

SHERIF GIRGIS

## The Mens Rea of Accomplice Liability: Supporting Intentions

**ABSTRACT.** Accomplice liability makes someone guilty of a crime he never committed, so long as he helped or influenced the perpetrator and did so with the required mens rea. Just what that mens rea should be has been contested for more than a century. Here I consider three major approaches and find them all wanting. I propose rejecting their common (but rarely questioned) assumption that what matters is the helper's mental state toward the perpetrator's commission of an offense. I suggest considering instead his stance toward the perpetrator's intention to act: a helper is an accomplice, on this view, if he (a) intends to see to it that the principal form or keep his own plan to commit an offense and (b) does not intend or expect that plan's frustration. This standard better justifies imposing accomplice liability. It more precisely picks out those helpers culpable for the perpetrator's very offense. And this parity of guilt is the best—perhaps the only good—basis for imposing the same liability on accomplice and principal, in a system so retribution-driven as to choose to do so at all.

**AUTHOR.** Yale Law School, J.D. expected 2016; Princeton University, Ph.D. expected 2016; University of Oxford, B.Phil. 2010; Princeton University, A.B. 2008. This Note was born of a stimulating seminar with Facundo Alonso; matured with exceptional help from Gideon Yaffe, John James Snidow, John Lewis, and Ben Eidelson; and owes its weaknesses to the author.



## **NOTE CONTENTS**

<b>INTRODUCTION</b>	462
<b>I. OVERVIEW OF ACCOMPLICE LIABILITY</b>	465
<b>II. THREE PRIOR PROPOSALS</b>	468
A. Historical Approaches	468
B. A Recent Proposal: Splitting Intentions	470
1. Splitting Intentions	470
2. Objections	472
<b>III. A NEW WAY FORWARD</b>	473
A. Proposal	473
B. Rationale	478
C. Comparison with Traditional Rationales	482
<b>IV. CONCRETE IMPLICATIONS</b>	484
A. Fit with Other Features of Accomplice Liability	484
B. Fit with Case Law	485
<b>V. OBJECTIONS</b>	487
A. A Single Standard?	487
B. Under-inclusive?	489
C. Incompatible with the Actus Reus Requirement or Derivative Nature of Accomplice Liability?	491
<b>CONCLUSION</b>	494

## INTRODUCTION

Accomplice liability poses an enduring puzzle. It invites the state to convict people of crimes they did not commit. Across the United States, a person can be convicted of grand larceny without pilfering a dime and jailed for first-degree murder without drawing a drop of blood. This might seem like a gross miscarriage of justice, but it is black-letter law: anyone deemed an “accomplice” to a crime can be convicted of it as if he had perpetrated it himself.<sup>1</sup>

What is the moral logic of a law by which one person can be convicted of another’s crime—simply for lifting a finger to help him, or for offering an encouraging word? Unsurprisingly, this question has beset courts and commentators for more than a century. Especially controversial is the proper mens rea standard for complicity: Say Cassius helps or encourages Brutus to murder Caesar. Before the law holds Cassius liable as Brutus’s accomplice, what attitude should it require him to have toward Brutus’s lethal act, or some aspect of it?

In this Note, I defend a new answer. After tracing accomplice liability’s broad outlines in Part I, I discuss in Part II three prominent contenders for its mens rea requirement. First, some laws require just that the accomplice know that his action will help the principal commit the crime. Second, others require that the accomplice intend to promote the principal’s act. Neither has achieved a steady victory in law:

[I]s simple knowledge enough? Yes, said the Supreme Court in . . . 1870; no, said Judge Learned Hand in *Peoni* in 1938; yes, implied the Supreme Court in 1947; no, said the Supreme Court in 1949; yes, if it is accompanied by an act that substantially facilitates the commission of the underlying offense, said the Supreme Court in 1961; usually, said

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1. See, e.g., 18 U.S.C. § 2(a) (2012) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”); FLA. STAT. ANN. § 777.011 (West 2013) (“Whoever . . . aids, abets, counsels, hires, or otherwise procures [an] offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.”); MONT. CODE ANN. § 45-2-302 (2011) (making someone liable for another’s conduct when “either before or during the commission of an offense with the purpose to promote or facilitate the commission, the person solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of the offense”).

the Second Circuit in 1962; only if knowledge is enough for the underlying offense, said the Second Circuit in another case in 1962; sometimes, said the Seventh Circuit in 1985; always, implied the Seventh Circuit in 1995; no, said the Second Circuit in 1995 and the Seventh Circuit in 1998.<sup>2</sup>

And finally, Gideon Yaffe has proposed another standard to resolve this contest between knowledge and purpose: the accomplice must intend that the principal commit the crime, but this intention need *not* dispose him to promote the principal's crime. I argue against all three proposals.

In Part III, I offer a new one. The options canvassed in Part II assume that what matters is the accomplice's mental state with respect to the principal's *commission* of the crime. I would scrap this premise. What should make someone an accomplice, I argue, is his stance toward the principal's *intention* to commit the offense. To be an accomplice, one must intend that someone else form (or keep) his own *plan* to commit a crime, without expecting or intending for that plan to be frustrated.<sup>3</sup> This standard more precisely matches the kind of investment that might make accomplices of mere helpers. In this and other ways, as I show in Part IV, it better justifies important features of complicity law. I address objections in Part V.

What I do not build is a ground-up defense of *having* accomplice liability. Any such grand theory must rest on a theory of punishment: Where liability should be imposed depends on where punishment is justified. So whether we should have *accomplice* liability depends on how it would serve the justifying goals of the criminal justice system—be they deterrence, rehabilitation, retribution, some combination of these, or other aims entirely. Is deterrence the main or only licit point of fining and jailing? Then accomplice liability as we know it should be retired: convicting helpers even when they causally contribute nothing to a crime, as our law does,<sup>4</sup> is hardly the most efficient way to minimize the amount of blood spilled and money embezzled. By contrast, the more one cares about rehabilitation, the more one will want the criminal law to bring into its curative sweep anyone who has certain attitudes toward crime and its harms, as accomplice liability largely does.

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2. Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1351-52 (2002) (footnotes omitted).

3. Here I use "plan" as synonymous with "intention." On understanding intentions as plans, see *infra* note 35 and accompanying text.

4. See *infra* Part I.

For the retributivist, finally, punishment must contribute to justice. And it does that only when the punished deserve it, when they are sufficiently culpable.<sup>5</sup> On this view, a criminal's choice to disrupt social order, callous to its value, does not just *cause* the injustice set right by law. For retributivists, rather, a guilty mind *partly constitutes* that injustice. This view need not require banning pure mental states.<sup>6</sup> The point is that a criminal's will to exercise more than his fair share of liberty—his insensitivity to the reasons for obeying some law—is part of the harm that punishment (which *limits* liberty) is meant to correct. Without this culpability, this disregard of reasons, harmful behavior is not the sort of social ill that normally justifies punishment. In short, a guilty mind—expressed in conduct—involves an arrogation of freedom beyond the law's reasoned bounds, an arrogation central to the retributivist basis for punishment.<sup>7</sup> Retributivist theories will therefore be most congenial to accomplice liability, and to my proposal for its mens rea standard: both concentrate on culpability in justifying liability schemes.<sup>8</sup>

It is not my purpose to argue that our law does or should forge such tight links between punishment and blameworthiness, much less that it should do so by the peculiar tool of accomplice liability. What I aim to offer is the best mens rea standard for such liability, *given* its practice of convicting a helper for another's crimes, whether or not his help did actual harm. In other words, this Note will assume that accomplice liability (in that sense) is worth having—and hence that liability should closely track culpability.<sup>9</sup> With these points fixed, it

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5. *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”).
  6. See *infra* Section V.C.
  7. For a brief sketch of one theory of retribution, see JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 128-30 (1983); and JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 262-64 (2d ed. 2011).
  8. See, e.g., WAYNE R. LAFAVE, *CRIMINAL LAW* § 13.2(f), at 683 (4th ed. 2003) (“Under the general principles applicable to accomplice liability, there is no such thing as liability without fault.”). For a brief discussion of how retributivism might acknowledge factors besides culpability in fixing punishment, see *infra* Section V.C.
  9. That does not mean that this Note should interest only retributivists. One could, for example, have a hybrid view, on which punishment is justified only if the defendant deserves it *and* certain other conditions are met. See generally NORVAL MORRIS, *THE HABITUAL CRIMINAL* 8-20 (1951) (outlining this and other views). My proposal could then appeal as a necessary (though not sufficient) condition for finding complicity—that is, as an account of the mental state that makes someone deserving of the punishment imposed upon the principal. Finally, one theorist's defense is another's *reductio*; those who reject

will address several questions: What mens rea would make the helper's culpability so much like the principal's that we could licitly convict both of the same crime? How well does this standard make sense of the doctrine? Which details would it suggest refining? And how does it fare against criticisms arising *from within* the same culpability-centered framework?

## I. OVERVIEW OF ACCOMPLICE LIABILITY

The doctrine of complicity makes a person “legally accountable for the conduct of another person.”<sup>10</sup> A convicted accomplice to murder is, then, a convicted murderer, just like the principal (or perpetrator). These are two routes to the same criminal conviction, status, and range of punishments—to liability for the same offense. In a landmark case on complicity, *United States v. Peoni*,<sup>11</sup> Judge Learned Hand quoted ancient authorities to the effect that “the law of homicide is quite wide enough to comprise . . . those who have ‘procured, counseled, commanded, or abetted’ the felony . . . ‘for it is colloquially said that he sufficiently kills who advises’ . . . the killing.”<sup>12</sup> Convicting an accomplice naturally requires inquiry into mens rea and actus reus. But the actus reus bar is set remarkably low. It is cleared by any words or behavior that count as *aiding* the principal (e.g., handing a murderer a gun), or influencing him (e.g., advising or inciting him to kill).<sup>13</sup> The helper's conduct need *not* be the but-for cause of the principal's offense.<sup>14</sup> With striking capaciousness, the law (in the words of one commentator) requires only that it “*could have* contributed to the criminal action of the principal,” and that

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retributivism wholesale might use this Note's elaboration of some of its striking implications to bolster a case against it.

10. MODEL PENAL CODE § 2.06(2) (Official Draft 1985).
11. 100 F.2d 401 (2d Cir. 1938).
12. *Id.* at 402 (citations omitted) (quoting 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 507 (1895)).
13. In this respect, the federal standard is typical: it holds fully liable for an offense anyone who “aids, abets, counsels, commands, induces or procures its commission.” 18 U.S.C. § 2(a) (2012).
14. See LAFAVE, *supra* note 8, § 13.2(b), at 673-75; *see also* State *ex rel.* Martin v. Tally, 15 So. 722, 739 (Ala. 1894) (“If the aid in homicide can be shown to have put the deceased at a disadvantage, to have deprived him of a single chance of life which but for it he would have had, he who furnishes such aid is guilty, though it cannot be known or shown that the dead man, in the absence thereof, would have availed himself of that chance.”).

“without the [helper’s] influence or aid, it is *possible* that the principal would not have acted as he did.”<sup>15</sup>

The standard for finding that one person has influenced another (e.g., that Cassius influenced Brutus in killing) thus differs from the standard for finding that one event has caused another (e.g., that a stabbing caused Caesar’s death).<sup>16</sup> What accomplice liability requires, again, is not *causing* the principal to act, but saying or doing something that *could* have done so. Cassius must have encouraged or helped Brutus to kill Caesar. But it doesn’t matter if Brutus would have acted just the same way even without Cassius’s input. So one can meet the actus reus requirement even by minimally effective help (at common law)<sup>17</sup> or *mere attempts* at help (under the Model Penal Code)—whether or not the help does any harm, and whatever its other features.<sup>18</sup>

Compensating for such a vast conduct element is a more stringent mens rea requirement. And here is where the controversy arises in federal and state law.<sup>19</sup> Which of the accomplice’s attitudes matters—his stance toward the perpetrator, toward the perpetrator’s act, or toward something else? And whatever its object, what must the content of that attitude or stance be?

To make this more concrete, suppose Cassius hands Brutus the knife by which Brutus kills Caesar. Several aspects of Cassius’s mental state might seem relevant to whether he is complicit in the crime. In particular, we might inquire into his mental state regarding each of (A) his own conduct, (B) Brutus’s lethal

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15. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 359 (1985).
  16. See H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 41-44, 51-59 (2d ed. 1985).
  17. See, e.g., *People v. Hughes*, 161 P.2d 285, 286 (Cal. Dist. Ct. App. 1945) (imposing liability on a defendant who “stood a few feet away [from a robbery] and did nothing other than to serve as a lookout for his associate”).
  18. MODEL PENAL CODE § 2.06(3)(a)(ii) (Official Draft 1985).
  19. See generally Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1997) (discussing why the law requires that the accomplice have intentionally aided the principal’s commission of the crime); Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351 (1998) (discussing the appropriate scope of accomplice liability for unintentional crimes); Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 236-47 (2000) (outlining the debate over whether the required mens rea for accomplice liability should be knowledge or purpose); Weiss, *supra* note 2, at 1345-46 (noting that in the federal law of aiding and abetting, there is no clear resolution to the question of whether intent or knowledge is the required mens rea); Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2172-74 (1988) (comparing theories of the mens rea for complicity and arguing that the accomplice should possess the full mens rea required of the perpetrator).

act (or its actus reus or mens rea component), and (C) the circumstances or results of Brutus's act.<sup>20</sup> Although all three dimensions are relevant to complicity, the first and third have posed much less difficulty and can be resolved by stipulation here.

First, as for (A), Cassius's mental state in performing his own conduct of aid or influence, I will assume that to be complicit, Cassius must have acted "volitionally, deliberately, and intentionally rather than by mistake or accident."<sup>21</sup> This is a modest rule, requiring only that Cassius be aware and in control of what he does.

As for (C), the circumstances or results of the principal's act, I assume with the Model Penal Code that an accomplice must have the same mental state regarding these elements of a crime as the principal. To be liable for first-degree murder, for example, both Cassius and Brutus must specifically intend the lethal result.<sup>22</sup>

Here I focus on (B), the most burning of these questions<sup>23</sup>: to count Cassius as an accomplice, what mental state should the law require of him toward Brutus's act (or toward its conduct or mental-state elements)?<sup>24</sup> I consider two options vying for dominance in the cases, and then Gideon Yaffe's proposal; assessing these will suggest, and support, my own.

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20. See LAFAYE, *supra* note 8, § 13.2(b), at 675 (offering some of these mental states, or a combination of them, as candidate standards for the mens rea of complicity).

21. Weiss, *supra* note 2, at 1348.

22. See, e.g., N.H. REV. STAT. ANN. § 626:8(IV) (2007) (establishing accomplice liability for "act[ing] purposely, knowingly, recklessly, or negligently with respect to [a] result, as required for the commission of the offense"); MODEL PENAL CODE § 2.06(4) (Official Draft 1985) (establishing accomplice liability "if [the defendant] acts with the kind of culpability . . . that is sufficient for the commission of the offense"). In fact, the Code is more ambiguous on the circumstance element than on the result; for simplicity, I stipulate the same standard for both.

23. See, e.g., *Hanauer v. Doane*, 79 U.S. 342, 347-48 (1870) (citing cases for and against the sufficiency of knowledge for complicity); *United States v. Fountain*, 768 F.2d 790, 797-98 (7th Cir. 1985) (summarizing the history of the "knowledge versus purposeful intent" debate); Weisberg, *supra* note 19, at 236 ("For decades, the American courts and legislatures have debated whether knowledge or 'true purpose' should be the required mens rea for accomplice liability.").

24. As I use them from now on, "the mens rea of accomplice liability" and synonymous terms refer to these aspects of the mental state required for grounding accomplice liability, and not to those labeled (A) or (C).



## II. THREE PRIOR PROPOSALS

### A. Historical Approaches

In this Section, I consider two criteria for the mens rea of complicity—knowledge and purpose—and find them, respectively, too wide and too narrow.

By some federal and state authorities on the complicity mens rea, a helper need not intend that the principal commit his crime. It is enough that he *know* that the principal will commit it. Thus, the Fourth Circuit held in *Backun v. United States*, someone who sells something aware that it will be put to felonious use can be counted an accomplice in felony just because “he could refuse to give the assistance by refusing to make the sale.”<sup>25</sup> That court cited another case holding that “one who *knowingly* delivers supplies to [an unlawful] distillery” should be liable for offenses committed there.<sup>26</sup> Several state statutes include similarly low mens rea requirements.<sup>27</sup>

Imagine that Cassius (who has recently taken a job as a cashier in a Roman department store) has reason to believe that Brutus will use the hammer he is about to buy from Cassius to break into Caesar’s palace.<sup>28</sup> Cassius-the-cashier does not intend for Brutus to use the hammer that way; he sells it to him just to please his snippy supervisor, Jupiter. Now Cassius may be morally to blame. Perhaps he should be liable for a separate offense, like knowingly contributing to a violent act. But it seems wrong to hold him liable for breaking and entering.<sup>29</sup>

25. 112 F.2d 635, 637 (4th Cir. 1940).

26. *Vukich v. United States*, 28 F.2d 666, 669 (9th Cir. 1928) (emphasis added).

27. See, e.g., IND. CODE ANN. § 35-41-2-4 (LexisNexis 2008); WYO. STAT. ANN. § 6-1-201(a) (2013).

28. For a case involving similar facts, see *People v. Lauria*, 59 Cal. Rptr. 628, 634 (Ct. App. 1967) (“[W]e think the operator of a telephone answering service with positive knowledge that this service was being used to facilitate the extortion of ransom, the distribution of heroin, or the passing of counterfeit money who continued to furnish the service with knowledge of its use, might be chargeable on knowledge alone with participation in a scheme to extort money, to distribute narcotics, or to pass counterfeit money.”).

29. For different approaches to this question in case law regarding conspiracy offenses, compare *United States v. Falcone*, 311 U.S. 205 (1940) (finding purveyors of sugar and yeast *not* to have participated in buyers’ moonshining), with *Direct Sales Co. v. United States*, 319 U.S. 703 (1943) (finding a wholesaler guilty for selling drugs to a physician who supplied them to addicts).

First, his connection to that crime is quite weak. At least someone who intends an end will, if he is rational, stand ready to promote it by some means, and to adjust that means to changing circumstances. One cannot intend something without being somewhat disposed to promote it. But in making the sale, Cassius does not intend the break-in. He is not at all disposed to promote it. He is just *aware* of being (by his sale) one strand in a causal thread leading to it.

But second, and more generally: Since most of us are nodes in a tightly packed web of social influence, which may include many (at least minor) offenses, this knowledge standard would cast too broad a net. It would limit not just sales, but a wide range of everyday actions “if we had to fear criminal liability for what others might do simply because our actions made their acts more probable” and we were in a position to know so.<sup>30</sup> So the knowledge standard catches more cases than it should.<sup>31</sup>

Consider now the purpose criterion, which also finds support in federal and state case law.<sup>32</sup> What if Cassius hands Brutus a knife *in order* to help him carry out his (Brutus’s) plan to fell Caesar? *Now* the assassination is among Cassius’s reasons for helping Brutus. And again, rational agents will be to some extent<sup>33</sup> disposed to promote what they intend. So Cassius is rationally disposed to promote the murder by Brutus. His intention would give him some inclination to see to it that Brutus killed Caesar. If the knife proved too dull, Cassius might hand Brutus a sword; if another senator grabbed the sword, Cassius might slip Brutus a vial of poison; and so on. Whatever the new circumstances, Cassius will be at least somewhat disposed to ensure that Brutus overcomes them to kill Caesar.

But as this example suggests, requiring Cassius to be so heavily invested sets the complicity bar too high. It should not be *necessary* for complicity that

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30. Kadish, *supra* note 15, at 353.

31. For further discussion, see Gideon Yaffe, *Intending to Aid*, LAW & PHIL., Dec. 2012, <http://link.springer.com/article/10.1007%2Fs10982-012-9168-8>.

32. See, e.g., MONT. CODE ANN. § 45-2-302(3) (2007) (imposing accomplice liability on one who acts “with the purpose to promote or facilitate the commission” of an offense); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (holding that accomplice liability requires that the defendant “participate in [the crime] as something that he wishes to bring about, that he seek by his action to make it succeed”); MODEL PENAL CODE § 2.06(3) (Official Draft 1985) (imposing accomplice liability on a person who, among other things, acts “with the purpose of promoting or facilitating the commission of the offense”).

33. I say “to some extent” because a countervailing factor might ultimately lead them to do otherwise.

one intend the aided crime's commission. By this rule, some whom we should count as accomplices would go free. The driver of a getaway car (or chariot) is one example.<sup>34</sup> Even if the driver for someone else's burglary is paid up-front, and is therefore indifferent to whether the burglary occurs, we should count him an accomplice. If the knowledge standard is too harsh, purpose is too lenient.

### *B. A Recent Proposal: Splitting Intentions*

Because of where these two approaches lead, Gideon Yaffe's project has been to negotiate between them. But to see his middle way, we need some background.

According to Yaffe and other philosophers of action, intentions give rise to two kinds of rational inclinations or dispositions. They do not just dispose us to promote what we intend. They also put us under rational pressure *not to reconsider* our intentions – not to change our minds – based on data we had all along. Intentions, that is, have motion *and* momentum. They move us toward an end, and give us reason not to change our minds about it absent new information.

Yaffe tries to exploit this dual nature of intentions to find a mens rea standard between knowledge and ordinary, fully committed intentions. On his view, briefly, the required mens rea should be a special kind of intention to aid – one that grounds the second but not the first inclination just described. An accomplice's intention, that is, need not dispose him to *promote* the crime he knowingly helped, but it must dispose him *not to reconsider* his help in light of its link to the crime. Here I elaborate on this proposal and raise objections to it.

#### *1. Splitting Intentions*

It is worth describing in more detail how Yaffe and other philosophers of action think intentions normally work.

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34. See, e.g., *United States v. McNeil*, 106 F. App'x 294, 301 (6th Cir. 2004) (holding that evidence that the defendant, as getaway driver for a robbery, "communicated extensively with" the robbers was enough to make him an accomplice rather than someone "substantially less culpable than the average participant" (internal citation omitted)); *People v. Jackson*, 407 N.Y.S.2d 874 (1978) ("[E]vidence sustains the jury's verdict that the defendant was guilty of being an accomplice to the robbery by reason of his knowing participation as the driver of the getaway car.").

Again, an example will help. Say Cassius-the-cashier decides to sell the hammer to Brutus to aid the break-in. By Yaffe's lights, Cassius will thus incur some reason (and become disposed) to do two things:

1. Take the steps necessary to promote Brutus's break-in by getting him the hammer.
2. *Not reconsider* selling Brutus the hammer in light of the fact, *already* considered, that the hammer will be so used.

In other words, Cassius will—if he is rational—abide by (1) and (2), absent stronger contrary reasons. He will adopt the means necessary to promoting his end, and avoid reconsidering that end in light of facts about it that he already considered in forming his intention. I will call (1) the “Means Norm” and (2) the “Non-Reconsideration Norm.”

Of course, Cassius-the-cashier can still change his mind, or new relevant factors may arise. Intentions *can* be revised. But part of being a rational agent means being *somewhat* disposed to promote what one intends. It means treating one's intentions as points of deliberation that are more fixed (assuming that information holds constant) than options that one considered but never formed intentions to pursue. Otherwise, intentions would play no useful role in one's life or action. They would settle nothing. At every moment, one would have to reconsider anew all the options and their merits. To play their proper role, then, intentions must be paid *some* deference and must help organize other choices. That is why, for Yaffe, intentions will typically give rise to the Means Norm and Non-Reconsideration Norm.

I say “typically” because Yaffe's proposal for the complicity mens rea drives a wedge between the purpose and the knowledge criteria by chipping away at one of these ordinary effects of intending. For Cassius-the-cashier to satisfy Yaffe's proposed mens rea, he must intend the sale to aid the break-in. But this need *not* dispose him to promote the break-in, only to avoid changing his mind about the sale on account of its connection to the break-in.

For Yaffe, in other words, the cashier must form an intention (to sell in aid of the break-in), but one of an unusual sort. This intention needn't ground the Means Norm *and* the Non-Reconsideration Norm, but only the latter. That is how Yaffe makes space between the knowledge and purpose criteria. It is how he would cover the getaway (chariot) driver in our burglary example. The driver, Yaffe thinks, would be disposed not to change his mind on account of the burglary even if he is not quite inclined to promote it. In general, Yaffe means this standard to cover helpers who intend that the principal commit his crime but who are not thereby disposed to promote it.

## 2. *Objections*

The problem is that the criteria just described may be impossible to satisfy. Doesn't having an intention *necessarily* incline us to promote its contents?<sup>35</sup> What could it mean to intend what we are not at all disposed to advance? In particular, how could a detail about a goal make its way into the content of our intention, without becoming part of what we are thereby disposed to promote?

Intentions and their practical implications, after all, are fixed not just by *what* they refer to, but by *how* they refer to it. Intending to *sell the hammer to someone who will use it in a break-in*, and intending to *sell the hammer to the customer who asks for it*, are different intentions. As new data come in, a cashier who has the first intention will be disposed to act differently from one who has the second. Each will be adjusting to promote different ends: either facilitation of a break-in, or simply selling to those who ask. Only a cashier with the first intention will be disposed to prefer criminal customers to law-abiding ones, to encourage stoutheartedness in nervous neophytes at crime, and so on.

Not necessarily, Yaffe says.<sup>36</sup> A cashier *could* form the first intention but be disposed to promote just the same outcomes as if he had formed the second. He could have the first intention and *not* be disposed to ensure the break-in occurs. But then what is the reference to "who will use it to break into a house" *doing* in the first intention? How does it differentiate the first intention from the second, as it must for Yaffe's proposal not to collapse into the purpose criterion?

In general, that is, what is the difference between

1. an intention to do simply *X*, formed by one who knows that *X* is *P* (what I will call a "simply *X* intention"), and
2. an intention to do *X*-which-is-*P* (a "compound *X-P* intention"),

in cases where (Yaffe thinks<sup>37</sup>) both dispose the agent to promote only *X*?

It can't be that only the compound *X-P* intention disposes the agent against changing his mind in light of *X*'s being *P*. The reason is that Yaffe thinks the same could be true of a simply *X* intention – if the agent forming it had *considered* that *X* is *P*, but without including *P* in his intention.

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35. See, e.g., MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 18-20 (1987) (defending a definition of intention that has just this implication).

36. Yaffe, *supra* note 31, at 14-18.

37. Yaffe, *supra* note 31.

But this only deepens the puzzle of what it means for our intentions to include something without disposing us to promoting it. If this mere incorporation can't be picked out by how it affects our acts or dispositions, how can we get a grip on it? Can we define it as the only basis—*besides* considering a certain belief at a certain point in deliberation—for a Non-Reconsideration Norm? That is little help.

Yaffe makes further attempts to justify this distinction, which I think fail for reasons that would take us too far afield. More relevant is *why* his search for a new complicity standard might have led to this approach. In particular, Yaffe might be moved toward this idiosyncratic, even hair-splitting sense of intention—stronger than knowledge, weaker than “ordinary” intention—by an assumption pervasive in the literature and law on complicity. That assumption holds that what matters is the helper's mental state *regarding the principal's commission of the crime*. Given the historic standoff over complicity, it may be time to question the premise. In the next Part, I make a proposal that scraps it.

### III. A NEW WAY FORWARD

#### A. Proposal

Based on Section II.A, we can plot discrete examples of when, intuitively, there is or isn't accomplice liability, so that we can begin to trace a line of best fit:

1. *Not* accomplice liability: Cassius-the-cashier sells Brutus a hammer believing but not intending that Brutus will use it to break in to Caesar's palace (“cashier case”).<sup>38</sup>
2. Accomplice liability: Cassius knowingly drives the getaway chariot for Brutus's burglary of Caesar's palace but achieves his end (payment) up-front, hence regardless of whether Brutus actually burgles, and hence (we can stipulate) without intending that Brutus do so (“getaway case”).

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38. Though I will refer below to this particular example for readability, it stands for all cases where the helper knows but does not intend that the crime will occur. For exemplary cases and analysis, see *supra* notes 25-31 and accompanying text. Moreover, I will use the term “break in” here and the substantively similar “burglary” in the second example to ensure that our different intuitions about them are responding just to the subtle differences between Cassius's stances toward each, while the different names may help to keep them separate in the reader's mind.

3. Accomplice liability: Cassius gives Brutus a knife intending that Brutus use it to kill Caesar (“knife case”).<sup>39</sup>

Note two things. First, to find a candidate standard for the mens rea of complicity that lies between the requirements judged too high (purpose) and too low (knowledge), we should consider what the knife and getaway cases have in common that the cashier case lacks. And since the common feature will have to justify potentially subjecting Cassius to the same punishment (for the same act) as Brutus, it should pertain to what makes Brutus himself blameworthy: his own guilty mind, or mens rea.<sup>40</sup>

At a first pass, what seems to make an accomplice is the helper’s *investment* in another’s injustice. Investment suggests standing to benefit. But that can’t be the whole of it. Otherwise, Brutus could make Cassius-the-cashier an accomplice just by planning, without input from him, to bring him back loot from Caesar’s palace. Investment in this context, then, must (also) suggest readiness to support or promote. But support or promote *what*?

It can’t just be Brutus’s act. That would yield the right results in the cashier and knife cases, but not in the getaway case, where Cassius is not invested in Brutus’s *act*. Yet he does seem invested in Brutus’s own *intention* to burgle. If that were lacking, Brutus would need no getaway, and Cassius would miss out on the money he seeks. So we can infer that Cassius at some point stands ready to promote Brutus’s intention—to get him to stick to the plan, if he starts to waver.

Rather than focus on Cassius’s disposition toward Brutus’s crime, then, complicity law might look to his disposition toward Brutus’s criminal intention.<sup>41</sup> If Brutus is blameworthy for having the criminal intention, Cassius

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39. This stands for any case in which the helper intends that the crime occur. For exemplary cases, see *supra* note 32 and accompanying text.

40. Again, this is one of the background assumptions of this Note, since it will be embodied by most legal systems focused enough on culpability to have accomplice liability at all. For brief discussion of this point, see *supra* notes 5-8 and accompanying text.

41. By requiring a certain attitude on Cassius’s part toward Brutus’s criminal “intention,” I do not mean to suggest that accomplice liability should be limited to specific-intent crimes. My proposal can also cover crimes of recklessness or criminal negligence. Suppose that Brutus commits involuntary manslaughter while driving his chariot drunk (and hence recklessly). If Cassius, with similar recklessness toward human life, intends that Brutus intend to drive under such conditions, then he can be liable as an accomplice to Brutus’s involuntary manslaughter. In general, to be an accomplice on this account, one must intend that the principal form or keep his intention to engage in the relevant criminal *conduct*, whether the

might be similarly blameworthy for intending that Brutus adopt or keep this intention.<sup>42</sup> Both might be to blame for insensitivity to the reasons against carrying out the criminal intention.

This blameworthiness can be a proper target of criminal law, as we have seen, if retribution is central to justifying punishment. And retribution or something like it probably *is* central, if our complicity law itself makes sense.<sup>43</sup> From this normative angle, we can see why the law might care how Cassius regards Brutus's intention. If Cassius intends to see to it that Brutus form or keep his own plan (his intention) to commit the offense, then Cassius intends Brutus's guilty mind: the very aspect of Brutus's act that makes Brutus worthy of criminal sanction at all.

Usually this will be the case, but not always. Say Brutus is an elusive serial killer, long disposed to kill when expedient. Suppose, too, that Cassius wants him to form and manifest one last murderous intention (to kill Caesar) under just the right circumstances to be apprehended before more blood is spilled. Perhaps Cassius knows the guards are on patrol at Caesar's palace. Or maybe he intends to call them over at the right moment. In either case, Cassius intends that Brutus form or keep a lethal plan, to be sure. But he expects or intends that it will *not* become the core of an act of murder—that Brutus's malign mental state will not become a fully executed *guilty mind*. So he doesn't show the insensitivity to the reasons against the crime's commission that Brutus shows. (Brutus, of course, isn't expecting his own intention to be thwarted.) As a result, we shouldn't hold Cassius liable for Brutus's very crime.

This reinforces a potential difference between helper and principal made possible by the fact that they are, after all, separate people. Only the helper can coherently intend the principal's intention while also intending or thinking it won't be carried out. And that makes it possible for the helper *not* to be callous to the reasons against the crime's commission. So our standard needs revising to exclude cases of this kind. Let Cassius satisfy the mens rea for complicity in Brutus's crime if:

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principal's crime is one of intent, knowledge, recklessness, or negligence. I set aside strict-liability crimes.

42. It is more natural to speak of intending actions rather than states of affairs. But throughout this Note, "Cassius intends that Brutus form or keep his intention . . ." will be shorthand for "Cassius intends to see to it that Brutus form or keep his intention . . ." It is a harmless shorthand: nothing crucial will turn on just what action constitutes "seeing to it."
43. See *supra* notes 5-8 and accompanying text.



1. He intends that Brutus form or keep (however temporarily) an intention to commit the crime (“Supporting Intention Condition”).
2. He does not expect or intend that Brutus will *fail* to commit it (“Non-Failure Condition”).

Applying this test to our knife case, we can see that it passes. If Cassius intends for Brutus to murder Caesar, he can’t at the same time expect or intend for Brutus *not* to do so. And if he intends that Brutus *commit* murder, he must also intend that Brutus *intend* to murder. So this proposal includes all cases covered by the (unduly narrow) purpose view.

But unlike that standard, this one is also satisfied in typical instances of the getaway case. There Cassius’s end—that Brutus pay him for an escape—depends on Brutus’s *intending* (or, to some point, keeping his intention) to commit the crime requiring escape. The getaway example is, after all, what led us to formulate the Supporting Intention Condition. Yet as stated, it also meets the Non-Failure Condition.

Casting Cassius in a variant of the getaway case will confirm that it meets the Supporting Intention Condition. If, days beforehand, Brutus wavered about going through with his plan, Cassius might encourage Brutus to keep it. Maybe he would wax on about how Caesar has become a despotic hoarder—about how redistributing palace loot would do the whole realm some good. In any case, he is disposed to encourage Brutus; as a means to getting and keeping his fee, after all, Cassius intends that Brutus keep his intention to burgle, at least up to the point of no return for Brutus.<sup>44</sup> Contrast all of this with Cassius’s attitude toward the burglary itself: If the burglary is threatened by the guards’ approach to the palace, Cassius will not adjust to make it succeed. He is not disposed to promote it.

In the cashier case, by contrast, Cassius lacks even the intention that Brutus intend the crime. If Brutus wavered in his decision to use the hammer to break in, Cassius would not be disposed to try to get Brutus to keep that intention. By hypothesis, Cassius merely believes that Brutus intends to use the hammer for the break-in—which he is in no way disposed to *promote*.

One might object that the cashier and getaway cases do not, after all, come out differently on my proposed criteria. According to this objection, either

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44. This confirms that the Supporting Intention condition can be satisfied even where Brutus formed his criminal intention before Cassius came onto the scene. Cassius can still make a difference to Brutus’s *keeping* the intention, which is just as crucial to Cassius’s end.

Cassius must intend Brutus's bad intention in both cases, or he needn't in either. In the first, after all, Cassius aims to make money by selling Brutus the hammer, which he knows won't happen unless Brutus has a purpose for it. So must Cassius not intend that Brutus retain his violent purpose? Of course, we might answer that Cassius need only intend that Brutus have *some* purpose for it, not necessarily a criminal one, and that this difference is what relieves him of complicity. But if Cassius-the-cashier is relieved on this ground, could Cassius-the-getaway-driver not similarly plead that he only intends that Brutus have *some* chauffeuring needs, however innocent? If Brutus wavers about the burglary, could Cassius not keep his money by getting Brutus to hire a ride to the baths?

As this discussion demonstrates, we can bend (or specify) the cases to *make* them converge. But as stated they will ordinarily differ in whether Cassius intends that Brutus have a criminal plan. Elaborating on both points will clarify my proposal.

First, further evidence (of evil motives or the like) might show that Cassius-the-cashier *does* intend for Brutus to have a violent purpose for the hammer—one that, for all Cassius expects or intends, will be fulfilled. And then, on my proposal, Cassius *would* be liable as an accomplice. But that result seems right. After all, in this modified cashier scenario, Cassius stands ready to encourage a wavering Brutus to retain his violent purposes. That readiness should make a difference to Cassius's blameworthiness, even if it finally makes no difference to his conduct.

Why, then, do ordinary instances of the cashier and getaway cases seem to diverge? Perhaps the answer is this: The ratio of legitimate to illegitimate purposes that Cassius will think Brutus could practically have for a hammer is high.<sup>45</sup> The same ratio with respect to a getaway ride—which Brutus must obtain in advance, secretly, and at great risk—is lower, and in absolute terms quite low. So in the getaway case it is likelier than not (and likelier than in the cashier case) that someone in Cassius's position would intend, as a means to his end, that the other party form or keep a criminal plan.

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45. Thus, as Weisberg notes, even courts applying the rule that purpose was required "would find: 'such factors as the contraband quality of the article supplied and failure to report the sale, as legally required, sufficient to meet its demands.'" Weisberg, *supra* note 19, at 238 (quoting MODEL PENAL CODE § 2.06 cmt. at 317-18 (Official Draft and Revised Comments 1980)).

In short, context gives evidence of what really matters for establishing complicity. The more crucial Cassius's help is to a crime, and the less useful it is otherwise, the likelier it is that he intends Brutus's criminal mind.

These points make sense of the common idea that an ordinary business owner selling ordinary products to an apparently criminal customer should not be held complicit.<sup>46</sup> If the business really is ordinary, then its owner's contribution to the crime won't likely be crucial. And ordinary products will probably have an ample range of licit uses. As the Supreme Court has observed in the related context of conspiracy liability, "[a]ll articles of commerce may be put to illegal ends," and yet "all do not have inherently the same susceptibility to harmful and illegal use."<sup>47</sup> The nature of the product sold may suggest, indirectly, that the seller shares the buyer's criminal purposes.<sup>48</sup>

And, again, that sharing makes a difference. Cassius's intention that Brutus intend to commit a violent crime, *like a violent intention of his own*, normally evinces a criminal's insensitivity to the reasons against the violence that *make* it criminal.<sup>49</sup> There are several ways of seeing this point and its relevance to complicity law.

### B. Rationale

The basic argument for this mens rea standard is that it best justifies doing just what accomplice liability remarkably does: holding the helper legally responsible for the *very same crime* as the perpetrator, even when he plays no actual role in *causing* it. The standard picks out cases where the helper identifies with what becomes the core of the principal's own criminal act, without expecting or intending that it will not become such. He thus shows the kind of callousness toward the reasons against a crime for which we hold the *principal* liable: Both have identified with a criminal mens rea. Both stand ready to act on that identification (either by supporting or by carrying out the criminal intention). And neither expects or intends for it to be frustrated,<sup>50</sup>

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46. For one defense of this intuition, see Mueller, *supra* note 19, at 2186-87.

47. *Direct Sales Co. v. United States*, 319 U.S. 703, 710 (1943).

48. *See id.* at 710-11; *see also* *People v. Lauria*, 59 Cal. Rptr. 628, 632 (Ct. App. 1967) ("Intent may be inferred from knowledge, when no legitimate use for the goods or services exists.").

49. It does this at least where the Non-Failure Condition is met—that is, where Cassius doesn't intend or expect to see Brutus's violent intention frustrated.

50. Again, intending to do something is normally incompatible with believing one will not carry out one's intention. Brutus cannot both intend to kill Caesar, and intend not to carry out his

though its execution depends on some factors beyond either agent's control.<sup>51</sup> So it is fair to treat them the same, depending on what happens next: to convict both of the crime if it occurs, of attempt if it is thwarted once begun, or of nothing if it isn't even attempted. To unpack this, I will show how each part of the standard contributes to picking out helpers who deserve much the same blame as those they help.

Take the Supporting Intention Condition first. Intending something is a strong way of identifying with it. More than approval or merely knowing causation, intention is the paradigm form of willing.<sup>52</sup> And, again, a criminal's

goal (or believe that he will not). So principals will meet something like the Non-Failure Condition as applied to their own intentions: for all they expect or intend, their intention will be carried out.

Moreover, it might be that intentions *to form or keep the intention to X* are reducible to simple, garden-variety intentions *to X*. (If Brutus can *plan to plan* to murder, is that any different from his just *planning to murder*?) It would then follow that principals *also* necessarily meet something like the Supporting Intention Condition as applied to themselves.

If that is right, then we have a new way of formulating the argument for this mens rea standard for complicity—namely, that it isn't, after all, a standard for *complicity* alone. It is a general mens rea standard of criminal liability. Anyone who meets it (and a relevant actus reus) should be held liable for the crime, full stop. It's just that perpetrators necessarily meet it, while helpers only sometimes do. When they do, we call them "accomplices."

And then the distinction between perpetrator and accomplice—which makes no legal difference—will depend just on the sort of actus reus met, which makes no culpability difference. That result, too, makes sense given this Note's stipulation that liability should turn most on culpability.

51. What happens next isn't entirely within the accomplice's control. But neither is it entirely within the principal's: whether Brutus commits murder or attempted murder will depend partly on outside factors, like whether Caesar gets away. And yet Brutus's own liability hinges on such factors (since, for example, attempts are treated differently from completed crimes). So it isn't obviously problematic to make Cassius's degree of liability, too, depend on factors beyond his control, like whether the principal attempts the crime, completes it, or does nothing. For more on this, see *infra* Section V.C.
52. See *Tison v. Arizona*, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). For a discussion of how intention identifies agents with choices and acts, see John Finnis, *A Philosophical Case Against Euthanasia*, in *EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES* 23, 28-30 (John Keown ed., 1995); and John Finnis, *The Fragile Case for Euthanasia: A Reply to John Harris*, in *EUTHANASIA EXAMINED, supra*, at 46, 53-54. Why is intending the "paradigm" way of willing? There is a sense in which one "wills" whatever one knowingly causes, even as an unintended side effect. But intending something involves a deeper embrace than that. If I intend to kill someone, I adopt his death as a reason for my conduct. Not so if I just knowingly cause his death as a side effect of pursuing some other goal.

intention is not separate from his crime, but is rather—at least on the most complicity-friendly views of punishment<sup>53</sup>—*an integral part of it*, which helps explain his precise blameworthiness. Without this *mens rea*, his otherwise-criminal act would not be the crime that it is, nor would it evince the same insensitivity to the reasons that make committing it unjust. In short, his culpability itself is part of the injustice, the unfairness, to be eradicated by criminal law, and culpability centers on a guilty mind. So to intend that someone have a criminal plan that might well become the core of a criminal act is to be willing to promote just the kind of social contaminant for which criminal law is (by hypothesis) the proper solvent.

Concretely, if it is unjust for Brutus to kill, it is unjust for him to form the intention to kill. But then it should also be unjust for Cassius to intend to promote this intention in Brutus, unless he expects or intends for it to stop at Brutus's mind—that is, for it not to be carried out. If it is unjust to promote an intention that, for all one intends or expects, will be carried out to harmful effect, why should it matter whether one does so by forming the intention oneself or supporting it in another? Of course, whether the murder happens will depend on some factors beyond Cassius's control, but is the same not true of Brutus?

To synthesize: Where the proposed *mens rea* is met, Cassius has identified himself with and willed what ultimately became—and what for all he expected or intended *would* become—an integral part of a criminal act. And if the essential core of Brutus's criminal act is something that Cassius has identified with, it makes sense to hold him liable for it on a par with Brutus. After all, Cassius has shown something much like Brutus's insensitivity to the reasons against Brutus's crime. And if culpability is central to justifying criminal liability,<sup>54</sup> then equal culpability can justify equal punishment.

In fact, though, there is no guarantee that Cassius and Brutus will have *exactly* the same insensitivity to the reasons against Brutus's crime. Perhaps Brutus is killing Caesar for sport, while Cassius regretfully intends that Brutus kill the emperor so that he (Cassius) can collect a bequest to keep his family from starving. There is then a *range* of possible degrees of callousness about murdering Caesar within which both Cassius and Brutus will fall: namely,

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53. See *supra* notes 5-8 and accompanying text.

54. See *Tison*, 481 U.S. at 156 (discussing retributivism's tight link between culpability and liability); *supra* notes 5-8 and accompanying text (discussing the focus on culpability in legal systems amenable to accomplice liability); see also *infra* Section V.C (considering how such views could still take factors besides culpability into account when determining liability).

whatever range of such attitudes is compatible with ultimately deciding to seek his murder despite the countervailing reasons. But this is precisely the same range within which *principals* may be convicted of murder. So it makes sense to treat accomplices in this range like principals—which is just what the law of complicity does.<sup>55</sup>

This analysis also shows that we shouldn't stretch the Supporting Intention Condition to cover more cases. If Cassius, despite helping Brutus, does *not* intend that Brutus intend to kill, then he does not share blameworthiness for Brutus's act. He does not support Brutus's guilty mind, which is by hypothesis *indispensable* to the precise injustice that the criminal law aims to rectify. And if Cassius does not support the essential core of Brutus's crime, it would be a mistake to count him an accomplice to *Brutus's very crime*.<sup>56</sup> As Sayre writes, "it is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual."<sup>57</sup> The Supporting Intention Condition, then, is necessary.

It is also sufficient—but only in combination with the Non-Failure Condition. As noted above, if Cassius intends that Brutus plan to burgle the palace but expects that Brutus will not—say, he expects Brutus to hit a roadblock—then Cassius might *not* evince the same insensitivity as Brutus to the reasons against the burglary. After all, he thinks it won't happen.

Even more clearly, Cassius is no accomplice if he *intends* for Brutus's plan to be thwarted. Recall the case in which Cassius wants Brutus, an elusive serial killer, to form and somehow manifest another murderous plan (this time against Caesar), so that Cassius can turn him in before the killing. Cassius intends precisely that what he has promoted—Brutus's intention—*not* become the core of an act of murder. So he certainly isn't, like Brutus, insensitive to the harms of the murder.

Note, finally, that this standard's two conditions nicely align with the retributivist theories sketched in the Introduction. Those theories see curing injustice as the point of the criminal law. And the injustice in question is constituted by a guilty mind, expressed in conduct. Just so, the Supporting

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55. At the same time, just as courts can adjust punishment for principals (within a range) on the basis of their role in the crime and differing levels of malice, so may they impose lesser punishments on accomplices in cases where they think the accomplices less malicious than those they help. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 cmt. 4 (2012).

56. Maybe Cassius should still be held liable for something else, like knowingly lending material support to a serious crime without a proportionate reason. See *infra* Section V.A.

57. Francis Bower Sayre, *Criminal Responsibility for Acts of Another*, 43 HARV. L. REV. 689, 717 (1930).

Intention Condition and the Non-Failure Condition guarantee that what the accomplice intends to support is a guilty mind that (for all he knows or intends) will be expressed in action.<sup>58</sup>

### C. Comparison with Traditional Rationales

This standard provides a more solid basis for justifying the equal treatment of principals and accomplices. Traditionally, holding accomplices liable for the same crime as principals—quite apart from the particular mens rea standard used to do so—has been justified by appeal either to the rules of agency in civil law,<sup>59</sup> or to the idea of forfeited personal identity.<sup>60</sup> The justification just offered, which naturally fits my proposed mens rea standard, improves on both approaches.

Civil agency “requires a party to consent to being subjected to the control of another.”<sup>61</sup> Normally, of course, accomplices never actually consent to being liable for another’s crimes. If given a *choice*, who would? We might argue that “[b]y intentionally acting to further the criminal actions of another, the secondary party voluntarily identifies himself with the principal party,”<sup>62</sup> but this approach faces two problems. First, it assumes just what needs argument—that aiding someone means consenting to liability for his actions.<sup>63</sup> And this is by no means self-evident, as suggested by the second problem: The theory would stretch criminal liability to grotesque proportions, to match civil liability under agency law. It would render an accomplice criminally liable for all the “natural and probable consequences” of the principal’s conduct.<sup>64</sup>

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58. For more on why the guilty mind must be carried out, see *infra* Section V.C.

59. See GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 126 (2d ed. 1961) (discussing rules of agency where the accessory is not the promoter of the mischief).

60. See Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 111 (1985) (discussing the theory on which an accomplice “forfeits his or her personal identity”).

61. *Id.* at 110 (citing RESTATEMENT (SECOND) OF AGENCY § 1 (1957)).

62. Kadish, *supra* note 15, at 354.

63. See Jacob Kreutzer, Note, *Causation and Repentance: Reexamining Complicity in Light of Attempts Doctrine*, 3 N.Y.U. J.L. & LIBERTY 155, 164 (2008).

64. *People v. Feagans*, 480 N.E.2d 153, 159 (Ill. App. Ct. 1985) (“[W]hen one attaches himself to a group bent on illegal acts . . . he is accountable for the acts committed by the other members . . . as a natural and probable consequence thereof . . .”); see also WIS. STAT. ANN. § 939.05(2)(c) (West 2005) (holding an accomplice liable for any crime committed “in

This implication, though embraced in some jurisdictions, has been criticized as being generally “inconsistent with more fundamental principles of our system of criminal law.”<sup>65</sup> Not only does it hold people criminally liable for acts they did not even think of; it also leads to convicting people of specific-intent offenses who had no such intent. In both cases, it lets the state impose just the same criminal stigma, status, and punishment on the “implicitly consenting” helper as on the principal. And it does so even though “[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”<sup>66</sup>

The same factors cut against a second common argument for accomplice liability: that by aiding a principal, an accomplice “forfeits her personal identity,” which then becomes bound up in the principal’s.<sup>67</sup> This theory leads to the same over-inclusive results as the civil agency analogy.

But it faces another problem, of more interest to theorists than would-be defendants. By treating the helper as “no more than an incorporeal shadow,”<sup>68</sup> it so effaces his autonomy as to undermine the theoretical foundations of accomplice liability. Someone functioning as a principal’s mere tool can hardly be liable for influencing him.<sup>69</sup> The “forfeited personal identity” doctrine would thus undermine the very form of liability it tries to justify.

By contrast, the standard examined here would tie the helper not to the *principal* but to his *act*—and not by some obscure or question-begging theory of implied consent, but by the central aspect of what ties the principal *himself* to the act for criminal liability: his willing it. This approach, in other words, coheres well with “the common law view . . . that one became responsible for another person’s crime by *joining* in it rather than by *causing* it.”<sup>70</sup> Grounded on a fairer foundation, it avoids inculcating too many actors as accomplices.

pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime”).

65. LAFAVE, *supra* note 8, § 13.3(b), at 688.

66. *Tison v. Arizona*, 481 U.S. 137, 156 (1987).

67. Dressler, *supra* note 60, at 111.

68. *Id.*

69. *Cf. id.* at 116-17 (“Yet, it is precisely because the criminal justice system stigmatizes the guilty and metes out punishment for wrongdoing that the common law usually rejects forfeiture, and instead evaluates legal guilt and apportions punishment based on the degree of personal responsibility. . . . Rejection of the forfeiture doctrine makes it less likely that criminals will be treated inhumanely, or that rights perceived as fundamental will be denied.”).

70. Weisberg, *supra* note 19, at 226.



#### IV. CONCRETE IMPLICATIONS

Here I consider how my proposal measures up against the law's actual standards. First I consider the actus reus of accomplice liability, the defense of withdrawal, and the punishment to which accomplices may be subject. Then I consider which important decisions the proposal supports, which it would regard as questionable, and which it contradicts.

##### *A. Fit with Other Features of Accomplice Liability*

The account I have offered makes sense of the wide scope of the actus reus for complicity, which can be satisfied by efforts to encourage the agent to commit the act, not just by physical facilitation.<sup>71</sup> Indeed, that encouragement needn't causally contribute to the aided crime. Fittingly, then, the proposed standard requires only that the helper promote the principal's criminal intention, not necessarily its execution. More obviously than physical help, words of counsel or influence can support a criminal intention without making it likelier to be carried out successfully.<sup>72</sup> So this standard fits these otherwise hard-to-explain points of complicity doctrine.

It also fits rather snugly the defense of withdrawal or abandonment, provided for in the Model Penal Code and the statutes of a dozen states.<sup>73</sup> Section 2.06(6)(c) of the Model Penal Code offers a defense to one who "terminates his complicity prior to the commission of the offense and (i) wholly deprives it of effectiveness in the commission of the offense; or (ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense."<sup>74</sup> Someone covered by this defense has likely fallen short of the proposed mens rea standard, by

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71. Thus, the federal accomplice liability statute provides that whoever "aids, abets, counsels, commands, induces, or procures" a crime's commission is liable as a principal. 18 U.S.C. § 2(a) (2012).

72. For another way in which this proposal coheres with the actus reus of accomplice liability, see *infra* Section V.C.

73. See, e.g., DEL. CODE ANN. tit. 11, §273(3) (2007); 720 ILL. COMP. STAT. ANN. § 5/5-2(c)(3) (West 2002); IND. CODE ANN. § 35-41-3-10 (LexisNexis 2004); ME. REV. STAT. ANN. tit. 17-A, § 57(5)(C) (2007); MODEL PENAL CODE § 2.06(6)(c) (Official Draft 1985).

74. MODEL PENAL CODE § 2.06(6)(c).

violating its Non-Failure Condition: he has intended that the principal's intention be frustrated.<sup>75</sup>

Finally, this account makes sense of the law's allowing the same punishment—the same criminal conviction—for accomplices as for principals. Again, to intend that someone intend a crime (without intending or expecting that his intention will be thwarted) is to manifest the same type of insensitivity to the reasons against it as the principal has shown.

### *B. Fit with Case Law*

The standard defended here also fits the holdings of several major cases. It accounts for the ruling in *United States v. Campisi*,<sup>76</sup> where a defendant was convicted of complicity in forgery for selling stolen bonds to someone who forged signatures on them. Campisi likely thought that buyers would not purchase the bonds unless they thought them useful, and that they would not think them useful unless signed (and thus fit for market exchange). So for Campisi to achieve his own goal of selling the bonds, he must have intended that his would-be buyer intend to forge signatures on them. At least, a factfinder could reasonably have inferred this from the context.<sup>77</sup> And there is no evidence that Campisi expected (much less intended) that the buyer would be thwarted.

The same goes for another case prominent in the literature, *United States v. Scotti*.<sup>78</sup> At trial in that case, the court had issued a jury instruction possibly suggesting that a mortgage broker could be guilty of extortion just for knowingly helping a loan shark's victim to secure the money to pay him back. The Second Circuit affirmed a decision<sup>79</sup> rejecting that instruction—a result supported by my proposed mens rea standard. For all we know from the record, the broker did not stand to gain from the extortionate loan's provision, nor from the loan shark's criminal intention to provide it. So the record does

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75. This would certainly be true of someone who warned law enforcement (prong (ii) of the defense); it would be reasonable to infer about someone who tried to reverse any effect of his help (prong (i)).

76. 306 F.2d 308, 309 (3d Cir. 1962).

77. Note that even if the would-be buyer made someone else produce the false signature, he would be liable as an accomplice to forgery, and hence liable for forgery (not just its solicitation), so long as the signatures were indeed produced.

78. 47 F.3d 1237 (2d Cir. 1995).

79. *United States v. Rodriguez*, No. CR 92-1061, 1993 WL 534314 (E.D.N.Y. Dec. 16, 1993).

not justify inferring that he met the Supporting Intention Condition—that he intended that the loan shark form or keep his criminal intention. He need only have intended that, the loan having been made, its victim escape the risks of not repaying it.<sup>80</sup>

More ambiguous is the famous decision in *United States v. Peoni*.<sup>81</sup> In that case, Joseph Peoni had sold counterfeit dollar bills to Regno, who sold them to Dorsey. And Dorsey's resulting possession of the counterfeit bills was itself an offense. The question was whether this made Peoni an accomplice to Dorsey's possession. The answer was no, according to Judge Learned Hand's opinion. As an initial matter, it is implausible that Peoni could have intended anything but a criminal intention on Regno's part (i.e., to possess counterfeit bills). If Regno lacked this intention, after all, he would not have sought the bills from Peoni. But could Peoni expect Regno himself to seek to possess the bills without also seeking to pass them on? (Is there any other goal that Regno might have had in trying to get the bills?) And if not, didn't Peoni have to intend that Regno plan to pass those bills along, which in turn required that someone else (here, Dorsey) intend to possess them?

Maybe at some point the transactions become so distant, fade so much into the practical horizon, that Peoni cannot be expected to have had *any* stance toward them. How my proposal disposes of this case will depend on whether Peoni actually had a certain stance toward Dorsey's plans. The court seems to acquit him on the ground that he probably didn't: "[Peoni] ought not to be tried for [conveying counterfeit bills] wherever the prosecution may pick up any guilty possessor—perhaps thousands of miles away."<sup>82</sup>

Finally, my account definitely rules out cases that impose accomplice liability for mere knowledge of the link between aid and crime.<sup>83</sup> But this is a welcome departure from the current (and conflicted) doctrine.<sup>84</sup>

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80. For Yaffe, the Court reached the right decision here if it turns out that the broker "refrained from representing the act as helpful to the loan shark in the intention that guided his behavior. . . and so lack[ed] a commitment of non-reconsideration with respect to the crime." Yaffe, *supra* note 31, at 28. Did he form this intention but somehow avoid being thereby disposed to promote the loan shark's crime? Or did he form an intention simply to help the victim, while knowing that this would help the loan shark? I find it hard to tell the difference—not just from the Court's perspective, but from the broker's. For discussion of problems of this kind, see *supra* Subsection II.B.2.

81. 100 F.2d 401 (2d Cir. 1938).

82. *Id.* at 403.

83. For such cases, see *supra* notes 25-27 and accompanying text.

84. For criticism of the knowledge standard, see *supra* Section II.A.

## V. OBJECTIONS

I will end by considering objections to my account, based on alternatives dominant in the literature and case law.

### A. A Single Standard?

I have assumed that whatever the mens rea standard for complicity is, it must pick out *the same* stance toward the aided crime, regardless of how grave the crime might be or how extensive the aid. I have not considered views on which the required mental state varies based on these other factors.

And yet a helper does seem to be more blameworthy the more serious the crime he aids and the more extensive his aid. Someone might be just as culpable for, say, (a) contributing greatly to a crime that he merely foresees, as for (b) contributing little to a similar crime that he *intends* for the principal to commit. If punishment should track culpability, why not treat the helper as an accomplice in (a) as well as (b), despite the difference in his attitudes toward the aided crime? Some courts have indeed moved to applying a disjunctive mens rea requirement for complicity.<sup>85</sup>

But doing so is, first, unnecessary, because the law has tools besides accomplice liability for punishing those who aid major crimes. For example, if Cassius gives Brutus resources that he just believes Brutus will use for terrorism, Cassius is liable not for complicity in the terrorist crime, but for a distinct crime with its own punishment schedule: lending terrorists material support.<sup>86</sup> Such alternatives remove the main motive for letting a range of mental states count for complicity in the worst crimes – namely, the concern to avoid treating equally culpable helpers differently.

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85. For example, Weiss reads *Campisi* as follows:

*Campisi's* view of *Peoni* is that rather than establishing the purposeful intent standard in all instances of aiding and abetting liability, *Peoni* generally retains knowledge as the appropriate standard. It imposes the higher purposeful intent standard only in cases where the connection of the aider and abettor to the principal is too remote for liability on a lesser standard.

Weiss, *supra* note 2, at 1399. Likewise, Judge Posner has held that “there is support for relaxing [what he takes as the usually applicable *knowledge*] requirement [for complicity] when the crime is particularly grave.” *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985).

86. 18 U.S.C. § 2339B (2012) (criminalizing the conduct of “*knowingly* providing material support or resources to a foreign terrorist organization” (emphasis added)).

Of course, something might be unnecessary but still convenient. What reasons counsel *against* a disjunctive standard? Recall that anything sufficient for complicity must suffice for liability not just for some wrongdoing, nor even for some crime, but for the same crime, with the same resulting status and disabilities. There are many cases in which helpers who do not satisfy the Supporting Intention Condition might *not* be just as blameworthy; and cases where they are (because the aided crimes are especially heinous) can, again, be covered by criminalizing facilitation.<sup>87</sup> This means that expanding the mens rea standard would do some harm, and do no good that couldn't be achieved by other means.

So limiting complicity to the mental state described here is not only conceptually cleaner but more just, without imposing greater costs. No one needs to go unpunished just because he fails to meet my proposed unitary mens rea standard. By contrast, if that standard is expanded, some who do not deserve conviction *of the very same act* may well be subjected to it. There is therefore no special reason to make the mens rea standard disjunctive (as opposed to separately criminalizing certain kinds of facilitation). And there is some reason to keep it to one attitude. So we should.

And we do. At common law and under the Model Penal Code, for example, the accomplice can't be liable for a more serious crime than the principal, even if he is more culpable (say, because he tries to do great damage by encouraging the principal in a petty offense). The reason, again, is that we must be able to attribute to the accomplice the very same act, not just any equally blameworthy one. The accomplice is in this sense like a coauthor of a crime. And it would be odd if the standard for whether (or how much) one has authored an act varied by its moral gravity. After all, no one thinks that a man acting alone is *more* an author of his felonies than of his (equally voluntary and premeditated) misdemeanors.

It would also be odd if the extent of one's authorship depended on the extent of one's behavioral participation just as such: someone acting alone is not *more* the author of his acts, the more extensive the behaviors required to perform them, even apart from any differences in mental states.

If, on the other hand, "extent" of participation meant *proportion* of causal contribution to the act's commission, then it would be too much a matter of degree to determine a binary relation to the act (i.e., that of coauthor/accomplice or not). And it would be inversely related to the number of co-defendants, which contradicts intuitions and practice; liability is not

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87. Mueller, *supra* note 19, at 2186.

divided as helpers multiply. For all these reasons, we should let only one kind of attitude ground accomplice liability.

*B. Under-inclusive?*

Of course, my proposal might be under-inclusive not because its standard is uniform, but because it is simply too high. Here I address four cases of apparent accomplice liability that my theory might seem to miss.

First, suppose that Cassius wants Caesar dead, and goes to his palace with a knife to do the deed. On arrival, he sees that Brutus is about to kill Caesar himself but that Calpurnia might interfere. So Cassius kills Calpurnia to free Brutus up to kill Caesar. Brutus stabs, and Caesar falls. Clearly, Cassius is an accomplice in the imperial assassination. But does he slip beneath the bar set by my proposal? In particular, does Cassius fail to meet the Supporting Intention Condition? Maybe he does not intend that Brutus intend to kill Caesar. Maybe he merely intends to kill Caesar himself.

I disagree. All along in the scenario, Cassius has the ultimate goal that Caesar die. At first, he forms the intention to kill Caesar himself as a means to that end. But our intended means often shift in light of new information. When he arrives and sees what is happening, Cassius shifts to intending that Brutus kill Caesar as Brutus had planned. This is, in any case, the best way to make sense of Cassius's killing Calpurnia: it is intended as a means of bringing about Caesar's death, but could only be such if it frees Brutus of Calpurnia. So Cassius must ultimately intend (as a means) that Brutus kill Caesar—and hence, that Brutus keep his own intention to do so. The Supporting Intention Condition is satisfied after all.

This apparent counterexample highlights an important point. One can have goals that one would, in some respect, regret seeing fulfilled, or that one regrets needing to have at all. But this is nothing new: many surely regret the financial cost of fulfilling their dream of studying law; parents might regret needing to have a plan for punishing a child if she misbehaves.

These possibilities bring us to a second apparent counterexample. Cassius tells Brutus: "You shouldn't go through with your planned burglary; it's wrong. But assuming you will, you'll need to hire a chariot driver for the getaway, and it might as well be me, so that I can make some money." As we have just seen, one can have an intention that one would (in some way) regret to see fulfilled. So Cassius's desire that Brutus not kill does not *ensure* that he (Cassius) fails the Supporting Intention Condition. Still, he might seem to fall short of satisfying that condition; yet it seems clear that he should count as an accomplice anyway.

In addressing this kind of case, it helps to fill in some details. For instance, maybe it's only up to a point that Cassius intends that Brutus abandon his criminal intention. And once he's begun making the risky preparations to help, Cassius switches to intending that Brutus keep his intention so that his risk pays off. Then here, as in the first apparent counterexample, Cassius *ultimately* satisfies the Supporting Intention Condition.

But what if Cassius claims that he *never* intended that Brutus form or keep his criminal plan? Maybe he says that he was indifferent all along, or even that he intended – till the end – that Brutus *drop* his intention.

Take the first of these cases: Cassius pleads perfect indifference. Here, I suspect, most of us (and most courts) would be inclined to find complicity simply because we would disbelieve Cassius. If a minimally rational person positions himself to benefit from something's occurring, and does so despite great risk and steep moral cost, he will be disposed to intend whatever must happen for him to get the benefit.

As for the second case, Cassius's providing the getaway ride while doing *nothing* to thwart the crime suggests that he does *not*, in fact, intend that Brutus drop his intention. Someone who has an intention and an opportunity to carry it out *will* do so unless he is thwarted or changes his mind.<sup>88</sup> Yet if Cassius drives the escape chariot for Brutus's burglary, it is safe to think (absent contrary evidence) that he had some opportunity to discourage or thwart the crime. His failure even to try is thus evidence that he was not *disposed* to try – that he did not intend for Brutus to change his mind. Our intuitions about motivational psychology make us suspect that Cassius really did satisfy the Supporting Intention Condition.

The same would be true, I suspect, if Cassius (in a prescient attempt to avoid this Note's Non-Failure Condition) took only feeble and ineffectual steps to stop Brutus. Most juries would probably see such steps as pretextual. Or at least, they would judge their authenticity in light of the opportunities that Cassius had to thwart or discourage Brutus. Someone who really intends to stop a crime will take what he reasonably considers *sufficient* steps for doing so, within the limits of his opportunities. This seems just a natural extension of the Means Norm described in Part II, which holds that one who intends to do something and has the opportunity will, unless prevented, do it. Given the

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88. In particular, Yaffe defends the following principle: "If (1) from  $t_1$  to  $t_2$  D has the ability and the opportunity to C and does not fall prey to 'execution failure,' and (2) D does not (at least until after  $t_2$ ) change his mind, then D would C." GIDEON YAFFE, *ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 94 (2010).

chance, it would be just as irrational not to take what we considered sufficient action toward a goal, as to do nothing about it at all.

*C. Incompatible with the Actus Reus Requirement or Derivative Nature of Accomplice Liability?*

On the account sketched here, the basis for imposing accomplice liability is that if the helper has a certain mental state, he exhibits much the same insensitivity to the reasons against the crime as the principal. One might object that this justification focuses so much on intentions that it can't explain either the need for an actus reus, or the law's longstanding predication of complicity on the principal's crime having actually occurred.<sup>89</sup> If Cassius satisfies the Supporting Intention Condition and the Non-Failure Condition regarding Brutus's crime, how can Cassius's blameworthiness depend on whether he has yet taken concrete steps to help or encourage Brutus, or on whether Brutus finally acts?

It probably can't, if by "blameworthiness" we mean the state of Cassius's moral character. Once he has decided to offer Brutus encouragement, Cassius's character is hardly worse just after the resulting sound waves pass through his lips than just before. His moral character also seems unaffected by whether Brutus finally manages to carry out his intention. Yet under our law, either factor can affect whether Cassius is an accomplice. Does this undercut a basic assumption of my account<sup>90</sup>—that what most justifies imposing accomplice liability is the helper's culpability?

Not necessarily. Several considerations might justify requiring an actus reus before imposing any criminal liability, while allowing us to base the *kind* of conviction just on culpability.

Some take overt acts to be indispensable *evidence* of a guilty mind. Building on this point, some see banning mental states as beyond the law's competence because (they argue) it is bound to be ineffective: absent behavioral evidence, the accused could always just deny having had the forbidden thought. Or perhaps banning thoughts is immoral (say, because freedom of thought is inherently valuable).<sup>91</sup>

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89. See Kadish, *supra* note 15, at 355-56.

90. See *supra* notes 5-8 and accompanying text.

91. See Herbert Morris, *Punishment for Thoughts*, 49 *MONIST* 342, 365 (1965); cf. JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 441 (Robert Campbell ed., 5th ed. 2005) (1885) ("Where a criminal intention is evidenced by an attempt, the party is punished in respect of the



It is beyond this Note's scope to assess or compare these rationales. What matters is that for each of them, the problem is criminalizing pure mental states. None gives us any more direction than that. Once we are beyond the realm of purely "mental" offenses, none tells us whether (or how much) to give weight to an offense's behavioral features in imposing liability. None would undermine the premise of my account that once criminal liability is justified at all, it is features of the helper's mental state that will (or won't) justify imposing *accomplice* liability.

And again, that premise seems right by our law's lights for this reason: any actus reus that might *possibly* contribute to the principal's crime is enough for the actus reus of complicity. So it can hardly be the actus reus in which complicity law takes much interest. As we have seen,<sup>92</sup> that actus reus need not be prohibited in itself. It needn't cause the principal's crime. In fact, it needn't cause one iota of harm.<sup>93</sup> So while preventing harmful conduct may be of greater interest in other areas (e.g., principal liability for murder), *here* the act element must be doing no more than the minimal work that it does *across* the penal code—evidentiary, moral, or otherwise.

The second question is related: Can this culpability-focused account explain why our law has traditionally held accomplices liable only where the principals have gone through with their crimes?

criminal intention . . . Why the party should be punished in respect of a mere intention, I will try to explain hereafter. The reason for requiring an attempt is probably the danger of admitting a mere confession. When coupled with an overt act, the confession is illustrated and supported by the latter. When not, it may proceed from insanity, or may be invented by the witness to it."); Gerald Dworkin & David Blumenfeld, *Punishment for Intentions*, 75 MIND 396, 396-404 (1966) (examining moral arguments against punishing people just for evil intentions). See generally YAFFE, *supra* note 88, 215-36 (discussing possible justifications for a conduct requirement).

92. See *supra* notes 14-17 and accompanying text.

93. Cf. J.W.C. Turner, *Attempts to Commit Crimes*, in MODERN APPROACH TO CRIMINAL LAW 273, 277-78 (Leon Radzinowicz & J.W.C. Turner eds., 1945) ("The important point is, however, that the *actus reus* in attempt need not be forbidden in itself. It follows, therefore, that whereas in most crimes it is the *actus reus*, the harmful result, which the law desires to prevent, while the *mens rea* is only the necessary condition for the infliction of punishment on the person who has produced the harmful result, in attempt the position is reversed, and it is the *mens rea* which the law regards as of primary importance and desires to prevent, while a sufficient *actus reus* is the necessary condition for the infliction of punishment on the person who has formed that criminal intent. . . . If then, in attempt, the sole purpose of the *actus reus* is to establish criminal liability for the existence of *mens rea*, it is necessary to decide . . . what will be a sufficient *actus reus*.").

Assuming that a good theory must explain this feature,<sup>94</sup> there may be rationales consistent with my account. Recall from Section III.A that if a person meets my proposed standard, he has identified himself with what ultimately became (and what for all he intended or expected *would* become) an integral part of a criminal act. But this condition applies only where what he intends—the principal’s own intention—becomes part of a *real* commission by the principal.

If Cassius fulfills the Supporting Intention Condition and the Non-Failure Condition with respect to Brutus’s crime, then Cassius *and* Brutus both identify with the criminal mens rea, take some active steps toward either supporting or carrying it out, and do not expect or intend for it to *fail* to be carried out. In these ways, both mental and behavioral, they are similarly situated toward the crime before its completion. They have both contributed behaviorally to a crime whose guilty mind they share, though its execution depends on some factors beyond their control. And so, as seen in Section III.B, we may treat them the same: as guilty of the crime if it occurs, of its attempt if thwarted midway, or otherwise of nothing. The law does just that.

Of course, a purist about culpability might still reject the complicity doctrines discussed in this Section, on the ground that they wrongly make liability hinge *at all* on something besides blameworthiness.<sup>95</sup> Someone concerned *only* with culpability might thus take issue with (a) punishing accomplices when the principals’ crimes finally occur but not at all where they do not, or (b) punishing them less when the principals’ crimes are just attempted. But the same concern—that liability should vary only by culpability—would tell every bit as much against (a’) the law’s refusal to punish *principals* whose intentions are never carried out, and (b’) its mitigation of punishment for *principals’* mere attempts.

After all, under my proposed mens rea standard, principal and accomplice—whom the law treats alike—will be alike when it comes to culpability. So if that standard is applied, culpability-based objections to the

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94. The importance of explaining it is at least waning; many courts and jurisdictions are beginning to abandon the requirement that the crime actually occur before accomplice liability is imposed. See, e.g., ILL. COMP. STAT. ANN. 5/5-2(c)(2) (West 2005); ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (2006); MO. ANN. STAT. § 562.041.2(2) (2011). See generally Weiss, *supra* note 2 (noting jurisdictions that have abandoned this requirement).

95. Recall that this Note assumes that the link between culpability and liability should be quite strong. Otherwise it would be hard to justify the features of accomplice liability that the Note takes for granted in its search for the best mens rea standard. See *supra* notes 5-9 and accompanying text.

contours of accomplice liability should put equal pressure on the shape of principal liability; there should be no *special* problem with complicity law. Either the questioned features should be reshaped *across* criminal law, or the purist's exclusive focus on culpability (and hence, perhaps, accomplice liability as we know it) should be rejected.

## CONCLUSION

Striking in scope and consequence, accomplice liability marks our criminal law's most flamboyant reliance on culpability. To supporters, it may be the purest expression of the principle that injustice is not exhausted by injuries to people or property but includes the guilty minds that lead to these. To skeptics, it may be our riskiest wager on the idea that the social disorder that we may set right by law extends to disorder in the criminal's mind.

Without taking a position on this feature of our law but taking it for granted, I have attempted to address complicity doctrine's oldest dispute while keeping its basic shape. If we are ever justified in imposing accomplice liability, it will be where the helper has the same kind of blameworthiness as the principal. And he will have that if he meets the mental state requirement proposed here: he will have identified with what became the core of the principal's own criminal act, without expecting or intending that the crime not come to pass.

But the great *if* looming over this Note points to deeper questions: *Should* we hold accomplices so liable? Is culpability quite so central to justifying punishment? Maybe the long conflict addressed here cannot be chalked up to the complexities of criminal psychology alone. Maybe it reflects enduring ambivalence about more basic questions of punishment and justice—questions that will far outlast this controversy, just as they were raised by Plato before *Peoni*.