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Against Accomplice Liability

Alex Kaiserman

And no bearer of burdens shall bear another's burden.
Qu'ran [35:18]

1. What is Accomplice Liability?

Most crimes in most legal systems can be regarded as consisting of two elements, the *actus reus* ("guilty act") and the *mens rea* ("guilty mind"). Murder in English law, for example, consists of an *actus reus* of unlawful killing and a *mens rea* of intention to kill or inflict grievous bodily harm. One *commits* a criminal offence if, but only if, one satisfies both elements of that offence.

Yet this is not quite the end of the story; for many legal systems also recognize different ways in which one can *participate* in the commission of a crime. One participates *as principal* in the commission of a crime by actually committing it; but one may also participate *as secondary party* in the commission of a crime by knowingly[1] aiding, abetting, counselling or procuring the principal.[2] And crucially, an agent's participation

[1] The *mens rea* requirement on accomplice liability is disputed; for different views on the state of play in England and the USA, see, respectively, A.P. Simester et al., *Simester and Sullivan's Criminal Law: Theory and Doctrine* (London: Bloomsbury, 2016), §7.4(iv); Sherif Girgis, "The Mens Rea of Accomplice Liability: Supporting Intentions," *Yale Law Journal* 123 (2013): 460–95. Since I will be arguing for the abandonment of accomplice liability, regardless of its *mens rea* requirement, I won't get into these controversies further.

[2] See, e.g., Accessories and Abettors Act (1861) §8: "Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence…shall be liable to be tried, indicted, and punished as a principal offender."

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as secondary party "is sufficient to make them…guilty of the crime committed by the principal, notwithstanding that they do not themselves satisfy the…elements of the crime."[3] By means of this mechanism, then, defendants can be convicted of crimes they did not commit.

To illustrate, consider the following case:

> **Gun Trader**: D is a gun trader. She knows that P is looking for a gun to kill V. D doesn't particularly want or intend for V to die, but she sells P the gun anyway. P intentionally kills V.

In this case, P is guilty of murder as principal. D is not guilty of murder as principal, however, because she doesn't satisfy either of the elements of that crime—she didn't kill V, nor did she intend to do so. But D would nevertheless be guilty of murder as secondary party, in virtue of the fact that she knowingly aided P in his commission of that crime.[4]

In this chapter, I will argue that accomplice liability in the criminal law should be abandoned. I start in section 2 by rehearsing three familiar challenges for accomplice liability, which I take to be serious enough to warrant a complete overhaul of the way we criminalize aiders and abettors. Sections 3–5 then take up the challenge of determining the precise sense in which D *wrongs* V by helping or encouraging P to harm him. I argue, first, that causation is a relation to which multiple events can contribute to different degrees; second, that to aid or abet the causing of a harm is to contribute to a causing of that harm; and third, that those who freely and culpably contribute to a causing of harm are *partially* responsible for that harm, to a degree that depends on the degree of contribution their actions made to the causing of it. Finally, in section 6, I argue that accomplice liability is a limited and flawed solution to a more fundamental underlying defect with the criminal law as it stands, namely that it includes no mechanism for the criminalization of partial responsibility for harms. To fix this defect, I argue for the introduction, for every crime whose *actus reus* is the causing of some harm, of a new

[3] A.P. Simester et al., *Simester and Sullivan's Criminal Law*, p. 213.

[4] "[I]f one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies…but he can still be an aider or abettor." National Coal Board v. Gamble [1959] 1 QB 11, 23.

crime whose *actus reus* is the making of a contribution to a causing of that harm, regardless of whether that contribution was made "through" the actions of another person.

As may be surmised from the arguments below, this chapter forms part of a larger project whose aim is to defend a form of *monism* about criminal participation, according to which there should be just one way to be guilty of a crime: by actually committing it. Nevertheless, I will not here be concerned with other extant modes of criminal participation, such as joint enterprise,[5] which allow for defendants to be convicted of crimes they didn't even help or encourage others to commit. I hope to address the conceptually quite different questions raised by these legal mechanisms in future work.

2. Three Problems for Accomplice Liability

Accomplice liability's origins in common law can be traced back to Anglo Saxon times.[6] Yet its conceptual foundations and ultimate justification remain mired in controversy. "Surveying complicity's hazy theoretical landscape" has been known to induce feelings of "hand-on-the-brow gloom"[7] in even the most intrepid of commentators. The law in this area has been described as "a disgrace,"[8] one which "reflects no coherent set of criminal law principles or policies."[9] In this section, I'll review what I take to be the three most serious problems with accomplice liability, before detailing my proposed alternative.

The first and most notorious problem with accomplice liability is its lack of sensitivity to different degrees of involvement in the commission

[5] If D and P embark on a joint criminal venture, during the course of which P commits some further crime, joint enterprise allows for D to be found guilty of that further crime if she foresaw a possibility that P would commit it, even if—crucially—she did not help or encourage P to commit it. In England the mechanism was allegedly introduced by the decision in *R v. Chan Wing-Siu* [1985] AC 168 and prevailed for over 30 years before it was effectively abolished by the Supreme Court in *R v. Jogee* [2016] UKSC 8.

[6] K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: Clarendon Press, 1991), p. 2.

[7] Ibid., p. 4.

[8] Joshua Dressler, "Reforming Complicity Law: Trivial Assistance as a Lesser Offense?," *Ohio State Journal of Criminal Law* 5 (2008): 427–48, at p. 428.

[9] State v. Burney, 82 P.3d 164, 169 (Or. Ct. App. 2003).

of a crime. If D knowingly assists or encourages P to commit a crime, D is guilty of that crime, however minor or trivial D's assistance or encouragement was.[10] Recent case law from different jurisdictions has confirmed that D is guilty of theft if she holds P's baby while he steals cash from a register;[11] of manufacturing bootleg liquor if she brings P a midday meal so that his work may continue uninterrupted;[12] of supplying class A drugs if she points to the location of a bag of heroin during a drug transaction;[13] of murder if, on hearing of P's plans to kill his wife, she utters the words "oh goody";[14] and of working without a permit if she attends a concert by a musician who has outstayed their visa.[15] Laypeople are often astonished to learn this.[16] A recent report on public attitudes towards homicide law in England found that, although most people favour tougher sentences for murder in general, nearly 80% of people believe that it is inappropriate to bring murder charges against those who help or encourage others to kill.[17]

Admittedly, the defendant's degree of involvement in the commission of a crime is usually taken into account at the sentencing stage. But this isn't always possible: a defendant found guilty of murder as secondary party in England, for example, will receive the statutory minimum sentence for murder of life in prison, even if the assistance rendered to the principal was relatively trivial.[18] In any case, justice in the criminal law

[10] "[C]omplicity law is binary: a person is or is not an accomplice. Legally speaking, there is no such thing as a 'major' or 'minor' accomplice." Joshua Dressler, "Reforming Complicity Law," p. 433.

[11] State v. Duran 526 P.2D 188 (N.M. Ct. App. 1974).

[12] Alexander v. State 102 So. 597, 598 (Ala. Ct. App. 1925).

[13] United States v. Ortega, 44 F.3d 505 (7th Cir. 1995).

[14] *Obiter* in R v. Giannetto [1997] 1. Cr. App. R. 1.

[15] Wilcox v. Jeffrey [1951] 1 All E.R. 464 (K.B.).

[16] One lawyer describes the "astonished reaction" he receives when he tells people "that aiding and abetting a felony is itself a felony, and may draw the same punishment." *Lawyer Tells Youths of Drug Deal Risks*, New York Times, Aug. 23, 1998, p. 19.

[17] Barry Mitchell and Julian V. Roberts, "Public Opinion and Sentencing for Murder: An Empirical Investigation of Public Knowledge and Attitudes in England and Wales," Report for the Nuffield Foundation (October 2010).

[18] The potential for injustice here has not escaped the attention of legislators. A recent UK parliamentary report on the law of secondary participation expressed concern that it was being used as a "dragnet…hoovering up young people from ethnic minority communities who have peripheral, minor or even in some cases non-existent involvement in serious criminal acts, along with the principal perpetrators of those acts, and imposing draconian penalties on them." Justice Committee, *Joint Enterprise: Follow Up* (HC 2014, 310), para 26. In response to mounting criticism, the Crown Prosecution Service has recently introduced guidelines

isn't simply a matter of proportionate sentencing; it's also a matter of *fair labelling*. We should ensure, as far as possible, that "offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking,"[19] because "what matters greatly to defendants, legal officials, and to the public is not only *whether* and *to what extent* persons are blamed and punished, but *for what* they are blamed and punished."[20] If we take this principle at all seriously, it's hard to justify a system that charges a person who commits a violent, unprovoked, premeditated killing and the person who looks after their dog while they do it with the same crime, regardless of how much judicial discretion we allow in sentencing decisions.

The second problem with secondary liability is that it makes the guilt of a secondary party *parasitic* on the guilt of the principal. Consider the following case:

> **Unintentional Killer**: D hands P a gun, assuring him that it is filled with blanks. In fact it's filled with live ammunition, and D knows this. On D's encouragement, P fires the gun at V, intending to merely frighten her. V dies immediately.

P does not commit murder in this case, because he had no intention to hurt V. It follows that D cannot be found guilty of murder as secondary party, for the simple reason that no murder has been committed.[21,22]

recommending that when "D's role as an accomplice is minor or peripheral," and "the offence attracts a mandatory or automatic or minimum sentence [which] may be considered disproportionate to the culpability of D," prosecutors should "consider whether a less serious charge…is more appropriate." The Code for Crown Prosecutors, "Secondary Liability: Charging Decisions on Principals and Accessories" (Issued 6 July 2017). But prosecutors are exactly the wrong people to be exercising this kind of discretion. Considerations of public interest and resource allocation aside, something is wrong with the law when prosecutors are being advised to charge defendants with lesser crimes than those of which they are provably guilty.

[19] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law (7th ed.)* (Oxford: Oxford University Press, 2013), p. 77.

[20] Douglas Husak, "Abetting a Crime," *Law and Philosophy* 33 (2014): 41–73, at p. 60.

[21] "It is hornbook law that a defendant charged with aiding and abetting the commission of a crime by another cannot be convicted in the absence of proof that the crime was actually committed." United States v. Ruffin 613 F.2d 408, 412.

[22] Some authors have suggested that the derivative nature of secondary liability precludes a finding of liability against D when P has a *defense*; see, e.g., Sanford H. Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine," *California Law Review* 73 (1985):

But it seems absurd to find D guilty of murder in **Gun Trader**, where she merely provides assistance to P, and not in **Unintentional Killer**, where she intentionally misleads P into killing someone. Intuitively, D is *more* blameworthy than P in **Unintentional Killer**; but accomplice liability is structurally incapable of reflecting this fact, because it's conceptually necessary that "an accessory cannot be guilty of a higher crime than his principal."[23,24]

One dramatic illustration of this point is the well-known case of *R v. Cogan and Leak*.[25] In this case, D encouraged P to have sexual intercourse with D's wife. Although D's wife had not consented to this, D assured P that she had. D and P were both initially found guilty of rape, P as principal and D as secondary party. But P's conviction was later quashed on appeal, on the grounds that since he reasonably believed that D's wife had consented, he did not satisfy the *mens rea* of rape. D's conviction, however, was upheld. In defence of this decision, the court argued that "[t]he fact that [P] was innocent of rape…does not affect the position that [D's wife] was raped…no one outside a court of law would say that she had not been."[26] This reasoning simply cannot be

323–410, at p. 328. I think this is a mistake; it misconstrues the legal (as well as the moral) function of excuses. If D helps P to intentionally kill V, but P subsequently succeeds in proving he is criminally insane, P has merely shown that he cannot be *convicted* of a criminal offence, *not* that he never committed it in the first place—P satisfies both of the elements of murder, after all, and that's just what it *is* to commit murder. Thus D can be found guilty of murder as secondary party in such a case, on the grounds that she knowingly assisted P in his commission of that crime, even though P cannot be convicted of the crime he committed. We can't say the same about **Unintentional Killer**, however, since in this case P doesn't even satisfy the *mens rea* element of murder, and so there simply is no commission of murder for which P can be excused or D found secondarily liable.

[23] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–9), bk. 4, ch. 3, sec 2, subsec. 1.

[24] The law effectively gets around this problem by means of an ingenious doctrine known as the 'innocent agent rule'. The idea is that we can regard D in cases like **Unintentional Killer** where the principal is 'innocent' as having killed V *herself*, and P as merely the 'tool' or 'instrument' by means of which the killing was achieved. Thus D *can* be found guilty of murder in **Unintentional Killer**, albeit as principal, not as secondary party. But first, it's not at all clear that P is really 'innocent' in **Unintentional Killer**—after all, he intended to cause V some discomfort, even if he didn't intend to kill him—and second, there are so-called 'non-proxyable' crimes to which the innocent agent rule cannot coherently be applied, because it is conceptually impossible to perform their *actus rei* 'through' the actions of another person. If D knowingly encourages P, an amnesiac who has forgotten that he is already married, to get married a second time, D quite clearly does not herself commit the crime of bigamy, despite P's innocence.

[25] 1 Q.B. 217 (1976). [26] Ibid., at p. 222.

right, however. The fact that P reasonably believed that D's wife had consented straightforwardly *does* affect the position that she was raped, insofar as it implies that P does not satisfy the elements of that crime. Any attempt to find D guilty of rape as secondary party therefore amounts to an attempt to find him guilty of a crime that *demonstrably was not committed*. The suggestion that most non-lawyers would think otherwise is clearly beside the point, as their Lordships must have known.

We've seen that accomplice liability is in one sense too permissive—it allows for disproportionate convictions against defendants who make minor contributions to serious criminal acts—and in a different sense too restrictive—it *doesn't* allow for serious convictions against defendants who culpably help or encourage "innocent" agents to cause serious harm. But even if the law could be tweaked to deal with these issues, there is, I think, a more fundamental problem with accomplice liability. Regardless of the details of the case, it is, quite simply, morally wrong to convict someone of a crime they did not commit. Paradigmatically, we praise or blame moral agents for what *they*, and they alone, have done, and not for what others to which they are somehow related have done;[27] the criminal law should reflect this foundational aspect of commonsense morality. That's not to say that those who culpably assist or encourage criminal wrongdoers haven't themselves done something worthy of reproach or state punishment; but any just criminal system should treat every instance of wrongdoing *on its own terms*, rather than punish people for crimes committed by others.

In this section I've raised three problems for accomplice liability, which I take to be sufficient to warrant its wholesale abandonment. The question now is what should take its place. If accomplice liability is not the right way of criminalizing those who assist or encourage criminal conduct, then what is?

[27] That's why the criminal law, unlike the civil law, has no general doctrine of vicarious liability, for example, whereby employers are held liable for the actions of their employees—"they must each answer for their own acts and stand and fall by their own behaviour." *R v. Huggins* (1730) 2 Str 883, 885.

3. Causation and Risk

Michael Moore has recently argued that accomplice liability is superfluous.[28] His argument has two premises: first, those who assist or encourage others to cause some outcome *themselves* cause that outcome; and second, the *actus rei* of all criminal offences can (or at any rate, *ought* to) be defined in terms of the causing of some outcome (to kill is to cause a death; to wound is to cause a wound; and so on).[29] Thus if D intentionally helps or encourages P to kill V, then D intentionally caused V's death; and so D intentionally killed V; and so D is guilty of murder *as principal*. There is simply no need to invoke a separate mechanism of accomplice liability.

There are two main objections to this kind of view in the literature. The first is that those who assist or encourage the commission of a crime often *make no difference* to whether the crime is actually committed. Consider the facts of *State v. Tally*,[30] for example. Four brothers rode to the next town to kill V. Upon discovering that a telegram was to be sent to V informing him of the danger, D ordered the telegraph operator not to send the warning telegram. The brothers found V and shot him dead. The state was unable to prove that V would have survived had he received the telegram. Nevertheless, the court found D guilty of murder as secondary party. "The assistance given…need not contribute to the criminal result in the sense that but for it the result would not have ensued," the court argued; "[i]t is quite sufficient if it facilitated a result that would have transpired without it."[31] Many commentators conclude from examples like this one that it's possible to assist or encourage someone's causing of a harm without causing that harm oneself.[32]

[28] Michael Moore, "Causing, Aiding, and the Superfluity of Accomplice Liability," *University of Pennsylvania Law Review* 156 (2007): 395–452.

[29] Moore is aware of the apparent exceptions to this rule—to get married is not to cause a marriage; to penetrate someone is not to cause them to be penetrated. But he thinks this is just bad legal drafting. It's non-consensual penetration, Moore insists, that is the wrong the law of rape is responding to, for example; insofar as the definition of rape doesn't include all those who are morally responsible for such a wrong, then, it should simply be redefined to ensure that it does.

[30] 15 So. 722 (1894). [31] Ibid., p. 69.

[32] "[T]he upshot of these cases is that causal responsibility is not necessary to complicitous criminal liability." Christopher Kutz, *Complicity: Ethics and Law for a Collective Age*

The second objection appeals to the well-established legal principle that "*the free, deliberate and informed act or omission of a human being…negatives causal connection.*"[33] If, for example, D lights the fuse of a bomb and leaves it outside V's house, but the fuse is extinguished by a gust of wind, D would not be guilty of murder if the fuse is later relit by a passing opportunistic arsonist (despite the fact that V's death wouldn't have occurred but for D's planting of the bomb), because the free, deliberate, informed act of the arsonist would "break the chain of causation" between D's wrongdoing and V's death. Taken at face value, this principle seems to preclude even the *possibility* of D's actions causing an event "through" the free, deliberate, informed act of another person.

Not all crimes require the existence of a causal connection between those who commit it and a harm, of course—we criminalize *attempts*, for example, as well as drunk driving, carrying an offensive weapon, attending a terrorist training camp, and so on. Arguably we are justified in criminalizing these acts, even in cases where they don't cause any harm, on the grounds that they *increase the risk* of a harm of a certain kind occurring.[34] Some theorists have suggested a similar rationalization of the criminalization of aiders and abettors—even if their actions don't cause the harms they help or encourage others to cause, we might nevertheless be justified in punishing them on the grounds that they increase the risk of certain kinds of harm occurring.[35]

The main problem with this approach, however, is that it lacks the resources to distinguish between successful and unsuccessful assistance.

(Cambridge: Cambridge University Press, 2000), p. 217; see also Christopher Kutz, "Causeless Complicity," *Criminal Law and Philosophy* 1 (2007): 289–305.

[33] H.L.A. Hart and Tony Honoré, *Causation in the Law (2nd ed.)* (Oxford: Oxford University Press, 1985), p. 136 (italics in original). For an excellent comparative study of the 'intervening causation' doctrine, see Douglas Hodgson, *The Law of Intervening Causation* (London: Routledge, 2008).

[34] The idea that attempts are legitimate targets of criminalization because they *risk* harms to others is "deeply ingrained in the law," Gideon Yaffe, *Attempts* (Oxford: Oxford University Press, 2011), p. 27; see, e.g., Oliver W. Holmes Jr., *The Common Law* (London: Macmillan, 1881), pp. 68–9; American Law Institute, *Model Penal Code*, commentary to §5.01.

[35] See, e.g., Christopher Kutz, "The Philosophical Foundations of Complicity Law," in *The Oxford Handbook of Philosophy of Criminal Law*, ed. John Deigh and David Dolinko (Oxford: Oxford University Press, 2011), pp. 147–65; Daniel Yaeger, "Helping, Doing, and the Grammar of Complicity," *Criminal Justice Ethics* 15 (1996): 25–35; Richard Buxton, "Complicity in the Criminal Code," *Law Quarterly Review* 85 (1969): 252–74.

If D sells a gun to P, knowing that he wants to use it to kill V, then D culpably increases the risk of a death occurring; but she doesn't *help* P to kill V if P loses the gun on the way home and so stabs V to death instead, or arrives at V's house to find him already dead from a heart attack, or simply has a change of heart and hands himself in to the police—D *tries* to help P to kill V in such cases, but trying to help is not the same as actually helping. Those who are already sceptical of the criminal law's distinction between inchoate and harm-based liability will no doubt approve of the blurring of this distinction;[36] but insofar as the law does distinguish between those who kill and those who merely try to kill, one feels it should also distinguish between those who help others to kill and those who merely try to help others to kill.

We seem to have reached an impasse. On the one hand, "[a] failed attempt at assistance or encouragement is just that…[i]t is a failed attempt because it has no effect, no impact, on the principal. This helps us to see that there must be *something* causal going on."[37] But on the other hand, those who assist or encourage others to commit crimes often "don't seem to have made a difference to the overall incidence of wrongdoing,"[38] and it seems, in any case, "logically impossible"[39] to cause a harm through the free, deliberate and informed acts of another person. John Gardner's solution to this dilemma is to conclude that there must be "two types of causal contribution."[40] If D helps or encourages P to kill V, then D and P both "causally contribute" to V's death. But it was P, and P alone, who actually *caused* it. Those who help others to kill thereby causally contribute to a death, on Gardner's view—indeed, it is precisely in virtue of this fact that their actions amount to *help*, rather than attempts at help—but they don't themselves *cause* the death, because "[c]ausing death is a causally refined way of causally

[36] The Model Penal Code §2.06(3)(a)(ii) explicitly allows for accomplice liability in cases where the defendant merely "agrees or attempts to aid such other person in planning or committing" a crime. For one endorsement of this ambivalence over whether the assistance was successful or merely attempted, see Christopher Kutz, "Causeless Complicity."

[37] John Gardner, "Complicity and Causality," *Criminal Law and Philosophy* 1 (2007): 127–41, at p. 137.

[38] Ibid.

[39] Law Commission, *Assisting and Encouraging Crime*, Consultation Paper No. 131 (1993), para 4.24.

[40] John Gardner, "Complicity and Causality," p. 128.

contributing to death," one which "requires a distinctive causal route from causer to death."[41]

As will become clearer below, I think Gardner's diagnosis is on the right track. But in the absence of any independent motivation for these two types of "causal contribution," his solution is *ad hoc*. What exactly does the difference between *causing* and *contributing* to an effect consist in? And why do accomplices merely contribute to the harms their principals cause? What we need is an independently motivated metaphysics of causation that can answer these questions; one that can explain in precisely what sense aiders and abettors are causally related to the harms that constitute the primary offence. This is what I propose to do in the next section.

4. Causing and Contributing

Asked what a cause is, we may be tempted to say that it is an event which was both *necessary* and *sufficient*, in the circumstances, for its effect—to say that *X* was a cause of *Y* is to say both that *Y* could not have occurred without *X* and also that it could not *but* have occurred *with* it. Yet on reflection, this account cannot be right: if A, B, and C vote unanimously to elect D to the chair of the philosophy faculty, A's vote was a cause of D's election, but it wasn't sufficient, by itself, for D's election; nor was it necessary, since D would still have won the vote had A voted for someone else. Neither necessity nor sufficiency is either necessary or sufficient for causation.

We can get around these counterexamples, however, with two simple refinements:[42] instead of requiring a cause to be sufficient for its effect, we should require only that it is one of a *plurality* of events that were

[41] Ibid., at p. 135.

[42] What follows is modelled on, but differs in several important respects from, Wright's 'NESS' (Necessary Element of a Sufficient Set) and Mackie's 'INUS' (Insufficient but Necessary element of an Unnecessary but Sufficient set) accounts of causation; see, respectively, Richard W. Wright, "Causation in Tort Law," *California Law Review* 73 (1985): 1735–1828; J.L. Mackie, "Causes and Conditions," *American Philosophical Quarterly* 2 (1965): 245–264. In particular, I prefer to talk of *pluralities* of events rather than sets, simply because sets, being abstract objects, are not the sorts of thing that enter into causal relations.

jointly sufficient for the effect; and instead of requiring a cause to be necessary for its effect, we should require only that it was necessary *for the sufficiency* of the plurality to which it belongs. Let's say that a plurality of events $X_1,\ldots, X_n$ were "minimally jointly sufficient in the circumstances" for some event Y if and only if they were jointly sufficient in the circumstances for Y, and no proper sub-plurality of $X_1,\ldots, X_n$ were jointly sufficient in the circumstances for Y. Now consider the following account of causation:

> MINIMAL SUFFICIENCY (MS): A plurality of events $X_1,\ldots, X_n$ collectively caused an effect Y if and only if $X_1,\ldots, X_n$ were minimally jointly sufficient in the circumstances for Y.[43]

To be *a cause* of an effect, then, is just to be one of a plurality of events that collectively caused it. A's vote was a cause of D's election, for example, because it was one of a plurality of events—for example, A's vote and B's vote—that were minimally jointly sufficient in the circumstances for D's election.

Note that causation is a relation between *pluralities* of events and individual events, on this view.[44] Suppose I tell you that Neil Gaiman and Terry Pratchett collectively authored *Good Omens*. By this I *don't* mean that Gaiman authored *Good Omens* and Pratchett *also* authored *Good Omens*; nor do I necessarily mean that Gaiman authored one *part* of *Good Omens* and Pratchett the other. Rather I simply mean that Gaiman and Pratchett authored *Good Omens together*. They are both *authors* of *Good Omens*, in virtue of having *contributed* to the authoring of it. The same is true of causation. Suppose I tell you that a fire was caused by a short-circuit and a gas leak. By this I *don't* mean that the

[43] It's well known that there are problems for this account if 'sufficient' is interpreted as a purely modal notion—for one thing, effects can be sufficient for their causes, in this sense. See David Lewis, "Causation," in *Philosophical Papers (Vol. 2)* (Oxford: Oxford University Press, 1986), pp. 159–213. For a different account of sufficiency that avoids these problems, see Michael Strevens, "Mackie Remixed," in *Causation and Explanation*, ed. Joseph Keim Campbell, Michael O'Rourke and Harry S. Silverstein (Cambridge, MA: The MIT Press, 2007), pp. 93–118. I'll pass over these issues here.

[44] On this point, see Alex Kaiserman, "Causal Contribution," *Proceedings of the Aristotelian Society* 116 (2016): 387–394.

short-circuit caused the fire and the gas leak *also* caused the fire; nor do I mean that the short-circuit caused one "part" of the fire and the gas leak another. Rather I simply mean that the short-circuit and the gas leak caused the fire *together*. They were both *causes* of the fire in virtue of having *contributed* to the causing of it.

Let's now apply (MS) to our original case, **Gun Trader**:

> **Gun Trader**: D is a gun trader. She knows that P is looking for a gun to kill V. D doesn't particularly want or intend for V to die, but she sells P the gun anyway. P intentionally kills V.

P's pulling of the trigger, of course, caused V's death. According to (MS), however, D's assistance did *not* cause V's death, because it wasn't individually sufficient for it. Even given D's decision to sell P a gun, V's death didn't *have* to occur—P could have lost the gun, or failed to track V down, or simply changed his mind. But D's assistance was arguably one of a plurality of events (which may have included, for example, P's resourcefulness and murderous intentions) which were minimally jointly sufficient in the circumstances for V's death. D's assistance was therefore *a cause* of V's death, according to (MS)—it contributed to a causing of V's death, although it didn't cause it by itself.

Notice how my analysis of this case differs from those considered so far. I don't agree with Moore that D's assistance *caused* V's death, but neither do I agree with his critics that there is no causal connection between D's assistance and V's death at all. Moreover, I don't agree with Gardner that the only way to resolve this dilemma is to embrace a kind of causal pluralism. There is just one causal relation, on my view; but it's a relation between pluralities of events and individual events. P's shooting and D's assistance were both *causes* of V's death, but whereas P's shooting *caused* V's death, D's assistance merely contributed, along with other events, to a causing of it.

One might object that this alleged difference between D and P is really no difference at all. *Technically* speaking, P's pulling of the trigger wasn't individually sufficient for V's death either—the gun mechanism *could* have failed, V *could* have ducked at just the right moment, the bullet *could* have quantum-tunnelled to the other side of the galaxy before

reaching her. So P's pulling of the trigger, just like D's assistance, was really just one cause among many of V's death, along with the presence of a bullet in the chamber, the absence of macroscopic quantum-tunnelling events, and many other events besides.

Recall, however, that (MS) only requires causes to be sufficient *in the circumstances* for their effects.[45] I agree with Mackie that "causal statements are commonly made in some context, against a background which includes the assumption of some *causal field.*"[46] When we say that P's pulling the trigger caused V's death, we're implicitly "holding fixed" certain facts, including facts about the gun mechanism, quantum-tunnelling, and so on, relative to which P's pulling of the trigger was (individually) sufficient for V's death. If someone were to come along and say, "Well technically speaking, P's pulling of the trigger was just one cause among many of V's death," her utterance would be perfectly true, but it would also change the context, to one in which we are no longer holding these facts fixed. Of course, this just raises a further question: if causal claims are relativized to sets of "background conditions," what are the *right* background conditions to use when evaluating causal claims in ethics and the law? This is an important question, and I will have more to say on it below; but for now I will simply assume that, *in the sense of interest to the law*, P's pulling of the trigger was individually sufficient for V's death and D's assistance was not (from which it follows, given (MS), that in the sense of interest to the law, P's pulling of the trigger caused V's death whereas D's assistance merely contributed to a causing of it). I take this to be an intuitive assumption—indeed, as we'll see, I take it to be part of what underlies our sense of discomfort in charging D and P with the same crime.

[45] Here I differ from Wright, who requires causes to be sufficient for their effects in the sense of making it nomologically impossible that the effect not occur. Although I do think there are contexts relative to which causes must suffice for their effects in this sense, however, I also think there are many less demanding contexts relative to which certain background conditions are properly held fixed (or, equivalently, certain possible worlds are properly ignored). For a much more detailed defense of this kind of causal contextualism, see Alex Kaiserman, "Necessary Connections in Context," *Erkenntnis* 82 (2017): 45–64.

[46] J.L. Mackie, *The Cement of the Universe: A Study of Causation* (Oxford: Oxford University Press, 1973), pp. 34–5.

Though I disagree with Moore and Gardner on the nature of D's relationship to V's death in cases like **Gun Trader**, I nevertheless agree with them that what distinguishes *successful* from *merely attempted* assistance or encouragement is the existence of a causal connection between the assistance or encouragement and the commission of the crime. But my approach also has the resources to respond to the two objections to such a view discussed in section 3. Let's start with the worry that those who assist or encourage criminal wrongdoing often don't make a difference to whether any crimes are committed. Moore's response to this objection is simply to point out that counterfactual dependence isn't necessary for causation[47]—Oswald's shooting caused Kennedy's death, for example, regardless of whether there was a second shooter who would have killed Kennedy had Oswald decided not to do so. But while Moore is certainly right that causation cannot be *identified* with counterfactual dependence, the law's "but-for test" is undoubtedly a good *guide* to causation in many cases. Ideally we should be able to explain how, and why, it fails in the specific cases of assistance or encouragement at issue.

Consider a case like *Tally*, in which D prevents the sending of a telegram to V warning him of P's murderous intentions, which intuitively helps P to kill V. Let's grant that V's death does not counterfactually depend on D's action—it's not the case that, had the telegram been sent, V wouldn't have died. Nevertheless, it doesn't follow that D's assistance wasn't a cause of V's death, according to (MS). Suppose for example that P's resourcefulness and murderous intentions weren't, by themselves, sufficient in the circumstances for V's death—given only these facts about P, V might have died or might have escaped, and it was only together with D's assistance that V's death became inevitable.[48] Then D's assistance would count as a cause of V's death, according to (MS), in virtue of being a non-redundant part of a plurality of events that were jointly sufficient in the circumstances for V's death.

Tellingly, this is exactly the reasoning the judges used in arriving at the verdict that D was an accomplice to V's murder:

[47] Michael Moore, "Causing, Aiding, and the Superfluity of Accomplice Liability," pp. 402–7.

[48] Again, when I speak here of events collectively making V's death 'inevitable,' I mean inevitable *holding fixed* the appropriate background conditions.

> The assistance given…need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him…though in all human probability the end would have been attained without it. If the aid in the homicide can be shown to have put the deceased at a disadvantage, *to have deprived him of a single chance of life, which but for it he would have had*, he who furnishes such aid is guilty, though it cannot be known or shown that the dead man, in the absence thereof, would have availed himself of that chance.[49]

It cannot be shown that V would have lived had D not prevented the sending of the warning telegram. What *can* be shown, however, is that the telegram would have given V a "*chance* at life." It follows that P's murderous intentions weren't, by themselves, sufficient for V's death, from which it follows that D's assistance was one of a plurality of events that were minimally jointly sufficient for V's death. This is exactly the sort of reasoning one would expect to see, given (MS), when presented with the question of whether D's assistance was a cause of V's death.[50]

The commentator who comes closest to endorsing this analysis of the *Tally* case is Sanford Kadish.[51] His official view is that "successful assistance" should be defined as an action "that *could have* contributed to the criminal action of the principal."[52] If by "could have contributed," Kadish means "could have been a cause," his analysis is clearly much too liberal—if I give P a gun, which he then loses on the way home, I have not helped P to kill V, even though my action *could* have contributed to a causing of V's death if P had been more careful. But this is not in fact

[49] 15 So. 722, 738–39.

[50] Kutz claims, without argument, that "Tally's help would appear to be a redundant contribution to a set of circumstances sufficient for the death, hence not a cause." He grants that "Tally surely did contribute to [V's] death, through his efforts," but insists that "it stretches the concept into incoherence to equate the elimination of one possibility of escape…with causation of the death." Christopher Kutz, "Causeless Complicity," p. 298. I'm not sure I understand Kutz's complaint here; after all, if Tally's help did in fact eliminate a possibility of escape, then its contribution *wasn't* redundant. It might be 'stretching the concept into incoherence' to say that Tally's help *caused* V's death, but that's not what (MS) implies—it implies only that Tally's help *contributed* to a causing of V's death.

[51] Sanford Kadish, "Complicity, Cause and Blame."

[52] Ibid., p. 359.

what he means: "By 'could have contributed,' I mean that without the influence or aid, it is *possible* that the principal would not have acted as he did."[53] This is very close to saying that an act of "successful assistance" should be one of a plurality of events that were minimally jointly sufficient for the principal's act. Kadish presents his view as a *non-causal* analysis of successful assistance, but only because of a mistaken view of what it takes to be a cause.

The second alleged obstacle to a causal account of assistance and encouragement is the so-called doctrine of "intervening causation," according to which P's action in cases like **Gun Trader** "breaks the chain of causation" between D's assistance and V's death. Moore's response to this objection is to simply reject talk of "breaking the chain of causation" as so much "metaphysical gibberish,"[54] grounded in a "libertarian metaphysics" that "border[s] on the unintelligible."[55] Admittedly the intervening causation doctrine is somewhat idiosyncratic in the wider context of theoretical approaches to causation—one finds basically no mention of "breaks in the chain of causation" in science or contemporary metaphysics, for example. Yet there is certainly *something* to the thought that "the free, deliberate and informed act or omission of a human being negatives causal connection." If D hands P a knife, which P freely and deliberately uses to injure V, it *does* seem odd to say that D's act *caused* V's injury; whereas if D forces P to injure V by threatening to kill him otherwise, or slips P a drug that causes uncontrolled violent outbursts before telling him that V is cheating on him, it doesn't seem anywhere near as odd to say that D's act caused V's injury. A satisfactory account of the metaphysics of aiding and abetting should explain this fact; it cannot simply wish it away.

I think that (MS) can, with some assumptions, explain the intuitions behind the intervening causation doctrine. Let's start with the following observation: those cases in which P's action is judged to have "broken

[53] Ibid. Kadish is guilty of a straightforward logical fallacy here—the possibility of a but-for relationship between X and Y does not imply the existence of a but-for relationship between X and the possibility of Y (formally, where ">" denotes the counterfactual conditional: $\Diamond(p > q) \not\models (p > \Diamond q)$.)

[54] Michael Moore, "Causing, Aiding and the Superfluity of Accomplice Liability," p. 414.

[55] Michael Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford: Oxford University Press, 2009), p. 272.

the chain of causation" between D's action and V's injury tend to be ones in which, given D's action, P *could have acted otherwise* (in a sense to be explained) than he actually did. If D threatens to kill P if he doesn't injure V, for example, there's a clear sense in which P *had* to—had no choice *but* to—do as D demanded; whereas if D merely hands P the knife which he uses to injure V, there is no analogous sense in which P couldn't have acted otherwise than he actually did. But these facts are relevant to the nature of the causal relationship between D and V, according to (MS). If P *had* to injure V, given D's action, it follows that D's action was individually sufficient for V's injury, and hence that D's action individually caused V's injury; whereas if P *could* have failed to injure V, even given D's action, it follows that D's assistance in all likelihood wasn't sufficient, by itself, for V's injury, and hence that it didn't individually cause V's injury.[56]

The particular "flavour" of modality at issue here is what is sometimes called *bouletic* modality. Effectively we're holding fixed, among other things, the fact that P doesn't do anything that cannot *reasonably* be expected of him, in light of his goals, desires or interests. In particular, we're holding fixed the fact that P won't sacrifice his life to protect V from injury. Of course, there's a sense in which P *could* have simply submitted to the threatened harm and refused to kill V. There's also (arguably) a sense in which D couldn't have acted otherwise in *either* case, one where we hold fixed the initial state of the universe and the laws of nature.[57] But these are different modal claims, evaluated relative to different sets of background conditions. My hypothesis, then, is that those circumstances in which P's act is judged to have "broken the chain of causation" between D's act and V's harm are those in which D's act is not sufficient for V's harm, relative to a particular set of background conditions that includes, among other things, facts about the *reasonableness* of P's act.

[56] Technically D's act could have been sufficient for V's death (by some means or other) even if it wasn't sufficient for P's particular act of killing. I'll set this complication aside in what follows.

[57] It will come as no surprise that the context-sensitivity of 'could have done otherwise' has been noted in debates over the compatibility of free will and determinism—see, e.g., Christian List, "Free Will, Determinism, and the Possibility of Doing Otherwise," *Noûs* 48 (2014): 156–78; Alex Kaiserman, "Alternative Possibilities in Context," *Inquiry* (forthcoming).

Early judicial development of the intervening causation doctrine seems consistent with this hypothesis. P's act was judged *not* to have broken the chain of causation between D's act and V's harm in cases where D's act made P's act "inevitable";[58] where P's act was the "necessary consequence" of D's act;[59] where D's act placed P "in such a situation that he *must*" act as he did;[60] or where P acted as any person "of ordinary prudence would have done."[61] By contrast, P's acting a certain way *was* judged to have broken the chain of causation when "it was not…necessary for him to do so";[62] when P acted out of a "condition…which was peculiar to her only"[63] or "in a matter in which he has no duty to act";[64] or when P's act was "unwarranted and unreasonable" in the circumstances.[65] These quotes all seem to support the idea that what lawyers are interested in when they talk of "breaking the chain of causation" is whether D's act was sufficient for P's act, in the sense of leaving him with no reasonable alternative but to act as he did.

Another instructive example is the classic case of Shakespeare's Iago, who whips Othello into a murderous rage by spreading lies about Othello's wife Desdemona. Did Iago's actions cause Desdemona's death, in the sense of interest to the law? The answer is famously (and deliberately) unclear; but it plausibly turns on whether Iago's actions were sufficient, in the sense explained above, for Desdemona's death. For suppose we thought that Othello was simply acting as any reasonable person would have done in the circumstances, and that given Iago's actions he had no reasonable alternative but to do what he did; then we are likely to conclude that Iago's actions did cause Desdemona's death. If, on the other hand, we thought that Othello could have acted otherwise than he did, even given Iago's villainous behaviour, we are likely to conclude that Iago's actions didn't cause Desdemona's death (although it may still have *contributed*, along with other events, to a causing of it).

[58] Scott v. Shepherd (1773) 2 W B1 892, 898.
[59] Ward v. Weeks (1830) 7 Bing 211, 215.
[60] Jones v. Boyce (1816) 1 Stark 493, 496.
[61] Clayards v. Dethick (1848) 12 QB 439, 447.
[62] Adams v. The Lancashire and Yorkshire Railway Company (1869) LR 4 CP 739, 741.
[63] Kingston v. Kingston, 102 ILTR 65, 68 (Sup. Ct, 1965).
[64] Cutler v. United Dairies (London) Ltd. [1933] 2 KB 297, 305 (CA).
[65] Wright v. Lodge [1993] 4 All ER 299, 307 (CA).

On the view sketched above, then, there is nothing especially metaphysically mysterious about the intervening causation doctrine—when lawyers ask themselves whether "the chain of causation has been broken" between D's action and V's harm, they are simply asking themselves whether D's action caused V's harm, relative to a particular set of background conditions. To say that P's action "broke the chain of causation" between D and V is just to say that D's action wasn't sufficient, by itself, for P's harming V, in the sense of leaving P with no reasonable alternative but to harm V. The important point to recognize for our purposes, however, is this: even if D's assistance or encouragement of P didn't individually cause V's harm, it doesn't follow that it wasn't *a cause* of V's harm—D's act may have *contributed* to a causing of V's harm in virtue of being a non-redundant part of a plurality of events that were jointly sufficient, in this sense, for the harm, even if it wasn't sufficient by itself. So even if we grant that one cannot *cause* an effect "through" the free, deliberate, informed acts of another person, it doesn't follow from this that one cannot *contribute* to a causing of an effect through the free deliberate, informed acts of another person.

There is no doubt more to be said on the intervening causation doctrine than I have space to say here.[66] But for our purposes it is sufficient to note that we can capture the insight behind the doctrine, without giving up the idea that there is some sort of causal connection between those who assist and encourage criminal wrongdoers and the harms those wrongdoers cause. Aiders and abettors may not always *cause* the harms caused by those they aid and abet, but it doesn't follow from this that they don't *contribute* to a causing of those harms.

5. Degrees of Causation and Degrees of Responsibility

All I have done so far is defend a particular claim about the causal structure of cases like **Gun Trader**. With this background in place, I now want to get clearer on the sense in which D *wrongs* V by helping or

[66] For a more detailed discussion of the issues involved, see Alex Kaiserman, "Partial Liability," *Legal Theory* 23 (2017): 1–26.

encouraging P to harm him. More generally, I want to get clearer on the kind of *moral responsibility* someone bears for an outcome in virtue of contributing to a causing of it.

Under what conditions is an agent S morally responsible for some (bad) outcome *O*? The standard philosophical answer to this question goes something like this:[67]

S is morally responsible for *O* if and only if, for some action ϕ:

- S ϕ-s *freely*;
- S's ϕ-ing was *culpable* with respect to *O*;
- S's ϕ-ing *caused O*.

If S's action wasn't free—because she was coerced, for example, or because she was mentally incapacitated—then S is not morally responsible either for her action or its consequences. Nor is S morally responsible for some outcome if her action wasn't culpable relative to the outcome—because she couldn't reasonably have foreseen that it (or anything like it) would occur, for example, or because she reasonably believed that there was no alternative but to act as she did.[68] And finally, S is only morally responsible for some outcome if her actions actually caused the outcome—if, for example, S and T both intentionally shoot at V, but only T's bullet hits its intended target, T is morally responsible for V's death and S is not.

It's widely recognized that the first two conditions on moral responsibility can be satisfied to a greater or lesser degree. On some accounts of freedom, to act freely is to be sensitive to reasons, and one can be more

[67] There have been some challenges to this standard picture. See, e.g., Alfred Mele, "Moral Responsibility for Actions: Epistemic and Freedom Conditions," *Philosophical Explorations* 13 (2011): 101–11, which argues that the distinction between the freedom condition on moral responsibility and the culpability condition is much murkier than is typically assumed; for discussion, see Carolina Sartorio, *Causation and Free Will* (Oxford: Oxford University Press, 2016), pp. 35–43. See also Carolina Sartorio, "How to be Responsible for Something Without Causing it," *Philosophical Perspectives* 18 (2004): 315–36, which argues (as the title suggests) that one can be morally responsible for an outcome without causing it, although her argument relies on controversial claims about the causal structures of cases involving overdetermination by omissions.

[68] For recent discussion of the epistemic conditions on moral responsibility, see Philip Robichaud and Jan Willem Wieland, *Responsibility: The Epistemic Condition* (Oxford: Oxford University Press, 2017).

or less sensitive to more or less reasons.[69] On other accounts of freedom, to act freely is to have the ability to act otherwise, and acting otherwise can be easier or harder in different cases and for different people.[70] Someone who acts with an *intention* to cause harm is more culpable than someone who merely acts in the *knowledge* that their actions will cause harm, and they in turn are more culpable than someone who merely ignores a *risk* that their actions might cause harm. Thus, even if two people both meet the minimum thresholds along the culpability and freedom dimensions to be considered morally responsible *simpliciter*, there may still be an interesting question as to whether one of them is *more* responsible, along one of these dimensions, than the other. In this section, I will argue that the same is true of the *causal* condition on moral responsibility: an agent can be more or less responsible for some outcome *O* in virtue of making a larger or smaller *degree* of contribution to the causing of *O*.

Many legal theorists treat talk of "degrees of causal contribution" as, at best obscure, and at worst simply incoherent. Talk of one event as "more of a cause" of an effect than another has been described as "conceptually meaningless,"[71] "oxymoronic,"[72] "purely random,"[73] and "unscientific."[74] "Philosophically,"[75] "in the proper scientific sense,"[76] "[a]s a statement of fact and pure logic,"[77] "[c]ausation is not a relative

[69] See Alex Kaiserman, "Reasons-Sensitivity and Degrees of Free Will," *Philosophy and Phenomenological Research* (forthcoming).

[70] For a defense of the view that abilities come in degrees, see Barbara Vetter, *Potentiality: From Dispositions to Modality* (Oxford: Oxford University Press, 2015). See also Dana Kay Nelkin, "Difficulty and Degrees of Moral Praiseworthiness and Blameworthiness," *Noûs 50* (2014): 356–78, which usefully distinguishes between the *difficulty* of acting otherwise and the degree of *sacrifice* it would require (Nelkin thinks both are relevant to moral responsibility).

[71] Richard W. Wright, "Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure," *University of California Davis Law Review* 21 (1988): 1141–212, at p. 1146.

[72] Kit Barker and Jenny Steele, "Drifting Towards Proportionate Liability: Ethics and Pragmatics," *The Cambridge Law Journal* 74 (2015): 49–77, at p. 67.

[73] David A. Fischer, "Products Liability—Applicability of Comparative Negligence," *Missouri Law Review* 43 (1978): 431–50, at p. 445.

[74] Richard W. Wright, "The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics," *Chicago-Kent Law Review* 63, (1987): 553–78, at p. 555.

[75] Richard N. Pearson, "Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives," *Louisiana Law Review* 40 (1979): 343–72, at p. 345.

[76] Richard W. Wright, "Allocating Liability Among Multiple Responsible Causes," p. 1146.

[77] Aaron Twerski, "The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation," *Mercer Law Review* 29 (1978): 403–32, at p. 413.

concept,"[78] and hence "does not admit of degree."[79] "There is no way, based purely on causation, to identify one cause of [an effect] as more important or significant than any other cause";[80] "no 'condition' of a result has a 'closer relation' to that result than another."[81]

Underlying these pronouncements, however, is an important metaphysical mistake. Although it makes no sense at all to say that Pratchett authored *Good Omens* "a lot," or that he authored it "more" than Gaiman did, it makes perfect sense to say that Pratchett *contributed* more than Gaiman did to the authoring of *Good Omens*. *Authoring* is a non-scalar relation; but it is nevertheless one to which multiple people can contribute to different degrees. The same is true of causation. Although it indeed makes no sense at all to say that the short-circuit caused the fire "a lot," or that it caused the fire "more" than the gas leak did, it makes perfect sense to say that the short circuit *contributed* more than the gas leak did to the causing of the fire. Causation is a non-scalar relation; but it is nevertheless one to which multiple events can contribute to different degrees.

In previous work, I have defended a probabilistic analysis of one event's degree of contribution to a causing of another.[82] The basic idea is that an event's degree of contribution to a causing of an effect should measure *how close* it came to being individually sufficient for the effect, compared to the other causes. Let $x_1,\ldots,x_n$ and y be the propositions that $X_1,\ldots,X_n$ and Y, respectively, occurred, and let b be the conjunction of all the relevant background conditions. "$P(p \mid q)$" denotes the *objective probability* of p conditional on q.[83] Very roughly speaking, one can think of the objective probability of a proposition as the "fraction" of possible

[78] Richard N. Pearson, "Apportionment of Losses Under Comparative Fault Laws," p. 345.

[79] Raymond Martin, "On Weighing Causes," *American Philosophical Quarterly* 9 (1972): 291–9, at p. 291.

[80] Richard W. Wright, "Allocating Liability Among Multiple Responsible Causes," p. 1146.

[81] John Stuart Mill, *A System of Logic (8th ed.)* (New York: Harper and Brothers, 1882), p. 237.

[82] Alex Kaiserman "Causal Contribution." For alternative ways of thinking about degrees of causal contribution, see also Alex Kaiserman, "'More of a Cause': Recent Work on Degrees of Causation and Responsibility," *Philosophy Compass* 13 (2018): e12498.

[83] I assume here that there are non-trivial objective probabilities, even in a deterministic world, which are distinct from the credences or degrees of belief it is rational for any actual agent to have.

worlds in which that proposition is true.[84] $P(p \mid q)$, then, is equal to the fraction of q-worlds that are also p-worlds. Finally, let $f(X_i, [X_1,\ldots, X_n]\rightarrow Y)^b$ be the function that returns X_i's degree of contribution to the causing of Y by the plurality of events $X_1,\ldots, X_n$, relative to the conjunction of background conditions b. Then:

$$\text{CAUSAL CONTRIBUTION (CC)}: f(X_i, [X_1,\ldots, X_n]\rightarrow Y)^b = \frac{P(y \mid x_i \,\&\, b)}{\Sigma_{j=1}^{n} P(y \mid x_j \,\&\, b)}$$

In words: X_i's degree of contribution to the causing of Y by the plurality of events $X_1,\ldots, X_n$ is equal to the probability of Y occurring conditional on X_i occurring, divided by the sum of the conditional probabilities for all of the other events involved in that causing.

To illustrate, suppose again that a fire was collectively caused by a short-circuit and a gas leak. Suppose also that the gas that leaked is extremely flammable. Although the leak wasn't individually sufficient for the fire, even the slightest movement would have created enough static electricity build-up to ignite the gas when it discharged. By contrast, the spark released by the short-circuit was very small, and would have posed no danger but for the presence of the gas. Then the probability in the circumstances of the fire occurring conditional on the gas leak occurring is very close to 1, whereas the probability in the circumstances of the fire occurring conditional on the short-circuit occurring is not much higher than the unconditional probability of the gas leak occurring. Particularly if the gas leak was very unlikely in the circumstances—a freak occurrence, perhaps—it follows from (CC) that the gas leak contributed much more to the causing of the fire than did the short-circuit.

Let's suppose that causal contribution does in fact come in degrees (either in the way I have described or in some other way). Given that causation is necessary for moral responsibility, it's natural to conclude that one can be *more* or *less* responsible for some outcome in virtue of

[84] Talk of 'fractions' of possible worlds is clearly somewhat delicate given that there is an uncountable infinity of them—I'll pass over these difficulties here.

making a larger or smaller contribution to bringing about that outcome. Of course, S can be more responsible than T along the causal dimension of moral responsibility without being more responsible than T *simpliciter*—to talk of an agent's *overall* degree of responsibility, we need some way of aggregating degrees of responsibility along its different dimensions, and it's not immediately obvious what the right way of doing that is. What we can say, however, is that *all other things being equal*, S is more morally responsible than T for *O* if S's actions contributed more than T's actions to the causing of *O*. Assuming that the other conditions on moral responsibility are satisfied, I'll say that S is *fully* responsible for those outcomes her actions *caused*, and *partially* responsible for those outcomes her actions *contributed* to bringing about.

Applied to cases like **Gun Trader**, this view implies that D is merely partially responsible for the death he helped or encouraged P to cause. *How* responsible will depend on the relevant conditional probabilities, according to (CC). Suppose for instance that P had two accomplices—D sold him the gun he used to kill V, and B helped him to track V down. Now suppose that guns are widely and easily available in this part of the world, so that it was very likely in the circumstances that P would have acquired a weapon one way or the other; on the other hand, V is very difficult to track down and B is the only person who knows where he is, so that it was quite unlikely in the circumstances that P would have succeeded in finding him. Then it follows from (CC) that D contributed only a small amount to the causing of V's death. If the situation had been reversed—guns are few and hard to find, but V is easy to track down—then D's contribution to the causing of V's death would have been correspondingly larger.

Generally speaking, aiders and abettors will only be partially responsible for the harms they help or encourage others to cause. This is also true of D in **Unintentional Killer**, for example, regardless of the fact that P arguably doesn't satisfy the culpability condition on moral responsibility with respect to V's death. As discussed above, however, it is possible for D to cause (in the relevant sense) a harm to V "through" the actions of P, by creating a situation in which P has no reasonable alternative *but* to harm V. In such cases, D will be fully responsible for V's death, even though it was P, and not D, who administered the fatal

blow.[85] But "help" and "encourage" don't seem to me to be the right words to describe what D does in such cases. Some causal verbs—"help," "encourage," but also "tempt," "inspire," or "persuade"—seem better suited to cases in which D's action merely contributes to a causing of P's action, whereas others—" coerce," "compel," or "induce," perhaps—seem better suited to cases in which D's action actually caused P's action. If that's right, someone who compels or induces someone else to cause a harm will be more responsible for it, all other things being equal, than someone who merely helps or encourages that person to cause the harm.

It's important to note that helping or encouraging someone to cause harm is not the only way of being (merely) partially responsible for a harm. Consider the following case for example:

> **Joint Sabotage:** D and P both independently[86] decide to sabotage V's car—D cuts the brakes, and P disconnects the steering wheel. V later dies in a car crash. Had only one of these acts of sabotage occurred, the car crash wouldn't have occurred. The two acts together, however, were jointly sufficient (in the circumstances) for V's death.

Since D's act wasn't individually sufficient for V's death, it didn't cause it by itself. But it did contribute, together with P's act, to the causing of V's death. Hence D is partially responsible for V's death in this case (and the same, by parallel reasoning, is true of P).

Another interesting class of cases are ones where V contributes to the causing of his own harm, as in the following case:

> **Careless Victim:** D shoots at V, intending to kill him. V survives but is left with multiple injuries. The injuries are treatable, but only if V takes

[85] Note that it's perfectly possible on my view for D and P to *both* be fully responsible for V's harm—responsibility is not some fixed quantity that has to be 'distributed' among the various guilty parties. See Michael J. Zimmerman, "Sharing Responsibility," *American Philosophical Quarterly* 22 (1985): 115–122; Alex Kaiserman, "Responsibility and the 'Pie Fallacy'," *Philosophical Studies* (forthcoming). One might sensibly wonder how this fact about responsibility is to be reconciled with the need in certain tort cases to divide up a fixed sum of money (the loss suffered by the claimant) between multiple defendants; for my answer to this question, see Alex Kaiserman, "Partial Liability," §V.

[86] I introduce this qualification to make it clear that this is not a case of joint agency; as explained in the introduction, I think such cases require separate treatment.

a certain medicine every day. Unfortunately, V persistently forgets to take the medicine and eventually dies.

D's act wasn't individually sufficient for V's death in this case, because V could have recovered had he not been so forgetful. But D's act contributes, along with V's carelessness, to the causing of V's death. Hence while D is fully responsible for V's gunshot wound, she is only partially responsible for V's death.

6. Criminalizing Partial Responsibility

So far I have argued that agents can be *partially* responsible for outcomes—by helping or encouraging someone to cause them, but in other ways too, as illustrated by cases like **Joint Sabotage** and **Careless Victim**. What I now want to argue is that there is a major defect with the criminal law as it stands; namely, *that it has no mechanism for criminalizing partial responsibility for harms.*

Recall that the *actus reus* of murder and manslaughter is unlawful killing. I agree with Moore that it is at least a necessary condition on D's killing V that his actions caused V's death.[87] *Contra* Moore, however, I have also argued that *causing* a death is only one way of *contributing* to a causing of it; and plausibly, one does not kill by helping or encouraging someone to kill, or by non-fatally injuring someone who later forgets to take their medicine, even though one contributes to a causing of a death in such cases. If that's right, then it follows that the crimes of murder and manslaughter simply do not apply to cases of mere partial responsibility for death. So this presents us with a problem: how exactly are we supposed to criminalize those who, either by aiding or abetting killers or by other means, end up partially responsible for another's death?

The law deals with this problem in different ways in different cases. In the case of aiders and abettors, as we've seen, it gets around it by finding the defendant guilty of a crime committed by *someone else*. In other cases, however, it effectively deals with the problem by stretching the

[87] Michael Moore, *Causation and Responsibility*, p. 5.

definition of what it is to kill. In *R v. Cato*,[88] for example, it was established that a defendant can be found guilty of unlawful act manslaughter so long as their action was "a significant cause of the death,"[89] even if it didn't cause it by itself.[90] Little guidance is given on what "significant cause" should be taken to mean here, short of vague explanations to the effect that "[t]he contribution that D makes must be more than insignificant or *de minimis*."[91] Nevertheless, the clear intention is to extend the scope of murder and manslaughter to include defendants who are merely *partially*, not fully, responsible for someone's death.[92]

I think this is the wrong approach. The crimes of murder and manslaughter should be reserved for those defendants who are *fully* responsible for someone's death; i.e. those defendants whose actions caused a death. It does violence to our ordinary understanding of the term to accuse someone who merely contributes to a causing of death of having "killed." To deal with those cases in which the defendant is merely partially responsible for someone's death, we should introduce a new set of crimes, whose *actus reus* is *the making of a contribution to a causing of death*. The same goes for other crimes whose *actus rei* are the causing of some harm—grievous bodily harm, for example, should be reserved for those who are fully responsible for a wound; those who are merely partially responsible should be convicted of a new crime whose *actus reus* is the making of a contribution to a causing of a wound. Since those who cause a harm also *a fortiori* contribute to a causing of that harm, those who commit, say, murder will also *a fortiori* commit the proposed new crime of intentionally contributing to a causing of death. This would allow for charges to be "stacked" against defendants in the usual way, leaving the jury with the task of determining whether the evidence supports the more serious charge. For those convicted of contributing to a

[88] [1976] 1 All ER 260.

[89] R v. Kennedy (No. 2) [2007] UKHL 38, [2008] 1 AC 269, para.7, citing *Cato*.

[90] See also *R v. Blaue* [1975] 1 WLR 1411, in which the defendant was found guilty of manslaughter after his victim refused a blood transfusion, on the grounds that his act was "still an operating cause and a substantial cause" of the victim's death.

[91] A.P. Simester et al., *Simester and Sullivan's Criminal Law*, p. 91.

[92] Notice that, taken at face value, this approach, together with the arguments of section 4, would appear to remove any need for accomplice liability—those who intentionally help or encourage others to kill could be found guilty of murder as principal, on the grounds that their actions contributed to a causing of a death.

causing of a harm, their *degree* of contribution should also be taken into account, along with the usual mitigating and aggravating factors, in determining their sentence—the larger the degree of contribution, the longer the sentence, all other things being equal.[93]

The primary advantage of such a system is that there would be no need for accomplice liability. Rather than finding D guilty of a crime committed by someone else in cases like **Gun Trader**, we could find her guilty of a crime she has actually committed, namely, knowingly contributing to the causing of V's death. Moreover, such a system would suffer from none of the problems associated with accomplice liability mentioned in section 2. First, D would be guilty of a lesser crime than P in **Gun Trader**, and her sentence would reflect her degree of contribution to the causing of V's death. In cases where the defendant rendered what intuitively seems like "trivial assistance," her sentence would be correspondingly reduced. But more importantly, this system would also be clear on what *constitutes* "trivial assistance": namely, an act which contributes only a small amount to the causing of the principal's act.

Second, the system I am proposing would not make the guilt of the aider or abettor parasitic on the guilt of the primary offender. If D intentionally helps or encourages P to kill V, she is guilty of intentionally contributing to a causing of death, regardless of P's degree of culpability relative to V's death. Indeed, although those who help or encourage others to cause harm will always have a lower degree of responsibility for the harm along the *causal* dimension than those they help or encourage, the opposite may be true along the culpability dimension. As a result there is no barrier on my view to the former being found guilty of a greater crime than the latter. In **Unintentional Killer**, for example, D would be guilty of intentionally contributing to a causing of death, even

[93] From a purely metaphysical point of view, the distinction between causing a harm and, say, contributing to degree 0.99 to a causing of it, is admittedly somewhat arbitrary. Nevertheless, any criminal justice system has to carve up the space of wrongful acts into a finite set of crimes in such a way that balances the demands of fair labelling with the need to make the system understandable to defendants, juries and the public. What I am proposing is that our categorization of wrongful acts into crimes should draw a line between causing a harm and merely contributing to a causing of it, rather than, say, between making a 'significant' contribution and making an 'insignificant' contribution, as the law as it stands, at least in some cases, seems to do.

though P is guilty of, at worst, gross negligence manslaughter, and at best, nothing at all.

Third, and most importantly, the system I am proposing treats every act of wrongdoing *on its own terms*, rather than finding one person guilty of a crime committed by another. Even proponents of accomplice liability grant that "there is a profound oddity about convicting someone of a crime that he or she did not do."[94] Yet accomplice liability is often defended on deterrence grounds. The state has a legitimate interest in deterring people from facilitating or encouraging criminal conduct; and ultimately, "[t]he pull of judgments about culpability must be reconciled with the demands of criminalization."[95] As should be clear by now, I find this argument unpersuasive. I don't deny that facilitating and encouraging criminal conduct should itself be criminalized; what I *do* deny is that accomplice liability is the right way to do it. Aiding and abetting presents no problem for the "central idea" that "liability should attach only where this accords with the requirements of individual justice";[96] the problem is rather that the criminal law has no appropriate mechanism for meeting the requirements of individual justice in cases of partial responsibility for harms.

The crimes I am proposing would also allow for useful discriminations to be made in other cases to which accomplice liability can't coherently be applied. Consider, for example, cases where D helps or encourages P to harm *himself*, by supplying the drugs on which P overdoses, for example, or by encouraging P to commit suicide.[97] D cannot be found guilty of a homicide offense *as secondary party* in such cases, since one does not commit such a crime by killing oneself. Nor does it seem right to describe D in such cases as having killed P herself by means of her aid or encouragement. Yet D clearly bears *some* degree of

[94] A.P. Simester, "The Mental Element in Complicity," *Law Quarterly Review* 122 (2006): 578–601, at p. 578.

[95] Ibid., at p. 600.

[96] Ben Livings and Emma Smith, "Locating Complicity: Choice, Character, Participation, Dangerousness and the Liberal Subjectivist," in *Participation in Crime: Domestic and Comparative Perspectives*, ed. Alan Reed and Michael Bohlander (London: Routledge, 2013), pp. 41–58, at p. 41.

[97] For discussion and references to recent cases, see Rebecca Williams, "Policy and Principle in Drugs Manslaughter Cases," *Cambridge Law Journal* 64 (2005): 66–78.

responsibility for P's death. A new crime of intentionally contributing to a causing of death would capture these cases too.

Similar considerations apply to cases like **Careless Victim**. Juries faced with such cases currently have two options—either D's shooting caused V's death, or it didn't. If it did, D is guilty of murder; if it didn't, D is only guilty of attempted murder and grievous bodily harm. But neither of these options seem to capture the nature of the wrong D has committed in this case. D hasn't committed murder, because her action didn't cause V's death; but neither is she *merely* guilty of attempted murder, because she bears some responsibility for V's death in virtue of having contributed to a causing of it. My new proposed crimes would help us avoid this dilemma.

7. Conclusion

In this chapter, I have argued that accomplice liability in the criminal law should be abandoned. Instead of finding aiders and abettors guilty of crimes committed by others, our criminal system should aim to actually capture the sense in which D wrongs V by helping or encouraging P to harm him. The best way to do this would be to introduce a new set of crimes, which explicitly proscribe partial responsibility for harms. Not only would this remove the need for accomplice liability, it would also fill gaps in the law concerning other cases, like **Careless Victim**, to which accomplice liability does not apply.

A recurring theme of this chapter has been the idea that there is nothing morally exceptional about aiding and abetting. All other things being equal, it is morally irrelevant, on my view, whether or not D's contribution to a causing of V's harm acted "via" the actions of another person.[98] Helping or encouraging someone to cause harm is just one way of being partially responsible for a harm—it's not a phenomenon which requires, or deserves, an exception to be made to our ordinary

[98] Except perhaps for the fact that, in cases of aiding and abetting, D may additionally bear some responsibility for a further harm, namely P's being convicted of a crime.

principles of individual responsibility. Instead, what the criminal law should recognize—what I have argued it currently fails to recognize—is the role of degrees of causal contribution in our attributions of individual responsibility. Once it does that, the case for accomplice liability (such as it is) evaporates.