DUMB AND DUMBER: RECKLESS ENCOURAGEMENT TO RECKLESS WRONGDOERS

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This paper discusses compound recklessness, i.e. situations in which one person's heedlessness helps another to commit a reckless offense. The conviction of the second party, who actually commits the offense, poses no unique problem. Offenses committable through various forms of criminal negligence and recklessness, such as involuntary manslaughter, are routinely available in every jurisdiction. But conviction of the first party who recklessly provided the means or opportunity for the second party's acts poses significant problems.

Part I of this paper looks at several cases which present illustrations of the kind of situations encountered. In Part II, the paper considers some of the complications involved in reaching an appropriate resolution of this dilemma. Part II A considers complicity as a possible solution but concludes it is unavailable as it requires an intention to aid another, which is absent in cases of recklessness and negligence. Part II B considers whether principles of causation might be utilized, but concludes they, too, are unsuitable. The second party's criminally reckless or negligent activity is apt to be considered an intervening, superseding cause, leaving the first party free of any criminal liability for harms caused by the final actor. Part II C considers the relatively new offense of Reckless Endangerment, an offense pioneered by the Model Penal Code which could, unlike complicity or causation, provide a means to criminally sanction the initially reckless individual who aids another in committing a reckless offense. Reckless endangerment is ultimately unsuitable, however, for while it may well be available in most states (sixty percent), it is by no means available in all, and where it is available is generally graded as a misdemeanor only, with a maximum imposable prison term of about a year.

This paper argues that in many cases such a relatively minor grading is disproportional to the harm committed, such as death or serious physical injury, and Part III proposes a new statute to address the problem. The policy arguments which must be considered in drafting such a statute are considered in Part III A, with the objective elements of the new offense considered in Part III A(1) (degree of aid or encouragement); Part III A(2) (omissions); Part III A(3) (resulting harm); and Part III A(4) (circumstances). The subjective

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elements of the proposed statute will be considered in Part III A(5). Part IV provides the definition of the proposed offense, together with a brief explanation of each of the elements that have been chosen to constitute its definition. A final consideration of how the proposed statute might be applied to the four illustrative cases is also provided.

I. ILLUSTRATIVE INSTANCES

"Shoot me. I'm ready." These were the last words of twenty year-old Daniel Wright, who put on what he mistakenly thought was a bulletproof vest so that he could have the experience of being shot before he joined the military. His friends gathered at a deserted field at 2:30 in the morning. Just as Wright instructed, one of the friends fired a shotgun into his chest at point blank range. It turns out, unknown to Wright and his buddies, that body armor comes in several different grades, among them the "flack jacket" which is designed to stop flying shrapnel and such things, not bullets. It was such a jacket that Wright wore that night, not a "bulletproof vest," and the shotgun blast tore fatally into his chest and heart.[1]

Twenty-two year-old Jason Welch was not a saint, but he was well intentioned. Welch, a guest at what the newspapers called a "marijuana-fueled party" attended by a number of young people in a thirty-unit apartment house, noticed that someone had tucked a nine millimeter Ruger semiautomatic pistol under his host's living room sofa. Recognizing the danger that such an instrument represented in the midst of such revelry, Welch took it upon himself to empty the weapon.

Although he had had no formal weapons training, he confidently applied the lessons he had learned from watching television shows and movies and ejected the ammunition clip and "racked the slide." What he apparently did not realize is that there is a proper sequence in which the operation has to be performed, with the ammunition clip being removed first and then "racking the slide" to clear the chamber. Performing these acts in the wrong sequence by moving the slide first simply replaces the bullet ejected from the chamber with another stored in the clip. Ejecting the clip afterwards does not remove the bullet now loaded in the firing chamber. Welch apparently performed the operations in the wrong order and when he pulled the trigger to finish the job on what he thought was now an empty gun, it fired.

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1. Ruth Ann Krause, *Man Linked to Flak-Jacket Fatal Shooting Pleads Guilty*, GARY IND. POST-TRIB., July 26, 2007, at A10; Karen Snelling, *Victim to Friends:"Shoot Me: I'm Ready,"* GARY IND. POST-TRIB., Feb. 12, 2005, at A1.

The pistol was pointed at the floor when it discharged. Kathryn Lally, who was watching television in the living room of the apartment directly below, was struck in the heart. Her mother found her dead the next morning, still sitting in front of the television.[2]

Joshua Paniccia was driving with a friend at well over eighty miles per hour in a forty-five miles per hour zone when he struck and killed a bicyclist. The cyclist's grieving mother told the judge at Paniccia's sentencing that she felt betrayed by a legal system that had allowed Paniccia to "plead down" a number of prior speeding offenses that occurred before the fatal collision. At sentencing, the prosecutor castigated the driver's parents for not taking away the youth's license, which they were legally authorized to do, when he was repeatedly stopped for speeding and racing. Instead of controlling their son, it appears they had enabled him by helping him purchase his "cherry red, souped-up 2002 Nisan Sentra."[3]

Engines roared as two cars, a Mitsubishi Eclipse and a Chevrolet Camaro, raced down a public street towards a crowd gathered outside a Dairy Queen. The Camaro's driver, Amilcar Valladares, less skillful or less lucky than his competitor, Sara Wall, lost control of his car, struck a utility pole and careened into the lines of waiting people. Miraculously, no one was killed even though several people were struck, and some were even thrown out of their shoes by the impact.[4]

In all of these cases, there is little doubt that the principal actor is criminally liable for a reckless homicide or assault. There was no intent to kill or injure in any of these misadventures, just reckless or seriously negligent[5] behavior. The crimes of manslaughter or assault (and assorted more specific offenses) are ready and waiting to deal with such actors. But what of those who also had some share in the blame? What are the responsibilities of the

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2. John Ellement & Donovan Slack, *Shot Through Floor Kills Woman Downstairs*, BOSTON GLOBE, June 28, 2005, at A1.

3. Pam Allen, *Fatal Crash Driver Had Been Cited*, DAILY GAZETTE (Schenectady, N.Y.), July 13, 2004, at B3; Leigh Hornbeck, *Victim's Mother Speaks of Betrayal*, TIMES UNION (Albany, N.Y.), June 7, 2005, at B1.

4. *See* Dáncia Coto, *Teen Describes Racing Accident That Injured Five*, CHARLOTTE OBSERVER, May 27, 2005, at 5B.

5. Terminology can be a problem here since "negligence" can be used to denominate either a genus or a species. "Negligence" can be used as a generic term to designate a want of proper attention or care in one's actions, or it can be a quite specific term designating a failure to be aware of risks in one's actions of which one should have been aware but was not. In this sense "negligence" is distinguished from "recklessness" in which the actor is aware of the risk but chooses to run it regardless. This last usage has acquired near canonical status since the advent of the Model Penal Code and I will adhere to that received usage, employing, as suggested by the Model Code itself, the term "unreasonable" to designate the genus of careless behavior. *See* MODEL PENAL CODE § 1.13(16) (2001).

friends who partied with Dan Wright, the person who concealed the gun found by Jason Welch, the parents who allowed Josh Paniccia to continue to drive (and the friend who rode with him), and Amilcar Valladares's competitor to both society and the law?

These four cases were randomly stumbled upon during the spring and early summer of 2005. Doubtless there are scores of other similar cases which happen all the time, but these cases present the inquiry of this article: what is the best response to the problem of those who recklessly encourage or enable reckless wrongdoing by others?

Three responses immediately come to mind. First, the law might use the doctrine of complicity to hold such persons accountable for the acts of the principal. Second, the principles of causation could be used to hold the encouragers and aiders directly and personally responsible for the harms ultimately produced. Both of these strategies seem initially attractive, but both are ultimately unsatisfactory. A third possibility, the offense of Reckless Endangerment pioneered by the Model Penal Code,[6] could be employed, but it is not entirely suitable as it does not mark a proper fit between the wrong done and the punishment imposed.

A. Complicity

The cases illustrated above demonstrate a sort of compound negligence where one person's carelessness assists another's imprudence. Complicity, or accomplice liability, therefore seems to be an obvious place at which to begin. Complicity deals with "the circumstances under which a person who does not personally commit a proscribed harm may be held accountable for the conduct of another."[7] The "doer of the deed" (the actual perpetrator) is not the only person criminally liable for the offense. Those who aided or encouraged him may also be held liable for the crime committed.

The common law devised various categories of participants in crime. For felonies,[8] the principal in the first degree was the primary actor, the one

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6. *See* MODEL PENAL CODE § 211.2 (1980).
7. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 465 (5th ed. 2009).
8. The common law did not develop sharp distinctions in the forms of participation in either treason or misdemeanor. As Perkins and Boyce state, "guilt of such crimes may be incurred by incitement or abetment as well as by perpetration . . . ." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 735 (3d ed. 1982). However, the elaborate distinction between principals of various degree and accessories before and after the fact was not employed. The common law did "not descend to distinguish the different shades of guilt in petty misdemeanors." *Id.* at 726 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 36 (1769)). If one perpetrated treason or a misdemeanor, or abetted or incited it, one was simply guilty of the principal offense.

who had done the criminal deed, and all others who criminally aided or assisted him derived their liability from him.[9] Aid or assistance could take many forms, such as soliciting or ordering the commission of the crime, assistance or counsel in the planning or commission of the crime, incitement or encouragement of the principal actor to commit the offense, emboldening him to act,[10] or otherwise aiding or abetting the crime's commission. Depending on whether or not one was present at the scene of the crime, those who criminally aided or abetted the principal were either principals themselves (but in the second degree) if they were present at the scene either actually or constructively, or, if absent from the scene at the time of the crime's commission, they were accessories either before or after the fact. As a practical matter, there was considerable procedural significance to these distinctions which could be quite nice,[11] but the substantive result was the

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9. The law of complicity is discussed in some depth in a number of standard text books. *See, e.g.*, DRESSLER, *supra* note 7, ch. 30; 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, ch. 13 (2d ed. 2003); PERKINS & BOYCE, *supra* note 8, ch. 6, § 8.

10. Acts which encourage or embolden another to pursue or persist in negligent action seem to play a significant role in many of the cases, as in the death of Daniel Wright or the injuries caused by Amilcar Valladares. Accomplice liability has been predicated on acts of shouting or otherwise communicating approval and a desire that the principal actor continue in his or her course of conduct. *See, e.g.*, Wilcox v. Jeffery, (1951) 1 All E.R. 464 (K.B.); R. v. Black, [1970] 72 W.W.R. 407 (Can.). In *State v. Ochoa*, 72 P.2d 609 (N.M. 1937), a crowd, angered at an arrest occasioned by an eviction, had gathered at the courthouse where a hearing was being held. "[T]hey pounded on the windows, shouted and cursed, and some of them threatened to kick the door down." *Id.* at 612. When the prisoner was sought to be returned to jail, a riot ensued in which the Sheriff was killed and others injured. It was not entirely clear who had fired the fatal shot. The court said of accomplice liability:

> The evidence of aiding and abetting may be as broad and as varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs, or by any other means sufficient to incite, encourage or instigate commission of the offense or calculated to make known that commission of an offense already undertaken has the aider's support or approval.

Id. at 615. The encouragement, however, must be given with the purpose of producing the principal actor's conduct. *See* Hicks v. United States, 150 U.S. 442 (1893); R. v. Clarkson, (1971) 3 All E.L. Rep. 344 (C-MAC).

11. Many writers have commented on the intricacies of the common law system of parties to crime. Dressler cites a number of them in his textbook in the first footnote to his chapter on complicity. *See* DRESSLER, *supra* note 7, at 465. Especially interesting observations are made by Richard Bonnie and colleagues. RICHARD J. BONNIE ET AL., CRIMINAL LAW 680-81 (2d ed. 2004) ("the distinction between principals and accessories was critically important . . . . This scheme invited evasion of justice.") and by Perkins & Boyce who attribute the nicety of principal-accessory distinctions to a "dissatisfaction . . . [with] an excessive number of executions in felony cases" which unsurprisingly "tended to prevent conviction despite clear evidence of guilt." PERKINS & BOYCE, *supra* note 8, at 751-52.

same for all categories of participant: all were guilty of the offense which had been committed by the primary actor.[12]

Accomplice liability could be imposed based on the commission of a variety of acts: direct commands or requests, physical assistance by various means, psychological encouragement, even by acts of omission. But the paradigm of the subjective component of complicity has always been generally agreed to be an intention or purpose to bring the crime about.[13] There has been some argument, as noted in footnote thirteen, over whether knowledge that one's conduct would aid another to commit a crime should be sufficient for accomplice liability. Some argue that one should not knowingly aid another to commit a crime, such as by providing a fee-based answering service for a known prostitute regardless of whether one is entirely indifferent as to her professional success or has a true purpose to promote the commission of her offense.[14]

Others argue that citizens should be free to go about their normal legitimate business even if they know that another will take advantage of their activities to commit a crime. An example often given is the seller of ordinary sugar who sells to a customer who he knows will use the sugar to make moonshine whiskey.[15] However, regardless of the divergence in views expressed about "mere" knowledge, the orthodox position is that recklessness

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12. The treatment of accessories after the fact has been a bit different. *See, e.g.*, BONNIE ET AL., *supra* note 11, at 681-82; DRESSLER, *supra* note 7, at 471. As Dressler notes, "[t]oday, nearly all jurisdictions treat accessory-ship after the fact as an offense *separate* from, and often *less* serious than, the felony committed by the principal in the first degree." *Id*.

13. Discussions of complicity typically begin with a statement such as Dressler's: "Courts frequently state that a person is an accomplice in the commission of an offense if he intentionally aids the primary party to commit the offense charged." DRESSLER, *supra* note 7, at 477. Then there is a discussion of whether knowledge that one's conduct will aid another to commit a crime should suffice to hold a person liable, often discussing the classic debate among the drafters of the proposed Model Penal Code and voting members of the American Law Institute. This debate is discussed at some length in the comments to section 2.06. *See* MODEL PENAL CODE § 2.06 cmt. 6(c) (1985). In this debate the drafters favored an extension of liability to some cases of knowing facilitation, noting that "[w]hether or to what extent this position involves departure from existing law, it is most difficult to say." MODEL PENAL CODE § 2.04 cmt. 2 (Tent. Draft No. 1 (1953)). The drafters then discussed various cases which might be argued to go in one or another direction depending on the facts to which they are related. The drafters' proposal was rejected by the Institute as a whole in favor of limiting accessorial liability to purposive conduct. As the current comments note, "[m]any recent revisions and proposals [among the States] reflect a similar judgment" in rejecting knowledge as a sufficient mens rea. MODEL PENAL CODE § 2.06 cmt. 6(c) (1985).

14. *See, e.g.,* People v. Lauria, 59 Cal. Rptr. 628 (Cal. Ct. App. 1967).

15. *See* United States v. Falcone, 109 F.2d 579 (2d Cir. 1940), *aff'd*, 311 U.S. 205 (1940).

and negligence are not sufficient mental states to incriminate one as an accomplice.[16]

Recklessness and negligence are conceived of as belonging to a fundamentally different category of culpability than that occupied by purpose and knowledge. As Holmes said, "even a dog distinguishes between being stumbled over and being kicked."[17] George Fletcher writes of "the classic distinction between dolus (intention) and culpa (negligence)"[18] which he states is the "basic cleavage . . . [in classifying] the states of mind used in criminal legislation."[19] Thus, an individual who acts only recklessly or negligently has no liability for a crime which requires intent, or perhaps knowledge. Liability in such a case would be incongruous. In *People v. Hernandez*, the court dealt with the analogous situation of intentional attempts to commit negligent offenses. The court said: "[T]he words 'attempt' and 'negligence' are at war with one another; they are internally inconsistent and cannot sensibly coexist."[20] As Robinson writes, "[O]ne cannot, it is claimed, accidentally be an accomplice."[21] Dressler goes on to explain:

> [C]ourts and statutes frequently express the culpability requirement for accomplice liability in terms of 'intent', e.g., the 'intent to promote or facilitate the commission of the offense.' . . . If so, it is logically impossible for a person to be an accomplice in the commission of a crime of recklessness or negligence.[22]

The people being considered here are acting with recklessness or negligence, likely of a degree sufficient to be considered criminally culpable, but often not

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16. A related issue arises where an actor intentionally aids or encourages another to engage in particular reckless conduct. If that other person performs the encouraged conduct and thereby commits a reckless crime, there is a question of whether the first actor can be convicted of that reckless crime as an accomplice. This question will be discussed later (*see infra* notes 47-66 and accompanying text) but note carefully that the aid or encouragement there discussed is given intentionally; that is not a case of recklessly or negligently stumbling into accessorial liability.
17. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Dover 1991) (1881).
18. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 443 (Oxford Univ. Press 2000) (1978).
19. *Id.* at 442. *See* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW (1998).
20. People v. Hernandez, 614 P.2d 900, 901 (Colo. Ct. App. 1980).
21. PAUL H. ROBINSON, CRIMINAL LAW 327 (1997).
22. DRESSLER, *supra* note 7, at 481. Professor Dressler has, however, begun to consider if complicity could be conceptualized in terms of the accomplice taking a risk that another will commit a crime. *See* Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense*, 5 OHIO ST. J. CRIM. L. 427 (2008). He discusses several articles considering various risk-based analyses and accepts none of them completely; but he does write that "I acknowledge that the criminal conduct of [accomplices] *can* coherently be seen as a risk-based, rather than a harm-caused, doctrine." *Id.* at 446. If excessive risk-taking becomes the focus of accomplice liability, then the emergence of recklessness as a suitable mens rea would seem entirely possible, if not inevitable.

with the intent or knowledge requisite for accomplice liability. For example, in the case of Daniel Wright, who died of a lethal shotgun blast to the heart, Wright intentionally directed his friend Robert Stottlemire, the principal in the first degree to a reckless homicide, to "shoot me." Aside from the pathos and complications caused by the law of suicide,[23] Wright's conduct is a classic instance of accomplice liability being incurred through intentionally directing or ordering another to do a criminal act.[24] But what of Wright's other friends present in the field that night? Seemingly, the events unfolded after a night of drinking in which all the young men, aged eighteen through twenty, were willing participants.[25] Only Wright directly ordered or solicited the fatal shot, but all are likely to have behaved with gross negligence.

When faced with an inebriated friend proposing to engage in such heedless behavior, any reasonable man would discourage it. A reasonable person certainly would not actually encourage this behavior by accompanying his friend in a drunken revelry to a deserted field in the middle of the night with a loaded shotgun. It is not clear exactly what was said that night or what messages the friends implicitly conveyed to each other by their conduct. Yet, regardless of how reckless the facts may show the friends to have been,[26] they

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23. "Self-destruction is a form of homicide, and a felony under English common law." WILLIAM LAWRENCE CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 623 (7th ed. 1958). The legal treatment of such deaths varied over time, from originally punishing such a "*felo de se*" with ignominious burial and forfeiture of lands and goods to later leaving the conduct unpunished. Suicide, although a deliberate and unlawful killing, did not constitute murder which required the killing of another. *See id.* at 623-28 and PERKINS & BOYCE, *supra* note 8, at 119-24. (Both authorities contain extensive citations to common law authority.) However that may be as a matter of history, a deliberate order to another person to unlawfully kill a human being remains an archetypical example of the kind of conduct which supports accomplice liability.

24. For a civil case with similar facts, see Michael R. v. Jeffrey B., 205 Cal. Rptr. 312 (Cal. Ct. App. 1984) (suit for damages where secondary actor urged the primary actor, while armed with a powerful slingshot, "Hey, shoot him, go for it." The court rejected the defense that there was no tort of "negligent encouragement" and that the secondary party was a mere "verbal bystander.").

25. *See* Ruth Ann Krause, *One-Year Term For "Flack Jacket" Lie*, GARY IND. POST-TRIB., Aug. 31, 2007, at A5.

26. The influence of crowd psychology in instigating negligent behavior can be seen at illegal road races, an increasingly common occurrence. These more or less organized events include crowds of spectators, encouraging the contestant drivers in exciting demonstrations of skill, daring and really stupid, i.e. grossly negligent, behavior. In one, detailed in a 2008 article, the crowd surged onto a rural highway behind two drag racers who had just started down the road in a cloud of smoke from spinning tires. Another driver then came over a rise in the road, could see nothing for the haze, and plowed into the hidden crowd, hurling bodies in all directions, killing eight. In an ironic twist, it seems that the driver may himself then have been engaged in another road race. *See* Brent Jones, *Racing Deaths Charges: Two Men Indicted on Eight Vehicular Manslaughter Counts*, BALT. SUN, July 30, 2008, at 1B. *See also* Victoria Kim, *Nearly 200 Arrested at Street Racing Site in Ontario*, L.A.TIMES, Sept. 29, 2008, at B4.

In another, detailed in a 2002 *Washington Post* article, two police officers were charged with "neglect of duty" after they watched such a race, taking place just beyond their jurisdictional boundary, while

are not accomplices to the deed and bear no homicidal liability absent any intentional action designed to get Stottlemire to fire the fatal shot.

Faced with this legal reality, the prosecution charged them with offenses stemming from the cover up of their involvement in the scheme.[27] But Stottlemire was the only person who was charged with anything related to Wright's death itself. It may be argued that this is a desirable result. The man who made the choice to fire the shot is being held responsible for his conduct, as would be the man who purposely directed that the act be done, if he had survived. The other young men have themselves shot no one and have not been connected to the homicide to such a substantial extent that they should be found guilty of committing it. Yet they certainly appear to have acted culpably. Their conduct was very dangerous, and at the end of it someone was dead–the victim of lethal violence.

Additionally, the life and health of other people were put in jeopardy, specifically that of the black citizens of Gary, Indiana, who were the objects of the police department's "full court press." During this crackdown, "anyone out walking" in the black area of town (where the shooting had supposedly occurred) was stopped and questioned, doubtless with the civility and courtesy for which police officers are justly famous.[28] This is conduct of a kind we may well wish to seriously discourage, whether it is committed again by Wright's friends or by some other similarly heedless young men. They would

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"play[ing] music on loud speakers to encourage the race." Sue Anne Pressley, *The Fast and the Fatal: Drag Racing Resurges; Illegal Thrills End in Death Across U.S.*, WASH. POST, Mar. 17, 2002, at A1.

27. After firing the fatal shot, Stottlemire helped place Wright in the car they had driven to the field, then ran away, leaving his friends, Michael Searle and Brock Beiker, with the shotgun they had taken from Beiker's father, the car, and the wounded Wright. The two drove Wright to a local hospital and told people what had happened. Rather than tell the truth, Searle had fired a shotgun blast into the car's windshield before they left the field to lend credence to the story they both had concocted of having been attacked by a black man wearing jeans and a knit cap from whom they had sought to purchase either alcohol or drugs. The young men were all white and from the suburbs; the supposed assailant was black and an urban drug dealer. The Gary, Indiana police mounted a "full court press" to find Wright's killers, stopping "anyone out walking" in the vicinity of the supposed homicide scene. "The whole unit (i.e., the homicide squad) put everything on hold to try and find the crime scene." The next day another young man who had been at the scene of the real shooting, accompanied by his parents, walked into the police station to tell the police what he had seen. At this point Searle and Beiker's story began to collapse and they then told the truth.

28. Professor Katheryn Russell discusses the phenomenon of the "racial hoax," i.e. false accusations of crime made principally against young black men. The motives for such hoaxing may be various, but many, as in the case of the death of Daniel Wright, are efforts to cover up the hoaxer's own wrongful conduct through use of racial stereotypes which appear to lend verisimilitude to the accusation. She considers a number of notorious instances of such conduct and proposes that such conduct itself be made a crime. Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593 (1996).

seem to be prime candidates for some criminal sanction, yet the charges against them stem only from the fact that they lied to the police after the homicide had occurred. It might be wise to establish a new offense more precisely tailored[29] to the dangers such persons pose and the personal blameworthiness that they exhibit.

Similarly, Jason Welch, who tried so clumsily to disarm a pistol found at a pot party, was also charged as the principal in a murder case. Whoever put the loaded pistol in the living room sofa aided Welch in the offense by providing him with the very weapon he used to kill Kathryn Lally. If this assistance had been provided intentionally, accomplice liability for the provider would be found easily. Supplying a criminal with the instruments necessary to commit a crime is another classic instance of the conduct of an accomplice.[30]

However, there is nothing which would indicate any intent to kill Lally. Hiding a loaded pistol in a sofa in the middle of a crowded, alcohol-fueled party is likely gross negligence. Still, however foreboding the conduct, it is not practically certain to cause death and the resulting death of Kathryn Lally can not be punished as a knowing homicide. Absent either a purpose to assist in the homicide or knowledge that they were doing so, the provider of the gun bears no accomplice liability for killing Lally.

It is important to note that weapon-possession offenses were charged against several of the party attendees and that other charges might have been possible. However, no charges arose out of Lally's death against any of the party goers. Again, one might argue that this is as it should be. The gun's owner may be careless, even criminally so, but it was the hubris of the ill-advised Welsh (who thought he knew enough about the workings of deadly firearms from watching Hollywood productions) that lead to the death of

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29. It is notable, for example, that no black citizen of Gary, Indiana was in fact shot and killed, while Daniel Wright was. One might wish to distinguish the two situations by imposing an appropriately more severe sanction in the case where death occurred as opposed to where it was "only" risked. Similarly, firing a shotgun directly at a man's heart with only a "bullet proof vest" of unknown provenance between him and eternity might be regarded as an act amounting to sporting with human life, of significantly greater depravity than exposing citizens to a chance of official harassment or violence. Such elements of result and mens rea are discussed later in connection with the proposed statute penalizing compound recklessness.

30. Thus Lady Macbeth, who had in fact killed no one, felt unable to wash the blood of the murdered King Duncan (and others) from her hands. She had "laid their daggers ready" for her husband to use in the bloody deed. WILLIAM SHAKESPEARE, MACBETH act 2, sc. 2.

Kathryn Lally. Yet, it is only the fact that firearms are heavily regulated that allows the authorities to take any action at all against the careless owner.[31]

In our third case, Josh Paniccia pled guilty to Criminally Negligent Homicide in the death of David Ryan, the thirty-two year old bicyclist struck by Paniccia when he lost control of his speeding, souped-up car. Paniccia had a passenger in the car at the time of the homicide. Had that passenger intentionally encouraged Paniccia to speed dangerously down the road, the passenger clearly would have incurred accomplice liability.[32]

But what of Paniccia's parents? The case occurred in New York. New York law requires parental consent for a minor to be issued a driver's license. Additionally, New York law allows the parent to withdraw that consent by filing a form with the Department of Motor Vehicles which will then cancel the license.[33] Thus, New York gives parents the power to take away their children's driving privileges should the child prove unworthy of them. However, it is an open question as to whether a legal duty to do so exists.

Paniccia, a relatively new driver, had been arrested for speeding three times in the twenty-one months preceding the fatal collision and had committed some other unspecified moving violations before that.[34] His parents did nothing to revoke his license and get Paniccia off the road. Instead, they helped him purchase the cherry red car and aftermarket add-on equipment, including a supercharger and racing tires, which enabled him to drive even faster than the car would go otherwise. The prosecutor criticized them pointedly at sentencing for enabling their son to continue to be a menace to all others on the road.[35] No charges were brought against them, likely because of the difficulty in establishing a legal duty to act.

But what if a legal duty to restrain their son's wayward activity could be established? Then the failure to fulfill that duty would have aided Paniccia by

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31. Equally reckless assistance in the misuse of unregulated materials may well be immune from police or prosecutorial intervention. For example, if the person who had hidden the gun had instead hidden a large kitchen knife or an elaborately ornamented samurai sword behind the sofa cushions, their actions might still forebode ill consequences, yet kitchen equipment and oriental collector's items are not normally subjected to close regulation.

32. *See, e.g.*, People v. Madison, 51 Cal. Rptr. 851 (Cal. Dist. Ct. App. 1966), where the passenger urged the driver who was pursuing another car to "Get him, Bill" and "Don't lose him, Bill." *Id.* at 853. Where the passenger had "prodded" the driver to drive recklessly and "spurred her to elude the [pursuing] police," the Maine Supreme Court reached a similar conclusion of liability using the language of proximate causation rather than complicity. People v. Saucier, 776 A.2d 621 (Me. 2001).

33. N.Y. VEH. & TRAF. LAW § 502(2)(d) (McKinney 2004).

34. Pam Allen, *Fatal Crash Driver Had Been Cited*, DAILY GAZETTE (Schenectady, N.Y.), July 13, 2004, at B1.

35. Leigh Hornbeck, *Victim's Mother Speaks of Betrayal*, TIMES UNION (Albany, N.Y.), June 7, 2005, at B1.

leaving him on the road. Similar to the owner of the pistol used by Jason Welch, the parents of Josh Paniccia, had there been a legal duty, would have aided their son in the killing of the cyclist by providing him with the opportunity and means to do so.

However, the mens rea problem would again prevent the law of accomplice liability from holding them accountable for the death they in fact aided. The parents clearly did not intend to assist their son in driving recklessly. Sufficient knowledge to support accomplice liability might arguably exist if Paniccia's reckless behavior is seen as "practically certain" to occur.[36] However, his conduct was extraordinarily foolish. He exceeded the speed limit by approximately fifty miles per hour, roughly doubling the posted limit of forty-five miles per hour, on a winding two-lane country road. His conduct might be a foreseeable possibility. Therefore, recklessness or negligence might be found. However, it is difficult to believe that such wild behavior would be certain to result from merely allowing him to drive upon public roads.

Thus, traditional complicity doctrine would insulate Paniccia's parents from being considered accomplices in their son's homicide. Perhaps even more so than in the previous cases, there is an attractive argument that this is a good result. The dignity and responsibility of the individual is a basic core value of our civilization. We hold that guilt is personal and not collective.[37]

The law of complicity, even when it holds one person liable for the acts committed by another, is designed to honor these values by limiting liability to those situations where one has chosen to associate himself/herself with the aims of another and has tried to bring those aims about. Holding parents responsible for the criminal offenses of their children based on a failure to properly raise and discipline them obviously presents disquieting prospects. If we think that the sins of the fathers should not to be visited upon the heads of their children, the converse would seem to be equally true. Where a child, or some other person subject to the supervisory authority of another, has committed a crime we should insist on (1) some significant degree of personal fault and (2) a fairly direct connection to the commission of the crime before we hold a parent or other supervisor liable for the commission of that

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36. *See* MODEL PENAL CODE § 2.02(2)(b)(ii) (1980).

37. *See, e.g.,* N.Y. PENAL LAW § 20.15 (McKinney 2004) (personal culpability of each offender is a measure of guilt when more than one person is criminally liable for an offense). "It is a fundamental principal of Anglo-Saxon jurisprudence that guilt is personal." Organization of American States, American Convention on Human Rights art. 5(3), July 18, 1978, 36 O.A.S. T.S. 22. *See also* United States v. Dotterweich, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting).

offense.[38] But here we are faced with people who stubbornly refuse to recognize the danger posed to others by the reckless action of their loved ones. Instead of providing proper restraint, they heedlessly assist their child or loved one in wreaking reckless havoc on us all. In such circumstances it is desirable to have available a special offense directed at the specific problem they pose.[39]

Sara Wall raced Amilcar Valladares through the streets of Gaston, North Carolina. Both drivers were reckless but only Valladares lost control of his car, injuring people gathered at a Dairy Queen. Wall had not "bumped" Valladares or otherwise caused him to crash.[40] She, personally, injured no one. Any effort to explore the possibility of holding her liable for assault as Valladares's accomplice plunges one into the unruly and complex complicity doctrine. Wayne LaFave, in discussing accomplice liability for assistance or encouragement of reckless or negligent conduct, says that "the cases in this area are generally in a state of confusion"[41] and that "there is considerable diversity in the cases on the subject of whether accomplice liability may rest upon knowing aid to reckless or negligent conduct if that conduct produces a criminal result."[42] Note that LaFave is writing of "knowing" aid or encouragement (which he finds is "most common[ly]" illustrated by cases in which an owner knowingly lends his car to an intoxicated friend who drives recklessly and kills another[43]) and is not considering the case of aid provided either recklessly or negligently. It appears from examining numerous cases that order and consistency are in even shorter supply when courts consider accomplice liability for reckless offenses where assistance or encouragement has been rendered recklessly.

A basic problem is that accomplice liability for reckless or negligent offenses can be seen as oxymoronic, a contradiction in terms.[44] As noted

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38. The commentaries to the Model Penal Code discuss briefly the possible imposition of accomplice liability for omissions of legal duties. *See* MODEL PENAL CODE § 2.06(3)(a)(iii) cmt. 6(d) (1985).

39. Sanford Kadish hypothetically discusses a similar case of a "vexatious youth" who, as is well known by his father, "is just beginning to learn to drive, has proved singularly inept, and has displayed an alarming proclivity to taking wild and irresponsible risks." Nevertheless the father gives him the family car to drive, with fatal consequences when the son drives recklessly. Kadish is very concerned with expanding criminal law for reckless complicity too widely, but nevertheless he believes a case might be made against the father in such a situation. Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 380-81 (1997).

40. *See* Commonwealth v. Levin, 135 A.2d 764 (Pa. Super. Ct. 1957).

41. LAFAVE, *supra* note 9, § 13.2(e).

42. *Id.* § 13.2(c).

43. *Id.* § 13.2(e).

44. Audrey Rogers noted the relative paucity of writing upon the "extent to which a person may be an accomplice to an unintentional crime" and suggested that it was at least partially explained by the fact that "some courts view the concept of intending to aid in the commission of an unintentional crime as oxymoronic." Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining*

above, there are two distinct forms or types of mens rea: purpose and negligence (or dolus and culpa if you find the Latin terms useful as conceptual place markers).[45] Each form may be broken down into subcategories (purpose may be divided into purpose and knowledge while negligence may be divided into recklessness and negligence[46]) but each form is considered separate and distinct and, as suggested in Kipling's poem, "[n]ever the twain shall meet."[47] That which is done on purpose cannot, by definition, be considered to have been done negligently, and the negligent actor cannot be considered to have acted purposefully.

Accomplice liability classically requires a mental state of intention or purpose (or perhaps knowledge) but reckless or negligent offenses require only the less culpable mens rea of recklessness or negligence. Not only is the degree of culpability unequal, but both purpose and knowledge require a choice to bring about the harmful results or conduct involved, or at least an awareness that they are certain to occur.

On the other hand, recklessness and negligence both exclude that sort of choice to do harm. A reckless or negligent actor does not believe that harm will result from his actions, has not made any choice, and does not have the awareness that marks the purposeful or knowing offender as so much more evil and dangerous.[48] It has been held that running the two together, i.e.

Within the Constraints of Intent, 31 LOY. L.A. L. REV. 1351, 1351-52 (1998).

45. *See* FLETCHER, *supra* notes 18 and 19.

46. There obviously is a certain taxonomical inelegance here in using the same term, either purpose or negligence, for both a genus and a species. The Model Penal Code avoids this linguistic problem by providing a general requirement for "culpability" and then defining four specific mental states, "purposely," "knowingly," "recklessly" and "negligently," which are required before an actor can be guilty of an offense. It does not further categorize the elusive mental element of criminal conduct. *See* MODEL PENAL CODE §§ 2.02, .05(1985). To distinguish blameworthy conduct that is done "on purpose" from that which is done "only accidently," more categories must be used than does the Model Penal Code. There is virtue here in adopting the Latin terms "dolus" and "culpa," but one can get along quite nicely by bearing context in mind.

47. RUDYARD KIPLING, *The Ballad of East and West*, *in* BALLADS AND BARRACK-ROOM BALLADS 3, 3 (1897), which opens with the lines "Oh, East is East, and West is West, and never the twain shall meet."

48. Herbert Wechsler and Jerome Michael discussed the difference between advertence and inadvertence as it bore upon the character and danger of offenders in their seminal article "A Rationale of the Law of Homicide." They noted there regarding inadvertent homicide that "[w]hatever his ends, we have no reason to believe that he would have sought them in the same way had he been aware that his behavior was homicidal. So far as we know, the preservation of life occupies a place in his scale of values which is at least close to that which we think it should have." Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide II,* 38 COLUM. L. REV. 1261, 1275 (1937). Thus, they argued, the unknowing man, even if he caused a death, was not of the same ilk as one who had knowingly killed another. Similarly, where one has not purposely joined with another to accomplish a criminal end, or does not know that his conduct will certainly assist in doing so, we have insufficient reason to believe that he is a bad and dangerous man who is apt to do such a thing again

attempting to impose liability as an accomplice to a reckless or negligent crime, is logically impossible: it is the legal equivalent of trying to combine matter and anti-matter, producing a nullity in which criminal liability cannot exist. The aesthetic sense, the appeal of *elegantia juris*, may generate a feeling of revulsion when faced with such a chimera as an accomplice to negligent crime and reject the possibility of such liability.

However, the beauty of logical form can often lose its attraction when confronted by a perceived imperative that certain actions be taken.[49] A number of courts, sometimes abetted by statutes and sometimes not, have striven mightily to devise ways to incriminate some of those who have aided or encouraged reckless wrongdoing. The "confusion" and "diversity" noted by LaFave in the cases and law in this area may well be a product of the competing claims of legal logic and social utility.

The most intellectually satisfying strategy that has been devised to date begins by concentrating attention on the conduct exhibited by the "primary"[50]actor rather than on the harmful result that the person has caused. For example, in automobile accident cases the focus would initially be on the conduct or driving techniques employed by the errant operator (the primary party) rather than on the injuries suffered by the victims. Then consideration would be given to the mental state exhibited by any person who may have aided the driver in any significant way (the "secondary" party) in relation to that conduct. There may be found a purpose by the secondary party to encourage or aid the act of driving, as by deliberately lending one's car to a

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and to whom we should attach responsibility for assisting in a crime committed by another so that he "may be made amenable to the corrective process that the law provides." MODEL PENAL CODE art. 5, introductory cmt. (1985).

49. Consider, for example, the imposition of criminal liability upon corporations. Originally, such liability was rejected as incompatible with legal principal. The corporation was an artificial being which was incapable of forming a criminal intent and could not be punished. An oft repeated adage was that "a corporation has no soul to damn, nor body to kick" and the well settled legal result was that while human corporate agents could be prosecuted, their corporate employers were immune. As business corporations grew more and more powerful during the nineteenth century, American courts were driven to repudiate this long standing doctrine, culminating with the Supreme Court's reasoning in the *New York Central* case that "[the Court] cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through [corporations], and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectively controlling [them]." N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 495-96 (1909).

50. The categories of "primary" and "secondary" parties have been used by commentators to distinguish between the person who "personally commits the physical acts that constitute an offense" (the "primary party") and those "secondary parties" who are not primary parties but who are sufficiently "associated with [the primary party] in the commission of the offense." DRESSLER, *supra* note 7, at 465.

friend known to be intoxicated. While there will most often be no purpose by the secondary party to cause a harmful result, if the focus is kept on the conduct, the required mental state of purpose to aid or encourage can be found. It is true that the secondary party has been proved an accomplice in conduct rather than the resultant death or injury, yet one may require only negligence or recklessness as to that result and still retain, at least in part, an allegiance to the traditional notion that accomplice liability is purposeful and not based on negligence. If one has exhibited recklessness or negligence as to the harm which was caused by the primary party whose conduct one has intentionally aided, then liability for recklessly or negligently causing that harm may be imposed without unduly torturing the received dogma on complicity.[51]

Regarding Sara Wall, one could argue that just as it takes two to tango, it takes two to race. One party to a race desires, needs, and encourages the other party's actions so that there is some opponent against whom to compete.[52] Thus the element of purposeful mens rea traditionally required for accomplice liability may be found, not in the offense considered as a whole, but in one component of the offense (i.e. conduct such as dangerous driving on city streets). The actor who has purposefully aided or encouraged the conduct may then be classified as "an accomplice in the commission of the conduct,"[53] and he may arguably be properly held complicit in the commission of the whole offense if he exhibits the mens rea sufficient for the offense, such as (in this example) a reckless disregard for the safety of others on the road.

Thus one who purposely aided or encouraged another to drive in a reckless manner could be held as an accomplice to a reckless homicide committed by a driver who fatally injured another. This is the technique that may be teased out of the provisions of the Model Penal Code and its two editions of official commentaries,[54] but it reaches only those cases where a guilty intention, or perhaps knowledge, on the part of the secondary party can be found.

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51. Justice David Souter (who was serving on the New Hampshire Supreme Court at the time) also struggled with this problem in *State v. Etzweiler*, 480 A.2d 870, 876-77 (N.H. 1984). Joshua Dressler explains the process rather nicely in his textbook. *See* DRESSLER, *supra* note 7, at 481-82, 500-01.

52. *See, e.g.*, People v. Abbott, 445 N.Y.S.2d 344, 346-47 (N.Y. App. Div. 1981), *cited with approval in* Riley v. State, 60 P.3d 204, 210-11 (Alaska Ct. App. 2002).

53. *See* MODEL PENAL CODE § 2.06(4) (1985).

54. *See id.* at cmt. 7; MODEL PENAL CODE § 2.04(4) cmt. (Tentative Draft No. 1 1953). This interpretation of the Code's language is an example of how easy interpretation can appear once you know what the authors had in mind when they wrote. Such interpretive adeptness seemed to elude the Supreme Court of New Hampshire when it decided *Etzweiler*, 480 A.2d 870; s*ee id.* at 876-77 (Souter, J., concurring).

An example of the kind of case in which this analysis works most easily is *People v. Madison*.[55] A jealous teen-age suitor, together with eight of his friends, chased his rival for approximately twenty minutes through suburban California streets intending to "kick his ass."[56] The defendant, Michael Madison, was not the driver of any of the pursuing cars but urged his friend who was driving to "[g]et him."[57] Their quarry eventually crashed and was killed. The pursing driver was convicted of involuntary manslaughter for his grossly negligent driving. Madison was convicted as an accomplice because his encouragement and direction as the group's leader was intended to urge the driver to engage in a "hazardous pursuit, fraught with peril to all of the participants . . . ."[58]

This kind of case is easy because of the personal presence of the defendant on the scene where he solicits or encourages specific acts or particular courses of conduct. Since the purpose of his actions is to produce the conduct of the primary party, it is not a great stretch for the law to attribute legal responsibility for those actions to the one who instigated them. However, actors may not always act with such a manifest guilty intention, or at least it may not be possible to prove beyond a reasonable doubt that they did so. As a result, a number of the Sara Walls of this world may not be reachable by this technique.

Drivers in fatal road races, who have not themselves killed or injured others, may often argue rather convincingly that they had no knowledge that their competitor would behave as stupidly as he did and that they therefore did not knowingly aid or encourage that particular conduct.[59] Whether their

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55. People v. Madison, 51 Cal. Rptr. 851 (Cal. Dist. Ct. App. 1966).
56. *Id.* at 853.
57. *Id.*
58. *Id.* at 855.
59. *See, e.g.*, Jacobs v. State, 184 So. 2d 711, 718 (Fla. Dist. Ct. App. 1966) (Carroll, J., dissenting) (a road racing case in which one participant killed both himself and an oncoming motorist and another participant was convicted of manslaughter through "aiding and abetting):

> [There is no testimony] from which reasonable men could conclude that the defendant knew that Kinchen [the deceased racer] was planning to try to pass the racing cars . . . and certainly not a word that the defendant knew or had the slightest notion that Kinchen would be so reckless as to try to pass Carter's car by turning into the east lane in the face of oncoming traffic [at the crest of a hill].

Judge Carroll's dissent failed to convince either of the two other judges who formed the majority, who ruled that the defendant was "an active participant in the unlawful event out of which the deaths arose." *Id.* at 716. Each case is of course fact specific but nevertheless, if the critical issue is seen to be whether the secondary party *knew* that the primary party was going to engage in particular reckless conduct, the sentiments expressed by Judge Carroll may be expected to be at play in many such cases. *Jacobs* and a similar case, *State v. McFadden*, 320 N.W.2d 608 (Iowa 1982), have been contrasted with *Commonwealth v. Root*, 170 A.2d 310 (Pa. 1961) by Kadish and his various co-authors for almost forty years. *Compare* SANFORD H. KADISH AND MONRAD G. PAULSEN, CRIMINAL

purpose or "conscious object" in driving must be restricted to their own conduct, which was not itself fatal or injurious, or may be expanded to include a further purpose to incite and encourage another to engage in reckless behavior is an uncertain matter.

New York's Appellate Division did find such intent to aid and encourage reckless behavior in *People v. Abbott*.[60] There, two men, Abbott and Moon, engaged in a high speed race on a public street. Abbott struck a car attempting to turn left across their path, instantly killing all three passengers in the turning vehicle (Abbot survived). Moon struck no one but was nevertheless convicted of criminally negligent homicide on the theory of accomplice liability in that he "intentionally aided Abbott to engage in the criminally negligent conduct which resulted in the deaths."[61]

The defense argued that such a theory was "'not logical' and that one must be liable by 'one's own acts as a principal for criminally negligent homicide or not at all.'"[62] The court found accomplice liability through intentional aid because "his conduct made the race possible. He accepted Abbott's challenge and shared in the venture. Without Moon's aid, Abbott could not have engaged in the high-speed race which culminated in tragedy."[63]

However, such nimble reasoning may not always carry the day. In *State v. Etzweiler*,[64] an actor purposely lent his car to a friend who was known to be intoxicated and whose conduct resulted in the death of another. The court flatly rejected such reasoning, stating "Etzweiler, as a matter of law, could not be an accomplice to negligent homicide . . . . We cannot see how Etzweiler could intentionally aid Bailey in a crime that Bailey was unaware that he was

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LAW AND ITS PROCESSES: CASES AND MATERIALS 358 *et seq*. (2d ed. 1969) *with* SANFORD H. KADISH, STEPHEN J. SCHULOFER AND CAROL S. STRIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 538 *et seq*. (8th ed. 2007). These cases, which have bedeviled several generations of fledgling law students, seem essentially irreconcilable.

60. People v. Abbott, 445 N.Y.S.2d 344 (N.Y. App. Div. 1981).

61. *Id.* at 346.

62. *Id.*

63. *Id.* at 347. In *People v. Hart* the court was faced with a similar scenario in which one competitor in a road race crashed into the other, killing one of the racers. The survivor was charged with reckless manslaughter. Rejecting the argument that at most Hart was an accomplice and that one "cannot be held liable as an accomplice to any unintentional crime," the court agreed with *Abbott*'s reasoning, stating that "[a] drag race or an illegal speed contest, by its definition, must involve more than one participant" and that "each participant is a principal and an accomplice" and liable for the acts of the other. People v. Hart, Nos. C-390, 1659N-01, 2002 WL 538058 (N.Y. Co. Ct. Mar. 18, 2002). The court noted especially "that the drag race was instigated by the defendant" who had driven his specially outfitted Corvette on the wrong side of the road revving his engine as a challenge to a man driving a Lamborghini. *Id.* at *2.

64. State v. Etzweiler, 480 A.2d 870 (N.H. 1984).

committing."[65] The New Hampshire legislature subsequently amended their statute in 2001 to reflect more closely the Model Penal Code approach noted above[66] and it now appears that Etzweiler, should he repeat his earlier ill-advised conduct, could indeed be convicted of homicide.[67]

B. Causation

Causation provides another approach to imposing liability. The negligent actor, such as the owner of the pistol Jason Welsh used, could be found to have proximately caused the harm and to be criminally liable for its occurrence. Such an approach would not rely on some form of vicarious or accomplice liability deriving from Welsh's criminality but would focus instead on the owner's own responsibility for having caused the result. Welsh would be regarded not as a criminal with whom the owner is associated and in whose guilt he or she shares, but simply as another link in a chain of causation connecting the owner to the death of Kathryn Lally when the gun discharged. This is a conceptually clean, indeed elegant, approach to liability which avoids the complications of interjecting a negligent mens rea into a doctrine of complicity viewed as essentially intentional in nature.

The approach would therefore seem to have much to offer. Of course, the problem is the concept of superseding cause.[68] Causation is one of the law's perennial conundrums, extensively, even avidly, discussed in articles, books[69] and learned opinions.[70] One of the issues regularly discussed is the

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65. *Id*. at 874-75.
66. *See* N.H. REV. STAT ANN. § 626:8 (2007).
67. *See* State v. Anthony, 861 A.2d 773 (N.H. 2004).
68. Perkins & Boyce state "[a] superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." PERKINS & BOYCE, *supra* note 8, at 781 n.79 (citing RESTATEMENT (SECOND) OF TORTS § 440 (1965)). Kadish argues for the special analytical significance of intervening acts because "we perceive human actions as differing from all other natural events in the world." Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 393 (1997) (citing his earlier work *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985)).
69. Ronald Boyce, Donald Dripps, and Rollin Perkins begin the causation section of their casebook with quotations from ten such sources. *See* RONALD N. BOYCE, DONALD A. DRIPPS & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE (10th ed. 2007). Dressler similarly begins his discussion of causation in his text with a citation to nine excellent books and articles. *See* DRESSLER, *supra* note 7, at 181 n.1. Dressler discusses causation specifically as it relates to accomplice liability in a section of his article. Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to An Old Problem*, 37 HASTINGS L.J. 91, 98–108 (1985). He recently renewed that discussion in his article *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?* which is written in part as a response to what Dressler characterizes as "perhaps the finest article published in an American law journal written on [complicity]." Joshua Dressler, *Reforming Complicity Law:*

responsibility of an actor whose conduct has initiated a chain of events which leads to a harmful result, but only after another actor has intervened. This will be an issue in all of the cases considered here. In all of them a reckless actor engages in conduct which initially hurts no one. It is only after a subsequent actor's own reckless conduct combines in some way with the initial harmless conduct that injury results. Kathryn Lally was not shot dead until the reckless acts of Jason Welsh combined with the conduct of the owner of the gun in recklessly leaving it stuffed under a sofa cushion in the middle of a party.

There are many variable factors which may go into determining potential responsibility. It is possible that the second actor who actually causes the harm is in some fashion an agent of the first, his principal. If an agency relationship can be established then the acts of the second actor, the agent, are in law the acts of his principal, the first actor. If the acts of both persons are legally attributable to the first actor, no question of intervening, superseding cause can arise.[71]

Where there is no agency type relation, things get much more complicated. There is the possibility that the original actor's conduct will itself be found to have substantially and independently contributed to the harm at the moment of its occurrence. Thus, if Kathryn Lally had been shot twice

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Trivial Assistance as a Lesser Offense? 5 OHIO ST. J. OF CRIM. L. 427, 430 (2008). Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985). *See also* FLETCHER, *supra* note 18, § 5.2.2; JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 247-95 (3d ed. 1960).

70. The cases are, of course, legion, but two will give the flavor of the issues involved. In *Stephenson v. State*, the defendant had abducted and debauched Madge Oberholtzer while traveling on a train, subjecting her to various forms of sexual perversion, including the infliction of extensive and severe bite wounds. Stephenson v. State, 179 N.E. 633 (Ind. 1932). Distracted by pain and shame she attempted suicide, ingesting bichloride of mercury, and became violently ill. Stephenson drove her home, refusing to stop when she screamed for a doctor. Her parents summoned a doctor who treated her for ten days until she died. During that time all of her wounds healed, although one had become infected for a time. The medical cause of death was a combination of many factors, including shock, poison, infection, lack of rest and food. The court affirmed a conviction of murder, holding that to deny Stephenson's causal connection to Oberholtzer's death would be a "travesty on justice." *Id.* at 649. For an excellent discussion of the case, *see* Comment, *Criminal Law and Procedure–Homicide– Causal Relation Between Defendant's Unlawful Act and the Death*, 31 MICH. L. REV. 659 (1933). The other case involved a wife who secretly mixed poison into a medicine which had been prepared by an apothecary upon the prescription of a physician for her sick husband. The husband took the medicine and became ill, as did his father-in-law who also tasted it. The father-in-law complained to the physician, who in turn complained of the apothecary, who defended his own work by mixing it all together more completely and eating the electuary. He died. All the Judges of England considered the case and agreed she was guilty of murder for "if the law should not be such, this horrible and heinous offense would be unpunished; which would be mischievous, and a great defect in the law." Agnes Gore's Case, (1611) 77 Eng. Rep. 853 (K.B.).

71. *See, e.g.,* Moreland v. State, 139 S.E. 77, 78 (Ga. 1927) (reckless manslaughter case where owner of automobile was "liable for the acts of his chauffeur done in his presence").

by two different guns, one fired by Jason Welsh and one by the unknown owner, *X*, and had bled to death from blood gushing from both wounds, both Welsh and *X* easily could be convicted of homicide.[72] But in our cases, such substantial contribution by the initial actor is not so easily demonstrated. The harmful result is the direct consequence of only the second act, the firing of a gun or the operation of an automobile. The first act has a connection to the resultant harm only indirectly, through its association with the second act.

The concept of superseding, independent, intervening cause may well insulate at least some of the first or antecedent negligent actors by concluding that only the second or subsequent actors are the cause of the harm. Hart and Honoré, in their classic book *Causation in the Law*, observe that "[t]he free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."[73] They go on to add that "[t]he broad principle, [in criminal law] as in tort, is that a reckless or grossly negligent reaction negatives causal connection"[74] between the original actor and the resultant harm.

They then proceed to discuss *Commonwealth v. Root*,[75] in which one competitor in a road race conducted on a two lane highway pulled out to pass the leading car, only to drive head-on into an oncoming truck at seventy to ninety miles per hour, killing himself. They justify the court's decision that the surviving competitor was not the proximate cause of deceased racer's death on the grounds that "the swerve of deceased into the path of the truck was a reckless act which on common-sense criteria would negative causal connection with the ensuing death. In tort law, however, there are some decisions which extend liability by making defendant, on facts such as these, liable for *encouraging* his partner's recklessness . . . ."[76]

They disapproved of such an extension in criminal law, however. In discussing the role of voluntary conduct as an intervening cause, they examined intervening negligent acts. They said that such acts do not "in general" supersede but that "[i]t is different if the response is so 'unnatural' or 'unreasonable' that causal connection is negatived on the ground of its

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72. *See* PERKINS & BOYCE, *supra* note 8, at 779-80 (substantial factor) & 782-85 (contributory cause).
73. H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 326 (2d ed. 1985).
74. *Id.* at 350.
75. Commonwealth v. Root, 170 A.2d 310 (Pa. Super. Ct. 1961).
76. HART & HONORÉ, *supra* note 73, at 350. They had earlier discussed a South African case, *Rex v. Stripp* 1940 EDL 29 (S. Afr.), in which a drunken bicyclist suddenly swerved into the path of a motorist who had driven around a curve on the wrong side of the road. Hart and Honoré explain the acquittal on the ground that "the action of the deceased was so foolhardy as to negative causal connection between the negligent driving of the accused and the death of the cyclist." *Id.*

abnormality."[77] Perkins and Boyce have also written about superseding, intervening cause. They say:

> If there are acts of two persons who have not acted in concert, and if the act of the second was not induced by the first and was not the normal response of a human being to the situation created by the first, the act of the second will ordinarily not be imputed to the first.[78]

They discuss specifically the effect of intervening negligent acts, but only in the case of medical treatment made necessary by the original actor's assault. They say that "medical or surgical treatment which results in death may be a superseding cause, if it is administered in bad faith or with criminal negligence."[79] They repeat this point twelve pages later, with emphasis: "it is not normal for the injured person to be treated by a 'quack' . . . or by one who will cause injury as a result of malice or *criminal* negligence. Hence medical or surgical treatment is not a superseding cause unless it falls within one of these abnormal categories . . . ."[80]

Perkins and Boyce also note the importance of the initial actor's mental state. They write that, at least in the case of "imprudent" actions taken by victims to avoid impending harms threatened by the initial wrongdoer's actions, it is "particularly true" that a superseding cause is more readily found when the initial actor has acted "from criminal negligence rather than from willfulness."[81] They write at considerable length of the kinds of factors which should properly influence a court's decision on causal imputability in such cases: whether the harm that befell the victim was in fact intended by the original actor, the nature of the intervening act, and whether the "harm, or harm of the same general nature, was a foreseeable risk of the condition created by the defendant."[82]

The Model Penal Code includes a section on causation, section 2.03. Regarding reckless or negligent causation, the Code requires, in addition to conduct which "is an antecedent but for which the result in question would not have happened," that any resultant harm be a risk which the actor either was or should have been aware of. If the harm is not such a risk, then a causal connection may still be found if the resultant harm is of the same general type

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77. *Id.* at 335-36.
78. PERKINS & BOYCE, *supra* note 8, at 810-11.
79. *Id.* at 803.
80. *Id.* at 815.
81. *Id.* at 797. LaFave expresses cautious agreement with the same view. WAYNE R. LAFAVE, CRIMINAL LAW 351-52 (4th ed. 2003).
82. PERKINS & BOYCE, *supra* note 8, at 813; *see id.* at 790-821.

as the "probable result" and is "not too remote or accidental in its occurrence to have a [just] bearing" on the actor's criminality. Thus the section requires, besides a "but for" cause-in-fact relationship between the actor's conduct and the resultant harm, that the harm which results be a risk of which the actor either was or should have been aware. If it is not such a risk, it must be of the same general type of harm as the probable result of his conduct and not "too remote or accidental in its occurrence to have a [just] bearing" on the actor's criminality.[83] Hart and Honoré called section 2.03 "[t]he most lucid, comprehensive, and successful attempt to simplify problems of 'proximate cause' in the criminal law."[84] They note, however, what they see as "one major criticism: it does not provide *specifically* for those cases where causal problems arise because, although the accused did not intend it, another human action besides the accused's is involved in the production of the proscribed harm."[85] This of course is the realm occupied by the concept of superseding, intervening cause, of which Hart and Honoré say:

> [F]or whatever else may be vague and disputable about common sense in regard to causation and responsibility, it is surely clear that the *primary* case where it is reluctant to treat a person as having caused harm which would not have occurred without his act is that where another voluntary human action has intervened. This has powerfully influenced the law and the language of decision.[86]

They note, as do the Model Penal Code's Commentaries, that some jurisdictions have considered or, in some cases, adopted additional language in their Codes that would insulate actors from harms "too . . . dependent on another's volitional act to have a just bearing" on defendant's criminal liability.[87]

Like beauty, categories of abnormality, undue dependency and foreseeability will often lie in the eye of the beholder, and the prediction of when a court will find a connection sufficient to establish causal responsibility for a resultant harm is uncertain. There probably is a continuum of cases, ranging from the more to the less likely to support causal responsibility. Cases such as that of Amilcar Valladares and Sara Wall, who engaged in wheel-to-wheel racing, seem likely candidates for a finding of causal

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83. MODEL PENAL CODE § 2.03(3)(b) (1985).
84. HART & HONORÉ, *supra* note 73, at 394.
85. *Id.* at 398.
86. *Id.*
87. *Id.* at 398-99; MODEL PENAL CODE § 2.03 cmt. 5 (1985); *Id.* cmt. 3; *See, e.g.*, HAW. REV. STAT. §§ 702-215(2), -216(2) (1993). The commentaries to the Model Penal Code defend their position.

responsibility should a court be so inclined. Each participant acted in response to the other and seemed to instigate and encourage the other's conduct which causes the harm. After all, a race, like the tango, takes two. If a racer cannot induce his or her competitor to compete, what is the sense of a wild drive down the street by yourself? Finding that the one is the proximate cause for the harm caused by the other requires no logical strain. But one cannot forget about cases like *Root*[88] in which the judicial eye focused on the behavior of the other driver who drove "recklessly and suicidally"[89] and whose conduct superseded any responsibility Root might have had for the resultant death.

In a recent New York case on similar facts (road racing resulting in the death of a competing driver), the surviving driver moved to dismiss a manslaughter indictment on the grounds that he did not "cause" the death.[90]

The court denied the defendant's motion and upheld the indictment, but the case illustrates that divergent views on causation are more than possible. Hart and Honoré began their book by mentioning the "uncertainties and confusions which continue to surround the legal use of causal language."[91] The Commentaries to section 2.03 of the Model Penal Code begin their discussion of "proximate causation" with the observation that the problems presented by the term "present enormous difficulty . . . because of the obscurity of the concept."[92] Perkins and Boyce observe that while causation has received "the most exhaustive and painstaking consideration by legal writers," the truth is that cause is such a matter of "fact and degree" that all efforts to lay down "simple and precise" rules which will make the answer to causation questions "obvious" are doomed to failure. The systems of universal rules and tests of causation are "demonstrably erroneous." The best

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88. Commonwealth v. Root, 170 A.2d 310 (Pa. Super. Ct. 1961).

89. *Id.* at 312. In fact twelve pairs of judicial eyes evaluated the conduct of Root, all apparently well aware of the concept of superseding cause. *See* Commonwealth v. Root, 156 A.2d 895 (Pa. Super. Ct. 1959). The judges divided evenly in their opinion, six to six. The six finding supersession all sat, at some point, on the Supreme Court of Pennsylvania.

90. People v. Hart, Nos. C-390, 1659N-01, 2002 WL 538058 (N.Y. Co. Ct. Mar. 18, 2002). The court said:

> Counsel for defendant has cited cases from other jurisdictions in which courts have held that a participant in a drag race or illegal speed contest cannot be held criminally liable for the death of a co-participant. Specifically, defendant cites cases from Florida, California, Oregon, Georgia, Ohio and Pennsylvania. The District Attorney has likewise brought case law to the Court's attention from jurisdictions which have found that such analogous liability exists. Specifically, The People refer to case law from Massachusetts, Maryland, Alabama and Ohio.

Id. at *1 (internal citations omitted).

91. HART & HONORÉ, *supra* note 73, at 1.

92. MODEL PENAL CODE § 2.03 cmt. 1 (1985).

one can do is to discover "clues."[93] This of course is not to say that certainty otherwise abounds in the criminal law and that causation is a unique sport in an otherwise logical and coherent field. But relying on concepts of proximate cause and superseding acts will not allow us easily to deal appropriately with the reckless aiders of reckless actors whose conduct has resulted in harm.

C. Reckless Endangerment

Current law when applied to these illustrative cases seems unsatisfactory. Illegal street racers may or may not be accomplices in the reckless homicides committed by their competitors. Enabling parents of daredevil drivers likely bear no responsibility for the harms their children cause. Intervening recklessness may or may not supersede the causal responsibility of an initially reckless actor. The likelihood of such supersession is increased if the ultimate actor acts intentionally, as did Robert Stottlemire when he deliberately shot Daniel Wright with a shotgun, as opposed to negligently, as did Jason Welch when he fired what he thought was an unloaded pistol through an apartment's floor into the heart of Kathryn Lally.

This is an entirely unsatisfactory situation in which justice, if it is to be achieved or approached at all, depends on the vagaries of the facts of individual cases and the ingenuity and abilities of individual counsel, judges and juries.[94] Another, possibly more satisfactory, solution to the problem would be to rely on the offense of Reckless Endangerment, introduced into American criminal law by the Model Penal Code in 1962.[95] That provision punishes as a misdemeanor anyone who "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." It was, when introduced, "an innovation in the penal law."[96] There were at that time scattered prohibitions of particular forms of reckless conduct, such as reckless driving of automobiles or abandoning refrigerators in a manner likely to trap unwary children, but the proposal was to create a "new misdemeanor"[97] establishing "a general prohibition"[98] of recklessly

93. PERKINS & BOYCE, *supra* note 8, at 777-78.
94. Professor Dressler might be even less unsatisfied with the use of a causation approach here. In his recent article proposing reform of the law of accomplice liability he concludes: "A causation or causation-plus approach to complicity law would result in a more just outcome." Dressler, *Reforming Complicity Law, supra* note 22, at 448.
95. MODEL PENAL CODE § 211.2 (1980) (Recklessly Endangering Another Person).
96. *Id.* cmt. 1.
97. MODEL PENAL CODE § 201.11 cmt. 1 (Tentative Draft No. 9 1959).
98. *Id.* cmt. 2.

endangering others. Its objective was to "replace the haphazard coverage of prior law with one comprehensive provision."[99]

The revised comments to the Code conclude that its proposal has been a success: "[v]irtually every modern revision effort follows the Model Code in including an offense of this sort."[100] From this one might conclude that the offense of Reckless Endangerment already covers the kinds of cases considered here. It might be argued that there is no need to create a new statute to penalize that which is already punished under current law.[101] However, there are problems with using Reckless Endangerment as the only solution to the problems posed by the reckless aider, enabler, or encourager.

First, the claim of near universal ascendency of the new penal order is a bit exaggerated. Out of the fifty states, thirty[102] have enacted general reckless endangerment offenses of the sort proposed by the Model Penal Code. Conversely, twenty states have not done so. In addition, the District of Columbia and the federal government have not enacted reckless endangerment offenses.[103]

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99. MODEL PENAL CODE § 211.2 cmt. 1 (1980).

100. *Id. See also* MO. REV. STAT. § 565.070(1)(4) cmts. (1999). Missouri's form of a reckless endangerment offense "has its equivalent in nearly all (perhaps all) of the new codes." *Id.* The Massachusetts commentators were a bit more restrained in their assessment, expressed in an editorial note published with the statute: "[a] majority of state criminal codes and the model penal code include reckless endangerment offenses." MASS. ANN. LAWS ch. 265, § 13L (LexisNexis 2009). Massachusetts did not enact a general reckless endangerment offense, however. Instead they chose to limit their offense to endangerment of children under the age of eighteen.

101. One of the chief virtues of the Model Penal Code is its relative simplicity, at least to the initiated, as compared to the often overlapping and polyglot nature of the criminal law it sought to replace. Herbert Wechsler criticized the then-current state of American criminal law: "The multiplicity of definitions of offenses or degrees thereof embodied in the penal law transcends by far what is required or appropriate in marking out the bounds of criminality." Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1113 (1952).

102. *See* ALA. CODE § 13A-6-24 (LexisNexis 2005); ALASKA STAT. § 11.41.250 (2008); ARIZ. REV. STAT. ANN. § 13-1201 (2001); ARK. CODE. ANN. §§ 5-13-204 to -206 (West 2009); COLO. REV. STAT. § 18-3-208 (2008); CONN. GEN. STAT. §§ 53a-63 to -64 (2007); DEL. CODE ANN. tit. 11, §§ 603-604 (2007); FLA. STAT. § 784.05 (1997); GA. CODE ANN. § 16-5-60(b) (2007); HAW. REV. STAT. §§ 707-713 to -14 (1993); 720 ILL. COMP. STAT. 5/12-5 (2006); IND. CODE ANN. § 35-42-2-2(b) (West Supp. 2008); KY. REV. STAT. ANN. §§ 508.060-.070 (West 2006); ME. REV. STAT. ANN. tit. 17-A, §§ 211, 213 (2006); MD. CODE ANN. CRIM. LAW § 3-204 (LexisNexis 2002); MO. REV. STAT. § 565.070(1)(4) (1999); MONT. CODE ANN. § 45-5-208 (2009); NEV. REV. STAT. ANN. § 202.595 (West 2006); N.H. REV. STAT ANN. § 631:3 (2007); N.Y. PENAL LAW §§ 120.20-.25 (McKinney 2004); N.D. CENT. CODE § 12.1-17-03 (1997); OR. REV. STAT. § 163.195 (2007); 18 PA. CONS. STAT. § 2705 (2002); TENN. CODE ANN. § 39-13-103 (2006); TEX. PENAL CODE ANN. § 22.05(a) (Vernon 2003); UTAH CODE ANN. § 76-5-112 (2008); VT. STAT. ANN. tit. 13, § 1025 (1998); WASH. REV. CODE § 9A.36.050 (2008); WIS. STAT. § 941.30 (2007-08); WYO. STAT. ANN. § 6-2-504 (2007).

103. Those States are: California, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia. Note that Massachusetts has enacted

The territories and commonwealths seem similarly split.[104] Thus, while a real majority of jurisdictions (about sixty percent) have an offense of Reckless Endangerment, a significant minority (about forty percent) do not. Given the considerable time during which they have failed to act, they do not seem disposed to do so. These states must either rely on reckless battery or homicide statutes, which implicate the problems of complicity and causation which have just been canvassed, or on specific statutes which may fortuitously happen to cover the particular factual situation involved.[105]

Next, if the offense of Reckless Endangerment is available within a given jurisdiction, it would seem that the definition of the offense would reach the kind of conduct of which we speak. Leaving a loaded pistol unsecured and in a place where drug impaired party-goers can play with it does indeed seem to be "recklessly engage[ing] in conduct which places or may place another person in danger of death or serious bodily injury."[106] So too does drunken midnight revelry with shotguns and the purchase of high performance auto parts for inexperienced drivers known to be prone to speeding on public roadways. However, the statutes seem written with an assumption that the harm which has been recklessly risked has not in fact occurred. As a Maryland court put it: "[r]eckless endangerment is an inchoate crime against persons that is intended to deal with the situation in which a victim is put at substantial risk of death or serious bodily harm but may, through a stroke of good fortune, be spared the consummated harm itself."[107] The commentary to New York's version of the offense (one of the earliest adoptions of the Model Penal Code's innovation) refers to the new statute as applicable to reckless

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a Reckless Endangerment offense limited to endangering children. MASS. ANN. GEN. LAWS ch. 265, § 13L (LexisNexis 2009). South Carolina has enacted a reckless endangerment law as part of its Military Code, limited in application to members of its National Guard. S.C. CODE ANN. § 25-1-2957 (2007). A number of states have reckless endangerment offenses limited to special situations. *See, e.g.*, VA. CODE ANN. § 18.2-56.1 (1977) (recklessly handling a firearm "so as to endanger life, limb or property of any person"); *see also id.* § 18.2-56.2 (recklessly leaving a loaded, unsecured firearm in a manner so "as to endanger the life or limb of any child under the age of fourteen."). New Jersey, interestingly, has enacted an offense entitled "Recklessly Endangering Another Person." The statute, however, limits its coverage to ship wreckers (such as those setting up false lights) and purveyors of adulterated sweets and candies. N.J. STAT. ANN. § 2C:12-2 (West 2005).

104. Guam and American Samoa both have reckless endangerment offenses. *See* GUAM CODE ANN. tit. 9, § 19.40 (2009) and AM. SAMOA CODE ANN. § 46.3522(a)(4) (2009). Puerto Rico and the U.S. Virgin Islands do not.

105. Thus, for example, Brock Bieker and Michael Searle, who were involved in the shooting of Daniel Wright, were convicted of providing false information regarding their actions in connection with Wright's death. *See* Krause, *supra* note 25.

106. MODEL PENAL CODE § 211.2 (1985).

107. Holbrook v. Maryland, 754 A.2d 1103, 1107 (Md. Ct. Spec. App. 2000).

conduct which "creates a substantial risk of, but does not result in, serious physical injury."[108]

The Model Penal Code does not specify one way or the other whether the non-occurrence of the harm risked is an element of the offense. However, the Code's commentaries suggest that its authors had in mind situations in which the harm risked had not in fact taken place. The commentary begins discussion of the fundamental rationale of the offense by noting that in some circumstances punishment may be appropriate "even if the ultimate harm against which the offense is aimed has not occurred."[109] After discussing some offenses in which the conduct was "in some sense preliminary to evil"[110] and properly incriminated "without proof of actual harm"[111] the commentary discusses homicide and assault. In those offenses actual harm is clearly required, as death and personal injury are elements of the offenses. The commentary then says that "[i]dentical conduct [to that which constitutes homicide or assault] committed with [a reckless culpable mental state] constitutes only a misdemeanor [of Recklessly Endangering Another Person], on the other hand, if injury is avoided."[112] This apparent presupposition of an uninjured victim of reckless endangerment may well account for the limited penalty most commonly attached to the offense. There are variations, of course, but a one year misdemeanor penalty is by far the most commonly encountered sanction.[113] Whether this is an adequate penalty for an offense in which the victim has in fact been seriously injured or killed, as is the situation in the cases being considered here, is questionable.

To address the question one has to consider the appropriate role of resulting harm in determining a just punishment for a crime. More specifically, should the actual occurrence, or nonoccurrence, of a harm affect the appropriate proportion between crime and punishment? The Model Penal Code generally downplays the significance of resulting harm.[114] To the drafters, the actual occurrence of the harm was often a matter of mere chance. An example would be the fortuity of whether or not competent emergency

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108. N.Y. PENAL LAW § 120 cmt. (McKinney 2004) (discussing "Reckless Assault"). *See* 720 ILL. COMP. STAT. 5/12-5 cmt. (2006) (statute "aimed primarily at the reckless homicide type of conduct where no homicide results (usually through no fault of the defendant.")); MO. ANN. STAT. § 565.070(1)(4) cmt. (West 1999) ("This subsection simply covers the situation where he acts with the same degree of recklessness as regards human life but through no fault of his, no one is injured.").

109. MODEL PENAL CODE § 211.2 cmt. 2 (1980).

110. *Id.*

111. *Id.*

112. *Id.*

113. *See infra* notes 164-71 and accompanying text.

114. *See* MODEL PENAL CODE § 211.2 cmt. 2 (1980); MODEL PENAL CODE § 2.03 cmt.1 (1985).

medical aid was available to the victim of a shooting.[115] The fortuitous element of the result did not affect the danger or blame associated with one who chose to run an unjustified risk of injuring others–or one who intended that injury.[116]

The proper focus should be on the mind of the actor, what he or she intended and consciously risked. This type of subjective mental state, and the intensity with which it was held, was what marked actors as dangerous persons to be feared as being likely to repeat their transgressions, and which also rendered them worthy of blame.[117] Mere matters of fortuity, such as objective result elements, are not accurate indicators of who stands in need of social control.[118]

For the drafters, this was an inconvenient truth. Our citizenry, stubbornly perhaps, did not accept this "rational" calculus. Rather, in the popular mind there was some special significance to the actual occurrence of harm, beyond the mere apprehension of it. Since some degree of "popular indignation"[119] or "resentment"[120] was necessary if the populace was to be mobilized behind the law and support it, the drafters concluded that "[w]hatever abstract logic may suggest,"[121] prudence favored accepting this popular convention and attributing punitive significance to the actual occurrence of harm. The significance accorded was only relative, i.e. affecting only the severity of the punishment or the degree of the crime. Criminality *vel non* was not to be determined by the happenstance of its result.[122]

In the realm of intentional crimes, the "logical" policy of equivalence between conduct which caused harm and conduct which only risked it was carried a long way. In the law of attempts, intentional efforts which fortuitously failed were punished to the same degree as were efforts which succeeded in causing harm, except in the case of capital crimes or felonies of

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115. *See* MODEL PENAL CODE § 211.2 cmt. 2 (1980).

116. *See* MODEL PENAL CODE art. 5, introductory cmt. (1985); MODEL PENAL CODE § 5.01 cmt.1 (1985); MODEL PENAL CODE § 211.2 cmt. 2 (1980).

117. *See* MODEL PENAL CODE art. 5, introductory cmt. (1985):

> Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others . . . . There is a need . . . for a legal basis upon which the special danger that such individuals present may be assessed and dealt with.

118. *See* Wechsler & Michael, *supra* note 48, at 1294 n.78. (Wechsler of course was the Chief Reporter and architect of the Model Penal Code.)

119. *Id.* at 1295.

120. *See* MODEL PENAL CODE § 2.03 cmt. 1 (1985); MODEL PENAL CODE § 211.2 cmt. 2 (1980) (amended 1985).

121. MODEL PENAL CODE § 2.03 cmt. 1 (1985).

122. *See id.*

the first degree.[123] First degree felons were spared "full" punishment only due to public sentiment and as part of a Benthamite inclination to "economize" the infliction of the most severe punishments.[124]

In regards to reckless criminality, however, a different balance was struck. Reckless Endangerment is an offense of recklessness which is analogous to the purposeful offense of attempt. In both cases, the result attempted or risked has not occurred[125] and the role played by chance is similar. However, Reckless Endangerment was punished not in the same degree as the completed offense, but only as a misdemeanor, a disparity of some "magnitude" as the commentators conceded.[126] They justified their choice more by prudential and practical arguments than theoretical ones.[127] The "widely spread and deeply rooted conviction by the public at large"[128] regarding the significance of harm was stubbornly held and only deferred to out of prudence and caution: "Thus, reckless creation of risk of death or serious bodily injury is only a misdemeanor under section 211.2, despite authorization of more serious penalties where such harms actually occur."[129]

In the cases of compound negligence, however, serious harms have actually occurred and yet there is no authorization of more serious penalties because doctrines of complicity and causation may prevent the legal connection of the initial actor's conduct and the ultimate actor's crime of assault or homicide. In the cases being examined here, should a more serious punishment than that allowed by a misdemeanor charge be available to appropriately reflect the initial actor's blame and the danger they caused? If we have "rationally" decided that the initial actor's blame and danger warrant the same penalty regardless of the fortuity of a result, but that the "full" warranted penalty must be withheld because of prudential concern for popular resistance to severe punishment in the absence of injury, does it not seem proper to "do the right thing" when the opportunity presents itself? Should we not impose that "full" punishment when popular resentment has been aroused

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123. MODEL PENAL CODE § 5.05 cmt. 1 (1985); *see also* MODEL PENAL CODE art. 5, introductory cmt. (1985) (first degree felonies were restricted to murder and aggravated forms of kidnapping, rape, and robbery). *See* MODEL PENAL CODE § 6.01 cmt. 4 (1985).

124. *See* MODEL PENAL CODE § 5.05 cmt. 2 (1985); Wechsler & Michael, *supra* note 48, at 1297.

125. Prior to the Model Penal Code, "attempt" was often defined as conduct short of the commission of a crime. This is the most usual situation (except perhaps in cases of plea bargaining where an attempt is punished less severely than the completed offense) but failure, as a required element of proof, has been eliminated. *See* PERKINS & BOYCE, *supra* note 8, at 612-17; *see also* N.Y. PENAL LAW § 110.00 practice cmt. (McKinney 2009).

126. MODEL PENAL CODE § 211.2 cmt. 2 (1980).

127. *See id.* ("Perhaps more persuasive are arguments drawn from practice rather than from theory.")

128. *Id.*

129. *Id.*

through actual injury? Regardless of the general question of whether an increase in punishment is merited simply because harm has in fact materialized, is it appropriate to have different rules of punishment depending only upon whether the offense is committed intentionally or recklessly? The rules of prudence and justice would seem to be similar in both cases and similar penal treatment should be expected. It would seem that Reckless Endangerment as presently enacted could easily be seen as providing an improperly disproportional response to our cases of compound negligence.

To allow more serious sanctions than those appropriate for a misdemeanor to be imposed, we should create a specific offense dealing with compound negligence causing injury or death. Negligence or recklessness is compounded when an actor negligently or recklessly reacts to a stimulus or when an opportunity is negligently or recklessly provided by another. All the individuals involved, both the initial actor and the subsequent or ultimate actor, are acting separately and on their own. Neither is acting in league with the other. Both are acting unreasonably. We can easily deal with the ultimate actor as he or she has proximately caused the harm while exhibiting a mens rea of recklessness or negligence. But the initial actor may often be prosecuted for a serious offense only if we find some way to attach his or her initial recklessness to the serious harm that has been caused. Yet the criminally negligent behavior of the subsequent independent actor may well insulate the initial actor from criminal responsibility for the harm which ultimately results. In all of these cases, the actor seems to have recklessly encouraged, aided, or facilitated another to do something especially foolish which has placed one or more people in serious jeopardy of life or limb. The problem is how best to connect the initial reckless behavior with the ultimately resulting harm.

III. A NEW STATUTE PROPOSED

It is my thesis that those who recklessly aid, encourage or facilitate negligent criminals who seriously injure others ought to be seriously penalized. Their offense should be a separate offense, specially designed to deal with their conduct. It should not constitute a mechanism for holding them liable for a crime committed by another. Such careless actors are dangerous and blameworthy and are proper subjects, in appropriate circumstances, for punishment. They may be deterred from such dangerous

assistive actions or educated into being more careful.[130] They may be deprived of some legal capacity, especially if a license is required to legally engage in the activity or one is otherwise subject to legal regulation. They have exhibited the requisite degree of blame, i.e. criminal or gross negligence, required by our criminal law. As matters now stand such actors often may avoid the serious punishment that is appropriate for their seriously dangerous and harmful conduct. This situation should be ended. What is needed is a suitable law directed specifically at their behavior and which contains appropriate gradations of guilt and suitable limitations to prevent the imposition of overly broad liability.

The first point to be considered is whether a new statutory offense dealing specifically with reckless or negligent aid, encouragement, or facilitation should be enacted or whether a better approach would be to hold those performing such acts responsible for the crime ultimately committed. Such a responsibility could be found by expanding upon principles of complicity or causation, i.e. by either holding them accountable for the acts of another or by expanding the causal responsibility of their own acts to include the harm committed by another. The reach of accomplice liability could be expanded, but it and its civil law counterpart, agency, have always been rooted in the purpose of one person to use another to perform an action in his stead.[131] Accomplice liability can be expanded without inordinate difficulty to reach actions of another who knows he or she is aiding,[132] or to actions which are deliberately encouraged if not directly ordered.[133] But that

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130. There is, of course, a lively debate regarding the culpability of inadvertent negligence and whether it is possible for criminal law to influence the decisions of people who are unaware that they are running serious risks by their conduct. *See, e.g.*, MODEL PENAL CODE § 2.02(2)(d) cmt. 4 (1985); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 69-85 (2009). Regardless of the outcome of that debate, the statute proposed here limits its coverage to advertent negligence, i.e. reckless risk takers, who clearly can be deterred and otherwise influenced in their conduct.

131. Agency is a relationship arising from the *agreement* of the parties. W. EDWARD SELL, AGENCY 1-2 (1975). Mutual assent or consent may be in part an objective standard (i.e. what a reasonable person would understand the manifestation of consent or assent to be) and thus it is possible for an agency relationship to arise without the subjective personal intention of a party to it. *See* WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 5 (2001). But the core common law idea is one of intention and consent and not of negligence. *Id.* at 2-5; RESTATEMENT (THIRD) OF AGENCY §§ 1.01 cmts. c-d, 1.03 cmts. b-d (2006). Professor Bainbridge, in discussing the idea of objective manifestations of consent, states: "[t]o be sure, there is no such thing as an 'unwitting agent,' in the sense that every agency relationship requires knowing consent by both parties." He then cites the case of *State v. Luster*, 295 S.E.2d 421, 425 (N.C. 1982), which found the term "unwitting agent" incoherent and a "contradiction in terms." STEPHEN M. BAINBRIDGE, AGENCY, PARTNERSHIP & LLCS 21 (2004).

132. *See supra* notes 13–15 and accompanying text.

133. *See supra* note 10.

would cross a boundary to expand liability for the conduct of another from situations where one has purposefully, knowingly, or deliberately asked or encouraged that other person to perform that conduct, to include situations where one has negligently, foolishly, or recklessly aided, assisted, or encouraged that conduct. It seems unwise to alter understandings which have endured for centuries when some other mechanism can be employed to reach the same end.

Similarly, proximate causation is a flexible concept which could be expanded. A number of offenses, such as the homicides and assaults at issue in my examples, require as an element proof that the actor caused a harmful result. One could decide that the initial negligent action of hiding a gun in a sofa or encouraging youthful bravado with a shotgun and "bulletproof" vest is sufficiently connected to the ultimate harm such that the initial actor is responsible for having caused it. But our tradition has been to recognize, as superseding causes, the subsequent criminal actions of a non-accomplice.[134] The actions of the final actor who inflicts the injury upon the victim are criminal. These final actors are guilty of grossly negligent behavior when they fire weapons in crowded buildings or directly into their victim's chest. Driving at double the speed limit on a winding country road or racing through suburban streets is itself criminally reckless behavior. These actions are not intended to cause harm, which would likely be superseding conduct, but they are far more culpable than simple negligence, carelessness, or inadvertence.

Superseding conduct is often associated with unforeseeable conduct-conduct which is so unexpected and abnormal that it should cut off the criminal liability of the initial actor. Usually one is allowed to presume that a fellow citizen (at least if one is not in league with him to commit crime) will be law abiding and will avoid criminal conduct.[135] While this presumption may be fictive or utopian, it is probably wise to continue to indulge in it if only to preserve our belief in the reasonable nature of our society. Conduct so extreme as to be criminally negligent should be left as unanticipated and should not forge a link in a causal chain leading to the initial actor's liability.

The best solution to the problem of the reckless enabler of a reckless offender lies in the creation of a separate offense, which I will call Compound Recklessness, specially created for the situation. Enacting a new statute would avoid compromising some basic postulates of complicity and causation as noted above while also permitting the tailoring of the law to more narrowly address the problems posed by reckless assistance to reckless wrongdoers. Following the lead of the Model Penal Code, I will specify the material

134. *See* authorities cited *supra* notes 67-69.

135. *See* authorities cited *supra* notes 73-77.

elements of the proposed offense, dividing them into objective or actus reus elements (conduct, result and circumstances) and subjective or mens rea elements.

A. Policy Arguments Underlying the Proposed Statute

The elements of the proposed statute, both objective and subjective, ought to be selected and defined to make the statute as useful as possible. The rationale of the various choices made is discussed next.

1. Objective elements (degree of aid or encouragement)

The first issue for consideration is determining the conduct that should be sufficient to constitute an objective element of the new crime. Is *commanding*, as Daniel Wright did when he ordered his own shooting appropriate? What about *encouraging*, as Sara Wall did as she raced wheel to wheel with Amilcar Valladares down the streets of Gaston, North Carolina? Or maybe *aiding*, as Joshua Paniccia's parents did when they helped him keep his souped up car on the road in spite of his atrocious driving record, is sufficient. Limits need to be placed on such elements of course, as will be discussed shortly, but these kinds of conduct are routinely proscribed by the law of complicity and they should be proscribed here too. The legal system has gained experience in utilizing the law of complicity which has shown us what kinds of conduct tend to stimulate crime in others. Though the mens rea may be different, this experience can profitably be utilized in defining an appropriate actus reus. At this point we are merely pouring old wine into new bottles, a time tested technique of often proven utility.[136]

But this experience demonstrates that "[t]here are, however, infinite degrees of aid [or encouragement] to be considered."[137] Joshua Paniccia's parents contributed to the death of David Ryan when they purchased performance enhancing equipment for their son's car and when they chose not to revoke his driving license. But what if the car had not been owned by Paniccia himself, but by another (whose only act of assistance was to let Paniccia use it)?[138] What of a supposed other car driven by a "friend" which

136. For example, the venerable federal mail fraud statute, first enacted shortly after the Civil War, has been kept up to date through amendments and new legislation covering use of newly developed technologies, such as telegraph and telephone wires, radio, satellite communication and private delivery services (e.g., Fed Ex and UPS), to communicate fraudulent solicitations. *See* 18 U.S.C. §§ 1341, 1343 (2008).

137. MODEL PENAL CODE § 2.04(3)(b) (Tentative Draft No. 1 1953).

138. *See* TIMES UNION (Albany, N.Y.), Dec. 2, 2005, at B1.

Paniccia said he was "chasing" or following?[139] Suppose the friend was far ahead, well out of sight and thus not providing the same degree of encouragement that Sara Wall's challenge provided Amilcar Valladares. If Paniccia felt impelled through some kind of adolescent rivalry to catch up and surpass his rival, should that be a sufficient stimulus to action, especially if known to the friend, upon which to impose liability?

In both of these hypothesized cases someone has acted in a way which in fact aided or encouraged Paniccia's reckless driving, but whether their connection to Paniccia's crime is sufficient to justify their incrimination is debatable. What needs to be established is some kind of limit or test which allows distinctions to be drawn between those kinds of aid and encouragement which are so powerfully effective that they ought to be criminally proscribed, and those which are so trivial that they can be safely and appropriately ignored.

What is needed is a suitable formula to decide what degree of contribution to the situation which resulted in the negligent crime should be required. It clearly cannot be just any contribution, no matter how insignificant. Discussions of the concept of "cause" in criminal law routinely deal with this matter, and courts have wisely decided that something more significant or "proximate" than a simple necessary condition or a "but for" prerequisite is required.[140]

The drafters of the Model Penal Code faced such a problem when proposing their section on complicity, section 2.04 (renumbered section 2.06 in the final draft). The drafters were wrestling with the question of whether knowing assistance rendered to a criminal should be sufficient for accomplice liability, or whether only purposive assistance should be recognized as sufficient. The drafters unsuccessfully recognized the problem of "infinite degrees"[141] but proposed as a workable standard a test of "substantial facilitation."[142] The drafters provided alternative expressions of their core idea, penalizing one who knowingly "substantially facilitated" the crime of another or who knowingly "provided means or opportunity for the commission of the crime, substantially facilitating its commission."[143] The drafters recognized that the line drawn by "substantial facilitation" was not precise and clear cut: "There will, of course, be arguable cases; they should, we think, be

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139. *See* TIMES UNION (Albany, N.Y.), July 3, 2004, at B1 and Jan. 21, 2005, at B4.

140. *See, e.g.*, MODEL PENAL CODE § 2.03 cmt. 2 (1985) ("As the law has consistently recognized, some limitation on this broad principal (i.e. but for causation) is necessary . . . .").

141. *See* MODEL PENAL CODE § 2.06 cmt. 6(c) n.58 (1985). The draft's ideas did, however, inspire a number of states (*see id.* n.61), including New York (*see* N.Y. PENAL LAW § 115 (McKinney 2004)).

142. *See* MODEL PENAL CODE § 2.04(3)(b) (Tentative Draft No. 1 1953).

143. *Id.*

argued in these terms"[144] which would provide courts "a basis for discrimination that should satisfy the common sense of justice."[145] The drafters thought this a workable standard or test.[146] They were correct.

"Substantial facilitation" would include providing indispensable means or necessary opportunity. Contrarily it would exclude the provision of marginal assistance or minimal aid, such as the case of making available "materials readily available upon the market"[147] which might easily be obtained even in the absence of the negligent aider's assistance. For example, in the case of Daniel Wright, his friend Brock Bieker provided the shotgun used to kill Wright while the car used to drive to the field in which he died belonged to an unidentified individual. The gun, which had been "taken"[148] from the Bieker family home, clearly was a substantial factor in Wright's death. It seems not to have been routinely available and it was the weapon which killed him. The car, too, was a cause in fact of the death, but the relatively ordinary availability of cars to suburban young men would indicate its availability probably did not substantially facilitate the homicide.[149]

The drafters of the Model Penal Code noted that a standard of "substantially facilitated" may arguably be "too vague" to be of use in making the proper distinctions between those worthy of incrimination and those not. The drafters countered that requiring the act to be accompanied by mens rea ("knowledge" in their draft but "advertent recklessness" in the Model Penal Code), especially when dealing with acts which provide the means or opportunity for another to commit an offense, should be sufficient.[150] There is little social utility in allowing people to disregard the consequences of any

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144. *Id.* cmt. 3.

145. *Id.*

146. Professor Dressler has recently revisited the problem of accomplice liability premised on trivial assistance. Dressler, *Reforming Complicity Law*, *supra* note 69. He argues that where a person's involvement in a crime is merely tangential it is unjust to impose full liability. He contends that the marginally involved accomplice has a lesser culpability than the principal perpetrator and that disproportionate punishment can only be avoided by recognizing the difference between a "substantial participant" and an "insubstantial" one. *See id.* at 448. He believes that while the term "[s]ubstantial participant concededly is an imprecise term," it can be made to work, and he ultimately suggests the creation of a lesser degree of the offense for such minor assistance. *Id.*

147. Dressler, *Reforming Complicity Law, supra* note 69, at 448.

148. Snelling, *supra* note 1.

149. In the case of Daniel Wright's death, the risk of harm run by those who might lend an automobile to the group of intoxicated young men clearly would include the risk of homicide caused by reckless driving. But shooting someone to death would seem beyond any likely risk of danger unless one knew about the gun or the young men's plans. One who supplied the shotgun would obviously be in a different situation and death by shooting may well be thought to be precisely the kind of danger created by his actions.

150. *See* MODEL PENAL CODE § 2.04(3)(b) cmt. 3 (Tentative Draft No. 1 1953).

of their actions which they knew others would use to commit a crime. Similarly, if a first actor knows of a substantial risk that others will recklessly cause harm to a third party by making significant use of a means or opportunity provided by the first actor, there is real utility encouraging, through threats of penalization, first actors to re-evaluate their conformity with the "standard of conduct that a law-abiding person would observe in the actor's situation."[151]

Here there is nothing valuable gained by providing a privilege for people to ignore their contribution towards conduct of another which they have clear reason to believe (and do in fact believe) risks the infliction of serious harm. Society achieves no value by allowing the initial actor's conduct to be free from legal sanction and receives value by forbidding it. No conduct other than that demonstrating an insufficient concern for the welfare of others, or a callous disregard of their life and limb, has been inhibited.

2. Objective elements (omissions)

The drafters of the Model Penal Code also discussed in their comments the question of omissions. They addressed the issue at the same point that they considered the requisite mental state as discussed above.[152] They concluded that it would be "unduly harsh" to impose liability unless an omission was purposefully designed to assist another to commit a crime; knowledge that the failure to act would provide such assistance was insufficient.[153] This is incorrect. Omissions of course presuppose a legal duty to act.[154] Moral duties alone are insufficient.[155] The proper place for concerns of undue harshness is in making the decision of whether to make the duty legally obligatory, subject to criminal sanctions if one fails to fulfill it. Once that threshold is crossed, I see no particular further harshness in holding that a culpable breach of that duty can lead to criminal consequences.

There is nothing special about purposeful culpability, as distinguished from recklessness, that would call for restricting the proposed offense of Compound Recklessness to omissions which purposely facilitated another's reckless crime. An example of the possible application of the proposed law

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151. MODEL PENAL CODE § 2.02(2)(c) (1985).
152. *See* MODEL PENAL CODE § 2.06 cmt. 6(c) (1985).
153. *Id.*
154. *See* MODEL PENAL CODE § 2.01(3) (1985).
155. People v. Beardsley, 113 N.W. 1128, 1129 (Mich. 1907) ("This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation."). *See* Regina v. Instan, (1893) 1 Eng. Rep. 450 (Q.B.) (concerning the relationship between legal and moral duties).

to cases of omission may be seen in the case of Joshua Paniccia. In Paniccia's case his parents had the legal power to revoke his driver's license and, based on his repeated traffic offenses, had good reason to have done so. In the absence of a legal duty there could of course be no liability; there would be no conduct subject to penalty.[156] If, however, there was a legal duty to act, then things could be entirely different. The parents could be found to be reckless in their stubborn belief in their child despite their awareness of the abundance of evidence that he did not warrant their faith. Their exposure of others to the risk of the demonstrated foolhardiness of their son could run them afoul of the proposed statute. Whether their belief in Joshua was praiseworthy, excusable or censorable would be a matter for a jury.

3. Objective elements (resulting harm)

Beyond the question of conduct, there are issues regarding results. Should the definition of the harm risked be limited to death and serious bodily injury? Alternatively, should other harms be included such as ordinary bodily injury, mental harm or suffering, or damage to property? The proposal put forward in the Model Penal Code regarding Reckless Endangerment might provide some guidance. The Model Code limited its coverage to "death or serious bodily injury."[157] "Recklessly placing another in danger of harm of lesser gravity," explained the Code's commentaries, "is not an offense under this provision."[158] Of the thirty-two jurisdictions which have enacted Reckless Endangerment provisions, twenty one have similarly limited their coverage to risks of death or serious physical or bodily injury.[159] However, eleven have gone beyond the Model Code's provision to include simply risks of "physical

156. This was the position taken by the prosecutor in the case. *See* Leigh Hornsbeck, *Victim's Mother Speaks of Betrayal,* TIMES UNION (Albany, N.Y.), June 7, 2005, at B1.

157. MODEL PENAL CODE § 211.2 (1980).

158. MODEL PENAL CODE § 211.2 cmt. 3 (1985).

159. *See* ALA. CODE § 13A-6-24 (LexisNexis 2005); ALASKA STAT. § 11.41.250 (2008); AM. SAMOA CODE ANN. § 46.3522(a)(4) (2009); COLO. REV. STAT. § 18-3-208 (2008); GUAM CODE ANN. tit. 9, § 19.40 (2009); HAW. REV. STAT. §§ 707-713 to -714 (1993); ME. REV. STAT. ANN. tit. 17-A, §§ 211, 213 (2006); MD. CODE ANN. CRIM. LAW § 3-204 (LexisNexis 2002); MO. ANN. STAT. § 565.070(1)(4) (1999); MONT. CODE ANN. § 45-5-208 (2009); N.H. REV. STAT. ANN. § 631:3 (2007); N.Y. PENAL LAW §§ 120.20 - .25 (McKinney 2004); N.D. CENT. CODE § 12.1-17-03 (1997); OR. REV. STAT. § 163.195 (2007); 18 PA. CONS. STAT. § 2705 (2002); TENN. CODE ANN. § 39-13-103 (2006); TEX. PENAL CODE ANN. § 22.05(a) (Vernon 2003); UTAH CODE ANN. § 76-5-112 (2008); VT. STAT. ANN. tit. 13, § 1025 (1998); WASH. REV. CODE § 9A.36.050 (2008); WYO. STAT. ANN. § 6-2-504 (2007).

injury,"[160] i.e., the offense may be committed regardless of what degree of physical injury is risked. A few states have gone even further. Texas proscribes recklessly (or with criminal negligence) placing a child in "imminent danger of death, bodily injury or physical or mental impairment."[161] In Nevada persons "responsible for the safety or welfare of a child" who negligently permit or allow a child "to be placed in a situation where the child may suffer physical pain or mental suffering as a result of abuse or neglect" appear to be guilty of a crime regardless of whether any mental or physical harm results.[162] Risking sexual abuse of children is proscribed by a Massachusetts statute dealing with Reckless Endangerment of Children.[163] Recklessly creating a risk of property damage seems to be covered by the Nevada statute.[164] Virginia also penalizes the reckless handling of a firearm "so as to endanger life, limb or property."[165]

The limited reach of the Reckless Endangerment statutes currently enacted need not limit the reach of the proposed Compound Recklessness statute, but the past experience of legislatures which have ventured into a closely related area sounds a note of caution. Personal injury and death occupy a special position in the hierarchy of interests protected by the criminal law.[166] Straying too far from the central importance accorded to life and limb in order to protect such real but less vital interests as mental health and property may risk failure to earn sufficient support for enactment of a new statute. It may be prudent to limit the law's proscriptions to reckless risks of death or serious bodily harm, leaving the more adventurously inclined reformer to include the risk of lesser degrees of bodily harm. A sense of

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160. *See* ARIZ. REV. STAT. ANN. § 13-1201 (2001); ARK. CODE ANN. §§ 5-13-204 to -206 (West 2009); CONN. GEN. STAT. §§ 53a-63 to -64 (2007); DEL. CODE ANN. tit. 11, §§ 603 to 604 (2007); FLA. STAT. § 784.05 (1997); GA. CODE ANN. § 16-5-60(b) (2007); 720 ILL. COMP. STAT. 5/12-5 (2006); IND. CODE ANN. § 35-42-2-2(b) (West Supp. 2008); KY. REV. STAT. ANN. §§ 508.060 - .070 (West 2006); NEV. REV. STAT. ANN. § 202.595 (West 2006); WIS. STAT. § 941.30 (2007-08).

161. TEX. PENAL CODE ANN. § 22.041(c) (Vernon 2003).

162. NEV. REV. STAT. ANN. § 200.508 2(b) (West 2006).

163. MASS. ANN. LAWS ch. 265, § 13L (2009).

164. NEV. REV. STAT. ANN. § 202.595 (West 2006).

165. VA. CODE ANN. § 18.2-56.1 (2009).

166. *See* SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 3 (1883):

> As one of the great objects of all law, and particularly of criminal law, is the protection of life, it follows that homicide must, as a rule, be unlawful . . . . Homicide may be regarded as the highest form of bodily injury which can, in the nature of things, be inflicted.

Michael and Wechsler began their influential article "A Rationale of the Law of Homicide" with the observation that it was a wise choice to begin efforts to reform the substantive criminal law with a revision of the law of homicide as "[a]ll men agree that in general it is desirable to prevent homicide and bodily injury." Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 702 (1937).

circumspection might counsel the omission of a proscription of reckless endangerment of property.

However, in the case of risks to property of catastrophic dimensions, such as the kinds of cases covered by Model Penal Code section 220.2(2),[167] there may be an argument for expansion of the range of protected interests. Disastrous financial loss and widespread property damage are serious harms and if the offender's connection to them is sufficiently strong, as in the cases reached by the proposed statute, it might be unduly dogmatic to exclude such calamities simply because they affected property rather than person. For example, reckless practices in the mortgage market played a significant role in triggering our current recession. In a large number of cases, mortgages were taken out by people manifestly unable to repay their loans except in a condition of ever rising real estate values. This may well be argued to be reckless behavior. Reasonable people are aware that no market always rises and arranging one's finances such that obligations cannot be met unless virtually impossible events occur is a gross deviation from a standard of reasonable care.

But what of the financial professionals who led so many homeowners into this financial trap? There is nothing to prove that those brokers, lenders, advisors, etc. intended to injure their various clients. However, a reckless attitude toward their clients' financial future might be demonstrated. Financial professionals surely know about the behavior of free markets and know that an economic bubble is likely to burst with disastrous consequences for those caught unprepared. Nevertheless, they continued to encourage their customers to borrow and invest in risky mortgages, pocketing handsome fees for themselves and contributing to a financial catastrophe.[168] Other than the fact that a financial debacle resulted (rather than a homicide), the facts are strikingly similar to those that led to the death of Daniel Wright. The actors encouraging Stottlemire to recklessly fire the shotgun might look somewhat different. They are after all wearing suspenders and drinking fine wine rather than sporting jeans and chugging Colt 45. However, the effect of their reckless encouragement may be the same: they motivated others into recklessly taking exceedingly costly risks. It might be quite useful, when a calamity has been suffered which injured or damaged vast quantities of property and financial resources, to have available an offense such as the proposed Compound Recklessness statute which authorized state actors to step

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167. MODEL PENAL CODE § 220.2 (1980); *see also id.* cmts. 2, 4.

168. *See* Peter S. Goodman & Gretchen Morgenson, *Saying Yes, WaMu Built Empire on Shaky Loans,* N.Y. TIMES, Dec. 28, 2008, at A1; Gretchen Morgenson, *Blame the Borrowers? Not So Fast*, N.Y. TIMES, Nov. 25, 2007, § 3 (Money and Business), at 1.

in armed with powerful tools to see that matters are fully investigated and justice done.

Finally, there is the issue of whether a result element of any kind should be included in the offense definition. Should this new offense of Compound Recklessness be defined so as to penalize negligence "in the air" so to speak, regardless of whether anyone ultimately is harmed? The definition of a criminal offense ought, says George Fletcher, to state a "morally coherent imperative."[169] It should also reflect sound social policy in forbidding or commanding particular conduct.

The moral imperative for the initial actor in the compound negligence scenarios examined above is clear: if the danger of another person's subsequent negligence is sufficiently obvious that it is foreseen, then one ought not to act without taking reasonable steps to forestall that risk of subsequent harm. Certainly the degree of risk, the seriousness of the harm anticipated, the reasons for running the risk, and the cost of preventive measures must all be assessed when making an informed moral calculation.[170]

However, the moral calculation involved here does not depend on the fortuity of whether the harm risked is actually inflicted on a victim. Whether the harm risked occurs or not, the judgment of personal culpability of the actor remains the same: he or she is worthy of blame and censure. Sound policy in this area would identify dangerous people who are likely to endanger others in the future and impose conditions on them to reduce the chances of their doing so.[171] The judgment of social danger should not be revised merely because in a particular case a harm recklessly risked has not come to pass.[172]

Thus when viewed either as a matter of social ethics or as a more utilitarian calculation of social defense against dangerous people, the answer to the question of what would be the best law seems clear: the offense should be defined so as to not require a result element. Rather, reckless conduct alone, when compounded with the subsequent reckless conduct of another, should be sufficient for guilt. However, prudential calculations of practical politics seem to have commanded the attention of officials who have attempted to create law in this area. How, as a practical matter, does one convince legislators to pass new laws and get police, prosecutors, judges, and juries to enforce them? How can these people be enlisted in the new crusade,

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169. FLETCHER, *supra* note 18, at 575.

170. *See* MODEL PENAL CODE § 2.02(2)(c), (d) (1985); *see also id.* cmts. 3, 4 (1985).

171. *See* MODEL PENAL CODE art. 5, introductory cmt. (1985) (if there is an obvious indication of an actor's future criminality that person "must be made amenable to the corrective process that the law provides").

172. *See supra* notes 114–18 and accompanying text.

or at least not be alienated by it? How does one persuade the citizenry that the new law is just and ought to be obeyed regardless of whether the risk of detection and prosecution happens to be small if they chose to disregard it?[173]

The treatment accorded to Reckless Endangerment, a species of non-compound negligence which does not require that any harm actually be inflicted, is instructive here. Earlier, this article discussed the punishment commonly attached to the offense, which is defined so as to not require proof that the harm risked has in fact been caused.[174] When imprisonment is to be imposed upon conviction, the jurisdictions have overwhelmingly settled on a basic[175] maximum sentence of about one year.[176] Thus, the near unanimous[177]

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173. Rudolph Gerber and Patrick McAnany write in the introduction to their collection of works on punishment:

> The prevention of crime as a goal of society is not ultimately achieved by either crass fear or huge detention centers but by a successful communication of disapproval. It is a moral process which depends for its success on a widely accepted system of laws which reflect a consensus of values . . . . Justice needs to be ultra-pure if it is to have its basic impact as moral message . . . . [C]ommunication may be successful even if the message gets through more to those speaking than to those spoken to. We may find that the moral process of crime and punishment is really a reforming technique for those who have never offended.

RUDOLPH J. GERBER & PATRICK D. MCANANY, CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 4-6 (1972).

174. *See supra* notes 107–12 and accompanying text.

175. I use the word "basic" to indicate that some states recognize an aggravated form of the offense which may indeed support the imposition of a higher, felony grade sentence. Arizona, for example, aggravates the offense to a felony if the actor creates a risk of "imminent death," but the felony is punished by a definite term of only one year; otherwise the offense is punished as a class one misdemeanor with a term of six months. ARIZ. REV. STAT. ANN. §§ 13-1201, -701, -707 (2001). Additionally, Delaware authorizes a sentence of imprisonment for up to five years if the defendant recklessly creates "a substantial risk of death." DEL. CODE ANN. tit. 11 §§ 604, 4205(b)(5) (2007). North Dakota authorizes imprisonment for up to five years if the actor exhibits "extreme indifference" to human life. N.D. CENT. CODE §§ 12.1-17-03, -32-01(4) (1997). Hawaii authorizes a five year sentence if the reckless actor places another in danger of death or serious bodily injury by employing "widely dangerous means." HAW. REV. STAT. §§ 707-713, 706-660(2) (1993). The commentary makes clear the means employed must risk a catastrophe within the meaning of Model Penal Code section 220.2(2). *See* HAW. REV. STAT. §§ 708-800 (1993). Montana allows imposition of a sentence not to exceed ten years if the actor knowingly creates a risk of death or serious bodily injury and specifically identifies "tree spiking" as an example of such conduct. MONT. CODE ANN. § 45-5-207 (2009). New York authorizes a sentence of up to seven years, with a minimum of one third of that, if the two factors are combined, i.e. if the reckless endangerment "evince[s] a depraved indifference to human life" and creates a "grave risk of death." N.Y. PENAL LAW §§ 120.25, 70.00(2)(d), (3)(b) (McKinney 2004). Kentucky agrees with the New York policy, authorizing a one to five year sentence. KY. REV. STAT. ANN. §§ 508.060, 532.060(2)(d) (West 2006). Tennessee allows imposition of a sentence of one to six years if the reckless endangerment involves the use of a deadly weapon. TENN. CODE ANN. §§ 39-13-103, 45-35-111(b)(5) (2006). New Hampshire agrees with this policy, authorizing a sentence of seven years. N.H. REV. STAT. ANN. §§ 631:3, 651:2(1)(b) (2007). The State of Washington authorizes a sentence of ten years if the reckless endangerment consists of recklessly discharging a firearm from a motor vehicle where there is a substantial risk of death (i.e. a drive by shooting). WASH. REV. CODE §§ 9A.36.045, .20.021(1)(b) (2008). Wisconsin

judgment of the jurisdictions which have actually enacted a Reckless Endangerment provision is that the appropriate level of punishment for the basic, unaggravated offense should be at most a term of imprisonment of about one year or less.

The comments to the Model Penal Code discuss (over approximately five full pages)[178] both the general issue of whether resulting harm ought to be an element of criminal offense definitions and the specific consequences to be anticipated if a criminal offense is defined in terms of conduct only, without regard for whether any actual harm results in a particular case. The commentators present a compelling argument that fortuity of result does not lessen the culpability or danger arising from engaging in the conduct in the first place, and indicate that the "logic"[179] which would appeal to a "rationalist"[180] would indicate that the appropriate level of criminal penalty ought not to be affected by the happenstance of the actual occurrence of the risked harm. However, they acknowledge that in fact results have played a central role in the criminal law as it has actually been enacted. The "more persuasive"[181] arguments for this fact are "drawn from practice rather than

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agrees with the policy of aggravating the offense for those who exhibit an especially wicked form of recklessness, a "depraved heart" in common law terms; however the Wisconsin statute is unique in that it begins its punishment hierarchy for the "basic" offense at ten years, and allows a sentence of twelve years and six months for the aggravated degree of the offense. WIS. STAT. §§ 941.30(1), 939.50(3)(f), (g) (2007-08).

176. ALA. CODE § 13A-6-24 (LexisNexis 2005); ALASKA STAT. § 11.41.250 (2008); ARIZ. REV. STAT. ANN. § 13-1201 (2001); ARK. CODE. ANN. §§ 5-13-204 to -206(West 2009); CONN. GEN. STAT. §§53a-63 to -64 (2007); DEL. CODE ANN. tit. 11, §§ 603 - 604 (2007); GA. CODE ANN. § 16-5-60(b) (2007); HAW. REV. STAT. §§ 707-713 to -714 (1993); 720 ILL. COMP. STAT. 5/12-5 (2006); KY. REV. STAT. ANN. §§508.060 - .070 (West 2006); ME. REV. STAT. ANN. tit. 17-A, §§ 211, 213 (2006); MO. ANN. STAT. § 565.070(1)(4) (1999); MONT. CODE ANN. § 45-5-208 (2009); NEV. REV. STAT. ANN. § 202.595 (West 2006); N.H. REV. STAT. ANN. § 631:3 (2007); N.Y. PENAL LAW §§ 120.20 - .25 (McKinney 2004); N.D. CENT. CODE § 12.1-17-03 (1997); OR. REV. STAT. § 163.195 (2007); TENN. CODE ANN. § 39-13-103 (2006); TEX. PENAL CODE ANN. § 22.05(a) (Vernon 2003); UTAH CODE ANN. § 76-5-112 (2008); VT. STAT. ANN. tit. 13, § 1025 (1998); WASH. REV. CODE § 9A.36.050 (2008); WYO. STAT. ANN. § 6-2-504 (2007).

177. Four States (Arizona, Colorado, Connecticut, and Indiana) provide for a maximum sentence of six months and one (Florida) has enacted a sixty day maximum. Three States (Maryland, Pennsylvania and Wisconsin) allow the imposition of a maximum sentence of more than a year. Wisconsin, which authorizes a possible maximum term of ten years (with an additional two and a half years if the actor's conduct demonstrates an utter disregard for human life), is clearly an outlier in this compilation of statutes. Wisconsin's statute drew an implied criticism from the authors of the commentary to the Model Penal Code who noted that an earlier draft of Wisconsin's statute, which provided for a prison sentence of not more than one year, was a "more satisfactory formulation" than the statute eventually adopted. *See* MODEL PENAL CODE § 211.2 cmt. 1 (1980).

178. *See id.* cmt. 2.

179. *Id.*

180. *Id.*

181. *Id.*

theory."[182] They note that "every Anglo-American jurisdiction"[183] maintains a series of offenses whose definitions require the occurrence of some harm. That "uniformity of practice,"[184] they say, probably reflects a "widely spread and deeply rooted conviction by the public at large"[185] that results matter. To defy this sentiment and impose the serious penalties applicable to result offenses such as homicide and aggravated battery would be to invite, at a minimum, jury nullification. People and politicians would simply not stand for it. Thus, to gain acceptance of its innovative provision, the Model Code imposed only misdemeanor level sanctions. This underlying judgment, say the commentators, is "to one or another extent [reflected] in all later enactments"[186] by the various states.

The result of this survey is to suggest that felony grade sanctions are likely to be supportable only in cases which are popularly regarded as truly serious. This paper argues that felony grade penalties in excess of one year ought to be available for possible use in appropriate instances of compound reckless behavior. The culpability of recklessly risking that another will act upon the product of one's conduct is not lessened by the subsequent recklessness of another who does exactly that. Nor is the social danger of the initial reckless actor neutralized by the subsequent reckless act of another. The initial actor has demonstrated the unreliability of his or her own internal controls and legislatures should retain the option to reinforce them with serious criminal consequences.

The price of having these serious penalties available is that the offense is reserved for situations in which a seriously harmful result has occurred. The most obvious instances are those in which harm to another's physical safety has not been merely threatened but has in fact occurred. Without a dead or broken body, so to speak, the citizens may not support enforcement of the new law and the prudent legislator may wish to correspondingly limit the new law's reach. Death and serious physical injury seem appropriate harms to be included as result elements of the proposed offense of Compound Recklessness. Whether less-than-serious physical injury should be included is a debatable proposition. Assault statutes usually include such injury, but often grade the offense as less severe.[187] It might be thought wise to leave cases of compound recklessness which cause only less-than-serious physical

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *See* MODEL PENAL CODE § 211.1 cmts. 1, 2 (1980) (trace the common law development of the crime of assault and its modern statutory formulations).

injury to the coverage of the existing reckless endangerment statutes, where they exist, to be punished as a misdemeanor rather than as a felony.

4. Objective elements (circumstances)

The final objective or actus reus element in a Model-Penal-Code-type taxonomy is circumstance. Is the offense one in which the conduct becomes wrongful only in a limited set of circumstances which ought to be specified in the offense's definition? Many offenses are wrong in almost all cases and do not need special circumstances stated as part of their definition. For instance, killing people is almost always forbidden. There may be special cases of self-defense or necessity where homicide is not wrongful, but they are sufficiently rare that it is more convenient to address such issues in a general provision of the criminal law dealing with justifications applicable to a wide variety of offenses.

It may be beneficial to include the circumstances in which the conduct will be criminal or the circumstances in which the conduct is immune from penal threats. Where the absence of consent is an element of a sexual offense, for example, it might be very useful to establish the limits of consent in certain special situations, such as where a jailor has intercourse with a prisoner or where a professor seeks sexual favors from a student. In those circumstances the sexual relations are criminal. In their absence, consensual sex is entirely legal.

It is probably true that as long as the offense of Compound Recklessness is limited to materialized risks of death or serious bodily injury there is no need for a circumstance element in its definition. The harms involved are of such a type as to be facially criminal. The formula for determining the situations in which a person may properly take the risk of causing such serious harms is already spelled out in the definitions of reckless behavior.[188] There is little value in specifying further particular circumstances which make such risk taking unlawful.

However, another use of the idea of a circumstance element is to create statutes which reach only a very limited and specified set of circumstances. One of the prime purposes of the Model Penal Code in proposing the offense of Reckless Endangerment was to create uniformity.[189] This was thought to be a superior organizational technique and an aid to critical thought which might elucidate some of the general principles which underlie apparently

188. *See* MODEL PENAL CODE § 2.02 (2)(c), (d) (1985).
189. MODEL PENAL CODE § 211.2 cmt. 1 (1980).

separate areas of law.[190] On the other hand, some states have thought that special statutes covering only limited instances of risky conduct should be enacted. The most obvious is Massachusetts, whose legislature apparently canvassed the entire field of Reckless Endangerment law on a national level but ultimately decided to enact a reckless endangerment offense limited to "creating a risk of serious physical injury to children."[191] Montana apparently has had a history of problems with "tree spiking" and has included that specific act as a possible element of its reckless endangerment offense.[192] Virginia has not enacted a general reckless endangerment statute, but does specifically penalize those who leave unattended a loaded, unsecured firearm in such a manner "as to endanger the life or limb of any child under the age of fourteen."[193]

One can have a serviceable penal law whether special circumstances are singled out for inclusion in the definition of offenses or are instead omitted and left for consideration at the time of sentencing or charging. The fate of the criminal law will not rise or fall depending upon which choice a drafter should make. However, simplicity is in itself a virtue. Simple definitions are more easily understood and, if they are not simplistic in the sense of omitting unavoidable complexities, cover their ground fully and completely. Perhaps it is only a matter of intellectual aesthetics, but simple definitions seem more elegant and satisfying. Therefore, I shall not include any special circumstances in the basic definition of my proposed offense of Compound Recklessness.

5. Subjective elements

The subjective or mens rea element should require a degree of negligence that is significantly more culpable than that necessary to support a simple civil claim for damages. In the language of modern statutes

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190. *See* JEROME HALL, GENERAL PRINCIPALS OF CRIMINAL LAW 12 (2d ed. 1947):

> [T]he degree of systematization of a discipline is the prime index of the state of knowledge of its subject matter . . . . Progress toward systematization resulted from discovering that crimes can be decomposed, i.e., analyzed into several elementary "material" (essential) ideas; then, that certain ideas are common to two or more offenses. These served as unifying agents, bringing together, e.g. murder and manslaughter, robbery, larceny and assault . . . . It was next perceived that certain generalizations [apply] to all the specific prescriptions.

See also Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952). One can see an opposite organizational technique employed in the alphabetical arrangement of the federal criminal law or the law of Rhode Island.

191. *See* MASS. ANN. LAWS ch. 265, § 13L ed. (LexisNexis 2009).

192. MONT. CODE ANN. § 45-5-207 (2009).

193. VA. CODE ANN. § 18.2-56.2 (2009).

influenced by the Model Penal Code only a "gross deviation" from the standard of care observed by reasonable people[194] should suffice. In terms reminiscent of the common law, "criminal negligence"[195] should be required.

Additionally, there is the question of whether actual awareness of the risk being run should be required, or whether a standard of what the actor "should have been aware of," should be sufficient. In Model Penal Code terms, this is the difference between recklessness and negligence.[196] There is of course a lively debate about whether inadvertent negligence should ever be punished criminally;[197] and while the Model Penal Code generally disapproves of inadvertent negligence as a culpable mental state, its definitions of crimes do include, generally in their lowest grades and when accompanied by aggravating circumstances,[198] offenses committed negligently.

The thirty-two American jurisdictions which have enacted endangerment offenses almost universally restrict the offense to Reckless Endangerment.[199] Language about what the actor "should have known" would seem consistent with a standard of inadvertent negligence, but the issue seems not to have been definitively decided. Texas has several statutes dealing with endangerment. Its statute which deals specifically with children less than fifteen years old also punishes endangering acts done with "criminal negligence" as well as those done with recklessness.[200] Otherwise it appears, although other wording is sometimes used,[201] that recklessness in the form of advertent risk taking is

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194. MODEL PENAL CODE § 2.02(2)(c), (d) (1985); *id.* cmt. 3.

195. *See* PERKINS & BOYCE, *supra* note 8, at 840-49; DRESSLER, *supra* note 7, at 130-32.

196. MODEL PENAL CODE § 2.02(2)(c), (d) (1985).

197. *See* PERKINS & BOYCE, *supra* note 8, at 849-51; DRESSLER, *supra* note 7, at 132-33; ALEXANDER & FERZAN, *supra* note 130, at 69-85; MODEL PENAL CODE § 2.02(2) cmt. 4 (1985).

198. *See, e.g.,* MODEL PENAL CODE § 210.4 (1980) (negligent homicide – a felony of the third, and lowest, degree); *Id.* § 211.1(b) (simple assault – negligently causing bodily injury with a deadly weapon, a misdemeanor); *Id.* § 220.3(1)(a) (criminal mischief – negligently damaging another's property by use of fire, explosives, poison gas, radioactive materials, or other potentially catastrophic means; graded as a violation).

199. Florida's statute requires "culpable negligence," a rather comprehensive term of not entirely clear meaning, but which has been held to include conduct which "the defendant must have known, or reasonably should have known" was dangerous. *See* Carrin v. State, 875 So. 2d 719, 721 (Fla. Dist. Ct. App. 2004) *rev'd on other grounds*, 978 So. 2d 115 (Fla. 2008). Nevada's offense is defined in terms of acts or omissions committed "in willful or wanton disregard" of another's safety (NEV. REV. STAT. ANN. § 202.595 (West 2006)). The statute seems to cover conduct "that the actor knows, or should know" are likely to cause harm. *See* Van Cleave v. Keitz-Mill Minit Mart, 633 P.2d 1220, 1221 (Nev. 1981).

200. TEX. PENAL CODE ANN. § 22.041(c) (Vernon 2003) (intentional and knowing conduct is also covered).

201. *See, e.g.*, KY. REV. STAT. ANN. §§ 508.060 - .070 (West 2006) ("wanton endangerment" where "wanton" is defined in the terms used by the Model Penal Code to define "reckless" behavior and "recklessly" is defined as the Model Penal Code would define "negligently." *Id.* § 501.020(3), (4). *See also* MONT. CODE ANN. § 45-5-208 (2009) (negligent homicide wherein "negligence" defined

universally required. It would seem that advertent negligence in the form of "reckless" behavior has found favor with legislators and probably ought to be retained in the proposed new statute.

However, whether there should be an aggravated form of the offense when the actor has exhibited an especially heinous form of recklessness, an "extreme indifference" to the occurrence of harm, is a matter open to debate. Six states have divided their offense of Reckless Endangerment into degrees in which recklessness so extreme as to constitute "extreme indifference" or "utter disregard" of human life constitutes an element of an aggravated degree of the offense.[202] The rest of the states have not done so. "Extreme indifference" is the modern statutory analogue of the old common law concept employed in homicide law of a "depraved heart, devoid of social duty, and fatally bent on mischief."[203] Murder, a capital offense, was distinguished from manslaughter, a non-capital offense, by the presence of "malice aforethought." Purposeful homicides, unless committed in a legally recognized "heat of passion," were malicious, while accidental homicides were not and were punished as manslaughter rather than as murder. There was thought to be a great gulf between purposeful and accidental homicides which required separate treatment for each. But there was a special exception made for those who killed not on purpose but with an "abandoned and malignant heart." Like the North and South poles, which are supposed to be poles apart but which look pretty much the same when you get there, people who killed on purpose and those who killed callously with no regard for the life they extinguished seemed equally wicked and dangerous.[204] Persons who simply did not "give a damn" as they furiously drove heavy wagons heedlessly through crowds or hurled heavy beams from city rooftops onto the crowded thoroughfares below seemed to be similarly situated when it came time to pass moral judgment on their conduct.[205] Both seemed equally evil and both were treated as murderers if they killed someone, even if one actually intended to kill while the other did

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as Model Penal Code defines "recklessness." *Id.* § 45-2-101(43).

202. ARK. CODE. ANN. § 5-13-204 (West 2009); CONN. GEN STAT. § 53a-63 (2007); KY. REV. STAT. ANN. § 508.060 (West 2006); N.Y. PENAL LAW § 120.25 (McKinney 2004); N.D. CENT. CODE § 12.1-17-03 (1997); WIS. STAT. § 941.30(1) (2007–08). Usually the addition of "extreme indifference" beyond ordinary recklessness elevates the offense from misdemeanor to felony grade. In Connecticut, however, both levels of the offense are only misdemeanors, while in Wisconsin both levels are felonies. *Compare* CONN. GEN STAT. §§ 53a-63 to -64 *with* WIS. STAT. § 941.30.

203. *See* LAFAVE, *supra* note 81, at 739.

204. *See* MODEL PENAL CODE § 210.2 cmt. 4 (1980) ("This provision reflects the judgment that there is a kind of reckless homicide that cannot be fairly distinguished in grading terms from homicides committed purposely or knowingly.").

205. *See* CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES § 10.06 (1958) (collecting many common law authorities); *see also* JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW § 88 (1934).

not. This moral judgment is the qualitative difference in culpability between the "merely" reckless and those who exhibit a depraved indifference to the value of human life. It deserves to be reflected in the grade of crime attributable to each in a law dealing with reckless encouragement and facilitation. The six states which aggravate their reckless endangerment offense when committed with "extreme indifference" have established a sound policy which should be followed by others.

IV. DEFINITION OF PROPOSED STATUTE

Having discussed the desirability of a statute dealing directly with compound negligence and having addressed some of the issues to be confronted in drafting it, the enactment of a statute similar to the following is suggested:

Compound Recklessness

> A person is guilty of Compound Recklessness when he recklessly commands, requests, aids or encourages the conduct of another person who recklessly causes serious bodily injury or death [or catastrophe]. Conduct shall constitute aid or encouragement only if it substantially facilitates such other person in the commission of their crime.

Aggravated Compound Recklessness

> A person is guilty of Aggravated Compound Recklessness when, under circumstances evincing an [extreme] [depraved] indifference to the value of human life, he recklessly commands, requests, aids or encourages the conduct of another person who recklessly causes serious bodily injury or death [or catastrophe]. Conduct shall constitute aid or encouragement only if it substantially facilitates such other person in the commission of their crime.

There are several things to note about this proposed statute. As discussed above, the conduct elements are similar to those employed in cases of accomplice liability. Special emphasis is placed on the elements of aid and encouragement because of the wide range of potential acts of encouragement and aid and the concomitant potential for excessive or oppressive statutory reach in those areas. By contrast, a command or request for conduct is usually quite specific in its nature and not nearly as likely to lead to statutory over-

breadth. Should the phrase "substantially facilitates" be thought unduly vague, one could borrow from the suggested alternative of the Model Penal Code's original proposal on complicity, defining aid and encouragement as "providing means or opportunity for the commission of the crime, substantially facilitating its commission."

No special provision is made for cases of omission. The consequence would be that, because "conduct" generally includes a failure to act only when there is a legal duty to do so, the absence of a legal duty would leave the conduct element of the offense unfulfilled in the case of an omission. However, as discussed in the case of Joshua Paniccia above,[206] the presence of a legal duty would allow the statute's application to an omission, all other elements being present of course.

The offense applies only in the case of "serious physical injury or death." As discussed above,[207] it is prudent to define the offense so as to apply only to instances where serious physical injury or death has resulted. Lesser harms are deliberately excluded and will be covered, if at all, only by extent statutes which may prohibit such conduct as reckless endangerment. If the proponents of such a statute feel particularly bold, as for example if their jurisdiction already has a reckless endangerment statute incriminating recklessly risking simple "physical injury" vice "serious physical injury," then simple "physical injury" could be substituted. The possibility of inclusion of catastrophic loss of or damage to property was discussed above.[208] The bracketed inclusion of "catastrophe" is designed to allow incrimination of such conduct should a decision to do so be made.

The mens rea element is specified as "recklessly," i.e., inadvertent negligence. Inadvertent negligence on the part of the original actor is regarded as an insufficient mens rea unless a legislature should deliberately choose to make such a choice. Purposeful and knowing wrongdoing is not directly considered in the proposed statute. If the initial actor should act purposely or knowingly to cause a death or serious injury we are beyond the scope of this proposal: complicity in the act of the second actor and or proximate cause will provide a mechanism to deal with the situation. Extreme recklessness, or depraved indifference, is included as an aggravated form of the offense. One might choose either of the bracketed words, probably depending upon whether one wished to emphasize the moral condemnation being visited upon the

206. *See supra* notes 148-51 and accompanying text.
207. *See supra* notes 152-61 and accompanying text.
208. *See supra* notes 162-63 and accompanying text.

actor,[209] which would tend toward "depraved," or to adopt a more dispassionate description of the actor's conduct, thus using "extreme" indifference.[210] As discussed previously, such a malignant form of recklessness should be sufficient to call forth more serious penal consequences than those appropriate for merely "ordinary" forms of reckless behavior.

The sentence appropriate to such an offense is not specified. It should be a felony grade offense of appropriately significant proportions. However, the length of the maximum sentence ought to be in harmony with the general run of other offenses in the particular jurisdiction's criminal law. Because these vary considerably, none are specified in this proposal. However, it is submitted that the judgment expressed in the comments to the Model Penal Code is a wise one: a sentence measured in decades would be extravagant.[211] The aggravated degree of the offense should be punished with an appropriately aggravated sanction.

V. CONCLUSION: HOW THE PROPOSED STATUTE MIGHT BE APPLIED TO THE FOUR ILLUSTRATIVE CASES

It will take some imagination to apply the proposed Compound Recklessness statute to the four illustrative cases with which this article began. In some of the cases, facts are entirely unknown while in others the pertinent facts were not well developed. Regarding the death of Daniel Wright, it is known that the shooter, Robert Stottlemire, was specifically directed to shoot by Wright himself and that, together with two other friends, Brock Bieker and Michael Searle, they "hatched the plan to try out the vest" after a night of drinking at Bieker's house.[212] The shotgun was taken from the Bieker home and all four young men were present at the deserted field where the fatal shot was fired. Bieker and Searle were charged under the Compound Recklessness statute; Wright and Stottlemire are already adequately covered under the standard principles of accomplice or personal liability. It is not know exactly

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209. *See, e.g.*, PERKINS & BOYCE, *supra* note 8, at 60 (where they speak of the "element of viciousness" which distinguishes the negligent murderer from one guilty only of manslaughter).

210. *See, e.g.,* People v. Phillips, 414 P.2d 353, 363-64 (Cal. 1966) (the court cautioned against using the metaphor of an "abandoned and malignant heart" while instructing a jury as it invites confusion and "could lead a jury to equate the malignant heart with an evil disposition or a despicable character; the jury then, in a close case, may convict because it believes the defendant is a 'bad man').

211. *See* MODEL PENAL CODE § 211.2 cmt. 1 n.1 (1985) ("A more satisfactory formulation" than the current Wisconsin statute, which allows more than ten years imprisonment, is an earlier draft of the statute which provided possible imprisonment for "not more than one year.").

212. Krause, *supra* note 25.

what Bieker and Searle did and said that night, but their guilt under the proposed statute would require that their conduct have been committed recklessly and have constituted encouragement which "substantially" facilitated the homicide.

If the proposed statute was enacted, the prosecution would spend significant time investigating whether Bieker and Searle remonstrated with Wright and Stottlemire, seeking to convince them to abandon such a foolhardy scheme, or whether they extolled the proposal as some sort of virile adventure. Acts of discouragement would disprove the offense while acts of encouragement would strengthen the prosecution's case. The encouragement could be through words ("That a boy! What a great idea") or through conduct (a slap on the back or a nod of approval). Providing an appreciative audience to witness such feats of daring might be thought to be an act encouraging their performance. Accompanying Wright and Stottlemire to the field and being present at the scene might be thought to be merely a neutral fact, but people tend not commit wrongful acts in front of witnesses who seriously disapprove. Wright and Stottlemire must have thought that Bieker and Searle would not report them to others for their foolish conduct and that perceived tacit approval and immunity might encourage them to act. Whatever the arguments that could be mounted may be, the prosecution would have to demonstrate an encouragement that was "substantial" and not merely minimal. The provision of the shotgun, apparently by Bieker, is "aid" rather than encouragement and that aid seems to be substantial. The defense would likely investigate to see if an argument could be made that in the outskirts of Gary, Indiana, shotguns are commonly available to young men; if so, the provision of the gun would be no more substantial than the provision of the car that took the party to the deserted field or the provision of the home in which the four "hatched" their plan while drinking alcohol together. The car and the home did of course facilitate to some degree the killing of Wright; the connection of the shotgun to the death, however, seems to be of a different order of magnitude and far more likely to be considered a "substantial" aid than the other contributing factors. The conduct of Bieker and Searle would have to be proved to be "reckless." Given the nature of the risk involved (death), the triviality of the reason for running it (to experience a thrill on an otherwise boring Saturday night), and it's obviousness (all people must recognize the risk of harm inherent in purposely firing a shotgun into someone's chest at point blank range), it is virtually certain that their conduct would be found "reckless."[213]

213. *See* MODEL PENAL CODE § 2.02(2)(c) (1985).

The only potentially difficult issue would be whether their conduct could be found to evince "an [extreme] [depraved] indifference to the value of human life" sufficient to elevate the offense to Aggravated Compound Recklessness. The prosecution might argue that their conduct amounted to "sporting with life" and demonstrated such an "abandoned and malignant heart"[214] as to justify the aggravated offense. The defense would focus on their youth, the silliness rather than the malignity of their conduct, and, perhaps, on the role the victim played in his own demise. In any event it would become an issue to be litigated and not, as in the real case, ignored as it was not an element of the case.

As for the death of Kathryn Lally, little is known about the person who aided Jason Welch in killing her. The identity of the person who placed the nine millimeter Ruger pistol under the sofa cushion was not determined and the circumstances surrounding that act remain unknown. There seems little doubt that the objective elements of the proposed statute have been fulfilled: the result element of death has occurred and the availability of the gun to the inexperienced Mr. Welch has substantially aided his reckless action.

Regarding the subjective elements, it can be seen that this case might illustrate the policy decision of whether to incriminate negligent as well as reckless behavior. There seems little doubt that a good argument can be made that leaving loaded pistols unsecured in places where visitors can easily find them constitutes a "gross deviation" from the standard of care observed by a reasonable person.

The issue might well turn on whether the aider was aware of the risk and consciously disregarded it (an example of reckless behavior) or whether he was unaware of the risk caused by his heedless conduct, but should have been (which would constitute negligent behavior only). One can imagine the facts which might bear on this issue: whether the person knew that a party was to be held in the room immediately after he placed the gun in the sofa; whether the person knew that the guests would become intoxicated; whether the person knew how many people would be there and how difficult it would be to keep track of the gun to ensure that it did not fall into the wrong hands; whether the

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214. *See* Commonwealth v. Ashburn, 331 A.2d 167 (Pa. 1975); Commonwealth. v. Malone, 47 A.2d 445 (Pa. 1946). Both cases discuss "Russian roulette or poker" in which the "participants, in turn, place a single cartridge in one of the five chambers of a revolver cylinder, give the latter a quick twirl, place the muzzle of the gun against the temple and pull the trigger, leaving it to chance whether or not death results from the trigger pull." *Malone*, 47 A.2d at 445 n.1. Such "uncalled-for" act[s] in callous disregard of [their] likely harmful effects" were found to evidence "an evil design in general; the dictate of a wicked, depraved and malignant heart." *Id*. at 446, 449. It would not be an obviously losing argument to suggest that shooting at another point blank for mere diversion constituted a "malignant heart" even if the parties were all friends.

person had a reason to place the gun where it could be reached easily (perhaps the person had recently been threatened with violence and the gun was for self-protection; or perhaps the person was a drug dealer and the gun was for protection of his or her illicit business); whether the gun had been placed in the sofa some time before the party and then simply forgotten.

In some of these cases the risk of harm arises as a result of a conscious calculation and could be judged reckless; in others the risk may be unappreciated and at most adjudged negligent. Should we convict that person even if the conduct is found to be inadvertent negligence rather than advertent recklessness? In either case the conduct aided Jason Welch just as "substantially" and the harm to Kathryn Lally is identical.

By convicting the unknown person of Compound Recklessness we encourage more care by our fellow citizens in the possession of firearms, to cause them to pause and consider more carefully their actions regarding the storage of firearms rather than to continue to blithely ignore the hazards of such conduct. Inadvertent negligence, even if gross or criminal negligence, ought not to be included in the statute. Thus the unknown person could be incriminated only if he or she was aware of the risk run by placing a loaded pistol in the midst of a party. The existence of the crime of Compound Recklessness would provide greater motivation for criminal investigators to learn the facts surrounding the actions of such people as the person who placed the pistol in a sofa where Jason Welch could find it. Depending upon what was learned, that person could be readily penalized as one who recklessly and substantially aided Welch to kill Kathryn Lally.

David Ryan was killed by eighteen year-old Josh Paniccia while recklessly driving a "souped-up" car which his parents helped him to purchase. Paniccia had a history of driving infractions, of which his parents had ample notice, and yet they still assisted him in driving by assisting in the car's purchase. Their case is distinguished from others, such as Bieker supplying the shotgun with which Daniel Wright was shot, by the fact that Paniccia's parents may have committed an act of omission as well as the act of commission (by helping him purchase the car). Paniccia's parents could have stopped him from driving, and endangering others, by a simple process of formally revoking their consent for their minor child to be issued a driver's license.

If there was a legal duty to do that when their child's danger to others was manifest, then it would be relatively easy to argue that they had acted recklessly in deliberately failing to act when duty bound to do so. The assistance they rendered would seem to be substantial and their guilt under the proposed statute appears likely. Whether their prosecution would be a just or useful thing to do is of course another matter, one entrusted to the discretion

of the prosecuting authorities. The authorities in New York would seem to have been inclined to prosecute if the opportunity to do so was available.

Amilcar Valladares killed no one when he lost control of his car during a street race and careened into a crowd standing at a Dairy Queen drive in, but he did injure a number of people. Sara Wall's actions in racing him down the street encouraged his headlong rush to beat her to the finish. There was no verifiable communication by voice or by writing but the challenge plainly issuing from her actions can be argued to have strongly encouraged his actions. Wall certainly knew of the likely effect of her actions, indeed it seems to have been her purpose to find someone to race, and her actions can thus be seen as reckless. She seems to be the type of person whose conviction would be authorized by the proposed statute prohibiting Compound Recklessness.