

Reforming Complicity Law: Trivial Assistance as a Lesser Offense?

Joshua Dressler*

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.

The subject of accomplice liability has received relatively little scholarly attention in the United States except for a flurry of intellectual activity in the mid-1980s. One of these articles proposed reform of complicity law in the form of what may be characterized as the “causation approach.” The thesis of that article was that the criminal law fails to adequately distinguish between accomplices who are critical parties in a crime and those whose involvement is trivial. To alleviate this problem, the article recommended a statutory distinction between “causal” and “non-causal” accomplices: causal accomplices could continue to be convicted of the offense committed by the principal; non-causal accomplices would be convicted of a lesser offense and punished accordingly.

* Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University. I presented an earlier draft of this article in August 2007 at the 23rd World Congress of the International Association for Legal and Social Philosophy in Krakow, Poland. I benefited from the comments of the conference participants, especially those of Doug Husak (who also offered a number of post-conference suggestions), Bob Sullivan (whose generous comments and gentle criticisms were appreciated), and Antony Duff (who invited me to participate in the conference and suggested I take on this topic). Participants at a Moritz College of Law workshop, especially my colleagues Sharon Davies, Alan Michaels, and Marc Spindelman also provided very useful advice, as did the Guest Editor of this symposium, Stephen Schulhofer. Nonetheless, of course, all errors are mine. Nobody is complicit. I thank Dan Corcoran (Moritz '08) for his excellent research assistance.

I want to save my greatest thanks for Sandy Kadish. Not only has he been a kind friend and mentor to me over the years, but it is his classic casebook that has taught me (and virtually every other law professor in the past half century) how to think about the substantive criminal law. When I had the temerity to produce my own casebook, I wrote in the preface, “With the publication of my own casebook comes my professional bar mitzvah, but I can think of no higher accolade than if someone were to say of this book, ‘Why, it is a son-of-Kadish (and [Stephen] Schulhofer).’” Sandy Kadish is truly the giant of twentieth-century American criminal law scholarship. His influence continues—and will continue—as long as there are people who care about developing a coherent and just system of criminal law.

This article reconsiders the causation approach. In particular, Professor Sanford Kadish's approach to complicity, which sees no role for causation in complicity analysis, is evaluated. Other criticisms directed at the causation approach to complicity, including those who advocate outright abolition of the doctrine of complicity, are considered. Notwithstanding its critics, however, a causation approach to accomplice liability is conceptually justifiable and would still make for good legislative reform. However, this approach is not without imperfections. Therefore, variations on the causation approach, which would also result in a more just system than the present one, are proposed.

Surveying complicity's hazy theoretical landscape can, depending on the commentator's nerve, temperament, and resilience, induce feelings running from hand-rubbing relish to hand-on-the-brow gloom.¹

I. INTRODUCTION

American accomplice law is a disgrace.² It treats the accomplice in terms of guilt and potential punishment as if she were the perpetrator,³ even when her culpability may be less than that of the perpetrator (and even less than is required in the definition of the offense for which she is convicted⁴) and/or her involvement

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

² One court, in more diplomatic language, has observed that “[i]ndeed, for over a century down to the present day, the law of accomplice liability has been subject to criticism that it reflects no coherent set of criminal law principles or policies.” *State v. Burney*, 82 P.3d 164, 169 (Or. Ct. App. 2003).

³ Robert Weisberg, *Reappraising Complicity*, 4 *BUFF. CRIM. L. REV.* 217, 222 (2000) (“[T]o find that someone is an accomplice is to punish her as if she were the principal.”); *People v. Shafou*, 330 N.W.2d 647, 654 (Mich. 1982) (“Accomplices generally are punished as severely as the principal, on the premise that when a crime has been committed, those who aid in its commission should be punished like the principal.”).

⁴ One of the more remarkable aspects of accomplice liability law is the recognition of the natural-and-probable-consequences doctrine, which basically provides that “[a] person who encourages or facilitates the commission of a crime is criminally liable not only for that crime, but also for any other crime that is a natural and probable consequence”—basically, foreseeable consequence—“of the target crime.” *People v. Hoang*, 51 Cal. Rptr. 3d 509, 513 (Cal. Ct. App. 2006). For example: *A* intentionally assists *B* to commit an armed bank robbery by driving the “getaway” vehicle; *B* enters the bank and, in order to commit the robbery, kidnaps a teller. On these facts, *A* is likely guilty of kidnapping even though she did not assist in that crime because it was a foreseeable consequence of assisting in the bank robbery. The injustice is that *A* will be convicted of an offense (kidnapping) that requires proof of intention (intention to forcibly restrain another), even though *A*'s culpability in this regard is that of negligence. Thus, there does not exist a parity of culpability between the accomplice (who is negligent) and the principal (who may only be convicted if there is proof of intent). See *State v. Roberts*, 14 P.3d 713, 732 (Wash. 2000) (noting that “an accomplice . . . may be convicted with a lesser mens rea and a lesser actus reus than a principal . . .”). This injustice, observed by a few courts, e.g., *Sharma v. State*, 56 P.3d 868, 871 (Nev. 2002).

in the crime is tangential. When lay persons learn this, it can prove to be a “jaw dropper.”⁵ Nonetheless, there has been no recent legislative effort to reform complicity law.⁶

The subject of accomplice liability has also received relatively little scholarly attention in the United States.⁷ However, there was a minor flurry of intellectual activity on the subject in law journals in the mid-1980s.⁸ One of these articles, my own,⁹ proposed reform of complicity law. The thesis of that article was that complicity law fails to adequately distinguish in terms of liability and punishment between accomplices who are critical parties to a crime—e.g., ringleaders, people who provide essential services or criminal instrumentalities, and/or those who are otherwise deeply embedded in the criminal enterprise—and accomplices whose involvement is peripheral. To alleviate this problem, the article recommended the development of a statutory distinction between “causal” and “non-causal” accomplices: causal accomplices (persons but for whose assistance the offense would not have occurred) could continue to be convicted of the offense committed by the principal;¹⁰ non-causal accomplices would be convicted of a lesser offense

(rejecting the doctrine and observing that “[t]his doctrine has been harshly criticized”), falls outside the scope of this essay.

⁵ *Lawyer Tells Youths of Drug Deal Risks*, N.Y. TIMES, Aug. 23, 1998, at 19 (a lawyer, telling an audience about a teenager sentenced to ten years in federal prison for serving as a translator for a friend in a drug deal, stated, “That’s the jaw-dropper When I tell kids that aiding and abetting a felony is itself a felony and may draw the same punishment, I always get the same astonished reaction.”).

⁶ The American Law Institute conducted a decade-long effort to draft a comprehensive criminal code, which culminated in 1962 with the adoption of the Model Penal Code. One provision of that code deals with complicity. See MODEL PENAL CODE § 2.06 (1962). Various states have adopted this provision in whole or in part.

⁷ There has been greater interest in the subject elsewhere, especially from United Kingdom scholars. E.g., SMITH, *supra* note 1; Richard Buxton, *Complicity in the Criminal Code*, 85 L.Q. REV. 252 (1969); John Gardner, *Complicity and Causality*, 1 CRIM. L. & PHIL. 127 (2007); David Lanham, *Accomplices, Principals and Causation*, 12 MELB. U. L. REV. 490 (1980); David Lanham, *Complicity, Concert, and Conspiracy*, 4 CRIM. L.J. 276 (1980); G.R. Sullivan, *Complicity for First Degree Murder and Complicity in an Unlawful Killing*, 2006 CRIM. L. REV. 502; G.R. Sullivan, *First Degree Murder and Complicity—A Necessary and Useful Division?* (Aug. 5, 2007) [hereafter, Sullivan, Manuscript] (unpublished contribution to the “Foundational Issues in the Philosophy of Criminal Law” special workshop at the 23rd World Congress of the International Association for Legal and Social Philosophy, in Krakow, Poland, on file with author).

⁸ See Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984).

⁹ Dressler, *supra* note 8.

¹⁰ This assumes that the principal and accomplice have the same mens rea. Unfortunately, present law does not always demand such parity of culpability. See *supra* note 4.

and punished accordingly.¹¹ This causation approach received some academic attention,¹² but no legislative interest.¹³

Professor Sanford Kadish was one of the 1980's authors who wrote about complicity.¹⁴ Indeed, his essay stands out as perhaps the finest article published in an American law journal written on the subject. In his essay, Kadish argued that *no* accomplice ever "causes" a principal to commit an offense; therefore, he would reject the causation approach. As part of this well-deserved tribute to the twentieth century's greatest American substantive criminal law scholar, I am taking the opportunity to consider and respond to Kadish's¹⁵ and other scholars'¹⁶ criticisms of the causation approach to complicity law.

I conclude that, however philosophers might resolve the perplexities of causation in the complicity context (and they appear not to be of one mind), a causation approach to complicity law is morally defensible, and is a distinct improvement on current law. However, the "causal accomplice" category is potentially over-inclusive: occasionally a person reasonably characterized as a causal accomplice may still be a sufficiently minor participant in a crime that she merits more lenient treatment than the causal approach ensures. Therefore, I suggest variations on the causation approach.¹⁷ Along the way, I will also consider the potentially more radical proposition that the doctrine of complicity should be abolished in favor of a risk-based form of inchoate liability.¹⁸

Sandy Kadish was a great scholar interested in law reform. My goal here, too, is reformist in nature. I am convinced that any fair-minded legislator will conclude that treating all accomplices and principals alike is unjust—even more so now than in the past¹⁹—and that *some* legal distinction among non-perpetrators should be drawn.

¹¹ Dressler, *supra* note 8, at 137–40. *See also infra* Section III.

¹² Most of the attention was lukewarm at best. *E.g.*, Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 115–16 (2005); Weisberg, *supra* note 3, at 229; Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25, 29–30 (1996).

¹³ At least one court has sympathetically noted, without endorsing, the causation approach. *Grissom v. People*, 115 P.3d 1280, 1289 (Colo. 2005); *see also* *United States v. Hansen*, 256 F. Supp. 2d 65, 67–68 & n.3 (D. Mass. 2003) (observing that "[a]cademic commentators also are troubled by [such] questions [as] 'Why does the law treat all secondary parties alike, despite their varied levels of contribution to crime?'" (quoting Dressler, *supra* note 8, at 92)); *State v. Roberts*, 14 P.3d 713, 733 (Wash. 2000) (citing the causation approach in support of the court's finding that an accomplice may not be executed unless she is guilty of major participation in the homicide).

¹⁴ Kadish, *supra* note 8. *See also* Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1997).

¹⁵ *See infra* Section IV.

¹⁶ *See infra* Section V.

¹⁷ *See infra* Section VII.

¹⁸ *See infra* Section VI.

¹⁹ In recent years, most states have sought to increase the certainty of sentencing decisions by adopting "mandatory minimum" sentencing laws (particularly in regard to recidivists and offenders convicted of violent crimes and drug offenses), more sweeping determinate sentencing, and/or

II. THE PROBLEM

An accomplice is one who, with the requisite *mens rea*,²⁰ “aids or abets” the principal in committing an offense. Without listing all of the possibilities, she may be one who: solicits the offense by commanding, without legally coercing, another to commit the offense; procures the offense by offering an incentive to another to commit the crime;²¹ provides psychological encouragement to a principal already planning to commit the offense who needs—or does not need—the extra psychological boost; provides an essential—or non-essential—instrumentality used in the crime; provides a significant—or insignificant—service in the commission of the offense; or does nothing at all and thereby fails to make any effort to impede the offense when she has a legal duty to make such an effort. In short (putting the omission example aside), an accomplice is one who provides substantial—or quite

sentencing guideline systems. BUREAU OF JUSTICE ASSISTANCE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 123 (1996). One effect of these sentencing changes is longer prison sentences for many offenders, especially repeat offenders and persons convicted of violent and drug crimes. Thus, to the extent that punishment of *all* violent and drug offenders has increased over the past few decades, a minor accomplice is more often the victim of disproportionate punishment today than when the causation reform proposal first was made. Of course, to the extent judges still have sentencing discretion, it is reasonable to assume that they sometimes exercise it to impose lesser sentences on minor accomplices. The causation reform proposal, however, calls upon lawmakers to treat non-causal assistance as a lesser *offense*, thus ensuring lesser punishment as a matter of right, which is vastly preferable to relying on the limited and inconsistent discretion of judges.

²⁰ There are a number of controversies and complexities relating to culpability, all of which go beyond the scope of this essay. *E.g.*, Candace Courteau, Comment, *The Mental Element Required for Accomplice Liability: A Topic Note*, 59 LA. L. REV. 325 (1998); R.A. Duff, ‘*Can I Help You?*’ *Accessory Liability and the Intention to Assist*, 10 LEGAL STUD. 165 (1990); Kadish, *supra* note 8; Tyler B. Robinson, Note, *A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under § 924(c)*, 96 MICH. L. REV. 783 (1997); Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351 (1998); Weisberg, *supra* note 3, at 236–247; 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 (2002). For one of the most serious injustices relating to *mens rea*, see *supra* note 4.

²¹ The term “accomplice” does *not* include one who coerces or manipulates an innocent person to commit an offense. Such an actor is considered the perpetrator of the offense, the “principal in the first degree” in traditional common law parlance, based on the “innocent instrumentality” doctrine. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.03[A][2][b], at 501–03 (4th ed. 2006). As with many other features of complicity law, this doctrine possesses vague contours. It ought to be limited to circumstances in which the person committing the physical acts that constitute the crime is (as the doctrine suggests) a tool of the coercive/manipulative party. The latter’s conduct makes the physical actor no more than a marionette whose strings are pulled by the dominant party. Thus, if *S*, knowing *P* is insane, preys on *P*’s mental instability to cause *P* to commit an offense, it is appropriate to treat *S* as the perpetrator of the crime through the innocent insane person, *P*. But, suppose that *S*, unaware that *P* is insane, provides a gun to *P* at the latter’s request so that *P* can murder *V*. If *P* is later acquitted on insanity grounds, the law should not treat *S* as the perpetrator of the crime through “innocent instrumentality” *P*. *P* was *not* manipulated by *S*; he was *not S*’s instrument. It is far from clear that all courts appreciate this distinction.

trivial—aid in the commission of the crime.²² And, in states that have enacted the Model Penal Code’s complicity provision, accomplice liability is even extended to persons who do *not* aid, even trivially, but attempt to do so.²³

²² Some cases of minor assistance involve providing services or goods. *E.g.*, *State v. Duran*, 526 P.2d 188 (N.M. Ct. App. 1974) (*D* held *P*’s baby while the latter stole some cash); *Alexander v. State*, 102 So. 597, 598 (Ala. Ct. App. 1925) (wife carried food to her husband for a midday meal, “so that the work might continue without interruption,” and remained for a half hour while he manufactured bootleg liquor); *see also* *R v. Bryce*, [2004] 2 Cr. App. R. 35, [2004] Crim. L.R. 936 (*B* drove *P* to a spot within a few miles of the victim, and then drove away; *P* killed the victim many hours later).

Alexander, 102 So. at 598, might also be explained in terms of psychological encouragement. George Fletcher provides two examples from Germany that would apply as well in Anglo-American law. In one case, the accomplice lent a smock to a murderer to keep his clothes clean, which constituted encouragement by strengthening the assailant’s resolve. In the other case, the accomplice provided a key to the perpetrator to unlock a cellar door; it did not work but the court ruled that providing the key constituted encouragement. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 8.8.2, at 677–78 (1978).

Presence at the scene of a crime, even with the requisite mens rea, supposedly does not constitute complicity, but little more is needed. *E.g.*, *United States v. Ortega*, 44 F.3d 505 (7th Cir. 1995) (*O*, sitting in the backseat of an automobile in which a drug transaction was occurring, pointed to the bag of heroin; held: this act, done knowingly, was sufficient to constitute aiding); *Fuller v. State*, 198 So. 2d 625, 630 (Ala. Ct. App. 1966) (presence plus the words “[I]et’s get out of here” can “reasonably be construed as . . . encourage[ment];” moreover, *F*’s presence “add[ed] numerical strength to the ‘gang’ when the [crime was committed by others]”); *State v. Helmenstein*, 163 N.W.2d 85 (N.D. 1968) (when a burglary was being planned, *H* expressed a desire that the principals take some bananas; the court stated that *H* “clearly” was an accomplice); *R v. Giannetto*, [1997] 1 Cr. App. R. 1 (trial judge instructed the jury, “[s]uppos[e] somebody came up to [him] and said, ‘I am going to kill your wife,’ if [the secondary party] played any part, . . . [like] patting him on the back, nodding, saying ‘oh goody,’ that would be sufficient . . .”); *Wilcox v. Jeffery*, [1951] 1 All E.R. 464 (K.B.) (presence in the audience of an illegal concert in order to write a story about it for a periodical rendered *W* an accomplice as he was “present, taking part, concurring, or encouraging” the illegal events; “[i]f he had boomed, it might have been some evidence that he was not aiding and abetting”); *R v. Coney*, [1882] 8 Q.B.D. 534 (*C* was a spectator at an illegal boxing match; the court did not disagree that, assuming the requisite mens rea, a spectator could be held as an accomplice).

Glanville Williams has written that “[w]here two persons independently and at different times instigate a third to commit a crime, and he does so, each of the two can be convicted as an accessory, it being unnecessary to show which, if either, had an effect upon the mind of the principal.” GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 126, at 383 (2d ed. 1961). In terms of accomplice liability, this seems wrong. If a person has no effect upon the mind of the principal, such a person has not aided in the completed crime, and thus should only be convicted of an inchoate offense, unless the jurisdiction permits guilt on the basis of an attempt to aid, *see infra* note 23, or on the controversial alternative ground that one who is a party to a conspiracy to commit an offense may be convicted of that offense, even if she is not an accomplice, if another member of the conspiracy commits the crime. *Pinkerton v. United States*, 328 U.S. 640 (1946).

²³ MODEL PENAL CODE § 2.06(3)(a)(ii) (1962) (a person is an accomplice if, “with the purpose of promoting or facilitating the commission of the offense,” she “aids or agrees [to aid] or *attempts to aid*” the other person in planning or committing the offense) (emphasis added). Thus, in *State v. Gelb*, 515 A.2d 1246 (N.J. Super. Ct. App. Div. 1986), an appellate court held that Gelb could be convicted of the completed offense although his act of encouragement did not occur until after the principal had already begun committing the crime.

Despite the immense variations in participation suggested in the last paragraph, complicity law is binary:²⁴ a person is or is not an accomplice. Legally speaking, there is no such thing as a “major” or “minor” accomplice. Thus, if the binary switch is turned on—the major or minor actor is deemed to be an accomplice—she and the perpetrator are treated alike in terms of guilt and potential punishment. This occurs because an accomplice, as it is now commonly explained, *derives* her liability from the principal. If the principal commits no crime, there is no liability for the would-be accomplice to derive, although she might be guilty of some inchoate offense of her own, such as conspiracy or solicitation.²⁵ If the crime *is* committed by the principal, the accomplice is guilty of that crime, not of a separate and lesser offense of “aiding and abetting.” As Professor Weisberg has nicely put it, “complicity is not a distinct crime, but a way of committing a crime.”²⁶

For immediate purposes, it is sufficient to note just two troubling features of derivative liability. First, because the accomplice is guilty of the offense committed by the principal, there is a grammatical inaccuracy—and, if you will, legality problem—in her conviction: as an accomplice to murder she will be convicted of the offense of “killing” another person when, in fact, she did not kill the victim; as an accomplice to a rape, she will be convicted of having sexual intercourse with one whom she did not (and perhaps could not) have had sexual relations; as an accomplice to burglary she will be convicted of breaking and entering a structure she may never have seen, much less broken or entered.²⁷ Second, as the last point suggests, the accomplice and the principal are treated as if they were one; the law ignores their separate identities. It is for this reason that the principal and accomplice are treated alike in terms of guilt and punishment—after all, as far as the law is concerned, they are one and the same person.²⁸

The traditional explanation for treating the accomplice as if she were the perpetrator is that the complicity doctrine is founded on civil agency principles. Thus, the principal’s actions, as agent, are imputed to the accomplice. The inadequacies of the analogy to civil agency law, set out elsewhere,²⁹ need not be

²⁴ Weisberg, *supra* note 3, at 222.

²⁵ The Model Penal Code provides for conviction of criminal attempt if a person “engages in conduct designed to aid another to commit a crime that would establish his complicity . . . if the crime were committed by such other person . . . although the crime is not committed or attempted by such other person.” MODEL PENAL CODE § 5.01(3) (1962).

²⁶ Weisberg, *supra* note 3, at 224.

²⁷ See also *infra* notes 72–78.

²⁸ *E.g.*, State v. Curry, 636 S.E.2d 649, 654 (S.C. Ct. App. 2006) (“[I]f a crime is committed by two or more pe[ople] who are acting together in . . . commi[tting] . . . a crime . . . , the act of one is the act of [all].”).

²⁹ *E.g.*, SMITH, *supra* note 1, at 74–76; Dressler, *supra* note 8, at 110–11; Kadish, *supra* note 8, at 354–55; Rogers, *supra* note 20, at 1355 n.13. For example, in civil agency, unlike criminal law, “the main focus of responsibility is not the actor, but rather the inactive party.” SMITH, *supra* note 1, at 75. That is, with civil agency, the person in the background is responsible for her agent’s action

rehearsed here. Harvard scholar Francis Sayre long ago observed that between the “two fields of law [complicity and civil agency] there seems utter disparity of thought,” and that “developments in the one field have not easily penetrated the other.”³⁰ Professor Smith has observed that “at best, agency doctrine . . . is capable of explaining only part of complicity’s coverage”³¹ In my view, what *really* explains complicity’s derivative liability principles may more bluntly be characterized as “forfeited personal identity”:

Ordinarily a person is held criminally responsible for his own actions. However, when an accomplice chooses to become part of the criminal activity of another, she says in essence, “your acts are my acts,” and forfeits her personal identity.^[32] We euphemistically may impute the actions of the perpetrator to the accomplice by “agency” doctrine; in reality we demand that she who chooses to aid in a crime forfeit[] her right to be treated as an individual. Thus, moral distinctions between parties are rendered irrelevant. We pretend the accomplice is no more than an incorporeal shadow.³³

The forfeiture explanation can lead to the response, “So what? Even if agency terminology is an imperfect way of explaining complicity law, isn’t the point of civil agency principles *and* criminal complicity law that we *should* treat two (or more people) as if there were one? This is nothing new or exceptional.”

Indeed, complicity doctrine *is* nothing new. Anglo-American complicity law, including its derivative nature, *is* centuries old.³⁴ But a doctrine that authorizes the forfeiture of personal identity *is* exceptional in the sense that, at its core, the criminal law ordinarily seeks to determine *personal* responsibility and to

because the former directs or ratifies the latter’s conduct. In criminal law, more often than not, the relationship is the reverse: the perpetrator (the “agent”) is the dominant party; the accomplice provides assistance but does not ordinarily control the situation. Moreover, civil agency law, but not criminal complicity law, recognizes “*ex post facto* ratification.” *Id.* And, civil agency does not typically extend to independent contractors, but there is no similar limitation with complicity.

³⁰ Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 695 & n.27 (1930).

³¹ SMITH, *supra* note 1, at 6.

³² An exception to this principle occurs if the accomplice successfully proves an excuse claim. In such circumstances, because of the excusing condition, the secondary party does not forfeit her personal identity and will not be held responsible for the non-excused principal’s conduct. I thank Doug Husak for pointing out this problem with my original characterization of the forfeiture principle.

³³ Dressler, *supra* note 8, at 111; *see also* *People v. McCoy*, 24 P.3d 1210, 1214–15 (Cal. 2001) (quoting some of the forfeiture language in the text); *People v. Prettyman*, 926 P.2d 1013, 1018 (Cal. 1996) (same); SMITH, *supra* note 1, at 76 n.92 (citing Dressler, *supra*).

³⁴ SMITH, *supra* note 1, at 73.

proportion guilt and punishment in relation to *personal* moral desert,³⁵ or, if one is utilitarian in focus, the criminal law often calibrates punishment in relation to *personal* dangerousness. It does not take much reflection to realize that accomplices are not always, or perhaps even usually, as deserving of guilt or punishment, or as dangerous, as their principal cohorts.³⁶ It is similarly evident that not all accomplices—contrast the mastermind behind a bank heist with a loving spouse who brings a midday meal to her criminal-minded husband or a car occupant who merely points at illegal drugs³⁷—are equally deserving (or in need) of punishment.³⁸ It is the personal forfeiture, aka civil agency, principle that conceptually hinders proper apportionment of guilt and punishment in multi-party criminal activity.

III. THE CAUSATION APPROACH

The thesis of my 1985 article was that the fault of accomplice liability centers on the law's failure to require a causal—a *sine qua non*—connection between the accomplice's assistance and the ultimate social harm perpetrated by the principal. According to traditional complicity doctrine, the accomplice must in fact assist in

³⁵ Kadish, *Reckless Complicity*, *supra* note 14, at 372 (“[T]here is the ethic of individualism and self-determinism reflected in traditional criminal law doctrine that except in limited specified circumstances neither what happens to another nor what another person does is one’s responsibility.”).

³⁶ I stress that this is not to say that the accomplice is *never* as deserving of punishment as the perpetrator, only that the perpetrator by actually committing the crime—by pulling the trigger of the gun, or pointing the gun at the bank teller and taking the cash, or forcibly having sexual intercourse with the victim—initially deserves to be treated as more morally deserving of blame and punishment than those who participate indirectly. See SMITH, *supra* note 1, at 81 (suggesting, at least as a “preliminary premise,” that “it might be claimed that the perpetrator, by virtue of exercising the *final* or most direct (human) control over whether the offence is carried out, is in an inherently special position; therefore, whatever the scale of the accessory’s contribution the perpetrator’s role assumes a particular and distinct moral importance.”).

³⁷ See generally *supra* note 22.

³⁸ I write from a desert-oriented approach, so the discussion that follows largely puts utilitarian considerations aside. If one focuses on utilitarian considerations, however, the treatment of all parties alike is also unwise. From a specific deterrence or rehabilitative perspective, individualization of punishment or treatment is required. This can cut both ways, of course. Sometimes accomplices might merit greater punishment than the principal. See, e.g., *Getsy v. Mitchell*, 456 F.3d 575 (6th Cir. 2006) (businessman hired a nineteen-year-old to kill the victim; held: death sentence received by the youth violated the Constitution in view of the fact that the businessman who hired him only received a life sentence in a separate trial), *reversed en banc*, 495 F.3d 295 (6th Cir. 2007) (Eighth Amendment proportionality requirement refers to an abstract evaluation of a sentence for a particular crime and does not involve a comparative analysis to other persons). But, it is reasonable to believe that in general those who personally perpetrate crimes are more dangerous and more in need of rehabilitation than those who merely provide limited assistance in a crime. In regard to general deterrence, as well, there may be good reason to treat accomplices more leniently than perpetrators in order to provide a minor incentive to would-be criminals to serve only in a secondary, background role in the crime.

the crime in the sense that her aid must contribute, at least trivially, to the outcome, but it is unnecessary for the government to prove beyond a reasonable doubt, *or at all*, that, in the absence of such assistance, the offense would not have occurred when it did.

This absence of a causal requirement is significant. Causation serves a critical role in a just system of criminal laws. First, it links the person whose guilt and punishment is at issue to the resulting harm. In an extreme example, the causation requirement prevents the law from choosing someone out of a crowd and holding her responsible for a harmful event. Imagine two hunters, strangers in different places in the forest, recklessly firing their respective weapons. If a bullet from one of the rifles strikes and kills a third person we know that, in order to prosecute for the homicide, it is necessary for the government to prove which hunter's bullet felled the victim. But why require such a determination? After all, both hunters were reckless, and their level of dangerousness may be the same. Nonetheless, the law provides that one of the hunters is guilty of criminal homicide and the other is not. The critical distinction, of course, is that one caused the harm and the other did not. Causation is the tool the criminal justice system uses to determine whom to punish in these circumstances; it ensures that a person is not randomly blamed for resulting harm. Of course, complicity law is not so extreme: the accomplice and the principal *are* functioning together; the law is not dragging someone into the courtroom unconnected to the harmful event.

The hunter example, however, allows us to focus on the second important role of causation in the criminal law. Causation serves as an essential (although not exclusive) tool in the accurate measurement of an actor's moral desert and proportional punishment for an outcome. With the hunters, one of them should be convicted of murder or manslaughter and her punishment should be proportional to the harm she has caused and her culpability for causing it. The other hunter arguably ought to be guilty of some offense, perhaps reckless endangerment, and should be punished proportional to the lesser harm *she* has caused.³⁹ The law does not treat these two people alike; their guilt and punishment will differ.⁴⁰ *But this*

³⁹ Despite the common assertion that the causation requirement is limited to so-called "result crimes," e.g., Weisberg, *supra* note 3, at 228, there *is* a causation requirement with "conduct crimes," such as reckless endangerment, as long as one defines "social harm," the linchpin of the criminal law, as the "negation, *endangering*, or destruction of an individual, group, or state interest, which [is] deemed socially valuable." Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345, 413 (1965) (emphasis added).

⁴⁰ This statement is generally accurate. The common law and most modern penal codes calibrate guilt and punishment on the basis of results (and culpability for those results). Thus, it is usually the case that an inchoate offense, such as criminal attempt, is punished less severely than a successfully completed offense, although the actor's moral blameworthiness (and dangerousness) is the same in both cases. The subjectivist drafters of the Model Penal Code sought to equalize punishment in most circumstances, but even they backed down with the most serious offenses. MODEL PENAL CODE § 5.05(1) (1962).

critical just-deserts feature of criminal law is ignored in the law of complicity. Because there is no causation requirement, an accomplice may be convicted of a crime only her principal caused, and she may be punished as severely as her cohort. It is *this* feature (or lack of feature, if you will) of complicity law that allows a prosecutor to obtain the conviction of a person who offers trivial encouragement by applauding the latter's illegality, or who holds a friend's baby so the friend can steal some money, or who responds "oh goody" to another person's stated intention to commit a crime, or who opens the bank door so that the other can enter to rob it;⁴¹ and it is *this* feature of complicity law that makes such a trivial accomplice subject to the same punishment as the mastermind or perpetrator of the crime.

According to the causation proposal, however, a critical line would be drawn between causal and non-causal accomplices. A causal accomplice could properly derive liability for the crime committed by the perpetrator (assuming, of course, she possessed the requisite mens rea) and, thus, could be convicted of the same offense and receive the same punishment as the principal party. In contrast, a non-causal participant would not derive liability for the perpetrator's offense but instead would be convicted of a lesser crime and punished less severely.⁴²

The grading distinction between completed and attempted offenses, which places a premium on luck or chance, has been the subject of enormous scholarly debate that must be put aside here. *See, e.g.,* Sanford Kadish, *Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994). This distinction, however, is deeply embedded in the criminal law, doubtlessly because it expresses the common and deeply-held moral intuition that (holding culpability constant) those who successfully commit a crime have a greater penal debt to pay than those who have failed to cause the intended social harm. PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME* 23 (1995) (finding in their study that respondents "assign different liabilities for attempts than for completed crimes," and that "[t]his result is consistent with the traditional grading of attempts . . . and is inconsistent with the Model Penal Code grading of attempt as being on an equal footing with the completed offense"). Those who reject these intuitions will find the "causation" arguments in the text unpersuasive.

⁴¹ *See generally supra* note 22.

⁴² I have advocated a somewhat similar position in regard to the question of the death penalty for accomplices. *See* Joshua Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17, 60–74 (1979) (a review of capital sentences in three states from 1935 through 1979, and an analysis of persons on death row in 1979, demonstrated legislative, prosecutorial, and juror hesitancy to permit execution of accomplices, particularly non-causal ones); *see also* Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819, 847 (1990) (observing that the preceding study was, at the time, "[p]erhaps the best of the overlooked data" on the subject of capital punishment of accomplices). Subsequent to the study, the Supreme Court ruled, based in part on a "broad societal consensus," that the death penalty constitutes unconstitutionally disproportionate punishment when imposed on accomplices whose degree of participation in the crime was minor. *Tison v. Arizona*, 481 U.S. 137, 146 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

IV. KADISH AND THE CAUSATION APPROACH

According to Professor Kadish, there is *never* a causal link between an accomplice's assistance and the crime committed by the perpetrator. Therefore, a causal/non-causal distinction is meaningless.⁴³ He draws a distinction between voluntary "wild card"⁴⁴ human intervening conduct, on the one hand, and non-human and involuntary human intervening conduct, on the other hand. As he would see it, there is a difference between Alice releasing the brake on a car parked on a steep hill, where the vehicle will invariably go downhill and, in contrast, handing a gun to Bob, who says he wants to murder Carla but who might change his mind.⁴⁵ Alice "caused" the harm that ensues at the bottom of the hill, but Kadish, influenced by philosophers Hart and Honoré,⁴⁶ would presumably contend that we cannot properly say that Alice "caused" Bob to kill Carla as long as Bob's decision to go through with his plan was volitional. Since an accomplice's assistance is always followed by the principal's voluntary criminal conduct,⁴⁷ there is simply no role for causation in complicity law; the voluntary human action "serves as a barrier through which the causal inquiry cannot penetrate."⁴⁸ Because causation is not available as a basis to explain complicity, the criminal law requires another explanation—agency principles—for holding accomplices responsible for their principals' actions.

Professor Weisberg has observed that Kadish "seems almost mesmerized by the exquisite metaphysics of the question" of causation.⁴⁹ I will not go that far, but Kadish's unyielding "wild card" reasoning *is* unsatisfactory.⁵⁰ First, to the extent that Hart's and Honoré's "voluntary human intervention" principle—a factor considered in determining what American lawyers call "proximate causation" rather than *sine qua non* causation⁵¹—is meant to be descriptive rather than normative, case law is limited and equivocal.⁵² Second, although it is true that

⁴³ Kadish's article on complicity, *supra* note 8, preceded by a few months my article advocating the causation approach, so he was not responding directly to my proposal, but his discussion of causation demonstrates that he would reject it.

⁴⁴ *Id.* at 360.

⁴⁵ See SMITH, *supra* note 1, at 68.

⁴⁶ H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985).

⁴⁷ If the perpetrator's actions are coerced or he acts innocently as the result of another person's fraudulent conduct, then the latter is actually the principal, not the accomplice, acting through an innocent instrumentality. See *supra* note 21.

⁴⁸ Kadish, *supra* note 8, at 336 (citing the first edition of HART & HONORÉ, *supra* note 46, published in 1959).

⁴⁹ Weisberg, *supra* note 3, at 229.

⁵⁰ See also Dressler, *supra* note 8, at 126–28.

⁵¹ DRESSLER, *supra* note 21, at 208.

⁵² SMITH, *supra* note 1, at 69; see also Sullivan, Manuscript, *supra* note 7, at 10 ("As it happens, English law has made some movement away from the dogma that freely chosen conduct cannot be caused by non-coercive, non-duplicious interventions.").

voluntary human conduct *is* less predictable than, say, the laws of gravity, the proposition that voluntary human conduct is invariably less predictable than some natural events, for example, the direction a tornado will take, is false. Indeed, Kadish might agree with this latter observation. More recently, he clarified his causation argument by stating:

I suggest that the differences in our reactions when it is a volitional human action that intervenes is not the product of perceived differences in probabilities, but of the pervasive conviction, widely manifested in the law, that it simply matters whether the causal route goes through another person, because we perceive human actions as differing from all other natural events in the world.⁵³

As a normative matter, voluntary human conduct *does* differ fundamentally from other forms of action.⁵⁴ But, why must we accept Kadish's causal assertion in the context of complicity law as an inflexible moral doctrine? We can just as persuasively assert that a perpetrator's voluntary conduct does *not* invariably preclude reaching the normative conclusion that an accomplice's assistance can cause—both factually *and* legally—a result through the perpetrator. Certainly based on a common-sense understanding of causation, it is sensible to claim that when I offer a huge fortune to another person to kill my wife, and he takes my money and performs the deed, I have “caused” her death. As philosopher John Gardner has written:

Many people . . . are tempted to say that people, as responsible agents, have free will and defy causality. Causal chains therefore cannot run to or through their actions. One wipes people [perpetrators] out of the story, as responsible agents, if one insists on subjecting their actions to causal explanations or on running causal explanations through their actions. So it is often said. But this strikes me as [a] . . . mistake When I pay a hitman to kill an enemy it is a straightforward consequence of what I do that the hitman kills my enemy, and hence that my enemy dies. . . . I procure the killing and I also cause, through the hitman, the death. There is a straightforward causal explanation of how it all unfolds, action and reaction, antecedent and consequent. None of this wipes out the hitman's part in the story as a responsible agent.⁵⁵

Of course, the contract killer (and only he) *killed* my wife—but it is hardly incoherent to treat the soliciting accomplice, along with the perpetrator, as causally

⁵³ Kadish, *supra* note 14, at 393.

⁵⁴ Joshua Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 Sw. L.J. 1063, 1073 (1981).

⁵⁵ Gardner, *supra* note 7, at 136–37.

responsible for the result. It is also sensible to attribute cause to a brilliant scientist who purposely provides me with the means to blow up the city of Los Angeles, which outcome would have been well beyond my (or anyone else's) expertise or capacity without her assistance. Kadish's normative claim to the contrary is unduly inflexible: normative claims of causal responsibility are better (and usually are) left to juries. And, I would submit, the "pervasive conviction" of most people is that accomplice conduct can satisfy causal principles.⁵⁶ To use Hart's and Honoré's own standard, "causal conceptions which pervade *ordinary* thought"⁵⁷ likely support this characterization.

V. OTHER CRITICISMS OF THE CAUSATION APPROACH

Even if one rejects Kadish's "metaphysical" position, one could claim that the causal approach is "surely not [correct], lest all accomplice liability . . . would raise impossible problems of causation."⁵⁸ Unless one is making an epistemological argument here—how can anyone know *anything*?—there is no reason to believe the issue of causation is beyond a jury's fact-finding capacity. It will be difficult in some cases to prove factual causation, but such difficulties of proof are hardly unique in criminal trials and insufficient reason to reject in full a distinction of such moral significance.⁵⁹ At worst, in a legal environment in which elements of an offense (here, causation) must be proved by the government beyond a reasonable doubt,⁶⁰ some causal accessories might avoid conviction of the principal's offense and be punished less severely than they deserve, but this is hardly a legal catastrophe.

Another criticism might be characterized as the "what's the big deal?" objection. Professor Weisberg writes that "Professor Dressler's continuing ambivalence [with the causal/non-causal distinction] is evident from his reluctance to leave any very significant content to the second category."⁶¹ Professor Yeager makes a slightly different point when he characterizes my concept of causation as so "dilute" that the "causal accomplice" category "sound[s] overinclusive."⁶² Put differently, the criticism is that all but the most trivial accomplices will satisfy the

⁵⁶ See SMITH, *supra* note 1, at 68 (suggesting that the inherent difference between natural and human intervening events does not justify "the denial of any sort of comprehensible causal attribution to secondary parties").

⁵⁷ HART & HONORÉ, *supra* note 46, at 2 (emphasis added).

⁵⁸ Weisberg, *supra* note 3, at 228.

⁵⁹ As for *proximate* causation—the question of whether the actual result is "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense," MODEL PENAL CODE § 2.03(2)(b) (1962)—this is an explicitly normative concept that, as noted above, is traditionally and suitably left to the jury.

⁶⁰ *In re Winship*, 397 U.S. 358 (1970).

⁶¹ Weisberg, *supra* note 3, at 229.

⁶² Yeager, *supra* note 12, at 30.

causal requirement, so either the causation reform proposal is much ado about little or, worse, is wrong because of an over-inclusive category of causal assistance.

The assertion that the “causal accomplice” category leaves little for the “non-causal” category may be an overstatement. One charged as an accomplice on psychological encouragement grounds (I put aside here encouragement by solicitation or “procuring”) likely would often be deemed non-causal. The same may be said for those who provide very minor assistance, e.g., the person who merely opens the door to the bank to let the perpetrator enter. It is impossible to know how many non-causal cases there are, but the absolute number is likely to be significant. Even if the causation approach would have only minor impact on legal outcomes, this does not discredit the proposal if the causation principle is as important a justice-enhancing feature as suggested here and, thus, the effect of the causation proposal would be to make complicity law a bit fairer.

That being said, it *is* true that if one applies a strict standard of factual causation, the proposed reform *will* have relatively little practical impact. Indeed, if one defines the causation test in terms of whether the result would have occurred “*when and as it did*,”⁶³ then the causation/non-causation distinction *does* entirely collapse. If Alice’s assistance consists only of opening the front door to a bank to let Bob enter to rob it, she *is* a causal accomplice under *this* definition because, had she not opened the door—if Bob had done it himself—then it can be said that, but for Alice’s assistance, the bank robbery would not have occurred *as* it did (namely, with Alice’s help rather than by Bob acting alone). Or, if Donald asks for a gun to kill Victor, and Abigail and ten others toss Donald a gun, and it just happens that Donald chooses Abigail’s weapon, Abigail is a cause of the death according to this view of *sine qua non* causation because, but for her assistance, the murder would have occurred in a different manner (with someone else’s gun). For purposes of the causation proposal, however, the law should not apply this strict standard of causation. Jurors, as fact-finders, should determine whether the criminal result would have occurred when it did without the accomplice’s assistance, and not whether it would have occurred in precisely the manner it did.⁶⁴

What about timing? Return to Alice opening the door for Bob at the bank. Suppose it can be shown that, but for Alice, Bob would have opened the door himself (not a big leap in faith), but he would have done so a *little* more slowly (he had arthritis). In these circumstances one must concede that but for Alice’s assistance, the robbery would *not* have occurred “when it did,” but rather one second later. A strict application of the but-for test would indeed treat Alice as a causal accomplice—she accelerated the outcome by one second, and thus the

⁶³ ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 773 (3d ed. 1982); *see also* SMITH, *supra* note 1, at 84 (stating that “cause” includes “time, place, extent and type of harm, and so on”).

⁶⁴ This is not to say that the manner in which a crime occurs never has causal significance. If a crime occurs in a highly unusual manner this will properly implicate traditional *proximate* causation considerations.

robbery that occurred is a different robbery than the one that would have resulted in Alice's absence. Thus, again, the causal/non-causal distinction evaporates. But, here too, the law should trust the common sense of a jury, which (with suitable jury instructions⁶⁵) would almost certainly treat Alice as a non-causal assistant in the crime.

But another concession is in order: the causation approach *will* sometimes require difficult temporal lines to be drawn. Consider the example offered by Professor Smith:

Knowing *P* was on his way to burgle a house, good natured *A* lends him his bicycle simply to make the ageing burglar's life a little less grim. *A*'s good turn enables *P* to carry out the offence a few minutes before he would otherwise have done had he arrived on foot.⁶⁶

At some point the acceleration of harm is admittedly too much to ignore. It is hard to defend the proposition that a crime that would seemingly occur an hour or, surely a day, later is the same offense,⁶⁷ but what about (as here) "a few minutes"? It is hard to show why, as a matter of retributive justice, this case is different than Alice's door-opening act that sped up the crime by just a second (or, for that matter, *slowed* down the crime by a second because *she* had arthritis). Of course, in Professor Smith's example, it is possible the few minutes mattered. *A*'s assistance may have permitted *P* to complete the burglary before the able-bodied resident could return home and frustrate the aging burglar's efforts; or the bicycle may have provided *P* with the needed reserve of energy to complete the job. Maybe all that can be said here is that facts matter, a causation test *does* require the prosecutor to work harder if she wishes to charge and convict a person as a causal accessory, and it is acceptable to leave these factual distinctions to the jury based on the evidence provided and a non-complex instruction on causation.⁶⁸

This latter example, and the concession that at some point the distinctions a jury might draw look suspiciously arbitrary, brings me to the claim that the "causal accomplice" category may be over-inclusive in the sense that *some* causal accomplices—or, at least, those who might plausibly be so characterized—are no more deserving of punishment than non-causal ones. This *is* an especially serious objection to the causation proposal.

⁶⁵ See *infra* note 68.

⁶⁶ SMITH, *supra* note 1, at 86. For a somewhat similar real example, see *R v. Bruce*, summarized *supra* in note 22.

⁶⁷ Dressler, *supra* note 8, at 133 n.206.

⁶⁸ The jury might be instructed simply: "In order to convict ___ of the offense of ___ as an accomplice [elsewhere defined], you must be satisfied beyond a reasonable doubt that, in the absence of ___'s assistance, the offense would not occurred when it did." Or, even more simply, "In order to convict ___ of the offense of ___ as an accomplice, you must be satisfied beyond a reasonable doubt that the offense would not have occurred in the absence of ___'s assistance."

The causal approach to complicity is premised on the view that if two people each cause a result, and each causes it with the same level of moral culpability (e.g., with the intention that the crime be committed), they deserve similar punishment, and they deserve greater liability and punishment than one whose involvement is non-causal. On reflection, however, causation may not do all of the work needed to draw sensible moral distinctions in multi-party crimes. In some cases a causal accomplice may *not* deserve to be treated as severely as the perpetrator (even granting full culpability). Glanville Williams long-ago asserted that it is “a matter of common sense [that] a person who gives very minor assistance ought not to be held as an accessory.”⁶⁹ Although there would likely be a significant overlap between Williams’s “major participant”/“minor participant” distinction and the causal/non-causal line, a jury *might* plausibly conclude in certain cases that an accomplice satisfies the causal test (perhaps, on certain facts, this could include the good natured accomplice who provided the bicycle to the burglar), but is still such a minor participant that she should be treated more leniently than the perpetrator.⁷⁰ In short, if broadly and deeply held community sentiments are considered—and they are ignored in a justice system only at great cost—the “causal accomplice” category may sometimes prove over-inclusive.

The significance of this criticism is considered in Section VII, but an entirely different critique of the causation approach merits attention at this point.

VI. COMPLICITY AS RISK-BASED CONDUCT—OR, ABOLISHING THE COMPLICITY DOCTRINE

The causation reform proposal is based on the premise that it is critical in calibrating guilt and imposing punishment to determine how much harm an actor

⁶⁹ SMITH, *supra* note 1, at 86 (quoting Williams, and incorrectly citing WILLIAMS, *supra* note 22, at 294).

⁷⁰ Common intuitions support this conclusion. ROBINSON & DARLEY, *supra* note 40, at 41 (finding “what intuition would have led us to expect”: “The greater the degree of help provided by the accomplice—where help is conceived of on a rough continuum beginning with encouragement and ending with criminal master minding—the greater the liability assigned to the accomplice.”); Norman J. Finkel & Kevin B. Duff, *Felony-Murder and Community Sentiment: Testing the Supreme Court’s Assertions*, 15 LAW & HUM. BEHAV. 405, 408–09 (1991) (reporting studies that indicate “defendants who are underlings and defendants whose participation in the crime was minor rarely get the death penalty”); Finkel, *supra* note 42, at 876 (in mock death penalty cases, “[m]ock jurors and mock justices repeatedly and consistently make proportionate and discriminative judgments of defendants for each particular case. Thus, mock jurors and . . . justices turn out overwhelmingly to be ‘proportionalists’ [imposing liability in proportion to the accomplice’s participation in the crime] rather than ‘equalists’ [equal punishment for accomplices and perpetrators.]”); *see also* State v. Noriega, 928 P.2d 706, 709 (Ariz. Ct. App. 1996) (“In the typical accomplice case . . . , the jury will be told of the acts of both the principal and the accomplice. As a result, the jury will likely observe there exists a continuum of behaviors ranging from the more serious acts of the principal to the less objectionable acts of the accomplice. In the example . . . , the accomplice behavior would likely be viewed by a lay person as less connected to the crime than the behavior of the principal, as well as less morally reprehensible.”).

has caused. This claim, however, will not persuade those who believe, contrary to American law and common intuitions,⁷¹ that people should be punished according to the harm they intend to cause or risk causing, and not in respect to the harm they actually cause. Nor does the causation proposal, which retains the complicity doctrine and its derivative liability underpinnings, satisfy those who would abolish the complicity doctrine outright.

Professor Daniel Yeager has characterized “causal and causal-like arguments,” as “weak[], if not . . . pointless[].”⁷² He considers complicitous conduct a form of risk-taking, much like criminal attempts and other inchoate offenses. He asserts that he is “not the first to recognize the possibility of complicity’s inchoateness; but I am one of the first to take it seriously.”⁷³ He reasons that “harm principles should have little or nothing to do with the law of complicity.”⁷⁴ He reaches the conclusion that complicity is more about risk than harm from a linguistic or grammatical perspective. He explains:

If . . . I ask you to try to score a basket against Michael Jordan, it would be ungrammatical for *me* to say (provided that you are not merely my means), “I tried to score against Jordan.” I have encouraged *you* to try to score against him. We could, however, and I do, say that *all* complicit acts, successful or not, are too mediated by the principal to be treated like attempted or completed object offenses.⁷⁵

It is wrong, in other words, to say that *any* secondary party is the murderer, robber, or rapist.⁷⁶ Instead, she is the *helper* in a murder, robbery, or rape, and should be convicted and punished as such. Thus, she should not be seen as deriving her liability from the principal⁷⁷—that is why it is pointless to talk in terms of cause—but rather she should be punished for what *she* has done, which is, by assisting, increasing the risk of harm by the principal.⁷⁸ In effect, Yeager would abolish the complicity doctrine as we understand it.

⁷¹ See *supra* note 40.

⁷² Yeager, *supra* note 12, at 33.

⁷³ *Id.* at 32.

⁷⁴ *Id.* at 31.

⁷⁵ *Id.* at 33.

⁷⁶ Yeager’s grammatical or linguistic point is correct. I previously made the same point. Dressler, *supra* note 8, at 92 n.3; *State v. Weeks*, 526 A.2d 1077, 1079 (N.J. 1987) (citing *id.*).

⁷⁷ There is one exception: In the case in which an actor orders or manipulates another person to commit a crime, Yeager would essentially apply current law and treat that person as the perpetrator of the crime.

⁷⁸ An accomplice is “an excessive risk-taker whose subjective . . . criminality . . . is what warrants punishment, regardless of whether his aid or encouragement informs or merely glances off of his principal.” Yeager, *supra* note 12, at 31.

Yeager is not the only advocate for this position. In a draft of a manuscript intended for publication,⁷⁹ G.R. Sullivan also recommends abolition of the complicity doctrine. Rather than analyze multi-party crimes in terms of principals and accomplices, Sullivan would create a more robust definition of principalship. In his reform proposal as tentatively developed in the manuscript, anyone who has “outcome responsibility” for an offense would be deemed a principal. Other participants (those without “outcome responsibility”) could be convicted of some lesser offense.

As it turns out, Sullivan’s discussion of “outcome responsibility” comes close to the causal approach or a variation of the “substantial participant” proposal I lay out below in Section VIIB. However, at least in one regard it goes considerably further. Sullivan posits the following scenario: *B* resolutely intends to kidnap *V*. *A* expresses to *B* his agreement that *V* should be kidnapped. *A*’s agreement, we are told by Sullivan, has no causal influence; *B* was resolute and would have proceeded with or without the encouragement. Nonetheless, based on no other involvement by *A*, Sullivan feels that *A*’s agreement is transformative in nature, sufficient to make him a principal in the subsequent killing, i.e., he has outcome-responsibility for the crime. Neither the causation approach nor the “substantial participation” proposal would justify such an outcome.⁸⁰

A more radical form of abolitionism is advocated in a forthcoming book by Professors Alexander, Ferzan, and Morse.⁸¹ In a current draft of chapter six of the book, the authors, largely in accordance with Kadish, reason that a person who aids in a crime never causes the outcome because she leaves the crime in the hands of a voluntary agent, the perpetrator, who may choose to commit the crime or not. All that the aider does, therefore, is to create a culpable risk that harm will occur, i.e., “accomplices” are really guilty of inchoate conduct. Thus, the authors would abolish the complicity doctrine and punish *all* non-perpetrators for what they have done—wrongful risk-taking.

Notice the impact of this proposal. Assume Ben advertises his services to the world: “I will kill anyone, anywhere, anytime if, but only if, you furnish me with one billion dollars. Fully guaranteed. Double your money back if I fail to exterminate the human rodent in your life.” Annette comes to Ben and pays the one billion dollar fee to have Carl killed. Annette returns home happy to know that her enemy will soon be dead. In one scenario, Ben dies of a heart attack a few minutes later, so Carl lives. In the other scenario, Ben kills Carl. In the Alexander-Ferzan-Morse world, insofar as Annette’s criminal liability is concerned, it does not matter which final scene is played out. As the complicity doctrine has been abolished, Annette is only guilty of what she has done, which is

⁷⁹ Sullivan, Manuscript, *supra* note 7.

⁸⁰ See also Gardner, *supra* note 7, at 135 (arguing that “the attempt to eliminate complicity from the moral landscape, in favour of a more capacious domain of principalship, fails.”)

⁸¹ LARRY ALEXANDER, KIMBERLY KESSLER FERZAN, & STEPHEN J. MORSE, A CULPABILITY-BASED THEORY OF CRIMINAL LAW (forthcoming 2008).

to take a substantial risk of causing Carl's death, doubtlessly a serious inchoate offense; but she is not guilty of Carl's death even if Ben earns his fee.

This approach strikes me as wrong on two accounts. First, assuming Carl *is* murdered, I have already suggested that I see no compelling justification for the view that Annette cannot share causal responsibility for Carl's death. Thus, their initial premise for abolishing the complicity doctrine, namely, that an accomplice cannot cause another voluntary actor to commit a crime, is wrong.

Second, and this follows from the first point but is true independently, the idea that Annette should not be held responsible for Carl's death runs counter to deeply felt, commonly held, moral intuitions regarding her proper liability. If Ben never kills Carl, Annette *should* be guilty of some inchoate offense (e.g., solicitation or attempted murder); if Ben earns his money, however, Annette *should* be held responsible for this death. Whether one uses complicity doctrine as I would or, following Sullivan's approach, conclude that Annette is a principal because she is outcome-responsible, few people would accept—nor, I think, should they—a justice system that did not hold Annette responsible for the murder that would not have occurred but for her one-billion-dollar payment.

Having said this, I acknowledge that the criminal conduct of non-perpetrators *can* coherently be seen as a risk-based, rather than harm-caused, doctrine. Of course, this approach suggests a more drastic reform than the causal approach to multi-party crime or virtually any other proposal that accepts the doctrine of complicity. Indeed, for those who believe that harm matters, and that risk-taking should be graded as a less serious offense than harm-caused crimes, it would follow from a risk-based perspective that *all* aiders and abettors would be punished less severely than those whose completed crimes they assisted. That *is* a possible way to approach the issue. My current interest, however, is in developing a reform approach moderate enough to gain some legislative interest. With that goal in mind, I now turn to two new reform proposals, beyond the causation approach.

VII. NEW REFORM PROPOSALS

A. "Causation-Plus" Standard

Once one accepts the premise (which, obviously, some do not) that an accomplice can cause a result through a voluntary perpetrator, the most salient objection to the causation approach to complicity law is that the "causal accomplice" category can prove over-inclusive. As noted above,⁸² this concern is mitigated if one understands causation in common-sense terms, but the possibility still remains that an accomplice with a seemingly minor role in an offense will satisfy the *sine qua non* test.⁸³ The problem is that, although *sine qua non* causation should be a necessary tool for determining criminal responsibility and

⁸² See *supra* notes 61–64 and accompanying text.

⁸³ See *supra* notes 65–70 and accompanying text.

moral desert, it quite arguably is not a sufficient tool. Measurement of moral desert also requires a determination of the actor's state of mind and—this is the relevant point here—the extent to which she participated (or, if you will, embedded herself) in the planning or commission of the crime.⁸⁴ In the absence of this latter factor—if a person is held responsible for a serious offense although her causal participation is minor, complicity law may sometimes *still* lead to “jaw-dropping”⁸⁵ results.

Therefore, an alternative reform proposal is the following: A person is not accountable for the actions of the perpetrator unless her assistance not only satisfies the causation requirement but there is evidence that the accomplice was a substantial participant, not a bit player, in the multi-party crime. Conceptually, an accomplice who satisfies both the causation and substantial-participant standards would be accountable for the conduct of the primary party and subject to the same punishment. The causal-but-minor accomplice would also derive her guilt from the principal (since she satisfies the but-for standard) and thus be guilty of the same offense as the principal, but she should be entitled as a matter of right to a reduced sentence because of her minor assistance. The *non*-causal participant would not derive liability for the completed offense but would instead be guilty of a lesser crime and, thus, be punished less severely for that reason alone.

This proposal is subject to complications. The Supreme Court has held that, as a matter of constitutional law, other than the fact of a prior conviction, any fact that exposes a defendant to a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt.⁸⁶ In the case of a *reduced* sentence, however, constitutional law is currently silent. A judge, rather than a jury, may make such a sentencing determination, and may do so on the basis of whatever level of proof the jurisdiction prefers. Thus, it would not be unconstitutional for a jurisdiction to require a convicted causal-but-minor accomplice at a sentencing hearing to prove her minor involvement by preponderance of the evidence. In the federal system and some states applying guideline sentencing, minor involvement in a crime *is* an express mitigating factor,⁸⁷ but a judge's refusal to reduce the sentence—even after a finding of minor involvement—will not necessarily constitute reversible error. And yet, according to the causation-plus proposal, a minor (but causal) accomplice should receive mitigated punishment as a matter of right.

This means that for the causation-plus proposal to work properly, either a jurisdiction must devise sentencing provisions that compel a reduction in sentence

⁸⁴ See *supra* note 70 and accompanying text.

⁸⁵ See *supra* note 5.

⁸⁶ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *United States v. Booker*, 543 U.S. 220, 243–44 (2005).

⁸⁷ *E.g.*, United States Federal Sentencing Guideline 3B1.2 provides for a downward adjustment in “offense level” if the defendant was a “minimal participant” in the criminal activity. U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2007).

of a minor (but causal) accomplice, or the state could simply treat non-causal participants and causal-but-insubstantial-participant accomplices alike—guilty of a lesser offense than the offense committed by the principal party, thereby ensuring reduced punishment.

B. “Substantial Participation” Standard

The causation-plus approach would necessitate complex statutory offense and/or sentencing distinctions that might deter even reform-minded lawmakers from proceeding. In these circumstances, the observation that “the best is the enemy of the good”⁸⁸ comes to mind. The best reform of complicity law may be to distinguish *exclusively* on the basis of the substantiality of the actor’s participation in an offense, without direct consideration of causation principles. A person whom the fact-finder determines was a substantial participant (with the requisite mens rea, of course), *and only such a person*, would be convicted of the same offense (and subject to the same punishment) as the principal, based on traditional derivative liability principles. Most of these accomplices *will* satisfy the but-for test, but some likely will not.

“Substantial participant” concededly is an imprecise term, but certainly no more so that the doctrine of proximate causation, which invites the fact-finder to draw justice-based lines of responsibility.⁸⁹ Ultimately, the issue here is whether the accomplice’s role in the planning or commission of the offense is sufficiently great that it is just to hold her accountable for—to derive liability for—the offense committed by the principal.

In regard to insubstantial participants in a crime, it would constitute poor policy, whether one applies utilitarian or just-deserts philosophy, to allow such a person to escape criminal liability. Minor assistance should constitute a separate and lesser degree of offense than the crime committed by the principal party.

VIII. CONCLUSION

Current complicity law is unjust in various regards, not the least of which is the fact that perpetrators, substantial participants, and tangential accomplices are treated alike in the guilt phase of a criminal trial. A causation or causation-plus approach to complicity law would result in a more just outcome.

Reform of some sort, even if it is not causation-based, will improve complicity law. Lawmakers should also seriously consider a “substantial participation” standard of complicity. This approach would provide a more just outcome than current law, permit line-drawing that conforms to moral intuitions about criminal responsibility, and does so in an uncomplicated manner.

⁸⁸ “Le mieux est l’ennemi du bien.” (Il meglio e l’inimico del bene). VOLTAIRE, 2 DICTIONNAIRE PHILOSOPHIQUE 49 (Lebigre Freres ed., 1834).

⁸⁹ See *supra* note 59.