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Upfront Complicity

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ABSTRACT

In most American jurisdictions, accomplice liability requires a mens rea of intention with respect to the conduct that constitutes the principal's commission of the crime. Scholars have criticized the intention requirement on the ground that some accomplices, such as those who were paid upfront for their assistance, do not care whether the principal's criminal conduct occurs and therefore do not intend to bring it about that the principal's criminal conduct occurs. This Article defends the intention requirement against this criticism. Drawing on insights from the philosophy of action, it argues that all who are genuinely complicit in a crime, including those who were paid upfront for their assistance, do intend to bring it about that the principal's criminal conduct occurs. The Article then critiques the alternative mens rea standards that scholars have proposed as replacements for the intention requirement. Finally, the Article explains why its argument supports the use of intention requirements in torts and areas of criminal law other than accomplice liability. It concludes that the law should resist calls to jettison intention as a condition for criminal and civil liability.

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* Deputy Soliciter General, State of Missouri. All views expressed herein are solely my own. I am grateful to Jennifer Barrow, Erin Blondel, Sam Bray, Kevin Douglas, Chad Flanders, Anton Ford, Sherif Girgis, Genevieve Lakier, Lee Otis, Anselm Müller, Candace Vogler, and Lael Weinberger for the feedback on drafts of this Article.

I. INTRODUCTION

The elements of accomplice liability are notoriously controversial.[1] Especially "burning" is the question of what *mens rea* to require with respect to the conduct that constitutes the principal's commission of the crime.[2] The answer in most American jurisdictions as well as the Model Penal Code is *intention*: the accomplice must "have the conscious objective of bringing about" the principal's criminal conduct.[3] This Article calls this rule the "intention requirement."

1. *See, e.g.*, Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. UNIV. CHI. L. REV. 131, 133 (2015) (describing satisfactory *mens rea* requirements for accomplice liability as "elusive"); Gideon Yaffe, *Intending to Aid*, 33 L. & PHIL. 1, 1 (2014) ("Courts and commentators are notoriously puzzled about the mens rea standards for complicity."); Christopher Kutz, *The Philosophical Foundations of Complicity Law*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 147, 149 (John Deigh & David Dolinko eds., 2011) (enumerating "a number of extraordinarily difficult questions" about accomplice liability); Joshua Dressler, *Reforming Complicity Law*, 5 OHIO ST. J. CRIM. L. 427, 428, 447 (2008) (describing "American complicity law" as "a disgrace" and characterizing its minimal *actus reus* requirements as leading to "jaw-dropping" results).

2. Sherif Girgis, Note, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 467 (2013). This Article does not address what *mens rea* accomplice liability should require with respect to the circumstance and result elements of the principal's crime. *See id.* at 466–67 (distinguishing these questions and focusing on accomplice liability's *mens rea* requirement with respect to the conduct element of the principal's crime); Commonwealth v. Roebuck, 32 A.3d 613, 619 (Pa. 2011) (noting that when the Model Penal Code and Pennsylvania law require intention with respect to "the commission of the offense," they mean intention with respect to the principal's conduct, not necessarily its results).

3. State v. Basham, 319 P.3d 1105, 1117 (Haw. 2014) (emphasis omitted) (stating the rule in Hawaii and the Model Penal Code); *see also* Wilson-Bey v. United States, 903 A.2d 818, 831–32 (D.C. 2006) ("Every United States Circuit Court of

The intention requirement has drawn heavy fire from scholars.[4] Some advocate replacing it with a requirement of knowledge or even recklessness.[5] Others propose *sui generis mens rea* requirements outside the familiar framework of intention, knowledge, recklessness, and negligence.[6] But although critics of the intention requirement disagree about which requirement is right, they generally agree on why the intention requirement is wrong. The common refrain is that the intention requirement is underinclusive insofar as it fails to hold liable accomplices who, though genuinely complicit, do not care whether the principal's criminal conduct occurs.[7]

The most obvious examples of such accomplices are those who are paid upfront. For instance, suppose that Alice is the night guard at the bank. Peter offers to pay her to let him in through the back door so that he can take the money in the vault. Alice agrees on the condition that Peter must pay her when she lets him through the door. Peter agrees, Alice opens the door, Peter pays her, and Peter takes the money in the vault. Because she is paid upfront,[8] Alice does not care whether Peter succeeds in taking the money. Therefore, critics of the intention requirement argue, Alice does not intend to bring about the conduct that constitutes Peter's theft, namely, Peter taking the money in the vault. If that is correct, then the intention requirement excludes Alice from liability as Peter's accomplice. But Alice is clearly complicit in Peter's theft. And although the law has good reason to exempt from liability certain special classes of guilty defendants, such as those who

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Appeals has adopted [the] requirement that the accomplice be shown to have intended that the principal succeed in committing the charged offense . . . . The majority of state courts have also adopted a purpose-based standard.").

4. *See, e.g.*, Kimberly Kessler Ferzan, *Conspiracy, Complicity, and the Scope of Contemplated Crimes*, 53 ARIZ. ST. L.J. 453, 471–75 (2021); Sarch, *supra* note 1, at 140–41; Yaffe, *supra* note 1, at 10; Girgis, *supra* note 2, at 469–70; Kenneth W. Simons, *Does Punishment for Culpable Indifference Simply Punish for Bad Character: Examining the Requisite Connection Between* Mens Rea *and* Actus Reus, 6 BUFF. CRIM. L. REV. 219, 241 n.48 (2002); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Liability*, 88 CALIF. L. REV. 931, 944–47 (2000); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1997); R.A. Duff, *"Can I Help You?" Accessorial Liability and the Intention to Assist*, 10 LEGAL STUD. 165, 169–71 (1990).

5. *E.g.*, Ferzan, *supra* note 4, at 471–75; Alexander, *supra* note 4, at 944–47; Kadish, *supra* note 4.

6. Sarch, *supra* note 1, at 162–78; Girgis, *supra* note 2, at 473–83; Yaffe, *supra* note 1, at 13–25; Simons, *supra* note 4, at 241 n.48.

7. *See infra* Part II.

8. This Article uses the term "paid upfront" in a broad sense in which any accomplice paid before the principal commits the crime is paid upfront. Of course, there is also a narrow sense in which only the accomplice paid before doing their part is paid upfront. Section IV.C discusses cases where the accomplice is paid upfront in this narrow sense.

were entrapped,[9] it is extremely difficult to see why accomplices such as Alice should fall into one of these special classes. Therefore, the critics conclude, the intention requirement is underinclusive: it excludes from liability some who should be liable.

This Article defends the intention requirement against the criticism that it is underinclusive. It concedes that defendants such as Alice should be liable as accomplices. But it denies that the intention requirement excludes them from liability. True, there is a sense in which accomplices such as Alice do not "care" whether the principal's criminal conduct occurs. But someone who does not "care" whether conduct occurs can nonetheless intend to bring about the conduct. And that is exactly what accomplices such as Alice do—they intend to bring about the principal's criminal conduct even though in a certain sense they may not "care" whether this conduct occurs.

Making good on these claims will require analyzing the structure of cooperative activity at a level of abstraction and precision that is characteristic of philosophy. To the extent that this Article dips into the philosophy of action, however, it does so in service of a normative legal project, namely, ascertaining what the elements of accomplice liability should be.

This Article proceeds as follows. Part II reviews the history of the debate about the intention requirement and explains in more detail the main objection to it. Part III argues that even those accomplices who do not care whether the principal's criminal conduct occurs do, assuming they are genuinely complicit, intend to bring it about that the principal's criminal conduct occurs. Part IV presents and responds to four objections to the argument in Part III. In Part V, the Article shifts from defense to offense, reviewing and criticizing three recently proposed alternatives to the intention requirement. Finally, Part VI explains how the arguments of the previous Parts can be deployed outside the context of accomplice liability to defend intention as a condition for criminal liability as a principal as well as intention as a condition for civil liability in tort.

II. CRITICS NEW AND OLD OF THE INTENTION REQUIREMENT

For much of the twentieth century, lawmakers and scholars hotly debated whether accomplice liability should require a *mens rea* of knowledge or intention with respect to the principal's criminal conduct.[10] The two leading cases among federal courts were *United States*

9. *See generally* United States v. Mayfield, 771 F.3d 417 (7th Cir. 2014) (en banc) (discussing the affirmative defense of entrapment).

10. *See* Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 236–61 (2000) (summarizing the debate).

v. Backun, which required only knowledge,[11] and *United States v. Peoni*, which required intention.[12] Among the states, some legislatures codified a requirement of knowledge and others a requirement of intention.[13] The drafters of the Model Penal Code struggled to reach a consensus on the question.[14] So did scholars,[15] leading to a "long, ongoing debate" about whether knowledge or intention is "the proper standard."[16]

Over time, however, the view that knowledge should be sufficient for accomplice liability fell out of favor, at least in the law. After the Supreme Court quoted *Peoni* with approval,[17] "it came to be generally accepted [among federal courts] that the aider and abettor must share the principal's purpose."[18] The drafters of the Model Penal Code ultimately adopted the intention requirement,[19] and several states amended their complicity statutes accordingly.[20] Although a few states continue to require only knowledge,[21] most have adopted the intention requirement.[22] In 2006, the District of Columbia Court of

11. United States v. Backun, 112 F.2d 635, 637 (4th Cir. 1940) (holding that one who "knowingly aids and assists in the perpetration of [a] felony" is liable as an accomplice regardless of whether they had "a stake in the outcome" (internal quotation marks omitted)).
12. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (holding that accomplice liability requires that the defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed").
13. *E.g.*, *compare* WASH. REV. CODE § 9A.08.020(2)–(3)(a) (2016) (knowledge), *with* MO. REV. STAT. § 562.041(1)(2) (2017) (intention).
14. *Compare* MODEL PENAL CODE § 2.06(3) (AM. L. INST., Official Draft 1962) (adopting the intention requirement), *with* MODEL PENAL CODE § 2.04(3)(b) (AM. L. INST., Tent. Draft 1, 1953) (proposing the knowledge requirement).
15. *E.g.*, *compare* Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2190 (1988) (defending the intention requirement), *and* Louis Westerfield, *The* Mens Rea *Requirement of Accomplice Liability in American Criminal Law—Knowledge or Intent*, 51 MISS. L.J. 155 (1980) (same), *with* Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 COLO. L. REV. 167, 191 (1981) (endorsing "the possibility of accomplice liability for a knowing aider," at least in some cases), Richard Buxton, *Complicity and the Criminal Code*, 85 L.Q.R. 252 (1969) (defending the knowledge requirement), *and* Kadish, *supra* note 4 (proposing to lower the bar to recklessness, at least for some crimes).
16. Candace Courteau, Note, *The Mental Element Required for Accomplice Liability*, 59 LA. L. REV. 325, 328 (1998).
17. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).
18. United States v. Fountain, 768 F.2d 790, 797–98 (7th Cir. 1985).
19. MODEL PENAL CODE § 2.06(3) (1962).
20. *See, e.g.*, HAW. REV. STAT. §§ 702-222, 702-223 (1993); 18 PA. CONS. STAT. § 3.06 (1972).
21. IND. CODE § 35-41-2-4 (2017); WASH. REV. CODE § 9A.08.020(2)–(3)(a) (2011); W. VA. CODE § 61-2-14e (1984); WYO. STAT. § 6-1-201(a) (2014).
22. Corteau, *supra* note 16, at 333 ("A majority of states, in line with the Model Penal Code, require that the accomplice have the intent to promote or facilitate the offense." (internal quotation marks omitted)); *see, e.g.*, Jones v. State, 199 A.3d 717, 724–25 (Md. Ct. Spec. App. 2019) (explaining that a jury instruction that

Appeals observed that "[e]very United States Circuit Court of Appeals has adopted *Peoni*'s requirement that the accomplice be shown to have intended that the principal succeed in committing the charged offense" and "[t]he majority of state courts have also adopted a purpose-based standard."[23]

Nevertheless, the debate between the intention and knowledge requirements remains very much alive among scholars.[24] And it has

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accomplice liability requires "the intent to make the crime happen" was "an accurate statement of the law"); Walraven v. Premo, 372 P.3d 1, 4 (Or. Ct. App. 2016) ("Under Oregon law, for a person to be criminally liable as an accomplice, the person must be found to have *intended* that the crime of which he or she is accused to have occurred."); Dixon v. Commonwealth, 263 S.W.3d 583, 586 (Ky. 2008) (explaining that, to be liable as an accomplice, "the defendant must intend that the crime be committed"); State v. Duran, 960 A.2d 697, 701 (N.H. 2008) (holding that "to prove accomplice liability, the State must prove that . . . the accomplice had the purpose to make the crime succeed"); State v. Pheng, 791 A.2d 925, 927–28 (Me. 2002) ("Accomplice liability may attach if a person, intending that a crime be committed, aids by actively furnishing advice and encouragement."). Like the Model Penal Code, many states' complicity statutes refer to an intention to "promote," "assist," or "facilitate" the commission of the offense. *Compare* MODEL PENAL CODE § 2.06 (1962), *with, e.g.*, ALA. CODE § 13A-2-23 (2018), DEL. CODE tit. 11, § 271(2) (1953), MONT. CODE § 45-2-302(3) (2009), OR. REV. STAT. 161.155(2) (1971), TENN. CODE § 39-11-402(2) (2019), *and* TEX. PENAL CODE § 7.02(2) (2021). R.A. Duff argues that there is a difference between such an intention and an intention that the offense be committed. Duff, *supra* note 4, at 169–70. The analysis in Part III suggests that Duff is mistaken. "An intention that *p*" is shorthand for "an intention to bring it about that *p*," *see* Charles F. Capps, *Intention in Action*, *in* THE OXFORD HANDBOOK OF ELIZABETH ANSCOMBE 33, 43–44 (Roger Teichmann ed., forthcoming 2022), and an intention to promote, assist, or facilitate the commission of an offense is an intention to bring it about that the offense is committed, *see infra* Part III; *accord* MODEL PENAL CODE § 2.06, cmt. 6(b) (1962) (equating having "the purpose of promoting or facilitating the offense" with "having as [one's] conscious objective the bringing about of conduct that the Code has declared to be criminal"); State v. Basham, 319 P.3d 1105, 1117 (Haw. 2014) (same).

23. Wilson-Bey v. United States, 903 A.2d 818, 831–32 (D.C. 2006); *see also* Kit Kinports, Rosemond*, Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 137 (2015) ("[T]he *Peoni* standard . . . has been adopted in a majority of jurisdictions."); Alexander, *supra* note 4, at 944 (explaining that "most criminal codes require that one have aided, attempted to aid, or encouraged the crime with the purpose that the crime be committed" in order to be "deemed complicit in a crime").

24. *E.g.*, *compare* Kinports, *supra* note 23, at 137 (explaining that the intention requirement makes sense because it "compensates for complicity's minimal actus reus requirement and ensures that those who may have committed minor or equivocal acts of assistance are not held responsible for crimes they did not intend to facilitate"), Kutz, *supra* note 1, at 150, 161–64 (arguing that "participatory intent," that is, "an intent to further the commission of the crime by the principal," is characteristic of genuine complicity), CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 66–112 (2001) (same), *and* Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1357–63 (1998) (concluding that responsibility for another's crime as an accomplice requires "intending to promote

been complicated in the last decade by a series of articles in which scholars have rejected both requirements.[25] These scholars agree with the defenders of the intention requirement that the knowledge requirement casts the net of liability too widely.[26] But they also agree with the defenders of the knowledge requirement that the intention requirement casts the net of liability too narrowly.[27] The solution, they argue, is to reject the intention–knowledge dichotomy and adopt a "middle way."[28]

Although the "middle way[s]"[29] proposed by these scholars may be new, their strategy for showing that the intention requirement casts the net of liability too narrowly is not. Critics of the intention requirement have long argued that the intention requirement is underinclusive because it excludes from liability accomplices who do not care whether the principal's criminal conduct occurs. For example, Larry Alexander imagines a case where a low-ranking mafia official supplies the mafia boss with a murder weapon solely out of loyalty, without caring whether the mafia boss actually commits the murder.[30] According to Alexander, because the low-ranking official "d[oes] not care" whether the boss kills the target, the low-ranking official does not satisfy the intention requirement.[31] Yet it seems that the low-ranking official is guilty as the boss's accomplice.[32] Similarly, R.A. Duff considers someone who designs "specially adapted equipment" for criminals

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[the crime's] commission"), *with* Ferzan, *supra* note 4, at 471–75 (arguing that "we should abandon intention" and instead "focus[ ] on knowing aid or encouragement"), CHIARA LEPORA & ROBERT E. GOODIN, ON COMPLICITY AND COMPROMISE 140 (2014) (asserting that, "in order to qualify as complicit simpliciter, all that is necessary is that the complicit agent knows, or should have known, that by [his or her action] he or she will advance whatever intentions the principal has"), A.P. Simester, *The Mental Element in Complicity*, 122 L.Q.R. 578, 588–92 (2006) (arguing that knowledge should be sufficient for liability), *and* Alexander, *supra* note 4, at 944–47 (proposing to lower the bar to recklessness).

25. Sarch, *supra* note 1, at 140–42; Yaffe, *supra* note 1, at 10–11; Girgis, *supra* note 2, at 468–70; *see also* Simons, *supra* note 4, at 241 n.48 (arguing that the "criterion of purpose or intention has notorious difficulties" but that the alternative of knowledge "is itself extremely problematic" and proposing a middle-ground solution).
26. Sarch, *supra* note 1, at 141–42; Yaffe, *supra* note 1, at 10–11; Girgis, *supra* note 2, at 468–69.
27. Sarch, *supra* note 1, at 140–41; Yaffe, *supra* note 1, at 10–11; Girgis, *supra* note 2, at 469–70.
28. Yaffe, *supra* note 1, at 13; *see also* Sarch, *supra* note 1, at 162–72 (arguing that the mental state of "condoning the crime should be regarded as the *mens rea* for complicity"); Girgis, *supra* note 2, at 473–83 (arguing that investment in the principal's criminal intention and not expecting or intending the principal to fail should be the required *mens rea*).
29. Yaffe, *supra* note 1, at 13.
30. Alexander, *supra* note 4, at 945.
31. *Id.*
32. *See id.*

"but who has no stake in the actual success of their crimes (neither [their] payment nor [their] future business depend on their success)."[33] According to Duff, because the supplier "has no stake in the actual success of [the] crimes," the supplier "does not act with the intention that they should be committed."[34] Again, however, it seems that the supplier is guilty as an accomplice.[35]

The new critics who propose a "middle way"[36] between intention and knowledge employ the same strategy for attacking the intention requirement. According to Sherif Girgis:

> It should not be necessary for complicity that one intend the aided crime's commission. By this rule, some whom we should count as accomplices would go free. The driver of a getaway car . . . is one example. Even if the driver for someone else's burglary is paid up-front, and is therefore indifferent to whether the burglary occurs, we should count him an accomplice. If the knowledge standard is too harsh, purpose is too lenient.[37]

Likewise, Gideon Yaffe writes: "The getaway car driver who is being paid separately from the proceeds of the robbery is surely an accomplice to the robbery, even though he does not seek the occurrence of the crime . . . ; this is a problem for the intent position."[38]

As far as the author of this Article is aware, no one has claimed that any court applying the intention requirement has actually held, or even suggested, that defendants in cases like the ones discussed above are not liable as accomplices.[39] Consequently, one might dismiss the criticism of the intention requirement as purely academic. As long as courts are convicting the "right" defendants, does it matter whether the doctrinal basis for liability is imprecise?

The problem is that, if the critics of the intention requirement are right, then the intention requirement *has* misled courts in other cases where it was not so obvious that the defendant was complicit. Take *Peoni*, for example: Peoni sold counterfeit bills to Regno, who sold them to Dorsey, and Dorsey's possession of the counterfeit bills was a crime.[40] Applying the intention requirement, Judge Learned Hand concluded that Peoni was not liable as an accomplice for Dorsey's possession of the counterfeit bills.[41]

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33. Duff, *supra* note 4, at 170.
34. *Id.*
35. *See id.* at 169–70.
36. Yaffe, *supra* note 1, at 13.
37. Girgis, *supra* note 2, at 469–70 (emphasis omitted).
38. Yaffe, *supra* note 1, at 10; *see also* Sarch, *supra* note 1, at 140–41 (agreeing with Yaffe).
39. *Cf.* Alexander, *supra* note 4, at 945 (opining that "regardless of the law's formal requirement of purpose, I suspect that most juries and even judges would deem" the low-ranking mafia official in the case that he imagines "to be an accomplice").
40. United States v. Peoni, 100 F.2d 401, 401 (2d Cir. 1938).
41. *Id.* at 402; *cf. infra* section V.B (discussing Girgis's theory in more detail).

As Girgis explains, it is not so clear that his proposed alternative *mens rea* requirement would dictate the same outcome.[42] For Girgis, complicity requires only that the accomplice: (1) intend that the principal intend to commit the crime and (2) not intend or expect that the principal will fail.[43] Presumably, Peoni intended that Regno intend to possess the bills; otherwise, Peoni could not have made the sale.[44] "But could Peoni expect Regno himself to seek to possess the bills without also seeking to pass them on?"[45] "And if not," Girgis continues, "didn't Peoni have to intend that Regno plan to pass those bills along, which in turn required that someone else (here, Dorsey) intend to possess them?"[46] So, there is a good argument that Peoni satisfied the first condition of Girgis's test, and there is no reason to suppose that Peoni did not satisfy the second condition too.

Thus, to protest that no court applying the intention requirement would ever hold that the accomplices in the cases imagined by the critics of the intention requirement cannot be criminally liable is to miss the point that the critics are making. The point is not that these are the only cases where the intention requirement leads to the wrong results. Rather, the point is that these are the cases where the intention requirement leads to the results that are *most obviously* wrong. It is precisely because these results are so obviously wrong that no court would ever embrace them. The strategy of the critics of the intention requirement is to use these cases to undermine confidence in the intention requirement generally, including in cases where intuitions are not so clear. If the critics' alternative *mens rea* standards outperform the intention requirement in the easy cases, then we have reason to follow the critics' alternative standards rather than the intention requirement in the hard cases, too.

III. INTENTION AND COMPLICITY

But are the critics right that the intention requirement excludes from liability the accomplice who does not care whether the principal's criminal conduct occurs? This Part argues that they are wrong. Close attention to the content of the practical reasoning of such an accomplice reveals that in fact the accomplice does intend to bring about the principal's criminal conduct.[47]

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42. Girgis, *supra* note 2, at 486.

43. *Id.* at 475–76.

44. *Id.* at 486.

45. *Id.*

46. *Id.*

47. *Cf.* JOHN FINNIS, *Intention and Side Effects*, *in* 2 COLLECTED ESSAYS: INTENTION AND IDENTITY 173, 174 (2011) ("[O]ne may intend to achieve a certain result without desiring it to come about.").

A. Intention and Practical Reasoning

There is a tight connection between intention and practical reasoning. In performing an action intentionally, an agent endorses a line of reasoning in favor of performing the action.[48] The agent need not pause to run through all the steps of their practical reasoning in deliberation before acting.[49] The agent need not even be "occurrently aware of endorsing" a line of reasoning for performing their action.[50] "Usually, she is merely conscious of doing so in the sense that, if asked what her reasons are for performing the action, she can answer without having to observe herself."[51]

The contents of an agent's intentions in acting are a function of the contents of the practical reasoning that the agent endorses in acting. Specifically, where "ϕ" designates a type of action,[52] an agent acts with the intention of ϕ-ing if and only if the agent represents the action in their practical reasoning as something they should do in part because the action constitutes ϕ-ing.[53] Of course, the sense of "should" here is not moral. It is the same, weak sense in which someone might say "I should try out that restaurant sometime" or "I should read a

48. Capps, *supra* note 22, at 35–36; John Schwenkler, *Understanding Practical Knowledge*, 15 PHIL. IMPRINT 1, 5 (2015); Donald Davidson, *Actions, Reasons, and Causes*, 60 J. PHIL. 685, 685–700 (1963); *see also* Matthew Hanser, *Permissibility and Practical Inference*, 115 ETHICS 443, 446–49 (2005) (analyzing the connection between actions and their potential reasoning).

49. *See, e.g.*, Schwenkler, *supra* note 48, at 5 (explaining that "the rational structure of [an agent's] intentional activity" is not a function of "anything that went on in [her] mind before she began to act"); G.E.M. ANSCOMBE, INTENTION 79–80 (2d ed. 1963) ("[I]f Aristotle's account [of practical reasoning] were supposed to describe actual mental processes, it would in general be quite absurd.").

50. Capps, *supra* note 22, at 35.

51. *Id.*; *see also* ERIC MARCUS, RATIONAL CAUSATION 66, 83 (2012) (affirming that "[a] person who is acting for a reason can explain her action by citing that reason not on the basis of evidence or observation but rather simply because she is intentionally performing the action for that reason" while denying that "representing an action as to be done is necessarily the outcome of engaged deliberation").

52. Throughout, this Article follows the convention in the philosophy of action of using the variables "ϕ" and, if a second variable is needed, "ψ," to represent types of actions.

53. *See, e.g.*, Capps, *supra* note 22, at 42 (arguing that an agent acts "with the intention of ϕ-ing in virtue of representing [her action] in her practical judgment as to be done because it (partially or wholly) constitutes ϕ-ing"); JOHN FINNIS, *Intention in Direct Discrimination*, *in* 2 COLLECTED ESSAYS: INTENTION AND IDENTITY 269, 274 (2011) (maintaining that "*[a]nything* which . . . you count—and *only* what you count—in favour of behaving the way you do appears (under the description it has in your actual practical reasoning) in the adequate account of your . . . intentions"); ANSCOMBE, *supra* note 49, at 79–80 (observing that tracing an agent's intentions by asking why she did what she did and reconstructing the agent's practical reasoning are two ways of getting at the same thing). *But see* Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147, 1148–52 (2008) (recognizing that this is the "conventional view" but claiming that "we must abandon" it).

book for pleasure," indicating no more than that there is something choice-worthy about the action in question.[54]

For example, suppose that Bob takes some medicine, reasoning as follows: "I should perform an action that will have the result that I feel better; taking some medicine will have the result that I feel better; this action constitutes taking some medicine; therefore, I should perform this action." Presumably, Bob did not rehearse this reasoning in his mind before acting. And presumably he does not view his action as morally obligatory; perhaps he even views it as morally forbidden (due to religious scruples against relieving pain, say, or because of a promise he made not to use the medicine in question). Still, Bob concludes that his action is choice-worthy because it constitutes: (1) taking some medicine and thus (2) bringing it about that he feels better. Asked why he is performing the action, those are the answers that he could give straightaway without having to examine his own movements and try to piece together what he is up to like an observer would have to do.[55] Therefore, Bob acts with the intentions of (1) taking some medicine and (2) bringing it about that he feels better.[56]

B. Practical Reasoning and Complicity

Any time one person is complicit in another's crime, the person who is complicit represents their action of aiding or abetting the crime in their practical reasoning as something they should do in part because it constitutes bringing about the principal's criminal conduct. To

54. *See, e.g.*, MARCUS, *supra* note 51, at 80–81; Matthew Boyle & Douglas Lavin, *Goodness and Desire*, *in* DESIRE, PRACTICAL REASON, AND THE GOOD 161, 189, 192 (Sergio Tenenbaum ed., 2010); CANDACE VOGLER, REASONABLY VICIOUS 50–51 (2002); MARK C. MURPHY, NATURAL LAW AND PRACTICAL RATIONALITY 2 (2001); ANSCOMBE, *supra* note 49, at 72–78.

55. *See* ANSCOMBE, *supra* note 49, at 50–51 (distinguishing knowledge of what one is doing intentionally from knowledge gleaned from observation).

56. To ward off a potential objection, note that defeaters of reasons why an agent *should not* perform an action need not be reasons why the agent *should* perform the action. Frances M. Kamm imagines a case where someone is considering throwing a party, hesitates because he does not want to clean up, but then remembers that the friends whom he would invite typically stay to help a party host clean up. Frances M. Kamm, *The Doctrine of Triple Effect*, 74 ARISTOTELIAN SOC'Y SUPPLEMENTARY VOL. 21, 26–27 (2000). So, the host goes ahead and throws the party. *Id.* In this case, the fact that his friends will help clean up is not part of the host's reasoning for why he should throw the party but only a defeater of what would otherwise be part of his reasoning for why he should not throw the party: although the consideration that his friends will help clean up shows one respect in which throwing the party is not bad, it does not show any respect in which throwing the party is good. Therefore, the proposed account of intention is consistent with Kamm's observation that the host does not throw the party with the intention of bringing it about that his friends help clean up. *See id.* (using this case to show that an agent "need not intend an effect" even if she acts on her "expectation" of the effect).

see that this is so, consider three hypothetical cases—"Bank Theft I," "Bank Theft II," and "Bank Theft III"—in which Alice is complicit in Peter's theft.

In Bank Theft I, Alice does not coordinate with Peter at all. Unbeknownst to him, she discovers that he is planning to pick the lock on the back door of the bank, break into the vault, and take the money inside. Alice has her eye on the $10,000 bonus that comes with being promoted to the position of head of security at the bank, and she knows that if Peter is successful then the current head of security will be fired. But although she is confident that Peter can break into the vault, Alice doubts that he is capable of picking the sophisticated lock on the back door. To enable Peter to take the money, Alice opens the door so that it is ajar when Peter arrives. Peter enters and takes the money in the vault.

Bank Theft II is the case presented in this Article's Introduction.[57] Peter offers Alice $10,000 if she will let him in through the back door so he can take the money in the vault. Alice agrees on the condition that Peter pays her when she opens the door. Peter agrees, Alice opens the door, Peter pays her, and Peter takes the money in the vault.

Finally, Bank Theft III represents the typical case of complicity. Peter offers Alice a $10,000 share of the money in the vault if she lets him in through the back door. Alice agrees and opens the door. Peter takes the money in the vault and pays Alice her share.

Notice that in each of the three cases, Alice is capable of opening the door in a way that will *not* result in Peter taking the money. For example, Alice could open the door only a crack, leaving in place a chain that prevents the door from opening farther. Or, she could open the door widely enough for Peter to get through but trip the alarm or attract the attention of other guards while doing so. Of course, in none of the cases does Alice do any of these things. That is no accident. As explained below, in each case, Alice reasons that she should open the door in a way that will result in Peter taking the money; hence, her opening the door in this way is intentional rather than accidental.

In Bank Theft I, Alice reasons that she should open the door in a way that will result in Peter taking the money because Peter taking the money will result in her making $10,000. The practical reasoning that Alice endorses can thus be summarized as follows:

(1.1) I should perform an action that will have the result that I make $10,000.

(1.2) Peter taking the money in the vault will have the result that I make $10,000.

(1.3) Opening the door widely and discreetly will have the result that Peter takes the money in the vault.

57. *Supra* Part I.

(1.4) This action constitutes opening the door widely and discreetly.

(1.5) Therefore, I should perform this action.[58]

Bank Theft II is different. In Bank Theft II, Alice does not reason that she should open the door in a way that will result in Peter taking the money because *Peter taking the money* will result in her making $10,000. Once Alice has done what Peter hired her to do, she will receive her pay regardless of whether Peter ends up taking the money. Still, Alice must do what Peter hired her to do. And what Peter hired her to do was to open the door in a way that will result in his taking the money. So, what will result in Alice making $10,000 is not *Peter taking the money* but rather *Alice opening the door in a way that will result in Peter taking the money*.

If there is any doubt that Peter hired Alice to open the door in a way that will result in his taking the money, suppose that Alice opens the door only a crack, leaving in place a chain that prevents Peter from entering, and then demands her payment, saying: "You hired me to open the door, and look! I did." Peter will rightly deny that Alice kept her side of the deal and refuse to pay her. One of the advantages of hiring a rational agent to do a job is that, given a general description of their role and its purpose, the rational agent can work out the details as they go. If he had programmed a drone to open the door, then Peter would have had to anticipate, and program the drone to be capable of handling, contingencies such as the presence of a chain on the door. Hiring Alice allowed Peter to outsource to her the calculation of the details of her performance with an eye to the purpose of her role. Even if the only explicit direction that Peter gave to Alice was, "Open the door at 2:00 AM," the expectation that Alice would execute on this direction in a way that will further his objective of taking the money was implicit.

In Bank Theft II, then, Alice reasons as follows:

(2.1) I should perform an action that will have the result that I make $10,000.

(2.2) Opening the door in a way that will have the result that Peter takes the money in the vault will have the result that I make $10,000.

58. This summary and the others below are intended display the shape of the agent's reasoning, not to reproduce it in a form that is valid in the technical sense employed by logicians. *See generally* Paul Pietroski, *Logical Form*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed., 2021), https://plato.stanford.edu/entries/logical-form/ [https://perma.cc/Y79V-ZAY3]; *cf.* David Mitchell, *Validity and Practical Reasoning*, 65 PHIL. 477 (1990) (arguing that validity in practical reasoning is the same as validity in theoretical reasoning).

(2.3) Opening the door widely and discreetly is opening the door in a way that will have the result that Peter takes the money in the vault.
(2.4) This action constitutes opening the door widely and discreetly.
(2.5) Therefore, I should perform this action.

The means-end chains traced by (1.1)–(1.5) and (2.1)–(2.5) are the same except for the link between *opening the door widely and discreetly* and *making $10,000*. In (1.1)–(1.5), this link is *Peter taking the money in the vault*. In (2.1)–(2.5), this link is *opening the door in a way that will result in Peter taking the money in the vault*. What matters for this Article's purposes, however, is that both (1.1)–(1.5) and (2.1)–(2.5) frame the fact that Alice's action will result in Peter taking the money as part of why Alice should perform the action.

Finally, consider Bank Theft III. In order for Alice to collect the $10,000 in Bank Theft III, two things must happen. First, as in Bank Theft II, Alice must do what Peter hired her to do, which is to open the door a way that will have the result that he takes the money in the vault. If Alice fails to do this, then she should not expect Peter to pay her even if Peter somehow manages to take the money anyway. Second, as in Bank Theft I, Peter must succeed in taking the money. Otherwise, there will be no spoils to divide.

In Bank Theft III, then, Alice reasons that she should open the door in a way that will result in Peter taking the money in the vault because *the conjunction of (a) her opening the door in this way and (b) Peter actually taking the money* will result in her making $10,000. The practical reasoning that Alice endorses can thus be summarized as follows:

(3.1) I should perform an action that will have the result that I make $10,000.
(3.2) My opening the door in a way that will have the result that Peter takes the money in the vault, together with Peter's actually taking the money in the vault, will have the result that I make $10,000.
(3.3) Opening the door widely and discreetly (a) is opening the door in a way that will have the result that Peter takes the money in the vault and thus (b) will have the result that Peter actually takes the money in the vault.
(3.4) This action constitutes opening the door widely and discreetly.
(3.5) Therefore, I should perform this action.

Again, the means-end chain traced by (3.1)–(3.5) differs from those traced by (1.1)–(1.5) and (2.1)–(2.5) only in the link between *opening the door widely and discreetly* and *making $10,000*. In (3.1)–(3.5), this link is the conjunction of (a) Alice opening the door in a way that will

result in Peter taking the money in the vault and (b) Peter actually taking the money in the vault. To repeat, however, what matters for this Article's purposes is that (3.1)–(3.5) as well as (1.1)–(1.5) and (2.1)–(2.5) frame the fact that Alice's action will result in Peter taking the money as part of why Alice should perform the action.

In sum, in each of Bank Theft I, Bank Theft II, and Bank Theft III, Alice represents her action in her practical reasoning as choice-worthy in part because the action constitutes bringing it about that Peter takes the money in the vault. The cases differ only in *how* this fact counts in Alice's practical reasoning in favor of performing her action. Therefore, in all three cases, Alice acts with the intention of bringing it about that Peter takes the money in the vault. So, there is no reason to think that the intention requirement is underinclusive. In particular, there is no reason to think that it is underinclusive because it excludes from liability accomplices such as Alice in Bank Theft II who do not care whether the principal's criminal conduct occurs.

IV. OBJECTIONS AND REPLIES

The argument in Part III faces at least four objections.

A. Skepticism about the Possibility of Nested Means-End Calculations

The first objection is that there is something fishy about the notion that practical reasoning can feature one means-end calculation nested within another. Part III simply assumed that this is possible when it argued that, in Bank Theft II, Alice's (second-order) means to bringing it about that she makes $10,000 is executing a (first-order) means to bringing it about that Peter takes the money in the vault. This section defends the assumption that practical reasoning can feature nested means-ends calculations by identifying other examples, besides cooperative actions such as Alice's in Bank Theft II, where an agent's practical reasoning features one means-ends calculation nested within another.

First, consider cases where the only way that an agent knows how to bring about one result, q, is by doing what will bring about another result, r, where r is not causally upstream (and may even be causally downstream) of q. Roderick Chisholm offers the example of someone—call him "Bob"—who wants to cause a certain configuration in the telephone switching system in Denver, knows that if he can get a call through to a Los Angeles telephone then he will have caused this configuration, and therefore proceeds to dial a Los Angeles number.[59] In this example, Bob reasons as follows:

59. Roderick Chisholm, *Freedom and Action*, *in* FREEDOM AND DETERMINISM 36 (Keith Lehrer ed., 1966).

(1) I should perform an action that will have the result that the telephone switching system in Denver is configured [in the desired way].
(2) Dialing my telephone in a way that will have the result that I am connected to a Los Angeles telephone will have the result that the telephone switching system in Denver is configured [in the desired way].
(3) Dialing [the Los Angeles number] is dialing my telephone in a way that will have the result that I am connected to a Los Angeles telephone.
(4) This action constitutes dialing [the Los Angeles number].
(5) Therefore, I should perform this action.

Here, Bob's practical reasoning involves the same kind of nested means-end calculation that Part III argues Alice's practical reasoning involves in Bank Theft II. Bob's second-order means to causing the switching configuration is executing a first-order means to establishing a connection with a Los Angeles telephone. Just as Alice does not need Peter actually to take the money in the vault in order to make $10,000, Bob does not need the Los Angeles telephone actually to ring in order to bring about the desired switching configuration. But he does need to execute a means to bringing it about that the Los Angeles telephone rings, just as Alice needs to execute a means to bringing it about that Peter takes the money in the vault.

Second, consider the agent who aims at a certain end for the sake of the "enhancement or preservation of his own self-image as a [virtuous] person."[60] Such an agent is, in Bernard Williams's memorable expression, "morally self-indulgent": "what [they] care[ ] about is not so much other people, as [themself] caring about other people."[61] For example, suppose that Carla is obsessed with her own moral purity. She is also a utilitarian who thinks that maintaining the purity of her moral character requires calculating her actions to maximize social welfare. For this reason, Carla frequently calculates her actions to maximize social welfare. When she does, her practical reasoning takes the following form:

(1) I should perform an action that will have the result that my moral character remains pure.
(2) Doing what will result in the highest possible overall utility will have the result that my moral character remains pure.
(3) This action constitutes doing what will result in the highest possible overall utility.
(4) Therefore, I should perform this action.

60. Bernard Williams, Moral Luck 45 (1981).
61. *Id.*

Here too, Carla's practical reasoning involves the same kind of nested means-end calculation that Part III argues Alice's practical reasoning involves in Bank Theft II. Carla's second-order means to maintaining the purity of her moral character is executing a first-order means to maximizing social welfare. Just as Alice does not need Peter actually to take the money in the vault in order to make $10,000, Carla does not need maximum social welfare in order to preserve her moral purity. But Carla does need to execute a means to bringing about maximum social welfare, just as Alice needs to execute a means to bringing it about that Peter takes the money in the vault.

Third, consider the agent who aims at a certain end as a means of "virtue signaling," that is, showing off to others how virtuous she is. Adapting Williams's description of moral self-indulgence, we might say that what such an agent cares about is not so much other people, as other people thinking that she cares about other people.[62] For example, suppose that Dave is insecure. He is especially eager to curry favor with Carla and her group of popular friends, all of whom are utilitarians. When he is around them, Dave goes out of his way to calculate his actions to maximize social welfare. When he does, his practical reasoning takes the following form:

(1) I should perform an action that will have the result that Carla and her friends consider me virtuous.

(2) Doing what will result in the highest possible overall utility will have the result that Carla and her friends consider me virtuous.

(3) This action constitutes doing what will result in the highest possible overall utility.

(4) Therefore, I should perform this action.

Again, Dave's practical reasoning involves the same kind of nested means-end calculation that Part III argues Alice's practical reasoning involves in Bank Theft II. Dave's second-order means to becoming popular is executing a first-order means to maximizing social welfare. Just as Alice does not need Peter actually to take the money in the vault in order to make $10,000, Dave does not need maximum social welfare in order to become popular. But he does need to execute a means to bringing about maximum social welfare, just as Alice needs to execute a means to bringing it about that Peter takes the money in the vault.

In sum, regardless of whether the argument in Part III is sound, an adequate moral psychology must allow for the possibility that practical reasoning can feature nested means-end calculations. Consequently, the fact that the argument in Part III implies that practical

62. *See id.*

reasoning can feature nested means-end calculations is no reason to reject the argument in Part III.

B. The Precise Content of the Accomplice's Intention

The second objection is that Part III's account of the content of Alice's intentions in Bank Theft II—specifically, its claim that Alice's means to making $10,000 is *opening the door in a way that will have the result that Peter takes the money in the vault*—is imprecise. The objection takes two forms, which are addressed in Sections 1 and 2, respectively.

1. Distracted by Appearances

First, one might think that the more precise formulation of Alice's means to making $10,000 is something like *acting in a way that will make Peter think I am opening the door in a way that will have the result that Peter takes the money in the vault*. After all, what determines whether Alice will receive her pay is whether Peter thinks she has done her job, not whether she has actually done her job. If she has done her job but Peter believes she has not, then Peter will not pay her. Likewise, if she has not done her job but Peter believes she has, then Peter will pay her. Therefore, it seems that Alice does not intend to bring it about that Peter takes the money in the vault. Instead, she intends only to create the appearance that she is bringing it about that Peter takes the money in the vault.[63]

The problem with this argument is that even assuming Alice's immediate means to making $10,000 is creating the appearance that she is bringing about the theft, it does not follow that she does not intend actually to bring about the theft. Having decided on creating the appearance as a means to making $10,000, Alice must now decide on a means to creating the appearance. There are two ways she could proceed. The first is deceptive: she could create the appearance without the reality, for example, by building a false entrance that will trap Peter rather than lead him to the vault. The second is nondeceptive: she could create the appearance by creating the reality, that is, by actually opening the door in a way that will bring about the theft. The defender of the intention requirement can cheerfully concede that Alice would not intend to bring about the theft if she chose the first option. This means the intention requirement would exclude Alice from liability. But that is no objection to the intention requirement: surely,

63. *See* Dana Kay Nelkin & Samuel C. Rickless, *So Close, Yet So Far: Why Solutions to the Closeness Problem for the Doctrine of Double Effect Fall Short*, 49 NOÛS 376, 380–81 (2015) (advancing a similar objection to the principle of double effect). I am grateful to Sherif Girgis for pointing out the need to respond to this argument and to Anton Ford for a helpful discussion of the response offered in this Section.

Alice is not guilty as Peter's accomplice if she thwarts Peter by trapping him. In Bank Theft II, however, Alice does not choose the first option. Instead, she chooses the much more straightforward second option: she creates the appearance that she is opening the door in a way that will bring about the theft by actually opening the door in a way that will bring about the theft. Therefore, even assuming Alice's immediate means to making $10,000 is creating the appearance that she is opening the door in a way that will bring about the theft, her means to creating this appearance is actually opening the door in a way that will bring about the theft. So, Alice does intend after all to bring about the theft.[64]

The point can be put a slightly different way. All that follows from the premise that Alice's immediate means to making $10,000 is *creating the appearance of cooperation* is that, instead of (2.1)–(2.5), the more complete account of Alice's practical reasoning is:

(2.1*) I should perform an action that will have the result that I make $10,000.

(2.2*) Acting in a way that will make Peter think I am opening the door in a way that will have the result that he takes the money in the vault will have the result that I make $10,000.

(2.3*) Actually opening the door in a way that will have the result that Peter takes the money in the vault is acting in a way that will make Peter think I am opening the door in a way that will have the result that he takes the money in the vault.

(2.4*) Opening the door widely and discreetly is opening the door in a way that will have the result that Peter takes the money in the vault.

(2.5*) This action constitutes opening the door widely and discreetly.

(2.6*) Therefore, I should perform this action.

The defender of the intention requirement can accept (2.1*)–(2.6*) as an account of Alice's practical reasoning in Bank Theft II. No less than (2.1)–(2.5), (2.1*)–(2.6*) frames the fact Alice's action will result in Peter taking the money as part of why Alice should perform the action. And if Alice's practical reasoning frames the fact that her action will result in Peter taking the money as part of why she should perform the action, then Alice intends to bring it about that Peter takes the money.

64. *See* Joshua Stuchlik, *The Closeness Problem for Double Effect: A Reply to Nelkin and Rickless*, 51 J. VALUE INQUIRY 69, 79 (2016) (defending a similar response to the objection in the double-effect context).

2. Credit for Trying

Alternatively, one might think that the more precise formulation of Alice's means to making $10,000 is something like *opening the door in a way that will result in Peter being in a position to take the money in the vault should he choose to do so*. After all, Peter did not hire Alice to concern herself with whether he would follow through with the theft. Instead, Peter hired Alice to set him up for success in the event that he does choose to follow through with the theft. Therefore, it seems, Alice does not open the door with the intention of bringing it about that Peter takes the money. Instead, she opens the door with the intention of bringing it about that, if Peter tries to take the money, then he will.[65]

Even assuming for argument's sake that this is true, it does not imply that Alice lacks a *mens rea* of intention with respect to Peter's criminal conduct. On the contrary, it implies that Alice has a *mens rea* of intention with respect to Peter's criminal conduct. In general, the law rightly treats one who acts with the intention of bringing it about that if p then q as having a *mens rea* of intention with respect to q. For example, suppose that Paul sues Dave, and the case is assigned to Judge Janet. Paul pays Janet a bribe in consideration for Janet promising that, if Dave files a motion to exclude the testimony of Paul's expert, then Janet will deny the motion. Clearly, Paul is guilty of the federal crime of bribing a public official, defined to include offering "anything of value to any public official . . . with intent . . . to influence any official act."[66] Paul satisfies the crime's *mens rea* requirement because he pays Janet with the intention of bringing it about that, if Dave files a motion to exclude Paul's expert from testifying, then Janet will deny the motion. The fact that Paul's intention is conditional in form does not matter. Take another example: as John Finnis observes, it makes no difference to a burglar's "moral or legal responsibility" whether he "enters a house intending to go to the dining room and steal the silver cutlery he once saw there" or "enters the house intending to steal silver cutlery if any there be therein."[67] Likewise, Alice has a *mens rea* of intention with respect to the conduct element of Peter's crime even assuming for argument's sake that she intends

65. I am grateful to Anselm Müller for pointing out the need to respond to this argument.

66. 18 U.S.C. § 201(b)(1); *see, e.g.*, United States v. Lee, 846 F.2d 531, 531–32 (9th Cir. 1988) (affirming the defendants' convictions under § 201(b) for paying a public inspector to underreport the number of violations if the true number exceeded a certain threshold); United States v. Anderton, 629 F.2d 1044, 1045 (5th Cir. 1980) (noting that the defendant had been convicted under § 201(b) for paying a public official to warn him if he was going to be arrested).

67. JOHN FINNIS, *Conditional and Preparatory Intentions*, *in* 2 COLLECTED ESSAYS: INTENTION AND IDENTITY 220, 224 (2011).

only to bring it about that, if Peter tries to take the money in the vault, then he will.

Moreover, there is good reason to doubt the assumption, granted for argument's sake until now, that Alice intends only to bring it about that Peter takes the money if he tries. Alice would not be doing her job if, while opening the door in a way that puts Peter in a position to take the money if he tries, she hypnotizes Peter so that he does not try. Thus, Alice's job is not merely to open the door in a way that will result in Peter taking the money if he tries. Instead, Alice's job is to open the door in a way that will result in Peter taking the money. To be sure, Alice's role is limited to opening the door; she is not responsible for seeing to it that Peter and any others who are involved in the crime perform *their* roles in ways that contribute to the crime's success. For example, Alice's job does not require her to follow Peter inside and give him a pep talk if he gets cold feet. But Alice is responsible for performing *her* role in a way that contributes to the crime's success, which at a minimum requires not performing it in a way that thwarts the crime's success by interfering with others' performance of their roles. That is why Alice is not doing her job if she uses hypnosis to prevent Peter from completing the crime.

Part III was correct, then, to describe Alice's job in Bank Theft II—and thus her means to making $10,000—as opening the door in a way that will result in Peter taking the money in the vault. In adopting this means to making $10,000, Alice is not merely acting with the intention of bringing it about that Peter takes the money *if he tries*; she is acting with the intention of bringing it about that Peter takes the money, period.

C. The Accomplice Paid Before Playing Their Part

The third objection is that Part III's argument cannot account for cases where the accomplice is paid before the principal commits the crime and before the accomplice does what the principal hired them to do. To explain why Alice has a *mens rea* of intention with respect to Peter's criminal conduct in Bank Theft II, Part III relied on the fact that Alice must do what Peter hired her to do—that is, open the door in a way that will result in him taking the money in the vault—if she is to receive her pay. But there would be no such fact to rely on if Alice had bargained to receive her pay before doing anything. Thus, it seems that, for all Part III says, there is no reason to suppose that Alice has a *mens rea* of intention with respect to Peter's criminal conduct if Peter pays Alice before she opens the door. Yet clearly Alice is guilty of and should be liable for theft as Peter's accomplice regardless of whether Peter pays her before or after she opens the door. Therefore, it seems that Part III fails to save the intention requirement from the charge of under-inclusivity.

This objection overlooks the fact that Alice may have an incentive to do what she was hired to do—that is, open the door in a way that will result in Peter taking the money in the vault—even if she has already received her pay. For example, if Peter paid Alice after she promised to open the door but before she executed on that promise, then Alice may do as she promised because she has a reputation in the criminal world to uphold. And even if Peter instructs Alice to let him in at the appointed time so he can take the money in the vault, hands her a wad of cash, and leaves without waiting for her to indicate her assent to his offer, Alice may do what Peter implicitly hired her to do because she is afraid of what he will do to her if she does not. Indeed, it is difficult to imagine that Peter would pay Alice as soon as she promised to assist unless he trusted that she had some other incentive to keep her promise, and it is difficult to imagine that Peter would simply hand Alice a wad of cash without requiring even a promise unless Peter knew that she was terrified of him.

In any event, provided that (for whatever reason) Alice does what she was hired to do, she acts with the intention of bringing it about that Peter takes the money in the vault. Granted, if instead Alice takes her pay and runs, then she does not act with the intention of bringing it about that Peter takes the money in the vault. But that is no objection to the intention requirement: if she takes her pay and runs, then Alice is not guilty of, and hence should not be liable for, theft as Peter's accomplice.

D. Sting Operations

The fourth and final objection is that Part III's argument rescues accomplice liability's intention requirement from the charge of under-inclusivity only to expose it to the charge of over-inclusivity. It seems that Part III's argument for why Alice has a *mens rea* of intention with respect to Peter's criminal conduct in Bank Theft II applies with equal force to law-enforcement officers engaged in sting operations that require them to pose as accomplices. After all, just as Alice must calculate her action to serve as a means to Peter's theft if Alice is to receive her pay, the undercover officer engaged in a sting operation must calculate their actions to serve as means to the target's criminal conduct if the officer is to pose convincingly as an accomplice. Therefore, it seems that Part III's argument for why Alice satisfies the intention requirement in Bank Theft II implies that the undercover officer posing as an accomplice also satisfies the intention requirement.

The first step in responding to this objection is to distinguish between two types of sting operations where a law-enforcement officer poses as an accomplice. The first type comprises cases where law enforcement plans to arrest the target after they have performed their criminal conduct. "Controlled buys" of illegal drugs are examples of

cases of this type. The second type comprises cases where law enforcement plans to arrest the target before they have performed their criminal conduct. For example, an undercover officer might offer to make available a minor for sex in exchange for a fee and then arrest the target as soon as the target has paid the fee.

In cases of the first type, the undercover officer acts with the intention of bringing about the target's criminal conduct. For example, if the undercover officer arranges for the target to sell drugs to a confidential informant, then the officer endorses the following reasoning:

(1) I should perform an action that will have the result that the target is arrested and convicted for drug distribution.
(2) Bringing it about that the target sells drugs to a confidential informant will have the result that the target is arrested and convicted for drug distribution.
(3) This action constitutes bringing it about that the target sells drugs to a confidential informant.
(4) Therefore, I should perform this action.

Because this reasoning represents the officer's action as something they should do in part because the action constitutes bringing it about the target sells drugs to the confidential informant, the officer acts with the intention of bringing it about that the target sells drugs to the confidential informant.

To avoid making the undercover officer liable, however, the law should not abandon the intention requirement for an even more stringent *mens rea* requirement (what would that be?). Instead, it should simply recognize an affirmative defense for law-enforcement officers engaged in sting operations such as controlled buys. If a prosecutor were to charge an undercover officer who assisted in a controlled buy as an accomplice, then the prosecutor might be able to establish a *prima facie* case for liability. But the officer could defeat the *prima facie* case by asserting the affirmative defense for law-enforcement officers engaged in sting operations such as controlled buys. Jurisdictions typically recognize an affirmative defense of justification that is broad enough to cover such cases.[68]

68. *See, e.g.*, ALA. CODE § 13A-3-22 (providing that "conduct which would otherwise constitute an offense is justifiable and not criminal when it . . . is performed by a public servant in the reasonable exercise of his official powers, duties or functions"); ARK. CODE § 5-2-603(a)(2) ("Conduct that would otherwise constitute an offense is justifiable when it is . . . [p]erformed by a public servant or a person acting at the public servant's direction in a reasonable exercise or performance of the public servant's official power, duty, or function."); N.D. CENT. CODE § 12.1-05-02(1) ("Conduct engaged in by a public servant in the course of the person's official duties is justified when it is required or authorized by law."); N.Y. PENAL CODE § 35.05(1) (providing that "conduct which would otherwise constitute an offense is justifiable and not criminal" if it "is performed by a public servant in the reasonable exercise of his official powers, duties or functions").

Cases of the second type—that is, cases where law enforcement plans to intervene before the target performs the criminal conduct—are trickier. To be sure, the law can extend the affirmative defense for law-enforcement officers engaged in sting operations to cover these cases, too.[69] But this is only a partial solution. Although the law properly recognizes the need to apprehend a criminal suspect as a justification for bringing about a drug crime, it should not recognize the need to apprehend a criminal suspect as a justification for bringing about, say, a rape.[70] Therefore, Part III's argument rightly implies that an undercover officer who works to bring it about that the target rapes a victim so that the officer can arrest the target should be liable for the rape. But what if the officer plans to intervene before the target commits the rape? On the assumption that the officer still intends to bring about the rape, it appears that the officer may be liable if the sting operation fails and the target commits the rape. And depending on whether the relevant jurisdiction recognizes abandonment as an affirmative defense to complicity in a criminal attempt,[71] the officer may be liable for attempted rape even if the sting operation is successful and the target is apprehended before committing the rape. Both implications seem wrong: it seems that the officer should be liable neither for rape if the sting operation fails nor for attempted rape if the sting operation succeeds. Therefore, the intention requirement is overinclusive on the assumption that the undercover officer intends to bring about the rape.

The solution is to reject the assumption that the officer intends to bring about the rape. True, there is a sense in which, to pose convincingly as an accomplice, the officer must calculate their performance to serve as a means to the target's criminal conduct even if the officer plans to intervene before the target performs their criminal conduct. But it does not follow that the officer intends to bring about the target's criminal conduct.

To see why, notice that one can recognize that a conclusion follows from a set of premises without affirming the conclusion on the basis of the premises. In other words, as logicians would put it, one can recog-

69. *See, e.g.*, ALA. CODE § 13A-3-22; ARK. CODE § 5-2-603(a)(2); N.D. CENT. CODE § 12.1-05-02(1); N.Y. PENAL CODE § 35.05(1).

70. *Cf.* JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH (1991) (arguing that certain types of actions are never justified).

71. *See generally* MODEL PENAL CODE § 2.06(6)(c) (providing that "a person is not an accomplice in an offense committed by another person if . . . he terminates his complicity prior to the commission of the offense and (i) wholly deprives it of effectiveness in the commission of the offense; or (ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense"); *id.* § 5.01(3) (providing that, where a crime is attempted but not completed, someone who would have liable for the crime as an accomplice if the crime had been completed is liable for the attempt).

nize that an argument is *valid* without endorsing it as *sound*.[72] For example, consider the following argument:

(1) If the moon is made of blue cheese, then extraterrestrial life exists;

(2) The moon is made of blue cheese;

(3) Therefore, extraterrestrial life exists.

Anyone can see that this argument is valid, even though no one is tempted to endorse it as sound because everyone knows that at least (2) is false. This is not to say that (3), the argument's conclusion, is false. Perhaps (3) is true. The point is that even if (3) is true, (1) and (2) do not constitute a sound argument for it.

As Elizabeth Anscombe explains, the distinction between recognizing that an argument is valid and endorsing it as sound holds not only in the case of theoretical reasoning but also in the case of practical reasoning.[73] Anscombe imagines a boss who indicates to their subordinate that the boss has an objective, q, and declares that the subordinate needs to ϕ for q to come about.[74] In doing so, the boss presents the subordinate with the premises of an argument for ϕ-ing.[75] But the subordinate knows that one of the premises of the argument is false: contrary to what the boss supposes, the subordinate's ϕ-ing will not bring it about that q (perhaps it will even ensure that q does not come about).[76] And the subordinate might not believe the other premise—that they should perform an action that will bring about the boss's objective, q—either. Nonetheless, Anscombe observes, the subordinate can draw the conclusion of the argument by going ahead and ϕ-ing, albeit "ironically."[77] The subordinate's action embodies the recognition that what follows from the boss's premises is that the subordinate should ϕ. But the subordinate does not *endorse* this bit of practical reasoning; indeed, the subordinate knows that one of its premises—that the subordinate's ϕ-ing will have the result that q—is false, and the subordinate may not believe the other premise—that they should do what will have the result that q—either. As Anscombe puts it, "[n]ot aiming at what the [boss] aims at,

72. *See, e.g.*, *Validity and Soundness*, *in* THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY (James Fieser & Bradley Dowden eds.), https://iep.utm.edu/val-snd/ [https://perma.cc/4ATG-9XPZ] ("A deductive argument is said to be *valid* if and only if it takes a form that makes it impossible for the premises to be true and the conclusion nevertheless to be false. . . . A deductive argument is *sound* if and only if it is both valid, and all of its premises are *actually true*.").

73. G.E.M. ANSCOMBE, *Practical Inference*, *reprinted in* HUMAN LIFE, ACTION AND ETHICS: ESSAYS BY G. E. M. ANSCOMBE 109, 135–40 (Mary Geach & Luke Gormally eds. 2005).

74. *Id.* at 137.

75. *See id.* at 136–37.

76. *See id.* at 137.

77. *Id.*

not believing his premises, but still drawing the conclusion in action . . . corresponds to not believing the assertions and not believing the conclusion but still drawing the conclusion in the theoretical case."[78]

The account of intention offered in section III.A is consistent with Anscombe's observation that the ironic subordinate does not act with the intention of bringing about the boss's end.[79] According to section III.A, "[t]he contents of an agent's intentions in acting are a function of the contents of the practical reasoning *that the agent endorses* in acting."[80] Because the subordinate does not *endorse* the reasoning that their action is something they should do since it constitutes bringing about the boss's end, section III.A's account of intention does not imply that the subordinate acts with the intention of bringing about the boss's end.

The undercover officer who plans to intervene before the target performs their criminal conduct is like the ironic subordinate. To pose as an accomplice, the officer frames in their own practical reasoning the premises that would motivate a genuine accomplice and "draw[s] the conclusion in action."[81] But the undercover officer does not *endorse* the argument whose conclusion they draw. Indeed, presumably the officer does not believe the premise that their action will have the result that the target performs their criminal conduct. And the officer certainly does not believe the premise that they *should* perform an action that will have this result.

Of course, given that they act intentionally, the officer does endorse *an* argument for performing their action.[82] The practical reasoning that they endorse is complex and includes the fact that a genuine accomplice would reason that they should perform an action like the one that the undercover officer is performing. What matters for present purposes is that the practical reasoning that the officer actually endorses does not represent their action as choice-worthy because the action constitutes bringing about the target's criminal conduct. Therefore, the undercover officer does not act with the intention of bringing about the target's criminal conduct.

In sum, sting operations pose no threat to the argument of Part III. Any plausible theory of complicity will require granting an affirmative defense to law-enforcement officers engaged in sting operations where the plan is to arrest the target after the target performs their criminal conduct. Therefore, it is no objection to the view defended in Part III

78. *Id.*
79. *See id.* at 136–38.
80. *Supra* section III.A (emphasis added).
81. ANSCOMBE, *supra* note 73, at 137.
82. *See supra* section III.A ("In performing an action intentionally, an agent endorses a line of reasoning in favor of performing the action.").

that it too requires this affirmative defense. As for cases in which the plan is to arrest the target before the target performs their criminal conduct, the intention requirement does not make the undercover officer even *prima facie* liable because the officer does not act with the intention of bringing about the target's criminal conduct.

V. PROBLEMS WITH ALTERNATIVE PROPOSALS

Parts III–IV defended the intention requirement against the objection that it cannot account for cases where the accomplice does not care whether the principal's criminal conduct occurs. It is now time to play offense. The problems with the knowledge requirement are well known,[83] and this Part does not rehearse them. Instead, this Part focuses on three "middle way[s]"[84] proposed recently by scholars who reject both the intention requirement and the knowledge requirement.

A. Gideon Yaffe's Proposal

The most complex but also the most influential of the three proposals is Gideon Yaffe's.[85]

1. Understanding Yaffe's Proposal

Central to Yaffe's theory of complicity is the notion of a "commitment of nonreconsideration." As Yaffe uses the term, an agent has a "commitment" not to reconsider their intention to ϕ on the ground that ϕ-ing will have a certain circumstance or result if, and only if, all else being equal, it would be irrational for the agent to reconsider their intention to ϕ on the ground that ϕ-ing will have that circumstance or result.[86]

Yaffe identifies two ways in which an agent who intends to ϕ can incur a commitment of nonreconsideration with respect to one of the circumstances or results of their ϕ-ing. The first is by representing the relevant circumstance or result in their intention to ϕ.[87] Call a commitment of nonreconsideration incurred in this way an "intention-based" commitment of nonreconsideration. The second is by consider-

83. *See, e.g.*, Yaffe, *supra* note 1, at 10–11; Girgis, *supra* note 2, at 468–69; Westerfield, *supra* note 15, at 175–82.
84. Yaffe, *supra* note 1, at 13.
85. *See, e.g.*, Heidi M. Hurd & Michael S. Moore, *Untying the Gordian Knot of Mens Rea Requirements for Accomplices*, 32 SOC. PHIL. & POL'Y 161, 179–80 (2016) (analyzing Yaffe's proposal); Sarch, *supra* note 1, at 142–48 (same); Girgis, *supra* note 2, at 470–73 (same).
86. Yaffe, *supra* note 1, at 16. *See generally* MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 60–75 (1987) (developing the theory of when it is rational for an agent to reconsider a prior intention that Yaffe, *supra* note 1, at 18–19, cites as background for his own view).
87. Yaffe, *supra* note 1, at 16–18.

ing the fact that ϕ-ing will have the relevant circumstance or result in the deliberation that culminated in the formation of their intention to ϕ.[88] Call a commitment of nonreconsideration incurred in this way a "deliberation-based" commitment of nonreconsideration.

To illustrate the distinction between intention- and deliberation-based commitments of nonreconsideration, Yaffe uses the example of a benefactor deciding whether to give money to a panhandler.[89] Suppose that, in deliberating about whether to give money to the panhandler, the benefactor considers the fact that the panhandler will likely use some of the money for food and some for drugs. The benefactor treats the fact that the panhandler will buy food as a reason for giving the panhandler money and the fact that the panhandler will buy drugs as a reason against giving the panhandler money. Ultimately, the benefactor concludes that the reason for giving the panhandler money outweighs the reason against doing so, and the benefactor gives the panhandler money. Because the benefactor's practical reasoning frames the fact that their action will have the result that the panhandler buys food as part of why they should perform the action, the benefactor represents this result in their intention. Therefore, according to Yaffe, the benefactor has an intention-based commitment of nonreconsideration with respect to the result that the panhandler buys food. Because the benefactor's practical reasoning does *not* frame the fact that their action will have the result that the panhandler buys *drugs* as part of why they should perform the action, the benefactor does not represent this result in their intention. Therefore, according to Yaffe, the benefactor does not have an intention-based commitment of nonreconsideration with respect to the result that the panhandler buys drugs. Nonetheless, the benefactor did consider in deliberation the fact that giving money to the panhandler will have the result that the panhandler buys drugs. Therefore, according to Yaffe, the benefactor has a deliberation-based commitment of nonreconsideration with respect to the result that the panhandler buys drugs.

Yaffe uses the idea of an intention-based commitment of nonreconsideration to generate an alternative to the intention requirement. According to Yaffe,

> (Y) The *mens rea* that should be required for liability for another's crime as an accomplice is an intention-based commitment of nonreconsideration with respect to the result that the principal commits the crime.[90]

Applying (Y) to typical cases of complicity, where everyone agrees that the accomplice "intend[s] that the crime be committed,"[91] is straightforward. In such a case, the accomplice represents their action

88. *Id.* at 21–22.
89. *Id.* The example is slightly altered below to fit the present context.
90. *Id.* at 19.
91. *Id.* at 10 (emphasis omitted).

in their practical reasoning and thus in their intention as having the result that the principal commits the crime. Thus, according to Yaffe, the accomplice has an intention-based commitment of nonreconsideration with respect to the result that the principal commits the crime. So, the accomplice is liable under (Y).

The challenge is for Yaffe to explain how (Y) is consistent with liability for accomplices in cases like Bank Theft II. Of course, Part III argued that all accomplices "intend that the crime be committed."[92] But the motivation for considering an alternative to the intention requirement is the assumption that the intention requirement excludes accomplices in cases like Bank Theft II from liability. Accordingly, Yaffe must show how (Y) is consistent with liability in such cases even assuming that the accomplice does not "intend that the crime be committed."[93]

To meet this challenge, Yaffe relies on a distinction between two ways of using a descriptive phrase.[94] Yaffe considers the statement, "I intend to pay the governor of California $1,000,000," uttered by someone who mistakenly believes Sylvester Stallone to be governor of California.[95] Yaffe explains that the speaker could mean at least two things by this statement. First, the speaker could mean that they intend to pay whoever is in fact the governor of California $1,000,000.[96] Second, the speaker could be using the description "the governor of California" as a device with which to direct the audience's attention to a particular person—namely, Stallone—of whom the speaker means to assert that they intend to pay that person $1,000,000.[97]

Yaffe uses the terms "*de dicto*" and "*de re*" to track the distinction between these two ways of using the description "the governor of California."[98] "When a descriptive phrase is interpreted *de re*," Yaffe explains, "it contributes only its referent to the truth conditions of the sentence."[99] "When it is interpreted *de dicto*, by contrast, the properties referred to in the description contribute to the sentence's truth conditions independently."[100] Thus, to hear the speaker as meaning that they intend to pay whoever is, in fact, the governor of California $1,000,000 is to interpret the description "the governor of California" *de dicto*, and to hear the speaker as meaning that they intends to pay the person they are picking out (incorrectly, as it turns out) with the

92. *Id.* (emphasis omitted).
93. *Id.* (emphasis omitted).
94. *See* GIDEON YAFFE, ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 129–71 (2010).
95. *Id.* at 145.
96. *Id.*
97. *Id.*
98. *Id.* at 143–45.
99. *Id.* at 144.
100. *Id.*

description "the governor of California" $1,000,000 is to interpret the description *de re*.[101]

According to Yaffe, people use descriptions *de re* not only in statements of their intentions but also in their intentions themselves.[102] For example, suppose that the speaker (truthfully) means that they intend to pay the person identified with the description "the governor of California"—namely, Stallone—$1,000,000. According to Yaffe, this suggests that the speaker uses the description "the governor of California" *de re* not only in their statement of their intention but also in their intention itself.[103] Although the (supposed) circumstance that Stallone is the governor of California is not part of the speaker's reasoning for why they should pay Stallone $1,000,000, the content of the speaker's belief to this effect "bled into"[104] the content of their intention.[105] Consequently, the speaker represents Stallone as the governor of California in their intention, thereby incurring an intention-based commitment of nonreconsideration with respect to the (supposed) circumstance that Stallone is the governor of California, even though the speaker does not intend that Stallone be governor of California.[106]

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101. *Id.* at 145. The distinction that Yaffe is drawing appears to be identical to Keith Donnellan's distinction between "attributive" and "referential" uses of definite descriptions, where Donnellan's "attributively" is equivalent to Yaffe's "*de dicto*" and Donnellan's "referentially" is equivalent to Yaffe's "*de re*." *Compare* Keith S. Donnellan, *Reference and Definite Description*, 75 PHIL. REV. 281, 285–89 (1966), *with* YAFFE, *supra* note 94, at 143–44. As Saul Kripke explains, this distinction is not what philosophers generally mean when they speak of the distinction between "*de re*" and "*de dicto*" uses of descriptions. *See* Saul A. Kripke, *Speaker's Reference and Semantic Reference*, *in* 1 PHILOSOPHICAL TROUBLES: COLLECTED PAPERS 99, 103–05 (2012). For the purposes of this Article, however, it is possible to bracket this point by reading Yaffe as stipulating his own sense of the terms "*de dicto*" and "*de re*." For an overview of the ways in which the terms "*de re*" and "*de dicto*" are used in the philosophical literature, see generally Michael Nelson, *The* De Re/De Dicto *Distinction*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed., 2019), https://plato.stanford.edu/entries/prop-attitude-reports/dere.html [https://perma.cc/W3G7-A5C5].

102. *See, e.g.*, Yaffe, *supra* note 1, at 14; YAFFE, *supra* note 94, at 147.

103. Charitably construed, Yaffe's claim, YAFFE, *supra* note 94, at 145–46, is not that the speaker's intention consists in them having uttered a series of words including "the governor of California" in their mind, see ANSCOMBE, *supra* note 49, at 47–49 (explaining that "intention is never a performance in the mind," including a performance of saying something to oneself), but rather that the speaker's practical thought latches onto the particular person thay have in mind to pay by means of the concept *the governor of California*, *cf.* A.W. Müller, *Reply to "I," in* JOWETT PAPERS 1968–1969 11, 14–15 (B.Y. Khanbhai et al. eds., 1970) (explaining that one cannot pick out a particular item without associating some descriptive content with it).

104. Yaffe, *supra* note 1, at 25, 19–20.

105. *See* YAFFE, *supra* note 94, at 145–46.

106. *See id.*

Now return to cases like Bank Theft II where the accomplice is paid upfront. In cases like this, Yaffe thinks, the content of the accomplice's belief that their action will have the result that the principal commits the crime bleeds into the content of their intention in the form of a description used *de re*.[107] Consequently, the accomplice represents their action in their intention as having the result that the principal commits the crime, thereby incurring an intention-based commitment of nonreconsideration with respect to the result that the principal commits the crime, even though the accomplice does not "intend that the crime be committed."[108] Therefore, (Y) is consistent with holding liable accomplices who were paid upfront liable even though the intention requirement is not.

2. Critiquing Yaffe's Proposal

Yaffe's theory of complicity faces at least three objections.

First, it is difficult to see how Yaffe's theory is consistent with liability when applied to concrete cases involving an accomplice who does not care whether the principal's criminal conduct occurs. For example, consider Bank Theft II. If Yaffe's theory is to account for the fact that Alice should be liable as Peter's accomplice, then the content of Alice's belief that her action will have the result that Peter takes the money in the vault must bleed into the content of Alice's intention in the form of a description used *de re*. In other words, Alice must pick out some particular item in her intention by means of a description that recognizes that Peter is going to commit theft. What item could this be? Yaffe does not provide an answer to this question, and it is difficult to produce a plausible answer on his behalf.

For starters, the item in question cannot be the event of Peter taking the money in the vault. True, Part III argued that Alice's intention includes a description of this event, "Peter taking the money in the vault." But Part III does not suggest that this description is used *de re*, simply as a device with which to pick out a particular event that Alice is interested in bringing about regardless of whether it satisfies the description: "Peter taking the money in the vault." Indeed, assuming Peter has not stolen from this bank in the past, no particular event satisfying the description, "Peter taking the money in the vault," is yet in existence when Alice performs her action. So, it would be very strange if Alice used that description in her intention as a device to pick out a particular event. And in any case, having relied on the as-

107. *See* Yaffe, *supra* note 1, at 20, 25 (arguing that the defendant in *United States v. Campisi*, 306 F.2d 308 (2d Cir. 1962), was properly convicted as an accomplice to forgery because "the content of his belief about his own aid—namely, that it was aiding *forgery*—almost surely bled into the content of his intention"; hence, his intention included a *de re* "representation of the buyer's act as one of *forgery*").

108. *Id.* at 10 (emphasis omitted).

sumption that the accomplice like Alice in Bank Theft II does not "intend that the crime be committed,"[109] Yaffe cannot accept Part III's analysis.

What else might Alice pick out in her intention by means of a description that recognizes that Peter is going to commit theft? One possibility is Peter himself. Yaffe could argue that Alice intends to open the door for a particular person and uses the description "the person who is going to take the money in the vault" to identify this person in her intention. This potential argument will not work, either. Suppose that Peter told Alice to let in whoever is standing at the back door at 2:00 AM, without telling her who it would be. In that case, Alice does not intend to open the door for a particular person. Perhaps she intends to open the door for whoever is standing there at 2:00 AM. But the description "whoever is standing there at 2:00 AM" does not recognize that the person is going to commit theft and, in any event, is here used *de dicto*.

What about Alice's action? Yaffe could argue that Alice intends to perform the particular action that she is performing (because it constitutes opening the door and hence bringing it about that she makes $10,000) and uses the description "this act of bringing it about that Peter commits theft" to identify this action in her intention. This potential argument also will not work. True, it is plausible that the practical reasoning underlying an agent's intentions in acting is a thought about the particular action that the agent is performing: a thought to the effect that that action is choice-worthy because it constitutes doing such-and-such.[110] But the content of this thought is limited to what the agent knows (or at least believes) about their action simply in virtue of being the one who performs the action.[111] And all the agent knows (or at least believes) about their action in this way, besides the properties that they reason make the action choice-worthy,[112] is that it is an *action*: something that they *do* rather than something that merely happens to them (like a muscle spasm).[113] So, the concept that an agent uses in their intention to latch onto the particular action that they are performing is the generic concept "this action,"[114] not some-

109. *Id.* (emphasis omitted).

110. *See, e.g.*, Capps, *supra* note 22, at 36–41; GEORGE M. WILSON, THE INTENTIONALITY OF HUMAN ACTION 120 (1989).

111. *See, e.g.*, John McDowell, *What Is the Content of an Intention in Action?*, 23 RATIO 415, 423 (2010) (characterizing practical knowledge as "the knowledge of an action one has as its agent"); Anne Newstead, *Knowledge by Intention? On the Possibility of Agent's Knowledge*, *in* ASPECTS OF KNOWING: EPISTEMOLOGICAL ESSAYS 183, 194 (Stephen Hetherington ed., 2006) (describing practical knowledge as the knowledge that "an agent has . . . of what she is doing 'from the inside'").

112. *See* FINNIS, *supra* note 53, at 274.

113. *See* Schwenkler, *supra* note 48, at 9; Anton Ford, *Action and Generality*, *in* ESSAYS ON ANSCOMBE'S *Intention* 76, 102–04 (Anton Ford et al. eds. 2011).

114. Capps, *supra* note 22, at 40.

thing very specific such as "this act-of-bringing-about-a-theft." Thus, in Bank Theft II, Alice reasons: "I should perform *this action* because it constitutes [opening the door, etc.]." She does not reason: "I should perform *this act-of-bringing-about-a-theft* because it constitutes [opening the door, etc.]."

In sum, it is difficult to see how Yaffe's theory can account for run-of-the-mill cases where the accomplice does not care whether the principal's criminal conduct occurs. Often, there appears to be nothing that the accomplice might pick out in their intention by means of a description used *de re* that recognizes that the principal is going to commit the crime. But if there is nothing that the accomplice might pick out in their intention in this way, then Yaffe has no basis for claiming that the accomplice represents their action in their intention as having the result that the principal commits the crime, which means that he has no basis for claiming that the accomplice has an intention-based commitment of nonreconsideration with respect to the result that the principal commits the crime. And unless the accomplice has an intention-based commitment of nonreconsideration with respect to the result that the principal commits the crime, the accomplice is not liable under (Y).

Second, even assuming that there is always something that a putative accomplice might pick out in their intention by means of a description that recognizes that the principal is going to commit the crime, whether the putative accomplice *actually uses* such a description to pick out the item in question seems to be a function more of happenstance than of anything of normative significance.[115] Indeed, to the extent that the determinants of whether the relevant description appears in the content of the putative accomplice's intention have any normative significance at all, this significance arguably cuts against Yaffe's theory. For example, Yaffe seems to think that the putative accomplice's belief that they are helping the principal commit a crime is more likely to bleed into the content of putative accomplice's intention if this belief is front and center in the putative accomplice's awareness.[116] But that suggests that the more callous the putative accomplice, the less likely they are liable under (Y).

Finally, Yaffe's theory faces a third problem. Yaffe argues that the use of a description referring to the principal's crime in one's intention makes one complicit in the crime by supplying one with an intention-

115. Thus, as Alexander Sarch observes, "it is often going to be a matter of luck whether a given condition makes it into the explicit content of one's intention or not." Sarch, *supra* note 1, at 147; *see also* Hurd & Moore, *supra* note 85, at 180 n.53 (expressing doubt that a "commitment to nonreconsideration can carry much culpability-enhancing blame with it").

116. *See* Yaffe, *supra* note 1, at 28 ("[W]hen [people] form their intentions for certain innocent reasons[,] . . . it is natural for their attention to be drawn away from their beliefs about what else they will be helping if they do as they intend.").

based commitment of nonreconsideration with respect to the result that the principal commits the crime. But Yaffe concedes that one can consider in deliberation that one's action will have the result that the principal commits a crime, thereby incurring a *deliberation-based* commitment of nonreconsideration with respect to the result that the principal commits the crime, without being complicit in the crime.[117] The problem is that the following proposition seems plausible: if a deliberation-based commitment of nonreconsideration with respect to the result that the principal commits the crime does not make one complicit in the crime, then neither does an intention-based commitment of nonreconsideration with exactly the same content.

Yaffe acknowledges this objection.[118] His response is to deny that the only difference between the two commitments is their source.[119] According to Yaffe, the deliberation-based commitment is conditional: it is irrational for the agent to reconsider an intention in light of a fact that they already considered in deliberation *unless the deliberation was itself irrational*.[120] In contrast, Yaffe thinks, an intention-based commitment of nonreconsideration is unconditional: it is irrational for the agent to reconsider their intention in light of a fact that is included in the intention's content *even if the intention is irrational*.[121]

Yaffe's response is unsatisfying for two reasons. First, Yaffe does not offer a convincing reason to think that deliberation-based commitments of nonreconsideration are conditional, but intention-based commitments of nonreconsideration are not. His argument for why intention-based commitments of nonreconsideration are unconditional is that intentions have the function of preventing agents from squandering mental resources on revisiting decisions that they have already made.[122] But it is unclear why the same argument is any less persuasive as applied to deliberation-based commitments of nonreconsideration. It seems equally plausible that deliberation has the function of settling once and for all whether a given set of considerations, on net, counsels in favor of or against performing the action in prospect.

Second, even assuming that Yaffe is correct that deliberation-based commitments of nonreconsideration are conditional and intention-based commitments of nonreconsideration are unconditional, it is difficult to see how such a fine distinction could make the difference between innocence and guilt.[123] As Yaffe acknowledges, "[i]t is one

117. *Id.* at 21–22.
118. *Id.* at 21–23.
119. *Id.* at 23.
120. *Id.* at 23–24.
121. *Id.*
122. *Id.*
123. *See* Sarch, *supra* note 1, at 146 ("[I]t is difficult to see why there is any difference in culpability between [the agent with the deliberation-based commitment of nonreconsideration and the agent with the intention-based commitment of

thing to identify a difference, quite another to show that the difference matters."[124] Yaffe's response is that the difference *does* matter: "if it was irrational for [the person with the unconditional commitment] to form the intention in the first place," he explains, then the commitment "silence[s]" the reasons against executing the intention.[125] But that is just another way of saying that the commitment is unconditional. Perhaps Yaffe is right that the distinction between conditional and unconditional commitments of nonreconsideration has *some* normative significance; as Sarch puts it, there is a sense in which the agent with the unconditional commitment is "more committed" than the agent with the conditional commitment.[126] But it is doubtful that the distinction has enough normative significance "to mark the kind of deep difference in culpability that could ground decisions to impose or withhold accomplice liability."[127]

B. Sherif Girgis's Proposal

Sherif Girgis offers a second alternative to the intention requirement. According to Girgis, the crucial assumption underlying both the intention requirement and Yaffe's proposed alternative is that "what matters is the helper's mental state *regarding the principal's commission of the crime*."[128] Girgis rejects this assumption.[129] In his view, instead of featuring a *mens rea* requirement with respect to the principal's conduct itself, accomplice liability should feature a *mens rea* requirement with respect to the principal's own mind regarding that conduct.[130] Even when an accomplice is paid upfront and hence need not intend for the principal to commit the crime, Girgis argues, the accomplice must still intend for the principal *to intend* to commit the crime, at least until the principal has paid the accomplice.[131] After all, if the principal were to abandon their intention to commit the crime before paying the accomplice, then the deal would be off and the accomplice would not collect their pay.[132]

Although he thinks that intending for the principal to intend to commit the crime should be necessary to satisfy accomplice liability's

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nonreconsideration], which would make accomplice liability appropriate for one but not the other.").

124. Yaffe, *supra* note 1, at 24.
125. *Id.* at 25.
126. Sarch, *supra* note 1, at 147 (emphasis omitted).
127. *Id.* at 148.
128. Girgis, *supra* note 2, at 473.
129. *Id.*
130. *Id.* at 474–76 (proposing that the law "look to [the accomplice's] disposition toward [the principal's] criminal intention" rather than "focus on [the accomplice's] disposition toward [the principal's] crime").
131. *Id.* at 474.
132. *Id.*

mens rea requirement with respect to the principal's conduct, Girgis does not think that it should be sufficient.[133] To explain why, he presents the following hypothetical.[134] Suppose that Brutus is an elusive serial killer. To catch him, Cassius lures him into a fake plot to assassinate Caesar. Unbeknownst to Brutus, Cassius intends to arrest him before he harms Caesar. Unfortunately, Brutus manages to assassinate Caesar anyway. According to Girgis, Cassius should not be liable as Brutus's accomplice even though Cassius intends for Brutus to intend to assassinate Caesar.[135] Therefore, Girgis concludes, intending for the principal to intend to commit the crime should not be sufficient to satisfy accomplice liability's *mens rea* requirement with respect to the principal's conduct.[136]

To exclude defendants like Brutus from liability, Girgis adds a second necessary condition to his proposed *mens rea* standard: it must be the case that the defendant neither intended nor expected that the principal would fail to execute their intention to commit the crime.[137] Thus, Girgis proposes:

> (G) The *mens rea* with respect to the conduct that constitutes P's crime that should be required for liability for the crime as an accomplice is (1) intending that P "form or keep (however temporarily) an intention to commit the crime" and (2) "not expect[ing] or intend[ing]" that P will fail to commit the crime.[138]

The first condition ensures that accomplice liability sweeps broadly enough to capture people like Alice in Bank Theft II, while the second condition ensures that accomplice liability does not sweep so broadly as to capture people like Brutus in Girgis's example.

There are at least two problems with (G)'s first condition. To bring the first problem into view, consider Girgis's response to an "apparent counterexample" where the accomplice tells the principal: "You shouldn't go through with [the crime]; it's wrong. But assuming you will, you'll need to hire [an accomplice], and it might as well be me, so that I can make some money."[139] Girgis recognizes that the accomplice in such a case could claim that they were "indifferent all along" to whether the principal retained the intention to commit the crime—on the one hand, all else being equal, they wanted the principal to do the right thing; on the other hand, all else being equal, they wanted to get paid.[140] But Girgis doubts that such a claim would be credible.[141]

133. *Id.* at 475–76.
134. *See id.* at 475.
135. *Id.*
136. *Id.* at 475–76; *cf. supra* section IV.D.
137. *Id.*
138. *Id.* at 466–67, 475–76.
139. *Id.* at 489.
140. *Id.* at 490.
141. *Id.* ("[M]ost of us (and most courts) would be inclined to find complicity simply because we would disbelieve [the defendant's claim of indifference].").

"If a minimally rational person positions himself to benefit from something's occurring, and does so despite great risk and steep moral cost," Girgis explains, "he will be disposed to intend whatever must happen for him to get the benefit."[142]

The problem is that it is possible to imagine cases where the accomplice does not stand to benefit from the persistence of the principal's intention to commit the crime. For example, imagine a variation on Part III's bank-theft cases—call it "Bank Theft IV"—where Alice knows that she will receive a large bonus if, but only if, Peter fails to take the money in the vault. Because the bonus is worth more than what Peter is offering Alice as a bribe, Alice stands to *lose* if Peter keeps his intention to commit the crime. For this reason, she tries to talk him out of it, making bank security and the vault's lock sound more formidable than they are. But Alice also knows that Peter is so talented a criminal that, with or without her help, he will find a way to steal the money in the vault if he decides to try. And she is too afraid to go to the police. So, after failing to convince Peter to abandon his intention, she decides that if Peter is going to take the money anyway, then she might as well collect the bribe and thus recover part of the bonus that she will lose. Reluctantly, Alice agrees to open the door, and Peter takes the money.

Bank Theft IV appears to be a counterexample to (G). Clearly, Alice should be liable for theft as Peter's accomplice. But it is doubtful that Alice intends for Peter to "form or keep an intention to commit" the theft.[143] At the very least, if Alice does not intend for Peter to commit the crime in Bank Theft II, then surely Alice does not intend for Peter to intend to commit the crime in Bank Theft IV. Presumably, the reason why some would deny that Alice intends for Peter to commit the crime in Bank Theft II is that she lacks a desire or other "pro[-]attitude"[144] toward Peter's commission of the crime.[145] In Bank Theft IV, however, Alice not only lacks a pro-attitude but has an "anti-attitude" toward Peter's commission of the crime: she would rather he not go through with it successfully. Certainly, she is not "position[ed] . . . to benefit"[146] from either Peter's commission of the crime or the persistence of his intention to commit the crime. So, it is difficult to see how (G) can account for cases like Bank Theft IV, especially

142. *Id.*
143. *Id.* at 476.
144. Davidson, *supra* note 48, at 686.
145. *See, e.g.*, Alexander, *supra* note 4, at 945 (arguing that the intention requirement excludes liability for accomplices in similar cases because such accomplices lack a "desire to see the crime committed"); Duff, *supra* note 4, at 169–70 (arguing that the intention requirement excludes liability for accomplices in similar cases because such accomplices cannot be said to "hope" that the principal commits the crime).
146. Girgis, *supra* note 2, at 490.

on the assumption that Alice does not intend to bring it about that Peter takes the money in Bank Theft II. And this assumption is what provides the motivation for considering (G) as an alternative to the intention requirement in the first place.

There is a second problem with (G)'s first condition. Recall the discussion in section IV.C of the accomplice who is paid before playing their part. Specifically, recall the variation on Bank Theft II—call it "Bank Theft V"—where Peter simply hands Alice a wad of cash after he demands that she open the door but before she has opened the door or even promised to open the door. Maybe Peter knows that his ruthless reputation will so deter Alice from refusing or, worse, double-crossing him that Alice will do as he asks even though the cash is already in her possession. Sure enough, after taking the cash, Alice plays her part by opening the door widely and discreetly.

Bank Theft V appears to be another counterexample to (G). Clearly, Alice should be liable for theft as Peter's accomplice. But it is doubtful that Alice intends for Peter to "form or keep an intention to commit" the theft.[147] Again, at the very least, if Alice does not intend for Peter to commit the crime in Bank Theft II, then surely Alice does not intend for Peter to intend to commit the crime in Bank Theft V. So, it is difficult to see how (G) can account for cases like Bank Theft V, especially on the assumption that Alice does not intend to bring it about that Peter takes the money in the vault in Bank Theft II. And this assumption is what provides the motivation for considering (G) as an alternative to the intention requirement in the first place.

C. Alexander Sarch's Proposal

Alexander Sarch offers a third alternative to the intention requirement. According to Sarch,

> (S) The *mens rea* that should be required for liability for another's crime as an accomplice is "the mental state of unjustifiably condoning" the crime.[148]

As Sarch uses the term, A "condones" P's action of ϕ-ing to the extent that the fact that A's ψ-ing will result in P's ϕ-ing does not "motivationally repel[]" A from ψ-ing.[149] Thus, A "possesses an *unjustifiably* condoning mental state" toward P's ϕ-ing if A "is *insufficiently* motivationally repelled" by P's ϕ-ing, "where this can involve either a pro-attitude toward [P's ϕ-ing] or an insufficient aversion to [P's ϕ-ing]."[150]

Presumably, Sarch would analyze Bank Theft II as follows. He would argue that Alice should be liable as Peter's accomplice because Alice was "insufficiently motivationally repelled"[151] by the fact that

147. *Id.* at 476.
148. Sarch, *supra* note 1, at 165 (emphasis omitted).
149. *Id.* at 164.
150. *Id.* (emphases added).
151. *Id.*

opening the door widely and discreetly would result in Peter's taking the money in the vault. If she had been sufficiently motivationally repelled, Sarch would say, then she would not have opened the door, or at least would not have opened the door widely and discreetly.

One problem with (S) is that it is possible for a person's assistance in a crime to be morally unjustifiable for reasons that do not warrant the imposition of criminal liability. For example, suppose that Alice swears to Bob when he is on his deathbed that she will never do what she knows will facilitate a drug deal. The next week, Alice walks by Peter's hot-dog stand. Paul is there, talking to Peter. Feeling hungry, Alice decides to buy a hot dog for $10 in cash. As she approaches the stand, she overhears Paul tell Peter that Peter must immediately produce an additional $10 in cash or else Paul will keep for himself the cocaine in his pocket. Peter responds that he does not have an additional $10 immediately available. Notwithstanding what she overheard and her promise to Bob, Alice follows through on her plan to buy a hot dog from Peter for $10 in cash. Peter uses the cash to complete the cocaine purchase from Paul.

In light of the oath that she swore to Bob when Bob was on his deathbed, Alice is clearly insufficiently motivationally repelled by the prospect of bringing about the drug deal. Thus, she has the mental state of "unjustifiably condoning" the drug deal.[152] According to (S), then, Alice should be liable for a drug offense as an accomplice. But no matter how morally blameworthy Alice may be, surely she should not be liable for a drug offense as an accomplice. Therefore, (S) is overinclusive.

Another problem with (S) is that it seems possible to be complicit in a crime for reasons that are morally even if not legally justified. For example, suppose that Alice is the night guard at a public building and Peter asks her to let him onto the property at night to create a work of art protesting a deeply unjust law. The work of art will be visible to thousands of people commuting past the building the next morning. If the law that Peter is protesting is unjust enough, then it is plausible that Alice can assist Peter without being "insufficiently motivationally repelled" by his actions,[153] even assuming those actions constitute criminal trespass and vandalism. According to (S), then, Alice should not be liable as Peter's accomplice for criminal trespass and vandalism. And that seems wrong. Therefore, this case suggests that (S) is not only overinclusive in some respects but also underinclusive in other respects.

152. *Id.*
153. *Id.*

VI. BEYOND ACCOMPLICE LIABILITY

The implications of Parts II–V extend beyond accomplice liability. The argument of the critics of accomplice liability's intention requirement, if sound, would disrupt not only the law of complicity but also other areas of criminal law, as well as areas of tort law. It would imply that criminal liability as a *principal* should rarely if ever be conditioned on having intended a certain result and that civil liability in tort should rarely if ever be conditioned on having intended a certain result. As explained in this Part, however, Part III's response to the criticism of accomplice liability's intention requirement is equally effective as a response to analogous criticism of principal liability's or tort liability's intention requirements.

A. Criminal Liability as a Principal

Start with principal liability for crimes that feature a *mens rea* requirement of intention. For example, consider the crime of bribing a public official, defined to involve offering a public official something of value with the intention of influencing the official's performance of their official duties. Suppose that Alice hires Peter, who knows Judge Janet well and is familiar with what she values, to bribe her to decide a case in a certain way. Peter agrees but demands his $10,000 payment upfront. Then, he selects an appropriate bribe—the promise of an appointment to the state supreme court—and approaches Judge Janet. In accordance with their agreement, Alice pays Peter after he extends the bribe but before Judge Janet decides the case.

Under the reasoning of the critics of accomplice liability's intention requirement, Peter need not and presumably does not intend to influence Judge Janet's performance of her official duties. Because he will have received his pay before Judge Janet issues her decision, he is indifferent to whether this decision is favorable to Alice. Therefore, according to the critics, Peter is innocent of the crime of bribing a public official, defined to require acting with the intention of influencing a public official in her performance of her official duties. Had his pay been contingent on the bribe's success, however, then Peter would have been liable. If that is right, then clearly the crime of bribing a public official should not feature a *mens rea* requirement of intention with respect to influencing the public official's performance of their official duties. Presumably, Peter should be liable both when he is paid upfront and when his pay is contingent on the bribe's success. But in any event the outcome in the two cases should be the same: whether Peter is liable should not depend on whether he is paid upfront.

The argument in Part III implies that this is a bad objection to the intention requirement of the crime of bribing a public official. Pro-

vided that he does what Alice hired him to do, Peter will offer a bribe whose content and manner of presentation will have the result that Judge Janet decides the case in the way that Alice wants her to. For example, Peter will offer Judge Janet something that she values highly. And he will do so in secret rather than publicly or in a message to Judge Janet's government email address. Thus, in the case where he is paid upfront, Peter endorses the following reasoning:

(1) I should perform an action that will have the result that I make $10,000.
(2) Offering Judge Janet a bribe whose content and manner of presentation will have the result that Judge Janet decides the case favorably to Alice will have the result that I make $10,000.
(3) Secretly offering Judge Janet an appointment to the state supreme court is offering Judge Janet a bribe whose content and manner of presentation will have the result that Judge Janet decides the case favorably to Alice.
(4) This action constitutes secretly offering Judge Janet an appointment to the state supreme court.
(5) Therefore, I should perform this action.

Because this reasoning frames the fact that Peter's action will result in Judge Janet deciding the case favorably to Alice as part of why Peter should perform the action, Peter acts with the intention of bringing it about that Judge Janet decides the case favorably to Alice. Therefore, Peter is liable not only when his pay is contingent on the bribe's success but also when he is paid upfront.

Objections and replies following this same pattern can be produced for other crimes featuring a *mens rea* requirement of intention. For example, if Alice hires Peter to take Violet's property and deliver it to Alice, then Peter should be liable for theft as a principal, even if he is paid while it is still to be determined whether Alice will escape and thus succeed in permanently depriving Violet of the property. Under the reasoning of the critics of accomplice liability's intention requirement, Peter need not and presumably does not act with the intention of permanently depriving Violet of her property. If true, this would show that theft should not require intending permanently to deprive the victim of the property. But it is false—Peter *does* act with the intention of permanently depriving Violet of her property—if the argument of Parts III–V is sound.

B. Civil Liability in Tort

Objections following the same pattern can also be produced for torts that feature a mental-state requirement of intention. For example, consider tortious interference with inheritance, which involves wrongfully interfering with someone's reasonable expectation of in-

heritance for the purpose of defeating that expectation.[154] Suppose that Dolores executes a will leaving everything to Tim. Later, however, after observing Violet exemplify virtue and Tim vice, Dolores announces her intention to revise her will to leave everything to Violet. Tim offers Tess, whom Dolores trusts, $10,000 to slander Violet so that Dolores does not revise her will. Tess agrees but demands payment upfront rather than a share of Dolores's estate if the plan succeeds. The plan does succeed: influenced by Tess's lies, Dolores hesitates about revising her will and dies before she can decide. In accordance with their agreement, Tim pays Tess $10,000 after she slanders Violet but before Dolores dies.

Under the reasoning of the critics of accomplice liability's intention requirement, Tess need not and presumably does not intend to bring it about that Tim remains the beneficiary of Dolores's will. Regardless of what Dolores decides to do once Tess has planted her lies, Tess will walk away with her reward from Tim. Therefore, according to the critics, Tess is not liable to Violet for tortious interference with inheritance. But if Tess's pay had been contingent on her success in convincing Dolores not to revise her will, then Tess would have been liable. If that is right, then clearly tortious interference with inheritance should not require an intention to defeat the plaintiff's expectation of inheritance. Presumably, Tess should be jointly and severally liable with Tim both when she is paid upfront and when her pay is contingent on her success in convincing Dolores not to revise her will. But in any event the outcome in the two cases should be the same: whether Tess is liable should not depend on whether she is paid upfront.

Again, the argument in Part III implies that this is a bad objection to the intention requirement for tortious interference with inheritance. Provided that she does what Tim hired her to do, Tess will tell lies whose content and manner of presentation will have the result that Dolores refrains from revising her will. For example, Tess will say things about Violet that Dolores will find reprehensible and things about Tim that Dolores will find commendable. For example, if Dolores loves cats, then Tess might say that Violet tortures cats and that Tim has started volunteering at an animal shelter. And Tess will pretend to be telling the truth; she will not, for example, wink or follow up with "just kidding." Thus, in the case where she is paid upfront, Tess endorses the following reasoning:

(1) I should perform an action that will have the result that I make $10,000.

154. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 19 (AM. L. INST. 2020).

(2) Making statements whose content and manner of presentation will have the result that Dolores refrains from revising her will will have the result that I make $10,000.
(3) Telling Dolores with apparent sincerity that Violet tortures cats and that Tim has started volunteering at an animal shelter is making statements whose content and manner of presentation will have the result that Dolores refrains from revising her will.
(4) This action constitutes telling Dolores with apparent sincerity that Violet tortures cats and that Tim has started volunteering at an animal shelter.
(5) Therefore, I should perform this action.

Because this reasoning frames the fact that Tess's action will result in Dolores refraining from revising her will as part of why Tess should perform the action, Tess acts with the intention of bringing it about that Dolores refrains from revising her will. Therefore, Tess is liable not only when her pay is contingent but also when she is paid upfront.

VII. CONCLUSION

For decades, scholars have argued that the intention requirement is underinclusive because it excludes from liability accomplices, such as those who were paid upfront for their assistance, who do not care whether the principal's criminal conduct occurs. But scholars have been unable to reach a consensus on what should replace the intention requirement. The knowledge requirement has its own problems, and the creative "middle way"[155] solutions that scholars have proposed have failed to gain traction in the literature or the law. This Article offers an explanation for the failure to produce a suitable alternative to the intention requirement: the intention requirement was right all along. Although the critics are correct that the law should hold liable the accomplice who does not care whether the principal's criminal conduct occurs, the intention requirement does not prevent the law from doing so. Close attention to the rational structure of complicity reveals that even accomplices who do not care whether the principal's criminal conduct occurs act with the intention of bringing it about that the principal's criminal conduct occurs.

Not only does this point vindicate the intention requirement in the context of accomplice liability, but it also supports the use of intention requirements in civil liability and other areas of criminal liability. Some have urged the law to "move beyond intention."[156] This Article suggests that the law should demur.

155. Yaffe, *supra* note 1, at 13.
156. Ferzan, *supra* note 53, at 1152.