Florida State University Law Review

Volume 44
Issue 2 *Winter 2017*

Article 5

Winter 2017

Relational Criminal Liability

Steven R. Morrison
University of North Dakota School of Law

RELATIONAL CRIMINAL LIABILITY©

STEVEN R. MORRISON*

ABSTRACT

"Relational criminal liability," or one person's criminal liability for the actions of another by way of a group of which both individuals are a part, generates a fundamental tension between collectivist and individualist approaches to liability. The collectivist approach, which reifies the group qua group, enables individuals to be liable for the acts of the group and the group to be liable for the acts of individuals. The individualist approach treats individuals qua individuals, holding them liable only for their own conduct.

This tension sounds both in moral philosophy and legal theory. As to philosophy, Michael Bratman, Margaret Gilbert, and Christopher Kutz take an ultimately individualistic approach to assigning moral responsibility in a group context. John Searle, Raimo Tuomela, and others posit irreducible collective bodies, capable of intent and agency distinct from those of their individual members. As to legal theory, long-standing American legal norms treat individuals as individuals, whereas work by George P. Fletcher and, more recently, Gideon Yaffe and Jens David Ohlin suggest a collectivist turn.

This unresolved tension produces inconsistency, unpredictability, and normative failures in the determination of relational criminal liability. This Article relieves that tension by showing, through an exposition of the relevant moral philosophy, legal theory, and case law, that an individualist approach best accounts for the concerns of collectivists and individualists alike. This account details the normative contours of relational criminal liability and addresses legitimate concerns with that liability. Finally, it develops a normative test for relational criminal liability and applies that test to a taxonomy of relational criminal liability, which includes the many theories of liability that fall under the relational label. It concludes that most, but not all, aspects of relational criminal liability are normatively justified and that many of its criticisms are better understood as aimed not at the substantive liability itself but at external failures that sound in procedure, interpretation, and sentencing.

* Assistant Professor of Law, University of North Dakota School of Law. I thank the participants of CrimFest 2015 and the American Bar Association Criminal Justice Section scholars workshop. Many people contributed their comments, including Albert Alschuler, Miriam Baer, Greg Gilchrist, Lauryn Gouldin, Aziz Huq, John D. Inazu, Benjamin Levin, Eric Miller, Anne Mostad-Jensen, Jens David Ohlin, Alice Ristroph, Laurent Sacharoff, Nirej Sekhon, Alexander Tsesis, Robert Weisberg, and Gideon Yaffe. Great thanks to them for their time and invaluable thought. Emily Donaher provided unparalleled editorial support, conversation, and ideas. Finally, thanks to UND Law School Dean Kathryn R.L. Rand for supporting the work that this Article required.

I. INTRODUCTION

When is it justified to impose criminal liability on one individual for the acts of another individual? When the individuals have no relationship, the answer is easy: never.[1] But when these two people are connected in relevant ways, the question of liability is live. It is also unanswered in any sustained way.[2] This Article proposes to provide such an answer.

The connection between the two people that this Article considers begins with what I call a 'purposive collective,' which I define as 'a collective that two or more individuals are a part of and by which the individuals share some mutual intent to produce, or mutual awareness of the potential for producing, some set of outcomes.' Purposive collectives do not, on their own, inevitably generate criminal liability. They do, however, entail *potential* liability because of the possibility of some shared *mens rea* and *actus reus*.

Consider the hypothetical case of Chris and Meghan: they own a home together, agree to paint it together, and further agree that Chris will buy the paint and Meghan will buy the brushes. This makes them engaged in a purposive collective, the intended outcomes of which are to buy the paint, buy the brushes, and paint the house.

What if Meghan stole the brushes and Chris stole the paint? Would each be criminally liable for the other's criminal conduct? It's not clear; it would depend, for example, on whether one knew of or instructed the other to commit the criminal act, or whether that other did so entirely on her own. While the *Pinkerton* doctrine might address this specific question, the question also reflects a broader category of liability, which I call 'relational criminal liability' ('relational liability' for

1. ALAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 163 (3d ed. 2014) (Where "the relationship [between two people] has no pre-existing legal basis, there is no duty to act. A man is not a murderer because he omitted to relieve a beggar even if there was the clearest proof that the beggar's death resulted from the omission.").

2. GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 188 (1998) ("How one person can become complicitous in the acts of another is by no means obvious.").

short) and define as 'one person's criminal liability for the actions of another by way of joint membership in a purposive collective.'

Relational liability is comprised of many crimes and theories of liability: Continuing Criminal Enterprise (CCE) kingpin liability, co-conspirator liability for conspiracy or its target offence, aiding and abetting, accessory, *Pinkerton*, natural and probable consequences, RICO conspiracy, vicarious responsibility, co-schemer liability, joint venture theory, and combinations of these theories. Many of these bases of liability can be expressed either as formal charges or mere theories of liability for other crimes. This Article defines the normative boundary of this system of liability.[3]

This definition depends upon resolving a fundamental philosophical and legal tension between collectivist and individualist accounts of moral responsibility or legal liability.[4] As to philosophy, Michael Bratman, Margaret Gilbert, and Christopher Kutz[5] have taken an individualist approach to moral responsibility that locates intent and agency in individuals acting in groups. John Searle, Raimo Tuomela, and others posit irreducible collective bodies, capable of intent and agency distinct from those of their individual members. As to law, long-standing American legal norms treat individuals as individuals, whereas work

3. This Article is also not about 'guilt by association' or 'collective responsibility.' Guilt by association, properly understood, is a term used to discuss any negative inference drawn against an individual *merely* for her association with unpopular others. Criminal conspiracy, for example, does not entail guilt by association because it is based on more than *mere* association—it requires a criminal agreement. Collective responsibility refers to the questions of whether an individual should be liable for the actions of her group, *see* Thomas R. Flynn, *Collective Responsibility and Obedience to the Law*, 18 GA. L. REV. 845, 847 (1984), or whether the group should be liable for the actions of an individual. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1204 (1985). In American law, these concepts are universally rejected; the former because guilt by *mere* association stresses American social norms and the First Amendment, and the latter because American law (with an exception for corporations, *In re* Sealed Case, 877 F.2d 83, 84 (D.C. Cir. 1989)), has never recognized groups as entities subject to criminal sanction.

4. George P. Fletcher, *Law*, *in* JOHN SEARLE 85, 99 (Barry Smith ed. 2003) [hereinafter *Law*] ("Legal theory has long struggled with the problem of collective intentions . . . .").

5. I recognize that Bratman and Gilbert, along with Raimo Tuomela and John Searle, provide the "four most influential theories of collective intentionality." Sara Rachel Chant et al., *Introduction: Beyond the Big Four and the Big Five*, *in* FROM INDIVIDUAL TO COLLECTIVE INTENTIONALITY: NEW ESSAYS 1, 1 (2014). I do not apply the theories of Tuomela and Searle in this Article because they, in contrast to Bratman's and Gilbert's individualistic approach to collective intentionality, posit an irreducible collective intentionality, above and separate from that of individual collective members. JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 23 (1995). For the same reason, I do not apply Philip Pettit and Christian List's thinking. *See* CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 19 (2011). Collective intentionality, while it may be true philosophically, is not useful to evaluate relational criminal liability, which, as an aspect of American criminal law, must normatively be based on an individual's *mens rea*.

by George P. Fletcher[6] and, more recently, Gideon Yaffe[7] and Jens David Ohlin[8] suggest a collectivist turn.

Broadly, this matters because the collectivist approach and the individualist approach each generates different initial presumptions of liability: A collectivist would be likely to hold Chris and Meghan liable for each other's conduct subject to facts that defeat such liability, whereas an individualist would presume no liability without facts that establish it.

Neither collectivists nor individualists are categorical, and so a more nuanced theory of liability is possible. This Article shows that an individualist approach best accounts for the concerns of collectivists and individualists alike.[9] Its nuance entails revisiting the concepts of *mens rea*, *actus reus*, and causation. As to *mens rea*, this Article advocates for liability where a defendant is reckless or worse,[10] informed in part by H.L.A. Hart's "role-responsibility" concept.[11] As to *actus reus*, it finds the defendant's requisite conduct, in part, in what Michael Moore refers to as acting to cause a *particular state of affairs* that gives rise to another's conduct,[12] and in Douglas Husak's control principle,[13] which provides another reasonable alternative to traditional *actus*

6. George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES L. 163, 168 (2004) [hereinafter *Collective Guilt*]; Fletcher, *Law*, *supra* note 4, at 99-100.

7. *See generally* Gideon Yaffe, *Collective Intentionality in the Law*, *in* THE ROUTLEDGE HANDBOOK ON COLLECTIVE INTENTIONALITY (Marija Yankovic & Kirk Ludvig, eds., forthcoming 2016) (positing that "several criminal law doctrines which justifiably mandate punishment do so in a way that can be adequately explained only by attributing the law with a supporting theory of collective intentionality").

8. Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147, 147, 151 (2007) [hereinafter *Group Think*].

9. Alan Norrie's quasi-Marxist account of the criminal law illustrates this point well. Individualism, of course, offers the promise of retributivist justice based on liability only where there is culpability, but Norrie seeks justice through a communal lens. NORRIE, *supra* note 1, at 17-23. He wrote: "The present law of omissions with its narrow confines has its roots in the nineteenth century's stubborn refusal to imagine relations and duties between people save on the narrow basis of a cash or contractual [relationship]." *Id.* at 157. This has led to injustice for "social actors." *Id.* at 30. This Article suggests, however, that it is the criminal law's attention to collectivism, rather than its dedication to individualism, that has generated unjust assignments of liability. A turn to an individualist account of liability *in the context of a collective* can protect individuals both as individuals and as "social actors," or those who act in a group.

10. LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 31, 41 (2009).

11. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 213 (2d ed. 2008).

12. MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 17 (2009).

13. DOUGLAS HUSAK, THE PHILOSOPHY OF CRIMINAL LAW 17, 36-41 (1987).

reus. Finally, the Article jettisons the causation requirement. Applying the work of Hart and Tony Honoré,[14] Moore, and others, causation emerges as normatively unnecessary to ground liability[15] and impracticable in the relational liability context.

Ultimately, a defendant may appropriately be relationally liable for the conduct of another person in a purposive collective when the defendant acts or refrains from acting with (1) the intent to facilitate the other's conduct; (2) knowledge that her action or omission from action will more likely than not facilitate the other's conduct; or (3) reckless disregard for the substantial likelihood that her conduct or omission from acting will facilitate the other's action.[16] This normative and retributivist test, while primarily individualist, accounts for the unique reality of multiple-person criminal conduct.[17]

Resolving the collectivist-individualist tension and drawing the normative contours of relational liability is practically important for three reasons.

First, the crimes and theories that comprise relational liability appear pervasively in the American criminal justice system.[18] Second, courts focus on and easily reject the separate concepts of guilt by association and collective responsibility.[19] Because of this particular focus, they discount the influence of run-of-the-mill relational liability and

---

14. H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985).

15. Alexander and Ferzan would apparently jettison the causation requirement for *all* criminal liability, not just relational liability. ALEXANDER & FERZAN, *supra* note 10, at 3.

16. I acknowledge that this test for relational liability appears to undermine traditional omissions law, namely that individuals are not legally and should not normatively be responsible for the actions of another where they do not act vis-à-vis the other's actions. I address this in detail *infra* Section III.e. I also leave aside the question whether each of these theories of liability should generate the same or different degrees of blameworthiness and punishment. I consider that question to be external to the structure of relational liability and address it *infra* Section V.c.

17. Deborah Tollefsen might claim that this test "involve[s] the postulation of a set of individual intentions (or attitudes of a certain sort) that have a common content and are interrelated in specific ways." Deborah Tollefsen, *A Dynamic Theory of Shared Intention and the Phenomenology of Joint Action*, *in* FROM INDIVIDUAL TO COLLECTIVE INTENTIONALITY: NEW ESSAYS 13, 13 (2014).

18. United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990) (explaining that conspiracy charges are "inevitable because prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge"); Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637, 640 (1988) ("It is common for the same person to be sued both as a primary violator and as an aider-abettor. It is not uncommon for a person to be held liable in both capacities."); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1310 (2003) (suggesting that more than 25% of all federal criminal prosecutions and a large number of state cases involved prosecutions for conspiracy).

19. Which I discuss in detail *infra* Part II; s*ee also Kotteakos v. United States,* 328 U.S. 750, 772 (1946) ("Guilt with us remains individual and personal . . . . It is not a matter of mass application."); United States v. Polasek, 162 F.3d 878 (5th Cir. 1998); United States v. DeDominicis, 332 F.2d 207 (2d Cir. 1964).

therefore implicitly embrace a broad application of that liability.[20] Third, players in the American criminal justice system readily, and often irrationally, read multiple-person criminal conduct as the unified work of a cohesive entity, which permits expansive, but often unreasonable, relational liability.[21]

Part II of this Article contextualizes its thesis by defining guilt by association and collective responsibility and then moves to a description of relational liability. Part III provides a basis, grounded in philosophy and legal theory, for the Article's approach to *mens rea*, *actus reus*, and causation regarding relational liability. It also sets forth the normative test for such liability and addresses legitimate concerns involving omissions law and the defense of abandonment. Part IV establishes the concrete structure of relational liability and evaluates it against the test established in Part III. It concludes that most, but not all, theories of such liability are normatively defensible. Part V rounds the Article out, highlighting failures of procedure, proof, and comparative culpability that are external to the substantive structure of relational liability and negatively affect its operation.

II. FROM GUILT BY ASSOCIATION TO RELATIONAL CRIMINAL LIABILITY

American criminal law has confronted three different versions of liability involving collectives: guilt by association, collective responsibility, and relational liability. The law categorically rejects the first two, but a summary discussion of them is important to understanding the third.

A. Guilt by Association

The law categorically rejects guilt by association,[22] which entails liability based on mere association with a criminal individual or group,

---

20. Conspiracy may be proven by inference arising from a defendant's single act, even if the defendant knew only one other member of the conspiracy. United States v. Huezo, 546 F.3d 174, 180 (2d Cir. 2008). On largely the same evidence, a defendant may be found guilty of aiding and abetting, in addition to conspiracy. United States v. Cowart, 595 F.2d 1023, 1030-31 (5th Cir. 1979). And such conduct can give rise to expansive and borderless *Pinkerton* liability. United States v. Hansen, 256 F. Supp. 2d 65, 67 n.3 (D. Mass. 2003).

21. Definitions triggering group liability can be difficult to apply. For example, one government agent has defined "street gang" as "an association of three or more individuals who collectively identify themselves by adopting a group identity." United States v. Norwood, 16 F. Supp. 3d 848, 855 (E.D. Mich. 2014). In another case, a violation of a regulation against assembly in a National Forest was alleged against a group "composed of citizens who are loosely affiliated." United States v. McFadden, 71 F. Supp. 2d 962, 964 (W.D. Mo. 1999).

22. For example, David Cole and James X. Dempsey refer to the "unconstitutional" principle of guilt by association. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 58-64 (2003); DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME

and nothing more. The Supreme Court, for example, in *Holder v. Humanitarian Law Project*[23] (*HLP*) countenanced individuals' membership in foreign terrorist organizations—as long as they did not do anything to support that organization.[24] And in *Gallo v. Acuna*[25] the California Supreme Court upheld injunctions against gang members for assembling together not because of the associational value of their assembly but because their "activities [were] directed in the main at trafficking in illegal drugs and securing control of the community through systematic acts of intimidation and violence."[26]

To be sure, as to *HLP*, membership rights without the ability to support the group of which one is a member seem illusory. And as to *Gallo*, the question of an injunction against assembly *prior to* the commission of crime by individuals suggests an unconstitutional prior restraint on assembly rights.[27] But the aspirational statement that both of these courts make is that guilt by mere association, without any evaluation of *mens rea*, *actus reus*, causation, or criminality in general, is not acceptable.

The rejection of guilt by association has, however, remained of limited force because it is usually based either on attention to rare, high-profile political cases[28] or on an unclear and expansive definition of guilt by association. Guilt by association is invoked, for example, to criticize some criminal investigations,[29] DNA databases,[30] automobile

---

OF NATIONAL SECURITY 121 (2d ed. 2006). Jens David Ohlin bases criminal liability on "collective intentions" arising from "group deliberations," but argues that "no adequate theory explains how the act and intention of one conspirator can be attributed to another, simply by virtue of their criminal agreement." Ohlin, *Group Think*, *supra* note 8, at 147. And the Supreme Court has declared that guilt by association "has no place" in the criminal law. Elfbrandt v. Russell, 384 U.S. 11, 19 (1966).

23. 561 U.S. 1 (2010).

24. *Id.* at 25-26 (2010) (The law " 'does not prevent [people] from becoming members of the PKK and LTTE or impose any sanction on them for doing so' . . . . Congress has not . . . sought to suppress ideas or opinions in the form of 'pure political speech.' Rather, Congress has prohibited 'material support.' " (citations omitted)).

25. 929 P.2d 596 (Cal. 1997).

26. *Id.* at 608.

27. *See* John Inazu, *Unlawful Assembly as Social Control* 6 (unpublished manuscript) (on file with author).

28. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982); *Elfbrandt*, 384 U.S. at 19; Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 178 (1951); Am. Commc'ns Ass'n, C.I.O. v. Douds, 339 U.S. 382, 433 (1950).

29. Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 625 (2004).

30. Frederick R. Bieber & David Lazer, *Guilt by Association; Should the Law Be Able to Use One Person's DNA to Carry out Surveillance on Their Family? Not Without a Public Debate Say Frederick Bieber and David Lazer*, NEW SCI., Oct. 23, 2004, at 20.

searches,[31] and gang databases.[32] Both the blinkered former approach and borderless latter approach risk the use of guilt by association as a trope to refer simply to cases that someone doesn't like.[33]

Some views of guilt by association are more nuanced because they justify liability for association where the defendant acts vis-à-vis the association in a way that justifies liability.[34]

For example, Bobby Chesney refers to conspiracy as "criminalized association," and contrasts this to "vicarious punishment."[35] It appears that, for Chesney, the latter may be normatively appropriate but the former is not, since it leads to punishment "not for any specific conduct by [one person], but for associat[ion] with" that person.[36] But conspiracy liability is more than mere association; it entails a criminal agreement formed intentionally. Chesney's take, therefore, differs from the one this Article advances. He focuses on the First Amendment *associational* aspect of a collective, not the *relational liability* that can arise from that association. While I share Chesney's practical concern with prosecuting conspiracies,[37] this Article is meant to trace the theoretical justifications for relational liability.

Christopher Yoo discussed the guilt by association inherent in antigang injunctions when the criteria for injunctions included whether someone admitted to gang membership, bore a gang tattoo, or was even an active participant in a gang.[38] For Yoo, however, injunctions do not constitute guilt by association where they are based on intentional and active participation in illegal gang activities.[39]

As another example, Brian Comerford rejects critiques of the material support for terrorism statute, explaining that "the law does not

---

31. David E. Edwards et al., *Case Comment, Criminal Law*—United States v. Bell*: Rejecting Guilt by Association in Search and Seizure Cases*, 61 NOTRE DAME L. REV. 258, 258 (1986).

32. Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 115, 130 (2005).

33. Note, *Guilt by Association: Three Words in Search of a Meaning*, 17 U. CHI. L. REV. 148, 160 (1949).

34. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982); Scales v. United States, 367 U.S. 203, 227 (1961); Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 138 (1948).

35. Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1434 (2003).

36. *Id.*

37. *See* Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 865 (2013) [hereinafter *Conspiracy Law's Threat*].

38. Christopher S. Yoo, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 212, 234 (1994).

39. *See id.* at 233.

criminalize association with, but rather support of, terrorist organizations."[40] In contrast to Chesney, who stresses the First Amendment associational problems with charges like conspiracy—and who has discussed these problems in the material support context[41]—Comerford discounts the patent conflict between criminal liability and First Amendment associational rights generated by the *HLP* opinion.[42] And as *HLP* suggests, courts have not taken seriously the line of associational liability established in *N.A.A.C.P. v. Claiborne Hardware*[43] and *Scales v. United States*.[44]

There is, furthermore, an aspect of impracticality in Comerford's comment, since to associate with a group is virtually synonymous with supporting it. And the government has not been eager to split this hair when it comes to assigning criminal liability: In *HLP*, government attorneys suggested that a lawyer who files an amicus brief in support of a foreign terrorist organization could be liable for material support.[45] Once again, however, my purpose in this article is not to trace the tension between relational liability and associational or other First Amendment rights. It is, rather, to advance a theoretical argument about the justifiable scope of relational liability.

Criticism of guilt by association is both too narrow and too broad. It is too narrow when it is used to condemn the application of criminal law only in rare, high-profile political cases. This ignores the pervasive use of association in run-of-the-mill criminal cases. It is too broad when it is used to condemn all sorts of governmental action, including criminal investigations and forming levels of suspicion, when that action refers to groups or associations, even when the reference is relevant. In the end, the concept of guilt by association isn't very helpful because it serves to condemn obviously unjustifiable forms of liability (those based on mere association), and it says little about other forms of liability (those based on association plus something else) that may or may not be defensible.

---

40. Brian P. Comerford, *Preventing Terrorism by Prosecuting Material Support*, 80 NOTRE DAME L. REV. 723, 734 (2005).

41. Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007).

42. *See* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (holding that associating with foreign terrorist organizations in order to provide them with support for peaceful and law-abiding activities constituted the federal crime of providing material support to terrorist organizations).

43. 458 U.S. 886, 886-87 (1982) (holding that the First Amendment protects one's association with a criminal group, as long as the individual engages in no criminal conduct nor contributes to others' criminal conduct).

44. 367 U.S. 203, 227 (1961) (providing a test for the extent of First Amendment associational rights in the context of a criminal group).

45. John D. Inazu, *Advocacy and Association*, 2013 UTAH L. REV. ONLAW 1 (2013).

B. Collective Responsibility

Collective responsibility—the responsibility of a group for the acts of an individual or of an individual for the acts of a group—has long been used to govern small communities[46] and to refer to the moral imperative of nations and other groups to respond to major crises.[47] The notion of collective responsibility as a basis for criminal liability, however, emerged in the United States only in the mid-twentieth century.[48] Joel Feinberg, for example, in 1968, considered liability for conspiracy, aiding and abetting, and other forms of relational criminal liability, but framed his work as one of collective responsibility, writing of the responsibility of "the whole group . . . for the actions of one or some of its members."[49]

Corporate criminal liability is an expression of collective responsibility[50] because it entails liability of corporations and other legal entities for the crimes of their individual employees and agents.[51] Individuals whose conduct gives rise to corporate criminal liability may also

---

46. Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 312 (1991) ("The institution of Frankpledge in medieval England held all members of a group responsible for a crime committed by one of them."); Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 201 (1932) (noting "the intensely local character of early legal systems, including the fact of collective responsibility of the community for acts done within its borders").

47. Myer Cohen, *International Government. By Clyde Eagleton. New York: The Ronald Press Co. 1932*, 43 YALE L.J. 518, 519 (1934); George H. Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L.J. 319, 331 (1938); C.D.P., *Present Day Labor Litigation*, 31 YALE L.J. 86, 87 (1921).

48. Possibly the first substantial mentions of collective responsibility as a theory of criminal liability were implied in a 1940 *Yale Law Review* article, Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1007 (1940), and a 1941 *Harvard Law Review* article, Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 59 (1941). *But see* Lamb v. People, 96 Ill. 73, 82 (1880), in which a trial court permitted a jury to find a defendant guilty on a collective responsibility theory. The Illinois Supreme Court held this was error, requiring a connection more than mere membership in the same group to assign liability.

49. Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 677 (1968).

50. Corporate liability as collective responsibility was not a foregone conclusion; theorists in the early twentieth century "debated whether corporations are just groups of people or actually constitute distinct entities separate from their members." Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2053 (2016).

51. United States v. Agosto-Vega, 617 F.3d 541, 552-53 (1st Cir. 2010); United States v. Philip Morris USA Inc., 566 F.3d 1095, 1118-19 (D.C. Cir. 2009); United States v. Singh, 518 F.3d 236, 249 (4th Cir. 2008); United States v. Jorgensen, 144 F.3d 550, 560 (8th Cir. 1998); United States v. Investment Enters., Inc., 10 F.3d 263, 266 (5th Cir. 1993); United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989); United States v. Gold, 743 F.2d 800, 822-23 (11th Cir. 1984); United States v. Beusch, 596 F.2d 871, 877-78 (9th Cir. 1979); United States v. Carter, 311 F.2d 934, 941-42 (6th Cir. 1963). As a striking example, prosecutors in the 2002 prosecution of the corporation Arthur Anderson had to prove only that "*any one* of Anderson's 28,000 U.S. employees" withheld or destroyed documents. Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 108 (2006).

be individually charged with a substantive crime,[52] and they may be charged with a relational crime, such as conspiracy.[53] They may even be charged with aiding and abetting the corporation itself.[54] These various theories of liability can get quite confusing; this Article clarifies the situation by setting corporate liability aside as an embodiment of collective responsibility and focusing on relational liability, or liability that one individual might be assigned for the conduct of another individual.

While the notion of collective responsibility in American law extended beyond the corporate realm,[55] it for the most part attended primarily to state-sponsored crime in international law and the law of war.[56] Most recently, the concept has been applied in the International Criminal Court and was most salient in the *Tadic* case from the International Criminal Tribunal for the former Yugoslavia, which introduced the crime of Joint Criminal Enterprise.[57] It has had virtually no influence on run-of-the-mill American criminal cases.[58]

Around 1990, philosophers began to produce sustained inquiries of collective responsibility.[59] These inquiries engaged two questions. First, could a collective have an intent and engage in conduct distinct from the intent and conduct of its constituent members? Second, if it could, how should the moral responsibility of individuals involved in the intent and conduct of the collective be evaluated? These inquiries

---

52. United States v. Wise, 370 U.S. 405, 409 (1962) ("No intent to exculpate a corporate officer who violates the law is to be imputed to Congress without clear compulsion . . . ." (citing United States v. Dotterweich, 320 U.S. 277 (1943)).

53. Pinkerton v. United States, 328 U.S. 640, 647-48 (1946); United States v. Clark, 717 F.3d 790, 808-09 (10th Cir. 2013); United States v. Sklena, 692 F.3d 725, 729-30 (7th Cir. 2012); United States v. Skilling, 554 F.3d 529, 547 (5th Cir. 2009), *aff'd in part and vac'd in part on other grounds*, 130 S. Ct. 2896 (2010); United States v. Singh, 518 F.3d 236, 252-53 (4th Cir. 2008).

54. United States v. Sain, 141 F.3d 463, 474-75 (3d Cir. 1998) ("AEC, because it is a corporation, is a separate legal entity, even though Sain owned all the stock. Thus, it has the capacity of being aided and abetted.").

55. *See* Gerald Dworkin, *Doing and Deserving*, 84 HARV. L. REV. 1317, 1322 (1971) (book review) (noting that Feinberg's "essay on collective responsibility brings sociology, law, and philosophy to bear on an important and neglected issue").

56. *See* Fletcher, *Collective Guilt*, *supra* note 6, at 168; Duane W. Layton, *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC'Y. INT'L L. PROC. 56, 63 (1986); *see also* Sanford Levinson, *Responsibility for Crimes of War*, 2 PHIL. & PUB. AFF. 244, 245, 249-50 (1973) (considering the dilemma of individual criminal conduct in collective contexts, and pointing to domestic criminal law, including aiding and abetting and conspiracy, but focusing on war crimes).

57. Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 697 (2011) [hereinafter *Joint Intentions*].

58. Again, I leave aside corporate criminal liability as an area of law that is unique. *See* Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 Yale L.J. 126, 129-30 (2008).

59. *See* MARGARET GILBERT, JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD 10 (2014).

sought primarily to construct a theory of collective agency, not to account for individual members' moral responsibility for the acts of fellow collective members. These inquiries, furthermore, were aimed at determining an individual's moral responsibility for the collective conduct, not criminal liability. The inquiry of relational criminal liability, then, departs from that of collective responsibility in two ways: it seeks to determine the scope of *criminal liability*, not moral responsibility, of one collective member for the conduct of *another collective member*, not for the conduct of the collective itself.

In a forthcoming book chapter, Gideon Yaffe addresses the question of collective intentionality in the criminal law.[60] When "a person incurs criminal liability for something *he did not do* thanks to the fact that he is part of a group of people to whom [the act] is rightly attributed,"[61] Yaffe sees the potential for either a collectivist or an individualist response to determining liability. The collectivist response presumes a "collective intentionality," and the individualist response is based on the presumption that the defendant has "made an individual, intentional causal contribution to the violation of a legally protected interest."[62] Yaffe's goal is to "adjudicate between" these positions.[63]

He prefers the collectivist response for two reasons. First, that approach "unites a group of individuals to which [a] crime . . . can be attributed."[64] If *A* (the actual actor) raped a victim (an action *a*) and *D* (the defendant who didn't commit *a* but whose liability is in question[65]) held the victim down, according to Yaffe "it makes good sense to hold [*A* and *D*] criminally liable for that crime, rather than for some form of criminal aiding."[66] Second, Yaffe believes that the individualist position is fatally flawed because supporters of that position must choose between two untenable options: they must either deny that it is justified to hold *D* criminally liable for *A*'s action, or they must admit that *D*'s liability is not for *A*'s action itself, but for some distinct action, like aiding *A*'s action.[67] In the end, for Yaffe, the collectivist position is superior because it "allows us to say" that *D* "is criminally liable [for *A*'s action] *because he was in on it*."[68]

60. Yaffe, *supra* note 7 (manuscript at 3).

61. *Id.* (manuscript at 4).

62. *Id.* (manuscript at 8-9).

63. *Id.* (manuscript at 9).

64. *Id.* (manuscript at 10).

65. I will use the nomenclature *D*, *A*, and *a* throughout this Article to refer to the defendant whose liability is in question (*D*), the actor whose conduct *D* might be liable for (*A*), and the conduct in question (*a*).

66. Yaffe, *supra* note 7 (manuscript at 10).

67. *Id.*

68. *Id.* (manuscript at 13).

C. Relational Criminal Liability

Yaffe's preference for the collectivist position seems to rest on two notions that I reject: that crime can be attributed to a *group*, separate from the group's members, and that collectives can have their own intentionality, separate from the intentionality of the collective's members. I prefer the individualist position, and there is a third option to Yaffe's untenable two that individualists can adopt. His two options presume that to be liable, *D* must somehow cause (or, perhaps, contribute to bringing about) *a*. Where *A* is the sole causer of *a*, *D* either cannot be liable (option one) or his liability cannot "be taken at face value [because i]t *seems* that we are holding [*D*] criminally liable for [*a*], but his actual crime is distinct; it is the crime of *aiding*" the commission of *a* (option two).[69]

The third option, which this Article adopts, is to jettison the causation requirement for *D* and determine *D*'s liability for *A*'s *a* based on *D*'s *actus reus* and *mens rea*.[70] This *actus reus* could be entirely acausal, at least as a scientific matter, as where *D* aids and abets *A*'s crime, or where *D* and *A* conspire to commit armed robbery, and in the course of the robbery *A* shoots someone.

This liability bridges the divide between collectivism and individualism, which Yaffe seeks. It acknowledges both that individuals must be judged as individuals to determine their liability, pursuant to accepted criminal law norms, and it also acknowledges that individuals participate in collectives, and through that participation may contribute to others' commission of criminal *a*'s.

To illustrate, consider two cases. In *Commonwealth v. Azim*,[71] the defendant was the driver of a car conveying two other men.[72] The three men spotted the victim; the defendant stopped the car, and the two other men exited the car to beat the victim. The Pennsylvania Supreme

---

69. *Id.* (manuscript at 10).

70. One of Yaffe's major concerns with relational criminal liability is the causation requirement, and my rejection of its necessity. If *D*'s causation of *a* no longer needs to be proved, then the thorny problems involving causation remain, but they are just shifted to proving *A*'s causation of *a*. This problem is most salient when, for example, *D* and *A* have a shared scheme and someone is harmed as a result of that scheme, but the evidence does not show clearly that either *D* or *A* caused the harm. E-mail from Gideon Yaffe, Professor of Law, Philosophy, and Psychology, Yale Law School, to Steven R. Morrison, Assistant Professor of Law, University of North Dakota School of Law (Dec. 30, 2015, 11:29 CST) (on file with author).

My theory of relational criminal liability does not propose to solve the scientific causation problem that Yaffe presents. It does, however, acknowledge Yaffe's concern that *someone* must have caused *a*. That person is *A*, and relational liability focuses on *D*'s liability, which does *not* require causation. This approach works even where, for example, *A* might have committed an "inchoate" crime such as attempt. While no harm will have been caused by anyone, *A* will have caused the *crime* of attempt. I presume that it follows that a *D* who aided the attempt may be liable for aiding in the commission of that crime.

71. 459 A.2d 1244 (Pa. Super. Ct. 1983).

72. *Id.* at 1245.

Court held that this evidence was sufficient to ground a conviction for conspiracy to batter.[73] And in *Commonwealth v. Cook*,[74] the defendant was convicted of conspiracy to commit rape because his friend actually raped the victim, and the defendant held his friend's belt while his friend raped the victim.[75] A Massachusetts appellate court held that the evidence was insufficient as to the defendant's rape charge.[76]

Although each case generated a different outcome despite similar facts, these cases can be viewed as consistent with each other and normatively grounded by evaluating the individual defendants' *mens rea* and *actus reus* in the context of a purposive collective. In *Azim*, the Pennsylvania court found that the defendant could be liable because he was the driver and because he was aware of the actual perpetrators' intentions to beat the victim.[77] And in *Cook*, the Massachusetts court found that the defendant engaged in no *actus reus* toward the crime of conspiracy, nor did he have any requisite *mens rea*, being apparently unaware of the actual rapist's plan until its execution.[78]

In the end, the approach that this Article takes is not as divergent from Yaffe's approach as it seems because his thesis isn't one that rejects individualism but rather one that embraces collectivism in order to make sense of the problem he has with claiming that a *D* who does not cause *a* is held by a guilty verdict to have committed *a*.[79]

While I acknowledge this problem, an individualist account of relational criminal liability has four major advantages over Yaffe's approach. As a matter of philosophic fact, individualist relational liability rejects what I claim to be the fiction of collective intentionality.[80] As a criminal normative matter, it treats all defendants as individuals for purposes of assigning liability, as American criminal law requires. As a matter of criminal procedure, it requires prosecutors to prove an individual *D*'s guilt and discourages a conviction based on *D*'s guilt by

---

73. *Id.* at 1247.

74. 411 N.E.2d 1326 (Mass. App. Ct. 1980).

75. *Id.* at 1328.

76. *Id.* at 1329.

77. *Azim*, 459 A.2d at 1247.

78. *Cook*, 411 N.E.2d at 1329. To be sure, based on the defendant's *actus reus* and *mens rea*, the court held that the defendant could be implicated in the rape as an accomplice, *Id.* at 1330, which seems to me to be the correct result.

79. Yaffe acknowledges that *D* can be liable for *A*'s *a* because *D* was "in on it," but to say that *D* actually committed *a* is factually wrong. If *A* stole and *D* helped, *D* did not 'steal,' but *D* can be "attributed with" the stealing. Yaffe, *supra* note 7 (manuscript at 13, 16). For Yaffe, the collectivist position allows for a more semantically honest attribution of liability.

80. Kirk Ludwig, *Is Distributed Cognition Group Level Cognition?*, 1 J. SOC. ONTOLOGY 189, 190 (2015) (explaining that there is "no reason to think that extant forms of distributed cognition involving groups of cognizers solving problems or performing tasks are instances of group level cognitive processes"); *see also infra*, Section III.a.

association with a potential criminal group. Finally, individualist relational criminal liability addresses the problem with claiming that "*D* committed *a*," where *A* actually committed *a*. Relational liability does so by rejecting this fiction and holding *D* responsible only for her own *actus reus* and *mens rea* vis-à-vis *A* in a way that connects *D* to *a* such that *D*s liability (for aiding and abetting, conspiring, or whatever) is justified. Yaffe wants the law to recognize the distinction between "stealing" (what *A* does) and "being responsible for stealing" (what *D* does).[81] Individualist relational liability acknowledges that distinction; Yaffe's collective approach moves away from that because it conflates two individuals into one causal entity.

The sustained philosophical debate between collectivists and individualists[82] has led Tracy Isaacs to advocate for a two-level analysis that considers both individual- and group-level agency.[83] While Isaacs may be correct as a philosophical matter—especially, perhaps, as her thinking might apply to moral evaluations of massive wrongs like genocide[84]—Jens David Ohlin, who is sympathetic to but skeptical of Isaacs' theory, sees three practical problems. First, positing collective agency will render individuals either morally or legally not responsible or responsible, both as individuals and as collective members.[85] Thus, individuals will either be let off the hook or will be, potentially, assigned *too much* responsibility for their conduct. Second, it is simply unclear what it means to hold collectives criminally responsible at the collective level.[86] Collective responsibility is, in other words, easier to assign in theory than in reality. Third, Ockham's razor[87] suggests a strong preference for a solely individualist approach rather than a more complex two-level analysis that includes a collective entity.[88]

So, as a philosophical matter, Isaacs may be correct, but practicality requires something else. Recognizing the individualist grounding of relational criminal liability responds to both Isaacs' philosophy and Ohlin's plea for a more workable approach. Relational liability recognizes that individuals act in collectives but retain individual agency

81. Ludwig, *supra* note 80.

82. Jens David Ohlin, *The One or the Many*, 9 CRIM. L. & PHIL. 285, 287 (2015) [hereinafter *One or Many*].

83. TRACY ISAACS, MORAL RESPONSIBILITY IN COLLECTIVE CONTEXTS 97-129 (2012).

84. Ohlin, *One or Many*, *supra* note 82, at 289-90.

85. *Id.* at 289.

86. *Id.* at 296-97.

87. Ockham's razor is a philosophical principle that "gives precedence to simplicity: of two competing theories, the simpler explanation of an entity is to be preferred." Encyclopedia Britannica, *Occam's Razor*, https://www.britannica.com/topic/Occams-razor (last updated June 4, 2015).

88. Ohlin, *One or Many*, *supra* note 82, at 287.

and can be judged entirely as individuals. I make no claim that collective agency exists or does not exist as a philosophical truth; rather, I contend that an individualist account of relational criminal liability is possible[89] and preferable since it aligns most closely with the criminal law norm of individual liability and discourages normatively unacceptable guilt by association.

Ohlin takes a different tack, positing the existence of group intentionality through which one group member's conduct may be attributable to another. "Simply put," he writes, "if one member of the group commits an action that is *caused* by the group's intention to commit the crime, it is plausible to attribute the act to the group itself, and by reverse extension, back down to each of its members."[90]

For Ohlin, this group intent-based form of liability can apply only to tightly knit conspiracies and only for acts that are within the scope of the criminal agreement[91] because only such groups will embody the shared intent to commit such acts necessary for liability. Thus, any form of *Pinkerton* that imposes liability based on a *mens rea* less than intent is not justifiable.[92] Such liability, for Ohlin, "elude[s] coherent explanation"[93] and is indefensible except on utilitarian grounds.[94]

An individualist account, which requires a *mens rea* of recklessness or worse, provides that explanation in the form of a retributivist critique of relational liability and, ultimately, a defense of most of its aspects. Instead of tracing liability from *A* through a group's collective intent to *D*, I account for liability via a direct *A*-to-*D* analysis. Just as Margaret Thatcher once proclaimed, "there's no such thing as society,"[95] this account has no need of a group intent to mediate *A* and *D*'s individual intents and provide for *D*'s liability for *A*'s conduct.

This approach has three advantages over Ohlin's. First, it applies to all collectives, tightly knit or otherwise, and so it dispenses with the fraught requirement of determining whether a group is tightly knit enough to form a group intent. Second, any theory of group intent risks guilt by association by imposing liability on *D* for *A*'s acts without a

89. In this, I differ from Ohlin's tentative opinion that collective intentionality is irreducible to individuals' intents, but we ultimately converge on a middle ground that promises a practicable theory by which to assign criminal liability. Ohlin, *Joint Intentions*, *supra* note 57, at 738.

90. Ohlin, *Group Think*, *supra* note 8 at 155.

91. *Id.* at 151.

92. *Id.*

93. *Id.* at 153.

94. *Id.* at 159.

95. *Margaret Thatcher: A Life in Quotes*, THE GUARDIAN (Apr. 8, 2013), https://www.theguardian.com/politics/2013/apr/08/margaret-thatcher-quotes [https://perma.cc/R6BE-6BRC].

thoroughgoing individualist inquiry into *D*'s individual culpability. This individualist approach avoids that risk. Third, it provides a defense of co-conspirator liability that responds to criminal law theory, which Ohlin notes is lacking.[96]

III. CRIMINAL LAW NORMS AND THE PHILOSOPHY OF COLLECTIVE RESPONSIBILITY

While a broad array of background norms support criminal law,[97] the structure of relational liability can be evaluated primarily by reference to three commonly accepted requirements to ground individualist liability: *mens rea*, *actus reus*, and causation. The test for relational liability this Part sets forth is based on a reevaluation of these requirements.

This reevaluation generates a normative test for relational liability that includes novel interpretations of the *mens rea* and *actus reus* requirements and a complete jettisoning of the causation requirement. Indeed, causation and the need to jettison it inheres throughout this Part's discussion of *mens rea* and *actus reus*. These interpretations respond to the structural exigencies of relational liability while remaining tethered to norms of criminal liability as expressed in more traditional views of *mens rea*, *actus reus*, and causation.

The test does so by drawing a unified thread through the work of legal scholars and moral philosophers. H.L.A. Hart's "role-responsibility" concept[98] and the philosophers' focus on individual *mens rea*, coupled with Larry Alexander and Kimberly Ferzan's as well as Jerome Hall's defenses of recklessness as a sufficient *mens rea*[99] (where that recklessness relates to the criminal result, not merely to a *D*'s general effect on someone else) provide a workable account of *mens rea* in the context of relational liability. Moore's work on the *actus reus* of causing a particular state of affairs[100] (seconded by Douglas Husak's control principle[101]) and his thoughts on accomplice liability do triple duty:

---

96. Ohlin, *Group Think*, *supra* note 8, at 150.

97. These include retributivist, deterrence, and utilitarian principles; proportionality; desert; individual culpability; the rule of lenity; the harm principle; liability based on human agency, Benjamin L. Berger, *Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defenses*, 51 MCGILL L.J. 99, 103 (2006), or human control, HART, *supra* note 11, at 210, and reference to community values and beliefs. Joel Feinberg, *The Expressive Function of Punishment*, *in* WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT 113 (Michael Tonry ed. 2011); Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1839-40 (2000); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871-72 (2000).

98. HART, *supra* note 11, at 213.

99. ALEXANDER & FERZAN, *supra* note 10, at 31, 41; JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 116 (2d ed. 1960).

100. MOORE, *supra* note 12, at 17.

101. HUSAK, *supra* note 13.

they support the recklessness *mens rea* for relational liability, provide a workable account of individual *actus reus* to ground such liability, and anticipate a jettisoning of the causation requirement. Finally, Hart and Honoré show directly how the causation requirement can defensibly be jettisoned.[102]

A. Mens Rea

Between *mens rea*, *actus reus*, and causation, *mens rea* is the element that has, for the most part, remained a requirement for criminal liability. There is a set of crimes for which liability is strict,[103] and negligence is sometimes used as well,[104] which has recently raised calls for reform.[105] But the use of these *mens rea* is still relatively rare in criminal law.[106]

Intent, knowledge, and recklessness remain.[107] Where *D* acts pursuant to one of these *mens rea* and causes *a* to occur, liability for *a* is easily grounded. Yet throughout criminal law, and especially as to relational liability, such *mens rea* and causation often do not exist. Where collectivists get around this problem by positing a collective intentionality shared by all members of the collective, this approach rests on assigning individual liability based on a *mens rea* in which the individual is assumed, but not proven, to partake. The individualist approach avoids this lack of proof problem by accounting for the *mens rea* held by *D* that suffices to ground her liability for *A*'s conduct.

H.L.A. Hart advocated for "role-responsibility," which entails a *D* who acts within a collective and is liable for a task assigned to him by agreement or otherwise.[108] This is not, strictly speaking, relational liability since the *D*s *mens rea*, *actus reus*, and causation all reside within her.

---

102. HART & HONORÉ, *supra* note 14, at 17.

103. Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

104. COLO. REV. STAT. § 18-3-105 (2016) ("Any person who causes the death of another person by conduct amounting to criminal negligence commits criminally negligent homicide . . . ."); MODEL PENAL CODE § 2.02 (AM. LAW INST. 1962).

105. S. 2298, 114th Cong. (2015); John Malcolm, *The Pressing Need for Mens Rea Reform*, THE HERITAGE FOUND. (Sept. 1, 2015) http://www.heritage.org/research/reports/2015/09/the-pressing-need-for-mens-rea-reform [http://perma.cc/U4Z8-8KYN]; John Villasenor, *Over-Criminalization and Mens Rea Reform: A Primer*, THE BROOKINGS INST. (Dec. 22, 2015), http://www.brookings.edu/blogs/fixgov/posts/2015/12/22-mens-rea-reform-villasenor [https://perma.cc/XN9Q-KGZQ].

106. Thomas "Tal" DeBauche, Note, *Bursting Bottles: Doubting the Objective-Only Approach to 18 U.S.C. § 875(C) in Light of* United States v. Jeffries *and the Norms of Online Social Networking*, 51 HOUS. L. REV. 981, 990 (2014). *But see* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933) (complaining of the use of strict liability for certain crimes).

107. MODEL PENAL CODE § 2.02 (AM. LAW INST. 1962).

108. HART, *supra* note 11, at 213.

Hart expanded this concept, arguing for liability where a *D* acted with the belief that her conduct could lead to harm.[109] Liability could attach, then, where a *D* caused *a*, but also where *D* performed an act that he knew could *result in a*.[110] Hart implicitly invoked relational liability by jettisoning the narrow, scientific causation requirement and interpreting the *actus reus* requirement to include conduct that the actor voluntarily performed, where the actor believed the conduct would lead to a harmful consequence.[111]

In support of the distinction between conduct "causing" and "resulting in" a harmful consequence, Paul Ryu highlighted the malleability of each term and the need to refer to some external reference point to come to a working definition of "causation."[112] More recently, Eric Johnson noted that only sometimes will actions that result in a consequence be deemed causes for purposes of imposing liability.[113] For example, Sanford Kadish found that one could be liable for the results of her conduct if she *caused* the result or was *complicit* in the result.[114]

Philosophers known for their work on collective responsibility[115] suggest an even broader defense of relational liability than Hart suggested. Christopher Kutz, Margaret Gilbert, and Michael Bratman each argue for one person's moral responsibility for the acts of another in certain cases, and in similar ways. For them, moral responsibility always remains individual; if an individual contributes *nothing* to the conduct of another in her collective, she cannot be responsible for that conduct simply because she is part of the collective.[116] They, however, extend moral agency of the individual beyond the bounds discussed by Hart,

---

109. Hart proposed that *mens rea* is satisfied by "intention or something like it," *Id.* at 116, writing, "[T]he law, though it may also be content with less, is content to hold a man guilty if the harmful consequence, e.g. death, was foreseen by the accused in the sense that he believed that it would come about as a result of some voluntary action on his part." *Id.* at 119.

110. *Id.* at 210 (resting criminal liability on a defendant's "knowledge or intention" or "understanding and control").

111. *Id.* at 119.

112. Paul K. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 777-78 (1958).

113. Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 61 (2005).

114. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 327 (1985).

115. Also known as "joint commitment," GILBERT, *supra* note 59, at 41; "shared agency," MICHAEL E. BRATMAN, SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER 4 (2014); "social reality," SEARLE, *supra* note 5; and "group agency," LIST & PETTIT, *supra* note 5.

116. As noted *supra*, some philosophers posit an irreducible collective intentionality above and beyond the individual intentionality of the collective's members. I do not deeply consider these theories not because I reject them philosophically, but because they do no useful work in individualistic American criminal law. *See* Robert D. Rupert, *Against Group Cognitive States*, *in* FROM INDIVIDUAL TO COLLECTIVE INTENTIONALITY: NEW ESSAYS 97, 97 (2014) (arguing against collective cognitive states, because "if a group has mental states, those states must do causal-explanatory work").

and deeper into the collective, because they embrace the notion that people operate simultaneously as individuals and as parts of collectives.

Kutz premises individual responsibility on one of three principles. On the "Individual Difference Principle," one is not responsible where one has made no difference to an action's occurrence. [117] On the "Control Principle," one is not responsible where one could not have prevented the action.[118] And on the "Autonomy Principle," one is not responsible for another's conduct unless one induced or coerced the actor into performing the act.[119]

Kutz recognizes, however, that individuals play important roles in collective endeavors that these three principles do not reach. He addresses this "I-We problem" not by abandoning the notion of individual moral responsibility, but by expanding the scope of that responsibility to allow for an individual's "participatory intention," which entails one person's "weak expectations" about another person's plans plus "sufficient overlap among their participatory intentions."[120] Where an individual intentionally contributes to a collective goal and another person commits an act toward that goal, the first person may be morally responsible for the conduct of the second.[121]

Margaret Gilbert argues that each member of a collective is obligated to act "as appropriate" in response to a collective goal.[122] This implies that each member must form "personal intentions that mesh appropriately" with those of other members.[123] This makes sense because most collective plans do not explicitly specify everything that must be done to realize them.[124] For Gilbert, there are "foundational joint commitment[s]" and joint commitments involving "shared subplans," which are plans that individual collective members carry out in order to achieve the foundational plan.[125]

Michael Bratman's theory of "planning agency" begins with an individual's desire to do something, and leads to the individual's planning to do that thing, which then leads to "modest sociality," or a shared intention with another to do that thing.[126] As with Kutz and

117. CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 3 (2000).
118. *Id.*
119. *Id.*
120. *Id.* at 67.
121. *Id.* at 104.
122. GILBERT, *supra* note 59, at 108.
123. *Id.* at 109.
124. *Id.* at 124.
125. *Id.* at 123.
126. BRATMAN, *supra* note 115, at 31.

Gilbert, according to Bratman, moral responsibility attaches for an individual's own plans and actions, but also for the plans and actions of others that comprise "*meshing* sub-plans."[127]

These theories envision moral responsibility for the actions of another, but they offer only vaguely legally cognizable limits.[128] For example, say *D* and *A* agree to commit an armed robbery. *A* illegally buys a handgun. *D* is clearly responsible for this action because it's necessary to achieving the shared goal of committing armed robbery. But should, say, *D* be responsible for *A*'s purchase of an illegal *automatic* weapon, which is contributory but not necessary to the shared plan? Even more doubtful is that *D* should be responsible for *A*'s purchase of a legal handgun with an illegal silencer.

Kutz's work highlights the difficulty of establishing meaningful limits. While he appears to embrace responsibility where someone could reasonably foresee the conduct of a fellow collective member, he also rejects *Pinkerton* liability.[129] He resolves that dilemma based on epistemic practicality. As an abstract matter, Kutz might support *Pinkerton* liability, but he also recognizes the reality that prosecutors advertise many conspiracies as tightly-knit, dangerous groups that are, in fact, comprised of attenuated relationships.[130] Given this practical reality, for Kutz "it is very hard to take this claim seriously" that *Pinkerton* is a valid theory of liability.[131]

While Kutz is correct as a practical matter, his abstract theory can be finessed to produce a legally cognizable limit to relational liability. Kutz limns relational moral responsibility by reference to an individual's *awareness* of another's conduct by excusing individuals from responsibility for the acts of others where those acts are "unintended consequences" of a collective plan. One person may be responsible for

---

127. *Id.* at 53.

128. The limits that these philosophers place on relational moral responsibility are important, but are vague in their application. Kutz would require a "tight connection" between one person's participatory intention and another's act, KUTZ, *supra* note 117, at 229, meaning that one person is not responsible for another's action where that action is an "unintended consequence" of the shared agreement. *Id.* at 155. Thus, responsibility for the act of another is not grounded if the act goes "beyond the pale of any reasonable collective expectation." *Id.* Gilbert advances an epistemic warning, writing, "[A]ny steps directed against a blameworthy collective must be taken with extreme caution, on pain of harming numerous individuals who have little or nothing to answer for in connection with that collective's action." GILBERT, *supra* note 59, at 80. Bratman adds some relief to this general caution, noting that his theory assumes symmetric authority relations, in which each member of a collective is truly equal with all other members. BRATMAN, *supra* note 115, at 85. Kutz echoes this, criticizing the fact that uniform sentences imposed on co-conspirators wholly fail to take into account relevant differences between individuals' participatory intentions. KUTZ, *supra* note 117, at 229.

129. KUTZ, *supra* note 117, at 215, 221.

130. *Id.* at 221.

131. *Id.*

the conduct of another if that conduct can be reasonably expected to result from collective intentionality.[132]

This implies that individuals who are reckless in relation to another's criminal conduct—those who consciously disregard the risk of another acting in such a way—should be relationally liable, but those who are merely negligent of the possibility of the other's criminal conduct—who unreasonably fail to be aware of the risks—should not be liable. This line is reflected in the criminal law's distaste for imposing liability based on a *mens rea* less than recklessness, and is supported by Alexander and Ferzan's global theory of criminal liability, which rests heavily on whether a defendant acted at least recklessly (and, in fact, jettisons causation as a *sine qua non* of liability).[133] Jerome Hall, furthermore, advocated for assigning liability only for a recklessness *mens rea* or worse.[134] Since he wrote that negligence entails "inadvertence"[135] and recklessness entails "voluntary harm-doing" or "at least an awareness of possible harm,"[136] Hall's conception of recklessness reflects Hart's *belief that harm will result* basis for liability, Kadish's complicity approach (which seems to imply a certain awareness of probable consequences), Alexander's focus on recklessness,[137] and the philosophers' various concepts of joint intention.

The question remains whether the requisite recklessness should be subjective or objective. If subjective, then relational liability should be grounded upon a *D*'s awareness that her conduct is sufficiently risky, or the conduct is *chosen*.[138] If objective, then liability should be grounded upon the conclusion that the *D ought* to know her conduct is sufficiently risky and thus has the responsibility to find out about the risks of the actions she performs.[139]

As an initial matter, deciding whether to take a subjective or objective approach to recklessness in the relational liability context seems either to not have any substantive impact or to depend upon one's *a priori* preferences as to the recklessness *mens rea* as a part of the criminal law's general part. Consider *Pinkerton* liability coupled with aiding and abetting: *D* aids and abets a conspiracy of which *A* is a member. The conspiracy's aim is to rob a bank. *A* steals a car, which is used

---

132. *Id.* at 155.

133. ALEXANDER & FERZAN, *supra* note 10, at 31, 41.

134. JEROME HALL, LAW, SOCIAL SCIENCE, AND CRIMINAL THEORY 244 (1982).

135. *Id.* at 246.

136. *Id.* at 246-47.

137. Larry Alexander, *Criminal Liability for Omissions: An Inventory of Issues*, *in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 121, 125 (Stephen Shute & A.P. Simester eds., 2005) ("inadvertent negligence is not culpable").

138. Victor Tadros, *Recklessness and the Duty to Take Care*, *in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 227-28 (Stephen Shute & A.P. Simester eds., 2005).

139. *Id.*

in the bank robbery. Under either a subjective or objective approach, *D* will likely be liable for the bank robbery since she was aware of the envisioned crime she was aiding. *D* should be liable for the car theft if she recklessly disregarded the likelihood of that crime occurring. But whether she should be held to a subjective or objective standard depends upon what one thinks of each standard prior to considering this particular *D*.

Upon further consideration, relational liability presents a unique circumstance whose subjective / objective determination ought to be *sui generis*. Depending as it does on *D* and *A*'s joint membership in a purposive collective, it could be said that *D*, by joining the collective, assumes a duty to find out about the risks that the collective's members pose. *D* should perhaps, therefore, be subject to an objective evaluation of her potential recklessness.

This conclusion is arrived at not by the usual analysis of recklessness as part of criminal law's general principles. Rather, it emerges as an aspect of the special subset of criminal law that is relational liability. One might defensibly conclude, therefore, that subjective recklessness is appropriate in the general principles of criminal law, but that the special subset of relational liability entails a carve out that calls for an objective analysis. This exception is based on the *D*s supposed duty to know of the risks of her purposive collective that she assumes when joining it. Failure to know of the risks of the collective amounts to recklessness; the same failure operates as a positive *actus reus* to defeat any potential conflict between omissions law and relational liability.[140]

B. Actus Reus

To provide an individualist account of relational liability, the *actus reus* requirement should either be abandoned or reconceived. While abandonment is an option,[141] the more conservative approach is to reconceive it. Michael Moore's and Douglas Husak's *actus reus* theories help to do so.

Start with direct acting, in which a *D* performs *a* that, if done with the requisite intent, comprises a crime. This narrow conception does not, of course, address relational liability. Moore, however, finds the requisite *actus reus* in *D* acting to cause a *particular state of affairs* that gives rise to *a* as committed by another.[142]

This conception of *actus reus* is connected to the question of causation. Moore notes that the act requirement depends upon its status as both absolute cause-in-fact and proximate cause, the latter of which

140. *Infra* Section III.e.

141. HART, *supra* note 11, at 90, 99 (expressing doubt that the criminal law, contrary to the accepted view, in fact contains any real *actus reus* requirement).

142. MOORE, *supra* note 12, at 17.

entails a policy-based evaluation of desert.[143] It is only when a cause-in-fact is established that the question of proximate causation is engaged. Where there is no cause-in-fact, there can be no liability, whether or not policy interests support it.[144]

This approach, valid for most aspects of the criminal law, cannot apply to relational liability because the willful action of another will normally be viewed as an intervening cause, eliminating the *D* as a causer-in-fact. Nevertheless, Moore's theory of proximate causation does provide a relevant insight that can ground liability where there is proximate causation but no causation-in-fact.

Moore presents three different versions of proximate causation. The "ad hoc policy" test is premised on balancing certain "social interests."[145] The "foreseeability test" asks whether conduct is foreseeable to a defendant.[146] And the " 'harm-within-the-risk' test" would lead to liability where a defendant's conduct generates a particular matrix of risk, which in turn produces harm.[147] Each of these versions of proximate causation reflect the matrix of moral responsibility set forth by Kutz, Gilbert, and Bratman; where the philosophers extended an individual's *mens rea* to embrace responsibility for the acts of another, Moore extends an individual's *actus reus* to embrace situations in which the individual contributes to the acts of another.

While the philosophers, discussing *mens rea*, above, end up implicitly adopting a recklessness requirement, Moore does as well,[148] though he arrives at this requirement through his discussion of *actus reus*. To understand how, start with Moore's discussion of the five different types of accomplice.

First, "truly causal accomplices" (or "causal contributors"[149]) should be liable for the actions of others because they use these others as tools to effect the conduct at issue.[150] These are accomplices who control everything,[151] and so can be said to have actually caused the resulting conduct.[152]

---

143. *Id.* at 83.

144. *See id.*

145. *Id.* at 96.

146. *Id.* at 98.

147. *Id.* at 99.

148. *Id.* at 157 (quoting Justice Cardozo's admonition that "[n]egligence in the air, so to speak, will not do").

149. *Id.* at 319.

150. *Id.* at 299.

151. *Id.* at 301 (these accomplices "pick[] the victim of the murder, order[] a subordinate to do it, pay[] him well for it, locate[] the victim for the hit-man, bring[] the gun and ammunition, and drive[] the hit man [sic] to the location of the killing").

152. *Id.* at 302.

Second, "necessary accomplices" (or "necessary contributors"[153]) are those who did not cause the result, but without whom the result would not have occurred.[154] Here, the accomplice should be liable because the result "counterfactually depended" upon the accomplice's action.[155]

Third, "chance-raising" accomplices (or "objective riskers"[156]) are those who by their actions do not cause the result but increase the risk of a result to an unreasonable level.[157] These accomplices can be liable because "to unreasonably risk is to be blameworthy, [with] the degree of blame here . . . depending on the culpability with which the risking is done."[158]

Fourth, "[s]ubjectively culpable accomplices" (or "culpable tryers"[159]) are those who seek to assist another in committing a crime.[160] These accomplices are liable where their actions amount to strong corroboration of their intent to commit a crime.[161]

Fifth, "vicarious accomplices" are those who in no way acted, but are blamed and held liable simply because they are associated with someone who did act.[162] Liability is in these cases undeserved. Moore locates *Pinkerton* liability here.[163]

Moore's plea, in the end, is to uncouple the accomplice and principal by eliminating the notion of accomplice liability, meaning that a defendant who does not commit the crime in question and the other person who does are treated as individuals.[164] Each person would be judged based on her own conduct; accomplices would no longer be judged on the legal fiction that they committed the principals' conduct.[165] Recall that this implicates Yaffe's concern with claiming that *D* actually committed a crime, when in fact *D* merely contributed to *A*'s commission of the crime. Yaffe's solution is a collectivist one, but Moore shows how an individualist approach is feasible.

---

153. *Id.* at 319.

154. *Id.* at 302-05 (For example, a defendant sees his enemy drowning and a lifeguard preparing a rescue. The defendant quickly restrains the lifeguard, and the enemy drowns.).

155. *Id.* at 305.

156. *Id.* at 319.

157. *Id.* at 310.

158. *Id.* at 310.

159. *Id.* at 319.

160. *Id.* at 315. To be sure, these accomplices "do not causally contribute to some legally prohibited result, nor are their acts or omissions necessary to that result occurring. Further, their acts do not elevate the likelihood of the harm occurring." *Id.* at 314.

161. *Id.* at 315-16.

162. *Id.* at 318-19.

163. *Id.*

164. *Id.* at 322.

165. *Id.* at 320.

Douglas Husak, in turn, provides an alternative "control" principle to that of *actus reus*.[166] Under Husak's theory, a *D* might be liable for something over which he had control (but didn't necessarily act to produce or cause to occur). Thus, omissions may in some cases stand in for an *actus reus*.[167] Put another, broader way, the *actus reus* "requirement is designed to ensure that persons are liable only when they are responsible."[168] This means, at the very least, that a *D* may be liable for something when he "performs a voluntary act, intending, knowing, or consciously disregarding the risk that it will cause him to perform a subsequent nonvoluntary criminal act."[169]

It can also reasonably mean that a *D*'s voluntary entry into a purposive collective that has a criminal aim can result in *D*'s liability for certain criminal results of that collective, even if *D* didn't voluntarily act to bring them about, but if *D* recklessly acted such that they occurred through the actions of *A*.[170]

The use of Moore's theory to evaluate the structure of relational liability suggests that individuals who act in collectives would be liable, if at all, based only on their own conduct, but could be liable for this conduct if it is reckless vis-à-vis the conduct of others. Truly vicarious accomplices would not be liable, because they don't act in any way in relation to the criminal conduct of another. Truly causal accomplices would be liable because they act with the pure intent to generate the criminal result.

Those accomplices in the middle of these two extremes should be judged by a recklessness standard. We know this for a number of reasons. First, Moore rejects negligence-based *Pinkerton* liability. Second, he would premise liability on a defendant's *active* conduct vis-à-vis another's criminal activity (and not a defendant's negligent ignorance of her contributions to another's criminal activity). Third, he would premise liability on a defendant's conduct that is strongly corroborative of an attempt to assist another in committing a crime. Recklessness implies a defendant's *active participation* (if only by consciously ignoring his role in risk-production) in another's criminal conduct. Conduct that reflects this active participation can be said to be reckless, and thus satisfies the *actus reus* requirement.

166. HUSAK, *supra* note 13.

167. *Id.* at 84.

168. Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2454 (2007).

169. *Id.* at 2457.

170. To be sure, this does contradict Husak's opinion that, under the control principle, even negligent acts and omissions may ground liability. *See* HUSAK, *supra* note 13, at 136.

C. Jettisoning Causation

Causation at base entails an individual *D* performing a criminal *a* or performing another action that is the intended cause-in-fact of *a* and results in *a*. While the doctrine *qui facit per alium facit per se* operates[171] to produce some relational liability, it is limited to situations in which an *A* is *D*'s mere instrument, much as a servant is said to be the legal instrument of a master.[172] It therefore does not ground many forms of relational liability, including, for example, a co-conspirator's liability for the conduct of her fellow, who commits the crime envisioned by the conspiracy.

As with *actus reus*, causation can be modified to suit individualist relational liability by expanding or jettisoning it.[173] Unlike *actus reus*, the causation requirement can be effectively dispensed with, which a number of scholars have suggested.[174] This means that relational liability is comprised not of what A.P. Simester and Stephen Shute would call "result crimes," but of normatively grounded "conduct crimes."[175]

H.L.A. Hart and Tony Honoré advanced Mill's notion of causation, in which the law does not discern *the* cause of an occurrence (because there is never a single cause) but normatively selects a contributing causal factor from an array of contributing factors to label as cause.[176] We typically look for a Sole Causal Event, but should embrace the "doctrine of the plurality of causes."[177] This means that a causation determination is a normative endeavor[178] and that causation of harm is neither always necessary nor sufficient to ground liability.[179]

---

171. Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 690 (1930) [hereinafter, *Responsibility*]; *see also* Michael B. North, Qui Facit Per Alium, Facit Per Se*: Representation, Mandate, and Principles of Agency in Louisiana at the Turn of the Twenty-First Century*, 72 TUL. L. REV. 279, 287 n.50 (1997) (Latin translated as "[w]hoever acts through another acts as if he were doing it himself.").

172. Sayre, *supra* note 171, at 693.

173. Like Moore's work, Husak's control principle can stand in for *actus reus* and causation alike. *See* HUSAK, *supra* note 13, at 170 ("I suggest that the control principle is a preferable alternative to the causal requirement of orthodox criminal theory.").

174. Michael Moore, as discussed above, would likely premise liability on a *D* recklessly causing a particular state of affairs that itself generates the probability of harm. Francis Sayre suggested that a "natural and probable consequence" test for liability could stand in for causation. Sayre would premise liability not on strict causation, but on these consequences, or on "knowledge plus acquiescence." Sayre, *Responsibility*, *supra* note 171, at 699, 702.

175. A.P. Simester & Stephen Shute, *On the General Part in Criminal Law*, *in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 1, 2 n.5 (Stephen Shute & A.P. Simester eds., 2005) ("By 'result crime', we mean crimes that specify the causing of a consequence as part of their *actus reus*. 'Conduct crimes' refer to behaviour by the defendant but not to its consequences.").

176. HART & HONORÉ, *supra* note 14, at 17.

177. *Id.* at 19.

178. *Id.* at 65-66 (causation determination "is a disguised way of asserting the 'normative' judgment that [someone] is responsible").

179. *Id.* at 67.

If strict causation as a requirement is jettisoned, as it should be, liability might be imposed for what could be called a *contributory alternative*, in which a *D* is liable for contributing to a criminal outcome (assuming the requisite *mens rea* and *actus reus*) as one of a set of factors. But this approach would save some culpable people from liability. Consider three people who agree to steal people's identities and open credit card accounts in their names. They all agree that *D1* and *D2* would obtain identifications from data service providers, and *A* would actually open the credit card accounts. *D1* and *D2* do so, but *A* ultimately uses only the information that *D2* provides. Under the *contributory alternative*, *D1* might escape liability.

The law could instead impose liability based on an *attempted contributory alternative*, in which a *D* is liable for attempting to contribute, whether or not she actually contributes. This is, in fact, inherent in the test for relational liability I propose below. It also entirely jettisons the causation requirement. Assuming that *D* acted with at least recklessness, it should not matter whether *D* caused or even contributed to *A*'s action.[180]

This is so even when jettisoning causation is evaluated against expansive definitions of causation. Jerome Hall, for example, offered that one definition of "cause" was "giving a person a motive to act—to cause [him] to act means to persuade or coerce him to act or to proceed in other ways which foreseeably give him a ground or incentive for action."[181] He went on to note that intervening causes that still ground liability for the non-acting *D* include situations in which the *D*s "conduct motivates other persons (sometimes the victim) to act, and their conduct is the immediate cause of a death."[182] To ground liability, "[t]his type of causation is limited to interpersonal relations and . . . must be sharply distinguished from causation in the biological and inanimate realms."[183]

Hall's definition of causation departs far from most individuals' conception of causation and is foreign to a conservative reading of that requirement. It seems more efficient to jettison the requirement. Hall does, however, point directly to relational criminal liability by applying his definition of causation only to "interpersonal relations."[184]

---

180. Hart and Honoré would likely support this approach, because they look to the *reasons* someone acts instead of causation. *Id.* at 51. I acknowledge that Hart and Honoré's theory isn't without its detractors, *see* HUSAK, *supra* note 13, at 165, but for my purposes their thoughts are relatively uncontroversial.

181. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 251 (1947) [hereinafter PRINCIPLES].

182. *Id.* at 262.

183. *Id.* at 251.

184. *Id.*

D. A Test for Liability

Built upon the legal theory and moral philosophy discussed above is a practicable normative test for evaluating theories of relational liability that looks to a *D*'s own *mens rea* and *actus reus*, requires a *mens rea* of at least recklessness, and jettisons the need to prove causation. This proposal is a conservative one because it remains closely tethered to traditional criminal law norms, but it also is crafted to respond appropriately to the structure of relational liability. It can be stated as follows:

Liability for the acts of another:

I. A defendant may be liable for the criminal act of another if

a. The defendant acts or refrains from acting with the intent to facilitate the criminal action of another;

b. The defendant acts or refrains from acting with the knowledge that his acting or refraining from acting is more likely than not to facilitate the criminal action of another; or

c. The defendant acts or refrains from acting with conscious disregard for the substantial likelihood that his acting or refraining from acting will facilitate the criminal action of another.[185]

This proposal is based upon four criteria.

First, *D* and *A*'s joint membership in a purposive collective does not depend upon mutual agreement to facilitate or even mutual knowledge of the other's existence. This is the *Tally* problem presented in *State*

185. This test does not consider liability of *D* for the actions of *A* when *D* and *A* do not operate in a purposive collective. *D* could, for example, unbeknownst to *A*, seek to assist *A* in committing a crime. Conspiracy to provide and attempt to provide material support to a foreign terrorist organization is an example. In one material support case, a prominent government expert advanced his theory of unconnected support:

> [A]l Qaeda is not just an organization. Al Qaeda also views itself as an ideology. It hopes to encourage people around the world who are unable to travel to places like Afghanistan or Somalia or wherever else, it hopes to encourage those people to do what they can at home.
>
> Particularly after 9/11, there was a tremendous emphasis on the training camps are closed [sic]. You can't just come to Afghanistan now to get training and go home. Now the battle is in your own backyard. The battle is what you yourself are able to do with your own abilities, so you should do whatever you can. It is an individual duty upon you to participate in the struggle. It is not about Usama Bin Laden and it's not about al Qaeda. It is about the methodology and the ideology behind them. If you follow the same methodology and the same ideology, then you too can be al Qaeda.

United States v. Kassir, No. 04 Cr. 356(JFK), 2009 WL 2913651, at *3 (S.D.N.Y. Sept. 11, 2009).

Such crimes are not part of the structure of relational criminal liability, and are thus not treated in this Article. These crimes could, however, be considered on their own, as part of what could be called the structure of '*a relational* criminal liability.'

ex rel. Martin v. Tally,[186] in which the defendant was convicted of aiding and abetting a murder where the murderers were not aware of the aiding and abetting.[187] Subsequent courts have affirmed the possibility of *D*'s liability for aiding and abetting *A* in such cases.[188]

Tally liability, however, is still relational liability because purposive collectives entail shared, overlapping intentions that members collectively work toward, but not necessarily *awareness* of these intentions.[189] Consider a *D* and *A* who decide to commit armed robbery of a bank. *D* inserts a virus into the bank's computerized security system, and *A* purchases illegal weapons, both of which are illegal acts. Both will clearly be liable for each other's criminal act. Unbeknownst to *A*, *D* also places a set of car lock picks into *A*'s backpack, thinking that it will help *A* steal a car. *A* discovers the lock picks, believing that she left them there from a previous heist. She uses the picks to steal a getaway car. *D* had a Kutzian weak expectation that *A* would steal the car, and *D* and *A* implicitly shared a Bratmanian meshing sub-plan to steal the car. *D*'s facilitation did not depend on *A* being aware of the facilitation.

Second, liability based on negligently acting or failing to act is impermissible. Although the Model Penal Code embraces such liability, negligence is in fact rarely used to ground criminal liability[190] and generally must be explicitly stated by statute.[191] Drawing the line at recklessness tracks the work of the criminal law scholars and philosophers of collective responsibility, who tend to justify liability (or moral responsibility) on a *D* consciously acting or recklessly failing to act in a way that facilitates another's criminal conduct, rather than a *D* failing to realize the harmful potentiality of her conduct.

This means that a *D* ought not be liable where the *D* merely knows of and acquiesces to *A*'s performance of *a*. This is so because knowledge

186. 15 So. 722 (1894).

187. *Id.* at 724.

188. Chisler v. State, 553 So. 2d 654, 665 (Ala. Crim. App. 1989) (allowing for "accomplice liability in the absence of a conspiracy or an agreement between the parties"); Seward v. State, 118 A.2d 505, 507 (Md. 1955); State v. Nutley, 129 N.W.2d 155, 167 (Wis. 1964). *But see* United States v. Beck, 615 F.2d 441, 448-49 (7th Cir. 1980) ("[Aiding and abetting] has two prongs—association and participation. To prove association, there must be evidence to establish that the defendant shared in the criminal intent of the principal." (citations omitted)).

189. Kutz's "weak expectations" about another person's plans plus "sufficient overlap among their participatory intentions," Gilbert's view that each member of a collective is obligated to act "as appropriate" in response to a collective goal, and Bratman's "meshing subplans" all *suggest*, but do not appear to *require* a conscious meeting of the minds regarding shared intent—they only require the shared, overlapping intent itself. *See* sources cited *supra* notes 120, 122, and 126.

190. DeBauche, *supra* note 106, at 990.

191. FLETCHER, *supra* note 2, at 116-17 ("If the relevant statute is silent, the minimally required form of culpability is recklessness . . . . [I]n the common law tradition, negligence is a suspect basis of liability.").

alone of another's potential (or likely) conduct entails no *mens rea* vis-à-vis that conduct. Where, however, there is knowledge plus the requisite *mens rea* to facilitate, then liability is justified.[192]

Third, causation as a concept must be jettisoned. Relational liability nearly always entails an *A* acting as an intervening cause between *D*'s action and *a*. A causation requirement would render virtually all relational liability unjustifiable.

Some might think that jettisoning causation could result in liability for one's mere intent alone. This is not so, since the *actus reus* requirement remains.[193] Furthermore, causation in criminal law is arguably an oversold concept. The very meaning of causation has for a long time been the subject of controversy[194] and has, in criminal law, remained underdeveloped.[195] Causation has, indeed, always been as much a normative inquiry as a scientific one.[196] This normativity allows scholars to finesse their notions of causation to suit their theories of punishment.[197] It also permits the position that causation is entirely unnecessary to determine liability and ground culpability. This position is based on the notion that it makes little sense to require actual harm to ground criminal liability; a person's bad intent coupled with requisite conduct connected to that intent (whatever harm it causes or does not cause) should be enough.[198] Causation *can* normatively be jettisoned, and it *must* be jettisoned if relational liability is to function.[199]

---

192. For example, my mere knowledge of a genocide on another continent does not make me liable for a warlord's murder of a civilian—even if I might have sponsored the civilian's visa to the United States. However, if I am a friend of the warlord, he has asked me not to sponsor a visa, and I respond favorably to his request, I may be liable because I am now in a purposive collective with the warlord and may be said to facilitate his murderous action (whether intentionally or recklessly).

193. To be sure, evidence of one's "agreement" with another, as in conspiracy law, can be fleeting and unclear, which justifiably draws the ire of critics, including me. Morrison, *Conspiracy Law's Threat*, *supra* note 37. This evidentiary problem, however, is external to the structure of relational liability, and is thus not the focus of this Article.

194. Ryu, *supra* note 112, at 775.

195. Brackett v. Peters, 11 F.3d 78, 82 (7th Cir. 1993) ("[T]he doctrine of causation is more developed [in tort law] than in criminal law.").

196. Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547, 564-65 (1988).

197. Lawrence Crocker, *A Retributive Theory of Criminal Causation*, 5 J. CONTEMP. LEGAL ISSUES 65, 66 (1994).

198. Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 30 (1994); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 686 (1994); Stephen J. Morse, *The Moral Metaphysics of Causation and Results*, 88 CALIF. L. REV. 879, 881 (2000). *But see* Jerome Hall, *Science and Reform in Criminal Law*, 100 U. PA. L. REV. 787, 800 (1952) ("Causation, another principle of criminal law, is meaningful in explanation of the relation between conduct and harm. If harm is excluded, causation becomes meaningless.").

199. To be sure, a causation requirement may serve as a proxy indicator for *mens rea*, protecting defendants against charges that are readily, but unreliably, provable. *See* Allen

Fourth, relational liability must be found in a *D*s own conduct and intent. This conservative approach maintains the law's focus on individual culpability and permits the imposition of normatively appropriate relational liability.

E. As to Omissions Law

The test for relational liability may be viewed as rejecting omissions law, pursuant to which an individual has no obligation to act to prevent the crime of another, even if the failure to act will serve the criminal endeavors of the other.[200] The test for relational liability, in fact, does not reject this, because both the test and omissions law imply no liability where *D* and *A* are not in the same purposive collective. Where *D* and *A* are in the same purposive collective, both the test and omissions law permit largely overlapping liability.

Omissions come in different forms—some are liability-grounding, some are not.[201] While it can be difficult to discern which omissions are actionable and which are not,[202] the typical approach is to ground liability for omissions where there is a legally imposed duty to act.[203] The difficulty of discerning which omissions generate liability and which do not often entails a normative question as to which legal duties to act are appropriate to impose on individuals.[204]

R. Friedman, *Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Nonracketeer Under RICO Section 1962(a)*, 82 COLUM. L. REV. 574, 574 (1982) (The "central problem" of allowing nonracketeers to be convicted under RICO is "whether such persons, whose actions in aid of investments may be blameless except for the origin of the money being invested, act with the requisite mens rea to criminalize their conduct."); George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CALIF. L. REV. 1027, 1047 (1995) (Continuing Criminal Enterprise "is defined without mens rea. . . . The predicate[] [acts] thus function . . . as a stand-in for mens rea."); Note, *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 935-36 (1959) (it would be difficult "to conceive of any crime in which the intent is less specific" than conspiracy). This is, however, an evidentiary problem and is thus external to the system of relational liability that this Article evaluates. Moreover, if relational liability did entail a causation requirement, it is difficult to see how prosecutors would be prevented from prosecuting virtually all defendants who might be relationally liable.

200. Francis Barry McCarthy, *Crimes of Omission in Pennsylvania*, 68 TEMP. L. REV. 633, 633 (1995).

201. Jacobo Dopico Gómez-Aller, *Criminal Omissions: A European Perspective*, 11 NEW CRIM. L. REV. 419, 420-21 (2008) (noting the difference between "commission by omission" and "pure omission"); Jesús-María Silva Sánchez, *Criminal Omissions: Some Relevant Distinctions*, 11 NEW CRIM. L. REV. 452, 452 (2008) (noting the difference between "simple omissions" and "inauthentic omissions," or "commission by omission").

202. Leavens, *supra* note 196, at 548-49.

203. State ex rel. Kuntz v. Mont. Thirteenth Judicial Dist. Ct., 995 P.2d 951, 955 (Mont. 2000); Commonwealth v. Pestinikas, 617 A.2d 1339, 1344 (Pa. Super. Ct. 1992); State v. Williquette, 385 N.W.2d 145, 150 (Wis. 1986); MODEL PENAL CODE § 2.01 (AM. LAW INST. 1962).

204. Leavens, *supra* note 196, at 548-49.

The test for relational liability does impose liability for a *D*'s reckless failure to act in the context of a purposive collective. Put another way, the test sometimes imposes on *D* a duty to act to prevent or mitigate *A*'s criminal conduct. By virtue of the *D* and *A*'s purposive criminal collective, this duty seems to me to be generally normatively appropriate.[205]

Imposing a duty to act suggests that a *D*'s omission can be considered a normatively inappropriate *act* that contributes to *A*'s *a*, and thus grounds liability.[206] Where there is a purposive criminal collective, such a duty is appropriate in certain circumstances. For example, if a *D* is charged with conspiracy to commit armed robbery and *A* steals a getaway car, proof of the conspiracy implies *D*'s dual and related duties: to act so as to prevent or mitigate any criminal conduct that is a reasonably foreseeable aspect of the conspiracy, and to not act for the same purpose. If *D*, then, fails to act such that the failure may facilitate the criminal conduct, and *D* does so at least recklessly, it seems normatively appropriate to impose liability on *D* for that conduct. Proof of the purposive criminal collective entails the legal duty to act such that an omission may be viewed as a liability-grounding commission.[207]

F. As to the Defense of Abandonment

It could be argued that jettisoning causation means that the defense of abandonment (also known as withdrawal[208] or renunciation[209]) is essentially nullified.[210] While this argument makes initial sense, it can ultimately be dismissed.

Abandonment is supposed to provide would-be criminals with a *locus poenitentiae*,[211] or a space for someone who has formed a criminal

---

205. If one who commits a crime owes a "debt" because of her guilt, Fletcher, *Collective Guilt*, *supra* note 6, at 168, it makes sense to impose a duty on that person to mitigate or avoid incurring increasing amounts of debt prior to punishment. Alan Norrie, furthermore, would impose liability "for an omission to an individual or individuals on the basis not of what was done, but in terms of an additional relationship giving rise to the *need* for an act." NORRIE, *supra* note 1, at 152.

206. FLETCHER, *supra* note 2, at 45 ("[T]he lack of human agency is not the problem expressed in the widespread anxiety about punishing omissions. There is agency and in this sense action in choosing nothing or choosing to do something."); HALL, PRINCIPLES, *supra* note 181, at 247 ("[W]hile, in a physical sense, an omission cannot of itself produce any external harm, nevertheless in law, as in everyday ethics, under certain conditions, personal forbearance is regarded as making use of external objects and forces.").

207. The purposive collective would thus entail a special relationship that gives rise to legal duties. *See* HUSAK, *supra* note 13, at 166 ("No one doubts that liability is just in cases involving 'special relationships,' for instance, when a parent deliberately and maliciously starves his infant to death.").

208. *See* Smith v. United States, 133 S. Ct. 714, 718 (2013).

209. *See* Thomas v. State, 708 S.W.2d 861, 863 (Tex. Crim. App.1986).

210. *See* Carroll v. State, 680 So. 2d 1065, 1066 (Fla. 3d DCA 1996).

211. Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141, 165 (2011); *DAD Notes*, 1987 ARMY LAW. 47, 48 n.21.

mens rea to reconsider, back out of completing a crime, and thereby avoid liability.[212] The argument therefore makes initial sense because the test for relational liability seems to expose *D*s to liability much earlier in their criminal endeavor than current law provides. Furthermore, the requisite *actus reus* under the test for relational liability can be quite preliminary and practically unimpactful. As such, there may be a very small *locus poenitentiae* for a *D* to form a criminal *mens rea* and then, say, withdraw from a conspiracy or abandon an attempt to aid and abet another.[213] Thus, while the test for relational liability does not formally reject abandonment, it may practically eliminate the opportunity for it to operate as intended.

This concern, however, rests on a misunderstanding of the test for relational liability as defining conduct that amounts to criminal liability, as if the test itself were a criminal law. The test in fact applies to extant crimes of relational liability. It does not redefine the elements of any crime. Rather, it makes a normative argument that some forms of relational liability are defensible, and others are not. With no elemental redefinition, the space for *locus poenitentiae* remains unaltered.

Furthermore, just as the test for relational liability does not redefine elements of crimes, it also does not abrogate statutes providing for abandonment. Laws like those in Minnesota,[214] Pennsylvania,[215] and others[216] provide detailed prescriptions governing the defense. These laws protect defendants more than the test for relational liability would and, in any event, these statutes are legally in force, whereas the test for relational liability merely defines the furthest normatively

212. Robert Batey, Minority Report *and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689, 694 (2004).

213. Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 343 n.83 (1980) ("To say that a locus poenitentiae should be provided is to say that a defendant should have a chance to change his mind if he is going to. Thus, the purpose of a locus poenitentiae is to provide yet another means to ensure to the extent feasible that the defendant is in fact embarked on a path of criminality from which he most likely will not stray.").

214. MINN. STAT. § 609.05, Subdiv. 3 (2017) ("A person who intentionally aids, advises, hires, counsels, or conspires with or otherwise procures another to commit a crime and thereafter abandons that purpose and makes a reasonable effort to prevent the commission of the crime prior to its commission is not liable if the crime is thereafter committed.").

215. 18 PA. CONS. STAT. § 903(f) (2017) ("Renunciation.—It is a defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal intent.").

216. HAW. REV. STAT. § 705-525 (2016); N.J. STAT. ANN. 2C:5-2(2)(f) (West 2016).

defensible extent of criminal liability in the relational context. Abandonment and the test for relational liability are therefore of different natures and are not mutually exclusive.[217]

IV. TESTING THE STRUCTURE OF RELATIONAL CRIMINAL LIABILITY

The structure of relational liability is comprised of many substantive crimes and theories of liability,[218] all of which are determined by four variables. First, this liability may be based in *D*'s assistance or anticipation of *A*'s *a*. Second, *D* may be charged or uncharged with the substantive crime in question. Third, the crime may be realized or unrealized. Fourth, *D*'s liability may be based on a simple theory or multiple theories compounded together.[219] Six categories of relational liability prevail in the case law.

A. Actor-Causer

"Actor-causer" liability inheres where *D* acts, and thereby causes *a*. Actor-causer liability therefore includes direct, non-relational liability,[220] but it also includes two other, more relational crimes: "kingpin" liability under CCE and *D*'s liability for conspiracy where *D* was a conspirator.

A CCE kingpin conviction requires proof that a *D* (1) supervised or organized five or more people, (2) committed a narcotics felony that was part of a series of such felonies, and (3) thereby obtained substantial income or resources.[221] While kingpin liability resides in a relational context because it is based on a purposive collective including *D* and others, the liability itself is not relational because it depends only on what the *D* intended, did, and caused. In other words, kingpin liability requires proof of a relationship with others, but the core elements of the crime look only to the individual *D*'s *mens rea*, *actus reus*, and causation.

---

217. While I implicitly argue that legislatures should apply the test for relational liability by repealing some relational liability crimes, I am not arguing—at least in this article—that the test is one of constitutional magnitude that should compel legislatures or courts to act.

218. Aiding and abetting offers a good illustration of the difference between "crime" and "theory of liability." *D* may be charged with the substantive *crime* of aiding and abetting under 18 U.S.C. § 2 (1951). *D* may also be charged with the crime of murder, which an *A* committed, where the *theory of liability* is that *D* aided and abetted *A* in the murder.

219. I do not include felony murder in this list, because, while it ought to be subject to the test for relational criminal liability, where appropriate, it is a highly complex system of law itself, not least because it can be committed by one person alone, or vicariously through another. *See Guyora Binder, Felony Murder in* CRITICAL PERSPECTIVES ON CRIME AND LAW 18, 22 (Markus D. Dubber ed., 2012).

220. As, for example, when *D* is charged with armed robbery because *D* entered a convenience store, held a gun to the clerk, and demanded and absconded with money.

221. 21 U.S.C. § 848 (2006).

Along with most crimes that entail *D*'s *mens rea*, *actus reus*, and causation, CCE "kingpin" liability is similarly justified. While CCE entails collective action, kingpin liability is premised upon *D*'s own intentional commission of a narcotics felony.[222] The collective is relevant only to provide an aggravating character to the defendant's conduct.

In addition to CCE liability, *D* may be liable for a conspiracy she engages in with *A* to commit *a*, as well as *a* itself where *D* committed *a*.[223] Despite critiques of conspiracy liability, which are aimed mostly at externalities,[224] these conspiracy charges are justified because proof of conspiracy liability is based solely on a *D*'s *mens rea* (intent to conspire), *actus reus* (agreement with another to conspire), and causation (because *D*'s intentional act in agreeing is a *sine qua non*, or but-for cause, of the conspiracy).[225] The only relational aspect is that a co-conspirator must also agree to the conspiracy. And, in fact, the requirement that two people agree is not universal. In New York, for example, a single person may "conspire" with an undercover government agent who, of course, has no intention to commit any crime.[226]

B. Charged Assistor—Realized

"Charged assistor—realized" liability attaches when *D* is charged with assisting another in committing a crime that the other in fact committed. This liability includes four crimes. First, *D* may be charged with aiding and abetting *A* in *A*'s plan to commit *a*.[227] Second, *D* may be charged with *a* as a co-conspirator, where the goal of the conspiracy

222. *Id.*

223. For example, one can be convicted of conspiracy to import marijuana as well as importation of marijuana. United States v. Cannington, 729 F.2d 702, 705, 713 (11th Cir. 1984).

224. These critiques mostly look to conspiracy law's vagueness, its evidentiary problems, its political nature, or the strategic purposes to which prosecutors put such charges. Krulewitch v. United States, 336 U.S. 440, 447-48 (1949) (Jackson, J., concurring); David B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189 (1972); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1 (1992); Bernard D. Meltzer, *Robert H. Jackson: Nuremberg's Architect and Advocate*, 68 ALB. L. REV. 55, 57 (2004); Morrison, *supra* note 37; Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 82 (2005); Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922).

225. *But see* Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137 (1973), for what may be the best critique of substantive conspiracy law.

226. *See* N.Y. PENAL LAW § 105.30 (MCKINNEY 2016).

227. As, for example, where *A* plans to purchase drugs for resale, and *D* drives *A* to meet a known drug dealer with the intent of helping *A* to purchase drugs.

is *a* and *A* commits *a*.[228] Third, *D* may be charged with being an accessory after the fact to *A*, who committed *a*.[229] Fourth, *D* may be charged with aiding and abetting a CCE kingpin.[230]

As an initial matter, each of these crimes carries a *mens rea* of intent and *actus reus* of facilitation, so can be justified.[231] The reality, however, may be less clear.

Aiding and abetting has been subject to different interpretations. For example, the Second Circuit at one time took three divergent positions on aiding and abetting.[232] And it was as late as 2014 that the United States Supreme Court defined the requisite *actus reus* and *mens rea* for proof of aiding and abetting the use of a firearm during a drug crime under 18 U.S.C. § 924(c).[233] In *Rosemond v. United States*, the Court considered a *D*'s conviction for aiding and abetting an *A*'s use or carrying of a firearm during a drug offense.[234] The Court held that the *D*'s participation in the drug transaction as the *actus reus*[235] and knowledge that his confederate would carry a gun as the *mens rea*[236] were sufficient to ground aiding and abetting liability. Even with this clarification, Justice Alito, concurring in part and dissenting in part, noted that tension remains in Supreme Court jurisprudence regarding the *mens rea* requirement.[237] One thread, Justice Alito noted, requires purpose or intent, and another thread requires mere knowledge.[238] The *Rosemond* Court left the *mens rea* of recklessness unaddressed, leaving a large unexplored gap between the extreme

228. As, for example, where *D* and *A* conspire to purchase drugs for resale, and *D* provides *A* with the name of a known drug dealer, and *A* sets up and makes the purchase from the dealer.

229. As, for example, where *A* purchases drugs for resale, and after the sale *D* hides the drugs for *A*'s protection and convenience.

230. As, for example, where *D* is a major drug dealer and provides drugs to a CCE kingpin. United States v. Pino-Perez, 870 F.2d 1230, 1232 (7th Cir. 1989).

231. 18 U.S.C. §§ 2 (1951), 3 (1994), 371 (1994).

232. One version allowed for liability if the defendant was merely aware that a crime would take place; it did not matter whether the defendant facilitated or encouraged it. United States v. Medina, 32 F.3d 40, 46 (2d Cir. 1994) (Citing caselaw for the proposition that "a defendant aids and abets a violation of § 924(c) by planning a crime of violence with the knowledge that a firearm will be used, regardless of whether the defendant committed any act to facilitate or encourage the use of a firearm in relation to the underlying crime." (citations omitted)). Another version required the defendant to perform some affirmative act relating to the crime aided and abetted. United States v. Giraldo, 80 F.3d 667, 676 (2d Cir. 1996). And a third version entailed liability on a theory of constructive possession (where the crime was possession of a firearm). United States v. Pimentel, 83 F.3d 55, 58-60 (2d Cir. 1996).

233. Rosemond v. United States, 134 S. Ct. 1240, 1247-48 (2014).

234. *Id.* at 1243.

235. *Id.* at 1247.

236. *Id.* at 1249.

237. *Id.* at 1253 (Alito, J., concurring in part and dissenting in part).

238. *Id.*

mens reas of intent and knowledge. To the extent that aiding and abetting liability is premised on less than recklessness, it is not justified.

Aiders and abettors are also subject to liability as principals, exposing them to the same sentences as the *A*'s who actually performed *a*. This suggests Yaffe's concern regarding substantive liability and also presents comparative and absolute retributivist justice questions. These questions are particularly poignant when the charge is aiding and abetting a CCE kingpin, which can lead to an aider and abettor being charged as an organization leader,[239] where actual members of the CCE are treated more leniently.[240]

Co-conspirator liability may entail the same asymmetric authority relationship, undermining its retributivist justifiability.[241] Asymmetric authority relationships (those characterized by unequal power among individuals) do not, however, negate intent—even the most impressionable co-conspirator must be shown to have intended to conspire and to commit the crime envisioned by the conspiracy, and to have actually conspired.[242]

The existence of asymmetric authority relations should not, furthermore, mean that the law should impose a regime of scaled culpability, in which all aiders and abettors and co-conspirators are *per se*

---

239. There is a circuit split as to this question. United States v. Pierson, 53 F.3d 62, 64 (4th Cir. 1995) (expressing doubt regarding kingpin liability for aiding and abetting); United States v. Miskinis, 966 F.2d 1263, 1267-68 (9th Cir. 1992) (embracing liability); United States v. Pino-Perez, 870 F.2d 1230, 1231 (7th Cir. 1989) (embracing liability, but highlighting the significant circuit split as to this question).

240. *Pino-Perez*, 870 F.2d at 1231-32, 1236. Congress addressed this problem as to accessory after the fact, which set forth in statute that an accessory can receive a sentence of only half the maximum term of imprisonment that the principal receives. 18 U.S.C. § 3 (1994). But the difference between aiding and abetting and accessory after the fact makes sense for two reasons. First, accessories could not have prevented and did not contribute to the principal's crime, whereas aiders and abettors might have prevented and played causal roles in the crime. Second, aiders and abettors are not invariably less culpable than principal actors. Some aiders and abettors play such a causal role that their culpability is equal to or greater than that of principals. *See Pino-Perez*, 870 F.2d at 1232 (aider and abettor was a bigger drug dealer than the person he aided and abetted); Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85, 86 (2005). In contrast, it seems unlikely that an accessory could contribute equally to the principal's crime, already committed, or would have any incentive to take advantage of a principal.

241. Michael Bratman, one of the philosophers relied upon in Part III, explicitly supports co-conspirator liability, but only where all co-conspirators are equal participants. BRATMAN, *supra* note 115, at 63, 85 (putting aside conditions involving "asymmetric authority relations").

242. United States v. Araujo, 310 F. App'x 21, 22-24 (7th Cir. 2009) (A drug conspiracy defendant argued that his father was the supervisor of the conspiracy, and that the defendant was "an impressionable young man—in his early twenties at the time—unduly influenced by his father to enter the conspiracy." The district court nevertheless found that the defendant was an "integral" part of the conspiracy and gave no downward sentencing departure. The Seventh Circuit affirmed.).

less culpable than their fellows who actually commit *a*. While committing an act may entail greater moral culpability than merely assisting the act,[243] it is also true that some aiders and abettors and co-conspirators are *more* culpable than those who actually commit *a*.[244] Regimes of scaled culpability would prevent judges from taking this into account. Retributivist justice, in the end, is not served either by mandating equal liability or scaled liability, but rather by judicial discretion in sentencing.[245] And that, if anything, is a problem external to the structure of relational liability.[246]

C. Uncharged Assistor—Realized

"Uncharged assistor—realized" liability refers to a *D* who assists an *A* in committing a crime that *A* in fact commits, but where *D* is not formally charged with assisting it. This classification includes liability where *D* is said to be liable for *A*'s doing *a* under a theory of aiding and abetting or conspiracy, but where *D* was not formally charged with aiding and abetting or conspiracy.[247] For example, in one case a defendant was charged with and convicted of drunk driving.[248] However, she neither actually drove drunk nor was charged with aiding and abetting another in driving drunk.[249] Instead, the implicit theory of aiding and abetting enabled her conviction.[250]

Using aiding and abetting and conspiracy as *theories* of liability, rather than as *formal charges* whose proof will ground liability, makes no difference in terms of internal justifiability. All other things being

243. Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 433 (2008).

244. Kurland, *supra* note 240, at 86.

245. To be sure, discretion is far from sufficient to ensure justice, since although it allows for individualized sentences, it also entails dynamic and normatively unacceptable disparities, Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 539 (2002), has been blamed for the failure of at least one juvenile justice system, Carrie T. Hollister, *The Impossible Predicament of Gina Grant*, 44 UCLA L. REV. 913, 924 (1997), and has been referred to as lawless, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (Hill and Wang New York 1972).

246. Discussed *infra*, Part V.

247. In *United States v. Thirion*, the defendant was charged with multiple fraud counts and conspiracy, and was extradited from Monaco. United States v. Thirion, 813 F.2d 146, 149-50 (8th Cir. 1987). Pursuant to the extradition agreement, the defendant could not be tried for conspiracy. *Id.* at 151. The district court did not dismiss the conspiracy count, but instructed the jury that it could not return a verdict on that count. *Id.* Nevertheless, the court noted that conspiracy and aiding and abetting, even where not charged, can be bases for substantive liability. *Id.* at 151-52.

248. State v. Byrd, 1986 WL 8850, at *1 (Tenn. Crim. App. Aug. 15, 1986).

249. *Id.* at *1.

250. *Id.* at *2; *accord* Williams v. State, 352 S.W.2d 230 (Tenn. 1961).

equal, the mechanism for determining liability doesn't matter.[251] All that matters is that the *D* acted with the requisite recklessness in support of *A*'s conduct.

To be sure, there are external procedural and constitutional problems with basing liability on uncharged theories. First, basing liability on an uncharged theory may violate a defendant's due process right to fair notice.[252] Second, double jeopardy and collateral estoppel issues emerge.

As to fair notice, courts usually hold that the failure to formally charge a theory of liability entails no due process violation,[253] in part because courts find that theories like aiding and abetting are always implicitly attached to every substantive count.[254] But this seems practically inaccurate. *Wright v. State*, [255] a 1985 Nevada case, shows why. In that case, the defendant was arrested with two associates for robbing a casino in Las Vegas.[256] The defendant was ultimately convicted of robbery with the use of a deadly weapon.[257] Early in the trial, the State's evidence was that the defendant himself carried the weapon.[258] Well into the trial, however, one of the arrestees testified for the State that the defendant was outside in the car during the robbery and was not aware of the robbery until later.[259] It was only during the closing argument that the prosecution adopted an aiding and abetting theory, arguing that the defendant was not in the casino during the robbery. The jury was then instructed on aiding and abetting.[260] The Nevada Supreme Court reversed, holding that the defendant's right to notice of the aiding and abetting theory was violated. Indeed, Nevada is an exception in requiring that such a theory be alleged in the indictment.[261]

---

251. In *Nye & Nissen v. United States*, the Supreme Court held that one could be charged with a substantive offense, but convicted on either a conspiracy / *Pinkerton* or aiding and abetting theory. Nye & Nissen v. United States, 336 U.S. 613, 618-20 (1949).

252. United States v. Lombardi, 138 F.3d 559, 561 (5th Cir. 1998).

253. United States v. Wrobel, 7 F. App'x. 723, 726 (9th Cir. 2001); State v. DeVerney, 592 N.W.2d 837, 846 (Minn. 1999).

254. United States v. Foreman, 87 F. App'x 107, 110-11 (10th Cir. 2004); United States v. Walker, 621 F.2d 163, 166 (5th Cir. 1980); United States v. White, No. 13-CR-10 JED, 2015 WL 1809686, at *3 (N.D. Okla. Apr. 21, 2015).

255. 701 P.2d 743 (Nev. 1985).

256. *Id.* at 743.

257. *Id.*

258. *Id.*

259. *Id.* at 743-44.

260. *Id.* at 744.

261. *Id.* at 745 (holding that the indictment should provide other information "as to the specific acts on constituting the means of the aiding and abetting so as to afford the defendant adequate notice to prepare his defense").

Double jeopardy[262] and collateral estoppel issues[263] may arise when aiding and abetting is charged as a crime, or is used as a theory of liability for another crime.[264]

As to double jeopardy, assume that the defendant in *Wright* was acquitted of armed robbery as a principal, despite the prosecution arguing the aiding and abetting theory late in the trial. By arguing aiding and abetting as a theory, rather than formally charging it, the prosecution would be able to charge the defendant in a later case for the *crime* of aiding and abetting.[265]

As to collateral estoppel, assume that the prosecution explicitly advanced a principle liability argument and that the implicit aiding and abetting theory was inherent. If the jury found the defendant not guilty, the prosecution would be precluded from relitigating the issue of whether the defendant was the principal in the armed robbery. It is not clear, however, that the prosecution would be barred from later charging the substantive crime of aiding and abetting.[266]

D. Charged Anticipator

"Charged anticipator" liability arises when a *D* could have anticipated *A*'s commission of a crime and is charged with a crime that connects the *D* to the *A*. This classification includes four theories of liability: *Pinkerton* liability where conspiracy,[267] CCE,[268] or RICO conspiracy[269] are charged, and liability for the natural and probable consequences of a conspiracy.[270] These theories entail a *D* who is charged in

---

262. *See* United States v. Rivera-Martinez, 931 F.2d 148, 154 (1st Cir. 1991).

263. United States v. Kalish, 780 F.2d 506, 508 (5th Cir. 1986).

264. United States v. Zackery, 494 F.3d 644, 649 (8th Cir. 2007).

265. Double jeopardy prevents retrial for the same charge, not for a different charge based on the same evidence. Grady v. Corbin, 495 U.S. 508, 521 (1990); *see also* United States v. McCall, 298 Fed. App'x 591, 593-94 (9th Cir. 2008) (where jury in a first trial received instructions on co-conspirator and aiding and abetting liability, and prosecution failed to prove conspiracy liability, double jeopardy did not bar retrial on aiding and abetting theory); Ottomano v. United States, 468 F.2d 269, 271-72 (1st Cir. 1972) (no double jeopardy violation where *D* was acquitted of conspiracy to sell cocaine, and later charged with and convicted of selling cocaine on an aiding and abetting theory).

266. Christian v. Wellington, 739 F.3d 294, 300 (6th Cir. 2014); *see also* United States v. Kendrick, 98 Fed. App'x 692, 694 (9th Cir. 2004) ("[C]onspiracy and aiding and abetting are separate and distinct offenses, and an acquittal by general verdict on the conspiracy charge does not generally preclude retrial on an aiding-and-abetting charge."); United States v. Nelson, 599 F.2d 714, 716 (5th Cir. 1979) ("[T]he double jeopardy clause does not preclude prosecution for aiding and abetting a substantive offense subsequent to an acquittal on a charge of conspiracy to commit that offense.").

267. United States v. Meester, 762 F.2d 867, 873, 877 (11th Cir. 1985).

268. United States v. Michel, 588 F.2d 986, 999 (5th Cir. 1979).

269. United States v. Campione, 942 F.2d 429, 437 (7th Cir. 1991).

270. Wesley M. Oliver, *Limiting Criminal Law's "In for a Penny, in for a Pound" Doctrine*, 103 GEO. L.J. ONLINE 8, 9 (2013).

a joint criminal plan with *A*, where *A* commits *a*, which is not a goal of the joint plan but could have been anticipated by *D*.

The *Pinkerton* doctrine imposes liability on *D* for the conduct of coconspirator *A* where that conduct is reasonably foreseeable and in furtherance of the conspiracy.[271] The natural and probable consequences test imposes the same liability where *A*'s *a* is a natural and probable consequence of the joint criminal plan. These doctrines have been equated to each other[272] and are subject to the same analysis, and so I treat them interchangeably.

These theories are criticized for imposing liability based on another's criminal intent.[273] But this is not necessarily so, since any agreement to commit *a* entails an implicit agreement to engage in conduct necessary to commit *a*.[274] For example, if *D* and *A* agree to commit armed robbery of a bank, it seems uncontroversial that *D* should be liable for the armed robbery that *A* commits, but also for *A*'s illegal purchase of weapons, and probably also for *A*'s theft of a getaway car.

The critics of these doctrines respond not to the doctrines themselves, but to the virtually limitless extent of their application.[275] Where, however, the application of these doctrines is appropriately cabined, they appear quite justifiable. For example, the Ninth Circuit has held that *Pinkerton* liability does not reach defendants who play extremely minor roles in conspiracies.[276] The Connecticut Supreme Court has found that *Pinkerton* does not apply where the nexus between the conduct in question and defendant is sufficiently remote.[277] And the Second Circuit has held that *Pinkerton*'s application in district court is entirely discretionary.[278]

---

271. United States v. Swiney, 203 F.3d 397, 401 (6th Cir. 2000).

272. Wilson-Bey v. United States, 903 A.2d 818, 835 (D.C. 2006).

273. Kimberly R. Bird, *The Natural and Probable Consequences Doctrine: "Your Acts Are My Acts!,"* 34 W. ST. U. L. REV. 43, 43 (2006); Matthew A. Pauley, *The* Pinkerton *Doctrine and Murder*, 4 PIERCE L. REV. 1, 3 (2005).

274. The philosophers referred to in Part III recognize this. Bratman argues for joint planning agency not only for conduct agreed to by two or more people, but also for meshing "sub-plans." BRATMAN, *supra* note 17, at 53. Margaret Gilbert finds that joint commitment entails an "obligation" to act "as appropriate to the shared intention in conjunction" with one's cohorts. This means that each person is obliged to form "personal intentions that mesh appropriately with those of the other party or parties." GILBERT, *supra* note 11, at 108-09.

275. United States v. McClain, 934 F.2d 822, 826-27 (7th Cir. 1991) ("When application of coconspirator liability is straightforward, a simple Pinkerton instruction may suffice. But as the proof of Pinkerton liability becomes more complex, the instruction must provide a higher degree of specificity . . . ." (citation omitted)). This is despite a purported due process limit on imposing liability for attenuated conduct. United States v. Alvarez, 755 F.2d 830, 850 (11th Cir. 1985).

276. United States v. Bingham, 653 F.3d 983, 997 (9th Cir. 2011).

277. State v. Apodaca, 33 A.3d 224, 235 (Conn. 2012); State v. Coltherst, 820 A.2d 1024, 1036 (Conn. 2003).

278. United States v. Blackmon, 839 F.2d 900, 910 (2d Cir. 1988).

Pinkerton and natural and probable consequences theories are not always justifiable, however, because they leave open the possibility that a *D* could be liable for negligently acting, or failing to act, to facilitate another's criminal conduct—not recklessly acting, as the test for relational liability requires.

This is a possibility because these bases of liability do not clearly require any specific *mens rea* or *actus reus*. If negligence is defined around that which is reasonable, then *Pinkerton* suggests a negligence *mens rea*. But reasonableness language imports a negligence standard if the foreseeability is objective and may import a recklessness standard if the foreseeability is subjective to the *D*.

Furthermore, *Pinkerton* and natural and probable consequences require no *actus reus* requirement. Instead, they presume that all members of a collective are responsible for certain conduct of other members, regardless whether the liable member facilitated the conduct or otherwise acted.

Pinkerton and natural and probable consequences make it possible for a *D* to be liable where she was negligent and did not act in relation to *a* at all. In such cases, relational liability is unjustified. Where, however, the theories require at least reckless facilitation, they are defensible.

E. Uncharged Anticipator

"Uncharged anticipator" liability inheres where a *D* could have anticipated *A*'s commission of a crime that *A* in fact committed, but *D* is not charged with a crime that connects *D* to *A*. This classification includes four theories of crime: *Pinkerton* liability where no conspiracy is charged,[279] co-conspirator liability where no conspiracy is charged,[280] vicarious responsibility,[281] and co-schemer theory.[282]

For example, both *Pinkerton* and co-conspirator liability may attach where the trier of fact finds that a conspiracy involving *D* and *A*

279. As, for example, where a *D* pleads guilty to attempted bank robbery and is convicted of using a firearm in furtherance of a violent crime, under *Pinkerton*, based on evidence that the *A*, not the *D*, used the firearm, even though conspiracy was not charged in the indictment. United States v. Zackery, 494 F.3d 644, 645-46, 648 (8th Cir. 2007).

280. Nickson v. Pliler, 400 Fed. App'x 209, 210 (9th Cir. 2010) ("It is long and firmly established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator." (quoting People v. Belmontes, 755 P.2d 310, 334 (Cal. 1988))).

281. Ferguson v. Estelle, 718 F.2d 730, 735-36 (5th Cir. 1983) (The "shared purpose to achieve jointly held illegal aims is the common thread among the diverse doctrines of vicarious criminal responsibility.").

282. United States v. Tarallo, 380 F.3d 1174, 1184 (9th Cir. 2004) ("Under 'coschemer liability,' a defendant who commits mail fraud is vicariously liable for all the acts of his coschemers in furtherance of the scheme, if the acts were reasonably foreseeable to the defendant." (citing United States v. Stapleton, 293 F.3d 1111, 1116-17 (9th Cir. 2002))).

existed, whether or not a conspiracy was formally charged.[283] Both of these forms of liability are internally justifiable for the same reason that *uncharged assistor—realized* liability is justifiable: because the inherent culpability of the *D* does not depend on the mechanism for determining liability. Of course, with this same internal justifiability come the same procedural and constitutional problems.

Theories of "vicarious responsibility"[284] and "co-schemer" theory[285] appear to be less justifiable. Vicarious responsibility expands upon *Pinkerton* by maintaining the "in furtherance" requirement but dropping the "reasonable foreseeability" requirement.[286] This explicitly jettisons any *mens rea* requirement, thus violating the test for relational liability. "Co-schemer" theory may be closely related in relevant parts to *Pinkerton* liability,[287] but it has also been treated as true guilt by association, with no requisite *actus reus* or *mens rea* on the part of the *D*.[288] It has also been used as a catch-all theory of liability, applicable where conspiracy liability may fail.[289] Co-schemer theory is, therefore, defensible only if it tracks recklessness-based *Pinkerton* liability.

F. Charged Assistor—Unrealized

"Charged assistor—unrealized" liability attaches to a *D* who is charged with a crime that connects her to *A*, where *A*'s alleged crime is not charged or where *A* has been acquitted. This classification includes aiding and abetting liability where the crime aided and abetted

283. *Zackery*, 494 F.3d at 646; United States v. Rubenacker, 39 M.J. 970, 971-72 (A.F.C.M.R. 1994).

284. United States v. Bernard, 287 F.2d 715, 719 (7th Cir. 1961) (imposing liability on "all joint venturers for all acts done and statements made in furtherance of the object of the joint scheme or undertaking").

285. United States v. Stapleton, 293 F.3d 1111, 1114-15 (9th Cir. 2002); Baker v. United States, 115 F.2d 533, 540 (8th Cir. 1940) ("The evidence conclusively shows that [the defendant] was a party to the scheme and even though a conspiracy is not charged, yet when such a scheme is clearly participated in by more than one individual, it constitutes in and of itself a conspiracy.").

286. *Bernard*, 287 F.2d at 719.

287. *Stapleton*, 293 F.3d at 1115.

288. *Baker*, 115 F.2d at 540.

289. Reuben v. United States, 86 F.2d 464, 468-69 (7th Cir. 1936) ("The defendants are not charged in the indictment with violation of the conspiracy statute, but they are charged in apt terms with a unity of purpose and action in the alleged scheme to defraud and the use of the mails. . . . One or more persons can originate and carry out a scheme to defraud and any number of persons can operate the plan, each doing his part after the machinery is put in motion; and it would be of no consequence that each and all did not actively participate in the several acts of mailing if each were aiding and advising in the furtherance of the scheme. While defendants were not charged with or tried for the specific offense of conspiracy, the charges and proof herein very strongly supported many of the elements of conspiracy, such as the asserted common scheme, the harmony of the actors, and their concert of action.").

is not charged or is acquitted[290] and conspiracy liability where the crime envisioned by the conspiracy is not charged or is acquitted.[291]

The justificatory basis for these theories is that each *D* is liable for her own intent and conduct, whether or not the *a* envisioned came to be.[292] This makes sense where a *D* is charged with aiding and abetting *A*, since the *D* is charged based on her own intent to assist and conduct of assisting.

This theory also supports *D*'s conspiracy liability where *A* is not charged with conspiracy but the trier-of-fact finds that such a conspiracy existed. Where an *A* is not charged with a crime, but *D* is charged with aiding and abetting *A* or conspiring with *A*, legitimate exercises in prosecutorial discretion may be at work. For example, *A* may be cooperating with law enforcement officials. Or *A* may have never completed any envisioned criminal act, but *D*'s intent to assist *A* made *D* much more culpable than *A*.

Less justifiable would be *D*'s conviction for conspiracy in jurisdictions that require two or more people to commit conspiracy[293] and *D*'s sole alleged co-conspirator has been acquitted of conspiracy. In such cases the trier-of-fact would have found that the prosecution failed to prove an agreement beyond a reasonable doubt, which is, in these jurisdictions, an element of conspiracy.[294] With insufficient proof of a bilateral agreement should come an acquittal for conspiracy.

It might, however, make sense to charge a *D*—and no one else—with conspiracy in jurisdictions that permit a one-person conspiracy.[295] It might also make sense that in jurisdictions that require two or more people to commit conspiracy, only one person could be charged (again,

---

290. Lugo v. United States, No. 09-cv-00696-NG, 2014 WL 7140456, at *7 (E.D.N.Y. Dec. 12, 2014) (defendant was convicted of aiding and abetting his brother's crime, even though his brother was acquitted).

291. United States v. Thomas, 900 F.2d 37, 40 (4th Cir. 1990) (The defendant's conspiracy conviction was affirmed, even though his sole alleged co-conspirator was acquitted. The court rejected the inconsistent verdict claim, observing, "[e]nough evidence exists of a conspiracy between [the defendants] to uphold the jury's verdict . . . .").

292. United States v. Standefer, No. 78-1909, 1979 WL 4863, at *2-3 (3d Cir. Feb. 9, 1979) ("It is not necessary that the actual principal be tried or convicted, *nor is it material that the actual principal has been acquitted . . . . Each participant in an illegal venture is required to 'stand on his own two feet.'* ").

293. As 18 U.S.C. § 371 (1994) requires. In contrast, in New York one person may commit the crime of conspiracy. There is no required meeting of the minds with a second conspirator. N.Y. PENAL LAW § 105.30 (MCKINNEY 2017).

294. Such liability would also contradict the philosophers' opinion that collective responsibility requires joint commitment. BRATMAN, *supra* note 17, at 50; GILBERT, *supra* note 11, at 89. The contrary argument is raised by Christopher Kutz, who might base relational liability on an individual's "*participatory intention*," which is housed in the individual as "an intention to act as part of a group." KUTZ, *supra* note 18, at 67.

295. *See* N.Y. PENAL CODE § 105.30 (MCKINNEY 2017).

based on prosecutorial discretion or relative culpability). The normative boundaries of these charges will depend upon one's epistemic interpretation of a jury acquittal and failure to charge. If an acquittal or failure to charge means that an *A did not commit* the conspiracy in question, then a *D* who is said to be in a conspiracy with that *A* cannot, by definition, be in a conspiracy. But if an acquittal means that the conspiracy charge against *A was not proven*, there may space for a jury nevertheless to hold *D* responsible for conspiracy.

G. Compound

"Compound" liability attaches to a *D* through the applied combination of two or more theories of liability. Many of the theories of liability discussed above have been combined to produce four types of compound liability.

First, a *D* who aids and abets a conspiracy may be treated as a co-conspirator for any subsequent *Pinkerton* liability.[296] In one case, for example, *D* aided and abetted *A*'s substantive drug charges.[297] *A* was part of a drug conspiracy.[298] *D*'s jury received a *Pinkerton* instruction, allowing *D* to be found guilty for the substantive acts of the conspiracy through *Pinkerton*, even though *D* was never found to be a part of the conspiracy.[299] This combination is indefensible from theoretical, retributivist, and procedural standpoints.[300]

Theoretically, while the *D* may be liable for the conspiracy itself because she aided and abetted it, she should not be liable for conduct arising from the conspiracy. This is so because *Pinkerton* and natural and probable consequences should assume that the crime in question

296. United States v. Vazquez-Castro, 640 F.3d 19, 25 (1st Cir. 2011) (defendant charged with conspiracy on an aiding and abetting theory, found guilty of a substantive charge on a *Pinkerton* theory); United States v. Labbous Nos. 94-6169, 94-6181, 1996 WL 166691, at *4 (6th Cir. Apr. 8, 1996) ("A *Pinkerton* charge, that all members of a conspiracy are responsible for acts committed by the other members, is appropriate even when the Defendant is charged with aiding and abetting."); United States v. Gonzalez, 933 F.2d 417, 446 (7th Cir. 1991) ("Even if a jury had found only that [the defendant] 'aided or abetted' the conspiracy, there is nothing that would have prevented it from also determining that [he] aided or abetted the substantive crimes of his co-conspirators."); United States v. Galiffa, 734 F.2d 306, 309-10 (7th Cir. 1984). *But see Gonzales*, 933 F.2d, at 445.

297. United States v. Comeaux, 955 F.2d 586, 591 (8th Cir. 1992).

298. *Id.* at 588.

299. *Id.* at 591; *see also* United States v. Jarvis, 335 Fed. App'x 845, 847 (11th Cir. 2009) (A defendant who aids and abets a conspiracy is "criminally responsible for the [conspiracy] to the same extent as the person who he assisted.").

300. *See* United States v. Miller, 552 F. Supp. 827, 830 (N.D. Ill. 1982) ("When aiding and abetting principles are combined with those of conspiracy, the law approaches the outer limits of culpability based upon complicity.").

was reasonably foreseeable *to a conspirator*,[301] who is presumed—by virtue of her status as a conspirator—to have a requisite level of knowledge regarding the conspiracy and its likely products such that she can be said to intend, know of, and facilitate, or act recklessly in regard to those consequences by participating in the conspiracy. The same presumption should not be applied to non-conspirators—even if they aid and abet the conspiracy.

This outcome also fails to satisfy retributivist principles. The test for relational liability limits the applicability of *Pinkerton* and natural and probable consequences to those *D*'s who themselves act or fail to act in relation to a crime. A *D* who aids and abets a conspiracy acts in relation to the crime of conspiracy, but not to any other conduct resulting from the conspiracy. This theory, therefore, holds that *D* is liable for an act that *D* did not intend or cause, and whose action vis-à-vis the crime is quite attenuated.[302]

This result is also procedurally problematic. The law appears to permit *Pinkerton* liability to stand in where evidence supporting an aiding and abetting conviction is absent.[303] This is possible because *Pinkerton* and aiding and abetting are *theories* of liability that may or may not be formally charged in an indictment. Therefore, a *D* who is charged under a conspiracy / *Pinkerton* theory that the jury does not adopt may still be convicted under an aiding and abetting theory. In turn, a *D* who is charged under an aiding and abetting theory (either as a theory or as a substantive crime) that the jury does not adopt may still be convicted under a conspiracy / *Pinkerton* theory.[304]

---

301. United States v. Fonseca-Caro, 114 F.3d 906, 907 (9th Cir. 1997) (Under *Pinkerton*, "a co-conspirator is vicariously liable for reasonably foreseeable substantive crimes committed by a co-conspirator in furtherance of the conspiracy.").

302. One can be charged with aiding and abetting the *formation* of a conspiracy, even before the conspiracy exists. United States v. Portac, Inc., 869 F.2d 1288, 1291-93 (9th Cir. 1989); United States v. Ammons, 682 F. Supp. 1332, 1339 (W.D.N.C. 1988). One can also aid and abet conduct that counts as predicate acts for a RICO conspiracy, and thereby be convicted of the conspiracy itself. United States v. Rastelli, 870 F.2d 822, 832 (2d Cir. 1989). The same goes for aiding and abetting crimes that are predicates for a CCE conviction. United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992); United States v. Aiello, 864 F.2d 257, 259 (2d Cir. 1988); *see also* State v. Coltherst, 820 A.2d 1024, 1036 (Conn. 2003); GILBERT, *supra* note 11, at 80 ("[A]ny steps directed against a blameworthy collective must be taken with extreme caution, on pain of harming numerous individuals who have little or nothing to answer for in connection with that collective's action."); KUTZ, *supra* note 117, at 221.

303. United States v. Myrie, 479 Fed. App'x 898, 903 (11th Cir. 2012); United States v. Zackery, 494 F.3d 644, 649 (8th Cir. 2007).

304. *Zackery*, 494 F.3d at 649; People v. Robinson, 715 N.W.2d 44, 48-50 (Mich. 2006); People v. Moreno, No. B144016, 2002 WL 31045375, at *6 (Cal. Ct. App. Sept. 13, 2002). In *Commonwealth v. DeCillis*, the defendant was acquitted of conspiracy to destroy a state police building. He was then charged with the substantive crime of destroying the building. The Commonwealth planned to use the very same evidence as it had during the conspiracy trial, but proceed on a joint venture theory, since it "had insufficient evidence as to which of the participants actually broke the window and placed the bomb inside" of the building. Commonwealth v. DeCillis, 669 N.E.2d 1087, 1088 (Mass. App. Ct. 1996). The appellate court

The second theory entails liability for the substantive offense envisioned by a conspiracy (and not other reasonably expected but unintended criminal conduct, subject to a *Pinkerton* analysis) where the *D* merely aided and abetted the conspiracy (and was not a co-conspirator).[305] This theory is defensible because the *D* will have aided and abetted a plan *to commit a crime*. The *D*, therefore, will have intended to facilitate the commission of that crime, satisfying prong one of the test for relational liability.

The third theory consists of aiding and abetting the predicate acts for a RICO conspiracy or CCE, in order to ground liability for the RICO conspiracy[306] or CCE itself.[307] This theory is indefensible because the *D*s intent and action extends only to the predicate act, not to the conspiracy of which the act is a component. In assisting the predicate act, there is no indication that the *D* knows of the conspiracy or intends to facilitate it (if there is, then the *D* should be charged with aiding and abetting the conspiracy). In the absence of knowledge about the conspiracy, the defendant cannot be said to be reckless as regards the conspiracy.

The fourth theory entails applying a "joint venture" theory of liability to a second prosecution, where a *D* was acquitted of conspiracy during a first prosecution, and the joint venture theory is based on the very same evidence as the conspiracy charge.[308] This theory is internally defensible if the joint venture theory itself satisfies the test for relational liability, but has external procedural and constitutional problems involving collateral estoppel and double jeopardy.

V. EXTERNAL FAILURES

The structure of relational liability often has suffered misplaced criticism because the critics aim their fire at the *internal structure* but make arguments about *external failures*.[309] To be sure, these external

---

upheld the prosecution, holding that acquittal of a substantive offense does not preclude subsequent prosecution for conspiracy, and acquittal of conspiracy does not preclude subsequent prosecution on a substantive crime charge—even if the theory of liability closely tracks that of the theory that originally failed. *Id.* at 1088-89.

305. United States v. Kasvin, 757 F.2d 887, 890 (7th Cir. 1985) (Seventh Circuit affirmed a conviction based on jury instructions that "[o]ne can aid and abet a conspiracy without necessarily participating in the original agreement," and "[n]o fatal amendment to an indictment occurs where a defendant may have been convicted as a principal in a conspiracy by aiding and abetting it even though he was not charged with aiding and abetting in the original indictment.").

306. United States v. Rastelli, 870 F.2d 822, 832 (2d Cir. 1989).

307. United States v. Barajas-Diaz, 313 F.3d 1242, 1246 n.5 (10th Cir. 2002).

308. *DeCillis*, 669 N.E.2d. at 1088.

309. Pinkerton v. United States, 328 U.S. 640, 648, 650 (1946) (Rutledge, J., dissenting) (criticizing *Pinkerton* for its expansive application and ease of proof as well as facilitation of

failures mean that relational liability is often imposed where there is no culpability. Reform efforts, however, must be based on an accurate structural evaluation and targeted where reform is most needed.

This Article's theoretical critique in favor of relational criminal liability, therefore, must be balanced against practical limitations. Relational liability in the real world is often just too vaguely seen,[310] or its evidence just too unreliable,[311] to provide the basis for criminal liability. In addition, a defendant's legal liability may rest on such an attenuated relationship between the defendant's conduct and the bad outcome that the value of relational liability for retributivist and deterrence aims is fatally undermined.[312] These practical, external arguments fall into three primary categories: the initiation of formal criminal charges, the often illusory limits of certain bases of liability, and the fact that many bases of liability assume equal culpability between—and provide equal punishment for—*D*'s and the *A*'s who actually perform *a*.

A. Formal Criminal Charges

For two reasons, formal charging instruments such as indictments and informations can present procedural and constitutional problems that affect the imposition of relational liability.

First, while prosecutors must charge a crime in these instruments, in federal jurisdictions they do not need to state their theories of liability in them.[313] Consider again the facts in *Wright v. State*,[314] in which the *D* was charged with armed robbery and was tried on the theory that he actually committed the robbery.[315] At the end of the trial, however, the prosecutor argued, for the first time, the *D*'s liability

---

excessively broad prosecutorial discretion); Dressler, *supra* note 243, at 433 (criticizing regimes of equal liability between principals and accomplices); Goldstein, *supra* note 224, at 406-07 (highlighting the evidentiary difficulty in determining a conspiracy defendant's *mens rea*).

310. Peter Margulies, *Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11*, 43 GONZ. L. REV. 513, 541 (2007-2008).

311. Kevin Jon Heller, Note, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and* United States v. Shabani, 49 STAN. L. REV. 111, 111 (1996).

312. Enmund v. Florida, 458 U.S. 782, 798-800 (1982) (White, J., plurality opinion).

313. United States v. Zackery, 494 F.3d 644, 646 (8th Cir. 2007) ("[J]ust as criminal liability based on aiding and abetting does not need to be specified in the indictment, criminal liability based on *Pinkerton* does not have to be specified in the indictment." (quoting United States v. Thirion, 813 F.2d 146 (8th Cir. 1987)); United States v. Stapleton, 293 F.3d 1111, 1119 (9th Cir. 2002) ("[V]icarious liability for substantive counts . . . does *not* require that the indictment charge conspiracy."); United States v. Meester, 762 F.2d 867, 878 (11th Cir. 1985); United States v. Olweiss, 138 F.2d 798, 800 (2d Cir. 1943).

314. 701 P.2d 743 (Nev. 1985).

315. *Id.* at 744.

as a mere aider and abettor.[316] Had the *D* been aware that this argument might be made, his defense could have looked quite different.[317]

Second, the label given to collectives or to the theory of liability—conspiracy, aiding and abetting, joint venture, scheme, *Pinkerton*, and so forth—mean little because the labels do not import any application of distinct law, nor do they offer meaningful limits. Instead, all of these labels function to link a *D* to an *A* through a purposive collective and impose relational liability.[318] Predictable legal structures, with elements that prosecutors must meet and defense counselors know ahead of time they must challenge, virtually do not exist. Rather, much of relational liability allows prosecutors to shape charges and evidence to their own purposes.[319]

There are four procedural or constitutional problems arising from this situation, all of which, to be sure, have failed in court or have not been tested.

---

316. *Id.*

317. The prosecution could have argued for liability based on a conspiracy theory as well, to much the same prejudicial effect. Garcia v. Foulk, No. C 13–05237 BLF (PR), 2015 WL 2148031, at *6 (N.D. Cal. May 4, 2015) (denying petition for writ of habeas corpus where jury was instructed that it could convict a defendant of murder on any of four theories: "(1) he was the actual perpetrator or an aider and abettor in the commission or [sic] murder or the lesser include[d] offenses; (2) he aided and abetted assault with a deadly weapon and murder was a natural and probable consequence of the assault; (3) he aided and abetted brandishing a firearm, and murder was a natural and probable consequence of brandishing a firearm; or (4) he conspired to commit the crimes of brandishing a firearm or assault with a deadly weapon, and murder was perpetrated by a co-conspirator in furtherance of that conspiracy and was a natural and probable consequence of the agreed upon criminal objective of that conspiracy" (citations omitted)); Tomas v. Roe, No. 97–CV–0762 TW(LAB), 1998 WL 1045306, at *3 (S.D. Cal. Dec. 21, 1998) (denying petition for writ of habeas corpus where the "prosecutor proceeded on alternative theories of vicarious liability based on an uncharged conspiracy to commit the robberies and aiding and abetting in those robberies." The court denied the petition because it was well-settled that "an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator").

318. Coplin v. United States, 88 F.2d 652, 660-61 (9th Cir. 1937) ("When it is established that persons are associated together to accomplish a crime or series of crimes, ... [i]t is not the name by which such a combination is known that matters, but whether such persons are working together to accomplish a common result." (quoting 16 C.J. § 1283, at 646) (emphasis omitted)); United States v. Black, 526 F. Supp. 2d 870, 883 (N.D. Ill. 2007) ("As a general rule, co-venturers in a criminal scheme—whether labeled as co-schemers, co-conspirators, or aiders and abettors—are jointly and severally liable for all proceeds generated under a fraud scheme."); United States v. Dukow, 330 F. Supp. 360, 364 (W.D. Penn. 1971) ("When two or more parties are found to have joined in a common scheme, all are responsible for the acts and declarations of each co-schemer in furtherance of the scheme while it is in progress, and this is so regardless of whether conspiracy is charged in the indictment. When a common scheme has been found to exist, the general rules of agency regarding joint liability are applied as a matter of evidence in determining guilt on the substantive counts.").

319. Krulewitch v. United States, 336 U.S. 440, 447 (1949) (Jackson, J., concurring) ("[C]hameleon-like" evidence of a conspiracy "takes on a special coloration from each of the many independent offenses on which it may be overlaid.").

First, defendants may not receive fair notice of the charges they face. Prosecutors can introduce novel theories of liability, even late in the trial.[320] And courts have virtually foreclosed the possibility of a successful due process argument because variance (or constructive amendment) is the basis for a fair notice claim, and variance arises only when new charges, not new theories of liability, emerge during the course of trial.[321]

Second, the right against double jeopardy may be violated, or at least stressed. Although most courts have rejected double jeopardy claims based on multiple theories of liability, others have expressed concern.[322] For example, a single criminal agreement can give rise to multiple conspiracy charges.[323] Both a RICO conspiracy and a CCE, for example, can be charged separately.[324] Furthermore, either one of these charges can be based upon a theory of conspiracy or of aiding and abetting the conspiracy.[325] And even where a conspiracy charge has been dismissed, a defendant may still be liable for a substantive crime through *Pinkerton* liability.[326]

Third, prosecutors may alter theories of liability to suit their evolving needs throughout trial.[327] The Second Circuit, for example, has held that in RICO conspiracy cases "it is irrelevant whether a defendant agrees to commit the racketeering acts as a principal or as an aider and abettor."[328] But it surely is relevant to a defendant who proceeds through pre-trial discovery, motions practice, and trial as though she were alleged to be a principal, only to hear the prosecutor argue for the

320. United States v. Wrobel, 7 Fed. App'x 723, 724-26 (9th Cir. 2002) (Defendant convicted for wire fraud; conviction sustainable under a *Pinkerton*, aiding and abetting, or principal theory); United States v. Bernard, 287 F.2d 715, 719 (7th Cir. 1961) (Defendant charged with tax evasion, evidence admitted on the theory of vicarious liability); People v. Williams, 302 P.2d 393, 395 (Cal. Dist. Ct. App. 1956) (Defendant charged as a principal, but convicted on a theory of co-conspirator liability).

321. United States v. Vazquez-Castro, 640 F.3d 19, 25 (1st Cir. 2011); United States v. Ashley, 606 F.3d 135, 141 (4th Cir. 2010).

322. United States v. Phillips, 664 F.2d 971, 1006 (5th Cir. 1981) ("[T]he *Blockberger* test 'is not easily applied to complex conspiracy prosecutions.' " (quoting United States v. Solano, 605 F.2d 1141, 1144 (9th Cir. 1979))).

323. Albernaz v. United States, 450 U.S. 333, 336-38 (1981); *Phillips*, 664 F.2d at 1007.

324. *Phillips*, 644 F.2d at 1014.

325. United States v. Cowart, 595 F.2d 1023, 1031 (5th Cir. 1979).

326. United States v. Chairez, 33 F.3d 823, 824, 828 (7th Cir. 1994).

327. United States v. McClain, 934 F.2d 822, 825 n.3 (7th Cir. 1991) ("Both defendants objected to the Pinkerton instruction during trial. At first the instruction was discussed by counsel and the district judge as if it were offered to facilitate the codefendants' conviction for the RICO conspiracy violation. When pressed by defense counsel as to whether combining a Pinkerton instruction with a RICO conspiracy charge would be permissible, the government apparently altered its strategy, claiming alternatively that the instruction was proper to allow the jury to convict Morgan Finley of the substantive acts of his alleged coconspirator, Michael Lambesis." (citation omitted)).

328. United States v. Rastelli, 870 F.2d 822, 832 (2d Cir. 1989).

first time in closing argument that she may be convicted as an aider and abettor.[329]

Fourth, the grand jury's authority to define charges is undermined. For example, a grand jury might issue an indictment for a substantive crime based on evidence that the *D* conspired to commit the crime. If, however, the prosecutor's conspiracy theory weakens with the post-indictment development of evidence, the prosecutor can easily switch to an aiding and abetting, vicarious liability, or some other theory of liability.[330] Similarly, a *D* might be indicted for a substantive crime but convicted for the conduct of others on a conspiracy theory (where conspiracy is uncharged).[331] In these cases, it is unknown whether the original grand jury would have signed off on the charges based on these other theories of liability because the standards of proof of each are different.[332]

B. Illusory Limits

The structure of relational liability entails various limits to liability. In practice, however, these limits are often illusory. For example, courts have doubted the value and definition of *Pinkerton* liability, [333] and line drawing for aiding and abetting is a dubious endeavor.[334]

Combining *Pinkerton* and aiding and abetting concepts generates additional confusion. In *United States v. Davis*,[335] a defendant was

329. Wright v. State, 701 P.2d 743, 744-45 (Nev. 1985).

330. United States v. Stapleton, 293 F.3d 1111, 1116-17 (9th Cir. 2002). Some states restrict this practice. *See* State v. Farrington, No. A-3398-05T4, 2010 WL 2010935, at *2 (N.J. Super. Ct. App. Div. May 20, 2010); People v. Castro, No. 2657-2001, 2002 WL 1899928, at *2 (N.Y. Sup. Ct. Aug. 1, 2002); Smith v. State No. W2012–00509–CCA–R3–HC, 2013 WL 5493549, at *1 (Tenn Crim. App. Sept. 30, 2013).

331. People v. Williams, 302 P.2d 393, 395 (Cal. Ct. App. 1956) (Defendant was "responsible as a principal for everything done by his co-conspirators, and the fact that a conspiracy was not alleged in the indictment is immaterial.").

332. United States v. Zackery, 494 F.3d 644, 649 (8th Cir. 2007).

333. One court lamented that *Pinkerton* "is not a usual criminal law concept [but is imported from negligence law] and surely not a concept that puts meaningful due process limits on criminal liability." United States v. Hansen, 256 F. Supp. 2d 65, 67 n.3 (D. Mass. 2003). The Seventh Circuit has expressed that "the value of [a *Pinkerton*] instruction[] in the RICO context is questionable." United States v. Neapolitan, 791 F.2d 489, 504 n.7 (7th Cir. 1986). It also has questioned whether *Pinkerton* "really adds anything besides complication, given the possibility of basing liability on aiding and abetting." United States v. Manzella, 791 F.2d 1263, 1267 (7th Cir. 1986).

334. United States v. Messer, 900 F.2d 260, *3 (6th Cir. 1990) ("Drawing an exact line of sufficient participation [in a scheme for aiding and abetting purposes] . . . is difficult if not impossible." (quoting Pereira v. United States, 347 U.S. 1, 8 (1954))); United States v. Kasvin, 757 F.2d 887, 894 (7th Cir. 1985) (Swygert, J., dissenting) (noting that aiding and abetting liability could extend to a drug addict who makes purchases from a drug conspiracy for personal use).

335. 154 F.3d 772 (8th Cir. 1998).

charged with aiding and abetting the use of a firearm.[336] The jury was instructed that it could convict based on either an aiding and abetting or *Pinkerton* theory.[337] The Eighth Circuit found no error, implying that aiding and abetting was a broader concept of liability that encompasses *Pinkerton* liability. Therefore, if any juror found the defendant liable on an aiding and abetting theory, then the juror would certainly find him liable under a *Pinkerton* theory.[338]

That is incorrect because each theory requires proof of unique elements. *Pinkerton* liability requires reasonable foreseeability and, sometimes, an act in furtherance of the conspiracy.[339] Aiding and abetting requires proof of specific intent to assist and actual assistance of the crime in question. One theory does not encompass the other; claiming that it does undermines the grand jury's authority (which might have signed off on an indictment based on one theory but not another) and risks conviction with jury unanimity and proof of every necessary element.[340]

Furthermore, when courts apply both *Pinkerton* and aiding and abetting theories to one criminal charge, they alternately distinguish the two theories in order to provide the jury with two unique theories of liability, each of which is able to stand on its own if the other fails,[341] but they equate them in order to avoid the problem of non-unanimous verdicts, as in *Davis*, above.[342] This combination of theories, of course, raises the problem of multiplicity, pursuant to which a defendant may be convicted on multiple counts that in fact comprise fewer crimes.[343]

---

336. *Id.* at777.

337. *Id.* at 782.

338. *Id.* at 783.

339. 19 U.S.C. § 371 (2012) requires an overt act, but other federal conspiracy statutes do not. Title 21 drug conspiracies, for example, require no overt act, United States v. Shabani, 513 U.S. 10, 11 (1994); United States v. Pumphrey, 831 F.2d 307, 308 (D.C. Cir. 1987), nor do some conspiracies to provide material support to a foreign terrorist organization, *see* 18 U.S.C. §2339B (2006); United States v. Abdi, 498 F. Supp. 2d 1048, 1064 (S.D. Ohio 2007), nor conspiracies to commit money laundering, Whitfield v. United States, 543 U.S. 209, 211 (2005).

340. *See* United States v. Lucas, 932 F.2d 1210, 1220-21 (8th Cir. 1991).

341. United States v. Zackery, 494 F.3d 644, 649 (8th Cir. 2007) ("[I]t is well settled that, '[e]ven in the absence of evidence supporting an aiding and abetting conviction, persons indicted as aiders and abettors may be convicted pursuant to a *Pinkerton* instruction.' " (quoting United States v. Comeaux, 955 F.2d 586, 591 (8th Cir. 1992))).

342. United States v. Davis, 154 F.3d 772, 783 (8th Cir. 1998) ("[I]t is doubtful, under the facts of this case, that a jury member found a defendant guilty of aiding and abetting in the use or carrying of a firearm but would not have found that defendant culpable under Pinkerton. If any juror who found the defendants guilty of directly aiding and abetting would also find the defendants vicariously liable, then no unanimity problem exists because all of the jurors would have at least agreed on the Pinkerton theory of guilt.").

343. For example, in a different *United States v. Davis*, the defendant was charged with conspiracy to commit rape and two counts of rape. It appears that the defendant did not actually rape the victim; instead, he assisted another in doing so. United States v. Davis, No. NMCM 9901170, 2003 WL 1537674, at *1-2 (N-M. Ct. Crim. App. Mar. 25, 2003). He was, however, found guilty of two counts of rape: on one count because he conspired with the

C. Equal Culpability

With the exception of accessory after the fact, relational liability generally assumes equal culpability between *D*s and *A*s even where *D* didn't act to cause *a* but is held responsible for *A*'s doing *a*. The philosophers of collective responsibility reject this premise in practice, just as Yaffe does in theory. Kutz, for example, would require an individual accounting of liability, even in a collective context.[344] Bratman acknowledges the existence of relationships of "asymmetric authority," in which authority to act or make decisions is not equally apportioned among members of a collective and which therefore calls for individualized assessments of liability.[345] And Gilbert observes that equal liability will unfairly harm members of collectives who "have little or nothing to answer for in connection with that collective's action."[346] Comparative culpability principles of retributivism would also suggest that an *A* who performs *a* is, by virtue of that performance and all other things being equal, more culpable than the non-acting *D*.[347]

Where equal liability regimes exist, courts may be unable to assign *less* culpability to *D* relative to *A* where *D* is truly less culpable and may also be unable to assign *more* liability to a relatively more culpable *D*.

To the first point, the Federal Sentencing Guidelines, some state guidelines, and mandatory minimum sentences limit judges' authority to assign individualized culpability. In the federal system, if two defendants are charged with murder, where one is the principal and the other aided and abetted the principal, both defendants will be assigned the offense level for murder.[348] While a *D*'s relative role in the offense will aggravate or mitigate her sentence,[349] the difference is unlikely to allow for condign punishment in many cases. Where the charge is murder, the aiding and abetting *D*'s base offense level will be 43,[350] which,

---

rapist to commit the crime, and on another count because he aided and abetted the rape. *Id.* at *2-3. In another case, a defendant was convicted of aiding and abetting an attempted first-degree murder, conspiring to commit the murder, aiding and abetting an aggravated robbery, and conspiracy to commit the robbery. State v. Mincey, 963 P.2d 403, 405 (Kan. 1998). The Kansas Supreme Court upheld the convictions, holding that aiding and abetting and conspiracy have different elements, and are therefore not multiplicitous. *Id.* at 410.

344. KUTZ, *supra* note 117, at 49 ("Agents are often said to warrant mitigated responses because they bear only a small degree of responsibility for a harm, or to be largely responsible and hence deserving of especially hard treatment.").

345. BRATMAN, *supra* note 115, at 85.

346. GILBERT, *supra* note 59, at 80.

347. Dressler, *supra* note 243, at 433.

348. U.S. SENTENCING GUIDELINES MANUAL § 2X2.1 (U.S. SENTENCING COMM'N 2014) (For aiding and abetting, "The offense level is the same level as that for the underlying offense.").

349. §§ 3B1.1-2.

350. § 2A1.1.

assuming no other relevant facts, generates a sentence of life.[351] A *D* who was a minimal participant in the murder will enjoy a four-point reduction in her offense level,[352] with a recommended sentence range of 262-327 months (21.8 to 27.25 years), and up to life if the *D* has a criminal history.[353] While a judge may find that the aider and abettor is less culpable than the actual murderer, the judge will often be discouraged[354]—or, where mandatory minimums operate, prevented—from mitigating the aider and abettor's sentence to the appropriate length.

To the second point, theories of relational liability can be used to impose *more* culpability on a non-acting *D*, but they may present additional procedural problems. In *United States v. Benabe*,[355] for example, a defendant was convicted of participating in a RICO conspiracy.[356] *Pinkerton* was not used to determine guilt at trial but was used to determine the defendant's sentence for, in part, four murders he was not charged with at trial.[357] Although the Seventh Circuit mentioned its concern with using *Pinkerton* in the RICO conspiracy context, it found no error, writing that *Pinkerton* or aiding and abetting theories could be used at sentencing just as they are used at trial to determine guilt.[358]

VI. CONCLUSION

In 1998, George Fletcher contended that "[w]e no longer think solely in terms of individuals acting solely on their own account but of groups of people interacting in order to produce a crime of shared responsibility."[359] He posed two important questions: are only individuals liable for a crime, and should we hold an entire group liable as a group for the crime?[360]

In this Article, I have argued that while individuals do act in collectives, they are ultimately liable as individuals. Flowing from that, we should not hold an entire group liable as a group. To answer these questions in any other way would upend American criminal law

351. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2014).

352. U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (U.S. SENTENCING COMM'N 2014).

353. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2014).

354. Because, on appeal, sentences within Guideline ranges are presumed reasonable, United States v. Brantman, 341 Fed. App'x 38, 39 (5th Cir. 2009), and courts imposing sentences outside these ranges must defend their decisions. *See, e.g.*, Koon v. United States, 518 U.S. 81 (1996). Different standards of review for Guideline sentences and sentences that depart from the Guidelines may further discourage departures. *See* United States v. Reed, 146 Fed. App'x 947, 950-51 (10th Cir. 2005).

355. 654 F.3d 753 (7th Cir. 2011).

356. *Id.* at 756.

357. *Id.* at 777.

358. *Id.* at 777-78.

359. FLETCHER, *supra* note 2, at 189.

360. *Id.*

norms, generate problems of proof and retributivist justice, and lead to unacceptable guilt by association.

Fletcher's questions abide in importance, even after more than twenty-five years of philosophy on collective intentionality and Fletcher's recognition of a collective turn in our thinking because criminal law theory has never recognized relational liability as a special part of criminal law. This liability has remained undertheorized and untested and has therefore been the target of misplaced criticism.

To clarify this area and normatively assess it, this Article has assumed an individual accounting, premised on an evaluation of each collective member's *mens rea* and *actus reus*. It rejects collectivist arguments as unclear, anti-retributivist, and gateways to guilt by association.

To be sure, there is less daylight between individualist and collectivist camps than initially appears. For example, Bratman, Gilbert, and Kutz contend with some type of collective reification, and Yaffe and Ohlin acknowledge the practical need for some individualist accounting of liability.

This Article mediates the debate by advancing an individualist account of relational liability. This account responds to the collectivists by accepting the practical reality of collective conduct and determining individual liability in light of that reality. It responds to traditional criminal law norms by locating liability squarely in the individual.

It also helps to resolve the debate by addressing the concerns of both camps. As to the collectivists, Yaffe's concern with the fiction that *D* is held to have committed a crime, when *A* in fact committed it, is avoided, since *D* and *A* are considered on their own. And Ohlin's concern with imposing too much liability (if collectivism leads to vicarious liability) or no liability (if group intent, not individual intent, is attended to) is resolved for the same reason. As to the individualists, Bratman's, Gilbert's, and Kutz's attention to the reality of groups is brought on board since relational liability judges individuals in the group context. Their accounts regarding *when* an individual should be relationally liable are also attended to and given expression that is practically applicable in criminal law.

In the end, an individualist account of relational liability has many salutary implications. It treats individuals as individuals, even when they act in groups; it degrades the possibility of guilt by association; it is globally applicable (and not only to, say, Ohlin's "tightly-knit" conspiracies); and it avoids reliance on the fiction of equal liability that concerns Yaffe.