failed killing that resulted in no deaths at all. *See supra* notes 2–7 and accompanying text.

descriptive assumption undergirding the doctrine. This weakness in the first rationale for transferred intent suggests that the doctrine should be judiciously employed. Subsection 2 contends that using the legal fiction of transferred intent to establish *A*'s mens rea towards *C*, without actually requiring any culpable mindset towards that person at all, violates modern mens rea principles that require proof of a culpable mindset as to each element of each crime charged. This strict-liability dimension of the transferred-intent rule has in fact caused some authors to oppose it categorically, and certainly also counsels against broadening its traditional scope. Finally, Subsection 3 considers the indeterminacy of the TI inquiry itself, characterized by an open-endedness that extends far beyond the normatively justifiable limits of the rule. Specifically, the question of whether the crime ultimately committed is sufficiently similar to the one intended to justify applying the rule is not easily answered. The indeterminacy in such sameness/difference determinations, this section argues, opens TI up to politically motivated overuse by prosecutors. For this reason as well, the doctrine should be narrowly construed.<sup>35</sup>

### 1. Descriptive Assumption: Nature of the "Intent" Required

As noted above—the need for transferred intent was originally premised upon the assumption that the criminal law understands intent as *particular*: that without the doctrine<sup>36</sup> *A* could not be punished for killing *C* since she intended to kill *B* instead. However, scholars currently disagree as to whether the criminal law requires proof of intent to kill the particular victim or only proof of intent to kill a human being, thereby allowing conviction of regular murder. Thus, some analysts reject the descriptive assumption, endorsing what has been called the "impersonality" approach to intent.<sup>37</sup> Relying upon the fact that murder statutes usually define the crime in general terms, as intentionally killing "a human being," rather than intentionally killing a particular person, these authors contend that *A*'s intent to kill *B*, who is clearly a human being, should be understood

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<sup>35</sup> While some have maintained that transferred intent is so fundamentally flawed that it should be abolished, see for example, Ashworth, *supra* note 2, at 87–91; Dillof, *supra* note 6, at 502–03 (arguing against the "moral soundness" of the doctrine), the pros and cons of abolition are beyond the scope of this article.

<sup>36</sup> See *supra* note 32 and accompanying text.

<sup>37</sup> See, e.g., DRESSLER, *supra* note 1, at 125. Westen calls it the "impersonality doctrine." Westen, *supra* note 2, at 332–34.

only in an “impersonal” sense. Of course, under that approach, *A*’s intent is always perfectly adequate to establish the mens rea to convict him of the murder of *C*, also a human being,<sup>38</sup> rendering transferred intent essentially superfluous.<sup>39</sup>

One way of picking between the particular and impersonal understandings would be to use the one that has been most commonly employed in the criminal law. That question, however, is not susceptible of a simple answer. For example, Westen reports that “[t]he impersonality doctrine has more support among commentators than among jurisdictions.”<sup>40</sup> Whereas most jurisdictions use the particular approach, “commentators tend to be evenly divided as between transferred intent and the impersonality doctrine.”<sup>41</sup> Thus, it is difficult to determine whether the descriptive assumption is accurate, making its necessity claim a somewhat more fragile foundation on which to build an argument for transferred intent than was originally thought. That fragility counsels in favor of a judicious, restrained use of the doctrine.

## 2. Normative Assumption: Tension Between Transferred Intent and Modern Mens Rea Principles

The normative assumption behind the transferred-intent doctrine has also been subjected to critique, raising serious questions about whether transferred-intent killings deserve to be punished as murders. Some scholars have even called for the

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<sup>38</sup> In other words, the result *A* produced (the death of another person) is essentially the same as that she intended (the death of another person). It is instructive perhaps to look at these approaches to intent from the perspective of Catharine MacKinnon’s famous critique of sameness/difference determinations. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 10–27 (1979). MacKinnon shows that the sameness/difference question is not susceptible of a determinate answer and can be manipulated by varying the standard of measurement (same or different as to what?). *Id.* at 119–20. For example, an apple is different from an orange if the standard is color, but the same if the standard is membership in the food category known as “fruit.” Thus, if one uses the standard of impersonal-intent theorists (“status of the victim as a human being”), then the intended and resulting harms are the same. But if one uses a narrower standard, then the result produced might not seem the same as that intended. In other words, since the choice of standard is *itself* a normative choice, the entire sameness/difference inquiry is irreducibly normative. For an earlier version of this argument, by legal realist Felix Cohen, see Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 *YALE L.J.* 201 (1931).

<sup>39</sup> Joshua Dressler, perhaps the most prominent advocate of the impersonal approach, calls the doctrine “unnecessary.” DRESSLER, *supra* note 1, at 125. However, it arguably makes the most sense to treat TI as requiring particular intent—for, if the original meaning were understood as impersonal, the doctrine would never have been created, since it would not have been necessary.

<sup>40</sup> Westen, *supra* note 2, at 335.

<sup>41</sup> *Id.*

doctrine's abolition.<sup>42</sup> Often central to such critiques is the tension between the transferred-intent doctrine and modern mens rea principles. That tension is illustrated if we imagine that *C*, the unintended victim in the *Hidden Child* hypothetical, had been visiting with a friend miles away and that the friend's mother had dropped *C* off at her home without advising *A* and *B*, *C*'s parents. Suppose further that *C*'s home was located in the woods on fifty acres of land, and that "no trespassing" signs were posted throughout the property. In other words, what if a reasonable person would have had no reason to think that shooting a gun in the living room of the home would create a risk of harm to anyone but the intended target?

In that scenario, transferred intent operates to allow *A* to be held liable for murdering *C* despite her lack of any culpable mens rea as to causing the death of anyone besides her intended target. This variation on the *Hidden Child* facts highlights how TI can undermine the offense-focused intent requirements of the criminal law, under which mens rea must be proven as to each individual crime. Both transferred intent and felony murder use the actor's culpable choice to commit one offense as sufficient evidence of her culpability for unintended, and even unforeseeable, consequences of that (here, uncompleted) crime. Like felony murder, the doctrine can thus allow a murder conviction for a completely accidental killing.<sup>43</sup>

From this perspective, transferred intent violates, or is at least in tension with, modern mens rea principles. Those principles not only require proof of culpable intent as to each specific offense charged, but, more importantly, they understand intent as the subjective desire to produce a particular harm, not as a general proclivity toward bad behavior or a specific bad choice that justifies convicting the actor of all repercussions of that choice.<sup>44</sup> These modern mens rea principles not only justify

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<sup>42</sup> See, e.g., Ashworth, *supra* note 2, at 87–91; Dillof, *supra* note 6, at 502–03 (arguing against the "moral soundness" of the doctrine).

<sup>43</sup> The difference between the two, of course, is that felony murder grounds the murder conviction merely upon commission (or attempt to commit) a *felony*, usually a dangerous one, whereas transferred-intent murder, for example, requires proof of an actual intent *to kill* though directed at someone else. For further discussion of whether or when the change of victim represents a *culpability*-related difference, see *infra* notes 46–48 and accompanying text.

<sup>44</sup> Whereas early common law courts allowed the culpable commission of one criminal act to ground a finding of culpability as to another offense unintentionally produced by the same conduct, modern courts reject such transferring of intent from one crime to another. Today, culpable mens rea must be proven as to each individual crime. This rule is best captured by a frequently-cited trio of cases: *Regina v. Pembrilton* [1874] LR 2 CCR 119 (intent to throw rock to disperse a crowd was insufficient to support liability for broken window that rock accidentally hit); *Regina v. Faulkner* [1877] 13 Cox CC 550 (Ir.) (mens rea for theft of rum in hold of ship did not support liability for

the rule that transferred intent between *crimes* is prohibited,<sup>45</sup> but also raise serious questions about the viability of the transfer of intent between *victims*.

If transferred intent allows *A* to be punished for murdering *C* without requiring any independent proof of *A* having the requisite mens rea towards *C*, then the effect of the doctrine is to use *A*'s moral blameworthiness towards *B* to justify liability for harm to *C*.<sup>46</sup> In the *Hidden Child* hypothetical, for example, if *C*'s death was a completely unforeseeable result of *A*'s conduct, then transferred-intent murder would violate the principle that criminal liability must be subjective and crime-specific, not objective or based on general moral blameworthiness.

Commentators who see transferring intent between victims as compromising modern mens rea principles have sometimes called for abolition of the doctrine.<sup>47</sup> A.J. Ashworth, for example, indicts "the insidious invocation of a subjectivist principle of *mens rea* to support what in reality is objective liability."<sup>48</sup> He continues: "It is hollow to proclaim the need for intention and recklessness as a basis for criminal liability without relating those mental attitudes to the particular harm or damage which *D* is charged with causing."<sup>49</sup> Anthony M.

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destruction of ship itself when rum fumes ignited); *Regina v. Cunningham* [1957] 41 Crim. App. 155 (mens rea for theft of gas meter was insufficient to convict of poisoning caused by resulting gas leak).

<sup>45</sup> See CYNTHIA LEE & ANGELA P. HARRIS, *CRIMINAL LAW: CASES & MATERIALS* 221 (3d ed. 2014).

<sup>46</sup> As will be discussed further *infra* text accompanying notes 113–114, this seems particularly inappropriate in light of the original assumption that created the need for transferred intent in the first place: the assumption that intent for homicide must be *particular* (as to a particular victim), not impersonal (an intent to kill a human being, whether specifically identified or not). Of course, the point of transferred intent is to create an exception to that rule, but since TI was introduced before modern mens rea principles evolved, see *supra* text accompanying note 44, these tensions are worth noting.

<sup>47</sup> See, e.g., Ashworth, *supra* note 2, at 87.

<sup>48</sup> *Id.* at 93; cf. GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 133 (2d ed. 1961) (TI should only apply if the actor was at least negligent as to the result actually caused).

<sup>49</sup> Ashworth, *supra* note 2, at 93. See also Peter Westen's assessment of Ashworth's position:

The strength of the purist position is that it is grounded in traditional understandings of mens rea and actus reus. An actor who, intending to harm B, misses and unintentionally harms C is unquestionably guilty of attempting to harm B (and he may at most also be guilty of recklessly or negligently harming C). To go further (as transferred intent and the impersonality doctrine do) and punish the actor for intentionally harming C when the harm is clearly accidental is doctrinally adventuresome . . . .

Westen, *supra* note 2, at 336. Ashworth proposes that, instead of using TI to convict *A* and others like her of murder, the law should simply convict them of attempted murder of *B*. Ashworth, *supra* note 2, at 85–86. He also advocates sentencing reform to increase the sentence for attempt to the same as that for the completed crime. *Id.* at 87–91. Thus, his proposed changes would have little *practical* significance in terms of sentencing. *Id.*

Dillof has made a similar argument against transferred intent. Concluding that murder liability for “mere accident” is not morally justifiable, Dillof maintains that we should criminally punish only the causing of harms that are intended in a narrow (“strict”)<sup>50</sup> sense, and that “harm to an unintended victim is an unintended result in the morally relevant sense.”<sup>51</sup> He would reject the transferred-intent doctrine entirely.<sup>52</sup>

Related critiques have been levied at particular applications of transferred intent. For example, commentators have argued that the doctrine has been inappropriately applied even in situations where the harm unintentionally caused to *C* is more serious under the law than the harm to *B* would have been.<sup>53</sup> The actor is not sufficiently culpable, they reason, to be subjected to the increased punishment attendant to killing such a victim.<sup>54</sup> Yet if the lack of culpability of an actor who unintentionally kills a child should preclude TI liability, why should the absence of moral blameworthiness attendant to *any* accidental killing not raise similar culpability concerns?<sup>55</sup> Opponents of the doctrine have cited these culpability considerations, and the slipperiness of the slope from one to the next, to support their view that homicide liability should be assigned by determining the actor’s *actual* mens rea as to the death of *the ultimate victim*, not by applying transferred intent. In any event, regardless of one’s conclusion about the viability of the entire TI doctrine, these barriers to the rule’s fair application at least suggest caution in its use.

### 3. Doctrinal Indeterminacy and Danger of Prosecutorial Abuses of Discretion

Finally, other difficulties that can arise in applying transferred intent further suggest the wisdom of circumscribed

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<sup>50</sup> Dillof, *supra* note 6, at 516–17.

<sup>51</sup> *Id.* at 503.

<sup>52</sup> *Id.* at 535. Of course, most of these critiques are implicitly premised upon the assumption that intent must be particular, rather than impersonal.

<sup>53</sup> See, e.g., Westen, *supra* note 2, at 322 n.15 (describing case where *C* was a child but *B* was not, yet transferred intent still applied despite the higher punishment for assaulting a child).

<sup>54</sup> *Id.* at 339 (“[I]t is excessive to penalize A for intentionally harming C because A did not intend to inflict a harm of that legal magnitude on anyone, including B.”).

<sup>55</sup> The reader might respond that now we are getting into questions of motive, which the criminal law considers irrelevant. See LAFAVE, *supra* note 11, at 256–60. While a lengthy discussion of the difference between intent and motive is beyond the scope of this article, suffice it to say that others have pointed out the indeterminacy in the concept of motive itself. See, e.g., Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CAL. L. REV. 89 (2006) (suggesting that using motive as a line-drawing tool is unlikely to bring clarity to issues such as those under discussion here).

use of the doctrine. Thus, even if it were determined that the criminal law consistently requires proof of particular intent, determining the appropriate scope of the doctrine would not be simple to do. To reiterate, the reasoning behind the doctrine is that an actor should receive the *same* punishment she would have received had she successfully completed the crime she intended to commit. That reasoning turns on the relationship between the actor's intent and the result actually caused.<sup>56</sup> The (often unarticulated) idea is that a central, core aspect of the intended result must still be fulfilled, even if the result did not occur in quite the way the actor originally intended it to.<sup>57</sup> Stated differently, the appropriate scope of transferred intent should turn on whether the resulting harm was "the same" as the intended harm. Are the two harms sufficiently similar to justify punishing *A* as if she had accomplished the intended goal? Even though *A* intended to kill *B*, not *C*, she is still held responsible as long as the difference between the two deaths is seen as negligible in terms of her moral responsibility for the result.

But intent is an especially slippery concept in this context, and there is no non-normative way to make such sameness/difference determinations.<sup>58</sup> This doctrinal indeterminacy arguably invites outcome-determinative jurisprudence, and could easily tempt prosecutors to push the boundaries of the TI rule, which may explain some of its more expansive applications. Like the mens rea issues discussed above,<sup>59</sup> these challenges in determining whether the intended harm is sufficiently similar to the resulting harm also counsel in favor of judicious use of transferred intent.<sup>60</sup> For all of these reasons, caution suggests that the transferred-intent rule should be narrowly construed.

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<sup>56</sup> Thus, limitations on the doctrine proposed by recent authors (e.g., Westen, Husak) derive from discomfort about the disconnect between the actor's intended result and the result that actually occurred. *See infra* Section I.C.2.a (discussing both authors).

<sup>57</sup> *Cf.* Westen, *supra* note 2, at 331–32 and accompanying text (stating that TI should not apply where the resulting death is of an unforeseeable victim or is produced by a causal force different from that released by the actor). Of course, the intent/result comparison raises questions similar to those that ground proximate causation. Thus, the Model Penal Code drafters incorporated their transferred-intent provision into the proximate cause section of the Code. MODEL PENAL CODE § 2.03(2)(a) (AM. LAW INST. 1985).

<sup>58</sup> *See supra* note 38.

<sup>59</sup> *See supra* Section I.B.2.

<sup>60</sup> *Cf.* Westen, *supra* note 2, at 348 (In situations of moral ambiguity, where people have "conflicting intuitions" about the proper resolution, transferred intent should not apply unless a jury affirmatively decides it should; resolution of such cases should depend on the fact finder's normative assessment of actor's culpability.).

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Despite these critiques of the foundational assumptions underlying, and the doctrinal indeterminacy of, transferred intent, there has been little judicial questioning of the doctrine's utility or justifiability, and (as noted earlier) it is still universally followed. Thus, abolition is unlikely to happen any time soon. Nevertheless, the chinks in the doctrine's armor identified here suggest that, at a minimum, transferred intent should be used prudently and sparingly. And, as will be discussed further below, the more expansive interpretations of TI-related liability raise important concerns about whether the rule is being used to undermine the culpability commitments of modern criminal law.<sup>61</sup>

C. *Expansive Applications of Transferred Intent: Attempt and Duplicated Intent in the Transferred-Intent Context*

Both courts and commentators have addressed the question of attempt liability in transferred-intent contexts. That question raises two issues: first, whether duplicated intent (use of the actor's original intent to convict of two distinct offenses) is ever appropriate and, second, whether transferred intent should be used in inchoate offenses. Only very rarely and briefly have discussions of those issues included consideration of whether and how the merger of attempt should influence the analysis.<sup>62</sup> This section gives an overview of three factual contexts in which such issues arise,<sup>63</sup> describes how courts have analyzed those factual variations, and considers what commentators have had to say. Part II will provide a brief overview of the merger doctrine and then will discuss when and why these sorts of expansions of transferred intent could violate that rule.

1. Illustrative Cases

Attempt liability can be imposed in the context of a transferred-intent case in several different ways. Three variations are discussed below.<sup>64</sup>

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<sup>61</sup> See *infra* Section I.C.

<sup>62</sup> But see *supra* note 8 and accompanying text.

<sup>63</sup> The three factual variations discussed herein are loosely based on Westen's three types of expansions of the transferred-intent doctrine. Westen, *supra* note 2, at 339.

<sup>64</sup> For a table summarizing the differences among the three variations, see *infra* Table 1.

a. *Variation 1: Attempted Murder Charges as to Intended Victim (in Addition to Transferred-Intent Murder Charges as to Unintended Victim)*

Variation 1 involves the same factual context as the classic transferred-intent case, where *A* misses *B* and hits *C*. But it differs in that the prosecutor adds in an additional offense, charging *A* not only with murder of *C*, but also with attempted murder of *B*. This, of course, is the variation presented in the *Hidden Child* hypothetical. Note that, in such situations, the attempt charges are *not* based on transferred intent, but rather on the *initial* intent to kill *B*, which directly supports the attempt charge (as to *B*). That initial intent is then used again, or transferred, to support the murder charge for the death of *C*. Courts are split as to whether the single intent to kill *B* can be duplicated to support both attempt and murder liability in such cases. Without such duplication, it is not possible to impose attempt liability, in addition to TI liability (or vice versa), in Variation 1 cases.

i. *People v. Scott*

For example, in *People v. Scott*,<sup>65</sup> Damien Scott and his co-defendant, Derrick Brown, fired an automatic weapon at Calvin Hughes, the estranged (and apparently abusive)<sup>66</sup> boyfriend of Elaine Scott, their mother. Hughes had just left her house after forcing his way in over her objections. He was standing in a park with several people when Scott's sons fired shots at the group in an attempt to kill him. The shots only grazed Hughes's foot, but killed one bystander and wounded another.<sup>67</sup> The jury convicted the defendants of both second degree murder (via transferred intent) of the bystander and attempted murder of Hughes.<sup>68</sup> The California Supreme Court upheld the duplication of the original intent to support transferred-intent murder of the bystander.<sup>69</sup> As the court put

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<sup>65</sup> 927 P.2d 288 (Cal. 1996).

<sup>66</sup> The court's description of the facts of the case includes reference to "acrimonious" relations between Hughes and Elaine Scott, a "physical altercation" after which Elaine Scott's sons forced Hughes to leave Elaine's apartment, and Hughes's forcing his way into the apartment a few days later. *Id.* at 290. It is not difficult to read into this euphemistic description the likelihood that Hughes was an abusive man.

<sup>67</sup> *Id.*

<sup>68</sup> See also *Poe v. Maryland*, 671 A.2d 501, 504–06 (Md. 1996) (affirming murder and attempted murder convictions where shot fired at a woman went through her and killed a child; the woman survived).

<sup>69</sup> *Scott*, 927 P.2d at 289 ("[D]efendants' exposure to a murder conviction based on a transferred intent theory of liability was proper regardless of the fact they were also

it, “defendants committed crimes against two persons.”<sup>70</sup> Thus, punishing Scott for two crimes constituted “the same criminal liability that would have been imposed had he hit his intended mark.”<sup>71</sup> The court did not explain why conviction of both attempt and murder should be understood as equivalent to the sole murder conviction that assumedly would have resulted had Scott succeeded in killing Hughes.<sup>72</sup>

## ii. State v. Hinton

An extreme example of multiple punishments for one act can be found in *State v. Hinton*,<sup>73</sup> a case involving conduct very similar to that in *Scott*. In this case, defendant Ronnie Hinton fired a gun into a group in which his intended victim was standing, causing multiple deaths.<sup>74</sup> The Supreme Court of Connecticut allowed the defendant’s original intent to kill one person to be used for attempted murder of the intended victim (who was apparently not killed)<sup>75</sup> as well as to be duplicated three times, resulting in three convictions of transferred-intent murder.<sup>76</sup> Here, however, transferred intent had been incorporated into the applicable statute, which defined murder as causing “the death of such person *or of a third person.*”<sup>77</sup> The statute imposed no limit, the court concluded, as to the number of such third-person deaths to which it could be applied.<sup>78</sup>

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charged with attempted murder of the intended victim.”); accord *Poe*, 671 A.2d at 503–05. Like many modern courts, the *Scott* court eschewed a literal, formalistic understanding of transferred intent that would preclude using the “same” intent “twice.” *Scott*, 927 P.2d at 289 (noting that “intent” should not be understood as something that can be “used up”). Because transferred intent “connotes a *policy*” not a literal interpretation of *how much intent* is available, the original intent to kill could be used for two different offenses. *Id.* (emphasis added). This use of both murder and attempt—where *A* has killed *C* but not *B*—is more frequently allowed than its opposite, where *A* has killed *B* but not *C*. As will be discussed further below, *People v. Bland*, 48 P.3d 1107 (Cal. 2002), represents the widely held conviction that, where the completed crime has been committed against the *intended* victim, attempt charges based on transferring/duplicating that attempt should *not* be allowed. *Id.* at 1110.

<sup>70</sup> *Scott*, 927 P.2d at 289.

<sup>71</sup> *Id.* at 292.

<sup>72</sup> Of course, if *Scott* had killed the intended victim, Hughes, his attempt to kill Hughes would have merged into the completed murder.

<sup>73</sup> 630 A.2d 593 (Conn. 1993).

<sup>74</sup> *Id.* at 596.

<sup>75</sup> The court’s account of the facts is not explicit on this point.

<sup>76</sup> *Hinton*, 630 A.2d at 598.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

Many readers might not see the results in *Scott* and *Hinton* as particularly disturbing. To shoot into a crowd is certainly a very dangerous thing to do, and likely evidences at least sufficient reckless indifference to the value of human life to establish depraved heart murder. So the punishment might seem proportionate to culpability, even if it is accomplished via transferred intent rather than direct proof of culpable mens rea. No harm, no foul.<sup>79</sup> On the other hand, if such killings would generate murder convictions under existing criminal law rules, it is hard to see the benefit of stretching the transferred-intent doctrine to reach the same result. Moreover, using the actor's original intent not only to generate multiple murder convictions, but also to support attempted murder of the intended victim, arguably extends the potential reach of transferred intent unacceptably far.<sup>80</sup> Most importantly for the purpose of this article, it violates the merger rule. As will be discussed further below, that rule is best understood as mandating that such attempts merge into the transferred-intent murder(s).

*b. Variation 2: Murder Charges as to Intended Victim  
(in Addition to Transferred-Intent Charges as to  
Unintended Victims)*

Variation 2 represents the flip side of Variation 1. Here, the actor (*A*) actually succeeds in killing the intended victim (*B*), but is also charged with attempted murder involving harms or threats against one or more unintended others (*Cs*). Thus, this variation raises the question of whether transferred intent can *ever* apply where the *intended* victim has been killed.<sup>81</sup> Such situations inevitably involve the duplication of intent. If transferred intent does apply, then a second question is whether it can *only* be used for additional *murder* charges (i.e., where both *B* and *C* were killed), or whether the intent to kill *B* can

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<sup>79</sup> It is important here to recognize that the harms and threats to third parties that are targeted by these expanded uses of attempt and murder in transferred-intent situations would not necessarily go unpunished under existing law. Besides depraved heart murder, manslaughter, malicious wounding, and reckless endangerment could also be used to address reckless or negligent harms collaterally caused to unintended victims. Thus, especially in cases involving public attacks in the presence of bystanders, the transferred-intent doctrine is arguably superfluous, as well as arguably allowing the imposition of punishment disproportionate to culpability.

<sup>80</sup> See Westin, *supra* note 2, at 339–40 (discussing the problems with such extensions).

<sup>81</sup> Westin includes in this category those cases where *B* is injured but not killed. Westin, *supra* note 2, at 339. Those cases of course pose a more difficult question in that the lesser harm suffered by *B* (and hence the lesser punishment to be imposed upon *A* for that crime) might suggest that it is more important to punish *A* for the harm against *C*.

also be transferred to support *attempted murder* charges (where *C* was merely injured, or threatened with injury).

These cases pose a harder question for courts than Variation 1 cases. First, Variation 2 cases raise the issue of whether transferred intent should ever be allowed where *B* was killed. The original purpose of transferred intent is not implicated in Variation 2 cases; there is no barrier to convicting *A* of the crime he originally intended (and actually committed)—murder of *B*. So there is no need to bring in transferred intent to assure punishment proportionate to culpability.<sup>82</sup> In fact, imposing murder liability for additional individuals killed, possibly accidentally, during the murder of *B* would constitute punishment disproportionate to the actor's intention to kill one person.<sup>83</sup> However, some courts reject the argument against double murder liability in such situations.<sup>84</sup>

The second issue raised by Variation 2 is whether transferred intent can be used to support an attempt charge involving *C*, as opposed to a murder charge for the death of *B*. In general, courts appear to view interjecting *transferred-intent-based* attempt charges into a case of murder of an *intended* victim less favorably than Variation 1's addition of regular attempt charges on top of classic transferred-intent murder.<sup>85</sup> In short, they seem to be more willing to allow attempt liability in Variation 1 cases than Variation 2. Using *A*'s original intent to kill to support attempted murder of the original victim is more appealing to judges than allowing that original intent to transfer to support the attempted murder of unintended victims.

#### *i.* People v. Bland

An illustrative Variation 2 case is the California case of *People v. Bland*.<sup>86</sup> That case involved a gang-related killing in which the defendant, Jomo K. Bland, shot into a car, killing one

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<sup>82</sup> Of course, this argument does not apply where *B* was injured, but not killed.

<sup>83</sup> See, e.g., *People v. Birreuta*, 208 Cal. Rptr. 635, 639 (Cal. Ct. App. 1984) (“When the intended victim is killed, . . . there is no need for such an artificial doctrine” as transferred intent.), *overruled on other grounds by People v. Flood*, 957 P.2d 869 (Cal. 1998).

<sup>84</sup> See, e.g., *People v. Bland*, 48 P.3d 1107, 1116, 1119 (Cal. 2002) (stating that TI can be used where *A* kills *B* and *C*, but not for *attempted* murder as to *C*).

<sup>85</sup> See, e.g., *Bland*, discussed *infra* Section I.C.1.b.i. *But see People v. Flores*, 223 Cal. Rptr. 465, 474 (Cal. Ct. App. 1986) (affirming two murder convictions involving intended victims and attempted murder conviction involving injury to unintended bystander); *People v. Neal*, 218 P.2d 556, 562 (Cal. Ct. App. 1950) (affirming conviction of both attempted murder against intended victim and attempted murder against unintended victim).

<sup>86</sup> 48 P.3d 1107 (Cal. 2002).

individual inside and injuring two others.<sup>87</sup> Bland apparently intended to kill the victim who died, Kenneth Wilson, and did not personally know the other two.<sup>88</sup> The court first discussed whether an actor's intent could be transferred (i.e., duplicated) even where the original target was killed, concluding that it could.<sup>89</sup> The potential of multiple duplications, expanding murder liability beyond the culpability represented by the intent to kill one person, did not seem to trouble the court. Even though the results of the acts to which such duplicated intent could apply might be unintended, or even accidental, nevertheless, "[a] single state of mind, [i.e., the actor's original intent] . . . will control the fact of guilt and the level of guilt of . . . all [the acts]."<sup>90</sup> Thus, any unintended death flowing from an initial act intending to cause death could result in additional murder liability. The sole limitation on this use of duplicated intent mentioned by the court was proximate causation.<sup>91</sup> In short, the court was willing to impose murder liability even for negligently caused deaths.<sup>92</sup>

However, the *Bland* court refused to hold that Bland's intent to kill could be transferred to support an *attempt* charge as to an unintended victim:

We explained above that intent to kill is not "used up" with the killing of the intended target but extends to every person actually killed. But this rationale does not apply to persons not killed. We see no suggestion the Legislature intended to extend liability for unintended victims to an inchoate crime like attempted murder. The crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences.<sup>93</sup>

Agreeing with another court's statement that the shooting of an unintended victim "should be punished according to the culpability which the law assigns it, but no more,"<sup>94</sup> the *Bland* court concluded that, since the defendant could be

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<sup>87</sup> *Id.* at 1110.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1115.

<sup>90</sup> *Id.* (quoting *Harvey v. State*, 681 A.2d 628, 637 (Md. Ct. App. 1996)).

<sup>91</sup> *Id.* at 1115 n.4.

<sup>92</sup> "Unforeseen circumstances may multiply the criminal acts for which the criminal agent is responsible." *Id.* at 1115 (quoting *Harvey*, 681 A.2d at 637). When foreseeability is the only limitation, transferred intent operates almost as severely as felony murder, imposing first-degree murder liability for even negligent (unforeseeable) deaths. See generally DRESSLER, *supra* note 1, at 521 n.107 (describing critiques of felony murder for "authoriz[ing] conviction for murder . . . for an unintentional, even accidental, death").

<sup>93</sup> *Bland*, 48 P.3d at 1116–17.

<sup>94</sup> *Id.* at 1116 (quoting *People v. Czahara*, 250 Cal. Rptr. 836, 840 (Cal. Ct. App. 1998)).

punished for murder of the intended victim, there was no need for the use of transferred intent for the attempt charges.<sup>95</sup>

*ii. Ford v State*

In contrast to the California Supreme Court, the high court in the Maryland case of *Ford v. State*<sup>96</sup> was more resistant to the Variation 2 expansion of transferred intent. While resolving the case on other grounds, the court categorically stated in dicta that transferred intent could not be used to obtain multiple convictions of the same intent-based offense when the crime was completed as to the intended victim.<sup>97</sup>

The case involved a group of youths who threw heavy landscaping rocks from a highway overpass onto the windshields of cars passing below, causing many serious injuries (including a fractured skull and permanent brain injury) to both drivers and passengers.<sup>98</sup> Defendant Ford explained his behavior by saying that he was drunk and did not intend to hurt anybody, but prosecutors claimed otherwise, charging him with twenty-eight counts of assault with intent to disable (among other charges).<sup>99</sup> The trial judge “instructed the jury that if it found Ford assaulted with intent to disable the drivers, this intent could be transferred to the passengers.”<sup>100</sup>

On appeal, the Maryland Court of Appeals correctly held that transferred intent did not apply to the state’s crime of assault with intent to disable, since the statute defining that offense specifically required that the defendant intend to disable the specific person being assaulted.<sup>101</sup> The court also refused to declare invalid the jury instruction quoted above, since defendants had not objected to it and, in any event, there was sufficient evidence in the record to conclude that defendants intended to disable both the drivers and the passengers.<sup>102</sup> In dicta, however, the court concluded that transferred intent

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<sup>95</sup> *Id.* at 1116–17.

<sup>96</sup> 625 A.2d 984 (Md. 1993).

<sup>97</sup> In another part of the case, the court embraced the concept of “concurrent intent”—a concept that opens disturbingly wide the door to liability in certain types of homicide cases, and does so through a doctrinal mechanism that seriously dilutes the meaning of the word “intent.” *Id.* at 1000–02. However, a detailed discussion of so-called concurrent intent is beyond the scope of this article.

<sup>98</sup> *Id.* at 987–88.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 996–97.

<sup>101</sup> *Id.*; see also MD. CODE ANN., Art. 27 § 386 (repealed 1996) (“assault or beat any person, with intent to maim, disfigure or disable *such person*” (emphasis added)).

<sup>102</sup> *Ford*, 625 A.2d at 997.

applies only when the intended crime is not committed.<sup>103</sup> Once a defendant's intent is applied in a crime against an intended victim, it cannot be duplicated for use in offenses against others. "Transferred intent does *not* make two crimes out of one."<sup>104</sup> The court explained its reasoning by first summarizing the "luck" rationale for transferred intent.<sup>105</sup> It then continued:

When the intended victim is killed, however, there is no need for such an artificial doctrine. The defendant's premeditation, deliberation, intent to kill and malice aforethought are all directly employable in the prosecution for murdering his intended victim. The accidental killing may thus be prosecuted as a manslaughter or second degree murder without ignoring the most culpable mental elements of the situation. There is no danger that a premeditated killing will go unpunished or be treated as a manslaughter because the murder of the intended victim will presumably be the subject of prosecution.<sup>106</sup>

Applying this analysis to the crime of assault with intent to disable, the court held that transferred intent was unavailable to extend the offense to unintended victims where it had already been completed against intended ones.<sup>107</sup>

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It is interesting to note that the arguments against transferred-intent attempt in *Bland* (a Variation 2 case) arguably also apply to Variation 1 uses of attempt. In *Bland*, the court said there was no need to add on an attempt charge because the actor could already be convicted of murder (of the intended victim). However, the same could be said for the attempt charge in *Scott*. In that Variation 1 case, since transferred-intent murder was available to punish Scott for murder (of the unintended victim), there was no reason to add attempted murder of the intended victim as well. In both contexts, the additional attempt charge is superfluous (in terms of accomplishing the purpose of duplicating intent), and constitutes punishment disproportionate to culpability.

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<sup>103</sup> *Id.* at 998.

<sup>104</sup> *Id.*

<sup>105</sup> See *supra* notes 32–33 and accompanying text.

<sup>106</sup> *Ford*, 625 A.2d at 998–99 (quoting *People v. Birreuta*, 208 Cal. Rptr. 635, 638–39 (Cal. Ct. App. 1984)).

<sup>107</sup> *Id.* at 999. Under the crime charged and the facts of the particular case, transferred intent was also, the court added, unnecessary to obtain a conviction. *Id.*

c. *Variation 3: Direct Attempt Charges to Intended Victim (in Addition to Transferred-Intent Attempt Charges as to Unintended Victim(s)) (State v. Gillette)*

This third variation on transferred-intent-related attempt arises in situations where the defendant, having intended to kill one person, ends up killing no one—but is charged with multiple counts of attempted murder (via direct intent as to *B*, and transferred intent as to the unintended victims). As long as *A* has been charged with attempted murder of *B*, all of the TI-based attempt cases necessarily require use of duplicated intent. If *A* is not charged with attempted murder of the intended victim, then (only) the *first* TI-based attempt charge involving an unintended victim relies on the actor's original (as opposed to duplicated) intent.

In *State v. Gillette*,<sup>108</sup> as an example, the defendant attempted to kill the mother of a child he had allegedly sexually abused<sup>109</sup> by putting a dangerous substance into a can of Dr. Pepper and sending it to the mother anonymously. Both the intended victim and two of her co-workers tasted the drink.<sup>110</sup> None of them was seriously injured, but they reported the incident to the police, and Gillette was convicted *via* transferred intent of two counts of attempted first degree murder.<sup>111</sup> In upholding the convictions, the Court of Appeals of New Mexico simply asserted that, “[i]f *A* attempts to kill *B* but *C* becomes the actual object of the attempt, it is proper to instruct the jury that *A* attempted to kill *C*.”<sup>112</sup> The court did not explain whether or how “becoming the object” of an attempt against another person differs from merely being affected or threatened in some way by that attempt. Nor did it require proof that Gillette had any sort of culpable mens rea towards others besides the intended

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<sup>108</sup> 699 P.2d 626 (N.M. Ct. App. 1985). For additional Variation 3 cases, see *Ochoa v. State*, 981 P.2d 1201 (Nev. 1999), and *State v. Rodriguez-Gonzales*, 790 P.2d 287 (Ariz. Ct. App. 1990).

<sup>109</sup> The facts in the case are complex and somewhat confusing. Defendant, who had been a boarder in the intended victim's home, was also convicted of sixteen counts of criminal sexual penetration against her son, with whom he apparently had an ongoing sexual relationship. *Gillette*, 699 P.2d at 628–30.

<sup>110</sup> *Id.* at 630.

<sup>111</sup> *Id.* at 636.

<sup>112</sup> *Id.*; see also *Rodriguez-Gonzales*, 790 P.2d at 288 (“Intent to murder is transferable to each unintended victim once there is an attempt to kill someone.”). The *Rodriguez-Gonzales* court relied on an MPC-styled transferred-intent provision located in the causation section of the state's criminal code, apparently misapplying language in that provision that likely related to the impossibility defense, *not* transferred intent. *But see State v. Brady*, 903 A.2d 870, 882–83 (Md. 2006) (defendant who intends to harm *B* in presence of *C*, but harms neither, may not be charged with attempt as to both).

victim. Rather, illustrating the full mens-rea-compromising potential of the transferred-intent doctrine, the court allowed transferred intent to be used to convict the defendant of attempted murder of not only the intended victim but also the unintended victims, without direct proof of any culpability towards those victims, such as an awareness of the possibility that they would be present.<sup>113</sup>

The table below summarizes the three variations described above. The first column indicates the facts of each variation—that is, who the actor killed and whether the victim was intended (*B*) or unintended (*C*). The second column indicates whether the variation involves transferred-intent murder, and against which victim. The third column indicates whether the variation includes what this article refers to as “direct” attempted murder—that is, attempt against the intended victim. And the final column indicates whether a variation involves attempted murder against an unintended victim—which could only be proven by transferring (and, duplicating) the original intent against the intended victim.<sup>114</sup>

TABLE 1. Transferred Intent and Attempt: Three Factual Variations

	Person(s) Killed	Murder via TI	Direct Attempt (no duplication)	Attempt via TI (using duplicated intent)
Variation 1	<i>C</i>	<i>C</i> <sup>115</sup>	<i>B</i> <sup>116</sup>	None
Variation 2	<i>B</i> (and possibly <i>C</i> )	<i>C</i> (if also killed)	None	<i>C</i> (if not killed)
Variation 3	None	None	<i>B</i>	<i>C, D, E, etc.</i>

<sup>113</sup> *Gillette*, 699 P.2d at 634–36.

<sup>114</sup> In each variation, transferred-intent attempt charges about unintended victims would necessarily involve duplicated intent, because charges would already have been brought for murder or attempt, based on the initial intent against *B*.

<sup>115</sup> *A*'s intent to kill *B* is “duplicated” here in the sense that it is used twice—for attempted murder of *B* and (via transferred intent) for murder of *C*. One or the other of those necessarily must be considered duplication of intent.

<sup>116</sup> Of course, attempted murder of *B* is premised upon duplication of intent if the transferred-intent murder charge re *C* is considered to have already “used up” (if you will) *A*'s initial intent. Again, the problem with such duplication is not that it “uses up” the intent, but rather that it imposes liability disproportionate to culpability, where the actor only intended to cause one death.

## 2. Scholarly Opinion on Attempt and Duplicated Intent in the Transferred-Intent Context

A number of scholars have addressed duplicated intent (which is usually a necessary component of attempt liability in the transferred-intent context, as the discussion above illustrates) and have analyzed the pros and cons of using transferred intent for inchoate crimes. None has given sustained attention to the question of whether such expanded liability violates the merger rule. The two articles described below illustrate the range of opinions on attempt liability in the transferred-intent context.

### *a. Peter Westen*

Peter Westen's extremely useful and thought-provoking article, *The Significance of Transferred Intent*,<sup>117</sup> dedicates a separate discussion to various extensions of the doctrine that the author considers problematic, including duplicated-intent cases and attempt cases.<sup>118</sup>

According to Westen, both using duplicated intent and applying transferred intent to inchoate crimes result in excessive penalties.<sup>119</sup> When discussing a scenario captured by Variation 1 above, he argues that "it is excessive to punish A for intentionally harming both B and C because the single penalty for harming a single person, e.g., C, suffices by itself to account for all the harm A ever intended to inflict."<sup>120</sup> Thus, for Westen, the duplication of intent (to support liability for harms to both intended and unintended victims)<sup>121</sup> results in liability disproportionate to culpability.

In assessing the appropriate scope of TI-related liability, Westen relies upon Douglas Husak's "principle of proportionate

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<sup>117</sup> Westen, *supra* note 2.

<sup>118</sup> Westen opposes attempt liability as imposed in all three types of cases represented by this article's Variations 1, 2, and 3. Westen, *supra* note 2, at 339–40. His particular focus (unforeseeable victims and different manner of injury) maps nicely onto the issues raised by the merger focus of this article: duplicated intent and inchoate crimes. *Id.* at 346. For example, duplicating intent for use in additional crimes increases the ability of prosecutors to charge for crimes involving unforeseeable victims or harms that occur in a different manner than originally intended. Allowing inchoate crimes such as attempt (involving only a *risk* of harm) is also likely to expand liability to cases involving unforeseeable victims.

<sup>119</sup> *See id.*

<sup>120</sup> *Id.* at 339–40.

<sup>121</sup> Harms that could be the focus of a case using duplicated intent to support an attempt charge could include physical injury short of the intended death (such as the bullet grazing Murphy's heel in the *Scott* case), as well as the psychological harm of having been exposed to a risk of being killed.

sentences”<sup>122</sup> to draw a distinction between the “basic case” usage of transferred intent, which he endorses, and the doctrinal extensions under discussion here, which he sees as unjustified.<sup>123</sup> Husak argues that punishment should be proportionate to the seriousness of the conduct engaged in, and that seriousness is a function of both culpability and harm proximately caused.<sup>124</sup> Discussing this proportionality principle, Westen essentially contends that harm caused is relevant *only* if it was *culpably* caused.<sup>125</sup> He believes determinations of culpable harm depend upon “people’s intuitions regarding . . . how [the] resulting harm [came] about.”<sup>126</sup> Harm caused should only matter where the public would view the actor as responsible for that harm.<sup>127</sup> Therefore, harms caused to unforeseeable victims or brought about by a different threat of force than that which A “initially unleashed”<sup>128</sup> should not necessarily trigger transferred-intent liability.<sup>129</sup> Rather, it is up to the jury to determine whether liability is appropriate in each individual case.<sup>130</sup>

In labeling attempt liability through duplicated intent as excessive, Westen expressly relies upon the notion that attempt merges where the harm is completed against the intended victim.<sup>131</sup> He does not, however, develop that argument in any detail.

### *b. Mitchell Keiter*

Mitchell Keiter has written the most enthusiastic endorsement of using duplicated intent and attempt liability in

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<sup>122</sup> Husak, *supra* note 25, at 92.

<sup>123</sup> See Westen, *supra* note 2, at 339–41. Westen calls such extensions of transferred intent “doctrinally adventuresome.” *Id.* at 336.

<sup>124</sup> Husak, *supra* note 25, at 92.

<sup>125</sup> Westen, *supra* note 2, at 343–44; see *supra* text accompanying notes 121–124 (discussing scholarship that compromises culpability principle).

<sup>126</sup> Westen, *supra* note 2, at 321. “[I]f punishment is rightly a function of whether the community perceives itself as having been wrongly harmed, punishing an individual is also rightly a function of whether the public perceives him as being the person who caused the harm.” *Id.* at 343.

<sup>127</sup> *Id.* at 344.

<sup>128</sup> *Id.* at 321.

<sup>129</sup> “The attribution by the public of its loss not to A but to intervening events or malefactors other than A diminishes the public’s anger at A and, thus, its desire that he suffer the full measure of punishment that he may abstractly deserve.” *Id.* at 344.

<sup>130</sup> Westen, *supra* note 2, at 348–49.

<sup>131</sup> *Id.* at 340 (“[I]t is excessive to penalize A for attempting to harm B in addition to intentionally harming C because A intended to harm only one person, and the penalty for intentionally harming one person, C, already includes the penalty for attempting to harm that person.”).

the transferred-intent context.<sup>132</sup> He justifies his support for many of the extensions discussed thus far by arguing that the severity of punishment should primarily be a function of dangerousness.

Keiter alleges that the transferred-intent doctrine “is being reshaped by the increasing lethality of homicidal attacks”<sup>133</sup> made possible by the use of “technologically advanced explosives and automatic weapons.”<sup>134</sup> Concerned primarily about public attacks perpetrated with such weapons, and the increased potential for “unanticipated harms” that they pose,<sup>135</sup> he contends that the actor who causes additional deaths in such circumstances should be punished more severely than the intentional killer of a single person, even if the former had no culpable intent toward any of the bystanders harmed.<sup>136</sup> For Keiter, the increased danger that he believes automatic weapons pose also justifies eliminating the heightened intent aspect of attempted murder (which requires specific intent at common law and purpose under the Model Penal Code), on the grounds that such weapons are extremely dangerous even in the hands of actors who do not intend to kill.<sup>137</sup>

Keiter goes so far as to assert that proof of an intent to cause harm can be completely dispensed with where the danger is sufficiently great. “The objective likelihood of inflicting harm compensates for the absence of a subjective desire to do so and

<sup>132</sup> See 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 (2004).

<sup>133</sup> *Id.* at 262. Keiter provides no data to support this assertion, and, in fact, Department of Justice statistics indicate that overall homicide rates declined from 1992 to 2011, and the homicide rate for incidents involving a firearm decreased by nearly half during that period (from 6.3 homicides per 100,000 persons in 1992, to 3.2 in 2011, a 49% decrease). ERICA L. SMITH & ALEXIA COOPER, U.S. DEPT OF JUSTICE, HOMICIDE IN THE U.S. KNOWN TO LAW ENFORCEMENT, 2011 6 (2013), <http://www.bjs.gov/content/pub/pdf/hus11.pdf> [<https://perma.cc/NN3G-XV3U>].

<sup>134</sup> Keiter, *supra* note 132, at 262. Again, Keiter provides no data to substantiate this allegation. In 2014, explosives, in particular, were responsible for only 6 of nearly 12,000 U.S. homicides. *Murder Victims by Weapon, 2010-2014*, FED. BUREAU OF INVESTIGATION, [https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded\\_homicide\\_data\\_table\\_8\\_murder\\_victims\\_by\\_weapon\\_2010-2014.xls](https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded_homicide_data_table_8_murder_victims_by_weapon_2010-2014.xls) [<https://perma.cc/XS5S-SL5G>].

<sup>135</sup> Keiter, *supra* note 132, at 262.

<sup>136</sup> *Id.* at 279 (arguing that, “[i]f A wishes B dead, it is better that A hire a sharpshooter whose accuracy ensures the safety of bystanders than a wild shotgunner who endangers them” and that, therefore, public safety is served “by imposing enhanced liability for crimes committed with greater public danger”); see also *id.* at 280–81 (interpreting *Ford* as suggesting “attempted murder liability for highly dangerous conduct that would support a wanton disregard murder conviction if the victim died” and arguing that “the objective danger posed, although not a substitute for intent may well be proof of it”).

<sup>137</sup> *Id.* Keiter’s position also ignores one of the rationales for heightened intent in the crime of attempt: confirming the danger sufficiently to compensate for the ambiguity of the actor’s inchoate conduct. See J. C. Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 434 (1957).

thus conduct where harm is likely may be punished as much as (or more than) conduct where harm is desired.”<sup>138</sup> Keiter does not clarify or elaborate on the phrase, “harm is likely,” so it is difficult to know whether he is arguing for murder liability based on extreme recklessness (such as the reckless indifference in depraved heart murder), simple recklessness, or mere negligence (including, perhaps, constructive knowledge). He could even conceivably be dispensing with mens rea altogether where the risk posed by the actor’s conduct is sufficiently great. In any event, as to the duplicated intent and attempt issues, it is clear that he advocates for very expansive liability—liability that would ignore the mens rea required in intent-based crimes and violate fundamental culpability principles of the criminal law.

As Keiter’s article and the cases discussed above illustrate, the combination of duplicated intent and attempt liability can have a dramatic impact on the scope of transferred-intent-related liability. Once courts are willing both to allow one intent to kill to be used to support multiple crimes, and to include within those crimes inchoate charges that do not require actual harm (but instead, only risk of harm), the potential liability from one act of violence (or potential violence) is expanded exponentially.

For the *Bland* court, for instance, an intent to kill one person supplies the mens rea for as many people as are foreseeably harmed. Consider, for example, the following hypothetical:

*Gas tank.* A shoots at B, intending to kill him. But A’s shot misses its mark and hits a gas tank a half mile away, causing an explosion and subsequent fire that ultimately results in the deaths of thirty people working in an office building next to the gas tank. A had seen neither the gas tank nor the office building when he shot at B.<sup>139</sup>

Under the *Bland* court’s thinking, A could be held liable for thirty murders. Even if she was completely (and even reasonably) unaware of the presence of the gas tank, as long as A’s conduct directly caused the explosion with no intervening acts (thereby satisfying the test often used for proximate causation),<sup>140</sup> she could be punished the same as a mass murderer who intentionally killed every student in a classroom. This willingness

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<sup>138</sup> Keiter, *supra* note 132, at 268.

<sup>139</sup> This hypothetical is loosely based on a hypothetical introduced by Westen, entitled “Exploding Tank.” See Westen, *supra* note 2, at 332 (crediting Glanville Williams for the original version).

<sup>140</sup> DRESSLER, *supra* note 1, at 189. Even if the applicable proximate cause test were closer to foreseeability (e.g., when an intervening cause is involved, see generally *id.* at 191 (discussing importance of foreseeability to intervening cause analysis)), that requirement would still only protect reasonable actors from liability. Anyone who was at least negligent as to the harm to unintended bystanders could still be subjected to multiple murder charges.

to use transferred intent to impose serious punishment on reckless, negligent, or even reasonable actors, and to duplicate the original intent an unlimited number of times, reaches far beyond what the transferred-intent doctrine was originally intended to accomplish. Compared, for example, to the felony-murder doctrine (which also allows murder liability based upon merely negligent or even reasonable conduct), this expansion of transferred intent creates far greater potential for multiple convictions, especially (if allowed) attempted murder convictions, to flow from one intentional act.<sup>141</sup> It thus represents a much more significant violation of modern culpability principles<sup>142</sup> than did the original transferred-intent doctrine.

The duplication of intent to support inchoate crimes against unintended victims, as happened in *Gillette*, expands the impact of the doctrine still farther. Attempt, as an inchoate offense, does not require proof of completed conduct or, indeed, of any specific harm to the victim. Thus, allowing the use of transferred intent to support attempt charges whenever an actor creates risks to bystanders opens the door to truly limitless potential liability. In the *Gas Tank* hypothetical, even if the explosion caused no deaths at all, under *Gillette*, A could potentially be charged with attempted murder of all thirty of the building's occupants who were endangered by his conduct. Just as *Gillette* appears to have had no awareness of, much less an intentional mens rea towards, his intended victim's co-workers, so in this modified version of the *Gas Tank* hypothetical A could be guilty of attempt despite having had no awareness of, or intent towards, the occupants of the building.<sup>143</sup>

In contrast, under traditional mens rea analysis, an actor who merely injured bystanders or exposed them to risk of injury would receive punishment significantly less serious than the attempted murder liability *Gillette* imposed via transferred intent. For instance, such an actor could perhaps be punished for reckless endangerment, or an offense involving risk creation with a firearm, or the like. Thus, as some courts have pointed out, these are not situations where the actor would go unpunished for the dangerous conduct in which she engaged.

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<sup>141</sup> Felony murder can, of course, also result in multiple murder convictions, but it cannot produce multiple attempt convictions based on threats to bystanders, as transferred intent can.

<sup>142</sup> On transferred intent's violation of modern mens rea principles, see *supra* Section I.B.1.

<sup>143</sup> One could perhaps distinguish these two cases by arguing that a reasonable person might anticipate the presence of co-workers when the Dr. Pepper can is sent to a workplace, but not anticipate the presence of the occupied building. But these cases do not require proof of negligence or recklessness before transferred intent can be employed.

The question is simply whether the actor should be treated *as if* she had *intended* to cause death to the bystanders, even where she clearly did not. Of course, if several bystanders were put at risk by the actor's conduct, then the actor could perhaps be subjected to several counts (not just one) of reckless endangerment<sup>144</sup> thereby increasing the potential liability under that one offense. However, that punishment would still likely pale in comparison to the multiple counts of attempted murder advocated by Keiter and invited by cases like *Gillette*.<sup>145</sup>

The sentencing impact of these charging decisions can be very significant. In Colorado, for example, attempted murder is punished as a class two felony,<sup>146</sup> which carries a sentence of approximately eight to twelve years.<sup>147</sup> In contrast, the crime of reckless endangerment, a class three misdemeanor, carries a maximum sentence of six months in prison and a fine of \$750.<sup>148</sup> Similarly, first degree (intent-to-kill) murder carries a sentence of life imprisonment or, possibly, death, whereas the presumptive sentence for manslaughter is two to four years.<sup>149</sup>

In sum, cases like *Scott*, *Bland*, and *Gillette* use attempt charges to expand the liability possible in transferred-intent contexts far beyond that which was originally allowed under the TI rule. The question is whether the fiction of transferred intent should replace the mens rea principles that would ordinarily govern such cases, and thereby allow conviction of one or more additional, inchoate, intent-based crimes where only one intent to harm existed. The unqualified nature of these cases' holdings supplies few meaningful limits to such expanded applications of the doctrine. However, as will be discussed in Part II, the merger rule provides just such a limit, and one that should not be ignored in transferred-intent contexts.

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<sup>144</sup> See, e.g., *People v. Wieckert*, 554 P.2d 688, 690 (Colo. 1976) (defendant who fired four shots in direction of patrol car where several individuals were standing found guilty of two counts of reckless endangerment and two counts of menacing), *overruled on other grounds by Villafranca v. People*, 573 P.2d 540 (Colo. 1978) (en banc).

<sup>145</sup> In Colorado, reckless endangerment is categorized as a class 3 misdemeanor. COLO. REV. STAT. § 18-2-101 (2016).

<sup>146</sup> *Id.* § (4).

<sup>147</sup> In Colorado, the exact sentence range will depend upon the year in which the crime was committed. See *id.* § 18-1.3-401.

<sup>148</sup> Some states' statutes include degrees of reckless endangerment, with conduct involving a firearm constituting a felony. See, e.g., KY. REV. STAT. ANN. § 508.060 (West 2016).

<sup>149</sup> COLO. REV. STAT. §§ 18-3-104, 18-1.3-401 (2016).

## II. ATTEMPT, MERGER, AND TRANSFERRED INTENT

### A. *Introduction*

Part I of this article discussed the recent expansions of liability under the transferred-intent doctrine accomplished by duplicating intent and adding attempt charges. As noted there, courts and commentators assessing those expansions have focused on issues such as culpability, intent, and harm, giving little attention to the question of whether imposing attempt liability in such situations violates the merger doctrine. This part fills that gap, proposing three important (and somewhat overlapping) justifications for the basic merger doctrine and considering, as to each one, whether that justification is implicated when attempt is used in the transferred-intent context. This part concludes that the rationales undergirding the basic merger doctrine apply with equal (and sometimes greater) force in the TI context. For that reason, imposition of attempt liability in certain transferred-intent situations violates the merger rule and should be disallowed. This part also briefly considers whether concerns raised by the merger issue are implicated even in TI situations where merger is not possible.

#### 1. Overview of the Merger Rule

As was noted above, under the merger doctrine, an individual (*A*) who intentionally kills another person (*B*) cannot be convicted of both murdering and attempting to murder *that same person*, where both charges stem from the same initial conduct.<sup>150</sup> *A*'s attempt to kill simply merges into the completed murder. Thus, merger of attempt can be seen as one instance of the broader rule mandating merger of all lesser included offenses. As one author put it, under the merger of attempt the actor "cannot be found guilty of both offenses because they are both parts of the same crime (the lesser offense is part of the greater offense)."<sup>151</sup> Attempted murder (for example) is necessarily part of the crime of murder.

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<sup>150</sup> See *id.* § 18-1-408(1)(a).

<sup>151</sup> *Lesser Included Offense*, THE FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/Lesser+Included+Offense> [<https://perma.cc/44K9-DBAB>]. It is worth noting that the merger rule prohibits double *convictions*, not double *charging*. Thus, as long as the state's rules allow it, a prosecutor is free to charge an actor with both attempt and the underlying offense. In turn, the court will instruct the jury on either or both of those crimes, as long as the evidence warrants such an instruction and the attempt is found to be a lesser included offense. But, per the merger rule, the jury will be required to choose between the two offenses; it cannot convict of both.

In a number of jurisdictions, the merger rule has been codified,<sup>152</sup> sometimes with a statute that explicitly prohibits conviction of both the attempt and the completed crime.<sup>153</sup> It is worth noting as well that some states define attempt as taking steps toward, but failing to complete, a crime.<sup>154</sup> In those states, attempt does not operate like a lesser included offense, since the requirement of failure effectively defines a crime and its attempt as mutually exclusive, with each containing an element the other lacks (failure and success, respectively).<sup>155</sup> But these attempt-as-failure statutes still ultimately produce the same effect as the merger rule. Under the failure approach, conviction of both attempt and the target offense is still precluded, as the two crimes are mutually exclusive. (It is impossible to both fail and succeed.) In short, these minority jurisdictions simply enforce the merger rule indirectly, by narrowly defining attempt.

In summary, conviction of both attempt and the target offense is precluded in the United States, either via the merger rule (codified or not) or via the statutory definition of attempt. In analyzing how the merger of attempt applies to transferred-intent situations, this article will focus on states using the non-failure definition of attempt, under which merger arises as a separate issue.

## 2. History of Merger

The merger of attempt is a remnant of the broader, now-defunct rule under English common law that required misdemeanors to be absorbed into felonies.<sup>156</sup> That misdemeanor merger rule was “based upon the fact that in early English criminal procedure a defendant in a felony trial had fewer rights than a defendant on trial for a misdemeanor.”<sup>157</sup> Since it was inappropriate to convict a defendant of a crime for which he had not received the requisite procedural protections, a misdemeanor

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<sup>152</sup> “The courts are in general agreement that an attempt conviction may be had on a charge of the completed crime, and statutes to this effect exist in some jurisdictions.” LAFAVE, *supra* note 11, at 610.

<sup>153</sup> *Id.* at 611.

<sup>154</sup> *See, e.g.*, COLO. REV. STAT. § 18-2-101 (2016).

<sup>155</sup> DRESSLER, *supra* note 1, at 381–82.

<sup>156</sup> *United States v. York*, 578 F.2d 1036, 1038 (5th Cir. 1978). The merger of misdemeanors was repudiated in England in 1851. *Id.* at 1039. In addition—although the author has not been able to find any mention of this argument in the literature—it seems possible that the merger of misdemeanors might also have related to the punishments imposed upon felons. Since nearly all felonies at early common law were capital offenses, LEE & HARRIS, *supra* note 45, at 397, it would have made no sense to convict an actor of a misdemeanor once he or she had been found guilty of a felony. The extra punishment was simply superfluous.

<sup>157</sup> LAFAVE, *supra* note 11, at 610.

conviction could not be had in a felony trial. At that time, attempts were classified as misdemeanors; thus, conviction of a completed felony precluded conviction of attempt to commit that same offense.<sup>158</sup>

Obviously, this historical rationale for the merger of attempt has no relevance today, where attempts can be felonies and misdemeanor trials do not provide augmented procedural protections.<sup>159</sup> Nevertheless, the mandatory merger of attempt persists; as noted above, it appears to be employed in every state and the federal system.<sup>160</sup> Thus, to understand legislative fealty to the merger of attempt today, it is necessary to consider what additional, more current, criminal justice concerns might underlie that rule. To contextualize that inquiry, the next section examines the various types of cases in which the merger issue can arise in the transferred-intent context.

### 3. Merger in the Transferred-Intent Context

As was noted in Part I, attempt liability can arise in the transferred-intent context in several different factual settings. This part returns to the three factual variations previously described:

*Variation 1:* Attempted murder charges as to *intended* victim (in addition to transferred-intent murder charges as to *unintended* victim)—i.e., attempt as to *B*, transferred-intent murder as to *C*.

*Variation 2:* Murder charges as to *intended* victim (in addition to transferred-intent attempt charges as to *unintended* victim)—i.e., murder as to *B*, transferred-intent attempt as to *C*.

*Variation 3:* Direct attempt charges as to *intended* victim and transferred-intent attempt charges as to *unintended* victim—i.e., attempt as to *B* and transferred-intent attempt as to *C*.

In the first two variations, the merger issue is readily apparent. Under Variation 1, if *A* had killed the intended victim, the attempt to do so would have merged into the completed offense. Since *A* killed the unintended victim instead, the question posed is whether the attempt against *B* should merge into that completed killing and therefore not be brought as an additional charge. Similarly, in Variation 2, if a court were

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<sup>158</sup> *Id.*

<sup>159</sup> In addition, today felonies are not automatically punished by death. See, e.g., Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 550, 550–52 (2005).

<sup>160</sup> See *supra* Section II.A.1.

willing to duplicate *A*'s intent even when the intended crime had been completed (perhaps the most controversial context in which the attempt issue arises), then the question would become whether not only *A*'s attempt to murder *B*, but also any attempted murder of *C*, merges into the homicide of *B*. In other words, should it be possible to impose attempted murder liability on an actor who has also been convicted of murder based on the same act?<sup>161</sup>

In contrast to the first two variations, in Variation 3 cases no death has occurred. Thus, the merger issue is not raised because there is no completed offense into which the attempt could merge. However, as will be discussed further below,<sup>162</sup> the analysis of merger can nevertheless shed some useful light on Variation 3. The following discussion will focus on the merger issues raised by Variation 1, but will at times specifically discuss the other two variations as well.<sup>163</sup>

### *B. Justifications for Merger in the Transferred-Intent Context*

The merger-of-attempt rule is surprisingly undertheorized. A search of the relevant literature reveals little explanation of the reasons for its use. Most articles begin and end with a perfunctory rehearsal of the history (i.e., the misdemeanor-merger rule) and perhaps an assertion that a completed crime self-evidently includes the attempt to commit it.<sup>164</sup> However, three important rationales can be posited to support the universal practice of merging attempts into completed offenses. All of these rationales are implicated, as is argued below, where attempt is applied in the transferred-intent context. If a use of attempt implicates these significant rationales for merger, then that use should be held to violate the merger doctrine.

The subsections that follow discuss the three justifications (or rationales) for merger posited here, considering whether each

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<sup>161</sup> In other words, should the double conviction allowed in the *Scott* case be prohibited? See *supra* Section I.B.1.

<sup>162</sup> See *infra* note 172.

<sup>163</sup> Of course, analogues to many of the questions addressed in this part—about whether and how the merger of attempt applies in transferred-intent situations—could also arise in minority attempt jurisdictions, where attempt is defined as *failing* to complete the crime. For a description of the minority rule, see *supra* notes 154–155 and accompanying text. Under such statutes, the question would be whether the statutory definition of attempt as failure would preclude attempt liability as to one person where the actor “succeeded” in killing a different person. While the considerations involved in that context are likely to be similar, such failure-statute questions are beyond the scope of this article.

<sup>164</sup> See DRESSLER, *supra* note 1, at 381 (“[T]he successful commission of the target crime logically includes an attempt to commit it.”).

one applies with equal force to both the basic merger situation *and* merger issues that arise in the TI context. The discussion concludes that each one (to a greater or lesser extent) is implicated in transferred-intent contexts, suggesting that merger should be applied to bar the use of attempt liability at least in Variation 1 and Variation 2 cases. Finally, as is discussed briefly herein as well, some of the concerns raised by these merger justifications are also relevant to the use of attempt in non-homicide—and hence non-merger—Variation 3 cases as well.

### 1. First Merger Justification: Assuring Punishment Proportionate to Culpability

#### *a. Proportionality as a Justification for Merger*

The first reason to merge attempt posited here is that doing so prevents punishment disproportionate to culpability. It is self-evident that, if *A* intends to kill *B* and does in fact kill *B*, *A* has held only one culpable intent: to cause the death of *B*.<sup>165</sup> *A* has made one culpable choice, and since his conduct effectuated that choice, *A* is appropriately punished for the one culpable choice that he made: to commit (one) murder. Punishment for both attempt and the underlying offense would be disproportionate to *A*'s culpability, and would therefore also over-deter future actors. Thus, the merger doctrine (especially where explicitly codified) can be understood as expressing the legislature's conclusion that punishing for both an attempt and the completed offense would be disproportionate to the actor's culpability.

#### *b. Proportionality Rationale Applied to the Transferred-Intent Context*

In transferred-intent situations, the potential for punishment disproportionate to culpability is perhaps even greater than in the basic attempt scenario. Many scholars have voiced concerns about such disproportionate punishment in TI attempt,<sup>166</sup> although without explicitly tying those concerns to the merger doctrine. A focus on merger, however, strengthens their position. According to the proportionality rationale for merger, the rule prohibits convicting of attempt where an intended murder has been committed, because so convicting the actor would doubly punish him for only one intent to kill.

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<sup>165</sup> Even if *A*'s intent is understood in impersonal terms, he still intended to kill only one person, making double punishment arguably disproportionate to his culpability.

<sup>166</sup> See, e.g., Westen, *supra* note 2, at 339–40 (calling such liability “excessive”).

Similarly, merger should bar adding attempt liability where an actor has been convicted (via transferred intent) of killing an *unintended* victim, for in both instances the murder conviction sufficiently punishes for the one intent to kill that the actor possessed. For example, in the *Hidden Child* hypothetical (a Variation 1 case), to punish *A* *not only* for transferred-intent murder of her child, but *also* for attempted murder of her husband, is to impose liability for two intent-based crimes, when she only intended to kill one person.<sup>167</sup> As Westen puts it, “the single penalty for harming a single person, e.g., *C*, suffices by itself to account for all the harm *A* ever intended to inflict.”<sup>168</sup> Convicting *A* of both attempt (as to the intended victim) and murder (as to the unintended one) produces just the sort of disproportionate punishment that the merger rule should be understood to prohibit.<sup>169</sup>

The unfairness of such punishment is illustrated by comparing *A* to a more culpable actor with equally bad aim. An actor who had intended to kill *two* people but only succeeded in killing one of them would be subjected to the very same punishment as *A*, even though the actor’s culpable intent would be twice as serious as *A*’s. Thus, the defendant in the *Scott* case argued that he was being prosecuted “as if he intended to kill two people rather than one.”<sup>170</sup> Westen is correct: In such cases, punishment for both attempt and murder is excessive. After all, it is one thing to prevent a culpable actor from escaping proportionate punishment due to bad aim (as TI was designed to do); it is yet another to increase someone’s punishment solely because he or she had bad aim. As these examples illustrate, the proportionality justification for merger arguably applies with equal force in the transferred-intent context. Of course, it will not usually be possible to know exactly what impact a state

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<sup>167</sup> It is worth noting parenthetically that attempted murder liability *as to C* would be precluded in such a case. Even though the intent to kill *B* could be transferred (duplicated) to support such a charge, the traditional merger rule would bar it. The attempt against *C* would merge into the death of *C*.

<sup>168</sup> Westen, *supra* note 2, at 339–40. Although Westen makes this assertion while discussing duplication of intent, such duplication is of course always part of transferred-intent cases that allow *A*’s intent to kill to be applied both to his preliminary conduct (attempt) and to his completed crime. *See also* *Ford v. State*, 625 A.2d 984, 998 (Md. 1993) (“Transferred intent does *not* make two crimes out of one.”).

<sup>169</sup> Transferred intent is often understood as punishing the actor for the crime he would have committed if he had not been so “lucky” as to have had bad aim (or for some other reason have failed to accomplish the intended killing). But, as was discussed above, if attempt does not merge in such cases (as it does in traditional homicides), then the actor with bad aim is once again likely to be punished much more harshly than she would have been had she succeeded in committing the intended killing. *See supra* notes 166–167 and accompanying text.

<sup>170</sup> *People v. Scott*, 927 P.2d 288, 292–93 (Cal. 1996).

legislature intended its merger rule to have in transferred-intent contexts (in the highly unlikely case that it considered that issue). But the examples just discussed strongly suggest that failure to merge the actor's original attempt into the transferred-intent murder undermines the proportionality goal of the merger rule. Moreover, as Westen has pointed out, the principle of legality suggests that any doubt as to whether a legislature would view a penalty as excessive is best resolved in the manner most favorable to the defendant, consistent with the rule of lenity.<sup>171</sup>

The same argument about liability disproportionate to culpability would apply to Variation 2 cases (where *A* actually kills *B*). In such cases, any attempted murder charge *regarding B* (the intended and actual victim) is of course prohibited by the traditional merger rule. The culpability rationale suggests that merger should also be understood to prohibit any attempt charge *as to C* (which would be based upon duplication of the original intent to kill *B*). The single penalty for murder of *B* is sufficient to account for all the harm *A* intended to inflict. Fealty to the proportionality concerns underlying the merger doctrine thus supports the current majority rule in Variation 2 cases—that completion of the intended offense precludes further attempt liability. For the same reason, additional attempt liability (beyond attempt as to the intended victim, *B*) should be prohibited in Variation 1 cases as well.<sup>172</sup>

Some courts and commentators, however, have responded to these proportionality concerns by dismissing them. As noted above, Mitchell Keiter acknowledges that defendants in cases like *Scott* and *Bland* are less culpable than someone who intends to harm two people. Yet he argues that such actors

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<sup>171</sup> Peter Westen, *Two Rules of Legality in Criminal Law*, 26 L. & PHIL. 229, 274–75 (2007).

<sup>172</sup> As an aside, although the merger issue itself is not directly implicated in Variation 3 cases, it is worth noting that those cases still raise important proportionality concerns, separate and apart from the proportionality rationale for merger. In Variation 3, *A* kills neither *B* nor *C* but creates a risk to each, and is charged with two (or more) counts of attempted murder. Of course, Variation 3 cases can involve far more than just two potential unintended victims—i.e., more than two individuals whom *A*'s conduct exposed to a risk of harm. In such cases, the original intent toward *B* is transferred (duplicated) in order to impose liability on other, and even multiple, persons put at risk by *A*'s conduct. If *A* is compared to another actor, who intended to kill two victims and missed both, *A* would suffer the same punishment even though the other person had a more culpable intent. In that sense, *A*'s punishment is disproportionate to her culpability. (Of course, were attempt liability barred in such situations, *A* could still be prosecuted for a lesser offense, such as reckless endangerment or malicious wounding.) Imposing two attempt convictions would be just as unfair here as imposing the attempt and murder convictions discussed above. Here as well, transferred intent should not turn one criminal intent into two (or more). Thus, the proportionality concern is a viable *independent* justification (i.e., independent from the merger doctrine) for prohibiting transferred-intent attempt in Variation 3 cases.

nevertheless should be convicted of both murder and attempt because of the additional danger created by their actions.<sup>173</sup> “A murderer who kills her victim in isolation is less dangerous than an offender who opens fire in the presence of one or more bystanders. Where culpability and harm are the same but the danger is greater, enhanced liability is not unjust.”<sup>174</sup>

Assumedly, Keiter would therefore endorse attempt liability even in Variation 3 situations, where no harm at all was caused to the unintended victim (C),<sup>175</sup> as long as that individual was put in danger by the actor’s intentional behavior. As is apparent from the quote above, Keiter is not arguing that convictions in such cases are appropriate because of the additional *harm* caused by A’s attempt to kill.<sup>176</sup> His focus is on *danger*; for him, equivalent harms warrant different punishments based on the dangerousness of the means used: “A[n unpremeditated] murder committed by the dangerous means of explosive devices may be worse than a premeditated killing.”<sup>177</sup> Asserting further that unintentional conduct “capable of inflicting multiple, indiscriminate deaths . . . warrants an even greater sanction than conduct intended to kill a single individual,”<sup>178</sup> Keiter seems to be suggesting that risk-creation, even if merely reckless—(or even negligent?)—justifies murder liability, via transferred intent if necessary.<sup>179</sup>

<sup>173</sup> See *supra* note 136 and accompanying text.

<sup>174</sup> Keiter, *supra* note 132, at 275.

<sup>175</sup> It is worth pointing out that the proportionality arguments in favor of merger (and against duplicating intent even where merger does not apply) arguably give inadequate attention to the issue of harm. For example, when the *Scott* court said, the defendant’s wounding of his mother’s batterer and killing of a bystander “committed crimes against two persons,” it is hard to deny that fact. *Scott*, 927 P.2d at 292. One could even argue that having a gunshot whiz by your ear is a harm to an *uninjured B*, even if C is ultimately the one killed. Indeed, the additional harm caused to the intended victim (in Variation 1) or to the unintended victim (in Variation 2) is perhaps the most convincing basis for suggesting that A can justly be punished more severely than if she had completed the intended killing. But that harm argument is ultimately not persuasive, for (generally speaking) harm cannot be the basis of criminal liability unless it is *culpable* harm. To impose liability for accidental harm is to impose strict liability or negligence-based liability, violating the criminal law’s commitment to culpability as a prerequisite to criminal liability. See *Morissette v. United States*, 342 U.S. 246, 251–52 (1952). And if an actor has negligently or recklessly caused harm, that conduct can be criminally punished through crimes of lesser seriousness than attempt, such as reckless endangerment.

<sup>176</sup> See discussion of harm issue above, *supra* note 175.

<sup>177</sup> Keiter, *supra* note 132, at 264.

<sup>178</sup> *Id.*

<sup>179</sup> In fact, Keiter asserts that subjective culpability can be completely dispensed with where the danger is sufficiently great. “The objective likelihood of inflicting harm compensates for the absence of a subjective desire to do so and thus conduct where harm is likely may be punished as much as (or more than) conduct where harm is desired.” *Id.* at 268. Keiter does not clarify or elaborate on the phrase, “harm is likely,” so it is difficult to know whether he is arguing for murder liability based on knowledge or a “depraved heart”—which of course already exists—on simple recklessness (which usually

Keiter would allow attempt liability to be imposed in two of the three attempt case variations under discussion here (1 and 3). In each of those instances, he justifies imposing punishment disproportionate to culpability on the grounds that it is warranted by the additional risk created by the actor. As to cases where the intended as well as the unintended victim dies, he would allow duplicated intent to be used to convict the actor of two murders. Only where *solely* the *intended* victim (*B*) dies does Keiter hesitate to impose attempt liability (as to the unintended victim). The actor who successfully killed the intended victim, he argues, poses less danger to bystanders than an actor who is a poor shot. Thus, she should not be subjected to the “enhanced liability [warranted] for crimes committed with greater public danger.”<sup>180</sup> Apparently, Keiter feels comfortable drawing lines about dangerousness based on the fortuity of whether or not a nearby person moves into the line of fire at the last moment, blocking the shot intended for another. The startling breadth of Keiter’s analysis seems to bring him perilously close to advocating preventive detention.

Some courts are similarly unmoved by punishment disproportionate to culpability in attempt cases based on duplicated intent.<sup>181</sup> In *Bland*, although only the intended victim was killed, the court stated in dicta that intent in such (Variation 2) cases could be duplicated to support other murder charges as to unintended victims as well.<sup>182</sup> In response to a culpability concern raised by the defendants, the court apparently assumed that deterrence trumps culpability. Punishing an actor for causing two deaths even if she had only intended one, it explained, was acceptable because it would provide a more powerful deterrent.<sup>183</sup> The court did not discuss exactly how a murder sentence could deter *accidental* conduct, nor whether culpability should serve as a limit on deterrence here as it is usually understood to do in the criminal law.<sup>184</sup> In fact, the

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constitutes only manslaughter) or even mere negligence. In any event, as to the duplicated intent and attempt issues, it is clear that he advocates very expansive liability for actors who intend to kill one person—and that he abandons the traditional understanding of mens rea-based homicide grading along the way.

<sup>180</sup> *Id.* at 280.

<sup>181</sup> And it is worth noting that Keiter is himself a Judicial Attorney employed at the California Supreme Court (or was at the publication of his article). *Id.* at 261 n\*.

<sup>182</sup> The *Bland* court was not willing, however, to transfer intent to support attempt charges. *People v. Bland*, 48 P.3d 1107, 1116 (Cal. 2002).

<sup>183</sup> *Id.* at 1114 (quoting *State v. Worlock*, 569 A.2d 1314, 1325 (N.J. 1990)).

<sup>184</sup> For further discussion of culpability as a limit on deterrence, see *infra* note 185.

court was quite dismissive of culpability and proportionality concerns,<sup>185</sup> asserting that one mens rea could appropriately

combine with a hundred *acti rei*, intended and unintended, to make a hundred crimes, consummated and inchoate. Unforeseen circumstances may multiply the criminal acts for which the criminal agent is responsible. A single state of mind, however [assumedly, the actor's original intent], will control the fact of guilt and the level of guilt of them all.<sup>186</sup>

Thus, any accidental consequence of an act intended to cause death could result in liability for intentionally caused harm. The sole limitation on this broad liability mentioned by the court was proximate causation.<sup>187</sup> This sort of reasoning goes far beyond the original TI concern about preventing culpable actors from escaping murder liability.

In summary, if merger is designed to prevent adding attempt liability where the intended murder has been committed, then conviction (via transferred intent) of an actor for an *unintended* killing should similarly bar convicting that individual of attempt as well. Against the backdrop of (at least occasional) judicial and scholarly willingness to endlessly duplicate intent, the proportionality argument for applying merger to attempt charges in TI contexts takes on added weight. Given the centrality of proportionality to American criminal law,<sup>188</sup> language such as that used in *Bland* raises concerns, and positions such as Keiter's appear radical and bizarrely out of date. These approaches underline the need to enforce and expand merger and other doctrines that vindicate the proportionality principle, rather than eroding and ignoring them.

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<sup>185</sup> "There is some force to . . . [the] argument that a person who intends to kill two persons and does so is more culpable than a person who only intends to kill one but kills two. But we find no legally cognizable difference between the two persons." *Bland*, 48 P.3d at 1113; see also *Ochoa v. State*, 981 P.2d 1201, 1205 (Nev. 1999) (punishing an actor who killed two victims, one intentionally and one unintentionally, for two murders would improve deterrence) (quoting *State v. Hinton*, 630 A.2d 593, 599 (Conn. 1993)). But, of course, deterrence is necessarily limited by proportionality; if it were not, a legislature could appropriately decide to impose the death penalty for shoplifting. (That would, after all, improve deterrence.) Thus, if the proportionality rationale for merger is convincing in the TI context, then the possibility of increased deterrence is an inadequate reason for abandoning the doctrine.

<sup>186</sup> *Bland*, 48 P.3d at 1115 (quoting *Harvey v. State*, 681 A.2d 628, 637 (Md. Ct. Spec. App. 1996)).

<sup>187</sup> *Id.* at 1115 n.4.

<sup>188</sup> See *supra* Section II.B.2.

## 2. Second Merger Justification: Avoiding Multiple Punishment

Given that punishing an actor for both a completed offense *and* an attempt to commit that offense could be considered punishing twice for the same crime, merging attempt could also be understood as necessary to vindicate constitutional values enshrined in the Double Jeopardy Clause. The Supreme Court has interpreted the Double Jeopardy Clause of the Eighth Amendment as prohibiting both successive prosecution (via multiple *trials*) and multiple *punishment* (in the same trial).<sup>189</sup> Since merger generally operates within only one criminal proceeding, the rule implicates only the second of the double jeopardy protections. This section briefly describes the current state of double jeopardy doctrine on multiple punishment, and considers the relevance of that doctrine to the rule mandating merger of attempt.

Given the overlaps between a completed offense and its attempt, the double jeopardy principle that multiple punishment for the same offense is unjust could also inform the merger doctrine. If one treats this double jeopardy value as one of the rationales for merger, the next question is whether that value is compromised by the use of attempt liability in the transferred-intent context. It is beyond the scope of this paper to conduct a full analysis of how the troubled and byzantine body of double jeopardy jurisprudence applies to that context. Instead, the discussion below will simply offer some preliminary thoughts on how the notion that punishing someone twice for the same crime is unjust might be understood in the context of transferred-intent-related attempts.

The discussion will first consider whether the double jeopardy prohibition against multiple punishment constitutes a viable rationale for the merger rule itself, addressing the two central organizing issues for current Supreme Court jurisprudence on the topic: the definition of “same offense” and the legislative discretion to define offenses and allocate punishments to particular crimes. Then, assuming that the injustice of multiple punishment *is* a viable rationale for merger, the section will address what

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<sup>189</sup> *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 306–07 (1984) (“Our cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense.”); *see also* Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45, 49 n.14 (2011) (“Not all judges think that the right against multiple punishments derives from the Double Jeopardy Clause. Some have said that the right is protected by the Due Process Clause.”).

results that value might suggest in various transferred-intent situations. Again, the point of the discussion is to identify some implications of this constitutional value for such cases, not to conduct a thorough analysis of all the relevant doctrinal issues.

*a. Avoiding Multiple Punishment as a Rationale for Merger*

*i. The “Same Offense” Requirement*

Central to double jeopardy protections against multiple punishment (as well as successive prosecution) is the notion that the “same offense” cannot be punished multiple times.<sup>190</sup> Under *Blockburger v. United States*,<sup>191</sup> “the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”<sup>192</sup> In other words, an offense is “the same” as another (possibly triggering double jeopardy protections) if it is a lesser included offense of that crime.<sup>193</sup>

The Supreme Court made this overlap between double jeopardy law and lesser included offense law explicit in 1989 when it applied *Blockburger*’s narrow, elemental test to the question of what constitutes a lesser included offense in federal criminal law,<sup>194</sup> “thus cementing the identification of double jeopardy and lesser included offense doctrines.”<sup>195</sup> This approach is now used to define LIOs, not just by the federal courts, but by the majority of states as well.<sup>196</sup>

Traditionally, attempt has been considered a lesser included offense of the completed crime.<sup>197</sup> Recently, however,

<sup>190</sup> As is discussed *infra* Section II.B.3.a.ii, successive prosecution of the same offense constitutes double jeopardy, but multiple punishment of the same offense is unconstitutional only if it violates legislative intent.

<sup>191</sup> *Blockburger v. United States*, 284 U.S. 299 (1932).

<sup>192</sup> *Id.* at 304.

<sup>193</sup> Contrasting the *Blockburger* test with other state approaches to defining lesser included offenses reveals the narrowness of the current double jeopardy rules. Although the majority of states now follow *Blockburger*, some reject the elemental approach in favor of the “cognate-pleadings” test, allowing the lesser offense to include additional elements as long it is of the “same class as the charged offense,” see Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 364, 419 (2005), or the still broader “evidentiary,” test which “looks at the inculpatory evidence introduced by the prosecution,” *id.* at 364.

<sup>194</sup> *Schmuck v. United States*, 489 U.S. 705, 716 (1989).

<sup>195</sup> Hoffheimer, *supra* note 193, at 407.

<sup>196</sup> See, e.g., *United States v. Mosley*, 126 F.3d 200, 203–04 (3d Cir. 1997); *State v. Hall*, 577 A.2d 1225, 1226 (N.H. 1990).

<sup>197</sup> See *State v. James*, 665 N.W.2d 891, 896–99 (Neb. 2003) (noting that courts have held attempt to be a lesser included offense whether or not the legislature has specifically so provided by statute).

commentators have noted that, especially in states that do not statutorily define lesser included offenses,<sup>198</sup> the narrow *Blockburger* approach may threaten the LIO status of attempt.<sup>199</sup> Nevertheless, the discussion below presents some arguments *in favor* of considering attempt a lesser included offense even under *Blockburger*.

Under *Blockburger's* elemental approach, the actus reus of an attempt arguably constitutes a subset of the completed offense, satisfying the test.<sup>200</sup> After all, every offense entails an effort to commit that offense, and at least one significant step towards doing so. Whether characterized as a substantial step (the Model Penal Code approach), or as approaching within dangerous proximity (a frequently-used common law test),<sup>201</sup> or as meeting some other doctrinal variation, the conduct required to establish an attempt constitutes a *piece* of the completed actus reus. Logically, then, the acts comprising the attempt can only be understood as constituting a subset of the conduct required to commit the completed crime.<sup>202</sup>

Turning to intent elements, the heightened mens rea usually required for attempt (specific intent at common law or purpose under the Model Penal Code) will sometimes, of course, be more demanding than that for the completed crime, in which case the mens rea for the attempt would not satisfy the *Blockburger* test.<sup>203</sup> In such instances, therefore, merger

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<sup>198</sup> Some "older statutes specifically treated attempt and assault as lesser included offenses . . . to eliminate any remnants of older procedural rules that excluded misdemeanors." Hoffheimer, *supra* note 193, at 429 n.324.

<sup>199</sup> *Id.* at 429.

The [elements] test . . . fails to explain why a party cannot be convicted of both a crime and the attempt to commit the crime. Because a prohibition against multiple convictions for crimes and attempts is often set forth by statute, many jurisdictions do not face the dilemma [of *Blockburger* possibly disrupting settled legal practices]. Nevertheless, the judicial rejection of the merger doctrine and subsequent authorization of multiple convictions of conspiracy and the crime that is the object of the conspiracy raise the possibility of a comparable prosecution for attempts and completed crimes.

*Id.* (footnotes omitted).

<sup>200</sup> Even a *completed* attempt (e.g., shooting a gun at an intended victim) will not involve performance of all the elements of the underlying offense (given that the shot misses; otherwise, the offense would not be an attempt).

<sup>201</sup> See DRESSLER, *supra* note 1, at 397–400.

<sup>202</sup> The exception, of course, would be the states that define attempt to require failure, as such attempts would not constitute a subset of the completed offense. See, e.g., *Crawford v. State*, 811 P.2d 67, 71 (Nev. 1991).

<sup>203</sup> Whenever the underlying offense is a general intent crime (or, under the MPC, is based on negligence, recklessness, or perhaps knowledge), the intent required for the attempt will be higher/more demanding than that for the completed crime. For example, attempted rape would require the specific intent (or purpose) to engage in forcible intercourse, whereas the completed offense is a general intent crime at common law, and under the MPC usually requires proof only of recklessness. Therefore, some argue that the

might not be necessary to vindicate double jeopardy values—as currently defined by the Supreme Court.<sup>204</sup> Nevertheless, as will be discussed further below, such mismatches do not arise when the underlying offense *itself* is intent-based, as will always be the case in transferred-intent cases.<sup>205</sup> In those cases, the attempt will not, therefore, contain a different mens rea element.

The next issue to consider, in determining whether the merger doctrine's longevity is explained in part by its vindication of double jeopardy values, is the impact of the Supreme Court's deference to legislative preferences regarding multiple punishment.

### *ii. Deference to Legislatures Regarding Multiple Punishment*

Deference to the legislature has been central to the Supreme Court's recent jurisprudence on the issue of multiple punishment. Whereas successive punishments imposed in *different* trials may raise constitutional concerns,<sup>206</sup> the Court considers multiple punishment in the *same trial* to be constitutional as long as it is consistent with legislative intent.<sup>207</sup> If a legislature has created two offenses that can be proven with the same facts, and clearly intended those punishments to be imposed for the same conduct, the Court will find no constitutional violation in the imposition of both punishments at trial.<sup>208</sup>

According to the [Supreme] Court, a statute authorizing two [distinct] punishments of amount *X* is no different from a statute authorizing a single punishment of *2X* for that same offense. Thus, the Court has concluded that whether a person may be punished for one act under two statutes is ultimately a legislative question. Cumulative

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crime of attempt is not the "same" as the completed offense. *E.g.*, Hoffheimer, *supra* note 193, at 430–31.

<sup>204</sup> However, application of *Blockburger* to undermine the lesser included offense doctrine by refusing to treat attempt or manslaughter as LIOs has been criticized as allowing unconstitutional "selective prosecution." *See, e.g., id.* at 435–36 ("[A] radical new construction of state law that permits every murder defendant to be subjected to the risk of multiple prosecution and punishment for the crime[] of . . . attempt . . . is vulnerable to an equal protection challenge.").

<sup>205</sup> *See infra* notes 217 and 218 and accompanying text; *see supra* Section II.B.

<sup>206</sup> *See* Justices of Bos. Mun. Court v. Lydon, 466 U.S. 294, 294 (1984); Hessick & Hessick, *supra* note 189, at 54–55.

<sup>207</sup> *Albernaz v. United States*, 450 U.S. 333, 344 (1981); *see also* *Whalen v. United States*, 445 U.S. 684, 692 (1980) (adopting presumption that statutes do not overlap, allowing two punishments for the same crime, unless explicitly indicated by the legislature), *cited in* Hessick & Hessick, *supra* note 189, at n.50.

<sup>208</sup> According to Hessick & Hessick, *supra* note 189, at 54–56, this essentially means that there is no constitutional protection against multiple punishments, for a court can never constitutionally impose a punishment that violates legislative intent.

punishments may be imposed under separate statutes so long as the legislature has clearly authorized those punishments. In that case, no double jeopardy protections apply.<sup>209</sup>

Thus, as Joshua Dressler succinctly puts it, “on the matter of cumulative punishments as part of a single prosecution . . . *Blockburger* is a rule of statutory construction.”<sup>210</sup> While the Court will assume that a state does not want to punish both a greater and a lesser included offense where the relationship between the two satisfies the elemental test, it will nevertheless uphold such a double punishment if the legislature clearly intended it.<sup>211</sup>

Because of this deference, if a legislature decided to eliminate the merger rule, by explicitly authorizing punishment for both attempt and the completed offense, it is possible that current double jeopardy law would provide no constitutional protection against such multiple punishment. It appears, however, that no state has passed such a provision.<sup>212</sup> To the contrary, many states have longstanding statutes and/or lines of precedent preserving and enforcing the merger of attempt.<sup>213</sup> Thus, violation of *existing legal regimes mandating merger* arguably offends double jeopardy principles that prohibit multiple punishment for the same offense. For these reasons, the merger rule should be understood as vindicating double jeopardy values prohibiting such punishments.

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<sup>209</sup> *Id.* at 56 (footnotes omitted); *see also* *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (“Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.”); Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595, 597 (2006) (“The Double Jeopardy Clause does not limit legislative authority to define punishment. In the case of related convictions, a legislature can fix the sentence or sentencing range, provided only that it falls within the broad range permitted by the constitutional prohibition on cruel and unusual punishment and the due process requirement of fundamental fairness. Therefore, in evaluating a defendant’s multiple punishment claim, the focus is legitimately, inevitably, and almost exclusively on legislative intent. The only question is whether the punishment exceeds that intended by the legislature.” (footnotes omitted)).

<sup>210</sup> JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 727 (3d ed. 2002).

<sup>211</sup> Hoffheimer, *supra* note 193, at 401.

<sup>212</sup> It is of course hard to prove a negative, but this author is aware of no such provision, and has seen no reference to such a provision in any secondary sources’ discussions of the merger doctrine.

<sup>213</sup> Even in those states that define attempt as requiring failure, conviction of both attempt and the completed crime is prohibited by the mutual exclusivity of the failure and success elements. *See supra* text accompanying note 153.

*b. Avoiding Multiple Punishment Rationale as Applied to the Transferred-Intent Context*

If double jeopardy values constitute a second rationale for the merger rule, then the use of merger is appropriate where those values are at stake. In the transferred-intent context, while the issues are rather more complex, several factors suggest that applying merger to prohibit attempt liability would often vindicate double jeopardy values. In the basic transferred-intent case (Variation 1), the question is whether the attempted murder of the *intended* victim, *B*, should merge into the murder of the *unintended* victim, *C*, thereby precluding double punishment for the same conduct. One could respond to this question, as Westen, has, by simply asserting that “the penalty for intentionally harming one person . . . already includes the penalty for attempting to harm that person.”<sup>214</sup> Apparently referring to the merger rule, Westen concludes that punishing an actor for both an attempt towards *B* and the murder of *C* is “excessive.”<sup>215</sup> But it is worth exploring this conclusion in more detail, beyond simply referencing the well-established legislative support for merging attempt into completed offenses. If extending attempt liability in the TI context, as described in Part I, violates double jeopardy values, then the argument against such extensions is strengthened.

Here, as elsewhere, double jeopardy values are implicated if the attempt and the completed killing are considered the “same” offense—unless double punishment for the two crimes is clearly statutorily authorized.

*i. The “Same Offense” Requirement*

In the TI context, the “same offense” requirement raises the question of whether an *attempted* murder of one person is the same offense as the *murder* of another.<sup>216</sup> Under *Blockburger*, it arguably is. Given that the murder statutes usually phrase the actus reus element of the offense in impersonal terms (e.g., causing the death of another), taking actions (beyond mere

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<sup>214</sup> Westen, *supra* note 2, at 340.

<sup>215</sup> *Id.* Although Westen does not explicitly mention merger in his brief discussion of this point, he seems here to be referencing the doctrine, and briefly alluding to the argument that is the subject of this article. *See id.* He applies this argument against attempt liability to both Variation 1 and Variation 2 contexts. *Id.*

<sup>216</sup> For example, in the *Hidden Child* hypothetical, assuming that transferred intent applied to convict the mother of murdering her child, *C*, whether she could also be convicted of *attempted* murder of the *father*, *B*, would depend on whether the completed murder of *C* is considered the “same offense” as the attempt against *B*. *Id.* at 331.

preparation) towards causing the death of another constitutes a subset of the completed crime of *actually* causing the death of another. The fact that the individual targeted and the one actually killed are different people is irrelevant to the basic conduct required for the offense.

This conclusion makes some sense as well when focusing on the actor's conduct, rather than the elements of the crime. While, on the one hand, steps toward killing *B* do not obviously seem to constitute a necessary component of the killing of *C*,<sup>217</sup> on the other hand intentionally attempting to kill *B* *does* seem to be a necessary component of the *accidental* or *unintentional* killing of *C*. After all, only by engaging in conduct directed towards killing *B* could *A* have ultimately taken the life of *C* (or threatened the life of *C*, as in Variation 2). From this perspective, once again, the commission of the *completed* (accidental) killing logically includes an attempt to commit the unsuccessful, *intended* one.<sup>218</sup>

Similarly, the mens rea element is also arguably the same, even if at first blush it might not seem to be. Of course, given the heightened mens rea of attempt, sometimes the intent elements of the completed offense will not be coextensive with those of the attempt, rendering the two offenses "different" under *Blockburger*.<sup>219</sup> However, it is only where the underlying offense is an *unintentional* crime that the attempt could be said to require a higher mens rea than the completed crime. Therefore, since transferred intent usually applies to crimes of intent,<sup>220</sup> in TI contexts the heightened mens rea of

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<sup>217</sup> After all, if we understand the elements of attempted murder of *B* as including sufficient steps towards *killing B*, then arguably the steps that resulted in *C's death* are not necessarily a subset of *B's* killing in the same way. At the very least, the aiming or timing of *A's* gunshot (for example) might be somewhat different when the shot kills *C* rather than *B*.

<sup>218</sup> Cf. DRESSLER, *supra* note 1, at 381 ("[T]he successful commission of the target crime logically includes an attempt to commit it."). This position is bolstered by the fact that the threat to *C* was a product of *A's* intent to kill *B* (and, of course, it is in fact *A's* intent *towards B* that is transferred to support the attempt involving *C*).

<sup>219</sup> For example, this would be the case if the mens rea for the underlying offense was merely recklessness.

<sup>220</sup> It is worth noting here that some states may also transfer intents of recklessness or negligence. The Model Penal Code does allow such intents to be transferred, so some states that have adopted the MPC may do so as well. MODEL PENAL CODE § 2.03(3)(a) (AM. LAW INST. 1985).

Under these [parallel] doctrines (transferred recklessness and transferred negligence), if an actor's conduct recklessly or negligently creates a risk of harm with respect to certain persons or property, and harm comes about that differs in character and manner of occurrence from that risk only in that different persons or property are affected, then the actor is liable for recklessly or negligently causing the harm which actually occurs. Transferred risk does not appear to have been recognized as a common-law doctrine.

attempt will usually match the mens rea of the completed crime—thereby satisfying *Blockburger*'s “sameness” requirement. Thus, an attempt against *B* and a completed offense against *C* arguably still constitute “the same” crime in the double jeopardy sense, just as attempt and the completed crime do generally.

It is worth noting here, however, that some Supreme Court cases suggest attempts and completed offenses in the transferred-intent context could nevertheless be considered *different* offenses, given that they harm different victims. The Court has held that offenses based on a single incident are not “the same” for double jeopardy purposes in situations where the actor harmed two or more different victims. For example, in *Ashe v. Swenson*,<sup>221</sup> where defendant and others allegedly robbed six poker players of money and personal items, the Court indicated, in dicta, that it would have taken no issue with the state charging six separate robbery offenses.<sup>222</sup> Similarly, in *Ebeling v. Morgan*,<sup>223</sup> the Court held that cutting into six mailbags “in the same transaction” constitutes six counts of injuring mailbags. However, the latter ruling was explicitly based on specific language in the applicable statute—language that the Court interpreted as expressing legislative intent to create a specific crime for each mailbag damaged.<sup>224</sup> Moreover, there are several reasons why this possible different-victim rule arguably should not apply to transferred-intent-related attempt cases.

In cases of crimes based on the same conduct but perpetrated against different victims, the actor will typically have formed a culpable intent for each offense. The robbers in *Ashe* obviously intended to deprive each of the poker players of his or her property. And in *Ebeling*, the Court seems to have assumed that direct (as opposed to transferred) intent was an important prerequisite to conviction of each of the six specific injuring-a-mailbag offenses. The Court stated,

[t]his case raises the question whether one who, in the same transaction, tears or cuts successively mail bags of the United States used in conveyance of the mails, with intent to rob or steal *any such*

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David J. Karp, *Causation In the Model Penal Code*, 78 COLUM. L. REV. 1249, 1267–68 n.57 (1978) (citations omitted). In a state with doctrines of transferred risk, the heightened attempt mens rea might therefore be greater than the mens rea of the completed crime, barring a finding of sameness under *Blockburger*. However, detailed discussion of transferred-risk offenses (as opposed to transferred-intent) is beyond the scope of this article.

<sup>221</sup> 397 U.S. 436 (1970).

<sup>222</sup> *Id.* at 446.

<sup>223</sup> 237 U.S. 625 (1915).

<sup>224</sup> *Id.* at 629.

mail, is guilty of a single offense or of additional offenses because of each successive cutting *with the criminal intent charged*.<sup>225</sup>

A finding of multiple offenses, the Court seemed to be implying, flows from six “successive” acts, each one performed “with the criminal intent charged”—i.e., to take “any such mail.”<sup>226</sup>

The Court’s emphasis on the importance of the defendant having made a decision to commit each separate offense—perhaps best evidenced by a separate, direct (not transferred) intent as to each—suggests that an intent to harm each individual victim should be a prerequisite to applying the different-victim rule.<sup>227</sup> Yet such an intent could often be absent in transferred-intent situations. In the typical Variation 1 case, for example, the actor need not have intended any harm at all to the person injured. (Hence, we call *C* the unintended victim.) Thus, it does not necessarily follow from the cases above that the killing of *C* should be considered a separate offense from the attempted murder of *B*.<sup>228</sup> The transferred-intent actor might actually have only one culpable intent to harm one victim, thereby strengthening the argument that multiple punishment in such cases is unjust.

As to Variation 2 cases, where the attempt on *B* clearly merges into the murder of *B*, the question becomes whether the attempt on *C* should also merge. Following the same reasoning presented above, the actus reus of the attempt on *C* (conduct going beyond preparation toward causing the death of another), is merely a subset of the conduct accomplishing the actual

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<sup>225</sup> *Id.* at 628 (emphasis added).

<sup>226</sup> In short, the different-victim rules seem to focus not only on the conduct elements of the two offenses at issue (different victims), but also on the actor’s culpable intent (to harm one person or more than one). The language the Court used in *Blockburger* to explain why successive sales of narcotics did not constitute one continuous offense is instructive here as well: “In the present case, the first transaction, resulting in a sale, had come to an end. The next sale was not the result of the original impulse, but of a fresh one—that is to say, of a new bargain.” *Blockburger v. United States*, 284 U.S. 299, 303 (1932); see also *id.* at 302 (“The distinction stated by Mr. Wharton is that ‘when the impulse is single, but [i.e., only] one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.’” (quoting WHARTON’S CRIMINAL LAW § 34 (11th ed. 1912)). This discussion suggests that the different-victim rule should similarly be understood as requiring a second impulse, not the single criminal offense involved in transferred-intent situations.

<sup>227</sup> It is beyond the scope of this article, however, to canvas all different-victim cases in order to determine whether courts are receptive to such an interpretation of *Ashe* and *Ebeling*.

<sup>228</sup> *A* had only the intent to harm *B*; the harm against *C* may be completely accidental. And even if *A* had some culpable mens rea towards the unintended victim (e.g., negligence or recklessness), unless that culpability rose to the level required for the underlying offense (e.g., extreme recklessness for a murder), it would be insufficient to satisfy the culpability as to each separate victim that appears to be required under the different-victim rule.

killing of *B*, yielding the conclusion that the conduct elements of the two offenses are sufficiently the same. Moreover, since an attempt against *C* and the murder of *B* would both require proof of intent to kill (via transferred intent for the former), the mens rea elements satisfy *Blockburger* as well.

In fact, the parallel between attempt in the transferred-intent context and regular attempt is even stronger here than in Variation 1. If *A* successfully kills *B*, and therefore cannot be convicted of attempted murder of *B*, why should *A* be convicted of attempted murder of a completely unintended victim, *C*? The crime she intended to commit has been completed; any other harms flowing from her conduct should be redressed only as separate crimes (such as, if appropriate, reckless endangerment), not under attempt. Since *exactly the same conduct* is involved in both the attempt against *B* and the alleged attempt against *C*, *and* exactly the same intent (the intent to kill *B*), the two attempts should both be considered “the same” crime as the murder of *B*—and both should therefore merge.

In summary, both Variation 1 attempts (attempted murder of *B*) and Variation 2 attempts (attempted murder of *C*) are best understood as satisfying the *Blockburger* test for lesser included offenses. Unless the legislature explicitly states otherwise, merger of attempt in those two contexts thus serves the second rationale for merger proposed here: vindicating the double jeopardy value that multiple punishment is unjust.

## *ii. Deference to Legislatures Regarding Multiple Punishment*

As was discussed above, the Supreme Court defers to legislative decisions about how crime and punishment are defined and allocated.<sup>229</sup> Thus, it views punishing the actor for two separate crimes based on the same conduct as equivalent to punishing one crime more severely; both are within the discretion of the legislature. Although the Court has never addressed whether eliminating merger would violate the Double Jeopardy Clause, its deference to legislative preferences suggests that such a change might be constitutional. In other words, if a state legislature specified that it intended an attempt against an intended victim *not* to merge into the completed crime against an *unintended* victim, double jeopardy values *as*

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<sup>229</sup> See *supra* Section II.B.3.a.ii.

currently expressed by the Supreme Court might not be implicated by such a conviction.<sup>230</sup>

As long as a state legislature has not so legislated, however, it is appropriate to merge attempt in the transferred-intent context, as elsewhere, in order to avoid compromising double jeopardy values (as well as the proportionality rationale for the doctrine). Especially given that *not* applying merger in the TI context would dramatically increase the possible sentence for one act of killing, merger should apply in that context absent affirmative evidence of legislative intent to limit the doctrine. Moreover, since not merging attempts in these situations dramatically disadvantages defendants, the criminal law's preference for lenity also supports the argument that attempt should merge in transferred-intent-attempt cases, unless the legislature has clearly expressed a contrary intent.<sup>231</sup>

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In summary, in the TI context, as in basic merger situations, double jeopardy values justify merging attempts into completed crimes. For that reason, merger should be understood to prohibit convicting a transferred-intent killer of both murder and attempted murder.

### 3. Third Merger Justification: Preserving Legislative Sentencing Schemes

#### *a. Preserving Legislative Sentencing Schemes as Rationale for Merger*

A final rationale for continued allegiance to the merger rule is closely related to the discussion just completed. As becomes apparent when considering deference to legislative preferences in the double jeopardy context, without merger, prosecutors would have the power to significantly undermine their states' sentencing schemes. Since merger is universally followed, it is safe to assume that legislatures have set the sentence ranges for crimes with that rule in mind; that is, on

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<sup>230</sup> Many legal scholars have described the Supreme Court's double jeopardy rulings on multiple punishment as offering very little protection to defendants. *See, e.g.,* Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183 (2004) (arguing that double jeopardy jurisprudence prohibits multiple punishment "only when the defendant receives two punishments for the exact same charges").

<sup>231</sup> *Cf. State v. Hinton*, 630 A.2d 593, 602 (Conn. 1993) (citing lenity doctrine as reason not to apply transferred intent to crime of attempted murder).

the assumption that committing an offense would not also expose the actor to punishment for having attempted it. Were merger suddenly to be eliminated, the effect would be to turn all crimes of intent into two offenses. For example, intent-to-kill murder liability would always trigger attempted murder liability as well. Yet the legislature, in setting the appropriate sentence for the former offense, certainly did not have in mind that the actor would always, inevitably, be faced with an additional, serious attempt sentence as well. For that reason, as long as merger is entrenched in our system of criminal law, it is important to ensure that the rule is consistently enforced. Thus, preserving legislative sentencing schemes is an additional rationale for continued and widespread adherence to the merger doctrine.

*b. Preserving Legislative Sentences Rationale as Applied to Transferred-Intent Context*

Since sentencing guidelines governing murder and other intentional crimes do not specify different sentences for transferred-intent-based convictions of those crimes, failure to apply merger in the TI context would similarly dramatically increase punishment exposure beyond that which the legislature had likely determined to be appropriate for the intentional killing of a human being.<sup>232</sup> Therefore, once a state decides to use merger (as all have), consistent enforcement of that rule—including in the TI context—is important. Allowing prosecutors to selectively ignore it would give them the power to undermine their states' sentencing schemes. Unless, and until, legislatures revise their criminal codes to explicitly limit or eliminate the longstanding practice of merging attempt, it can be assumed that enforcing the merger doctrine in the TI context, as elsewhere, is necessary to preserve the integrity of their sentencing schemes.<sup>233</sup> Even if it is

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<sup>232</sup> As noted above, *supra* note 207, without merger, the punishment exposure for transferred-intent murder, for example, would be increased to include the punishment for attempting to murder the intended victim as well (and possibly unintended bystanders), thereby undermining legislative assessments of the seriousness of the crime of murder.

<sup>233</sup> A few additional benefits of the merger doctrine—or, rather, detrimental effects of eliminating it—deserve brief mention here. Those effects mostly involve the increased indeterminacy of punishment that would result were the merger doctrine to be abandoned. In the absence of merger, the prosecutor would have broad discretion to seek conviction of either attempt or the underlying offense *or both*, making it difficult to predict a defendant's exposure *ex ante*. As a result, actors would lack meaningful notice of their punishment exposure, ambiguity about that exposure could result in over- or under-deterrence, and prosecutorial plea bargaining power would be significantly increased. In the transferred-intent context, prosecutors would have the discretion to seek conviction of transferred-intent murder only, of attempted murder only—as to the intended victim and/or the bystander(s), or of all of those crimes. Thus, failure to apply merger in the

not possible to determine definitively what the legislature intends the scope of merger to be in the TI context, the principle of legality and the notion of lenity suggest such uncertainty should be resolved by merging TI-related attempts.

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To summarize, although there has been little discussion of the rationales for the longstanding rule that attempt merges into the completed offense, the merger rule's longevity is likely attributable to the fact that it serves at least three important (and related) criminal justice purposes. First and foremost, the rule prevents punishment disproportionate to culpability, precluding conviction of two intent-based crimes when the actor intended only one harm. Second, it vindicates double jeopardy concerns about multiple punishment for the same offense (in the same trial). Finally, consistent application of the merger rule prevents the arbitrary and unanticipated transformation of one intent-based crime into two (or more) crimes, thereby preserving the underlying legislative sentencing assessments expressed in a jurisdiction's criminal code.

Of course, these three rationales are not unrelated. In varying ways and to varying extents, all three reference a state legislature's assessments of criminal desert: One way to assess the proportionality of punishments (although not the only one)<sup>234</sup> is to ask whether they comport with legislative intent. Current double jeopardy jurisprudence is explicitly aimed at preventing punishment in excess of legislatively intended limits.<sup>235</sup> And, of course, state sentencing schemes are perhaps the most explicit expression of the legislature's culpability assessments. Thus, culpability concerns infuse each of the three rationales posited here. More importantly, however,

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transferred-intent context would increase the already-inordinate power of prosecutors. On plea bargaining inequalities, see generally Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) (arguing that plea bargaining pressures often cause innocent defendants to plead guilty); Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 295 (2004) (discussing Feeney Amendment to Amber Alert law and its likely impact in reducing judicial power to "check prosecutorial harshness"). On the inordinate power of prosecutors in our criminal justice system, see ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) (arguing that lack of review of or accountability for prosecutorial exercises of discretion has serious consequences for defendants and undermines criminal justice).

<sup>234</sup> As Peter Westen has noted, other possible standards of just penalties include "a federal constitutional notion of desert" (such as Supreme Court jurisprudence about excessive penalties under the Eighth Amendment) and "a general moral notion of desert." E-mail from Peter Westen, to the author (Apr. 8, 2016, 11:20 AM) (on file with author).

<sup>235</sup> See *supra* Section II.B.3.a.ii.

when considered together these rationales for the merger of attempt provide a persuasive explanation (and justification) for continued use of the merger rule.

Moreover, each of these justifications suggests, with greater or lesser force, that merger should apply in the transferred-intent context as well. And enforcing the rule in this context is arguably even more important than in the basic attempt case. Without merger, the expansive interpretations and applications of transferred intent described in Part I would create the potential for every transferred-intent murder to become a murder *plus* an attempted murder—or even plus *several* attempts.<sup>236</sup> Thus, the potential for expanded liability absent merger is arguably even greater in transferred-intent situations than in basic attempt cases.

Such multiple charges have the potential to expose actors to liability disproportionate to their culpability, to compromise double jeopardy values, and to undermine state sentencing schemes, just as elimination of merger would do in basic attempt cases. It seems highly unlikely that most state legislatures had such limitless liability in mind when drafting their criminal codes. Without a clear indication from the legislature that such liability was intended, therefore, it is inappropriate to expand transferred-intent-related liability in a way that violates the merger rule. Because attempt liability in the TI context compromises several of the rationales for the merger doctrine, merger should apply to prohibit attempt liability in that context, at least as it occurs in Variations 1 and 2. And finally, as also noted above, there may be other, compelling reasons unrelated to merger to reject Variation 3 attempt liability as well.<sup>237</sup>

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<sup>236</sup> As *State v. Gillette*, illustrates, once attempt via transferred intent is allowed, an intentional actor can face multiple charges of attempt based on the risk created by only one intentional act—and regardless of the actual culpable intent, if any, towards those potential bystander deaths. *State v. Gillette*, 699 P.2d 626, 634–36 (N.M. Ct. App. 1985); see also *supra* note 114 and accompanying text. Without merger, the actor in a Variation 1 case would be subject to both attempt and murder liability, exactly as is prohibited in a regular murder case, where *A*'s attempted murder of *B* is merged into *A*'s murder of *B*. Although *A* has the same intent in either scenario, in the transferred-intent case the attempt charge involving the intended victim would not be merged into the murder charge involving an *unintended* victim. This is what happened to Darren Scott in the *Scott* case, of course. And even if an actor had no way of knowing that others might be injured by her conduct, she could still find herself charged with two intentional crimes (murder and attempt)—or even more.

<sup>237</sup> See *supra* note 172.

## CONCLUSION

The merger of attempt has operated for centuries to prohibit convicting someone of both the inchoate and the completed version of a single crime. Merger is still universally applied today because of the inherently sensible idea that a person should not be punished twice for what is essentially the same offense. Some limit to the state's ability to punish should apply. Even under the Supreme Court's restrictive elemental test for determining unconstitutional multiple punishment, attempt is best viewed as a lesser included offense that merges into the completed crime. Thus, merger of attempt vindicates broader values stemming from double jeopardy law and general notions of fairness and evenhandedness.

All of those concerns (and others) apply with equal force to the use of attempt in the transferred-intent context. Transferred intent already compromises culpability concerns, imposing murder liability on an actor who may have been no more than negligent as to the risk of causing the death that resulted from her conduct. The doctrine allows murder liability to be imposed on that actor because of the harm she *intended* to cause, and the serendipitous nature of her failure to cause it. To impose attempt liability *in addition* to murder liability in such cases goes too far, using a legal fiction to punish an actor multiple times for one ineffectual culpable act resulting in one unintended harm. If bad aim should not protect an actor from liability appropriate to her intent, it should also not increase liability *beyond* her culpability.

To punish an actor for both attempt on the intended victim and murder of the person accidentally killed is functionally equivalent to punishing someone for both attempt and murder as to one, intended victim. The merger doctrine prohibits such double punishment for good reason, as the discussion herein of justifications for the doctrine reveals. Therefore, unless and until a legislature has indicated it wishes to narrow the merger rule, that rule should be understood as prohibiting additional attempt charges in transferred-intent cases, such as those evident in recent expansions of the transferred-intent doctrine.