

The Significance of Transferred Intent

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Abstract The doctrine of transferred intent (or transferred “malice” in England) generally provides that if A attempts to harm B but, because of bad aim, misses and accidentally causes the same harm to befall C, A’s harmful intent vis-à-vis B is transferred to C, thus rendering A guilty of intentionally harming C. Commentators acknowledge the doctrine to be a legal fiction, but they differ regarding whether the fiction produces just results, some believing it does, others believing that A is guilty at most of attempting to harm B rather than intentionally harming C. Commentators who agree that the fiction produces just results nevertheless differ regarding whether the fiction should be retained or whether A’s intent to harm “a” person, in this case, B, is the only intent that signifies for crimes of intentional harm, regardless of whom A eventually harms. Doug Husak sought to achieve reflective equilibrium between intuition and theory regarding bad-aim cases by proposing in 1996 that A be punished for attempting to harm B (rather than for harming C) but sentenced as if he had harmed B. I once believed that Husak was correct. But I now have doubts, in part because Husak, along with others, cannot explain why the strength of people’s intuitions regarding A’s responsibility in bad-aim cases depends upon (1) C’s being a reasonably foreseeable victim, and (2) C’s being harmed by the same threat of force that A initially unleashed against B. I argue that one cannot achieve reflective equilibrium in bad-aim cases without inquiring into why resulting harm matters in criminal law, and that when one does, one discovers that just as people’s intuitions regarding whether intentional harms are proximate depend upon how resulting harms occur, so, too, people’s intuitions regarding whether an actor is guilty of intentional harm depend upon how resulting harm comes about.

Keywords Transferred intent · Transferred malice · Resulting harm · Proximate cause

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