



**CAUSATION AND REPENTANCE:  
REEXAMINING COMPLICITY IN LIGHT  
OF ATTEMPTS DOCTRINE**

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## INTRODUCTION

The doctrines governing complicity, attempts, and results-based crimes all employ very different causation requirements. A defendant can never be held liable for murder unless his actions caused the death of the victim. Nor can he be convicted of an incomplete attempt to murder unless it is likely that he would have murdered the victim but for timely intervention by a police officer. But in the case of an accused accomplice, causation is almost irrelevant.<sup>1</sup> This Note will examine the reasons for this disparate treatment, and ultimately argue that accomplice law should be modified so as to be more closely in line with the current state of attempts law.<sup>2</sup>

Attempts law and accomplice law are both concerned with the same problem: how should criminal liability be determined for behavior that may not have caused any actual harm, but which is nevertheless socially undesirable? In an incomplete attempt,<sup>3</sup> the defendant has not committed the substantive crime for which he is punished. Under accomplice law, the defendant is punished for his

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<sup>1</sup> See Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 324, 327 (1985) ("Complicity emerges as a separate ground of liability because causation doctrine cannot in general satisfactorily deal with results that take the form of another's voluntary action."). See also Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1986) (arguing in favor of a but-for causation requirement for complicity liability).

<sup>2</sup> Most of the legal scholarship related to accomplice liability has revolved around the question of the appropriate mental state requirement for the accomplice. See, e.g., Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931 (2000); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1997); Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351 (1998); Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 236 (2000); Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1344 (2002); Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169 (1988); Candace Courteau, *The Mental Element Required for Accomplice Liability: A Topic Note*, 59 LA. L. REV. 325 (1998).

<sup>3</sup> This Note will generally use "attempt" and "incomplete attempt" interchangeably. For a discussion of the distinction between incomplete and complete attempts, see *infra* notes 47-49 and accompanying text.

effect on another person's behavior. Determining the appropriate punishment in accomplice and attempts cases requires the jury to resolve much more difficult counterfactual scenarios than are present in the typical criminal case. This unique problem creates the need for specialized bodies of law. What is striking is that the two bodies of law that deal with this problem have set quite different thresholds for liability.

Attempts law requires a fairly strong showing that the accused would have committed the crime, absent government intervention. This leaves some behavior that seems to cry out for regulation free of criminal sanction. These areas are handled with specific, gap filling statutes.<sup>4</sup>

Accomplice law, on the other hand, has only one rule creating liability for all complicit behavior. It does not require any showing that the crime would not have happened without the accomplice's actions—rather, it requires only that the accomplice's actions *could* have affected the course of the crime in any way. This is all that is needed to support liability equal to that of the primary perpetrator.

Accomplice liability should be reformed to distinguish between causal and non-causal accomplices. Non-causal accomplices should be given lighter sentences than causal accomplices to similar crimes. In addition to making accomplice law more consistent with theories that require retributive justification for punishment,<sup>5</sup> this would also make accomplice law more consistent with the law of attempts. As this Note will demonstrate, there is no convincing reason for different standards under accomplice law and attempts law.

Part I will lay out the current role of causation in results based crimes, and contrast it with accomplice and attempts law. Part II will then directly compare and contrast the structure of attempts and complicity liability. Part III will examine the arguments

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<sup>4</sup> See, e.g., CAL. PENAL CODE § 646.9 (West 2007) (defining the crime of stalking, creating liability in an area where there is insufficient proof to convict of, e.g., attempted assault).

<sup>5</sup> See Dressler, *supra* note 1, at 124-25.

in favor of different treatment of causation in the two bodies of law. Finally, Part IV will discuss potential reforms to accomplice law suggested by the comparison to attempts.

## I. CAUSATION OVERVIEW

### A. RESULTS BASED CRIMES

Certain crimes, such as murder, are defined in terms of prohibited results, rather than prohibited actions.<sup>6</sup> In order to determine whether someone should be punished when a prohibited result occurs, that person's behavior must be linked to the prohibited result. Causation provides this link. If A wishes B dead, and B dies, A cannot be punished unless he has done something that *caused* B to die.<sup>7</sup>

This requirement is usually expressed in terms of but-for causation. That is, the prosecution must show that but for the defendant's actions, the prohibited result would not have occurred.

Causation is treated as an element of the crime. This means that the prosecution must establish the causal link beyond a reasonable doubt.<sup>8</sup> Thus, in a case where a man was shot in the chest by one person and then in the head by another, a conviction of the second shooter for murder could not be sustained because the prosecution could not establish beyond a reasonable doubt that the victim was still alive at the time of the shot to the head.<sup>9</sup>

There are times when even showing but-for causation is insufficient, as courts find that the evidence does not meet the standard of proximate causation.<sup>10</sup> The extent to which proximate cause

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<sup>6</sup> Of course, the actions taken in the course of committing a crime like murder may independently be illegal; this section does not focus on act-based crimes (such as unlawful possession of a firearm) because they do not raise any issues of causation.

<sup>7</sup> For a discussion of the justification for this requirement, see Michael S. Moore, *Causation and Responsibility*, 16 SOC. PHIL. & POL'Y 1, 4-5 (1999); but see Meir Dan Cohen, *Causation*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 162, 165-166 (Sanford H. Kadish, ed., 1983).

<sup>8</sup> *People v. Dlugash*, 41 N.Y.2d 725, 730-31 (1977).

<sup>9</sup> *Id.*

<sup>10</sup> See 40 AM. JUR. 2D *Homicide* § 12 (2007).

increases the burden of the causation requirement can be difficult to define precisely – the important point here is that in the area of results based crimes but-for causation is necessary, though not sufficient, for any liability to attach to the defendant’s actions.

## B. ACCOMPLICE LIABILITY

### 1. *An Overview*

Accomplice law is concerned with apportioning liability to people based on their effects on the behavior of others. This could be handled by applying the usual causation standard for results-based crimes (thus, A, in helping B to kill V, causes V to die), if not for our unwillingness to treat human actions as being caused. Because we regard human actions as being willed, rather than caused,<sup>11</sup> we need a special doctrine to hold people liable for the acts of others:

[W]hen we seek to determine the responsibility of one person for the volitional actions of another the concept of physical cause is not available to determine the answer, for whatever the relation of one person’s acts to those of another, it cannot be described in terms of that sense of cause and effect appropriate to the occurrence of natural events without doing violence to our concept of a human action as freely chosen. . . .

How, then, can the law reach those whose conduct makes it appropriate to punish them for the criminal actions of others- a person, for example, who persuades or helps another to commit a crime? . . . If it were not for the very special way in which we conceive of human actions, causation doctrine might serve this purpose, on the view that one who intentionally causes another to commit certain actions falls under the prohibition against committing those actions. But

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<sup>11</sup> Sanford H. Kadish, *A Theory of Complicity*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H. L. A. HART* 287, 288 (Ruth Gavison ed., 1987).

our conception of human actions as controlled by choice will not allow that to work. . . . Some alternative doctrine is needed, therefore, which imposes liability on the first actor who is to blame for the conduct of another, but which does so upon principles that comport with our perception of human actions. This is the office of the doctrine of complicity.<sup>12</sup>

One important distinction to note is that the need for accomplice liability does *not* rest on the idea that human beings do not affect each other's behavior. If this were the case, imposing sanctions for complicity would be impossible to justify (as a logical consequence of the idea would be that deterring complicity would have no effect on crime, making it a waste of time and effort to punish complicity). Rather, the idea is that the accomplice does not cause the principal to act in the *same sense* that one causes a bullet to fire by pulling the trigger of a gun; since the accomplice's act doesn't carry the same sort of moral responsibility, applying the standard causation doctrine would be inappropriate. Since such behavior is blameworthy and worthwhile to deter, a new form of liability must be established to deal with it.

In the following, I will examine the form that this type of liability takes in common law jurisdictions and under the Model Penal Code.

## 2. *Common Law and the Model Penal Code*

The common law and the Model Penal Code both make the accomplice's mental state the primary obstacle to imposing liability. This section will detail what restraints, if any, are placed on liability based on causation.

Discussions of the common law in this Note will draw on cases from a variety of jurisdictions. My goal is to provide an idea of the general shape of the common law, rather than to give a spe-

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<sup>12</sup> *Id.* at 291-92.

cific answer as to how particular jurisdictions would decide particular issues.

*a. Common Law*

Under the common law, the accomplice's action need only exert a minimal influence on the principal actor's behavior.<sup>13</sup> Thus, a person who attended an illegal jazz concert and applauded the performance was held liable for aiding and abetting the unlawful concert.<sup>14</sup> Interception of a telegraphed warning of attack was sufficient to aid and abet the commission of a murder,<sup>15</sup> even though the accomplice's actions in both cases probably did not meet the threshold of but-for causation.

However, the accomplice must have had at least some influence over the principal.<sup>16</sup> If the aid provided is completely ineffective, there is no liability.<sup>17</sup> In contrast to the treatment of normal results based crimes, it is enough to establish accomplice liability that the accomplice's actions *could have* been the but-for cause of the criminal result; there is no need to prove that they *actually were* a but-for cause of the criminal result.<sup>18</sup>

*b. The Model Penal Code*

The Model Penal Code has essentially removed the *actus reus* requirement for complicity by defining an accomplice as one who "aids or agrees or *attempts* to aid" another in the commission or planning of a crime (emphasis added).<sup>19</sup> Since the attempt to aid makes the defendant as liable as any aid actually provided, the ef-

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<sup>13</sup> See, e.g., *People v. Hughes*, 161 P.2d. 285 (Cal. Ct. App. 1945); *McCarty v. State*, 26 Miss. 299, 303 (1853); *Fuller v. State*, 198 So.2d 625 (Ala. Ct. App. 1966).

<sup>14</sup> *Wilcox v. Jeffery*, [1951] 1 All E.R. 464 (K.B.).

<sup>15</sup> *State ex rel. Attorney Gen. v. Tally*, 15 So. 722, 739 (Ala. 1894).

<sup>16</sup> See Kadish, *supra* note 1, at 356 ("[T]here is another feature of the result requirement: not only must there have been an unlawful action by the principal; in addition, the action of the secondary party must have succeeded in contributing to it.").

<sup>17</sup> See *State v. Hoffman*, 199 N.C. 328, 333 (1930).

<sup>18</sup> See Kadish, *supra* note 1, at 359.

<sup>19</sup> MODEL PENAL CODE § 2.06(3)(a)(ii) (2001).

fectiveness of the defendant's actions in helping the principal offender to commit the crime is irrelevant.

Imposing liability on one who merely attempts to aid represents an extension of liability as compared to the common law, which did not recognize liability for an attempt to aid.<sup>20</sup> Not everyone agrees that this expansion of liability is appropriate. At least one jurisdiction has responded to this by largely adopting the MPC formulation of accomplice liability, but removing the words "or attempts to aid" from § 2.06 (3) (a) (ii).<sup>21</sup>

### 3. *Scholarly Treatments of the Causation Requirement for Accomplices*

#### a. *The Principal-Agent Analogy*

The accomplice-principal relationship is often compared to the contractual principal-agent relationship as it is treated in torts cases.<sup>22</sup> Under this view, the accomplice has consented through his actions to share in the legal consequences faced by the principal as a result of whatever crimes the principal might commit, just as the principal consents to be bound to face the financial consequences created by the actions of his agent.<sup>23</sup> As a result, the causation requirement can be entirely removed from accomplice liability—once the accomplice consents to face the liability, any causal effect of his actions is irrelevant.

Since the accomplice never *actually* consents to be liable for the criminal actions of the principal, the argument must be that something in his actions nevertheless communicated consent to be bound. A prosecutor might make an argument of the form "Sure, Artie never consciously consented to accept the blame for Pete's actions. But everybody knows that if he supplied Pete with the murder weapon, Artie would face accomplice liability. Accordingly, his actually supplying Pete with the murder weapon is an objective

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<sup>20</sup> See J.C. Smith, *Aid, Abet, Counsel, or Procure*, in *RESHAPING THE CRIMINAL LAW* 120, 132-133 (P.R. Glazebrook ed., 1978).

<sup>21</sup> See WASH. REV. CODE § 9A.08.020(3)(a)(ii) (2005).

<sup>22</sup> See Kadish, *supra* note 1, at 354.

<sup>23</sup> *Id.* at 354-55.

manifestation of consent to face liability, should Pete commit a crime with the weapon.” The circularity of this argument should be apparent. The fact that society has laid down rules does not mean that anybody who violates these rules has consented to be punished—at least, not in such a way as to provide independent support for the rule.

In addition to being conceptually unsound, this description of how accomplice law works does not fit the way that the law has historically been applied. Under the common law, a man who shouts encouragement to a deaf person in the process of murdering somebody would not be held liable as an accomplice.<sup>24</sup> If the legal standard were based on the idea of consent to a principal-agent relationship, then liability would attach because the shouting man has manifested his consent to be punished, regardless of whether the killer has heard him.<sup>25</sup> Even under the Model Penal Code, where the shouter would be held liable, the justification given is that he has committed an inchoate crime<sup>26</sup>—not that he has consented to be punished for his actions.

*b. Complicity as Omission*

Another argument for removing the causation requirement entirely from accomplice law is that complicity should be treated as a special form of commission by omission. On this view, the accomplice is not being punished for having caused the crime to happen, but rather for failing to stop the crime from happening. The action the accomplice takes to help the principal is not important because of its role in causing the crime to happen, but because it allows us to separate the accomplice out for punishment from eve-

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<sup>24</sup> *Id.* at 358-59.

<sup>25</sup> One might try to explain this away by importing even more pseudo-contract law, arguing that the deaf man’s lack of awareness of the shouting man prevents the forming of a principal-agent relationship. However, this is inconsistent with other applications of the law, where the principal clearly does not need to be aware of the existence of the accomplice in order for the accomplice to be liable (for example, a burglar for whom some helpful accomplice has previously picked the lock).

<sup>26</sup> See MODEL PENAL CODE AND COMMENTARIES, § 2.06, cmt. at 314 (1985).

ryone else who failed to prevent the crime, avoiding the parade of horrors often associated with civil liability for omissions.<sup>27</sup> An example of a situation where this analysis provides a good explanation of our intuitions about blameworthiness is the incident in Massachusetts in which a crowd of people in a bar allegedly applauded a rape in progress.<sup>28</sup> While the crowd's applause probably did not cause the rape to happen, their failure to stop the rape or call the police was shocking, and arguably merited legal sanction.

Conceptually, this view makes a certain amount of sense. However, the punishment is very harsh compared to the level of moral blameworthiness, if we are really only punishing for a failure to rescue.<sup>29</sup> Remember that the accomplice generally faces punishment similar to the punishment inflicted on the primary offender. While applauding a rape in progress is certainly reprehensible behavior, it does not seem quite as bad as actually committing rape.

The other problem with using this explanation of accomplice liability is that it does not match up well with existing law. Judicial opinions routinely condemn accomplices for their part in causing criminal behavior, rather than for failing to prevent criminal actions.<sup>30</sup> In addition, this analysis is inconsistent with the fact that merely being present is not enough for liability, and some action aiding or abetting the principal actor is required.<sup>31</sup>

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<sup>27</sup> Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 198-200 (1973). It also avoids other normative issues raised by Epstein, including the need to maintain autonomy without extending the principle so far as to make assistance in a criminal venture a positive good. *See id.* at 200-03 (as applied to strict liability in torts).

<sup>28</sup> *See Women's Rape in Bar Enrages New Bedford*, N.Y. TIMES, Mar. 11, 1983, at A14.

<sup>29</sup> Perhaps reflecting concerns about this harshness, the MPC only provides liability for omissions where the person who failed to act had a legal duty to act. *See People v. Beardsley*, 150 Mich. 206, 209 (1907).

<sup>30</sup> *See, e.g., State ex rel. Attorney Gen. v. Tally*, 15 So. 722, 739 (1894) (condemning Judge Tally for depriving the victim of a "single chance of life which but for [Tally's actions] he would have had").

<sup>31</sup> *State v. Birchfield*, 235 N.C. 410, 413-14 (1952).

c. *Requiring But-For Causation*

Professor Joshua Dressler has been a strong proponent for requiring but-for causation in order to punish a defendant for being an accomplice.<sup>32</sup> He argues that causation should play an important role in the punishment applied to an accomplice.<sup>33</sup> While acknowledging that accomplice law does not currently work in this fashion,<sup>34</sup> he argues that many of the perceived obstacles to applying a but-for causation standard are overblown, and that many of them boil down to simply deciding what standard of evidence should apply to the causation question.<sup>35</sup>

Professor Dressler acknowledges that even non-causal accomplices deserve punishment, albeit less punishment than causal accomplices receive.<sup>36</sup> Holding such a rigid requirement of causal harm as to allow the non-causal accomplice to completely escape liability would be inconsistent with liability for inchoate crimes. While it is true that attempts commonly merit less punishment than do completed crimes,<sup>37</sup> it would be difficult to justify a complete exoneration for non-causal accomplices where the attempter only receives some mitigation of punishment from the fact that he has not caused significant harm.

Of course, an argument based on retributive justice will only be persuasive to those who believe that the only valid justification for criminal punishment is retribution. The Model Penal Code itself rejects retributive justifications for punishment,<sup>38</sup> and its widespread adoption indicates some support for this position (as does much of the scholarship on the subject).<sup>39</sup> As discussed in Part III,

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<sup>32</sup> Dressler, *supra* note 1, at 124-30.

<sup>33</sup> *Id.* at 120-21.

<sup>34</sup> *Id.* at 108.

<sup>35</sup> *Id.* at 127.

<sup>36</sup> *Id.* at 129.

<sup>37</sup> *See id.* at 105-06.

<sup>38</sup> *See* MODEL PENAL CODE § 5.05(1) (grading inchoate crimes at the same level as the underlying substantive crime); MODEL PENAL CODE AND COMMENTARIES §5.05, cmt. at 490 (1985).

<sup>39</sup> *See generally* Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

however, an increased role for causation in determining accomplice liability can be justified without reliance on the argument from retribution.

*d. A Possibility of Causation*

The generally accepted requirement for holding an accomplice liable is that it must be possible that his actions caused the crime to be committed.<sup>40</sup> In *Tally*, Judge Tally bribed a telegraph operator to prevent him from warning Ross (the victim) that the Skelton boys were riding into town to kill him.<sup>41</sup> While in all likelihood the Skelton boys would have successfully completed the murder without Tally's interference, the court held that:

The assistance given . . . need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it. If the aid in the homicide can be shown to have put the deceased at a disadvantage, to have deprived him of a single chance of life, which but for it he would have had, he who furnishes such aid is guilty, though it cannot be known or shown that the dead man, in the absence thereof, would have availed himself of that chance; as where one counsels murder, he is guilty as an accessory before the fact, though it appears to be probable that murder would have been done without his counsel . . .

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<sup>40</sup> Kadish, *supra* note 1, at 359.

<sup>41</sup> State *ex rel.* Attorney Gen. v. Tally, 15 So. 722, 733 (Ala. 1894).

<sup>42</sup> *Id.* at 738-39.

The problem with this standard is that it creates the possibility that accomplices can receive harsh sentences for minimal actions. For example, in *Wilcox*,<sup>43</sup> Wilcox was held to have violated a law forbidding the performance of music by a foreign artist when he attended a jazz concert and applauded—his purchase of a ticket, and applause at the event, sufficed to pass the possible causation test, even though it is very unlikely that one fewer attendee would have led to the cancellation of the concert. In an American case, *Alexander v. State*,<sup>44</sup> a woman was held to be an accomplice because she prepared food for the perpetrator.<sup>45</sup>

In addition, the mental state requirement and acts requirement of complicity may be related. Since the two requirements combine to define the field of behavior proscribed by the law, judges will interpret each requirement with an eye towards how that interpretation will affect the scope of overall liability. The extremely lax nature of the acts requirement for complicity would create a very broad range of culpable behavior if complicity required only a mental state of recklessness or knowledge, like most substantive crimes. Part of what motivates judges to enforce the very strict requirement of a purposeful mental state may be a desire to avoid such overreach and keep the overall scope of accomplice law within reasonable limits.

Maintaining the strict mental state requirement risks allowing truly heinous actions to go unpunished. In *United States v. Fountain*, an inmate who knowingly, but not purposefully, provided a weapon that another inmate used to kill a prison guard was only held liable for murder through a unique stretching of accomplice doctrine.<sup>46</sup> As a practical matter, the correct balance between the mental state and acts requirement should give more weight to the

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<sup>43</sup> *Wilcox v. Jeffery*, [1951] 1 All E.R. 464 (K.B.).

<sup>44</sup> 102 So. 597 (Ala. Ct. App. 1925).

<sup>45</sup> *Id.* at 598.

<sup>46</sup> 768 F.2d 790, 798 (7th Cir. 1985). For a look at just how unique, see Weiss, *supra* note 2, at 1401-07.

defendant's actions as a factor used to filter out defendants who don't deserve to be punished.

### C. ATTEMPTS LIABILITY

This section will provide a brief overview of the law regarding incomplete attempts. Incomplete attempts are distinguished from complete attempts in that the defendant still had something further to do in order to commit the crime that he was attempting. A man who is arrested while pointing a gun at somebody may have committed an incomplete attempt at murder (though the proof may be insufficient<sup>47</sup>); a man who shoots a body that he does not know to be dead, intending to kill it, has committed a completed attempt at murder.<sup>48</sup> Completed attempts present their own set of interesting issues,<sup>49</sup> but are not readily comparable to accomplice law in the same way as are incomplete attempts.

Many different tests have been proposed to determine when a defendant should be liable for an attempted crime. Most common law jurisdictions require a showing that the accused was dangerously close to completing the crime. The Model Penal Code uses a test that requires only a substantial step towards the completion of the crime, but allows for exculpation if the defendant voluntarily desists from the attempt before being caught.

#### 1. *The Dangerous Proximity Test*

Common law jurisdictions typically require that the prosecution show that there was a "dangerous proximity to success" before law enforcement intervention. The classic formulation of the traditional common law test for accomplice liability was laid out in *People v. Rizzo*:

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<sup>47</sup> See *State v. Whins*, 692 So.2d 1350, 1352, 1354 (La. Ct. App. 1997) (acquitting a man of attempted murder conviction due to lack of proof of specific intent).

<sup>48</sup> *People v. Dlugash*, 41 N.Y.2d 725, 735 (1977).

<sup>49</sup> See *Graham Hughes, One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005 (1967) (commenting on the doctrines of legal and factual impossibility of attempted crime).

The law must be practical, and therefore considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference. The cases which have been before the courts express this idea in different language, but the idea remains the same. The act or acts must come or advance very near to the accomplishment of the intended crime . . . . [As said by Justice Holmes, dissenting in *Hyde v. United States*, 225 U.S. 347, 387 (1912):] “There must be dangerous proximity to success.”<sup>50</sup>

The requirement of dangerous proximity to success attaches liability late in the sequence of events that lead to a crime being committed. One of the concerns motivating this test is a desire to preserve a *locus penitentiae*—that is, preserving an opportunity to repent.<sup>51</sup>

There is an intuitive appeal to finding no criminal liability when the defendant voluntarily desisted from his attempt to commit the crime. However, due to the structure of the common law, courts were unable to set an early point for liability and allow absolution for repentance. At common law, attempt was like any other crime—once the crime was completed, repentance might have mitigated punishment, but it did not absolve the defendant of guilt.<sup>52</sup> Accordingly, attaching liability only for crimes that were dangerously close to success was the only way to avoid convicting those who had abandoned their attempts.

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<sup>50</sup> *People v. Rizzo*, 246 N.Y. 334, 337 (1927).

<sup>51</sup> SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW* 567-68 (7th ed. 2001).

<sup>52</sup> This is a more intuitive rule for non attempts crimes. Consider the bank robber who wakes up the next day, recognizes the error of his ways, and returns the money to the bank and apologizes.

## 2. *The Model Penal Code Test*

The Model Penal Code rule provides a more direct role for repentance. The structure of the MPC attempts code is that a defendant is liable for an attempt when he has taken a substantial step towards the commission of a crime.<sup>53</sup> The MPC then provides a non-exhaustive list of examples of what might constitute a substantial step.<sup>54</sup> The items on the list tend to correlate with a likelihood of completion (e.g. a person who is lying in wait for his victim seems unlikely to have second thoughts), but are not as demanding as the requirement of “dangerous proximity” in the traditional test. For example, the defendant in *Rizzo* might have satisfied the requirement in Model Penal Code of “lying in wait, *searching for* or following the contemplated victim of the crime.”<sup>55</sup> The MPC then provides that anybody who voluntarily repents and abandons his attempt is therefore absolved of liability for the attempt.<sup>56</sup>

The MPC rule has been adopted in about half of the states of the country.

## 3. *The Causation-Like Role of Repentance*

Repentance clearly plays a different role in attempts than it does in results-based crimes. The exculpatory role of repentance invites further exploration. After all, there is no intuitive feeling that we should absolve a bank robber of all criminal liability just for voluntarily returning his ill-gotten gains. Why should somebody who was planning to rob a bank but who changed his mind on the way there be treated any differently? One possible reason that our intuitions differ in the context of an attempt is that repentance before committing the crime breaks the causal chain.

It may seem odd to refer to causation in the context of an attempt (as no result has been caused), but causation provides the best analytic framework for understanding the law of attempts. In

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<sup>53</sup> MODEL PENAL CODE § 5.01(1)(c).

<sup>54</sup> MODEL PENAL CODE § 5.01(2).

<sup>55</sup> MODEL PENAL CODE § 5.01(2)(a) (emphasis added).

this framework, the central question in an attempts case is whether the accused, if he had not been arrested, would have completed the crime.<sup>57</sup> That is, do the actions of the defendant up to the point of his arrest indicate that he would have caused himself to commit the substantive crime in question?

If the prosecution could prove the answer to this question, then a special body of attempts law would be unnecessary. Unfortunately, it is impossible to prove beyond a reasonable doubt what would have happened in a counterfactual world when a question involving human actions is involved. Absent attempts law, this would leave a crucial area of human behavior unregulated by criminal law.

This gap in liability creates the need for a specialized body of law that handles inchoate crimes. Both the Model Penal Code and the dangerous proximity test do this by defining what behavior is enough to show a sufficient probability of committing a crime (in effect this lowers the burden of proof from the reasonable doubt standard by removing causation from the list of things to be proved and replacing it with a proxy that is easier to prove). The heightened mental state requirement prevents this lowered standard of causation from creating too much liability.

Another reason to believe that the perpetrator of an attempt is being punished largely because of the crime that he would have committed had he not been caught is the relatively severe punishment attached to attempts. Under the Model Penal Code, attempts carry a punishment equal to the substantive crime that was attempted.<sup>58</sup> Even under modern non-Model Penal Code jurisdictions, while punishment for attempts is less than the punishment for the crime attempted, the punishment is still fairly severe, and

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<sup>56</sup> MODEL PENAL CODE § 5.01(4).

<sup>57</sup> See *People v. Rizzo*, 246 N.Y. 334, 337 (1927) (restricting liability to acts such that “in all reasonable probability the crime itself would have been committed, but for timely interference”).

<sup>58</sup> MODEL PENAL CODE § 5.05 (1).

also is usually proportional to the punishment attached to the attempted crime.<sup>59</sup>

The perpetrator of an incomplete attempt, by definition, has not completed the crime attempted. This means that the actual harm that he has caused to society is low.<sup>60</sup> Accordingly, a punishment that is as severe (or almost as severe) as the punishment for the completed crime would be wildly out of proportion to the perpetrator's actual blameworthiness unless the punishment is justified by a belief that he would have completed the crime if not caught. A similar argument could be made for completed attempts where failure to complete the crime is due to luck (i.e. defendant shot at victim but missed). There, the punishment is justified by the fact that the perpetrator would have committed the crime had he not gotten lucky in the results lottery.<sup>61</sup>

Under this view, the special exculpatory power of repentance is obviously justified. We only want to punish people who would have committed the crime but for some external constraint on their behavior. A defendant who has voluntarily repented and desisted from committing a crime clearly does not fall within this category.

## II. COMPARING COMPLICITY TO ATTEMPTS LIABILITY

Complicity and attempts liability regulate similar behavior and should be structured similarly. There are two differences in the situations handled by the doctrines that could justify different treatment. First, the accomplice is punished for aiding another in committing a crime, while the attempter is punished for attempting to commit a crime himself. This section will argue that these two categories of acts are sufficiently similar that a similar framework

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<sup>59</sup> See, e.g., CAL. PENAL CODE § 664 (West 2007) (setting a maximum term for attempt of not more than one-half of the highest maximum term authorized for the completed offense and of life imprisonment for attempted first degree murder).

<sup>60</sup> Although the actions establishing an attempt do some harm to society by creating the apprehension of a crime, this harm is of a much lower magnitude than the harm created by the completed crime.

<sup>61</sup> See Schulhofer, *supra* note 39, at 1595.

should be used to evaluate each. The second difference is that in the case of an attempt, the defendant is arrested before any actions that would violate the rest of the penal code have taken place, while in the case of complicity, the defendant is arrested after somebody has violated the law. However, the mere fact that some crime has happened somewhere should not create liability for any individual who cannot somehow be tied to the crime. The purpose of complicity and attempts law is to provide ways to tie defendants to crimes, and this section will argue that they should do so in similar ways.

Accomplice and attempts liability are ways that one can commit other crimes, rather than independent crimes one can commit. Someone who assists in a murder is charged with murder, not with “being an accomplice to a murder.” Though one who attempts a murder is charged with “attempted murder” rather than simply “murder,” there is no separate crime of “attempted criminality.” If it were possible to prove beyond a reasonable doubt that somebody would have committed a crime had he not been arrested, then we probably would not need attempts liability, as it could simply be folded in with liability for actually committing a crime.<sup>62</sup> Of course, such proof is rarely available, so the law of attempts relaxes this standard and allows for liability on a showing that the defendant has done something that indicates that they were likely to have committed a crime absent police intervention.

In making this connection to the underlying crime, both accomplice liability and attempts liability put a heavy emphasis on the mental state of the defendant.<sup>63</sup> They each require a showing of purpose in order to convict. This is a somewhat unusual requirement—usually the distinction between whether somebody’s general

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<sup>62</sup> Although this might not create a great system of criminal justice. See, e.g., the 2002 movie *Minority Report*.

<sup>63</sup> See, e.g., MODEL PENAL CODE §§ 2.06(3)(a) (requiring purpose for accomplice liability [need parenthetical]), 5.01(1)(c) (requiring purpose).

state of mind is purposeful or knowing only affects the grading of a crime, if it has any effect at all.<sup>64</sup>

One way to explain this heightened mental state requirement is that both accomplice and attempts liability relax the causation standard as compared to the standard present for results based crimes. Increasing the mental state requirement constrains liability, preventing the attenuated causation requirement from creating an excessive range of prohibited behavior.

Another similarity between the two bodies of law is how they treat actions that absolutely could not have caused the underlying crime. An accomplice whose actions could not have possibly caused the principal to commit the primary offense faces no liability.<sup>65</sup> Similarly, a defendant arrested for an attempted crime that had voluntarily repented and ceased his attempt faces no liability under the Model Penal Code,<sup>66</sup> while under common law attempts liability didn't attach until it became extremely unlikely that the defendant would repent.<sup>67</sup> This shows that while both attempts and accomplice liability have relaxed the role of causation in constraining liability, causation does continue to play a role, at least in the extreme case where causation is completely absent.

A striking difference between complicity and attempts liability is the difference in the threshold of probability at which liability attaches. In attempts liability, the defendant has to have done something to indicate that he was highly likely to have committed the crime, absent police intervention.<sup>68</sup> For complicity, on the other hand, the defendant need only have engaged in behavior that

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<sup>64</sup> See, e.g., MODEL PENAL CODE § 210.2 (homicide, conflating purpose and knowledge); *id.* §211.1 (assault, conflating purpose and knowledge); *id.* §222.1 (robbery, where purpose can increase the grade of the offense).

<sup>65</sup> Kadish, *supra* note 1, at 358-59.

<sup>66</sup> MODEL PENAL CODE, § 5.01(4).

<sup>67</sup> See *People v. Rizzo*, 246 N.Y. 334, 337 (1927).

<sup>68</sup> *Id.*; MODEL PENAL CODE § 5.01(1)(c).

*might* have caused the principal to commit a crime.<sup>69</sup> What could justify this distinction?

A. ATTEMPTING TO JUSTIFY THE DISPARITY IN TREATMENT

1. *Existence of Harm*

In a complicity case, a crime has occurred. In an attempts case, no crime has occurred. One might argue that the difference in the fact of crime should lead us to treat the defendant differently in complicity and attempts cases.

One potential response would be to follow the Model Penal Code's, and many scholars, in rejecting of the use of the fact of harm to determine punishment.<sup>70</sup> Under this view, the outcome of the "results lottery" should not determine the amount of punishment that is appropriate in any given case.<sup>71</sup> If we were to adopt this idea, then the fact of harm would be irrelevant when determining how to treat accomplices and attempters.

Even if we were to reject the Model Penal Code view, however, the fact that a crime has occurred is not a good reason to treat complicity different from attempts. Although a crime has occurred in the complicity case, the existence of the crime is only relevant if it can be tied to the defendant.

Absent some tie to the defendant, the crime is just some unfortunate occurrence that doesn't justify any liability. Suppose that Albert hates Victor, and wishes that Victor were dead. Albert doesn't do anything to make his wish come true, but somebody else murders Victor anyway. We have a guilty mind and a crime, but there can be no punishment of Albert because there is nothing to link the two together.<sup>72</sup> The same is true in complicity cases generally—the fact that someone has committed a crime has no bearing

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<sup>69</sup> Kadish, *supra* note 1, at 359.

<sup>70</sup> See, e.g., Schulhofer, *supra* note 40, at 1600-03.

<sup>71</sup> *Id.*

<sup>72</sup> *People v. Stewart*, 40 N.Y.2d 692, 697 (N.Y. 1976) (explaining that an "obscure or merely probable connection between an assault and death ... will require acquittal") (quoting *People v. Brengard*, 265 N.Y. 100, 108 (N.Y. 1934)).

on whether the defendant should be held liable, unless the defendant can be tied to the crime.

The issue is what we should require to tie the defendant to the crime. In the context of results based crimes, we require that the prosecution prove beyond a reasonable doubt that the defendant's actions caused the prohibited result. In the attempts liability context, we require a fairly firm showing that the defendant would have caused a crime to occur, had he not been caught first. The mere fact that a crime has been committed does not provide a good justification for removing the requirement to show that the crime would not have happened without the defendant's actions. We might weaken the requirement in the accomplice context as compared to the results-based context for other policy reasons, but the mere fact that some result has happened does not matter.

## 2. *A Non-Causal View of Attempts Law*

One could disagree with the view of attempts law that I have set out here. On my view, there is a spectrum of potential results: on one end, we are completely certain that the crime would have been committed had the police not intervened, and on the other end we have no idea whether the crime would have been committed without police intervention. The role of attempts law is to identify the point on that spectrum that the prosecution must reach in order to hold a defendant liable for an attempt.

If one does not see this as an accurate conception of attempts law, and choose to view it as a more ad hoc approach (or as conforming to a systemic design that is not analogous to causation in the accomplice context), then the comparison between complicity and attempts is clearly inapt.

## B. SUMMARIZING THE ARGUMENT FOR SIMILAR TREATMENT

Complicity and attempts liability have similar justifications. Both create liability for a set of behavior that, while socially harmful, is extremely difficult to punish under the normal rules of criminal liability, primarily because of the role of causation.

Both doctrines must solve the problem of how to handle defendants whose behavior has only a probabilistic connection to the substantive crime that has been violated (or prospectively will be violated). For complicity, the accused accomplice's behavior may have caused the principal to commit the crime, but it is usually impossible to prove that it has beyond a reasonable doubt. In the context of attempts, the defendant may have committed the crime had he not been interrupted but, again, it is impossible to say for certain. Since both doctrines are justified by similar concerns, we might expect them to take similar forms.

In fact, both attempts and complicity do take roughly similar forms. They both function by relaxing the causation (and thus, the *actus reus*) requirement for liability, while raising the *mens rea* requirement to require purpose. The two forms of liability diverge on how far to relax the causation requirement. Whereas attempts doctrine relaxes the requirement only slightly, complicity relaxes the requirement so far as to practically remove it as an obstacle to liability. Since there is no compelling reason further to relax the requirement, I shall argue that the latter approach should be modified.

The next section discusses how we might change accomplice law to make it more analogous to the law of attempts.

### III. REFORMING ACCOMPLICE DOCTRINE

The operation of attempts doctrine could be described as a fairly stringent causation standard, augmented by ad hoc findings of liability for areas where the causation standard is not met, but liability is clearly appropriate (i.e., stalking). Accomplice law, on the other hand, uses a single standard of liability to cover all potentially blameworthy (and arguably, some not so blameworthy) behavior. This section will explain why accomplice law should be reformed, and then explore potential methods of bringing accomplice liability in line with attempts liability.

#### A. WHICH DOCTRINE TO REFORM?

Observing that accomplice and attempts liability operate differently and ought to operate similarly does not tell us which doctrine should be changed. It may be that, as some argue, the acts requirement of attempts liability should be removed.<sup>73</sup> There are several reasons why this view is misguided.

##### 1. *Insubstantial Crimes*

Attempts law punishes activity that has not independently created a harmful result. This means that the potential for prosecutorial abuse is particularly acute here, and that we should be especially concerned with protecting defendants' rights. A murder conviction, after all, requires a body—a conviction for attempted murder only requires a jailhouse confession by the accused, linked with some action that can be characterized as “dangerous proximity” to success.<sup>74</sup>

Changing attempts law to be more similar to accomplice law would require removing the acts requirement altogether. Since all that would need to be proven is the defendant's intent, a confession alone would be enough to sustain a conviction. If we are concerned about police and prosecutorial misconduct, dramatically lowering the burden required of the prosecution to prove an attempt is obviously problematic.

##### 2. *If it Ain't Broke...*

Attempts liability seems to be working fairly well. While there are occasional oddities,<sup>75</sup> there do not seem to be many mani-

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<sup>73</sup> See, e.g., Glanville Williams, *Police Control of Intending Criminals*, 1955 CRIM. L. REV. 66, 69 (1955).

<sup>74</sup> See *McQuirter v. State*, 63 So. 2d 388 (Ala. Ct. App. 1953) (finding an African American man guilty of assault with intent to rape based on a jailhouse confession, where his overt actions consisted of walking in the same general direction as a white woman).

<sup>75</sup> See *United States v. Schoof*, 37 M.J. 96, 103 (C.M.A. 1993) (holding that one factor in determining whether attempt to deliver classified documents to the USSR was com-

festly unjust findings. Accomplice doctrine, on the other hand, is marked by a level of judicial disagreement<sup>76</sup> and strange outcomes<sup>77</sup> suggesting that reform would be appropriate. The only question is what reforms should be implemented.

## B. BUT-FOR CAUSATION

One possible test would require that the prosecutor show that but-for the accomplice's actions, the crime would not have been committed. This statement of the test is incomplete, as it does not specify the prosecution's burden of proof. The only *a priori* unacceptable test is the reasonable-doubt standard, as this creates a burden that is almost impossible for the prosecution to meet, given the vagaries of human action and free will. Since all of the problems associated with this test arise from its stringency, the following discussion will assume that we adopt as a burden of proof the preponderance of the evidence.

### 1. *The Metaphysical Objection*

One immediate objection to the but-for test would follow Professor Kadish's line of argument that aiding and abetting are just qualitatively different from the types of crimes where we require but-for causation:

Perhaps the answer follows from the fact that the concept of a sine qua non condition belongs to the natural world of cause and effect, and has no place in accounting for human actions. Physical causation deals with natural events in the physical world. Experience teaches us that natural events

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pleted was how far defendant had driven on the road between his ship and the Soviet Embassy).

<sup>76</sup> See Weiss, *supra* note 2, at 1451-59.

<sup>77</sup> Compare *Wilcox v. Jeffery*, [1951] 1 All E.R. 464 (K.B.) (holding concertgoer liable as aiding and abetting performance), with *State v. Gladstone*, 474 P.2d 274 (Wash. 1970) (holding that person who drew map for an undercover officer directing him to drug dealer was not aiding and abetting due to lack of specific intent).

occur in consequence of some antecedent events, whether those antecedent events are the conduct of persons or other natural events. Barring miracles, so long as we know the causal laws we can speak with certainty. This permits of the concept of sufficient conditions, enabling us to conclude that if those conditions are present, a certain result has to occur. ...

Cases of influencing another to commit an act are different. We do not view a chain of events that includes volitional human actions as governed solely by the laws of nature. In complicity, the result at issue is another volitional human action, which we perceive as controlled ultimately by that actor's choice, not by natural forces. No matter how well or fully we learn the antecedent facts, we can never say of a voluntary action that it had to be the case that the person would choose to act in a certain way.<sup>78</sup>

However, this difference has already been acknowledged in the creation of a separate body of accomplice law, and particularly with the heightened mental state requirement. The very existence of accomplice law rejects the idea that free will creates a level of uncertainty that precludes us from imposing liability. Once we have established this separate body of law, the only question is how to constrain liability. It seems almost perverse to argue that because the existence of free will makes any showing of causation suspect, we should remove causation altogether as an element of blameworthiness.

In this context, the existence of free will simply creates some irreducible uncertainty about what would have happened in the counterfactual world without the accomplice's actions. The existence of this irreducible uncertainty means that we cannot require the prosecution to prove causation beyond a reasonable doubt, because such proof is usually impossible. However, this does not pre-

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<sup>78</sup> Kadish, *supra* note 1, at 360.

clude us from requiring *some* showing of causation before we impose liability on the accomplice equal to that of the principal actor.

Compare this with the dilemma faced by attempts law. In the attempts context, the existence of free will implies that it is always possible that an apprehended perpetrator could have abandoned his plans before committing a crime. This irreducible uncertainty has not led to a complete abandonment of the acts requirement, but rather to a loosening of the requirement, accompanied by a tightening of the mental state requirement.

## 2. *The Dedicated Principal*

The problem of the already dedicated principal actor poses a major practical problem to using but-for causation. Suppose that the prosecution must show but-for causation, but is only required to do so by a preponderance of the evidence (the lowest commonly used standard of proof). In order to impose liability for aiding and abetting, the principal actor must have been less likely than not to have not committed the crime before the accomplice's actions, and more likely than not to commit the crime after the accomplice's actions. As a result, once a perpetrator is more than fifty percent likely to commit a crime, it becomes impossible for anybody else to be liable for aiding and abetting them.

Suppose that Pete tells his buddy Alan that Pete is planning to kill his wife. In fact, Pete has a gun in his car and will be driving home after their conversation to shoot his wife while she is sleeping. It's safe to say that the odds of Pete committing the crime are greater than fifty percent. If we insist on a but-for causation test, nothing Alan does from this point on will make him liable as an accomplice (whether he encourages Pete, rides home with Pete to act as a lookout, or actually helps Pete tie his wife down before Pete shoots her).

The problem becomes much worse if but-for causation must be proven beyond a reasonable doubt. With that standard, if there were any reasonable chance that Pete would have committed the crime before talking to Alan, nothing Alan could do could create accomplice liability.

## C. TORT-LIKE PROBABILISTIC CAUSATION

Tort law frequently has to deal with the problem of uncertainty in causation.<sup>79</sup> Consider a drug that raises the risk of cancer. When somebody who has taken the drug is diagnosed with cancer, they would like to recover damages from the drug company. In order to do so, they must show that the drug more likely than not caused their injury. The standard rule in this situation is that the plaintiff must show that the drug at least doubles the risk of cancer.<sup>80</sup>

We could apply a similar analysis to the causation element of complicity. Before the accomplice's actions, there was some pre-existing likelihood that the principal was going to commit (or succeed in committing) the crime in question. After the accomplice's action, there was a posterior likelihood that the principal would commit the crime. Under the existing causation requirement, any increase from the prior to the posterior likelihood is sufficient to establish liability, assuming the appropriate mental state has been shown. If we were to adopt the test of liability from tort law, however, we would require that the accomplice's actions at least double the chance that the crime would be committed. Such a test might appear to violate the constitutional requirement that elements of crimes be proven beyond a reasonable doubt. However, if the requirement is cast as an affirmative defense then there is no constitutional violation.<sup>81</sup>

This test is different from the but-for causation test, although there is quite a bit of overlap. The main difference would be in cases where the principal was almost fifty percent likely to commit the crime before the accomplice's actions, and slightly over fifty percent likely to commit the crime after the accomplice's actions. Here the but-for test would find liability (because absent the accomplice's actions, the chance of the crime being committed was

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<sup>79</sup> See generally Peter C. Haley, *Paradigms of Proximate Cause*, 36 TORT & INS. L. J. 147 (2000).

<sup>80</sup> See, e.g., *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1320 (9th Cir. 1995).

<sup>81</sup> See generally *Patterson v. New York*, 432 U.S. 197 (1977).

less than fifty percent), but the test from tort law would not (because the accomplice's actions did not double the risk of the crime occurring).

### 1. *Lack of Doctrinal Support*

One obvious argument against adopting the tort law torts-like standard is that criminal law does not currently use this type of probabilistic reasoning. This is a fair point, and likely precludes any court from adopting this standard on its own. However, when we are considering a potential statutory reform, it does not make sense to limit our search for good solutions to those already adopted somewhere in the field of criminal law.

Arguably, accomplice law presents a mixed causation issue that is not seen elsewhere in criminal law. We have one action with multiple potential causers and must sort out exactly who should bear the blame for the result. This is a rare situation in criminal law, but a common situation in the world of torts. If this is the case, then it makes sense to look to torts law for an appropriate causation test. While one might raise the objection that torts standards generally provide much less protection for the defendant than do criminal standards, this causation test would be much more protective of the defendant than the current (lack of a) causation requirement for complicity liability.

### 2. *Hindsight Bias*

Scholars in the field of behavioral economics have recognized that people tend to overestimate the likelihood that events would have occurred as they did.<sup>82</sup> That is, when people are asked to estimate the likelihood that X would have occurred, their estimate will be higher if X did occur than it would be if X did not occur.

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<sup>82</sup> Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 580 (1998) ("Virtually every study on judging in hindsight has concluded that events seem more predictable than they actually are.").

This suggests that people will tend to assign a high probability to the likelihood of the crime being committed. This in turn suggests that tort law's test for causation would simply collapse in practice to become the but-for test. If the jury assigns a 100 percent probability to the crime being committed after the accomplice's actions, then the accomplice is liable if and only if the pre-existing likelihood that the crime would have been committed was at or under fifty percent. This is exactly the same state of affairs as the but-for causation test given in section A.

We could avoid this issue if we could remove the hindsight bias. Unfortunately, psychologists have been unable to come up with any general way to mitigate hindsight bias.<sup>83</sup> While we might be able to avoid the hindsight bias in some situations by withholding information about what has happened (removing the hindsight bias by preventing hindsight), this is not a practical solution for criminal trials.

### 3. *The Committed Principal Problem*

This test also suffers from the same problem as the but-for test when the principal is committed to committing a crime. Once the likelihood that the principal will commit the crime is over fifty percent, it is of course impossible to double the chance that the crime will be committed.

#### D. REFINING THE BUT-FOR TEST TO ADDRESS THE DEDICATED PRINCIPAL PROBLEM

Requiring but-for causation for accomplice liability seems promising, but faces a major obstacle: it would excuse a large class of undesirable behavior from criminal liability. The rest of this section will discuss ways in which the test could be refined in order to deal with the problem of the dedicated principal.

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<sup>83</sup> *Id.* at 586-87.

### 1. *Slight Changes Lead to Different Crimes*

Causation for the purposes of criminal law requires that, but for the defendant's actions, the criminal event would not have occurred when it did.<sup>84</sup> The phrase "when it did" is crucial—the accomplice may cause the event to occur by affecting the time at which an event occurs. The most extreme case of this is murder, where the accomplice's actions only hasten the inevitable. This philosophy retains its intuitive appeal when the crime is moved up only by days or by hours.

In principle, this theory could also apply when the accomplice changes the time at which the crime is committed by mere minutes or seconds (though this is unlikely to happen in practice, given that the rule must be applied by juries).<sup>85</sup> This interpretation of causation would expand accomplice liability to cover most of the cases involving dedicated principals, since the accomplice will usually exert at least some effect on when the crime takes place. However, almost anything that *any* alleged accomplice does will have at least some minute effect on the timing of the crime that is ultimately committed. A rigorous application of the changed timing rule would effectively eliminate the causation requirement and return us to the current regime of accomplice liability.

### 2. *Accomplice's Effect on Likelihood of Lack of Crime*

Another way that we could try to get around the problem would be to look at the accomplice's effect on the chance that the crime will *not* be committed. This is the perspective that the Tally court was focusing on when they observed that the aid in the homicide was sufficient if it "deprived [the victim] of a single chance of life."<sup>86</sup> Suppose that Judge Talley's actions changed the probability that the Skelton boys would succeed from nearly certain to completely certain. As a percentage change in their chances of success,

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<sup>84</sup> WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW 249-50 (1972); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 771-72 (3d ed. 1982).

<sup>85</sup> See Dressler, *supra* note 1, at 132 n.203.

this does not look very substantial (an increase from a 90% chance of success to a 100% chance of success only represents an 11% change in chances of success). However, if we look at it as changing the chance of failure from slim to none, then his actions start to look very significant (a change from 10% to 0% represents a 100% change in the chance of failure).

The problem with this solution is that it will again tend to remove the causation requirement—since juries will usually look at crimes that have been committed as having been very likely to have been committed, the accomplice’s action will almost always be seen as having reduced the likelihood of lack of crime to zero. The only way for this test to be practical would be if the jury’s hindsight bias could be removed, which is impossible for the reasons discussed above.<sup>87</sup>

### 3. Using “Attempted Complicity” to Fill the Gap

Another way to extend liability to conduct that should be punished but is not captured in a but-for test would be to criminalize attempted complicity, i.e. adopting the Model Penal Code test, but changing the definition of “aid and abet” to require a causal effect.<sup>88</sup> On this theory, anybody who attempted to aid and abet a crime would be liable, whether or not his behavior actually caused the crime to be committed. This would capture some liability not captured by the but-for causation test, but would not create liability in the case of the dedicated principal.

If the defendant believed that what he was doing was helping somebody who was already a dedicated principal, then he would be attempting to do something that was not a crime. This means that even under the attempted complicity standard, he would not be guilty of anything. In fact, attempts liability will only create new liability for people who *think* that they are attempting to

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<sup>86</sup> State *ex rel.* Attorney Gen. v. Tally, 15 So. 722, 733 (Ala. 1894).

<sup>87</sup> See *supra* notes 82-83 and accompanying text.

<sup>88</sup> See MODEL PENAL CODE § 2.06(3)(ii).

aid a non-dedicated principal but who are *actually* aiding a dedicated principal.<sup>89</sup>

The accomplice's opinion of the pre-existing likelihood that the crime would be committed does not seem to be a good proxy for behavior that actually should be punished. Consider again the example of *Tally*. Should Judge Tally be able to escape liability if he believed that the Skelton boys would succeed in their murder attempt without his bribery of the telegraph operator? If not, attempted complicity is not the appropriate tool to use to fill the gap.

#### 4. *Reduced, Gap Filling Liability*

Creating liability for behavior that is blameworthy, but does not rise to the level of causal complicity may require a more general rule of liability. Suppose we were to create a rule that any behavior that is currently sufficient to make one an accomplice, but that does not bear a causal relationship to the crime committed, makes one a non-causal accomplice. Non-causal accomplices are subject to some categorically limited liability—perhaps non-causal accomplices to felony are subject to a maximum of Y years of imprisonment, while non-causal accomplices to misdemeanor are subject to a maximum of Z years of imprisonment.

This approach would bring accomplice law more in line with attempts law. Attempts law does not attempt to cover all possible inchoate crimes, leaving gray areas as gaps to be filled by statutes that are generally less harsh in punishment than attempts law would be if it were applied.<sup>90</sup> Contrast this with current accomplice law, which defines liability extremely broadly, covering all of the areas of complicity behavior that we could possibly want to criminalize, leaving any problems of over-inclusive liability to be dealt

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<sup>89</sup> The rule might possibly also cover those who think that aiding a dedicated principal is a crime, depending on how one resolves the issue presented by the Lady Eldon's Lace hypothetical. Hughes, *supra* note 49, at 1007.

<sup>90</sup> As, for example, stalking is often used to fill the gap left by the application of attempts liability standards to rape. See, e.g., N.Y. PENAL LAW § 120.45 (McKinney 2004).

with by prosecutorial discretion. Limiting the reach of full accomplice liability and replacing it with less harsh non-causal accomplice liability is likely to lead to more just results.

This approach also resembles the steps that some states have taken to cover areas of culpable behavior that accomplice liability does not currently reach because of the strict mental state requirement. These states have adopted gap-filling statutes that often provide that behavior that would create accomplice liability, except that the mental state is merely knowledge rather than purpose, makes the defendant liable for a lesser crime.<sup>91</sup> The use of gap-filling statutes in general seems more likely to match the culpability of criminal behavior with the severity of the sanctions imposed.

The best way to reform accomplice liability to make it conform more closely to the principles embodied in attempts liability is to restrict full liability to accomplices who were but-for causes of the crime. Accomplices whose actions were *not* but-for causes of the crime should be punished, but subject to categorically lower liability.<sup>92</sup>

#### E. POTENTIAL OBJECTIONS

##### 1. *Why Not Let the Judges and Prosecutors Sort out Blameworthiness?*

The current system leaves almost complete discretion with judges and prosecutors to determine the particular blameworthiness of a given accomplice's behavior. One argument against any proposed reform is that the current system works fairly well. If we examine Professor Dressler's parade of examples in which liability turns on trivial actions, the results of judicial and prosecutorial discretion actually appear fairly just and benign.<sup>93</sup> In addition, even as

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<sup>91</sup> See, e.g., N.Y. PENAL LAW § 115.05 (McKinney 2004) (designating the act of second degree criminal facilitation a class C felony, whereby one both believes it probable that he aids another to commit a class A felony and in fact does so).

<sup>92</sup> See Dressler, *supra* note 1, at 137-38 (reaching essentially the same conclusion through reasoning from basic principles as we have by analogy to attempts law).

<sup>93</sup> See Dressler, *supra* note 1, at 102 (citing *Alexander v. State*, 102 So. 597, 598 (Ala. 1925) (holding that an accomplice's testimony must be corroborated in order to sus-

a theoretical matter we would not expect prosecutors to go for the maximum punishment available any time that they get the chance—rather, we would expect the prosecutor to seek (and the judge to administer) the amount of punishment that he feels is just.<sup>94</sup> Is this system really so terrible?

There is still good reason to think that the proposed changes would result in a noticeable improvement to the system. First of all, a lack of high profile prosecutorial abuses does not prove that the system is working well—many cases may simply result in unjust plea bargains and be removed from the system. In addition, the institutional pressures on prosecutors may distort the incentive to administer justice, even absent any conscious act of bad faith. Reducing the amount of discretion available to prosecutors and judges would also be consistent with the overall shape of American criminal law.<sup>95</sup>

This reduced discretion gives the proposed plan an advantage over proposed reforms that are limited to changes in the sentencing provisions for accomplices.<sup>96</sup> These proposals still leave the judge (or the prosecutor, to the extent that sentencing factors can be

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tain a conviction); *State v. Helmenstein*, 163 N.W.2d 85 (N.D. 1968) (holding that uncorroborated testimony of accomplice is insufficient to sustain conviction); *State v. Duran*, 526 P.2d 188 (N.M. Ct. App. 1974) (describing accomplices participation in crime as involving carrying child while fleeing from store manager and carrying stolen money, in addition to holding child while crime took place)). The only cases where serious liability attached for truly trivial involvement could be characterized as foreign oddballs. See, e.g., *Wilcox v. Jeffery*, [1951] 1 All E.R. 464 (K.B.); G. FLETCHER, *RETHINKING CRIMINAL LAW* 677 (1978) (referencing a “German case” in which the defendant provided the wrong key to the cellar door to steal wine but was found guilty as an accessory to theft).

<sup>94</sup> William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (observing that plea bargains are based more on prosecutor’s preferences than on a calculation of the expected value if the case were to go to trial).

<sup>95</sup> Compare N.Y. PENAL LAW §§ 125.00-.27 (McKinney 2004) (enumerating the classifications of homicide), with e.g., *Brottsbalken [BrB]* [Criminal Code] 3:1-2 (Swed.) (providing that murder will be punished by imprisonment for ten years or for life, unless the crime is “less grave,” in which case the punishment is six to ten years of imprisonment).

<sup>96</sup> See, e.g., Paul H. Robinson, *A Sentencing System for the 21<sup>st</sup> Century?*, 66 TEX. L. REV. 1, 48-51 (1987).

stipulated as part of a plea agreement) with unfettered discretion as to the punishment of each particular accomplice. In contrast, the proposed causative reform would allow juries to draw a bright line between more and less culpable conduct. This is of course still supplemented by the discretion accorded to the judge in the sentencing process, but the reform will significantly constrain the judge's course of action.

2. *Does this Reform Truly Individualize Blame and Consequences?*

Another angle of attack of the proposed reform is the claim that it does not go far enough in individualizing the accomplice's level of blame. Compare the following two scenarios: (1) there is a 35% chance that *P1* will commit murder, and after talking to *A1* there is a 65% chance that *P1* will commit murder; (2) there is a 55% chance that *P2* will commit murder, and after talking to *A2* there is a 85% chance that *P2* will commit murder. Both *P1* and *P2* then go on to commit murder. Under the proposed reform, *A1* would be liable as a causative accomplice, while *A2* would not be. This would make *A1* subject to much more liability than *A2*, even though their actions were very similar, and only the contexts in which they took action were different. The response to this takes two parts.

a. *Context Matters*

Of course, there are many contexts in which two people can engage in "the same action" and face different legal consequences. If two people both hold a gun and pull the trigger, the legal consequences will be quite different if one is at the firing range while the other is shooting at his wife. The issue here is whether the difference between scenarios (1) and (2) above is sufficient to justify different legal treatment.

The difference in context here is that *P1* was more likely than not *not* going to commit a crime before *A1* intervened, while *P2* was already more likely than not going to commit a crime before *A2* intervened. This means that *A1* was a but-for cause of the murder, while *A2* was not (under the preponderance of the evidence standard). Since we generally feel that causation is an important

component of blameworthiness,<sup>97</sup> it makes sense to treat *A1* and *A2* differently. They are being treated differently *not* because they fared differently in the “results lottery,” but rather because they took their respective actions in different contexts. Any time a legal standard involves drawing a line somewhere, there will be cases close to either side of the line. The existence of close cases does not make a rule invalid.

*b. The Perfect is the Enemy of the Good*

It is also worthwhile to note that under the current system, *A1* and *A2* will both be treated as accomplices who are as liable for the murder as if they had committed it themselves. If you believe that neither *A1* nor *A2* should be held liable, then the only advantage of the existing system over the proposed reform is that *A1* and *A2* are being treated equally unfairly. Introducing a rule that fixes the unjust result of holding *A2* liable may result in unequal treatment, but at least it leads to fewer unjust convictions. It is difficult (and perhaps impossible) to design a rule that will make the sort of fine-grained distinctions necessary to excuse *A1* from liability while maintaining a useful accomplice doctrine. We should not let the fact that we are unable to design a perfect rule stop us from introducing a rule that is at least better than what currently exists.

*3. This Rule Expands Liability to Cover Previously Innocent Behavior*

This rule would also expand liability to cover the area of the completely ineffective accomplice. That is, somebody who shouted encouragement to a deaf man in the process of committing murder would be liable as a non-causal accomplice. This liability is appropriate—there is no compelling reason to distinguish between shouted encouragement that is not heard and shouted encouragement that has no effect on the progress of the crime.

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<sup>97</sup> See Dressler, *supra* note 1, at 99.

## F. APPLYING THE TEST

The preceding discussion of the appropriate test for liability has been rather abstract. This section will present some concrete scenarios, and then compare and contrast the treatment that each would receive under the current law and under the but-for causation test.

The discussion here, as in the rest of the Note, is intended to focus on the acts requirement for complicity. Accordingly, it is assumed in all cases that the requisite mental state is present.

### 1. *The Client*

In our first scenario Al hires Pete, a professional hit man, to kill his wife, Violet. Pete accepts Al's money, and later kills Violet.

The current law and the proposed causation standard would treat Al and Pete exactly the same way in this case: both would find full culpability for the murder. Al's actions here clearly caused Pete to act—not in the sense that Pete was not acting of his own free will, but in the sense that absent Al's actions, it is incredibly unlikely that Pete would have killed Violet. This sort of case provides the easiest possible hook that the prosecution can use to prove causation.

### 2. *The Specialist*

Abe is very good at disabling security systems. In fact, he's one of the best in the business. That's why Paul contacts Abe when he wants to rob a bank that uses a very sophisticated security system. It's a rush job—they'll be robbing the bank the day after Paul contacts Abe. Abe takes the system offline, allowing Paul and his other henchmen to enter the bank and steal various valuables from the vault.

Again, the proposed reform would not affect the treatment of this case. Abe's actions have obviously had a major influence on when (and whether) the crime would occur. If he had not been available, Paul would not have been able to rob the bank when he

did, or would have had to risk robbing the bank with the security system in place.

### 3. *The Superfluous Helper*

This time, Paul is a professional burglar. His wife, Alice, is aware of this fact, and approves of his endeavors. In fact, she prepares for him a boxed meal that he can eat between burglaries, so that he does not get hungry and quit early.

This is the first example where the causal test would treat Alice differently than would existing law. Under the current law Alice could be held fully liable for any crimes that Paul committed, under the theory that Alice may have helped him to commit the crimes by preparing his meal.<sup>98</sup> Under the proposed reform, Alice would be only a non-causal accomplice, subject to lesser liability. The mere *possibility* that Alice's actions caused the crimes to happen would no longer be enough to justify treating Alice as if she were the perpetrator.

### 4. *The Easily Replaceable Helper*

Anthony has no particular skills that he can bring to bear to further a criminal enterprise. Rather, Paul simply asks him to act as a lookout for Paul while Paul robs a bank, and pays Anthony for his time. While Paul would not have robbed the bank without having somebody act as a lookout, there was no pressing need for Anthony to be the person acting as a lookout. Others were readily available and willing to help, and would have done an equally good job.

This is a tricky case. Under existing accomplice law, Anthony would be as liable as Paul for the robbery. However, it is not clear whether Anthony really caused the robbery to happen. In a counterfactual world where Anthony had not been available, Paul would have obtained the help of some other volunteer, and would

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<sup>98</sup> See *Alexander v. State*, 102 So. 597, 598 (Ala. Ct. App. 1925) (recognizing that providing food to persons engaged in committing a felony renders one an accessory to the crime).

have proceeded as planned. We could argue that the presence of another ready volunteer does not matter, as only “the crime that actually occurred” is relevant.<sup>99</sup> However, this seems to simply ignore the problem raised here. The actual crime is the robbery committed by Paul. In trying to determine whether Anthony caused the crime to happen, the only tool we have available to us is but-for causation, which necessarily requires a counterfactual evaluation. However, allowing Anthony to escape full responsibility creates a situation where the criminals of the world can reduce their liability simply by arranging to have two available accomplices, and then employing the assistance of only one in committing the crime.

As a practical matter, however, it may be that the fact that causation is a jury question will prevent this issue from creating widespread problems. To a certain extent, judgments of causation are based on a jury’s common sense idea of blameworthy behavior, rather than the numerical probability that they attach to particular actions.<sup>100</sup> The proposed reform is designed to give juries an opportunity to impose categorically lower punishment on less blameworthy behavior, and relies on their ability to make fair individual judgments on a case-by-case basis.

#### CONCLUSION

Accomplice law currently treats all complicit activity the same, regardless of its relative impact on the substantive crime perpetrated. Changing this standard is not only desirable as a matter of legal principle, but is also a practical thing to do. In particular, the area of attempts law has dealt with many of the issues that are often presented as insurmountable barriers to bringing causation concepts to accomplice law, chief among them the uncertainty created by free will. Once these barriers have been removed, treating causal and non-causal accomplices differently is an obvious reform to make.

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<sup>99</sup> Dressler, *supra* note 1, at 131-32.

<sup>100</sup> See David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1774-75 (1997).