Error in persona vel in objecto and aberratio ictus vel impitus: a transferred malice?

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I. Introduction

A wanted to kill his foe B; one a night as A was walking home, he recognized a person near him, and thought that this person was B. A took his gun, fired at that person and killed him. The victim, however, was C, not B. This is a case of mistaken identity (*error in persona*). A was mistaken with respect to the identity of his target.

A shot at B with the intention to kill him, but the bullet missed B, the intended object, and instead hit and killed C, a bystander who crossed the street, and who was, at the time of the shooting, invisible to A. This is a case of error in performance (*aberratio ictus vel impetus*).

The relevant question is for what offence should A be convicted? Is A liable for murdering C, or is he liable for attempted murder against B and perhaps negligent homicide against C? In other words, do the mistaken identity and error in performance have legal implications for A's criminal liability? Do the mistaken identity and error in performance negate the elements of the offence: the actus reus and/or the mens rea of the offence against the actual object?

The *actus reus* comprises conduct and circumstances, which generally describe the object of the offence, as well as the elements of result and causality as specific elements of offences of result. The actus reus is the primary constituent of the antisocial character of an offence. The presence of the actus reus points to an infringement of, or a threat to a protected interest. The *mental element* of the offence is also a necessary element for the realization of the offence, and is an element of the antisocial character of the offence and of the actor’s culpability. *Mens rea*, as the normal mental element required for the offence, comprises awareness and wilfulness, while negligence is the exceptional mental element in criminal law.

This article will address the issue of identity between the intended object of an offence and the object actually harmed. What degree of concreteness does mens rea require in regard to the “object of the offence” of the actus reus? Does awareness imply real knowledge of the object actually harmed? Or is it sufficient that there be awareness of an object that realizes the description of the result in the offence in a general and abstract way?

Clearly, the requirement that the actor be aware of the object actually harmed is met when the intended object is identical to the actually harmed object. This is the case when A acts with mens rea to kill B, shoots at B, and actually kills him. This cognitive element is also present when the intended object is a member of a specific group, such as a family or a race, and the object actually harmed is a member of that group.¹ Other examples are where an actor intends to set fire to a building and kill anyone who may be in or around

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it, throwing stones at passing cars with intent to harm anyone who may be in the vehicles.

However, situations can arise in which the intended object of a crime and the actual object are not identical. This possibility of incongruence of the objects can be the result of a mistake in regard to the identity of the object (error in persona vel in objekto), or due to an error in the performance of the offence (aberratio ictus vel impetus).

Mistake of identity – error in persona vel in objekto – denotes a situation in which the perpetrator acts with awareness of a particular object, but harms a different object due to a mistake as to its identity. For example: A pours gasoline into a room through a window and his accomplice throws in a burning match, both intending to kill B, but the B’s brother, who was sleeping in the room, is killed.

Error in performance – aberratio ictus vel impetus – refers to a situation in which the perpetrator’s actions deviate from the intended path and harm an unintended object. For example: A, intending to kill B, gives him a bottle of his favourite drink laced with poison. B places the bottle in the refrigerator. Before B has a chance to taste it, C stops by, drinks the beverage and dies.

The question that will be addressed in this paper is whether mens rea requires actual awareness in regard to harming the specific, concrete object. Are mistake of identity and error in performance of legal significance in regard to the existence of mens rea?

This paper is composed of two chapters. The chapter One treats of the lege ferenda of mistake of identity, while chapter Two treats of error in performance.

We will state at the outset that we are of the opinion that mistaken identity is of no legal consequence for the crystallizing of mens rea to harm the actual object when both the intended object and the actual object are equivalent in terms of the actus reus of the actual crime, i.e. where the intended object fulfils the circumstantial requirements of the offence actually perpetrated. In such a case, the actor has mens rea to harm the actual object. As opposed to this, in the case of error in performance the deviation from the intended object is of legal significance. The actor can be said to act with mens rea in regard to the actual object only when he is actually aware of the possibility of deviation and harm to the actual object. Normally, in a case of error in performance, the actor bears criminal responsibility for an attempted offence against the intended object (assuming the fulfilment of the necessary conditions for an attempt), and may also be responsible of a completed offence in regard to the actual object, depending upon the actor’s mental attitude toward that object, which may be mens rea, negligence, or even nothing.

In this part we will try to determine what the principles of criminal law would suggest as the ideal law in regard to mistake of identity and error in performance. Do the principles of criminal law provide satisfactory legal solutions? If not, then it will be necessary to determine whether considerations of justice require that we deviate from the principles of criminal law and define the law applicable to these two situations in terms of some fiction, such as transferred malice.

I. Mistaken Identity
When the intended object of the offence and the actual object are not equivalent in terms of the actus reus of the actual offence (tatbestandlich ungleichwertig) – in other words, the intended object does not fulfil the requirements of the description of the result of the actual offence, the actor’s mistake is of legal consequence.

For example: An actor slaps a mannequin in a store window, believing it to be a woman who is staring at him. As a result, the mannequin falls and breaks. Since the actor did not know that he was slapping a mannequin, i.e. property for the purpose of the offence of causing damage to property, there is no mens rea. Therefore, the actor can be said to have negligently caused damage to property, which is not a criminal offence, and to have attempted (an impossible but punishable) assault.²

Mistake of identity thus describes a situation in which the actor makes a mistake as to the identity of the object standing before him. For example: A, acting with mens rea to harm B, harms C in the belief that C is B. The question of whether A acted with mens rea in harming C depends on the definition of mens rea, its relationship to the actus reus of the offence as it actually occurred, and the nature of the doctrine of mistake of fact.

The general element of mens rea is cognitive. It is the actual awareness of the presence, or the possible presence of the elements that compose the actus reus of the offence. A mistake of identity can be of legal significance if mens rea requires that the object of the offence have a specific identity (as a description of the result of the offence). Mistake of fact can also serve as a support (but only a support) in examining the legal impact of a mistake of identity, inasmuch as the rule of mistake of fact applies only to situations in which the actor is completely unaware, or mistaken in regard to the existence of the element of the actus reus. Mistake of fact is the parallel legal rule to mens rea. It defines the opposite situation that negates mens rea. An actor’s mistake is of legal consequence for the existence of mens rea if it is consonant with the rule of mistake of fact.³

When the two objects are equivalent in terms of the actus reus of the actual offence, a mistake of identity is of no legal significance insofar as mens rea to harm the actual object. The actor has mens rea to harm the object before his eyes, i.e. the actual object. For the purpose of the relationship between the actor’s mens rea and the description of the result – the object of the offence – it is sufficient that the actor be aware of the existence of the object actually harmed, and of the nature of that object as satisfying the description of the result.

Thus, for example, in terms of awareness of the object of the offence of murder and manslaughter, it is sufficient that the actor be aware that the victim is a person.⁴ The penal evaluation of the situation would be no different if the actor’s belief reflected reality. Thus, his mistake is of no legal consequence. This can also be shown by negation. The rule of mistake of fact treats the existence or absence of the object that satisfies the description of the result of the offence, and ascribes no importance to the specific identity of the object. Therefore, in a case of mistake of identity, the actor’s mistake as to

³ See Roxin, supra note 2 at 388-390; Sven Grotendiek, Strafbarkeit des Taetlers in Fallen der aberratio ictus und des error in persona (Muenster, 2000), 91-92; Stuart, supra note 13, at 244; George P. Fletcher, Rethinking Criminal Law (1978), 687.
the identity of the actual object is of no legal significance, and the actor is viewed as having acted with mens rea to harm the actual object.\(^5\)

We can therefore conclude that when the two objects are equivalent in terms of the actus reus of the actual offence, mistake of identity is of no legal consequence. The legal situation would be no different were the actor’s belief an accurate reflection of reality. The actor commits the offence with mens rea to harm the actual object, and the mistake is irrelevant to the existence of mens rea. This approach expressed the prevailing view in Anglo-American\(^6\) law and European-Continental law,\(^7\) although it is origin can be found in ancient Roman law.\(^8\)

II. Error in Performance

Error in performance concerns a situation in which the actor’s conduct deviates from its intended path, and harms an object other than the intended one.\(^9\) When the objects are not equivalent in terms of the actus reus of the actual offence, in that the intended object does not fulfil description of the result or the circumstantial requirement of the offence, there is no problem. The actor bears responsibility in accordance with the normal rules of criminal law defining the actus reus and the mental element of the actor at the time of

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\(^9\) It should be noted that there isn’t always an actual deviation from a path of motion. The deviation can also be that the person who eats the poisoned food is not the intended victim for whom it was prepared.
commission of the offence. In other words, the actor can be held criminally responsible for an attempt to commit the intended offence, as well as the commission of any completed offence actual perpetrated. For example, the actor wishes to break a store window, but misses and strikes the owner of the premises. In this case, the actor bears responsibility for an attempt to damage property, and may also be held liable for inflicting assault, in accordance with his mental attitude in regard to the victim – mens rea, negligence or nothing.

Error in performance is entirely different from mistake of identity. In the case of a mistake of identity, the injury is inflicted upon the object that is right before the actor’s eyes, whereas in the case of an error in performance, the injury is inflicted upon some third party who is not the object of the actor’s attention. In the case of a mistake of identity, there is just one deviation from the actor’s plan, while an error in performance involves two deviations. First, the action itself deviates from the intended path, and second, it injures an unintended object.

As stated in the chapter on mistake of identity, the actor’s mistake as to the identity is of no legal significance if the object fulfils the circumstantial requirement of the actual offence, i.e. when both objects are equivalent from the point of view of the actus reus. In the case of an error in performance, the second deviation – mistake as to the identity of the object - is therefore of no legal consequence. But the first deviation – the departure of the action from its intended path – may be of significance, either to the doctrine of imputation (causation) or to mens rea.

We do not accept the view that “there is no difference between a mistake of identity and an error in performance, inasmuch as in terms of the actus reus of the actual offence, the actor harmed an object of equivalent value to the intended object, and the actor acted with mens rea to harm an object of the same type.” The question that arises in regard to an error in performance is: Is the deviation of the action of legal significance, and can the act that harmed the actual object be objectively and subjectively imputed to the actor?

(a) Error in performance according to the definition of the actus reus and the mens rea of the offence

The actus reus of the offence is composed of a conduct element, as a general element, and a circumstantial element and an element of result (which derives from the conduct), when these belong to the elements defining the actus reus. Mens rea is expressed in the actor’s actual awareness of all elements of the actus reus of the offence, and in wilfulness. In terms of the awareness, the actor must actually be aware of the nature and quality of his conduct, the existence of the circumstance and the possibility of the causing the result, i.e. that his conduct could harm the object of the offence.

10 See Jescheck & Weigend, supra note 12, p. 313; Hettinger, supra note 36, p. 533-534; Rath, supra note 37, p. 76-79; Smith & Hogan, supra note 23, p. 91.
11 Jescheck & Weigend, supra note 12, p. 313; Silva-Sanchez, supra note 12, p. 352-353; LaFave & Scott, supra note 1 p. 285; Smith & Hogan, supra note 23, p. 90-91.
12 See Jescheck & Weigend, supra note 12, p. 313.
13 Supra, text at notes 40-41.
The object of the offence is something concrete that can be perceived by human senses, upon which the conduct that constitutes the offence physically operates. A “person” as the object of an assault, and a “thing” as the object of theft are not generic, but rather refer to a particular person hit, or a specific thing taken. Where it otherwise, there would be little if any substance to the requirement of awareness of the circumstances, inasmuch as we are all aware that there are people and things in the world. Just as awareness of the nature of the conduct reflects awareness of the actor’s actual conduct, awareness of the circumstances refers to awareness of the actual, concrete circumstances.

This is also true in regard to awareness of the possibility of endangering or harming the object. When the actor does not take into account the possibility that his conduct may endanger or harm the actual object, he cannot be described as having mens rea to commit the offence. Similarly, we cannot say that the actor’s intention is directed at the possibility of causing some hypothetical result in a general way, but rather it is directed at a concrete result that will affect a particular object. In the words of the Canadian Justice Dickson: “recklessness cannot exist in the air; it must have reference to the consequences of a particular act.” Mens rea must relate to the concrete object of the offence. When an actor is not aware that his conduct may injure the concrete object of the offence that is actually harmed, that harm cannot described as having been caused with mens rea.

(b) The doctrine of general mens rea (general malice – dolus in genere)
The prevailing approach in Italian and Japanese law, and the minority approach in other Continental law systems and in Anglo-American law system, adopt the view that mens rea is general - the doctrine of general malice – dolus in genere, which origin is to be found in ancient Roman law. According to this approach, mens rea relates to every object of the class of the intended object. This approach is based upon the following arguments: The actus reus of the offence is composed of conduct in accordance with the definition of the offence, and a circumstance or a result caused by the conduct, where these form part of the definition of the offence. In regard to the circumstantial element (relevant to the object of the offence), the actus reus of the offence requires only the existence of the object, but does not demand that the circumstantial element be a concrete object. The element of result is also fulfilled when the conduct leads to the relevant result, but there is no demand that it be some specific, concrete result. The actus reus is abstract, and it need not be realized in some concrete manner.


19 See Winkelmann, 5-7; Schaffstein, 132-134.
According to this approach, the mental element – which must correlate with all the elements of the offence – is also abstract, and there is no need for its concrete realization. The actor need not actually be aware of the existence of a specific, concrete object, or of a specific, concrete result. It is sufficient that the actor be aware of the existence of some object that fulfills the circumstantial element of the offence, and of the occurrence of some result that fulfills the result requirement in the definition of the offence. From the above, it can be concluded that the actor’s mens rea to commit the actus reus of the offence comprises mens rea to commit any actus reus of the offence. Mens rea is general (\textit{dolus in genere}), rather than specific and concrete.

The doctrine of general malice was enunciated in the \textit{Latimer} case\textsuperscript{20} by Coleridge J., who stated: "It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the judges call \textit{general malice}, and that is enough".\textsuperscript{21}

Support for this approach can be found in the purpose of the criminal law to guarantee communal life of free individuals by protecting abstract social values. The legally protected value that provides the underlying justification for the criminal norm is an abstract value, and the criminal law does not allow for any distinction in regard to the specific identity of the object that represents that value. Therefore, the supporters of this view argue that error in performance is of no legal consequence for the existence of mens rea when the actual object and the intended object are equivalent in terms of the actual actus reus, as defined in the norm. The actor is actually aware of the object that constitutes the circumstantial element, and in the case of an offence of result, the actor is aware of the possibility of causing a result that fulfills the requirement of the offence, and mens rea is general (\textit{dolus in genere}).

We disagree to the conclusion above, and following reject the doctrine of general malice, for several reasons:

\textsuperscript{20} \textit{The Queen v. Latimer}, (1886) 17 Q.B.D. 359 (361).
\textsuperscript{21} \textit{Ibid.}, at 361 (emphasis supplied).

Andrew J. Ashworth, “Transferred Malice and Punishment for Unforeseen Consequences”, Reshaping the Criminal Law: Essays in honour of Glanville Williams (P.R. Glazebrook – ed., 1978) 77, at footnote 11, sees Coleridge J. as “confusing transferred malice with the doctrine that an intention to harm anyone in the line of fire can support a charge of wounding or murdering the person who was in fact harmed.” It may be that Coleridge confuses the two forms, particularly when he states the opinion that the conviction is based upon what the judges call general malice, when the judges prior to \textit{Latimer} refer to transferred malice. We find a clear instance of confusion of transferred malice and general malice in Clifford Hall, “A Defense of the Doctrine of Transferred Malice: Its place in the Nigerian Criminal Law,” 34 Intern. & Compara. L.Q. (1985) 805, p. 810-811, where the author takes the view that “[t]ransferred malice is itself a species of general malice,” and supports this view on the basis of Coleridge’s statement in \textit{Latimer}. Moreover, the author cites instances in which the actor shoots at people in the street, or places a bomb, and cases of mistake of identity and cases of error in performance, and states the opinion that the actor bears criminal responsibility for the completed offence. His argument is that “his general objective has been achieved since he intended to kill and did kill. The actual victim is unintended and is immaterial since the actus reus intended to be caused has occurred …The accused in each of these malice situations has exhibited a general malice in the old sense.” The author is mixing 2 different kinds together. When the actor shoots at a group of people congregated in the street or plants a bomb to kill at random, that actor has mens rea to cause the death of the victim, see supra note 1-3 and the text there. A case of mistaken identity is also different, inasmuch as the actor acts to harm the actual object. The identity of that object is irrelevant. Error in performance differs completely from these examples.
First, an actor bears responsibility for a specific act, and not for some conduct in the abstract. He is held liable only for the specific, concrete results of that conduct. The actor’s conduct is antisocial because of the specific circumstances in which he acts. The actor is not charged with an abstract act, but rather with the commission of a concrete criminal act. The actor has mens rea in regard to the criminal act only if he acted with awareness of the actual actus reus. Subjectively, we can only impute the event to the actor if he was actually aware of the chain of events as it occurred in the real world. Mens rea concerns the mental relationship to the actus reus as it occurs, and not to the actus reus of some undefined occurrence. The actor’s mens rea does not relate to any hypothetical offence, but rather to the commission of a specific offence. Were it not so, it would be hard to understand why a person should be held liable for instigating murder if he successfully convinces an actor who has decided to kill “A” to kill “B” instead.

Second, it is possible to distinguish between two levels, that of the prohibition in general – the norm - and that of imputing the prohibition to an actor – the charging. While on the general level we can, and should view the prohibition in the abstract terms of the elements of the offence, that is not the case in regard to charging and punishing a person for the commission of an offence. Criminal liability is imputed to a person for a concrete offence committed in the real world, and not for an abstraction. A defendant is put on trial for a concrete act.

Third, the actor’s mens rea must relate to the concrete event that occurred in the real world. General mens rea (dolus in genere) in isolation, unconnected to any concrete event, is insufficient. For example, imagine that an actor, while driving in his car and preparing himself mentally to kill his foe, is involved in a traffic accident in which his intended victim is killed. If mens rea were general (dolus in genere), the actor could be charged with murder as a completed crime, inasmuch as the actus reus was fulfilled, and the actor had premeditated intent to kill the victim. Such a result is, of course, unacceptable. The forming of a criminal intention is not, in itself, sufficient. That intention must be put into effect and realized in the actor’s specific conduct. The actor’s mens rea must coincide with the elements of the actus reus, and with the actual event as it occurred. The actor must actually be aware of the existence of the elements of the actus reus of the offence committed in fact, including the concrete object. Mens rea is, therefore, a concrete concept rather than an abstract dolus in genere. Without this concreteness, it cannot be claimed that the actor underwent the test required to held him culpable.

Fourth, the doctrine of general malice cannot adequately deal with situations of self-defence in which the actor causes the death of an innocent third party due to an error in performance in the course of defending himself. Under the approach of general malice, the actor causes the death of the passer-by with mens rea. In other words, the actor fulfils the requirements of the actus reus, with the necessary mens rea of murder or
manslaughter. The actor will not enjoy the claim of self-defence, since the victim was not his assailant.\textsuperscript{26}

Therefore, the mens rea required for committing a criminal offence is a concrete mens rea, and not general and abstract mens rea; the doctrine of general malice is not to accepted, at least in the case of error in performance.

(c) Error in performance – a matter of causation (imputation)?

Another question that can arise is whether error in performance should be viewed in terms of causation, and not as a factor affecting the mental element of the offence? As already stated, error in performance comprises two deviations or mistakes. The second mistake is in regard to the specific identity of the object of the offence, and is not, in itself, of legal consequence.

The first deviation is that of the divergence of the action from its intended course. Some are of the opinion that the required and appropriate solution for error in performance is to be found in the area of causation.\textsuperscript{27}

We think differently. Error in performance does not constitute the typical case of causation, and is not decided by that doctrine. In the context of causation or more accurately - imputation, we examine whether the causative progression that led to the actual result, which was also the expected result, was different or exceptional in comparison to the expected process of causation. In other words, the actual and intended results are identical, the intended object and the actual object are one, but the result was caused in an unexpected manner, for example, death by drowning rather than by suffocation.

As opposed to this, in the case of error in performance, the intended object is different from the actual object, and therefore the intended result is different from the actual result in terms of the actual object (the death of “A” rather than “B”). Therefore, error in performance presents a different type of problem and cannot by itself be governed by the rules applicable to causation.\textsuperscript{28} Only where the error in performance constitutes at the same time also an exceptionally rare development, then even if the other conditions are present, the doctrine of causation may rule out imputing responsibility.

Interim Summary

Mens rea represents a concrete mental state. Acting with mens rea to inflict injury upon an actual object can be imputed to an actor only if he takes into account the possibility

\textsuperscript{26} The solution suggested by the supporters of the doctrine of general malice, according to which such a case presents disproportionate injuries: a justified injury and an unjustified injury, and the actor bears responsibility in accordance with his mental attitude toward the actual injury (see: Peter Noll, "Tatbestand und Rechtswidrigkeit: Die Wertabwägung als Prinzip der Rechtfertigung", 77 ZStW (1965) 1, p. 5, note 7) is not consistent with the doctrine, inasmuch as it focuses upon the actual object rather than upon the injury (see, loc. cit).

\textsuperscript{27} See Hans Welzel, Das Deutsche Strafrecht, 6 Aufl., (Berlin, 1958), 64; Sauer, supra note 65, p. 169; Puppe, supra note 14, p. 20.

\textsuperscript{28} If error in performance is not an instance of causation, see Stratenwerth, supra note 12, p. 177-178; Hans-Ludwig Schreiber, "Grundfälle zu 'error in objecto' und 'aberratio ictus' im Strafrecht", JuS (1985) 874; or a special case of causation that is treated differently, see Cramer, supra note 12, sec. 15, para. 57; Troendle, supra note 1, sec. 16, para. 6; Trifftere, supra note 12, p. 12; Janiszewski, supra note 66, p. 534; Cornelius Prittwitz, "Zur Diskrepanz zwischen Tagesgeschehen und Taetervorstellung", G.A (1983) 110; Guenter Bemann, "Die Objektverwechslung des Taeters in ihrer Bedeutung fuer den Anstifter", Festchrift fuer Stree/Weisels (Heidelberg, 1993) 397, p. 401, is not of concern here.
that his conduct might injure that concrete object of the offence. Thus, error in performance is of legal consequence. The actor in error in performance does not have mens rea with regard to the actual injured object. Cases of error in performance must, therefore, be divided into two parts: The actor bears criminal responsibility for an attempt to commit an offence against the intended object. He may also be held responsible for a completed offence against the actual object, in accordance with his mental state in regard to that object. This view expressed the prevalent approach in Continental law\textsuperscript{29} and other minority view of modern Anglo-American law.\textsuperscript{30}

In principle, this same view would appear to derive from the definition of mens rea in Anglo-American law. Nevertheless, the Anglo-American legal approach rejected that solution, and developed the fiction of transferred malice, by which the mens rea to harm the intended object is transferred to the object actually harmed, as if the perpetrator had acted with mens rea in regard to that actual object.

\textbf{(d) The justifications for transferred malice: The Role of Criminal Law, the Purpose of Punishment, the Punishment of Attempt and Evidentiary considerations}

It is said that the role of criminal law is expressed in protecting abstract social values, and therefore, the specific identity of the injured object is of no importance. The importance of the object is entirely expressed in representing the abstract social value. Where life is concerned, it is irrelevant whether the victim is “A” or “B”, and where we are concerned with property, it makes no difference which specific property is involved. The purpose of punishment is to deter potential criminals, and to prevent conduct that may harm the protected value. As far as deterrence is concerned, it is sufficient that the actor seeks to harm the protected value, and it is preferable to emphasise protection of the value as an abstract one that is unaffected by an error in performance.

Another main reason for this is that, historically, attempt was not punishable under common law, so the actor would have borne responsibility only for the offence perpetrated against the actual victim, in accordance with the actor’s mental attitude toward that eventuality. Since error in performance is usually accompanied by negligence toward the actual object, the actor would be held criminally culpable only for his negligent act only where such negligent conduct would constitute a criminal offence. Historically, negligence offences were very rare. Under the principles of criminal law, the result would have exempted such an actor from punishment in the overwhelming majority of cases of error in performance. Such a result would be manifestly unjust, and would undermine the objective of criminal law to defend societal values. A similar, but


\textsuperscript{30} See Ashworth, \textit{supra note} 16, p. 77ff; Andrew Ashworth, "The Elasticity of Mens Rea", \textit{Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross} (1981) 45ff.; Stuart, \textit{supra note} 13, 245; Gordon & Christie, \textit{supra note} 13, 123 ff; Williams, \textit{supra note} 13, 401-402, who suggests limiting the application of the fiction to instances in which there is negligence in regard to the actual object.
less forceful argument was later based upon the fact that the penalty for attempt - as a
punishable criminal phenomenon – was generally half that of the completed offence. It
was argued that there was little logic to sentencing an actor to one half of the penalty –
as mandated for an attempt - when in fact he actually harmed an object that fulfilled the
description of the result of the offence.

A criminal offence is composed of the antisocial nature of the conduct and of its result,
and of culpability. In the instant case, the antisocial nature of the conduct and the actor’s
culpability are no different than they would be had he not missed his target. The
antisocial result (harm to the actual object) is of no lesser severity than the intended
result. Therefore, considerations of justice argue in favour of convicting the actor of the
completed, mens rea offence. This is how the common law came to develop the legal
fiction of transferred malice, by which the mens rea to harm the intended object is
transferred to the object actually harmed, as if the perpetrator had acted with mens rea in
regard to that actual object. The justification of the transferred malice doctrine is nicely
summed up in the American Birreuta case:

"The function of the transferred intent is to insure that adequate punishment of those
who accidentally kill innocent bystanders, while failing to kill their intended victims. But
for the transferred intent doctrine, such people could escape punishment for murder,
even though they deliberately and premeditatedly killed – because of their ‘lucky’
mistake. The transferred intent doctrine is borne of the sound judicial intuition that such
a defendant is no less culpable than a murderer whose aim is good. It insures that such a
defendant will not be allowed to defend against a murder charge".

We can summarize by saying that under the Anglo-American fiction of transferred
malice, the actor bears criminal responsibility for the completed offence committed with
mens rea against the actual object. The fiction is applicable only where the intended
object fulfils the description of the result of the actual offence. In other words, both
objects must be equivalent in terms of the actus reus of the offence in order to equate
the antisocial result with the antisocial intention. Because defences to criminal
responsibility negate the antisocial nature of the offence or the actor’s culpability, the

31 See The Queen v. Saunders & Archer, 2 Plowd. 473, 474, 75 Eng.Rep. 706, 708 (1576); William L. Prosser,
"Transferred Intent", 45 Tex. L. Rev. (1967) 650, pp. 652-653; Ford v. State, 625 A.2d 999; and see People v.
Czubara, 250 Cal. Rptr. 836, 839 (Ct. App. 1988), according to which “Transferred intent is …used to reach
what is regarded with virtual unanimity as a just result.”

32 See The Queen v. Saunders & Archer, 2 Plowd. 473, 474, 75 Eng.Rep. 706, 708 (1576); and see Matthew
Hale, History of Pleas of the Crown (Vol. I, 1736), 466: “If A by malice forethought strikes at B and missing
him strikes C whereof he dies, tho he never bore any malice to C yet it is murder, and the law transfers the
malice to the party slain.” And see William Blackstone, Commentaries on the Laws of England (3rd ed., Vol IV,
1884), 200-201; and see Prosser, supra note 19, pp. 650 ff.; and Wilfred J. Ritz, "Felony Murder, Transferred

33 People v. Birreuta, 162 Cal.App. 3d 454, 460-208 Cal.Rptr. 635, 638-639 (Cal.App. 1 Dist. 1984); and Ford

34 See loc.cit; John C. Smith and Brian Hogan, Criminal Law (10th ed., 2002), 90ff; Mordica v. State, 618
So.2d, 301 (Fl.App. 1 Dist. 1993); Gladden v. State, 330 A.2d, 176 (Md. 1974); Kimberly D. Kessler, “The
C.C.C. (2d) 418 (Ont. C.A.). The fiction of transferred malice is expressly mentioned in the Canadian
Criminal Code, sec. 229(b), sec. 244, and was adopted in the English Draft Criminal Law Bill 1993, cl. 32
(Law Com. No. 218, 1993); Draft Offences Against the Person Bill 1998, cl. 17. The American Model Penal
Code, sec. 03.2(2), and in Amendment No. 39 (1994) to the Israeli Penal Law, sec. 20(c)(2). Also see
the ambiguous situation in Scotch law, Tim H. Jones and Michael G.A. Christie, Criminal Law: Greens
Concise Scots Law (3rd ed., 2003), 67-68; R.A. McCall Smith and David Sheldon, Scots Criminal Law (1992),
143-144.
defences transfer with the intent. The actor has recourse to the same defences that he could have claimed against the intended object.\textsuperscript{35}

In our view, the purpose of the criminal law is not decisive for not granting legal consequence to an error of performance:

First, granted that criminal law protects abstract social values, the elements of criminal offence, including mens rea, have to be fulfilled as a condition for conviction. The question that has to be answered is: can the actor be held subjectively responsible for causing harm to the actual object? Where the actor does not take into account the possibility that his conduct may harm the actual object, we cannot impute mens rea to harm the actual object.

Second, the fiction of transferred malice is not required as it was in the past in regard of punishing attempt.\textsuperscript{36} One of the considerations that formerly justified transferred malice was that attempts were either not punishable, or were punishable to a lesser extent than completed offences. This no longer reflects the normative situation. In modern criminal law, attempts are punishable and in many systems the maximum criminal penalty for an attempt is identical to that of the completed crime.\textsuperscript{37} However, it can be argued that attempt should, and perhaps must be more leniently punished,\textsuperscript{38} inasmuch as no result is actually realized. But such a reduction is not necessary. Criminal penalties respond to culpable antisocial conduct. There are three considerations in establishing a just framework for criminal punishment: the antisocial severity of the conduct, the antisocial severity of the result, and the severity of the actor’s culpability:

First, the reduction in attempt is appropriate to an incomplete attempt, in which the actor has not done all that he believes to be necessary on his part to complete the offence. In such a case, the antisocial character of the act, and the severity of the actor’s culpability are less than they would be for a completed offence. But this is not the situation we encounter in regard to an error in performance. In a case of error in

\textsuperscript{35} See sec. 28(2) of the Law Commission’s Draft, supra note 13, 82, 186-187; also see Mordica v. State, 618 So.2d, 301 (Fla.App. 1Dist. 1993); R. v. Droste, (1982) 63 C.C.C. (2d) 418, 424 (Ont. C.A.).
The House of Lords recently addressed the fiction of transferred malice in Attorney General’s Reference (No. 3 of 1994), [1997] 3 All E.R. 948, in regard to a man who got a woman pregnant and unsuccessfully attempted to kill her. The baby was born prematurely, and subsequently died. The House of Lords was of the opinion that the mental state of murder could not be found in regard to the infant, even by means of the fiction of transferred malice. At page 949, the Lords expressed the view that conviction of murder would require “a double ‘transfer’ of intent: first from the mother to the foetus and then from the foetus to the child as yet unborn.” Since a foetus is not a “person” for the purpose of the offence of murder, the mental state required for murder is different than that of a termination of pregnancy. However, the Lords did convict the defendant of manslaughter due to the special characteristics of the offence, and without recourse to the fiction of transferred malice. From the acquittal on the charge of murder, we can discern a certain measure of dissatisfaction with the fiction of transferred mens rea.

\textsuperscript{36} On the modern conception of the function of criminal attempt, see Jescheck & Weigend, supra note 12, p. 514-515; Stuart, supra note 13, p. 652 ff; Ashworth, supra note 41, p. 460 ff. On the identity of the role of criminal attempt and the completed offence, see Williams, supra note 13, 136.

\textsuperscript{37} On German law, see Cramer, supra note 12, para. 23; on Austrian law, see Trifferer, supra note 12, p. 352; on Swiss law, see Trechsel, supra note 12, paras. 21-22; on English law, Card, Cross & Jones, supra note 53, p. 569-570; on South African law, see Burchell & Milton, supra note 12, p. 365-366; on Swedish law, see Nils Jareborg, Scarpas on Penal Theory (Uppsala, 2002), p. 29-30; on Israeli law, see sec. 34D of the Israeli Penal Code – 30 Isr. L. Rev. 1996, p. 5, 22. As opposed to this, see Art 463 of the Canadian Criminal Code, under which the penalty for attempt is less than that for the completed offence, see Roach, supra note 59, p. 98; Arthur Ripstein, Equality, Responsibility, and the Law (Cambridge, 1999) 218ff.

\textsuperscript{38} See George P. Fletcher, Basic Concepts of Criminal Law (1998), p. 173 ff; Trechsel, supra note 12, secs. 21-22; Cramer, supra note 12, sec. 23, paras. 3 ff; Noll, supra note 74, p. 1 ff; Jareborg, supra note 79, p. 30.
performance, the actor completes the perpetration of the antisocial conduct that constitutes the offence, but misses his intended target. An error in performance represents a completed attempt in which the antisocial character of the act and the culpability of the actor are equivalent to those of the completed offence.\textsuperscript{39} The only penal consideration that distinguishes between a completed attempt and a completed offence is the antisocial severity of the result. In a typical attempt, the object of the offence is placed in danger of harm, but there is no actually harmful result. This consideration justifies some leniency, but only to a limited degree inasmuch as the result is entirely fortuitous, and unrelated to the actor. Moreover, the court can disregard the consideration that the intended result was not achieved. When the legislature makes the penalty for attempt equivalent to that of the completed offence, it takes what we deem to be the correct view that there can be situations in which it is appropriate to impose the same punishment that would be exacted in the case of the completed offence.\textsuperscript{40} Were the legislature of the opinion that the punishment for attempt should always be less than that of the completed offence, it could enact that by statute, and establish that the penalty for an attempt will be, for example, three quarters of the penalty for the completed offence.\textsuperscript{41} Therefore, in the most severe cases of attempt, the courts may impose a penalty equal to that of the completed offence.

Second, inasmuch as an error in performance represents a completed attempt, and it also causes a result that is identical to the one intended,\textsuperscript{42} it constitutes one of the most severe forms of attempt. Therefore, taking into account the result actually caused, a court may impose punishment of equal severity to that of the completed offence.\textsuperscript{43} Even if we take the view that the penalty for an attempt must always be less than that imposed for the completed offence, the law can nevertheless expressly establish that in the case of an error in performance, where the object actually harmed is equivalent to that intended, the punishment will be the same as for the completed offence. This is the approach adopted in Norwegian law.\textsuperscript{44} This approach is wholly consistent with the principles of criminal law, particularly the doctrine of anti-sociality and the principle of culpability, and frees us of the need for a legal fiction.

Third, in addition to attempt, the actor may also bear criminal responsibility for the commission of an offence against the actual object through recklessness or negligence. The punishment imposed upon the actor for the attempt to commit the intended offence and the completed offence of recklessness or negligence need not be less than the penalty that would be imposed for the completed mens rea offence, and it may even be greater. The maximum penalty imposed for attempted murder is less than the penalty for murder, but it would appear that the reason for that is to be found in the approach

\textsuperscript{39} Also see Ashworth, supra note 16, p. 88, according to whom: “the arguments advanced in favour for lower sentences for attempted than for completed crimes apply only where [the actor] has not done all the acts he intended to do... and not to cases where [he] has done all the acts he intended to do but has failed to produce the desired result.” Also see Andenaes, supra note 12, p. 200; Williams, supra note 13, p. 136-137; Burchell, Hunt & Burchell, supra note 17, p. 261, n. 62.

\textsuperscript{40} On the Swedish case law, see Jareborg, supra note 79, p. 30.

\textsuperscript{41} See e.g., sections 27 and 49 of the German Criminal Law, which establish the penalty for abetting/adding a crime at ¾ of the penalty for the primary offence.


\textsuperscript{43} See Rath, supra note 37, p. 114-116; Herzberg, supra note 84; Hruschka, supra note 84; Wessels, supra note 84, para. 256. It should be clear that the result will be taken into account in cases in which the actor does not bear criminal responsibility for the result, e.g. for a completed offence of negligence.

\textsuperscript{44} See Andenaes, supra note 12, p. 200.
of ancient law, in which the penalty for attempt was generally half that of the completed offence. Thus we would argue that Husak’s assertion, “The seriousness of these two offences, even when combined, is not as great as murder,” is not necessarily correct. The punishment of attempted murder and competed manslaughter or negligent homicide need be less than the punishment imposed for murder.

Therefore, in terms of the development of the rules for the punishment of attempt, there is no longer any need for the approach enunciated by Glanville Williams, who suggested restricting the fiction of transferred malice to cases in which the actor was at least negligent in regard to the actually harmed object, such that the actor at least committed negligent homicide. It would therefore follow that, as far as punishment is concerned, there would no longer appear to be any basis for the statement that the “function of transferred intent is to ensure the adequate punishment of those who accidentally kill innocent bystanders, while failing to kill their victims.” Where attempt is punishable to the same extent as the completed offence, there is neither need nor advantage in the doctrine of transferred malice. As stated in the South African case law: “where attempt is a criminal offence and is generally punishable with the same penalty as the permissible punishment for the crime itself, there appears to be no juridical or social need for the transferred malice."

Appropriate punishment makes the fiction of transferred malice superfluous. The differential approach permits an appropriate penalty in terms of all of the components of the actor’s conduct. The supporters of preserving the fiction must explain why, in some cases, it would be justified to release the actor from criminal responsibility arising from the actual harm inflicted as a result of his conduct.

However, a problem arises in regard to the doctrine of criminal attempt because the mental element of attempt in Anglo-American law is one of purpose. Where the actor is indifferent to the possibility of causing the intended result, he may be held liable for negligence, where negligence is criminally punishable and where there was negligence in regard to the actual object. He may bear no criminal liability where negligence is not punishable, or where the harm to the actual object was accidental.

The question of which kind of mental element is sufficient for criminal attempt requires an in-depth research and would go beyond the scope of this paper; here we present few arguments in favour of broaden the mental element of attempt that includes purpose and indifference.

Defining the mental element of attempt exclusively in terms of purpose can undermine the role of criminal law in protecting society’s vital legal interests. For example, consider a case in which a person acts indifferently toward causing grievous bodily harm or death. If the result is achieved and a person is injured or killed, the actor will be held

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45 Husak, supra note 2, p. 65.
46 See supra note 18.
48 Citation from Burchell & Milton, supra note 12, p. 287.
49 This is true for Canadian law, see Roach, supra note 59, p. 100-101; Ripstein, supra note 79, 242ff; English law, see Ashworth, supra note 41, p. 463 ff; and see Eugene Meehan and John H. Currie, The Law of Criminal Attempt (2nd ed., 2000), 45ff.
50 See Mayer, supra note 65, p. 331.
responsible for causing grievous bodily harm or manslaughter, accordingly. However, if some unrelated, outside factor interferes and prevents the unlawful result, the actor will bear no criminal liability other than for some forms of conduct that may fall within the scope of endangerment.

Clearly, in terms of protecting social interests as abstract values, and in terms of the actor’s culpability, the above situations are indistinguishable. Granting such overwhelming importance to chance – seven to twenty years’ imprisonment for offences of causing grievous bodily harm or manslaughter, as opposed to no criminal liability whatsoever – is unjust, and contrary to the purpose of criminal law.

Moreover, when the legislature adopts the view that attempts are punishable to the same extent as completed offences, it correctly emphasizes the antisocial severity of the conduct and of the actor’s culpability as decisive considerations in punishing attempts, while granting only minor significance to the antisocial result, since the non-occurrence of the result – particularly in a completed attempt – is generally a matter of chance. Therefore, when the legislature defines the indifferent causing of a result as an offence, it means that conduct performed in a state of indifference, which fulfils the actus reus (and creates a danger of realizing the result), is of particular severity. That being the case, one may legitimately ask whether the antisocial character of the conduct, performed with the requisite mental element, disappears when the result is fortuitously avoided. Should the chance non-occurrence of the result entirely negate the severity of the conduct itself?

Moreover, where an actor is held criminally liable for the complete perpetration of an offence accompanied by rashness, logic requires that an attempt to carry out the same offence accompanied by indifferent be deemed criminally liable, inasmuch as the antisocial character of the act, and the actor’s culpability are more severe in the case of the indifferent attempt than in the case of an offence completed through rashness. This is particularly so where the legislature places emphasis upon the antisocial act, and upon the actor’s culpability, while downgrading the importance of the antisocial result by equating the punishment for attempts and completed offences. When the punishment of attempts is made contingent upon purpose, then in the case of a completed offence that suffices with carelessness, the demand for purpose renders an attempt to be far more severe than the completed crime itself.

Of course, rashness – as a form of mens rea – cannot provide the mental element of an attempt. The mental element of attempt can be indifference or acceptance of the possibility of the realization of the result. A person acting rashly acts not only without wishing to cause the result but also hoping that it not be realized. One might argue that the actor would refrain from acting if he were truly to internalize the possibility that the result might be achieved. In the absence of acceptance of the possibility of the result, the antisocial character of the conduct, and the actor’s culpability are of reduced severity. It is the result that supplies the requisite antisocial weight and culpability to justify criminality. When a person acts rashly, one cannot say that he is disappointed when the

52 "Rashness – assumption of an unreasonable risk as to the possibility of bringing about the consequences hoping that it will be possible to prevent them", as defined in Israeli Criminal Code, sec. 20 (a) (2) (i), see Isr. L. Rev. 30 (1996) 13.

53 "Indifferent – to the possibility of bringing about the consequences", as defined in Israeli Criminal Code, sec. 20 (a) (2) (ii), see Isr. L. Rev. 30 (1996) 13.

54 See supra note 94 about the definition of rashness.
result is not realized. The opposite is true of an attempt. Therefore, it would be difficult to argue that the actor attempted to commit the offence.

As noted above, this subject is more related to the requirements of the mental element of criminal attempt, and an in-depth discussion would go well beyond the scope of this examination. For the sake of our topic important is the observation that the various rules in regard to the mental element and the punishment of completed offences and attempts may underlie the Anglo-American adoption of the fiction of transferred malice, as well as its rejection by the Continental systems, as expressed by the South African court.\(^55\) It should be clear that in a system in which a punishable attempt can be perpetrated with a mental element of indifference, and where an attempt is punishable to the same extent as the completed offence, it is easier to reject the fiction of transferred malice than it would be in a system that characterizes an attempt in terms of purpose to complete the offence, and in which attempts are treated more lightly than completed offences. We would therefore conclude this discussion with an invitation to re-examine the question of the mental element of criminal attempt.

An English commission for the reform of the criminal law added evidentiary considerations, as well: "[A]n attempt charge may be impossible (where it is not known until trial that the defendant claims to have had X [the indented Person or thing] and not Y [the actually affected person or thing] in contemplation); or inappropriate (as not describing the harm done adequately for labelling or sentencing purposes). Moreover, recklessness with respect to Y may be insufficient to establish the offence or incapable of being proved".\(^56\) This might be the case, for example, where the actor shoots at a group of people, and it is hard to prove the identity of the intended victim.\(^57\) But the argument is not convincing. For the purpose of a conviction for the completed offence, it is sufficient to show that the actor was aware that he was shooting at a person in a life-threatening manner.\(^58\) Proving that mental element is hardly daunting. When the victim is right before the shooter’s eyes, one can seek assistance from rules drawn from experience, such as that a person intends the natural results of his actions. Moreover, the fiction primarily serves to transfer mens rea from the intended victim to the actual victim. Thus, its use requires proof that the actor acted with mens rea in regard to a specific person. In addition, it is hard to imagine many instances in which a defendant might credibly stand up in court and claim for the first time: “I intended to kill so-and-so who was standing next to the person I killed, and not the person I actually killed.” Even if we were to follow the Commission’s reasoning, the end-result would not justify adopting the fiction of transferred malice. If he were believed, a defendant who would put forward the defence that he intended to murder someone other than his actual victim could face punishment that would not be less, and that might even exceed the penalty that might be imposed for the crime with which he was originally charged.

In summary, it can be said that the purpose of the criminal law, the purpose of punishment, the doctrine of attempt, and evidentiary considerations, all taken together, do not require that we turn attempt into a completed offence. The only consideration that might justify the fiction of transferred malice in a case of error in performance is, as

\(^{55}\) Supra, text at note 90.
\(^{56}\) The Law Commission, supra note 13, p. 82.
\(^{57}\) See Ritz, supra note 20, p. 184.
\(^{58}\) See supra, text at notes 40-41; as said when the legal protected interest by the offence of murder is human life, and the offence does not require a specific identity of the victim.
stated, the definition of the mental element of attempt, a subject that we believe should be re-examined.

Of late, Professor Husak\textsuperscript{59} has attempted to salvage the thesis that the actor in a situation of error in performance should be punished for the completed offence. Husak considers a case in which a person acts with intent to kill the intended object, but his action deviates from its intended course and causes the death of someone else. Husak takes the position that the intent cannot be transferred.\textsuperscript{60} He expressly states:

\textit{I do not really construe my project as a defense of the doctrine \[of transferred intent\]. Instead, my project is better conceptualized as providing an alternative to the doctrine of transferred intent, that is, a rationale that allows \[the actor\] to be punished as a murderer that does not allege that his intention somehow transferred from one person to another.}\textsuperscript{61}

Husak’s article is intended to explain and justify the view that the actor should be deemed a murderer, i.e. that he commits the completed offence without need for recourse to the fiction of transferred malice. Husak brings the following “hard case” in order to show why the actor should be deemed a murderer:

Suppose that Arthur intends to kill two victims. He is amazed at his good fortune when he sees both his intended victims in close proximity. He carefully aims at each, and quickly fires two bullets. Both victims drop dead. The subsequent autopsy reveals that the bullet he aimed at his first intended victim hit and killed the second intended victim instead, and the bullet he aimed at his second intended victim hit and killed the first intended victim instead.\textsuperscript{62}

According to Husak, if we reject the fiction of transferred malice, we cannot convict the actor for two completed murders. Since society views the actor as having murdered two people, the actor should be held criminally responsible for two crimes of murder. However, Husak continues to argue that Arthur “must have been reckless with respect to \[the second intended victim's\] death; he must have been aware that his act might kill him instead of \(\text{or in addition to}\) \[the first intended victim].”\textsuperscript{63} Where we are concerned with a single act that deviated and killed another, Husak does not adopt the view that the actor is a murderer, but rather the actor “should be treated \textit{as} a murderer, although he is not literally punished \textit{for} murder.”\textsuperscript{64} This result is achieved on the basis of the principle of proportionate sentences.\textsuperscript{65} Criminal punishment is the requital for Harm and Culpability. These two elements are identical to those that would have been present had the action achieved its goal, i.e. murder. In accordance with the theory of proportionate sentences, we impute to the actor criminal responsibility equivalent to that of murder, i.e. we treat him as a murderer.

In our opinion, Husak’s very improbable example cannot support a general approach. Husak’s argument can be made in cases of homicide, in which no distinction can be drawn in terms of severity; it is not applicable to cases of injury to the body or damage to

\textsuperscript{59} See Husak, \textit{supra note} 2; A similar suggestion was made by Noll, \textit{supra note} 74, p. 1, 5, arguing that full liability for the completed offence should be imputed to the actor. Noll therefore adopts the approach that mens rea is \textit{dolus in genere}.

\textsuperscript{60} Husak, \textit{supra note} 2, p. 83 ff.

\textsuperscript{61} \textit{Ibid.}, at p. 68.

\textsuperscript{62} \textit{Ibid.}, p. 70.

\textsuperscript{63} \textit{Ibid.}, p. 80.

\textsuperscript{64} \textit{Ibid.}, p. 87.

\textsuperscript{65} \textit{Ibid.}, p. 91 ff.
property, where intended injury or damage differs from the injury or damage in fact. Moreover, as stated above, the sentence for two attempts of murder and for two completed manslaughter must not be lesser than the sentence for two completed murder. Therefore, Husak’s theory is unnecessary. Furthermore, as Husak himself admits, the approach is not conceptual, and is not consistent with the fundamental principles of criminal law. Husak’s theory "puts the cart before the horse". There is no need to adopt legal fictions in order to impute appropriate criminal responsibility to the actor in a case of error in performance.

The conclusion is that in cases of error in performance it is possible to impose criminal liability for an attempt to perpetrate the intended offence against the intended object, and for a completed offence in accordance with the actor’s mental attitude towards harming the actual object. There is no justification for adopting any fiction. In a case of error in performance, the actor should bear criminal responsibility for harming the actual object in accordance with his mental attitude towards that harm, and for his conduct in regard to the intended object in accordance with the mental element that accompanies the conduct.

Therefore, transferred malice, as “an arbitrary exception to normal principles,” a “defect,” and a “curious survival of the antique law,” should be abandoned. The fiction was developed in order to avoid the unjustified evasion or mitigation of punishment. Now that the underlying reason no longer exists, the fiction is no longer justified.

(e) Additional disadvantages regarding the fiction of transferred malice
The fiction of transferred malice is justified by vestiges of ancient criminal law that are no longer relevant. The fiction is also inconsistent with other principles of criminal law, and may exact a greater price than appropriate for a system of law based upon principles of justice.

The fiction of transferred malice distorts reality, and leads to results that do not adequately reflect the antisocial character of the event. Consider a case in which the actor shoots at his foe with premeditated intent to kill. The bullet hits his foe’s security guard, yielding a result to which the actor was indifferent. The fiction would have our actor guilty of a single offence. But this does not reflect the full, antisocial character of the event, nor does it hold him accountable for his high culpability. The actor should be held criminally responsible for the manslaughter of the guard, and for the attempted murder of his intended victim.

Furthermore, the fiction of transferred malice is specifically attuned to homicide due to the absolute equivalence of human lives. But it does not adequately reflect the social harm inflicted, nor provide the conditions for appropriate punishment (in other words, it is not consistent with the relevant, necessary conditions required for establishing the criminal penalty under the retributive principle) for offences other than homicide.

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66 Williams, supra note 13, p. 134.
67 Ritz, supra note 20, p. 172.
68 Prosser, supra note 19, p. 650.
69 See Troendle, supra note 1, sec. 15, para. 11i; Roxin, supra note 2, p. 385-386; Jakobs, supra note 17, p. 278-279; Ashworth, supra note 16, p. 86-87.
Consider, for example, a case in which an actor, intending to destroy a picture of no particular artistic note, misses his mark and destroys a work of significant historical, cultural or artistic value for example – a Picasso. The doctrine of transferred malice might deem the actor to have intentionally destroyed a Picasso.\(^{70}\) Such a result does not accurately reflect the antisocial character of the act or the culpability of the actor. The social damage caused by the destruction of a significant work of art is far greater than that caused by destroying a picture of no particular worth. The mental element reflects the severity of the antisocial character of the act, and the actor’s culpability. Intentionally causing damage expresses a level of anti-sociality and culpability far more severe than recklessness or negligence.\(^{71}\) Viewing the event as if the actor intended to destroy a Picasso increases the severity of the anti-social character of the event and of the actor’s culpability. Criminal punishment is retribution for culpable anti-social conduct, yet transferred malice leads to punishment that exceeds the just penalty for the actor’s conduct and culpability.\(^{72}\)

The fiction of transferred malice is not consonant with the defences to criminal responsibility, and it may lead to unacceptable results. Consider the example, in which a person tries to defend himself from an unlawful attack, the self-defence attack misses the unlawful assailant, and due to error in performance injures the assailant’s wife who has come to break up the fight. In this case, transferred malice would grant the actor the defences he would have enjoyed against the intended object. In other words, the injury to the wife – who is not the assailant – would be the result of an act of justified self-defence.\(^{73}\) The woman, however, would not be permitted to defend herself against the actor’s misdirected attack, since self-defence can only be in response to an unlawful assault, and the actor’s conduct is legally justified. This is hardly acceptable. The actor's conduct directed against the assailant is justified by self-defence, and it is therefore desirable, or at least permitted. As opposed to that, harming the assailant’s wife is not legally justified, is not permitted, and is anti-social; the act of injures the assailant's wife might constitute a negligence offence or might be excused. Viewing the event as a single act comes at the price of severely distorting reality. It does not permit a necessary division that would distinguish the antisocial, unjustifiable injury to the assailant’s wife from the socially acceptable, justified harm to the assailant.\(^{74}\) It also prevents us from distinguishing between an actual defence and a putative.\(^{75}\)

3. Criticism of the application of the fiction of transferred malice
In cases of error in performance, Israeli courts employed the fiction of transferred malice in handing down convictions for a completed mens rea offence against the actual object, while also convicting the actor for the attempted commission of the same

\(^{70}\) See *State v. Cantua-Ramirez*, 718 P.2d 1030.
\(^{71}\) As stated, *supra note* 47, since the circumstance of a father is one that aggravates culpability, therefore, in this case the contradiction refers only to the usual form of the completed offence. Convicting the actor of murder does not contradict the principles of anti-sociality of the offence and culpability.
\(^{72}\) See Ashworth, *supra note* 18, p. 45 ff; Williams, *supra note* 33, p. 86-87; Burchell & Milton, *supra note* 12, p. 287.
\(^{73}\) See The Law Commission, *supra note* 13, p. 82; LeFave & Scott, *supra note* 1, p. 285.
\(^{75}\) See George P. Fletcher, “The Right and the Reasonable”, in Albin Eser/George P. Fletcher (eds.), *Justification and Excuse* I (Freiburg, 1987) 67, at pp. 105 on the distinction between actually justified defence and putative justified defence.
offence against the intended object.\textsuperscript{76} English and American courts have convicted the actor in cases of error of performance of two completed offences, i.e. a completed mens rea offence against the actual object by virtue of transferred malice, and a completed mens rea offence against the intended object who was also harmed.\textsuperscript{77} American case law has even gone so far as to apply the fiction of transferred malice when no object was harmed, and convicted a defendant of three counts of attempted murder – against the intended object and two others – on the basis of the fiction of transferred malice.\textsuperscript{78} The facts of the case were as follows: The actor sent a poisoned beverage to the workplace of a woman, with the intention of causing her death. The woman tasted the poisoned beverage, and finding that it tasted bad, she told two friends, who then tasted it, as well. Each of the three took only a few sips, so that none died. The court convicted the actor of an attempt to murder the woman who was the intended victim, as well as of two attempts to murder her two friends, on the basis of the fiction of transferred malice.

These decisions are strange,\textsuperscript{79} and even absurd. First, the fiction of transferred malice was developed for cases in which a perpetrator acted to kill a person, but as a result of an error in performance, caused the death of someone else. At the time, attempts were either not punishable, or were punishable only to a lesser degree. As a result, the actor could not be held criminally liable, or could not appropriately be held to account. The rationale for punishing the actor for a completed offence on the basis of a fiction of transferred mens rea is that one offence absorbs the intended result of the other.\textsuperscript{80} The fiction was not intended - at least from the perspective of its development – to apply to attempts, i.e. to situations in which no one is killed or injured.\textsuperscript{81}

Secondly, the fiction was intended to prevent a situation in which a defendant could avoid or mitigate punishment by raising a claim of error in performance. The fiction was not intended to make the actor’s position worse than it would have been had he succeeded in completing the intended offence. Thus an actor should not be convicted of a completed offence against the actual object by virtue of the fiction, while also held liable for a completed or even an attempted offence against the intended object.

Thirdly, where an actor is convicted for a completed mens rea offence, or for an attempted offence against the intended object – i.e. his mental state is realized for the purpose of convicting him of the completed or attempted offence – how can that same mental element be realized again and again for the purpose of additional offences?

Fourthly, convicting the actor in such situations of a completed mens rea offence or an attempted offence against the intended object, as well as for a completed mens rea offence or an attempt against the actual object by virtue of the fiction of transferred intent is incompatible with the culpability principle. Culpability represents the


\textsuperscript{77} See State v. Hinton, 630 A.2d 593, 598ff (Conn. 1993); Mordica v. State, 618 So.2d 303; State v. Sampol, 636 F.2d 621, 674 (D.C. Cir. 1980).

\textsuperscript{78} State v. Gillette, 699 P.2d 626, at 634 (N.M. App. 1985).


\textsuperscript{80} Also see Dressler, supra note 14, at 124; Ashworth, supra note 16, at 84; Ritz, supra note 20, at 172, 176; Kessler, supra note 23, at 2209-2211; Anthony M. Dillof, "Transferred Intent: An Inquiry into the Nature of Criminal Culpability", 1 Buff. Crim. L. Rev. (1998) 501, 506.

\textsuperscript{81} And see People v. Birreuta, 162 Cal.App. 3d 454, 460, 208 Cal.Rptr. 635, 638-639 (Cal.App. 5 Dist. 1984); Ford v. State, 625 A.2d 984, 998-999 (Md. 1993).
appropriate degree of condemnation and blame that society associates with an antisocial act. Because the actor acts with mens rea to harm his intended object – i.e. acts to realize the completed offence – he can be condemned for the performance of that antisocial act of harming his intended object with mens rea. The actor’s culpability is that deriving from the perpetration of a completed offence or an attempt to complete it, but it does not achieve the level of blameworthiness associated with the perpetration of two completed or attempted offences.

The Ontario High Court of Justice, Canada, used the fiction of transferred intent to convict a man of murder after he attempted to commit suicide by causing a traffic accident that caused the death of a person. The Court took the view that the defendant had acted with premeditated intention to cause the death of a person, and that intent could be transferred to the victim.

This approach would appear to be problematic and even mistaken for several reasons:

First, suicide is not a criminal offence. Therefore, the actus reus of suicide is not identical to the actus reus of murder or manslaughter. Although suicide is a wrong in all aspects of the law, the intended object (the actor himself), and the actual object (another person) are not equivalent in terms of the actus reus of the offence (murder or manslaughter).

Second, the justification of the fiction of transferred malice is based upon the assumption that in the case of an error in performance, the antisocial severity of the actor’s conduct and his culpability are equal to what they would have been had he succeeded in attaining his original goal, and the antisocial result is no less severe than that which he intended. But since suicide is not a criminal offence, it is not in any way comparable to killing another person, and the fiction is entirely out of place.

Third, the fiction of transferred intent was historically intended to prevent a situation in which an error in performance would lead to non-culpability or mitigated punishment. The fiction was not intended, at least in terms of its historical development, to punish the actor more severely than he would have been punished had he succeeded in achieving his desired goal.

D. Conclusion

When two objects are equivalent in terms of the actus reus of the actual offence, the definition of mens rea leads to the conclusion that a mistake of identity is not relevant in criminal law. The penal evaluation of the event would be no different if reality conformed to the actor’s mistaken belief. For the purpose of establishing mens rea to harm the object of the offence, it is sufficient that the actor be aware that the object satisfies the circumstantial element or the description of the result of the offence. The specific identity of the object of the offence is of no consequence for the criminal law.

82 The actor’s culpability for the completed attempt - where the actor had done all measures in his ability to complete the offence - is equal to his actor’s culpability for the completed offence. The difference between the completed attempt and the completed offence is in the actus reus, i.e. in the antisocial nature of the result, which constitutes the inflicting of harm upon a legally protected value.

83 See Dressler, supra note 14, p. 125; Ashworth, supra note 18, p. 45 ff.; Ashworth, supra note 16, p. 84; Glanville Williams, "Convictions and Fair Labelling", 42 Camb. L.J. (1983) 85, p. 88; Kessler, supra note 23, p. 2209; Dillof, supra note 30, p. 506. This argument is irrelevant when the penalty for murder is death.


85 See Ritz, supra note 20, at 179-180; Williams, supra note 13, pp. 126-127, 129, 132 at footnotes 5-6; Williams, supra note 33, 87.
In terms of criminal law, the actor need only act with mens rea to harm the object before his eyes. A mistake of identity is of no consequence.

In a case of error in performance, the actor’s conduct deviates from its intended path and harms a different object from the one intended. Mens rea to harm the object of the offence requires that the actor take into account – i.e. be actually aware – that his conduct will harm the object of the offence. The object of the offence is that object affected by the criminal conduct. Therefore, in the typical case of error in performance, in which the actor does not take into account the possibility that his conduct may deviate and harm the object of the offence, the actor does not act with mens rea to harm the actual object of the offence. The actor can be criminally responsible for an attempt to commit the intended offence, as well as for perpetrating a completed offence against the actual object, in accordance with the actus reus and the mental element of the actor at the time of commission.

The considerations regarding the purpose of criminal law and the punishment of attempts that motivated ancient law to make recourse to a legal fiction, and not to grant legal consequence to an error in performance are no longer extant. In modern criminal law, attempt is a punishable phenomenon, and – with some exceptions - the penalty for an attempt is equal to that of the completed offence. Therefore, the main historical considerations no longer require that we deviate from referring to reality as it is, and calling an attempt – an attempt.

Only the doctrine of attempt that defines the mental element as one of purpose can in any way provide ground for the fiction of transferred malice. But that doctrine should not be viewed as carved in stone. Changes in the law of attempts (concerning the mental element) may yet make it possible to adopt a differential approach to error in performance, as is required by the fundamental principles of criminal law.