

## IS ACCOMPLICE LIABILITY SUPERFLUOUS?

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In response to Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395 (2007).

Professor Moore's two central theses in *Causing, Aiding, and the Superfluity of Accomplice Liability*<sup>1</sup> are, first, that we should recognize not just one, but four distinct types or "desert bases" of accomplice liability; and second, that once we have done this clearly, we will also see that accomplice liability is superfluous—that the criminal law does not need a distinct doctrine of complicity.

The four kinds of accomplice who are properly held criminally liable are (a) "truly causal accomplices,"<sup>2</sup> whose acts are indeed causes of the relevant resulting harm; (b) "necessary accomplices,"<sup>3</sup> on whose acts or omissions the resulting harm counterfactually depends; (c) "chance-raising accomplices,"<sup>4</sup> whose acts increase the chance that the harm will ensue but are neither causes of, nor counterfactually necessary for, that harm's occurrence; and (d) "subjectively culpable accomplices,"<sup>5</sup> who seek to encourage or assist a principal but whose acts actually make no difference at all.<sup>6</sup> But, Moore argues, the grounds for these types of accomplice liability are not peculiar to complicity; they are the four types of desert bases (causation, counterfactual dependence, chance-raising, purely subjective culpability) for criminal liability generally, of "principals" as much as of "accomplices." Those classed as accomplices are indeed, "in general and on average,"<sup>7</sup> less blameworthy than those classed as principals (for instance, because

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<sup>1</sup> Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395 (2007).

<sup>2</sup> *Id.* at 420-24.

<sup>3</sup> *Id.* at 424-32.

<sup>4</sup> *Id.* at 432-40.

<sup>5</sup> *Id.* at 442-46.

<sup>6</sup> Our existing laws also recognize a fifth kind of accomplice liability—vicarious accomplice liability. Moore rejects this fifth category as being inconsistent with the demand that liability be grounded in moral blameworthiness. *See id.* at 446-48.

<sup>7</sup> *Id.* at 449.

they generally make a lesser causal contribution to the harm's occurrence), but, according to Moore, this difference in degree of blameworthiness is only usual, rather than exceptionless, and is not enough to warrant a categorical distinction between "principals" and "accomplices."

Moore's distinctions between the four desert bases depend upon, and help to explicate further, the account of causation that he has been developing over the last decade or so,<sup>8</sup> but I will not be concerned with that account in this brief Response. I will instead, in Part I, ask some questions about the third and fourth desert bases that Moore identifies, before arguing in Part II that there is still some room for a distinctive doctrine of complicity and thus for accomplice liability as a distinctive type of liability. That argument will appeal to the mens rea of accomplice liability rather than to the actus reus (which is the focus of Moore's argument): my claim is therefore that, even if all that Moore says about the actus reus is right, it does not warrant his conclusion that "*aiding* another to cause a harm is not a distinct basis for blame and punishment."<sup>9</sup>

#### I. "CHANCE-RAISING" AND "SUBJECTIVELY CULPABLE" ACCOMPLICES

Even if we accept Moore's arguments that counterfactual necessity is distinct from causation<sup>10</sup> and that omissions, preventions, and "double preventions" are noncausal,<sup>11</sup> it is still true that the acts or omissions of necessary accomplices, as well as those of "truly causal accomplices," will figure in appropriate explanations of how the crime came to be committed and of how the resultant harm came to ensue. *P* killed *V* (and *V* died) because, inter alia, *D* supplied *P* with the gun with which he shot *V*, or because *D* told *P* where he could find *V*.<sup>12</sup> So too, *P* killed *V* (and *V* died) because, inter alia, *D* prevented the sending of the telegram that would have warned *V* and thus saved his life.<sup>13</sup> There is thus a single crime, the killing of *V*, for which both *P* and *D* can be held responsible even if *D*'s contribution will usually have been less significant than *P*'s.

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<sup>8</sup> See *id.* at 396 n.3 (citing various sources); see also MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY (forthcoming 2008).

<sup>9</sup> Moore, *supra* note 1, at 402.

<sup>10</sup> *Id.* at 403-07.

<sup>11</sup> *Id.* at 426-30.

<sup>12</sup> *Id.* at 422-23.

<sup>13</sup> *Id.* at 426.

Matters are quite different with “chance-raising” accomplices, since *D*’s activities will not necessarily figure in an explanation of how the crime came to be committed. They will figure, of course, if *P* relied on them, even if they were not materially necessary: if *P* was encouraged or confirmed in his effort to kill *V* by knowing that *D* had prevented the sending of the telegram that might have saved *V*’s life,<sup>14</sup> or that *D* stood ready to shoot *V* if *P*’s shot missed,<sup>15</sup> *D*’s contribution will figure in the explanation of *V*’s killing—even if the telegram would not have saved *V* or even if *P*’s shot killed *V*. But *D*’s liability does not, Moore argues, require such knowledge on *P*’s part;<sup>16</sup> and if *P* did not know that *D* had prevented the sending of a warning telegram that would not have saved *V* anyway, or that *D* was poised to shoot *V* if *P* missed, *D* will be absent from the explanation of *P*’s killing of *V*. The same is true of “subjectively culpable accomplices,” whose efforts to assist or to encourage are unnoticed, ineffectual, or even counter-productive<sup>17</sup>—the crime will not have been committed because of what *D* did or tried to do.

But in both of these types of cases, Moore insists, *D*’s liability should not depend on the actual commission of the crime. *D* should be liable, on just the same basis, whether or not *P* actually kills *V* or even tries to kill *V*, since *D*’s liability should not depend on what *P* does or does not do. Either *D* is liable as a culpable chance-raiser or risk-creator, if his action does increase the chance that the crime will be committed. Or *D* should be liable—like those whose criminal attempts are so misguided that they do not in fact create any risk of harm<sup>18</sup>—as one who tries to commit a crime.

I want to raise two questions about Moore’s view of these cases. First, doesn’t his account of the “chance-raising” cases *understate* the culpable responsibility of some agents? If we believe, as I believe and as Moore at least used to believe,<sup>19</sup> that “resulting harm” should make a difference to criminal liability—i.e., that one whose criminal attempt fails is properly convicted of a lesser offense and is properly liable to a lesser punishment than he would have been had the attempt succeeded—then, even if the crime is committed, *D* will be guilty of a

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<sup>14</sup> See *id.* at 437-38.

<sup>15</sup> See *id.* at 439.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 442-43.

<sup>18</sup> See *infra* notes 19, 21, and accompanying text.

<sup>19</sup> See R.A. DUFF, CRIMINAL ATTEMPTS 327-47, 350-62 (1996); MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 191-247 (1997).

lesser offense than *P* will be. This seems to be true, on Moore's account, even if *D* acts with *P*'s knowledge and approval, with the intention of doing what he can to ensure the successful commission of the crime, so long as his actions do not in fact contribute causally to, and are not in fact necessary for, its commission. But surely a *D* who so purposefully associates himself with the crime, and who plays his part in making its successful commission more likely, should be held responsible for the crime along with *P* if it is actually committed? Moore might reply that if *D* acts with *P*'s knowledge and approval, then *D*'s chance-raising contribution is at least likely to figure in the explanation of the crime's successful commission. I doubt that that is true: *P* might allow *D* to play his role from a whole variety of motives, not all of which involve *P*'s relying on *D* for the carrying through of the criminal project (e.g., pity, a desire to make *D* feel useful, laying the basis for later blackmail). But we can anyway focus on the case in which *P* does not know of what *D* is doing—a case in which *D* seeks unilaterally to associate himself with the crime. Suppose that *D* really wants *P* to succeed in robbing the bank, but also knows that *P* is both careless and unwilling to accept help (at least from him). So, without *P*'s knowledge, *D* takes steps to increase *P*'s chances of success—he appoints himself as lookout (*P* did not arrange one) or he arranges for a back-up getaway car. In fact, all goes smoothly, and *D*'s precautions prove to have been unnecessary. I am still inclined to say that *D* has made himself a party to the actual crime: his liability should be not that of a mere chance-raiser who was (perhaps fortuitously) not actually responsible for the commission of the crime but, instead, that of a genuine party to the crime. By actively involving himself in this way, he makes himself a party to the robbery.

The other question about Moore's account of these cases (in particular the "subjectively culpable" cases) is whether it stretches criminal liability too far. *D* sees *P* trying to break the window of what she believes to be *V*'s car and thinks that he is attempting to commit criminal damage. Wanting to ingratiate herself with him, she gives him a hammer, intending thereby to assist his commission of that offense, and, with the help of the hammer, he breaks the car window. As far as *D* is concerned, she is a willing accomplice in his commission of the crime. As far as the facts are concerned, however, there was no such crime for her to assist, since the car was *P*'s property (he had locked his keys inside it). If liability can be based on grounds that are as purely "subjective," as Moore (in agreement with the Model Penal Code) seems to allow, with no requirement for objective risk or

wrongdoing, it seems that *D* is guilty of an attempted crime.<sup>20</sup> This example leads us into the murky realms of “impossible attempts,” and in particular those, typified by the person who handles what she mistakenly believes to be stolen goods,<sup>21</sup> in which an agent acts in a mistaken belief such that, had it been true, she would have been committing a complete offense. Now if that mistaken belief was integral to the agent’s purpose in acting as she did (such that, if she realized after the event that her belief was false, she would consider her enterprise a failure), she should indeed be liable for an attempt. Had *D* passed *P* the hammer because she wanted to see *V*’s property damaged, she should indeed be liable in the way that Moore argues. But in my version of the example her belief that the car is not *P*’s is merely incidental. What is crucial to her enterprise of ingratiating herself with *P* is that she help him break the window of that car, not that she help him break the window of a car that does not belong to him. The fact that it is *P*’s own car, then, does not render her enterprise a failure. In such cases we find a proper application of the much misused slogan that an agent should not be criminally liable if she achieved all that she intended without committing an offense—the offense that she would have been committing had her belief been true.<sup>22</sup> This is not to say that liability requires objective harm-causing or risk-creation: if its being *V*’s car was integral to *D*’s purpose, for instance, she is properly held liable.<sup>23</sup> Rather, it is to suggest that Moore, like the Model Penal Code, pushes the scope of inchoate criminal liability too far.

The mistaken *D* discussed in the previous paragraph highlights a question that has been lurking throughout this discussion—a question about the kind of intention or mens rea that accomplice liability

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<sup>20</sup> See Moore, *supra* note 1, at 446; see also MODEL PENAL CODE § 5.01 (1985). Section 5.01(1) makes it clear that liability depends not on the actual circumstances, but on the circumstances as *D* believed them to be—thus *D* is to be judged as if the car was *V*’s. Section 5.01(3) deals with the possibility of accomplice liability in the absence of a principal committing a crime.

<sup>21</sup> See, for example, *Anderton v. Ryan*, (1985) 1 A.C. 560 (H.L.), in which the defendant purchased what she believed to be a stolen video recorder; because the prosecution failed to prove that it had been stolen, the court was forced to assume that the defendant had actually merely handled nonstolen goods in the mistaken belief that they were stolen. See also *People v. Jaffe*, 78 N.E. 169, 170 (N.Y. 1906), in which the goods that the defendant handled did not count as “stolen” because they had been recovered by, and were under the control of, the police.

<sup>22</sup> For further explanation and argument, see DUFF, *supra* note 19, at 98-106, 206-19.

<sup>23</sup> But for a further argument that criminal attempts must objectively engage with the actual world, see DUFF, *supra* note 19, at 219-33.

should require. By focusing more directly on this question, we will be able to see why there is still room, despite Moore's arguments, for accomplice liability as a distinctive type of liability.

## II. INTENTION, FORESIGHT, AND COMPLICITY

To simplify matters, we can focus on cases in which liability is grounded in the fact that *D* assists (or intends to assist) the commission of the target offense—focusing on assistance, rather than on solicitation or encouragement. Two familiar questions about the appropriate mens rea arise. First, when it is said that *D* must intend to assist or facilitate *P*'s commission of the offense, should that be taken to require a "specific intent"—that is, purpose—to assist or facilitate? Or should it be enough that *D* realizes (or knows) that his intended action will in fact assist or facilitate? As Moore notes,<sup>24</sup> American law typically requires purpose,<sup>25</sup> whereas English law (which has signally failed to develop an adequately clear understanding of intention) requires only knowledge.<sup>26</sup> Second, must *D* also "intend," however intention is interpreted, that the offense be committed; or is it enough that he intends to assist *P*, even if he has no interest in whether *P* succeeds, or even hopes that *P* fails?<sup>27</sup>

If *D* acts as he does in order to assist *P*'s commission of the offense, and does so in order to do what he can to ensure that the offense is successfully committed, then Moore's overall argument seems to me (subject to the questions raised in the previous section) to succeed. If I make it my purpose to assist the commission of an offense and act as I do in order that the offense will be committed, I make myself nonderivatively responsible for it; my contribution might be less, as a matter of degree, than that of the person who finally does the deed, but my responsibility and liability are neither derivative from his nor different in kind from his. Thus, if the law should require purpose, rather than merely knowledge, both as to the fact that what I do will assist the commission of the crime and as to its actual commission, it does not need a distinct type of accomplice liability. However, two

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<sup>24</sup> See Moore, *supra* note 1, at 396.

<sup>25</sup> See MODEL PENAL CODE § 2.06(3) (1985); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 513-14 (4th ed. 2006).

<sup>26</sup> See, e.g., DAVID ORMEROD, SMITH & HOGAN CRIMINAL LAW 179-80 (11th ed. 2005) (describing the mens rea requirements of a "secondary party," which includes "knowledge as to the facts" of the principal's offense).

<sup>27</sup> Further questions, which I cannot pursue here, arise when the primary offense is not one of intention; for the sake of brevity and simplicity, I will look here only at offenses that do require purpose.

concerns arise here: first, there is good reason to extend the law more broadly than this, to capture some who do what they know will assist the commission of an offense although it is not their purpose to do so; and, second, this should be understood as a distinct type of liability.

*D* supplies *P* with equipment or goods that he knows *P* intends to use for the commission of a crime (he supplies ingredients that he knows *P* will use to make explosives for a terrorist attack, a gun that he knows *P* will use to commit a robbery, a car that he knows *P* will drive while drunk or disqualified, etc.). He claims, plausibly, that it was no part of his purpose to assist *P*'s commission of the offense; his purpose was merely to meet a friend's request for the item in question or to earn the money that *P* offered for it. Should that save him from liability for involvement in *P*'s commission of the crime?<sup>28</sup> Surely not. As well as condemning *P*, morally and legally, for his commission of the crime, we should be able to condemn *D*, both morally and legally, for his contribution to its commission. However, although we should condemn them both, we should also draw a distinction of kind, rather than only of degree, between them, for two reasons.

First, if I act with the (direct) intention of assisting the commission of an offense, I cannot (absent a plea of infancy or insanity) deny responsibility for assisting it or for its commission. If, however, I act in the knowledge that my action will assist its commission, there might be room to admit such knowledge while denying responsibility, by arguing that I had no prospective responsibility, in relation to that aspect of my action, that would give me reason to act differently. A doctor who prescribes contraceptives to a girl of fifteen might know that this will facilitate the commission of an offense of sexual intercourse with a minor, since the girl and her eighteen-year-old boyfriend are more likely to have intercourse more often if she has the contraceptives. But, the doctor might plausibly argue, she should not be held responsible for assisting its commission, since its prospective commission was not a factor that she should have considered in deciding whether to prescribe the contraceptive. Her sole concern was, as it should have been, to provide the treatment that was medically appro-

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<sup>28</sup> It might be argued that we can and should deal with such cases not via any general doctrine of complicity, but through the creation of particular special offenses, for instance of supplying certain kinds of dangerous item. Such offenses do have a place in a rational criminal code, but they do not capture the way in which *D* should also be held responsible in relation to the commission of the primary offense.

priate for her patient.<sup>29</sup> Part of what makes at least some such denials of responsibility morally plausible is, I suggest, the fact of intervening human agency: it is not my business that what I do makes it easier for *P* to commit the crime partly because it is *P*'s business whether he commits the crime (whereas if I act with the intention of assisting *P*'s commission, I make it my business); it is up to *P* whether he commits the crime or not and—at least sometimes—I am not required to guide my actions by my knowledge of what *P* will do.<sup>30</sup>

Second, even when *D* should not be allowed to deny responsibility for the foreseen fact that her action will assist *P*'s commission of an offense, and even when her action does make a genuine contribution to the commission of the offense, there still seems to be a categorical difference, rather than one only of degree, between *D* and *P*. For *D* has not committed herself to the crime's commission (as *P* commits himself by intending to commit the crime); she has not made the crime her own in the way that *P* does; she can still say that, in the end, it is up to *P* rather than to her whether the crime is committed. This might not save her from criminal liability (often it should not). It might not even make her offense less serious than *P*'s (for we must remember that differences that are worth marking are not always differences in degree of guilt). But it does make her relationship to the commission of the offense significantly different.

These comments have, of necessity, been brief, gestural, and dogmatic, rather than developed, explained, and adequately defended. I hope, however, that they have done enough to show that, despite the sophistication and plausibility of much of Moore's argument, there might be more still to be said for a distinctive doctrine of accomplice liability than he allows.

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<sup>29</sup> See *Gillick v. W. Norfolk & Wisbech Area Health Auth.*, (1986) 1 A.C. 112, 190 (H.L.) (on appeal from Eng.) (involving a case with similar facts); R.A. DUFF, ANSWERING FOR CRIME 35-36 (2007). Shopkeepers might offer an analogous, though morally less plausible, argument that what their customers do with the goods they sell is not their business. Similarly, hosts who serve drinks to guests who will, they know, then drive home under the influence might analogously argue that it is the guests', not the host's, responsibility to avoid the commission of that offense.

<sup>30</sup> This is not to appeal to the libertarian view of "intervening causes" that Moore rightly criticizes. See Moore, *supra* note 1, at 408-12. To say that it is up to *P* is not to portray *P* as an uncaused cause; it is to assert what is sometimes a morally plausible allocation of responsibility.

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Preferred Citation: R.A. Duff, Response, *Is Accomplice Liability Superfluous*, 156 U. PA. L. REV. PENNUMBRA 444 (2008),  
<http://www.pennumbra.com/responses/04-2008/Duff.pdf>.