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Felony Murder, Transferred Intent, And The Palsgraf Doctrine In The Criminal Law

Wilfred J. Ritz

FELONY MURDER, TRANSFERRED INTENT, AND THE *PALSGRAF* DOCTRINE IN THE CRIMINAL LAW

WILFRED J. RITZ*

Transferred intent is a doctrine common to both tort and criminal law, but it is a fiction—tolerated without enthusiasm.[1] In torts the doctrine has lost favor, being replaced by the rule expressed by Cardozo, C. J., in the well-known case of *Palsgraf v. Long Island R.R.*[2] In criminal law, even though "there is some difficulty in rationalizing"[3] transferred intent, the doctrine is still accepted as the basis for imposing criminal liability on a defendant whose victim is a different person from the one he intended should suffer from his criminal act.

In criminal law the doctrine of transferred intent had a common origin with the felony murder rule, but in the course of time, two separate, and supposedly distinct, rules developed. The use of the fiction has delayed recognition that the principle of the *Palsgraf* case is as applicable in the criminal law as in torts, replacing both transferred intent and the felony murder rule.

This article will undertake: (1) to show the common origin of transferred intent and felony murder and how, through a misconception, two distinct rules developed; (2) to state briefly the *Palsgraf* doctrine; (3) to show how the rules of transferred intent, felony murder, and *Palsgraf* apply in homicide cases; and (4) to show how transferred intent and *Palsgraf* apply in nonhomicide cases.

I. TRANSFERRED INTENT AND THE FELONY MURDER RULE.

Transferred intent and the felony murder rule have a common origin, the early common law treating the two as the same thing—a

*Professor of Law, Washington and Lee. A.B., 1938, Washington and Lee; LL.B., 1950, Richmond; LL.M., 1951, Harvard. Assistant Director of Research, 1938-42, Industrial Director, 1946-50, Virginia State Chamber of Commerce; Assistant Professor of Law, Wake Forest, 1952-53; Associate Professor of Law, Washington and Lee, 1953-59. Member, Virginia and Massachusetts Bars; Virginia State and American Bar Associations; American Society for Legal History; Virginia Historical Society.

[1]Authorities on both torts and criminal law attribute authorship of the doctrine to the other field. Compare Prosser, Law of Torts 33 (2d ed. 1955) with Perkins, Criminal Law 713 (1957).

[2]248 N.Y. 339, 162 N.E. 99 (1928); Restatement, Torts § 281(b) (1934). See Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1 (1953).

[3]Dykes v. State, 99 So. 2d 602, 606 (Miss. 1957).

technique for finding the implied malice on which a conviction of murder could be based.[4] This is shown in the following passage from Blackstone:

> "Also in many cases where no malice is expressed, the law will imply it: as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice.... In like manner if one kills an officer of justice, either civil or criminal, in the execution of his duty,... the law will imply malice, and the killer shall be guilty of murder. And if one intends to do another felony, and undesignedly kills a man, this is also murder. Thus if one shoots at A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder."[5]

It should be noted that Blackstone did not speak of the law transferring or changing a defendant's intent to cause the death of *A* into an intent to cause the death of *B*. Instead, he was illustrating what is now known as the felony murder rule. A person committing or attempting to commit a felony has the state of mind that is called "malice." He is sufficiently blameworthy so that if he accidentally kills while attempting to commit a felony he commits murder. A dictum of Holt, L.C.J., provides another well-known illustration:

> "[I]f two men have a design to steal a hen, and one shoots at the hen for that purpose and a man be killed, it is murder in both, because the design was felonious."[6]

Attempts at common law were only misdemeanors,[7] so in each of these illustrations from Blackstone and Holt there is no underlying felony; there is only the state of mind of a would-be felon who has killed in attempting to commit a felony. It is the *intent* to commit—not the

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[4]Mansell & Herbert's Case, 2 Dyer 128b, 73 Eng. Rep. 279 (1536). The members of a mob, who killed while attempting to commit robbery, were found guilty of the murder of a different person than the one at whom they had intentionally thrown a rock.

[5]4 Blackstone, Commentaries *200-01. Early cases in which the accused had an intent to commit a felony and the court used the language of transferred intent in defining malice are: Salisbury's Case, 1 Plowden 100, 75 Eng. Rep. 158 (1553); Saunders and Archer, 2 Plowden 473, 75 Eng. Rep. 706 (1575); Gore's Case, 9 Co. Rep. 81a, 77 Eng. Rep. 853 (1611).

[6]Rex v. Plummer, 1 Kel. 109, 117, 84 Eng. Rep. 1103, 1107 (1701).

[7]Perkins, Criminal Law 476 (1957); Clark and Marshall, Crimes 169 (5th ed. 1952).

commission of a felony—that supplies the malice that is an essential ingredient of murder. Nevertheless, there is a rather widespread misconception that the felony murder rule requires an "underlying felony."[8] When attention is fixed on this supposedly necessary underlying felony, the basic simplicity[9] and true purpose of the rule—i.e., to establish the mental element necessary for murder—becomes obscured.[10]

The theory of transferred intent is that "the state of mind which one has when about to commit a crime upon one person is considered by the law to exist and to be equally applicable although the intended act affects another person."[11] In homicide cases, therefore, it is rather obvious that transferred intent and felony murder rule perform exactly the same function.

It may be said in support of the theory of transferred intent that punishment is imposed in accordance with the culpability of the accused. If a defendant attempts to kill *A,* but kills *B* instead, all the elements of an intentional killing are present. The accused is as culpable, and society is harmed as much, as though he had accomplished the result he had intended.[12] Therefore, the cause of justice is served by punishing the defendant for a crime of the same seriousness as the one he tried to commit.

While this reasoning seems persuasive, it *does* require a legal fic-

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[8]E.g., Ludwig, Foreseeable Death in Felony Murder, 18 U. Pitt. L. Rev. 51, 61 (1956). "Since the defendant must be guilty of a felony before the doctrine may apply...."

[9]This is not to say that difficult problems do not arise in homicide cases involving felony murders. The problems are those of causation and parties, and the problems are not peculiar to felony murders. See, e.g., Ludwig, Foreseeable Death in Felony Murder, 18 U. Pitt. L. Rev. 51 (1956).

[10] Arent and MacDonald, The Felony Murder Doctrine and Its Application Under the New York Statutes, 20 Cornell L. Q. 288 (1935); Corcoran, Felony Murder in New York, 6 Fordham L. Rev. 43 (1937).

Stephen listed "an intent to commit any felony whatever" as one of the states of mind that constitutes malice. Stephen, A Digest of the Criminal Law, Art. 264 (1877). Nevertheless, he referred to Holt's illustration of shooting at a fowl with intent to steal it, as though the attempt itself, and not the intent, was what constituted malice. Regina v. Serne, 16 Cox C.C. 311, 312-13 (1887).

[11]1 Burdick, Law of Crime 149 (1946). The situation in which the doctrine of transferred intent is applied should be distinguished from that arising from mistaken identity, in which the accused intends to kill the human being he assaults, but he is mistaken as to the person's identity. In such a case, as Parke, B., said, "The prisoner did not intend to kill the particular person, but he meant to murder the man at whom he shot." Regina v. Smith, Dears. C.C. 559, 560, 169 Eng. Rep. 845 (1855). See also State v. Costa, 95 Conn. 140, 110 Atl. 875 (1920); McGhee v. State, 62 Miss. 772 (1885); State v. Wansong, 271 Mo. 50, 195 S.W. 999 (1917).

[12]4th Rep. (1839) Parl. Pap. xix 254, quoted in Williams, Criminal Law 108 (1953).

tion. "[T]he state of a man's mind is as much a fact as the state of his digestion."[13] Neither a state of mind nor an intent can be transferred—except by a fiction. As a matter of logic, though, the principal defect in the theory of transferred intent is not in supporting a conviction for the murder of *B*. The defect is in apparently freeing the accused from liability for an attempt to kill *A*. If the specific intent to kill *A* is *transferred* to *B*, it is no longer available to support a conviction for an attempt to kill *A*![14]

One way of avoiding the illogic of transferred intent as applied to homicide is to define murder in terms of an intent to kill the person killed *or another*.[15] Since murder at common law does not require an *actual* intent to kill, apparently satisfactory results are thus obtained without straining logic.[16] In nonhomicide crimes requiring a specific intent, this way of avoiding the illogic of transferred intent is not available, as will be demonstrated later in this paper.[17]

II. The *Palsgraf* Doctrine.[18]

Palsgraf v. Long Island R.R.[19] established the principle in tort law that the character of a person's conduct—whether careful or negligent—must be determined in relation to particular persons or things or to classes thereof. In *Palsgraf* a man carrying a parcel was trying to catch a train. He dropped the parcel when a guard pushed him on the train. The package contained explosives, which exploded and caused

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[13]Edgington v. Fitzmaurice, 29 Ch. Div. 459, 483 (C.A. 1885).

[14]Gunter v. State, 111 Ala. 23, 20 So. 632 (1896); Burnam v. State, 2 Ga. App. 395, 58 S.E. 683 (1907); Jones v. State, 89 Tex. Crim. 355, 231 S.W. 122 (1921). There is contrary authority. The matter is more fully discussed, infra, under the heading, "Multiplicity of Crimes."

Williams, Criminal Law 109, (1953) suggests that the justification for the doctrine of transferred intent is found in the assessment of punishment with reference to the culpability of the accused. The person who attempts and fails is just as bad as the one who attempts and succeeds. The doctrine of transferred intent permits inflicting the same punishment for *an attempt* to kill A as though the attempt had succeeded. Public opinion will be agreeable to this when a person is killed, but not when no one is killed. This line or reasoning as developed by Williams necessarily assumes that the accused cannot be guilty of both the murder of B and of an attempt to kill A.

[15]E.g., N.Y. Penal Law § 1044; 2 Wisc. Stat. § 940-01 (1955); Stephen, A Digest of the Criminal Law, Art. 264 (1877).

[16]Burdick, Law of Crime 149 (1946); Miller, Criminal Law 65 (1934); Perkins, Criminal Law 715 (1957).

[17]The doctrine is criticized in Perkins, Criminal Law 713-19 (1957) and Williams, Criminal Law 107-10 (1953).

[18]Articles on the doctrine are collected in Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1 (1953).

[19]248 N.Y. 339, 162 N.E. 99 (1928).

some scales at another part of the platform to fall and injure the plaintiff. In an opinion by Cardozo, C. J., the New York Court of Appeals held that the railroad was not liable to the plaintiff:

> "The conduct of the defendant's guard if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all."[20]

Speaking more generally, Cardozo said:

> "Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all."[21]

Andrews, J., taking a different viewpoint, dissented:

> "Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain."[22]

The Cardozian view was accepted by the *Restatement of Torts*:[23] A person who by his conduct creates a recognizable risk of a particular harm, or of harm to a particular interest or class of persons, is not liable for a *different* kind of harm, or for the *same* kind of harm to a different interest or to a person in another class.[24]

The *Palsgraf* case involved a negligent and not an intentional tort. Cardozo said that a different rule may apply to "certain cases of what is known as transferred intent, an act willfully dangerous to A resulting by misadventure in injury to B."[25] There is no theoretical difficulty in extending the doctrine to intentional torts;[26] if the *Palsgraf* doctrine is sound when applied to negligent torts, it is equally sound when applied to intentional torts. But whatever may be the rule in torts, the *Palsgraf* doctrine can be applied throughout the criminal law to characterize a man's conduct as intentional, reckless, negligent, careful, etc.

III. Homicide.

In order to show how transferred intent, the felony murder rule, and the *Palsgraf* doctrine apply in the criminal law, the following basic factual situation will be used: *A* and *B* are standing together in front of a thick bush. Behind the bush *C* stands at his favorite fishing

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[20]162 N.E. at 99. Three justices concurred in this opinion.
[21]Id. at 101.
[22]Id. at 103. Two justices concurred in this opinion.
[23]Section 281(b) (1934).
[24]Id., Comment on clause (b).
[25]162 N.E. at 101.
[26]See Prosser, Law of Torts 34 (2d ed. 1955).

spot. The person whose conduct is at issue, i.e., the accused or the defendant, knows that *C* frequents the spot, but does not know that he is now fishing. *D* is concealed behind another bush, although the defendant has no way of knowing this.

A. *Murder.*

In this basic factual situation the accused fires a bullet at *A* with an intent to kill him. This bullet may miss and kill no one, or it may hit and kill either *A, B, C,* or *D*. Each of these five possibilities involving an attempt to commit murder or a murder will now be considered.

1. *No one is killed or injured.* The accused is guilty of an attempt to murder *A*[27] and of no other crime. An attempt requires a specific intent, and the accused has that only with reference to *A*.

2. *A is killed.* The accused is guilty of the murder of *A*. At common law the accused is guilty of murder because he has express malice, the actual intent to kill; there is no need to consider the felony murder rule.

This simple answer, though, may be complicated in a jurisdiction that has a statute dividing murder into degrees. Such a statute may define first-degree murder so as to include the *unintentional* felony murder, while defining second-degree murder so as to include the *intentional* killing perpetrated without deliberation and premeditation.[28] Under such a statute is the person who commits an intentional killing without deliberation and premeditation guilty of first or second-degree murder?

Since under modern statutes an attempt to commit murder is generally a felony, the argument can be made that the attempt to kill *A* is a felony, which brings the felony murder rule into operation, so that when death results the felonious homicide is automatically first-degree murder. The argument is clearly unsound and is based on the misconception that the essential element of the felony murder rule is an underlying felony instead of an intent to commit a felony. Since the actual intent to kill or *express malice* is present, the mental element of murder is clearly established. It is pointless to invoke the felony murder rule to establish *implied malice,* a somewhat different mental

[27]The phraseology, "assault with intent to kill," would be as appropriate as "attempt to kill." Generally, the common law crime is called an "attempt," while the statutory crime, which may be no more than a codification of the common law, is designated—an "assult with intent." But see Perkins, Criminal Law 501 (1957), indicating that there is some authority that there may be a slight difference between an attempt and an assault with intent.

[28]*E.g.,* N.Y. Penal Law §§ 1044, 1046.

state, which also supports a conviction of murder. Since the felony murder rule is inapplicable the crime under the statutory definition is second-degree murder. The end result under such a statute is that an unintentional killing, i.e., the felony murder, may be first-degree murder, although an intentional killing, i.e., one without deliberation and premeditation, is only second-degree murder. The anomaly, and so it would seem to be, is caused by the statutory scheme making some unintentional killings more serious crimes than some intentional killings.[29]

New York reaches this same result under somewhat tortuous reasoning, since New York has apparently departed from the original felony murder rule and now considers the quintessence of the rule to be the commission of a felony, or what is called the underlying felony, and not the intent to commit a felony.[30] In the case supposed, in order to prevent the underlying felony, the attempt to murder *A*, from automatically raising the resulting murder of *A* to first-degree murder, New York limits the scope of the felony murder rule to "independent" underlying felonies. If the attempt on the life of the person killed forms a part of and becomes the chief ingredient of the crime of homicide, there is said to be a merger of the underlying felony—the attempt to murder—into the homicide, with the result that the felony murder rule is deemed inapplicable, and so the intentional killing without premeditation and deliberation is second-degree murder.[31]

3. *B is killed.* The accused is guilty of the murder of *B*. He may or may not be guilty of an attempt to kill *A*.

Under the doctrine of transferred intent[32] the accused is guilty of the same crime he would have committed if he had killed the person he

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[29]It has meen noted in New York, People v. Van Norman, 231 N.Y. 454, 132 N.E. 147, 148 (1921).

[30]Problems arising under the New York interpretation of the felony murder rule are discussed in Arent and MacDonald. The Felony Murder Doctrine and Its Application Under the New York Statutes, 20 Cornell L.Q. 288 (1935); Corcoran, Felony Murder in New York, 6 Fordham L. Rev. 43 (1937).

[31]People v. Luscomb, 292 N.Y. 390, 55 N.E.2d 469 (1944); People v. Lazar, 271 N.Y. 27, 2 N.E.2d 32 (1936); People v. Wagner, 245 N.Y. 143, 156 N.E. 644 (1927); People v. Spohr, 206 N.Y. 516, 100 N.E. 444 (1912); People v. Huter, 184 N.Y. 237, 77 N.E. 6 (1906).

[32]Mayweather v. State, 29 Ariz. 460, 242 Pac. 864 (1926); Brooks v. State, 141 Ark. 57, 216 S.W. 705 (1919); People v. Harrison, 395 Ill. 463, 70 N.E.2d 596 (1946), cert. denied, 334 U.S. 812 (1948); State v. Williams, 122 Iowa 115, 97 N.W. 992 (1904); State v. Clark, 147 Mo. 20, 47 S.W. 886 (1898); State v. Bectsa, 71 N.J.L. 322, 58 Atl. 933 (1904); New Mexico v. Ochoa, 61 N. M. 225, 297 P.2d 1053 (1956); Carpio v. State, 27 N. M. 265, 199 Pac. 1012 (1914).

intended to murder. The indictment should be drawn in all respects as though the decedent was the person at whom the shot was fired.[33] If the killing of *A* would have been first-degree murder because wilful, deliberate, and premeditated, so is the killing of *B*, the innocent bystander.[34] On principle, the intent to kill *A* has been transferred from *A* to *B*, so that it is no longer available to support a conviction of an attempt to murder *A*, but the cases are in conflict.[35]

Under the felony murder rule the accused is also guilty of the murder of *B*.[36] The intent to commit a felony, that is to kill *A*, supplies the malice necessary to support a conviction for the murder of *B*. The express malice directed toward *A* is implied malice in relation to *B*. There is no need to transfer intent, i.e., express malice. Nevertheless, following Blackstone's phraseology, courts sometimes undertake to explain the presence of malice under the felony murder rule in terms of a transfer of intent by implication.[37]

When murder is divided into degrees, the degree of murder may be different when *B* is killed, depending upon whether the felony murder rule or transferred intent is used. A familiar statutory scheme, as in Virginia, provides that murders in the commission or attempt to commit certain specified felonies, such as robbery, burglary, arson, and rape, are murders in the first degree; other felony murders are included in the catchall second-degree murder that includes all *murders* that are not in the first degree.[38] If the felony murder rule is used under such a statute, a killing of *B* in an attempt to murder *A* is only murder in the second degree, since an attempt to commit murder is not one of the specified felonies. Most American statutes have apparently been drafted on the basis that a killing of *B* in an attempt to murder *A* will be covered by a doctrine of transferred intent and does not need sta-

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[33]State v. Clark, 147 Mo. 20, 47 S.W. 886 (1898).

[34]Mayweather v. State, 29 Ariz. 460, 242 Pac. 864 (1926).

[35]See discussion, infra, under heading "Multiplicity of Crimes."

[36]Williams, Criminal Law 107 (1953).

[37]"[T]he malicious and premeditated intent to perpetrate one kind of felony, was, by implication of law, transferred from such offence to the homicide which was actually committed, so as to make the latter offence a killing with malice aforethought, contrary to the real fact of the case as it appeared in evidence." People v. Enoch, 13 Wend. 159, 174 (N.Y. 1834).

"Both at common law and under the New York statute there is a transference of intent from the felony to the homicide by implication and the homocide becomes one committed with malice prepense." People v. Luscomb, 292 N. Y. 390, 55 N.E.2d 469, 472 (1944).

[38]Va. Code § 18-30 (1950). The specified felonies in Viriginia are robbery, burglary, arson, and rape.

tutory treatment.[39] Transferred intent in this situation gives rise to a first-degree murder conviction, which is probably thought to be a desirable result, and partly explains the tenacity of the doctrine. Some state statutes dividing murder into degrees define the felony murder rule in terms of the commission or attempt to commit *a* felony; such a statute is broad enough so that a killing of *B* in an attempt to kill *A* is a felony murder.[40]

England has abolished the felony murder rule, but in doing so has given statutory codification to something in the nature of the doctrine of transfererd intent. The Homicide Act of 1957[41] provides in section 1(1) that:

> "Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

Under this statute a killing of *B* in an attempt to kill *A* is clearly murder.

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[39]Summaries of statutory provisions relating to felony murders will be found in Note, A Survey of Felony Murder, 28 Temp. L.Q. 453 (1955); Arent and MacDonald, The Felony Murder Doctrine and Its Application Under the New York Statutes, 20 Cornell L.Q. 288, 294 (1935).

[40]E.g., N.Y. Penal Code § 1044.

Under the New York application of the felony murder rule, it has been held that an assault on A is an independent felony, which brings into operation the felony murder rule when B interferes and is intentionally killed and the crime is first-degree murder. People v. Luscomb, 292 N.Y. 390, 55 N.E.2d 469 (1944); People v. Wagner, 245 N.Y. 143, 156 N.E. 644 (1927); People v. Giblin, 115 N.Y. 196, 21 N.E. 1062 (1889). The same result, i.e., first-degree murder, would seem to follow when there is an attempt to kill A, without premeditation and deliberation, resulting in the death of B. The matter is not free from doubt, though, since second-degree murder is defined by statute as a killing of a human being with a design to effect the death of the person killed, or of another, but without deliberation and premeditation. N.Y. Penal Law § 1046. If the statute does not apply in this situation it is difficult to see how the statutory provision relating to the death of a person other than the one intended to be killed can ever be given effect. Corcoran, Felony Murder in New York, 6 Fordham L. Rev. 43, 49 (1937). There appears to be no New York authority squarely in point. In People v. Miles, 143 N.Y. 383, 38 N.E. 456 (1894), the accused intended, with deliberation and premeditation, to kill A, but killed B instead. A conviction of first-degree murder was upheld. This result was based on an application of the felony murder rule; the same result would follow from an application of the doctrine of transferred intent. In People v. Van Norman, 231 N.Y. 454, 132 N.E. 147 (1921), the trial court refused to charge that if the accused assaulted A without deliberation and premeditation, but with intent to kill, and killed B instead, the offense would be murder in the second degree. A conviction of first-degree murder was reversed, the court stating that the jury might have ignored that the defendant was engaged in a felony, and then the offense would have been murder in the second degree.

[41]5 & 6 Eliz. 2, c. 11.

Under a broadly-stated *Palsgraf* doctrine, the character of the accused's conduct is not determined in the large, so to speak, but only in relation to particular persons or things. The conduct of a person shooting at *A* with intent to kill is intentional or purposeful in relation to *A*;[42] the same conduct, though, is not intentional, but only wanton and reckless in relation to *B*.[43] A defendant who kills while acting with wanton and wilful disregard of his victim commits murder,[44] and so the defendant by killing *B* commits murder. The degree of the murder will depend upon the statutory scheme. For example, it will be first-degree in New York and second-degree in Virginia.[45] If second-degree murder seems too lenient, it should be remembered that under the *Palsgraf* theory the accused is also guilty of an attempt to murder *A*.

4. *C is killed.* Under transferred intent and the felony murder rule the situation is in all respects the same as though *B*, the bystander, was killed. Under *Palsgraf*, though, the conduct of the accused towards *C* represents a lesser degree of criminality than the same act carried in relation to *A* and *B*. It may be characterized as gross, criminal, culpable negligence, with the result that the accused is guilty of the involuntary manslaughter of *C*. Of course, he is also guilty of an attempt to murder *A*.

5. *D is killed.* Under transferred intent and the felony murder rule the situation is still the same as though *B* had been killed. Under *Palsgraf*, however, the conduct of the accused is not criminal in relation to *D*, and so the killing of *D*, is not a crime. The accused is still guilty of an attempt to kill *A*.

This result may seem too lenient, but if so, it is not because the *Palsgraf* doctrine is wrong in principle, but because there are other incongruities or defects in the criminal law, which are emphasized in this particular situation. An accused who attempts to kill *A* and fails,

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[42]See Model Penal Code § 2.02(2)(a) and comment (Tent. Draft No. 4, 1955); Williams, Criminal Law 31-43 (1953).

[43]See Model Penal Code § 2.02(2)(c) and comment (Tent. Draft No. 4, 1955). Williams, Criminal Law 49-59 (1953) defines recklessness differently than in the Model Penal Code. The Williams concept of recklessness, or subjective recklessness, is the same as the Model Penal Code concept of "knowingly." Model Penal Code § 2.02(2)(b) and comment (Tent. Draft No. 4, 1955). Recklessness is being used in this paper in the same sense as in the Model Penal Code.

[44]People v. Jernatowski, 238 N.Y. 188, 144 N.E. 497 (1924); State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925); State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957). Williams, Criminal Law 45-48 (1953) denies that murder on this basis existed in England.

[45]See statutes cited supra notes 38 and 40.

causing actual harm to no one, is just as culpable as though he had killed *A*. Nevertheless, he is held accountable for only an attempt to murder *A* and not for the social harm that might have happened—the murder of *A*. The defendant who in the exercise of due care shoots at a rabbit and accidently kills a man commits no crime. Although the social harm, as measured by the death of a man, is just as great as though the defendant had intended to kill, the accused is not culpable and so not held criminally liable. If these two results are sound, then the defendant's act that is in accord with the exercise of due care with reference to *D* should not be more severely dealt with because it happens also to be criminal with reference to *A*. Certainly no one would argue that the criminal act of the defendant with reference to *A* should be dealt with *less* severely, because he acted carefully with reference to other persons.

B. *Voluntary Manslaughter.*

When the accused shoots at *A* under circumstances that would constitute voluntary manslaughter if *A* were killed, but misses *A* and kills *B* instead, under the doctrine of transferred intent the crime is voluntary manslaughter.[46] The applicability of the felony murder rule involves the same considerations that have already been discussed when the accused shoots at *A* with malice aforethought and kills either *A* or *B*. If the felony murder rule is applied the crime is murder; if the rule is not applied resort must be had to some other rule, either transferred intent or *Palsgraf*, to determine the crime. Under *Palsgraf* the crime committed will be determined by the character the conduct of the defendant bore in relation to the person killed. It may be found that the defendant acted with criminal negligence so that the crime will be involuntary manslaughter, or it may be found that he acted with due care in relation to *B* so that there is no criminal homicide.

C. *Suicide Attempts.*

The validity of the *Pasgraf* concept is particularly evident in the situation in which a person attempts an unsuccessful suicide in the course of which another person is killed. Under transferred intent, in order to determine whether such a killing is criminal, it is necessary to decide whether an attempt to commit suicide is a crime. This in

[46]Pinder v. State, 27 Fla. 370, 8 So. 837 (1891); Caraway v. State, 98 Tex. Crim. 119, 263 S.W. 1063 (1924); Rex v. Gross, 23 Cox C.C. 455 (1913).

[47]Williams, Criminal Law, 107, n.9 (1953); Turner, The Mental Element in Crimes at Common Law, 6 Camb. L.J. 31, 64-65 (1936).

turn may require an esoteric inquiry into whether suicide itself is a crime.[48] If attempted suicide is not a crime then no crime has been committed, but if it is a crime the killing will be a crime of the same character as attempted suicide. If attempted suicide is a felony, the felony murder rule may or may not be deemed applicable, in accordance with considerations already discussed.

Under the *Palsgraf* approach it is immaterial whether suicide or attempted suicide is a crime, since the conduct of the would-be suicide, even though not criminal in itself, may be criminal in relation to other persons. For instance, the man who survives the airplane crash he himself caused in an endeavor to commit suicide will be guilty of the murder of other persons whom he knew would be killed in the crash. The *Palsgraf* approach was used in *State v. Campbell*.[49] The Iowa court in this case found that attempted suicide was not a crime, but in reversing a conviction the court said that "the defendant could have been convicted of either murder or manslaughter by the reckless use of a deadly weapon."[50]

D. *Self-Defense.*

When an accused shoots at *A* in self-defense but kills *B* instead, he commits no crime under transferred intent.[51] The felony murder rule is inapplicable since there is no intent to commit a felony. Although a shooting at *A* in self-defense is excusable, under the *Palsgraf* doctrine the manner of the shooting may be criminally negligent in relation to *B*. This thought was expressed by the Supreme Court of Colorado in *Henwood v. People*:[52]

> "[H]is action in this respect would be lawful, but, if he did so without due caution or circumspection, taking into consideration the presence of others in the barroom, he was not guiltless, but might be adjudged guilty of involuntary manslaughter...."[53]

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[48]Commonwealth v. Mink, 123 Mass. 422 (1877); State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1890). Since a felon's goods and chattels were forfeited to the crown at common law in England, such an inquiry served a useful purpose. Perkins, Criminal Law 65 (1957).

[49]217 Iowa 848, 251 N.W. 717 (1934).

[50]251 N.W. at 719. See also Perkins, Criminal Law 66-67 (1957).

[51]Montgomery v. State, 78 Ga. App. 258, 50 S.E.2d 777 (1948); Caraway v. State, 98 Tex. Crim. 119, 263 S.W. 1063 (1924); Spannell v. State, 83 Tex. Crim. 418, 203 S.W. 357 (1918); Gaines v. State, 67 Tex. Crim. 325, 148 S.W. 717 (1912); Pittman v. State, 272 P.2d 458 (Okla. Crim. 1954).

[52]54 Colo. 188, 129 Pac. 1010 (1913).

[53]129 Pac. at 1012. See also Pinder v. State, 27 Fla. 370, 8 So. 837 (1891).

This view is being incorporated into modern statutes, such as the *Model Penal Code*[54] and the *Wisconsin Criminal Code*.[55] It has the support of leading authorities.[56]

E. *Multiplicity of Crimes.*

American cases are in conflict as to whether a single act and a single intent affecting more than one person constitutes one or more than one offense. The question usually arises in a second prosecution and is approached from the standpoint of double jeopardy. Under one view there is only one punishable offense, so that a second prosecution is barred.[57] Under the opposite view there are multiple offenses, so that a second prosecution for a crime against a different person is not barred.[58] The same rules presumably apply when the several

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[54]Model Penal Code § 202(10), comment at 131-32 (Tent. Draft No. 4, 1955).

[55]V Wisconsin Legislative Council, Judiciary Committee Report on the Criminal Code § 340.01, comment (1953).

[56]Perkins, Criminal Law 715 (1957); Williams, Criminal Law 107 (1953).

[57]Gunter v. State, 111 Ala. 23, 20 So. 632 (1896) (Acquittal or conviction of murder of A bars subsequent prosecution for murder of B, when one act kills both persons.); Hurst v. State, 24 Ala. App. 47, 129 So. 714 (1930) (Accused's killing of A and B while defending self from assault by A constitutes only one offense.); Carson v. People, 4 Colo. App. 463, 36 Pac. 551 (1894) (Acquittal of assault with intent to kill A bars prosecution for involuntary manslaughter of B.); State v. Wheelock, 216 Iowa 1428, 250 N.W. 617 (1933) (Acquittal of charge of involuntary manslaughter of A bars prosecution for involuntary manslaughter of B and C, killed in the same auto collision.); Jones v. State, 66 Miss. 380, 6 So. 231 (1889) (Acquittal of assault and battery on A bars prosecution for assault and battery on B, when the blow that struck B was justified as towards A.); Jones v. State, 89 Tex. Crim. 355, 231 S.W. 122 (1921) (Where accused shot at A with intent to kill, but hit and injured B, the state could prosecute for an assault upon both A and B, or upon either of them, but conviction or acquittal in one case would bar the prosecution of the other.); Spannell v. State, 83 Tex. Crim. 418, 203 S.W. 357 (1918) (Acquittal of A on grounds of self-defense, bars prosecution for murder of B, killed by another bullet fired at A in self-defense.); Sadberry v. State, 39 Tex. Crim. 466, 46 S.W. 639 (1898) (Conviction of assault with intent to murder A bars prosecution for assault with intent to murder B, where a single shot fired at four persons hit all four.); State v. Damon, 2 Tyler 387 (Vt. 1803) (Conviction of assaulting, beating, and wounding A bars prosecution for assault on B, where accused wounded both persons in same affray at same time with same stroke.).

[58]People v. Brannon, 70 Cal. App. 225, 233 Pac. 88 (1925) (Acquittal of assault with intent to kill A does not bar prosecution for murder of B.); People v. Allen, 368 Ill. 368, 14 N.E.2d 397 (1936) (Acquittal of involuntary manslaughter of A does not bar prosecution for manslaughter of B, killed in same auto collision.); State v. Melia, 321 Iowa 332, 1 N.W.2d 230 (1941) (Acquittal of murder of A does not bar prosecution for murder of B, where the two deaths do not result from the single discharge of a gun or the negligent driving of an automobile, thus distinguishing State v. Wheelock, 216 Iowa 1428, 250 N.W. 617 (1933), in which it was held that there could not be two prosecutions for involuntary manslaughter arising out of the same auto collision.); City of Olathe v. Thomas, 26 Kan. 233 (1881) (Conviction of assault and

charges are made in a single prosecution.[59] The *Model Penal Code* adopts the view that there are as many crimes as persons killed or injured.[60] Under the *Code* abuses are prevented by requiring that all offenses arising out of the same conduct be prosecuted in a single proceeding.[61]

The theory of transferred intent in consistent only with the view that there is but one offense committed. The felony murder rule and the *Palsgraf* doctrine, on the other hand, are consistent with the concept of multiple offenses.

The question was graphically presented in the recent Mississippi case of *Dykes v. State*.[62] The defendant killed his wife and father-in-law. He was first tried for the murder of the father-in-law, in which

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battery on A does not bar prosecution for assault on B, when both assaults occurred at the same time.); Slone v. Commonwealth, 266 Ky. 366, 99 S.W.2d 207 (1936) (Acquittal of murder of B does not bar prosecution for voluntary manslaughter of A, when both killings occur in mutual combat.); Commonwealth v. Browning, 146 Ky. 770, 143 S.W. 407 (1912) (Conviction of assault with intent to kill A does not bar prosecution for assault with intent to kill B, when both A and B wounded by the same shot fired by the accused.); State v. Fredlund, 200 Minn. 44, 273 N.W. 353 (1937) (Acquittal of involuntary anslaughter of A does not bar prosecution for manslaughter of B, killed in the same auto collision.); State v. Cosgrove, 102 N.J.L. 255, 132 Atl. 231 (1926) (Acquittal of manslaughter of A does not bar prosecution for assault and battery on B, when both occurred in same auto collision.); Fay v. State, 71 P.2d 768 (Okla. Crim. 1937) (Conviction of assault with intent to kill A does not bar prosecution for assault with intent to kill B, injured in same auto collision.); State v. Robinson, 12 Wash. 491, 41 Pac. 884 (1895) (Acquittal of murder of A does not bar prosecution for murder of B, when both killings resulted from the same conspiracy.); Winn v. State, 82 Wis. 571, 52 N.W. 775 (1892) (Acquittal of murder of B, killed in an effort to disarm the accused who was assaulting A, does not bar prosecution for assault with intent to kill A.).

In some cases the two crimes charged are closely related in time, but clearly arise out of separate and distinct acts. Belvins v. State, 20 Ala. App. 229, 101 So. 478 (1924) (A killed with a shotgun and B with a rifle); State v. Roberts, 170 La. 727, 129 So. 144 (1930) (A and B both killed with an ax); State v. Labbee, 134 Wash. 55, 234 Pac. 1049 (1925) (B killed after accused had killed A in self-defense.).

[59]Among the cases following a one offense rule are People v. Barr, 259 N.Y. 104, 181 N.E. 64 (1932) (Accused cannot be indicted for two crimes of manslaughter growing out of same auto collision.); Smith v. State, 159 Tenn. 647, 21 S.W.2d 400 (1929) (Accused can be convicted of only one crime where prosecuted for manslaughter of A and assault on B.); Huffman v. State, 200 Tenn. 487, 292 S.W.2d 738 (1956) (Accused can be convicted of only one crime of assault and battery with intent to maim, when three persons injured by accused intentionally running into the rear of the car in which they were riding.).

[60]Horack, The Multiple Consequences of a Single Criminal Act, 21 Minn. L. Rev. 805, 807 (1937), agrees that this view is sound in principle.

[61]Model Penal Code & 1.08(2) and comment (Tent. Draft No. 5, 1956). On some other points the Code is not so clear, as whether an assault with intent to kill A is a lesser included offense of the murder of B. See Model Penal Code § 1.08(4) and comment (Tent. Draft No. 5, 1956).

[62]99 So. 2d 602 (Miss. 1957).

proceeding he claimed to have shot in self-defense and was acquitted. Thereafter, in a trial for the murder of his wife he defended on the ground that he accidentally killed his wife while shooting in self-defense at her father. Nevertheless, he was convicted. On appeal the conviction was reversed for error in the instructions on the subject of transferred intent. The defendant, the court said, could be convicted of murder of the wife only if the proof showed he intentionally murdered her. He could not be convicted on a theory of transferred intent, that is, that he accidentally killed the wife while shooting with malice at her father. This theory, the court said, had been foreclosed by the acquittal in the earlier prosecution, which had established that he killed the father in self-defense and not out of malice.

If transferred intent really means that the intent is transferred, this result is not supportable. If the intent to kill the father was transferred to the wife, as the person who had actually been killed, it could not remain untransferred when the state prosecuted for murder of the father. The intent could not be both transferred and untransferred. So if the intent had been transferred the jury was right in acquitting for the murder of the father. The transferred intent was now, so to speak, attached to the dead wife. The acquittal for the murder of the father only established that the intent was not then attached to the deceased man; it did not establish that it had never existed. This is ludicrous reasoning, but no more ridiculous than the fiction of transferred intent itself.

The *Dykes* case can be easily handled under the *Palsgraf* doctrine. The acquittal of the defendant for the murder of the father-in-law is essentially not relevant to the issue. Even if the defendant did shoot the father-in-law in self-defense, the manner in which he engaged in combat may have been so wanton and reckless in relation to his wife that an accidental killing of her would be murder. By the same token, even though he had been convicted of murder of the father-in-law he could be acquitted of a criminal homicide with reference to his wife, since he might have exercised due care in reference to her.

F. *The Problem of Proof.*

The difficulties of proof have probably influenced the adoption of the fiction of transferred intent. When a man shoots into a crowd, it is difficult to determine at whom he aimed, especially if he used a shotgun. The trier of fact is entitled to infer from the fact that he hit a person that he intended to hit that particular person. As a rule of

evidence the proposition that the intent follows the bullet is valid.[63] This is a rule that is quite different from one that says, as transferred intent does, that even though it is a fact that the defendant intended to kill *A*, he will be treated as though he intended to kill *B*. When there is doubt as to the person at whom the accused was shooting, the several possibilities may be separately charged, but tried in a single prosecution. The evidence will establish the true facts, or failing that, the presumption that the intent follows the bullet will provide the basis for a finding of fact.

The requirement that the state prove the character of the accused's conduct towards the victim of the crime does not mean that the name of the victim is an element of the crime.[64] It is "a detail which serves merely to describe the crime and does not form a part of the substance or body of the offense charged."[65] When the victim is unknown, it is sufficient to allege that the name of the decedent is unknown.[66] The purpose of requiring the victim's name to be alleged is to inform the defendant of the nature and character of the charge against him so as to enable him to prepare his defense,[67] to prevent a variance between the allegation and proof at the trial,[68] and

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[63]This point was clearly made in two Maryland decisions. In Webb v. State, 201 Md. 158, 93 A.2d 80, 82 (1952), the court said, "The evidence supports an inference that he intended to shoot the prosecuting witness as he had threatened to do." In Davis v. State, 204 Md. 44, 102 A.2d 816, 819 (1954), the court said, "Malice and, so intent to murder, may be inferred from all the facts and circumstances of the occurence. The deliberate selection and use of a deadly weapon directed at a part of the body is a circumstance which indicates a design to kill . . . ." Nevertheless, in its most recent expression of the rule, the Maryland Court of Appeals, relying on these two cases, has changed the inference of fact into a substantive rule of law: "If the assault was committed under circumstances such that, if death ensued, the crime would have been murder in either the first or second degree, it is not necessary to sustain such a charge that a specific intent to take life should be shown." Hall v. State, 213 Md. 369, 131 A.2d 710, 713 (1957).

Another clearly distinguishable rule is that under which the jury may infer an intent to kill the person assaulted from the use of a deadly weapon. State v. Vargas, 180 Kan. 716, 308 P.2d 81 (1957); Davis v. State, 204 Md. 44, 102 A.2d 816 (1954); State v. Wansong, 271 Mo. 50, 195 S.W. 909 (1917).

[64]State v. Silver, 139 Conn. 234, 93 A.2d 154 (1952); People v. Johnson, 104 N.Y. 213, 10 N.E. 690 (1887); Barnett v. Texas, 294 S.W.2d 835 (Tex. Crim. 1956).

[65]People v. Cruz, 285 App. Div. 1076, 139 N.Y.S.2d 722, 723 (2d Dep't 1955).

[66]Adams v. State, 202 Md. 455, 97 A.2d 281 (1953), *rev'd on another ground*, 347 U.S. 197 (1954); State v. Faure, 98 N.J.L. 18, 119 Atl. 4 (1922); State v. Rappise, 3 N.J. Super. 30, 65 A.2d 266 (1949); People v. Johnson, 104 N.Y. 213, 10 N.E. 690 (1887); Brown v. State, 53 Tex. Crim. 303, 109 S.W. 188 (1908).

[67]Adams v. State, supra note 66; State v. Faure, supra note 66; State v. Rappise, supra note 66; People v. Cruz, 285 App. Div. 1076, 139 N.Y.S.2d 722 (2d Dep't 1955); State v. Garcia, 83 S.E.2d 528 (W.Va. 1954).

[68]Hutson v. State, 202 Md. 333, 96 A.2d 593 (1953).

to enable the accused to plead double jeopardy in the event of a subsequent prosecution.[69]

IV. Offenses Other Than Homicide

A. *Against the Person.*

What crimes are committed when a person shoots at *A* with intent to kill, but injures *B* instead? In one respect this situation is less complicated than when a killing is involved, since there is no doctrine similar to the felony murder rule that could be applied. The answer can be provided only by the doctrines of transferred intent or *Palsgraf*. The discussion of this question will be based on the same basic set of facts as was used in considering homicide.

1. *No one is injured.* The accused is guilty of an attempt to kill *A*, because of the attempt to commit a battery on *A*.[70] Since an assault may be committed by placing another in reasonable apprehension of receiving an immediate battery, even though the defendant does not intend to commit a battery,[71] is there also an assault against *B*? The answer is no. Although the criminal law recognizes a "negligent battery," when there is a physical touching,[72] it does not recognize a negligent or reckless assault when there has been no touching.

2. *A is injured.* The accused is guilty of an attempt to kill *A*, and of no other crime.

3. *B is injured.* Under the doctrine of transferred intent there is an attempt to kill *B*.[73] The cases adopting the doctrine, either expressly or by implication, give three reasons: (a) The intent follows the bullet[74] (b) The only requirements of an attempt to kill are that the defendant have an intent to kill and do an act towards accomplishing his purpose; it is not necessary that the intent be directed at the

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[69]Illinois v. Walker, 7 Ill. 2d 158, 130 N.E.2d 182 (1955); People v. Cheney, 405 Ill. 258, 90 N.E.2d 783 (1950); People v. Cruz, 285 App. Div. 1076, 139 N.Y.S.2d 722 (2d Dep't 1955); State v. Scott, 237 N.C. 432, 75 S.E.2d 154 (1953).

[70]Perkins, Criminal Law 86 (1957).

[71]Ibid.

[72]Id. at 84.

[73]People v. Rothrock, 21 Cal. App. 2d 116, 68 P.2d 364 (1937); Dunaway v. People, 110 Ill. 333 (1884); Matthews v. State, 148 N.E.2d 334 (Md. 1958); State v. Thomas, 127 La. 576, 53 So. 868 (1910); State v. Gilman, 69 Me. 163 (1879); State v. Gallagher, 83 N.J.L. 321, 85 Atl. 207 (1912); People ex rel. Starvis v. Rogers, 170 Misc. 609, 10 N.Y.S.2d 722 (City Ct. 1939); State v. West, 152 N.C. 832, 68 S.E. 14 (1910); Mathis v. State, 39 Tex. Crim. 549, 47 S.W. 464 (1898); Smith v. State, 95 S.W. 1057 (Tex. Crim. 1906); The Queen v. Latimer, 17 Q.B.D. 359 (C.C. 1886).

[74]Hand v. State, 90 Ga. App. 452, 83 S.E.2d 276 (1954).

person who may be injured by the act.[75] (c) If the accused has killed *B*, he would have been guilty of the murder of *B*, by reason of a transference of intent, and so "it would be a strange perversion of reasoning"[76] not to hold him guilty of an attempt to kill when death does not result.[77]

Other courts have rejected the theory of transferred intent in this situation and require, if the accused is charged with an attempt to kill *B*, that the prosecution prove that he did in fact intend to kill *B*.[78] The arguments used to support transferred intent are rejected: (a) The cases in which courts have spoken of the intent following the bullet have involved woundings. If this rationale were sound there could not be a conviction of an attempt when the bullet strikes no one. Since the law does recognize an attempt to kill, whether or not there is a wounding, the theory must be unsound.[79] (b) If the accused is to be held for only one crime requiring an intent to kill, it is preferable to convict him of a crime committed against the person he *did* intend to kill rather than a crime against a person he *did not* intend to kill.[80] (c) The supposed analogy to homicide is fallacious, since an attempt to kill requires a specific intent and murder does not.[81]

There is some evidence in the cases that the courts in considering this situation are thinking in *Palsgraf* terms—conduct intentional towards *A* is reckless towards *B*. For example, in the Ohio case of *Callahan v. State*[82] the court said:

> "Where a shot discharged at one injures another, who is at the time known to be in such position or proximity that his injury may be reasonably apprehended as a probable consequence of the act; in which case the law does not permit such reckless disregard of, and indifference to, results to pass with impunity, but will hold the intent to have embraced the victim; and the principle is the same whether one or many are imperiled."[83]

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[75]State v. Thomas, 127 La. 576, 53 So. 868 (1910).

[76]State v. Gallagher, 83 N.J.L. 321, 85 Atl. 207 (1912).

[77]Ibid.; State v. Gilman, 69 Me. 163 (1879).

[78]Jones v. State, 159 Ark. 215, 251 S.W. 690 (1923); Scott v. State, 49 Ark. 156, 4 S.W. 750 (1886); Lacefield v. State, 34 Ark. 275 (1879); People v. Keefer, 18 Cal. 636 (1861); Commonwealth v. Morgan, 74 Ky. (11 Bush) 601 (1876); State v. Martin, 342 Mo. 1089, 119 S.W.2d 298 (1938); State v. Williamson, 203 Mo. 591, 102 S.W. 519 (1907); State v. Mulhall, 199 Mo. 202, 97 S.W. 583 (1906); State v. Shanley, 20 S.D. 18, 104 N.W. 522 (1905); Regina v. Holt, 7 Car. & P. 518, 173 Eng. Rep. 229 (N.P. 1836).

[79]People v. Bollnow, 331 Ill. 434, 163 N.E. 437 (1928); State v. Mulhall, 199 Mo. 202, 97 S.W. 583 (1906).

[80]State v. Martin, 342 Mo. 1089, 119 S.W.2d 298 (1938).

[81]State v. Mulhall, 199 Mo. 202, 97 S.W. 583 (1906).

[82]21 Ohio St. 306 (1871).

[83]Id. at 309.

Even when the *Palsgraf* principle is accepted, there is still a problem of deciding which crime has been committed by an accused whose conduct towards *B* is reckless, the same conduct being intentional towards *A*. The common law recognizes an "intentional" battery as a crime; it has come to recognize a "negligent" battery as a crime, although frequently still preserving the language of "intention." It does *not* now recognize a "reckless" battery as a distinct crime. Therefore, this conduct must be subsumed under a broadened concept of either intentional battery[84] or negligent battery.[85]

4. *C or D is injured.* The same results are reached under transferred intent as though *B* were injured. Under *Palsgraf,* conduct that is intentional is relation to *A,* may be reckless as to *B,* criminally negligent as to *C,* and not criminal as to *D.*

5. *A and B (or C or D) are injured.* This unusual factual situation was presented in the recent Washington case of *State v. Cogswell,*[86] in which the defendant was convicted of two assaults with intent to kill. The defendant shot his wife, the bullet passing through her body and injuring their small daughter, whom she was shielding.[87] The trial court instructed the jury:

> "I instruct you that if you find that the defendant, with intent to kill a particular individual, shot or struck at that individual with a firearm, and by mistake, accident or inadvertence the charge or blow also took effect upon a second individual, in the eyes of the law the intent to kill was transferred to the second individual as well; and the defendant is just as guilty as if he had originally intended to kill the second individual also."[88]

The defendant argued on appeal that the instruction was erroneous on the ground that the doctrine of transfer of intent is not applicable

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[84]Hand v. State, 90 Ga. App. 452, 83 S.E.2d 276 (1954); Callahan v. State, 21 Ohio St. 306 (1871).

[85]Scott v. State, 49 Ark. 156, 4 S.W. 750 (1886); People v. Keefer, 18 Cal. 636 (1861).

[86]339 P.2d 465 (Wash. 1959).

[87]These convictions were under Wash. Rev. Code § 9.11.010: "Every person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another—

"(1) Shall assault another with a firearm or any deadly weapon or by any force or means likely to produce death; . . . shall be guilty of assault in the first degree . . . ."

The defendant was *also* convicted of an assault in the first degree committed on his mother-in-law, at whom he shot and missed and who he then pistol-wipped, and *also* of an assault in the second-degree on his father-in-law, whom he attacked with a knife.

[88]339 P.2d at 468.

to specific intent crimes. The Supreme Court of Washington found that there was sufficient evidence to sustain both convictions on the theory that the defendant actually intended to kill both his wife and daughter, and so the court left to the proper case the question of whether transfer of intent in Washington applies to assaults with intent to kill.

If the court in the *Cogswell* case had found that the defendant did not intend to kill the child, then the daughter would have been in the position of *B, C,* or *D* of our basic factual situation. Logic could not support a conclusion that the intent to kill the wife was untransferred so as to support a conviction with reference to the wife, and also transferred into an intent to kill the daughter so as to support a conviction with reference to the child. If the defendant knew the child was behind his wife's body and nevertheless fired a bullet at the wife, then this conduct—intentional toward the wife (*A*)—was wanton and reckless in relation to the child (*B*). Under circumstances less grievous the defendant might only be criminally negligent in relation to the child (*C*). If the defendant did not know or have reason to know of the presence of his daughter (*D*), his conduct would not be criminal with reference to the child.

B. *Substantive Law and the Problem of Proof.*

The close relationship between the substantive law and the problems of proof are illustrated in the Georgia case of *Hand v. State.*[89] The accused fired two or three shotgun blasts toward a group of persons, injuring five of them. He was prosecuted under an indictment with five counts, each count charging an assault with intent to kill one of the persons hit. The jury acquitted on four counts and convicted on one. In affirming, the Georgia Court of Appeals pointed out that the jury could have found three different factual situations under the evidence: (1) The accused had a separate intent to kill each person, and if so, he committed five assaults with intent to kill.[90] (2) He did not intend to kill any particular person. Then, his firing with a reckless disregard of life and safety would create a presumption of malice and specific intent as to each person whom he hit,[91] and he would have committed five assaults with intent to kill. (3) He had an intent to kill only one particular person, in which case he committed only one assault with intent to kill.[92]

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[89]90 Ga. App. 452, 83 S.E.2d 276 (1954).
[90]Fews v. State, 1 Ga. App. 122, 58 S.E. 64 (1907).
[91]Hand v. State, 90 Ga. App. 452, 83 S.E.2d 276, 279 (1954).
[92]Webb. v. State, 68 Ga. App. 466, 23 S.E.2d 578 (1942).

The result in the third situation is not sound, when considered in relation to those reached in the other two, since under accepted views of culpability intentional conduct is worse than reckless conduct. By applying the *Palsgraf* principle, the criminal liability of the accused is graded with reference to both his culpability and the social harm he has caused. In the first situation, the accused having intended and attempted to kill five persons is guilty of five assaults with intent to kill. In the third situation, the accused having intended and attempted to kill one person is guilty of one assault with intent to kill, and also of four negligent or reckless batteries because of his conduct towards other persons. In the second situation the accused has committed five negligent or reckless batteries. These "reckless batteries may be punished along with "intentional" batteries, without resorting to a fiction that reckless conduct is the same as intentional conduct.

C. *Against Property.*

The theory of transferred intent is of little significance in crimes involving destruction or damage of property. The requisite mental element for such crimes is described as "malicious," rather than "intentional." Malicious has a meaning that is broader than intentional. The state of mind necessary for common law arson, which is described as maliciousness, includes both an actual intent to burn the dwelling house of another and also an intent to burn something under circumstances showing a plain and strong likelihood that the dwelling house of another will be burned.[93] So, if a man burns his own house under circumstances that create an unreasonable fire hazard to other dwelling houses, which do catch afire and burn, he commits arson.[94] This development of the law is consistent with the *Palsgraf* doctrine—an intentional burning of one house may be a reckless burning of another and a negligent burning of still a third.[95] So too with the crime of malicious mischief, which may be committed by either intentional or reckless conduct.[96] The rum runner who recklessly damaged police cars while trying to "skin through"[97] and the driver of the horse and buggy who drove so recklessly that the buggy shaft injured another horse[98] were both acting maliciously and committed malicious mischief. In both common law arson and malicious mis-

[93]Perkins, Criminal Law 175 (1957).
[94]3 Co. Inst. *67.
[95] See Williams, Criminal Law 104.
[96]Perkins, Criminal Law 285-90 (1957).
[97]Commonwealth v. Hosman, 257 Mass. 379, 154 N.E. 76 (1926).
[98]Porter v. State, 83 Miss. 23, 35 So. 218 (1903).

chief, conduct that is reckless toward property has been assimilated with conduct that is intentionally destructive of property.

D. *Mixed Offenses.*

When an accused intends to inflict an injury on a person, but misses and damages property instead, it is said by most authorities that intent will not be transferred,[99] so that the person who throws a stone at a person and breaks a window is not guilty of malicious injury to property.[100] The reason for the difference in treatment when property instead of another person is injured is not entirely clear. It may be because the fiction is too obvious. In any event the *Palsgraf* principle provides a more acceptable and realistic solution. The accused fires with intent to kill a man on horseback, but kills the horse instead. Under *Palsgraf* this is an attempt to kill the man. It is also the crime of malicious mischief to property, since the conduct is reckless in relation to the horse. If the accused had shot at the horse and killed a man, the crime would be murder, based on reckless conduct in relation to the man. There would be no other crime with reference to the horse, since it is not criminal to attempt to kill, as distinguished from actually killing, a horse.

V. Conclusion

A. *Homicide.*

There are three doctrines available for determining the crimes committed when an accused attempts to kill *A* but kills *B* instead: (1) transferred intent, (2) felony murder rule; and (3) the *Palsgraf* doctrine. Under transferred intent the accused is treated in law as though the "intent followed the bullet" regardless of what his intent in fact may be, and so the crime committed is the same as though the defendant had killed the person he intended to kill. Under the felony murder rule the intent to commit a felonious homicide on *A* is sufficient to bring the felony murder rule into operation. The crime committed is determined under the jurisdiction's treatment of felony murders. Under the *Palsgraf* doctrine, the character of the accused's conduct is determined in relation to the person killed. The accused's act may be intentional in relation to *A*, reckless as to *B*, criminally negligent as to *C*, and not criminal as to *D*.

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[99]Edwards, Mens Rea in Statutory Offenses 15-16 (1955); Perkins, Criminal Law 716 (1957); Williams, Criminal Law 104; Turner, The Mental Element in Crimes at Common Law, 6 Camb. L.J. 31, 48 (1956).

[100]The Queen v. Pembliton, L.R. 2 Cr. Cas. Res. 119 (1874).

As a general proposition all three rules will yield the same result, either murder or not murder, but the degree of murder may vary depending upon the statutory scheme. Generally, also, the *Palsgraf* doctrine, in comparison with the other two rules, will tend to reduce the grade of the homicide committed, but will tend to increase the number of crimes committed. Therefore, no generalization is possible as to which rule yields the more severe punishment, since that will depend upon the statutes fixing penalties.

B. *Offenses Other Than Homicide.*

There are two doctrines available for determining the crimes committed when an accused intends to kill one person, but either misses entirely or injures another. These are: (1) transferred intent and (2) the *Palsgraf* doctrine. Under transferred intent the accused is treated in law as through the "intent followed the bullet" regardless of what his intent in fact may have been. Under *Palsgraf* the character of the conduct of the accused is determined in relation to both the person intended to be killed and the person injured, each considered separately. The defendant will be guilty of an attempt to kill the one, and he may be guilty of a reckless or negligent battery or of no crime at all in relation to the person injured.

No generalization is possible as to which rule yields the more severe punishment, since this depends on the penalties imposed by statute. *Palsgraf* tends to reduce the degree of the crime committed, but tends to increase the number of crimes.

C. *Summary.*

A broadly-stated *Palsgraf* doctrine should be adopted in the criminal law because: (1) It is based on the principle that the character of a person's conduct is determined by considering it *in relation to* the environment in which he acts. (2) It is not based, as transferred intent is, on a legal fiction that is contrary to fact. (3) It is equally applicable to all offenses, homicide and nonhomicide, offenses against the person and against property. (4) It brings the principles of tort law and criminal law into greater harmony.