Rethinking Accomplice Liability

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In every American jurisdiction, accomplice liability is "derivative" in the sense that the accomplice is punished not for her own acts of aiding or abetting but for the acts of the principal whom she aids or abets. The derivative character of accomplice liability has created problems in cases where the principal and the accomplice have different affirmative defenses or mental states, as well as cases where the principal's conduct is causally efficacious but the accomplice's is not.

American law has partially corrected for these problems by walking back the extent to which accomplice liability is derivative. Although at common law the accessory's liability was wholly derivative of the principal's, now many jurisdictions judge the accomplice by her own affirmative defenses and mens rea. But no jurisdiction has taken the final step of eliminating derivative liability for accomplices altogether and judging the accomplice by her own actus reus.

This Article urges the law to complete this process of doctrinal evolution by abolishing derivative liability for accomplices. In some cases, judging the accomplice by her own actus reus and mens rea would not change the outcome because the accomplice's actus reus and mens rea constitute the same type of crime as the principal's. In the remaining cases, judging the accomplice by her own actus reus and mens rea would change the outcome for the better.

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INTRODUCTION

The basic premise of accomplice liability—so foundational that it has been described as true "[b]y definition"—is that the accomplice is liable for the conduct of the principal.[1] Accordingly, scholars and lawmakers generally approach the project of fashioning liability rules for accomplices as a search for conditions under which the law is justified in punishing one person for the conduct of another.[2]

The search has yielded considerable frustration and little success.[3] Scholars and lawmakers are "notoriously puzzled" by what mens rea makes someone responsible for another person's conduct.[4] They disagree sharply over whether someone should need to make a causal contribution to another

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1. Michael G. Heyman, *Due Process Limits on Accomplice Liability*, 99 MINN. L. REV. 131, 131 (2015) ("By definition, complicity law attaches guilt to the accomplice for the criminal acts of others."); *see also, e.g.*, Rosemond v. United States, 572 U.S. 62, 70 (2014) (describing accomplice liability as resting on the "centuries-old view . . . that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission"); Christopher Kutz, *The Philosophical Foundations of Complicity Law*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 147, 148–49 (John Deigh & David Dolinko eds., 2011) (describing the idea that "contribution to someone else's bad act can render one responsible for that act" as the "basic principle" of accomplice liability).

2. *See, e.g.*, Gideon Yaffe, *Intending To Aid*, 33 LAW & PHIL. 1, 5–8 (2014) [hereinafter Yaffe, *Intending To Aid*] (setting out to identify "what mental state a person would need to have such that, when coupled with the right kind of aid on his part, he is properly held responsible for, and so attributed with, the act of the person whom he aids"); Sherif Girgis, Note, *The Mens Rea of Accomplice Liability*, 123 YALE L.J. 460, 463–65 (2013) (treating the law's "practice of convicting a helper for another's crimes" as a "fixed" point and asking what conditions best justify the practice); Gideon Yaffe, *Moore on Causing, Acting, and Complicity*, 18 LEGAL THEORY 437, 457 (2012) (arguing that liability for accomplices must be based on considerations that justify "extend[ing] the circle of liability beyond that with respect to which we are active"); Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 437 (2008) (defending a causation requirement for accomplice liability on the ground that "[a] causal accomplice could properly derive liability for the crime committed by the perpetrator").

3. *See* Douglas Husak, *Abetting a Crime*, 33 LAW & PHIL. 41, 44 (2013) (observing that "no consensus on [what accomplice liability's requirements should be] exists," "commentators are enormously dissatisfied with the decisions courts have reached," and "critics disagree radically about what reforms should be implemented to rectify this state of affairs").

4. Yaffe, *Intending To Aid*, *supra* note 2, at 1; *see, e.g.*, Kutz, *supra* note 1, at 161–64 (arguing that the answer is intention); Kimberly Kessler Ferzan, *Conspiracy, Complicity, and the Scope of Contemplated Crime*, 53 ARIZ. ST. L.J. 453, 471–75 (2021) (arguing the answer is knowledge); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Liability*, 88 CALIF. L. REV. 931, 944–47 (2000) (arguing that the answer is recklessness); Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. U. CHI. L.J. 131, 155 (2015) (arguing that the answer is none of the above); Girgis, *supra* note 2 (same); Yaffe, *Intending To Aid*, *supra* note 2 (same).

person's conduct to incur liability for it.[5] And they debate the extent to which a person's complicity in a crime can justify punishing the person for the natural and probable consequences of undertaking to commit the crime.[6] The "historic standoff"[7] over these questions has led exasperated commentators to describe the law of accomplice liability as "vexing,"[8] "a disgrace,"[9] "extraordinarily difficult,"[10] a "Gordian knot,"[11] and a scene of "chaos."[12]

This Article suggests that the search was a wild-goose chase from the start. The reason why conditions that justify punishing one person for the conduct of another have proven so "elusive"[13] is that no such conditions exist. This does not mean that accomplices should escape punishment. It just means that they should be punished for their own actus reus and mens rea, not someone else's.

Accepting this conclusion would entail a radical overhaul of the law of complicity.[14] The focus in prosecutions against accomplices would shift from

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5. *Compare, e.g.*, Dressler, *supra* note 2, at 447 (characterizing the notion that accomplice liability for serious offenses should require anything less than a major causal contribution as "jaw-dropping"), *with* Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289, 289 (2007) (arguing that accomplice liability should not require a causal connection between the accomplice's action and the principal's crime).

6. *Compare, e.g.*, WIS. STAT. § 939.05(2)(c) (West 2023), *with* ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2023), *and* State v. Carrasco, 946 P.2d 1075, 1079 (N.M. 1997).

7. Girgis, *supra* note 2, at 473.

8. Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 228 (2000).

9. Dressler, *supra* note 2, at 428; *accord* Husak, *supra* note 3, at 44.

10. Kutz, *supra* note 1, at 149.

11. Heidi Hurd & Michael S. Moore, *Untying the Gordian Knot of Mens Rea Requirements for Accomplices*, 32 SOC. PHIL. & POL'Y 161, 161 (2016).

12. 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).

13. Sarch, *supra* note 4, at 133 (referring to accomplice liability's mens rea requirements); MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 319 (2009) (referring to accomplice liability's actus reus requirements).

14. Although heterodox, the position staked out by this Article is not entirely novel. One other scholar, Michael S. Moore, has defended a similar position. *See* MOORE, *supra* note 13, at 280–323; Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 400–02 (2007). Although this Article agrees with Moore's conclusion, it disagrees with important parts of his reasoning and offers a different set of arguments for the same conclusion. The few scholars other than Moore who criticize derivative liability for accomplices tend to propose replacing it with a set of new crimes. *See* M. Beth Valentine, *Abetting a Crime: A New Approach*, 41 LAW & PHIL. 351, 360–61 (2022); Alex Kaiserman, *Against Accomplice Liability*, *in* 4 OXFORD STUDIES IN PHILOSOPHY OF LAW 124, 125–26 (John Gardner et al. eds., 2021); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, REFLECTIONS ON CRIME AND CULPABILITY: PROBLEMS AND PUZZLES 17–60 (2018); Husak, *supra* note 3, at 67; Stephen J. Morse, *Reasons, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 398–99 (2004). This Article proposes a very different solution: abolish accomplice liability without replacing it

what the principal did to what the alleged accomplice did, and with this change in focus would come a change in outcomes. Current regimes of accomplice liability often lead to extraordinarily harsh outcomes, such as convicting a gang member who participated in a verbal altercation of murder because her fellow gang member unexpectedly drew a gun and shot the person with whom they were arguing.[15] The law could avoid such outcomes if it held all defendants, principals and accomplices alike, liable only for their own actus reus and mens rea.

This Article is organized as follows. Part I makes the case for judging the accomplice by her own actus reus and mens rea. It argues that "derivative" liability for accomplices—the practice of judging the accomplice by the principal's actus reus and/or mens rea—is inconsistent with first principles, ignores lessons from the history of accomplice liability, and leads to problematic outcomes. To explain why the law nonetheless embraces derivative liability for accomplices, Part II advances the hypothesis that the law is compensating for errors that prevent it from recognizing the accomplice's own actus reus and mens rea as constitutive of the type of crime for which the accomplice should be liable, which in many cases is the type of crime committed by the principal. Derivative liability is thus a workaround that enables the law in many cases to reach the right outcome. Part II seeks to diagnose and correct the errors that make the workaround of derivative liability seem necessary. Once the errors are corrected, it becomes clear that the crime for which the law should punish the accomplice is the crime constituted by the accomplice's own actus reus and mens rea.

I. MAKING THE CASE FOR NONDERIVATIVE LIABILITY

There are at least three reasons to doubt that liability for accomplices should be derivative. First, derivative liability is difficult to square with first principles. Second, derivative liability disregards lessons from the history of accomplice liability. Third, derivative liability leads to problematic outcomes in a significant range of cases.

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with anything. Provided that the law defines existing crimes properly, liability for accomplices will take care of itself.

15. *See infra* Section aa.4 (discussing People v. Machuca, No. B243964, 2014 WL 3576294 (Cal. Ct. App. July 21, 2014)).

A. Responsibility and Punishment

The first reason to doubt that liability for accomplices should be derivative is that derivative liability is difficult to justify as a matter of first principles. Scholars disagree about what (if anything) justifies criminal punishment. But even non-retributivists who deny that moral wrongdoing is sufficient to justify punishment generally agree that moral wrongdoing is necessary to justify punishment.[16]

This makes sense. The distinctive feature of the criminal law—and an important part of how the criminal law achieves its ends, however those ends are understood—is its expressive function.[17] Unlike a tort judgment or a judgment that a person is to be civilly committed, a criminal conviction "conveys society's authoritative moral condemnation": the defendant is publicly blamed for whatever it is she is convicted of doing.[18]

Accordingly, the criminal law should avoid making people liable for things for which they are not morally blameworthy.[19] For one thing, making people liable for things for which they are not morally blameworthy dilutes the criminal law's expressive power.[20] It makes people less likely to recognize criminal prohibitions as expressive of blame, or at least less likely to accept such expressions of blame as accurate. And this, in turn,

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16. *See, e.g.*, Michael S. Moore, *The Strictness of Strict Liability*, 12 CRIM. L. & PHIL. 513, 513 (2018) (asserting that "it is uncontroversial that criminal law should not punish where it cannot blame"); Douglas Husak, *Applying* Ultima Ratio*: A Skeptical Assessment*, 2 OHIO ST. J. CRIM. L. 535, 537 (2005) ("Punishments must be justified, and justified punishments must be deserved. Persons deserve the censure inherent in punishment only if their conduct merits this response."); Pablo de Greiff, *Deliberative Democracy and Punishment*, 5 BUFF. CRIM. L. REV. 373, 394 (2002) (insisting that "immorality is a necessary condition for punishment," even if "punishment may serve other social ends such as deterrence").

17. *See generally* R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001); EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., 1984); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965).

18. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 352 (1996); *see also* Feinberg, *supra* note 17, at 400 (describing criminal punishment as "a conventional device for the expression . . . of judgments of disapproval and reprobation"); Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies [the criminal sanction].").

19. *See* Husak, *supra* note 16, at 537 (noting the "profound implications for the content of the substantive criminal law" that follow from expressive theories of the criminal law).

20. *See* Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 425, 444 (1963) (noting that using the criminal law to regulate conduct with which the "stigma of moral reprehensibility does not naturally associate itself" tends to "impair" the criminal law's effectiveness).

compromises the criminal law's ability to use its expressive function to achieve aims such as retribution and deterrence.[21]

More fundamentally, making people liable for things for which they are not morally blameworthy is unjust.[22] It is one thing if defendants are occasionally held liable for something for which they are not morally blameworthy, even though lawmakers designed substantive and procedural criminal law to target only blameworthy conduct.[23] This might occur because the judge got the law wrong, the jury got the facts wrong, or a rule such as waiver, that is designed to facilitate the accuracy and efficiency of the judicial process overall, has the unfortunate result in a particular case of mandating the wrong outcome. But it is another thing if defendants are held liable for something for which they are not blameworthy because lawmakers designed the law to have this result. In the latter case, the false branding of defendants as blameworthy is deliberate and amounts to a kind of public slander.

So for reasons of justice as well as prudence, the criminal law should not make people liable for things for which they are not morally blameworthy.[24] But a person is not morally blameworthy for something unless she is morally responsible for it, and a person is morally responsible only for what she

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21. *See id.* at 444.

22. *See* Moore, *supra* note 16, at 513 ("[A]voiding the injustice of punishing those without fault limits the shape of all doctrines of the criminal law.").

23. *Cf.* Larry Alexander, *The Philosophy of Criminal Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 815, 819 (Jules Coleman & Scott Shapiro eds., 2002) ("No human system of punishment can avoid the possibility of punishing the innocent and punishing the guilty more than they deserve.").

24. This does not necessarily mean that the law should never create *mala prohibita*, that is, crimes that would not involve moral wrongdoing but for the fact that the law makes them crimes. *See* A.P. Simester & A.T.H. Smith, *Criminalization and the Role of Theory*, *in* HARM AND CULPABILITY 4–5 (A.P. Simester & A.T.H. Smith eds., 1996). According to some theorists, people have a *pro tanto* moral obligation to obey the law. *E.g.*, Samuel Scheffler, *Membership and Political Obligation*, 26 J. POL. PHIL. 3 (2018); Christopher Health Wellman, *Toward a Liberal Theory of Political Obligation*, 111 ETHICS 735 (2005); GEORGE KLOSKO, THE PRINCIPLE OF FAIRNESS AND POLITICAL OBLIGATION (1992); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 314–20 (1980). *Contra* A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS (1979); Joseph Raz, *The Obligation To Obey the Law*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 232 (1979). Alternatively, even if there is no general moral obligation to obey the law, there may be a *pro tanto* moral obligation to obey certain kinds of laws. And some *mala prohibita* may belong to a kind of law that people have a *pro tanto* moral obligation to obey. If so (a question that this Article leaves for another day), then *mala prohibita* need not involve diluting the expressive power of the criminal law or treating defendants unjustly. The law may have the power, simply by prohibiting the conduct in question, to make it the case that those who perform the conduct are widely recognized as deserving, and in fact do deserve, the moral censure expressed by a criminal conviction. *See* Simester & Smith, *supra* (offering *mala prohibita* as an example of how "some moral obligations can be spelled out only by law").

does.[25] Therefore, the criminal law should not make people liable for things that they did not do—such as things that other people did.[26]

Of course, sometimes a person's action is morally wrong only because of the person's mental state toward one of the action's results (which may be another action that someone else performs). In that case, one might, as a shorthand, describe the person as "responsible" for the result itself.[27] But a person's "responsibility" for a result is grounded in the person's responsibility for the action she performed that led to the result.[28] Properly speaking, it is not the result itself but the person's action of bringing about the result that constitutes the moral wrong for which the person is responsible.[29] Therefore, it is the person's action of bringing about the result, not the result itself, for which the law is justified in punishing the person.[30]

Applied to the accomplice, this means that it is the accomplice's own action of aiding or abetting the principal's action, not the principal's action itself, for which the accomplice is morally responsible. Therefore, it is the accomplice's own action of aiding or abetting the principal's action, not the principal's action itself, for which the law is justified in punishing the accomplice.[31]

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25. *See, e.g.*, Morse, *supra* note 14, at 367–78; JOHN MARTIN FISCHER & MARK RAVIZZA, RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY 28–91 (1998) (discussing responsibility for actions); R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY 154 (1990); *see also* Vincent Chiao, *Action and Agency in the Criminal Law*, 15 LEGAL THEORY 1, 16–23 (2009) (linking the concept of responsibility in the criminal law to the defendant's "conduct qua practically rational agent"); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN MORSE, CRIME AND CULPABILITY 171–96, 226–62 (William A. Edmonson & Brian Bix eds., 2009) (locating the "locus of culpability" in the defendant's own choice).

26. *See* Kaiserman, *supra* note 14, at 130 ("Paradigmatically, we praise or blame moral agents for what *they*, and they alone, have done, and not for what others to which they are somehow related have done; the criminal law should reflect this foundational aspect of commonsense morality." (citation omitted)).

27. *See, e.g.*, FISCHER & RAVIZZA, *supra* note 25, at 92–122 (discussing responsibility for consequences).

28. *See id.*

29. *See* ALEXANDER & FERZAN WITH MORSE, *supra* note 25, at 171–75, 192–96 (arguing that results are irrelevant to the actor's blameworthiness).

30. *See id.* at 226–60.

31. Valentine, *supra* note 14, at 353 ("[W]e ought to punish [accomplices] for the aid they provide and not for the crime they aid."); Morse, *supra* note 14, at 398 (concluding that "accomplice liability [should] focus[] entirely on the accomplice's own behavior and . . . should not be derivative").

B. The History of Accomplice Liability

History offers a second reason to doubt that liability for accomplices should be derivative. Accomplice liability used to be *more* derivative than it is today.[32] At common law, "an accessory could not be tried or convicted before the conviction of the principal."[33] Thus, if the principal was acquitted of murder, then an accomplice whom the common law would classify as an "accessory" could not even be tried for murder.[34]

The law has since walked back the extent to which accomplice liability is derivative. In the words of the California Supreme Court, accomplice liability "is not entirely vicarious" anymore.[35] The accomplice is still liable for the principal's actus reus.[36] That is, the law treats the accomplice as if she had performed the same conduct, in the same circumstances, with the same results as the principal. But if the crime that this actus reus constitutes varies depending on the mens rea with which it is paired, then in many jurisdictions the accomplice's liability is "assessed according to his own mens rea," not the principal's.[37] Additionally, many jurisdictions judge the accomplice by her own affirmative defenses (or lack thereof), not the principal's.[38]

This is an improvement over the common law. For example, suppose that Alice approaches Peter when he is in a state of extreme emotional disturbance

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32. *See* Weisberg, *supra* note 8, at 223.

33. *Id.* at 223 n.12.

34. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *36 ("It is a maxim, that *accessorius sequitur naturam sui principalis*: and therefore an accessory cannot be guilty of a higher crime than his principal; being only punished as a partaker of his guilt."). The relevant kind of accessory is an "accessory before the fact": someone who encouraged or assisted the principal before the principal committed the crime but was not present at the scene of the crime. *Id.*

35. People v. McCoy, 24 P.3d 1210, 1213 (Cal. 2001).

36. *See id.* at 1213–14.

37. *Id.* at 1214 (emphasis omitted) (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 450 (2d ed. 1995)); *accord* Taylor v. State, 840 N.E.2d 324, 335–36 (Ind. 2006); *Ex parte* Thompson, 179 S.W.3d 549, 553–55 (Tex. Crim. App. 2005); Hunt v. State, 687 So. 2d 1154, 1162 n.4 (Miss. 1996); Oates v. State, 627 A.2d 555, 558–59 (Md. Ct. Spec. App. 1993); State v. McAllister, 366 So. 2d 1340, 1342–43 (La. 1978); Oaks v. People, 424 P.2d 115, 117 (Colo. 1967) (en banc). *But see* State v. Guloy, 705 P.2d 1182, 1193–94 (Wash. 1985) (en banc) (holding that a defendant can be convicted of aggravated first-degree murder as an accomplice if the principal has the mens rea required to commit aggravated first-degree murder, even if the defendant does not).

38. *See, e.g.*, United States v. Azadian, 436 F.2d 81, 82–83 (9th Cir. 1971); *McCoy*, 24 P.3d at 1216–17; Vaden v. State, 768 P.2d 1102, 1106 (Alaska 1989). *But see* United States v. Lopez, 662 F. Supp. 1083, 1086–88, 1088 n.4 (N.D. Cal. 1987) (holding that although excuses available to the principal do not transfer to the accomplice, justifications do); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 278–81 (1985).

and unable to act rationally, and persuades him to kill Violet, Alice's longtime enemy. Surely, any affirmative defense that Peter can invoke to mitigate his liability from murder to manslaughter should not transfer to Alice, who should be liable for murder. The law should judge each defendant by that defendant's own affirmative defenses (or lack thereof).[39]

Similarly, suppose that Alice hires Peter to beat up Violet, ostensibly for the purpose of teaching Violet a lesson by giving her a good drubbing, but in fact for the purpose of killing Violet: Alice knows, but Peter does not, that Violet has a medical condition that will result in her death if Peter punches her. If Alice's plan is successful, then surely Alice should be liable for murder even though Peter should be liable at most for manslaughter. Each defendant should be liable for the grade of homicide that corresponds to that defendant's own mens rea.[40]

Cases like these strongly suggest that liability for accomplices should not be derivative as to the principal's affirmative defenses or mens rea. But if liability for accomplices should not be derivative as to the principal's affirmative defenses or mens rea, then it is extremely difficult to see why liability for accomplices should be derivative as to the principal's actus reus. Section I.A suggests that derivative criminal liability is never justified as a matter of first principles. But if Section I.A is wrong, and the accomplice really does "forfeit[] her right to be treated as an individual" distinct from the principal,[41] then it seems that the law should treat the accomplice as if she were "one and the same person"[42] as the principal not only for purposes of the principal's actus reus but also for purposes of the principal's affirmative defenses and mens rea. The notion that an accomplice "forfeits her personal

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39. *See McCoy*, 24 P.3d at 1215 ("An accomplice may be convicted of first-degree murder, even though the primary party is convicted of second-degree murder or of voluntary manslaughter. This outcome follows, for example, if the secondary party, premeditatedly, soberly and calmly, assists in a homicide, while the primary party kills unpremeditatedly, drunkenly, or in provocation." (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 450 (2d ed. 1995))).

40. *See id.* ("Likewise, it is possible for a primary party negligently to kill another (and, thus, be guilty of involuntary manslaughter), while the secondary party is guilty of murder, because he encouraged the primary actor's negligent conduct, with the intent that it result in the victim's death." (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 450 (2d ed. 1995))).

41. Dressler, *supra* note 2, at 434 (alteration in original) (quoting Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 111 (1985)).

42. *Id.* at 433.

identity"[43] is strange to begin with; the notion that she forfeits her personal identity only as to the principal's actus reus is even more bewildering.

In sum, it is plausible that liability for accomplices should not be derivative at all if it should not be derivative as to the principal's affirmative defenses or mens rea. And reflection on the history of accomplice liability suggests that liability for accomplices should not be derivative as to the principal's affirmative defenses or mens rea. Therefore, it is plausible that liability for accomplices should not be derivative as to the principal's actus reus either.

C. Derivative Liability's Problematic Outcomes

But the proof is in the pudding. Judging the accomplice by the principal's actus reus may seem ad hoc given that many jurisdictions now judge the accomplice by her own affirmative defenses and mens rea.[44] But does judging the accomplice by the principal's actus reus ever lead to the wrong outcome in the way that the common law's practice of judging the accomplice by the principal's affirmative defenses and mens rea did?

The same question can be asked about some jurisdictions' practice of continuing to judge the accomplice by the principal's affirmative defenses or mens rea in certain cases. Few if any jurisdictions today would judge Alice by Peter's affirmative defense in the case where Alice takes advantage of Peter's state of extreme emotional disturbance to convince Peter to kill Violet.[45] Likewise, few if any jurisdictions today would judge Alice by Peter's mens rea in the case where Alice hires Peter to beat up Violet and knows, though Peter does not, that Violet will die as a result.[46] But some jurisdictions continue to judge the accomplice by the principal's affirmative defenses or mens rea in other cases.[47] This too—judging the accomplice by

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43. *Id.* at 434 (quoting Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 111 (1985)).

44. *McCoy*, 24 P.3d at 1214–17.

45. *See infra* Section I.C.1 (explaining that the practice of judging the accomplice by the principal's affirmative defenses survives in some jurisdictions but only as to justifications). *But see* Commonwealth v. Pasteur, 850 N.E.2d 1118, 1127 (Mass. Ct. App. 2006) (appearing to assert in dicta that if the principal had a provocation affirmative defense to murder, then that defense would transfer to the accomplice).

46. *See infra* notes 87–88 and accompanying text (explaining that even Washington state, which continues to judge the accomplice by the principal's mens rea in other cases, would not do so in a case like this). *But see Pasteur*, 850 N.E.2d at 1127–28 (implying in dicta that an accomplice to homicide cannot be convicted of murder unless the principal had the mens rea required to commit murder).

47. *See infra* Sections I.C.1–2.

the principal's affirmative defenses or mens rea in some cases but not others—seems ad hoc. But does it ever lead to the wrong outcome?

This Section answers both questions in the affirmative. Thus, a third reason to conclude that liability for accomplices should not be even partially derivative is that derivative liability leads to problematic outcomes even if it is only partially derivative. Sections I.C.1 and I.C.2 explain how the practice in some jurisdictions of continuing to judge the accomplice by the principal's affirmative defenses or mens rea in certain cases leads to problematic outcomes. Section I.C.3 explains how the practice in every jurisdiction of continuing to judge the accomplice by the principal's actus reus leads to problematic outcomes. Finally, Section I.C.4 turns to the doctrine of natural and probable consequences, which operates as a fully derivative regime of supplemental liability once an accomplice has already derived liability from the principal for one crime, and explains how the doctrine of natural and probable consequences also leads to problematic outcomes.[48]

1. Affirmative Defenses

As noted in Section I.B, the trend in modern law is to judge the accomplice by her own affirmative defenses. But not every jurisdiction follows this rule consistently.[49] Some jurisdictions still give the accomplice the benefit of the principal's affirmative defenses when they take the form of justifications as opposed to excuses or nonexculpatory defenses.[50] This leads to problematic

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48. Current law also leads to problematic outcomes insofar as the conditions for qualifying as an accomplice subject to derivative liability in the first place screens from liability some defendants who would otherwise count as committing crimes. The most likely scenario is one where complicity's requirement of intention (or, in some jurisdictions, knowledge) as to the principal's conduct screens from liability a defendant who would otherwise count as committing a crime of recklessness. *See* ALEXANDER & FERZAN, *supra* note 14, at 21–26 (offering examples); Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 324, 378–90 (1985) (same). *But see* Kevin Cole, *Purpose's Purposes*, 2 GA. CRIM. L. REV. (forthcoming 2024) (arguing that there are virtues to screening such defendants from liability). This Article sets aside problems with the requirements for triggering derivative liability for accomplices to focus on problems with derivative liability itself. Even if complicity's threshold requirements captured the right defendants, the practice of punishing those defendants for the principal's actus reus and/or mens rea would remain problematic.

49. United States v. Lopez, 662 F. Supp. 1083, 1086–88, 1088 n.4 (N.D. Cal. 1987).

50. Justifications defeat liability by showing that the conduct in question was not wrong; excuses defeat liability by showing that although the conduct in question was wrong, the defendant is less than fully to blame for it; and nonexculpatory defenses defeat liability by showing that although the conduct in question was wrong and the defendant is to blame for it, the defendant should nonetheless go unpunished. Examples of justifications include self-defense and execution of public duty, examples of excuses include provocation and duress, and

outcomes in cases where the elements of a justification defense are satisfied as to the principal but not as to the accomplice.

For example, in *State v. Montanez*, the principal and the defendant engaged in a verbal altercation with several unarmed individuals.[51] The principal drew a gun, and a standoff ensued between him and the others.[52] Meanwhile, the defendant ducked into a nearby building and returned with a gun.[53] When the defendant opened fire on the other individuals, the principal also fired his gun and killed two of them.[54] The defendant asserted an affirmative defense under Connecticut General Statutes section 53a-19,[55] which provides that a person is justified in defending himself or another "from what he reasonably believes to be the use or imminent use of physical force."[56] This affirmative defense can be used only if the defendant was not the initial aggressor,[57] where the "initial aggressor is the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used upon that other person."[58] The jury rejected the affirmative defense and convicted the defendant on two counts of manslaughter as an accomplice.[59] But the Connecticut Supreme Court reversed the convictions on the ground that the trial court should have instructed the jury to acquit the defendant if either he *or the principal* had a meritorious section 53a-19 defense.[60]

On remand, the parties struck a plea deal that resulted in the defendant's effective prison sentence being reduced by more than half.[61] That should come as no surprise. The jury could well have found that, once the defendant opened fire, the principal reasonably believed that the other individuals would respond with physical force against them both. On this theory, the

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nonexculpatory defenses include double jeopardy and (arguably, though some would classify it as an excuse) entrapment. *See generally* Robinson, *supra* note 38, at 213–31 (providing an overview of justifications, excuses, and nonexculpatory defenses).

51. State v. Montanez, 894 A.2d 928, 931–32 (Conn. 2006).

52. *Id.* at 932.

53. *Id.*

54. *Id.* at 932–33.

55. *Id.* at 937 nn.13–14.

56. CONN. GEN. STAT. § 53a-19(a)–(b) (2023).

57. *Id.*

58. State v. Skelly, 3 A.3d 1064, 1068 (Conn. App. Ct. 2010) (citing State v. Singleton, 974 A.2d 679 (Conn. 2009)).

59. *See Montanez*, 894 A.2d at 930.

60. *Id.* at 945–46.

61. *Compare* State v. Montanez, No. HHD-CR96-486765-T, 2003 WL 25335467 (Conn. Super. Ct. Oct. 15, 2003) (total effective sentence of fifty-six years), *rev'd*, 894 A.2d 928 (Conn. 2006), *with* State v. Montanez, No. HHD-CR96-486765-T, 2007 WL 7294401 (Conn. Super. Ct. July 10, 2007) (total effective sentence of twenty years).

principal would have a meritorious section 53a-19 defense even though the defendant, as the initial aggressor, would not. It is therefore unsurprising that the Connecticut Supreme Court's decision to make the principal's section 53a-19 justification available to the defendant brought the prosecution to the bargaining table.

Unsurprising, but also unfortunate. Retribution and deterrence both support liability for initial aggressors: the initial aggressor is morally to blame for creating the conditions that made violence necessary, and liability is needed to deter people from creating such conditions.[62] Neither consideration loses any of its force as applied to accomplices such as the defendant in *Montanez*. Under the rule announced by the Connecticut Supreme Court, a person can bring about a victim's death with impunity by creating conditions under which a third party reasonably believes that lethal force is necessary to prevent the victim from inflicting serious bodily harm on the third party or someone else and then assisting or encouraging the third party to use lethal force against the victim.

Similar considerations apply to the rule in many jurisdictions that the defendant has a general justification defense only if the situation necessitating the otherwise unlawful conduct arose "through no fault of the defendant."[63] Requirements such as these also serve important aims of retribution and deterrence: they secure liability for people who are to blame for creating conditions that necessitate *prima facie* unlawful conduct and thus deter people from creating such conditions. Again, neither consideration loses any of its force as applied to accomplices.

Or consider justification's mental-state requirements. For example, defense of self, others, or property typically requires that the defendant reasonably believed that the victim was about to use physical force.[64] Mental-state requirements for justifications reflect the retributivist notion that the defendant who lacked reasonable grounds to believe that the objective elements of a justification defense were present is lucky, not justified, if it turns out that those elements were present after all. Mental-state requirements also provide additional deterrence insofar as they raise the expected punishment costs of unlawful conduct by eliminating the possibility of acquittal in the event that, unbeknownst to the actor, the objective elements

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62. *See* United States v. Cole, 622 F. Supp. 2d 632, 637–38 (N.D. Ohio 2008) (explaining retributive and deterrent goals for punishing).

63. *E.g.*, DEL. CODE ANN. tit. 11, § 463 (2023); MO. REV. STAT. § 563.026(1) (2023); N.Y. PENAL LAW § 35.05(2) (McKinney 2023).

64. *E.g.*, CONN. GEN. STAT. § 53a-19(a) (2023); TEX. PENAL CODE ANN. § 9.33 (West 2023); UTAH CODE ANN. § 76-2-406 (West 2023).

of an affirmative defense are present. Given that such considerations warrant including mental-state requirements in justification defenses, there is no reason to suspend these requirements for the accomplice simply because the principal happens to satisfy them. The accomplice who fails to satisfy the requirements is lucky, not justified, if the principal happens to satisfy them, and the promise of acquittal if the principal happens to satisfy them reduces the expected punishment costs that the accomplice faces.

Finally, note that giving the accomplice the benefit of both her own justifications and the principal's while giving the principal the benefit only of her own justifications creates an arbitrary disparity in the law's treatment of principals and accomplices. Often, the distinction between principal and accomplice reflects nothing of significance to the law.[65] For example, suppose that Peter and Alice work together to steal from Violet: one of them distracts Violet while the other grabs Violet's purse. It is hard to see why the sanction that retribution, deterrence, or the other ends that criminal punishment warrant imposing on each defendant should depend on who performs which role. Yet suppose that Peter reasonably believes that confiscating Violet's purse is necessary and sufficient to prevent an imminent terrorist attack because Violet is carrying the detonator to a nuclear explosive planted in an urban center, whereas Alice knows that this is not the case. Under Connecticut's rule, whether Alice is liable for theft turns on whether she distracted Violet or grabbed Violet's purse. If Alice distracted Violet, then she was the accomplice and would receive the benefit of not only her own but also Peter's justifications. And Peter has a meritorious justification. Therefore, if Alice distracted Violet, then Alice would not be liable for theft. But if Alice grabbed Violet's purse, then she was the principal and would receive the benefit only of her own justifications. And she has no meritorious justification. Therefore, if Alice grabbed Violet's purse, then Alice would be liable for theft. The arbitrariness of making Alice's liability for theft turn on whether she distracted Violet or grabbed Violet's purse is another indication that something is wrong with the rule from *Montanez*.

In sum, like judging the accomplice by the principal's excuses, judging the accomplice by the principal's justifications leads to problematic outcomes. Jurisdictions such as Connecticut that continue to judge the accomplice by the principal's justifications should take the next step in the

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65. *See* Kaiserman, supra note 14, at 154–55 ("[T]here is nothing morally exceptional about aiding and abetting . . . . Helping or encouraging someone to cause harm is just one way of being partially responsible for a harm—it's not a phenomenon which requires, or deserves, an exception to be made to our ordinary principles of individual responsibility.").

process of rolling back derivative liability for accomplices and judge the accomplice by her own affirmative defenses in all cases.[66]

2. Mens Rea

As noted in Section I.B, the trend in modern law is also to judge the accomplice by her own mens rea. Again, though, not every jurisdiction follows this rule consistently. In Washington State, a defendant who knew that her assistance or encouragement would facilitate the principal's crime is judged not only by the principal's actus reus but also—if the principal's mens rea is more serious than her own—the principal's mens rea.[67] This leads to problematic outcomes in cases where the principal commits a crime that has a mens rea requirement of intention, and the accomplice knew but did not intend that her action would facilitate the principal's commission of that crime.

For example, committing aggravated first-degree murder under Washington law requires acting with premeditated intent to kill the victim.[68] Yet defendants who knew but did not intend that their actions would facilitate the principal's killing of the victim can be liable for aggravated first-degree murder as accomplices.[69] When such defendants "argue[] that in order for [the accomplice] to be convicted of aggravated murder in the first degree the State must prove that the accomplice intended to murder the victim," Washington courts respond that "the accomplice statute contains no such requirement"

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66. The Connecticut Supreme Court is not the only court that has endorsed the notion that the accomplice may take advantage of the principal's justifications. *See also* Powers v. State, 773 S.E.2d 751, 753 n.2 (Ga. 2015); United States v. Lopez, 662 F. Supp. 1083, 1087–88, 1088 n.4 (N.D. Cal. 1987); State v. Winsett, 205 A.2d 510, 519 (Del. Super. Ct. 1964).

67. *E.g.*, State v. Guloy, 705 P.2d 1182, 1193–94 (Wash. 1985) (en banc) (imputing the principal's more serious mens rea to the accomplice). On the mens rea requirement of knowledge, see WASH. REV. CODE § 9A.08.020(3)(a) (2023) (conditioning accomplice liability on the defendant's "knowledge that [her conduct] will promote or facilitate the [principal's] commission of the crime"). The defendant must know that she is facilitating the commission of the general type of crime that the principal goes on to commit, but the defendant need not know what grade of offense she is facilitating. *See, e.g.*, Sarausad v. State, 39 P.3d 308, 315 (Wash. Ct. App. 2001) ("[A]n accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor level assault, [but] need not have known that the principal was going to use deadly force or that the principal was armed.").

68. WASH. REV. CODE §§ 10.95.020, 9A.32.030(1)(a) (2023).

69. *E.g.*, State v. Thomas, 208 P.3d 1107, 1111 (Wash. 2009) (en banc); *Guloy*, 705 P.2d at 1193–94; *see also* State v. Bockman, 682 P.2d 925, 936–37 (Wash. Ct. App. 1984).

but instead requires only knowledge; hence "the State need not prove that the principal and accomplice share the same mental state."[70]

Similarly, committing burglary under Washington law requires breaking and entering with the intent to commit a crime.[71] Yet a defendant who merely knew that her actions would facilitate someone else's breaking and entering with intent to commit a crime is liable for burglary as an accomplice, even if the defendant herself did not intend for anyone to commit a crime.[72]

Or consider robbery, which under Washington law requires using force or intimidation with the intention of "obtain[ing] or retain[ing] possession of the property [taken from the victim]."[73] In *State v. Trout*, Adam Trout drove four companions to a house after Jason Fox, who had stolen the property of one of Trout's companions, dared the owner to come to the house to retrieve the property.[74] Upon entering the house, Trout and his companions encountered three individuals but not Fox.[75] Trout told the house's occupants, "[w]e're not gonna hurt you. We're just here for Jason."[76] But his companions proceeded to assault the occupants anyway, holding one at gunpoint and taking money and other property from the other two, Jennifer Wilson and Trina Brooks.[77] Brooks recalled Trout as the "nice guy" who did not participate in the assaults and eventually pulled one of his companions off Wilson, saying "[l]et's go."[78]

The Washington Court of Appeals affirmed Trout's conviction for, *inter alia*, two counts of first-degree robbery as an accomplice.[79] The court relied on Brooks's testimony "that other than [Trout's] statement that they had to go and pulling the guy off Jennifer, the 'nice guy' did nothing else to stop what was going on" and that Trout's presence provided "[m]ore manpower" and "[m]ore scary."[80] The court treated the provision of additional

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70. State v. Hoffman, 804 P.2d 577, 605 (Wash. 1991) (en banc) (citation omitted); *accord* State v. Roberts, 14 P.3d 713, 732 (Wash. 2000) (en banc) ("[A]n accomplice . . . may be convicted with a lesser mens rea and a lesser actus reus than a principal to premeditated first degree murder.").

71. WASH. REV. CODE §§ 9A.52.025, .030 (2023).

72. State v. Muasau, No. 42509-2-II, 2013 WL 6046094, at *3–5 (Wash. Ct. App. Nov. 13, 2013) (upholding Muasau's burglary conviction on the ground that there was sufficient evidence that "Muasau *or an accomplice* intended to commit a crime after unlawfully entering," and "[t]he State need not prove that the principal and accomplice share the same mental state" (emphasis added)).

73. WASH. REV. CODE § 9A.56.190 (2023).

74. State v. Trout, 105 P.3d 69, 72 (Wash. Ct. App. 2005).

75. *Id.*

76. *Id.* at 74 (alteration in original).

77. *Id.* at 72–73.

78. *Id.* at 74.

79. *Id.* at 79.

80. *Id.*

"manpower" and "scary" as sufficient assistance or encouragement to satisfy accomplice liability's actus reus requirement.[81] And the court apparently determined that the evidence supported a finding that Trout knew that his provision of additional "manpower" and "scary" was facilitating his companions' robberies of Brooks and Wilson.[82] Accordingly, the court concluded that Trout satisfied Washington's requirements for deriving liability for the robberies committed by his companions.[83]

If Trout had been judged by his own mens rea, then he would have been acquitted. Indeed, the case would not have been even close. The evidence indicated that Trout neither intended to bring about the use of force or intimidation against Brooks or Wilson nor intended to bring about the taking of their property. On the contrary, Trout's statement, "[w]e're not gonna hurt you,"[84] expressed an intention for the group *not* to use force against the victims and appears to have been made with the intention of ensuring that the victims were reassured and thus *not* intimidated. And Trout's statement, "We're just here for Jason,"[85] suggests that he intended for the group *not* to take anything from the victims but only to reclaim what Fox had stolen. Trout even intervened to end the use of force against Wilson (though apparently not quickly enough to satisfy the Washington Court of Appeals).[86] Judged by his own mens rea, Trout was plainly innocent of first-degree robbery under Washington law.

Interestingly, Washington courts do not judge the accomplice by the principal's mens rea in cases where the principal's mens rea corresponds to a *lesser* crime than the accomplice's. For example, in *State v. Wilder*, the Washington Court of Appeals upheld the accomplice's conviction for first-degree murder even though the principal had been convicted only of second-degree murder.[87] The court explained: "The jury could have believed [the accomplice] had the requisite premeditated intent [for first-degree murder], even though the principal . . . did not."[88] Thus, as to the principal's mens rea, Washington's regime of derivative liability for accomplices operates as a one-way ratchet: the accomplice is judged by the principal's mens rea if and

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81. *Id.* at 75.

82. *Id.* ("[Trout] himself indicates that he went along to provide additional backup in case things got out of control.").

83. *Id.*

84. *Id.* at 74 (alteration in original).

85. *Id.*

86. *See id.* at 72–74.

87. State v. Wilder, 608 P.2d 270, 273–74 (Wash. Ct. App. 1980).

88. *Id.*

only if judging the accomplice by the principal's mens rea would result in a more serious conviction for the accomplice.

That cannot be right. The problem is not that Washington judges the accomplice by her own mens rea when doing so works to her detriment. The same considerations of retribution and deterrence that justify more severe punishments for principals with more serious mental states apply equally to accomplices. All else being equal, actions done with knowledge as to the fact that they will contribute to bringing about someone's else's death are morally worse, thus warranting harsher retribution, and have a higher expected social cost, thus warranting stronger deterrence, than actions done with recklessness as to the fact that they might contribute to bringing about someone else's death. This is true regardless of whether the causal path to death runs through the conduct of another person.[89] So Washington courts are right to judge the accomplice by her own mens rea in cases when doing so works to her detriment. If, as in *Wilder*, the accomplice had the premeditated intention to bring about the victim's death, then the accomplice *should* be liable for aggravated first-degree murder even if the principal did not have the same intention. Likewise, in the case from Section I.B where Alice hires Peter to beat up Violet, who Alice but not Peter knows will die if punched, Alice should be liable for murder even though Peter has at most a mens rea of recklessness as to Violet's death. Having a more serious mens rea should subject the accomplice to a more severe punishment.

But it is simply the other side of the coin that having a less serious mens rea should subject the accomplice to a less severe punishment. For the same reasons that Washington is right to judge the accomplice by her own mens rea when doing so works to her detriment, Washington is wrong not to judge the accomplice by her own mens rea when doing so works to her benefit. Jurisdictions such as Washington should therefore take the next step in the process of rolling back derivative liability for accomplices and judge the accomplice by her own mens rea in all cases.[90]

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89. *See* Kaiserman, *supra* note 14, at 154 ("All other things being equal, it is morally irrelevant . . . whether or not D's contribution to a causing of V's harm acted 'via' the actions of another person.").

90. Although Washington may be the most striking example of a jurisdiction that continues to sometimes judge the accomplice by the principal's mens rea, Washington is not the only example. Indiana also holds defendants liable for crimes that they knowingly assist or encourage, sometimes even if the crime features a mens rea requirement of intention. IND. CODE § 35-41-2-4 (2023). For example, in *White v. State*, the Indiana Court of Appeals affirmed a defendant's conviction for theft as an accomplice because the defendant proceeded with driving the principal away from a casino after the principal told him that he had just stolen from the casino. 944 N.E.2d 532, 536–37 (Ind. Ct. App. 2011). The court concluded that even if the defendant "did not know

3. Actus Reus

Although some jurisdictions already judge the accomplice by her own affirmative defenses and mens rea in all cases, not one has taken the final step of judging the accomplice by her own actus reus. The law's practice of continuing to judge the accomplice by the principal's actus reus leads to problematic outcomes in cases where the principal's conduct is causally efficacious even though the accomplice's conduct is not. Such cases fall into two categories: those where the accomplice tried but failed to assist the principal, and those where the accomplice merely stood ready to assist the principal if necessary.

For an example of the first kind of case, consider *State v. Gelb*.[91] There, Gelb and some companions were toying with a railway switch.[92] Spotting an approaching train, one of the companions started to pull the switch.[93] Gelb recommended waiting until the train had passed the signal that warned oncoming trains when the switch had been pulled.[94] But when the companion hesitated, another companion "reached across and pulled the switch handle the rest of the way down."[95] In fact, "the train was well past" the signal anyway.[96] The train diverted onto a side track and crashed, causing the death of a victim.[97] Gelb's encouragement was doubly causally irrelevant to the fatal crash: even if his companions had heeded his advice to wait, it would not have mattered because the train was already beyond the signal—and his companions did not heed his advice anyway.[98] Nonetheless, because Gelb was judged by the principal's actus reus, Gelb was held liable for manslaughter.[99]

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ahead of time" that driving the principal from the casino would mean assisting in a theft, the defendant "knew, as soon as [the principal] entered the car" because the principal "told [the defendant] what had happened." *Id.* at 537. The defendant simply "laughed and drove away." *Id.* Thus, the court affirmed the defendant's conviction even though there was no evidence that the defendant intended to deprive the victim of the property, as he would need to do to commit theft under Indiana law. *See* IND. CODE § 35-43-4-2 (2023). *But cf.* Bethel v. State, 730 N.E.2d 1242, 1246 (Ind. 2000) (holding that because principal liability for attempted murder requires a mens rea of intention as to the victim's death, so does accomplice liability for attempted murder).

91. State v. Gelb, 515 A.2d 1246 (N.J. Super. Ct. App. Div. 1986).
92. *Id.* at 1248–49.
93. *Id.* at 1249.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *See id.*
99. *Id.* at 1251–53. The court relied on New Jersey's accomplice-liability statute, which provides: "A person is an accomplice of another person in the commission of an offense

To see what is wrong with this outcome, suppose that instead of giving his companions advice about how to ensure that the train was diverted without the conductor's awareness, Gelb had decided to take matters into his own hands by actually doing what he advised his companions to do: push the switch back to its original setting, wait, and then pull it once he thought that the train had passed the signal. But suppose that all of this was causally irrelevant because the train had not only passed the signal but also diverted onto the side track by the time Gelb pushed the switch back to its original setting. In this version of the case, because Gelb attempted to bring about the diversion by himself rather than through other people, the law would have treated Gelb as a principal, and he would have been judged by his own actus reus. Had Gelb attempted to cause the diversion with the intention of bringing about the victim's death, judging Gelb by his own actus reus would have meant holding him liable for attempted murder.[100] But because Gelb was only reckless as to the victim's death, judging him by his own actus reus would have meant holding him liable for nothing.[101]

The disparity between the two outcomes is extremely difficult to justify. In the real version of the case, Gelb tried but failed to bring about the diversion through his companions, by seeing to it that they pulled the switch at the appropriate time;[102] whereas in the fictional variant, Gelb tried but failed to bring about the diversion directly, by pulling the switch himself at the appropriate time. Normatively, it is hard to see why this difference should matter.[103] And it is especially hard to see why Gelb should face a more serious punishment in the case where he advised his companions on when to pull the switch than in the case where he pulled the switch himself. Yet, thanks to the law's practice of judging the accomplice by the principal's actus reus, that is exactly what would happen. In the case where Gelb gave his companions advice, he was liable as an accomplice for manslaughter; but in the case where Gelb pulled the switch himself, he would have been liable as a principal for nothing. Even if we modify the cases so that Gelb intended the victim's death, a disparity remains: Gelb would have been liable for murder

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if . . . [w]ith the purpose of promoting or facilitating the commission of the offense; he . . . aids or agrees *or attempts to aid* such other person in planning or committing it." N.J. STAT. ANN. § 2C:2-6(c)(1) (West 2023) (emphasis added).

100. *See* N.J. STAT. ANN. § 2C:11-2(a) (West 2023).

101. *See* N.J. STAT. ANN. § 2C:5-1(a)(2) (West 2023) (requiring intention as to any result elements of the target crime for attempt liability).

102. *Gelb*, 515 A.2d at 1248–49.

103. *See* Kaiserman, *supra* note 14, at 154.

in the case where he gave his companions advice but only attempted murder in the case where he pulled the switch himself.[104]

Something has gone wrong. Reasonable minds may disagree about whether liability for an attempt to commit a crime should require intention as to the crime's result elements and whether attempts should be punished less severely than completed crimes. The point is that however the law resolves those issues, it should treat Gelb the same in the case where he offers advice and in the case where he pulls the switch.

Similar considerations apply to cases where the accomplice merely stands by, ready to assist the principal if necessary.[105] For example, suppose that Alice brings a backup sniper rifle to hand to Peter in the event that Peter's sniper rifle jams when he is trying to assassinate Violet. Suppose that Peter would have attempted the assassination even without Alice's promise to assist if necessary and that Alice's assistance proves unnecessary because Peter's rifle does the job. Even so, because Alice was "present at the scene and . . . ready to assist," the law would treat her as an accomplice.[106] Accordingly, Alice would be judged by Peter's actus reus.[107] And Peter's actus reus consisted of an action that caused Violet's death. Therefore, Alice would be liable for murder.

But now suppose that, unbeknownst to Alice or Peter, Paul was also on the scene, carrying his own sniper rifle and intending to kill Violet if Peter failed to do so. As someone who stood ready to commit the crime himself rather than to assist someone else in committing it, Paul would be treated as a principal.[108] Accordingly, Paul would be judged by his own actus reus. And

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104. *Cf.* People v. Dlugash, 363 N.E.2d 1155 (N.Y. 1977) (holding that a defendant who shoots a would-be victim with the intent to kill, unaware that the would-be victim is already dead, is liable for attempted murder). A conviction for a completed crime generally triggers a more serious sentencing range than a conviction for an attempt. *E.g.*, N.Y. PENAL LAW § 110.05 (McKinney 2023) (mapping punishments for attempts to punishments for completed crimes and generally providing lower sentencing ranges for attempts).

105. For an account of why such accomplices satisfy complicity's mens rea requirement, see Nicholas Almendares & Dimitri Landa, *Standing in Reserve: A New Model for Hard Cases of Complicity*, 55 ARIZ. ST. L.J. 431, 443–45, 447–55 (2023).

106. State v. Rotunno, 631 P.2d 951, 952 (Wash. 1981); *accord, e.g.*, 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 . . . ."); *see also* Kutz, *supra* note 5, at 295 ("Complicity doctrine imposes liability not just for the paradigm cases [of causally efficacious assistance or encouragement], but also for cases where the accomplice's assistance is in reserve, or otherwise superfluous to the principal's crime.").

107. *See* N.J. STAT. ANN. § 2C:2-6 (West 2023).

108. *See id.*

Paul's actus reus was limited to a substantial step toward causing Violet's death: he showed up with the rifle, but he did not use it. Therefore, Paul would not be liable for murder. At most, assuming the court treated Paul's conditional intention to bring about Violet's death *if Peter does not* as sufficient mens rea, Paul might be liable for attempted murder.[109]

Again, the disparity in the law's treatment of Alice and Paul is extremely difficult to justify. Paul's role as backup shooter is at least as worthy of retribution and deterrence as Alice's role as backup rifle-supplier. So it is hard to see why the law should punish Alice more severely than Paul. Yet, thanks to the law's practice of judging the accomplice by the principal's actus reus, that is exactly what would happen: Alice would be liable for murder, whereas Paul would be liable at most for attempted murder.

One might think that there is an easy fix to these problems: simply add a causation requirement to the conditions for qualifying as an accomplice in the first place. But this solves the problem of over-punishment only to create a problem of under-punishment. Suppose that Alice tries but fails to assist Peter in murdering Violet, but Peter manages to murder Violet anyway—or that Alice stands by ready to assist Peter in murdering Violet, but Alice's assistance proves unnecessary. Adding a causation requirement to accomplice liability would prevent Alice from being liable for murder, but only by preventing Alice from being liable for anything. And that seems wrong, too. Alice should be liable for attempted murder.

Thus, once the law decided to make accomplice liability derivative as to the principal's actus reus, it faced a dilemma in cases where the accomplice has the intention required to be guilty of an attempt but does not make a causal contribution to the crime, either because she tries but fails or because she merely stands in reserve. The law could either hold the accomplice liable for a completed crime, thereby over-punishing her, or else hold the accomplice liable for nothing, thereby under-punishing her.[110] The law has opted for the first horn of the dilemma by generally eschewing a causation requirement for

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109. GIDEON YAFFE, ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 160 (2010) ("Under both the account that I advocate, and under the rival account to be found in the *Model Penal Code*, [a conditional intention to kill the victim if he is still alive] would suffice for *mens rea* for attempted murder."); *see* Almendares & Landa, *supra* note 105, at 454 (suggesting that a defendant like Paul might be liable for attempted murder). On the law's treatment of conditional intentions, see *infra* note 210 and accompanying text.

110. Of course, the accomplice might be liable for conspiracy by virtue of agreeing to participate. The point is that she would not incur liability for anything else by virtue of honoring that agreement, either by trying to assist or by standing in reserve.

accomplice liability.[111] Whether or not this is the lesser of two evils, it is an evil. What the law ought to be doing in such cases is holding the accomplice liable for an attempt.

Shifting to a regime of nonderivative liability would enable the law to do exactly that. The law should therefore complete the process of rolling back derivative liability for accomplices and judge the accomplice not only by her own mens rea and affirmative defenses but also by her own actus reus.

4. The Doctrine of Natural and Probable Consequences

Finally, consider the doctrine of natural and probable consequences. Under this doctrine, a defendant who aided or abetted a crime derives liability not only as to the crime that she aided or abetted but also as to any other crime that (1) was committed in furtherance of the crime that she aided or abetted and (2) is a natural and probable consequence of undertaking to commit the crime that she aided or abetted.[112] Some states extend liability further by dropping the requirement that additional crimes must have been committed in furtherance of crime that the defendant aided or abetted.[113] Illinois extends liability further yet, at least in cases where an accomplice aided or abetted a "dangerous" crime, by making the two requirements disjunctive rather than conjunctive: someone who aids or abets a dangerous crime "becomes accountable for any wrongdoings committed by other members of the group in furtherance of the common purpose, *or* as a natural or probable consequence thereof."[114]

The doctrine of natural and probable consequences functions as a regime of fully derivative, supplemental liability: as to the additional crimes

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111. *See* Dressler, *supra* note 2, at 435–36 (discussing the absence of a causal requirement from complicity law); CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 217 (2000) ("[C]ausal responsibility is not necessary to complicitous criminal liability."). Many states have provided by statute that a mere attempt to aid is sufficient actus reus for accomplice liability. *E.g.*, ARIZ. REV. STAT. ANN § 13-303(B)(2) (2023); N.J. STAT. ANN. § 2C:2-6(c)(1) (West 2023); TEX. PENAL CODE ANN. § 7.02(a) (West 2023). The traditional common-law rule is slightly more demanding: although the accomplice's action need not be a but-for cause of the principal's crime, the accomplice's action must at least make the crime easier to commit or more likely to succeed, even if only trivially so. *See* State v. Tally, 15 So. 722, 737–41 (Ala. 1894).

112. *E.g.*, KAN. STAT. ANN. § 21-5210(b) (West 2023).

113. *E.g.*, ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2023); People v. Gentile, 477 P.3d 539, 542 (Cal. 2020) ("When an accomplice aids and abets a crime, the accomplice is culpable for both that crime and any other offense committed that is the natural and probable consequence of the aided and abetted crime.").

114. People v. Flynn, 983 N.E.2d 8, 14 (Ill. App. Ct. 2012) (emphasis added).

committed by the principal, the accomplice is judged by both the principal's actus reus and the principal's mens rea. Thus, the doctrine of natural and probable consequences leads to *both* the errors associated with judging the accomplice by the principal's mens rea discussed in Section I.C.2 *and* the errors associated with judging the accomplice by the principal's actus reus discussed in Section I.C.3.

Sometimes the doctrine leads to both errors in the same case. For example, consider *People v. Machuca*.[115] Rosa Ayon was in a van with Rene Machuca and other fellow gang members when Alvaro Mora, a member of a rival gang, approached the van yelling at them.[116] Ayon and Machuca exchanged words and gang signs with Mora, and one of the government's witnesses later testified that Ayon "appeared to want to exit the van to physically confront Mora" but "subsequently drew back."[117] Machuca then shot and killed Mora.[118] "Ayon did not know Machuca was armed,"[119] and there was no evidence that Ayon's participation in the verbal altercation had any influence on Machuca's decision to engage in violence.[120] Nonetheless, the California Court of Appeals affirmed Ayon's conviction of murder on the theory that her words and actions constituted sufficient encouragement to render her complicit in Machuca's assault of Mora, and murder is a natural and probable consequence of assaulting a rival gang member.[121] Thus, Ayon was punished for murder even though there was not a shred of evidence that she either had the mens rea or performed the actus reus required to commit murder.[122]

Or consider *People v. Kessler*.[123] There, the defendant waited in a car while his two unarmed companions entered a tavern after closing time to steal some money.[124] The Illinois Supreme Court affirmed the defendant's convictions as an accomplice not only for burglary but also for the two counts of attempted murder that his companions committed after getting into a fight and taking someone else's gun.[125] There was no evidence that the defendant had a mens rea of intention as to the victims' deaths, as is required to commit

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115. People v. Machuca, No. B243964, 2014 WL 3576294 (Cal. Ct. App. July 21, 2014).
116. *Id.* at *1–2.
117. *Id.* at *8.
118. *Id.* at *1, *9.
119. *Id.* at *7.
120. *See id.* at *1–2.
121. *Id.* at *7–9.
122. In 2018, the California legislature abolished the doctrine of natural and probable consequences as applied to murder. S.B. 1437, 2018 Leg., Reg. Sess. (Cal. 2018) (amending CAL. PENAL CODE § 188).
123. People v. Kessler, 315 N.E.2d 29 (Ill. 1974).
124. *Id.* at 30–31.
125. *Id.* at 33.

attempted murder.[126] Thus, *Kessler* stands for the proposition that although "principals . . . are not guilty of attempted murder unless they acted with intent to kill[,] . . . an accomplice can be held accountable for attempt[ed] murder even in the absence of intent to kill."[127] Moreover, the first attempted murder occurred in the tavern while the defendant was waiting outside, unaware that his companions had encountered anyone.[128] The defendant could not possibly have taken any step, let alone the "substantial step" required to commit an attempt under Illinois law, toward bringing about the death of the first homicide target.[129] Thus, as in *Machuca*, the defendant was held liable for a crime despite neither having the mens rea nor performing the actus reus required to commit it.

A regime of nonderivative liability for accomplices would provide no support for convictions like these. Instead, like any other defendant, an alleged accomplice would be liable for the crime with which she is charged only if she committed it. In repudiating the expansion of liability entailed by the doctrine of natural and probable consequences, a regime of nonderivative liability would align with a large and growing chorus of scholars and lawmakers calling for the doctrine to be abolished.[130]

II. RESPONDING TO THE CASE FOR DERIVATIVE LIABILITY

If derivative liability is so difficult to justify as a matter of first principles, then why did the common law make accessory liability wholly derivative? And why does accomplice liability remain partially derivative, when partially derivative liability is ad hoc and leads to problematic outcomes? What is preventing the law from completing the process of doctrinal evolution

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126. *See id.* at 30–31.

127. People v. Bell, 447 N.E.2d 909, 915–16 (Ill. App. Ct. 1983). The California Supreme Court is similarly candid about how the doctrine of natural and probable consequences leads to disparate treatment of principals and accomplices. Because it incorporates the doctrine of natural and probable consequences, accomplice liability in California "is not designed to ensure that [the accomplice's] conduct constitutes the offense with which he is charged. His liability is vicarious." People v. Croy, 710 P.2d 392, 398 n.5 (Cal. 1985).

128. *Kessler*, 315 N.E.2d at 30–31.

129. 720 ILL. COMP. STAT. 5/8-4(a) (2023).

130. *E.g.*, Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 395 (2010); Dressler, *supra* note 2, at 428 n.4; Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1360–63 (1998). Some states have abolished the doctrine already. *E.g.*, Sharma v. State, 56 P.3d 868, 871–73 (Nev. 2002); State v. Carrasco, 946 P.2d 1075, 1079 (N.M. 1997).

described in Section I.B and judging the accomplice by her own actus reus, mens rea, and affirmative defenses in all cases?

This Article's hypothesis is that the law adopted and partially retains a regime of derivative liability for accomplices to compensate for other errors. Ideally, the law's basis for holding any defendant liable for a crime would be that the defendant committed the crime. The problem is that, in many cases, the accomplice clearly should be liable for the same type of crime as the principal, yet various errors have obscured the fact that the law should recognize the accomplice's own actus reus and mens rea as constituting that type of crime. This has made it seem as if holding the accomplice liable for her own actus reus and mens rea would lead to the wrong outcome. Because the only other actus reus and mens rea in the vicinity that do constitute the type of crime for which the accomplice should be liable are the principal's, scholars and lawmakers have assumed that the accomplice's liability should be derivative of the principal's.

This Part sets out to diagnose and correct the errors for which derivative liability for accomplices is compensating. This task is crucial to showing that the law should abandon derivative liability for accomplices. Although Part I shows how current regimes of derivative liability leads to bad outcomes, the errors discussed in this Part make it seem as if a regime of nonderivative liability would lead to outcomes that are even worse. Unless and until these errors are corrected, it might seem that the problems discussed in Part I are simply the price that the law must pay to avoid even bigger problems.

A. Conduct Crimes

The first reason for thinking that judging the accomplice by her own actus reus and mens rea would lead to the wrong outcome concerns "conduct crimes," that is, crimes that one can commit only by performing a certain type of action.[131] Conduct crimes stand in contrast to "result crimes," that is, crimes that one can commit only by performing an action with a certain type

131. *See, e.g.*, Claire Finkelstein & Leo Katz, *Contrived Defenses and Deterrent Threats: Two Facets of One Problem*, 5 OHIO ST. J. CRIM. L. 479, 484 (2008) (noting that conduct crimes "require a particular action by the defendant").

of result.[132] It seems that crimes such as battery,[133] perjury, and theft should be defined as conduct crimes: committing them should require engaging in offensive physical contact with someone else, lying under oath, and taking someone else's property, respectively. Yet it is easy to imagine cases where an accomplice should be liable for one of these crimes despite not having performed the required action. For example, suppose that Alice pays Peter to beat up Violet. Clearly, Alice should be liable for battery. But it seems that Alice did not perform the action that commission of battery should require: she did not make offensive physical contact with anyone. Therefore, it seems that judging Alice by her own actus reus would lead to the wrong outcome.

Call this argument the "Conduct Crimes Argument." The Conduct Crimes Argument strikes many scholars as ironclad. "Since [conduct crimes] do not consist in making a causal contribution to anything," writes John Gardner, "one obviously cannot engage in them oneself by contributing causally to another person's engaging in them."[134] Hence, "one cannot be a principal in [a conduct crime] by making one's causal contribution through another principal."[135]

This Section disagrees. Properly defined, battery and similar crimes may not always "consist in making a causal contribution to anything."[136] But sometimes they do. For example, the conduct of someone who successfully builds a drone to injure someone else should satisfy the actus reus requirement for battery. The conduct of someone who successfully aids or abets another person to injure someone else should be treated no differently. Thus, the law can reach the right outcome by judging accomplices to crimes such as battery by their own actus reus.

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132. *See, e.g.*, Hurd & Moore, *supra* note 11, at 167–68 (explaining that result crimes have a "crucial element" consisting of a "result of the voluntary act of the accused"). As this Article defines the terms "conduct crime" and "result crime," it is possible for a crime to be both a conduct crime and a result crime. The possibility of hybrid crimes like this does not play an important role in this Section's argument.

133. IND. CODE § 35-42-2-1(c) (2023) (providing that, subject to enumerated exceptions, "a person who knowingly or intentionally . . . touches another person in a rude, insolent, or angry manner" is guilty of battery).

134. John Gardner, *Complicity and Causality*, 1 CRIM. L. & PHIL. 127, 135 (2007); *accord*, *e.g.*, Kadish, *supra* note 48, at 336 (stating that accomplices "do not commit action crimes, since they do not engage in the prohibited action").

135. Gardner, *supra* note 134, at 135.

136. *Id.*

1. Conduct Crimes and Result Crimes

A helpful place to start is with a response to the Conduct Crimes Argument that this Article will *not* endorse. It is common to assume that every crime must be either a conduct crime or a result crime.[137] But if crimes such as battery are defined as conduct crimes, then judging accomplices such as Alice in the case where she pays Peter to beat up Violet by their own actus reus will lead to the wrong outcome. Therefore, it is tempting for the defender of the view that accomplices should be judged by their own actus reus to argue that crimes such as battery should be defined as result crimes.

That is the approach that Michael S. Moore takes to defining crimes such as battery. According to Moore, actions are limited to bodily movements,[138] and if actions are limited to bodily movements, then all crimes—including crimes such as battery, perjury, and theft—should be defined as result crimes and not as conduct crimes.[139] For example, Moore maintains that the actus reus of battery should be a bodily movement that results in "contact with the body of" the unconsenting victim,[140] the actus reus of theft should be a bodily movement that results in "the movement of [the victim's] property" into another's possession,[141] the actus reus of rape should be a bodily movement that results in "sexual penetration of" the unconsenting victim,[142] and the actus reus of conspiracy should be a bodily movement that results in one's coconspirator(s) registering one's assent to the criminal plot.[143]

Redefining so-called "conduct crimes" as result crimes arms Moore with a response to the Conduct Crimes Argument. Moore can say that where Alice paid Peter to beat up Violet, both Alice and Peter performed bodily movements that resulted in offensive physical contact with Violet: Alice's mouth and hands moved while she gave Peter instructions and handed him money, Peter's fists moved while he carried out Alice's instructions, and both

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137. *See, e.g.*, *id.* (failing to consider the possibility that so-called "conduct crimes" may, even if they need not, consist in making a causal contribution to something); MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 112 (2003) (stating offenses may be divided into "conduct crimes and result crimes").

138. MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 78, 245 (2010); *see also id.* at 280–301. Strictly speaking, Moore identifies actions not "with bodily movements *simpliciter*, but . . . with the complex event [of] volitions-causing movements." *Id.* at 113. This complication is irrelevant for this Article's purposes.

139. *Id.* at 213–25 ("The actus reus requirements of all crimes have hidden causation requirements built into them."); *see also* Hurd & Moore, *supra* note 11, at 167–68.

140. MOORE, *supra* note 138, at 217.

141. *Id.*

142. *Id.*

143. *Id.* at 220–22.

sets of movements were causes of the offensive physical contact between Peter's fists and Violet's body. Therefore, in Moore's view, both Peter and Alice should count as committing the actus reus of battery.

Tempting as it is, recharacterizing putative conduct crimes as result crimes is a mistake. Moore makes it seem as if the proper way to define crimes turns on where one draws the line between conduct and results. In fact, it is unnecessary to resolve the longstanding debate in the philosophy of action over where to draw the line between conduct and results[144] to see that neither the standard view, that crimes such as battery, perjury, and theft should be defined as conduct crimes, nor Moore's dissenting view, that they should be defined as result crimes, is correct.

For a counterexample to the standard view, imagine that Peter builds a robot to find and punch Violet. While the robot is looking for Violet, Peter takes a nap. He is still asleep when the robot locates Violet and punches her. Surely, Peter should be liable for battery. Yet even on a capacious view of conduct, Peter's conduct caused rather than constituted the offensive physical contact. After all, Peter was asleep and thus not performing any conduct at all when the offensive physical contact occurred. Therefore, committing battery should not require performing a certain type of action.[145]

For a counterexample to Moore's view, imagine that Peter lies under oath using sign language. Surely, Peter should be liable for perjury regardless of what happens next. Moore could try analyzing perjury in the way that he analyzes conspiracy, by defining perjury as a bodily movement that results in one's audience understanding the false assertion that one is expressing.[146] But whereas the notion that no conspiracy has been formed without both parties' consciousness of their mutual assent may be defensible, the notion that a statement does not constitute a lie unless and until it is correctly interpreted by its audience seems clearly mistaken. Even if no one present understands the signs that constitute Peter's false statement, a prosecutor who could prove

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144. *Compare, e.g.*, Anton Ford, *The Province of Human Agency*, 52 NOÛS 697, 700 (2018) (defending a capacious view of conduct), *with* Jennifer Hornsby, *Actions in Their Circumstances*, *in* ESSAYS ON ANSCOMBE'S *INTENTION* 105, 125–27 (Anton Ford et al. eds., 2011) (attributing to Elizabeth Anscombe a view of conduct less capacious than Ford's but more capacious than Moore's), *and* Donald Davidson, *Agency*, *in* ESSAYS ON ACTIONS AND EVENTS: PHILOSOPHICAL ESSAYS 43, 59 (2001) (defending the same narrow view of conduct as limited to bodily movements that Moore does).

145. *Cf.* Finkelstein & Katz, *supra* note 131, at 484 (pointing out that defining burglary to require conduct that constitutes breaking and entering would erroneously result in the acquittal of a defendant who "had himself shot from the mouth of a cannon" into a building with the intention of committing a crime therein).

146. *See* MOORE, *supra* note 138, at 220–22. I am grateful to Richard McAdams for encouraging me to consider this response.

later based on a videotape that the signs expressed knowingly false testimony would—and should—be able to secure a conviction for perjury.[147] Peter's perjury was complete as soon as he had produced the signs. Yet even on Moore's narrow view of conduct as limited to bodily movements, Peter's production of the signs was pure conduct because it consisted of nothing other than movements of his own body. Therefore, committing perjury should not require performing an action that has a certain type of result.[148]

2. Causation and Constitution

A better account of crimes like battery, perjury, and theft begins by recognizing that the distinction between conduct and results carries no normative weight. For example, compare a case where Paul punches someone with his fist with the example where Peter programs a robot to punch someone. Even assuming, *pace* Moore, that punching consists entirely of conduct, the law should treat Paul's punching someone with his fist and Peter's programming a robot to punch someone the same. It is what actions constituting offensive physical contact and actions causing offensive physical contact have in common that justifies criminalizing both under the heading of battery. Likewise, compare the example where Peter lies under oath in sign language with a case where Paul lies under oath in spoken language. Even assuming with Moore that a spoken statement consists of sounds that are the mere result of the speaker's conduct of moving her vocal cords,[149] the law should treat Peter's sign-language statement and Paul's spoken statement the same. Again, it is what actions constituting false statements under oath and actions causing false statements under oath have in common that justifies criminalizing both under the heading of perjury.

What does an action that constitutes a certain kind of event have in common with another action that causes the same kind of event? Answering this question requires clarifying the sense of constitution in play. Lawyers sometimes use the term "constitutes" interchangeably with the "is" of identity. That is not the sense of "constitutes" relevant here. The identity

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147. *Cf.* James Edwin Mahon, *The Definition of Lying and Deception*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 25, 2015), https://plato.stanford.edu/entries/lying-definition/ [https://perma.cc/3TWX-SE5K] (recognizing that even if a lie is necessarily addressed to another person (or what one believes is another person), a lie need not involve successful communication, as "one might, e.g., mistake a waxed dummy for another person, and lie to it").

148. Even if one finds the proposed counterexample inconclusive, it is an advantage of the account offered in Section aa.2 that it does not require taking a position on the matter; nor does it require taking a position on where to draw the line between conduct and results.

149. *See* MOORE, *supra* note 138, at 221.

relation is symmetric: if A is identical to B, then B is identical to A. The relevant constitution relation is a kind of dependence relation. As such, it is not symmetric: it is not the case that if A constitutively depends on B, then B constitutively depends on A.

Constitutive dependence, sometimes called "grounding" in the philosophical literature,[150] comes in several forms.[151] Relevant here is the dependence of the general on the particular. For example, Bob's having Rover (a particular dog) is constitutive of Bob's having a dog (generally). It is because Bob has Rover that Bob has a dog, rather than vice-versa.[152]

Constitution is distinct from causation.[153] Bob's having Rover does not cause but rather constitutes Bob's having a dog, and Bob's saying "Sit!" does not constitute but rather causes Rover's sitting. Nonetheless, constitution and causation share something in common: each is a form of dependence. That is why both constitution and causation can be expressed by the generic term "because": it is because Bob has Rover that Bob has a dog, and it is because Bob said "Sit!" that Rover sat.[154]

We can now answer the question of what an action that constitutes a certain kind of event has in common with another action that causes the same kind of event. In both cases, an event of the relevant kind occurred because the particular action at issue occurred. For example, recall the pair of battery cases, assuming for argument's sake a capacious view of conduct. Paul's action of punching the victim constitutes an instance of offensive physical contact. Thus, it is because Paul punched the victim that an instance of offensive physical contact occurred, rather than vice-versa. Peter's action of programming a robot to punch the victim causes an instance of offensive physical contact. Thus, it is because Peter programmed the robot that an instance of offensive physical contact occurred, rather than vice-versa.

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150. *E.g.*, Shamik Dasgupta, *Constitutive Explanation*, 27 PHIL. ISSUES 74, 75, 89–93 (2017). This Article need not take a side in the debate between realists and antirealists about whether the dependence of one fact on another is something that exists independently of our explanatory needs and interests. *See id.* Because the term "grounding" is sometimes used to refer to a constitutive dependence relation that allegedly does exist independently of our explanatory needs, *e.g.*, Jessica Wilson, *No Work for a Theory of Grounding*, 57 INQUIRY 535, 540 (2014), this Article uses the more neutral language of constitution instead.

151. Dasgupta, *supra* note 150, at 75.

152. *See* G.E.M. Anscombe, *Making True*, *in* LOGIC, TRUTH, AND MEANING: WRITINGS BY G.E.M. ANSCOMBE 101, 101–02 (Mary Geach & Luke Gormally eds., 3d ed. 2015) (discussing the dependence of the general fact that "some elements" have a certain property on the fact that "iodine and chlorine [in particular] do").

153. Dasgupta, *supra* note 150, at 75.

154. *Id.* (noting that constitution and causation each correspond to a "sense of the English word 'because'").

Likewise, recall the pair of perjury cases, assuming for argument's sake Moore's narrow conception of conduct. Peter's action of using sign language constitutes a false statement. Thus, it is because Peter made those signs that a false statement occurred, rather than vice-versa. Paul's action of moving his vocal cords causes a false statement. Thus, it is because Paul performed those vocal-cord movements that a false statement occurred, rather than vice-versa.

When defining the actus reus of crimes like battery and perjury, the law should focus on dependence generically rather than on causation or constitution specifically. For example, the law should provide that the defendant's action counts as a battery only if an instance of offensive physical contact with someone else's body occurred because that action occurred. This definition will capture actions constituting offensive physical contact as well as actions causing offensive physical contact. Likewise, the law should provide that the defendant's action counts as an instance of perjury only if a false statement under oath occurred because that action occurred. This definition will capture actions constituting false statements under oath as well as actions causing false statements under oath.

The same analysis can be extended to other putative conduct crimes. For example, even assuming a capacious view of conduct, the law should recognize that theft need not consist of pure conduct. If Peter programs a drone to pick Violet's pocket but is asleep when the drone actually does the taking, then Peter should be liable for theft even though everyone should agree that the taking was not conduct that he performed. And even assuming a narrow view of conduct, the law should recognize that theft can consist of pure conduct. Suppose that Peter designs a mechanical claw and trains himself to control it at will by means of an implant in his brain. Peter deactivates the implant and sells the claw to Violet, but then he reactivates the implant and moves the claw at will back into his possession. Even Moore would treat Peter's movements of the claw like movements of his body for purposes of the distinction between conduct and results.[155] Thus, Peter should be liable for theft even though everyone should agree that the taking of Violet's property consisted of pure conduct. To capture both cases, the law should provide that an action counts as an instance of theft only if a taking of someone else's property occurred because the action occurred, where this

155. *See* MOORE, *supra* note 138, at 104–05 (entertaining a thought experiment in which "a pilot operates a plane by use of a helmet that is wired to the plane's controls," enabling the pilot directly to control the plane's movement, and conceding that if ever we acquire the ability to develop and use such technology, "then the most basic acts we know how to do will not be [limited to] bodily movements.").

"because" can signify either a relation of constitution or a relation of causation.

One might worry that this approach to defining the actus reus of crimes like battery, perjury, and theft strays too far from the ordinary meanings of the names of such crimes.[156] For example, whatever may be true about the relationship between causation and constitution, "perjury" is not an apt description of what the typical accomplice to perjury does. In ordinary conversation, it would be unusual to describe a person who paid someone else to lie under oath as thereby committing perjury. Similarly, it would be unusual to describe someone who paid someone else to beat up a victim as battering the victim. The same point could be made about other putative conduct crimes such as rape, burglary, and drug possession.

This worry is misplaced. As Moore explains, lawmakers should determine the scope of criminal prohibitions based on the considerations that justify the existence of criminal prohibitions in the first place, not the quirks of ordinary language.[157] It is no objection to a proposed definition of a crime that the definition does not correspond precisely to how the crime's label is used in ordinary English conversation. What matters is that the definition tracks a wrong that the law is justified in criminalizing.

Definitions that follow the approach suggested here do just that. Compare the defendant who hits someone else with her bare fists, the defendant who hits someone else while wearing gloves, the defendant who hits someone else with a baseball bat, the defendant who builds a Rube Goldberg machine to hit someone else, the defendant who programs a robot to hit someone else, and the defendant who trains a gorilla to hit someone else. Somewhere along this spectrum of cases, it becomes incorrect as a matter of ordinary language to say that the defendant "battered" the victim. Yet the same normative considerations that support criminalizing any one of these behaviors also support criminalizing the others. Defining battery not by reference to ordinary language but as proposed here would allow the law to treat all cases on the spectrum the same.

Indeed, it is plausible that this is what the law is implicitly doing already. It is difficult to imagine that a court would acquit the defendant who used a Rube Goldberg machine to bring about a hitting of someone else of battery on the ground that committing battery requires performing conduct that constitutes offensive physical contact with the victim.[158] This suggests that

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156. *E.g.*, Husak, *supra* note 3, at 68–70.

157. *See* MOORE, *supra* note 13, at 295–97.

158. *But see* Dusenbery v. Commonwealth, 263 S.E.2d 392, 393–94 (Va. 1980) (holding that the defendant who "seized [a] boy's penis, and forced it 'partially in' [a] girl's vagina" did not

the law already recognizes that not only conduct constituting offensive physical contact with someone else but also conduct causing offensive physical contact with someone else can constitute battery. To the extent that this is true of all conduct crimes, this Section merely makes explicit what the law implicitly recognizes already.[159] At any rate, what matters for this Article's purposes is that crimes such as battery, perjury, and theft *should* be defined in terms of dependence generically rather than constitution or causation specifically. To the extent that they are not so defined, the solution is to fix their definitions, not to tinker with liability rules for accomplices.

3. Application to Accomplices

Section II.A.2's defense of its approach to defining the actus reus of crimes such as battery, perjury, and theft relies solely on the fact that this approach supports liability for the *principals* who should be liable for such crimes. At no point does Section II.A.2 cite as a reason to endorse its approach that it supports liability for the accomplices who should be liable for such crimes. Nonetheless, it is easy to see that the approach to defining the actus reus of crimes such as battery, perjury, and theft proposed in Section II.A.2 does, in fact, support liability for the accomplices who should be liable for such crimes.

If crimes such as battery, perjury, and theft are defined as proposed in Section II.A.2, then they can be committed either by performing an action that constitutes a certain kind of event or by performing an action that causes that kind of event. And the only reason the Conduct Crimes Argument offers for denying that the typical accomplice to a so-called "conduct crime" commits that crime is that the accomplice does not perform an action that constitutes the relevant kind of event. For example, the typical accomplice to battery does not herself hit anyone, the typical accomplice to perjury does not herself lie under oath, and the typical accomplice to theft does not herself take someone else's property. But the typical accomplice to battery does cause someone to hit someone else, the typical accomplice to perjury does cause someone to lie under oath, and the typical accomplice to theft does cause someone to take someone else's property. Therefore, if the actus reus of a crime such as battery, perjury, or theft is defined generically in terms of the dependence of the relevant event on the defendant's conduct, rather than

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commit rape under Virginia's criminal-rape statute because his conduct did not constitute "carnally know[ing]" the victim).

159. *But see id.*

specifically in terms of the constitution of the relevant event by the defendant's conduct, then those who should be liable for the crime as accomplices satisfy the crime's actus reus requirements.

Thus, the Conduct Crimes Argument fails. The action of the typical accomplice to a crime such as battery, perjury, or theft causes even if it does not constitute the relevant kind of event, such as a hitting, a lie, or a taking of property. That should suffice to satisfy the crime's actus reus requirement. So the law can hold the accomplice liable for the crime even if the law judges the accomplice by her own actus reus; there is no need to judge the accomplice by the principal's actus reus.[160]

B. Free Will

Or is there? Section II.A's conclusion is premised on the idea that the typical accomplice to a so-called "conduct crime" causes the principal to perform her criminal conduct. The second challenge to the claim that the law should judge the accomplice by her own actus reus and mens rea denies that the accomplice's action ever causes the principal's action. The idea behind the challenge is that the principal's exercise of free will breaks the causal chain that would otherwise link the accomplice's action to the principal's

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160. Some scholars have advanced an argument for why accomplice liability should be derivative that is related to but distinct from the Conduct Crimes Argument. According to these scholars, some crimes are "nonproxyable." *See* Yaffe, *supra* note 2, at 449–56; *see also* Kadish, *supra* note 134, at 373. The most plausible example is bigamy. Arguably, bigamy essentially involves the *perpetrator* marrying someone while married to another. As Moore notes, the claim that bigamy should be nonproxyable is distinct from the claim that bigamy should be a conduct crime: if bigamy should be defined as causing oneself to be married to multiple people at once, then bigamy should be defined as a nonproxyable result crime. *See* MOORE, *supra* note 13, at 298. *But see* Gardner, *supra* note 134, at 135–37 (conflating nonproxyable crimes with conduct crimes). If bigamy is nonproxyable, then a defendant who aids or abets someone else to marry another while already married does not perform the actus reus of bigamy. But one might think that the defendant should be liable for bigamy as an accomplice. Thus, the argument goes, the law must judge the accomplice by the principal's actus reus to reach the right outcome. *See* Yaffe, *supra* note 2, at 456–58. Moore responds by pointing out that if the evil that prohibiting bigamy is targeting really is making *oneself* married to multiple people at once, such that bigamy should be defined as a nonproxyable crime, then acquitting the person who makes it the case that someone else is married to multiple people at once is the right outcome. *See* MOORE, *supra* note 13, at 297–99. And if the right outcome is to convict the person who makes it the case that someone else is married to multiple people at once, then that simply shows that bigamy should not be defined as a nonproxyable crime. *Id.* Moore's response is persuasive, and this Article does not discuss the argument of nonproxyability further.

action and its results.[161] On this view, judging the accomplice by her own actus reus would lead to the wrong outcome in cases where the accomplice would need to cause the results of the principal's action to count as committing the crime for which she should be liable.[162]

That is a rough statement of what this Article calls the "Free Will Argument."[163] The Free Will Argument is widely regarded as *the* explanation for why "[c]omplicity emerges as a separate ground of liability."[164] In the words of Guyora Binder and Luis Chiesa, derivative liability for accomplices is a "polite-work-around of libertarian limits on causal responsibility. It advances the utilitarian goal of extending criminal responsibility for the acts of others . . . while accepting the libertarian premise that one actor cannot cause the voluntary conduct of another."[165]

This Section argues that the workaround is unnecessary. Even the most ardent defenders of the existence of free will and its incompatibility with determinism should agree that every freely chosen action has many partial, non-necessitating causes. And the law neither does nor should require more than partial causation for criminal liability. Therefore, ideas about free will and determinism do not preclude recognizing the accomplice's action as a legal cause of the principal's action and its results.

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161. *See, e.g.*, Valentine, *supra* note 14, at 357–58 ("The [accomplice], though offering aid, does not cause the primary principal to act if the principal commits a voluntary action; intervening agency breaks the legal and moral causal chain." (footnote omitted)).

162. *See id.* at 359.

163. The canonical statement of the Free Will Argument appears in Kadish, *supra* note 134, at 329–36, though it has antecedents in H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985); Paul Ryu, *Causation in the Criminal Law*, 106 U. PA. L. REV. 773, 782–86 (1958); and James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 167–69 (1925).

164. Kadish, *supra* note 134, at 327.

165. Guyora Binder & Luis Chiesa, *The Puzzle of Inciting Suicide*, 56 AM. CRIM. L. REV. 65, 110 (2019); *see also id.* at 91. The relevant "libertarianism" is not the political view. *See generally* Bas van der Vossen & Billy Christmas, *Libertarianism*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 7, 2023), https://plato.stanford.edu/entries/libertarianism [https://perma.cc/YHK2-GVY7] ("Libertarianism is a family of views in political philosophy. Libertarians strongly value individual freedom . . . ."). Rather, it is the philosophical view that affirms both that free will exists and that free will is incompatible with determinism. *See generally* Kadri Vivehlin, *Arguments for Incompatibilism*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 22, 2022), https://plato.stanford.edu/archives/fall2022/entries/incompatibilism-arguments [https://perma.cc/F7ZQ-WNC3] ("A libertarian is an incompatibilist who believes that we in fact have free will and this entails that determinism is false . . . .").

1. Reconstructing the Argument

To bring out the problem with the Free Will Argument, it is helpful to articulate the argument more precisely. The Free Will Argument focuses on cases where:

> (1) The principal is morally responsible for his action,

and, assuming the relevant crimes are properly defined,

> (2) Judging the accomplice by her own actus reus would lead to the wrong outcome unless the accomplice's action caused the principal's action.[166]

Unless one denies the existence of moral responsibility, it is extremely difficult to deny that cases exist where (1) and (2) are true. For example, suppose that Alice pays Peter to program a drone to pick Violet's pocket. We can assume that Peter does not act under hypnosis or duress or any other condition that would relieve him of moral responsibility. Therefore, bracketing skepticism about the existence of moral responsibility, (1) is true.

As for (2), if theft were defined in such a way that anything anyone named "Alice" does counts as theft, then obviously judging Alice by her own actus reus would lead to the right outcome (convicting Alice of theft) regardless of whether Alice's action caused Peter's action. But if we are to assess the proposal to judge the accomplice by her own actus reus based on the outcomes to which it leads, then we must assume that the relevant crimes are properly defined. Even if judging the accomplice by her own actus reus is the right approach, it could lead to the wrong outcome if the law made an error in defining the relevant crime.[167] Alternatively, even if judging the accomplice by her own actus reus is the wrong approach, it could lead to the right outcome if the law also made an error in defining the relevant crime and the two errors cancelled each other out. So, the question is whether (2) is true *assuming theft is properly defined*.

The answer is "yes." This Part's own argument in Section II.A implies that, if theft is properly defined, then Alice does not perform the actus reus of theft unless her action causes the taking of Violet's property. But any causal chain linking Alice's action to the taking runs through Peter's action of programming the drone. Therefore, Alice does not perform the actus reus

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166. *See* Valentine, *supra* note 14, at 352–60.

167. *Cf. supra* Section II.A.2 (conceding that judging the typical battery accomplice by her own actus reus would lead to the wrong outcome if battery were defined to require contact between the defendant's body and the victim's body, but observing that the solution is to correct the faulty definition of battery rather than to tinker with accomplice liability).

of theft unless Alice's action causes Peter's action, which means that judging Alice by her own actus reus would lead to the wrong outcome (Alice's acquittal) unless Alice's action caused Peter's action.

According to the Free Will Argument, cases like this show why liability for accomplices needs to be derivative at least as to the principal's actus reus. The Free Will Argument maintains that a person is morally responsible for her action only if she freely chose to perform it.[168] Thus,

> (3) If the principal is morally responsible for his action, then the principal's action was freely chosen.

According to the Free Will Argument, however, freely chosen actions differ from "other events in the world" in that freely chosen actions are not predetermined by prior events.[169] Thus,

> (4) If the principal's action was freely chosen, then the principal's action was not predetermined.

And because the language of "causation" expresses the "necessary quality" of the sequences in which prior events predetermine subsequent events,[170]

> (5) If the principal's action was not predetermined, then nothing caused the principal's action.

In conjunction, (1), (3), (4), and (5) entail that "nothing caused the principal's action."[171] And this, in conjunction with (2), entails that

> (6) Judging the accomplice by her own actus reus would lead to the wrong outcome.

It is widely believed that the Free Will Argument captures the reasoning behind derivative liability for accomplices.[172] This idea finds support in the

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168. *See* Kadish, *supra* note 134, at 330–31.
169. *Id.* at 330.
170. *Id.*
171. *Id.* at 327.
172. *See supra* notes 164–165 and accompanying text.

fact that courts have endorsed premises (3),[173] (4),[174] and (5)[175] of the Free Will Argument. Even those who refrain from endorsing the Free Will Argument tend to think that it cannot be challenged without undermining the authority of the criminal law.[176] They think that (3)–(5) are just true statements about what it is to be morally responsible,[177] and there are plenty of cases where (2) is undeniable; hence, challenging the Free Will Argument requires rejecting (1) and denying the principal's moral responsibility in those cases.[178] But a criminal conviction expresses moral blame, which presupposes

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173. *See, e.g.*, People v. Horn, 205 Cal. Rptr. 119, 129 (Ct. App. 1984) ("[Criminal] punishment is a corollary of responsibility, based upon the concept of man as capable, within limits, of making free choices and putting them into effect." (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 460 (2d ed. 1960))); Salzman v. United States, 405 F.2d 358, 364 (D.C. Cir. 1968) (footnote omitted) ("[T]o hold a man criminally responsible his actions must have been voluntary, the product of a 'free will.'").

174. *See, e.g.*, State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 410–11 (W. Va. 1980) (indicating that free will and determinism are incompatible); Cole v. State, 128 A.2d 437, 439 (Md. 1957) ("[A]ny but the most superficial analysis of questions of criminal responsibility quickly encounter fundamental and perhaps insoluble questions of free will versus determinism."); McNorton v. State, 284 S.E.2d 107, 109 (Ga. Ct. App. 1981) (Deen, J., concurring) (describing the law's postulate that a person "possessed a free will," such that "he could make a choice and that he is responsible for his choice," as "indubitably . . . a legal position of non-determinism").

175. *See, e.g.*, Lewis v. State, 474 So.2d 766, 771 (Ala. Crim. App. 1985) (characterizing an exercise of "free will" as an "intervening cause sufficient to break the chain of causation.").

176. *See, e.g.*, Kadish, *supra* note 48, at 326 (purporting "to determine what the concepts of blame, responsibility, and causation that underlie the criminal law are" without "tak[ing] a position on whether the concepts presupposed by the criminal law are, in the final analysis, true"); *see also* McNeil v. United States, 933 A.2d 354, 364 (D.C. 2006) ("The controlling premise of our system of criminal law is that a person who commits a crime is 'a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.'" (quoting Carter v. United States, 252 F.2d 608, 616 (D.C. 1957))); People v. Drew, 583 P.2d 1318, 1320 (Cal. 1978) (en banc) ("The criminal law rests on a postulate of free will . . . ."); Goldberg v. R. Grier Miller & Sons, Inc., 182 A.2d 759, 762 (Pa. 1962) ("If there were no free will, every criminal penalty would be unjust . . . ."); Sauer v. United States, 241 F.2d 640, 648 (9th Cir. 1957) ("Modern psychiatry to the contrary, the criminal law is grounded upon the theory that, in the absence of special conditions, individuals are free to exercise a choice between possible courses of conduct and hence are morally responsible."); Morissette v. United States, 342 U.S. 246, 250 (1952) (footnote omitted) (describing "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil" as "universal and persistent in mature systems of law.").

177. *See* Kadish, *supra* note 48, at 329–36; *see also* Michael Corrado, *Is There an Act Requirement in the Criminal Law?*, 142 U. PA. L. REV. 1529, 1555–56, 1560 (1994) (limiting moral responsibility to voluntary choices and expressing a "preference . . . for an interpretation of [the criminal law's voluntary-act requirement] which made clear that it is incompatible with causation of action.").

178. *See* Kadish, *supra* note 48, at 326, 329–36.

moral responsibility.[179] Denying (1) thus amounts to contradicting the message expressed by the principal's conviction, thereby undermining the authority of the criminal law.

Not everyone agrees. Michael S. Moore argues that courts can and should reject the Free Will Argument while nevertheless affirming that the principal is morally responsible for her conduct.[180] Instead of denying (1), Moore argues, courts should deny (4): the premise that freely chosen actions are not predetermined by prior events.[181] Moore offers a lengthy argument in support of the claim that free will is compatible with determinism.[182] But this claim remains deeply controversial. The debate between compatibilists and incompatibilists about free will and determinism is among the oldest in philosophy, and it has spawned a large and difficult literature.[183] Situating Moore's argument within that literature and assessing its viability in light of the arguments for incompatibilism is too large an undertaking to fit within the scope of this Article. Suffice to say that Moore's position is hotly contested.[184]

2. Responding to the Argument

Fortunately, an alternative reply to the Free Will Argument is available that requires neither undermining the authority of the criminal law nor taking a contested position in one of the oldest debates in philosophy. The Free Will Argument trades on an equivocation between contributing causes and sufficient causes, where X is a sufficient cause of Y if and only if nothing more than X is required to provide a complete causal explanation for Y, and X is a contributing cause of Y if and only if X is a nonsufficient cause of Y.[185]

Recall the Free Will Argument's second premise:

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179. *See supra* Section I.B.

180. *See* MOORE, *supra* note 13 at 268–73.

181. *See id.*

182. *See* Michael S. Moore, *Compatibilism(s) for Neuroscientists*, 3 SOC., POL. & LEGAL PHIL. 1 (2014); MOORE, *supra* note 13, at 268–73.

183. *See generally* Vivehlin, *supra* note 165; Timothy O'Connor & Christopher Franklin, *Free Will*, STAN. ENCYCLOPEDIA OF PHIL. (Nov. 3, 2022), https://plato.stanford.edu/archives/win2022/entries/freewill [https://perma.cc/CYL6-859H]; Michael McKenna & D. Justin Coates, *Compatibilism*, STAN. ENCYCLOPEDIA OF PHIL. (Nov. 26, 2019), https://plato.stanford.edu/archives/fall2021/entries/compatibilism [https://perma.cc/5RJB-6LN3].

184. *See, e.g.*, Alexander R. Pruss, *Incompatibilism Proved*, 43 CAN. J. PHIL. 430, 430 (2013). *See generally* Vivehlin, *supra* note 165 (surveying arguments against compatibilism).

185. For an account of what makes an explanation complete, see ALEXANDER R. PRUSS, THE PRINCIPLE OF SUFFICIENT REASON: A REASSESSMENT 17–18 (2006).

> (2) Judging the accomplice by her own actus reus would lead to the wrong outcome unless the accomplice's action caused the principal's action.

It is easy to imagine cases where (2) is plausible if interpreted as

> (2a) Judging the accomplice by her own actus reus would lead to the wrong outcome unless the accomplice's action was at least a contributing cause of the principal's action.

But it is extremely difficult to produce a case in which (2) is plausible if interpreted as

> (2b) Judging the accomplice by her own actus reus would lead to the wrong outcome unless the accomplice's action was a sufficient cause of the principal's action.

For example, in the case where Alice pays Peter to program a drone to pick Violet's pocket, Peter's action was only a contributing cause of the taking of Violet's property. Other contributing causes include Violet's action of placing the property in her pocket, the functioning of the drone's machinery, and the manufacturing of Violet's pants to feature pockets that are loose enough to enable the drone to pick them undetected. Yet no one will deny that Peter performs the actus reus of theft (assuming theft is properly defined). So too, Alice's action need not be more than a contributing cause of the taking of Violet's property for it to be true that Alice performs the actus reus of theft. And if Alice's action need not be more than a contributing cause of the drone's taking of Violet's property, then Alice's action need not be more than a contributing cause of Peter's intervening action, either. Therefore, all that is required for judging Alice by her own actus reus to lead to the right outcome is for Alice's action to be at least a contributing cause of Peter's taking.

Now, however, recall the Free Will Argument's fifth premise:

> (5) If the principal's action was not predetermined, then nothing caused the principal's action.

Again, one could interpret (5) in two ways:

> (5a) If the principal's action was not predetermined, then there is nothing that was even a contributing cause of the principal's action,

and

> (5b) If the principal's action is not predetermined, then there is nothing that was a sufficient cause of the principal's action.

It is not clear that even (5b), the more modest of these two claims, is true.[186] But what is clear is that (5a) is false. Even those who maintain that no freely chosen action is predetermined should agree that every freely chosen action has many contributing causes. For starters, it is true of every action that a human freely chooses to perform that the human's parents' action of procreating the human was a contributing cause of the action.

Thus, at least one of the Free Will Argument's premises is false unless (2) is read as (2a) and (5) is read as (5b). But if (2) is read as (2a) and (5) as (5b), then the Free Will Argument is invalid in the sense that its conclusion does not follow from its premises. The Free Will Argument would run as follows:

> (1) The principal is morally responsible for his action;
>
> (2a) Judging the accomplice by her own actus reus would lead to the wrong outcome unless the accomplice's action was at least a contributing cause of the principal's action;
>
> (3) If the principal is morally responsible for his action, then the principal's action was freely chosen;
>
> (4) If the principal's action was freely chosen, then the principal's action was not predetermined;
>
> (5b) If the principal's action was not predetermined, then there is nothing that was a sufficient cause of the principal's action;

therefore,

> (6) Judging the accomplice by her own actus reus would lead to the wrong outcome.

But (6) simply does not follow from the conjunction of (1), (2a), (3), (4), and (5b). Nothing about the conjunction of those premises excludes the possibility that judging the accomplice by her own actus reus would lead to the right outcome because the accomplice's action was a contributing cause of the principal's action. Therefore, even granting (1), (2a), (3), (4), and (5b) for argument's sake, the Free Will Argument is unsound.

C. Mens Rea

The third reason for thinking that judging the accomplice by her own mens rea and actus reus would lead to problematic outcomes concerns the accomplice's mens rea. Recall from Section I.B that while all jurisdictions

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186. *See, e.g.*, G.E.M. Anscombe, *Causality and Determination*, *in* 2 COLLECTED PAPERS 133 (1981) (denying (5b)).

continue to judge the accomplice by the principal's actus reus, some now judge the accomplice by her own mens rea.[187] What this Article calls the "Mens Rea Argument" maintains that it is a good thing that not all jurisdictions have embraced this rule in all contexts.[188] According to the Mens Rea Argument, there are two kinds of cases where the accomplice should be liable for the same type of crime as the principal even though the accomplice lacks the mens rea that should be required to commit that type of crime. Below, Section II.C.1 addresses the first kind of case, and Section II.C.2 addresses the second kind of case.

1. Intending the Principal's Ends

The first kind of case is one where it seems that the accomplice intends only the means that the principal has outsourced to the accomplice and does not intend the principal's end. The most obvious examples are cases where the principal agrees to pay the accomplice as soon as the accomplice has performed her act of assistance, but before the principal goes on to commit the crime. For example, suppose that Peter hires Alice, the night guard at the bank, to let him through the back door so that he can take the cash in the bank. Alice agrees on the condition that Peter pay her when she opens the door. That way, Alice's payment will not be contingent on Peter's success in breaking into the vault and escaping undetected. Peter agrees, Alice opens the door, Peter pays her, and Peter goes on to take the money.[189]

Clearly, Alice should be liable for theft as Peter's accomplice. But it is plausible that theft should be defined to require intention as to the taking of the victim's property.[190] And it seems that Alice does not intend to bring it about that Peter takes the money because her payment is not contingent on

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187. *See, e.g.*, Oates v. State, 627 A.2d 555, 558 (Md. Ct. Spec. App. 1993); State v. McAllister, 366 So. 2d 1340, 1343 (La. 1978).

188. *See, e.g.*, State v. Guloy, 705 P.2d 1182, 1193–94 (Wash. 1985) (en banc); Taylor v. State, 840 N.E.2d 324, 336 (Ind. 2006) (emphasis added) ("[A]n accomplice can be guilty of a greater *homicide* crime than the principal when the accomplice's mens rea is more culpable"); People v. McCoy, 24 P.3d 1210, 1217 n.3 (Cal. 2001) ("[W]e express no view on whether or how these principles apply outside the homicide context.").

189. This example is taken from Charles F. Capps, *Upfront Complicity*, 101 NEB. L. REV. 641, 643–44 (2023).

190. *See, e.g.*, James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study in the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1437 (1994).

whether Peter takes the money.[191] Therefore, it seems that judging Alice by her own mens rea would lead to the wrong outcome.[192]

a. Satisfying the Mens Rea Standard

The first problem with this argument is that, in fact, Alice does intend to bring it about that Peter takes the money. If the accomplice who is paid upfront does her job, then she does it with the intention of bringing it about that the principal completes the crime.[193] Peter does not hire Alice simply to open the door; instead, he hires her to open the door in a way that will promote his objective of taking the money in the bank.[194] For example, if Alice opens the door for a split second and then shuts it again and locks it, or if Alice opens the door while the other guards are standing nearby, then Peter will rightly deny that Alice has kept her side of the deal.[195] Although she opened the door, she failed to do so in a way that promoted his objective of taking the money in the bank.[196]

Given that Alice's job is not just to open the door but to open the door in a way that will bring about the theft, and given that Alice does her job, Alice acts with the intention of bringing about the theft.[197] Whenever someone acts intentionally, she endorses a chain of reasoning in favor of performing the action. The person's intentions are a function of this reasoning. Specifically, for any type of action, "ϕ," a person acts with the intention "of ϕ-ing if and only if the agent represents the action in [her] practical reasoning as something [she] should do in part because the action constitutes ϕ-ing."[198] For example, someone who is sick might perform an action of swallowing a pill, reasoning that the action is something she should do "because it constitutes (1) taking some medicine and thus (2) bringing it about that [she] feels better."[199] In that case, the person acts "with the intentions of (1) taking some medicine and (2) bringing it about that [she] feels better."[200]

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191. *See, e.g.*, Girgis, *supra* note 2, at 469–70; Yaffe, *Intending To Aid*, *supra* note 2, at 10; R.A. Duff, *"Can I Help You?" Accessorial Liability and the Intention To Assist*, 10 LEGAL STUD. 165, 170 (1990).

192. Capps, *supra* note 189, at 643–44.

193. *Id.* at 643–44, 649–55.

194. *Id.* at 643–44.

195. *Id.* at 653.

196. *Id.* at 643–44, 649–55.

197. *Id.* at 643–44.

198. *Id.* at 650.

199. *Id.* at 651.

200. *Id.*

When Alice opens the door, she reasons that her action is something she should do because it constitutes (1) opening the door in a way that will result in Peter taking the money and thus (2) doing her job and thus (3) bringing it about that Peter pays her.[201] To earn her pay, Alice must do what Peter hired her to do; and to do what Peter hired her to do, it is not enough to open the door in any way whatsoever; she must open the door in a way that will result in Peter taking the money. Therefore, Alice acts with the intention of opening the door in a way that will result in Peter taking the money (as well as the further intentions of doing her job and bringing it about that Peter pays her). Alice thus intends that her action will result in Peter taking the money.[202]

What is true of Alice is true of other accomplices who are paid upfront for their assistance. If the accomplice paid upfront does her job, then she acts with the intention of bringing about the principal's criminal objectives.[203] And if the accomplice acts with the intention of bringing about the principal's criminal objectives, then the accomplice has the mens rea required to commit the type of crime for which she should be liable even if that mens rea is intent.[204]

b. Lowering the Mens Rea Standard

Suppose for argument's sake that the previous Section's analysis is unsound. Suppose that, in fact, the accomplice paid upfront does not intend to bring about the principal's criminal objectives. Does it follow that judging the accomplice by her own mens rea would lead to the wrong outcome in cases where the accomplice is paid upfront?

It does not. To see why, notice that sometimes the party paid upfront for her role in the crime is the principal. For example, suppose that Alex pays Paul to program a drone to take Violet's wallet. Paul agrees on the condition that Alex pay him once he has released the drone. That way, his payment will not be contingent on whether the drone succeeds in taking Violet's wallet and escaping undetected. Alex agrees, Paul programs and releases the drone, Alex pays him, and the drone takes Violet's wallet.

Clearly, Paul should be liable for theft as a principal. But if Alice does not intend to bring it about that Peter takes the money in the case where Peter pays Alice as soon as Alice opens the back door to the bank,[205] then neither does Paul intend to bring it about that the drone takes Violet's wallet in the

201. *Id.* at 652–55.
202. *Id.* at 655.
203. *See id.*
204. *See id.* at 660.
205. *See supra* Section II.C.1.

case where Alex pays Paul as soon as Paul releases the drone. Therefore, in the case where Peter pays Alice as soon as she opens the back door to the bank, what follows from the assumption that Alice does not intend to bring it about that Peter takes the money is that theft should not require a mens rea of intention as to the taking of the victim's property.[206] Instead, theft should feature a lower mens rea requirement that Paul satisfies in the case where he programs the drone. But any requirement that Paul satisfies in the case where he programs the drone will be one that Alice satisfies in the case where she opens the door. Therefore, even assuming that Alice does not intend to bring it about that Peter takes the money, Alice should count as committing theft. If Alice does not count as committing theft, then that is only because the relevant jurisdiction has defined theft improperly. Once the jurisdiction has corrected its definition of theft, which it would need to do anyway to hold the right defendants liable as principals, Alice would count as committing theft.

Thus, there is no need for the law to judge the accomplice by the principal's mens rea to reach the right outcome in cases where the accomplice is paid upfront. At most, some jurisdictions might need to fix their definitions of certain crimes.

2. Intending the Principal's Means

The second kind of case is the mirror-image of the first. Sometimes, it seems that the accomplice intends only the principal's end, not the principal's means. So, if committing the crime for which the accomplice should be liable requires intending the principal's means, then it seems that judging the accomplice by her own mens rea would lead to the wrong outcome.

For example, suppose that Alice hires Peter to rob a bank. In the course of robbing the bank, Peter roughs up Violet—a bank teller who refuses to cooperate with his demands—to make an example of her and prompt the other bank employees to cooperate. It seems that not only Peter but also Alice should be liable for battery in addition to robbery, even if only in the alternative due to the doctrine of merger.[207] As the Commentary to the Model Penal Code puts it, the person who aids or abets another in committing a crime should be treated as "an accomplice in whatever means may be employed" by the principal in execution of the crime insofar as those means

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206. *Cf.* Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147, 1152 (2008) (urging the law to drop mens rea requirements of intention).

207. Merger would prevent Peter or Alice from being convicted of both battery and robbery. But all the objection requires is that if for some reason the prosecution decides not to charge robbery, then not only Peter but also Alice should be liable for battery.

are "fairly envisaged in the [crime aided and abetted]."[208] Yet it also seems that Alice did not know or intend that her action would result in an instance of offensive contact with another. And it is plausible that battery should be defined to require knowledge or intention as to the offensive physical contact with the victim. Therefore, it seems that judging Alice by her own mens rea would lead to the wrong outcome.[209]

a. Satisfying the Mens Rea Standard

The first problem with this argument is that, in fact, Alice does have a mens rea of intention as to the offensive physical contact that constitutes the battery. Generally, the law rightly treats an intention to bring it about that if *p* then *q* as sufficient to satisfy a mens rea requirement of intention as to *q*.[210] For example, the law rightly holds both the person who "enters a house intending to go to the dining room and steal the silver cutlery he once saw there" and the person who "enters the house intending to steal silver cutlery if any there be therein" liable for burglary, which requires breaking and entering with the intention of committing a crime.[211]

Here, it is plausible that Alice hires Peter with the intention of bringing it about that if a teller refuses to cooperate, then Peter will rough up the teller. To be sure, Alice may not have mentally contemplated the possibility that a teller might refuse to cooperate. But the content of an actor's intentions is often submerged beneath the actor's conscious awareness.[212] This commonly

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208. MODEL PENAL CODE § 2.06 cmt. 6(b) (AM. L. INST. 1985).

209. I am grateful to Genevieve Lakier for prompting me to consider this objection.

210. Capps, *supra* note 189, at 660; *accord* MODEL PENAL CODE § 2.02(6) (AM. L. INST. 1962) ("When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense."); *cf.* Holloway v. United States, 526 U.S. 1, 9–12 (1999) (citing case law treating conditional intentions like unconditional intentions in support of its holding that a conditional intention satisfies the mens rea requirement in 18 U.S.C. § 2119). Arguably, the general practice of treating a conditional intention like an unconditional intention does and should admit more exceptions than those allowed by the Model Penal Code's qualification for conditions that "negative[] the harm or evil sought to be prevented by the law defining the offense." MODEL PENAL CODE § 2.02(6) (AM. L. INST. 1962); *see, e.g.*, Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. & CRIMINOLOGY 1138, 1142–43 (1997) (offering examples). But even assuming for argument's sake that the conditional intentions in the examples discussed here should fall within the range of exceptions, all that would follow is that battery should not feature a mens rea requirement of intention *simpliciter* but rather a lower mens rea requirement that the conditional intentions satisfy. *See infra* Section II.C.2.b.

211. Capps, *supra* note 189, at 660 (quoting John Finnis, *Conditional and Preparatory Intentions*, *in* 2 COLLECTED ESSAYS: INTENTION AND IDENTITY 220, 224 (2011)).

212. *See* Capps, *supra* note 189, at 650 (noting that the person acting intentionally "need not even be 'occurrently aware of endorsing' a line of reasoning for performing" her action;

happens when the actor's means to her end consist of rote actions that do not require her attention, such as putting one foot in front of another as a means to walking somewhere.[213] Importantly for this Article's purposes, it also happens when an actor outsources the execution of a means to her end to human or nonhuman instruments. Although outsourcing the job enables the actor to turn her attention elsewhere, the actor nonetheless intends to bring it about that the instrument takes the steps that the actor knows are involved in executing the job.

For example, someone who starts the dryer after putting in a load of laundry intends to bring it about that the clothes spin in the drum, even if the person is not thinking about how the dryer works when she presses the "start" button. What matters is that the person knows that the way pressing "start" will cause the clothes to become dry is by bringing it about that the clothes spin in the drum. Thus, the full account that the person endorses of why her action is worth performing includes the fact that the action constitutes bringing it about that the clothes spin in the drum.[214] And as noted above, when a person treats the fact that her action constitutes doing something as part of the explanation for why she should perform the action, the person acts with the intention of doing that thing.[215] The fact that the person is not dwelling on a particular detail of the explanation at the time does not remove that detail from the contents of her intentions.[216]

Indeed, one reason why people outsource certain tasks—besides efficiency—is that they find attending to what the tasks involve unpleasant. Sometimes the discomfort is unrelated to a sense of guilt. For example, a person might believe that compassion requires euthanizing a suffering animal yet asks someone else to do it and averts her eyes. But often the discomfort is just guilt. For example, the mafia boss with a need to murder an innocent

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"[u]sually, she is merely conscious of doing so in the sense that, if asked what her reasons are for performing the action, she can answer without having to observe herself" (internal quotations omitted)).

213. Charles F. Capps, *Intention in Action*, *in* THE OXFORD HANDBOOK OF ELIZABETH ANSCOMBE 33, 50 (Roger Teichmann ed., 2022).

214. *Cf.* John Finnis, *Intention and Side Effects*, *in* 2 COLLECTED ESSAYS: INTENTION AND IDENTITY 173, 176 (2011) ("What one does is done 'with intent to X' . . . if X is . . . part of one's plan either as its end (or a part of its end, or one of its ends) or as a means." (emphasis omitted)).

215. *See supra* note 198 and accompanying text.

216. *See, e.g.*, Capps, *supra* note 213, at 35–36, 50 (noting that the actor's endorsement of the practical reasoning underlying her intentions may be implicit and that the actor's attention may be elsewhere); G.E.M. ANSCOMBE, INTENTION 79–80 (2d ed. 1963) (noting that if the account of the practical reasoning underlying an actor's intentions "were supposed to describe actual mental processes, it would in general be quite absurd," as "it would be very rare for a person to go through all the steps" of the reasoning).

person might order his subordinate to do the deed because he does not want to "get his hands dirty." The complicity of high-ranking officials in large-scale human-rights abuses carried out by low-ranking officials is often like this. The high-ranking officials see to it that the politically expedient program of human-rights abuses continues, but at a distance so that it does not prick their consciences.

In any event, whatever a person's motive for outsourcing part of a larger project to a human or nonhuman instrument, the person intends to bring it about that the instrument take the steps that the person knows are involved in the part that she is outsourcing to the instrument.[217] Thus, in hiring Peter to execute the bank robbery, Alice intended to bring it about that Peter would take the steps that Alice knows are involved in robbing a bank. And surely Alice knew that part of robbing a bank is physically intimidating the bank employees, including by pushing around uncooperative employees if necessary. If so, then in hiring Peter to rob the bank, Alice acted with the intention of bringing it about that if a bank teller refused to cooperate, then Peter would rough up the teller.

The situation would be different if the crime that Peter had committed in furtherance of the robbery was not something normally done as part of robbing a bank. Then it would not be the case that Alice intended to bring it about that Peter committed the other crime, because the other crime would not be a step that Alice knew would be involved in the job that she outsourced to Peter. For example, suppose that for complicated reasons unknown to Alice, Peter had to embezzle funds to obtain the equipment that he would need to execute the robbery. In that case, Alice would lack the intention as to the transfer of the funds that is, and plausibly should be, required to commit embezzlement. Therefore, judging Alice by her own mens rea would mean acquitting Alice of embezzlement. And this seems right.

b. Lowering the Mens Rea Standard

Not convinced? Then consider once again that the problem extends to principals, too. Suppose that Paul is leading a casino heist that will culminate in his taking millions of dollars in cash from the casino's vault. But he needs a way to stop a security guard from opening a door in the event that the guard happens to walk that way. Paul's accomplice supplies Paul with a remote control and assures Paul that if he aims it at the door and presses a button, then it will prevent anyone from opening the door. Initially, Paul is under the impression that the remote control works by locking the door, but later he

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217. *See* Capps, *supra* note 213, at 35–36.

learns that the remote control works by arming the door with a powerful electric shock that will paralyze anyone who touches the door's handle. Suppose that Paul decides to proceed with the plan notwithstanding what he has learned about how the remote control works. After Paul uses the remote control to secure the door, the guard happens to walk down the hallway and try the door handle. Upon touching the handle, the guard is paralyzed by the electric shock.

Surely, Paul should be liable for battery as a principal. It should be no defense for Paul to protest that he did not intend to bring it about that the door handle would electrocute the guard; at most, he intended only to bring it about that the door handle would electrocute the guard if the guard tried to open the door. The law should treat the conditional intention the same as the unconditional intention. Likewise, it should be no defense for Paul to protest that he did not even intend to bring it about that the door handle would electrocute the guard if the guard tried to open the door; at most, he (1) intended to bring it about that the remote control would stop the guard from opening the door if the guard tried to open the door and (2) knew (but did not intend) that the remote control would accomplish this task by electrocuting the guard. If Paul were right, then he would lack a mens rea of intention as to the offensive physical contact with the guard's body. But that would simply show that battery should not require a mens rea of intention as to the offensive physical contact with the victim's body. Instead, it should require a lower mens rea requirement that Paul satisfies. And any requirement that Paul satisfies in this case will be one that Alice satisfies in the case where Alice hires Peter to rob the bank and Peter roughs up the teller. Therefore, even assuming that Alice lacks a mens rea of intention as to Peter's battery of the teller, Alice should count as committing battery. If Alice does not count as committing battery, then that is only because the relevant jurisdiction has made an error in its definition of battery, one that it would need to correct anyway to hold the right defendants liable as principals.

Once again, therefore, it is unnecessary for the law to judge the accomplice by the principal's mens rea to hold the accomplice liable for the right type of crime. At most, some jurisdictions might need to fix their definitions of certain crimes.

III. CONCLUSION

According to John Gardner, "morality can be divided into two parts: principalship and complicity."[218] One way to be guilty of something is to have done it; the other way is to have aided or abetted it. If that were true, then holding the accomplice liable for the principal's conduct might make sense. But the notion that "morality cleaves in two"[219] strikes me as double vision. In reality, there is just one thing it is to be guilty of something, and that is to have done it; "guilt" for someone else's conduct is to be analyzed as guilt for having assisted, encouraged, or otherwise contributed to bringing about the other's conduct.[220] Accordingly, the law should hold the accomplice liable not for the principal's conduct but for the accomplice's own conduct of assisting, encouraging, or otherwise contributing to bringing about the principal's conduct.

This reform would reconcile liability for accomplices with first principles, completing a process of doctrinal evolution that is already underway.[221] And it would have a real and positive impact on how cases are decided. Abolishing derivative liability for accomplices would not prevent the law from reaching the right outcome in those cases that the law is already getting right. But abolishing derivative liability for accomplices would enable the law to reach the right outcome in those cases that the law is currently getting wrong.

Rethinking liability for accomplices in nonderivative terms would also reset the agenda for reform. The questions that have dominated the scholarly debate for decades would become moot. If derivative liability for accomplices were abolished, then determining what its requirements should be would no longer be necessary. The law would no longer need to decide, for example, what mens rea a defendant should need to have as to the principal's conduct to derive liability for it as an accomplice, or whether a defendant should need to be causally responsible for the principal's conduct to derive liability for it as an accomplice.

Instead, the law could refocus on the questions that should have occupied its attention all along, namely, questions about what kinds of actions the ends of the criminal law justify punishing a person for performing, and how much and what kinds of punishment the ends of the criminal law justify imposing for those actions. Should theft have a mens rea requirement of intention as to

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218. Gardner, *supra* note 134, at 128.

219. *Id.* at 141.

220. *See* Kaiserman, *supra* note 14, at 126 (suggesting that the law should recognize "just one way to be guilty of a crime: by actually committing it").

221. *See* sources cited *supra* note 14.

the taking of the victim's property?[222] What about battery—should recklessness as to the offensive physical contact with the victim be sufficient for liability?[223] Should the criminal law treat counterfactual dependence as necessary for causation (or for metaphysical dependence more generally, whether causal or constitutive)?[224] When should risking a harm, without knowing or intending that it will occur, give rise to criminal liability,[225] and should it matter whether the harm actually materializes?[226] Should the criminal law punish attempts (or at least "last-act" attempts, those where the defendant did all she could to complete the crime) less severely than completed crimes?[227]

The implication of this Article's argument is that if the law answers questions such as these correctly, which it must do anyway to convict the right defendants as principals, then liability for accomplices will take care of itself. It is irrelevant to retribution, deterrence, and the other ends of criminal punishment whether the causal route from the defendant's action to the criminal result runs through the agency of another person. Accordingly, the criminal law should, all else being equal, treat principals and accomplices the same. This means that the answers to questions about the scope and severity of liability that the law should adopt for principals are also the answers that the law should adopt for accomplices. Thus, the way to reform liability for accomplices is to not tinker with rules of derivative liability that apply specially to accomplices. Instead, it is to ensure that the rules governing ordinary principal liability—that is, a person's liability for her own actus reus and mens rea—are properly calibrated and then to apply these rules to accomplices too, disposing of derivative liability altogether.

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222. *Cf. supra* Section II.C.1.b.

223. *Cf. supra* Section II.C.2.b.

224. *See, e.g.*, Richard W. Wright, *The NESS Account of Natural Causation: A Response to Criticisms*, *in* PERSPECTIVES ON CAUSATION 13 (R. Goldberg ed., 2011) (criticizing the counterfactual test for causation and defending an alternative account); MOORE, *supra* note 13, at 371–512 (same, but proposing a different alternative).

225. *See generally* FINDLAY STARK, CULPABLE CARELESSNESS: RECKLESSNESS AND NEGLIGENCE IN THE CRIMINAL LAW (2016); Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597 (2001); Alexander, *supra* note 4; DUFF, *supra* note 25, at 139–79.

226. *Compare* Alex Walen, *Crime, Culpability, and Moral Luck*, 29 LAW & PHIL. 373, 380–82 (2010) (reviewing ALEXANDER & FERZAN, *supra* note 29) (yes), *and* MOORE, *supra* note 13, at 20–33 (yes), *with* ALEXANDER & FERZAN, *supra* note 29, at 192–93 (no), *and* Morse, *supra* note 14, at 393–95 (no).

227. *Compare* Thomas Bittner, *Punishment for Criminal Attempts: A Legal Perspective on the Problem of Moral Luck*, 38 CAN. J. PHIL. 51 (2008) (yes), *and* Michael Davis, *Why Attempts Deserve Less Punishment Than Completed Crimes*, 5 LAW & PHIL. 1 (1986) (yes), *with* ALEXANDER & FERZAN, *supra* note 29, at 192–93 (no), *and* Morse, *supra* note 14, at 378–93 (no).