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COMPLICITY

*James G. Stewart**

Abstract

Complicity is responsibility for helping. This essay provides a comparative overview of the criminal law and theory pertaining to complicity. Instead of taking a strong prescriptive position on the best way to construct accomplice liability, it charts a series of recurrent normative problems in this area and points to various solutions these problems have generated in practice. The essay begins by considering structural questions that inform the shape accomplice liability is given in different criminal systems, then discusses the conduct required to establish accomplice liability, before plotting the various static and dynamic mental elements that are frequently allocated to the concept. Overall, the essay suggests that a comparative approach is very helpful in shedding light on blind spots in various schools of thought about complicity, including whether it deserves an autonomous existence separate from perpetration. I conclude that the subject deserves our ongoing intellectual engagement, since it goes to the heart of our attempts to live decently, in this our very imperfect world.

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TABLE OF CONTENTS

<i>I. Introduction</i>	3
<i>II. Preliminary Structural Issues</i>	4
A. Complicity and Perpetration.....	5
B. Mode of Participation, Inchoate Offence or Separate Crime	6
C. Between Unitary and Differentiated Models	8
D. Complicity and Justifications	10
<i>III. The Objective Element of Complicity</i>	11
A. Practical Assistance and Moral Encouragement	11
B. The Nature and Extent of Derivative Liability.....	13
C. The Causation Quandary.....	16
D. Substantial and de minimus contributions.....	19
<i>IV. The Subjective Element of Complicity</i>	21
A. Purpose.....	21
B. Knowledge	25
C. Recklessness/Dolus Eventualis	28
<i>V. Conclusion</i>	30

“[s]urveying complicity's hazy theoretical landscape can, depending on the commentator's nerve, temperament, and resilience, induce feelings running from hand-rubbing relish to hand-on-the-brow gloom.”

*K.J.M. Smith, A Modern Treatise on the Law of Criminal Complicity.*¹

I. INTRODUCTION

Complicity is responsibility for helping. If I am planning to rob a bank, my chances of succeeding are appreciably increased if I enlist others to assist me. A division of labor enables me to take the cash from the bank vault, while a partner in crime detains the manager at gunpoint. Thus, from a consequentialist perspective, the criminal law should punish my assistants too, in order to deter would-be helpers who lower barriers to criminal offending.² Likewise, on a deontological basis, accomplices share responsibility for the crimes they assist. If we are accountable for the harms we bring into the world, focusing on just the individual who makes the final contribution to the realization of a criminal offense overlooks the often important, sometimes decisive, difference accomplices make to criminal endeavors and, on occasion, their solidarity with the perpetrator. Accomplices deserve punishment to rebalance the moral ledger, express disapprobation in ways that shore up the community's common condemnation of prohibited conduct, or to respect their own dignity.

And yet, crafting standards of complicity that achieve these ends poses a set of beautiful conceptual problems. Perhaps most fundamentally, my confederate in the bank heist did not steal anything—I am the only one who takes property from the bank. This might not be an especially vexing problem if the wording of the criminal offense did not require “taking property”, which only I did; or if accomplice liability did not make my assistant responsible for one and the same crime. But to borrow John Gardner's metaphor (which draws on murder not robbery), as far as complicity goes, it is as if the accomplice pulled the trigger herself.³ Of course, she often did not. But why the qualifier “often”? Now the real

¹ K. J. M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 4 (1991).

² GABRIEL HALLEVY, THE MATRIX OF DERIVATIVE CRIMINAL LIABILITY 33 (2012).

³ John Gardner, “Aid, Abet, Counsel, Procure”: An English View of Complicity, in EINZELVERANTWORTUNG UND MITVERANTWORTUNG IM STRAFRECHT, 228 (Albin Eser, Barbara Huber, & Karin Cornils eds. 1998).

complexity begins; perhaps my confederate's role was so dominant in the criminal enterprise that she is the real perpetrator, and I her accomplice. Alternatively again, might we say that there are no accomplices here at all, since we jointly designed and executed the robbery in concert? Complicity is helping, but what does that mean?

In what follows, I offer an overview of the various answers to these questions. Throughout, I draw on comparative criminal law and theory, which proves helpful in exposing blind spots in the various schools of thought about accomplice liability. For instance, most Anglo-American scholarship on complicity assumes that I am inevitably the perpetrator in my hypothetical, and that my colleague's responsibility is to be assessed using complicity, regardless of whether he is the real perpetrator, a co-perpetrator or a more peripheral aid. German criminal theory, on the other hand, is not wedded to the idea that my colleague is an accomplice, although the analytical tools it develops to make that determination are sometimes more sophisticated than satisfying, and assume the need to distinguish between perpetrators and accomplices at all. In what follows, I explore and take issue with both approaches.

A disclaimer at the outset. Of necessity, I am unable to traverse an extensive terrain in this high altitude survey, so I have elected to limit my attention to the paradigm case of complicity: aiding and abetting. Thus, assume in my burglary scenario that I am able to convince a bank clerk to provide me with the code to the vault ahead of time in exchange for a cut of my takings at the bank. This clerk was not at the bank when the robbery took place, played no part in the planning and has no ongoing relationship with me; she merely saved me the time, expense and inconvenience of using explosives to open the safe. The question is, under what conditions can we hold her responsible for the armed robbery she assists? As we will see, the interweaving pathways we must tread to answer this question are elaborate, the conceptual terrain often treacherous, and where you end up very much depends on where you begin.

II. PRELIMINARY STRUCTURAL ISSUES

So much of the content of complicity is contingent on core structural commitments, but too often, we rush into the intriguing controversies without having fully contemplated these core questions. In this section, I sketch the bare bones of four preliminary controversies, in preparation for the short journey through the labyrinth of accomplice liability that awaits.

A. *Complicity and Perpetration*

There is a latent defect in the foundations of Anglo-American complicity theory. English speaking scholars assume that the accomplice is always the person who assisted the physical perpetrator, and that the perpetrator was whoever personally performed the requisite verb in the crime's definition (i.e. "taking" in burglary). Only part of that assumption is sound—complicity is the remainder of responsibility by participation left over once perpetration is subtracted. Thus, as Carl Erik Herlitz explains, the problem of defining complicity is broadly analogous to defining "night"; if you can adequately define "day" the project takes care of itself.⁴ For complicity too, the meaning we attach to it is inexorably bound up in our definition of perpetration, which requires brief treatment by way of introduction. But at the risk of spoiling the plot, the idea that the accomplice never does the "taking" warps understandings of complicity.

German criminal theorists call the assumption that the accomplice is whoever helps *without* satisfying the definition of the crime the "objective theory of perpetration."⁵ On this theory, the perpetrator is someone who actually pulled the trigger, meaning that the individual wielding the weapon creates the object to which complicity attaches. The question becomes, who assisted the person with the gun? And yet, this view of the perpetration/complicity binary was abandoned in much of Europe in the first half of the 19th century, when theorists like Feuerbach exposed its hidden flaw.⁶ In cases where an actor pulling the trigger was merely an innocent proxy for a puppet master in the background, it seemed perverse to call the mastermind a mere accomplice when she was really the prime mover in the whole criminal affair. The puppet master did not satisfy the definition of the crime, and yet it was her undertaking. Therefore, the objective theory of perpetration failed to single out the real accomplice.

Instead, Continental theorists attempted to develop an integrated concept of complicity that was sensitive to a revised notion of perpetration (as compared with common lawyers, who were content to retain the

⁴ CARL ERIK HERLITZ, PARTIES TO A CRIME AND THE NOTION OF A COMPLICITY OBJECT: A COMPARATIVE STUDY OF THE ALTERNATIVES PROVIDED BY THE MODEL PENAL CODE, SWEDISH LAW AND CLAUS ROXIN 40–41 (1992).

⁵ GEORGE FLETCHER, RETHINKING CRIMINAL LAW 654–655 (1978); Neha Jain, *Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration*, 61 AM. J. COMP. L. 831–871 (2013).

⁶ Hans-Ludwig Schreiber, *Problems of Justification and Excuse in the Setting of Accessorial Conduct*, 1986 BYU L. REV. 611, 613–614 (1986).

objective theory and treat innocent agency as a category apart). The initial step away from the objective theory of perpetration, saw the rise of a subjective alternative—a perpetrator became someone who takes the crime “to be his own,” and by implication, an accomplice is a person who takes herself to be assisting “the act of another.”⁷ In time, this turn to the subjective also fell out of favor. The reasons were myriad, but the possibility that no one might think of themselves as playing the lead role in a joint crime was chief among them. In the place of the subjective theory, a mixed objective/subjective test gained ascendancy based on an assessment of who has hegemony or control over the criminal act.⁸

Whatever the merit of these contrasting theories of perpetration, they highlight a point of monumental significance for the journey to come—Anglo-Americans’ theory of complicity is built on shaky ground. In particular, the idea that “all actors whose conduct does not satisfy the definition of the offense are accessories” is conceptually unsafe.⁹ This insight has major implications for the contours we give to complicity. If we cannot tell automatically whether the standards we are discussing attach to the mafia boss, the foot soldier in the prison camp or the businessperson selling weapons, we should proceed with great caution that our intuitions about one category do not spill over into an entirely different scenario. Bald intuitions that overlook this point are sometimes damaging.

B. *Mode of Participation, Inchoate Offence or Separate Crime*

Complicity can be located in one of a number of places. Traditionally, it functions as a form of participation, meaning that it allocates responsibility to the accomplice for the perpetrator’s consummated offence. According to this orthodox understanding, complicity is a device within the general part of the criminal code that matches the helper’s agency with the crimes they assist. It is precisely this participation-type structure that creates many of the wonderful conceptual difficulties we later explore, from the verbal inconsistency between the requirements of the crime and the actions of the accomplice (the latter is held responsible for murder even though she did not personally “kill”

⁷ FLETCHER, *supra* note 5, at 655.

⁸ Fletcher, *supra* note 5, at 655; Schreiber, *supra* note 6, at 626; HÉCTOR OLÁSULO, *THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES* 30–33 (2009).

⁹ FLETCHER, *supra* note 5, at 655.

anyone) to perceived difficulties with causation between accomplice and completed offence.

The second option is to make complicity an inchoate offence comparable to attempt. This model enjoys some powerful support. For Christopher Kutz, for example, the quintessence of complicity lies in the risk-enhancing character of the accomplice's act, meaning that the only real inquiry is whether the accomplice's actions were "of the type to make a difference."¹⁰ We return to these ideas in some depth momentarily, but at this juncture, observe how many leading scholars join Kutz in arguing that complicity is best reconstructed as a form of inchoate liability,¹¹ in sharp contrast with the manner in which it functions as a matter of doctrine in most jurisdictions presently. On this inchoate account, the concept is transformed into culpable conduct that increases the risk of criminal harm, regardless of whether or not that harm occurs—the bank clerk is responsible for burglary, even if I do not use the code she supplied.

The third option treats complicity as a separate offence. In a number of jurisdictions, lawmakers have enacted a separate crime that no longer couples with other offences like burglary, effectively relocating accomplice liability from the general to the special part of the criminal code. On this vision of complicity, the bank clerk who provided the code for the safe would be convicted of a separate crime called "criminal facilitation", not burglary. While these facilitation offenses are increasingly common,¹² they invariably complement rather than replace traditional participation-type notions of complicity. In a subsequent section, we assess the merit of this approach in greater detail. For now, note simply how there are credible reasons for situating complicity among forms of participation, inchoate offences and the special part of the

¹⁰ Christopher Kutz, *The Philosophical Foundations of Complicity Law*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW, 5–6 (John Deigh & David Dolinko eds., 2011); See also Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289–305 (2007).

¹¹ See also Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25 (1996).

¹² For discussions of these new statutes in US jurisdictions and in England, see respectively, Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. R. 217–281, 261–270 (2000) (note that some of the facilitation statutes discussed are not inchoate, in that they require the crime facilitated to have occurred); ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW (6 ed. 2009) (discussing three genuinely inchoate offences passes as part of the Serious Crime Act 2007 in England and Wales. The new crimes are labelled "Encouraging and Assisting Crime," and do not require that the crime is consummated.)

criminal code, and that all models are reflected in extant doctrine somewhere in the world.¹³

C. *Between Unitary and Differentiated Models*

The next preliminary issue is existential—why have complicity at all when a broader notion of perpetration can envelop it? Put differently, is it really important that forms of responsibility mark the type and degree of participation, or could we just condense them into a single concept that ensures uniform standards? Thus, in addition to those arguments for uprooting then replanting complicity in different parts of the criminal code (forms of participation, inchoate offences, or special part), we must also consider whether we should not just remove complicity to the sentencing phase. According to advocates for what German theorists call the unitary theory of perpetration (“Einheitstäterschaft”), this option has a range of philosophical advantages.¹⁴ These arguments have great consequences for the content of complicity to which we turn subsequently, so warrant brief introduction here.

The unitary theory of perpetration comes in three varieties, although some might contest whether the third species really fits within the genus.¹⁵ The first, known as a pure unitary theory, treats a causal contribution to a crime coupled with the requisite blameworthy moral choice as necessary and sufficient elements of responsibility (excuses and justifications aside). On this view, complicity is stripped of any autonomous existence outside a capacious notion of perpetration. So, instead of attempting to manufacture fine-tuned rules that define complicity in such and such a manner, a unitary theory of perpetration places it and all other modes of participation in a big pot, then boils them all down to their shared essence. Through this distillation, blame attribution involves deciding whether

¹³ Of these options, inchoate versions of complicity are the rarest, but they do exist. See Jørn Vestergaard, *Criminal Participation in Danish Law - Uniformity Unlimited?*, in *CRIMINAL LAW THEORY IN TRANSITION FINISH AND COMPARATIVE PERSPECTIVES* 475–490 (Raimo Lahti & Kimmo Nuotio eds., 1992).

¹⁴ I have advocated for the unitary theory of perpetration in international criminal law. See James G. Stewart, *The End of “Modes of Liability” for International Crimes*, 25 *LEIDEN J. INT’L. L.* 165–219 (2012); For arguably the leading text in Germany, see THOMAS ROTSCH, “EINHEITSTÄTERSCHAFT” STATT TÄTHERRSCHAFT: ZUR ABKEHR VON EINEM DIFFERENZIERENDEN BETEILIGUNGSFORMENSYSTEM IN EINER NORMATIV-FUNKTIONALEN STRAFTATLEHRE (1st ed. 2009). For an overview of countries that adopt the unitary theory, see JEAN PRADEL, *DROIT PÉNAL COMPARÉ* 121, 133 (2e ed. 2002).

¹⁵ Wolfgang Schöberl, *Die Einheitstäterschaft als europäisches Modell: die strafrechtliche Beteiligungsregelung in Österreich und den nordischen Ländern*, 2006.

accused X is responsible for crime Y based on settled core principles that pay no regard to the *form* participation takes, leaving their moral significance to be assessed post hoc by judges at the sentencing phase of a trial.

The second variant provides more detail, without compromising the unitary theory's core commitments.¹⁶ The pure unitary theory has faced a barrage of criticism from differentialists, who object that cramming forms of participation into a single vessel does not forewarn would-be criminals of their exposure to potentially serious criminal responsibility, thereby violating the principle of legality. To address this concern, a number of states adopt a watered down unitary concept—called a functional unitary theory of perpetration—that at least articulates the different forms of causal connections that might apply within a unitary framework: responsibility might involve carrying out the offence personally, instructing others to do so, providing necessary assistance, or assistance that is readily available elsewhere. On either the pure or functional unitary theories, however, complicity is just like perpetration not attempt.

Third, some argue that subjecting accomplices to the same range of punishment as perpetrators also constitutes a weak type of unitary theory. In Germany (and the many jurisdictions that follow its example), aiders and abettors are sentenced to a maximum of three quarters of the penalty for the offense they facilitate, whereas the sentence for instigators is taken from the same sentencing range as principals.¹⁷ To a large extent, this discrepancy in maximum sentence drives the need for differentiating between perpetrators and accomplices, even if “[r]emarkably little effort is spent on justifying this differentiation”.¹⁸ Nonetheless, this approach generates a tendency to look upon systems that formally equate sentencing ranges for perpetrators and accomplices (in France and England, for example),¹⁹ as soft iterations of the unitary theory. If this third variant is accurately described as unitary, it places no restriction on the substantive

¹⁶ DIETHELM KIENAPFEL, *DER EINHEITSTÄTER IM STRAFRECHT* 22 (1971) (explaining how a very formal notion of the unitary theory was displaced by a more functional or material view of unitary perpetration).

¹⁷ *Strafgesetzbuch*, § 26, 27 and 49. For a modern English translation, see MICHAEL BOHLANDER, *THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION* 43, 50 (2008).

¹⁸ Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 *J INT CRIMINAL JUSTICE* 977–1001, 984 (2007). For attempts to justify the distinction based on the perpetrator's “important criminal energy”, see CLAUS ROXIN, *STRAFRECHT, ALLGEMEINER TEIL. BD. 2: BESONDERE ERSCHEINUNGSFORMEN DER STRAFTAT* 231 (1. A. ed. 2003).

¹⁹ The Accessories and Abettors Act 1861 (24 & 25 Vict. c.98), s. 8 (emphasis added) (stating that the accomplice “shall be liable to be tried, indicted, and punished *as a principal offender*.”)

elements of accomplice liability of complicity, whereas other unitary theories do.

D. *Complicity and Justifications*

Oftentimes, the core elements of accomplice liability are forced to accommodate anxieties about the guilt or innocence of would-be accomplices, when these anxieties are better processed elsewhere in a tripartite structure of crime. The justification of necessity is a prime example. How is it that necessity might ease some of the normative load complicity is frequently asked to shoulder, allowing for a more principled election from the various models identified above? Might it be that where we position complicity in the architecture of criminal justice and the model we employ to achieve our objectives also requires an appreciation of justifications? In what follows, I draw on an important English case that bears this point out, highlighting a background issue that we return to when we come to debates about the mental element required for complicity.

In a famous English case called *Gillick*, a group of doctors sold contraceptives to underage patients in a bid to prevent teenaged pregnancies and sexually transmitted diseases.²⁰ By implication, however, these doctors were also knowingly facilitating sexual intercourse among juveniles, making the doctors complicit in statutory rape. Although the issue arose in a civil not criminal trial, the House of Lords used the occasion to further the longstanding contest between purpose and knowledge as mental elements for complicity (subjects we return to in some detail further below). But as leading British commentators suggest, the better approach was to consider this scenario as an instance of necessity,²¹ rather than allowing intuitions about guilt or innocence to corrupt the contours of complicity itself. How is this approach advantageous?

By allowing necessity to function together with mental elements for complicity lower than purpose, we arguably create a model that is better calibrated to moral nuance. On the one hand, this combination avoids creating a safe harbor for indifferent assistants, who deliberately help sometimes massive criminal wrongs without desiring their occurrence in a strong volitional sense. Think of the suppliers of the chemical asphyxiant

²⁰ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

²¹ DAVID C. ORMEROD, SMITH & HOGAN CRIMINAL LAW 102–103 (12th ed. 2008); ASHWORTH, *supra* note, 12 at 418.

Zyklon B to the S.S. for use at Auschwitz,²² who would quickly point to their commitment to profit maximization as the true purpose of their supply. Surely this is inadequate, especially when indifference suffices for the perpetration of the crime with which they are charged. On the other hand, the necessity/complicity combination exonerates assistance that simultaneously promotes a set of laudable values that outweigh the harm inflicted.²³ Whatever the case, the availability of justifications has major ramifications for the definition we assign complicity.

III. THE OBJECTIVE ELEMENT OF COMPLICITY

In order to guard against thought-crimes, guilt by association or punishment based on status, a *wrongful act* calibrated to the definition of the crime is widely regarded as “a primary candidate for a universal principle of criminal liability.”²⁴ But what action is required of the accomplice, particularly when someone else will frequently (but not invariably) complete the crime? In the abstract, the best we can say is that the accomplice assists, but once we move to concretize what this means, a range of thorny questions arise that have generated contradictory approaches in theory and doctrine. As we will see, these debates go to the heart of questions about where to situate complicity within the criminal law and touch on all the contextual issues we traversed in the previous section.

A. *Practical Assistance and Moral Encouragement*

The conduct required from complicity can involve actions or omissions, practical assistance or moral encouragement. In other words, the assistance that might constitute complicity is not limited by type. In some systems, criminal legislation provides certain illustrations, chief among which is “providing the means,” but these references are never exhaustive of the forms help might take. After all, how could one catalog

²² United Nations War Crimes Commission, Trial of Bruno Tesch and Two Others “The Zyklon B Case,” 1 Law Reports of Trials of War Criminals 93.

²³ For helpful discussions of the relationship, see Douglas N. Husak, *Justifications and the Criminal Liability of Accessories*, 80 J. CRIM. L. & CRIMINOLOGY 491 (1989); Schreiber, *supra* note 6.

²⁴ FLETCHER, *supra* note 5, at 420; But see Douglas N. Husak, *The Alleged Act Requirement in Criminal Law*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW (John Deigh & David Dolinko eds., 2011).

all types of assistance without creating loopholes for the imaginative? The conduct element of accomplice liability must therefore be open-ended, meaning that a whole raft of behaviors can assist crimes, ranging from providing weapons to driving getaway cars and cheering from the peripheries. In part, the perilous path the theory of complicity must travel stems from this breadth, especially when the accomplice's conduct is "otherwise innocent."²⁵

According to Christopher Kutz, this characteristic of complicity produces a stark asymmetry—any type of conduct can constitute complicity but perpetration is circumscribed. "The principal's actions are only a basis for liability if they satisfy the relatively constraining templates of substantive criminal law: they are burnings or batterings or killings or rapings or robberies, or attempts thereof. By contrast, virtually any kind of act, speech or otherwise, can satisfy the act requirement of accomplice liability, for virtually anything one person does can be a form of assistance or encouragement to the other."²⁶ While this reflection is insightful, we should also temper the sense that the asymmetry is unique to complicity; that view presupposes the objective theory of perpetration but other (more popular) alternatives reveal that all forms of participation can sometimes involve this breadth. As we saw earlier, accomplices might be those doing the batterings and killings perpetrators mastermind.

Moral encouragement can also constitute assistance. If I yell support to a stranger who is about to kill a common enemy, am I responsible for the murder that follows? Most jurisdictions rightly answer in the affirmative, but the hypothetical brings delicate problems in causation to the fore. Assuming that assistance must affect the realization of the crime, how do we establish that the encouragement made a difference to the perpetrator's decision to carry out the offence? Worse, what if the perpetrator never heard my enthusiastic encouragements, meaning that I positively desired, endorsed and supported the criminal wrongdoing, without contributing to it? Is a psychological disposition coupled with some action upon it sufficient for accomplice liability, or have we fallen down the precipice into the realm of thought crimes we feared at the outset?

Omissions can form the basis for accomplice liability too, where would-be accomplices labor under a legal obligation to act. If I rob a bank and a policeman stationed just outside decides not to apprehend me in order to help, he is potentially an accomplice, despite having done quite literally nothing. Of course, there is something of a fiction in the equation

²⁵ Glanville Williams, *Complicity, Purpose and the Draft Code - 2*, CRIMINAL LAW REVIEW 98, 101 (1990).

²⁶ Kutz, *supra* note 10, at 294.

omission + duty = action, but that white lie is not particular to complicity²⁷, and therefore, it offers no analytical leverage in the contest between the various models of accessorial liability. In fact, given the structural congruity of commission and complicity, one wonders with Michael Moore why accomplice liability is not subsumed within generic principles of attribution.²⁸ This reasoning suggests one of the stronger versions of the unitary theory of perpetration, where complicity and perpetration are symmetrical, mirroring one another with perfection. At the same time, the argument is also vulnerable to the litany of criticisms differentialists offer against condensing responsibility into a single concept.

B. *The Nature and Extent of Derivative Liability*

The term “derivative liability” is frequently used to describe accomplice liability, but it is less frequently defined. What precisely is this derivative liability, and if we embrace it, are we safely fenced off against a collapse into vicarious liability, a.k.a. guilt by association? For Sanford Kadish, vicarious liability is (illiberal) punishment based only on a relationship between the parties, whereas derivative liability requires an action and blameworthy choice on the part of the secondary party, apt to “make it appropriate to blame him for what the primary actor does.”²⁹ But here too, the different models I presented earlier furnish a set of alternative understandings, which frequently pass under the radar in accounts that neglect comparative theory. Complicity can certainly embrace derivative liability with varying degrees of intensity, but it can also discard the derivative structure altogether.³⁰ In what follows, I expand on several of these possibilities.

How could complicity without derivative liability work? Could we really deny that complicity is responsibility “for what the primary actor does”, reimagining the concept as responsibility for one’s own actions (including their causal imprint occasioned through others)? True, few

²⁷ Marcelo Ferrante, *Causation in Criminal Responsibility*, 11 *NEW CRIMINAL LAW REVIEW* 470–497 (2008); MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* (2009).

²⁸ Michael S Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 *U. PA. L. REV.* 395 (2007).

²⁹ Sanford H Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 *CAL. L. REV.* 323, 337 (1985).

³⁰ Poland offers an example of complicity without derivative liability in existing doctrine. See Stanisław Frankowski, *Criminal Law*, in *INTRODUCTION TO POLISH LAW*, 355 (Adam Bodnar & Stanislaw Frankowski eds., 2005).

countenance this conceptual possibility, assuming it is axiomatic that complicity must take derivative form. For instance, George Fletcher defines accessorial liability as “all those who are held derivatively liable for another’s committing the offense,”³¹ without entertaining alternative possibilities. On this account, one is compelled to manufacture an act and choice that adequately bridge the distance between an accomplice’s agency and the perpetrator’s wrongdoing (for which the accomplice is blamed), conscious all the while of the short distance to vicarious liability and other evils.

Needless to say, this engineering produces important downstream consequences. Most strikingly, the derivative nature of complicity dictates that even the most nefarious would-be accessory, who does everything in her power to facilitate someone else’s crime, is complicit in nothing if a perpetrator does not act wrongfully. No crime, no complicity. So, if X sends a crowbar to her friend Y in prison in order for Y to use it to break out of prison, there is nothing to be responsible for if Y dies before ever receiving the crowbar. This, once again, draws us back into the competing models of complicity we witnessed to begin, especially arguments that complicity should be reinvented as a form of inchoate liability. Why should the accomplice escape justice if her actions and moral choice are identical whether the crime is consummated or not, but by a matter of pure chance, the perpetrator does not act as she imagined?

To at least minimize this apparent absurdity, observe the gradual diminution of derivative liability historically. Initially, derivative liability was so intense that the accomplice would escape prosecution if the principal perpetrator was never apprehended, prosecuted and convicted.³² In England it was only in 1848 that it became possible to indict, try, convict and punish an accessory before the fact “in all respects as if he were a principal felon,”³³ regardless of whether the perpetrator was first brought to trial and convicted. Around the same time, Continental systems made a similar shift, which reduced the principal’s perpetration of the crime to a contested issue within the accessory’s trial. With these changes, the formal reliance on derivative liability within complicity became less intense, although it still remained a central feature of the doctrine.

Recently, the intensity of derivative liability has continued to dissipate. In most modern national jurisdictions, an accomplice can now be held responsible where the principal perpetrator’s crime is excused, say when an accomplice assists someone insane to commit a crime. As a

³¹ FLETCHER, *supra* note 5, at 637.

³² Dubber, *supra* note 18, at 982; Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 695 (1929)

³³ Sayre, *supra* note 32, at 695.

result, most contemporary notions of complicity entail only a “limited or partially derivative character” (“limitierte Akzessorietat”).³⁴ Although the moral basis for this dilution is plain enough (why excuse an accomplice if the perpetrator dies, disappears or is insane?), it also gives rise to normative complications. How do we determine the responsibility of someone who gives you a gun intending that you kill W, but fortuitously, W attacks you first and you kill him with the gun in self-defense? Perhaps the derivative component of complicity should erode completely, making the person who provides the weapon responsible for murder even though you are not?

This brings us back to the unitary theory of perpetration, which seems to affirm this normative position. According to a number of commentators, the unitary theory successfully unshackles itself from the binds of derivative liability, by asserting that “each causal contributor to the crime is individually liable for his own conduct.”³⁵ Some even argue that “the central point of contention between unitarian and differentiated systems in regard to the criminal liability of accessories can thus be found in the question whether the liability of the accessory is derived from the wrong committed by the perpetrator, or whether it is autonomous.”³⁶ So, instead of conceiving of a single murder as containing a discrete quantum of wrongdoing to be distributed between perpetrators and accomplices, a unitary theory posits as many murders as there are participants, even though they all involve the same dead body.

To be clear, these positions are certainly open to dispute. Why must the unitary theory do without the derivative structure anyway? Could it not be possible for a pure or functional unitary theory to harmonize objective and subjective elements for all types of participation in a crime, but still allow a partial derivation from the perpetrator in cases such as these? Most fundamentally, is it fair to convict the person who supplies me with a weapon I use to defend myself of murder, just because he wanted the deceased dead? If these and other related questions require greater attention in the theory of accomplice liability, they at least caution against overly categorical avowals that complicity is responsibility for someone else’s offence or rushes to inchoate liability to deal with perverse results born of the derivative structure. As is frequently the case with complicity, any one problem has a variety of plausible solutions that heavily depend on prior commitments.

³⁴ Schreiber, *supra* note 6, at 620.

³⁵ ALBIN ESER, *INDIVIDUAL CRIMINAL RESPONSIBILITY* 783 (2002).

³⁶ JOHANNES KEILER, “ACTUS REUS” AND PARTICIPATION IN EUROPEAN CRIMINAL LAW 159 (2013).

C. *The Causation Quandary*

Causation is one of the central dilemmas in accomplice liability. The positions on whether an accomplice's conduct must make a causal contribution to a completed crime are so highly disputed in theory and practice that the issue probably acts as a pivot for the different ways of constructing accessorial liability set out earlier. One could write tomes on this issue alone, so I content myself in merely setting out core parameters of the debate(s) in broad strokes. As will become apparent, the initial tension pits those who view the perpetrator's voluntary human acts as an intervening cause that impedes the passage of causal power from accomplice through perpetrator to crime, but it also involves misgivings about situations where there are multiple sufficient causes for a single event. I deal with both in turn, highlighting a selection of issues that arise under the umbrella of each debate.

Following the seminal work of H.L.A. Hart and Tony Honoré on causation, most English-speaking commentators have argued that the volitional actions required to convict the direct perpetrator preclude the claim that the accomplice too *caused* the harm.³⁷ The perpetrator made a genuine decision; this interrupts all earlier causal influence, and acts as an intervening cause. On this account, the accomplice's actions are no more the cause of a crime than the perpetrator's genes, family history and socio-economic background, all of which undoubtedly provide influence, without overriding the perpetrator's blameworthy moral choice.³⁸ As a consequence, various accounts of complicity emerged that attempted to sooth the cognitive dissonance created by treating complicity as a mode of participation, when participation could not be established by the usual metrics.³⁹

While Hart and Honoré's masterpiece captivated Anglo-American views of the topic for several decades, there is much that now points in the opposite direction. First, instigation offers a clear counterpoint—if X pays a hitman to assassinate his wife, we have little trouble in declaring that both X and the hitman caused the wife's death.⁴⁰ Moreover, German understandings of cause, effect and agency all deny voluntary human

³⁷ H. L. A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 129 (2 ed. 1985).

³⁸ Kadish, *supra* note 29, at 333.

³⁹ Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense*, 5 OHIO ST. J. CRIM. L. 427, 427 (2007).

⁴⁰ Moore, *supra* note 28, at 422-423. In fairness to Hart and Honoré, they viewed instigation as an exception to their general rule that voluntary action breaks causal chains, but as Joel Feinberg retorts "they put forward no more general principle to explain why the exceptions are exceptions." JOEL FEINBERG, *HARM TO OTHERS* 153 (2nd Printing, ed. 1987).

actions the ability to annihilate the enduring causal influence of the accomplice's act,⁴¹ a position that coincides with Michael Moore's more recent scholarship, which searched high and low for a metaphysical justification for the notion of intervening causes, coming up empty handed.⁴² In all of these instances, we have grounds for thinking that causation matters for complicity if it matters for criminal responsibility at all.

Indeed, an argument from the debate about whether causation matters for responsibility generally works for complicity, too. In this regard, Michael Moore draws on Susan Wolf—we would be appalled by someone who treated negligent driving that killed an infant as merely a question of poor driving, in the same way that we would view someone who blamed themselves for killing an infant when they merely drove negligently as psychically imbalanced.⁴³ By extrapolation to complicity, when we try business representatives as accomplices in atrocity for selling asphyxiants to Auschwitz, we are not just concerned about their associations with the Nazis; we mean to single out a particular type of conduct and its unspeakable causal impact. Associating with the wicked is one thing, but offering a substantial causal contribution to a mass killing is altogether qualitatively different. Causation tracks this distinction.

If this reasoning is sound, it sheds new light on the shortcomings of treating complicity as a separate offence. To return to Auschwitz, a separate offence approach to accomplice liability would convict the suppliers of Zyklon B of *criminal facilitation*—not murder, extermination or genocide.⁴⁴ This alternative may overcome evidential difficulties associated with proving complicity or anxieties about its possible overreach, but it also gravely understates guilt to convict the vendors of the chemical used to gas in excess of four million people of a crime labeled “*criminal facilitation*.” As I have argued elsewhere, the label of a crime is a key feature of the punishment inflicted upon a criminal, and accomplices are no exception.⁴⁵ Therefore, even if one thinks that a new

⁴¹ See, for instance, WOLFGANG JOECKS, in: Wolfgang Joecks, Klaus Miebach and Bernd von Heintschel-Heinegg (ed.), *Münchener Kommentar zum Strafgesetzbuch. Band 1 §§ 1-51 StGB, 2003, § 27*, marginal numbers 23-37. French understandings of causation in complicity are similar. See Philippe Salvage, *Le Lien de Causalité en Matière de Complicité*, *REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ* 25–42 (1981).

⁴² MOORE, *supra* note 27, Chapter IV.

⁴³ Citing S. Wolf, 'The Moral of Moral Luck', in C. Calhoun ed. *Setting The Moral Compass Essays By Women Philosophers* 6 (New York: Oxford University Press, 2004).

⁴⁴ UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 116, at 93.

⁴⁵ Elsewhere, I argue that the principle of fair labeling frequently deserves no separate existence from culpability. See Stewart, *supra* note 14, at 176; On fair labeling, see

separate offence of complicity complements the more traditional participatory model nicely, when the crime (here genocide) does take place and the accomplice's actions make an unequivocal contribution to it (here providing the means), convicting the accomplice of "criminal facilitation" seriously miscommunicates responsibility for what really transpired.

What of overdetermined forms of complicity? In many instances, an accomplice provides assistance that makes no discernible difference to the occurrence of criminal harm, since the assistance provided was not essential to the crime's realization.⁴⁶ If the Nazis had access to a long line of willing suppliers of chemical asphyxiants, it would be difficult to argue that the suppliers of Zyklon B really *caused* the terrible ends to which their chemicals were put. As one of the defendants claimed, had he not agreed to supply the chemicals to Auschwitz, "the S.S. would certainly have achieved their aims by other means."⁴⁷ So if causation means "but for" causation then even if this firm did not furnish the S.S. with the means of exterminating humans en masse, the horror of Auschwitz would still have unfolded almost identically. Thus, many argue that complicity cannot require a causal connection between assistance and completed crime, leading us back into the case for alternative models.

This dilemma also leads to at least one important strategy for side-stepping the problem without reinventing complicity as a concept. Sanford Kadish, for instance, argued that we need a new notion for measuring the "success" of an accomplice's help, given two key features of the concept. First, assistance that has absolutely no impact on the crime is not culpable, say when I send a crowbar to a friend in prison in the hope he can use it to break out, but it arrives after the friend scales the prison wall (derivative liability). Second, accomplices frequently make no discernible difference at all, yet we insist on their responsibility (overdetermination). In response, Kadish suggests that the core question should be whether the accomplice's help "*could have* contributed to the criminal action of the principal."⁴⁸

This thesis fails on two scores. First, raising the risk of an event will not suffice for causation if in fact the risk is not realized. The vendors of Zyklon B undoubtedly "could have contributed" to the Holocaust by supplying asphyxiants, but if we modulate the facts somewhat such that at

James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 MODERN LAW REVIEW 217–246 (2008).

⁴⁶ James G. Stewart, *Overdetermined Atrocities*, 10 J. INT'L CRIM. JUST. 1189–1218 (2012).

⁴⁷ UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 116, at 102.

⁴⁸ Kadish, *supra* note 29, at 359.

the last minute all prisoners at Auschwitz were shot not gassed, it is undeniable that the company directors of Tesch & Stabenow did not play a causal role in the deaths that actually transpired.⁴⁹ If causation matters to responsibility, risk raising itself will not do. Second, overdetermined causes are universally considered a species of causation, even if philosophical justifications for that view are surprisingly difficult to come by.⁵⁰ Excluding overdetermined causes would not only eviscerate a large portion of complicity, it would also lead to intensely counterintuitive results for perpetration—no one could ever *cause* murder. Everyone eventually dies, so the serial killer merely modifies the time, place and manner of an inevitability. If these modifications matter for perpetrators, should they not for accomplices too?

D. *Substantial and De Minimis Contributions*

For many, the causal contribution an accomplice makes to an offence must be “substantial” in order to implicate her in the consummated crime. By insisting on substantial contributions, we erect a threshold that excludes *de minimis* assistance, viz. conduct that had little more than a trivial impact of the crime’s occurrence. To cite a neat and often-used example, consider the responsibility of a serial murderer’s grandmother—but for her decision to procreate the better part of a century earlier, the murder of numerous innocents would never have transpired at the hands of her progeny.⁵¹ But by including the grandmother in the pool of agents responsible for these crimes, we extend accomplice liability beyond the point of plausibility, to an extreme where it chills normal social interaction and undermines liberal values. While this is agreed theoretically,⁵² the boundaries of *substantial* contributions remain ill defined and contested.

Consider the reference to “substantial contributions” in the negotiations of the American Model Penal Code. As is well known, these negotiations were dominated by an acute anxiety about the relationship

⁴⁹ MOORE, *supra* note 27, at 284.

⁵⁰ See Stewart, *supra* note 14; See also, John Gardner, *Complicity and Causality*, 1 CRIM. LAW AND PHILOS. 127–141, 138–140 (2007) (arguing that overdetermined accomplices still make causal contributions to the 'overall incidence' of criminal harm, and that it is no justification to have 'subtracted' the alternative cause that would have caused the harm had the particular accomplice desisted).

⁵¹ J. Stapleton, 'Perspectives on Causation,' in Jeremy Horder ed., *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 2002), at 67.

⁵² For a discussion of the metaphysics of “substantial” causes, see Stewart, *supra* note 46, at 1207.

between complicity and commerce. One aspect of the reasoning is especially germane here—when reflecting on the objective element of complicity, commentators to the MPC reasoned that “[a] vendor who supplies materials readily available upon the market arguably does not make a substantial contribution to commission of the crime since the materials could have been gotten as easily elsewhere.”⁵³ Unfortunately, this explanation is less than satisfying, and speaks to the troubles created by leaving “substantial” undefined. What is so problematic about this explanation?

If assistance is only ever substantial if it is not readily available, the rule excludes all overdetermined contributions from complicity. But this reading of “substantial” would swallow the better part of complicity. If soldier A acts as a lookout while his colleagues rape women in a prison, is he really exonerated because another soldier in his platoon would certainly have filled his shoes had he defected? Surely not. As we saw earlier, overdetermined forms of assistance make up a core component of any defensible theory of accomplice liability, and excluding them from the scope of the doctrine is unthinkable. In practice, for instance, many criminal codes take it upon themselves to explicitly state that non-necessary forms of assistance still amount to complicity,⁵⁴ such is their commitment to punishing forms of help that were sufficient but not necessary. In short, overdetermined contributions must still be substantial, otherwise the test cannibalizes an unacceptably large part of the concept.

We are left then, reluctantly agreeing with Joachim Vogel, who after surveying much of the voluminous literature arguing for one model of criminal attribution over another, concludes that “[t]here is a clear and present danger that real and really important questions are neglected. For instance, a real problem is to define the “minimum threshold” of participation and responsibility.”⁵⁵ In other words, for all the energy expended debating unitary versus differentiated models of attribution and the tests for differentiating different forms of participation, the lower reaches of complicity remain under-theorized, in a world where globalization facilitates criminal offending at ever increasing rates. If

⁵³ LAW AMERICAN LAW INSTITUTE, Part 1, §§ 1.01 to 2.13 MODEL PENAL CODE AND COMMENTARIES 318 (1985).

⁵⁴ For thirteen examples from South America, for instance, see JUAN BUSTOS RAMIREZ & MANUEL VALENZUELA BEJAS, *LE SYSTEME PENAL DES PAYS DE L’AMERIQUE LATINE: AVEC REFERENCE AU CODE PENAL TYPE LATINO-AMERICAIN* 128–130 (1983) (setting out examples of complicity rules that formally distinguish essential from non-essential forms of assistance).

⁵⁵ Joachim Vogel, *How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models*, *CAHIERS DE DÉFENSE SOCIALE* 151–69, 160 (2002).

accomplice liability is to be principled and not arbitrary, that situation is inadequate.

IV. THE SUBJECTIVE ELEMENT OF COMPLICITY

If there is anything approaching universal agreement in criminal theory, it might be that only the guilty should be punished. Punishment without culpability is anathema to liberal notions of criminal law, even if it does promote deterrence or other desirable utilitarian outcomes. This insight requires that an individual make a blameworthy moral choice that is perfectly calibrated to the meaning of the offence with which she is convicted. But what type of choice will suffice to blame the accomplice for “what the primary actor does,” if indeed this is the point of reference? In what follows, I rehearse competing solutions to this question, offering reflections on their comparative strengths and weaknesses. I consider the three dominant tests, bearing in mind that the unitary theory of perpetration will employ them all depending on the mental element in the crime with which the accomplice is charged.

A. *Purpose*

The American Model Penal Code requires that the accomplice helps with “the *purpose* of facilitating the commission of the offence.”⁵⁶ Although the International Criminal Court and one or two other systems emulate this language, purpose is a serious outlier in comparative terms. As we noted earlier, a unitary theory of perpetration would require the accomplice to have whatever mental element was required of a perpetrator, which would mean a dynamic not static standard. Further below, I set out how most other Anglo-American jurisdictions adopt knowledge as the relevant mental element for complicity (although this frequently, if not invariably, dilutes into recklessness in practice). Finally, the majority of criminal systems inspired by the civil law tradition allow *dolus eventualis*, an even lower standard, to suffice for complicity. The Model Penal Code, however, facially requires “purpose,” and many have interpreted this as bravely forging a new path that requires an accomplice to positively desire the criminal outcome her assistance helps bring into the world.

⁵⁶ See Model Penal Code Commentaries (Philadelphia: American Law Institute, 1985), § 2.06(4), 296 (emphasis added).

At the outset, let me suggest that this whole vision of the MPC is misguided. As I pointed out earlier, experts who participated in the negotiating of the MPC were most concerned about one thing: business. They worried that adopting knowledge as a mental element for complicity would embroil otherwise legitimate businesses in too many criminal offenses they had no personal stake in. Sure, I know you will use these weapons to commit a crime, but it is no concern to me whether that crime occurs or not, and to borrow from Glanville Williams' memorable objection, "[t]he law of complicity makes me my brother's keeper, but not to the extent of requiring me to enquire whether he is engaging (or proposing to engage) in iniquity, when my own conduct (apart from the law of complicity) is innocent."⁵⁷ Accordingly, the experts settled on "purpose," presumably out of a desire to carve out a safe harbor for business.

And yet, it is far from clear whether they achieved their goal. While the MPC certainly begins by stating that "[a] person is an accomplice... if with the *purpose* of facilitating the commission of the offence," it goes on to insist that "[w]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result *that is sufficient for the commission of the offense.*"⁵⁸ For leading American scholars and the vast majority of state jurisdictions in America, this means that the purpose requirement goes only to the provision of the assistance (my purpose was to give you the weapon), leaving the mental element in the crime with which the accomplice is charged to determine the culpability requisite for the attendant consequences my actions caused (if I was reckless about consequences, I am complicit if recklessness is sufficient for the crime in question).⁵⁹

Thus, the concept of complicity in the MPC is actually startlingly similar to the unitary theories of perpetration. Notice, for example, how the second component of complicity's definition in the MPC is dynamic in tenor, requiring parity between the mental element for accomplice and that

⁵⁷ Williams, *supra* note 25, at 101.

⁵⁸ See Model Penal Code Commentaries (Philadelphia: American Law Institute, 1985), § 2.06(4), 296 (emphasis added).

⁵⁹ Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681–762, 266 (1983) (discussing the negotiating history of the MPC that supports this interpretation). As a matter of doctrine, John Decker's comprehensive survey shows that only 3 of 50 state criminal systems in the United States adopts a strong purpose standard. See John F Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S. C. L. REV. 237 (2008).

for perpetrator. As I detailed earlier, this desire for equivalence of mental elements between accomplice and perpetrator is a hallmark of unitary theories of perpetration, which deny the need for the forms of participation differentialists hold dear (even while they struggle in vain to reach agreement on quite how to draw said distinctions). By no small coincidence, the authors of the MPC shared the skepticism about the differentialists' program, denying complicity any autonomous significance.⁶⁰ Surprisingly, then, the MPC actually enshrines a functional unitary theory of perpetration.

But for the sake of analytical completeness, let us consider "purpose" as requiring a volitional commitment to the completed crime, that I will call *the strongest form of purpose*. According to the MPC, the term "purpose" denotes conduct that is undertaken with the "conscious object" of bringing about the criminal result.⁶¹ The point of delineation with knowledge is fine, but "conscious object" undeniably implies a stronger volitional disposition. As Jeroen Blomsma surmises of purpose (in a slightly different context), "[t]he result is the reason for his conduct; it is what matters to the actor. As a consequence, it is characterized by the sense of having failed when the result is not achieved."⁶² Thus, desires for profit often preclude application of this standard of complicity in commercial contexts, although at least conceptually, nothing prevents a corporate officer from *wanting* to simultaneously make a handsome profit from sales to Auschwitz and to destroy Jews.

One point of clarification about purpose is necessary. In a helpful illustration, Antony Duff explains how one frequently does something purposefully, without actually wanting it in a strong sense. He describes scenarios where you reluctantly pay back a debt you have incurred or undergo a painful operation to cure an illness, wanting the end but not the means. Your *purpose* is still to have the painful operation and pay the debt.⁶³ Thus, I still satisfy the purpose standard by helping someone to kill their partner in order to take a share of insurance monies, whereas I do not

⁶⁰ AMERICAN LAW INSTITUTE, *supra* note 53, at 299 (stating that, according to the section on complicity in the MPC, "[a]s in the states that have abolished the common law distinctions between principals and accessories, it would suffice under this draft to charge commission of the substantive crime. It seems unnecessary, however, in framing an entire system to declare that the offender is a "principal"; such language has meaning only because of the special background of the common law and it has been abandoned in most recent legislative reforms.").

⁶¹ AMERICAN LAW INSTITUTE, *supra* note 53, at 2.02(2)(1).

⁶² JEROEN BLOMSMA, *MENS REA AND DEFENCES IN EUROPEAN CRIMINAL LAW* 66 (2012).

⁶³ R. ANTONY DUFF, *INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW (PHILOSOPHICAL INTRODUCTIONS)* 53–54 (1990).

if I help that same person to burn down their *house* in order to collect insurance monies we will share, *even if I know that the wife will definitely perish in the fire*.⁶⁴ If the wife lives in the former scenario, my plans are thwarted; not so in the latter. Failure is therefore a helpful test for purpose in complicity (assuming purpose goes to the completed offence, which it does not as a matter of doctrine).

So, should accomplice liability turn on this distinction? While *the strongest form of purpose* is sometimes celebrated as a laudable liberal adjustment to normal principles,⁶⁵ we should reflect momentarily on its implications—by this doctrine an accomplice who acts in such a way that she not only satisfies the mental element of the crime but makes an essential and unjustifiable contribution to its realization is absolved of liability. The danger is that this “elevation theory” gives an almost unattainable height to the subjective element of complicity, misapplying desert and mis-communicating responsibility. From a retributive perspective, helping the partner kill her wife for insurance money when her death is virtual certainty is perfectly sufficient for a version of murder that only requires intent, so why require more? By demanding that the accomplice show a purpose when a perpetrator need not, “purpose” arguably over-corrects.

A utilitarian view of complicity generates the same result. Since deterrence (and therefore crime prevention) is maximized by punishing those who are aware of even the slightest risk of harm, purpose is unattractive from a utilitarian perspective.⁶⁶ Admittedly here, there are more complicated questions about over-deterrence, which require a careful calibration of complicity standards with the desire for free social intercourse. Nonetheless, utilitarian concerns tend to militate against adoption of the highest conceivable notion of blameworthy moral choice (i.e., purpose) across the entire panoply of crimes, since complicity can achieve greater deterrence for criminal harms by setting the mental element at levels much closer to that defined in a crime. In short, *the strongest form of purpose* under-deters accomplices by doing too little to offset the strong incentives for offenders to enlist assistants in the execution of their criminal plans.

⁶⁴ I take the example from Jeroen Blomsma, modifying it slightly to emphasize complicity. BLOMSMA, *supra* note 62, at 74.

⁶⁵ The drafters of the US Model Penal Code concluded that the purpose standard was the preferable mental element for accessorial liability in order to offset the indirect nature of the accomplice’s contribution to the criminal harm. See Model Penal Code Commentaries (Philadelphia: American Law Institute, 1985), § 2.06, 318-319.

⁶⁶ I.H. Dennis, *The Mental Element for Accessories*, in CRIMINAL LAW: ESSAYS IN HONOUR OF JC SMITH, 60 (Peter Smith ed., 1987).

Moreover, empirical research suggests that in many instances members of the public believe that the accomplice is blameworthy even though they did not share the perpetrator's criminal purpose. The subjects of one survey reported "stark disagreement" with the "elevation thesis" (*viz.* the idea that the mental element in complicity should be elevated to purpose, that is, beyond that required within the paradigm of the crime itself).⁶⁷ Instead, respondents assigned punishments to accomplices "who are knowing or even only reckless with respect to the criminal outcome in instances in which the elevation view would assign no liability."⁶⁸ While one cannot assume that these sentiments are invariable attributes of complicity everywhere, the study at least serves as further grounds for caution about adopting *the strongest form of purpose*—using this elevated standard as the mental element for complicity may fail to match law with popular notions of justice. Perhaps this explains why almost no jurisdiction adopts it in practice.⁶⁹

B. Knowledge

In the earlier example about helping someone burn down a house to collect insurance money, we concluded that the strongest version of the purpose standard of accomplice liability would not extend liability to virtually certain side-effects of the accomplice's true objective. If burning the house down would almost definitely kill the partner's wife, the strongest purpose standard exonerates the accomplice of murder (even though the perpetrator is guilty of that crime). Knowledge, the second major mental element for complicity, assigns these virtually certain side-effects to the accomplice too, when *the strongest form of purpose* would not. Put differently, knowledge diminishes the volitional commitment the muscular version of purpose insists upon in favor of a purely cognitive test. The result is, a static mental standard for complicity within a differentiated system, that applies without regard to the mental elements required in the different sorts of criminal offences it partners with.

To begin, note the comparative rationale for the purpose and knowledge tests for complicity. If the "purpose" standard is understood in

⁶⁷ PAUL ROBINSON & JOHN M DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 103 (1996).

⁶⁸ *Id.* at 103.

⁶⁹ Israel, for example, is one of the very few states that use purpose as a mental element for complicity. Nonetheless, like the MPC and the vast majority of states in America, it interprets it as implying a unitary theory of perpetration. See Itzhak Kugler, *Israel, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW* 352 – 392, 370 (Kevin Jon Heller & Markus Dubber eds.),

its strongest sense (which, at the risk of laboring the point, it almost never is in practice), purpose is said to promote autonomy by precluding criminal impediments to otherwise lawful activities that depend on social cohesion, whereas “knowledge” promotes social control and the prevention of crime by demanding that agents take interventionist action when aware that their actions are enabling offending.⁷⁰ In its most (overly) ambitious guise, the knowledge standard posits that the potential aider “might be an educative or moralizing force that causes the would-be offender to change his mind.”⁷¹ To some extent, the Anglo-American systems of criminal law that adopt either knowledge or purpose as standards for complicity align themselves along these communitarian or individualistic axes. Knowledge promotes community; a strong notion of purpose is libertarian.

So, how does this knowledge standard work? The first challenge lies in ascertaining just what knowledge attaches to—knowledge of what? That question is not as straightforward as it might seem, particularly when the offense itself fails to offer terribly much guidance. So as soon as one utters the word knowledge, a whole series of deeply complicated, highly debated and ultimately inconsistent responses arise,⁷² born of “uncertainty as to whether the law should be concerned with [the] mental state relating to [the accomplice’s] own acts of assistance or encouragement, to his awareness of the principal’s mental state, to the fault requirements for the substantive offense involved, or some combination of the above.”⁷³ But for present purposes, let us assume that knowledge goes to the consummated crime the accomplice’s assistance helps produce, accepting that this is mostly an over-simplification for convenience.

Knowledge presents epistemic troubles. How can someone know the future? Even if member X of a terrorist organization provides her colleague Y with a nuclear warhead for a specific terrorist mission, X cannot know with certainty that a crime will transpire. Short of knowing that water will flow downhill or that the sun will rise in the East, no one can know with certainty what the future will involve, and surely few human actions ever acquire a degree of predictability anywhere close to

⁷⁰ Louis Westerfield, *The Mens Rea Requirement of Accomplice Liability in American Criminal Law - Knowledge or Intent*, 51 MISS. L.J. 155, 178 (1980).

⁷¹ *Id.*

⁷² Weisberg, *supra* note 12, at 233 (exploring different interpretations of these three elements); Grace E Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2174 (1987), (arguing that, because of these multiple points of inquiry, confusion has existed concerning the mens rea element of accomplice liability for years).

⁷³ WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 540 (2nd ed. 2010).

the direction of the Earth's rotation or laws of physics.⁷⁴ The obvious solution is to think of knowledge as implying appreciation of a virtually certain probability (akin to indirect intent), but as soon as a degree of probability becomes the touchstone, the temptation to surreptitiously slide into recklessness can prove irresistible.

This danger is most acute where a would-be accomplice provides forms of assistance that can enable a wide range of crimes. Take the classic English case of *R v Bainbridge*,⁷⁵ where the defendant bought oxygen-cutting equipment for an individual named Shakeshaft, who later used it to break into a bank. Bainbridge indicated that he suspected that Shakeshaft would use it for something illegal, but he did not know what precisely this illegality would involve. The English House of Lords held that it was essential to prove that the accomplice knew the *type* of crime the perpetrator would commit; knowledge of mere criminal propensities was inadequate. Conversely, if Bainbridge knew that burglary was likely to occur with his assistance, he needn't know that it would involve a bank, the bank's location, the proprietors of the bank, or the time of perpetration.⁷⁶

Before we begin to discuss this finding, note that it conforms to interpretations of knowledge in a number of other jurisdictions. In systems as diverse as France, England, Germany and the United States, comparable rules do similar work,⁷⁷ suggesting that knowledge of the *type* of offence might be sufficient for most understandings of complicity. But does this go too far? As Andrew Ashworth laments, this position "introduces reckless knowledge as sufficient."⁷⁸ So perhaps knowledge never meant knowledge at all. Still, if I throw a grenade at a car knowing of a virtual certainty that there is someone inside the vehicle, it does not matter whether there is a lone three month-old girl from New Zealand, four elderly Japanese men, or a dozen pregnant Eskimos. If awareness of a

⁷⁴ Stephen Shute, *Knowledge and Belief in the Criminal Law*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 171, 186-187 (Stephen Shute & A. P. Simester eds., 2002).

⁷⁵ *R v. Bainbridge* [1960] 1 QB 129, [1959] 3 All ER 200, CCA.

⁷⁶ ORMEROD, *supra* note 21, at 203.

⁷⁷ See, for instance, LaFave, *supra* note **Error! Bookmark not defined.**, at 550-552 (discussing the "natural and probable consequence" rule in various American jurisdictions, which is very similar to that adopted in international criminal justice); JACQUES-HENRI ROBERT, *DROIT PÉNAL GÉNÉRAL* 350 (6e éd. 2005) (setting out how an accomplice's acts are unlawful if the crime actually committed injures the same *legal interest* as that the accomplice considered).

⁷⁸ Ashworth, *supra* note 12, at 419 (pointing out that "the accomplice knows that one or more of a group of offences is virtually certain to be committed, which means that in relation to the one(s) actually committed, there was knowledge only of a risk that it would be committed - and that amounts to recklessness.").

virtual certainty of causing a human death is sufficient for murder, this is all the specificity needed for perpetration. Why would complicity be any different?

The major concern, however, is that knowledge is a fixed requirement when the mental elements in crimes for which it assigns blame are not. Knowledge may suffice for complicity, but what happens when the crime in question requires a specific purpose?⁷⁹ Intriguingly, the knowledge standard in complicity tends to overpower stronger mental elements in these crimes—in many jurisdictions, knowledge suffices for conviction of crimes of ulterior intent, allowing the weaker complicity standard to eviscerate the stronger character of the crime it joins with. In David and Goliath fashion, the weaker mental element for complicity slays the stronger counterpart in the crime. This makes for good biblical narrative, but it is less clear whether the story ends well for theories of complicity. By merely requiring knowledge as a necessary mental state for conviction, accomplice liability risks distorting responsibility, as distinct from attributing wrongdoing in line with the moral weight of the crime in question. A unitary theory corrects for this problem, but arguably ushers in problems of its own.

C. *Recklessness/Dolus Eventualis*

Unsurprisingly, recklessness is by far the most interesting and controversial standard for complicity. Can I really be responsible for the crime someone else commits, by conducting myself in ways that are “otherwise lawful,” when I merely run a risk that the offence will occur? Is this not deeply illiberal, given the asymmetries Kutz points to between perpetrator and accomplice? In many jurisdictions the answer is a curt no: a concept vaguely analogous to recklessness suffices to make the accomplice responsible for the completed offence she assists in the many systems that employ *dolus eventualis* as the lowest form of intention; in countries that adopt a unitary theory of perpetration, recklessness suffices for complicity when it is adequate for perpetration; and if one follows Ashworth, many (maybe all) systems that formally require knowledge really demand recklessness. In what follows, I critically review recklessness as a standard for complicity, treating the term as a vague equivalent of *dolus eventualis*.

⁷⁹ For relevant discussions, see Jeremy Horder, *Crimes of Ulterior Intent*, in HARM AND CULPABILITY 153–172 (A. P. Simester & A. T. H. Smith eds., 1996); Whitley R. P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 CRIMINAL JUSTICE REVIEW 317–335 (2003).

For one group of commentators, recklessness is at least refreshingly honest about its function—it avoids complicity being rendered “a dead letter”.⁸⁰ The argument again hinges on the inability to know the future with certainty. To return to my earlier example, even if member X of a criminal gang provides her terrorist colleague Y with a nuclear warhead for a specific terrorist mission, X cannot know with certainty that a crime will transpire. Thus, argue the recklessness advocates, we either deny that complicity exists for assistance in advance of the crime (because people can seldom *know* in a strong sense what others will do in the future) or we apply a standard closer to recklessness for accomplices who choose to undertake acts they know are inherently risky (providing nuclear weapons to terrorists).⁸¹ In all likelihood, this reasoning probably explains why knowledge dilutes to recklessness so frequently in practice.

But is reckless complicity a bridge too far? Embracing reckless complicity would require us to continuously vet those with whom we have dealings so that we can ensure that our interactions do not lead to potentially serious criminal harm. This, according to many scholars, would have the unsavory consequence of creating “blank cheque responsibility”,⁸² where the aider becomes responsible for all foreseeable consequences of their daily public interactions.⁸³ Beyond unduly infringing upon liberty and individual autonomy, a reckless standard of complicity would offend liberal notions of punishment and inhibit social intercourse.⁸⁴ Especially in a world where we depend on markets to “stabilize the pursuit of individual conceptions of the good despite widespread moral disagreement”,⁸⁵ inhibiting risky behavior by otherwise innocent third parties arguably goes too far.

But is this *always* the case? Notice how the critics of recklessness seldom mention desert, even though the notion acts as a corner piece of any defensible theory of criminal responsibility. To conform with desert, recklessness should be appropriate as a standard of liability for the accomplice *when it is adequate for the perpetrator*. The argument conveniently dovetails with claims that using recklessness as a standard for complicity *where recklessness suffices for the crime in question* would not imperil an individual’s autonomy or chill normal social interchange

⁸⁰ BRENT FISSE & COLIN HOWARD, HOWARD’S CRIMINAL LAW 332 (5th ed. 1990).

⁸¹ Fisse and Howard, *supra* note 80, at 332.

⁸² Smith, *supra* note 1, at 13.

⁸³ Williams, *supra* note 25, at 101.

⁸⁴ Sanford H Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 383 (1996).

⁸⁵ CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 168 (2000).

any more than reckless perpetration already does.⁸⁶ Consequently, there may be no generic difficulty to instances of reckless complicity as such; it is really the application of recklessness across crimes whose mental elements are more onerous than is unduly harsh. This qualified defense of reckless complicity becomes stronger still if this account of complicity is understood in conjunction with necessity as a justification. The result, of course, again recalls the unitary theory of perpetration, which pairs the mental element for complicity to that set out in the crime.

V. CONCLUSION

This short essay highlights just some of the features of accomplice liability, in ways that reveal both the “hand-rubbing relish” and “hand-on-the-brow gloom” promised in the epigraph. Alas, there is so much that has had to go unaddressed. The essay leaves out, for instance, the doubtful arguments by many leading theorists that the accomplice liability of vendors approximates to omission liability, because the vendor is required to depart from their “ordinary course of business.”⁸⁷ Likewise, it makes no mention of the substantial body of literature governing so-called “neutral acts” (“*neutrale Handlungen*”),⁸⁸ but in a forthcoming work, I disagree with the view in a portion of this literature that “typical,” “ordinary” or “commonplace” actions are excluded from the scope of accomplice liability.⁸⁹ And finally, space has not allowed discussion of what Sanford

⁸⁶ Kadish, *supra* note 84, at 387 (“It is not evident to me that subjecting actors in these circumstances to liability for a crime of recklessness need greatly imperil the security of otherwise lawful activities, certainly not any more than holding actors liable for recklessly ‘causing’ harms, which the law regularly does. People aren’t all that unpredictable.”); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 944-947 (2000) (defending reckless complicity against arguments of overreach).

⁸⁷ R. A. Duff, “*Can I Help You?*” *Accessory Liability and the Intention to Assist*, 10 LEGAL STUDIES 165-181 (1990); GLANVILLE LLEWELYN WILLIAMS, CRIMINAL LAW: THE GENERAL PART 368-349 (1953); FLETCHER, *supra* note 5, at 582-583.

⁸⁸ For just three recent books on the topic, see H. Kudlich, *Die Unterstützung fremder Straftaten durch berufsbedingtes Verhalten* (Berlin, 2004); P. Rackow, *Neutrale Handlungen als Problem des Strafrechts* (Frankfurt am Main, 2007); K. Pilz, *Beihilfes zur Steuerhinterziehung durch neutrale Handlungen von Bankmitarbeitern* (Frankfurt am Main et al., 2001).

⁸⁹ See James G. Stewart, *The Accomplice Liability of Arms Vendors: A Conceptual Defense*, (2014) forthcoming.

Kadish dubbed “non-proxyable crimes.”⁹⁰ Can an accomplice who is herself not married be convicted of bigamy if she helps a married friend marry for a second time? These and the other problems set out here are difficult, but they are also deserving of our ongoing intellectual energies—complicity goes to the heart of our attempts to live an honest moral life, in this our very imperfect world.

⁹⁰ Kadish, *supra* note 29, at 373; John Gardner, *Complicity and Causality*, 1 CRIM. LAW AND PHILOS. 127–141, 127 (2007); Gideon Yaffe, *Moore on Causing, Acting, and Complicity*, 18 LEGAL THEORY 437, 451–453 (2012); VOLKER KREY, GERMAN CRIMINAL LAW GENERAL PART 157–159 (2002) (discussing crimes that must be committed with one’s own hands “eigenhändige Delikte”, crimes that can only be incurred by persons under a specific legal duty “Pflicht”, and crimes that can only be committed by individuals with special qualities “Sonderdelikte”).