Is Transferred Malice for Murder Always Justifiable?

Samuel Williams*

Introduction

1.1. The Inquiry

Consider a number of examples:

*Tuba*: V is walking under a bridge. D intends to kill V and drops a tuba on V's head. V dies.

*Skydive*: D is a sniper on a rooftop. He is aiming to kill V1, who is on the top floor of a hotel. D fires a shot at V1, but the bullet hits V2, a skydiver falling from the sky, who dies immediately. At the time of shooting, D neither knew nor had reason to know of V2's proximity, or the fact that skydiving occurred in the vicinity.

*Boomerang*: In desolate woods, D throws a heavy boomerang at V1, intending to render V1 unconscious. The boomerang misses, swerves upwards and hits V2 who is hiding in a tree. V2 dies upon the boomerang's impact. D neither knew nor had reason to know of V2's presence on the scene.

Under English law, D in *Tuba* will be convicted of the murder of V and given a mandatory life sentence.\(^1\) This paper considers whether D should also be convicted of murder and given a mandatory life sentence in *Skydive* and *Boomerang*. This is the current position in English law, by virtue of the rule of transferred malice.\(^2\)

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\(^{1}\) Murder is the killing of another person, with the intention to kill that person or to cause that person grievous bodily harm: *Cunningham* [1982] AC 566 (HL). The mandatory life sentence is provided for by section 1(1) of the Murder (Abolition of Death Penalty) Act 1965.

rule states that D’s intention to kill V1 in Skydive and D’s intention to cause grievous bodily harm to V1 in Boomerang is sufficient for a murder conviction in relation to V2. Note that I’ve limited my inquiry to examples where D neither knew nor had reason to know of V2’s presence. Different considerations may apply if these facts were altered, but I do not consider them here.

I will throughout this paper refer to the rule of transferred malice as ‘the Rule’. I consider whether this Rule is justifiable, specifically whether there are reasons positively justifying the Rule, whether there are reasons against the Rule, and whether there are any reasons negatively justifying the Rule by removing one of these reasons against.

The Rule has at least three aspects that we may test for justifiability: criminalisation, conviction, and punishment. First, the Rule communicates ex ante that the deaths of V2 in situations such as Skydive and Boomerang constitute the offence of murder. Second, persons falling under the Rule, such as D in Skydive and Boomerang will be convicted of murder. Third, persons falling under the Rule will be given the mandatory life sentence.

If the Rule was abolished, D in Skydive and Boomerang would be convicted and sentenced for attempt crimes against V1, and unlawful and dangerous act

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5 Specifically attempted murder, and attempted grievous bodily harm with intent. An attempted offence is taking steps that are more than merely preparatory to the commission of an offence, with the intention to commit that offence: Criminal Attempts Act 1981, section 1. The offence of causing grievous bodily harm with intent requires someone to cause any grievous bodily harm to any person with intent to do some grievous bodily harm to any person: Offences Against the Person Act 1861, section 18.
manslaughter against V2. The maximum sentence for these crimes is life imprisonment. This background must be borne in mind when considering justifications for the Rule, as we must show why the Rule provides additional value to this background. This is quite different from asking whether the Rule is justifiable if the alternative to the Rule was no conviction and no punishment.

We must consider difference between a mandatory and maximum life sentence, as the Rule’s application would lead to the former, whilst its abolition would lead to the latter. When giving a mandatory life sentence, the court is obligated to make an order specifying the minimum amount of time D is to be imprisoned before consideration for parole. For adult defendants, this period can be for either 15 years, 30 years, or for the remainder of D’s life. Thus those receiving the mandatory life sentence will spend at least 15 years in prison.

Where life imprisonment is merely a maximum sentence, the court has a variety of options from life imprisonment to absolute discharge. They must take account of various factors including punishment, reducing crime, reforming D, protecting the public, and the making of reparation to those affected by D’s offences. It is thus possible for D to receive an absolute discharge in relation to offences with a maximum sentence of life imprisonment, a stark contrast to the position where an offence gives rise to the mandatory life sentence.

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6 Unlawful and dangerous act manslaughter requires the commission of a criminal offence, where that offence was dangerous in the sense that a reasonable person with the knowledge of the defendant would foresee a risk of some harm to a person, and that offence caused the death of the victim: Church [1966] 1 QB 59 (CA); Newbury and Jones [1977] AC 500 (HL); Dawson (1985) 81 Cr App R 150 (CA). The foreseeable harm necessary to establish dangerousness need not be in respect of the person killed: AG’s Reference (no 3 of 1994) [1998] AC 245 (HL). In our examples, the attempt is the unlawful act, it is dangerous as a reasonable person with D’s knowledge would know it gave rise to a risk of some harm to V1, and the unlawful act caused V2’s death.

7 Criminal Attempts Act 1981, sections 4(1)(a) and 4(1)(b); Offences Against the Person Act 1861, section 18.

8 Criminal Justice Act 2003, section 269(2) and schedule 21.


10 Criminal Justice Act 2003, section 142(1).
1.2. The Value of the Inquiry

There are at least three values in undertaking this inquiry. First, the Rule is far from obsolete. In 2011, a majority of the Supreme Court in Gnango found a defendant guilty for murder.\textsuperscript{11} Four judges convicted on the basis of transferred malice.\textsuperscript{12} Three judges convicted on the basis of joint enterprise.\textsuperscript{13} The doctrine of joint enterprise was recently abolished in Jogee.\textsuperscript{14} As such, the justifiability of the Supreme Court’s conviction rests on whether the Rule is sound.

Second, the Rule itself is controversial. Lord Mustill has said that ‘whatever grounds [for the rule] there may once have been have long since disappeared’.\textsuperscript{15} Andrew Ashworth’s view is that ‘The doctrine could, then, be abolished without material loss to criminal justice; and it is desirable that it should be’.\textsuperscript{16} Given calls for its abolition from senior judges and commentators alike, we should take the case for abolition seriously.

Third, the Rule gives rise to additional puzzles. Should the Rule apply across different offences, for example where D intends to shoot and kill V1 but accidentally shoots a car window? Should D be able to transfer any defences from V1 to V2, for example if V1 had attacked D so as to enable D to plead self-defence? Should the Rule apply in situations where the harm to V2 occurred in a very different way to that intended against V1, for example if D shoots and misses V1, striking a moving car in the petrol tank, which explodes causing the car to

\textsuperscript{11} (n 2).
\textsuperscript{12} [60] (Lord Phillips and Lord Judge, with whom Lord Wilson agreed), [103] (Lord Dyson).
\textsuperscript{13} [71] (Lord Brown), [81] (Lord Clarke), [105] (Lord Dyson).
\textsuperscript{14} [2016] UKSC 8 [78]-[90].
\textsuperscript{15} AG’s Reference (No 3 of 1994) (n 6) (262).
\textsuperscript{16} Ashworth, ‘Transferred Malice and Punishment for Unforeseen Consequences’ in Glazebrook (ed), Reshaping the Criminal Law - Essays in Honor of Glanville Williams (S&S 1978) 87.
swerve and squash V2? These puzzles can only be solved by considering possible justifications for the Rule.

1.3. An Outline of the Inquiry

The structure of the paper is as follows. First, I will consider some existing arguments for the Rule: offence definition, emotional responses, D’s dangerousness, the intentional attack on V1, and proportionate punishment. I claim that none of these provide a complete justification for the Rule, though ‘emotional responses’ and the ‘intentional attack on V1’ come in use when considering arguments based on the deterrence of retaliation and the rule of law.

Second, I consider three potential positive justifications for the Rule: the deterring of wrongdoing or harm, the instilling of a respect for values, and the avoidance of retaliation. I claim that it is far from clear that these justifications provide strong reasons for the Rule.

Third, I consider whether D is blameworthy in respect of V2’s death in Skydive and Boomerang. This may be relevant in two ways: some argue blameworthiness is a positive justification for criminalisation, conviction and punishment; some argue the lack of blameworthiness is a reason against criminalisation, conviction and punishment. Both arguments will be assessed. I claim that it is far from clear that D is blameworthy in respect of V2’s death. If accepted, no reason is provided for the Rule, and a reason against the Rule exists if the ‘lack of blameworthiness’ objection is considered sound. I believe the objection is sound.

Fourth, I consider whether the rule of law provides a reason against the Rule. I claim that a reason against is established, though it is a relatively weak reason.

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17 Section 2.
18 Section 3.
19 Section 4.
20 Section 5.
Finally, I conclude that the arguments considered do little to positively justify the Rule. Furthermore, the lack of blameworthiness objection provides a strong reason against the Rule. As such, we should take seriously the possibility of abolishing the Rule.

Existing Arguments

There are a number of proposed justifications for the Rule. I suggest none of these provide a complete justification for the Rule.

2.1. Offence Definition

The first argument proposes to redefine the definition of murder, thus denying there is any Rule to be justified. Alan Beever says:21

> At least with respect to central cases, then, it is clear that the doctrine [of transferred malice] must apply. This is not because the application of the doctrine is supported by policy arguments or the like, but because the result reached by the doctrine is demanded by the definition of the offence… The actus reus of murder is to kill a person… the identity of the person is immaterial to the definition of the offence… the doctrine of transferred malice is a logical consequence of the nature of the offences.

The idea here is to deny the existence of the Rule, and redefine murder as requiring an intention to kill or cause grievous bodily to some person through acting, not necessarily the person killed by the action.

The objection to offence definition is that it simply pushes the question back further: why should we define murder in the proposed way, rather than requiring an intention to kill the person actually killed. I will, however, continue to consider justifications for the Rule, rather than a redefined murder offence. Nothing turns on this semantic distinction.

2.2. Emotional Responses

The second argument relies on emotional responses to justify the Rule. Glanville Williams says:22

[P]robably the reason for the doctrine is an emotional one; D has the mens rea of murder (of [V1]), and commits the actus reus of murder (of [V2]), and the difference in victim… is regarded as immaterial.

Admittedly Williams’ own intuitions do not extend to Skydive or Boomerang as he requires D to have been negligent in respect of V2’s death, whereas in these cases D neither knew nor had reason to know of V2’s presence. However, it clearly raises the possibility of intuitions doing some justificatory work.

Similar in this regard is Peter Westen, who says ‘the sufficiency of impersonal intent - that is, intent to harm a person, even if not the particular harmed - is derivative of whether ordinary observers resent an actor for purposeful harm’.23

Making a slightly different argument, James Gordley says:24

[T]he approach… holds [D] responsible for a reason that answers to our sense of justice. Imagine a person’s reaction if someone he loved were killed by a bullet aimed at someone else. If he were asked to regard the killing as merely an unfortunate accident, he might feel a sense of outrage.

This argument is different in focusing on the emotional responses of V2’s loved ones, rather than the public in general.

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A number of objections can be levelled. First, it is far from clear that ordinary people have any settled views on transferred malice. I asked about twenty people for an instinctive reaction on the following question: should we apply the Rule in Skydive and Boomerang? Around half of people instinctively favoured retention, the other half thinking manslaughter was preferable. The response in no way correlated with whether people had studied or practised law. Whilst I accept the limited use of such a small sample size, it is at least plausible that similar divergence would exist in a larger sample. Admittedly this small study provides no objection to Gordley’s framing of the argument.

Second, it is not clear how people’s emotional responses serve to justify the Rule. Williams and Gordley provides no argument on this point. Westen says:25

[Whilst] desert is indeed solely a function of the wrongs that actors culpably risk, whether an actor ought to be given the full punishment he deserves rightly depends in part upon whether the community rightly cares that he incurs it, and that the latter, in turn, depends upon whether the harm the community seeks to prevent occurs.

For Westen, if the community does not care for punishment being incurred in a particular case, the state by punishing would be showing ‘overweening righteousness’, which is a reason against such punishment.26

Two responses: first, the concept of ‘overweening righteousness’ is nowhere defined. Second, we are not told why ‘overweening righteousness’ is bad when the state considers whether to punish in a particular case. As such the argument is at best incomplete.

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25 (n 23) 343.

26 Ibid.
Below I attempt to deal with the second objection, and detail why emotional responses might be relevant in justifying the Rule.\textsuperscript{27} Furthermore, I do so in such a way that perhaps escapes the first objection.

\subsection*{2.3. Dangerousness of the Defendant}

A third argument justifying the Rule focuses on the dangerousness of the defendant. It suggests that D in \textit{Skydive} and \textit{Boomerang} is as dangerous as a person who successfully kills their intended target, and more dangerous than someone who attempts but fails to kill anyone at all. For example, Glanville Williams says: \textsuperscript{28}

\begin{quote}
Where the attempt shows a lack of cunning or careful planning, that may itself be a reason for treating the offender with some leniency, since a would-be criminal who constantly fails is less dangerous than one who constantly succeeds. On the other hand, one who inflicts harm in the course of an attempt, even though upon the wrong victim, is evidently as dangerous as if his plan had not miscarried. Thus whereas there may be a reason for treating the wholly unsuccessful attempter with leniency, there can be no special consideration due to one whose malice becomes transferred.
\end{quote}

A number of objections can be levelled at this. First, Williams does not tell us why the defendant’s being more dangerous matters. At best the argument is incomplete.

However, the objection can probably be dismissed; it is possible to imagine that the defendant’s dangerousness may be relevant on several theories of criminalisation or punishment. We might think there is value in communicating to the public the dangerousness of particular people (for example to encourage caution). Alternatively, we might think there is value in punishing D to reform D into being a less dangerous person, or to protect the public from D’s presence in society. If we assumed the Rule achieved these goals better than the Background, then we have reason for the Rule.

\textsuperscript{27} See Section 3.3.

\textsuperscript{28} (n 22) 187.
Second, Williams’ assessments of ‘dangerousness’ seem too simplistic. Even if we assume that the outcome of harm is one factor in a dangerousness assessment, surely there are additional factors to consider. The reason motivating D to attack V1 must be highly relevant. Does the reason extend only to V1, or could it motivate D to carry out additional attacks in the future? This second objection seems fatal to the dangerousness argument.

2.4. The Intention to Harm V1

A number of commentators seek to justify the Rule with reference to D’s intention to harm V1. For example, James Gordley says:

When… the defendant is held liable for harm inflicted intentionally, it does not matter whether his action created a large or a small risk of harm… Should it matter, then, that he caused, not the harm he wanted, but a different harm? Certainly it matters from his own perspective. His intention to bring about the very harm he wished was thwarted. His own ends, which would have been advanced, in his view, by causing this very harm, were not realized. But a defendant’s failure to achieve his ends hardly exonerates him in criminal… law.

Making a somewhat similar suggestion, Jeremy Horder says:

[The] justification for convicting of murder in such cases is the assumed moral insignificance of the way someone is killed, as well as of the identity of the person killed… when death has been intentionally caused. [This idea] allows liability when a particular kind of interest has been culpably invaded or destroyed, even when the victim was not the intended victim, or the interest was not invaded or destroyed in the way intended.

We should note that Horder’s framing of the argument wouldn’t justify the Rule’s application in *Boomerang*: in that example D did not intend to cause death to V1, but rather merely intended to cause grievous bodily harm.

29 (n 24) 194.

The objection is that the arguments are at best incomplete. Gordley does not tell us why it ‘does not matter’ that D killed V2 when he intended to V1. Similarly, Horder does not justify the ‘moral insignificance’ of the victim’s identity.

It is plausible to think that this sort of argument would require identifying why intentions matter in the case where D intends to harm V and succeeds. I sketch one possibility below.\(^{31}\)

2.5. Proportio nate Sentencing

Another argument proposed as a justification of the Rule is Doug Husak’s ‘principle of sentencing theory’.\(^{32}\) He suggests that:\(^{33}\)

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\text{[T]he punishment a defendant deserves should be proportionate to the seriousness of his criminal conduct... the seriousness of criminal conduct is a function of two variables - harm and culpability... If D1 and D2 act with the same culpability, and proximately cause the same harm, then they must have committed equally serious crimes.}
\]

If accepted, this argument provides a reason for the Rule. This is because D in \textit{Skydive} and \textit{Boomerang} deserves the same punishment as D who intends to kill V and succeeds. The fact that the Rule imposes the mandatory life sentence on D in \textit{Skydive} and \textit{Boomerang} thus gives D what he deserves, which is a good thing.

There are, however, a number of objections. First, Husak provides no argument as to why the punishment the defendant deserves should be proportionate to the seriousness of the criminal conduct. One could adopt a theory of punishment which aimed solely to deter future wrongdoing. On such a theory, the defendant’s desert could only be indirectly relevant, as a factor to be considered when designing a punishment that would serve as a successful deterrent. Husak provides no reason to prefer one theory of punishment over another.

\(^{31}\) Section 5.


\(^{33}\) Ibid 92.
Second, Husak provides no argument for the conclusion that the seriousness of criminal conduct is a function of harm and culpability. It’s plausible that wrongdoing would also have a role to play in deciding the seriousness of criminal conduct. Furthermore, it is plausible to believe in the possibility of harmless and non-culpable wrongdoing, which presents problems for Husak. Furthermore, Husak neither defines ‘harm’ nor ‘culpability’. These are contentious concepts, and so cannot merely be assumed.

Third, it is not obvious that there exists equal culpability between D in *Tuba*, *Skydive*, and *Boomerang*. This depends on your theory of culpability, and Husak does not provide us with a theory. I will return to whether D in each case is equally culpable, or blameworthy, below.\(^{34}\)

## Three Potential Reasons For

This section considers three potential justifications for the Rule: first, the deterrence of future harm or wrongdoing; second, the instilling of a respect for values; and third, the deterrence of retaliation. I claim that without empirical research it is difficult to establish these arguments as providing strong reasons for the Rule.

### 3.1. Deterrence of Future Wrongdoing or Harm

I assume that the deterrence of wrongdoing or the doing of harm is a good thing. It might be argued that the Rule can be justified by virtue of the deterrence of future wrongdoing or harm. This would provide a positive justification for the Rule.

What sorts of wrongdoing or harms might be deterred by the Rule? One sub-set of harms and wrongs can be derived by focusing on D at the start of *Tuba*, *Skydive*, and *Boomerang* when making the decision to drop the tuba, shoot the sniper rifle, or throw the boomerang. If the Rule caused D to decide against the proposed cause of

\(^{34}\) Section 4.2.
action a number of harms and wrongs might be avoided. We may avoid various injuries, including death, to D's intended victims, V and V1. We may avoid various injuries, including death, to people in the vicinity, V2. Additionally, if D commits an offence and is caught, he will face conviction and a lengthy sentence. It would be good to avoid this hard treatment and disruption in D’s life.

I think the argument valid, but it rather depends on how successful the Rule is at deterring the above identified wrongs and harms. Empirical evidence would be needed to identify the strength of the reason the argument provides. However, the possibility of success may be doubted for two reasons. First, the intricacies of the law of homicide are not widely known. Whilst most people will be aware of the difference between murder and manslaughter, I imagine few will have heard of the doctrine of transferred malice. Whilst those who have studied or practised law will have a vague idea of the Rule, it is difficult to conceive of many others who will have.

Second, even if the Rule is known, it seems unlikely to play much role in D’s practical reasoning. D in Tuba, Skydive and Boomerang have all decided to kill or seriously injure V or V1, assumedly with the knowledge that if they are caught they will receive lengthy sentences. D (1) wanting V or V1 dead motivated D more than (2) this risk of sentence. The Rule means that (3) if D fails to hit their intended victim but instead strikes V2, someone D neither knew nor had reason to know was present, D will be convicted and sentenced for the murder of V2. Given (1) outweighed (2) in D’s head, it seems unlikely that (3) will change D’s mind, given the low probability in D’s head of hitting a person they neither know nor have reason to know is present on the scene.

This issue may compounded if D knows that (4) D risks being liable for an attempt against V1, and (5) D risks being liable for unlawful and dangerous act manslaughter against V2. In such circumstance, the Rule’s actually affecting D’s
practical reasoning would be based on (1)<(2)/(3)/(4)/(5), where (1)>(2)/(4)/(5). This seems quite implausible.

3.2. Instilling a Respect for Values

One argument for criminalisation, conviction, and punishment is the idea of instilling a respect for certain values within a community. John Gardner’s argument for this idea is:35

It’s a good thing if people do no wrong;
It’s a better thing still if people have no disposition to do wrong;
Prevention is better than cure;
Criminalization and criminal punishment can both help to prevent people from forming or maintaining the disposition to do wrong.
Criminalization and criminal punishment are good things.

Another way of putting this argument is ‘we need to express public disapproval in the clarion voice of the criminal law so that the wider population will not become morally desensitized or confused’.36

The idea behind the argument is that people are less likely to commit wrongs if they identify with the value attacked by the wrong in question. The criminal law may lead people to reflect on particular values, and come to understand their importance.

Is this a plausible justification for the Rule? The Rule most obviously seems to protect the value of human life or bodily integrity. As such, people’s awareness of the Rule may be caused to reflect on these values, and see their importance. This may reduce not just serious attacks on human life, but more minor assaults and batteries. It may also have indirect effects, causing people to reflect on how other aspects of society are best-seen as furthering these values.


Similarly to the previous section, empirical evidence would be necessary in order to determine the strength of any reason derived from this argument.

The main objection to this argument is similar to that considered in the previous section: very few people are actually aware of the Rule. The majority of those aware of the Rule will be law students and practitioners. This reduces the potential strength of any reason derived from this argument.

One response to the objection might be that, unlike the argument considered in section 3.1, people’s awareness of the Rule is unnecessary for the success of this argument. Where the Rule is applied in particular cases, people may hear of these cases - for example through the media. If the Rule makes it more likely that people will hear of the cases, or more likely for them to reflect on the values of human life and bodily integrity, then the strength of the reason derived from this argument is increased. Perhaps murder convictions are more widely reported. Perhaps murder convictions mandatory life sentences compel people to reflect more than a conviction of attempt alongside a discretionary life sentence.

Even accounting for the response, it seems probable that this argument might provide a positive justification for the Rule, though it seems probable that this will be a relatively weak reason.

3.3. Avoiding Retaliation

Some suggest that convicting and punishing offenders bring value, by reducing the likelihood of retaliation by the victim, and other people close to the victim. Gardner writes:37

The justifiability of criminal punishment, and criminal law in general, is closely connected to the unjustifiability of our retaliating against

those who wrong us. That people are inclined to retaliate against those who wrong them, often with good excuse but rarely with adequate justification, creates a rational pressure for social practices which tend to take the heat out of the situation and remove some of the temptation to retaliate.

The idea is that ‘deliberate infliction of suffering or deprivation’ brings ‘closure’ to the victim and others who are close to them.\textsuperscript{38} This makes them less likely to commit further wrongs or inflict further harm aimed at the defendant or those close to them. In slightly more colourful language, we can view the criminal law: \textsuperscript{39}

As a response to the activities of \textit{victims}, together with their families, associates, and supporters. The blood feud, the vendetta, the duel, the revenge, the lynching.

Does this provide a plausible justification for the Rule? There are two questions that must be answered: first, does the killing of V2 in \textit{Skydive} and \textit{Boomerang} give rise to the inclination to retaliate, and second, does the Rule reduce this inclination to retaliate, or perhaps make it more difficult to act upon such inclinations?

As to the first, clearly we cannot be focusing on V2 in \textit{Skydive} and \textit{Boomerang}. Alas, V2 is dead. So we must be asking how those people with close bonds with V2 would respond. Recall the above discussion concerning emotional responses.\textsuperscript{40} Glanville Williams and Peter Westen both suggest that cases such as \textit{Skydive} and \textit{Boomerang} elicit an emotional response that D is a murderer and should be punished as such. Perhaps more vividly, recall James Gordley’s point: \textsuperscript{41}

\begin{quote}
[T]he approach… holds [D] responsible for a reason that answers to our sense of justice. Imagine a person’s reaction if someone he loved were killed by a bullet aimed at someone else. If he were asked to regard the killing as merely an unfortunate accident, he might feel a sense of outrage.
\end{quote}

\textsuperscript{38} Ibid 216.

\textsuperscript{39} Ibid 215.

\textsuperscript{40} Section 2.2.

\textsuperscript{41} Text to (n 24).
Maybe the avoidance of retaliation is a way of making sense of the arguments from emotional responses. When people feel a significant emotional response to wrongdoing, they want to see that justice is done, and if they feel otherwise they may be inclined to retaliate, to take the law into their own hands. Of course to properly substantiate this argument we would need empirical evidence. But the idea seems far from implausible. V2 has been killed by someone who was acting with an intention to kill V1. It is easy to imagine those close to V2 being significantly affected by such events.

One objection to this first point is that people may have little inclination to retaliate when D neither knew nor had reason to know of V2’s presence on the scene, as is the case in both Skydive and Boomerang. We should be cautious to remember this nuance of the examples.

Another objection is that the inclination to retaliate is likely to vary significantly depending on the identity of V2. If V2 is a member of a gang or mafia, there seems a large chance that people close to V2 will be inclined to retaliate. But other examples may involve a much lower risk. This variation sits somewhat uncomfortably with the Rule’s application in every scenario. But again, this is pure hypothesis: without empirical studies it is difficult to assess the level of variation between different cases.

The second point is whether the Rule actually reduces any inclination to retaliate, or makes inclination more difficult to act upon. In particular, is the label ‘murder’ and the mandatory life sentence better than the label ‘manslaughter’ combined with a discretionary life sentence in this regard?

Might the public condemnation of D reduce inclinations? The label ‘murder’ coupled with a mandatory life sentence does convey a strong message that what D has done is wrong. This message is even stronger than the ‘manslaughter’ label
alongside the discretionary life sentence. However, we may question whether there would be a significant difference in effect on inclination. With or without the Rule, D would receive a serious criminal conviction, and be punished for a significant period of time.

Under the Rule, D will certainly receive a mandatory life sentence. This may lead to additional imprisonment, depending on whether the discretion to give a life sentence for manslaughter is exercised if the Rule didn’t exist. This additional imprisonment may be good for a number of reasons. During the time of additional imprisonment, whilst admittedly not impossible, it is significantly more difficult for those close to V2 to retaliate and attack D. Similarly, once D is finally released there has been more time for those close to V2 to have come to terms with the emotional trauma of V2’s death.

An objection to this ‘additional imprisonment’ line of reasoning is that whilst it serves to reduce retaliation against D, it remains possible to retaliate against those people who are close to D. Rather than avoiding retaliation, the Rule may simply deflect it onto new victims.

**Blameworthiness**

Blameworthiness is considered by many as a necessary condition of conviction or punishment. A number of arguments have been given for this. I will consider two arguments: one advanced by John Gardner and one by Andrew Simester. I claim that Gardner’s argument provides at best a weak reason for the Rule. I claim that Simester’s argument provides a strong reason against the Rule.

4.1. A Positive Justification for Punishment

Gardner sees blameworthiness as a positive justification for punishment. The argument has a number of steps. It is good for wrongdoers to feel regret for their
wrongdoing. A blameworthy wrongdoer is less likely to feel this regret, as such a person: 42

   has already shown himself insufficiently responsive to the reasons against doing as he did… This rational under-responsiveness also militates against his experiencing without intervention the apt measure of regret.

Thus, punishment is good because it: 43

   gives people who do not regret their faulty wrong (or do not regret it enough) something extra about their faulty wrong to regret.

Let us assume the validity and soundness of the argument. I wish to consider whether it can provide justification for the Rule. Reconstructed to apply to this context we might say that given D’s attack on V1 in Skydive and Boomerang it is likely that D will not feel regret in respect of V2’s death, or possibly that D will not feel enough regret. Thus we have a reason for the Rule.

The first objection to the argument focuses on the likelihood of D’s regretting any wrong against V2. The fact that D has intended to attack V1 rather under-determines the likelihood of such regret. The reason D chose to attack V1 seems highly relevant. In Skydive and Boomerang D neither knows nor has reason to know that V2 is in the vicinity. The identity of V2 will affect how much regret D feels. Perhaps V2 is a child? Perhaps V2 is D’s child?

One might respond: most people would not intend to kill or seriously injure another human. The fact that D is prepared to kill V1 at least makes it more likely that D would not regret V2’s death.

43 Ibid 76. It is clear that Gardner uses ‘faulty’ and ‘blameworthy’ interchangeably: ‘only those who are at fault (=blameworthy)’ Ibid 77.
To rejoinder: the preparedness to attack V1 is relevant to our assessment of whether D will feel the appropriate regret in relation to V2. But other factors are still relevant, in particular the reason motivating D to attack V1. Perhaps if D desires to harm another human life, with no preference for whom, then D won’t regret the wrong against V2. However, if the reason is specifically applicable to V1 - perhaps V1 is a love rival, a member of a rival gang, or an impediment in D’s political campaign - then D is likely to regret V2’s death significantly.

The second objection to the argument is that it seems not to justify the Rule. The Rule entails that D will receive the mandatory life sentence. There is no room for adjustment based on the likelihood of D’s regret. The argument seems to provide much stronger justification for a discretionary life sentence; rather than have a blanket rule applicable in all cases, the sentencing judge could assess the chance of regret and sentence accordingly. This would be the position were the Rule to be abolished.

4.2. A Negative Justification for Criminalisation

Simester sees blameworthiness as a negative justification for criminalisation. The argument is that conviction and punishment for stigmatic crimes amounts to state-sanctioned communication of blame. If D is not blameworthy then conviction and punishment amount to defamation which is bad. Blameworthiness serves as a negative justification by removing the defamation objection.44

What counts as a stigmatic crime? Simester defines them as those that involve ‘public condemnation’, a ‘condemnatory statement on behalf of society’, or where the conviction ‘asserts publicly that she is a reprehensible wrongdoer’.45 It is clear that ‘murder’ falls into this category.

So this argument provides us with a reason against the Rule, unless D is blameworthy. It thus becomes important to inquire as to whether D actually is blameworthy in Skydive and Boomerang.

Could we say that D is blameworthy because he knew or ought to have known of V2’s presence? Alas, no. This line of argument is ruled out by virtue of the examples used in Skydive and Boomerang. D neither knew nor had reason to know of V2’s presence.

It seems plausible to think that the only way D can be blameworthy in respect of V2’s death is by virtue of D’s actions towards V1. If V1 was not in the picture, we would surely not blame D for V2’s death. Imagine D is about to shoot a rifle at a firing range. D neither knew, nor had reason to know, that V2 was hiding behind the target. Upon firing, a bullet moves through the target and kills V2. It seems we would not blame D for the killing of V2.

So why does the attack against V1 make a difference? Gardner suggests that ‘those who embark on crimes, or at least certain risky crimes, change in the process their own normative positions regarding the risks they take’. This can only be the conclusion of a reasoned response to the question. It begs the question of why the normative position is changed.

Simester offers one argument, which focuses on an offence (‘X’) committed against V1, and the reasons justifying the conclusion that an offence is committed. He says where D commits X, and X has a particular consequence Y, we can blame D in respect of Y, providing certain conditions are met. The conditions are: the actus

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46 Gardner, ‘Rationality and the Rule of Law in Offences Against the Person’ ch 2 in Offences and Defences (OUP 2007) 41.

47 (n 44) 44-5.
reus elements of X must have corresponding mens rea elements; and there must be some ‘connection between… culpability [in respect of X] and the harm [Y].’

Under the second condition, the required connection is that Y is a token of a class of risks that justify D’s duty not to X. In Simester’s words, we must ask whether the risk ‘formed part of the reason why, even ex ante, [D’s] behaviour was wrong’. These are labelled ‘intrinsic’ as opposed to ‘extrinsic’ risks. If Y is an intrinsic risk of X, then we can hold D blameworthy in respect of Y. For example, if D drives dangerously, and runs down V, V’s injury would be an intrinsic risk. Contrarily, if D threw a rock at V, missed and hit V’s binoculars which were hidden in long grass, the property damage would be an extrinsic risk.

Does this argument help with Skydive and Boomerang? The offences committed against V2 are attempted murder and attempted grievous bodily harm. These have mens rea elements, as D must intend to commit murder or intend to cause grievous bodily harm. As such the first condition is satisfied. Is the second condition satisfied? This depends on whether V2’s death is an intrinsic risk with respect to the attempt offence against V1. This seems implausible. The risk intrinsic to the attempt offences are injuries to V1. It would be odd to justify a duty not to attack V1 with reference to the bodily integrity of V2. As such, it seems the argument provides no reason to conclude that D is blameworthy with respect to V2’s death.

Perhaps it would be helpful to posit a definition of blameworthiness. There are many different theories. Let’s consider Gardner’s. He says that for an agent to be blameworthy they must: ‘(a) have done something wrong and (b) have been responsible for doing it, while lacking (c) justification and (d) excuse for having done it’. Gardner defines ‘wrong’ as a breach of duty. The relevant wrong in Skydive

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48 Ibid 44.
49 Ibid 45.
and Boomerang is the killing of V2. For Gardner, ‘responsibility’ is constituted by the capacity for reason. We can assume this is satisfied.

So is D justified or excuse in respect of the killing of V2? For Gardner, justification requires that D acted for an undefeated reason. If for example D attacked someone in self-defence, this might constitute a justification. But it is difficult to conclude that there is a similar sort of good reason for D to act in Skydive or Boomerang.

So is D excused on the facts? For Gardner, the ‘simplest excuse of all is the justified mistake excuse’. If one has a justified belief that their action is justified, then this serves to excuse their action if it turns out to be unjustified. This would satisfy (d) above, and so render D blameworthy in respect of V2’s death.

So is D under a justified belief that their action is justified in Skydive or Boomerang. This depends on how you describe the relevant action. We might describe the relevant action as ‘pulling the trigger’ or ‘throwing the boomerang’. If so, there seems no room for excuse. However, if we describe the relevant action as ‘killing V2’, then perhaps we could say D was excused. D neither knew of nor had reason to know of V2’s presence in the vicinity. As such D was under a justified mistake, in that he justifiably believed in the absence of D2.

In order to say that D is blameworthy in respect of V2’s death, we thus need a reason to describe the action in the former way (‘pulling the trigger’ or ‘throwing the boomerang’), rather than the latter. This is where things get tricky. What sort of reason would suffice?

I think Gardner would adopt the former description. He explains that we are responsible for consequences when such consequences contribute constitutively to the wrongness of our doing as we do. We are to blame for those consequences when elements (b), (c), and (d) of the blameworthiness equation are also met.

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51 Gardner ‘Wrongs and Faults’ (n 42) 64.
'There is thus no further question... of whether our responsibility or blame extends to a particular unforeseen or unforeseeable consequence of our actions'.\textsuperscript{52} This discussion suggests that there might be unforeseen and unforeseeable consequences that satisfy the excuse condition (d). This suggests Gardner does not adopt the latter description.

Perhaps we could consider what the \textit{point} of blameworthiness is. For Gardner blameworthiness is a tool in our box for \textit{assessing people}.\textsuperscript{53} He ties this closely to the idea of acting for particular reasons, stating that the reasons that we act upon constitute us in our moral character.\textsuperscript{54} If we take this view, then it seems difficult to distinguish the blameworthiness of D in \textit{Skydive} and \textit{Boomerang} from the blameworthiness of D if V2 had not been present in the scene of those examples. D acted faultily with respect of reasons concerning V1. But D knew nothing and had no reason to know of V2. Thus to say that D is blameworthy with respect to V2’s death seems incorrect.

The arguments considered in this section have not, it is suggested, given us reason to conclude that D is blameworthy with respect to V2’s death in \textit{Skydive} and \textit{Boomerang}. As such, Simester’s objection of state defamation has not been rebutted and provides, until further argument is considered, a reason against the Rule.

This paper has not considered further arguments on the appropriate definition of blameworthiness, and whether the result of unforeseen and unforeseeable death is relevant. This would be a profitable line of inquiry. In making such inquiries the question to be borne in mind must be \textit{why} we should adopt one definition over another. This question can only be answered if we have an idea of what the \textit{purpose} or \textit{point} of blameworthiness might be. If the point of blameworthiness is to assess an agent in their engagement with reason, then I think it will be difficult to

\textsuperscript{52} ‘Crime: in Proportion and in Perspective’ (n 37) 229-30, Fn 27.

\textsuperscript{53} ‘Wrongs and Faults’ (n 42) 51.

\textsuperscript{54} Ibid 62.
construct a definition that leads to the conclusion that D is blameworthy in respect of V2’s deaths.

## The Rule of Law

This section considers whether the rule of law provides a reason against the Rule. This depends on one’s definition of what the rule of law requires. Different commentators take differing positions on this question.

Ashworth says ‘if a legal system is to claim moral authority over its subjects and to respect their autonomy, it should adhere to rule-of-law principles in its criminal law, by ensuring fair warning, maximum certainty of definition, subjective requirements for criminal liability, and so on’.\(^5\)\(^5\) From this he derives an idea that the ‘extent of criminal liability should be measured by the extent of the harms intended or actually foreseen by the defendant’.\(^5\)\(^6\) Elsewhere Ashworth thinks this idea provides a reason against transferred malice, as ‘In a system based on subjective liability, the legal label attached to D’s offence should generally reflect his intentional act and not the chance result’.\(^5\)\(^7\) So on Ashworth’s conception of what the rule of law requires, we have a reason against the Rule.

Not everyone agrees. Gardner considers the principle ‘actus non facit reum nisi mens sit rea’,\(^5\)\(^8\) which Gardner refers to elsewhere as a ‘constituent principle of the rule of law’.\(^5\)\(^9\) Gardner applies this principle to constructive offences, defined as ‘result crimes that one commits by committing another (lesser) crime and thereby contributing to a certain outcome (which may or may not have been foreseen or

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\(^{56}\) Ibid 238.

\(^{57}\) Ashworth, ‘Transferred Malice and Punishment for Unforeseen Consequences’ (n 16) 89.

\(^{58}\) Gardner, ‘Rationality and the Rule of Law in Offences Against the Person’ (n 46) 41.

\(^{59}\) Gardner, ‘Reply to Critics’ ch 12 in Offences and Defences (OUP 2007) 247.
foreseeable', He concludes: the ‘guilty act must therefore still be attended by a guilty mind… What need not be attended by any mens rea are the consequences and circumstances, the risk of which one bears because one committed the original crime'.

The Rule seems to fit into Gardner’s definition of constructive offences. Applying the argument it would seem that the rule of law provides no reason against the Rule, as in all cases in which the Rule applies there will be some mens rea in relation to the lesser crime of attempting to kill or seriously harm V1.

To resolve this dispute over what the rule of law requires, we need to identify the justification for the idea of the rule of law, or put differently what is valuable about the idea. One view, that of Joseph Raz, suggests that ‘observance of the rule of law is necessary if the law is to respect human dignity’, which includes ‘respecting their autonomy, their right to control their future’. One way of violating the rule of law is when law ‘does not enable people to foresee future developments or to form definite expectations’.

The important point here seems to be to enable people to account for the law in their practical reasoning. To convict an agent when they neither knew nor had reason to know that they were infringing the law would be bad for the rule of the law. One might analogise from this position to argue against the Rule: as D neither knew nor had reason to know of V2’s presence, D was unable to take the risk of conviction and punishment for a crime against V2 into account. This seems to be Ashworth’s position.

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60 Ibid 246.
61 Gardner, ‘Rationality and the Rule of Law in Offences Against the Person’ (n 46) 41.
63 Ibid 222.
One might object to this analogy. Whether it works depends on how fine-grained a choice we think it is good to give D. It seems important to give D a choice to escape criminal liability entirely. However, if D has already attempted a serious attack on V1, it seems D has little objection to being convicted of a crime against V2, providing the crime D has chosen to commit is of roughly similar seriousness to the crime against V2. If D had intentionally stolen a chocolate bar, this seems an insufficient choice to hold D liable for murder; but this is not the case in *Skydive* or *Boomerang*, where the crimes are of similar severity. Perhaps here we see space for the argument considered above, that D’s intentional attack upon V1 matters in some way to justifying the Rule.\(^{64}\) D’s intention to attack V1 marks D’s descent into serious criminality. D can no longer voice a rule of law objection to criminalisation.

One may respond to the objection. What if V2 is the last person in the world that D would wish to attack? Perhaps V2 is D’s spouse, or child. It seems plausible to say that D has a legitimate rule of law objection to being convicted for the murder of their loved one, notwithstanding the attack on V1. Whilst D has chosen to cross the borderline into serious criminality, there seems another important distinction between this and serious criminality in respect of someone to whom you hold close personal bonds. We might conclude that the rule of law sometimes provides reasons against the Rule, but not in all cases.

**Conclusion**

A number of arguments have been considered in assessing the justifiability of the Rule. Section 2 rejects a number of arguments of positive justification as incomplete. These were arguments based on offence definition, emotional responses, the dangerousness of D’s acts, the intentional attack upon V1, and proportionate punishment. The arguments from emotional responses and the intentional attack upon V1 were revisited in sections 3 and 5 respectively.

\(^{64}\) Section 2.4.
Section 3 considered arguments based on the deterrence of wrongdoing or harm, instilling a respect for values, and deterring retaliation. I claimed that the argument from emotional responses could help construct the argument from deterring retaliation. Whilst empirically under-determined, it seems plausible that these arguments provide at best a weak reason for the Rule.

Section 4.1 considered an argument for blameworthiness as a positive justification for the Rule, concluding the argument did not work. Section 4.2 considered that in the absence of an argument for holding D blameworthy in respect of V2’s death, there is a serious objection to the Rule in that it amounts to state defamation.

Section 5 considered that in some cases the rule of law may provide a reason against the Rule. The argument based on the intentional attack of V1 had some relevance here.

In conclusion, there seem to be at best weak reasons in favour of the Rule. There is a major objection to the Rule in that it amounts to state defamation. In such circumstances, in the absence of further argument, we should take seriously the idea of abolishing the Rule. It would be better if D were not held liable for the murder of V2 in Skydive and Boomerang, but rather was held liable for attempts against V1, and the manslaughter of V2.