

COMPARATIVE ANALYSIS AS 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 upon 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 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 loaded 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

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¹ *People v. Gordon*, 32 N.Y.2d 62 (1973).

² Ejecutoria suprema del 7 de marzo del 2001, R. N. 4166–99.

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

analysis will reveal that, in America, gradations between different degrees of assistance are made primarily based on the actor's mental state. 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.

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. In contrast, the prevailing pattern of criminality in Europe and Latin America is that of manifest criminality, with its attendant focus on conduct and objective rules of causation.

When these patterns of criminality become well-entrenched, they have the tendency to create tunnel vision in the legal actors that 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.

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 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. As the blameworthiness of aider's mental state 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. 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. 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.

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.⁴ A competing view of complicity holds that liability hinges on knowledge that one is aiding the commission of a crime.⁵ Hoss would be held liable as an accomplice under this competing 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. It was also considered and ultimately rejected by the drafters of the Model Penal Code.⁶

⁴ See, generally, WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 13.2 (b). The classic formulation of this view in the case law is *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938).

⁵ The classic formulation is *Backun v. United States*, 112 F.2d 635 (1940).

⁶ See, Model Penal Code § 2.06, Comment at 318 n. 58 (1985).

Regarding grading distinctions, most American states do not formally distinguish between different kinds of assistance for the purposes of grading criminal offenses. Nevertheless, a handful of states punish the less serious offense of “criminal facilitation” alongside the more serious crime of “complicity”.⁷ Although there are minor drafting variations between the different states that punish criminal facilitation, the core elements of the crime are knowingly providing to another the means or opportunity to commit a criminal offense.⁸ 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.⁹

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.¹⁰ In states that punish both complicity and criminal facilitation, the mental state of the former is limited to purpose, whereas the mental state of the latter is knowledge. To illustrate the distinction it is once again useful to go back to the example of Hoss’s sale of a gun to Tara. 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 use 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 complicity.

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

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

⁷ See, e.g., N.Y.Penal Law § 115.00

⁸ LAFAVE, *supra* note 4.

⁹ But see N.Y.Penal Law § 115.00.

¹⁰ LAFAVE, *supra* note 4.

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 commission of an offense.¹¹

Some scholars argue that such acts of assistance should not be punished because they do not fall within the scope of conduct that the legislature sought to prevent when it criminalized the relevant offense.¹² They would claim, for example, that the legislature did not seek to punish wholesale sugar providers when it criminalized the production of certain liquors. Rather, it intended to punish those directly involved in the unlawful liquor production process. Others argue that these acts of assistance should not be punished because the actors who engage in such conduct are performing acts that fall within the scope of the social role that they are expected to fulfill. The cab driver who takes a perpetrator to the bank that he intends to rob is simply engaging in the kind of act that his role as taxi driver requires of him – shuttling passengers from point A to point B.¹³ 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 we ask the taxi driver to refuse to shuttle the criminal minded passenger, the cab driver is being asked to thwart 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.¹⁴ Or so these scholars would argue.

These scholars further argue such acts of assistance should not be criminalized even when the vendor provides the good or service knowing that it will be used for the commission of an offense or with the purpose that it be used to commit an offense. What is doing the work in these cases is an 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

¹¹ See, e.g., Kai Ambos, *La complicidad a través de acciones cotidianas o externamente neutrales*, REVISTA DE DERECHO PENAL Y CRIMINOLOGÍA, 2ª ÉPOCA, N° 8, MADRID, 2001, at 196.

¹² *Id.*

¹³ *Id.*

¹⁴ Note the parallels between imposing liability when assistance is the product of a neutral act and imposing liability for omissions to aid.

presence or absence of a particular mental state is thus irrelevant to determining whether the 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.¹⁵ Substantial accomplices are punished as severely as the actual perpetrators of the crime.¹⁶ On the other hand, insubstantial accomplices are typically punished less harshly than perpetrators (and substantial accomplices).¹⁷ 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 distinguish substantial from insubstantial complicity by focusing on the nature and quality of the assistance provided. 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 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.

¹⁵ GIMBERNAT ORDEIG, *AUTOR Y COMPLICE EN DERECHO PENAL* (Tirant, 2006).

¹⁶ *Id.*

¹⁷ *Id.*

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.¹⁸ The criminality of such acts is “obvious” or “manifest”. 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. 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. Mental states thus function as a “challenge to the authenticity of appearances”¹⁹ rather than as an “inner

¹⁸ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 115 (1978)

¹⁹ *Id.*

dimension of experience that exists independently from acting in the real world”²⁰.

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. 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.”²¹ 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”.²² Such mental states are subjective, in the sense that they are experienced by the actor but not by others.

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.²³ Originally, obtaining property by deception was not criminally punished. Courts found that in the absence of a “trespass” there could be no liability, even if the defendant deceived the victim. 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.²⁴ Without a trespassory act such as “breaking bulk”, there is no objective indicia of criminality. 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. 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. 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. 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. If the mental state was sufficiently blameworthy, liability for theft could attach. This shift to the

²⁰ *Id.*

²¹ *Id.* 118

²² *Id.*

²³ George Fletcher, *The Metamorphosis of Larceny*, 89 HARVARD L. REV. 469 (1976).

²⁴ *Id.*

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.²⁵

Professor Guyora Binder has argued that the patterns of criminality described by Fletcher can also shed light on the historical development of homicide law. At common law, homicide was defined as an unlawful killing of a human being with malice. When the law of homicide first developed, the core element of the offense was not the intent to kill. Instead, the central feature of homicidal conduct was the infliction of a mortal wound or the carrying out of an armed attack.²⁶ While we now typically associate malice with a blameworthy mental state, Binder demonstrates 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.²⁷ 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.

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. 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.²⁸ 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. This marks the transition in the law of homicide from manifest to subjective criminality.²⁹

The shift from manifest to subjective criminality in American criminal law reflected in the laws of theft and homicide expose a more general trend that has accelerated since the second half of the twentieth century and that 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. The chief penological goals of the

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

Model Penal Code were to deter those who can be deterred and to identify and treat dangerous individuals who cannot be deterred.³⁰ 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.³¹ In order to further this goal, the MPC fully embraced the pattern of subjective criminality. Examples of this abound. The MPC 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.

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. 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".³² 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 (subjective criminality). Since the MPC 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

1. 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

³⁰ MARKUS D. DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 2.0–2.1

³¹ *Id.*

³² Paul H. Robinson, *The Model Penal Code's Conceptual Error on the Nature of Proximate Cause and How to Fix It*, 51 CRIMINAL L. BULLETIN 1310 (2015).

complicity also follows this trend. As I pointed out in Part I, both criminalization and grading decisions regarding complicity are primarily made on the basis of the actor's mental state. Given this emphasis on subjective criminality, 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.³³ 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.³⁴ While selling pens and attending concerts are seemingly innocuous acts, contemporary American criminal law imposes liability in 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.

2. Manifest Criminality in Continental European Complicity Law

In contrast, 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. Even if they do, the punishment imposed would be mitigated considerably because of the trivial nature of the assistance provided. 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. This fits quite well with the pattern of manifest criminality.

3. 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 Continental European 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

³³ Garvey, *supra* note 12.

³⁴ *Wilcox v. Jeffery*, 1 All E.R. 464 (1951).

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 acts that are not easily recognizable as wrongful by the general populace. Doing so would not sit well with a society that was still reeling 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.³⁵ 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.

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, 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.

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

Even if there were good reasons for American lawmakers to turn to the pattern of subjective criminality during the middle of the twentieth century, those reasons may no longer exist. The correctional/treatmentist model has long been in decline. Furthermore, the possibility of a more authoritarian

³⁵ 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”.

government has loomed large ever since the September 11th terrorist attacks and the wave of repressive criminal legislation that ensued in its aftermath. In light of these events, American criminal law reformers might very well benefit from taking a closer look at the pattern of manifest criminality.

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. Consequently, the reasons that justified the turn to manifest criminality in these countries are no longer as strong as they were in the past.

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? 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.³⁶ 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. 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 and legislatures. As a certain pattern of criminality becomes entrenched, it tends to produce legislation and case law that conform to the pattern.

Complicity law presents a case in point. Contemporary American criminal law reformers have by and large 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*. 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

³⁶ CHARLES ZASTROW & KAREN KIRST-ASHMAN, UNDERSTANDING HUMAN BEHAVIOR AND THE SOCIAL ENVIRONMENT 40 (7th ed., 2007).

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. 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 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 are not impervious to this kind of tunnel vision. The recently decided Supreme Court case of *Rosemond v. United States*³⁷ is 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*). Unsurprisingly, all justices dismissed the defendant's *actus reus* claim as contrary to settled complicity law principles. The justices disagreed, however, regarding the defendant's *mens rea* claim. 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. This is the predictable result of criminal law doctrines that respond to the pattern of subjective criminality.

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. 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.³⁸ 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. 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. The details of these debates are not important for my purposes. What does

³⁷ 134 S. Ct. 1240, 1243 (2014).

³⁸ *Dolus* includes purpose, knowledge, and *dolus eventualis*, which is roughly analogous to the Model Penal Code's recklessness.

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.

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. 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. 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.

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?

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 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.