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Introduction

THE TOPIC

Naïvely, one would think that there is one thing it is to be guilty of a crime, namely, having committed it. I do not mean that the one thing it is to be *declared* guilty of a crime is to have committed the crime. A criminal trial can result in a false conviction or a false acquittal, and some who commit crimes are never arrested to be put on trial in the first place. I mean that the one thing it is *actually* to be guilty of a crime is to have committed the crime. In other words, the only basis for convicting a criminal defendant of the crime with which she is charged is the fact that she committed it.

The common law (that is, the legal tradition developed over time by courts) in the American state and federal systems is generally understood to say otherwise: In fact, there are *two* things it is to be guilty of a crime. One can be guilty of a crime in virtue of having committed it, but one can also be guilty of a crime in virtue of having “aided or abetted” it. Contrary to what one would naïvely think, then, there are two distinct bases for convicting a defendant of a crime: (1) the fact that she committed the crime or (2) the fact that she aided or abetted the crime. Someone who is guilty of a crime in virtue of having committed it is called a “principal,” and the form of liability that committing a crime gives rise to is called “principal liability.” Someone who is guilty of a crime in virtue of having aided or abetted it is called an “accomplice,” and the form of liability that aiding or abetting a crime gives rise to is called “accomplice liability.” Though “it might seem like a gross miscarriage of justice” for the law to “invite[] the state to convict people of crimes they did not commit,” the conventional understanding is that “it is black-letter law: anyone deemed an ‘accomplice’ to a crime can be convicted of it as if he had perpetrated it himself” (Girgis 2013, 462).

The notion that the law recognizes a basis for convicting a defendant of a crime other than the fact that she committed it is, on its face, surprising. I do not mean that it is surprising that the law

generally treats principal and accomplice as guilty of the same crime.¹ This seems right. For example, suppose that Alice pays Peter to transfer Violet’s wallet into Alice’s purse while Alice keeps Violet distracted. *Prima facie*, it seems that Alice is, like Peter, guilty of theft (as opposed to, say, some distinct crime of “aiding or abetting theft”). Of course, principal and accomplice may differ in culpability: sometimes, the principal will be more culpable; other times, the accomplice. But the law rightly reserves consideration of such differences in culpability for the sentencing stage of the trial, once liability has been established (see Sarch 2018). Whatever might be going on in the life of one or the other that speaks in favor of imposing a lighter sentence on him or her, it seems that both Peter and Alice are guilty of theft.

What is surprising, then, is not the notion that the law treats the paradigmatic accomplice as guilty of the *type of crime* whose commission by the principal she aids or abets; rather, it is the notion that the law treats the paradigmatic accomplice as guilty of the *token criminal commission* that she aids or abets. Naïvely, one is inclined to say of Alice that, like Peter, she is guilty of theft because, like Peter, she committed theft. Although only one thing was stolen, it was stolen because of the (coordinated) larcenous acts of two—just as the death of someone from two gunshot wounds, inflicted simultaneously by different shooters, is the result of two murderous acts. True, there is a sense in which the principal but not the accomplice actually “does” the deed: it is Peter, not Alice, who actually lays hold of the wallet. But neither does Peter “do” the deed in this sense if he programs a drone to take Violet’s wallet, yet he would commit theft nonetheless. Evidently, what it is to commit a crime is such that it is possible to commit a crime by means of an instrument rather than by actually “doing” the deed oneself.

¹ Though not always. See, e.g., *People v. McCoy*, 24 P.3d 1210, 1213–17 (Cal. 2001). I will discuss cases in which principal and accomplice are guilty of different crimes in Chapter 4.

So why does the common law treat the accomplice as guilty of the principal's criminal commission rather than of her own criminal commission? The conventional answer, articulated in an influential article by Sanford Kadish (1985), is that the common law recognizes a general limit, called the "Doctrine of Intervening Causes," on what can count as committing a crime. Roughly, the Doctrine of Intervening Causes provides that, if P would otherwise have committed a crime only in virtue of the fact that P's ϕ -ing resulted in q , and the causal chain running from P's ϕ -ing through q includes the voluntary action of another agent, then it is not the case that P committed the crime. As Kadish (1985, 327) points out, the Doctrine of Intervening Causes implies that the paradigmatic accomplice does not commit the crime of which she is guilty. Take the case above in which Alice pays Peter to transfer Violet's wallet into Alice's purse. If Alice were to have committed theft, then it would be partially in virtue of the fact that, as a result of Alice's hiring of Peter and distraction of Violet, Violet's wallet was taken. But the causal chain running from Alice's hiring of Peter and distraction of Violet through the taking of Violet's wallet includes as its last link Peter's voluntary action of taking Violet's wallet. Therefore, under the Doctrine of Intervening Causes, Alice does not commit theft. The only commission of theft in the vicinity of which she can be guilty is Peter's.

According to the common law as it is conventionally understood, then, it matters whether the instrument by which a defendant brings about a crime includes the voluntary action of another. The reason that Peter commits theft if he programs a drone to take Violet's wallet, but Alice does not commit theft if she arranges for Peter to take Violet's wallet, is that the drone does not take the wallet voluntarily whereas Peter does.

But is this rationale for treating having committed a crime and having aided or abetted a crime as distinct bases for a criminal conviction plausible? No doubt there is an important difference between the nonvoluntary "actions" of a drone and the voluntary actions of a human being. But it is not obvious why this difference should have the relevance that the Doctrine of Intervening Causes

assigns it. Consider the controversy that Elizabeth Anscombe ([1957] 1981, 70) generated when she accused President Truman of “commit[ting] massacres” by ordering the atomic bombings of Hiroshima and Nagasaki. The accusation excited many criticisms. As far as I know, however, they all disputed the idea that the bombings could be nontendentiously described as “massacres.” I do not know of anyone who seriously argued that although the bombings were massacres, Truman did not *commit* them because in each case it was a pilot rather than Truman himself who actually dropped the bomb.

That said, Kadish (1985, 329–36) does offer an argument (although he himself withholds judgment on its merits) for the Doctrine of Intervening Causes. And others (e.g., Duff 2007) have offered other arguments in defense of the supposed common-law tradition of treating having committed a crime and having aided or abetted a crime as distinct bases for a criminal conviction. We will consider these arguments in Chapters 3–7. In the meantime, let us keep an open mind. Perhaps the common law is right to recognize two things it is to be guilty of a crime, (1) to have committed it and (2) to have aided or abetted it.

However, the doubts that we have raised should make us open to two other, more discomfiting possibilities. Perhaps the naïve thought that not only Peter but also Alice committed theft, and that if what happened at Hiroshima and Nagasaki were massacres then they were massacres that Truman committed, is right. Perhaps there really is just one thing it is to be guilty of a crime, namely, to have committed it. If so, then the conception of what it is to be guilty of a crime that the common law is generally understood to embody is flawed. And that would mean that either the common law is generally misunderstood or the common law is flawed.

In sum, we have three views on the table: (1) the common law does and should recognize two things it is to be guilty of a crime, (2) the common law does but should not recognize two things it is to be guilty of a crime, and (3) the common law does not and should not recognize two things it is to

be guilty of a crime. (Of course, a fourth position is logically possible, namely, that the common law does not but should recognize two things it is to be guilty of a crime, but I take it that this position is not plausible.)

THE STAKES

At this point, one might question how much is at stake in sorting out which of these three views is correct. After all, state legislatures have largely supplanted the common law by passing statutes that specify necessary and sufficient conditions for accomplice liability (in American law, statutes take precedence over the common law developed by courts). And even to the extent that state legislatures have merely codified what the common law already held, it is not necessarily a problem if their statutory definitions of accomplice liability reflect a flawed conception of what it is to be guilty of a crime. What matters, it seems, is not whether the conception of what it is to be guilty of a crime embodied in the law of accomplice liability is true, but whether it is extensionally adequate—that is, whether the law imposes accomplice liability on all and only those who are actually guilty of crimes as accomplices. Consider an analogy: Suppose that Carla thinks that it is in virtue of being some of Bob’s favorite drink that a substance is water. Clearly, Carla suffers from a false conception of what it is to be water: in fact, it is in virtue of having the molecular composition H_2O that a substance is water. But if water does happen to be Bob’s favorite drink, and all we care about is that Carla has an extensionally adequate test for whether something is water, a test that equips her to answer questions of the form “Is this water?” correctly, then we need not bother correcting Carla. Similarly, assuming that the law contains an extensionally adequate test for whether someone is guilty of a crime, and all we care about is that the law places liability where and only where it should, then we need not get worked up over questions about whether the test reflects a true conception of what it is to be guilty of a crime.

The problem is that courts, legislatures, and scholars cannot seem to agree on what an extensionally adequate test for whether someone is guilty of a crime as an accomplice would look like. Consider, for example, the question what mindset a defendant must have had with respect to the principal's commission of the crime if the defendant is to be guilty of the crime as an accomplice. That is, what constitutes the "mens rea" or "guilty mind" of an accomplice? "Courts and commentators are notoriously puzzled" by this question (Yaffe 2014, 1).

According to some American jurisdictions, the answer is intention: a defendant is guilty of a crime as an accomplice only if she intended to bring it about that the principal commits the crime. For example, Missouri law conditions accomplice liability on the defendant having acted "with the purpose of promoting the commission of [the crime]."²

According to other American jurisdictions, the answer is knowledge: a defendant is guilty of a crime as an accomplice only if she knew that she was bringing it about that the principal commits the crime, but she need not have intended to bring it about. For example, Washington law conditions accomplice liability on the defendant having acted "[w]ith knowledge that [her action] will promote or facilitate the commission of the crime."³

Still other American jurisdictions⁴ follow the Model Penal Code's⁵ (1962) approach, which distinguishes among the conduct that constitutes the principal's commission of the crime and any results or circumstances in virtue of which that conduct constitutes commission of a crime. For example, if a driver's conduct of driving 100 miles per hour is to constitute manslaughter, then it will be partially in virtue of the fact that a person whom she hit died as a result. The Model Penal Code

² Mo. Rev. Stat. § 562.041(1)(2).

³ Wash. Rev. Code § 9A.08.020(3)(a).

⁴ See, e.g., Haw. Rev. Stat. §§ 702-222, 702-223.

⁵ The Model Penal Code is a mock criminal code published by the American Law Institute in 1962 as a model for states to adopt. The Model Penal Code has been tremendously influential: since 1962, many states have revised their criminal codes to align closely with it.

(1962, § 2.06(3)–(4)) conditions accomplice liability on the defendant having acted (1) with the intention of bringing about the *conduct* that constitutes the principal’s commission of the crime and (2) with whatever mindset with respect to any *results* in virtue of whose occurrence that conduct constitutes the commission of a crime that a defendant must have to be liable for the crime as a *principal*. For example, principal liability for manslaughter requires recklessness—which the Model Penal Code (1962, § 2.02(2)(c)) defines as “conscious[] disregard[] [of] a substantial and unjustifiable risk”—with respect to the death of the victim. Under the Model Penal Code, then, to be liable as an accomplice to the manslaughter committed by the driver, one must have (1) intended to bring about the driver’s conduct of dangerously fast driving and (2) consciously disregarded the substantial and unjustifiable risk that someone would die as a result. Notably, the Model Penal Code is silent regarding what mindset the defendant must have had with respect to any circumstances in virtue of which the principal’s conduct constitutes a crime to be guilty as an accomplice (for a discussion of this point, see Mueller 1988, 2178–80).

Finally, some jurisdictions build on one of the approaches above by providing that one who is liable as an accomplice to a crime C_1 under one of those approaches is also liable as an accomplice to any crime C_2 that (1) is committed in furtherance of C_1 and (2) is a “natural and probable consequence” of undertaking to commit C_1 .⁶ A few jurisdictions even drop the condition that C_2 must have been committed in furtherance of C_1 .⁷

Scholars, meanwhile, have weighed in with widely various and sometimes quite complicated proposals. According to Gideon Yaffe (2014, 19), a defendant is guilty of a crime as an accomplice only if she acted with an intention “that constitutes a commitment of non-reconsideration with respect to the commission of [the crime].” Sherif Girgis (2013, 475–76) argues that a defendant is guilty of a

⁶ Wis. Stat. § 939.05(2)(c); see also, e.g., Kan. Stat. § 21-3205(2).

⁷ See, e.g., Ariz. Rev. Stat. § 13-303(A)(3). For a comprehensive overview of state-law approaches to accomplice liability’s mens rea requirements, see Decker (2008).

crime as an accomplice only if she both (1) intended for the principal to intend to perform the conduct that constitutes the principal's commission of the crime and (2) did not "expect or intend that [the principal] [would] fail to commit it" (Girgis leaves open what mindset the defendant must have had with respect to the circumstances and results in virtue of which the principal's conduct constitutes a crime). Alexander Sarch (2015, 164–65) proposes that a defendant is guilty of a crime as an accomplice only if she was "insufficiently motivationally repelled by [the principal's crime]." And Heidi M. Hurd and Michael S. Moore (2016, 162–63) argue that "the mens rea for accomplices should be exactly the same as it is for . . . principals."

Worse, the disagreement does not end with questions about the mens rea of accomplice liability. For example, courts and scholars also disagree, even if less "notoriously" (Yaffe 2014, 1), about whether making a causal contribution to the crime is a necessary condition for being guilty of the crime as an accomplice. Defending the view often associated with *State ex rel. Attorney General v. Tally*,⁸ Christopher Kutz (2011, 154–58; 2007) argues that the answer is "no." Whereas Joshua Dressler (2008, 447) characterizes the notion that accomplice liability for serious offenses should require anything less than a major causal contribution as "jaw-dropping."

In short, it is not difficult to understand why exasperated commentators have characterized the law of accomplice liability as "vexing" (Weisberg 2000, 228), a "disgrace" (Dressler 2008, 428), tied in a "Gordian knot" (Hurd and Moore 2016), stalled in a "historic standoff" (Girgis 2013, 473), and suspended in a "state of chaos" (Weiss 2002, 1351).

Presumably, consensus on what the conditions for accomplice liability should be has been so "elusive" (Sarch 2015) because no one can agree about what it is to be guilty of a crime as an accomplice. And one candidate explanation for why no one can agree about what it is to be guilty of a crime as an accomplice is that the debate has proceeded almost entirely on the assumption,

⁸ 15 So. 722 (Ala. 1894).

supposedly inherited from the common law, that being guilty of a crime as an accomplice must consist in something quite other than having committed the crime. But if this is the diagnosis for the widespread confusion about accomplice liability, then the cure is to understand why this assumption is incorrect.

So, the stakes of adjudicating among the three views distinguished above are more than merely theoretical. Getting to the bottom of the matter may be the key to resolving longstanding debates about whom the law should and should not convict as an accomplice.

THE ARGUMENT

Recall what the three views on the table are. According to the first, the common law should and does recognize two things it is to be guilty of a crime. According to the second, the common law does but should not recognize two things it is to be guilty of a crime. According to the third, the common law neither should nor does recognize two things it is to be guilty of a crime.

As I have noted, the first view is the standard view (henceforth, that is what I will call it: the “Standard View”). Occasionally, it is defended (see, e.g., Duff 2007). Usually, however, it is accepted uncritically: most scholarship simply takes for granted that the law is right to recognize that there are two things it is to be guilty of a crime and wades straight into debates about what the distinctive conditions for accomplice liability should be. As far as I know, the only scholar to stake out an alternative to the Standard View is Michael S. Moore (2009, 280–323; 2007), who defends a version of the second view.⁹ I am aware of no one who has so much as considered the third view. Yet it is the third view that I believe is correct. In this dissertation, I will attempt to explain why.

⁹ Recently, Heidi M. Hurd has joined Moore to defend key aspects of his theory (see Hurd and Moore 2016). Baruch Weiss (2002, 1355–56, 1486–88) comes close to defending the second view, but ultimately concludes that the regime that governs liability for principals “has to be modified” to fit accomplices. Finally, it is not even clear that Moore himself defends the second view insofar as he (2009, 282–83) treats the liability of conspirators for crimes committed by their coconspirators under *Pinkerton v. United States*, 328 U.S. 640 (1946), as a distinct form of criminal liability and does not tell us whether he thinks that *Pinkerton* was right to recognize

My argument will proceed as follows:

In Chapter 1, I will argue that criminal liability is “formally” incurred *by* an agent *for* an exercise of her agency, in the sense in which some argue that desire is “formally” of the good. On this view, criminal liability otherwise than *for* an agent *because of* an exercise of her agency is not just normatively undesirable; it does not even make sense. That is, the notion of criminal liability otherwise than for an agent because of an exercise of her agency is conceptually confused. The only thing it could possibly be to be guilty of a crime—not just the only thing it is in, say, the ideal legal system to be guilty of a crime—is to have committed it oneself. I will defend the claim that criminal liability is formally incurred by an agent for an exercise of her agency by deriving it from the function of the criminal law. I will then explain why, if this claim is true, then when courts impose liability on the accomplice for what is in fact the principal’s exercise of agency, they are indulging the legal fiction that the principal’s exercise of agency is the accomplice’s—just as when courts impose liability on a corporation for its officers’ or employees’ exercises of agency, they are indulging the legal fiction that these are the corporation’s exercises of agency.

In Chapter 2, I will offer a back-up argument for the claim that criminal liability is formally incurred by an agent for an exercise of her agency, in case some remain unconvinced by my argument that it follows from the function of the criminal law. I will show that the claim that criminal liability is formally incurred by an agent for an exercise of her agency unites and explains the major common-law doctrines of criminal liability, including the Voluntary Act Requirement, the Fault Principle, and the requirement of proximate causation. Without the claim that criminal liability is formally incurred by an agent for an exercise of her agency, it is difficult to make sense of these doctrines as amounting to anything other than a grab bag of ad hoc rules. Chapter 2 will conclude my positive argument for

it. In this Dissertation, I will set *Pinkerton* liability aside and focus only on principal liability and accomplice liability. Within this focus, Moore counts as a defender of the second view.

this Dissertation's thesis that the common law not only should but does recognize only one thing it is to be guilty of a crime, namely, to have committed it. I will devote the remainder of the Dissertation to diagnosing the mistakes that might prevent one from realizing that accomplices commit the crimes of which they are guilty. Presumably, it was because one of these mistakes took root in the common law that courts resorted to the legal fiction of treating the principal's exercise of agency as the accomplice's in order to provide a way to convict accomplices of the crimes of which they are guilty.

In Chapter 3, I will examine what I will call the "Conduct Crimes Objection" to the claim that accomplices commit the crimes of which they are guilty. The Conduct Crimes Objection concerns crimes such as theft, battery, rape, conspiracy, and perjury whose commission seems to require performing conduct of a certain type. It is easy to produce examples in which someone is guilty of such a crime as an accomplice despite not having performed conduct of the type that it seems that commission of the crime requires. Apparently, such a defendant should be held liable on grounds other than the fact that she committed the crime. In response, I will deny that to commit, say, battery, one must intentionally hit the victim oneself. Instead, I will argue, one must intentionally ϕ , where " ϕ -ing" is a description of one's action that becomes true of it in virtue of the fact that the victim was hit. Therefore, the accomplice who intentionally *brings it about that the principal hits the victim* commits battery, even though she does not herself hit the victim.

In Chapter 4, I will examine what I will call the "Overinclusivity Objection" to the claim that accomplices commit the crimes of which they are guilty. The Overinclusivity Objection is one of two arguments (I will examine the other in Chapter 7) that purport to show that the Doctrine of Intervening Causes states a limit on who counts as having committed a crime. As we saw above, the Doctrine of Intervening Causes implies that it is not the case that the paradigmatic accomplice committed the crime of which she is guilty. Therefore, if the Doctrine of Intervening Causes states a limit on who counts as having committed a crime, then the paradigmatic accomplice is guilty of a

crime that she did not commit. I will respond to the Overinclusivity Objection by undermining its argument that the Doctrine of Intervening Causes states a limit on who counts as having committed a crime.

In Chapter 5, I will introduce what I will call the “Mens Rea Objection” to the claim that accomplices commit the crimes of which they are guilty. According to the Mens Rea Objection, the mens-rea requirements in virtue of satisfying which someone is guilty of a crime as an accomplice are different from the mens-rea requirements in virtue of satisfying which someone commits a crime.¹⁰ Three classes of cases motivate this idea: (1) cases in which the accomplice is paid upfront, (2) cases in which the accomplice knows that the principal is up to no good but does not know the specific type of crime that the principal is going to commit, and (3) cases in which the principal foreseeably commits one crime in the course of carrying out the accomplice’s encouragement or instruction to commit another crime. In all these cases, it seems, the accomplice need not have acted with the intention of bringing it about that the principal commits her crime. Yet we can imagine cases in each of the three categories in which the crime of which the accomplice is guilty is one that she did not commit unless she acted with the intention of bringing it about that the principal commits her crime. It seems that the accomplice in such cases is guilty of a crime that she did not commit. In Chapter 5, I will address the second and third classes of cases. Regarding the second class of cases, cases in which the accomplice is in the dark as to what exactly the principal is up to, I will argue that the accomplice acted with the requisite intention provided that she intended to further the principal’s objectives in the knowledge that they are crooked. She need not have intended to further the principal’s objectives under a description that identifies the specific type of crime that the principal has in prospect.

¹⁰ Although the Mens Rea Objection emerges most clearly from discussions in the scholarly literature (see, e.g., Sarch 2015, 140; Yaffe 2014, 10; Girgis 2013, 469–70), it finds some support in case law as well. See, e.g., *People v. Mendoza*, 959 P.2d 735, 739 (Cal. 1998) (“The mental state necessary for conviction as an aider and abettor[] is different from the mental state necessary for conviction as the actual perpetrator.”).

Regarding the third class of cases, cases in which the principal foreseeably commits crime C_2 in the course of carrying out the accomplice's encouragement or instruction to commit crime C_1 , I will argue that implicit in an instruction to ϕ is an instruction to do what ϕ -ing normally requires. Hence, if it is normal in the course of committing crime C_1 to commit crime C_2 , then the principal is executing on the accomplice's intentions not only by committing C_1 but also by committing C_2 in the course of committing C_1 .

In Chapter 6, I will address the remaining class of cases, cases in which the accomplice is paid upfront. I will argue that the action of the accomplice who is paid upfront exemplifies two orders of intention. In playing a part in the crime, the accomplice is acting with the intention of bringing it about that the principal commits the crime. But the accomplice plays a part in the crime—that is, acts with the intention of bringing it about that the principal commits the crime—with the intention of bringing it about that the principal pays her. So, her action exemplifies two orders of intention: she acts with the first-order intention of bringing it about that the principal commits the crime, and she does that—acts with the first-order intention of bringing it about that the principal commits the crime—with the second-order intention of bringing it about that the principal pays her. I will conclude that the accomplice who was paid upfront exemplified the intention required to count as having committed the crime of which she is guilty.

Finally, in Chapter 7, I will examine what I will call the “Free Will Objection” to the claim that accomplices commit the crimes of which they are guilty. The Free Will Objection is the argument that Kadish (1985) claims lies behind the common law's treatment of aiding or abetting as a distinct basis for a criminal conviction. Like the Overinclusivity Objection, it purports to show that the Doctrine of Intervening Causes states a limit on who counts as having committed a crime. According to Kadish (1985, 329–36), the Doctrine of Intervening Causes reflects the presupposition, foundational to the criminal law, that voluntary actions are libertarian-free, which Kadish takes to entail being uncaused.

In response, I will argue that the criminal law should not treat voluntary actions as uncaused, even if it should treat voluntary actions as libertarian-free (*pace* Kadish, an action's being libertarian-free does not entail its being uncaused). I will close Chapter 7 by summarizing the implications of the Dissertation's arguments for ongoing debates about what the necessary and sufficient conditions for accomplice liability should be.

1. What Is It to Be Guilty of a Crime?

INTRODUCTION

In this Chapter and the next, I will present my positive argument for this Dissertation's thesis that the common law not only should but does recognize only one thing it is to be guilty of a crime, namely, to have committed it. According to the "guise-of-the-good" thesis, something is eligible to be the object of desire in virtue of the fact that it is in some respect good. Similarly, one might think that something is eligible to be the object of vision in virtue of the fact that it is colored. In the same way, I will argue, a pair $\{A, \phi\}$ is eligible to be *for whom* and *because of what* the criminal law prescribes punishment in virtue of the fact that ϕ was an exercise of A's "agency," that is, something that A "committed." In other words, just as one might think that desire is "formally" of the good, and vision is "formally" of what is colored, so criminal liability is "formally" incurred *by* an agent *for* an exercise of her agency. Note that this claim is not equivalent to the claim made by Susan Dimock (2012) and Vincent Chiao (2009) that a criminal law that prescribed punishment otherwise than for agents because of the way they exercised their agency would be a bad criminal law. The claim that I will defend is that such a law would not really be a "criminal" law at all.

I do not mean that the law cannot impose criminal liability on A for ϕ -ing unless ϕ -ing is *in fact* an exercise of A's agency—any more than defenders of the guise-of-the-good thesis think that one cannot desire something unless that thing is *in fact* good. Instead, I mean that the law cannot impose criminal liability on A for ϕ -ing except insofar as the law *treats* ϕ -ing as an exercise of A's agency—just as defenders of the guise-of-the-good thesis think that one cannot desire something except insofar as one *perceives* that thing as good. Thus, it is no objection to the guise-of-the-good thesis that one can desire something that does not exist or exists but is not good in the way that one thinks. Similarly, it

is no objection to the claim that criminal liability is formally incurred by an agent for an exercise of her agency that, for example, corporations may be held criminally liable for acts of their officers and employees. Corporate criminal liability rests on the legal fiction that corporations are “persons” who “act” through their officers and employees. Thus, when a court imposes criminal liability on a corporation for what its officers or employees did, the court is treating the acts of the corporation’s officers and employees as exercises of the corporation’s agency. Likewise, it is no objection to the claim that criminal liability is formally incurred by an agent for an exercise of her agency that a technologically primitive society in which everyone believes that what are in fact alien robots are rational aliens could enact a criminal law that prescribes punishment for certain “behaviors” of these “aliens.” When a court in this society imposes criminal liability on a robot for “misbehaving,” the court is treating the robot’s activity as an exercise of its agency.

I will defend the claim that criminal liability is formally incurred by an agent for an exercise of her agency as follows. In Part I, I will offer an account of “agency” in the relevant sense, the sense familiar from the philosophy of action (see, e.g., Davidson [1971] 2001). Of course, there is much more to say about this topic than I could hope to say here. My goal is merely to offer enough of an account to set up the two arguments that I will offer for the claim that criminal liability is formally incurred by an agent for an exercise of her agency. I will offer the first of those arguments in Part II, where I will derive the claim that criminal liability is formally incurred by an agent for an exercise of her agency from the function of the criminal law. The second argument I will postpone until the next Chapter. In Part III of this Chapter, I will explain why the claim that criminal liability is formally incurred by an agent for an exercise of her agency implies that the common law not only should but does recognize only one thing it is to be guilty of a crime, namely, to have committed it. I will suggest that we should understand courts’ statements that an accomplice is liable for the principal’s conduct as admissions that they are indulging in a legal fiction when adjudicating criminal charges against an

accomplice. That is, they are holding the accomplice liable for what they are treating as her own exercise of agency, even though it is really the principal's exercise of agency. I will close by remarking on why the insight that the current law of accomplice liability involves a legal fiction matters for sorting out what the law of accomplice liability should be.

I. AGENCY

In this Part, I will offer an account of agency as the capacity to treat the facts with which one is presented as “practical reasons,” that is, reasons for or against doing something. I will say more about practical reasons in Section A and about what it is to exercise the capacity to treat facts as practical reasons in Section B. In Section C, I will distinguish three senses in which an exercise of agency can be said to be “completed.” I will summarize the key points of my account in Section D.

A. Practical Reasons

Practical reasons can be either “positive” or “negative” in the sense that they can be either reasons for actions or reasons against actions (see Raz 1999, 91). For example, a litigant might treat the fact that it might result in a favorable judgment as a reason for offering the judge a bribe. And the judge might treat the fact that she swore to render judgment impartially as a reason against accepting the bribe.

In addition, practical reasons can be either forward-looking or backward-looking in the sense that they can specify either results or circumstances of the action in prospect (see Müller 2011). For example, the litigant we imagined treated the fact that it might result in a favorable judgment as a forward-looking reason for offering the bribe. But the judge treated her promise as a backward-looking reason against accepting the bribe. Note that I am using the term “results” loosely to refer to anything that an action contributes to bringing about, including a larger action of which it is a part. Thus, for example, making an omelet counts in this loose sense as a “result” of cracking a couple eggs.

These two distinctions—between positive and negative practical reasons, and between forward-looking and backward-looking practical reasons—are independent. I have offered examples of a forward-looking reason for doing something and a backward-looking reason against doing something. But we can think of examples of forward-looking reasons against doing something and backward-looking reasons for doing something, too. For example, the litigant might treat the fact that it might result in her arrest as a reason against attempting to bribe a public official. And if the litigant does offer the bribe and the judge accepts it, then the judge might treat her promise to the litigant who bribed her as a reason for rendering a favorable judgment.

B. Exercising the Capacity to Treat Facts as Practical Reasons

Like practical reasons themselves, exercises of the capacity to treat facts as practical reasons can themselves be either “positive” or “negative”: one can either treat a fact with which one is presented as a practical reason or disregard it (see Raz 1999, 116–17). It is as much an exercise of her agency for the judge to disregard her oath of office by accepting the bribe as it is for the judge to act on her oath of office by rejecting the bribe. Although it is not the case that a nonrational agent such as a tree treats facts as practical reasons, neither is it the case that a nonrational agent such as a tree *fails* to treat facts as practical reasons in the sense that it *disregards* them.

What I mean by “treating” a fact as a practical reason does not include merely weighing the fact in deliberation. To “treat” the fact that p as a reason for ϕ -ing, in the sense in which I am using the term, is to ϕ (or at least to attempt to ϕ) because p ; likewise, to “treat” the fact that q as a reason against ψ -ing is <not to ψ > (or at least to attempt <not to ψ >) because q . Thus, for example, if the prospect of being caught and arrested gave the litigant pause when she deliberated whether to bribe the judge, but she decided to go ahead and offer the bribe anyway, then it is not the case that the litigant “treated” the fact that it might result in her arrest as a reason against bribing the judge, in the sense in which I am using the term. Of course, there is a perfectly natural sense of the term in which

the litigant did “treat” the fact that it might result in her arrest as a reason against bribing the judge insofar as she counted that fact against bribing the judge, albeit not decisively, in her deliberation. But there is another sense in which the litigant did not “treat” the fact that it might result in her arrest as a reason against bribing the judge insofar as she did not “act on” it as such a reason: she went ahead and at least attempted to bribe the judge anyway. I am using the term “treat” in the latter sense.

The same clarification applies to my use of the term “disregard.” “Disregarding” a fact as a practical reason, in the sense in which I am using the term, does not include merely omitting to weigh the fact in deliberation. To “disregard” the fact that p as a reason for ϕ -ing, in the sense in which I am using the term, is <not to ϕ > (or at least to attempt <not to ϕ >) in spite of the fact that p ; likewise, to “disregard” q as a reason against ψ -ing is to ψ (or at least to attempt to ψ) in spite of the fact that q . Thus, for example, if the judge rejected the litigant’s bribe not even partially because she swore to render impartial judgment, but only because rejecting the litigant’s first offer might result in an even more generous second offer, then it is not the case that the judge “disregarded” the fact that she promised to render impartial judgment as a reason against accepting the litigant’s bribe, in the sense in which I am using the term.

Thus, every exercise of agency consists in an action or an omission. Our two positive-negative distinctions—between positive and negative practical reasons, and between positive and negative exercises of the capacity to treat facts as practical reasons—yield four permutations. Positive exercises of agency with respect to positive practical reasons (doing something because of a reason for doing it) and negative exercises of agency with respect to negative practical reasons (doing something in spite of a reason against doing it) consist in action. Negative exercises of agency with respect to positive practical reasons (not doing something in spite of a reason for doing it) and positive exercises of agency with respect to negative practical reasons (not doing something because of a reason against doing it) consist in omission.

We can now distinguish two aspects to an exercise of agency. First, there is the endorsement, or nonendorsement, of a bit of practical reasoning that is involved in treating, or disregarding, a fact as a practical reason for or against action. For example, when the litigant treated the fact that it would result in a favorable judgment as a reason for bribing the judge, she endorsed a practical inference from the premise that bribing the judge would result in a favorable judgment to the conclusion to bribe the judge. Second, there is the action or omission that embodies this endorsement or nonendorsement of a bit of practical reasoning. In this case of the litigant, that was her action of offering the bribe.

C. The Completion of an Exercise of Agency

Finally, consider three senses in which an exercise of agency can be “complete.” The first two senses in which an exercise of agency can be “complete” are meaningful only in connection with exercises of agency that consist in actions or omissions with relatively determinate beginnings or endings. Because omissions rarely have relatively determinate beginnings or endings, this means that these senses of “completion” apply primarily to exercises of agency that consist in actions. The third sense in which an exercise of agency can be “complete” applies to all exercises of agency.

1. The completion of the agent’s practical reasoning

An exercise of agency that consists in an action comes to completion *as an endorsement or nonendorsement of a bit of practical reasoning* as soon as the agent begins to act because or in spite of the relevant reason. In contrast to working through a bit of practical reasoning in deliberation, endorsing or failing to endorse a bit of practical reasoning is an Aristotelian *energeia* as opposed to an Aristotelian *kinesis*: as soon as one is endorsing or failing to endorse a bit of practical reasoning, one has endorsed or failed to endorse it. For example, consider again the litigant who bribes the judge because it will result in a favorable judgment and in spite of the fact that it might result in getting arrested. The litigant’s action of bribing the judge was a process that took time—time spent, say, slipping the judge

a wad of cash. But the endorsement of a practical inference that the action embodied (the endorsement of the inference from the premise that it will result in a favorable judgment to the conclusion to bribe the judge), as well as the failure to endorse a practical inference that the action embodied (the failure to endorse the inference from the premise that it might result in getting arrested to the conclusion not to bribe the judge), were both complete as soon as the action began.

2. The completion of the agent's activity in the matter

In contrast, an exercise of agency that consists in an action comes to completion *as an action* only once the agent has, in the words of Elizabeth Anscombe (1979, 229), “completed his activity in the matter.” In the case of the litigant, this was once she has finished, say, passing the wad of cash to the judge. Although it remained to be seen whether the judge would respond to the bribe by delivering a favorable judgment, that was out of the litigant's hands; her activity in the matter came to an end once she had passed the judge the wad of cash. Anscombe's example is one in which an assassin pulls a trigger because it will result in the death of his target. Once the assassin has pulled the trigger, Anscombe (1979, 228–29) observes, he has “completed his activity in the matter.” Unless something goes wrong (for example, the shot misses) and he must find an alternative means of finishing the job, he does not need to do anything else for the death of his target to come about as a result.

3. The consummation of the exercise of agency

For an exercise of agency to be “completed” in the third sense is for it to be, in Anscombe's (1979, 228–29) terminology, “consummat[ed].” That in virtue of which an exercise of agency is consummated is a function of the truth or falsity of the representations of the action, its circumstances, and its results in the practical reasoning whose endorsement or nonendorsement the exercise of agency involves. As illustrated below, this function differs depending on whether the exercise of agency consists in an action or an omission.

An exercise of agency that consists in an action reaches consummation in virtue of the fact that its representation of the action's circumstances was true and its representation of the action and its results came true. For example, suppose that Peter puts some arsenic in a dish because doing so will likely result in Violet's death. If this exercise of agency is consummated, then it will be in virtue of the fact that Peter deposited the arsenic with the result that Violet died; hence, the representation of the action in prospect (depositing the arsenic) and its results (Violet's death) in the practical reasoning that Peter endorsed came true. Or, suppose that Peter takes a purse despite the fact that it belongs to someone else. If this exercise of agency is consummated, then it will be in virtue of the fact that the purse did belong to someone else and yet Peter took it; hence, in the practical reasoning that Peter failed to endorse, the representation of the circumstances (the purse belonging to someone else) was true and the representation of the action in prospect (taking the purse) came true.

An exercise of agency that consists in an omission reaches consummation in virtue of the fact that its representation of the circumstances was true but its representation of the action and its results did *not* come true, even in part. For example, suppose that negligent parents fail to care for a child in spite of the fact that the child is their child. This exercise of agency reaches consummation in virtue of the fact that the child is indeed their child but they do not take care of the child. In the practical reasoning that they failed to endorse, the representation of the circumstances was true (the child was theirs) but the representation of the action in prospect (taking care of the child) did not come true.

D. Summary

In sum: Agency is the capacity to treat the facts with which one is presented as practical reasons. Practical reasons can be either positive, that is, reasons for action, or negative, that is, reasons against action. In addition, practical reasons can be either forward-looking, that is, results-oriented, or backward-looking, that is, circumstance-oriented. One can exercise the capacity to treat facts as practical reasons "positively" by acting because of a positive practical reason, or not acting because of

a negative practical reason; but one can also exercise the capacity to treat facts as practical reasons “negatively” by acting in spite of a negative practical reason, or not acting in spite of a positive practical reason. Finally, exercises of agency can be said to reach “completion” in three senses: one’s endorsement or nonendorsement of a bit of practical reasoning is complete as soon as one starts to act; one’s action itself comes to completion only once one is finished acting; and one’s exercise of agency may not reach consummation until even later if it involved acting on or against a forward-looking practical reason.

II. THE FUNCTION OF THE CRIMINAL LAW

Now that I have clarified the claim that criminal liability is formally incurred by an agent for an exercise of her agency, it is time to defend it. In this Part, I will argue that the claim that criminal liability is formally incurred by an agent for an exercise of her agency follows from the function of the criminal law. In Section A, I will argue that criminal law is what I will call a “functional kind,” and that either its function is to punish wrongdoing (as retributivists claim) or its function is to deter socially harmful behavior (as mixed theorists and utilitarians claim).¹ In Section B, I will argue that, to count as an instance of a functional kind, something must be constituted by the right sort of material to perform the function that defines the kind. Finally, in Section C, I will argue that it is in virtue of being a rule that prescribes punishment for those who exercise their agency in a certain way that something is the right sort of material for a law that punishes wrongdoing or deters socially harmful behavior. I will conclude in Section D that criminal liability is formally incurred by an agent for an exercise of her agency.

A. Criminal Law’s Function

¹ Mixed theorists differ from utilitarians insofar as they recognize backward-looking (i.e., retributivist) constraints on criminal law’s pursuit of forward-looking (i.e., utilitarian) goals such as deterrence. The obvious example of such a constraint is a bar on prescribing criminal punishment for the morally innocent. For the *locus classicus* of the mixed theory, see Hart (1960).

Unlike other kinds of kinds, functional kinds are defined by the normative standards to which their instances are subject. For example, species of organism are functional kinds. To be, say, a grizzly bear is to be subject to a normative standard that defines the species *grizzly bear*: a standard that, *inter alia*, requires building up an extra layer of fat in the fall and hibernating in a den during the winter. Thus, although it is possible for a particular grizzly bear not to do these things, it would be to that extent defective *qua* grizzly bear (see Thompson 2008, 25–82). Some types of artefacts are functional kinds, too. To be, say, a paper clip is to be subject to a normative standard that requires being able to hold papers together. Although it is possible for a particular paper clip to be unable to hold papers together, it would be to that extent defective *qua* paper clip (see Murphy 2013, 8).

Although there is a live debate in general jurisprudence about whether law generically is a functional kind (e.g., compare Murphy 2013 with Leiter 2018, 7–15), there appears to be something approaching a consensus among criminal-law scholars that criminal law specifically is a functional kind. Open any criminal-law textbook, and you will find an overview of the debate among retributivists, utilitarians, and mixed theorists about whether the primary function of the criminal law is to punish wrongdoing (as retributivists maintain) or to deter socially harmful behavior (as utilitarians and mixed theorists maintain). Thus, a retributivist would say that a criminal law that fails to punish wrongdoing is defective *qua* criminal law, while a mixed theorist or utilitarian would say that a criminal law that fails to deter socially harmful behavior is defective *qua* criminal law. I do not want to wade into the debate among retributivists, mixed theorists, and utilitarians here. My point is not to settle the question who is right about what the function of the criminal law is but only to draw attention to the fact that most criminal-law scholars agree that the criminal law has *a* function, and moreover that this function is either to punish wrongdoing or to deter socially harmful behavior.

I will rely on this point of near-consensus among criminal-law scholars as the first premise of the argument in this Part. Admittedly, there are some who will deny this premise. Those such as Brian

Leiter (2018, 7–15) who resist characterizing any artefactual kind as a functional kind will, of course, deny not only that law generically is a functional kind but also that criminal law specifically is a functional kind. And even among those who affirm that the criminal law has a function, there are parties to the debate about what this function is who reject the traditional alternatives of retributivism, utilitarianism, and mixed theory. For example, those who subscribe to the social-cohesion theory of criminal punishment associated with Émile Durkheim ([1893] 1964) will, although they affirm that the criminal law has a function, deny that this function is either to punish wrongdoing or to deter socially harmful behavior. Unfortunately, I do not have the space here to engage with views that deny that the criminal law has a function or views that ascribe a nontraditional function to the criminal law. Those who are sympathetic to such views are encouraged to persist through Chapter 2, where I will offer a second argument for the claim that criminal liability is formally incurred by an agent for an exercise of her agency. This second argument will not rely on the premise that the function of the criminal law is either to punish wrongdoing or to deter socially harmful behavior.

B. Proper Matter and Functional Kind Membership

The second premise in the argument is that something cannot qualify as an instance of a functional kind—except perhaps as a secondary instance—unless it is at least “constitutionally able” to perform the function of that kind (Murphy 2013, 12). For example, although it is possible for something to be a paper clip, albeit a defective one, even if it is unable to hold papers together (say, because it is misshapen), something that was not even made of the right sort of material for holding papers together would not count as a paper clip at all. Likewise, something that was not even made of the right sort of material for chopping things would not count as an axe, even a defective one. Mark C. Murphy (2013, 13–14) offers the examples of a “paper clip” made of liquid and an “axe” made of cottage cheese. Such items would not really be a paper clip and an axe any more than drawings of a paper clip and an axe would really be a paper clip and an axe.

The only caveat to make is that some functional kinds admit of secondary instances that are not constitutionally able to perform their kinds' functions. For example, it seems that chairs constitute a functional kind whose function is to support the weight of a seated human. In line with the reasoning above, Jonathan Crowe (2014, 743) claims that this excludes the possibility of constructing an "air chair," because air is not suitable material for supporting the weight of a seated human. This seems plausible enough. But what about a stage-prop chair constructed out of paper maché, which is not suitable material for supporting the weight of a seated human, either? According to Crowe (2014, 750), a paper-maché stage-prop "chair" would be "a model chair," where "[t]he word *model* . . . is an alienans. A model chair is really no chair at all." Now, I see no reason to protest if Crowe wishes to withhold the label "chair" to stage-prop chairs, decorative chairs, dollhouse chairs, etc. that are not even "constitutively capable of performing the chair-function" (Crowe 2014, 750). But nor do I see any reason to protest if someone wishes to apply the label "chair" to such objects. What matters is that stage-prop chairs, decorative chairs, dollhouse chairs, etc. are at most secondary instances of "chairs" in the sense that it is only in virtue of their relation to objects that are independently identifiable as chairs that they may be called "chairs," too. Unlike primary instances of chairs, stage-prop chairs, decorative chairs, dollhouse chairs, etc. do not count as "chairs" in their own right. It is only because they are designed to resemble and represent the primary instances that we grant them membership in the kind by courtesy. Thus, we can avoid table-thumping about how to use words if we qualify the claim that an instance of a functional kind must be constitutionally able to perform the kind's function by restricting it to primary instances of the kind. So qualified, the claim is not subject to counterexample by things like paper-maché stage-prop chairs.

C. Proper Matter for a Criminal Law

The third premise in the argument is that the only sort of law that is constitutionally able to punish wrongdoing or to deter socially harmful behavior is a rule that prescribes punishment for those

who exercise their agency in a certain way. As we know from H. L. A. Hart ([1961] 2012, 79–99), laws constitute a species of rules. And, as I will explain, a rule constitutes the right sort of material either for punishing wrongdoing or for deterring socially harmful behavior only if it prescribes punishment for those who exercise their agency in a certain way.

Consider first the function of punishing wrongdoing. I take it that only exercises of agency can constitute wrongdoing. A tree does not *wrong* the person on whom it falls. Nor does the person who is defenestrated (against her will) *wrong* the person on whom she falls. And the explanation is that in neither case was it true that the falling was done in exercise of the falling entity's agency. Therefore, the only sort of rule that so much as has the right form to discharge the function of punishing wrongdoing is one that prescribes punishment for those who exercise their agency in a certain way.

Now, consider the function of deterring socially harmful behavior. To deter A from ϕ -ing is to supply A with a reason against ϕ -ing by arranging for A to suffer harm if A ϕ -s. This presupposes that ϕ -ing is the sort of thing that A is to do, or not to do, because and/or in spite of reasons—and thus the sort of thing that A is to do, or not to do, in exercise of her agency. For example, one cannot deter the grass on the lawn from growing higher than three inches by laying down a rule that any blade that exceeds three inches will be uprooted. Growing higher than three inches is not the sort of thing that grass can treat the fact that it will result in harm as a reason against doing. The only sort of rule that can be characterized as deterring anything is thus a rule that prescribes harm for those who exercise their agency in a certain way.

D. The Form of Criminal Liability

Putting together the considerations of Sections A–C, we reach the conclusion that criminal liability is formally liability incurred by an agent for an exercise of her agency. A rule that prescribed punishment otherwise than for agents because of how they exercised their agency would be unsuitable material for a law that punishes wrongdoing or deters socially harmful behavior (Section C), and

therefore unsuitable material for a law that performs the function of the criminal law (Section A). But then it would not constitute a *criminal* law at all (Section B) and hence would not provide *criminal* liability for anything. At most, if it was dressed up as a criminal law—for example, if it used language like “it shall be a crime to,” it provided for traditionally criminal remedies such as imprisonment, and the legislature codified it in the section of the statutory code reserved for criminal statutes—then we might classify it as a secondary case of a criminal law. But its status as a “criminal law” would be parasitic on, and therefore secondary to, the primary instances of criminal laws that render the body of law to which it belongs recognizable as a regime of criminal law in the first place. And our purposes in this Dissertation permit us to set aside secondary cases like this. For I take it that accomplice liability is not only loosely speaking a form of “criminal” liability, in the way that dollhouse chairs are only loosely speaking “chairs.” Therefore, having set aside secondary cases, we can say that it is in virtue of being an agent and an exercise of her agency that someone and something are eligible to be that for whom and because of what a criminal law prescribes punishment. In other words, criminal liability is formally liability incurred by an agent for an exercise of her agency.

III. LEGAL FICTIONS AND ACCOMPLICE LIABILITY

If I am right that criminal liability is formally incurred by an agent for an exercise of her agency, then the common law of accomplice liability is generally misunderstood. Courts routinely make statements to the effect that the accomplice is liable for the principal’s conduct. Such statements are generally understood to indicate not only that courts impose liability on the accomplice for what is in fact the principal’s exercise of agency, but also that courts impose liability on the accomplice for what *they treat as* the principal’s exercise of agency. But if criminal liability is formally incurred by an agent for an exercise of her agency, then a court could not be imposing *criminal* liability on an accomplice unless it is imposing liability on the accomplice for what the court at least treats as an exercise of the accomplice’s own agency. It is true that courts occasionally refer to aiding or abetting a crime as an

“alternative basis for criminal liability”—alternative, that is, to committing the crime oneself.² But if criminal liability is formally incurred by an agent for an exercise of her agency, then courts are misarticulating their own practice when they say things like this, in somewhat the way that native language speakers who apply the rules of their language correctly in their usage sometimes slip up when they try to articulate those rules.³

What courts are really getting at when they make statements to the effect that the accomplice is liable for the principal’s conduct, I think, is that for the purposes of adjudicating the charges against the accomplice, they indulge the legal fiction that the principal’s exercise of agency is the accomplice’s.⁴ Therefore, when they impose liability on the accomplice, they are imposing liability for *what they are treating as* her own exercise of agency, even though in fact it is not.

Now, one might question why it matters whether courts are implicitly indulging a legal fiction that the principal’s exercise of agency is the accomplice’s when they impose liability on the accomplice for what is in fact the principal’s exercise of agency. After all, the outcome is the same regardless whether courts indulge in a legal fiction regarding whose exercise of agency it is for which they are holding the accomplice liable.

The answer is that it matters because of what it tells us about what has gone wrong in the law of accomplice liability and how to fix it. Legal fictions are rules of decision-making procedure that are supposed to enable courts to get to the right answer by directing them to reason from a false premise. Typically, legal fictions arise for one of two reasons: either something has gone wrong in the law, such that a false premise is introduced to correct a deficient rule; or else the truth is highly complex, and applying the law to a simple falsehood is nearly functionally equivalent to applying the law to the

² E.g., *Banther v. State*, 997 A.2d 870, 885–86 (Del. 2009).

³ I am grateful to Anton Ford for suggesting this analogy.

⁴ Obviously, courts do not indulge this legal fiction for the purposes of adjudicating the charges against the principal.

complex truth. I will call legal fictions of these two kinds “corrective legal fictions” and “simplifying legal fictions,” respectively.

An example of a corrective legal fiction might be the legal fiction that a donee “accepted” a beneficial gift of which she was unaware. Arguably, this legal fiction corrects the rule that something is not a gift, and hence no transfer of property has occurred, unless the donee has accepted it. The better rule would be something like: an apparently detrimental “gift” is invalid unless the donee accepted it, and an apparently beneficial “gift” is valid unless the donee rejected it. But once courts had declared so many times that a gift requires acceptance, that became “the rule,” which prompted later courts to invent as a corrective the legal fiction that a donee accepted a beneficial gift of which she was unaware. I do not know if this is an accurate history of the law of gifts, but it could be, and whether apocryphal or not, it illustrates the concept of a corrective legal fiction.

An example of a simplifying legal fiction might be the legal fiction that corporations are persons. Arguably, indulging this legal fiction enables courts to reach roughly the same outcomes in typical civil litigation involving corporations that they would reach if they managed to sort out the underlying contractual relationships among real persons that constitute a corporation.

Note that, unlike a corrective legal fiction, a simplifying legal fiction does not necessarily indicate that something has gone wrong in the law. Instead, it reflects a tradeoff between what legal scholars call “error costs” and “decision costs.” If reasoning from a false premise enables courts to get to the right answer most of the time, and getting to the right answer by way of true premises would be difficult or impractical (say, because of the difficulty of obtaining evidence, or because of how many parties the court would have to involve in the case), then it makes good sense to have a second-order legal rule—what H. L. A. Hart ([2012] 1961, 97) would call a “rule of adjudication”—that directs courts to assume the false premise for the purposes of deciding cases. Although this second-order legal rule will come at a small “error cost” insofar as reasoning from the false premise will not get the

court to the right answer every time, the tremendous “decision costs” of the alternative are much greater.

My own view is that the notion that the principal’s exercise of agency is the accomplice’s is a corrective rather than a simplifying legal fiction. In Chapters 3–7, I will entertain and respond to four objections to the claim that the one thing it is to be guilty of a crime is to have committed it, each of which maintains that to have aided or abetted a crime is a second thing it is to be guilty of a crime. I will diagnose the first objection, the Conduct Crimes Objection, in the framework of “element analysis” within which it is conventional for lawyers to analyze crimes. I will diagnose the second objection, the Overinclusivity Objection, in the law’s acceptance of deficient, oversimplified definitions of crimes such as crimes of homicide. I will diagnose the third objection, the Mens Rea Objection, in errors about the nature of action and intention. Finally, I will diagnose the Free Will Objection, the objection that Sanford Kadish (1985) argues lies behind the common law’s embrace of the Doctrine of Intervening Causes, in confusion about the relationship between free will and causation. The incorporation of any of these mistakes into the common law could have prompted the introduction of the legal fiction that the principal’s exercise of agency is the accomplice’s. If Kadish (1985) is right, then the culprit is confusion about the relationship between free will and causation. But we do not need to resolve the historical question here. By clearing all four obstacles to recognizing that the accomplice committed the crime of which she is guilty, we will show how the common law can unwind both the corrective legal fiction that the principal’s exercise of agency is the accomplice’s and the mistake that gave rise to it, regardless which of the four possible mistakes it was.

The work of unwinding the corrective legal fiction that the principal’s exercise of agency is the accomplice’s and the mistake that gave rise to it is of more than merely academic interest. As explained in this Dissertation’s Introduction, the law of accomplice liability is a mess: legislatures, courts, and scholars cannot seem to agree on what conditions trigger the imputation of the principal’s exercise of

agency to the accomplice in the first place. But if the legal fiction that the principal's exercise of agency is the accomplice's is a corrective legal fiction, then this legal fiction cannot do its job unless courts know when to indulge it. And the only way to figure out when indulging the corrective legal fiction is necessary to get the right answer is to do the hard work of uncovering the truth that the corrective legal fiction is tracking. By unwinding the legal fiction and the mistake that gave rise to it in the first place, legal officials can thus help the law not just to arrive at the right answer for the right reasons, but to arrive at the right answer at all. The role of legislators in this project is obvious: one of the functions of the legislature is precisely to overrule the common law when it has gone wrong. But judges have a role, too: although bound by precedent, they are not bound so tightly that they cannot help the common law to "work itself pure."

CONCLUSION

I conclude that the common law not only should but does recognize only one thing it is to be guilty of a crime, namely, to have committed it. As I argued in Part II, criminal liability is formally incurred by an "agent" for an exercise of her "agency," where "agent" and "agency" have the sense elaborated in Part I. It follows that it is not just a bad idea for the law to hold someone liable for a crime otherwise than on the grounds that she committed the crime; it is a category mistake to think that the law *could* hold someone liable for a crime otherwise than on the grounds that she committed the crime. The notion of criminal liability incurred otherwise than by an agent for an exercise of her own agency does not even make sense. Therefore, the Standard View, which maintains that the law treats the accomplice as guilty of, and hence liable for, the principal's exercise of agency, is not just a misdescription of the ideal regime of criminal law. It is a misdescription of every regime of law recognizable as a regime of *criminal* law at all—including the criminal component of the common law. The only way to make sense out of courts' statements to the effect that the accomplice is criminally liable for the principal's conduct is to hear them as admissions that courts are indulging in a legal

fiction when they adjudicate criminal charges against an accomplice—just as courts are indulging in a legal fiction when they adjudicate criminal charges against a corporation. When courts impose liability on a corporation, they are imposing liability for what *they are treating as* the corporation’s exercise of agency, even though (everyone knows that) what they are treating as the corporation’s exercise of agency is in fact the exercise of the agency of a real person affiliated with the corporation. Similarly, when courts impose liability on the accomplice, they are imposing liability for *what they treat as* the accomplice’s exercise of agency, even though (everyone knows that) what they are treating as the accomplice’s exercise of agency is in fact the principal’s exercise of agency. The distinction is subtle between (1) holding an accomplice liable for ϕ -ing on the fiction that ϕ -ing is an exercise of her own agency and (2) holding an accomplice liable for ϕ -ing while acknowledging that ϕ -ing is not an exercise of her own agency. But realizing that only (1) makes sense gives us a clue as to the approach that we must take if we wish to iron out the law of accomplice liability.

2. The Common Law of Criminal Liability

INTRODUCTION

In this Chapter, I will offer a second argument for the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency. Recall that the argument for this claim offered in the previous Chapter involved deriving it from the function of the criminal law. As I conceded, there are some—including those who deny that the criminal law has a function and those influenced by Émile Durkheim’s ([1893] 1964) theory of criminal punishment—who might not be persuaded by the first argument. Fortunately, the independent argument of this Chapter should have broad appeal. According to this argument, the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency—where “agency” is understood in the terms set forth in Chapter 1—unites and explains the major common-law doctrines of criminal liability, including the Voluntary Act Requirement, the Fault Principle, and the requirement of proximate causation. I will discuss the Voluntary Act Requirement in Part I, the Fault Principle in Part II, and the requirement of proximate causation in Part III. I will conclude that even those who are skeptical of the argument from the function of the criminal law that I offered in Chapter 1 should recognize the explanatory power and therefore the plausibility of the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency.

I. THE VOLUNTARY ACT REQUIREMENT

According to the “Voluntary Act Requirement,” someone may be criminally liable only because of a “voluntary act” on her part. That is, even if someone may be criminally liable *for* something other than a voluntary act on her part (as defenders of the Standard View think is true of accomplices), it must be at least partially in virtue of the fact that she performed a voluntary act with certain properties that she is criminally liable for that thing. Thus, although the Standard View

maintains that the accomplice is guilty of the principal's crime, it also maintains that the accomplice is guilty of the principal's crime partially in virtue of the fact that the accomplice herself performed a voluntary action of aiding or abetting the principal's crime.

Courts and commentators regularly characterize the Voluntary Act Requirement as “a foundational component of criminal law” (Farrell and Marceau 2013, 1545). Whether most of them believe that a “criminal” law that violated the Voluntary Act Requirement would be a bad criminal law (as a blunt axe is a bad axe) or no criminal law at all (as a cottage-cheese “axe” is no axe at all), except perhaps in a secondary sense (as a dollhouse “chair” is a chair only in a secondary sense), is unclear. But everyone agrees that, the Voluntary Act Requirement notwithstanding, the common law has always countenanced holding a defendant criminally liable for an omission, not even partially in virtue of the fact that the defendant also performed some voluntary, nonomissive action. And not all criminal omissions can plausibly be classified as secondary cases of crimes. Evidently, then, whether we interpret the Voluntary Act Requirement as stating a necessary condition for something to be a good criminal law or a necessary condition for something to be a primary case of a criminal law at all, omissions can satisfy the Voluntary Act Requirement.

In Section A, I will argue that the idea that criminal liability is formally liability incurred by an agent for an exercise of her agency explains why the Voluntary Act Requirement states a necessary condition for criminal liability and hence, *a fortiori*, a necessary condition for liability under a good criminal law. In Section B, I will argue that the account of agency offered in Chapter 1 explains why omissions can satisfy the Voluntary Act Requirement.

A. Why Criminal Liability Requires a “Voluntary Act”

The claim that criminal liability is formally liability incurred by an agent for an exercise of her agency explains why the Voluntary Act Requirement is “a foundational component of criminal law” (Farrell and Marceau 2013, 1545). Although criminal-law scholars disagree about how to understand

the special sense of “agency” discussed in Chapter 1, almost everyone seems to agree that, however it is to be understood, it is an exercise of “agency” in this sense that constitutes a “voluntary act” for the purposes of the Voluntary Act Requirement (see, e.g., Yaffe 2012, 174; Duff 2004, 69–70, 83–4; Schopp 2001, 317; Fletcher 1994, 1444; Sistare 1989, 74–76; etc.). If this is right, then the Voluntary Act Requirement follows trivially from the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency. The claim that criminal liability is formally liability incurred by an agent for an exercise of her agency entails that criminal liability is limited to liability for an exercise of agency, except perhaps in secondary cases. If a “voluntary act” is just an exercise of agency, then this means that criminal liability is limited to liability for a voluntary act, except perhaps in secondary cases. And someone who is criminally liable for an event is, of course, criminally liable at least partially in virtue of that event’s occurrence. Therefore, it follows from the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency that criminal liability is limited to liability because of a voluntary act, except perhaps in secondary cases.

B. Why Omissions Can Count as “Voluntary Acts”

The account of agency as the capacity to treat facts as practical reasons offered in Chapter 1 explains why omissions can satisfy the Voluntary Act Requirement. Many commentators struggle to explain the fact that omissions can satisfy the Voluntary Act Requirement, given that the Voluntary Act Requirement is supposed to require a “voluntary act” understood as an exercise of agency. As I will explain, the difficulty evaporates if we affirm the account of agency offered in Chapter 1, on which omissions can constitute exercises of agency.

If there is a standard conception of agency among criminal-law scholars, then it is a conception of agency that received its most philosophically influential exposition in Donald Davidson’s ([1971] 2001) paper with that title. According to Davidson ([1971] 2001, 59; [1978] 2001; [1963] 2001), something is an exercise of a person’s agency in virtue of being an action that she performed

intentionally under some description, and something is an action that an agent performed intentionally under some description in virtue of being a movement of that agent's body caused in the right way by the right kind of mental state(s) of that agent. It is common for criminal-law scholars to assume, implicitly or explicitly, a Davidsonian conception of agency. Thus, for example, Michael Moore ([1993] 2010, 45) glosses a "voluntary act" for the purposes of the Voluntary Act Requirement as a "bodily movement that is caused by a volition." Similarly, Heidi Hurd (1994, 203–04; see also Dressler 2015, 88–91) glosses a "voluntary act" for the purposes of the Voluntary Act Requirement as a "willed bodily movement." And although Davidson ([1971] 2000, 49) himself was willing to "interpret the idea of a bodily movement generously" so as "to encompass such 'movements' as standing fast," not all who have followed him have been so generous—which is understandable, given that it is a strange idea of "movement" that encompasses not moving. Thus, Moore ([1993] 2010, 28) rejects the notion that an omission can be, as he puts it, a "kind of ghostly act." "[A]ctions are . . . willed bodily movements," he ([1993] 2010, 28) explains, and "omissions are the absence of any willed bodily movements." Likewise, Heidi Hurd (1994, 203) writes that "in omitting . . . one does not act at all, for an omission is simply a failure to will a bodily movement."

It is this conception of agency that gives rise to the perception of tension between the fact that the common law embodies the Voluntary Act Requirement and the fact that the common law countenances criminal liability for omissions unconnected with action. If a "voluntary act" is just an exercise of agency, then a conception of agency on which agency can be exercised only in actions as opposed to omissions renders convicting a defendant of an omission, not even partially because of some action on her part, incompatible with the Voluntary Act Requirement.

Some theorists (e.g., Dimock 2012; Husak [1998] 2010) respond to the perceived tension between criminal omissions and the Voluntary Act Requirement by concluding that the Voluntary Act

Requirement is not really part of the common law. Others (e.g., Dressler 2015, 87–88, 106–09; Moore [1993] 2010, 44–59) conclude that the Voluntary Act Requirement admits of exceptions.

Neither option is plausible. Too many courts and casebooks pay homage to the Voluntary Act Requirement for it not to be part of the common law, for better or worse. And it is not as if those who treat the Voluntary Act Requirement as “a foundational component of criminal law” (Farrell and Marceau 2013, 1545) are all ignorant of the fact that some defendants are guilty of crimes that consist in omissions unconnected with actions. But if the Voluntary Act Requirement is a “foundational component” of criminal law, then it should not admit of exceptions—or, if it does, then the exceptions had better be for secondary cases that are only loosely describable as “crimes.” And not all crimes that consist in omissions unconnected with actions are mere secondary cases of crimes. Failure to pay taxes and parental neglect of a child, for example, cannot plausibly be characterized as “crimes” only in a secondary sense, in the way that a dollhouse chair is a “chair” only in a secondary sense. Evidently, then, the Voluntary Act Requirement is part of the common law, and omissions can satisfy it.

A better solution is to reject the Davidsonian conception of agency that gave rise to the problem in the first place and to endorse in its stead the conception of agency offered in Chapter 1. There I argued that exercises of agency can be either positive or negative in the sense that they can be either *because* or *in spite* of practical reasons. And I argued that practical reasons themselves can be either positive or negative in the sense that they can be either *reasons for* or *reasons against* action. As I explained, these two distinctions yield four permutations, two of which involve action and two of which involve omission. But all four permutations are ways of exercising agency. Therefore, Christine Sistiare (1995, 30; see also Anscombe [1982] 2005, 207–09) is right to insist that “[o]missions [can be] events attributable to persons *qua* agents,” and George Fletcher (1994, 1445) to conclude that criminal omissions “pose[] no exception to the requirement of human action or agency in the criminal law.”

In sum, the account of agency offered in Chapter 1 explains why omissions can satisfy the Voluntary Act Requirement. On this view, the exercise of agency that constitutes a criminal omission is simply a positive exercise of agency with respect to a negative practical reason or a negative exercise of agency with respect to a positive practical reason. For example, it seems plausible to say that a parent who is guilty of criminal neglect of her child is liable for failing to take care of the child in spite of the fact that she is the child's parent. Theorists such as Moore and Hurd must deny that what the parent is criminally liable for is a voluntary act because "failing to take care of the child" does not refer to a bodily movement. Whereas the theorist who endorses the account of agency offered in Chapter 1 can affirm that what the parent is criminally liable for is a voluntary act because failing to take care of the child in spite of the fact that she is the child's parent constitutes a negative exercise of agency with respect to a positive practical reason.

II. THE FAULT PRINCIPLE

The claim that criminal liability is formally liability incurred by an agent for an exercise of her agency also explains the common law's "Fault Principle," which precludes liability unless the defendant manifests a "guilty mind," that is, "mens rea." It even explains why *mentes rea* come in the four varieties of intention (or, occasionally, motive), knowledge, "recklessness" (understood as conscious disregard of risk),¹ and negligence. Although it was the Model Penal Code (1962, § 2.02) that introduced the four-level mens-rea framework, it did so in "[c]larification" of what was already

¹ Ordinarily, of course, the term "recklessness" connotes not just any disregard of risk, but a *morally impermissible* disregard for risk. Thus, the Model Penal Code (§ 2.02(2)(c)) defines "recklessness" as "conscious[] disregard[] [of] a substantial and unjustifiable risk." The claim that criminal liability is formally liability incurred by an agent for an exercise of her agency explains why all primary cases of criminal laws must feature mens-rea requirements of intention or motive, knowledge, *disregard for at least some risk*, and/or negligence. As I will argue in Chapter 4, however, a good regime of criminal law will generally impose liability only for exercises of agency that are independently morally impermissible. On my view, then, it is no surprise that within the universe of ways of disregarding risk, all of which are eligible to be criminalized, criminal codes tend actually to criminalize only ways of disregarding risk that are unjustifiable and to use a term that connotes moral impermissibility to characterize the kind of disregard of risk that these exercises of agency involve. For the purposes of this Chapter, however, I will use "recklessness" in a morally neutral way to refer to any disregard of risk.

implicit in the common law; “only [these] four concepts are needed” to reconstruct the mens rea standards implicit in the “abundance of mens rea terms” in the common law, “such as general and specific intent, malice, wilfulness [sic], wantonness, recklessness, scienter, criminal negligence, and the like” (Wechsler 1968, 1436). In Section A, I will explain why crimes that consist in positive exercises of agency necessarily feature mens-rea requirements of intention and/or motive. In Section B, I will explain why crimes that consist in negative exercises of agency necessarily feature mens-rea requirements of intention, knowledge, recklessness, and/or negligence. Finally, in Section C, I will address so-called “strict-liability” crimes, which might seem to be counterexamples to the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency.

A. Positive Exercises of Agency

First, consider crimes that consist in positive exercises of agency. The law defining such a crime must specify (1) the type of action that the perpetrator does or does not perform, and/or (2) the content of the practical reason for or against the action because of which the perpetrator does or does not perform the action. For example, a law that makes it a crime to do something because it will result in someone else’s death specifies the content of the practical reason because of which the perpetrator acts. And a law that makes it a crime to injure someone because of her race specifies both the type of action that the perpetrator performs and the content of the practical reason because of which the perpetrator performs it.

Implicit in any specification of the type of action that an agent performed, or did not perform, because of a practical reason is the claim that this action was performed, or not performed, intentionally. Elizabeth Anscombe ([1957] 1963, 9) famously wrote that intentional actions “are the actions to which a certain sense of the question ‘Why?’” applies, where the relevant sense is that in which the question asks for “a reason for [the action].” We can also say, I think, that intentional omissions are the omissions to which a certain sense of the question “Why?” applies, where the

relevant sense is that in which the question asks for a reason against the action omitted. That is, if an agent ϕ -s because of a reason for ϕ -ing, then she intentionally ϕ -s; and if an agent <omits to ϕ > because of a reason against ϕ -ing, then she intentionally <omits to ϕ >.

Implicit in any specification of the content of a *forward-looking* practical reason because of which an agent acted, or omitted to act, is the claim that the agent acted, or omitted to act, with the intention of bringing about, or avoiding, the result to which the practical reason refers. For example, when Peter added arsenic to the dish because it would result in Violet's death, Peter intentionally added arsenic to the dish with the further intention of bringing about Violet's death. And if Paul omits to speak up and tell the truth about some matter because telling the truth would result in his embarrassment, then Paul intentionally omits to tell the truth with the intention of avoiding embarrassment.

Finally, implicit in any specification of the content of a *backward-looking* practical reason because of which an agent acted, or omitted to act, is the claim that the circumstance to which the practical reason refers was the agent's "motive," in the sense in which "motive" refers to a distinct variety of mens rea in the criminal law. For example, if Peter punched Violet because of her race, then the fact that Violet is a member of the race in question was Peter's motive for punching her.

I conclude that crimes that consist in positive exercises of agency necessarily feature mens-rea requirements of intention and/or motive. The law defining such a crime must specify (1) the type of action that the perpetrator does or does not perform, and/or (2) the content of the practical reason for or against the action because of which the perpetrator does or does not perform the action. Implicit in (1) is a mens-rea requirement of intention with respect to the specified type of action, and implicit in (2) is a mens-rea requirement of either (a) intention or (b) motive with respect to the specified practical reason, depending on whether the practical reason is (a) forward-looking or (b) backward-looking.

B. Negative Exercises of Agency

Next, consider crimes that consist in negative exercises of agency. The law defining such a crime must specify (1) the type of action that the perpetrator does or does not perform, and/or (2) the content of the practical reason against or for the action in spite of which the perpetrator does or does not perform the action. For example, a law that makes it a crime to take something in spite of the fact that it belongs to someone else specifies both the type of action that the perpetrator performs and the content of the practical reason in spite of which the perpetrator performs it.

In Chapter 1, we said that the capacity to treat facts as practical reasons (which includes the capacity to disregard them) extends only to facts that are “present” to the agent. Thus, even if the fact that p counts in favor of ϕ -ing, one who omits to ϕ does not <omit to ϕ > *in spite* of the fact that p if she has no way of knowing that p . Her omission to ϕ does not constitute a negative exercise of her agency with respect to the fact that p because, having no way of knowing that p , the fact that p is not present to her. Likewise, even if the fact that p counts against ϕ -ing, one who ϕ -s does not ϕ *in spite* of the fact that p if she has no way of knowing that p . Again, her ϕ -ing does not constitute a negative exercise of her agency with respect to the fact that p because, having no way of knowing that p , she does not have the fact that p present to her.

Our purposes now require us to be slightly more precise than we were in Chapter 1: in fact, the capacity to treat facts as practical reasons extends only to facts that are present to the agent *as practical reasons*. Thus, if the fact that p counts in favor of ϕ -ing, then one who omits to ϕ does not <omit to ϕ > *in spite* of the fact that p if she has no way of knowing *that she is omitting to ϕ* . Her omission to ϕ does not constitute a negative exercise of her agency with respect to the fact that p because, having no way of knowing that she is omitting to ϕ , she does not have the fact that p “present” to her *as a reason for* what she omitted to do. Likewise, if the fact that p counts against ϕ -ing, then one who ϕ -s does not ϕ *in spite* of the fact that p if she has no way of knowing that she is ϕ -ing. Again, her ϕ -

ing does not constitute a negative exercise of her agency with respect to the fact that p because, having no way of knowing that she is ϕ -ing, she does not have the fact that p “present” to her *as a reason against* what she did.

An example might help to make the point more concrete. Even if Peter knows that Violet did not consent to being hit, Peter does not hit Violet in spite of the fact that Violet did not consent to being hit if Violet snuck up behind Peter and Peter, having no idea that she was there, hit her accidentally when turning around. Although the fact that Violet did not consent to being hit was present to Peter, it was not present to him *as a reason against* what he did.

Thus, implicit in any specification of the content of the practical reason in spite of which an agent acted, or omitted to act, is the claim that the fact constituting this reason was present to the agent, and moreover present to her *as a reason against* her action or omission. And this entails that implicit in any specification of the type of action that an agent performed, or omitted to perform, in spite of a practical reason is the claim that the fact that she was performing, or omitting to perform, an action of that type was also present to her.

Now, there are two ways in which a fact can be “present” to an agent in the relevant sense. First, a fact is present to an agent if she is conscious of it. Second, a fact is present to an agent if it is her own fault that she is not conscious of it even though it is “right under her nose.”² For example, consider a lifeguard who is oblivious to the fact that a swimmer is drowning right in front of her, say, because she is distracted by all the attractive people in bathing suits, or because she has fallen asleep as a result of having stayed out too late the night before. In this case, the lifeguard can be said to have failed to rescue the drowning swimmer in spite of the fact that it is her duty as lifeguard to rescue drowning swimmers. For it was her own fault that she was not conscious of the fact, right under her

² Although what unites these two ways for a fact to be “present” is an interesting question, I do not have the space to pursue it here.

nose, that she was omitting to rescue the drowning swimmer. Therefore, the fact that she was omitting to rescue the drowning swimmer was present to her, which means the fact that it is her duty as lifeguard to rescue drowning swimmers was present to her as a reason for something that she was omitting to do.

The presence to an agent of a fact thus entails knowledge, “recklessness” (understood as conscious disregard of risk), or negligence with respect to the fact. If she is conscious of the fact, then she exemplifies knowledge if the fact takes the form *that such-and-such is the case* and recklessness if the fact takes the form *that such-and-such may well be the case*. And if due to her own fault she is not conscious of the fact even though it is right under her nose, then she exemplifies negligence.

Therefore, crimes that consist in negative exercises of agency necessarily feature mens-rea requirements of intention, knowledge, recklessness, or negligence. The law defining such a crime must specify (1) the type of action that the perpetrator does or does not perform, and/or (2) the content of the practical reason against or for the action in spite of which the perpetrator does or does not perform the action. Implicit in (1) is a mens-rea requirement of knowledge, recklessness, or negligence—and because knowledge and recklessness are compatible with intention, a specification of (1) may also be associated with a mens-rea requirement of intention. For example, we can imagine a law that makes it a crime *intentionally* to take something in spite of the fact that it belongs to someone else. Implicit in (2) is also a mens-rea requirement of knowledge, recklessness, or negligence—this time, however, intention and motive are excluded because it is given that the perpetrator acted, or omitted to act, *in spite* rather than *because* of the practical reason. For example, if all that a law made it a crime to do was to take something *because* it belongs to someone else, then the crime defined by this law would feature a mens-rea requirement of motive with respect to the circumstance that the thing belongs to someone else. But this crime would consist in a positive exercise of agency. And crimes that consist in positive exercises of agency were covered in Section B.

C. Strict Liability

In Sections A–B, I argued that the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency implies that all primary cases of criminal laws must feature mens-rea requirements of intention or motive, knowledge, recklessness, or negligence. I have suggested that this implication speaks in favor of the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency, because all criminal laws do feature such mens-rea requirements. But a skeptic might turn the tables, arguing that this implication speaks against the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency, because in fact not all criminal laws feature such mens-rea requirements. “Strict-liability” crimes, the skeptic could point out, lack a mens-rea requirement with respect to the type of action that the perpetrator does or does not perform and/or with respect to the fact that the perpetrator treats or disregards as a practical reason. It seems that I must either insist that such crimes are not really crimes, except perhaps in a secondary sense, or else give up the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency.

I do not think that so-called “strict-liability” crimes present counterexamples to the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency. Strict liability in the criminal law, I will argue in this Section, is about procedure rather than substance.

The criminal law features a complex set of procedural rules designed to promote the integrity and efficiency of the decision-making process. These include rules of evidence that govern what evidence the factfinder (typically, the jury) is allowed to consider, burdens of proof that specify which side is presumed to be correct on a given issue until the other side proves otherwise, standards of proof that specify what level of persuasion is required to “prove” a claim (for example, proof beyond reasonable doubt, proof by a preponderance of the evidence, etc.), rules of collective decision (for example, the rule that the jury must be unanimous), etc.

I believe that strict liability in the criminal law is about burdens of proof. Normally, the prosecution bears the burden of proving that the defendant indeed exercised her agency in the way that the criminal law prohibits. In other words, the factfinder is normally supposed to presume that the defendant did not exercise her agency in this way until the prosecution proves otherwise. Strict-liability crimes reverse this presumption with respect to certain mens-rea requirements. The reversed presumption in favor of the prosecution may be either rebuttable or nonrebuttable.

Strict liability makes sense, on this interpretation, under two conditions. The first condition is that it must be highly improbable, assuming that the other conditions for liability are satisfied, that the defendant did not exemplify the requisite mens rea. The second condition is that it must be difficult in at least some cases for the prosecution to adduce independent evidence, beyond the facts in virtue of which the other conditions for liability are satisfied, that the defendant exemplified the requisite mens rea. If the first condition is satisfied, then the risk of error associated with a presumption in favor of the prosecution is low. And if the second condition is satisfied, then the risk of error associated with the normal presumption in favor of the defense is significant: the jury might be confused into thinking that the prosecution failed to prove beyond reasonable doubt that the defendant exemplified the requisite mens rea because it failed to adduce independent evidence on specifically that point.

For example, consider statutory rape. In many jurisdictions, it is a crime to disregard the fact that a person is below the age of consent as a reason against having sex with the person, and to secure a conviction, the prosecution does not have to prove that the defendant exemplified any mens rea with respect to the circumstance that the victim was underage. On my view, laws defining statutory rape establish a presumption that the defendant exemplified knowledge, recklessness, or at least negligence with respect to the fact that the victim was underage, given that the defendant indeed voluntarily had sex with the victim. This presumption makes sense: Given that the defendant had sex

with the victim, it is unlikely that the defendant was not at least negligent with respect to the victim's age. And in cases in which the defendant was not independently familiar with the victim, the fact that the defendant had sex with the victim may be the only evidence that the defendant knew or should have known that the victim may well be underage.

I conclude that strict-liability crimes such as statutory rape are consistent after all with the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency. Rather than dispensing with the requirement of mens rea, such crimes merely establish a presumption that the defendant exemplified the requisite mens rea. In doing so, they are creating a rule that governs the procedure by which the court is to decide whether the defendant violated the criminal law rather than a rule that determines the substance of what counts as violating the criminal law.³

³ Strict liability is in any case less common than some think. For example, consider two influential Supreme Court cases on "public-welfare offenses," *U.S. v. Dotterweich*, 320 U.S. 277 (1943), and *U.S. v. Park*, 421 U.S. (1975). In *Dotterweich*, the Court reinstated the defendant's conviction for shipping misbranded or adulterated pharmaceuticals, even though the defendant himself, a wholesaler, was not aware that the drugs that he had procured from the manufacturer were misbranded or adulterated. In *Park*, the Court reinstated the defendant's conviction for storing food for sale in a way that caused its adulteration, even though the defendant himself, the president of the company that was storing the food before selling it, was unaware that the company's warehouse was in as bad a state as it was. Although *Dotterweich* and *Park* are often cited as dispensing the Fault Principle (see, e.g., Brickey 1982), this is a mistake. What the Court said was that the applicable criminal statutes "dispense[d] with the conventional requirement for criminal conduct—awareness of some wrongdoing." *Dotterweich*, 320 U.S. at 281; see also *Park*, 421 U.S. at 670 (noting that public-welfare offenses do not "require[] 'consciousness of wrongdoing'"). And negligence—as I am using the term—requires no such awareness. Those who interpret *Dotterweich* and *Park* as endorsing strict liability are conflating (1) the Fault Principle, which conditions criminal liability on a mens rea of at least negligence, with (2) the tradition in Anglo-American criminal law of normally conditioning criminal liability on a mens rea of at least recklessness (regarding this tradition, see Hautamaki 1951). The former specifies a necessary baseline for criminal law generally; the latter reflects contingent features of the Anglo-American criminal regime. Thus, the dissent in *Dotterweich* accused the majority of interpreting the relevant statute to transgress the "fundamental principle of *Anglo-Saxon* jurisprudence that guilt . . . *ought not lightly* to be imputed to a citizen who, like the respondent, has no evil intention or *consciousness of wrongdoing*." *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting) (emphases added). This principle that the dissent described is not same as the fundamental principle of *criminal law* that guilt *cannot* be imputed to a defendant who was not even *negligent*. That the Court did not mean to suggest that public-welfare statutes deviate from the Fault Principle is clear from *Park*'s characterization of the defendant as guilty of "neglect where the law requires care" and its clarification that the statute "does not require [the] impossible," but only that those in the defendant's position exercise "no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." *Park*, 421 U.S. at 671, 673. For more on whether *Dotterweich* and *Park* treat public-welfare offenses as negligence crimes or strict-liability crimes, compare Abrams (1981) (entertaining negligence view) with Brickey (1982) (asserting strict-liability view).

III. PROXIMATE CAUSATION

Finally, the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency explains the common law's proximate-causation requirement for principal liability for a completed crime (as opposed to principal liability for a mere criminal attempt). Consider a crime that consists in performing an action either because of a forward-looking reason for the action or in spite of a forward-looking reason against the action. The common law imposes principal liability for a completed as opposed to merely attempted commission of such a crime only if the defendant's action "proximately" caused the result that the forward-looking reason specifies. For example, the common law imposes principal liability for completed as opposed to merely attempted murder only if the defendant's action proximately caused the death of the victim. In this Section, I will argue that the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency explains the requirement of proximate causation.

The best interpretation of what the common law means by "proximate" causation, I think, is that a defendant's action "proximately" caused a result iff it caused the result in a way that was foreseeable from the defendant's perspective at the time she performed the action.⁴ Some (e.g., Kadish 1985) argue that proximate causation under the common law requires not only foreseeability but also the lack of an intervening voluntary action. It is true that there is some case law to support the notion that every voluntary action breaks the chain of proximate causation.⁵ But the preponderance of the case law, especially relatively recent case law (see Binder 2016, 211), supports the claim that only

⁴ See, e.g., *State v. Lovelace*, 738 N.E.2d 418, 425 (Ohio Ct. App. 1999) "[F]or a criminal defendant's conduct to be the proximate cause of a certain result, it must first be determined that the conduct was the cause in fact of the result, . . . [and] [s]econd, . . . that the result achieved was not so extraordinary or surprising that it would be simply unfair to hold the defendant criminally responsible for something so unforeseeable."

⁵ See, e.g., *Lewis v. State*, 474 So.2d 766, 771 (Ala. Crim. App. 1985) (characterizing any exercise of "free will" as an "intervening cause sufficient to break the chain of causation"); but see also *id.* (suggesting that an intervening cause does not break the chain of causation if the defendant "should have perceived the risk" or "intended" that it would occur).

unforeseeable intervening causes break the chain of proximate causation.⁶ At any rate, I will argue in Chapters 4 and 7 that the law should not incorporate the doctrine that Kadish (1985) describes. Therefore, even if the common law has flirted with this doctrine in the past, it is no objection to the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency that it fails to vindicate this doctrine. On the contrary, if the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency implied that every voluntary action breaks the chain of proximate causation, then that would give us reason to reject this claim.

When I say that the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency explains the common law's requirement of proximate causation, then, I mean that it explains the requirement of foreseeability. To see how it does this, we need to isolate the sense of "completion" at issue in the distinction between completed and merely attempted crimes.

⁶ See, e.g., *State v. Frahm*, 444 P.3d 595, 601 (Wash. 2019) ("Whether an [intervening] act . . . relieve[s] a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant."); *State v. Smith*, 443 P.3d 360, 363 (Kan. 2019) ("[A]n intervening cause may absolve the defendant of liability unless the intervening cause is foreseen or might reasonably have been foreseen by the defendant."); *State v. Irish*, 873 N.W.2d 161, 168 (Neb. 2016) ("An intervening cause supersedes and cuts off the causal link only when the intervening cause is not foreseeable."); *State v. Lampien*, 223 P.3d 750, 758 (Idaho 2009) ("To relieve a defendant of criminal liability, an intervening cause must be an unforeseeable and extraordinary occurrence."); *Commonwealth v. Carlson*, 849 N.E.2d 790, 794 (Mass. 2006) ("[I]ntervening conduct of a third party will relieve a defendant of culpability . . . only if such an intervening response was not reasonably foreseeable."); *People v. Schaefer*, 703 N.W.2d 774, 786 (Mich. 2005) ("If [the intervening cause] was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause."); *People v. Saavedra-Rodriguez*, 971 P.2d 223, 226 (Colo. 1998) (en banc) ("For an independent intervening cause to relieve a defendant of liability it must not be reasonably foreseeable."); *People v. Hansen*, 68 Cal. Rptr. 2d 897, 899 (Cal. Ct. App. 1997) ("If an intervening cause is a normal and reasonably foreseeable result of defendant's original act, . . . [then it] will not relieve [the] defendant of liability."); *Commonwealth v. Catalina*, 556 N.E.2d 973, 980 (Mass. 1990) ("Intervening conduct that is reasonably foreseeable will not relieve the defendant of criminal responsibility"); *People v. Armitage*, 239 Cal. Rptr. 515, 525 (Cal. Ct. App. 1987) (holding that "only an unforeseeable intervening cause" is "exonerating"); *M.C.J. v. State*, 444 So.2d 1001, 1005 (Fla. Dist. Ct. App. 1984) ("[I]f the intervening cause is foreseeable, the original [] actor may yet be held liable."); *State v. McFadden*, 320 N.W.2d 608, 613 (Iowa 1982) ("Proximate cause is based on the concept of foreseeability."); *State v. Moore*, 580 S.W.2d 747, 752 (Mo. 1979) (holding that although "an independent intervening cause might relieve [a defendant] of criminal responsibility," an intervening cause is not "independent" if it is "reasonably foreseeable"); *Delawder v. Commonwealth*, 196 S.E.2d 913, 915 (Va. 1973) ("An intervening act which is reasonable foreseeable cannot be relied upon as breaking the chain of causal connection.").

Recall from Chapter 1 that there are three senses in which an exercise of agency can be said to reach “completion.” First, an exercise of agency that consists in an action comes to completion *as an endorsement or nonendorsement of a bit of practical reasoning* as soon as the agent begins to act because or in spite of the relevant reason. Obviously, this is not the sense of “completion” in which the criminal law distinguishes completed from merely attempted crimes. It is not the case that a person has completed murder as soon as she begins to kill. If the police were to intervene before she could finish the job, then she would be liable only for attempted murder. Indeed, our first sense of “completion” does not support a distinction between success and mere attempt at all, because even a mere attempt is complete as an endorsement or nonendorsement of a bit of practical reasoning.

Second, an exercise of agency that consists in an action comes to completion *as an action* only once the agent has completed her activity in the matter. This is not the sense of “completion” in which the criminal law distinguishes completed from merely attempted crimes, either. It is not the case that the assassin discussed in Anscombe (1979, 229) has committed murder as soon as he has pulled the trigger, thereby completing his activity in the matter. If the target is wearing a bullet-proof vest, then the would-be assassin will be liable only for attempted murder.

That leaves completion as consummation. Let us review what it means for an exercise of agency to reach consummation. If an exercise of agency consists in an action, then it reaches consummation in virtue of the fact that, in the practical reasoning that the defendant endorsed or failed to endorse, the representation of the circumstances was true and the representation of the action and its results came true. If an exercise of agency consists in an omission, then it reaches consummation in virtue of the fact that, in the practical reasoning that the defendant endorsed or failed to endorse, the representation of the circumstances was true and the representation of the action and its results did not come true.

This last sense of completion does seem to match the sense of “completion” in which the criminal law distinguishes completed from merely attempted crimes. For example, recall the case in which Peter puts some arsenic in a dish because doing so will likely result in Violet’s death. Peter’s exercise of agency will be consummated only if Peter succeeds in depositing the arsenic and Violet in fact dies as a result, because only in that case would the representation of the action in prospect (depositing the arsenic) and its results (Violet’s death) in the practical reasoning that Peter endorsed have come true. And sure enough, the criminal law would hold Peter liable for completed as opposed to merely attempted murder only if Violet in fact died as a result of Peter’s action.

Having isolated the relevant sense of “completion,” we are now in a position to see why the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency explains the common law’s proximate-causation requirement of foreseeability. If a completed crime is a consummated exercise of agency, then any result in virtue of whose occurrence the crime was completed must have been foreseeable to the agent. If the consummated exercise of agency was a positive exercise of agency, then the agent *did* foresee the result, because she endorsed a bit of practical reasoning that represented that result as coming about. And if the consummated exercise of agency was a negative exercise of agency, then although the agent failed to endorse the bit of practical reasoning that represented the result as coming about, the considerations in that practical reasoning were present to her. And I take it that if a consideration that represents a result as coming about is present to an agent, then the result is foreseeable from her perspective. Therefore, whether an exercise of agency is positive or negative, any of its results in virtue of whose occurrence it reaches consummation must have been foreseeable.

I conclude that the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency explains the proximate-causation requirement of foreseeability. If criminal liability is formally liability incurred by an agent for an exercise of her agency, then a completed crime

is just a consummated exercise of agency. But any results in virtue of whose occurrence an exercise of agency reaches consummation must have been foreseeable to the agent. Therefore, any results in virtue of whose occurrence a crime reaches completion must have been foreseeable to the principal.

CONCLUSION

This concludes my positive argument for this Dissertation's thesis that the common law not only should but does recognize only one thing it is to be guilty of a crime, namely, to have committed it. In the previous Chapter, we saw that this thesis follows from the claim that criminal liability is formally liability incurred by an agent for an exercise of her agency. I offered one argument for this claim in the previous Chapter, where I derived it from the function of the criminal law. And I offered a second argument for this claim in this Chapter, where I highlighted its explanatory power with respect to the major common-law doctrines of criminal liability, including the Voluntary Act Requirement, the Fault Principle, and the requirement of proximate causation.

If I am right that the common law not only should but does recognize only one thing it is to be guilty of a crime, to have committed it, then we must understand courts as indulging a legal fiction when they convict the accomplice of the token crime that the principal committed. As I indicated in the previous Chapter, I believe that this legal fiction is corrective rather than simplifying, which means that it is a sign that something has gone wrong in the law. Some idea must have worked its way into the law that implies that the accomplice did not commit the crime of which she is guilty. In the next five Chapters, I will attempt to exhaust the plausible candidates for what this idea is. I will identify four objections to the claim that accomplices commit the crimes of which they are guilty. By understanding where they go wrong, we can catch a glimpse of what the common law "worked pure" would look like. We will then be in a position at the end of the Dissertation to resolve debates about what the necessary and sufficient conditions for accomplice liability should be.

3. The Conduct Crimes Objection

INTRODUCTION

In this Chapter, I will examine what I will call the “Conduct Crimes Objection” to the claim that accomplices commit the crimes of which they are guilty. This objection concerns so-called “conduct crimes” such as battery, theft, and rape. It seems that one cannot commit such a crime unless one performs conduct of a certain type, but it also seems that there are cases in which the defendant is guilty of such a crime as an accomplice even though she did not perform the requisite conduct. It seems, then, that at least some accomplices do not commit the crimes of which they are guilty.

In Part I, I will spell out the Conduct Crimes Objection in more detail. In Part II, I will explain how Michael S. Moore, the other scholar who defends my claim that accomplices commit the crimes of which they are guilty, works around the Conduct Crimes Objection. After concluding that Moore fails to offer a satisfactory solution, I will briefly consider a second false route of escape in Part III. Finally, in Part IV, I will present my own response to the Conduct Crimes Objection. I will conclude that crimes such as battery, theft, rape, etc. pose no threat to the claim that accomplices commit the crimes of which they are guilty.

I. THE CONDUCT CRIMES OBJECTION

Crimes such as battery, theft, rape, conspiracy, and perjury are called “conduct crimes” because it is generally thought that one commits them at least partially in virtue of performing conduct of a certain type. For example, it seems that one commits battery at least partially in virtue of hitting the victim, one commits theft at least partially in virtue of taking the victim’s property, etc. Conduct crimes are sometimes contrasted with pure “result” crimes, where one commits a pure “result” crime at least partially in virtue of performing conduct that has result(s) of a certain type, and not even partially in virtue of performing conduct of a certain type. The classic example of a pure result crime is homicide:

one commits homicide at least partially in virtue of performing conduct that results in the victim's death, but what type of conduct it is (a stabbing, a poisoning, etc.) is irrelevant.

Conduct crimes pose a challenge to the claim that accomplices commit the crimes of which they are guilty. It is easy to imagine defendants who are guilty of conduct crimes as accomplices even though they did not perform the conduct that it seems that one must perform to commit the crime. For example, suppose that Alice pays Peter to beat up Violet. Surely, Alice is guilty of battery as Peter's accomplice. Yet it seems that Alice did not commit battery, because she did not perform conduct of the type that commission of battery requires: she did not herself hit Violet. Therefore, Alice appears to be a counterexample to the claim that accomplices commit the crimes of which they are guilty.

II. THE GOALPOST-SHIFTING RESPONSE

As I mentioned in this Dissertation's Introduction, the leading defender of the claim that accomplices commit the crimes of which they are guilty is Michael S. Moore. In this Part, I will assess whether Moore offers a satisfactory response to the Conduct Crimes Objection. In Section A, I will review how Moore avoids the problem that the objection raises. Then, in Section B, I will argue that this way of avoiding the problem is not viable.

A. Assimilating Conduct Crimes to Result Crimes

According to Moore, the sorts of crimes that give rise to the Conduct Crimes Objection are not really conduct crimes after all. In fact, they are pure result crimes. Moore reaches this conclusion by narrowing the goalposts around conduct until most of what most people would classify as conduct becomes results. According to Moore ([1993] 2010, 280–301), conduct is limited to basic action: intentional action not done by means of other intentional actions. And Moore ([1993] 2010, 78–112) thinks that basic actions are limited to bodily movements.¹ It follows that conduct is limited to bodily

¹ Strictly speaking, Moore (2010, 113) identifies basic actions not “with bodily movements *simpliciter*, but . . . with the complex event” of a volition causing a bodily movement. This complication is irrelevant for our purposes. In addition, Moore allows that, as technology progresses, we may develop the capacity to perform

movements. But if conduct is limited to bodily movements, Moore ([1993] 2010, 213–25; see also Hurd and Moore 2016, 167) argues, then crimes like battery, theft, etc. turn out not to be conduct crimes after all. Instead, they are pure result crimes: crimes that one commits at least partially in virtue of performing conduct that has result(s) of a certain type, and not even partially in virtue of performing conduct that is itself of a certain type.

For example, Moore maintains that one commits battery in virtue of performing (with the requisite mens rea) a bodily movement that results in “contact with the body of” the unconsenting victim ([1993] 2010, 217), theft in virtue of performing (with the requisite mens rea) a bodily movement that results in “the movement of [the victim’s] property” into another’s possession ([1993] 2010, 217), rape in virtue of performing (with the requisite mens rea) a bodily movement that results in “sexual penetration of” the unconsenting victim ([1993] 2010, 217), and conspiracy in virtue of performing (with the requisite mens rea) a bodily movement that results in one’s coconspirator(s) registering one’s assent to the conspiracy ([1993] 2010, 220–22). (Perjury, which Moore does not discuss, is trickier for him to handle. We will return to it in Section B.2.)

By reclassifying crimes like battery, theft, rape, and conspiracy as pure result crimes, Moore avoids the problem raised by the Conduct Crimes Objection. For example, when Alice paid Peter to beat up Violet, both Alice and Peter performed bodily movements that resulted in contact with Violet’s body: 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 sets of movements were

basic actions that are not bodily movements (or volition-causing-bodily-movement complexes). He (2010, 104) entertains 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. Moore does not dispute that turning the plane would be a basic action for the pilot. “If we ever do acquire the ability” to develop and use such a helmet, he (2010, 104–05) concedes, “then the most basic acts we know how to do will not be [limited to] bodily movements.” Because we do not yet “have the capacity” to develop and use such devices as the imagined helmet, however, “as it stands, the levers by which we move the world are our own bodies” (M. Moore 2010, 105).

causes of the contact between Peter's fists and Violet's body. On Moore's view, then, it is in virtue of the same thing—performing (with the requisite mens rea) conduct that results in contact with Violet's body—that both Peter and Alice committed, and therefore are guilty of, battery.

Of course, Moore need not deny that the legislature could, if it liked, abolish the crime of battery and replace it with a new crime—call it “shmattery”—that one commits iff one intentionally punches with one's arm in spite of the fact that doing so will result in someone else being hit who did not consent to being hit. If this is how shmattery is defined, then Alice did not commit shmattery when she paid Peter to beat up Violet, because she did not punch with her arm. On Moore's view, then, Alice is not guilty of shmattery. But this is no objection to Moore's view. To be sure, justice has miscarried if Alice escapes criminal liability while Peter is convicted. But Moore can say that the miscarriage of justice occurred at the legislative stage, not the judicial stage. In other words, the injustice did not consist in the fact that, despite being guilty of a crime, Alice was not convicted; rather, it consisted in the fact that, despite what she did, Alice was not guilty of a crime.

The Conduct Crimes Objection gets off the ground only because we all have at least a rough sense of what laws against battery, theft, rape, etc. criminalize. If, say, “battery” were a term of art in the positive law of each jurisdiction, then the defender of the Conduct Crimes Objection could not invoke our intuition that Alice is guilty of “battery” if she pays Peter to beat up Violet. The only reason we have any “intuition” at all about the matter is because we have an intuitive grasp of what the common law, and now state criminal codes to the extent that they have codified the common law, are referring to when they speak of “battery.”² Otherwise, we have no basis for an opinion about whether

² It is easy for legal scholars and practitioners, who are trained to make arguments from the authority of positive law, to forget that there are concepts in the criminal law that have a life of their own, independently of what positive law has to say about them. Elizabeth Anscombe (1963, 400–01) reports an exchange that she had with Joel Feinberg, who objected to her analysis of murder (which did not appeal to positive law as an authority) on the grounds that “‘murder’ was a legal concept,” and thus he did not know what she was talking about. Anscombe replied that “this is often said, but only because it is said, and the best thing to do about it is to stop

Alice is guilty of “battery” until we are informed what jurisdiction Alice is subject to and consult what the positive law actually says about “battery” in that jurisdiction. And if the positive law in the relevant jurisdiction clearly defines “battery” like *shmattery*, then Moore is free to deny that Alice is guilty of “battery.” If Alice nonetheless should be liable for a crime, Moore can say, then that merely shows that something is wrong with the positive law in the relevant jurisdiction, which ought to criminalize battery but instead criminalizes “battery”; it does not show that Alice is *really* guilty of “battery,” just on grounds other than the fact that she committed it.

Therefore, when Moore denies that the crimes that give rise to the Conduct Crimes Objection really are conduct crimes, he is referring to putative conduct crimes that are familiar enough to support an intuition that those who aid or abet them are guilty of them. He is not denying that *shmattery* is a conduct crime. No one denies the power of legislatures to stipulate into existence pointless crimes like *shmattery* that really are conduct crimes. But there is no pressure on the defender of the claim that accomplices commit the crimes of which they are guilty to affirm that those who aid or abet such crimes are guilty of them. She can merely say that the fact that those who aid or abet such crimes are not guilty of them is part of what makes such crimes pointless.

B. Problems with the Goalpost-Shifting Response

Moore’s way of avoiding the problem of conduct crimes rests on two premises. The first is that conduct is limited to bodily movements. The second is that none of the crimes that give rise to the Conduct Crimes Objection is such that committing it requires performing a bodily movement of a certain type. In this Section, I will argue that each premise is unmotivated at best. In Section 1, I will undermine the basis that Moore provides for thinking that conduct is limited to bodily movements. That basis, recall, was that conduct is limited to basic action, and basic actions are limited to bodily

saying it. No one, for example, concerns himself with questions of legality before calling ‘murder’ the killings of so many people by the Hitler regime.”

movements. I will argue that it is not the case that conduct is limited to basic actions. In Section 2, I will undermine the basis that Moore provides for thinking that none of the crimes that give rise to the Conduct Crimes Objection is such that committing it requires performing a bodily movement of a certain type. That basis, recall, was that the crimes that give rise to the Conduct Crimes Objection are all pure result crimes, and committing a pure result crime does not require performing a bodily movement of any particular type. I will argue that it is not the case that the crimes that give rise to the Conduct Crimes Objection are all pure result crimes.

1. Conduct is not limited to basic actions.

The basis that Moore provides for the claim that conduct is limited to bodily movements is unsound. Moore defends this claim by arguing that conduct is limited to basic actions, and basic actions are limited to bodily movements. As I will argue in this Section, however, it is not the case that conduct is limited to basic actions. Whatever else might constitute “conduct,” I take it that intentional actions do. And, as I will argue, not all intentional actions are basic actions.

Elizabeth Anscombe ([1957] 1963) famously pointed out that an agent normally has knowledge that is not based on observation or inference of what she is doing intentionally. For example, someone who is opening a window intentionally does not need to step back to observe what she is doing to know that she is opening a window. Of course, it might be a good idea to watch what she is doing to make sure that nothing goes wrong. The point is that she does not have to rely on observation or inference to discover that opening a window is what she is up to in the first place. As Anscombe ([1957] 1963, 51) puts it, it is not as if the agent has to say, “Let me see, what is this body bringing about? Ah yes! the opening of the window.” Unless the action is going so wrong that the agent is not really in the process of doing what she thinks she is doing, her nonobservational, noninferential judgment about what she is up to constitutes knowledge. Following Anscombe ([1957]

1963, 57), I will call this knowledge “practical knowledge.” The judgment that normally constitutes such knowledge I will call “practical judgment.”³

According to Anscombe ([1957] 1963, 87–88), practical judgment is not a mere correlate or side effect of intentional action; rather, it is in virtue of being the object of practical judgment that “what happens” is an intentional action at all. An action is an intentional action in virtue of being intended under some description (Anscombe [1957] 1963, 29; see also Davidson [1971] 2001, 46–47). And it is in virtue of being represented in practical judgment under a certain description that an action is intended under that description (Anscombe [1957] 1963, 87). Therefore, an agent’s practical judgment, normally constitutive of knowledge, that what is happening falls under certain descriptions (e.g., “opening the window”) is what grounds the fact that what is happening is an intentional action.

If Anscombe is right, then it is not the case that all intentional actions are basic actions. For on Anscombe’s view, what distinguishes intentional actions from other events, including their results, is the fact that intentional actions are objects of practical judgment. And it is not the case that only basic actions are the objects of practical judgment. Someone who is opening a window intentionally knows without observation or inference that she is opening a window, even if her action of opening the window includes parts, such as unlocking the catch and raising the sash, that are themselves intended as means to the whole that they constitute. Someone who is doing a jumping-jack knows without observation that she is doing a jumping-jack, and a jumping-jack is constituted by the intentional actions of opening the stance and closing the stance. Someone who cracks a couple eggs as part of making an omelet does not have to wait to observe what other ingredients get added to the

³ Some (e.g., Thompson 2011) argue that what I am calling “practical judgment” always constitutes practical knowledge. On this view, if ϕ -ing is what one intends to be doing, then ϕ -ing is what one is in fact doing, no matter how poor a job of it one is doing. Others (e.g., McDowell 2010, 430) disagree. Anscombe herself was ambivalent about the matter (see, e.g., Anscombe [1957] 1963, 50–51, 57, 82). For present purposes, I can afford to remain neutral in this debate. My argument would be otherwise unaffected if, instead of characterizing practical judgment as *normally* constitutive of practical knowledge, I characterized it as *always* constitutive of practical knowledge.

skillet to know that she is making an omelet. And so on. If Anscombe (see also Thompson 2008, 91) is right, then nonbasic actions like these—opening a window, doing a jumping-jack, and making an omelet—are all paradigm cases of intentional actions.

Surely, this account of distinction between intentional actions and intended results is more intuitively plausible than an account that limits intentional actions to the “atomic,” “eye-blink-like units” that are basic actions (Thompson 2008, 91). Ask a competent language-user to identify some of the intentional actions that she has performed today, and you will likely receive an enumeration of items to which the follow-up question “And how did you do that?” has a substantive answer (I mean: an answer other than “I can’t say I had a method; I just did it,” which is the only answer that one can give to the question how one performed a basic action).⁴ The philosopher who insists on striking such items as “making breakfast,” “driving to work,” and “phoning my mother” from the list on the grounds that the question how the agent performed them *does* have a substantive answer, and hence they are nonbasic, will be suspected of having changed the subject.

I conclude that Moore’s argument for the claim that conduct is limited to bodily movements fails. That argument rested on the premise that conduct is limited to basic actions, and we have just seen that conduct is not limited to basic actions. This leaves the claim that conduct is limited to bodily movements unmotivated at best. And it therefore leaves Moore’s response to the Conduct Crimes Objection, which relies on this claim as a premise, unmotivated as well.

⁴ Cf. Anscombe’s ([1957] 1963, 25–28) discussion of the analogous answer to the question, “Why did you do that?”: “For no particular reason; I just did it.” Anton Ford (2015, 133) has dubbed this the “null answer” to the question. Anscombe ([1957] 1963, 9, 34) argues that the central or paradigm cases of intentional action are those with “positive” (i.e., nonnull) answers to the question why their agents did them. Therefore, although the null answer is possible, “it could [not] be the only answer ever given,” because without central cases, there could be no peripheral cases either (Anscombe [1957] 1963, 34; see also Ford 2015, 133–35). If Ford (2015, 138–40; see also Vogler 2002, 130–35) is right, then the point holds not only with respect to the question “Why?” (which moves from means to ends) but also with respect to the question “How?” (which moves from ends to means). Although the null answer to the question “How?” is possible, it could not be the only answer even given. In other words, although basic actions are possible, it could not be the case that all actions are basic; basic actions are not “the central cases of intentional action” (Vogler 2002, 134, emphasis omitted).

2. It is not the case that the crimes that give rise to the Conduct Crimes Objection are all pure result crimes.

The basis that Moore provides for thinking that none of the crimes that give rise to the Conduct Crimes Objection is such that committing it requires performing a bodily movement of a certain type is also unsound. According to Moore, the crimes that give rise to the Conduct Crimes Objection are all pure result crimes, and committing a pure result crime does not require performing a bodily movement of any particular type. It is true, of course, that committing a pure result crime does not require performing a bodily movement of any particular type. But it is not the case that the crimes that give rise to the Conduct Crimes Objection are all pure result crimes. For pure result crimes do require performing conduct that has result(s) of a certain type. And I take it that, even on Moore's narrow conception of conduct, at least one putative conduct crime familiar enough to support an intuition that those who aid or abet it are guilty of it is not such that committing it requires performing conduct that has result(s) of a certain type. The crime that I have in mind is perjury. I take it that lying in sign language under oath constitutes commission of perjury, regardless what results it has. Even on Moore's narrow conception of conduct, however, lying in sign language counts as pure conduct, because it consists in nothing more than a bodily movement. Therefore, perjury is a counterexample to the claim that the crimes that give rise to the Conduct Crimes Objection are all pure result crimes.

I conclude that Moore fails to provide a sound basis for thinking that none of the crimes that give rise to the Conduct Crimes Objection is such that committing it requires performing a bodily movement of a certain type. Again, this leaves the claim that none of the crimes that give rise to the Conduct Crimes Objection is such that committing it requires performing a bodily movement of a certain type unmotivated. And it therefore leaves Moore's response to the Conduct Crimes Objection, which relies on this claim as a premise, unmotivated as well.

III. THE DISJUNCTIVE RESPONSE

At this point, one might be tempted to adopt a disjunctive account of the crimes that give rise to the Conduct Crimes Objection. There are two versions of this approach, which I will illustrate using the example of battery. According to the first, one commits battery in virtue of *either* hitting the victim *or* performing conduct that results in the victim being hit. According to the second, one commits battery *either* in virtue of hitting the victim *or* in virtue of performing conduct that results in the victim being hit. The difference between the two accounts is that the first involves a disjunction within a single grounding explanation, whereas the second involves a disjunction between two grounding explanations.

Unfortunately, neither account will do. In Section A, I will explain the problem with the first; in Section B, I will explain the problem with the second.

A. Disjunction within a Single Grounding Explanation

No crime could be such that one commits it in virtue of literally *either ϕ -ing or ψ -ing*. Recall from Chapter 1 that to commit a crime can only be to do something, or to fail to do something, because, or in spite, of a practical reason. But it is a category mistake to think that anything of the form *either ϕ -ing or ψ -ing* is something that one can do. We do say things like, “right now, Bob is either working or sleeping.” But this statement is analyzable as “right now, either Bob is working or Bob is sleeping.” Analyzed as “right now, the thing Bob is doing is: either-working-or-sleeping,” it would be nonsense. Similarly, a criminal statute that took the form not of a dual prohibition on ϕ -ing and on ψ -ing, such that one violates the statute iff either one ϕ -s or one ψ -s, but rather of a single prohibition on *ϕ -ing-or- ψ -ing*, such that one violates the statute iff one *ϕ -s-or- ψ -s*, would be nonsense.

B. Disjunction between Grounding Explanations

To make sense out of the proposal to define a crime like battery disjunctively, then, we must interpret it as a proposal to define battery as constituted either by hitting the victim or by performing

conduct that results in the victim being hit. In other words, we must interpret it as suggesting a disjunction between grounding explanations for the fact that a crime was committed, rather than a disjunction within a single grounding explanation for the fact that a crime was committed.

Interpreted this way, the proposal at least makes sense. However, it is an unsatisfying alternative to the Standard View. It vindicates the claim that there is just one thing it is to be guilty of a crime, namely, to have committed it, at the cost of implying that there are two things it is to commit a crime—or, at least, two things it is to commit the crimes that give rise to the Conduct Crimes Objection. And this merely relocates the problem with the Standard View. The motivating intuition behind the claim that Moore and I want to defend is that it is ultimately in virtue of some way in which someone who is guilty of crime C as a principal and someone who is guilty of crime C as an accomplice are alike that the law should treat them alike, that is, as each guilty of C. Saying that the principal and the accomplice are both guilty of C in virtue of having committed C does not satisfy this intuition if the principal commits C in virtue of one thing and the accomplice in virtue of something else.

I do not mean to suggest, of course, that the principal and the accomplice do exactly the same thing. If Peter hires Alice to distract Violet while Peter steals Violet's purse, then obviously Alice's action of distracting Violet is going to be different in all sorts of ways from Peter's action of taking Violet's purse. But then again, no two principals perform actions that are exactly the same in every respect, either. If Paul steals Veronica's car, then Paul's action of taking Veronica's car will be different in all sorts of ways from Peter's action of taking Violet's purse. The point is that it is in virtue of some way in which Peter's and Paul's actions are alike that each constitutes commission of theft. Whatever differences there are between the actions—for example, the fact that one occurred on a Tuesday and the other on a Saturday—do not enter into the grounding explanations for why Peter and Paul committed theft. The motivating intuition behind the claim that Moore and I want to defend is that it is likewise in virtue of some way in which Peter's and Alice's actions are alike that each constitutes

commission of theft. It is incompatible with this intuition to admit differences between Peter's and Alice's actions into the grounding explanations for why Peter and Alice committed theft. Yet this is exactly what it means to endorse a disjunction between grounding explanations for why principal and accomplice count as having committed a crime.

IV. AN ALTERNATIVE RESPONSE

Having surveyed two responses to the Conduct Crimes Objection and found them lacking, I will now present what I take to be the appropriate response. First, in Section A, I will point out that the crimes that give rise to the Conduct Crimes Objection pose a problem not only for the claim that accomplices commit the crimes of which they are guilty, but also for the claim, which no one denies, that *principals* commit the crimes of which they are guilty. Therefore, even if I prove unable to solve the problem, that would not constitute an objection to the claim that accomplices commit the crimes of which they are guilty. The problem would remain even if we rejected that claim. In Section A, I will explain why. Then, in Section B, I will propose a solution to the problem.

A. Extending the Problem to Principals

Before I propose a solution to the problem of conduct crimes, I want to lower the stakes by showing that the problem remains even if we deny that accomplices commit the crimes of which they are guilty. The problem of conduct crimes is a problem not only for the claim that accomplices commit the crimes of which they are guilty; it is also a problem for the claim, which no one denies, that principals commit the crimes of which they are guilty. Therefore, the problem would remain even if we affirmed with the defender of the Standard View that only principals commit the crimes of which they are guilty.

Recall the case discussed in this Dissertation's Introduction in which Peter programs a drone to take Violet's wallet. If Peter is manually steering the drone, then it is plausible that the taking of Violet's wallet is an action that he performs: if asked what he was up to, he could answer without

having to observe what is happening that he is taking Violet's wallet. But if the drone is sophisticated enough that Peter can program it to locate Violet's wallet and retrieve it on its own, then it is plausible that the taking of Violet's wallet is not an action that Peter performs. To be sure, *bringing it about the drone takes Violet's wallet* is an action that Peter performs; however, this action comes to completion when Peter finishes programming the drone (cf. Anscombe 1979, 228–29). The taking itself is something that the drone does as a result of this action. Although Peter may be confident based on the drone's past rate of success that *an* event that is a taking of Violet's wallet will occur, he need not have any knowledge of the particular taking that does occur (perhaps he is asleep at the time)—and if he does have knowledge of the particular taking that does occur, then it will presumably be because he observed it happen; hence, his knowledge of it is not practical knowledge. Therefore, even if we reject Moore's narrow view of conduct as bodily movement in favor of the broader view of conduct as the object of practical judgment that I proposed in Part II.B.1, the taking of Violet's wallet is not conduct that Peter himself performs. Yet Peter is clearly guilty of theft.

Or, consider a case in which two or more coprincipals jointly execute a taking of someone else's property. For example, suppose that Peter teams up with Paul to haul away Violet's safe, which is too heavy for Peter to carry by himself. Again, the taking is not conduct that Peter himself performs; instead, it is conduct that Peter and Paul together perform. Yet Peter is clearly guilty of theft.

It is true that courts have, on occasion, acquitted defendants like Peter in these cases. For example, in the notorious case of *Dusenbery v. Commonwealth*,⁵ the defendant, an armed night guard, caught two teenagers and threatened them into having sex while he watched.⁶ “Complaining that the boy had not penetrated the girl, the defendant . . . seized the boy's penis, and forced it ‘partially in’ the girl's vagina.”⁷ The Virginia Supreme Court reversed the defendant's conviction for rape on the

⁵ 263 S.E.2d 392 (Va. 1980).

⁶ *Id.* at 393.

⁷ *Id.*

grounds that Virginia’s criminal-rape statute defined rape as involving “carnally know[ing]” the victim, which the defendant did not himself do.⁸

I take it, however, that *Dusenbery* was wrongly decided. Although the court said that “the penetration of the [victim’s] sexual organ by the sexual organ of the [defendant]”⁹ is necessary for the defendant to commit rape, it cannot really have meant this. Taken literally, this statement implies that it would not constitute rape for a defendant to attach an extension to his sexual organ and penetrate the victim’s sexual organ against her consent but in such a way that only the extension goes inside. It is hard to believe that the court would have wanted to endorse this implication. But this case and *Dusenbery* lie on a spectrum of cases involving penetration with an instrument. True, at some point along the spectrum from simple instruments like the extension to complicated instruments like a perverted Rube Goldberg machine, it becomes incorrect as a matter of ordinary language to say that the defendant *himself* “sexually penetrated,” or “carnally knew,” the victim. But at no point does it become incorrect as a matter of ordinary language to say that the defendant is guilty of rape. And presumably guilt of what ordinary people mean by “rape” is closer to what the legislature meant to be the criterion of liability than whether it is correct as a matter of ordinary language to say that the defendant “carnally knew” the victim. After all, the latter criterion reflects nothing of significance to the criminal law—indeed, nothing of significance at all. A criminal law that made *that* the criterion of liability would make no sense, and a good interpretation is one that makes sense out of what it interprets (see Davidson 1973, 18–19).

At any rate, even if *Dusenbery* were rightly decided, all that would show is that the Virginia legislature decided to decriminalize rape and in its place to criminalize something else, which it assigned the label “rape” as a term of art in Virginia law. And in that case, we could set Virginia-law

⁸ *Id.* at 393–4.

⁹ *Id.* at 394.

“rape” to one side, along with shmattery and other crimes that a state legislature might stipulate into existence, as irrelevant to the dialectic in this Chapter for the reasons explained in Part II.A.

The same reasoning applies to the other crimes that give rise to the Conduct Crimes Objection. For example, imagine a statute that defines criminal battery as involving “hitting” the victim. Plainly, an interpretation of this statute on which hitting someone with a baseball bat does not constitute committing battery, on the grounds that it is the bat that does the hitting; the defendant merely swings the bat, would be obtuse. Even a court that hewed stubbornly to the ordinary usage of the verb “hit” would treat hitting someone with a baseball bat as battery for the purposes of the statute, because it is correct as a matter of ordinary language to say that the defendant in that case “hit” the victim. But what if the defendant employed a Rube Goldberg machine to deliver the blow? Programmed a robot to do it? Again, all such cases of hitting with an instrument lie on a spectrum. At no point along the spectrum does it become incorrect as a matter of ordinary language to say that the defendant is guilty of battery. And although at some point it does become incorrect as a matter of ordinary language to say that the defendant “hit” the victim, where exactly this vague borderline lies is a matter of mere linguistic convention with no underlying significance. It would be pointless for a criminal law to make *that* the crucial borderline between guilt and innocence. And a law that did would criminalize something other than battery, even if it assigned it the label “battery” as a term of art.

I conclude that there are cases in which a defendant is guilty of a conduct crime *as a principal* despite not having committed the conduct associated with the crime. In both the case in which Peter programmed a drone to take Violet’s wallet and the case in which Peter teamed up with Paul to take Violet’s safe, Peter is guilty of theft as a principal even though he did not himself take Violet’s property. The defendant in *Dusenbery* was guilty of rape (even if not Virginia-law “rape”) as a principal even though he did not himself sexually penetrate the victim. Someone who employs a Rube Goldberg machine to beat up a victim is guilty of battery as a principal even though she herself does not hit the

victim. And so on. In sum, if it is a problem for my theory that there are cases in which someone is guilty of theft, rape, or battery *as an accomplice* even though she did not herself take from, sexually penetrate, or hit the victim, then it is equally a problem for the Standard View that there are cases in which someone is guilty of theft, rape, or battery *as a principal* even though she did not herself take from, sexually penetrate, or hit the victim.

B. Proposed Solution

I will now offer a solution to the problem of conduct crimes. In Section 1, I will offer an account of conduct crimes such as theft, battery, etc. In Section 2, I will explain how this account solves the problem of conduct crimes for principals: it explains why those like the defendant in *Dusenbery* are guilty of conduct crimes as principals even though they did not themselves perform the relevant conduct. In Section 3, I will explain how the proposal solves the problem of conduct crimes for accomplices: it explains why someone can be guilty of a conduct crime as an accomplice even though she did not herself perform the relevant conduct. Finally, in Section 4, I will diagnose the cause of confusion about conduct crimes in the standard “element analysis” of crimes employed by the Model Penal Code (1962) and taught in criminal-law textbooks. Replacing element analysis with the analysis of crimes as exercises of agency developed in Chapter 1 enables us to reconceive the distinction between conduct crimes and result crimes in a way that does not give rise to the problem of conduct crimes.

1. How to define conduct crimes

The key to my solution is the idea of an action’s “consummation” (Anscombe’s 1979, 228–29). In Chapter 1, I introduced this notion in connection with exercises of agency. But we can apply it to actions as well. The idea is simple:

Consummation of an action =_{def} An action reaches “consummation” under the description “ ϕ -ing” in the event that makes the description “ ϕ -ing” true of the action.

Anscombe introduces this idea in the course of responding to Judith Jarvis Thomson's (1971) objection to the view, known as the "Anscombe-Davidson thesis," that Anscombe ([1957] 1963, 37–47) and Donald Davidson ([1971] 2001, 57–59) defend regarding the individuation of actions. Thomson uses the example of a fatal shooting to press the objection. According to the Anscombe-Davidson thesis, "pulling the trigger," "shooting the victim," and "killing the victim" are different descriptions of the same action that the shooter performed, rather than descriptions of three different actions that the shooter performed. This cannot be right, Thomson (1971, 116–19) protests, because the actions of pulling the trigger, shooting the victim, and killing the victim came to completion at different times: there was a lag between when the trigger had been pulled and when the bullet struck the victim, and again between when the victim had been shot and when the victim died. Anscombe (1979, 228–29) responds by distinguishing "the time of completion of an act," understood as "the time by which the agent had completed his activity in the matter," and the time of "consummation of the act," understood as "the time by which it had come about that" the act satisfied a certain description. The one action the shooter performed, variously describable as "pulling the trigger," "shooting the victim," and "killing the victim," had come to completion once the trigger had been pulled; however, this action did not reach consummation under the description "shooting the victim" until a moment later, when the bullet struck the victim, and it did not reach consummation under the description "killing the victim" until later still, when the victim died.

The concept of an action's "consummation" is thus intensional in the sense that a statement that an action reaches consummation in a certain event depends on how the action is described (Anscombe 1979, 228–29). Although "shooting the victim" and "killing the victim" are descriptions of the same action performed by the assassin, it changes the truth value of the statement that the action of killing the victim reached consummation in the victim's death—from true to false—if we substitute "shooting the victim" for "killing the victim."

Notice that the concept of a practical reason is intensional in the same sense: the truth value of a statement that something is a reason for (or against) an action also depends on how the action is described. For example, suppose that, to preserve his life, Bob runs out of a burning building. Although it is the only way to escape, running through the flames does cause him to burn more quickly while he is still in the building than he would have had he remained motionless. So, we can accurately describe Bob's action both as "escaping from the burning building" and "making himself burn more quickly." But it was escaping from the burning building, not making himself burn more quickly, that Bob did because it would preserve his life. In other words, it is under the description "escaping from the burning building," not "making himself burn more quickly," that Bob's action is such that he treated the fact that it would preserve his life as a reason for performing it.

I can now present my solution to the problem of conduct crimes. I will use theft as my example. Bracketing questions of mens rea, I submit that, roughly (this formulation will have to be refined in later Chapters), one commits theft iff, where ϕ -ing is an action that reaches consummation in a taking of X, one ϕ -s in spite of the fact that X belongs to someone else. A complete definition would specify mens-rea requirements for (1) the ϕ -ing (must the defendant act intentionally under that description, or is it enough that she knew that her action fell under that description?) and (2) the fact that X belongs to someone else (must the defendant know that X belongs to someone else, or is it enough that she was reckless or negligent with respect to that fact?). Because our business in this Chapter does not require us to sort out what the proper mens-rea requirements are for theft, I will leave these questions aside.

2. Solving the problem of conduct crimes for principals

The proposed definition of theft solves the problem of conduct crimes for principals. It allows us to account for cases in which someone is guilty of theft as a principal even though she did not herself take the victim's property.

For example, under the proposed definition, Peter counts as having committed theft in the case in which he programs a drone to take Violet's wallet. Among the true descriptions of Peter's action of programming the drone is "bringing it about that the drone takes the wallet." Although Peter's action reaches completion as soon as the drone has been programmed, it does not reach consummation under the description "bringing it about that the drone takes the wallet" until the drone does, in fact, take the wallet. For it is the drone's taking of the wallet that makes the description "bringing it about that the drone takes the wallet" true of Peter's action. Finally, it is under the description "bringing it about that the drone takes the wallet" (as opposed to, say, "programming a machine" or "typing on a keyboard") that Peter's action is such that he disregards the fact that the wallet belongs to Violet as a reason against performing it. Thus, bringing it about that the drone takes the wallet is an action that reaches consummation in a taking of the wallet, and Peter performs it in spite of the fact that the wallet belongs to Violet. Therefore, Peter counts as having committed theft under the definition proposed in Section 1.

Peter also counts under the proposed definition as having committed theft in the case in which he teams up with Paul to haul away Violet's safe. In this case, Peter's contributions to the team effort (lifting his end of the safe, etc.) are describable as "bringing it about that he and Paul together haul away the safe." Under this description, Peter's action reaches consummation in a taking of the safe. And it is under this description (as opposed to, say, "straining his back") that Peter's action is such that he disregards the fact that the safe belongs to Violet as a reason against performing it. Thus, bringing it about that he and Paul together haul away the safe is an action that reaches consummation in a taking of the safe, and Peter performs it in spite of the fact that the safe belongs to Violet. Therefore, Peter counts as having committed theft under the definition proposed in Section 1.

Although I am using the example of theft, the same approach works just as well for crimes like rape, battery, etc. For example, on my view, the conduct that one must perform to be guilty of

battery is not hitting the victim, but rather conduct that reaches consummation in a hitting of the victim. Not only hitting the victim oneself, but also bringing it about via a Rube Goldberg machine that a club hits the victim, are examples of conduct that reaches consummation in a hitting. Similarly, the conduct that one must perform to be guilty of rape is not sexually penetrating the victim, but rather conduct that reaches consummation in sexual penetration of the victim. Both the conduct of the typical rapist and the conduct of the defendant in *Dusenbery* are examples of conduct that reaches consummation in a sexual penetration.

3. Solving the problem of conduct crimes for accomplices

Finally, and crucially for the purposes of this Dissertation, the definition of theft proposed in Section 1 also solves the problem of conduct crimes for accomplices. It allows those, like Moore and me, who think that accomplices commit the crimes of which they are guilty, to account for cases in which someone is guilty of theft as an accomplice even though she did not herself take the victim's property.

For example, under the proposed definition of theft, Alice commits theft if she aids Peter in taking Violet's purse by distracting Violet. Among the true descriptions of Alice's action is "bringing it about that Peter takes Violet's purse." Alice's action does not reach consummation under this description until the Peter does, in fact, take the purse, for it is Peter's taking of the purse that makes the description "bringing it about that Peter takes the purse" true of Alice's action. Finally, it is under the description "bringing it about that Peter takes the purse" (as opposed to, say, "making small talk") that Alice's action is such that she disregards the fact that the purse belongs to Violet as a reason against performing it. Thus, bringing it about that Peter takes the purse is an action that reaches consummation in a taking of the purse, and Alice performs it in spite of the fact that the purse belongs to Violet. Therefore, Alice counts as having committed theft under the definition proposed in Section 1.

Or, suppose that Alice abets Peter to take Violet's purse by paying him to do it. Here again, Alice's action is describable as "bringing it about that Peter takes Violet's purse," a description under which it reaches consummation in Peter's taking of Violet's purse. And it is under this description (as opposed to, say, "handling some currency") that Alice's action is such that she disregards the fact that the purse belongs to Violet as a reason against performing it. In this case too, then, bringing it about that Peter takes the purse is an action that reaches consummation in a taking of the purse, and Alice performs it in spite of the fact that the purse belongs to Violet. And so Alice counts once again as having committed theft under the definition proposed in Section 1.

The definition of theft proposed in Section 1 also captures those who are guilty of crimes as accomplices in more unusual cases. For example, consider

Double Dealing. Alice is the night guard at the bank. Peter offers Alice a share of the contents of the bank vault if Alice leaves the back door open for him one night, and Alice accepts. Independently, Paul offers Alice a share of the contents of the bank vault if Alice leaves the back door open for him on the same night. Because she suspects that Peter might get cold feet, Alice accepts Paul's offer, too. Alice leaves the back door open. As it happens, Peter arrives first and steals the money in the vault.

In *Double Dealing*, Alice's action is describable as "bringing it about that either Peter or Paul takes the money in the vault." The event that makes this description come true of her action is Peter's taking the money in the vault. Therefore, Alice's action reaches consummation under the description "bringing it about that either Peter or Paul takes the money in the vault" in a taking of the money in the vault. And it is also under the description "bringing it about that either Peter or Paul takes the money in the vault" (as opposed to, say, the description "opening a door") that Alice's action is such that she disregards the fact that the money in the vault belongs to other people as a reason against

performing it.¹⁰ Therefore, under the definition of theft proposed in Section 1, Alice counts as having committed theft in *Double Dealing*.

Again, although I am using the example of theft, the same approach works for crimes like rape, battery, etc. Once we become clear on precisely what conduct commission of a conduct crime should require (not hitting, but conduct that reaches consummation in a hitting; not sexual penetration, but conduct that reaches consummation in sexual penetration; etc.), we can see that everyone who is guilty of a conduct crime as an accomplice does in fact perform the conduct required to commit the crime.

4. Revisiting the distinction between conduct crimes and result crimes

Before closing, it is worth diagnosing the cause of the confusion about conduct crimes in the standard “element analysis” of crimes. It is conventional for lawyers to analyze crimes as consisting in “elements” each of which falls into one of three categories: (1) facts about the defendant’s conduct (“conduct elements”), (2) facts about the results of the defendant’s conduct (“result elements”), and (3) facts about the circumstances of the defendant’s conduct (“circumstance elements”) (see, e.g., Model Penal Code § 1.13(9)). Crimes are specified by the elements that constitute them. Thus, for example, reckless manslaughter is specified by (1) the conduct element that the defendant performed a voluntary action with reckless disregard of the risk to the victim’s life, and (2) the result element that the victim died as a result.

The problem is that, as we have seen in this Chapter, the sorts of crimes that give rise to the Conduct Crimes Objection do not fit the straitjacket of element analysis. Among the facts in virtue of which someone counts as having committed, say, theft is the fact that she performed conduct that reached consummation in a taking of someone else’s property. This is neither necessarily a fact about the defendant’s conduct itself nor necessarily a fact about the results of the defendant’s conduct. Yet

¹⁰ I am grateful to Anselm Müller for prompting me to consider this sort of case.

element analysis requires the fact of a taking to fit into one of the three buckets of facts about the defendant's conduct, facts about the results of the defendant's conduct, or facts about the circumstances of the defendant's conduct. Not fitting into the latter two buckets, it gets crammed into the first, though it does not really fit there, either. The upshot is that the very plausible idea that there can be no commission of theft without a taking gets conflated with the idea that gives rise to the problem of conduct crimes, namely, the idea that there can be no commission of theft without a taking performed by the defendant herself.

We avoid the problem if we analyze crimes within the agency-based framework developed in Chapter 1. Within this framework, we distinguish between something that the defendant did or failed to do, and a practical reason because or in spite of which the defendant did or failed to do that thing, with practical reasons themselves dividing into forward-looking reasons concerning the results of the defendant's action and backward-looking reasons concerning the circumstances of the defendant's action. So, the agency analysis also involves a kind of tripartite distinction among conduct, results, and circumstances. Crucially, however, the relevant fact(s) about the defendant's "conduct"—what she did or failed to do, because or in spite of the applicable reasons—need not be fact(s) about the defendant's conduct as opposed to its results, that is, facts that specify intrinsic properties of an action the defendant performed as opposed to extrinsic properties of the form *having such-and-such result*. Often, a practical reason bears on the performance or nonperformance of an action under a description in terms of its results. For example, in the case in which Alice helped Peter to steal Violet's purse, the description of Alice's action under which the fact that the purse belonged to Violet counted as a reason against performing it was "bringing it about that Peter takes the purse," a description of Alice's action in terms of its results.

Thus, the analysis of crimes as exercises of agency opens a fresh understanding of the distinction between conduct crimes and result crimes. On this understanding, conduct crimes are

those that one commits in virtue of doing or failing to do *something specific* because or in spite of a practical reason. This criterion correctly sorts those crimes that are traditionally regarded as conduct crimes from those that are not. For example, to commit theft, it is not enough to do just anything in spite of the fact that something, X, belongs to someone else; one must perform conduct that reaches consummation in a taking of X. Hence, theft is a conduct crime. Whereas to commit manslaughter, it is enough to do anything at all in (reckless) spite of the fact that it will result in someone else's death; there is nothing specific, such as stabbing or shooting, or conduct that reaches consummation in a stabbing or a shooting, that one must do. Hence, manslaughter is not a conduct crime. Instead, because all it requires is acting in spite of a specific, forward-looking practical reason, it is a pure result crime. Analyzing crimes as exercises of agency thus enables us to make sense out of the distinction between conduct crimes and result crimes without raising the difficulties that arise when we try to parse the distinction in terms of element analysis.

CONCLUSION

I conclude that the claim that accomplices commit the crimes of which they are guilty survives the Conduct Crimes Objection. The same considerations that suggest that conduct crimes pose a problem for this claim also suggest that conduct crimes pose a parallel problem for the claim, which no one denies, that principals commit the crimes of which they are guilty. And once we replace the traditional element analysis of crimes with the agency analysis developed in Chapter 1, we can solve both problems. The key is to recognize that commission of a conduct crime does not require performing conduct that is itself of a certain type, but rather conduct that reaches consummation in an event of a certain type.

4. The Overinclusivity Objection

INTRODUCTION

In this Chapter, I will examine what I will call the “Overinclusivity Objection” to the claim that accomplices commit the crimes of which they are guilty. The Overinclusivity Objection is the first of two arguments that purport to show that the Doctrine of Intervening Causes states a limit on who counts as having committed a crime, a limit that implies that it is not the case that accomplices commit the crimes of which they are guilty. I will examine the second argument in Chapter 7.

My argument in this Chapter will proceed as follows. In Part I, I will spell out the Overinclusivity Objection in more detail. The idea behind the Overinclusivity Objection is that we should affirm the Doctrine of Intervening Causes because it explains why defendants in certain cases are not guilty of crimes (hence, an account of what it is to be guilty of a crime that omits the Doctrine of Intervening Causes will be overinclusive in the sense that it will imply that too many people are guilty of crimes). In Part II, I will review the response that Heidi M. Hurd and Michael S. Moore (2016, 178–82) offer to the Overinclusivity Objection. I will conclude that Hurd and Moore’s response is unsuccessful. In Part III, I will defend an alternative response to the Overinclusivity Objection. Whatever the correct explanation is for why the defendants in the cases highlighted by the Overinclusivity Objection are not guilty of crimes, I will argue, it is not the Doctrine of Intervening Causes. In Part IV, I will offer a tentative explanation of my own. Finally, in Part V, I will explain what role I think there is for something like the Doctrine of Intervening Causes in the criminal law. I will conclude that the Overinclusivity Objection poses no threat to the claim that accomplices commit the crimes of which they are guilty.

I. THE OVERINCLUSIVITY OBJECTION

The Overinclusivity Objection rests on two premises. The first is that the Doctrine of Intervening Causes states a limit on who counts as having committed a crime. The second is that if the Doctrine of Intervening Causes states a limit on who counts as having committed a crime, then it is not the case that accomplices commit the crimes of which they are guilty. In Section A, I will explain the rationale for the first premise; in Section B, I will explain the rationale for the second premise.

A. The Argument for the Doctrine of Intervening Causes

Consider the crime of manslaughter. As a first pass, we might define manslaughter as doing something in spite of the risk that it will result in the victim's death. But this cannot be quite right. For surely Alice is not guilty of manslaughter in

Car Sale I. Peter goes to the car dealership to purchase a car and is greeted by Alice, a salesperson. While Peter is test-driving a car, he makes some remarks that lead Alice to suspect that he is a very irresponsible driver. Nonetheless, when Peter decides to purchase the car, Alice sells it to him. A week later, Peter runs over Violet while driving recklessly.

Even though Alice sold the car in spite of the risk that it would result in someone's death, and this risk materialized, it seems that Alice is not guilty of manslaughter. One way to explain why Alice is not guilty of manslaughter in *Car Sale I* is to affirm

The Doctrine of Intervening Causes. Among the agents who were *prima facie* responsible for bringing about a certain result, only the agent whose responsible contribution was causally most proximate to the result is eligible to have committed a crime in virtue of having brought about the result.

Under the Doctrine of Intervening Causes, Peter's action of driving recklessly was an intervening cause of Violet's death that precludes Alice from counting as having committed manslaughter.

Therefore, the Doctrine of Intervening Causes explains why Alice did not commit, and therefore why she is not guilty of, manslaughter in *Car Sale I*.

B. Complicity and the Doctrine of Intervening Causes

The Doctrine of Intervening Causes implies that it is not the case that accomplices commit the crimes of which they are guilty. For example, suppose that Peter pays Alice to lure Violet into a dark alley so that Peter can kill her. In this case, both Peter and Alice were responsible for bringing about Violet's death. But only Peter is eligible under the Doctrine of Intervening Causes to count as having committed murder, because Peter's responsible contribution to Violet's death—stabbing her—was causally more proximate to Violet's death than Alice's responsible contribution to Violet's death—luring her into the dark alley. Therefore, under the Doctrine of Intervening Causes, Alice did not commit murder. But Alice is nonetheless guilty of murder. Therefore, if the Doctrine of Intervening Causes states a limit on who counts as having committed a crime, then it is not the case that accomplices commit the crimes of which they are guilty.

II. HURD AND MOORE'S RESPONSE

Let us see what Michael S. Moore has to say in response to the Overinclusivity Objection. In Section A, I will review Moore's response to the Overinclusivity Objection. In Section B, I will argue that this response is unsuccessful.

A. The Shopkeeper's Privilege

Moore (2009, 232) does not deny the second premise of the Overinclusivity Objection: the premise that if the Doctrine of Intervening Causes states a limit on who counts as having committed a crime, then it is not the case that accomplices commit the crimes of which they are guilty. Instead, Moore (2009, 254–79) denies the first premise of the Overinclusivity Objection: the premise that the Doctrine of Intervening Causes states a limit on who counts as having committed a crime. Writing with Heidi Hurd, Moore acknowledges that a “potential overbreadth” of criminal liability is a “worry”

(Hurd and Moore 2016, 178). But Hurd and Moore think that a better solution than the Doctrine of Intervening Causes is available. “[T]o deal with the overbreadth problem,” they (2016, 181) propose a “shopkeeper’s privilege,” which they characterize as “an instance of a more general ‘right to do right when others do wrong,’ but [with] its own distinctive contours.” Hurd and Moore (2016, 181) enumerate four such contours:

1. “[T]he privilege applies only in cases where the instrumentality through which the defendant causes some legally prohibited result is the voluntary action of some other human agent”;
2. “the crime aided must not be too grave in its seriousness, nor the substantiality of the aid given to that crime too great”;
3. “the action of the [defendant] must be part of a larger pattern of activity that is routine for the [defendant]”; and
4. “there must be a strong agent-relative ‘reason of autonomy’ for the act that aids another.”

Would the shopkeeper’s privilege proposed by Hurd and Moore acquit Alice in *Car Sale I*? Perhaps it would. Alice caused Violet’s death through Peter’s voluntary action of driving recklessly. The crime was arguably not “too grave” (although it seems rather grave to me, I suppose that manslaughter is at least less grave than murder because it involves a mens rea of mere recklessness with respect to the victim’s death), and the substantiality of Alice’s assistance was not “too great” (had she refused to sell Peter the car, he could have bought a car at another dealership). Selling cars is routine for Alice. Finally, whatever “a strong agent-relative ‘reason of autonomy’” is,¹ I suppose that it is possible that Alice had one for carrying on business as usual. Arguably, then, Alice satisfies the four conditions of Hurd and Moore’s shopkeeper’s privilege in *Car Sale I*.

B. The Shopkeeper’s Privilege Does Not Solve the Problem

¹ Hurd and Moore (2016, 181 n. 58) refer the reader to Nagel (1985) for the meaning of this term.

Nonetheless, I do not think that Hurd and Moore’s shopkeeper’s privilege is adequate as a response to the Overinclusivity Objection. Even if Alice qualifies for the shopkeeper’s privilege in *Car Sale I*, it is easy to tweak the case such that Alice does not qualify for the shopkeeper’s privilege but is still innocent of manslaughter.

For example, consider

Car Sale II. Everything is as it is in *Car Sale I*, except that Alice is the manager of the car dealership. In that capacity, she almost never sells cars herself. It is only because two of her salespeople both called in sick and the third was busy with another customer that Alice had to step in to greet Peter when he arrived.

In *Car Sale II*, the third condition of the shopkeeper’s privilege is not satisfied: Alice’s action is not “part of a larger pattern of activity that is routine” for her. Therefore, if we replace the Doctrine of Intervening Causes with the shopkeeper’s privilege, then Alice comes out as having committed manslaughter. Yet I take it that if Alice is not guilty of manslaughter in *Car Sale I*, then neither is she guilty of manslaughter in *Car Sale II*.

Or, consider

Car Sale III. Everything is as it is in *Car Sale I*, except that what concerns Alice about Peter is specifically that he has a temper, and a week later, instead of running over Violet by accident, Peter kills Violet after smashing into her car deliberately in a fit of road rage.

In *Car Sale III*, as in *Car Sale I* and *Car Sale II*, Alice sold Peter the car in spite of the risk that someone might die as a result, and that risk materialized. In *Car Sale III*, however, the crime that Peter commits is not manslaughter but murder. Even if Peter did not intend or know that Violet would die, he certainly smashed into her car with the kind of extraordinary recklessness “manifesting extreme indifference to the value of human life” that the law rightly recognizes as sufficient mens rea for

murder (Model Penal Code 1962, § 210.2(1)(b)). Therefore, the second condition of the shopkeeper's privilege is not satisfied: it is not the case that murder is "not too grave" a crime. And so, if we replace the Doctrine of Intervening Causes with the shopkeeper's privilege, then Alice comes out as having committed manslaughter. Yet I take it that if Alice is not guilty of manslaughter in *Car Sale I*, then neither is she guilty of manslaughter in *Car Sale III*.²

Thus, Hurd and Moore's shopkeeper's privilege cannot explain why Alice is not guilty of manslaughter in *Car Sale II* and *Car Sale III*. But the Doctrine of Intervening Causes can: in each case, Peter's action constitutes an intervening cause that, according to the Doctrine of Intervening Causes, precludes Alice from counting as having committed manslaughter. Therefore, Hurd and Moore fail to undermine the idea that the Doctrine of Intervening Causes states a limit on who counts as having a crime.

III. AN ALTERNATIVE RESPONSE

² The prospect of holding accomplice and principal liable for different crimes (in *Car Sale III*, manslaughter and murder, respectively) raises the question whether an accomplice can ever be guilty of a crime of which the principal is not guilty. The answer is yes. For example, suppose that Alice knows but Peter does not know that Violet has hemophilia and will die if Peter punches her. Nonetheless, Alice hires Peter to punch Violet. Peter punches Violet, and Violet dies as a result. Clearly, Peter is guilty of battery. One could argue that he is also guilty of manslaughter. Cf. *State v. Frazier*, 98 S.W.2d 707 (Mo. 1936) (upholding the manslaughter conviction of a defendant who had punched a victim with hemophilia, thereby causing the victim's death, even though the defendant did not know that the victim had hemophilia). But I take it that at any rate Peter is not guilty of murder. Yet Alice is guilty of not just manslaughter but murder, because she knew that Violet would die if Peter punched her. Therefore, Alice, the accomplice, is guilty of a crime, murder, of which Peter, the principal, is not. For real-world cases like this, see *Taylor v. State*, 840 N.E.2d 324, 335–36 (Ind. 2006); *People v. McCoy*, 24 P.3d 1210, 1213–17 (Cal. 2001); *Hunt v. State*, 687 So.2d 1154, 1162 n.4 (Miss. 1996); *Oates v. State*, 627 A.2d 555, 557–62 (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). Such cases present a difficulty for one who denies that the accomplice committed the crime of which she is guilty. For if the principal is not guilty of the crime, then it seems that the principal did not commit it. But if neither the accomplice nor the principal committed the crime, then it seems that no one committed it. And surely it is not the case that the accomplice is guilty of a crime that no one committed. One who denies that the accomplice committed the crime of which she is guilty could respond by insisting that, strictly speaking, what the principal "commits" is a unit of mere behavior that may constitute different crimes depending on the mens rea with which it is paired. On this view, in cases in which principal and accomplice exemplify different mentes reae, each is liable for the same unit of behavior committed by the principal; however, this unit of behavior constitutes one crime on the part of the principal and a different crime on the part of the accomplice. Although I am skeptical that an intentional action can be decomposed into a unit of mere behavior plus a mental item in the way that this response presupposes (cf. Lavin 2015; Ford 2011), I will not press the point here.

Although I do not think that Moore's response to the Overinclusivity Objection is successful, I do think that it is on the right track. That is, I think that Moore is right to challenge the premise that the Doctrine of Intervening Causes states a limit on who counts as having committed a crime, rather than the premise that if the Doctrine of Intervening Causes states a limit on who counts as having committed a crime, then it is not the case that accomplices commit the crimes of which they are guilty. And I also think that Moore is right to acknowledge that the Doctrine of Intervening Causes is a flawed solution to a genuine problem. In this Part, I will attempt to offer a more adequate solution than Hurd and Moore's shopkeeper's privilege.

The problem of overinclusivity is bigger than cases like *Car Sale I*, *Car Sale II*, and *Car Sale III* suggest. These cases show that standard definitions of crimes of homicide are overinclusive insofar as they imply that some who bring about a victim's death through the agency of another are guilty of homicide even though in fact they are not. But it is easy to produce other cases that show that standard definitions of crimes of homicide are overinclusive insofar as they imply that some who bring about a victim's death *directly, not through the agency of another*, are guilty of homicide even though in fact they are not. For example, consider

Sverve. A driver swerves to avoid hitting two people, foreseeing but not intending that she will hit one person as a result. The driver is at fault neither for the presence of the three people in the road nor for her inability to avoid hitting the two without hitting the one.

If doing something in spite of the fact that it will result in someone else's death constitutes committing murder, then the driver in *Sverve* committed, and hence is guilty of, murder. But I take it that the driver in *Sverve* is not guilty of murder.

Cases like *Sverve* show that the Doctrine of Intervening Causes does not really solve the problem of overinclusivity. Because no other responsible agent intervenes between the driver's action

and the victim's death, the Doctrine of Intervening Causes cannot explain why the driver is not guilty of murder in *Swerve*. This suggests that the Doctrine of Intervening Causes is not really the explanation for why Alice is not guilty of manslaughter in *Car Sale I*, *Car Sale II*, and *Car Sale III*, either. Cases like *Swerve* reveal the Doctrine of Intervening Causes to be an epicycle that partially covers up the problem of overinclusivity but fails to address its root cause.

One might respond by denying that the erroneous guilty verdict in *Swerve* is a manifestation of the same underlying problem with standard definitions of crimes of homicide as the erroneous guilty verdicts in *Car Sale I*, *Car Sale II*, and *Car Sale III*. If this is right, then perhaps the Doctrine of Intervening Causes is after all the explanation for why Alice is not guilty of manslaughter in *Car Sale I*, *Car Sale II*, and *Car Sale III*, and some other principle is the explanation for why the driver is not guilty of murder in *Swerve*.

For example, one might propose to supplement the Doctrine of Intervening Causes with the Model Penal Code's (1962, § 3.02(a)) "choice-of-evils" justification. The choice-of-evils justification provides that conduct that would otherwise constitute a crime does not constitute a crime if "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the [crime]." Now, it is unclear what exactly is the "harm or evil" that the law defining murder seeks to prevent: The sum total of deaths that would occur but for the criminalization of murder? Death in the abstract? But suppose we interpret the Model Penal Code's choice-of-evils justification in such a way that the "harm or evil . . . sought to be prevented by the law defining the offense charged" is the "harm or evil" that the defendant is on trial for having brought about. In *Swerve*, that would be the death of the one bystander. Then one could argue that the "harm or evil" that the driver sought to avoid by swerving, a pair of deaths, is greater than the "harm or evil" that the law seeks to prevent, a single death. On this view, the choice-of-evils justification narrows the range of murders that constitute crimes in a way that excludes the driver's conduct.

Unfortunately, supplementing the Doctrine of Intervening Causes with the choice-of-evils justification will not solve the problem of overinclusivity, either. To begin with, the choice-of-evils justification intervenes too late to save our intuitions about cases like *Swerve*. What is counterintuitive is not just the claim that the driver is guilty of a murder that the law should treat as a crime; it is also the claim that the driver is guilty of murder, period. After all, surely most (all?) of the many philosophers (e.g., Finnis 1988; Anscombe 1958) who affirm that under no circumstances is it morally permissible to commit murder will agree that what the driver did in *Swerve* was morally permissible. Yet all we are entitled to say if we affirm the choice-of-evils justification is that although the driver committed murder, it was a murder that the law should treat as “justified” and hence not treat as a crime. The choice-of-evils justification does not entitle us to deny that the driver committed murder in the first place. Therefore, it fails to do justice to our intuitions about the case.

Besides, the baldly utilitarian choice-of-evils justification is doubtful even as a claim about what the law should treat as a crime. For example, consider

Organ Harvest. A physician harvests organs from a healthy, unwilling victim to save two other people, foreseeing but not intending that the victim will die as a result.

I take it that the physician in *Organ Harvest* is guilty not only of murder, but of a murder that the law should treat as a crime. Yet the choice-of-evils justification implies that the law should treat the physician’s conduct as “justified,” such that it does not constitute a crime.³

And even if one bites the bullet, affirming that the justified conduct committed by the driver in *Swerve* is murder and the murder committed by the physician in *Organ Harvest* is justified conduct, supplementing the Doctrine of Intervening Causes with the choice-of-evils justification *still* would not solve the problem of overinclusivity. Consider

³ Alternatively, if the defender of the choice-of-evils justification proposes that it is not deaths as such, but rather killings, that the criminal prohibition on murder seeks to prevent, then we could imagine cases in which murdering one person is necessary and sufficient to prevent someone else from murdering two people.

Epidemic. A physician uses the last dose of an antidote to cure a patient of a deadly disease during an epidemic. Producing more doses will take time. The physician foresees but does not intend that someone else will die from the disease in the meantime as a result of the unavailability of the dose that the physician will have used on the patient.

I take it that the physician in *Epidemic* is not guilty of murder at all, and hence, *a fortiori*, is not guilty of unjustified murder. It would be absurd if guilt for murder were triggered by any use of the last dose as long as the prevalence of the disease is at least two. Yet the physician does something in spite of the fact that it will result in someone else's death. Because no other responsible agent intervenes between the physician's action and the victim's death, the Doctrine of Intervening Causes cannot explain why the physician's conduct does not constitute murder. And because it is not the case that the "harm or evil" that the physician seeks to prevent, one death, is greater than the "harm or evil" that the physician is on trial for having brought about, one death, the choice-of-evils justification cannot even explain why the physician's conduct is justified.

I conclude that although the Doctrine of Intervening Causes implies that Alice is not guilty of manslaughter in *Car Sale I*, *Car Sale II*, and *Car Sale III*, it is implausible as an explanation for *why* Alice is not guilty of manslaughter in *Car Sale I*, *Car Sale II*, and *Car Sale III*. For it fails to imply that the driver is not guilty of murder in *Swerve*, and presumably whatever explains why Alice is not guilty of manslaughter in *Car Sale I*, *Car Sale II*, and *Car Sale III* also explains why the driver is not guilty of murder in *Swerve*. In principle, one could argue that there are multiple problems of overinclusivity, and the Doctrine of Intervening Causes is the solution to one of them. But the attempt to cobble together a patchwork solution to the problem(s) of overinclusivity by supplementing the Doctrine of Intervening Causes with the choice-of-evils justification failed, and I see no reason to be optimistic that layering on yet another epicycle will make the problem(s) disappear.

We have thus undermined the Overinclusivity Objection. The Overinclusivity Objection relied on the claim that the Doctrine of Intervening Causes explains why defendants in cases like *Car Sale I* are not guilty of crimes to motivate its premise that the Doctrine of Intervening Causes states a limit on who counts as having committed a crime. But we have just concluded that the Doctrine of Intervening Causes does not explain why defendants in cases like *Car Sale I* are not guilty of crimes. True, I have not yet attempted, like Hurd and Moore did, to identify what *does* explain why defendants in cases like *Car Sale I* are not guilty of crimes, if the Doctrine of Intervening Causes does not. But we do not need to identify the correct explanation in order to defuse the threat posed by the Overinclusivity Objection to the claim that accomplices commit the crimes of which they are guilty. All we need to do is to show that the Doctrine of Intervening Causes is not the correct explanation.

IV. CRIMINAL LIABILITY AND MORAL WRONGDOING

This conclusion might leave some readers unsatisfied. If what these readers want is an account of, say, murder that will supply an explanation for why someone did or did not commit murder in any case that one could imagine, then I will have to leave them unsatisfied. I do not have a complete account of what it is to commit murder, and I suspect that developing one would require a book of its own. What I can offer, however, is an explanation for why the defendants in cases like *Car Sale I*, *Car Sale II*, *Car Sale III*, *Sverve*, and *Epidemic* should not be guilty of anything that the law should recognize as a crime. In the course of offering this explanation, I will also offer enough of an account of manslaughter and murder to explain at least why the defendants in *Car Sale I*, *Car Sale II*, and *Car Sale III* are not guilty of manslaughter and to distinguish *Sverve* and *Epidemic* from *Organ Harvest*.

Before I get started, it is important to emphasize that the argument in this Part is bonus material as far as this Dissertation's thesis is concerned. Even if the argument of this Part is a total failure, the conclusion of the previous Part that the Overinclusivity Objection poses no threat to the claim that accomplices commit the crimes of which they are guilty would still stand.

My argument in this Part will proceed as follows. In Section A, I will explain how the content of one's moral obligations is a function of convention as well as preconventional moral principles. In Section B, I will explain why it makes sense for the criminal law to track preexisting moral obligations, that is, the moral obligations implied by preconventional moral principles in conjunction with prelegal conventional rules. In Section C, I will argue that the best way for the criminal law to track preexisting moral obligations is for it to approximate complex forms of prelegal moral wrong by partially specifying them and then conditioning liability on the moral impermissibility of the defendant's exercise of agency. On this view, the legal definition of "murder" should be only a rough approximation of what it really is to commit murder, plus the requirement that a defendant commits "murder" for the purposes of the law only if she exercises her agency in a morally impermissible way. Finally, in Section D, I will explain why if the law follows this approach, then the defendants in cases like *Car Sale I*, *Car Sale II*, *Car Sale III*, *Swerve*, and *Epidemic* will not be guilty of crimes.

A. Convention Partially Determines the Content of Moral Obligations

Legal norms develop against a background of prelegal norms. Some of these norms are moral norms that are not only prelegal but more generally preconventional.⁴ For example, it is morally impermissible (arguably with a handful of exceptions) to act with the intention of bringing about a person's death. It is plausible that there are moral norms governing knowingly or recklessly bringing

⁴ Those who think that morality is conventional all the way down will, of course, dispute this claim. But I do not think that it is plausible that morality is conventional all the way down. One reason why it is not plausible is that it implies an unacceptable relativism. Suppose that the convention in Society A is to treat slavery with whatever tolerance or approval the conventionalist thinks constitutes a type of conduct as morally permissible in a society, and the convention in Society B is to treat slavery with whatever intolerance or lack of approval the conventionalist thinks constitutes a type of conduct as morally impermissible in a society. It seems clear to me that Society B's attitude toward slavery is, and Society A's attitude is not, appropriate (that is: appropriate *simpliciter*, not just "from our perspective" as denizens of a society whose conventions happen to overlap with Society B's in this regard). Because conventionalism cannot accommodate this truth, conventionalism must be false. A second reason to reject conventionalism is that it has a difficult time accommodating the fact that, sometimes, those who are challenging convention have morality on their side. Therefore, even if basic moral principles were society-relative, it is difficult to see how they could be a function of convention. Something can be both morally right and unconventional in the same social context.

about a person's death, too. For example, I take it that, *ceteris paribus*, the action of the driver in *Swerve* is morally permissible but the action of the physician in *Organ Harvest* is not. Here is a plausible explanation for why: *ceteris paribus*, it is morally impermissible to act intentionally under a description under which one knows that one is killing a person. The descriptions under which the driver in *Swerve* acted intentionally, "swerving" and "avoiding the two people," are not descriptions under which the driver killed the one bystander. Indeed, the action that constituted the killing—running over the victim—was not intended by the driver under any description. In *Organ Harvest*, by contrast, it was cutting the victim open, as such, that constituted the killing, and the physician did it intentionally. So, we have identified one plausible preconventional, moral norm that governs knowingly or recklessly bringing about a person's death. And there are, no doubt, many others.

The content of most of our moral obligations, however, is not hard coded into preconventional moral norms. Instead, it is soft coded into a general, *pro tanto* moral obligation to comply with conventional norms that play an important social-organizational role. What H. L. A. Hart ([1961] 2012, 55–57) calls "social rules" are the means by which human beings solve coordination and other collective-action problems. From the institution of promising (Anscombe 1969) to the norms governing eighteenth- and nineteenth-century whaling practices (Ellickson 1989), conventional norms that enjoy general, even if not universal, compliance enable a tremendous amount of human flourishing that could not otherwise be attained. On some Aristotelian-naturalist metaethical views, this may be sufficient to ground a *pro tanto* moral obligation to comply with the organizing conventions of one's society. But I take it that the existence of such an obligation is plausible even if one harbors doubts about the Aristotelian-naturalist's explanation for its existence.⁵

⁵ See, e.g., Evans and Smith (2018, 610) (arguing that "individuals have an obligation to perform the duties of the roles they inhabit" without assuming a particular metaethical theory). For a catalog of the ways in which social roles can alter the topology of preconventional moral obligations, see Swanton (2016, 697–700). Arguably, the moral obligations associated with the conventions most essential to human life, such as promising, are basic rather than derivative of a general moral obligation to comply with the organizing norms

B. The Criminal Law Should Track Preexisting Moral Obligations

It is against this backdrop of moral and merely customary conventional rules that the more sophisticated conventional rules that constitute a legal system develop. As tools of social organization, Hart ([1961] 2012, 91–94) famously pointed out, merely customary rules are limited in three ways. First, people may be uncertain about what is and what is not a customary rule in their society. Second, custom evolves slowly; it cannot adapt quickly to changed circumstances. Third, disputes about how customary rules apply to a given circumstance will arise that do not admit of easy resolution. The key to transcending these limitations is the special social rule that Hart ([1961] 2012, 94–95) called the “rule of recognition”: a higher-order conventional norm that prescribes acceptance of lower-order conventional norms that satisfy certain criteria of validity. The mere existence of the rule of recognition solves the first problem, the problem of uncertainty. And if it has the right content, then the rule of recognition can solve the second and third problems as well. Rapid change in the conventional norms governing a society is possible if the criteria of validity specified by the society’s rule of recognition allow for rapid change in the norms that satisfy them (see Hart [1961] 2012, 95–96). (For example, if the criterion of validity is promulgation by a monarch or legislature, then the norms that satisfy it can change as quickly as the monarch or legislature can issue a decree.) And if the criteria of validity specified by the rule of recognition are flexible enough, then among the norms that can satisfy the criteria of validity specified by the rule of recognition will be norms that govern a process of resolving disputes about how the other norms that satisfy the criteria of validity specified by the rule of recognition apply to particular circumstances (see Hart [1961] 2012, 96–98). According

of one’s society. For a view on which the moral obligation to honor one’s promises is not derivative in this way, see Shiffrin (2008).

to Hart ([1961] 2012, 100–10), a rule is a *legal* rule—a *law*—in virtue of satisfying the criteria of validity specified by a rule of recognition that solves all three problems.⁶

By the time law arrives on the scene, then, custom has already supplied content to the general moral obligation to comply with the organizing conventions of one’s society, generating many and diverse rights and responsibilities that are no less moral for being conventional (see Anscombe 1978, 9–18; [1978] 1981). Of course, law has an important role to play in supplementing and correcting custom. For the reasons that Hart (see also Shapiro 2011, 154–76, 213–4) pointed out, law can achieve results that custom by itself cannot, even custom that is just fine as far as custom goes. And not all customs are good at all: some are outdated, rooted in prejudice, incompatible with preconventional moral norms, or otherwise defective as tools of social organization. But one need not adopt a naïve conservatism to recognize that much custom is good, and it would be a mess if law uprooted it. Imagine what a disaster it would be if the law stopped recognizing property rights, for example.

Criminal law is no exception. Indeed, if retributivists are right, and the function of law is to punish moral wrongdoing, then the criminal law should take citizens’ preexisting moral obligations as it finds them.⁷ Utilitarians and mixed theorists, it is true, will allow the criminal law to impose new obligations that do not merely reinforce preexisting moral obligations. But mixed theorists will insist that law do so within the constraints of preconventional moral norms lest the criminal law end up

⁶ More precisely, Hart ([1961] 2012, 116–17) thinks that a rule is a law in virtue of belonging to a system of rules united by a rule of recognition that solves all three problems, provided that two additional conditions are met: (1) most of the members of society obey most of the system’s primary rules most of the time, and (2) the officials treat the system’s secondary rules as normative “standards of official behavior.”

⁷ This is why, as Douglas Husak ([2005] 2010) points out, it is a challenge for retributivists to make sense out of “*mala prohibita*”—actions that would be morally permissible but for being criminalized. Husak ([2005] 2010, 411) offers the example of a federal money-laundering statute that “imposes up to 10 years’ imprisonment on persons who knowingly engage in a monetary transaction (such as a bank deposit or withdrawal) of funds greater than \$10,000 derived from specified unlawful activities.” As Husak ([2005] 2010, 411) points out, “although it is obviously wrongful to profit from conduct that is *malum in se*, it is hard to see why persons who deposit or withdraw these funds from banks commit a second wrong that is independent of or prior to law.” But then it is difficult to see how the money-laundering statute could be justified on retributivist grounds. Husak ([2005] 2010, 432) concludes that retributivists have so far failed to explain how, on their view, “punishment can be justified for those who commit *mala prohibita* offenses.”

punishing morally innocent conduct. And even utilitarians should recognize that one of the criminal law's most effective mechanisms of deterrence is the stigmatization of criminal conduct, which for many citizens operates by screening criminal conduct out from the range of options that they would even consider (see Kahan 1996, 603). This mechanism of deterrence is arguably even more effective than the more familiar mechanism that operates by increasing the cost (by adding the risk of criminal punishment) of an option already under consideration. But the stigmatizing power of the criminal law is diluted to the extent that the law criminalizes "*mala prohibita*" (conduct that would be morally permissible but for being criminalized) rather than "*mala in se*" (conduct that would be morally impermissible even if the law did not criminalize it). And the stigmatizing power of the criminal law risks being compromised altogether if the law criminalizes conduct that remains morally permissible notwithstanding being criminalized. As Carissa Byrne Hessick (2006, 117; see also Kahan 1996, 604) puts it, the criminal law deters "most effectively when [citizens] believe that committing a crime is morally wrong," which will "occur[] only so long as criminal laws approximate moral wrongs." If anything, then, the criminal law should conform even more closely to the topology of preexisting moral obligations than other areas of law should.

C. The Criminal Law Should Condition Liability on Moral Wrongdoing

Unfortunately, there is no clean way to implement the principle that the criminal law should track preexisting moral obligations. On the one hand, it would vest too much discretion in the judge or jury for the law simply to declare it a crime to commit some complex kind of moral wrong, such as murder, without doing anything to settle disagreements about what constitutes murder. Retributivists and mixed theorists should worry that like cases would not be treated alike, because opinions about what constitutes this or that crime would vary from judge to judge and jury to jury. Utilitarians and mixed theorists should worry about overdeterrence: potential defendants' uncertainty regarding the

opinions of the judge or jury they would face if prosecuted would deter some socially beneficial conduct.

On the other hand, it would be a fool's errand to attempt to specify with precision the contours of complex moral wrongs like murder, or the conditions under which *pro tanto* moral wrongs like trespass amount to moral wrongs *tout court*. The topology of prelegal moral obligations is simply too complex and moving a target for the criminal law to reproduce faithfully in any detail. As Douglas Husak (1989, 4) observes, “[o]ffenses would become horribly complex if all (or even most) factors relevant to blameworthiness were incorporated into statutes.” Even if, miraculously, the legislature got all the factors right, criminal statutes would be a nightmare for the executive branch to enforce and the judicial branch to adjudicate. And even statutes that at the time of their enactment accurately specified the contours of preexisting moral obligations would have to be updated regularly as social norms continue to evolve, sometimes rapidly in response to technological change, unless the contours of the moral obligations that they are tracking are fixed entirely by preconventional moral norms.

The best option for most crimes, I think, is the middle course of at least partially specifying what constitutes committing the kind of moral wrong in question and then conditioning liability on the moral impermissibility of the defendant's exercise of agency. When the criminal law is tracking an absolute moral wrong, such as murder, the moral impermissibility of the defendant's exercise of agency should be a condition on that exercise of agency constituting commission of the crime. When the criminal law is tracking a *pro tanto* moral wrong, such as trespass, the moral permissibility of the defendant's exercise of agency should be a defeater of liability even though the exercise of agency did constitute commission of the crime. Either way, the proposal to condition liability on the moral impermissibility of the defendant's exercise of agency could be implemented procedurally by requiring the prosecution to prove beyond reasonable doubt that the first condition is met, in which case the

burden would shift to the defendant to raise the issue of moral permissibility as an affirmative defense and convince the jury by a preponderance of evidence that the second condition is not met.

For those who remain concerned about the degree of discretion that this proposal would vest in judicial decisionmakers, it is worth noting that, for better or worse, judicial decisionmakers exercise a comparable degree of discretion already. The kind of moral judgment that I am claiming should play an explicit role in judicial determinations of criminal liability is in fact playing an implicit role in judicial determinations of criminal liability already: it is well documented that courts tend to invoke various legal doctrines selectively to impose liability when the defendant acted morally impermissibly and to withhold liability otherwise.⁸ And many jurisdictions, following the Model Penal Code (1962, § 2.02(2)(c)), explicitly build a moral condition into the definition of recklessness.⁹ So, my proposal does not vest judicial decisionmakers with more discretion than they are exercising already, albeit implicitly, and the discretion with which it vests them explicitly is qualitatively similar to the discretion that the Model Penal Code and many jurisdictions explicitly vest them, even if in a narrower range of cases.

⁸ See, e.g., Huq and Lakier (2018, 1527) (noting that a clear showing that the defendant was morally at fault is “an increasingly important gatekeeper of . . . criminal liability in federal law,” with various “doctrinal mechanisms . . . employed to ensure that” liability is imposed “only when fault is . . . apparent”); Huigens (1995, 1462) (“Criminal liability is not imposed [merely] because the actions of the defendant fall into a particular pattern or have a particular result. In the actual adjudication of a criminal case, . . . [t]he question—made explicit in cases of colorable justification or excuse, but implicit in every case—is whether the choices the actor made, in the particular circumstances she faced, reflect sound practical judgment.”); Gobert (1993, 12–13) (“Obtuse and strained analyses often appear in cases involving intervening causes in order to allow the courts to impose sanctions on a defendant thought to be deserving of punishment or to avoid imposing liability on a defendant not thought to be so deserving.”).

⁹ See, e.g., N.J. Stat. Ann. § 2c:2-2(b)(3) (defining “recklessly” as “consciously disregard[ing] a substantial *and unjustifiable* risk”) (emphasis added). Note that definitions of recklessness are not the only places where American jurisdictions recognize moral conditions for criminal liability. As Hessick (2006, 124) observes, the application of criminal law in American jurisdictions involves a “multitude of moral judgments.” For example, New York recognizes insanity as a defeater of criminal liability only if the defendant lacked the cognitive capacity to appreciate that what she did was “wrong” in a sense that entails being “against commonly held moral principles.” N.Y. Penal Law § 40.15. For more examples, see Hessick (2006, 125–27).

A few caveats are in order before moving on. First, in some cases, the extra condition for liability that I am proposing—the condition that the defendant’s exercise of agency was morally impermissible—may be redundant, because the law has already managed concisely to specify sufficient conditions for committing the moral wrong in question. For example, with a handful of candidate exceptions (e.g., killing in a just war and killing in execution of a capital sentence), doing something because it will result in someone else’s death is always morally impermissible, regardless of the context of social norms. Therefore, assuming the law has already provided for these exceptions, it does not need to qualify its criminalization of doing something because it will result in someone else’s death by adding the condition: when doing so is morally impermissible.

Second, there will be cases in which the extra condition should be omitted even though it is not redundant. For example, it is plausible that parking violations and other peripheral or secondary cases of “crimes”—the sorts of offenses that the Model Penal Code (1962, 104(5)) calls “violations”—should not be conditioned on the moral impermissibility of the action of parking illegally. And there may even be primary cases of crimes whose deterrent value would be so compromised by the extra condition that the extra condition should be omitted.

Third, *mala prohibita* should be handled slightly differently. The moral permissibility of the conduct of a defendant charged with a *malum prohibitum* cannot be assessed in abstraction from the existence of the criminal law that the defendant is charged with violating. Otherwise, defendants charged with a *malum prohibitum* offense could rarely, if ever, be convicted, because *mala prohibita*, by definition, would be normally morally permissible but for being criminalized. Criminal laws targeting *mala prohibita* do not reflect but rather seek to alter preexisting moral obligations. Therefore, a criminal law that *pro tanto* prohibits the *malum prohibitum* of ϕ -ing should be understood to criminalize all ϕ -ings that are within the law’s power to render morally impermissible, excluding only those that, given the

topology of preexisting moral obligations, would remain morally permissible even if the criminal law were to prohibit them.

D. Solving the Problem of Overinclusivity

If we condition liability for most crimes on the moral impermissibility of the defendant's exercise of agency, then the problem of overinclusivity disappears. In Section 1, I will explain why conditioning criminal liability on moral wrongdoing solves the problem for principals. In Section 2, I will explain why conditioning criminal liability on moral wrongdoing solves the problem for accomplices.

1. Solving the problem of overinclusivity for principals

First, recall the cases that raised the problem of overinclusivity for principals: *Sverve* and *Epidemic*. I take it that the driver's action in *Sverve* and the physician's action in *Epidemic* were both morally permissible. Therefore, if we condition criminal liability for doing something in spite of the fact that it will result in someone else's death on the moral impermissibility of doing so, then neither the driver in *Sverve* nor the physician in *Epidemic* is liable for murder.

2. Solving the problem of overinclusivity for accomplices

Now, recall the cases that raised the problem of overinclusivity for accomplices: *Car Sale I*, *Car Sale II*, and *Car Sale III*. The norm in our society is that retailers should sell their products to anyone prepared to pay, without concerning themselves with what the buyer intends or is likely to do with the product. Buyers will take offense if sellers violate this norm, and store managers will fire salespeople who violate it. This norm serves an important social function. Among the ways to prevent various bad outcomes, tasking the sellers of items which may be used in a way that produces these outcomes with screening their customers is generally far from the most efficient. It is plausible, then, that a retail salesperson such as Alice in *Car Sale I*, *Car Sale II*, and *Car Sale III* is in most cases at least morally permitted—and perhaps, in some cases, morally obligated as a matter of faithfully executing

the job for which her employer has hired her—to sell without concerning herself with her buyers’ business.

There are, of course, exceptions. If big Bob sells power tools, and small Sam who poses no threat to Bob walks in and demands a chainsaw for immediate use on his romantic rival who happens to be at the bus stop outside, then it seems clear that Bob is obligated, both as a matter of social norms and as a matter of ethics, not to sell a chainsaw to Sam. The gravity and certainty of the bad result—an imminent murder—suffice to defeat not only the *pro tanto* social obligation, but also the *pro tanto* social and moral permission, that Bob has to sell the retail item to any customer who will pay for it. (For more cases like this, see Kadish 1997.)

But the exceptions prove the rule. If Bob sells the chainsaw to Sam and Sam puts it to immediate use on his romantic rival, then it is plausible that the law *should* hold Bob liable for manslaughter.

I conclude that conditioning criminal liability on moral wrongdoing solves the problem of overinclusivity for accomplices, because it would acquit defendants like Alice in *Car Sale I*, *Car Sale II*, and *Car Sale III*. And although it would convict Bob in the case in which Bob sells the chainsaw to Sam, this seems like the correct verdict.

V. THE THREAT RULE

Finally, I want to forestall the impression that I do not think that the criminal law should incorporate anything like the Doctrine of Intervening Causes. It is true that I do not think that there is a role in the criminal law for anything like the Doctrine of Intervening Causes in determining what counts as committing a crime. However, I do think that there is a role for something like the Doctrine of Intervening Causes in defeating liability for some who committed crimes.

The variant on the Doctrine of Intervening Causes that I have in mind is thus like the doctrine of entrapment, which provides that if law-enforcement officials incite a defendant to commit a crime

that the defendant was not already predisposed to commit, then the defendant is not liable for the crime (the point being to deter law-enforcement officials from inducing people whom they want to prosecute into committing crimes). A defendant who pleads entrapment does not deny that she committed a crime; rather, she claims that she is not liable for the crime that she committed. Similarly, I will suggest, the law should incorporate a variant on the Doctrine of Intervening Causes that, although it does not affect who counts as having committed a crime, does affect who among those who committed a crime are liable for the crime.

The specific role that I want to suggest for something like the Doctrine of Intervening Causes is to deter threats of a certain kind. Consider

Lawsuit I. Alice and Bob are involved in a petty dispute. After Alice files a frivolous lawsuit against Bob to harass him, Bob's brother, Peter, credibly threatens to murder two people unless Alice drops the lawsuit. Alice refuses, and Peter proceeds to murder two people.

It is plausible that Peter but not Alice should be held liable for homicide. The reason that Alice should not be liable for homicide cannot, however, be the fact that Alice was acting in line with her prelegal moral obligations. For there is no such fact: Alice was being stubborn and vindictive. Instead, the reason that Alice should not be liable for homicide is plausibly the fact that a legal regime that made Alice liable would incentivize people like Peter to exploit the threat of criminal liability to get people to do what they want. Although we may want a person like Alice to yield to the threat once it has been made, we would much rather people like Peter not make such threats in the first place. One way to deter the making of such threats in the first place is to neutralize them by establishing a legal rule that defeats liability for the person to whom the threat is directed.

Here is a plausible candidate for such a rule:

The Threat Rule =_{def} If P threatens to bring about q iff A ϕ -s, and A ϕ -s anyway, then A is not criminally liable in virtue of ϕ -ing in spite of the fact or risk that it will or might result in q , even if the law provides for *prima facie* criminal liability for doing something in spite of the fact that it will or might result in q .

Note that the Threat Rule would not entail that A could not be criminally liable in virtue of ϕ -ing *because* it will result in q . This is a feature rather than a bug. Consider

Lawsuit II. Everything is as it is in *Lawsuit I*, except that Peter selects two victims with whom, unbeknownst to Peter, Alice also has petty disputes and really wants to kill. As a result, Peter's threat has exactly the opposite effect from the effect that Peter intended it to have: although Alice had in fact decided to drop the lawsuit before Peter made his threat, she changes her mind and does not drop the lawsuit so that Peter will kill the two victims.

Under the Threat Rule, Alice would be liable for homicide—not in virtue of doing something *in spite of* the fact that it will result in the two victims' deaths, but rather in virtue of doing something *because* it will result in the two victims' deaths. And this seems right. It would make no sense for a person to “threaten” to do something that the person to whom the threat is directed wants, such that the latter will refuse to yield to the “threat” with the intention of inducing the former to execute on the threat. Because no one would (knowingly) make such a “threat” anyway, there is no need for the law to deter doing so.

One could, if one liked, describe the Threat Rule as a sort of “doctrine of intervening causes,” with Peter's execution of his threat as an “intervening cause” that defeats liability for Alice. But it is important not to be misled by the word “intervening”: as far as concerns whether Alice should be

held liable for homicide, it is irrelevant whether Peter “completed his activity in the matter” (Anscombe 1979, 229) before or after Alice refused to yield to his threat.¹⁰ Consider

Lawsuit III. Everything is as it is in *Lawsuit I*, except that Peter has hacked the court’s server and written a program that will cause a bomb to explode in the two victims’ home if in a week the program finds Alice’s lawsuit against Bob in the database of active cases. Alice refuses to drop the lawsuit even after Peter informs her of the setup, and the bomb explodes, killing the two victims.

I take it that Alice should not be liable for homicide in *Lawsuit III* if she should not be liable for homicide in *Lawsuit I*. If the law is going to deter threats of the kind at issue in *Lawsuit I*, then it should deter them regardless whether the person who makes the threat is clever enough to arrange for the bad result to follow without further activity on his part if the person whom he is threatening goes ahead with whatever the threat is intended to prevent her from doing.

It is plausible, then, that the law should incorporate something like the Doctrine of Intervening Causes, such as the Threat Rule. But its role should be limited to defeating liability for those who committed, and hence are guilty of, crimes under unusual circumstances such as those in *Lawsuit I* and *Lawsuit III*. In this role, it poses no threat to the claim that accomplices commit the crimes of which they are guilty.

CONCLUSION

I conclude that the claim that accomplices commit the crimes of which they are guilty survives the Overinclusivity Objection. The problem of overinclusivity posed by cases like *Car Sale I* gives rise to an objection to this claim because the standard solution to the problem, the Doctrine of Intervening Causes, precludes the paradigmatic accomplice from counting as having committed the crime of which she is guilty. In Part III, however, we saw that the Doctrine of Intervening Causes does not really

¹⁰ I am grateful to Candace Vogler for helping me to see this point.

solve the problem of overinclusivity. In Part IV, I tentatively offered an alternative solution, one that is consistent with the claim that accomplices commit the crimes of which they are guilty. Because the argument in Part IV is likely to be controversial, it is important to emphasize that even if it fails as a solution to the problem of overinclusivity, what is important for the purposes of this Dissertation's thesis is that the Doctrine of Intervening Causes also fails as a solution to the problem of overinclusivity. The failure of the Doctrine of Intervening Causes to solve the problem is all that I need to defuse the Overinclusivity Objection to the claim that accomplices commit the crimes of which they are guilty.

5. The Mens Rea Objection

INTRODUCTION

In this Chapter, I will examine what I will call the “Mens Rea Objection” to the claim that accomplices commit the crimes of which they are guilty. According to the Mens Rea Objection, there are at least three types of cases in which someone is guilty of a crime as an accomplice despite the fact that she did not act with the knowledge and/or the intention with which one must act to commit the crime. The first type of case is one in which the accomplice was paid upfront to assist in a crime that features a mens-rea requirement of intention. It is this type of case that has received the most attention in the literature (see, e.g., Sarch 2015, 140; Yaffe 2014, 10; Girgis 2013, 469–70; cf. also Duff 2007, 449), and it will occupy our attention for part of this Chapter and all of the next. But there are two additional types of cases that are grist for the mill of the Mens Rea Objection.¹ The second type of case is one in which the accomplice knows that the principal is up to no good but does not know what type of crime the principal is going to commit, and it turns out that this crime is one that features a mens-rea requirement of knowledge or intention. Finally, the third type of case is one in which the principal foreseeably commits a crime that features a mens-rea requirement of knowledge or intention in the course of carrying out the accomplice’s encouragement or instruction to commit another crime. In each type of case, it seems that the accomplice is guilty of a crime that features a mens-rea requirement of knowledge or intention even though the accomplice does not satisfy this mens-rea requirement. Therefore, it seems that the accomplice is guilty of a crime that she did not commit.

In Part I, I will spell out the Mens Rea Objection in more detail. In Part II, I will address cases in which the accomplice is paid upfront. After considering and rejecting one solution to the problem

¹ I am grateful to Genevieve Lakier and Candace Vogler for prompting me to address these cases, too.

that these cases pose, I will introduce what I believe is the correct solution. However, I will postpone a thoroughgoing defense of this solution until the next Chapter. In Part III, I will address cases in which the accomplice is in the dark as to what type of crime the principal is going to commit. In Part IV, I will address cases in which the principal commits an additional crime that is “fairly envisaged” (Model Penal Code 1985, § 2.06 cmt. 6(b)) in the course of carrying out the crime that the accomplice encouraged or instructed the principal to commit. I will conclude that in each case the accomplice does in fact act with the required mens rea; therefore, the Mens Rea Objection does not pose a threat to the claim that accomplices commit the crimes of which they are guilty.

I. THE MENS REA OBJECTION

According to the Mens Rea Objection, there are three types of cases in which someone is guilty of a crime as an accomplice even though she did not act with the knowledge and/or the intention with which one must act to count as having committed the crime: (1) cases in which the accomplice is paid upfront, (2) cases in which the accomplice knows that the principal is up to no good but does not know what type of crime the principal is going to commit, and (3) cases in which the principal foreseeably commits one crime in the course of carrying out the accomplice’s encouragement or instruction to commit another crime. I will discuss these cases in Sections A–C, respectively.

The examples that I will use to illustrate and respond to the Mens Rea Objection will, for the most part, involve crimes of theft and battery. I will use these crimes in my examples because each has traditionally been defined to feature a mens-rea requirement of intention. When discussing my examples, I will simply accept these traditional definitions. That is, I will assume that, to commit theft, one must act intentionally under a description under which one’s action reaches consummation in a taking of X, where X is the victim’s property; and to commit battery, one must act intentionally under a description under which one’s action reaches consummation in a hitting of the victim. Whether these assumptions are sound is unimportant because nothing turns on our choice of examples. The problem

posed by the accomplice who is paid upfront can be illustrated with any crime that features a mens-rea requirement of intention, and the problems posed by the accomplice in the dark and the principal who performs additional crimes “fairly envisaged” in the course of committing the crime abetted can be illustrated with any crime that features either a mens-rea requirement of intention or a mens-rea requirement of knowledge. The reader who doubts that theft and battery satisfy these criteria is encouraged to substitute crimes that she thinks do satisfy them. And if she thinks that no crimes satisfy them, then so much the worse for the Mens Rea Objection.

A. The Accomplice Paid Upfront

The first type of case in which it seems that the accomplice did not exemplify the mens rea required to commit the crime of which she is guilty is one in which the accomplice was paid upfront. Alexander Sarch (2015, 140), Gideon Yaffe (2014, 10), and Sherif Girgis (2013, 469–70) each appeal to such cases to motivate the construction of mens-rea requirements specific to accomplice liability as opposed to principal liability. For example, consider

Pink Panther I. The Phantom is determined to steal the valuable Pink Panther jewel from Princess Dala’s palace. He offers George, chief of palace security, a bribe if George lets him into the back gate at night. George accepts the offer, on the condition that the Phantom must pay George upfront, when he opens the gate. The Phantom agrees. George opens the gate as promised, the Phantom pays George the bribe, and the Phantom goes on to steal the Pink Panther.

Because George was paid upfront, he need not have cared whether the Phantom actually took the Pink Panther. It seems, then, that George need not have opened the gate with the intention of bringing it about that the Phantom takes the Pink Panther. More generally, George need not have acted intentionally under any description under which his action reached consummation in the Phantom’s taking of the Pink Panther. But we are assuming that one commits theft only if one acts intentionally

under a description under which one's action reaches consummation in a taking of X, where X is the victim's property. Therefore, George did not commit theft in *Pink Panther I*. Yet it seems that he is guilty of theft nonetheless. So, *Pink Panther I* appears to be a counterexample to the claim that accomplices commit the crimes of which they are guilty.

B. The Accomplice in the Dark

The second type of case in which it seems that the accomplice did not exemplify the mens rea required to commit the crime of which she is guilty is one in which the accomplice knew that the principal was up to no good but did not know what type of crime the principal was going to commit. For example, consider

Pink Panther II. Everything is as it is in *Pink Panther I*, except that when the Phantom begins to explain to George why he wants to sneak through the back gate, George stops him. George tells the Phantom that he will do as the Phantom requests but that he would rather not know what the Phantom is up to.

In *Pink Panther II*, George did not act intentionally or even knowingly under the description "bringing it about that the Phantom steals the Pink Panther." More generally, it seems that George did not act intentionally or even knowingly under any description under which his action reached consummation in the Phantom's taking of the Pink Panther. Again, however, we are assuming that one commits theft only if one acts intentionally under a description under which one's action reaches consummation in a taking of X, where X is the victim's property. Therefore, George did not commit theft in *Pink Panther II*. Yet it seems that he is guilty of theft nonetheless. So, *Pink Panther II* appears to be a counterexample to the claim that accomplices commit the crimes of which they are guilty.

C. Means Fairly Envisaged

The third type of case in which it seems that the accomplice did not exemplify the mens rea required to commit the crime of which she is guilty is one in which the principal foreseeably committed

one crime in the course of carrying out the accomplice's encouragement or instruction to commit another crime. For example, consider

Bank Robbery. Alice hires Peter to rob a bank. In the course of robbing the bank, Peter roughs up Violet, a bank teller who does not 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 is guilty of not only robbery but also battery.² As the drafters of the Model Penal Code (1985, § 2.06 cmt. 6(b)) put it, the person who abets another to commit 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 are “fairly envisaged in the [crime abetted].” Yet it seems that Alice did not act intentionally or even knowingly under any description under which her action reached consummation in Peter's battery of Violet. True, she acted intentionally under the description “getting Peter to rob the bank.” But she did not act intentionally under any such description as “getting Peter to rough up Violet.” And we are assuming that one commits battery only if one acts intentionally under a description under which one's action reaches consummation in a hitting of the victim. Therefore, Alice did not commit battery in *Bank Robbery*. Yet it seems that she is guilty of battery nonetheless. So, *Bank Robbery* appears to be a counterexample to the claim that accomplices commit the crimes of which they are guilty.

II. THE ACCOMPLICE PAID UPFRONT

Let us start with the first class of problem cases, those in which the accomplice is paid upfront. I will briefly consider and reject one way of responding to such cases in Section A. Then, in Section B,

² In most jurisdictions, battery “merges” into robbery, such that if Peter or Alice is convicted of robbery then he or she cannot also be convicted of battery. We can set aside this complication. All the Mens Rea Objection requires is that Alice has the guilt to support a conviction for battery, if for some reason the prosecution chooses not to charge her with robbery.

I will sketch the outlines of what I take to be the appropriate response. I will postpone a thorough defense of this response until the next Chapter.

A. An Unsuccessful Response

Consider the following response to *Pink Panther I*. It is not the case, one might say, that someone commits theft only if she acts intentionally under a description under which her action reaches consummation in a taking of someone else's property. Instead, someone commits theft only if she acts intentionally under a description under which her action reaches consummation in *what she knows to be a part of* a project of taking someone else's property. If we interpret "part" inclusively (as distinct from "proper part"), such that everything is a "part" of itself, then this condition is satisfied if the accomplice intends to bring about the taking in its entirety. But it is also satisfied if the accomplice intends to bring about what she knows to be a proper part of the principal's larger project of taking of the victim's property.

On this view, we are entitled to deny that George lacked the mens rea required to count as having committed theft in *Pink Panther I*. Even if George did not act with the intention of bringing it about that the Phantom steals the Pink Panther, he did act with the intention of bringing it about that the gate is open for the Phantom. And he knew that getting access to the palace grounds was, like escaping from the palace grounds, part of the Phantom's larger project of stealing the Pink Panther. Therefore, George acted intentionally under a description under which his action reached consummation in *what he knew to be a part of* the Phantom's project of taking Dala's property.

The problem is that the proposed definition of theft is implausibly overinclusive: it implies that people commit theft who clearly are not guilty of it. For example, consider

Pink Panther III. Everything is as it is in *Pink Panther I*, except that George opens the gate not because the Phantom has offered him a bribe, but because Dala has instructed him to let in Sir Charles, with whom Dala is having an affair. George tries to warn

Dala that Sir Charles is the Phantom, but she will have none of it, and she orders George to open the gate anyway. Although he knows that Sir Charles is going to steal the Pink Panther, George follows orders and lets him in. Sir Charles steals the Pink Panther.

I take it that George is not guilty of theft in *Pink Panther III*. As in *Pink Panther I*, however, George acted with the intention of bringing it about that the gate is open for the Phantom and knew that getting access to the palace grounds was part of the Phantom's project of stealing the Pink Panther. Therefore, under the proposed definition of theft, George committed and hence is guilty of theft in *Pink Panther III*. This shows that the proposed definition is inaccurate as a definition of theft, the crime with which we are familiar. Of course, a legislature could stipulate into existence a new crime—"shleft," say—that fits the proposed definition. But nothing of significance follows from tallying up who is and who is not guilty of shleft, for the same reason that, as we noted in Chapter 3, nothing of significance follows from tallying up who is and who is not guilty of shmattery.

B. An Alternative Response

Fortunately, a better response is available. In fact, I will argue, George did act intentionally under a description under which his action reached consummation in the Phantom's taking of the Pink Panther in *Pink Panther I*. A thorough defense of this claim will require its own Chapter. Here, I will merely present the argument in summary form.

What the Phantom hired George to do in *Pink Panther I* was not precisely to open the gate; rather, it was to open the gate in a manner calculated to further the Phantom's purpose of stealing the Pink Panther. George would not have earned his pay had he, say, pried the gate open an inch and wedged it there. Nor would he have earned his pay had he opened the gate by assembling all the palace guards and having them knock it down. George's job was not just to open the gate, but to do so in a

manner calculated to promote the Phantom's success. This required, *inter alia*, opening the gate wide enough to let the Phantom through and avoiding attracting the attention of the other guards.

But to calculate one's action to bring about a result is to act with the intention of bringing about the result.

Therefore, if George was to earn his pay in *Pink Panther I* by doing what the Phantom hired him to do, then he had to open the gate with the intention of bringing it about that the Phantom steals the Pink Panther. For the Phantom hired him to open the gate in a manner calculated to promote the theft, and to do that is to open the gate with the intention of bringing about the theft.

Now, as we imagined the case, George *did* earn his pay by doing what the Phantom hired him to do. He could have chosen to decline the Phantom's offer. He could have chosen to cheat the Phantom by accepting the offer but turning him in after taking the pay. As we imagined the case, however, George did neither of those things. Instead, he kept his side of the bargain.

Therefore, George opened the gate with the intention of bringing it about that the Phantom steals the Pink Panther. It is true that George's pay was not contingent on the Phantom's success. All this shows, however, is that it is not the case that George aimed in intention at the Phantom's success because the Phantom's success would result in a windfall for George. It is perfectly consistent with the claim that George aimed in intention at the Phantom's success because *aiming in intention at the Phantom's success* would result in a windfall for George.

I conclude, tentatively, that cases in which the accomplice is paid upfront pose no threat to the claim that accomplices commit the crimes of which they are guilty. Even if the crime in question features a mens-rea requirement of intention, the accomplice nonetheless counts on my view as having committed the crime because, notwithstanding the fact that she was paid upfront, she aimed in intention at the principal's success.

III. THE ACCOMPLICE IN THE DARK

Let us move on to the second class of problem cases, those in which the accomplice is in the dark as to what exactly the principal is up to. Before proposing a solution, I want to lower the stakes, as I did when discussing the problem of conduct crimes in Chapter 3. Like the problem of conduct crimes, the problem posed by cases like *Pink Panther II* is a problem not only for the claim that accomplices commit the crimes of which they are guilty; it is also a problem for the claim, which no one denies, that *principals* commit the crimes of which they are guilty. Therefore, even if I prove unable to solve the problem, that would not constitute an objection to the claim that accomplices commit the crimes of which they are guilty. The problem would remain even if we rejected that claim. In Section A, I will explain why. Then, in Section B, I will propose a solution to the problem.

A. Extending the Problem to Principals

The reason that the problem posed by cases like *Pink Panther II* would remain even if we accepted the Standard View that only principals commit the crimes of which they are guilty is that we can produce cases in which it is the principal rather than the accomplice who is in the dark. For example, consider

Pink Panther IV. After Dala thwarts his attempt to steal the Pink Panther, the Phantom wants revenge. He develops a software program that will hack into Dala's bank account and transfer all her money to another account. The program will run only when a button in Dala's palace is pushed. Having urgent business elsewhere, the Phantom hires George to push the button. "Just make sure no one sees you do it," the Phantom warns, "and don't tell anyone later that you did it, especially the police. You see, what will happen when you push this button is—" "No need to explain," interrupts George; "I'd rather not know what will happen when I push the button." George takes the money, pushes the button when no one is looking, and the program executes successfully.

In *Pink Panther IV*, the Phantom played the role of abettor to George as the principal. But it was still George who was in the dark as to exactly what was going on, though he knew enough to know that the Phantom was up to no good. Now, I take it that if George is guilty of theft in *Pink Panther II*, then George is guilty of theft in *Pink Panther IV* as well—only this time, in *Pink Panther IV*, he is guilty of theft as a principal rather than as an accomplice. Yet George did not act intentionally or even knowingly under any such description as “taking Dala’s money.” Therefore, it seems that George did not commit theft. So, *Pink Panther IV* appears to be a counterexample to the claim, which even the defender of the Standard View affirms, that *principals* commit the crimes of which they are guilty.

B. Proposed Solution

I will now propose a solution to the puzzle posed by principals and accomplices in the dark. We know from Chapter 3 that, to be guilty of theft, the conduct that George must have performed intentionally in spite of the fact that the property to be stolen belonged to someone else is conduct that reached consummation in a taking of that property. And we know from Part II.B of this Chapter (pending confirmation in the next Chapter) that, although paid upfront in both *Pink Panther II* and *Pink Panther IV*, George nonetheless aimed in intention at bringing about the Phantom’s end. To be sure, George could not have aimed at it under the description “wiping Dala’s bank account” in *Pink Panther IV*, because he did not know that the Phantom’s end fell under that description. But he knew at least that the Phantom’s end was covert, such that to further it, he had to open the gate (in *Pink Panther II*) or push the button (in *Pink Panther IV*) discreetly. The fact that George calculated his performance accordingly indicates that he acted with the intention of bringing about the Phantom’s end. Under this description, George’s action reached consummation in the obtaining of the Phantom’s end, an event which was a taking of someone else’s property. Therefore, in both *Pink Panther II* and *Pink Panther IV*, George acted intentionally under a description—“bringing about the Phantom’s covert end”—under which his action reached consummation in a taking of someone else’s property.

It remains to show that George did this in spite of the fact that the property to be stolen (in *Pink Panther II*, the Pink Panther; in *Pink Panther IV*, the bank funds) belonged to someone else. Now, at first glance, this might seem hopeless: How could George have acted “in spite of” this reason if it was not “present” to him in the sense explained in Chapter 1? But I think that, in fact, the reason constituted by the fact that the relevant property to be stolen belonged to Dala *was* present to George, albeit not under this description. George knew that the Phantom was up to no good, which means he knew that there was a strong reason for him not to promote the Phantom’s end. And indeed there was: the fact that the property to be stolen belonged to Dala. Although George did not know what the content of this fact was that made it a reason against promoting the Phantom’s end, he did know that it was content that at any rate did make the fact a reason against promoting the Phantom’s end. I submit that this is sufficient for the fact to have been “present” to George as a reason against promoting the Phantom’s end.

Now, one might protest that this proves too much because it implies that George would have been guilty of theft even if he had had no reason to suspect that the Phantom was up to no good. For there are reasons against doing everything that we do; for example, everything that we do comes at an opportunity cost. Suppose, then, that George had no reason to suspect that the Phantom was up to no good. Still, he knew that there was *a* strongest reason against promoting the Phantom’s end—that is, a reason that, among the reasons against promoting the Phantom’s end, was the strongest. Suppose that this strongest reason was the fact that the property to be stolen belonged to Dala. By my argument, George acted in spite of this reason. Therefore, it seems that I must affirm that George committed and hence is guilty of theft even if he had had no reason to suspect that the Phantom was up to no good.

The objection is a good one, and it shows that we must make a distinction. The mere presence to the “agent in the dark” of the fact, under any description, that the property to be stolen belonged

to someone else is insufficient to constitute her facilitation of the end of the “agent in the know” as itself a commission of theft. The reason must be present to the agent in the dark under a description that indicates that it renders bringing about this end at least *pro tanto* morally impermissible. This description may be the very description under which the reason does render bringing about the end of the agent in the know at least *pro tanto* morally impermissible, namely, the description of the fact in terms of its content. But it may also be a description of the fact that does not specify its content but only indicates that its content is such as to render bringing about the end of the agent in the know at least *pro tanto* morally impermissible. In this case of *Pink Panther II* and *Pink Panther IV*, this description is something like: “the fact that makes bringing about the Phantom’s covert end something that the Phantom wants to hide.” Although this description does not specify the content of the fact that makes it the case that the Phantom is up to no good, it does indicate that this content is at any rate such that it *does* make it the case that the Phantom is up to no good.

Therefore, it is imprecise to define theft as intentionally ϕ -ing in spite of the fact that X belongs to someone else, where ϕ -ing reaches consummation in a taking of X. To avoid the implication that George is guilty of theft in the case in which he had no reason to suspect that the Phantom was up to no good, we must clarify that the fact that X belongs to someone else must be present to the agent under a description that indicates that ϕ -ing is at least *pro tanto* morally impermissible.

I conclude that cases in which the accomplice is “in the dark” as to what crime specifically the principal is plotting pose no threat to the claim that accomplices commit the crimes of which they are guilty. The problem of criminals acting “in the dark” is not specific to accomplices; it is also possible for a *principal* to be “in the dark” as to what crime specifically the *accomplice* is plotting. Therefore, even if we could not solve the problem, that would give us no reason to deny that accomplices commit the crimes of which they are guilty. And we can solve the problem anyway, both as it applies to principals

and as it applies to accomplices, by refining our definitions of crimes to clarify under what description a reason must be present to an agent for the agent's acting in spite of that reason to constitute a crime.³

IV. MEANS FAIRLY ENVISAGED

Finally, let us consider the third class of problem cases, those in which the principal commits an additional crime that is “fairly envisaged” in the course of carrying out the crime that the accomplice abetted.

The first thing to notice is the similarity that the rule in criminal cases that an abettor is liable for means that it was foreseeable that the principal would take to the end abetted bears to an analogous rule in civil cases. Confusingly, in the civil context, if Bob gives orders to Carla, then Bob is the “principal” and Carla his “agent,” even though in the criminal context Carla would be the “principal” and Bob her “accomplice.” In civil cases, a principal is liable for torts that her agent commits under her “authority,” where a tort counts as one that the agent commits under the principal's authority not only if committing it is among the agent's “express responsibilities” but also if committing it “is necessary, usual, [or] proper to accomplish or perform [the] agent's express responsibilities” (Restatement of Agency 2006, § 2.01 cmt. b, § 7.04). Therefore, in *Bank Robbery*, Violet could recover from Alice in a tort action for battery. Making Alice not only civilly but also criminally liable for Peter's battery thus brings criminal law in line with tort law.

³ Note that our reflections on cases in which the principal or the accomplice is in the dark reinforce the argument in Chapter 4 that the Doctrine of Intervening Causes is an inadequate solution to the problems with standard definitions of crimes that cases like *Car Sale I* expose. These problems are the result of the fact that standard definitions of crimes (manslaughter is acting in reckless disregard of the risk to another's life, theft is intentionally taking what one knows to be another's property, etc.) are far too crude to capture the complex prelegal moral wrongs that the criminal law tracks. We have just seen that even the relatively sophisticated definition of theft that we proposed in Chapter 3 fails to capture precisely what it is to commit theft, for reasons having nothing to do with the distinction between principals and accomplices. It should come as no surprise, then, that merely supplementing the less sophisticated, standard definitions of crimes with the Doctrine of Intervening Causes does not solve the problem, either.

Constitutional-law scholars have described a connection between this feature of the law of agency and the Necessary and Proper Clause of the U.S. Constitution, which provides that Congress may make laws that are “necessary and proper” for carrying into execution its enumerated powers.⁴ The idea is that the Necessary and Proper Clause does not so much confer an additional power on Congress as clarify that Congress has not only the powers that are explicitly enumerated in Article I but also the powers that are “implied” in (or, as constitutional-law scholars sometimes put it, “incidental” to) those explicitly enumerated powers (see, e.g., Bray 2016, 741–42). Similarly, a principal’s mandate to her agent includes not only the responsibilities that the principal explicitly enumerates but also the responsibilities that are “implied” in those explicitly enumerated responsibilities.

I think that this is correct, and that the analogy carries over to the criminal context as well. Just as permission to ϕ implies permission to do what is “necessary, usual, and proper” to ϕ , so a mandate to ϕ implies a mandate to do what is “necessary, usual, and proper” to ϕ . The latter principle holds whether ϕ -ing constitutes a tort or a crime.

Of course, phrases like “necessary, usual, and proper” are extremely vague. This is inevitable, given that explicit impositions of obligations or grants of permission imply subsidiary obligations or permissions by what Paul Grice (1989) dubbed “implicature” rather than by entailment (cf. Mikhail 2015). The entailments of a statement include all and only those propositions that follow by deductively valid inference from the statement’s meaning. The implicatures of a statement include all and only those propositions that follow by deductively valid inference from what the speaker intends to communicate by using the statement. For example, if Carla tells Bob, her house guest, that he is free to eat anything in the refrigerator, then it follows by implicature but not entailment that Bob is

⁴ U.S. Constitution, Art. 1, § 8.

permitted to open the refrigerator. What precisely is the extent of obligation or permission that follows by implicature from an explicit declaration of requirement or approval is a function of background conventions of normalcy that vary widely from case to case, which is why it is impossible to delineate the scope of implied obligations or permissions with any specificity in abstraction from particular cases. Consequently, if we wish to fashion a general rule that the abettor is liable for all crimes that the principal committed under her authority, then we cannot be much more specific than the drafters of the Model Penal Code (1985, § 2.06 cmt. 6(b)), who proposed to make the abettor liable for all crimes “fairly envisaged” as means to the crime that she explicitly directed the principal to commit. Whether this standard is met in a given case is a fact-specific question that must be left to the jury.

We are now in a position to see why cases like *Bank Robbery* pose no threat to the claim that accomplices commit the crimes of which they are guilty. True, the obligation to rough up the teller does not follow by entailment from Alice’s instruction to Peter to rob the bank. But if we want to know what Alice intended to get Peter to do by giving him this instruction, then we must look to what Alice intended to communicate with this instruction. And presumably what Alice intended to communicate was that Peter was to do whatever is “necessary, usual, and proper” for a successful bank robbery. Although this probably excludes dropping a nuclear bomb on an adjacent municipality to distract law enforcement, it surely includes roughing up an uncooperative teller. In sum: Alice instructed Peter to rob the bank with the intention of getting him to do whatever is “necessary, usual, and proper” for a successful bank robbery; under this description, Alice’s action reached consummation in Peter’s, *inter alia*, committing battery of Violet; and Alice got Peter to do what was “necessary, usual, and proper” for a successful bank robbery in spite of the fact that any uncooperative teller whom Peter would rough up would not have consented to being hit. On my view, then, Alice committed, and hence is guilty of, battery.

CONCLUSION

Pending a more thorough discussion in the next Chapter of cases in which the accomplice to a crime that features a mens-rea requirement of intention is paid upfront, I conclude that the Mens Rea Objection fails. Assuming that the argument in the next Chapter is sound, we can account for all three types of problem cases introduced by the Mens Rea Objection without conceding that some accomplices do not commit the crimes of which they are guilty. Even if the accomplice to a crime that features a mens-rea requirement of intention was paid upfront, the accomplice acted with the intention required to commit the crime. Even if the accomplice to a crime that features a mens-rea requirement of knowledge or intention was in the dark as to what type of crime the principal was going to commit, the accomplice acted with the knowledge or intention required to commit the crime. And even if the principal foreseeably committed an additional crime, one that features a mens-rea requirement of knowledge or intention, in the course of committing the crime that the accomplice abetted, the accomplice acted with the knowledge or intention required to commit the additional crime.

6. The Accomplice Paid Upfront

INTRODUCTION

In this Chapter, I will deliver on the promise made in the previous Chapter to offer a more thorough defense of the solution that I sketched to the problem posed by cases in which the accomplice to a crime that features a mens-rea requirement of intention is paid upfront. Recall that such cases present a challenge to the claim that accomplices commit the crimes of which they are guilty because it seems that the accomplice is guilty of the crime even though she did not act with the intention with which one must act to commit the crime. The case that we used to motivate the challenge was

Pink Panther I. The Phantom is determined to steal the valuable Pink Panther jewel from Princess Dala's palace. He offers George, chief of palace security, a bribe if George lets him into the back gate at night. George accepts the offer, on the condition that the Phantom must pay George upfront, when he opens the gate. The Phantom agrees. George opens the gate as promised, the Phantom pays George the bribe, and the Phantom goes on to steal the Pink Panther.

Because George was paid upfront, there is no reason to think that he cared whether the Phantom managed to steal the Pink Panther. But then it seems that there is no reason to think that George acted intentionally under any description under which his action reached consummation in the Phantom's taking of the Pink Panther. And we assumed, at least for argument's sake, that one commits theft only if one acts intentionally under a description under which one's action reaches consummation in a taking of the victim's property. It appears, then, that George did not commit theft. Yet he is nonetheless guilty of theft. Therefore, *Pink Panther I* looks like a counterexample to the claim that accomplices commit the crimes of which they are guilty.

In the previous Chapter, I sketched the outlines of an argument that, in fact, George did act intentionally under a description under which his action reached consummation in the Phantom's taking of the Pink Panther in *Pink Panther I*. Specifically, I argued, George opened the gate with the intention of bringing it about that the Phantom steals the Pink Panther.

It is time to offer a proper defense of this claim. My argument will proceed as follows. I will begin in Part I by analyzing the rational structure of cooperative activity. An action like George's in *Pink Panther I*, I will argue, exemplifies multiple orders of intention: what George does with the intention of bringing it about that the Phantom pays him is <to open the gate with the intention of bringing it about that the Phantom steals the Pink Panther>. Hence, George acts not only with the second-order intention of bringing it about that the Phantom pays him, but also with the first-order intention of bringing it about that the Phantom steals the Pink Panther. In Part II, I will address five objections to the argument in Part I. I will conclude that accomplices exemplify the requisite mens rea to commit the crimes for which they are guilty, even if they are paid upfront. Therefore, cases in which the accomplice is paid upfront pose no threat to the claim that accomplices commit the crimes of which they are guilty.

I. THE RATIONAL STRUCTURE OF COOPERATION

In this Part, I will offer an analysis of the rational structure of cooperative activity that makes good on my claim that the accomplice to a crime that features a mens-rea requirement of intention acts with the intention required to commit the crime, even if she is paid upfront. I will develop the analysis in Section A and apply it to cases of criminal complicity in Section B.

A. Two Orders of Intention

Suppose that Bob is building a house. Because building a house is not the sort of thing that one can do straightaway, Bob must calculate various other actions that put the conditions for building a house in place and that constitute building a house. For example, Bob will have to purchase a lot

and acquire building materials. Until he performs such actions, the conditions for building a house are not in place. Once the conditions are in place, Bob must perform the many actions that will constitute building a house as parts constitute a whole. For example, Bob must lay a foundation, erect a framework, install some siding, add a roof, etc. Many of these actions—both those that put in place the conditions for building a house, and those that constitute building a house—are themselves not the sorts of things that one can do straightaway. To put into place the conditions for and to constitute these actions, Bob will have to calculate still more actions. For example, adding a roof will comprise many shingle-layings; and to set up for it, Bob may have to erect a scaffold.

As he calculates out the action of building the house, Bob is engaged in what we can describe in the language of Chapter 1 as positive exercises of agency with respect to positive, forward-looking practical reasons. He is treating the fact that it will result in his building a house as a reason for adding a roof; he is treating the fact that it will result in his adding a roof as a reason for erecting a scaffold; etc. As we noted in Chapter 1, there is a tight connection between forward-looking practical reasons and intention. With an important exception that we will consider in Part II.C, if one treats the fact that it will result in q as a reason for ϕ -ing, then one ϕ -s with the intention of bringing it about that q . Thus, Bob erects the scaffold with the intention of bringing it about that he adds a roof, and he adds a roof with the intention of bringing it about that he builds a house.

It is true that it is somewhat unconventional to speak of one action as “bringing about,” or having as a “result,” an action for which it merely puts in place the conditions or of which it is merely a part, especially if the agent of the latter action is identical to the agent of the former action. The point—and all I mean by saying that Bob’s building a house is a “result” of his adding a roof, or that by adding a roof Bob is “bringing it about” that he builds a house—is that Bob’s reason for adding a roof is that it will be in part *because* he managed to add a roof that he managed to build a house. The sense of “because” here is, of course, nontelic. Thus, telic explanations of actions in terms of

intentions, like most telic explanations (see Taylor 1964; Wright 1973; Bedau 1992; Koons 1998), embed nontelic explanations: Bob is adding a roof *because* (telic sense) <it will be in part *because* (nontelic sense) he added a roof that he built a house>. We see the same pattern when the agent's end is a consequence that is not another action of her own and that her means does not merely make possible but "causes" in a narrower sense. For example: Peter is pulling the trigger *because* (telic sense) <it will be in part *because* (nontelic sense) he pulled the trigger that Violet died>. It is this means-end pattern, which is present even if the agent's end is another action of her own and/or her means merely puts in place the conditions for or partially constitutes her end, that I am tracking with the terms "result" and "bringing about."

Suppose, then, that instead of Bob, it is someone else who performs some of the actions that relate to Bob's action of building a house as means to an end. For example, suppose that Bob comes to his senses after finishing the framework and realizes how hard it is to build a house all by oneself. So, he decides to hire out the execution of some of the means that he has calculated to his end of building a house. To erect the scaffold that he will need in order to add a roof, Bob hires Carla.

Our reflections on what is common to cases in which the agent's end is another action of her own and cases in which it is not suggest the idea that the action of erecting the scaffold does not lose its calculative-teleological orientation to the actions of adding a roof and building the house simply because it is no longer the case that the agent of the former action is also the agent of the latter actions. Ben Laurence (2011) defends this idea, and so will I. The difference that Bob's decision to hire out erecting the scaffold makes is simply that, instead of *Bob* erecting the scaffold with the intention of bringing it about that he adds a roof and the further intention of bringing it about that he builds a house, *Carla* erects the scaffold with the intention of bringing it about that Bob adds a roof and the further intention of bringing it about that Bob builds a house (where, again, this "bringing about"

consists in nothing more than “making possible”). Although the agent of the means has changed, the calculative-teleological relation of means to ends remains intact.¹

Now, one might think that this cannot be right, at least not if Carla is to receive her pay as soon as her job is complete. For in that case, bringing it about that he adds a roof and thus that he builds a house is just what *Bob* sees in Carla’s erecting the scaffold; what *Carla* sees in her erecting the scaffold is simply bringing it about that Bob pays her. Once Bob has paid her, she could not care less whether Bob actually adds a roof and completes the house or instead abandons the project. Thus, when the agent of the means changed, so did the end to which that means was ordered: instead of Bob erecting the scaffold with the intention of bringing it about that he adds a roof and the further intention of bringing it about that he builds the house, Carla erects the scaffold with the intention of bringing it about that Bob pays her.

This line of reasoning gets at least one thing right: it is true that Carla is erecting the scaffold as a means to bringing it about that Bob pays her. I will not deny that. What I will deny is that the end of bringing it about that Bob pays her simply *replaces* the ends of bringing it about that Bob adds a roof and bringing it about that Bob builds a house in Carla’s practical reasoning. The correct account of Carla’s practical reasoning, I will argue, must take note not only of bringing it about that Bob pays

¹ The only caveat to make here is that “Bob” in the expression of Carla’s intentions (“bringing it about that *Bob* adds a roof” and “bringing it about that *Bob* builds a house”) is a referring expression, whereas “he” in the expression of Bob’s intentions (“bringing it about that *he* adds a roof” and “bringing it about that *he* builds a house”) is not. Certainly, “he” in the expression of Bob’s intentions is not a mere stand-in for “Bob,” such that we could replace “he” with “Bob” in the expression of Bob’s intentions with no change in meaning. For Bob intends to add a roof and build a house *himself*, and he need not know that he is Bob. Therefore, when Bob outsources the means of erecting the scaffold to Carla, it is not the case that the *only* thing that has changed is the agent of this means. The contents of the intentions of the agent of this means have also changed insofar as they now include a reference to the agent of the ends of adding a roof and building a house that they previously did not. On these matters, see Anscombe (1975); Müller (1970). What is important for our purposes is that when Bob outsources the means of erecting the scaffold to Carla, this means retains its calculative-teleological relation to Bob’s ends of adding a roof and building a house in the sense that Carla acts intentionally under descriptions under which her action reaches consummation in Bob’s adding a roof and building a house.

her, but also bringing it about that Bob adds a roof and thus that Bob builds a house, as ends to which Carla erects the scaffold as a means, albeit in different ways, as we will see.

To start, we must be more precise about the sense in which Carla is erecting the scaffold as a means to bringing it about that Bob pays her. Speaking more precisely, Carla's means to her end of bringing it about that Bob pays her is doing whatever Bob hired her to do. It is true, of course, that if Carla does what Bob hired her to do, then "erecting the scaffold" is a true description of what Carla does. But so is "doing construction work." For that matter, so is "doing something." As I will explain, however, "doing something" is not specific enough to be the description under which what Carla does is what Bob hired her to do. "Doing construction work" is more specific but still not specific enough. "Erecting a scaffold" is yet more specific, but I want to argue that even it is not specific enough.

To see that doing something is not, under that description, Carla's means to her end of bringing it about that Bob pays her, suppose that Carla plays solitaire all day instead of erecting the scaffold. The next morning, Bob shows up, expecting to start work on the roof. He is upset to find that Carla has not erected the scaffold. When he confronts her, Carla protests, "Well, you hired me to do something. And I did—I played solitaire. That is doing something." Carla's argument is obviously sophistical, and Bob will not pay her. This shows that doing something is not, under that description, what Bob hired Carla to do, and therefore not, under that description, a suitable means to Carla's end of bringing it about that Bob pays her.

The same reasoning applies to the description "doing construction work." Carla should not expect Bob to pay her if she builds a road through his backyard. Doing construction work is not, under that description, what Bob hired Carla to do and therefore not, under that description, a suitable means to Carla's end of bringing it about that Bob pays her.

Finally, I want to argue that the same reasoning also applies to the description "erecting the scaffold." Suppose that Carla erects a perfectly sound scaffold and anchors it firmly in the ground—

four miles from the house. Bob is furious. “How is this supposed to help?” he asks. “I cannot reach the house from there!” Carla responds: “I am sorry to hear that, but, you know, it is not really my problem. I did what you hired me to do: I erected a scaffold.” Again, Carla’s argument is obviously sophistical, and Bob will not pay her. This shows that erecting a scaffold is not, under that description, what Bob hired Carla to do and therefore not, under that description, a suitable means to Carla’s end of bringing it about that Bob pays her.

What exactly is Carla’s job description, then? Even “erecting a scaffold within reach of the house” is not specific enough; it will not do for Carla to erect a scaffold that is within reach of the house but that is far too short or far too high. Nor will it do for Carla to erect a scaffold that is within reach of the house and at the appropriate height but that will not support the combined weight of Bob and the roofing materials that he needs to bring up on it. On the other hand, we do not want to get too specific. For example, we do not want to include in Carla’s job description details such as the number of fingerprints on the metal rods that constitute the scaffold.

What distinguishes details such as the height and load-bearing capacity of the scaffold, on the one hand, from details such as the number of fingerprints on the scaffold, on the other? I submit that the answer, roughly speaking, is their relevance to the role that Bob calculated Carla’s work to have in his project of building a house. Carla’s work is supposed to further the construction of the house by putting the conditions in place for Bob to add a roof. Unless she calculates her performance to further these ends, she is not doing what Bob hired her to do. This explains why she must erect a scaffold in the right location, at the right height, and with sufficient load-bearing capacity; as well as why she does not have to leave any particular number of fingerprints on the scaffold. The former properties of the scaffold are critical to its role in Bob’s project; the number of fingerprints it has is irrelevant.

On this view, Bob has hired Carla to complete one region of what Michael Bratman (1987, 29–30) calls a “partial plan,” or what I will call an incompletely calculated project. Bob has calculated

out much of how he is building a house. He has calculated, *inter alia*, adding a roof as a means, to which he has further calculated erecting a scaffold as a further means. But this leaves much to be determined—where exactly to place the scaffold, what materials to use, how to transport them to the construction site, which rod to place first, and so on. Bob is outsourcing all of this to Carla. He is saying to her, in effect, “I have calculated out from the end building a house through adding a roof to erecting a scaffold; now, I will pay you to take it from here.”

If this is right, then what Bob hired Carla to do is to calculate out the action of erecting a scaffold from the end of bringing it about that Bob adds a roof and the further end of bringing it about that Bob builds a house. That is, Bob has hired Carla to do exactly what he would have done himself. The only difference is that, for Carla, the actions that she is making possible and hence “bringing about” by erecting the scaffold are actions of another; whereas, for Bob, the actions that he would have been making possible and hence “bringing about” by erecting the scaffold would have been actions of his own. But the calculative-teleological relation of means to end holds constant across this difference.

It is a mistake, then, to suppose that when Bob outsources erecting the scaffold to Carla, bringing it about that Bob pays her replaces bringing it about that Bob adds a roof and bringing it about that Bob builds a house as the intention with which erecting the scaffold is done. Bob hired Carla to calculate out the action of erecting a scaffold from the end of bringing it about that Bob adds a roof and the further end of bringing it about that Bob builds a house, which entails erecting the scaffold with the intention of bringing it about that Bob adds a roof and the further intention of bringing it about that Bob builds a house.

So where does bringing it about that Bob pays her fit into Carla’s calculations? It cannot be a further intention with which Carla is bringing it about that Bob adds a roof, or bringing it about that Bob builds a house, in the sense in which we might suppose that when Bob supplied Carla with

materials, building a house was a further intention with which he was bringing it about that Carla erects the scaffold. For Bob needed Carla actually to erect the scaffold so that he could get on with building the house. Whereas as far as concerns whether Carla gets paid, it makes no difference whether Bob finishes the house or even gets around to adding a roof, at least if we assume that Carla is to be paid when she completed her job. This, I think, is why it is so tempting to think that when Bob outsources erecting the scaffold to Carla, bringing it about that Bob pays her simply replaces bringing it about that Bob adds a roof and bringing it about that Bob builds a house as the intention with which erecting the scaffold is done. Nonetheless, we have seen that this is a mistake. So, the puzzle how to fit the end of bringing it about that Bob pays her into Carla's calculations remains.

The solution is to realize that, in relating Carla's intention to bring it about that Bob pays her to her intention to bring it about that Bob adds a roof, or to her intention to bring it about that Bob builds a house, we are relating not two intentions in order, but rather two orders of intention. Recall that Carla's means to bringing it about that Bob pays her is not simply erecting a scaffold, but erecting a scaffold with the intention of bringing it about that Bob adds a roof and the further intention of bringing it about that Bob builds a house. It is not the case, then, that Carla is erecting a scaffold with the intention of bringing it about that Bob adds a roof, the further intention of bringing it about that Bob builds a house, and the yet further intention of bringing it about that Bob pays her. Instead, Carla is <erecting a scaffold with the first-order intention of bringing it about that Bob adds a roof and the further first-order intention of bringing it about that Bob builds a house> with the second-order intention of bringing it about that Bob pays her. Thus, Carla's bringing it about that she receives her pay does not depend on her *actually* bringing it about that Bob adds a roof and/or builds a house. But it does depend on her *acting with the intentions of* bringing it about that Bob adds a roof and builds a house.

B. Application to Criminal Complicity

Let us apply this analysis to complicity with crimes that feature a mens-rea requirement of intention. I will continue to use the example of theft, commission of which (we are assuming) requires acting intentionally under a description under which one's action reaches consummation in a taking of the victim's property. On the basis of the analysis in Section A, we can distinguish three ways in which someone can be guilty of theft as an accomplice. First, there are cases in which the accomplice's further ends figure in her calculations as ends to which bringing about the taking is her means. Second, there are cases in which the accomplice's further ends figure in her calculations as ends to which acting with the intention of bringing about the taking is her means. Third, there are cases in which the accomplice's further ends figure in her calculations as ends to which *both* bringing about the taking *and* acting with the intention of bringing about the taking are her means.

For an example of the first type of case, consider

Pink Panther V. George is the assistant chief of security at Princess Dala's palace, but he wants his boss's salary. He discovers that the Phantom plans to break into the palace that night, by picking the lock on the back gate, and steal the Pink Panther. George wants the Phantom to steal the Pink Panther so that Dala will fire the current chief of security and promote him. But he also knows that the Phantom might not succeed in picking the sophisticated lock. So, without bothering to coordinate with the Phantom, George opens the gate when no one is looking so that the Phantom can walk right through when he arrives. Sure enough, the Phantom walks right through the gate and steals the Pink Panther.

In this case, George calculates bringing it about that the Phantom steals the Pink Panther as a means to becoming chief of palace security, and he calculates opening the gate as a means to bringing it about that the Phantom steals the Pink Panther. So, *Pink Panther V* is an example of the first type of case:

one in which the accomplice's further end figures in her calculations as an end to which bringing about the taking is her means.

We have already encountered an example of the second type of case: *Pink Panther I*. One who supposed that what the Phantom hired George to do in *Pink Panther I* is simply to open the gate would be making the same kind of mistake as one who supposed that what Bob hired Carla to do in the example discussed in Section A was simply to erect a scaffold. George should not expect payment if he opens the gate just a crack, not widely enough for the Phantom to get through, or if he calls over the other palace guards while opening the gate. George was hired to calculate out the action of opening the gate with an eye to the Phantom's end of stealing the Pink Panther, just as Carla was hired to calculate out the action of erecting a scaffold with an eye to Bob's ends of adding a roof and building a house. To earn his reward, then, George must open the gate in a way calculated to bring it about that the Phantom steals the Pink Panther. So, *Pink Panther I* is an example of the second type of case: one in which the accomplice's further end figures in her calculations as an end to which acting with the intention of bringing about the taking is her means.

Finally, for an example of the third type of case, consider

Pink Panther VI. Everything is as it is in *Pink Panther I*, except that instead of paying George upfront to open the gate, the Phantom offers George a share of the proceeds from the sale of the jewel if the Phantom manages to steal it. George accepts the offer, and the Phantom steals the Pink Panther.

If George is to collect his reward in *Pink Panther VI*, then two things must happen. First, he needs to do what the Phantom hired him to do. As in *Pink Panther I*, this consists in opening the gate in a way calculated to bring it about that the Phantom steals the Pink Panther. If George fails to do this, then he should not expect a share in the spoils even if the Phantom manages to steal the Pink Panther in spite of George's failure to play his part. So, George needs to act with the intention of bringing it

about that the Phantom steals the Pink Panther. Second, George needs this intention to be realized. Unless the Phantom succeeds in stealing the Pink Panther, there will be no spoils to divide. So, *Pink Panther VI* is an example of the third type of case: one in which the accomplice's further end figures in her calculations as an end to which *both* bringing about the taking *and* acting with the intention of bringing about the taking are her means.

In all three types of case, the accomplice acts with the intention of bringing about the taking. The cases differ only in the way in which this intention and the accomplice's further intention are related: as two intentions in order, as two orders of intention, or in both of these ways. So, we have no reason to think that there are cases in which someone is guilty of theft as an accomplice even though she lacked the intention that one must have to commit theft. The claim that accomplices commit the crimes of which they are guilty thus emerges unscathed from reflection on cases in which the accomplice is paid upfront.

II. OBJECTIONS AND REPLIES

I will now address five objections to the analysis of cooperation offered in Part I.A and its application in Part I.B to complicity with crimes that feature a mens-rea requirement of intention.

A. Skepticism about Multiple Orders of Intention

The first objection is that there is something fishy about the notion that an action can exemplify multiple orders of intention. In response to this objection, I will offer other examples of actions that exemplify multiple orders of intention. These examples will show that the notion that an action can exemplify multiple orders of intention is perfectly respectable.

First, consider the agent who turns aside from aiming at an end that she concludes it is morally impermissible to aim at, in order to avoid something that follows as a consequence of acting morally impermissibly. Such an agent is, as Matthew Hanser (2005, 458–61) puts it, engaged in “practical

metareasoning” about the quality of the practical inference that she is entertaining or that she has endorsed and is in the process of executing. For example, consider

Catholic Bomber. Bob is a military pilot. He is also a Catholic who believes that mortal sin destroys a person’s “state of grace”—that is, state of friendship with God—and who subscribes to the principle of double effect. One day, Bob receives a terror-bombing mission. Bob sets out to complete the mission but repents midflight. He reasons that although bombing with the intention of destroying a military target may be morally permissible, bombing with the intention of bringing about civilian deaths not only is not morally permissible but constitutes mortal sin. Bob aborts the mission in order to remain in a state of grace.

In *Catholic Bomber*, Bob turns aside from *bombing with the intention of killing civilians*. And he does that—he turns aside from *bombing with the intention of killing civilians*—with the intention of remaining in a state of grace. In other words, Bob <turns aside from *bombing with the first-order intention of killing civilians*>, with the second-order intention of remaining in a state of grace.

Second, consider the agent who aims at a certain end for the sake of the “enhancement or preservation of his own self-image as a [virtuous] person” (Williams 1981, 45). Such an agent is, in Bernard Williams’ (1981, 45) memorable expression, “morally self-indulgent”: “what [he] cares about is not so much other people, as himself caring about other people.” For example, consider

Narcissistic Utilitarian. Carla is obsessed with her own moral purity. She is also a utilitarian who thinks that moral purity consists in acting with the intention of maximizing social welfare. Frequently, in order to enhance her moral worth, Carla calculates her actions to maximize social welfare.

In *Narcissistic Utilitarian*, Carla <acts with the first-order intention of maximizing social welfare>, with the second-order intention of enhancing her moral worth.

Third, consider the agent who aims at a certain end as a means of “virtue signaling,” that is, showing off to others how virtuous she is. Adapting Williams’ description of moral self-indulgence, we might say that what such an agent cares about is not so much other people, as other people thinking that she cares about other people. For example, consider

Insecure Utilitarian. Dave is insecure. He is especially eager to curry favor with Carla and her group of popular friends, all of whom are utilitarians. When he is around them, Dave goes out of his way visibly to calculate his actions to maximize social welfare.

In *Insecure Utilitarian*, Dave <acts with the first-order intention of maximizing social welfare>, with the second-order intention of improving Carla’s and her friends’ opinion of him.

I conclude that whether or not my analysis of cooperation is sound, an adequate moral psychology must allow for the possibility of actions performed with multiple orders of intention anyway. It is therefore no objection to my analysis of cooperation that it implies that an action can exemplify multiple orders of intention.

Before moving on, it is worth noting that variants of each of the three cases above in which the agent’s first-order practical reason is backward- rather than forward-looking are possible. Anselm Müller (2011, 252–53) describes these as cases in which the agent has a forward-looking practical reason in the “background” when she acts (or refrains from acting) on the backward-looking practical reason. For example, an agent might turn aside from acting on a motive of revenge—from treating the fact that someone wronged her as a reason to harm that person—to avoid disappointing her parents. And the morally self-indulgent agent who prizes loyalty, or the virtue signaler whose audience prizes loyalty, might enhance her moral worth, or her audience’s opinion of her, by treating the fact that someone took her side in a past dispute as a reason to take that person’s side in a present dispute.

Cases like these, in which the agent’s first-order practical reason is backward-looking, also support my analysis of cases like *Pink Panther I*. For they provide examples of actions backed by two

orders of practical reasons, where a reference to the first-order practical reason figures in the specification of what the second-order practical reason rationalizes. Therefore, they alleviate concerns that my analysis of *Pink Panther I* is a nonstarter because it implies that George's action is backed by two orders of practical reasons: he <opens the gate (discreetly) because it will further the crime>, because it will earn him money.

However, cases in which the agent's first-order practical reason is backward-looking do not lend as much support to my analysis of cases like *Pink Panther I* as do cases in which the agent's first-order practical reason is forward-looking. For they do not provide examples of actions performed with two orders of *intention*, where a reference to the first-order intention figures in the content of the second-order intention. For example, consider the virtue signaler who <takes X's side because X took her side> because she wants to show off how loyal she is. Although "because X took her side" refers to a practical reason, it does not refer to an intention: X's taking the virtue signaler's side already happened, and it is not something that she is now acting with the intention of bringing about. Contrast this case with *Insecure Utilitarian*, in which Dave < ϕ -ed because it would maximize social welfare>, because it would impress Carla and her friends. Here, "because it would maximize social welfare" refers not only to a practical reason, but also, because that practical reason is forward-looking, to an intention: the intention to maximize social welfare. Therefore, cases in which the agent's first-order practical reason is backward-looking do not alleviate concerns that my analysis of cases like *Pink Panther I* is a nonstarter because it implies that George's action exemplifies two orders of intention, where a reference to the first-order intention figures in the content of the second-order intention.

In sum, cases in which the agent's first-order practical reason is backward-looking lend additional support to my analysis of cases like *Pink Panther I*. However, they do not lend as much support to this analysis as do cases in which the agent's first-order practical reason is forward-looking. Fortunately, cases in which the agent's first-order practical reason is forward-looking are sufficient on

their own to show that an adequate moral psychology must allow for the possibility of actions with the kind of rational structure that I attributed to George's action in *Pink Panther I*.

B. The Problem of Overinclusivity

Let us move on to the second objection. According to this objection, the analysis of cooperation in Part I rescues my account of criminal complicity from the Mens Rea Objection's charge of underinclusivity at the cost of opening it to the opposite charge of overinclusivity, that is, the charge that it implies of too many defendants that they are guilty of crimes.

To bring the objection into view, recall Elizabeth Anscombe's ([1957] 1963) famous case of the man operating a water pump. The man knows that someone else has poisoned the water with the intention of assassinating the inhabitants of the house whose water supply the man is replenishing. Anscombe ([1957] 1963, 42) asks whether the man intends to "poison[] the household." Her answer is that it depends on how the case is further specified. If the man is the regular hired hand who "go[es] with the house," then he can plausibly insist that he intends simply to "do[] his usual job," provided of course that replenishing the water supply is indeed "his usual job" ([1957] 1963, 42–43). "On the other hand, if [replenishing the water supply is] not his normal job, but he was hired by the poisoner to pump the water, knowing it was poisoned, the case is different" ([1957] 1963, 44). In this version of the case, the man cannot plausibly deny that he intends to poison the household.

It may seem that the account that I offered in Part I lacks the resources to distinguish between Anscombe's two versions of her case. My account can explain well enough why the man cannot plausibly deny that he intends to poison the household in the second version of the case. He was hired to play a part in the project of poisoning the household.² And this part does not lose its calculative-

² As I am using the term, "the project of ϕ -ing" should be understood capaciously, to comprise not only the actions that constitute ϕ -ing but also the actions that put in place the conditions for it. Thus, we do not need to get hung up on questions such as whether the water pumping was part of the poisoning itself or only a preparation for it.

teleological relation to poisoning the household just because the poisoner outsourced it to the man who pumped the water, any more than erecting the scaffold lost its calculative-teleological relation to building a house just because Bob outsourced it to Carla. Therefore, if the man is to do what he was hired to do, then he must pump the water with the intention of bringing about the poisoning of the household.

What my account cannot explain, it may seem, is why the man can plausibly deny that he intends to poison the household in the first version of the case, in which he is the regular hired hand who “go[es] with the house” (Anscombe [1957] 1963, 42). For it is not as if the man’s performance is any less a part of the project of poisoning the household in this version of the case. True, as the household’s regular hired hand, the man has on many occasions performed physically similar water pumpings that were not parts of assassination attempts. But why should that matter? We are asking about the man’s intentions on this occasion. And nothing about what the man has done on previous occasions alters the fact that, on this occasion, he is doing what he knows amounts to playing a part in the project of poisoning the household. And I have been insisting that the parts of a project do not lose their teleology within the project simply because someone other than the principal agent of the project is performing them. On my account, then, it seems that the man pumps the water with the intention of poisoning the household in the first version of the case as well as in the second.

One way to respond to this objection is to bite the bullet: I could part ways with Anscombe ([1957] 1963) and concede that my account entails that the man intends to poison the household in both versions of the case. Anscombe ([1957] 1963, 45) herself states that the interest we have in distinguishing the cases “is certainly not an ethical or legal interest.” After all, she ([1957] 1963, 45) points out, the fact that the man does not intend to poison the household in the first version of the case “will not absolve him of murder.” One might think, then, that I should simply concede that my

account entails that the man intends to poison the household in both versions of the case and embrace the implication that the man is guilty of murder in both versions of the case.

The problem with this response is that we can produce other cases in which biting the bullet will prove considerably less plausible. For example, consider the drug-store cashier who rings up an ingredient that he knows the customer intends to use to produce an illegal drug for her own consumption. For the customer, acquiring the ingredient is a crucial part of executing on her plan to do drugs. She has available to her a few ways of acquiring the ingredient. For example, she could shoplift it. Alternatively, she could purchase it legally. In the case that we are imagining, she opted to purchase it legally. Part of purchasing it legally is that a cashier rings it up at checkout. So, the cashier's action is part of the customer's project of acquiring the ingredient, which is itself part of the customer's project of doing drugs. Because the relation of part to whole is transitive, we can conclude that the cashier performs what he knows to be a part of the customer's project of doing drugs. So, it seems that, on my account, the cashier intends the customer's use of the drugs and is therefore guilty of the crime of illegal use of a controlled substance. But if this is correct, then we should reject my account. For surely it is not the case that the cashier is guilty of the crime of illegal use of a controlled substance.

A better response to the objection would be to point out that in neither the cashier case nor the version of the water pumping case in which the man is just "doing [his] usual job" (Anscombe [1957] 1963, 42) was the cashier or the man pumping water hired to play a part in a criminal enterprise. As a result, neither faces any pressure to promote the criminal objectives of the principal. Put another way, although each *knows* that what he is doing satisfies the description "playing a part in a criminal enterprise," neither acts *intentionally* under any such description. For "playing a part in a criminal enterprise" is not a description under which their actions are means to their further ends of bringing it about that they receive payment. Because they were not hired to play a part in a criminal enterprise, playing a part in a criminal enterprise is not, except *per accidens*, what they must do in order to earn

their pay. “Playing a part in a criminal enterprise” is thus comparable to a description like “burning calories” (at least on the assumption that neither the cashier nor the water pumper is ringing up purchases or pumping water, respectively, for exercise!).

Note that what is important here is that the cashier and the man pumping water as part of his usual job were not hired to play a part in a crime, not that they were not hired by a criminal. To bring this out, consider a case in which an agent knows that he is playing a part in the criminal enterprise *of his employer*, and yet is not his employer’s accomplice because playing a part in the criminal enterprise is not what he was hired to do. For example, suppose that Peter opens a dry-cleaning service in order to make enough money to finance the casino heist he has planned. With more work than he can handle alone, he hires Alice to handle the tuxedos. Later, Alice finds out that Peter is going to use the money that he is making on his dry-cleaning business to rob a nearby casino. I take it that it is not the case that Alice is guilty of theft simply because she shows up to work the next day and dry-cleans a batch of tuxedos, even though Alice knows that, in doing what Peter has hired her to do, she is playing a part in Peter’s criminal enterprise (which, we may assume, is successful).

The reason that Alice is not guilty of theft, I submit, is that she was not hired to play a part in the casino heist. To be sure, Alice was hired to play a part in the business, and this part does not lose its teleology simply because Peter outsourced it to Alice. This is why, if she is to receive her pay, then Alice must do more than merely satisfy the letter of her job description: dry-cleaning tuxedos. She must calculate her job performance with an eye to the ends that define the business. For example, Alice should expect to be fired if, after dry-cleaning the tuxedos, she cuts them into pieces, sews purple peace signs into the seats of the pants, or plasters them with mud. It will not do to protest that the tuxedos are clean as a whistle, or at any rate were before she plastered them with mud, and that therefore she satisfied the letter of her job description: she dry-cleaned the tuxedos. Alice was hired not merely to dry-clean tuxedos, but to do so in a way calculated to promote the overall ends that

define the business. This entails, *inter alia*, making it possible for Peter to return the tuxedos that Alice has dry-cleaned to their owners in a presentable state. Therefore, because Alice intends to play her part in the business in order to bring it about that Peter pays her, and because her part in the business retains its teleology even though she is not the owner of the business, Alice's action exemplifies two orders of intention: she <dry-cleans the tuxedos with the first-order intention of making them presentable to the business's clients>, with the second-order intention of bringing it about that Peter pays her.

Presumably, however, Alice was not hired to play a part in whatever larger projects Peter has undertaken that include his operation of the business as a part, including his project of robbing the casino. Admittedly, it is difficult to imagine what it would look like for Alice to calculate her job performance with an eye to facilitating the casino heist, but we can try. Perhaps Peter plans to produce replicas of the custom tuxedos that the casino staff wear so that his coconspirators can get into staff-only areas of the casino under disguise, as in the movie *Ocean's 11*. So, Peter sets up shop near the casino, hoping not only to make enough money to finance the heist, but also to lure casino staffers into dropping off their tuxedos for dry-cleaning, allowing him to study the tuxedos up close and produce accurate replicas. Presumably, Alice can expect to earn her pay as long as she carries on with her usual job of dry-cleaning the tuxedos. She need not do anything differently when, say, Polly the police detective approaches the shop to drop off her suit for dry-cleaning. For example, Alice need not hide the casino tuxedos, lest Polly recall having seen them there when, after the heist, she wonders who could have produced such accurate replicas of the custom tuxedos worn by the casino staff. What this shows is that playing a part in the heist—that is, acting with the first-order intention that Peter pulls off the heist—is not what Alice must do to realize her second-order intention of bringing it about that Peter pays her. And this, I submit, is why Alice is not guilty of theft.

Of course, it is possible that Peter does tell Alice that she must help out with the heist or else he will fire her. In that case, we would expect Alice, if she decides to stay on, to calculate her job performance to further Peter's criminal aspirations, unless she plans to betray him. For example, we would expect Alice to hide the tuxedos when she sees Polly at the door; perhaps she would also invent some excuse to tell the casino staff for why their dry-cleaning is taking longer than usual in order to buy time for Peter to complete the replicas. All of this would indicate that Alice is <acting with the first-order intention of bringing it about that Peter pulls off the heist>, with the second-order intention of bringing it about that Peter pays her. On my account, then, Alice is guilty of theft. And this seems right.

In summary, the argument of Part I does not lead to an overinclusive regime of accomplice liability. On the contrary, it enables us to reach an intuitive verdict in each of the cases that we have considered. It preserves Anscombe's ([1957] 1963) distinction between the two versions of her water-pumping case, implying that the man pumping water intends to poison the household when hired specifically to do so but does not intend to poison the household when simply going about his usual job. It implies that the cashier who rings up the ingredient the customer is to use in producing illegal drugs for her own consumption is not guilty of illegal use of a controlled substance. Finally, it implies that Alice is not guilty of theft simply because she continues to dry-clean tuxedos, thereby bringing in revenue that Peter will use to commit a crime—though Alice would be guilty of theft if Peter convinced her to tailor her job performance to further his criminal objectives.

Before moving on, it is worth pausing to turn the tables on those who argue that my account is incompatible with Anscombe's ([1957] 1963) remarks about the water pumping case. In fact, it is my opponent who has a problem accommodating Anscombe's remarks. For nowhere does Anscombe stipulate that, in the case in which the man is not going about his usual job, but was hired specifically to pump the poisoned water, the man's pay is contingent on the success of the assassination attempt.

She says simply that “the commission by the acceptance and performance of which [the man] gets the money is . . . to pump poisoned water” ([1957] 1963, 44). This suggests, if anything, that the man will receive his pay once he has pumped the poisoned water, even if it remains to be seen whether the inhabitants of the house actually drink it and, if they do drink it, whether they actually die as a result. Yet Anscombe appears prepared, without further specification of the case, to conclude that the man intends to “poison[] the household” ([1957] 1963, 42). Now, my account can explain why the man intends to poison the household even if, because he is to receive his pay regardless, he does not care whether his action ends up actually bringing about the poisoning of the household. But it is unclear how the opponent of my account can produce such an explanation. Certainly, it seems that those (e.g., Sarch 2015, 140; Yaffe 2014, 10; Girgis 2013, 469–70; cf. also Duff 2007, 449) who assume that the accomplice who is paid upfront need not act with the intention of bringing about the principal’s crime cannot accept Anscombe’s analysis of her own case. Therefore, Anscombe’s remarks about the water-pumping case are not only consistent with my account; they appear to presuppose it.

C. Sting Operations

The third objection to the account that I offered in Part I is that it lacks the resources to distinguish between genuine accomplices and law-enforcement officers engaged in sting operations. After all, the law-enforcement officer engaged in a sting operation must calculate her performance to further the principal’s crime if she is to pose convincingly as an accomplice. And I said that it is George’s calculation of his action to further the Phantom’s crime that explains why George is guilty of theft in *Pink Panther I*. So, it seems that my account of *Pink Panther I* implies that the law-enforcement officer who conducts a sting operation is guilty of a criminal attempt (if the sting operation is successful and the crime is foiled) or of a completed crime (if the sting operation fails). But this is absurd. Therefore, it seems that something must be wrong with my account of *Pink Panther I*.

I concede that there is a sense in which, to pose convincingly as an accomplice, the law-enforcement officer calculates her performance to further the principal's crime. That is, there is a rational order in the law-enforcement officer's activity that can be represented by a practical syllogism that has the principal's crime in the place of the objective. For example, suppose that Alice is an undercover police officer who has told Peter that she will help with the plan to rob the casino but who plans to arrest him when the time comes. Whenever Peter is watching, Alice does things like hide the tuxedos when Polly the police detective approaches the shop, provide excuses to the casino staff for why the dry-cleaning is taking longer than usual, and so on. Such actions will be calculated to further Peter's crime in the sense that they exemplify a rational order that—taking hiding the tuxedos from Polly as an example—can be represented, roughly, as follows: given the crime's success as an objective, Alice drew the conclusion to hide the tuxedos from the premises (i) that the crime is more likely to be successful if Polly does not find out that the shop is handling the casino staff's tuxedos, and (ii) that unless she (Alice) hides the tuxedos, Polly will find out that the shop is handling the casino staff's tuxedos. Thus, there is a sense in which Alice calculated her action of hiding the tuxedos as a means to bringing about Peter's criminal objective.

It does not follow, however, that Alice intends Peter's crime. I said in Part I.A that if an agent calculates her ϕ -ing as a means to bringing it about that q , then she ϕ -s with the intention of bringing it about that q —*with one exception*. It is time to consider the exception.

An example that illustrates the exception appears in Anscombe ([1989] 2005, 135–40). Anscombe imagines an “ironical” subordinate whose superior indicates that he has an objective, E , and declares that the subordinate needs to ϕ for E to come about. Anscombe observes that the subordinate can draw the conclusion of the superior's practical syllogism by ϕ -ing, even if the subordinate knows that, contrary to what his superior supposes, his ϕ -ing will not promote E at all; perhaps it will even ensure that E does not come about. In this case, the subordinate's syllogism is

genuinely “practical” because it “lead[s] to the [subordinate’s] doing the required thing,” that is, it concludes in action (Anscombe [1989] 2005, 135). Yet it differs from the paradigmatic practical syllogism insofar as the subordinate does not intend the objective, E, or believe the premise that he needs to ϕ for E to come about.

Anscombe ([1989] 2005, 136–37) draws an analogy to theoretical reasoning from premises that one does not believe. One can draw the conclusion from the premises, Anscombe observes, but one need not believe the conclusion. Just so, in practical reasoning, one can draw a conclusion—an action—from premises that one does not believe that link the conclusion to an objective, but one need not *intend* the objective. As Anscombe ([1989] 2005, 137) puts it, “Not aiming at what the [superior] aims at, not believing his premises, but still drawing the conclusion in action . . . corresponds to not believing the assertions and not believing the conclusion but still drawing the conclusion in the theoretical case.”³

I think that Anscombe’s analogy is helpful, and that it can be extended further. One can conduct a theoretical inference without believing the conclusion even if one believes each of the premises. Suppose that I am certain that some proposition p is false. Then you present me with the propositions

³ Other examples of “ironical” practical inference include cases in which the first agent is bluffing, and hence does not really believe one of the premises either, and the second agent either is in on the bluff or else calls the bluff. (I am grateful to Anselm Müller for prompting me to consider such cases.) For example, consider an embellishment of the famous story in the Jewish Scriptures in which King Solomon determines which of two women is the mother of a baby by proposing to cut the baby in half and give each woman one half, which prompts the true mother to seek to settle the case by letting the other woman have the baby. Suppose that, as part of the bluff, Solomon ordered his attendant to fetch his sword and bring him the baby. Suppose further that the attendant realized what Solomon was up to. The attendant could then calculate his actions (for example, appropriately placing the baby on a chopping block, not only fetching Solomon’s sword but handing it to him unsheathed, etc.) to further Solomon’s “end” of cutting the baby in half. But the attendant would not act with the intention of bringing it about that Solomon cuts the baby in half, because he knows that, for all his “assistance,” Solomon will not actually do it. In other words, although the attendant calculates his actions on the premise that they will contribute to bringing it about that Solomon splits the baby, he does not actually believe this premise and therefore does not actually intend for Solomon to split the baby.

r ,

$r \supset (q \vee p)$,

and

$\sim q$,

and I admit of each proposition that I believe it to be true. I draw the conclusion that p . But I do not believe that p . Instead, certain that p is false, I figure that either I slipped up in my reasoning and p does not follow from the premises or else one of the premises (which, I do not know) must be false.

Just so, I submit, one can conduct a practical inference without intending the objective even if one believes each of the premises. In the theoretical case, this is possible only if the thinker believes that the conclusion is false. Now, what corresponds to belief in the negation of the conclusion in the theoretical case is intention of the negation of the objective in the practical case; as Anscombe ([1957] 1963, 55) observes, “the contradiction of ‘I’m replenishing the house water-supply’ [uttered as an expression of intention, not observation] is not ‘You aren’t, since there is a hole in the pipe,’ but ‘Oh, no, you aren’t’ said by someone who thereupon sets out e.g. to make a hole in the pipe with a pick-axe.” Thus, one who draws a practical inference while believing each of the premises may nonetheless not intend the objective, but only if she intends to prevent the objective. In both cases, there is a limit: at some point, the theoretical thinker’s credence in the premises becomes so high that one can no longer say that she really believes that the conclusion is false; likewise, at some point, the practical thinker’s credence in the premises becomes so high that one can no longer say that she really intends to prevent the objective. Still, subject to this limit, it is possible to conduct a practical inference without intending the objective even if one believes one or more of the premises.

Return now to our example of a law-enforcement officer engaged in a sting operation. Alice may be confident that she will succeed in arresting Peter. Then again, she may have some doubts. At a certain point, she may even come to believe that, more likely than not, Peter will elude capture and

hence what she is doing really will end up contributing to the completion of a successful crime. Still, because she is engaged in a sting operation, Alice evidently *intends* to stop Peter. Therefore, assuming that she does not become so confident that Peter will succeed that we can no longer say that she really intends to stop him, she does not intend for Peter to commit the crime—even though her actions embody a practical syllogism that has the crime in the place of the objective and she believes some or even each of the syllogism’s premises.

I conclude that my account does not imply that law-enforcement officers engaged in sting operations act with the intention of bringing it about that the target of the sting operation commits the crime. Therefore, my account does not have the absurd implication that a law-enforcement officer engaged in a sting operation is guilty of a criminal attempt or, if the sting operation fails, a completed crime.⁴

D. The Relevance of the Accomplice’s Intentions

The fourth objection to my account is that it misrepresents the practical reasoning of the accomplice who is paid upfront. The objection concedes that, for the accomplice to receive her pay, her performance must be such as to further the principal’s ends. What the objection denies is that it matters, given that the accomplice in fact furthers the principal’s ends, whether she *intended* to do so. For it presumably does not matter to the principal, and what matters to the principal is all that matters as far as concerns whether the accomplice receives her pay. Therefore, even if the accomplice did intend for the principal to commit the crime, it would be a mistake to refer to this intention in specifying the accomplice’s means to her further ends. And this undermines the motivation for supposing that the accomplice intends to bring about the principal’s ends in the first place. But if we have no reason to suppose that the accomplice who is paid upfront intends to bring about the

⁴ Although I have focused on law-enforcement officers engaged in sting operations, the same reasoning applies to double agents, that is, agents engaged in double crossings.

principal's ends, then my attempt to account for the fact that George is guilty of theft in *Pink Panther I* fails.

My response to this objection is to deny that the accomplice should expect to receive her pay provided that her performance ends up furthering the principal's ends, even though this is, in a sense, "all that matters" to the principal. Suppose that Peter hires Alice to assist him in committing a crime. Instead of showing up to play her part, however, Alice goes off drinking. Finding her drunk in a bar, Peter hypnotizes her and directs her to get the job done, which she does under the influence of the hypnosis. Although her performance furthered Peter's ends, Alice should not expect Peter to pay her. Or, consider

Pink Panther VII. The Phantom has hired George to open the back gate to the palace so that the Phantom can sneak in and steal the Pink Panther jewel. When the Phantom arrives, George opens the gate and says: "Aha! Now we've got you." Behind George is the entire palace guard, armed and ready to arrest the Phantom. But then an errant laser beam from a passing UFO zaps the whole line of guards, leaving only George and the Phantom.

No doubt the Phantom is pleased in *Pink Panther VII*—George has furthered the crime marvelously, even better than he would have had he intended to do so, for he has disposed of the entire palace guard! Yet the last thing that George should expect the Phantom to do to him is to pay him.

Examples like these show that the accomplice does not anticipate payment merely because she furthered the crime or pleased the principal; manifesting (or at least faking, as in cases of sting operations) an intention to bring it about that the principal commits the crime is necessary as well.

Why is this so? The answer, I suggest, is that the basis for the accomplice's expectation of payment is the principal's promise, and the principal's promise is conditioned on the accomplice playing the part in the criminal enterprise that was assigned to her. It is true, of course, that the

principal might have chosen other means of accomplishing her objectives. She could have performed the part that she outsourced to the accomplice herself. She could have hypnotized someone to do it. In fact, however, she did neither of these things; instead, she incentivized an accomplice to use her own capacity of practical reasoning to get the job done by promising the accomplice a reward if she did. What constituted the basis of the accomplice's expectation of payment was therefore the principal's promise, and this promise was conditioned on the accomplice playing the part assigned to her—something that I have been arguing entails aiming in intention at the criminal enterprise as a whole.

It might seem strange that one should expect a criminal to keep her promise. It is certainly true that, if the accomplice is prudent, then she will be wary about accepting the job. She will want to confirm that the principal has an incentive to keep her promise. For example, does the principal have a reputation in the criminal world for honesty in dealings with fellow criminals, a reputation that it is plausible that she values more than the money that she promised to the accomplice?⁵ Can the accomplice make a credible threat to punish the principal if she breaks her promise? Doubts about such questions might be reasons for the accomplice to demand payment upfront: that way, if the principal refuses to pay, then the accomplice can threaten to call the police or otherwise thwart the crime.

In any event, if the accomplice does accept the job, then it is evidently because she has satisfied herself that the principal can be trusted to deliver on her promise—for, again, this is the only basis that the accomplice has for expecting payment. And the principal's promise is conditioned on the accomplice playing her part in the criminal enterprise. The accomplice's means to her end of bringing

⁵ Notice that if the principal keeps her promises in order to uphold her reputation, then upholding her reputation functions as what Müller (2011, 252–53) calls a “background” reason for treating the fact that she promised to do something as a reason to do it. See Section B.

it about that the principal pays her, then, is precisely that: playing her part in, and thus aiming in intention at the success of, the principal's crime.

E. The Accomplice Paid before Playing Her Part

Having dealt with the previous objection, we are now in a position to make short work of the fifth and final objection. According to this objection, I cannot explain why the accomplice who is paid not only before the crime is complete but before she plays her part in it is nonetheless guilty of a crime, if the crime is one, like theft, that features a mens-rea requirement of intention. After all, to explain why George is guilty of theft in *Pink Panther I*, in which he was paid after playing his part but before the crime was complete, I relied on the fact that George had to act with the intention of bringing it about that the Phantom steals the Pink Panther in order to bring it about that the Phantom pays him. But there would be no such fact to rely on if George had received his pay before doing anything at all. For example, consider

Pink Panther VIII. Everything is as it is in *Pink Panther I*, except the Phantom agrees to pay George, and does pay George, immediately before George opens the gate.

Even if I can explain why George is guilty of theft in *Pink Panther I*, it seems that I cannot explain why George is guilty of theft in *Pink Panther VIII*. For it is not the case in *Pink Panther VIII* that George had to act with the intention of bringing it about that the Phantom steals the Pink Panther in order to bring it about that the Phantom pays him. Yet if George is guilty of theft in *Pink Panther I*, then surely he is guilty of theft in *Pink Panther VIII*. It cannot be the case that whether George is guilty of theft turns on whether he was paid immediately before or immediately after opening the gate.

What the objection misses is that it is not the case that George was paid "before doing anything at all" in *Pink Panther VIII*. George was paid only after at least *promising* to open the gate. And now we are on familiar ground. If the principal agreed to pay the accomplice after the accomplice promised but before the accomplice delivered, then evidently the principal was satisfied that the accomplice had

sufficient incentive to honor her promise (she has a reputation in the criminal world to uphold, perhaps). And if the accomplice does honor her promise, then my account entails, correctly, that she is guilty of a crime. For her promise was to play a certain part in the criminal enterprise, which involves aiming in intention at the success of the crime.

Of course, it is also possible that the principal was too trusting, and the person whom she hired as an accomplice will take the money and run. My account implies that the person whom the principal hired in such a case is not guilty of a crime. But surely this is the correct verdict: having done nothing at all to further the crime, the person whom the principal hired was plainly not complicit in it. Any discomfort with this result stems, I think, from a sense that acquitting the person who breaks her promise to aid and abet a crime of liability for the crime lets her off too easily. But it is important to remember that the person who promises to aid and abet a crime but later reneges on the promise remains guilty of conspiracy to commit the crime, the punishment for which may, depending on the jurisdiction, be identical to the punishment for commission of the crime. And in any case there is something to be said for imposing a harsher punishment on the accomplice who goes through with the job than the would-be accomplice who cuts and runs. After all, we want the law not only to deter someone who has not yet agreed to aid a crime from starting down that route, but also to deter “on the margin” someone who has started down that route by agreeing to aid a crime from continuing down that route by actually aiding the crime.

CONCLUSION

I conclude that cases like *Pink Panther I* in which the accomplice to a crime that features a mens-rea requirement of intention is paid upfront pose no threat to the claim that accomplices commit the crimes of which they are guilty. Once we understand the rational structure of cooperative activity, it becomes clear that the accomplice in such a case does act with the intention with which one must

act to commit the crime. Therefore, the fact that the accomplice is guilty of the crime is consistent with the claim that accomplices commit the crimes of which they are guilty.

7. The Free Will Objection

INTRODUCTION

In this Chapter, I will examine what I will call the “Free Will Objection” to the claim that accomplices commit the crimes of which they are guilty. Like the Overinclusivity Objection considered in Chapter 4, the Free Will Objection purports to show that the Doctrine of Intervening Causes states a limit on who counts as having committed a crime. Unlike the Overinclusivity Objection, however, the Free Will Objection does not motivate the Doctrine of Intervening Causes by citing cases in which we supposedly cannot explain why the defendant is not guilty of a crime except by appeal to the Doctrine of Intervening Causes. Instead, the Free Will Objection asserts that something like the Doctrine of Intervening Causes follows from the fact that human actions are freely chosen.

In Part I, I will review Sanford Kadish’s (1985) canonical statement of the Free Will Objection. In Part II, I will examine the response that Michael S. Moore (2014; 2009) offers to the Free Will Objection. Moore targets the fact that the Free Will Objection relies on incompatibilism about free will, that is, the view that free will is incompatible with determinism. Moore argues at length that incompatibilism is false. After examining Moore’s argument against incompatibilism, however, I will conclude that it is unsound. In Part III, I will offer an alternative response to the Free Will Objection. I will argue that the Free Will Objection trades on an equivocation on “cause,” between “partial cause” and “complete cause.” Once the distinction between partial and complete causation is clear and the equivocation laid bare, the Free Will Objection loses all plausibility. I will conclude that the idea that human actions are freely chosen poses no threat to the claim that accomplices commit the crimes of which they are guilty. In closing, because this is the last Chapter of this Dissertation, I will summarize

the implications of this Dissertation's arguments for ongoing debates about what the necessary and sufficient conditions for accomplice liability should be.

I. THE FREE WILL OBJECTION

The canonical statement of the Free Will Objection appears in Kadish (1985), though it has antecedents in McLaughlin (1925), Ryu (1958), and Hart and Honoré ([1959] 1985). I will quote Kadish's informal presentation of the argument at length in Section A. Then, in Section B, I will attempt to extract the reasoning that is implicit in Kadish's remarks.

A. Kadish's Statement of the Argument

According to Sanford Kadish,

We perceive human actions as differing from other events in the world. . . . [Other events] occur . . . in sequences and associations that have a necessary quality about them. We express this quality in terms of causation Human actions stand on an entirely different footing. . . . Except in special circumstances, . . . [a person] is free to choose his actions. . . . This is the perception that underlies the conception of responsibility which, in turn, is central to the conception of blame. (1985, 330)

Kadish continues:

In the same sense and for the same reasons that a person's genes, upbringing, and social surroundings are not seen as the cause of his actions, neither are the actions of another seen as the cause of his actions. We regard a person's acts as the products of his choice, not as an inevitable, natural result of a chain of events. (1985, 333)

Thus,

Complicity emerges as a separate ground of liability . . . because of the distinction between nature and will: The voluntary action of the principal actor cannot appropriately be said to have been caused . . . by the action of the secondary party (or

accomplice). A voluntary action is treated as the terminal point of a causal inquiry beyond which the inquiry does not proceed. No one and nothing caused the principal's action. He freely and voluntarily chose to act. (1985, 327)

Note that Kadish (1985, 326–27) himself withholds judgment from the soundness of the Free Will Objection. He merely presents it as the argument that, for better or worse, has driven the common law's treatment of aiding or abetting a crime as a distinct basis for criminal liability.

Kadish's reconstruction of the reasoning behind the common law's apparent treatment of aiding or abetting a crime as a distinct basis for criminal liability has been tremendously influential. It is regularly cited as *the* explanation why, for better or worse, the common law recognizes not one but two things it is to be guilty of a crime (see, e.g., Binder and Chiesa 2019, 91, 110). Of course, if the arguments in Chapters 1–2 were sound, then the common law does not in fact recognize two things it is to be guilty of a crime. But some mistake that suggests that the accomplice did not commit the crime of which she is guilty must have crept into the common law to motivate the legal fiction of treating the principal's exercise of agency as if it were the accomplice's. Kadish has as good a claim as any to have identified this mistake.

B. A Closer Look at the Argument

Let us try to state more precisely the argument that Kadish presents informally in the passages above. Take a case in which someone is guilty of a crime as an accomplice. To keep things simple, let us make a few assumptions. First, assume that the crime is a result crime. Second, assume that it is not the case that the person who is guilty as an accomplice is also guilty as a principal.¹ Third, assume that

¹ Cases in which someone is guilty both as an accomplice and as a principal are possible. Suppose, for example, that Alice procures two guns and gives one to Peter. Alice and Peter then simultaneously shoot Violet, and Violet dies from the gunshot wounds, with each wound necessary but insufficient to cause her death.

the person whom the person who is guilty as an accomplice aids or abets is guilty as a principal.² Provided that there are cases in which these assumptions hold, they are harmless. And it is extremely plausible that there are cases in which these assumptions hold. For example, suppose that Alice and Peter carry out a consensual agreement to murder Violet: Alice supplies the weapon, and Peter uses it to kill Violet. The crime of which Alice is guilty, murder, is a result crime; Alice is guilty of murder only as an accomplice, not also as a principal; and Peter is guilty of murder as a principal.

The first premise of the Free Will Objection is that, in a case like this,

- (1) The principal is morally responsible for her action,

where a person is morally responsible for something iff it is voluntary on her part, that is, iff it is an exercise of her agency in the sense elaborated in Chapter 1. Kadish (1985, 329–30) seems to think that the rationale for (1) is that the principal is to blame for her action, and a person is to blame only for that for which she is morally responsible. In fact, an even stronger argument for (1) is available. As we saw in Chapters 1–2, only an exercise of agency, understood as the sort of thing for which a person is morally responsible, can constitute the commission of a crime. Therefore, if (as we have assumed) the principal is guilty of a crime as a principal, that is, in virtue of having committed a crime, then the principal was morally responsible for her action, regardless whether her action merits praise, blame, or some other reactive attitude.

The next premise in the Free Will Objection is that an agent is morally responsible for her action only if she freely chose to perform it. More formally,

- (2) Necessarily, for all actions V, if the agent of V is morally responsible for V, then V was freely chosen.

² Again, cases in which this assumption does not hold are possible. The principal might have an excuse or justification that functions as a defeater of guilt. For example, she may have acted in self-defense or under duress. See, e.g., *People v. McCoy*, 24 P.2d 1210, 1217 (Cal. 2001).

The Free Will Objection continues: Freely chosen actions can be distinguished from “other events in the world” by the fact that they are not necessitated, that is, predetermined, by prior events. Unlike “other events,” freely chosen actions do not “occur . . . in sequences and associations that have a necessary quality about them” (Kadish 1985, 330). Thus,

(3) Necessarily, for all actions V, if V was freely chosen, then V was not predetermined.

And because the language of “causation” expresses the “necessary quality” of the sequences in which prior events predetermine subsequent events (Kadish 1985, 330),

(4) Necessarily, for all actions V, if V was not predetermined, then V was uncaused.

In conjunction, (1)–(4) entail that “nothing caused the principal’s action” (Kadish 1985, 327).

According to the Free Will Objection, this conclusion creates the need for complicity “as a separate ground of liability” (Kadish 1985, 327). For, trivially,

(5) Necessarily, for all actions V, for all actions W, if V was uncaused, then it is not the case that W caused V.

And

(6) If the accomplice committed the crime of which she is guilty, then the accomplice’s action caused the principal’s action.

In a moment, I will explain why (6) is plausible. For now, notice that, in conjunction, (1)–(6) entail that it is not the case that the accomplice committed the crime of which she is guilty. So, there must be some “separate ground,” other than the fact that she committed the crime, in virtue of which the accomplice is guilty of and hence liable for the crime.

Why think that (6) is true? We have assumed that the crime of which the accomplice is guilty is a result crime. And commission of a result crime requires causing the result that defines the crime (for example, commission of homicide requires causing the death of the victim). Therefore, if the accomplice committed the crime of which she is guilty, then her action caused the result that defines

the crime. Now, if the accomplice's action caused this result, then either it caused the result through the principal's action or it caused the result otherwise than through the principal's action. But if the accomplice's action had caused the result otherwise than through the principal's action, then the accomplice would be guilty of the crime as a principal. And we have assumed that it is not the case that the accomplice is guilty of the crime as a principal. So, the accomplice's action caused the result through the principal's action. But if the principal's action causally mediated the accomplice's action and the result, then the accomplice's action caused the principal's action, too. Therefore, (6) is true: if the accomplice committed the crime of which she is guilty, then the accomplice's action caused the principal's action.

II. THE COMPATIBILIST RESPONSE

In this Part, I will review Michael S. Moore's (2014; 2009) response to the Free Will Objection. Moore (2009, 268–73) attempts to undermine the Free Will Objection by affirming compatibilism about free will and determinism. That is, he denies

(3) Necessarily, for all actions V, if V was freely chosen, then V was not predetermined.

In this Part, I will argue that Moore's argument for compatibilism fails. In Section A, I will introduce the compatibilist analysis of free choice that Moore thinks is basically right and explain why even Moore agrees that it cannot be exactly right. Then, in Section B, I will argue that neither of the two strategies that Moore suggests for refining this analysis to avoid the difficulty identified in Section A is successful. I will conclude in Section C that Moore's argument for compatibilism fails; hence, his response to the Free Will Objection is inconclusive at best.

A. The Simple Conditional Analysis

Developing ideas of G. E. Moore (1912, 84–95) and Donald Davidson ([1973] 2001, 73), Michael Moore (2014, 33–36) provisionally suggests the following analysis of free choice:

Simple Conditional Analysis. A is free to ϕ = If A wants badly enough to ϕ , then A will choose to ϕ ; and if A chooses to ϕ , then A will ϕ .

If the Simple Conditional Analysis is correct, then (3) is false. It is possible for an agent to be predetermined to want badly enough to ϕ , and thus to choose to ϕ , and thus to ϕ . If the Simple Conditional Analysis is correct, then the agent in such a case is free to ϕ despite being predetermined to ϕ . Hence, (3) is false.

The problem is that the Simple Conditional Analysis is false. As Moore (2014, 39–41) acknowledges, it is vulnerable to counterexample by cases of the kind that Keith Lehrer (1968, 31–32) made famous several decades ago. For example, consider

Magician. A magician has stripped Alice of her power to ϕ but will instantaneously restore it if Alice chooses to ϕ . If Alice wants badly enough to ϕ , then she will choose to ϕ . And if Alice chooses to ϕ , then the magician will instantaneously restore her power to ϕ and Alice will ϕ .

According to the Simple Conditional Analysis, Alice is free to ϕ . But no one who lacks the power to ϕ is free to ϕ , and Alice lacks the power to ϕ . So, Alice is not free to ϕ . Therefore, the Simple Conditional Analysis is false.

B. Moore's Attempts to Patch the Simple Conditional Analysis

Lehrer-type counterexamples notwithstanding, Moore thinks that the Simple Conditional Analysis is on the right track. He (2014, 40–41) offers two alternatives for refining the Simple Conditional Analysis to avoid counterexamples like *Magician*, without losing the conclusion that (3) is false. I will examine the first strategy, which involves refining the Simple Conditional Analysis into a more complicated analysis, in Section 1, and the second strategy, which involves downgrading the

Simple Conditional Analysis from an analysis to a biconditional, in Section 2. I will conclude that neither strategy is successful.

1. The Sophisticated Conditional Analysis

The first strategy for patching the Simple Conditional Analysis is one that Moore borrows from Kadri Vihvelin (2004). As I understand it, the strategy, adapted to fit Moore's needs, can be summarized as follows. The freedom to ϕ is the disposition to choose to ϕ given that one wants badly enough to ϕ plus the disposition to ϕ given that one chooses to ϕ .³ But it is not the case that an agent A has a disposition to ϕ in circumstances C only if A will ϕ given C. Instead, A has a disposition to ϕ in C in virtue of exemplifying the properties that constitute what Vihvelin (2004, 438) calls the "causal basis" of the disposition: the properties of A that under normal conditions are present and causally responsible for the fact that A ϕ -s in C. Thus, we must replace the Simple Conditional Analysis with the following alternative. Let " F_1, F_2, \dots, F_n " refer to the properties that constitute the causal basis of A's disposition to choose to ϕ given that A wants badly enough to ϕ . And let " G_1, G_2, \dots, G_m " refer to the properties that constitute the causal basis of A's disposition to ϕ given that A chooses to ϕ . Then:

Sophisticated Conditional Analysis. A is free to ϕ = (i) A exemplifies F_1, F_2, \dots, F_n and if A wants badly enough to ϕ and continues to exemplify F_1, F_2, \dots, F_n , then A will choose to ϕ ; and (ii) A exemplifies G_1, G_2, \dots, G_m and if A chooses to ϕ and continues to exemplify G_1, G_2, \dots, G_m , then A will ϕ .

³ Vihvelin (2004, 436–37) operates with following analysis of disposition, inspired by David Lewis (1997, 157): "O has the disposition at time t to X iff, for some intrinsic property B that O has at t, for some time t' after t, if Condition C were to obtain at time t and O retained property B until t', C and O's having of B would jointly be an O-complete cause of O's X'ing." As Vihvelin (2004, 437) points out, however, even if this analysis of disposition is flawed, although "some of [her] arguments [would] have to be reformulated, [] the basic line of argument [would] be the same."

Although the Sophisticated Conditional Analysis is a mouthful, the key difference between it and the Simple Conditional Analysis is simple: the Sophisticated Conditional Analysis implies that one is free to ϕ only if one has and retains the causal bases of one's dispositions (i) to choose to ϕ given that one wants badly enough to ϕ and (ii) to ϕ given that one chooses to ϕ .

Unlike the Simple Conditional Analysis, the Sophisticated Conditional Analysis is immune to counterexample by cases like *Magician*. In *Magician*, it is true, Alice will choose to ϕ if she wants badly enough to ϕ and will ϕ if she chooses to ϕ . On the Simple Conditional Analysis, this entails that Alice is free to ϕ . Not so on the Sophisticated Conditional Analysis. On the Sophisticated Conditional Analysis, to conclude that Alice is free to ϕ , we would need the additional premise that Alice will retain the causal bases of her dispositions (i) to choose to ϕ given that she wants badly enough to ϕ and (ii) to ϕ given that she chooses to ϕ . And in *Magician*, the magician has deprived Alice of her power to ϕ , which presumably involved depriving her of the causal basis of her disposition to ϕ given that she chooses to ϕ . Therefore, unlike the Simple Conditional Analysis, the Sophisticated Conditional Analysis does not imply, incorrectly, that Alice is free to ϕ in *Magician*.

Like the Simple Conditional Analysis, however, the Sophisticated Conditional Analysis implies that (3) is false. It is possible for an agent to be predetermined to want badly enough to ϕ and to retain the causal bases of her dispositions (i) to choose to ϕ if she wants badly enough to ϕ and (ii) to ϕ if she chooses to ϕ . If the Sophisticated Conditional Analysis is true, then the agent in such a case is free to ϕ despite being predetermined to ϕ . Hence, (3) is false.

The problem is that the Sophisticated Conditional Analysis is false, too. It is vulnerable to counterexample by cases of the kind that Elizabeth Anscombe ([1976] 1981, 165, 168–69) produced in defense of Lehrer's criticism of views like the Simple Conditional Analysis. For example, consider

Lock. Alice has been hypnotized to leave the room. Unbeknownst to her, the door is locked. An implant in Alice's brain with a wireless connection to the lock will unlock the door iff it detects that Alice has chosen to leave the room. If Alice tries to leave due to hypnosis, or is caused to move toward the door by anything other than her own choice, then she will be unable to leave.

According to the Sophisticated Conditional Analysis, it is true before the implant registers Alice's choice to leave that Alice is free to leave. In fact, however, Alice is not free to leave until after the implant registers her choice to leave; until then, she is locked in the room. Therefore, the Sophisticated Conditional Analysis is false. Or, consider

Carbon Monoxide. Bob is contemplating suicide by carbon monoxide poisoning. Unbeknownst to Bob, the chamber he has prepared is full of a harmless gas that Bob merely believes is carbon monoxide. In fact, the universe is currently devoid of carbon monoxide, and Bob lacks access to the materials that he would need to synthesize it. However, Carla the chemist is watching closely. Unbeknownst to Bob, Carla will synthesize carbon monoxide and pump it into the chamber if Bob wants badly enough to poison himself with carbon monoxide to choose to poison himself with carbon monoxide.

Again, according to the Sophisticated Conditional Analysis, Bob is free to poison himself with carbon monoxide, when in truth he is not. Therefore, the Sophisticated Conditional Analysis is false.

Now, I doubt that cases like *Lock* that feature external sources of interference or prevention are as devastating for compatibilism as Anscombe ([1976] 1981, 168–69, 172) seems to think. The compatibilist can revise the Sophisticated Conditional Analysis so that one is free to ϕ only if there are no external sources of interference with one's ϕ -ing. (Because it would be messy, I will not state the revised analysis, but the reader is free to derive it by working from the Sophisticated Conditional

Analysis.) This revised analysis of freedom would not imply that, in *Locke*, Alice is free to leave before the implant registers her choice to leave. But it would still imply that (3) is false.

Cases like *Carbon Monoxide* are different. Such cases do not involve external sources of interference with the agent's action. Instead, they involve a lack of the conditions of possibility for the agent's action. It is not as if Bob has the wherewithal to poison himself with carbon monoxide, such that if he fails to do so it is only because something interfered—as would be the case, for example, if Carla locked the door to the chamber that Bob had filled with carbon monoxide so that Bob could not enter. Instead, the conditions of possibility for Bob to poison himself with carbon monoxide are not present in the first place: no carbon monoxide exists, and Bob lacks the materials to produce any. To account for cases like *Carbon Monoxide*, then, it seems that the compatibilist would have to revise the Sophisticated Conditional Analysis to imply that

(7) One is free to ϕ only if the conditions of possibility for one's ϕ -ing are present.

And now the compatibilist is in trouble. For it is plausible that

(8) One is free to do something only if one is free to do otherwise.

Even many compatibilists concede (8) (see, e.g., M. Moore 2014, 28–55). In conjunction with (7), however, (8) implies that (3) is *true*. For if one is predetermined to ϕ , then the conditions of possibility for doing otherwise than ϕ -ing are not present. Therefore, by (7), one is not free to do otherwise than ϕ . But then, by (8), one is not free to ϕ , either. Hence, (3) is true: if one was predetermined to ϕ , then one did not ϕ freely.

It appears, then, that Moore's first strategy for rescuing the Simple Conditional Analysis without losing the conclusion that (3) is false is a failure. Not only did persisting with this strategy not lead to the conclusion that (3) is false; it appeared to lead to the conclusion that (3) is true.

2. The Simple Biconditional

Moore's second strategy for patching the Simple Conditional Analysis is to downgrade it from an *analysis* of free choice to a *biconditional*. That is, he proposes to replace the Simple Conditional Analysis with the

Simple Biconditional. A is free to ϕ iff <if A wants badly enough to ϕ , then A will choose to ϕ ; and if A chooses to ϕ , then A will ϕ >.

Even if cases like *Magician* show that the Simple Conditional Analysis is false because it purports to state the *meaning* of statements like "A is free to ϕ ," Moore (2014, 41) reasons, they do not show that the Simple Biconditional, which purports merely to state necessary and sufficient conditions for facts of the form "A is free to ϕ " to obtain in the actual world, is false. For although cases like *Magician* may be metaphysically possible, they are nomically impossible: the laws of nature in the actual world rule it out that anything like *Magician* will ever occur.

The problem is that the Simple Biconditional is false, too. Moore is so focused on cases like *Magician* that he overlooks the possibility of cases like *Lock* and *Carbon Monoxide*. Although *Magician* may be nomically impossible, *Lock* and *Carbon Monoxide* are not—at least, not on Moore's conception of choice as an event that causes a human action. And both *Lock* and *Carbon Monoxide* are counterexamples to the Simple Conditional Analysis. Therefore, they are also counterexamples to the Simple Biconditional.

C. The Bottom Line

I conclude that Moore's defense of compatibilism fails. It would be far too hasty, of course, to conclude that compatibilism is false. True, the attempt to produce a conditional analysis of freedom seemed to lead us to incompatibilism. But there are ways of avoiding this destination. For example, although many affirm (8), some deny it—including at least one prominent philosopher who is plausibly

classified as an incompatibilist.⁴ And there may be a clever way to accommodate cases like *Carbon Monoxide* without conceding (7). Finally, the compatibilist need not go in for a conditional analysis of freedom in the first place. Philosophers have debated whether free will is compatible with determinism for centuries, and we are not going to resolve the debate here. The bottom line for our purposes is that Moore has not resolved it, either. If we want a decisive answer to the Free Will Objection, then we will have to do better than denying (3) on the grounds that free will is compatible with determinism.

III. AN ALTERNATIVE RESPONSE

Fortunately, a better response to the Free Will Objection is available. The Free Will Objection trades on an equivocation. A statement like “the accomplice’s action caused the principal’s action” is susceptible to at least two interpretations. First, it might mean that the fact that the accomplice performed her action constitutes at least a *partial* explanation for the fact that the principal performed her action. Second, it might mean that the fact that the accomplice performed her action constitutes a *complete* explanation for the fact that the principal performed her action.

Keeping in mind the distinction between partial and complete causation, reconsider

- (6) If the accomplice committed the crime of which she is guilty, then the accomplice’s action caused the principal’s action.

The argument for (6), recall, was that commission of a result crime requires causing the result that defines the crime. Therefore, if the accomplice committed the crime (which we stipulated was a result crime), then she must have caused the result. And because we stipulated that the accomplice was not also a principal, she did not cause the result independently of the principal’s action, which means that she must have caused it through the principal’s action. And if she caused the result through the principal’s action, then she caused the principal’s action, too. Clearly, this is an argument for

⁴ The philosopher I have in mind is Thomas Aquinas. Note, however, that Aquinas likely would have affirmed a weaker version of (8) that is nonetheless strong enough to do the work that (8) does in the argument above. For a discussion of Aquinas’s views on the matter, see Furlong (2015).

- (6a) If the accomplice committed the crime of which she is guilty, then the accomplice's action was at least a partial cause of the principal's action,

not

- (6b) If the accomplice committed the crime of which she is guilty, then the accomplice's action was a complete cause of the principal's action.

For no one thinks that commission of a result crime requires *completely* causing the result. Suppose, for example, that Alice supplies the parts for a Rube Goldberg machine that Peter is to assemble and use to kill Violet. Peter's action—depressing the pedal of the machine, say—is only a partial cause of Violet's death; the various components of the machine have to do their parts, too. Yet no one will deny that Peter committed murder. But then it is not the case that Alice's action must have been a complete cause of Violet's death if Alice is also to count as having committed murder. And this leaves us with no reason to think that Alice's action must have been a complete cause of Peter's action if Alice is to count as having committed murder. So, we have no reason to accept (6b).

Therefore, if the Free Will Objection is to succeed, then (6) must be read as (6a) rather than (6b).

Now, however, reconsider

- (4) Necessarily, for all actions V, if V was not predetermined, then V was uncaused.

Again, we could interpret (4) in two ways:

- (4a) Necessarily, for all actions V, if V was not predetermined, then V was not even partially caused,

and

- (4b) Necessarily, for all actions V, if V was not predetermined, then V was not completely caused.

It is not clear that even (4b), the more modest of these two claims, is true (see, e.g., Anscombe [1971] 1981). What is clear, however, is that (4a) is false. Even those who insist that no human action is predetermined should agree that every human action has many partial causes. For starters, it is true of every human action that its agent's parents' action of procreating the agent was a partial cause of the action.

Therefore, if the Free Will Objection is to succeed, then (4) must be read as (4b) rather than (4a).

But if (4) is read as (4b) and (6) as (6a), then the Free Will Objection is invalid unless

(5) Necessarily, for all actions V, for all actions W, if V was uncaused, then it is not the case that W caused V.

is read as

(5') Necessarily, for all actions V, for all actions W, if V was not completely caused, then it is not the case that W even partially caused V.

And (5') is false.

I conclude that the Free Will Objection is unsound. Even if we grant for argument's sake the libertarianism about free will entailed by the conjunction of (1)–(3), we should deny the conjunction of (4)–(6). The most plausible version of libertarianism will concede that human actions are at least partially caused (see, e.g., Pruss 2006, 136, 158). And nothing about the notion that the accomplice committed the crime of which she is guilty requires the accomplice's action to have more than partially caused the principal's action.

CONCLUSION

I conclude that the claim that accomplices commit the crimes of which they are guilty survives the Free Will Objection. The Free Will Objection trades on an equivocation that, once laid bare, relieves any pressure on the defender of the claim that accomplices commit the crimes of which they

are guilty to wade into contested debates about free will. The only position that the Free Will Objection shows is closed off to the defender of the claim that accomplices commit the crimes of which they are guilty is an extreme version of libertarianism that, as far as I know, no one has ever endorsed.

I have now completed my defense of this Dissertation's thesis: that the common law should—and, properly understood, does—recognize only one thing it is to be guilty of a crime, namely, to have committed it. I offered my positive argument for this claim in Chapters 1–2, concluding that the legal fiction of treating the principal's exercise of agency as if it were the accomplice's must have arisen as a corrective to a prior mistake that prevented courts from recognizing that accomplices commit the crimes of which they are guilty. I have been devoting the remainder of the Dissertation to diagnosing what this mistake might have been. In Chapters 3–6, I rebutted three objections to the claim that accomplices commit the crimes of which they are guilty: the Conduct Crimes Objection, the Overinclusivity Objection, and the Mens Rea Objection. And here in Chapter 7, I rebutted a fourth objection: the Free Will Objection. Evidently, the legal fiction of treating the principal's exercise of agency as if it were the accomplice's took root in the common law because courts were influenced by one or more of these objections. Understanding where these objections go wrong clears the way for legal officials to unwind this legal fiction along with the mistake that gave rise to it. Now that we can see what it would look like for the common law to “work itself pure” in this way, we are finally in a position to weigh in on the debates among legislatures, courts, and scholars regarding what the necessary and sufficient conditions for accomplice liability should be.

Consider first the contentious debate about mens rea. As explained in this Dissertation's Introduction, courts, legislatures, and scholars are all over the map regarding what the mens-rea requirements for accomplice liability should be. Some propose a single mens rea with respect to the principal's crime as a whole: states like Missouri condition accomplice liability on the intention to

promote the crime,⁵ states like Washington condition accomplice liability on the knowledge that one is promoting the crime,⁶ Gideon Yaffe (2014, 19) suggests that accomplice liability should be conditioned on having a “commitment of non-reconsideration” with respect to the crime, and Alexander Sarch (2015, 164–65) suggests that accomplice liability should be conditioned on being “insufficiently motivationally repelled” by the crime.

Others propose distinct mens-rea requirements for distinct “elements” of the principal’s crime. For example, Sherif Girgis (2013, 475–76) proposes to condition accomplice liability on intention with respect to *the principal’s intention* to perform the conduct element of the crime, while bracketing the question what mens rea the defendant should have to exemplify with respect to the other elements of the crime to be liable as an accomplice. Heidi Hurd and Michael Moore (2016, 162–63) argue that the mens-rea requirements for accomplice liability should be “exactly the same” as the mens-rea requirements for principal liability. Following the Model Penal Code (1962, § 2.06), Hawaii conditions accomplice liability for a crime on intention with respect to the principal’s conduct and, with respect to the results of the principal’s conduct, whatever mens rea is required for principal liability for the crime; however, it remains silent about what mens rea is required with respect to the circumstances of the principal’s crime. Thus, for example, under Hawaii law, someone is liable for reckless manslaughter as an accomplice only if she intended to bring about the conduct of the principal that caused the victim’s death and was herself reckless with respect to the risk that someone would die as a result. However, the Hawaii complicity statutes simply do not tell us whether, for example, someone is liable for rape as an accomplice only if she had *knowledge* of the circumstance that the victim did not consent, only if she was *reckless* with respect to this circumstance, or only if she was *negligent* with respect to this circumstance—or even whether accomplice liability for rape is “strict”

⁵ Mo. Rev. Stat. § 562.041(1)(2).

⁶ Wash. Rev. Code § 9A.08.020(3)(a).

(that is, without any mens-rea requirement that the prosecution must prove) with respect to the circumstance that the victim did not consent. For one more example, consider the standard that the Supreme Court established recently for complicity with federal crimes, which appears to require intention with respect to the principal's conduct and "advance knowledge"—which "means knowledge at a time the accomplice can [still] . . . walk away"—of the circumstance elements of the crime.⁷

Finally, as explained in this Dissertation's Introduction, states like Wisconsin supplement one of these proposals by also providing that an accomplice is secondarily complicit in any crime(s) foreseeably committed by the principal "in furtherance" of the crime(s) with which the accomplice is primarily complicit.⁸ And states like Arizona provide that an accomplice is secondarily complicit in any crime(s) foreseeably committed by the principal while committing the crime(s) with which the

⁷ *Rosemond v. United States*, 572 U.S. 65, 78 (2014). Unfortunately, the majority opinion in *Rosemond* is not entirely perspicuous. At times, it seems that the Court is endorsing an "advance knowledge" requirement with respect to the crime as a whole, a standard that would bring federal law in line with the law of states like Washington, with the caveat that Washington does not condition accomplice liability on the defendant having acquired the relevant knowledge at time when she still had a "realistic opportunity to quit the crime." *Id.* For example, the *Rosemond* majority declares that accomplice liability's mens-rea requirement "must go to the specific and entire crime charged." *Id.* at 76. Elsewhere, however, the Court seems at pains to indicate that this is not the standard that it is endorsing. For example, it denies "express[ing] [any] view about what sort of facts, if any, would suffice to show that" a defendant "who incidentally facilitate[s] a criminal venture rather than actively participate[s] in it"—such as "the owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used"—has the mens rea "necessary to be convicted of aiding and abetting." *Id.* at 77 n.8. Both the term "incidentally"—familiar from the Court's First Amendment jurisprudence, which distinguishes laws aimed at suppressing speech or religious exercise from laws that merely "incidentally" burden speech or religious exercise—and the phrase "knowing but not caring" suggest that the Court is setting aside cases in which the defendant exemplifies knowledge but not intention with respect to the principal's conduct, that is, with respect to "how the gun will be used." In addition, the Court suggests that an accomplice is liable because he "determined . . . to do what he can to 'make [the principal's crime] succeed,'" which suggests intention with respect at least to the principal's conduct. *Id.* at 78 (quoting *Nye v. Nissen*, 336 U.S. 613, 619 (1949)). In sum, it is unclear whether the Court meant to endorse an "advance knowledge" standard with respect to the crime as a whole, or whether it meant to reserve the question whether accomplice liability must exemplify a mens rea of intention with respect to the principal's conduct specifically. The whole matter is complicated by the fact that it is unclear when the Court is using "intent" as the old-fashioned generic term for mens rea and when it is using "intent" to refer to intention, a specific grade of mens rea. E.g., compare *Rosemond*, 572 U.S. at 81 n.10 (defending its inclusion of advance knowledge within "the distinctive intent standard for aiding and abetting" against the dissent's criticism) with *id.* at 71 (noting that the common-law tradition conditioned accomplice liability on "the intent of facilitating the offense's commission").

⁸ Wis. Stat. § 939.05(2)(c).

accomplice is primarily complicit, even if the principal did not commit the former crime(s) in furtherance of the latter crime(s).⁹

The upshot of the argument of this Dissertation is that Hurd and Moore (2016) have it right: because there should be just one form of liability—liability for having committed a crime—there should be just one set of mens-rea requirements, applicable to principals and accomplices alike, for each type of crime. As the discussion in Chapter 5 of cases like *Bank Robbery* shows, rules like Wisconsin’s that provide for accomplice liability for crimes that the principal foreseeably commits in furtherance of a crime that the accomplice abetted are not arbitrary additions to the regime proposed by Hurd and Moore but rather implications of that regime, properly understood.

Now, consider accomplice liability’s actus-reus requirements. The most contentious question here is whether accomplice liability should be conditioned on making a causal contribution to the principal’s crime. This Dissertation answers that question in the affirmative as far as concerns accomplice liability for a completed crime and in the negative as far as concerns accomplice liability for a criminal attempt. This solution opens up only once we recognize that not only the principal but also the accomplice attempts and, if successful, commits the crime of which she is guilty; hence, the distinction between a completed crime and a criminal attempt is defendant-relative: it is possible that the principal successfully committed while the accomplice merely attempted the crime.

Take *State ex rel. Attorney General v. Tally*¹⁰ as an example. In *Tally*, the defendant interfered with the delivery of a telegram intended to warn the victim, who had brought shame to the defendant’s family, that he was being pursued by four armed men. The four men were members of the defendant’s family. As it turned out, the defendant’s relatives caught up with the victim and killed him before he reached the telegram’s destination. Hence, the defendant made no causal contribution to the murder.¹¹

⁹ Ariz. Rev. Stat. § 13-303(A)(3).

¹⁰ 15 So. 722 (Ala. 1894).

¹¹ *Id.* at 726–28.

Christopher Kutz (2007, 297–99) treats the fact that the court—rightly, it seems—found the defendant guilty¹² nonetheless as evidence that accomplice liability should, quite generally, not be conditioned on making a causal contribution to the crime. But why not say that the defendant in *Tally* was guilty of attempted murder and his four relatives of (completed) murder? The only reason this solution does not present itself to most commentators is that they think of the principal alone as attempting and, if successful, committing the crime of which she is guilty. From this perspective, it makes no sense to hold the defendant in *Tally* liable for a mere attempt at murder: the only murderous deed in the vicinity was that of the defendant’s relatives, and it was no mere attempt. The options are thus either liability as an accomplice for the relatives’ (completed) murder or else no liability for murder, completed or attempted, at all. Whereas on my view, the defendant’s interference with the delivery of the telegram because (he thought) this interference would bring about the victim’s death constituted its own murderous deed. That particular murderous deed simply turned out to be a mere murderous attempt, while the defendant’s relatives’ murderous deed was a murderous success.

¹² Because the defendant in *Tally* was a judge, the case was an impeachment proceeding rather than an ordinary criminal prosecution.

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