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WITH MALICE TOWARD ALL: THE INCREASED LETHALITY OF VIOLENCE RESHAPES TRANSFERRED INTENT AND ATTEMPTED MURDER LAW

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WHAT MAKES SOME crimes worse than others? As crimes require both a mens rea and an actus reus, some commentators have deemed the corresponding concepts of culpability and harm the elements that determine the severity of a crime. [1] The factors operate on a sliding scale whereby more of one compensates for less of the other. There is a third element, however, that is often overlooked: the danger posed by the offender's conduct. As Professor Arnold Loewy has observed, dangerousness, like culpability and harm, works on a sliding scale in determining severity; additional danger may compensate for less harm, just as it may compensate for less culpability. [2] Although danger is a third variable in evaluating the seriousness of a crime, criminal law fails to attach adequate weight to danger in many contexts. Fuller consideration of danger will render both the law more coherent and society more secure.

A prominent example of weighing danger is the assignment of murder liability for dangerous conduct that results in unintended death. Known in different jurisdictions as “depraved heart,” “extreme indifference,” “constructive intent,” “wanton disregard,” “implied malice,” or any combination of these terms, [3] a common thread is the requirement ***262** of a level of danger not required for intentional murder. Part I of this article analyzes the danger component of offense grading, focusing on wanton disregard murder.

Part II reviews the transferred intent doctrine, which is being reshaped by the increasing lethality of homicidal attacks. The common law developed a simple rule that held defendant D responsible for murder when his shot missed intended victim A and instead killed unintended victim B. Today's defendants, however, many of whom use technologically advanced explosives and automatic weapons, may kill not only B, but also C and D, and perhaps injure A and E as well. Not only are more unanticipated harms now possible, there is also a need to determine their relative gravity. A single murder was punishable by death under common law, rendering additional liability superfluous. Today, however, a single murder does not automatically render the defendant subject to the maximum penalty so further grading is necessary.

Part III examines the elements of attempted murder. The common law required an intent to kill as a prerequisite, even though this was not required for a completed murder. One justification for this distinction is that attacks performed with such intent are more dangerous than those performed wantonly. [4] When the weapons of choice were arrows and single-shot firearms, this was likely true; an aimed bullet is more dangerous than an unaimed one. But this premise warrants reexamination in a day when assailants can fire fifty “wall-piercing” bullets within seconds. [5] Aim is no longer a prerequisite for heightened danger.

Philosophers as diverse as Thomas Hobbes, [6] Jeremy Bentham, [7] and Moses Maimonides [8] have agreed that the crimes that most endanger the public warrant the strongest punishment. This article applies that principle to the changing nature of homicidal violence.

*263 I. The Danger Principle

Danger combines with culpability and harm to determine criminal liability. For example, an assault may be aggravated either because the offender intends to commit another offense like rape (culpability), because he uses a weapon (danger), or because he seriously injures the victim (harm). An abundance of any factor may compensate for a deficiency of another. Section A of this part illustrates this principle generally; section B considers the effect of danger on the specific offense of murder.

A. The Danger Component of Liability

The three elements of culpability, danger, and harm substitute for one another on a sliding scale.[9] For example, aggravated battery and involuntary manslaughter are punished identically in California.[10] The former involves the greater culpability of an intentional infliction of unlawful force and the lesser harm of serious injury,[11] whereas the latter involves the lesser culpability of criminal negligence (lack of due care) but the greater harm of death.[12] As culpability and harm may mutually substitute, so may danger and harm. For example, California punishes aggravated assault with the same sentence imposed on aggravated battery. The former offense requires not the harm of injury but the danger of the use of a deadly weapon or force likely to produce injury.[13] Transitively, culpability and danger form a comparable sliding scale.[14]

Liability thus depends on the presence of the three variables. Although murder, which produces the most severe harm, death, is punishable by life imprisonment,[15] other offenses also carry a life sentence if there is sufficient culpability or danger. Even absent danger or the harm of death or injury, the aggravated culpability of a ***264** premeditated intent to kill justifies a sentence of life imprisonment.[16] Danger (even without the culpability of an intent to kill or injure) likewise supports life imprisonment for offenders who create danger by kidnapping for ransom or reward.[17] Furthermore, such kidnappers are sentenced to life imprisonment without possibility of parole ("LWOP") if they magnify the danger by intentionally confining their victim in a manner that exposes her to a "substantial likelihood of death," even if no injury occurs.[18]

Of the three relationships, this article will emphasize the relationship between culpability and danger, emphasizing that culpability is not the sine qua non of liability. In distinguishing first degree from second degree murders (with the harm of death constant), California deems premeditated and deliberate murders in the more serious first degree category, as they involve aggravated culpability.[19] On the other hand, first degree status also obtains for killings involving especially dangerous means like poison, explosives, or drive-by shootings, even if there is no intent to kill.[20] A murder committed by the dangerous means of explosive devices may be worse than a premeditated killing. "The use of destructive devices, Molotov cocktails in this instance, which can inflict indiscriminate and multiple deaths, marks defendant as a greater danger to society than a person who premeditates the murder of a single individual."[21] Homicidal conduct capable of inflicting multiple, indiscriminate deaths thus warrants an even greater sanction than conduct intended to kill a single individual.

B. Dangerous Murder

There are several components to danger: the number of victims threatened and the probability and extent of harm. Culpability likewise has several aspects. The Model Penal Code ranks culpability states as follows: purpose, knowledge, recklessness, and negligence.[22] But as Professor Kenneth Simons has explained, the issues of desire and belief ***265** form distinct and independent hierarchies.[23] The most culpable desire state is purpose, followed by indifference or callousness, which occurs when the actor is either completely neutral regarding the harmful result or insufficiently averse to it.[24] Culpable belief states include knowledge (a belief that the result is relatively certain), recklessness (belief that the result is substantially possible), and negligence (unreasonable unawareness of result's possibility).[25]

Purpose or knowledge alone sufficed under common law to establish "intent" to achieve the forbidden result; the presence of either maximum state rendered immaterial the absence of the other. Accordingly, neither purposeful nor knowing actors could necessarily be deemed worse. Consider two hypothetical offenders with very different mental states. Apprehensive April wishes to kill Malpracticing May, whose misadvice has driven April into bankruptcy. April fears detection and does not wish to endanger any bystander. She therefore chooses an unorthodox manner in which to attack May, whose office abuts a ball field; when May walks by her window, April will throw a baseball at May, whose preexisting head injury renders her especially vulnerable to this weapon. April realizes her plan will likely fail to kill or even injure May, but chooses the method for its plausible deniability; a baseball, unlike a gun, is not an intrinsically incriminating tool.

In contrast to April, Busbomber Bonnie plants a bomb on a bus. She prefers that nobody suffers injury or death, but she wants people to ride her company's taxis, and hopes the danger will frighten people into avoiding buses. She is reasonably certain that several people will ***266** die as a result of the bombing. Whereas April has a desire state of purpose (she intends to harm May), but lacks a belief state of knowledge, recklessness, or conceivably even negligence (she realizes it is not likely she will successfully harm May), [26] Bonnie has a belief state of knowledge, but lacks the desire state of purpose. Although the Model Penal Code regards purpose as more culpable than knowledge, it is difficult to find April's act more objectionable, or worthy of sanction. Bonnie objectively creates a much greater probability of harm, and subjectively realizes it.

Moreover, knowledge is sufficient but not necessary to establish malice. For example, if Bonnie sets explosives to detonate at specific times, and reasonably perceives only a forty percent probability that the vehicle will be occupied at that time, she does not "know" the explosion will lead to death. Most states, however, do not require knowledge as a prerequisite for murder but instead permit a lesser level of certainty to suffice. The vast majority of states would thus authorize a murder conviction under those circumstances for Bonnie, whose conduct reflects a wanton disregard for human life.

Such wanton disregard murder is no less serious than intentional murder. To compensate for the absence of desire, wanton disregard statutes require additional elements not required for intentional murder. Most obviously, the conduct must objectively create a grave danger to human life. [27] Most states also require that the offender subjectively perceive this danger. [28] Some states require that the conduct endanger human life generally rather than only a specific victim. [29] None of these requirements exist for intentional murder. Wanton disregard murder is not a lesser grade of murder. [30]

***267** Some states actually treat wanton disregard murder as more serious than intentional murder. Washington, for example, punishes intentional killings as second degree murder, but punishes unintentional homicides that manifest a depraved indifference to human life generally (as opposed to a specific victim) as first degree murder. [31] Likewise, Tennessee punishes a knowing killing as second degree murder, [32] but a reckless killing committed with an explosive device as first degree murder. [33] An exceptional degree of danger may substitute for not only an intent to kill, but also malice itself. In Massachusetts, a common law jurisdiction, the punishment for manslaughter committed with an explosive device is the same as the punishment for murder by ordinary means; the greater danger substitutes for malice in supporting a sentence of life imprisonment. [34]

The United States Supreme Court has endorsed this logic, approving the death penalty for offenders who kill with depraved indifference to human life.

A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. . . . [S]ome non-intentional murderers may be among the most dangerous and inhumane of all--the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders. . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known

to carry a grave risk of death represents a highly culpable mental state, [which] may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though not inevitable, lethal result. [35]

***268** The public likewise considers acts that endanger bystanders to be especially serious. [36] First, police have more difficulty solving cases where there is no prior relationship between the offender and victim. [37] Second, strangers have neither warning nor any possible responsibility for the killer's attack, making precautions more difficult. Perhaps most importantly, there is the likelihood of recidivism; one who does not confine his murderous conduct to specific enemies might kill anyone.

The law therefore recognizes danger as a factor supporting enhanced liability. Implied malice is not an inferior form of malice; danger is no less important than culpability in determining liability. 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.

II. Transferred Intent

Transferred intent [38] developed at common law to cover those cases where an offender intended to harm one victim but instead harmed a different victim. [39] In the seminal case of The Queen v. Saunders & Archer, [40] Saunders, intending his wife's death, gave her a poisoned apple. She ate only a small, nonfatal portion and innocently fed the rest to their three-year-old daughter, who died. [41] The court, finding Saunders caused the girl's death (actus reus) with an intent to kill (mens rea), held him liable for murder, despite his not desiring to harm his daughter. "John Saunders gave the poison . . . [and] intended that death should follow. And when death followed from his act, although it happened in another person than her whose death he directly meditated, yet it shall be murder in him . . . ." [42] The court observed that given the wife's innocent agency, the murder would go unpunished absent this transfer. [43]

***269** Because Saunders was hanged for the murder, liability for the attempted murder of his wife would have been superfluous. Today, however, an intentional murder alone does not necessarily compel the imposition of the death penalty or even life imprisonment, and thus consideration of liability beyond a single murder has practical significance. This Part describes four factual predicates to be considered in determining the offender's liability: (1) the offender kills both an intended and an unintended victim; (2) the offender kills an unintended victim but not the intended victim; (3) the offender kills neither the intended nor the unintended victim; and (4) the offender kills the intended victim but not an unintended victim. Evaluation of these different predicates reveals the weight that courts increasingly attach to the factor of danger in determining liability.

A. Both Intended and Unintended Victims Die

The first circumstance arises where the offender intends to kill one individual but kills two (or more). In People v. Birreuta, [44] Birreuta shot into the dark bedroom of his neighbor, intentionally killing her. As he was leaving, he heard a noise and shot again, killing his wife, whom he did not know was there. [45] The court declined to punish the latter killing as intentional murder: "We conclude that the interests of justice are best served by differentiating between killers who premeditatedly and deliberately kill two people, and killers who only intend to kill one person, and accidentally kill another. Both types should be punished for both killings, but the former type is clearly more culpable." [46] The court found no need for the artificial doctrine of transferred intent because the jury could consider Birreuta's premeditated intent to kill the neighbor in determining Birreuta's liability for her death. The intent to kill one victim is therefore "used up" when the defendant kills the intended victim. [47]

Professor Douglas Husak, advocating "proportionate sentences" based on culpability, defended this result. [48] Professor Husak contrasted D1, a defendant who intended only one death but caused two, with D2, a defendant who intended multiple deaths. [49] Considering the two factors of culpability and harm, he concluded D2 warrants ***270** greater punishment than D1 because "to intend to kill several persons is more culpable than to intend to cause a single death." [50] A corollary to this analysis is that Birreuta deserves greater punishment than one who intends and inflicts one death, as the two offenders' culpability would be the same but Birreuta inflicted greater harm.

Basing liability on the offender's pre-offense desires might be appropriate if offenders merely programmed a computer by entering the number of desired victims, whom a robotic assassin would then kill with perfect certainty. Since all other variables are constant, the "double killer" would deserve greater liability. But because criminals not only must desire the harm but also must perpetrate it, the other variables do not remain constant.

In State v. Worlock, [51] Worlock shot at his intended victim, but instead hit and killed an unintended victim. Worlock continued firing, however, until his initial target also died, and he was convicted for both murders. [52] Considering this sequence, one may conclude that despite his initial preference to take only one life, Worlock modified his intent to include a second victim after shooting the first. [53] Worlock thus may be distinguished as exceptional; most cases do not involve this sequence where the offender sees he has killed one victim and subsequently forms the intent to kill another.

Even absent this sequence, however, offenders who intend only one death but inflict two may deserve the same liability as offenders who intentionally kill two. As Part I has shown, the time, place, and manner of the intended killing, and the consequent danger it ***271** presents, are relevant considerations. Consider three hypothetical assassins, all of whom wish to kill Diplomat Dan. Sharpshooter Sheila waits until Dan enters his car at the beginning of his motorcade. Once she sees Bodyguard Brad, she wishes to kill him too, to prevent his subsequent testimony, but has no more ammunition. She fires one shot, aiming to kill both with a single bullet; she has a fifty percent chance of killing Dan, and a less than one percent chance of killing Brad too. Carbomber Carla plants a bomb in the diplomat's car, not wishing to kill anyone but Dan. She has an eighty percent chance of killing Dan, who drives his own car. Additionally, there is a twenty percent chance of killing a second victim and a ten percent chance of killing a third (since Dan occasionally drives with passengers). Also wishing Dan's demise is Shotgunner Shawn, who fires wildly at the car during the procession; she has a sixty percent chance of killing Dan, a fifteen percent chance of killing a passenger, and there is an additional ten percent chance Dan will kill a spectator once he is shot and loses control of his vehicle. [54]

Under these circumstances, it is hardly obvious why Sheila deserves the most liability if each offender kills two people. On the one hand, she alone harbors the desire state of wishing to kill a second person. On the other hand, only Carla and Shawn perceive and pose a significant risk to additional victims; Sheila does not. Under basic criminal law principles, Sheila alone is liable for two intentional killings if the second victim dies.

Courts have held, however, that the real-life counterparts of Carla and Shawn are also doubly liable for murder. [55] This result is just. Although they lack the subjective desire to kill, they pose and perceive a danger of killing, which compensates for the lesser subjective culpability (desire state).

In United States v. Sampol, [56] the defendants detonated a bomb under the car of Orlando Letelier, a former Chilean ambassador. The explosion killed Letelier and his passenger, Ronni Moffitt. [57] The United States Court of Appeals, District of Columbia Circuit, affirmed two counts of first degree murder, observing that the doctrines of transferred intent, accomplice liability, and conspiracy all supported ***272** the second murder conviction; Moffitt's death was a foreseeable consequence of the detonation. [58] In State v. Hinton, [59] Hinton fired a single shotgun shell at a crowd, intending to kill one specific victim. [60] The shell, containing eight pellets, killed the intended victim and two others. The court upheld three murder convictions due to the intent to kill the intended victim, echoing the Saunders reasoning: "[A]s to each person killed, the defendant had the 'intent to

cause the death of another person,' and, acting with that intent, he 'cause [d] the death of . . . a third person."' [61] The court thus did not evaluate Hinton's intent before the crime (as if he programmed a computer to take one life), but considered his intent in firing the fatal pellets, through which three victims were killed through an act performed with intent to kill ("kicked," as opposed to "stumbled over").

Sampol and Hinton warrant murder liability; they desired to take a human life (culpability), they did so (harm), and they created an objective likelihood of such death (danger). Unlike some dangerous killers (Bomber Bonnie) they desired to kill; unlike some culpable killers (Apprehensive April), they posed a significant danger. Of course, considering the danger they consciously created, they committed the second and third killings with wanton disregard for human life, thereby justifying a murder conviction even without the transferred intent doctrine. [62]

The tougher case arises where the killer is merely reckless or negligent regarding the possibility of additional victims, and thus would not be guilty of murder absent transferred intent. For example, if Ignorant Ira fires into what he "knows" is an unoccupied room, he will not be convicted of murder if the occupant is killed. [63] If his belief is reasonable, he might not be guilty of even manslaughter. Advocates of proportional culpability, like Professors Husak and Dressler, favor the same nonliability for the second, unforeseen killing by Birreuta, who intentionally killed the one person he knew was present. For culpability-oriented theorists, that intentional murder should be immaterial in ***273** determining liability for the unintended killing; each homicide should be judged on its own.

Overlooking the intentional murder, however, overlooks the very reason why inadvertent killings are punished less severely than intentional ones, if at all.
What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for . . . abstaining from what [the law] forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent [due to, inter alia, ignorance or mistake] . . . the moral protest is that it is morally wrong to punish because 'he could not have helped it' or 'he could not have done otherwise.' [64]

An implicit premise of the excuse, as applied to the inadvertent killer, is the ordinary respect for human life held by the reasonable person, who would not knowingly kill (absent any perceived justification), and thus would have "helped it" or "done otherwise" if he had known all the facts. For a defendant like Birreuta, however, that premise does not apply. Birreuta's maliciously shooting the neighbor proved he lacked the ordinary respect for human life that the excuse presumes. That he might have desisted had he known his second target's identity reflects only the fortuitous esteem in which he held his wife specifically, rather than human life generally.

There is another rule that imputes malice for "accidental" homicides: the felony murder rule. In fact, because murder is itself a felony, the intended murder or attempt thereof may serve as a predicate felony supporting the imputation of malice for the second. [65] This particular application of felony murder is stronger than the basic rule; committing a murder will almost always be both more culpable and more dangerous than committing other felonies. [66] Additionally, the application may serve either or both of the deterrent purposes underlying the felony murder rule: reducing the number of accidental deaths and the number of underlying felonies themselves. [67] The rule may prompt some offenders to commit their lethal attack where there are no bystanders. Furthermore, perhaps some of those who defer their lethal attack will not have another opportunity before being apprehended, killed, or abandoning their plan.

***274** As New Jersey's high court thus concluded, "When a defendant contemplates or designs the death of another, the purpose of deterrence is better served by holding that defendant responsible for the knowing or purposeful murder of the unintended as well as the intended victim." [68] The highlighted phrase recognizes the nature of the second homicide was not accidental but intentional, albeit intended for a different party. [69] Even if the result, which may be described as replicated rather than transferred

intent, does not advance deterrence, it manifests the desert principle that offenders who kill with malice deserve murder liability. The California Supreme Court observed a defendant like Birreuta does not kill his second victim by "accident" [70] and thus disapproved Birreuta. [71]

A defendant who kills both an intended and unintended victim receives double murder liability, regardless of his mens rea toward the second victim, due to the enhanced harm inflicted on the second victim. Danger, of course, is related to harm, as it describes its probability of occurrence. As sections B and D will show, however, enhanced danger itself may justify additional liability, even when mens rea and harm are held constant.

B. Unintended Victim Dies, Intended Victim Survives

What happens where a defendant misses his intended target but kills an unintended victim? A culpability analysis favors literally transferring, rather than replicating, the intent, so that "If A's intent to kill B is transferred to C, it is no longer available to support A's liability for the attempted murder of B." [72] Therefore, "A should not be punished more than the standard murderer." [73] According to this theory, the "standard murderer" has the culpability to kill one person and inflicts this harm. If the poorly aiming A has the same intent and inflicts the same harm, he warrants the same liability.

The California Supreme Court unanimously held otherwise in People v. Scott, [74] affirming a conviction for intentional murder and attempted murder where the defendants killed an unintended victim ***275** but missed their intended target. [75] Justice Brown observed: "In their attempt to kill the intended victim, defendants committed crimes against two persons." [76] It is true that the Scott defendants intended and inflicted one death; their culpability and harm thus did not exceed that present in the "standard" case. Unlike the standard case, however, a second defendant was placed in danger, justifying greater liability.

Maryland's high court reached this same result in Poe v. State, [77] where the defendant fired at a woman, and the bullet passed through her body (she survived) and killed a child standing behind her. [78] One commentator objected to the court's affirming both the murder and attempted murder convictions: "[Conviction for two intentional crimes] ignore[s] the difference in culpability between one defendant, who commits one act intending to kill one person, and a second defendant, who commits two acts intending to kill two people. . . . This is simply unjust." [79]

But an exclusive focus on the number of intended victims or "acts" fails to account for the danger factor. As the hypothetical involving Sharpshooter Sheila, Carbomber Carla, and Shotgunner Shawn demonstrates, [80] the number of intended victims might not reflect the danger created. Nor is the number of "acts" determinative of danger; the Sampol and Hinton defendants in a single act killed multiple victims and thus may create more danger than Mobster Mabel, who fires multiple shots at her target in a remote location to avoid killing bystanders. As the California Supreme Court has observed:

> It is clear that a person who engages in an urban gun battle is more culpable than one who fires a weapon at an isolated individual. The risk of injury to bystanders clearly is a risk arising from even one firing of the weapon. The more culpable and dangerous the behavior, the greater the need exists for effective deterrence. [81]

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.

***276 C. Both the Intended and Unintended Victims Survive**

Although courts uniformly endorse the concept of replicated intent [82] when the unintended victim dies, there is a split of authority in cases where the unintended victim survives. [83] Liability seems proper for the act-based offense of assault with intent to kill. [84] There are greater conceptual problems, however, with replicating liability for the design-based offense of attempted murder, an offense that comes closer to assigning liability on the "computer program" model described in II.A.

Maryland's high court has rejected replicated intent for unconsummated murders. The court explained that the transferred intent doctrine arose to remedy the potential injustice of an offender's escaping liability because he harmed the wrong victim.

> [A] completed crime requires the concurrence of a mens rea, a guilty mind, and an actus reus, a bad act. The purpose of transferred intent is to link the mental state directed towards an intended victim . . . with the actual harm caused to another person.
>
> . . . .
>
> Thus, transferred intent makes a whole crime out of two halves by joining the intent as to one victim with the harm caused to another victim. [85]

Unlike a completed crime like murder, however, attempted crimes have no harm element, and thus there is no need to link the intent as to one victim with the harm of another; the intent as to the intended victim suffices for liability. "Transferred intent is . . . inapplicable ***277** . . . where the subject crime is already completed as to an intended victim, [as with] attempts or other crimes that can be completed without the necessity of physical contact." [86] The Ford court also offered a practical argument against transferring intent: the potentially unbounded pool of unintended victims for whom attempted murder liability could attach.

> Assuming an attempted murder scenario where the defendant fires a shot at an intended victim and no bystanders are physically injured, one sees that it is virtually impossible to decide to whom the defendant's intent should be transferred. Is the intent to murder transferred to everyone in proximity to the path of the bullet? Is the intent transferred to everyone frightened and thereby assaulted by the shot? There is no rational method for deciding how the defendant's intent to murder should be transferred. [87]

Several states, however, have offered possible methods of limiting liability. The most common response to this dilemma is to require harm as a prerequisite for transferring attempted murder liability. Some states replicate intent for attempted murder only where an unintended victim suffers physical injury. [88] An Arizona court following a statute based on the Model Penal Code supported three counts of attempted murder liability where the third victim was a bystander. The Arizona statute provided in pertinent part:

> If intentionally causing a particular result is an element of the offense, and the actual result is not within the intention or contemplation of the person, that element is established if:
>
> (1) the actual result differs from that intended or contemplated only in the respect that a different person . . . is injured or affected or that the injury or harm intended or contemplated would have been more serious or extensive than that caused . . . . [89]

The case reached an arguably satisfying result insofar as an individual who harms three individuals deserves more liability than one who harms two (intent being held constant), [90] but the statute is ambiguous as to whether it aims to transfer intent from one victim to another or actually replicate it. [91]

***278** Broader liability could arise from decisions that cite danger instead of harm as the limiting principle. In State v. Gillette, [92] the defendant left a poisoned soda can for his intended victim but two additional individuals drank the tainted liquid. [93] Although none of the victims suffered injury, "the danger to the victims was real." [94] The court therefore permitted

attempted murder liability for all individuals endangered by the offense. “If the substance is ingested by the intended victim, as well as by others who work with her, defendant's felonious intent to kill is transferred to others who foreseeably may also ingest the poison.” [95]

Oklahoma effectively combines harm and danger as disjunctive limiting principles in allowing intent to replicate liability as to victims injured (harmed) or assaulted (endangered) by the attack. [96] The defendant firebombed an apartment, intending to kill at least one victim. One unintended victim died, one apparently intended victim was injured, and several other individuals needed to flee the burning building. The court found “through this act of attempting to kill any of those inhabitants by throwing the firebomb at the apartment, he committed the offense of attempt to kill as to any persons assaulted by mistake or accident.” [97]

In People v. Bland, [98] the California Supreme Court followed its common-law counterpart, Maryland, in rejecting replicated intent where the unintended victim survives. Bland recalled the felony murder analogy, and observed “there is no crime of attempted felony murder when no death occurs.” [99] Bland also cited the common-law distinction that attempted murder requires an intent to kill whereas ***279** completed murder does not. [100] Section E will nevertheless show that the common citation to People v. Gaither [101] suggests the gap between Bland and Gillette may be rather small.

D. Intended Victim Dies, Unintended Victim Survives

Both California and Maryland impose liability for murder and attempted murder where the unintended victim dies and the intended victim survives. [102] By contrast, where the intended victim dies and the unintended victim survives, there will be one count of murder but none for attempted murder. [103] The legitimate consideration of danger in assessing liability justifies this apparent anomaly.

This disparity in liability has prompted objection. “[Liability] depend[s] on which of the intended and unintended victims are killed or injured . . . despite the fact that [the defendants] had the same intention and caused the same harm in both situations.” [104] In Bland, the California Attorney General also criticized the disparity, arguing the contrast “reward[s] the defendant with good aim and punish[es] the one with bad aim, despite the fact that in both scenarios the defendant acted with the exact same mental state: the intent to kill his intended victim, and his actions resulted in the same harm.” [105] But the assertion that the constant level of culpability and harm warrants a comparable level of overall liability overlooks the danger variable.

In rejecting this claim, Bland followed Scott, which noted the existence of the second victim endangered by the attack: “In their attempt to kill the intended victim, defendants committed crimes against two persons.” [106] Bland likewise observed, “When one attempts to kill one person but instead kills another, there are always two victims: the intended target and the one actually killed. But when one kills the intended target . . . whether a second victim also exists may be less clear.” [107]

***280** The Attorney General was correct in observing the shooter with good aim is rewarded and the one with bad aim is penalized. [108] But this is not unjust. If 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. When police have justification to shoot a hostage-taking terrorist, they use sharpshooters to reduce the danger to bystanders. The contrast between Scott and Bland correctly serves the interest of public safety by imposing enhanced liability for crimes committed with greater public danger.

E. The “Kill Zone”

The Ford court faced the dual task of repudiating the reasoning of a precedent that had authorized replicated intent for attempted murder, [109] while preserving that case's result of multiple attempted murder convictions. Ford explained the former case had

properly upheld both attempted murder convictions due not to transferred intent but "concurrent intent." [110] Whether or not Ford represents a conscious effort to establish attempted murder liability for highly dangerous conduct that would support a wanton disregard murder conviction if the victim died, the case might have that effect.

Intent is concurrent, according to Ford, "when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity." [111] The court offered examples of highly dangerous conduct to illustrate the concept.

For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method ***281** employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. [112]

Ford described evidence that would justify affirming the conviction on appeal; it did not describe how to instruct a jury to reach its verdict. The explanation in Ford is nonetheless meaningful as it recognizes that the means used to kill are relevant in determining the gravity of the offense, and thus the magnitude of liability. If D intends to kill B, it is technically immaterial whether he does so "to ensure A's death," to inherit B's estate, or to intimidate C. Ford means that in Maryland (and now California) [113] the objective danger posed, although not a substitute for intent, may well be proof of it.

In People v. Vang, [114] gang members fired at least fifty shots at two rivals' homes, and were convicted of eleven counts of attempted murder. [115] The court emphasized the number of shots and the wall-piercing weapons used in finding substantial evidence supporting the conclusion that:

> [D]efendants harbored a specific intent to kill every living being within the residences they shot up.
>
> . . . .
>
> . . . The fact that they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed. [116]

Vang's observation that the defendants could not see all their victims implied they did not know the victims were there. [117] Under ordinary culpability principles, a defendant cannot intend (either by desiring or knowing) the murder of a victim he does not know exists. The kill zone thus indirectly recognizes danger as a ground for attempted murder liability.

***282** The element of danger has shaped transferred intent doctrine. Even where an offender contemplates a single victim, the law imposes two counts of murder where two victims die, [118] and imposes murder and attempted murder liability where the unintended victim dies and the intended victim lives. [119] The majority rule, however, declines to apply the doctrine to impose attempted murder liability where the unintended victim survives. Thus, although the Bland jury could convict the defendant of the murder of the driver (the intended victim), the jury could not convict Bland of attempted murder of the passengers unless it found he specifically intended their deaths too.

A Florida appellate court, by contrast, held in a factually identical case that the jury could convict a defendant for the attempted murder of the two surviving victims even if the defendant lacked the specific intent to kill them. [120] This liability arose not from transferred or replicated intent, which the court rejected because the unintended victims survived. Instead, liability derived from an expanded definition of attempted murder, which authorized an attempted murder conviction upon a showing that the defendant harbored malice, whether express (intent to kill) or implied (wanton disregard). [121] Part III examines this expansion.

III. Attempted Murder

As explained in the introduction, wanton disregard is the functional equivalent of intent to kill. Nearly every state authorizes murder liability where death results from wanton disregard. Yet almost none find such conduct malicious when death does not result. If the two mental states are equivalent when the victim dies, why are they different when the victim survives?

In non-fatal cases, wanton disregard may present an even stronger basis for attempted murder liability than purpose. Both Apprehensive April and Busbomber Bonnie evince sufficient culpability when the victim dies; April due to her subjective desire and Bonnie due to the objective probability of death, which she subjectively contemplates. Although Bonnie's conduct may be objectively worse, the physical fact of death establishes that April's was also objectively harmful, ***283** worthy of sanction and suppression. Where the objective element of death is absent, however, April's conduct, unlikely to cause harm, seems more innocuous relative to Bonnie's. Society has a greater interest in preventing bus bombings than baseball tosses.

The common law required an intent to kill for attempted murder liability, [122] but this rule is misleading. Judges traditionally instructed juries that individuals are presumed to intend the natural and probable consequences of their acts, an instruction that now constitutes an unconstitutional presumption. [123] Such instruction could support an attempted murder conviction for a defendant like Vang because the natural and probable consequence of his acts was the death of his victims.

Courts, which must apply existing law regardless of policy preferences, have rarely provided a rationale for the intent requirement. Reevaluation is especially appropriate where past decisions have never considered the question carefully. For example, throughout the twentieth century, California courts held, without analysis, that voluntary manslaughter required an intent to kill. In People v. Lasko, [124] however, the court observed that if implied malice was the equivalent of express malice where there was no provocation, the rule should be the same where provocation existed. “Just as an unlawful killing with malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill.” [125] Similar reevaluation is appropriate for attempted murder.

Section A will describe the authorities that support the existence of attempted wanton disregard murder and Section B will examine, and ultimately reject, the policy arguments supporting the common law rule. [126] Section C reviews California's law of assault, which offers a ***284** concrete model for creating an offense of incipient murder, equal to but distinct from attempted murder.

A. Supporting Authorities

1. The Model Penal Code

The Model Penal Code supports broader attempt liability than the common law rule. It holds a person guilty of an attempt if:

> [A]cting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

> (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. [127]

Thus, purpose or belief suffices to support attempt liability. Belief appears to be a lower standard than knowledge, an act considered substantially certain to produce the result. A Model Penal Code commentary expressly precludes attempt liability for "reckless conduct," thus appearing to bar attempted manslaughter liability under the Code, but wanton disregard may well qualify as belief within this definition. [128]

2. Florida

The Florida Supreme Court rejected a specific intent requirement for attempt cases, observing "the illogic of requiring the state to prove an intent for successful prosecution of an attempt to commit a crime when no such degree of proof is necessary for successful prosecution of the completed crime." [129] The court relied on policy and reason to support its conclusion.

***285** In Gentry v. State, [130] the defendant attacked his father in a manner that exhibited the wanton disregard sufficient to support a murder conviction had his father died.

> [A]ppellant, while allegedly in a drunken state, swore at his father, choked him, snapped a pistol several times to his head and when the weapon failed to fire, struck the father in the head with the gun. Had a homicide occurred, there can be no doubt that the appellant could have been successfully prosecuted for second-degree murder without the state adducing proof of a specific intent to kill. The fact that the father survived was not the result of any design on the part of the appellant not to effect death but was simply fortuitous. We can think of no good reason to reward the appellant for such fortuity by imposing upon the state the added burden of showing a specific intent to kill in order to successfully prosecute the attempted offense. [131]

The fortuity of the father's survival precluded the defendant's liability for murder, but there was no reason to permit the fortuity of survival to result in a double windfall by also precluding an attempted murder conviction.

Gentry is sound. Either an intent to kill (express malice) or wanton disregard of human life (implied malice) establishes malice; as discussed in Part I, the latter is as serious as the former. Murder and attempted murder are distinguished by the harm factor, i.e. the presence or absence of the victim's death. The failure of a malicious actor to inflict death should limit his liability to attempted murder; there is no sound basis for limiting it further.

3. Colorado

Colorado also authorizes attempted murder liability for offenders who evince extreme indifference to human life but fail to produce death. In People v. Castro, [132] the Colorado Supreme Court based its decision more on statutory construction than policy, but ultimately followed reasoning similar to Gentry's. Colorado's extreme indifference murder law has three elements: the culpability element of "extreme indifference to the value of human life," the conduct element of "'intentionally' engaging in conduct that creates a grave risk of death to another," and the consequence element of "causing the death of another." [133] Colorado's attempt statute resembles that of the ***286** Model Penal Code. [134] The distinction in Colorado between attempted and completed crimes, therefore, is the difference between a "substantial step toward the [crime's] commission" and its actual completion: i.e. the victim's survival. [135]

The Castro court emphasized that extreme indifference murder is defined not by the defendant's recklessness regarding the consequence of death, but by the intent ("conscious object") to engage in the dangerous conduct.

[U]nder the initial statutory scheme the mens rea for extreme indifference murder--intentionally engaging in conduct which creates a grave risk of death-- was not bottomed in the result of the act but in the conduct. [Citation.] The crime of extreme indifference murder, in other words, while not requiring a conscious object to kill, necessitates a conscious object to engage in conduct that creates a grave risk of death to another. [136]

According to Colorado, therefore, the salient difference between April and Bonnie lies not between April's intent and Bonnie's recklessness regarding death, but between April's intent to kill and Bonnie's intent to incinerate the bus. Bonnie's conduct is more likely to inflict harm, more likely to kill, and more likely to kill multiple victims. If neither April's throw nor Bonnie's bomb planting actually kills anyone, Bonnie's act is at least as worthy of attempted murder liability as April's.

B. Objections

Courts in other jurisdictions apply the majority rule that attempted murder requires a specific intent to kill, but these authorities cite precedent rather than justify the position. Thus:

> [The majority rule] has been accepted as a function of the etymology of the word “attempt.” . . . To attempt something, it is said, ***287** necessarily means to seek to do it, to make a deliberative effort in that direction. Intent is inherent in the notion of attempt; it is the essence of the crime. An attempt without intent is unthinkable; it cannot be. [137]

Without judicial or legislative explanation, it has fallen to academic commentators to provide a rationale for the rule beyond mere etymology.

1. Less Harm, More Culpability

Some commentators follow the position, rejected by the Florida Supreme Court in Gentry, that the non-lethality of the act should affect not only the harm component (and thus reduce liability to attempted murder) but the culpability component as well. Clarkson and Keating, for example, base the claim that criminal attempts should require intent on their “basic equation of blame plus harm equals criminal liability”; in other words, culpability and harm (not danger) combine to determine an offense's severity. [138] According to this argument, where the offender inflicts harm a lesser degree of culpability is required, but where harm does not occur, liability requires the highest degree of culpability. [139]

At least two major flaws undermine this argument. The first is the questionable assertion that intent (purpose) is automatically a higher degree of culpability than wanton disregard. Does April obviously warrant greater punishment than Bonnie? Bonnie consciously poses a grave danger to numerous victims, and manifests indifference to human life. April, by contrast, does not pose such a grave danger, even to a single victim, nor does she subjectively perceive she poses such danger, and may show great respect for all forms of human life except her target May. As Professor Simons correctly observed, desire-states and belief-states are incapable of direct comparison. [140] It may be that purpose is a more culpable desire state than indifference, but indifference alone does not establish malice; there must be an objectively grave danger to human life and a subjective awareness of it.

Even if intent were more blameworthy than wantonness, it is illogical to create a sliding-scale model, in which more culpability is needed to compensate for less harm. A sliding scale might be warranted if overall liability remained constant; a jurisdiction may, for example, ***288** treat attempted intentional murder and completed wanton disregard murder as equally severe offenses. [141] But if attempted murder is a lesser crime than murder, the absence of harm produces a lesser sentence, and thus the defendant already receives favorable treatment due to absence of death. In Clarkson & Keating's mathematical equation, if BLAME + HARM = LIABILITY, the absence of harm on the left side produces a corresponding drop on the right side. Raising the mens

rea bar, as the Florida court observed, unwisely creates a double windfall. There is no such enhanced mens rea requirement for assault, which also involves less harm than murder; attempted murder likewise ought not require enhanced mens rea.

2. Intent Is More Harmful Than Wanton Disregard

Professor Duff has refined the basic equation described above. Instead of arguing that intent substitutes for harm, he argues that intent creates harm beyond that created by depraved indifference. [142] Professor Duff distinguishes between attacks (which manifest an intent to kill) and endangerments (which manifest wanton disregard), which merely threaten to cause harm. [143] The former, according to Duff, are worse, because "[a]ttacks are essentially, not merely potentially, harmful"; whereas death is part of the "intrinsic character" of an intended killing, it is not part of the intrinsic character of an act reflecting wanton disregard. [144] Although his presentation of the question is comprehensive and sophisticated, the emphasis on the act's "essence" or "intrinsic character" ultimately recalls the "etymological argument" about the essence or inherent character of an attempt as requiring intent. [145]

Professor Duff's ideal law would not "aim[ ] to penalize culpably dangerous conduct" but would be concerned only with attacks, in light of the intrinsic distinction between the two. [146] "One who intends to do harm . . . relates himself as an agent as closely as he can to that harm. . . . By contrast, one whose action is only potentially harmful relates himself less closely . . . to the harm which he risks causing." [147]

This restates the debate over whether the law should measure penal liability subjectively or objectively. Who is more "closely related" to ***289** harm: April, who creates a minimal prospect of harm, or Bonnie, who creates a strong probability of death?

Duff would deny attempted murder liability even for an offender who acts knowingly with regard to harm, because she "displays a willingness to cause harm, but not a positive orientation towards it." [148] It is not evident, however, why a subjective willingness combined with an objective likelihood should not suffice for attempted murder liability but a "positive orientation" and no substantial likelihood should suffice, especially as "willingness" suffices when the victim dies. As the Florida Supreme Court observed, the fortuity of survival should have no bearing on the required mens rea.

Professor Duff thus insists that the harm of an attempt be defined by the offender's subjective intent rather than the objective danger presented. The purposeful actor warrants attempt liability but the knowing actor does not. "[Knowledge] leaves logical space for the agent to be relieved (as well as surprised) if the harm does not ensue: but one who directly intends harm must be frustrated, not relieved, when it does not ensue." [149] Liability therefore depends on whether the individual offender subjectively will be relieved by the failure to kill. It is no less reasonable, however, for liability to turn on whether society objectively will be relieved because the act failed to kill. [150] Because April's act is far less likely to cause harm, society is better off if offenders act like April instead of Bonnie. Accordingly, if both their acts fail to produce death, Bonnie is at least as deserving of attempted murder liability as April.

3. Penal Frugality

Both Professor Duff and Professor Enker also invoke the concept of penal frugality in justifying an intent requirement for attempted murder. [151] If an act may be reckless (creating a substantial and unjustified risk) even where harm is quite unlikely, [152] then characterizing such recklessness as "attempted manslaughter" where death does not result would astronomically expand the reach of the criminal law. As Commentary to the Model Penal Code explained, "the scope of the criminal law would be unduly extended if one could be liable for an ***290** attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility." [153]

This argument, perhaps plausible for recklessness, is unsound for acts creating the grave risk of harm produced by acts of wanton disregard. If Bonnie's bomb creates (approximately) a fifty percent chance of death, then extending attempted murder liability to her will not dramatically expand the reach of murder or attempted murder defendants; the numbers of attempted murders committed through such conduct will be no greater than the number of murders. At a certain point the excessive danger created by conduct supports a finding of murder rather than manslaughter. It should likewise justify attempted murder. [154]

4. Intent Is More Dangerous Than Wanton Disregard

Perhaps the most influential justification for the intent requirement is the allegedly heightened danger posed by purposeful actors, as opposed to those who are merely reckless as to the harmful consequence. [155]

***291** [O]ne who intends to harm others and acts upon that intent poses sufficient present danger to warrant subjecting him to [criminal sanction]. . . .

This is not the case with respect to conduct that is merely reckless. In such circumstances it is not the actor's purpose to cause the harm risked. His goals lie in another direction. The danger is rather a charge upon his ends, a price he is willing to pay to achieve them, but not the ends themselves. Conduct that endangers other persons' safety should certainly be made criminal. . . . But such liability should be limited to conduct that risks harm, that is in fact dangerous. [156]

Professor Enker thus agrees that danger should be the determinative factor in imposing liability for uncompleted crimes.

Crimes of homicide, however, may present an exception to the general principle that intentional crimes create more danger than reckless ones. Bonnie creates more danger than April. This contrast is not an unfairly manipulated hypothetical; in many jurisdictions, a grave danger to human life, perhaps to multiple victims, is a necessary element of wanton disregard murder. [157] Purposeful conduct might pose such danger, but might not. If danger is the condition that warrants liability, attempt statutes should include it directly, rather than use the imperfect proxy of purpose.

The proxy of purpose was more accurate in the past. When would-be murderers used arrows or bullets fired from a single-shot firearm, purpose was more pertinent in establishing danger; an aimed arrow or bullet was far more dangerous than an unaimed one. But when reckless shooters like Vang can fire more than fifty wall-piercing bullets within seconds, the shooter's lack of purpose no longer ensures the relative safety of individuals within shooting range. Advances in weapons technology have obviated the relative safety formerly enjoyed by reckless assailants' potential victims.

Professor Enker's argument, however, did not rely solely on the greater danger posed by the purposeful offender's initial conduct. Enker contended that danger lies in the “unspent intent, [which] is itself a source of harm independent of his conduct.” [158] Unlike the non-purposeful actor, the purposeful one might modify his act to achieve the desired harm.

***292** When the actor intends the harm of a substantive crime, his apparently harmless conduct may become harmful at any moment. And if due to some mistake on his part or to chance circumstances his conduct is ineffectual toward achieving his goal, he may at any moment discover the facts and adjust his conduct accordingly. [159]

Purposeful shooters are more likely than wanton ones to fire a second shot when their first does not kill or injure. Professor Duff shares Professor Enker's position that purposeful offenders are more dangerous than reckless ones: “someone who is trying to cause harm will do what she reasonably can to increase the chance that the harm will ensue, unlike someone who is merely reckless as to a risk of harm.” [160]

However, the Enker/Duff argument ultimately depends on the chance of harm, i.e. danger. For example, suppose a risk-averse assassin like April positions herself so far from the target as to have only a one percent chance of killing with each bullet. A

purpose to kill, manifested by repeated shots, may aggravate the danger beyond one percent, depending on the number of shots fired. But even if Professors Enker and Duff are correct, and the assassin fires additional shots, they will still pose much less danger collectively than Bonnie's single bomb. “The pivotal question is whether the defendant intended to commit an act likely to result in [harm], not whether he or she intended a specific harm.” [161] It is the danger, not the desire, that defines the crime.

5. Intent Poses More Future Danger Than Wanton Disregard

Professor Enker limited the time frame in which the purposeful assailant could modify his tactics to the attack itself. But a proponent of the purpose element of attempted murder could claim that “unspent intent” also enhances danger through the possibility of future attempts. But both purposeful and wanton offenders evince an “intent.” April intends to kill or injure May, Bonnie intends to blow up the bus. If April is more likely to recommit her attempt, it is less because she is more committed to her end than because she is less likely to cause harm on her first attempt.

The Colorado Supreme Court thus rejected the argument that only purposeful offenders are likely to repeat their criminal attempts. “The probability of future dangerousness, however, is not confined to ***293** actors whose conscious purpose is to . . . achieve the proscribed results. . . . We believe that this danger is equally present when one acts knowingly.” [162] The court cited the Model Penal Code, which explained:

> [T]his extension of liability is warranted because the manifestation of dangerousness is as great--or very nearly as great--as in the case of purposive conduct. In both instances a deliberate choice is made to bring about the consequence forbidden by the criminal laws, and the actor has done all within his power to cause this result to occur. The absence in one instance of any desire for the forbidden result is not, under these circumstances, a sufficient basis for differentiating between the two types of conduct involved. [163]

The knowing actor was therefore sufficiently dangerous to be guilty of an attempt. So too are wanton actors; just as wanton disregard is a functional equivalent of knowledge in establishing malice when the victim dies, so too may it be for establishing an attempted murder when the victim lives.

As illustrated by Professor Simons's taxonomy, [164] the mens rea below the desire-state of purpose is not the belief-state of knowledge (or even wanton disregard), but the desire-state of indifference. It may be that an offender who desires the death of V is more likely to continue his efforts after an act failing to achieve that result than an offender who is merely indifferent to V's fate. But this point obtains only for indifference to a specific victim's fate. The indifference necessary to show implied malice is usually, de facto and sometimes de jure, toward human life generally, not a specific human's life. If so, an indifferent offender may actually manifest more future dangerousness than the purposeful offender. April's respect for human life in general may prompt her to take care that she not endanger bystanders in her attempts to harm May, both by using a method that will not endanger another victim, or by desisting altogether from acting when anyone else is present. Furthermore, the means she uses may inflict only injury, not death, a result that may nevertheless sate April's hatred. Finally, although she strongly desires that harm befall the despised May, she will never target another victim.

None of these points obtain for Bonnie. Her bombing reveals an indifference to human life in the abstract, which arguably reflects more future dangerousness than April's act. Bonnie is willing to endanger ***294** many bystanders, and her means are less likely to result in injury short of death. Perhaps most significantly, if she is willing to kill so many people for mere economic reasons, she is likely to re-offend whenever a profit motive appears. She could destroy another bus or a building if it would enrich her. An individual who does not mind driving 100 miles per hour on crowded streets to return home in time for his favorite television program will likely run late on future occasions and drive recklessly again.

The concept of unspent “intent” (mens rea) may apply to Bonnie as much as to April, as both commit an intentional offense. April intends to kill May and Bonnie intends to blow up a bus. Bonnie may be just as (or more) committed to her goal of

destroying the bus as April is committed to her goal of killing May. Wanton offenders may pose just as much future danger as intentional ones.

C. Incipient Murder

Both Professor Duff and Professor Enker admit the need to suppress conduct that Professor Duff deems "endangerments," which for the analysis below may be defined as conduct that creates a grave risk of death to another person under circumstances evincing a depraved indifference to human life. Both commentators favor proscribing such endangerment as a distinct offense rather than as depraved indifference attempted murder.[165] It may be less important, however, to decide whether depraved indifference endangerment should be punished as a different offense from intent-to-kill attack or merely a different species of it (as premeditated murder and felony murder are two different species of first degree murder), than it is to recognize that the objective danger created by depraved indifference is as worthy of sanction as the subjective mens rea evinced by a purpose to kill. An analysis of California's law of assault reveals the mutual substitutability of danger and purpose.

California law provides alternate ways to prosecute violence toward another. An unconsummated battery may be charged as an attempted battery or an assault, "an incipient or inchoate battery."[166] ***295** The former requires a specific intent to inflict physical force on the victim.[167] Assault, however, occurs when the defendant "intentionally engage[s] in conduct that will likely produce injurious consequences."[168] In contrast to attempted battery, "the prosecution need not prove a specific intent to inflict a particular harm."[169] Attempted battery thus requires express "malice" (on a lesser scale); the offense occurs whenever the harmful result is desired, regardless of likelihood. Assault requires a lesser form of implied malice, in that it occurs whenever the harmful result is likely, regardless of desire.

As the California Supreme Court explained, assault has traditionally been characterized as an "attempted battery," although its relation to a completed battery differs from most attempt crimes in that no specific intent to achieve the result (of battery) is necessary.[170] Ordinarily, an act is sufficiently remote from the actual offense that it ought not constitute an "attempt" absent some specific intent. "[A] person could not be convicted of attempted rape for grabbing a woman and throwing her to the ground unless the evidence further established a specific purpose to force an act of sexual intercourse on the victim."[171] This specific purpose is necessary for attempted rape liability because without it, the offender will not penetrate the victim. Further intentional conduct is necessary for the crime's completion. The connection between assault and battery, however, is much closer. "[O]nce the violent-injury-producing course of conduct begins, untoward consequences will naturally and proximately follow."[172] No further conduct by the offender is needed to complete the crime.[173]

If an incipient battery occurs when an offender creates the likelihood of a battery (regardless of his specific purpose), then an incipient murder may likewise occur when the offender creates the likelihood of a murder, regardless of purpose. In contrast to the hypothetical rapist described above, neither the incipient batterer nor murderer need do anything further to complete the crime. Once an offender shoots a dart at his victim, thereby committing an assault ("incipient battery"), the act will be a battery (without any further conduct by the offender) once the dart hits the victim. The same logic connects an "incipient murder" to a murder. If the offender shoots a ***296** poisoned dart at the victim, it is incipient murder; once it hits and kills the victim, it is murder.

The law recognizes "incipient battery" as a proper analogue of attempted battery due to the objective danger created: "'The gravamen of the crime [of aggravated assault] is the likelihood that the force applied or attempted to be applied will result in great bodily injury.'"[174] This likelihood, for which there is no similar "incipient rape," alone suffices to constitute the offense because "the law seeks to prevent such harm irrespective of any actual purpose to cause it."[175] Accordingly, "[i]f one commits an act that by its nature will likely result in physical force on another, the particular intention of committing a battery is thereby

subsumed." [176] If the harm in this doctrine is not mere "physical force" but "death or great bodily injury," identical logic supports a conviction for "incipient murder."

D. Danger or Purpose?

When a homicide victim dies, many jurisdictions consider the offense to be murder, regardless of whether the perpetrator acted with express or implied malice. Either the subjective intent to kill or the objective creation of a grave danger (combined with a subjective awareness) suffices for liability. Several authorities find the same equation should hold when the homicidal attack fortuitously fails to kill.

The Model Penal Code attaches attempt liability to any perpetrator who desires or believes his attack will kill. [177] This position follows the common law position that knowledge is not the necessary belief-state for liability; a "belief" or expectation is sufficient. Colorado law similarly observes the intent to commit an act that actually creates grave danger reflects a comparable culpability as the intent to kill. [178] The objective danger of the former mental state compensates for its lesser subjective intent. Florida law has most precisely corrected the traditional position, articulated by Clarkson and Keating, that blame plus harm equals liability. [179] The blameworthiness of depraved indifference is no less than that of an intent to kill, and the lesser harm in attempted murder cases reduces the level of liability, so blame (the requisite mens rea) remains constant.

***297** Both Professors Enker and Duff have worked hard to rationalize the majority rule, which permits convictions for murder but not attempted murder upon a showing of wanton disregard. Much of Duff's analysis depends on the etymological argument: attacks (express malice) are essentially harmful, whereas endangerments (implied malice) are only potentially harmful. But this ultimately depends on the notion that a purpose to kill is per se harmful (regardless of whether there is any substantial objective danger) whereas a grave danger to human life (without purpose) is not. Ultimately, he proves his thesis by restating it.

Professor Enker comes closest to justifying the rule, because he links the element of purpose to the effect of danger. He notes that purposeful acts are generally more harmful than reckless ones. Although this was largely true in centuries past, it is less so today, when firearms and explosives do not require careful aim (a concomitant of purpose) to inflict extensive harm. Moreover, an offender who intends to commit an act he knows is dangerous may be as likely to repeat the act as an offender who intends to kill. Professor Enker also asserts the offender who acts with purpose is more likely to re-attempt the offense than an offender who acts with only indifference. Empirically, his claim is likely correct in cases where the offender's indifference is to a specific victim. But where an offender acts with indifference to human life generally, an element of many depraved indifference statutes, there might not be a significant disparity between purposeful and indifferent offenders regarding the likelihood of recidivism.

Professor Enker persuasively shows that purposeful actors are generally more dangerous than indifferent ones. But it is not specific intent itself but the danger it produces that supports attempted murder liability. Not all indifferent attackers should be liable for attempted murder, as most do not create a grave danger to human life. But those offenders who do create such danger deserve classification with purposeful actors as they do in cases of completed murder.

Conclusion

There are three determinants of penal liability: culpability, danger, and harm. These factors combine through an equation, by which a greater degree of one factor increases overall liability when the others are held constant. The easiest factor to measure is usually harm; the law can easily distinguish a double homicide from a single homicide, or a completed murder from an attempted one. The respective ***298** roles of culpability and danger have been more ambiguous, but the recent trend in the law has been to enhance the relative weight of the danger determinant.

The functional equivalence of culpability and danger has long shaped murder law, as either express or implied malice suffices to support a murder charge. [180] In recent years, courts have begun to apply this principle to the doctrine of transferred intent. So long as a defendant intends to kill a victim, she may be liable for murder as to any additional, unintended victims as well. Regardless of her subjective desires, courts have constructively replicated her malice due to the danger and harm her conduct objectively produced. [181] Furthermore, danger alone, without any tangible harm, may support double liability (murder and attempted murder) when an offender seeks to kill one victim but kills another. [182] Due to the specific intent requirement of attempted murder, this multiple liability does not attach when the intended victim is killed. [183] A reevaluation of this frequently applied and rarely justified rule is the next logical step in recognizing the effect of danger on penal liability.

As Oliver Wendell Holmes observed more than a century ago: "Acts should be judged by their tendency under the known circumstances, not by the actual intent which accompanies them." [184] The significance of objective danger, which establishes malice when the victim dies, should matter no less when the victim fortuitously survives.

> It may be true that in the region of attempts, as elsewhere, the law began with cases of actual intent, as those cases are the most obvious ones. But it cannot stop with them, unless it attaches more importance to the etymological meaning of the word attempt than to the general principles of punishment. [185]

The majority rule distorts these general principles, which recognize express and implied malice as equal bases for malice. The hypotheticals of Apprehensive April, who acts with express but not implied malice, and Busbomber Bonnie, who acts with implied but not express malice, show that in cases where the victim survives, implied malice may be an even stronger basis for attempted murder liability. Careful scrutiny of this question will likely prompt more ***299** jurisdictions to follow Florida and Colorado in suppressing danger as well as desires.

The purposeful offender may be worse subjectively than the depraved one: "In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed . . . and the reckless taking of life . . . ." [186] But while subjective intent may have the first word on penal liability, it cannot have the last. "[B]ut human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimination as to the moral qualities of individual conduct." [187] If the law is to fulfill its mission of maintaining security and order, it cannot authorize a conviction for attempted murder for April but an acquittal for Bonnie.

Footnotes

a1 Judicial Attorney, California Supreme Court, Chambers of Justice Janice R. Brown; the author participated in the Supreme Court decisions of People v. Ochoa, 28 P.3d 78 (Cal. 2001) and People v. Bland, 48 P.3d 1107 (Cal. 2002). The author wishes to thank Sheila Tuller Keiter, Blair Hoffman, and Professor Arnold Enker.

1 See Elizabeth Harris, Recent Developments, 56 Md. L. Rev. 744, 760 (1997); see also Douglas N. Husak, Transferred Intent, 10 Notre Dame J.L. Ethics & Pub. Pol'y 65, 92 (1996).

2 See generally Arnold H. Loewy, Culpability, Dangerousness and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated, 66 N.C. L. Rev. 283 (1988).

3 This article uses these terms interchangeably. Implied malice will be used as a contrast to express malice (intent to kill), but for the most part, the noun "disregard" will be preferred over "indifference," which may improperly suggest a requirement of complete neutrality regarding the victim's survival.

4 See Arnold Enker, Mens Rea and Criminal Attempt, 4 Am. B. Found. Res. J. 845, 854-55 (1977).

5 People v. Vang, 104 Cal. Rptr. 2d 704, 710 (Ct. App. 2001).

6 Thomas Hobbes, Leviathan 228 (C.H. Wilson & R.B. McCallum eds., Oxford 1971) (1660).

7 Jeremy J. Bentham, An Introduction to the Principles of Morals and Legislation 168 (H. Burns & H.L.A. Hart eds., 1970).

8 Moses Maimonides, The Guide for the Perplexed 345 (M. Friedlander trans., 2d ed. 1936).

9 See Mitchell Keiter, Just Say No Excuse: The Rise and Fall of the Intoxication Defense, 87 J. Crim. L. & Criminology 482, 505-06 (1997).

10 Compare Cal. Penal Code § 193 (West 1999 & Supp. 2003) with § 243(d) (West 1999).

11 See People v. Mansfield, 245 Cal. Rptr. 800, 802-03 (Ct. App. 1988).

12 See People v. Clark, 181 Cal. Rptr. 682, 688 (Ct. App. 1982).

13 See Cal. Penal Code § 245(a) (West 1999).

14 In assessing the doctrine of diminished responsibility due to mental or emotional impairment, the Model Penal Code implicitly acknowledged the sliding scale of culpability and danger: "[T]he factors that call for mitigation [due to impaired cognition/volition] are the very aspects of an individual's personality that make us most fearful of his future conduct." Model Penal Code § 210.3 cmt. at 71 (1980); cf. Burger v. Kemp, 483 U.S. 776, 794 (1987).

15 Cal. Penal Code § 190 (West Supp. 2003).

16 Id. § 664(a); see People v. Bright, 909 P.2d 1354, 1360 (Cal. 1996).

17 See Cal. Penal Code § 209(a).

18 Id. California likewise imposes LWOP for an attempt to derail a train, which poses extraordinary danger, even when no one is injured. Id. § 218.

19 Id. § 189.

20 See People v. Catlin, 26 P.3d 357, 402 (Cal. 2001).

21 People v. Thompson, 29 Cal. Rptr. 2d 847, 851-52 (Ct. App. 1994). An additional reason why the homicidal means of poison, explosives, or drive-by shootings are so dangerous is that they enable the murderer to kill from a distance. This reduces the likelihood the murderer will face resistance, be observed, apprehended, or connected through blood or other physical evidence to the crime.

22 Specifically, the Code states:
A person acts purposely [with respect to the harmful result if] it is his conscious object to ... cause such a result ....
A person acts knowingly [with respect to the harmful result if] he is aware that it is practically certain that his conduct will cause the result ....
A person acts recklessly [with respect to the harmful result] when he consciously disregards a substantial and unjustifiable risk that the [harm] will result from his conduct ....
A person acts negligently [with respect to the harmful result] when he should be aware of a substantial and unjustifiable risk that the [harm] ... will result from his conduct ....
Model Penal Code § 2.02 (1985).

23 See Kenneth Simons, Rethinking Mental States, 72 B.U. L. Rev. 463, 476-82 (1992).

24 See id. at 467, 477.

25 See id. at 476. One might characterize these belief states as reflecting a subjective danger, perceived by the actor, which contrasts with the objective danger that actually exists. For example, a reckless actor may correctly perceive his act unjustifiably creates a five percent risk of death. A negligent one, however, may perceive no risk, although it actually exceeds twenty percent.

26 The Model Penal Code would not find her negligent unless she should have been aware of a "substantial and unjustifiable risk." The minimal risk presented by her conduct might not satisfy this standard. Model Penal Code § 2.02.

27 See, e.g., People v. Nieto-Benitez, 840 P.2d 969, 976 (Cal. 1992) ("[A]n act, the natural consequences of which are dangerous to life ....").

28 See, e.g., People v. Watson, 637 P.2d 279, 283 (Cal. 1981) "[A] finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved.").

29 See, e.g., Ex parte Washington, 448 So. 2d 404, 408 (Ala. 1984).

30 See id.
[R]eckless murder could be considered an included offense of intentional murder ... if it differed from [intentional murder] only because it required a lesser kind of culpability ... [but reckless murder] requires a showing that the defendant's conduct was directed at human life in general as opposed to a particular individual. This additional difference between ... intentional murder, and universal malice murder precludes the latter from being an included offense, since it can be established only by a showing of facts not required [for] ... intentional murder .... Id.

31 Wash. Rev. Code Ann. §§ 9A.32.030(1)(b), 9A.32.050(1)(a) (West 2000).

32 Tenn. Code Ann. § 39-13-210(a)(1) (1997).

33 Id. § 39-13-202(a)(3).

34 Mass. Ann. Laws ch. 265, §§ 1, 2, 13 (Law. Co-op. 2002); see also id. at ch. 266, §§ 101, 102B.

35 Tison v. Arizona, 481 U.S. 137, 157-58 (1987).

36 David Crump & Susan Waite Crump, In Defense of the Felony Murder Doctrine, 8 Harv. J.L. & Pub. Pol'y 359, 366 n.31 (1985).

37 Adam Walinsky, The Crisis of Public Order, Atlantic Monthly, July 1995, at 39, 46.

38 See People v. Bland, 48 P.3d 1107, 1111 n.1 (Cal. 2002). The doctrine actually involves transferred mens rea, but convention dictates retaining the term.

39 See William L. Prosser, Transferred Intent, 45 Tex. L. Rev. 650, 652 (1967). The doctrine apparently dates back to the 1553 case of Regina v. Salisbury, 75 Eng. Rep. 158 (1553).

40 75 Eng. Rep. 706 (1576).

41 Id. at 707.

42 Id. at 708.

43 Id.

44 208 Cal. Rptr. 635 (Ct. App. 1984), disapproved in People v. Bland, 48 P.3d 1107, 1115 (Cal. 2002).

45 Id. at 637.

46 Id. at 639.

47 See Joshua Dressler, Understanding Criminal Law 123 (2001).

48 Husak, supra note 1, at 94.

49 Id.

50 Id. He also contends the harm is greater, even where the number of victims is the same. This assertion apparently stems from the principle that intentional acts inflict a greater harm than inadvertent ones: "Even a dog distinguishes between being stumbled over

and being kicked." Oliver Wendell Holmes Jr., The Common Law 3 (1881). It is not evident that the principle applies when a victim dies, however. Furthermore, Mrs. Birreuta was not "stumbled over" but "kicked"; she was victimized by an intentional act, albeit one aimed at a different target.

Professor Anthony Dillof, an even more vigorous opponent of the transferred intent doctrine, denies that the killing of an unintended victim "wrong[s]" that victim at all. Considering the standard case like Saunders, he argues "because A in harming C did not wrong C, neither a corrective [tort] nor a retributive response is triggered by the harm to C. The harm becomes legally irrelevant. Where there is no underlying wrongdoing to respond to, tort and criminal law must equally stay their hands ...." Anthony M. Dillof, Transferred Intent: An Inquiry Into the Nature of Criminal Culpability, 1 Buff. Crim. L. Rev. 501, 535 (1997-1998).

51 569 A.2d 1314, 1316 (N.J. 1990).

52 Id. at 1316, 1325.

53 Id. at 1325. The court thus rejected Worlock's request to reduce his liability for the unintended victim from murder to manslaughter on the grounds that "he [subsequently] pursued and killed [the intended victim]." Id.

54 See People v. Ochoa, 28 P.3d 78, 114 (Cal. 2001) (noting that shooting a driver endangers other drivers and pedestrians).

55 See United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980); see also State v. Hinton, 630 A.2d 593 (Conn. 1993).

56 636 F.2d 621.

57 Id. at 629. Michael Moffitt, sitting in the rear, survived. Id. at 677.

58 See id. at 674-77.

59 630 A.2d 593.

60 See id. at 596.

61 Id. at 598 (citing Conn. Gen. Stat. § 53a-54a (2003)).

62 In some jurisdictions, however, wanton disregard killings constitute a lesser grade of murder than intentional killings. Okla. Stat. tit. 21, §701.7 (2003) (intentional murder is first degree); Okla. Stat. tit. 21, § 701.8 ("depraved mind" murder is second degree).

63 Nearly all jurisdictions require an awareness of the potentially fatal consequence as a prerequisite to murder liability. See, e.g., People v. Watson, 637 P.2d 279, 283 (Cal. 1981) (finding that implied malice requires that the defendant actually appreciate the risk involved).

64 H.L.A. Hart, Punishment and Responsibility 152 (1968).

65 See, e.g., State v. Jones, 896 P.2d 1077 (Kan. 1995); Millen v. State, 988 S.W.2d 164 (Tenn. 1999).

66 Felonies like train-wrecking or arson may endanger more people, and thus, depending on how one determines culpability, such offenders may be even more culpable than those who act carefully to kill only one person.

67 See People v. Hansen, 885 P.2d 1022, 1027 (Cal. 1994).

68 State v. Worlock, 569 A.2d 1314, 1325 (N.J. 1990).

69 See Holmes, supra note 50, at 3.

70 People v. Bland, 48 P.3d 1107, 1113 (Cal. 2002). "When one intends to kill and does so, the killing is hardly an accident, even if the specific victim or victims are unintended."

71 Id. at 1115.

72 Dillof, supra note 50, at 506.

73 Id.

74 927 P.2d 288 (Cal. 1996).

75 See id. at 292. Two other common law jurisdictions have also upheld intentional murder liability for the death of the unintended victim. See Ruffin v. United States, 642 A.2d 1288 (D.C. 1994); see also Poe v. State, 671 A.2d 501 (Md. 1996).

76 Scott, 927 P.2d at 292.

77 671 A.2d 501.

78 Id. at 502.

79 Harris, supra note 1, at 758.

80 See discussion supra Part II.A.

81 In re Tameka C., 990 P.2d 603, 608 (2000).

82 Some states invoke transferred intent to support attempted murder liability, but merely to impose liability as to the unintended (but injured) victim instead of the intended one. See, e.g., People v. Burrage, 645 N.E.2d 455, 462 (Ill. App. Ct. 1994).

83 The analysis is the same regardless of whether the intended victim dies (see discussion infra Part II.D.), because no one disputes the propriety of murder liability for that victim. The question of whether the offender should be liable for the unintended victim's attempted murder is thus the same regardless of whether there is murder or attempted murder liability for the intended victim.

84 For example, in the widely cited case of State v. Thomas, 53 So. 868 (La. 1910), the Louisiana Supreme Court affirmed two counts of violating a statute that applied to "'[w]hoever shall shoot, stab, cut, strike, or thrust any person with a dangerous weapon with intent to commit murder ....'" Id. at 869. The defendant had fired a gun at Washington but hit both Washington and unintended victim Meyers. Id. In another case where the defendant fired at an intended victim but also hit an unintended victim, the South Carolina Supreme Court affirmed two convictions of assault with intent to kill: "A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim." State v. Fennell, 531 S.E.2d 512, 517 (S.C. 2000).

85 Ford v. State, 625 A.2d 984, 997-98 (Md. 1993).

86 Id. at 999.

87 Id. at 1000.

88 See State v. Rodriguez-Gonzales, 790 P.2d 287, 289 (Ariz. Ct. App. 1990); see also Ochoa v. State, 981 P.2d 1201, 1205 (Nev. 1999).

89 Rodriguez-Gonzales, 790 P.2d at 288 (quoting Ariz. Rev. Stat. § 13-203(B)).

90 Of course, this enhanced liability could also result from a conviction for aggravated battery for the unintended victim's injury.

91 The Arizona statute is also ambiguous regarding its application to cases where the disparate result is conjunctive: i.e., both the victim's identity and the extent of the harm vary from that expected. In fact, commentary to the Model Penal Code (on the attempts section) rejects replicating intent for attempted murder in cases like Rodriguez-Gonzales. Model Penal Code § 5.01 (Tentative Draft No. 10, 1960).

92 699 P.2d 626 (N.M. Ct. App. 1985).

93 Id. at 630.

94 Id. at 635.

95 Id. at 636. The court's statement was ambiguous; the next sentence authorized attempted murder liability on behalf of "each individual who ingested the poison," suggesting actual consumption was necessary. However, the court then cited another poison case, People v. Gaither, 343 P.2d 799 (Cal. Ct. App. 1959), which upheld seven convictions for attempted murder even though only four of the

seven household members consumed the poison. In Gaither, however, the evidence supported a finding that the defendant intended to kill all seven victims. Gaither, 343 P.2d at 805.

96 See Short v. State, 980 P.2d 1081, 1098-99 (Okla. Crim. App. 1999).

97 Id.

98 48 P.3d 1107 (Cal. 2002).

99 Id. at 1117.

100 Id. As Part III, infra, will show, this is not the Model Penal Code rule, and some states have declined to adopt an intent to kill element for attempted murder liability.

101 343 P.2d 799 (Cal. Ct. App. 1959).

102 See People v. Scott, 927 P.2d 288 (Cal. 1996); Poe v. State, 671 A.2d 501 (Md. 1996).

103 See Bland, 48 P.3d 1107, 1119; see also Harvey v. State, 681 A.2d 628, 641 (Md. Ct. Spec. App. 1996).

104 Harris, supra note 1, at 755.

105 Bland, 48 P.3d at 1119 (quoting the Attorney General's argument).

106 Scott, 927 P.2d at 292.

107 Bland, 48 P.3d at 1119.

108 The disparity is due to the common law rule that attempted murder requires an intent to kill. Thus Scott was guilty of attempting to kill his intended victim but Bland was not guilty of attempting to kill his unintended victim. Part III, infra, will critically evaluate this common law position.

109 See Ford v. State, 625 A.2d 984, 999-1000 (Md. 1993) (justifying the decision in State v. Wilson, 546 A.2d 1041 (Md. 1988)).

110 Id. at 1000.

111 Id.

112 Id. at 1000-01.

113 See People v. Bland, 48 P.3d at 1107, 1118 (Cal. 2002) (quoting Ford with approval).

114 104 Cal. Rptr. 2d 704 (Ct. App. 2001).

115 Id. at 706-07, 710.

116 Id. at 710-11.

117 Otherwise, the statement has little meaning, as there would be no need for the court to authorize liability as to those victims who the defendants perceived but did not see.

118 See supra Part II.A.

119 See supra Part II.B.

120 See Shellman v. State, 620 So. 2d 1010 (Fla. Dist. Ct. App. 1993). The defendant shot at an occupied vehicle, killing his intended victim. Two other individuals in the car, whom Shellman apparently did not intend to kill, survived the attack. Id. at 1012.

121 Id.

122 See Braxton v. United States, 500 U.S. 344, 351 n.* (1991).

123 See Sandstrom v. Montana, 442 U.S. 510, 513, 523 (1979) (holding that the jury might have impermissibly thought the presumption of intent was conclusive, thus shifting the burden of persuasion and relieving the State from having to prove every element beyond a reasonable doubt).

124 999 P.2d 666 (Cal. 2000).

125 Id. at 671.

126 The Ford and Bland courts offer a practical constraint on imposing attempted murder liability on offenders who act with wanton disregard: how to limit liability. If someone shoots a single bullet into a car with five passengers, is he liable for five counts of attempted murder? The easy answer is that he should be liable for at least one count of attempted murder. The question, however, is not limited to wanton disregard cases. What if the shooter intends to kill all five passengers but fires two bullets? Is he liable for five counts of attempted murder or only two?

127 Model Penal Code § 5.01(1) (1985).

128 Id. at cmt. 303-04.

129 Gentry v. State, 437 So. 2d 1097, 1098 (Fla. 1983). The intent requirement was significant because its existence would have justified instruction regarding the defendant's intoxication, which in Florida is a defense to specific intent crimes (like intentional murder) but not general intent crimes (like wanton disregard murder). See id. at 1099; see also Keiter, supra note 9, at 492-96.

130 437 So. 2d 1097, 1099.

131 Id.

132 657 P.2d 932 (Colo. 1983).

133 Id. at 937 (quoting Colo. Rev. Stat. § 18-3-102(1)(d) (1973)).

134 See id. “A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he intentionally engages in conduct constituting a substantial step toward the commission of the offense.” (Colo. Rev. Stat. § 18-2-101(1)).

135 See id. Arkansas has a hybrid rule that combines extreme indifference with the felony-murder rule. See White v. State, 585 S.W.2d 952, 953 (Ark. 1979). Like Colorado, Arkansas follows the Model Penal Code, finding an attempt is committed when one “purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense ....” Id. (quoting Ark. Stat. Ann. § 41-701(b) (Repl. 1977)). Arkansas considers as first degree murder a killing committed “in the course of and in the furtherance of [a] felony ... under circumstances manifesting extreme indifference to the value of human life.” Id. (quoting Ark. Stat. Ann. § 41-1502(1)(a) (Repl. 1977)).

136 Castro, 657 P.2d 932 at 938.

137 Enker, supra note 4, at 847.

138 Christopher M.V. Clarkson & Heather M. Keating, Criminal Law: Text and Materials 441 (2d ed. 1990).

139 See id. at 440-41.

140 See Simons, supra note 23, at 477.

141 See Wis. Stat. Ann. §§ 940.01(2), 940.02(1), 940.05(1) (West Supp. 2002).

142 See R.A. Duff, Criminal Attempts 364-65 (1996).

143 See id. at 364.

144 Id. at 365.

145 See Enker, supra note 4, at 847.

146 Duff, supra note 142, at 373.

147 Id. at 366.

148 Id. at 370.

149 Id.

150 See id.

151 See id. at 368-69; see also Enker, supra note 4, at 849-50.

152 See Larry Alexander, Insufficient Concern: A Unified Conception of Criminal Culpability, 88 Cal. L. Rev. 931, 933-34 (2000).

153 Model Penal Code § 5.01 cmt. at 304 (1985).

154 One type of conduct that Professor Enker considers reckless but not worthy of attempted homicide liability is dangerous driving. See Enker, supra note 4, at 854 n.28. Sufficiently dangerous driving, however, establishes malice. See People v. Watson, 637 P.2d 279, 282 (Cal. 1981). California Vehicle Code section 2800.2, for example, prohibits flight from a police officer by driving with "a willful or wanton disregard for the safety of persons or property." Cal. Penal Code § 2800.2 (West 2000). The Court of Appeal has interpreted the reference to persons or property as conjunctive: "[t]hat is, the disregard is for everything, whether [persons] or [property]." People v. Sewell, 95 Cal. Rptr. 2d 600, 604 (Ct. App. 2000). This conduct is an inherently dangerous felony such that it would support a second degree felony murder conviction if anyone died. Id.; see also People v. Johnson, 18 Cal. Rptr. 2d 650 (Ct. App. 1993). Yet the punishment is minimal--because the offense occurs almost by definition after the offender has committed another offense, thereby instigating a police pursuit, the offender may receive a concurrent sentence for the flight. Even if he receives a consecutive sentence, under California law this will amount to only an additional one-third of the mid-term of the subordinate offense which in this case would be eight months (one-third of the two year mid-term term of a sixteen month, two year, three year offense). Cal. Penal Code § 1170.1 (West Supp. 2004). Considering the more serious punishment he probably already faces from the underlying crime, flight is a worthwhile gamble for a rationally calculating offender, even though everyone from passengers to officers to innocent bystanders are endangered by the flight. People v. Acevedo, 129 Cal. Rptr. 2d 270 (Ct. App. 2003). Imposing attempted murder liability for such flight might both prevent the danger created by the flight and facilitate the apprehension of serious criminals, which in turn could deter the underlying crimes.

155 See Enker, supra note 4, at 855-56; see also Duff, supra note 142, at 140. It was Professor Enker's arguments that the Colorado Supreme Court addressed in expanding attempt liability to non-purposeful crimes. People v. Krovarz, 697 P.2d 378, 381 (Colo. 1985) (knowledge is sufficient); see also People v. Thomas 729 P.2d 972, 977 (Colo. 1986) (Dobofsky, J., specially concurring) (recklessness is sufficient).

156 Enker, supra note 4, at 856.

157 See, e.g., People v. Nieto-Benitez, 840 P.2d 969, 976 (Cal. 1992); see also Ex parte Washington, 448 So. 2d 404, 408 (Ala. 1984).

158 Enker, supra note 4, at 855.

159 Id.

160 Duff, supra note 142, at 140.

161 People v. Colantuono, 865 P.2d 704, 712 (Cal. 1994).

162 People v. Krovarz, 697 P.2d 378, 381 (Colo. 1985).

163 Id. at 382 (quoting Model Penal Code § 5.01(1)(b), Proposed Official Draft 1962, cmt. at 29-30).

164 See Simons, supra note 23, at 476-77.

165 See Enker, supra note 4, at 865-66. Professor Enker believes a model law could punish truly dangerous conduct almost as severely as (purposeful) attempted murder, whereas Professor Duff emphasizes that the additional harm created by "attacks" warrants greater punishment. See Duff, supra note 142, at 364-66.

166 See Cal. Penal Code §§ 240, 242 (West 1999) (defining an assault as an unlawful attempt to commit a violent act upon someone and a battery as an actual use of force or violence on someone); see also People v. Colantuano, 865 P.2d 704, 710 (Cal. 1994).

167 See Colantuano, 865 P.2d at 710.

168 Id. at 709.

169 Id.

170 See id. at 710.

171 Id. at 710 n.7.

172 Id. at 711.

173 See id.

174 Id. (quoting People v. McCaffrey, 258 P.2d 557 (Cal. Ct. App. 1953)).

175 Id.

176 Id.

177 See supra Part III.A.1.

178 See supra Part III.A.3.

179 See supra Part III.A.2; see also Clarkson & Keating, supra note 138, at 441.

180 See supra Part I.B.

181 See supra Part II.A.

182 See supra Part II.B.

183 See supra Part II.D.

184 Holmes, supra note 50, at 66.

185 Id.

186 People v. Rogers, 18 N.Y. 9, 18 (1858).

187 Id.

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