

UC San Diego

UC San Diego Previously Published Works

Title

Complicity

Permalink

<https://escholarship.org/uc/item/2n75g5wk>

ISBN

9781138783638

Author

Bazargan-Forward, Saba

Publication Date

2017-11-02

DOI

10.4324/9781315768571-31

Peer reviewed

Ch. 25: Complicity

Saba Bazargan-Forward

Department of Philosophy
UC San Diego

Abstract

Complicity marks out a way that one person can be liable to sanctions for the wrongful conduct of another. After describing the concept and role of complicity in the law, I argue that much of the motivation for presenting complicity as a separate basis of criminal liability is misplaced; paradigmatic cases of complicity can be assimilated into standard causation-based accounts of criminal liability. But unlike others who make this sort of claim I argue that there is still room for genuine complicity in the law and in morality. In defending this claim, I sketch an approach to complicity which grounds our liability for what others do not in our causal relation to their actions but in our “agency-relations” with others. In such cases, one agent can be liable for the wrongs of second agent to the extent that first authorizes the second to act at her behest. This approach fills the gap where standard causation-based accounts of complicity fail – especially in where several agents cooperatively contribute to an overdetermined harm.

1. Introduction

Complicity marks out a way that one person can be liable to sanctions for the wrongful conduct of another. There are at least three approaches to an analysis of complicity. The first is a juristic; it adverts to the theoretical grounds for complicity in the law. The second is a joint-action approach

which grounds complicity in the shared actions and intentions of individuals engaged in a cooperative project. The third is a group-agency approach which locates complicity in the individuals who together compose a group agent. A comprehensive analysis of complicity would incorporate the insights of all three approaches into a univocal account. But that project is beyond the scope of this essay. Instead, I will focus mostly on the juristic approach, as it provides the most developed account of complicity. After describing the role of complicity in the law, I will argue that much of the motivation for presenting complicity as a separate basis of criminal liability is misplaced; paradigmatic cases of complicity can be assimilated into standard causation-based accounts of criminal liability. But unlike others who make this sort of claim (Moore 2007) I will also argue that there is still room for genuine complicity in the law and in morality. In defending this claim, I sketch an approach to complicity which grounds our liability for what others do not in our causal relation to their actions but in our “agency-relations” with others.

2. What Complicity Is

In Anglo-American criminal law an individual can become liable for a crime by committing it herself. Doing so requires both performing the prohibited act (the *actus reus*) and harboring a culpable state of mind (the *mens rea*). However, the doctrine of complicity (also known as the law of aiding and abetting, or accessorial liability) states that individual (known as the secondary actor, the accomplice, or the accessory) can be liable for the crimes of someone else: the individual (known as the primary actor, or the principal) who actually committed the crime. In such cases the secondary becomes complicit by intentionally aiding or encouraging the primary to perform the prohibited act.¹ Complicity, then, is not a crime in its own right. One cannot

¹ In the UK, this doctrine is stated in the “Accessories and Abettors Act of 1861” (amended by the Criminal Law Act of 1977): ‘Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence... shall be liable to be tried, indicted and punished as a principal offender’. In the US the doctrine is stated in the Model Penal Code §2.06, and in the federal aiding and abetting statute: ‘[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal 18 U.S.C. § 2(a) (1982).

be guilty of “complicity”(unlike the crime of “conspiracy”). Rather, complicity is a way to become liable for a crime committed by another. Once the complicity of the secondary is proved, then unless she is an accessory after the fact, she is as treated as if she had fulfilled the *actus reus* and *mens rea* conditions of the crime itself. In that respect she is treated like the primary.

Crucially, however, the secondary’s liability is derivative rather than vicarious vis-à-vis the primary. In cases of vicarious liability, the defendant has committed no wrong; she is still (vicariously) liable for what the primary does in virtue of the defendant’s formal relationship with the primary (such as the relationship between a parent and child or between a commanding officer and her subordinates). This relationship permits attributing to the defendant responsibility for the wrongful actions the primary commits. When, alternatively, an individual is *derivatively* liable, her liability is parasitic off the primary’s liability in virtue of her own intentional actions – specifically actions aimed at contributing to the primary’s wrongful conduct. It is in virtue of so culpably contributing that she shares in the primary’s liability.

2. Requisites of Complicity

Under the law, for an individual to be complicit in the criminal wrongdoing of another, the secondary must not only contribute to the wrongful conduct of the primary, but do so with some *mens rea* directed towards the primary’s crime. It is generally acknowledged that accomplices need not have an intention with the same content as the primary. That would rule out the possibility of complicity altogether since a secondary intentionally performs acts of assistance or encouragement, not the prohibited act itself. But there is no further consensus over what the requisite mental state is. Some have argued that the secondary must provide aid with the purpose that the crime in question succeed (*Judge Learned Hand in United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). This is despite the fact that many crimes do not require the mental state of purpose on the part of the primary. Others argue that mere knowledge of the fact that acting will enable the primary to commit the crime in question suffices for satisfying the *mens rea* (Weiss 2002: 1396–1409). Still others abandon the notion that there is a single *mens rea* that the secondary must possess, in favor of the more flexible view that

the requisite *mens rea* for complicity varies with the *mens rea* required for the crime in question (Weiss 2002: 1410–14).

It might seem useful to repair to the literature on joint action since it tends to meticulously detail the mental states that cooperators must have in order to qualify as joint actors. Since cooperative action in furtherance of wrongdoing seems to imply complicity, the mental states partly definitive of joint action might help resolve the requisite *mens rea* for complicity in the law. But this strategy cannot ground the existing law of complicity. This is because in the law, the secondary can be complicitously liable for having provided assistance in furtherance of the primary's criminal act, even if the primary was unaware that she had been aided, as in this case:

Guardian Devil

J witnesses, without being noticed, a bank robbery in progress. J sees a patrol car approaching the scene. She wants the robbery to succeed (since she has a grudge against the bank). So J pretends to require assistance, thereby preventing the police from discovering the robbery. The robbery consequently succeeds.

Under the doctrine of liability in Anglo-American law, the conditions for complicitous liability are satisfied so long as influence succeeds as intended in contributing to the decision of the principal to commit the crime. Accordingly, J is complicit in the robbers' wrongdoing in that she can be charged as an accessory. But even on the most minimalist account of joint action (see for example Ludwig (2007)) the robber does not count as acting jointly with J since the robber has no intentions directed toward an action by a group that includes himself and J. Complicity in the law overflows joint action, in that it is possible to be complicit for a crime without partaking in a jointly intentional conduct. We cannot, then, simply turn to the literature on joint-action in an effort to ground complicity (though, as I will argue, the philosophy of joint action will have an important role to play in making sense of the agency-relation approach to liability).

In what follows I focus on an issue that will inform the remainder of the discussion. If satisfying the *actus reus* of complicity requires a causal contribution to the wrong in question, what need is there for an account of complicity at all?

4. Superfluity of Complicity

In standard cases of liability where the wrongdoer acts on her own and without assistance from others, she is liable in virtue of culpably causing the wrongful event in question (liability for omissions and inchoate crimes notwithstanding). In such cases, the liability is “direct” or “non-derivative” in that we need only appeal to the fact that the wrongdoer has culpably caused the wrongful event in order to explain her liability. But it is alleged — famously by Sanford Kadish, (1985) following Hart and Honoré (1958) — that we cannot appeal to direct liability in cases where one party contributes to a wrong via another’s voluntary acts. Where the primary’s actions are fully voluntary, the secondary cannot be characterized as having caused the primary’s actions. On this agent-causal view of human agency, the voluntary actions of agents are literally uncaused events. Accordingly, the secondary cannot be held liable for the crime on the basis that she caused it. The role of complicity, then, is to provide separate grounds for liability in such cases.

A doctrine ruling out interpersonal causation seems to render otiose contributory action – a requisite for the *actus reus* in complicity. But Kadish, again following Hart and Honoré, distinguishes between causation properly construed and mere causal influence. A “causal influence” simply raises the probability of an event’s occurrence, whereas a “cause” necessitates that event’s occurrence. Thus, Kadish writes that voluntary human actions can only be causally influenced, rather than outright caused: ‘Since an individual could always have chosen to act without the influence, it is always possible that he might have’ (Kadish 1985: 360).

The disjunctive structure of liability – derivative versus direct – is necessary, then, to accommodate the liability of aiders and abettors given an agent-causal view of autonomous agency. But agent-causation is an untenable view of metaphysics, at odds with a naturalistic view of the world. It claims that the will when operating freely does so in a realm distinct from that of ordinary natural events and laws, thereby insulating autonomous agents from the causal effects. It is hard to square this with a view that identifies willing with mental states that supervene on the neurological structure of our brains. While it might be true that we ineluctably tend to regard the voluntary actions of others as uncaused events, any account of morality ought to be

based not on our debunked pretheoretic intuitions about metaphysics, but on the most plausibly developed account of how things actually are.²

Once we jettison the metaphysical baggage of agent-causation, we are in a position to see that the criminal law is not as dependent on a distinct doctrine of complicity as it might otherwise seem. Consider the following pair of examples.

Uncertain Murder 1

I want my innocent enemy dead. I have a friend – you – who might aid me in my goal. I ask you to kill him. I calculate that there is a 60 percent chance that you'll do so. You subsequently commit the murder.

Uncertain Murder 2

I want my innocent enemy dead. I constructed a machine which, if it functions correctly, will kill my enemy. The machine is not perfectly reliable though; it works only 60 percent of the time. The machine nonetheless successfully kills my enemy.

The basis of liability in the two versions of the example should be exactly the same. The fact that my contribution to the innocent's death in *Uncertain Murder 1* is mediated by an agent, whereas in *Uncertain Murder 2* it is not, makes no difference to my liability. In both cases, the basis of my liability is *direct* (or, alternatively put, non-derivative) in that I culpably act in a way that causes the innocent's death. It just so happens that in the first case my causal relation to the death is mediated by an autonomous agent whereas in the second case it is not.

The basis of an individual's liability for a harm is the same regardless of whether she causes the harm by a) committing it, or b) aiding and abetting a voluntary accomplice. In both cases the individual is directly/non-derivatively liable in that it is her causal relation *to the wrong* (rather than merely to the agent who commits it) that grounds her liability. The notion of complicity does no work in undergirding her liability.

² For a compelling series of arguments in support of this view, see Moore (2000).

One might raise the following objection. For some acts, what the agent brings about precludes certain kinds of mediating agency. That is, some acts cannot “go through” the agency of others – at least not in certain ways. Sanford Kadish famously called these actions “nonproxyable” (Kadish 1985: 372-85). A paradigm example of a nonproxyable act is rape. It is possible to contribute to the commission of a rape (by, for example, providing the perpetrator with access to the victim) but the contributor does not thereby *commit* the rape, regardless of how integral the contribution was. ‘In such cases’, John Gardner writes, ‘whoever acts through a principal must be an accomplice’ (Gardner 2007: 135). The upshot is that any attempt to subsume complicity under causation by recasting accomplices as non-derivatively liable for what the principal does must fail – at least for nonproxyable wrongs.

But this objection fails. It is true that if, for example, P1 pays P2 to lie, which P2 consequently does, it is a semantic fact that only P2 committed the lie – not P1. But our interest is not in whether P2 can be felicitously described as having lied. Rather, our concern is with morality. What P1 does, by intentionally contributing to the act of lying, is morally tantamount to what P2 does, precisely because P1 acted in a way to bring about *a lie*. The point can be put differently: there is no substantial *moral* difference between intentionally committing a nonproxyable wrong and intentionally causing that wrong to be brought about.³ It is thus a mistake to think that the only way to ground the liability of contributors of nonproxyable acts is by introducing derivative forms of liability.

We might deny that causal contributors act *as* wrongly as proximate wrongdoers. But there are ways to accommodate this view without having to deny that the contributor is non-derivatively liable. For instance, when P1 commits his act – i.e. when he pays P2 to lie – the probability that this will result in a lie is less than when P2 commits her act – i.e., when she utters the lie. If the probability that an act will result in a wrongdoing is relevant to the assessment of the wrongfulness of that act, then *ceteris paribus* P1 acts

³ For a far more thoroughgoing analysis of nonproxyability friendly to the sort of suggestion I’m making here, see Moore (2007) and Moore (2009). But see Yaffe (2012).

less wrongfully than P2. In addition, if the nonproxyable wrong is something particularly gruesome or heinous such as torture or rape, we might be inclined to think that the proximate wrongdoer is a morally worse person than an upstream contributor. But this is because performing these heinous crimes while actually facing the victim requires vicious character traits which the proximate wrongdoer, by virtue of committing the act, reveals himself to possess, whereas we cannot safely attribute these traits to the upstream contributor.

So again, in the sorts of cases described so far, the contributor's causal relation *to the wrong* (rather than merely to the agent who commits it) grounds her liability. We do not need to invoke the notion of complicity *as a form of derivative liability* to ground a causal contributor's liability.

If what I have argued is correct, many paradigmatic instances of complicity, construed as derivative liability, will fall under the rubric of causal liability. Suppose P2 wants to commit an armed robbery, but she lacks a firearm. P2 asks P1 for a weapon; she agrees to give him a quarter of the loot in compensation. P1 agrees. On the orthodox account of complicity, P1 is liable for armed robbery even though she didn't commit it; her liability in this case is derivative, where derivative liability is grounded in an attempt to enable the wrongdoer to commit a wrong. It is also the case, on the account I have presented, that P1 is liable for armed robbery even though she didn't commit it – but her liability on my view is nonderivative. Like the protagonist in *Uncertain Murder 1* and *2*, she bears it wholly in virtue of the fact that she culpably acted in a way that risked causing an armed robbery. The fact that it was mediated by the agency of another does not itself change the basis of her liability.

If the liability in such cases is non-derivative is there any room for complicity construed as a form of genuinely derivative liability? I will argue that there is.

4. Superfluity of Complicity

On both the orthodox account of complicity and the revised account, which dispenses with derivative liability, an individual is complicit in the

wrongdoing of another only if she causally contributes to that wrongdoing or causally influences the wrongdoer. The problem, though, is that it's possible to causally contribute to a wrongdoing without making a morally relevant difference to that wrongdoing. To see why, it's necessary to look closer at what it means to causally contribute to an event.

The two dominant theories of causation today are *regularity* and *counterfactual* accounts. Regularity accounts explicate the notion of causal necessity undergirding accounts according to which one event is a cause of another event when the first event is an insufficient but necessary element of a set of conditions actually sufficient but not necessary for the occurrence of the second event.⁴ On counterfactual accounts, the first event is a cause of the second other if the two can be related to each other, either directly or by a chain of mediating events, such that if the first had not occurred, the second would not have occurred.⁵ There are, of course, numerous problems plaguing both accounts. But the problem of preemptive overdetermination in particular reveals the role that complicity plays in morality.⁶ Here is a typical example.

Assassination Fund

A villain wishes to assassinate a political figure meddlesome to local criminal elements. With the expressed purpose of doing so, the villain solicits financial donations from various criminals in furtherance of hiring a hitman. Hundreds of small donations pour in. The donations she receives are far more than what is necessary to hire a hitman, which she subsequently does. No one donation was necessary or sufficient for hiring the hitman.

This sort of case is troublesome for any account of liability grounding an accomplice's liability in her contribution to the wrongful act. Though each donor contributed to the fund, no particular contribution was a necessary

⁴ For variations of this account, see Hart and Honoré (1958), Mackie (1974), Wright (2001).

⁵ The modern progenitor of such accounts is David Lewis. See Lewis (1973).

⁶ For a detailed analysis, see Moore (2009).

element of a set of funds sufficient for hiring the assassin. We have difficulty, then, explaining why any donor is liable *for a murder* when no single donor caused that murder. An appeal to the supposedly “derivative” character of complicity is of no help, since we still need to explain why a contributor can be derivatively liable for a wrong that she did not empower the principal to commit. For any particular donor, she alone makes literally no difference to whether the murder occurs. It might be argued that she slightly raised the antecedent probability of the murder’s occurrence by donating, but it is unclear why this should make her liable for the murder when it turns out that her donation made no actual difference to the murder’s occurrence. We can imagine her donation lying at the bottom of the barrel, unused – yet she is liable for murder.

Some have attempted to circumvent this problem by foregoing causal accounts of derivative liability altogether. For example, Christopher Kutz denies that a causal contribution is necessary for complicity; the “participatory intentions” of the accomplice are what grounds liability (Kutz 2000). Michael S. Moore defends a singularist account of causation, which purports to solve problematic cases of overdetermination (2009: 496–512). (He also argues that subjective chance-raising can be a determiner of culpability). Sanford Kadish suggests that by ‘extending our wills’ to the actions of others we come to be complicit in what they do (1985: 355). Daniel Yeager, taking a different approach, argues that there is a morally relevant distinction between helping and doing ; complicitous individuals, by merely helping, incur a risk-based rather than a harm-based form of liability (Yeager 1996).

I believe Kutz and Kadish are on the right track. When we intentionally cooperate in furtherance of some collectively caused event, each cooperator can become liable for what any other cooperator does, in virtue of making herself the principal’s *agent*. That is, when someone agrees to act at your behest in furtherance of some goal you specify, you can become liable for what that person foreseeably does in furtherance of that goal *independent of whether you caused (or even causally influenced) your agent to so act*. Consider this case:

Yard Cleaning

P1, who is physically disabled, asks P2 for a favor: that P2 clean P1's front yard. While on an errand, P2 happens to be driving by P1's house – though she doesn't know that this house is P1's. Detesting the sight of an unsightly front yard, P2 takes it upon herself to clean it, not knowing that she is cleaning P1's yard. In the process of doing so, P2 recklessly damages prized orchids belonging to P1's neighbors.

P1 bears remedial liability for the damages that P2 causes even though P1's agreement with P2 in no sense contributed to P2's conduct. Of course, if it weren't for P1, P2 wouldn't have caused the damage since P2 was, after all, cleaning P1's yard. But this alone does not ground P1's liability – after all, if P2's assistance were unsolicited, then P1 would not be remedially liable even though she is a *sine qua non* of the damage P2 causes. What grounds P1's remedial liability, then, is not her causal or counterfactual relation to what P2 does, but the fact that she intentionally made P2 her agent. It is the normative rather than the causal relationship P1 bears to P2 that makes P1 liable for what P2 foreseeably does in furtherance of the ends specified in that relationship. P1 vests in P2 the fiduciary power to act on P1's behalf; this fiduciary power is insensitive to the causal route by which P2 comes to subsequently act, so long as those actions fall within the rubric of the proffered agreement.

Successful uptake of the agency-relation requires that P2 see herself as having accepted P1's request to act as an agent. But the satisfaction-conditions for acting as someone's agent are extensional in the sense that P2 needn't occurrently regard herself as P1's (or anyone's) agent when P2 is fulfilling her duties to P1. Rather, she need only act in a way that achieves what is required of her. This might seem to problematically ambiguate liability in cases where multiple principals establish agency-relations with one and the same individual who ultimately acts in ways that extensionally fulfills several of the roles she agreed to adopt.⁷ If in the course of doing so she acts recklessly, it might seem unclear which if any of the principals bears liability if we cannot repair to the agent's intentions – specifically, those occurrent intentions specifying for whom she saw herself as acting. But there

⁷ I thank a referee for challenging me on this point.

is another option: the intentions the agent *would* have possessed upon careful, informed reflection specify the principal for whom she is acting in cases where there are multiple principals. If there is no mere single principal she settles on, this suggests that they share liability among them.

So though in *Yard Cleaning* it is not the agreement that causes P2 to damage the orchids but rather a deviant causal chain, and though P2 did not take herself to be acting under the aegis of P1's authority when the former was cleaning the latter's yard, P1 is nonetheless liable. This is a non-causal, derivative basis of liability. It is not vicarious liability, since it is grounded in an agreement made between P1 and P2 – an agreement establishing what is called an “agency-relationship.”

We have, then, a way to ground complicity in cases where the accomplice does not causally contribute to what the primary wrongdoer does. Recall that in *Assassination Fund* each donator, by virtue of donating with the intention of enabling the villain to fund the assassination thereby makes the villain his or her agent; this, in turn, makes each donator liable for what the villain does in foreseeable furtherance of carrying out the assassination. Because the villain hires the hitman in furtherance of the assassination, and because this was the expressed purpose of the fund, the donors are liable for the assassination.

To better understand the nature of the agency-relation between the donors and the villain, it is helpful to strip the example of its inessential elements. Suppose the villain simply announces to the criminal underworld that if she receives enough donations, she will hire an assassin. That is the extent of the relationship between the villain and the donors. It seems, then, that the villain is not acting at the behest of the donors in that she does not seem to be acting as their representative or under their authority. In short, there seems to be no “agency-relation” between the villain and the donors. But this is illusory. If the villain presented her conditional intention to hire an assassin *as a promise* to the donors – a promise to hire an assassin should she receive enough funds – and, if the donors donated to the fund on the understanding that doing so is tantamount to accepting that promise, then the villain is thereby in an agency-relation with the donors. On this view, simply offering and accepting a promise establishes an agency-relation since the promisee now has a special authority over the promisor that the promisor

act in accordance with the terms of the mutually agreed-upon promise. This authority is asymmetrical: the promisee but not the promisor can at any time unilaterally free the promisor of the obligation the latter bears to the former.

Some might balk at the suggestion that merely accepting a promise can be enough to establish an agency-relation. There is a high bar for entering into an agency-relation with others. It is typically thought to require an explicit agreement to that effect, and for good reason: because entering into an agency-relation with another has such sweeping effects on liability, the provisions for entering into such a relationship should be accordingly hard to satisfy. It might therefore seem that I am using the agency-relation (and with it, its normative upshots) over-inclusively.

This is a potent objection, but I believe it can be defused. The agency-relation is typically thought of as bivalent – you are either in such a relation or you are not. I propose that this is the wrong way to think about the agency-relation. It is best construed as a scalar relation in that there are degrees to which one is in an agency-relation with another.

The stronger the agency-relation, the greater the deprivations to which the principal (P1) is liable for what the agent (P2) does, and the greater the range of actions committed by P2 for which P1 can be held liable. Put differently, the strength of the agency-relation affects the degree to which P1 is liable for any given harm, and the harms for which P1 can be held liable. These factors can be respectively called the *depth* and the *breadth* of liability.

I cannot here provide all the criteria determining the strength of the agency-relation. But I will present a few viable candidates: 1) how each party characterizes their relationship to each other, 2) what is at stake in establishing the agency relation, and 3) the stringency of the agreement, all play a role in determining the strength of the agency-relation. I will briefly discuss these in order.

In cases where the agency-relation is at its strongest, P2 not only agrees to be P1's agent, but in addition, P1 is disposed to characterize herself as vesting a fiduciary power in P2; P2 likewise is disposed to characterize herself as acting on P1's behalf. But it is possible to establish an agency-relation without either party thinking of her relation to the other in such terms. It is enough if P2 agrees to assist P1 in furthering some end that P1 has. In such

a case, P2 acts at the behest of P1, as P1's agent; after all, if P2 subsequently fails to act in accordance with the agreement absent good reason, P1 has a claim against P2. And only P1 can release P2 of the obligation that P2 has. It is not infelicitous, then, to describe P2 when she acts in accordance with that agreement (regardless of whether the agreement is what is *motivating* her to so act) as acting under P1's authority. But the strength of the agency-relation established in such a case is weaker than in a case where each is disposed to characterize herself as in an agency-relation with the other.

Another factor determining the strength of the agency-relation is this: the more at stake in establishing the agency-relation, the greater its strength. For example, agreeing to act as someone's bodyguard will, simply by virtue of what is at stake in such a role, constitute a stronger agency-relation than agreeing to act as someone's gardener. This suggests, in *Yard Cleaning*, that the strength of the agency-relation between P1 and P2 is relatively low.

A final factor (in an incomplete list of factors) determining the strength of the agency-relation is the strength of the agreement between P1 and P2. Some agreements are stronger than others, where the strength determines among other things the stringency of the presumptive duty to follow through with the agreement. The strength of the agreement is determined by the reasonableness of the view that each party has a second-personal duty to follow through with the agreement. One factor determining the reasonableness of such a belief is whether and the extent to which the agreement is formalized. An agreement put in writing, assessed by a lawyer, and signed in the presence of a notary, will *ceteris paribus* be stronger than an agreement sealed by a wink and a nudge. Note, though, that as I indicated above, the agreement in question need not be one in which P2 agrees to act as P1's agent – an agreement in which P2 agrees to aid P1 in furtherance of some end will suffice to establish an agency-relationship, albeit a weaker one.

With this preliminary and incomplete investigation of the factors influencing the strength of the agency-relation, we are now in a better position to assess the grounds for complicity in cases like *Assassin Fund* and *Yard Cleaning*. In the former case, it might seem that the donors made no agreement with the villain. But in soliciting financial assistance the villain is understood as

having agreed to use those funds in furtherance of hiring a hitman. Indeed, if he used it for completely different purposes the donors would have a claim against the villain precisely because the villain has broken his promise. This shows that we can interpret donating money under those circumstances as establishing a weak agency-relation between the villain and each donor. That the content of the agreement is largely implicit and informal, and that the villain might not see himself as an agent of the donors, weakens the agency-relation established between them. But the fact that what is at stake is morally important – a matter of life or death – is a factor strengthening the agreement. (Determining how to weigh these against each other is a task for another time).

Contrast this with *Yard Cleaning*. Again, the agreement between P1 and P2 is not one in which P2 is expressly characterized as P1's agent – this weakens the strength of the resulting agency-relation. But such a relation nonetheless exists in virtue of the agreement P2 makes to aid P1 in furtherance of cleaning P1's yard. Since this end is morally trivial, the strength of the relation is accordingly diminished, which weakens the depth and breadth of P1's liability for what P2 foreseeably does in furtherance of the ends specified in the agreement. Suppose, for example, that P2, instead of recklessly damaging the prized orchids belonging to P1's neighbor, somehow ends up recklessly killing the neighbor's child. P1 will bear little or no liability for what P2 does, not just because that eventuality was not relevantly foreseeable, but because the weak nature of the agency-relation accordingly narrows the breadth of P1's liability – i.e. the range of acts committed by P2 for which P1 is liable.

4. Superfluity of Complicity

Regardless of how an agency-account of complicity is developed, it will not do the work that complicity does in Anglo-American criminal or tort law; this is because in the law an individual can be complicit in a wrongdoing by contributing to it without the wrongdoer's knowledge. Consider again *Guardian Devil*, where J aids robbers unbeknown to them. Since J assists without their knowledge, clearly there is no agency-relation between J and them. Yet in Anglo-American criminal law, J is legally complicit in their wrongdoing. J can be charged as an accessory to robbery. But I argued that

this is a straightforward case of *non-derivative* liability – it is J’s causal relation to the wrongdoing (in combination with satisfying the requisite culpable mental states) that grounds her liability. So, although this sort of case will not be covered by an account of complicity based in the agency-relation, it does not need to do so. It is no limitation of the agency-relation account that it does not impute complicity in cases like *Guardian Devil*.

There are many issues pertaining to derivative and non-derivative complicity which need much more discussion, such as the possibility of *reckless* derivative liability (whereby the agency-relation makes us complicit for wrongdoing we do not intend but are in a position to foresee); whether we can bear non-derivative liability for the unsuccessful attempts of wrongdoers we enable; whether an unsuccessful attempt to enable a wrongdoer who nonetheless succeeds can make the attempted enabler liable; whether we should treat non-derivative liability for the harm we enable another to commit differently from the non-derivative liability of innocent agency (i.e. cases where we use unwitting or cognitively impaired individuals in furtherance of wrongful ends), and so on. In addition, there is obviously much more to say about the determinants of the agency-relationship and its application, in a broader range of cases. But my goal here is more modest: to show that insofar as there is room for genuinely non-causal derivative liability – which seems necessary to implicate wrongdoers in cases of concurrent and preemptive overdetermination – we should take more seriously the possibility that the agency-relation can serve as grounds for complicity in such cases.

sbazargan@ucsd.edu

References

- Gardner, J. (2007) “Moore on Complicity and Causality,” *University of Pennsylvania Law Review* 156: 432-43.
- Hart, H.L.A. and Honore, T. (1958) *Causation in the Law*, 2nd edition, Oxford: Clarendon Press.
- Kadish, S. (1985) “Causation and Complicity: A Study in the Interpretation of Doctrine,” *California Law Review*

73: 323-410.

Kutz, C. (2000) *Complicity: Ethics and Law for a Collective Age*, Cambridge: Cambridge University Press.

Lewis, D. (1973) "Causation," *Journal of Philosophy* 70: 556-67.

Ludwig, K. (2007) "Collective Intentional Behavior from the Standpoint of Semantics," *Nous* 41 (3): 355-93.

Mackie, J.L. (1974) *The Cement of the Universe*, Oxford: Clarendon Press.

Moore, M.S. (2000) "The Metaphysics of Causal Intervention," *California Law Review* 88: 827-78.

— (2007) "Causing, Aiding, and the Superfluity of Accomplice Liability," *University of Pennsylvania*

Law Review 156 (2): 395-452.

— (2009) *Causation and Responsibility*, New York: Oxford University Press.

Weiss, B. (2002) "What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer

Under Federal Law," *Fordham Law Review* 70 (4): 1341-81.

Wright, R. (2001) "Once More Into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal

Responsibility," *Vanderbilt Law Review* 54 (3): 1071.

Yaffe, G. (2012) "Moore on Causing, Acting, and Complicity," *Legal Theory* 18 (4): 437-58.

Yeager, D. (1996) "Helping, Doing, and the Grammar of Complicity," *Criminal Justice Ethics* 15: 25-35.