TWO CASES IN COMPLICITY

DANIEL YEAGER*

*The controlling purpose of this piece is to identify and correct a snag in the way courts distinguish discrete modes of criminality: helping, doing, and trying. To that end, I analyze two representative cases: one from the New York Court of Appeals, the other from the California Supreme Court. Both cases fall into an avoidable linguistic trap which twists the way we think and talk about group criminality. In each, two persons are bent on committing murder, but neither intends to divide the labor up between two parties: the actual killer and the killer's helper. Instead, both parties are trying to commit the murder by their own hand. My concern here is how we fix the parties' responsibilities, whether or not we know which of the two delivered the coup mortel. In the New York case (*People v. Dlugash*), we do not know whose shots proved fatal; in the California case (*People v. McCoy*), we do. Both cases, undisturbed by precedent, labeled both shooters murderers, the theory being that each must be the killer, killer's helper, or both.*

It is my thesis that to hold as much makes only misleading sense. Courts commit this error by veering from the reality that helping gestures are by definition outside the elements of the crime being helped; anyone who fulfills an element of the crime is committing the crime, not helping it. Yet Dlugash *and* McCoy *take the position that trying but failing to commit murder by one's hand can, without more, somehow constitute helping someone else murder that same intended victim. My proposed fix is to elevate the function of elemental analysis in complicity, in part by reviving an esoteric English doctrine, "joint principality," which holds that in some instances of group criminality, there is no helping; there is only doing (or trying to do). To absorb this teaching is to better understand not just the relationship between language and the world, but the stakes in mistaking attempted murder for murder. Precisely, because in no jurisdiction is attempted murder punished as severely as murder, differentiating between helping, doing, and trying involves making moral—not just semantical—judgments both about what has been done and what to do about it.*

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INTRODUCTION

"A man's relation to his own acts is quite different from his relation to the acts of other people."

Peter Winch, 1972[1]

"[T]here is nothing so plain boring as the constant repetition of assertions that are not true, and sometimes not even faintly sensible; if we reduce this a bit, it will be all to the good."

J.L. Austin, 1962[2]

The doctrine of criminal complicity in its technical (as opposed to idiomatic sense) gives credit where credit is due: to ringleader and ring, robber and getaway driver, burglar and lookout. One may be criminally complicit by encouraging or assisting by word or deed a perpetrator's criminal purpose.[3] When that purpose is murder, the complicit party's guilt is established by proof of helping gestures made before or during a killing performed by the perpetrator.[4] Credit here is actually blame, which is borne equally by complicit party and perpetrator,[5] though no one, in or out of court,

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1 PETER WINCH, ETHICS AND ACTION 130, 140 (1972).

2 J.L. AUSTIN, SENSE AND SENSIBILIA 5 (G.J. Warnock ed., 1962).

3 *See* United States v. Peoni, 100 F.2d 401, 402 (2d. Cir. 1938); Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 135–39 (2015) (calling *Peoni*'s articulation of complicity "canonical").

4 *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.2(a) & n.60 (3d ed. 2018) ("[T]o be an accomplice to another's crime, the requisite act or omission must occur 'either before the fact or during the fact', as otherwise the purported accomplice is only an accessory after the fact." (citation omitted)).

5 *See* People v. Shafou, 330 N.W.2d 647, 654 (Mich. 1982) ("Accomplices generally are punished as severely as the principal . . . .").

believes that the two have in any sense done the same thing.[6]

The controlling purpose of this Piece is to shed light on what Wittgenstein would call the "form of life"[7] (*Lebensform*) or "language game"[8] (*Sprachspiel*) of complicity, by identifying and correcting a way in which courts muddle three discrete modes of criminality: helping, doing, and trying. To unmuddle, I analyze two representative cases: one from the New York Court of Appeals, the other from the California Supreme Court. Both cases fall into an avoidable linguistic trap which twists the way we think and talk about group criminality. In each, two persons are bent on committing murder, but not by dividing labor between an actual killer and a killer's helper. Instead, each party is trying to commit the murder *by their own hand*. My concern here is how we fix the parties' responsibilities, whether or not we know which of the two delivered the *coup mortel*.[9] In the New York case (*People v. Dlugash*),[10] we do not know whose shots proved fatal; in the California case (*People v. McCoy*),[11] we do. Both cases, undisturbed by precedent, labeled both shooters murderers, the theory being that each must be the killer, killer's helper, or both.

Despite the considerable time law professors continue to expend on complicity,[12] my research has disclosed no engagement with the question of

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6 *See* Winch, *supra* note 1, at 141 ("Is a man who has attempted murder as morally blameworthy as one who has committed murder? [T]here is certainly a strong inclination to answer yes. But this inclination must be looked on with reserve.").

7 For Wittgenstein, "to imagine a language is to imagine a form of life." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 19 (G.E.M. Anscombe trans., Macmillan Publ'g Co., 3d ed. 1968) (1953); *see generally* J.F.M. Hunter, *"Forms of Life" in Wittgenstein's Philosophical Investigations*, 5 AM. PHIL. Q. 233, 233–35 (1968) (providing four different interpretations of Wittgenstein's "forms of life": as a language game, as a package of mutually related tendencies, as a way of life, and as something typical of a living being).

8 *See* Joshua A.T. Fairfield, *The Language-Game of Privacy*, 116 MICH. L. REV. 1167, 1175 (2018) (reviewing LUDWIG WITTGENSTEIN, REMARKS ON FRAZER'S GOLDEN BOUGH 23 (Rush Rhees ed., A.C. Miles trans., 1979)) ("A language-game is a specific activity or context in which a word-system arises."). Language games, which include asking, thanking, cursing, greeting, and praying, are "a web of interconnected customs and conventions." Bruce A. Markell, *Bewitched by Language: Wittgenstein and the Practice of Law*, 32 PEPP. L. REV. 801, 808 (2005). Language games function as negotiations among participants within a speech community (*e.g.*, construction workers), the success of which makes the activities of those communities possible. *See* Fairfield, *supra* at 1176 n.31 ("To a considerable extent, Wittgenstein's philosophy involves *negotiations* with others . . . ." (emphasis in original) (quoting Gordon Baker, *Wittgenstein: Concepts or Conceptions?*, 9 HARV. REV. PHIL. 7, 14 (2001)).

9 In the first case (out of New York), one man shot the victim, who had either just died or was just about to die, when a second man shot that same victim, thus leaving it up in the air who delivered the *coup mortel*. In the second case (out of California), two men shot from a car at the same victim, who was struck and killed by the driver alone.

10 363 N.E.2d 1155, 1158 (N.Y. 1977).

11 24 P.3d 1210, 1212 (Cal. 2001).

12 *See, e.g.*, Kimberly Kessler Ferzan, *Conspiracy, Complicity, and the Scope of Contemplated Crime*, 53 ARIZ. ST. L.J. 453 (2021) (suggesting reform to *Pinkerton* liability and complicity, as

whether one really can help murder merely by trying to commit the same murder oneself. I take the question up here to demonstrate that to hold as much makes misleading sense. Courts commit this error by veering from what should be a truism: Help can be withheld, or it wouldn't be help at all.[13] Helping gestures are by definition *outside* the elements of the crime being helped; anyone who fulfills an element of the crime is *committing* the crime, not helping it.[14] Yet *Dlugash* and *McCoy* take the position that trying but failing to commit murder by one's hand *can*, without more, constitute helping someone else murder that same intended victim. Due to the Double Jeopardy bar, that position was only implicit in *Dlugash*. That position would become explicit in *McCoy*, where a codefendant, by shooting out the window of a car with intent to kill—but hitting no one—caught a twenty-five-years-to-life prison sentence as accomplice to murder.

My proposed fix is to elevate the function of elemental analysis in complicity, in part by reviving an esoteric English doctrine called "joint principality."[15] Joint principality, when properly deployed, can facilitate our understanding of particular modes of untoward human action. Joint principality maintains that in some instances of group criminality, there is no helping; there is only doing (or trying to do). To absorb this teaching is to better understand not just the relationship between language and the world

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the current conceptions strain mens rea); Peter A. French, *Complicity: That Moral Monster, Troubling Matters*, 10 CRIM. L. & PHIL. 575 (2016) (exploring the discrepancies between complicity and moral responsibility for accomplices); Kevin Cole, *Purpose's Purposes: Culpability, Liberty, Legal Wrongs, and Accomplice Mens Rea*, 2 GA. CRIM. L. REV. 1 (2024) (examining the purpose requirement for accomplice liability as a liberty enhancing function); Charles F. Capps, *Upfront Complicity*, 101 NEB. L. REV. 641 (2023) (defending the intentionality requirement of complicity); Alexander Sarch, *Is Parity of Culpability a Constraint on Accomplice Liability?*, 15 OHIO ST. J. CRIM. L. 337, 337 (2018) (investigating whether the parity-of-culpability principle "places an independent constraint on the contours of accomplice liability").

13 *See* Daniel B. Yeager, *Dangerous Games and the Criminal Law*, 16 CRIM. JUST. ETHICS 3, 9 (1997) ("[T]hat a getaway driver may be necessary for a *successful* robbery must be observed to be known; getaway drivers are not analytically necessary to robbery. Consequently, getaway drivers are helpers, not . . . principals, regardless of how they may characterize their actions." (quoting Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25, 29 n.49 (1996))).

14 *See id.*; *infra* Part I.A.3.

15 *See* A.P. SIMESTER, J.R. SPENCER, G.R. SULLIVAN & G.J. VIRGO, SIMESTER & SULLIVAN'S CRIMINAL LAW THEORY & DOCTRINE 207 (4th ed. 2010) (explaining that in joint principality, "each may separately satisfy some part of the actus reus for the offense where their actions, in combination, fulfil the complete actus reus requirement and each has the requisite mens rea"); Neha Jain, *Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration*, 61 AM. J. COMPAR. L. 831, 838 (2013) (describing English law's joint principality concept as multiple principals who separately meet all elements of the offense, or two principals who both have the mens rea and whose combined actions fulfill the actus reus required for the offense—despite one principal not fulfilling each element of the actus reus); *cf.* Marc Ancel, *The Collection of European Penal Codes and the Study of Comparative Law*, 106 U. PA. L. REV. 329, 354 (1958) (emphasis added) ("The Italian Code of 1889 distinguished not only between principals and accessories, *but between joint principals*, accessories after the fact and accessories before the fact . . . .").

(if that were not enough), but also the stakes in mistaking attempted murder for murder. Precisely, because in no jurisdiction is attempted murder punished as severely as murder,[16] to be able to tell helping, doing, and trying from one another is to further the process of making moral—not just semantical—judgments both about what has been done and what to do about it.

I
TWISTING COMPLICITY

Complicity rests on the premise that anyone whom the law calls accessory, accomplice, aider and abettor, or whom I call "helper" in their perpetrator's, principal's, or whom I call "doer's" offense is derivatively, not vicariously, liable for that offense. The difference between derivative and vicarious liability is that, unlike vicarious liability, derivative liability is based on the defendant's own actions, not merely on their relationship with someone else.[17] Proof of the helper's derivative liability is mediated by the actions of the principal. If the principal commits a crime, then equal punishment is inflicted on the helper as well,[18] so long as the crime that occurs is one the helper knew about and meant to further when lending a hand.[19]

But why is credit *equal*? Is it as though the helpers commit their offenses themselves by acting *through* their principals? "We say, for example, 'Louis XIV built Versailles,' even though the actual construction was not done by him."[20] Indeed, we can think of cases where the principal is not a principal at all, but instead is a tool, instrument, or means of someone else, such as when the helper recruits an insane person or a child to do the

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16 *Compare* 18 U.S.C. § 1111(b) (2003) (first-degree murder punishable by death, second-degree murder by a maximum term of life in prison), *with* 18 U.S.C. § 1113 (1996) (limiting maximum sentence for attempted murder to 20 years).

17 *Compare* Grobman v. Posey, 863 So. 2d 1232, 1235 (Fla. 4th Dist. Ct. App. 2003) ("[A] vicariously liable party has engaged in no wrongful conduct … The basis for imposing liability is that party's relationship with the negligent tortfeasor."), *with id.* at 1236 ("Although the liability is not vicarious (because the derivatively liable person has engaged in tortious conduct), the liability is derivative because it depends upon a subsequent wrongful act or omission by another.").

18 *See* Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1219 (2007) ("An accomplice typically is subject to the same punishment as is the principal perpetrator of the crime.").

19 *See* JUD. COUNCIL OF CAL., CALIFORNIA JURY INSTRUCTIONS CRIMINAL No. 3.01 (West 2021) ("To be guilty as an aider or abettor, the defendant's intent or purpose of committing or encouraging or facilitating the commission of the act or crime by the perpetrator must be formed before or during the commission of the act or crime.").

20 JOHN R. SEARLE, INTENTIONALITY 110 (1983).

deed. But those cases of "innocent agency"[21] or "perpetration by means"[22] involve such coercion or manipulation of the innocent agent or means as to render their doings fishy enough to not be "actions" at all, and so something for which the exploited innocent agent or means is held not responsible.[23] I likewise would act through you if I handed you a package into which I have secretly put a bomb for delivery to my enemy, or placed you under duress by threatening you with greater harm if you do not act on my behalf. Acting through another is, therefore, to perform the act oneself. In such a case, there is *only* a perpetrator; there is no helper. From this background, I turn to explicate the two cases in which the language of complicity—designating what, exactly, counts as helping as opposed to doing or trying—gets all out of gear (or as Wittgenstein might say, "goes on holiday"),[24] thereby bringing about unsupportable results.

*A. The New York Version (*People v. Dlugash*)*

Thanks to the sustained popularity of a leading casebook,[25] professors of criminal law will likely recognize *People v. Dlugash*[26] as one of the main "stuffed deer" cases,[27] which pose a question which, if not yet a dead horse, would not have far to go to become one. While there is no doubt that, as

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21 *See* MODEL PENAL CODE §2.06(2)(a) (AM. L. INST. 2024) (stating that actor is legally accountable for conduct of another if "he causes an innocent or irresponsible person to engage in such conduct"); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 120, at 349–53 (2d ed. 1961) (generally describing "innocent agents").

22 *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 8.7.3, at 666 (1978) ("There is some Anglo-American authority for the proposition that the party not actually acting must dominate his 'instrument' in order to qualify as a perpetrator-by-means.").

23 *See* Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 370 (1985) ("Where the defendant intentionally manipulates an innocent person to commit what would be a crime if the innocent person were not legally excused, the defendant is seen as causing the other's act . . . . The primary actor becomes 'merely an instrument' of the secondary actor."); *cf.* Shachar Eldar, *Holding Organized Crime Leaders Responsible for the Crimes of Their Subordinates*, 6 CRIM. L. & PHIL. 207, 209 (2012) ("[P]erpetration-by-means is only suitable for criminal activity within an organized hierarchical framework characterized by the tight control of a superior over subordinates within the hierarchy. It is clearly suited to cases in which the hierarchical subordinate is an innocent agent acting out of necessity or justification, or is legally incompetent."); MODEL PENAL CODE § 5.01(2)(g) (AM. L. INST. 1985) (soliciting an "innocent agent" to commit a crime is itself an attempt to commit a crime by soliciting party). *See generally* Shachar Eldar, *Indirect Co-Perpetration*, 8 CRIM. L. & PHIL. 605, 616 (2014) (exploring a combination of co-perpetration and perpetration-by-means).

24 WITTGENSTEIN, *supra* note 7, at 38.

25 *See* SANFORD KADISH, STEPHEN SCHULHOFER & RACHEL BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 639 (11th ed. 2022).

26 363 N.E.2d 1155, 1155 (N.Y. 1977).

27 These refer to cases involving impossibility, be it legal or factual. *See generally* Daniel Yeager, *Decoding the Impossibility Defense*, 56 U. LOUISVILLE L. REV. 359, 372 (2018) (criticizing a Missouri case in which convictions for attempting to take wildlife out of season were reversed because the defendants shot a stuffed decoy deer, which they mistook for a live wolf).

Dlugash records, "man dies but once,"[28] my interest here is less in what renders an attempt "impossible"[29] than in decoding actions that mischaracterize the division of labor within group criminality.

1. The Dlugash *Nuts and Bolts*

The story begins after 3:00 a.m. on December 22, 1973, with Joe Bush and Michael Geller arguing in Geller's Brooklyn apartment about a small rent debt Bush owed Geller.[30] The dispute climaxed when Bush shot Geller two or three times in the chest with a .38.[31] Two to five minutes later, with Geller either barely alive or barely dead, Melvin Dlugash, who was also present in the apartment and knew both Bush and Geller, shot an either barely alive or barely dead Geller as many as seven times in the head and face "from within one foot" with a .25.[32]

A Kings County grand jury, acting on the assumption that Geller was still alive when Dlugash shot him, charged Dlugash with "acting in concert with another person actually present"[33] (i.e., Bush) in Geller's murder. At trial, the judge instructed the jury on two theories: The first theory cast Dlugash as principal murderer, a role he could play only if Geller was still alive when Dlugash shot him; the second theory cast Dlugash as attempted murderer, a role he could play only if Geller had already died from Bush's shots before Dlugash began shooting.[34] The prosecutor's request to instruct the jury on the indictment's sole theory—that Dlugash was accomplice to Bush's murder of Geller—was dismissed by the trial court.[35] Weighing up

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28 *Dlugash*, 363 N.E.2d at 1159.

29 *See generally* Yeager, *Decoding the Impossibility Defense*, *supra* note 27 (analyzing impossibility).

30 *See Dlugash*, 363 N.E.2d at 1157.

31 The New York Court of Appeals stated that Geller was shot twice in the chest with large rounds, soon after stating the number to be three. *Id.* at 1156–58. Later, on habeas, a federal district court would state that Dlugash shot Geller three times. *See* Dlugash v. State of New York, 476 F. Supp. 921, 922 (E.D.N.Y. 1979) [hereinafter *Dlugash II*].

32 The New York Court of Appeals stated that Geller was shot seven times in the head and face with smaller rounds, soon after stating the number to be "approximately five." *Dlugash*, 363 N.E.2d at 1156–57. Later, on habeas, a federal district court would state that Dlugash shot Geller five times. *See Dlugash II*, 476 F. Supp. at 922.

33 *Dlugash*, 363 N.E.2d at 1157.

34 *Id.* at 1158. All attempts involve failures that had at the outset a non-trivial likelihood of succeeding. While it makes sense to condition attempted murder on a live intended victim, the crime also lies where the would-be killer has a non-delusional basis for taking the (necessarily barely) dead person for live (as in *Dlugash*). *Cf.* Yeager, *Decoding the Impossibility Defense*, *supra* note 27, at 374–79 (discussing cases involving dead persons taken for live persons in the context not of attempted murder, but of attempted rape).

35 *Id.* With Bush having just shot Geller in the chest at close range, how would jurors *know* whether Geller had just died or was just about to die? Of the prosecution's four witnesses, two—a police detective and an assistant prosecutor—were in no position to say. Both testified that Dlugash

the equivocations of three pathologists,[36] the jury, believing Geller to not yet have taken his last breath when Dlugash began shooting him, convicted Dlugash as principal killer in the second-degree murder of Geller.[37]

On Dlugash's appeal, the appellate division reversed, going so far as to throw out the indictment on the grounds that 1) Geller might already have been dead by the time Dlugash shot him; and 2) no attempted murder could lie since Dlugash believed Geller to already be dead by the time Dlugash shot him.[38] On the prosecution's subsequent appeal, the unanimous New York Court of Appeals, through Judge Jasen, ruled that the appellate division had erred by negating the jury's finding that Dlugash believed Geller survived the shots fired by Bush.[39] Most notably for our purposes, the Court of Appeals took the trial court to task for setting aside the indictment's aiding-and-abetting theory.[40] But, due to the operation of a rule of Double Jeopardy, the trial court's ruling was unreviewable.[41] That move by the trial court, which Judge Jasen found improvident, precluded reinstating Dlugash's conviction on the indictment's theory that Dlugash was accomplice to Bush, who delivered the fatal blow.[42] Finding itself forced by the trial court's procedural error to improvise a way to hold Dlugash accountable for Geller's death, the Court of Appeals reversed and remanded to the appellate division, which complied with the remand order, the gist of

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had told them that he took Geller for already dead, having shot him thereafter only to placate Bush, whom Dlugash feared. *Id.* at 1157. The other two prosecution witnesses—"physicians from the office of the New York City Chief Medical Examiner"—could not say "with medical certainty" that Geller was still alive when Dlugash shot him. *Id.* at 1157–58. Dlugash put on only one witness, a retired coroner, who concluded only that Geller "might have died of the chest wounds 'very rapidly . . . .'" *Id.* at 1158. The jury must have resolved these equivocations to find Geller barely alive, given Dlugash's conviction as principal murderer, not attempted murderer.

36 *Id.* at 1157–58.

37 Bush, who did not testify at Dlugash's trial, pled guilty to a lesser offense: first-degree manslaughter. *See id.* at 1158 n.1.

38 *See* People v. Dlugash, 51 A.D.2d 974, 975 (N.Y. App. Div. 2d Dep't 1976), *rev'd*, People v. Dlugash, 363 N.E.2d 1155 (N.Y. 1977).

39 *See* People v. Dlugash, 363 N.E.2d 1155, 1162–63 (N.Y. 1977).

40 *See id.* at 1159 ("We believe that the evidence in the record would support a reasonable inference that Dlugash intentionally aided Bush in killing Geller. . . . However, the trial court refused to permit the jury to consider this theory and the question of accessorial liability is, therefore, out of the case.").

41 *See id.* ("We have held that the People may not appeal trial orders of dismissal 'where retrial of the defendant, or indeed any supplemental fact finding, might result from appellate reversal of the order sought to be appealed.'" (quoting People v. Brown, 353 N.E.2d 811, 819 (N.Y. 1976)).

42 *Id.* (citing People v. Benzinger, 324 N.E.2d 334, 337 (N.Y. 1974)). Reinstating Dlugash's conviction as principal murderer was also not an option for the New York Court of Appeals. *See Dlugash*, 363 N.E.2d at 1158 ("Preliminarily, we state our agreement with the Appellate Division that the evidence did not establish, beyond a reasonable doubt, that Geller was alive at the time defendant fired into his body.").

which was to find Dlugash guilty of attempted murder.[43]

2. *Three Versions of* Dlugash

Remarkably, nowhere does the Court of Appeals explain how Bush's killing of Geller was *helped* by Dlugash, whose only contribution was to shoot the still-alive Geller point blank repeatedly in the head and face. New York, like other jurisdictions, holds an accomplice equally responsible for a principal's crime when the accomplice "solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."[44] Each mode of contribution on the list above can be characterized as encouragement or aid provided by the accomplice to the principal. What I am arguing is that the list does not (nor could it) include any action that constitutes an element of the target offense, here a second-degree murder that New York defines as an intentional killing.[45] Of the three ways we might explicate Geller's death in legal terms, not one supports characterizing Dlugash as an accomplice to Bush's murder of Geller, despite the protestations of the Court of Appeals.

a. If Geller Was Barely Alive

First, if Geller was barely alive when Dlugash, taking Geller for alive, shot him in the face and head, then Dlugash would be a principal murderer. Although Geller likely would have died within minutes from wounds inflicted by Bush, intentionally shortening even a dying person's life is murder on the part of Dlugash, who on these facts officially finished off the almost-dead Geller.[46] While Dlugash might have been the most immediate cause of death on these facts, rather than relegate Bush to the role of attempted murderer, New York's causal doctrines would likely keep Bush on the hook as principal murderer along with Dlugash, the two combining

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43 *See Dlugash*, 363 N.E.2d at 1163 (remanding with instructions to the appellate division to modify judgment for murder to attempted murder); People v. Dlugash, 59 A.D.2d 745 (N.Y. App. Div. 2d Dep't 1977) (entering judgment for attempted murder on remand).

44 N.Y. PENAL LAW § 20.00 (McKinney 1967).

45 *See* Dlugash v. State of New York, 476 F. Supp. 921, 923 (E.D.N.Y. 1979) ("The pertinent part of § 125.25 of the New York Penal Law provides that a person is guilty of murder when '[w]ith intent to cause the death of another person, he causes the death of such person . . . .'"); N.Y. PENAL LAW § 125.25(1) (McKinney 1967).

46 *Cf.* Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 110–16 (2005) (discussing accomplice-liability cases where it is "possible to say that the victim's death was caused by the cumulative effect of a process to which the defendant contributed, even if it is not also possible to say that the defendant's contribution was essential"); Roger S. Magnusson, *The Sanctity of Life and the Right to Die: Social and Jurisprudential Aspects of the Euthanasia Debate in Australia and the United States*, 6 PAC. RIM L. & POL'Y 1, 78 n.448 (1997) ("The fact that a victim is terminally ill has never been recognized as a defence for homicide.") (citations omitted).

as concurrent causes of Geller's death.[47] Certainly, one may causally contribute to a prohibited result *without being accomplice to it*. Two sets of circumstances come to mind: 1) "joint principality," and 2) coincidence.

The first association that involves no helper is the little-known "joint principality,"[48] under which two parties, sharing the same intention, 1) divide the *physical* elements of an offense;[49] or 2) perform the same element(s).[50] As the signifier "joint principals" suggests, both participants in both cases *commit* the target crime. Both *do*; neither commits the crime *through* the other, nor do they *help* each other. Rather, because both have the same intention/*mens rea* and commit *an* element of the offense, both play functionally identical roles in the crime—doing, as it were, the exact same thing. Two examples are instructive. First, two parties rob when one commits the assault (one element of robbery) and the other the larceny (the other element of robbery);[51] second, two parties kidnap when together they forcibly move their victim to another location.[52]

It is worth bearing this mode of liability in mind, given that it, unjustifiably in my view, has no operation in either New York or California. Indeed, for reasons that remain opaque, joint principality is a feature of English law that simply has never caught on anywhere in the U.S.[53]

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47 *See, e.g.*, People v. Duffy, 595 N.E.2d 814 (N.Y. 1992) (reinstating homicide conviction against Duffy, who encouraged and provided rifle to the distraught Schuhle, the two combining in a causal and responsibility sense to bring about Schuhle's death by suicide).

48 A leading treatise, otherwise remarkably thorough, describes the theory in just one sentence, cites no cases, then dismisses it in two sentences. *See* FLETCHER, *supra* note 22, § 8.6.2, at 655. A quarter-century after the fact, an entire symposium was dedicated to this "worldwide-famous book." *See, e.g.*, Francisco Muñoz Conde, *"Rethinking" the Universal Structure of Criminal Law*, 39 TULSA L. REV. 941, 944 (2004).

49 *See* WILLIAMS, *supra* note 21, § 119, at 349 ("Two persons may be guilty as joint perpetrators . . . . Part of a crime may be committed by one principal, another by another. Thus, in burglary, one may break and the other enter.").

50 *See id.* (explaining that "where a body of men beat a constable (some with sticks, some by throwing stones, some with their fists), and the constable died of the aggregate violence," the judge directed the jury to find the men equally responsible).

51 *See, e.g.*, George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CALIF. L. REV. 1027, 1042 (1995) (arguing that larceny and assault are elementally included within robbery).

52 *See, e.g.*, CAL. PENAL CODE § 207(a) (West 2004) ("Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.").

53 It is telling in this regard that a superb three-volume U.S. treatise *mentions* joint principality, but backs it up with just six cases total, four dating back to 1821, 1869, 1886, and 1901. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.1(a) & nn.26–29 (3d ed. 2023). A fifth case is about a murder involving a basic principal/accomplice relation, *not* joint principals. There, the court ruled that when one capital murderer acted as "sniper" and the other as "spotter," both were principals, neither a helper. *See* Muhammad v. Commonwealth, 619 S.E.2d 16, 32–37 (Va. 2005). This is in a word, wrong. In the sixth case, the court did get it right in concluding that there

Regrettably, bypassing this potentially useful doctrine papers over distinctions in human action, distinctions that go to the scope of one's responsibility—here, whether one is answerable for the killing of another, and if so, then to what extent.

The second association that comes to mind is coincidence: When two events, neither independent nor the product of a coordinated helper-doer relationship, combine coincidentally to bring about a prohibited result.[54] There is no shortage of representative New York cases on point,[55] including *People v. Matos*, where the Court of Appeals affirmed the felony-murder conviction of a Manhattan McDonald's robber (Matos), who was accused of killing a police officer (Dwyer) who, in a rooftop pursuit, slipped and fell fatally 25 feet down an airshaft.[56] There, Matos (robber) and Dwyer (victim) were in no sense working together as joint principals or as principal/accomplice; indeed, their actions were antagonistic. Nor were Matos's robbery and Dwyer's fatal accident-in-pursuit independent of one another either, given that the events were too linked both temporally and causally to support such a conclusion.[57]

It is worth noting that if Dlugash and Bush *jointly* killed Geller, then Dlugash, as a principal murderer, would be neither accomplice to murder nor attempted murderer. Nor could Bush be an *accomplice* to Dlugash's murder of Geller—a role Bush could not play merely by either jointly killing (which would render Bush a principal murderer) or trying to kill Geller himself (which would render Bush an attempted murderer).

b. If Geller Was Barely Dead

Second, if Geller was barely dead when Dlugash, taking him for alive, shot him in the face and head, Dlugash's crime would be attempted murder of Geller. In New York, "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to

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were joint principals in an extortion. United States v. Bell, 812 F.2d 188 (5th Cir. 1987). The explanation, however, misfired. *See id.* at 195 ("[I]n the crime of armed bank robbery, the getaway driver and robber holding only a canvas sack are generally joint principals along with the robber carrying the firearm . . . ."). Getaway drivers do not rob—not by driving. The facts are too stick-figure, however, to comment on the precise role of the party holding the canvas sack.

54 *See generally* Eric A. Johnson, *Dividing Risks: Toward a Determinate Test of Proximate Cause*, 2021 U. ILL. L. REV. 925 (2021); Eric A. Johnson, *Two Kinds of Coincidence: Why Courts Distinguish Dependent from Independent Intervening Causes*, 25 GEO. MASON L. REV. 77 (2017).

55 *Cf.* People v. Kibbe, 321 N.E.2d 773 (N.Y. 1974) (upholding murder conviction against robbers who deposited their severely intoxicated victim, without his glasses, mostly naked, on highway shoulder, after which he was fatally struck by a car).

56 People v. Matos, 634 N.E.2d 157, 158 (N.Y. 1994).

57 *Cf.* People v. Cavitt, 91 P.3d 222, 225–26 (Cal. 2004) ("[T]he felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death.").

effect the commission of such crime."[58] The New York Penal Law's use of "tends" here captures that in actuality, *all* attempts by their very nature do not quite bring about their intended result. But they do have to come *close* to the intended result to justify punishment.[59] To illustrate, consider theft,[60] which cannot occur unless the thief illegally acquires or disposes of another's property with the intent to permanently deprive.[61] An attempted thief does not acquire or dispose of *any* property, but not for lack of effort. There is a legal "difference between failing at larceny by picking the empty pocket of a passerby on a sidewalk and by picking the empty pocket of a mannequin in a department store."[62] Both have failed; but only the first has come close enough to theft to have attempted theft.[63] Likewise, there is a legal difference between intentionally shooting a person who, taken for alive, has been dead for sixty seconds (like Geller) and one who has been dead for sixty days. Again, both would-be killers have failed, despite their efforts; but only the first has come close enough to murder to have attempted murder.[64]

Justifiably taking Geller for alive, Dlugash would attempt murder of Geller by purposely, albeit belatedly, shooting him in the face again and again: just the sort of thing only a murderer would do. We might say that on these facts, Bush beat Dlugash to the punch. Or, as the Court of Appeals put it, "Whatever else it may be, it is not criminal homicide to shoot a dead

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58 *See* N.Y. PENAL LAW § 110.00 (McKinney 2019). Alternatively, in Model Penal Code states, such conduct must count as a "substantial step." *See* MODEL PENAL CODE §§ 5.01(1)–(2) (AM. L. INST. 1984); *see also* People v. Mahboubian, 543 N.E.2d 34, 43 (N.Y. 1989) ("We need not . . . adopt the Model Penal Code's definition of an attempt as a 'substantial step' toward completion of the crime . . . to conclude that some acts – even if preparatory in a dictionary sense – go sufficiently beyond 'mere preparation' as to be properly characterized as an attempt . . . ." (citation omitted)). In California, such conduct must count as "a direct but ineffectual act." JUD. COUNCIL OF CAL., CALIFORNIA CRIMINAL JURY INSTRUCTIONS No. 6.00 (West 2020).

59 *E.g.*, State v. Daniel B., 137 A.3d 837, 844–48 (Conn. App. Ct. 2016) (whether conduct passes from nonactionable mere preparation into the realm of an actionable substantial step is measured by what the actor has already done, not by what remains to be done).

60 *See* CAL. PENAL CODE § 484(a) (West 2001) (declaring that anyone who shall "steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall … defraud any other person of money, labor or … property … is guilty of theft").

61 *See* MODEL PENAL CODE § 223.2(1) (AM. L. INST. 1980) ("A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.").

62 Yeager, *Decoding the Impossibility Defense*, *supra* note 27, at 360.

63 *See* MODEL PENAL CODE § 5.05(2) (AM. L. INST. 1984) ("If the . . . conduct charged to constitute a criminal attempt . . . is . . . inherently unlikely to result . . . in the commission of a crime, . . . the Court shall . . . enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.").

64 *Id.*; *cf.* ALA. CODE 1975 § 13A-11-13(a) (1977) ("A person commits the crime of abuse of a corpse if . . . he knowingly treats a human corpse in a way that would outrage ordinary family sensibilities.").

body."[65] In this case, the "whatever else" is attempted murder, which is the description of the killing to which the Court of Appeals resorted. What Dlugash would *not* be on these facts is an *accomplice* to Bush's murder of Geller—a role Dlugash could not play merely by shooting a corpse.

c. If Bush or Dlugash Helped the Other Murder Geller

Third, we can develop facts by which either Bush or Dlugash would be accomplice to the other's murder of Geller. Such facts would require that the accomplice's encouragement or aid be given both 1) before Geller expires, and 2) other than by an attempt to kill Geller *by the putative accomplice's own hand*. For example, soliciting the murder in the first place, cautioning the other against getting cold feet, providing the other the weapon, preventing Geller's escape, or restraining Geller so that the other could finish him off are modes of helping that could make Bush or Dlugash accomplice to the other's murder of Geller. Without more, however, *none* of these helping gestures could count as the acts of a *principal* murderer. Otherwise, there would *be* no helping/doing distinction in the law of complicity. Nor could any of these helping gestures count as *attempting* to commit murder, any more than "'argue' is equivalent to 'try to convince,' or 'warn' is equivalent to 'try to alarm' or 'alert.'"[66] It should by now go without saying that Bush or Dlugash shooting Geller at close range in the head, face, or chest is precisely how one might go about *committing*, *not helping*, murder.

3. Helping, Doing, Trying, and the Analytic-Synthetic Distinction

One way of decoding this aspect of the grammar of group criminality is that "help can be withheld, or it wouldn't be helping at all."[67] A homely illustration might come in handy here. Suppose you are taking a course in Criminal Procedure, which I have already taken. Your task in the course is to write a paper on the constitutional regulation of the taking and admissibility of confessions. After you write the sections on the Due Process and Self-Incrimination clauses, I write your section on the Right to Counsel, which you then paste into your paper to turn in. In this example it would be

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[65] People v. Dlugash, 363 N.E.2d 1155, 1159 (N.Y. 1977) (citing State v. Simpson, 93 S.E.2d 425, 430 (N.C. 1956)).

[66] J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 126 (J.O. Urmson & Marina Sbisà eds., Harvard Univ. Press 2d ed. 1975) (1962). Here, I will briefly demonstrate in Austinian fashion how doing and trying differ. If "argue" really is "try to convince," then what is "try to argue"? "*Try to try* to convince?" I highly doubt it. As a teen I would "argue" with my parents about the Vietnam War. But I was not "trying to convince" them of the wrongness of the war; instead, I was trying to provoke them. (Mission accomplished.) Another example, but this time reversing the terms: I might "try to convince" you that slavery is wrong by handing you a copy of *Uncle Tom's Cabin* by Harriet Beecher Stowe. But I am not "arguing" anything.

[67] *See* Yeager, *Dangerous Games and the Criminal Law*, supra note 13, at 29.

ungrammatical to say, "I have helped you write your paper." Instead, I have *written* your paper (or some of it, at least) as a sort of coauthor. Now let's suppose a second example in which, given the same task, I limit my role to sharing my class notes with you, pointing you to a hornbook, and answering your questions as best I can about custody, charges, warnings, consultation with counsel, and so on. Here my efforts might *inform* and *improve* your paper, but they are in no sense *constitutive* of your paper. As a result, here it would be perfectly grammatical to say, "I have helped you write your paper." But because I have not *written* even a word of it, I am no coauthor.

This relation of helping (unlike doing) to the ultimate harm can, in Kantian terms, be described as "synthetic," not "analytic."[68] Philosopher John Searle summarizes that a proposition's "analyticity" makes it "true in virtue of its meaning or by definition."[69] So, "Rectangles are four-sided" is analytic, whereas "My son is now eating an apple" is not; the latter statement is not analytic because its truth must be verified.[70] That makes it synthetic. Another way of stating this distinction is that analytic statements are true or false "tautologically" and the truth or falsity of synthetic statements "depends on facts about the world."[71] After all, I cannot know whether John is eating an apple without checking; experience, however, has no role in the *definition* of a rectangle. Yet another way of saying this is that "the truth of statements depends both on language and extra-linguistic fact." The truth of analytic statements (e.g., "all bachelors are unmarried") is determined by the "linguistic component alone," whereas the truth of synthetic statements (e.g., "it is raining outside") is determined by the "factual component alone," through experience, that is, through confirmation/refutation of the statement out in the world.[72]

On this sketch we should be able to map analyticity on to principal criminality. While analytic *doing* refers to actually committing an element of a crime, synthetic *helping* refers to an action that promotes the crime, but without fulfilling any of its elements. It is not so much a matter of helping gestures being *factually* unnecessary to a given crime; instead, it is a matter of helping gestures playing no part in the *definition* of the offense. Linguistically/analytically, "gun" is not part of the definition of murder; but as a factual/synthetic matter, it is certainly a lot easier to commit murder with a gun than without. For our purposes, analytic and synthetic can function as terms for distinguishing helping from doing—functioning as a

68 *See* IMMANUEL KANT, CRITIQUE OF PURE REASON 48–49 (Norman Kemp Smith trans., 1929).

69 JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 6 (1969).

70 *Id.* at 7.

71 *See* Charles L. Barzun, *Justice Souter's Common Law*, 104 VA. L. REV. 655, 683–84 (2018).

72 *See* Daniel C.K. Chow, *Trashing Nihilism*, 65 TUL. L. REV. 221, 269–70 (1990).

way to avoid “Loose (or Divergent or Alternative) Usage.”[73]

Thus, if the crime analytically (elementally, definitionally) *requires* two or more parties, then the required parties cannot, merely by participating, “help” an activity to which they are *by definition* essential. A buyer therefore does not help a seller by paying for goods any more than an unmarried person helps a bigamist by marrying the bigamist, a betrothed couple helps each other get married by marrying, or someone helps someone else kiss simply by kissing them.

Recall that the dormant English principle of joint principality holds that two parties rob when, both intending to rob, one commits the assault and the other the larceny.[74] Since both the force or threat of force and the taking of property are analytically necessary to *any* robbery, neither party here has the purpose to help robbery; both have the purpose of committing it. Accordingly, both are principal robbers; neither is a helper.

Conversely, where the help of one party is necessary only as an empirical or synthetic matter, actions that do not fulfill a statutory definition of crime or one of its elements, but (simply, merely) *happen to be* necessary for the crime to succeed on these facts, constitute helping and not doing.[75] So it follows that the fact that a getaway driver may be needed for this specific robbery to succeed must be observed to be known. Getaway drivers are not analytically necessary to robbery, which has two elements, driving being neither. Getting the law to see this much, however, is far from light work.

4. *Making Sense of the Position of the New York Court of Appeals*

a. What Difference Does It Make What We *Call* Things?

Suppose I have succeeded here in establishing a grammatical difference between helping, doing, and trying. So what? Doesn’t the law’s official abrogation of differences between helpers and perpetrators in a punishment sense—which occurred over a century ago—reduce the conceit of this Piece to a sort of quibbling, not over what things *are*, but over what we *call* them? Yes, if we are concerned only with telling a murderer from a murderer’s accomplice. But Dlugash might well have been neither murderer nor accomplice. Instead, Dlugash might have been merely an attempted murderer, and worrying over the consequences of being an adjudicated

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[73] J.L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC’Y 1 (1956–57), *reprinted in* J.L. AUSTIN, PHILOSOPHICAL PAPERS 175, 183 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979).

[74] *See* WILLIAMS, *supra* note 21, 49 at 349 (noting how, when individuals commit distinct acts in furtherance of a crime, the individuals all can be considered to have committed the crime itself).

[75] *See* FLETCHER, *supra* note 22, § 8.6.2, at 655 (“A formal version of the theory holds that all actors whose conduct does not satisfy the definition of the offense are accessories.”).

murderer as opposed to attempted murderer is no quibble.

Nowhere are attempted murderers eligible for punishment as severe as murderers are, be they principal murderers or murderers' helpers.[76] In New York, second-degree attempted murder (Dlugash's crime of conviction prescribed by the Court of Appeals) is a Class B felony punishable by as little as five years in prison.[77] Second-degree murder, on the other hand (Dlugash's crime of conviction at trial), is a Class A-I felony punishable by no fewer than fifteen years.[78] With a difference of a decade or more of prison time on the line, to describe Dlugash's belated attempt to kill Geller as a way of *helping* Bush kill Geller is a serious mistake well worth avoiding.

The Court of Appeals's explanation of its reading of the helping/doing/trying criteria appears below, where we are told that hounding down who exactly did what in bringing about Geller's demise is not really all that important:

> Where two or more persons have combined to murder, proof of the relationship between perpetrators is sufficient to hold all for the same degree of homicide, notwithstanding the absence of proof as to which specific act of which individual was the immediate cause of the victim's death. On the other hand, it is quite unlikely and improbable that two persons, unknown and unconnected to each other, would attempt to kill the same third person at the same time and place. Thus, it is rare for criminal liability for homicide to turn on which of several attempts actually succeeded. In the case of coconspirators, it is not necessary to do so and the case of truly independent actors is unlikely.[79]

For the Court of Appeals, when more than one person has "combined" within an unspecified "relationship" to commit murder, it makes no difference whose idea it was, who lured the victim to the situs of the killing, who blocked the exits, or who did the shooting, so long as there is "proof of the relationship between perpetrators."[80] It is far-fetched, Judge Jasen goes on, that within minutes of each other, Bush and Dlugash would both shoot Geller in Geller's apartment if Bush and Dlugash were "unknown," "unconnected,"

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[76] *See, e.g.*, MODEL PENAL CODE § 5.05(1) (AM. L. INST. 2017) (murder is a first-degree felony; attempted murder is a second-degree felony); CAL. PENAL CODE § 664(a)–(c) (West 2011) (prison sentences for attempts generally are set at half the duration of the target offense); *infra* note 144.

[77] *See* N.Y. PENAL LAW §§ 110.05(3), 70.00(2)(b), & 70.02(3)(a) (McKinney 2019); People v. Williams, 219 A.D.3d 409, 413 n.6 (N.Y. App. Div. 2023) (Friedman, J., dissenting in part) (observing that although attempted second-degree murder has a top end of twenty-five years, five years "is in line with sentences . . . upheld for similar crimes").

[78] *See* N.Y. PENAL LAW §§ 125.25(1), 70.00(2)(a), & 70.00(3)(a)(i) (McKinney 2019) (allowing second-degree murder to be punishable by fifteen years on the low end, and by life with possibility of parole on the high end).

[79] People v. Dlugash, 363 N.E.2d 1155, 1159 (N.Y. 1977) (citation omitted).

[80] *Id.*

"truly independent actors."[81]

It is hard to know what the court is getting at here. For starters, combined *how*? *What* relationship between the perpetrators? As joint principals? Principal and accomplice? Is "perpetrator" being used here in a technical sense, as in principal, not accomplice? Or is "perpetrator" being used here in a more idiomatic sense, as in player/participant, whether principal or accomplice?

If the parties are "combined" as coperpetrators in a technical sense (where more than one party intentionally kills the victim), then the Court of Appeals is correct: They are as joint principals equally responsible. Dlugash was convicted of intentionally killing Geller by his own hand, the indictment having alleged that Dlugash did the deed "in concert with" Bush.[82] Because New York does not recognize joint principality, there must be a different sense of teamwork at work here for the Court of Appeals.

If the parties have not "combined" as joint principals, then that would leave a "relationship" of principal and accomplice. In the abstract, the Court of Appeals is right: If we know that the parties stand in a principal-accomplice relation to each other and to the killing, then they are both murderers, even if we are unsure who did what—i.e., unsure who killed, who helped. But the Court of Appeals is right only in the abstract. I say this because there is no way to know that the parties *stand* in the role of principal-accomplice *without* knowing what each party has done. It is only by paying attention to this distinction—who performed the elements? Whose role was outside the elements?—that we are able to see that Dlugash was *not* Bush's helper, but instead was either Geller's co-principal murderer (the two combining either as joint principals or coincidentally) or solo attempted murderer, depending on the precise moment at which Geller expired.

Complicating the matter is that in New York, the requirement of unanimous verdicts in criminal cases does not require unanimity on the theory of liability—principal or accessorial—so long as all twelve jurors agree that there is proof beyond a reasonable doubt that the defendant was one or the other.[83] This means that jurors need not contemplate, let alone agree on, whether the defendant was principal or accomplice; they can convict the defendant anyway. While this take on unanimity seems to make the principal-accomplice distinction vanish in a puff of smoke, what matters in cases like *Dlugash* is not whether defendant is principal or accomplice. What matters in cases like *Dlugash* is whether defendant is *neither*, but instead is just someone who tried and failed to kill a victim whom someone else had already killed. In that sense, Dlugash helped absolutely nothing,

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[81] *Id.*

[82] *See supra* notes 33–37 and accompanying text.

[83] *See, e.g.*, People v. Brewer, 196 A.D.3d 1172, 1174 (N.Y. App. Div. 4th Dep't 2021).

despite having "combined" with Bush, who was not "unknown" or "truly independent" of Dlugash. It is just that their combination does not meet the criteria of principal-accomplice, the theory of liability the Court of Appeals felt best suited the facts.

b. The Conspiracy-Complicity Distinction

For its position that sorting who did what in *Dlugash* is unnecessary, the Court of Appeals, as indicated in the block quote above, found support in "the case of coconspirators."[84] For the court to point to conspiracy law as support for finding Dlugash (who either murdered Geller himself or tried to murder him) *accomplice* to the murder is to whiff on a key sense in which conspiracy and complicity differ. That difference is worth elaborating here to demonstrate that conspiracy is to my mind looser, more open, more flexible than complicity. And to not see that is, again, to twist complicity by treating distinct roles in group criminality—helping, doing, and trying—as interchangeable. To point to these nontrivial distinctions in modes of human action is to at once point to how complicity, *unlike* conspiracy, can *separate* rather than align Dlugash and Bush at the level of action and blame.

Conspiracy, which is an agreement between two or more persons to commit a crime (plus some act in furtherance of the agreement),[85] is a form of inchoate or "subjective criminality"[86] that authorizes punishment, even a life sentence,[87] without necessarily culminating in harm to any victim. Harm is a necessary condition of tort,[88] not of crime.[89] Although attempt, too, is inchoate or subjective, attempts are not punishable without an earnest effort toward the completed offense.[90] Conspiracies need not get that far; in fact,

84 *Dlugash*, 363 N.E.2d at 1159.

85 *See, e.g.*, People v. Lendof-Gonzalez, 163 N.E.3d 15, 22 (N.Y. 2020) ("In a conspiracy prosecution, the People must prove the commission of an overt act in furtherance of the conspiracy, which 'provides corroboration of the existence of the agreement' and shows that 'the agreement has reached a point where it poses a sufficient threat to society to impose sanctions.'" (citations omitted)).

86 *See* Deborah W. Denno, *When Two Become One: Views on Fletcher's "Two Patterns of Criminality"*, 39 TULSA L. REV. 781, 781 (2004).

87 *See, e.g.*, 18 U.S.C. § 1117.

88 *See* Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 964 (2003) ("In tort, there can be no damages if no one has been harmed, since there is no basis for a civil plaintiff to sue a defendant for wrongdoing alone.").

89 *See* Dennis J. Baker, *The Moral Limits of Consent as a Defense in the Criminal Law*, 12 NEW CRIM. L. REV. 93, 108 (2009) ("Inchoate liability criminalization is about punishing harmless wrongs to prevent serious harmdoing from transpiring.").

90 *See, e.g.*, United States v. Harper, 33 F.3d 1143, 1147–48 (9th Cir. 1994) (holding that an armed threesome who purposely jammed an ATM to jam in order to summon a repair tech—whom they planned to rob—did *not* attempt robbery because the tech had not yet arrived before police arrested them).

they need not get far at all.[91] As an illustration, after two persons agree to rob a bank, one of them surveils the bank from across the street, only to abort the plan after seeing a surveillance camera near the door.[92] It is not unusual in such cases of second thoughts for timid conspirators like these to receive the same sentence they would had they actually gone ahead and successfully robbed the bank.[93] Because the law at times locates a group's plan to commit a crime on the same moral plane as actually committing it, it is that criminal intention rather than the result at which conspiracy law strikes. The thinking here is that agreements increase the risk that the contemplated harm will occur, so even a stillborn agreement is punishable as a way to deter criminal associations.[94] Or as Leo Katz summarizes the matter, "psychological evidence backs up" that "[t]wo heads are better than one" is truer than "[t]oo many cooks spoil the broth."[95]

On the one hand, it is hornbook that one might be complicit in an attempt, as where I drive you to the bank to commit a burglary, but you are unable to crack the locked exterior door.[96] On the other hand, the topic of complicity is largely based on "manifest criminality"[97]—not just planning crime, but successfully carrying it out. Put slightly differently, unlike conspiracy and attempt, complicity generally entails harm, not just risk of harm.[98] Thus, it is not just the association of criminals that complicity regulates; that is the office of conspiracy. Complicity, on the other hand, regulates those associations that *attain* their criminal objectives, not associations that *might* do so. An accomplice's liability is therefore mediated by the principal (who might get caught or not go through with the plan) and

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91 *See, e.g.*, People v. Johnson, 303 P.3d 379, 385 (Cal. 2013) ("[T]he overt act need not amount to a criminal attempt and it need not be criminal in itself.").

92 *See, e.g.*, United States v. Jackson, 435 F. Supp. 434, 436 (E.D.N.Y. 1976) (providing a similar fact pattern).

93 *See, e.g.*, CAL. PEN. CODE § 182(a) (West 2011).

94 *See* People v. Luparello, 187 Cal. App. 3d 410, 437 (Ct. App. 1986) ("The law . . . implicitly recognizes the greater threat of criminal agency and explicitly seeks to deter criminal combination by recognizing the act of one as the act of all.").

95 LEO KATZ, BAD ACTS AND GUILTY MINDS 261 (1987).

96 *See, e.g.*, 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.3(c) (3d ed. Oct. 2023 Update) ("Ordinarily, the proof will be of completed criminal conduct by the principal, although it would seem theoretically possible for one to be an accomplice to an attempt . . . ."); *cf.* Dennis J. Baker, *Conceptualizing Inchoate Complicity: The Normative and Doctrinal Case for Lesser Offenses as an Alternative to Complicity Liability*, 25 S. CAL. INTERDISC. L.J. 503, 549 n.285 (2016) ("A person can be liable as an accessory for participating in the perpetrator's attempted crimes . . . ."). Cases finding accomplices derivatively liable for their principals' attempts are not hard to find. *See, e.g.*, State v. Winward, 20 A.3d 338 (N.H. 2011); State v. Glantz, 560 N.W.2d 783 (Neb. 1997).

97 *See* Denno, *supra* note 86, at 781; *see generally* Finkelstein, *supra* note 88.

98 For a discussion of how the Model Penal Code seems to contemplate complicity as at times inchoate, see Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 233–36 (2000) (discussing sections 5.01(3) and 2.06(3)(a)(ii)).

unmediated (because the accomplice contributes to the crime, or there would be no complicity).

Not all complicit acts are preceded by conspiracy.[99] Complicit parties may be coordinated by acting in attunement toward a common goal.[100] But coordination doesn't necessarily entail cooperation, which is to mutually express that attunement not just in action, but in antecedent communication that cannot be taken for anything but an agreement.[101] In fact, courts have explained that mere trading of pricing information, and subsequently pricing goods or services identically, may be insufficient to establish the existence of price-fixing conspiracies, even though their actions were "consciously parallel."[102] Missing there is evidence of an agreement *behind* the consciously parallel behavior. Unsurprisingly, therefore, accomplices to crime regularly are acquitted on conspiracy charges, both because smoking-gun evidence of agreements is rare, and because coordinated criminal activity (not unlike a pick-up game of basketball) often occurs without prior communication, formal delegation of duties, or actual manifestation of agreement. I might in this vein say that after hearing about the weekly pick-up game (whether or not I was invited), I showed up, played by the game's conventions, but had told no other participant I would. I therefore would have agreed to nothing, though it may look otherwise.

Dlugash involved no conspiracy or even an allegation of one. As a result, neither Dlugash nor Bush could be on the hook for killing Geller without meeting the criteria of either principal or accomplice. But if they had conspired to kill Geller, the Court of Appeals is absolutely correct: It wouldn't make a bit of difference to guilt which of the two did what. And why is that? Because in conspiracy, coconspirators' responsibility arises more out of their relation to one another than to the crime. Put another way, in conspiracy, responsibility for commission of the target offense(s) comes from the fact that the target crimes are committed *in the name of* the conspiracy. When the plan is fully realized, all members must accept responsibility—*not* based on their role in the harm-causing event itself (i.e., murder, rape, arson, robbery, burglary, kidnapping, and so on)—but based on their having signed on to the group objective. Coconspirators are

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99 *See, e.g.*, 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.3(a) (3d ed. Oct. 2023 Update) ("[W]hile an agreement is an essential element of the crime of conspiracy, aid sufficient for accomplice liability may be given without any agreement between the parties.").

100 *See* KATZ, *supra* note 95, at 260–75. Katz dedicates a chapter to "nods and winks," which divides forms of human alignment/attunement into three: cooperation, *see id.* at 262–69, coordination, *see id.* at 269–71, and coalescence, *see id.* at 271–74. By his account, cooperation is best suited for conspiracy law. *See id.* at 275.

101 *See id.* at 269.

102 *See, e.g.*, Theatre Enters., v. Paramount Film Distrib. Corp., 346 U.S. 537, 539–41, 544 (1954); *In re* Chocolate Confectionary Antitrust Litig., 999 F. Supp. 2d 777, 801–03, 805 (M.D. Pa. 2014); City of Moundridge v. Exxon Mobil Corp., 429 F. Supp. 2d 117, 132 (D.D.C. 2006).

accomplices in the target offense sure enough, but it is not just any old encouragement they have offered. Instead, by joining an agreement, coconspirators are organized in a way that the law finds particularly ominous.[103] It may be telling that as a case not alleging a conspiracy, *Dlugash* would cite the flexibility of conspiracy doctrine to justify superimposing conspiracy's flexibility on complicity, though false to the grammar of complicity. It is error to confuse overlapping doctrines as interchangeable,[104] the result here being to suggest that conspiracy doctrine, which has no specific application to any aspect of *Dlugash*, is somehow instructive as to Dlugash's putative role as accomplice in Geller's murder. It's not.

*B. The California Version (*People v. McCoy*)*

While *Dlugash* is a case in which it was up in the air whether Geller died just before or just after Dlugash shot him, *People v. McCoy* is a case where it was clear enough to the California courts which of the two shooters killed the victim.[105] Unlike *Dlugash*, *McCoy* is not part of the criminal-law canon. In fact, *McCoy* is largely unknown outside California,[106] where it has been cited over 2,000 times.[107] *McCoy* is loosely a version of a hypothetical that Sandy Kadish nicked from Sir James Fitzjames Stephen's 1883 treatise on criminal law.[108] Stephen, in turn, derived the hypo from Shakespeare's *Othello*.[109] To recap, Othello is a Venetian general who is manipulated by Iago, an ensign whose various resentments include being passed over for lieutenant by Othello in favor of Cassio, in whose room Iago plants a handkerchief to symbolize a made-up affair between Cassio and Othello's

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103 For some of the Supreme Court's more theatrical denunciations of the "distinct evil" of criminal conspiracies, see Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1227 & n.91 (2007).

104 *See, e.g.*, Chisler v. State, 553 So. 2d 654, 665 (Ala. Crim. App. 1989) ("The failure to distinguish the principles of conspiracy and complicity liability no doubt exists because the two 'normally go hand-in-hand.'" (citation omitted)).

105 24 P.3d 1210 (Cal. 2001).

106 *But see* Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 434 n.33 (2008) (citing, inter alia, *McCoy*, 24 P.3d at 1214–15).

107 WESTLAW, https://westlaw.com [https://perma.cc/8U44-XQM6] (search in search bar for "24 P.3d 1210"; then follow "Citing References" link) (last visited May 15, 2024) (185 times in federal courts in California; 1,198 times in California state courts; and 769 times in appellate court briefs and petitions in California).

108 *See* Kadish, *supra* note 23, at 364 (quoting 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 8 (London, MacMillan & Co. 1883)).

109 *See id.* at 364 ("Stephen appears to have in mind cases in which a secondary party truthfully reveals facts to another, with the [intended] effect . . . of motivating the other to commit a homicide. He treats *Othello* as a case of this kind, though, of course, in the play Iago stages an elaborate lie.")

wife Desdemona.[110] Cassio barely survives the violent aftermath; Desdemona, however, is killed in the marital bed by Othello. Kadish's interest in the play is in the spectacle of Iago "coolly whipping Othello into murderous rage,"[111] bringing about, Kadish tells us, an odd legal result: The helper (Iago) commits murder (because he is not in the heat of passion), but Desdemona's killer (Othello) commits only voluntary manslaughter (because he is in the heat of passion).[112] As instructive as *Othello* may be to *McCoy*'s understanding of the doctrine of complicity,[113] my interest in *McCoy* is not in the California Supreme Court's rule that "an aider and abettor may be guilty of greater homicide-related offenses than those the actual perpetrator committed."[114]

Rather, my interest in *McCoy* is in its mischaracterization of an attempted murder as a murder, an error facilitated by a refusal by every court in the litigation to acknowledge the centrality of offense elements in separating out helping from doing, and both helping and doing from trying. Only by close study of what counts, elementally, as committing murder oneself, helping someone else commit murder, and trying (but failing) to commit murder oneself can nonarbitrary judgments about what has been done and what to do about it take place. Again, the teachings of joint principality, which do engage us in this elemental analysis, might help the California Supreme Court out of this funk.

1. *The* McCoy *Nuts and Bolts*

McCoy begians on September 4, 1995, with a drive-by shooting in Stockton, where Ejaan Dupree McCoy (driver) and Derrick Lakey (passenger) fired off a flurry of shots toward a group of four standing on a corner.[115] Lakey's bullets struck no one, but McCoy's killed Calvin Willis.[116] At trial, McCoy testified that he emptied his gun from the car in self-defense, mistaking a can of beer held by Willis's cousin, Tubiya McCormick, for a gun.[117] The nontestifying Lakey was wounded by return fire.[118] A jury found

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[110] On why asking why Othello believes a silly handkerchief over a flesh-and-blood woman who loves him is the wrong question, see Stanley Cavell, *Epistemology and Tragedy: A Reading of Othello*, DAEDALUS, Summer 1979 at 27, 38.

[111] *See* Kadish, *supra* note 23, at 340; State v. Miller, 471 P.3d 927, 933 n.4 (Wash. Ct. App. 2020) (recounting Kadish's deployment of the *Othello* example).

[112] *See* Kadish, *supra* note 23, at 385.

[113] *See* People v. McCoy, 24 P.3d 1210, 1216–17 (Cal. 2001) (recounting *Othello* example without attribution to Kadish or Stephen); *see also* People v. Curiel, 538 P.3d 993, 1020 (Cal. 2023) (same).

[114] *McCoy*, 24 P.3d at 1212, 1217; People v. McCoy, 93 Cal. Rptr. 2d 827, 832 (Ct. App. 2000).

[115] *McCoy*, 24 P.3d at 1212; *McCoy*, 93 Cal. Rptr. 2d at 832.

[116] *McCoy*, 24 P.3d at 1212.

[117] *McCoy*, 93 Cal. Rptr. 2d at 831, 834.

[118] *McCoy*, 24 P.3d at 1212.

McCoy and Lakey guilty of first-degree murder of Willis, plus attempted murder of McCormick and his brother Simon.[119]

Almost four years after trial, the Court of Appeal reversed as to McCoy, ruling that the trial court botched the jury instruction on McCoy's imperfect-self-defense excuse, which otherwise might have reduced his crimes to voluntary manslaughter and attempted voluntary manslaughter.[120]

Taking the view that an accomplice cannot be convicted of an offense greater than that of which the principal is convicted (when both players are tried together on the same evidence), the Court of Appeal reversed Lakey's convictions as well.[121] On the Attorney General's appeal from that ruling, the California Supreme Court, limiting its review to Lakey, reversed in a unanimous opinion authored by Justice Chin.[122] McCoy's partial excuse of imperfect self-defense, the California Supreme Court held, was "personal" to McCoy and therefore of no benefit to Lakey.[123] Because Lakey himself proffered no defense at trial that he had acted in self-defense, the court found no basis for the Court of Appeal to have upset Lakey's convictions.[124]

2. *Decoding the California Courts' Assessments of Lakey's Role in the Shootings*

For me, the nub of *McCoy* is the casualness with which all three courts arrived at the conclusion that Lakey acted as McCoy's accomplice in a murder and two attempted murders. In the Court of Appeal's introductory paragraph, we are told that "Lakey was convicted upon the theory that he

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119 Plus other counts and special allegations not pertinent here. *See McCoy*, 93 Cal. Rptr. 2d at 830–31.

120 *See id.* at 833–37; *see also McCoy*, 24 P.3d at 1213 ("[I]t is possible that on retrial McCoy will be found guilty of manslaughter and attempted voluntary manslaughter rather than murder and attempted murder."). At the prosecution's election, however, there would be no retrial. Instead, judgments were entered for voluntary manslaughter and attempted voluntary manslaughter. Some six years after the first trial, resentencing in the trial court would lop a minimum of 18 years off McCoy's sentence, from 50 years 4 months to life down to 32 years 4 months. *See* People v. McCoy, No. C043674, 2005 WL 737711, at *1–2 (Cal. Ct. App. Mar. 30, 2005).

121 *See McCoy*, 93 Cal. Rptr. 2d at 837–40.

122 *See McCoy*, 24 P.3d at 1213, 1217.

123 *Id.* at 1217.

124 Despite the Attorney General's insistence that it was "undisputed . . . that Lakey did not act in imperfect self-defense," *see* Respondent's Reply Brief at 2, People v. McCoy, 24 P.3d 1210 (Cal. 2001) (No. S087893), 2001 WL 34152326, at *2, the California Supreme Court's remand was to reinstate Lakey's convictions *only if* Lakey was not prejudiced by the erroneous instruction on self-defense. *See McCoy*, 24 P.3d at 1217 n.4. The Court of Appeal thereafter found against Lakey. *See* People v. McCoy, No. C024654, 2002 WL 864283, at *2 (Cal. Ct. App. May 7, 2002) ("Having obtained supplemental briefing from the parties on that issue, we now conclude Lakey is not entitled to reversal on that ground because there was insufficient evidence to justify an instruction on imperfect self-defense as to him.").

aided and abetted McCoy."[125] Or at least the "circumstances strongly suggest" that Lakey was McCoy's accomplice and not a principal, given that "all the bullets in Calvin Willis's body came from McCoy's gun."[126] Plus, at least as to the attempted murder of Tubiya, who was shot in the chest,[127] "the jury found 'not true' the special allegation that Lakey inflicted injury or death by discharging a firearm from a motor vehicle."[128] I take this to mean that the Court of Appeal found it legally significant that McCoy came a lot closer to killing Tubiya than Lakey did. The Court of Appeal did not elaborate, however, apparently taking the position that McCoy's status as principal automatically rendered Lakey McCoy an accomplice as to all three victims.

The California Supreme Court would elaborate, arriving at essentially the same position as the Court of Appeal, also by way of assertions that come off as Delphic. First, the court registered that "Lakey's guilt for *attempted* murder might be based entirely on his own actions in shooting at the attempted murder victims."[129] Second, "Lakey and McCoy were to some extent both actual perpetrators and aiders and abettors,"[130] since "[b]oth fired their handguns, although McCoy's gun inflicted the fatal wounds."[131] And finally, once the jury found Lakey to have shared McCoy's intent to kill, "it could find him liable for both his and McCoy's acts, without having to distinguish between them."[132]

Let's test the California Supreme Court's three claims. The first is absolutely true; how else, except as attempted murder, could we describe shooting with intent to kill three persons (though no one in particular),[133] yet killing none? But if we do describe Lakey as a principal attempted murderer of Tubiya and Simon (as we should), then the second claim—that Lakey was

125 *McCoy*, 93 Cal. Rptr. 2d at 830; *see also McCoy*, 24 P.3d at 1116 ("The majority [below] found that McCoy, whose gun fired the fatal bullets, was guilty as the direct perpetrator and Lakey as an aider and abettor.").

126 *McCoy*, 93 Cal. Rptr. 2d at 837.

127 *Id.* at 831.

128 *Id.* at 837. Although the Court of Appeal found labeling Lakey accomplice (not perpetrator) in the attempted murder of Simon McCormick "more problematic" than labeling Lakey the same in Calvin Willis's murder or Tubiya McCormick's attempted murder, the Court of Appeal nonetheless found it sufficiently "probable" that Lakey was McCoy's accomplice as to Simon. *Id.* at 837–38.

129 *McCoy*, 124 P.3d at 1216 (emphasis in original).

130 *Id.* at 1217.

131 *Id.*; *see also id.* at 1216 ("Although Lakey was liable for McCoy's actions, he was an actor too. He was in the car and shooting his own gun, although it so happened that McCoy fired the fatal shots.").

132 *Id.* at 1217; *see also id.* at 1215–16 (explaining that the aider-and-abettor doctrine "obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role").

133 *See McCoy*, 93 Cal. Rptr. 2d at 837 ("[T]he evidence showed simply that Lakey had fired his gun out the window of the car without specifying that Lakey had any particular target.").

principal *and* accomplice in two attempts plus in the murder of Calvin—would drop out. After all, there is no way Lakey could simultaneously and by the same actions both attempt to kill Tubiya and Simon and help McCoy do the same. Nonetheless, if Justice Chin's second claim—that both shooters were both doing and helping—were true, then the third claim—that it doesn't matter which shooter was doing and which was helping—would also be true.[134]

Yet the court offers no support whatsoever for the second claim. I suppose we could develop examples where two parties are both doing and helping the same crime or crimes, but *McCoy* is not an example itself, nor does *McCoy* present any such examples. Recall that McCoy was the driver, and Lakey the passenger. If Lakey had been principal murderer or principal attempted murderer, then McCoy's role as driver could count as aid on his part in Lakey's crimes as principal, quite apart from McCoy's attempted murders in his own right. But that's not what was said to have happened. All three courts put Lakey in the accomplice bucket, with none mentioning McCoy's driving as a helping gesture. On the *McCoy* record there's no conspiracy, no encouragement, no supplying a weapon by one to the other. What we have instead is nothing but both parties shooting with intent to kill—not exactly independently, but not in a relation of doer to helper either.

As elsewhere,[135] whether a participant is helping as opposed to doing has for well over a century been a legally insignificant status in terms of labeling judgments of conviction in California.[136] A blackletter feature of California law states that one becomes helper/accomplice to a crime or attempt "when he or she, one, with knowledge of the unlawful purpose of the perpetrator and, two, with the intent or purpose of committing, encouraging or facilitating the commission of the crime by act or advice *aids, promotes, encourages or instigates the commission of the crime*."[137] Note

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[134] As in New York, see *supra* note 83 and accompanying text, California takes positions on unanimity that affect instructions on complicity. *See* People v. Russo, 25 P.3d 641, 645 (Cal. 2001) ("[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or . . . 'theory' whereby the defendant is guilty.").

[135] *See, e.g.*, Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 118 n.150 (1985) ("[P]rincipals in the first and second degree, and accomplices before the fact, are 'properly subject to the same punishment,' and … the modern approach is to abrogate all distinctions." (citation omitted)); Cooper v. State, 154 S.W. 989, 990 (Tex. Crim. App. 1913) ("In some states the difference between accessories before the fact, or accomplices under our statute, and principals, has been abolished . . . .").

[136] *See, e.g.*, People v. Coffey, 119 P. 901, 905 (Cal. 1911) ("[U]nder the code accessories before the fact are punishable in the same way as principals." (quoting Stone v. State, S.E. 630, 632 (Ga. 1903))); People v. Valencia, 43 Cal. 552, 555 (Cal. 1872) ("The principal and the accessory are alike guilty of the same offense . . . .").

[137] *McCoy*, 93 Cal. Rptr. 2d at 840 (emphasis added).

that the italicized language above includes no helping gestures that could be confused for those that would fulfill elements of the principal's crime or crimes. But what about when a player is *neither* helping *nor* doing? That is, what about when a player (here, Lakey) neither principally brings about the prohibited harm (by fulfilling the elements of the offense) nor helps someone else (here, McCoy) bring about the prohibited harm (by aiding, promoting, instigating, or encouraging the principal's actions)? *Then* what?

The California Supreme Court did not engage this question because it found that the helping-versus-doing criteria "overlap" too much to be meaningful except in the easiest cases.[138]

> [T]he dividing line between the actual perpetrator and the aider and abettor is often blurred. It is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator and in part as the aider and abettor of the other, who also acts in part as an actual perpetrator.[139]

Specific examples of the "blurred" line would follow:

> [O]ne person might lure the victim into a trap while another fires the gun; in a stabbing case, one person might restrain the victim while the other does the stabbing. In either case, both participants would be direct perpetrators as well as aiders and abettors of the other. The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role.[140]

I will take Justice Chin at his word that the helping-doing line "is often blurred,"[141] but he has not developed revelatory examples of that blurring here. In the first example, the person who lures the victim into the trap is the helper because the luring party does not maliciously cause death; the shooter, who does maliciously cause death, is the doer. Is there any plausible contrary account of their roles? In the second, the person restraining the victim is the helper, again, because the restraining party does not maliciously cause death; the stabber, who does maliciously cause death, is the doer. Again, by what criteria would their roles be characterized any other way? The analytic-synthetic distinction might be helpful here:[142] Shooting and stabbing here are constitutive of murder (a malicious killing) and thus are the acts of doers,

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138 People v. Delgado, 297 P.3d 859, 863 (Cal. 2013) ("Comparing the two defendants' liability for the homicide, we noted the overlap between direct perpetration of a crime and aiding and abetting in it.").

139 *Id.* (quoting People v. McCoy, 24 P.3d 1210, 1215–16 (Cal. 2001)).

140 *Id.*

141 *Id.*

142 *See supra* Part I.A.3.

whereas luring and restraining are *not* constitutive of an element of murder, and thus are the acts of helpers.

3. *Repudiating Joint Principality to the Detriment of the Grammar of Complicity*

If *McCoy* is correct to insist that the helping-doing distinction is not empty but blurred—that too often we really can't tell helping from doing—then it should come as no surprise to us that the California Supreme Court would also reject joint principality as a legally relevant mode of doing. As I emphasize above, joint principality has never caught on in the U.S. In fact, rarely has the doctrine even come up.[143] And when it does, the brief explanations for rejecting it are as unsatisfying as they are incomplete. Again, for me, the consequence of sidelining joint principality is to risk confounding an attempted murder for a murder: To mistake one serious crime (attempts carry seven years base term in California)[144] for a more serious crime (murder is twenty-five to life)[145] is far from a technical detail.[146]

Given the stakes, the topic is remarkably esoteric, as in hidden. Twenty-three years before *McCoy*, George Fletcher dubbed joint principality "unworkable."[147] The reason? Too many potential borderline cases. For the exact same reason, Keith Smith has also flicked off the idea of joint

143 *See supra* note 53.

144 *See* CAL. PENAL CODE § 664(a) (West 2011) (prescribing five, seven, or nine years for non-premeditated attempted murders); CAL. PENAL CODE § 1170(b)(1) (West 2024) ("When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term . . . ." However, "circumstances in aggravation of the crime" may "justify the imposition of a term of imprisonment exceeding the middle term" if the underlying facts have been stipulated to by the defendant or found true "in a court trial." *Id.* § 1170(b)(2).

145 *See id.* § 190(a) (West 2000) (prescribing sentences of twenty-five years to life, or even death, for 1st-degree murder, and fifteen years to life for 2nd-degree murder). Lakey was convicted of 1st-degree murder. *See McCoy*, 93 Cal. Rptr. 2d at 830–31.

146 A minute order from Judge Van Oss's sentencing of Lakey broke it down like this: Count 1 (1st-degree murder, 25 years plus a firearm enhancement of 4 years); Count 2 (attempted murder, 7 years plus a firearm enhancement of 4 years); Count 3 (assault with a semiautomatic weapon, 6 years, all but 2 years stayed); Count 4 (attempted murder, 7 years, 56 months of which were stayed, plus a firearm enhancement of 16 months); Count 6 (felon in possession, 2 years, 16 months stayed). Total sentence: 46 years, 4 months. *See* Minute Order M6, People v. Derrick Lakey, No. 059733 (Cal. App. Dep't Super. Ct., Sept. 3, 1996, J2411H1) [hereinafter *Lakey*] (on file with author).

147 FLETCHER, *supra* note 22, § 8.6.2, at 655 ("This approach would obviously expand the category of accessories to include a co-perpetrator who holds the victim while his partner commits assault or rape.").

principality,[148] which he traces within English law back 300 years.[149] Fletcher's and Smith's views notwithstanding, borderline cases are a necessary feature of even the best, clearest, most workable definitions—of anything. No one has stated this point better than Searle when he said, "*We could not recognize borderline cases of a concept as borderline cases if we did not grasp the concept to begin with.*"[150] The sort of elemental analysis I advocate here is not foreign to criminal law. Indeed, for proof, one need only study the limitations placed by the merger doctrine on felony murder,[151] the Double Jeopardy Clause on multiple trials and punishments,[152] the Due Process Clause on affirmative defenses,[153] and the Sixth Amendment on the taking and admissibility of confessions on uncharged offenses.[154] All four are familiar legal doctrines that boil down to elemental analysis; somehow all four cope with borderline cases.

Joint principality is not just a theory of liability, but one which the law cannot do without. But we do without it nonetheless. Except for once, and not for long. In 1998, a California court of appeal decided *People v. Cook* (*Cook I*),[155] in which two juveniles robbed Donald Thornton of a shopping bag. Edward Cook applied the force, which included fatally stabbing Thornton; Edward's friend Adolph took the property, four beers. On Edward's appeal of his conviction for murder and robbery, the court stated this surprising fact: "Despite the fact that trial courts must frequently determine whether a defendant is potentially an aider and abettor instead of a direct perpetrator, so as to determine whether to give the pattern aiding and abetting instruction, we find only scant appellate discussion of the difference."[156] Finding among that scant discussion no explicit support for the position I take here,[157] the court affirmed the judgment below anyway, pronouncing the following rule to support its conclusion that no instruction on accomplice liability was due Edward, whom the court deemed a principal:

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148 *See* K.J.M. SMITH, A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY 27–28 (1991) ("[N]ot only can there be frequent evidential difficulty in identifying the precise role of each participant, but there is also a degree of uncertainty over the substantive criteria for its determination.").

149 *See id.* at 28, nn.47–48; *e.g.*, R. v. Bingley (1821) 168 Eng. Rep. 890, 891; Russ. & Ry. 446 (explaining that when each participant forged part of a banknote, all were deemed principal forgers).

150 *See* SEARLE, *supra* note 69, at 8 (emphasis added).

151 *See, e.g.*, People v. Farley, 210 P.3d 361, 361 (Cal. 2009); People v. Bush, 2023 IL 128747, ¶ 43–53, 234 N.E.3d 754, 767–71 (Ill. 2023).

152 *See, e.g.*, Blockburger v. United States, 284 U.S. 299, 304 (1932).

153 *See, e.g.*, Patterson v. New York, 432 U.S. 197, 205 (1977); Dixon v. United States, 548 U.S. 1, 20–29 (2006) (Breyer, J., dissenting).

154 *See* Texas v. Cobb, 532 U.S. 162, 172–73 (2001).

155 61 Cal. App. 4th 1364, 1364 (1998).

156 *Id.* at 1369 (citation omitted).

157 *See id.* at 1370–71.

"[O]ne who engages in conduct that is an element of the charged crime is a perpetrator, not an aider and abettor, of the completed crime."[158] That right there is a succinct statement of the doctrine of joint principality.

Four years later, a federal district court denied Edward's petition for federal habeas relief in *Cook v. Lamarque* (*Cook II*),[159] but not before adjudging the rule in *Cook I* unconstitutional.[160] The federal district court's explanation is worth quoting at length:

> Due process requires that all elements of the offense be proven against the defendant. However, the *Cook* rule allows the prosecution to prove an offense by establishing only one element as to a particular defendant, effectively removing the necessity of proving all required elements and thereby lessening the burden of proof. Pursuant to the *Cook* rule, if a crime is completed, then the prosecution need only prove that a defendant committed one element in order for the defendant to be found guilty of the entire crime, so long as another actor committed the remaining elements. Under *Cook,* in such a case, aiding instructions are unnecessary.[161]

The passage above guts joint principality. The anticipated gain for the federal district court in doing the gutting is then expressed "by a simple hypothetical example":[162]

> Consider two individuals who decide to frighten another individual. As part of the plan, one actor is to utilize a toy gun in a confrontation with the victim. Now, let us suppose the other actor decides he in fact wants to kill the victim, and he replaces the toy gun, unbeknownst to the first actor, with a real gun. When the first actor, thinking he is using a toy gun, pulls the trigger and kills the victim, is he guilty of murder? Under the *Cook* rule, the answer is in the affirmative. Pursuant to Cal. Penal Code § 187, murder is defined as 'the unlawful killing of a human being, or a fetus, with malice aforethought.' Applying the *Cook* rule, the first actor is guilty of murder even though he did not bear malice aforethought, because the crime was completed, he committed an unlawful killing, and the element of malice was completed by the other actor. This result is clearly unconstitutional, but it is entirely possible under the new rule announced in *Cook.*[163]

Whatever the above hypothetical may do, it does *not* demonstrate a defect within joint principality threatened by the short-lived *Cook I*. To begin with, the first actor above would *not* be guilty of murder. The district court itself explained that the first actor lacked malice aforethought, i.e., the mens rea

[158] *Id.* at 1371.
[159] 239 F. Supp. 2d 985, 999 (E.D. Cal. 2002).
[160] *Id.* at 996.
[161] *Id.*
[162] *Id.*
[163] *Id.*

for murder. Recall the discussion of joint principality above,[164] which posits two parties in possession of the *same* mens rea sharing or dividing the *physical* elements of the crime (in a robbery, one assaults and the other steals).[165] In *Cook II*'s hypo above, the duped participant fulfills only the physical elements of murder in a killing that is for his part accidental, *not* at all malicious. The federal district court understandably cites no supporting precedent for a proposition that no court would hold.

Only one published case anywhere has cited *Cook I* or *Cook II*.[166] Given the chance in 2013 to address what a California court of appeal called "the nebulous distinction between a direct perpetrator and an aider and abettor,"[167] the California Supreme Court would side with *Cook II*, rejecting the position I take here.[168] Specifically, *People v. Delgado* rejected joint principality as "rigid," while endorsing *McCoy*'s approach—whereby "both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other"—as "nuanced."[169] The California Supreme Court went on to say that, "when an offense contains more than one act element, the People must establish the defendant's liability for conduct meeting *all* such elements"; otherwise, "the defendant's guilt must rest in that respect on his or her derivative liability, as a coconspirator or an aider and abettor, for another's conduct."[170]

From there, it reasoned that Mildred Delgado might have performed part of a kidnapping—detaining the victim—while Myra Gonzalez, who drove the car in which the victim was restrained, arguably performed the other part of a kidnapping—coercing the victim's movement.[171] This division of labor, the court concluded, would place Delgado in the accomplice, not principal, bucket.[172] No joint principality for the California Supreme Court.

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164 *See supra* Section I.A.2.a.

165 *See* SIMESTER, ET AL., *supra* note 15, at 207 (explaining that in joint principality, "each may separately satisfy *some* part of the actus reus for the offence where their actions, in combination, fulfil the complete actus reus requirement *and each has the requisite mens rea*" (second emphasis added)).

166 An unpublished decision called *Cook I*'s endorsement of joint principality "meritless." People v. Swayne, No. CH49879A, 2013 WL 2303781, at *11 (Cal. Ct. App. 2013).

167 People v. Mandock, No. SWF025152, 2012 WL 1537722, at *8 (Cal. 4th App. Div. 2012).

168 *See* People v. Delgado, 297 P.3d 859, 865 n.3 (Cal. 2013) ("To the extent *Cook I* . . . held aiding and abetting instructions need not be given if the evidence shows the defendant personally performed *any* element of the charged offense, the decision is hereby disapproved.") (emphasis in original).

169 *Id.* at 865.

170 *Id.* (emphasis in original). British complicity expert Keith Smith states this same concern. *See* SMITH, *supra* note 148, at 29.

171 *Delgado*, 297 P.3d at 864.

172 It may be worth noting that the 6-to-1 majority's account of California's kidnapping-for-robbery statute is contestable. *See id.* at 867–70 (Kennard, J., dissenting in part).

When the California court added that an accomplice's stance toward a principal can be expressed as "your acts are my acts,"[173] a reminder is in order that we must be careful to make sure that the accomplice really *is* an accomplice. To do otherwise would be "tampering," which is to take ordinary words (here "helping," "doing," and "trying") and attribute to them an extraordinary sense in other than extraordinary circumstances.[174] A case can be made, however, that law presents extraordinary speech situations:

> In the law a constant stream of actual cases, more novel and more tortuous than the mere imagination could contrive, are brought up for decision—that is, formulae for docketing them must somehow be found. Hence it is necessary first to be careful with, but also to be brutal with, to torture, to fake and to override, ordinary language: we cannot here evade or forget the whole affair. (In ordinary life we dismiss the puzzles that crop up about time, but we cannot do that indefinitely in physics.).[175]

Consider, for instance, the notion of trying/attempting. Ordinarily, we say we are going to attempt something when there is a nontrivial *ex ante* likelihood of both success and failure. If the objective is too easy (like raising my arm) or too difficult (like beating LeBron James in a game of one-on-one), then we would not describe the action in prospect by saying "I'll try." Nor would we say afterward that "I tried" until we have actually given it our best shot but fell short for whatever reason.[176] For example, no one tries to take the Bar Exam simply by signing up for a prep course. There is simply too much left to do at that point, at least until I am driving to the exam and get in an accident, or once there my computer crashes, or my credentials are rejected. Yet the Model Penal Code nonetheless says that searching for a victim, reconnoitering, or possessing materials to be used in crime may in some cases count as an attempt to do whatever these preparations are for.[177] Such an extended sense of what it means to try and fail is seen as necessary, lest law enforcement be forced to sit by idly and await, say, for the trigger to be pulled, the demand note to be passed, the store to be broken into, and so on. The law of attempt, therefore, requires that we "override" the conventions or grammar of ordinary language as a way to better protect persons and their property.

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173 *Id.* at 865 (quoting People v. McCoy, 24 P.3d 1210, 1214 (Cal. 2001)) ("When a person 'chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts' . . . ." (quoting Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 111 (1985))).

174 *See* AUSTIN, *supra* note 2, at 15 ("One can't abuse ordinary language without paying for it."); *id.* at 63 ("Tampering . . . is not so easy as is often supposed, is not justified or needed so often as is often supposed, and is often thought to be necessary just because what we've got already has been misrepresented.").

175 Austin, *supra* note 73, at 175, 186 (emphasis in original).

176 *See supra* notes 58 –59 and accompanying text.

177 *See* MODEL PENAL CODE § 5.01(2) (AM. L. INST. 1962).

Does group criminality similarly pressure our language to dissolve the conventions or grammar of helping, doing, and trying? If so, the case is not made by *Dlugash*, *McCoy*, or their progeny. Instead, by writing off elemental distinctions between helping and doing, those cases ignore that some participants are doing neither. Not just where the accomplice does not share the principal's intentions, but where, by trying and failing to commit a crime by one's own hand, one's actions should be understood as decoupled from the actions of others. Once decoupled from the group, it would be out of order to say, "your acts are my acts." They're not.

CONCLUSION

Owning up to this reality of human action is becoming more and more necessary as New York, California, and other states snuff out antiquated doctrines like felony murder, which holds all participants responsible as murderers for any killing—intentional or even accidental—by any member of their number while committing or attempting certain felonies.[178] Also on the way out are state versions of the federal *Pinkerton* rule, whereby accomplices remain on the hook for the actions of principals who end up committing offenses more serious (typically murder) than those of the group's common scheme or design (typically assault).[179] As a result, more and more must the legitimacy of judgments of conviction and sentence turn on sorting who did what—who is in the elements of the offense, who is out. Judgments that include lengthy terms of imprisonment should accordingly abandon this mimicking of joint and several liability, which is no more than a civil collection device meant to thwart insolvency. Rather than continue with such an ill-suited approach to loose criminal associations like those that tied Dlugash to Bush, and Lakey to McCoy, in its place we should install a regime fixated on defendants' relation to the elements of the offense with which they are charged.

Meanwhile, make no mistake: *Dlugash* and *McCoy*, which brazenly resist this reality, are representative cases, not outliers.[180] The ultimate disposition for Melvin Dlugash—who ended up with an attempted murder conviction for shooting a corpse he reasonably took for a live person—is probably about what he deserved. The payoff for reading *Dlugash* as a tract on group criminality is to learn that, contrary to the New York Court of Appeals's position, there is no plausible way to characterize the Dlugash-

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[178] *See* S.B. S6865, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018); S.B. 21-124, 2021 Gen. Assemb., Reg. Sess. (Col. 2021).

[179] *See* S.B. 1437, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

[180] *See, e.g.*, People v. Didyavong, 90 Cal. App. 5th 85 (2023) (upholding murder convictions on alternative theories concerning gang members who were beating the victim until a member of their number fatally shot him).

Bush relation as one of complicity, regardless of which one of them delivered Geller's *coup mortel*. But the costs of courts' loose or extravagant usages of the criteria of helping, doing, and trying were much higher for Derrick Lakey. Multiple phases of his protracted litigation report that he caught 25-years-to-life for "helping" McCoy murder Calvin. Unreported by those phases of his case is that Lakey caught seven years for helping McCoy attempt murder of Tubiya, plus another seven (almost five of which would be stayed) for helping McCoy attempt murder of Simon.[181] Had Lakey's role in the shootings properly designated him principal *attempted* murderer of Calvin—not accomplice to Calvin's murder—Lakey would be facing a fraction of the years he faces for shooting out the window of a car, hitting no one. Now serving his twenty-eighth year at age forty-seven, Lakey's next parole hearing is set for February 2027.[182] These are serious matters.

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181 *See Lakey*, *supra* note 146, and accompanying text.

182 *See Lakey, Derrick*, CDCR No. J2411H1, Cal. Incarcerated Records and Info. Search, https://apps.cdcr.ca.gov/ciris/search [https://perma.cc/6MZE-GL6W] (search in search bar for last name "Lakey," first name "Derrick"; then click "LAKEY, DERRICK") (last visited May 24, 2024).