

# Conspiracy, Complicity, and the Scope of Contemplated Crime

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One of the leading casebooks for the first-year Criminal Law course begins the mens rea discussion with *Regina v. Cunningham*.<sup>1</sup> Cunningham, in need of money, decided to rip the gas meter off the residential gas pipe in his soon-to-be basement to steal the shillings inside.<sup>2</sup> That Cunningham was guilty of theft was uncontroversial.<sup>3</sup> The problem was that Cunningham did not turn off the gas, and it seeped into the adjacent home, partially asphyxiating the neighbor, Sarah Wade.<sup>4</sup>

Although the case is technically about the interpretation of the word “maliciously” in the Offences against the Person Act, the lesson students are to draw from it is broader: each crime should stand on its own culpability. The criminality inherent in being a thief is not the criminality inherent in practically poisoning the neighbor. Instead, Cunningham needed to have been culpable as to the possibility of poisoning her. Specifically, Cunningham had to be reckless as to the risk of endangering life.<sup>5</sup> The jury was not so instructed—reversible error.<sup>6</sup>

Though this view of mens rea is foundational, it is sometimes abandoned. Two doctrinal appendages to conspiracy and complicity are among the culprits. First, under the *Pinkerton* doctrine, conspiring to commit one offense can place the defendant on the hook for another offense, even if the defendant did not agree to it.<sup>7</sup> Second, under the natural and probable

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1. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 258–62 (10th ed. 2017) (excerpting *R v. Cunningham* [1957] 2 QB 396 (Eng.)).

2. *Cunningham*, 2 QB at 396.

3. *Id.* at 397.

4. *Id.* at 398.

5. *Id.* at 401.

6. *Id.*

7. *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946).

consequences doctrine, aiding one offense can make the defendant liable for another offense that the defendant did not even foresee.<sup>8</sup> This means that a defendant who unreasonably fails to appreciate that the person he encouraged might commit another offense can still be punished for that other offense even though he did not purposefully aid it. And when he is punished for this second offense, he is not punished for his culpability in failing to perceive the risk of this second offense—that is, his negligence—but instead he is punished for whatever crime the perpetrator committed at the perpetrator’s level of culpability.

The worry about these appendages is that they have the potential to punish someone inconsistently with standard criminal law principles and disproportionately to her culpability. First, the criminal law typically does not punish merely negligent actors. The influential Model Penal Code makes recklessness the default mental state if no mental state term appears in the statute.<sup>9</sup> A criminal mind—a guilty mind—is typically thought to require an awareness that one may do harm.<sup>10</sup> Second, even when we extend liability to negligence, we typically think it is worse to cause a harm purposefully rather than negligently. In the context of killings, one is murder; the other is manslaughter.<sup>11</sup> That is, the gravity of the offense and the amount of punishment are tied to whether the person chose to aim at or risk the harm or whether the person just failed to see what a reasonable person would.<sup>12</sup> *Pinkerton* liability and the natural and probable consequences doctrine cause problems because they obliterate these lines. They allow individuals who may be only negligent vis-à-vis the commission of an offense to be punished as if they had acted with a higher degree of culpability.<sup>13</sup> Under these doctrines, failure to foresee a risk of death can lead to punishment for even a premeditated killing.<sup>14</sup>

The obvious solution is to abandon such doctrines. If they punish someone beyond her culpability, then they ought to be reformed or removed. But there

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8. *E.g.*, *People v. Luparello*, 231 Cal. Rptr. 832, 853 (Ct. App. 1986).

9. MODEL PENAL CODE § 2.02(3) (AM. L. INST. 1985).

10. *See generally* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, WITH STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 3–71 (2009) (arguing that recklessness should be the mental state governing criminal liability and arguing negligence is not culpable); Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147 (2011) (discussing problems with punishing for negligence).

11. ALEXANDER & FERZAN, *supra* note 10, at 266–67.

12. Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1202 (2017) (arguing criminal punishment should track blameworthy mental states).

13. *See infra* Part I.

14. *See infra* Part I.

are two worries here. First, I suspect that part of this expansion is fueled by conceptual questions about what is within and what is without the scope of someone's intention. If there is uncertainty about what is the core and what is the periphery, there will always be instability. Second, there is a normative push at work here. Because we have let our ordinary language drive our criminal law too frequently, the conduct our statutes captures may be too narrow. When people who deserve to be punished fall outside the reach of the criminal law, these appendages are an attractive way to extend the reach of the criminal law.

Accordingly, we may need to broaden the criminal law in order to effectively narrow it. This Article will argue for a two-part solution. First, I advocate expanding the reach of complicity to include knowing, as opposed to only intentional, aid. Second, I contend that we can narrow the reach of *Pinkerton* liability and the natural and probable consequences doctrine by extending liability to nontarget crimes only if the defendant had the mental state required for that offense, with punishment commensurate to the mental state the defendant did have. This proposal is more modest than my theoretical work that would simply abandon conspiracy and complicity in favor of a blanket recklessness offense.<sup>15</sup> What is proposed here is a pragmatic solution. But it will capture within criminal law's net those whom we are normatively justified in capturing, cabin the criminal law's reach so as not to create too much room for unfettered discretion, and gloss over most (if not all) of the complexities of determining the scope of intentions, a puzzle that lies at the heart of those crimes.

This Article proceeds as follows. Part I provides an overview of the mental state requirements for conspiracy and complicity, as well as *Pinkerton* liability and the natural and probable consequences doctrine. Part II introduces the puzzles about the scope of intentions that lie at the center of complicity and conspiracy. Part III argues that intention cannot be reduced to motivational significance but instead includes those results or circumstances that the actor takes her conduct necessarily to entail. Part IV reveals how these questions arise both because of the potential scope of intentions themselves and because of the further evidentiary inferences we perform in ascertaining what is intended. Part V turns normative and argues that we are justified in reaching beyond purpose. Rather than arguing for a broad expansion, however, this paper argues for a revision of the core of accomplice liability as well as *Pinkerton* and the natural and probable consequences

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15. See generally ALEXANDER & FERZAN, *supra* note 10; Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1178–81 (1997) (advocating abandonment of conspiracy in favor of broader conceptualization of solicitation).

doctrine that gives conspiracy and complicity a more principled reach, both conceptually and normatively.

### I. CONSPIRACY AND ACCOMPLICE LIABILITY: CORE AND EXTENSIONS

At the outset, let's set out the mental state requirements for conspiracy and accomplice liability, and then we can consider the extensions from *Pinkerton* liability and the natural and probable consequences doctrine. A conspiracy is an express or implied agreement between two or more people to commit a crime or to accomplish a legal act through unlawful means.<sup>16</sup> The offense requires two mental states: that the co-conspirators intend to agree and that they intend the achievement of the object of the conspiracy.<sup>17</sup> If A and B agree to rob a bank and then do so, they will be guilty of both the crime of conspiracy and the target offense of bank robbery.

Accomplices are those who intentionally assist or encourage the perpetrator's commission of the offense.<sup>18</sup> Accomplice liability, which makes the defendant guilty of the perpetrator's offense and is not its own substantive crime, requires "dual intents": (1) the intent to render the conduct that, in fact, assisted the primary party to commit the offense; and (2) the intent, by such assistance, that the primary party commit the offense charged.<sup>19</sup> If C provides A and B with ski masks to rob the bank (so that they can provide him with the three thousand dollars they owe him), he is their accomplice and will be guilty of bank robbery. Because A and B encourage each other by their agreement, they are both each other's accomplices and co-conspirators. But D who trips the bank security guard to help A and B, unbeknownst to them, is their accomplice but not their co-conspirator.

Although these offenses seem very targeted, they are quickly expanded. The *Pinkerton* rule provides that co-conspirators are liable for substantive offenses committed by their compatriots, even if they are not the object of the conspiracy, if the nontarget offense (1) was committed in furtherance of the conspiracy, (2) was within the scope of the unlawful project, and (3) was reasonably foreseen as a natural or necessary consequence of the unlawful agreement.<sup>20</sup> *Pinkerton* applies in federal jurisdictions and many states.<sup>21</sup>

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16. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.01[A] (8th ed. 2018).

17. *Id.* § 29.05[A].

18. *Id.* § 30.02[A][1]; *see also* 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as principal.").

19. DRESSLER, *supra* note 16, § 30.05[A]. Things can get a little trickier when the crime involves recklessness or negligence. *Id.*

20. *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946).

21. DRESSLER, *supra* note 16, § 30.08[B].

There is no need to prove the defendant intended the nontarget offense or even consciously appreciated it. Instead, if it was reasonably foreseeable, then *even if the defendant did not foresee it*, the defendant can be convicted of her compatriot's offense. Mere negligence somehow can fill in for crimes that otherwise require intention, knowledge, or recklessness. Even premeditated murder can be appended.<sup>22</sup>

For example, in *United States v. Vazquez-Castro*, the appellate court upheld the defendant's conviction for possession of a firearm in furtherance of drug trafficking, based on the defendant's commission of the offenses of conspiracy to possess with intent to distribute cocaine and possessing with intent to distribute cocaine.<sup>23</sup> The defendant's role was simple. He exited one car, got the drugs from another, and then walked to a restaurant to meet the buyers (or in actuality, undercover DEA agents).<sup>24</sup> Alas, the car from which the defendant obtained the drugs, and in which he sat in the rear passenger seat for mere seconds to get the drugs, had a gun under the driver's seat carpet.<sup>25</sup> There was no evidence, direct or indirect, that the defendant knew about the gun.<sup>26</sup> But the court found *Pinkerton* was satisfied nonetheless.<sup>27</sup> Even if Vazquez-Castro had absolutely no idea that someone would have a firearm, these facts were sufficient because the possession of such a weapon was within the scope of the drug deal and reasonably foreseeable. This is a far cry from asking what was the within the scope of Vazquez-Castro's intention and agreement.

Accomplice liability broadens its reach through the natural and probable consequence doctrine. This doctrine, applicable today in many jurisdictions, yields "[a]n aider and abettor is guilty not only of the intended, or target, crime but also of any other crime a principal in the target crime actually commits (the nontarget crime) that is a natural and probable consequence of that target crime."<sup>28</sup> The question is whether the nontarget crime is reasonably foreseeable.<sup>29</sup>

The natural and probable consequences doctrine, which does not even require that the later act be within the scope of the agreement, casts an even wider net than *Pinkerton*. Consider *People v. Zielesch*.<sup>30</sup> There, the defendant

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22. See, e.g., *United States v. Gonzales*, 841 F.3d 339 (5th Cir. 2016).

23. 640 F.3d 19, 26–27 (1st Cir. 2011).

24. *Id.* at 23.

25. *Id.*

26. See *id.* at 26–27.

27. *Id.* at 27.

28. DRESSLER, *supra* note 16, § 30.05[B][5] (quoting *People v. Smith*, 337 P.3d 1159, 1164 (Cal. 2014)).

29. DRESSLER, *supra* note 16, § 30.05[B][5] (quoting *Smith*, 337 P.3d at 1164–65).

30. 101 Cal. Rptr. 3d 628 (Ct. App. 2009).

bailed the perpetrator out of jail in exchange for methamphetamine and the murder of his estranged wife's lover.<sup>31</sup> The perpetrator, under the influence of meth and seeking to avoid returning to prison, shot and killed a police officer who stopped his car; at the time, he was nowhere near the intended crime scene.<sup>32</sup> The court, using conspiracy and accomplice liability terminology interchangeably but employing the natural and probable consequences test in determining liability, held that the perpetrator's use of the defendant's gun combined with the conspiracy to commit murder was sufficient for this conviction of murder:

If the hired killer is an unstable methamphetamine user who, before the assassination is completed, finds it necessary to kill a law enforcement officer to avoid being sent back to jail, the conspirator who hired and armed the assassin is guilty not only of conspiracy to murder the intended target, but also the murder of the peace officer. It would be a rare case indeed where a murder is an unforeseeable result of a conspiracy to commit murder.<sup>33</sup>

Again, the worry here is that punishment will be disproportionate to the defendant's culpability. Undoubtedly, the defendant did not behave reasonably, and arguably, he had greater culpability than negligence for his decision to give an unstable meth addict a gun. But all the court requires for this *first-degree murder* conviction is negligence.

## II. THE PROBLEM AT THE CORE

Why not just remove the appendages? The concern is that even if severed, the appendages may grow back, and they may grow back because of fundamental confusions about what it means to intend something in the first place. *Pinkerton* liability and the natural and probable consequences doctrine are attractive not because they represent forfeiture doctrines that seek to punish defendants more harshly than their culpability warrants, but because they seem to capture something about the true extent of the defendant's culpability. In other words, we need to know what the defendant intended to agree to or to aid. And our intuitions suggest that that intention may be broader than first appears.

Let's look at two cases to see the problems that might arise in determining intention's scope. First, consider the Supreme Court's opinion in *Rosemond*

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31. *Id.* at 631.

32. *Id.* at 630, 632.

33. *Id.* at 636.

*v. United States*.<sup>34</sup> Rosemond and accomplices attempted to sell one pound of marijuana; the buyers took the drugs but did not provide the cash, instead punching one of the sellers in the face and running off with the drugs.<sup>35</sup> Rosemond or his confederate then gave chase, and one of them discharged a firearm.<sup>36</sup> The government charged Rosemond on alternative theories of either being the shooter or being an accomplice to the shooter, resulting in Rosemond's conviction under 18 U.S.C. § 924(c), which prohibits using or carrying a firearm during a drug trafficking crime.<sup>37</sup> Rosemond was convicted and sentenced to the ten-year mandatory minimum applicable when the weapon is discharged.<sup>38</sup>

The critical inquiry in *Rosemond* is not a question about how to extend liability to this act. Rather, it is a question about whether Rosemond's serving as an accomplice to the drug deal included this gun charge in the first instance.<sup>39</sup> The Court noted that no one claimed that the firearm violation was a natural and probable consequence of the marijuana deal and maintained that it was expressing no view on that doctrinal appendage.<sup>40</sup> Instead, the Court was asking the question of what mens rea was required for accomplice liability for this "double-barreled crime."<sup>41</sup>

Here, Justice Kagan's opinion shifts from purpose to knowledge. While at first citing Learned Hand's "canonical" purpose/intent formulation in *United States v. Peoni*,<sup>42</sup> she quickly moves to precedent that she claims supports a view that knowledge suffices for accomplice liability's mens rea.<sup>43</sup>

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34. 572 U.S. 65 (2014).

35. *Id.* at 67.

36. *Id.*

37. *Id.* at 68–69.

38. *Id.* at 69.

39. *Id.* at 71.

40. *Id.* at 76 n.7.

41. *Id.* at 71.

42. 100 F.2d 401, 402 (2d Cir. 1938) ("It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he 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. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it.")

43. *Rosemond*, 572 U.S. at 76–77. These cases were distinguishable, however, as all but one did not involve conduct elements. See Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 145–53 (2015) (discussing why the cases are distinguishable).

Ultimately, the Court holds the decision to engage in the drug deal, knowing that there would be a firearm,<sup>44</sup> is sufficient:

In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one. . . . He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense—i.e., an armed drug sale.<sup>45</sup>

The problem is where this knowledge requirement comes from. Justice Kagan claims that this is a compound crime, but after requiring purpose for aiding the drug offense, she only requires knowledge for the gun conduct.<sup>46</sup> But recall, typically, complicity has required that one intend to aid any conduct element—and this crime has two: the *dealing* of the drugs and the *using* of the firearm. Justice Kagan treats the crime, for all intents and purposes (pardon the pun), as one of *engaging in a drug deal, knowing your confederate is armed*. But that is not the crime. It is *displaying, using, or discharging* a firearm while engaged in a drug deal.<sup>47</sup> It is only because Justice Kagan plays fast and loose with the conception of the crime at issue and ignores the statutory language that she can gloss over the fact that her analysis cannot easily be reconciled with *Peoni*.<sup>48</sup> Justice Alito notes that the Court has never been clear about purpose and knowledge, but he does not seem particularly troubled by this,<sup>49</sup> despite the fact that there are statutory distinctions, conceptual distinctions, and potentially normative distinctions at hand.

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44. *Rosemond*, 572 U.S. at 77–78. There were tricky questions that divided the majority from the concurrence/dissent on when that knowledge had to obtain, but we can ignore that for our purposes. *Compare id.* at 78 (explaining that defendant must have a “realistic opportunity” to decide whether to aid once knowledge is acquired), *with id.* at 85–92 (Alito, J., concurring in part and dissenting in part) (arguing that circumstances that may make it difficult to avoid assisting are better understood as defenses and not implicating whether the mens rea for the crime exists).

45. *Id.* at 77–78 (majority opinion).

46. *Id.* at 75, 79 (“It punishes the temporal and relational conjunction of two separate acts, on the ground that together they pose an extreme risk of harm.”).

47. *See* 18 U.S.C. § 924(c).

48. *See* Stephen P. Garvey, *Reading Rosemond*, 12 OHIO ST. J. CRIM. L. 233, 243 (2014) (noting that *Peoni* and *Rosemond* cannot be reconciled by construing the gun charge as a circumstance element).

49. *See Rosemond*, 572 U.S. at 85 (Alito, J., concurring in part and dissenting in part) (“The Court refers interchangeably to both of these tests and thus leaves our case law in the same, somewhat conflicted state that previously existed. But because the difference between acting purposefully (when that concept is properly understood) and acting knowingly is slight, this is not a matter of great concern.”).



But let's ignore whether *Rosemond* can be reconciled with *Peoni* and turn to the underlying conceptual question: Is the intention to aid your friend's drug deal, knowing he has the gun, an intention to aid an armed drug deal? And is it the same as the intention to aid the use of a gun during a drug deal? There does seem to be some rhyme to Justice Kagan's reasoning that the decision to aid is the decision to aid the crime in its entirety and not just the portions that one wants. What would explain our intuitions that one does intend to aid the crime as she finds it? Or as Justice Kagan puts it, "the player knew the heightened stakes when he decided to stay in the game."<sup>50</sup> This is the question that we shall explore in the next section.

Here is a second case to consider. In *United States v. Carr*, one defendant, Franklin, stayed in the car during the robbery of a credit union.<sup>51</sup> The plan was for one robber to enter a credit union disguised as a FedEx delivery person.<sup>52</sup> The credit union was just a two-woman office, with no security guard.<sup>53</sup> It did not have customers and only workers and delivery personnel were admitted.<sup>54</sup> When the faux FedEx delivery person tried to force his way in, one teller fought back and was pushed back into the credit union.<sup>55</sup> At other points, a firearm was displayed.<sup>56</sup> The Fourth Circuit held (1) that there was sufficient evidence of forced accompaniment (a quasi-kidnapping offense), as pushing a teller back into the credit union was within the scope and foreseeability of the planned robbery, and (2) that there was *insufficient* evidence that this robbery would involve a firearm as the kind of robbery did not necessitate it and there was no evidence that guns were ever discussed.<sup>57</sup>

*Carr* seems rightly decided. *Pinkerton* liability seems to be capturing something quite right about what Franklin was thinking—namely, if you are going to commit this bank robbery, it has to be committed in some way and that way is going to involve pushing some people around. What did Franklin think he was doing? Did he not anticipate the forced accompaniment? If *Carr* seems so right, how can *Pinkerton* be so wrong?

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50. *Id.* at 80 (majority opinion).

51. 761 F.3d 1068, 1071 (9th Cir. 2014).

52. *Id.*

53. *Id.* at 1071, 1080.

54. *Id.* at 1071.

55. *Id.* at 1071–72, 1080.

56. *Id.* at 1072.

57. *Id.* at 1079–81.

### III. THE SCOPE OF INTENTIONS

To see the difficulty at the core of these questions, it is time to do some philosophy. We need to know what it is to intend something. Now, I am not arguing that the criminal law should import this understanding directly. But we can only see why we are so confused if we understand exactly what is so confusing. And what is so confusing is figuring out what it is to intend something in the first place.

Let's start with a first cut at the scope of intentions. What we intend is first and foremost what is motivationally significant to us—that is, what we aim at.<sup>58</sup> Intentions are mental states that mediate actions by (nondeviantly) causing actions, and most importantly, causing actions in a way that rationalizes them.<sup>59</sup> Intentions explain why we perform an action.<sup>60</sup>

We can thus distinguish intended results from side-effects that we know will follow from our intended actions but that we do not desire. Even if you know a result will follow from your action, it does not mean that you intend that result. You may intend to drink without intending the hangover that you know will come the next day.<sup>61</sup>

Intention and knowledge are different. Known consequences do not cause or explain actions. In addition, intentions constrain reasoning in different ways than beliefs do. If one intends an action, then, according to philosopher Michael Bratman, one will engage in means-end reasoning, screen out alternatives, and be resistant to reconsideration.<sup>62</sup> These norms do not apply to beliefs. For instance, if I intend to see my sister in Rhode Island, then I will be under rational pressure to buy a plane ticket to get there. But believing she

58. Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147, 1148–49 (2008) (“Something is intended if it is motivationally significant.”); see also G.E.M. ANSCOMBE, INTENTION 9 (2d ed. 1963) (“[Intentional actions are ones] to which a certain sense of the question ‘Why?’ is given application.”); John Finnis, *Intention and Side-Effects*, in LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS 32, 36 (R.G. Frey & Christopher W. Morris eds., 1991) (“Whatever, then, is included within one’s chosen plan or proposal, whether as end or as means to that end, is intended, i.e., is included within one’s intention(s).” (emphasis omitted)); Anthony Kenny, *Intention and Purpose in Law*, in ESSAYS IN LEGAL PHILOSOPHY 146, 148 (Robert S. Summers ed., 1968) (“To somebody who is not a lawyer, it might seem that there was a further question relevant to Smith’s intention: not only what he foresaw, but what he wanted.”); A.P. Simester, *Moral Certainty and the Boundaries of Intention*, 16 OXFORD J. LEGAL STUD. 445, 446 (1995) (“Bluntly stated: things done as means or ends are intended; those done as side-effects are not.”).

59. Michael S. Moore, *Yaffe’s Attempts*, 19 LEGAL THEORY 136, 151 (2013).

60. See ANSCOMBE, *supra* note 58, at 9.

61. Cf. R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 88–89 (1990) (“[F]or a circumstance to be part of what I *intend*, more is needed than what I ‘want’ or hope or believe it to exist: what matters is whether I act as I do because I believe that the circumstance does or might exist.”).

62. MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 141 (1987).

is in Rhode Island doesn't require me to engage in any means-end reasoning. Other norms of rationality that apply to beliefs do not apply to intentions. For instance, stuck in equipoise, one may flip a coin to decide which of two paths to intend to take, but one cannot resolve beliefs in such a way.<sup>63</sup> One could not, unsure whether her spouse is cheating on her, simply flip a coin to determine what to believe.

This distinction, however, is not the end of the matter. There are the tricky "closeness" cases. Does a scientist who intends to decapitate intend to kill? Does the person who goes to a restaurant and orders the lobster, knowing it to be the most expensive item on the menu, thereby intend to order the most expensive thing on the menu?<sup>64</sup>

Elsewhere I have argued that contrary to conventional wisdom, the scope of an intention is not only those factors that are motivationally significant, but also those factors that are understood by the agent to be conceptually and empirically entailed by the factors that are motivationally significant.<sup>65</sup> This is because an actor's understanding of *what she is doing* requires an understanding more robust than simply one thin linguistic description. To illustrate, someone who knows what it is to decapitate knows that what one is doing is killing. The one conceptually and empirically entails the other.

Let me briefly explain what the account on offer is. It is an account of intentional content. If A intends to decapitate B, then "decapitating B" is A's intentional content. But that content is not just words. Rather, that content must mean something to A. The content of the intention, then, is not only the description under which the intentional object is motivationally significant, but also all descriptions that inform the agent's understanding of her act. A rational person would understand that in this world there is simply no way for a decapitated person to live. Hence, understanding what it means to decapitate B is understanding that one is killing B.

This connection is defeasible. It requires that the person be rational, understand basic physics and biology, and the like. Because we live in a world where people die when their heads are removed from their bodies, most people's understanding of decapitation is that it is a form of killing. If someone did not know this, then (1) he would not believe it to be true and (2) he could certainly not intend it. But what matters is the agent's understanding of the act. So, if conversely, the person falsely believes that paper cuts immediately and necessarily cause death, then that person intends to kill when he intends to give a paper cut.

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63. See GILBERT HARMAN, *REASONING, MEANING, AND MIND* 63, 65 (1999).

64. Robert Audi, *Intending*, 70 *J. PHIL.* 387, 396 (1973) (answering in the negative).

65. See Ferzan, *supra* note 58.

These cases are then distinguished from cases where one can understand one's action as excluding the side-effect. One can understand what it is to drink heavily without getting a hangover, even if one knows that a hangover will follow in this case. Even if in an individual case a consequence is known, that consequence is not part of one's intentional content unless one cannot understand what one is doing without understanding that one is causing the known consequence. Just because we know something will happen does not mean we intend that result. (It is an altogether different question whether we are blameworthy for known results.)

There is a further question about closeness cases. How should we treat circumstances as opposed to results? Circumstances can have motivational significance, though we might think those cases are less frequent. I may take a laptop because I want it, knowing it is yours, but it is less frequent for me to take the laptop *because* it is yours. Still, even if the cases wherein circumstances have motivational significance are rare, we must now ask the further question, which is whether one only acts intentionally vis-à-vis a circumstance when that circumstance is motivationally significant.

The answer here, too, is that it is simply not the case that the scope of our intentions is determined by the description that is motivationally significant. Other descriptions are equally part of the representational content. Consider a case where one decides to intentionally kill Mary. One does not think one is going to kill a string of letters, specifically M-A-R-Y. Rather M-A-R-Y is a human being, a woman, a professor, the person who gave one a failing grade in English, and so on. The ascription of meaning given to an intentional object is not a one-dimensional word but rather the entire array of senses that one ascribes to that word. And although one description may be the motivationally significant one, all the descriptions one attributes count as intended.<sup>66</sup>

Now, one might ask why it is that circumstance elements take on more known circumstances than result elements do. Why is it not just that one *knows* that one is killing a human being, while one *intends* to kill the nasty professor? The reason is that when one acts prospectively one is aware that the other descriptions may or may not follow—it is not, except in closeness cases which are intended, part of the agent's understanding that these results are nomologically or conceptually required to follow. I can understand drinking without understanding hangovers. But with a person or object on the other hand, one is acting on *this person/thing*. To understand that I am writing with *this pen* is to be writing with *this blue pen* is to be writing with *the blue*

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66. For further defense of these claims, see Ferzan, *supra* note 58. Gideon Yaffe takes a similar approach. See Gideon Yaffe, *Intending To Aid*, 33 LAW & PHIL. 1, 18 (2014) (“[O]ur intentions constitute commitments to conditions that they do not also commit us to promoting.”).

*pen my mom gave me for my birthday.* To think about the object I am using is to invoke what it is to me, which includes all the descriptions I (consciously or preconsciously) attribute to it.

Now reconsider *Rosemond*. One question is whether we should understand the aiding of two conduct crimes similarly to a conduct and a result or a conduct and a circumstance. Under the first understanding of the scope of an intention, one can understand dealing drugs without guns and so the gun is not intended, even if it is known. On the other hand, one understands that one is assisting another who has two things going on at the same time. That person is both dealing drugs and carrying a gun.<sup>67</sup> After all, if I give you fifty dollars for your birthday for you to order the lobster and lobster is the most expensive thing on the menu, I have intentionally aided your ordering the most expensive thing on the menu. That is, what I understand myself to be doing is broader than just aiding your order of lobster; it is everything that I understand lobsters to be. I may not care that it is a crustacean, but I aid you in so buying one.

Justice Kagan's sense, then, that one takes one's accomplice's crime as she finds it is arguably correct when we think about how we approach another's behavior. All those descriptions inform what one is aiding. This is distinct from the idea that one is necessarily aiding a likely result. Rosemond would not have intended to aid death just because he intended to aid an armed drug deal. But if he intends to aid someone's crime, and he understands it involves drugs and a gun, then irrespective of which aspect is motivationally significant (the drugs with a gun on the side or the gun with drugs on the side), the person understands that he is aiding behavior that has both components. What first appears to be slippage into knowledge may well be a more sophisticated understanding of what it means to intend something.

#### IV. INTENTIONS, INFERENCES, AND THE LAW

The law, of course, does not aim to delve into complex questions within the philosophy of mind. The question is, though, how the law understands intentions. If we naturally intuit that one intends to kill a human being when one intends to kill Mary, or that one intends to kill when one intends to decapitate, then we have some intuitive grasp of the scope of intentions. But as the law seeks to fully account for intentions' scope, we are not always so certain as to where the precise boundaries lie. And one way to determine

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67. I am putting to the side the slippage between the carrying and the discharging of the weapon. Rosemond was at most aiding the carrying and not the discharge. This nuance was also glossed over by the Court.

those boundaries is to rely on the inference that people intend “the natural and probable consequences of their actions.” I suspect that this inference unfortunately masks three distinct approaches to intentions and that we conflate these approaches in our thinking and in our doctrine. It is this conflation that leads to *Pinkerton* liability and the natural and probable consequences doctrine.

When we think one consequence “naturally and probably” follows from our actions, we might be talking about three different things: it could be (1) the very sort of result that is conceptually tied to understanding the action, (2) an evidentiary inference, or (3) punishment for negligence. The first approach is about the scope of an intention. To intend to decapitate just is to intend to kill. There are tricky philosophical problems here, but there is no normative objection. That is, there is nothing wrong with punishing an actor for intending to kill when she intends to decapitate. When we are asking what the person intends, we are asking about what she is rationally conjoining in her plan.

Now consider the second approach. We don’t have direct evidence of people’s mental states. Thus, we often think we know what people intend by showing what they know will occur. If I point a gun at your head and pull the trigger, I likely intend to kill you because why else would I bring about this known harm?

The final approach moves beyond the scope of the intention, ultimately allowing the failure to foresee what was natural and probable as intended. But really failing to see what is natural and probable is negligence. So this “culpability equivalence” view conflates intention with knowledge.

To see all three of these at play, and how easy it is to allow for inappropriate cross pollination, consider the English case of *Director of Public Prosecutions v. Smith*, which conflates negligence with intention.<sup>68</sup> During a traffic stop, an officer grabbed onto Smith’s car as Smith drove off.<sup>69</sup> Smith drove erratically to shake the officer loose, and unfortunately, he succeeded in so doing, resulting in the officer’s death.<sup>70</sup> The murder conviction required an intention to cause grievous bodily harm, and the House of Lords approved the following instruction:

“The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts.

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68. [1961] AC 290 (HL) (appeal taken from Eng.).

69. *Id.* at 290.

70. *Id.*

If you feel yourselves bound to conclude from the evidence that the accused's purpose was to dislodge the officer, then you ask yourselves this question: Could any reasonable person fail to appreciate that the likely result would be at least serious harm to the officer? If you answer that question by saying that the reasonable person would certainly appreciate that, then you may infer that that was the accused's intention, and that would lead to a verdict of guilty on the charge of capital murder."<sup>71</sup>

The court held that the trial court did not err in failing to tell the jury that such an inference was rebuttable.<sup>72</sup> Rather, the only thing that would sever the inference, opined the court, was a finding of insanity or diminished capacity.<sup>73</sup>

We now see how easy it is to blur these questions. Did Smith intend to kill the officer? We rely on both the inference that people intend the natural and probable consequences of their actions, and the inference from what a reasonable man would think would happen to what the defendant may have intended. But as we have seen, not all known side-effects, even the ones a reasonable person would appreciate, fall within the scope of the intention. If I unreasonably eat your salad thinking it is mine, then despite what a reasonable person would have thought, I don't intend to eat *your* salad. If I hang my drapes and know they will fade in the sunlight, I still don't intend to fade the drapes. So here, the question is whether Smith could understand his action—shaking the officer loose at a high speed into oncoming traffic—as an action that does not conceptually entail seriously harming the officer. Arguably, he could understand his action as “shaking the officer loose” and still think the officer could survive without serious harm. Hence, the scope of his intention need not include killing; thus, a finding that death was a natural and probable result is not a finding that the result was intended.

What if the instruction is construed instead as recognizing that it was likely that he intended the injury given that serious bodily injury was a natural and probable result of throwing the officer off the car? The case would make sense as an evidentiary inference, but the House of Lords approved this inference being essentially irrebuttable, thus allowing the finding of intention from the finding of reasonable. This was substantive equivalence, not a way for the jury to get to intention.

If this test is not picking out the scope of what Smith intended and it is not being employed as an evidentiary inference of what that intention was, what is it? It is punishment for negligence. What this case allowed the jury to do

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71. *Id.* at 325.

72. *Id.* at 326–27.

73. *Id.* at 327.

was find that the defendant intended a result just because he reasonably ought to have appreciated it.

Notably, then, asking about “natural and probable consequences” allows slippage between the true scope of an intention, an evidentiary inference to intention, and a conflation of negligence with intention. A court may believe it is getting at “what is intended” but actually only reach what it would have been reasonable to foresee.

So how is *Pinkerton* liability functioning? Consider three possibilities. It could merely be capturing the defendant’s negligence. In *Carr*, for example, maybe he should have foreseen that a teller would be pushed back into the bank, but he did not. Or, it could be capturing an evidentiary inference. We could think that the defendant must have contemplated a teller being pushed inside when he contemplated the kind of bank robbery he planned.

Here is a final understanding of how *Pinkerton* liability is functioning. It is merely capturing what it would be to intend the bank robbery in the first place. Just as we understand that decapitations are killings, the argument would be that Carr’s very understanding of his act necessarily included detaining the teller against her will. How else do you get the teller to stay put and to give you money, particularly when your plan does not include a weapon?

Let us take a step back. If we have three approaches to the “natural and probable consequence” inference, which ones are worrisome? I have already argued that the culpability equivalence view is normatively problematic because it conflates intention with negligence. What of the other two? The evidentiary inference view depends on the case. What we are saying is that given the fact that we can infer purpose from natural and probable consequences, why not just require proving natural and probable consequences? Now, to be sure, as an evidentiary inference, a trial court can only constitutionally charge the jury that it is permissible for them to infer that a defendant intends the natural and probable consequences.<sup>74</sup> But the criminal law converts such inferences into irrebuttable presumptions through its substantive provisions.<sup>75</sup> For example, possession of extraordinary amounts of drugs can be punished as if they were possessed with intent to distribute. The intention element may be removed, however, because at the amounts provided it would be extraordinarily unlikely that the drugs were for personal use. Construed this way, even if such a codified inference was overinclusive, it may be far less objectionable than the “culpability equivalence” view. Of course, this is because the inference is very strong in

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74. See *Francis v. Franklin*, 471 U.S. 307, 315–18 (1985).

75. See generally Frederick Schauer, *Bentham on Presumed Offenses*, 23 UTILITAS 363 (2011) (discussing presumptive offenses).



this example. The weaker the empirical support, the weaker the inference, and the more objectionable this codification of an evidentiary inference as a substantive rule becomes.

There are no normative issues with the scope-of-intention view as we are only punishing the defendant for the full scope of what she intended. Notably, the scope-of-intention view is supported by *Pinkerton*'s own language. *Pinkerton* was held responsible for what his brother did because he was an accomplice to his brother's action and the conduct was in fact that target offense.<sup>76</sup> The Court then states:

The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. . . .

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.<sup>77</sup>

Notice that the "scope of the unlawful project" does not truly purport to be anything a co-conspirator happens to do.<sup>78</sup> Rather, this test seems to be saying that one is on the hook for the full scope of the crime that one intended to aid.

Where does this leave us? It means that depending on the case, *Pinkerton* liability may be appropriately tracking the scope of the intention, serving as a modestly overinclusive codified evidentiary inference, or punishing individuals disproportionately to their culpability. As formulated, *Pinkerton* liability sometimes gets it right, sometimes gets it slightly wrong, and sometimes gets it very wrong. But *Pinkerton* liability will remain tempting insofar as it sometimes seems to capture what defendants like Franklin must have been thinking.

The same possibilities arise with the natural and probable consequences doctrine as it attaches to complicity. Importantly, that doctrine lacks some of

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76. *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946).

77. *Id.* at 647–48.

78. *See id.*

*Pinkerton*'s guardrails, as it does not look at what is within the scope of the agreement, but just what will "naturally and probably" connect one crime to the next. Thus, it is more likely in practice to be employed for problematic culpability equivalence and less likely to be used simply to ascertain the true content of the accomplice's intention.<sup>79</sup>

## V. TAKING STOCK AND GOING NORMATIVE

Although I hope my discussion of the scope of intentions is correct, my aim is more modest. My goal at this point is only to convince you that intentions are *complicated*. As an evidentiary matter, in aiming to discern an intention's scope, we may quickly slip to liability for negligence. And, as a conceptual matter, the criminal law is using a mental state that captures not only what is motivationally significant, but also other understandings of that intentional object.<sup>80</sup>

One might think that we ought to try to limit intentions in legal practice to only those aspects that are motivationally significant. There is reason to be skeptical that this is possible, as one implication, for example, would be that people rarely intend to kill human beings; they only knowingly kill them.

Moreover, a court that is inclined to construe intention narrowly will face conceptual and normative pressure to include other crimes. If one viewed Rosemond as appropriately on the hook for his accomplice's gun possession, but thought he did not intend to aid the gun possession, then the only legal avenue available would be *Pinkerton* liability or the natural and probable consequences doctrine. So, too, the court in *Carr* seems to be capturing something about what Franklin must have taken his bank robbery to entail. Why sever a doctrine that seems to capture the culpable? That is, our normative inclinations—that these aspects should count as intended—will resist being cast to the side and, if so cast, will call for the creation of further doctrines to capture them. On the other hand, the current state of the law is unpalatable because in its quest to capture the culpable, it has also punished negligent actors disproportionately to their culpability.

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79. *Cf. Roy v. United States*, 652 A.2d 1098, 1105 (D.C. 1995) (reining in the doctrine to those crimes "within a reasonably predictable range").

80. Gideon Yaffe also places more within intentional content than just what is motivationally significant. *See generally* Yaffe, *supra* note 66. His view, however, has been subject to critique. *See, e.g.,* Heidi M. Hurd & Michael S. Moore, *Untying the Gordian Knot of Mens Rea Requirements for Accomplices*, 32 SOC. PHIL. & POL'Y 161, 180 (2016) ("[O]ur main objection here is that Yaffe's proposal does not find the middle ground that he too seeks."). These disagreements, of course, support the general point, which is that these are complicated, nuanced questions.

In this section, I want to put on the table both a modest and an immodest amount of tinkering with the law. The modest tinkering will narrow the criminal law's reach while expanding complicity and conspiracy beyond intentions. The immodest tinkering suggests that a wider reconceptualization of conspiracy and complicity is warranted. It will cast a wider net at the initial stage, but it will not rely on further appendages. The upside of the immodest approach is that it will capture those who deserve to be punished. The downsides are that it has the criminal law depart from ordinary language and it creates more discretion, something that at this political moment may not be attractive to reformers.

Let's go big first. Ultimately, what we aim for is a criminal law that punishes only the deserving and only as much as they deserve. As we have seen, complicity and conspiracy present problems, both because it is difficult to ascertain the boundaries of intentions and because there are doctrinal appendages that allow for punishment at the lesser culpability of negligence.

But this does not mean that intention is the appropriate boundary for complicity and conspiracy. To be sure, our ordinary linguistic use of complicity and conspiracy may seemingly require intention. But the question for criminal law is not what complicity *really is* but what the criminal law should call a complicity. And if what the criminal law ought to capture departs too substantially from the best ordinary language or philosophical account of what complicity really is, well, then, let's rename the crime.

Adding insult to injury, when we try to cabin these doctrines by our ordinary understandings of them, intention fails to work the way we think it does. We use intention because we think it captures some important aspect of identifying with the wrong. But intentions don't mark this boundary, as they will include aspects of the action that are not motivationally significant. Maybe we should abandon intention.

In what follows, I will focus on complicity for two reasons. First, functionally, we are thinking about when conspiracy makes co-conspirators each other's accomplices. Second, as Heidi Hurd and Michael Moore have argued, conspiracy liability should be premised solely on accomplice liability—that is, one person can only be responsible for another's conduct if she engages in actions that do or might increase the risk of harm by another person.<sup>81</sup> The idea that just by “agreeing,” without more, one person could take on responsibility for another's conduct is implausible when placed under scrutiny.<sup>82</sup> I couldn't write a contract that says that I am guilty of anything

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81. Hurd & Moore, *supra* note 80, at 163, 170 (“[N]o one is morally blameworthy for another's actions just because he agreed that such actions should be done when such agreement in no way aids or procures the criminal acts.”).

82. *See id.*

you are. Instead, it is that these agreements play a role in encouraging the other actor.

If we abandon intentions, we should begin by considering using recklessness as the mental state for complicity. As Sandy Kadish observed years ago, and Larry Alexander, Heidi Hurd, Michael Moore, and I have echoed, recklessness should be sufficient for complicity.<sup>83</sup> Given that I don't ultimately advocate this approach, I will only gesture at that view here. If one engages in an action that increases the risk of another's wrongdoing, that should be sufficient for criminal liability. And although I would punish this increased risk irrespective of whether the principal committed the offense,<sup>84</sup> such defendants can surely be on the hook when the principal does commit the underlying crime. Why are we not responsible when we increase the risk of another's wrongs? Think of it this way. The court in *People v. Zielesch*<sup>85</sup> was right to think that you ought not to supply violent, temperamental meth addicts with firearms. It was just wrong to think that the conspiracy to commit murder was what did the justifying work. Instead, the defendant's culpability stems from his recklessness as to death at the time he made the choice to give the addict the weapon.

For as long as "make it all recklessness" has been on the table, it has faced a few obstacles. First, there is a long-standing resistance to the idea that one needs to worry about the wrongdoing of others.<sup>86</sup> But the potential for a causally downstream culpable actor to do something wrongful should impact whether we are at liberty to engage in an action.<sup>87</sup> Just as I must take into account other events in the causal universe, so too I must take into account others' actions. Second, there is the worry that merchants need an exception, lest they be on the hook for every condom that assists suspected prostitution, every champagne bottle that will be imbibed at a high school graduation

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83. *Id.* at 178, 180 ("If knowing, reckless, and negligent causers of harm should be liable generally, even if less punishably so than purposive causers, then so too should accomplices."); see also LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, REFLECTIONS ON CRIME AND CULPABILITY: PROBLEMS AND PUZZLES 21–26 (2018); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 369 (1997). Indeed, I concur with Hurd and Moore that the way that accomplice liability deals with risk creation, via Model Penal Code § 2.06(4), is unstable because there is no principled way to determine what the "conduct" is that one must purposefully aid. See Hurd & Moore, *supra* note 80, at 172–74.

84. See generally Kimberly D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183 (1994) (advocating that attempts be punished the same as completed crimes).

85. 101 Cal. Rptr. 3d 628, 636 (Ct. App. 2009).

86. ALEXANDER & FERZAN, *supra* note 83, at 19–26 (advocating that a third party's behavior does impact the justifiability of a risk taken, but that a third party's behavior does not relieve one of causal responsibility for harms caused).

87. See *id.*

party, and every knife that will be used to kill someone.<sup>88</sup> Finally, it is worth noting that even after suggesting that reckless complicity was theoretically elegant and normatively attractive, Sandy Kadish did not recommend its implementation for the American criminal justice system.<sup>89</sup> If the rest of the criminal justice system were functioning well, this sort of expansion would be appropriate.<sup>90</sup> But it grants tremendous discretion at all stages of decision making as the critical inquiry is whether the risk is “substantial” and “unjustifiable.”

So, we have two reasons to go big. First, intentions are not actually tracking what we think they are. They are not narrow enough to only capture what is motivationally significant. And this creates instability, on display in a case such as *Rosemond*, in which Justice Kagan correctly intuits that the gun is within the scope of the intention but does not do so through a principled articulation of the intentional object.<sup>91</sup> Second, using intentions is not normatively attractive. Intentions are not narrow enough to only capture what the defendant identifies with, and they are not broad enough to capture the full reach of an actor’s culpable choice.

Yet to engage in such broad rethinking would require reworking accomplice liability and conspiracy from the ground up. And it would require us to feel confident that we could adequately carve out when we are and are not at liberty to ignore others’ potential wrongdoing and how this analysis would apply to all of those who sell what they suspect could become the instruments of crimes. We would then have to have confidence that such a standard with significant discretion could be implemented in the far from ideal world that we have.

If we can’t go big, should we go home? Surely, we can make some modest changes that will improve conspiracy and complicity, even if they do not fully remediate the problems. We currently have an intention core and a negligence periphery. But we could reach the best of *Pinkerton* liability and the natural and probable consequences doctrine by having a knowledge core, and we could eliminate the worst of it by having a “culpability otherwise required” periphery.

Here is the first fix. Consider the Model Penal Code’s original proposed definition for complicity:

A person is an accomplice of another person in the commission of a crime if . . . acting with knowledge that such other person was

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88. *Id.* at 40–43.

89. Kadish, *supra* note 83, at 370, 382–90.

90. *See id.* at 384–90.

91. 572 U.S. 65, 76–82 (2014).

committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission.<sup>92</sup>

As the original Commentary observed, the “substantial facilitation” requirement should itself exempt purveyors of common goods.<sup>93</sup> However, even backing off the requirement of substantial facilitation could yield:

A person is an accomplice of another person in the commission of a crime if . . . acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly aided or encouraged its commission. This provision shall not apply to merchants who are providing readily available lawful goods and services at market price, unless the merchant intends the commission of the crime.

Now, Rosemond is on the hook if he knows there is a gun, and Franklin is on the hook if he knows the teller will be pushed. The last sentence is intended to create a merchant exception that does not exempt the merchant who sells the gun with the purpose of causing a death but will exempt FedEx from being an accomplice to what it might otherwise know to be the illegal shipment of pharmaceuticals from Canada to the United States.<sup>94</sup>

One might worry that this approach will ultimately devolve into recklessness through the willful blindness doctrine. To be clear, I would not advocate that we employ willful blindness in these cases. If the concern is that we ought not have to worry about every risk that another will do wrong, and that is why we are requiring knowledge, then we would wind up in precisely the same dilemma if we allowed willful blindness to substitute for knowledge.<sup>95</sup>

Having extended the law in this way, we can narrow the reach of the doctrinal appendages. Consider a suggestion from Andrew Ingram:

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators in furtherance of the unlawful purpose, each of the other conspirators is guilty of the felony actually committed or a lesser included offense thereof, provided that the other conspirator acted with the

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92. MODEL PENAL CODE § 2.04(3)(b) (AM. L. INST., Tentative Draft No. 1, 1953).

93. *Id.* cmt. 3, at 27–32. States can make this explicit in their statutes. *See, e.g.*, N.D. CENT. CODE § 12.1-06-02(1) (2021).

94. Something I advocated long ago. *See* Alexander & Kessler, *supra* note 15, at 1192 (advocating a per se rule excluding merchants); *see also* Hurd & Moore, *supra* note 80, at 180–82 (advocating a shopkeeper’s privilege).

95. *See* Kimberly Kessler Ferzan, Book Review, 131 ETHICS 406, 409–10 (2021) (noting that willful blindness should not be employed when the policy justification for knowledge should preclude the willful blindness inquiry).

kind of culpability that suffices to commit the felony or lesser included offense with which he or she is charged and the offense was a result of the carrying out of the conspiracy.<sup>96</sup>

To modify this for both conspiracy and accomplice liability:

If, in the course of committing the target offense to which the accomplice or co-conspirator rendered aid or encouraged, the perpetrator commits another felony, the accomplice or conspirator is guilty of the felony actually committed or a lesser included offense thereof, provided that the accomplice or conspirator acted with the kind of culpability that suffices to commit the felony or lesser included offense with which he or she is charged and the offense was a result of the carrying out of the target offense.

What this provision will do is that rather than equate the perpetrator's culpability, whatever it happens to be, with the accomplice's negligence, the accomplice will instead be responsible at the level of her own culpability. If the accomplice is only negligent, then she may only be punished at the level of negligence, even if the perpetrator acts purposefully. She will then not be punished disproportionately to her mens rea.

My proposal does not tinker with conspiracy, which might seem to be a loose thread given that conspiracy requires intentions.<sup>97</sup> However, with complicity revised, there will be little need to contort the boundaries of conspiracy to attach liability to conspirators who may have encouraged, by their agreement, the commission of an offense beyond the one to which they agreed. Accordingly, this intention-laden crime can remain as drafted without undermining the reforms proposed herein.

#### CONCLUSION

*Pinkerton* liability and the natural and probable consequences doctrine both have the capacity to punish negligent actors as if they were premeditated ones. Because both complicity and conspiracy rely on intentions, and intentions are conceptually difficult and normatively over- and under-inclusive, we ought to reform our laws to capture those who are culpable and to punish them only to the extent of their culpability. The reforms proposed here, focusing on knowing aid or encouragement, and responsibility for secondary crimes at the defendant's level of culpability, will result in a more just criminal law.

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96. Andrew Ingram, *Pinkerton Short-Circuits the Model Penal Code*, 64 VILL. L. REV. 71, 94 (2019).

97. See *supra* notes 16–17 and accompanying text.