

## Is Parity of Culpability a Constraint on Accomplice Liability?

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Not long ago in this journal, Joshua Dressler declared that “American accomplice law is a disgrace.”<sup>1</sup> The main basis for this indictment is that complicity doctrine “treats the accomplice in terms of guilt and, potentially, punishment, as if she were the perpetrator, even when her culpability is often less than that of the perpetrator . . . .”<sup>2</sup> In this contention of Dressler’s, we see the influence of a powerful intuition that is often invoked in the complicity literature. The idea behind this *parity of culpability principle* is that there must be some sort of equivalence in the culpability of the principal and the accomplice in order for both to be convicted of the same crime and subject to the same range of possible sentences—as complicity doctrine requires. The federal complicity statute states that “[w]hoever . . . aids, abets, counsels, commands, induces or procures [the commission of an offense] is punishable *as a principal*.”<sup>3</sup> The parity of culpability principle (or just *parity principle* for short) would place a limitation on when accomplice liability—with the attendant punishment “as a principal”—is justly imposed. The principle entails that complicity law is unjust to the extent it permits convicting a defendant as an accomplice despite her<sup>4</sup> being less culpable than the relevant principal.

My aim in this paper is to take a closer look at the parity principle—how it is to be understood, what if anything supports it, and whether it really places an independent constraint on the contours of accomplice liability. Is parity of culpability between the accomplice and the specific principal she aids really a necessary condition of its being fair to subject them both to the same criminal liability? That is what I aim to investigate here.

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<sup>1</sup> Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 428 (2008).

<sup>2</sup> *Id.* at 427.

<sup>3</sup> 18 U.S.C. § 2(a) (1998) (emphasis added). *Cf.* Accessories & Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.).

<sup>4</sup> Throughout the paper, I will generally default to using female pronouns in cases like this. (This tracks Dressler’s convention. *See* Dressler, *supra* note 1 and accompanying text.) Sometimes I will use “her” for the accomplice and “his” for the principal, since this provides a convenient way to refer to different individuals within the same sentence.

The parity principle, were it defensible, would provide a handy tool for evaluating the content of complicity law. It would rule out doctrines that impose accomplice liability on defendants who are not as culpable as the principals they aid. The parity principle thus is attractive in that it offers a route to conclusions about when complicity liability should or should not be imposed.

Indeed, the parity principle was recently deployed in this way by the U.K. Law Commission in crafting its recommendations about how to punish accomplices to homicide offenses.<sup>5</sup> The Commission stated that a putative accomplice “should be liable for the offence committed by [the principal] only if there is what might be called ‘parity of culpability’ between them.”<sup>6</sup> However, the Commission cautioned that this term “simply means that an encourager or assister should be liable for [the principal’s] offence only if his involvement was such that he might properly be considered to be *as morally culpable as [the principal], or more culpable than [the principal]*, and should therefore (in the context of murder) be held responsible in law for the victim’s death.”<sup>7</sup> Some argued the Law Commission’s proposals did not live up to its own ambitions in this regard but rather violated parity of culpability by allowing certain actors to be convicted as accomplices despite being significantly less culpable than the principals they aided.<sup>8</sup> In this way, the parity principle might help us select among competing views about the contours of complicity doctrine.<sup>9</sup>

In a similar fashion, the parity principle might also be used to resolve vexing doctrinal questions or to drive reforms in this often criticized area. Consider a few further examples.

First, a persistent difficulty in the law of complicity concerns the mens rea one must have toward the principal’s underlying crime in order to qualify as an accomplice to it.<sup>10</sup> Some courts hold that being an accomplice requires that one aid

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<sup>5</sup> LAW COMM’N, A NEW HOMICIDE ACT FOR ENGLAND AND WALES?, CONSULTATION PAPER No. 177 (2005).

<sup>6</sup> *Id.* para. 5.53.

<sup>7</sup> *Id.* para. 5.54 (emphasis added).

<sup>8</sup> Robert Sullivan, *First Degree Murder and Complicity—Conditions for Parity of Culpability Between Principal and Accomplice*, 1 CRIM. L. & PHIL. 271, 273–74 (2007). Note that Sullivan seems to work with a conception of the parity of culpability principle that is somewhat weaker than the Law Commission’s. *Id.* at 273. I discuss Sullivan’s version below. See *infra* Part I.

<sup>9</sup> I have also relied on the parity principle in previous work to argue against certain views about the mens rea required for complicity. See Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. U. CHI. L.J. 131, 133 (2015) (“It will become clear that one of the major challenges for the existing approaches [to mens rea] is that they allow a defendant to be convicted as an accomplice, and therefore punished ‘as a principal,’ even when the accomplice appears to be substantially less culpable than the principal wrongdoer.”). In this earlier piece, I was not sufficiently attentive to the difficulties for the parity principle, which are raised in this article.

<sup>10</sup> Wayne LaFave observes that “[t]here is a split of authority as to whether some lesser mental state will suffice for accomplice liability, such as mere knowledge that one is aiding a crime or knowledge that one is aiding reckless or negligent conduct which may produce a criminal result.”

the principal with the *intention* or *purpose* that the underlying crime be successfully committed.<sup>11</sup> Others maintain that it is enough to aid the principal while merely *knowing* the crime will be committed (perhaps only for some crimes).<sup>12</sup> Some theorists debate whether the mens rea standard should be lowered even further to encompass some instances of recklessness.<sup>13</sup> Furthermore, some courts, plus the Model Penal Code (at least where results are concerned),<sup>14</sup> adopt a flexible standard under which the accomplice must have the same mens rea as the underlying crime requires of the principal actor—the so-called “derivative approach.”<sup>15</sup>

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2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 13.2, at 337 (2d ed. 2003). See also Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1351 (2002) (“[T]he law on the aider and abettor’s mental state . . . is best described today as in a state of chaos . . .”).

<sup>11</sup> The view taken in Judge Learned Hand’s opinion in *United States v. Peoni* is that an accomplice must have a “purposive attitude” toward the underlying crime (i.e. that it be “something that he wishes to bring about, that he seek by his action to make it succeed”). *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). The Supreme Court subsequently endorsed this view as well. *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

<sup>12</sup> The Supreme Court recently held that mere knowledge of the crime—or at least knowledge of the conduct and circumstance elements of the underlying crime (if not the result elements)—will suffice for complicity liability. *Rosemond v. United States*, 134 S. Ct. 1240, 1243 (2014); see also Weiss, *supra* note 10, at 1396–409 (discussing cases requiring only knowledge). In *Rosemond*, the Court held that to impose complicity liability for a firearm offense under 18 U.S.C. § 924(c), the Government must “prov[e] that the defendant actively participated in the underlying drug trafficking or violent crime with *advance knowledge* that a confederate would *use or carry a gun* during the crime’s commission.” *Rosemond*, 134 S. Ct. at 1243 (emphasis added). Stephen Garvey persuasively argues that the firearm offense in § 924(c) is best read as involving both conduct and circumstance elements but not result elements. See Stephen P. Garvey, *Reading Rosemond*, 12 *OHIO ST. J. CRIM. L.* 233, 243 (2014) (arguing that the “even better” reading of § 924(c) is “as part conduct and part attendant circumstance,” the idea being that “[t]he actor must *do* something *with* something, where the something done is ‘us[ing] or carr[ying]’ (conduct), and where the something used or carried is a ‘firearm’ (attendant circumstance)”). See also Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 *SAN DIEGO L. REV.* 133, 156 (2015) (noting that § 924(c) “can arguably be interpreted as including a circumstance element”). Garvey also questions whether the holding in *Rosemond* really is compatible with the *Peoni* standard, strictly construed, but that is a question for another time. See Garvey, *supra*.

<sup>13</sup> Sanford H. Kadish, *Reckless Complicity*, 87 *J. CRIM. L. & CRIMINOLOGY* 369, 369 (1997); see also Gideon Yaffe, *Intending to Aid*, 33 *LAW & PHIL.* 1, 14, 19 (2014) (suggesting that complicity “can be present in at least some cases in which a person thinks it likely, but falls short of believing, that the activity he aids will involve the crime,” and ultimately defending a “middle way” between the intent and knowledge standards, which also sometimes allows recklessness to suffice for complicity).

<sup>14</sup> MODEL PENAL CODE § 2.06(4) (AM. LAW INST. 2016) (“When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.”).

<sup>15</sup> See Weiss, *supra* note 10, at 1410–14 (discussing the derivative approach); see also *United States v. Jones*, 308 F.2d 26 (2d Cir. 1962) (en banc).

Given this diverse range of views, it might be tempting to use a simple constraint like the parity principle to make progress in deciding what the mens rea for complicity should be. For instance, one might argue that adopting the knowledge standard generally is normatively out of bounds insofar as it inculcates merely knowing actors who are significantly less culpable than the principal offender. The classic example is the gas station attendant who fills up the bank robbers' gas tank while overhearing their plans, thus knowingly helping them to carry out the robbery. Alternatively, one might mount an argument for the derivative approach on the grounds that it best respects the parity principle. This angle might seem promising, given that the derivative approach insists that the accomplice have the same mens rea as the underlying crime itself requires the principal offender to possess. The merits of the argument can be debated,<sup>16</sup> but the point is that the parity principle in this way might seem a promising tool for making progress on this vexed issue.

In addition to helping sort out difficult doctrinal questions, the parity principle—if defensible—might also be used to drive reforms of complicity law. For example, there has been much debate about whether being an accomplice requires that one make a causal contribution to the underlying crime. Thus, a second way the parity principle might be invoked is to argue that it supports requiring some kind of causal contribution—if not being a but-for cause of the crime, then at least having some causal influence on the manner, ease, or burdens of the crime's commission.<sup>17</sup> Dressler argued that the law of complicity is unjust in punishing accomplices whose “involvement in the crime is tangential” the same as the principal.<sup>18</sup> Such minor participants in the crime often seem less culpable than the principal offender.<sup>19</sup> Accordingly, the parity principle could in this way

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<sup>16</sup> I doubt even the derivative approach fully respects the parity principle, however. Plausibly, providing what one knows will only be utterly trivial aid, while possessing the mens rea for the crime is not likely to always be as culpable as directly perpetrating the underlying crime with the requisite mens rea thereof.

<sup>17</sup> See Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 421–42 (2007) (recognizing a variety of ways to understand the sort of causation involved in accomplice liability, i.e. not only truly causal (or substantial) accomplices but also necessary accomplices and chance-raisers); see also R.A. Duff, *Is Accomplice Liability Superfluous?*, 156 U. PA. L. REV. PENNUMBRA 444 (2008) (agreeing with Moore's construal of causation for complicity but criticizing his view that complicity liability is superfluous); John Gardner, *Complicity and Causality*, 1 CRIM. L. & PHIL. 127, 128 (2007) (arguing for a broad understanding of the sort of causation involved in complicity; contending that while “[b]oth principals and accomplices make a difference [and] have an influence,” “[t]he essential difference between them is that accomplices make their difference through principals, in other words by making a difference to the difference that principals make”).

<sup>18</sup> Dressler, *supra* note 1, at 428–29.

<sup>19</sup> Perhaps the main exception to the claim that non-causal or minor participants in the crime are less culpable than the principal offender is the case where the accomplice *believes* she will make a major contribution to the crime but, in fact, does not (perhaps merely due to luck). For example, think of the person who shouts encouragement to the principal while genuinely and reasonably believing this will make all the difference to the commission of the crime, but, in fact, the words of

propel the effort to abolish full complicity liability for those who only provide trivial or non-causal assistance to the underlying crime (perhaps replacing it with a lesser form of accomplice liability instead, as Dressler proposed).<sup>20</sup>

A third use of the parity of culpability principle might take aim at a different aspect of complicity law: the much-maligned natural and probable consequences doctrine. This is the rule that the aider and abettor “of an initial crime . . . is also liable for any consequent crime committed by the principal, even if he or she did not abet the second crime, as long as the consequent crime is a natural and probable consequence of the first crime.”<sup>21</sup> It has been widely criticized for allowing accomplices to the initial crime who were merely *negligent* as to the commission of the secondary crime to be convicted of that crime as well *even if* that crime requires a greater mens rea than negligence.<sup>22</sup> As Dressler noted, this sort of case involves serious injustice because “there does not exist a parity of culpability between the accomplice (who is negligent) and the principal.”<sup>23</sup> Thus, we see another way in which the parity principle might be used to push for reforms to the harsher aspects of complicity doctrine.

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encouragement go unheard. This aider, given her beliefs about the world, does not seem substantially less culpable than the principal.

Of course, there is the question of whether such a person is really an accomplice at all. Perhaps this case is best construed as the mere attempt to aid or encourage. However, at least the Model Penal Code would construe this as genuine accomplice liability despite the lack of causation. See § 2.06(3)(ii) (regarding “attempts to aid” a crime as enough for complicity liability).

<sup>20</sup> Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 137–40 (1985); see also Dressler, *supra* note 1, at 446–48 (discussing problems with merely distinguishing between causal and non-causal accomplices and considering the view that only “substantial participants” should receive full complicity liability, while minor assistance should be the basis only for convicting the aider of a lesser offense); Sarch, *supra* note 9, at 135 (arguing that we should recognize different degrees of complicity liability, which are to be separated not on the basis of causal contribution but rather based on the degree of attitudinal endorsement the putative accomplice has towards the underlying crime).

<sup>21</sup> Weiss, *supra* note 10, at 1424. Most Federal Circuits adopt some version of this doctrine. See, e.g., *United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982) (“An aider and abettor ‘is liable for any criminal act which . . . was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him . . . .’” (citation omitted)); Weiss, *supra* note 10, at 1425 n.388 (collecting cases); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 196–98 (2007) (listing cases that recognize the natural and probable consequences doctrine in Appendix C). In the UK, the equivalent doctrine is called *joint enterprise liability* (or, more formally, parasitic accessorial liability), which was recently abolished in the seminal case of *R v. Jogee* [2016] UKSC 8, [2017] AC 387 [2], [87] (appeal taken from Eng.).

<sup>22</sup> LAFAVE, *supra* note 10, § 13.3, at 362 (“The ‘natural and probable consequence’ rule of accomplice liability . . . is inconsistent with more fundamental principles of our system of criminal law. It would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind.”); see also Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 395 (2010).

<sup>23</sup> Dressler, *supra* note 1, at 428 n.4.

While I am sympathetic to such reform efforts, I will contend that the arguments in their favor at bottom do not rest on the parity of culpability principle. What I will argue is that there is no defensible version of the parity principle that also places an *independent* deontological constraint on complicity liability (i.e. one that is not simply co-extensive with and reducible to other more fundamental principles we already have good reason to adopt).<sup>24</sup> Instead, I contend, the heavy lifting in efforts to reform complicity doctrine is, at bottom, to be done by the familiar *desert constraint*, which figures into retributivist views of punishment.<sup>25</sup> More precisely, as I will understand it, the desert constraint is the claim that an offender may not, in justice, be punished in excess of her desert, where desert, in turn, is understood as the culpability she incurs in virtue of her conduct.<sup>26</sup> The main point of the desert constraint thus is to rule out punishments that go beyond what is proportionate to one's culpability for what one did.

At least on its face, the parity principle seems to be independent of the desert constraint. For an actor to be justly convicted as an accomplice to the principal's crime, and therefore subject to the same range of sentences, the desert constraint requires that this not be excessive in relation to the accomplice's own culpability. The parity principle, by contrast, requires that the accomplice's culpability also rise to the same level as the principal happened to reach in the case at hand. These are different tests. As we will see in more detail below, punishing the two the same might not be excessive compared to the culpability of either actor, even though the principal happened to be a particularly bad actor who incurred more culpability in the case at hand than the accomplice.<sup>27</sup>

In what follows, I will consider some possible rationales for the principle as an independent constraint. Specifically, it might be thought to stem from the derivative nature of complicity or from the fact that accomplices are punished "as a principal." However, after clarifying the parity principle in Part I, I argue in Part II

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<sup>24</sup> Thus, my claim is that the parity principle can be rendered defensible only by construing it so that it simply becomes reducible to other principles we should already accept for independent reasons—most importantly, the desert constraint.

<sup>25</sup> See, e.g., Mitchell N. Berman, *The Justification of Punishment*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 144 (Andrei Marmor ed., 2012) (explaining retributivism as the view that punishment is justified if, but only to the extent that, "it is deserved or otherwise fitting, right or appropriate, and not [necessarily because of] any good consequences that individual acts of punishment . . . may cause to be realized"); see also *id.* at 151 (discussing desert-constrained consequentialism).

<sup>26</sup> Some might think desert could encompass more than culpability—perhaps also facts about which wrong one committed (e.g. a killing versus an attempted killing), which may not directly affect culpability. However, I set aside this complication in what follows because any plausible version of the desert constraint must at the very least *also* rule out punishments that are disproportionate to one's culpability. This concern that punishment should be fair in light of culpability is the main focus of the existing discussions of the parity of culpability principle, and so it is my focus here, too. My talk of the desert constraint thus is just meant as a convenient way to talk about the requirement that punishment not be disproportionate to culpability.

<sup>27</sup> See discussion *infra* Parts I, III.

that none of these rationales for the principle succeeds. Finally, in Part III, I draw together some of the observations from the previous discussion into an affirmative argument against the parity principle, and I show that the natural attempts to avoid the problem would render it trivial.

Accordingly, I submit that insofar as we are interested in mounting fairness arguments for reforming complicity law in various ways, the parity principle is not the tool to use. Rather, such reform efforts are more properly based on the more mundane desert constraint, which simply rules out excessively harsh punishments. My hope is that by clarifying the real normative basis for reform-minded arguments, we can push them with greater analytical clarity and ultimately improve their chances of being implemented.

### I. CLARIFYING THE PARITY OF CULPABILITY PRINCIPLE

Let us start by getting clear on what the parity of culpability principle says exactly. Throughout the discussion, I will use “D1” to refer to the principal actor who commits the underlying crime directly, while “D2” refers to the secondary actor who aids D1’s conduct. Moreover, I will use “criminal liability” as a general way to denote an offender’s conviction of a given offense (and the official condemnation it carries), together with the range of available sentences this conviction carries with it. Thus, my talk of subjecting D1 and D2 to “the same criminal liability” is shorthand for their being convicted of the same offense and facing the same sentencing range—even if the sentencing judge ultimately imposes different sentences on them within this range due to highly case-specific reasons like general or specific deterrence, rehabilitation, or other defendant-specific characteristics like criminal history. I prefer talking in terms of levels or amounts of criminal liability here rather than amounts of *punishment* because using the latter term might sound as if I am only referring to the sentences offenders actually receive, which leaves out something important.<sup>28</sup>

Given this terminology, let us consider the parity principle more carefully. In theory, parity of culpability might be used as an affirmative ground of liability: Where D2’s conduct is as culpable as D1’s, there is a basis for imposing the same liability on D2 as on D1.<sup>29</sup> Some have relied on this idea to argue, for example,

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<sup>28</sup> For example, one might worry that talking just of the sentence imposed may lead to overlooking the relevant label applied to the offender or the condemnation expressed.

<sup>29</sup> More precisely, this version of the parity principle could be formulated as follows:

**Parity of Culpability as a Ground (PCG):** Where D2 aids D1’s commission of a crime and is otherwise a plausible candidate for being deemed an accomplice (even if D2 does not, strictly speaking, meet the existing definition of complicity in the jurisdiction at hand because her *mens rea* is insufficient), then if D2’s conduct is as culpable as D1’s, there is a weighty reason to subject D2 to the same criminal liability as D2.

PCG might be invoked in debates about reforming the contours of complicity law, which is why it is formulated as a claim about when complicity liability *should* be imposed.

that in some cases D2's aiding D1 with a mens rea of recklessness toward the underlying crime should be sufficient to treat D2 as an accomplice.<sup>30</sup>

Nonetheless, parity of culpability is more commonly invoked as a *limit* on the liability of the putative accomplice. The idea is that D1's culpability for crime C functions as a *floor* above which D2's culpability for her own conduct must rise if D2 is not to be unjustly convicted of C as an accomplice and face the same sentencing range as D1. Thus, the parity principle rules out imposing the same criminal liability on D2 and D1 where D2 is significantly *less* culpable than D1. For example, if D1 commits a robbery and D2's conduct in aid thereof is substantially less culpable than D1's conduct—as when D2 reasonably believes she is providing only the most trivial assistance to D1's conduct, or when D2 does not know D1 will commit robbery but is only aware of a risk thereof (as in some versions of the gas station attendant case)—then it would be unjust to subject D2 to the same liability for the robbery as D1.

This version of the principle will be my focus in what follows. For convenience, it can be summarized as follows:

**Parity of Culpability as a Limit (PCL):** Where D2 aids D1's commission of a crime, C, and D2 is otherwise a plausible candidate for being deemed an accomplice, then D2 should be subject to the same criminal liability as D1 is for C (i.e. D2 should also be convicted of C and subject to the same range of sentencing options as D1) *only if* D2's culpability for her actions in aid of D1 is *equal to or greater than* D1's culpability for C in this case.

A few clarifications about the principle are in order. First, PCL is a normative principle. It is intended for use in debates about reforming the contours of complicity law. This is why it is formulated as a claim about when complicity liability *should* be imposed.

Second, PCL might in theory be weakened to say only that D2's culpability must be at least *roughly* equal to D1's. This would allow courts to subject D1 and D2 to the same liability even if D2's culpability is less than D1's, as long as it is not *far* below D1's. I will overlook this tweak in what follows for two reasons. For one, it adds ambiguity to the principle. We would need a principled way to determine how much less D2's culpability can be compared to D1's without offending the principle, which will be difficult to provide. Furthermore, this tweak

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<sup>30</sup> See, e.g., Monica Lyn Schroth, *Reckless Aiding and Abetting: Sealing the Cracks That Publishers of Instructional Materials Fall Through*, 29 SW. U. L. REV. 567, 596 (2000) (“[I]f the principal's additional reckless acts are directly attributable to the principal's intoxication while driving, in those scenarios, the accomplice is as reckless—and thus as culpable—as the accomplice whose principal followed the exact reckless agenda envisioned by the accomplice. The culpability of the accomplice is the same in either scenario because the crime could still have easily resulted even without the additional reckless conduct by the principal. . . . Only liability assessed through a reckless complicity doctrine would achieve accountability in both situations.”).



seems arbitrary. While a rationale might be in the offing for insisting on equal culpability, it is not clear why these rationales would support allowing *nearly equal* culpability to be enough.<sup>31</sup> Thus, PCL itself will be my focus.

The third clarification concerns what sense of culpability figures into PCL. I do not mean what has been called “narrow culpability,” which merely refers to the mens rea required for various crimes.<sup>32</sup> Rather, I have something like “broad culpability” in mind.<sup>33</sup> More specifically, criminal culpability is roughly that which determines the extent to which conduct that violates a (legitimate) prohibition within the applicable legal system merits condemnation (and the associated forms of “hard treatment”) by the law. In the dominant view of criminal culpability, one is culpable for a prohibited action to the extent it manifests *insufficient regard* for the legally protected interests of others or protected values more generally.<sup>34</sup> However, culpability is not only supposed to determine the level of condemnation that should attach to conduct that violates an *already existing* prohibition; in addition, it is also a factor that impacts criminalization (i.e. what conduct to prohibit in the first place and how serious a response it merits). Thus, culpability is key to determining not only the extent to which violations of *existing* prohibitions merit condemnation by the state but also

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<sup>31</sup> However, if it turns out that the arguments for PCL discussed below can be repurposed to support this weakened version of the parity principle, then there is every reason to think that the defects in these arguments will also carry over to the weakened principle.

<sup>32</sup> See Douglas Husak, “Broad” Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449, 456 (2012) (“In this narrow sense, culpability is ‘the particular mental state provided for in the definition of the offense.’” (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 119 (5th ed. 2009))). Sullivan agrees that narrow culpability is not the right focus in this context. See Sullivan, *supra* note 8, at 273 (“Parity of culpability need not entail the same [mens rea] requirements for principals and accomplices. In those cases of complicity where D’s role in the killing is subsidiary or auxiliary to P’s, D’s mental state regarding the wrongdoing of P is at least as germane to his culpability as his intentionality and awareness of his own conduct.”).

<sup>33</sup> Husak, *supra* note 32, at 456–57 (“[T]he broad sense of [culpability] refers to ‘a general notion of moral blameworthiness, i.e., that the defendant committed the actus reus of an offense with a morally blameworthy state of mind.’” (citation omitted)). While closely tied to moral blameworthiness, I suggest below that broad culpability should not be simply identified with the moral notion. See *infra* notes 35–39 and accompanying text.

<sup>34</sup> See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 67–68 (2009) (arguing that “insufficient concern [is] the essence of culpability”); see also Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289, 374 (2006) (“[A] person is normatively *blameworthy* for engaging in conduct that a statute prohibits if he was motivated by an attitude of disrespect for the interests that the statute seeks to protect . . . .”); VICTOR TADROS, CRIMINAL RESPONSIBILITY 250 (2005) (“[I]f [a defendant] is convicted of a serious offence, the state communicates . . . that [his] behaviour manifested an inappropriate regard for other citizens and their interests.”); Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 552–53 (2012); Kenneth W. Simons, *Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character”?* Examining the Requisite Connection Between Mens Rea and Actus Reus, 6 BUFF. CRIM. L. REV. 219, 249–50 (2002); Alexander Sarch, *Who Cares What You Think? Criminal Culpability and the Irrelevance of Unmanifested Mental States*, 36 LAW & PHIL. 707 (2017).

the extent to which conduct that breaches prohibitions the state ideally *should* adopt would merit condemnation (which, if substantial, would give a reason to criminalize such conduct).<sup>35</sup>

One might wonder how moral blameworthiness is related to criminal culpability. Some see little daylight between the two.<sup>36</sup> Others think criminal culpability is systematically impacted by a range of practical considerations and institutional design constraints that the moral notion is not.<sup>37</sup> Although I have argued for the latter view,<sup>38</sup> I will remain neutral on the issue here. Just note that the insufficient regard theory can neatly capture both views. If criminal culpability consists in manifesting insufficient regard for legally protected interests or values, then this notion collapses into the moral notion insofar as the relevant set of interests and values that should be protected by law *just is* the set of interests and values that matter morally (i.e. that morality demands we act with sufficient regard for). By contrast, if the law ought not to protect precisely the same interests and values as the ones that matter to morality—perhaps because the law should only protect a narrower, less fine-grained set of interests and values than morality recognizes<sup>39</sup>—then criminal culpability, on the insufficient regard theory, would come apart from the moral notion. In what follows, readers should just use their preferred version of the theory. The arguments regarding the parity principle remain intact either way.

One final clarification. An important reason to focus on PCL is that it purports to place an independent constraint on accomplice liability. This is not obviously true of other formulations of the principle that have been suggested. For example, G.R. Sullivan explains the principle as follows:

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<sup>35</sup> See Sarch, *supra* note 34, at Part III.A (distinguishing between posited culpability, which tracks the degree of censure that *existing* law attaches to various kinds of conduct, and normative culpability, which tracks the degree of censure that the law ideally *should* attach to them).

<sup>36</sup> See Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29, 30–31 (1990); see also Husak, *supra* note 32, at 456–57 (explaining the broad notion of culpability as corresponding to moral blameworthiness); Amy J. Sepinwall, *Faultless Guilt: Toward a Relationship-Based Account of Criminal Liability*, 54 AM. CRIM. L. REV. 521, 528 (2017) (contending that “the criminal law’s conception of desert depends on a moral conception of desert,” and in general suggesting a tight connection between moral blameworthiness and the legal notion of culpability that criminal liability is supposed to track).

<sup>37</sup> See Mark Dsouza, *Criminal Culpability After the Act*, 26 KING’S L.J. 440, 453 (2015).

<sup>38</sup> See Sarch, *supra* note 34, at Part III.E (arguing culpability is best seen as a stripped down analog of the notion of moral blameworthiness).

<sup>39</sup> For example, one plausibly manifests insufficient regard for the legally relevant considerations when one steals even with good motives. But the same behavior may demonstrate substantially less disrespect (insufficient regard) for the more fine-grained moral considerations. What explains the difference between the applicable moral and legal considerations for which one must act without manifesting insufficient regard? It might be due to practical considerations, like our epistemic limitations or the need for easy-to-apply bright-line rules. Or perhaps the explanation is something more principled about the kind of thing the law is or should be—like the need for the criminal law to be simple enough to serve as a publically available guide to action.

[P]arity of culpability cannot mean that [D1] and [D2] must be equally to blame for V's death, even assuming reliable judgements of that degree of precision can be made. What is required is that in each case that [D2 like D1] is found guilty as an accomplice to first degree murder, *he is not treated unjustly if he receives the same punishment as [D1]*.<sup>40</sup>

Plausible as it is, this way of thinking about the principle will not do for present purposes. The trouble is that Sullivan's principle simply amounts to a restatement of the general desert constraint—according to which offenders may not be punished in excess of what their culpability makes them deserve. Sullivan's principle boils down to the claim that where D2 is convicted of C as an accomplice to D1's commission of C, then if D2 receives the same punishment as D1, this must not be unjust to D2. But this is just to claim that the range of punishments open to the sentencing court upon convicting D2 of C as an accomplice must not be unjustly harsh compared to D2's culpability. However, it is hard to see how this could be anything but an application of the already applicable desert constraint. If so, one wonders what independent work there is for the parity principle to do. In pressing for one's preferred reforms, for example, why not just appeal to the desert constraint directly?

PCL, by contrast, purports to impose an independent test that D2 must satisfy to be justly convicted as D1's accomplice and subject to the same range of sentencing options. The desert constraint requires that this not be excessive in relation to either D1 or D2's culpability. By contrast, PCL also demands that D2's culpability must be at least as great as the culpability level that D1 happened to reach in the case at hand. These tests could come apart. On the one hand, the parity principle might be satisfied but the desert constraint violated—as would be the case if D1 and D2 are equally culpable, but both are punished too harshly. Conversely, D1 and D2 in theory might both merit being convicted and punished for, say, arson, or perhaps murder—thus satisfying the desert constraint—but D2 might still be somewhat less culpable than D1 because of the extreme way in which D1 committed the crime in question. (I will discuss this case in more detail below.<sup>41</sup>)

Thus, while Sullivan's principle is no doubt *correct*, it does not purport to place an independent constraint on accomplice liability. PCL fares better on this score. Accordingly, PCL is the better contender for a formulation of the parity principle that independently constrains the scope of accomplice liability.

My immediate task in what follows, therefore, will be to consider possible rationales for PCL. The discussion will also reveal other versions of the parity principle, which at first might seem more promising. But I will argue that they, too, face serious problems.

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<sup>40</sup> Sullivan, *supra* note 8, at 273 (emphasis added).

<sup>41</sup> See *infra* Part III.

## II. ARGUMENTS FOR THE PARITY PRINCIPLE

PCL and the desert constraint are both concerned in different ways with the degree of criminal liability that is fair given the putative accomplice's culpability. Why accept both claims, given that we already have reason to adopt the desert constraint? If no sound motivation for PCL as an independent constraint is forthcoming, perhaps we should rethink the attraction that PCL was seen earlier to hold for advocates of complicity law reform. Therefore, in this Part, I will discuss the two most important types of argument that might be given for PCL. I will argue, however, that neither succeeds.

### A. *The Derivative Nature of Accomplice Liability*

The parity principle as an independent constraint on accomplice liability might naturally seem to stem from the idea that such liability is derivative in nature. Sanford Kadish offers (and then criticizes) this familiar account of the sense in which complicity is derivative:

[S]ince the accomplice's culpability is derived from that of the principal, the limit of the accomplice's culpability is determined by that of the principal. Thus if the principal is not guilty, the secondary actor cannot be held liable as his accomplice; and if the principal is culpable of a given crime, the accomplice cannot be held for a higher one.<sup>42</sup>

How might this support a parity principle like PCL? If "the accomplice's culpability is derived from that of the principal," then perhaps D1's culpability *transfers* to D2, such that D2 automatically acquires, through the transfer, whatever amount of culpability D1 had. If this idea were right, D2 could not have any more or less culpability than D1 had for the underlying crime.

This rough idea requires refinement. One issue concerns the focus on culpability. The trouble is that the dominant theory of culpability—the insufficient regard theory (sketched above)—does not underwrite the assumption that culpability can directly transfer in this way from one person to another (as if it were, say, title to property). On the insufficient regard theory, a person's culpability consists in the degree to which *her own conduct* manifests insufficient regard for the relevant legally protected interests and values. If culpability thus is an evaluation of the quality of one's own individual conduct and the practical reasoning that produced it, then the argument would have to be reframed.

The natural way to do this is to focus instead on the accomplice's criminal *liability* (i.e. the crime she is to be convicted of and the range of sentencing options

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<sup>42</sup> Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 385 (1985).

she is subject to). It might be more plausible to suppose that *this* can be incurred by way of a transfer of the liability that the principal incurred. After all, the insufficient regard theory does not obviously rule out the idea that *liability* can directly transfer from one person to another. Accordingly, framing the argument in terms of liability seems more promising. Thus conceived, the argument can be summarized as follows:

**Argument from the Derivative Nature of Complicity (v.1)**

- (1) Complicity liability is derivative in nature.
- (2) If (1), then the accomplice, D2, is subject to the same criminal liability as the principal, D1, is subject to for his crime, C (i.e. no more and no less).
- (3) A person's criminal liability is just only if it is neither excessively harsh nor overly lax compared to her culpability.
- (4) Assume D1's criminal liability for C is just.
- (5) If D2 is subject to the same criminal liability as D1 is for C, then if (3) and (4), then the accomplice D2's criminal liability is just only if D2's culpability is as great as D1's culpability for C.
- (6) Therefore, the accomplice D2's criminal liability is just only if D2's culpability is as great as D1's culpability for C.

The conclusion here amounts to PCL—the claim that a necessary condition of it being just to impose D1's same level of criminal liability onto D2 for her acts in aid of C is that D2 is at least as culpable as D1.<sup>43</sup>

However, there are still two major flaws with this argument. One concerns premise (2): As a doctrinal matter, it is not true that, merely because complicity is derivative in nature, the accomplice is always subject to the same liability as the principal. Often, the accomplice will be convicted of a lesser offense than the principal she aids.<sup>44</sup> As Kadish notes:

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<sup>43</sup> One might worry that there is something odd about this argument insofar as it seeks to derive a limit on accomplice liability from internal features of the doctrine, while one might expect such a limit more naturally to come from outside the doctrine. (Thanks to Steve Garvey for this worry.) Nonetheless, I do not think this dooms the argument right out of the gate. After all, in other places we find internal limits on various forms of liability, not merely external side-constraints. For example, Congress's authority to impose certain forms of criminal liability plausibly only goes so far as its power to regulate interstate commerce extends. The present argument—if it works—would likewise seek to highlight an internal limitation on accomplice liability by showing that its animating principles perhaps do not extend as far as one might have suspected *ex ante*.

<sup>44</sup> See MODEL PENAL CODE § 2.06(7) (AM. LAW INST. 2016) (“An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense . . . .” (emphasis added)); see also, e.g., IND. CODE § 35-41-2-4 (1977) (imposing a similar rule).

It is widely accepted that the secondary party's liability need not be as great as that of the principal, who may have acted with a mens rea that makes him more culpable than the secondary party. The latter, for example, may, in the heat of provocation, induce the primary party to kill, while the primary party may act with cool deliberation.<sup>45</sup>

A number of U.S. courts have adopted this view.<sup>46</sup> Likewise, another noteworthy example is the U.K. Supreme Court's recent landmark decision in *R v. Jogee*, where the court, after abolishing the doctrine of joint enterprise liability as a "wrong turn" in the law, vacated the murder conviction of an accomplice who was merely reckless as to the death the principal caused intentionally.<sup>47</sup> The court observed that "[i]f a person is a party to a violent attack on another, without [the requisite] intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter."<sup>48</sup> The same can also occur in the theft context: "if D2 encourages D1 to take another's bicycle without permission of the owner and return it after use, but D1 takes it and keeps it, D1 will be guilty of theft but D2 of the lesser offence of unauthorised taking, since he will not have encouraged D1 to act with intent permanently to deprive."<sup>49</sup>

How can this be consistent with accomplice liability being derivative in nature? In the homicide context, the most natural explanation is to construe manslaughter as a lesser-included offense of murder. We might say that in being guilty of murder, the principal can also be deemed to have committed the lesser-included offense of manslaughter.<sup>50</sup> Thus, when D2 aids D1 with only the mens

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<sup>45</sup> Kadish, *supra* note 42, at 339 (citation omitted).

<sup>46</sup> See, e.g., *State v. Williams*, 689 A.2d 821, 826 (N.J. Super. Ct. App. Div. 1997) (observing "where an assault committed by multiple perpetrators results in the death of the victim and the case is submitted to the jury under a theory of accomplice liability, the jury should be informed that even if it concludes that 'the principal . . . committed purposeful or knowing murder, the accomplice [can] be found guilty of a lesser offense involving recklessness if he intended that an assault be committed upon [the victim] but did not share the principal's intent that that assault cause death or serious bodily injury.'" (alterations in original) (citation omitted).

<sup>47</sup> *R v. Jogee* [2016] UKSC 8, [2017] AC 387 [87] (appeal taken from Eng.); see also *id.* paras. [2], [79], [85].

<sup>48</sup> *Id.* para. [96]. This was the ultimate outcome for the accomplice in *Jogee* itself, with the accomplice to the principal's intentional killing only being convicted of manslaughter on retrial. See, e.g., Owen Bowcott, *Ameen Jogee Jailed for Manslaughter in Joint Enterprise Test Case*, *GUARDIAN* (Sept. 12, 2016), <https://www.theguardian.com/law/2016/sep/12/ameen-jogee-jailed-manslaughter-police-officer-joint-enterprise-test-case> [<https://perma.cc/P96T-33BY>].

<sup>49</sup> *Jogee*, [2016] UKSC 8, [2017] AC 387 [90].

<sup>50</sup> This is particularly plausible in light of the widespread view that a higher mens rea (e.g. intent) with respect to a result can also suffice for satisfying a lower mens rea (e.g. recklessness) with respect to that same result. MODEL PENAL CODE § 2.02(5) (AM. LAW INST. 2016) ("When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly.").

rea for manslaughter, but D1 commits murder, D2's liability for manslaughter can be seen as derivative liability for *a part of the full offense* that D1 committed. If D1 committed the full offense of murder, then D2 remains derivatively liable for *a portion* of what D1 did.<sup>51</sup> Thus, even if the fact of D2's liability derives from the fact of D1's, it does not follow that the *amount* of liability that D2 faces must equal the amount faced by D1. The upshot is that premise (2) must be revised.

A second problem with the argument concerns premise (3). In particular, one might contend that for one's criminal liability to be just, it is not necessary to avoid both the Scylla of being overly harsh and the Charybdis of being overly lax. Perhaps there is comparatively little injustice in under-punishing; one might think the main problem is over-punishment. This is admittedly controversial. Arguably, there is residual unfairness to victims if the offender is punished too leniently. Others, however—particularly those who are worried about the excesses of the sentences imposed in criminal justice systems like ours<sup>52</sup>—might think it is less of an injustice if an offender's criminal liability is too low compared to her culpability. Taking this view would suggest we back off the claim, embodied in premise (3), that it is unjust to under-punish, and instead insist only that justice requires avoiding criminal liability that is excessive compared to the offender's culpability (setting aside possible unfairness to victims from under-punishing).

Suppose we modify the argument to avoid these problems. Suppose we revise premise (2) so that the derivative nature of complicity entails only that D1's liability imposes a cap on D2's liability. Indeed, this tracks Kadish's summary of derivativeness above: "the limit of the accomplice's culpability is determined by that of the principal."<sup>53</sup> Moreover, suppose we revise premise (3) to focus solely on the injustice of imposing *more* criminal liability than deserved. Thus, the argument becomes the following:

**Argument from the Derivative Nature of Complicity (v.2)**

- (1) Complicity liability is derivative in nature.
- (2) If (1), then the accomplice, D2, is subject to *no more* criminal liability than the principal, D1, is subject to for her crime, C.
- (3) A person's criminal liability is just only if it is *non-excessive* compared to her culpability.
- (4) Assume D1's criminal liability for C is non-excessive compared to her culpability but is at the limit of what is just—i.e. if D1 faced any more liability, it *would* be excessive.

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<sup>51</sup> See Kadish, *supra* note 42, at 339–40 (noting that subjecting the accomplice to less criminal liability than the principal "does not contradict the conception of the secondary party's liability as derivative," since "[t]he accomplice's liability . . . may derive from *some and not all* of [the principal's] liability." (emphasis added)).

<sup>52</sup> See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 4 (2008) (summarizing his conclusion "that we have too much punishment and too many crimes in the United States today" and that "[w]e overpunish and overcriminalize.").

<sup>53</sup> Kadish, *supra* note 42, at 385.

- (5) If D2 is subject to no more criminal liability than D1 is for C, then if (3) and (4), then the accomplice D2's criminal liability will be non-excessive only if D2 has at least as much culpability as D1.
- (6) Therefore, the accomplice D2's criminal liability (which can be anything up to D1's level of liability) will be non-excessive (and hence just) only if D2 has at least as much culpability as D1.

The key step in the argument is premise (5). What is the rationale for it? On the one hand, imposing the same liability on D2 as D1 clearly is not excessive if D2 has *more* culpability than D1, given that D1's liability is already known to be non-excessive. To illustrate, suppose D1 has 100 units of culpability. If D2 and D1 both receive, say, 10 years of imprisonment, and we know this is non-excessive compared to D1's culpability of 100, then it also would not be excessive for D2 if D2's culpability is *greater* than 100. By contrast, if D2 has *less* culpability than D1, then it *would* be excessive to impose the same liability on D2 as D1. This is because D1's liability is assumed to be the maximum permitted given D1's level of culpability for C. We are assuming—given premise (4)—that any punishment above 10 years *would* be excessive compared to D1's culpability of 100. Ten years is right at the upper limit of what is permitted given a culpability level of 100. This suggests that a punishment of 10 years is indeed excessive compared to any level of culpability *lower* than 100. If 10 years is the maximum permitted for actors with a culpability of 100, then 10 years would seem excessive for those with a culpability below 100. Accordingly, if D2 had any less culpability than D1 (i.e. less than 100 units in our example), then this would likewise make imposing D1's same level of liability on D2 (i.e. 10 years) excessive compared to D2's lower level of culpability. From this line of reasoning, we get premise (5).

Although this argument is more promising, it still encounters problems. Most importantly, one might push back against the assumption in (4) that D1's liability lies at the upper limit of what is just, given D1's culpability for C. This might be a fair assumption in harsh criminal justice systems—which our system may seem to be approaching (not least because of Attorney General Jeff Sessions' memo encouraging prosecutors to always charge the most serious provable offenses).<sup>54</sup> But this is not a necessary feature of all criminal justice systems. Some might be more lenient in the offenses they tend to charge defendants with. Moreover, some judges might also impose sentences that fall below the range that would, strictly speaking, be called for on desert grounds. Accordingly, there is room to push back on premise (4). In that case, the conclusion would not hold. If D1's liability is *less* than the maximum that would be allowed without being excessive, it becomes possible to lower D2's culpability without necessarily making it excessive to subject D2 to the *same* amount of criminal liability as D1 receives. This means

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<sup>54</sup> Memorandum from Att'y Gen. Jefferson B. Sessions on Dep't Charging & Sentencing Policy for All Fed. Prosecutors (May 10, 2017), <http://i2.cdn.turner.com/cnn/2017/images/05/12/ag.memo.on.department.charging.and.sentencing.policy.pdf> [<https://perma.cc/2NCK-JYFL>].



that there would no longer be any need to *require* D2 to be at least as culpable as D1 in order to avoid injustice to D2.

This problem may not totally doom the argument, however. It could still establish a restricted version of the conclusion: namely, that our parity principle, PCL, holds in the limited circumstances in which premise (4) is true. In other words, despite the above problem, the argument might still establish that to avoid injustice when punishing D1 and D2 the same, D2's culpability must be as great as D1's at least when D1 is subject to the maximum liability possible without being excessive. Nonetheless, this would significantly limit the interest of the conclusion.

A second difficulty, which may not go to the core of the argument, is nonetheless worth exploring, as it further clarifies the derivative nature of complicity. Specifically, premise (2) does not always hold. It is not true across the board that D1's liability places a cap on the liability that can be imposed on D2 as an accomplice; sometimes D2 faces more liability than D1.<sup>55</sup> Kadish offers a nice illustration:

Iago deliberately influenced Othello to kill Desdemona by making him erroneously believe that Desdemona had been unfaithful and by otherwise inflaming his jealousy and vengefulness. Othello would be guilty of a culpable homicide, but perhaps only of manslaughter in view of the circumstances. Iago, however, acted with greater culpability, since he coldbloodedly engineered the killing. Could he be held for the crime of murder?<sup>56</sup>

In light of Iago's significantly greater culpability, the answer to this question seems to be "yes, Iago should be convicted of murder." One might try to explain this conclusion away using the innocent agency doctrine. This alternative theory is distinct from complicity and imposes direct (not derivative) liability when one causes an innocent agent to do the *actus reus*—roughly as one might use an inanimate tool to commit the crime oneself.<sup>57</sup> However, this explanation is not available in the Iago case because the principal is *not* an innocent agent.<sup>58</sup> Rather,

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<sup>55</sup> See Kadish, *supra* note 42, at 340 (arguing "there are situations in which a secondary actor's liability surely should exceed that of the primary actor," such as when "the instigator with cool deliberation provokes another person to kill in hot blood").

<sup>56</sup> *Id.* at 385.

<sup>57</sup> See *id.* at 369–70 (explaining the innocent agency doctrine); see also Weiss, *supra* note 10, at 1353–54 (noting that "[b]ecause the aiding and abetting doctrine requires the existence of a criminally acting principal, the common law developed a separate doctrine to apply when the principal is an innocent intermediary, 'as in the case of infants, or idiots, employed to administer poison,' or any other case where the principal, even if an adult of sound mind, is an innocent dupe. In such a case, rather than being guilty of 'aiding and abetting' the innocent principal, the defendant is guilty of 'causing' the innocent principal to commit the offense.") (citations omitted).

<sup>58</sup> See Kadish, *supra* note 42, at 387 (arguing that the innocent agency theory is not available to hold Iago guilty of murder in this case because "the conceptual difficulty remains that Othello

Othello is an independent wrongdoer in virtue of his committing the lesser crime of manslaughter, which severs the chain of liability tracing back to Iago.<sup>59</sup> Thus, complicity remains the chief strategy for convicting Iago of murder.

A number of American courts confronting such cases endorse the view that D2 can be convicted on complicity grounds of an offense that is more serious than the one that D1 committed.<sup>60</sup> Likewise, some U.K. courts (and the U.K. Law Commission<sup>61</sup>) also endorse this view.<sup>62</sup>

acted culpably and responsibly in intentionally killing his wife. There is, to be sure, some rhetorical force in speaking of him as Iago's tool, maneuvered into doing what Iago wanted him to do. But since Othello committed an action for which he himself is responsible, it is straining to say in the same breath that, on the theory of innocent agency, his act was (also) the act of Iago.”)

<sup>59</sup> See, e.g., Glanville Williams, *Finis for Novus Actus?*, 48 CAMBRIDGE L.J. 391, 392 (1989) (observing that “an intervening act is thought to break the moral connection that would otherwise have been perceived between the defendant’s acts and the forbidden consequence”); SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 529 (8th ed. 2007) (noting that a later criminal act “displaces the relevance of prior conduct by others and provides a new foundation for causal responsibility”); *People v. Bailey*, 549 N.W.2d 325, 334 (Mich. 1996) (noting that “[w]here an independent act of a third party intervenes between the act of a criminal defendant and the harm to a victim, that act may,” under some circumstances, “only serve to cut off the defendant’s criminal liability . . .”).

<sup>60</sup> See, e.g., *People v. Jones*, 518 P.2d 819, 821–22 (Colo. 1974) (holding that a defendant charged with being an accessory could be found guilty of murder, even though the person who actually committed the murder had been found not guilty by reason of insanity). This same rule is also clear in jurisdictions that employ the natural and probable consequences doctrine. See *supra* notes 21–22 and accompanying text. A good example is *Rainey v. State*, 572 N.E.2d 517, 518–19 (Ind. Ct. App. 1991). In this case, the court affirmed the accomplice’s conviction for murder despite her argument that “the murder convictions are inconsistent with her companion’s convictions of voluntary manslaughter.” *Id.* at 518. The court held that although the accomplice plausibly did not “kill[] the victims” herself, “an accomplice is criminally responsible for the acts of her confederate which are done in the probable and natural consequence of the common plan.” *Id.* The court reasoned that “if acquittal of a principal does not preclude conviction of an accessory for the crime charged, conviction of the principal for a lesser offense will not have such an effect” and that “[c]onsistency is no longer required.” *Id.* at 519.

Another example is arguably *Standefer v. United States*, in which the Supreme Court held that the federal complicity statute “evinced a clear intent to permit the conviction of accessories to federal criminal offenses despite the prior acquittal of the actual perpetrator of the offense.” 447 U.S. 10, 19 (1980). See *id.* at 20 (noting that since “all participants in conduct violating a federal criminal statute are ‘principals,’” “they are punishable for their criminal conduct; the fate of other participants is irrelevant.”). Thus, the Court affirmed the accomplice’s conviction of aiding and abetting five counts of bribery in violation of 26 U.S.C. § 7214(a)(2), even though the principal had been acquitted of three of these—a clear instance of the accomplice facing greater liability than the principal. See *id.* at 12–13. Perhaps this would not be so troubling if the accomplice and principal were tried by different courts. After all, different juries could rationally reach different views on the same question. Nonetheless, if this procedural explanation were not available—as would be the case if both the accomplice and principal were tried by the same jury—then this would amount to the same result as in Kadish’s Iago hypothetical.

<sup>61</sup> The 2007 Law Commission Report on Participating in Crime also notes that there is some support for this in existing law. See paras. 2.18–.19 (discussing *Howe* and related examples).

<sup>62</sup> In *R v. Howe* [1987] 1 AC 417 (HL) [458] (appeal taken from Eng.), the House of Lords approvingly quoted the following example, where imposing greater liability on the accomplice than

One might object that surely *this* view is incompatible with the derivative nature of accomplice liability. Nonetheless, we can answer this objection by being clearer about what such liability is supposed to be derivative *of*. The best explanation is again suggested by some comments of Kadish's.<sup>63</sup> The problem is particularly pressing when "the primary actor acted under the duress of a third party, was legally irresponsible, or, because of a reasonable mistake, believed he was doing something harmless," or otherwise had some defense that is personal to him.<sup>64</sup> However, as Kadish notes, "[t]he secondary actor's culpability is surely unaffected by the fact that the principal has an excuse," and so "some doctrinal adaptation is needed to avoid the absurdity of acquitting the [accomplice] in these cases."<sup>65</sup> The move, as Kadish explains it, is this:

[W]here a person is exculpated because he is excused, the wrong has been done, although the defendant is, for reasons that apply only to him, not guilty. It is to the commission of this wrong that the secondary party is an accomplice, rather than to the actus reus (not every actus reus entails a wrong); his liability derives from the wrong done by the primary party.<sup>66</sup>

The idea is that accomplice liability is not derivative of the principal's *liability* but rather what we might call the *prima facie wrongful conduct of the principal*, which the accomplice—in light of his aid thereto—is also called upon to answer for.<sup>67</sup>

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the principal seems warranted:

[D2] hands a gun to [D1] informing him that it is loaded with blank ammunition only and telling him to go and scare [the victim] by discharging it. The ammunition is in fact live, as [D2] knows, and [the victim] is killed. [D1] is convicted only of manslaughter, as he might be on those facts. It would seem absurd that [D2] should thereby escape conviction for murder.

Lord Mackay stated that he "would affirm [the] view that where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not, in my opinion in any way, result in a compulsory reduction for the other participant." *Id.*

<sup>63</sup> See Kadish, *supra* note 42, at 380–81. A different explanation might be to say that when the accomplice is convicted of murder, while the principal is convicted only of manslaughter, one might again argue that while the *fact* of the accomplice's liability still derives from the principal's liability, the *amount* thereof need not exactly match the principal's degree of liability. Perhaps the liability that accrues to the accomplice is *magnified* because of his much more culpable mens rea.

<sup>64</sup> *Id.* at 341.

<sup>65</sup> *Id.* at 341–42.

<sup>66</sup> *Id.* at 380. Cf. Peter Alldridge, *The Doctrine of Innocent Agency*, 2 CRIM. L. FORUM 45, 47 (1990) ("Accessory liability is derivative not from a *convictable crime* but from a *wrongful act*.").

<sup>67</sup> Note that this formulation arguably goes further than Kadish's and Alldridge's. See *supra* note 66 and accompanying text. Their formulation might suggest that accomplice liability derives from an *all things considered* wrong; my proposal is to construe it as deriving from *prima facie* wrongful conduct that demands an answer. This has benefits in dealing with the hard cases discussed below. See *infra* notes 71–72.

Thus, even if the principal ends up being able to provide an adequate answer—perhaps by appealing to an excuse (like incapacity) or an immunity, which is purely personal to the principal—these answers may not be available to the accomplice.<sup>68</sup> In that case, the accomplice remains on the hook for the prima facie wrongful conduct unless he, too, can give an adequate answer.

Thus, in the Othello case, a killing has occurred, which is a general type of action for which someone must answer. Both Othello and Iago are called to answer for it because of their respective bits of behavior, which had a sufficient nexus to the killing. However, Othello has a partial excuse that is personal to him, which reduces his liability. But this excuse is not available to Iago, who deliberately engineered the outcome.<sup>69</sup> Lacking any other defense, he remains liable for the killing. Iago can thus be convicted of a more serious crime on complicity grounds even while accomplice liability remains derivative in nature.<sup>70</sup> (One might wonder if this explanation works when the principal answers by claiming a *justification*,<sup>71</sup> but I think the theory can, perhaps with some extension, cover such cases as well.<sup>72</sup>)

The upshot is that premise (2) in the above argument fails. The basic problem, as we have now seen in some detail, is that the accomplice's liability is

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<sup>68</sup> See LAFAVE, *supra* note 10, § 13.3, at 356 (“While guilt of the principal is ordinarily a prerequisite to accomplice liability, it may be otherwise when the principal has a defense which is personal to him . . .”); see generally *id.* at 364 (discussing “whether the various defenses available to the principal in the first degree are likewise available to the accomplice in the sense that the accomplice may establish the defense and thus show that no crime was committed by the principal.”).

<sup>69</sup> See *id.* at 364 (noting that “an accomplice may not benefit from a principal’s heat of passion so as to downgrade his own liability to voluntary manslaughter”).

<sup>70</sup> This also allows us to preserve the view that, where no principal engages in any even prima facie wrongful conduct, no accomplice liability can be imposed, since there is nothing for which the accomplice remains answerable.

<sup>71</sup> For example, as Kadish explains: “Consider a case where a conductor signals to the bus driver that it is safe to back up when it is not, and someone is killed as a consequence. If the conductor was negligent in failing to see the danger, but the driver acted reasonably in relying on the conductor, could the conductor be found liable as an accomplice for a crime of causing a death through negligent driving? It has been argued that he could since he encouraged the wrongful but excused act of the driver. But it is hard to see how the driver can be said to have done a wrongful act when he simply backed up in reasonable reliance on the conductor, his driving being perfectly prudent and proper.” Kadish, *supra* note 42, at 381. Thus, there is no wrong for the accomplice—the conductor—to answer for.

<sup>72</sup> Note that this explanation can even suffice to explain Kadish’s trickiest case of the bus driver. See *supra* note 71. The bus driver, after all, had a justification: his reliance on the lookout’s advice was reasonable under the circumstances, and so he faces no liability for backing up and injuring the other pedestrians. No wrong remains for him to be held liable for, as he has fully answered for the prima facie wrongful conduct at issue. By contrast, the lookout who has no such reasonableness justification—or indeed any excuse, immunity, denial of mens rea, or other sort of proper response available—should remain liable for the prima facie wrongful conduct of the driver, something that he remains called on to answer for. In this way, the lookout remains liable for the prima facie wrongful conduct of the bus driver, and he should face an amount of criminal liability that is proportionate to his culpability for acting as he did.

not necessarily tethered—either at the top end or the bottom—to that of the principal. The liability D1 happens to face need not always serve as a cap on the liability that D2 properly faces, and we saw the converse earlier: D2 sometimes faces less liability than D1. None of this prevents us from seeing accomplice liability as derivative of the underlying at least prima facie wrongful conduct performed by the principal. However, it does prevent us from using the derivative nature of complicity to construct an argument for a parity principle like PCL. Given that the accomplice’s liability can legitimately diverge from that of the principal for the underlying conduct, we must conclude that the derivative nature of complicity is not a promising basis on which to mount such an argument. The derivative nature of complicity does not guarantee parity of *liability* as between D2 and D1, and so there is no reason on this basis for demanding parity of *culpability* between them. Although the liability D2 faces as an accomplice might *often* track D1’s liability for the underlying wrongful conduct—particularly where D1 and D2 are on a par with respect to available defenses—it is not necessarily the case that D2’s liability tracks the amount thereof that D1 happens to face. Thus, we must look for alternative grounds for the parity of culpability principle.

#### B. *Punishing the Accomplice as a Principal*

In the previous section, we saw that the accomplice and principal are not always guaranteed to face precisely the same liability (i.e. conviction and subsequent sentencing range). Thus, in seeking a basis for the parity of culpability principle, perhaps we should focus on those cases where D2 and D1 are to be convicted of the same crime—not the outlier cases where the accomplice and principal end up meriting conviction for different crimes (e.g. different grades of the same type of misconduct). When both parties are otherwise legitimately convicted of the same crime (because they are on a par with respect to available defenses), perhaps parity of culpability then serves as a necessary condition for subjecting them to the same level of criminal liability?

The second type of argument for the parity principle must be formulated with this lesson in mind. Specifically, one might try to argue for the parity principle by starting from the axiom that the accomplice is punished *as a principal*.<sup>73</sup> This cornerstone of complicity doctrine is encoded in the complicity statutes themselves.<sup>74</sup> At first glance, this might seem to suggest that being an accomplice entails receiving the same punishment as the principal in the case at hand—which, in turn, might seem to require being as culpable as the principal, too (on the assumption that the principal’s punishment is just). But we saw in the last section

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<sup>73</sup> See LAFAYE, *supra* note 10, § 13.1, at 336 (noting that “a person guilty by accountability [for the acts of another] is guilty of the substantive crime itself and punishable accordingly”) (citation omitted); see also MODEL PENAL CODE §§ 2.06(1)–(2) (AM. LAW INST. 2016).

<sup>74</sup> See 18 U.S.C. § 2(a) (1998); see also Accessories & Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.).

that it is not always appropriate to convict the accomplice of the same crime as the principal, thereby subjecting the pair to the very same punishment. So what could it then mean to say that the accomplice is to be punished as a principal—if not that the accomplice is to be punished the same as *the* principal in the case at hand? The most natural remaining interpretation is to claim that if D2 is to be convicted as an accomplice to a particular crime C (regardless of whether D1 is also appropriately convicted of C as opposed to some other greater or lesser grade of the offense), then D2 is to be punished as *a principal who is guilty of C*, where that principal may or may not be D1.

If this is how to understand the claim that accomplices are to be punished as principals, then we might be able to derive an argument for some version of the parity principle. Of course, some have argued that we should abandon the idea that accomplices are to be punished as principals; Dressler, for instance, suggests that accomplices who provide only trivial assistance to a crime should face less liability than the principals who do this crime directly.<sup>75</sup> But assuming we are stuck with this feature of complicity doctrine, one might think it requires the parity principle.<sup>76</sup> The argument, more precisely, is this:

**Punished as Principals Argument (v.1):**

- (1) D2 can fairly be deemed an accomplice to crime C, and therefore punished as a principal who committed C, only if D2 is as culpable as a principal who committed crime C.
- (2) D2 is as culpable as a principal who committed C only if D2 is as culpable as *the* principal who committed C in the case at hand, *viz.* D1 (provided it is a case where D1 is in fact guilty of C).
- (3) Therefore, D2 can fairly be deemed an accomplice, and therefore punished as a principal who committed C, only if D2 is as culpable as *the* principal who committed C in the case at hand, *viz.* D1 (provided it is a case where D1 is in fact guilty of C).

Premise (1) stems from the basic idea that someone who counts as an accomplice to a given crime is to be punished as *a principal* who committed that crime. Thus, under the desert constraint, which prohibits punishments that are excessive in relation to culpability, if D2 is an accomplice to C, and therefore punished as a principal who committed C, then D2 must be as *culpable* as a principal who committed C. Hence premise (1).

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<sup>75</sup> See Dressler, *supra* note 1, at 446–48; see also Dressler, *supra* note 20, at 137–40; Sarch, *supra* note 9, at 135 (defending a similar idea on mens rea grounds).

<sup>76</sup> Again, one might think there is something odd about deriving a limitation on accomplice liability from the internal features of the doctrine rather than considerations that are external to it. However, as explained earlier, see *supra* note 43, internal limitations on certain forms of liability, which derive from recognizing the outside reaches of their animating principles, are not unprecedented. So, I think this worry need not doom the argument from the get-go.

The core of the argument, then, is premise (2). Given that previous sections have already shown how both the liability and culpability of accomplices and principals might differ, it might seem odd to claim that, to be as culpable as *a* principal who is guilty of crime C, the accomplice must be as culpable as *the* principal who committed C in the case at hand. Nonetheless, premise (2) is not without a rationale. In particular, it is going to be difficult to determine whether the accomplice is as culpable as *any other* person who would justly be convicted and punished for committing C. After all, determining whether this condition is met would require considering all (or at least the most common) ways of committing C, determining which is the least culpable, and then asking if the actual accomplice in question, D2, is as culpable as a person who commits C in this way. That requires a lot of tricky reasoning about hypotheticals. Thus, if the case is in fact one where the principal in question, D1, actually did commit C in this instance, one might want to focus specifically on D1 and ask the more concrete and tractable question of whether D2 is as culpable as *this person*. Thus, the actual principal in the case at hand could serve as a useful proxy for evaluating whether the accomplice is as culpable as the more generic “a principal” referred to in premise (1).

While there thus may be a rationale for premise (2), this does not get around the fact that premise (2), strictly speaking, is false. The problem has already been alluded to: D2 will sometimes be as culpable as *a principal* who commits C, even though she is not as culpable as D1, who committed C in the particular case at hand. For instance, suppose that D1 commits a gruesome murder, torturing the victim for days before finally ending his life. Suppose D2 is not aware of the heinous methods through which D1 will commit the murder, but D2 nonetheless wants D1 to kill the victim, who D2 hates for her own reasons. Therefore, D2 tells D1 where to find the victim, which makes it far easier for D1 to carry out the killing. In such a case, D2 plausibly is substantially less culpable for her conduct than D1 is for the ghastly murder—particularly because D2 does not foresee the horrific methods through which D1 intends to bring about the victim’s death. Nonetheless, because D2 desires the killing and intends to aid its commission, it is quite plausible that D2 is as culpable for what she does as *some person* who is guilty of murder. Consider Jack, for example, who intentionally kills in response to genuine but slightly unreasonable fears about his safety, where this does not quite amount to a defense because the peril he fears is not, strictly speaking, imminent but would occur sometime in the future.<sup>77</sup> Supposing that D2 in the heinous murder case is indeed as culpable as Jack, who is guilty of murder, we then have a counterexample to premise (2). It seems possible for D2, the

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<sup>77</sup> See, e.g., *Menendez v. Terhune*, 422 F.3d 1012, 1028 (9th Cir. 2005) (noting that “California recognizes imperfect self-defense in homicide cases where the killing resulted from an ‘actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury,’” but “[t]he fear, no matter how great, cannot be of prospective danger or even one that is in the near future.”) (citations omitted).

accomplice, to be as culpable as *a principal* who commits the crime—like Jack—without being as culpable as the specific principal, D1, who committed the crime in this case.

In response to this problem, we might try to modify the parity principle and the argument in support of it. Rather than focusing on parity of culpability as between the accomplice and the specific principal in the same case, one might think the principle should say that the accomplice, to be justly punished, must be as culpable as *a principal*. The thought is that the accomplice only needs to be as culpable as *some other person* who would be justly convicted as a principal who is guilty of the crime in question. Importantly, being as culpable as *any* such person would do the trick. As a result, the only threshold that this version of the principle would insist on is that the accomplice, to be properly punished for C, must rise to the culpability level of *the least culpable person* who would be properly convicted and punished for C. This amounts to abandoning PCL in favor of the following principle:

**Generic Counterpart Parity Principle (GCPP):** Where D2 aids D1's commission of a crime, C, and D2 is otherwise a plausible candidate for being deemed an accomplice, then D2 should be convicted of C and subject to the associated sentencing options, just like D1, *only if* D2's culpability for her actions in aid of D1 is equal to or greater than the level of culpability of *some other person who would be justly convicted of C directly and subject to these sentencing options*—i.e. in effect, the least culpable person who could be justly convicted of C and subject to the associated sentencing options without these being excessive.

One might think GCPP is easier to defend because it places a weaker constraint on accomplice liability than PCL. If we trade PCL for GCPP, we might rehabilitate the present argument. Applied to GCPP, the argument becomes this:

**Punished as Principals Argument (v.2):**

- (1) D2 can fairly be deemed an accomplice to crime C, and therefore punished as a principal who committed C, *only if* D2 is as culpable as a principal who committed C.
- (2\*) D2 is as culpable as a principal who committed C only if D2's conduct is as culpable as the least culpable principal who commits C.<sup>78</sup>
- (3\*) Therefore, D2 can be an accomplice to crime C, and therefore punished as a principal who committed C, only if D2's conduct is as culpable as the least culpable principal who commits C.

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<sup>78</sup> Or perhaps, we might prefer to say "only if D2's culpability at least reaches the average culpability level of principals who commit C."



While this argument is perhaps *sound*, it remains unsatisfying. The principle it supports—GCPP—faces at least three serious problems.

First, GCPP is exceedingly difficult to apply, since it requires difficult reasoning about hypothetical actors. Determining whether this generic parity condition is satisfied requires considering all (or at least the most common) ways of committing C, determining which is the least culpable, and then asking if the actual accomplice in question, D2, is as culpable as a person who commits C in this way. Given the hypothetical and open-ended nature of this inquiry, this constraint would be quite hard to apply in evaluating particular doctrinal rules (e.g. about the mens rea required for complicity) or pushing specific reform proposals (e.g. to eliminate the natural and probable consequences doctrine).

Second, and relatedly, GCPP faces incommensurability problems. Suppose D2 intends to aid D1 in committing murder by making it look like an accident during a boxing match; in fact, the boxing gloves are coated with a deadly toxin, which D2 provided. How might we meaningfully compare D2's culpability here with, say, a doctor who intentionally withdraws the patient's life support in order to end the patient's extreme suffering? One might worry that there are deep conceptual difficulties in comparing these two act types. Perhaps this worry can be answered in theory, but it further reduces the practical utility of GCPP.

Third, even if one is not troubled by the open-ended nature of GCPP, one might still worry that it is too weak to drive meaningful reforms. GCPP is quite permissive. To be guilty of murder as an accomplice, for example, this principle requires only that the putative accomplice is as culpable as the least culpable person who is guilty of that crime. But this need not be a particularly high threshold. Perhaps all it requires for being an accomplice to murder, for example, is being as culpable as the kindhearted doctor who, after much careful consideration, decides to violate the law by committing a mercy killing, although she does not meet the requirements of any recognized justification. Such a person seems to have quite a low degree of culpability. If being as culpable as such a person is all it takes to be fairly convicted as an accomplice to murder, the bar imposed by GCPP for being an accomplice to that crime is not a very high one. Thus, GCPP does not impose much of a limit on accomplice liability at all. Accordingly, GCPP would not be particularly useful for reform-minded scholars or jurists who want to curb some of the intuitive excesses of complicity doctrine. It is such a permissive principle that it imposes little meaningful constraint on accomplice liability of the kind that could effectively be used to push for significant reforms to complicity doctrine.

The upshot is that this line of argument—from the fact that accomplices are punished as principals—does not support the kind of parity of culpability constraint that we are looking for. PCL admittedly does not suffer from GCPP's flaws, since it both is more concrete in its comparison of two actual actors—D1 and D2—and is not so lax as to be unable to drive meaningful reform. But PCL derives no support from the fact that accomplices are punished as principals. So PCL still remains unsupported.

### III. CONCLUSION: THE REAL BASIS FOR THE CALL TO REFORM COMPLICITY LAW

I have considered the two most natural sources of motivation for PCL's requirement that the accomplice must be as culpable as the specific principal whose conduct she aids in the case at hand in order to be subject to the same criminal liability as that principal. Neither one proved a successful basis for establishing a satisfactory version of the parity principle. The considerations from the last section can be recast as an affirmative objection to PCL as an independent constraint on accomplice liability. Let me squarely lay out the difficulty before arguing that it cannot be easily avoided simply by tweaking the parity principle.

The problem with PCL is that it sometimes seems fair to subject the accomplice, D2, to the same criminal liability as the principal in the instant case, D1, even though D2 is less culpable for her conduct than D1 is for his. Schematically, the counterexample has the following structure. Suppose D1 and D2 are both subject to a certain amount of criminal liability—say, 40 years of imprisonment. Suppose the level of culpability required to make this punishment deserved is 400 units. Suppose finally that D1's culpability level actually is 600, while D2 only has 400 units of culpability. Here, subjecting D2 to 40 years of imprisonment would be just, even though D2 is less culpable than D1. If there are such cases, PCL would be false.

It is plausible that there are such cases. As an example, recall the case where D1 commits a gruesome murder, but D2—despite providing substantial aid to D1 while knowing that D1 will kill the victim—nonetheless has no awareness of the full extent of the crime or the monstrous methods it will involve. The heinous manner in which D1 carries out the killing plausibly aggravates D1's culpability but not D2's—particularly since D2 is not aware that these aggravating factors will be present. Accordingly, it is plausible that D2 is less culpable for her conduct than D1 happens to be for the crime he carried out with D2's aid.

For this case to be a counterexample to PCL, it must also be the case that, although D2 is not as culpable as D1, there still would be no injustice to D2 in convicting her of murder in this scenario and subjecting her to the same range of sentencing options as D1. The reason to think this would indeed be just to D2 is that it is plausible that D2's culpability for her own conduct in aid of D1 rises to a level that is at least as great as many defendants who are properly labeled murderers and punished accordingly. Here is an argument to secure the point. Compare D2 to another actor, D3, who is also directly guilty of murder. D3 kills by pushing a boulder down a hill in a crowded park despite knowing that it is practically certain to cause death to one person. (Suppose all else is likewise equal as between D2 and D3—they lack any justification or excuse, and they reasonably believe their acts impose the same high likelihood of death.) D3's act of pushing the boulder makes a substantial causal contribution to a process that results in death. D3 fully knows this, and so she should have had sufficient motivation *not* to push the boulder. Because she failed to be motivated against pushing the

boulder but went ahead to do so, her conduct manifests insufficient regard for the value of human life. The very same can be said of D2, whose actions also made a substantial causal contribution to a process that she knew would result in the death of a person. D2's conduct thus also manifests insufficient regard for the value of human life. The only difference between D2 and D3 concerns the nature of the deadly process that their respective actions causally contributed to. For D2 this process involved a human actor, while for D3 it involved an inanimate object. It is unclear how or why this difference could have any impact on the degree of insufficient regard for human life that D2 and D3 each manifested in their respective conduct. Accordingly, given that all else is equal between D2 and D3, it is plausible to see their culpability as the same. No one would doubt that it is just to convict D3 of murder and punish her accordingly. Thus, there is little reason to doubt that the same is true for D2.<sup>79</sup>

If this is right, then there are good reasons to think that PCL faces counterexamples. In the above hypothetical, it seems proper and just to punish D2 as a murderer, just like D1, and subject her to the same range of sentences as D1, even though D2 happens to be less culpable than D1.

Now, one might try to revise PCL to sidestep this problem. The natural response would be to reformulate the parity principle as the claim that *if D1 is punished in a way that is neither excessive nor too lenient* compared to D1's culpability for his conduct, C, *then* D2, as an accomplice to C, can justly be subject to the same liability as D1 *only if* D2 is as culpable as D1. How would this avoid the sort of counterexample just discussed? The reason is that in punishing D1's gruesome killing the same as the generic murder that D2 is punished for, D1 would be punished *too leniently*. Accordingly, the revised parity principle would not apply to this case, and so this would be no counterexample to it.

Nonetheless, this revised formulation of the parity principle is also deficient. The trouble is that it just builds the desert constraint into the applicability conditions of the parity principle. In other words, this formulation states the conditions that D1's culpability must meet for the revised principle to apply at all, such that it necessarily tracks the conditions of just punishment that the desert constraint otherwise employs. Thus, this modification does not amount to a version of the parity principle that provides any kind of *independent* constraint on accomplice liability either. It simply mirrors the desert constraint in a trivial way. It would be like trying to defend the analogous parity constraint on CEO compensation by insisting on the following claim: "If A's payment is *neither excessive* given his merit *nor too low* given his merit, then it is possible for B to deserve the same payment as A for the same work only if B has the same level of merit as A does." This claim is trivially true. It is not an independent constraint

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<sup>79</sup> A different way of bolstering the claim that it is not unjust to convict D2 of murder and punish her accordingly would be to maintain that D2 surpasses whatever minimum threshold of culpability might be required in order to be properly convicted and sentenced as a murderer. However, I am not entirely sure how to make sense of such thresholds in the abstract.

on fair payment above and beyond the general desert principle that independently applies.

Accordingly, I see no way to defend an independent parity of culpability principle without making it trivial or question-begging.<sup>80</sup> As a result, we have to abandon it and simply rely on the independently motivated desert constraint, which directly requires that punishments not be excessive in relation to culpability.

This would not force us to sacrifice much of substance, I think. The desert constraint is already sufficient to capture whatever intuitive force one might have thought the parity principle carries. There is a powerful insight at work when scholars criticize complicity law, for instance, for punishing D2 the same as D1, even though D2 was only a trivial player in the scheme or perhaps did not fully intend D1's crime but merely expected it was likely to occur (like the gas station attendant who knows that the principal plans to drive off to rob a bank). I have been at pains to argue that it would be a mistake to couch this criticism in terms of the parity principle. But there is an insight at work here nonetheless.

What is this insight? The fundamental problem in such cases where complicity law seems too harsh, I submit, is not that D2 is subject to the *same* criminal liability as D1 despite D2 being less culpable than D1; rather, it is that these cases intuitively involve a direct violation of the desert constraint. That is, they are cases where D2's liability is clearly excessive compared to his own culpability. Convicting the gas station attendant of the robbery and subjecting her to the same liability that normally accompanies such a conviction simply seems disproportionately harsh given her own, intuitively low level of culpability. After all, she expects to only make a trivial causal contribution to the crime and has a *mens rea* that falls below full intention that the crime be committed. Thus, the real basis for objecting to cases like this, I submit, is not that punishing the gas station attendant in this way violates any independent parity of culpability constraint. After all, the specific principal in question here—i.e. the actual bank robber—might act in a far more culpable manner than the putative accomplice (or indeed a more culpable manner than the average bank robber). Instead, the problem is that punishing the gas station attendant to the same extent as someone who himself

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<sup>80</sup> Another way one might amend the parity principle to help it avoid the above counterexample is to appeal to the relevant culpability range. (Thanks to Ambrose Lee for this suggestion.) Perhaps the principle should say that imposing the same criminal liability on D1 and D2 for a given crime, C, is just only if D2's culpability is in the same *range* that D1's culpability for C is in, where the relevant range is defined as that which must be attained for it not to be unjust to subject one to criminal liability for C.

Nonetheless, this amendment also threatens to make the parity principle collapse into the desert principle. Why would it be important to insist that D2's culpability be in the same broad range as D1's in order to subject them to the same criminal liability for C? Because only people within the relevant range are justly subject to the degree of criminal liability that is fitting for those who commit C. Anyone below that range would be unjustly punished if convicted and subject to liability for C. However, this simply is an instance of the desert constraint, which states that one cannot be punished for C unless it is proportionate to one's culpability. Accordingly, this amendment does not save the parity principle as an independent constraint on accomplice liability either.

robs a bank is likely to strike most people as excessive given the gas station attendant's own low level of culpability.

Accordingly, if we are going to lodge fairness objections to complicity law in its current form, we would do better to formulate them directly in terms of the desert constraint. The punishments complicity law currently permits are often excessive compared to the culpability of the accomplice's own conduct. If "American accomplice law is a disgrace,"<sup>81</sup> *this* is the reason why—not because it violates any parity of culpability principle *per se*. I leave open whether it might be rhetorically effective to object in particular cases that the accomplice was punished the same as the principal, even though the former was noticeably less culpable than the latter. But this is not the underlying normative basis for the complaint. Rather, it is the plain old desert constraint that such complaints ultimately rest on. Clarifying the normative foundations of our objections to the harshness of complicity doctrine will, I hope, help us push these objections with greater analytical clarity and enhanced moral force.

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<sup>81</sup> Dressler, *supra* note 1, at 428.