Conspiracy, Complicity, and the Scope of Contemplated Crime  
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One of the leading casebooks for the first-year Criminal Law course begins the mens rea discussion with Regina v. Cunningham. Cunningham, in need of money, decided to rip the gas meter off the residential gas pipe in his soon-to-be basement to steal the shillings inside. That Cunningham was guilty of theft was uncontroversial. The problem was that Cunningham did not turn off the gas, and it seeped into the adjacent home, partially asphyxiating the neighbor, Sarah Wade.

Although the case is technically about the interpretation of the word, “maliciously,” in the Offences against the Person Act, the lesson students are to draw from it is broader: Each crime should stand on its own culpability. The criminality inherent in being a thief is not the criminality inherent in practically poisoning the neighbor. Instead, Cunningham needed to have been culpable as to the possibility of poisoning. Under the terms of that statute, he had to have been reckless as to the potential for endangering life. The jury was not so instructed—reversible error.

Though this view of mens rea is foundational, it is sometimes abandoned. Two doctrinal appendages to conspiracy and complicity are such culprits. First, under the Pinkerton doctrine, conspiring to commit one offense can place a defendant on the hook for another offense, even if the defendant did not agree to it. Second, under the natural and probable consequences doctrine, aiding one offense can make the defendant liable for another offense that the defendant did not even foresee.

The worry about these appendages is that they have the potential to punish someone inconsistently with standard criminal law principles and disproportionately to her culpability. First, the criminal law typically does not punish merely negligent actors. The influential Model Penal Code makes recklessness the default mental state if no mental state term appears in the statute. A criminal mind—a guilty mind—is typically thought to require an awareness that one may do harm. Second, even when we extend liability to negligence, we typically think it is worse to cause a harm purposefully rather than negligently. In the context of killings, one is murder; the other is manslaughter. That is, the gravity of the offense and the amount of punishment is tied to whether the person chose to aim at or risk the harm or whether the person just failed to see what reasonable people would. Pinkerton and the natural and probable consequences doctrines cause problems because they obliterate these lines. They allow individuals who may be only negligent vis-à-vis the commission of an offense to be punished as if

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4 See Model Penal Code § 2.02(3).
they had acted with a higher degree of culpability. Under these doctrines, failure to foresee a risk of death can lead to punishment for even a premeditated killing.

The obvious solution is to abandon such doctrines. If they punish someone beyond her culpability, then they ought to be reformed or removed. But there are two worries here. First, I suspect that part of this expansion is fueled by conceptual questions about what is within and what is without the scope of someone’s intention. If there is uncertainty about what is the core and what is the periphery, there will always be instability. Second, there is a normative push at work here. Because we have let our ordinary language drive our criminal law too frequently, the conduct our statutes captures may be too narrow. When people who deserve to be punished fall outside the reach of the criminal law, these appendages are an attractive way to extend the reach of the criminal law.

Accordingly, we may need to broaden the criminal law in order to effectively narrow it. This Article will argue for a two-part solution. First, I advocate expanding the reach of complicity to include knowing, as opposed to only intentional, aid. Second, I contend that we can narrow the reach of Pinkerton and the natural and probable consequences doctrine by extending liability to non-target crimes only if the defendant had the mental state required for that offense, with punishment commensurate with the mental state the defendant did have. This proposal is more modest than my theoretical work that would simply abandon conspiracy and complicity in favor of a blanket recklessness offense. What is proposed here is a pragmatic solution. But it will capture within criminal law’s net those whom we are normatively justified in capturing, cabin the criminal law’s reach so as not to create too much room for unfettered discretion, and gloss over most (if not all) of the complexities of determining the scope of intentions, a puzzle that lies at the heart of all of those crimes.

This Article proceeds as follows. Part I provides an overview of the mental state requirements for conspiracy and complicity, as well as Pinkerton and the natural and probable consequences doctrine. Part II introduces the puzzles about the scope of intentions that lie at the heart of complicity and conspiracy. Part III reveals how these questions arise both because of the potential scope of intentions themselves and because of the further evidentiary inferences we perform in ascertaining what is intended. Part IV turns normative and argues that we are justified in reaching beyond purpose. Rather than arguing for a broad expansion, however, this paper argues for a revision of the core of accomplice liability as well as Pinkerton and the natural and probable consequences doctrine that gives these doctrines a more principled reach, both conceptually and normatively.

I. Conspiracy and Accomplice Liability: Core and Extensions

A conspiracy is an express or implied agreement between two or more people to commit a crime or to accomplish a legal act through unlawful means. The offense requires two mental states: that the co-conspirators intend to agree and that they intend the achievement of the object of the conspiracy. If A and B agree to rob a bank and then do so, they will be guilty of both the crime of conspiracy and the target offense of bank robbery.

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7 See, e.g.,
8 See generally Alexander and Ferzan, [Crime and Culpability], supra note ____; Alexander and Kessler, Mens Rea and Inchoate Crimes.
9 Dressler § 29.01[A].
10 Dressler § 29.05[A].
Accomplices are those who intentionally assist the perpetrator in committing this offense.\textsuperscript{11} Accomplice liability, which makes the defendant guilty of the perpetrator’s offense and is not its own substantive crime, requires “‘dual intents’: (1) the intent to render the conduct that, in fact, assisted the primary party to commit the offense; and (2) the intent, by such assistance, that the primary party commit the offense charged.”\textsuperscript{12} If C provides A and B with ski masks to rob the bank (so that they may provide him with the three thousand dollars they owe him), he is their accomplice and will be guilty of bank robbery. Because A and B encourage each other by their agreement, they are both each other’s accomplices and co-conspirators. But D who trips the bank security guard to help A and B, unbeknownst to them, is their accomplice but not their co-conspirator.

Although these offenses seem very targeted, they are quickly expanded. The \textit{Pinkerton} rule provides that co-conspirators are liable for substantive offenses committed by their compatriots, even if they are not the object of the conspiracy if the nontarget offense was committed (1) in furtherance of the conspiracy, (2) was within the scope of the unlawful project, and (3) was reasonably foreseen as a natural or necessary consequence of the unlawful agreement.\textsuperscript{13} \textit{Pinkerton} applies in federal jurisdictions and many states.\textsuperscript{14} There is no need to prove the defendant intended the nontarget offense or even consciously appreciated it. Instead, if it was reasonably foreseeable, then \textit{even if the defendant did not foresee it}, the defendant can be convicted of her compatriot’s offense. Mere negligence somehow can fill in for crimes that otherwise require intention, knowledge, or recklessness. Even premeditated murder can be appended.\textsuperscript{15}

For example, in U.S. v. Vazquez-Castro, the appellate court upheld a the defendant’s conviction for possession of a firearm in furtherance of drug trafficking, based on the defendant’s commission of the offenses of conspiracy to possess with intent to distribute cocaine and possessing with intent to distribute cocaine.\textsuperscript{16} The defendant’s role was simple. He exited one car, got the drugs from another, and then walked to a restaurant to meet the buyers (or in actuality, undercover DEA agents). Alas, the car from which the defendant obtained the drugs, and in which he sat in the rear passenger seat for mere seconds to get the drugs, had a gun under the driver’s seat carpet. There was no evidence, direct or indirect, that the defendant knew about the gun. But the court found \textit{Pinkerton} was satisfied nonetheless. Even if Vazquez-Castro had absolutely no idea that someone would have a firearm, these facts were sufficient because the possession of such a weapon was within the scope of the drug deal and reasonably foreseeable. This is a far cry from asking what was the within the scope of Vazquez-Castro’s intention and agreement.

Accomplice liability broadens its reach through the natural and probable consequence doctrine. This doctrine, applicable today in many jurisdictions,\textsuperscript{17} yields “an aider and abettor is guilty not only of the intended, or target, crime but also of any other crime a principal in the target crime actually

\begin{itemize}
\item \textsuperscript{11} Dressler § 30.02[A][1]; see also 18 U.S.C. § 2 (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as principal.”)
\item \textsuperscript{12} Dressler § 30.05 [A]. Things can get a little trickier when the crime involves recklessness or negligence. \textit{Id.}
\item \textsuperscript{13} Pinkerton v. United States, 328 U.S. 640 (1946).
\item \textsuperscript{14} CITE
\item \textsuperscript{15} See, \textit{e.g.}, US v. Gonzales, 841 F.3d 339 (5\textsuperscript{th} Cir. 2016).
\item \textsuperscript{16} 640 F.3d 19, 26-27 (2011).
\item \textsuperscript{17} Dressler § 30.05[B][5].
\end{itemize}
commits (the nontarget crime) that is a natural and probable consequence of that target crime.\textsuperscript{18} The question is whether the nontarget crime is reasonably foreseeable.\textsuperscript{19}

The natural and probable consequences doctrine, which does not even require that the later act be within the scope of the agreement, casts an even wider net. Consider People v. Zielesch.\textsuperscript{20} There, the defendant bailed the perpetrator out of jail, wanting only methamphetamine and the murder of his estranged wife’s lover in return. The perpetrator, nowhere near the intended crime scene but driving under the influence of meth and seeking to avoid returning to jail, shot a police officer who stopped his car. The perpetrator’s use of the defendant’s gun, combined with the conspiracy to commit murder, was sufficient for this murder (note: the court uses conspiracy and accomplice liability terminology interchangeably but employs the natural and probable consequences test in determining liability):

\begin{quote}
If the hired killer is an unstable methamphetamine user who, before the assassination is completed, finds it necessary to kill a law enforcement officer to avoid being sent back to jail, the conspirator who hired and armed the assassin is guilty not only of conspiracy to murder the intended target, but also the murder of the peace officer. It would be a rare case indeed where a murder is an unforeseeable result of a conspiracy to commit murder.\textsuperscript{21}
\end{quote}

Again, the worry here is that punishment will be disproportionate to the defendant’s culpability. Undoubtedly, the defendant did not behave reasonably, and arguably, he had greater culpability than negligence for his decision to give an unstable a meth addict a gun. But all the court requires is a showing of negligence for a conviction for first-degree murder.

II. The Problem at the Core

Why not just remove the appendages? The concern is that even if severed, they appendages may grow back, and they may grow back because of fundamental confusions about what it means to intend something in the first place. Pinkerton, and the natural and probable consequences doctrine, are attractive, not because they represent forfeiture doctrines that seek to punish defendants more broadly than their culpability, but because they seem to capture something about the true scope of the defendant’s culpability.

Let’s look at two cases to see the problems that might arise in determining intention’s scope. First, consider the Supreme Court’s opinion in Rosemond.\textsuperscript{22} Rosemond and accomplices attempted to sell one pound of marijuana, but the buyers took the drugs but did not provide the cash, instead punching one of the sellers in the face and running off with the drugs. Either Rosemond or his confederate then gave chase and discharged a firearm. The government charged Rosemond on alternative theories of either being the shooter or being an accomplice to the shooter, resulting in Rosemond’s conviction under 18 U.S.C. § 924(c), prohibiting using or carrying a firearm during a drug

\textsuperscript{18} Dressler § 30.05[B][5] (citing People v. Smith, 337 P.3d 1159 (Cal. 2014), State v. Henry, 752 A.2d 40, 44 (Conn. 2000)).
\textsuperscript{19} Dressler § 30.05[B][5] (citing People v. Smith, 337 P.3d 1159 (Cal. 2014)).
\textsuperscript{20} 179 Cal.App.4th 731 (2009).
\textsuperscript{21} Id. at 636.
\textsuperscript{22} 572 U.S. ___ (2014).
trafficking crime. Rosemond was convicted and sentenced to the ten-year mandatory minimum applicable when the weapon is discharged.

Rosemond is not a question about how to extend liability to this act. That is, it is not a natural and probable consequence or Pinkerton case. Rather, it is a question about whether Rosemond’s serving as an accomplice to the drug deal included this gun charge in the first instance. The Court noted that no one claimed that the firearm violation was a natural and probable consequence of the marijuana deal and maintained that it was expressing no view on that doctrinal appendage.23 Rather, the court was asking the question of what mens rea was required for accomplice liability for this “double barreled crime.”

Unfortunately, Justice Kagan’s opinion obscures the line between purpose and knowledge. While at first citing Learned Hand’s “canonical” purpose/intent formulation in Peoni, she quickly moves to precedent that she claims supports a view that knowledge suffices for this intent requirement.24 Ultimately, the Court holds the decision to engage in the drug deal, knowing that there would be a firearm, is sufficient. (There were tricky questions that divided the majority from the concurrence/dissent on when that knowledge had to obtain, but we can ignore that for our purposes.):

In such a case, the accomplice has decided to join the criminal venture, and share its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one.

He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense—i.e., an armed drug sale.

The problem is where this knowledge requirement comes from. Justice Kagan claims that this is a compound crime,25 but after requiring purpose for aiding the drug offense, she only requires knowledge for the gun conduct. As commentators have noted, typically, complicity has required that one intend to aid any conduct element—and this crime has two: the dealing of the drugs and the using of the firearm. Justice Kagan treats the crime, for all intents and purposes (pardon the pun), as one of “engaging in a drug deal, knowing your confederate is armed.” But that is not the crime. It is displaying, using, or discharging a firearm while engaged in a drug deal. It is only because Justice Kagan plays fast and loose with the conception of the crime at issue, and ignores the statutory language, that she can gloss over the fact that her analysis cannot be easily reconciled with Peoni.26 Justice Alito notes that the Court has never been clear about purpose and knowledge, but he does not seem particularly troubled.

23 n.7
24 These cases are distinguishable because they did not involve conduct elements. Kinsports, Rosemond, Mens Rea, and the Elements of Complicity, 52 San Diego L. Rev. 133 (2015)
25 “It punishes the temporal and relational conjunction of two separate acts, on the ground that together they pose an extreme risk of harm”
26 Kinsports, supra note __, at __; Stephen P. Garvey, Reading Rosemond, 12 Ohio State J. Crim. L. 233, 243 (2014)(noting that Peoni and Rosemond cannot be reconciled by construing the gun charge as a circumstance element).
by this,27 despite the fact that there are statutory distinctions, conceptual distinctions, and potentially normative distinctions at hand.

But let’s ignore whether Rosemond can be reconciled with Peoni and turn to the underlying conceptual question: Is the intention to aid your friend’s drug deal, knowing he has the gun, an intention to aid an armed drug deal and is it the same as the intention to aid the use of a gun during a drug deal? There does seem to be some rhyme to Justice Kagan’s reasoning that the decision to aid is the decision to aid the crime in its entirety and not just the portions that one wants. What would explain our intuitions that one does intend to aid the crime as she finds it? Or as Justice Kagan puts it, “the player knew the heightened stakes when he decided to stay in the game.”

Here is a second case to consider. In U.S. v. Carr,28 one defendant, Franklin, stayed in the car during the robbery of a credit union. The plan was for one robber to enter a credit union disguised as a FedEx delivery person. The credit union was just a two-woman office, with no security guard. It did not have customers and only workers and delivery personnel were admitted. When the faux FedEx delivery person tried to force his way in, one teller fought back and was pushed back into the credit union. At other points, a firearm was displayed. The Fourth Circuit held (1) that there was sufficient evidence of forced accompaniment (a quasi-kidnapping offense), as pushing a teller back into the credit union was within the scope and foreseeability of the planned robbery, and (2) that there was insufficient evidence that this robbery would involve a firearm as the kind of robbery did not necessitate it and there was no evidence that guns were ever discussed. 29

My immediate reaction is that Carr seems rightly decided. Pinkerton seems to be capturing something quite right about what Franklin was thinking—namely, if you are going to commit this bank robbery, it has to be committed in some way and that way is going to involve pushing some people around. What did Franklin think he was doing? Did he not anticipate the forced accompaniment? If Carr seems so right, how can Pinkerton be so wrong?

III. Intentions and Inferences

To see the difficulty at the core of these questions, it is time to do some philosophy. We need to know what it is to intend something. Now, I am not arguing that the criminal law should import this understanding directly. But we can only see why we are so confused if we understand exactly what is so confusing. And what is so confusing is figuring out what it is to intend something in the first place.

Let’s start with a first cut at the scope of intentions. What we intend is first and foremost what is motivationally significant to us. Intentions explain “why?” we perform an action. Intentions are mental states that mediate actions by (nondeviantly) causing actions, and most importantly, causing actions in a way that rationalizes them.30

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27 E.g., “The Court refers interchangeably to both of these tests and thus leaves our case law in the same, somewhat conflicted state that previously existed. But because the difference between acting purposefully (when that concept is properly understood) and acting knowingly is slight, this is not a matter of great concern.”
28 761 F.3d 1068 (2014),
29 Id. at 1079-1081
Intentions are thus contrasted with effects that we know will follow from our intended actions, but that we do not desire. The question about what distinguishes an intention from a side-effect is well known. Placing drapes in the sunlight causes them to fade; aiming at the munitions factory will blast the adjacent school in the infamous terror bomber/strategic bomber just war hypotheticals; and so forth.\(^{31}\) Even if you know a result will follow from your action, it does not mean that you intend that result. You may intend to drink without intending the hangover that you know will follow.\(^{32}\)

Intention and knowledge are different. Known consequences do not cause or explain actions. In addition, intentions constrain reasoning in different ways than beliefs do. If one intends an action, one will screen out alternatives, engage in means-end reasoning, and be resistant to reconsideration.\(^{33}\) These norms do not apply to beliefs. In contrast, stuck in equipoise, one may flip a coin and decide which of two paths to intend, but one cannot resolve beliefs in such a way.\(^{34}\) One could not, unsure whether her spouse is cheating on her, simply flip a coin to determine what to believe.

This distinction, however, is not the end of the matter. There are the tricky “closeness” cases. Does a scientist who intends to decapitate intend to kill? Does the person who goes to a restaurant and orders the lobster, knowing it to be the most expensive item on the menu, thereby intend to order the most expensive thing on the menu?

Elsewhere I have argued that contrary to conventional wisdom, the scope of an intention is not only those factors that are motivationally significant, but also those factors that are understood by the agent to be conceptually and empirically entailed by the factors that are motivationally significant.\(^{35}\) That is, the actor’s understanding of what she is doing requires an understanding more robust than simply one thin linguistic description. To illustrate, someone who knows what it is to decapitate knows that what one is doing is killing. The one conceptually and empirically entails the other.

Let me briefly explain what the account on offer is. It is an account of intentional content. If A intends to decapitate B, then “decapitating B” is A’s intentional content. But that content is not just words. Rather, that content must mean something to A. The content of the intention, then, is not only the description under which the intentional object is motivationally significant, but also all descriptions that inform the agent’s understanding of her act. A rational person would understand that in this world there is simply no way for a decapitated person to live. Hence, understanding what it means to decapitate B is understanding that one is killing B.

This connection is defeasible. It requires that the person be rational, understand basic physics and biology, and the like. Because we live in a world where people die when their heads are removed from their bodies, most people’s understanding of decapitation is that it is a form of killing. If someone did not know this, then (1) he would not believe it to be true and (2) he could certainly not intend it. But what matters is the agent’s understanding of the act. So, if conversely, the person falsely believes that


\(^{35}\) Kimberly Kessler Ferzan, Beyond Intention, 29 Cardozo Law Review 1147 (2008).
paper cuts immediately and necessarily cause death, then that person intends to kill when he intends to give a paper cut.

These cases are then distinguished from cases where one can understand one’s action as excluding the side-effect. One can understand what it is to hang drapes, without them fading, even if one knows that it is empirically certain that the drapes will fade. Even if in an individual case a consequence is known, that consequence is not part of one’s intentional content unless one cannot understand what one is doing without understanding that one is causing the known consequence. Just because we know something will happen does not mean we intend that result. (It is an altogether different question whether we are blameworthy for known results. But to the extent that the criminal law relies on intention, this is a distinction that makes a big difference.)

There is a further question about closeness cases. How should we treat circumstances as opposed to results? Circumstances can have motivational significance, though we might think those cases are less frequent. If Alex intends to have sex with this woman, he may know she doesn’t consent, but it takes a significantly eviler actor to be motivated by that fact. I may take a laptop because I want it, knowing it is yours, but it is less frequent for me to take the laptop because it is yours. Still, even if the cases wherein circumstances have motivational significance are rare, we must now ask the further question, which is whether one only acts intentionally vis-à-vis a circumstance when that circumstance is motivationally significant.

Again, it is simply not the case that the scope of our intentions are determined by the description that is motivationally significant. Other descriptions are equally part of the representational content. Consider a case where one decides to intentionally kill “Albert.” One does not think one is going to kill a string of letters, specifically A-L-B-E-R-T. Rather A-L-B-E-R-T is a human being, a man, the guy over there, the person who stole one’s girlfriend, and so on. The ascription of meaning given to an intentional object is not a one-dimensional word but rather the entire array of senses that one ascribes to that word. And, although one description may be the motivationally significant one, all the descriptions one attributes count as intended.

Now, one might ask why it is that circumstance elements take on more known circumstances than result elements do. Why is it not just that one knows that one is killing a human being, while one intends to kill the girlfriend stealer? The reason is that when one acts prospectively one is aware that the other descriptions may or may not follow—it is not, except in closeness cases which are intended, part of the agent’s understanding that these results are nomologically or conceptually required to follow. My neighbor could erect a large wall blocking the sun to my window and I could still understand myself as hanging drapes. With a person or object on the other hand, one is acting on this person/thing. To understand that I am writing with this pen is to be writing with this blue pen is to be writing with the blue pen my mom gave me for my birthday. To think about the object I am using is to invoke what it is to me, which includes all the descriptions I (consciously or preconsciously) attribute to it.

What does this mean for law? When we think one consequence “naturally and probably” follows from our actions, we might be talking about three different things: it could be (1) the very sort

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36 For further defense of these claims, see Beyond Intention.
37 See Beyond Intention; Accord Gideon Yaffe, Intending to aid, 33 Law and Philosophy 1, 18 (2014) (“our intentions constitute commitments to conditions that they do not also commit us to promoting”).
of result that is conceptually tied to understanding the action, (2) an evidentiary inference, or (3) punishment for negligence.

Consider the English case of Director of Public Prosecutions v. Smith, which is often cited as wrongly decided and conflating negligence with intention. During a traffic stop, an officer grabbed on to Smith’s car as Smith drove off. Smith drove erratically to shake the officer loose, and unfortunately, he succeeded in so doing, resulting in the officer’s death. The murder conviction required an intention to cause grievous bodily harm, and the House of Lords approved the following instruction:

The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts.

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If you feel yourselves bound to conclude from the evidence that the accused's purpose was to dislodge the officer, then you ask yourselves this question: Could any reasonable person fail to appreciate that the likely result would be at least serious harm to the officer? If you answer that question by saying that the reasonable person would certainly appreciate that, then you may infer that that was the accused's intention, and that would lead to a verdict of guilty on the charge of capital murder.

The court held that the trial court did not err in failing to tell the jury that such an inference was rebuttable. Rather, the only thing that would sever the inference, opined the court, was a finding of insanity or diminished capacity.

We now see how easy it is to blur these questions. We rely on both the inference that people intend the natural and probable consequences of their actions and the inference from what a reasonable man would think would happen to what the defendant may have intended. But as we have seen, not all known side-effects, even the ones a reasonable person would appreciate, fall within the scope of the intention. If I unreasonably eat your salad thinking it is mine, then despite what a reasonable person would have thought, I don’t intend to eat your salad. If I hang my drapes, and know they will fade in the sunlight, I still don’t intend to fade the drapes. So here, the question is whether Smith could understand his action—shaking the office loose at a high speed into oncoming traffic—as an action that does not conceptually entail seriously harming the officer. Arguably, he could understand his action as “shaking the officer loose” and still think the officer could survive without serious harm. This is why the case does conflate negligence within intention, but we can quickly see how elusive this answer becomes at the margins.

This then returns us to Carr. When someone intends to rob a bank, what is it that they intend? It is not just the words. Rather, for it to be a bank robbery, there would need to be a bank, and some show of force. Money would need to be taken. And so forth.

So how is Pinkerton functioning? Consider three possibilities. It could merely be capturing the defendant’s negligence. Maybe he should have foreseen that a teller would be pushed back into the bank, but he did not. Let’s call this the “culpability equivalence” view. Or, it could be capturing an evidentiary inference. We could think that the defendant must have contemplated a teller being
pushed inside when he contemplated the kind of bank robbery he planned. Let’s call this the “evidentiary inference” view.

Here is a final understanding of how Pinkerton is functioning. It is merely capturing what it would be to intend the bank robbery in the first place. Just as we understand that decapitations are killings, the argument would be that Carr’s very understanding of his act necessarily included detaining the teller against her will. How else do you get the teller to stay put and to give you money, particularly when you plan does not include a weapon? Let’s call this the “scope of intention” view.

Notably, the “scope of intention” view is supported by Pinkerton’s own language. Pinkerton was held responsible for what his brother did, because he was an accomplice to his brother’s action and the conduct was in fact that target offense. The Court then states:

The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. . . .

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

Notice, that the “scope of the unlawful project” does not truly purport to be anything a co-conspirator happens to do. Rather, this test seems to be saying that one is on the hook for the full scope of the crime that one intended to aid.

Now, the “scope of intention” view poses no problems, normatively or conceptually. It would be the view that Carr in fact intended the forced accompaniment. (We might still ask whether the government should just charge this directly from a legality/procedural standpoint. But we are dealing punishing someone for what he intended.) In contrast, the “culpability equivalence” view is very problematic. It is precisely the problem of punishing the negligent actor as if she acted intentionally.

The evidentiary inference view falls somewhere in between. Now, to be sure, as an evidentiary inference, constitutionally, a trial court can only charge the jury that it is permissible for them to infer that a defendant intends the natural and probable consequences. But the criminal law converts such inferences into irrebuttable presumptions through its substantive provisions. For example, possession of extraordinary amounts of drugs is punished as if they were possessed with intent to distribute. The intention element is removed, however, because at the amounts provided it would be extraordinarily unlikely that the drugs were for personal use. Construed this way, even if such a codified inference was overinclusive, it may be far less objectionable than the “culpability equivalence” view would have it.

Where does this leave us? It means that depending on the case, Pinkerton may be appropriately tracking the scope of the intention, serving as a modestly overinclusive codified evidentiary inference, or
punishing individuals disproportionately to their culpability. As formulated, *Pinkerton* sometimes gets it right, sometimes gets it slightly wrong, and sometimes gets it very wrong. But *Pinkerton* will remain tempting insofar as it sometimes seems to capture what defendants like Franklin must have been thinking.

Now consider *Rosemond*. One question is whether we should understand the aiding of two conduct crimes similarly to a conduct and a result or a conduct and a circumstance. Under the first understanding of the scope of an intention, one can understand dealing drugs without guns and so the gun is not intended, even if it is known. On the other hand, one understands that one is assisting another who has two things going on at the same time. That person is both dealing drugs and carrying a gun. After all, if I give you $50 for your birthday for you to order the lobster and lobster is the most expensive thing on the menu, I have intentionally aided your ordering the most expensive thing on the menu. That is, what I understand myself to be doing is broader than just aiding your order of lobster; it is everything that I understand lobsters to be. I may not care that it is a crustacean, but I aid you in so buying one.

Justice Kagan’s sense, then, that one takes one’s accomplice’s crime as she finds it is arguably correct when we think about how we approach another’s behavior. All those descriptions inform what one is aiding. This is distinct from the idea that one is necessarily aiding a likely result. *Rosemond* would not have intended to aid death, just because he intended to aid an armed drug deal. But if he intends to aid someone’s crime, and he understands it involves drugs and a gun, then irrespective of which aspect is motivationally significant (the drugs with gun on the side or the gun with drugs on the side), the person understands that he is aiding behavior that has both components.

IV. Taking Stock and Going Normative

Although I hope my discussion of the scope of intentions is correct, my aim is more modest. My goal at this point is only to convince you that intentions are complicated. The criminal law is using a mental state that not only captures what is motivationally significant, but also other understandings of that intentional object. A court that is inclined to construe intention narrowly will face conceptual and normative pressure to include other crimes. If one viewed *Rosemond* as appropriately on the hook for his accomplice’s gun possession, but thought he did not intend to aid the gun possession, then the only legal avenue available would be *Pinkerton* or the natural and probable consequences doctrine. So, too, the court in *Carr* seems to be capturing something about what Franklin must have taken his bank robbery to entail. Why sever a doctrine that seems to capture the culpable?

In this section, I want to put on the table both a modest and an immodest amount of tinkering. The modest tinkering will narrow the criminal law’s reach, while expanding complicity and conspiracy beyond intentions. The immodest tinkering suggests that a wider reconceptualization of conspiracy and complicity is warranted. It will cast a wider net at the initial stage, but will not rely on further appendages. The upside is that it will capture those who deserved to be punished. The downsides are that it has the criminal law depart from ordinary language and it opens up more legal questions to

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39 I am putting to the side the slippage between the carrying and the discharging of the weapon. *Rosemond* was at most aiding the carrying and not the discharge. This nuance was also glossed over by the Court.
40 Gideon Yaffe also places more within intentional content then just what is motivationally significant. I address my concerns with Yaffe’s view elsewhere. See Ferzan; see also Hurd and Moore; Girgis; Sarch.
discretionary judgment calls by juries, something that at this political moment may not be attractive to reformers.

Let’s go big first. Ultimately, what we aim for is a criminal law that punishes only the deserving and only as much as they deserve. As we have seen, complicity and conspiracy present problems, both because it is difficult to ascertain the boundaries of intentions and because there are doctrinal appendages that allow for punishment at the lesser culpability of negligence.

But this does not mean that intention is the appropriate boundary for complicity and conspiracy. To be sure, our ordinary linguistic use of conspiracy and complicity may seemingly require intention. But the question for criminal law is not what “complicity really is” but what the criminal law should call a complicity. And if what the criminal law ought to capture departs too substantially from the best ordinary language or philosophical account of what complicity really is, well, then, let’s rename the crime.

Adding insult to injury, when we try to cabin these doctrines by our ordinary understandings of them, intention fails to do the work we think it does even for these concepts as we understand them. We use intention because we think it captures some important aspect of identifying with the wrong. But intentions don’t mark the boundaries we think they should, as they will include aspects of the action that are not motivationally significant. So, if we aren’t going to be hamstrung by our ordinary language, particularly because our ordinary language does not even track the scope of intentions, what should we do?

In what follows, I will focus on complicity for two reasons. First, functionally, we are thinking about when conspiracy makes co-conspirators each other’s accomplices. Second, as Heidi Hurd and Michael Moore have argued, the only way that co-conspirators should be on the hook for such offenses is when one has engaged in actions that count as being accomplices—that is engaging in actions that do or might increase the risk of harm. The idea that just by “agreeing” without more, one person could take on responsibility for another’s conduct is implausible when placed under scrutiny. I couldn’t write a contract that says that I am guilty of anything you are. Instead, it is that these agreements play a role in encouraging the other actor.

As Sandy Kadish observed years ago, and Larry Alexander and I, along with Heidi Hurd and Michael Moore have echoed, recklessness should be sufficient for complicity. If one engages in an action that increases the risk of another’s wrongdoing, that should be sufficient for criminal liability. And although I would punish this irrespective of whether the principal committed the offense, such defendants can surely be on the hook when the principal does commit the underlying crime. Think of it this way. The court in People v. Zielesch was right to think that you ought not to supply violent, temperamental meth addicts with a firearm. It was wrong to think that the conspiracy to commit murder was what did the justifying work. Instead, it is arguable that the defendant was reckless as to death at the time he made the choice to give him the weapon.

For as long as “make it all recklessness” has been on the table, it has faced a few obstacles. First, there is a long-standing resistance to the idea that one needs to worry about the wrongdoing of others. But the potential for a causally downstream culpable actor to do something wrongful should

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impact whether we are at liberty to engage in an action. Just as I must take into account other events in
the causal universe, so, too, I must take into account others’ actions. Second, there is the worry that
merchants need an exception, lest they be on the hook for every condom that assists suspected
prostitution, every champagne bottle that will be imbibed at a high school graduation party, and every
knife that will be used to kill someone. Finally, it is worth noting that even after suggesting that reckless
complicity was theoretically elegant and normatively attractive, Sandy Kadish did not recommend its
implementation for the American criminal justice system. If the rest of the criminal justice system were
functioning well, this sort of expansion would be appropriate. But it grants tremendous discretion at all
stages of decision making as the critical inquiry is whether the risk is “substantial” and “unjustifiable.”

So, we have two reasons to go big. First, intentions are not actually tracking what we think they
are. They are not narrow enough to only capture what is motivationally significant. And, this creates
instability, on display in a case such as Rosemond, in which Justice Kagan correctly intuits that the gun is
within the scope of the intention, but does not do so through a principled articulation of the intentional
object. Second, using intentions is not normatively attractive. Intentions are not narrow enough to only
capture what the defendant identifies with, and they are not broad enough to capture the full reach of
an actor’s culpable choice.

Yet, to engage in such broad rethinking would require reworking accomplice liability and
conspiracy from the ground up. And, it would require us to feel confident that we could adequately
carve out when we are and are not at liberty to ignore others’ potential wrongdoing and how this
analysis would apply to all of those who sell what they suspect could become the instrument of a crime.
We would then have to have confidence that such a standard with significant discretion could be
implemented in the far from ideal world that we have.

If we can’t go big, should we go home? Surely, we can make some modest changes that will
improve conspiracy and complicity, even if they do not fully remediate the problems. We currently have
an intention core and a negligence periphery. But we could reach the best of Pinkerton and the natural
and probable consequences doctrine by having a knowledge core, and we could eliminate the worst of it
by having a “culpability otherwise required” periphery.

Here is the first fix. Consider the Model Penal Code’s original proposed definition for complicity:

A person is an accomplice of another person in the commission of a crime if...acting with
knowledge that such other person was committing or had the purpose of committing the crime,
he knowingly, substantially facilitated its commission.

As the original Commentary observed, the “substantial facilitation” requirement should itself exempt
purveyors of common goods.43 However, even backing off the requirement of substantial facilitation
could yield:

A person is an accomplice of another person in the commission of a crime if...acting with
knowledge that such other person was committing or had the purpose of committing the crime,
he knowingly aided or encouraged its commission. This provision shall not apply to merchants
who are providing readily available lawful goods and services at market price, unless the
merchant intends the commission of the crime.

43 North Dakota makes this explicit. 12.1-06-02.
Now, Rosemond is on the hook if he knows there is a gun, and Franklin is on the hook if he knows the teller will be pushed. The last sentence is intended to create a merchant exception that does not exempt the merchant who sells the gun with the purpose of causing a death, but will exempt FedEx from being an accomplice to what it might otherwise know to be the illegal shipment of pharmaceuticals from Canada to the United States.

Having extended the law in this way, we can narrow the reach of the doctrinal appendages. Consider a suggestion from Andrew Ingram:\footnote{Andrew Ingram, Pinkerton Short-Circuits the Model Penal Code, 64 Vill. L. Rev. 71 (2019).}

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators in furtherance of the unlawful purpose, each of the other conspirators is guilty of the felony actually committed or a lesser included offense thereof, provided that the other conspirator acted with the kind of culpability that suffices to commit the felony or lesser included offense with which he or she is charged and the offense was a result of the carrying out of the conspiracy.

To modify this for both conspiracy and accomplice liability:

If, in the course of committing the target offense to which the accomplice or co-conspirator rendered aid or encouraged, the perpetrator commits another felony, the accomplice or conspirator is guilty of the felony actually committed or a lesser included offense thereof, provided that the accomplice or conspirator acted with the kind of culpability that suffices to commit the felony or lesser included offense with which he or she is charged and the offense was a result of the carrying out of the target offense.

One thread that remains loose is that conspiracy requires an intention to agree and an intention to commit the target offense. However, with complicity revised, there will be little need to contort the boundaries of conspiracy to attach liability to conspirators who may have encouraged, by their agreement, the commission of an offense beyond the one to which they agreed. Accordingly, this intention-laden crime can remain as drafted without undermining the reforms proposed herein.

Conclusion

Pinkerton and the natural and probable consequences doctrines both have the capacity to punish negligent actors as if they were premeditated ones. Because both complicity and conspiracy rely on intentions, and intentions are conceptually difficult and normatively over and under inclusive, we ought to reform our laws to capture those who are culpable, but only to punish them to the extent of their culpability. These proposed reforms, focusing on knowing aid or encouragement, and responsibility for secondary crimes at the defendant’s level of culpability, will result in a more just criminal law.