JOINT INTENTION AND ACCOMPLICE LIABILITY

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Abstract

When can one be held criminally liable for the criminal acts of another? This central question of accomplice liability law has spawned conflicting precedents and a confused, inconsistent doctrine. One prominent approach, at the core of the Joint Criminal Enterprise doctrine used by international courts as well as of the law used in a number of high-profile domestic cases, is to base joint criminal liability on foreseeability. However, the foreseeability standard entails abandoning mens rea and individual intentions as necessary elements of a crime, and so departs from some of the law’s core commitments. The other main approach, based on an influential opinion by Learned Hand, ties joint criminal liability to intention. In so doing, it avoids the problems of the foreseeability doctrine, but it is too ambiguous to be applied consistently.

We propose a framework that grounds this area of law in a considered account of joint intention while preserving the importance of both mens rea and individual intention in the assignment of criminal liability. This approach provides a resolution of long-standing confusions about the meaning and consequentialness of accomplice actions and offers a unified, coherent doctrine to replace a series of disparate and ad hoc conclusions in case law. A key concept in our approach is one of standing in reserve, which extends the coverage of a joint intention beyond the immediate participants in the actus reus and offers a systematic way of addressing a series of challenging cases including felony murder rules, organized crime, state-sponsored violence, and terrorist sleeper cells.

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INTRODUCTION

Under what circumstances can one be held liable for the actions of another? This question arises in various forms across legal and historical settings and has been subject of an ongoing debate in both legal and academic communities. While accomplice liability has existed since the beginning of Anglo-American law, it poses an enduring puzzle. In

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2 For a prominent formulation of some of challenges inherent in defining accomplice
criminal jurisprudence, it has spawned a set of conflicting doctrines, leading to a muddled area of law. As one court has put it: “the case law and therefore the theory of federal accomplice liability has fallen into some disarray” and are contributing to “disparate results based on conflicting ideas of accomplice liability.” The legal scholarship echoes this sentiment: “the current status of the law on the aider and abettor’s mental state is far from clear. In fact, it is best described today as in a state of chaos.” A similar apprehension and the manifesting debate are currently playing out in international law, where collective criminal action is a central issue: “[c]ollective criminal action has been – and remains – the most contentious area of substantive international criminal law.”

Yet joint criminal liability, i.e., accomplice liability or, stated more generally, the criminal law holding someone other than the primary perpetrator responsible, is an essential concept. Many crimes are committed by people acting in concert, and the law needs some way of addressing them. These cases pose a fundamental challenge because they do not naturally fit into the conventional way of defining a crime. Traditionally, a crime consists of two parts: (1) a required mental state, referred to as mens rea or a culpability requirement, and (2) the specific acts that constitute the crime, referred to as actus reus. Burglary, for example, is defined as entering a private building with the purpose of committing a crime within it. With a burglary committed by a single person they must intentionally perform those acts – the person has not committed burglary unless they enter a private dwelling and so forth.


3 United States v. Hill, 55 F.3d 1197, 1200 (6th Cir. 1995). See also United States v. Otero-Mendez, 273 F.3d 46, 52 (1st Cir. 2001) (“It is difficult to articulate a precise intent standard for an aider and abetter”).

4 Baruch Weiss, What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law, 70 Fordham L. Rev. 1341, 1352 (2002). While this statement is made in the context of the federal case law, things are no better at the state level, either: “Due to the inconsistency between the plain language of states' accomplice liability legislation and its respective interpretation in the state courts, many states' accomplice laws present a confused picture in terms of the law's stance on accomplice liability. No aspect of this law is more complex than that relating to the mental state requirement for accomplice liability.” John F. Decker, The Mental State Requirement for Accomplice Liability in American Criminal Law, 60 S.C. L. Rev. 237 (2008).


6 E.g., Model Penal Code § 221.1.

7 Although depending on the circumstances they may be guilty of related offenses such as attempted burglary.
burglary in myriad ways, however. They could pick the lock, disable a security system, provide tools, or serve as a lookout or a getaway driver – in short, perform a number of tasks that might be helpful in the commission of a burglary without setting foot inside the building.\(^8\)

Since the *actus reus* in these cases can vary so wildly,\(^9\) we must rely more on the *mens rea* element of the crime.\(^10\) Intuitively, it is intentions, and specifically the relationship between the intentions of the individuals involved,\(^11\) that distinguish the taxi driver from a getaway driver. And the key to understanding joint crimes is placing them in the context of *joint intentions*: intentions that relate to each other in particular, and sometimes in particularly complex, ways that bring about the criminal actions. The framework for analyzing joint intentions that has been developed in the philosophical literature in the last two decades is in a position to provide a firm theoretical foundation for joint criminal liability and unify the disparate rulings in this muddled area of law. Rather than looking for discrete, *ad hoc*, markers of accomplice liability such as words of encouragement\(^12\) or leaving it to judges to adjust the standards for liability based on their assessment of the seriousness of the crime,\(^13\) the joint intention approach identifies an underlying characteristic – the presence or absence of the relevant joint intention – which determines accomplice liability. Individuals are guilty of a crime if and only if they intended to commit the actions that define it.\(^14\) One who slips and accidentally falls into a private dwelling is not a burglar.\(^15\) The same standard ought to apply to potential accomplices. But with an accomplice, the intention is a joint

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\(^11\) See Part III. for our account of joint intention.

\(^12\) E.g., *State v. Holland*, 67 S.E. 2d 272 (1951); *State v. Williams*, 255 N.C. at 184; *People v. Villa*, 318 P.2d 828, 834 (1957).

\(^13\) An influential example of judges doing this can be found in *United States v. Fountain*, where the Seventh Circuit explained that among other things “[p]rostitution, anyway a minor crime,” which meant they would draw accomplice liability more narrowly than in a case of a serious crime, like murder. *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir.), *opinion supplemented on denial of reh’g*, 777 F.2d 345 (7th Cir. 1985); see also notes 61-62, *infra* and accompanying text.

\(^14\) A small exception is made for so-called public welfare offenses, which are crimes that more closely resemble civil offenses. See notes 85-89, *infra* and accompanying text.

intention; and an individual should be subject to *joint* criminal liability if and only if they can be shown to have a joint intention to commit the crime along with the principal perpetrator.

We propose grounding joint criminal liability in the account of joint intention that is particularly well-suited to this purpose because it is consistent with the core normative commitment of criminal law to individual intentionality. No less important than providing an immanent approach to supplant ad hoc criteria for assigning liability, the joint intention framework allows us to develop a systematic approach to “hard cases” where the potential accomplice’s actions were not necessary or essential to the crime – they were not needed to accomplish it, and in fact took extremely little, or even no action to bring it about – situations courts have struggled with for centuries. A common response to these hard cases has been for courts to retreat from the demanding requirements of both *mens rea* and individualized intentions and adopt a doctrine that ascribes liability based on the foreseeability of the ultimate results of a person’s actions and their potential to enable the criminal acts of another. In other words, when it comes to joint crimes, one is liable for all the foreseeable consequences of one’s actions, regardless of their own mental state, applying something akin to the usual standard of recklessness rather than the often more exacting standards for culpability in criminal cases.

16 On the role of individual intentions in criminal law, see notes 127-129, infra and accompanying text. On the role of intentionality, that is, that criminal liability generally requires intentional action rather than, see, e.g., Morissette v. United States, 342 U.S. 246, 250 (1952); United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978) (“the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”).

17 Hicks v. United States, 150 U.S. 442 (1893); People v. Russell, 693 N.E. 2d 193 (1998); Tison v. Arizona, 481 U.S. 137 (1987). Our focus on these cases and the theoretical framework needed to address them distinguishes our work from Jens David Ohlin, who uses joint intention analysis to shed light on the criminal liability under international law in cases in which participants are engaging together in the actions defining a crime. See Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 Chi. J. Int’l L. 693 (2011).

18 Acting recklessly involves “consciously disregard[ing] a substantial and unjustifiable risk that the material element [of an offense] exists or will result from his conduct.” Model Penal Code § 2.02. The key distinction between recklessness and negligence in the criminal context is that in the case of recklessness the risk was known to the actor. For negligence, all that is required is that the actor should have been aware of the risk and that their failure to perceive it is “a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.” *Id.*

19 E.g., Model Penal Code § 210.2 (murder); Model Penal Code § 222.1 (explanatory note, grading robbery based on, inter alia, purpose of the perpetrator); People v. Luparello, 187 Cal. App. 3d 410 (Ct. App. 1986).
DOCTRINE OF FORESEEABILITY HAS EMERGED AS AN INFLUENTIAL, IF NOT THE DOMINANT, APPROACH TO JOINT CRIMINAL LIABILITY IN U.S. COURTS, AND HAS PROVEN PARTICULARLY IMPORTANT IN INTERNATIONAL LAW THROUGH THE DEVELOPMENT OF THE JOINT CRIMINAL ENTERPRISE DOCTRINE (SPECIFICALLY JCE III). HINGING ACCOMPlice LIABILITY ON FORESEEABILITY, HOWEVER, MEANS ABANDONING THE BEDROCK COMMITMENT TO GROUND CRIMINAL LIABILITY IN THE INTENTION, I.E., MENTAL STATE, REQUIREMENTS THAT DEFINE CRIMINAL OFFENSES. WHILE WE ARE NOT THE FIRST TO QUESTION FORESEEABILITY-BASED RULES FOR LIABILITY ASSIGNMENT, A COHERENT ALTERNATIVE TO THESE RULES HAS BEEN LACKING. OUR PRIMARY CONTRIBUTION IS DEVELOPING SUCH AN ALTERNATIVE. IT IS GROUNDED IN A JOINT INTENTION FRAMEWORK FOR DETERMINING MENS REA THAT CAN BOTH HANDLE THE HARD CASES THAT CONFRONT THE CRIMINAL LAW IN A COHERENT AND SYSTEMATIC WAY, AND IS WELL-SUITED TO THIS TASK BECAUSE IT ADHERES TO THE VALUES EMBODIED IN CRIMINAL LAW AND DOCTRINE.

The philosophical analysis of joint intention has been developed to account for the connection of individual intentions to an action or profile of actions with either of two key characteristics. They either (1) cannot be understood in single-individual-action terms: e.g., performing a symphony, winning at chess, or committing genocide. These are simply actions that cannot be understood or described without reference to joint intentions. One cannot win at chess alone. Or, potentially, (2) an action or profile of actions that have a broader intending constituency than the agents performing the intended action: e.g., raiding an ISIS outpost to rescue hostages, patrolling the street on behalf of the neighborhood crime watch, or conducting a hit on the members of a competing street gang. The scope of the joint intention in these cases may plausibly include people other than those carrying out the main actions. The bulk of the joint intention literature has focused on (1), but a recent work concentrates on (2), and

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20 E.g., Ohlin, supra note 5, at 703.
22 While Ohlin, supra note 5, suggests that joint intention analysis is a good place to look for grounding the law of accomplice liability, he does not pursue the project of developing the corresponding account of accomplice liability, which is our aim in this Article.
circumstances where the joint intention extends beyond those actually performing the action are particularly relevant to our argument here. In both (1) and (2) the relevant joint intention emerges from a complex interlocking and interdependent structure on the individual intentions that gives these individual intentions jointness. That is, a joint intention consists of a set of individual intentions that are related to each other in a certain way, and that relationship is what gives these individual intentions their essential jointness and distinguishes them from intentions of individuals simply acting alongside each other – a case that, in the criminal liability context, would be straightforwardly handled by individual liability provisions.

The relatively simple, or “easy cases,” of joint criminal liability fall under (1). Archetypically, accomplices\textsuperscript{25} work together to bring about the offense. An easy case of joint criminal liability would therefore be something like multiple perpetrators assaulting someone at once: they are all engaged in the same activity at the same time and working towards a joint goal (harming the victim). The “hard cases,” on the other hand, fall under (2). These cases lack the straightforward action participation of the group assault case and include instances of actions by members of complex criminal organizations with a division of labor and potentially different motives. An important example that belongs to this class of cases and that we take up in more detail later,\textsuperscript{26} is terrorist sleeper cells. Suppose a terrorist group has many separate teams that could plan and carry out an attack, but it only calls upon one of them to actually do so. A key question of interest here concerns the liability of the teams that were not called into action. Under what, if any, conditions could members of those teams be considered participants in that joint crime?\textsuperscript{27}

Central to our approach to understanding who should be counted as an accomplice, and therefore held liable in these cases, is the notion of

\textsuperscript{25} For the purposes of this Article we focus on accomplices, and use the term in a general sense. As a practical matter, distinctions between types of accomplices have long been dismantled in the United States. Conspiracies are, with regards to the issues discussed here, essentially the same, although we bracket the particular features of conspiracies, such as their structure or the elements of the conspiracy offense itself.
\textsuperscript{26} See Section IV.B., infra.
\textsuperscript{27} Note that it is important to separate out this particular crime, the terrorist attack, from related crimes such as a conspiracy to carry out the attack. A conspiracy charge carries its own complications, such as proving the relevant agreement among the co-conspirators, but is conceptually, at least, clearer than the joint criminal liability that is our main topic here.
standing in reserve. We show how this concept can be used to extend the
coverage of joint intention beyond the immediate participants in the joint
action. An individual i can be said to stand in reserve with respect to a
jointly intended action A if she is not participating in A but, should her
participation in A become necessary for the success of A, and that event is
sufficiently likely, she would participate accordingly. In short, she stands
ready to participate in the event that her participation is needed to bring A
about. We use this notion and the attendant claims about i’s intention with
respect to A to construct an account of i’s liability for the criminal act A and
develop conditions that courts should require for accepting the claims about
i’s liability under this account. We then illustrate the implications of this
argument with respect to different types of cases that have been the subject
of considerable controversies both in judicial decisions and legal
scholarship, including the “hard cases” alluded to above.

Part I below describes the current state of accomplice liability doctrine,
focusing primarily on domestic criminal law. Part II provides a critique of
this doctrine anchored in the importance of intention to criminal law. Part
III outlines the key elements of the joint intention framework we rely on to
develop our approach to accomplice liability. Part IV then uses this
framework to shed light on some of the longstanding puzzles in this area of
law, applying its insights to particular cases, including duels, the division of
labor within organized crime, and crimes committed by authoritarian
regimes. Here our goal is both to show in practice the broad contours of a
doctrinal alternative we propose and to buttress it with proposals for what
counts as sufficient evidence for establishing the presence of intentions in
complex cases of collective criminal liability.

I. ACCOMPlice LIABILITY: A Theory in Disarray

A. Theory 1: Providing Aid

The main approaches to accomplice liability can be placed in three
categories. One option, which the law has consistently avoided, is simplest
and most direct: define an accomplice as anyone who provides aid or
assists in the commission of a crime. This could perhaps be limited to aid
that is substantial or reasonably necessary to the crime, so that minor or de
minimis help would not qualify. Defining accomplice liability this way is
intuitive – an accomplice is someone who assists another in committing an
offense. But, it is also both over- and under-inclusive. Consider again a
crime like burglary, or any crime where tools are useful to completing the
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acts that constitute the crime. Is anyone who provides the tools, including the clerk at a hardware store or a helpful neighbor, an accomplice? The law has rejected this radical expansion of guilt, even in cases far less sympathetic than an arms-length transaction or innocently providing aid. In state v. ayers\textsuperscript{28} the defendant sold a 16 year old a stolen gun without a license, itself a crime.\textsuperscript{29} A few days later the purchaser of the gun accidentally shot and killed someone at a party. Although ayers’ conduct was “outrageous and criminal,” and the shooting could not have happened but for his sale of the handgun, he was not considered an accomplice to the shooting. In order to be considered liable, the court explained, the shooting must have been committed by someone acting in furtherance of a common object or purpose, as distinguished from someone acting independently or in opposition to him ... where the criminal liability arises from the act of another, it must appear that the act was done in furtherance of the common design, or in prosecution of the common purpose for which the parties are assumed or combined together.\textsuperscript{30}

Even though ayers’ intervention was necessary for the crime – there could have been no shooting absent the gun – that was not enough to make him liable. As the court explained, there must be a presence and a certain coordination of intentions relating to the crime.

If providing aid, even the aid necessary for the crime to be committed, is not considered sufficient for criminal liability,\textsuperscript{31} the simple accomplice liability rule sweeps too broadly, expanding the scope of accomplices far more than it is under current law. But courts have also shied away from considering such aid to be necessary for someone to count as an accomplice. The classic case illustrating this is tally judge, which explains:

The assistance given, however, need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it.\textsuperscript{32}

The Supreme Court has articulated a similar position, explaining that an accomplice need not actually help in order to be guilty. It is enough that

\textsuperscript{28} 478 N.W.2d 606 (Iowa 1991).
\textsuperscript{29} Ayers also removed the serial numbers from the weapon. state v. ayers, 478 N.W.2d 606, 607 (Iowa 1991).
\textsuperscript{30} state v. ayers, 478 N.W.2d 606, 608 (Iowa 1991) (internal citations omitted).
\textsuperscript{31} see also model penal code § 2.06.
\textsuperscript{32} state v. tally, 102 Ala. 25, 69, 15 So. 722, 738-39 (1894).
she was ready and able to do so.\textsuperscript{33} In short, although it has intuitive appeal, the simple provision of aid is neither a necessary nor sufficient for criminal liability.

\textbf{B. Theory 2: Liability for Foreseeable Consequences}

The second approach, which some courts embrace, is based on foreseeability. The exact formulation varies, but a representative standard is: “Liability is extended to reach the actual, rather than the planned or ‘intended’ crime, committed on the policy conspirators and aiding and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.”\textsuperscript{34} The Supreme Court endorsed this theory of accomplice liability in \textit{Pinkerton v. United States},\textsuperscript{35} which held co-conspirators responsible for each other’s actions committed in the furtherance of their common criminal enterprise. Even if the co-conspirator commits crimes that were not themselves the object of the conspiracy – as was the case in \textit{Pinkerton} – if those acts were foreseeable as likely consequences of the initial conspiracy or criminal endeavor, all the participants can be held liable. The \textit{Pinkerton} opinion is complex because it involved a conspiracy – itself a special sort of joint crime – and joint criminal liability of those involved in the conspiracy. In addition to the conspiracy itself, however, the defendant, Daniel Pinkerton, was found guilty for the crimes his brother committed while Daniel was incarcerated because they were connected to the initial conspiracy. The existence of the conspiracy itself thus serves as sufficient intent \textit{(mens rea)}\textsuperscript{36} for crimes that could be “reasonably foreseen” as connected to it.\textsuperscript{37}

Although courts have debated the implications of \textit{Pinkerton},\textsuperscript{38} a

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  \item \textsuperscript{33} \textit{Hicks v. United States}, 150 U.S. 442, 450, 14 S. Ct. 144, 147, 37 L. Ed. 1137 (1893) (“where an accomplice is present for the purpose of aiding and abetting in a murder, but refrains from so aiding and abetting because it turned out not to be necessary for the accomplishment of the common purpose, he is equally guilty as if he had actively participated by words or acts of encouragement”).
  \item \textsuperscript{34} \textit{People v. Luparello}, 187 Cal. App. 3d 410, 439, 231 Cal. Rptr. 832, 849 (Ct. App. 1986). See also \textit{United States v. Fountain}, 768 F.2d 790, 798 (7th Cir. 1985) (applying a foreseeability standard and relaxing \textit{mens rea} requirements when the crimes are serious).
  \item \textsuperscript{35} 328 U.S. 640 (1946).
  \item \textsuperscript{36} “The criminal intent to do the act is established by the formation of the conspiracy.” \textit{Pinkerton v. United States}, 328 U.S. 640, 647, 66 S. Ct. 1180, 1184, 90 L. Ed. 1489 (1946).
  \item \textsuperscript{37} \textit{Pinkerton v. United States}, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 1184, 90 L. Ed. 1489 (1946).
  \item \textsuperscript{38} See, e.g., \textit{State v. Bridges}, 133 N.J. 447 (1993). \textit{Bridges} offers an interpretation that narrows \textit{Pinkerton} to conspiracy cases, implying that there is a different, special, and
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number of other cases have followed its example. In Luparello, for example, the defendant paid others to get some information from the victim “at any cost.” The primary perpetrators eventually ambushed the victim and shot him, and Luparello himself was held liable, even though he was not present at the murder and did not explicitly plan it in any way. Indeed, Luparello was considered guilty of first degree murder, which was based on the shooter’s choice to lie in wait for the victim. Luparello’s own mental state could be best described as recklessness or possibly criminal negligence: there was some risk of violence given his instructions to a group of armed people, one that was both clear and substantial. But, on its own, recklessness would not be sufficient to impose guilt for that murder charge. The key criterion that distinguishes between the different gradations of homicide is the mental state of the perpetrator. Likewise, in Pinkerton the defendant was held responsible for crimes his co-conspirator committed even though he was incarcerated and could not have provided any aid in those acts, on the understanding that those crimes were foreseeable acts that furthered their shared criminal enterprise. Along similar lines, courts have concluded that the use of deadly force was a reasonably foreseeable consequence of a major drug sale, especially if it was known to the defendants that some of the parties were armed and had expressly contemplated the possibility of violence. This standard of foreseeability is an objective one, so it is not necessary that the defendant actually have contemplated or been aware of these possibilities. Joint criminal liability under this doctrine hinges on whether the events were reasonably foreseeable, an inquiry that is frequently quite fact-specific.

The foreseeability standard has become particularly important in international law, where joint crimes are a critical, if contentious, issue.\textsuperscript{48} International courts have adopted a doctrine of joint criminal enterprise (JCE), which closely parallels \textit{Pinkerton}. JCE\textsuperscript{49} ascribes liability to someone who agreed to a primary criminal enterprise or goal but did not share an intention with some of the other members working towards that goal who committed additional offenses, sometimes referred to as “incidental crimes,” so long as those crimes were foreseeable.\textsuperscript{50} Although there is no shared intention or \textit{mens rea} towards the additional, incidental crime, they are still held responsible for it by virtue of their initial involvement with the primary criminal enterprise. The doctrine has been likened to an assumption of risk: while the accomplice lacks the relevant \textit{mens rea}, she willingly runs the risk that one of her partners in crime will commit some additional, unrelated but foreseeable, crime.\textsuperscript{51} The result is essentially identical to \textit{Luparello} – a different, lesser mental state becomes sufficient for these crimes when we they are committed as part of a group. Accordingly, defendants have been held responsible for killings, beatings, and other abuses that have taken place at detention camps, forced deportation, or during refugee crises even though the killings and specific abuses were not intended by those defendants to be part of the criminal enterprise.\textsuperscript{52}

While foreseeability as the basis for joint criminal liability is in use in many jurisdictions,\textsuperscript{53} it entails a considerable departure from a foundational commitment, widely, if not universally, embraced, to condition criminal

\textsuperscript{47} See, e.g., \textit{People. v. Brigham}, 216 Cal.App. 3d 1039 (relying on the facts that the principal perpetrator was known by the defendant to be “hardheaded” and “obstreperous” to uphold a conviction based on the murder that was not initially contemplated); \textit{Alvarez}, 755 F.2d 380 (relying on specific statements of the defendants’ co-conspirators).

\textsuperscript{48} \textsuperscript{Ohlin, supra, note 5 at 694.}

\textsuperscript{49} JCE is actually a complex doctrine with different categories of liability. We focus on only one of them here, usually referred to as “JCE III.”

\textsuperscript{50} \textsuperscript{Cassese, supra, note 46, at 113.}

\textsuperscript{51} See \textit{Prosecutor v Duško Tadić}, Case No IT-94-1-A, Judgment, ¶ 228 (ICTY App July 15, 1999).

\textsuperscript{52} “The Trial Chamber is not, however, convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committed against the refugees at Potocari were also an agreed upon objective among the members of the joint criminal enterprise. However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign.” \textit{Prosecutor v Radislav Krstic}, Case No IT-98-33-T, Judgment, ¶ 616 (ICTY Aug 2, 2001).

liability on mens rea, i.e., the mental state requirement for a crime. In effect, the departure sanctions using the accomplice’s culpability for one crime – such as a conspiracy or particular criminal endeavor – to justify charging her with another crime, even though the crimes may require different, logically distinct, mental states. As cases like Luparello illustrate, in the contexts of joint crimes, the foreseeability doctrine effectively replaces the gradations of mens rea with, at most, recklessness. An accomplice who was reckless – meaning s/he consciously disregarded a risk – is, under this doctrine, guilty of a crime requiring a willful, deliberate, or premeditated mental state\textsuperscript{54} and, ironically, can be held liable under conditions or evidence that the primary perpetrator could not. But the foreseeability doctrine goes further still because the foreseeability standard is an objective one, and so the liable accomplice need not even have been conscious in her disregard of the risks – and so need not have been reckless – so long as a reasonable person under the circumstances of the case may be expected to have been conscious of those risks. The doctrine’s reduction of mens rea, requiring only something akin to recklessness, or even less, as the objective standard, and resembling ordinary negligence is has been the point of significant scholarly\textsuperscript{55} and judicial\textsuperscript{56} criticism by Sanford Kadish and others, and the concern with this reduction is one of the motivations of this Article.

Relying on foreseeability alone not only involves stepping back from the normative principle embodied in mens rea,\textsuperscript{57} it also risks dramatically, and perversely, expanding the scope of criminal liability.\textsuperscript{58} As noted above, the act requirement of an offense – actus reus – may be of little help when it comes to joint crimes because the accomplice can aid the crime in a wide variety of ways without participating in the actus reus. In Tally Judge, the accomplice sent a telegram alerting the primary perpetrators to the victim’s whereabouts,\textsuperscript{59} and in other cases there are lookouts, drivers, and so forth – actions and roles or functions that are perfectly innocent outside the context of committing a crime. Further, in the

\textsuperscript{54} E.g., Cal. Penal Code § 189 (West); Model Penal Code § 210.2 (Murder).
\textsuperscript{58} E.g., Kadish, supra note 53, at 371-72.
\textsuperscript{59} State v. Tally, 102 Ala. 25, 42-43, 15 So. 722, 728 (1894).
currently prevailing doctrine, the act requirements for joint criminal liability are quite minimal: words of encouragement or simply being present can suffice, the act requirements that define a crime (criminal action(s) by the primary perpetrator) simply do not have much impact on those. Thus, if we were to remove (or significantly reduce) the intention-based culpability requirements as well, there would be very little that limits liability. The potential accomplice may not intend or even desire events that may, nonetheless, be reasonably foreseeable, and yet s/he could be punished for them.

The main argument for a foreseeability standard with respect to joint crimes is a practical one, turning on the view of joint crimes as a special, severe threat to people and society. An alternative public policy justification has been to reserve the foreseeability standard only for serious crimes, keeping a stricter standard that requires some mental or culpability element for relatively minor ones. Judge Posner articulated a version of this public policy justification, distinguishing the requirements for joint criminal liability according to the seriousness of the crime:

Compare the following hypothetical cases. In the first, a shopkeeper sells dresses to a woman whom he knows to be a prostitute. The shopkeeper would not be guilty of aiding and abetting prostitution unless the prosecution could establish the elements of Judge Hand's test [Peoni, described below]. Little would be gained by imposing criminal liability in such a case. Prostitution, anyway a minor crime, would be but trivially deterred, since the prostitute could easily get her clothes from a shopkeeper ignorant of her occupation. In the second case, a man buys a gun from a gun dealer after telling the dealer that he wants it in order to kill his mother-in-law, and he does kill her. The dealer would be guilty of aiding and abetting the murder. This liability would help to deter—and perhaps not trivially given public regulation of the sale of guns—a most serious crime. We hold that aiding and abetting murder is established by proof beyond a reasonable doubt that the supplier of the murder weapon knew the purpose for which it would be used.

Posner also emphasizes that the prostitute in the hypothetical case could easily acquire the dress – the aid the shopkeeper is providing – elsewhere, although that seems to be true of the gun dealer as well. The potential murderer could simply find another gun store across town, and this is all the

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60 See notes 97-103, infra and accompanying text.
61 Cassese, supra, note 46, at 117-18; Mueller, supra, note 10, at 2174. Cassese also argues that this kind of liability makes some sense in the international context because of the deficiencies of that body of law. Cassese at 120.
62 United States v. Fountain, 768 F.2d 790, 798 (7th Cir.), opinion supplemented on denial of reh'g, 777 F.2d 345 (7th Cir. 1985).
more true when the murder weapon or other instrument of a crime is more readily available than a firearm (e.g., a knife, crowbar). As we argue below, however, prosecuting joint crimes does not require abandoning mens rea-type requirements. All that is necessary is a nuanced theory of joint intention that the law can utilize. It should be noted, though, that at the extremes, the difference between foreseeability and intention tends to collapse. If someone drops a glass on a tile floor, it is very foreseeable that it will break, and choosing to drop the glass can be seen as evidence of the intention to break it. Likewise, taking actions to bring about a highly foreseeable, nearly certain event can serve as evidence of an intention directed towards it. But this is a much higher standard than the (objectively) reasonable foreseeability used by courts in these cases, and properly understood foreseeability is only important here as an evidentiary matter. If the standard is one based on intention, then, despite the potential for using foreseeable consequences as evidence of intention, it would be possible to rebut the evidence based on foreseeability (e.g.: perhaps the defendant thought the glass was made of a very hard plastic), and the defendant would not count as an accomplice. By contrast, under the foreseeability doctrines, the fact that the consequence was objectively foreseeable is sufficient in and of itself for joint criminal liability.

C. Theory 3: Peoni, Intention-Based Liability

Leaving assistance in the commission of a crime and foreseeability aside, the third option for defining joint criminal liability was canonically articulated by Learned Hand in United States v. Peoni. In order to be considered an accomplice, it is necessary that one must “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.” Similarly, the Supreme Court has ruled that even if the defendant’s actions had the effect of encouraging the primary perpetrator to commit a crime, which itself is considered a form of aid, she could not

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64 See Section III., infra.
66 Peoni, 100 F.2d at 420. See also Nissen, 336 U.S. at 619.
67 Reves v. Ernst & Young, 507 U.S. 170, 178 (1993); (quoting Black's Law Dictionary
qualify as an accomplice unless that was also her intent.\textsuperscript{68} If, for example, the defendant’s words were actually motivated by fear or desperation, but the primary perpetrator mistook the words as encouragement, she would not be an accomplice; the effect alone is not sufficient. Unlike \textit{Luparello} and \textit{Pinkerton}, \textit{Peoni} includes an element of intention, the defining characteristics of which are that the individual both wishes the event to occur and has some (potentially very weak) commitment to realizing it.

The implications of an intention-based rule like \textit{Peoni}, and the differences between a rule of that sort and the substantial assistance and foreseeability ones described above, can be seen by comparing two cases. In \textit{Ayers}, as noted previously, the seller of a handgun – despite the fact that it was an illegal sale to a minor – was not held liable for the shooting death that followed. Providing the gun clearly aided in the commission of the offense – there is no accidental shooting without it – and there is a good argument that a reasonably foreseeable consequence of selling a fifteen year-old without a firearms license a gun is accidental injury or death. To this point, the state of Iowa had made it a crime to sell or make available a firearm to anyone under the age of twenty-one,\textsuperscript{69} and the court in \textit{Ayers} concluded that “Ayers’ criminal acts were unquestionably reckless.”\textsuperscript{70} He was aware of the risk and still acted – recklessness being a conscious disregard of a risk\textsuperscript{71} – and that implied that his action met a higher standard than objective foreseeability, which only requires that someone in that situation would have reasonably recognized the risk, not that they actually did.\textsuperscript{72} Under the latter approach to joint criminal liability, Ayers would have unquestionably been considered responsible for the crime (in this case involuntary manslaughter). However, citing a standard almost identical to \textit{Peoni}, the Iowa Supreme Court did not extend to him the liability for the shooting.\textsuperscript{73} Two years later, the Iowa courts considered these issues again in \textit{State v. Travis}. Travis knew his motorcycle was damaged and unsafe to drive, but still offered it Engler, who had never driven a motorcycle before.

\begin{footnotes}
\item[68] (6th ed. 1990), which states that aiding and abetting “comprehends all assistance rendered by words, acts, encouragement, support or presence”); \textit{Hicks}, 150 U.S. at 449 (“acts or words of encouragement”).
\item[69] Iowa Code § 724.22 (1989).
\item[70] \textit{State v. Ayers}, 478 N.W.2d 606, 608 (Iowa 1991).
\item[72] See notes 46-47, \textit{supra}, and accompanying text.
\item[73] \textit{State v. Ayers}, 478 N.W.2d 606, 608 (Iowa 1991). The court in \textit{Ayers} confusingly couches this in terms of foreseeability rather than intention. Looking at the standard the court ultimately relied on and applied to the case, though, it is more clearly described as an intention-based standard.
\end{footnotes}
Engler drove it recklessly, striking and killing a child. Travis’ conviction for aiding and abetting involuntary manslaughter (the same offense as in Ayers) was now upheld. The court distinguished Ayers by noting that Travis was much more intimately involved in Engler’s reckless driving, making him potentially liable for it:

Travis did not merely assent to Engler's driving his motorcycle, he initiated it. While riding as passenger, he failed to provide sufficient instruction nor did he tell Engler to slow down or drive with caution. In addition, while Travis was earlier driving the vehicle and Engler accompanied him as passenger, he role modeled driving the vehicle in a reckless manner. We find the evidence of Travis's conduct sufficient to support the charge of aiding and abetting.

Ayers and Travis together illustrate the unique features of joint criminal liability according to a standard based on joint intention. Under such a rule, accomplice liability turns on the presence of a joint intention to facilitate the crime, an intention directed towards the criminal acts as a goal. Importantly, the culpability and causation elements of the underlying offense here are not sufficient for liability. In both Ayers and Travis, the harm (the crime) would not have come about but for the defendant’s actions. And, in both cases the defendant possessed the requisite mens rea for the crime charged (recklessness), had they been the principal perpetrator. These defendants were not the principal perpetrators, though, and the question before the court in each case was whether they could be considered accomplices. In that instance, as a participant in a joint crime, the usual markers of guilt – being a critical part in the causal chain leading up to the crime and having the required mental state – were not sufficient. Instead, accomplice liability was based on whether the defendant and the principal perpetrator shared a common purpose with regards to the crime.

Basing guilt and punishment on joint intention avoids the risk of radically expanding criminal liability entailed in the foreseeability approach. As one court put it:

Something of significance beyond the fact of presence is necessary to justify a conviction. This requirement is an essential safeguard against the ever present danger of assuming the complicity of all in attendance whenever group activity is involved, and especially when many members of a group, actors as well as onlookers, are tried together. Restricting guilt based on joint intentions provides this safeguard. Given that foreseeability is not necessary, joint criminal liability doctrines can

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74 State v. Travis, 497 N.W.2d 905, 908 (Iowa Ct. App. 1993). See also id. at 909.
75 United States v. Barber, 429 F.2d 1394, 1397 (3d Cir. 1970); see also Mueller, supra, note 10, at 2174.
function without it, and liability should only be imposed when the potential accomplice is party to a joint intention to commit the crime. At most, foreseeability should be relegated to an evidentiary role, an issue we take up again below.

The approach we endorse and argue for below has close affinities to Peoni. Hand’s language that “he must participate in it as in something that he wishes to bring about” captures the conventional understanding of the idea of intention. Our joint intention-based approach is consistent with the spirit of Peoni and the cases that follow it. It is also a valuable modification to joint criminal liability doctrine because, while Peoni is the most widely-used standard for these cases in the United States, it is quite ambiguous, leading courts to continually struggle to apply it. “The cases interpret Judge Hand in so many different ways that there is no agreement as to how his seemingly simple formulation should be applied even in the most straightforward situations.” So, there are two basic points of confusion in the current accomplice liability doctrine. First, there are conflicting standards, foreseeability and Peoni, which alone would be a serious issue. Second, the intention-based standard drawn from Peoni, which avoids the serious problems presented by the foreseeability one, is applied in contradictory ways. Even worse, the doctrine is sufficiently muddled at this point that courts sometimes recite these conflicting standards in the same case and struggle to distinguish between them, let alone apply them consistently and fairly.

What constitutes “in some sort associate[ing] himself with the venture” in Learned Hand’s canonical formulation remains unclear. Just the two cases cited above as examples of an intention-based accomplice liability doctrine leave open a number of questions. In Travis it was important that the defendant suggested that Engler drive his motorcycle. Would the conviction in Ayers been upheld, then, if the defendant had

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76 Almendares & Landa, supra note 24, at 751.
79 E.g., United States v. Clayborne, 509 F.2d 473, 480-81 (D.C. Cir. 1974) (citing Peoni and then turning to foreseeability); see also United States v. Fountain, 768 F.2d 790, 798 (7th Cir.), opinion supplemented on denial of reh’g, 777 F.2d 345 (7th Cir. 1985).
80 United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
advertised the gun somehow, thereby initiating the sale? If Travis was
guilty in part because he only provided shoddy guidance as to how to safely
operate a potentially dangerous instrument, is Ayers not even more culpable
for providing no guidance whatsoever as to how to handle a firearm?
Alternatively, does it matter, as some have suggested, whether the potential
accomplice expects that the aid she provides will be later used in a crime? Our
objective here is to bring some much needed clarity to this important
area of law by providing an explicit framework for answering these sorts of
questions.

II. THE NECESSITY OF INTENTION

A. The Traditional Role of Mens Rea

The conflicting, vague standards described in the previous section
indicate that some revision of the current law regarding joint crimes is
essential. The need for this adjustment to be an intention-based account of
criminal liability arises from two additional considerations. The first is the
central role that intention has always played in criminal law. As the
Supreme Court put it: “The contention that an injury can amount to a crime
only when inflicted by intention is no provincial or transient notion. It is as
universal and persistent in mature systems of law as belief in freedom of the
human will.”

This principle is embodied in the culpability requirements
attached to crimes, that is, in the traditional mens rea requirements as well
as in the set of defenses that guard against liability when the defendant
cannot appreciate or control her behavior, i.e., when there is a lack of
intention. This makes perfect sense, moral and legal blameworthiness
depends on intentional acts: we do not hold someone responsible, and
certainly not in the same way, for a spasm or seizure as we do for a

81 See Glanville Williams, Criminal Law: the General Part, 369-70 (London, 1961);
United States v. Fountain, 768 F.2d 790 (7th Cir. 1989). The defendant in Ayers changed
the grips and filed off the serial numbers of the handgun before completing the sale, which
could be taken as evidence that the gun was likely to be later used for illicit purposes. Or,
it could have been due to the fact that the gun had already been used in a crime, so it was a
precaution to protect the new owner.

82 Morisette v. United States, 342 U.S. 246, 250 (1952). See also Morse, Inevitable
Mens rea (2003); Perkins, A Rationale for Mens rea (1939). United States v. United States
Gypsum Co., 438 U.S. 422, 436 (1978) (“the existence of a mens rea is the rule of, rather
than the exception to, the principles of Anglo-American criminal jurisprudence.”).

83 For some of the philosophical underpinnings of this position, see Dimitri Landa, On
the Possibility of Kantian Retributivism, 21 Utilitas 276 (2009).

84 These defenses include intoxication, insanity, duress, and so forth. See, e.g., Clark
v. Arizona, 548 U.S. 735 (2006); Model Penal Code § 2.02-.09.
deliberate, intentional choice.

While there are exceptions – notably, “public welfare” or “regulatory” offenses that do not require a showing of intention – they are cabined and only tolerated because they closely resemble civil violations. They are limited to offenses where the punishments are minor, there is no implicit moral condemnation in being found guilty, and the parties involved should have been on notice that such laws may exist because they are participating in either dangerous or heavily-regulated activities. Take away any of these features – if, for example, the crime is not narrowly-tailored and criminalizes a broad range of apparently innocent conduct, or if the penalties are severe – and intent will be a necessary condition for guilt. In general, the hallmark of criminal liability is intention.

Of course, the necessity of intention does not imply the intention to harm is necessary for the assignment of liability. As an overall rule, a liable party need not always intend the outcome, that is, the harm or events that constitute the crime. Whether the presence of that intention is an element of the offense depends on the mens rea requirements associated with it. If the particular crime requires a mental state such as purpose or willfulness, then someone is guilty only if they intended the result. A defendant who is merely reckless, such as the defendant in Travis, above, need not intend the outcome; there was no evidence that he wished for an accident to occur. All else being equal, he probably preferred nobody to be injured. Accordingly, he could not be guilty of a crime with purpose as the mental state


88 See Staples, 511 U.S. at 617-18 (holding that a felony implies that the offense is a serious one, and therefore unlikely to constitute a public welfare offense); Francis B. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 72 (1933) (“Crimes punishable with prison sentences … ordinarily require proof of a guilty intent”); Labert v. California, 355 US 225. But see State v. Lindberg, 215 P. 41 (1923); State v. Mertens, 64 P.3d 633 (2003).

89 Public welfare offenses survive essentially because they entail only civil liability.

90 Model Penal Code § 2.02.

requirement. He could, however, still be (and was) found guilty of a crime because his relevant actions – giving the defective motorcycle over to the inexperienced Engler to drive and so on – were intentional and voluntary. They were not convulsions or an action committed under “hypnotic suggestion.” As the Model Penal Code states: “A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.” This provision is “the fundamental predicate for all criminal liability, that the guilt of the defendant be based upon conduct, and that the conduct include a voluntary act or an omission to perform an act of which the defendant was physically capable.”

This basic maxim applies to all crimes (barring the aforementioned public welfare offenses). But an intention-based approach to joint crimes is more demanding. Unlike the overarching rule that all crimes be the product of intentional acts or omissions, both Peoni and our joint intention-based approach require accomplices to intend, to some degree, the result. Under Peoni, joint criminal liability necessitates that the accomplice “in some sort associate himself with the venture” and it must be “something that he wishes to bring about.” Likewise, one cannot share an intention towards a goal without having some sort of intention of promoting that goal. This implies that the mental state requirements for joint criminal liability will sometimes be more demanding with respect to accomplices than with respect to the principal perpetrators. A showing of recklessness in the harm-causing actus reus, for example, may be sufficient for the principal perpetrator, but would not suffice for the accomplice.

This relatively strict implication for demonstrating intention in cases of joint criminal liability both underscores the effective radicalism of the doctrine of foreseeability and puts in perspective the second consideration in favor of a joint intention-based approach. Although a crime is traditionally defined as two sets of elements together, a mental state (mens rea) and a set of specific acts (actus reus), an accomplice does not necessarily engage in the defining criminal act (commit the critical actus reus). The variety of ways in which criminal complicity may be manifested,

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92 Model Penal Code § 2.01 (2)(c).
93 Model Penal Code § 2.01.
95 Peoni, 100 F.2d at 420.
and the behavioral minimalism of those manifestations\(^{97}\) often make *actus reus* of little help in defining the contours of joint crimes. Simply being present at the scene of the crime can, in some cases, suffice. Courts have noted that the presence of a putative accomplice can make the primary perpetrator more secure by serving as a lookout or even just potentially doing so.\(^{98}\) lend the primary perpetrator credibility in dealing with others,\(^{99}\) strengthen her position physically,\(^{100}\) or provide tacit approval and encouragement.\(^{101}\) Even remaining as part of a group after it is clear that they intend on committing a crime can be sufficient.\(^{102}\) As cases like *Tally Judge* illustrate, such help can also be superfluous: the prosecution need not prove that but for the accomplice’s actions the crime would not have been committed or that those actions made it substantially more likely to succeed.\(^{103}\) Accordingly, an individual can be subject to joint criminal liability even if her action did not in any way affect how events actually unfolded. *The act requirements, therefore, do not play an effective defining role when we turn to accomplices and joint crimes generally.* They are simply both too vague and too minimal. Yet, the law needs some way to distinguish between mere passersby and those who are actually involved in the commission of the crime. To do so, we must rely heavily on the analysis of mental states.\(^{104}\) It is doubly so when, as in some of the hard cases we discuss below, the accomplice’s actions do not directly contribute to the actions defining the crime.

**B. Intent vs. Intention-in-Action**


\(^{99}\) *Garguilo*, 310 F.2d at 253.

\(^{100}\) *Garguilo*, 310 F.2d at 253; *People v. Villa* at 833-34 (“They aided and abetted by their actual presence … At the time of the rape by each of the men the other three stood near by and abetted the perpetrator by presenting a show of force and by keeping watch against intrusions.”); *People v. Mummert*, 135 P.2d 665, 668 (1943).


\(^{103}\) *Tally Judge*, 102 Ala. at 69; *Hicks*, 150 U.S. at 450.

\(^{104}\) Christopher Kutz, *Causeless Complicity*, 1 Crim. L. & Phil. 289, 294 (2007) (“Thus, the potential scope of liability for accomplices is both exceptionally wide and vague, and one of the primary roles of the mens rea requirement is to limit this scope and render it more predictable.”).
The law traditionally characterizes intent as a mental state, a component of the mens rea determination. To say that A intentionally shot and killed B is to say that she did so with “purpose” as defined by the Model Penal Code\textsuperscript{105} and can be punished accordingly.\textsuperscript{106} The law’s usual treatment places intention on the mental state side of the mens rea/actus reus formula. So, showing intent alone would not be enough for liability, some additional actions must be associated with it. The contemporary philosophy of action literature, on the other hand, sees intentions somewhat differently. This literature understands an intention as a plan for action.\textsuperscript{107} To have an intention to φ is to have a set of plans related to bringing about φ. Intentions can be conditional, e.g., “if facts are like this, then I will φ,” and they can be subject to revision. But, unless they impact one’s plans, they do not properly count as full-blown intentions; they are hypothetical intentions, desires, or similar attitudes. The important thing to note about this philosophical definition of intention is that there is very little difference between having an intention (perhaps properly-speaking a fully developed non-conditional one) and taking at least some of the steps to carry it out. If one intends to φ, “one is already in progress towards doing it.”\textsuperscript{108} While the notion of intending to φ but not yet acting on that intention, not yet putting that plan into action, is a straightforward one for courts and jurists, it is an odd one from the philosophical perspective. From that point of view, having an intention is nearly indistinguishable from at least the first steps to realize it; to have an intention is to have a plan that affects other plans.

These differing treatments of the terms are based on practical considerations. While a philosopher can stipulate someone’s intentions for illustrative purposes, the law is tasked with discovering them based on evidence. There is simply no other option than inferring someone’s intentions from some pattern of their actions.\textsuperscript{109} In addition, because the law is potentially using the power of the state to punish people, relatively demanding conditions for liability are likely appropriate.\textsuperscript{110} For the purposes of clarity, we use the term “intention-in-action” to indicate intention in the sense used by philosophers of action, which is much closer to an (intentional) action in and of itself than the way the law usually

\textsuperscript{105} Model Penal Code § 2.02.
\textsuperscript{106} Model Penal Code § 210.2.
\textsuperscript{108} Intention, Stanford Encyclopedia of Philosophy, supra.
\textsuperscript{109} See Section III.C., below.
JOINT INTENTION AND ACCOMPLICE LIABILITY [24-Jul-17]

A consideration of the crime of conspiracy helps illustrate the idea of intention-in-action, and is important for understanding the broader criminal law reach of joint criminal liability. Conspiracy is an unusual, pervasive\(^\text{111}\) offense which makes it a crime to agree to commit another, different crime or to agree to plan a crime.\(^\text{112}\) Conspiracy is thus an inchoate offense, targeting preparatory conduct that has not yet become a completed crime. It is also an inherently joint crime – there must be multiple people involved for there to be a conspiracy. Compared to some of the other forms of joint criminal liability examined in this Article, conspiracy is, conceptually, relatively simple. The challenges that typically arise in the context of conspiracies concern how to prove them, as they are rarely made clearly or openly,\(^\text{113}\) how to understand their scope, and the way they serve to create an expanded form of accomplice liability.\(^\text{114}\) The \textit{actus reus} for a conspiracy is the agreement. “[T]he essence of the conspiracy is being combined for an unlawful purpose.”\(^\text{115}\) The agreement or plan that defines a conspiracy is considered an action in itself, and this sort of action – especially to make a plan – closely parallels our concept of intention-in-action. Take, for example, this canonical formulation: “A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act itself.”\(^\text{116}\) Many jurisdictions require someone to take an “overt act” in the furtherance of the conspiracy.\(^\text{117}\) This is a practical consideration, however, like the evidentiary ones noted above, and not, as such, an additional element of the conspiracy offense. As the Supreme Court explained: “The function of the overt act in a conspiracy prosecution is simply to manifest ‘that the conspiracy is at work,’ and is neither a project still resting solely in the


\(^{112}\) E.g., Model Penal Code § 5.03.

\(^{113}\) E.g., Kotteakos \textit{v. United States}, 328 U.S. 750 (1946).

\(^{114}\) See, e.g., Pinkerton; discussion \textit{infra}.


\(^{117}\) E.g., Model Penal Code § 5.03(5) (for the most serious crimes); 18 U.S.C. § 371.
minds of the conspirators nor a fully completed operation no longer in existence.’’ The overt act is evidence – sometimes statutorily required – that the plan which forms the central element of the conspiracy offense has been created and agreed to. We return to the example of conspiracy in Section IV.C., where we re-consider it in the context of the discussion of the burdens of proof involved in joint criminal liability cases.

When we refer to intention for the remainder of this Article and when applying our approach to joint crimes to particular cases, we mean it in the stronger sense of intention-in-action. This idea is consistent with what law aims to criminalize. As the quotation on conspiracy illustrates, intention in the sense of something like a wish or a desire, i.e., an attitude that does not affect plans or actions, is neither sufficient nor really the object of legal inquiry. It is only when someone forms a plan, at the very least, that the law steps in, even in the special cases of inchoate offenses like conspiracy and attempt. Indeed, conspiracy marks the outer limits of the earliest stages of putting a plan into action that can trigger liability under criminal law.

Moreover, because intention-in-action is a more demanding notion than intention in a more aspirational sense, it sets the bar for justifying the assignment of liability higher. And since, as we argue below, a robust account of joint criminal liability can be anchored in accounts of joint intentions which meet that higher bar, it must enjoy presumption of greater plausibility.

A classic example of a lookout in a bank robbery has those intentions and makes for a relatively easy case when it comes to assigning joint criminal liability for the robbery. She is actively participating in the crime even though her participation may be superfluous (if no police comes by). She is contributing to the joint project of committing the crime, and is doing so with a clear (if relatively undramatic) action. The more difficult cases


119 Although the philosophical literature has generally been more precise on the contours of these terms.

120 Compare also the concept of a wish or desire with the concepts of purpose and knowledge that form the main part of the Model Penal Code’s culpability (mens rea) requirements.


122 Approaching the puzzles presented by joint criminal liability this way, using this more demanding notion, is also consistent with the normative principles behind the rule of lenity. See, e.g., Zachary S. Price, The Rule of Lenity as a Rule of Structure, 72 Fordham L. Rev. 885 (2004).
are ones where the actions on the part of the potential accomplice do not directly aid or enable the *actus reus* that defines the offence of the primary perpetrator. In those cases, which we take up in the next section, a proper account of the mental states will be even more essential.

### III. **Joint Intentions Without Joint Actions**

#### A. Understanding Joint Intention

Intention is a bedrock idea in criminal law and moral responsibility, and our concern with crimes in which there are multiple participants points naturally to the concept of *joint* intention to cash out the entailed intentionality. Although the concept of joint intention is complex, and the subject of considerable philosophical debate, the key underlying intuition makes its relevance here immediate. If the multiple participants in a crime rely on each other’s actions and intentions in some germane way, then a crime is a joint product of intentional actions, and, with respect to at least some of the participants, it cannot be understood as a sole product of their *individual* (socially unmediated) actions and intentions. The concept of joint intention is meant to allow us to create an account of intention(s) behind such joint action products without undermining the idea of individual intentional agency, with its attendant multi-faceted commitments to the norms of individual rationality.\(^{123}\)

In broadest-brush terms, joint intention turns on the coordination between individual participants with respect to their individual beliefs, intentions, and the entailed subsidiary intentions, or sub-plans, although in some versions it also requires normative or psychological commitments to collective entities on whose behalf the joint action is being performed.\(^{124}\) Three types of conditions, identified in the philosophical literature, on the relationship between participants’ individual action-relevant attributes help explicate the idea of joint intention analytically. Participants’ individual

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intentions depend on each other in that if one of the parties’ intentions disappears, that particular joint intention must change or be abandoned (interdependence); the participants intend their joint project by way of each other’s corresponding intentions (interlocking); and the subplans entailed by those individual intentions work in concert (meshing). In straightforward cases that are the focus of the bulk of the literature on joint intention in philosophy, the relevant individuals are similarly situated, and joint intention obtains when the conditions of interlocking, interdependence, and meshing subplans hold under common knowledge among the participants.\(^\text{125}\) In the context of the accomplice liability law, the relevant question concerns whether the potential accomplice could be understood as having intended the criminal actions of the primary perpetrator, not whether the primary perpetrator had intended them, and that asymmetry sanctions the asymmetry in the focus of the inquiry into the jointness of intention.

The formulation of joint intention in terms of the relationships described by these conditions makes it possible to describe intentions for actions that are impossible to conceive in terms that are strictly individual, like playing a duet, in terms of intentions and actions that are, nonetheless, individual. In other words, it creates a continuity between individual actions and intentions on the one hand and joint actions and intentions on the other. In its strong form, championed by Michael Bratman,\(^\text{126}\) this continuity eschews creation of concepts that are irreducible to individual-level concepts we use in constructing accounts of individual intentional action: there is no essential ontological difference between joint and individual intentions, a joint intention simply consists of a set of individual intentions related to each other in a certain way.

This approach is especially appealing in the context of criminal law, because it conceives liability as fundamentally individual. The U.S. Supreme Court has noted that “Guilt with us remains individual and personal, even as respects conspiracies,”\(^\text{127}\) and conspiracy is, of course, an inherently joint crime. Other courts have echoed the sentiment, maintaining that “guilt is generally personal to the defendant” and doing otherwise is “repugnant to our system of jurisprudence.”\(^\text{128}\) It is noteworthy that these


considerations also have constitutional bite in the context of freedom of association protections, as the courts have held that membership in a group alone cannot constitute a crime. Instead, the individual must have a specific intent to further some criminal purpose.

To illustrate the contours of the concept of joint intention, consider the example of a neighborhood crime watch. Not every member needs to actively participate in the crime watch for it to be a success, it needs some critical mass, but it functions perfectly well if less than the entire neighborhood actively patrols it. A simple way of representing this idea is in game-theoretic terms. We can say that providing the public good of a patrol requires \( n \) out of \( m \) residents (where \( n < m \)), and a particular patrol composition (a particular realization of \( n \) out of \( m \) draws) corresponds to an equilibrium (one of many) in a strategic game of providing that public good. Assuming all \( m \) are ready and willing to join the patrol, a coordination on a specific \( n \)-person patrolling subset is representing all \( m \) residents, and the coordination between their individual beliefs, intentions, and entailed subplans can be understood as corresponding to the requirements of a jointly intended action in the above sense. Here we will consider five variations on this crime watch scenario – the Core Case, Imperfect Coordination, Control Relationship, Probabilistic Participation, and Pivotal-Event Participation – each of which highlight different aspects of the joint intention concept. In each case there are individuals whose actions and intentions vary but all satisfy the conditions that define a joint intention – interdependence, interlocking, and meshing subplans – to a sufficient degree to make them parties to a joint intention with respect to the provision of the neighborhood crime watch.

The Core Case. Let us suppose the neighborhood consists of 25 residents, and that 5 are necessary for a successful crime watch. If 5 people are committed to doing their part for the crime watch – patrolling, etc. – then they have a joint intention to provide the crime watch, although since it is a public good, the other 20 residents also benefit from it. This is the most straightforward, idealized version of a joint intention – the providers of the public good are working together towards a shared end, each of their efforts takes into account and is sensitive to the efforts of the others, and their individual intentions depend on the intentions of the other


\[130\] Additional efforts to patrol or contribute to do not improve the crime watch’s efficacy.
JOINT INTENTION AND ACCOMPLICE LIABILITY

These 5 residents will, for instance, need to coordinate their patrol schedules, (meshing subplans) and if 1 one of the providers abandons the project, then their joint intention to provide the neighborhood crime watch must change, too (interdependence). The remaining 4 must either abort their plan, find another provider, or alter their strategy (e.g., take on more patrol time each). Further, the contributors all intend to provide the crime watch by way of each other’s intentions, they are working together towards the shared end (interlocking).

The core case corresponds to the symmetric idealized setting of joint intention in which interlocking, interdependence, and meshing subplans hold straightforwardly under common knowledge among the participants. The next four classes of cases describe situations in which these conditions are met imperfectly or in a more complex way.

Imperfect Coordination. The parties may come short of the idealized version of a joint intention due to imperfect planning. If, for example, there is some confusion in the scheduling of patrols, so that individuals 1 and 2 are both mistakenly scheduled for the same time, that does not automatically destroy the joint intention to create the crime watch. The participants in the crime watch may muddle through, or change their sub-plans in such a way to accommodate these circumstances. Provided it is clear enough that the parties are relying on each other to succeed and taking their intentions into account (albeit imperfectly), there is, most plausibly, a joint intention to provide the crime watch and they are the parties to that intention. They still have a joint intention to provide the crime watch, just this way as opposed to according to their original plan, and they may succeed or fail in delivering a joint action on that intention, as the two notions are quite distinct. As in the Core Case, all of the conditions on a joint intention are satisfied, although the subplans here do not perfectly mesh.

Control Relationship. Suppose that in this neighborhood there is a person who enjoys considerable influence over other residents who will, enact a plan for providing the crime watch if she were to propose it. If she were to propose such a plan, then we would naturally conclude that she is also a party to a joint intention that the crime watch be provided. Her individual intention is different than the ones described above: the subsidiary intentions, sub-plans, of the 5 providers do not depend on her

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participation in the crime watch. But, she still has an intention to bring it about and to do it by way of the intentions of the other residents involved, thus interlocking her intention with theirs. Furthermore, while the providers’ intentions do not depend on this controller’s personal participation in the watch – she is not intending to participate – their intentions to participate do depend on her controlling intention to have the watch: the contributors to the watch would not be making those contributions, at least not in the same way, but for her influence, manifesting interdependence with her intention. The situation here is similar to the facts of Luparello: the primary perpetrators would not have gone looking for the victim or harmed, let alone killed, him had they not been ordered to by Luparello.

As with the Core Case, this presents is a stark, idealized version of the scenario. Individuals can often exert influence without having dictatorial control over a situation. If someone has some substantial control over how other individuals will act and they exert this control to make it more likely that the project is realized (e.g., resolve uncertainty by selecting 5 definite contributors to the crime watch), then they are a party to a joint intention with respect to that project.

The Control Relationship can exemplify an asymmetric joint intention, illustrating how one can plausibly maintain a claim of the presence of something close to a joint intention in the absence of common knowledge. Consider, as an example, a hypothetical case inspired by Tally Judge.

\[132\] In this scenario she is not actively participating in the crime watch itself at all.
\[133\] Almendares & Landa, supra note 25, at 750.
\[134\] The basic notion that ordering a crime to be committed makes one culpable is well-established. E.g. Model Penal Code § 2.06(3)(a)(i) (solicitation); Mirjan Damaska, The Shadow Side of Command Responsibility, 49 Am. J. Comp. L. 455 (2001) (“Under all modern systems of domestic criminal law a superior can be punished for the misdeeds of his underlings, provided that he directed, abetted, or aided the immediate perpetrators.”); Francis Bowes Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689, 695 (1930).

The critique of theories of liability based solely on control is that they sometimes do away with any mental state requirement, that is, they substitute the control relationship for the controller’s mens rea. Ohlin, supra note 5, at 734. Our joint intention approach does not do this. It is not enough that the controller be aware that the crime is likely to take place. She must have an actual joint intention, in the manner described here, that the criminal acts be performed. Put another way, she has to exercise intentionally her control towards this end.

\[136\] Almendares & Landa, supra note 25, at 750-52.
Suppose that Tally desires that the victim be killed, and, further, knows that the Skeltons wish to murder the victim and plan to ambush him in the center of town. Knowing this, Tally contacts the victim, inviting him to lunch near where the Skeltons are lying in wait. The victim accepts the invitation and is murdered. In this scenario, Tally has knowledge of the Skeltons’, the primary perpetrators’, intentions and subplans, but they are unaware of his.

The Skeltons are his instruments in doing the killing (in that, his intentions proceed by way of theirs, corresponding to the interlocking condition above). Yes, this alone is indistinguishable from having a wish that is, serendipitously, shared by someone else who is willing to act on it. Another person might have wished for the victim to be killed, and even wished that the Skeltons carried it out. While that desire would be consistent with treating someone else as an instrument of that wish, that should not be sufficient grounds for either a joint intention or criminal liability. What makes the difference here is that Skeltons’ actions (and their potential subsequent intentions if the victim fails to appear where they are lying in wait) depend on Tally’s intentions, even if they do not know it. In this case, we would be justified in asserting that Tally shares in Skeltons’ intention to kill the victim, even as the stronger claim to the existence of a symmetric joint intention may be harder to maintain given the Skeltons are not aware of Tally’s involvement ex hypothesi.\(^{137}\)

**Probabilistic Participation.** Rather than choosing at the outset a particular subset of residents to provide the crime watch, the neighborhood could adopt a selection mechanism. Participation in the crime watch could

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\(^{137}\) Tally’s sharing in Skeltons’ intention in this example distinguishes Tally from someone like Harry Frankfurt’s Black, who would act to ensure a given crime occurs but is not a party to any sort of joint intention with the principal perpetrator. Harry Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 J. Philos. 829 (1969). Black wants someone else to perform an action, for example a murder or other crime, and would prefer not to do anything himself. In Frankfurt’s scenario, if this other person opts not to take the action Black prefers, then Black will intervene and force the other person to act as he wishes. Suppose that the other individual has no knowledge of Black’s existence, and that she chooses to undertake Black’s preferred action of her own accord, i.e., without any form of coercion or intervention by Black. In that instance, Black is not sharing in her intention (even if he agrees with the idea) because the principal perpetrator’s actions and intentions in no way depended on Black (though his liability is a distinct question). Had the other person failed to act, leading Black to spring into action and coerce her to commit the crime, Black would be an accomplice in a straightforward fashion.

Our analysis of the modified Tally Judge case also points to a difference from “participatory intention” described by Christopher Kutz. Christopher Kutz, *Acting Together*, 61 Phil. & Phenomenological Research 1 (2000). In the latter, there is no need to satisfy a version of interdependence, but it is key is our analysis.
be determined by a lottery – the 5 names that are drawn will be the ones who provide. Those 5 are obviously parties to a joint intention to provide the crime watch, they are a version of the Core Case described above. But, what of the people who agreed to the lottery in the first place? Provided the probability of being selected to participate is not too remote, all the residents who are ready and willing to participate have beliefs, intentions, and actions that stand with respect to one another in a relationship that tacks closely to the demands of joint intention. The intentions of those not selected run through (interlock with) the intentions of those actually participating in the watch. Furthermore, the intentions of the two sets of individuals are interdependent through the mutually agreed-upon random selection device. They are all participants in the joint intention that the neighborhood crime watch be provided even if, in practice, some participate in its provision with some probability less than 1.\(^\text{138}\)

**Pivotal-Event Participation.** Participation in the crime watch, that is, actual patrolling, is costly. Yet, the crime watch is a public good, so even those who do not put the effort into realizing it still derive the benefit from living in a safer neighborhood. This creates the temptation to free-ride on the participation of others, enjoying the benefits of the public good without contributing towards it. Yet, in the event they are pivotal – that is, if provision of the public good turns on their participation in the joint action (“the pivotal event”) – residents who might otherwise free-ride may (though receiving a benefit alone does not imply this) still participate in the joint action because in that event of being pivotal, the marginal effect of their participation is maximized. (Put differently, relative to the cost of participation in the joint action, the marginal benefit of participation has to be high enough to make participation worthwhile, and in that event, the marginal benefit is highest.) In other words, those are the residents who are willing to participate, but only if they have to in order to make the crime watch succeed, and otherwise they would rather free-ride.

Such reluctant pivotal-event participants in the joint action (who may be non-participants outside of that event) are, like the certain participants in the Core Case and the probabilistic ones in the Probabilistic Participation scenario, parties to a joint intention to provide the crime watch (albeit with a qualification related to the counterfactual nature of the argument). Even in the cases where there are enough participants to ensure the provision of the crime watch without the intervention by those would-be participants, the intentions of the latter run through (interlock with) the intentions of those

\(^{138}\) *Id.* at 747-48.
actually participating in the watch. Further, the intentions of those would-be participants are interdependent with the intentions of actual participants in the sense that if someone from either set were to change their intention with respect to participation, then the intentions with respect to participation of those in the other set should be expected to change. (The free-riding would-be participants may spring into action if an “active” participant were to stand down, and an “active” participants would prefer to stand down if a would-be participant suddenly to become “active.”) To be sure – and that is the qualification noted above – the probability of the pivotal event that triggers that change must be sufficiently high to make an imprint on their planning ex ante, otherwise those counterfactual events are, essentially, merely hypothetical. In other words, the intentions of those would-be participants have to fit the stronger intention-in-action definition given above. When they do, those individuals, like the would-be participants in the Probabilistic Participation scenario, exemplify the condition of standing in reserve with respect to the underlying joint project. While, holding fixed the actions of other participants, their actions, put in a criminal law setting, lack the actus reus of the primary perpetrators, they are parties to the joint intention with them to accomplish the criminal act and, under our account of joint criminal liability, would be considered accomplices.

B. Standing in Reserve vs. Potential Causing

The requirement that the relevant intentions of those standing in reserve meet the intention-in-action standard helps explain why our account of the basis of criminal prosecution under the Standing in Reserve doctrine is proof against the objection that it criminalizes a mere intention (a thought), as well as how it differs from a prominent account of criminal complicity offered by Christopher Kutz. Although the conceptual apparatus of joint intention is typically applied to understanding cases in which participants in a joint intention all take the relevant individual actions feeding into the joint action, the Control Relationship, Probabilistic Participation, and Pivotal-Event Participation scenarios, we argued, show that a joint intention need

139 Almendares & Landa, supra note 25, at 750.
140 It is important to see that the pivotal-event participation argument for the inclusion in the set of participants in the joint intention is distinct from the argument that what makes these reluctant participants in the joint intention is that they are receiving benefits from the joint action. Mere preference for a particular outcome does not imply that one is intending that outcome or is a member of a set of participants in the joint intention to bring that outcome about.
141 See generally, Kutz, Christopher, Complicity: Ethics and Law for a Collective Age (2000); Kutz, Christopher, Causeless Complicity, 1 Crim. Law & Philosophy 289 (2007).
not require joint actions. It does when it comes to two friends who have conceived a plan to play a duet, but does not in the case of a neighborhood crime watch patrol, or, more generally, cases where a public or other collective good is provided by a subset of sufficiently motivated beneficiaries, potentially in complex social settings with mixed motives and conflicting interests that are ubiquitous in criminal interactions.\footnote{Indeed, the law itself often creates these mixed motives by providing substantial incentives to individuals for abandoning or betraying their criminal confederates. \textit{See} Federal Sentencing Guidelines Manual § 5K1.1 (11/1/16); Department of Justice’s Corporate Leniency Policy (available at: https://www.justice.gov/atr/corporate-leniency-policy).}

The contrast between our approach and one developed by Kutz, which treats joint criminal liability as an inchoate offense along the lines of an attempted crime, is instructive here.\footnote{James G. Stewart, \textit{Complicity} in \textit{The Oxford Handbook of Criminal Law} (Markus D. Dubber and Tatjana Hornle, eds.), 5 (2014).} Like the case law discussed above, the inchoate account of joint criminal liability does not require that the potential accomplice actually cause the offense to occur.\footnote{Our joint intention-based account shares this quality.} As in \textit{Tally Judge}, the help given may be superfluous. In laying out a version of this account, Kutz presents a variation on \textit{Tally Judge} where the potential accomplice (the defendant in that case) provided the principal perpetrators with an extra gun in case one of theirs malfunctioned. In that scenario, “Tally might have causally contributed to [the victim’s] death, but it is not necessarily the case that he did.”\footnote{Christopher Kutz, \textit{Causeless Complicity}, 1 Crim. L. & Phil. 289, 298 (2007).} Actually contributing to the crime’s success, that is, playing a causal role, is not a condition necessary to be an accomplice: “In the world in which their guns fire, his act of assistance (clearly adequate for accomplice liability) is potentially but not actually causal.”\footnote{Christopher Kutz, \textit{Causeless Complicity}, 1 Crim. L. & Phil. 289, 298 (2007).} At first glance, this logic appears to parallel the standing in reserve logic developed here. The individual standing in reserve is potentially causal: if the pivotal event occurs (e.g., if the shooter’s gun malfunctions), he will contribute and ensure the criminal project succeeds, and is otherwise superfluous, just like the unneeded gun. But there is a difference. Under the inchoate offense treatment of accomplices, even if the accomplice does not make a causal difference in what happens, she does commit an action that could have been causal. In Kutz’s scenario, Tally is still handing a rifle over to the shooters, even if they end up not using it (i.e., if it makes no difference in the events that take place). Under our joint intention-based account, that actual action that is potentially causal is not necessary for joint intention, and so for a joint criminal liability. An
objection from the standpoint of Kutz’s account, then, could be that in not requiring an action that is even potentially causal, we are left with just intention, which is too slender a reed to support criminal liability.

In a nutshell, our response is that while requiring an action, rather than a mere intent in aspirational sense, is right, requiring an action that is potentially causal is not. As discussed above, in developing our joint intention-based account, we use intentions in the stronger sense of intentions-in-action. So, when we argue in favor of basing criminal liability on intentions (ones of a certain sort that relate to the intentions of others in a particular way), we mean plans that are not just hypothetical, but rather plans that have been, to some relevant extent, put into action. Individuals who are standing in reserve, we argue, are intending in this way. In the relatively easy cases, the accomplice has some control over what the primary perpetrators do, so what is done is responsive to their intentions. In the harder cases, the accomplices are implementing an intentional plan that the primary perpetrators succeed in their crime.\(^{147}\) The actions of these accomplices – of joining the joint criminal project, pledging to step in, and so forth – may, \textit{a la} Kutz, increase the chances that the crime takes place, and \textit{may} even influence the actions of those performing \textit{actus reus}, but they need not entail actions actually or potential contributing to the \textit{actus reus}. But, again, to count as accomplices, their intentions must be more than hypothetical ideas, they must entail choices that affect their future plans and so forth. That is what gives an intention-in-action its distinctive character and distinguishes it from other mental states.

It is important to emphasize that the intention-in-action of the accomplice must be proven by the prosecution. Here we are sketching the necessary elements of accomplice liability. The more actions a potential accomplice has taken to support the joint crime, even if she is only standing in reserve, the easier it will be to meet the burden of proof.\(^ {148}\) In the absence of actual actions by the accomplice (e.g., providing tools to the burglar), it will be more difficult to differentiate between a hypothetical plan and an intention that is in the early stages of its implementation. For example, suppose \(i\) is standing in reserve with respect to an arson on a specified target. Until she makes the preparations – manufactures explosives, casing the target, etc. – it will be difficult to show she has an intention in the sense that we mean it. But, that is a question of the evidentiary standard (in other words, an epistemological question), not a

\(^{147}\) Which, note, is different in content from an intention \textit{to} commit the crime.

\(^{148}\) The logic here bears some resemblance to the overt act requirement of a conspiracy; both provide evidence of a plan.
question of what should be properly seen as criminal (a question of legal ontology).

Having sketched the key elements of the framework of joint intention relevant to the consideration of joint criminal liability, we now turn to applying it to particular cases. These cases illustrate how this framework can be used to resolve some persistent puzzles that have confronted this area of law, and also how we can do so without resorting to a foreseeability doctrine of criminal law and so without compromising commitment to assigning criminal liability in response to intentional acts.

IV. A Spectrum of Cases: Easy to Hard

It is useful to think of possible joint crime cases on a spectrum based on the actions of the potential accomplice that ranges from the clearest cases where the accomplice is most directly involved in committing the acts to those where the accomplice does not participate in those acts at all. As the discussion in the previous section makes clear, that range of cases, based on the accomplice’s actus reus, implicates a broader constituency in the joint criminal intention than the set of agents performing the intended action (element (2) of joint intention, above). In this section we sketch how our joint intention approach to accomplice liability would help in determining criminal liability in these cases.

A. Easy Cases

*Easy Cases 1 – Direct, Identical Involvement:* These cases can be thought of as examples of the archetypal case of accomplices. The perpetrators of the crime all actively participate in it, and do so in the same way. Consider a burglary of a warehouse, and suppose that the boxes that the thieves want to steal are too heavy for a single person to move, and so they work together. This is an easy, intuitive case, and it resembles the basic cases of joint intention. Like the duet, if either of the burglars does not hold up her end of the task (literally, in this scenario), the project fails.  

*Easy Cases 2 – Direct, But Varying Involvement:* A crime can often be

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149 Indeed, helping someone move furniture is one of the common examples in the joint intention literature.
a complex endeavor. The example of the warehouse burglars is simple in part because the participants are engaged in identical behavior. Indeed, they were interchangeable. More generally, however, joint crimes, often exhibit a division of labor. A classic example is a getaway driver or a safecracker\textsuperscript{150} who have specialized, discrete roles to play in a joint criminal project. These, again, are fairly straightforward cases, although recognizing the presence of a joint intention despite mixed motives and assigning liability contingent on the joint intention also makes some cases that courts have long struggled with (even when arriving at what we would consider the correct results) into easy ones.

The cases we have in mind here usually arise when bystanders are harmed: e.g., two or more people are engaged in some activity and a third party is injured. \textit{People v. Abbott}\textsuperscript{151} is a canonical case where in the course of a drag race one of the racers got into an accident, killing a bystander. Both drivers were charged with negligent homicide on the grounds that they both had the requisite culpable mental state, negligence,\textsuperscript{152} and that the driver who did not have the accident intentionally aided in its commission.\textsuperscript{153} \textit{Abbott} can be seen as analogous to joint intentions to play a game or a competitive sport; while the parties are in some sense antagonistic since they are playing against each other, they have agreed to play the game, abide by its rules, and so on. The drag racers in \textit{Abbott} both presumably wanted to win, but they also both intended to conduct the race.

\textit{People v. Russell,}\textsuperscript{154} is very similar to \textit{Abbott}, except it is plausible that the parties involved possessed mixed motives. They were trying to kill each other, and a bystander was shot during their gun battle. It was unclear who had fired the bullet, and all the participants were charged and convicted as accomplices to the murder, with the prosecution relying on the same theory as in \textit{Abbott}. Critical to the court’s reasoning in \textit{Russell} was that the fight

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\textsuperscript{150} See, e.g., Ocean’s Eleven; Leverage; The Sting.
\textsuperscript{151} 84 A.D.2d 11 (NY App Div 1981).
\textsuperscript{152} In modern cases, the negligence referred to in the criminal context is usually not identical to the one used in tort law. Criminal negligence generally corresponds to a standard that can be thought of as gross negligence, though many commentators think it should be used sparingly. The defendants in \textit{Abbott} were almost assuredly reckless as well.
\end{flushright}
resembled something like a duel. Accordingly, it had that same quality of the parties agreeing to participate in a joint endeavor. A drag race is inherently dangerous, but it still has defined rules. A duel, like tennis or a drag race, has its own set of rules or mores. If the parties agree, perhaps tacitly, to a duel then they share that joint intention, and they can be held liable for its effects, even those they do not directly cause. On appeal, the court found enough evidence that the events in this case were close enough to a duel to warrant guilt being applied to all the participants.

Although Burroughs was shooting at Russell and Bekka, and Russell and Bekka were shooting at Burroughs, there was adequate proof to justify the finding that the three defendants tacitly agreed to engage in the gun battle that placed the life of any innocent bystander at grave risk and ultimately killed Daly. Indeed, unlike an unanticipated ambush or spontaneous attack that might have taken defendants by surprise, the gunfight in this case only began after defendants acknowledged and accepted each other’s challenge to engage in a deadly battle on a public concourse. 155

The court also noted that the combatants challenged each other and accepted the challenges directed at them. 156 Provided one recognizes that the parties’ mixed motives do not negate the possibility of them sharing a joint intention, then Russell and Abbott become very similar cases and were correctly decided. A bystander being shot is also almost assuredly a reasonably foreseeable consequence of a gun battle in a public place, but the above reasoning in the context of these cases shows how they can be properly analyzed without abandoning mens rea at all.

B. Hard Cases

**Hard Cases 1 – Some Involvement, Signals of Involvement:** Recall that one of the longstanding features of accomplice liability is a rejection of the intuitive, natural approach that would regard as an accomplice anyone who provides substantial aid to the principal perpetrator. 157 A joint intention approach explains why this is neither a necessary nor a sufficient condition for liability. It also explains why the act requirements for joint crimes can be so minimal. As in the neighborhood crime watch example, actual participation is not necessary for one to be a party to a joint intention. An

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156 *Id.*
157 Sometimes the act of providing aid in and of itself is made into a separate crime, such as in the case of providing material aid to terrorists or some financial crimes, especially those relating to record-keeping. These are separate from the general issue of joint criminal liability, though. No one suggests that providing such aid makes one an accomplice to future crimes carried out by the beneficiary, hence the need for a separate offense.
instructive illustration here can be made with an idea of mixed strategies – strategies or decision rules that assign positive probabilities to different actions. Suppose the residents of the neighborhood contribute to the crime watch with probability less than 1 – e.g., come for a patrol contingent on how busy they are at work, which works out to be about 70% of the time. The difference between a resident who comes on a given night and one who does not is simply chance, not an intention (or its absence) to improve the safety of the neighborhood by creating and participating in a crime watch. There are analogous criminal situations, such as when the potential perpetrators all draw lots to determine who will commit the acts that constitute the crime.

Generalizing to cases in which one’s willing participation is determined by external conditions, these and other situations we describe below can be instructively analyzed with the concept of standing in reserve. In a broad class of cases, participation depends on a pivotal event (which can itself be probabilistic) and individuals (standing in reserve) are ready to do their part, to contribute to the joint project, if and only if certain conditions obtain – generally if their contribution ends up being necessary for the realization of the goal. In the context of criminal law, this captures cases where an accomplice was ready and available to render aid to the primary perpetrator, but that aid proved unnecessary.

A few examples, drawn from cases where the scope of the joint intention, and with it the scope of liability, is the main issue illustrate our argument about the implications of standing in reserve more concretely. Consider a scenario where the Mafia – a complex organization that engages in a variety of criminal activities— plans to commit arson. To accomplish this goal, it needs the services of a forger – the agents who will actually perform the arson need false travel documents. Let us suppose there are two possibilities. There could be a forger who is herself a full-fledged member of the Mafia, specializing in forgery through something like a division of labor within the organization. Alternatively, the Mafia could employ a freelance forger through a storefront like the now-defunct Silk Road. In either case, the forger is aware of at least the basics of the plan. She is, for instance, forging documents to enable notorious arsonists to get close to their next target.

While both the freelance forger and the Mafia specialist are obviously guilty of forgery, is there any reason to hold either of them responsible for the arson? Are they accomplices to that crime? The freelance forger is reminiscent of Ayers. She is committing a crime, and the
results of her actions (arson in this hypothetical case, a shooting in Ayers) are certainly foreseeable. But, as in Ayers, there is no intention to commit this crime. It is an arms-length transaction and all the freelance forger intends is to commit her particular crime and get paid. The lack of intention regarding the arson, the potential joint project, should prevent her from being liable for it. Is the Mafia forger any different? Potentially yes. The freelance forger’s intentions ended at the act of forging. If the Mafia forger is a “made man” pledged to support the organization’s endeavors however she can, then that forger is party to the relevant joint intention to produce arson. Given that intention, she is standing in reserve, ready to participate in the arson if doing so becomes pivotal to realizing it. Provided that happening is not too remote a possibility, the Mafia forger, given this description, should be considered an accomplice to the arson.

Membership in an organization, like the Mafia in the above example, is not sufficient for joint criminal liability, however. To illustrate, consider a situation where there is a repressive state that commits crimes against humanity. In this case, the state apparatus is a complex organization like the Mafia in the previous example. It will employ people in a variety of roles, and one of the questions facing the law, especially international human rights law, is the scope of liability stemming from these crimes. Are those who are not directly employed in the terrible acts, such as those in support or ancillary capacities, liable for these crimes against humanity? Suppose someone works as a guard at a concentration camp, or as a carpenter or electrician there, maintaining its facilities. To what extent should they be held responsible, criminally, for what happens there?

As Jens David Ohlin suggests, joint intention analysis is in a position to shed some light on these questions. Indeed, it is, and it does so under our formulation. Like in the Mafia case, membership in the organization – either the state in general or the camp – is not, in and of itself, enough. The scope of liability for the acts of another in these cases turns on the intentions of the support personnel. If they intended to aid or enable specific acts, then they should be held responsible for them. They would be accomplices, no different from the safecracker, getaway driver, or other accomplice where there is a division of labor. (For the present purposes, we set aside the possibility of a special crime that punishes belonging to a group in and of itself, e.g., the crime of being a member of the Nazi Party or

\[158\] Naturally, membership in such an organization is not a necessary condition for accomplice liability. The relationship between an organization and accomplice liability is further illustrated by our bank robbery example, below.

\[159\] Ohlin, supra note 5, at 742.
the SS. In U.S. law such a crime would face serious constitutional challenges.\(^{160}\)

Here, the concept of standing in reserve again serves a useful purpose. We are not concerned with a broad-ranging intention to support the regime. The question here is whether the guard or other support personnel are accomplices to particular crimes. The approach we advocate holds that if their choice to serve entailed a non-trivial chance of being assigned to a position where they would be called upon to perform atrocities – i.e., if the probability of that assignment is high enough to meet the threshold of intention-in-action – then that choice, even if it did not, in fact, lead to such an assignment, would still put them in the position of standing in reserve relative to those who did receive that assignment, and so in a relationship of joint criminal liability with them.

There may be mitigating factors, such as duress, that a court can take into account. An individual may have been choosing between serving on the battlefield, at a high risk to herself, or volunteering for guard duty, fully aware that that may entail participating in atrocities. In such a case, a relevant question may turn on the plausibility of the defense that she would have chosen to disobey an order to engage in atrocities: how does an expected punitive response to that disobedience compare with the expected harm to her from deprivations on a battlefield? The answer affects the interpretation of individual intention to volunteer as a guard and may affect the extent of the guard’s punishment (or the prosecutor’s desire to pursue the case).

Finally, consider a third example of these types of cases, one that lacks an overarching organization that was an important element in the previous two (the Mafia and the repressive state, respectively). Suppose that there are several participants in a bank robbery whose plan is to extort, with threats of violence, the staff at the bank, but they agree not to hurt anyone. If this description accurately captures the facts,\(^ {161}\) but in the course of the robbery, one of the robbers unexpectedly to his crewmates, shoots and kills someone, then those crewmates (“the Non-Violent Bank Robbers”) are not parties to the relevant joint intention to commit a homicide and should not be considered accomplices to that crime. They are


\(^{161}\) Although see below on the evidentiary considerations entailed in a scenario like this one.
clearly accomplices to the robbery itself, and to the use of threats of violence to commit it. But, they were not standing in reserve with regards to the shooting, having had no intention of, for example, stepping in to complete the shooting if necessary.

This example highlights the extent to which a felony murder rule can be made consistent with commitments to mens rea. Whether someone can be held liable for a murder committed in the course of another crime depends on their specific intentions with respect to using lethal force. To illustrate, consider two slightly different versions of the above example: the Reluctantly Violent Bank Robber and the Unarmed Bank Robber. In both of these cases, the plan is the same as in the Non-Violent Bank Robber scenario: use firearms to extort money from the bank personnel but not harm them in fact. However, in the Reluctantly Violent Robber sub-case, a potential accomplice also has a gun, “just in case.” That is, the plan is for no one to actually use a gun, but if something were to happen, she is prepared to shoot. Under these circumstances, she might be standing in reserve with respect to a shooting. She did not plan on shooting anyone, and did not (we are stipulating) wish to do so. But, as a contributor to the joint action (bank robbery), she is indistinguishable from the free-riders in the crime watch example who would contribute to the joint project (crime watch) if doing so was necessary to realize it. By contrast, the Unarmed Bank Robber is incapable of contributing in this way, she cannot be standing in reserve, so without additional involvement she should not be considered an accomplice to the shooting.

The logic of standing in reserve also explains why and when encouragement or even tacit approval can be enough to make one an accomplice. It can be a signal that the individual is standing in reserve, willing to help the principal perpetrator under some circumstances (e.g., if their aid would be necessary to realize the crime), and communicating that intention helps ensure common knowledge and allow the perpetrators to take the reservist’s intention into account in their own intentions. The willingness to aid is enough, provided the relevant group of individuals satisfies the conditions for a joint intention we laid out above.163

162 This qualification is important. For example, the Unarmed Bank Robber could still be a party to the joint intention to shoot if she were a mastermind, who played a substantial role in developing a plan with the possibility of a shooting. See the discussion above of the joint intention through a control relationship. 163 E.g., People v. Villa, 156 Cal. App. 2d 128, 135, 318 P.2d 828, 833-34 (1957). 164 See note 125, supra and accompanying text.
Hard Cases 2 – No Involvement: The arguments in the Mafia forger scenario can be applied to cases where the potential accomplice has done nothing at all to contribute to the particular crime. The forger, either freelance or committed to the Mafia’s overarching missions, helped bring the arson about. That is not, however, a necessary condition for a joint intention, which we illustrate with the following Sleeper Cells scenario.

Suppose there are three terrorist cells A, B, and C, each of which is prepared to carry out violent acts. The identities of the cells are known to the main terrorist organization, but not to the members of the cells themselves. All they know, or possibly reasonably believe, is that other cells similarly-situated to themselves exist and that they are activated, as needed, by the leadership of the organization. To continue the hypothetical, suppose that cell A carries out an attack, committing a series of crimes on behalf of the terrorist organization. What is the liability, if any, for those crimes that should attach to members of cells B and C? Following the analysis above, the other cells were standing in reserve. If they had been called upon to act, then they would have done so. The intention to do so can be seen as part of the definition of a committed terrorist sleeper cell in our hypothetical (although what evidence of commitment is persuasive would be determined at trial). Indeed, all three cells had the same intention, to act if called upon, mirroring the pivotal-participation situation in the neighborhood crime watch example. The cells also share a joint intention: their plans and intentions are commonly known to be responsive to each other’s plans and intentions through the coordinating actions of the organization leadership.

As with the hard cases above, in order for the sleeper cells that are not called upon to carry out the crime to be liable, have a genuine intention-in-action. Examples of evidence that this is the case might include undergoing training or stockpiling supplies. Merely identifying with the terrorists or hoping they succeed does not make one into a sleeper cell. In order for there to be liability, the government must prove that the sleeper cell had something of a plan to carry out the attack if they were called upon to do so, an issue we consider in more detail in the following section.

C. Evidence and Burdens of Proof

165 The guilt of the main terrorist organization that prepared and arranged for the cells and ordered the attack is straightforward. It obviously shared a joint intention with respect to the attack and did its part to bring it about.
Our primary focus has, throughout, been on the correct scope of the relevant joint intentions and, through them, the proper scope of joint criminal liability. The examples above outline the conditions under which someone can be held criminally liable for the actions of another and, because this analysis is ultimately based on individual intentions, it does not entail surrender of core mens rea principles. While we propose some changes to current doctrine – most significantly, clarifying accomplice liability by abandoning the foreseeability doctrine because it is neither consistent with a fundamental commitment to mens rea nor necessary for a coherent doctrine of accomplice liability – we do not propose any changes to the allocations of burdens of proof. As with all criminal trials, the burden of proof remains with the government. The recommendations we advocate in the context of the examples discussed above should therefore be understood as conditional statements: if the prosecution is able to establish these things beyond a reasonable doubt, then the individual could be held liable.

As a practical matter, of course, it is not enough that the potential accomplice have the relevant intentions, the prosecution must prove that this was the case. This implies that under the account we defend, joint criminal liability requires establishing facts about the parties’ mental states. This is a challenge for the courts, juries, and the prosecution. But, it is also a familiar one. Much of the law, especially the criminal law, turns on estimations of motive and intent. “In the field of contracts, as generally elsewhere,… ‘The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.’”

The latter observation underscores an important caveat in our project of bringing the philosophical analysis of joint intention bear on criminal law doctrine. A philosophical analysis, including the philosophical analysis of intention, typically proceeds by constructing statements constituting logical closures or pointing out failure of logical closure in previous arguments. As such, it is fundamentally deductive rather than inductive. Relatedly, and despite the emphasis on intention as a mental event (and so action in and of itself), a philosophical analysis of intention is also non-behavioral in how it assesses the presence of intention because a given externally observable behavioral event is consistent with multiple intention schemes. When a philosopher is given a description of behavior and an external observer’s intentional interpretation of that behavior, she is apt to view that as a challenge to come up with (arbitrarily complex) intention schemes defying

the suggested association and to view the existence of such alternative intention schemes as a refutation. Plausibility and likelihood, which are key reference concerns in a legal analysis, have no place in such an approach.

A legal argument concerned with an attribution of intention, must, of course, also base it on a deductively coherent model, and that is where the relevance and the value of the philosophical analysis comes in: it clarifies what is possible and how, as well as what is not. But the legal arguments about the presence of intention are also necessarily inductive and behavioral. An extremely complex causal (intentional) scheme that is not contrary to the facts but that has no affirmative evidence in its favor is unlikely to stand up to reasonable doubt, let alone to the preponderance of evidence standard, in the presence of a simple(r) scheme with apparently strong evidence in its favor. In the textbook view, a judge or a jury bound by such standards will use the proposed schemes along with the evidence given to support them to arrive at explanatory theories that are inductively coherent – that make the best sense of the information that is brought to bear on the case. And rarely having access to credible direct testaments of intentions, they are bound to rely on a mix of external behavioral evidence for evaluating different possible intention schemes – i.e., to reason inductively from observations of behavior in the light of the proposed theoretical accounts of that behavior. In the best of circumstances, then, and in the best practice we are arguing for in this Article, legal arguments use the philosophical resources, such as theories of individual and joint intention, for logical (deductive) claims about the possibility of making particular types of intention-based statements, and then turn such philosophical claims into a guide to an inductive inference about the presence of the relevant type of intention in a given case. The use of the philosophical analysis of intention that we envision may, thus, be described as forensic: it is a tool for uncovering what joint intentions exist in complex social interactions, and who, and under what circumstances, could – and if the relevant evidentiary standards are met, should – count as a party to a joint intention to engage in a given action.

Inferring what mental state best fits with a set of actions or body of evidence is a standard part of the fact-finding task. In Hicks, for example, the defendant alleged that his comments were not made in order to encourage the primary perpetrator; he claimed, instead, that he was speaking out of fear for his own life and actually intended to dissuade the shooter.167 This is the sort of question that is submitted to a jury.168

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167 Hicks v. United States, 150 U.S. 442, 447 (1893). Hicks reportedly laughed and said “Pull off your hat, and die like a man” to Colvard before the primary perpetrator,
Similarly, in a case like *Russell*, it will be up to the fact-finder to determine whether the actions taken by each of the parties were close enough to a duel, a stylized joint endeavor, to constitute a joint intention. The existence of overarching organizations, such as the Mafia or a terrorist group in our examples, can play a role here as well. While membership in these organizations is assuredly not enough to make one an accomplice, it can help fit into the prosecution’s account of the facts. The Mafia forger’s membership in the organization, and perhaps other commitments along those lines that he has made as a fully initiated “made man,” help demonstrate that he has the relevant blanket intention to support the organization in its endeavors *however needed*. In the context of our example, the implication is that he is standing in reserve with regards to the arson, and should therefore be held liable for more than just the act of forging. It is evidence that, in terms of culpability, she should be distinguished from a freelance forger.

In the sleeper cells example, the prosecution might be able to point to evidence that cells B and C had been trained to carry out this sort of attack, stockpiled materials necessary to it, and so on. It is these sorts of factors, which serve as evidence that the sleeper cells were in fact standing in reserve and therefore shared the relevant joint intention, that distinguish the members of the sleeper cells from someone who merely sympathizes with their cause. A sympathizer, who may be happy that the attack was carried out, is not an accomplice to it. Conceptually, she is equivalent to a freelance forger who happens to have a grudge against the target of the arson. The intention-in-action idea is again the distinguishing feature, separating “keyboard warriors” or advocates from accomplices with the required *mens rea* who should face criminal charges.

Even in the harder cases, such as those relying on the standing in reserve logic, our joint intention-based account does not impose unfamiliar demands on courts and the legal system. The prosecution’s burden in those cases bears a strong resemblance to what must be proven for a conspiracy case with the common overt act requirement. Although conspiracy cases are complex and present their own challenges, they are something the law has managed for decades. The practical difficulties of the approach to joint criminal liability we present here are no greater or different than those that

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commonly confront the criminal law. In the terrorist sleeper cells example, in order for there to be accomplice liability, the prosecution would have to prove that a sleeper cell that was not activated was, in fact, standing in reserve. Proving this fact requires proving that the members of the sleeper cell intended to commit terrorism if they had been called upon to do so (the pivotal event). An intention, in the intention-in-action sense we mean it, is a plan-in-implementation. Naturally, a joint intention is a plan made with others, which is the essence of a conspiracy.\(^\text{170}\)

The latter conclusion notwithstanding, it is important to see that conspiracy is distinct from standing in reserve – a point that underlies the practical importance of our doctrinal argument. The two concepts overlap, but, generically, there is no entailment relationship between them, and the penal code, as a rule, treats membership in a conspiracy to commit a criminal act and the complicity in that criminal act differently.\(^\text{171}\) Examples of cases that include standing in reserve but no conspiracy include cases like \textit{Hicks}, where the defendant was present during the murder. The main theory that would warrant Hicks being considered an accomplice to the murder was that he was there to aid in its commission, his intervention was simply unnecessary,\(^\text{172}\) a theory the courts have returned to repeatedly.\(^\text{173}\) In other words, the best way to make sense of \textit{Hicks} and related cases is that the accomplices were standing in reserve. Yet, there was no evidence of a conspiracy – that is, a plan – between Hicks and the shooter to commit the murder. Courts have, likewise, upheld convictions on the basis of arguments that resemble the standing in reserve logic without any showing of a conspiracy.\(^\text{174}\) The converse is also true – there can be a conspiracy

\(^\text{170}\)\ See notes 112-118, \textit{supra} and accompanying text.

\(^\text{171}\)\ In addition to being distinct offenses, the penalties for conspiracies and accomplice liability vary considerably. For example, the punishment under federal law to conspire to defraud the United States is limited to five years. An accomplice, on the other hand, is punished just as if she were the primary perpetrator, and several offenses that would fall under 18 U.S.C. \(\S\) 371’s very general language of “any offense against the United States, or to default the United States, or any agency thereof …” carry stiffer penalties. \textit{See, e.g.}, 18 U.S.C. \(\S\) 510 (forging endorsements on Treasury checks or bonds or securities of the United States – up to ten years); 18 U.S.C. \(\S\) 472 (uttering counterfeit obligations or securities – up to twenty years). \textit{See also} 18 U.S.C. \(\S\) 111 and 18 U.S.C. \(\S\) 372; United States Sentencing Commission, \textit{Guidelines Manual}, \(\S\)2X1.1(a), (b)(2); \(\S\)2X1.1 (Application Notes 2); \(\S\)2X2.1, \(\S\)2X2.1 (Application Note: Background).

\(^\text{172}\)\ \textit{Hicks v. United States}, 150 U.S. 442, 450 (1893).


\(^\text{174}\) For example, in \textit{People v. Moore}, there was a robbery while Moore stood nearby, saying and doing nothing in the course of the crime. In upholding the conviction, the court explained that “His presence could have given encouragement to his companions and acted
without standing in reserve, depending on the nature of the conspiracy and the second offense. Suppose that $i$ and $j$ conspire to counterfeit money, but in the course of carrying out her part of the plan $i$ murders someone. Without more – an intention (in the intention-in-action sense that we use here) to step in and somehow help $i$ with the killing\footnote{Sometimes a standing in reserve intention can be inferred from the presence of the conspiracy, especially if the conspiracy has a broad scope and the ancillary crime is intimately related to the object of the conspiracy. For example, if $i$ and $j$ were parties to an ongoing conspiracy to steal cars, then that might furnish some evidence that $j$ was standing in reserve with regards to $i$’s stealing of tools necessary to that endeavor.} – there is no reason to conclude that $j$ was standing in reserve with respect to this crime. In sum, standing in reserve is logically distinct from conspiracy, even as the affinity between them shows that law is fully capable of the kind of analysis required by our joint intention approach.

Our final point brings us back to the comparison to the foreseeability doctrine, critique of which was one of our main points of departure. Compared to the joint intention approach we advocate, foreseeability demands less from the prosecution, but at the expense of fundamental conceptual and doctrinal problems. Under foreseeability, it is clearly easier to marshal the evidence necessary to charge someone as an accomplice, since the prosecution does not have to present or respond to evidence about the particular defendant, and the defendant is legally responsible for anything the principal perpetrator did that was reasonably foreseeable, regardless of whether she actually was aware of it. The defendant’s actual intentions would not matter. Whether Hicks was speaking out of nervous terror, or even clumsily trying to dissuade the shooter, would be irrelevant, his guilt would turn on the reasonably foreseeable consequences of that speech.

\footnote{175 Sometimes a standing in reserve intention can be inferred from the presence of the conspiracy, especially if the conspiracy has a broad scope and the ancillary crime is intimately related to the object of the conspiracy. For example, if $i$ and $j$ were parties to an ongoing conspiracy to steal cars, then that might furnish some evidence that $j$ was standing in reserve with regards to $i$’s stealing of tools necessary to that endeavor.}

as a deterrent to any continued resistance on the part of [the victim].” \textit{People v. Moore}, 120 Cal. App. 2d 303, 306, 260 P.2d 1011, 1013 (1953); see also \textit{People v. Mummert}, 57 Cal. App. 2d 849, 855, 135 P.2d 665, 668 (1943) disapproved of on other grounds by \textit{People v. Collins}, 54 Cal. 2d 57, 351 P.2d 326 (1960). In Moore, the court also pointed out: “Where two or more persons enter upon a common undertaking, whether by prearrangement, or entered into on the spur of the moment, and that undertaking contemplates the commission of a criminal offense, each of the parties to the undertaking is equally guilty of the offense committed whether he did an overt act or not.’ Moore, 120 Cal. App. 2d at 306-07 (quoting Haney v. State, 20 Ala.App. 236 (1924)) (emphasis added).

Supra.
Despite this relative ease in application, the foreseeability doctrine, we argued, entails abandoning mens rea for joint criminal liability and replacing it with something like ordinary negligence or, at most, recklessness. As explained above, this is inconsistent with the fundamental normative commitments of criminal law, and by diminishing the mens rea requirements creates a perversely large potential scope for joint criminal liability. The two moves available to a proponent of the foreseeability doctrine are (1) salvage mens rea by claiming that being aware of a potential consequence implies intending that consequence; or (2) forego the idea of accomplice liability for an intentional crime in cases without the accomplice actus reus and downgrade it to a negligence offence under the rubric of reasonable awareness of potential consequences. The first option entails reliance on a claim that is clearly dubious as a logical statement about reasonable agency. The second gives away the farm. The joint intention-based approach we advocate avoids both of these pitfalls.

Although foreseeability does not define liability, it can, and with a better effect, be used in an evidentiary fashion, as Posner’s hypothetical case of a prostitute buying a dress effectively illustrates. If the shopkeeper knows the purchaser to be a prostitute, then, it is perhaps foreseeable that she would use the dress essentially as a tool in her prostitution. Under the foreseeability doctrine, the inquiry stops here: the shopkeeper is considered to have aided in prostitution, she helped provide the means, and this finding is sufficient for liability. If, however, we treat foreseeability as only an evidentiary consideration, then the above facts become evidence of the shopkeeper’s intentions, but they do not have direct legal effect in and of themselves. One might be taken to have intended the foreseeable consequences of one’s intentional acts, especially as the degree of foreseeability increases, and the fact-finder can use this to infer an individual’s intentions. Of course, when foreseeability is used in this evidentiary fashion, that claim is open to a rebuttal: the shopkeeper could introduce evidence that she personally did not understand what the purchaser was likely to use the dress for – she might have credited the alternative story the prostitute told her, or simply been inattentive and did not notice. Similarly, the shopkeeper could present evidence about her own intentions, such as a fervent stance against prostitution, that could counter the inference that she intended the foreseeable consequence of the sale. By making what is reasonably foreseeable the definition of accomplice

176 See notes 39-45, supra and accompanying text.
177 See Section II, supra.
178 See notes 57-60 and 97-105, supra, and accompanying text.
179 Note 62, supra, and accompanying text.
liability, the foreseeability doctrine does not allow for these opportunities.

**CONCLUSION**

Joint criminal liability is an essential concept but one that the law has struggled with for centuries. In its present state, this area of the law is fractured and confusing: not only are there multiple competing doctrines, but there is also a series of seemingly ad hoc holdings. The key challenge is to develop rules capable of coherently managing the myriad of often tangled facts while addressing the wrongdoing without casting the net too broadly.

We develop an approach to joint criminal liability that grounds it in a sophisticated account of joint intention in cases that may or may not include *actus reus* by a potential accomplice. Our approach offers a way of harmonizing and rationalizing this area of the law that is, at once, consistent with the central defining commitments of criminal law to individual liability and to basing *mens rea* on intentional action.

A key feature of our approach is the idea of standing in reserve, which we use to characterize participation in a joint criminal intention when the accomplice’s *actus reus* is absent. Conceiving joint criminal intention in this fashion provides a robust framework for assessing guilt in a series of hard cases, including complex criminal enterprises, violence by the state, and terrorist sleeper cells. Of course, our goal here has not been to give a disposition for every possible case involving joint criminal liability that may come before the court. But we hope to have provided a means for courts and others to do so that puts this area of law on firmer theoretical footing.