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LOSING ALL SENSE OF JUST PROPORTION: THE PECULIAR LAW OF ACCOMPLICE LIABILITY

MICHAEL HEYMAN[†]

INTRODUCTION

Complicity is the outlier of criminal law. Representing an extraordinary use of state power, criminal law both condemns and punishes those who violate its norms. To be a proper subject for that exercise of power, someone must engage in blameworthy conduct. Nonetheless, complicity law, replete with statements that liability is derivative,¹ imposes liability for another's criminal conduct. Accordingly, complicity law seems to violate the fundamental precept of personal wrongdoing as a predicate for punishment. And, though it need not, in practice it has with terrible frequency.

Worse perhaps, complicity law might undermine the very principle of legality that underpins the legal system.² Following

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¹ Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 337 (1985). However, Professor Kadish is not responsible for this sometimes-doggerel assertion. He warns "not to misconstrue derivative liability as imparting vicarious liability," indicating the necessity for finding "intentional action" by the accomplice that makes it appropriate to blame her. *Id.*

² See PAUL H. ROBINSON & MICHAEL T. CAHILL, ILL. CRIMINAL CODE REWRITE & REFORM COMM'N, FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION xxiii–xxiv (2003) [hereinafter FINAL REPORT], available at <https://www.law.upenn.edu/fac/phrobins/illinois/IL%20final%20report%20Vol1.pdf> The report stated:

One of the critical functions of a criminal code is to provide notice to citizens of what conduct is prohibited. Indeed, the fundamental principle of legality — the requirement of a clear prior written prohibition as a prerequisite to criminal liability — underlies numerous constitutional and other core criminal-law rules, such as the constitutional prohibition against *ex post facto* laws and the constitutional invalidation of vague offenses. Providing notice also has obvious practical value, for citizens can hardly be expected to obey the law's commands if they are unaware of them, or cannot understand them.

the Model Penal Code (the "Code"),³ many modern codes provide for accomplice liability for anyone who "aids or agrees or attempts to aid such other person in planning or committing" an offense.⁴ Such open-ended liability based on no clearly defined wrongful conduct seems to flout the notion that criminal laws must be precisely expressed to be valid and seems at odds with the otherwise staggering achievement of the Code regarding culpability.

Confronting a hodge-podge of criminal laws from this country, the Code created a common lexicon and means for drafting criminal laws. Rather than dealing with the oddities of malice, evil, or similar vague and arcane notions, the Code reduced the number of possible mental states to four and reduced the requirements to satisfy the commission of an act to three.⁵ The Code paved the way not only for the drafting of more modern codes, but also for reconceptualizing criminal law to better serve its objectives.

But the Code's provision on accountability may be as vague and unworkable as then-existing law. Rather than providing careful guidelines for what acts would suffice, it instead used broad terms such as "aids" and "attempts to aid."⁶ Furthermore, it seemingly compounded problems by using that language to modify "in planning or committing" the offense.⁷ Thus, by rejecting the "baroque maze" of notions that pervaded the common law of complicity, the Code provided a streamlining that might have carried its own problems.⁸

Perhaps this was inevitable. Having committed to a unitary law of complicity, the drafters of the Code faced a dilemma of seemingly violating the careful work they had contributed to establishing reformed culpability law. However, because the

³ See generally MODEL PENAL CODE AND COMMENTARIES, PART I §§ 1.01 to 2.13 (Official Draft and Revised Comments 1985) [hereinafter 1985 COMMENTARIES]; MODEL PENAL CODE AND COMMENTARIES, PART II §§ 210.0 to 213.6 (Official Draft and Revised Comments 1980) [hereinafter 1980 COMMENTARIES].

⁴ MODEL PENAL CODE § 2.06(3)(a)(ii) (Proposed Official Draft 1962).

⁵ See *id.* § 2.02. Section 2.02 provides for purpose, knowledge, recklessness, and negligence. *Id.* Similarly, the same section indicates that these mental states should be carefully assigned to the conduct, results, or attendant circumstances confronting the criminal actor. *Id.*

⁶ *Id.* § 2.06(3)(a)(ii).

⁷ *Id.*

⁸ Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 390–91 (2010).

range of help available to accomplices is so great, and because the difficulties of determining the causal efficacy of such aid is so immense, the drafters had little choice but to create a law founding liability on intentional aid demonstrating the accomplice's commitment to the criminal ends of the primary actor.⁹

Unfortunately, these obvious difficulties of cabining accomplice law were exacerbated by a parallel development in the law. Most states still find the accomplice liable not only for the assisted offense, but for those that are committed as a "natural and probable consequence" of the commission of the target offense.¹⁰ In fact, some have adopted this position *despite* having codified the Code position on complicity.¹¹ Thus, the often-tenuous connection between the direct actor and his accomplice is further attenuated, as he now shares responsibility for conduct in which he has neither engaged nor intentionally

⁹ The Code had, after all, required that the accomplice provide that aid "with the purpose of promoting or facilitating the commission of the offense." MODEL PENAL CODE § 2.06(3)(a) (Proposed Official Draft 1962).

¹⁰ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 475 (6th ed. 2012) [hereinafter DRESSLER, UNDERSTANDING]; see also *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190 (2007). In that case, the parties presented a virtual fifty state survey on complicity law, with the respondent arguing against the legitimacy of this doctrine. Nevertheless, reversing the Ninth Circuit, Justice Breyer said, "few jurisdictions (only 10 in Duenas-Alvarez's own view) have expressly rejected the 'natural and probable consequences' doctrine. Moreover, many States and the Federal Government apply some form or variation of that doctrine, or permit jury inferences of intent in circumstances similar to those in which California has applied the doctrine, as explained below." *Id.* at 190–91 (emphasis added) (citations omitted). Indeed, even the respondent admitted that many states apply the doctrine in the face of conflicting statutes or decisional law. Brief for Respondent at 17, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (No. 05-1629).

As LaFave has explained: "The established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided." WAYNE R. LAFAVE, CRIMINAL LAW 725 (5th ed. 2010) (citation omitted). Indeed, LaFave pointed out that recent codifications also adopt this position. *Id.* at 726.

¹¹ See generally Heyman, *supra* note 8. As that piece discusses, Illinois has, rather sadly, codified this notion under the rubric of "common design." Thus, the Code provision sits side-by-side with this wholly conflicting one. See 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2012) ("When 2 or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the common design or agreement and all are equally responsible for the consequences of those further acts."). Sadly, this development is consistent with LaFave's observations about the durability of this doctrine. See LAFAVE, *supra* note 10, at 725–27.

assisted. Whatever flimsy connection might ordinarily tie the two together in criminality would seem to be gone; yet liability still attaches, taking complicity liability beyond the breaking point.

Mindful of the presence of this doctrine, the Code repudiated it, expressly distancing itself from it. From its perspective, the natural and probable consequence doctrine was both "incongruous and unjust."¹² The thinking was simple: Predicating liability on foreseeability seemingly establishes negligence as the mental state for the accomplice, though more is required to convict the primary actor. That inverts things unacceptably. Because of the ambiguous nature of the accomplice's conduct, the dangers of convicting an innocent person are so great that, if anything, the law should require a *greater* mental state for the accomplice as opposed to the primary actor.¹³

Thus, however mindless this foreseeability doctrine, it has substantial traction. Its injustice should not go unnoticed, but repudiation on any large scale will take some doing. Advancing that objective requires a reappraisal of complicity law generally to see the harms wrought by this doctrine. This Article first examines the development of complicity law, noting its common law origins. The Model Penal Code has streamlined the law, but this is not evident until we recognize the maze of terms and concepts that preceded it. Thus, I point out the complex, but flawed, categories of actors that existed at common law and the significance of the accomplice's location and temporal relationship to the criminal event.

Second, I show the harm wrought by this natural and probable consequence, or common design, doctrine. Magnifying the problematic issues of general complicity law, it extends accomplice liability to establish a form of guilt by association totally at odds with civilized notions of criminal liability. Here, an examination of the problems of one state, Illinois, exemplifies this unfortunate turn in the law and represents the general pathology of criminal law development. The thinking of the Code has been entirely subverted in this terribly critical area.

¹² 1985 COMMENTARIES, *supra* note 3, § 2.06 at 312 n.42.

¹³ *Id.*

I then examine the theoretical constructs of any notion of complicity, as well as the predominant thinking of several critics. Criticism is nearly pointless without an attempt to replace bad doctrine with something preferable, and the chief thinkers in this area have tried to do just that. Thus, some have sought to infuse substantial notions of causal contribution into complicity law,¹⁴ while others find causal analysis better applied to the laws of nature than to those governing human conduct.¹⁵ I find all such approaches misguided; they treat complicity law as if it is a quagmire from which we can emerge, by simply creating better theory that properly assigns blame and captures the dynamic of the accomplice-primary actor relationship. As explained the variety and forms of accomplice assistance rule out the imposition of any grand theory upon this area.

Instead, we have to examine the ends of criminal law and fit accomplice liability within them. Accordingly, I bring complicity law within a system based on individual culpability: a system that condemns and punishes based on the actor's personal commitment to the criminal objective. The Code did this with its inclusion of the term "attempts to aid" and its other provisions on complicity, and we should recognize the limits of any attempt to substantially improve upon that basic construct.

I. COMPLICITY LAW: ORIGINS AND ACTORS

Complicity law can be a real "jaw-dropper" for the uninitiated.¹⁶ In a recent article, Joshua Dressler recounted a rather remarkable story from *The New York Times*¹⁷ concerning a nineteen-year-old boy sentenced to ten years in prison as an accomplice to a drug sale.¹⁸ However, rather than acting in any traditional capacity, the teenager had acted as a translator for a

¹⁴ Joshua Dressler has done this on a few occasions. See Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 447 (2008) ("A person is not accountable for the actions of the perpetrator unless her assistance not only satisfies the causation requirement but there is evidence that the accomplice was a substantial participant, not a bit player, in the multi-party crime.").

¹⁵ Kadish, *supra* note 1, at 360 ("Sine qua non in the physical causation sense, therefore, does not exist in any account of human actions.").

¹⁶ *Lawyer Tells Youths of Drug Deal Risks*, N.Y. TIMES, Aug. 23, 1998 at 19.

¹⁷ See Dressler, *supra* note 14, at 429 n.5 (citing *Lawyer Tells Youths of Drug Deal Risks*, *supra* note 16).

¹⁸ *Lawyer Tells Youths of Drug Deal Risks*, *supra* note 16.

Spanish-speaking friend in the drug deal.¹⁹ Thus, a teenager, who held a full-time job and had never had any previous brushes with the law, received a ten-year sentence in a federal penitentiary with no possibility of parole.²⁰ Yet, for all we know, that teenager was simply with a friend who made the purchase and, when asked, translated a few words here and there.

This is no one-time horror tale. By placing the primary actor on the same footing as the accomplice, complicity law treats them equally for all purposes.²¹ Naturally, that is not in the least confined to drug offenses. One well-known legal chestnut deals with the unfortunate reporter who hailed the arrival of a prominent jazz musician for his performance at the Princes Theatre in London.²² Apparently the artist, Coleman Hawkins, was prohibited from employment in the United Kingdom, a fact presumably known to the reporter, Herbert Wilcox. Thus, the court found his paid presence at the concert the basis for his liability as an accomplice to Hawkins and nothing more was required.²³

Indeed, explaining the basis for his liability, the court said that he was "present, taking part, concurring, or encouraging, whichever word you like to use for expressing this conception."²⁴ But which words are used *does* matter. It matters a great deal. The court was unconcerned with whether Wilcox in any way communicated with Hawkins. Moreover, it is not even clear what was being approved of or encouraged: musical artistry or a violation of the criminal laws of the United Kingdom. Similarly, the court was equally indifferent to precisely *when* Hawkins' offense took place, and thus, whether Wilcox could even have caused it, at this point. What we have then is criminal liability in one who undoubtedly did not cause the criminal conduct and was simply one of many in an appreciative audience at that concert.

¹⁹ *Id.*

²⁰ *Id.*

²¹ The potential for sympathetic sentencing is frequently possible, but not in that setting given the mandatory nature of the applicable drug sentences.

²² *Wilcox v. Jeffery*, (1951) 1 All E.R. 464 (K.B.) (U.K.).

²³ *Id.*

²⁴ *Id.*

But as foolish as this result seems, it is equally foolish to abolish complicity entirely as a legal notion.²⁵ Though criminal liability attaches to the actor who engages directly in the prohibited act, others can play roles of varying degrees of involvement, leading up to that conduct. And that is just the problem: determining what counts as involvement sufficient to implicate criminal liability for the accomplice, without losing all sense of just proportion.²⁶

A. *Common Law Approaches and Comparative Insights*

Though crimes may frequently be the product of individual action, some may require more participants. Some, by their nature, require different people performing different tasks. The classic cases come from conspiracy law, where engaging metaphors have been used to depict the nature of the conspiratorial relationship, its party dimension. For example, the case of *United States v. Bruno*²⁷ strained this metaphoric rendering of conspiratorial relationships.

In *Bruno*, eighty-eight defendants were charged with a single conspiracy “to import, sell and possess narcotics.”²⁸ The group consisted of smugglers, middlemen, and two groups of retailers selling to addicts in New York, Texas, and Louisiana.²⁹ Invoking the famous images of the chain and the wheel, the court recognized the interdependence of the different types of groups extending as a veritable criminal chain and the relationship of the retailers at the end to the middlemen as spokes in a wheel in which the middlemen served as hubs.³⁰ However inapt those

²⁵ See *Commonwealth v. Vieira*, 519 N.E.2d 1320 (Mass. 1988). That case involved a rape that took place at a bar viewed by sixteen customers (many cheering and laughing) and a bartender, none of whom helped the victim. *Id.* at 1321. That event was poignantly depicted in the 1988 movie *The Accused*, starring Jodie Foster. See *THE ACCUSED* (Paramount Pictures 1988).

²⁶ Rejecting membership in a conspiracy as a per se basis for accomplice liability, the Code commentary anchored liability in the conduct of the would-be accomplice. Indeed, warning against a per se approach it said: “law would lose all sense of just proportion if simply because of the conspiracy itself each were held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all.” 1985 COMMENTARIES, *supra* note 3, § 2.06 at 307.

²⁷ 105 F.2d 921, 922–23 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939).

²⁸ *Id.* at 922.

²⁹ *Id.*

³⁰ See *id.* at 922–23 (discussing the relationship of distribution between the smugglers, middlemen, and retailers).

depictions, they did manage to capture the complex relationships necessary to achieve the ultimate objective of the extremely profitable sale of narcotics on the streets.

Complicity differs from conspiracy, but conspiracy is obviously an agreement to *do something*, and both involve multi-party criminal enterprises.³¹ Though the codefendants in *Bruno* stood on equal criminal footing despite their disparate roles, complicity law has shown real ambivalence about the very basis for a party's linkage to the completed offense. In both complicity and conspiracy we have multiple parties and concerted actions, and while complicity inherently requires more of the would-be accomplice, the issue has often become of "what" do we "need" more.

Dressler, in a central article, sought to find that missing ingredient.³² There, he considered the relative strengths of the various theories supporting accomplice liability and, indeed, whether all parties should be punished equally. Focusing on the "hegemony test," he considered the liability of the brains behind a bank robbery that, nevertheless, had little control over the other participants.³³ In his example, the brains might consist of a skilled electrician who had the know-how to disable the alarm system.³⁴ Yet, under the hegemony test, the "brains" would be exempt from full punishment, something that offends our moral intuitions about blame and punishment.³⁵

At least the act hegemony approach has the virtue of predicating punishment on a person's level of involvement in an offense, contrasting dramatically with the somewhat simple-minded common law approaches. The common law constructed accomplice liability upon the two axes of time and location, and thus, based liability on the categories into which the actors fell.

³¹ Conspiracy is an inchoate offense usually requiring little conduct beyond the agreement. By contrast, complicity obviously requires the commission on an offense.

³² Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 92-93 (1985).

³³ *Id.* at 124.

³⁴ *Id.*

³⁵ To Dressler, this approach "goes too far in permitting leniency" as it "excludes from full punishment too many actors, even as it generally ensures that those who are fully punished deserve it." *Id.*

Under the common law, actors were categorized as principals or accessories.³⁶ The major actor was the “principal in the first degree,” often and understandably thought of as the real perpetrator.³⁷ Simply put, he performed the crime in the most conventional sense, satisfying both the act and mental state requirements personally, or through another whom he controlled.³⁸ Absent other actors, we think of him as the criminal actor.

But, as crimes are often the product of concerted action, there was a need to deal with the others who played some roles in committing crimes. The common law could have simply rejected the idea of accomplice liability, but in embracing it, the common law had to somehow define the types of roles played by more indirect players. The next type of actor is the “principal in the second degree.”³⁹ Here, potentially separated from the crime by both time and location, the actor in the second degree nevertheless played some sort of role in assisting the chief actor. Yet it is problematic to attenuate criminality through this party as, by definition, she has not committed the *actus reus* of the offense. That’s where the common law started to get bogged down, as by extending liability beyond the perpetrator, it now had to confront the question of just what others had to do to deserve punishment.

Thus, though this party did not have to be present,⁴⁰ he did have to provide some form of assistance or encouragement, whereby it seemed fitting to hold him liable. So, for example, though we think of Dressler’s expert electrician as a principal in the second degree for the early, though significant, role he played in the heist, as we will see, he would not count. Rather,

³⁶ For a fuller development of this scheme, see DRESSLER, UNDERSTANDING, *supra* note 10, at 460–61.

³⁷ *Id.* at 460.

³⁸ See *id.* at 460–61. The Code wound up dealing with this issue of manipulation through its notion of the innocent instrumentality. See MODEL PENAL CODE § 2.06(2)(a) (Proposed Official Draft 1962). It provided that one is responsible for the acts of another if she has the “culpability that is sufficient for the commission of the offense, [and] [s]he causes an innocent or irresponsible person to engage in such conduct.” *Id.*

³⁹ DRESSLER, UNDERSTANDING, *supra* note 10, at 462.

⁴⁰ The perpetrator was deemed to be constructively present. And as Dressler points out, a person is constructively present if “he is situated in a position to assist the principal in the first degree during the commission of the crime.” *Id.*

paradigms for complicity consisted of those who served as lookouts, getaway drivers and others who played functional roles in the criminal venture.

That skilled electrician would, instead, be characterized as an "accessory before the fact." As the law developed, that party was neither actually nor constructively present, but rather played some role in the pre-crime setting. Additionally, because of that separation from the crime, she was frequently considered less blameworthy than the other parties.

Finally, the "accessory after the fact" played an odd role in this scheme. Often, the accessory existed solely to obscure the commission of the offense or shield the other actors from detection. Despite that, however, for some time he was regarded as derivatively liable for the crimes already committed. Fortunately, this has changed, as now virtually all jurisdictions regard his conduct as separate and apart from the original offense, thus constituting a new crime.⁴¹

But over time the drawbacks of this scheme became clear, as liability hinged on the when and where of what one did, rather than on either the causal efficacy of her conduct or her degree of involvement in the criminal venture. However, this is not the only approach taken by criminal codes.

1. The German Approach to Complicity

German law represents an instructive departure from this approach. It shares the common law inclination to base complicity on one's distinctive role, but substantially redefines each role. Whereas the common law regarded time and place as critical, the German approach is based on one's functional role in the crime's commission. By its approach, there are five types of criminal actors:

⁴¹ *Id.* at 463.

First, there is the direct perpetrator (*unmittelbarer Täter*).⁴² This is obvious, and tracks the thinking of the MPC.⁴³ Here, there is obviously no issue of imputing conduct to another, for the direct perpetrator has directly engaged in the criminal act.

Next, the German scheme has recognized the indirect perpetrator (*mittelbarer Täter*), a party described by one commentator as one who “uses another as an unwitting or unwilling tool to engage in the proscribed conduct.”⁴⁴ This, too, finds an analogue in the Code, in that it also recognizes the need to codify this approach, lest someone escape liability behind this subterfuge.⁴⁵

Finally, still dealing with the criminal conduct of the offense itself, German law recognizes a co-perpetrator (*Mittääter*),⁴⁶ one who jointly engages in the prohibited conduct with the direct perpetrator. However, it is here that German law may be puzzling, since it regards some forms of accomplice contribution as being of equal blameworthiness with that of the acts of the direct perpetrator and thus conflates their roles. Thus, so long as the co-perpetrator agrees upon a common plan with the direct actor and acts upon that, he is equally blameworthy.⁴⁷

Here the German approach parted ways with the common law. Though the common law distinguished between actors based on a temporal scheme, the Germans gave no weight to that. Here, this approach more closely represents that of the

⁴² Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. INT'L CRIM. JUST. 977, 979 (2007).

⁴³ Recall that section 2.06 begins by stating “[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.” MODEL PENAL CODE § 2.06(1) (Proposed Official Draft 1962).

⁴⁴ Dubber, *supra* note 42. (illuminating contrast of the common law and German schemes).

⁴⁵ Again, the Code assigns liability so long as “acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct.” MODEL PENAL CODE § 2.06(2)(a) (Proposed Official Draft 1962).

⁴⁶ Dubber, *supra* note 42.

⁴⁷ See Kai Hamdorf, *The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law*, 5 J. INT'L CRIM. JUST. 208, 212 (2007).

Code, basing accomplice liability on the "aid" lent to the criminal venture.⁴⁸ Nonetheless, the German approach is both puzzling and unique hereafter.

Having recognized three categories of perpetrators, it then has two distinct and different categories, roughly corresponding to accessories. First is the solicitor (*Anstifter*).⁴⁹ That is someone who incites or encourages another to engage in the criminal conduct. Though we might expect him to be punished more lightly than the principals, that is not so.⁵⁰ However, mitigated punishment *is* provided for the fifth and last category of actor under German law.

The facilitator (*Gehilfe*) is someone who only aids another in committing the act, though he is not treated as a perpetrator.⁵¹ Indeed, he receives a mandatory punishment discount under German law, presumably because his assistance reflects a lesser involvement in the criminal enterprise.⁵² This clearly parts ways with the Model Penal Code and signals a critical theme in German accomplice law: the significance of *Tatherrschaft*, something roughly translated as act dominion.⁵³ Thus, the borderline distinction between co-perpetrator and facilitator under German law would be resolved by determining whether one had *Tatherrschaft*, a distinction particularly bewildering as it is unhinged to presence. One can be present and not have it, yet absent and still have *Tatherrschaft*.⁵⁴ And, as explained, substantial punishment mitigation may hinge on this factor.

On its face, the German categorical approach seems preferable to its common law counterparts, as it distinguishes the participants on a more precise, functional basis, and levies punishments differently between the principals and the

⁴⁸ MODEL PENAL CODE § 2.06(3) (Proposed Official Draft 1962). There, you are an accomplice if, "with the purpose of promoting or facilitating the commission of the offense" one "aids or agrees or attempts to aid such other person in planning or committing it." *Id.* § 2.06(3)(a).

⁴⁹ STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, Teil I [BGBL. I] § 26 (Ger.), available at <http://dejure.org/gesetze/StGB/26.html>.

⁵⁰ *See id.* § 25.

⁵¹ *Id.* § 27.

⁵² Section 49 of the code specifies special mitigating circumstances. For example, were the principal actor to receive imprisonment for life, the facilitator would receive not fewer than three years. *See id.* § 49(1).

⁵³ Dubber, *supra* note 42, at 981.

⁵⁴ *See id.* at 982.

facilitator. And, perhaps it is preferable. However, the semblance of tidiness proved somewhat illusory, as the scholars and courts in Germany have wrestled with a different approach to complicity.⁵⁵ This formal, objective theory was in tension with a more subjective approach, one based on this notion of *Tatherrschaft*. Clearly analogous to what Dressler called act hegemony, this notion brings us back to the idea that the categorical approach does not always align perfectly with our intuitions of blameworthiness and proper punishment.

Under this evolving theory, parties should be classified according to their control over the *actus reus* of the crime. But the ambiguity of that view has been recognized, and German courts have further refined this notion, recognizing three distinctive kinds of control: First, the actor may control the action itself (*Handlungsherrschaft*).⁵⁶ Second, he may exercise control over the volitional controls of another (*Willensherrschaft*).⁵⁷ Finally, he may exercise control over the functional aspects of the crime (*funktionale Tatherrschaft*).⁵⁸

Now the complexities and tensions with the German law are beyond the scope of this paper. However, German law recognizes the need to both categorize actors, yet also show some flexibility of approach to serve the overarching objective of adjusting the criminal law to ferret out the worst actors and apportion blame accordingly. Indeed, comparing the two systems, Professor Dubber concluded not only that the similarities vastly outweigh the differences, but also that they shared the common commitment to reject any notion of guilt by association.⁵⁹ As Dubber said, “Most important, both systems are committed to complying with the general principle that criminal liability requires that each defendant — perpetrator and accomplice alike — satisfy each element of the offence as statutorily defined.”⁶⁰ However, this statement is only partially true.

⁵⁵ See Hamdorf, *supra* note 47, at 210.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* See generally 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 279–81 (1992) (discussing *funktionale Tatherrschaft* as cases of co-perpetration).

⁵⁹ Dubber, *supra* note 42, at 978.

⁶⁰ *Id.*

The natural and probable consequences doctrine⁶¹ dispenses with all need to prove any mental state for the accomplice. If the second offense is regarded as a natural consequence of the first, an accomplice to the first offense is automatically liable for the second. Remarkably, this doctrine has withstood the adoption of the Code in some states,⁶² as it has been nurtured as a judicially created notion to which the judiciary has clung stubbornly. An examination of this doctrine reveals its dangers and serious subversion of sensible doctrine.

II. NATURAL AND PROBABLE CONSEQUENCES

The story of the translator's liability and ten-year sentence is disconcerting. But is it so inevitably wrong? We do not know, and that is precisely the point. We do not know what the boy did, nor can we conclude anything from the mere fact of their friendship. For example, it may be that the translator was walking with his friend, by chance they happened upon the dealer, he translated a few words when asked, and that was it. Absent any predefined relationship involving the sale or purchase of drugs, the translator's involvement may have been utterly minimal, spontaneous, and fleeting.

That is not the only possibility. It might also be that the boy regularly served as a translator, frequently playing a key role in facilitating the sale and purchase of drugs. Were that the case, the poignant appeal of the story would disappear. And it would disappear because he was directly involved in the proscribed conduct, though only acting in a secondary capacity. Moreover, his choice to participate would then be clear, and his liability would be based upon his own conduct. But by either scenario, he was involved in the drug transaction.

But now imagine a changed situation, one in which he accompanied some friends to a house where drugs were purchased. Imagine further that he knew a sale was in the offing as he waited outside, but that things went terribly wrong inside during the transaction, and his friends were charged with attempted murder of the other boys, having fired some shots at

⁶¹ Or, as I have said and it is sometimes known, the "Common Design doctrine."

⁶² However, as I have said, apparently ten states have rejected this doctrine explicitly. See DRESSLER, UNDERSTANDING, *supra* note 10, at 475 n.95. At the same time, states such as Illinois maintain that doctrine along with the obviously conflicting Code version of complicity.

them. Finally, imagine that the shots were fired with guns wrested by them from the others, as they were initially unarmed at the time of the encounter. In that setting, a conviction could easily be obtained against him for the attempted murders—as well as the others, naturally—using the natural and probable consequences doctrine. But why?

Crime is a compound concept, requiring the actor to engage in the proscribed conduct with the requisite mental state.⁶³ Many modern codes reflect this and, frequently following the Model Penal Code, specify this clearly.⁶⁴ Indeed, demonstrating repugnance at the idea of strict liability, the Code specifically requires proof of culpability absent a clear demonstration that strict liability was intended.⁶⁵ Finally, these very requirements are repeated in both the Code and state codes, in their sections on complicity. By dispensing with the requirements of personal wrongdoing, this natural and probable doctrine undercuts this clear requirement of personal liability. The doctrine has arisen out of an odd interplay between legislatures and courts, one in which courts have shown a common law bias at odds with modern code law.

This bias would ensnare our young translator, as courts have frequently ignored the niceties of code law, in favor of intuitive perceptions of justice.⁶⁶ By that view, having thrown in with his

⁶³ See MODEL PENAL CODE § 2.06(1) (Proposed Official Draft 1962).

⁶⁴ For example, the Illinois Code rearranges the MPC sections, but provides that “[a] person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both.” 720 ILL. COMP. STAT. ANN. 5/5-1 (West 2012). That code then literally compounds things, by providing that a voluntary act is a “material element of every offense” and no one is guilty of an offense, other than one involving strict liability, unless she possesses the mental state prescribed for the offense. *Id.* at 5/4–1, 5/4–3.

⁶⁵ See MODEL PENAL CODE § 2.05 (Proposed Official Draft 1962). Moreover, section 2.02(3) requires proof of purpose, knowledge or recklessness if the relevant law does not prescribe the culpability involved. *Id.* § 2.02(3). Again, state codes, such as that of Illinois, clearly oppose any presumption of strict liability and impose the same proof in the face of legislative silence. See 720 ILL. COMP. STAT. ANN. 5/4-3(b), 5/4-9.

⁶⁶ See James R. Thompson et al., *The Illinois Criminal Code of 2009: Providing Clarity in the Law*, 41 J. MARSHALL L. REV. 815, 818 (2008) (explaining how the achievements of the CLEAR Commission and the Code changed resulting from the authors’ efforts). Commenting on the newly-codified Common Design rule, the authors characterized the rule as having been consistently applied by the Illinois Supreme Court “for over one hundred and fifty years.” *Id.* at 823. And although they lauded the rule as being consistent with the existing statute, that position is

friends, the boy bore responsibility for their illegal conduct that grew out of the drug deal. But though that cannot be supported by any cognizable criminal law theory, the origins and tenor of complicity law reveal a real doctrinal ambivalence. Part of the body of criminal law deals with multiple parties and their acquiescence in the conduct of others. Thus, it resists neat classification, partially about representational relationships, it draws simultaneously from criminal law as well as doctrines from agency law.

Commentators as varied as Francis Sayre and George Fletcher have noticed this ambivalence.⁶⁷ Writing well before the modern code era, Sayre discussed complicity within the context of the agency rule of respondeat superior.⁶⁸ The similarities are obvious, as in both settings someone has acquiesced in being represented by another. Indeed, as Sayre notes, “even if the particular criminal act has not been authorized or consented to, if it grows out of and is the proximate consequence of one that has been authorized or procured,” the defendant is justly liable.⁶⁹ But Sayre drew the line at what he called “true crimes,” as “it is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual.”⁷⁰

Similarly, Fletcher, bemoaning this theoretical incoherence, called for reconceptualizing this criminal relationship to capture the person most deserving of serious punishment.⁷¹ Unquestionably, however extralegal it is, courts frequently lump together the accomplice to the original offense with the principal

untenable. *See* Heyman, *supra* note 8, at 390–91 (explaining how the “principal in the second degree” can be one who was not physically present or who provided assistance).

⁶⁷ *See* Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 689–90 (1930) (discussing how different systems of law have reached varying solutions for the relationship of master or principal and servant or agent); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 664 (Oxford U. Press 2000) (1978) (describing the ambivalence as a result of deciding “whether criminal law is similar to or different from the private law of agency”).

⁶⁸ This is the familiar notion whereby the master is liable for even the wrongful conduct of his servants. *See* Sayre, *supra* note 67, at 690.

⁶⁹ *Id.* at 703–04.

⁷⁰ *Id.* at 717.

⁷¹ FLETCHER, *supra* note 67, at 660. It should also be observed that Fletcher preferred the sophistication of the German system, especially the parts calling for differentiated punishments. *See id.* at 659.

actor under this natural and probable view, despite dramatic—and, you would think, obvious—differences in culpability. And, in many cases, they do so claiming statutory support.

A. *The Odd Law of Common Design*

Pity poor Rudy Kessler. A man in the wrong place at the wrong time found himself charged with two counts of attempted murder for sitting in a car and waiting for his friends to return.⁷² Kessler and two friends had spent some time carousing, when one mentioned that he needed to “‘put his hands on’ \$1800.”⁷³ Kessler mentioned that he had worked at a bar in Rockford, Illinois not long ago, but that the receipts have rarely been that large.⁷⁴ Nonetheless, the other two decided to head off toward the bar, to see what they could find.

Entering after closing, they found more than they bargained for. Though unarmed, they got into a scuffle with the bar owner who had returned to inspect the premises, found a pistol behind the bar, and shot him in the neck.⁷⁵ Fleeing the scene, they also fired several shots at pursuing state police.⁷⁶ Eventually run off the road, they were arrested and ultimately charged with one count of burglary and two counts of attempted murder.⁷⁷ Thus far, Kessler’s conduct is strongly reminiscent of our translator’s. Hanging around with the wrong guys, he found himself in trouble almost entirely of their making. Yet, because of their close association, he faced identical criminal liability though the applicable code seemed to preclude this result.

Convicted on two counts of attempted murder, Kessler argued that the Code barred such a result. Specifically, he argued that intent to kill was wholly lacking, without which there could be no attempted murder. Though he was successful

⁷² *People v. Kessler*, 315 N.E.2d 29, 30 (Ill. 1974).

⁷³ *Id.*

⁷⁴ *Id.* For the appellate opinion detailing those facts, see *People v. Kessler*, 296 N.E.2d 631, 633 (Ill. App. Ct. 1973).

⁷⁵ *Kessler*, 315 N.E.2d at 31.

⁷⁶ *Id.*

⁷⁷ *Id.*

at the appellate level, the state Supreme Court disagreed.⁷⁸ In that court, the common law bias easily overcame the clear mandate of the statute.

Largely ignoring Kessler's argument, the court focused on the meaning of the word "conduct" within the state accountability statutes.⁷⁹ The language is critically important, it provided that: "[a] person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct."⁸⁰ Thereafter, it set out the predicates for accomplice liability, namely intentional aid in the commission of the target offense.⁸¹

As the Illinois scheme closely followed the Model Penal Code, it also provided definitions of critical terms such as "voluntary act" and "conduct." At the time, Illinois defined "conduct" as "a series of acts, and the accompanying mental state."⁸² Again, sweeping aside the mental state requirement, the court agreed with the state's argument that conduct included *all* of the acts of the wrongdoer:

We believe the statute, as it reads, means that where one aids another in the planning or commission of an offense, he is legally accountable for the conduct of the person he aids; and that the word 'conduct' encompasses any criminal act done in furtherance of the planned and intended act.⁸³

The court applied a bludgeon to this carefully crafted statutory scheme, forcing a doctrine upon it that plainly did not fit.

⁷⁸ The appellate court rather reluctantly agreed with Kessler, concluding that "[i]mputed or implied intent [was] clearly outside the contemplation of the statute on accountability," though the common design rule was a "more reasonable approach to the law of accountability but one which [the court could not] adopt in contravention of the language in the Code." *Kessler*, 296 N.E.2d at 636, 636 n.3.

⁷⁹ Note that both the Illinois Code and the Model Penal Code premise guilt on one's intentional connection to the conduct of another for whom he is legally accountable. *See* MODEL PENAL CODE § 2.06(1) (Proposed Official Draft 1962); 720 ILL. COMP. STAT. ANN. 5/5-1 (West 2012). However, I say the court ignored his argument because it focused solely on the act component of the statute, ignoring the mens rea issue entirely.

⁸⁰ 720 ILL. COMP. STAT. ANN. 5/5-1 (emphasis added).

⁸¹ *Id.* at 5/5-2.

⁸² *Kessler*, 315 N.E.2d at 32 (quoting Ill. Rev. Stat. ch. 38, para. 2-4 (1971)) (current version at 720 ILL. COMP. STAT. ANN. 5/2-4).

⁸³ *Id.* (emphasis added).

The term “conduct” in the accountability section was plainly linked to “an element of” the target offense.⁸⁴ Through that mechanism, someone who has not directly committed the criminal act is liable nevertheless, provided that he afforded intentional assistance in its commission. That scheme does not accommodate common design—or its generic sibling, natural and probable)—as guilt requires this linkage to each crime, one by one. Thus, had Kessler been present at the time of the shootings and, for example, provided a weapon upon demand, he could have been guilty. However, passively sitting unaware of these events in the car outside of the bar, he could not remotely be found guilty. Yet of course, he was.⁸⁵ Worse, he was sentenced to five to fifteen years on each count of attempted murder.⁸⁶

Because of the crudity of this court’s reasoning, it did nothing to delineate any contours for accomplice liability. Without even examining what is meant by “common design,” it nevertheless found that they *had* one, and that was the sole basis for Kessler’s guilt.⁸⁷ Thus, we are back to our translator who is unlucky enough to be linked to those who expand the criminal venture, and we are without any guidance for assessing his individual guilt. But that was 1974, barely a decade into the new Code law. Yet, unfortunately, matters have only worsened.

B. Parallel Courses, Opposite Directions

The discussion here about German developments and scholarly discussion in American journals would seem to bode well for law’s progress in America. It may be just the opposite: As German jurisprudence refines this notion of act dominion and as American scholars wrestle with fundamental questions about complicity law, courts and legislatures often proceed unfazed by—and unaware of—these inquiries.⁸⁸ Were act dominion the

⁸⁴ *Id.* at 31.

⁸⁵ Perhaps even more telling of this notion of guilt by association was that the court went on to attempt to buttress its finding by citing to both Nineteenth Century case law—clearly inapplicable to the Code—and felony murder jurisprudence; the latter authority is particularly inappropriate, as felony murder provides its own principle of liability as a strict liability doctrine. *Id.* at 32.

⁸⁶ See *People v. Kessler*, 296 N.E.2d 631, 633 (Ill. Ct. App. 1973).

⁸⁷ See *Kessler*, 315 N.E.2d at 31–32.

⁸⁸ See, e.g., Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169 (2003). There, Robinson and Cahill bemoan the amendment cycles experienced by post 1960s and

touchstone for accomplice liability, liability would turn on a potentially long, highly detailed factual inquiry into a party's conduct. As it is, courts have done just the opposite, reciting empty platitudes that have only lead to this judicially created mess.

Following the Illinois Supreme Court's decision in *Kessler*,⁸⁹ that Court's view was embodied in the pattern jury instructions used by various trial judges.⁹⁰ Such instructions provide the blueprint for the instructions given to juries and are often given verbatim. Here are the instructions on accountability:

A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of [an] offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of [an] offense.

[The word "conduct" includes any criminal act done in furtherance of the planned and intended act.]⁹¹

Finally, the Pattern Jury Instructions provide that "[i]ntent to promote or facilitate the commission of an offense may be shown by evidence that the defendant shared a criminal intent of the principal *or evidence that there was a common criminal design.*"⁹² Performing a sleight-of-hand, whereby association with the principal becomes the basis for accomplice liability, courts have charted a course for disaster.

Common design has been used as an expedient to avoid having to prove an accomplice's guilt for subsequent offenses; it operates automatically.⁹³ But its core precept, open-ended liability for the misconduct of one's cohorts, can lead to its

1970s Codes. Regarding those amendments as almost inevitably leading to code degradations, they examine a major engine driving those developments: the "news-story/political-response cycle." *Id.* at 170. The Illinois amendments discussed here provide a particularly painful example of code degradation. 720 ILL. COMP. STAT. ANN. 5/5-2 (West 2012).

⁸⁹ *Kessler*, 315 N.E.2d at 30.

⁹⁰ *See, e.g.*, ILL. PATTERN JURY INSTRUCTIONS-CRIMINAL § 5.03 (4th ed. 2011).

⁹¹ *Id.* I have chosen the word "an" as provided for in these instructions in the case of a multi-crime setting.

⁹² *Id.* (emphasis added). Note also that this instruction dispenses with the need to prove the mental state of the accused. Moreover, since the so-called "common design" participant is responsible for the conduct of others, the instructions also eliminate the need to prove his wrongful acts. *See Heyman, supra* note 8, at 409.

⁹³ Naturally, since "common design" is just a local name for natural and probable, anything said of the one is true for the other.

expansion even beyond these malign uses. For example, imagine two street gangs involved in a violent conflict where someone was shot, but not killed. Imagine further that it can only be proven that the shots came from one of several boys even though formal ballistic tests were performed. It would seem, then, that charges against any person would fail, as it cannot be determined who shot the victim. Naturally, this is not the case.

*People v. Cooper*⁹⁴ illustrated such a situation. That case examined the unsightly spectacle of the clash between two street gangs, the Gangster Disciples and the Black Disciples, which resulted in the killing of one gang member and the serious wounding of another on the streets of Chicago.⁹⁵ On appeal to the state supreme court, defendants claimed that the failure to identify which one shot the victim prevents either from being designated the principal, thus ruling out any potential accountability.⁹⁶ The court disagreed.⁹⁷

First, the court cited the too-familiar shibboleth of common design, indicating the joint responsibility parties bear for the acts of all.⁹⁸ It then proceeded to enlarge that rule to affirm the conviction in this case. The language used is critical: “Evidence that a defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another.”⁹⁹ The breadth of this language is staggering, as is its sentiment. This would seem to make mere membership in a gang a sufficient basis for guilt for *anything* done by any member. Taken seriously, this is a total and impermissible rewrite of the accountability statute.

However, since liability hinges on sharing of a common purpose, the court then explained what counts as sharing: “A conviction under accountability does not require proof of a preconceived plan if the evidence indicates involvement by the accused in the spontaneous acts of the group.”¹⁰⁰ This is scarcely the language of criminal law at all. The predicate conduct by the defendant is “involvement,” and the very notion of the need for a

⁹⁴ 743 N.E.2d 32 (Ill. 2000).

⁹⁵ *Id.* at 36.

⁹⁶ *Id.* at 41.

⁹⁷ *Id.* at 42.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

“common plan” is undercut by the denial of any need for a plan at all, whereby association with “spontaneous” conduct cements the defendant’s relationship to both the group and its objectives. Despite the odd references here to communities of unlawful purpose, guilt was not based on any community of effort.¹⁰¹ On the contrary, guilt was based on the defendant’s presence, that he fired shots and that *someone* from this group, known or unknown to him, with or without his help, shot the victim.

All traditional doctrine has been jettisoned in favor of a position that can only yield guilt. Indeed, the court virtually concedes this in its parting comments on this issue, citing to the view that “accountability may be established through a person’s knowledge of and participation in the criminal *scheme*, even though there is no evidence that he directly participated in the criminal *act* itself.”¹⁰² As true as that may be in some contexts,¹⁰³ to cite that concept here only indicates that the defendant’s connection to the shooting has *not* been established, but that simply does not matter.

Indeed, the court’s discussion is also noteworthy for what is never said. The Illinois accountability statute is taken virtually verbatim from the Code, which requires that someone intentionally assist another in the commission of a crime. Yet, despite the obvious culpability requirement for accomplice liability, the court said absolutely nothing about defendant’s mental state.

In the plainest sense, accountability is established when someone has helped another to commit a crime. But there was absolutely no discussion of how Cooper helped the others whereby we could conclude that he should be liable for their conduct. Instead, speaking in the broadest—and vaguest—language, the court found guilt based on presence and misconduct in this admittedly loathsome display of gang behavior.¹⁰⁴ And yet, the crime of which Cooper was convicted was not “gang behavior.”

¹⁰¹ *Id.* at 43 (“[S]uch evidence sufficiently demonstrated a common design and a community of unlawful purpose between the defendant and the unknown assailant.”).

¹⁰² *Id.* (emphasis added) (citing *In re W.C.*, 657 N.E.2d 908, 924 (Ill. 1995)).

¹⁰³ As with someone who participated in the planning of a crime, or played a major role in an early stage of a criminal enterprise.

¹⁰⁴ See *Cooper*, 743 N.E.2d at 43–44.

Cooper was convicted of aggravated battery with a firearm.¹⁰⁵ That was the sole crime committed by anyone who was party to this encounter. But it was not clear at all whether an aggravated battery was even committed. Whereas common design had been used to link a defendant guilty of one offense to a subsequent one, its usage here stretched this doctrine beyond its initial contours. In the absence of any first crime, mere presence at this dreadful spectacle sufficed for allegiance to some form of group-held common design. Though Kessler was at least proved guilty of the burglary, here no criminal conduct at all was proven; presence alone sufficed.

It is hard to deny the pro-prosecution flavor of this doctrine and the zeal with which courts have favored it. The traditional arguments made by the defense, rooted in doctrine, have been swept aside in favor of an impermissibly broad definition of conduct, and in particular, one favoring presence at a criminal event. Why is that? How has criminal law evolved to the point at which clear statutory mandates have been ignored and effectively replaced by conflicting ones that repudiate them?

C. *The Politics of Criminal Law Reform*

Scholarly discussion often seems to proceed from the unspoken premise that bad law will be recognized as such and will somehow virtually self-correct. Naturally, no such thing happens. In fact, criminal law is far less amenable to that myth of spontaneous change than other areas of law because of some serious built-in problems. As the late Bill Stuntz has observed, several forces make substantive change difficult here.

First, whereas natural lobbies exist to oversee and propose changes in some areas of law, “for most of criminal law, no private intermediaries are well positioned to monitor the law’s content and mobilize interested voters on one or another side of contested issues.”¹⁰⁶ The Model Penal Code was a spectacular achievement but was driven by the backing of the American Law

¹⁰⁵ See 720 ILL. COMP. STAT. ANN. 5/12-4.2 (West 1993) (repealed 2011), available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0236> (“A person commits aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm (1) causes any injury to another person . . .”).

¹⁰⁶ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529 (2001).

Institute and the high profile and prestige of its members. Criminal law currently commands no such support. To the extent that states have enacted changes over the years since widespread Code enactments, these changes have cluttered codes, distorted meanings with inconsistent usage and generally attached themselves to each once-new code like "barnacles collecting on the hull of a ship."¹⁰⁷ Simply put, interest in criminal law reform commands little attention outside of a small circle of passionate parties who often appear to be talking only to one another.¹⁰⁸

Beyond that, powerful political forces drive changes, many of which are unwelcome, to the substantive law. Criminal law is an obvious hot-button area, and stories of atrocities and seemingly-too-lax standards litter the news on a daily basis. On the superficial level, conventional politics drive changes, often following the ebb and flow of crime rates, especially violent crime.¹⁰⁹ But, as Stuntz observed, a deeper politics, one endemic to this area, drives changes much more powerfully and predictably.

These deeper politics consist of what Stuntz called the politics of "institutional design and incentives."¹¹⁰ In a complex argument, he showed the dominance of prosecutors in criminal law development, and the natural tendency of that development to push toward broader rules of liability and harsher sentences.¹¹¹ If Stuntz is right, and I think he is, it is easy to account for the appeal of common design: It provides the optimal mechanism whereby people are convicted at lowest institutional costs and with greatest ease. However, this perverse doctrine has drawn attention even outside of this small circle of cognoscenti, and has received the attention of not one, but two, law reform commissions.

¹⁰⁷ See Robinson & Cahill, *supra* note 88, at 172.

¹⁰⁸ As Stuntz has said, "[c]riminal law scholars may be talking to each other (and to a few judges), but they do not appear to be talking to anyone else." Stuntz, *supra* note 106, at 508 (citation omitted).

¹⁰⁹ *Id.* at 510.

¹¹⁰ *Id.*

¹¹¹ *Id.* Though Stuntz saw the waning of the "tough-on-crime" sentiment, he also saw no letup in the deeper politics, which pushed to make "criminal law both larger and less relevant." *Id.*

D. The Progress of Criminal Law Reform

Law and order advocates frequently proclaim their allegiance to the rule of law. Presumably, that provides the normative content for the positions they espouse. However, taking inventory of their requirements for guilt often produces a healthy skepticism about their sincerity.

As state before, crime is a compound concept, requiring proof of proscribed conduct with the requisite mental state.¹¹² Complicity law, by its very nature, provides a mechanism whereby guilt attaches to those less involved in the crime than the principal actor. Because of these principles, and because of the frequently murky involvement of the accomplice, we would naturally expect the “beyond a reasonable doubt” standard to be honored here, as the potential for wrongful conviction is often so great. It would seem odd to protect the principal—someone arguably more blameworthy—with the full panoply of rights, while neglecting to protect the accomplice similarly. “Natural and probable” turns “logic and expectations” on its head.

First, as implemented, the doctrine dispenses with the requirement for a criminal act related to the target offense, as involvement in the prior venture suffices. Indeed, though complicity statutes explicitly require proof of criminal conduct, cases like *Kessler* shunt that proof aside as an annoying inconvenience.¹¹³ Moreover, decades later, in cases such as *Cooper*, the requirement for involvement in a prior crime was dropped, wherein the defendant’s “voluntary attachment” to a gang provided the predicate for liability for any gang-related crimes.¹¹⁴ Thus, this doctrine abrogates the bedrock doctrine requiring a personal actus reus for guilt.

But it gets worse. Proof of guilt “beyond a reasonable doubt” requires the prosecution to prove both the conduct and the requisite mental state. This is not mere hornbook doctrine, but it is doctrine embodied in both the Model Penal Code and codes such as Illinois’ that have adopted that. Thus, the Illinois code rejects the notion of strict liability, requiring proof of mental states unless the offense “clearly indicates a legislative purpose

¹¹² See MODEL PENAL CODE § 2.06(1) (Proposed Official Draft 1962).

¹¹³ Recall that the *Kessler* court interpreted conduct to consist of *all* acts of the principal actor, thus providing for the open-ended liability of the accomplice. See *People v. Kessler*, 315 N.E.2d 29, 33 (Ill. 1974).

¹¹⁴ See *People v. Cooper*, 743 N.E. 2d 32, 42–43 (Ill. 2000).

to impose absolute liability for the conduct described.”¹¹⁵ Beyond that, so critical is mens rea to guilt, that the statute elsewhere requires that “[a] person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element [of] . . . the offense, he acts while having one of the mental states described in Sections 4-4 through 4-7.”¹¹⁶

This is significant for several reasons. First, it clearly rejects the idea of strict liability except in unusual cases. Second, it even rejects the notion that negligence can support guilt where the statute is silent, as the sections referred to define intent, knowledge, and recklessness, but not negligence. Thus, in *Kessler*, for example, whereas the state had to prove that his cohorts intended to kill the bartender and police officer, Kessler was convicted utterly without proof of mental state at all. The rule of law has not simply been ignored; it has been eviscerated.

Again, Professor Stuntz warned: “[t]he system by which we make criminal law has produced not the rule of law but its opposite. And the doctrines that aim to reinforce the rule of law only add to the lawlessness.”¹¹⁷ But criminal law creation does not take place wholly unchecked. For example, the state of Illinois adopted major provisions of the Code a year *before* its official promulgation. Moreover, not only did it benefit from the decade-long work of that group, but the state also assigned the task of code creation to its own distinguished group.¹¹⁸

Yet time passed, and roughly forty years after the Code’s adoption, it had become so swollen with amendments and other “barnacles” that then Governor George H. Ryan appointed a commission to study the code and recommend all necessary changes.¹¹⁹ Governor Ryan was aware of this degradation of the

¹¹⁵ 720 ILL. COMP. STAT. ANN. 5/4-9 (West 2012).

¹¹⁶ *Id.* at 5/4-3.

¹¹⁷ Stuntz, *supra* note 106, at 599. Sadly, so convinced was Professor Stuntz of the intractability of this problem, he proposed the use of the rule of lenity, the vagueness doctrine, and the ban on retroactive crime definition as the only viable safeguards against this encroaching lawlessness. *See id.*

¹¹⁸ At the urging of the state Supreme Court and the Governor, the Chicago and Illinois State bar associations established a joint committee in 1954 to work on revising the criminal code. The joint committee completed its work in 1960, and it was approved by the state legislature in 1961, taking effect the following January. JOHN F. DECKER & CHRISTOPHER KOPACZ, ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES Ch. 1, § 1.01 (5th ed. 2012).

¹¹⁹ In length alone, the code had increased from the seventy-two pages originally enacted to over 1,200 at that time. FINAL REPORT, *supra* note 2, at v. Thus, Governor

code—as well as unfortunate parallel developments in common law—commenting specifically on the fact that “penalties are disproportionate to the harm involved or in comparison to other offenses, major criminal offenses are defined outside the Criminal Code, and many important common-law rules remain in force but uncodified.”¹²⁰

Two years after the commission’s creation, it produced a report spanning over 600 pages.¹²¹ That report, particularly sensitive to culpability requirements and obviously troubled by common design’s rejection of mens rea, explicitly recommended the “[e]limination of the ‘[c]ommon [d]esign’ [r]ule for [c]omplicity [l]iability.”¹²² But that was only the consensus opinion of the commission members. A clear rift existed within the commission, and Robinson provided commentary to explain the recommended position:

Issue: Should the Proposed Code incorporate the common-law “common-design” rule, which imposes complicity liability for all crimes in furtherance of a common criminal design or agreement on all parties to the agreement, whether or not they foresaw, knew about, or ratified those crimes?

Yes: The common-design rule makes it easier to convict an offender’s confederates without a complex and difficult evidentiary showing of culpability.

No: The common-design rule inappropriately allows for liability based on negligence, or even in the absence of culpability as to the offense. The original 1961 Code sought to eliminate the common-design rule, which was then resurrected in case law. To the extent such a complicity rule is considered

Ryan created the Criminal Code Rewrite and Reform Commission, Chaired by Matthew Bettenhausen, with special counsel Wayne R. LaFave and Andrew D. Leipold, and with many varied and distinguished members. *Id.* Perhaps most significantly, Paul H. Robinson served as the commission’s Reporter and put in literally thousands of hours of work for the commission. *Id.* at iii–iv.

¹²⁰ *Id.* at iv.

¹²¹ *See id.* at v.

¹²² *Id.* at lvi–lviii. Indeed, noting that “the Illinois courts have resurrected a common law rule of accountability for which there is no statutory authority,” the report went on to note a remarkable anomaly created by that rule: as “a person may be found liable as an accomplice even where, based on his lack of culpability, he would have *no* liability if he himself had personally committed the crime.” *Id.* at lvii. Moreover, the very committee appointed to create the 1961 code stated that “liability under this subsection requires proof on an ‘intent to promote or facilitate . . . commission’ of the substantive offense.” 720 ILL. COMP. STAT. ANN. 5/5-2 cmt. (West 1993).

necessary or desirable in the homicide context, it can be addressed directly through a felony-murder rule.

Reporter: Strongly recommends against expanding liability beyond the current complicity provision.¹²³

In that final report, then, the commission strengthened the section on complicity. Whereas the statute only spoke in terms of someone intending to promote or facilitate the commission of the offense,¹²⁴ the commission report provided ultimate clarity regarding the requisite mental state. Thus, proposed section 301 stated that one is accountable for the conduct of another if, “having the culpability required by the offense, he intentionally aids, solicits, or conspires with such other person in the planning or commission of the offense”¹²⁵ The mental state for the offense had to be the same for the principal actor and accomplice alike.

Unfortunately, the achievements of that commission were short-lived. Shortly after the report was published, Governor Ryan left the office in disgrace, which left no one to shepherd a new code through the state legislature.¹²⁶ What followed only seems to confirm Professor Stuntz’s dour vision of the progress of criminal law.

Another law reform commission emerged in 2005, seemingly with the same ambition as the earlier one. The group, known as the CLEAR Initiative, established an objective to rid the code of its “redundancies, inconsistencies and confusing language” and to generally improve a code that had become unwieldy over the years, often producing unjust results.¹²⁷ Chaired by former Governor James Thompson, it shared only one member from the prior commission, DuPage County Prosecutor Joseph E. Birkett, a member who had dissented from some of the ambitions of the

¹²³ FINAL REPORT, *supra* note 2, at 19, n.1.

¹²⁴ The Model Penal Code, like the Illinois code, is slightly ambiguous about the mental state for complicity, providing for intentional assistance, but not specifically stating what the accompanying mental state must be.

¹²⁵ FINAL REPORT, *supra* note 2, at 19 (emphasis omitted) (citations omitted).

¹²⁶ Governor Ryan was involved in a scandal dating back to his days as Secretary of State. He was found guilty on twenty counts in a trial concluding on April 17, 2006 and is currently in prison. Monica Davey & Gretchen Ruethling, *Former Illinois Governor Is Convicted in Graft Case*, N.Y. TIMES (Apr. 18, 2006), http://www.nytimes.com/2006/04/18/us/18ryan.html?_r=2&ref=georgeryan&.

¹²⁷ CLEAR INITIATIVE, <http://www.clearinitiative.org> (last visited Mar. 3, 2013). An obvious acronym, CLEAR stands for Criminal Law Edit, Alignment and Reform.

earlier commission.¹²⁸ Touting its allegiance to the Principle of Legality, it did little but codify the notion of common design, placing it side-by-side with the obviously conflicting Model Penal Code counterpart.¹²⁹

Having discussed this failure elsewhere, there is no need to revisit this sorry effort further.¹³⁰ The natural and probable consequences doctrine—here designated common design—simply extends an already attenuated principle of liability beyond the breaking point. But the very existence of this extreme doctrine owes to the ambivalence surrounding accomplice liability generally. Ill-conceived, it is nonetheless an understandable outgrowth of a principle of liability closely tied to agency principles, thus often dissociated from concepts of fault.

German law and the common law predicated liability on party status. The Model Penal Code swept that aside, but that simplification carried its own problems, throwing into question the very basis for accomplice liability. Scholars, then, strive to derive some grand theory of accomplice liability. But any grand theory here must fail, and the very quest for one loses sight of some fundamental objectives of the criminal law.

¹²⁸ See Letter from Joseph E. Birkett to Paul H. Robinson (Oct. 24, 2000) (on file with the Illinois Criminal Code Rewrite and Reform Commission Staff) (resisting any major rewrite of the code).

¹²⁹ See generally Heyman, *supra* note 8.

An essential feature of a criminal code is the Principle of Legality, which requires that penal law should give notice to the citizenry as to what conduct is proscribed as well as provide an ascertainable standard of guilt to those who have enforcement responsibilities, such as police, prosecutors, judges and juries.

John Decker, *The Mission of the Criminal Law Edit, Alignment, and Reform Commission (CLEAR): An Introductory Commentary*, 41 J. MARSHALL L.REV. 611, 657–58 (2008) (emphasis omitted) (citations omitted). Professor Decker was the Special Advisor to the CLEAR Initiative.

That this mirrors the sentiments of the prior commission is a sad irony, given the clear departure of the latter group from this principle in its codification of common design. See FINAL REPORT, *supra* note 2.

¹³⁰ See Heyman, *supra* note 8, at 390–91. Indeed, CLEAR's failure was not lost on Robinson. When I contacted him about the codification of common design, he seemed resigned, telling me that it came as no surprise, as "that is exactly what you should expect from that crowd." E-Mail from Paul H. Robinson to Michael G. Heyman (May 6, 2010) (on file with author).

III. COMPLICITY LAW: THE SETTING

Complicity law is troubling. Reading the tale our youthful translator, we chafe at the idea of imposing liability for potentially slight, impromptu assistance—worse, because of the offense, he faced a mandatory ten-year sentence. Yet, we also recognize that some criminal acts either require joint efforts or in fact result from such contributions of one sort or another. There, the very notions of principal and accomplice blur, and we begin to see the merit of the German system, differentiating as it does among a variety of types of actors. In that, it resists the binary choice of our system of either guilty or not guilty with potentially identical punishments. Unfortunately, the very emergence of the notion of *Tatherrschaft* demonstrates the flaws of that scheme. Moreover, that concept itself, as previously mentioned has been further refined, thus underscoring its inadequacy as an all-embracing theory.

The strength of any theory lies in its ability to successfully address hard cases. The easy ones are readily handled. For example, apparently the Code decided to address the *Othello* situation by including the notion of “provoking” one to commit a crime. That is, because of the slight inaccuracy of characterizing Iago’s conduct through other terms, provocation seemed more appropriate. However, those involved settled on “encourage,” as it seemed adequately broad to cover a variety of acts.¹³¹ But that is an easy case. The harder cases can involve multiple parties, a variety of types of contributions, and varying degrees of commitment to the criminal enterprise.

¹³¹ See MODEL PENAL CODE AND COMMENTARIES, PART I §§ 3.01 to 5.07, § 5.02 at 372 (Official Draft and Revised Commentaries 1985) (“Encouragement also covers forms of communication designed to lead the recipient to act criminally, even if the message is not as direct as a command or request. Whether one can ‘encourage’ without communicating a desire that a crime be committed may be more arguable, but the term is probably broad enough to cover such cases as well if a criminal purpose exists.”). Indeed, Professor Kadish discussed *Othello* on numerous occasions, concluding, “there is no reason why Iago should not be held accountable as *Othello*’s accessory.” Kadish, *supra* note 1, at 365. It should be noted that this is the Commentary to section 5.02, dealing with solicitation to commit a crime. The Model Penal Code explicitly uses the term “encourages,” the subject of this debate:

A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

MODEL PENAL CODE § 5.02 (2011).

Take newly minted parolee Danny Ocean, from the movie *Ocean's Eleven*, who sought revenge against the man who was dating his ex-wife.¹³² Danny developed a plan to steal a hundred-and-fifty-million dollars from the vault housing the monies from the three casinos owned by his ex-wife's boyfriend. He first hired a blackjack dealer, Frank Catton, and then reunited with Rusty Ryan, who became his right-hand man, helping him to devise the scheme and recruit the appropriate personnel.

The personnel consisted of a wealthy financier, Reuben Tishkoff, who, at first, reluctantly agreed to bankroll the venture; an electronics expert, Livingston Dell; a demolitions man, Basher Tarr; a savvy old-timer, Saul Bloom; the Malloy Brothers, the pickpocket, Linus Caldwell; and, perhaps most important, a "grease man" named Yen.¹³³ In a wildly detailed plan, Danny and Rusty set out, through brains and guile, to build an exact replica of the vault, forward a video of that replica to security to create a sense of well being, black out the city, and, through other pyrotechnics, to pull off the heist.

Every member played an indispensable role, though only three entered the vault itself: Danny, Linus and Yen. Every member was aware of all details of the plan, though Danny concealed his true motive of revenge from them. Also, though all did something indispensable, the form of the contributions differed greatly, as did the relationship of each to the gang and one another. Naturally, their commitments to the venture differed too, as they were in it for different reasons, though all seemed to genuinely relish the challenge of the plan.

¹³² This account is taken from the synopsis at the IMDB website. *Synopsis for Ocean's Eleven*, IMDB, <http://www.imdb.com/title/tt0240772/synopsis> (last visited Jun. 29, 2013).

¹³³ Yen could be described as

a 95 pound 'little Chinese guy', who worked as an acrobat in a Las Vegas show. He was so flexible that he could fold in half and fit in a very small tube in a portable safe. At the time of the robbery this is how he got into the vault of the casino. He got in, and therefore they called him the greaseman.

Urban Dictionary: greaseman, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=greaseman> (last visited Jun. 29, 2013).

A. *Dominant Justifications for Accomplice Liability*

Though a comparatively neglected topic, discussions of accomplice liability have clustered about two central concepts: act dominion and causation. In a major piece, Professor Kadish tried to explain why causation should play no role at all. Eschewing the analogy to a mechanical system, Kadish explained the difference between human actions and non-willed events: "In a word, every volitional actor is a wild card; he need never act in a certain way. . . . Since an individual could always have chosen to act without the influence, it is always possible that he might have. No laws of nature can settle the issue."¹³⁴ Thus, though Kadish embraced the notion that people "influence" others,¹³⁵ he saw the criminal actor as a free moral agent, one who bore sole causal responsibility for her choices.

But is that right? Kadish focused on the decision to commit the crime, seeing no other role for causation in that universe of conduct. But don't the contributions of others play different and substantial roles, culminating in the criminal conduct itself? German theorists, refining the notion of *Tatherrschaft*, recognized that it naturally subdivided into several categories, among which was *Willensherrschaft*, control over the volitional controls of another. By narrowly focusing on only this aspect of causation, Kadish lost sight of the variety of ways people contribute to ultimate outcomes.¹³⁶

In *Ocean's Eleven*, Danny went to see Reuben for money to bankroll the criminal venture. Indeed, because of the complexity of the scheme, the cost was undoubtedly enormous. But without that backing, the job could never have been pulled. Reuben had absolutely no control over the plans and only contributed the financial wherewithal for the crime. By Kadish's thinking, he played no role in causing that conduct. Of course he did. That money was indispensable to the crime and played a role, along with a host of other factors, in bringing it about.

Because of that backing, Danny could attract the personnel he did and bring his grand scheme to fruition. Indeed, that backing provided comfort and supplies to the gang that led directly to their criminal success. Reacting against Kadish's

¹³⁴ Kadish, *supra* note 1, at 360.

¹³⁵ *Id.* at 343.

¹³⁶ See *supra* text accompanying note 58.

narrow view, Dressler tried to revamp the theoretical underpinnings for complicity.¹³⁷ Tracking some of our intuitions, his approach seeks to mete out punishment proportionally to the harm people cause.¹³⁸ This operates in two ways. Since he who causes the harm has created social harm, he should receive substantial punishment. However, the accomplice who lends non-causal assistance should, then, receive less punishment as, though the involvement is there, the harm is not. Taking this a step further, Dressler even provided sample statutes that captured this distinction.¹³⁹

But this is too neat a distinction. Every member of Ocean's Eleven helped produce the result, though not in the sense of human agency advanced by Kadish.¹⁴⁰ All parties were entirely interdependent, thus bringing about the final result. They caused it as surely as did Danny and Linus, by rappelling into the vault, as did Yen, by folding himself in half to occupy a tiny space, as did the technical accomplices and, of course, the redoubtable Reuben and Saul. In fact, had Danny not been at the crime site, there is still no doubt that we would regard him as the dominant figure in this gang, though he would then be acting only in an accomplice capacity.

We would regard him as the overwhelmingly dominant figure because he interacted with everyone, conceived the plan, assembled the personnel, and was most deeply committed to its success at every point. This sort of group dynamic has not gone unnoticed, as Dressler has retreated somewhat from his causation approach in recent years. Most recently, he tried to balance these two dominant themes of act hegemony and causation. Thus, he proposes that “[a] person is not accountable for the actions of the perpetrator unless her assistance not only

¹³⁷ See Dressler, *supra* note 32, at 92–93 n.2.

¹³⁸ *Id.* at 130.

¹³⁹ First, he provided: “A person is guilty of any offense specified in this Code if, acting with the kind of culpability that is sufficient for the commission of the offense, he causes the harm specified by the offense to be committed by another.” Then, dealing with the non-causal accomplice: “A person is guilty of the offense of Noncausal Assistance if, acting with the kind of culpability that is sufficient for the commission of another offense: . . . he purposely assists, or influences another, in the commission of other [sic] offense” *Id.* at 138.

¹⁴⁰ That is, though it is not clear how the mere accomplices convinced the principals to commit the criminal act of stealing from the vault. But the question seems trivial, as the assembled group was completely interdependent, success depending on the successful operation of the various role players.

satisfies the causation requirement but there is evidence that the accomplice was a substantial participant, not a bit player, in the multi-party crime."¹⁴¹ But that verges on tautology, as it provides no standard for finding causal contribution or major party status. Virtually conceding this, he further elaborated that the "best reform" may consist of drawing distinctions on the basis of "the substantiality of the actor's participation."¹⁴² By that view, the minor participant should only be guilty of a lesser crime, whatever that might be.¹⁴³

Sometimes there are lesser crimes. In some areas, specific substantive laws have been passed that address the liability of those in foreseeable chains of criminal wrongdoing. Thus, for example, laws prohibiting the sale of handguns to minors aim to punish those who facilitate offenses by young, impulsive wrongdoers.¹⁴⁴ Unfortunately, since the range of assistance is almost unimaginably varied, this simply cannot work on any meaningful scale, as that would require an impossibly complex reconceptualization of all crimes. How would we treat the various members of Danny's group? How could those *types* of contributions possibly be identified and categorized? And that approach would also be in tension with our fundamental intuitions that some forms of aid are so major, their effects so profound, that the actors simply must receive substantial punishment, though technically they are only accomplices. The punishment should fit the crime, and the crime is the one assisted.

New York departs from the view that accomplice liability should be structured to fit the crime, at least in part. Instead, codifying the notion of criminal facilitator, it somewhat uncouples liability from the target offense, thus creating four levels of facilitators.¹⁴⁵ Resembling the German approach, it predicates liability on the age of the perpetrator, the age of the

¹⁴¹ Dressler, *supra* note 14, at 447.

¹⁴² *Id.* at 448.

¹⁴³ *Id.*

¹⁴⁴ See Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 270–271 (2000). In fact, Weisberg points out this alternative to reformulating notions of the bases for accomplice liability. *Id.*

¹⁴⁵ These provisions are in addition to New York complicity law, which takes rather traditional form.

facilitator, and the gravity of the target offense.¹⁴⁶ Thus, for example, the most serious crime is facilitation in the first degree, defined as:

[a] person is guilty of criminal facilitation in the first degree when, believing it probable that he is rendering aid to a person under sixteen years of age who intends to engage in conduct that would constitute a class A felony, he, being over eighteen years of age, engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit such a class A felony.¹⁴⁷

Having the clear virtue of expanding that binary universe of accomplice-like liability, it avoids the trying metaphysics of some theories, instead basing liability on the youth of the perpetrator and the efficacy of the assistance provided. But that may exhaust its virtues. Focusing on the conduct feature, it limits liability to those things that provide “means or opportunity” only.¹⁴⁸ How, or whether, that could address some of the characters in *Ocean’s Eleven*, our young translator, or jazz aficionado of the Hawkins case is unclear. Thus, its relationship to New York’s general complicity law becomes unclear as well.¹⁴⁹

New York’s culpability features are even stranger. Hinging liability on the actor’s belief that she is probably rendering assistance to another, it specifies neither knowledge nor recklessness, thus leaving culpability unacceptably vague. Moreover, the facilitator need not have the mental state for the commission of the target offense, thus further distancing him from this event.¹⁵⁰ So, it would seem that the assistance itself is the gravamen of the offense. Unfortunately, the commentary on that section suggests otherwise: “In fact, the conduct of the facilitator will be generally ‘confined to preparation so attenuated

¹⁴⁶ See N.Y. PENAL LAW § 115.08 (McKinney 2012).

¹⁴⁷ *Id.* Criminal facilitation in the first degree is a Class B felony, one step down from the assisted crime.

¹⁴⁸ *Id.*

¹⁴⁹ New York’s general complicity law states: “When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.” *Id.* § 20.00.

¹⁵⁰ The scheme provides no defense even if “[t]he defendant himself is not guilty of the felony which he facilitated because he did not act with the intent or other culpable mental state required for the commission thereof.” *Id.* § 115.10.

from the final stages that the role of the facilitator is only remotely related as a cause or contributor to the ultimate crime.’”¹⁵¹ Accordingly, this approach fails, at least as implemented, as an alternative or addition to general complicity law.¹⁵²

The failure of these alternatives does not reveal the intractability of the problem, but may, on closer examination, signal the presence of a pseudo-problem. *Ocean's Eleven* demonstrates the remarkable breadth of assistance possible in a multi-party venture.¹⁵³ Causation, depth of commitment, and act dominion provide fine abstractions, but break down as ineffective tools for carefully calibrating blame and punishment. They simply cannot work with optimal precision. But does the Code's approach, sweeping though it is, really fail to provide an adequate legal standard for accomplice liability?

IV. JUST DESERTS AND THE JUSTIFICATION FOR PUNISHING ACCOMPLICES

The failures of the New York approach, of specific assistance statutes, and of any grand theory are of a piece: Each attempts to deal with the infinite variability of human conduct by reducing it to some common features and apportioning blame accordingly. Each envisions some rule that captures this infinite variety of conduct, reducing that to manageable categories. The Code takes a different approach, as its operative conduct consists of “aid” or “agreement” to aid in the planning or commission of the offense. Rejecting some rule or set of rules, the Code instead opted for a broad standard for determining accountability. Effectively rejecting the objective of somehow finding a perfect rule of complicity, it recognizes the real-world limitations of that ideal.

¹⁵¹ William C. Donnino, Practice Commentary, N.Y. PENAL LAW § 115.00, at 106 (quoting *People v. Beaudet*, 32 N.Y.2d 371, 377, 345 N.Y.S. 2d 495, 501, 298 N.E. 2d 647, 651, (1973)). The model jury instructions for this section provide little guidance, as they only require the jury to find that the facilitator “was rendering aid” and that the conduct “in fact aided” the principal actor. CJI2d[N.Y.] PL 115, <http://www.nycourts.gov/judges/cji/2-PenalLaw/115/115-08.pdf>.

¹⁵² Robert Weisberg reached a similar conclusion, recognizing that because of internal definitional issues and “ill-coordination with complicity laws more generally, they cannot avoid the perennial problems of complicity law.” Weisberg, *supra* note 144, at 270.

¹⁵³ Indeed, not to court the precious, but the last installment in this area was *Ocean's Thirteen* in 2007, thus adding to the complexity.

The Code's beauty lies in the very generality of its language. Essentially embodying a *standard* for accomplice liability, it avoids the pitfalls of yielding to any constricting rules, which distinguishes it from less successful efforts.¹⁵⁴

Moreover, the Code's scrupulous adherence to culpability principles assuages fears of potential injustice and uncertainty. To be an accomplice, one must intentionally aid another in the commission of the offense.¹⁵⁵ Beyond that, one must do so with the *mens rea* for the target offense. These requirements achieve two critical objectives: They help determine the commitment of the actor to the venture and prevent the conviction of the indifferent companion.

Perhaps the young translator was, indeed, that indifferent companion. As Kadish demonstrated, under the Code approach he should not be convicted absent a showing of conduct on his part intended to further the drug offense.¹⁵⁶ Likewise, the attendee at the jazz concert in London should not have been convicted as an accomplice to Hawkins because he did not assist him in committing the immigration violation and the prosecution has the burden to prove guilt beyond a reasonable doubt.

Fortunately, though, Danny's full complement of helpers *would* be convicted, as, by hypothesis, they all knew of the plan, its objective, and their interdependence in the commission of the theft—and pursued it with uncommon dedication. And yet, we recoil somewhat at the notion of lumping them together, particularly because their roles differed so substantially. Danny was the obvious kingpin, but some, like Yen, were, in Dressler's language, bit players.

¹⁵⁴ Professor Pierre Schlag cleverly avoided buying into any static notion of these concepts. *See generally* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985). Schlag recounts a pithy distinction between the two, involving the obligations of drivers at railroad crossings. Whereas Holmes offered the rule that the driver must stop, look and listen, Cardozo instead suggested that the actor proceed with reasonable caution. *Id.* Though too much can be made of the differences between these legal tools, standards seem to afford a flexibility not readily shared with rules. Conversely, rules seem to provide a certainty fitting for criminal law.

¹⁵⁵ Recognizing the breadth of the notions of assistance and influence, Kadish pointed out that they could encompass meanings such as: advise, persuade, command, encourage, induce, procure, instigate, or solicit. Kadish, *supra* note 1, at 343.

¹⁵⁶ *See id.*

We recoil for the wrong reasons. Our discomfort results from thinking in causal terms, and for instinctively predicating guilt on causal contribution to the result. Perhaps results do not matter.

A. *Lessons from the Field: Insights from Social Psychology and Penology*

In the summer of 1971, Philip Zimbardo launched a program known as the Stanford Prison Experiment.¹⁵⁷ Working with students in his summer course on the psychology of imprisonment, he established a simulated prison setting at Stanford, including guards and prisoners who were students in the course.¹⁵⁸ The results were stunning and horrifying. Within six days, he terminated the project “because it was running out of control.”¹⁵⁹ Reminiscent of *Lord of the Flies*, the guards were abusing the prisoners so badly that the psychological damage was staggering.

From this and similar situations, Zimbardo learned of the “pervasive yet subtle power of a host of situational variables [that] dominate an individual’s will to resist.”¹⁶⁰ Good people can engage in evil conduct as a result of the forces of “deindividuation, obedience to authority, passivity in the face of threats, self-justification, and rationalization.”¹⁶¹ According to Zimbardo, this convincing explains the atrocities at Abu Ghraib as well as other shameful uses of power over others.¹⁶²

But explanation is not to be confused with excuse. Though discussing this banality of evil, Zimbardo did not excuse such actions, but rather, praised those who resisted these pernicious forces.¹⁶³ Similarly, those who commit crimes with others are not to be forgiven despite these powerful social forces that influence

¹⁵⁷ PHILIP G. ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 19–20 (2007).

¹⁵⁸ *See id.*

¹⁵⁹ Philip G. Zimbardo, *Revisiting the Stanford Prison Experiment: A Lesson in the Power of Situation*, *THE CHRONICLE OF HIGHER EDUC.*, Mar. 30, 2007, at B6. Zimbardo reported that “[b]y [d]ay 5, five of the student prisoners [had] to be released early because of extreme stress.” *Id.* In the same vein, most of the remaining students “[adopted] a zombielike attitude and posture, totally obedient to escalating guard demands.” *Id.*

¹⁶⁰ ZIMBARDO, *supra* note 157, at xii.

¹⁶¹ *Id.*

¹⁶² *See id.*

¹⁶³ Inverting things, he also spoke of the “banality of heroism.” *Id.* at 21.

behavior. Indeed, those selfsame forces create an environment conducive to criminality and violence, and those who participate freely have chosen that environment *as theirs*. Having created that environment, they have thus increased the likelihood of crime and must accept punishment accordingly.

Those who seek the perfect test for complicity may have lost sight of just what they are seeking. Likewise, this Article noted the extraordinary use of interpretation and the power represented by criminal law.¹⁶⁴ Punishing serious violations of our norms, criminal law determines whether and to what extent certain people should be punished. The Code emphasizes culpability as the touchstone, as do many current thinkers.

This approach recognizes risk creation as the basis for the criminal sanction. It considers “an actor *deserving* of punishment when he violates these norms that forbid the unjustified harming of, or risking harm to, others—that is, failing to give others’ interests their proper weight.”¹⁶⁵ That is why we punish: Inherent in that choice to do something wrong is the choice to devalue others as well as the norms that should bind. Conversely, just as some should receive the punishments they deserve, they should receive no more than that, or none at all, if they have not made such choices.¹⁶⁶ This focus explains the appropriate antipathy toward laws that penalize the indifferent actor, the person only tenuously connected to the wrongdoing.¹⁶⁷

¹⁶⁴ *Id.* at 6.

¹⁶⁵ LARRY ALEXANDER, ET AL., *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 6 (2009). Stephen Morse, also a psychologist, recognized that “[i]t is simply a fact about human beings that potential encouragement or aid in principle increases the risk that the recipient will commit the act aided or encouraged.” Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, U. ILL. L. REV. 363, 398 (2004). As he said, this is simply “how the world works.” *Id.*

¹⁶⁶ As Alexander said, “unperceived risks do not affect the actor’s culpability.” ALEXANDER, ET AL., *supra* note 165, at 18. An argument against negligence, it is, a fortiori, one against liability without any risk creation at all.

¹⁶⁷ Some commentators have tried to make sense of various theories of inculcation without culpability. For example, Paul Robinson wrote a piece in which he isolated four such theories across a wide range of crimes, accepting some, while rejecting others. *See generally* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984). By contrast, Mark Noferi constructed a due process check on such imputation, particularly in the *Pinkerton* setting. *See generally* Mark Noferi, *Towards Attenuation: A “New” Due Process Limit on Pinkerton Conspiracy Liability*, 33 AM. J. CRIM. L. 91 (2006).

This unswerving focus on culpability solves many problems. It justifies the conviction of Ocean's Eleven, while questioning that of others discussed here. It supports the Code's general theory of complicity, meting out punishment proportionally with what people have wrongly done, thus utterly rejecting vicarious liability.¹⁶⁸ And it argues powerfully against views such as the natural and probable doctrine.

For all the formal objections to natural and probable, the most troubling is its rejection of this bedrock concept of personal responsibility.¹⁶⁹ Rudy Kessler did *nothing* to warrant a conviction of attempted murder. Similarly, though Marcus Cooper "attached himself" to a violent gang, there was no showing whatsoever that he committed aggravated battery with a firearm.¹⁷⁰ Imposition of liability under this doctrine is wholly unjustified and affirms Professor Stuntz's baleful vision of criminal justice in America. In an area itself fraught with problems, this doctrine is simply barbaric.

CONCLUSION

Dressler proclaimed, "American accomplice law is a disgrace."¹⁷¹ Noting the binary nature of guilt and innocence, surely he has a point. Portraying injustices such as that of the young translator, he further established his position. And certainly, he rightly criticized the natural and probable view for many of the same reasons expressed here. But beyond that, it is just not that simple.

¹⁶⁸ As Professor Morse noted, this "account of accomplice liability focuses entirely on the accomplice's own behavior and suggests that accomplice liability should not be derivative." Morse, *supra* note 165. However, even though Professor Morse is correct that guilt is personal, liability is derivative in the sense that the accomplice assumes responsibility for the *actus reus* of the crime through his own culpable participation.

¹⁶⁹ By "formal," I mean such matters as the statutory factors that bar its imposition, its inconsistency with the Code view in states such as Illinois that have enacted both, and its obvious subversion of the presumption of innocence and the need for proof of guilt beyond a reasonable doubt.

¹⁷⁰ See *supra* note 114 and accompanying text. Strikingly, the California version of this rule assigns responsibility to those who are "concerned in the commission of a crime." CAL. PENAL CODE § 31 (West 2012). Thus, for example, some defendants who had robbed a business were found guilty of subsequent rapes committed, because of the "sexual aura" of the business robbed. *People v. Nguyen*, 26 Cal. Rptr. 2d 323, 332 (Ct. App. 1993).

¹⁷¹ Dressler, *supra* note 14, at 428.

Illinois adopted its code over fifty years ago, yet courts simply refused to apply it properly. They ignored it despite unambiguous state code commentary, as well as clear language from that of the Model Penal Code. Sadly, this has not been simply a local phenomenon, but rather, has occurred countless times throughout the country following the Code revolution of the 1960s and 1970s. Hardly a pattern restricted to complicity law, blatant disregard for the proper administration of the Code may nevertheless be most malign here.

Worse, the forces that shape criminal law cut against the grain of sound law reform. Attacks on the rule of law validate Bill Stuntz's vision of criminal law as an area driven by special interests, with no counterbalancing forces at work.¹⁷² The results truly are pathological, even resulting in codifications that restore the inanity of the pre-Code era.

But academic efforts to rethink complicity law show little promise. There is no need for new statutory law; rather, we must recognize the stunning accomplishment of the Code and further recognize its sound theoretical underpinnings. Focusing on risk creation, it promotes punishing those who intentionally pursue these criminal objectives. Thus, deflecting the focus to also capture notions such as causal contribution, it distorts that very focus.

The natural and probable view is manifestly unjust, but it is simply the most extreme example of law losing touch with its fundamental objectives. *All* aspects of complicity law that are similarly adrift should be rejected. But that requires the will—perhaps the political will—of those involved to repudiate this legal monster that complicity law has become.

Courts, prosecutors, and legislators have to sincerely pursue the rule of law and stop paying it mere lip service. No magic wand can make this happen, nor can any grand theory improve upon what we already have. Rather, the people involved in the criminal justice system must stop pursuing what can only be a form of blood lust and return to an ideologically neutral law or risk losing all sense of just proportion.

¹⁷² Reviewing Stuntz's last book, *The Collapse of American Criminal Justice*, Tracey Meares made a poignant observation: "[I]t is *justice* that has collapsed, not the system that purportedly delivers it." Tracey L. Meares, *Justice Falls Down: America's Flawed Criminal Justice System*, HARV. MAG., Mar.–Apr. 2012, at 18, 18.