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# Reform of Anglo-American Complicity Law: Conduct, Connectivity and Comparative Solutions

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**Abstract**

The challenge presented by extant Anglo-American complicity law is that it intractably homogenises different participatory modalities across a broad landscape of culpability, and ultimately the controller/instigatory actor may be treated alike with the ethereal shadow marionette. It is essential to effect change, not only as a concern of appropriate legal substantive reformulation, but also to avoid capricious practical unfairness. It should not be reforms predicated on the illusory distillation of causality requirements, between assistance and encouragement provided by the accessory and direct commission of harm(s), but rather on an imputed-normative-proportionality standardisation, reviewable via evidentiary perspectives in terms of actual intercessory conduct. A critique of alternative legal system approaches to complicitous behaviour, notably the Germanic Criminal Code, provides further significant insights towards the adaptation of a new accessorial liability framework. This broadened template promulgates a synchronous and complementary original review of withdrawal precepts. A redemptive change of heart aligned with appropriate reductive criminal depredation may exculpate via reverse conduct prophylaxis. Only an individual actor who has manifestly interceded in criminal harm(s), adjudged by the jurors as moral arbiters within prescribed gradations of culpability, as addressed herein, should rank imputably in equiparated blameworthiness with the principal offender. If this equiparation is lacking, or if the criminal wrongdoing is characterised as a wholly independent action by another party, then alternative forms of potential secondary party liability must be sought – a *de novo* facilitation offence as propounded subsequently, and consideration of reverse burden of proof.

**Keywords**

Complicitous behaviour, instigation and aiding, comparative perspectives, intercessory conduct, disavowal, imputed proportionality, novel reform template

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Surveying complicity's hazy theoretical landscape can, depending on the commentator's nerve, temperament and resilience, induce feelings running from hand-rubbing relish to hand-on-the-brow gloom.<sup>1</sup>

## Introduction

It is important that we refocus our attention on each individual actor's degree of moral blameworthiness within complicity precepts.<sup>2</sup> Guilt and punishment should, accordingly, cohere synchronously, and with complementarity.<sup>3</sup> This presents an immediate challenge to our notions of fairness and justice, in that, multi-jurisdictional complicity laws are idiosyncratic in substantively divorcing personal responsibility for direct effectuation of harm(s).<sup>4</sup> The principal offender (perpetrator) directly carries out the commission of the *actus reus* of the offence, but the secondary party (accessory) may only provide attenuated peripheral involvement or engagement via assistance or encouragement of the perpetrators' crime, in effect, as an 'incorporeal shadow.'<sup>5</sup> An orator of hard truths would intuitively find it difficult to find equi-paration of culpability and punishment in tangentially dissonant modes of participation in wrongdoing, and, yet, this is reflective of Anglo-American jurisprudence.<sup>6</sup> The aetiology of metaphorical human action does not presumptively justify liability on the part of an accessory: there is always an intervening 'cause' by the immediate progenitor of the criminal act.<sup>7</sup>

Casuistic doctrinal reasoning has been applied to 'connect' the accomplice to the full crime, and alternative theoretical perspectives advanced to justify complicity and the boundaries of imputed culpability.<sup>8</sup> In truth, however, whilst different yardsticks have been applied to this elusive 'connectivity' conundrum, and a search for a perpetrator – secondary party common thread, it remains difficult to explain, yet alone justify.<sup>9</sup> Complicity activity is wholly different in temporal individuation, reach, and impact on the substantive offence that transpires: '[W]hy does the criminal law potentially equate the villainy of an Iago with the loyalty of a spouse who furnishes a lunch to her perpetrator – husband?'<sup>10</sup> A fundamental issue for reappraisal is, consequently, whether we can continue with extant rules, across different Anglophone jurisdictions that treat principal and secondary party offenders alike in terms of culpability and blameworthiness.<sup>11</sup> Moreover, whether it is still conscionable to fail to

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1. KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press, Oxford 1991), at 4.
  2. See Jacob Kreutzer, 'Causation and Repentance: Re-examining Complicity in Light of Attempts Doctrine', (2008) 3 *New York University Journal of Law and Liberty* 155, at 195: 'Accomplice liability currently treats all complicit liability the same, regardless of its relative impact on the substantive crime committed. Changing this standard is not only desirable as a matter of legal principle, but is also, a practical thing to do'.
  3. See generally, John Gardner, 'Complicity Causality' (2007) 1 *Criminal Law and Philosophy* 127.
  4. See Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 9th edn 2018) 455–458.
  5. See Joshua Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 *Hastings Law Review* 91, at 111.
  6. See Robert Weisberg, 'Reappraising Complicity' (2000) 4 *Buffalo Criminal Law Review* 217, at 224: '[C]omplicity is not a distinct crime, but a way of committing a crime; and see generally', GR Sullivan, 'Complicity for First Degree Murder and Complicity in an Unlawful Killing' (2006) *Criminal Law Review* 502; David Lanham, 'Complicity, Concert and Conspiracy' (1980) 4 *Criminal Law Journal* 276; Dennis J Baker, 'Lesser Included Offences, Alternative Offences and Accessorial Liability' (2016) 80 *Journal of Criminal Law* 446; and Jeremy Horder and David Hughes, 'Joint Criminal Ventures and Murder: The Prospects for Law Reform' (2009) 20 *King's College Law Journal* 379.
  7. See Dressler (n. 5) 102: 'Once the secondary party is found accountable, she is not punished for her own actions or for the extent of her assistance. Rather, she is punished for the actions of the perpetrator because accessory law is derivative'.
  8. See Paul H Robinson, 'Imputed Criminal Liability' (1984) 93 *Yale Law Journal* 611; and see generally, Joshua Dressler, 'Reforming Complicity Law: Trivial Assistance as a Lesser Offence' (2008) 5 *Ohio State Journal of Criminal Law* 427.
  9. See generally, Alan Reed and Michael Bohlander, *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate Publishing Limited 2013).
  10. See Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability' (n. 5) 92.
  11. See generally, AP Simester, JR Spencer, F Stark; GR Sullivan and GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing Limited 2019) 223–282; and Kimberly Kessler Ferzan and Lawrence A Alexander, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press 2009).

demarcate and distinguish between different types of accessorial behaviour, and intercession in ultimate harm(s): ‘punishment is rendered proportionally to culpability because this approach is considered deontologically correct.’<sup>12</sup>

In considering the ‘apposite’ conduct/ contribution requirements for secondary participation, to legitimately establish liability, we are not entering into *terra incognita*; fellow academics have found some tillable soil for deconstruction,<sup>13</sup> but it is very surprising how limited treatment this fertile landscape has received in recent times. This stands, in contradistinction, to the extensive distillation of other hardy perennials within the criminal justice complicity garden, notably definitional fault element requirement for secondary participation,<sup>14</sup> and the extended common purpose doctrine.<sup>15</sup> A seminal debate on the extension of the conduct nexus for complicity, to fundamentally demand causality ties linking D2’s aid/encouragement to the actual progenitation of harm, occurred over thirty years ago in American jurisprudence. The requirement of a *sine qua non*, a but-for intercessory contribution to the offence by D2, (or otherwise), was contested in pre-eminent scholarly contributions, led by Dressler,<sup>16</sup> Kadish<sup>17</sup> and Robinson.<sup>18</sup>

At the epicentre of this significant debate, and the dissonant views articulated, was whether causation serves as an essential ‘tool’ in the accurate measurement of an actor’s moral desert, and proportional punishment for the harm(s) engendered, beyond the intervening conduct of the principal offender.<sup>19</sup> Within domestic English law critique, KJM Smith consistently iterated that complicity liability ‘ought’ to be viewed through a prism of causality dependence: the supererogatory predicate for accessory liability coheres to their causal contribution and direct linkage to the offence that another actor commits.<sup>20</sup> Accomplices, as Gardner asserts,<sup>21</sup> bring wrongdoing into the world via another agent (the principal offender): an accomplice is one who acts with the consequence or result that the principal commits the wrong.<sup>22</sup> The juxtaposition, however, as Moore has presented on a number

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12. Dressler (n. 5) 92; and see Andrew P Simester, ‘The Mental Element in Complicity’ (2006) 122 *Law Quarterly Review* 578, at 588–589: ‘[D]octrines of complicity are quite separate from those concerning the perpetration of crime ... [I]ndeed, we can put this more strongly. The proper question to ask is not whether S is culpable in respect of the occurrence of P’s crime, but whether the occurrence of that time can legitimately be attributed to S (as well as P). At issue is not culpability but responsibility – in particular, the principle of wrong-responsibility’.
  13. See generally, GR Sullivan, ‘Doing Without Complicity’ (2012) *Journal of Commonwealth Criminal Law* 199; Richard Taylor, ‘Procuring, Causation, Innocent Agency and the Law Commission’ (2008) *Criminal Law Review* 32; JR Spencer, ‘Trying to Help Another Person Commit a Crime’ in P Smith (ed), *Criminal Law: Essays in Honour of J.C. Smith* (1987) 148; Kimberley Kessler Ferzan and Lawrence A Alexander, *Reflections on Crime and Culpability* (Cambridge University Press 2018); and Heidi M Hurd and Michael S Moore, ‘Untying the Gordian Knot of *Mens Rea* Requirements for Accomplices’ (2016) 32 *Social Philosophy and Policy* 161.
  14. See generally, GR Sullivan, ‘Intent, Purpose, and Complicity’ (1988) *Criminal Law Review*; RA Duff, ‘Can I Help You: Accessorial Liability and the Intention to Assist’ (1990) 10 *Legal Studies* 165; Simester (n. 12); and Glanville Williams, ‘Complicity, Purpose and the Draft Code’ (1990) *Criminal Law Review* 4; and see Law Commission No. 305, *Participation in Crime* (2007).
  15. See generally, Richard Buxton, ‘Being an Accessory to One’s Own Murder’ (2012) *Criminal Law Review* 275; David Ormerod and Karl Laird, ‘*Jogee*: Not the End of a Legal Saga but the Start of One?’ (2016) *Criminal Law Review* 539; Andrew P Simester, ‘Accessory Liability and Common Unlawful Purposes’ (2017) 133 *Law Quarterly Review* 73; William Wilson and David Ormerod, ‘Simply Harsh to Fairly Simple: Joint Enterprise Reform’ (2015) *Criminal Law Review* 1; Matthew Dyson, ‘Principals Without Distinction’ (2018) *Criminal Law Review* 296; and B Crewe, A Liebling, N Padfield and G Virgo, ‘Joint Enterprise: The Implications of an Unfair and Unclear Law’ (2015) *Criminal Law Review* 252.
  16. Dressler, ‘Reassessing the Theoretical Underpinnings of Accomplice Liability’ (n. 5).
  17. Stanford H Kadish, ‘Complicity, Cause and Blame: A Study in the Interpretation of Doctrine’ (1985) 73 *California Law Review* 323.
  18. Robinson, ‘Imputed Criminal Liability’ (n. 8).
  19. See Kadish (n. 17) at 391: ‘The problem raised by this use of causation follows from the characteristic ways in which human actions are conceived as taking place. Actions are seen not as caused happenings, but as the product of the actor’s self-determined choices, so that it is the actor who is the cause of what he does, not one who set the stage for his action’.
  20. Smith (n. 1) 55–99; and see generally, KJM Smith, ‘Withdrawal in Complicity: A Restatement of Principles’ (2001) *Criminal Law Review* 769.
  21. Gardner (n. 3) 120–129.
  22. *Ibid.*

of occasions, is that such a deconstruction of liability potentially drives a coach and horses through 'normal' identification of personal attributive liability, and asynchronously conflates responsibilities.<sup>23</sup>

A fundamental principle is that an actor is liable for individual acts and omissions, not derivatively for the explicit conduct of others.<sup>24</sup> There is, consequentially, a resonant scalar question vis-à-vis the causality inter-section of an accomplice intertwined with culpability: 'much of the territory currently covered by complicity could be remapped as forms of direct liability as a principal'.<sup>25</sup> A difficulty, however, is the broad spectrum of complicitous behaviour that currently sits loosely and disjunctively within the panoply of potential secondary participation.<sup>26</sup> It is inefficacious, and, at times, tautologous and counter-intuitive, to normatively treat inproportionate dissonant conduct as standardised.<sup>27</sup> The hiring of a hit man to shoot to kill is viewed as kaleidoscopically similar contributory/intercessory conduct as holding a friend's baby to allow her to steal.<sup>28</sup> It is equated with shouting 'Oh Goody' to a principal offender who stabs the victim, wholly irrespective in such a scenario as to whether this verbal encouragement makes any difference whatsoever to the harmful actions of the perpetrator.<sup>29</sup> All types of conduct are treated as plain vanilla in terms of liability with no variegation. The challenge, and deleterious consequences, as Sullivan has cogently adumbrated,<sup>30</sup> is that individuals such as taxi drivers, providers of otherwise lawful services, and family members with no criminal disposition whatsoever may be enveloped within the umbrella of secondary participation. They may be associated/intersect with the crimes of a principal offender, predicated on tokenistic and minimalistic acts of assistance or encouragement.<sup>31</sup>

Tokenistic and minimalistic acts of assistance and encouragement ought not to be enough henceforward for accessorial culpability.<sup>32</sup> The extant boundary threshold for potential liability is set at an extremely low bar and ineffectual *de minimis* gradation: D1 only need be 'aware' in a generalistic and non-specific sense of D2's encouragement; no actual 'stake' in the crime is transformatively essential; and no requirement exists, as it should, for prosecutors to prove to the jurors, as moral arbiters, that the encouragement had any effect on the perpetrator's commission of harm(s).<sup>33</sup> A recalibration of complicity precepts is urgently needed to predicate liability on morally justifiable principles.<sup>34</sup> There needs to be an immediate *de novo* reappraisal to efficaciously align mode of participation synchronously with normative proportionality standardisations and to rationalise evidentiary attribution before jurors as our

23. See Michael S Moore, *Causation and Responsibility*, 2009, chapter 13; and see generally Peter Glazebrook, 'Structuring the Criminal Code: Functional Approaches to Complicity: Incomplete Offences and General Offences', in Simester and Smith (eds), *Harm and Culpability* (1996) 195: it is contended therein that we might abrogate substantive complicity precepts *in toto*, relying in contradistinction on variegated modes of engagement in crime – modality as a route to inculcation, but without drawing a dichotomy between principal offenders and accomplices. Note that Sir John Smith rejected a causality analysis for complicity: see JC Smith, 'Aid, Abet, Counsel or Procure' in P Glazebrook (ed), *Reshaping the Criminal Law* (1978).

24. See Kadish (n. 17) at 336: '[C]ausation doctrine cannot make the first actor liable for a prohibited result caused by a volitional act of the second actor ... the latter's action serves as a barrier through which the causal inquiry cannot penetrate to hold the first actor liable. To hold the first actor for the crime, we need an alternative doctrine that is consistent with our conception of human actions. The doctrine of complicity also fills the doctrinal gap for result crimes'.

25. Simester et al (n. 11) at 280.

26. See Sullivan, 'Doing Without Complicity' (n. 13) at 228–229.

27. *Ibid.*

28. *State v Doran*, 526 P. 2d 188 (N.M. Ct App. 1974); and see also *Alexander v State* 102 So. 579, 598 (Ala. Ct. App. 1925) where a wife carried food to her husband for a midday meal, providing sustenance whilst he continued to manufacture bootleg liquor.

29. *R v Giannetto* [1997] 1 Cr. App. R. 1.

30. See Sullivan, 'Doing Without Complicity' (n. 13) at 228–229.

31. *Ibid.*, at 229.

32. See generally, Michael S Moore, 'Causing, Aiding and the Superfluity of Accomplice Liability' (2007) 156 *University of Pennsylvania Law Review* 395.

33. See Sullivan, 'Doing Without Complicity' (n. 13) at 217: 'Liability based on complicity regularly entails criminal convictions for the full crime and with a culpability of lesser dimension than is required for the principal'.

34. See generally, James Edwards and Andrew P Simester, 'Crime, Blameworthiness and Outcomes' (2019) 39 *Oxford Journal of Legal Studies* 50.

moral arbiters.<sup>35</sup> This reattribution should be cast within parameters of reasonableness to justify inculpation, and with an attenuated reverse burden onus. It is important to reflect pragmatically on the secondary party's actual intercession with the completed crime(s) and to adapt moral blameworthiness reconceptualisations, including an examination of the degree of hegemony or control over others.<sup>36</sup>

Modes of complicitous behaviour ought to be considered afresh, reviewable via an original 'quasi-excusatory' lens that is normatively akin to denunciatory acts of an effective withdrawal, and with parallel syllogisms for reform optionality. It needs to be asked of jurors, as moral arbiters, whether D2 acted with a 'particularly blameworthy mindset'.<sup>37</sup> Parity of culpability, or otherwise, between principal offender and accessory needs to be recast, and dissonances in moral culpability translated into a transformational reappraisal of inculpatory/non-inculpatory behaviour.<sup>38</sup> It is necessary to re-examine the shoals of culpability, of personal responsibility, and of criminalisation itself, providing a more fundamental binomial role for D2's 'actual' intercessory conduct, beyond causality or illustory associated connection(s).<sup>39</sup> Anglophone jurisdictions have repeatedly made antediluvian judicial references, and incantations, to a need for causation/connection between D2's conduct and D1's criminal wrongdoing.<sup>40</sup> The pithy reality, however, is that, other than for procurement,<sup>41</sup> or for overwhelming supervening acts attributable to a principal,<sup>42</sup> causality ties are *not* relationally attributive. A far stronger synergy is required between delfacatory conduct and criminal harm(s).

Complicity liability is further deconstructed in the sections that follow: (i) a critique of the theoretical underpinnings of secondary participation in crime, and the true nature of derivative liability; (ii) conduct for complicity liability is recast in terms of withdrawal precepts, and alignment on an imputed-normative-reasonableness-assessment of intercessory criminal behaviour; (iii) a comparative review of alternative criminal law legal systems, notably Germany, adducing new reform pathways for complicity with standardised contemporary solutions; and (iv) a new imputed proportionality framework for complicitous behaviour, creating a bespoke facilitation offence, an original recalibration of evidentiary perspectives, and controversially promulgating adventitious benefits appurtenant to reverse burden. An optimal reform template is propounded in the conclusion section, with a renewed focus on the level of control or dominance between individual criminal actors, and a reconstituted system predicated on offence definition, guilt, and culpability. It is quintessentially significant to reconstitute the manner in which an accessory is embedded in the planning or commission of the crime and the

35. See generally, Findlay Stark, 'The Demise of "Parasitic Accessorial Liability": Substantive Judicial Reform, not Common Law Housekeeping' (2015) 75 *Cambridge Law Journal* 550; and Daniel Yeager, 'Helping, Doing and the Grammar of Complicity' (1996) 15 *Criminal Justice Ethics*.

36. See generally, Thomas J Miceli and Kathleen Segerson, 'Punishing the Innocent Along with the Gravity: The Economics of Individual Versus Group Punishment' (2009) 109 *Columbia Law Review* 1; and see Paul H Robinson et al, 'Empirical Desert, Individual Prevention and Limiting Retributivism: A Reply' (2014) 17 *New Criminal Law Review* 312.

37. See Beatrice Krebs, 'Joint Criminal Enterprise in English and German Law, D.Phil' (2015), accessible at <https://ora.ox.ac.uk>, at 89; and see generally, Andrew Von Hirsch, 'Extending the Harm Principle: Remote Harms and Fair Imputation' in A Simester and ATH Smith (eds), *Harm and Culpability* (Clarendon Press, Oxford) 263.

38. See generally, Douglas Husak 'Broad Culpability and Retributivist Dream' (2011–2012) 9 *Ohio State Journal of Criminal Law* 449.

39. See generally, Matthew Dyson, 'Might Alone Does Not Make Right: Justifying Secondary Liability' (2015) *Criminal Law Review* 967.

40. See generally, Kimberly Kessler Ferzan, 'Holistic Culpability' (2007) 28 *Cardozo Law Review* 2523; and Dennis J Baker, 'Complicity, Proportionality and the Serious Crime Act' (2011) 14 *New Criminal Law Review* 403.

41. See *Attorney-General's Reference (No. 1 of 1975)* [1975] Q.B. 773 (CA): 'To procure means to produce by endeavour. You procure a thing by setting out to see that it happens, and taking the appropriate steps to produce that happening'.

42. See *Anderson and Morris* [1966] 2 Q.B. 110 (CCA); and see generally, Moore (n. 32) at 110 who argues that a route to make normative sense of the intervening cause/accomplice liability doctrine is to ground the legal doctrines in the facts about causation: 'Because the dominant policy of the criminal law is to punish only those who are morally responsible, and only in proportion to the degree of their responsibility'.

intercessory nature of their conduct. The time is ripe to positively reformulate the unconscionable ‘disgrace’ of definitional conduct element requirements (or non-requirements) for complicity that Dressler charted over thirty years ago.<sup>43</sup>

## Imputed Proportionality and Personal Responsibility: The (Non)-Derivative Nature of Complicity

Anglo-American complicity theory is rooted in derivative liability.<sup>44</sup> There is a fundamental requirement to establish a common nexus between the criminal wrongdoing of the principal actor, and a co-relating thread between the accessory’s conduct and the effectuation of particularised harm.<sup>45</sup> The perpetration of the criminal wrong itself operates transformatively as a catalyst for potential secondary participation liability. The implication, and derivation, is that complicity law is *sui generis* in running contrary to traditional notions of individuated responsibility for the ascription of criminal wrongdoing.<sup>46</sup> The required ‘linkage’ or nexus between D1 and D2 to consequentially establish accessorial liability, and the theoretical justifications for inculcation, remains opaque and open to contested challenges.<sup>47</sup> The theoretical explanations for such non-traditional individuated responsibility, as KJM Smith stated,<sup>48</sup> broadly fall within two generalised categorisations for debate: liability that is predicated upon, ‘consensual, agency or ratification notions’<sup>49</sup>; or, alternatively, an ‘inchoate or risk-based account, with the principal offence primarily serving an evidential function’.<sup>50</sup> What, however, is suggested herein is required instead is a more nuanced and comparative legal system review of complicity theory. An evaluative critique that proportionally focuses on the accessory’s actual delictory acts of assistance or encouragement in a real-world sense, an evidentiary perspective that legitimately transmogrifies how D2 intersects in the criminal harm(s) propagated, and morally justifies the attribution of personal liability.

### Complicitous Behaviour: Agency and Forfeiture of Personal Rights

A number of commentators have drawn parallels between the derivations of complicity liability, and the nature of civil law agency.<sup>51</sup> Attribution of liability is articulated as predicated upon reciprocal

43. See Dressler (n. 8) at 428–429: ‘American accomplice law is a disgrace. It treats the accomplice in terms of guilt and potential punishment as if she were the perpetrator, even when her culpability may be less than that of the perpetrator (and even less than is required in the definition of the offence for which she is convicted) and/or her involvement in the crime is tangential. When lay persons learn this, it can provide to be a “jaw dropper.” Nonetheless, there has been no recent legislative effort to reform complicity law’.

44. See Dressler (n. 5) at 108: ‘Accomplice law ... conflicts with the usual values of criminal law. It holds persons accountable for the actions of others. As a result, although the accomplice is punished because of her own conduct, she is punished to the extent of another’s. She can be punished for harm she did not cause’.

45. See KJM Smith (n. 1) at 73: ‘The two most prominent and longest enduring elements of common law complicity have been its derivative nature and equality of potential punishment for all parties. And although throughout complicity’s recorded history each has been subject to modification, they remain the closest to bedrock principles to be found in common law complicity doctrine’.

46. See generally, Dennis J Baker, ‘Complicity, Proportionality and the Serious Crime Act’ (2011) 14 *New Criminal Law Review* 403.

47. See generally, Christopher Kutz, ‘Causeless Complicity’ (2007) 1 *Criminal Law and Philosophy* 289; and Daniel Yeager, ‘Helping, Doing and the Grammar of Complicity’ (1996) 15 *Criminal Justice Ethics* 25.

48. See KJM Smith (n. 1) at 74.

49. *Ibid.*

50. *Ibid.*

51. See generally, HL Schreiber, ‘Problems of Justification and Excuse in the Setting of Accessorial Conduct’ (1986) *Brigham Young University Law Review* 611; and see KJM Smith (n. 1) at 74–76; Dressler (n. 5) at 109–110; Dressler (n. 8) at 433–434; and see Kadish (n. 17) at 354 who rationalised why a fault ingredient lower than intention is inapposite for secondary party inculcation: ‘[I]t may reside in the notion of agreement as the paradigm mode by which a principal in agency law (the secondary party in the terminology of the criminal law) becomes liable for the acts of another person. [Such liability] ... rests essentially on his consent to be bound by the actions of his agent whom he vests with authority for this purpose’.

ideological touchstones of principal and agent: ‘every act done in furtherance of a common intent by each of them is, in law, done by all’.<sup>52</sup> Consensus is primordial within civil law agency precepts, in the contextualisation of the principal assenting, *in toto*, to the actions of the agent, and obligational reciprocity on the other side.<sup>53</sup> In contradistinction, within secondary participation, it is eminently feasible, and often factually apposite, that the accessory operates wholly outwith the knowledge or consent of other criminal actors.<sup>54</sup> Consensus is not inferentially required, or tangentially linked to, criminal modes of secondary participation in a crime.<sup>55</sup> Theories of apparent or ostensible authority, central to civil law agency and commercialisation of transactions, are not relationally relevant to complicity.<sup>56</sup> This bifurcated importational divide between complicity and agency prompted Sayre to state that, between the two fields of law, there seems often a disparity of thought, and, consequentially, that, ‘developments in the one field have not easily penetrated the other’.<sup>57</sup>

There is a clear divide in the principal/agent roles in civil and criminal law in terms of ‘responsibility’ for the effectuation of action(s).<sup>58</sup> The positions are juxtaposed and reversed. In civil law agency, in terms of ‘responsibility-producing action’,<sup>59</sup> the agent is derivatively empowered via the actions of the principal, and the latter is constitutively in charge.<sup>60</sup> The opposite ‘power’ balance resonates in complicity, and alternative rationales apply for ascriptive responsibility, empowered authority, and imputation of liability.<sup>61</sup> Moreover, in a number of presentational factual metanarratives within complicity, there is no prior collaboration, or any representational consensus between D1 and D2, in any shape or form; the agency is not the theoretical predicate for inculcation, nor is it suitable or pervasive for adaptation.<sup>62</sup>

Dressler has extended the conceptualisation of agency to affirm, in part, that it is arguably justifiable to punish an accomplice, akin to a perpetrator, because of their ‘forfeited personal identity’.<sup>63</sup> These personal rights are lost when, in effect, D2 purchases a ticket for inculcation via propagation of criminal wrongdoing. The analysis is that the accessory’s volitional election to interpose themselves in the criminal actions of another, traducing the boundary gradation of liability, means that D2 articulates, in effect that, ‘your acts are my acts’.<sup>64</sup> The co-relation is that, accordingly, the accessory has forfeited their personal identity, and correspondingly, abrogated their rights to be assimilated as an independent individual actor: ‘moral distinctions between parties are rendered irrelevant’.<sup>65</sup> The challenge, however, as Dressler cogently acknowledges is that, beyond perfunctory incantation of forfeiture of personal identity, there remains a fudged panoply of harmful conduct to decipher and recalibrate,

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52. Alderson B. in *Macklin* (1838) 2 Lew C.C. 225, 168 E.R. 1136.

53. See Kadish (n. 17) at 354–355; and note corollary also with conspiracy: see, for example, *Pinkerton v United States*, 328 U.S. 640, 646 (1946) (‘And so long as the partnership in crime continues’ each party is responsible for the acts of fellow partners).

54. See Smith (n. 1) at 74; and see *Mohan* [1967] 2 A.C. 187.

55. See generally, Francis Bowes Sayre; ‘Criminal Responsibility for the Acts of Another’ (1930) 43 *Harvard Law Review* 695; and see generally, *State v Tally* (1894) 102 Ala 25.

56. See Smith (n. 1) at 75.

57. Sayre (n. 55) at 695: notably, ‘[F]undamental difference in conception and in terminology has served to insulate the two fields of thought’.

58. See Dressler (n. 8) at 433–434.

59. See Smith (n. 1) at 75.

60. See generally, Schreiber (n. 51).

61. See generally, Kadish (n. 17) at 354–355.

62. See generally, Richard Buxton, ‘Complicity in the Criminal Code’ (1969) 85 *Law Quarterly Review* 252.

63. See Dressler (n. 5) at 111; and Dressler (n. 8) at 434–435.

64. Dressler, ‘Reassessing the Theoretical Underpinning of Accomplice Liability’ (n. 5) at 111.

65. *Ibid.*

coalescing around the significance and import of variegated moral distinctions in conduct.<sup>66</sup> Dissonant modes of participatory engagement should demand dis-similar moral reprobation.<sup>67</sup>

Calibration of personal dangerousness, extended beyond forfeiture of individual rights, is absolutely crucial vis-à-vis criminal responsibility, and liability.<sup>68</sup> An accomplice, in truth, is often not as dangerous, as culpable, or as blameworthy as the principal who directly effects the offence commission.<sup>69</sup> It is, thus, essential to positively calibrate D2's actual conduct, their different individual acts of assistance and encouragement, to proportion degrees of inculcation.<sup>70</sup> It is illogical to treat the instigation of killing by another in a similar 'personal forfeiture' vein to the provider of food as sustenance to their wrongdoer partner.<sup>71</sup> A theory of complicity, predicated simply on personal forfeiture of rights by any delictory accomplice, is counter-intuitive. It is not 'just' about obfuscation of personal rights, but about the scope of engagement (or otherwise) in the criminal harm(s) effected.<sup>72</sup>

The primordial need to proportionally recognise how an accessory actually intercedes in the harm brought about by others stands in contradistinction to an alternative theory of complicity liability predicated on a change in normative position by D2.<sup>73</sup> The change in normative position theory has been applied within extended common purpose doctrine and parasitic accessorial liability inculcation,<sup>74</sup> but it has been suggested it could apply more broadly to justify complicitous behavioural liability.<sup>75</sup> The predicate is that a culpable accessory may have forfeited any entitlement to proportional punishment to their past harm-doing and individuated culpability gradation, because of a change to their normative position in criminal engagement.<sup>76</sup> The derivational effect is that the secondary party actor has opened up liability for unintended aggravated consequences.<sup>77</sup> It runs counter, however, to a substantial contribution

66. See Dressler 'Reforming Complicity Law' (n. 8) at 435; and see Smith (n. 1) at 81: '[I]t might be claimed that the perpetrator, by virtue of exercising the final or most direct (human) control over whether the offence is carried out, is in an inherently special position; therefore whatever the scale of the accessory's contribution the perpetrator's role assumes a particular and distinct moral importance'.

67. See Simester, 'The Mental Element in Complicity' [n. 12] at 580: '[W]herever we reprove a person, the grounds for reproof must originate in the conduct of that person ... [T]he criminal law contains a supplementary principle of personal control over liability, according to which no one should have the power deliberately to render another person guilty of a crime. Our liability, like our culpability, flows from what we do (or omit to do). It does not, and should not, spring from the choices of others'.

68. See generally, Graeme Virgo, 'Guilt by Association: A Reply to Peter Mirfield' (2013) *Criminal Law Review* 584.

69. See generally, Alan Reed, 'Joint Enterprise and Inculcation for Manslaughter' (2010) 74 *Journal of Criminal Law* 200; Simon Parsons, 'Joint Enterprise and Murder' (2012) 76 *Journal of Criminal Law* 463; and A O'Rourke, 'Joint Criminal Enterprise and Bratanin: Misguided Overcorrection' (2006) 47 *Harvard International Law Journal* 307.

70. See generally, Glanville Williams, 'Complicity, Purpose, and the Draft Code: Part 2' (1990) *Criminal Law Review* 98.

71. See Dressler (n. 8) at 435.

72. Ibid., and see generally, David Lanham, 'Accomplices, Principals and Causation' (1980) 12 *Melbourne University Law Review* 490.

73. See generally, Victoria B Wang, 'A Normative Case for Abolishing the Doctrine of Extended Joint Criminal Enterprise' (2019) 83 *The Journal of Criminal Law* 144.

74. See Simester, 'The Mental Element in Complicity' (n. 12) at 598–599: 'Through entering into a joint enterprise, S changes her normative position. She becomes, by her deliberate choice, a participant in a group action to commit a crime. Moreover, her new status has moral significance: she associates herself with the conduct of the other members of the group in a way that the mere aider or abettor, who remains an independent character throughout the episode, does not'.

75. See Jeremy Horder, 'A Critique of the Correspondence Principle in Criminal Law' (1995) *Criminal Law Review* 759: 'The fact that I deliberately wrong V arguably changes my normative position vis-à-vis the risk of adverse consequences of that wrongdoing to V, whether or not foreseen as reasonably foreseeable'; and see generally, Jeremy Horder and David Hughes, 'Joint Criminal Ventures and Murder: The Prospect for Law Reform' (2009) 20 *King's College Law Journal* 379.

76. See generally, William Wilson, 'Murder and the Structures of Homicide' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press 2000) 40.

77. See generally, Andrew Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 *New Criminal Law Review* 232; and Youngjae Lee, 'Recidivism as Omission: A Relational Account' (2009) 87 *Texas Law Review* 571.

to harm standardisations, appropriate culpability thresholds, and legitimate punishment<sup>78</sup>: ‘it is empirically absurd and normatively unacceptable to interpret every decision to commit a serious crime as an intentional waiver of the right to proportional treatment’.<sup>79</sup>

### *Abrogation of Complicity: A Culpability–Risk Model and Enhanced Dangerousness*

An alternative perspective, advanced, in part, by Sullivan,<sup>80</sup> is to look to a culpability–risk model, addressing the enhancement of the risk of the dangerousness of the principal actor.<sup>81</sup> The risk/dangerousness model assumes that the accomplice is liable because her participation, via acts of assistance or encouragement, has increased the likelihood that the principal actor will commit criminal harm(s).<sup>82</sup> The dilemmatic choice remains, however, as to why we should hold the accessory fully responsible for criminal harm(s) that are caused and effected by another party.<sup>83</sup> Why is the same amount of proportional responsibility imposed on a secondary party? This is not fully answered by a culpability–risk framework.<sup>84</sup>

Sullivan’s extended culpability–risk template advocates the potential abolition of complicity doctrine *per se*, and an abrogation of the principal/accessory distillation.<sup>85</sup> This recalibrated model extends the definitional ambit of the principal offender to encompass all offence contributions which fall within the behavioural umbrella of ‘outcome responsibility’ conduct.<sup>86</sup> This is a broadened variant of Dressler’s substantial participation framework for complicitous liability.<sup>87</sup> The challenge, in both adaptations, however, is to identify across a continuum of intercessory complicitous behaviour by secondary party actors when the evidentiary touchstones of ‘determinativeness’ and/or ‘substantiality’ pertains.<sup>88</sup> It remains subject to conjecture as to which factorisations, and inculcated behaviours, are relationally significant.<sup>89</sup> A reciprocal issue that of effective attribution of liability, applies to an instrumentalist model of

78. See generally, Dennis J Baker, ‘Unlawfulness’s Doctrinal and Normative Irrelevance to Complicity Liability: A Reply to Simester’ (2017) 81 *The Journal of Criminal Law* 393; Barry Mitchell, ‘Minding the Group in Unlawful and Dangerous Act Manslaughter: A Moral Defence for One Punch Killers’ (2008) 72 *The Journal of Criminal Law* 537; and Andrew Ashworth, *Positive Obligations In Criminal Law*, Hart Publishing, Oxford, 2013, at 130–147.

79. See KW Simons, ‘Is Strict Liability in the Grading of Offences Consistent with Retributive Desert?’ (2012) 32 *Oxford Journal of Legal Studies* 445, at 449; and see generally, Andrew Von Hirsch, *Censure and Sanctions*, Clarendon Press, Oxford, 1993, at 81.

80. See GR Sullivan, ‘Participating in Crime: Law Com. No. 305 – Joint Criminal Ventures’ (2008) *Criminal Law Review* 19, at 30–31. The contention, in the realm of joint enterprise liability, is that D2 is also ‘partly responsible’ for the commission of the more serious crime by D1, beyond the initial common plan, and consequentially an increased penalty is apposite to reflect the increased risk of exponential offence commission.

81. See Dennis J Baker, *Glanville Williams: Textbook of Criminal Law* (Sweet and Maxwell, 13th edn 2012) at para. 14-062; and see generally, Christopher Kutz, *Complicity-Ethics and Law for a Collective Age* (Cambridge University Press 2000) 165 contending that accomplice liability must bear reflection on the nature of their individual conceptualisation, and their particularised role and identify within the shared project.

82. See Sullivan I (n. 80) at 29–30.

83. *Ibid.*

84. See GP Sullivan, ‘Doing Without Complicity’ (n. 13) at 202: ‘The most straightforward way to bring D(1), the organiser of V1’s death, dully to book would be to treat him as a joint principal alongside P ... Anglophone criminal law should recognise three types of principal offender. The first type would be perpetrators. The second type would be persons who although not perpetrators have, by their conduct, had a causal influence on the commission of the offence. The third type would be persons who have jointly agreed with others to commit the offence, and intend that one or more parties to the agreement will commit the offence. To be convicted as a principal would require proof of any *mens rea* specified in the offence. A lesser form of culpability than that specified for the offence would not suffice even for non-perpetrator principals’.

85. *Ibid.*, at 210, citing a term acknowledged to Honoré: see, Tony Honoré, *Responsibility and Fault* (Hart Publishing 1999) 7–40.

86. See Dressler (n. 5) at 121–124; and see Dressler (n. 8) at 448.

87. See generally, Gardner (n. 3) at 127 asserting that the voluntary conduct of D1 can be ‘caused’ by D2, and with an ‘allocation’ of responsibility between accomplices and principals.

88. See generally Kadish (n. 17) at 323; and see Gardner (n. 17) asserting the intransitivity of many criminal and moral harms, and illustratively adducing the ‘non-proxyable’ wrong of rape. D2, in certain circumstances, can only be associated responsibility for aiding/encouraging a rape via accountability as an accessory.

89. See Larry Alexander, Kimberly Kessler Ferzan and Stephen J Morse, *A Culpability-Based Theory of Criminal Law* (2009).

liability advanced by Alexander, Ferzan and Morse.<sup>90</sup> An accomplice is recategorised as simply creating a culpable ‘risk’ that harm will occur, equitable to inchoate conduct.<sup>91</sup> Constitutively, this template abolishes complicity doctrine and punishes all non-perpetrators for what they have done – tangentially wrongful risk-taking.<sup>92</sup>

A utilitarian calculus of wrongful risk-taking, a model predicated simply on enhanced dangerousness via complicitous behaviour *per se*, is wholly insufficient as a comprehensive substantive underpinning for accessorial liability.<sup>93</sup> There is no comparative statistical research that properly addresses the differential dangerousness of offenders, nor any detailed exploration of impugned theoretical ramifications.<sup>94</sup> What is required instead is a far more nuanced and multi-textured conceptual analysis of actual complicitous conduct, and effectuation of harm: ‘[H]arm or *actus reus* of the crime is the indispensable justification for punitive intervention’.<sup>95</sup> Harm is the representative measure of the complicitous participant’s level of legal guilt, and of merited punishment: it acknowledges the threshold gradation to which societal moral equilibrium has been irreducibly altered.<sup>96</sup> It is vital to effectively address the personal responsibility of each individual criminal actor that morally justifies inculpation.

### ***Complicity: A New Theoretical Model – Normative Conduct Reappraisal and Evidentiary Perspectives***

It is necessary to look beyond extant theoretical perspectives that have been addressed, or adapted, to complicity liability, and reappraise *de novo* optimal categorisations. An imputed-normative-proportionality standardisation should be promulgated, a reconceptualisation of complicitous behaviour, that legitimately demystifies responsibility and culpability in a far more nuanced and coarse-grained ideologically relevant manner. Causality ties do not generally provide a universalist and pervasive nexus between principal/accessory,<sup>97</sup> outwith cases of procurement,<sup>98</sup> or as subsequently suggested herein, as a quasi-exculpatory reverse burden intercession, where the ‘acts’ of the perpetrator are demarcated as, ‘an overwhelming supervening event’,<sup>99</sup> inuring D2 from aggravated consequential liabilities.<sup>100</sup> Causation is inapposite, and often counterfactual, as a leitmotif of accessorial inculpation: ‘D1’s

90. *Ibid.*

91. See generally, Eric A Johnson, ‘Criminal Liability for Loss of a Chance’ (2005) 91 *Iowa Law Review* 59; and Daniel Yeager, ‘Helping, Doing, and the Grammar of Complicity’ (1996) 15 *Criminal Justice Ethics* 25.

92. See Dressler (n. 5) at 111.

93. *Ibid.*, and see generally, Joshua Dressler, ‘The Jurisprudence of Death by Another: Accessories and Capital Punishment’ (1979) 51 *University of Colorado Law Review* 17.

94. *Ibid.*, at 104.

95. See generally, Kimberly Kessler Ferzan, ‘Holistic Culpability’ (2007) 28 *Cardozo Law Review* 2523; GP Fletcher, ‘Comparative Law as a Subversive Discipline’ (1998) 46 *The American Journal of Comparative Law* 683; and John Gardner, ‘Rationality and the Rule of Law in Offences Against the Person’ (1994) 53 *Cambridge Law Journal* 502.

96. See Simester, ‘The Mental Element in Complicity’ (n. 12) at 589: ‘Paradigmatically, both within and outwith the law, people are distinctively responsible for, and only for, the consequences of their own actions’.

97. See Robinson, ‘Imputed Criminal Liability’ (n. 8) at 632, 635 and 638: ‘the strength of the causal relation varies’, and that sometimes the ‘causal connection to the harm is tenuous at best’; and see GP Fletcher, *Rethinking, Criminal Law* (1978) 680, that one can contribute to a result without causing it lies at the foundations of accessorial liability; and see Kadish (In. 17) at 357: ‘[T]he common notion of success is captured in the ordinary locution of something having mattered, of it having made a difference. In causation the requirement of a condition *sine qua non* assures this sense of success, since the requirement means that without the act the result would not have happened as it did. In complicity, however, a *sine qua non* relationship in this sense need not be established. It is not required that the prosecution prove, as it must in causation cases, that the result would not have occurred without the actions of the secondary party. The commonly accepted formulation is that to establish complicity, any influence or help suffices for liability’.

98. See *A-G’s Reference (No. 1 of 1975)* [1975] Q.B. 773 (CA).

99. See Horder (n. 4) at 476–477.

100. See *R v Tas (Ali)* [2019] Criminal Law Review 339.

actions serve as a barrier through which the causal inquiry cannot penetrate to hold the first actor liable ... the doctrine of complicity fills the doctrinal gap for result crimes.<sup>101</sup>

An imputed-normative-proportionality standardisation, that genuinely reflects delictory acts of assistance or encouragement which make an influential difference to effected criminal harm(s), would efficaciously address notions of the moral desert for inculcation, and personal responsibility for liability. It deontologically focuses in a wholly apposite manner on relational culpability, behavioural 'fault' in conduct by an accessory across a continuum of differentiated actions, and is reflective of real-world intercession/contribution to criminal wrongdoing. This new template proposal, explored subsequently, looks to the jurors, as moral arbiters, of complicitous influential behaviour. It is reflective of an evidentiary theory of liability that Robinson,<sup>102</sup> in part, has generally articulated, balancing competing interests of fairness and utility, and consequentially may be subject to some controversy given its utilitarian open-textured imputations: '[C]riminal law permits the imputation of both the objective and culpability elements of a crime ... it imposes liability even though the defendant has not satisfied all the objective elements of an offence'.<sup>103</sup>

The adaptive imputed proportionality recalibrated test that is propounded concentrates normatively on complicitous 'fault' in behaviour, set against graduated threshold norms. It focuses on comparative lessons derived from the adventitious Anglo-American implementation of elements of the German Criminal Code that makes a transformatively significant binary divide between two dissonant categorisations of secondary participation.<sup>104</sup> The instigator of criminal conduct is defined and interpreted, as an individual who may have control or hegemony over the actions of others, and who 'causes' the perpetrator to effect the commission of the criminal wrongdoing.<sup>105</sup> There is a requirement for 'direct' communication between perpetrator and accessory, and psychological control is required.<sup>106</sup> Alternatively, and with a radically differentiated intercession in effected harm, will be the aider who simply facilitates the wrong of another individual actor, via emboldenment, influencing their conduct in a more attenuated manner, through the provision of succour, security and support.<sup>107</sup> Consequently, a more indirect influential connection is prescribed, but with a co-terminous mandatorily reduced sentence, properly aligning and cohering with 'legitimate' culpability and responsibility norms.<sup>108</sup>

The imputed-normative-proportionality framework, adapted and proposed herein, is reflective of bifurcatory accessory conduct: a divide between the *scylla* and *charybdis*.<sup>109</sup> A secondary party who intersects in the criminality in a fundamentally contributory manner, instigating the offence, or significant conduct that materially aids the perpetrator, are adduced on one side of the scales. Transformatively, alternative and more minimalistic aid and encouragement, peripheral in terms of facilitation, is cast through a different lens and requires iteration of a wholly new offence model, reviewable on the evidence in terms of actual engagement.<sup>110</sup> This framework, set in a comparative contextualisation, should examine the nature of the interest the criminal actor has in the

101. Kadish (n. 17) at 336.

102. Robinson, 'Imputed Criminal Liability' (n. 8) at 613.

103. *Ibid.*

104. See generally, Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009); and C Roxin, *Täterschaft Und Täterschaft* (8th edn, Walter De Gruyter 2006).

105. See Kai Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime' (2007) 5 *Journal of International Criminal Justice* 208, at 212–214.

106. *Ibid.*, 213.

107. *Ibid.*

108. *Ibid.*; and see H Trondle and T Fischer, *Strafgesetzbuch* (53rd edn, Munich 2006) 214–215.

109. See generally, Stephen J Morse, 'Criminal Responsibility and the Disappearing Person' (2007) 28 *Cardozo Law Review* 2545.

110. See generally, Ben Livings and Emma Smith, 'Locating Complicity: Choice, Character, Participation, Dangerousness and the Liberal Subjectivist' in Alan Reed and Michael Bohlander (eds), *Participation In Crime – Domestic And Comparative Perspectives* (Ashgate Publishing 2013) 41.

result, the scope of the accessory's participation in the criminal act, and the control, or otherwise, that the secondary party had over the effectuation of harm(s).<sup>111</sup> There needs to be charted a new type of bespoke facilitation offence, specifically calibrated and implemented, to embrace ethereal and non-significant participatory intercessory contribution to harm. Moral desert, culpability gradation thresholds, and personal responsibility for participatory wrongdoing need to be recast in terms of synchronous and aligned new theoretical perspectives.<sup>112</sup>

## Modes of Participation and Moral Blameworthiness: A Synchronous and Complementary Review of Instigatory and Renunciatory Conduct

It is important to focus on how an accessory intersects with the harm(s) effected by the principal offender: connectivity via assistance or encouragement precepts represent an avowal of wrongdoing to justify criminalisation.<sup>113</sup> Equally, a secondary party who repents, disavows, and seeks to withdraw their delictory conduct prior to offence commission may break the threshold gradation of culpability connectivity.<sup>114</sup> *Ex post facto* reconceptualisation of negating conduct provides a kaleidoscopic continuum to standardise exculpatory behaviour. A dualistic reconsideration of inculpatory/exculpatory conduct within complicity engenders a deterministic framework for the promulgation of broader causation/contribution principles as legitimate pathways to liability.<sup>115</sup> Renunciatory and instigatory contributive acts of assistance or encouragement should be considered afresh, and as complementary, to properly deconstruct modes of participation and moral blameworthiness.

The criminalisation process takes on heightened significance when we factorise redemptive conduct on the part of an individual that may or may not act as a withdrawal defence to neutralise earlier complicitous behaviour, and consequential derivative inculcation.<sup>116</sup> It is submitted herein that there should be the propagation of a new standardised template for both intercessory assistance and encouragement, aligned and deconstructed in complementarity with withdrawal principles. This new joint framework should be predicated on a synchronous reasonableness-imputed proportionality assessment of both inculpatory and exculpatory individual conduct.

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111. See generally, Sullivan (n. 13).

112. See generally, Alan Reed and Michael Bohlander, 'Participation In Crime' (n. 13); and Dressler (n. 5) at 104: '[A]ny non-utilitarian juridical conception of blame focuses initially and primarily on the external harm caused by the criminal actor. The harm or *actus reus* of the crime is the indispensable justification for punitive intervention. Harm is the measure of the actor's degree of legal guilt and of his deserved punishment ... [I]t is to that degree to which the moral equilibrium of society has been disturbed. This is presumably the maximum amount of redress to which society is entitled'.

113. See generally, Graeme Virgo, 'Joint Enterprise Liability is Dead: Long Live Accessorial Liability' (2012) *Criminal Law Review* 850; A Green and C McGourlay, 'The Wolf Packs in our Midst and Other Products of Criminal Joint Enterprise Prosecution' (2015) 79 *The Journal of Criminal Law* 280, and see generally, Peter Mirfield, 'Guilt by Association: A Reply to Professor Virgo' (2013) *Criminal Law Review* 577.

114. See Kreutzer (n. 2) at 171: 'The exculpatory role of repentance invites further exploration. After all, there is no intuitive feeling that we should absolve a bank robber of all criminal liability just for voluntarily returning his ill-gotten gains. Why should somebody who was planning to rob a bank but who changed his mind on the way there be treated any differently? One possible reason that our intuitions differ in the context of an attempt is that repentance before committing the crime breaks the causal chain'. It is noteworthy that a fundamentally different perspective *vis-à-vis* renunciatory/instigatory conduct is adopted in this article, drawing instead parallel syllogisms that sit within the penumbra of an imputed-normative-proportionality standardisation.

115. See Simester, 'Accessory Liability and Common Unlawful Purposes' (n. 15) at 87: 'The normative significance of ongoing presence in a joint criminal enterprise also explains why the requirements for withdrawal from a common purpose differed historically: S needed simply to disengage unequivocally from the shared purposed, whereas aid or encouragement must in principle be countermanded'.

116. See generally, Barry Mitchell, 'Participating in Homicide' in Alan Reed and Michael Bohlander (eds), *Participation in Crime: Domestic And Comparative Perspectives* (Ashgate Publishing 2013) 7–24.

## Withdrawal Precepts and Quasi-Excusatory Defences

The conceptual edifice appurtenant to withdrawal fits within the realm of quasi-excusable defences and reduced culpability.<sup>117</sup> Secondary participation in crime, effected through D2's assistance or encouragement of wrongdoing, may arguably, similarly be viewed through a spectrum of behavioural engagement that facilitates quasi-excusable and reduced culpability outcome determination.<sup>118</sup> Minimalistic and tokenistic encouragement of crime is *not* the same as instigation and material assistance, nor should relational (dis)-equivalence continue to skew liability, nor inapposite fudged equiparation continue to prevail.<sup>119</sup>

A pre-incipulatory interlude prevails for withdrawal from participatory engagement, wherein a redemptive change of heart, aligned with appropriate reductive criminal deprecation may exculpate via reverse conduct prophylaxis.<sup>120</sup> Adventitiously, reverse conduct prophylaxis may be adapted to also apply to temporal individuation of the accessory's actual intercession/contribution to criminal wrongdoing more broadly. This posits a more extensive evidentiary review of delictatory conduct, traducing T3 (commission of harm stage), and reconstitutively the contributory conduct of the secondary party at T1 or T2 stages in a continuum.<sup>121</sup> Participation in crime as an accessory requires 'fault' in the actual conduct itself, beyond simple *but for* causation. As Toulson L.J. asserted in the Supreme Court in *Hughes*,<sup>122</sup> reviewing the nature of causality, the progenitation of harm must be connected to something 'objectively wrong',<sup>123</sup> about the individual actor's conduct. Causal salience applied, but significantly there was a fundamental requirement, in a causing death whilst driving scenario, for 'something open to proper criticism in the conduct of the defendant':<sup>124</sup> connectivity plus 'fault' in conduct as a leitmotif

117. It is noteworthy that Kelman has provided a broader multi-layered reappraisal of inchoate and derivative liability, articulating an explanation underpinning adoption in U.S. jurisdictions of multi-faceted abandonment principles: '[T]he basic decision to allow [an] abandonment defence follows a wide time-framed interpretive construction. The defendant had already committed some act which, if interrupted by external forces, would constitute ... an attempt .... Yet we judge the act innocent [that is, not attempt] because of the defendant's subsequent failure to consummate the harm': see Mark Kelman, 'Interpretative Construction in the Substantive Criminal Law' (1981) 33 *Stanford Law Review* 591, at 593, who articulates the expression 'time-framing with reference to the "the way we view disruptive incidents'.
118. See Model Penal Code and Commentaries s. 5.01 comment at 359–60 (Official Draft 1962 and Revised Comments 1985). The comment in relation to attempt renunciation states: 'The basis for allowing the defence involves two related considerations. First, renunciation of criminal purpose tends to negative dangerousness. As previously indicated, much of the effort devoted to excluding early "preparatory" conduct from criminal attempt liability has been based on the desire not to impose liability when there is an insufficient showing that the actor has a firm purpose to commit the crime contemplated. In cases where the actor has gone beyond the line drawn for defining preparation, indicating *prima facie* sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his purpose to commit the crime ... The second reason for allowing renunciation of criminal purpose as a defence to an attempt charge is to provide actors with a motive for desisting from their criminal designs thereby diminishing the risk that the substantive crime will be committed ... on balance it is concluded that renunciation of criminal purpose should be a defence because ... it significantly negates dangerousness of character, and, as to later stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort'.
119. See generally, Daniel Moriarty 'Extending the Defense of Renunciation' (1989) 62 *Temple Law Review* 1.
120. Note also that in English law the Serious Crime Act 2007 in ss. 44–46 imposed inchoate liability for acts capable of assisting or encouraging the principal (D1), and are not derivative from offence completion.
121. See Oliver Wendell Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457, at 459: 'If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to'.
122. [2013] UK56; and see generally, GR Sullivan and AP Simester, 'Causation Without Limits: Causing Death While Driving Without a Licence, whilst Disqualified, or Without Insurance' (2012) 10 *Criminal Law Review* 753; and Sally Kyd Cunningham, 'Has Law Reform Policy Been Driven in the Right Direction? How the New Causing Death by Driving Offences are Operating in Practice' (2013) *Criminal Law Review* 711.
123. *Ibid.*, at para [29].
124. *Ibid.*

for proportionate liability.<sup>125</sup> This coheres with an appropriate moral blameworthiness standardisation for complicitous behaviour: a normative assessment by jurors of fault gradations (or otherwise) attached to dissonant types of conduct. It represents a lodestar for the potential parallel syllogism of instigatory and renunciatory re-conceptualisation of liability and the parameters of disavowal.<sup>126</sup>

In determining prohibited and reductionist behaviour there are dilemmatic choices to be made in terms of temporal individuation of liability across an extended time frame, and layered within a continuum of conjoined events.<sup>127</sup> As for accessory liability, in general, it is significant to examine the theoretical underpinnings of withdrawal and redemptive renunciatory conduct.<sup>128</sup> The precise legal topography for withdrawal has polarised debate, but, in truth ought to be viewed through a lens reflecting reduced culpability and/or societal dangerousness of the actor.<sup>129</sup> As with consideration of the material contribution that D2 actually makes to D1's defalcations, there ought to be a primordial reflective evaluation of the moral blameworthiness of each respective individual actor. Parity of culpability should apply as a moral barometer to assuage guilt, or to identify the extent of blameworthiness and criminalisation of acts engendered by a materially contributing wrongdoer, or to recalcitrantly negate harm.<sup>130</sup> The pithy reality is that the accessory who instigates the perpetrator to kill their partner by payment is not the same in terms of 'blameworthiness' in any real-world sense, as the secondary party who provides succour to a criminal wrongdoer by providing a packed lunch or a fresh shirt.<sup>131</sup>

125. See generally, Sally Kyd, 'Causing Death', Alan Reed and Michael Bohlander (eds) with Nicola Wake, Emma Engleby and Verity Adams in *Homicide In Criminal Law: A Research Companion* (Routledge Publishing 2018) 119–135.

126. A number of international commentators have endorsed conceptualisations of disavowal and renunciatory exculpatory behaviour: see Rollin Perkins and Ronald Boyce, *Criminal Law* (3rd edn, Foundation Press 1982) 656 who assert: 'it would be sound to recognise the possibility of a *locus penitentiae* so long as no substantial harm has been done and no act of actual danger committed'; and Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press 1979) who states, 'there is much in principle as well as in authority to support the defence of renunciation if the actor has voluntarily and effectively abandoned his criminal activity before doing any harm'.

127. See Kelman (n. 117) at 593; and see generally, Meir Dan-Cohen, 'Decision Rules and Conduct Rules: An Acoustic Separation in Criminal Law' (1984) 97 *Harvard Law Review* 625; and P Doherty, 'A New Crime: Criminal Facilitation' (1971) 18 *Loyola Law Review* 103.

128. See generally, George Vouso, 'Background Responsibility and Excuse' (1987) *Yale Law Journal* 1661.

129. Note that the alternative perspective to reduced societal dangerousness focuses instead on an incentivisation premise that underpins withdrawal precepts. It is buttressed by the argument that an inducement opportunity can be presented to individual non-coerced participants to prevent consummation of complicitous liability; and expunge their guilt. The incentive rationale, as presented, is of a quasi-justificatory nature in that the prescribed harm (D2's complicitous behaviour to date) is outweighed by the need to avoid an even greater harm or to further a greater societal interest (the avoidance of a completed substantive offence). The essence of this presupposition is made explicit in the Model Penal Code's general justification defence in the U.S. which provides a defence if, 'the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged': see Model Penal Code s. 3.02(1). The English Law Commission has previously offered support for this justificatory basis for withdrawal, highlighting that considerations of social policy support the argument that if an accessory counters assistance with equally obstructive measures, an acquittal ought to follow given the reductionist efforts to right the wrong: see Law Commission Consultation Paper, *Assisting and Encouraging Crime* (Law Com. No. 131, 1993) at para. 4.131; and Law Commission Working Party Paper, *Inchoate Offences* (Law Com. No. 50, 1973) at 150: 'Since the object of the criminal law is to prevent crime it is equally important to give reasonable encouragement to a conspirator, attempter or inciter to withdraw ... the absence of such a defence may operate to dissuade an individual who might otherwise decide to cease participating in the planning of a crime from taking that decision since having become a party to the inchoate offence there is no inducement for him to cease his activities before commission of the substantive offence takes place'.

130. See Moriarty, 'Extending the Defence of Renunciation' (n. 119) at 22: 'The Model Penal Code Commentary argues that a man who has begun a criminal enterprise may be judged dangerous because he is likely to cause criminal harm in the future. It is a sensible use of the criminal law to neutralize his threat before it materializes. A man who has renounced his crime, on the other hand, has revealed the error of our prediction of future harm at his hands. We have no reliable basis to judge him a danger and it would be wrong to subject him to criminal sanctions'.

131. See generally, Robin Stanley O'Regan, 'Complicity and the Defence of Timely Countermand or Withdrawal Under the Griffith Code' (1986) 10 *Criminal Law Journal* 236.

Nor does behavioural engagement equate to the supplier of bank plans to others who then seeks to disavow by warning authorities of a future burglary.<sup>132</sup>

Imputed liability is the legitimised philosophical justification that embodies secondary participation and indirect intercessory conduct in criminal harm(s).<sup>133</sup> Contemporaneously, the reduced social dangerousness model of withdrawal exculpation takes as a starting proposition that individuals who have commenced upon a criminal enterprise are amongst a cadre to be feared by society in that they have failed to control internal regulatory intuitions of right and wrong as a bulwark to set against criminal propensity.<sup>134</sup> In essence, they have exposed themselves as requiring external societal control mechanisms imposed by criminal law. Their injudicious proclivities, and skewed lack of control functionality, evidenced by initial engagements, have been recalibrated to a degree if they unequivocally and genuinely take steps of cessation.<sup>135</sup> Their penitent behaviour may counter-act complicitous behaviour, and, consequently, in terms of present or future depredations, they do not present as great a societal danger, or at least present a reducibly minimal threat.<sup>136</sup> Their rebalanced internal controls have correspondingly been presented as meeting a more acceptable threshold gradation, and, thus, the necessity of external control via criminal sanction has been obfuscated: 'spontaneous abandonment show[s] that the offender is not dangerous, or is so in an insignificant degree'.<sup>137</sup>

Participatory complicitous conduct and repentant negation of prior engagement align synchronously together in terms of inputted proportionality, degrees of moral blameworthiness,

132. See *Grundy* [1997] Crim. L.R. 543; and see also *Commonwealth v Soares* 377 Mass 461, 471–72, 387 N.E. 2d 499, 507 (1978) (cert. denied, 444 U.S. 881 (1979) (defendant who gave no assistance to the principal but who stood ready to do so with the knowledge of the principal may be found guilty as an accomplice if his readiness to give aid may have encouraged the actor); see *United States v Garguilo*, 310 F. 2d 249, 253 (2d Cir. 1962) (note that the court was prepared to grant that a person whose only role was to carry the photographic negatives for the principal counterfeiter could be found to be an accessory, asserting that, 'evidence of an act of relatively slight moment may warrant a jury's finding participation in a crime').

133. See generally, Robinson (n. 8).

134. See Richard Buxton, 'The Working Paper on Inchoate Offences: (1) Incitement and Attempt' (1973) *Criminal Law Review* 556, 560: '[P]ersons who threaten to commit acts forbidden by the substantive criminal law ... are, by reasons of their intentions, socially dangerous'; and Walter Ulmann, 'The Reasons for Punishing Attempted Crimes' (1939) 51 *Judicial Review* 353, at 363: '[T]he external criminal act is considered as a mere symptom of the destructive tendencies; the offender appears ... already so dangerous that the law dare not wait for further proofs of his dangerous character'; and Herbert Wechsler, 'The Challenge of a Model Penal Code' (1952) 65 *Harvard Law Review* 1097, at 1105: '[T]he object is control of harmful conduct in the future. The legislative question therefore is: What past behaviour has such rational relationship to the control of future conduct that it ought to be declared a crime?'

135. See generally, AP Simester et al., *Simester And Sullivan's Criminal Law* (n. 11) at 277–278; and see Henry Seney, 'A Pond as Deep as Hell: Harm, Danger and Dangerousness in Our Criminal Law' (1972) 18 *Wayne Law Review* 569, at 571 criticising the derivations of the social dangerousness argument: 'This yields the preposterous inference that an unsuccessful effort at one crime proves some special disposition to general crime-doing ... The little gods of evidence who try widely, if unsuccessfully, to keep evidence of past crimes out of trials for present crimes because of the dubious inferences which might be drawn from past guilt to present guilt, would surely "laugh themselves mortal" at the proposition that a man should be found guilty of a present crime on the basis of inferences about future crimes'.

136. See generally, Alan Reed and Ben Fitzpatrick, *Criminal Law*, Sweet and Maxwell, 2009, at 127–144; and see generally, Joshua Dressler, *Understanding Criminal Law* (M. Bender, 1987), 357 (contending that punishment is not deserved if an individual renounces their criminal enterprise); and see Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press 1979) 105 (arguing that the full course of conduct that includes an effective renunciation is not a criminal act sufficiently dangerous to warrant liability). 'There is a very profound axiom in law ... and it is this ... human nature is repelled by crime. However, civilisation has given us needs, vices and artificial appetites which sometimes cause us to repress our good instincts and lead us to wrongdoing' (Alexandra Dumas, *The Count of Monte Cristo*) (Robin Buss translation, Penguin 2003) XVII, 161). The actor's renunciation potentially indicates a restoration of human instinct and, therefore, indicates that D2 is less socially dangerous than D1 who goes on to complete the substantive offence.

137. See Royal Commission for the Reform of the Penal Statutes, Report and Preliminary Project for the Italian Penal Code (1921) 214; and see Michael Bayles 'Character, Purpose and Criminal Responsibility' (1982) 1 *Law and Philosophy* 5, at 13–14 (stressing that abandonment of attempt may negate the inference of an undesirable disposition or character trait); and see generally, Moriarty (n. 130); and Paul Hoerber, 'The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation' (1986) 74 *California Law Review* 377.

and societal dangerousness characterisation.<sup>138</sup> The redemptive change of heart of the accessory means that imputed criminal liability for complicity may be inapposite as the ‘flame of dangerousness’, created by initial attitudinal behaviour has been doused to undo or prevent harm.<sup>139</sup> The reasoning here is that the individual, considered inwardly on a prognostic basis, has revealed him or herself as possessing more limited socially dangerous characteristics, and, therefore, should be inculcated a quasi-excuse.<sup>140</sup> Tokenistic or minimalistic intercession in wrongdoing by limited acts of assistance or encouragement should co-terminously reflect reductionist culpability threshold, via mandatory lower sentences,<sup>141</sup> or effectuation of an alternative facilitation offence.<sup>141</sup>

In general terms, an excuse is a defence that involves concession that the action is wrong, but nonetheless, the individual’s characteristics, or prevailing state of affairs, indicate that they should not be inculcated for their infractions, or materially at a different threshold (and a different crime), than the instigator or perpetrator.<sup>142</sup> It is not that the assistance or encouragement, intercession, or acts of withdrawal, are justified in any terms of net harm, but rather that the penitent and redemptive situation presented by the actor, or tokenistic (in) effectual contribution, should potentially excuse, and this is for adjudicative interpretation by fact-finders.<sup>143</sup> The recalibration is intrinsically demonstrative of a quasi-excuse, in that, although the defendant cannot be said to be subject to some form of internal incapacity or external impairment preventing his actions from being broadly characterised as the free exercise of informed choice,<sup>144</sup> a positive premium should exist for a genuine change of heart that is driven by a voluntary motivation of contrition.<sup>145</sup> In complementarity, trivial acts of assistance or encouragement are less materially intercessory in wrongdoing and effected harm, and require dissonant non-equiparated culpability to the direct progenitors of offences.<sup>146</sup> This provides a more satisfactory conceptual basis for lack of (or reduced) criminal penalty, in that, as a defendant of lower culpability, who is less socially dangerous, a different threshold categorisation should apply.<sup>147</sup>

### Reverse Conduct Prophylaxis and Accessory Liability: An Individuated Normative Assessment

A reformulated template is provided in this article for complicity, identifying the requirements of a proportionality test for fact-finders in terms of gradations of excusing/non-excusing conduct. A manifestly normative question is stipulated as to whether the individual actor’s repentant behaviour was reasonable

138. See generally, Reed and Fitzpatrick, ‘Criminal Law’ (n. 136).

139. See William Wilson, *Criminal Law: Doctrine and Theory* (4th edn). A Katz, ‘Dangerousness: A Theoretical Reconstruction of the Criminal Law, Part I’ (1970) 19 *Buffalo Law Review* 1; Paul H Robinson, ‘A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability’ (1975) 23 *University of California Los Angeles Law Review* 266; and SJ Schulhofer, ‘Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law’ (1974) 122 *University of Pennsylvania Law Review* 1497.

140. See KJM Smith, ‘Withdrawal in Complicity: A Restatement of Principles’ (2001) *Criminal Law Review* 769, at 773; and see generally, KJM Smith, ‘General Defences and Withdrawal’, in KJM Smith (ed), *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press 1991).

141. See generally, Michael Moore, ‘Choice, Character and Excuse’ in E Paul, F Miller and J Paul (eds), *Crime, Culpability and Remedy* (Blackwell 1990).

142. See generally, Stanford H Kadish, ‘Excusing Crime’ in S Kadish (ed), *Blame and Punishment* (Macmillan 1987) 81; and George Vuoso, ‘Background, Responsibility and Excuse’ (1987) 96 *Yale Law Journal* 1661.

143. See generally, Paul H Robinson, *Structure and Function in Criminal Law* (Clarendon Press 1997) 81–87; HL Schreiber, ‘Problems of Justification and Excuse in the Setting of Accessorial Conduct’ (1986) *Brigham Young University Law Review* 611; and John H Smith, *Justification and Excuse in the Criminal Law* (Sweet and Maxwell 1989).

144. Smith ‘Withdrawal in Complicity’ (n. 140) at 773.

145. *Ibid.*

146. See generally, Dennis J Baker, *Glanville Williams: Textbook of Criminal Law* (3rd edn, Sweet and Maxwell 2012) 506–508.

147. Smith, ‘General Defences and Withdrawal’ (n. 140) at 253–254.

in the circumstances.<sup>148</sup> A corollary of this postulation is whether D2's intercession in criminal wrongdoing was sufficiently blameworthy and culpable to impute liability.<sup>149</sup> The 'price of exculpation', and the 'cost of promotion of harm(s)', should be standardised within an imputed proportionality – reasonableness pervasive framework.<sup>150</sup>

The threshold gradations for withdrawal are not easy to satisfy: more repentance is irreducibly not enough, and depredatory conduct needs to be wholly countermanded, not simply discontinued.<sup>151</sup> A continuum scale across a spectrum of criminal association may beneficially be promulgated in terms of threshold levels of dis-engagement, and comparative redemptive abatement.<sup>152</sup> This scalarity mirrors, in counterpoise, the metanarrative of instigatory conduct, and degrees of associated intercession in harm(s). Judicial precepts reveal a higher redemptive threshold level will apply to those who provide material assistance or instigation to D1, but reduced threshold levels of 'proper efforts' to undo previous harm will qualitatively apply to those who have simply provided encouragement.<sup>153</sup> Flexibility may apply to individual circumstances in terms of required direct or indirect countermands.<sup>154</sup>

Consider, by way of illustration in this regard, a hypothetical postulation involving a multi-party common enterprise to plant a bomb in a shopping precinct to raise awareness of a terrorist organisation, but with risk to life. The level and mode of participatory engagement may vacillate across a wide continuum, and the reasonableness-proportionality nexus requirement for qualitative acts of accessory withdrawal should shift according to normative fact-finder deliberations. It, reflectively, presents a *de novo* recategorisation of how positive acts to aid/encourage wrongdoing should beneficially be empathetically reconstituted in harmony with withdrawal: (i) A, with knowledge of the common purpose, makes a meal for the gang on the day of the bomb detonation; (ii) B, a shopkeeper, again with direct contemplation, sells the balaclava disguise; (iii) C supplies the bomb-making equipment, interested only in commercial profit; (iv) D instigates and counsels the plan of criminal action; (v) E makes the bomb in preparation; (vi) F supplies the petrol for a get-away vehicle; (vii) G drives the car to the shopping precinct; and (viii) H and I enter the shopping precinct to plant the bomb, but are apprehended by a security guard, H shouts to I to leave and abandon their plan, but I shoots the guard, and they decamp.

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148. See generally, Smith, 'General Defences and Withdrawal' (n. 140); and in terms of effective manifestation of withdrawal requirements see *O'Flaherty* [2004] 2 Cr. App. R. 20 at para [60]: 'To disengage from an incident a person must do enough to demonstrate that he or she is withdrawing from the joint enterprise. This is ultimately question of fact and degree for the jury'.

149. See generally, 'Withdrawal from Criminal Liability for Complicity and Inchoate Offences' (1983) 12 *Anglo-American Law Review* 200.

150. See generally, Peter Gillies, *The Law of Criminal Complicity* (Law Book Company 1980).

151. See *Becerra and Cooper* (1976) 62 Cr. App. R. 212; and see also *Mitchell and King* (1998) 163 J.P. 75; [1999] Crim. L.R. 496; *O'Flaherty* [2004] EWCA Crim. 546; [2004] Crim. L.L. 75; *Mitchell* [2008] EWCA Crim. 3552; *Campbell (Andre)* [2009] EWCA Crim. 50-; and *Otway* [2011] EWCA Crim. 3.

152. Note that a modified proportionality test is supported by the Model Penal Code s. 2.06 (6)(c)(ii) which provides a defence where the defendant terminates his complicity prior to the commission of the offence, and gives timely warning to the law enforcement authorities or otherwise makes 'proper effort' to prevent the commission of the offence. By way of illustration, in *Commonwealth v Huber* (1958) 15 D and C 2d: 726, where D2 had provided assistance through supply of the tools of the trade (a rifle for use in a robbery) the court determined that an escape route from liability was provided to D2 via reporting the actions of D1 to the police in time to thwart the robbery. This 'escape' mechanism is more generous than English law where an effective withdrawal must, 'serve unequivocal notice on the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw: see *Becerra and Cooper* (1976) 62 Cr. App. R. 212, at 218. It is essential that in order to allow the principal offender the opportunity to desist rather than complete the offence, the co-adventurer must make a timely and unequivocal communication to D1 of his change of heart and of the fact that, if continuance of liability occurs, it is on the principal offender's own account, without the aid and assistance of the person who is purporting to withdraw. Renunciatory precepts are more generous in Australia, and the position adopted by the High Court in *White v Ridley* (1978) Kro CLR 342, simply requires that redemptive efforts *must* be aimed at crime commission prevention rather than simply undoing the efforts of the original behaviour. In general terms a reasonableness-proportionality of remedial action standardisation is imposed, requiring a duty of reasonable negation ("proper efforts") that charts a pathway for an Anglo-American reformulated template'.

153. See Smith, 'Withdrawal in Complicity' (n. 140) at 780–782.

154. *Ibid.*

The above hypothecation reveals that different levels of participatory engagement (A to I) will be co-terminous and coalesce together with determinative redemptive behaviour, and facilitation of withdrawal. The required countermands for different modes of participation may be direct or indirect, and incorporate direct physical intervention or weapon retrieval at one end of the scale, to warnings to law enforcement authorities or to potential victims at the reduced level.<sup>155</sup> It is suggested herein that the following gradations and demarcations form part of our proportionality-reasonableness nexus for withdrawal, and synergistically indicate dissonant culpability and moral blameworthiness classification for accomplices with alternative imputation.<sup>156</sup>

In reviewing the postulated scenario a dichotomy exists between co-adventurers and mechanical assistants,<sup>157</sup> in that a fundamentally higher threshold level of renunciatory conduct applies to the former category of participants in crime. If D2 acts as a co-adventurer and has provided material assistance, then direct countermand should be required in terms of retrieval of the weapon, or physical intervention, proactively to protect the victim, including restraint of D1.<sup>158</sup> If the 'tools of the crime' are supplied by D2 then more is needed proportionally for an effective withdrawal.<sup>159</sup> The reasonableness-proportionality standardisation dictates that an enhanced level of redemptive counter-action is needed effectively to absolve D2.<sup>160</sup> This resonates more broadly with adventitious Germanic perspectives on accomplice liability, explored subsequently.<sup>161</sup> A far broader conceptualisation of co-perpetrator is inculcated, embracing significant contribution at the 'planning' stage of wrongdoing and a broadened appraisal of the degree<sup>162</sup> of individual hegemony as an instigator. Binomially, accessories who provide lesser facilitative support to effected wrongdoing are demarcated via mandatorily receiving a reduced sentence proportionally reflective of culpability norms, and dilution of personal responsibility.<sup>163</sup>

A more onerous standard will apply to the instigator of harm, and within the German criminal justice system, it needs to be demonstrated that their engagement has been wholly neutralised.<sup>164</sup> The apposite guiding principles in English domestic law were established in *Gallant*,<sup>165</sup> where D2 had instigated the violence, and it was legitimately determined that '[I]n those circumstances, assuming that the attack started as a joint enterprise, he clearly would have to do more than merely walk away in order to demonstrate that he was withdrawing from any further participation'.<sup>166</sup> A higher threshold is presumptively engaged herein as the instigator needs to withdraw from a duality of inculcated and co-terminous participatory engagement;

155. See generally, Smith 'General Defences and Withdrawal' (n. 140).

156. See generally, Richard Taylor, 'Complicity, Legal Scholarship and the Law of Unintended Consequences' (2009) *Legal Studies* 1.

157. See Wilson (n. 139) at 591.

158. See David Lanham, 'Accomplices and Withdrawal' (1981) 97 *Law Quarterly Review* 575, at 582.

159. Note that a clear division applies in terms of general U.S. principles relating to abrogation of liability for inchoate offences or complicity; inchoate offence liability, in more constrained terms, requires that the individual has 'directly' prevented the harm from occurring. A more relaxed and generous standardisation applies to complicitous derivative liability where D2 can effectively withdraw by making 'proper effort' to prevent D1 from committing the substantive offence, and failure to prevent that commission does not constitute a total bar to defence applicability provided 'reasonable efforts' to desist can be promulgated before fact-finders; see generally, Paul H Robinson, *Criminal Law Defences* (West 1984).

160. See Law Commission Report No. 177 at para 4.135-4.137 which appears to draw a dichotomy between different culpability gradation thresholds between assisting and encouragement, indicating that encouragement at a lower threshold may be negated by 'discouragement' which is less of a stricture than measures impacted for assistance withdrawal. Interestingly, the report appears rather schizophrenic in this regard: at one point the withdrawal defence seems predicated upon D2 seeking to 'undo' the effect of an earlier act of participation, but the actual proposals iterate redemptive action aimed at preventing the principal offence; see Vol. 2 at para. 9.41.

161. See generally, Bohlander, '*Principles of German Criminal Law*' (n. 104); and Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime' (n. 105).

162. See generally, Roxin (n. 104).

163. See Hamdorf (n. 105) at 210-214.

164. See generally, Kai Ambos, 'Towards a Universal System of Crime: Comments on George Fletcher's Grammar of Criminal Law' (2007) 28 *Cardozo Law Review* 2647.

165. [2008] EWCA Crim. 1111; and see generally; Reed and Fitzpatrick, '*Criminal Law*' (n. 136) at 127-144.

166. *Ibid.*

this duality embraces both the common purpose itself and the responsibility to effectively countermand the initial encouragement (emboldenment) to others that were furnished at the outset.<sup>167</sup>

### *Intercessory Conduct and Disavowal: Complementary Standardisations*

A different perspective ought to apply where an accessory has simply provided limited encouragement, or basic agreement, to the commission of a crime. When such ethereal touchstones are inculcated the ‘price of exculpation’ for withdrawal, and, significantly, the ‘cost of inculpation’ for accessorial liability should be lowered.<sup>168</sup> Kadish illustrated that complicity doctrine raises a question as to what it truly means for the accessory’s intercession to have made a difference.<sup>169</sup> No requirement exists to show that the result would not have occurred without the secondary party’s actions, but extant law posits that ‘any influence or help suffices for liability’.<sup>170</sup> As such, a shout of encouragement to D1 to attack V, but D1 is deaf, is constitutively futile for imputed liability, albeit alternative inchoate crimes are engendered.<sup>171</sup>

The corollary, as presented in the hypothecated scenario above, is that for withdrawal the ‘price’ of exculpation may not be as high as taking additional steps to prevent the commission of the crime, but penitent behaviour may involve strictures of indirect countermand. The countermand, dependent on prevailing factual variants in different circumstances, may incorporate either notification to law enforcement authorities, or to the victim, or attempted comportment with both sets of reductionist disengagement.<sup>172</sup> The preferred analysis of withdrawal, as a quasi-excuse, extrapolated from derivations of reduced social dangerousness, should allow fact-finders to consider an individuated proportionality standardisation within a normatively compartmentalised set of indicators to indirect countermands.<sup>173</sup> A parallel syllogism should reciprocally apply for instigatory acts: the ‘cost’ of inculpation for trivial acts of aid or encouragement needs to be fundamentally reappraised in terms of moral blameworthiness equiparation.<sup>174</sup>

The proportionality test will clearly not apply when the pre-incipulatory interlude has expired, and the possibility of withdrawal is no longer timely.<sup>175</sup> The constitutive timeliness (or otherwise) of an attempt to withdraw from complicitous joint enterprise activity was vividly exemplified in the recent determination in *Mitchell*,<sup>176</sup> before the appellate court. A violent altercation occurred in the car park of a public house, initiated by a dispute between rival bookings of a taxi cab. The factual evidence was unclear, but Mitchell (D2) had either instigated or encouraged the initial attack, and then a lull occurred in the violence whilst D2 was looking for a missing shoe, before the victim was fatally punched and kicked by others.<sup>177</sup> In a case of spontaneous violence, inflicted by a group of participants, D2 had engaged in the first attack, not the second, but only a short time period accrued between the two assaults, and consequently the conduct during the course of the earlier attack still represented a ‘significant and operative cause’ of death.<sup>178</sup> The instigatory

167. See generally, T Fischer, *Strafgesetzbuch Mit Nebengesetzen* (62nd edn, CH Beck 2015); and C Roxin, ‘Organisationsherrschaft Und Tatenschlossenheit’ in A Müller, HE Pawlik and M Wolter (eds), *Festschrift Für Friedrich – Christian Schroeder Zum 70. Geburtstag* (CF Muller 2006) 387.

168. See Lanham, ‘Accomplices and Withdrawal’ (n. 158) at 584–584.

169. See Kadish, ‘Complicity, Cause and Blame’ (n. 17) at 357.

170. *Ibid.*

171. *Ibid.*, at 359: ‘[B]ut that does not mean accomplice liability can be imposed if the secondary party fails to influence or aid the principal. When he could not have been successful in any case there is no liability. But it is enough if the facts establish a possibility of success’.

172. See Lanham (n. 158) at 584–585.

173. See generally, PS Davies, *Accessory Liability* (Hart Publishing 2015).

174. See generally, JC Smith, ‘Criminal Liability of Accessories: Law and Law Reform’ (1997) 113 *Law Quarterly Review* 453.

175. See *Eldredge v United States* (1932) 62 F.2d 449: note in a memorable statement the court determined that an expressed intent to withdraw from a conspiracy to use dynamite to destroy a building is insufficient if the fuse is set, and at that juncture verbal communication is inadequate, so the individual to withdraw must step on the fuse.

176. [2018] EWCA Crim. 2687.

177. *Ibid.*

178. *Ibid.*; and see generally, Andrew P Simester, ‘Causation in Criminal Law’ (2017) 133 *Law Quarterly Review* 416.

intercessory acts of encouragement by the accessory, embracing positive encouragement of wrongdoing, proportionally justified censure for murder: no effective renunciatory disavowal by direct or indirect countermand was dissociative for culpability gradation.<sup>179</sup>

Modes of instigatory and renunciatory behaviour should be reviewed through a complementary and synchronous lens to effectively deconstruct moral blameworthiness.<sup>180</sup> Conduct of an irreducibly minimal nature is inadequate to meet the threshold test: perfunctory verbal disclaimers of liability<sup>181</sup>; failure to attend on the day of the commission of the criminal purpose (omission)<sup>182</sup>; or fleeing from the scene of the crime<sup>183</sup> are all ineffectual manifestations of imputed countermand. Normatively, these types of limited remedial disengagement are not sustainable or adequate as a vignette of redemptive behaviour: the 'price' of exculpation has not been satisfied.<sup>184</sup> Minimalistic and tokenistic acts of disavowal do not negate liability. It is capricious, accordingly, to treat limited acts of assisting or encouraging harm(s) as ranking *pari passu* in culpability equiparation to the responsibility of the actual progenitor of the criminal wrongdoing.<sup>185</sup> There is not the same normative proportionality or imputed responsibility, and to suggest otherwise is the antithesis of any fair and just Anglo-American criminal justice system(s). The review in this section, originally addressing the penumbra of instigatory and renunciatory conduct, is taken forward in the evaluative critique that follows, considering alternative multi-jurisdictional perspectives on complicity and the apposite parameters and co-relation of trivial/non-trivial intercessory acts. A clarion call is made for reform to holistically and transparently adapt a new overarching complicity framework.<sup>186</sup>

## A Comparative Review of Alternative Legal Systems: Optimal Standardisations and Contemporary Solutions

### *The German Criminal Code: An Anglo-American Reform Pathway*

Anglophone criminal justice legal systems would benefit from a closer examination, and comparative extirpation, of Germanic precepts appurtenant to complicitous behaviour.<sup>187</sup> Although to contextualise, both Anglo-American and German criminal law systems have adopted a perpetrator–accessory dualistic standardisation of modes of participatory engagements, far more enlightened perspectives on culpability,

179. See generally, AP Simester et al., '*Simester And Sullivan's Criminal Law*' (n. 11) at 278: 'It is worth re-emphasising that the withdrawal must be timely, occurring before the crime is committed, and perhaps before its commission is even commenced. As such, even where withdrawal is effected by D2, it will not preclude liability if the *actus reus* of D1's crime occurs prior to that withdrawal; and see, *Campbell (Andre)* [2009] EWCA Crim. 50 (note events during the earlier attack were themselves attributed as a contributing and concurrent cause of death)'.

180. *Ibid.* at 277: 'Withdrawal, however, is not easy. Repentance is insufficient. The participation must not merely be discontinuance. It must be countermanded'.

181. See *Baker* [1994] Crim. L.R. 444; *Nawaz*, Unrep. May 13, 1999; and *Fletcher, Fletcher and Zimnowodski* [1962] Crim. L.R. 551 (note the relevant evidence was too vague to anthropomorphise as an unqualified withdrawal where a complicitous actor sought to withdraw from a planned arson by telling the principal offender, 'Don't do it' or 'Don't be a fool', before the latter set off for the premises with the petrol. In similar vein, the bland statement by the defendant in *Nawaz*, to the effect that he 'withdrew' from the joint enterprise was also insufficient. To be effective, as interpreted in *Otway*, [2011] EWCA Crim. 3, the withdrawal must be voluntary, real, communicated in some form in good time, and incorporate an effort to dissuade others from continuing.

182. See *Rook* [1993] 2 All E.R. 955; and *Goodspeed* (1911) 6 Cr. App. R. 133.

183. See *Becerra and Cooper* (1976) 62 Cr. App. R. 212 (note where D2 had supplied the knife to their co-adventurer, simply calling out 'let's go' and climbing out of a window, during a burglarious intrusion, was an ineffectual countermand to prevent a murder conviction when D1 stabbed V to 'escape' the premises; and see also *O'Flaherty* [2004] EWCA Crim. 526.

184. See generally, Edwards and Simester, 'Crime, Blameworthiness and Outcomes' (n. 34).

185. *Ibid.*

186. See generally, Andrew Ashworth, 'Taking the Consequences' in Schute, Gardner and Horder (eds), *Action and Value in Criminal Law* (1993) 107 (note that generalist argument against preservation of complicity liability is that the accessory's liability becomes a matter of moral luck 'derived' from the perpetrator's final actions).

187. See generally, Kai Ambos and Stefanie Bock, 'Germany' in Alan Reed and Michael Bohlander (eds) *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate Publishing 2013) 323–329.

actual intercessory conduct and personal responsibility have been adapted in the German Criminal Code.<sup>188</sup> This has occurred substantively after a period of significant historical reflection, and academic commentaries *vis-à-vis* theorised optimality.<sup>189</sup> There is a far more advanced imputed-normative-proportionality assessment of inculpatory conduct, differentiated attributive responsibility, and mere tokenistic or minimalistic engagements in criminal wrongdoing are disposed of via a ‘quasi-excusatory’ reconstitutive realignment of blameworthiness, calibrated through a mandatory sentence reduction.<sup>190</sup>

**Modes of Participatory Engagement.** German criminal law makes a fundamental distinction between three levels or modes of participation in a crime: perpetration as a principal<sup>191</sup>; abetting/instigation an offence<sup>192</sup>; and aiding,<sup>193</sup> as a widened formulation of secondary participation.<sup>194</sup> The German conceptualisation of co-perpetration, *Mittäterschaft*, is significantly wider than Anglo-American adaptations: dichotomously, there is no contemporaneous requirement that each co-perpetrator contributes ‘directly’ to the commission of the *actus reus* of the relational offence.<sup>195</sup> In a broadened manner there will be material contributory sufficiency where an individual actor plays a leading role at the earlier T1 planning or preparational temporal individuation.<sup>196</sup> The nature of the proportional contribution to criminal wrongdoing is viewed in a more coarse-grained ideological imputation manner.<sup>197</sup>

The differentiated modes of participatory engagement in German law, those of principal offender perpetration, abetting/instigating, and aiding as a form of secondary participation, are subject to further subdivision, and normative comportations with moral justificatory equilibrium.<sup>198</sup> The first categorisation, that of principal offender intercession in harm, may be sub-divided further, as Hamdorf asserts, into a triumvirate of perpetrator defacations: direct perpetration; indirect perpetration; and co-perpetration.<sup>199</sup> The direct perpetrator is the individual whose conduct is directly, and immediately, co-terminous with the definitional commission of the offence, the criminal actor who effects the criminal harm with their own hands.<sup>200</sup> The indirect perpetrator, in contradistinction, is any individual who commits the offence through another, and this other person is generally an innocent agent, controlled by the auspices of the hinterman.<sup>201</sup> Co-perpetrators effect the criminal wrongdoing in concert, jointly on the basis of a unilateral plan, each of them materially contributing to the fulfilment of the common illegal venture.<sup>202</sup> The

188. See generally, Claus Roxin, ‘Crimes as Part of Organised Power Structures’ (2011) 9 *Journal of International Criminal Justice* 193.

189. See generally, Johannes Wessels and Werner Beulke, *Strafrecht Allgemeiner Teil, Die Straftat Und Ihr Aufbau* (42nd edn, CF Muller 2012); Bernd Heinrich, *Strafrecht-Allgemeiner Teil* (3rd edn, Kohlhammer 2012); and Claus Roxin, *Täterschaft Und Täterschaft* (De Gruyter 1963, 6th edn 2003).

190. See Hamdorf (n. 105) at 210–218; and Krebs (n. 37) at 175–223.

191. S. 25 St GB; and see, Michael Bohlander, *The German Criminal Code: A Modern English Translation* (Hart Publishing 2008) 43.

192. S. 26 St GB; and see Claus Roxin, *Strafrecht Allgemeiner Teil, B and II, Besondere Erscheinungsformen der Straftat* (CH Beck 2003); and see generally Gerhard Werle and Boris Bunghardt, ‘Introductory Note’ (2011) 9 *Journal of International Criminal Justice* 191.

193. S. 27 St GB; and see generally, Kai Ambos, *Der Allgemeine Teil Des Völkerstrafrechts* (2nd edn, Duncker and Humblot 2004) 594, 597–599, and 614.

194. See generally, Bohlander (n. 104).

195. See Krebs (n. 37) at 175.

196. *Ibid.*, and see generally, RL Christopher, ‘Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions’ (2007) 28 *Cardozo Law Review* 2675.

197. See Ambos and Boch, Germany (n. 187) at 324–325.

198. See Hamdorf (n. 105) at 209–210.

199. *Ibid.*, at 210.

200. See Ambos and Boch, ‘Germany’ (n. 187) at 324–325; and see generally, Tatjana Hörnle, ‘Commentary to Complicity and Causality’ (2007) 1 *Criminal Law and Philosophy* 143.

201. See Johannes Wessels and Werner Beulke, *Strafrecht Allgemeiner Teil, Die Straftat Und Ihr Aufbau* (42nd edn, CF Muller 2012) mn. 535–536; and Rudolf Rengier, *Strafrecht Allgemeiner Teil* (4th edn, CH Beck 2012, s. 43 mn. 1–2).

202. See Bohlander I (n. 104) at 160–165.

contribution of each participant, in terms of the modality of engagement, operates reciprocally and is demarcated by mutual attributive personal responsibility.<sup>203</sup> Interestingly, within the German Criminal Code, there is a bifurcatory approach to secondary participation, separated from other criminal justice systems: a divide applies between those who assist or facilitate the wrongdoing, and individual actors who instigate or solicit the offence in question.<sup>204</sup>

A principal offender in the German criminal justice system is, consequently, phenomenologically embodied as an individual actor that can be said to ‘control’ the perpetration of criminal wrongdoing.<sup>205</sup> This is standardised as criminal conduct that is ascriptively transmogrified as the very behaviour prescribed by the statutory offence – *Tatherrschaftslehre*.<sup>206</sup> Germanic theoretical perspectives are heavily influenced by the hierarchical control over, or domination of the act precepts adduced by Roxin: ‘[A] person is a perpetrator if he controls the course of events, one who, in contrast, merely stimulates in someone else the decision to act, or helps him to do so, but leaves the execution of the attributable act to the other person, is a “mere” accomplice’.<sup>207</sup> The concomitant of this theorised hierarchical control adaptation is that a perpetrator, as Hamdorf articulates, may be imputed normative personal liability across a spectrum of behavioural intercessory conduct, all within the ‘controlling’ the criminal act panoply.<sup>208</sup> Liability pertains either by controlling the action itself (*Handlungsherrschaft*), by controlling the mind of another participant, or alternatively, and pragmatically, via the assertion of operational control.<sup>209</sup>

A binomial division, with imputed-normative-proportionality policy inculcations, applies in the *Strafgesetzbuch*, between perpetrators and accessories who are instigators of criminal wrongdoing and, alternatively, accessories who merely ‘facilitate’ criminal conduct.<sup>210</sup> Perpetrators of harm, and instigators at the earlier T1 point of temporal individuation, are treated in contemplementarity, of equal culpability and blame-worthiness, viewed through the same normative contribution to harm(s) behavioural conduct kaleidoscope.<sup>211</sup> Facilitators, however, who proportionally intersect in the completed offence in a more tokenistic and minimalistic behavioural manner, receive a mandatorily reduced sentence – a statutory discount for ‘aiding’ murder could, illustratively, be to reduce imprisonment from 2 years to 11 years and three months.<sup>212</sup>

Normatively, in terms of imputed proportional responsibility, for complicitous behaviour, the Germanic Criminal Code has adopted significant criteria for evidentiary determination.<sup>213</sup> These criteria, as Hamdorf has iterated, have been dispositive in instigator/facilitator threshold gradations, and coalesce within the *BGH* in three comportations.<sup>214</sup> This important adaptive review should be reflectively significant for Anglo-American jurisprudence: ‘(1) the nature of the interest the party has in the result; (2) the scope of the party’s participation in the criminal act; and (3) the control that the party had over the criminal act’.<sup>215</sup> It adventitiously expedites a much more extensive and expansive determinative analysis of ‘how’ D2’s conduct, in a real-world sense, intersects with criminal wrongdoing.

203. Ibid, and see MD Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment* (2005) 6 *German Law Journal* 1049.

204. See Krebs (n. 37) at 177–178.

205. See Ambos and Boch, ‘Germany’ (n. 187) at 325–332.

206. See generally, CE Herlitz, *Parties To A Crime*, Uppsala: iustus förlag, 1992, at 259–410.

207. See Roxin (n. 192) at 196; and see generally Christopher (n. 196).

208. See Hamdorf (n. 105) at 209–211.

209. Ibid.

210. See Bohlander (n. 104) at 153–157.

211. See generally, George P Fletcher, *Rethinking Criminal Law* (Little Brown and Company 1978) at 671.

212. See Ambos and Boch, ‘Germany’ (n. 187) at 339.

213. See generally, P Cramer and G Heine, in A Schöнке, H Schröder et al., *Strafgesetzbuch – Kommentar* (27th edn, CH Beck, Munich 2006), at 509–510.

214. See Hamdorf (n. 105) at 211; and see generally Dubber (n. 203).

215. Ibid., and see generally Christopher (n. 196).

*Secondary Participation: A Binomial Divide Between the Instigator and the Aider.* An intentional and unlawful act by the perpetrator remains a supererogatory predicate for derivative accessory liability within the German Criminal Code.<sup>216</sup> As previously, adumbrated, a binomial divide then pervades the modality of secondary participation: alternative formations of either instigating or aiding criminal wrongdoing.<sup>217</sup> The *actus reus* behavioural definitional element of instigation representationally embraces any act by D2 that ‘causes’ the perpetrator to effect the commission of the harm(s).<sup>218</sup> The primordial viewpoint amongst academics is that a direct nexus must prevail, some kind of effective communication between the criminal actors.<sup>219</sup> The communication from the secondary party, as Krebs articulates, must present a causal, but for, relational tie, for the perpetrator’s determination to bring about the wrongdoing.<sup>220</sup> There is a concomitant prosecutorial evidential requirement to establish a psychological contract of mutuality.<sup>221</sup> The instigator, on the evidence, needs to directly cause the delictual actions of another party: ‘[A] person who has already taken the decision to commit an offence, the so-called *omni-modo facturus*, cannot be instigated any more’.<sup>222</sup>

It is a materially insufficient contribution for instigation liability that the individual actor has simply provided an ‘opportunity’ for criminal harm to be committed by others.<sup>223</sup> Illustratively, leaving a window open with an aspiration that another breaks into a house, or abandoning a car borrowed from another with keys left in the ignition, in a locality frequented by car thieves, are postulations where inculpation is not imputably proportionate.<sup>224</sup> The causative facilitation requirement in German criminal law is more strictly delineated, and trammelled within a more positivistic enhanced psychological contract requirement, than under Anglo-American jurisprudential authorities.<sup>225</sup> A broadened proportionate contribution to wrongdoing is quintessential, direct causality ties are evidentially vital, and culpability and blameworthiness gradation thresholds, between perpetrator and instigator, are legitimately equated and need to be aligned *pari passu*.<sup>226</sup>

*Aiding and Mandatory Sentencing Reductions: Non-Causal Support and Encouragement.* In the German Criminal Code, all secondary party acts of assistance that do not fall within the panoply of perpetration or instigation sit within the umbrella of *Beihilfe*, and purviewed definitionally as modalities of ‘aiding’.<sup>227</sup> The behavioural conduct that is consequentially embraced, as Krebs translates,<sup>228</sup> incorporates broadened assistance to the perpetrator, that may be rendered in a physical or psychological manner: ‘[I]t needs to be rendered intentionally but does not have to be causal for the commission of the criminal offence; it suffices that the assistance facilitated it or made it safer for the principal offender’.<sup>229</sup> Assisting,

216. See Ambos and Boch, ‘Germany’ (n. 187) at 332.

217. See generally, Hamdorf (n. 105) at 213–214; and Krebs (n. 37) at 175–194.

218. See Rene Bloy, *Die Beteiligungsförm Als Zurechnungstypus Im Strafrecht* (Duncker and Humblot 1985), 328; and see also Wessels and Beulke (n. 201) at 553–554.

219. See Harro Otto, *Anstiftung Und Beihilfe, Jus.*, 1982, at 557–560; and Ambos and Boch, ‘Germany S’ (n. 187) at 333.

220. See Krebs (n. 37) at 197; and see, generally Dubber (n. 203).

221. *Ibid.*, and see also, Klaus Geppert *Die Beihilfe* (s. 27 StGB), Jura, 1999, at 266–268.

222. Ambos and Boch, ‘Germany’ (n. 187) at 333; and see, Urs Kindhäuser, *Strafrecht Allgemeiner Teil* (5th edn, Nomos Verlag 2011) s. 38, mn 40–44.

223. See generally, Jürgen Baumann, Ulrich Weber and Wolfgang Mitsch, *Strafrecht Allgemeiner Teil* (11th edn, Gieseking Verlag 2003), at s. 30 Rn. 63; and see Roxin (n. 192) s. 26 mn 76.

224. See Kindhäuser (n. 222) at s. 41 mn 26; Rengier (n. 201) at s. 45 mn 30; and Krebs (n. 37) at 197–198.

225. See Geppert (n. 221) at 268; and Otto (n. 219) at 560.

226. See Ambos and Boch, ‘Germany’ (n. 187) at 332–334; and see generally Christopher (n. 196).

227. See Thomas Weigend, ‘Germany’ in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook Of Comparative Criminal Law* (Stanford University Press 2011) 267.

228. See Krebs (n. 37) at 200–201.

229. *Ibid.*, at 200; and see Hamdorf (n. 105) at 213: ‘The *actus reus* of aiding can be any kind of act that furthered the commission of the offence, namely the act of the perpetrator(s). The aid need not cause the main offence. According to the case law of the BGH, not only physical assistance, but also mental assistance can be considered on aid under Sect. 27, StGB’.

under Germanic secondary participation precepts, operates in a far wider criminality landscape, and a broadened importation, addressing every modality of conduct which enables, facilitates, expedites, or intensifies the wrongdoing of another party.<sup>230</sup> There is no requirement for any direct causality ties between perpetrator and aider, no need for an explicit ascriptive nexus between D2's conduct and the commission of the primary offence by D1<sup>231</sup>: the conduct of the aider need not be a *condition sine qua non* for the effected harm.<sup>232</sup> It is, however, insufficient for inculcation, as in Anglo-American complicity laws, that the secondary party is simply present at the crime scene with a positive attitude towards the commission of the offence.<sup>233</sup> A further correlation needs to apply, whereby the perpetrator is encouraged by, feels more secure because of the presence of the aider, and synchronously the aider should be aware that their presence moderates the attitudinal belief of another criminal actor.<sup>234</sup>

In conclusion, there is much to learn from a comparative extirpation of the German Criminal Code, and recalibration of perpetrator/secondary party complicitous behaviour. An instigator is conceptualised as a secondary party but treated as a principal offender if relational causality ties to wrongs are evidentially established.<sup>235</sup> Aiding is prescribed a far more comprehensive definitional comportionation, but in a quasi-excusatory fashion, receiving a mandatory statutory sentencing discount.<sup>236</sup> This 'quasi-excusatory' analysis resonates with an earlier critique of withdrawal, and reverse conduct prophylaxis. It also adheres to an imputed-normative-proportionality standardisation, as propounded herein, for complicitous behaviour, reviewable via a new evidentiary framework. It reflects a dissonant template that has been adapted by the *BGH.*, coalescing around three comportationally significant factorisations that are of crucial salience: the scope of the individual actor's participation; the nature of their interest in D1's defacations; and, importantly, their hierarchical control over the conduct of other participatory wrongdoers.<sup>237</sup> An optimal recalibration of liability ought to focus on how a secondary party has intersected with the criminal offence. A hierarchical reordering of culpability between the instigator (facilitator) who makes a direct physical or psychological contract with the perpetrator, and the aider, whose intercessory behaviour is more attenuated, and whose attributive responsibility is reduced, should adventitiously be standardised.<sup>238</sup>

## Anglophone Cross-Jurisdictional Analysis: A New Framework

*The U.S. Approach: Secondary Participation and Modality.* It is notable that a broadened contextualised review of U.S. precedential authorities reveals significant vacillations, and divided discourse, on fundamental causality ties (or otherwise) between perpetrator and accomplice.<sup>239</sup> As with similar Anglophone jurisdictions, complicity laws, and conduct touchstones for liability, remain subject to solipsistic *ad-hoc* instrumental progression, both within and between states.<sup>240</sup> The primordial theoretical and practical perspective, however, is that intrinsically there is no need for prosecutors to identify any causal nexus, any *sine qua non* ascriptive responsibility linkage, between D2's acts of assistance and encouragement, and

230. See Rengier (n. 201) at s. 45 mn. 82; and Weigend (n. 227) at 267.

231. See Wessels and Beulke (n. 201) at mn. 575; and Heinrich (n. 189) at mn 1306.

232. See Weigend (n. 227) at 267; and see generally, Völker Krey and Robert Esser, *Deutsches Strafrecht Allgemeiner Teil* (5th edn, Kohlhammer 2012) mn. 817–824.

233. See generally, Cramer and Heine (n. 213) at 554.

234. See generally, H Tröndle and T Fischer, *Strafgesetzbuch* (53rd edn, CH Beck, Munich 2006) 214–228.

235. See Rengier (n. 201) at s. 45 mn. 30; Roxin (n. 189) at s. 26 mn. 76; and Wessels and Beulke (n. 201) at mn 568.

236. See Ambos and Boch, 'Germany' (n. 187) at 339.

237. See Hamdorf (n. 105) at 211.

238. See generally, Roxin, 'Crimes as Part of Organised Power Structures' (n. 188).

239. See generally, Moore (n. 32); Husak (n. 38); Kessler Johnson Schreiber (n. 51); and Ferzan (n. 40); Yeager (n. 47); (n. 91).

240. See generally, Luis E Chiesa 'United States' in Alan Reed and Michael Bohlander (eds), *Participation In Crime: Domestic and Comparative Perspectives* (Ashgate Publishing 2013) 469–485.

the prohibited criminal harm(s).<sup>241</sup> Illustratively, in *State v Tally*,<sup>242</sup> discussed further subsequently, the Alabama court highlighted that, ‘the assistance given, however, need not contribute to the criminal result in the sense, that, but for it, the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it’.<sup>243</sup> In contradistinction, in *Breaz v State*,<sup>244</sup> the court emphasised that ‘it is necessary that there be an immediate connection between instigation and the principal’s act’.<sup>245</sup> In truth, the lessons from the US, as with England, are that diametrically opposed judicial and academic commentary has been propagated over the causal ties dichotomy within complicity, the elements of materially contributory complicitous behaviour, and the parameters of an apposite theoretical landscape.<sup>246</sup>

More generally, within the purview of U.S. complicity laws, has been adaptation and adoption by states of Section 2.06 of the Model Penal Code, which distinguishes fundamentally and dualistically between perpetrators and accomplices.<sup>247</sup> Perpetrators are definitionally interpreted as individuals who either commit the offence, ‘by their own conduct’ or ‘by the conduct of another person for which they are legally accountable’.<sup>248</sup> A bifurcated behavioural divide applies between perpetrators and accomplices; in that the latter party is complicitous if she solicits another to commit an offence, aids or agrees to aid another person in the commission of a crime, or fails to make an effort to prevent a crime when he had a legal duty to do so.<sup>249</sup>

The Model Penal Code, adopted by a majority of U.S. states, makes it clear that an individual who encourages or helps another in the commission of the offence is complicitous, irrespective of whether they were present at the temporal point of denouement when the perpetrator representationally effected the *actus reus* of the crime.<sup>250</sup> It is constitutively significant that, in terms of disjunctive and unconscionable culpability standardisations the US, in synchronicity with English complicity law, but diametrically opposed to the German Criminal Code, fails to make any nuanced proportionality distinction between perpetrators and accomplices.<sup>251</sup> There is a pervasive Anglo-American failure to make evidentiary demarcations that cohere to personal

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241. See generally, Paul H Robinson, *Criminal Law* (Aspen 1997) 320–329; Luis E Chiesa, ‘Comparative Criminal Law’ in MD Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 1089; and AC Michael, ‘Acceptance: The Missing Mental State’ (1998) 71 *Southern California Law Review* 953.

242. 102 Ala. 25 (1894).

243. *Ibid.* It is noteworthy that the court asserted that if the aid in 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 can be known or shown that the dead man, in the absence thereof, would have availed himself of that chance; and see also, *Commonwealth v Flowers*, 387 A. 2d 1268 (1978); and *State v Gelb* 515 A 2d 1246 (1986), citing at 1252 the comment of the New Jersey Code’s Revision Committee that the complicity provisions dealt with enhancing the probability that another will commit a crime.

244. 13 NE 2d 952 (1938) 953; and see also *McGee v Commonwealth*, 270 SE 2d 733 (1980); *Workman v State* 21 NE 2d. 712 (1939); and *State v Bass*, 120 SE 2d 580 (1961). Note that Perkins has asserted: ‘[G]uilt or innocence of the abettor is not determined by the quantum of his advise or encouragement. If it is rendered to induce another to commit the crime, and actually has this effect, no more is required’, citing *People v Washburn* 280 Nov 132 (1938); and *State v Rollie* 585 SW 2d 78 (1979): see R Perkins and R Boyce, *Criminal Law* (3rd edn 1982) 735–766.

245. *Ibid.*; and see generally, Kimberley Kessler Ferzan, ‘Holistic Culpability’ (2007) 28 *Cardozo Law Review* 2523.

246. See generally, Matthew Dyson, ‘Might Alone Does Not Make Right: Justifying Secondary Liability’ (2015) *Criminal Law Review* 967.

247. See generally, Wayne R LaFave, *Substantive Criminal Law* (2nd edn, West 2011) s. 13.1.

248. Model Penal Code s. 2.06(1): Note that the drafters of the Model Penal Code decided to abandon the principal/accessory distinction altogether, and more than half of American jurisdictions have followed suit: see Comments to Model Penal Code s. 206, at 299.

249. Model Penal Code s. 2.06(3); and see generally, Robert Weisberg, ‘Reappraising Complicity’ (2000) 3 *Buffalo Criminal Law Review* 217.

250. See LaFave (n. 247) at s. 13; and see generally, Audrey Rogers, ‘Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent’ (1998) 31 *Loyola of Los Angeles Law Review* 1351.

251. See generally, Chiesa (s. 240) at 474–478.

responsibility and moral blameworthiness to justify gradated reprobation.<sup>252</sup> There is no punishment dichotomy between either type of participatory modality – minimalistic and tokenistic acts of assistance or encouragement may wrongly be equated with inculpation for instigation or co-perpetration.<sup>253</sup>

*The Canadian Approach: The Criminal Code and Reciprocal Culpability Standardisations.* Extant provisions within the Canadian Criminal Code, notably Sections 21-22, cohere with Anglo-American perspectives on complicitous behaviour, conflating dissonant modes of participatory engagement in liability terms, and with irreducible synchronicity of culpability gradations.<sup>254</sup> The individual actor who actually commits an offence, and a secondary party who aids, abets, or counsels the commission of the harm, are treated as umbilically connected, and of equal moral blameworthiness.<sup>255</sup> This broadened purposive statutory approach, and straitened ideological juxtaposition concomitantly relieves the prosecution from any evidentiary burden in establishing whether a criminal act is a principal offender who directly brought about the wrongdoing, or is an individual who simply assisted, encouraged, or counselled the commission of the harm.<sup>256</sup> Participatory modality is (dis)appropriately homogenised and universalised.<sup>257</sup>

A dualistic and standardised framework for participatory engagement in Canada was established by the Supreme Court in *R v Thatcher*.<sup>258</sup> Chief Justice Dickson asserted that, within the prevailing statutory Criminal Code, the actual perpetrators need not be identified, and that, ‘the whole point of Section 21(1) is to put an aider or abettor on the same footing as the principal offender’.<sup>259</sup> This predisposition was to eradicate distinctions at common law between principals in the second degree, and accessories.<sup>260</sup> The pragmatic outcome, outwith dissonant morally justifiable reprobation standardisations, was to alleviate the necessity for the Crown to choose between different forms of participatory modality.<sup>261</sup> The corollary is that dis-adventitiously, and contrary to the triumvirate of culpability gradation levels in the German Criminal Code, within Canada, all modes of participatory engagement are traduced in one contextualisation with a disregard for more nuanced moral blameworthiness and personal responsibility evidentiary equipoise.<sup>262</sup>

*South African Perspectives: A Bifurcation Between Perpetrators and Accomplices.* Jurisprudential and theoretical precepts in South African complicity law have historical original derivations from Roman, Roman-Dutch, and English doctrinal perspectives.<sup>263</sup> A fundamental dichotomy has originated *vis-à-vis* participatory modality, with a focus on pre-and-post complicitous behaviour, distilled from

252. See generally, Dressler (n. 5); Robinson (n. 8); Sullivan (n. 13).

253. See generally Dressler (n. 8); Horder (n. 75); and Ashworth (n. 77).

254. See generally, Kent Roach, *Criminal Law* (5th edn, Irwin Law 2012) 141–150; Eric Colvin and Sanjeev Anand, *Principles of Criminal Law* (3rd edn, Thomson 2007) 561; and Morris Manning and Peter Sankoff, *Criminal Law* (4th edn, Butterworths 2009) 250.

255. Section 21(1) of the Canadian Criminal Code is as follows: (1) Everyone is a party to an offence who: (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it; see Criminal Code of Canada RSC 1985 c. C. 34 (as amended).

256. See Roach (n. 254) at 145.

257. *Ibid.*

258. [1987] 1 SCR 652.

259. *Ibid.*, at para 66.

260. *Ibid.*, at para 72.

261. *Ibid.*

262. See generally, JC Smith, ‘Aid, Abet, Counsel or Procure’ in PR Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (Stevens 1978) 120.

263. See generally, Gerhard Kemp (ed) and others, *Criminal Law in South Africa* (Oxford University Press 2012) chapter 24; Jonathan Burchell, *South African Criminal Law and Procedure* (Vol. 1, 4th edn, Juta 2011); and CR Sayman, *Strafeg* (6th edn, Lexis Nexis 2012) chapter 7.

the actual completion of the criminal wrongdoing.<sup>264</sup> In terms of a prior engagement, a further bifurcated divide applies, as in comparative Anglophone jurisdictions more broadly, and di-sected between perpetrators (embracing also a widened ambit for co-perpetrators), and accomplices.<sup>265</sup>

In this realm, Burchell<sup>266</sup> has cogently demarcated three separate postulations whereby an individual actor, within the South African criminal justice system, may be embodied as a perpetrator/co-perpetrator: (1) Where he or she personally satisfies the definitional elements of the crime, and, is, therefore, a perpetrator in his or her own right (liability is in no way accessory, or dependent on the participatory conduct of another person); (2) where he or she, although possessing the requisite capacity, and the fault element (*mens rea*) for the crime in question does not comply with all of the elements of the unlawful conduct in question, and the conduct of the perpetrator is ‘attributed’, or ‘imputed’ to him or her, by virtue of prior agreement, or active association in a common purpose to commit the crime in question; and (3) as Burchell iterates, a conceptualisation of imputation-where an individual procures another person, who may be an innocent or unwilling agent, to commit a crime.<sup>267</sup>

A more nuanced bifurcation of co-perpetrator/accomplice liability in South African jurisprudence was delivered by the Appellate Division of the High Court in *State v Williams*.<sup>268</sup> Extant law adopts the classical distinction made by Judge Joubert therein, that looks to an accomplice’s participatory modality through the legal prism of providing the opportunity, the means, or the information to further harm(s) by another criminal actor, but not effectuation.<sup>269</sup>

[A]n accomplice is not a perpetrator or a co-perpetrator, since he lacks the *actus reus* of the perpetrator. An accomplice associates himself willingly with the commission of the crime by the perpetrator or co-perpetrator in that he knowingly affords the perpetrator or co-perpetrator the opportunity, the means, or the information which furthers the commission of the crime ... [A]ccordingly, in general principles, there must be a ‘causal connection’ between the accomplice’s assistance and the commission of the crime by the perpetrator or co-perpetrator.<sup>270</sup>

What is unresolved by the determination in *State v Williams*, and remains problematical across alternative multi-jurisdictional criminal justice legal systems, is what is truly meant by rhetorical incantations to a requirement of a secondary party’s ‘furtherance’ of harm commission by another party.<sup>271</sup> The touchstones to join together ‘furtherance’ with proportional inculcation remain as certain as how many angels could dance on the head of a pin. Moreover, there is an expressly propagated assertion that there must ‘generally’ be a causal connection between an accomplice’s assistance and the commission of the criminal offence.<sup>272</sup> Again, what is actually meant here in terms of interpretive definitional elements for complicitous behaviour? It is unclear in South African precepts whether an individual actor can further or assist the commission, of a result crime, constitutively ‘causing’ the result (illustratively, death in the case of murder), and not be held liable as a perpetrator/co-perpetrator, rather than as an accomplice.<sup>273</sup>

264. See RC Whiting, ‘Principals And Accessories In Crime’ (1980) 97 *South African Law Journal* 199.

265. See generally, Jonathan Burchell, *Principles of Criminal Law* (3rd edn, Juta 2005) 570–579.

266. See Burchell (n. 263) at 489.

267. *Ibid.*, at 487.

268. 1980 (1) SA 60 (A). Note in terms of academic critique of the determination in *Williams* see JCW Van Rooyen, ‘Discussion of *Williams*’ (1980) (1) SA 60 A (1983) *De Jure* 198–200; CR Snyman, ‘Discussion of *Williams*’ (1980) ‘Tydskrit Vir Die Suid-Afrikaanse Reg’ *Journal of South African Law* 188–191; and JMT Labuschagne, ‘Discussion of *Williams* 1980 (1) S 60 (A)’ (1980) *De Jure* 163–164.

269. 1980 (1) SA 60 A; and see also Burchell (n. 263) at 518.

270. *Ibid.*, at 63; and see Burchell (n. 263) at 515.

271. See Snyman (n. 263) at 271; and JC de Wet and HC Swanepoel, *Strafeg* (4th edn, by JC de Wet, Butterworth 1985) 191.

272. See Burchell (n. 263) at 96: Note that typically expressed as the *condition sine qua non*, and Burchell articulates that, ‘[A]n act is a cause of the consequence if the act cannot be notionally eliminated from the sequence of events, without the consequence also disappearing’; *ibid.*

273. *Ibid.*, at 97–98.

There is also a palpable lack of clarity in South African jurisprudential relational authorities, as Burchell<sup>274</sup> and Kemp<sup>275</sup> have adumbrated, whether both factual and legal causation are required for perpetrator/co-perpetrator liability, but only factual causation in the sense of ethereal and undetermined 'furthering' or 'assisting' the commission of a crime for accomplice liability.<sup>276</sup>

In summary, it is propounded that comparative legal systems, notably Germany, provide a vitally significant deconstruction of apposite conduct requirements for complicity liability, and culpability threshold gradation.<sup>277</sup> South African complicity law, in truth, ultimately presents an open-textured and unresolved dilemmatic choice: determination of liability, either as a perpetrator/co-perpetrator or accomplice will be informed by the degree of participation (for solipsistic *ad hoc* future judicial determination) before the completion of the crime.<sup>278</sup> It remains important, as considered in the subsequent section, to deconstruct, both specifically and precisely, different participatory modalities, and to suggest a new reform optimality pathway, informed by comparative legal systems review.<sup>279</sup>

274. *Ibid.*, at 519.

275. See generally, Kemp (n. 263).

276. See generally AP Simester, 'Causation In (Criminal) Law' 416.

277. It is noteworthy that Australian common law, by way of further illustration, is synonymous in many ways with traditional Anglo-American jurisprudential precepts. Whether absent from or present at the scene of criminal wrongdoing, an individual actor who intentionally aids, abets, counsels or procures the harm, with requisite knowledge of D1's intention to bring about the crime with relational *mens rea*, may be inculpated as a secondary party. Derivative liability is applicable, and the terms aiders and abettors are usually used to describe the conduct of individuals that are present at the scene of the criminal wrongdoing. In contradistinction, counsellors and procurers are normally absent when the crime is committed. In Victoria, New South Wales and South Australia the primordial derivation of criminal law is the common law of England; the other jurisdictions (the federal jurisdictions), which incorporate Australian Capital Territory, Northern Territory, Queensland, Tasmania and Western Australia are referred to as 'Code' jurisdictions, subject to alternative legislative statutory schemes; see generally, Andrew Hemming, 'In Search of a Model Penal Code Provision for Complicity and Common Purpose in Australia' (2011) 30 *University of Tasmania Law Review* 53.

278. It is significant, as Bagaric asserts, that there is contemporaneity in Anglo-Australian common law derivations of aid, abet, counsel and procure: 'Aid means to help, support or assist the principal offender. An example is acting as a look-out while the principal offender robs a bank. There is no requirement that the secondary party actually aids the principal offender; it is sufficient that this was the purpose of the secondary offender. An "abettor" is someone who encourages or incites the commission of the offence. Counselling involves advising or encouraging the offender prior to the commission of the offence. Procuring means to cause the offence to be committed – it is the strongest form of assistance. To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. Apart from procuring, to be liable as an accessory pursuant to one of the other limbs, it is not necessary to establishing a causal connection between the acts of the secondary party and the principal offender'; see Mirko Bagaric, 'Australia' in Alan Reed and Michael Bohlander (eds), *Participation in Crime: Domestic And Comparative Perspectives* (Ashgate Publishing 2013) 298.

279. It is important herein, as part of comparative review and reform optimality, to reflect on dissonances between legal systems appurtenant to complicity. Illustratively, in *R v Jogee* [2016] UKSC 8, in a joint sitting of the Supreme Court of England and Wales; on 18 February 2016, it was unanimously determined that parasitic accessorial liability (extended common purpose doctrine) no longer formed part of English law. Common purpose doctrine, and the 'agreement' between the parties as to relational conduct for inculpation, formed part of generalist complicity doctrine. The High Court of Australia, however, in *Miller v The Queen* (2016) 259 CLR 380, in a judgment delivered on 24 August, 2016, only a few months after *Jogee*, reasserted contrarily that the principle of extended joint criminal enterprise liability should remain part of the common law of Australia. For present purposes, this bifurcation has an important impact on conduct requirements for secondary party liability in either London or Canberra: far wider attributional liability predicates now apply in the latter legal system. Arguably, and fundamentally, whereas with accessorial liability the Crown must prove assistance, encouragement, or procuring, in the case of joint criminal enterprise it must simply show that the accused 'participated' in the criminal act of another. As such, the *actus reus* definitional comportment, and consequential intercession in the crime of another, is transposed by the 'agreement' to participate with others in my criminal activity – no requirements of causality or 'direct' connectivity between conduct and actual harm prescribed are traduced; see generally, Simester, 'Accessory Liability and Common Unlawful Purposes' (n. 15); Ormerod and Laird (n. 15); Dyson (n. 15); Edwards and Simester, 'Crime, Blameworthiness and Outcomes' (n. 34); Wang (n. 73); Andrew Dyer, 'The Australian Position' Concerning Criminal Complicity: Principle, Policy or Politics' (2018) 40 *Sydney Law Review* 289; and Laura Stockdale, 'The Tyranny of Small Differences: Culpability Gulf Between Subjective and Objective Tests for Extended Joint Criminal Enterprise in Australia' (2016) 90 *Australian Law Journal* 44.

## Imputed Proportionality, Evidentiary Perspectives and Reverse Burden: The Way Ahead

The challenge presented by extant Anglo-American complicity law is that it intractably homogenises different participatory modalities, across a broad landscape of culpability, and ultimately the controller/instigatory actor may be treated alike with the ethereal shadow marionette.<sup>280</sup> It is essential to effect change, not only as a concern of appropriate legal substantive reformulation, but also to avoid capricious practical unfairness. It should not be reforms predicated on the illusory distillation of causality requirements, between assistance and encouragement provided by the accessory and direct commission of harm(s), but rather on an imputed-normative-proportionality standardisation, reviewable via evidentiary perspectives in terms of actual intercessory conduct. Only an individual actor who has manifestly interceded in criminal harm(s), adjudged by the jurors as moral arbiters within prescribed gradations of culpability, (as set out herein), should rank imputably in equiparated blameworthiness with the principal offender.<sup>281</sup> If this equiparation is lacking, or if the criminal wrongdoing is characterised as a wholly independent action by another party, then alternative forms of potential secondary party liability must be sought – a *de novo* facilitation offence, as propounded subsequently, or alternative forms of inchoate liability.

The fundamental question in terms of complicity liability ought to be whether an accomplice has provided assistance or encouragement that straddles the proportionality threshold test dividing line for liability. This judicial divining rod sits between limited/non-limited intercession with criminal wrongdoing, so that imputed liability is morally justifiable.<sup>282</sup> A review of complicitous behaviour that morally justifies inculpation before jurors were consistently adumbrated by Lord Justice Toulson, both in leading appellate judgements,<sup>283</sup> and scholarly commentaries.<sup>284</sup> It is necessary, as set out below, to posit a series of alternative threshold levels for a participatory modality to guide an imputed-normative-proportionality standardisation, and one that is relationally relevant across a spectrum of complicitous engagements in harm(s)<sup>285</sup> It is instructed by the earlier contrasting review of comparative legal systems, and informed by an evaluation of reverse conduct prophylaxis denunciatory conduct for withdrawal.<sup>286</sup> Hypothecated postulations are presented, drawn, in part, from Anglo-American precedential authorities, and are contemporaneously critiqued. The different modality levels adduced engage a range of behavioural intercessions: where D2 serves as the instigator/mastermind of the criminal plan; accomplices who in differently adumbrated factual situations make a material contribution to the wrongdoing; potentially intervening conduct by the principal actor that may representationally be ‘overwhelming’; minimalistic acts of assistance and encouragement; and posited behaviours that are ineffectual and non-contributory.<sup>287</sup> Such a practical recalibration allows effective boundaries to be drawn on

280. See generally, Dressler (n. 5); and Sullivan (n. 13) and Duff (n. 14).

281. See Dressler (n. 8) and 447: ‘Measurement of moral desert also requires a determination of the actor’s state of mind and – this is the relevant point here – the extent to which she participated (or, if you will, embedded herself) in the planning or commission of the crime’.

282. See generally, Robinson, ‘Imputed Criminal Liability’ (n. 8).

283. See *Mendez v R* [2010] EWCA Crim. 516; *Stringer* [2011] EWCA Crim. 1396; *Hughes* [2013] UKSC 56; and *Jogee* [2016] UKSC 8.

284. See Sir Roger Toulson, ‘Sir Michael Foster, Professor Williams and Complicity in Murder’ in Dennis J Baker and Jeremy Horder (eds), *The Sanctity of Life and the Criminal Law – The Legacy of Glanville Williams* (Cambridge University Press, Cambridge 2013) 230.

285. See generally, Dennis J Baker, ‘Reinterpreting the Mental Element in Criminal Complicity: Change of Normative Position Theory Cannot Rationalize the Current Law’ (2016) 40 *Law and Psychology Review* 121.

286. See generally, Moriarty (n. 119); Reed and Fitzpatrick (n. 136); KJM Smith ‘Withdrawal in Complicity’ (n. 140); KJM Smith, ‘General Defences and Withdrawal’ (n. 140); and Gillies (n. 150).

287. See Robinson, ‘Imputed Criminal Liability’ (n. 8) at 635: ‘[B]ut doctrines of imputation have also resulted in liability where the defendant’s causal connection to the harm is tenuous at best. Under the complicity aspect of the felony murder rule, a co-felon has been held for murder when a gangleader, annoyed by one member of the gang, shot and killed the offending member ... Under the natural and probable consequence rule in complicity, a passenger in a car has been held liable for second degree murder when the driver, operating a vehicle on the wrong side of the road, killed a pedestrian. Both driver and passenger were drinking, and the passenger was held to be part of the unlawful enterprise of drinking and driving ... [I]f the perceived basis for the imputation of the objective element is the causal connection, then where the connection is weak – as in these latter cases – the imputation should be considered unjustified’.

participatory modality and is invested in lessons to be drawn from the German Criminal Code.<sup>288</sup> It facilitates a fundamental reappraisal of the nature of the interest that the actor has in the result, the actual scope of the actor's participation in the criminal act, and the control that was engaged in harm effectuation. It considers, albeit controversially, the 'quasi-excusatory' nature of tokenistic instigatory acts, and the potential for a reverse burden where intervening conduct is evidentially supererogatory.<sup>289</sup>

### *Control, Instigation and Hegemony: Lessons From the German Criminal Code*

Consider, by way of illustration, the following postulation. D2 hires D1, a professional hitman, to kill V his business partner. This 'contract' killing occurs after a financial payment is made to effect the murder. There is no difficulty, within an imputed-normative proportionality standardisation, as in the contextualisation of the German Criminal Code,<sup>290</sup> in equiparating our moral reprobation, and the culpability threshold of the principal offender and instigatory accessory: reciprocity in sentencing is justified for homicide.<sup>291</sup> The behavioural actions of the accessory have 'caused' the perpetrator to carry out the murder and absent the secondary party's instigation the killing is incredibly unlikely to have occurred.<sup>292</sup> A binomial divide applies in the *Strafgesetzbuch*, within the German Criminal Code, between perpetrators and accessories: secondary participation is further delineated within instigation and aiding of harm(s).<sup>293</sup> Instigation, in terms of imputed responsibility, is subject to particularised definitional compartmentation. The instigator must *cause* the perpetrator to effect the offence, a psychological contract is needed between the parties, and direct communication is evidentially fundamental.<sup>294</sup> It is an insufficient normative touchstone in contradistinction to the 'aiding' of harm(s) classification, that intercessory conduct simply provides an opportunity for wrongs to be committed by others.<sup>295</sup>

A further posited scenario, derived from the 'control, instigation, and hegemony' modality gradation threshold for complicitous behaviour, is presented by evaluation of the U.S. precedential authority of *Fritz v State*.<sup>296</sup> In this categorisation, the Germanic conceptualisation of co-perpetration, *Mittäterschaft*,<sup>297</sup> and level of control over the actions of others in terms of instigator responsibility is far broader and dissonant to Anglo-American extant laws and equiparated standardisations. There is, legitimately, no requirement in the German Criminal Code for contribution to the *actus reus* of the relational offence by each co-perpetrator, but predicates full personal responsibility via intercession at the earlier planning or preparation stage.<sup>298</sup>

In *Fritz v State*,<sup>299</sup> the defendant emotionally manipulated another party (Clayton) to kill her husband and was held liable for first-degree murder through 'controlling' the actions of another party (later

288. See generally, Hamdorf (n. 105); and Ambos (n. 164).

289. See Dressler (n. 5) at 139; and Robinson (n. 8) at 667–668.

290. See Krebs (n. 37) at 200–203.

291. See Ambos and Boch, 'Germany' (n. 187) at 339; and see generally, Hörnle (n. 200).

292. See KJM Smith (n. 1) at 75: 'Under the hegemony theory, control if viewed as an essential ingredient of cause: the principal is he who decisively controls the occurrence of the criminal act; and see Sullivan (n. 13) at 202–204'.

293. See Hamdorf I (n. 105) at 210–214.

294. *Ibid.*

295. *Ibid.* It is noteworthy that English law complicity precepts have consistently adumbrated the penalisation of non-causal assistance and encouragement within the parameters of liability: see Lord Bingham in *R v Kennedy (No. 2)* [2007] UKHL 38; [2008] 1 AC 269 at para [17], quoting with approval from Glanville Williams, 'Finis for Novus Actus' (1989) 48 *Cambridge Law Journal* 391, at 398: 'Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be the principal and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed'.

296. 25 Wis. 2d 91, 130 N.W. 2d 279 (1964), *cert. denied*, 380 U.S. 936 (1965).

297. See generally, Bohlander (n. 104).

298. See Krebs (n. 37) at 175–200.

299. 25 Wis. 2d 91, 130 N.W. 2d 279 (1964), *cert. denied*, 380 U.S. 936 (1965).

adjudged not guilty of the killing by reason of a mental condition defence).<sup>300</sup> Control over the actions of another may be direct, or indirect, as in *Asher v State*,<sup>301</sup> wherein D2 persuaded D1 by various pressures and threats to rob a bank. The accessory controlled all other aspects of the wrongdoing: planning the execution of the robbery; providing the money used to purchase the toy gun and sack; providing a post-robbery hiding place by identifying and unlocking a parked car; and promises to pick up the perpetrator after completion of the robbery.<sup>302</sup>

A control, instigation and hegemony standardisation within modalities of participatory behaviour may adventitiously be promulgated. A comparative review of the German Criminal Code, and widened perspectives of co-perpetration, may be adopted in Anglo-American complicity law. This recalibration, as Hamdorf iterates,<sup>303</sup> engages a focus on controlling the criminal act by either controlling the action itself, by controlling the mind of another participant, or, alternatively, and pragmatically, asserting operational control<sup>304</sup> as embodied in *Asher v State*. It legitimately interweaves a causality and imputed proportionality nexus to equiparate liability, and personal responsibility.<sup>305</sup>

### *Moral Justifications for Complicitous Liability: The Nature of Aiding and Appropriate Culpability Gradations*

It is vitally important, as Sullivan asserts,<sup>306</sup> that for complicity liability there must be some form of culpability possessed by the secondary party, reviewable through the lens of their associated criminal conduct, which is 'broadly'<sup>307</sup> of the same magnitude as the culpability of the other criminal actor(s) in harm effectuation.<sup>308</sup> This challenge, it is suggested, is palpably not met successfully within Anglo-American criminal justice systems, but the German Criminal Code presents a more justifiable co-terminous integration of co-perpetration and instigatory acts of assistance or encouragement. Aiding as a participatory modality is treated separately, unlike other comparative jurisdictions, and in Germany, it is demarcated in a bespoke particularised manner, as 'quasi-exculpatory', via mandatory sentencing discount.<sup>309</sup> It is important to also contextualise participatory liability for 'aiding' crime through the prism of a newly reformulated imputed-normative-proportionality standardisation, addressing moral justifications for gradations of intercessory conduct. Aiding (or encouragement) of the crime committed by another does not require causality ties, any but – for ascriptive responsibility nexus, but it suffices for liability that the engagement facilitates the harm, or it makes it safer for the perpetrator to effect.<sup>310</sup> A correlation needs to apply where the principal offender is encouraged by, feels more secure because of the presence of the aider, and synchronously the aider must have a comportational awareness that their presence moderates the other's attitudinal beliefs.<sup>311</sup>

Lord Justice Toulson across a series of appellate determinations,<sup>312</sup> has made a significant contribution to effectively distinguish the legal and moral components of aiding and encouraging within complicitous

300. *Ibid.*, at 94, 130 N.W. 2d at 280.

301. 394 F. 2d 424 (9th Cir. 1968).

302. *Ibid.*, at 428.

303. Hamdorf (n. 105) at 210.

304. *Ibid.*

305. See Robinson (n. 8) at 614, n. 10: 'The rules of complicity generally impute the objective elements of the offence charged upon a showing of the actor's contribution to the criminal venture, the actor's culpability as to his contribution, and the culpable state of mind necessary for the commission of the offence'.

306. Sullivan, 'Doing Without Complicity' (n. 13) at 204.

307. *Ibid.*

308. See AP Simester et al., '*Criminal Law: Theory and Doctrine*' (n. 11) at 278–281.

309. See generally, Roxin (n. 104).

310. See Geppert (n. 221) at 268; and Otto (n. 219) at 560.

311. See Ambos and Boch, 'Germany' (n. 187) at 332–334; Christopher (n. 196) and see generally, Moore (n. 32).

312. See *infra* note 283.

behaviour.<sup>313</sup> In terms of participatory modality, whether a perpetrator acted with the aid or encouragement of the accessory is presented as a simple factual question for jury evaluation as moral arbiters, abrogating confusion over ascriptive causal responsibility dilemmatic choices.<sup>314</sup> It is interwoven with the fairness question as to whether it is ‘just’ to find that culpability threshold gradations have been established.<sup>315</sup> The moral component is whether it is justifiable to consider the accessory personally liable for harm effectuation.<sup>316</sup> In the Court of Appeal determinations in *Mendez*<sup>317</sup> and *Stringer*,<sup>318</sup> Toulson L.J. articulated that there is no precise definitional formula for the *actus reus* ingredients of complicity, but rather it had to be evidentially proved to the jurors’ satisfaction that the criminal wrongdoing was committed with the secondary party’s assistance or encouragement.<sup>319</sup> Before the Supreme Court in *Jogee*<sup>320</sup> a few years later, rejecting the doctrine in general, of parasitic accessorial liability, Toulson L.J. restated that secondary participation modality was uniformly adapted: ‘[U]ltimately, it is a question of fact and degree whether D2’s conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1’s offence as encouraged or assisted by it’.<sup>321</sup>

It is, however, necessary to go much further in providing cognate illustrations, within the propounded imputed – normative – proportionality standardisation, of complicitous behaviour that ought to cross the Rubicon in terms of inculpation, and more effective jury guidance.<sup>322</sup> In *Mendez*,<sup>323</sup> the criminal conduct involved the emboldenment of others in the group by participating in violence directed against the victim, leading to a fatal stabbing. The accessory in *Stringer*<sup>324</sup> participated with others in an attack on another individual, subsequent to a chase through the streets with baseball bats, and ultimately an unlawful killing by stabbing. It was determined that the ‘chasing’ of the victim was sufficiently connected to the stabbing to evidentially be adduced as constitutive of ‘encouragement’.<sup>325</sup> The temporal

313. See Toulson (n. 284).

314. *Ibid.*, at 241–244.

315. *Ibid.*, at 241–242.

316. *Ibid.*, at 239–241; and see generally, Paul H Robinson et al., ‘Empirical Desert, Individual Prevention, and Limiting Retributivism: A Reply’ (2014) 17 *New Criminal Law Review* 312.

317. [2010] EWCA Crim. 516.

318. [2011] EWCA Crim. 1396.

319. See *Mendez* [2010] EWCA Crim. 516, at para [20] *per* Lord Justice Toulson: ‘Conduct by P which involves a total and substantial variation from that encouraged by D could not properly be regarded as the “fruit” of D’s encouragement, nor with propriety to be said to have been committed under D’s influence’; and see also para [23]: ‘D’s conduct must (objectively) have constituted assistance or encouragement at the time of P’s act, even if P (subjectively) did not need assistance or encouragement’; *Ibid.* See also *Stringer* [2011] EWCA Crim. 1896 at para [48] *per* Lord Justice Toulson: ‘It is well established that D’s conduct need not cause P to commit the offence in sense that “but for” D’s conduct P would not have committed the offence ... [B]ut it is also established by the authorities referred to in *Mendez and Thompson* that D’s conduct must have some relevance to the commission of the principal offence, there must, as it has been said, be some connecting link. The moral justification for holding D responsible for the crime is that he has involved himself in the commission of the crime by assistance or encouragement, and that presupposes some form of connection between his conduct and the crime’.

320. [2016] UKSC 8.

321. *Ibid.*, at [para] 12 *per* Lord Toulson and Lord Hughes, with the concurrence of Lord Neuberger, Lady Hale, and Lord Thomas; and see also, Law Commission *Participating in Crime* (2007) Law Com. No. 305, at para 2.33: ‘However, the precise nature of this “sufficient” connection is elusive. It is best understood, at least where D’s conduct consists of assistance, as meaning that D’s conduct has made a “contribution” to the commission of the offence’.

322. See generally, Steven Slavell, ‘Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent’ (1985) *Columbia Law Review* 1232.

323. [2010] EWCA Crim 516; and see also Graham Virgo, ‘Joint Enterprise Liability is Dead: Long Live Accessorial Liability’ (2012) *Criminal Law Review* 850, at 858: ‘[I]n *Mendez* it was held that secondary liability was founded on causation, even where the assistance or encouragement related to the commission of crime A and D1 committed crime B’. This is not, however, a test of “but for” causation, but simply whether D2 can be considered to have materially contributed to the commission of the offence by D1. It was even acknowledged that the assessment of such contribution may have a ‘moral component’ as to whether it is ‘just’ to hold D2 liable for the offence committed.

324. [2011] EWCA Crim 1396.

325. *Ibid.*, at para [48–50].

points of individuation between the chasing and stabbing were so unattenuated, formed an indivisible continuum, that the perpetrator had been assisted in the murderous attack by the complicitous behaviour of others.<sup>326</sup> The principal offender had the comfort and security of knowing that he was not acting individually but had the support of others, and the expectation that assistance could be garnered from them if required.<sup>327</sup>

Jurisprudential precedential authorities highlight a relational connectivity comportation, as Virgo articulates,<sup>328</sup> that the killer is simply ‘influenced’ by the accessorial contribution, even if the unlawful killing would have occurred without any aid, or direct encouragement.<sup>329</sup> Moreover, the definitional parameters, and true nature of succour and/or comfort to the perpetrator by the accessory’s intercession in the harm(s) was extended even further by Toulson LJ in *Stringer*.<sup>330</sup> By extrapolation, it was adduced that a ‘presumed connection’ might apply in my posited modality scenario, provided there is only, at a *de minimis* gradation, some kind of overarching awareness of the communication (direct or indirect) of support:

If D provides assistance or encouragement to P, and P does that which he has been encouraged or assisted to do, there is good policy reasons for treating D’s conduct as materially contributing to the commission of the offence, and therefore justifying D’s punishment as a person responsible for the commission of the offence, whether or not P would have acted in the same way without such assistance or encouragement.<sup>331</sup>

It is self-evident in *Mendez* and *Stringer* that each respective secondary party embedded themselves within the criminal harm effected: moral desert precepts intimate their liability as aiders/encouragers, providing succour and support to the perpetrators.<sup>332</sup> Our moral compass, as a normative barometer, asks whether it is ‘just’ to consider them culpable for what occurred? A positive answer is elicited but their personal responsibility ‘ought’ to be judged in comportation with their conduct in providing comfort and support to the principal offender. The nature of their conduct sits within the umbrella of *Beihilfe* under the German Criminal Code, and purviewed as ‘aiding’ crime, not co-perpetration or instigating.<sup>333</sup> The aider or encourager of harm sits in a different categorisation of secondary participation – a panoply of conduct that has a widened importation, embracing every modality of conduct which enables, facilitates, expedites or intensifies the wrongdoing of another party.<sup>334</sup> The concomitant, however, is a mandatorily reduced sentencing regime in terms of appropriate blameworthiness.<sup>335</sup>

A more nuanced imputed-normative-proportional standardisation should apply across the intercessory spectrum of aiding and encouragement of criminal wrongdoing. Participatory modality should also be guided by a new type of focus that demands that our jurors as moral arbiters of

326. *Ibid.*, at para [55]; and see Virgo (n. 323) at 858: ‘Instead of relying on causation as a justification for the imposition of assisting or encouraging a crime, the Court of Appeal in *Stringer* recognised that such liability can be imposed where there is some connecting link so that D2’s conduct can be considered to have made a contribution to the commission of the offence. The imposition of such liability is “morally justified” because D2 has involved himself in the commission of a crime by the act of assistance or encouragement’.

327. *Ibid.*, at para [48, 49].

328. Virgo (n. 323) at 859.

329. *Ibid.*; and see also, generally, Graeme Virgo, ‘Guilt by Association: A Reply To Peter Mirfield’ (2013) *Criminal Law Review* 584.

330. [2011] EWCA Crim. 1396, at para [47–50].

331. *Ibid.*, at para [50]; and see Virgo (n. 323) at 858–860.

332. See Virgo (n. 323) at 859: ‘This connection justification for accessorial liability is not subject to the limitation of causation, namely that the voluntary acts of D1 will break the chain of causation, but it does involve some form of link between D2 and D1 in that D1 must have been influenced by D2’s contribution in some way’.

333. See Weigend (n. 227) at 267.

334. See Rengier (n. 201) at s. 45 mn. 30; Roxin (n. 189) at s. 26 mn 76; and Wessels and Beulke (n. 201) AT MN 568.

335. See Ambos and Boch, ‘Germany’ (n. 187), at 339.

liability concentrate upon the level of ‘fault’ intrinsic to the complicitous behaviour *per se*. This recalibration can again be illustrated by a review of a number of postulated factual and hypothecated situations. In the off-cited determination in *Wilcox v Jeffrey*,<sup>336</sup> for example, there was ‘fault’ in the whole attitudinal manner by which the accessory embedded themselves in the acts of the principal. The accomplice attended a concert by Coleman Hawkins in his capacity as a jazz critic and writer, and, additionally, paid a fee to attend the performance: ‘his presence and his payment to go there was an encouragement’.<sup>337</sup> The concert itself had been prohibited, and was unlawful, as Hawkins, a U.S. citizen, had entered the country unlawfully, without a work permit contrary to the Aliens Order 1920.<sup>338</sup>

It ought to be significant for fact-finders to review the culpability intrinsically attached (or otherwise) to the accessory’s complicitous behaviour in general, and separately in normative consideration as part of actual acts to aid or encourage. In the realm of ascriptive causal responsibility more broadly, outwith complicity, it is significant that Toulson L.J. made a fundamental intervention to establish ‘fault’ as part of *actus reus* conduct requirements.<sup>339</sup> In *Hughes*,<sup>340</sup> before the Supreme Court, an uninsured defendant was driving perfectly safely, on the correct side of the road, and his vehicle was impacted by the deceased who steered uncontrollably into the other lane, whilst affected by a cocktail of drugs and exhaustion from overwork. At issue was whether the defendant, absent ‘personal responsibility’, could be said to have caused death by driving, and, consequentially, an offence within the purview of the Road Traffic Act 1988.<sup>341</sup> The Supreme Court, and Toulson L.J., overturning the appellate court decision, asserted that there was no explicit abrogation of normal causation requirements, and ‘driving’ should not be confused with mere presence.<sup>342</sup>

Importantly, and if followed in a widened contextualisation, the statements in *Hughes* are of heightened significance beyond the particularised factual scenario presented. The death had to be connected to something objectively wrong about Hughes’ driving: ‘[J]uries should be directed ... there must be something open to proper criticism in the driving (conduct) of the defendant ... which contributed in some more than minimal way to the death’.<sup>343</sup> Causal salience was required as an imprimatur for liability, but more relationally relevant to the present discussion is the transformational emphasis on normative imputed fault (or otherwise) in the epicentre of the very conduct of the individual actor.<sup>344</sup> This is translational for fact finder review and consideration, within the arena of modalities of participating behaviour, with a primordial reappraisal of moral desert, justification for liability, and re-evaluation of how a secondary party has embedded themselves into the wrongdoing of another. Consider, by way of illustration, an accessory who supplies oxygen-cutting equipment in contemplation of a number of bank raids by D1.<sup>345</sup> During the course of one such burglary the perpetrator is apprehended by a security guard and fatally hits the victim over the head with the equipment supplied by D2. An appraisal of the delfacatory complicitous conduct of

336. [1951] 1 All ER 464.

337. *Ibid.*, at 466 *per* Lord Goddard.

338. *Ibid.*, and see generally, ‘AP Simester et al., *Simester and Sullivan’s Criminal Law*’ (n. 11) at 232–237.

339. See generally, Toulson (n. 284).

340. [2013] UKSC 56: and see generally Kyd, ‘Causing Death’ (n. 125).

341. The offence of ‘causing’ death by driving whilst unlicensed, uninsured or disqualified under s. 32B Road Traffic Act 1988 (RTA 1988); and see Road Safety Act 2006, section 21.

342. *Hughes* (n. 340) at para [29].

343. *Ibid.*, at para [32, 33] *per* Lord Toulson and Lord Hughes.

344. *Ibid.*; and see generally, AP Simester, et al., ‘*Simester and Sullivan’s Criminal Law*’ (n. 11) at 111: ‘On this analysis (in *Hughes*), causation requirements in the criminal law are intimately bound up with fault’.

345. See *Bainbridge* [1960] 1 Q.B. 129, and see *State v Tazwell*, 30 La Ann. 894 (1878) (though the burglar did not use the tools given by another the other would be liable as an accomplice (to the property crime) in view of the encouragement and support provided by the proffer of aid).

the accessory, outwith *mens rea* comportations, is significant in terms of ‘fault’ appurtenant thereto, and categorisation of aid provided for normative fact-finder deliberation.<sup>346</sup>

A recalibration of ‘fault’ as part of an imputed-normative-proportional standardisation of participatory modality, and adapted to aiding/encouraging harm(s), would facilitate more efficacious outcome responsiveness. It would posit a different outcome in the seminal U.S. case of *Commonwealth v Root*,<sup>347</sup> highlighted by Kadish.<sup>348</sup> A supererogatory precept, as Simester has articulated, should be whether as a principal offender or secondary party, the grounds for reproof must originate, and have as their derivation, the conduct of that individual actor.<sup>349</sup> In *Commonwealth v Root*, the respective individuals engaged in an automobile race on a country road, reaching speeds of over 90 miles per hour, and engaging reckless manoeuvres to pass each other – the deceased was killed instantly when he collided with a truck coming from the opposite direction. Root was convicted of involuntary manslaughter, but the majority of the Pennsylvania Supreme Court reversed the decision; it was deemed inappropriate to traduce and reconceptualise the voluntary actions of V (reckless) to find a cause of death via the conduct of another individual actor.<sup>350</sup> This outcome seems inapposite, significantly over-generous to a defendant who encouraged harm, and normatively acted with an imputed fault in their conduct, was directly connected to the wrong, and who manifestly embedded themselves in the offence by assisting and encouraging the commission of an *actus reus* (death by dangerous driving).<sup>351</sup> There is a perceptibly dissonant scalarity in terms of ‘fault’ in conduct in contradistinction to the metanarrative in *Hughes*.

In summary, the aider or encourager of harm(s) ought, in Anglo-American complicity law, to have a separate particularised compartmentalisation within participatory modalities. A new definitional categorisation and standardisation is required, bespoke and dissonant in culpability gradation from the co-perpetrator, or the instigator. The *Beihilfe*, and Germanic Criminal Code, foreshadows, in part, the optimal way ahead, with a widened import to ‘aiding’ with such complicitous behaviour constitutively embracing, enabling, facilitating, expediting, or intensifying the wrongdoing of another party.<sup>352</sup> It should be fundamental for our fact-finders to evidentially consider the level of ‘fault’ intrinsic to the accessorial conduct *per se*, with proportionality to the personal responsibility of the individual actor. This ought to be assessed normatively in comportation with a gradation of the accomplice’s conduct in providing support, succour, and comfort to the principal offender.

### *Insubstantial Intercession in the Crimes of Others: Lessons From Germany and the Need for a Bespoke Facilitation Offence*

Anglophone jurisdictions have capriciously compartmentalised ‘any’ acts of assistance or encouragement by an accessory towards the effectuation of criminal wrongdoing in derivative equiparation with the offence commission conduct of the actual perpetrator. This has occurred irrespective of causal salience,

346. See Simester, ‘The Mental Element in Complicity’ (n. 12) at 580: ‘[W]hen we reprove a person the grounds for reproof must originate in the conduct of that person. While this is true of moral judgements generally, in the institutional context of law it holds especially for crimes. The criminal law contains a supplementary principle of personal control over liability, according to which no one should have the power deliberately to render another person guilty of a crime. Our liability, like our culpability, flows from what we do (or omit to do). It does not, and should not, spring from the choices of others’.

347. 403 Pa 571, 170 A 2d 310 (1961).

348. Kadish (n. 17) at 400; and see Glanville Williams, *Criminal Law; The General Part* (2nd edn, 1961) 393–394, asserting that since the deceased committed no offence in causing his own death by his reckless action there was no homicide offence for which D2 liability could prevail. However, as Kadish cogently articulates, the fundamental concern is the survivor’s inculpation for recklessly causing the death of the competitor which is an offence; *ibid.*, at 400, n. 341.

349. Simester (n. 12) at 580.

350. *Root*, 403 Pa at 574, 170 A 2d at 311.

351. See generally, Kyd (n. 125).

352. See Roxin (n. 192) at 190–196; and see generally, Christopher (n. 196).

or, indeed, despite irreducibly slight connection or limited perfunctory association with perpetrating acts. Liability predicated an insubstantial tangential association to harm(s) has unfortunately become a modern form of Anglo-American pageantry. Kadish has asserted that no requirement has prevailed in U.S. criminal law for the prosecution to establish, as it must in other ascriptive personal responsibility causation cases that the harm would not have deontologically transpired without the complicitous behaviour.<sup>353</sup> A presumption of connection or intercessory behaviour, inductively, often as a matter of legal fiction, has been portrayed, and extensively applied, in a counter-intuitive, and counter-factual manner to achieve dispositorily prescribed outcomes.<sup>354</sup> Perfunctory and tangentially constrained types of participatory modality have been raised to a culpability threshold gradation that is ill-deserved.<sup>355</sup>

Anglo-American jurisprudence is, unfortunately, replete with illustrations where no requirement exists to demonstrate that the actual aid or encouragement made any fundamental difference to the principal offender's resolution to commit the harm.<sup>356</sup> Nor that the supposedly contributory acts of the accomplice made any real substantial difference to the effected wrongdoing itself.<sup>357</sup> It is not enough to justify personal inculcation, or responsibility equiparation, where the aid/encouragement is wholly ineffective, and makes no material contribution at all to the offence commission.<sup>358</sup> The call of encouragement to a perpetrator to inflict violence on another person, which demonstrably fails to impart any influence as the principal is deaf, could hardly form the constituents of the *actus reus* of complicity liability.<sup>359</sup> Beyond such an extreme illustration of wholly ineffectual and failed encouragement, our laws are replete with illustrations where tokenistic and minimalistic acts of aiding/encouraging satisfy the derivative D2 inculpatory threshold, and equiparated liability is propagated. A spectrum of wholly perfunctory and limited intercessory conduct in the crimes of others have prevailed to disassociately 'find' liability: carrying the photographic negatives for the principal counterfeiter<sup>360</sup>; lending a smock to another so as not to dirty his clothes whilst administering a beating,<sup>361</sup> a wife preparing food to provide sustenance to her criminally attuned husband<sup>362</sup>; asking burglars in advance to get bananas<sup>363</sup> as a precursor to taking the goods; providing the wrong key to encourage the perpetrator to unlock a cellar door,<sup>364</sup> and in *Gianetto*,<sup>365</sup> a trial judge who instructed the jury in the following terms: '[S]uppose somebody came up to [him], and said, 'I am going to kill your wife', if (the secondary party) played *any* part ... [like] patting him on the back, adding, saying 'Oh goody', that would be sufficient.<sup>366</sup> Dressler has also cogently adumbrated that, in U.S. states that have enacted the Model Penal Code's complicity provision, there is a further broadened liability comportation to where the secondary party does not aid, even in a perfunctory manner, but attempts to do so, as a corresponding touchstone of liability.<sup>367</sup>

353. Kadish (n. 17) at 357.

354. See G Fletcher, *Rethinking Criminal Law*, 1978, at 634–649.

355. *Ibid.*

356. See Robinson, 'Imputed Criminal Liability' (n. 8) at 633, n. 80–83; Dressler (n. 5) at 102; and Kadish (n. 17) at 357.

357. See Sullivan, 'Doing Without Complicity' (n. 13) at 217.

358. *Ibid.*

359. *Ibid.*, at 219.

360. *United States v Garguilo*, 310 F.2d 249, 253 (2nd Cir. 1962).

361. A German case illustration, provided by Fletcher; see Fletcher, 'Rethinking Criminal Law' (n. 354) at 677.

362. *Alexander v State*, 20 Ala. 432, 433, 102 So. 597, 598 (1925).

363. *State v Helmenstein*, (63 N.W. 2d 85) N.D. 1968.

364. See Fletcher (n. 354), at 677–678, providing an illustration from German case law.

365. *R v Gianetto* [1997] 1 Cr. App. R. 1.

366. *Ibid.*

367. See Dressler (n. 8) at 432. See Model Penal Code s. 2.06(3)(a)(ii) (1962) (a person is an accomplice if, 'with the purpose of promoting or facilitating the commission of the offence', she 'aids or agrees [to aid] or attempts to aid' the other person in planning or committing the offence. Illustratively, as Dressler asserts, see *State v Gelb*, 515 A. 2d 1246 (N.J. Super Ct. App. Div. 1986) wherein the appellate court determined that D2 could be convicted of the full substantive offence although his participatory acts of encouragement did not occur until after D2 had already begun committing the offence.

It is inapposite to impose full substantive accessorial derivative liability for criminal wrongdoing affected by another, simply on the predicate of what is reducibly, in effect, no more than a positive disposition towards the principal offenders' actions. The secondary party should only bear imputed proportional responsibility for their complicitous, but personal behaviour: '[F]ull accountability for a wrong, whether perpetrated by oneself, or by somebody else, requires responsibility for the wrong in terms of a material in the world connection with the events that constitute the externalities of the crime, and culpability commensurate with the blame and censure associated with its commission'.<sup>368</sup> The German Criminal Code highlights an adventitious pathway for Anglo-American legal systems to follow, in part, and to adapt. There is no synchronous equiparation of culpability across the dis-proportional liability spectrum of co-perpetrator, instigator and aider.<sup>369</sup> It is insufficient for liability to have a presumption of connection in terms of assistance or encouragement: aiding requires a nexus whereby the perpetrator is encouraged by, feels more secure because of the presence of the aider, and a correlation on the part of the accessory in terms of awareness that their presence moderates the attitudinal belief of the perpetrators.<sup>370</sup> If this definitional comportation is not met for aiding, as is the posited scenario with tokenistic or minimalistic acts of assistance or encouragement, then alternative types of participatory modality need to be engendered *de novo* for this lower threshold categorisation.<sup>371</sup>

An adaptation of Germanic criminal law precepts and recategorisation of a triumvirate of culpability standardisations present different, and more morally justifiable outcomes – determinativeness in the illustrative postulations herein. It presages an alternative result in the off-debated U.S. precedential authority of *State v Tally*,<sup>372</sup> where complicitous responsibility for a homicide committed by co-perpetrators was viewed through a lens of attempted aid. This categorisation should be reappraised through an inputted-normative-proportional standardisation, and via propagation of an alternative bespoke new facilitation offence, reconstitutively encompassing personal responsibility, and evidentiary liability thresholds.

In *State v Tally*, the secondary party had sent a telegram that instructed a telegram operator not to deliver a telegram previously sent to one of the victim's relatives, providing a warning of the imminent threat. The warning telegram was not sent by the operator. Tally was held, co-terminously with others, accessorially liable for the subsequent homicide, predicated on their attempted aid, even though the killers were unaware of Tally's encouragement.<sup>373</sup> There was no requirement for causal salience in terms of ascriptive personal responsibility for the criminal result, any effectual importation that the killers were influenced by the accessorial contribution, or, indeed, that any succour or comfort was communicated to the co-perpetrators, either directly or psychologically.<sup>374</sup> Liability applied for the effectuation of a result that would have been applied without it. It seems counter-factual and counter-normative to ascribe full complicity liability where conduct is wholly ineffectual, and in no sense is the principal offender(s) 'influenced' by the accessorial contribution, nor, indeed, can presumed connection operate to fill the factual evidentiary gap.<sup>375</sup>

More generally, a newly formulated 'facilitation' offence is needed for broader adoption in Anglo-American criminal law. This newly formulated offence should be standardised at a lower

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368. See Sullivan (n. 13) at 217.

369. See Hamdorf (n. 105) at 210–218.

370. See Tröndle and Fischer (n. 234) at 214–228.

371. See generally Dubber (n. 203).

372. 102 Alan. 25, 15 50 722 (1894).

373. *Ibid.*, at 69 15 30, at 738–739.

374. *Ibid.*, at 69, 15.50., at 738: 'The assistance given ... need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it'; and see generally, Moore, 'Causing, Aiding and the Superfluity of Accomplice Liability' (n. 32).

375. See generally, Sullivan (n. 13) at 217.

culpability and personal responsibility standardisation than currently applies to *all* types of assistance or encouragement of harm(s).<sup>376</sup> Perfunctory acts of intercessory behaviour need to be reconceptualised and recalibrated. It should properly demarcate complicitous behaviour that currently improperly straddles tokenistic and minimalistic conduct, and forms of instigation: a *via media* is required between the *scylla* and *charybdis* of extant dis-equiparating participatory modality. Attempted aiding or encouraging is *not* the same as other types of facilitative complicitous behaviour. The newly formulated facilitation offence will be applicable where the accessory has provided no real-world material succour or support to the perpetrator, where deontologically the aiding or encouragement provided is normatively disproportionate to the establishment of full derivative culpability, moral desert dissociates the individual accessorial actor from equal criminal liability, and evidentially the secondary party is not truly 'embedded' in the criminal wrongdoing.<sup>377</sup>

The proposed *de novo* facilitation offence herein draws, in part, upon alternative comparative criminal legal system perspectives, including New York.<sup>378</sup> It conceptualises 'facilitation' as providing an individual with the means or the opportunity to commit a crime, and adapts criteria that the *BGH* in Germany has established,<sup>379</sup> as well as integrating innovative propositions advanced within the article. The facilitation offence, as originally 'propounded, should be "quasi-excusatory"' within the panoply of participating modalities, subject to a mandatorily discounted sentence. It is submitted that the following template ought to be adventitiously adopted as part of the comparative reform of complicity precepts:

A person is guilty of criminal facilitation when he intersects in the criminal offence perpetrated by another, by engaging in conduct which provides the means or opportunity for the commission thereof, and which, in fact, aids or encourages such a person to commit an offence. The jury will proportionally consider this determination as a question of fact and review: (1) The nature of the interest that the party has in the result; (2) The scope of the party's participation in the criminal act; and (3) The control, or otherwise, that the party had over the criminal act. Aid or encouragement does not have to be causal for the commission of the principal offence, but it suffices that it facilitates it, or makes it safer for the other party, whereby they feel more secure because of the participation of the aider or encourager.

### *Intervening Acts Committed by the Principal Offender: Causality, Culpability and Reverse Burden*

Causality ties and ascriptive personal responsibility intersect with complicity liability in a particularised and specific manner.<sup>380</sup> The contextualisation is bespoke and individuated, and the lens needs to shine on the issue of whether the unlawful act(s) of the perpetrator ought to be regarded as unilateral, independent and one-sided, outwith the assistance and encouragement of other participatory modalities, consequently abrogating the responsibility of the accessory for derivative offence commission.<sup>381</sup> It is within this limited metanarrative that the import of causality (or otherwise), and dissolution of causal ties of

376. See generally, Rudi Fortson, 'Inchoate Liability and the Part 2 Offences Under the Serious Crime Act 2007' in Alan Reed and Michael Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate Publishing 2013) 173.

377. See generally, David Ormerod and Rudi Fortson, 'Serious Crime Act 2007: The Part 2 Offences' (2009). *Criminal Law Review* 389; and John Child, 'Exploring the *Mens Rea* Requirements of the Serious Crime Act 2007: Assisting and Encouraging Offences' (2012) 76 *Journal of Criminal Law* 220.

378. New York Penal Code S. 115.00; and see Wayne R LaFave, *Substantial Criminal Law* (2nd edn, West 2011) s. 13.2 (d).

379. See generally, Roxin (n. 192); and Bloy (n. 208).

380. See Moore (n. 32) at 407: 'Causation is one of those doctrines adopted by the criminal law because of its role in determining moral responsibility ... when the but for test leads to counterintuitive results in the concurrent asymmetrical, and preemptive overdetermination cases, then they (the courts) ignore the definition and go with some other, more intuitive notions of causation'.

381. See generally, Simester 'Causation in Criminal Law' (n. 178).

behavioural culpability becomes determinatively significant.<sup>382</sup> The independently propagated actional choices effected by the principal offender, their volitional course of conduct, not relationally contributed to by the secondary party, may act as a detumescent bulwark to inculpation.<sup>383</sup> There is a consequential preclusion of accessory liability, and personal responsibility, where an intervening cause (a *novus actus interveniens*) intersects with the commission of criminal wrongdoing: '[W]henever we reprove a person the grounds for reproof must originate in the conduct of that person'.<sup>384</sup> The corollary, as Feinberg stated, is, 'the more expectable harm behaviour is, whether voluntary or not, the less likely it is a negative causal connection'.<sup>385</sup>

The comportment of intervening acts by a principal offender, breaking causal ties of other criminal actors, was set out before the appellate court in *Anderson and Morris*.<sup>386</sup> The quintessentially important concern related to the definitional intersection of causality, rather than inculcated issues of *mens rea* dissonance and reformulation on the part of the perpetrator.<sup>387</sup> The defendant had joined another to carry out a basic assault but, in the course of the unlawful act, the other party unexpectedly stabbed the victim to death with a concealed knife. The secondary party's conviction for manslaughter was reversed,<sup>388</sup> and Lord Parker set out the parameters of intervening causality and complicitous behavioural liability:

Considered as a matter of causation there may well be an overwhelming supervening event which is of such a character that it will relegate into history matters which would otherwise be looked upon as causative factors.<sup>389</sup>

The ascription of causality principles should be relationally relevant to complicity in order to standardise when the action of a principal offender intervenes, and transmogrification of culpability via 'an overwhelming supervening act'.<sup>390</sup> It engages, as Simester iterates,<sup>391</sup> an examination, of the precepts of personal control over criminal liability.<sup>392</sup> A common law rule of Anglo-American criminal law is that the intervention of a free, deliberate, and informed third-party action may break the chain of liability between the initial wrongdoing of an individual actor, and the harm that ultimately transpires.<sup>393</sup> The dilemmatic choices presented within complicity laws, and still unresolved, relates to the consideration

382. See Moore I(n. 32) at 408 addressing the nature of a 5 step test on direct and proximate intervening acts by D1: 'The direct cause notion is thus given whatever content it has by the notion of an intervening cause'. Generically, an event is an intervening cause if and only if (1) it is an event, not a state or an omission; (2) it occurs after the defendant's act but before the harm in question (i.e. it 'intervenes'); (3) it is itself a cause of the harm; (4) it is causally independent of the defendant's act (i.e. it is not an effect of that act); and (5) it is such an extraordinary natural event as to amount to a 'coincidence', or it is the 'free, informed, voluntary act' of some third-party human agent.

383. *Ibid.*; and see generally, Michael S Moore, 'The Metaphysics of Causal Intervention' (2000) 88 *California Law Review* 827, at 832–852; and Michael S Moore, 'The Independent Moral Significance of Wrongdoing' (1994) 5 *Journal of Contemporary Legal Issues* 237.

384. See Simester (n. 12) at 580.

385. See Feinberg, *Causing Voluntary Action*, 166.

386. [1996] 2 Q.B. 110.

387. *Ibid.*, at 119.

388. *Ibid.*, at 120; and see KJM Smith, 'A Modern Treatise on the Law of Criminal Complicity' (n. 1) at 89: '[I]t is implicit in this notion of presumed cause that, given appropriate evidence, the "accessory" may avoid conviction by establishing that his actions were causally ineffectual'.

389. *Ibid.*, at 120; and see also *Dunbar* [1988] Crim. L.R. 693; and *Lovesey and Peterson* [1970] 1 QB 352.

390. See *Jogee* [2016] UKDC 8 at para [97]: 'it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen'.

391. See Simester (n. 12) at 580.

392. *Ibid.*

393. The fundamental ambit of this principle was reaffirmed by the House of Lords in *Kennedy (n. 2)* [2007] UKHL 38, within the contextualisation of drug administration and unlawful act manslaughter liability, treating the ingestion of the drug by V as an intervening 'cause' subsequent to supply of heroin by D who also prepared the syringe: '[I]nformed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act ... [T]hus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another'.

of the nature and ambit of independent act ‘quasi-excusatory’ standardisations, and the need for adaptation of an imputed-normative-proportionality template for holistic propagation. The extant position is that it remains opaque, and subject to solipsistic *ad hoc* instrumentalistic development, as to when a secondary party is inured from consequential liability by independent and intercessory perpetrator conduct.<sup>394</sup> The successful prediction of outcome-responsibility remains as likely in Anglo-American law as tattooing soap bubbles! Indeed, numerous illustrations prevail across the breadth of Anglophone jurisdiction that reveals such palpable inconsistencies, and counterfactual evidentiary gradations.<sup>395</sup>

The difficulties presented by the lack of universalistic standardisations in this arena were illustratively presented in the recent case of *Tas*,<sup>396</sup> reviewing the nature of intercessory perpetrator conduct in a post-*Jogee* scenario, and the abrogation of common purpose doctrine. The factual scenario presented engaged a planned assault on a victim (use of fists) where the accessory provided backup and an escape vehicle, but the principal offender independently stabbed the victim to death. The accomplice’s conviction for manslaughter was upheld by the appellate court, irrespective of D2’s ignorance that D1 was in possession of a weapon.<sup>397</sup> There was no automatic entitlement to an acquittal consequential to the principal offender’s volitional intercessory conduct. It was a question of fact and degree whether the secondary party’s conduct was so distanced in time, place, or circumstances from the conduct of the perpetrator that it would not be realistic to regard the homicide as encouraged or assisted by another.<sup>398</sup> An overwhelming supervening event, inuring the accomplice from liability, only applied if the victim’s death, constitutively, was caused by, ‘an act which nobody in the defendant’s shoes would have contemplated might happen, and was of such a character as to relegate his acts to history’.<sup>399</sup> This is an extremely high ‘quasi-exculpatory’ threshold to cross. Confusingly, the appellate court in *Tas* endorsed a dichotomy between two extremes: firstly, those co-relating to ‘causative matters’ which may entitle a trial judge to direct the jury on overwhelming supervening events<sup>400</sup>; and, secondly, other factual concerns which might be regarded as aspects of ‘mere escalation’, where no trial judge direction is implicated.<sup>401</sup> This framework, however, does not assist in the delineation of causally salient intervening acts, and, unfortunately, obfuscates fact-finder determinations in creating an unclear and non-sustainable binary divide between the causal dissolution of responsibility/escalation of anticipated harm, with complicitous responsibility still adhering to the latter.<sup>402</sup>

394. See Horder (n. 4) at 476–478. See further *Lanning and Camille [2021]EWCA Crim 450*. Note most recently in *Grant[2021] EWCA Crim 1243* the appellate court emphasise that ultimately the question will be whether the accessory’s conduct may have been so distanced in time, place or circumstance from the conduct of the perpetrator that it would not be realistic to regard (his or her) offence as encouraged or assisted by it; *ibid.*, at para [97–98].

395. See generally, Moore (n. 32) at 408; Simester (n. 178) at 424–426.

396. *R v Tas (Ali)* [2019] Crim. L.R. 339; [2018] EWCA Crim. 2603.

397. *Ibid.*, at para [96–98].

398. *Ibid.*, at [97].

399. *Ibid.*, at [12]; and see Karl Laird, ‘Case Commentary on *R v Tas (Ali)*’ (2019) *Criminal Law Review* 339, at 342.

400. *Ibid.*

401. *Ibid.*; and see Brian Leveson P at [41] who gave the following guidance in *Tas (Ali)*: ‘In our judgment, whether there is an evidential basis for overwhelming supervening event which is of such a character as could relegate into history matters which would otherwise be looked upon as causative (or, indeed, withdrawal from a joint enterprise) rather than mere escalation which remained part of the joint enterprise is very much for the judge who has heard the evidence and is in a far better position than this court to reach a conclusion as to evidential sufficiency’.

402. *Ibid.*, at 343: ‘A further distinct question arises, namely what is the consequence of the defendant pleading overwhelming supervening event successful? This does not concern the availability of overwhelming supervening event, but rather the extent to which it negates the secondary party’s liability ... [S]ome of the language used by the Supreme Court, being redolent of causation, suggests that the court envisaged overwhelming supervening event being relevant to *actus reus* so it could not be said that the secondary party assisted or encouraged the principal; and in the context of a fundamentally radical different course of conduct departure by D1 and homicide see *Gamble* [1989] NI 269 (The Northern Ireland Court of Appeal held that if the perpetrator killed in a way that was wholly unanticipated then the accessory would not be guilty of either murder or manslaughter’.

The earlier decision in *Rafferty*<sup>403</sup> was endorsed in *Tas*, mistakenly conflating the former outcome – determination, as predicated also on withdrawal precepts. Withdrawal, as previously discussed, and abrogation of liability via intervening perpetrator causality, is fundamentally different in contextualisation, albeit synergies may apply via adaptation of ‘quasi-excusatory’ norms.<sup>404</sup> In *Rafferty*, the defendant, and other co-adventurers, carried out an attack on the victim at a beach. Rafferty elbowed the victim in the back and stole his debit card (elements of robbery). Before decamping from the scene for over 40 min to find a cash dispenser he called out, ‘come on boy’s, leave it’. In his absence the violence escalated, the victim was stripped down, and then drowned. The trial judge left for jury consideration whether D2 had withdrawn from the unlawful common purpose. In reality, this was a non-issue. The appellate court, quite appropriately conclude that Rafferty was not a principal offender as he was not a substantial cause of the unlawful homicide. The defendant could also not be categorised as a secondary party.<sup>405</sup> The act of drowning, effected by the other co-perpetrators, was ‘causatively’ of a fundamentally different nature (now casuistically reviewable as ‘an overwhelming supervening event’), from the unlawful robbery enterprise that was contemplated and engaged. Concomitantly, this should have meant that any consideration of ‘quasi-excusatory’ withdrawal precepts was rendered otiose.<sup>406</sup>

The outcome determination in *Tas*, and across a number of similar cases where accessorial homicide liability has been engendered including for felony murder, counterfactual and counternormative. It is contradictory to imputations of causality and intervening intercessory principal offender actions.<sup>407</sup> Child and Sullivan<sup>408</sup> have cogently postulated for reflective consideration, a post-*Jogee* scenario (not dissimilar to the factual pattern in *Tas* itself) where substantive doctrinal and theoretical perspectives demand alternative outcomes.<sup>409</sup> Illustratively, consider a hypothecate where D2 intentionally assists or encourages D1 to effect harm on V, but through a relatively non-serious course of conduct (punch in the face), but violence escalates, and V is shot and killed. The question posited is whether the secondary party, in such circumstances, ought to be liable for homicide, and, co-determinatively in which crime(s) have they interceded and made proportional contributory reprovable defacements.<sup>410</sup> Child and Sullivan<sup>411</sup> legitimately assert, in response, that to hold a secondary party liable for manslaughter in such contextualisations is factually inaccurate in predicting blame on assisting the shooting (or conjunctively the stabbing in *Tas*), or otherwise linking culpability gradations to mere predictive fiction<sup>412</sup>:

deriving liability from an unforeseen potential outcome of that conduct is incoherent.<sup>413</sup>

403. [2007] EWCA Crim. 1846; [2008] Crim. L.R. 218.

404. See generally, Mitchell [N. 116], Kelman n (117); and Moriarty (n. 119).

405. [2007] EWCA Crim. 1846, at 1853.

406. See David Ormerod, ‘Case Commentary on *Rafferty*’ (2008) *Criminal Law Review* 218, at 220 who states: ‘The defence of withdrawal would only seem to be relevant if the acts of P1 and P2 were not fundamentally different from those which D had foreseen. If the jury reached that conclusion, it would be highly questionable whether merely walking away from the scene to fulfil part of the robbery can properly be described as a withdrawal’.

407. See Laird (n. 399), at 342: ‘It is respectfully submitted that withdrawal and overwhelming supervening event are two distinct concepts, and it would be unhelpful to conflate them’.

408. JJ Child and GR Sullivan, ‘The Current State of Murder in English Law: A Critique, Wrong Turns And All’ in Alan Reed and Michael Bohlander (eds) with Nicola Wake, Emma Engleby and Verity Adams, *Homicide in Criminal Law: A Research Companion* (Routledge Publishing 2019) 62–81.

409. *Ibid.*; and see generally, Dennis J Baker, ‘Lesser Included Offences, Alternative Offences and Accessorial Liability’ (2016) 80 *The Journal of Criminal Law* 446; and Dennis J Baker, ‘*Jogee*: Jury Directions and the Manslaughter Alternative’ (2017) *Criminal Law Review* 51.

410. *Ibid.*, at 78.

411. *Ibid.*; and see generally, Jeremy Horder, *Homicide and the Politics of Law Reform* (Oxford University Press 2012) 159–169 articulating a modality of ‘moral remoteness’.

412. See generally, Simester (n. 15).

413. Child and Sullivan (n. 408) at 78.

A new way forward is needed, within the imputed-normative-proportional formula for complicity, as adduced to substantively readdress the nature of intervening causality. This reformulated template needs to pervasively standardise variegated types of course of conduct departures by the principal offender, and volitional independent commission of alternative harm(s) on their part. In such recategorisation, the earlier acts of assistance or encouragement by the accomplice are 'non-causal' in terms of higher gradation harm commission by D1, and different level of culpability and personal responsibility is equated with moral censure, and blameworthiness.<sup>414</sup> An optimal pathway to more efficaciously reconceptualise culpability for complicitous behaviour is required.<sup>415</sup> It is proposed, albeit controversially, that Anglo-American complicity law should beneficially recalibrate intervening principal actor causality as 'quasi-excusatory' for homicide and other offences, and with a reverse burden of proof, and standardisation of evidentiary requirements.<sup>416</sup> A *de novo* defence ought to apply to limit proportionality imputations to situations where the conduct requirements of complicity are properly engendered and to effectively facilitate juror consideration of intervening dissolution of causality ties.<sup>417</sup> The burden of proof in this special 'quasi excusatory' type defence could legitimately be reversed, with the onus shifted to the second participant. It is, thus, contended that intercessory acts committed by the perpetrator (their course of conduct departure) need to be viewed as an affirmative defence, operating *sui generis* as an independent offence-modification defence, and cathartically as a quasi-excuse on a reduced culpability framework.<sup>418</sup> Optimisation principles indicate that a reverse burden of proof should apply on a preponderance of evidence standard and that it is for the recalcitrant defendant to satisfy the court of dissolution of causal ties for homicide, and other crimes, via the volitional intervening course of conduct by the principal actor.<sup>419</sup>

This is reflective of practice in a number of U.S. jurisdictions to the complicity aspect of felony murder and in complementarity with withdrawal, and, in this regard, Robinson has concluded: '[T]he burden of production for defences of renunciation, abandonment, and withdrawal is always on the defendant. The burden of persuasion is generally on the defendant by a preponderance of the evidence'.<sup>420</sup> A number of defendants have challenged the constitutionality of this reversal but to no avail.<sup>421</sup>

In similar vein, special defences to homicide and other offences may apply, predicated on evidentiary normalisations and reverse burden onus, where a complicitous actor can satisfy jurors as moral arbiters that a wholly volitional independent act by a perpetrator is applicable in the following variegated circumstances<sup>422</sup>: (1) D2 did not reasonably believe that the principal offender intended to effect an act likely to result in death or grievous bodily harm, and their acts of assistance or encouragement co-related only to

414. See generally, Beatrice Krebs, *The Scope of the Enterprise: Liability for Joint Enterprise Murder and Manslaughter After Jogie* (Hart Publishing 2018).

415. See generally, Beatrice Krebs, 'Accessory Liability: Persisting In Error' (2017) 76 *Cambridge Law Journal* 7; Sir Richard Buxton, 'Jogie: Upheaval in Secondary Liability for Murder' (2016) *Criminal Law Review* 324; M Dubber and T Hörnle, *Criminal Law: A Comparative Approach* (Oxford University Press 2014) 304–328; and Matthew Dyson, 'Ever Working In Practice, but Never in Theory? The New English Law of Criminal Complicity' (2017) 129 *Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 232.

416. See generally, Robinson, 'Imputed Criminal Liability' (n. 8).

417. *Ibid.*

418. See *Vera* 153 Mich. App. at 418, 395 N.W. 2d at 341 (burden of providing an affirmative defence shifted to a defendant was held constitutional); and *Cowart* 136 Ga. App. at 531, 221 S.E. 2d at 651 (burden of proof *vis-à-vis* the abandonment defence placed upon the defendant).

419. See Dressler (n. 5) at 130: '[I]f the practical problems of proof ultimately seem to severe, a state might shift the burden of persuasion regarding causation to accomplices, requiring them to prove that their assistance was not causally necessary'.

420. See Paul H Robinson, *Criminal Law Defences* (West 1984) 349–350.

421. See *Patterson v New York*, 432 U.S. 197 (1977); and see *Leland v Oregon*, 343 U.S. 790 (1952) (acceding as constitutional the determinative that an individual actor prove his sanity beyond a reasonable doubt).

422. See Dressler (n. 5) at 139: 'If a jurisdiction is concerned about practical problems with the causation approach, it could shift to the defendant the burden of persuasion on the issue of causation. Because this latter statutory system treats the distinctions between accomplices as one of punishment for, and not as elements of, the crime, such a shift would be constitutional'.

the propagation of non-serious harm; (2) D2 did not carry an offensive weapon during the fatal attack, or supply any such weapon to the principal offender<sup>423</sup>; (3) D2 did not reasonably believe that D1 was armed with an offensive weapon at the time of the attack, or any other complicitous individual<sup>424</sup>; (4) it is a special defence where D2 only provided, in accordance with their intentions, acts of assistance or encouragement in furtherance of any property crime, and not a crime against the person – including robbery, where only some force, albeit minor, was intended,<sup>425</sup> and (5) D2 will be punished to a specific gradation level, less than otherwise, if proved by a preponderance of the evidence that his conduct did not cause to be committed the harm specified by the offence for which he is held accountable. Individuated personal liability will only apply for acts of assistance or encouragement that align with directly and facilitate offence commission. These reforms would beneficially charter an optimal reform of complicity principles, specifically addressing the causal salience of radical course of conduct departures by the perpetrator, the spectrum of imputed proportionality culpability, and substantiality of behavioural contribution to harm(s).

## Conclusion

The precise legal topography of Anglo-American complicitous behaviour ought to be distilled within a newly formulated standardisation. The guiding principles that are promulgated in this article may be crystallised in the following terms:

1. A recalibration of complicity precepts is urgently needed to predicate liability on morally justifiable principles. There needs to be an immediate reappraisal to efficaciously align mode of participation synchronously with normative proportionality standardisations, and as evidentiary attribution before jurors as moral arbiters. This reattribution should be cast within parameters of reasonableness to justify inculcation, and with an attenuated reverse burden onus. It is important to reflect pragmatically on the secondary party's actual intercession with the completed crime(s) and to adapt moral blameworthiness conceptualisations, including an examination of the degree of hegemony or control over others.

Modes of complicitous behaviour ought to be considered afresh, reviewable via an original 'quasi-excusatory' lens that is normatively akin to denunciatory acts of an effective withdrawal, and with parallel syllogisms for reform optimality. It needs to be asked of jurors, as moral arbiters, whether D2 acted with a 'particularly blameworthy mindset'. Parity of culpability, or otherwise, between principal offender and accessory needs to be recast, and dissonances in moral culpability translated into a transformational reappraisal of inculpatory/non-culpatory behaviour. It is necessary to re-examine the shoals of culpability, of personal responsibility, and of criminalisation itself, providing a more fundamental binomial role for D2's actual intercessory conduct, beyond causality or illusory associated connection(s). Anglophone jurisdictions have repeatedly made antediluvian judicial references and incantations to a need for causation/connection between D2's conduct and D1's criminal wrongdoing. The pithy reality, however, is that other than for procurement, or for overwhelming supervening acts attributable to a principal, causality ties are not relationally attributive. A far stronger synergy is required between delfacatory conduct and criminal harm(s).

2. The adaptive imputed proportionality recalibrated test that is propounded, and new theoretical perspectives on accessorial liability, concentrate normatively on complicitous 'fault' in behaviour,

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423. See Paul H Robinson, *Criminal Law Defences* (West 1984) 657; and see generally, Paul H Robinson, 'Criminal Law Defences: A Systematic Analysis' (1982) 82 *Columbia Law Review* 199.

424. *Ibid.*

425. See Paul H Robinson and Jane A Grall, 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond' (1983) 35 *Stanford Law Review* 681, at 736–744.

set against graduated threshold norms. It focuses on comparative lessons derived from the adventurous Anglo-American implementation of elements of the German Criminal Code, which makes a transformatively significant binary divide between two dissonant categorisations of secondary participation. The instigator of criminal conduct is defined and interpreted as an individual who may have control or hegemony over the actions of others, and who 'causes' the perpetrator to effect the commission of the criminal wrongdoing. There is a requirement for 'direct' communication between perpetrator and accessory, and psychological control is required. Alternatively, and with a radically differentiated intercession in effected harm, will be the aider who simply facilitates the wrong of another individual actor, via emboldenment, influencing their conduct in a more attenuated manner, through the provision of succour, security and support. Consequently, a more indirect influential connection is prescribed, but with a co-terminous mandatorily reduced sentence, properly aligning and cohering with 'legitimate' culpability and responsibility norms.

3. There should be the propagation of a new standardised template for both intercessory assistance and encouragement, aligned and deconstructed in complementarity with withdrawal principles. The conceptual edifice appurtenant to withdrawal fits within the realm of quasi-excusatory defences and reduced culpability. Secondary participation in crime, effected through the accomplice's assistance or encouragement of wrongdoing, may, arguably, similarly be viewed through a spectrum of behavioural engagement that facilitates quasi-excusatory and reduced culpability outcome determination. Minimalistic and tokenistic encouragement of crime is not the same as instigation and material assistance, nor should relational (dis)-equivance continue to skew liability, nor inapposite fudged equiparation continue to prevail.

A pre-incipatory interlude prevails for withdrawal from participatory engagement, wherein a redemptive change of heart, aligned with appropriate reductive criminal depredation may exculpate via reverse conduct prophylaxis. These precepts ought to be adapted to also apply to temporal individuation of the accessory's actual intercession/contribution to criminal wrongdoing more broadly. This posits a more extensive evidentiary review of delictatory conduct, traducing T3 (commission of harm stage), and reconstitutively the contributory conduct of the secondary party at T1 or T2 stages in a continuum. Participation in crime as an accessory requires 'fault' in the actual conduct itself, beyond simple but for causation. Connectivity plus 'fault' in conduct is required as a leitmotif for proportionate liability. Moreover, the precise legal topography for withdrawal, in general, has polarised debate, but, in truth, ought to be viewed through a lens reflecting reduced culpability and/or societal dangerousness of the actor. Their penitent behaviour may counter-act complicitous behaviour and, consequently, in terms of present or future depredations, they do not present as great a societal danger, or at least present a reducibly minimum threat.

Participatory complicitous conduct and repentant negation of prior engagement align synchronously together in terms of imputed proportionality degrees of moral blameworthiness and societal dangerousness characterisation. The redemptive change of heart of the accessory means that imputed criminal liability for complicity may be inapposite as the 'flame of dangerousness', created by initial attitudinal behaviour, has been doused to undo or prevent harm. The reasoning here is that the individual, considered inwardly on a prognostic basis, has revealed him or herself as possessing more limited socially dangerous characteristics, and, therefore, should be inculcated a quasi-excuse. Tokenistic or minimalist intercession in wrongdoing by limited acts of assistance or encouragement should co-terminously reflect reductionist culpability thresholds, via mandatory lower sentences, or effectuation of an alternative facilitation offence.

Modes of instigatory and renunciatory behaviour should be reviewed *de novo* through a complementary and synchronous lens to effectively deconstruct moral blameworthiness. Conduct of an irreducibly minimal nature is inadequate to meet the threshold test: perfunctory verbal disclaimers of liability; failure to attend on the day of the commission of the criminal purpose (omission), or fleeing from the scene of the

crime are all ineffectual manifestations of imputed countermand. Normatively, these types of limited remedial disengagement are not sustainable or adequate as a vignette of redemptive behaviour: the 'price' of exculpation has not been satisfied. Minimalistic and tokenistic acts of disavowal do not negate liability. It is capricious, accordingly, to treat limited acts of assisting or encouraging harm(s) as ranking *pari passu* in culpability equiparation to the responsibility of the actual progenitor of the criminal wrongdoing. There is not the same normative proportionality or imputed responsibility, and to suggest otherwise is the antithesis of any fair and just Anglo-American criminal justice system(s).

4. It is submitted there is much to learn from a comparative extirpation of the German Criminal Code, and recalibration of perpetrator/secondary party complicitous behaviour. A perpetrator is phenomenologically embodied as an individual actor that can be said to 'control' the very behaviour prescribed by the criminal offence. *Tatherschaftslehre*: A perpetrator may be imputed normative personal liability across a spectrum of behavioural intercessory conduct, all within the 'controlling' the criminal act panoply. Liability pertains either by controlling the action itself (*Handlungsherrschaft*), by controlling the mind of another participant, or alternatively, and pragmatically, via the assertion of operational control. A binomial division, with imputed-normative-proportional policy inculcations, applies in the *Strafgesetzbuch*, between perpetrators and accessories who are instigators of criminal wrongdoing and, alternatively, accessories who merely 'facilitate' criminal conduct.

An instigator is conceptualised in the German Criminal Code as a secondary party but treated as a principal offender if relational causality ties to wrongs are evidentially established. Aiding is prescribed a far more comprehensive definitional comportment, but in a quasi-excusatory fashion, receiving a mandatory statutory sentencing discount. This 'quasi-excusatory' analysis resonates with an earlier critique of withdrawal, and reverse conduct prophylaxis. It also adheres to an imputed-normative-proportional standardisation, as propounded herein, for complicitous behaviour, reviewable via a new evidentiary framework. It reflects a dissonant template that has been adapted by the *BGH*, coalescing around three comportmentally significant factorisations that are of crucial salience: the scope of the individual actor's participation; the nature of their interest in D1's defalcations; and, importantly, their hierarchical control over the conduct of other participatory wrongdoers. An optimal recalibration of liability ought to focus on how a secondary party has intersected with the criminal offence. A hierarchical reordering of culpability between the instigator (facilitator) who makes a direct physical or psychological contract with the perpetrator, and the aider, whose intercessory behaviour is more attenuated, and whose attributive responsibility is reduced, should adventitiously be standardised.

5. The fundamental question in terms of complicity liability ought to be whether an accomplice has provided assistance or encouragement that straddles the proportionality threshold test dividing line for liability. This judicial divining-rod sits between limited/non-limited intercession with criminal wrongdoing, so that imputed liability is morally justifiable. A review of complicitous behaviour that morally justifies inculcation before jurors were consistently adumbrated by Lord Justice Toulson, both in leading appellate judgments, and scholarly commentaries. It is necessary to posit a series of alternate threshold levels for a participatory modality to guide an inputted-normative-proportionality standardisation and one that is relationally relevant across a spectrum of complicitous engagements in harm(s). It is instructed by a contrasting review of comparative legal systems and informed by an evaluation of reverse conduct prophylaxis denunciatory conduct for withdrawal.
6. The aider or encourager of harm(s) ought, in Anglo-American complicity law, to have a separate particularised compartmentalisation within participatory modalities. A new definitional categorisation and standardisation is required, bespoke and dissonant in culpability gradation from the co-perpetrator, or the instigator. The *Beihilfe*, and Germanic Criminal Code, foreshadows, in

part, the optimal way ahead, with a widened import to ‘aiding’ with such complicitous behaviour constitutively embracing, enabling, facilitating, expediting, or intensifying the wrongdoing of another party. It should be fundamental for our fact-finders to evidentially consider the level of ‘fault’ intrinsic to the accessorial conduct *per se*, with proportionality to the personal responsibility of the individual actor. This ought to be assessed normatively in comportation with a gradation of the accomplice’s conduct in providing support, succour, and comfort to the principal offender.

7. More generally, a newly formulated ‘facilitation’ offence is needed for broader adoption in Anglo-American criminal law. This newly formulated offence should be standardised at a lower culpability and personal responsibility standardisation than currently applies to *all* types of assistance or encouragement of harm(s). Perfunctory acts of intercessory behaviour need to be reconceptualised and recalibrated. It should properly demarcate complicitous behaviour that currently improperly straddles tokenistic and minimalistic conduct, and defacatory acts of instigation: a *via media* is required between the *scylla* and *charybdis* of extant dis-equiparating participatory modality. Attempted aiding or encouraging is *not* the same as other types of facilitative complicitous behaviour. The newly formulated facilitation offence will be applicable where the accessory has provided no real-world material succour or support to the perpetrator, where constitutively the aiding or encouragement provided is normatively disproportionate to the establishment of full derivative culpability, moral desert dissociates the individual accessorial actor from equal criminal liability, and evidentially the secondary party is not truly ‘embedded’ in the criminal wrongdoing.

The proposed *de novo* facilitation offence herein draws, in part, upon alternative comparative criminal legal system perspectives, including New York. It conceptualises ‘facilitation’ as providing an individual with the plans or the opportunity to commit a crime, and adapts criteria that the *BGH* in Germany has established, as well as integrating innovative new propositions. The facilitation offence, as originally propounded, should be ‘quasi-excusatory’ within the panoply of participatory modalities, subject to a mandatorily discounted sentence.

A person is guilty of criminal facilitation when he intersects in the criminal offence perpetrated by another, by engaging in conduct which provides the means or opportunity for the commission thereof, and which, in fact, aids or encourages such a person to commit an offence. The jury will proportionally consider this determination as a question of fact and review: (1) The nature of the interest that the party has in the result; (2) The scope of the party’s participation in the criminal act; and (3) The control, or otherwise, that the party had over the criminal act. Aid or encouragement does not have to be causal for the commission of the principal offence, but it suffices that it facilitates it, or makes it safer for the other party, whereby they feel more secure because of the participation of the aider or encourager.

8. Special defences to homicide and other offences may apply, predicated on evidentiary normalisations and reverse burden onus, where a complicitous actor can satisfy jurors as moral arbiters that a wholly volitional independent act by a perpetrator is applicable in the following variegated circumstances: (1) D2 did not reasonably believe that the principal offender intended to effect an act likely to result in death or grievous bodily harm, and their acts of assistance or encouragement co-related only to the propagation of non-serious harm; (2) D2 did not carry an offensive weapon during that fatal attack, or supply any such weapon to the principal offender; (3) D2 did not reasonably believe that D1 was armed with an offensive weapon at the time of the attack, or any other complicitous individual; (4) it is a special defence where D2 only provided, in accordance with their intentions, acts of assistance or encouragement in furtherance of any property crime, and not a crime against the person – including robbery, where only some force, albeit minor, was intended; and (5) D2 will be punished to a specified gradation level,

less than otherwise, it proved by a preponderance of the evidence that his conduct did not cause to be committed the harm specific by the offence which he is held accountable. Individual personal liability will only apply for acts of assistance or encouragement that align with, and directly facilitate, offence commission. These reforms would beneficially charter an optimal reform of complicity principles, specifically addressing the causal salience of radical course of conduct departures by the perpetrator, the spectrum of imputed proportionality culpability, and sustainability of behavioural contribution to harm(s). The unconscionable 'disgrace' of definitional conduct element requirements (or non-requirements) for complicity that Dressler charted over thirty years ago is still ripe for reconceptualisation and reformulation.

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