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Helping, Doing, and the Grammar of Complicity

DANIEL YEAGER

In the law a constant stream of actual cases, more novel and more tortuous than the mere imagination could contrive, are brought up *for decision*—that is, formulae for docketing them must somehow be found. Hence it is necessary first to be careful with, but also to be brutal with, to torture, to fake and to override, ordinary language¹

Introduction

This essay is about the grammatical² and, to a lesser extent, moral aspects of the law of complicity, which treats someone who helps someone else commit a crime as though the helper himself committed the crime. The point I hope to make here is similar to the one Professor Phillip Johnson made about what he called “the unnecessary crime of conspiracy.”³ In its current mode, complicity too is unnecessary, but for better reasons, I think, than Professor Johnson came up with for saying the same about conspiracy.

Johnson suggested eliminating the crime of conspiracy by calling conspiracies “attempts,”⁴ a change of description that is more than semantic. Attempting entails *trying*. Conspiracies may demonstrate their members’ antisocial character, but by agreeing to kill someone tomorrow or next month the parties have no more attempted or tried to commit murder than those who engage to marry attempt to marry, or those who register for a Bar Exam prep-course attempt to take the Bar Exam. Professor Johnson forces his redescription of conspiracy into the Model Penal Code’s definition of attempt which, even without his help, already makes a paranoid fantasy out of what it means to attempt a crime. Despite what the Code says, searching for a victim,⁵ reconnoitering,⁶ or possessing materials to be used in crime⁷ are not part of the grammar of trying to commit a crime; equally ungrammatical is Professor

Johnson’s claim that agreeing to commit a crime is trying to commit a crime.

I am not concerned here with conspiracy, but with complicity. My thesis is that in its current mode, where someone encourages someone else to commit a crime, complicity is unnecessary because it is redundant of laws that criminalize solicitation (a request that someone else commit a crime)⁸ or conspiracy (where the requested party agrees).⁹ Where complicity is not redundant, that is, where the criminal idea does not originate with the helper, or where there is no agreement to commit a crime, I would redescribe complicity as an inchoate or risk-based, as opposed to consequence- or harm-based, mode of criminality. This is because the essence of complicity is not causal as to the principal or perpetrator’s offense, but relational as to the principal offender, or simply expressive of the helper’s antisocial or dangerous character.¹⁰

A decade ago, Paul Robinson,¹¹ Sanford Kadish,¹² and Joshua Dressler¹³ each wrote excellent pieces on complicity, which before then had received little scholarly attention in America. In 1991, Oxford University Press published Keith Smith’s impressive one-volume treatise, which presents Smith’s views alongside centuries of English thought on the topic.¹⁴ None of these four principal works or the work examined therein, including that of criminal-law gurus George Fletcher and Glanville Williams, sees complicity as a form of inchoate liability. In the last quarter-century, three short articles recommending such an approach have appeared in English law journals: two by Richard Buxton and one by J.R. Spencer, both of whom focus more on the operation

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than on the meaning of complicity.¹⁵ The same can be said of the English Law Commission, whose 150-page consultation paper compresses into a few short paragraphs the essence and logic of complicity.¹⁶ The Model Penal Code, too, hints at the inchoate nature of complicity, but the Code's approach fails both grammatically (someone who tries but fails to help robbery has perpetrated robbery),¹⁷ and thematically. By placing the complicity provisions remote from the inchoate provisions, and by sentencing complicit actors like perpetrators, not like inchoate offenders, the Code's drafters demonstrate that they saw complicity as only nominally inchoate or risk-based.¹⁸ So it is that space left in the complicity *oeuvre*—at least that which is composed of theoretical accounts rather than “majority” and “minority” rules of decision—that this essay attempts to fill.

Complicity's legitimacy rests on its demand that the helper's contribution be significant enough to justify its punishment, but not so significant, dominant, or manipulative as to altogether wipe out the responsibility of

the principal. Someone who helps or tries to help someone else commit a crime exerts somewhere from no, to some, to too much constraint on his principal's autonomy or spontaneity. Too much influence exerted by the helper does not produce a case of complicity; rather, it produces a case of principal liability for the overreaching helper in his agent's “innocent” wrongdoing. I address this upper level of complicity in Part I. No influence, or an insignificant amount of influence, does not describe a case of complicity because the helper has not done enough to see him as “causally” related to the principal's offense. An example would be one party's oral solicitation of a deaf principal or of a principal who is already resolved to commit the solicited offense. Cases falling in between, which are meant to be pure cases of complicity, owe their existence entirely to the odd meaning given to the word “cause” in this context. I criticize these lower and core levels of complicity in Part II before arguing in Part III for the reconceptualization of complicity as a risk-, not harm-based offense.

I Principal Liability

Complicity rests on the premise that someone whom the law interchangeably calls an accessory, accomplice, aider and abettor, secondary party, or to whom I refer as a helper in his principal's offense is derivatively, not vicariously, liable for that offense. The difference between derivative and vicarious liability is that, unlike vicarious liability, derivative liability is based on the defendant's own actions, not merely on his relationship with someone else. Derivative liability and therefore punishment is shared equally among principals and helpers. Proof of the helper's derivative liability is heavily mediated by the conduct and attitude of the principal. If the principal commits a crime, then equal credit goes to the helper as well,¹⁹ provided that the crime which occurs is one the helper knew about and whose success the helper intended when he provided his assistance.²⁰

But why? Is it *as though* the helper committed the offense himself? Did he act *through* his principal? Certainly one can perform an action by getting others to perform it. “We say, for example, ‘Louis XIV built Versailles,’ even though the actual construction was not done by him.”²¹ Indeed, we can think of cases where the principal is not a principal at all, but is simply, perhaps metaphorically,²² a tool, instrument, or means of someone else, such as when the helper recruits a lunatic or a

child to do the deed. But those cases involve, or should involve, such coercion or manipulation of susceptible parties that the agent's act is fishy enough to be called not responsible or not spontaneous. Thus I find it unimaginable, although the law does not, that my providing a gun for a lunatic (I being unaware of his incapacity) to use to assault someone makes the assault mine and not his.²³ For my agent's act to be mine, I must act in a way that shows I see his act as such; it would be ungrammatical to say someone could “use” someone else inadvertently. Were I, for example, to pay you to paint my house, it is not as though I see myself painting the house—I see you doing it. The only evidence of my seeing myself doing it would be my placing such constraints on your autonomy, or my knowingly exploiting your *ex ante* lack of autonomy, that it ceases to be your spontaneous act. Thus if I were to force or even gently ask my young son to paint my house, then I have painted my house through my son.

I likewise would act through you were I to hand you a package into which I have secretly put a bomb for delivery to a victim I have in mind, or were I to place you under duress by threatening you with a greater harm if you do not act on my behalf than if

you do. A harder but still manageable case is where a malicious felon places an innocent or a police officer in circumstances where it is the innocent's right or the officer's duty to apply deadly force to repel the felon's threat of force, and the innocent or officer kills someone other than the malicious felon.²⁴ In such cases the felon does not act through the innocent or officer because missing is the malicious felon's purpose to use the killer. The felon's purpose is likely the opposite, except in so-called "shield" cases (where a third party is used by escaping suspects or those under siege as a shield against police gun-fire),²⁵ or in cases where one felon sends an innocent or a confederate outside to a certain death in order to facilitate the malicious felon's escape. With such a bad purpose and excessive risk at play, it is easy to see how in those cases we might conclude that the felon acts through the "killer" to deflect the justified use of deadly force away from the felon and toward another target.

Commentators are skeptical about whether and when someone can act through someone else. For example, Professor Smith begins the sixteen pages he devotes to the concept with the generally accepted supposition that an originating actor or user's "misconception of the quality of his own liability as being secondary should not inhibit his conviction as a principal."²⁶ Thus a user who mistakenly believes his agent to fully comprehend the situation is nonetheless a principal.²⁷ Smith then correctly rejects this supposition because innocent agency "intuitive[ly]" should be linked only to "those cases where the principal has consciously pursued an objective through the manipulative use of an agent."²⁸ But from there Smith concludes that the essence of innocent agency does not include killing someone by commanding one's highly trained mastiff to attack, or by recruiting a lunatic to shoot or stab.²⁹ For Smith, Kadish, and Peter Alldridge, these are cases of "causing harm," even though *poisoning* someone by way of a lunatic somehow is, at least for Smith, a case of innocent agency.³⁰

I am not sure where that gets us, except in the case of the mastiff, and even then, "causing" is the better description only if by "agent" we mean "human" as opposed to nonhuman "tools," "instruments," or "means."³¹ As for infancy and lunacy, those defenses point to conditions that negate responsibility, but not necessarily will, volition, or choice.³² Thus to call cases involving infancy and lunacy cases of causing harm does not necessarily improve upon our calling them cases of acting through someone else. If need be, philosophers of action could distinguish for us these

two ways of bringing about harm. They could explain how causing harm is a broader category than perpetrating harm,³³ how acts and their consequences are distinct,³⁴ and how causing harm, unlike perpetrating harm, is indifferent to the causal agent's intention or purpose—that is, how causing can be inadvertent or merely mechanical whereas using cannot.³⁵ But why, when faced with questions of principal liability, would we *want* to distinguish causing harm from perpetrating harm? A category for causing harm is necessary when the originating actor has *not* acted through someone else. In all other cases, however, that category is useful only if we cannot identify what it means to act through someone else. But there *are* criteria for that determination. If innocent agency or acting through someone else means anything, and none of the commentators referred to above denies that it does, then it is perfectly at home whether the agent is a lunatic, a child, or someone duped as to material facts, and whether the harm is committed by shooting, stabbing, or nonconsensual intercourse, provided

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that the harmful act is orchestrated by a user who is counting on the agent's susceptibility, incapacity, or lack of responsibility.

I mention mistake as to the woman's nonconsent in the context of a rape case because any serious student of complicity must contribute his two cents on the renowned *Regina v. Cogan and Leak*,³⁶ in which Leak misled the intoxicated Cogan into thinking Leak's wife wanted intercourse with Cogan. Cogan's mistaken and therefore "innocent" state of mind set him free, but Leak's guilty state of mind made him the principal rapist of his wife, even though he was exempt by law because of his status as cohabitating husband, and even though it was Cogan, not Leak, who penetrated Ms. Leak.

Applying what Professor Fletcher calls a "narrow" view of complicity, the English Court of Appeal implied that Leak could not be an accessory to rape unless Cogan was a principal rapist. If that were the

law, then neither Cogan nor Leak would be legally accountable for the wrong, even though the court insisted that “no one outside a court of law” would say Ms. Leak was not raped.³⁷ Professor Fletcher characterizes this latter observation as the basis of a “broad” theory of complicity that decouples the wrongfulness of an act from its attribution to a particular actor. Wrongfulness, the argument runs, can be considered abstractly, without reference to the liability of the perpetrator. Thus a helper can be liable for the wrongful-but-excusable actions of his principal. By covering a principal’s untoward actions or wrongs and not just his crimes, the broad theory expands the scope of derivative liability. Its virtue is its ability to obtain a conviction in a hard case like *Cogan & Leak*, where “[i]t is not clear whether Leak induced and exploited Cogan’s alleged mistake as to Ms. Leak’s consent.”³⁸ Our acceptance of the broad theory, Professor Fletcher points out, “would have the advantage of reserving the notion of perpetration-by-means to cases in which the party behind the scenes in fact dominates and controls an ‘innocent or irresponsible agent.’”³⁹ Consequently, the appellate court’s articulated basis for holding Leak liable—that he had “procured” Cogan’s unwanted penetration of Ms. Leak—was achieved by impressing innocent agency into service on facts that in Fletcher’s view did not warrant it. Professors Curley and Alldridge agree.⁴⁰

So does Professor Kadish.⁴¹ Kadish objects to the appellate court’s ruling in *Cogan & Leak* on the ground that rape is a too-personal and thus “nonproxyable” offense that cannot meet the demands of acting through someone else. Kadish admits his grounds for objecting are “wholly technical” or statutory, not conceptual.⁴² His point is that “[w]hat it means to be drunk and disorderly, to marry, to have sexual intercourse, or to escape from prison, is to do these things through one’s own person.”⁴³ Yet Kadish also admits that “[i]t does not seem implausible to hold that a ground control commander ‘pilots’ a plane when he “talks down” a nonpilot in an emergency, or that a conductor “drives” a bus when he encourages a six-year-old child to steer the bus down a hill.”⁴⁴

Professor Kadish may be too brisk with what he calls “our understanding of those actions.”⁴⁵ His gripe with what it means to act *through* someone else is determined by the limitations of what he thinks it means to *rape*. If, for example, it were not Cogan’s penis that penetrated Ms. Leak, but another foreign object, then I assume Kadish no longer would call the action personal to the rapist and therefore nonproxyable. What

kind of law would say that rape occurs if Leak had used a dildo, but not a penis? So too, is it really obvious that someone who tunnels under a prison to facilitate his insane lover’s escape from prison has not committed the offense of escaping from prison? Our understanding of these actions depends only partly on the wording of the statutes and jury instructions that set out the elements of criminal offenses; the rest truly

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is conceptual—dependent on the implications of words as used in ordinary language.

It well may be that Leak imagined himself acting through Cogan. To be sure, whether his misleading Cogan is the type of restriction on Cogan’s autonomy or spontaneity that the law of principal liability wants to recognize is not easily answered. *Cogan & Leak* is a far cry from cases involving automatons or agents who suffer from lunacy or infancy. It is not as though Leak were influencing a child—a bundle of desires with a will but no intelligence. *Cogan & Leak* is a difficult case, but that does not mean we don’t know what it means to act through someone else. It means that we do: “We could not recognize borderline cases of a concept as borderline cases if we did not grasp the concept to begin with.”⁴⁶

If identifying *Cogan & Leak* as a borderline case means sometimes culprits like Cogan and Leak should be acquitted, then the law—not what it means to act through someone else—really is “a ass.”⁴⁷ It is only the most crabbed definition or understanding of rape that could excuse Cogan or exclude acts that occur by way of another man’s penis as opposed to some other object. Cogan’s indifference to Ms. Leak’s desires should not absolve him; he was more than inconsiderate not to have first verified Mr. Leak’s representations with Ms. Leak, who at first tried to turn away from Cogan, and sobbed from beginning to end.⁴⁸ When faced with such conflicting data, Cogan was brutish not to desist.

II Making a Difference to the Principal

Then in what way is it *as though* helpers who do not coerce or manipulate their principals commit their principals' offenses?⁴⁹ The helper has merely helped. But helping, say, burglary, is not committing burglary; analytically, help can be withheld, or it wouldn't be helping at all. Nor is helping burglary trying to commit burglary, any more than "'argue' is equivalent to 'try to convince', or 'warn' is equivalent to 'try to alarm' or 'alert.'"⁵⁰ Because helping crime is distinct from committing the crime you're helping, complicity mis-speaks by treating a helper as a principal.

The law nevertheless treats a helper as a principal so long as the helper purposefully contributes to his principal's offense. "Contribute" in this context is like "cause," but not in its ordinary or what I call "strong" sense that would be familiar to any first-year student of torts. That familiar sense requires that a condition be a *sine qua non* or at least a substantial factor in the occurrence in question.⁵¹ Indeed, cause in the context of the law of complicity doesn't mean "cause" at all, although some, like Professor Smith, characterize it as such.⁵² At the least, a helper must render "actual"⁵³ aid that "mattered,"⁵⁴ "made a difference,"⁵⁵ or even worse, "presum[ably] caused"⁵⁶ the principal's actions. Only when the helper's actions "could not have been successful in any case" is there no liability.⁵⁷ And it takes such an extended use of "cause" or "contribution" to support the conclusion, for example, that lending a man a smock to keep a battery victim's blood from staining the batterer's suit made enough difference to the batterer to justify our treating the smock-lender as a batterer;⁵⁸ or, that an angry judge's interception of a telegram might have mattered in a murder because, had the victim received the telegram, he might have anticipated the gunman behind him when three gunmen stood before him and the crucial wire read, "Four men on horseback with guns following. Look out."⁵⁹ Even a door opened for a burglar "might possibly" make a difference to burglary through the window.⁶⁰

Above I mention only exceptional examples; but even essential cases of complicity, such as where a helper lends his principal a crow bar for a burglary or drives him to the situs of the crime, are not cases where the helper has caused the offense (if "cause" is given its customary meaning), even if, for example, the principal cannot drive a car. So long as the principal

might have entered anyway, either with his own crowbar or by other means, then why say "caused" or the less objectionable "made a difference" if we mean "helped" or perhaps more precisely, "tried to help"?⁶¹ According to Smith, "cause" for purposes of complicity covers "an event's exact occurrence, including time, place, extent and type of harm, and so on."⁶² Such an extravagantly loose sense of cause furnishes the law with a convenient way of passing through the mysterious workings of the principal, whom Professor Kadish calls a "wild card"⁶³ whose will otherwise poses "a barrier through which the causal inquiry cannot penetrate."⁶⁴ So we say it is *as though* the helper committed the offense because it is *as though* he caused the principal to commit it. Professor Paul Gudel has called this type of linguistic move "illegitimate" because it simultaneously uses a word in a special or technical sense that need not conform to our ordinary use of the word, while still trading on what we normally mean by it.⁶⁵ Gudel's criticism fits our use of cause here. Moreover, the linguistic move he criticizes excites but fails to address a fundamental question: What difference does it make whether the helper makes a difference?

Like Professor Kadish, Professor Dressler skips over this question. Dressler would impose on the law of complicity two modes of liability: causal and noncausal. For him, "[a] causal accomplice is one but for whose acts of assistance the social harm would not have occurred *when* it did The noncausal accomplice, on the other hand, renders unnecessary assistance."⁶⁶ Dressler's causal explanation covers all solicitors and suppliers of hard-to-find skills and materials, and even some that are not so hard to find.⁶⁷ In fact, only an otherwise superfluous helper whose opening a bank door hastens a robbery by seconds does Dressler call "noncausal," as opposed to one who hastens the job by an hour, whom he calls "causal."⁶⁸ These are unsatisfying causal accounts, as they must be, to avoid drifting into cases of principal liability. At one point Professor Dressler concedes that noncausal assistance is "[l]ike inchoate harm,"⁶⁹ but he does not say how or why he rejects that view for a view that uses simile to describe the thing itself.

Like Dressler, Professor Robinson endorses a causal account of complicity. Like me, Robinson sees com-

plicity as a spectrum of influence that the helper exerts on the principal's "degree of independent action."⁷⁰ We differ, however, in that his spectrum is comparatively fine-grained and he, like Dressler, believes in the dilute sense of cause that really isn't cause at all. Except for the would-be helper who exerts no influence on his principal, each of the following helping-actions, whose degree of contribution increases as the list goes on, is in Robinson's view causally responsible for the principal's acts: 1) the helper creates or helps create the situation where the offense occurs; 2) the helper encourages but does not otherwise aid his principal; 3) the helper facilitates the offense with minor aid; 4) the helper's contribution to the success of the venture is equal to that of the principal; 5) the helper is the mastermind or moving force behind the operation; 6) the helper causes the crime by clever persuasion of an innocent agent; and 7) the helper causes the crime by manipulating an innocent dupe.⁷¹

Robinson's position on complicity is hard to pin down because he directs most of his attention to the special case of felony murder and the doctrines known as "variation" and "common purpose," which address the specificity of knowledge that a helper must have about the offense or offenses his principal commits. But at least

one thing in Robinson's scheme is clear: he would not treat a helper as if he committed the principal's offense if the "causal connection" between the helper and the principal's harm is "tenuous at best."⁷² Less clear is the extent to which cases of complicity are "causal" in his, Dressler's, or anyone else's sense. If I understand him correctly, Robinson uses "cause" in a strong sense in what I've numbered 6 and 7—which are cases of principal liability—and in its dilute sense in all others, including the first, which he says involves "causal responsibility" even though, oddly, there is "no direct contribution to the conduct constituting the offense."⁷³

Neither Dressler's nor Robinson's explanation is adequate. Dressler tells us a bit more about what it means to cause an offense, but he supplies too few examples to illustrate his modes of causality (which sound overinclusive) and noncausality (which sound underinclusive). Robinson, on the other hand, without telling us in what way an encourager, minor facilitator, or creator of bad situations is causally related to the offense, identifies seven categories of complicity, which are not what he calls cases of "imputed liability," because of the presence of an essential causal connection that is strongly causal only in the principal-liability cases that comprise his last two categories.

III Complicity as an Inchoate or Risk-Based Offense

The resilience of this unusual use of "cause" may be due to the nature of derivative liability. For the helper's liability to flow backward from the principal's offense, the helper must have had something to do with the offense and not merely with the offender. The law of complicity requires that the helper be connected to his principal—since helpers must know the principal's purpose and encourage or assist him—and to the offense, since the helper must intend to facilitate and then cause or make a difference in the principal's offense. This dual role reflects two primary and shifting bases of criminality. The helper's relation to the principal reflects an endangerment- or risk-basis of liability, and the helper's relation to the crime reflects a consequence- or harm-basis of liability.

I hesitate, however, to suggest that delineating the risk or harm basis of complicity, "without more," could iron out the wrinkles in the fabric of complicity. Criminal laws are meant to prevent *and* repair—meant at

once to deter and control those who pose future threats of harm, *and* punish their past accomplishments of it. Consider, for example, the law of attempt. At their inception, laws that punish failed acts are risk-based: any law that punishes failure *at all* is aimed at risk-prevention. Yet something harmful does occur when the actor has done his best to harm someone, though his act misfires. Certainly a parent who discovers a razor blade in his child's Halloween apple *feels* harmed, though less so than he would were he less vigilant.

As an illustration of the workings of harm and risk rationales, consider California's law of attempt.⁷⁴ That law punishes nothing preparative, virtually nothing less than a bungled or misfired action.⁷⁵ Consequently, California law reflects less concern for risk than does the Model Penal Code, whose attempt provision punishes even the slightest gesture toward crime.⁷⁶ At sentencing, California punishes attempts half as severely as

completed offenses (which betokens a harm-orientation),⁷⁷ whereas the Model Penal Code punishes most attempts just like it does completed offenses (which betokens a risk-orientation).⁷⁸ But when it comes to conspiracy, California's double-counting of the completed offense and the agreement is murderously risk-based,⁷⁹ while the Model Penal Code takes on a harm-orientation by allowing convictions only for the completed offense or its underlying agreement, but not both.⁸⁰ We could subject every criminal law or criminal-law regime to a similar analysis, flipping harm and risk rationales, which could do whatever work we want them to. I do not care to do that here, but if I did, one thing would remain constant: harm principles should have little or nothing to do with the law of complicity.

The law does not see this, however. It is hornbook law that the helper plays a dual role in crime—he is both dependent or parasitic on the principal's criminal acts and is independently criminal in his own right. When it comes to demonstrating his connection to the crime that his principal commits, the law requires only scant proof, or it invokes the language of causation, although again I believe the language of helping or trying to help could perform this task more grammatically than can that of causation in its loose sense. If the law of complicity were not concerned with harm, then it would be indifferent to the presence or absence of cause on the helper's part. But not only does complicity concern itself with harm; it is more concerned with harm than with crime. I say this because under the popularized broad view of complicity, most defensive matters that may exculpate a principal are characterized as wrongful-but-forgivable excuses—arguably even defenses that do no more than expose an ill-advised or overcharged case—which benefit only or remain personal to the principal.⁸¹ This is a heavy tax laid on the helper, but it does leave intact the baseline assumption that a helper's liability is mediated and immediate at once. It is mediated in that the helper must help what he knows *his principal wants to do*. It is immediate in that, if their jointly desired harm occurs, however innocently on the principal's part (typically because he lacks the requisite guilty state of mind), then it is *as though* the helper committed a crime that, paradoxically, is not a crime at all. So viewed, liability is derivative not so much of criminality, but of harmful results, even those that are brought about by innocent or unconvictable principals. Thus it is more the helper's association with harm than with criminals at which the law of complicity strikes.

This state of affairs may express our belief that someone who helps an innocent wrongdoer is just the sort of person with whom the criminal law should concern itself. I share that belief, but only because the helper, with the requisite bad attitude, has associated himself with another's criminal purpose, which may or may not succeed. Granted, the success of the principal excites greater indignation than does a failure. But fixating on success or harm demands our reliance on a flimsy, rhetorical sense of cause, even when it is redescribed by Professor Kadish as not so much "cause," but "making a difference." Our instincts are correct about the propriety of punishing the helper, but our instincts are flawed if they divert our attention to the harm, which might have nothing that can be demonstrated, or nothing whatsoever, to do with the helper. The helper is an excessive risk-taker whose subjective, not manifest criminality, to lift a term from George Fletcher,⁸² is what warrants punishment, regardless of whether his aid or encouragement informs or merely glances off of his principal. Criminal associations *tend* to succeed more than solo ventures do; and while I agree with Professor Dressler that whether or not this is true poses a complicated and untravelled empirical question,⁸³ absent evidence that too many cooks really do spoil the broth,⁸⁴ there is nothing wrong with treating criminal associations as though they create excessive risks of manifest criminality. It is sound social policy to discourage criminal associations, to "give credit where credit is due—not merely to the ringleader—but to the ring" as well.⁸⁵ But we go too far when we conclude that, because helpers' help tends to help, helping is just like doing. It isn't. Again, because the relation of helping (unlike doing) to the ultimate harm is synthetic, not analytic, the actions are distinct and should be so treated.⁸⁶

I hope the law is not like it is simply to avoid problems in separating principals from helpers. I know those problems were in part what long ago led Parliament and Congress to invent new procedures for prosecuting helpers.⁸⁷ But if the current status of complicity is symptomatic of our indignation at behind-the-scenes masterminds in gaming, counterfeiting, prostitution, drug manufacturing, "building Versailles," and other far-flung enterprises that rely on hierarchy and division of labor, then this indignation only expresses that *we* think "game," "counterfeit," "sell sex," "manufacture drugs," and "build Versailles" describe actors and acts that the law does not. To answer who the real perpetrator is in these cases would require thorough

knowledge of the enterprise, of who really has a stake in the outcome, of who, if anyone, exercises hegemony over the act (again to borrow from Professor Fletcher),⁸⁸ and whether we think, for instance, that an underling's running a printing press is what we mean by counterfeiting as opposed to helping counterfeiting. Making these hard calls is part of judging, informing them is part of lawyering, and being subject to them is part of being a criminal defendant who treads into areas of questionable legality. Maybe I would find saying any of this unnecessary were indeterminate sentencing still the norm, but I doubt it.

If we know who the real principal is, then his helpers are punishable for one reason only: with an attitude more antisocial than that of indifference they, by associating themselves with a criminal venture, increase the risk of criminality by bolstering or enlightening someone with encouragement, information, or materials. It is not as though they haven't done anything; they *have* done something that we should denounce. Because of the limits of the grammar of helping, they are not attempting or trying to commit the principal crime; what they have done may be better described as inciting or soliciting, counseling, conspiring, facilitating, aiding and abetting, or attempting to do the same. By any other name, fundamentally, complicity is a more risk- than harm-based

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form of liability, and to see it as such follows naturally from our recognizing the grammatical if not the moral distinctions between helping and doing.

I am not the first to recognize the possibility of complicity's inchoateness; but I am one of the first to take it seriously. In a single paragraph of his 87-page article, Professor Kadish says that "it would [not] be incongruous to apply the concept of attempt to complicity, thereby converting it to a doctrine of inchoate

liability."⁸⁹ He then points out that a number of American jurisdictions have done just that, though only where the principal follows through and commits a crime.⁹⁰ Glanville Williams also recognizes the possibility, but for him the matter is "of little more than technical interest" wherever the punishments for inchoate and completed offenses are equally severe.⁹¹ Although Professor Smith finds non-causal explanations for complicity to be theoretically inadequate,⁹² he mentions, without elaborating, that "inchoate liability's functions and rationale must . . . be drawn into any reassessment and restructuring of complicity."⁹³ But the only use he finds for inchoate liability is to pave the way for his causal account of complicity. That account does not follow or include a reassessment of complicity, but finds a rationale for it in its current state. Because complicity requires the occurrence of a harm to attribute to the helper, and because complicity practically if not formally punishes helpers less severely than principals, Smith argues, complicity is not inchoate.⁹⁴

In 1969, Professor Buxton introduced the argument I make here: "Where the accused gives aid or furnishes materials preparatory to the commission of the principal offence he does the guilty act which the law seeks to forbid at that time, and . . . only by great artificiality of reasoning can his culpability be related to subsequent actions by the perpetrator."⁹⁵ Four years later, he pressed the English Law Commission to take his advice, which finally it has, although without attribution.⁹⁶ Buxton would punt the requirement that a principal offense occur. The benefits of such an alteration, he posits, would be the same as any risk-based crime, plus a separate crime of complicity would tighten up what he saw as the wildly uncertain scope of laws against solicitation and conspiracy.⁹⁷ Neither Buxton nor his successor, Spencer, has much further to say on point; the same can be said of the Law Commission, despite its lengthy consultation paper.

Professor Fletcher, too, refers to the potentially inchoate nature of complicity. After observing that generally the helper "contributes either advice or material aid, but he does not 'cause' the primary perpetrator to commit the offense,"⁹⁸ Fletcher explains the Model Penal Code's unsuccessful-helper provision with the drafters' singular justification: "[W]hether the aid is actually rendered is fortuitous; the actor is equally culpable and his dangerousness is equally great if the perpetrator never receives the aid."⁹⁹ Fletcher properly rejects classifying unsuccessful helpers as attempters of the ob-

ject offense because their actions are too preparative and because it is the principal's actions, not the ultimate harm, at which a helper's help is pitched. Fletcher then rejects classifying unsuccessful helpers as successfully complicit because to do so would create an anomaly whereby behavior too preparative for attempt would be punished as severely as a completed offense; this, he says, would "tak[e] the principle of subjective liability to its logical extreme."¹⁰⁰ But from there he decouples unsuccessful aid from solicitations that fail to move the requested party into action. His point is that a failed request poses a greater threat than failed aid and thus approaches, but still is not, a criminal attempt.¹⁰¹

Fletcher is correct in resisting the inflation of attempt laws, but wrong to limit his objections to unsuccessful as opposed to successful acts of complicity. I agree that helping a principal is not attempting the principal's crime; it is help that may or may not further the principal's goals.¹⁰² For the reasons I stated earlier, a solicitation may be punishable on its own, but not because it is an attempt or is even like an attempt.¹⁰³ It is neither. If, for example, I ask you to try to score a basket against Michael Jordan, it would

be ungrammatical for *me* to say (provided that you are not merely my means), "I tried to score against Jordan." I have encouraged *you* to try to score against him. We could, however, and I do, say that *all* complicit acts, successful or not, are too mediated by the principal to be treated like attempted or completed object offenses. Yet Fletcher says: "That the accessory actually contributes to the commission of the crime is part of what it means to be an accessory. There is no social wrong in acting to aid the crime of another, unless the aid actually furthers the criminal objective or strengthens the resolve of the perpetrator."¹⁰⁴ Really? Professor Fletcher's own excellent analyses of patterns of subjective criminality, by themselves, would lead an attentive reader to dismiss this claim out of hand. *How much* punishment an excessive risk-taker (as opposed to harm-causer) deserves is a separate and more familiar issue, which is taken up elsewhere in some excellent discussions, including his.¹⁰⁵ I am not suggesting that trying to help or helping is morally identical or adjacent to perpetrating a crime (how could it be?), just that neither type of action is grammatically anything like *perpetrating* harm.

Conclusion

In this essay I have tried to uncover some of the weaknesses, if not the pointlessness, of causal and causal-like arguments that claim to connect the helper to his principal's acts and not just to his principal. Just as an infelicitous solicitor "without more" is not a conspirator (never mind what the Model Penal Code says),¹⁰⁶ a conspirator is not a murderer, nor is some-

one who helps a murderer himself a murderer. By yoking together dissimilar modes of criminality the law of complicity not only is *needlessly* ungrammatical,¹⁰⁷ but it ignores its essentially inchoate foundations, and consequently skirts the law's responsibility of making careful, refined, graded, even nuanced distinctions about action, responsibility, and blame.

NOTES

1 J.L. AUSTIN, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 186 (J.O. Urmson & G.J. Warnock, 3d ed. 1979).

2 "Grammar" refers to the conditions under which words apply sensibly in the world—to their point, working, essence, or logic. See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 116 (G.E.M. Anscombe trans. 3d ed. 1958); S. CAVELL, *MUST WE MEAN WHAT WE SAY?* 1-12 (1976).

3 Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137 (1973).

4 See *id.* at 1161-64.

5 MODEL PENAL CODE § 5.01(2)(a) (Proposed Official Draft 1962).

6 *Id.* § 5.01(2)(c).

7 *Id.* § 5.01(2)(f).

8 *Id.* § 5.02.

9 *Id.* § 5.03(1)(a)-(b).

10 A principal or perpetrator is the primary actor—"someone whose liability can be established independently of all other parties." G. FLETCHER, *RETHINKING CRIMINAL LAW* 637 (1978).

11 Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984).

12 Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323 (1985).

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

- 14 K.J.M. SMITH, *A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY* (1991).
- 15 Buxton, *Complicity in the Criminal Code*, 85 L.Q. REV. 252 (1969); Buxton, *Complicity and the Law Commission*, 1973 CRIM. L. REV. 223; Spencer, *Trying to Help Another Person Commit a Crime*, in *CRIMINAL LAW: ESSAYS IN HONOUR OF J.C SMITH* 148 (Peter Smith ed. 1987).
- 16 Great Britain, The Law Commission Consultation Paper No. 131, *Assisting and Encouraging Crime* §§ 4.24-26, at 90-91 (1993). Professor Kadish kindly brought this document to my attention.
- 17 MODEL PENAL CODE § 2.06(3)(a)(ii) (Proposed Official Draft 1962); *Model Penal Code and Commentaries* explanatory note at 297, comment at 314 (1985).
- 18 MODEL PENAL CODE § 2.06 (Proposed Official Draft 1962) (located in Article 2, which defines "General Principles of Liability," including complicity); *id.* §§ 5.01-07 (located in Article 5, which defines and sets the punishments for "Inchoate Crimes," including attempt, solicitation, conspiracy, and possession of weapons).
- 19 *E.g.*, MODEL PENAL CODE § 2.06(1)-(5) (Proposed Official Draft 1962); CALIFORNIA PENAL CODE § 971 (West 1995).
- 20 *E.g.*, MODEL PENAL CODE § 2.06(3) (Proposed Official Draft 1962); 1 CALIFORNIA JURY INSTRUCTIONS (CRIMINAL) § 3.01 (West 1988). The attitude of the principal is part of what it means for him to "act" criminally or "commit" a crime. Likewise, the attitude of the helper is part of what it means for him to "act" criminally, "help," or "try to help" the principal offender. *Cf.* Hornsby, *Action and Aberration*, 142 U. PA. L. REV. 1719, 1727 (1994) ("There is an action if and only if there is an event of a person's intentionally doing something."); Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 89 (1991) ("The picture of action as consisting of two causally related components, one mental and one physical, is false to the way we normally talk and think about human acts. When we observe our fellow humans, we do not see merely bodily movements.").
- 21 J. SEARLE, *INTENTIONALITY* 110 (1983).
- 22 G. FLETCHER, *supra* note 10, § 8.5, at 639; Kadish, *supra* note 12, at 371.
- 23 *See* MODEL PENAL CODE § 2.06(2)(a) (Proposed Official Draft 1962); *Model Penal Code and Commentaries* explanatory note at 297, comment at 300-03 (1985) (no mention of whether originating actor must be aware of agent's innocence or of exactly which defenses make an agent innocent).
- 24 *See* *People v. Washington*, 402 P.2d 130 (Cal. 1965).
- 25 *See* K.J.M. SMITH, *supra* note 14, at 99 & n.17.
- 26 *Id.* at 97.
- 27 *Id.*
- 28 *Id.* at 103.
- 29 K.J.M. SMITH, *supra* note 14, at 105.
- 30 *See id.* at 103-10; Kadish, *supra* note 12, at 370-71, 382-84; Alldridge, *The Doctrine of Innocent Agency*, 2 CRIM. L. FORUM 45, 55-59 (1990).
- 31 G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 120, at 351-52 (2d ed. 1961).
- 32 *See* Moore, *Causation and the Excuses*, 73 CALIF L. REV. 1091, 1102-12 (1985).
- 33 *E.g.*, Danto, *Basic Actions*, in *THE PHILOSOPHY OF ACTION* 43, 45 (A. White ed. 1968) ("[P]erforming an action is not a truth-condition for 'causing something to happen'").
- 34 *E.g.*, A. WHITE, *Introduction to THE PHILOSOPHY OF ACTION* 2 (A. White ed. 1968) ("The successes we chalk up are the things we do, yet they are not the actions we take.").
- 35 *Id.* at 3.
- 36 *R. v. Cogan & Leak*, 1976 Q.B. 217 (Eng. C.A.).
- 37 *Id.* at 223.
- 38 G. FLETCHER, *supra* note 10, § 8.7.3, at 666 n.25.
- 39 *Id.* § 8.7.3, at 667.
- 40 Curley, *Excusing Rape*, 5 PHIL. & PUB. AFF. 325, 342-43 (1976); Alldridge, *supra* note 30, at 50-52, 59.
- 41 Kadish, *supra* note 12, at 382 (Fletcher's approach to innocent wrongdoing, "even with its drawbacks, appears to be the best doctrinal move to justify liability that a court could make without statutory changes").
- 42 *Id.* at 374.
- 43 *Id.*
- 44 *Id.* at 373 n.143.
- 45 *Id.* at 374.
- 46 J. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 8 (1974).
- 47 C. DICKENS, *OLIVER TWIST* 461 (London, 1966) (1st ed. London 1837-39).
- 48 *R. v. Cogan & Leak*, 1976 Q.B. 217, 221 (Eng. C.A.).
- 49 Here I am not talking about "joint principality," under which two parties divide the elements of an offense; *e.g.*, two parties rob when one commits the assault and the other the larceny. Since both the force or threat of force and the taking of property are analytically necessary to any robbery, neither party has the purpose to *help* robbery; both have the purpose of committing it. Contrariwise, where the help of one party is necessary only as an empirical or synthetic matter—that is, where a helper does not fulfill a statutory definition of crime or one of its elements, but his help *happens* to be necessary for the crime to succeed *on these facts*, then he is helping and not doing, regardless of how he may characterize his own actions. *See* J. SEARLE, *supra* note 46, at 4-11 (a proposition's "analyticity" makes it "true in virtue of its meaning or by definition." So, "Rectangles are four-sided" is analytic, whereas "My son is now eating an apple" is not; the latter statement is not analytic because its truth must be verified). For example, that a getaway driver may be needed for a *successful* robbery must be observed to be known; getaway drivers are not analytically necessary to robbery. Therefore, cases of joint principality do not involve help, regardless of how a joint principal characterizes his actions. *But cf.* G. FLETCHER, *supra* note 10, § 8.6.2, at 654-55 (cases of joint principality are hard because it is sometimes "virtually impossible to quantify the degree of causal contribution" between, say, the person who supplies the murder weapon and the person who pulls the trigger).
- 50 *See* J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 126 (J.O. Urmson & M. Sbisá 2d ed. 1975). ("[F]irstly, the distinction between doing and trying to do is already there in the illocutionary verb [*e.g.*, argue] as well as in the perlocutionary verb [*e.g.*, convince]; we distinguish arguing from trying to argue as well as convincing from trying to convince. Further, many illocutionary acts are not cases of trying to do any

perlocutionary act; for example, to promise is not to try to do anything.”). *Id.*

51 See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265-69 (5th ed. 1984 & Supp. 1988); W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW § 3.12, at 277-81 (2d ed. 1986).

52 K.J.M. SMITH, *supra* note 14, at 55-93; Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 702-08 (1930); Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2170-72 (1988).

53 Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581, 600 (1941).

54 Kadish, *supra* note 12, at 358-59.

55 *Id.*

56 See K.J.M. SMITH, *supra* note 14, at 19, 87-88; Dressler, *supra* note 13, at 132, 139-40; Robinson, *supra* note 11, at 657-58.

57 Kadish, *supra* note 12, at 359.

58 This example is taken from a German Case, Judgment of May 10, 1883, 8 RGSt. 267 (cited in G. FLETCHER, *supra* note 10, § 8.8.2, at 677-78).

59 State ex rel. Attorney General v. Tally, 102 Ala. 25, 69, 15 So. 722, 734 (1894).

60 *But see* Kadish, *supra* note 12, at 359.

61 See *id.* at 361 (“[I]f I provide the crowbar that the principal uses to gain illegal entry, my assistance was a but-for condition of the entry. To be sure, he might have entered anyway—with his crowbar or by other means. But he did not. My aid was necessary for what actually happened.”); G. WILLIAMS, *supra* note 31, § 121, at 359 (“[I]t is enough that the accused has facilitated the crime, even though it would probably have been committed without his assistance.”).

62 K.J.M. SMITH, *supra* note 14, at 84.

63 Kadish, *supra* note 12, at 360.

64 *Id.* at 336 (citing H.L.A. HART & A. HONORÉ, CAUSATION IN THE LAW 69 (1959)).

65 Gudel, *supra* note 20, at 80.

66 Dressler, *supra* note 13, at 124-25. (Emphasis added).

67 *Id.* at 130-34.

68 *Id.* at 133-34 n.206.

69 *Id.* at 125.

70 Robinson, *supra* note 11, at 632.

71 *Id.* at 632-33.

72 *Id.* at 635.

73 *Id.* at 633.

74 CALIFORNIA PENAL CODE §§ 663-65 (West 1995).

75 People v. Orndorff, 261 Cal. App. 2d 212, 67 Cal. Rptr. 824 (1968); 1 CALIFORNIA JURY INSTRUCTIONS (CRIMINAL) § 6.00 (West 1988).

76 MODEL PENAL CODE § 5.01(1)-(3) (Proposed Official Draft 1962).

77 CALIFORNIA PENAL CODE § 664(a)-(c) (West 1995).

78 MODEL PENAL CODE § 5.05(1) (Proposed Official Draft 1962).

79 People v. Travis, 171 Cal. App. 2d 842, 844 (1959).

80 MODEL PENAL CODE §§ 1.07(1)(b), 5.05(3) (Proposed Official Draft 1962).

81 *But cf.* Regina v. Richards, 1974 Q.B. 776 (Eng. C.A.).

82 G. FLETCHER, *supra* note 10, § 3.1.2, at 118-19.

83 Dressler, *supra* note 13, at 111-12.

84 L. KATZ, BAD ACTS AND GUILTY MINDS 261 (1987) (“[P]sychological evidence” backs up that “two heads are better than one” is more likely true than competing folk-saying about too many cooks spoiling the broth).

85 *Id.* at 252.

86 See *supra* notes 49-50 and accompanying text.

87 See Standefer v. United States, 447 U.S. 10, 15-20 (1980) (reviewing legislative history here and in England); W. LAFAVE & A. SCOTT, *supra* note 51, § 6.6, at 572-75 (discussing procedural problems that led to legislative changes and changes themselves).

88 G. FLETCHER, *supra* note 10, §§ 8.6.2-8.7.4, at 654-73.

89 Kadish, *supra* note 12, at 356.

90 *Id.*

91 G. WILLIAMS, *supra* note 31, § 126, at 382.

92 K.J.M. SMITH, *supra* note 14, at 55.

93 *Id.* at 93.

94 *Id.* at 70-78.

95 Buxton, *Complicity in the Criminal Code*, *supra* note 15, at 268.

96 Buxton, *Complicity and the Law Commission*, *supra* note 15, at 223-30; CONSULTATION PAPER NO. 131, *supra* note 16, § 4.24, at 90 (“[I]t is logically impossible that it should become the law, that the accessory must *cause* the commission of the principal crime; and for that reason also the actual occurrence of the principal crime is not taken into account in assessing the accessory’s culpability.”).

97 Buxton, *Complicity and the Law Commission*, *supra* note 15, at 228-29.

98 G. FLETCHER, *supra* note 10, § 8.5, at 635.

99 *Id.* § 8.8.2, at 679 (citing MODEL PENAL CODE § 2.06(3)(a)(ii) (Proposed Official Draft 1962)).

100 *Id.* § 8.8.2, at 680.

101 *Id.* § 8.8.2, at 681.

102 *But cf.* MODEL PENAL CODE § 5.01(3) (Proposed Official Draft 1962) (where principal commits or attempts no offense despite helper’s aid or encouragement, helper has attempted the offense he tried but failed to help).

103 Cf. Smith, *Secondary Participation and Inchoate Offenses, in CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS* 21, 24 (1981) (“The recognition by the law of the distinct crime of incitement means that . . . the mere incitement of another to commit an offence does not amount to an attempt to commit it.”).

104 G. FLETCHER, *supra* note 10, § 8.8.2, at 680-81.

105 E.g., Symposium, *Issues in the Philosophy of Law*, 37 ARIZ. L. REV. 117 (1995); Fletcher, *Constructing a Theory of Impossible Attempts*, 5 CRIM. J. ETHICS 53 (1986).

106 MODEL PENAL CODE § 5.04(1) (Proposed Official Draft 1962) (“agreement” with someone who feigns agreement or lacks capacity to agree is still a “conspiracy”).

107 Cf. *supra* note 1 and accompanying text.