ABSTRACT. Courts and commentators are notoriously puzzled about the mens rea standards for complicity. Accomplices intend to aid, but what attitude need they have towards the crimes that they aid? This paper both criticizes extant accounts of the mens rea of complicity and offers a new account. The paper argues that an intention can commit one to an event’s occurrence without committing one to promoting the event, or making it more likely to take place. Under the proposed account of the mens rea of complicity, an accomplice must have an intention that commits him to the crime’s occurrence, but need not commit him to making it more likely that the crime occurs. The paper traces the implications of this view both for several difficult complicity cases, and for ongoing debates among philosophers of action about the necessary and sufficient conditions of joint agency.

I. INTRODUCTION

Regno wanted some counterfeit bills. Instead of making them himself, he bought some from Peoni. Peoni knew that Regno would either use the bills to try to buy something from some unsuspecting citizen, or else sell them to some other crook who would, in turn, either try to pass them off as real or sell them. As it happened, Regno did just what Peoni did: he sold them as counterfeit bills to Dorsey. Dorsey tried to pass them off as real, and was arrested. He was easily convictable for the crime of possession of counterfeit bills. Peoni was charged as Dorsey’s accomplice in the possession. Rather than producing evidence that Peoni himself possessed the bills, that is, the United States’ government produced evidence that Peoni helped Dorsey to possess them.¹ Peoni was convicted at trial as Dorsey’s

¹ It is a bit unclear why the government chose this route. I suspect that they lacked evidence that Peoni had ever been in possession. Perhaps Peoni had arranged for the bills to be delivered to Regno without ever having been in possession of the bills himself. Or perhaps there was enough evidence of that possibility to generate reasonable doubt that Peoni had ever been in possession.
accomplice, but the appeals court overturned the conviction. In his short but oft-cited opinion, Judge Learned Hand asserted that although Peoni’s conduct did indeed help Dorsey to possess counterfeit bills – thanks to Peoni’s conduct, Regno had bills to sell – Peoni did not act with the mental state needed for accomplice liability. In support of his conclusion, Hand made the following famous remark:

[Definitions of complicity] all demand that [the defendant] in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used – even the most colorless, ‘abet’ – carry an implication of purposive attitude towards it.2

Federal courts in the United States, and many state courts as well, have done an admirable job since of pretending as though they know exactly what Hand meant. All agree, correctly, that Hand was saying that a defendant is an accomplice to a crime only if he has some intention. But courts have acted as though Hand’s statement makes it clear what intention the accomplice must have. In fact, however, Hand left it open. Hand’s point was that Peoni lacked an intention sufficient to ‘associate [him] with the venture’. But Hand made no real effort to say precisely what intention a person need have in order to be so associated.3

The question that Hand did not answer is, at its heart, not in the first instance a legal question, but a philosophical one. It is a question in moral psychology and the philosophy of action. Putting aside the law, we recognize a variety of different ways in which those who are associated with another’s wrongful conduct are worthy of some form of blame or censure for that conduct thanks to the association. There isn’t only the child who throws the rock through the window but also the friend who eggs her on. There isn’t only the dinner guest who tells a racist joke, but also those who laugh at it. There isn’t only the philandering husband, but also the mistress. And so on.

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2 United States v. Peoni (100 F.2d 401 at 402 (1938)).
3 Hand’s suggestion that the accomplice must ‘seek by his action to make [the venture] succeed’ suggests that he thinks the accomplice must intend that the crime be committed. But in the very same paragraph, Hand leaves open the possibility that Peoni was Regno’s accomplice in the sale to Dorsey. But Peoni obviously did not intend that Regno sell to Dorsey; what did he care what Regno did with the counterfeit bills?