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## Condoning the Crime: The Elusive *Mens Rea* for Complicity

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# Condoning the Crime: The Elusive Mens Rea for Complicity

Alexander F. Sarch\*

*There is a long history of disagreement about what the mens rea for complicity is. Some courts take it to be the intention for the underlying crime to succeed while others take mere knowledge of the underlying crime to be sufficient. Still others propose that the mens rea for complicity tracks the mens rea of the underlying crime—the so-called “derivative approach.” However, as argued herein, these familiar approaches face difficulties. Accordingly, we have reason to continue our search for the elusive mens rea for complicity. This Article develops a new account of the mens rea for complicity, drawing on an older approach informed by agency law principles. In particular, I argue that a distinct attitude of condoning the underlying crime is best seen as the mens rea for complicity. This approach yields a more principled framework for determining when accomplice liability is warranted than the existing approaches do. Moreover, it demonstrates that certain reforms to the current legal regime are warranted. Most importantly, the law should recognize that complicity comes in degrees. While reforms of this sort have been previously proposed for reasons relating to causation, this Article argues that different levels of complicity must also be recognized on independent mens rea grounds.*

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## INTRODUCTION

Under the federal aiding and abetting statute, “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”<sup>1</sup> There is widespread agreement that to be guilty under this provision, one must not only perform an action in aid of the conduct of the principal wrongdoer, but also perform that action with some mens rea (or mental state) toward the principal’s underlying crime.<sup>2</sup> However,

1. 18 U.S.C. § 2(a) (2012).

2. See 2 WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 13.2, at 337 (2d ed. 2003) (“It may generally be said that one is liable as an accomplice to the crime of another if he (a) gave assistance or encouragement or failed to perform a legal duty to prevent it (b) with the intent thereby to promote or facilitate commission of the crime.”); see also *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994)) (“[T]hose who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime.”). Although the word “intent” is used by these authorities in stating the general rule for complicity, this should not be taken to settle the debate about what mens rea toward the underlying crime is required for being an accomplice. It is not entirely clear what “intent” as used by these authorities means—in particular, whether this “intent” standard can ever be satisfied by something less than full intention or purpose, such as mere knowledge or even recklessness. See 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); see

there is a long history of disagreement about how, precisely, this mens rea should be understood.<sup>3</sup> As one commentator recently observed, “the law on the aider and abettor’s mental state is . . . best described today as in a state of chaos.”<sup>4</sup> Some courts have held that what is required for complicity is that aid be rendered with the *intention* or *purpose* for the underlying crime to succeed.<sup>5</sup> Others have held that it is enough to aid the principal’s conduct while merely having *knowledge* that the crime will be committed.<sup>6</sup> Yet others have taken an altogether different view, proposing that the mens rea required for complicity tracks the mens rea of the underlying crime—the so-called “derivative approach.”<sup>7</sup>

However, as argued below, these familiar approaches face difficulties.<sup>8</sup> It will become clear that one of the major challenges for the existing approaches is that they allow a defendant to be convicted as an accomplice, and therefore punished “as a principal,”<sup>9</sup> even when the accomplice appears to be substantially less culpable than the principal wrongdoer.

Accordingly, we have reason to continue our search for the elusive mens rea for complicity. This Article develops a new account of the mens rea for complicity, drawing on an older approach informed by agency law principles. Commentators often give the agency theory short shrift, but it has advantages and accordingly deserves careful scrutiny. Although I argue that the agency theory ultimately faces problems as traditionally formulated, recognizing the problems points the way to a better account. The account I end up proposing adopts the

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*also infra* note 6 and accompanying text.

3. LAFAVE, *supra* note 2, at 337 (“There is a split of authority as to whether some lesser mental state will suffice for accomplice liability, such as mere knowledge that one is aiding a crime or knowledge that one is aiding reckless or negligent conduct which may produce a criminal result.”).

4. Weiss, *supra* note 2, at 1351.

5. Most importantly, intention or purpose is suggested by Judge Learned Hand’s seminal opinion on complicity, which held that being an accomplice requires that the defendant “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.” *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). This formulation was then quoted approvingly by the Supreme Court in *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

6. The Supreme Court recently noted that with respect to what it termed the “intent” required for being an accomplice, it had “previously found that intent requirement satisfied when a person actively participates in a criminal venture with full *knowledge* of the circumstances constituting the charged offense.” *Rosemond*, 134 S. Ct. at 1248–49 (emphasis added); *see also* Weiss, *supra* note 2, at 1396–409 (discussing cases requiring only knowledge).

7. *See* Weiss, *supra* note 2, at 1410–14 (discussing the derivative approach); *see also infra* notes 70–71 and accompanying text.

8. *See infra* Parts II–III.

9. 18 U.S.C. § 2(a) (2012).

basic insight of the agency theory, but refines it in a number of respects and thereby seeks to place the law of complicity on a firmer normative foundation.

According to the account defended here, a distinct attitude of *condoning* the underlying crime is what should be regarded as the mens rea for complicity. A key feature of this account, which goes beyond the agency theory as traditionally formulated, is that one can condone the underlying crime to greater or lesser degrees. This, in turn, helps explain why accomplices sometimes can be less culpable than the principals they aid. As argued below, this feature of the theory helps it circumvent the problems that undermine existing accounts of the mens rea for complicity.

The upshot of the account defended here is that the law of complicity stands in need of reform. In particular, the law should begin to distinguish between *full* and *lesser* complicity. In the current legal regime, those who are found guilty as accomplices are punished as principals—i.e., subject to the same panoply of sentencing options as the primary wrongdoer. Under the reform advocated here, however, only full accomplices should be punished as principals, while lesser accomplices should be subject to less harsh sentences. Reforms of this sort are needed, I argue, in order to capture the fact that accomplices are not always as culpable as the principals they aid, and to avoid the resulting injustice involved in punishing every accomplice as a principal.

A number of prominent legal scholars have advocated reforms that are similar in spirit, but their arguments have tended to focus on issues of *causation*, not considerations pertaining to mens rea. For example, Joshua Dressler has argued that complicity law is a “disgrace” because “[i]t treats the accomplice in terms of guilt and potential punishment as if she were the perpetrator, even when her culpability may be less than that of the perpetrator . . . and/or her involvement in the crime is tangential.”<sup>10</sup> Accordingly, Dressler proposes reforming the law of complicity so that “[a] person is not accountable for the actions of the perpetrator unless her assistance not only satisfies the [but-for] causation requirement but there is evidence that the accomplice was a *substantial participant*, not a bit player, in the multi-party crime.”<sup>11</sup> In a similar vein, Baruch Weiss has argued that “in cases involving knowledge offenses, where the aider and abettor acts with mere

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10. Joshua Dressler, *Reforming Complicity Law: Trivial Assistance As A Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 428–29 (2008) (footnote omitted).

11. *Id.* at 447 (emphasis added).

knowledge . . . [liability should be confined] to cases where the aider and abettor has rendered not just any act of assistance, but rather one that is *substantial*.”<sup>12</sup> That is, he thinks we should “increas[e] the substantiality of the requisite act [of aid or facilitation] when [this is] necessary to protect a marginal participant.”<sup>13</sup> Similarly, Michael Moore contends that accomplices “should be held to the completed crime only if . . . they either *substantially caused* the criminal result, or that result counterfactually depended upon their action,”<sup>14</sup> while Christopher Kutz argues that “[a] rational law of complicity would recognize [the differing culpability levels of participants in criminal activities], by mitigating the accountability of [minimal] accomplices and aggravating that of instigators.”<sup>15</sup>

I am sympathetic to such arguments and the reform proposals they support. Nonetheless, these authors have not recognized the full force of the case for reforming the law of complicity. These scholars argue that because accomplices can *causally contribute* to the underlying crime to greater or lesser degrees, and because this in turn might bear on their culpability, special rules are needed to protect accomplices that contribute to the crime in only minor ways.<sup>16</sup> (Indeed, the U.S. Sentencing Guidelines already contain a provision that speaks to these causation-related concerns.<sup>17</sup>) However, one of the chief conclusions of this Article is that the law of complicity requires reform not just for causation reasons, but also for independent mens rea reasons. In particular, I argue that the mens rea for complicity, if it is to be understood in a normatively defensible way, must itself be seen as coming in degrees. Accordingly, a normatively adequate understanding of the mens rea of complicity provides a separate basis for recognizing that accomplices can be less culpable than the principals they aid, and therefore should not automatically be punished as principals. This Article’s investigation of the mens rea for complicity thus provides an additional ground—beyond mere considerations of causation—for the conclusion that complicity doctrine should be reformed to recognize different levels of complicity.

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12. Weiss, *supra* note 2, at 1487 (emphasis added).

13. *Id.* at 1488.

14. Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 451–52 (2007) (emphasis added).

15. CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 233 (2000) (footnote omitted).

16. See *supra* notes 10–15 and accompanying text.

17. U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (U.S. SENTENCING COMM’N 2011); see also *infra* note 129 and accompanying text.

I intend to back into the conclusion that complicity law requires reform—specifically, that it should distinguish between full and lesser complicity—by going back to first principles and re-examining what mens rea should be required for complicity. After offering a few preliminary clarifications in Part I, Part II critiques the most prominent contemporary accounts of the mens rea for complicity. Specifically, I consider two familiar single mens rea approaches, as well as the criticisms of them offered by Gideon Yaffe. I then raise doubts about Yaffe’s own account and proceed to argue against the derivative approach favored by some courts. Part III then investigates, but ultimately rejects, an older account of the mens rea for complicity that is based on agency law principles. Understanding the shortcomings of the agency law approach, however, points the way to a better theory, which I articulate and defend in the last two Parts of the Article. Part IV formulates a new account of the mens rea for complicity based on the core notion of condoning a crime. This account, I suggest, helps shed light on the hitherto intractable debate over the correct mens rea standard for complicity. Finally, Part V investigates how to practically implement the resulting view of complicity. The upshot is a more principled and flexible framework for determining when accomplice liability is warranted, one which more adequately explains and justifies criminal accomplice liability than the existing accounts. Having reached a more normatively defensible account of the mens rea for complicity, it thus becomes clear just how badly the law of complicity stands in need of reform.

## I. PRELIMINARIES

### A. *Complicity Law Generally*

To begin with, I should note a few basic points about the law of complicity that will serve as background for the discussion to follow. Accomplice liability is generally thought to be derivative in nature.<sup>18</sup> That is, the liability of the accomplice is thought to be parasitic on the liability of the principal wrongdoer. Accordingly, under existing law, accomplices are traditionally punished *as principals*.<sup>19</sup> That is, they are convicted of the principal’s underlying crime and thus are subject to the

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18. See, e.g., Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 337 (1985) (“The secondary party’s liability is derivative, which is to say, it is incurred by virtue of a violation of law by the primary party to which the secondary party contributed.” (footnote omitted)).

19. 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.”).

same panoply of sentencing options as the principal<sup>20</sup> (even if judges have discretion to tailor sentences as the facts of the case may warrant<sup>21</sup>).

Next, being an accomplice requires some act that aids or facilitates the underlying crime. My aim here is not to give an account of what this act requirement involves, as that is a complex question in its own right. But note that the act must be deliberate—i.e., it cannot merely be an accidental or involuntary body movement that happens to benefit the principal.<sup>22</sup> As Wayne LaFave notes, “[s]everal terms have been employed by courts and legislatures in describing the kinds of acts which will suffice for accomplice liability. The most common are ‘aid,’ ‘abet,’ ‘advise,’ ‘assist,’ ‘cause,’ ‘command,’ ‘counsel,’ ‘encourage,’ ‘hire,’ ‘induce,’ and ‘procure.’”<sup>23</sup> Moreover, an extremely minimal act can suffice.<sup>24</sup> As one case discussed by LaFave puts it, “[t]he assistance given . . . need not contribute to the criminal result in the sense that but for it the [criminal] result would not have ensued.”<sup>25</sup>

In addition, some mens rea or mental state directed toward the principal’s underlying crime is also required for being an accomplice—whether the required mens rea is taken to be purpose, knowledge, or something else.<sup>26</sup> This Article will consider a number of views as to what, precisely, the required mens rea is.

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20. Weiss, *supra* note 2, at 1345 (“The aider and abettor is guilty not of some lesser offense, but of the very offense committed by the actual perpetrator . . . . Thus, our taxi driver, if she is an aider and abettor, is guilty of bank robbery and subject to the same potential penalties as the actual bank robber who went into the bank, threatened the teller, and grabbed the money.”).

21. See, e.g., *Gall v. United States*, 552 U.S. 38, 46 (2007) (observing that since *United States v. Booker*, 543 U.S. 220 (2005), “the [Sentencing] Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are ‘reasonable’”).

22. See, e.g., MODEL PENAL CODE § 2.01(1)–(2) (1985) (noting that “[a] person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable,” and specifying, for example, that neither “a reflex or convulsion” nor “a bodily movement that otherwise is not a product of the effort or determination of the actor” is a voluntary act).

23. LAFAVE, *supra* note 2, § 13.2, at 337–38.

24. For example, in one case discussed by Glanville Williams, accomplice liability was imposed on a bystander to an assault who merely shouted “[I]et him have it, Chris!” during a brawl. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 126, at 382 n.2 (2d ed. 1961). For a more recent example, see *United States v. Ortega*, 44 F.3d 505, 507–08 (7th Cir. 1995), where an aiding and abetting conviction was affirmed for a defendant who knowingly “assisted the sale by pointing to the bag of heroin,” and said “over there.” See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.04(B)(1), at 508 (4th ed. 2006) (noting that “the degree of aid or influence provided is immaterial”).

25. LAFAVE, *supra* note 2, § 13.2, at 342 (quoting *State ex rel. Martin v. Tally*, 15 So. 722, 738 (Ala. 1894)).

26. See *supra* note 2.

### B. Two Clarifications

The discussion to follow will be limited in two respects. First, I shall focus just on the question of what makes accomplice liability *appropriate* or *deserved*, not the broader question of whether it is justified, e.g., by consequentialist considerations. To say that conviction of a certain crime, C, is deserved is just to say that the defendant possesses the required type and degree of culpability that is characteristic of the wrongdoing in cases of C.<sup>27</sup> By contrast, there may be extraneous considerations—such as facts about deterrence—that in principle could make it justified to expand the definition of C to permit conviction even when one does not strictly speaking deserve it.<sup>28 29</sup>

Since I am here concerned with when accomplice liability is deserved, I will be focusing primarily on retributivist considerations, and will not ask how the conclusions of this Article are affected by consequentialist considerations (which many take to be crucial to the justification of punishment).<sup>30</sup> Therefore, the arguments of this Article should be understood to be conditional on there being no serious problems from the consequentialist perspective (which there, of course, might turn out to be).

Second, since my focus here is the mens rea for complicity, I endeavor as far as possible to set aside the question of how much and what type of causal impact on the underlying crime (if any) is required for accomplice liability. Some have forcefully argued that it is unfair to treat those who make only a very small contribution to the underlying crime as accomplices, who are punishable as principals. For instance, Dressler has argued that one should not be “accountable for the actions of the perpetrator unless her assistance not only satisfies the [but-for] causation requirement but there is evidence that the accomplice was a

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27. If C is a malum prohibitum crime (i.e., criminal not because wrong in itself, but because prohibited), then there may be no wrongdoing inherent in C. But that is no problem, since it simply means that conviction of C would never be properly deserved, even though it might be justified by other deterrence or consequentialist considerations.

28. Of course, such a view would be controversial, as it would transgress the familiar “desert constraint” on punishment. See, e.g., Mitchell Berman, *The Justification of Punishment*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 141, 150 (Andrei Marmor ed., 2012) (observing that consequentialist justifications of punishment are often criticized as permitting “the practice of punishing persons known . . . to be innocent when doing so would achieve net social benefits,” thus violating the desert constraint on punishment).

29. Note also that in theory, there could also be consequentialist considerations that make it justified to *refrain* from convicting some defendants even though they might deserve it.

30. See Berman, *supra* note 28, at 144–46 (discussing considerations like deterrence, incapacitation, and rehabilitation, which commonly figure into consequentialist justifications of punishment).

substantial participant, not a bit player, in the multi-party crime.”<sup>31</sup> Weiss,<sup>32</sup> Moore,<sup>33</sup> and Kutz<sup>34</sup> have made similar suggestions.

I am sympathetic to the idea of treating putative accomplices differently depending on the degree of causal contribution they have made to the underlying crime (insofar as this might bear on an accomplice’s culpability). However, the question of what kind of causal contribution one must make to the underlying crime in order for accomplice liability to be warranted raises a host of thorny questions in its own right,<sup>35</sup> and since my topic here is only the mens rea required for complicity, I will largely steer clear of such causation issues in what follows. In particular, to avoid causation-related complications, I try to avoid examples in which a putative accomplice intuitively should not be convicted as an aider and abettor because he made only a small causal contribution to (was a minor participant in) the primary wrongdoer’s crime. It is precarious to draw general inferences about whether the defendants in such cases possess the level of culpability or type of mens rea required for complicity. After all, if such defendants seem to have only slight culpability, this might well be due to the small causal contribution they make to the underlying crime. Accordingly, the various accounts of the mens rea for complicity to be discussed below should be tested mainly against cases in which a *meaningful* contribution is made to the underlying crime, such that our intuitions are not misled by the complications involving accomplices who contribute only trivially or insignificantly to the underlying crime.<sup>36</sup>

31. Dressler, *supra* note 10, at 447.

32. Weiss, *supra* note 2, at 1487–88.

33. See *supra* note 14 and accompanying text.

34. See *supra* note 15 and accompanying text.

35. For example, is accomplice liability fairly imposed on someone who endorsed the underlying crime but failed to make its success any more likely? Should such a person be treated as a principal, or is some lesser degree of accomplice liability warranted instead? Does one’s actual causal contribution bear on one’s culpability and warranted punishment even when the actual amount of aid rendered was much greater than expected or intended (a kind of moral luck)? Or does one’s culpability depend only on the degree of causal contribution that was *foreseeable* at the time one acted in aid of the crime?

36. Another important clarification—perhaps obvious to legal practitioners—is this: in order to have the required mens rea (whatever it is) toward the underlying crime, one need not possess this mens rea toward that crime *under the description* “crime,” “criminal,” “wrong,” or the like. It is intuitive that one can be an accomplice to murder, for example, if one merely aids the principal’s conduct with the purpose of bringing about the victim’s death, even if one does not act with an intention the content of which is “I will help him commit murder.” Rather, to be an accomplice to murder, it should suffice that one merely act with an intention (or whatever other mens rea is required) the content of which is “I will help bring about the victim’s death.” More generally, in order to have the mens rea, M, toward the underlying crime, C, that is required for being an accomplice to C, the content of M does not have to be “C,” “crime,” “wrongdoing,” or

## II. PROMINENT CONTEMPORARY ACCOUNTS OF THE MENS REA FOR COMPLICITY

In this Part, I critique the most prominent contemporary accounts of the mens rea for complicity. I consider two familiar single mens rea approaches, as well as the criticisms of them offered by Gideon Yaffe. I then raise doubts about Yaffe's own account and proceed to argue against the derivative approach favored by some courts. In the next Part, I complete the critical portion of the Article by investigating the older agency law account of the mens rea for complicity.

### A. Intent and Knowledge

The simplest approach to identifying the mens rea for complicity is to take it that, in all cases, the putative accomplice must bear one of the criminal law's traditional mental states toward the underlying crime. Typically, this is either intent (purpose) or knowledge. Yaffe helpfully explains the difficulties that these approaches face.<sup>37</sup>

Consider first the view that to be an accomplice, one must have the intent or purpose of bringing about the principal's crime.<sup>38</sup> As Yaffe explains, this view is problematic because it sets the bar for accomplice liability too high. While it is clear that rendering aid with the intent that the underlying crime be committed is a sufficient basis for accomplice liability (provided the other requirements are satisfied), taking such intent to be *necessary* for complicity erroneously rules out some cases that intuitively should count. For example, Yaffe points out, "[t]he getaway car driver who is being paid separately from the proceeds of the robbery is surely an accomplice to the robbery, even though he does not seek the occurrence of the crime, or is in any other way committed

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anything similar, but could instead be just the relevant elements of C or the conditions in virtue of which those elements would obtain. This is a point that Gideon Yaffe has convincingly made in the attempts context. See GIDEON YAFFE, *ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 98–101 (2010) (discussing the conditions under which we may “enrich” the description of what someone is trying to do). The Supreme Court also recognizes this point. See, e.g., *Rosemond v. United States*, 134 S. Ct. 1240, 1250 (2014) (observing that the mens rea for complicity can be “satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense” (emphasis added)).

37. Gideon Yaffe, *Intending to Aid*, 33 L. & PHIL. 1, 8–11 (2014).

38. Weiss helpfully distinguishes two versions of the intent approach. One merely requires that “the aider and abettor purposefully intend and desire that the principal commit the acts that constitute a violation of the law.” Weiss, *supra* note 2, at 1393. (This is the version Yaffe discusses.) The second version requires not only desiring that the principal commit the acts that constitute the crime, but in addition that he has “a bad purpose—i.e., he or she must understand that the principal's conduct violates the law, and desire that the conduct violate the law.” *Id.* The latter approach recognizes ignorance of the law as an excuse that exculpates the aider and abettor, while the former does not.

to making it more likely that the crime takes place; this is a problem for the intent position.”<sup>39</sup>

Taking knowledge<sup>40</sup> to be the mens rea required for complicity is similarly problematic. It sets the bar too low. The reason, Yaffe suggests, is that according to the knowledge standard, one “who gives money to the panhandler, knowing [he] will use at least some of it to buy drugs” is an accomplice, although such a person intuitively “is not an accomplice to a drug buy.”<sup>41</sup>

Some might question Yaffe’s argument here. Perhaps this benefactor seems not to be an accomplice only because real life versions of this example would involve only recklessness.<sup>42</sup> When panhandlers ask for money, one is rarely *certain* that the money one gives will be used on drugs. The more common scenario involves only *suspicions* that it will. But supposing one asks the panhandler why he wants the money, receives the answer “to buy heroin,” and then proceeds to give the panhandler enough money to buy a dose, then it is not implausible that one really is complicit in the resulting drug buy.<sup>43</sup>

Nonetheless, Yaffe is right to doubt the normative credentials of the knowledge standard, as can be seen from other examples. Suppose you give \$10 to each of ten panhandlers, and you have conclusive evidence for thinking that there is a 60% chance each one will use the money to

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39. Yaffe, *supra* note 37, at 10.

40. Note that knowledge that proposition, p, is true, in the criminal law, is typically taken to mean a subjective belief amounting to practical certainty in p plus the truth of p—not justified true belief plus an anti-Gettier condition, as in the philosophical literature. See Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1374–75 (1992).

41. Yaffe, *supra* note 37, at 10.

42. Recklessness, as Ira Robbins notes, is acting with a “conscious disregard of a substantial and unjustifiable risk, or ‘conscious risk creation.’” Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 220–22 (1990) (quoting MODEL PENAL CODE §§ 2.02(2)(c), 2.02 cmt. 3, at 236 (Official Draft and Revised Comments 1985)).

43. On the other hand, perhaps it seems that the benefactor should not be an accomplice even if he did have full knowledge because, although concerned not to facilitate any criminal or harmful behavior, he nonetheless believes there are other justifying reasons to give the panhandler the money. For example, perhaps the knowing benefactor is motivated by compassion or a desire to show empathy, which he thinks is a reason that justifies helping the panhandler buy his heroin. Even if this were to describe the moral state of affairs, the law does not take this position. The law, that is, does not recognize *any* such justifying reasons to commit knowledge crimes—which marks a difference from recklessness crimes. For knowledge crimes, the only justifying reasons the law recognizes are the affirmative defenses. See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 474–75 (1992) (“Once an actor perceives a ‘highly probable’ risk of physical harm, she is prima facie liable for assault or murder. She must fit within a limited number of defenses in order to avoid conviction. But an actor who perceives only a ‘substantial’ risk is not liable unless her conduct both is unjustifiable and is a ‘gross deviation’ from social norms, considering all of the circumstances.”).

buy heroin.<sup>44</sup> Although you are not practically certain (i.e., do not count as knowing) that any particular panhandler will use your money to buy drugs, you are practically certain that at least one will. If knowledge were the mens rea for complicity, you would plausibly be an accomplice to at least one drug buy (likely several). But this might seem counterintuitive.

Alternatively, if one is tempted to dismiss the previous example because it raises questions about the legal import of statistical evidence,<sup>45</sup> notice that problems arise even without statistical evidence. Suppose a gas station attendant fills up a car knowing that its occupants are about to rob a bank.<sup>46</sup> Suppose this is not trivial aid, but makes the crime easier because the nearest other gas station is miles away (and driving there would make apprehension a bit more likely).<sup>47</sup> Despite knowingly aiding the robbery, the attendant seems substantially less culpable than the robbers themselves. Accordingly, it seems problematic to treat him as an accomplice who is punishable as a principal.

These examples suggest that knowledge is not always sufficient for having the mens rea for complicity. Nor is it necessary. As Yaffe notes, it seems complicity “can be present in at least some cases in which a person thinks it likely, but falls short of fully believing, that the activity he aids will involve the crime.”<sup>48</sup> For example, it seems proper to count as an accomplice “the getaway car driver [who] thinks there is a 65% chance his friends will rob the bank while inside and a 35% chance that they will simply make a legal deposit.”<sup>49</sup> Thus, it seems recklessness should sometimes also satisfy the mens rea requirement for complicity. We want our view of the mens rea for complicity to make room for this possibility, too.<sup>50</sup>

### B. Yaffe’s Account

Based on considerations like the foregoing, Yaffe plausibly

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44. For a similar example in a different context, see *id.* at 473–74.

45. See generally Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. REV. 1 (2012) (analyzing the moral and legal significance of acting with statistical knowledge).

46. This example is drawn from Weiss, *supra* note 2, at 1487.

47. We also must suppose that the attendant is not threatened, but is free to refuse, since otherwise he would have an excuse for selling them the gas.

48. Yaffe, *supra* note 37, at 14.

49. *Id.* at 10.

50. Kadish also takes the view that recklessness with respect to the underlying crime can suffice for accomplice liability. See Sanford Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 378–83 (1997) (arguing that in some cases, recklessly aiding the underlying crime can suffice for accomplice liability).

concludes that taking the mens rea for complicity to be intent is underinclusive, while taking it to be knowledge is overinclusive (as well as underinclusive).<sup>51</sup> Accordingly, Yaffe seeks a “middle way,” which would specify the mens rea for complicity so as to avoid the defects of both the intent standard and the knowledge standard.<sup>52</sup>

On Yaffe’s picture, intentions are attitudes that have certain *contents*, which can be thought of as a proposition describing the state of affairs intended.<sup>53</sup> Furthermore, Yaffe distinguishes between being committed by one’s intention to *promoting* some condition and merely being committed by one’s intention to the *obtaining* of the condition.<sup>54</sup> Thus, I might be committed to promoting some of the conditions in the content of my intention, but not others.

To use Yaffe’s example, suppose a sniper is instructed to assassinate the second UCLA graduate to speak at a graduation event at the school.<sup>55</sup> Thus, the content of the sniper’s intention is to shoot and kill the second UCLA graduate to speak.<sup>56</sup> Accordingly, (at least) the following three conditions are present in the content of the sniper’s intention: 1) the person targeted is the second speaker, 2) the person targeted is a UCLA graduate, and 3) the person targeted is shot and dies.<sup>57</sup> The sniper, Yaffe observes, is committed to taking steps to ensuring that 1) and 3) obtains, but not to ensuring that 2) does.<sup>58</sup> After all, for the sniper nothing is riding on the fact that he kills someone who happens to be a UCLA graduate. The important thing is that he kills the second speaker, who also incidentally has the property of being a UCLA graduate. Thus, Yaffe explains “[t]he sniper is committed by his intention to the co-occurrence of . . . three properties, but he is committed by his intention to *promoting* the occurrence only of” the first and third.<sup>59</sup>

What is the upshot of all this? Although the sniper is not committed to *promoting* the obtaining of 2), Yaffe thinks there nonetheless is a weaker sense in which the sniper is committed to 2) being true—and it is this weaker sense of commitment that Yaffe takes to be the crux of complicity liability. In particular, because the sniper has the intention

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51. Yaffe, *supra* note 37, at 8–11.

52. *Id.* at 13.

53. *See, e.g., id.* at 19.

54. *Id.* at 14.

55. *Id.* at 14–15.

56. *Id.* at 14.

57. *Id.* at 15.

58. *Id.*

59. *Id.* (emphasis added).

he does—with “UCLA graduate” included in the content of his intention—the sniper is committed to not abandoning his intention *merely on the ground that the person to be assassinated is indeed a UCLA graduate*. In other words, suppose the sniper walks into the room with the intention to kill the second UCLA graduate to speak. Now he is informed by the person next to him that, indeed, the second speaker graduated from UCLA. It would be irrational, Yaffe thinks, if the sniper were to give up his plan solely on the basis of learning this fact. Thus, when a condition is included in the content of one’s intention, one is at the very least “commit[ed] to not reconsider[ing] one’s intention on the grounds that one believes the condition to hold.”<sup>60</sup>

Thus, Yaffe’s proposal for the mens rea of complicity is this: “D meets the mens rea standard for complicity with P’s crime C *if and only if* D has an intention to aid that constitutes a commitment of non-reconsideration with respect to the commission of C by P.”<sup>61</sup> In other words, if the commission of P’s crime is included in the content of the intention that D acts with when he aids P, such that D would be irrational to reconsider that intention just based on the belief that P will commit the crime, then D has the mens rea required to be an accomplice.

Yaffe immediately proceeds to clarify that we must distinguish between considering a condition *in your deliberations* and that condition’s figuring into the *content of your intention*.<sup>62</sup> On Yaffe’s view, the former is not enough for having the mens rea for complicity; only the latter suffices.<sup>63</sup> Consider, say, the person who donates to the panhandler (“the benefactor”) and merely considers it highly likely (i.e., knows) that the panhandler will use some of the money on drugs. Despite taking this likelihood into account in his deliberations, he

60. *Id.* at 16.

61. *Id.* at 19.

62. *Id.* at 22.

63. Here’s how Yaffe puts this point: He says that different commitments are produced by i) merely considering a condition in your deliberations, as opposed to ii) having a condition figure into the content of your intention. He notes

that the first agent, who does not include the panhandler’s crime in the content of his intention, is under no rational pressure not to reconsider his intention to aid if the deliberation that issued in that intention was not fully rational. That is, if he was not under rational pressure to form the intention to aid in the first place, he is not under rational pressure to retain the intention in the face of facts that he took into consideration when he formed it but did not include in the content of the resulting intention.

*Id.* at 23 (emphasis omitted).

decides to give the panhandler some money nonetheless. However, it does not follow that this consideration is part of the content of the benefactor's intention. And this is the crucial thing for complicity, Yaffe thinks: It is only when a condition figures into the content of a person's intention that he is under rational pressure not to reconsider in light of the fact that that condition obtains. If the condition merely figures into the person's *deliberations*, this does not generate the same rational pressure not to reconsider.<sup>64</sup>

Thus, since the benefactor only considered in his *deliberations* the fact that the panhandler might use some of the money for drugs, it would not be irrational of the benefactor to reconsider upon being told that the panhandler will use some of the money on drugs. This might get him to see his deliberations as irrational, for example, thus causing him to give up his intention to donate. By contrast, if the content of the benefactor's intention were *to give the panhandler some money that will be used in part on drugs*, then he really would be committed to not reconsidering upon learning that the panhandler will use part of the money on drugs. It would be irrational of the benefactor to reconsider his intention just on this basis. After all, the purpose of intentions, Yaffe thinks, is to conclude deliberations and settle on a course of action, and reconsidering based on something that *is in the content* of the intention seems pointless, as this would reopen the very question that the intention was meant to settle (i.e., what to do). Thus, the benefactor does not count as having the required mens rea for complicity because the panhandler's drug purchase does not figure into the content of the benefactor's intention.

Accordingly, Yaffe's view may be summarized as follows:

*Yaffe's Mens Rea for Complicity:*

- 1) If (and only if) the commission of the crime by the principal is included in the content of the defendant's intention, *i*, when he acts to aid the principal, such that the defendant would be irrational to reconsider *i* just based on the belief that the principal will commit the crime, then the defendant has the mens rea required to be an accomplice of that crime.
- 2) If the defendant merely took the principal's crime into consideration in the deliberations that issued in *i*, but the crime does *not* figure into the content of *i* itself, then the

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64. More specifically, Yaffe claims, while you would remain barred from reconsidering if you believe your deliberations were *rational*, believing your deliberations were *not rational* allows you to reconsider based on learning that a condition you considered in those deliberations obtains. *Id.* at 23.

defendant is *not* under rational pressure not to reconsider *i* just based on the fact that the principal will commit the crime, and so the defendant *lacks* the mens rea for being an accomplice to that crime.

One might question Yaffe's view in various ways. I will raise two such questions here. Perhaps answers can be found, but I think these questions make it reasonable to continue our search for the mens rea for complicity.

First, there is a practical worry about how to implement Yaffe's view in the criminal law. In particular, how do we figure out exactly what is in the content of a person's intention and what is not? From the outside, there appears to be a vanishingly small difference between conditions that one merely considers in deliberating and conditions that are overtly included in the content of one's intention when one acts. It may well prove unworkable to make the imposition of accomplice liability turn on this distinction. It seems likely that in many real cases it will be virtually impossible to distinguish cases of the first type from cases of the second. For example, how are we in practice to tell the difference between (a) the benefactor who gives money to the panhandler after merely considering in his deliberations the fact that the money will be used on drugs from (b) the benefactor who gives the panhandler money while the content of his intention expressly includes the fact that the panhandler will use some of the money on drugs? After all, the benefactor behaves the same way in both cases.

The second worry is normative. In particular, why think there is any significant difference in culpability between these two versions of the benefactor that could justify imposing accomplice liability on the second, but not the first? After all, benefactor (a) is stipulated to have expressly considered the fact that the money he gives the panhandler will be used on drugs, and then decided to go ahead and do so anyway. Although the fact that the money will be used on drugs is part of the content of the benefactor's intention in case (b), this is not something that he has to be committed to promoting. The benefactor in (b) need not be committed by his intention to taking steps to ensure that the panhandler completes his drug buy—just as would be the case for the benefactor in (a). Accordingly, it is difficult to see why there is any difference in culpability between the two benefactors, which would make accomplice liability appropriate for one but not the other.

Now, Yaffe is aware of this objection. In response, he argues that benefactor (b) is worse because he is committed by his intention to not reconsider it “even if it was irrational to form the intention in the first

place.”<sup>65</sup> By contrast, benefactor (a) is not under rational pressure to refrain from reconsidering his intention. Yaffe explains:

[A] person [like benefactor (b)] who intends to *aid a drug buy* thereby gives himself a positive reason not to take the fact of the other’s commission of the crime as a reason to reconsider the way in which he directs his conduct. If he really has a reason to reconsider in light of that fact—if it was irrational for him to form the intention in the first place perhaps because it is wrong to buy drugs—his commitments silence those reasons. By contrast, [a] person [like benefactor (a)] who intends to aid a purchase, and considers the fact that it will be a purchase of drugs when he forms the intention, has not altered the landscape of reasons in this way. If he had no good reason to form the intention, he has no good reason to retain it in the face of the fact that he will be aiding a drug buy.<sup>66</sup>

Thus, benefactor (b) seems *more committed* to aiding the drug buy. He has given himself a positive reason (put himself under rational pressure) not to reconsider his intention even if that intention was irrationally formed. By contrast, benefactor (a) is under no rational pressure not to reconsider his intention if it was irrationally formed.

Might this explain why benefactor (b) is more culpable than benefactor (a)? Doubts remain. Yaffe’s claim is just that, supposing the intention to give money to the panhandler is itself irrational, benefactor (a) would not be irrational in reconsidering that intention on the ground that the money will be used for drugs, while benefactor (b) *would* be irrational for reconsidering his intention on that ground. But why think that this added irrationality for benefactor (b) makes a difference to his culpability—not to mention enough of a difference to warrant suddenly imposing accomplice liability? Yaffe’s idea, I take it, is that it is because this added irrationality stems from the greater *commitment* that benefactor (b) has to aiding a drug buy.<sup>67</sup> But this is far from obvious. After all, it is often going to be a matter of luck whether a given condition makes it into the explicit content of one’s intention or not. In many cases, whether it does might depend on factors outside one’s control that are not reflective of one’s culpability—e.g., whether one is pressed for time, or whether one is distracted or cognitively limited. Therefore, it does not seem that the question of whether a given condition has made it into the content of one’s intention will always signal a greater commitment to, or a greater willingness to tolerate, the criminal aims of the principal—as opposed

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65. *Id.* at 24 (emphasis omitted).

66. *Id.* at 24–25.

67. *Id.* at 24.

to stemming from arbitrary factors beyond one's control.

As a result, if the difference between benefactors (a) and (b) can sometimes be due solely to luck, it does not seem that one necessarily is more culpable just because the principal's crime has made it into the express content of one's intention. Therefore, the question of whether the principal's crime is contained in the content of the defendant's intention does not seem to mark the kind of deep difference in culpability that could ground decisions to impose or withhold accomplice liability in particular cases. Of course, it is possible that this worry might be answered with further work. But I think the questions facing Yaffe's view at least provide motivation to continue the search for the mens rea for complicity.<sup>68</sup>

### C. *The Derivative Approach*

An altogether different approach is to give up on the idea that there is a single mens rea that the accomplice necessarily possesses, and instead take the mens rea for complicity to vary with the mens rea required for the underlying crime. Weiss aptly labels this the "derivative approach."<sup>69</sup> Succinctly put, this is the view that "[t]he state of mind required [for] aiding and abetting is the same as that required to prove the principal offense."<sup>70</sup> Weiss traces this approach back to the Second Circuit's decision in *United States v. Jones*.<sup>71</sup> The legal rationale for this approach, according to the *Jones* court, was that Congress's intent in enacting the aider and abettor statute was to "erase whatever distinctions may have previously existed between different classes of

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68. Sherif Girgis has recently offered a different single mens rea approach, which follows in the footsteps of Yaffe's view. Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460 (2013). On Girgis's view, you are an accomplice when you aid the principal's conduct with the intent that the principal keep his intention to perform the underlying crime. However, this approach is deeply flawed for the simple reason that there clearly can be cases of complicity where the accomplice simply has no intention whatsoever about whether the principal keeps her intention to do the crime. For example, I might simply intend to aid you in your conduct and be well aware that you are committing a crime, but entirely indifferent as to whether you succeed in accomplishing the crime or not. (This can be illustrated using any case where mere knowledge seems sufficient for complicity—e.g., Yaffe's getaway car driver. Yaffe, *supra* note 37, at 10.)

69. Weiss, *supra* note 2, at 1410–14.

70. *United States v. Mangual-Corchado*, 139 F.3d 34, 51 (1st Cir. 1998).

71. 308 F.2d 26 (2d Cir. 1962) (en banc). It is not clear whether the Second Circuit adopts the derivative approach across the board any longer. See, e.g., *United States v. Scotti*, 47 F.3d 1237, 1245 (2d Cir. 1995) ("We also do not find it problematic that, in a seeming paradox, it is easier to prove principal liability under § 894(a)(1) than aiding and abetting under 18 U.S.C. § 2. . . . [A]iding and abetting requires a finding of specific intent or purpose to bring about the crime whereas § 894(a)(1) only requires knowledge." (citations omitted)).

principals and between principals and aiders or abettors.”<sup>72</sup> Therefore, since the statute provides that an aider and abettor is punishable as a principal, one might assume that Congress intended for the aider and abettor’s mens rea to be the same as the mens rea required for the principal to be guilty of the underlying offense.<sup>73</sup> (I take no stand on whether this argument for the derivative approach is sound.)

Despite its greater flexibility, the derivative approach suffers from normative flaws. One initial question is that complicity appears to be a unified phenomenon, and so it is not clear why the standard for being an accomplice should vary depending on the nature of the underlying offense. After all, it is not obvious why altering the mens rea required for the underlying offense would have any bearing on what it takes to be an *accomplice*. The explanation, it seems, must be that by making the mens rea for complicity vary in tandem with the mens rea for the underlying offense, the derivative approach seeks to ensure that accomplice liability for a given crime is only imposed if the defendant is *roughly as culpable* as the principal. But if this is the basic thought behind the derivative approach, the approach fails to make good on that rationale. The reason, as I’ll now go on to argue, is that the derivative approach allows defendants who are substantially less culpable than the principal to be convicted as an accomplice to the underlying offense, and therefore punishable as a principle.

Indeed, this is the main normative difficulty with the derivative approach: it allows aiders to be convicted as principals despite being *substantially less culpable* than the principal—an intuitively unfair result. Consider Sanford Kadish’s example of a father who knows his twenty-year-old son is prone to taking reckless joyrides.<sup>74</sup> Nonetheless, the father asks his son to fill the car with gas and gives him the keys. Predictably, after filling up, the son joyrides and kills a pedestrian (which could have been avoided with normal careful driving). The son is guilty of involuntary manslaughter, a crime for which recklessness toward the victim’s death suffices.<sup>75</sup>

On the derivative approach, the father is an accomplice. Since

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72. *Jones*, 308 F.2d at 31.

73. For cases that adopt the derivative approach, see Weiss, *supra* note 2, 1415–16 n.340. See, e.g., *United States v. Williams*, 985 F.2d 749, 755 (5th Cir. 1993) (“The defendants were charged with aiding and abetting the use of a firearm. An aider and abettor must share in the criminal intent of the principal. To establish the state of mind required for a § 924(c) conviction, the government must prove that a defendant had knowledge of the firearm. To convict, the jury was required to find, therefore, that each defendant as an aider and abettor knew that the gun was at least available to one of the defendants.” (citations omitted)).

74. Kadish, *supra* note 50, at 380–81.

75. See, e.g., MODEL PENAL CODE § 210.3(1)(a) (1985).

recklessness toward the death is the mens rea for the underlying crime, the same mens rea is required for being an accomplice to that crime. The father likely believed the probability of a death resulting from his son's driving to be lower than what the son believed it to be while joyriding. After all, the father is not certain the son will joyride, but the son, while driving, is certain of this. Nonetheless, supposing the father is aware of a high enough chance of death to count as reckless as to the death, he would have the mens rea for complicity on the derivative approach. However, this result seems implausible. The father intuitively is significantly *less culpable* for his part in bringing about the death than the son. It is the son, after all, who is responsible for the decision to take a joyride in the first place.

One possible, but I think ultimately unsuccessful, response is this: One might think that the father here is still culpable enough to warrant being convicted for involuntary manslaughter, even if he is less culpable than his son. Perhaps we can suppose that for each crime, there is a minimum level of culpability that must be attained in order for conviction of that crime to be deserved. Assuming there is such a minimum level, it then would not be unjust to convict the father of involuntary manslaughter as an accomplice if the father's culpability level is at least as high as the minimum required level for this crime. Nonetheless, this answer is inadequate to fully defuse the objection. After all, it is unclear how we might even begin to go about determining what this minimum culpability level is for any particular crime, and so it is doubtful that there is any such level for each crime. (There are other problems with the present response as well.<sup>76</sup>)

Thus, the derivative approach is problematic because it allows accomplices to be punishable as a principal even when significantly less culpable than the principal. Why is this a problem? Most importantly,

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76. Even if there were such a minimum culpability level for involuntary manslaughter, problems remain. The father's contribution to the crime is much less substantial than that of the son, and the lion's share of the responsibility for the death would lie with the son. The father's culpability level depends not merely on his mens rea toward the underlying crime, but also on the extent of his expected causal contribution to the bad results that are an element of that crime. This means that we can imagine variations of this father-and-son case where the father's recklessness toward the death of the victim remains constant, but his expected causal contribution is progressively lessened (e.g., by making it progressively easier for the son to gain access to a car for his joyrides). At some point, the father's culpability for the death of the victim will dip below the minimum culpability threshold required for involuntary manslaughter. Nonetheless, the derivative approach would say that accomplice liability should still be imposed on the father even in such a case simply because he had a reckless mental state toward the death of the pedestrian. Accordingly, we can be quite sure that versions of this father-and-son counterexample will arise for the derivative approach regardless of what the minimum culpability level for involuntary manslaughter might be.

because it is in tension with the intuitive principle that two people should be punished alike only if they are equally culpable. One might respond that judges can take such differences in culpability into account when exercising their sentencing discretion.<sup>77</sup> Nonetheless, there is something worrisome about convicting two individuals with substantially different culpability levels of the same crime. After all, this not only means that both are condemned with equal force by the law in virtue of being convicted of the same crime, but also that they are subjected to the same panoply of sentencing options. Relying on judges' sentencing discretion to avoid imposing similar punishments on those with substantially different culpability is at best an imperfect after-the-fact solution. Better to avoid the problem from the outset.

### III. THE AGENCY LAW APPROACH: ENDORSING THE CRIME

A different, older sort of approach to the mens rea for complicity relies on an analogy to agency law. This approach is commonly given short shrift, often being subject to easily-answered objections. But this approach merits careful consideration, for its insights and shortcomings are instructive.

#### *A. First-Pass Formulation of the View: The Real Endorsement Account*

Sanford Kadish explains the basic idea behind the agency law approach as follows:

The explanation for the intention requirement . . . may reside in the notion of agreement as the paradigm mode by which a principal in agency law (the second party in the terminology of the criminal law) becomes liable for the acts of another person. The liability of the principal in civil law rests essentially on his consent to be bound by the actions of his agent, who he vests with authority for this purpose.<sup>78</sup>

More explicitly, this analogy to agency law may be summarized as follows: On the civil side, the principal authorizes the act of his agent (or ratifies it after the fact) and in this way the principal consents to be bound by the acts of the agent. Adapting this idea to the criminal law, the criminal accomplice (or secondary party) is understood as the analog of the civil law principal. The perpetrator of the underlying crime (the primary defendant) is understood as the analog of the civil law agent. Thus, insofar as the accomplice authorizes or endorses the primary wrongdoer's conduct, he is deemed to have consented to be "bound" by it—i.e., responsible for that conduct and its (foreseeable)

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77. See *supra* note 21 (noting that the Sentencing Guidelines are advisory).

78. Kadish, *supra* note 18, at 354.

consequences.

One might have doubts about this basic sketch of the view, depending on how the details are spelled out. In particular, trouble seems to arise if the theory is formulated in terms of either consent to be bound or authorization. But these preliminary problems can be avoided, I suggest, by appeal to the idea that the mens rea required for being an accomplice is an attitude akin to the intuitive notion of *endorsing* the principal's underlying criminal conduct. This notion of endorsement can be understood roughly as the attitude of being in favor of the principal's conduct, or positively inclined toward it. (In the next Part, a notion akin to endorsement will be formulated with greater precision. It will form the centerpiece of my own account of the mens rea for complicity.<sup>79</sup>)

To start, some have objected to this sort of agency law view on the ground that consent to be bound often is not present in real cases of complicity. One commentator, for example, worries that “[n]ormally, of course, accomplices never actually consent to being liable for another’s crimes. If given a *choice*, who would?”<sup>80</sup> However, this objection is misguided since virtually no one would knowingly accept liability—i.e., the penalties—for another person’s misconduct if the alternative is to avoid such liability. However, people might very well consent to be on the hook for the actions of another before it is known whether any liability will ensue. That is, one might well accept the *risk* of sanctions in return for the perceived benefits of aiding or partaking in the principal’s crime.

Still, there is a deeper worry here, which is that actual consent to be bound is intuitively too high a bar for accomplice liability. In many cases the accomplice will not actually consent to be bound by the principal’s crime—i.e., will not think to himself when acting: “I know there’s a chance I might get punished for this, but I’m ok with that; I’ll help the principal come what may.” Nonetheless, this concern can be answered. For in many cases where actual consent to be bound is lacking, the accomplice might still possess an attitude of approval or endorsement toward the principal’s conduct. And acting to help the principal with such an attitude of endorsement seems to be a fair basis for *attributing* the consent to be bound to the accomplice—i.e., for taking there to be *constructive* consent on the part of the accomplice. Thus, the way to construe the theory under consideration is to say that being an accomplice requires acting to aid the principal with something

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79. See *infra* Part IV (developing the condoning theory of complicity).

80. Girgis, *supra* note 68, at 482.

like the mental state of *endorsement* toward the principal's criminal conduct (or at least the relevant elements of the crime, even if not the principal's action under the description "crime").

A second, somewhat related objection to the present type of theory would arise if the agency law principal-agent metaphor is taken seriously, and the view were spelled out in terms of *authorization*. The trouble is that the principal-agent metaphor seems strained in many actual cases of criminal activity involving multiple actors. Recall that this metaphor in the criminal context is premised on the accomplice's authorizing (or ratifying) the conduct of the primary defendant, such that the accomplice is analogous to the civil law principal and the primary defendant corresponds to the civil law agent. However, in many cases the accomplice clearly will not be in any position to decide whether or not to authorize the principal's actions.<sup>81</sup> Perhaps the accomplice would be in a position to do so if he were the one who ordered, initiated, or requested that the principal engage in the underlying criminal conduct—as when the accomplice is the mastermind and the principal is the henchman. But in very many cases, this sort of power relation will not be present. Often the accomplice will merely be an assistant or a helper of the principal.<sup>82</sup> If the principal is the leader and the accomplice is merely a hanger-on, someone who takes a back seat and only assists the primary defendant, then it seems the accomplice would be in no position to authorize or permit the primary defendant's conduct.<sup>83</sup>

As with the first worry, the answer to this problem is to construe the theory in terms of the accomplice's *endorsement* of the principal's conduct. After all, even where the accomplice is not the leader of the group of wrongdoers, but rather merely an assistant or helper, the accomplice might nonetheless act from an attitude of endorsement toward the principal's conduct. Accordingly, it is more plausible to premise accomplice liability on the mental state of endorsement than to premise it directly on agency law concepts like authorization and ratification.

With these clarifications in hand, a first-pass statement of the agency law theory can now be given. I call it the "real endorsement account"

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81. As Dressler notes, sometimes they will merely be "bit players." Dressler, *supra* note 10, at 447.

82. *Id.*

83. Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 110 (1985) (objecting to the agency law theory on the ground that a "criminal accomplice is responsible for the acts of another [P] even if . . . [P] is not under the accessory's direct control or supervision").

because it depends on whether the putative accomplice *really* acts with the mental state of endorsement.

*Real Endorsement Account:* Putative accomplice, D, is guilty of crime, C, as an accomplice if and only if:

- 1) D voluntarily does something in aid of (that influences, assists, or makes easier) the principal, P's, commission of some legally unjustified and unexcused conduct,<sup>84</sup> and
- 2) D acts to provide this aid with the requisite attitude of endorsement toward P's conduct (i.e., either under the description "crime," "wrong," etc., or else simply toward each of the relevant elements of the crime).<sup>85</sup>

One welcome result of this view is that it captures cases in which the accomplice does not consciously consider whether to endorse the underlying criminal conduct or expressly think to himself that he consents to be bound by it. After all, being in favor of the principal's conduct, or being positively inclined toward it, does not require thinking to oneself when helping the principal: "I approve of what he is doing." The accomplice can act from the requisite attitude of endorsement even if his approval of the crime does not expressly figure into the content of an occurrent thought (just as one can act on a desire even without consciously thinking "I want this"). A second beneficial result of this account is that it avoids the result that after-the-fact expressions of approval of a crime can transform one into an accomplice—a possibility that has worried some commentators.<sup>86</sup> The account avoids this implication because merely possessing the relevant attitude of

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84. The phrase "unjustified and unexcused conduct" is used here, rather than "crime," for the reasons explained in Kadish, *supra* note 18, at 341–42 ("Sometimes the principal, though having violated the law with the required mens rea and *without excuse or justification*, enjoys some special defense that would have precluded his conviction at any time [like] a defense of diplomatic immunity or entrapment. . . . There seems no reason not to impose accomplice liability upon a person who helps him." (emphasis added)).

85. Although it is already implicit in 2), one might add a further condition requiring that there be the right kind of causal connection between 1) and 2). In particular, 1) must have been produced by or motivated by the mental state of endorsement mentioned in 2). If that attitude of endorsement is motivationally inert, then it is not clear that one would have a genuine case of complicity. This is the well-known *concurrency requirement*. See LAFAYE, *supra* note 2, § 6.3 (explaining that "[w]ith those crimes which require some mental fault . . . in addition to an act or omission, it is a basic premise of Anglo-American criminal law that the physical conduct and the state of mind must concur," where "concurrency" requires that the mental fault "actuates" the criminal act or omission).

86. For example, in discussing the closely related "forfeiture theory," Dressler objects that "a pure forfeiture system would justify punishment of those who ratify prior criminal acts." Dressler, *supra* note 83, at 117.

endorsement (i.e., satisfying 2)) does not *suffice* for complicity. In addition, one must act to aid the commission of the crime (i.e., satisfy 1)). After-the-fact expressions of approval of a crime may satisfy condition 2), but do not satisfy condition 1).

Now, one might wonder how such an agency theory relates to the traditional mens rea categories of the criminal law: purpose, knowledge, recklessness, and negligence.<sup>87</sup> The answer is that these traditional mens rea categories can serve as proxies for the underlying attitude of endorsement that in fact is required for being an accomplice. Thus, a jurisdiction that takes, for example, mere knowledge to be the mens rea for complicity would implicitly be assuming that to knowingly aid a crime is sufficient for having the requisite kind of endorsement. Of course, such an assumption may be disputed. But this just shows that on agency law theories (like the real endorsement account), to understand complicity in terms of just one of the familiar mens rea categories (as most courts do) can best be an approximation—a practical implementation, as it were—of the mental state that *in fact* figures into complicity.

#### *B. A More Sophisticated Formulation: The Objective Endorsement Account*

Despite its attractions, the real endorsement account faces problems of a certain sort that have led some commentators to incorporate an additional piece of machinery into the theory.<sup>88</sup> In particular, it seems that there can be cases where one does not actually endorse the wrongdoing of the principal, but still actively and knowingly aids it in a way that makes it appropriate to regard one as an accomplice.

For example, suppose Pete is a security expert with a knack for finding flaws in high-tech security systems.<sup>89</sup> One day, Pete learns that his neighbor, Thomas, is on his way to kill his rival who lives in a mansion across the street. The mansion has the most advanced security system on the market—supposedly impenetrable. Thomas was simply planning to blast his way into the mansion. But Pete had been studying precisely this system and realizes that this is the perfect opportunity to test his hypothesis that the system has a critical flaw. By pressing just a few buttons on the keypad, the system can be tricked into thinking that an intruder is an authorized visitor, thus creating a few minutes' delay

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87. See MODEL PENAL CODE § 2.02 (1985) (defining the mental states of purpose, knowledge, recklessness, and negligence).

88. Cf., e.g., Kadish, *supra* note 18, at 354–55 (discussing the idea of manifesting one's consent to be bound).

89. Thanks to Jake Ross for very helpful conversations about cases of this sort.

before the authorities are notified. If Pete simply crosses the street and presses a few buttons for Thomas, he can demonstrate the flaw and prove himself once and for all to be the preeminent expert in his field. Now, Pete has nothing whatsoever against Thomas's rival, abhors killing in general, and does not want Thomas to go through with the crime. Thus, Pete does not endorse the crime and would prevent it if he could. But he knows that in this case he is powerless to stop the crime. Without Pete's help, Thomas would have blasted his way in anyway, though this would have alerted the police a bit sooner and increased his chances of getting caught somewhat. Thus, let's stipulate, Pete's aid will at best lessen the risks and burdens Thomas faces in committing the crime. (Moreover, Thomas is heavily armed and it's useless for Pete to try to use defensive force against him. There are no police in the area, Pete does not have a telephone at hand to warn the intended victim, and so on.) Accordingly, Pete reasons that since Thomas will carry out the crime with or without his help, he might as well use this perfect occasion to prove skill as a security analyst. So he presses a few buttons on the keypad, tricks the system and proves that the hypothesized flaw does exist. Thomas gains entry to the mansion, as he inevitably would, and kills his rival.

Is Pete an accomplice to Thomas's murder? Intuitively the answer is "Yes." Although Pete was not a but-for cause of the crime, he nonetheless engaged in conduct that he knew would make it somewhat easier for Thomas to accomplish his criminal aims. Moreover, although Pete did not subjectively endorse or condone the killing, he nonetheless voluntarily involved himself in the crime when he did not have to. He could, after all, merely have stood back and avoided getting involved in the crime in any way. His decision to help out Thomas, despite the on-balance small degree of help provided, seems to be a sufficient basis for treating him as an accomplice to Thomas's crime.<sup>90</sup>

But notice that the real endorsement account cannot capture the result that Pete is any sort of accomplice. After all, Pete was stipulated *not* to have the requisite attitude of endorsement that the account takes to be necessary for complicity. By hypothesis, Pete does not endorse or desire Thomas's crime. If he were in a position to stop him from committing it, he would do so. Accordingly, the real endorsement account entails that Pete is not an accomplice of any kind.

These considerations might motivate one to move away from formulating the view in terms of *real* or *actual* endorsement, and

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90. One might worry that it would be unfair to convict Pete of murder on a complicity theory. After all, he seems much less culpable than Thomas. This is a problem I return to below.

instead to formulate it in terms of *objectively manifesting* one's endorsement of the underlying crime. After all, one might think that even though Pete subjectively does not endorse Thomas's crime, he nonetheless sends signals that would make it reasonable for an objective observer to infer that he does endorse it. Kadish introduces this idea by analogizing to contract law: "Under the prevailing objective approach of contract law, it is the principal's manifestation of consent, rather than his subjective state of mind, that determines the authority of the agent and rights of third parties."<sup>91</sup> The implication is that criminal complicity works the same way. Thus, Kadish offers the following, more complete summary of the agency law view:

    Insofar as *manifesting* consent to be bound by the acts of another is a general requirement for holding one person liable for the actions of another, the requirement of intention for complicity liability becomes more readily explicable. Obviously, in the context of the criminal law, literal consent to be criminally liable is irrelevant. But by intentionally acting to further the criminal actions of another, the secondary party voluntarily identifies himself with the principal party. The intention to further the act of another, which creates liability under the criminal law, may be understood as equivalent to manifesting consent to liability under the civil law.<sup>92</sup>

For the reasons given above, Kadish's talk of manifesting consent to be bound should be replaced with talk of manifesting *endorsement* of the primary defendant's underlying crime. With this substitution, we can state an objectified version of the endorsement theory as follows:

*Objective Endorsement Account:* Putative accomplice, D, is guilty of crime, C, as an accomplice if and only if:

- 1) D voluntarily does something in aid of (that influences or assists) the principal, P's, commission of some legally unjustified and unexcused conduct, and
- 2) D's act of aid was done with a mental state, M, toward P's conduct (either under the description "crime," "wrong," etc., or the relevant elements of the crime), and M together with the aid provided, *would lead an objective observer to reasonably understand D to endorse the criminality of P's conduct.*

More simply, this account says that you are an accomplice when you *objectively signal*, by your aid and attitude toward the underlying crime,

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91. Kadish, *supra* note 18, at 354.

92. *Id.* at 354–55 (emphasis added).

that you endorse the criminal conduct of the principal and that this endorsement is powerful enough to manifest itself in your own actions. This account also allows that giving aid with one of the traditional mens rea categories like knowledge (or even recklessness) could, in principle, be enough to objectively signal that you possess the required attitude of endorsement. However, there is nothing in the account that requires that this always be the case either. In general, your mens rea and actions in aid of the underlying crime will serve as evidence from which we can determine whether you in fact endorsed the crime, and such a determination will have to be made on a case-by-case basis (or perhaps with the help of simplifying assumptions adopted by the jurisdiction in question).

This, then, is what I take to be the most sophisticated version of the agency law theory. It does seem to get a number of cases right. In addition to the case of Pete, it also seems to get both versions of the getaway car driver case right.<sup>93</sup> We saw above that regardless of whether the getaway car driver positively knew that his passengers would rob the bank, or merely was reckless about the matter (i.e., believed there was a 65% chance that they would rob it), it is intuitive that he should be counted an accomplice. The objective endorsement theory explains why this is the case. In particular, it seems plausible that a reasonable observer would infer from the aid rendered by the driver, together with his mental state toward the crime (whether it be knowledge or recklessness), that the driver endorsed the crime. Moreover, this account also gets the statistical panhandler case right.<sup>94</sup> In particular, it seems plausible that giving money to several panhandlers does not make one an accomplice to a drug buy, even if one knows statistically that at least one of them will use the money on drugs. Especially given that the money might have been given from goodwill or compassion, or perhaps from the idealistic hope that the money would not be used on drugs, it is doubtful that a reasonable observer would infer that the benefactor endorses any of these panhandlers' purchases of drugs.<sup>95</sup>

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93. See *supra* note 39 and accompanying text.

94. See *supra* notes 41–45 and accompanying text.

95. The same might be true for the case of the gun salesman who sells a firearm to someone knowing that it will be used for a crime. Insofar as one thinks that the gun salesman should not be deemed an accomplice (I myself am unsure about this case), the objective endorsement account can explain this. One might think that because engaging in commerce is generally a beneficial activity, if a permissible aim like seeking to make a reasonable profit is the only thing that motivated the gun salesman, then a reasonable observer might not infer from his conduct that he endorsed or condoned the crime for which he knew the gun would be used. I am not saying this is the right implication about this case. But if one thinks it is, then the objective endorsement

Note in closing that one natural objection to this view—i.e., that it is inappropriate to carry over civil agency law principles to the criminal context—appears misplaced. Dressler, for example, objects to the agency law theory (among other reasons) because “fundamentally, criminal law is based on moral blame, stigma and punishment rather than on business and financial considerations,”<sup>96</sup> which underlie agency law. However, this objection, without more, is not convincing. Just because the aims and concerns of one area of law differ from those that underlie another, it does not follow that certain principles or mechanisms at work in the one area cannot operate in the other—even if the mode of operation or scope of applicability is different as between the two areas. That is what we seem to have when it comes to the law of agency and the law of complicity.<sup>97</sup>

### C. *The Trouble with the Endorsement Account*

Despite its advantages, I think the objective endorsement account suffers from problems serious enough to warrant its rejection. It is undermined by at least two normative problems.

First, the objective endorsement account has trouble with a modified version of the Pete and Thomas case.<sup>98</sup> Recall that the objectified version of the account was supposed to give the correct implication about the original case because although Pete subjectively does not endorse or condone Thomas’s crime, he nonetheless objectively signals that he does. But now consider a version of the case in which Pete not only subjectively lacks the requisite endorsement, but also objectively signals that fact. Perhaps he does this by carrying a sign with him,

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account has the resources to explain it.

96. Dressler, *supra* note 83, at 115.

97. Michael Moore’s objection to the agency theory is also answerable. He writes:

Yet this vicarious (or agency) interpretation of complicity does not begin to cover cases where accomplice liability has been imposed. There is no requirement that one be a conspirator to be an accomplice. If I aid you by finding a ladder, placing a gun where you can find it, and making sure the victim is where you can find him, I am liable as an accomplice for whatever crimes I am trying to promote with such aid, even if there is no prior agreement between us. Moreover, in most states, complicity requires more than mere agreement or group membership; one has to aid the commission of a crime to be an accomplice, and in such states the aiding required cannot be reduced to mere group membership or general agreement.

Moore, *supra* note 14, at 400. This objection is unpersuasive. Granted, complicity and conspiracy liability are not coextensive. Nonetheless, the agency theory does not reduce complicity to conspiracy. The agency theory does not entail that an *agreement* is necessary for accomplice liability (as it is for conspiracy). Rather, the agency theory only requires that there be aid together with the requisite attitude of endorsement. And of course that can happen without an agreement between the parties.

98. Again thanks to Jake Ross for pressing me on this point.

which reads, “I do not endorse Thomas’s crime; I just want to show I’m right that all security system have flaws!” If a sign would not lead a reasonable observer to conclude that Pete lacks the requisite endorsement, note that additional details can be added until the observer *would* reach this conclusion. Suppose Pete posted a notice to this effect on his website. Moreover, suppose he wrote a letter carefully explaining why he disapproves of Thomas’s actions, but nonetheless finds it necessary to use this occasion to demonstrate that the mansion’s security system is flawed as he hypothesized. Suppose the letter was not written after the fact in self-serving fashion, but was written in advance in circumstances that make it entirely credible. As the case is further refined, it becomes harder and harder for reasonable observers to avoid the conclusion that Pete does *not* endorse Thomas’s crime. Accordingly, as the case is elaborated, we reach a point where Pete objectively signals that he does not endorse the crime. Thus, he wouldn’t be an accomplice on the objective endorsement account. But this is counterintuitive. Surely, Pete is at least *some kind of accomplice* even though he neither subjectively favors the crime nor signals that he endorses it. Thus, the present account is in trouble.

More generally, the trouble arises because the objective endorsement account makes complicity depend on what it is reasonable to *infer* from the available evidence. While the defendant’s act in aid of the underlying crime might create a *presumption* that the defendant endorses the crime, the facts known in a particular case could conclusively rebut this presumption. The facts of certain cases might lead honest reasonable observers to infer that endorsement is lacking, even though the defendant deliberately aided the underlying crime. Such cases pose problems for the objectified version of the account.

The objective endorsement account also suffers from a second normative problem. In particular, it entails that ignorance of the law—or the criminal nature of the primary defendant’s conduct—cannot be a defense, even in cases when this seems to dramatically reduce the accomplice’s culpability. Consider a layperson who is negligently unaware that in some technical area, the criminal law prohibits certain conduct (e.g., failing to file reports with the IRS for cash transactions in excess of \$10,000<sup>99</sup>). Moreover, suppose this person proceeds to aid someone else in knowingly engaging in just this conduct. Suppose that

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99. See, e.g., *United States v. Am. Inv’rs of Pittsburgh, Inc.*, 879 F.2d 1087, 1097–98 (3d Cir. 1989) (discussing the obligation of “banks to file a report of each deposit, withdrawal and exchange of currency which involves the physical transfer of currency of more than \$10,000”); see also 31 U.S.C. § 5313(a) (2012); 31 C.F.R. § 1010.311 (2015).

the aider does not endorse the criminality of the principal's conduct, and but for negligently failing to realize that the conduct was criminal, she would not have aided in the way she did. Intuitively, the aider is much less culpable than the primary wrongdoer (who, let's suppose, performs the prohibited conduct knowing that it is criminal). In such a case, it might seem problematic to hold the aider fully responsible for the underlying crime as an accomplice. Nonetheless, by intentionally aiding the principal, the aider might seem to at least *objectively signal* that she endorses the underlying crime. Thus, the objective endorsement view seems to implausibly entail that the person in question should be held fully responsible for the crime as an accomplice.<sup>100</sup>

#### D. How to Move Forward

It is worth considering what lesson is to be drawn from these worries, since doing so points the way to a more satisfactory account. In light of the two problems just presented for the objective endorsement account, the natural move seems to be to strip the account of the requirement that one *objectively manifest* one's endorsement. This, after all, seems to be the source of the problems just discussed. This move, however, would revive the problem based on the original Pete case, which motivated incorporating the objective manifestation requirement into the theory. So if we are to return to some version of the real endorsement account, how do we deal with the original case of Pete?

Recall the problem: Intuitively, Pete is an accomplice even though the real endorsement account entails that he is not, since he does not subjectively endorse Thomas's crime. But to this, it is possible to respond that Pete *really should not* be labeled an accomplice who is punishable as a principal. After all, he seems substantially less culpable for his small involvement in the crime than Thomas, the principal killer. Is it really fair to convict Pete of something as serious as *murder* on a complicity theory, given that he only aided the crime in a minor way and subjectively did not endorse the crime (indeed, overtly disapproved of it)? It might seem quite unjust to open Pete up to the full range of sentencing options that accompanies a conviction for murder.<sup>101</sup>

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100. Note that this objection is similar in structure to the problem that undermined the derivative approach discussed in Part II.C. Both objections involve cases where full accomplice liability would be imposed even though the accomplice is much less culpable than the principal.

101. Some of this unfairness might be mitigated at the sentencing stage by way of the sentencing judge's discretion to give lesser sentences for less culpable conduct. But I do not think this is sufficient to eliminate the problem. Mandatory minimums would still be triggered, and Pete would still face the stigma and condemnation that results from being convicted *for*

Therefore, a better reply to this objection, I suggest, is to recognize that complicity comes in *degrees*, and that accomplices accordingly can have different levels of culpability. While Pete is not as culpable as someone who himself commits murder, Pete nonetheless is somewhat complicit in Thomas's crime because of the manner in which he participated in it. Pete thus may appear not to be a *full* accomplice, but rather only a *partial* or *lesser* accomplice. The trouble, though, with the real endorsement account (like the other accounts discussed to this point) is that it makes complicity an on-off affair: either one provides some aid to the crime while endorsing it, or one does not, and this is all there is to the question of whether one is an accomplice. The real endorsement account ultimately fails, therefore, because it entails that Pete is *no sort of accomplice at all* given that he lacked the requisite attitude of endorsement.

Thus, a more normatively defensible account of complicity should recognize that one's degree of attitudinal support for the crime, as well as the amount of help one seeks to provide for it, can differ in ways that affect one's culpability as an accomplice. Other commentators have pressed related points (against the agency law theory, in fact). Dressler, for one, writes that "moral intuition suggests that not all accomplices are alike, and . . . their categorical treatment as if they are perpetrators is not necessarily fair."<sup>102</sup> In the next Part, I formulate an account of complicity that makes room for differences of just this sort. In particular, I formulate a version of the endorsement account on which the mens rea for complicity itself can come in degrees. By doing so, I aim to offer a more normatively justified account of the mens rea for complicity.

#### IV. TOWARD A BETTER ACCOUNT OF THE MENS REA FOR COMPLICITY

##### A. *Sketching the Account*

In this Part, I aim to rehabilitate a version of the agency law theory discussed in the previous Part. To do this, I shall back off of the objectified component of the endorsement account for the reasons just discussed in Parts III.C and III.D. This amounts to returning to a version of the real endorsement account. However, as noted, this might immediately seem problematic, since Pete was stipulated not to favor, desire, or bear any other pro-attitude toward Thomas's crime.<sup>103</sup>

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*murder.*

102. Dressler, *supra* note 83, at 118.

103. *See supra* notes 89–90 and accompanying text (discussing the first version of the Pete hypothetical).

Wouldn't taking the mens rea for complicity to be endorsement implausibly entail that Pete is not an accomplice?

This problem, however, can be avoided by a more sophisticated understanding of the requisite attitude. To see what this attitude is, more precisely, notice that complicity can involve more than mere pro-attitudes. Being an accomplice does not seem to require that one is positively in favor of the crime or affirmatively desire its completion. Even if you did not positively favor or endorse the underlying crime in the sense of having a pro-attitude toward it, you still might *condone* the crime in the sense that you are willing to tolerate or accept its performance.<sup>104</sup> This, too, seems sufficient to make you an accomplice. Even if you did not actually favor or authorize the crime, and perhaps would even stop it if you could, it seems to be enough for complicity that you merely were willing to tolerate the crime in order to obtain certain benefits from its performance. Accordingly, the current proposal is that the mental state of *condoning the crime* should be regarded as the mens rea for complicity. (Perhaps the phrase “endorsing the crime” could still be used here, but I think “condoning” better conveys the idea of being willing to tolerate a crime even without affirmatively favoring it.)

Let me be more precise about what it is to condone a crime. The basic idea is that it involves being *insufficiently against* the crime—either by positively approving of the crime (i.e., having a pro-attitude toward it) or by being insufficiently repelled by it (i.e., having an insufficient motivational aversion to it). Moreover, to be an accomplice, one must act on this mental state of condoning the crime—i.e., manifest it in action through performing some voluntary action that apparently aids the primary wrongdoer in his underlying conduct.<sup>105</sup>

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104. Cf. Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953 (1998) (giving a counterfactual account of the notion of acceptance).

105. This talk of “manifestation” is included because “an actor’s mere possession of [a] legally relevant mental state[] hardly suffices for criminal liability. Free-floating desires, intentions, beliefs, or attitudes, without more, do not justify criminal liability. In addition, the mental state must be ‘connected’ to the relevant criminal act or omission in the right way.” Ken Simons, *Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character”?* *Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 BUFF. CRIM. L. REV. 219, 230 (2002). Thus, for punishment for a mental state to be warranted, that “mental state or culpability requirement[] must be appropriately expressed in, or connected to, action.” *Id.* at 261. See also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 15.01, at 508 (Matthew Bender & Co. eds., 6th ed. 2012) (observing that the “principle of concurrence contains two components:” first, “the defendant must possess the requisite mens rea at the same moment” as the actus reus, and second, “[t]he defendant’s conduct that caused the social harm must have been set into motion or impelled by the thought process that constituted the mens rea of the offense”); 1 WAYNE LAFAYE, SUBSTANTIVE CRIMINAL LAW § 6.3(a), at 451 (2d ed. 2003) (“With those

Note, however, that it is also possible to be justified in condoning the crime. This could happen if, say, the crime itself is justified (e.g., because of necessity or self-defense) or if one has some justification of one's own for condoning it. But justifiably condoning some conduct does not seem to make one guilty as an accomplice to it. Instead, being guilty of a crime as an accomplice seems to require unjustifiably condoning it. Accordingly, we can characterize the mental state required for complicity as follows:

*Unjustifiable Condoning:* Putative accomplice, D, possesses an unjustifiably condoning mental state toward the primary actor, P's, wrong or bad action, A, if D is insufficiently motivationally repelled by A, where this can involve either a pro-attitude toward A or an insufficient aversion to A. The greater D's failure to be sufficiently repelled by A, the greater the degree to which D condones P's doing A.

Notice that not just *any* amount of failing to be repelled by the underlying crime will count as unjustifiably condoning it. Rather, only a failure to be *sufficiently* repelled by it will count as unjustifiable condoning. Thus, by attaching accomplice liability only to unjustifiable condoning, the criminal law will necessarily have to take a stand on what counts as being *insufficiently* repelled by the crime—i.e., a failure that constitutes a punishable departure from the attitudes and conduct that are expected of a law-abiding citizen.

Given the discussion thus far, it should be clear that there are three paradigm cases of unjustifiably condoning a crime—i.e., three ways in which the putative accomplice might fail to be sufficiently motivationally repelled by it:

- (1) In the first case, the putative accomplice, D, feels some motivational pressure *in favor of* bringing about the action, A, of the primary wrongdoer, P, even though D *should not*, since A's bad-making features<sup>106</sup> give reason not to bring

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crimes which require some mental fault (whether intention, knowledge, recklessness, or negligence) in addition to an act or omission, it is a basic premise of Anglo-American criminal law that the physical conduct and the state of mind must concur.”). The connection requirement has also been codified in some states’ criminal codes. *See, e.g.*, CAL. PENAL CODE § 20 (2014) (“In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.”). *See generally* Alex Sarch, *Knowledge, Recklessness and the Connection Requirement Between Actus Reus and Mens Rea*, 120 PENN STATE L. REV. (forthcoming 2015).

106. A bad-making feature of an action is simply a property it possesses that contributes to the badness of the action. For more on this notion, and the related idea of wrong-making features,

about P's A-ing (and there are no other reasons sufficient to justify bringing about P's A-ing).

- (2) In the second case, D feels *no* motivational pressure against bringing about P's A-ing although he *should*—again, because A's bad-making features give reason not to bring it about and nothing else justifies bringing it about.
- (3) In the third case, D feels *some* motivational pressure against bringing about P's A-ing, but the amount (or strength) thereof is *insufficient*. As a result, D's motivation against bringing about P's A-ing might be overridden by perceived reasons in its favor, even though these reasons in fact do not adequately justify bringing about P's A-ing.

Note that in principle, a case of type (1) could also be a case of type (2) or (3). After all, it is possible to incorrectly feel some motivational attraction *toward* the crime, while also failing to feel a sufficient amount of motivational pressure *against* the crime.

Given this general sketch of the mental state of unjustifiably condoning a crime, we can now state the condoning theory of complicity as follows:

*Condoning Theory of Complicity:* Defendant, D, is an accomplice to principal, P's, crime, C, if and only if:

- 1) D voluntarily does something in aid of (that influences, assists, or makes easier) P's commission of some legally unjustified and unexcused conduct, and
- 2) D provides this aid from the mental state of *unjustifiably condoning P's conduct*—i.e., D's act of aid is produced by or is a manifestation of that mental state.<sup>107</sup>

One of the primary benefits of taking the mens rea of complicity to be unjustifiable condoning is that one can condone the crime to a greater or lesser extent. This allows us to say that there are degrees of complicity, purely in virtue of the mens rea associated with accomplice liability (and not merely in virtue of the causal contribution one might have made to the underlying crime, as other commentators like Dressler and Weiss have suggested<sup>108</sup>).

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see, for example, MARK TIMMONS, *MORAL THEORY: AN INTRODUCTION* 349 (2d ed. 2012).

107. This talk of "production" or "expression" is included for the reasons articulated in *supra* note 105.

108. See *supra* notes 10–15 and accompanying text; see also *infra* note 126 (noting that many scholars have supported the idea of recognizing varying degrees of complicity).

*B. The Case of Pete Redux*

Because the condoning theory allows for degrees of complicity, it handles the case of Pete well. First, note that Pete can qualify as an accomplice even though he does not desire, favor, or have any other overt pro-attitude toward the underlying crime. While he did not positively endorse or approve of Thomas's murder, Pete nonetheless was insufficiently repelled by its bad-making features. Pete likely believed that there were some justifying (or at least excusing) considerations that made it permissible for him to help Thomas—e.g., that Thomas would have completed the crime even without his help and that Thomas's entry into the mansion was the perfect opportunity to demonstrate, once and for all, how skilled a security analyst Pete was. However, it should be fairly uncontroversial that these considerations in fact do not justify (or excuse) Pete in easing the path for Thomas to commit murder. Plausibly, nothing justifies one in aiding the intentional taking of a life except considerations that would fit comfortably within a recognized defense like necessity or self-defense.<sup>109</sup> Accordingly, we can conclude that Pete was *insufficiently* repelled by the murder. He should have been repelled by Thomas's crime to a substantial degree (i.e., should have felt some motivational aversion to it) because the crime's bad-making features give reasons against bringing it about that Thomas does the crime, and nothing justifies it. Thus, if Pete was repelled by Thomas's crime at all, this amount was less than he *should* have felt. Therefore, Pete unjustifiably condoned the crime. (This is a case that belongs most naturally in category (2) or (3) from above.)

In addition, the condoning theory also explains why the various ways Pete tries to signal that he does not endorse Thomas's crime—the sign, the letter, etc.—ring hollow. For all his protestations, he still fails to be sufficiently repelled by the crime. In particular, he is not repelled enough to keep his hands clean and avoid participating in the crime. Now, his insufficient aversion to the crime *just is* the attitude of condoning the crime that is required for being an accomplice. As a result, Pete *misunderstands* his own mental state when he says that he does not support the crime. By voluntarily helping out, although he does not have to, he manifests his insufficient degree of aversion to the aspects of the crime that make it wrong. Thus, despite his protestations to the contrary, he does condone the crime somewhat. As a result, what

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109. Cf. Simons, *supra* note 43, at 474 (noting with respect to principal liability that “[o]nce an actor perceives a ‘highly probable’ risk of physical harm, she is prima facie liable for assault or murder. She must fit within a limited number of defenses in order to avoid conviction.”).

his sign and letter claim is simply *false*, according to the present theory. The upshot is that in cases like that of Pete, holding up a sign or writing a letter will not work. Even if one consciously believes that one does not condone the crime, it is not one's beliefs about the matter that determines whether one condones the crime or not. One can condone even while believing that one does not. In this case, Pete's action of aiding the crime demonstrates that he is not sufficiently repelled by it. Thus, Pete is an accomplice according to the present theory—intuitively, the right result.

Now, since accomplices are traditionally punished as principals, one might worry that there is something troubling about taking Pete to be complicit in the murder. For this means labeling him a murderer and opening him up to the full range of sentencing options that accompanies such a conviction. This might seem troubling given that Pete intuitively is much less culpable for his part in the murder than Thomas, the primary actor in the killing.<sup>110</sup>

However, the condoning theory has the resources to deal with this worry. One of the main benefits of this theory is that it allows complicity to come in *degrees*. This stems from the fact that one can condone a crime to a greater or lesser extent. (Accordingly, my account differs from the views of other theorists who advocate the recognition of degrees of complicity, though in virtue of the causal contribution made to the underlying crime.<sup>111</sup>) While the present theory counts Pete as some kind of accomplice, it does not need to take him to be a full accomplice who is just as culpable as the primary wrongdoer. Rather, the theory is free to ascribe only a lesser degree of complicity to Pete because he does not condone the killing *very much*—certainly not as much as someone like Thomas who is significantly motivationally attracted to the killing and purposefully brings it about. After all, Pete was stipulated not to desire or intend the killing. He merely failed to be sufficiently repelled by it. But the degree to which he unjustifiably condones (fails to be repelled by) the killing plausibly is *less* than what would be the case if he overtly favored, desired, or intended the killing. Accordingly, the present theory can say that Pete is less complicit in the killing than he would be had he provided the same aid to Thomas while desiring or intending that the killing take place.

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110. Note that not all of this can be chalked up to the idea that Pete causally contributed to the killing less than Thomas did. After all, Pete's assistance is substantial, allowing Thomas to take advantage of the flaw in the security system and decreasing his chances of getting caught.

111. See *supra* notes 10–15 and accompanying text; see also *infra* note 126.

### C. Evidence of Condoning and the Traditional Mens Rea Categories

One might wonder how the mental state singled out by this theory—unjustifiable condoning—relates to the traditional categories of the criminal law: namely, purpose (or intent), knowledge, recklessness, and negligence. These four mental states make up the familiar “culpability hierarchy,”<sup>112</sup> in which a bit of misconduct performed with a mental state located higher on the hierarchy is thought to be more culpable than the same misconduct performed with the mental state that falls lower on the hierarchy.<sup>113</sup>

According to the theory proposed here, which of these traditional mental states the putative accomplice acted with is best seen as a source of defeasible *evidence* about whether the true mens rea for complicity is present.<sup>114</sup> If a putative accomplice acted with a mental state that is higher up on the culpability hierarchy, then (all else equal) his acts of assistance likely will manifest a greater degree of condoning the underlying crime—i.e., a greater failure to be repelled by the crime.

Consider, first, the difference between purpose and knowledge. Acting with the purpose that the underlying crime be committed will generally display a greater failure to be repelled by the crime than merely aiding it knowingly would. Aiding with the purpose that the crime be committed involves some overt motivational attraction to the crime (a pro-attitude).<sup>115</sup> By contrast, aiding with mere knowledge of

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112. See, e.g., Danye Holley, *Culpability Evaluations in the State Supreme Courts from 1977 to 1999: A “Model” Assessment*, 34 AKRON L. REV. 401, 410 (2001) (assessing how far states have gone in adopting the “Model Penal Code culpability definitions and its hierarchical interrelationship”); Simons, *supra* note 43, at 464 (discussing “the hierarchical ordering of states of mind in contemporary law”).

113. To the four core mental states just mentioned, we might also add willful blindness (which tends to fit in the hierarchy somewhere between knowledge and recklessness), extreme recklessness (to be placed in a similar spot) and gross negligence (to be placed between recklessness and simple negligence). See Alex Sarch, *Willful Ignorance, Culpability and the Criminal Law*, 88 ST. JOHN’S L. REV. 1023 (2014) (discussing conditions under which willfully ignorant misconduct is as culpable as the analogous knowing misconduct); MODEL PENAL CODE § 210.2(b) (1985) (noting that “criminal homicide constitutes murder when . . . it is committed recklessly under circumstances manifesting *extreme indifference* to the value of human life” (emphasis added)); *Pennsylvania v. Lobiondo*, 501 Pa. 599 (1983) (distinguishing negligence from gross negligence).

114. In this respect, my account resembles a view of Gideon Yaffe’s according to which the “point of mens rea” is to provide evidence about whether one’s modes of recognition and response to reasons is faulty—i.e., one’s degree of culpability. See Gideon Yaffe, *The Point of Mens Rea: The Case of Willful Ignorance* (Nov. 26, 2014) (unpublished manuscript) (on file with author).

115. This view is widespread. Michael Bratman argues that intending an effect entails being committed to it in at least three ways, while merely foreseeing the effect does not. In particular, when one intends an effect, one is disposed to 1) “engage in appropriate means-end reasoning” about how to bring about the effect, 2) rely on this intention to “constrain [one’s] other

the crime, but no purpose or other pro-attitude toward it, shows at best that one's motivational aversion to crime is insufficiently strong, such that one is willing to abide or tolerate the performance of the crime.<sup>116</sup> But a positive attraction to an event is generally going to involve a greater failure to be repelled by it than a mere willingness to tolerate that event.<sup>117</sup>

A related point applies as between recklessness and knowledge,<sup>118</sup> as

intentions," and 3) "make adjustments in what one is doing in response to indications of one's success or failure in promoting" the intended effect. MICHAEL BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 141 (1999); *see also* Allison Hills, *Defending Double Effect*, 116 PHIL. STUD. 133, 134 (2003) (observing that an agent who intends an effect "aim[s] at it" or "tries to achieve it"; "an agent intends some state of affairs if she is committed to bringing it about").

116. Bratman and Hills claim that this pro-attitude or commitment to effects that are intended is not present when the effect is merely a foreseen side effect of one's conduct. *See* BRATMAN, *supra* note 115, at 142 (claiming that when one does not intend the effect, but merely foresees it, one's "attitude toward . . . [the effect] will not play a similar trio of roles"); Hills, *supra* note 115, at 134 ("[A]n agent merely foresees bringing about some state of affairs if she is aware that she will bring it about, but she does not aim at it, try to achieve it, choose actions on the basis of whether they contribute to achieving it, or monitor her success at achieving it.").

117. This requires qualification. In principle, it is possible that someone could intend the underlying crime and thus, feel a motivational attraction to it, but nonetheless be more repelled by the crime than a merely knowing aider. For example, contrast a good-hearted but naïve intentional accomplice, A, with a callous but merely knowing accomplice, B. Suppose A is strongly repelled by the crime (she is shocked and disgusted by it), but believes that the benefits of its success slightly outweigh the harmfulness of the crime. Accordingly, A aids the crime with the purpose that it succeed. Now consider B, who has no real interest in or pro-attitude toward the success of crime, but decides to aid the crime out of sheer indifference to it. B is not repelled by the crime whatsoever, but also is not particularly attracted to it. Accordingly, B aids the crime only knowingly—with no overt desire for, or commitment to, its success. B seems more insufficiently repelled by the crime than A is. After all, A is highly repelled by it—nearly as repelled as a normal law-abiding person would be. Accordingly, my argument in the main text might seem problematic.

Nonetheless, as I have argued elsewhere, this complication does not completely undermine the familiar culpability hierarchy. The sense in which purposeful misconduct is worse than merely knowing misconduct simply must be formulated with greater precision. In particular, there is a sense in which being *committed* to promoting the success of the crime (or more generally causing harm) displays a distinctive form of culpability that is not present in merely knowing misconduct (where no such commitment is present). This is the distinctive culpability in wrongly taking there to be reasons in favor of the crime (or harm)—that is, being overly attracted to the crime (or harm). Nonetheless, this distinctive culpability can, in some cases, be outweighed by other sources of culpability displayed by the merely knowing wrongdoer (e.g., the meager benefits aimed at when acting). Thus, purposeful misconduct is only pro tanto more culpable than merely knowing misconduct. But if all the morally salient factors are held equal, I argue, *then* purposeful misconduct is on balance more culpable than merely knowing misconduct. For a full elaboration of this argument, see Alex Sarch, *Double Effect and the Criminal Law Culpability Hierarchy*, 9 CRIM. L. & PHIL. (forthcoming 2015).

118. As noted above, knowledge in the criminal law is not justified true belief plus some anti-Gettier condition, but rather just the conjunction of high subjective credence (practical certainty) and truth. *See supra* note 40.

other theorists have also noted.<sup>119</sup> In particular, one seems to more strongly condone the underlying crime if one aided it knowing that the principal would do the crime than if one was merely reckless about the matter (i.e., believed there was a substantial chance the underlying crime would be committed). This is because acting with knowledge (practical certainty) that one is aiding a bad action tends to show *a greater failure to be repelled by it* than providing the same aid while merely seeing it as fairly likely that one is helping the criminal action.<sup>120 121</sup>

The result is the same for recklessly aiding a crime as opposed to negligently doing so. The former involves consciously disregarding a risk that one is aiding the underlying crime, while the latter involves not conscious disregard of the risk, but merely failing to recognize it when

119. See Simons, *supra* note 45, at 16 (arguing that a knowing wrongdoer's "action reveals willingness to tolerate a greater harm or evil in pursuit of his ends" than the action of a merely reckless wrongdoer).

120. This follows from a principle I have elsewhere dubbed "the principle of comparative culpability." According to this principle,

[f]or any two people who commit the actus reus of a crime, if they are identical in all respects except that one is more confident in the truth of the inculpatory proposition, P, than the other, then—assuming there are no relevant excuses or justifications, and all else is equal—the person with the greater degree of confidence in P is more culpable than the one with the lesser degree of confidence.

See Sarch, *supra* note 113, at 1062–63 (footnote omitted).

121. One might object that this claim would not hold if the actor thought there were justifying reasons in favor of the underlying crime. In that case, the actor might indeed be strongly repelled by the crime, but the motivational force he feels against it is outweighed by the strength of the apparent justifying reasons in its favor. For example, A might be sufficiently repelled by B's putatively criminal conduct, but A is nonetheless motivated to aid B because A believes there are other considerations that justify B's conduct. In this case, A's knowingly aiding B might not demonstrate more insufficient repulsion to B's crime than someone who *recklessly* aids a similar crime but does *not* think there are any reasons that justify the crime.

However, it is doubtful that the criminal law would recognize such a state of affairs. First of all, note that the sort of counterexample just sketched cannot arise if the underlying crime aided itself is a knowledge or intent crime. After all, the criminal law does not recognize that there are *any* justifying reasons for knowledge or intent crimes outside of the formal defenses of necessity, self-defense, and so on. See Simons, *supra* note 43 at 474–75. Thus, according to criminal law doctrine, there cannot be a situation in which the primary actor is guilty of a knowledge or intent crime, but nonetheless is justified by something outside the affirmative defenses like necessity or self-defense (which would defeat his guilt). As a result, if the putative accomplice really does aid something that is a knowledge or intent crime, then he cannot be sufficiently repelled by it *and*, at the same time, correctly believe that the crime is justified by some other considerations.

By contrast, recklessness crimes have the possibility of justifying reasons built in. After all, being reckless requires being aware of an *unjustified* risk. But if the risk that the primary actor is aware of is *justified*, then he would not qualify as reckless! As a result, there would be no crime there for the putative accomplice to aid. Accordingly, the putative accomplice would not have been *insufficiently* repelled by the primary actor's conduct. He would not be *insufficiently* repelled by it because it is not criminal. Accordingly, the amount of repulsion he feels toward it would be entirely adequate, even if he aids that conduct.

one should have.<sup>122</sup> Thus, recklessness toward the underlying crime would typically show a greater failure to be repelled by the crime than negligence toward it would.

Thus, on the present account, determining which of the traditional mens rea a putative accomplice possessed while aiding the underlying crime is evidence of the degree to which he possessed the true mens rea for complicity—i.e., that of condoning the crime. If so, this would help explain the intractable disagreement concerning what mens rea is required for complicity. The discussion to this point has largely presupposed that it will ultimately be one of the traditional mens rea categories (e.g., purpose or knowledge or recklessness), or some combination of these, that should be required for complicity. However, if the present account is correct—such that the traditional mens rea one acted with just is *evidence* of the degree to which one possesses the true mens rea for complicity—then we would have been searching in vain for one traditional mens rea (or a combination of them) that always delivered plausible results about particular cases. Accordingly, the present account highlights a flawed assumption inherent in the debate about the correct mens rea for complicity, as it has, by and large, proceeded to this point.<sup>123</sup> Explicitly rejecting this assumption should help make progress on a question that, hitherto, has proved intractable.

In addition, the question of which traditional mens rea one acted with is not the *only* source of available evidence when it comes to determining the extent to which one condoned the underlying crime. A second source of evidence about whether the defendant possessed the true mens rea for complicity is the amount of *causal contribution that he intended or expected* to make to the success of the crime.<sup>124</sup> After

122. The Model Penal Code defines recklessness such that “[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.” MODEL PENAL CODE § 2.02(c) (1985). By contrast, a “person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.” *Id.* § 2.02(d).

123. Not all theorists writing on complicity make this assumption. Yaffe is one notable example of a legal scholar who does not endorse a traditional mens rea category as the mental state required for complicity. See Yaffe, *supra* note 37, at 13–25.

124. We might make the notion more precise as follows:

*Projected Causal Contribution:* Defendant, D’s, projected causal contribution to the wrongdoing, W, of another is greater:

- a) the more *actual* causal contribution to W that D *expects* (believes), when acting, that he will make to W; or if no amount is expected when acting, then
- b) the more such contribution D *contemplates* when deliberating about how to act beforehand; or if no amount is expected or contemplated, then
- c) the more such contribution that is reasonably *foreseeable* to D based on his

all, it seems that, as a general matter, the greater the causal contribution one believes one's actions will make to the underlying crime (however such contributions are to be understood—e.g., as raising the probability of the success of the crime, or as lessening the burdens of doing it), the more one manifests one's failure to be sufficiently repelled by the crime. Of course, this is just a generalization, since the amount of causal contribution one *can* make depends not just on how attracted or repelled one is by the prospect of the crime, but also on what options for aiding the crime are practically available. Nonetheless, it seems that the degree of expected causal contribution to the crime can still provide valuable (if defeasible) evidence about the extent to which the putative accomplice unjustifiably condones the underlying crime.

## V. IMPLEMENTING THE CONDONING THEORY

Difficult questions remain, however, about how the idealized account of complicity just presented could be *practically implemented* in the criminal law. In this Part, I consider how the theory that unjustifiable condoning is the mens rea for complicity might be implemented. The result, I argue, is an account of when and how criminal accomplice liability should be imposed that is more normatively defensible than the other accounts discussed. However, to obtain the normative benefits of the proposed account, reforms to existing complicity law are required.

### A. Full vs. Lesser Complicity

One of the main benefits of taking condoning the crime to be the mens rea for complicity is that it straightforwardly makes room for different degrees of complicity. To preserve the normative advantages of this idea, the criminal law, too, should recognize different levels of accomplice liability. (As explained earlier,<sup>125</sup> other legal scholars have made similar suggestions, at least as far as the defendant's causal contribution to the crime is concerned.<sup>126</sup>) To keep the proposal as

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evidence prior to acting.

125. See *supra* notes 10–15 and accompanying text.

126. The idea of reforming the criminal law to recognize degrees of complicity is not novel. However, the existing proposals in this vein focus on recognizing that one can make different levels of causal contribution to the underlying crime, whereas my proposal involves recognizing that the mens rea of complicity can come in degrees. By way of contrast, Christopher Kutz argues that “[a] rational law of complicity would recognize [the differing culpability levels of participants in criminal activities], by mitigating the accountability of [minimal] accomplices and aggravating that of instigators.” KUTZ, *supra* note 15, at 233. In a similar vein, Dressler forcefully argues that “American accomplice law is a disgrace. It treats the accomplice in terms of guilt and, potentially, punishment, as if she were the perpetrator, even when her culpability is often less than that of the perpetrator and/or her involvement in the crime is tangential.” Dressler,

simple and practical as possible, the framework I endorse carves out only two levels of complicity: *full complicity* and *lesser complicity*. Which category a given defendant belongs in will depend on the degree to which he unjustifiably condones the underlying crime. A precise account of this distinction will be provided in a moment.

One looming question that should be addressed first, however, is what the penalties associated with these two categories of complicity should be. Again, with an eye to keeping the framework as practical as possible, I suggest that only a full accomplice should be punishable *as a principal*—i.e., may be convicted of the same underlying crime that the principal has committed. By contrast, a lesser accomplice should not be punished as a principal, but should be convicted of a distinct offense—namely, the crime of being a lesser accomplice to the underlying offense. And this new crime should be taken to carry a lesser penalty than the underlying offense. This could be accomplished, to start with, by a statutory reform exempting the lesser accomplice from any mandatory minimums associated with the underlying crime.<sup>127</sup> Moreover, an amendment to the United States Sentencing Guidelines should recognize a reduction to the offense level for the underlying crime based on the comparatively low degree to which a lesser accomplice condones the underlying crime.<sup>128</sup> This proposal seems especially feasible, given that the Guidelines already include a reduction for the defendant’s so-called “mitigating role,” which subtracts between two and four points from the defendant’s offense level if she was either a “minor” or “minimal” participant.<sup>129</sup> However, while this existing reduction applies to cases involving a minor causal contribution to the crime, my proposal is to allow the lesser accomplice’s offense level to be reduced based on her less culpable mens rea—i.e., the relatively small extent to which she condones the crime. In other words, the

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*supra* note 10, at 427. I think Kutz’s and Dressler’s proposals are well taken and my view that the mens rea of complicity comes in degrees is compatible with their views. See also Weiss *supra* note 2, at 1487-88; Moore, *supra* note 14, at 451-52.

127. Cf. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 199–200 (1993) (arguing that “[a]t long last, the time may be ripe for congressional reexamination of mandatory minimum sentencing statutes” and claiming that there is “good reason to believe that in their overall effects, mandatorys are not only unfair but also powerfully counterproductive”).

128. For some general explanation of how the U.S. Sentencing Guidelines function, see, for example, BRADFORD BOGAN, AN INTRODUCTION TO FEDERAL SENTENCING 9–19 (14th ed. 2012).

129. U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (U.S. SENTENCING COMM’N 2011) (“(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels. (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels. In cases falling between (a) and (b), decrease by 3 levels.”).

proposal is to recognize an offense level reduction for “minor endorsement.”

What, then, do the categories of full and lesser complicity involve, more precisely? As seen in discussing the problems with the derivative approach, we want to avoid the result that the accomplice is punished as a principal despite being significantly less culpable than the principal wrongdoer. We can accomplish this by taking it that one is a *full accomplice* when one counts as complicit in the underlying crime and is approximately as culpable as a principal. By contrast, one is a *lesser accomplice* when one counts as complicit in the underlying crime, but is substantially less culpable than a principal.

Of course, making such culpability judgments directly is an extremely fact-sensitive and difficult task. Accordingly, a more workable test is needed for determining when an accomplice is as culpable as the principal wrongdoer—i.e., whether he is a full or a lesser accomplice. My proposal, which draws loosely on the agency approach, is that we look to see whether the putative accomplice’s failure to be repelled by the underlying crime is so great that *he would have authorized the crime, if he were in a position to make that sort of determination*. More precisely, the proposed test is this:

*Authorization Test.* For a putative accomplice, D, and primary wrongdoer, P, D condones P’s crime, C, strongly enough to make D count as a full accomplice to C if D’s failure to be motivationally repelled by C is so great that, *if D were in a position of power or authority over P prior to P’s conduct*, D would authorize or allow P’s commission of C (or at least each relevant element of the offense).

Although I do not claim this to be a perfect test,<sup>130</sup> as a general rule, those putative accomplices who satisfy the Authorization Test are unlikely to be substantially less culpable than the principal wrongdoer. The reason is that if one’s actual attitude toward the crime is such that one would authorize the crime *ex ante* were one in a position to decide whether or not it will be committed, then one’s level of indifference to, or failure to be repelled by, the crime approximates the level possessed by someone who performs the crime himself. This, in turn, has

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130. In particular, one might worry that this test would allow us to impose accomplice liability merely on the basis of how the defendant *would* have acted under counterfactual circumstances (akin to punishing merely for character) rather than on the basis of how he *actually* behaved. Cf. Sarch, *supra* note 105 (manuscript at 22–33) (devoting Part III to discussing related worries about a prominent theory of another criminal law doctrine). Nonetheless, the Authorization Test is put forward merely as an evidentiary heuristic that courts can straightforwardly employ in real cases.

implications about culpability. After all, one's *culpability* for an action is plausibly understood as being a function of the extent to which the action manifests one's insufficient regard for the legitimate interests of others (i.e., one's failure to properly respond to the reasons against doing the action).<sup>131</sup> Accordingly, a putative accomplice who condones the underlying crime strongly enough to satisfy the Authorization Test is typically going to be approximately as culpable for his conduct as the principal wrongdoer is for the underlying crime. This test, although imperfect, should help focus the judicial decision maker's inquiry into whether someone who aided and condoned the underlying crime somewhat is to count as a full accomplice or a lesser accomplice.

### B. *Advantages of the Proposed Framework*

Taken together, these proposals yield an account of when and how accomplice liability should be imposed by the criminal law. The theoretical basis for the account is the idea that the *mens rea* for complicity is the mental state of condoning the underlying crime. And the fact that one can condone a crime to greater or lesser degrees is captured by distinguishing between full and lesser complicity, with their differing levels of punishment.

As I will now argue, this account largely avoids the difficulties with the other views of complicity discussed above. For one thing, it avoids the difficulty faced by the derivative approach. That approach, recall, allowed for accomplice liability—full stop—to be imposed even on defendants who were significantly less culpable than the principal. The account proposed here, however, provides a systematic way to impose some, but not full, liability on lesser accomplices who are not as culpable as principals who perform the underlying crime directly. For this reason, the framework has plausible implications about the case of Pete (discussed above). Pete—in both versions of the case<sup>132</sup>—condones the crime somewhat, but likely not enough to make him as culpable as Thomas. Thus, on the present account, Pete is not a full

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131. See, e.g., NOMY ARPALY & TIM SCHROEDER, IN PRAISE OF DESIRE 170 (2014) (“[A] person is blameworthy for a wrong action, A, to the extent that A manifests ill will (or moral indifference) through being rationalized by it.”). This theory is also roughly equivalent to the theory that an action is culpable to the degree that it displays the actor's faulty modes of recognition and response to reasons. GIDEON YAFFE, ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 38 (2010) (discussing the theory that conduct deserves censure (or blame) if and only if “it is a product of a faulty mode of recognition or response to reasons for action”); see also Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 931, 938 (2000) (endorsing an insufficient regard theory of culpability).

132. See *supra* Parts III.A, III.B and accompanying text.

accomplice, but rather a lesser accomplice who receives a reduced punishment proportionate to his relatively lower degree of culpability.

Similarly, the father who recklessly lends his keys to his joyride-loving son would also be only a lesser accomplice.<sup>133</sup> After all, the father seems substantially less culpable for the death his son caused because the father did not very strongly condone that crime. Although the father failed to be sufficiently repelled by the son's reckless joyride, this failure was not so great that he would authorize the son's misconduct *ex ante*. So the father fails the Authorization Test.

By contrast, the getaway driver who knows his passengers will rob a bank and has a financial stake in the crime because he is to be paid from the proceeds of the heist might well count as a full accomplice.<sup>134</sup> His knowledge and stake in the crime, together with the substantial causal contribution he expects to make, provide good (if fallible) evidence that he would authorize the heist *ex ante*, were he in a position to make that call.<sup>135</sup> However, if the driver only believed there was a substantial risk that his passengers would rob the bank, it is less obvious that he would authorize the robbery *ex ante*. Accordingly, the reckless getaway driver might count only as a lesser accomplice.

What, then, about the borderline case of donating money to the panhandler knowing it will be used on drugs?<sup>136</sup> If the benefactor genuinely knows (not merely suspects or thinks there is a risk) that the panhandler will use the money to buy drugs, and supposing the benefactor realizes that his causal contribution to the crime is substantial, then it is plausible that the benefactor unjustifiably condones the drug buy. He fails to be sufficiently motivationally repelled by what the law views as the bad-making features of drug buys. Thus, some sort of accomplice liability would be appropriate. However, whether the benefactor is to be deemed a full accomplice or a lesser accomplice depends on whether he in fact condones the drug buy so much that he would authorize the drug buy *ex ante*, were he in a

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133. *See supra* notes 74–76 and accompanying text.

134. *See supra* note 39 and accompanying text.

135. This case might seem to be similar in some ways to that of Pete. However, there are at least two significant differences. First, even though Pete also is aware that Thomas will commit the murder, we know conclusively that Pete does *not* condone the murder and would not authorize it *ex ante*. Second, while the getaway car driver sees his contribution as a but-for cause for the success of the bank robbery, Pete reasonably believes that his aid is *not* a but-for cause of Thomas's murder. After all, Pete is well aware that Thomas will accomplish the crime with or without his help. Given these two differences, I think it is plausible that the getaway car driver could be a full accomplice, while Pete (as explained in Part III.B) would only be properly considered a lesser accomplice.

136. *See supra* notes 41–47 and accompanying text.

position to decide whether it would take place.

Similar considerations apply to the statistical version of the benefactor case. It is clear that this benefactor would not authorize any drug buys *ex ante*, and so full accomplice liability is unwarranted. If complicity were taken to be an on-off affair, then no accomplice liability would seem appropriate. But if degrees of complicity are recognized, as I argue they should be, then perhaps the benefactor in the statistical case should be taken to be a lesser accomplice. On the other hand, if one thinks no accomplice liability is appropriate here, then one can get this result by asserting that the amount of repulsion to the drug buys the benefactor manifested was *not insufficient*.

The case of the gas station attendant who pumps gas for the bank robbers,<sup>137</sup> knowing what they intend to do, likely would not count as an accomplice (though for slightly different reasons). Although the gas station attendant has the *mens rea* of knowledge toward the bank robbery, the amount of causal contribution he expects to make to the success of the crime is small. He recognizes that he is not a but-for cause of the robbery, since the robbers could simply drive on to another gas station—though this would slow them down and raise their chances of getting caught. Thus, he expects to make only a small contribution to the crime.<sup>138</sup> As a result, it is doubtful that he was insufficiently repelled by the crime—i.e., that he unjustifiably condoned it. Nonetheless, if one thinks that his conduct shows him to have condoned the bank robbery to an unjustifiable extent, then one could still count him a lesser accomplice. (Full accomplice liability is ruled out because it is clear that he does not desire the crime and would not authorize its commission *ex ante*.)

One final benefit of the present account is that (unlike the objective endorsement view) it makes room for the possibility that ignorance of the law can impact a putative accomplice's liability for the underlying crime. In particular, if you act to aid the conduct of another, but reasonably fail to realize that it is wrong or criminal, then this can mitigate the extent to which your actions show that you are insufficiently repelled by the underlying crime. If there is a good explanation for why you failed to realize that the conduct you aided is criminal (e.g., because the law in question dealt with highly technical matters and you are a layperson), then this can defeat the inference that

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137. See *supra* notes 46–47 and accompanying text.

138. Matters would be different if the gas station were the only one for miles, and the robbers were out of gas. Though in that case, if the attendant reasonably feared for his safety, he might have a duress defense for his conduct.

you unjustifiably condoned a crime.

### C. Concluding Remarks

Given that the account developed here has plausible implications about all the issues discussed above, there is a great deal counting in its favor. It has the resources to plausibly explain a range of hard cases that complicity doctrine has traditionally struggled to address in a principled fashion. More work would be needed to fully spell out the details of the present account and to determine the best way to implement it practically. But enough should hopefully have been said to justify pursuing the matter further.

One might protest that my account does not really provide a solution to the question we began with: namely, which of the traditional mens rea categories should be required with respect to the underlying crime in order to be an accomplice. However, rather than privileging one or several of the familiar mens rea categories, my account seeks to show why the traditional mens rea categories, by themselves, do not sufficiently explain the mental state involved in complicity. In recognizing that the mens rea for complicity comes in degrees, the account defended here shows that theorists have been trying in vain to formulate a rule concerning the mens rea for complicity in terms of the traditional mens rea categories. Rather, my account reveals that different traditional mens rea can suffice in different cases because it is possible for the putative accomplice to unjustifiably condone the underlying crime to different degrees.

What is more, my account helps to drive home the need to reform the law of complicity. While others have argued that aiders who make only a minor causal contribution to the underlying crime should not be punished as harshly as principals,<sup>139</sup> my account shows that a distinction between full and lesser complicity is called for on independent mens rea grounds. Because one can condone the underlying crime to different degrees, and because this has a direct impact on the extent of one's culpability for aiding the crime, the law should not automatically punish aiders who only weakly condone the crime as harshly as principals. To punish such lesser accomplices as harshly as principals, despite their being substantially less culpable than principals, would be to commit a grave injustice. Recognizing that the mens rea for complicity comes in degrees thus serves to highlight the injustice that exists under the current legal regime, and shows the way to avoiding this injustice in the future.

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139. See *supra* notes 10–15, 126–129 and accompanying text.