The Magic Bullet in *People v. Perez*: Charging Attempts Based on Culpability and Deterrence Regardless of Apparent Ability

ANDREW P. GARZA*

ABSTRACT

In *People v. Perez* the California Supreme Court held that a defendant who fires a single shot into a crowd of eight people is properly charged with only one count of attempted murder. Although the defendant intended to kill anyone his bullet struck, the court declined to charge him with a count for each potential victim because he lacked a particular target and because of the physical impracticability of killing all eight with one shot. However, this Comment argues that where a defendant manifests the requisite intent as to each potential victim, and undertakes the ineffectual act necessary for an attempt charge, a count for each theoretical victim is proper irrespective of the practicalities of a single shot.

By focusing on the spatial alignment of the victims and the physical possibilities of the bullet, the court misapplied its precedent. Moreover, a defendant who risks the lives of more than one person is more morally culpable than one who fires at an isolated individual. Attempt law rationale and theories of punishment favor charging defendants in proportion to their culpability. Multiple charges further these goals and increase deterrence. While there may be concerns that such a rule will lead to disproportionate punishments, these concerns are mitigated by prosecutorial discretion in charging and judicial discretion in sentencing.

* Candidate for Juris Doctor, New England Law | Boston (2012). B.A., Political Science, University of Connecticut (2009).

> *I do not suppose that firing a pistol at a man with intent to kill him is any the less an attempt to murder because the bullet misses its aim. . . . It is just as impossible that that bullet under those circumstances should hit that man, as to pick an empty pocket. But there is no difficulty in saying that such an act under such circumstances is so dangerous, so far as the possibility of human foresight is concerned, that it should be punished.*[1]

INTRODUCTION

In 2010, an American was shot to death every hour.[2] And of the Nation's nearly thirteen-thousand homicides in 2010, over two-thirds of the victims were killed by firearms.[3] Even those fortunate enough to survive gun violence are scarred for the rest of their lives.[4] Despite significant efforts to reduce gun violence through increased regulation and harsher criminal sentences,[5] more can be done[6]—specifically, in the way that attempted murder is charged.

Over the last few years, the California Supreme Court decided several attempted murder cases where defendants fired weapons at multiple victims.[7] The cases were problematic because while the defendants' action risked the lives of multiple individuals, the force used was inadequate, as a practical matter, to kill everyone.[8] In *People v. Smith*, the defendant fired a single bullet into a car containing an infant and two adults.[9] In *People v. Oates*, two shots were fired into a group of five.[10] The defendant in *People v. Stone* fired a lone shot into a crowd of ten children outside of a carnival.[11]

---

[1] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 69-70 (1881).

[2] *See Uniform Crime Reports: Murder by State, Types of Weapons, 2010*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl20.xls (last visited May 31, 2012).

[3] *Id.* Calculations are based on the 2010 Uniform Crime Report (UCR) data which reported 12,996 murders, 8775 of which were caused by firearms. *Id.*

[4] *See* Kathleen Reich, Patti L. Culross & Richard E. Behrman, *Children, Youth, and Gun Violence: Analysis and Recommendations*, FUTURE OF CHILD., Summer/Fall 2002, at 5, 5.

[5] *See* David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1440-41, 1449-50 (2011) (discussing Projects "Triggerlock," "Safe Neighborhoods," and other efforts since the early 1990s to reduce violent crime through the imposition of harsher sentences).

[6] *See* Reich et al., *supra* note 4, at 18-19.

[7] *See infra* notes 9-12 and accompanying text.

[8] *See infra* notes 9-12 and accompanying text.

[9] People v. Smith, 124 P.3d 730, 737 (Cal. 2005).

[10] People v. Oates, 88 P.3d 56, 58 (Cal. 2004).

[11] People v. Stone, 205 P.3d 272, 274 (Cal. 2009).

In each case the defendants intended to kill a specific target in a group or whoever was struck by the gunfire.[12] Although each group member's life was risked equally, the defendants were not consistently charged with a count for each potential victim.[13] In these cases, the California Supreme Court was consumed by the practical, potential lethality of each defendant's actions.[14] As a result, the court reached inconsistent, seemingly arbitrary, decisions on the proper number of counts of attempted murder.[15] Smith was ultimately convicted of two counts for the three lives threatened, while Oates, who shot at five, was convicted of five counts.[16] Unlike Oates, Stone was convicted of only a single count for the ten lives his actions threatened.[17]

In 2010, the court again considered a multiple-attempt scenario in *People v. Perez*.[18] Like the prior cases, Rodrigo Perez attempted to murder members of a group.[19] Although Perez believed the group contained rival gang members, his gunfire threatened the lives of seven police officers and a civilian.[20] The district court convicted Perez of eight counts of attempted murder—one for each person—and the appellate court affirmed.[21] Although Perez endangered the lives of every member of the group, the California Supreme Court found that Perez's actions warranted only a single count of attempted murder because he lacked the apparent ability to kill all eight people.[22]

This Comment argues that in failing to affirm Perez's eight convictions, the court misapplied its previous line-of-fire precedent and wrongly focused on the practicalities of a single shot.[23] Permitting a charge for each person Perez's actions endangered furthers the purposes of attempt law by punishing culpability and deterring future misconduct.[24] Part I.A of this

[12] *Id.* at 278; *Smith*, 124 P.3d at 733; *Oates*, 88 P.3d at 58.

[13] *Stone*, 205 P.3d at 275; *Smith*, 124 P.3d at 733; *Oates*, 88 P.3d at 58.

[14] *See Smith*, 124 P.3d at 735 & n.2, 737-39; *Stone*, 205 P.3d at 277-78; *Oates*, 88 P.3d at 58.

[15] *See* cases cited *supra* notes 9-12.

[16] *Smith*, 124 P.3d at 733; *Oates*, 88 P.3d at 58.

[17] *Stone*, 205 P.3d at 275.

[18] People v. Perez, 234 P.3d 557, 599 (Cal. 2010).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *See infra* Part III-IV.

[24] *See* EUGENE MEEHAN, THE LAW OF CRIMINAL ATTEMPT—A TREATISE 20-25 (1984) (discussing punishment theories of deterrence, retribution, and rehabilitation as applied to attempt crimes); WILLIAM WILSON, CENTRAL ISSUES IN CRIMINAL THEORY 249 (2002); Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 30-36 (1968) (discussing how "the law of attempt has great value as a special deterrent").

Comment will examine the development and definition of modern attempt law, the underlying rationales, and theories of punishment. Part I.B will examine two theories the California Supreme Court has developed to address situations where a defendant's specific intent to kill can be inferred from conduct. Part II will describe the facts and holding of *People v. Perez*. Part III will demonstrate how *Perez* misapplied the precedent the court developed in *People v. Chinchilla*. Part IV will analyze how charging eight counts of attempted murder based on the firing of a single shot furthers the purposes and policies of attempt law.

I. Background

A. *Development, Definition, and Rationales for Attempt Law*

The idea that one should not be allowed to go free because they attempted to commit a crime and failed is characterized as "a feeling deep rooted and universal."[25] But, despite the universality of the notion, the crime of attempt was not formally recognized until 1784.[26] Prior to 1784, criminal liability was nonexistent for attempted murder—in essence, "a miss was as good as a mile."[27]

1. Modern Attempt Law

Criminal attempts fall into two categories: complete-but-imperfect attempts[28] and incomplete attempts.[29] Liability for criminal attempt arises where a person intends to commit an offense and performs an "overt deed" toward that end; intent alone is insufficient.[30] Attempt is a "specific intent" crime[31] characterized as involving two separate "intents."[32] The actor must "intentionally perform [the] act[] that bring[s] her in proximity to commission of a substantive offense," and must perform that act "with

[25] Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 821 (1928).

[26] *Id.* at 834.

[27] *See* JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 560 (2d ed. 1960).

[28] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 379 (5th ed. 2009) ("A complete-but-imperfect attempt occurs when the actor performs all of the acts that she set out to do, but fails to attain her criminal goal."). For example, where a person intends to kill another and fires a gun in their direction but misses, a complete attempt has occurred. *Id.* at 379-80.

[29] *Id.* at 380 ("[A]n incomplete attempt occurs when the actor does some of the acts necessary to achieve the criminal goal, but she quits or is prevented from continuing . . . . [For example, when] a police officer arrives before completion of the attempt.").

[30] *See* WILSON, *supra* note 24, at 226-27 (internal quotation marks omitted).

[31] MEEHAN, *supra* note 24, at 42 ("If the definition of the offence requires that a consequence be achieved by the actor, the actor must have had the *intention* to achieve that consequence . . . .").

[32] DRESSLER, *supra* note 28, at 391.

the specific intention of committing the target crime."[33]

Because attempt law seeks to punish inchoate, or incomplete, acts courts have had difficulty clearly defining what acts are sufficient to subject a defendant to criminal liability.[34] Despite this difficulty, courts agree that "bad thoughts" alone are insufficient, and an actor's conduct is not punishable until it crosses the line from "mere preparation" into "perpetration" of the underlying offense.[35] Courts and scholars have taken a variety of approaches in drawing the preparation-perpetration line and have developed numerous tests to determine when an actor has crossed that line.[36]

2. Attempt Law Rationale and Theories of Punishment

a. *Why Punish Attempts?*

The crime of attempt seeks to punish criminal intent coupled with a corroborative act.[37] It is based on the idea that those "who have sufficiently manifested their dangerousness" ought to be punished.[38] Not content with punishing solely those who succeed in committing crimes, attempt law recognizes that it is equally necessary to "stop, deter and reform" those who unsuccessfully attempt to commit crimes.[39] In addition, attempt law is cognizant of the fact that it would be contrary to common notions of justice to allow the exculpation of a person simply because they are less effective in their criminal enterprises.[40] Even where an attempt causes no physical harm—e.g., a would-be murderer misses a potential victim with an errant

[33] *Id.*

[34] *See* United States v. Williamson, 42 M.J. 613, 617 n.2 (N-M. Ct. Crim. App. 1995) ("Indeed, the facts may reveal that the line of demarkation is not a line at all but a murky 'twilight zone.'" (citations omitted)).

[35] *See* 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 218-20 (2d ed. 2003); MEEHAN, *supra* note 24, at 79-82; WILSON, *supra* note 24, at 226-27.

[36] *See* 2 LAFAVE & SCOTT, *supra* note 35, at 218-29; MEEHAN, *supra* note 24, at 79-135. Although the names vary slightly, the most common of these tests are: the "Last Act" test, "Proximity" test, "Dangerousness" test, "Indispensable Element" test, "Probability of Desistance" test, and the "Equivocality" test. *See id.*, *supra* note 24, at 89, 92-93, 103-04, 109, 112, 117, 143. The *actus reus* is not in issue in this case. People v. Perez, 234 P.3d 557, 562 n.3 (Cal. 2010) ("It is undisputed the defendant's act . . . constituted the 'ineffectual act' required for attempted murder." (citations omitted)).

[37] Elkind, *supra* note 24, at 36.

[38] 2 LAFAVE & SCOTT, *supra* note 35, at 204.

[39] *Id.* at 208-09 (quoting Donald Stuart, *The Actus Reus in Attempts*, 1970 CRIM. L. REV. 505, 511).

[40] *Id.* at 209-10.

shot—there is always social harm.[41] "When a person . . . pulls the trigger of a gun, she endangers another person's bodily security, jeopardizes the interests of loved ones of the intended victim, and impairs society's interest in a safe community in which to live."[42]

b. *Punishing for Retributive and Deterrent Aims*

A variety of theories support the punishment of criminal attempts, including deterrence[43] and retribution.[44] Deterrence can be divided into two categories: general and specific deterrence.[45] General deterrence is the idea that we punish those who commit crimes to send a message to society to avoid criminal conduct in the future.[46] Specific deterrence is the notion that the offender is punished for attempted crimes in order to deter his or her future misconduct.[47] Primarily the defendant is deterred through incapacitation—where incarceration prevents the commission of further crimes—but secondarily through intimidation—where, after release, the prior punishment serves as a constant reminder to the defendant that future criminal conduct will result in more punishment.[48]

---

[41] *See* DRESSLER, *supra* note 28, at 385. Social harm is defined as the "negation, endangering, or destruction of an individual, group or state interest which [is] deemed socially valuable." *Id.* at 113.

[42] *Id.* at 385; *see* MEEHAN, *supra* note 24, at 28 & n.81 (noting that unsuccessful attempts create "Status Quo Disruption[s]"); Thomas Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 DEPAUL L. REV. 231, 258 (1978) (noting that attempt is reprehensible because it "put[s] a socially valued good into jeopardy, or . . . impair[s] 'some related but lesser interest' protected by the criminal law" (footnotes omitted)).

[43] *See* WILSON, *supra* note 24, at 249 ("[T]he deterrent function of the criminal law is arguably as well advanced by punishing attempters as achievers."). *But see* MEEHAN, *supra* note 24, at 21-22 (arguing the deterrence theory has limited relevance).

[44] *See* MEEHAN, *supra* note 24, at 20-25 (explaining the interaction of attempt law with various theories of punishment); Elkind, *supra* note 24, at 30-36.

[45] JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 34 (1974) (discussing the difference between individual prevention and the effects of punishment upon society generally).

[46] *See id.* at 34-37 (discussing the idea that general deterrence is concerned with the "effects of punishment upon the members of society in general"); C.J. Ducasse, *Philosophy and Wisdom in Punishment and Reward*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 3, 8 (Edward H. Madden et al. eds., 1968).

[47] *See* ANDENAES, *supra* note 45, at 34; PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 8-9 (2008); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 17 n.68 (2005).

[48] *See* Fellmeth, *supra* note 47, at 26; Gerhard O.W. Mueller, *The Public Law of Wrongs—Its Concepts in the World of Reality*, 10 J. PUB. L. 203, 211 (1961) (arguing that the unpleasantness of incarceration serves as a specific deterrent to the criminal on release).

Retributive theorists argue that where a person freely chooses to engage in criminal behavior, punishment is justified.[49] Culpability retributivists argue that "morally culpable wrongdoing . . . deserves, merits, or warrants punishment" and that it is "morally fitting that an offender should [be punished] in proportion to her desert or culpable wrongdoing."[50] Therefore, a defendant who attempts murder but fires and misses his target is as morally culpable as a successful murderer.[51]

B. *Proving Attempted Murder*

1. Specific Intent Required

It is necessary to look to the crime of murder to understand the type of intent required for the crime of attempted murder.[52] The law of murder prohibits the killing of a human being by another.[53] Attempted murder, therefore, requires a two-fold intent.[54] A person is liable for attempted murder, for example, when they "intentionally pull the trigger of [a] gun" and do so with the intent to kill.[55] Conversely, where a person pulls the trigger of a gun but lacks the specific intent to kill, they are not guilty of attempted murder.[56]

Proving intent can sometimes be difficult.[57] Because attempted murder (and criminal attempts generally) is a specific intent crime, a prosecutor is

[49] Brand Blanshard, *Retribution Revisited*, *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT, *supra* note 46, at 59, 68 ("When a normal man chooses to do wrong, he turns down an opportunity . . . of doing right. Anyone who does this is morally guilty.").

[50] Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 860 (2002) (footnotes omitted); *see* JOHN KLEINIG, PUNISHMENT AND DESERT 28 (1973) (arguing that punishment "properly applies only to those legal sanctions in which the offender is exposed to moral condemnation").

[51] WILSON, *supra* note 24, at 249-51 (arguing that under a utilitarian theory an attempter is equally in need of incapacitation and rehabilitation as an "achiever"); *see* Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV. 143, 143 (1995) ("Perpetrators of attempted and successful criminal actions (of the same kind) ought to be punished equally.").

[52] *See* 2 LAFAVE & SCOTT, *supra* note 35, at 212-13 ("The crime of attempt does not exist in the abstract, but rather exists only in relation to other offenses; a defendant must be charged with an attempt to commit a specifically designated crime, and it is to that crime one must look in identifying the kind of intent required." (footnotes omitted)).

[53] 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 114 (15th ed. 1994) [hereinafter WHARTON].

[54] DRESSLER, *supra* note 28, at 391.

[55] *Id.*

[56] *Cf.* Rollin M. Perkins, *Criminal Attempt and Related Problems*, 2 UCLA L. REV. 319, 330 (1955) (noting that a defendant who takes an umbrella believing it to be his own does not possess the requisite intent and is not guilty of attempted larceny).

[57] *See* 4 WHARTON, *supra* note 53, § 695, at 591-92, 597.

sometimes required to prove that a person acted with a greater amount of culpability than is required for an actual murder conviction.[58] For example, while "recklessness"—defined as "conduct manifest[ing] an extreme indifference to the value of human life"[59]—is sufficient for a conviction of murder if someone is actually killed, it generally does not satisfy the specific intent requirement of attempted murder.[60] Scholars and courts have criticized the notion that attempt requires a greater culpability than the target offense.[61]

2. Problems of Proof: "Line-of-Fire" and "Kill-Zone" Theories

Because of the heightened culpability that a prosecutor must prove in an attempted murder prosecution, California courts have developed theories to deal with situations in which a defendant's specific intent to kill is not always clear.[62] These theories are "line of fire,"[63] and, by way of illustration, "kill zone."[64]

a. *Line-of-Fire Theory*

The line-of-fire theory was first developed in the 1997 case *People v. Chinchilla*.[65] In *Chinchilla*, the defendant fired a shot at two police officers who were attempting to arrest him.[66] When the shot was fired, the officers were in a direct line with one crouched down in front of the other.[67] The

[58] *See id.*

[59] DRESSLER, *supra* note 28, at 519. For example, where a person shoots into a room full of people and someone is killed or where a person plays "Russian roulette" by spinning the chamber of a gun loaded with one bullet and fires in another's direction. *Id.* at 520.

[60] *See* 4 WHARTON, *supra* note 53, § 693, at 586-88 ("There can be no attempt to commit a crime the gravamen of which is 'negligent' or 'reckless' conduct.").

[61] *See* State v. Brady, 745 So. 2d 954, 957 (Fla. 1999) (citing Gentry v. State, 437 So. 2d 1098, 1099 (Fla. 1983)) ("If the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime."); MEEHAN, *supra* note 24, at 49-50 ("If the *mens rea* for the completed offence has, for good reasons of policy, been determined to be recklessness, for the same good reasons of policy it should be sufficient for the attempt, where the only factual difference may be interruption or some last-minute hitch that was not planned for.").

[62] *See, e.g.*, People v. Smith, 124 P.3d 730, 744 (Cal. 2005); People v. Bland, 48 P.3d 1107, 1118 (Cal. 2002); People v. Chinchilla, 60 Cal. Rptr. 2d 761, 766 (Cal. Ct. App. 1997).

[63] *See Smith*, 124 P.3d at 744-45; *Chinchilla*, 60 Cal. Rptr. 2d at 766 (explaining the rationale of the line-of-fire theory by stating that a reasonable jury could believe that a defendant intended to kill two people if firing only one bullet aimed at both victims).

[64] *Bland*, 48 P.3d at 1118.

[65] 60 Cal. Rptr. 2d at 766.

[66] *Id.* at 762.

[67] *Id.* at 764.

California Supreme Court stated that "[w]here a single act is alleged to be an attempt on two persons' lives, the intent to kill should be evaluated *independently* as to each victim."[68] In determining whether intent existed, the court acknowledged that no California case had considered whether one shot could support a conviction for two counts of attempted murder.[69] The court held, however, that "[w]here a defendant fires at two officers, one of whom is crouched in front of the other, the defendant endangers the lives of both officers and a reasonable jury could infer from this that the defendant intended to kill both."[70]

The court applied this theory again in *People v. Smith* to determine whether a conviction for two counts of attempted murder could be based on a single shot.[71] In *Smith*, the defendant fired a single shot at the driver of a vehicle as it pulled away.[72] When the shot was fired there was a passenger to the driver's right and an infant seated directly behind the driver's seat.[73] The shot "narrowly missed" both the driver and the infant.[74] The defendant argued that the evidence was insufficient to support two counts of attempted murder because he did not intend to kill the baby.[75] Applying *Chinchilla*, the court held that because the driver and the baby were "directly in [the defendant's] line of fire," his intent to kill both individuals could be inferred; thus, the conviction for two counts of attempted murder was proper.[76] Alongside the line-of-fire theory, the California Supreme Court uses a kill-zone theory.

b. *Kill-Zone Theory*

The kill-zone theory was developed in *People v. Bland*.[77] In *Bland*, the defendant and an accomplice opened fire into a car containing three people.[78] The intended victim, a rival gang member, died from his

[68] *Id.* (emphasis added) (internal quotation marks omitted) (quoting People v. Czahara, 250 Cal. Rptr. 836, 840 (Cal. Ct. App. 1988)).

[69] *Id.* at 766.

[70] *Id.*

[71] 124 P.3d 730, 744 (Cal. 2005).

[72] *Id.* at 737.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 738.

[76] *Id.* at 738-39. A dissent was issued criticizing the majority opinion for allowing two counts of attempted murder based solely on the positioning of the mother and her baby. *Id.* at 745 (Werdegar, J., dissenting).

[77] 48 P.3d 1107, 1118 (Cal. 2002).

[78] *Id.* at 1110.

injuries.[79] The other two passengers, unintended targets, sustained non-lethal gunshot wounds.[80] The defendant was charged with one count of murder and two counts of attempted murder.[81] The court addressed whether the defendant could be convicted for the attempted murder of the two surviving victims where he only intended to kill one victim.[82] The court held that where a person intends to kill one target in a group—and uses a means of force sufficient to kill everyone in the group in order to effectuate that intent—a "kill zone" is created, and a trier of fact may infer a concurrent intent[83] to kill the others alongside the specific intent to kill the primary target.[84]

II. *People v. Perez*

On July 3, 2005 at 1:30 a.m., eight police officers responded to a report of a carjacking.[85] The stolen vehicle had been spotted in a parking lot adjacent to Grande Vista Avenue in Los Angeles.[86] The parking lot was located in Varrio Nueva Estrada ("VNE")[87] gang territory.[88] After apprehending several suspects, the police brought the victims to the scene in order to identify the perpetrators.[89] During the identification procedure there were eight police officers, one victim, and three marked police cars in the parking lot.[90] The police officers and the victim were standing near the

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *See id.*

[83] "Concurrent intent" is the idea that a person may have more than one intent during the commission of a crime. *See* LeEllen Coacher & Libby A. Gallo, Note, *Criminal Liability: Transferred and Concurrent Intent*, 44 A.F. L. REV. 227, 234 (1998) ("Proof that the secondary victims were in the 'killing zone' established by the wrongdoer's method of attacking the primary victim is circumstantial evidence of the wrongdoer's concurrent intent to harm all the victims.").

[84] *See Bland*, 48 P.3d at 1118-19. In so holding, the California Supreme Court relied on the analysis developed in *Ford v. State* that "[t]his situation is distinct from the 'depraved heart' situation because the trier of fact may infer the actual intent to kill which is lacking in a 'depraved heart' scenario." 625 A.2d 984, 1001 (Md. 1993).

[85] People v. Perez, 234 P.3d 557, 560 (Cal. 2010).

[86] *Id.*

[87] *See generally* Alex Alonso, *Another Gang Related Shooting Murder and a $25,000 Reward Offered*, STREETGANGS.COM MAGAZINE (Dec. 23, 2002), http://www.streetgangs.com/newsletter/122302palacios.html (illustrating the type of gang violence that is prevalent in this area).

[88] *Perez*, 234 P.3d at 560.

[89] *Id.*

[90] *Id.*

stolen car and all in close proximity to one another.[91] As one of the victims was interviewed and photographs of the vehicle were taken, a car turned onto South Grande Vista crawling at ten to fifteen miles per hour.[92]

Out of the dark a shot was fired from the passenger-side window nearly severing the middle finger of Officer Rodolfo Fuentes.[93] The bullet continued through a metal security door, a wooden front door, deflected off of a kitchen cabinet, and came to rest inside the bathroom of a nearby apartment unit.[94]

Sometime later the police located the defendant, Rodrigo Perez, after identifying the vehicle used in the shooting.[95] Perez was charged with eight counts of premeditated attempted murder.[96] Ultimately, Perez was convicted of all eight counts of premeditated attempted murder.[97] The jury acquitted the defendant, however, of one charge as to Officer Monahan, who was standing approximately twenty to thirty feet from the group of officers.[98]

Perez appealed the conviction arguing that because he fired only a single shot the evidence was insufficient to support the conviction for eight counts of attempted murder.[99] The California Court of Appeals disagreed and affirmed Perez's conviction stating that "[t]he jury, which heard testimony and viewed exhibits regarding the officers' relative locations, was in a position to determine whether the officers' proximity to each other was such that in intending to kill any of the officers defendant's shooting endangered the lives of all."[100] The Supreme Court of California granted review of the issue of whether there was sufficient evidence to support the conviction of eight counts of premeditated attempted murder based on the firing of a single shot.[101]

The court began its analysis with a discussion of attempt law,[102] writing that "[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the

[91] *Id.* at 560–61.

[92] *Id.* at 560.

[93] *Id.*

[94] *Perez*, 234 P.3d at 561.

[95] *See id.*

[96] *See id.* at 562.

[97] People v. Perez, No. B198165, 2008 WL 3865501, at *1 (Cal. Ct. App. Aug. 21, 2008).

[98] *Perez*, 234 P.3d at 561 n.2.

[99] *Id.* at 562.

[100] *Id.*

[101] *Id.*

[102] *See id.* at 562–63.

intended killing."[103] The court found the *actus reus* requirement clearly satisfied by the defendant's firing at the group.[104] However, the court found the intent element satisfied only as to one charge of attempted murder.[105] The court stated that even without a specific target in a group, a shooter can be convicted of *one* count of attempted murder because the requisite intent is "the intent to kill *a* human being, not a *particular* human being."[106] The court noted in passing that "'the record support[ed] the conclusion that [Perez] intended to kill whoever in the crowd was struck by the bullet[,]'" but ultimately found that the evidence was insufficient to support more than one count of premeditated attempted murder.[107]

The court rejected the government's argument that the proximity of the officers and carjacking victim to Officer Fuentes, coupled with the defendant's intent to kill whoever in the crowd was struck by the bullet, satisfied the elements for eight counts of attempted murder.[108] Specifically, the court pointed to: (1) the lack of a specific target within the group; (2) the absence of evidence showing that he "intended to kill two or more persons with the single shot"; and (3) the absence of evidence that the defendant "specifically intended to kill two or more persons in the group" in finding the charges unsupported.[109]

In so holding, the court distinguished *People v. Bland*, which advanced the kill-zone theory, based on the fact that the defendant, in firing only one shot, lacked the apparent ability to kill all eight people.[110] The court also distinguished *People v. Smith*, where it found the line-of-fire theory applicable.[111] It concluded that because the defendant did not have the apparent ability to kill all eight people with one shot based on their position relative to one another, multiple attempted murder convictions could not be sustained.[112]

---

[103] *Id.* at 562 (quoting People v. Lee, 74 P.3d 176, 183 (Cal. 2003)).

[104] *Perez*, 234 P.3d at 562 n.3.

[105] *Id.* at 563.

[106] *Id.* (quoting People v. Stone, 205 P.3d 272, 274 (Cal. 2009)).

[107] *Id.*

[108] *Id.* at 564.

[109] *Id.* at 563-64.

[110] *See Perez*, 234 P.3d at 564-65.

[111] *Id.* at 565.

[112] *See id.*

ANALYSIS

III. *Perez* Misapplied Precedent.

In *Perez*, the court discussed the line-of-fire and kill-zone theories that it previously developed but concluded that they were inapplicable.[113] In its analysis of the facts under a line-of-fire theory, the court held that unlike *Smith*, the people in *Perez* were not in a direct line, "one behind the other," such that the defendant was capable of killing them all with one shot.[114] Therefore, an inference of specific intent was improper and the eight counts were unsupportable by the evidence.[115] However, the court incorrectly applied the line-of-fire theory it developed in *People v. Chinchilla*.[116]

The *Perez* court erred because it applied *Smith*'s version of the line-of-fire theory to the facts of *Perez*—the *Smith* version, however, is a misstatement of the line-of-fire theory.[117] Because *Chinchilla* was a case of first impression, the court looked to other jurisdictions in deciding the case.[118] In *Chinchilla*, the government cited several out-of-state cases containing similar facts,[119] and the California Supreme Court adopted the reasoning of those courts.[120] Ultimately it held that "[w]here a defendant fires at two [people], one of whom is crouched in front of the other, the defendant endangers the lives of both . . . and a reasonable jury could infer from this that the defendant intended to kill both."[121]

---

[113] *See id.* at 564-65.

[114] *Id.* at 565.

[115] *See id.*

[116] *See infra* text accompanying notes 117-54.

[117] *Compare* People v. Smith, 124 P.3d 730, 744-45 (Cal. 2005) (Werdegar, J., dissenting), *with* People v. Chinchilla, 60 Cal. Rptr. 2d 761, 766 (Cal. Ct. App. 1997); *see infra* text accompanying notes 122–124.

[118] *Chinchilla*, 60 Cal. Rptr. 2d at 766 & n.3.

[119] People v. Bigsby, 367 N.E.2d 358, 363 (Ill. App. Ct. 1977) (holding that the defendant possessed the requisite intent for attempted murder by endangering the lives of both people with one shot); People v. Mimms, 353 N.E.2d 186, 189 (Ill. App. Ct. 1976) (holding that a defendant attempted to murder two people with one shot by endangering their lives); State v. Sharp, 661 A.2d 1333, 1334-35 (N.J. Super. Ct. Law Div. 1993) (holding that a defendant's discharge of a rifle in the direction of two pursuing officers placed both of their lives in danger and supported two counts of attempted murder).

[120] *Chinchilla*, 60 Cal. Rptr. 2d at 766 ("We have . . . reviewed the out-of-state authorities cited by the [government]. We find the reasoning of those cases persuasive and adopt that reasoning here." (citations omitted)).

[121] *Id.* at 766.

The adoption of out-of-state authorities by the *Chinchilla* court is significant because of the facts and language in those cases.[122] The court in *Smith* read *Chinchilla* as standing for the proposition that where two potential victims are in a line "one behind the other," the jury can infer intent to kill both, and the evidence is sufficient to sustain multiple convictions for attempted murder.[123] But, this is an erroneous reading of *Chinchilla* because in adopting the reasoning of *People v. Mimms*, *People v. Bigsby*, and *State v. Sharp*, the *Chinchilla* court expressly foreclosed the need to find any particular spatial alignment among victims in determining a shooter's intent.[124]

In *Mimms* the shooter fired one bullet at two police officers as they crossed the street together.[125] The shooter in *Bigsby* fired one shot at two police officers who were trying to apprehend him.[126] Neither the *Mimms* court nor the *Bigsby* court made any reference to the spatial alignment of the potential victims: the determination of each defendant's intent rested solely on his endangerment of the officers' lives by firing in their direction.[127] Most significantly, the *Sharp* shooter fired one bullet toward two police officers who were standing "shoulder-to-shoulder" five feet in front of him.[128] Given the physical orientation of the officers (side-by-side in close proximity to the defendant) and the firing of only a single shot, the defendant lacked the apparent ability to kill both.[129] Nevertheless, the court found the conviction of two counts of attempted murder was proper.[130] In each of these cases—all involving a single shot fired at multiple people—the courts held each defendant's act of firing alone placed multiple lives in danger making the defendant's intent apparent and a conviction for

[122] *See Bigsby*, 367 N.E.2d at 360-61; *Mimms*, 353 N.E.2d at 189; *Sharp*, 661 A.2d at 1335; *supra* note 119; *infra* text accompanying notes 128-36.

[123] People v. Smith, 124 P.3d 730, 738 (Cal. 2005).

[124] *See Bigsby*, 367 N.E.2d at 360-61, 363 (finding no question of defendant's intent to kill two officers by firing a single shot at both without considering their proximity to each other); *Mimms*, 353 N.E.2d at 189 (finding the defendant intended to kill either of the two officers by shooting one round in their direction without considering their proximity to each other); *Sharp*, 661 A.2d at 1334-35 (finding that the defendant intended to kill the two officers by firing a single shot at both without considering their proximity to one another).

[125] *Mimms*, 353 N.E.2d at 187.

[126] *Bigsby*, 367 N.E.2d at 363.

[127] *Id.* ("Defendant fired at both officers, endangered both their lives and displayed an intent to kill either or both of them."); *Mimms*, 353 N.E.2d at 189 ("In the present case, defendant fired his rifle in the direction of both officers. This action displayed defendant's intent to kill either policeman, and placed both of their lives in danger.").

[128] *Sharp*, 661 A.2d at 1334.

[129] *See id.*

[130] *Id.* at 1335.

attempted murder as to each person proper.[131]

The language in *Chinchilla*'s holding—"[w]here a defendant fires at two officers, . . . the defendant *endangers the lives of both officers* and a reasonable jury could infer from this that the defendant intended to kill both"[132]—is identical to that in *Mimms*, *Bigsby*, and *Sharp*.[133] Given the identical language and the absence of any spatial requirement articulated in *Mimms*, *Bigsby*, and *Sharp*, the *Chinchilla* court's inclusion of the language describing the officers' positions at the time of the shooting[134] is not a condition precedent to finding multiple convictions but rather an incorporation of the facts of the case into the holding.[135]

Unlike in *Perez*, the line-of-fire theory was correctly applied in *People v. Brown*.[136] In *Brown*, the defendant was charged and convicted of two counts of attempted first-degree murder.[137] The defendant in *Brown* fired one shot at two police officers who were attempting to arrest him in a drug and weapon sting.[138] Like Perez, the defendant argued that the evidence was insufficient to sustain the two counts of attempted murder on the basis of a single shot.[139] The court held that because Brown purposely fired his weapon at the two officers his specific intent could be inferred, and his convictions were proper notwithstanding the physical impossibility of killing both with one shot.[140]

Applying line-of-fire theory to the facts in *Perez*, eight counts of attempted murder based on the single shot are proper.[141] Perez fired at the group in the parking lot intending to "kill anybody, wherever [the] bullet hit."[142] In firing, Perez "endanger[ed] the lives of each individual in the group."[143] Because of this endangerment a jury could reasonably infer the defendant's intent to kill each of them under a line-of-fire theory.[144]

---

131 *Bigsby*, 367 N.E.2d at 363; *Mimms*, 353 N.E.2d at 189; *Sharp*, 661 A.2d at 1335.

132 People v. Chinchilla, 60 Cal. Rptr. 2d 761, 766 (Cal. Ct. App. 1997) (emphasis added).

133 *See supra* note 119.

134 *Chinchilla*, 60 Cal. Rptr. 2d at 766 (indicating that one of the officers was "crouched in front of the other").

135 *See id*.

136 793 N.E.2d 75 (Ill. App. Ct. 2003).

137 *Id.* at 77.

138 *Id.* at 79.

139 *Id.* at 81.

140 *See id.*

141 *See infra* text accompanying notes 142–147.

142 *See* People v. Perez, 234 P.3d 557, 559 (Cal. 2010) (internal quotation marks omitted).

143 *Id.* at 565.

144 *See* People v. Chinchilla, 60 Cal. Rptr. 2d 761, 766 (Cal. Ct. App. 1997) (indicating when multiple lives are endangered by a single shot intent may be inferred as to all individuals in the direction of that shot).

Coupling the inference of intent with the defendant's act that "undisputed[ly] . . . constituted the 'ineffectual act' required for attempted murder,"[145] Perez's actions satisfied the elements of attempted murder as to each member of the group.[146] Thus, the *Perez* court's intent analysis—focusing on the physical orientation of the victims and the apparent ability of the shooter—misapplies the line-of-fire theory.[147]

However, the line-of-fire theory is not without limits. It does not stand for the proposition that attempt charges would be proper if the defendant in *Sharp* fired at eight people standing side-by-side, or if Perez fired into a group of 500 people.[148] The jury is capable of placing limitations on the theory.[149] In *Perez*, the jury "heard testimony and viewed exhibits regarding the officers' relative locations" and was in the best position "to determine whether the officers' proximity to each other was such that in intending to kill any of the officers[, the] defendant's shooting endangered the lives of all."[150] Given that the jury in *Perez* acquitted the defendant of the attempted murder charge as to the officer standing alone, approximately twenty to thirty feet from the group of eight, the theory does not subject a defendant to limitless liability.[151] In conclusion, while the cited authorities considered multiple charges for cases involving only two people,[152] charges for each of Perez's eight potential victims were warranted because Perez attempted to murder anyone he could.[153] The jury found that, based on the proximity of the officers to each other, he endangered the lives of all.[154]

---

[145] *Perez*, 234 P.3d at 562 n.3 (quoting People v. Lee, 74 P.3d 176, 183 (Cal. 2003)).

[146] *See supra* Part I.B.1.

[147] *See Perez*, 234 P.3d at 565.

[148] *See id.* at 562.

> The jury, which heard testimony and viewed exhibits regarding the officers' relative locations, was in a position to determine whether the officers' proximity to each other was such that in intending to kill any of the officers defendant's shooting endangered the lives of all. Indeed, in making these determinations, the jury acquitted defendant of the count involving the officer who was farthest from Fuentes.

Id.

[149] *Id.*

[150] People v. Perez, No. B198165, 2008 WL 3865501, at *6 (Cal. Ct. App. Aug. 21, 2008).

[151] *See Perez*, 234 P.3d at 561 n.2.

[152] *See supra* note 119.

[153] *See supra* text accompanying notes 142-144.

[154] *See Perez*, 234 P.3d at 565.

IV. Charging a Defendant Who Endangers the Lives of Many Properly Considers the Purposes and Policies of Attempt Law.

By applying the *Smith* line-of-fire theory, the *Perez* court wrongly focused on the practicalities of a single shot[155] rather than on the fundamental purposes of attempt law: punishing culpability and deterring future misconduct.[156]

A. *Greater Culpability Should Be Met with Increased Punishment.*

The *Smith* test, as erroneously articulated by the court in *Perez*, creates a rule "that a single gunshot may of itself give rise to multiple attempted murder convictions *provided* the alleged victims [are] all in the defendant's direct line of fire."[157] The court's rule suggests that regardless of the defendant's actual intent, if the victims are properly arranged in a line an inference of intent to kill is proper.[158] But, it is illogical to determine a defendant's guilt based solely on the positioning of intended victims.[159] The crime of attempt recognizes that a would-be murderer who fires and misses is as morally culpable as the murderer who does not miss.[160] If the purpose of attempt law is to punish those "who have sufficiently manifested their dangerousness,"[161] regardless of success the positioning of potential victims does not change the dangerousness inherent in firing a shot at a group of people with the intent to kill.[162]

A defendant who risks the lives of more than one person or of innocent bystanders is more morally culpable than one who fires at an isolated individual.[163] The idea that severity of punishment should match a defendant's culpability[164] is evident in other areas of law as well,

---

[155] *See id.*

[156] *See* MEEHAN, *supra* note 24; WILSON, *supra* note 24, at 249-50; Elkind, *supra* note 24; *supra* Part I.A.2.

[157] *Perez*, 234 P.3d at 566 (Werdegar, J., concurring) (internal quotation marks omitted).

[158] *Id.*

[159] *See id.*

[160] *See* WILSON, *supra* note 24, at 249-51.

[161] 2 LAFAVE & SCOTT, *supra* note 35, at 204.

[162] *See Perez*, 234 P.3d at 566-67 (discussing various cases in which multiple individuals in a group were in danger because of a defendant's attempted murder of one individual).

[163] *See In re* Tameka C., 990 P.2d 603, 608 (Cal. 2000) ("An increased sentence measured by the risk of harm to multiple victims reflects a rational effort to deter such reprehensible behavior.").

[164] *See* NIGEL WALKER, PUNISHMENT, DANGER & STIGMA: THE MORALITY OF CRIMINAL JUSTICE 25 (1980); Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 602 (1978) (discussing H.L.A. Hart's principle that "[t]he punishment must match, or be equivalent to, the wickedness of the offense").

specifically in hate crime[165] and firearm enhancements.[166] If "[p]unishment is a legal sanction whose severity ought to be a function of the moral gravity of the criminal action,"[167] allowing eight counts of attempted murder when a defendant endangers the lives of each individual in a group properly punishes a defendant in proportion to his culpability.[168]

B. *The Prospect of Multiple Charges Will Increase Deterrence.*

A justice system that punishes criminals undoubtedly influences the conduct of potential offenders as well.[169] "The more culpable and dangerous the behavior, the greater the need exists for effective deterrence."[170] The goal of general deterrence is to warn society that specific conduct is intolerable and will be met with serious consequences.[171] Punishment also leads to the "internalization of the belief that certain types of conduct are reprehensible."[172] At the heart of the theory of deterrence is the idea that a potential criminal makes a rational choice to avoid punishment; thus, an increase in punishment yields a corresponding decrease in criminality.[173] While deterrence is addressed by legislatures keen on "coerc[ing] individuals to conform their behavior to societal norms," it is increasingly addressed by the broad discretion given to judges to tailor punishment to individual offenders.[174] When a court permits a

[165] *See* Allison M. Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 BUFF. CRIM. L. REV. 389, 394-95 & n.18 (2002) (noting that hate crimes affect individuals, disrupt the ideals of a democratic society, and threaten entire communities); Janine Young-Kim, *Hate Crime Law and the Limits of Inculpation*, 84 NEB. L. REV. 846, 879 (2006) (discussing that culpability is enhanced when crime is motivated by hate).

[166] *See, e.g.*, United States v. Parrilla, 114 F.3d 124, 125-27 (9th Cir. 1997) (explaining that sentencing enhancements for use of a firearm during a drug-trafficking crime reflect the increased danger of violence and allow a court to sentence defendants according to their criminal predisposition and culpability).

[167] Herman, *supra* note 51, at 143 (discussing Feinberg's "reform position" on the punishment of failed attempts).

[168] *See* Christopher, *supra* note 50, at 859-60.

[169] Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951 (2003) (acknowledging the notion that "a punishment system does deter" but criticizing the effectiveness of deterrence overall).

[170] *In re* Tameka C., 990 P.2d 603, 608 (Cal. 2000).

[171] Barry J. Cavanaugh, *The Justification of Punishment*, 16 ALBERTA L. REV. 43, 47 (1978) (discussing theories of retribution and deterrence as justifications for punishment).

[172] *Id.* at 48.

[173] *See id.* at 47.

[174] *See* ANDENAES, *supra* note 45, at 136; Leslie Yalof Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 880–81 (1998) ("The true purpose of the criminal law is to coerce individuals to conform their behavior to

defendant to be charged with multiple counts of attempted murder, each of which carries its own penalty, it condemns the defendant as more culpable for the danger created by firing into a crowd than the targeting of an isolated individual.[175] When it is made clear to society that punishment "is certain to follow every violation of the criminal laws, general deterrence is realized."[176]

In addition, the goal of specific deterrence is supported by charging multiple counts of attempt.[177] When a defendant is incarcerated his neutralization prevents him from committing more crimes, and he is intimidated by the "unpleasantness of punishment."[178] Specific deterrence teaches an offender "through physical and psychological experience . . . that we mean it when we threaten detriment."[179] An increase in punishment by charging multiple counts of attempt decreases the likelihood that the defendant will repeat the conduct in the future.[180]

C. *Charging Multiple Attempts Does Not Lead to Disproportionate Punishment.*

The doctrine of proportionality often arises in the sentencing context in determinations of the propriety of an offender's punishment.[181] Under a theory of retribution, an offender ought to be punished in proportion to his culpability.[182] To punish out of proportion to the seriousness of the offense is to punish undeservedly.[183] Charging multiple counts of attempt where only one shot is fired is not disproportionate because of prosecutorial discretion in charging and judicial discretion in sentencing.[184] A prosecutor

societal norms. Typically, society achieves this desired conformity through punishment. Punishment . . . maintains societal order to the extent that it influences the future behavior of others.").

[175] *See* WILSON, *supra* note 24, at 249-50 (noting that harsher punishment for criminal attempts advances deterrence and public interests).

[176] Elkind, *supra* note 24, at 29.

[177] *See id.* at 30-36.

[178] 1 WHARTON, *supra* note 53, § 3.

[179] Mueller, *supra* note 48, at 211.

[180] *See* Cavanaugh, *supra* note 171, at 47.

[181] DRESSLER, *supra* note 28, at 49.

[182] WILSON, *supra* note 24, at 135 ("Rationality in criminal doctrine requires . . . [that] the degree of censure and punishment is proportionate to the degree of blame we assign to the defendant for his wrongful conduct."); Blanshard, *supra* note 49, at 62 ("[R]etribution means the infliction of suffering on a guilty man because of his guilt and in proportion to it."); Christopher, *supra* note 50, at 860.

[183] KLEINIG, *supra* note 50, at 49.

[184] *See* 2 LAFAVE & SCOTT, *supra* note 35, at 241.

has broad discretion in charging decisions.[185] Permitting the possibility of charging eight counts of attempt will provide the prosecution with a flexible standard that, coupled with discretion, can be tailored to the culpability of an individual defendant.[186] As the prosecution in *Perez* pointed out, concerns about excessive punishment can be balanced by the trial judge: "Sentencing is the time to consider such equities as how many shots the defendant fired at the group, and, when appropriate, to sentence concurrently,[187] as the trial judge did."[188]

CONCLUSION

The *Perez* court's stubborn reliance on the spatial alignment and apparent ability to kill misapplies line-of-fire theory and stifles the purposes of attempt law. Under California's line-of-fire theory, when a defendant "endanger[s] the lives of each individual in [a] group," the requisite intent for attempted murder is satisfied.[189] When that intent is coupled with the "ineffectual act" required by attempt law, a conviction for every endangered person is proper. Charging multiple counts of attempt subjects a defendant to harsher punishment and furthers the goals of general and specific deterrence. A person who fires a bullet into a crowd, intending to kill a specific target, or whomever the bullet strikes, is more culpable than one who fires at an isolated individual. Permitting multiple charges for such action furthers the purposes of attempt law by properly punishing the increased culpability. Given the carnage that firearm related crimes cause each year, allowing multiple charges will provide prosecutors with an extra arrow in their quiver—an arrow that will undoubtedly save lives.

---

[185] Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 671-72 (noting that a prosecutor's discretion in charging decisions is "the most significant aspect of the prosecutorial function").

[186] *See id.*

[187] Concurrent sentences are defined as "[t]wo or more sentences of jail time to be served simultaneously." BLACK'S LAW DICTIONARY 1485 (9th ed. 2009). "For example, if a convicted criminal receives concurrent sentences of 5 years and 15 years, the total amount of jail time is 15 years." *Id.*

[188] Answer Brief on Merits at 11, People v. Perez, 234 P.3d 557 (Cal. 2010) (No. S167051), 2009 WL 1880370.

[189] *See Perez*, 234 P.3d at 565; *supra* text accompanying notes 141-146.