PUBLIC

ANNEX B

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J. G. Stewart, 'Complicity' in M Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014)

rushes to inchoate liability to deal with perverse results born of the derivative structure. As is frequently the case with complicity, any one problem has a variety of plausible solutions that heavily depend on prior structural issues.

3. The causation quandary

Causation is one of the central dilemmas in accomplice liability. The positions on whether an accomplice's conduct must make a causal contribution to a completed crime are so highly disputed in theory and practice that the issue probably acts as a pivot for the different ways of constructing accessorial liability set out earlier. One could write tomes on this issue alone, so I content myself with merely setting out core parameters of the debate(s) in broad strokes. As will become apparent, the initial tension concerns those who view the perpetrator's voluntary human acts as an intervening cause that impedes the passage of causal power from accomplice through perpetrator to crime, but it also involves misgivings about situations where there are multiple sufficient causes for a single event. I deal with both in turn, highlighting a selection of issues that arise under the umbrella of each debate.

Following the seminal work of H. L. A. Hart and Tony Honoré on causation, most English-speaking commentators have argued that the volitional actions required to convict the direct perpetrator preclude the claim that the accomplice, too, *caused* the harm.[36] The perpetrator made a genuine decision; this interrupts all earlier causal influence, and acts as an intervening cause. On this account, the accomplice's actions are no more the cause of a crime than the perpetrator's genes, family history, and socioeconomic background, all of which undoubtedly provide influence, without overriding the perpetrator's blameworthy moral choice.[37] As a consequence, various accounts of complicity emerged that attempted to soothe the cognitive dissonance created by treating complicity as a mode of participation, when participation could not be established by the usual metrics.[38]

While Hart and Honoré's masterpiece captivated Anglo-American views of the topic for several decades, there is much that now points in the opposite direction. First, instigation offers a clear counterpoint—if X pays a hitman to assassinate his wife, we have little trouble in declaring that both X and the hitman caused the wife's death.[39] Moreover,

[36] H. L. A. Hart and Tony Honoré, *Causation in the Law* (2nd ed., 1985), 129 ff.

[37] Kadish (n. 29) 333 ff.

[38] Joshua Dressler, "Reforming Complicity Law: Trivial Assistance as a Lesser Offense," (2007) 5 *Ohio State Journal of Crim. Law* 427 ff.

[39] Moore, (2007) *University of Pennsylvania LR* 422–423 ff. In fairness to Hart and Honoré, they viewed instigation as an exception to their general rule that voluntary action breaks causal chains, but as Joel Feinberg retorts "they put forward no more general principle to explain why the exceptions are exceptions." Joel Feinberg, *Harm to Others* (2nd printed ed., 1987), 153 ff.

German understandings of cause, effect, and agency all deny voluntary human actions the ability to annihilate the enduring causal influence of the accomplice's act,[40] a position that coincides with Michael Moore's more recent scholarship, which searched high and low for a metaphysical justification for the notion of intervening causes, coming up empty-handed.[41] In all of these instances, we have grounds for thinking that causation matters for complicity if it matters for criminal responsibility at all.

Indeed, an argument from the debate about whether causation matters for responsibility works for complicity, too. In this regard, Michael Moore draws on Susan Wolf—we would be appalled by someone who treated negligent driving that killed an infant as merely a question of poor driving, in the same way that we would view someone who blamed themselves for killing an infant when they merely drove negligently as psychically imbalanced.[42] By extrapolation to complicity, when we try business representatives as accomplices in atrocity for selling asphyxiants to Auschwitz, we are not just concerned about their associations with the Nazis; we mean to single out a particular type of conduct and its unspeakable causal impact. Associating with the wicked is one thing, but offering a substantial causal contribution to a mass killing is altogether qualitatively different. Causation tracks this distinction.

If this reasoning is sound, it sheds new light on the shortcomings of treating complicity as a separate offense. To return to Auschwitz, a separate offense approach to accomplice liability would convict the suppliers of Zyklon B of *criminal facilitation*—not murder, extermination, or genocide.[43] This alternative may overcome evidential difficulties associated with proving complicity or anxieties about its possible overreach, but it also gravely understates guilt to convict the vendors of the chemical used to gas in excess of four million people of a crime labeled "*criminal facilitation*." As I have argued elsewhere, the label of a crime is a key feature of the punishment inflicted upon a criminal, and accomplices are no exception.[44] Therefore, even if one thinks that a new separate offense of complicity complements the more traditional participatory model nicely, when the crime (here genocide) does take place and the accomplice's actions make an unequivocal contribution to it (here providing the means), convicting the accomplice of "criminal facilitation" seriously miscommunicates responsibility for what really transpired.

What of overdetermined forms of complicity? In many instances, an accomplice provides assistance that makes no discernible difference to the occurrence of

[40] See e.g. Wolfgang Joecks, in Wolfgang Joecks, Klaus Miebach, and Bernd von Heintschel-Heinegg (eds.), *Münchener Kommentar zum Strafgesetzbuch*, Band 1 §§ 1–51 StGB 2003, § 27, nn. 23–37.

[41] Moore (n. 27) chs. IV ff.

[42] Citing S. Wolf, "The Moral of Moral Luck," in C. Calhoun (ed.), *Setting The Moral Compass: Essays By Women Philosophers* (2004), 6 ff.

[43] United Nations War Crimes Commission (n. 22) 93 ff.

[44] Elsewhere, I argue that the principle of fair labeling frequently deserves no separate existence from culpability. See Stewart, (2012) 25 *Leiden Journal of International Law* 176 ff. On fair labeling, see James Chalmers and Fiona Leverick, "Fair Labelling in Criminal Law," (2008) 71 *Modern LR* 217.

criminal harm, since the assistance provided was not essential to the crime's realization.[45] If the Nazis had access to a long line of willing suppliers of chemical asphyxiants, it would be difficult to argue that the suppliers of Zyklon B really *caused* the terrible ends to which their chemicals were put. As one of the defendants claimed, had he not agreed to supply the chemicals to Auschwitz, "the S.S. would certainly have achieved their aims by other means."[46] So if causation means "but for" causation then even if this firm did not furnish the S.S. with the means of exterminating humans en masse, the horror of Auschwitz would still have unfolded almost identically. Thus, many argue that complicity cannot require a causal connection between assistance and completed crime, leading us back into the case for alternative models.

This dilemma also leads to at least one important strategy for sidestepping the problem without reinventing complicity as a concept. Sanford Kadish, for instance, argued that we need a new notion for measuring the "success" of an accomplice's help, given two key features of the concept. First, assistance that has absolutely no impact on the crime is not culpable, say, when I send a crowbar to a friend in prison in the hope he can use it to break out, but it arrives after the friend scales the prison wall (derivative liability). Secondly, accomplices frequently make no discernible difference at all, yet we insist on their responsibility (overdetermination). In response, Kadish suggests that the core question should be whether the accomplice's help "*could have* contributed to the criminal action of the principal."[47]

This thesis fails on two scores. First, raising the risk of an event will not suffice for causation if in fact the risk is not realized. The vendors of Zyklon B undoubtedly "could have contributed" to the Holocaust by supplying asphyxiants, but if we modulate the facts somewhat such that at the last minute all prisoners at Auschwitz were shot not gassed, it is undeniable that the company directors of Tesch & Stabenow did not play a causal role in the deaths that actually transpired.[48] If causation matters to responsibility, risk-raising itself will not do. Secondly, overdetermined causes are universally considered a species of causation, even if philosophical justifications for that view are surprisingly difficult to come by.[49]

Excluding overdetermined causes would not only eviscerate a large portion of complicity, it would also lead to intensely counterintuitive results for perpetration—no one could ever *cause* murder. Everyone eventually dies, so the serial killer merely modifies the time, place, and manner of an inevitability. If these modifications matter for perpetrators, should they not for accomplices too?

[45] James G. Stewart, "Overdetermined Atrocities," (2012) 10 *Journal of International Crim. Justice* 1023.
[46] United Nations War Crimes Commission (n. 22) 102 ff.
[47] Kadish (n. 29) 359 ff.
[48] Moore (n. 27) 284 ff.
[49] See Stewart, (2012) 25 *Leiden Journal of International Law* 176 ff.

4. Substantial and *de minimis* contributions

For many, the causal contribution an accomplice makes to an offense must be "substantial" in order to implicate her in the consummated crime. By insisting on substantial contributions, we erect a threshold that excludes *de minimis* assistance, viz. conduct that had little more than a trivial impact on the crime's occurrence. To cite a neat and often-used example, consider the responsibility of a serial murderer's grandmother—but for her decision to procreate the better part of a century earlier, the murder of numerous innocents would never have transpired at the hands of her progeny.[50] But by including the grandmother in the pool of agents responsible for these crimes, we extend accomplice liability beyond the point of plausibility, to an extreme where it chills normal social interaction and undermines liberal agenda. While this is agreed theoretically,[51] the boundaries of *substantial* contributions remain ill-defined and contested.

Consider the reference to "substantial contributions" in the negotiations of the U.S. Model Penal Code (MPC). As is well known, these negotiations were dominated by an acute anxiety about the relationship between complicity and commerce. One aspect of the reasoning is especially germane here—when reflecting on the objective element of complicity, commentators to the MPC reasoned that "A vendor who supplies materials readily available upon the market arguably does not make a substantial contribution to commission of the crime since the materials could have been gotten as easily elsewhere."[52] Unfortunately, this explanation is less than satisfying, and speaks to the troubles created by leaving "substantial" undefined. What is so problematic about this explanation?

If assistance is only ever substantial when it is not readily available, the rule excludes all overdetermined contributions from complicity. But this reading of "substantial" would swallow the better part of complicity. If soldier A acts as a lookout while his colleagues rape women in a prison, is he really exonerated because another soldier in his platoon would certainly have filled his shoes had he defected? Surely not. As we saw earlier, overdetermined forms of assistance make up a core component of any defensible theory of accomplice liability, and excluding them from the scope of the doctrine is unthinkable. Even in practice, many criminal codes take it upon themselves explicitly to state that non-necessary forms of assistance still amount to complicity,[53] such is their commitment to punishing forms of sufficient assistance. In short, overdetermined contributions must still be substantial, otherwise the test cannibalizes an unacceptably large part of the concept.

[50] J. Stapleton, "Perspectives on Causation," in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence* (2002), 67 ff.
[51] For a discussion of the metaphysics of "substantial" causes, see Stewart, (2012) *International Journal of Crim. Law* 1207 ff.
[52] American Law Institute, *Model Penal Code and Commentaries* (1985), Part 1, §§ 1.01–2.13, 318 ff.
[53] For 13 examples from South America, e.g., see Juan Bustos Ramirez and Manuel Valenzuela Bejas, *Le Système Pénal des Pays de L'Amérique Latine* (1983), 128–130 ff.