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ACCIDENTALLY KILLING ON PURPOSE: TRANSFERRED MALICE AND MISSING VICTIMS*

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ABSTRACT. Transferred malice, or transferred intent, is the criminal doctrine that states that if D tries to kill A, and accidentally kills B, the intent to kill transfers from A to B, and so D is guilty of murdering B. This is widely viewed as a useful legal fiction. One of the finest essays on this topic was written by our honorand, Douglas N. Husak. Husak views both the potential usefulness of, and his preferred alternative to, transferred malice through the lens of sentencing – how much hard treatment the offender will receive. In this essay, I take a step back and ask in what ways transferred malice might be useful. I find its potential usefulness is not restricted to sentencing, but thinking about other ways in which it might be useful actually brings other potential drawbacks into focus – in particular, I argue, transferred malice mislabels the crimes the offender committed, and does so in a way that erases one of the victims from the moral description of the crime.

I. INTRODUCTION

On 2nd October 2007, Arnel Gnango armed himself with a gun and went to a car park, looking for a man whom Gnango said owed him some money. A man wearing a red bandana, who has never been formally identified, entered the car park and began shooting at Gnango. Gnango returned fire. A passing pedestrian, Magda Pniewska, was caught in the cross fire and was killed by a single shot to the head. The fatal shot was fired by the man in the red bandana.

* It is a real honour to be asked to participate in this special issue. Doug Husak is one of the smartest criminal law theorists we have, and one of the nicest. I am very grateful to him for the support he has given me in my career. In preparing this article I have benefited from discussion with Chris Mills, Kim Ferzan, Victor Tadros, James Edwards, John Nicholson, Gabe Mendlow, Peter Westen, Alec Walen, Jake Bronsther, Gideon Yaffe, Antony Duff, Andrew Ashworth, an anonymous referee, and (of course) Doug Husak. This work has been supported by a Research Fellowship from the Leverhulme Trust.

Gnango was arrested, charged, and convicted of the murder of Pniewska, even though the bullet that killed her was not only fired by someone else, but was aimed at him.¹

Gnango's conviction relied on two controversial common law doctrines, as interpreted in English law. The first is 'joint enterprise'. If a murder is a foreseeable consequence of a joint criminal venture, all parties to the venture could be held to be jointly liable for it.² The court construed the gun fight as a joint criminal venture.³ Therefore, if it were true that Gnango's opponent in the gun fight were guilty of murder, Gnango would also be guilty of murder, even though the bullet was fired at him. But how could 'Bandana Man', as he was known in the case, be guilty of murdering Magda Pniewska, when he had been trying to kill Gnango? If murder is intentional killing, and Bandana Man had intended to harm Gnango in particular, how could he have murdered someone else? This is where the second doctrine comes in – transferred malice (or transferred intent as it is known in the US). According to transferred malice, if a person, D, intends to kill A but accidentally kills B, they are guilty of murdering B, since the intent to kill A 'transfers' to the killing of B.

Transferred malice is our focus here. And our honorand, Douglas N. Husak, wrote one of our finest essays on the topic. Husak lays out the problem of transferred malice as follows. Focusing on a simple case in which Smith means to kill Black but accidentally kills White, Husak notes two things. First, he claims that intuitively we will want to find Smith guilty of murder. Second, he claims that *without* transferred intent we would be left with this argument:

- (1) Murder is the intentional killing of a human being.
- (2) Smith is guilty of murder only if there exists some human being who he has killed intentionally – in this case, either White or Black.
- (3) Smith did not kill Black.
- (4) Smith did not kill White intentionally.

¹ R v Gnango (Appellant), [2011] UKSC 59. I am grateful to Lucia Zedner for first raising this case with me.

² Joint enterprise has undergone important revisions since *Gnango*. See the landmark cases *R v Jogee (Appellant)* [2016] UKSC 8 and *Ruddock (Appellant) v The Queen (Respondent)* (Jamaica) [2016] UKPC 7 for a reversal of the foreseeability test.

³ Throughout the case, there was disagreement as to whether Gnango should be seen as participating in a joint enterprise of affray which led to the killing (and so would be held to have 'parasitic accessory liability'), as aiding and abetting Bandana Man's murder of Pniewska, or as a 'joint principal'.

Thus,

- (5) There exists no human being who Smith has killed intentionally.

Thus,

- (6) Smith is not guilty of murder.⁴

This is, Husak takes it, the crux of the argument for transferred malice. We can fill out the case for transferred malice like so:

- (7) Without transferred malice, Smith will not be guilty of murder
(from 1-6)
- (8) Intuitively, Smith is guilty of murder

Therefore

- (9) Transferred malice brings our criminal law in line with our intuitions.

Husak's essay is rich, engaging, and complex. But one of the key messages is comparatively simple. According to Husak, what is important here is that Smith receive the same *sentence* that a murderer would. But to get there, we shouldn't indulge in legal fiction and pretend that intentions 'transfer'. We don't need to use the substantive criminal law to get the right sentence, we should use sentencing law and guidelines instead. We should sentence Smith *as if* he were a murderer, without pretending that he is.

Here, I want to challenge this sentencing-focused approach. We might be tempted to support transferred malice not only for sentencing-based reasons, but also for labelling-based reasons. However, once we focus on labelling, I will show, we see that transferred malice potentially mislabels the crimes committed, and in such a way that erases one of the victims from the picture. Whether it does this depends on how we understand the moral wrong of attempted harm.

⁴ Douglas N. Husak, 'Transferred Intent,' *Notre Dame Journal of Law, Ethics & Public Policy*, 10 (1996): 65-97, at p. 66.

II. THE ASSUMPTIONS OF TRANSFERRED MALICE: INTENTIONS AND RESULTS

Although there is no canonical statement of the doctrine, transferred malice is easy enough to explain in simple ‘bad aim’ cases.⁵ If D shoots at A but hits and kills B, D is guilty of the murder of B, since the intent to kill A ‘transfers’ to the killing of B. It is worth bearing in mind that D is clearly guilty of the attempted murder of A, and, under certain conditions, the manslaughter of B.⁶ Given this, the rationale for transferred malice cannot be that it is needed to secure a conviction (at least in this simple case). If transferred malice is needed to get the right result in this case, then it must be because it’s somehow important to convict for *murder* rather than attempted murder, manslaughter, or both.

In order for this to be important, there must be an important difference between murder and attempted murder, and between murder and manslaughter. In affirming an important difference between attempted murder and murder, the advocate of transferred malice must affirm that *results matter* (in some way). In affirming an important difference between manslaughter and murder, the advocate of transferred malice must affirm that *intentions matter* (in some way). Since any argument for transferred malice has to assume these two claims, this, as Husak shows, quickly rules out a certain intuitive kind of argument for the importance, or value, of transferred malice.

Compare D with D*:

D shoots at A but kills B, having exposed B to a 25% risk of being shot.

D* shoots at A and kills A, having also exposed B to a 25% risk of being shot.

The only difference between these two offenders is luck. We might be tempted to say that *because the only difference between them is luck*, the law should treat them alike, and so it is important that D is tried for and convicted of murder, just like D*.

This particular argument for transfer malice relies on the claim that how we treat criminals should not be determined by luck. But the advocate of transferred malice has already rejected this very

⁵ Husak brilliantly demonstrates that however straightforward transferred malice may be in these simple cases, it is far from clear how it can or should be applied to more complex cases. *Ibid.*, pp. 75–83.

⁶ I will focus here on cases in which the killing of B would qualify as manslaughter. That is, cases where B was clearly visible to D, and there was a clear and unacceptable risk that B would be killed.

claim. One of the background assumptions in this debate is that *results matter*. And results can be a matter of luck. Consider D**:

D** shoots at A, also exposing B to a 25% risk of being shot. D** misses both.

For the advocate of transferred malice, there is an important difference between murder and attempted murder, between D* and D**. That is why we need transferred malice in the first place. But the difference between D* and D** is a matter of luck. If we had to treat those who have acted similarly but had differential luck the same, if results did not matter, then there would then be no need for transferred malice, for D, D*, and D** would all be alike.⁷

III. TRANSFERRED MALICE: USEFUL LEGAL FICTION?

It is widely accepted that transferred malice is a 'legal fiction'. Many commentators and legal practitioners make this claim. For example, Lord Mustill states:

Like many of its kind this is *useful enough* to yield rough justice, in particular cases, and it can sensibly be retained notwithstanding its lack of *any sound intellectual basis*.⁸

But it is rarely said, so far as I can see, exactly what is it useful *for*. It is worth distinguishing a variety of ways in which it, or criminal law fictions in general, could be useful. I outline here three different ways in which it might be useful.

A. *Useful 1: Sentencing*

As I noted above, in order for transferred malice to be useful in our simple, paradigmatic case, it must be because it is important that D is convicted of murder and not attempted murder and manslaughter. Why should we care whether a person is convicted of one crime rather than another? One reason is to do with sentencing. This would allow us to construct this kind of reasoning in favour of transferred malice as a useful legal fiction:

⁷ Husak, 'Transferred Intent,' pp. 89–96; Douglas Husak, 'The Philosophy of Criminal Law: Extending the Debates,' *Criminal Law and Philosophy* 7 (2013): 351–365, at p. 362. For perhaps the most thorough attempt to deny that results matter, see Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009).

⁸ Attorney General's Reference (No. 3 of 1994) [1998] AC 245, 261. Italics mine.

- i. The punishment for murder is greater than that of attempted murder, manslaughter, or both.
- ii. In our simple case, D should receive the same punishment as the punishment for murder, not a lesser sentence.
- iii. Transferred malice ensures that D receives the same punishment as the punishment for murder.

Husak assumes that if transferred malice is useful, it is useful because of sentencing considerations. What matters, according to Husak, is that D be *punished* as if he had killed A rather than B. This informs both the argument he initially makes for transferred malice (i.e., 1–9 above), and his alternative to the doctrine of transferred malice.

Husak states that while D may be guilty of attempted murder and manslaughter, ‘The seriousness of these two offenses, even when combined, is not as great as murder. Those who think that Smith should be convicted of murder – and punished accordingly – typically appeal to the doctrine of transferred intent to reach this result.’⁹ Husak claims that what is important is that D is punished as harshly as a murderer, and so is ‘treated *as* a murderer, even though he has not actually committed murder’ and that ‘Those whose intuitions support the doctrine of transferred intent have no reason to ask for more.’¹⁰ Husak, therefore, sets up the problem as one about sentencing: we want D to be punished as severely as a murderer and, without transferred malice (or some other similar doctrine), he won’t be (because of (i) above).

Husak’s solution also focuses on the severity of punishment. Husak claims that all this should be dealt with within sentencing theory rather than substantive criminal law. A system of proportionate punishments is needed – we should use the combination of culpability and harm caused to determine sentences. Once we do this, we will give the same sentence to D as to the murderer, and will have no reason to employ legal fiction.¹¹

I have three issues with this sentencing-focused explanation of the problem and proposed solution. The first is that it is not necessarily the case we need transferred malice, even within our current systems, in order to achieve equal punishments. Husak notes that the death

⁹ Husak, ‘Transferred Intent,’ p. 65.

¹⁰ *Ibid.*, pp. 87–88.

¹¹ *Ibid.*, pp. 91–96.

penalty is available only for murder, so in some contexts, this is correct.¹² But even where it is on the statute books, not every murder, as a matter of positive law, warrants the death penalty, and so it will often not be the case that a murder conviction is required in order to give D the same punishment as a murderer (all else equal). Moreover, many of us, including Husak, believe the death penalty to be unjust.¹³ If all transferred malice achieves is the opportunity to put D to death unjustly, it isn't that useful after all. It merely helps secure more unjust punishment.

It is also worth remarking that the doctrine of transferred malice applies beyond those US jurisdictions which continue as international outliers in keeping the death penalty on the books. In England and Wales, for example, murder carries a mandatory life sentence,¹⁴ but the maximum sentence for *both* attempted murder *and* manslaughter is also a life sentence. It may be true that the *typical* sentence for murder exceeds that for attempted murder and manslaughter combined, but the form of manslaughter here is particularly egregious. So, it is not always the case that higher punishments are only available if we use transferred malice to secure a conviction for murder. My point here is that Husak's preferred alternative – handling this via sentencing – may already be available. And yet it is notable that jurisdictions in which the life sentence is available for murderers and attempted murderers alike still find use for the doctrine. This suggests there may be more to this issue than sentencing. This is a theme to which we will return.

Second, Husak's alternative to transferred malice raises difficult questions about what we should take to be fixed and what we should take to be alterable in thinking through whether the doctrine should be retained. This is because Husak's solution only becomes available once we remove one of the assumptions that generates the argument for transferred malice. Recall that in explaining the attraction of transferred malice, and in setting up the problem, Husak notes that "The seriousness of [manslaughter and attempted murder], even when combined, is not as great as murder."¹⁵ But Husak's 'solution'

¹² *Ibid.*, p. 65, n. 6.

¹³ See, for example: Douglas Husak, 'Reservations About Overcriminalization,' *New Criminal Law Review* 14 (2011): 97–107, at p. 103, n 14.

¹⁴ For clarity, a life sentence does not necessarily mean a life in prison.

¹⁵ Husak, 'Transferred Intent,' p. 65. Husak must mean this statement as a matter of positive law, for he denies it as a matter of morality.

is basically to make this not the case. Husak appears, then, to set up the argument for transferred malice from within a set of constraints, and then assumes away one of those constraints in providing his alternative. Perhaps Husak would then support, rather than seek to replace, transferred malice, when operating within the constraints he sets out. Perhaps this explains why he sometimes views himself as giving a theory of transferred malice, and sometimes views himself as providing an alternative to it.¹⁶

Third, I do not think it clear that the *only* thing driving supporters of transferred malice is that they want D to receive the same sentence as a murderer. It is not only important to them that D is punished, as Husak has it, *as a murderer*, it is important to them that D is punished *for murder*. Contra Husak, they believe they have reason to ‘ask for more.’ As Peter Westen argues in his own reply to Husak, ‘criminal justice is not merely a function of giving offenders the hard treatment they deserve. It is also a function of giving their conduct a ‘label’ that fairly ‘represents’ what they have done.’¹⁷ The criminal law is concerned with very different crimes, and it does not only punish us, it labels us, and the wrongs we have done. Even when crimes are of roughly similar levels of severity, we do not convict of, say, ‘a level 9 crime’. We convict of a specific offence with a specific name. It matters whether the law says you are guilty of ‘fraud’ or ‘treason’, even if the sentence is the same.

Husak’s way of conceiving of transferred malice as a potentially useful legal doctrine is therefore too narrow. Consequently, his sentence-focused solution may also be too narrow. Even if we get the sentencing right, we may have reasons to retain transferred malice.

¹⁶ Husak, ‘Transferred Intent,’ p. 68.

¹⁷ Peter Westen, ‘The Significance of Transferred Intent,’ *Criminal Law and Philosophy* 7 (2013): 321–350, at pp. 341–342. Westen appears to view the labelling issue ultimately as a clash of intuition.

B. Useful 2: Labelling

The above remarks point to a second way that transferred malice may prove to be a useful legal fiction: it allows us to *label* D as a murderer instead of an attempted murderer and a negligent or reckless killer (i.e., someone who has committed manslaughter).¹⁸ Is this useful? Only if D is best labelled as a murderer, rather than something else. Whether this is the best label for D may depend on what we take to be fixed and what we take to be alterable within our criminal law. For example, we could ask this question without a fixed account of the available labels in mind: we could label him a murderer, a reckless killer and an attempted murderer, or *something else* (a 'transferred malicer', perhaps). Or we could ask the question about labelling with only the currently available labels from our criminal law as an option set.

Initially, let's approach it in this latter way. Is it better to label D as a murderer or as an attempted murderer and a reckless killer? A lot will depend, I will argue, on how we understand the moral significance of wrongful intentions and attempts. I will return to these topics. But, for now, I want to observe the following. In thinking about what label we ought to use, it is tempting to focus on D's blameworthiness, and in doing so we will naturally think about what we want to say about the *criminal*. With this in mind, it will be tempting to label D as a murderer. And indeed, as Peter Westen remarks, '400 years of Anglo-American jurisprudence suggests that [D] is widely regarded as a murderer, not an attempted murderer.'¹⁹

However, we should also bear in mind the victims of crime. Our legal labels do not only label criminals, they label their crimes, and in doing so they label what has been done to their victims. Not all crimes need be understood primarily through victims, but many of our core crimes are understood as crimes against the person. Once we start to think about the victims, however, it is far from obvious that we are better off describing D as a murderer. The ordinary murderer has primarily wronged only a single person. In labelling

¹⁸ One may wonder why, if 'murderer' is the right label, transferred malice would nevertheless remain a 'fiction'. Why isn't it just another way of being a murderer? The remaining fiction lies in the claim that the intent 'transfers' from A to B. One response to transferred malice is to deny that it is necessary for anything, since murder is rightly understood as unjustified killing, coupled with the intent to seriously harm someone. Husak labels this the 'impersonality doctrine.' Husak, 'Transferred Intent,' pp. 73–75.

¹⁹ Westen, 'The Significance of Transferred Intent,' p. 342.

them a murderer we describe their moral transgression, and accurately report what was done to their victim.

If we describe D simply as a 'murderer', however, we erase one of his victims from the moral description.²⁰ D attempted to kill A. A was a victim of an attempt on his life. Saying that D is guilty of murder implies that he is guilty of *murdering B*, and so erases A from the description of the crime, and from our understanding of D's wrongdoing. If attempted murder is a crime best understood as one where the victim is wronged, to say simply that 'D murdered B' is a significant mis-description, morally speaking, of what happened. Thus, when it comes to labelling, rather than speaking clearly in favour of transferred malice, as we might imagine, we come across a potential significant *cost* of transferred malice. Even if sentencing considerations speak in favour of transferred malice, we might, in some cases prefer slightly unjust sentences in order to secure accurate labelling.²¹

It might be thought that A is not erased from the picture. After all, the intent to kill A is specifically relied upon in order to convict D of murdering B.²² A, then, remains a fundamental part of the picture. This may be true, but A still seems to be erased *as a victim*. 'D murdered B' does not include A, and the crime that A was a victim of is used to convict D of a different crime against a different person. Criminal law theorists worry about how the state can 'steal' the crime from the victim. Here, this concern is surely amplified, for the state steals the crime from A and *uses* it to convict D of a different crime *against B*.

Later, I will turn my attention to how we should understand the moral significance of intentions, and attempts, in the criminal law. We must do so, I will argue, if we are to get a better sense of

²⁰ As Gabriel Mendlow has pointed out to me, this objection only applies to convicting D of murder *and only murder*. If D were convicted of the attempted murder of A *and* the murder of B, then this objection would not apply. So, is this a problem with transferred malice after all? It is, to the extent that transferred malice is viewed as useful because it allows us to convict D of 'murder' *instead of* some conjunction of crimes that include the attempted murder of A (which is how it is ordinarily used). In addition, the conjunction of 'murder and attempted murder' seems problematic in double counting the intention to kill A.

²¹ For a related argument concerning transferred *defences* see Shachar Eldar, 'Cross-Victim Defences,' *Criminal Law and Philosophy* (forthcoming). Eldar denies, however, that the reasons he gives against transferred defences give us reason to reject transferred malice altogether. About a case in which D has a defence to harming A, but actually harms B, he says: 'the unreserved treatment of the defence as if it applies to B ignores the real harm that that victim suffered undeservedly.'

²² I am grateful to Peter Westen for pressing me to think about this.

whether attempted murder should be understood, primarily, as a wrong done to the victim, and, if so, a better sense of how serious the omission of the attempted murder of A from the description is.

Thus far in this section we have looked at two ways in which transferred malice might be useful regarding the central kind of case, where D tries to kill A, but kills B. It might be useful in ensuring that D receives the punishment that his crime warrants. But, as we saw, it's not clear that transferred malice is needed to achieve this. Nor is it clear that sentencing is all that matters. Transferred malice might also help, independently, with fair labelling. But I have tried to give us reason to doubt that it does this either, since it erases from the moral description of the offender and his offence the attempted murder of A.

C. Useful 3: Securing Murder Convictions

We have looked at how transferred malice might be useful in the classic transferred malice cases – e.g., cases in which D shoots at A but accidentally kills B. However, if transferred malice is useful, one of its primary uses could be in ordinary murder cases – e.g., cases in which D* shoots at and kills A.

Imagine if transferred malice did not exist. And imagine that D* shoots at A and kills him, though B was present as well. Without transferred malice, D* would have a possible defence open to him – that he had actually meant to kill B, and that he killed A by mistake. He hasn't, he can claim, murdered A at all. It may be simple to prove that D* killed A, that he meant to do serious harm (by firing a bullet at people), but very difficult to prove that he meant to kill A, and not B.²³

Supporters of this kind of usefulness may think it *unimportant*, or, more radically, *positively unjust* for people in standard transferred malice cases to be found guilty of murder, rather than something else. But since they think it very important that ordinary murderers actually be found guilty of murder, they may want to deny them the defence outlined above, and view convicting of murder in actual transferred malice cases as 'collateral damage'.

²³ This defence may have a reverse onus, and require D* to show that he did *not* intend to kill A. Many philosophers are critical of reverse onus defences, but even with such a defence, D* may have opportunities to avoid a murder conviction that transferred malice would cut off.

If this is the rationale for transferred malice, we should be very wary of retaining transferred malice. This is for two reasons. First, we should be wary of using the substantive criminal law to make life easier for prosecutors. If the crime of murder really is killing someone you intended to kill (or seriously harm) then prosecutors should have to prove defendants guilty *of that crime*. If the presumption of innocence is really as important as our political and legal rhetoric suggests – if it really is, in the famous phrase, the ‘golden thread’ of our legal system – then we shouldn’t use the content of the law to undermine it.²⁴

Second, if the reason for wanting to make sure that ordinary murderers are punished *as murderers* is that the punishment for attempted murder plus manslaughter would be lower, and if we think those in transferred malice cases are *actually* guilty of attempted murder plus manslaughter, then what we are dealing with here is trading off under-punishment (allowing the murderer to avoid the full punishment for murder) against over-punishment (punishing D for murder when he should be punished for lesser offences). But when we are considering over-punishment against under-punishment, we should err on the side of under-punishment. Or so both Husak and I have argued elsewhere.²⁵

In this section I have canvassed three distinct ways in which we might try to justify transferred malice as a ‘useful legal fiction’, but I have also expressed doubts about each.

The first is that we need transferred malice in order to punish defendants in these cases *as if* they were murderers. Husak claims that we do not need transferred malice to do this, since it can and should be handled at the level of sentencing. However, in a world in which that is not possible, transferred malice may still be useful, though that will only be the case if transferred malice defendants really should be punished as murderers.

The second reason we might embrace transferred malice is because of labelling considerations. It might not matter to us merely that D is *punished* as a murderer, but that he is *labelled* as one.

²⁴ Victor Tadros, ‘Rethinking the Presumption of Innocence,’ *Criminal Law and Philosophy* 1 (2007): 193–213.

²⁵ Douglas N. Husak, ‘Retributivism in Extremis,’ *Law and Philosophy* 32 (2013): 3–31, at p. 15; Patrick Tomlin, ‘Could the Presumption of Innocence Protect the Guilty?,’ *Criminal Law and Philosophy* 8 (2014): 431–447.

However, rather than transferred malice being useful here, I have argued that it is potentially problematic, since it erases one of D's victims from the picture. D tried to kill A, and that is a grave moral wrong, and a very significant fact about A's life. Transferring the intent away from A to B also transfers A's victimhood to B. This is *prima facie* unappealing, but much will depend on how we understand the significance of attempted murder, and whether we see it as a victim-centred crime.

Finally, I outlined a case for the usefulness of transferred malice which centres around ordinary murder cases, and preventing a 'mistaken victim' defence for murderers. I pointed out that this case appears to rely on ensuring the right sentence for murderers over ensuring that D receives the right punishment in the transferred malice case. This justification prioritises over-punishment over under-punishment.

IV. QUESTIONS ABOUT INTENTION

Is transferred malice a useful legal fiction? It might be if it is central to securing fairer sentences, or to more accurately labelling crimes. But does it actually achieve these things? Intuitively we may wish to sentence D as a murderer, or to label him as one, but does his conduct actually warrant these responses? Peter Westen claims that if we are to make progress on the issue of transferred malice we must pay closer attention to the importance of outcomes in the criminal law. As we have seen, the puzzle of transferred malice *assumes* that results matter. But Westen argues that we need to know *why* and *how* results matter.²⁶ My strategy for the remainder of this paper is similar, but focussed on the other assumption that underpins the puzzle – the (less controversial) principle that *intentions matter*. Obviously, a lot of philosophical ink has been spilt on the moral significance of intentions, both in moral philosophy and in the philosophy of criminal law. But we need to ask some quite specific questions here.

In particular, we must ask ourselves two, interrelated, questions about intentions, results, and the moral relationship between them. I can only make limited progress on answering these questions here,

²⁶ Westen, 'The Significance of Transferred Intent,' pp. 342–344.

but I hope that showing what questions we must ask, what the philosophical literature on intentions appears to suggest, and how our answers affect the right stance on transferred malice, offers progress of a kind.

First, then, while everyone agrees that, all else equal, intentional harm is more blameworthy than reckless or negligent harm, we must ask ourselves about the moral relationship between the bad intention and the harmful result. Is intentional harm worse because there is a secondary wrong, or is there a single wrong that is exacerbated by the wrongful intention? And if there is a single wrong, how do the two elements of the wrong, the intention and the harm, interact with one another? Which is fundamental?²⁷ So far as I can see, we have three possible positions here:²⁸

- i. The wrongs are distinct.
- ii. There is a single wrong. The wrong of acting with a bad intention is exacerbated by the harm.
- iii. There is a single wrong. The wrongful harm is exacerbated by the bad intention.

Let me briefly state why this is relevant. If the wrongs are distinct, this seems to speak in favour of transferred malice in terms of sentencing. If we have two separate wrongs here, then it doesn't seem to matter whether the intentions and the harms 'match up' at all. This is basically Husak's view: D is just as blameworthy as a murderer, for both have acted on the same bad intention and have caused the same serious harm. However, this view potentially speaks *against* transferred malice when it comes to labelling. For *if* the distinct wrong of acting on a bad intention (i.e., the attempt to kill) is understood as *wronging the intended target*, then not only do we have two distinct wrongs, we have two distinct victims – the party who is harmed, and the party who suffers the wrong of the attempt to harm.

If, on the other hand, acting on the bad intention is the fundamental wrong, which is exacerbated by (foreseeable) harm to an innocent party, this would seem to speak in favour of transferred

²⁷ This, in turn, should help us to understand the crime of murder. Some jurisdictions define it as unjustifiably killing a person with intent to kill *that* person, whereas others define it differently. Husak argues forcefully against this 'impersonality doctrine'.

²⁸ I am grateful to Alec Walen for discussion here.

malice, in terms of sentencing. Whether or not it speaks in favour of transferred malice in terms of labelling will, again, turn on whether that fundamental wrong is best understood as a victim-centred wrong. But this view may prove too much, allowing us to match any (foreseeable) harmful result to any bad intention

Finally, if harming an innocent victim is the fundamental wrong, which is exacerbated by an intent to harm, this seems to speak against transferred malice. For surely harm to an innocent person is best understood as victim-centred crime. And if the intent exacerbates that existing wrong, then surely it matters whether the intent was also directed at that person. It's hard to see why D's intent to harm A would exacerbate the wrong done to B.

The second question concerns how we should think about attempts to harm. The concern that I have outlined with transferred malice – that it appears to erase one of the victims – only really gets going if we understand D's attempt to harm or kill A as not just wrongful, but as *wronging* A. If the moral significance of intending to harm is not understood in this way, transferred malice appears less objectionable.

V. THINKING ABOUT INTENTIONS

Before I proceed to saying something about these important questions, it is worth emphasising that the issues and questions we are exploring concern the relationship between intentions and outcomes when it comes to *impermissible conduct*. This is a related, but importantly different, question from the question of whether, and how, intentions can affect *permissibility*.²⁹ Much of the literature on the moral significance of intentions is devoted to this issue, and concerns whether some variant of the Doctrine of Double Effect (DDE) is correct. But we should not unquestioningly bring that literature to bear on the issues we are interested in here. For here, there is *no question* about permissibility. We are sure that murder, and attempted murder, and manslaughter are wrongful. We are sure that trying to kill A and accidentally killing B is impermissible. What we are trying to work out is the role of intentions in accurately

²⁹ For this important distinction, and an overview of different variants of the Doctrine of Double Effect (DDE) and how they apply to the criminal law, see Alexander Sarch, 'Double Effect and the Criminal Law,' *Criminal Law and Philosophy* 11 (2017): 453–479.

describing that wrongfulness and in establishing the level of blameworthiness. Indeed, it is worth remembering that many philosophers who deny that intentions can have any bearing on what is and is not permissible accept that intentions are relevant to *how* blameworthy wrongful acts are,³⁰ and that our legal systems mark important differences between negligent, reckless, and intentional harm.

Nevertheless, we should not dismiss the literature on intentions and permissibility as wholly irrelevant to our enquiries here. It may concern a different question, but it is a question in our neighbourhood: after all, *if* intentions are relevant to permissibility, it seems likely that the *way* in which they contribute to an act's wrongfulness will also have a bearing on how we should understand that wrongfulness and how seriously wrongful the act is.

There are, broadly speaking, two different understandings of the significance of intentions when it comes to permissibility, one associated with Thomas Nagel, the other with Warren Quinn. Nagel is broadly seen as the inspiration for the agent-centred view of the moral significance of intentions.³¹ Alex Sarch has recently developed an agent-centred variant of the DDE for application in the criminal law. According to Sarch, 'aiming at a state of affairs that not only is bad or wrongful, but that is also unjustified, does seem wrong in itself – i.e., an independent source of culpability.'³² Sarch argues that this independent source of culpability is related to a *commitment* to bring about harm, and this commitment 'manifests more insufficient regard for others, all else equal, than merely foreseeing that one's actions will cause harm'.³³

Quinn's view of the DDE has two key features. First, for Quinn, it is not *intending to harm* that matters, but *intending to use or affect in a way that foreseeably harms*. Second, the view is patient-focused. Quinn distinguishes between direct and indirect harmful agency:

Something counts as 'harmful direct agency' [intentional harm] only insofar as harm comes to the *very people* who are *deliberately affected* by the agency. Insofar as harm comes to others, the agency also counts 'indirectly harmful' [foreseen harm].³⁴

³⁰ See, for example, T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, Mass: Harvard University Press, 2008), chs. 1–3.

³¹ Thomas Nagel, *The View from Nowhere* (Oxford: Oxford University Press, 1986).

³² Sarch, 'Double Effect and the Criminal Law,' p. 460.

³³ *Ibid.*, p. 466.

³⁴ Quinn, 'Actions, Intentions, and Consequences,' p. 344, n. 18. My italics.

Quinn gives a Kantian-inspired, and patient-centred, grounding to this distinction:

Each person is to be treated, so far as possible, as existing only for purposes that he can share. This ideal is given one natural expression in the language of rights. People have a strong *prima facie* right not to be sacrificed in strategic roles over which they have no say. They have a right not to be pressed, in apparent violation of their prior rights, into the service of other people's purposes.³⁵

With these two pictures of the moral significance of intentions on the table, let us turn back to the questions set out in the previous section. My intention here is not to adjudicate between these competing understandings of intentions, but rather to see how they might inform debates about transferred intent.

Our first question concerns the relationship between the harm suffered and the intent to harm. It is, I think, hard to work out exactly what these views say about this issue, since they are focused on a case in which X intends to harm (or affect) Y, and harms Y. In other words, these views were not formulated around bad aim cases, and so it is hard to know exactly how they apply to such cases.

Let's look at Quinn's view first. On Quinn's view, the DDE kicks in when harm comes to the *very people* that the agent means to affect. This view, then, seems to hold little promise for providing us with theoretical backing for transferred malice, for the moral significance of intentions seems to apply to cases in which X tries to, and succeeds in, affecting Y *in a way that harms her*. This might be a bit quick, however. For harming itself, while surely wrongful, doesn't play much of a role in the wrongs that Quinn describes.³⁶ After all, we can use people, or press them into the service of our purposes, without harming them, and in doing so we would surely wrong them in the way Quinn describes. Perhaps, then, we have two independent wrongs here – the wrong of using and the wrong of harming. Again, however, this does not seem to provide much backing for transferred malice, from either a sentencing nor a labelling perspective, for if we have two independent wrongs here, there doesn't seem to be much argument for bringing them together under the heading of murder.

An agent-centred view might be more promising. After all, if D's harm to B is to be coupled with his intent to harm A, to deliver the

³⁵ *Ibid.*, pp. 350–351.

³⁶ I am grateful to Jacob Bronsther for discussion here.

verdict that he ought to be punished as, or labelled as, a murderer, an approach that is more focussed on what is going on with D is probably more likely to ignore the differences between A and B and so deliver this result.

However, at least on Sarch's version of this view, the wrongfulness of the intention is an 'independent source of culpability'.³⁷ Since the wrongful state of the affairs and the wrongful intention are independent sources of culpability, perhaps we can, on this view, make sense of why D is as blameworthy or as culpable as a murderer. In an ordinary murderer, D* is culpable both for the unjustified killing of A, and, independently, acting on the intention to kill A. In a transferred malice case, D is culpable for the unjustified killing of B, and, independently, acting on the intention to kill A. However, this view, if interpreted as allowing us to decouple the blameworthiness of the outcome and the blameworthiness of the intention, again seems to give us two different victims. If the wrongfulness of the intention is grounded in insufficient regard for others, D has disrespected A through his attempt and harmed B through his killing. Furthermore, this separation may be *too* expansive. Why shouldn't we just couple together *any* bad intention with any unjustified state of affairs? For example, should an intention to kill be coupled with property damage?

The issue we keep coming back to is this: If the moral significance of intentions demands that the actual harm be closely related to the intended harm, then in order for it to count as an intended harm, it surely matters who the intended harm was directed at. If, on the other hand, the harm and the intention are separable, we have two independent wrongs directed at two independent people.

I have argued throughout that a potential problem with transferred malice is the way in which it erases A from the picture. As I have made clear, whether or not this is problematic turns on whether it is best to understand the attempted murder of A as a victim-centred crime – one in which A herself is seriously wronged – or as one in which the wrong is impersonal, or primarily agent-focused.

Is A wronged when D tries to kill her?³⁸ It is tempting, as philosophers, to focus on the cleanest version of such a case, to find

³⁷ In this sense, Sarch's view is similar to the alternative to the DDE outlined in Alec Walen, 'The Doctrine of Illicit Intentions,' *Philosophy & Public Affairs* 34 (2006): 39–67.

³⁸ I am grateful to Antony Duff and Gideon Yaffe for helpful discussion of these issues.

whether attempts in and of themselves can wrong us. We can construct examples of *pure attempts*, attempts where A was never even aware that D had tried to take her life, and ask whether she is wronged in such circumstances. I will discuss such cases, but I also think it is a mistake to focus only on these cases in the context of transferred malice, as I will explain.

Let us take the pure attempts first, then.³⁹ Imagine that A is completely unaware of D's attempt to kill her. Has she been wronged? We might be tempted to say something like 'if D has caused A no negative experiences, how can he have wronged her?' But sometimes things we do not experience can be bad for us, and can wrong us. Death, for example. B is certainly wronged by D, even though she does not 'experience' her death. Another example is betrayal, such as extramarital affairs we never learn about.⁴⁰ It seems at least plausible to me that a pure attempt on my life can wrong me in a way similar to an extramarital affair. It is a betrayal. It is not (necessarily) a betrayal of an intimate relationship, but it is a betrayal of the most basic moral relationship between two persons. And betrayals one does not know about can wrong. In fact, that you do not know about them can be part of the wrong, for there is then a significant fact about your life of which you are left ignorant. Betrayals behind the back create a chasm between how you understand your own life and reality. This is a bad aspect of a life, in the same way that being delusional, however pleasant, is a bad aspect of a life.⁴¹ Consider two people, alike in all other ways, but one has, unbeknownst to him, survived multiple attempts on his life. Although this person has been very fortunate, it seems to me that his life is going, in two distinct ways, badly: people are trying to kill him, and he is ignorant about something of fundamental importance about his own life. Or consider how you would react on finding out

³⁹ This issue is closely related to, though not reducible to, the issue of whether pure risks can be bad for us, or wrong us. Not all attempts produce risk, and not all risks are attempts. Regrettably, I lack the space to cover that fascinating literature here. See, for example, John Oberdiek, *Imposing Risk: A Normative Framework* (Oxford: Oxford University Press, 2017); Tom Parr and Adam Slavny, 'What's Wrong with Risk?', *Thought* 8 (2019): 76–85; Claire Finkelstein, 'Is Risk a Harm?', *University of Pennsylvania Law Review* 151 (2003): 963–1001. I also cannot do justice to the full philosophical complexity of attempts, though it is notable that the existing literature has not focused on this question of whether attempts wrong the victim. See Gideon Yaffe, *Attempts: In the Philosophy of Action and the Criminal Law* (Oxford: Oxford University Press, 2010); R.A. Duff, *Criminal Attempts* (Oxford: Clarendon Press, 1997).

⁴⁰ Thomas Nagel, 'Death,' *Noûs* 4 (1970): 73–80.

⁴¹ For example, Nozick's experience machine. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 43–44.

people had been trying to kill you. You'd be upset. And while finding out would be what *caused* you to be upset, it isn't what you would be upset *about* – you'd be upset at the fact that people tried to kill you, and you'd feel *personally* aggrieved, indeed wronged, by that.⁴²

However, while the philosopher in me is tempted to look only at pure attempts, the actual legal puzzle before us is not one in which pure attempts are very likely to come up. In most cases, transferred malice cases will be ones in which the victim of the attempt is perfectly aware that someone has tried to take their life. This will be by one of two routes. In most actual cases I am aware of, the attempt is perfectly obvious at the time of attack. It is hard to be oblivious of an attempt on your life when the person next to you is killed. But even if the victim of the attempt remains oblivious, at least of the fact that they were the intended target, someone has been killed, and the state is required to look into that. Via the investigation and prosecution, the person will become aware that there was an attempt on their life. So, we need to ask whether *this* kind of attempt wrongs its victim, and whether leaving out *this* kind of attempt from the moral description of a crime ('D murdered B') erases one of D's victims. Regardless of whether a pure attempt wrongs a person, it seems clear to me that *experiencing* an attempt on your life, and knowing that somebody has tried to kill you will, for most people, be seriously psychologically damaging. That is a significant wrong to impose upon a person. Now imagine that that person is told that the wrong they suffered is not going to be acknowledged in law. Instead, the wrong they have suffered will be used to convict D of a crime against B. It does seem both that they are a victim, and that the way in which the criminal law frames the crime removes them (at least *qua* victim) from the picture.⁴³

This section is a far-too-brief excursion into these issues. My main point here is simply this: to make progress on this issue, we must

⁴² I think this is where pure attempts may differ importantly from pure risks. For example, we might not feel aggrieved by a pure risking that was not an attempt.

⁴³ If attempts wrong us, this raises questions about mistaken identity cases. For example, if D sees B, believes B is A, and kills B, has D wronged A with an attempt, even if A was many miles away? In my view, such cases raise the issue of what the right description of A is, for the purposes of establishing victimhood: what matters, that D tried to kill 'John Nicholson', (A) or that D tried to (and indeed did) kill the physical body belonging to B? In my (tentative, and perhaps idiosyncratic) view, we do not need to choose here, for D wrongs both A and B with his attempt in this case. And my account of how attempts wrong us explains why: it is a significant and bad fact about *both* their lives that somebody tried to kill them, under these two different descriptions. Shachar Eldar encourages us to consider bad aim and mistaken identity cases together. See Eldar, 'The Limits of Transferred Malice,' *Oxford Journal of Legal Studies* 32 (2012): 633–658. I am grateful to Andrew Ashworth and Antony Duff for discussion.

think through the moral significance of intentions, and in particular look at that issue from the victims' points of view. If we are wronged because we have special rights against people harming *us* on purpose, as Quinn appears to suggest, then harming someone else by accident looks like a different form of wrong. And if we are wronged by someone attempting to harm us, then calling D a murderer seriously mislabels the wrongs he has done, by erasing one of his victims from the picture.

VI. CONCLUDING REMARKS

This essay ends up in at least partial agreement with Husak. Husak argues that we should rid ourselves of transferred malice. Instead of using the substantive criminal law to ensure that criminals in 'bad aim' cases be punished as murderers, we should use sentencing law. I am sceptical of the need for this – I am sceptical as to whether our best understanding of the moral significance of intentions will lead to us the conclusion that it is as bad to attempt to kill A and accidentally kill B as it is to intentionally kill A.

However, imagine that Husak is right. Imagine that we should punish D as much as a murderer. What, exactly, then is wrong with using transferred malice *instead of* sentencing law? Husak is dissatisfied with relying on 'legal fiction', but beyond that he does not pinpoint further issues with relying on transferred malice to reach the right results in sentencing.⁴⁴ My arguments in this paper can be taken to bolster this side of Husak's argument. I have argued that there are important reasons to avoid using transferred malice *even if* it gets us the right sentences.

Husak focuses almost entirely on sentencing considerations. In doing so, Husak's treatment of transferred malice misses something important, both about the case for transferred malice, and its drawbacks. Many people find it both intuitively plausible and important that D is not only punished like a murderer, but is convicted and punished *for* murder. I think, however, that we have good reasons *not* to label D as a murderer. In describing D as a murderer, we imply that D's crime was to murder B. The other victim, A, who has suffered a serious wrong, is erased from the crime, and the crime

⁴⁴ Husak, 'Transferred Intent,' pp. 86–87.

against them is used to convict D of an offence against B. This is important moral information that a conviction for attempted murder and manslaughter would not miss.

I do not pretend that I have solved all of the issues here, even to my own satisfaction, let alone anyone else's. However, I hope that I have shown some questions that we need to ask. Our debates on transferred malice can be informed by debates on the moral significance of intentions, and by thinking through the kind of wrong that an attempt on a life represents. Not only this, but our understandings of these more fundamental issues in moral and legal theory can be furthered by considering transferred malice-like cases. For example, our understanding of the plausibility and best interpretation of the DDE would be furthered by considering bad aim cases.

In many ways, my modest progress here is regrettable, for our honorand deserves better. Yet I find it hard to regret this. Had I managed to solve these puzzles, I would have fewer reasons to continue to discuss them with brilliant scholars like Doug Husak. I look forward to my next chance to do so.

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