

Standing in Reserve: A New Model for Hard Cases of Complicity

Nicholas Almendares & Dimitri Landa*

The “hard cases” for the law relating to accomplices deal with the definition of what counts as aiding and abetting a crime. A retailer might sell a murder weapon in the ordinary course of business, while an accomplice might do nothing because their help was simply not needed. How do we distinguish between these cases? The Capitol Riot is a striking example of this sort of hard case because there were so many people involved in so many different and ambiguous ways. Outside of the conceptually easy cases of someone caught on camera making off with property or attacking officers, who should be found guilty of what? A lack of a rubric for answering these questions makes collective crimes like the Capitol Riot especially challenging for the law.

Drawing on philosophy of action and game-theoretic reasoning, we develop a novel model of complicity built on the concept of standing in reserve and show how it helps to understand joint intention and responsibility in complex social situations, such as those where only a proper subset of participants may actively engage in the primary criminal act. This model of complicity is consistent with the fundamental normative commitments of criminal law, such as the central importance of mens rea and punishing only intentional actions. Standing in reserve thus offers a principled, coherent approach to identifying complicity in these hard cases.

Through a series of applications, we show how the standing in reserve model sheds light on the Capitol Riot as well as related controversies including guilt by association, terrorism, and felony murder.

* Nicholas Almendares is Associate Professor of Law, Indiana University Maurer School of Law. Dimitri Landa is Professor of Politics, New York University. We would like to thank Hamilton Dickey, Mary Kate Dugan, Jessica Eaglin, Zachary Kaufman, Guha Krishnamurthi, Asaf Lubin, Preston Michelson, Micah Schwartzman, Brian Sheppard, India Thusi, Joseph Tomain, Deborah Widiss, and the participants of the Collective Action and the Law Conference for all their insights and comments on various drafts. We would also like to thank the editors at the *Arizona State Law Journal* for all their work. All errors are our own.

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INTRODUCTION

The law relating to accomplices, or complicity,¹ confronts some especially “hard cases.” A vexing class of them revolve around defining relevant help to the principal perpetrator in committing the crime. A seemingly straightforward example of complicity is providing a murder weapon. Yet, does that mean anyone who sells a weapon or other instrumentality of a crime is an accomplice, subject to the same legal consequences as the principal perpetrator? Are shopkeepers, not to mention large retailers like Amazon or Wal-Mart, all complicit; they are, after all, also providing the weapon or other tool.² Furthermore, some accomplice’s actions are hard to distinguish from those of a disinterested bystander. Serving as a lookout is an archetypal example of an accomplice,³ but if nobody comes by their actions that day could be observationally identical to someone entirely uninvolved with the crime.⁴ Since courts have concluded that someone’s presence alone can make them an accomplice,⁵ it can be difficult to distinguish a mere bystander⁶—or someone who is only tangentially involved in the crime⁷—from an accomplice who may be held equally responsible with the principal perpetrator.

1. The term “complicity” can be defined in different ways. Throughout this Article we mean it to have the fairly narrow, specialized meaning of being an accomplice and therefore potentially fully liable for a crime that is directly committed by another.

2. This is not a fanciful example. Judge Posner, for instance, tackled this issue in a series of cases. *See* *United States v. Colon*, 549 F.3d 565, 571 (7th Cir. 2008); *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985); *see also* Nicholas Almendares, *Foreseeability, Causation, and Guilt*, in *COLLECTIVE ACTION, PHILOSOPHY, AND LAW* 210 (Chiara Valentini & Terese Marques eds., 2022).

3. *E.g.*, Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 *HASTINGS L.J.* 91, 102 (1985); *Veney v. State*, 170 A.2d 171 (Md. 1961); *United States v. Teffera*, 985 F.2d 1082, 1087 (D.C. Cir. 1993); *United States v. Delgado*, 972 F.3d 63, 76 (2d Cir. 2020), *as amended* (Sept. 1, 2020), *cert. denied sub nom.* *Anastasio v. United States*, 141 S. Ct. 1114 (2021).

4. As we will explain, the lookout could be distinguished by looking at their prior actions as evidence of their intentions, even if they end up being unnecessary in some sense to bring the crime about.

5. *E.g.*, *U.S. v. Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962); *State v. Holland*, 67 S.E.2d 272 (N.C. 1951); *State v. Williams*, 255 N.C. 82, 88–90 (N.C. 1961); *People v. Villa*, 318 P.2d 828, 834 (Cal. Ct. App. 1957); *see also* *People v. Hill*, 233 N.E.2d 367 (Ill. 1968).

6. Grace E. Mueller, *The Mens Rea of Accomplice Liability*, 61 *S. CAL. L. REV.* 2169, 2174 (1988).

7. *People v. Brigham*, 216 Cal. App. 3d 1039 (Cal. Ct. App. 1989).

Perhaps not surprisingly, then, the state of complicity law has been described as “chaos,”⁸ “disgrace,”⁹ and “disarray,” leading to “disparate results based on conflicting ideas of accomplice liability”¹⁰ in both domestic as well as international law.¹¹ Courts sometimes recite mutually exclusive standards in the same case,¹² and a recent authoritative survey identifies no less than six interpretations of the most widely-used rule.¹³ These are no minor distinctions—these interpretations decide guilt or innocence for serious crimes, such as armed robbery¹⁴ and murder.¹⁵ The confusions loom especially large when we consider *collective crimes*, ones that involve numerous people, often in multifaceted, overlapping ways. As groups get larger and the relationship to the crime gets more complex and ambiguous, the current understanding of complicity becomes even more inadequate. Incoherence of the law of accomplices leads to complicity being assigned haphazardly and arbitrarily, calling into question the very legitimacy of the legal system.¹⁶ When it comes to serious crimes and consequences, we should

8. Baruch Weiss, *What Were They Thinking? The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1351 (2002). While Weiss’s description refers to the federal case law, things are no better at the state level, either:

Due to the inconsistency between the plain language of states’ accomplice liability legislation and its respective interpretation in the state courts, many states’ accomplice laws present a confused picture in terms of the law’s stance on accomplice liability. No aspect of this law is more complex than that relating to the mental state requirement for accomplice liability.

John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 *S.C. L. REV.* 237, 239 (2008).

9. Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?* 5 *OHIO ST. J. CRIM. L.* 427, 428 (2008).

10. *United States v. Hill*, 55 F.3d 1197, 1200 (6th Cir. 1995); *see also United States v. Otero-Mendez*, 273 F.3d 46, 52 (1st Cir. 2001) (“It is difficult to articulate a precise intent standard for an aider and abettor.”).

11. Jens David Ohlin, *Joint Intentions To Commit International Crimes*, 11 *CHI. J. INT’L L.* 693, 694 (2011).

12. *E.g.*, *United States v. Clayborne*, 509 F.2d 473, 480–81 (D.C. Cir. 1974) (citing *Peoni* and then turning to foreseeability); *see also United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985), *modified on denial of reh’g*, 777 F.2d 345 (7th Cir. 1985).

13. Weiss, *supra* note 8, at 1373.

14. *Id.* at 1382.

15. *See, e.g.*, *Tison v. Arizona*, 481 U.S. 137, 152 (1987) (analyzing the intent of accomplices in felony-murder); *State v. Tally*, 102 Ala. 25, 69 (Ala. 1894) (articulating requirements for intent necessary to establish accomplice liability for murder).

16. *Cf.* Yoav Dotan, *Making Consistency Consistent*, 57 *ADMIN. L. REV.* 995, 999–1000 (2005); Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 *NOMOS: AM. SOC’Y POL. LEGAL PHIL.* 3, 5–6 (2011); Frederick Schauer, *On Treating Unlike Cases Alike*, 33 *CONST. COMMENT.* 437, 437 (2018). *See generally* LON L. FULLER, *THE MORALITY OF LAW* (1969).

demand more from the relevant doctrines than “I know it when I see it.”¹⁷ We propose a novel conceptual model for resolving the hard cases of accomplice liability. This model, which provides a principled framework for adjudicating such cases, is normatively appealing and upholds the core commitments of the criminal law. It is based on the concept of *standing in reserve*, which we develop by drawing on the philosophy of action and game theoretic reasoning.

We provide an analytically precise definition of standing in reserve in subsequent sections, but its central components can be readily and informally summarized. They include intentionality with respect to the joint project (the crime in question), in the strong sense of a commitment to a plan to further that project should one’s active participation in the project become important¹⁸ and mutuality of influence with those who are actively participating.¹⁹ A back-up player on a sports team, for example, is standing in reserve: they are ready and willing to play if someone on the field is injured, and the rest of the team takes that into account, adjusting their strategy accordingly.

Given that complicity is an inherently joint endeavor—one cannot, after all, be an accomplice alone—any invocation of an accomplice’s intention here must be in the context of a collective intention. Indeed, standing in reserve is a species of joint or collective intention, which has been the focus of an extensive philosophical literature,²⁰ but has had relatively little impact on the law so far. In addition to developing the legal implications of these ideas, one of the contributions of this Article is to help develop a distinctive *mens rea of complicity* that is anchored in a philosophically coherent framework of intentionality.

Consistent with criminal law’s longstanding commitment to primarily punishing only intention actions,²¹ exemplified by *mens rea* requirements,²²

17. This old saw comes from Justice Potter Stewart in a case dealing with pornography, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

18. See discussion *infra* Section I.B.

19. We describe standing in reserve more precisely *infra* Part II.

20. See generally MICHAEL BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* (2014); Nicholas Almendares & Dimitri Landa, *Mixed Motives in the Equilibrium View of Joint Intention*, 173 PHIL. STUD. 733 (2016); MARGARET GILBERT, *What Is It for Us To Intend?*, in *SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY* 14 (2000); Margaret Gilbert, *Shared Intention and Personal Intentions*, 144 PHIL. STUD. 167 (2009); JOHN SEARLE, *MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION* (2010); Raimo Tuomela, *Joint Intention, We-Mode and I-Mode*, 30 MIDWEST STUD. PHIL. 35 (2006); Natalie Gold & Robert Sugden, *Collective Intentions and Team Agency*, 104 J. PHIL. 109 (2007).

21. See *infra* notes 35–40 and accompanying text.

22. See *infra* Section I.A.

we argue that properly accounted-for intention should guide complicity. Despite the centrality of intention in criminal law, looking to intention to circumscribe complicity is a matter of real debate. A number of doctrines deem someone an accomplice absent intention with respect to the crime, making the actual standard for complicity something much closer to negligence, irrespective of individual culpability.²³ Yet, we hesitate to punish the run-of-the-mill retailer, even if they end up providing material aid to the perpetrator of the crime.²⁴ Standing in reserve is able to shed light on hard cases like these where we have strong intuitions but have so far lacked the appropriate conceptual language to go beyond applying our intuitions in an ad hoc way.²⁵ It provides a rubric that can separate reinforcements or tacit supporters from bystanders or retailers, the fan in the stands from the back-up player.

To show the promise of this concept along with how it could be used in practice, we sketch a series of applications of standing in reserve. A number of these applications are based on the events in Washington, D.C. on January 6th, 2021, which underscored the inadequacies of complicity law. Some of the participants in the Capitol Riot committed obvious, easy to identify crimes such as making off with property,²⁶ vandalism,²⁷ and assaulting

23. One rule for complicity is the foreseeability doctrine: “[A]iders and abettors should be responsible for the criminal harms they have naturally, probably and *foreseeably* put in motion.” *People v. Luparello*, 187 Cal. App. 3d 410, 439 (Cal. Ct. App. 1986) (emphasis added); *accord* *United States v. Alvarez*, 755 F.2d 830, 847 (11th Cir. 1985) (citing *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946)); *see infra* Section I.A. Intention or *mens rea* requirements are relaxed under this rule. *See, e.g.*, Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 372–73 (1997). An analogous doctrine exists in international law called joint criminal enterprise. Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 109, 110 (2007). There is also the felony murder rule. *See infra* Section III.C.

24. *Compare* *State v. Ayers*, 478 N.W.2d 606, 608 (Iowa 1991) (holding that defendant’s sale of a stolen gun to an unpermitted minor was not the proximate cause of death resulting from minor’s discharging of the gun), *with* *State v. Travis*, 497 N.W.2d 905, 909 (Iowa Ct. App. 1993) (holding that the defendant’s offer of his motorcycle to inexperienced minor to drive was the proximate cause of victim’s death).

25. Almendares, *supra* note 2, at 215–20 (discussing how the foreseeability doctrine may lead to judge-made ad hoc policy decisions, as illustrated in *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985)).

26. *E.g.*, JAMIE RASKIN ET AL., TRIAL MEMORANDUM OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN THE IMPEACHMENT TRIAL OF PRESIDENT DONALD J. TRUMP 40 (2021), <https://int.nyt.com/data/documenttools/impeachment-manager-brief/77a0a0d89423b554/full.pdf> [<https://perma.cc/4E2A-AGXC>].

27. *E.g., id.* at 26 (citing reports).

officers.²⁸ Conceptually, these are easy cases. Along similar lines, there are conspiracy charges for some of those involved in the riot.²⁹ What makes many of the Capitol Riot cases hard, though, is that the events represent an inherently collective crime.³⁰ One cannot riot alone; numerous people were involved in the Capitol Riot, often in varied, overlapping ways. As groups get larger and the relationship to the crime gets more complex and ambiguous, the current understanding of complicity becomes more inadequate. Outside of the easy cases—e.g., where someone is caught on camera stealing or attacking law enforcement—what liability, if any, exists for the rest of the rioters? What distinctions should be made between them? That is, who should be found guilty solely of something like trespassing or misdemeanors and who should be guilty of more serious crimes?

The legal response to the Capitol Riot has been greatly criticized,³¹ and the judges presiding over these cases have expressed concerns.³² The state of the

28. E.g., Martin Austerhuhle, *Meet Three D.C. Police Officers Who Fought for the U.S. Capitol*, NPR (Jan. 15, 2021), <https://www.npr.org/local/305/2021/01/15/957244194/meet-three-d-c-police-officers-who-fought-for-the-u-s-capitol> [<https://perma.cc/8WWE-4U7U>].

29. See, e.g., Ryan Lucas, *4 Proud Boys Charged with Conspiracy Over Jan. 6 Capitol Riot*, NPR (Mar. 19, 2021, 4:08 PM), <https://www.npr.org/2021/03/19/979304432/4-proud-boys-charged-with-conspiracy-over-jan-6-capitol-riot> [<https://perma.cc/YJ9B-2GMM>]; Alan Feuer & Nicole Hong, *The F.B.I. Charged Some People with Conspiracy in the Capitol Riot, but Proving It Won't Be Easy*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/the-fbi-charged-some-people-with-conspiracy-in-the-capitol-riot-but-proving-it-wont-be-easy.html> [<https://perma.cc/TK7L-PFUB>].

30. There are also First Amendment issues wrapped up in it given it is so intertwined with politics and protected speech.

31. E.g., Jimmy Grulé, *Criminalizing Material Support to Domestic Terrorist Organizations: A National Security Imperative*, 47 J. LEGIS. 8, 16 (2021) (“The insurrectionists violently attacked the seat of our nation's democracy for the purpose of overturning the results of the 2020 presidential election. This conduct far exceeds the severity of the criminal charges filed against the insurgents.”); John Bellinger, *The D.C. District Court and the Jan. 6 Cases*, LAWFARE (Jan. 3, 2022, 10:23 AM), <https://www.lawfareblog.com/dc-district-court-and-jan-6-cases> [<https://perma.cc/C2CZ-ARA6>] (“Despite the gravity of the Jan. 6 assault, the government has charged most of the participants with misdemeanors punishable by less than one year in jail, such as entering a restricted building and entering and remaining on the floor of Congress.”).

32. Rachel Weiner & Spencer S. Hsu, *Woman Who Said She Wanted To Shoot Pelosi in the Brain Pleads Guilty to Misdemeanor*, WASH. POST. (Sept. 28, 2021, 6:45 PM), https://www.washingtonpost.com/local/legal-issues/pelosi-threat-dawn-bancroft-plea/2021/09/28/d2f0bbb8-209b-11ec-9309-b743b79abc59_story.html [<https://perma.cc/4EJT-JCFF>] (“[Judge] Sullivan asked prosecutors why Bancroft was not charged with threatening a government official, which is a felony.”); Kyle Cheney & Josh Gerstein, *‘Almost Schizophrenic’: Judge Rips DOJ Approach to Jan. 6 Prosecutions*, POLITICO (Oct. 28, 2021, 2:48 PM), <https://www.politico.com/news/2021/10/28/almost-schizophrenic-judge-rips-doj-approach-to-jan-6-prosecutions-517442> [<https://perma.cc/3PLL-PW4R>] (“[Chief Judge] Howell said there was a disconnect between the nearly apocalyptic language prosecutors have used in court filings about the Jan. 6 attack and what she called the ‘most minimal’ charges the government settled for

law concerning complicity certainly does not help, especially in the context of a complex collective crime like this one. Judges have looked to make distinctions amongst rioters,³³ but the law currently gives them precious little guidance as to how to go about doing so, arguably accounting for disparate treatment of Capitol Riot defendants.³⁴ The model of standing in reserve developed in this Article aims to fill this gap.

In addition to discussing the implications of our proposal for cases related to the Capitol Riot, we also show how its helps shed light on related longstanding controversies in criminal law, such as sleeper cells, the scope of the felony murder rule, and “status crimes” or guilt by association. In all these hard cases the standing in reserve model provides a way of assigning responsibility that avoids ad hoc complicity rules and normatively unappealing approaches to criminalizing behavior. We show that when properly informed by this model, ordinary complicity rules are up to this task without abandoning principles like individual intentionality that are critical to criminal law.

This Article consists of three Parts. Part I contains some initial background useful to putting standing in reserve in context, such as the role of intention in complicity law. Part II presents our concept of standing in reserve and its relationship to similar concepts in the law and legal theory. Part III applies standing in reserve to an array of hard cases, using real-world examples and present controversies stemming from the Capitol Riot.

in plea deals.”); Alan Feuer, *How the Capitol Riot Suspects Are Challenging the Charges*, N.Y. TIMES (Apr. 14, 2021); *United States v. Munchel*, 991 F.3d 1273, 1286 (D.C. Cir. 2021) (Katsas, C.J., concurring) (holding that the charges against the defendants inform pre-trial detention decisions).

33. *E.g.*, *United States v. Munchel*, 991 F.3d 1273, 1284 (D.C. Cir. 2021) (“In our view, those who actually assaulted police officers and broke through windows, doors, and barricades, and those who aided, conspired with, planned, or coordinated such actions, are in a different category of dangerousness than those who cheered on the violence or entered the Capitol after others cleared the way.”); *see also* Rachel Weiner, *Chief Federal Judge in D.C. Assails ‘Muddled’ Jan. 6 Prosecutions: ‘The Rioters Were Not Mere Protesters,’* WASH. POST (Oct. 28, 2021, 5:51 PM) (“‘Probation should not be the norm,’ [Chief Judge] Howell said, but added that [Jack Jesse] Griffith should not be punished more than others who engaged in similar conduct.”).

34. There has been the additional concern that judges, perhaps owing to a lack of guidance in law or doctrine, have been making decisions in the Capitol Riot based on their political leanings. Rachel Weiner et al., *Judges Have Declined U.S.-Proposed Sentences in Two-Thirds of Jan. 6 Cases So Far*, STARS & STRIPES (Jan. 7, 2022); Roger Parloff, *Are Judges Showing Their Political Colors in the Jan. 6 Criminal Cases?*, LAWFARE (Jan. 19, 2022, 11:51 AM), <https://www.lawfareblog.com/are-judges-showing-their-political-colors-jan-6-criminal-cases> [<https://perma.cc/24ER-UM9V>].

I. BACKGROUND CONSIDERATIONS

A. *Intention in Criminal Law*

Intention is a bedrock idea in criminal law and moral responsibility. With rare exceptions, criminal liability requires intention.³⁵ In the words of the United States Supreme Court: “The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will”³⁶ This principle is embodied in the culpability requirements attached to crimes—the traditional *mens rea* requirements as well as the defenses that apply when the defendant cannot appreciate or control her behavior,³⁷ i.e., when there are good reasons to suspect lack of intention.³⁸ The Model Penal Code is quite explicit on this point: “Subsection (1) states the fundamental predicate for all criminal liability, that the guilt of the defendant be based upon conduct, and that the conduct include a voluntary act or an omission to perform an act of which the defendant was physically capable.”³⁹ This does not mean that criminal liability requires the defendant to intend the results of their actions—that varies from crime to crime⁴⁰—but the actions themselves must be intentional and not something like a reflex or stumble.

35. The main exceptions are so-called “public welfare” or “regulatory” offenses that are essentially civil penalties. *See* *Staples v. United States*, 511 U.S. 600, 617–18 (1994) (holding that a felony implies that the offense is a serious one, and therefore unlikely to constitute a public welfare offense); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72 (1933) (“Crimes punishable with prison sentences . . . ordinarily require proof of a guilty intent.”); *Lambert v. California*, 355 U.S. 225 (1957); *see also infra* Section III.C. *But see* *State v. Lindberg*, 215 P.41 (Wash. 1923); *State v. Mertens*, 64 P.3d 633 (Wash. 2003).

36. *Morisette v. United States*, 342 U.S. 246, 250 (1952); *see also* Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL’Y 51 (2003); Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (“[The] existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” (citation omitted)).

37. For some of the philosophical underpinnings of this position, see Dimitri Landa, *On the Possibility of Kantian Retributivism*, 21 UTILITAS 276 (2009).

38. These defenses include intoxication, insanity, duress, and so forth. *See, e.g.*, *Clark v. Arizona*, 548 U.S. 735 (2006); MODEL PENAL CODE § 2.08–2.09.

39. MODEL PENAL CODE § 2.01, explanatory note; *see also* Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 594 (1963) (“The most important aspect of the Code is its affirmation of the centrality of *mens rea* . . .”).

40. *See, e.g.*, MODEL PENAL CODE art. 2.

Intention's importance for complicity is emphasized by Learned Hand in the landmark opinion *United States v. Peoni*,⁴¹ which requires an accomplice to "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."⁴² Hand's reasoning was later adopted by the Supreme Court,⁴³ and is the commonly relied-upon standard for accomplices.⁴⁴

Intention is also an appealing way of circumscribing the scope of complicity. Absent some sort of limits, taxi drivers, retailers, and even bystanders⁴⁵ can aid in the commission of the crime, making them all potential accomplices and subject to the same legal consequences as the principal perpetrator,⁴⁶ up to and including the death penalty.⁴⁷ The prybar or laptop purchased on Amazon can be at least as helpful to committing a crime as tacit encouragement.⁴⁸ The requirement of intention in *Peoni* endeavors to avoid this problem.

By definition, complicity involves multiple people.⁴⁹ Moving from individual to joint intention is, however, complicated. Easy, intuitive cases

41. *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938); see also Candace Courteau, *The Mental Element Required for Accomplice Liability: A Topic Note*, 59 LA. L. REV. 325, 331 (1998); *People v. Green*, 181 Cal. Rptr. 507, 515–16 (Cal. Ct. App. 1982) (Miller, J., concurring).

42. *Peoni*, 100 F.2d at 420; see also *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

43. *Nye & Nissen*, 336 U.S. at 619.

44. Weiss, *supra* note 8, at 1373.

45. See Mueller, *supra* note 6, at 2173–74. A bystander could be used as a cat's-paw or mistakenly believed by the victim to be the primary perpetrator's ally and thereby inadvertently strengthen their position.

We mean bystander, especially in these motivating examples, in the simple common way of someone present but uninvolved with the crime and unaffiliated with the perpetrators. Zachary Kaufman presents a far richer typology of bystanders for the purposes and a normative hierarchy of them for the purposes of legal duties. Zachary Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders Amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1371–79 (2019). Some of Kaufman's categories, like engagers and enablers, share a family resemblance with those we describe as standing in reserve. But the conditions we use to define standing in reserve are more demanding—one can be an enabler without being a party to a full joint intention the way we describe in Section II.A. This makes sense as our papers are addressing different questions. Kaufman uses his typology to argue for expanded legal duties, such as a duty to report for certain crimes. Such Bad Samaritan laws would not be the same as deeming an accomplice.

46. See Dressler, *supra* note 9, for a critique.

47. See, e.g., *Tison v. Arizona*, 481 U.S. 137 (1987).

48. See *State v. Holland*, 67 S.E.2d 272, 275 (N.C. 1951) ("Though when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of law this was aiding and abetting." (internal citations and quotation marks omitted)).

49. MODEL PENAL CODE § 206 (AM. L. INST. 1980).

involve all parties directly participating in the *actus reus* that defines the crime or actively enabling others to do so. When the Senators stabbed Julius Caesar, they were all plainly engaged in a joint, intentional action. Hard cases of joint criminal action—cases in which a possible accomplice’s action in some way falls short of the primary *actus reus*—are much less clear simply because such departures from the *actus reus* can take place in myriad distinct ways, including, ultimately, manifesting in no participation in the primary *actus reus* at all. This creates an obvious challenge for connecting a possible accomplice to the primary criminal act, including a challenge in describing the motivation of the potential accomplice with respect to that act—a challenge evidenced by widespread confusion about how to apply *Peoni*. As Baruch Weiss notes, “The cases interpret Judge Hand in so many different ways that there is no agreement as to how his seemingly simple formulation should be applied even in the most straightforward situations.”⁵⁰

One alternative is to simply abandon the intention criteria. This is the approach taken by the foreseeability doctrine. The exact formulation varies, but a representative example is: “Aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.”⁵¹ Accordingly, one can be considered an accomplice to murder during a drug sale because deadly confrontations are a reasonably foreseeable consequence of that activity.⁵² The idea is likened to an assumption of risk: the accomplice willingly runs the risk that one of her partners in crime will commit some additional, unrelated but foreseeable, offense.⁵³ This rule has become especially important in international law, where a parallel doctrine

50. Weiss, *supra* note 8, at 1352; *see also* Gideon Yaffe, *Intending To Aid*, 33 LAW & PHIL. 1, 2 (2012) (“Federal courts in the United States, and many state courts as well, have done an admirable job since of pretending as though they know exactly what Hand meant.”). For examples of this confusion in the case law, *see* Rosemond v. United States, 134 S. Ct. 1240, 1248–49 (2014); United States v. Ortega, 44 F.3d 505, 508 (7th Cir. 1995); United States v. Grubczak, 793 F.2d 458, 463–64 (2d Cir. 1986); United States v. Campisi, 306 F.2d 308, 310–11 (2d Cir. 1962); *see also* Weiss, *supra* note 8, at 1398 (“Because an aider and abettor typically works directly with the principal, *Campisi* essentially relegates *Peoni*’s purposeful intent standard to a very narrow class of cases, leaving the knowledge standard intact as the primary mental state applicable to the aider and abettor.”).

51. *People v. Luparello*, 187 Cal. App. 3d 410, 439 (Ct. App. 1986); *see also* United States v. Fountain, 768 F.2d 790, 798 (7th Cir. 1985) (applying a foreseeability standard and relaxing mens rea requirements when the crimes are serious).

52. *See, e.g.*, United States v. Alvarez, 755 F.2d 830, 849 (11th Cir. 1985) (collecting cases).

53. *See Prosecutor v. Tadić*, Case No IT-94-1-A, Judgment, ¶ 228 (Int’l Crim. Trib. for the Former Yugoslavia Appeals Chamber July 15, 1999), <https://ucr.irmct.org/scasedocs/case/IT-94-1#eng> [https://perma.cc/T9BL-7BRN]; *cf.* *Pinkerton v. United States*, 328 U.S. 640 (1946).

called joint criminal enterprise (“JCE”)⁵⁴ has been adopted.⁵⁵ JCE imposes liability for “incidental crimes”—additional offenses committed in the course of working towards a primary agreed-upon criminal enterprise or goal.⁵⁶ Defendants have been held responsible for killings, beatings, and other abuses that have taken place at detention camps, forced deportation, or during refugee crises even though the killings and specific abuses were not intended by those defendants.⁵⁷

Foreseeability and intention are, of course, not unrelated to one another. The clearly foreseeable consequences of an intentional action are a natural way to infer intentions.⁵⁸ If an individual shoots a gun at someone at point-blank range, we readily infer that they intended to harm or kill them, all else being equal. Foreseeability can thus play an evidentiary role, especially given that, as a practical matter, we cannot know someone else’s intentions.⁵⁹ The foreseeability doctrine, however, goes well beyond that, building the claim about the (ostensibly foreseeable) effects directly into definition of complicity.⁶⁰ Furthermore, the standard it uses for that is an objective one, so that it is not necessary that the defendant has actually contemplated or even been aware of these effects.⁶¹ The end result is something startlingly close to negligence; the question is whether a reasonable person under the

54. JCE is actually a complex doctrine with different categories of liability. We focus on only one of them here, usually referred to as “JCE III.”

55. Ohlin, *supra* note 11, at 694–95.

56. *See id.* at 695 n.1.

57. “The Trial Chamber is not, however, convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committed against the refugees at Potočari were also an agreed upon objective among the members of the joint criminal enterprise. However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign.” *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 616 (Int’l Crim. Trib. For the Former Yugoslavia Aug. 2, 2001), <https://ucr.irmct.org/scasedocs/case/IT-98-33#eng> [<https://perma.cc/3ZMH-XHJP>].

58. Almendares, *supra* note 2, at 211, 221.

59. *Id.* at 221.

60. *See id.* at 216.

61. “[T]he issue does not turn on the defendant’s subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant.” *People v. Nguyen*, 26 Cal. Rptr. 2d 323, 331 (Cal. Ct. App. 1993); *see also* *People v. Woods*, 11 Cal. Rptr. 2d 231, 240 (Cal. Ct. App. 1992) (“[L]iability is based on an ‘objective analysis of causation’”); *People v. Montano*, 158 Cal. Rptr. 47, 50–51 (Cal. Ct. App. 1979); Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 402 (2010); Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585, 612–13 (2008).

circumstances would be expected to recognize the relevant risks.⁶² For this reason, the foreseeability doctrine has been subjected to significant judicial⁶³ and scholarly⁶⁴ criticism. To the extent that gradations of *mens rea* or culpability requirements matter, the foreseeability doctrine establishes complicity as a sweeping exception to them. Indeed, it does it while leaving the scope for complicity largely unbounded and so inviting ad hoc reasoning by judges for when and how to limit it given the seemingly unreasonable outcomes to which this doctrine gives rise.⁶⁵

If abandoning intention in defining complicity is undesirable, can one provide a coherent intention-based account of complicity in joint crimes? A key to such an account lies in the theory of *joint intention*, which can help guide intention-based standards like *Peoni* and its progeny, and grounds our model of standing in reserve that we will use to rationalize the hard cases of complicity like those related to the Capitol Riot. We will show that standing in reserve corresponds to instantiations of joint intention, i.e., that when someone is standing in reserve with respect to a particular (joint) project, they are party to a joint intention to bring that project about. When such a project is a criminal action, those standing in reserve are properly construed as criminal accomplices, much as a back-up baseball player who meets the criteria of standing in reserve is a party to a joint intention that her team win and an accomplice in its winning even if she never actually takes the field.⁶⁶

In broadest-brush terms, joint intention turns on the coordination between individual participants with respect to their individual beliefs, intentions, and the entailed subsidiary intentions, or subplans.⁶⁷ In Michael Bratman's influential formulation, the joint intention to *J* is defined by the persistence of several requirements on individual participants' intentions and of their

62. Recklessness is a subjective standard as it is based on the defendant's own mental state. "As we use the term, recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved but the awareness is of risk, that is of probability rather than certainty; the matter is contingent from the actor's point of view." MODEL PENAL CODE § 2.02 cmt. 3 (AM. L. INST., Tentative Draft No. 4, 1955). Of course, even recklessness—a more demanding threshold for guilt than criminal negligence—falls well short of the culpability requirements for many serious crimes. See MODEL PENAL CODE § 2.02(5) (AM. L. INST. 1962).

63. See, e.g., *People v. Luparello*, 231 Cal. Rptr. 832, 858–61 (Cal. Ct. App. 1986) (Wiener, J., concurring); *Sharma v. State*, 56 P.3d 868, 872 (Nev. 2002).

64. See, e.g., Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 370 (1997); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 75–76 (2007) (international JCE); Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 717–22 (1930).

65. Almendares, *supra* note 2, at 211; see also *United States v. Colon*, 549 F.3d 565, 571 (7th Cir. 2008); *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985).

66. See *infra* Part II.

67. But see *infra* text accompanying notes 78–83.

beliefs about that persistence.⁶⁸ First, each participant has intentions in favor of the group engaging in *J* (*pro-J intentions*).⁶⁹ Second, each participant's individual intentions depend on those of other participants in that if one of the parties' intentions disappears, that particular joint intention must change or be abandoned (*interdependence*).⁷⁰ An intuitive way of thinking about this is as an influence condition: "for me to intend that we *J*, I need to see your playing your role in our *J*-ing as in some way affected by me."⁷¹ Intentions that are identical or aimed towards the same goal are insufficient—we could all be individually painting a house but not working together towards that end (e.g., we could all be painting it different uncoordinated colors).⁷² Third, each participant intends to perform her part of *J*-ing by way of each other's corresponding intentions (*interlocking*).⁷³ If the intentions are interlocking, then the way *A* intends to see the joint project *J* brought about is through the intentions and actions of *B*. This can be conditional—e.g., *A* intends that *B* do their part to bring about *J* only under certain conditions—but they cannot be too tentative. If *B*'s intentions play no role in *A*'s intentions or plans, then this is more a case of *B* being an onlooker to *A*'s efforts than a true party to a joint intention.⁷⁴ If interdependence is a kind of influence condition, then interlocking may be thought of as a kind of property of cooperativeness between the participants. In Bratman's example, if *A* wants to go to New York, and *B* kidnaps *A* and takes him to New York in the trunk of his car, *A* does not intend to go to New York by way of *B*'s intention to go to New York with *A*—their intentions are certainly not interlocking, though they may well have been interdependent.⁷⁵ Fourth, each participant's intentions toward *J* proceed in part by way of her own and each other participant's subplans, which mesh with each other (*intended meshing subplans*).⁷⁶

The formulation of joint intention in terms of the relationships described by the requirements of *pro-J* intentions, interdependence, interlocking, and meshing subplans creates a continuity between individual actions and

68. MICHAEL BRATMAN, *FACES OF INTENTION* 112–16 (1999).

69. *See id.* at 112.

70. *See id.* at 115–16.

71. *Id.* at 116; *see also id.* at 114–15.

72. For an example of this in the context of crime, *see infra* our discussion of Black in Section II.A.

73. BRATMAN, *supra* note 68, at 118 ("I intend that our performance of the joint activity be in part explained by your intention that we perform the joint activity.").

74. This condition, thus, parallels the way intention is used in the philosophy of action.

75. *Id.* at 117–18.

76. *Id.* at 120–21.

intentions on the one hand and joint actions and intentions on the other.⁷⁷ A joint intention is, in essence, “built out of” individual intentions, actions, and beliefs.⁷⁸ This approach to joint intention is especially suited to criminal law because criminal law conceives of liability as fundamentally individual.⁷⁹ As the Supreme Court put it, “The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law”⁸⁰—a commitment that the courts have cleaved closely to in the context of constitutional protections of freedom of association, holding that membership in a group alone cannot constitute a crime.⁸¹

B. *Intention vs. Intent*

Before going any further, it is important to understand the difference between what we in this Article, and the philosophical literature we draw on, mean by “intention” and the common usage of “intent” in law. In many legal uses the terms are treated basically as synonyms, and the meaning can be more than a little bit ambiguous.

In the law’s traditional treatment, *intent* is characterized as a component of the *mens rea* determination. In most legal contexts, to say that *A* intentionally shot and killed *B* is to say that she did so with something like “purpose” as defined by the Model Penal Code⁸² and can be punished accordingly.⁸³ In this regard, intentional action is contrasted with something involuntary like a spasm. The contemporary literature on philosophy of action sees *intention* in a much more action-implying way.⁸⁴ To have an intention to ϕ is to have committed to a set of plans related to bringing about

77. MICHAEL BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* 4 (2014).

78. Not all philosophical accounts of joint intention share this feature. Alternative, “non-individualist” accounts can be found in GILBERT, *supra* note 20, at ch.2; Gilbert, *supra* note 20; Tuomela, *supra* note 20; Gold & Sugden, *supra* note 20.

79. See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 772 (1946) (“Guilt with us remains individual and personal, even as respects conspiracies.”); *United States v. Petersen*, 611 F.2d 1313, 1324 (1979).

80. *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring).

81. See, e.g., *Scales v. United States*, 367 U.S. 203, 207–08 (1961); *People v. Castenada*, 3 P.3d 278, 282 (2000); *United States v. Barber*, 429 F.2d 1394, 1397 (3d Cir. 1970). We return to the idea of status crimes and guilt by association in Section III.C.

82. MODEL PENAL CODE § 2.02 (AM. L. INST. 1981).

83. *Id.* § 210.2.

84. Although under any definition, something like a spasm would be deemed not intentional.

ϕ .⁸⁵ Intentions can be conditional, e.g., “if this thing happens, then I will ϕ ,” and they can be subject to revision, with the commitments to particular plans changing accordingly. But, unless a mental state impacts one’s plans, it does not count as an intention proper.

The important thing to note about this philosophical definition of intention is that there is little difference between having an intention in this sense and taking at least some of the steps to carry it out. If one intends to ϕ , one is already “in progress towards” doing it.⁸⁶ Thus, while the notion of intending to ϕ but not yet acting on that intention, not yet putting that plan into action, is a straightforward one for courts and jurists—and perhaps, even in common parlance—it is somewhat odd (or, at least, unstable) from the philosophical perspective.⁸⁷ Intending to meet with someone, then, would involve setting aside time in one’s schedule, arranging for transportation, communicating this intention with the other party, and other similar steps.

Yet, despite using intent in a thinner sense closer to a “wish” than a “plan,” criminal law generally looks to intent paired with clear action; in the traditional formulation, a *mens rea* is paired with an *actus reus*, or the acts that define a crime. The stronger sense of intention used by philosophers of action, which is much closer to an (*intentional*) *action*, is thus consistent with what law in fact aims to criminalize.⁸⁸ Indeed, in practice, there is often little to no difference between the philosophical treatment of intention and what needs to be established in prosecuting a criminal case, in which intentions are inferred from actions and choices. Showing that someone intends to ϕ , then, entails looking at what they have done to prepare for or otherwise bring about ϕ .⁸⁹ So, if a case is going to establish such an intention, then they will be

85. Kieran Setiya, *Intention*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2022), <https://plato.stanford.edu/entries/intention/> [<https://perma.cc/2D98-AFU8>]; see MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 18–20 (1987).

86. Setiya, *supra* note 85.

87. John Searle distinguishes between “prior intentions” and “intentions in action.” John R. Searle, *The Intentionality of Intention and Action*, 4 COGNITIVE SCI. 47, 47 (1980). We have in mind the latter notion. The former is effectively limited to a desire or a short-lived prerequisite for what we would consider an intention proper—something that is already affecting one’s *modus operandi*. Gideon Yaffe distinguishes “intending” from “being guided by [an] intention,” but his distinction, made in the context of an analysis of criminal attempts, is best understood as being about the evidentiary status of intentions (where we are with him in agreement), rather than as a point about the meaning of “intention.” GIDEON YAFFE, ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 90–93 (2010).

88. The philosophical literature has generally been more precise on the contours of these terms.

89. This also raises the evidentiary considerations of foreseeability discussed above. See *supra* text accompanying notes 51–65.

“already in progress towards doing it.” In short, while inferring intentions is a serious challenge for the legal system, it is also a familiar one, and much of the law, especially the criminal law, turns on estimations of motive and intent.⁹⁰

Because our account of standing in reserve and joint intention draws on the philosophical arguments in which intention is used in the stronger, commitment-to-a-plan-of-action, we will use the term “intention” in the remainder of this Article, including when applying the idea of standing in reserve to various cases. Indeed, it is this more demanding sense of intention that ends up being at the core of our arguments about complicity.

II. STANDING IN RESERVE

A. Defining the Concept

Having described both what we mean by intention and its role in complicity law, we turn now to providing a more precise definition of standing in reserve, a concept we argue can illuminate hard cases of complicity. Our explication of the concept draws on game-theoretic reasoning, a long-established tool of legal analysis.⁹¹ Games revolving around coordination⁹² are naturally suited to understanding joint and collective action, even though they have, curiously, received little attention in law.⁹³ Such games frequently have multiple equilibria, which will be important for understanding standing in reserve and its relationship to complicity.

An individual *A* can be said to be standing in reserve with respect to a joint action *J* if the following conjunction of conditions holds:

90. “We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. ‘The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.’” *Lucy v. Zehmer*, 84 S.E.2d 516, 521 (Va. 1954) (quoting *First Nat. Exch. Bank of Roanoke v. Roanoke Oil Co.*, 192 S.E. 764, 771 (Va. 1937)); see also *infra* notes 102–105 and accompanying text.

91. Cf. Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 210 (2009). See generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994); Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291 (1990).

92. “Game theory identifies another pervasive problem: the need to *coordinate*.” McAdams, *supra* note 91, at 218.

93. *Id.* at 210.

Condition (1): *A is not actively engaged in J because such an engagement would be superfluous.*

Condition (2): *A is ready and willing to actively engage to bring J about in the event her participation stops being superfluous.*

Condition (3): *There exists sufficiently common knowledge among the participants in J that (2) is true.*

Condition (4): *Other participants in J are reciprocally influenced in their actions and/or intentions by the fact that (2) is true.*

We will now elaborate on these conditions in some detail. While the meaning of Condition (1) is transparent, the “ready and willing” clause in Condition (2) requires some explanation. This clause, which speaks to *A*’s intention in the strong sense described in Section I.B., stems from the fact that there are different ways by which *J* could come about: some in which *A* is actively engaged as a participant, and others in which she is not but other individuals are, and *A* would be if one of those who are actively engaged falters. These different sets of actively engaged participants comprise what we may think of as different equilibria in a coordination game among participants. To make this more concrete, imagine a situation in which residents decide to establish a neighborhood crime watch, which requires some but not all of them (i.e., a proper subset) to participate on any given day. On a particular Saturday, three residents out of the forty that live in the neighborhood would be sufficient to provide proper coverage. Fewer than three would be too few, but greater than three would not appreciably increase crime deterrence. The three participants on that Saturday could be drawn from the set of forty in many different ways, with each draw of three corresponding to a pure strategy equilibrium in a threshold coordination game.⁹⁴

It is useful, by way of interpretation, to distinguish two different elements that could go into the “ready and willing” clause of Condition (2):

Condition (2.i) *A knows which equilibrium is being played.*

94. Another way of describing such a game is as a threshold public goods game. See generally Thomas R. Palfrey & Howard Rosenthal, *Participation and the Provision of Discrete Public Goods: A Strategic Analysis*, 24 J. PUB. ECON. 171 (1984).

Condition (2.ii) *Supposing there is a possibility of an equilibrium “tremble,” A is making sure that no “tremble” has occurred, and in the event of a “tremble” A is available to take the place of one of the actively engaged participants.*

The idea behind (2.i) is that for *A* to be “ready and willing,” she has to know what equilibrium is actually being played. In our example of the three-person crime patrol, *A* needs to know that *B*, *C*, and *D* were selected to patrol. This element of Condition (2) ensures *A* is choosing not to actively engage because she knows that she is superfluous and not for some other reason. It rules out *A* choosing not to participate by accident (e.g., she thought she was not part of the contributing set but in fact she was) or because she intends that *J* not be brought about. In other words, *A* is sure, or at least reasonably confident, that *J* is being brought about by the actions of others, and that is what in part motivates her choice not to actively participate. The second, somewhat more demanding, element of Condition (2), (2.ii), is that *A* is making sure there is no “tremble”⁹⁵—something that, perhaps unexpectedly, prevents the actively engaged participants from performing their task. For the neighborhood crime watch, such a tremble could, for example, entail one of the three selected active participants falling ill or otherwise becoming unavailable to patrol. This element of Condition (2) thus envisions a potentially more active involvement on *A*’s part even as *A* remains not actively engaged in *J* in the sense that she is not directly trying to bring *J* about (e.g., she is not going on the patrol herself). This involvement may, of course, come in a variety of forms—it could entail *A* taking steps on her own to make sure there is no tremble, or an arrangement whereby *A* (and possibly everyone else in the neighborhood or otherwise involved) will be alerted if there is, in fact, a “tremble.” Returning to our intuitive example of standing in reserve, the back-up player is making sure⁹⁶—they are typically observing the game, and someone like a coach will tell them if they need to play.

Condition (3) is relatively straightforward. For the participants to have the common knowledge of *A*’s state is for each of them to know that state, to know that they all know that state, and so on. It is worth noting that while there may, as in our example of the crime watch, be multiple actively engaged

95. This label is inspired by Reinhard Selten’s idea of a trembling hand perfect equilibrium. See R. Selten, *Reexamination of the Perfectness Concept for Equilibrium Points in Extensive Games*, 4 INT’L J. GAME THEORY 25, 35 (1975).

96. Game-theoretically, “making sure” is akin to verifying that the common conjecture for how the game is to be played holds up. See Robert Aumann & Adam Brandenburger, *Epistemic Conditions for Nash Equilibrium*, 63 ECONOMETRICA 1161, 1163 (1995).

participants, for *A* to be standing in reserve it will suffice that at least some of them satisfy this condition—in this sense, *A* may be standing in reserve for those of them who satisfy this condition. That is one sense of “sufficient common knowledge” to which the formulation of Condition (3) refers. Another sense is that some finite number of degrees of “I know that you know that I know that you know,” would be sufficient: it is governed by whether the relevant actively engaged members expect that *A* would switch to active participation if needed (she is ready and willing) and *A*’s knowing that expectation exists.

Turning now to Condition (4), note that its aim is to capture a sense of mutuality; standing in reserve affects not only *A* but also other participants. To see this, suppose Conditions (1)–(3) are satisfied but Condition (4) is not. Although *A* may be ready and willing to actively participate, her presence has no effect on the other participants, including those actively engaged in bringing *J* about (e.g., those going out on patrol). Consequently, while *A* and other participants may, perhaps, be pursuing the same aim, it would obviously be incorrect to say that they are doing it jointly. It would be as if *A* would happily help out with the neighborhood crime watch, but nobody in the neighborhood knew that. Or, it is like there is a fan in the stands ready and able to play, but nobody on the team is aware of it.

A different way of saying this is that the concept of standing in reserve is *reciprocal*: while there may be anticipation on *A*’s part about the possibility of being called in to actively participate—captured by Condition (2)—if there is no such anticipation on the part of the other participants with respect to *A*, then, from their perspective, *A* is not and cannot be counted as a reserve participant. In short, if there is no reciprocal or two-directional relationship of this kind with the other participants, then *A* cannot be standing in reserve. A natural way of fleshing out this notion of reciprocal influence is by way of the conditions of interdependence and interlocking that play a similar role in the definition of joint intention, underscoring the close connection between standing in reserve and jointly intending. The latter is, of course, a broader concept than the relationship of standing in reserve: jointly intending a project *J* need not imply standing in reserve with respect to *J*, since active participants collaborating with one another may be parties to a joint intention without either of them being in reserve. The converse, though, holds under our interpretation of reciprocal influence: *A* who is standing in reserve for an actively participating *B* with respect to a project *J* is jointly intending *J* with *B*. (The meshing subplans condition is trivially satisfied both when a reservist is in place and when she replaces the active participant.) We discuss this in more detail below when describing some important types of standing in reserve.

To see how standing in reserve satisfies conditions for joint intention, consider the following two hypothetical scenarios that instantiate standing in reserve, which will be useful as exemplars of categories of standing in reserve going forward.

Pivotal-Event Participation. Consider a scenario in which it is common knowledge among active and potential participants that when an event in which the active participation of residents standing in reserve is required—“the pivotal-participation-event”—occurs, then potential participants would join the group of active participants. In short, they are standing in reserve unless and until the pivotal-event occurs; if it does, then they actively participate. Such pivotal-participation-event participants in the joint action may never actively participate if the pivotal-event never occurs. Indeed, they may prefer that that be the case. Actively participating in the crime watch, for example, means taking time out of one’s day to patrol the streets—an effort that, all else equal, rational individuals may prefer to avoid, preferring, instead, to free-ride on the efforts of others. Still, by construction in this example, if push comes to shove (i.e., the pivotal-event occurs) such individuals will actively participate.

Pivotal-event participants are parties to a joint intention that the crime watch be provided, albeit with some qualifications related to the counterfactual nature of the description.⁹⁷ Even in the cases where there are enough participants to ensure the provision of the crime watch without the intervention by those “fair weather” participants, the intentions of the pivotal-event participants satisfy the requirements that define joint intentions. Such intentions run through the intentions of those actively participating in the crime watch, thus satisfying *interlocking*: the intention of those standing in reserve with respect to the crime watch is obviously a product of the intentions of those more active members of the neighborhood. Further, the intentions of all the members of the neighborhood are *interdependent* in the sense that if someone from either set (active participants or standing in reserve) were to change their intention with respect to participation, then the relevant intentions of those in the other set should be expected to change. For example, some of those standing in reserve may spring into action if an active participant were to stand down, and an active participant would prefer to stand down if a reserve participant were suddenly to become “active.” Given the common knowledge conditions, the intentions and subplans of each set in relation to participation *mesh* with those of the other. To be sure, the probability of the pivotal-participation-event that triggers that change must

97. Almendares & Landa, *supra* note 20, at 744–48; *see also infra* notes 107–110 and accompanying text.

be sufficiently high to make an imprint on their planning *ex ante*. It has to make some difference in their plans or subplans, otherwise those counterfactual events are, essentially, merely hypothetical, effectively indistinguishable from mere wishes or hopes that the public good of the crime watch be provided. Being glad that someone else is doing something is not sufficient for standing in reserve.

Probabilistic Participation. Rather than choosing at the outset a particular subset of residents to provide the crime watch, the neighborhood could adopt a lottery-based selection mechanism. Suppose that the names of a set of three active participants would be drawn at random. The selected participants are obviously parties to a joint intention to provide the crime watch. But, what of the residents who agreed to be in the lottery in the first place but were not selected? Provided the probability of being selected is not too remote,⁹⁸ all the residents who are ready and willing to participate and who satisfy the remaining conditions of standing in reserve have beliefs, intentions, and actions that track closely the demands of joint intention. The intentions of those not selected run through, or *interlock* with, the intentions of those actually participating in the watch. Furthermore, the intentions of the two sets of individuals are *interdependent* through the mutually agreed-upon random selection device. And, of course, their subplans *mesh*, trivially. They are, thus, all participants in the joint intention that the neighborhood crime watch be provided even if, in practice, some end up actively participating in the provision and others do not. Indeed, all that distinguishes those who are selected to participate from those who are not is chance.

We can approach interpretations of (non-)participation in these examples from a somewhat different perspective as well. In situations spanning a large number of people, like those in standard cases of collective crimes, individuals often have varied, even divergent, interests. To take the crime watch as an example, they may differ in how much they value the crime watch or other goods and have incentive to free ride on the benefit provided by others without expending direct effort themselves. Such situations are the ones most likely to give rise to the hard cases of complicity. But they are also where game-theoretic analysis allows us to systematically analyze implications of socially complex, and therefore less intuitive, circumstances.

In games with multiple pure strategy equilibria, like the crime watch, there are also equilibria in randomized (mixed) strategies, in which players choose

98. If the probability is too low, then it does not rise to the level of a real intention. One does not generally intend to spend one's hypothetical lottery winnings in the sense of intention that we mean it here entailing concrete plans and subplans. That is more of an idle daydream than an intention.

the relevant supporting pure strategies with interior probability values. It is easy to see that mixed strategies can be understood as responses to uncertainty about the choice of pure strategy by other players.⁹⁹ When there is no such uncertainty, a randomization between pure strategies is dominated by a pure strategy play (unless the pure strategies deliver exactly the same payoff). In the game of the neighborhood crime watch, there is, thus, a continuum of mixed strategy equilibria, for which the set of pure strategy equilibria are limiting cases. Individual *A* for whom the realization of their mixed strategy is to not show up for a street crime patrol is playing exactly the same strategy as individual *B* for whom the realization of the same mixed strategy is to show up. If *B* is party to a joint intention that the crime watch be provided, then surely, so is *A*. Individual *C* who is playing a pure strategy of not showing up for the patrol but who meets our definition of standing in reserve is a limiting case of *A* who, like *C*, is not at the patrol (but then also of individual *B*, who is). *C* simply knows with greater confidence than *A* and *B* that there are enough others who are showing up to make *her* own showing up superfluous. Indeed, *A*'s reasoning about her own participation is similar to *C*'s: if the probability with which *B* is randomizing between showing up for the patrol and not places higher weight on the former, *A* will want to put lower weight on her own showing up.¹⁰⁰ In short, someone standing in reserve with respect to *J* should be counted among those who have a joint intention with respect to *J*.

Putting the foregoing conclusions into a criminal law setting: although the pivotal-participation-event and probabilistic participants may not perform the relevant *actus reus* (e.g., homicide or theft), and may, indeed, not directly participate in the crime in any ancillary fashion, (e.g., providing a weapon or tool used to commit the crime) they are best understood as parties to the joint intention with respect to the criminal act. Their standing in reserve makes them parties to a joint intention that the relevant joint (criminal) action *J* be realized, and, accordingly, they should be considered complicit in *J*.

We can see a close connection between standing in reserve and joint intention in the context of the following classic example, due to Harry Frankfurt, of an agent he names Black.¹⁰¹ Suppose that an individual *i* and Black both intend to kill someone, but neither *i* nor Black knows of the other's intentions. It is clear that neither is satisfying Conditions (3) and (4) of

99. See John C. Harsanyi, *Games with Randomly Disturbed Payoffs: A New Rationale for Mixed-Strategy Equilibrium Points*, 2 INT'L J. GAME THEORY 1, 6–11 (1973).

100. Almendares & Landa, *supra* note 20, at 746–47.

101. Harry G. Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 J. PHIL. 829, 835 (1969).

standing in reserve with respect to the other. A key implication is that there is no jointness in their intentions: *i*'s intentions did not depend on Black's, her subplans did not take Black's intentions into account, and so forth. Their intentions are neither interdependent nor interlocking and their subplans do not mesh. They happen to have the same individual intentions—killing the victim—but Black's intentions have no relationship to *i*'s and vice versa. We can describe their intentions as parallel, but not joint. This would still be true if both *i* and Black were aware of each other (even satisfying Condition (3) of standing in reserve) but their intentions still did not have the characteristics of jointness (and so failed Condition (4)).

Since Black and *i* did not have any joint intentions, we would not consider Black complicit in *i*'s actions and vice versa. That being said, while *i* could not be an accomplice to Black's crime, *i* still might be considered blameworthy, and she could possibly have committed attempted murder. An uncontroversial example would be if *i* and Black both came upon the victim and shot at them but *i*'s bullet missed while Black's struck the victim and caused her death.¹⁰² Another example might be if both *i* and Black were lying in wait for the victim, but Black attacked first, preempting *i*. Actually succeeding in committing the crime is, of course, not a requirement for an attempt.¹⁰³ The elements of an attempt are intent to commit the crime and "substantial step" towards committing it,¹⁰⁴ though defining just what constitutes a substantial step is difficult.¹⁰⁵ This definition is very close to the philosophical meaning of intention we use; substantial steps are good evidence of a real commitment to carrying out the action, of a bona fide intention, rather than of something closer to a hope or desire.

Frankfurt's example can be instructively contrasted with the classic case of *Tally Judge*, who, in a bid to assist his brothers-in-law, who were intent on carrying out a murder, sent a telegram to help ensure that the intended victim was not warned of the danger.¹⁰⁶ The Court ruled that whether Tally's telegram reached its addressee and had the desired effect was irrelevant for Tally's accomplice liability as was Tally's participation in the primary criminal *actus reus*: "It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and

102. See, e.g., *Ex parte Thompson*, 179 S.W.3d 549 (Tex. Crim. App. 2005).

103. See, e.g., *United States v. Bauer*, 626 F.3d 1004, 1007 (8th Cir. 2010); *United States v. Coté*, 504 F.3d 682, 687 (7th Cir. 2007); *United States v. Sims*, 428 F.3d 945, 959–60 (10th Cir. 2005) (collecting cases).

104. E.g., MODEL PENAL CODE § 5.01.

105. CHARLES DOYLE, CONG. RSCH. SERV., R42001, ATTEMPT: AN OVERVIEW OF FEDERAL CRIMINAL LAW 4–6 (2020).

106. *State v. Tally*, 102 Ala. 25, 39–44 (Ala. 1894).

abettor, though in all human probability the end would have been attained without it.”¹⁰⁷ The U.S. Supreme Court has long held a similar position.¹⁰⁸ In Tally’s case, it appears that the murderers were not aware of Tally’s actions, suggesting that Tally was not standing in reserve, even if, like Black, he is attempting a murder, with his brothers-in-law as a kind of murder weapon.

But consider Christopher Kutz’s hypothetical version of *Tally*, where rather than sending a telegram, Tally instead provided the principal perpetrators with an extra gun in case one of theirs malfunctioned.¹⁰⁹ Unlike the actual case, Kutz’s version of the Tally case is a kind of hyper-variation on the pivotal-event participation case of standing in reserve. It is equivalent to Tally being on hand at the murder, standing in reserve with respect to the supply of a functional weapon for the crime; in effect, Tally foreshortens the wait for his services by handing over the spare gun in case it is needed. Tally’s standing in reserve in this hypothetical version creates for him an accomplice liability, which occurs independent of whether he was instrumental in causing the crime to occur.¹¹⁰

B. *Complicity vs. Conspiracy*

Before turning to the application of standing in reserve to hard cases for complicity, it is instructive to consider a distinction between conspiracy and complicity. The two crimes are closely related, and standing in reserve further

107. *Id.* at 69.

108. *Hicks v. United States*, 150 U.S. 442, 450 (1893) (“[W]here an accomplice is present for the purpose of aiding and abetting in a murder, but refrains from so aiding and abetting because it turned out not to be necessary for the accomplishment of the common purpose, he is equally guilty as if he had actively participated by words or acts of encouragement.”).

109. Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289, 298 (2007).

110. *See, e.g., id.* at 300. Kutz’s conclusion with respect to Tally’s liability is different from ours. In his account, “What binds together all the complicity cases is the mental state of the accomplice—a mental state directed both towards the accomplice’s own agency (including the agency involved in refraining) and towards the agency of the principal.” *Id.* While we agree that the mental state of the accomplice is a key factor in determining liability (*see also* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 359 (1985)), in our account, accomplice liability depends on the existence of at least tacit coordination between accomplices. Further, while Kutz rejects actual causation as the requirement of accomplice liability, he argues that that liability meets the standard that the accomplice’s actions could be potentially causal, and in that sense, increase the ex-ante likelihood of a success of a criminal action. Kutz, *supra* note 109, at 289, 298. By contrast, we are agnostic on whether such standard is relevant or, indeed, needs to be satisfied in the cases of standing in reserve, as standing in reserve may, in fact, have the opposite effect on the criminal action. We discuss the relationship between causality and complicity in greater detail in Nicholas Almendares & Dimitri Landa, *When Is One Responsible for Actions of Another?* (N.Y.U. Working Paper, 2022).

underscores their connection simply because it presupposes a kind of understanding between the parties to a joint crime. However, despite the overlap between conspiracy and complicity in both theory and practice, there are important differences between co-conspirators and accomplices, including those accomplices who are complicit by way of standing in reserve.

The centerpiece of a conspiracy is the agreement to carry out the criminal acts.¹¹¹ It is a distinct offense, one separate from the underlying crime that is the object of the conspiracy, although jurisdictions are split on whether one can be punished for both the underlying offense and the conspiracy to commit it.¹¹² The essence of a conspiracy, its *actus reus*, is the agreement itself.¹¹³ Take, for example, this canonical formulation:

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.¹¹⁴ So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act itself.¹¹⁵

Additionally, many jurisdictions require someone to take an “overt act” in the furtherance of the conspiracy, over and above the agreement itself, especially for the most serious offenses.¹¹⁶ This requirement is more evidentiary than conceptual—that is, more as a matter of social policy than a defining characteristic of conspiracy. As the Supreme Court explained, “The function of the overt act in a conspiracy prosecution is simply to manifest ‘that the conspiracy is at work,’ . . . and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.”¹¹⁷ Put another way, requiring an overt act ensures that the conspiracy is a bona fide intention in the philosophical sense of the term.

The key difference between conspiracy and standing in reserve is that the latter is not defined by an explicit agreement—there could be complicity without a prior explicit agreement regarding the crime. Joint intentional action can be relatively spontaneous: audience members do not negotiate with each other to applaud a good performance, and people shovel snow, negotiate

111. MODEL PENAL CODE § 5.03(1)(a).

112. Paul H. Robinson, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 755 n.329 (1983); MODEL PENAL CODE § 1.07(1)(a), (4)(b).

113. *Hyde v. United States*, 225 U.S. 347, 388 (1912).

114. MODEL PENAL CODE § 5.03(1)(a).

115. *Mulcahy v. The Queen* [1868] LRE & I. App. 306, 316–17 (appeal taken from Eng.).

116. *E.g.*, MODEL PENAL CODE § 5.03(5); 18 U.S.C. § 371.

117. *Yates v. United States*, 354 U.S. 298, 334 (1957) (quoting *Carlson v. United States*, 187 F.2d 336, 370 (10th Cir. 1951)), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978).

traffic, and hold open doors without clear prior agreements. In just the same manner people could be standing in reserve without the kind of agreement that defines a conspiracy.

Another illustrative class of examples involves third-party coordinators. Collective action can be hard. Even if all the possible participants agree on the goal—no mean feat in itself—there will frequently be many ways to proceed. A crowd, even one that manages to basically agree on what to do, can still struggle to coordinate because its members both have to pick a course of action and somehow convey that choice throughout the group. Even if a group of people all want to go out to dinner together, they still have to coordinate on where and when. Coordination through bilateral agreements may be more or less feasible depending on the size of the group and the nature of the relationships within it: roommates will have an easier time coordinating than everyone who shares a birth date. One way coordination problems can be mitigated in larger groups is through common public signals that the relevant group takes to be authoritative. Or, what amounts to the same thing, there can be a person whose pronouncements are similarly deemed authoritative. Those public signals designate a particular way of proceeding, resolving the coordination problem.

In such a scenario we would not say that members of the crowd are conspiring; there are no real agreements in the requisite sense, because there is no real bilateral communication. The very infeasibility of doing so created both the coordination problem and the value of public signals to mitigate it.¹¹⁸ The participants are also not engaged in an agreement with the coordinator (who, to be sure, need not even be an actual person: coordination can occur off a randomly generated publicly observed signal). The communication, such as it is, only flows in one direction: the coordinator sends the signal, but there need not be any way for the participants to “reply” or otherwise transmit their assent. The lack of any agreement between the coordinator and anyone else separates this example from something like a “hub and spoke” conspiracy.¹¹⁹ We will return to the idea of an organizing third party in Section III.B.

The main point of these brief examples is to show that despite the similarities between joint intention and conspiracy, and the fact that, in practice, they will often travel together, they are distinct ideas: there can be

118. We consider the legal consequences of this kind of organization in further work on the First Amendment doctrine of incitement. Nicholas Almendares & Dimitri Landa, *Incitement as Coordination* (Working Paper, 2022).

119. *E.g.*, *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 (9th Cir. 2015).

joint, collective activity, even at large scale, without the kind of agreement that characterizes a conspiracy.

The extent to which separating conspiracy and complicity makes a practical difference depends on whether someone can be punished for both the conspiracy and the predicate offense, that is, the conspiracy's object. When there is a persuasive case to be made that there was a conspiracy, complicity may be of secondary importance, though the general rule is that one can be punished for both the conspiracy and the predicate offense, that is, the conspiracy's object.¹²⁰ When the case for conspiracy is weak—perhaps for reasons suggested in the above examples—establishing complicity in hard cases may be expected to take center stage.

III. APPLYING STANDING IN RESERVE TO HARD CASES

Having laid out our concept of standing in reserve, we now apply it to a series of “hard cases.” Our purpose in this Part is to illustrate how standing in reserve can resolve some of the persistent puzzles in this area of law and in a consistent, principled manner. Our purpose here is not to provide a comprehensive account of complicity or of every facet of complex events like the Capitol Riot (though we do believe that joint intention overall is useful to those ends). For the moment we set to one side charges like conspiracy,¹²¹ incitement,¹²² and possible legal duties to intervene.¹²³ Instead, we focus here on the particularly challenging cases where the potential accomplice is not directly participating in bringing the crime about.

120. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1370 (2003) (“[T]raditionally conspiracy law refused to permit merger, so that when *A* conspires with *B* to steal government funds, both are liable for the theft *and* the offense of conspiracy.”); *Iannelli v. United States*, 420 U.S. 770, 777 (1975).

121. See *supra* Part II.B; see also, e.g., Alan Feuer, *Sedition Sentence for Oath Keepers Marks Moment of Accountability*, N.Y. TIMES, May 26, 2023; Press Release, Department of Justice, Court Sentences Two Oath Keepers Leaders on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach (May 25, 2023), <https://www.justice.gov/opa/pr/court-sentences-two-oath-keepers-leaders-seditious-conspiracy-and-other-charges-related-us#:~:text=Rhodes%20was%20sentenced%20to%2018,three%20years%20of%20supervised%20release> [https://perma.cc/6U5H-2J5R].

122. We take this issue up in another work. Almendares & Landa, *supra* note 118.

123. See, e.g., Zachary D. Kaufman, *Digital Age Samaritans*, 62 B.C. L. REV. 1117, 1121–23 (2021).

C. The Capitol Riot—Collective Crimes

A group of people directly assaulting someone or breaking in a door is a straightforward case for both joint intention and complicity. In these scenarios they are all actively working in concert towards a shared goal; all these individuals are active participants. Situations like that only cover a fraction of those present at the Capitol on January 6th, 2021. There are some blanket charges, like trespassing, that could apply, but these are fairly minor and do not capture the events of that day.¹²⁴ They fail to make meaningful distinctions between the vast majority of rioters. Absent something as straightforward as clear evidence of direct participation in a specific crime,¹²⁵ participation in the Capitol Riot becomes one of our “hard cases.” The question boils down to what extent there may be complicity beyond the easy to identify instances.

There would be no way to do justice to a full accounting of the legal consequences of the Capitol Riot in this Article. To illustrate the utility of our standing in reserve model of complicity and how it could be applied practically, we concentrate on what police dubbed the “hallway of hell”¹²⁶ where officers fought with rioters. One officer described the experience as: “It was some medieval s*** We pushed this group back, 30 guys versus 15,000. We pushed them back through the doorway, and we just kept pushing them until we got to the threshold of the [hallway].”¹²⁷ Following this account,¹²⁸ those directly engaged with officers are clear-cut cases of criminal wrong-doing (at the very least, the act of assaulting the officers). But what of the people not directly engaged with the officers, not to mention the considerably larger group several ranks back or even outside the confines of the hallway?

Let us stipulate for the moment that there is a person in the “back ranks” of the crowd with the intention to force their way into the Capitol Building and that their subplans to that end involve fighting their way past police if that becomes necessary. They might prefer not to fight the police but are willing and prepared—they *intend*—to do so if necessary to achieve their

124. See *supra* notes 31–34 and accompanying text.

125. See, e.g., *supra* notes 26–28.

126. Austermuhle, *supra* note 28.

127. *Id.* (bracketed alteration in original).

128. Once officers pushed rioters out of the confined hallway they were reportedly surrounded and attacked. *Id.*; Evan Hill et al., “They Got an Officer!”: How a Mob Dragged and Beat Police at the Capitol, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/01/11/us/capitol-mob-violence-police.html> [<https://perma.cc/5UAV-J24Q>].

goals. With this individual in mind, we can consider some scenarios and show how the concept of standing in reserve can guide the law of accomplices.

Suppose there are many rioters, all rushing the hallway with the intention described above. Who ends up actually confronting the police there is essentially random. They all, by construction, have identical intentions, and those in the back ranks who might never personally “throw a punch” may be considered standing in reserve from those actively engaging with officers. Thus, they should be considered an accomplice to the assault. This is a clear application of the analytical framework presented in Part I. The only difference between someone directly engaged with the officers and someone just behind them is happenstance (or perhaps footspeed), and that would make for a poor reason for the law of complicity to treat them qualitatively differently. This position is consistent with case law¹²⁹ and especially with theories of criminal law, including those discussed in Part II.¹³⁰

We could, further, imagine someone who is reluctant to confront the police and so prefers to hold back and let others do it: someone who might view such a confrontation as personally distasteful or who might simply not want to undertake the effort. Both of these motivations are analogous to those of the free-riders in our neighborhood crime watch—they would prefer not to actively participate in the joint project, but the benefits to them of seeing the joint project realized still exceed their cost. In other words, if needed, they will participate, a key condition for them to be standing in reserve. They are akin to the pivotal-event participants from the above discussion, and, despite their reluctance, also standing in reserve with respect to assaulting the officers and so, we argue, accomplices to that crime.

An example of this kind of “reluctant rioter” could be Eric Munchel, who entered the Capitol on January 6th equipped with a tactical vest, taser, and zip ties, along with possibly other weapons.¹³¹ The next day, Munchel told a newspaper:

We wanted to show that we're willing to rise up, band together and fight if necessary . . . It was a kind of flexing of muscles. . . . The

129. *See Hicks v. United States*, 150 U.S. 442, 450 (1893) (“We understand this language to mean that where an accomplice is present for the purpose of aiding and abetting in a murder, but refrains from so aiding and abetting because it turned out not to be necessary for the accomplishment of the common purpose, he is equally guilty as if he had actively participated by words or acts of encouragement.”); *State v. Tally*, 15 So. 722, 738–39 (Ala. 1894) (discussing superfluous aid by an accomplice).

130. *See Kutz, supra* note 109, at 298; *see also* John Gardner, *Complicity and Causality*, 1 CRIM. L. & PHIL. 127, 130 (2007) (explaining that the causal contributions of accomplice and principal are equally morally reprehensible).

131. *United States v. Munchel*, 991 F.3d 1273, 1275–76 (D.C. Cir. 2021).

intentions of going in were not to fight the police. The point of getting inside the building is to show them that we can, and we will.¹³²

Munchel might not have had the distinct goal of fighting the police—he would, taking his statements as accurate, have preferred if the Capitol had been undefended. But he intended to fight if that turned out to be necessary to get into the Capitol and disrupt the proceedings on January 6th. Had Munchel been in the “hallway of hell” beside someone fighting with the police, it would appear that would have satisfied Condition (2) (ready and willing) for standing in reserve. The conclusion that he was, indeed, standing in reserve would then depend on the relationship of his intentions to those who ended up doing the fighting.

The scenarios we have sketched inspired by the “hallway of hell” during the Capitol Riot contain important elements of standing in reserve. They resemble back-up players on a sports team, who are ready and willing to step in and play the game if needed. The same can be said about reinforcements in a military engagement. Provided that conditions for standing in reserve are satisfied, it is hard to see how the alternate or the reinforcements could be anything but parties to the relevant joint intention to win the game or battle. The conditions for standing in reserve are, however, key to making intentions truly joint ones. These conditions demand that the underlying knowledge and individual intentions appropriately fit together. To emphasize, if at the cost of repetition, if a fan in the stands is able and willing to step in for an injured player but the team does not know that, or if that situation is sufficiently unlikely that it does not affect the team’s plans and subplans, the fan is not truly standing in reserve, and there is no relevant joint intention. In contrast, back-up players do typically affect their team—knowing that a single injury would force the team to forfeit a game would alter a team’s plans, leading them to be more conservative and safety-conscious, would likely make players less willing to report injuries, and so forth. The mutuality element of standing in reserve is critical—in a joint intention, the intentions of all the participants must affect each other. The sports and military examples illustrate this feature; the relationship between the individual intentions is what distinguishes the eager fan from the alternate on the team’s roster.

There is some evidence of this reciprocal relationship at the Capitol Riot. Rioters commonly invoked the numbers of people gathered and the strength that implied, making statements like: “There’s a lot of people here willing to

132. *Id.* at 1277.

take orders,”¹³³ “We wanted to show these politicians that it’s us who’s in charge, not them . . . We’ve got the strength,”¹³⁴ and “We had enough people, we could have tore that building down brick by brick.”¹³⁵ One rioter reportedly told an officer attempting to arrest him, “You guys don’t have the numbers.”¹³⁶ Likewise, the size of the crowd affected the officers stationed at the Capitol. One officer explained that the size and belligerence of the crowd made it impossible to arrest any of the participants or use mass arrest tactics.¹³⁷ Other officers recounted how the numbers influenced their actions:

We recovered 9 or 10 guns, found or taken off people. Guarantee so many more had ‘em . . . You don’t want to start a gunfight and have a bloodbath. We wouldn’t have won. They knew they could get up on you without you shooting ‘em . . . And there’s so many. You could go hands on if you want, but there’s too many people.¹³⁸

Testimony before the January 6th Committee indicates that many of the people gathered that day were armed.¹³⁹

To the extent that a plausible case can be made that this evidence demonstrates mutuality of participants’ intentions, this creates a path to establishing that those in the back ranks of the “hallway of hell” or similar confrontations during the Capitol Riot were standing in reserve with respect to a crime like assaulting an officer. As a consequence, they would be considered accomplices to it even though they did not directly take actions that either define that crime (the actual assault itself) or are instrumental in bringing it about (like helping arm the principal perpetrator). As we have explained, under the right circumstances one can be a party to a joint intention *without taking any direct actions* to support the joint project. A key purchase

133. Dan Barry et al., ‘Our President Wants Us Here’: The Mob That Stormed the Capitol, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> [<https://perma.cc/6D2A-R8KC>].

134. Sabrina Tavernise & Matthew Rosenberg, *These Are the Rioters Who Stormed the Nation’s Capitol*, N.Y. TIMES (May 12, 2021), <https://www.nytimes.com/2021/01/07/us/names-of-rioters-capitol.html> [<https://perma.cc/APP9-R7B9>].

135. *Id.*

136. Peter Nickeas, *Inside the Fight for the Capitol: US Capitol Police Officers Recount Being Unprepared and ‘Betrayed,’* CNN (Jan. 19, 2021, 9:00 AM), <https://www.cnn.com/2021/01/19/politics/capitol-police-officers-speak/index.html> [<https://perma.cc/L9UW-FHEU>].

137. *Id.*

138. *Id.*

139. See Maham Javaid, *What Are Magnetometers, or Mags?*, N.Y. TIMES (June 28, 2022), <https://www.nytimes.com/2022/06/28/us/what-are-magnetometers-mags.html> [<https://perma.cc/2Y3D-KKMH>].

of the standing in reserve model of participation is to identify what those circumstances might be.

Critically, all of our preceding analysis turns on the individuals' intentions to force their way into the Capitol and fight the police if they had to. In our scenarios, these are bona fide intentions, meaning they affect the individuals' plans and subplans (for instance, they might have armed themselves in anticipation of a confrontation). If, on the other hand, the person had no intention of confronting the police—if they would have preferred that the Capitol Riot be stymied rather than harm officers—then the case for their standing in reserve with respect to the assault on the officers is weak, and they should not be considered complicit in the assault even if, as a matter of fact, their presence emboldened and encouraged someone who did intend to fight with police. This is the flip side of an accomplice being culpable even if the aid they provided was superfluous; just as intention, in the strong sense laid out above, should be a sufficient condition for criminal liability, a lack of intention should lead to a different result.

The burden remains on the government to prove the existence of the potential accomplice's intentions. Returning to the sports example, we have confidence that the player sitting on the bench intends to stand in reserve, stepping in if called upon, because she is suited up, practiced with the team, and has prepared in various ways. If she were being deliberately inattentive, failing to make sure as to the status of the joint project (i.e., winning the game), then we might conclude that she is not, or is no longer, a party to the joint intention.¹⁴⁰ In a case like the Capitol Riot, we would look for similar markers of intention such as whether individuals arrived at the site armed or other preparations alongside their stated intentions in communications with allies, manifestoes, and other evidence typically marshalled to develop intent at trial.¹⁴¹ Conversely, the defense would be able to introduce evidence establishing that the potential accomplice lacked the relevant intentions. Just as we can imagine a rioter eager to do their part but who just happens by luck to be stuck in the back ranks and another rioter who would reluctantly attack officers if that was the best way to achieve their overall goal, we can easily imagine a rioter who would not personally fight, regardless of the circumstance. For instance, an officer who was beaten during the Capitol Riot

140. See *supra* Section II.A.

141. Tom Dreisbach & Tim Mak, *Yes, Capitol Rioters Were Armed. Here Are the Weapons Prosecutors Say They Used*, NPR (Mar. 19, 2021), <https://www.npr.org/2021/03/19/977879589/yes-capitol-rioters-were-armed-here-are-the-weapons-prosecutors-say-they-used> [<https://perma.cc/UH3V-F4NJ>].

and threatened with being killed¹⁴² recounts that: “At one point, I decided I could appeal to someone’s humanity in this crowd. And I said I have kids Fortunately, I think it worked. Some people did start to protect me, they encircled me and tried to prevent people from assaulting me.”¹⁴³ Such a rioter could still be party to a joint intention to storm the Capitol, and thus could be guilty of crimes like trespassing or obstructing an official proceeding, but they probably should not be considered an accomplice to the assault. The case of Ray Epps, who was present at the Capitol Riot, encouraged people to breach the building, helped direct them towards the Capitol, but also tried to dissuade other rioters from violence,¹⁴⁴ may fit this description.

Standing in reserve also helps rationalize a longstanding doctrine relating to encouraging the principal perpetrator to commit the crime. One of the challenges for complicity is that an accomplice can aid a crime in so many varied ways. Some of these, no doubt, involve communication: someone who shares the code to disable an alarm could certainly be an accomplice. In similar fashion, during the Capitol Riot, a lot of people reportedly got lost within the grounds,¹⁴⁵ so sharing information about the building layout could have been a form of aid.¹⁴⁶ These would be fairly easy cases—in each one, the accomplice is actively participating in bringing about the crime, the joint

142. Austeruhle, *supra* note 28 (“[P]eople were trying to get my gun, and they grabbed my ammunition magazines I remember trying to retain my gun, I remember guys chanting, ‘Kill him with his own gun.’”).

143. *Id.* In the same interview, this officer added: “The ones in the crowd that somehow appealed to their better angels and offered me some assistance, thank you. But f*** you for being there.” *Id.*

144. Alan Feuer, *A Trump Backer’s Downfall as the Target of a Jan. 6 Conspiracy Theory*, N.Y. TIMES (July 13, 2022), <https://www.nytimes.com/2022/07/13/us/politics/jan-6-conspiracy-theory-ray-epps.html> [<https://perma.cc/Q6W5-MRBZ>].

145. See Barry et al., *supra* note 133 (“Confusion reigned. ‘Hey what’s the Senate side?’ said a tall man in camouflage and sunglasses. ‘Where’s the Senate? Can somebody Google it?’”).

146. One striking image of the Capitol Riot shows a person with a bullhorn shouting directions to the crowd. Ronan Farrow, *A Pennsylvania Mother’s Path to Insurrection*, NEW YORKER (Feb. 1, 2021), <https://www.newyorker.com/news/news-desk/a-pennsylvania-mothers-path-to-insurrection-capitol-riot> [<https://perma.cc/L2AM-3PEW>]. There are also reports of “tours” of the Capitol Building shortly before January 6, 2021 that could have been used to gather reconnaissance for the Capitol Riot. See Luke Broadwater, *Jan. 6 Panel Says Capitol Marcher Toured with G.O.P. Congressman*, N.Y. TIMES (June 15, 2022), <https://www.nytimes.com/2022/06/16/us/politics/jan-6-loudermilk-tour.html> [<https://perma.cc/YB6A-NTKM>]; Luke Broadwater, *Republican Lawmakers Are Accused of Giving Capitol Tours to Insurrectionists Before the Riot as New Inquiries Are Opened*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/politics/republicans-capitol-tours.html> [<https://perma.cc/42QH-P9Q2>].

project.¹⁴⁷ They are analogous to someone who provides a weapon or other instrumentality used in a crime.¹⁴⁸ The situation becomes more complicated when the participation comes in the form of words of encouragement. Courts have long held that encouragement suffices for complicity,¹⁴⁹ and these decisions have expanded to embrace tacit encouragement, too.¹⁵⁰ An expansive understanding of solicitation—where someone induces another to commit a crime—could include encouragement,¹⁵¹ but it would be an example of criminal consequences based on encouragement in which the complicity doctrine of the words of encouragement would be redundant with solicitation.

Standing in reserve provides partial justification for the words of encouragement doctrine. The words—or more subtle acts in the case of tacit

147. Encouragement can also, in special cases, amount to a crime in and of itself, separate from doctrines like complicity. *See, e.g.,* Kate Taylor, *Former Boston College Student Charged in Boyfriend's Suicide after Thousands of Texts*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2021/12/23/us/inyoung-you-boston-college-suicide-guilty-plea.html> [<https://perma.cc/H2MG-MDSU>] (involuntary manslaughter charge); Katherine Q. Seelye & Jess Bidgood, *Guilty Verdict for Young Woman Who Urged Friend To Kill Himself*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/suicide-texting-trial-michelle-carter-conrad-roy.html> [<https://perma.cc/XN3U-QQ8K>] (involuntary manslaughter charge).

148. And, as we have seen, this kind of help can be superfluous; that does not change the complicity analysis. If people were not lost during the Capitol Riot or the burglars had already made other arrangements to disable the alarm, that does not mean the person aiding them through providing information is absolved of their liability.

149. *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993) (stating that aiding and abetting “comprehends all assistance rendered by words, acts, encouragement, support, or presence” (quoting Black’s Law Dictionary 68 (6th ed. 1990)); *Hicks v. United States*, 150 U.S. 442, 449, 455 (1893) (stating that “acts or words of encouragement” may constitute aiding or abetting a crime). In *Hicks* the Court also concluded that even if the defendant’s actions had the effect of encouraging the primary perpetrator to commit a crime, she could not qualify as an accomplice unless that was also her *intent*. *Hicks*, 150 U.S. at 455 (“[T]he acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting . . .”). If, for example, the defendant’s words were actually motivated by fear or desperation, but the primary perpetrator mistook the words as encouragement, she would not be an accomplice; the effect alone is not sufficient. *See id.* at 449. The *Hicks* decision is consistent with our arguments in this Article because it makes liability dependent on the potential accomplice’s intentions.

150. *State v. Holland*, 67 S.E.2d 272, 275 (N.C. 1951) (acknowledging that a person’s mere presence can constitute encouragement of a crime); *People v. Villa*, 318 P.2d 828, 833–34 (Cal. Ct. App. 1957) (finding that three men aided and abetted a rape “by their actual presence, and by their acts they rendered actual assistance to the perpetrator” (quoting *People v. Mummert*, 135 P.2d 665, 668 (Cal. Ct. App. 1943)); *see also* *United States v. Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962).

151. *E.g.*, MODEL PENAL CODE § 5.02 (“A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime . . .”).

encouragement—help demonstrate to others that one is, in fact, standing in reserve. They say, in effect, “you can count on me” to the other participants, signaling that one is a party to the joint intention. But in arguing that the concept of standing in reserve can make sense of the words of encouragement doctrine, we do not mean to suggest that all encouragement should be understood as standing in reserve. Someone offering encouragement through social media, while otherwise unable to feasibly contribute to the potential joint project, would surely not be standing in reserve: if called upon, they would not be able to do their part, and should not bear accomplice liability.

Another instance of words of encouragement that does not fall under standing in reserve is incitement or instigation of a crime, which is treated as distinct, though not entirely unrelated, from participation in criminal activity as an accomplice.¹⁵² Naturally, someone who incites a crime could also be standing in reserve with respect to it. They might well be a natural candidate for doing so having already signaled some commitment to seeing the crime realized. Yet this need not be the case. Many incitement cases, including the landmark ones, involve publishing or mass communication,¹⁵³ with no intention to intervene or plausible means of doing so. Incitement, especially in a politically charged case like the Capitol Riot, raises thorny First Amendment issues, so we defer discussion of it to other work.¹⁵⁴

D. Sleeper Cells—Proximity & Standing in Reserve

Our illustrations of standing in reserve so far have involved potential participants who are fairly close to the action: the back-up player is present at the stadium while the rest of the team plays; the rioter on January 6th might be right next to someone assaulting a police officer. The same is true for the archetypal examples of joint intention like duets. Proximity may be important: it can make it far easier to assure others, often implicitly, that one is in fact standing in reserve and for them to take that intention into account.

152. *See, e.g.*, *United States v. Miselis*, 972 F.3d 518, 525, 537–38 (4th Cir. 2020) (discussing encouragement and organizing in terms of incitement but not in terms of complicity).

153. *E.g.*, *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917) (publishing political cartoons), *rev'd*, 246 F. 24 (2d Cir. 1917); *Schenck v. United States*, 249 U.S. 47, 47 (1919) (publishing political tracts attempting to cause insubordination in the United States military and naval forces); *Brandenburg v. Ohio*, 395 U.S. 444, 444 (1969) (speech filmed and broadcast by news media advocating for the necessity of crime, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 236 (4th Cir. 1997) (publishing “Hit Man: A Technical Manual for Independent Contractors,” an instruction book on murder).

154. *Almendares & Landa*, *supra* note 118.

Someone close by might, by their very presence, be indicating that they intend to step in and help out if it becomes necessary. Proximity also better enables someone standing in reserve to make sure the intention is being carried out. However, being close at hand is not necessary for one to be standing in reserve.

Sleeper cells, commonly associated with terrorist organizations,¹⁵⁵ are a particularly challenging case for the law. The hallmark of a sleeper cell is that it has not necessarily done anything (yet); it is ready but waiting to carry out an attack. As we have argued, though, taking action—that is, carrying out the attack or helping do so—is not a necessary condition for being a party to a joint intention that the attack be carried out. Standing in reserve offers a way for law to parse these situations without resorting to something like “status crimes” or “guilt by association” that criminalize mere membership in a group, which would raise, among other things, its own host of First Amendment concerns.¹⁵⁶

To illustrate the application of standing in reserve to sleeper cells, suppose there is an organization with three cells, *A*, *B*, and *C*, each of which is prepared to carry out an attack if ordered to. The identities of each cell are known to the main organization but not to the members of the cells themselves. All they know, or at least reasonably believe, is that other similarly situated cells exist, and that they are activated, as needed, by the organization’s leadership. Suppose that cell *A* is activated and commits an attack on behalf of the organization. What liability for those crimes, if any, should attach to members of cells *B* and *C*? We argue that those cells may

155. Sleeper cells are popular with other groups, as well, such as white nationalists. *Sleeper Cell*, DICTIONARY.COM, <https://www.dictionary.com/e/politics/sleeper-cell/> [<https://perma.cc/SAN3-XUUN>] (defining a sleeper cell as “a group of operatives, spies or terrorists, living in secret among a targeted community waiting for instructions or an opportunity to act”); Alexandra Alter, *How ‘The Turner Diaries’ Incites White Supremacists*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/books/turner-diaries-white-supremacists.html> [<https://perma.cc/M5ZK-BRCM>]; J.M. Berger, *The Turner Legacy: The Storied Origins and Enduring Impact of White Nationalism’s Deadly Bible*, RESEARCHGATE (Sept. 2016), https://www.researchgate.net/publication/311760245_The_Turner_Legacy_The_Storied_Origins_and_Enduring_Impact_of_White_Nationalism%27s_Deadly_Bible [<https://perma.cc/GH67-CPFV>].

156. *E.g.*, *Scales v. United States*, 367 U.S. 203, 207 (1961) (“[A]n offense is not made out on proof of mere membership in a Communist organization.”); *People v. Castaneda*, 3 P.3d 278, 285 (Cal. 2000) (holding that a defendant “actively participates” in a gang where his involvement in the gang is more than nominal or passive); *United States v. Barber*, 429 F.2d 1394, 1397 (3d Cir. 1970) (concluding that, in order to aid and abet another to commit a crime, it is necessary that a defendant not only associate himself with the criminal enterprise, but that “he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed”).

plausibly accrue liability as standing in reserve with respect to the acts committed by *A*.

From the standpoint of the cells, the organization leadership's decisions to activate one cell or another are akin to random draws. If there is sufficiently common knowledge about the existence of the other cells and a sufficient likelihood of being activated to affect the plans of each member of a cell—i.e., the possibility of being activated by the organization is not so remote or fanciful that it makes no difference to their plans, subplans, and so on—it can be readily seen that a given cell's choices are interdependent with the choices of the others. The only difference is that the kind of information about intentions that was facilitated through something like words of encouragement or other signals between potential participants in the joint project is here mediated by the leadership of the organization. If they are truly committed, the cells' intentions are interlocking (they proceed by way of the intentions of the other cells). If they will carry out their missions if and only if they are the ones selected by the leadership, then the cells' respective subplans would, it seems, also be appropriately meshing.

Following this analysis, all three cells share a joint intention: their plans and intentions are commonly known to be appropriately responsive to each other's plans and intentions. The complication of this example—where it differs from the cases of standing in reserve we have described so far—is that the “jointness” of these intentions is being realized through the coordinating actions of the organization leadership. Indeed, in our simple example, all three cells have the same intention—to act if called upon, closely resembling the probabilistic participants in the neighborhood crime watch.¹⁵⁷ When one is activated to strike, the others are best understood to be standing in reserve and members of the inactive cells are complicit in the criminal actions carried about by the one chosen by the leadership.

There also exists a straightforward joint intention between each of the cells and the leadership: when cell *A* engages in an attack, it is an act that is jointly intended by that cell and the leadership.¹⁵⁸ Indeed, unlike the harder case of someone standing in reserve, the leadership is actively participating in realizing the jointly intended project, namely by ordering one of the cells into action. If cells *A* and *B* join the organization knowing that one of its tenets is to maintain secrecy by delegating communication to the coordinator and

157. See *supra* Section II.C for a discussion of the neighborhood crime watch example. If, for some reason, they do not share the same basic intentional characteristics as those standing in reserve in that scenario, then they would not be parties to a joint intention and would not, we argue, be accomplices.

158. See Almendares & Landa, *supra* note 20, at 749–50.

keeping the cells themselves in the dark, and they do this in furtherance of the goal of increasing the effectiveness of the terrorist cause they all seek to advance, it cannot be that their lack of information about the other cells somehow indemnifies them from the joint responsibility that would otherwise exist. Rather, it seems that deference to the leadership, which here amounts to each cell's standing in reserve,¹⁵⁹ creates a kind of transitive joint intention (and therefore joint responsibility) relationship: cell *A* jointly intends action *J* with the leadership; cell *B* defers to the leadership and follows its orders, which means that it would have taken action *J* had the leadership called on it to do so; therefore, cell *A* and cell *B* jointly intend action *J*. The leadership, for its part, coordinates all this activity; it picks out a way to proceed, including, of critical importance here, who will actively participate in the crime.¹⁶⁰ If, for example, *A* and *B* agreed to decide who would carry out the by a coin flip, we would naturally conclude they had a joint intention regarding it. The organization's leadership essentially plays the same role.

Our investigation of sleeper cells also has implications for the events of January 6th, 2021. According to court filings, during the Capitol Riot there were members of a militia group that did not personally take part in the events at the Capitol but were instead part of a "quick reaction force" or "QRF" tasked with "bringing the tools if something goes to hell" so that members of the group at the Capitol Building would not have to "schlep [weapons] on the bus."¹⁶¹ As one member of the group, who was at the Capitol, explained, the quick reaction force "provided ready access to guns during operations" and was "designed so that 'If it gets bad, they QRF to us with weapons for us . . . [w]e can have mace, tasers, or night sticks. QRF staged, armed, with our weapons outside the city' . . ."¹⁶² These communications indicate the presence of a joint intention between those actively carrying out the violence at the Capitol that day and the QRF. Stipulating the truth of the allegations, members of the QRF were (explicitly) standing in reserve, ready to step in and participate in the joint project of the Capitol Riot if called upon to do so.¹⁶³ Furthermore, their presence—like that of a team's back-up player and

159. Subject to all the requirements we lay out for standing in reserve.

160. One could think of it as playing the role of the pivotal-event as described in Section II.A.

161. Government's Memorandum in Support of Pre-Trial Detention at 5, *United States v. Jessica Marie Watkins*, No. 1:21-cr-28-APM-3 (D.C. Super. Ct. Feb. 11, 2021) [hereinafter *Watkins Detention Memorandum*], <http://cdn.cnn.com/cnn/2021/images/02/11/04518323725.pdf> [<https://perma.cc/56ME-XNEW>].

162. *Id.*

163. Incidentally, this is an instance where there is both complicity and conspiracy. See Ryan Lucas, *Oath Keepers Face Seditious Conspiracy Charges. DOJ Has Mixed Record with Such*

like that of the presence in the Capitol hallways on January 6th of those supporting the fights with the police officers—might plausibly have affected the behavior of direct participants in the Capitol Riot, indicating the existence of the mutuality of intentions required by standing in reserve.¹⁶⁴

Again, as throughout all of our analysis, the attribution of complicity must turn on the intentions of the sleeper cells or quick reaction force. These intentions must be bona fide intentions in the demanding sense we use the term,¹⁶⁵ which must be established by the prosecution for there to be criminal consequences. Merely identifying with the terrorists or militias or hoping they succeed does not make one complicit. The requisite intentions can be conditional—as described above, the members of each cell only intend to attack if the leadership gives them the order—but they must be true intentions; they must have an impact on the cell members’ other plans and decisions to constitute a genuine intention.¹⁶⁶ If the members of sleeper cells or similar groups have undergone specialized training, stockpiled supplies, picked targets, and so on—that is, they had something close to a plan of action if called upon—then that provides evidence of their standing in reserve, and so of being accomplices with respect to the activated cell’s actions.¹⁶⁷ The QRF being present, prepared, and in constant communication with people at the Capitol on January 6th (a clear instance of making sure and monitoring the status of the joint project and ensuring its success) is evidence of such an intention.

E. Material Support—Complicity Without Intention

Our analysis of sleeper cells through the lens of standing in reserve differs from the common legal treatment of organized terrorism, at least in practice. There exist specialized crimes that ascribe guilt based on someone else’s actions but have laxer intention requirements, joint or otherwise. The most

Cases, NPR (Feb. 1, 2022, 7:17 AM), <https://www.npr.org/2022/02/01/1076349762/oath-keepers-charged-capitol-riot-seditious-conspiracy> [<https://perma.cc/EPJ2-UYRY>].

164. See Watkins Detention Memorandum, *supra* note 161, at 16 (“Even if it is true that Watkins did not carry firearms with her into the Capitol, she also did not feel the need given the Quick Reaction Force (QRF) presence nearby ‘with weapons for us.’”).

165. See *supra* Section I.B.

166. *Id.*

167. The planning and preparation we have in mind that indicates the existence of a bona fide intention might fall well short of what it takes to constitute a criminal attempt. See, e.g., State v. Kornberger, 16 A.3d 1107, 1111 (N.J. Super. Ct. App. Div. 2011) (defining one type of criminal attempt as “a situation ‘where the criminal act is very nearly complete and requires one more step either beyond the actor’s control or not requiring his control for completion’” (quoting State v. Condon, 919 A.2d 178, 182 (N.J. Super. Ct. App. Div. 2007))).

well-known example in U.S. law is the felony murder rule, which while much maligned,¹⁶⁸ still applies in most domestic jurisdictions¹⁶⁹ and is set out in a federal statute.¹⁷⁰ Under felony murder, any death that occurs in the course of another specified, usually serious, crime is treated as a murder, that is, an intentional killing.¹⁷¹ Roughly speaking, the intention to commit the other crime substitutes for the requisite intention for murder.¹⁷²

More germane to sleeper cells, providing material support to a terrorist organization is a separate statutory offense.¹⁷³ It is an expansive offense¹⁷⁴ that has seen extensive use:¹⁷⁵ Eighty percent of the high profile terrorist convictions between 2001 and 2010 were material support offenses.¹⁷⁶ Unsurprisingly, and like complicity generally, the requisite “material support” can take a variety of forms, including funds, equipment, training, information, and personnel.¹⁷⁷ The last of these includes one’s own efforts on

168. See, e.g., Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 73 (1990) (“Commentators persistently have attacked the strict-liability aspects of the felony-murder . . . rule[.]. Indeed, the debate has been extraordinarily one-sided . . .”); see also John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1387 (1979) (identifying “at least fifty years of sustained academic and judicial hostility” towards the felony murder rule); *People v. Aaron*, 299 N.W.2d 304, 306 (Mich. 1980) (“The existence and scope of the felony-murder doctrine have perplexed generations of law students, commentators and jurists in the United States and England, and have split our own Court of Appeals.”).

169. GUYORA BINDER, *FELONY MURDER* 6–7 (Stanford Univ. Press 2012).

170. 18 U.S.C. § 1111(a).

171. See, e.g., W. E. Shipley, *Judicial Abrogation of Felony-Murder Doctrine*, 13 A.L.R.4th 1226 (1982); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1430 (1994).

172. See Shipley, *supra* note 171.

173. 18 U.S.C. § 2339A.

174. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 12–13 (2005) (“[Section 2339A] punishes the provision of material support or resources to anyone, regardless of the identity of the recipient, so long as the provider ‘know[s] or intend[s] that [the aid is] to be used in preparation for, or in carrying out, a violation’ of any of more than two dozen crimes of violence specified in the statute.”); see also Alexandra Link, *Trying Terrorism: Joint Criminal Enterprise, Material Support, and the Paradox of International Criminal Law*, 34 MICH. J. INT’L L. 439 (2013); Michael P. Scharf, *Joint Criminal Enterprise, the Nuremberg Precedent, and the Concept of “Grotian Moment,”* in ACCOUNTABILITY OF COLLECTIVE WRONGDOING 119 (Tracy Isaacs & Richard Vernon eds., 2010).

175. Chesney, *supra* note 174, at 20.

176. TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2010 13 (Ctr. on L. & Sec., N.Y.U. eds., 2010), http://www.lawandsecurity.org/Portals/0/documents/01_TTRC2010Final1.pdf [<https://perma.cc/8QBX-ZFCQ>].

177. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 8–9 (2010) (citing 18 U.S.C.A. § 2339A(b)(1) (West)).

behalf of the terrorist organization,¹⁷⁸ so anyone volunteering to be a sleeper cell would almost assuredly be considered guilty of this crime. The most high-profile material support cases have involved this sort of personal support.¹⁷⁹

The standing in reserve model of complicity suggests that, to the extent that these specialized crimes are used to substitute for complicity, they are, to certain degree unnecessary. In particular, the version of the material support charge based on the defendant's own work supporting the terrorist group can be readily captured under ordinary criminal law principles. Equipped with the concept of standing in reserve, criminal law is up to that task.

Furthermore, the standing in reserve approach has an important comparative benefit over material support and felony murder because it avoids sacrificing criminal law's core commitment to intention.¹⁸⁰ Material support does not require showing an intent to aid the organization's terrorist activities,¹⁸¹ and so runs a serious risk of being a "status crime" that punishes the simple membership in a group—a form of guilt by association. Felony murder, famously, is subject to the same concern—the defendant need not have intended the killing, just the other felony. Unmoored from intention, these rules fail to track the blameworthiness, which becomes especially important in the complex, hard cases where individuals may be engaged in different actions and involved in the crime(s) in different ways. Crimes like felony murder and material support "solve" this problem in a blunt fashion, through broad application of the charge, even though that charge may be far more serious than common sense or moral desert would suggest. Indeed, Guyora Binder, an influential constructive critic of the felony murder rule, suggests that the way to rehabilitate felony murder is to use intention to limit its scope.¹⁸² Standing in reserve shows how intention can be marshalled for this purpose.

It has been suggested that the felony murder rule could apply to collective crimes like the Capitol Riot.¹⁸³ Felony murder depends on another felony, and

178. 18 U.S.C.A. § 2339A(b)(1) (West).

179. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1161 (U.S. C.M. Comm'n R. 2011).

180. *See supra* Section I.A.

181. *See Holder*, 561 U.S. at 21–22.

182. *See generally* BINDER, *supra* note 169 (discussing methods by which to reconstruct felony murder law).

183. Multiple people were killed during the Capitol Riot, and a number of observers have debated whether felony murder would be an option available to prosecutors. Carissa Byrne Hessick, *Felony Murder and the Storming of the Capitol*, *LAWFARE* (Jan. 14, 2021, 9:19 AM),

burglary—unlawful entry with intent to commit another crime—seems plausible.¹⁸⁴ As Carissa Byrne Hessick points out, the unauthorized entry into either House of Congress and disrupting official business in the Capitol Building constitute crimes in and of themselves.¹⁸⁵ Unsurprisingly, numerous people have been charged with unlawful entry into the Capitol.¹⁸⁶ Applying felony murder to a situation like the Capitol Riot raises two major problems, though. The first is the bluntness noted in the previous paragraph—not all participants in the riot may deserve to be charged with murder. The second is that felony murder probably still requires establishing complicity.¹⁸⁷ It is not enough that all participants commit the same *type* of offense (burglary), for them to be guilty under the felony murder rule they need all to be involved in the same particular offense (*this* burglary). In the Capitol Riot case, that is far from obvious. While they were all unlawfully in the Capitol, it is quite possible that they all did not intend the same additional crimes. Some might have intended to disrupt the proceedings,¹⁸⁸ others to kidnap elected officials,¹⁸⁹ and some others something worse still.¹⁹⁰ The evidence also suggests that there were discrete organized groups, each of which might have had their own goals.¹⁹¹ So, while those who had entered the Capitol might all be burglars, they need not all be accomplices to each other's particular

<https://www.lawfareblog.com/felony-murder-and-storming-capitol#:~:text=Put%20simply%2C%20felony%20murder%20treats,felony%20murder%20has%20serious%20consequences> [https://perma.cc/PT4A-ZPGR]; Elura Nanos, *Could the Capitol Rioters Really Be Charged with Felony Murder for Death of Ashli Babbitt?*, L. & CRIME (Jan. 7, 2021, 12:24 AM), <https://lawandcrime.com/legal-analysis/could-the-capitol-rioters-really-be-charged-with-felony-murder-for-death-of-ashli-babbitt/> [https://perma.cc/VS9B-EFVV].

184. Hessick, *supra* note 183 (“Th[e] [federal felony murder] statute lists many crimes that can trigger the felony murder rule—including arson, murder, treason and espionage—but the most likely to apply here is burglary.”). Other listed offenses, like sabotage, have fairly specific meanings. *E.g.*, 18 U.S.C. § 2151.

185. Hessick, *supra* note 183; 40 U.S.C. § 5104.

186. *Capitol Breach Cases*, U.S. DEP’T JUST., <https://www.justice.gov/usao-dc/capitol-breach-cases> [https://perma.cc/KX7K-68DW].

187. *See* Hessick, *supra* note 183.

188. *Id.*

189. Barry et al., *supra* note 133.

190. Peter Baker et al., *Pence Reached His Limit with Trump. It Wasn’t Pretty*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/politics/mike-pence-trump.html> [https://perma.cc/SX3X-93LU]; Peter Baker & Sabrina Tavernise, *One Legacy of Impeachment: The Most Complete Account So Far of Jan. 6*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/13/us/politics/capitol-riots-impeachment-trial.html> [https://perma.cc/SR6R-GUMN].

191. Groups like the Oath Keepers allegedly made their own plans for the Capitol Riot and thus may have had distinct goals from other participants. *See* Watkins Detention Memorandum, *supra* note 161, at 1 (describing Defendant’s communications and planning efforts related to January 6th events).

burglaries (all of which, of course, highlights how complicated collective crimes like the Capitol Riot are). Applying felony murder to the Capitol Riot would thus require an analysis along the lines of standing in reserve, so there is little to be gained by broadly and bluntly applying murder charges.

IV. CONCLUSION

Complicity is an essential part of criminal law. But it leads to a host of puzzles. The hard cases of complicity, which motivate this Article, defy the usual way of delineating crimes because the alleged accomplice may be doing little or nothing to aid and abet the crime. These hard cases are common in contexts of large-scale collective crimes, a leading example being the Capitol Riot. Naturally, we cannot afford to simply ignore them, nor should we mete out punishment for them arbitrarily.

To help guide a systematic approach to these hard cases, we propose a model of accomplice liability built on the concept of standing in reserve. This model, which is closely tied to a theory of joint intention, provides a novel principled approach that puts the law of accomplices on firmer theoretical footing. Notwithstanding its novelty, the standing in reserve model of accomplice liability is consistent with *mens rea* and the fundamental normative commitments of criminal law, giving credence to the judgments on liability that the model generates. It refines and guides considerations like *mens rea* instead of ignoring them like the main legal responses to these hard cases do.