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ORIGINAL PAPER

Reckless Enabling

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Abstract
The 2016, the UK Supreme Court case of *Jogee* confirmed a long-standing convention in English law. In cases where D is assisting or encouraging P to commit an offence, D will only be liable as an accessory for that offence if she intentionally assists or encourages P and if she knows the essential features of the offence. In this paper, I discuss and develop some of the arguments from Sanford Kadish's 1996 article "Reckless Complicity." I argue that a special sub-category of complicity, namely 'enabling', can be done recklessly, and is sufficiently blameworthy to ground criminal liability.

Keywords Complicity · Recklessness · Intention · Enabling · *Jogee*

1 Introduction

In English law, for D to be complicit in P's offence, D must *intentionally* assist or encourage P while *knowing* the essential features of the offence P is planning or already carrying out. It is not enough that D is reckless in her assistance or encouragement, and/or that she merely suspects what P will do. In this paper, I explore and develop some of the issues raised by Sanford Kadish in his 1997 paper "Reckless Complicity". Building on his classic (1985) paper on complicity, Kadish's later piece in principle supports the idea of inculpating some reckless accessories, but ultimately rejects it because it would intrude too much on too many ordinary self-determined social interactions.[1] I take a narrower type of reckless complicity,

[1] Kadish was writing in the context of the Model Penal Code, which has a higher cognitive standard than mere knowledge of the essential features of P's offence. Section 2.06 (3) states: "A person is an accomplice of another person in the commission of an offense if (a) *with the purpose* of promoting or facilitating the commission of the offense, he […] (ii) aids or agrees or attempts to aid such other person in planning or committing it. […]" (my emphasis). For my purposes, I will be focusing on the lower English cognitive standard.

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namely *reckless enabling*, and argue that it can be a basis for liability. My argument is mainly theoretical, and I will not have enough room to apply the theory to practice.[2]

For simplicity, I will focus mainly on assistance, but I will come back to encouragement later. And, although I will focus on *reckless* enabling, I start with the concept of *intentional* enabling from Mellema (2016). For Mellema, a secondary party can assist by enabling or facilitating; the crucial distinction lies in D's control of the situation. 'Control' does not mean that D controls P's actions—P is and remains a free agent. *Control* in this context means that D's assistance is a necessary condition for P to carry out the specific offence—and D knows that it is. If D withdraws her assistance, then D can assume that P will probably not carry out the offence. P may of course go on to carry out *an* offence, without assistance, or with someone else's assistance, but that would be a different offence. In contrast, when D facilitates P's offence, she assists it without controlling it; D could withdraw her facilitation and P would probably carry on with the offence, perhaps with minor adjustments.

The boundary between intentional enabling and facilitating is bit vague, and I cannot do justice to Mellema's account here.[3] It will suffice to work with the clear example of enabling that Kadish (1997) himself provides,[4] and to argue that at least here the accessory should be liable. In this example, a reckless accessory assists a reckless principal (what Moriarty (2010) calls "compound recklessness"). Later I will consider cases of a principal acting intentionally. A father lends the family car keys to his 16-year-old (licensed) son, and asks him to drive to the petrol station to fill up the tank. The father knows the son to be impulsive and wild. As such, in lending him the keys, the father knowingly takes the risk that the son will go for a dangerous joyride, thereby threatening other road users and pedestrians. The father enables the son's reckless driving in a fundamental way: he can withhold the keys, but chooses to lend them. (The father is confident that the son is not going to steal the keys and drive off anyway.) If the son later kills a pedestrian, he will be straightforwardly liable for manslaughter, but under current UK law, the father will not be liable as an accessory to manslaughter.

Two caveats before we continue. First, I will not consider the provisions relating to inchoate complicity under the English Serious Crime Act (SCA) 2007, where D,

[2] The most wide-ranging theoretical and practical discussion of the different types of complicity is Lepora and Goodin (2013).

[3] Here is a borderline case: P is determined to commit a bank robbery, and asks to borrow D's gun. D knows that P will commit the robbery either with her (D's) real gun or with his own (P's) plastic replica gun. So, we could say (1) that if D lends P her gun, then she is merely facilitating a crime that is going to happen anyway. Alternatively, we could say (2) that D has control over whether P will commit an *armed robbery* or not; if D withholds her gun, then P will only commit an unarmed robbery, a different crime.

There is a good deal of metaphysical nuance in the notion of "would have done it anyway," which I cannot explore here. In his book-length treatment of this nuance, Kutz (2000) argued that a single bomber pilot did not make any real difference to the 1000-bomber raid on Dresden in February 1945, and therefore the pilot's complicity could not be based in a causal contribution but on his "participatory intention." Gardner (2007) argued explicitly against Kutz by saying that a causal contribution was necessary for complicity. See also Glover and Scott-Taggart (1975), who take a more explicitly consequentialist line.

[4] Kadish (1997, p. 380) takes this example from Williams (1990).

in order to be liable, must intentionally perform an act that is "capable" of assisting P in committing the offence, regardless of whether P actually goes on to commit it. It might be possible for the SCA to capture my notion of reckless enabling, but I will not explore that. Second, there is a question of whether my conception comes close to English 'joint enterprise' liability, either in its 'pre-*Chan*' or '*Chan*' versions. Although I will discuss the facts of the famous joint enterprise case of *Jogee*,[5] I will not discuss joint enterprise as such.

2 The English Law on Complicity

In this section, I will discuss the current state of English complicity law in more detail, and I will broadly follow the account of the sixth edition of the mainstream textbook *Simester and Sullivan's Criminal Law: Theory and Doctrine* (2016), hereafter called *Simester*. As *Simester* argues, there have actually been two strands of English complicity law across the last 50 years. The minor strand actually comes close to reckless complicity, and I will examine it below. The major strand is what I mentioned in the introduction: P wants to commit an offence, and D will be complicity if she intentionally assists him, while knowing the essential matters of P's planned crime. (The 'essential' includes above all any facts that would make P's plans criminal.) Once D is found liable, she is punished for P's offence as if she had been a joint principal (the principle of equivalent culpability).[6]

So, D's mental state comprises an 'intention element' and a 'knowledge element'. The main source of the knowledge element is *Johnson v Youden*, where the relevant sentence reads: "Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute the offence."[7] *Simester* glosses it as follows:

> [D] must accept, or assume, and have no substantial doubt that the relevant facts are true. There must be actual knowledge; it is not enough that [D] ought to have known the facts. Neither is it sufficient if [D] suspects that they may well be true, even if accompanied by a negligent or reckless failure to enquire into the facts (p. 235)

In terms of the intention element, D carries out actions that she reasonably believes could in fact assist P. Importantly, there is no requirement that D *desire* that P commit the offence; it is only the assistance that must be intended. In this way, D's (wider) motive might differ from her (narrower) intention, but it is her intention that counts. This point is spelled out in *Jogee*:

[5] *Jogee* [2016] UKSC 8. Because this judgement also provided a summary of the current state of complicity law, I will be citing it directly in the next section.

[6] Section 8 of the Accessories and Abettors Act 1861 reads: "Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence […] shall be liable to be tried, indicted, and punished as a principal offender."

[7] *Johnson v Youden* [1950] 1 KB 544, at [546].

> However, as a matter of law, it is enough that D2 intended to assist D1 to act with the requisite intent. That may well be the situation if the assistance or encouragement is rendered some time before the crime is committed and at a time when it is not clear what D1 may or may not decide to do. Another example might be where D2 supplies a weapon to D1, who has no lawful purpose in having it, intending to help D1 by giving him the means to commit a crime (or one of a range of crimes), but having no further interest in what he does, or indeed whether he uses it at all.[8]

Recall that one of my questions is whether the knowledge threshold could be lowered to a suspicion. In an earlier piece, Simester (2006, p. 581) defended the knowledge threshold for accessories by invoking the notion of control. Most of the criminal law imputed responsibility to single offenders on the basis of their control of their actions, with two exceptions: omissions and complicity. If P tells D about his burglary plans, and D intentionally lends him a crowbar to assist him, then as soon as P takes the crowbar, P controls D's culpability: if P abandons the plans, D will be innocent; if he goes ahead with them, he thereby *makes* D complicit (whether D likes it or not). This essential lack of control, argues Simester, means that we need more than just intentional assistance to inculpate D—namely, we need D's knowledge of P's plans. The knowledge "helps establish the morally wrongful character of D's behaviour" (ibid.). It means that D is pressing ahead with the assistance in sufficient knowledge of what she is assisting (even when the threshold for the principal offence might be recklessness). So Simester's defence of the status quo is one I shall have to address.

So much for the mens rea of assistance. The actus reus can be tricky, and is worth spelling out since it will be relevant to our conception of reckless enabling. D has decided to lend her crowbar to P for his burglary. Now consider two scenarios. (1) D is driving to P's place to give him the crowbar and her car breaks down. P cannot wait, and goes off to perform the burglary without D's crowbar, and D is innocent. (2) D lends P her crowbar, P takes it to the target house, but discovers an open window and so does not use the crowbar. Now, even though it turned out that the crowbar was not needed, it was *there*, ready to be used, just as D intended it to be; so this would be enough to inculpate D.

Kadish's example of the father and son might possibly be described as an *omission*: the father should have kept his car in safe hands, but failed.[9] Recall that omissions was Simester's other exception to the principle of punishing only those in control of their actions. When a negligent doctor fails to do what she should do, it may be a matter of luck whether the patient dies or not, but her culpability will depend on that luck. Normally, omissions are not culpable, but can become so when there

[8] *Jogee* at [90]. The same example was used by Devlin J in *National Coal Board v Gamble* [1959] 1 QB 11.

[9] In the original discussion of the father and son, Granville Williams believes the father should not be liable for reckless complicity with manslaughter, but could be liable for a 'failure to prevent' (1990, p. 12).

is an explicit duty of care, as with the doctor or a parent.[10] What about accessorial omissions? Again, if there is a specific duty of care, then an intentional omission can be liable, as when a security guard refrains from the locking a warehouse at night, knowing that her burglar colleague will take advantage. Without a duty of care, however, there is not normally any liability for intentional omissions that knowingly assist. In *Bland*, D was living with a drug dealer, knew all about his activities, but did nothing to prevent them or to inform the police—her conviction as an accomplice was quashed.[11] Given the above, it would seem that *reckless* assistance by omission, outside a duty of care, would not be culpable. And indeed it would be too onerous a restriction on ordinary activities.[12]

3 The Minor Strand of English Complicity Law

Simester's minor strand in English complicity law seems to allow lower thresholds than the knowledge criterion, and this might be a way in for any conception of reckless enabling. In the 1993 Consultation Paper on *Assisting and Encouraging Crime*,[13] the Law Commission drew attention to cases where a suspicion seemed to be sufficient for complicity. In *Carter v Richardson*,[14] D was a driving instructor supervising P, a learner driver. D knew that P had consumed alcohol, and suspected that P might be over the legal limit, but despite such suspicion allowed him to drive. Lord Widgery stated that D would be complicit if D "knew that [P] had been drinking to such an extent that it was probable that his blood alcohol content was over the limit."[15] As *Simester* points out (p. 236), the word *knowledge* is there, but it is knowledge of what is 'probable', and this suggests a mental state below the *knowledge* of what P *will* do or be, as required for *Youden*-style complicity.

Simester describes three other appellate judgements since the 1993 Law Commission Consultation Paper, and each seems to support a reduced cognitive threshold. *Rook*[16] concerned a contract killing. A man named Afsar hired Rook, P1, and P2 to kill V. Rook claimed that he was only going along with the agreement in order to get an advance payment and then to disappear. On the agreed day, Rook stayed away, believing that P1 and P2 would call the job off because of his absence; but they carried out the killing anyway. However, in the words of the court, when he absented himself on the fateful day, Rook had contemplated the "real and serious risk" of P1 and P2 committing the offence anyway, and yet he did not seek to prevent them,

[10] Husak (1980) discusses the relationship between omissions and causation.

[11] *Bland* [1987] 151 JP 857.

[12] This mirrors the law governing conspiracy. In *R v Saik* [2006] UKHL 18, D worked in a bureau de change in London, and suspected that the money he received was the proceeds of crime. He was convicted of conspiracy to launder money contrary to s. 93C (2) Criminal Justice Act 1988, but successfully appealed, arguing that he lacked the intention to conspire.

[13] Consultation Paper no. 131 (1993) para 2.58.

[14] *Carter v Richardson* [1974] RTR 314.

[15] *Ibid.*

[16] *Rook* [1993] 1 WLR 1005.

warn the victim, or inform the authorities. His complicity in murder was upheld. In *Bryce*[17] Bryce was driving P to V's caravan and leaving P there. V was not in the caravan at the time, but returned several hours later, whereupon P ambushed him and killed him. Bryce appealed his conviction as an accessory to murder, arguing that there was too big a time lag for him to 'know' exactly what P was going to do. His appeal was dismissed on the ground that it was sufficient that Bryce had foreseen the "real possibility" that P would commit the offence.[18]

Following these cases, in its 2007 Report, the Law Commission confirmed their support for the dominant *Youden* strand of complicity law,[19] and this was echoed in *Jogee* (Section [9]) in 2016, without any mention of *Rook* or *Bryce*. In the end, *Simester* endorses the *Jogee* conclusion (pp. 237–238), mainly on the grounds of over-criminalisation. This confirms an earlier article by Simester (2006), where he argues that, regardless of whether some reckless accessories may or may not be culpable to a degree that could interest the criminal law, an overall policy of evaluating and then punishing potential accessories would be too restrictive on too many ordinary activities.

Interestingly, *Simester* (i.e., the textbook authors) had been more positive about the minor strand in the fifth edition of the book (2013, p. 226), under the concept of "reckless belief". This concept differs from a mere suspicion because it contains a reasonability constraint. So, we say that a dangerous driver is taking an unreasonable risk of causing harm, whereas a surgeon is taking a reasonable risk when operating on a consenting patient. The fifth edition of *Simester* claims that this reasonability constraint would protect the shopkeeper from complicity, since she would be acting reasonably in selling a knife to a customer despite her suspicions of the customer's plans. The sixth edition of *Simester* (p. 268 fn. 174) rejects this compromise because the authors worry, once P has gone on to commit the offence with the knife bought from the shopkeeper, that a jury might *retrospectively* judge the shopkeeper's sale to have been unreasonable and therefore complicit. As will be seen, I am more optimistic about the fifth edition compromise than the sixth edition *Simester*, at least in cases such as Kadish's father lending the car keys to the impulsive son. The main reason for inculpating that father and not the shopkeeper is the father's degree of intimate character knowledge of the son.

4 The Father, the Son, and the Family Car

Now that we have the outlines of English complicity law in place, let us return to Kadish. Slightly confusingly, Kadish's overall project is to consider *three* separate sets of counter-arguments *against* allowing reckless complicity to suffice for liability. He rejects the first two sets, but agrees with the third set of arguments. Ultimately,

[17] *Bryce* [2004] EWCA Crim 1231, para. 71.

[18] To these two cases, *Simester* (2016, p. 237) also adds the case of *Reardon* [1999] Crim LR 392 (CA).

[19] Report no. 305: *Participating in Crime* (2007), s. 3.77 ff. and especially the recommendations at s. 3.91 and 3.95.

however, Kadish admits that his discussion is mainly theoretical, and he steps back from any concrete law-reform proposals; given the reality of American criminal law, policing, and prisons, he says, he is very reluctant to recommend any further widening of criminalisation (pp. 370). The gist of my own position is to agree with Kadish in rejecting the first two sets of counter-arguments, but unlike Kadish I would reject the third as well. As a result, I would be more inclined to allow the reckless accomplice to be liable—at least within the narrower construal of reckless enabling I am proposing.

The first argument runs as follows: reckless complicity is sufficiently like reckless principalship to be culpable in the same way. In response, the first set of counter-arguments Kadish considers insist on the difference.

Consider an ordinary single-person recklessness case. D drives well above the speed limit in an urban area in order to get to her destination quickly. In doing so, she consciously disregards the unreasonable risk to other road users and pedestrians. (She has no good reason to drive so quickly, nothing that the fifth edition *Simester* would allow, or that would ground a defence of necessity.) The risk of hitting a pedestrian has to do with the predictable behaviour of pedestrians in urban areas: whether or not they are jay walking, such pedestrians make reasonable assumptions about being able to see and avoid cars in time, and about being seen in time for drivers to swerve or brake. As a competent adult driver, she has full control of the vehicle: she could slow down or stop at any time, but chooses not to. This feature of control is the key to her responsibility, even if she does not intend to hit anyone.

Kadish's example of the father and son is essentially a variation of the unassisted reckless driver, but with an extra 'layer' of recklessness. As Gardner (2007, p. 132) puts it, "on any credible view [of responsibility] I need to give attention, in what I do, to what you will do in consequence." The father knows his son to be wild and impulsive, and therefore in lending the keys he consciously disregards an unreasonable risk that the son will go for a joyride after the petrol fill-up. Throughout, the father controls the son's driving (and its foreseeable consequences) in that withholding the keys would reliably prevent the son from getting in the car at all. Kadish asks: if the liability of the first, unassisted driver (the case of ordinary recklessness) relies on (1) her control of the vehicle, and (2) her disregard of the predictable behaviour and expectations of pedestrians, then why can the father not be liable when he controls his son's driving and disregards the son's predictable behaviour? Notice the importance of the father's *character knowledge* of his son. The father has witnessed his son's wildness, impulsiveness, and recklessness first hand, on several other occasions, and therefore reliably understands the risk of his son being so on this occasion too.[20]

[20] The father-son example is important too because of the antecedent family relationship making it more likely that the father not only knows his son's character well, but also *identifies* with him and his behaviour to a certain extent. Yaffe (2012, p. 437), in a response to Moore's (2009) major work on causality in the law, argues that "sometimes a person's responsibility for that to which he causally contributes depends on his recognition of an identity between himself and the protagonist of the event for which he is held responsible."

That is the first argument in favour of criminalising reckless enabling. Kadish considers a set of three possible counter-arguments in favour of the status quo. The first has to do with causal remoteness: the father's recklessness is too 'far' from the son's killing of the pedestrian, there are too many other contingencies that have to take place, and therefore it would be unfair to blame the father. This unfairness would be compounded by the principle of equivalent culpability. Perhaps it would be fair to hold the father complicit with the dangerous driving, but not with the manslaughter. However, as Kadish points out (1997, p. 380), it is not as if the two crimes have nothing to do with each other, and the father was well aware of the strong likelihood that the first would lead to the second. Indeed, in English law, the two offences are conceptually linked into a single offence of 'causing death by dangerous driving', under s. 1 of the Road Traffic Act 1988.

I would argue that it is entirely fair to hold the father liable as an accessory to manslaughter precisely because he enabled it. This is where Mellema's distinction between enabling and facilitating comes in. Simester (2006) would argue that it was unfair to inculpate the reckless father, because he lacks control *after* handing over the keys; but Mellema would say that the important moment in time is *before* handing over the keys, when the father had control over whether the son will drive at all.[21] So, *given* the father's loan of the keys on this occasion, the father is causally complicit with the direct, predictable consequences of the reckless driving, namely the death of the pedestrian—for the father enabled both the reckless driving and the manslaughter. This particular manslaughter would not have occurred but for the father's loan of the keys, and the significant risk of it occurring was entirely foreseeable to the father at the moment of lending the keys. This element of control justifies lowering the mens rea threshold to the same level as for the unassisted reckless driver, whereas the accomplice who merely *facilitated* the principal crime would still need to meet the existing knowledge threshold.[22]

That's the first of three counter-arguments (i.e., in a set) against the first argument for making reckless complicity liable on the grounds of culpability. Let me summarise the second and third counter-arguments (in this set) as follows:

> 2. What the (unassisted) reckless driver gets wrong is *not* her disregard for predictable pedestrians, but rather her overestimation of her own driving abilities. Under the spirit of the Delphic Oracle, she should "know herself" better, and the Oracle presupposes that 'herself' is directly accessible to her, if only she would look at her past behaviour in similar situations. When we hold her liable, we are blaming her for failing to learn from her past mistakes suffi-

[21] As stated earlier, I stipulated that the father could be confident that the son would not steal the keys if he withheld them. But one can imagine a *third* 'layer' of recklessness. Imagine the son has stolen the keys and gone for a joyride on several previous occasions, and so the father has taken to keeping the keys on his person at all times. Under such circumstances, the father might on one occasion be reckless about leaving the keys lying around, knowing that his son will be tempted both to steal the keys and to go for the joyride. This third layer would indeed be too causally remote to make the father complicit with any resulting manslaughter.

[22] It should be remembered that in non-murder offences there is room for discretionary sentencing, and so the father's remoteness to the offence could be reflected in a lesser sentence than that given to the son.

ciently to generate appropriate caution. In contrast, in the father-son example, the son's past behaviour is not *directly* knowable, but can only be discovered by observation. This additional distance reduces the duty on the father to be more cautious in lending the car keys.

3. The unassisted reckless driver can predict enough of the future, statistically generalisable behaviour of a *class* of people: urban pedestrians.[23] She does not know the identity of the pedestrian she is destined to hit, but she knows there is a risk of her hitting some member of this class, given their generally known predictable behaviour. In contrast, the father is weighing the risks of a particular person's future behaviour. However well I think I can predict a particular person's behaviour, that person retains the capacity to act *out of* character, to surprise me, perhaps in later explicable ways, perhaps not. The result is that I can be much more confident in my predictions about a class than about an individual.[24]

Along with Kadish, I would declare that individuals "aren't all *that* unpredictable" (p. 387); in particular, a teenage son who still lives with his father is not that unpredictable. We are not talking about predicting the son's future career path. We are talking about predicting the son's general dispositions, based on the father's experience with the son's past responses to temptation, all of which could be ascertainable by the prosecution. In fact, I would suggest that the father could know his son's dispositions more reliably than many reckless drivers could reliably know (1) their own driving skill and (2) the risks that they are taking in driving fast. This might seem counter-intuitive; but we must remember that one frequent component of recklessness is precisely a lack of self-knowledge at the moment of the reckless behaviour. For this reason, the father's detached knowledge, built up over many months and years, is probably more reliable.

Kadish was interested in *three* sets of counter-arguments against reckless complicity, and I have only considered the first. I am going to leave the other two sets for the section after the next one. Our discussion in this section, however, naturally leads in a fruitful direction beyond Kadish.

5 Reckless Complicity with an Intentional Offence

Kadish mainly limits his argument to reckless complicity with a principal's *reckless* offence, such as manslaughter. This allows the symmetry argument that if recklessness is enough for principal liability, then it should be enough for

[23] In the same spirit, the reckless agent can be reasonably expected to know enough about certain patterns of natural events. In the classic case of *R v Cunningham* [1957] 2 QB 396, D broke a domestic gas meter in order to steal the coins inside, and was reckless about whether the gas might escape and endanger his neighbours. This presupposes a level of general knowledge about pipes, about gas and its poisonousness, and about human vulnerabilities.

[24] Although we make character judgements of each other all the time ("my son is so impulsive"), we are also well aware of the limits of such judgements. And such limits are reflected in the criminal law's reluctance to allow character judgements to play too big a role in prosecution and defence strategies.

accessory liability. There is a further question of whether one can be recklessly complicit with another's *intentional* offence; and I think one can, at least in the case of enabling. (The enabling condition is still an important minimum engagement because of the secondary's control of whether the specific principal crime takes place.)

Recall the facts of *Bland*, discussed above. Bland knew all about his roommate P's (intentional) drug-dealing activities, but Bland was not liable as an accessory for any alleged failure to prevent P or to inform the authorities. Kadish offers the following similar example (p. 371), which has an important difference. D and P live together as roommates and friends. P is a career burglar, and D knows this (again, we are assuming that such knowledge is demonstrably reliable, given their intimacy over time.) One Sunday, D is at home, feeling sick. However, D has to prepare a report for her employer (V) by the next day. D gives her office key to P and asks P to get some paperwork from her (D's) desk at the office. While handing over the key, D is aware of the risk that P will use the occasion to (intentionally) steal something from the office, or indeed to make a secret copy of the key in order to return on a later occasion with intent to burgle. (D is confident that P would not be interested in burgling her office otherwise, since P has his eye on easier, more profitable targets.)

Unlike the joyriding son, the career burglar's possible acts will be intentions. It seems to me that the sick office worker should be just as liable (as a reckless enabler) as the joyriding son's father. Both cases hang on how well D knows P, and whether D is aware of the unreasonable risk that P will succumb to a temptation. Again, it's possible that the leopard will change its spots, that the career burglar will discover religion and become an honest locksmith; it's possible, but the point is that D does not know of any reason now that P would be ready to retire when he is skilled enough to profit well from it. So *even though* the roommate might not burgle again, and *even though* the teenage son might drive carefully, both the father and the office worker ought to conclude that the risk of an offence, and therefore of them being reckless enablers, is too great. Indeed, it could be argued that judgements about the burglar's character are much more reliable than judgements about the teenage son's character precisely because he is an adult with a settled 'profession'.

Consider another case of recklessly enabling an intentional offence, a hybrid of the father-son and of the roommate-burglar. A mother owns a licenced gun, which she normally keeps locked up. One morning, before she goes to work, she lends the gun to her teenage daughter, and asks her to watch the cabbages in the garden and to shoot any marauding rabbits. (I will assume that the daughter is licensed to use the gun, and so by itself the loan is not breaking the law.) At the same time, the mother knows of her daughter's involvement in an armed urban gang, and knows that there is a risk that the daughter will use the gun to intentionally wound a rival. The mother has sufficient control of the situation because she could have withheld the gun, and prevented that gun from being used for the

wounding, but the mother chose to take the risk. Again, I think the mother could be liable as an accessory to the resulting wounding; indeed, when it comes to sentencing, the mother might be even more complicit in her daughter's intentional grievous bodily harm than the father is in his son's reckless killing because of the higher essential dangerousness of a gun. In holding the mother liable, the criminal law would be sending an important message to all licenced gun owners to take even greater care not to let their weapons get into the hands of people likely to intentionally harm others.[25]

What about murder? This is interesting because the logic seems to pull in opposite directions. What if the daughter, in this last example, used the gun to murder the rival, and the mother was aware that this gang was regularly involved in murderous violence? One objection to the possibility of reckless complicity to murder might run as follows: since murder is the most serious of crimes, with the most serious of penal consequences, that would suggest that the cognitive threshold should be *as high* for the accessory as for the principal (i.e., at least foresight of a virtual certainty)—and indeed that is the current legal position.[26] However, following on from the previous paragraph, the very seriousness of murder also suggests the opposite, consequentialist logic: potential enablers must be forcefully deterred from reckless assistance by the prospect of being held legally complicit. When one in our midst is planning murder, all of us need to be more vigilant. The distinctive feature of murder under English criminal law is the mandatory life sentence, of course, and that means that anyone found complicit to murder would also have to receive the life sentence. Earlier, I suggested that the merely reckless accessory would be entitled to a more lenient sentence, and this would be impossible in a murder case—although such an accessory might be entitled to a lower *minimum* term.

Recall the 2016 case of *Jogee*, which involved a detailed summary of the dominant strand of complicity law. *Jogee* suggests one way that such a murder case could be re-interpreted to allow discretionary sentencing of the reckless accessory, and that would be by convicting the principal for murder and convicting the reckless accessory for manslaughter.

> 27. […] even where there was a joint intent to use weapons to overcome resistance or avoid arrest, the participants might not share an intent to cause death or really serious harm. If the principal had that intent and caused the death of another he would be guilty of murder. Another party who lacked that intent,

[25] Indeed, Kadish (1997, p. 388) floats the suggestion that reckless complicity would only be available in relation to felonies, the thought being that only a felony is serious enough to 'drag' the reckless secondary into the orbit of its culpability, whereas a mere misdemeanour would allow the reckless secondary to keep her 'distance'.

[26] One solution might have been to convict the mother of *inchoate* complicity under section 44 of the Serious Crime Act 2007. While the notion of inchoateness would suggest more discretionary sentencing, s. 58 (2) and (3) of the Act itself rules this out: "(2) If the anticipated or reference offence is murder, he is liable to imprisonment for life. (3) In any other case he is liable to any penalty for which he would be liable on conviction of the anticipated or reference offence."

> but who took part in an attack which resulted in an unlawful death, would be not guilty of murder but would be guilty of manslaughter.[27]

The problem is that the mother and the daughter cannot be described as sharing a 'joint intent' e.g., of attack on the future victim. The mother does not endorse either the daughter's vindictive plans or the daughter's general engagement in the urban gang. The mother's direct intention is no more than to assist the dispatch of some pesky rabbits, and the lending the gun would not itself be unlawful. However, if we again consider the particular seriousness of murder, and consider the particular carelessness of the mother (i.e., a specific kind of recklessness), then it might be possible to see the mother, precisely through her careless indifference, as *effectively* involved—whether she subjectively appreciates such involvement or not—in her daughter's dangerous plans. And that careless involvement would be enough to convict her of manslaughter on the basis of her enabling the daughter's murder of the rival.

So, I would claim, beyond Kadish's argument, that there can be enough blameworthiness in the reckless enabler of an intentional offence. For completeness, I should mention that Kadish offers (1997, p. 383) one brief example of reckless complicity with the intentional offence of murder, but it is a special situation. In the American case of *People v Stanciel*,[28] a mother leaves her infant child for a weekend with the child's violent alcoholic father, the same father who had already assaulted the child once before (an assault the mother knew about). While the child is in the father's care, the father beats her to death. The father is charged with murder, and the mother is charged as an accessory to murder. The situation is special for two reasons, however, and each might pull in different directions. First, the mother has a legal duty of care to the child, and so her reckless surrender of the child to a known abuser seems to reveal an essential indifference about the child's fate, which—if not intentional assistance of murder—seems to be much worse than the mental states I have been considering under ordinary recklessness. Second, as Kadish notes (1997, p. 384 fn. 37), the mother may be psychologically dependent on or terrified of the father, and therefore might have lacked the autonomy to act in the child's best interests, and this would prevent it being a true case of complicity.

6 Kadish's Other Two Arguments

Recall that Kadish was discussing *three* sets of mainstream counter-arguments against reckless complicity being sufficient for liability. In the section before last, I discussed the first set, which focused on culpability. According to the mainstream view, the reckless secondary is never sufficiently culpable for liability,

[27] *Jogee* at [27]. In support, the judgement cites *R v Smith (Wesley)* [1963] 1 WLR 1200. In this case, Smith and P were in a bar, and started smashing the place up. During the violence, the bartender tried to restrain P, and P stabbed him to death. Smith was convicted of manslaughter on the basis that he knew that P was carrying a knife, and was involved in an illegal common venture that resulted in a homicide, even if Smith did not intend to kill anyone.

[28] *People v. Stanciel*, 589 N.E.2d 557 (Ill. App. Ct. 1991).

and both Kadish and I have been arguing against this. Let me now say something about the other two sets of arguments: Kadish will reject the second, but will reluctantly accept the third. I want to half-reject the second and fully reject the third.

The second set of arguments concerns "ordinary business", which we have seen before. If we inculpate reckless complicity, this will be too much of a burden on crowbar sellers and lenders with suspicions. Kadish rejects this argument on the grounds of parity with our current inculpation of unassisted recklessness; we already burden reckless drivers with liability for unintended harmful consequences, and so the sellers of weapons and tools are no different. I have more sympathy for the sellers and the lenders, and I would distinguish them from the reckless drivers precisely on the basis of the control criterion. It is essential to the unassisted driver's recklessness that she controls the situation, whereas the lenders and the sellers do not normally provide a necessary condition for the crime taking place. In Mellema's terms, they do not enable, they merely facilitate.

The third set of counter-arguments concerns the "ethic of self-determinism", and Kadish accepts this as the most powerful.

> I suggest that the differences in our reactions when it is a volitional human action that intervenes is not the product of perceived differences of probabilities, but of a pervasive conviction, widely manifested in the law, that it simply matters whether the causal route goes through another person, because we perceive human actions as differing from all other natural events in the world. […] You may be as culpable as another for the harm the other causes if you exercise your will to participate in his action. Otherwise, what he causes is his doing, not yours (1997, p. 393)

Kadish's explanation is certainly plausible. What is interesting is the clash of two very powerful intuitions here: the paternalistic intuition and the liberal intuition. The paternalistic intuition is obvious, for example, to parents, when they quickly learn to be careful in what they leave lying around for their curious progeny to discover and experiment with. The liberal intuition is obvious, for example, to any person who watches helplessly as a close friend goes off to do something foolish, while realising that the friend simply has her own life to lead and must bear the consequences of her foolishness.

Kadish sees the liberal intuition as more powerful than the paternalistic intuition, whereas I am more persuaded by the paternalistic, at least in the context of reckless enablers. Perhaps this also reflects deeper priorities in our respective conceptions of political philosophy, where Kadish sees the individual as the fundamental ontological unit, while I would see both individuals *and* relationships as the equally fundamental units. Kadish will warn of the risk of abuse of reckless complicity by a government desperate to fight crime by casting the net of culpability as wide as possible. I will warn of the culture of individualism encouraging offenders to rely on the reckless indifference of others in carrying out their harmful purposes. This is clearly a much broader debate, which I cannot address here, having to do with the purpose of the criminal law, as well as the expressive and educational functions of it.

7 Reckless Encouragement

In this final section, I tentatively consider an even broader form of reckless enabling. The mainstream 'self-determinist' will bristle against it even more, and I concede that it would have to be very precisely defined and qualified in order to remain fair, but I think there is something to it. Traditionally, complicity—and the narrower concept of enabling—can take the form of assistance or encouragement. I have been talking entirely about assistance in the form of providing or withholding a weapon, a tool, or information. This has the advantage that it is relatively easy to *trace* the weapon from the principal back to the accessory, and to establish relatively clearly the (potential or actual) causal contribution of the assistance, together with the counter-factual alternatives, in order to meet the enabling condition that I consider crucial.

In contrast, encouragement is striking in that it defies easy determination of causal contribution, of counter-factual comparisons, and of control. There will be some paradigm examples, as in the incitement to racial hatred, and these have been separately criminalised, for example, by the Public Order Act 1986. This offence has a high mens rea threshold, however. Section 18 states[29]:

> 1. A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if –
>
> (a) he intends thereby to stir up racial hatred, or
> (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.
>
> […]
>
> 5. A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

In contrast, our question is whether *reckless* incitement ought to be criminalised. Since any attempt to criminalise reckless incitement will run afoul of the "ordinary business" argument (and indeed freedom of speech arguments) even more than reckless assistance, then we must be even more careful about restricting our discussion to reckless enabling by incitement. In addition, it is not enough to use the *inchoate* incitement of the Public Order Act 1986 as a model, since enabling requires the demonstration of a strong causal link to the principal offence.[30] Before all that, we

[29] Sections 19–22 have similar provisions in different contexts.

[30] For a wide-ranging empirical discussion, see Schroth (1999).

must also recognise that incitement can take many forms, and this will hugely complicate any theoretical discussion. The South African case of *S v Mkosiyana*[31] spells out the many relevant verbs:

> An inciter […] is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take many forms, such as a suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity.

So, when trying to determine whether certain kinds of reckless enabling by encouragement should be criminalised, we must accept a high evidential threshold for the prosecution. Was the reckless secondary's encouragement really a necessary condition for the principal to commit the offence (recklessly or intentionally) that he did? In other words, did D have sufficient control over the situation that without such encouragement P would plausibly not have gone on to commit that offence (at least, not at that time, or not in that manner)? And did D reliably know that she had such control over the situation? Perhaps the evidential burden will be too high for more than a few cases. One borderline situation described by Gardner (2007, p. 137) is when D provides encouragement that either (1) may turn out to be redundant since P was set on committing the offence regardless, or (2) may act as the 'tipping point' to entice P to commit an offence that he would not otherwise have committed. At the moment of providing the encouragement, D might not have known what sort of causal contribution she was making; indeed, even after the crime was committed, she might never know. In such cases of uncertainty, it would certainly be unfair to penalise the reckless encourager.

One important source of evidence of control, I suggest, would lie in the antecedent relationship between D and P. Some relationships would offer relatively straightforward evidence, as when the secondary uses her authority or power recklessly to incite a subordinate principal, e.g., as a parent, employer, or mob leader.[32] Consider the famous historical example of the English King Henry II, who in 1170 declared to his court: "will no one rid me of this turbulent priest?" Four of his knights interpreted his words as a *command* to kill the Archbishop of Canterbury Thomas Becket, which they duly did. Although clever politicians will always be careful to preserve 'plausible deniability' in their indirect suggestions, I think it is possible that Henry was genuinely reckless rather than calculating on this occasion, but that such recklessness would be enough to charge him as an accessory to Becket's murder. Although there was of course no court willing to charge Henry, Henry agreed to an act of penance 4 years later, allowing himself to be publicly beaten by the Canterbury Cathedral monks.

[31] *S v Mkosiyana* [1966] 4 SA 655, 658.

[32] There are nuances here that I do not have the space to explore: authority is a moral-legal normative notion, and therefore technically a person with authority is not 'encouraging' a subordinate. Power refers to the ability of one person to make another, acting out of self-interest, do something that he would not normally do. Again, this is not really 'encouraging'. (Remember that the notion of 'control' that I described as essential to enabling is something very different from the notion of controlling a subordinate or minion.).

Hierarchical relationships are easier to appreciate as sources of evidence of reckless enabling. More difficult are cases of equal friendship. I want to look at friendships infused with 'toxic masculinity', that is, fuelled by anger, powerlessness, poverty, and boredom, as well as drugs and alcohol, into actions of casual violence that all too easily escalate. I have mentioned the *Jogee* judgement on several occasions, but here we could look at the facts of the case. Hirsi and Jogee are young men, bored, as they are on so many evenings in their bleak Leicester council estate. They consume alcohol and cocaine, and work themselves into a condition of heightened resentment and aggression. At one point, they decide to visit an acquaintance named Fyfe to settle a disagreement with him. The confrontation ends with Hirsi stabbing Fyfe to death. Hirsi is apprehended and convicted of murder; that much is uncontroversial. The main question for the original trial jury, and then for the Court of Appeal and for the Supreme Court, was Jogee's liability as a secondary party.

The Supreme Court famously used the *Jogee* case to abolish the controversial doctrine of joint enterprise, but this is not my present concern. What is important is that, in the original 2013 trial, as well as in the September 2016 re-trial (6 months after the February 2016 Supreme Court verdict), Jogee was found to be an *intentional* accessory. In the 2013 trial, he was found to have intentionally encouraged Hirsi despite foreseeing the possibility that Hirsi might commit the collateral offence of murder (that's the joint enterprise bit). In the 2013 re-trial, Jogee intentionally encouraged Hirsi in a common venture that resulted in a homicide, and he was therefore was found guilty of manslaughter, in line with *R v Smith*.[33] I suggest that both interpretations read into Jogee's mind too much intention. Instead, Jogee could have plausibly been found liable for *recklessly* encouraging Hirsi, to the point of possibly enabling the murder of Fyfe.

One reason that it was controversial to describe Jogee as engaged in a joint enterprise with Hirsi is that the two men did not have enough that would amount to a *plan*. They were merely passing the time, with one thing leading to another. Similarly, it was controversial to describe Jogee as contemplating what Hirsi would or would not do—it is more plausible to say that he was not contemplating anything. Finally, it is implausible to describe Jogee as intentionally encouraging anything *focused*; instead, both of them are egging each other on in vaguely aggressive directions over the course of a long evening. At one point, with Hirsi inside confronting Fyfe, Jogee is outside, smashing things against Fyfe's car, yelling at Hirsi to "do something" to Fyfe. This is hardly specific enough to constitute intentional encouragement of a killing—it is the vague exhortation of random violence. But, it is reckless: Jogee should have known that there was a risk of the violence escalating in unpredictable directions, with harmful consequences. In addition, I suggest it was enabling. Or, rather, perhaps it was not enabling in the moments just before the killing, when Hirsi was angry and drunk enough to act on his own, beyond Jogee's control, but I think it was enabling across the longer timespan of the evening. If Jogee had properly realised the dangerous mood growing in Hirsi's behaviour, he could have left the scene, and I think Hirsi's malevolence would have significantly evaporated, to the point of him skulking off home to sleep it off, the

[33] See fn. 27.

fatal outcome averted. So much of drunken male aggression thrives on performance in front of one's peers, after all.

The worry, of course, is that my proposal to criminalise reckless enabling by encouragement will lead to the same controversies that made joint enterprise so controversial and that led eventually to its rejection in the *Jogee* Supreme Court judgement—especially that reckless enabling would come too close to guilt by association. This is a valid concern, which could only be met with a high evidentiary threshold about the antecedent relationship, the causal influence, and the control. But my whole discussion of reckless enabling by encouragement in this last section has been tentative, and would require further work.

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