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Examining Intent through the Lens of Complicity

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1. Introduction

Since the formulation of the doctrine of transferred malice in the English Common Law, some four and a half centuries ago, criminal law has grappled with the question of whether intent should be conceptualized as object-specific (i.e., aimed at the targeted person or object) or type-oriented (aimed at any person or at any object, as the case may be).[1] This question is particularly salient when the defendant caused harm to a different object than the one he had in mind, either by accidentally missing the target or as a result of mistaken identification. In such cases, an object-specific conceptualization does not permit conviction for the harm caused, whereas a type-oriented one does, as does the doctrine which transfers the defendant's intent from the intended person or object to the one actually harmed.

The issue involves two levels of abstraction, each of which is intuitively appealing. Assume, for example, that an actor aims to harm Ann, and either by accident or mistake ends up harming Ben. Has the actor realized his intent to harm 'a person' or was his action simply a failed attempt to harm Ann? Anglo-American law favors the former solution and would consequently attach the label of successful consummation to cases in which harm was displaced within objects of the same type. German law treats these cases, at least in scenarios of accidental miss-aim, as attempts. As we shall see, there are no inherently decisive factors. Therefore, arguments for and against each position should address commonly shared intuitions with respect to concrete cases. However, the literature on the subject illustrates that the examination of displaced harm in single-perpetrator scenarios reaches an intuitive deadlock and is unable to guide the jurisprudential discourse of intent.

In this article, I seek to break through this deadlock by embedding instances of accidental miss-aim and mistaken identification into scenarios of collective criminality. Analysis of nine conceptually distinct illustrations that combine multiple

1. For a recent comparative survey of approaches to the topic of transferred malice within Common Law and continental legal systems, see Michael Bohlander, "Transferred Malice and Transferred Defenses: A Critique of the Traditional Doctrine and Arguments for a Change in Paradigm" (2010) 13 New Crim L Rev 555 at 583-607. For a comparative survey of the various approaches in different jurisdictions in the US, see Travis E Robey, "Recent Decisions: The Court of Appeals of Maryland – Criminal Law" (2005) 64 Md L Rev 1098 at 1106-08. There is extensive academic writing in the field, reflecting a variety of approaches, as shown in Section 2 below. Douglas N Husak created a taxonomy of these approaches in his article "Transferred Intent" (1996) 10 Notre Dame JL Ethics & Pub Pol'y 65 [Husak, "Intent"], discussed below. I have also offered a contribution in Shachar Eldar, "The Limits of Transferred Malice" (2012) 32 Oxford J Legal Stud 633 [Eldar, "Malice"], but did not address the combination of transferred malice and offences involving multiple participants, which is the focus of the present article. A review of positions relevant to my present argument appears in Section 2.

participation and displaced harm reveals that, contrary to Anglo-American law, intent is better conceptualized as object-specific. The analysis also supports equal treatment of accidents and mistaken identification.

I begin by supposing that an indirect participant (instigator or perpetrator by means of another) caused the direct perpetrator to mistake the identity of his object or to accidentally miss it and harm a different object instead. Is a change in the object of the offence sufficient to impose liability on the indirect participant for an offence that the direct perpetrator was about to commit in any case, although with respect to a different object? Next, I assume a situation in which the direct perpetrator, because of an error in identification, missing the target, or a deliberate deviation, harms a different object from the one intended by the indirect participant who commissioned the offence. How does the change in the object affect, in each case, the liability of the indirect participant? Finally, I assume that a party to a joint criminal enterprise acts according to a common plan but against a different object than the one intended, again because of an error in identification, a missed target, or a deliberate deviation. Is it appropriate to attribute the injury to the different object to the perpetrator's accomplices? Analyzing these cases may shed some light on the nature of criminal complicity and its boundaries. More importantly for present purposes, however, the conclusion reached advances the debate about various disputed issues in the area of transferred malice and improves our understanding of criminal intent in general.

Case law has been reporting instances that combine *indirect participation and a change in the object of the offence* ever since the 16th century. The *Saunders and Archer*[2] verdict of 1577, which gave rise to the doctrine of transferred malice, already involved such an arrangement. John Saunders planned to assassinate his wife in order to marry his new lover. He revealed this plan to his friend, Alexander Archer, who advised that he poison his wife and supplied him with poison. Saunders poisoned a baked apple which he then presented to his wife. His wife only tasted the apple and gave the rest to the couple's three-year-old daughter. Saunders witnessed his daughter eat the apple but kept silent lest he

2. (1577), 75 ER 706 (QB); 2 Plowd 473 [*Saunders and Archer*]. Some commentators refer to the verdict in the case of *R v Salisbury* (1553), 75 ER 152(QB) 1 Plowd 97, 100 [*Salisbury*] as the original source of the doctrine of transferred malice. See, e.g., William L Prosser, "Transferred Intent" (1967) 45 Tex L Rev 650 at 652; Michael S Moore, *Causation and Responsibility* (Oxford: Oxford University Press, 2009) at 204. In this verdict, the defendants were convicted of homicide when, after planning to murder a Doctor Ellis, they ended up killing the servant who attended to him. The instruction given by the court in this case is too short and narrow to be considered the initial formulation of the doctrine of transferred malice: 'when a man has malice against another, and intends to kill him, and endeavours to put his purpose in execution, and kills one that resists his purpose, it cannot be otherwise construed that by necessity of reason he has malice against all those who would defeat his design, and that he would offer violence to them that would defend the person against whom his malice is directed, rather than desist from his purpose, and therefore if he kills them to whom he had before-hand intended to offer such violence, this cannot be anything else than murder: and so the act declares his intent before, and the malice against the principal begets in himself another malice against those whom he presumes will resist his purpose, which malices are combined one to the other inseparably'. By contrast, the verdict in *Saunders and Archer* lists cases of accidental miss-aim and of mistaken identity. Moreover, it carves out the rule that malice is transferred from the intended object to the one harmed in practice.

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become suspected of attempting to poison his wife. Consequently, the child died; the English court created the doctrine of transferred malice which stands to this day; and Saunders was convicted of murdering the child. Nevertheless, the judges deliberated on whether to apply the doctrine to the secondary participant, Archer. The ruling concerning Archer was long delayed, finally ending in his acquittal.[3] Similar scenarios are discussed below in Sections 3 and 4.

The common law courts have also dealt with cases that combine *joint perpetration with a change in the object of the offence*, from the old *Mansell and Herbert's case*[4] to the recent controversial ruling in the matter of *R. v. Gnango*.[5] The former case involved a group robbery: while the robbers were breaking into the house, one of them threw a rock at someone present,[6] missed and accidentally killed a woman who walked out of the house. The court held that because the woman appeared to be protecting the property which was being robbed, all the parties to the robbery were guilty of her murder.[7] By contrast, the *Gnango* case is not one of common joint perpetration, although some of the judges sitting in this case classified it as such. The defendant, a minor by the name of Armel Gnango, was involved in a shootout in a South London parking lot with another youth who was referred to as 'Bandana Man'. One of the bullets missed its target, killing a care worker who happened to pass by the scene. Ballistic testing revealed that the bullet was not from Gnango's gun. Although the court found that Bandana Man fired the fatal shot, the court convicted Gnango for the murder of the care worker, reversing his acquittal.[8] Section 5 of this article analyses permutations of these fact scenarios.

2. Change in the Object of the Offence

Unintended change of the object of the offence can occur as a result of accident (missing the target and harming an object other than the one intended) or by mistake (injuring an object erroneously identified as the one intended). The doctrine of transferred malice was designed to bridge the gap that exists in both instances[9] between the mental element and the physical occurrence, that is, between the

3. Edmund Plowden reported that Lord James Dyer, who headed the panel that handed down the verdict, told him that the publication of the acquittal was delayed to allow Archer to appeal for an amnesty, thereby preventing the ruling from becoming a precedent. See the comments appended to the *Saunders and Archer* ruling, *ibid* at 709. The consequences of the acquittal are discussed in Section 4 below.

4. (1555), 73 ER 279; 2 Dy 128b. If we seek an earlier source than *Saunders and Archer*, *supra* note 2 to the doctrine of transferred malice, this case seems more appropriate than *Salisbury*, *supra* note 2, although a clear rule, such as the one that appears in *Saunders and Archer*, is not present in this case either.

5. [2011] UKSC 59, [2012] 1 AC 827 [*Gnango*].

6. It is possible that it was one of the robbers. The verdict omits this detail.

7. The minority opinion acquitted the participants because it was believed that the robbers had no evil intentions toward the woman.

8. The court recognized that the case combines the issues of co-participation and of transferred malice (*Gnango, supra* note 5 at para 2).

9. The ruling that established the doctrine, *Saunders and Archer*, *supra* note 2, explicitly applies it both to cases in which the operation misses its target and to cases of mistaken identity.

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object intended and the object that was harmed. The doctrine fictitiously[10] shifts the perpetrator's *mens rea* from the one object to the other and holds the perpetrator accountable as though he had consummated the offence toward the object which he actually harmed. Thus, a defendant who intends to kill person A and in the process kills person B instead is convicted of intentionally killing person B: the mental element directed at A is attached to the physical harm caused to B to form a consummated offence towards B. It is customary to make the transfer of malice between objects contingent upon some type of relationship between the perpetrator and the object actually harmed, for example, objective foreseeability as to the possibility of injuring that object (which is also required for conviction as an element of causation). Additionally, the doctrine only applies to objects of the same type, and therefore a defendant who intended to harm a person and instead harmed an inanimate object (or *vice versa*) is not convicted of a consummated offence but of an attempt aimed at the intended object (perhaps coupled with a consummated offence towards the object that was harmed in practice, based on the mental element that was in effect with regard to this object).

The tension between the intuitive appeal of transferred malice and the common legal requirement for a rigorous concurrence between the mental and physical elements of the offence[11] resulted in a range of approaches to the doctrine, expressing both support and reservation. The doctrine is supported by Anglo-American law and appears both in the Draft Criminal Code Bill for England and Wales[12] and in the American Model Penal Code.[13] The reservations are mostly academic (although they have gained positive influence outside Anglo-American countries) and can be classified in several ways. One theoretical division is between the abolitionists and the purists.[14] Abolitionists hold that the doctrine of transferred malice is redundant because it applies to cases in which the definition of the offence does not require a specific object to be harmed. Offences against the person and offences concerning property alike are not typically founded on intention to specifically harm a particular object but on the abstraction of a general intention to harm an object type, such as 'human' or 'property'. The defendant meets this general requirement if both the intended object and the one actually harmed are of the same category referred to by the offence.[15] By contrast, *purists*

10. On the fictitious nature of the doctrine, see Glanville Williams, *Criminal Law*: *The General Part* 2d ed (London: Stevens & Sons, 1961) at 126; Wayne R LaFave & Austin W Scott, *Substantive Criminal Law* (St Paul: West, 1986) at 399; Anthony M Dillof, "Transferred Intent: An Inquiry into the Nature of Criminal Culpability" (1998) 1 Buff Crim L Rev 501 at 506.

11. See Barry Mitchell, "In Defence of a Principle of Correspondence" (1999) Crim L Rev 195.

12. The Law Commission, A Criminal Code for England and Wales, 1988-9, H.C. 299 at 53 (§ 24).

13. The American Law Institute, *Model Penal Code,* 1962, s 2.03(2)(a) [*MPC*].

14. Based on the taxonomy devised by Husak, "Intent", *supra* note 1 at 69-75.

15. This position is reflected, among other sources, in the following literature: Hyman Gross, *A Theory of Criminal Justice* (Oxford: Oxford University Press, 1979) at 102; Prosser*, supra* note 2 at 653; Kyron Huigens, "Symposium: The Nature, Structure and Function of Heat of Passion Provocation as a Criminal Defense" (2009) 43 U Mich JL Ref 1 at 10-11; AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 5th ed (Oxford: Hart, 2013) at 165; Richard Card, *Card, Cross and Jones: Criminal Law*, 20th ed (Oxford: Oxford University Press, 2012) at 88. The abolitionist position has also been stated within the specific context of events involving multiple perpetrators: CMV Clarkson, "Complicity, Powell and Manslaughter" (1998) Crim L Rev 556 at 559 ('The accessory is a party to a shared violent

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believe that the reference to a general object type in the wording of offences simply means that all objects of that type equally receive the protection of the law, but the intention in every particular case still needs to be object-specific and examined with respect to the individual target of the offender (provided that the offender's intention is indeed specific, and not generally directed at any object of a given type, as in the case of an indiscriminate bomber). Therefore, the purist does not find the doctrine of transferred malice redundant, but wrong. Instead of transferring the offender's malice from one object to another in order to form a consummated offence against the object that was actually harmed, purism proposes a charge of attempt on the intended object, possibly coupled with a consummated offence against the actual object, depending on the defendant's mental state in its respect.[16]

The issue does not lend itself to unequivocal resolution,[17] partly because both positions revolve around a more fundamental controversy regarding the manner in which *mens rea* is realized: as a *general intent*[18] toward the type of object that comes to harm ('a person') as a symbol of a social value (according to the abolitionists), or as an *object-specific intent* attached to a particular individuum (according to the purists).[19] The controversy has to do with the level of abstraction concerning the object of *mens rea*, and questions of this type are not subject to sharp discrimination.[20] The choice in the level of abstraction used in legal

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venture involving foresight of the death of a human being. All human life is of equal value. Why should the identity of the victim make any difference?'); KJM Smith, *A Modern Treatise on the Law of Complicity* (Oxford: Oxford University Press, 1991) at 207: ('[t]he issue should *not* be "did A [the accessory] desire or consent to *that* murder?" but "did A desire or consent to participation in *an* offence of murder?"').

16. See Andrew Ashworth, "The Elasticity of Mens Rea" in CFH Tapper, ed, *Crime, Proof and Punishment*: *Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) at 45, 57-58 [Ashworth, "Mens Rea"]; Heidi M Hurd & Michael S Moore, "Negligence in the Air" (2002) 3 Theor Inq L 333 at 390.

17. Thus, Husak was reserved in assessing the possibility of deciding between the abolitionist and purist positions: there are no decisive arguments for either position, and 'all that remains to be said is that reasonable minds may differ in their judgments'. See Husak, "Intent", *supra* note 1 at 71, and similarly Peter Westen, "The Significance of Transferred Intent" (2013) 7 Crim L & Phil 321. Moreover, even one who adopts either the abolitionist or the purist position is likely to recognize the need for the doctrine of transferred malice in some circumstances, especially when transferring malice between offences, and when the possibility of attempt liability is not available. For a discussion and illustration of the categories in which the doctrine of transferred malice is likely to survive the assaults of abolitionism and of purism, see Eldar, "Malice", *supra* note 1 at 640-49.

18. Occasionally referred to as impersonal or replicated. See Jeremy Horder, "Transferred Malice and the Remoteness of Unexpected Outcomes from Intentions" (2006) Crim L Rev 383; Mitchell Keiter, "With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law" (2004) 38 USF L Rev 261. Some authors use the type-oriented view of intent to justify the doctrine of transferred malice. See, e.g., Daniel J Curry, "Poe v. State: The Court of Appeals of Maryland Limits the Applicability of the Doctrine of Transferred Intent" (1997) 27 U Balt L Rev 167 at 169-70.

19. For a survey of attitudes toward the level of abstraction of the object of the intent, see Kimberly Kessler Ferzan, "Beyond Intention" (2008) 29 Cardozo L Rev 1147. Note that the purist does not attach an object-specific intent to someone who initially intended to cause general harm without focusing on a given object.

20. The conceptualization of *mens rea* raises two contradictory intuitions. For a survey of issues that reach a similar dead end, see Christopher Boorse & Roy A Sorensen, "Ducking Harm" (1988) 85 J Phil 115 at 133. It is not surprising that the conceptualization of *mens rea* is

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discourse is best grounded in the intuitive agreement between discussants about the fit between the chosen level of abstraction and the correct disposal of the cases that form the object of the debate.[21] Therefore, arguments for and against various levels of abstraction—abolitionist vs. purist, general vs. concrete—must address our intuitions in the handling of concrete cases that, at present, fall within the ambit of the doctrine of transferred intent[22] and show consistency with respect to agreed upon legal principles.

Another conceptual dispute takes place between the *consistent* and the *divided* approaches to the issue. The segmentation occurs between abolitionists and purists who maintain their positions consistently with regard to cases of both mistaken identification and accidental miss-aim, and those who reserve their abolitionist or purist positions only to cases of miss-aim. The divided approach has practical consequences only within the framework of the purist position. Adherents of the type-oriented intent approach and the abolitionist position do not take into consideration the identity of the harmed object and thus pay no heed to its transposition, whether it is as a result of mistaken identification or missed target. By contrast, the dividing purist supports liability for attempt vis-à-vis the intended object in cases of missed target and liability for a consummated act with respect to the harmed object in cases of mistaken identification. According to this approach, a perpetrator who mistakes the identity of the harmed object still acts with *mens rea* to hurt the object before his eyes, that is, the object that is harmed. His belief that his action toward the object before him will harm the intended object is merely his motivation for that act, which is not necessary for assessing the requisite *mens rea* standard for criminal liability. By contrast, in cases of missed target the object that is physically aimed at and the object that is actually harmed are different and should not be united. Divided-Purism is the dominant position under German law.[23] In a recent article, I argued

included in this group, as it is based on another question notorious for leading to a similar dead end, that of moral luck. The change in object as a result of missing the target or mistaking the identity of the victim touches upon the question whether it is appropriate to acknowledge the ill luck that caused the intended object not to be harmed and another object to be harmed. For the connection between the doctrine of transferred malice and moral luck, see Kimberly D Kessler, "The Role of Luck in the Criminal Law" (1994) 142 U Pa L Rev 2183 at 2207. Ashworth also linked these topics and based his argument for the purist position on his refusal to acknowledge fortuity in the realization of the act. According to him, the advantage of the purist position is based on the fact that it prevents acknowledging the fortuitous nature of the harm caused to the object in practice. See Andrew J Ashworth, "Transferred Malice and Punishment for Unforeseen Consequences" in PR Glazebook, ed, *Reshaping the Criminal Law*: *Essays in Honour of Glenville Williams* (London: Stevens & Sons, 1978) at 77, 89 [Ashworth, "Transferred Malice"]. This argument is not convincing because the purist position acknowledges the fortuity in missing the intended target. We must reluctantly face our inability to reach a clear decision between the levels of conceptualization of intent.

21. For a description of purism as essentially intuitive, see Husak, "Intent", *supra* note 1 at 66-67, 69-70.

22. This is also Ashworth's opinion in "Transferred Malice": '[n]either proposition [framing intentions in general or in respect to the object actually harmed] is deducible from the general principles of *mens rea*: it depends upon how one chooses to define those principles, and that choice will be influenced by one's view about the solution of the particular problem presented by the transferred malice situation'. *Supra* note 20 at 91.

23. See Michael Bohlander, *Principles of German Criminal Law* (Oxford: Hart, 2009) at 74. Support for divided purism can also be found in the work of Anglo-American commentators;

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against the divided approach and the rationale on which it is based.[24] I pointed out that similarly to the distinction between the abolitionist and the purist positions, the different attitudes toward mistaking the identity of the victim and missing the target are not open to unequivocal determination, and are dependent on the manner in which we conceptualize intent. Based on a stricter conceptualization than that used by the dividing purist, it is possible to argue that the distinction between the object that was harmed in practice and the one intended by the perpetrator applies just as much to cases of mistaken identification as to cases of missed-aim.

In the subsequent sections, I will try to shed light on the two controversies, between the abolitionists and the purists and between the consistent and the divided approaches, by pointing out the consequences of each side to the debate in scenarios of collective criminality. The analysis of such scenarios supports the arguments for the purist approach (contrary to the Anglo-American position) and against the divided approach (contrary to the dominant position in German law). Thus, the article argues for the consistent object-specific approach to the question of conceptualizing criminal intent (implying also the rejection of the doctrine of transferred malice).

3. The Indirect Participant Caused a Change of Object

Consider first the following three scenarios:[25]

> Scenario 1: DP aims his gun at A wishing to kill him. Just as DP pulls the trigger, IP, intending to kill B, deflects DP's hand so that the bullet kills B instead of A.
>
> Scenario 2: DP ambushes A wishing to kill him. IP, who is aware of DP's plan and desires to harm B, sends B to the vicinity of the ambush, so that DP would mistakenly identify him as A and harm him. DP sees B approaching and, mistakenly taking him for A, kills B.
>
> Scenario 3: DP aims his gun at A wishing to kill him, but his friend, IP, persuades him in the last moment to kill B instead.

Scenarios 1 and 2 most closely resemble cases of perpetration by means of another (sometimes referred to as 'perpetration through others' or the doctrine of 'innocent or semi-innocent agency'). In scenario 1, IP assumed control of the event and of DP, whereas in scenario 2, IP enjoyed a superior understanding of the situation. In both cases, however, IP affected only the identity of the object that was harmed and not the causing of harm or the type of harm caused.

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see for example the position of Ashworth, as it is expressed in the combination of two of his articles: Ashworth, "Mens Rea", *supra* note 16 at 57-58, and 'Transferred Malice', *supra* note 20 at 77-78.

24. Eldar, "Malice", *supra* note 1 at 636-39.

25. DP = the direct perpetrator of the offence; IP = the indirect or distant participant; A = the intended object of the offence; and B = the actual object that was harmed.

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Although all but pure utilitarians[26] would consider IP's conduct in scenarios 1 and 2 condemnable, the law finds it difficult to label them according to any of the recognized categories of complicity: IP did not carry out the actions jointly with DP, he is not an aider to DP because DP did not resort to his help (indeed, IP interfered with DP's actions), and he did not do anything by way of instigating DP to act (in both scenarios IP did not communicate with DP at all). The law is also ill at ease treating these scenarios as instances of perpetration by means of an innocent or even semi-innocent agent.[27] The fact that the victim in each case is not the one that DP intended is of no legal significance because homicide laws refer to causing the death of a non-particular 'person', and the doctrine of transferred malice prevents a narrower individualization of the object of the offence to specific victims. Therefore DP is fully responsible for murdering B, making it inappropriate to regard him as an agent by which means IP committed the offence.

Note, however, that it is the reliance on type-oriented intent and the decision to transfer the intent from the intended object to the one actually harmed that create the difficulty in these scenarios. In scenario 1, IP deflects DP's hand as he is pulling the trigger in order for the bullet to strike B instead of DP's intended victim A, and we may well wish to attribute to IP liability for the killing of B. What is the level of conceptualization required to best realize this motivation? The direct perpetrator intended to kill a person, and therefore a type-oriented conceptualization of his intent includes the killing of the intended object (similarly, the doctrine of transferred malice allows transferring the intent from the intended to the actual object rendering the direct perpetrator liable for murdering the latter). Since the type-oriented conception of intent, as well as the application of transferred malice, render the direct perpetrator fully liable for the intentional killing of the actual object, the law faces two undesirable options with regards to the indirect participant: (1) to acquit the indirect participant of liability for the killing because he was not an accomplice to the direct perpetrator's action, and neither did he cause the death of a person (he merely altered the victim's identity, which under a type-oriented conceptualization is immaterial); or (2) to expand the doctrine of perpetration by means of another to uncomfortable boundaries, boundaries that would include perpetration by means of an agent who is not innocent or even semi-innocent, but who is fully liable for the intentional killing. Conceptualization of intent as object-specific circumvents this difficulty. If the direct perpetrator is convicted of the homicide caused based on his existent

26. I refer particularly to act utilitarianism, as opposed to rule utilitarianism. A utilitarian account of the acts attributed to IP in the above examples leads to equilibrium, as the saving of the life of A is counted against the killing of B. A calculus of rule utility, as any examination of actions that is not based solely on utilitarian considerations, is expected to lead to the condemnation of IP.

27. On the doctrine of innocent or semi-innocent agency see Williams, *supra* note 10 at 374; The Law Commission, Participating in Crime 100 (Law Com 305, 2007). Any objection to the above analysis on the ground that the offence of murder does not require a direct act on the part of the perpetrator is met in the context of offences that do require such an act, e.g., rape, where the indirect participant directs the rapist to a different victim than the one intended. Yet even in the context of murder, bringing about a homicide by means of another is more accurately dealt with through the laws of complicity and multiple participation than by those concerning the direct causing of harm.

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mental element regarding the possibility of harming the actual object (negligence or recklessness, as the case may be, leading to his conviction of negligent homicide or manslaughter, respectively), it becomes possible to regard the indirect participator as a perpetrator by means of his semi-innocent agency. Perpetration of murder by means of a negligent or reckless agent fits more naturally with the doctrine than the perpetration of murder through another murderer, and it makes for more sensible jurisprudence. Thus, cases such as scenario 1 support the object-specific over the type-oriented notion of intent.

Recall that the topic is logically under-determinate. Thus, a favorable solution to scenario 1 is provided by the purist conception of object-specific intent, but the advantage is not a sweeping one. A variation of scenario 1 illustrates this point: armed with a pistol and a poor understanding of ballistics, DP believes that he is aiming his weapon in such a way that a single bullet will strike both A and B and kill them. IP, whose understanding of ballistics is superior, knows that the bullet will only strike A, and therefore, and with the intention that it will be B that dies from the shot, deflects DP's hand in the direction of B. In this variation DP's specific intent includes both objects, rendering him liable for the murder of B under either conception of intent. Therefore, in this variation, holding IP liable for murdering B through the innocent or semi-innocent agency of DP is as problematic for purists as it is for abolitionists.

The case of sending a different victim to the site of the ambush (scenario 2) illustrates yet another point. The two cases differ in that in scenario 1 the direct perpetrator harms the actual object accidentally by missing his target, whereas in scenario 2 he does so as a result of mistaken identification. Scenario 2 shows that events in which the object is replaced by the indirect perpetrator provide an intuitively appealing basis to argue against the divided approach, that is, against the distinction between missing the target and mistaking its identity. Similarly to scenario 1, this scenario is also best handled through an object-specific conceptualization of intent, which would attribute to the direct perpetrator an attempt to harm the intended object and only an unintentional consummated offence against the actual object. Our motivation to convict the indirect participant as causing intentional harm to the actual object by means of a mislead agent is properly satisfied when the direct perpetrator is not convicted of intentionally harming the actual object, as prescribed by the divided approach in cases of mistaken identification, but only of negligence or recklessness. In this way, the mental state of the direct perpetrator vis-à-vis the harm caused to the actual victim is inferior to that of the indirect participant, enabling the doctrine of perpetration by means of a semi-innocent agent to lead to the just conviction of the indirect participant of the intentional killing of B without exceeding its natural boundaries.

Scenario 3, in which IP persuades DP to kill victim B instead of intended victim A, illustrates a case of instigation and it too provides an argument in favor of specific intent, albeit a weaker one than that which was provided by its predecessors. Unlike the case in which IP deflected DP's hand (scenario 1) or sent a victim to the scene of the ambush (scenario 2), which refer to a single shooting incident, the instigation scenario can be divided into two events: the killing of A

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and the killing of B. Looked at in this way, the scenario is no more than a special case of instigation in which IP incited DP to abandon his original plan and to adopt instead a different one, which is the source of his liability for instigation to kill B. Such a scenario does not carry much informative weight for the present investigation. But even with this reservation granted, the instigation scenario illustrates the intuitive strength of the purist position, because had the object remained unchanged we would not have considered a case in which the indirect participant persuaded the direct perpetrator to change the timing of the event or the manner of its execution as generating a separate instance of the offence. Indeed, in such cases law would not regard the indirect participant as an instigator but as an aider to the offence who advised on the manner of its execution.[28] Thus, the law demonstrates a distinctive sensitivity to the identity of the harmed object, as is advocated by the purist approach.[29]

The combined result of the discussion of scenarios in which the distant participant caused a change in the object of the offence supports the object-specific conceptualization of intent, as well as a consistent application of this level of abstraction in cases of accidentally missing the target and of mistaking the identity of the object alike. In the following sections of the article, I will demonstrate that similar insights follow from other types of combination between complicity and displaced harm.

4. The Direct Perpetrator Caused a Change of Object

We now move to consider three additional scenarios to determine which conception of intent best distributes liability among the physical and distant participants in the offence.

> Scenario 4: IP sends DP to kill A, or provides DP with the means to do so. DP misses A and kills B instead.
>
> Scenario 5: IP sends DP to kill A, or provides DP with the means to do so. DP mistakenly identifies B as A and kills B instead of A.
>
> Scenario 6: IP sends DP to kill A, or provides DP with the means to do so. For his own reasons, DP chooses to kill B instead.

Scenarios in which the direct perpetrator deviates from the original plan combine questions of causality with issues of *mens rea* and bring four additional variables into consideration: (a) whether the deviation is accidental, mistaken, or

28. We return in Section 4 to the topic of change of object as opposed to a change of *modus operandi*.

29. Scenarios involving perpetration by means of another similarly emphasize the importance of the specific object. Consider that IP had deflected DP's hand or misled him (scenarios 1 and 2), not in order to cause him to hurt B instead of A but in order to hurt A indirectly rather than directly (e.g., by causing the explosion of a nearby gas tank, perhaps in order to blur the identity of the perpetrator and make it more difficult to apprehend him). In this case, the object is the same but the *modus operandi* is different. These scenarios lose their intuitive appeal, and the motivation to impose liability on the indirect perpetrator as a perpetrator by means diminishes significantly.

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intentional; (b) the extent of the deviation from the original plan; (c) the nature and content of the deviation;[30] (d) the timing of the deviation. A change of the object of the offence is generally perceived as a material deviation. By comparison, a change in the *modus operandi* is generally considered to be insignificant. It is possible, however, to envisage examples in which the *modus operandi* is material as far as the indirect perpetrator is concerned. For example, a husband who insured his wife against death by traffic accident, may experience disappointment if the hit-man he hires to run her over decides to shoot her to death instead.[31] Similarly, when the insurance policy is limited in time or territory, these can become essential operational factors.[32] Because occasionally the mode of execution is important, the nature and content of the deviation cannot be the

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30. Variables (a)-(c) are mentioned by Smith, *supra* note 15 at 198. A separate variable is the mental element of the indirect perpetrator: are we going to settle for a factual causal relation between his indirect participation and the harm caused to the different object? Or are we going to demand a mental element of negligence or recklessness in order to convict for harm caused to the different object? Lanham has identified four approaches to the liability of the indirect perpetrator for a change of target by the direct perpetrator, based on: (a) causality, (b) negligence, (c) recklessness, and (d) explicit agreement. See David Lanham, "Accomplices and Transferred Malice" (1980) 96 LQR 110 at 110. Note that the fourth approach is the only one that is unique to joint participation; the others are relevant also to the liability of the individual perpetrator whose act harms someone other than the intended object. This approach, as well as the third one, rejects the possibility of transfer of intent, as both require a subjective mental element regarding the object that was harmed in practice, and therefore they are identical with the purist position or closely resemble it. The first approach allows the unrestricted transfer of intent. The second approach seeks to limit the doctrine in order to strike a balance between it and the requirement that *mens rea* concur with the physical element of the offence. The second approach is more common in the literature, and since the publication of Lanham's article, secondary approaches have been formulated based on other touchstones for limiting the scope of the doctrine, as for example, 'remoteness', following Horder, *supra* note 18 or 'immediate and physical effect', according to the approach of Glanville Williams, *Textbook of Criminal Law*, 2d ed (London: Stevens & Sons, 1983) at 181. Below, I refer only to the negligence (or objective foreseeability) approach. I cannot address in full the rationale for choosing the negligence qualifier. For a more detailed discussion, see Eldar, "Malice", *supra* note 1 at 649-57. Lanham supports the causality approach. According to him, the liability of the indirect perpetrator should be based on the question whether the harm caused to the object in practice was the direct result of the attempt by the direct perpetrator to consummate the offence against the intended object. Thus, he is critical of the verdict in *Saunders and Archer*, arguing that the death of the child is a direct result of Saunders's attempt to poison his wife (*ibid* at 114). But is that so? Saunders's failure can be seen as perpetration of murder of the child by means of his (innocent) wife, that is, a new and different offence than the one in which Archer served as accessory.

31. It is possible to argue that the result *has* changed here, as the intended method was to lead to the awarding of the insurance payment, whereas the method used in practice did not have this result. But concerning the offence at hand (homicide), the result is the same, that is, the death of the wife.

32. Even if the *modus operandi* of the offence is generally not considered to be substantive, whereas the object of the offence is considered to be such, we should not infer from this fact that the object is the only substantive factor in the offence. In general, the boundaries of the offence are also important, and if the direct perpetrator carries out a different offence from what has been planned with regard to the intended target, the deviation is considered substantive. Thus, if IP gives DP a passkey with the expectation that DP will use it to enter the National Gallery after closing and steal Holbein's *The Ambassadors*, whereas DP arrives at the museum during visiting hours and uses the key he received from IP in order to damage the painting, IP is not liable as an accessory to this act despite the fact that the offence was carried out against the intended object.

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decisive factors in settling the liability of the distant participant.[33] On this background, English law elected to emphasize the process that caused the deviation, and distinguished deviation caused by accident (scenario 4) or mistake (scenario 5) from deliberate deviation (scenario 6). This position and the implications it carries for the conceptualization of intent are best explained through the case of *Saunders and Archer*.[34]

The *Saunders and Archer* ruling represents a case in which the direct perpetrator changed the object of the offence: Archer provided Saunders with the means to lace an apple intended to be used to poison Saunders' wife; unsuspectingly, the wife gave the apple to their daughter, who consumed it in the couple's presence and died. Which of scenarios 4-6 is relevant to this case, and what is the significance of this determination for Archer's liability for the death of Saunders's daughter? David Ormerod characterizes *Saunders and Archer* as a case of deliberate deviation (scenario 6). He attributes the court's decision to acquit the indirect participant, Archer, to the position that Saunders's choice to keep silent in view of the transfer of the poisoned apple from the wife to the daughter creates a new and independent act, disconnected from the assistance provided by Archer. Ormerod observes that had Saunders not been present at the time when his wife transferred the apple to his daughter, this would have been a case of accidental displacement of harm (scenario 4), and Archer should have been found liable.[35] Michael Bohlander on the other hand is critical of the court's ruling and classifies the facts of *Saunders and Archer* as accidental displacement of harm (scenario 4). In his opinion, Saunders did not actively replace his victim but merely failed to intervene in the course of events, and such an omission cannot sever the chain of causality starting with him presenting his wife with the poisoned apple.[36]

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33. Note that the American Model Penal Code bundles together the change of object with the change of method, and treats them identically. See *MPC*, *supra* note 13, s 2.03(2).

34. *Saunders and Archer, supra* note 2.

35. David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford: Oxford University Press, 2011) at 213. This remark may exaggerate the significance of the presence of the direct perpetrator on the scene at the time when the change of object takes place. It may do so by taking for granted whether the change of object was deliberate. If Saunders had not been present during the event, but arranged things so that his wife would pass the apple to his daughter, Archer would be innocent of killing his daughter. And, had Saunders tried to prevent his daughter from consuming the apple, but been unsuccessful in preventing her death, then, despite his presence, the displacement of harm would nevertheless have been accidental, which imposes liability on both Saunders and Archer. It is the combination of Saunders's presence and his failure to intervene to save his daughter's life that makes her poisoning a separate intentional act, similar to the case in which Saunders would have used the poison supplied by Archer at another time, in another place, and against a different victim.

36. Michael Bohlander, "Problems of Transferred Malice in Multiple-actor Scenarios" (2010) 74 J Crim L 145 at 150 [Bohlander, "Transferred Malice"]. Contrary to Ormerod, who appears to ascribe exaggerated significance to Saunders's presence at the scene of the event, Bohlander errs by not ascribing any importance to the question of Saunders's presence. Granted that from a causal-factual point of view there may be no significance to Saunders's presence at the scene; nevertheless his presence is likely to transform Saunders's role from a passive link in the chain of causation into a perpetrator by means of his innocent wife. Thus we may identify three links on the causal chain of the poisoning, by which IP gives the apple to DP, who commits through the agency of W an offence against a new victim. Had the wife told Saunders to pass the apple to the daughter, and he had done so, we would regard this as a new and separate event of direct and intentional killing of the daughter by Saunders. Similarly, given that the apple that Saunders handed to his wife passed to the daughter without his wife's awareness of the danger,

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The prevailing approach found in scholarly comments on this verdict makes the liability of the indirect participant for the change of object contingent upon whether or not the direct perpetrator changed the object deliberately. The indirect participant is not liable if the direct perpetrator deviated purposefully from the plan, as for example, if he received a knife to kill A and resolves to use the knife to kill B instead. By contrast, accidental or mistaken deviation of the direct perpetrator does not detract from the liability of the indirect participant.[37] Under this approach, scenarios 4 and 5 lead to liability and scenario 6 to acquittal. Among the supporters of the prevailing approach, based on the distinction between accidental or mistaken change in the object on one hand and deliberate change on the other, are Herbert Hart and Tony Honore. In their opinion, only an independent decision on the part of the direct perpetrator to change the object of the offence can exempt the indirect participant of liability.[38] They suggest viewing Saunders's decision to conceal from his wife that the apple was poisoned as a new and independent decision, which annuls Archer's liability as an indirect participant. They hint, however, at another possibility, according to which Saunders's decision was not altogether independent, free, or deliberate, as revealing that the apple was poisoned would have constituted an admission of attempted murder on the wife and exposed him to severe penalty. Lack of free deliberation in Saunders would have rendered Archer liable.[39] This analysis, rather than illustrate the advantage of the prevailing approach, lends support to the foreseeability standard in determining the indirect participant's liability. It seems clear that the question of whether Saunders's feelings of apprehension of his wife or the police were stronger than his love for his daughter, or *vice versa*, should not have direct bearing on the test applied to determine the liability of Archer, which more plausibly depends on whether Archer should have foreseen the death.

The question therefore arises whether the decision of the direct perpetrator to replace the object of the offence should be the only touchstone for the liability of the indirect participant, as is the case in the prevailing approach. It seems evident that the test should not focus on the mental state of the direct perpetrator but on

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and that Saunders did not prevent this, Saunders can be regarded as an intentional perpetrator of the killing of his daughter by means of her unsuspecting mother. From this vantage point, the case of *Saunders and Archer* appears similar to the event in which IP hands poison to DP so that he may kill his wife, and DP decides to poison a different person (scenario 6).

37. The distinction between intentional and unintentional deviation is, for example, at the root of Card's analysis, *supra* note 15 at 746, and also of Ormerod's, *supra* note 35 at 211-13.

38. HLA Hart & Tony Honore, *Causation in the Law*, 2d ed (Oxford: Oxford University Press 1985) at 383-84. They refer to page 203 in their book in a way that can indicate that they nevertheless do agree with the objective foreseeability test for the indirect perpetrator with regard to the deviation made by the direct perpetrator, as on this page they write that 'a voluntary act which is not reasonably foreseeable … negatives responsibility'. But except for this reference, the discussion focuses on the degree of independence of the decision made by the direct perpetrator. This matter is central in the thinking of Hart and Honore, as expressed in their book. In their opinion, it is not possible to commit an offence by means of a responsible agent because at the point where the liability of the physical perpetrator begins, the causal chain that begins with the actions of the indirect perpetrator ends, and a new causal chain is initiated.

39. This idea is presented also by Williams, *supra* note 10 at 403.

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the point of view of the distant accomplice,[40] and that whenever the deliberate deviation is within the boundaries of foreseeability, it is not fundamentally different from deviation caused by accident or mistake. Whether the deviation is accidental or mistaken on one hand or deliberate on the other serves as an indication of the degree of its predictability, but it is not an independent and decisive benchmark. It may be the case that deliberate deviations from the original plan by the direct perpetrator are generally unforeseen, but this is not necessarily true. At the same time, deviations caused by accident or mistake are not always foreseen. Saunders's presence at the time of the transfer of the apple from his wife to his daughter affected his mental state as a perpetrator, but it does not necessarily attest to the mental state of his accessory. Saunders acting as a *novus actus interveniens* in the causal chain between Archer and the fatal result can play no more significant a role than to indicate the probability of this result and therefore its level of foreseeability.

This elaborate discussion over the *Saunders and Archer* verdict bears direct consequences for the conceptualization of intent, as the avowed confidence of Anglo-American Law in the doctrine of transferred malice and in the type-oriented conceptualization of intent evidently falls apart when approaching scenarios of complicity in which the direct perpetrator changes the object of the offence. The only occasion in which English law ascribes any relevance to the specific identity of the object of the offence is of this type. When the direct perpetrator deliberately changes the object of the offence, the doctrine of transferred malice does not apply to the indirect participant despite the fact that from his point of view the displacement of harm was accidental. Accounting for the identity of the victim in cases of indirect participation contradicts the general applicability of the doctrine of transferred malice and the overall disregard by English law of the concrete identity of the victim in other contexts.[41] This deviation from the generic attitude of English law should make us question the type-oriented conceptualization and the doctrine of transferred malice in general. This is indeed the effect that this deviation had on Andrew Ashworth and Jeremy Horder, who write:

> [I]f it is accepted that the identity of the victim is so important in this type of case [deliberate deviation in cases of indirect participation] one may inquire more widely whether there really is inadequate moral significance in the plea: 'I intended to kill my enemy, X, and never meant any harm to the poor innocent Y'. The pragmatic approach adopted elsewhere in the criminal law (apart from complicity) may fail to mark significant moral distinctions.[42]

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40. It is important not to confuse the focal points of the test, as did Foster in cases that fall within the category discussed in this section (changing the object of the offence by the direct perpetrator): 'I believe the following criteria will let the most inquisitive reader into the grounds upon which the several cases falling under this head will be found in turn. Did the principal commit the felony he standeth charged with under the influence of the flagitious advice; and was the event, in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart willfully and knowingly commit a felony of another kind or upon a different subject?', Sir Michael Foster, *Crown Law*, 3d ed (1792) at 372.

41. This is the empirical conclusion reached by Ashworth and Horder after surveying the case law from *Saunders and Archer* to the present day. See Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law*, 7th ed (Oxford: Oxford University Press, 2013) at 443.

42. *Ibid* at 189.

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Deciding between the different possibilities becomes particularly important in situations in which the deviation is foreseeable by only one of the parties to the offence, either the direct perpetrator or the indirect participant. Recall that foreseeability (objectively conceived) regarding harm to the actual object is sometimes considered a condition for the transfer of malice and it additionally serves as one of the requirements of causality. Let us consider that the direct perpetrator was commissioned by the indirect participant to harm object A, or that he was assisted by the indirect participant for this purpose, and that eventually the direct perpetrator harmed object B. Let us now add two alternative assumptions: (a) the direct perpetrator could be expected to foresee the possibility of harming B, whereas the indirect participant bore no such expectation; and (b) the indirect participant could be expected to foresee the possibility of harming B, whereas the direct perpetrator bore no such expectation. Under assumption (a),[43] where the indirect participant is a perpetrator by means of an innocent agent (as opposed to being defined as an instigator or aider), he cannot be found liable for the harm that befalls the actual object, because the direct perpetrator is merely an instrument at his disposal and the foresight of the instrument with regard to the threat to the actual object is not projected onto the perpetrator by his means. This result is not consistent with the law applicable in similar scenarios to the instigator and the aider, whose liability derives from that of the direct perpetrator. At least as long as the direct perpetrator has not deliberately altered the target of the offence, a transfer of the direct perpetrator's intent applies also to the derivatives, and therefore the instigator and aider are found liable for the harm caused to the actual object.[44] Thus, the perpetrator by means of an innocent or semi-innocent

43. Admittedly, this alternative is not a common occurrence because normally it is the distant participant who is expected to envision a broader variety of future possibilities than does the direct perpetrator, from whose point of view the realistic alternatives are limited to the circumstances surrounding him at the time of commission. Nevertheless, consider a case similar to scenario 4 (accidental deviation by the direct perpetrator), in which IP sends DP to kill a shopkeeper at a time when the shop is closed and usually occupied by the shopkeeper alone. Upon entering the shop, DP notices a vagrant hiding in the store after business hours; DP proceeds to shoot at the shopkeeper but accidentally hits the vagrant. It may prove easier to illustrate the possibility of higher expectations from the direct perpetrator using cases involving mistaken identification (scenario 5): IP sends DP to burn down A's house, convinced that DP knows the address. By an unlikely mistake, DP sets fire to B's house.

44. The liabilities of instigators and aiders are tested derivatively, that is, as derivatives of the direct perpetrator's liability for the offence. The issue of transferred malice raises a challenge before the doctrine of derivative liability: are the rationales that apply to scenarios of accidental miss-aim or mistaken identification valid in the case of secondary (derivative) intent on the part of the instigator and the aider? Is it possible to derive from the transferring of the intent of the direct perpetrator from one object to another a similar transfer in the intent of the indirect participant as well? In other words, concerning the scenarios involving instigation and aiding discussed in this section, the law must decide whether to derive the *mens rea* of the indirect participant from that of the direct perpetrator, or to focus the test directly on the intent of the indirect participant. To illustrate, consider that IP provided a gun to DP in order to kill A, and that DP missed A and killed B instead, or alternatively, mistook B for A and killed him. Derivatively, the former deviation represents an accidental miss-aim on the part of DP, and therefore also on the part of IP, whereas the latter is a mistaken identification on the part of DP, and therefore also on the part of IP. By contrast, direct consideration of IP's intent treats both events as accidents as far as he is concerned, because from his point of view his indirect act against the intended object missed its target, whether DP changed the object by accident or because of a mistaken identification; See Bohlander, "Transferred Malice", *supra* note 36

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agent is liable only for attempting to cause harm to the intended object, whereas the instigator and the aider are liable for the consummated harm caused to the actual object, and this is inconsistent with the status of the perpetrator by means as a principal in the offence whose liability should not be lesser than that of the instigator and aider, who are merely secondary participants. The inference is that as long as accessorial liability derives from that of the perpetrator, it is preferable in these cases to renounce the transfer of malice and to opt for the object-specific conceptualization of intent. In this way, the liability of the instigator and of the aider derives from the attempt to harm the intended target, consistent with the liability of the perpetrator by means in similar scenarios.[45]

Applying the doctrine of transferred malice to assumption (b), in which the indirect participant alone should have foreseen the danger to the actual object, has the reverse result. When the indirect participant is a perpetrator by means who should have expected the risk to the actual object at the hands of his agent, he is convicted of harming that object. By contrast, liability imposed on the instigator and aider is derived from the liability of the direct perpetrator for having attempted to harm the intended object.[46] In this alternative, the inconsistency is not too problematic, as the liability of the perpetrator by means, who is liable for the harm to the actual object, is greater than that of the instigator and the aider, who are liable only for attempted harm to the intended target. The discussion, however, accomplishes a higher degree of consistency by adopting the purist ideal of object-specific intent. Thus, the intent of the perpetrator by means of another is not transferred to the object actually harmed, and all the participants—the direct perpetrator, the perpetrator by means, the instigator, and the aider—are convicted for attempted harm to the intended object.

Scenarios in which the direct perpetrator changed the object of the offence illustrate further the futility in the divided treatment of deviations caused by accident and by mistake. From the vantage point of the indirect participants, both deviations are accidental. If IP sent DP to kill A, and DP aimed at B thinking that he was A (scenario 5), it is a case of mistaken identification from the perspective of DP, but an accidental missed operation as far as IP is concerned, because his action was aimed against A throughout.[47] The same holds for IP if DP miss-aims (scenario 4). The divided approach can become especially tricky when it is used to assign liability to accessories. According to the divided approach, when the

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at 148. The situation is different in scenarios where the indirect participant is classified as a perpetrator by means of an innocent agent, e.g., a father who sends his minor son to poison his mother, and the son poisons his sister instead. The doctrine of derivative liability does not apply to the perpetrator by means, and therefore his mental state is tested directly. The father is perceived as having accidentally missed his target whether his son replaced the object of poisoning because of a mistaken identification or because of a missed target.

45. A similar consistency is achieved by abandoning derivative liability on which complicity in the English criminal law is based. It follows that one may use the example in the text to illustrate failures in the method of derivative liability. For a recent analysis of the shortfalls of derivative liability, see Douglas Husak, "Abetting a Crime" (2014) 33 Law & Phil 41.

46. Although we must be open to the possibility that the superior understanding of the indirect participant makes him a perpetrator in the killing of B by means of the semi-innocent agency of the direct perpetrator.

47. Bohlander, "Transferred Malice", *supra* note 36 at 151.

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indirect participant instigates the direct perpetrator to commit the offence, or helps him do so, and the direct perpetrator mistakes the identity of the intended object (scenario 5), the liability for instigation or aiding derives from the direct perpetrator's liability for harming the actual object (recall that the divided approach advocates the abolitionist position in instances of mistaken identification), although we saw that from the vantage point of the indirect participant the displacement of the harm was an accident. It follows that the divided approach is inconsistent in its treatment of direct perpetrators and accessories. By contrast, the application of the purist position to cases of mistake and accident alike—which attributes to the direct perpetrator attempt vis-à-vis the intended object whether the change of object was the result of accident or mistake (scenarios 4 or 5, respectively)—allows the purist to attribute to the instigator and the aider in both scenarios liability derived from the attempted harm to the intended target (instigation to attempt or aiding an attempt, respectively), as is appropriate in cases of accident. If the dividing rationale between accidental and mistaken change of object fails with respect to the indirect participant, its strength relative to perpetrators in general is reduced.

In sum, we saw that in cases in which the direct perpetrator chose, on his own initiative, to alter the object of the offence (scenario 6), the law avoids adopting a type-oriented conceptualization of *mens rea* and creates an exception to the application of the doctrine of transferred malice. This revelation led us to examine examples in which the direct perpetrator caused a change in the object of the offence through either accident or mistaken identification (scenarios 4 and 5). In these examples, choosing a type-oriented conception of intent and applying the doctrine of transferred malice result in a lack of uniformity in the liability of the various categories of indirect participation: the perpetrator by means of an innocent agent on one hand, and the instigator and the aider on the other. According to the alternative in which only the direct perpetrator is expected to foresee the possibility of causing harm to the object that was harmed in practice, the approach that follows the type-oriented intent and the doctrine of transferred malice results in inability to impose liability for harming the actual object on the perpetrator by means (whose liability should be greater, not lower than that of the instigator and aider to the offence), while at the same time the instigator and aider (whose liability is derived from that of the direct perpetrator, whose intent in turn was transferred to the object actually harmed) are found liable for harm caused to this object. In the opposite situation, in which only the indirect perpetrator is expected to foresee the possibility of harm to the object actually harmed, the approach following the type-oriented intent and the doctrine of transferred malice results in a mismatch between the liability of the perpetrator by means, who is accused of causing harm to the actual object, and that of the instigator and the aider, who are liable for attempting to cause harm to the intended object. By contrast, conceptualizing the intent of the direct perpetrator as specific to the intended object alone, as in the purist position, makes it possible to impose uniform liability on all indirect participants in both alternatives, founded on the attempt to harm the intended object.

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The scenarios presented in this section further demonstrate the superiority of the object-specific conceptualization of intent in cases in which the direct perpetrator mistook the identity of the object of the offence, especially when his liability is derivatively imputed to the indirect accessories. According to the divided approach, the liability of accessories in such cases is derived from the harm caused to the actual object. Because the mistake of the direct perpetrator represents, from the indirect accessories' point of view, an accidental miss-operation, an inconsistency is revealed within the divided approach. By contrast, conceptualizing intent as object-specific in cases of accidental miss-aim and mistaken identity by the direct perpetrator alike avoids such inconsistency, by enabling the law to derive the liability of instigators and aiders from the attempt directed at the intended object in both cases.

5. Change of Object and Joint Perpetration

We now add three final scenarios:

> Scenario 7: P1 and P2 shoot at each other with intent to kill. P1 misses P2 and kills a bystander, O.
>
> Scenario 8: P1 and P2 jointly set out to kill O. In the course of the operation, P1 fires at O, misses, and hits P2.
>
> Scenario 9: P1 and P2 jointly set out to kill O. In the course of the operation, P1 mistakenly identifies P2 as O and fires at him.

The first scenario describes the facts in the ruling of the UK Supreme Court in *Gnango*.[48] Examining the liability of P2 for the killing of O in this scenario raises the question of whether this is indeed a case of joint perpetration. Another way of looking at the actions of P1 and P2 is to regard the two as parties to an affray and to derive P2's liability for the killing of O parasitically from the liability of the actual shooter, P1. The court however was not prepared to adopt this course because of the mismatch between the circumstances of the concrete case and the subtleties in the definition of affray in English law[49] and, more fundamentally, because both participants in the event, Gnango and Bandana Man,[50] did not act jointly, but much to the contrary were firing at each other with the intention to kill.[51] Therefore, a majority of the Court chose to regard Gnango (the equivalent

48. *Gnango*, *supra* note 5.

49. The court accepted that in some cases an affray may base joint perpetration, for example, when there is a preliminary agreement to battle between the parties to the affray (*ibid* at para 39). Note that the Court demarcated affray and riot (*ibid* at para 41) and expressed reluctance to extend joint liability for missed operations in the case of large groups, indicating that an increase in the number of participants indeed affects the debate on transferred malice. Ormerod addressed this aspect of the ruling in David Ormerod, "Worth the Wait?" (2012) Crim L Rev 79 at 80.

50. For the details of the verdict, see Section 1 above.

51. An opposing view was taken by the Court of Appeal for Ontario in *R v JSR*, 2008 ONCA 544, 237 CCC (3d) 305; 239 OAC 42. The evidence at the preliminary inquiry in this case allowed the possibility that the accused was involved in a mutual gun fight, in which one of the bullets directed at the accused strayed and caused the death of a young female bystander. On these

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of P2 in scenario 7) as being a co-perpetrator with Bandana Man (the equivalent of P1 in scenario 7) in the shooting aimed at himself. Because the bullet missed Gnango and struck a passerby, the Court transferred the intent from the killing of Gnango to the killing of the passerby, and convicted Gnango of her killing. The majority judgment reflects two approaches to the nature of Gnango's complicity with Bandana Man: four of the judges imposed on Gnango liability for assisting the shooting at himself, based on the logic that by shooting at Bandana Man, Gnango encouraged him to return fire.[52] This view classifies the situation as one of indirect participation, which falls under the scenarios described in Section 4 above. These judges, however, expressed their willingness to concede the second approach among the majority judges, according to which Gnango's conduct can be viewed as joint perpetration of shooting at himself,[53] which is why the verdict falls within the confines of the present section.[54]

The conviction of Gnango for the killing of the passerby is made possible only by the adoption of one of two approaches: (a) the conduct of the shooters is defined broadly as a Battle between two opponents that resulted in death; (b) the conduct is defined more narrowly, as shooting by Bandana Man, but the shooting is attributed to Gnango as a joint perpetrator. The majority opinion chose to adopt the second approach, and in addition transferred the malice of the parties from Gnango to the passerby.[55] This choice reflects a fictitious attitude toward Gnango

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facts, the court concluded that the firing of the fatal shot formed part of a joint activity undertaken by the accused and his adversary and may therefore be attributable to the accused.

52. Note that this is not a standard case of encouragement, which falls under instigation or accessoryship to committing an offence, but a case of provocation. See Damian Warburton, "Murder—Whether Secondary Liability by Joint Enterprise Arises in Circumstances of Mutual Conflict Between Defendants" (2011) 75 J Crim L 457 at 461. Richard Buxton pointed out an additional difficulty in attributing accessoryship to murder to Gnango: according to him, even if we accept the ruling of the court that Gnango wanted to assist the Bandana Man, at most it is possible to say that he wanted to assist the Bandana Man in *trying* to kill him, not to succeed in it. It follows that Gnango's verdict should not be derived from the consummated offence of killing the passerby. Richard Buxton, "Being an Accessory to One's Own Murder" (2012) Crim L Rev 275 at 278.

53. Lord Clarke went further and drew a parallel between this case and the verdict in the matter of *R v Pagett* (1983), 76 Cr App R 279, in which it has been decreed that when a police officer fires at an assailant in reasonable self-defence against deadly force, but misses and kills a passerby, the assailant is convicted of the death of the passerby. See *Gnango*, *supra* note 5 at para 83-89. The parallels between these two cases is problematic because in *Pagett*, the defendant created the event by himself and was responsible for it in its entirety. By contrast, in *Gnango* the defendant was not fully responsible for the event. Gnango did not coerce the Bandana Man to engage in a shootout with him, whereas the intervention of the police officer in *Pagett* was the result of a constraint created by the defendant. Indeed, *Pagett* is an example of perpetration by means of another, whereas *Gnango* is not, despite the possibility of a causal connection between Gnango's actions and the killing of the passerby at the hands of the Bandana Man.

54. The Court pointed out this admixture in the case of *Gnango*, *supra* note 5 at para 2: 'The particular areas of criminal law that will have to be considered are (i) joint enterprise; (ii) transferred malice; (iii) exemption from liability where a party to what would normally be a crime is a victim of it'.

55. The minority judge in *Gnango*, Lord Kerr, was not willing to classify the conduct broadly, as a violent encounter, and therefore did not convict Gnango as a joint perpetrator of the killing; nor did he regard Gnango as the person who caused the Bandana Man to shoot, and therefore he did not convict him either as an accessory to the killing of the passerby. For further opinions concerning this case, see the debate in Graham Virgo, "Joint Enterprise Liability is Dead: Long Live Accessorial Liability" (2012) Crim L Rev 275; Peter Mirfield, "Guilt by Association: A

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as someone who had formed an intent to kill himself, an intent that was translated into intention to harm the passerby. Unfortunately, adoption of a purist approach that examines the intent of the parties to the event as object-specific would not have led the majority judges to a better result. According to this position, the *mens rea* of the parties is not transferred to the passerby, and therefore the liability of the Bandana Man is for attempt to harm Gnango (perhaps in combination with a consummated offence, based on the mental element of the shooter, against the passerby), and Gnango's liability, as a partner to the shooting of the Bandana Man, refers to the same offence. The problem here is not rooted in the position adopted with regard to the conceptualization of intent, but in the odd amalgamation into a partnership of mutual attempted murder, a creation that is a distorted result of the desire to attribute the death of the passerby to Gnango. The failure of the purist position to carry the majority opinion in *Gnango* to a more satisfactory result than the one reached by means of the type-oriented approach or through the doctrine of transferred malice does not attest to the superiority or inferiority of either position, but points to a flaw in the perception of two opponents shooting at each other as sharing each other's objectives.

To further illustrate this point I propose to implement a technique that served the argument in the preceding sections of this article: adding parties to the scenario. How should we regard an accessory who provided Gnango with the gun after he learned about Gnango's conflict with the Bandana Man? Had the Bandana Man killed Gnango, we would not have imposed on the provider of the gun liability as an accessory to Gnango in killing himself. Similarly, we would not have imposed liability on the provider of the gun as an accessory to the Bandana Man in killing Gnango by providing a gun to Gnango so that he may kill the Bandana Man. From the point of view of the provider of the weapon, the killing of the passerby at the hands of the Bandana Man is a less expected result than the killing of Gnango in the shootout with the Bandana Man. Thus, why impose liability on the provider of the weapon for this offence, as would follow from the position of the majority judges? Such a ruling would clearly be a misrepresentation of the incident, and form another unfortunate result of implicating Gnango in his own killing or attempt thereof.

Scenarios 8 and 9 represent a proper case of joint perpetration: the participants jointly commit the offence against a common object, similarly to the *Mansell and Herbert* case,[56] but with one important variation. A case such as that of *Mansell and Herbert* is not in itself insightful for our inquiry into the preferable conception of intent, because the question that *Mansell and Herbert* raises does not deviate from that which appears in all cases of displaced harm: Is it appropriate to attribute to the perpetrator (in this case, perpetrators) (a) harm to the actual object, according to the type-oriented conceptualization or through the transfer of malice from the intended object to the one that was harmed in practice, or (b) attempt to harm the intended object, as proposed by the purist position and the

Reply to Professor Virgo" (2013) Crim L Rev 577; Graham Virgo, "Guilt by Association: A Reply to Peter Mirfield" (2013) Crim L Rev 584.

56. *Mansell and Herbert's case*, *supra* note 4.

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object-specific conceptualization on which it relies. By contrast, the variations that appears in scenarios 8 and 9 enable us to advance the debate, because even if we accept that there are no decisive reasons in either case concerning the liability of the shooter,[57] P1, regarding the liability of the joint perpetrator who did not shoot but was shot at, P2, the answer is clear: it is much more reasonable to attribute to P2 attempted homicide of his intended victim O rather than attempted self-homicide.[58] This is the case especially if we take into account that if P2 had tried to kill himself he would have been absolved of all liability.[59] The purist position does not attribute to P2 joint perpetration in the attempt to kill himself but joint perpetration in the attempt to kill O, the intended object. It could be argued that the purist position allows attributing to the parties, in addition to the attempt to harm the intended object, further liability for harm caused to the actual object. But since there was no partnership between the parties for harming each other, liability for harming P2 is contingent upon the individual mental state of each defendant with regard to the given outcome. Thus, P2 is absolved of the harm caused to himself despite P1's liability for this offence.

The wisdom in not treating one as a joint perpetrator in an attempt to harm oneself is valid both in cases of missed operation and of mistaken identification. As illustrated in scenario 9, it makes no difference whether P1 thought that P2 is the intended O or whether P1 aimed at O and hit P2 by accident; in both cases it would be likewise unusual to impose liability on P2 for an attempt to kill himself.

It follows, therefore, that scenarios of displaced harm caused by a joint perpetrator support an object-specific conceptualization of intent and a consistent application in cases of accident and mistaken identification—the same conclusion as that reached in the two preceding sections through the analysis of indirect participation. The example of reciprocal shooting (scenario 7) does not grant priority to either approach concerning the conceptualization of intent. But the case of the perpetrator who aims for the victim but harms his joint perpetrator instead (scenarios 8 and 9) supports the object-specific conceptualization of intent, because both the type-oriented conceptualization of intent and the doctrine of transferred malice lead to the anomalous conclusion that the perpetrator who was hurt is guilty of taking part in a criminal enterprise of killing himself, although attempted suicide is not a criminal offence. By contrast, an object-specific conceptualization avoids a similar anomaly by imposing on the perpetrator who was harmed liability for attempted harm to the intended victim of the joint criminal enterprise, whether his partner aimed at him as a result of missing the victim or because of mistaking him for the victim.

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57. See *supra* notes 17-22 and accompanying text.

58. Bohlander, "Transferred Malice", *supra* note 36 at 157.

59. Buxton, *supra* note 52 at 279-80. Ormerod suggests an additional consideration in this matter: 'Is it possible for an intended victim to be liable for assisting his own attempted murder? Consider A and B who are suicide bombers: they intend to blow up a deserted landmark in the depth of night and each other in the process. A's bomb does not detonate and he survives the blast. Can A, by being an accessory to B's conduct, be guilty of attempting to murder himself? Such a result would look odd given that if A succeeded in killing B he would only be liable as part of a suicide pact for his manslaughter'. David Ormerod, "Joint Enterprise: Murder – Killing of Bystander by Other Party in Gunfight" (2011) Crim L Rev 151.

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6. Conclusion

I hope to have demonstrated the way in which taking complicity into account helps solve the deep-rooted controversy regarding the manner in which intent to harm a particular object[60] is to be conceptualized: as general intent toward the type of object that comes to harm (e.g., a human being) or as an object-specific intent attached to a particular (e.g., John). The dispute involves two contradictory intuitions that cannot be reconciled by means of logic, and there are no decisive arguments for either position. Therefore, arguments for and against the two levels of abstraction should address commonly shared intuitions in the handling of concrete cases. When a defendant causes harm to a different object than the one he had in mind, either because of accidentally missing the target or as a result of mistaken identification, intuitions can easily go both ways.

Anglo-American law generally places no importance on the specific identity of the object harmed, reasoning that if the defendant intended to harm one object but ended up harming another of the same type, then something sufficiently similar to a consummate offence has occurred. Other legal systems, most notably German law, as well as a few Anglo-American commentators intuit that significance must be given to the actual object of the defendant's intent, at least in cases of accidental miss-aim if not in instances of mistaken identification. And indeed, if the defendant specifically intended to harm an enemy but ended up harming a beloved, we should find the conceptualization of his intent as generally aimed at any person whatsoever, including the beloved, uncomfortable to say the least. Thus, examining concrete cases of displaced harm in single-perpetrator scenarios reaches an intuitive deadlock. However, expending the inquisition to scenarios involving multiple perpetrators demonstrates that the object-oriented conceptualization of intent better accommodates the doctrines of complicity by sensibly allocating responsibility to accessories and joint perpetrators, and is therefore preferable. And as the analysis of nine distinct scenarios of collective criminality here examined show, this solution is valid both when the target is accidentally missed and when the object of the offence is replaced because of mistaken identification.

60. When the defendant intends harm to a non-particular object, as in the case of the indiscriminate shooter, both levels of abstraction reach the same result, as the defendant's specific intent includes all objects of the same type. See *supra* note 19.

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