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Comparative Analysis as an Antidote to Tunnel Vision in Criminal Law Reform: The Example of Complicity

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INTRODUCTION

For all the intricacies of the criminal justice system, the conceptual apparatus upon which the criminal law is erected is worth preserving only if it provides acceptable answers to two questions. Should we punish? And, if so, how much? In the context of complicity, we should therefore ask: (1) should this conduct be punished as complicity (or some

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other form of punishable assistance), and, if so, (2) how much should we punish this type of assistance?

One of the biggest challenges that lawmakers face when criminalizing complicity is deciding what to do with cases involving actors who supply a good or service with awareness that the good or service will be used to consummate a criminal act. Cases of this sort abound. In a New York case, a person was charged with criminal facilitation for providing an undercover agent with the address of a person from whom the agent could buy drugs.[1] In a Peruvian case, a taxi driver was charged with complicity for driving a group of people to a house and waiting for them while they stole items from inside the house and loading them into the trunk of the cab.[2] In an oft-cited case from California, an owner of a telephone answering service was charged with conspiring with women who were using his call answering service for arranging illicit meetings with prospective clients.[3] Should we punish some or all of these actors? If we ought to, how much should we punish them? Should we punish them as accomplices? As something less than accomplices? These questions do not lend themselves to easy answers, but criminal law reformers must answer them nonetheless.

In what follows, I will explore the solutions offered to these questions in the United States and in Continental Europe. The comparative analysis will reveal that, in America, gradations between different degrees of assistance are made primarily based on the actor's mental state.[4] In contrast, European and Latin American courts and scholars commonly make these distinctions based on the import of the actor's contribution to the crime.[5]

Without judging which of these two approaches is preferable, I will argue that these disparate solutions are dictated—at least in part—by the fact that these two different legal traditions take competing paradigms or patterns of criminality as their point of departure. In the United States, the dominant pattern has been that of subjective criminality, with its focus on mental states.[6] In contrast, the prevailing

1. People v. Gordon, 295 N.E.2d 777, 778 (N.Y. 1973).

2. Ejecutoria Suprema del 7 de Marzo del 2001, R. N. 4166–99 (Peru).

3. People v. Lauria, 251 Cal. App. 2d 471, 474–475 (Cal. Ct. App. 1967). While the defendant in *Lauria* was charged with conspiracy, his conduct could have easily given rise to a complicity charge as well.

4. 2 WAYNE R. LAFAVE, SUBST. CRIM. L. § 13.2(b) (3d ed. 2018), Westlaw (database updated Oct. 2018).

5. GUNTHER JAKOBS, DERECHO PENAL. PARTE GENERAL. FUNDAMENTOS Y TEORÍA DE LA IMPUTACIÓN 842 (2ª ED. 1997).

6. United States v. Peoni, 100 F.2d 401, 402–03 (2d Cir. 1938); Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940).

pattern of criminality in Europe and Latin America is that of manifest criminality, with its attendant focus on conduct and objective rules of causation.[7]

When these patterns of criminality become well-entrenched, they have the tendency to create tunnel vision in the legal actors who are working within the context of a certain pattern. Thus, American lawmakers have a natural tendency to turn to mental states as a way of dealing with grading and criminalization decisions, while their Continental European counterparts tend to focus on objective conduct elements instead.[8]

In the context of criminal law reform, the tunnel vision that is produced by deeply embedded paradigms or patterns of criminality has the effect of stifling creativity. If left unchecked, the assumptions that serve as the backdrop to our criminal justice system will likely prevent reformers from giving serious consideration to alternatives that are in tension with the dominant patterns of criminality. I will end by arguing that one way of avoiding this outcome is by engaging in the comparative analysis of criminal law. Comparative analysis serves as a kind of "second opinion" that may help criminal law reformers to keep in check their natural tendency to conform to deeply embedded patterns of criminality.

I. CRIMINALIZING ASSISTANCE TO OTHERS IN COMPARATIVE PERSPECTIVE

Determining whether and to what extent to punish someone for aiding the commission of a crime by providing the perpetrator with a good or service is an issue that has long baffled lawmakers. In this Part, I will explore the different ways in which American and European scholars have attempted to answer these questions.

A. The American Approach: Distinguish Between Degrees of Assistance Based on the Aider's Mental State

American courts and legislatures usually try to draw distinctions between different degrees of assistance to wrongdoing based on mental states. The more blameworthy the mental state with which the assistance was rendered, the more likely the conduct is to be criminalized and punished severely.[9] As the blameworthiness of aider's mental state

7. JAKOBS, *supra* note 5.

8. LAFAVE, *supra* note 4.

9. Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 739 & nn.259–61 (1983).

wanes, so does the likelihood of criminalization and the severity of punishment.

In the context of complicity, American courts have long debated whether only purposeful aid should be criminalized as complicity or whether knowing help should also be punished as such.[10] There is general agreement that we should punish those who render aid to the perpetrator with the conscious objective (*i.e.*, purpose) of helping him consummate the offense.[11] No such agreement exists regarding those who engage in certain conduct knowing that it is practically certain that their acts will help someone else commit a criminal offense.[12]

This is best illustrated with an example. Suppose that Tara offers Hoss $500 for his gun, explaining to him that she intends to use it to kill Jared, her long-time enemy. Hoss sells Tara the gun, which she promptly uses to kill Jared. If Hoss sold Tara the gun with the desire that Tara use it to kill Jared, Hoss will be punished as an accomplice to Tara's homicide in all American jurisdictions. The situation is murkier if Hoss sells the gun to Tara without desiring that she use it to kill Jared, but with knowledge that she will, in fact, use it to kill Jared.

In many states, Hoss's sale of the gun is not punished as complicity. The rationale often given for this outcome is that complicity requires that the aider in some way associate himself with the perpetrator's conduct.[13] That is, complicity requires more than mere knowledge that one is helping another commit a crime.[14] It requires purposely wanting to bring about the commission of the offense.[15] The classic formulation of this view can be traced back to Judge Hand's formulation of the mental state of complicity in *United States v. Peoni*.[16] According to Hand, the mental state of complicity has "nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct."[17] Rather, complicity doctrine "demand[s] that [the accomplice] 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."[18] In sum, Judge Hand's view of complicity requires that

10. *Id.*
11. *See generally* LAFAVE, *supra* note 4.
12. *Id.*
13. *Id.*
14. Dennis J. Baker, *Complicity, Proportionality, and the Serious Crime Act*, 14 NEW CRIM. L. R.403, 408–09 (2011).
15. *Id.*
16. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
17. *Id.*
18. *Id.*

the accessory have a "purposive attitude towards" the consummation of the offense.[19]

A competing view of complicity was put forth in the oft-cited case of *Backun v. United States*, where it was contended that "[g]uilt as an accessory depends, not on 'having a stake' in the outcome of crime."[20] Instead, complicity liability hinges on knowledge that one is aiding the commission of a crime.[21] A direct consequence of this view—as the Court admits—is that "[o]ne who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun."[22] Returning to our hypothetical, Hoss would be held liable as an accomplice under this view, for he knew that selling the gun to Tara would aid her in the killing of Jared. While this view is certainly coherent, it remains the minority approach.[23] It was also considered and ultimately rejected by the drafters of the Model Penal Code.[24]

In spite of the difference between these competing approaches, they both have in common the fact that the lines between punishable and non-punishable assistance are drawn on the basis of the actor's mental state. The majority view only punishes purposeful assistance, thus leaving knowledge, recklessness and negligent aid unpunished.[25] The minority view punishes both purposeful and knowing assistance, but does not criminalize reckless or negligent assistance.[26]

At the same time, neither view sets a minimum threshold of assistance as a prerequisite for complicity liability. Instead, they both punish *any* degree of assistance, however trivial, as full-blown complicity.[27] There is, of course, no reason why this needs to be the case. It is plausible to imagine an approach to complicity that only generates liability once the degree of assistance reaches a certain level. This, as I will show in the next Section, is exactly what is done in many European and Latin American jurisdictions. Nevertheless, American criminal law has tended to eschew distinctions based on the kind of assistance

19. *Id.*
20. 112 F.2d 635, 637 (4th Cir. 1940).
21. *Id.*
22. *Id.*
23. Robinson & Grall, *supra* note 9.
24. *See* MODEL PENAL CODE § 2.06, cmt. at 318 n.58 (AM. LAW. INST., Official Draft and Revised Comments 1985).
25. Robinson & Grall, *supra* note 9, at 739 nn. 259–61.
26. *Id.*
27. *See* Stephen P. Garvey, *Reading Rosemond,* 12 OHIO ST. J. CRIM. L. 233, 236 (2014).

furnished and instead focuses on the mental state with which the aid was rendered.[28]

The same is true for grading distinctions made once the assistance is criminalized. Most jurisdictions do not make formal grading distinctions between degrees of complicity.[29] Once the actor satisfies the objective and subjective elements of complicity, the actor is considered a full-blown accomplice and, in principle, may be punished as severely as the perpetrator regardless of whether his assistance was substantial or trivial.[30] Judges usually retain the power to mitigate the punishment of accomplices at the sentencing stage.[31] While it would be sensible to use this judicial power to mitigate the sentences of bit players whose contribution to the offense was not particularly blameworthy, such mitigation is nevertheless discretionary.[32] As a consequence, it does not result in a uniformly applied grading distinction.

In spite of the fact that the majority of American states do not formally distinguish between different kinds of assistance for the purposes of grading criminal offenses, a handful of states punish the less serious offense of "criminal facilitation" alongside the more serious crime of "complicity."[33] Although there are minor drafting variations between the different states that punish criminal facilitation, the core element of the crime is knowingly providing to another the means or opportunity to commit a criminal offense.[34] The objective element of the offense (*i.e.*, *actus reus*) is thus to assist the perpetrator of a crime by either providing him with the means or the opportunity to commit the offense. In turn, the mental state (*i.e.*, *mens rea*) required by the offense is to furnish such aid with *knowledge* that the conduct facilitates the commission of a crime.[35]

While there are arguably some slight differences between the *actus reus* of complicity and the *actus reus* of criminal facilitation, the chief element that distinguishes these crimes from one another is the *mens rea* of each respective offense.[36] In states that punish both complicity and

28. *See* LAFAVE, *supra* note 4.

29. Baker, *supra* note 14, at 403–04; Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 447 (2008).

30. *See, e.g.*, Dressler, *supra* note 29, at 433. *See also* Luis E. Chiesa, *Reassessing Professor Dressler's Plea for Complicity Reform: Lessons from Civil Law Jurisdictions*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 1–2 (2014).

31. *See, e.g.*, *United States v. Cantrell,* 433 F.3d 1269, 1283–84 (9th Cir. 2006).

32. *See id.*

33. *See, e.g.*, N.Y. PENAL LAW § 115.00 (McKinney 2018).

34. *See* LAFAVE, *supra* note 4.

35. N.Y. PENAL LAW § 115.00 (McKinney 2018).

36. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 13.2(d) (3d ed. 2017) Westlaw (database updated Oct. 2017).

criminal facilitation, the mental state of the former is limited to purpose, whereas the mental state of the latter is knowledge.[37] To illustrate the distinction, it is once again useful to go back to the example of Hoss's sale of a gun to Tara.[38] In a state that punishes both complicity and criminal facilitation, Hoss would be guilty of complicity to homicide if he sold the gun to Tara with the purpose that she uses it to kill Jared. If, however, he lacked such purpose but instead sold the gun to Tara knowing that she would use it to kill Jared, he would be guilty of criminal facilitation.

Note that the difference between both scenarios is solely the mental state with which the assistance is furnished. If the aid is provided purposely, the assistance is punished as complicity.[39] If, on the other hand, the assistance is provided knowingly, "but without any specific intent to effectuate, carry into execution, or reap the fruits of the object crime", the aid is punished as criminal facilitation.[40] The result is a grading scheme that primarily distinguishes between the most serious kinds of assistance (complicity) and the less serious ones (criminal facilitation) on the basis of the presence or absence of certain mental states.

B. The European and Latin American Approach: Distinguish Between Degrees of Assistance Based on the Aider's Conduct

Civilian jurisdictions focus more on the import of the conduct that aided the perpetrator.[41] If a contribution is both substantial and outside of the ordinary course of business, the more likely it is to be criminalized and punished considerably.[42] As the contribution becomes less substantial, the assistance is punished less harshly.[43] If the assistance amounts to providing a good or service during the course of doing business, the conduct is likely to go unpunished.[44]

Regarding the latter, scholars in civil law jurisdictions have devoted considerable efforts to figuring out whether vendors ought to be held criminally liable for providing products or services when they have reason to believe that the product or service will be used to facilitate the

37. *See id.* at n.134.
38. *See supra* Section I.A, at 3.
39. *See* LAFAVE, *supra* note 36.
40. 6 KAMINS, MEHLER, SCHWARTZ & SHAPIRO, NEW YORK CRIMINAL PRACTICE, § 56.06 (2d ed. 2018).
41. *See* Dressler, *supra* note 29, at 5.
42. *Id.*
43. *Id.*
44. *Id.*

commission of an offense.[45] These scholars ask whether it is fair for complicity liability to attach when the actor's assistance consists in engaging in what appears to be a "neutral act", such as selling sugar, giving a cab ride, or providing a telephone answering service.[46]

The passenger's reasons for making use of the taxi service should not be relevant to the cab driver. As long as the passenger pays the fare, the taxi driver need not inquire nor care about why the passenger is requesting his services. The service that he provides is transportation, not policing the streets or protecting the public from wrongdoing. If he risks criminal liability for providing transportation to a criminal minded passenger who pays the requisite fare, the criminal law is impliedly asking him to prevent crime. By refusing to shuttle the criminal minded passenger, the taxi driver is thwarting the crime that the passenger intends to commit. But this is incompatible with the general view that there is no special duty to fight crime. Just like actors are not punished for not preventing crime, the taxi driver should not be punished for not refusing to shuttle the criminal minded passenger to his destination.[47] Or so these scholars would argue.

In doctrinal terms, these scholars would furnish the taxi driver (and anyone who assists a crime by engaging in so-called neutral acts) with an offense modification defense.[48]

This kind of defense applies when the actor's conduct nominally satisfies the elements of the offense but it does not inflict the kind of "evil [that is] sought to be prevented by the [crime] statute defining the offense."[49] When this is the case, courts are authorized to "modify" the offense definition in a way that excludes the actor's conduct from the scope of the crime.[50]

It is important to note that the offense modification defense in these cases applies regardless of the mental state with which the assistance is furnished. Neutral acts of assistance are not criminalized under this view even when the vendor provides the good or service knowing that it will be used for the commission of an offense. Even purposeful assistance goes

45. *See, e.g.*, Kai Ambos, *La Complicidad a Través de Acciones Cotidianas o Externamente Neutrales,* REVISTA DE DERECHO PENAL Y CRIMINOLOGÍA, 2.ª ÉPOCA, 195, 196 (N.º 8º 2001).

46. JAKOBS, *supra* note 5.

47. Note the parallels between imposing liability when assistance is the product of a neutral act and imposing liability for omissions to aid.

48. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis,* 82 COLUM. L. REV. 199, 233–234 (1982).

49. *Id.* at 209.

50. *Id.* at 267. *See generally* MODEL PENAL CODE § 4.01 (AM. LAW. INST., Official Draft and Revised Comments 1985).

unpunished under this approach. What is doing the work in these cases is the objective determination that the kind of conduct engaged in by the actor fails to inflict the kind of evil that the criminal law seeks to prevent. The presence or absence of a particular mental state is thus irrelevant to determining whether the neutral act of assistance should be punished.

European and Latin American criminal scholars also make grading decisions based on an objective assessment of the kind of assistance provided. The criminal law of these countries frequently distinguishes between substantial and insubstantial complicity.[51] Substantial accomplices are punished as severely as the actual perpetrators of the crime.[52] On the other hand, insubstantial accomplices are typically punished less harshly than perpetrators (and substantial accomplices).[53] The resulting grading regime is one in which substantial acts of assistance are punished quite severely, whereas trivial or insubstantial facilitation is punished considerably less.

Courts and scholars have crafted different standards to determine whether the accomplice's assistance is substantial. Some focus on whether the good or service provided is scarce or abundant.[54] If the assistance consists in providing a product or service that is difficult to obtain (*i.e.,* scarce), these scholars would classify the aid as "substantial" and, therefore, punish it as severely as actual perpetration of the crime.[55] If, however, the assistance consists of providing a good or service that is easy to obtain (*i.e.*, abundant), the aid is likely to be classified as insubstantial and, consequently, punished less severely than perpetration of the offense.[56] Others focus on whether the assistance was indispensable to the perpetration of the offense to be classified as substantial. Conversely, if the crime would have likely been perpetrated regardless of the assistance, the aid would be classified as insubstantial and the more lenient grading scale would apply.[57]

Regardless of which test is applied to distinguish substantial from insubstantial complicity, they all share an emphasis on the objective quality of the assistance. Whether assistance is deemed substantial depends on whether it made it considerably easier for the perpetrator to consummate the offense. The analysis is primarily objective, in the sense that it inquires as to the actual role that the assistance played in the perpetration of the offense. The primary concern is therefore not the

51. ENRIQUE GIMBERNAT ORDEIG, AUTOR Y CÓMPLICE EN DERECHO PENAL (2006).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id*.

mental state with which the assistance was furnished. Regardless of whether the aid was rendered purposely or knowingly (or even recklessly), what ultimately determines whether the assistance is substantial is how much it facilitated the commission of the offense. If the accomplice helped the perpetrator a lot, he is punished as much as the perpetrator. If the help was only of marginal significance, the accomplice is punished much less. Whether the help is provided with a particular mental state is thus irrelevant to determinations of substantiality.

The contrast with the American approach is stark. In America, both criminalization decisions and grading decisions regarding assistance to crime are made primarily on the basis of the mental state with which the assistance is furnished. In Europe and Latin America, however, whether and how much to punish acts of assistance is not generally dependent on the actor's mental state. Rather, it is the product of an objective assessment regarding the evil sought to be prevented by the offense and the substantiality of the assistance provided.

II. PATTERNS OF CRIMINALITY IN COMPLICITY

What explains the sharp contrast between the American and Continental European approaches to criminalizing and grading complicity? Why do such criminalization and grading decisions in America focus primarily on the mental state with which the assistance is rendered whereas in Continental Europe they tend to focus on the objective nature of the conduct that facilitated the commission of the offense?

While I have no definitive answers to these questions, I will sketch a tentative and admittedly incomplete explanation of why these two legal traditions approach questions of complicity so differently. In a nutshell, I will argue that contemporary American complicity law is in great part the product of an approach to criminal justice that is modeled on what has come to be known as the "pattern of subjective criminality." In contrast, the Continental European approach to accomplice liability is heavily influenced by the "pattern of manifest criminality." The pattern of subjective criminality privileges mental states over objective conduct elements, whereas the pattern of manifest criminality favors objective conduct elements over mental states. As I will argue in Part III, these patterns have a tendency to become entrenched in a legal culture. When they do, lawmakers often develop "tunnel vision" that prevents them from giving serious consideration to alternative ways of thinking that are in conflict with the pattern of criminality that is dominant in their legal culture.

A. Manifest Criminality vs. Subjective Criminality

Several decades ago, Professor George Fletcher observed that crimes and the doctrines that are developed to construe them tend to conform to one of several patterns. The first is the pattern of "manifest criminality." Crimes that conform to this pattern feature conduct that any observer would recognize as criminal without having to inquire upon the actor's mental state.[58] The criminality of such acts is "obvious" or "manifest."[59] Since these crimes are defined primarily by reference to a manifestly criminal act, the intent with which the act is carried out is relevant only after the requisite act has been found to exist.[60] Furthermore, the relevance of mental states under the pattern of manifest criminality is confined to establishing an excuse or a mistake defense that negates the inference of blame that arises from engaging in the manifestly criminal act.[61] Mental states thus function "as a challenge to the authenticity of appearances"[62] rather than as an "inner dimension of experience that exists independently from acting in the [real] world."[63]

In contrast, offenses that conform to what Fletcher calls the pattern of "subjective criminality" are defined primarily by the existence of a blameworthy mental state.[64] As such, Fletcher observes that "the core of criminal conduct" that follows the pattern of subjective criminality "is the intention to violate a legally protected interest."[65] While in the context of manifest criminality mental states are parasitic to the manifestly criminal act, in the pattern of subjective criminality they constitute "a dimension of experience totally distinct from external behavior."[66] Such mental states are subjective, in the sense that they are experienced by the actor but not by others.[67]

There are many examples of these competing patterns of criminality at work. Fletcher has argued that the historical evolution of the law of theft can best be understood as a body of law that slowly moved from the pattern of manifest criminality to the pattern of subjective criminality.[68]

58. GEORGE FLETCHER, RETHINKING CRIMINAL LAW 115–16 (Little, Brown and Co. ed., 2000) (1978).
59. *Id.*
60. *Id.* at 117.
61. *Id.*
62. *See id.*
63. *Id.*
64. *Id.* at 118.
65. *Id.*
66. *Id.*
67. *Id.*
68. George P. Fletcher, *The Metamorphosis of Larceny,* 89 HARV. L. REV. 469, 520–523 (1976).

Originally, obtaining property by deception was not criminally punished.[69] Courts found that in the absence of a "trespass" there could be no liability, even if the defendant deceived the victim.[70] The law of theft thus required the existence of a trespassory taking that unequivocally identifies the act as criminal. An example of such trespassory acts include instances of "breaking bulk", such as removing an object belonging to another from its packaging or destroying the item in its entirety.[71] Without a trespassory act such as "breaking bulk," there is no objective indicia of criminality.[72] Causing property to exchange hands by lying does not satisfy the trespass requirement, for such a transaction would not appear manifestly criminal to an impartial observer.[73] The criminality of the conduct would come to light only if we gained access the defendant's mind and could see that he was knowingly making a false statement with the intent to dispossess another of his property.[74] Since we lack the capacity to access the minds of others, such takings could not be described as manifestly criminal and, therefore, were not punishable at the time.[75] Subsequently, courts began to slowly move away from the pattern of manifest criminality and instead started to focus on the defendant's mental state at the time of the taking.[76] If the mental state was sufficiently blameworthy, liability for theft could attach. This shift to the pattern of subjective criminality allowed courts to catalogue takings by deception as criminal even in the absence of a trespassory act such as breaking bulk.[77]

Fletcher observed that a similar shift can be detected in the law of attempts. Originally, attempts were punished only if the actor engaged in conduct that came very close to consummation of the offense.[78] In some jurisdictions, attempt liability would only attach when the actor engaged in the last step prior to consummation.[79] Similar tests for determining what conduct counts as an attempt include the "proximity" and "unequivocality" tests.[80] Pursuant to the proximity test, an actor's conduct may be punished as an attempt only if it comes dangerously close

69. *Id.* at 475–76.
70. *See id.*
71. *Id.* at 482.
72. *Id.* at 492.
73. *See id.* at 498.
74. *See id.*
75. *See id.* at 490–92.
76. *Id.* at 517–18.
77. *Id.* at 517–18.
78. *Id.* at 521 n.216.
79. People v. Rizzo, 246 N.Y. 334, 337 (N.Y. 1927).
80. *Id. See* Fletcher, *supra* note 68, at 521; Donald Galloway, *Patterns of Trying: A critique of Fletcher on Criminal Attempts*, 7 QUEEN'S L.J. 232, 242 (1982).

to completion.[81] The unequivocality test generates attempt liability only if—without taking into account the mental state with which the act is performed—the actor's conduct is manifestly criminal.[82] While there are subtle differences between these tests, they all require that the actor engage in conduct that can be readily perceived as criminal without reference to the actor's mental state.[83] They thus represent examples of the pattern of manifest criminality.

In contrast, the modern trend is to impose attempt liability even when the actor has not engaged in conduct that is manifestly criminal. This trend is most obviously the case with the Model Penal Code formulation of attempt, which requires only that the actor engage in a "substantial step" towards the commission of the offense.[84] Pursuant to the substantial step test, a seemingly innocuous act - such as buying a ski mask – may generate attempt liability if it "strongly corroborat[es] . . . the actor's criminal purpose."[85] Under this test, the conduct element is merely probative of the actor's mental state. The actor's subjective culpability thus becomes the central element of attempt liability. As the law of attempts moves away from proximity tests and closer to the substantial step standard, it moves from the pattern of manifest criminality to the pattern of subjective criminality.

Professors Guyora Binder and Robert Weisberg argue that the patterns of criminality described by Fletcher can also shed light on the historical development of rape and homicide law. Regarding rape law, Binder and Weisberg point out that the law originally required that the sex be forcible and that the victim resist the perpetrator's sexual advances.[86]

The force and resistance elements are compatible with the pattern of manifest criminality, for they require the occurrence of acts that clearly signal the criminal nature of the sexual intercourse.[87] In contrast, many modern rape statutes have eliminated the force and resistance requirements.[88] Modern rape laws now require that the sex be without the victim's consent and that the perpetrator be at least negligent with

81. Rizzo, 246 N.Y. at 337; Guyora Binder & Robert Weisberg, *What is Criminal Law About?,* 114 MICH. L. REV. 1173, 1185 (2016).

82. Galloway, *supra* note 80, at 242.

83. Rizzo, 246 N.Y. at 337; Galloway, *supra* note 80, at 242.

84. MODEL PENAL CODE § 5.01 (1)(c) (AM. LAW INST., Proposed Official Draft 1962).

85. United States v. Jackson, 560 F.2d 112, 118 (2d Cir. 1977).

86. Binder & Weisberg, *supra* note 81, at 1185.

87. *See* FLETCHER, *supra* note 58, at 117.

88. *See* John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1083–87 (2011).

regard to the victim's lack of consent.[89] This more modern approach shifts the focus from the perpetrator's visible use of force and the victim's visible resistance to the actor's subjective indifference to the victim's lack of consent and to the victim's desire to not engage in intercourse.[90] While the force requirement reflects the pattern of manifest criminality,[91] the more modern rape laws reflect the pattern of subjective criminality.[92]

Binder and Weisberg observe the same pattern in the law of homicide. At common law, homicide was defined as an unlawful killing of a human being with malice.[93] When the law of homicide first developed, the core element of the offense was not the intent to kill.[94] Instead, the central feature of homicidal conduct was the infliction of a mortal wound or the carrying out of an armed attack.[95] While we now typically associate malice with a blameworthy mental state, Binder and Weisberg demonstrate that malice in the law of homicide originally meant simply that the manifestly violent act of killing was not excused pursuant to "self-defense, provocation or accident."[96] This reflected the pattern of manifest criminality, for inculpation was the product of engaging in a manifestly violent act and the element of malice served only to exculpate.[97]

With time, however, malice morphed from an element that merely signaled lack of exculpation to an inculpatory element that communicated blame. As a result, malice is defined in more modern homicide law as a mental state that consists in either the intent to kill, the intent to cause serious bodily injury or the intent to commit a felony.[98] When malice was simply defined as the lack of excuse, most homicide litigation centered around the existence (or lack thereof) of self-defense, provocation or accident.[99] In contrast, when malice became a mental state that consisted in proof of intent to engage in wrongful conduct, much homicide litigation gravitated around whether the killing was produced with an accompanying blameworthy mental state.[100] This marks the

89. Decker & Baroni, *supra* note 88, at 1086–90; *see also* Binder & Weisberg, *supra* note 81, at 1185.
90. *See* Binder & Weisberg, *supra* note 81, at 1185.
91. *Id.* at 1188.
92. *See generally* FLETCHER, *supra* note 58, at 118.
93. Binder & Weisberg, *supra* note 81, at 1185.
94. *Id.*
95. *Id.* at 1185–86.
96. *Id.* at 1186.
97. *Id.*
98. *Id.* at 1186–87.
99. *Id.* at 1186.
100. *Id.* at 1186–88.

transition in the law of homicide from manifest to subjective criminality.[101]

The shift from manifest to subjective criminality in American criminal law reflected in the laws of theft, attempt, rape, and homicide expose a more general trend that has accelerated since the second half of the twentieth century and continues to this day. The turn towards subjective criminality was precipitated in great part by the publication and subsequent influence of the Model Penal Code (hereinafter "the Code"). The chief penological goals of the Code were to deter those who can be deterred and to identify and treat dangerous individuals who cannot be deterred.[102] Given that criminal laws quite often fail to deter, many of the Code's rules are best explained as doctrines that allow society to better identify and correct dangerous individuals.[103] In order to further this goal, the Code fully embraced the pattern of subjective criminality. Examples of this abound. The Code shifted the emphasis of attempts from engaging in an act that is close to consummation to engaging in conduct that strongly confirms the actor's purpose to engage in future wrongdoing. The Code punishes most attempted crimes as severely as completed crimes. It also punishes conspiracy even when one of the parties to the conspiracy has feigned agreement and has thus not really agreed to commit a crime.[104]

Perhaps the most obvious example of the Code's shift to subjective criminality is its causation provisions. While causation has historically been conceived as an objective inquiry into the relationship between the defendant's act and the wrongful result that ensued, the Code instead defines causation primarily on the basis of the mental state with which the actor engaged in the allegedly wrongful conduct.[105] As such, causation is conceptualized by the Code as part of the culpable mental state requirements "rather than as an independent requirement about the relation between the actor's conduct and the prohibited result."[106] The shift from manifest to subjective criminality is evident. Rather than requiring conduct that is objectively linked to the result in a certain kind of way (manifest criminality), the Code requires that conduct be linked to the result in a way that is compatible with the actor's mental state

101. *Id.* at 1186–87.

102. MARKUS D. DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 7–12 (2d ed. 2015).

103. *Id.*

104. *See* MODEL PENAL CODE § 2.03 (AM. LAW. INST., Official Draft and Revised Comments 1985).

105. *Id.*

106. Paul H. Robinson, *The Model Penal Code's Conceptual Error on the Nature of Proximate Cause, and How to Fix It,* 51 CRIM. L. BULL. 1311, 1313 (2015).

(subjective criminality).[107] Since the Code has greatly influenced criminal law reform during the latter half of the twentieth century, it is no surprise that the pattern of subjective criminality has become quite dominant in America during the last several decades.

B. Subjective Criminality and Manifest Criminality in Complicity Law on Both Sides of the Atlantic

Subjective Criminality in American Complicity Law

Given that American criminal law has trended towards the pattern of subjective criminality, it should come as no surprise that the law of complicity also follows this trend. As I pointed out in Part I, in America both criminalization and grading decisions regarding complicity are made primarily based on the mental state with which the assistance is rendered.[108] With regard to criminalization, the dividing line between liability and non- liability is more often than not whether the assistance was furnished purposely (liability) or knowingly (no liability).[109] Regarding grading decisions, the few jurisdictions that formally distinguish between degrees of assistance also do so based on whether the aid is purposely (more punishment) or knowingly rendered (less punishment).[110]

Since both criminalization and grading decisions regarding complicity are primarily made on the basis of the actor's mental state, the nature and degree of the assistance rendered is not generally relevant to such decisions.[111] As a result, even quite trivial acts of assistance can be punished as complicity, as long as the aid is rendered with the mental state required by law.[112] Thus, criminal liability may attach for acts of assistance that are not manifestly criminal, such as selling a pen to someone who will use it to forge a signature or attending a concert performed by a foreign musician who is not authorized to perform in the country.[113] On their face, selling pens and attending concerts are seemingly innocuous acts. Even if performed with knowledge that the acts are in some way facilitating someone else's commission of an offense, the aid provided to the perpetrator in these cases is quite trivial. Nevertheless, contemporary American criminal law imposes liability in

107. *See* MODEL PENAL CODE § 2.03 (AM. LAW. INST., Official Draft and Revised Comments 1985).
108. *See supra* Part I.
109. *See* LAFAVE, *supra* note 4; *supra* Part I.
110. *See supra* Part I.
111. *See* LAFAVE, *supra* note 4.
112. Garvey, *supra* note 27, at 236–38.
113. Wilcox v. Jeffery (1951) 1 All ER 464 (KB).

these cases if the aid is provided with a particularly blameworthy mental state. It is therefore not surprising that much litigation and case law regarding complicity in America centers on whether the aid was provided with the mental state required by the complicity statute. Current American complicity law thus presents the signature structure of the pattern of subjective criminality.

III. MANIFEST CRIMINALITY IN CONTINENTAL EUROPEAN COMPLICITY LAW

In contrast, the complicity doctrine in Continental European jurisdiction is more aligned with the pattern of manifest criminality. Consequently, acts of assistance that are not readily recognizable as criminal do not generally trigger criminal liability.[114] Even if they do, the punishment imposed would be mitigated considerably because of the trivial nature of the assistance provided.[115] This is the case regardless of the mental state with which the aid is furnished. Selling a pen subsequently used to forge a signature would thus not generate liability even if the seller desired that the buyer use the pen to perpetrate the forgery. The central element of complicity doctrine in Continental Europe is thus the nature and quality of the act rather than the mental state with which it is carried out.[116] This fits quite well with the pattern of manifest criminality.

Reflections on Why Different Patterns of Criminality Became Entrenched in America and Continental Europe

There is no obvious explanation for why American complicity law follows the pattern of subjective criminality while civilian complicity law more closely tracks the pattern of manifest criminality. A possible explanation is that many Latin American and Continental European countries deliberately shifted criminal law paradigms after experiencing how the criminal justice system was abused by authoritarian regimes.

In the aftermath of the atrocities committed by the National-Socialist regime, German lawmakers and scholars tasked with reforming criminal law had good reason to avoid punishing seemingly innocuous conduct that was not readily identifiable as criminal.[117] A criminal law patterned on punishing acts that are not easily recognizable as wrongful by the general populace would not sit well with a society that was still reeling

114. Chiesa, *supra* note 30, at 8.

115. *Id*. at 7.

116. *Id*. at 6.

117. *See generally*, José David Rodriquez González, Human Dignity and Proportionate Punishment: The Jurisprudence of Germany and South Africa, and its Implications for Puerto Rico, 87 Rev. Jur. U.P.R. 1179 (2018).

from a criminal justice system that punished people solely because the way in which they lived their lives was deemed to be blameworthy by the state.[118] Instead, German lawmakers, courts, and commentators designed a criminal justice system erected upon the pattern of manifest criminality. The criminal law doctrines that resulted presupposed that an individual could be branded as a criminal by the state only when he had engaged in an act that was manifestly wrongful, either because it caused societal harm or risked causing such harm.[119]

On the other hand, Americans did not have to suffer through the kinds of atrocities perpetrated by authoritarian governments that were commonplace in Europe and Latin American during the twentieth century. This may explain why the turn towards manifest criminality failed to materialize in the United States during the latter stages of the twentieth century. Instead of having to deal with overhauling a criminal justice system that was bankrupted by vicious governments, post-World War II American reformers set out to craft a criminal law that was compatible with the criminological and penological theories of the time. Given that treatmentism, correction, and rehabilitation were in style during the middle part of the twentieth century, it is unsurprising that American reformers – including the drafters of the Model Penal Code – focused on fashioning criminal law doctrines that were compatible with these theories.

The norms of criminal law that resulted naturally focused on identifying individuals in need of treatment and correction. With its emphasis on blameworthy mental states, the pattern of subjective criminality is ideally suited for accomplishing this task. Without the jolting effect of World War II, American lawmakers simply did not feel the same urgency to embrace the pattern of manifest criminality as their European and Latin American counterparts.

IV. TUNNEL VISION IN CRIMINAL LAW REFORM AND COMPARATIVE ANALYSIS AS ANTIDOTE

Even if we successfully account for how the patterns of subjective and manifest criminality became entrenched in America and Europe, this still does not explain why these patterns remain embedded in our

118. *See id.* National-Socialist criminal law scholars actually devised a doctrinal category of blame (culpability) that emanated from "the way in which the actor conducted his life."

119. Markus D Dubber, *Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 83, 114–15 (Antony Duff & Stuart P. Green eds., 2011).

criminal laws several decades later. Even assuming that there were good reasons for these respective patterns to become entrenched in the first place, those reasons may no longer exist. In America, the correctional/treatmentist model has long been in decline.[120] Furthermore, the possibility of a more authoritarian government has loomed large ever since the September 11th terrorist attacks and the wave of repressive criminal legislation that ensued in its aftermath.[121] In light of these events, American criminal law reformers might very well benefit from taking a closer look at the pattern of manifest criminality.[122] In Latin America, and especially in Europe, there are numerous democratic governments in place and multiple checks have been adopted to ensure that the mistakes that led to the rise of authoritarian governments during the twentieth century will not be repeated.[123] Consequently, the reasons that justified the turn to manifest criminality in these countries are no longer as strong as they were in the past.[124]

In light of these changes, why haven't American lawmakers and courts looked more closely at the pattern of manifest criminality as a model for criminal law reform? Why haven't their European and Latin American counterparts taken more seriously the pattern of subjective criminality as an alternative model for doctrinal evolution? While there are surely many reasons that explain the continued entrenchment of these patterns, in this final Part of this Essay I will explore one possible reason: tunnel vision.

A. Criminal Law Reformers and Tunnel Vision: The Example of Manifest and Subjective Criminality

In its broadest sense, tunnel vision is the failure to consider alternatives that deviate from one's previously established decision-making framework.[125] The background decision-making framework can be the product of individual preference or choice or of more systemic forces, such as prevailing practices or paradigms in any given field.[126] While tunnel vision affects many different kinds of decisions, considerable emphasis has been placed in recent years on studying how tunnel vision impacts law enforcement officers in ways that may lead to

120. Dubber, *supra* note 119, at 104.
121. *See id.* at 104–05.
122. *See id.* at 105.
123. *See id.* at 103.
124. *See supra* Section II.A.
125. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases,* 2006 WIS. L. REV. 291, 292 (2006).
126. *Id.* at 295.

wrongful convictions.[127] Little attention, however, has been paid to how tunnel vision may impact criminal justice actors more broadly.[128] In the remainder of this piece, I will explore how criminal law reformers are susceptible to tunnel vision's pernicious impacts.

A chief cause of tunnel vision in substantive criminal law reform is the tendency of the prevailing pattern of criminality to become deeply rooted in courts, legislatures, and academia.[129] As a certain pattern of criminality becomes entrenched, it tends to produce legislation, case law, and scholarly writings that conform to the pattern. Complicity law presents a case in point.

As I showed in Part I, American criminal law usually distinguishes between punishable and non-punishable assistance based on the mental state with which the aid is provided.[130] Some states subsequently reformed their complicity laws to distinguish between more and less culpable kinds of assistance.[131] The resulting scheme was one in which purposeful assistance was punished considerably more than knowing assistance.

While the criminal law reformers who came up with this grading scheme ought to be commended for attempting to more finely calibrate punishment, they can nevertheless be faulted for failing to seriously consider alternatives to punishing assistance that ran counter to the prevailing pattern of subjective criminality. More specifically, they failed to contemplate that acts of trivial assistance ought to be punished considerably less than acts of substantial assistance, *regardless of the mental state with which the assistance is provided*.[132] To my knowledge, no American state formally distinguishes between trivial and substantial complicity, in spite of the intuitive appeal of this distinction. While there are certainly multiple factors that explain why this distinction has not found its way into American criminal law, it is difficult to deny that tunnel vision is one of these factors. Given that the pattern of subjective criminality has dominated American criminal law reform since at least the publication of the Model Penal Code, the solutions proposed by lawmakers tend to follow this pattern.[133] As a result, American criminal law reformers have devoted an inordinate amount of time to tinkering with mental states as a way of making grading distinctions and have

127. *Id.*

128. *See id.* at 396–97 (summarizing ways to mitigate the impact of tunnel vision in the criminal justice system).

129. *See* Dressler, *supra* note 29, at 448; *see also* Chiesa, *supra* note 30, at 3 n.18.

130. *See* discussion *supra* Part I.

131. LAFAVE, *supra* note 4.

132. *See* Chiesa, *supra* note 30, at 12.

133. *See* DUBBER, *supra* note 102, at 7–12.

generally ignored modifying the actus reus of the offense. This seems to be a case in which the prevailing pattern (subjective criminality) has become so entrenched that it drowns out alternative modes of thinking about the criminal law.

Courts and scholars are not impervious to this kind of tunnel vision. To date, most scholarly debates regarding whether and how much to punish complicity in America revolve around questions of mens rea. The recently decided Supreme Court case *Rosemond v. United States*[134] and the scholarly commentary it spurred are representative. The defendant in *Rosemond* claimed that he could not be held liable as an accomplice to the crime of carrying a firearm during the commission of a drug trafficking crime unless he engaged in an act that assisted the carrying of the firearm (actus reus) and he had the purpose of facilitating the carrying of the firearm (mens rea).[135] Unsurprisingly, all justices dismissed the defendant's actus reus claim as contrary to settled complicity law principles.[136] The justices disagreed, however, regarding the defendant's mens rea claim.[137] The substance of the Court's disagreement is not relevant for the purposes of this Essay. What is relevant, however, is that the disagreement was about the mental state of complicity rather than about its conduct element.[138] This is the predictable result of criminal law doctrines that respond to the pattern of subjective criminality.

The scholarly commentary prompted by *Rosemond* similarly focused on the defendant's mental state.[139] In an essay analyzing *Rosemond,* Steve Garvey noted that the Court made conflicting statements regarding whether the mens rea of complicity is purpose or knowledge.[140] He then sets out three different ways of reconciling the Court's seemingly conflicting statements regarding the mens rea of complicity.[141] In another recent article on *Rosemond*, it was observed that "the rules governing mens rea and complicity remain surprisingly unresolved."[142] The author then puts forth a defense of "purpose" as the mental state that complicity ought to require.[143]

134. 572 U.S. 65 (2014).
135. *Id.* at 69.
136. *Id.* at 70.
137. *Id.* at 84 (Alito, J., dissenting).
138. *Id*. at 69–70, 84.
139. Garvey, *supra* note 27, at 238–41.
140. *Id.*
141. *Id.* at 241.
142. Kit Kinports, Rosemond, *Mens Rea, and the Elements of Complicity,* 52 SAN DIEGO L. REV. 133, 134 (2015).
143. *Id*. at 135.

There are, of course, scholars whose writings focus on the conduct element of complicity.[144] But these writings are the exception rather than the norm. Most complicity scholarship—like most complicity case law—focuses on mental states.[145] This is to be expected, given that conspiracy in general and American criminal law in particular have been embedded within the pattern of subjective criminality for several decades.

Continental European criminal law reform has been similarly hampered by tunnel vision that is the product of deeply rooted patterns of criminality. In contrast to the United States, the prevailing pattern of criminality in Continental Europe and Latin America is that of manifest criminality.[146] As such, questions regarding the mental element of complicity are considered largely settled. There is widespread agreement that an accomplice must act with *dolus* regarding the perpetrator's offense, which includes purpose, knowledge, and *dolus eventualis,* which is roughly analogous to the Model Penal Code's recklessness.[147] There is less agreement regarding the conduct element of complicity, especially in cases in which the alleged accomplice's aid consists in selling a good or service during the ordinary course of business. Some argue that the actus reus of complicity should exclude assistance that takes place as a result of an ordinary act of business, such as the lawful sale of a weapon.[148] Others argue that such acts ought to satisfy the objective element of the offense.[149] Regarding grading decisions, there is consensus that substantial acts of assistance ought to be punished more severely than trivial acts of aid. There is considerable debate, however, regarding how to distinguish between substantial and trivial assistance.[150] The details of these debates are not important for my purposes. What does matter, however, is that both with regard to criminalization and grading decisions, the debates are primarily about the conduct element of complicity. While such grading and criminalization decisions could certainly be based at least partly on mental states, Continental European courts and scholars seem largely oblivious to this possibility. This is in keeping with the pattern of manifest criminality.

144. *See, e.g.*, Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 397–401 (2007).

145. *See, e.g.*, Brief of the Int'l Comm'n of Jurists and the American Ass'n for the Int'l Comm'n of Jurists, Amici Curiae Supporting Petitioners, Presbyterian Church of Sudan v. Talisman Energy, Inc., (2010) (No. 09-1262), 2010 WL 2032055.

146. *Id.* at 13–14.

147. *Id.*

148. Baker, *supra* note 14, at 405.

149. *Id.* at 403.

150. *See id.*

It is unfortunate that lawmakers, courts, and scholars on both sides of the Atlantic seem stuck on viewing criminal law doctrines primarily through the lens of the pattern of criminality that is dominant in their legal culture. American reformers seem fixated on the pattern of subjective criminality. In the context of complicity, this makes it difficult for them to perceive what Continental European scholars have known all along: that the law of complicity would be more rational and fair if liability depends not only on the mental state with which the assistance is furnished but also on the objective nature of the act of assistance in question.[151] An infelicitous consequence of this is that American criminal law has failed to formally distinguish between trivial and substantial acts of assistance. This is a considerable failure, for there are powerful consequentialist and retributive reasons for punishing substantial acts of assistance more than trivial acts of assistance.[152]

On the other hand, Continental European scholars appear trapped in the pattern of manifest criminality.[153] As far as complicity is concerned, this prevents them from making more frequent use of mental states as tools for determining whether and how much to punish certain acts of assistance.[154] This is unfortunate, for there are good reasons to believe that purposeful assistance is both more dangerous and blameworthy than knowing or reckless assistance.[155] As such, an argument could be made for punishing assistance that consists in selling goods or services during the ordinary course of business if the sale is made with the purpose of facilitating the commission of a crime but not if it is made with knowledge or awareness of a possibility that the sale will facilitate the perpetration of an offense. Similarly, Continental European courts and scholars could profit from making more use of mental states when distinguishing between substantial and trivial complicity. Regardless of the degree of causal contribution to an offense, it could be argued that purposeful assistance is more worthy of punishment than knowing or reckless assistance. In spite of the intuitive nature of these claims, they mostly escape Continental European lawmakers who seem mired in the pattern of manifest criminality, and, therefore, pay relatively little attention to mental states as tools for grading criminal offenses.[156]

151. *See* Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940); United States v. Peoni, 100 F.2d 401, 402–03 (2d Cir. 1938); People v. Lauria, 251 Cal. App. 2d 471, 474–475 (Cal. Ct. App. 1967).

152. *See* discussion *supra* Section I.A.

153. *See* discussion *supra* Section II.B.2.

154. *See* discussion *supra* Section I.A.

155. *See* discussion *supra* Section I.A.

156. *See* discussion *supra* Section II.B.2.

B. Comparative Analysis as Antidote to Tunnel Vision in Criminal Law Reform

So far, I have tried to show that criminal law reformers may be hampered by "tunnel vision" that prevents them from fully considering alternatives to the prevailing mode of thinking about the criminal law.[157] One source of tunnel vision is the pattern of criminality that is dominant in a certain legal culture. For countries like the United States in which the prevailing pattern is that of subjective criminality, legislatures, courts, and scholars are prone to thinking about criminalization and grading questions primarily on the basis of mental states.[158] On the other hand, for countries like those in Continental Europe where the dominant pattern is that of manifest criminality, the knee jerk reaction to a criminal law problem will be trying to solve it by tinkering with the conduct element of the offense.[159]

This is unfortunate, for – as I have tried to demonstrate – much can be gained by looking at the criminal law from the perspective that is afforded by an alternative pattern of criminality. How, then, can criminal law reformers combat tunnel vision? How can they look beyond the prevailing paradigm and explore solutions that run counter to patterns of criminality that have become well-entrenched? There are surely several ways of achieving this. Scholars undoubtedly play a role in doing so. By proposing novel solutions to old problems, academic writings can inspire criminal law reforms that would otherwise not be on the radar screen of lawmakers. But—as I observed in the previous subsection—scholars are also susceptible to tunnel vision, for they also write against the backdrop of a prevailing paradigm that cannot be easily overcome.[160]

In the context of medical treatment, it is often said that a remedy to tunnel vision is asking for a second opinion. By getting the fresh perspective of a different physician, we increase the likelihood of spotting tunnel vision. If both are in agreement, we feel more confident moving forward. If, however, there is disagreement, we have reason to reconsider. Analogously, engaging in comparative analysis provides criminal law reformers with a "second opinion" of sorts. If a system of criminal law that operates with a different set of background assumptions approaches criminalization and grading decisions in a similar manner, we should feel more confident about our criminal law. If, on the contrary, a criminal justice system premised on a different pattern

157. *See* discussion *supra* Section III.A.
158. *See* Fletcher, *supra* note 58, at 118.
159. *See id.* at 115–16.
160. *See* discussion *supra* Section III.A.

of criminality answers such questions differently, then we have good reason to take a step back and assess whether we are on the right track. In doing so, we should consider whether we have failed to contemplate alternative arrangements because we are so embedded within a certain paradigm or pattern of criminality that our creativity in problem-solving has been stifled. If we sense that this may be the case, then we can force ourselves to think outside of the dominant pattern and come up with more novel solutions to the problem at hand.

CONCLUSION

Criminal law reform ought to be a creative endeavor. But true creativity in law reform is stifled by background assumptions that if left unchecked will likely prevent lawmakers from seriously considering alternatives that run counter to prevailing paradigms. In the complicity context, the dominant patterns of criminality in the United States and Continental Europe have contributed to a state of affairs in which American actors focus almost entirely on mental states as ways of making grading and criminalization decisions while their European counterparts focus almost solely on conduct requirements in order to make the same decisions. This is regrettable, for the United States would profit from paying more attention to the conduct element in complicity, while Continental European jurisdictions would benefit from focusing more on mental states. I have argued that one way of avoiding the tunnel vision that is generated by background assumptions and dominant patterns of criminality is by engaging in comparative analysis. By comparing our solutions to the solutions offered in countries that take a different pattern of criminality as their point of departure, we increase the likelihood of identifying blind spots in our ways of thinking. Criminal law reformers would thus benefit from comparative analysis even when their end goal is reforming domestic norms of criminal law.