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# TRANSFERRED INTENT IN AMERICAN TORT LAW

VINCENT R. JOHNSON*

## I. AN ANCIENT FICTION IN MODERN TIMES

### A. *Continued Vitality of an Old Doctrine*

Transferred intent is an ancient common-law fiction that continues to be recognized as an active part of American tort law. The transferred-intent doctrine is described in casebooks[1] and treatises,[2] tested on bar examinations,[3]

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1. *See, e.g.*, ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS 46-49 (2003) (extensive discussion); GEORGE C. CHRISTIE ET AL., CASES AND MATERIALS ON THE LAW OF TORTS 52-55 (3d ed. 1997) (presenting principal case and notes); JOHN L. DIAMOND, CASES AND MATERIALS ON TORT 20-23 (2001) (extensive discussion); DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 47-48 (4th ed. 2001) (presenting a case and note); RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 9 (7th ed. 2000) (brief discussion); MARK F. GRADY, CASES AND MATERIALS ON TORTS 114-17 (1994) (presenting a case illustrating transferred intent); JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 24-25 (2003) (brief discussion); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 48-56 (2d ed. 1999) [hereinafter JOHNSON & GUNN, STUDIES] (presenting two principal cases and related notes); ROBERT E. KEETON ET AL., CASES AND MATERIALS ON TORT AND ACCIDENT LAW 39 (3d ed. 1998) (brief note); JERRY J. PHILLIPS ET AL., TORT LAW: CASES, MATERIALS, PROBLEMS 109-10 (3d ed. 2002) (stating that "'transferred intent' applies when A attempts to commit a trespassory tort on B and inadvertently commits such a tort on C instead"); DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 16-19 (2d ed. 1998) (stating that transferred intent applies with respect to battery, assault, and

asserted by attorneys on behalf of clients,[4] discussed[5] and applied[6] by courts,

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false imprisonment); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 28-29 (10th ed. 2000) (describing the doctrine in much the same terms as the article by Prosser discussed in the text, *infra*); AARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS: CASES AND MATERIALS 15-17 (2003) (presenting a principal case and hypothetical); DOMINICK VETRI ET AL., TORT LAW AND PRACTICE 807-08 (2002) (presenting a principal case and questioning why transferred intent is needed if the plaintiff can sue for negligence); RUSSELL L. WEAVER ET AL., TORTS: CASES, PROBLEMS, AND EXERCISES 21-22 (2003) (discussing transferred intent as it relates to battery).

It is interesting to observe how early the concept of transferred intent appears in most casebooks. It would be easy for a student to conclude from the priority of placement that transferred intent is an important feature in American tort law.

The doctrine is also often discussed in the teacher's manuals for law school casebooks. *See, e.g.*, VINCENT R. JOHNSON & ALAN GUNN, TEACHING TORTS: A TEACHER'S GUIDE TO STUDIES IN AMERICAN TORT LAW 17-20 (2d ed. 1999) [hereinafter JOHNSON & GUNN, TEACHER'S GUIDE] (criticizing the misapplication of transferred intent to cases more properly treated as negligence); VICTOR E. SCHWARTZ ET AL., TEACHER'S MANUAL FOR USE WITH PROSSER, WADE AND SCHWARTZ'S TORTS 28-31 (10th ed. 2000) (discussing transferred-intent cases appearing in the Prosser casebook); AARON D. TWERSKI & JAMES A. HENDERSON, JR., TEACHER'S MANUAL, TORTS: CASES AND MATERIALS 8-9 (2003) (stating, as part of a detailed discussion of the doctrine, that "[t]ransferred intent imposes liability for an unforeseeable plaintiff when the defendant acts intentionally to tortiously injure another" and that "[a]ll doubts should be resolved against an intentional tortfeasor").

2. *See, e.g.*, KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 25-26 (2d ed. 2002) (stating that the doctrine helps to avoid problems of proof because "sometimes a plaintiff will easily be able to prove that the defendant intended harm to someone" but unable to prove precisely who that was); JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 4-5 (2000) (stating that the rule applies to the five torts descended from the writ of trespass); DAN B. DOBBS, THE LAW OF TORTS 75-79 (2000) (suggesting that it may be "accurate to state the rule [of transferred intent] as an extended liability rule by saying that the defendant, who acts in such a way that intended injury would be actionable, is liable for all direct consequences even though they are not intended"); *id.* at 63-64 (discussing transferred intent as it applies to assault); RICHARD A. EPSTEIN, TORTS 13 (1999) (including a brief discussion differentiating intended victims from unexpected victims); VINCENT R. JOHNSON, MASTERING TORTS: A STUDENT'S GUIDE TO THE LAW OF TORTS 16-17 (2d ed. 1999) (offering an overview of the doctrine focusing on the issue of wrongfulness); MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW 25 (2d ed. 2003) (brief discussion); 4 TEXAS TORTS AND REMEDIES § 50.02[2] (J. Hadley Edgar, Jr. & James B. Sales eds., 2001) (stating "[i]t is immaterial that the actual injury inflicted was not the *type* of harm intended").

3. *See* NATIONAL CONFERENCE OF BAR EXAMINERS, THE MBE: MULTISTATE BAR EXAM: SAMPLE MBE 87 (1995) (Question 184 presents a scenario where a guard fires at a robber but strikes the plaintiff; the answer is that the guard is not liable for battery if he "fired reasonably in his own defense"; another choice suggests that the guard would be held liable based on transferred intent.); *see also* BARBRI, MULTISTATE BAR REVIEW: TORTS 1-2 (2002) (stating in a bar-review outline that transferred intent applies with respect to assault, battery, false imprisonment, trespass to land and trespass to chattels).

4. *See, e.g.*, Hall v. City of New York, No. 99 Civ. 979 (GE2), 2001 WL 1029046, at *2 (S.D.N.Y. Sept. 5, 2001) (In a civil rights action, plaintiff invoked a variety of legal doctrines, including transferred intent, but failed to state a claim based on battery, assault, or on false arrest.); Eady v. Capitol Indem. Corp., 502 S.E.2d 514 (Ga. Ct. App. 1998) (indicating that plaintiffs argued that transferred intent was not controlling in an insurance coverage dispute, but that the suit was decided on other grounds); Allstate Ins. Co. v. Ray, 1998 WL 896366, at *2-4 (Ohio Ct. App. Dec.

18, 1998) (stating that the plaintiff argued that transferred intent should not apply to a case involving interpretation of insurance coverage, but that the court did not need to reach that issue); Drawl v. Cornicelli, 706 N.E.2d 849, 853 (Ohio Ct. App. 1997) (arguing unsuccessfully that transferred intent should apply to an action for spoliation of evidence); Rivera v. Safford, 377 N.W.2d 187, 189 (Wis. Ct. App. 1985) (rejecting an argument that transferred intent should be read into the workers' compensation statute).

5. *See, e.g.*, Robins v. Meecham, 60 F.3d 1436, 1441-42 (9th Cir. 1995) (discussing transferred intent in the context of a § 1983 action based on a ricocheting gun shot in a prison); Niehus v. Liberio, 973 F.2d 526, 533 (7th Cir. 1992) (discussing transferred intent as it applies to accidental injury of a third person); *In re* EDC, Inc., 930 F.2d 1275, 1279 (7th Cir. 1991) (stating that transferred intent does not apply to fraud); Bolden v. O'Leary, No. 89 C 6230, 1995 WL 340961, at *3-5 (N.D. Ill. June 2, 1995) (stating that "[t]here is no transferred intent under Section 1983" and holding that inadvertent exposure to a chemical agent was not actionable under § 1983); Allstate Ins. Co. v. Lewis, 732 F. Supp. 1112, 1113-15 (D. Colo. 1990) (holding, in an insurance coverage dispute, that a seventeen-year-old boy's intent to assault with a gun a girl who was "bugging" him could not "be transferred to the ensuing physical harm caused by the accidental shooting"); Johnson v. McMurray, 461 So. 2d 775, 781 (Ala. 1984) (In a suit based in part on assault and battery, the court found that an instruction to the jury was erroneous because the charge was "subject to being interpreted as 'transferred intent,' as a matter of law."); Christensen v. Superior Ct., 2 Cal. Rptr. 2d 79, 101 (1991) (referring to a source stating that transferred intent does not apply to intentional infliction of emotional distress); Du Lac v. Perma Trans Products, Inc., 163 Cal. Rptr. 335, 338 (Ct. App. 1980) (stating that transferred intent applies to false imprisonment); Holder v. District of Columbia, 700 A.2d 738, 743 (D.C. 1997) (discussing instruction on transferred intent in a case involving unsuccessful claims for assault, battery, and negligence); Gray v. Morley, 596 N.W.2d 922, 927 n.3 (Mich. 1999) (Kelly, J., dissenting) (stating, in a case dealing with the intentional-tort exclusion to workers' compensation immunity, that transferred intent applies with respect to assault and battery); Adams v. Nat'l Bank of Detroit, 508 N.W.2d 464, 468 (Mich. 1993) (quoting a California case stating that transferred intent applies to false imprisonment); Rubino v. Ramos, 641 N.Y.S.2d 409, 410 (App. Div. 1996) (refusing to apply transferred intent to a barroom fight); Johnson v. BP Chemicals, Inc., No. 1-97-32, 1997 WL 729098, at *7 (Ohio Ct. App. Nov. 18, 1997) (stating that transferred intent will establish liability for battery in some cases, but that if the defendant is the unexpected victim's employer the "result is not clear"); Gottfried v. Joseph, No. 1-87-12, 1988 WL 38099, at *6, *8 (Ohio Ct. App. Apr. 21, 1988) (refusing to allow transferred intent to be invoked for the purpose of barring an action based on a shorter statute of limitations applicable to intentional torts); Cincinnati Ins. Co. v. Mosley, 322 N.E.2d 693, 696 (Ohio Ct. App. 1974) (discussing and rejecting a transferred-intent based argument in an insurance coverage dispute); State Farm Mut. Auto. Ins. Co. v. Martin, 660 A.2d 66, 68 (Pa. Super. Ct. 1995) (stating, in a suit relating to insurance coverage, that "[i]ntent, however, may be transferred from an intended victim to another"); Germantown Ins. Co. v. Martin, 595 A.2d 1172, 1175 (Pa. Super. Ct. 1991) (suggesting in dicta that an insured's intent to shoot and kill "everyone" in a house could be transferred to a victim whose identity or presence was unknown to the insured at the time of the shooting).

6. *See, e.g.*, Manning v. Grimsley, 643 F.2d 20, 22 (1st Cir. 1981) (involving a baseball thrown toward hecklers that struck a fan who may not have been a heckler); Universal Calvary Church v. City of New York, No. 96 Civ. 4606, 2000 WL 1538019, *47, *55, *60, *65, *70 (S.D.N.Y. Oct. 17, 2000) (holding that claims were stated for assault and battery based on transferred intent where police sprayed mace on people at a church revival riot); *In re* White, 18 B.R. 246, 249 (Bankr. E.D. Va. 1982) (holding that a judgment relating to the accidental shooting of a third person was nondischargeable because of transferred intent); Butler v. Comic, 918 S.W.2d 697, 698 (Ark. 1996) (stating that, in an action for deceit, transferred intent could supply the element of intent to deceive); Fidelity Mortgage Co. v. Cook, 821 S.W.2d 39, 43 (Ark. 1991) (stating, in a case where a misrepresentation was embodied in a loan commitment document that was received by the plaintiff, that transferred intent applies); Hall v. McBryde, 919 P.2d 910, 914 (Colo. Ct. App. 1996) (holding,

and is even acknowledged by the American Law Institute.[7] However, there

in a case where a child fired a gun at gang members but a bullet unexpectedly struck a neighbor, that transferred intent could be used to establish liability for battery); City of Winter Haven v. Allen, 541 So. 2d 128, 138 (Fla. Dist. Ct. App. 1989) (applying transferred-intent analysis in a case where a deputy sheriff was shot by a police officer); Holloway v. Wachovia Bank & Trust Co., 428 S.E.2d 453, 462 (N.C. Ct. App. 1993) (holding, in a car repossession case involving a gun pointed at the driver, that because transferred intent was recognized at common law, a passenger's assault claim should have been submitted to the jury).

7. In neither the *Second Restatement* nor the *Third Restatement* is there a section devoted exclusively to transferred intent. However, in the *Third Restatement*, there are occasional references suggesting the legitimacy of the concept. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) §1 cmt. b (Tentative Draft No. 1, 2001). The *Third Restatement* notes:

> If an actor intends to injure one person but the effort is unsuccessful and another person is injured instead, it might be difficult to say that the actor intended the actual victim's injury. However, in some cases the doctrine of transferred intent is applicable, and allows the law to reach the conclusion that the actor intended the victim's injury.

*Id.*; *see also id.* at § 1 Reporters' Note cmt. b (stating that "in dealing with particular torts of battery, assault, and false imprisonment, the *Second Restatement* seemingly accepts the transferred-intent doctrine"); *id.* § 1 Reporters' Note cmt. f (alluding to relationship between insurance issues and transferred intent); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 33 cmt. c (Tentative Draft No. 3, 2003) (discussing transferred intent in relationship to rules governing scope of liability for intentional torts); *id.* at § 33 Reporters' Note cmt. c (opining that "employing transferred intent to extend the scope of liability for intentional tortfeasors is entirely appropriate given the greater culpability of those who act with malicious intent and the policy behind scope of liability to avoid imposing liability out of proportion to the culpability of the defendant").

In the *Second Restatement*, the only direct reference to transferred intent in the blackletter rules or the commentary is a statement in a comment to the section entitled "Liability for Intended Consequences–General Principle," which provides:

> For certain early developing torts, such as assault, battery and false imprisonment, it is held not to be necessary to intend to harm the plaintiff, but intent to commit the tort (or a similar one) on a third person is sufficient. This "doctrine of transferred intent" has not been applied to newly developing torts arising out of the action of case and should have no application to this Section. Intent to commit the tort on a third person may, however, make it easier to find that the actor's conduct was substantially certain to cause harm to the plaintiff, as, for example, when the actor tells a falsehood to the plaintiff for him to relay to the third person and the plaintiff himself relies upon it to his detriment.

RESTATEMENT (SECOND) OF TORTS § 870 cmt. b (1979). Otherwise, in the *Second Restatement*, the sections defining assault and battery are crafted so that either tort will lie if there is intent to commit an assault or a battery involving the same person or a different person. *See* RESTATEMENT (SECOND) OF TORTS §§ 13 and cmt. b, 16, 18, 20 and 21 (1965). For example, the section on assault states in relevant part:

> (1) An actor is subject to liability to another for assault if
> (a) he acts *intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact*, and
> (b) the other is thereby put in such imminent apprehension.

*Id.* § 21 (emphasis added). And the section on false imprisonment is drafted so that liability is

has been virtually no critical examination of whether the transferred-intent fiction still serves a useful purpose in contemporary tort law.[8] This is surprising, for few features of the tort system have escaped scrutiny in recent years. In wave after wave of "tort reform," interested parties have done battle in legislatures, courts, and law journals over the availability and terms of compensation for injuries. Transferred intent is a part, albeit a very small part, of the turf that has been repeatedly contested. To have survived these battles wholly unscathed is remarkable.

The concept of transferred intent originally took root in a world of all-or-nothing compensation before the advent of comparative principles. That alone might be enough to arouse suspicion because the widespread adoption of comparative negligence and comparative fault has spurred reexamination and revision of many older rules that once seemed well established.[9] The many features of tort law altered by comparative principles include the

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imposed if there was intent to confine either the plaintiff or a third person. *Id.* § 35(1).

8. A notable exception is Osborne M. Reynolds, Jr., *Transferred Intent: Should its "Curious Survival" Continue?*, 50 OKLA. L. REV. 529 (1997). The thesis offered by Professor Reynolds is very different from the one presented in this Article. Professor Reynolds argues that transferred intent is unnecessary because the same result of imposing liability for an intentional tort can be achieved by other means. "[Q]uite apart from any doctrine of transferred intent—liability for an intentional tort extends to all direct consequences, and extends to remote, indirect consequences where the tort of trespass to land is concerned, so long as there is some chain of causation." *Id.* at 554. He concludes, with respect to the direct-result test, that:

> Such simplicity, understandability to jurors, and the resulting predictability of result, are surely preferable to the rigidities and complexities of transferred intent—a doctrine that should be relegated to the compartment of legal history appropriate to a "bare-faced fiction of the kind dear to the heart of the medieval pleader."

*Id.* at 555 (quoting Prosser); *see also id.* at 544 (stating that "[t]he rule of liability for 'direct and natural consequences' *is* . . . different from the doctrine of transferred intent . . . [but t]he result can be the same under either rule").

In contrast, the argument advanced in this Article is not that there are other ways to hold the defendant liable for an intentional tort, but that, at least in the case of unexpected victims of conduct intended to harm another, liability is more properly governed by principles addressing lack of care, namely, the law of negligence and recklessness.

9. *See* Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103 (2002). Professor Green writes:

> [T]he ripple effects of comparative negligence are far broader than merely removing the bar to recovery by a negligent plaintiff. We might think of the first ring of effects as the abolition of doctrines developed to ameliorate the harshness of contributory negligence, including last clear chance and stricter rules of proximate cause for plaintiff contributory negligence. But there are several more and larger rings of ripples that cut a wide swath across tort law. Indeed, the breadth and depth of the impact of comparative negligence on tort law belies the conception that comparative fault merely changes the rule about apportioning liability between a negligent plaintiff and defendant.

*Id.*

following: the rule of joint and several liability; the res ipsa loquitur doctrine; the rescue doctrine; the defense of assumption of the risk; and the defenses applicable to strict liability claims. It would not be amiss to ask, although apparently few have, whether the transferred-intent doctrine survives the enactment of a comparative approach to accident compensation.

However, the scholarship dealing with transferred intent in tort law is so thin that one would not need to be current in order to frame a good question. The concept of transferred intent entered American tort law long before the law of negligence was well established.[10] One might ask simply whether transferred intent should be retained in a world where, because of the abrogation of immunities and no-duty rules,[11] the negligence doctrine is now broadly applicable, and most people are held to a duty of reasonable care.[12] That is, should the transferred-intent fiction continue to be indulged when ordinary, honest negligence principles are usually sufficient to provide a clear path to compensation?

### *B. The Need for Reform*

The thesis of this Article is that, insofar as it concerns accidental injuries to third parties (as opposed to accidental injuries to intended victims), transferred intent in tort law is an outdated remnant of a bygone era—a time when it was necessary for courts to employ fictions to ensure that deserving plaintiffs were awarded relief and that blameworthy defendants did not escape liability. However, today the transferred-intent doctrine serves little useful

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10. Transferred intent was first applied in English tort law in 1773. *See* William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 654 (1967). American applications of the doctrine go back at least as far as 1869. *Id.* at 654-55 n.35. The American law of negligence was just then beginning to take shape. *See* G. EDWARD WHITE, TORT LAW IN AMERICA 3 (1982) ("The emergence of Torts as an independent branch of law came strikingly late in American legal history."); *id.* at 12-13 (opining that in the 1870s Oliver Wendell Holmes's "significant contribution was the isolation of negligence as a comprehensive principle of tort law"). It was not until the middle part of the twentieth century that many important limitations on the negligence principle were swept away. *Id.* at 112.

11. *See, e.g.*, DOBBS, *supra* note 2, at 751-64 (discussing the decline of spousal, parental, and charitable immunity); *id.* at 591-92 (discussing the abrogation of limited-duty categories relating to premises liability); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 1055 (5th ed. 1984) (stating that "[t]he most striking feature of the tort law of governmental entities today is that the immunities, once almost total, have been largely abolished or severely restricted at almost all levels").

12. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 6(a) (Tentative Draft No. 2, 2002). "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct poses a risk of physical harm. . . ." The commentary further indicates "[t]hat is equivalent to saying that an actor is subject to liability for negligent conduct that causes physical harm. Thus, in cases involving physical harm, courts ordinarily need not be concerned with the existence or content of the ordinary duty." *Id.* at § 6 cmt. f.

purpose with respect to third parties, for actions based on lack of care typically provide plaintiffs with a better route to recovery. Accordingly, in the third-party context, the concept should be limited by courts and eventually discarded. More specifically, the transferred-intent doctrine in tort law, where it is now recognized, should be constrained to its present boundaries. Even within that sphere, the doctrine should be restricted when there is good reason to do so, such as for the purpose of preserving insurance coverage for accidental harm or, perhaps, for taking into account fault on the part of the plaintiff, when it is appropriate to do so.[13] Where the transferred-intent fiction is not now part of tort law, it should be rejected in favor of more legitimate legal principles.

### *C. Criminal Law Counterpart Distinguished*

In America, the doctrine of transferred intent appears in both torts and criminal law. By far, the larger number of cases invoking the doctrine arise from the criminal context. The utility of the concept of transferred intent in criminal law has long been criticized, and many authorities state that it is an unnecessary fiction.[14] Not surprisingly, the usefulness of referring to

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13. *See* discussion *infra* Part III.B.1.

14. WAYNE R. LAFAVE, CRIMINAL LAW 339-40 (4th ed. 2003). Professor LaFave also doubts the necessity of the rule. He writes:

> [P]roper conclusions of law as to criminal liability in the bad-aim situation are sometimes said to rest upon the ground of "transferred intent": To be guilty of a crime involving a harmful result to *C*, *A* must intend to do harm to *C*; but *A*'s intent to harm *B* will be transferred to *C*; thus *A* actually did intend to harm *C*; so he is guilty of the crime against *C*. This sort of reasoning is, of course, pure fiction. *A* never really intended to harm *C*; but it is not necessary, in order to impose criminal liability upon *A*, to pretend that he did. What is really meant, by this round-about method of explanation, is that when one person (*A*) acts (or omits to act) with intent to harm another person (*B*), but because of a bad aim he instead harms a third person (*C*) whom he did not intend to harm, the law considers him (as it ought) just as guilty as if he had actually harmed the intended victim. In other words, criminal homicide, battery, arson and malicious mischief do not require that the defendant cause harm to the intended victim; an unintended victim will do just as well.

*Id.* at 339-40 (footnotes omitted); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 122-24 (3d ed. 2001) (describing the fiction in criminal law as unnecessary and potentially misleading); Prosser, *supra* note 10, at 653. Prosser states:

> Professor Perkins has pertinently pointed out that under modern criminal statutes the ancient doctrine [of transferred intent] has no proper application, since these statutes normally require only an intent to affect some human being; and when they do require a specific intent to injure the one in fact injured, there is no room for criminal liability. This has not, however, deterred the courts from talking about the doctrine.

*Id.* at 653.

criminal-law precedent when addressing tort issues is often doubted.[15] This Article will not consider the continued vitality of transferred intent in criminal law. One might expect, however, that the analysis would differ.

Criminal law and tort law serve different purposes (largely, punishment, on the one hand, and compensation, on the other). In addition, whereas negligence is the baseline regime in tort law, criminal responsibility ordinarily requires culpability greater than negligence. The argument in this Article is that, in tort law, an action for negligence (or recklessness) is an equal or preferable avenue of recourse in comparison to one based on transferred intent. In contrast, negligence is not a ubiquitously available alternative basis for criminal responsibility, where it may be necessary to establish some form of intent, lest a blameworthy person escape responsibility.

## II. PROSSER'S FORMULATION OF TRANSFERRED INTENT

In 1967, William L. Prosser was at the height of his career.[16] He was a professor of law at Hastings and a former dean of Berkeley.[17] Prosser was also by then the author of three editions of the hornbook that transformed the

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15. *See* Reynolds, *supra* note 8, at 548-50:

> The doctrine of transferred intent remains securely established as part of the criminal law. . . .
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> . . . .
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> The doctrine in the criminal law is . . . much the same as in tort law and rests on the same basic rationale: a policy of widespread liability for an intentional wrong, reflected in extending liability to all direct consequences. But in the criminal law, there is no problem comparable to the tort question of allowing recovery for mental anguish. Indeed, the whole emphasis in the criminal law is on wrongful intent, not on scope and recovery of damages. Thus, the criminal cases may be regarded as of limited precedential value in tort.

*Id.* at 550.

16. *See generally* WHITE, *supra* note 10, at 153-63 (discussing the contributions of Prosser to American tort law).

17. *See* Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth edition) and the Prosser Legacy*, 39 VAND. L. REV. 851, 852 n.5 (1986) (citations omitted). Joyce states:

> [Prosser] was appointed to the faculty of the University of Minnesota Law School in 1930, where he remained until reentering practice with his old law firm in 1943. . . . Prosser joined the Harvard Law School faculty in 1947, but left in the following year for the University of California at Berkeley (Boalt Hall). . . . He served as dean there until 1961 and remained a member of the faculty until 1963. In the latter year, he moved across the Bay to Hastings College of the Law, where he remained until his death in 1972.

*Id.*

field of torts,[18] a co-author of a widely used torts casebook,[19] and Reporter for the American Law Institute's *Restatement (Second) of Torts*.[20] In the *Texas Law Review* that year, Dean Prosser wrote: "Diligent search has failed to uncover any discussion anywhere, in text or law review, of that curious survival of the antique law, the doctrine of 'transferred intent.'"[21] Setting the stage for his examination of case law, Prosser hypothesized:

> Defendant shoots at *A*, intending to wound or kill him. His aim is bad, and he misses *A*. The bullet passes through a screen of bushes and hits *B*. Defendant is unaware of *B*'s presence, and he could not reasonably have been expected to be aware of it. There is no intent to hit *B* and no negligence with respect to *B*. The injury to *B* is an accident, pure and simple. Nevertheless, defendant is liable to *B* for battery, an intentional tort. The intent to commit a battery upon *A* is pieced together with the resulting injury to *B*. It is "transferred" from *A* to *B*: "The intention follows the bullet."[22]

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18. The copyright page to KEETON ET AL., *supra* note 11, indicates that the Prosser hornbook was published in 1941, 1955, 1964, and 1971. *See also* Joyce, *supra* note 17, at 865 n.68 (between 1978 and 1984 alone, the Prosser hornbook was cited in nearly 3500 cases).

19. *See* WHITE, *supra* note 10, at 155 (indicating that Prosser was a coauthor of the most widely adopted Torts casebook). The copyright page to WILLIAM L. PROSSER ET AL., TORTS: CASES AND MATERIALS (8th ed. 1988) shows that prior editions of the Prosser casebook were published in 1951, 1952, 1957, 1962, 1967, 1971, 1976, and 1982.

20. *See* WHITE, *supra* note 10, at 155 (stating that in the 1950s Prosser became the Reporter for the *Second Restatement of Torts*).

21. Prosser, *supra* note 10, at 650.

22. *Id.* (quoting State v. Batson, 96 S.W.2d 384, 389 (Mo. 1936)). The *Restatement* offers a similar illustration. *See* RESTATEMENT (SECOND) OF TORTS § 16 cmt. b & illus. 3 (1965), which states:

> b. The intention which is necessary to make the actor liable under the rule stated in this Section is not necessarily an intention to cause a harmful or offensive contact or an apprehension of such contact to the plaintiff himself or otherwise to cause him bodily harm. It is enough that the actor intends to produce such an effect upon some other person and that his act so intended is the legal cause of a harmful contact to the other. It is not necessary that the actor know or have reason even to suspect that the other is in the vicinity of the third person whom the actor intends to affect and, therefore, that he should recognize that his act, though directed against the third person, involves a risk of causing bodily harm to the other so that the act would be negligent toward him.
>
> Illustration:
>
> 3. A and B are trespassers upon C's land. C sees A but does not see B, nor does he know that B is in the neighborhood. C throws a stone at A. Immediately after C has done so, B raises his head above a wall behind which he has been hiding. The stone misses A but strikes B, putting out his eye. C is subject to liability to B.

*Id.*

Prosser acknowledged that this is nothing more than "arrant, bare-faced fiction,"[23] but after tracing the history of the writ of trespass in English law and the progress of the transferred-intent doctrine in American courts, he seemed reconciled to the rule:

> There was . . . some merit in the old idea of the absolute wrong. As between the innocent plaintiff struck by the bullet and the guilty defendant who fired it with intent to kill another man, it put the loss upon the one upon whom it ought in obvious justice to fall.[24]

Prosser concluded that case law showed that "the applicability of 'transferred intent' is coextensive with that of the old action of trespass."[25]

> [T]respass was the progenitor of no less than five modern torts: battery, assault, false imprisonment, trespass to chattels, and trespass to land. . . . [W]hen the defendant intends any one of the first four, his intention will be "transferred" to make him liable for any one of the five . . . . One who intends a battery becomes liable for assault when he puts a third person in fear for his own safety and for trespass to chattels when he damages a chattel. One who intends an assault, as where he shoots to frighten another, is liable for battery when the bullet unforeseeably hits a stranger, for assault when it frightens him, and for trespass to chattels when it hits a chattel. And one who intends trespass to a chattel, as where he shoots at somebody's dog, is liable for battery when he hits a man and probably also for trespass to land when he damages real property.[26]

In addition, according to Prosser, under American tort law, privileges also transfer: "As in the criminal cases, the privilege of self-defense has also been carried over, and it has been held that one who accidentally shoots a stranger while exercising that privilege is not liable."[27]

During the nearly four decades since Prosser wrote, much has changed in American tort law.[28] The most notable development has been the replacement

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23. Prosser, *supra* note 10, at 650.

24. *Id.* at 661.

25. *Id.* at 658.

26. *Id.* at 655-56 (footnotes omitted).

27. *Id.* at 655 (citations omitted).

28. *See generally* Vincent R. Johnson, *Tort Law in America at the Beginning of the 21st Century*, 1 RENMIN U. L. REV. 237, 237-41 (2000):

of common-law contributory negligence with comparative negligence and comparative fault.[29] But there have been other changes as well, including judicial expansion of liability rules,[30] seemingly continuous "tort reform" by legislatures,[31] and constitutional challenges to legislative lawmaking in the torts field.[32] In light of all these developments, does the doctrine of transferred intent, as described by Dean Prosser, still make sense?

To answer this question it is useful to distinguish unexpected injuries to intended victims from unexpected injuries to third parties. Both types of harm ordinarily have been treated as falling within the scope of the doctrine.[33] Yet, there is a world of difference between a case where D shoots to frighten A, but unexpectedly strikes A, and a case where D shoots to frighten A, but unexpectedly strikes B. Treating unintended injury to an intended victim as an intentional tort is hardly shocking. The defendant intended to invade the interests of the plaintiff, and in that sense the resulting harm was not

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> The twentieth century was a time of great change for tort law in America. At the beginning of the 1900s, victims of physical injury and property damage were afforded little in the way of redress. Under a variety of legal doctrines—some of which were almost stunning in their severity—tort plaintiffs were routinely denied recovery by American courts. No-duty rules, harsh defenses, and a wide range of immunities conspired to deprive injured persons of most opportunities to secure compensation. The prevailing rules protected the interests of business, the process of industrialization, and the pursuit of commercial progress by denying relief to the unfortunate individuals harmed by dangerous machines, defective products, and unsafe practices.
>
> Over the course of the twentieth century, the legal landscape of American tort law was thoroughly transformed. Slowly but inexorably, virtually every feature of the American tort system was examined and reshaped. No-duty rules were eviscerated with exceptions and sometimes jettisoned entirely. Defenses which once totally barred recovery were modified in accordance with comparative principles so that in a wide range of cases at least partial recovery is permitted, even if the plaintiff has engaged in some form of misconduct. Immunities excusing certain classes of persons and institutions from the obligation to exercise care have been widely abrogated, in whole or in part. Today, at the beginning of the 21st century, the general rule in American tort law is that all persons are obliged to exercise reasonable care to avoid foreseeable harm to others. Doctrinal departures from this basic principle are viewed with considerable skepticism.

*Id.* (footnotes omitted).

29. *See generally* DOBBS, *supra* note 2, at 503-06 (discussing comparative fault).

30. *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 5-7 (1988) (lamenting that in the mid-twentieth century academics and judges "changed the common law as profoundly as it had ever been changed before"), *reviewed in* Vincent R. Johnson, *Liberating Progress and the Free Market from the Specter of Tort Liability*, 83 NW. U. L. REV. 1026, 1045 (1989).

31. *See* JOHNSON & GUNN, STUDIES, *supra* note 1, at 5 (discussing reforming tort law).

32. VICTOR E. SCHWARTZ ET AL., WHO SHOULD MAKE AMERICA'S TORT LAW: COURTS OR LEGISLATURES? 2-15 (1997) (discussing instances where state constitutional provisions have formed the basis for attempts to nullify legislative tort reform).

33. Both types of cases are ordinarily treated as falling within the scope of the doctrine. *See infra* Part IV.A.

accidental, even if unexpected.[34] To call that type of invasion an intentional tort appeals to common sense. In contrast, in cases involving unexpected harm to third parties, the defendant never intended to harm the plaintiff, and it is purely fictional to treat the case as if the defendant did. Consequently, the discussion that follows focuses primarily on whether transferred intent is defensible in cases involving unexpected harm to persons other than intended victims.

## III. ALTERNATIVE ACTIONS BASED ON LACK OF CARE (NEGLIGENCE AND RECKLESSNESS)

The continued viability of the tort doctrine of transferred intent turns upon two questions. First, is there a compelling need for the doctrine in the sense that otherwise deserving people would unfairly be denied compensation? Second, even if there is no compelling compensatory need for the rule, does transferred intent serve other important purposes and fit well within the fabric that defines the American law of torts? These questions are probed in the following sections.

### *A. Availability*

Prosser's hypothetical about a bullet unexpectedly striking a person in the bushes is carefully crafted. Prosser asks the reader to assume that the defendant "could not reasonably have been expected to be aware" of the plaintiff's presence; that "[t]here is . . . no negligence" with respect to the plaintiff; and that the "injury . . . is an accident, pure and simple."[35] On these assumptions, reliance upon transferred intent by the unfortunate victim

34. This is particularly true with respect to assault and battery—the cases to which transferred intent most frequently applies—and perhaps also with false imprisonment. The defendant knows the person (although maybe not the identity of the person) whose interests are being invaded. With the trespass torts, the proposition stated in the text is less apparent, because intent to invade the personal security of the plaintiff is not essential. For example, in trespass to land, all that is necessary is intent to be present, not intent to be present on the plaintiff's land. *See* RESTATEMENT (SECOND) OF TORTS § 163 (1965) ("If the actor intends to be upon the particular piece of land, it is not necessary that he intend to invade the other's interest in the exclusive possession of his land."). A similar line of reasoning applies to trespass to chattels. *See* RESTATEMENT (SECOND) OF TORTS § 217 (1965). The commentary provides:

> It is not necessary that the actor should know or have reason to know that such intermeddling is a violation of the possessory rights of another. Thus, it is immaterial that the actor intermeddles with the chattel under a mistake of law or fact which has led him to believe that he is the possessor of it or that the possessor has consented to his dealing with it.

*Id.* at cmt. c.

35. Prosser, *supra* note 10, at 650.

appears to be essential. But are these fair assumptions?

To put the matter quite simply, a person who fires a gun under circumstances where there is a chance that the bullet will miss its target creates a foreseeable risk of harm to anyone within range of the bullet. If there was no good reason to discharge the gun (and Prosser's hypothetical seems to assume that there was none), the defendant acted unreasonably and therefore negligently. It makes no difference that the actor was unaware of the plaintiff's presence, for a risk of harm was created that endangered the class of persons of which the plaintiff was a member,[36] namely persons within the range of the bullet.[37] The actor had no right to count on persons not being present, and at the very least knew that he did not "know" that no one was behind the bushes. There are cases addressing similar facts that indicate that a person who fires a gun without excuse is liable for negligence to innocent persons who are hit.[38] Indeed, it would be rather astonishing to conclude otherwise. How could a person who fires a gun, without good reason, into an area that might be populated be found to have exercised reasonable care? Consequently, there is no reason to think that the blameworthy actor would escape liability;[39] rather, it is quite likely that the actor would be held

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36. The fact that a duty is owed to members of a class foreseeably endangered by the defendant's conduct is well established. The principle was recognized recently by *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654 (Tex. 1999). *Holder* denied recovery to the victim of a crime unexpectedly committed in defendant's parking garage in the middle of the night because the plaintiff "was not a member of this class nor any other that [the defendant] could have reasonably foreseen would be the victim of a criminal act in its garage." *Id.* at 657; *see also* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928) ("The orbit of the danger as disclosed to the eye of reasonable vigilance . . . [is] the orbit of the duty.").

37. In *Palsgraf*, which involved a claim based on negligence, Chief Justice Benjamin Cardozo wrote:

> The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. . . . This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." . . . Some acts, such as shooting are so imminently dangerous to anyone who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer.

*Palsgraf*, 162 N.E. at 100 (citations omitted).

38. *See, e.g.*, Day v. Utah Dept. of Pub. Safety, 980 P.2d 1171, 1180 (Utah 1999) (stating that "[o]fficers have . . . been liable for negligently injuring bystanders while trying to apprehend a fleeing misdemeanant").

39. *See* Gottfried v. Joseph, No. 1-87-12, 1988 WL 38099, at *6 (Ohio. Ct. App. Apr. 21, 1988). *Gottfried* involved a fight between two patrons in a bar which caused accidental injuries to a third person, who was stabbed by a broken bottle. The court wrote:

responsible for negligence or recklessness.[40] The question then is whether those causes of action are so inferior to one for an intentional tort that justice demands that the law embrace the fiction of transferred intent.

### *B. Adequacy*

#### 1. Carelessness on the Part of the Plaintiff

At one time, an action based on transferred intent had a huge advantage over a suit based on negligence or recklessness: it avoided the one-hundred percent bar of contributory negligence. *Keel v. Hainline* provides an excellent example.[41] In *Keel*, children in a classroom became rowdy while a teacher was absent from the room for thirty-five or forty minutes.[42] Battle stations were established behind the piano at one end of the room and a chalkboard at the other, and the children waged war by throwing erasers and other objects toward combatants across the classroom.[43] One of the wood-backed erasers went awry and accidentally struck the eye of a girl, who throughout the melee was studying in the middle of the room.[44] Had the girl sued the thrower of the eraser and his cohorts for negligence, it is likely that they would have argued that, by staying in her seat for so long and failing to get out of the way, the girl had neglected to exercise care on her own behalf.[45] Although the supposed fault on the part of the girl might have been slight, that argument would have posed a serious risk for the plaintiff. Under the then-prevailing common-law rule of contributory negligence, any carelessness on the part of

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> The fact that either Joseph or Hanthorn may have been guilty of, and had a cause of action for, assault and battery as to the other did not preclude conduct on the part of either or both of them from being negligent as to the plaintiff, giving a cause of action to plaintiff against either or both of them for their respective conduct.

*Id.* at *6.

40. By the same token, if the actor had good reason for firing the bullet that unexpectedly struck the person beyond the bushes in the Prosser hypothetical—for example, the actor was exercising self-defense or seeking to capture a fleeing felon—it could be argued that the actor did not behave unreasonably and therefore could not be found liable for negligence. But that would leave the victim no worse off than under transferred intent, for as noted above, Prosser acknowledged that privileges still may preclude liability in what would otherwise be a transferred-intent case. Either way the plaintiff would lose.

41. 331 P.2d 397 (Okla. 1958).

42. *Id.* at 398.

43. *Id.* at 398-99.

44. *Id.* at 399.

45. "A person is guilty of contributory negligence if he or she does not use ordinary care for his or her safety." Benton v. Hillcrest Foods, Inc., 524 S.E.2d 53, 58 (N.C. Ct. App. 1999) (citation omitted).

the plaintiff, however small, would have completely barred recovery.[46] By framing the action as one for assault and battery, premised on the fiction of transferred intent, the injured girl avoided the risk of an adverse finding on contributory negligence, and was permitted to recoup her damages.[47] Thus, under the regime of contributory negligence, an action based on transferred intent had significant advantage over a suit for negligence: It avoided the total bar created by common-law contributory negligence.

However, this advantage no longer exists in the vast majority of states that have adopted comparative negligence or comparative fault,[48] and it therefore cannot justify retention of the transferred-intent doctrine. Today, carelessness on the part of the plaintiff is no longer always a total bar to recovery.[49] Rather, in cases involving some slight fault on the part of the plaintiff (which is the only type of neglect that could be attributed to the girl in *Keel*),

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46. *Cf.* Pippin v. Potomac Elec. Power Co., 132 F. Supp. 2d 379, 384 (D. Md. 2001) (stating "if the Plaintiff was contributorily negligent in any way, it will be unable to recover anything in damages, no matter how small the degree of negligence") (citation omitted).

47. JOHNSON & GUNN, TEACHER'S GUIDE, *supra* note 1, at 18. The result in *Keel*, based on transferred intent, may be erroneous. In the teacher's manual for our casebook, my co-author and I state:

> *Keel* is wrong. The doctrine of transferred intent applies only if the actor's blow, if it had struck as intended, would have resulted in an intentional tort. If the defendants' aim in *Keel* had been better, they would have committed no tort at all, as those at whom the erasers were thrown had consented. Compare a case in which a football player, trying to tackle a runner, misses and hits a photographer standing on the sidelines: this is certainly not a battery. It will not do to say that *Keel* is different from this case because the defendants' conduct was "wrongful." It is "wrongful" to speed down a busy street, but if the speeder hits a pedestrian by accident, the tort is negligence, not battery. The wrongfulness of the defendants' conduct in *Keel* consisted in their ignoring the danger their conduct posed to others; this is negligence, not an intentional tort. The *Keel* court seems to have turned what should have been a negligence case into a battery case because of a concern that the defendants would have had a contributory negligence defense to a negligence claim.

*Id.* at 18.

48. Only five jurisdictions still treat contributory negligence as a total bar to recovery: Alabama (Bergob v. Scrushy, 855 So. 2d 523, 531 (Ala. Civ. App. 2002)); District of Columbia (Wingfield v. Peoples Drug Store Inc., 379 A.2d 685, 687 (D.C. 1977) (citing Karma Constr. Co. v. King, 296 A.2d 604, 605 (D.C. 1972))); Maryland (Pippin v. Potomac Elec. Power Co., 132 F. Supp. 2d 379, 383 (D. Md. 2001)); North Carolina (Yancey v. Lea, 532 S.E.2d 560, 563 (N.C. Ct. App. 2000)); and Virginia (Litchford v. Hancock, 352 S.E.2d 335, 337 (Va. 1987) (citing Fein v. Wade, 61 S.E.2d 29, 321 (Va. 1950)).

49. Under a "pure" comparative system, the plaintiff's recovery is reduced in accordance with the plaintiff's percentage of fault. For example, a plaintiff 60% at fault can recover 40% of his or her damages. Under a "modified" or "50%" system, the plaintiff recovers nothing if the plaintiff is more at fault than the defendant(s), and recovers a proportionally reduced amount if less at fault than the defendant(s). Thus, under a "modified" regime, a plaintiff 55% at fault recovers nothing, and a plaintiff 38% at fault recovers 62% of his or her losses. *See generally* UNIFORM COMPARATIVE FAULT ACT § 2, 12 U.L.A. 135-40 (1996); JOHNSON & GUNN, STUDIES, *supra* note 1, at 18-19 n.2.

negligence on the part of the plaintiff results in only a small reduction in recoverable damages.

Of course, an action based on the transferred-intent fiction may give the plaintiff an advantage over a suit based on negligence[50] because even today, in most states, carelessness on the part of the plaintiff is still not a defense to an intentional tort.[51] However, the question is not whether a suit premised on transferred intent gives the plaintiff some advantage; the question is whether fairness dictates that the plaintiff should be given that advantage. It is difficult to see why that is true in a case where the defendant has accidentally harmed a third person. Why should the factfinder ignore that the plaintiff failed to exercise care on his or her own behalf? Carelessness by the plaintiff is normally relevant in a case of accidental harm. Indeed, if a potential plaintiff can avoid injury through the exercise of care, the law should encourage the plaintiff to do so. Taking the plaintiff's conduct into account creates an incentive for self-protection, which in turn tends to minimize the costs of accidents. The public policy in favor of deterring unnecessary losses[52] suggests that, rather than opt for a fiction of transferred intent in cases of unexpected injury to a third person, the law should apply a straightforward negligence analysis, which under a comparative negligence or comparative fault regime has the potential to encourage the exercise of care by both the

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50. *Cf.* City of Winter Haven v. Allen, 541 So. 2d 128, 136 (Fla. Dist. Ct. App. 1989) (holding that, in a case involving a shooting during a drug raid, a plaintiff who pleads only negligence cannot rely upon transferred intent to defeat a request for a comparative negligence instruction).

51. This fact is reflected in the Uniform Comparative Fault Act, which does not define intentional harm as a form of fault for purposes of applying comparative principles. *See* UNIFORM COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 127 (1996), which states:

> "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

*Id.*

However, some jurisdictions take a different approach and, at least for some purposes, permit comparisons of negligence and intentionally tortious conduct. *See* Whitehead v. Food Max of Miss., Inc., 163 F.3d 265, 281 (5th Cir. 1998) ("Arizona, California, Colorado, Connecticut, Kentucky, New Jersey, New Mexico, New York, and Utah allow [a] comparison.").

52. *See generally* JOHNSON & GUNN, STUDIES, *supra* note 1, which states:

> The deterrence principle recognizes that tort law is concerned not only with fairly allocating past losses, but also with minimizing the costs of future accidents. According to this principle, tort rules should discourage persons from engaging in those forms of conduct which pose an excessive risk of personal injury or property damage.

*Id.* at 7.

defendant and the plaintiff. Doing so will not only deter unnecessary losses, it will also tend to distribute liability in proportion to fault.[53]

2. Punitive Damages

Considerations relating to punitive damages also cannot justify the retention of transferred intent. Recovery of money to punish or make an example of the defendant depends not so much upon whether the action is based on intent or lack of care, but upon whether the case involves highly blameworthy conduct.[54] Some intentional tort cases satisfy that criterion[55]—others do not.[56] The same is true of suits based on lack of care.[57] If the law were to require the type of case that traditionally has fit within the transferred-intent doctrine to be litigated based on the defendant's lack of care, it could nevertheless be framed as a suit for recklessness or gross negligence (rather than ordinary negligence) if the defendant's conduct was egregious. In such cases, punitive damages normally may be recovered.[58]

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53. Under a "pure" comparative system, damages are allocated in proportion to fault. The same is true under a "modified" comparative system if the plaintiff is less at fault than the defendant(s). However, if the plaintiff is more at fault than the defendant(s) in a "modified" comparative system, the plaintiff recovers nothing, in which case damages are not allocated in proportion to fault.

54. *See generally* Benton v. Hillcrest Foods, Inc., 524 S.E.2d 53, 59 (N.C. Ct. App. 1999) ("As a general rule, punitive damages may be recovered where tortious conduct is accompanied by an element of aggravation." (citing Robinson v. Duszynski, 243 S.E.2d 148 (1978))).

55. *See, e.g.*, Micari v. Mann, 481 N.Y.S.2d 967 (Sup. Ct. 1984) (awarding punitive damages in a case where an acting teacher deceived students into having sex with him or in front of him; the evidence supported findings for battery, assault, and intentional infliction of emotional distress).

56. *See, e.g.*, Drabek v. Sabley, 142 N.W.2d 798 (Wis. 1966) (holding that the evidence supported findings of false imprisonment and battery, but not an award of punitive damages, where the defendant chased down a child who had thrown snowballs at passing cars and drove the child to the police station).

57. The mere lack of ordinary care will not support an award of punitive damages. *See, e.g.*, Miles v. Kohli & Kaliher Assocs., 917 F.2d 235, 252 (6th Cir. 1990). However, some states permit an award of punitive damages where the defendant has acted with "gross negligence" or "gross neglect." *See* Buzzard v. Farmers Ins. Co., 824 P.2d 1105, 1115 (Okla. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon Supp. 2004). As recently defined in Texas, "gross negligence" corresponds to the level of wrongdoing that other jurisdictions commonly refer to as recklessness. *See id.* § 41.001(11). The Texas Code states:

> "Gross negligence" means an act or omission: (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; *and* (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

*Id.* (emphasis added).

58. "Only 14 states, including California, Delaware and Virginia, limit punitive damages awards to intentional acts of malice." James J. Restivo, Jr., *Insuring Punitive Damages*, NAT'L L.J.,

3. Vicarious Liability

In many instances a plaintiff seeking recovery, even for punitive damages,[59] must succeed in establishing vicarious liability on the part of a solvent person, such as an employer of the tortfeasor. Insofar as this is a concern, an action based on transferred intent has no advantage over one based on negligence.

In employment relationships, the tort must fall within the scope of the employment. According to the *Restatement (Second) of Agency*, section 228, the

> conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of the force is not unexpectable by the master.[60]

Virtually all transferred-intent cases involve the use of force, such as discharge of a firearm or use of brute strength. Regardless of whether one characterizes the injury as an intentional tort or negligence, the key questions for purposes of respondeat superior are the same, namely whether that conduct was the kind of conduct the defendant was employed to perform[61] and whether the use of force was "not unexpectable" from the standpoint of the employer.[62] In addition, some authorities have opined that, in fact, "'[i]ntentional tortious acts are rarely considered to be within the scope of an

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July 24, 1995, at C1. Other states generally also permit recovery in cases involving only willful indifference, wanton or reckless conduct or gross negligence. *See id.* at C1.

59. Punitive damages may be assessed against an employer under respondeat superior without violating the due process requirements of the Fourteenth Amendment. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). Some states have addressed the issue of vicarious liability for punitive damages by statute. *See, e.g.*, ALASKA STAT. § 09.17.020(k) (Michie 2002) (discussing liability for actions of managerial agents).

60. RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958). The evolving third *Restatement of Agency* proposes a somewhat different test for scope of employment:

> An employee's conduct is within the scope of employment when it constitutes performance of work assigned by the employer or occurs within a course of conduct subject to the employer's control. An employee's conduct is not within the scope of employment when it is not intended to further any purpose of the employer.

RESTATEMENT (THIRD) OF AGENCY § 7.08(2) (Preliminary Draft No. 7, 2003).

61. *See* RESTATEMENT (SECOND) OF AGENCY § 228(1)(a) (1958).

62. *See id.* § 228(1)(d).

employee's employment.'"[63]

Of course, on appropriate facts, respondeat superior liability can be imposed for reckless conduct, as well as in cases of intentional harm and negligence.[64] Likewise, an employee's conduct giving rise to strict liability may be imputed to an employer if the acts occur within the scope of the employment. Taking all of this into consideration, for purposes of imputing a tort to the tortfeasor's employer, an intentional tort action has no advantage over negligence and may in fact be less preferable. Consequently, factors relating to vicarious liability in the employment context cannot justify retention of the transferred-intent doctrine.

Parents are sometimes held vicariously liable, pursuant to a statute, for the torts of their minor children. This is relevant because an accidental shooting by a child may raise issues relating to transferred intent.[65] State legislatures in all fifty states have enacted parental-liability laws,[66] but they vary widely in their terms and coverage. Among the most important variables are those concerning what type of conduct may serve as the basis for vicarious liability and the limits, if any, on the amount that may be recovered from the parents. In most states, parental liability is triggered only by conduct worse than negligence. For example, the Texas statute requires the conduct to be "wilful and malicious,"[67] and the Oregon statute imposes liability on parents only for torts "intentionally or recklessly"[68] committed by a child. Consequently, with respect to parental liability for accidental harm caused by a child, the plaintiff may have an advantage if it is possible to invoke the doctrine of transferred intent. How much of an advantage this is, it is difficult to say. First, the intentional tort of a child may be treated no differently than one caused by the child's extreme lack of care, as under the Oregon law. Second, the statutory liability of parents is often capped by parental liability statutes, sometimes at a relatively low dollar amount. For example, "$25,000 per occurrence" under

63. Medlin v. Bass, 398 S.E.2d 460, 464 (N.C. 1990) (quoting Brown v. Burlington Indus. Inc., 93 N.C. App. 431, 437 (1989) (rejecting a respondeat superior claim based on sexual assault).

64. *See, e.g.*, Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989) (recognizing that in a defamation action reckless disregard for the truth can be imputed on a respondeat superior theory).

65. *See* Hall v. McBryde, 919 P.2d 910, 914 (Colo. Ct. App. 1996) (action against child and parents for injuries sustained by a neighbor when the child fired a gun at a passing car).

66. *See* L. Wayne Scott, *Liability of Parents for Conduct of Their Child Under Section 33.01 of the Texas Family Code: Defining the Requisite Standards of "Culpability,"* 20 ST. MARY'S L.J. 69, 87-92 (1988) (summarizing provisions from all fifty states); David A. Reesman, Note, *Tort Law: Parental Liability and the Extension of Social Host Liability to Minors*, 16 U. DAYTON L. REV. 827, 848-49 (1991).

67. TEX. FAM. CODE ANN. § 41.001(2) (Vernon 2002).

68. OR. REV. STAT. § 30.765(1) (2001).

the Texas law[69] and "not more than $7,500" in Oregon.[70] Third, some types of harm are not imputed to parents under parental liability statutes. Illustratively, Texas imposes vicarious liability for property damage (for example, vandalism) but not for personal injuries.[71]

Do the advantages that may be conferred on an intended third-party victim by a parental-liability statute warrant continued adherence to the concept of transferred intent? Surely not. It is one thing to say that a parent should be held liable for the intentional tort of a child; it is another thing entirely to say that a tort of a child should be labeled intentional because, by doing so, a parent may be held liable. While the former may make good sense, the latter makes no sense at all. If fairness demands that parents be held responsible for accidental harm caused by their children, the laws should so provide. Legal fictions should not be employed to circumvent the express terms of the law.

4. Insurance Coverage

Continued recognition of transferred intent also cannot be defended based on insurance considerations. Indeed, if insurance coverage is a concern, a suit for negligence is more likely to be advantageous to the plaintiff than one based on transferred intent. Liability policies normally exclude from coverage harm expected or intended from the standpoint of the insured.[72] As a result, an action framed as an intentional tort, based on conduct so blameworthy that the fiction of transferred intent applies, will probably result in a judgment that cannot be collected from the defendant's insurance.[73] In contrast, judgments based on negligence, or even recklessness, are normally covered by third-party liability insurance.

While there is no reported case of a defendant seeking to avoid liability for negligence on the ground that he or she really committed an intentional tort, there are decisions in which insurance companies have sought to escape from contractual obligations to an insured by making that argument.[74] Courts

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69. TEX. FAM. CODE ANN. § 41.0025(a) (Vernon 2002).

70. OR. REV. STAT. § 30.765(2) (2001).

71. TEX. FAM. CODE ANN. §41.001 (Vernon 2002).

72. *See* 7A APPLEMAN, INSURANCE LAW AND PRACTICE § 4501.09, at 265 (Supp. 2003) ("expected injury" is not equated with mere foreseeability of injury).

73. "[I]ntentional injuries, generally, are not covered. Otherwise a liability policy could be used as a license to wreak havoc at will." *Id.*

74. *See* Cincinnati Ins. Co. v. Mosley, 322 N.E.2d 693, 696 (Ohio Ct. App. 1974) (in a case where an insured intentionally drove her car toward two persons but unexpectedly hit a third person she did not know was present, the insurance company unsuccessfully argued that the injuries were not covered because transferred intent brought the case within an exclusion for bodily injury "caused intentionally" by the insured); *see also* State Farm Mut. Auto. Ins. Co. v. Martin, 660 A.2d 66 (Pa. Super. Ct. 1995) (stating, in a suit relating to insurance coverage, that "[i]ntent, however, may be

have sometimes found it unnecessary to base their rulings in such cases on whether transferred intent was applicable.[75] However, it is clear that insurance companies seeking to avoid coverage have raised transferred-intent arguments.[76] For this and other reasons, an action based on transferred intent gives a plaintiff no advantage over one based on negligence with respect to collecting a judgment from insurance proceeds.

5. Statute of Limitations

It is doubtful that one could frame an argument defending transferred intent based on considerations relating to statutes of limitations, even though the applicable statutes may vary depending on the classification of the tortious conduct. In many states, simple intentional torts, such as battery and assault, are subject to a short statute of limitations, while a longer statute applies to negligence.[77] If that is true,[78] a suit based on negligence has advantages over one based on transferred intent insofar as concerns the timeliness of the plaintiff's filing.[79] However, even if that is not the case, the length of the

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transferred from an intended victim to another").

75. *Id.* at 1197. *But see Cincinnati Ins. Co.*, 322 N.E.2d at 696 (stating that transferred intent "has no application to interpreting the terms of an insurance policy); *cf.* Boseman v. Orleans Parish Sch. Bd., 727 So. 2d 1194 (La. Ct. App. 1999). *Boseman* was an action for sick leave benefits, where the court wrote:

> Given the fact that the record indicates that the attack on Ms. Boseman continued for some unspecified period of time, the necessary intent appears to be present, even without resorting to the doctrine of transferred intent. This was not a situation where a teacher simply came between two students who were fighting and got caught in the crossfire.

*Id.* at 1197.

76. *See* Allstate Ins. Co. v. Lewis, 732 F. Supp. 1112, 1113-15 (D. Colo. 1990) (rejecting an insurance company's argument that transferred intent triggered an intentional-act exclusion from coverage where a boy, who intended to assault a girl with a gun, accidentally shot her).

77. *See* TORT LAW DESK REFERENCE: A FIFTY-STATE COMPENDIUM 591 (Morton F. Daller ed., 2003) (In New York, "[c]auses of action to recover damages for injury to property, personal injury, or malpractice . . . must be brought within three years," but "[c]laims involving intentional torts, such as assault, battery, [and] false imprisonment . . . are subject to a one-year limitations period.") (footnotes omitted).

78. In some states the statute of limitations for negligence is *not* longer than for an intentional tort. Sometimes the applicable statute is the same. *See id.* at 67 ("Personal injury and wrongful death actions founded on negligent, intentional, or tortious conduct generally must be brought within two years in California.") (footnote omitted). In addition, sometimes the statute applicable to an intentional tort is longer than for negligence. *See id.* at 1 ("Most tort claims in Alabama . . . are governed by a two-year statute of limitations, though trespass to person or property, assault and battery, false imprisonment, and conversion are subject to a six-year statute of limitations.") (footnotes omitted).

79. *See* Gottfried v. Joseph, No.1-87-12, 1988 WL 38099, at *8 (Ohio Ct. App. Apr. 21, 1988) (holding that while a one-year intentional-tort statute of limitations barred an action based on transferred intent, that statute did not bar an alternative claim for negligence).

statute of limitations for negligence is no reason for holding that negligence principles should not be employed to govern a case of accidental harm. Undoubtedly, legislatures set the period of limitations governing negligence actions with suits involving lack of care specifically in mind.

6. Immunities

Rules immunizing certain groups of people from tort liability (for example, nonprofit associations[80] or school teachers[81]) are sometimes defined by reference to whether harm was intentionally, recklessly, or negligently inflicted. In certain instances, suits based on conduct worse than negligence survive the immunity;[82] in other cases, the contrary is true and a suit may be maintained only if there is a level of fault falling short of intent. For example, in some states an intentional-tort action may be brought notwithstanding the otherwise applicable bar of spousal immunity.[83] However, under the Federal Tort Claims Act, suits for intentional torts such as battery, assault, and false imprisonment are barred, but actions based on negligence of a government employee are permitted.[84] Not surprisingly, it is impossible to generalize in the abstract about whether, for purposes of avoiding immunity, one would be better off alleging an intentional tort or negligence. It depends, perhaps, upon whether one is more likely to be accidentally shot by one's spouse or by the police. Consequently, considerations relating to immunities do little to shed light on whether the doctrine of transferred intent should be retained, although such issues sometimes arise in transferred-intent cases.[85] Questions as to the

80. *See* N.J. STAT. ANN. § 2A:53A-7a (2000) (immunizing nonprofit associations from certain types of negligence claims).

81. *See* TEX. EDUC. CODE ANN. § 22.0511 (Vernon Supp. 2004) (immunizing professional employees of a school district from liability for acts within the scope of duties that involve the exercise of judgment, except in cases of excessive force in the discipline of students or negligence resulting in bodily injury to students).

82. For example, the Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C.A. §§ 6731-6738 (2003), with various limits, immunizes certain school teachers from liability for negligence based on actions within the scope of the teacher's responsibilities undertaken in "efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school." *Id.* at § 6736(a)(2). Suits based on "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher" may still be maintained. *Id.* at § 6736(a)(4).

83. *See, e.g.*, Lusby v. Lusby, 390 A.2d 77 (Md. 1978) (holding that a wife could maintain an action against her husband for intentionally forcing her car off the road and inflicting physical harm); Townsend v. Townsend, 708 S.W.2d 646, 649 (Mo. 1986) (holding that spousal immunity did not bar an action for intentional tort against a husband who shot his wife in the back).

84. *See generally* Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2009 (1998) ("The FTCA permits suits against the United States for state negligence torts committed by federal agencies and agents.") (footnote omitted).

85. *Cf.* Gray v. Morley, 596 N.W.2d 922, 927 n.3 (Mich. 1999) (Kelly, J., dissenting) (stating,

continued viability of transferred intent, therefore, must be resolved by reference to considerations other than immunity, for the field of immunity offers no clear guide as to which course plaintiffs should take.

7. Minority

At least one work has raised the question of whether an action based on transferred intent is preferable to one based on negligence because, in the case of a child defendant, it may be difficult to prove that the child acted unreasonably.[86] At first glance, this argument has some appeal, for the torts descended from the writ of trespass have simple intent requirements,[87] whereas a negligence test involving a risk versus utility analysis is often complex. However, on closer examination, the advantage is illusory.

Ordinarily, a child need not exercise as much care as an adult and must exhibit only that degree of care that would be exercised by children of similar "age, intelligence, and experience."[88] However, a child will be held to an adult standard of care "when the child is engaging in a dangerous activity that is characteristically undertaken by adults."[89] According to the *Restatement*, "[h]andling firearms is best regarded as a dangerous adult activity."[90] Consequently, in a wide range of activities that are dangerous, it is no more difficult to establish negligence on the part of a child than on the part of anyone else. In the remaining range of cases involving child defendants, there would seem to be little reason to hold children liable to third parties for unexpected harm based on a transferred-intent theory. The children's standard (and its dangerous-activity exception) in negligence law is designed to "protect[] the need of children to be children but at the same time [to] discourage[] immature individuals from engaging in inherently dangerous activities."[91] Applying transferred intent to cases where a child defendant has caused unexpected harm would tend to frustrate the public policies that have shaped negligence principles in this area of the law.

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in a case dealing with the intentional-tort exclusion to workers' compensation immunity, that transferred intent applies with respect to assault and battery).

86. *See* CHRISTIE ET AL., *supra* note 1, at 55.

87. For example, battery and assault require intent to make contact or to cause apprehension of contact. *See* RESTATEMENT (SECOND) OF TORTS §§ 16, 32. False imprisonment requires intent to confine. *See id.* § 35. Trespass to chattels requires intent to affect the chattel. *See id.* § 217 cmt. c. Trespass to land requires intent merely to be present on the land. *See id.* § 163.

88. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 10(a) (Tentative Draft No. 1, 2001).

89. *Id.* § 10(c).

90. *Id.* § 10 cmt. f.

91. Robinson v. Lindsay, 598 P.2d 392, 394 (Wash. 1979) ("Children will still be free to enjoy traditional childhood activities without being held to an adult standard of care.").

8. Discharge in Bankruptcy

Perhaps the only real advantage that a transferred-intent action has over one based on negligence is that a resulting judgment cannot be discharged in bankruptcy. Under the bankruptcy code, one may not discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."[92] For purposes of this statute, "willful" has been construed to mean "intentional."[93] Consequently, judgments based on intentional torts that are malicious are nondischargeable. Ordinary negligence, and even recklessness,[94] will never qualify as "willful and malicious."[95]

Nondischargeability can be a significant advantage, and at least one case has held that a judgment based on transferred intent was nondischargeable.[96] However, it would be a peculiar legal system that justified the continued application of an archaic legal fiction, that in many respects (for example, statutes of limitations and insurance) may be disadvantageous to a deserving plaintiff, on considerations relating to discharge in bankruptcy. Moreover, there is still the question as to whether plaintiffs whose cases might fall within the transferred-intent doctrine should have this particular advantage. They are, after all, victims of accidental harm, just like many plaintiffs whose only option is to file suit based on negligence. Why do these plaintiff deserve the benefit of nondischarageability in bankruptcy that is denied to others? Why should the fact that the defendant in a transferred-intent case tried, but failed, to harm some third person be the basis for giving an unexpected victim the peculiar bonus that a resulting judgment will be so durable as to survive the defendant's filing for bankruptcy?[97] Certainly, nondischargeability is an

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92. 11 U.S.C. § 523 (a)(6) (1993).

93. *See In re* White, 18 B.R. 246, 248 (Bankr. E.D. Va. 1982) (stating that the "word 'willful' means deliberate or intentional") (footnote omitted).

94. *See id.* at 248 (stating that "[i]t is clear under the Bankruptcy Reform Act of 1978 that 'reckless disregard' is no longer sufficient to make a debt nondischargeable").

95. *See generally* George M. Ahrend & Randall T. Thomsen, *Tort Claims and Judgments as Debts for "Wilful and Malicious Injury" Nondischargeable Under Section 523(a)(6) of the Bankruptcy Code*, 100 COM. L.J. 498, 499 (1995) (stating that courts differ in their interpretation of the section and litigation has "dramatically increased as creditors have creatively tried to avoid discharge of debts owed to them").

96. *See In re White*, 18 B.R. at 248 (holding that, due to transferred intent, the accidental shooting of a third person resulted in a judgment that was nondischargeable).

97. *Cf.* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928). In rejecting the plaintiff's negligence claim, Chief Judge Cardozo wrote:

> The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to some one else. . . . What the plaintiff must show is "a wrong" to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but not "a wrong" to any one.

advantage to the injured person, but no one would suggest that it is a reason to adopt the fiction of transferred intent or that a legal system that neglects to so provide fails to sufficiently conform to the principles of justice relevant to accident compensation.

## IV. OTHER CONSIDERATIONS RELEVANT TO ABROGATION OF TRANSFERRED INTENT

As the preceding sections suggest, transferred intent is not a concept that is essential to affording redress to unexpected victims of intentional tortious conduct because actions based on lack of care are widely available. In addition, a suit based on the fiction of transferred intent is rarely preferable to one based on negligence,[98] and many times less advantageous.[99] None of the advantages are sufficient to justify the continued application of the transferred-intent doctrine to third-party cases, and the various disadvantages suggest that the fiction should not be retained. Nevertheless, it is important to ask whether there are good reasons, aside from compensatory considerations, that warrant the continued application of the doctrine of transferred intent.

### *A. Treating Victims Equally*

Is transferred intent needed to ensure that similarly situated victims are treated equally? If so, that would seem to be an argument in favor of retaining the fiction. Consider these two scenarios:

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*Id.* at 100.

98. *Cf.* Holder v. District of Columbia, 700 A.2d 738, 743 (D.C. 1997) (stating that a finding that the officer was not negligent in shooting the plaintiff precluded liability for assault and battery on a theory of transferred intent).

99. Discussing intentional torts versus negligence generally, the *Restatement* says:

> [S]omewhat ironically—given that intentional torts are generally deemed considerably more serious than torts of mere negligence—in certain circumstances the plaintiff is worse off if the tort committed against the plaintiff is classified as intentional rather than negligent. In some jurisdictions, for example, the statute of limitations is shorter for intentional torts than for negligent torts. If the tort was committed by the employee of the defendant being sued, classifying the employee's tort as intentional makes it more difficult for the plaintiff to show the tort was committed within the scope of the employee's employment. For reasons somewhat related to vicarious liability, if the plaintiff's suit is against a public entity, a rule of immunity may apply to intentional torts committed by a public employee but not to the employee's negligent torts. In private litigation, the plaintiff may expect that an eventual judgment will be covered by the defendant's insurance policy, and that policy may exclude coverage for intentional torts; accordingly, the plaintiff can be worse off if the tort is intentional rather than negligent.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 5 cmt. a (Tentative Draft No. 1, 2001).

Case One:
A bullet is fired by D1 for the purpose of killing P1. P1 is wounded by the bullet, which passes through P1's body, then strikes P2, whose presence was unexpected.

Case Two:
A car bomb is detonated by D2 outside of a bakery for the purpose of killing its owner. The blast injures both the owner, P3, and a customer, P4, whose actual presence might have been expected but was in fact unknown to D2.

It seems clear that in the two cases P1 and P3 would be forced to sue for intentional battery. They might try to cast their actions in terms of negligence (for example, for the purpose of reaching insurance coverage), but those efforts would likely fail.[100] Courts are reluctant to allow plaintiffs to "underplead" causes of action.[101] If P1 and P3 are required to sue for intentional battery, would abolition of transferred intent in third-party cases mean that P2 and P4 must sue for negligence or recklessness? And, if so, is

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100. *See* Universal Calvary Church v. City of New York, 2000 WL 1538019, *13 (S.D.N.Y. Oct. 17, 2000) (stating that under New York law, "once intentional conduct has been established, the actor is liable for assault and not negligence, even when physical injuries have been inflicted inadvertently"); Prada v. City of Albany, 956 F. Supp. 174, 183 n.9 (N.D.N.Y. 1997) (stating that "[i]t is well settled that negligence and assault and battery claims are mutually exclusive. . . . 'An assault and battery is an intentional act, whereas negligence is unintentional'" (quoting United Nat'l Ins. Co. v. Tunnel, Inc., 988 F.2d 351, 353 (2d Cir. 1993)); Locke v. N. Gateway Rest. Inc., 649 N.Y.S.2d 539, 548 (App. Div. 1996) (holding, in an an action to recover for injuries sustained when a restaurant employee attacked a patron, that the patron's claim was one for assault, not negligence, and that the action was time-barred); Germantown Ins. Co. v. Martin, 595 A.2d 1172, 1175 (Pa. Super. Ct. 1991) (holding, despite allegations of negligence, that an injury was intentional where there was "no evidence that the shooting was accidental or negligent").

Note, however, that intentional-tort claims are not always inconsistent with claims of negligence. In *Holder v. District of Columbia*, 700 A.2d 738 (D.C. 1997), the victim of a shot fired by a police officer for the purpose of hitting another person brought claims for assault, battery, and negligence. *Id.* at 739. The court did not find that the theories were inconsistent, but held that, under the unique instructions in the case, a jury finding that the officer was not negligent in shooting the plaintiff also necessarily incorporated a finding that the officer could not be held liable for assault and battery on a theory of transferred intent. *Id.* at 743.

101. *See generally* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721 (1997) (discussing attempts to plead and prove negligence in cases involving the intentional infliction of harm); *see also* Mazzafero v. Albany Motel Enters., Inc., 515 N.Y.S.2d 631, 633 (App. Div. 1987) (holding that if employees of a bar or its security firm engaged in offensive touching of the plaintiff, it was intentional and not inadvertent, and thus any right to recover for resultant injury was on the basis of the intentional torts of assault and battery rather than in negligence).

there something wrong with that? Put differently, were not P2 and P4 victims of the identical conduct that injured P1 and P3, respectively? Should they not be accorded the same litigational advantages and disadvantages as P1 and P3? Is application of the transferred-intent doctrine a prerequisite to equal treatment?

With respect to these questions, the situation of P4 is easier to address than that of P2 because, arguably, P4 can state an action for intentional battery without transferred intent. According to the *Restatement*, "[a] person acts with the intent to produce a consequence if: (a) The person has the purpose of producing that consequence; or (b) The person knows to a substantial certainty that the consequence will ensue from the person's conduct."[102] The commentary then provides:

> The applications of the substantial-certainty test should be limited to situations in which the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, *or to someone within a small class of potential victims within a localized area.* The test loses its persuasiveness when the identity of potential victims becomes vaguer, and when in a related way the time frame involving the actor's conduct expands and the causal sequence connecting conduct and harm becomes more complex.[103]

Because customers of the bakery were a "small class of potential victims within a localized area," the fact that the particular presence or identity of P4 was unknown to D2 should make no difference. P4, like P3, will likely succeed in stating a claim for intentional battery.[104]

The situation of P2 is different. P2 was not personally expected to be present, nor was P2 a member of a small class whose presence was expected to a substantial certainty. There was, presumably, merely some risk that

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102. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 1 (Tentative Draft No. 1, 2001).

103. *Id.* § 1 cmt. e (emphasis added).

104. *Cf. In re* EDC, Inc., 930 F.2d 1275, 1279 (7th Cir. 1991). Judge Richard Posner offered this illustration involving criminal law:

> Suppose you blow up a plane carrying X and Y in order to kill X. If both die in the explosion, you are just as much Y's murderer as X's, not because of the fiction of transferred intent but because you knew that Y (or any other person who might be a passenger on the plane) would die if your plot against X succeeded. *United States v. McAnally*, 666 F.2d 1116, 1119 (7th Cir. 1981). It is not a transferred-intent case because nothing went wrong with your plan; it is a case of extreme recklessness, equated to deliberateness.

*Id.*

someone might be present (which is why D1 may be sued for negligence or recklessness), but that probability fell far short of establishing the knowledge form of intent.[105] Without transferred intent,[106] P2 will be relegated to an action based on lack of care, and that classification will carry with it consequences with respect to applicable defenses, insurance, and the like. To that extent, P2 will be treated differently than P1, even though both were injured by the very same bullet. Does that mean P1 and P2 are being treated unfairly, and would indulging in the fiction of transferred intent avoid that unfairness? On both accounts, the answer is no.

Equality is not a matter of identical treatment; rather, it is a matter of reasonably similar treatment. An assessment of the terms and availability of damages available to P1 in an intentional battery action and P2 in an action based on, say, recklessness, would likely yield the conclusion that each was being treated fairly, even if they were not being treated identically. There might be some differences in terms of applicable defenses, statutes of limitations, and other relevant consequences of classification. However, as the above discussion suggests, an action based on lack of care is often preferable to one based on intent. Perhaps more importantly, regardless of whether the action is cast based on intent or lack of care, each plaintiff will be able to recover compensatory damages for all losses that are suffered, as well as punitive damages, to the extent that they are appropriate. It would be difficult to conclude that P2 will be denied rudimentary justice or so far disadvantaged as to be denied equal treatment by the law.

In any event, transferred intent is not a device capable of significantly ameliorating concerns about unequal treatment that might be raised by Case One. Making the doctrine available to P2 would merely give P2 the option of suing for intentional battery; it would not require P2 to do so. If P2 preferred to sue for negligence, presumably the facts would support such a claim.

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105. To some extent, the difference between the knowledge forms of intent, recklessness, and negligence is a matter of degree. According to the *Second Restatement*:

> If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness . . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence.

RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965).

106. There is authority that transferred intent could apply to this type of case. *See* Niehus v. Liberio, 973 F.2d 526, 533 (7th Cir. 1992) ("If A aims at B, and hits C, C can sue A for battery, even though he was not the intended victim and even though battery is an intentional tort. C can of course still sue A if A hits B as well as C.").

Moreover, the transferred-intent doctrine does nothing to address concerns about the inequality that P1 might have about P2's opting to sue for negligence, while P1 is relegated to an action for intentional battery. To that extent, it becomes clear that transferred intent is not a concept that ensures equal treatment of similarly situated victims; rather, it is a rule that, in certain circumstances, gives some unintended victims—not necessarily the victims most seriously harmed—an asymmetrical option.

### *B. The Idea of "Absolute Wrong"*

Prosser's endorsement of the concept of transferred intent was influenced by his belief that there was "some merit in the old idea of the absolute wrong."[107] Modern tort law does not frequently speak of "absolutely wrong" conduct, although, of course, such conduct exists. The attack on the World Trade Center, drive-by shootings, and murder come to mind.

However, even if it once made sense to say that the idea of absolute wrong justified the fiction of transferred intent, it is hard to see why that would be true today. As the above discussion indicates, a person who engages in absolutely wrong conduct is not likely to escape tort liability for unintended harm to a third person.

In any event, one cannot defend correlating the concept of absolute wrong to the five torts descended from the writ of trespass—battery, assault, false imprisonment, trespass to land, and trespass to chattels[108]—which for most practical purposes define the outer reaches of the transferred-intent doctrine.[109] Battery is not always highly blameworthy,[110] nor is assault;[111] nor false imprisonment,[112] trespass to land,[113] or trespass to chattels.[114] Whether

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107. *See* Prosser, *supra* note 10, at 661.

108. *See* JERRY J. PHILLIPS ET AL., TORT LAW: CASES, MATERIALS, PROBLEMS (TEACHER'S MANUAL) 33 (2002) (stating that "[t]here is no apparent reason why transferred intent could not apply to other intentional torts, such as conversion, invasion of privacy and the like").

109. *See* Drawl v. Cornicelli, 706 N.E.2d 849 (Ohio Ct. App. 1997) (holding that transferred intent does not apply to a spoliation of evidence claim and stating that research revealed no case to the contrary). *But see* Butler v. Comic, 918 S.W.2d 697, 698 (Ark. 1996) (stating that transferred intent could supply the element of intent to deceive in a suit for fraud).

110. *See, e.g.*, Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955) (holding a five-year-old child coud be liable for a battery committed by moving a chair behind the plaintiff).

111. *See, e.g.*, Moore v. El Paso Chamber of Commerce, 220 S.W.2d 327 (Tex. Ct. App. 1949) (finding that an assault was committed while trying to drum up interest in the livestock show); *cf.* Bouton v. Allstate Ins. Co., 491 So. 2d 56, 57 (La. Ct. App. 1986) (holding that a homeowner was not assaulted by trick-or-treaters, one of whom wore military fatigues and another of whom flashed a camera in the homeowner's face, for a "reasonable person expects to see an endless array of ghouls, beasts, and characters" on Halloween).

112. *See, e.g.*, Drabek v. Sabley, 142 N.W.2d 798 (Wis. 1966) (holding that a false imprisonment was committed where the defendant tried to discipline a child who had thrown

such conduct is egregious and therefore absolutely wrong depends upon the facts. If one were interested in identifying absolutely wrong conduct, one would consider as a candidate for the benefits of transferred intent the tort of outrage (which "requires conduct utterly intolerable in civilized society")[115] or perhaps those types of defamation involving intentionally false statements of fact published widely. Yet there are no cases applying transferred intent to such situations,[116] and it seems that ordinary tort principles are sufficient to address those types of problems.

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snowballs at passing cars).

113. *See, e.g.*, Dougherty v. Stepp, 18 N.C. 37 (1835) (holding that a trespass was committed when the defendant entered the unenclosed land of the plaintiff and surveyed a part of it without marking trees or cutting bushes because "the law infers some damage; if nothing more, the treading down the grass or the herbage, or as here, the shrubbery").

114. *See, e.g.*, Zaslow v. Kroenert, 176 P.2d 1 (Cal. 1946) (holding that trespass to chattels was committed by placing the plaintiff's furniture in storage).

115. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965) ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."). More recent cases continue to apply this exceptionally demanding standard. *See, e.g.*, Lybrand v. Trask, 31 P.3d 801, 804 (Alaska 2001) (holding that the standard was not met where the defendant painted large religious words and symbols on the plaintiff's roof).

116. *But see In re* EDC, Inc., 930 F.2d 1275, 1279 (7th Cir. 1991) (stating that "the doctrine of transferred intent . . . is not limited to battery cases" and citing a "famous" English case involving defamation, Jones v. E. Hulton & Co., [1909] K.B. 444, *aff'd* [1910] A.C. 20 (H.L.)). A good candidate for applying transferred intent to intentional infliction of emotional distress would be a case where a young girl, whose presence is unknown, witnesses defendants beating her father on Christmas Day. But in *Taylor v. Vallelunga*, 339 P.2d 910 (Cal. Dist. Ct. App. 1959), the court denied recovery.

The Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), precludes any argument that transferred intent may be employed in American defamation cases. The court wrote:

> [T]he evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. . . . There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements . . . did not even concern the police. . . . The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual.

*Id.* at 288-89.

Furthermore, many of the cases to which transferred intent has been applied involve conduct falling far short of an absolute wrong.[117] *Keel v. Hainline*[118] again offers a good example. It may have been careless, even reckless, for kids to wage an eraser battle in the presence of unwilling classroom spectators, but certainly the conduct falls far short of the egregiousness that one would expect of an absolute wrong, which presumably involves conduct that would be wrong at all times and in all places.

The idea of absolute wrong fails to explain the concept of transferred intent as it is now applied in American tort law. And no one suggests that transferred intent should be reformed to focus on absolutely wrong conduct. Accordingly, considerations relating to the concept of absolute wrong cannot justify retention of the transferred-intent doctrine.

### *C. Clarity in Legal Principles*

If there were nothing more to the concept of transferred intent than that "the intention follows the bullet,"[119] the elegance and clarity of the doctrine would have considerable appeal; however, the doctrine is more convoluted than elegant.

Prosser described transferred intent as applying with respect to the five torts descended from the writ of trespass when unexpected harm of a type within that range befalls the intended victim or a different person. What this means is fairly complex. As distilled by one bar review outline:

> The transferred intent doctrine applies where the defendant intends to commit . . . [one of the five torts] against one person but instead (i) commits a different tort against that person, (ii) commits the same tort as intended but against a different person, or (iii) commits a different tort against a different person. In such cases, the *intent to commit a tort against one person is transferred to the other tort or to the injured person* for purposes of establishing a prima facie case.[120]

The complexity of those contours is sufficient to arouse suspicion about the artificiality of the transferred-intent doctrine. But, the complexity does not end here. As noted above,[121] under Prosser's formulation, not only does

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117. *Cf.* Hall v. McBryde, 919 P.2d 910 (Colo. Ct. App. 1996) (employing transferred intent to establish battery where a child fired a gun for the stated purpose of protecting his home).

118. 331 P.2d 397 (Okla. 1958).

119. Prosser, *supra* note 10, at 650.

120. BARBRI, *supra* note 3.

121. *See supra* note 27 and accompanying text.

intent transfer, but so do privileges.[122] Thus, fiction is stacked upon fiction until the desired result is reached. One can avoid this multiplication of fictions by hypothesizing, as many sources do, that intent only transfers if the defendant has acted wrongfully, which of course is not the case if the defendant has a privilege.[123] There are cases holding that if a police officer, while rightfully using force against another, causes harm to a bystander, the harm is not intentionally inflicted and any recovery by the bystander must be predicated on proof of negligence.[124] If courts are willing to go that far, why not just say, at least in cases involving third persons, that any unexpected harm is not intentionally inflicted, it is accidental, and that liability must be determined under ordinary negligence principles? By doing so, the question of whether the defendant should be held liable would be honestly addressed.

## V. THE PROPER COURSE FOR JUDICIAL ACTION

It is highly unlikely that legislative tort reform will ever address the issue of transferred intent. Consequently, it is up to the courts to decide whether and how the doctrine should be applied. The following list contains suggestions to guide the exercise of judicial discretion.

(1) Courts should refuse to allow defendants to invoke the doctrine with the goal of avoiding liability for negligence. The purpose behind transferred

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122. *Cf.* Brudney v. Ematrudo, 414 F. Supp. 1187 (D. Conn. 1976) (holding, without discussion of transferred intent, that the defendant police officer did not commit an actionable assault and battery against the plaintiff in that it was evident that he acted within reasonable limits in determining type and amount of force required to rescue a fellow officer); Talmage v. Smith, 59 N.W. 656, 657 (Mich. 1894) (applying the rule without using the term "transferred intent"); See also DOBBS, *supra* note 2, stating:

> [T]he defendant must not be held liable if his conduct was protected by a privilege and the plaintiff is injured without fault. For example, the defendant may act intentionally in justified self-defense; if his act of self-defense causes injury to a bystander, there is no reason to impose liability unless the defendant was negligent.

*Id.* at 77.

123. *See* City of Winter Haven v. Allen, 541 So. 2d 128, 137 (Fla. Dist. Ct. App. 1989) (stating that "before there can be a transferred intent to commit an intentional tort, the original intent with which the act is committed must be wrongful"); Reynolds, *supra* note 8, at 536 (stating that in a case where the defendant acts in self-defense "there is no wrongful intent since the conduct is privileged; thus, there is no intent to be transferred"); *see also* Holder v. District of Columbia, 700 A.2d 738 (D.C. 1997) (holding that a finding that the officer was not negligent in shooting the plaintiff precluded liability for assault and battery on a theory of transferred intent).

124. *See* Moore v. City of Detroit, 340 N.W.2d 640, 643 (Mich. Ct. App. 1983) (stating that "the doctrine of transferred intent is not applicable in a case such as the present one, where the allegedly tortious conduct was justified. In such a situation, there is no intentional tort liability but only potential negligence liability") (citation omitted).

intent is to expand liability, not to contract it.[125] A tortfeasor should never be permitted to escape accountability for negligence by urging that the injury was really an intentional tort.[126]

(2) Courts should decline to allow insurance companies to rely upon the transferred-intent doctrine for the purpose of denying coverage for accidental harm.[127] Some courts have taken this path.[128]

(3) Courts should confine transferred intent to actions for assault and

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125. *See* Gottfried v. Joseph, No. 1-87-12, 1988 WL 38099, at *6 (Ohio. Ct. App. Apr. 21, 1988). The court wrote:

> [T]he [transferred-intent] doctrine, when made applicable, is for the purpose of extending the liability of the defendant based on an intentional act against one person to another person unintentionally injured. It does not follow that it is to be applied to foreclose recovery by an innocent bystander for unintentional injuries received by him resulting from the intentional act against another when another applicable theory of recovery exists.

*Id.*

126. Such an argument was made by the defendant in *Rubino v. Ramos*, 641 N.Y.S.2d 409 (App. Div. 1996). With little by way of analysis or explanation, the court refused to apply transferred intent to a bar room fight. The court said simply:

> [T]he evidence shows that the "touching" of plaintiff, an innocent bystander, was not intentional, but rather inadvertent and accidental; the glass object was hurled at a third person, hit the third person and fragments of that broken glass injured plaintiff. In our view, plaintiff properly pleaded a negligence cause of action.

*Id.* at 410 (citation omitted).

127. In *Allstate Ins. Co. v. Ray*, 96 CA 20, 1998 WL 896366, at *2 (Ohio. Ct. App. Dec. 18, 1998), the plaintiff argued that it was against public policy to apply transferred intent for the purpose of precluding insurance coverage in a case where the insured did not intend to injure the person in question. The court found it unnecessary to address this question because the policy exclusion for "[a]n act or omission intended or expected to cause bodily injury or property damage" clearly applied where the insured fired a gun at point blank range. *See id.* at *2.

In *Eady v. Capitol Indemnity Corp.*, 502 S.E.2d 514 (Ga. Ct. App. 1998), the court discussed the plaintiffs' claim that transferred intent should not apply to a case of an accidental shooting. *Id.* at 515. The court was "sympathetic" to that argument, but found it unnecessary to decide the case on those grounds. *Id.* at 516. It was clear, under an earlier supreme court ruling, that the case "arose out of" an assault and battery for purposes of an insurance contract exclusion from coverage. *Id.*

128. *See* Allstate Ins. Co. v. Lewis, 732 F. Supp. 1112, 1115 (D. Colo. 1990) (holding that intent to assault a girl with a gun could not "be transferred to the ensuing physical harm caused by . . . accidental shooting" for purposes of triggering an intentional-act exclusion from coverage); Cincinnati Ins. Co. v. Mosley, 322 N.E.2d 693, 696 (Ohio Ct. App. 1974) (holding, in a case involving injury by an automobile to an unexpected third person, that transferred intent "has no application to interpreting the terms of an insurance policy").

In *Smith v. Moran*, 209 N.E.2d 18, 19, 21 (Ill. App. Ct. 1965), the defendant intentionally fired a shot at one person, but struck the plaintiff instead. In a dispute relating to an insurance contract provision excluding coverage for harm "caused intentionally by or at the direction of the Insured," the court, without mentioning the doctrine of transferred intent, concluded the injuries were covered because "the injury to the plaintiff was not intentionally caused by the defendant, but was an unintentional result of an intended act directed at [the intended victim]." *Id.*

battery. Outside of those two torts there is little modern precedent to support the doctrine.[129] Similarly, courts should decline to extend or read the doctrine of transferred intent into statutory language absent a clear indication of legislative intent to the contrary.[130]

(4) Courts should refuse to apply transferred intent to cases in which fault on the part of the plaintiff should be taken into account, if employing the doctrine would mean that the plaintiff's fault would not be a defense under comparative principles.

(5) Courts should decline to employ transferred intent in cases involving the legitimate exercise of discretion by the defendant (for example, privileged conduct).[131] Negligence principles are better suited to accommodating the numerous considerations that are relevant to the exercise of discretion than the blunt doctrine of transferred intent.[132]

(6) In the absence of clear evidence of the contemporary importance of the doctrine, courts should entertain arguments for its total abrogation, at least in the context of third-party accidental injuries.

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129. *See In re* Matter of EDC, Inc., 930 F.2d 1275, 1279 (7th Cir. 1991) (declining to apply transferred intent to fraud); Reynolds, *supra* note 8, at 537 (stating that "[o]nce we go beyond the torts of assault and battery, the applicability of transferred intent becomes doubtful"); *id.* at 542 ("[A]lthough five torts—assault, battery, false imprisonment, trespass to chattels and trespass to land—developed from the old writ of trespass, the doctrine of transferred intent has only been clearly applied to the first two of these torts.").

In *Hall v. McBryde*, 919 P.2d 910 (Colo. Ct. App. 1996), a child fired a gun at a car full of gang members, but one of the bullets unexpectedly struck a neighbor. The court had the opportunity to consider whether transferred intent applied between trespass to chattels (striking the car) and battery (striking the neighbor). However, the court did not address that issue. Instead, it found that by firing at the car, the defendant child had intended to commit an assault.

130. *See* Rivera v. Safford, 377 N.W.2d 187, 189 (Wis. Ct. App. 1985). The court wrote:

> We refuse to extend the [worker's compensation] statute to cover cases of transferred intent. The legislature has clearly spelled out the assault exception to worker's compensation's exclusive remedy. We cannot read the doctrine of "transferred intent" into a clearly-worded statute. The obvious and ordinary meaning of the phrase "assault intended to cause bodily harm" is that the assault must be actually intended to cause harm to the injured employee.

*Id.*

131. In many respects, the distinction here is between clearly impermissible use of force, on the one hand, and arguably permissible use of force on the other.

132. The negligence doctrine performs this function in various fields. *Cf.* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 747 (2003) ("By embracing a rule of reasonableness, negligence principles recognize that the complexities and uncertainties of law practice mandate existence of a scope of action within which, free from the risk of legal liability, attorneys must be able to exercise judgment as to how to conduct representation.").

## VI. CONCLUSION

The thesis of this Article is simple: When a person, even a person with evil intent, causes harm to an unexpected third person, that harm has not been intentionally inflicted and it should not be treated as if it were. Rather, the unexpected harm should be treated as an accident, and liability should be imposed under the principles that govern compensation for accidents, namely the doctrines of negligence and recklessness. There is no reason to think that taking this straightforward approach to issues of liability will cause the plaintiffs to go uncompensated or blameworthy defendants to escape responsibility. The principles governing liability for lack of care (negligence and recklessness) are broadly applicable to support an award of compensatory damages, and punitive damages may be imposed in appropriate cases involving extreme carelessness. In addition, the plaintiff may be better off with a judgment based on principles of negligence or recklessness than on the fiction of transferred intent, because it may be easier to reach insurance proceeds or impose vicarious liability upon a solvent party.

Without doubt, the fiction of transferred intent is deeply entrenched in American tort law, but that is no reason to retain it. The doctrine has been rejected in the context of constitutional torts,[133] and an examination of the consequences of calling accidental harm an intentional tort, rather than recklessness or negligence, shows that there is little to be said on behalf of the transferred-intent doctrine given the present contours of tort liability in America.

While outright abolition of the transferred-intent doctrine would be desireable—at least insofar as concerns third parties—it is more likely that courts will proceed in ways that limit its application. Courts should refuse to allow defendants and insurance companies to invoke the doctrine defensively for the purpose of avoiding liability or insurance coverage for negligence and recklessness. Courts should also refuse to apply the doctrine to cases in which it is appropriate to take into account fault on the part of the plaintiff, if classifying the tort as intentional would mean that the plaintiff's fault would not be a defense under comparative principles. In addition, courts should decline to employ the transferred-intent doctrine in cases involving the permissible exercise of discretion by a defendant because considerations relevant to the exercise of discretion are more properly accommodated by principles governing liability for lack of care, than by the principles defining the intentional torts with respect to which transferred intent is ordinarily

133. *See* Bolden v. O'Leary, No. 89 C 6230, 1995 WL 340961, at *3 (N.D. Ill. June 2, 1995) ("There is no transferred intent under Section 1983. Thus, when a correctional officer intends to shoot one inmate and inadvertently hits another, there is no Eighth Amendment violation.").

applicable. Finally, courts should consider with an open mind arguments for the abolition of transferred intent, at least in the third-party context.