Dumb and Dumber: Reckless Encouragement to Reckless Wrongdoers

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Abstract

This paper deals with compound negligence, *i.e.*, situations in which one person’s heedlessness helps another to commit a negligent offense. The conviction of the second party who actually commits the offense poses no unique problem; offenses committable through criminal negligence, such as involuntary manslaughter, are routinely available in every jurisdiction. But conviction of the first party who negligently provided the means or opportunity for the second party’s unreasonable behavior poses significant problems. Accomplice liability is unavailable as complicity requires an intention to aid another, which is absent in such cases. Causation might be tried, but the second party’s criminal negligence is apt to be considered an intervening, superseding cause. Reckless Endangerment, an offense pioneered by the Model Penal Code, may well be available in most States (60%), but by no means all, and where available is generally graded as a misdemeanor only, with a maximum imposable prison term of about a year. This paper argues that in many cases such a relatively minor grading is disproportional to the harm committed, such as death or serious physical injury, and proposes a new statute to address the area. Special problems considered in drafting the proposed statute include the degree of aid that ought to be sufficient for liability, the type and degree of harms that should be covered, and the mens rea that should be required, *i.e.*, in Model Penal Code terms, either recklessness or negligence. Several unfortunate instances serve as case studies.
Dumb and Dumber: Reckless Encouragement to Reckless Wrongdoers

This paper deals with compound recklessness, i.e., situations in which one person’s heedlessness helps another to commit a reckless offense. The conviction of the second party who actually commits the offense poses no unique problem; offenses committable through various forms of criminal negligence and recklessness, such as involuntary manslaughter, are routinely available in every jurisdiction. But conviction of the first party who recklessly provided the means or opportunity for the second party’s unreasonable behavior poses significant problems. This paper begins in Part I [page 2] with several cases which present illustrative instances of the kind of situations encountered. In Part II [page 4] the paper considers some of the problems involved in reaching an appropriate resolution. Part II A [page 4] considers complicity as a possible solution but concludes it is unavailable as accomplice liability requires an intention to aid another, which is absent in cases of recklessness and negligence. Part II B [page 19] considers whether principles of causation might be utilized, but concludes they too are unsuitable. The second party’s criminal reckless or criminally negligent activity is apt to be considered an intervening, superseding cause, leaving the first party free of any criminal liability for harms caused by the final actor. Part II C [page 25] considers the relatively recent offense of Reckless Endangerment, an offense pioneered by the Model Penal Code which could, unlike complicity or causation, provide a means to criminally sanction the initially reckless individual who aids another to commit a reckless offense. The offense is found ultimately unsuitable, however, for while it may well be available in most States (60%), it is by no means available in all and where it is available is generally graded as a misdemeanor only, with a maximum imposable prison term of about a year. This paper argues that in many cases such a relatively minor grading is disproportional to the harm committed, such as death or serious physical injury, and in Part III [page 32] proposes a new statute to address the area. The policy arguments which must be considered in drafting such a statute are considered in Part III A [page 34], with the objective elements considered in Part III A(1) [page 34] (degree of aid or encouragement); Part III A(2) [page 38] (omissions); Part III A(3) [page 39] (resulting harm); and Part III A(4) [page 46] (circumstances). The subjective elements of the proposed statute will be considered in Part III A(5) [page 48]. Part III B [page 50] provides the definition of the proposed statute itself, together with a brief explanation of each of the elements that have been chosen to constitute its definition.
Part I: Illustrative Instances

“Shoot me. I’m ready.” The last words of Daniel Wright, aged 20, who put on what he thought, mistakenly, was a bulletproof vest so that he could have the experience of being shot before he joined the military. His friends gathered at a deserted field at 2:30 in the morning. One did as Wright instructed and fired a shotgun into his chest at point blank range. It turns out that, unknown to Wright or his buddies, body armor comes in several different grades, among them the “flack jacket” which is designed to stop flying shrapnel and such things, not bullets. It was such a jacket that Wright wore that night, not a “bulletproof vest,” and the shotgun blast tore fatally into his chest and heart.1

Jason Welch, aged 22, was not a saint but he was well intentioned. Welch, a guest at what the papers called a “marijuana-fueled party” attended by a number of young people in a 30-unit apartment house, noticed that someone had tucked a 9mm Ruger semiautomatic pistol under his host’s living room sofa. Recognizing the danger that such an instrument represented in the midst of such revelry, Welch took it upon himself to empty the weapon. Although he had had no formal weapons training he confidently applied the lessons he had learned from watching TV shows and movies and ejected the ammunition clip and “racked the slide,” i.e., slid the movable top part of the pistol fully backward and let it snap forward, a move which he thought would empty the gun’s firing chamber of any bullet it might contain. What he apparently did not realize is that there is a proper sequence in which the operation has to be performed, with the ammunition clip removed first and then the chamber cleared by “racking the slide.” Performing the acts in the wrong sequence by moving the slide first simply replaces the bullet ejected from the camber with another stored in the clip; ejecting the clip afterwards does not remove the bullet now in place in the firing chamber. Welch apparently performed the operations in the wrong order and when he pulled the trigger to finish the job on what he thought was now an empty gun, it fired. The pistol was pointed at the floor when it discharged and Kathryn Lally, who was

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watching TV sitting on the sofa of the living room of the apartment directly below, was struck in the heart. Her mother discovered her dead the next morning, still sitting in front of the television.²

A grieving mother, whose son had been killed while bicycling by the speeding car driven by 18- year- old Joshua Paniccia, told the judge at the killer’s sentencing that she felt betrayed by a legal system that had allowed the driver, who had been driving with a friend well over 80 mph in a 45 mph zone, to “plead down” a number of prior speeding offenses before the fatal collision. The prosecutor at the sentencing castigated the driver’s parents for not taking away the youth’s license, which they were legally authorized to do, when he was repeatedly stopped for speeding and racing. Instead of controlling their son it appears they had enabled him by helping him purchase his “cherry red, souped-up 2002 Nisan Sentra.”³

Roaring engines announced the arrival of two cars, a Mitsubishi Eclipse and a Chevrolet Camaro, racing down a public street towards a crowd gathered outside a Dairy Queen. The Camaro’s driver, Amilcar Valladares, less skillful or less lucky than his competitor, Sara Wall, lost control of his car, struck a utility pole and careened into the lines of waiting people. Luckily, even miraculously, no one was killed even though people were struck and some thrown out of their shoes by the impact.⁴

In all of these cases there is little doubt that the principal actor is criminally liable for a reckless homicide or assault. There was no intent to kill or injure in any of these misadventures, just reckless or seriously negligent⁵ behavior. The laws of manslaughter or assault (and assorted

³ See Leigh Hornbeck, Victim’s mother speaks of betrayal, TIMES UNION (Albany, N.Y.), June 7, 2005, at B1.; Pam Allen, Fatal crash driver had been cited, DAILY GAZETTE (Schenectady, N.Y.), July 13, 2004, at B3.
⁴ See Dância Coto, Teen describes racing accident that injured 5, CHARLOTTE OBSERVER, May 27, 2005, at 5B.
⁵ Terminology can be a problem here since “negligence” can be used to denominate either a genus or a species. “Negligence” can be used as a generic term to designate a want of proper attention or care in one’s actions or it can be a quite specific term designating a failure to be aware of risks in one’s actions of which one should have been aware but was not. In this sense “negligence” is distinguished from “recklessness” in which the actor is aware of the risk but chooses to run it regardless. This last usage has acquired near canonical status since the advent of the Model Penal Code and I will adhere to that received usage, employing, as suggested by the Model Code itself, the term
more specific offenses) are ready and waiting to deal with such actors. But what of those who also had some share in the blame, the friends who partied with Dan Wright, the person who secreted the gun found by Jason Welch, the parents who allowed Josh Paniccia to continue to drive (and the friend who rode with him), and Amilcar Valladares’ competitor, what are their responsibilities, if any, to the law? I ran across these four cases randomly in the spring and early summer of 2005. Doubtless there are scores of other, similar cases which happen all the time, but these cases started me thinking about what the best response should be to the problem of those who recklessly encourage or enable reckless wrongdoing by others.

Three responses come immediately to mind. First, we might use the doctrines of complicity to hold such persons accountable for the acts of the person they have encouraged or aided. Second, we might use the principles of causation to hold the encouragers and aiders themselves directly and personally responsible for the harms ultimately produced. Both of these strategies seem initially attractive, but both ultimately are unsatisfactory. A third possibility, the offense of Reckless Endangerment pioneered by the Model Penal Code, could be employed but it seems, at least to my mind, not entirely suitable as it does not mark a proper fit between the wrong done and the punishment imposed.

Part II A: Complicity

As regards complicity, or accomplice liability, the law deals with “the circumstances under which a person who does not personally commit a proscribed harm may be held accountable for the conduct of another.” The “doer of the deed” or the actual perpetrator is not the only person criminally liable for the offense; those who aided or encouraged him to do so also may be held liable for the crime committed. In the kind of cases illustrated above we are looking at a sort of compound negligence where one person’s carelessness assists another’s imprudence and accomplice liability would seem to be an obvious place at which to begin.

“unreasonable” to designate the genus of careless behavior (see MODEL PENAL CODE §1.13(16)).
7 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 465 (5th ed. 2009).
thinking. The common law devised various categories of participants in crime. For felonies\(^8\) the principal in the first degree was the primary actor, the one who had done the criminal deed, and all others who criminally aided or assisted him derived their liability from him\(^9\). The aid or assistance could take many forms, such as soliciting or ordering the commission of the crime, assistance or counsel in the planning or commission of it, incitement or encouragement of the principal actor to commit the offense, emboldening him to do the deed\(^10\), or otherwise aiding or abetting the crime’s commission. Depending on whether or not one was present at the scene of the commission of the crime those who criminally aided or abetted the principal were either principals themselves, but in the second degree, if they were present at the scene, either actually or constructively, or, if absent from the scene at the time of the crime’s commission, they were accessories either before or after the fact. There was considerable practical significance in a procedural vein to these distinctions which could be quite nice\(^11\), but the substantive result was

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\(^8\) The common law did not develop sharp distinctions in the forms of participation in either treason or misdemeanor. As Perkins and Boyce state, “guilt of such crimes may be incurred by incitement or abetment as well as by perpetration.” ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 735 (3d ed. 1982). However, the elaborate distinctions between principals of various degrees and accessories before and after the fact was not employed. The common law “[d[id] not descend to distinguish the different shades of guilt in petty misdemeanors.” \textit{Id.} at 726 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 36 (1769)). If one perpetrated treason or a misdemeanor, or abetted or incited it, one was simply guilty of the offense principal.\(^9\)

\(^9\) The law of complicity is discussed in some depth in a number of standard textbooks. See, e.g., DRESSLER, supra note 7, ch. 30; 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, ch. 13 (2d ed. 2003); PERKINS & BOYCE, supra note 8, ch. 6, § 8.\(^10\)

\(^10\) Acts which encourage or embolden another to pursue or persist in negligent action seem to play a significant role in many of the cases, as in the death of Daniel Wright or the injuries caused by Amilcar Valladares. Accomplice liability has been predicated on acts of shouting or otherwise communicating approval and a desire that the principal actor continue in his or her course of conduct. See, e.g., Wilcox v. Jeffery, [1951] 1 All E.R. 464 (K.B.); R. v. Black, [1970] 4 C.C.C. 251, 255, 258 (Can., B.C. Ct. App.). In State v. Ocha, 41 N.M. 589, 72 P.2d 609 (1937) a crowd, angered at an arrest occasioned by an eviction, had gathered at the courthouse where a hearing was being held. “[T]hey pounded on the windows, shouted and cursed, and some of them threatened to kick the door down” (\textit{Id.} at 593, 72 P.2d at 612). When the prisoner was sought to be returned to jail a riot ensued in which the Sheriff was killed and others injured. It was not entirely clear who had fired the fatal shot. The court said of accomplice liability “The evidence of aiding and abetting may be as broad and as varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs, or by any other means sufficient to incite, encourage or instigate commission of the offense or calculated to make known that commission of an offense already undertaken has the aider’s support or approval” (\textit{id.} at 599, 72 P.2d at 615). The encouragement, however, must be given with the purpose of producing the principal actor’s conduct. See Hicks v. U.S., 150 U.S. 442, 14 S.Ct.144, 37 L. Ed. 1137(1893); R. v. Clarkson, [1971] 3 All E. L. Rep. 344 (C-MAC).\(^11\)

\(^11\) Many writers have commented on the intricacies of the common law system of parties to crime. Dressler cites a number of them in his textbook in the first footnote to his chapter on complicity (see DRESSLER, supra note 7, at 465). An especially interesting pair of observations are made in RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR., & PETER W. LOW, CRIMINAL LAW 680-81 (2d ed. 2004) (“the distinction between principals and accessories was critically important. . . . This scheme invited evasion of justice.”) and Perkins & Boyce who attribute the nicety of the principal-accessory distinctions to a “dissatisfaction . . . [with] an excessive number of
the same for all categories of participant: all were guilty of the offense which had been committed by the primary actor. There were a number of intriguing complications debated and developed, not always consistently, over considerable time dealing with the objective components, or actus reus if you will, of the doctrine of complicity, but the paradigm of the subjective component or mens rea has been generally agreed to be an intention or purpose to bring the crime about. There has been some argument, as is noted in footnote thirteen, regarding whether knowledge that one’s conduct would aid another to commit a crime should be sufficient for accomplice liability. Some argue that one should not knowingly aid another to commit crime, as for example by providing, for a fee, an answering service for a known prostitute regardless of whether one is entirely indifferent as to her professional success or, contrarily, has a true purpose to promote the commission of her offense. Others argue that citizens should be free to go about their normal legitimate business even if they know that another will take advantage of that to commit a crime. An example often given is the seller of ordinary sugar who sells to a customer whom he knows will use the sugar to make moonshine whiskey. However that particular debate regarding knowledge may be concluded, the orthodox position is that recklessness and negligence are not sufficient mental states to incriminate one as an accomplice. Recklessness and negligence are conceived of as belonging to a fundamentally}

executions in felony cases” which unsurprisingly “tended to prevent conviction despite clear evidence of guilt.” PERKINS & BOYCE, supra note 8, at 751-52.

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

13 Discussions of complicity typically begin with a statement such as Dressler’s: “Court’s frequently state that a person is an accomplice in the commission of an offense if he intentionally aids the primary party to commit the offense charged” (DRESSLER, supra note 7, at 477). Then there is a discussion of whether knowledge that one’s conduct will aid another to commit a crime should suffice, often discussing the classic debate among the drafters of the proposed Model Penal Code and voting members of the American Law Institute. (This debate is discussed at some length in the comments to §2.06. See MODEL PENAL CODE §2.06 cmt. 6(c) at 313-19 (1985). In this debate the drafters favored an extension of liability to some cases of knowing facilitation, noting that “whether or to what extent this position involves departure from existing law, it is most difficult to say.” MODEL PENAL CODE §2.04 cmt. 2 to (Tent. Draft No. 1 (1953)). The drafters then discussed various cases which might be argued to go in one or another direction, depending on the facts to which they related. The drafters’ proposal was rejected by the Institute as a whole in favor of limiting accessorial liability to purposive conduct. As the current comments note, “[m]any recent revisions and proposals [among the States] reflect a similar judgment” in rejecting knowledge as a sufficient mens rea (MODEL PENAL CODE §2.06 cmt. 6(c) at 318) (1985)).


15 See United States v. Falcone, 109 F.2d 579, aff’d, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940).

16 A related issue arises where an actor intentionally aids or encourages another to engage in particular reckless
different category of culpability than that occupied by purpose and knowledge. As Holmes said, “even a dog distinguishes between being stumbled over and being kicked”\textsuperscript{17} and George Fletcher writes of “the classic distinction between dolus (intention) and culpa (negligence)”\textsuperscript{18} which he states is the “basic cleavage . . . [in classifying] the states of mind used in criminal legislation.”\textsuperscript{19} Thus an actor who acts only recklessly or negligently has no liability for a crime which requires purpose, or perhaps knowledge. Liability in such a case would be incongruous. As Robinson writes “[o]ne cannot, it is claimed, accidentally be an accomplice”\textsuperscript{20} and Dressler states “[c]ourts and statutes frequently express the culpability requirement for accomplice liability in terms of ‘intent’, e.g., the ‘intent to promote or facilitate the commission of the offense.’ . . . . If so, it is logically impossible for a person to be an accomplice in the commission of a crime of recklessness or negligence.”\textsuperscript{21}

The kinds of people we are considering are acting with recklessness or negligence, quite likely of a degree sufficient to be considered criminally culpable, but often not with the intent or knowledge requisite for accomplice liability. In the case of Daniel Wright, for example, who died of a lethal shotgun blast to the heart, Wright intentionally directed his friend Robert Stottemire, the principal in the first degree to a reckless homicide, to “shoot me.” Aside from the pathos and complications caused by the law of suicide\textsuperscript{22}, Wright’s conduct is a classic instance of conduct. If that other performs the encouraged conduct and thereby commits a reckless crime, there is a question whether the first actor can be convicted of that reckless crime as an accomplice. This question will be discussed later (see notes 47-66 and accompanying text) but note carefully that the aid or encouragement there discussed is given intentionally; that is not a case of recklessly or negligently stumbling into accessorial liability.

\textsuperscript{17}OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (1881).
\textsuperscript{18}GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 443 (1978).
\textsuperscript{19}Id. at 442. See GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW, ch. 7 (Intention versus Negligence (1998).
\textsuperscript{20}PAUL H. ROBINSON, CRIMINAL LAW 327 (1997).
\textsuperscript{21}DRESSLER, supra note 7, at 481. Professor Dressler has, however, begun to consider if complicity could be conceptualized in terms of the accomplice taking a risk that another will commit a crime (see Joshua Dressler, Reforming Complicity Law: Trivial Assistance as a Lesser Offense, 5 OHIO S.J. CRIM. L. 427 (2008). He discusses several articles considering various risk based analyses, accepting none of them completely, but he does write that “I acknowledge that the criminal conduct of [accomplices] can coherently be seen as a risk-based, rather than a harm-caused, doctrine” (id. at 446). If excessive risk-taking becomes the focus of accomplice liability, then the emergence of recklessness as a suitable mens rea would seem entirely possible, if not inevitable.
\textsuperscript{22}“Self-destruction”, say Clark & Marshall, “is a form of homicide, and a felony under English common law.” (A TREATISE ON THE LAW OF CRIMES (CLARK & MARSHALL) 623 (Marian Quinn Barnes 7th ed 1958). The legal treatment of such deaths varied over time, from originally punishing such a “felo de se” with ignominious burial and forfeiture of lands and goods to later leaving the conduct unpunished. Suicide, although a deliberate and unlawful
accomplice liability through intentionally directing or ordering another to do a criminal act,\textsuperscript{23} here involuntary manslaughter. But what of the other friends present in the field that night? The facts are not fully clear, but it is likely that these young men, aged 18 through 20, after a night of drinking and carousing, were all willing participants in that night’s events, egging on Wright in various degrees\textsuperscript{24}. None but Wright has been shown to directly order or solicit the fatal shot, but all are likely to have behaved with gross negligence. When faced with an inebriated friend proposing to engage in such heedless behavior the reasonable man would discourage it, protesting the suicidal folly of it all, and certainly would not actually encourage it by accompanying his friend in a drunken revelry to a deserted field in the middle of the night with a loaded shotgun. It is not clear exactly what they said or what messages were implicitly conveyed by their conduct, yet regardless of how reckless the facts may show the friends to have been\textsuperscript{25}, absent behavior intentionally designed to get Stottlemire to fire the fatal shot the friends are not accomplices to the deed and bear no homicidal liability. Faced with this legal reality the prosecution charged them with offenses stemming from their lies told to police to cover up their involvement in such an imprudent scheme\textsuperscript{26}, but no charge regarding Wright’s death itself was killing, did not constitute murder which required the killing of another. (See \textit{id.} at 623-628 and \textsc{Perkins & Boyce supra} n. 8 at 119-124. Both authorites contain extensive citations to common law authority.) However that may be as a matter of history, a deliberate order to another person to unlawfully kill a human being remains an archetypical example of the kind of conduct which supports accomplice liability.\textsuperscript{23} A civil case on similar facts is Michael R. v. Jeffrey B., 158 Ca. App. 3d 1059, 205 Cal. Rptr. 312 (1984) (suit for damages; secondary actor had urged the primary actor, armed with a powerful slingshot, “Hey, shoot him; go for it.”; defense of no tort of “negligent encouragement” and that secondary party was a mere “verbal bystander” rejected.).\textsuperscript{24} \textit{See} Ruth Ann Krause, \textit{1-year term for “flack jacket” lie}, \textsc{Gary Ind. Post-Trib.}, Aug. 31, 2007, at A5. \textsuperscript{25} The influence of crowd psychology in instigating negligent behavior can be seen at illegal road races, an increasingly common occurrence. These more or less organized events include crowds of spectators, encouraging the contestant drivers in exciting demonstrations of skill, daring and really stupid, i.e., grossly negligent, behavior. In one, detailed in a 2002 Washington Post Article, two police officers were charged with “neglect of duty” after they watched such a race, taking place just beyond their jurisdictional boundary, while “play[ing] music on loud speakers to encourage the race.” Sue Anne Pressley, \textit{The Fast and the Fatal: Drag Racing Resurges; Illegal Thrills End in Death Across U.S.}, Mar. 17, 2002 at A1. In another late night race the crowd surged onto a rural highway behind two drag racers who had just started down the road in a cloud of smoke from spinning tires. Another driver then came over a rise in the road, could see nothing for the haze, and plowed into the hidden crowd, hurling bodies in all directions, killing eight. In an ironic twist it seems that the driver may himself then have been engaged in another road race see Brent Jones, \textit{Racing Deaths Charges; two men indicted on eight vehicular manslaughter counts}, \textsc{Baltimore Sun}, July 30, 2008, at 1B. \textit{See also} Victoria Kim, \textit{Nearly 200 Arrested at Street Racing Site in Ontario}, \textsc{L.A. Times}, Sept. 29, 2008 at B4. \textsuperscript{20} After firing the fatal shot Stottlemire helped place Wright in the car they had driven to the field, then ran away, leaving his friends, Michael Searle and Brock Beiker, with the shotgun they had taken from Beiker’s father, the car and the wounded Wright. The two drove Wright to a local hospital and of course had to tell people what had happened. Rather than tell the truth, Searle had fired a shotgun blast into the car’s windshield before they left the
lodge except against the young man who actually pulled the trigger. It may be argued that this is a desirable result. The man who made the choice to fire the shot is being held responsible for his conduct, as would be the man who purposely directed that the act be done, if he had survived. The other young men have themselves shot no one and have not been sufficiently connected to the homicide as something they have tried to bring about to such a substantial extent that they should be guilty of committing it. Yet they certainly appear to have acted culpably. Their conduct was very dangerous, at the end of which someone lay dead, the victim of lethal violence. Additionally the life and health of other people were put in jeopardy, specifically the black citizens of Gary, Indiana, who were the objects of the police department’s “full court press” in which “anyone out walking” in the black area of town where the shooting had supposedly occurred was stopped and questioned, doubtlessly with the civility and courtesy for which police officers are justly famous. This is conduct of a kind we may well wish to seriously discourage, whether committed again by them or by some other similarly heedless young man. They would seem to be prime candidates for some sanction imposed by the criminal law and yet the charges against them stem only from the fortuity that they lied to the police after the homicide had occurred. We might wish to establish a new offense more precisely tailored to the dangers such persons pose and the personal blameworthiness that they exhibit.

field to lend credence to the story they both had concocted of having been attacked by a black man wearing jeans and a knit cap from whom they had sought to purchase either alcohol or drugs. The young men were all white and from the suburbs; the supposed assailant was black and an urban drug dealer. The Gary, Indiana police mounted a “full court press” to find Wright’s killers, stopping “anyone out walking” in the vicinity of supposed homicide scene. “The whole unit (i.e., the homicide squad) put everything on hold to try and find the crime scene.” The next day another young man who had been at the real scene of the shooting, accompanied by his parents, walked into the police station to tell the police what he had seen. At this point Searle and Beiker’s story began to collapse and they then told the truth.

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

28 We might note for example that no black citizen of Gary, Indiana, was in fact shot and killed while Daniel Wright was. We might wish to distinguish the two situations by imposing an appropriately more severe sanction in the case where death occurred than where it was “only” risked. Similarly, firing a shotgun directly at a man’s heart with only a “bullet proof vest” of unknown provenance between him and eternity might be regarded as an act amounting to sporting with human life, of significantly greater depravity than exposing citizens to a chance of official harassment or violence. Such elements of result and mens rea are discussed later in connection with the proposed statute incriminating Compound Recklessness.
Similarly, Jason Welch, who tried so clumsily to disarm a pistol found at a pot party, is also charged as the principal in a homicide, but with murder in his case. Whoever put the loaded pistol in the living room sofa in fact aided Welch in the offense by providing him with the very weapon he used to kill Kathryn Lally. If this assistance had been provided intentionally accomplice liability for the provider would be found easily: supplying a criminal with the instruments necessary to commit the crime is another classic instance of the conduct of an accomplice. However, there is nothing which would indicate that an intention to kill Ms. Lally motivated the provider. Hiding a loaded pistol in a sofa upon which a number of intoxicated party-goers were expected to sit in the midst of a crowd of fellow inebriants is likely grossly reckless conduct, fraught with foreboding of many possible outcomes, most bad. Still such conduct is not practically certain to cause death and thus cannot be plausibly argued to be knowingly homicidal. Absent either a purpose to assist in the homicide or knowledge that one was doing so, the provider of the gun bears no accomplice liability for killing Ms. Lally. Again, other charges might be possible and weapons possession offenses were laid against several of the party attendees, but no offense arising out of Ms. Lally’s death was charged against any of them. Again, one might argue that this is as it should be. The gun’s owner may be careless, even criminally so, but it was the hubris of the ill-advised Mr. Welsh who thought that he knew enough about the workings of deadly firearms from watching Hollywood productions that lead to the death of Kathryn Lally. Yet it is only the fact that firearms are heavily regulated that allows the authorities to take any action at all against the careless owner; equally reckless assistance in the misuse of unregulated materials may well be immune from police or prosecutorial intervention. As in the case of Daniel Wright’s late night companions in the deserted field we may wish that there was some offense directly applicable to the irresponsible conduct of the pistol’s owner.

In our third case Josh Paniccia pled guilty to Criminally Negligent Homicide in the death of Kathryn Lally. Thus Lady Macbeth, who had in fact killed no one, felt unable to wash the blood of the murdered King Duncan (and others) from her hands. She had “laid their daggers ready” for her husband to use in the bloody deed. WILLIAM SHAKESPEARE, MACBETH act 2, sc. 2, l. 11 (The Pelican Shakespeare 1971).

For example, if the person who had hidden the gun had instead hidden a large kitchen knife or an elaborately ornamented Samurai sword behind the sofa cushions we might still forebode ill consequences, yet kitchen equipment and oriental collector’s items are not normally subjected to close regulation.
of David Ryan, the 32 year old bicyclist struck by young Paniccia when he lost control of his speeding, souped-up car. Paniccia had a passenger in the car at the time who, had it been shown (as it was not) that he had intentionally urged Paniccia to speed dangerously down the road, could have been charged as an accomplice. But what of Paniccia’s parents? The case occurred in New York and New York law requires parental consent for a minor to be issued a driver’s license. Additionally, New York law allows the parent to withdraw that consent by filing a form with the Department of Motor Vehicles, which will then cancel the license. Thus New York gives parents the power to cause the loss of their children’s driving privileges should the child prove unworthy of them, but it is an open question as to whether a legal duty to do so exists. Paniccia, who could have had a driver’s license for only about two years at most, had been arrested for speeding three times in the 21 months preceding the fatal collision and had committed some other unspecified moving violations before that. His parents did nothing to revoke the license and get Paniccia off the road; instead they had helped him purchase the cherry red car and the aftermarket add on equipment of a “blower” or supercharger and racing tires which enabled him to drive even faster than the car would go otherwise. The prosecutor criticized them pointedly at sentencing for enabling their son to continue unchecked as a menace to all others on the road. No charges were brought against them, however, doubtlessly at least in part because of the difficulty in establishing a legal duty to act. But what if a legal duty, backed up by the criminal law, to restrain their son’s wayward activity could be established? Then their negative act of failure to fulfill their duty would have in fact aided the young Paniccia by leaving him on the road. Just as surely as the owner of the pistol who provided Jason Welch with the weapon he used to kill, the parents of Josh Paniccia would have, had there been a legal duty, aided their son to kill by providing him with the opportunity, i.e., unrestrained access to the open road, and the means, i.e., a souped-up car which it was legal for him to drive, to do so. However, again the mens rea problem would prevent the law of accomplice liability from

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31 See, e.g., People v. Madison, 51 Cal. Rptr. 851, 242 Cal. App.2d 820 (4th Dist. 1966) where the passenger urged the driver who was pursuing another car to “Get him, Bill” and “Don’t lose him, Bill.” (Id. at 853, 242 Cal. App.2d at 823). Where the passenger had “prodded” the driver to drive recklessly and “spurred her to elude the [pursuing] police” the Maine Supreme Court reached a similar conclusion of liability using the language of proximate causation rather than complicity (People v. Saucier, 776 A.2d 621 (Me. 2001)


33 Pam Allen, Fatal Crash Driver had been Cited, DAILY GAZETTE (Schenectady, N.Y.), July 13, 2004, at B1.

holding them accountable for the death they in fact aided. The parents clearly had no purpose to assist their son to drive recklessly and probably could not be shown to have known with practical certainty that he would do so. There was certainly a considerable risk that he would do so, but Paniccia’s conduct in exceeding the speed limit on a winding, two lane highway by approximately 50 MPH (traveling nearly 90 MPH in a 45 MPH zone, roughly doubling the allowed speed) is probably sufficiently extraordinarily foolish to be seen as not certain to result from merely allowing him to drive upon public roads. Thus traditional complicity doctrine would insulate them from being considered accomplices in their son’s homicide. Perhaps even more so than in the previous cases an attractive argument can be mounted that this is a good result. The dignity and responsibility of the individual is a basic, core value of our civilization. We hold that guilt is personal and not collective.\textsuperscript{35} The law of complicity, even when it holds one person liable for the acts committed by another, is designed to honor these values by limiting liability to those situations where one has chosen to associate him or herself with the aims of another and has tried to bring those aims about by his or her assistance. Holding parents responsible for the criminal offenses of their children based on a failure to properly raise and discipline them obviously presents disquieting prospects. If we think that the sins of the fathers should not to be visited upon the heads of their children, the converse would seem to be equally true. Where a child, or some other person subject to the supervisory authority of another, has committed a crime we should insist on some significant degree of personal fault with a fairly direct connection to the commission of that crime before we hold a parent or other supervisor liable for the commission of that offense.\textsuperscript{36} But if we are faced with people who stubbornly refuse to recognize the degree of danger posed to others by the grossly careless actions of their loved ones (or others for whom they owe some duty of supervision), and who instead of restraint provide significant assistance which substantially facilitates the wreaking of havoc among the rest of us by their child, might not it be desirable to have available a special offense to deal with such people and perhaps

\textsuperscript{35} See, e.g., U.S. v. Dotterweich, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting) (“It is a fundamental principal of Anglo-Saxon jurisprudence that guilt is personal.”); AMERICAN CONVENTION ON HUMAN RIGHTS art. 5(3), July 18, 1978, O.A.S. T. S. No. 36. See also N.Y. PENAL LAW § 20.15 (personal culpability of each offender is measure of guilt when more than one person is criminally liable for an offense).

\textsuperscript{36} The commentaries to the Model Penal Code discuss briefly the possible imposition of accomplice liability for omissions of legal duties. See MODEL PENAL CODE § 2.06(3) (a)(iii) cmt.6(d) (1985).
encourage them to take their responsibilities to society more seriously?  

The case of Sara Wall, the driver racing Amilcar Valladares on a public roadway, illustrates the unruly complexity of doctrine in this area. Wayne LaFave in discussing accomplice liability for assistance or encouragement to reckless or negligent conduct says that “the cases in this area are generally in a state of confusion” and that “there is considerable diversity in the cases on the subject of whether accomplice liability may rest upon knowing aid to reckless or negligent conduct if that conduct produces a criminal result.” Note that LaFave is writing of “knowing” aid or encouragement (which he finds is “most common[ly]” illustrated by cases in which an owner knowingly lends his car to an intoxicated friend who drives recklessly and kills another) and is not considering the case of aid provided either recklessly or negligently. My own impression upon reading numerous cases is that order and consistency are in even shorter supply when it comes to considering accomplice liability for reckless offenses where assistance or encouragement has been rendered recklessly.

A basic problem is that accomplice liability for reckless or negligent offenses can be seen as oxymoronic, a contradiction in terms. As noted above there are two distinct forms or types of mens rea: purpose and negligence (or dolus and culpa if you find the Latin terms useful as conceptual place markers.) Each form may be broken down into subcategories (purpose may be divided into purpose and knowledge while negligence may be divided into recklessness and

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37 Sanford Kadish discusses, hypothetically, a similar case of a “vexatious youth” who, as is well known by his father, “is just beginning to learn to drive, has proved singularly inept, and has displayed an alarming proclivity to taking wild and irresponsible risks.” Nevertheless the father gives him the family car to drive, with fatal consequences when the son drives recklessly. Kadish is very concerned with expanding criminal law for reckless complicity too widely, but nevertheless he believes a case might be made against the father in such a situation. Sanford H. Kadish, Reckless Complicity, 87 J. CRIM. L. & CRIMINOLOGY 369, 380-81 (1997).
38 LaFave, supra note 9, § 13.2(e) at 352.
39 Id. at § 13.2(c) at 345.
40 Id. at § 13.2(e) at 352.
41 Audrey Rogers noted both the relative paucity of writing upon the “extent to which a person may be an accomplice to an unintentional crime” and suggested that it was at least partially explained by the fact that “some courts view the concept of intending to aid in the commission of an unintentional crime as oxymoronic.” Audrey Rogers, Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent, 31 L.OY. L.A. L. REV. 1351, 1351-52 (1998).
42 See FLETCHER, supra notes 18 and 19.
negligence) but each form is considered separate and distinct and, as in Kipling’s poem, “Never the twain shall meet.” That which is done on purpose cannot by definition be considered to have been done negligently, and the negligent actor cannot be considered to have acted purposefully. Accomplice liability classically requires a mental state of intention or purpose (or perhaps knowledge) but reckless or negligent offenses require only the less culpable mens rea of recklessness or negligence. Not only is the degree of culpability unequal but both purpose and knowledge require a choice to bring about the harmful results or conduct involved, or at least an awareness that they are certain to occur. Recklessness and negligence on the other hand both exclude that sort of choice to do harm. A reckless or negligent actor does not believe that harm will result from his actions and has not made the choices and does not have the awareness that marks the purposeful or knowing offender as so much more evil and dangerous. It has been held that running the two together, i.e., attempting to impose liability as an accomplice to a reckless or negligent crime, is logically impossible, the legal equivalent of trying to combine matter and anti-matter, producing a nullity in which criminal liability cannot exist. The aesthetic sense, the appeal of elegantia juris, may generate a feeling of revulsion when faced with such a chimera as an accomplice to negligent crime and the possibility of such liability rejected.

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43 There obviously is a certain taxonomical inelegance here in using the same term, either purpose or negligence, for both a genus and a species. The Model Penal Code avoids this linguistic problem by providing a general requirement for “culpability” and then defining four specific mental states, “purposely,” “knowingly,” “recklessly” and “negligently,” which are required before an actor can be guilty of an offense. It does not further categorize the elusive mental element of criminal conduct (see MODEL PENAL CODE §§ 2.02 & 2.05). To distinguish blameworthy conduct that is done “on purpose” from that which is done “only accidentally” more categories must be used than does the Model Penal Code. There is virtue here in adopting the Latin terms “dolus” and “culpa” but one can get along quite nicely by bearing context in mind.

44 See RUDYARD KIPLING, The Ballad of East and West, in BALLADS AND BARRACK-ROOM BALLADS (1897) which opens with the lines “Oh, East is East, and West is West, and never the twain shall meet”.

45 Michael and Wechsler discussed the difference between advertence and inadvertence as it bore upon the character, and danger, of offenders in their seminal article “A Rationale of the Law of Homicide.” They noted there regarding the inadvertent homicide that “[w]hatever his ends, we have no reason to believe that he would have sought them in the same way had he been aware that his behavior was homicidal. So far as we know, the preservation of life occupies a place in his scale of values which is at least close to that which we think it should have.” Herbert Wechsler & Jerome Michael, A Rationale of the Law of Homicide II, 38 COL. L. REV. 1261, 1275 (1937). Thus, they argued, the unknowing man, even if he caused a death, was not of the same ilk as one who had knowingly killed another. Similarly, where one has not purposely joined with another to accomplish a criminal end, or does not know that his conduct will certainly assist in doing so, we have insufficient reason to believe that he is a bad and dangerous man who is apt to do this sort of thing again and to whom we should attach responsibility for assisting a crime committed by another so that he “may be made amenable to the corrective process that the law provides.” MODEL PENAL CODE Art. 5, Intro. at 294 (1985).
However, the beauty of logical form can often lose its attraction when confronted by a perceived imperative that certain actions be taken. A number of courts, sometimes abetted by statutes and sometimes not, have striven mightily to devise ways to incriminate some of those who have aided or encouraged reckless wrongdoing. The “confusion” and “diversity” noted by LaFave in the cases and law in this area may well be a product of the competing claims of legal logic and social utility. The most intellectually satisfying strategy that has been devised to date begins by concentrating attention on the conduct undertaken by the “primary” actor rather than on the harmful result that the person has caused. In the case of automobile “accidents” for example the focus would be on the conduct or driving techniques employed by the errant operator (the primary party) rather than on the injuries suffered by the victims. Then consideration is given to the mental state exhibited by any person who may have aided the driver in any significant way (the “secondary” party) in relation to that conduct. It may often be found that although there is no purpose on the part of the secondary party to cause the harmful result, there is nevertheless a purpose to encourage or aid the driving behaviors exhibited by the primary party, or at least a knowledge of their near certainty. Then it is possible to conclude that the secondary party is an accomplice to the particular conduct which he or she intended to aid or encourage. Once you have categorized the aider an intentional accomplice in something, even if it is only conduct, it is a fairly simple matter, if one thinks it socially useful to do so, to find accomplice liability for a complete crime. If one has exhibited recklessness or negligence as to the harm which was caused by the primary party whose conduct one has intentionally aided, then liability for recklessly or negligently causing that harm may, if one chooses to do so, be imposed.

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46 Consider, for example, the imposition of criminal liability upon corporations. Originally, such liability was rejected as incompatible with legal principal. The corporation was an artificial being which was incapable of forming a criminal intent and could not be punished. An oft repeated adage was that “a corporation has no soul to damn, nor body to kick” and the well settled legal result was that while human corporate agents could be prosecuted, their corporate employers were immune. As business corporations grew more and more powerful during the 19th century, American courts were driven to repudiate the long standing doctrine, culminating with the Supreme Court’s reasoning in the New York Central case that “[the Court] cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through [corporations], and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectively controlling [them].” New York Central & Hudson River Railroad v. United States, 212 U.S. 481, 495-96 (1909).

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

48 Joshua Dressler explains the process rather nicely in his textbook. See DRESSLER, supra note 7, at 481-82, 500-01.
without unduly torturing the received dogma on complicity. In the case of street racing of the kind in which Sara Wall engaged it might be argued that just as it takes two to tango, it takes two to race. One party to a race desires, needs and encourages the other party’s actions so that there is some opponent against whom to compete. Thus the element of purposeful mens rea traditionally required for accomplice liability may be found, not in the offense considered as a whole, but in one component of the offense, i.e., conduct such as dangerous driving on city streets. The actor who has purposefully aided or encouraged the conduct may then be classified as “an accomplice in the commission of the conduct” and it may be argued that he may be properly held complicit in the commission of the whole offense if he exhibits the mens rea sufficient for the offense, as for example a reckless disregard for the safety of others on the road. Thus one who purposely aided or encouraged another to drive in a reckless manner could be held as an accomplice to a reckless homicide committed by the driver who fatally injured another. This is the technique that may be teased out of the provisions of the Model Penal Code and its two editions of official commentaries, but it reaches only those cases where a guilty intention, or perhaps knowledge, on the part of the secondary party can be found. An example of the kind of case in which this analysis works most easily is People v. Madison in which a jealous teenage suitor together with eight of his friends in two cars chased his rival for fifteen or twenty minutes through suburban Orange County, California, streets, apparently intending to “kick his ass.” The defendant, Michael Madison, was not the driver of any of the pursuing cars but urged his friend, Bill, who was driving, to “Get him, Bill” and “Don’t lose him, Bill” as the cars fishtailed and sped through the neighborhood. Their quarry eventually crashed and was killed. The court had no difficulty in deciding that the encouragement and aid given by Madison, seemingly the group’s leader, intending that Bill engage in a “hazardous pursuit, fraught with

49 See MODEL PENAL CODE § 2.06(4) (1985).
51 See id. cmt. 7 at 321-22; MODEL PENAL CODE § 2.04(4) cmt. 7 (1985); MODEL PENAL CODE § 2.06(4) cmt. at 34-35 (Tentative Draft No. 1)(1953). This interpretation of the Code’s language is an example of how easy interpretation can appear once you know what the authors had in mind when they wrote. Such interpretive adeptness seemed to elude the Supreme Court of New Hampshire when it decided State v. Etzweiler, 125 H.H. 57, 480 A.2d 870 (1984); see especially Id. at 67-69, 480 A.2d at 876-77 (Souter, J., concurring).
53 Id. at 824, 51 Cal. Rptr. at 853.
54 Id. at 823, 51 Cal. Rptr. at 853.
peril to all the participants” were sufficient to convict him of involuntary manslaughter as an accomplice to Bill’s grossly negligent acts of driving. This kind of case is easy because you have the personal presence of the defendant on the scene where he solicits or encourages specific acts or particular courses of conduct. Since the purpose in his actions is to produce the conduct of the primary party it is not a great stretch for the law to attribute legal responsibility for those actions to the one who instigated them. However, actors may not always act with such a manifest guilty intention, or at least it may not be possible to be proved beyond a reasonable doubt that they did so, and so a number of the Sara Walls of this world may not be reachable by this technique. Drivers in fatal road races who have not themselves killed or injured others may often argue rather convincingly that they had no knowledge that it was practically certain that their competitor would do such a stupid thing as he did and that they did not knowingly aid or encourage that particular conduct. Whether their purpose or “conscious object” in driving may be restricted to their own conduct, which has itself not proved fatal or injurious, or may be expanded to include a further purpose to incite and encourage another to engage in reckless behavior is an uncertain matter. New York’s Appellate Division did find such an intention to aid

55 Id. at 827, 51 Cal. Rptr. at 855.
56 See also People v. Branch, 202 Mich. App. 550, 509 N.W.2d 525 (1994) where a passenger in a vehicle fleeing from the police gave the driver some “driving directions” and threw beer cans at the police all with the purpose to assist the driver to flee and elude the police. The passenger was convicted of Vehicle Code offenses applicable to drivers under “an aiding and abetting theory” argued by the prosecution. People v. Saucer, 776 A.2d 621 (Me. 2001) presents a similar situation (under the facts as presented by the defense) in which the passenger “spurred [and prodded the driver] to elude the police by driving at high speed and to crash through a gate” with fatal results. The court upheld the manslaughter conviction on a causation theory (which will be discussed shortly) rather than utilizing complicity doctrine.
57 See, e.g., the dissenting opinion of Judge Carroll in Jacobs v. State, 184 So.2d 711, 718 (Fla. Dist. Ct. App. 1966), a road racing case in which one participant had killed both himself and an oncoming motorist and another participant was convicted of manslaughter through “aiding and abetting: “[there is no testimony] from which reasonable men could conclude that the defendant knew that Kinchen [the deceased racer] was planning to try to pass the racing cars . . . and certainly not a word that the defendant knew or had the slightest notion that Kinchen would be so reckless as to try to pass Carter’s car by turning into the east lane in the face of oncoming traffic [at the crest of a hill].” Judge Carroll’s opinion failed to convince either of the two other judges who formed the majority who ruled that the defendant was “an active participant in the unlawful event out of which the deaths arose.” (184 So.2d at 716). Each case is of course fact specific but nevertheless if the critical issue is seen to be whether the secondary party knew that the primary party was going to engage in particular reckless conduct the sentiments expressed by Judge Carroll may be expected to be at play in many such cases. Jacobs and a similar case, State v. McFadden, 329 N.W.2d 608 (Iowa 1982), have been contrasted with Commonwealth v. Root, 403 Pa. 571, 170 A.2d 310 (1961) by Kadish and his various co-authors for almost 40 years (compare SANFORD H. KADISH AND MONRAD G. PAULSEN, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 358 et seq. (2d ed. 1969) and SANFORD H. KADISH, STEPHEN J. SCHULOFER AND CAROL S. STRIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 538 et seq. (8th ed. 2007). These cases which have bedeviled several generations of fledgling law students seem essentially irreconcilable.
and encourage in People v. Abbott. There two men, Abbott and Moon, had engaged in a high speed race on a public street. Abbott struck a car attempting to turn left across their path, instantly killing all three passengers in the turning vehicle although surviving himself. Moon struck no one but was nevertheless convicted of criminally negligent homicide on the theory of accomplice liability in that he “intentionally aided Abbott to engage in the criminally negligent conduct which resulted in the deaths.” The defense argued that such a theory was “not logical’ and that one must be liable by ‘one’s own acts as a principal for criminally negligent homicide or not at all.’ The court found accomplice liability through intentional aid because “[a]ctually his conduct made the race possible. He accepted Abbott’s challenge and shared in the venture. Without Moon’s aid Abbott could not have engaged in the high-speed race which culminated in the tragedy.” Somewhat similarly Maryland’s Court of Special Appeals upheld an automobile manslaughter conviction when it ruled that by “engaging in the illegal speed contest (i.e., a “drag race” on a suburban Washington street), appellant aided and abetted the criminal conduct” of the racer who actually struck the victims. It did not, however, specify exactly what theory of accomplice liability it was using.

However, such nimble reasoning may not always carry the day. In State v. Etzweiler for example, a case involving an actor who purposely lent his car to a friend who was known to be intoxicated, with fatal consequences for another, the court flatly rejected such reasoning, stating “Etzweiler, as a matter of law, could not be an accomplice to negligent homicide. . . . We cannot see how Etzweiler could intentionally aid Bailey in a crime that Bailey was unaware that he was

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59 Id. at 13, 445 N.Y.S.2d at 346.
60 Id.
61 Id. at 15, 445 N.Y.S.2d at 347. In People v. Hart the court was faced with a similar scenario in which one competitor in a road race had crashed, killing himself, and the survivor was charged with reckless manslaughter. Rejecting the argument that at most Hart was an accomplice and that one “cannot be held liable as an accomplice to any unintentional crime” the court agreed with Abbott’s reasoning, stating that “A drag race or an illegal speed contest, by its definition, must involve more than one participant” and that “each participant is a principal and an accomplice” and liable for the acts of the other. 2002 WL 538058 (N.Y. Co. Ct. 2002). The court noted especially that “the drag race was instigated by the defendant” who had driven his specially outfitted Corvette on the wrong side of the road revving his engine as a challenge to a man driving a Lamborghini.
committing." The New Hampshire legislature subsequently amended their statute in 2001 to reflect more closely the Model Penal Code approach noted above and it now appears that Mr. Etzweiler, should he repeat his earlier ill-advised conduct, could indeed be convicted of homicide.

Part II B: Causation

Causation provides another approach to liability. The negligent actor, such as the owner of the pistol who placed it in a sofa where Jason Welsh could find it and negligently attempt to disarm it, could be found to have proximately caused the harm and to be criminally liable for its occurrence. Such an approach would not rely on some form of vicarious or accomplice liability deriving from Welsh’s criminality, but would focus on the owner’s own responsibility for having caused the result. Welsh would be regarded not as a criminal with whom the owner is associated and in whose guilt he or she shares, but simply as another link in a chain of causation connecting the owner to the death of Kathryn Lally when the gun discharged. This is a conceptually clean, indeed elegant, approach to liability which avoids the complications of interjecting a negligent mens rea into a doctrine of complicity viewed as essentially intentional. The approach would seem to have much to recommend it on that basis. The problem of course is the concept of superseding cause. Causation is one of the law’s perennial conundrums, extensively, even avidly, discussed in articles, books and learned opinions. One of the issues regularly

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64 Id. at 65, 480 A.2d at 874-75.
67 Perkins & Boyce state “A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about”, citing the Restatement, Second, of Torts. Perkins & Boyce, supra note 8, at 781 n.79. Kadish argues for the special analytical significance of intervening acts as “we perceive human actions as differing from all other natural events in the world.” (Sanford H. Kadish, Reckless Complicity, 87 J. CRIM. L. & CRIMINOLOGY 369, 393 (1997), citing his earlier work Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 CALIF. L. REV. 323 (1985).
68 Dressler begins his discussion of causation in his text with a citation to nine excellent books and articles (see Dressler, supra note 7, at 181 n.1); Boyce, Dripps & Perkins similarly begin the causation section of their casebook with quotations from ten such sources (Ronald N. Boyce, Donald A. Dripps & Rollin M. Perkins, CRIMINAL LAW AND PROCEDURE, (10th ed. 2007). Dressler discusses causation specifically as it relates to accomplice liability in a section of his article Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to Old Problems, 37 HASTINGS L.J. 91, 98-108 (1985). He recently renewed that discussion in his article Reforming Complicity Law: Trivial Assistance as a Lesser Offense?, 5 Ohio S.J. of Crim. L. 427 (2008)
discussed is the responsibility of an actor whose conduct has initiated a chain of events which in fact leads to a harmful result, but only after another actor has intervened. This is the situation which is present in all the cases being considered here: one actor negligently engages in conduct which causes, in and of itself, no harm to anyone until another negligent actor’s conduct combines in some way with the original conduct to produce a harmful result. Kathryn Lally was not shot dead until the negligent acts of Jason Welsh combined with the conduct of the owner of the gun in negligently leaving it stuffed under a sofa cushion in the middle of a party. There are many variable factors which may go into possible calculations of potential responsibility. Is the second actor who actually causes the harm in some fashion an agent of the first who, by his own action, has not? If so, the acts of the second actor are, in law, the acts of the first, who is then responsible for all of the acts, both his own and the second actor’s, which have lead to the harm and the causation question is easily answered against him. Where there is no agency type relation, however, things get very much more complicated. There is the possibility that the original actor’s conduct will itself be found to be substantially and independently contributing to the harm at the moment of its occurrence. Thus if Kathryn Lally had been shot twice by two different guns, one fired by Jason Welsh and one by the unknown owner, X, and had bled to death from blood gushing from both wounds, both Welsh and X easily could be convicted of

which is written in part as a response to what Dressler characterizes as “perhaps the finest article published in an American law journal written on [complicity]” (id. at 430): Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985). See also FETCHER, supra note 18, at § 5.2.2 (360-72); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW chap. VIII (247-95) (2d ed. 1947). 69 The cases are of course legion, but two will give the flavor of the issues involved. Agnes Gore’s case involved a wife who secretly mixed poison into a medicine which had been prepared by an apothecary upon the prescription of a physician for her sick husband. The husband took the medicine and became ill, as did his father-in-law who tasted it also. The father-in-law complained to the physician, who in turn complained of the apothecary, who defended his faith in his own work by mixing it all together more completely and eating the electuary. He died. All the Judges of England considered the case and agreed she was guilty of murder for “if the law should not be such, this horrible and heinous offense would be unpunished; which would be mischievous, and a great defect in the law.” 9 Co. Rep. 81a, 77 Eng. Rep. 853 (1611). In Stephenson v. State, 205 IN 141, 179 N.E. 633 (1932) the defendant had abducted and debauched Madge Oberholtzer while traveling on a train, subjecting her to “various forms of sexual perversion, including the infliction of extensive and severe bite wounds.” Distracted by pain and shame she attempted suicide, ingesting bichloride of mercury, and became violently ill. Stephenson drove her home, refusing to stop when she screamed for a doctor. Her parents summoned a doctor who treated her for ten days, until she died. During that time all of her wounds had healed, although one had become infected for a time. The medical cause of death was a combination of many factors, including shock, poison, infection, lack of rest and food. The court affirmed a conviction of murder, holding that to deny Stephenson’s causal connection to Oberholtzer’s death would be a “travesty on justice.” An excellent discussion of the case is had in a student comment appearing in 31 MICH. L. REV. 659 (1933). 70 See, e.g., Moreland v. State, 139 S.E. 77 (Ga. 1927) (reckless manslaughter: owner of automobile “liable for the acts of his chauffeur done in his presence”).
homicide. But in our cases such substantial contribution by the initial actor is not so easily demonstrated. The harmful result is, directly, the consequence of only the second act, the firing of a gun or the operation of an automobile. The first act has a connection to the resultant harm only indirectly, through its association with the second act. The concept of superseding, independent, intervening cause may well insulate at least some of our first or antecedent negligent actors by concluding that only the second or subsequent actors are the cause of the harm. Hart and Honoré in their classic book, Causation in the Law, state “[t]he free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.” They go on to add that “[t]he broad principle, [in criminal law] as in tort, is that a reckless or grossly negligent reaction negatives causal connection” between the original actor and the resultant harm. They then proceed to discuss the Root case in which one competitor in a road race conducted on a two lane highway pulled out to pass the leading car, only to drive head on into an oncoming truck at 70 to 90 miles per hour, killing himself. They justify the court’s decision that the surviving competitor was not the proximate cause of deceased racer’s death on the grounds that “the swerve of deceased into the path of the truck was a reckless act which on common-sense criteria would negative causal connection with the ensuing death. In tort law, however, there are some decisions which extend liability by making defendant, on facts such as these, liable for encouraging his partner’s recklessness . . .” They disapproved of such an extension in criminal law, however. Earlier, in discussing the role of voluntary conduct as an intervening cause, they had discussed intervening acts of negligence. They said that such acts do not “in general” supersede but that “[i]t is different if the response is so ‘unnatural’ or ‘unreasonable’ that causal connection is negatived on the ground of its abnormality.”

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71 See PERKINS & BOYCE, supra note 8, at 779-80 (substantial factor) and 782-85 (contributory cause).
73 Id. at 350.
75 HART & HONORÉ supra note 72 at 350. They had earlier discussed a South African case, (Rex v. Stripp, 1940 EDL 29) in which a drunken bicyclist suddenly swerved into the path of a motorist who had driven around a curve on the wrong side of the road. Hart and Honoré explain the acquittal on the ground that “the action of the deceased was so foolhardy as to negative causal connection between the negligent driving of the accused and the death of the cyclist.” Id.
76 Id. at 335-36.
Perkins and Boyce too have written about superseding, intervening cause. They say, “If there are acts of two persons who have not acted in concert, and if the act of the second was not induced by the first and was not the normal response of a human being to the situation created by the first, the act of the second will ordinarily not be imputed to the first.”\textsuperscript{77} They discuss specifically the effect of intervening acts of negligence, but only in the case of medical treatment made necessary by the original actor’s assault. They say that “medical or surgical treatment which results in death may be a superseding cause, if it is administered in bad faith or with criminal negligence.”\textsuperscript{78} They repeat this point 12 pages later, with emphasis: “it is not normal for the injured person to be treated by a ’quack’ … or by one who will cause injury as a result of malice or \textit{criminal} negligence. Hence medical or surgical treatment is not a superseding cause unless it falls within one of these abnormal categories….”\textsuperscript{79} Perkins and Boyce also note the importance of the initial actor’s mental state. They write that, at least in the case of “imprudent” actions taken by victims to avoid impending harms threatened by the initial wrongdoer’s actions, it is “particularly true” that superseding cause is more readily found when the initial actor has acted “from criminal negligence rather than from willfulness.”\textsuperscript{80} They write at considerable length on the kinds of factors which should properly influence the decision on causal imputability in such cases, including whether the harm that befell the victim was in fact intended by the original actor, the nature of the intervening act, and whether the “harm, or harm of the same general nature, was a foreseeable risk of the condition created by the defendant.”\textsuperscript{81}

The Model Penal Code includes a section on causation, § 2.03. That section, when dealing with the reckless or negligent causing of harm, requires, besides a “but for” cause in fact relationship between the actor’s conduct and the resultant harm, that the harm which in fact results be within the risk of which the actor either was or should have been aware, or, if not, that it be of the same general type of harm as the probable result of his conduct and not “too remote

\textsuperscript{77} \textsc{Perkins & Boyce, supra} note 8, at 810-11.
\textsuperscript{78} \textit{Id.} at 803.
\textsuperscript{79} \textit{Id.} at 815
\textsuperscript{80} \textit{Id.} at 797. \textsc{LaFave} expresses cautious agreement with the same view. \textsc{Wayne R. LaFave, Criminal Law} 351-52 (4th ed. 2003).
\textsuperscript{81} \textit{Id.} at 813; see \textit{id.} at 790-823.
or accidental in its occurrence to have a [just] bearing” on the actor’s criminality.\textsuperscript{82} Section 2.03 has been called “[t]he most lucid, comprehensive, and successful attempt to simplify problems of ‘proximate cause’ in the criminal law” by Hart and Honoré.\textsuperscript{83} However, they make what they see is “one major criticism: it does not provide specifically for those cases where causal problems arise because, although the accused did not intend it, another human action besides the accused’s is involved in the production of the proscribed harm.”\textsuperscript{84} This of course is the realm occupied by the concept of superseding, intervening cause, of which Hart and Honoré say: “[f]or whatever else may be vague and disputable about common sense in regard to causation and responsibility, it is surely clear that the primary case where it is reluctant to treat a person as having caused harm which would not have occurred without his act is that where another voluntary human action has intervened. This has powerfully influenced the law and the language of decision.”\textsuperscript{85} They note, as does the Model Penal Code’s Commentaries, that some jurisdictions have considered, or have adopted, additional language to their Codes that would insulate actors from harms “too …dependent on another’s volitional act to have a just bearing” on defendant’s criminal liability.\textsuperscript{86}

Of course abnormality, undue dependency and foreseeability, like beauty, often lie in the eye of the beholder and the prediction of when a court will find a connection sufficient to establish causal responsibility for a resultant harm is uncertain. There probably is a continuum of cases, ranging from the more to the less likely to support causal responsibility. Cases such as that of Amilcar Valladares and Sara Wald who engaged in wheel to wheel racing seem likely candidates for a finding of causal responsibility should a court be so inclined. Each participant acts in the face of the other and personally and manifestly seems to instigate and encourage the other’s conduct which causes the harm. After all, a race, like the tango, takes two; if a racer cannot stimulate his or her competitor to compete, what is the sense of a wild drive down the

\textsuperscript{82} Model Penal Code § 2.03(3)(b) (1985).
\textsuperscript{83} Hart & Honoré, Causation in the Law 394 (2d ed. 1985).
\textsuperscript{84} Id. at 398.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 398-99; Model Penal Code § 2.03, cmt.5 (266-67) (1985). See, e.g., Haw. Rev. Stat. §§ 702-215(2), 702-216(2) (1993). The commentaries to the Model Penal Code defend their position (Model Penal Code § 2.03, cmt. 3 (262-64)).
street by yourself? A finding that the one is the proximate cause for the harm caused by the other seems unstrained. But one cannot forget about cases like Root\(^\text{87}\) in which the judicial eye focused on the behavior of the other driver who drove “recklessly and suicidally”\(^\text{88}\) and whose conduct superseded any responsibility Root might have had for the resultant death. In a recent New York case on similar facts of road racing resulting in the death of a competing driver, the surviving driver moved to dismiss a manslaughter indictment on the grounds that he did not “cause” the death. The court said: “Counsel for defendant has cited cases from other jurisdictions in which courts have held that a participant in a drag race or illegal speed contest cannot be held criminally liable for the death of a co-participant. [The court here inserted a footnote: ’Specifically, defendant cites cases from Florida, California, Oregon, Georgia, Ohio and Pennsylvania.’] The District Attorney has likewise brought case law to the Court’s attention from jurisdictions which have found that such analogous liability exists. [The court here inserted another footnote: ’Specifically, The People refer to case law from Massachusetts, Maryland, Alabama and Ohio.’].\(^90\) The court denied the defendant’s motion and upheld the indictment, but the case illustrates that divergent views on causation are more than possible. Hart and Honoré began their book by mentioning the “uncertainties and confusions which continue to surround the legal use of causal language.”\(^90\) The Commentaries to the Model Penal Code §2.03 begin the discussion of “proximate causation” with the observation that the problems presented by the term “present enormous difficulty … because of the obscurity of the concept.”\(^91\) Perkins and Boyce observe that while causation has received “the most exhaustive and painstaking consideration by legal writers,” the truth is that cause is such a matter of “fact and degree” that all efforts to lay down “simple and precise” rules which will make the answer to causation questions “obvious” are doomed to failure. The systems of universal rules and tests of causation are “demonstrably erroneous”. The best one can do are “clues.”\(^92\) This of course is not to say that certainty

\(^{88}\) Id. at 576, 170 A.2d at 312. In fact 12 pairs of judicial eyes evaluated the conduct of Mr. Root, all apparently well aware of the concept of superseding cause. (See Commonwealth v. Root, 191 Pa. Super. 238, 156 A.2d 895 (1959). The judges divided evenly in their opinion, six to six. The six finding supersession all sat on the Supreme Court of Pennsylvania.
\(^{89}\) People v. Hart, 2002 WL 538058.
\(^{90}\) HART & HONORÉ, supra note 67, at 1.
\(^{91}\) MODEL PENAL CODE § 2.03 cmt.1 (255) (1985).
\(^{92}\) PERKINS & BOYCE, supra note 8, at 777-78.
otherwise abounds in the criminal law and that causation is a unique sport in an otherwise logical and coherent field. But relying on concepts of proximate cause and superseding acts will not allow us easily to deal appropriately with the reckless aiders of reckless actors whose conduct has resulted in harm.

Thus far we seem left with what is at best an uncertain, indeed an unruly, state of precedent in which the Sara Walls of this world may, or may not, be accomplices of their competitors, the enabling parents of daredevil drivers probably bear no criminal responsibility for their children’s criminally reckless behavior, and the causal responsibility of grossly negligent behavior is, perhaps, likely, or perhaps only possibly, superseded by the subsequent grossly negligent behavior of another who acts upon the situation originally occasioned. The likelihood of such supersession is increased if the ultimate actor acts intentionally, as did Robert Stottlemire when he deliberately shot Daniel Wright with a shotgun, as opposed to negligently, as did Jason Welch when he fired what he thought was an unloaded pistol through an apartment’s floor into the heart of Kathryn Lally. This is an entirely unsatisfactory situation in which justice, if it to be achieved or approached at all, depends on the vagaries of the facts of individual cases and the ingenuity and abilities of individual counsel, judges and juries.

Part II C: Reckless Endangerment

Another, possibly more satisfactory, solution to the problem would be to rely on the offense of Reckless Endangerment, introduced into American criminal law by the Model Penal Code in 1962. The section, which punishes as a misdemeanor anyone who “recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury”, was then, says the Code’s Commentary, “an innovation in the penal law.” When the section was proposed there were scattered prohibitions of particular forms of reckless conduct,

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93 Professor Dresler, it seems, might be less unsatisfied than I with the use of a causation approach here. In his recent article proposing reform of the law of accomplice liability he concludes: “A causation or causation-plus approach to complicity law would result in a more just outcome” (Dressler, Reforming Complicity Law supra n.68 at 448.)

94 See MODEL PENAL CODE § 211.2, Recklessly Endangering Another Person (1980).

95 Id. at cmt. 1 at 195 (1980).
such as reckless driving of automobiles or abandoning refrigerators in a manner likely to trap unwary children, but the proposal was to create a “new misdemeanor”\(^96\) establishing “a general prohibition”\(^97\) of recklessly endangering others. Its object was to “replace the haphazard coverage of prior law with one comprehensive provision”.\(^98\) The revised comments to the Code conclude that its proposal has been a success: “[v]irtually every modern revision effort follows the Model Code in including an offense of this sort.”\(^99\) Thus it might seem that there is no need to expand the law further as Reckless Endangerment already provides a suitable means to sanction people who heedlessly endanger us all by recklessly assisting another to negligently injure one or more of us. But there are problems with reckless endangerment as a solution.

First, the claim for near universal ascendency of the new penal order is a bit exaggerated. Of the fifty states thirty\(^100\) have indeed enacted general reckless endangerment offenses of the sort proposed by the Model Penal Code. However, twenty states have not done so, nor has the United States, either in the U.S. Code or the D.C Code\(^101\). The territories and commonwealths

\(^{96}\) Model Penal Code § 201.11 cmt. 1 at 86 (Tentative Draft No.9, 1959).

\(^{97}\) Id. cmt. 2 at 87.

\(^{98}\) Model Penal Code § 211.2 cmt. 1 at 196 (1980).

\(^{99}\) Id. See too the Comments to MO. REV. STAT. § 565.070(1)(4) (1999) that its form of a reckless endangerment offense "has its equivalent in nearly all (perhaps all) of the new codes." The Massachusetts commentators were a bit more restrained in their assessment, expressed in an Editorial Note published with the statute: "a majority of state criminal codes and the model penal code include reckless endangerment offenses." MASS. ANN. LAWS ch. 265, § 13L (LexisNexis 2009). Massachusetts did not enact a general reckless endangerment offense, however. Instead they chose to limit their offense to endangerment of children under the age of 18.


\(^{101}\) Those States are: California; Idaho; Iowa; Kansas; Louisiana; Massachusetts; Michigan; Minnesota; Mississippi; Nebraska; New Jersey; New Mexico; North Carolina; Ohio; Oklahoma; Rhode Island; South Carolina; South Dakota; Virginia; and West Virginia. Note that Massachusetts has enacted a Reckless Endangerment offense limited to endangering children (MASS. ANN. LAWS ch. 265, § 13L (LexisNexis 2009)). South Carolina has enacted a reckless endangerment law as part of its Military Code, limited in application to members of its National Guard (S.C. Code Ann. § 25-1-2957 (2007)). A number of States have reckless endangerment offenses limited to special
seem similarly split. Thus while a real majority of jurisdictions, about 60 percent, do have an offense of reckless endangerment, a significant minority of about 40 percent do not. Given the considerable time that they have failed to act, they do not seem disposed to do so. In dealing with our merry band of bunglers this cluster of jurisdictions must rely either on the general negligent battery and homicide statutes that all have, which implicates the problems of causation and complicity which we have just canvassed, or upon the variety of specific endangerment offenses that may exist in each of them and may, or may not, depending on the particular facts of the case, be applicable.

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

situation (see, e.g. VA. CODE ANN. § 18.2-56.1 (recklessly handling a firearm “so as to endanger life, limb or property of any person”) and § 18.2-56.2 (recklessly leaving a loaded, unsecured firearm in a manner so “as to endanger the life or limb of any child under the age of fourteen.”) New Jersey is interesting as it has enacted an offense entitled “Recklessly Endangering Another Person”; however the statute limits its coverage to ship wreckers (such as those setting up false lights) and purveyors of adulterated sweets and candies (see N.J. STAT. ANN. § 2C:12-2 (2005)).

102 Guam and American Samoa both have reckless endangerment offenses (see GUAM CODE ANN. § 19.40 (LexisNexis 2009) and AM. SAMOA CODE ANN. § 46.3522(a)(4) (LexisNexis 2009)). Puerto Rico and the U.S. Virgin Islands do not.

103 MODEL PENAL CODE § 211.2 (1985).

not result in, serious physical injury.” The Model Penal Code itself does not specify whether the non-occurrence of the harm risked is an element of the offense, however the commentaries discussing the offense organize reckless homicide, assault and reckless endangerment along a continuum in which if death results the offense is either murder or manslaughter, if serious bodily injury results (and the actor acts with extreme recklessness) the offense is felonious assault, but “[i]dentical conduct committed with [a reckless culpable mental state] constitutes only a misdemeanor, on the other hand, if injury is avoided.” This apparent presupposition of the uninjured victim of reckless endangerment probably accounts for the limited penalty most commonly attached to the offense. There are variations of course, but a one year misdemeanor penalty is by far the most commonly encountered sanction. Whether this is an adequate penalty for an offense in which the victim has in fact been seriously injured or killed, as is the situation in the cases we have been considering, is questionable.

To address the question one has to consider the appropriate role of resulting harm in determining a just punishment for a crime. More specifically, should the actual occurrence, or not, of a harm effect the appropriate proportion between crime and punishment? The Model Penal Code generally downplays the significance of resulting harm. To the drafters, the actual occurrence of the harm was often a matter of mere chance, for example the fortuity of whether or not competent emergency medical aid was available to the victim of a shooting. The fortuitous element regarding result did not affect the danger or blame associated with one who chose to run an unjustified risk of injuring others - or one who intended that injury. The proper focus should be on the mind of the actor, what he or she intended and consciously risked. The type of subjective mental state, and the intensity with which it was held, was what marked actors as dangerous, persons to be feared as likely to repeat their transgressions again, and which rendered

105 N.Y. PENAL LAW, Art. 120 cmt. at 166 (2004) (discussing “Reckless Assault”). See 720 ILL. COMP. STAT. 5/12-5 cmt. (2006) (statute “aimed primarily at the reckless homicide type of conduct where no homicide results (usually through no fault of the defendant.”); MO. ANN. STAT. § 565.070(1)(4) cmt. (1999) (“This subsection simply covers the situation where he acts with the same degree of recklessness as regards human life but through no fault of his, no one is injured.”).
106 MODEL PENAL CODE § 211.2 cmt. 2 at 200 (1980).
107 See post notes 164-171 and accompanying text.
109 See MODEL PENAL CODE § 211.2, cmt. 2 (200) (1980).
110 See MODEL PENAL CODE Art. 5, Intro. (293) (1985); § 5.01, cmt.1 (298) (1985); § 211.2 cmt.2 (199-200) (1980).
them worthy of blame. Mere matters of fortuity, such as objective result elements, were not accurate indicators of who stood in need of social control. But for the drafters there was an inconvenient truth. Our citizenry, stubbornly perhaps, did not accept this “rational” calculus. Rather, in the popular mind there was some special significance to the actual occurrence of harm, beyond the mere apprehension of it. Since some degree of “popular indignation” or “resentment” was necessary if the populace was to be mobilized behind the law and support it, the drafters concluded that “[w]hatever abstract logic may suggest”, prudence favored accepting this popular convention and attributing punitive significance to the actual occurrence of harm. The significance accorded was only relative, i.e., effecting only the severity of the punishment or the degree of the crime; the criminality vel non was not to be determined by the happenstance of a result. In the realm of intentional crimes the “logical” policy of equivalence between conduct which caused harm and conduct which only risked a result was carried quite far. In the law of attempts intentional efforts which fortuitously failed were punished to the same degree as were efforts which succeeded in causing harm, except in the case of capital crimes or felonies of the first degree. First degree felons were spared “full” punishment only to account for public sentiments and as part of a Benthamite inclination to “economize” on the infliction of the most severe punishments. However, as regards reckless criminality a different balance was struck. Reckless Endangerment is in the realm of reckless criminality the analogue of attempt in the land of intentionality. In both cases the result attempted or risked has not occurred and the

111 See MODEL PENAL CODE Art. 5, Intro. (294) “Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others . . . There is a need . . . for a legal basis upon which the special danger that such individuals present may be assessed and dealt with.”
112 See Herbert Wechsler & Jerome Michael, A Rationale of the Law of Homicide II, 37 COL. L. REV. 1281, 1294 & n. 78 (1937). (Wechsler, of course, was the Chief Reporter and architect of the Model Penal Code.)
113 Michael & Wechsler, supra note 110, at 1295.
114 See MODEL PENAL CODE § 2.03 cmt.1 (257) (1985); § 211.2 cmt.2 (202-03) (1980).
116 See Id. at 256-57.
117 MODEL PENAL CODE § 5.05(1) (1985). See id. cmt. 1 (489-90) and art. 5, Intro. (294-95). First degree felonies were restricted to murder and aggravated forms of Kidnapping, Rape and Robbery (see MODEL PENAL CODE § 6.01 cmt. 4 (38) (1985).
118 See MODEL PENAL CODE § 5.05(1) cmt. 2 (490) (1985); Michael & Wechsler, supra note 110 at 1297.
119 Prior to the Model Penal Code attempt was often defined as conduct which failed of commission of a crime. This is the most usual situation of course (except perhaps in cases of plea bargaining where an attempt is punished less severely than the completed offense) but failure, as an required element of proof, has been eliminated. See PERKINS & BOYCE, supra note 4, at 612-17; see also N.Y. PENAL LAW §110.00 Practice Cmt. (McKinney 2009).
role played by chance is similar. However, Reckless Endangerment was punished not in the same
degree as the completed offense, but only as a misdemeanor, a disparity of some “magnitude”
concede the commentators. They justify their choice more from prudential and practical
reasons than theoretical. The “widely spread and deeply rooted conviction by the public at
large”, stubbornly held regarding the significance of harm was deferred to out of prudence and
caution: “Thus, reckless creation of risk of death or serious bodily injury is only a misdemeanor
under section 211.2, despite authorization of more serious penalties where such harms actually
occur.”

However, in our cases of compound negligence serious harms have actually occurred and
yet there is no authorization of more serious penalties because doctrines of complicity and
causation may prevent the legal connection of the initial actor’s conduct and the ultimate actor’s
crime of assault or homicide. Should in our cases a more serious punishment than misdemeanor
be available to appropriately reflect the initial actor’s blame and danger? If we have “rationally”
decided that the initial actor’s blame and danger warrant the same incrimination regardless of the
fortuity of a result, but that the “full” warranted penalty must be withheld because of prudential
concern for popular resistance to severe punishment in the absence of injury, does it not seem
proper to “do the right thing” when the opportunity presents itself and impose that “full”
punishment when popular resentment has been aroused through actual injury? Regardless of the
general question of whether an increase in punishment is merited or not simply because a harm
has in fact materialized, is it appropriate to have different rules of punishment depending only
upon whether the offense is committed intentionally or recklessly? The rules of prudence and
justice would seem to be similar in both cases and similar treatment as regards penal
consequences should be expected. It would seem that Reckless Endangerment as presently
enacted could easily be seen as providing an improperly proportional response to our cases of
compound negligence.

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120 Model Penal Code § 211.2, cmt. 2 (200) (1980).
121 See Id. at 201-03. See especially page 201: “Perhaps more persuasive are arguments drawn from practice rather
than from theory.”
122 Id. at 202.
123 Id. at 203.
If more serious sanctions than those appropriate for a misdemeanor are thought appropriate there should be created either an aggravated form of reckless endangerment or a specific offense dealing with this form of compound negligence in which the initial actor unreasonably runs the risk of unreasonable conduct by a subsequent actor, which has in fact eventuated in serious harm. It is not a case where the initial actor has him or herself acted to endanger or injure another directly, as by firing guns blindly into buildings or driving down public roads heedless of the welfare of others. Nor is it an indirect case of endangerment involving a reasonable reaction by the victim, as where a police officer fulfills his sworn duty by pursuing a fleeing suspect down a dark New York subway tunnel. 124 Nor is it even a case of unreasonable reaction of the victim which can be clearly foreseen, as in the tragic Goodwin 125 case where two young girls, aged nine and ten, found a loaded and cocked shotgun which had been left in the woods around their home two weeks earlier. They supposed the gun to be a “water gun” and fought for its possession with the brother of one of the girls who tried to take their trophy from them. While pulling and tugging upon the gun it slipped from their hands, fell to the ground and discharged, killing one child on the spot, seriously injuring another, and leaving the third, fortuitously, unscathed. Young children are incompetent and are not supposed to react reasonably; they are expected to act foolishly and childishly and any problem with intervening cause was rejected by the Tennessee court. But when we deal with competent adults who negligently react to a stimulus or an opportunity negligently provided by another, we encounter this special world of compound negligence. All the individuals, both the initial actor and the subsequent or ultimate actor, are acting separately and on their own; neither is acting in league with the other. Both are acting unreasonably. We can easily reach the ultimate actor; he or she has proximately caused the harm while exhibiting a mens rea of recklessness or negligence. But the initial actor can only be reached in a really serious way if we find some way to attach his or her initial recklessness to the serious harm that has eventuated. Yet the criminally negligent behavior of the subsequent independent actor would seem to insulate the initial actor from criminal responsibility for the harm which ultimately materializes. In all of these cases the actor seems to have recklessly encouraged or aided or facilitated another to do something especially foolish which has placed one or more people in serious jeopardy of life or limb. The problem is

how best to connect the initial reckless behavior with the ultimately resulting harm.

Part III: A New Statute Proposed

It is my thesis that those who recklessly aid, encourage or facilitate negligent criminals who seriously injure others ought to be seriously incriminated. Their offense should be a separate offense, specially designed to deal with their conduct; it should not constitute a mechanism for holding them liable for the crime committed by another. Such careless actors are dangerous and blameworthy and are proper subjects, in appropriate circumstances, for punishment. They may be deterred from such dangerous assistive actions or educated into being more careful. They may be incapacitated, especially if a license is required to legally engage in the activity or one is otherwise subject to legal regulation. They have exhibited the requisite degree of blame, i.e., criminal or gross negligence, recognized by our criminal law. These people are now often unpunishable (or punishable only by exercising deftly such a degree of forensic gymnastics that the result is unpredictably uncertain) because accomplice liability requires purposeful (or perhaps knowing) aid to a primary criminal; negligent aid is insufficient. What is needed is a suitable law directed specifically at their behavior and which contains appropriate gradations of guilt and suitable limitations to prevent the imposition of too wide a liability.

The first point to be considered is whether a new statutory offense dealing specifically with reckless or negligent aid, encouragement or facilitation should be enacted or whether a better approach would be to hold them responsible for the crime ultimately committed. Such a responsibility could be found by expanding upon principles of complicity or causation, i.e., either by holding them accountable for the acts of another or by expanding the causal responsibility of their own acts to include the harm committed by another. The reach of accomplice liability could be expanded, but it and its civil law counterpart, agency, have always

126 There is of course a lively debate regarding the culpability of inadvertent negligence and whether it is possible for criminal law to influence the decisions of people who are unaware that they are running serious risks by their conduct. See, e.g., MODEL PENAL CODE § 2.02 (2)(d) cmt. 4 at 243-44 (1985); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN (WITH STEPHEN MORSE), CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 69-85 (2009). Regardless of the outcome of that debate, the statute proposed here limits its coverage to advertent negligence, i.e. reckless risk takers, who clearly can be deterred and otherwise influenced in their conduct.
been rooted in the purpose of one person to use another to perform an action in his place and stead. Accomplice liability can be expanded without inordinate difficulty to reach actions of another which one knows he or she is aiding, or to actions which are deliberately encouraged if not directly ordered. But we would be crossing a boundary to expand liability for the conduct of another from situations where one has purposefully, knowingly or deliberately asked or encouraged that other person to perform that conduct, to include conduct done by another where one has negligently, foolishly or recklessly aided or assisted or encouraged that conduct. It seems unwise to alter understandings which have endured for centuries when some other mechanism can be employed to reach the same end.

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

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127 Agency is a relationship arising from the agreement of the parties (W. Edward Sell, Agency 1-2 (1975)). The mutual assent or consent may be in part an objective standard, i.e., what a reasonable person would understand the manifestation of consent or assent to be, and thus it is possible for an agency relationship to arise without the subjective personal intention of a party to it (see William A. Gregory, The Law of Agency and Partnership 5 (2001) but the core common law idea is one of intention and consent and not negligence. See Gregory, supra at 2-5; Restatement (Third) of Agency §§ 1.01 cmts. c,d & 1.03 cmts. b, d (2006). Professor Bainbridge in discussing the idea of objective manifestations of consent states: “To be sure, there is no such thing as an ‘unwitting agent,’ in the sense that every agency relationship requires knowing consent by both parties.” He then cites the case of State v. Luster, 295 S.E.2d 421, 425 (N.C. 1982) which found the term “unwitting agent” incoherent, a “contradiction in terms.”) Stephen M. Bainbridge, Agency, Partnership & LLCs 21 (2004).

128 See n.13-15 and accompanying text.

129 See n.10.

130 See authorities cited supra notes 66-68.
negligence, carelessness or inadvertence. Superseding conduct is often associated with unforeseeable conduct, conduct which is so unexpected and abnormal that it should cut off the criminal liability of the initial actor. Usually one is allowed to presume that a fellow citizen (at least if one is not in league with him to commit crime) will be law abiding and will avoid criminal conduct\textsuperscript{131}. While this presumption may be fictive or utopian it probably is wise to continue to indulge in it if only to preserve via a fig leaf our belief in the reasonable nature of our society. Conduct so extreme as to be criminally negligent should be left as unanticipated and should not forge a link in a causal chain leading to the initial actor’s liability.

I believe that the best solution to the problem of the reckless enabler of the reckless offender lies in the creation of a separate offense, which I will call Compound Recklessness, specially created for the situation. Enacting a new statute allows us to avoid compromising some basic postulates of complicity and causation as noted above while also allowing us to tailor the law more closely to the problems posed by reckless assistance to reckless wrongdoers. Following the lead of the Model Penal Code I will specify the material elements of the proposed offense, dividing them into objective or actus reus elements (conduct, result and circumstances) and subjective or mens rea elements.

Part III A: Policy Arguments Underlying the Proposed Statute

Part III A(1): Objective elements (degree of aid or encouragement)

The first issue for consideration is what conduct should be sufficient to constitute an objective element of the new crime? Commanding, as Daniel Wright did when he ordered his own shooting; encouraging, as Sara Wall did as she raced wheel to wheel with Amilcar Valladares down the streets of Gaston, North Carolina; or aiding, as Joshua Paniccia’s parents did when they helped him keep his souped up car on the road in spite of his atrocious driving record, should be sufficient. Limits need to be placed on such elements of course, as I will discuss shortly, but these kinds of conduct are routinely proscribed by the law of complicity and they should be proscribed here too. We have gained experience over time utilizing the law of

\textsuperscript{131} See HART & HONORÉ, supra notes 71-75.
complicity which has shown us what kinds of conduct tend to stimulate crime in others, and
though the mens rea may be different we can profitably utilize our experience in defining an
appropriate actus reus. At this point we are merely pouring old wine into new bottles, a time
tested technique of, often at least\textsuperscript{132}, proven utility.

But that gained experience demonstrates that as regards encouragement or aid “[t]here
are, however, infinite degrees of aid [or encouragement] to be considered.”\textsuperscript{133} Joshua Paniccia’s
parents contributed to the death of David Ryan both when they purchased performance
enhancing equipment for his car and when they chose not to revoke his driving license, an act
within their power under New York law. But what if the car had not been owned by Paniccia
himself, but by another (perhaps one of his parents or perhaps not) whose only act of assistance
was to let Paniccia use it, as had happened at about the same time in a neighboring county in
upstate New York with similar fatal consequences produced by a young and inexperienced
driver?\textsuperscript{134} What of a supposed other car driven by a “friend” which Paniccia said he was
“chasing” or following?\textsuperscript{135} Could the mysterious “friend”, who was never identified, be
implicated if the “chasing” was not some kind of head to head race, as was the case of Amilcar
Valladares and Sara Wall, but was instead a case of some kind of adolescent rivalry in which
Paniccia felt impelled, to the friend’s knowledge, to catch up and surpass his rival who was some
minutes ahead? In both of the hypothesized cases someone has acted in a way which in fact
aided or encouraged Paniccia’s reckless driving, but whether their connection to Paniccia’s crime
is sufficient to justify their incrimination is debatable. What needs to be established here is some
kind of limit or test which allows distinctions to be drawn between those kinds of aid and
encouragement which are so powerfully effective that they ought to be criminally proscribed,
and those which are so trivial that they can be safely and appropriately ignored. We need a
suitable formula to decide how significant a contribution to the situation which resulted in the
negligent crime should be required. It clearly cannot be just any contribution, no matter how

\textsuperscript{132} The venerable federal mail fraud statute for example, first enacted shortly after the Civil War, has been kept up
to date through amendments and new legislation covering use of newly developed technologies, such as telegraph
and telephone wires, radio, satellite communication and private delivery services (e.g., Fed Ex and UPS), to
\textsuperscript{133} MODEL PENAL CODE § 2.04(3)(b) at 30 (Tent. Draft No. 1, 1953).
insignificant. Discussions of the concept of “cause” in criminal law routinely deal with this matter and we have wisely decided that something more significant or “proximate” than simply being a necessary condition, a “but for” prerequisite, is required\(^\text{136}\). The drafters of the Model Penal Code faced such a problem when proposing their section on complicity, § 2.04 (renumbered § 2.06 in the final draft). The drafters were wrestling with the question of whether knowing assistance rendered to a criminal should be sufficient for accomplice liability, or should only purposive assistance be recognized as sufficient for complicity in another’s crime. The drafters, unsuccessfully\(^\text{137}\), recognized the problem of “infinite degrees” but proposed as a workable standard a test of “substantial facilitation”.\(^\text{138}\) The drafters provided alternative expressions of their core idea, incriminating one who knowingly “substantially facilitated” the crime of another, or one who knowingly “provided means or opportunity for the commission of the crime, substantially facilitating its commission.”\(^\text{139}\) The drafters recognized that the line drawn by “substantial facilitation” was not precise and clear cut: “There will, of course, be arguable cases; they should, we think, be argued in these terms”\(^\text{140}\) which would provide courts “a basis for discrimination that should satisfy the common sense of justice.”\(^\text{141}\) The drafters thought this a workable standard or test; I do too\(^\text{142}\).

“Substantial facilitation” would include of course the provision of indispensable means or necessary opportunity; contrarily it would exclude the provision of marginal assistance or minimal aid, such as the case of making available “materials readily available upon the

\(^{136}\) See, e.g., MODEL PENAL CODE § 2.03 cmt. 2 at 258 (“As the law has consistently recognized, some limitation on this broad principal (i.e., but for causation) is necessary . . . .”) (1985).

\(^{137}\) See MODEL PENAL CODE § 2.06 cmt. 6(c) at 318 (1985). The draft’s ideas did, however, inspire New York (see N.Y. Penal Law Article 115) and several other states (see MODEL PENAL Code § 2.06 cmt. 6(c) at 319 n.61 and accompanying text).

\(^{138}\) See MODEL PENAL CODE § 2.04(3)(b) (Tent. Draft No. 1, 1953).

\(^{139}\) Id.

\(^{140}\) Id. cmt. 3 at 31.

\(^{141}\) Id. cmt. 3 at 30.

\(^{142}\) Professor Dressler has recently revisited the problem of accomplice liability premised on trivial assistance (Joshua Dressler, Reforming Complicity Law: Trivial Assistance as a Lesser Offense?, supra n.68). He argues that where a person’s involvement in a crime is merely tangential it is unjust to impose full liability. He contends that the marginally involved accomplice has a lesser culpability than the principal perpetrator and that disproportionate punishment can only be avoided by recognizing the difference between a “substantial participant” and an “insubstantial” one (see id. at 448.) He believes that while the term “[s]ubstantial participant concededly is an imprecise term”, it can be made to work and he ultimately suggests the creation of a lesser degree of the offense for such minor assistance (id.).
market” which might easily be obtained even in the absence of the negligent aider’s assistance. In the case of Daniel Wright, for example, his friend Brock Bieker provided the shotgun used to kill Wright while the car used to drive to the field in which he died belonged to an unidentified individual. The gun, which had been “taken” from the Bieker family home, clearly was a substantial factor in the death; it seems not to have been routinely available and it was the weapon which killed him. The car too was a cause in fact of the death, but the relatively ordinary availability of cars to suburban young men would indicate its availability probably did not substantially facilitate the homicide. The drafters of the Model Penal Code noted that a standard of “substantially facilitated” may be argued to be “too vague” to be of use in making the proper distinctions between those worthy of incrimination and those not. The drafters countered that requiring the act be accompanied by mens rea (knowledge in their draft but advertent recklessness here), especially when dealing with acts which provide the means or opportunity for another to commit an offense, should be sufficient. There was little social utility, they argued, in allowing people to disregard the consequences of their action of which they knew others would make use to commit crime. Similarly here, if an actor knows of the substantial risk that others will recklessly cause harm to another by making significant use of a means or opportunity provided by the first actor, there is real utility in seeking through threats of incrimination to encourage re-evaluation of the conformity of that initial conduct with the “standard of conduct that a law-abiding person would observe in the actor’s situation.” Likewise, there seems to be no utility in ensuring a legal privilege or immunity for people to ignore conduct what they have clear reason to believe and do believe forebodes the reckless infliction of serious harm. We achieve no value by allowing the initial actor’s conduct to be free from legal sanction and we receive value by forbidding it. No conduct other than that demonstrating an insufficient concern for the welfare of others, or a callous disregard of their life and limb, has been inhibited.

143 Id.
145 In the case of Daniel Wright’s death the risk of harm run by those who might lend an automobile to the group of intoxicated young men clearly would include the risk of homicide caused by reckless driving, but shooting someone to death would seem beyond any likely risk of danger unless one knew about the gun or the young men’s plans. One who supplied the shotgun would obviously be in a different situation and death by shooting may well be thought to be precisely the kind of danger created by his actions.
146 See MODEL PENAL CODE § 2.04(3)(b) cmt. 3 at 30 (Tent. Draft No. 1, 1953).
147 MODEL PENAL CODE §2.02(2)(C) (1985).
The drafters of the Model Penal Code also addressed in their comments the question of omissions. They addressed the issue at the same point as they discussed the requisite mental state as discussed above. They concluded that it would be “unduly harsh” to impose liability unless the omission was designed on purpose to assist another to commit a crime; knowledge that the omission to act would do so was insufficient. In this I disagree. Omissions of course suppose a legal duty to act; moral duties alone are insufficient. The proper place for concerns of undue harshness is the decision whether to make the duty a legally obligatory one sanctioned by criminal punishment if one fails to fulfill it. Once that threshold is crossed I see no particular further harshness in holding that a culpable breach of that duty can lead to criminal consequences. There is nothing special about purposeful culpability as distinguished from recklessness that would call for restricting the proposed offense of Compound Recklessness to omissions which purposely facilitated another’s reckless crime. An example of the possible application of the law to cases of omission may be seen in the case of Joshua Paniccia. In Paniccia’s case his parents had the legal power to revoke his driver’s license and, based on his repeated traffic offenses, had good reason to have done so. If they had no legal duty to exercise this power, as the prosecutor believed, then they committed no act and in the absence of conduct committed no crime regardless of how unreasonable their decision was to continue their trust in their boy’s bona fides and competence. If, however, there was a legal duty to act, then things could be entirely different. They could be found to be reckless in their stubborn belief in their child despite their awareness of the abundance of evidence to the contrary. Their exposure of others to the risk of the demonstrated foolhardiness of their son could run them afoul of the

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148 See MODEL PENAL CODE § 2.06 cmt. 6(c) at 320 (1985).
149 Id.
150 See MODEL PENAL CODE § 2.01(3)(1985).
151 People v. Beardsley, 150 Mich. 206, 209, 113 N.W. 1128, 1129 (1907) (“This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation.”). See Regina v. Instan, [1893] 1 Q.B. 450 concerning the relationship between legal and moral duties.
proposed statute. Whether their belief in Joshua was praiseworthy, excusable or censorable would be a matter for a jury.

Part III A(3): Objective elements (resulting harm)

Beyond the question of conduct there are issues as regards result. First, should the harm risked be limited to death and serious bodily injury, or should other harms be included such as ordinary bodily injury, mental harm or suffering, or damage to property? The proposal put forward by the Model Penal Code regarding Reckless Endangerment might provide some guidance. The Model Code limited its coverage to “death or serious bodily injury.”

“Recklessly placing another in danger of harm of lesser gravity”, explained the Code’s commentaries, “is not an offense under this provision.” Of the thirty two jurisdictions which have enacted Reckless Endangerment provisions, twenty one have similarly limited their coverage to risks of death or serious physical or bodily injury. However, eleven have gone beyond the Model Code’s provision to include simply risks of “physical injury”, i.e., the offense may be committed regardless of what degree of physical injury is risked. Some few States have gone even further. Texas proscribes recklessly (or with criminal negligence) placing a child in “imminent danger of death, bodily injury or physical or mental impairment.” In Nevada persons “responsible for the safety or welfare of a child” who negligently permit or allow the child “to be placed in a situation where the child may suffer physical pain or mental

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153 Model Penal Code § 211.2 (1980).
154 Id. cmt. 3 at 203 (1985).
suffering as a result of abuse or neglect” appear to be guilty of crime regardless of whether the mental or physical harm eventuates.158 Risking of sexual abuse of children is proscribed by a Massachusetts statute dealing with Reckless Endangerment of Children159. Recklessly creating a risk of property damage seems covered by the Nevada statute160 and in Virginia also if the actor recklessly handles a firearm “so as to endanger life, limb or property.”161 The limited reach of the Reckless Endangerment statutes currently enacted need not limit the reach of the proposed Compound Recklessness statute, but the past experience of legislatures which have ventured into a closely related area sounds a note of caution. Personal injury and death occupy a special position in the hierarchy of harms protected by the criminal law.162 Straying too far from the central importance accorded to life and limb in order to protect such real but less vital harms as mental health and property may risk failure to earn sufficient support for enactment of a new statute. It may be the course of prudence to limit the law’s proscriptions to reckless risks of death or serious bodily harm, leaving the more adventurously inclined reformer to include the risk of lesser degrees of bodily harm. A sense of circumspection might counsel the omission of proscription of reckless endangerment of property. However, in the case of risks to property of catastrophic dimensions, such as the kinds of cases covered by Model Penal Code §220.2(2) Causing or Risking Catastrophe,163 there may be an argument for expansion. Disastrous financial loss and widespread property damage are serious harms and if the connection to them is sufficiently strong, as in the cases reached by the proposed statute, it might be thought unduly dogmatic to exclude such calamities simply because they affected property rather than person. For example, reckless practices in the mortgage market played a significant role in triggering our current recession. In a large number of cases mortgages were taken out by people manifestly unable to repay their loans except in a condition of ever rising real estate values. This may well

159 MASS. ANN. LAWS ch.265, § 13L (2009).
162 See 3 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) (“As one of the great objects of all law, and particularly of criminal law, is the protection of life, it follows that homicide must, as a rule, be unlawful . . . . Homicide may be regarded as the highest form of bodily injury which can, in the nature of things, be inflicted.”) Michael and Wechsler began their influential article “A Rationale of the Law of Homicide” with the observation that it was a wise choice to begin efforts to reform the substantive criminal law with a revision of the law of homicide as “[a]ll men agree that in general it is desirable to prevent homicide and bodily injury.” Herbert Wechsler & Jerome Michael, A RATIONALE OF THE LAW OF HOMICIDE: I, 37 COL. L. REV., 700, 702 (1937).
be argued to be reckless behavior: reasonable people are aware that no market always rises and
to arrange one’s finances such that obligations cannot be met unless virtually impossible events
occur is a gross deviation from a standard of reasonable care. But what of the financial
professionals who lead so many homeowners into this financial trap? There is nothing to prove
that those brokers, lenders, advisors etc. intended to injure their various clients; however, a
reckless attitude toward the clients’ financial future might be able to be demonstrated. Financial
professionals surely know about the behavior of free markets and know that an economic bubble
is likely to burst, with disastrous consequences for those caught unprepared. Nevertheless they
continued to encourage their customers to take out and invest in these risky mortgages, pocketing
handsome fees for themselves and leading finally to a financial catastrophe. Other than the
fact that a financial debacle eventuated rather than a homicide, the facts fit fairly well into the
pattern exhibited in the shotgun death of Daniel Wright with the encouraging crowd wearing
braces and drinking fine wine rather than sporting jeans and chugging Colt 45. It might be
thought quite useful where a calamity has been suffered, injuring or damaging vast quantities of
property and financial resources, to have available an offense such as the proposed Compound
Recklessness statute, authorizing State actors to step in armed with powerful tools to see that
matters are fully investigated and justice done.

Finally, as regards a result element, there is the issue of whether a result element of any
kind should be included in the definition. Should this new offense of Compound Recklessness be
defined so as to incriminate negligence “in the air” so to speak, regardless of whether the
subsequent negligent actor has in fact harmed anyone, or should the offense be defined to require
that harm to the victim has in fact eventuated? The definition of a criminal offense ought, says
George Fletcher, to state a “morally coherent imperative.” It should also reflect sound social
policy in forbidding or commanding particular conduct. I believe it is clear what the moral
imperative is for the initial actor in the compound negligence scenarios we have seen: if the
danger of another person’s subsequent negligence is sufficiently obvious that it is foreseen, then

164 See Peter S. Goodman & Gretchen Morgenson, Saying Yes to Anyone, WaMu Built Empire on Shaky Loans,
N.Y. TIMES, Dec. 28, 2008 at A1; Gretchen Morgenson, Blame the Borrowers? Not So Fast, N.Y. TIMES, Nov. 25,
2007, § 3 (Money and Business) at 1.
165 FLETCHER, supra note 18, at 575 (§ 7.6.1).
one ought not to act without taking reasonable steps to forestall that subsequent risk of harm. Certainly, the degree of risk, the seriousness of the harm anticipated, the reasons for running the risk and the cost of the preventive measures, must all be accessed when making an informed moral calculation\textsuperscript{166}. However, the moral calculation involved does not depend on the fortuity of whether the harm risked is actually inflicted on a victim. Whether the harm risked eventuates, or whether it does not, the judgment of personal culpability of the actor remains the same: he or she is worthy of blame and censure. So too sound policy which seeks to identify dangerous people who are likely to offend in the future (and to impose conditions on them to reduce the chances of their doing so) would not revise its judgment of social danger based merely on the matter chance as to whether the harm recklessly risked has in fact come to pass\textsuperscript{167}. Thus when viewed either as a matter of social ethics or as a more utilitarian calculation of social defense against dangerous people, the answer to the question of what would be the best law seems clear: the offense should be defined not to require a result element. Rather, reckless conduct alone, when compounded with subsequent reckless conduct of another, should be sufficient for guilt. However, prudential calculations of practical politics seem to have commanded the attention of officials who have attempted to create law in this area. How, as a practical matter, do we convince legislators to pass new laws and police, prosecutors, judges and juries to enforce them? How do we enlist these people in the new crusade, or at least not alienate them? How do we persuade the citizenry that the new law is just and ought to be obeyed regardless of whether the risk of detection and prosecution happens to be small if they chose to disregard it?\textsuperscript{168}

The treatment accorded to Reckless Endangerment, a species of non-compound negligence which does not require that any harm be actually inflicted, is, I think, instructive here. Earlier I discussed the punishment commonly attached to the offense, which is defined so as to

\textsuperscript{166} See MODEL PENAL CODE § 2.02(2)(C), (d) and cmts. 3, 4 (1985).
\textsuperscript{167} See supra notes 108 – 112 and accompanying text.
\textsuperscript{168} Gerber and McAnany write in the Introduction to their collection of works on punishment: “The prevention of crime as a goal of society is not ultimately achieved by either crass fear or huge detention centers but by a successful communication of disapproval. It is a moral process which depends for its success on a widely accepted system of laws which reflect a consensus of values . . . . Justice needs to be ultra-pure if it is to have its basic impact as moral message. . . .[C]ommunication may be successful even if the message gets through more to those speaking than to those spoken to. We may find that the moral process of crime and punishment is really a reforming technique for those who have never offended.” CONTEMPORARY PUNISHMENT 4-6 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).
not require proof that the harm risked has in fact been caused.\textsuperscript{169} When imprisonment is to be imposed upon conviction, the jurisdictions have overwhelmingly settled on a basic\textsuperscript{170} maximum sentence of about one year.\textsuperscript{171} Five States provide for a significantly more lenient sentence, four\textsuperscript{172} of six months and one of 60\textsuperscript{173} days. Only three States allow imprisonment for a term indicative of a felony grade crime, i.e., for more than a year for an unaggravated commission of the crime. Maryland defines the offense as a misdemeanor but allows a sentence of

\textsuperscript{169} See supra notes 104 – 106 and accompanying text.

\textsuperscript{170} I use the word “basic” to indicate that some states recognize an aggravated form of the offense which may indeed support the imposition of a higher, felony grade sentence. Delaware for example authorizes a sentence of imprisonment for up to five years if the defendant recklessly creates “a substantial risk of death” (\textsc{Del. Code Ann. tit. 11 §§ 604; 4205(b)(5) (2007)}). Arizona too aggravates the offense to a felony if the actor creates a risk of “imminent death”, but the felony is punished by a definite term of only one year; otherwise the offense is punished as a class 1 misdemeanor with a term of 6 months (\textsc{Ariz. Rev. Stat. Ann. §§ 13-1201, 13-701, 13-707 (2001)}). North Dakota authorizes imprisonment for up to five years if the defendant exhibits “extreme indifference” to human life (\textsc{N.D. Cent. Code §§ 12.1-17-03; 12.1-32-01(4) (1997)}). Wisconsin agrees with this policy of aggravating the offense for those who exhibit an especially wicked form of reckless, a “depraved heart” in common law terms; however the Wisconsin statute is unique in that it begins its punishment hierarchy for the “basic” offense at ten years, and allows a sentence of 12 years and six months for the aggravated degree of the offense (\textsc{Wis. Stat. §§ 941.30(1); 939.50(3)(f), (g) (2007-2008)}). New York authorizes a sentence of up to seven years, with a minimum of one third of that, if the two factors are combined, i.e. if the reckless endangerment “evince[es] a depraved indifference to human life” and creates a “grave risk of death” (\textsc{N.Y. Penal Law §§ 120.25; 70.00 (2)(d), (3)(b) (McKinney 2004)}). Kentuck with the New York policy, authorizing a 1-5 year sentence (\textsc{Ky. Rev. Stat. Ann. §§ 508.060; 532.060(2)(d) (West 2006)}). Tennessee allows imposition of a sentence of 1-6 years if the reckless endangerment involves the use of a deadly weapon (\textsc{Tenn. Code Ann. §§ 39-13-103, 45-35-111(b)(5) (2006)}). New Hampshire agrees with this policy authorizing a sentence of seven years (\textsc{N.H. Rev. Stat. Ann. §§ 631:3; 651:2(1)(b) (2007)}). The State of Washington authorizes a sentence of 10 years if the reckless endangerment consists of recklessly discharging a firearm from a motor vehicle and with a substantial risk of death (i.e., a drive by shooting) (\textsc{Wash. Rev. Code §§ 9A.36.045; 9A.20.021(1)(b) (2008)}). Hawaii authorizes a five year sentence if the reckless actor places another in danger of death or serious bodily injury by employing “widely dangerous means” (\textsc{Haw. Rev. Stat. §§ 707-713; 706-660(2) (1993)}). The commentary makes clear the means employed must risk a catastrophe within the meaning of Model Penal Code sections 220.2(2) (see \textsc{Haw. Rev. Stat. §§ 708-800(21) (1993)}). Finally Montana allows imposition of a sentence not to exceed ten years if the actor knowingly creates a risk of death or serious bodily injury and specifically identifies “tree spiking” as an example of such conduct (\textsc{Mont. Code Ann. § 45-5-207 (2009)}).


\textsuperscript{173} \textsc{Fla. Stat. §§ 784.05; 775.082(4)(b) (1997)}.
imprisonment “not to exceed five years”. Pennsylvania too classifies the offense as a second-degree misdemeanor but allows a sentence of “not more than two years”. Wisconsin classifies the offense as a felony and authorizes imprisonment for a term “not to exceed 10 years.” An additional two and a half years can be added if the actor’s conduct demonstrates an “utter disregard for human life.” Thus the near unanimous judgment of the jurisdictions which have actually enacted a Reckless Endangerment provision within their criminal law is that the appropriate level of punishment for the basic, unaggravated offense should be at most a term of imprisonment of about one year or less.

The Comments to the Model Penal Code discuss over approximately five full pages both the general issue of whether resulting harm ought to be an element of criminal definitions and the specific consequences to be anticipated if a criminal offense is defined in terms of conduct only, without regard to whether any actual harm results in the particular case. The commentators present a compelling argument that fortuity in result does not lessen the culpability or danger in engaging in the conduct in the first place, and indicate that the “logic” which would appeal to a “rationalist” would indicate that the appropriate level of criminal penalties ought not to be effected by the happenstance of the actual occurrence of the risked harm. However, they acknowledge that in fact results have played a central role in the criminal law which has actually been enacted. The “more persuasive” arguments for this fact are “drawn from practice rather than theory” say the commentators. They note that “every Anglo-American jurisdiction” maintains a series of offenses whose definitions require the actual

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177 Wis. Stat. § 941.30; 939.50(3)(f) (2007–2008). Wisconsin is clearly an outrider in this compilation of statutes, drawing an implied criticism from the authors of the commentary to the Model Penal Code that an earlier draft of Wisconsin’s statute, which provided for a prison sentence of not more than one year, was a “more satisfactory formulation” than the statute eventually adopted. See Model Penal Code § 211.2 cmt.1 at 195 (1980).
178 See Model Penal Code § 211.2 cmt.2 at 198-203 (1980).
179 Id. at 200.
180 Id. at 202.
181 Id. at 201.
182 Id.
183 Id. at 202.
occurrence of a harm. That “uniformity of practice”\textsuperscript{184} they say probably reflects a “widely spread and deeply rooted conviction by the public at large”\textsuperscript{185}, that results matter. To defy this sentiment and impose the serious penalties applicable to result offenses such as homicide and aggravated battery would be to invite, at a minimum, jury nullification. People and politicians would simply not stand for it. Thus to gain acceptance of its innovative provision the Model Code imposed only misdemeanor level sanctions. This underlying judgment, say the commentators, is “to one or another extent [reflected] in all later enactments”\textsuperscript{186} by the various States.

The result of this survey is to suggest that the felony grade sanctions are likely to be supportable only in cases which are popularly regarded as truly serious. I think it appropriate that felony level penalties in excess of one year ought to be available in the case of compound negligence of the type we have been considering. The culpability of recklessly risking that another will act upon the product of one’s conduct is not lessened by the subsequent recklessness of another who does exactly that. Nor is the social danger of the initial reckless actor neutralized by the subsequent reckless act of another. The initial actor has demonstrated the unreliability of his or her own internal controls and we should retain the option to reinforce them with serious criminal consequences. But the price of having these serious penalties available seems to be that the offense be reserved for situations in which a seriously harmful result has occurred. The most obvious instances are those in which harm to another’s physical safety has not been merely threatened but has in fact occurred. Without a dead or broken body, so to speak, the citizens may not support enforcement of the new law and the prudent legislator may wish to correspondingly limit the new law’s reach. Whether physical injury less than serious ought to be covered is debatable. Assault statutes usually include such injury, but often grade the offense as less grave.\textsuperscript{187} It might be thought wise to leave cases of compound recklessness which cause only less than serious physical injury to the coverage of the existing reckless endangerment statutes, where they exist, punishable as a misdemeanor rather than as a felony.

\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 203.
\textsuperscript{187} See Model Penal Code § 211.1 cmts. 1, 2 at 174-87 (1980) which trace the common law development of the crime of assault and its modern statutory formulations.
Part III A(4): Objective elements (circumstances)

The final objective or actus reus element in a Model Penal Code type taxonomy is circumstance: is the offense one in which the conduct becomes wrongful only in a limited set of circumstances which ought to be specified in the offense’s definition? Many offenses are wrong in almost all cases and do not need special circumstances stated as part of their definition. Killing people is for instance almost always forbidden. There may be special cases of self-defense or necessity where homicide is not wrongful, but they are sufficiently rare that it is more convenient to address such issues in a general provision of the criminal law dealing with justifications applicable to a wide variety of offenses. It may be beneficial, however, in creating the definition of other offenses to include as elements the circumstances in which the conduct will be criminal, or circumstances in which the conduct is immune from penal threats. Where the absence of consent is an element of a sexual offense for example it might be very useful to establish the limits of consent in certain special situations, such as where a jailor has intercourse with a prisoner or where a professor seeks sexual favors from a student. In those circumstances the sexual relations are criminal; in their absence consensual sex is entirely legal. It is probably true that as long as the offense of Compound Recklessness is limited to materialized risks of death or serious bodily injury we do not need a circumstance element in its definition. The harms involved are of such a type as to manifest criminality on their face. The formula for determining the situations in which a person may properly take the risk of causing such serious harms is already spelled out in the definitions of reckless behavior.\textsuperscript{188} There is little value in specifying further particular circumstances which make such risk taking unlawful.

However, another use of the idea of a circumstance element is to create statutes which reach only a very limited and specified set of circumstances. One of the prime purposes of the Model Penal Code in proposing the offense of Reckless Endangerment was to eliminate the ad hoc series of offenses dealing with various particular risky forms of conduct and replacing them

\textsuperscript{188} See \textsc{Model Penal Code} §§ 2.02 (2)(c), (d) (1985).
all with an offense of general applicability. This was thought to be a superior organizational technique and an aid to critical thought which might elucidate some of the general principles which underlay apparently separate areas of law. Some States have however thought that special statutes covering only limited instances of risky conduct should be enacted. The most obvious is Massachusetts which apparently legislatively canvassed the entire field of Reckless Endangerment on a national level but ultimately decided to enact a reckless endangerment offense limited to “creating a risk of serious physical injury to children.” Montana apparently has had a history of problems with “tree spiking” and has included specifically that circumstance as a possible element of its reckless endangerment offense. Virginia has not enacted a general reckless endangerment statute, but does incriminate specifically those who leave unattended a loaded, unsecured firearm in such a manner “as to endanger the life or limb of any child under the age of fourteen.” One can have a serviceable penal law whether special circumstances are singled out for inclusion in the definition of offenses or are omitted and left for consideration at the time of sentencing or charging. The fate of the criminal law will not rise or fall depending upon which choice a drafter should make. However, simplicity is in itself a virtue. Simple definitions are more easily understood and, if they are not simplistic in the sense of eliding over unavoidable complexities, cover their ground fully and completely. Perhaps it is only a matter of intellectual aesthetics, but simple definitions seem more elegant and satisfying. At any event I shall not include any special circumstances in the basic definition of my proposed offense of Compound Recklessness.

190 See Jerome Hall, General Principals of Criminal Law 12 (2d ed. 1947) (“[T]he degree of systematization of a discipline is the prime index of the state of knowledge of its subject matter. . . . Progress toward systematization resulted from discovering that crimes can be decomposed, i.e., analyzed into several elementary “material” (essential) ideas; then, that certain ideas are common to two or more offenses. These served as unifying agents, bringing together, e.g., murder and manslaughter, robbery, larceny and assault . . . . It was next perceived that certain generalizations [apply] to all the specific prescriptions.”); Herbert Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097 (1952). One can see an opposite organizational technique employed in the alphabetical arrangement of the Federal criminal law or the law of Rhode Island.
Part III A(5): Subjective elements

The subjective or mens rea element should require a degree of negligence that is significantly more culpable than that necessary to support a simple civil claim for damages. In Model Penal Code terms a “gross deviation” rather than merely a deviation from the standard of care observed by reasonable people\(^\text{194}\), or in more common law-like parlance, “criminal negligence”\(^\text{195}\) ought to be required. Additionally, there is the question of whether actual awareness of the risk being run should be required, or whether a standard of what the actor “should have been aware”, should be sufficient. In Model Penal Code terms this is the difference between recklessness and negligence\(^\text{196}\). There is of course a lively debate about whether inadvertent negligence should ever be punished criminally\(^\text{197}\) and while the Model Penal Code generally disapproves of inadvertent negligence as a culpable mental state, its definitions of crimes do include, generally in their lowest grades and when accompanied by aggravating circumstances\(^\text{198}\), offenses committed negligently. The 32 American jurisdictions which have enacted endangerment offenses almost universally restrict the offense to Reckless Endangerment. Nevada’s offense is defined in terms of acts or omissions committed “in willful or wanton disregard” of another’s safety\(^\text{199}\) and seems to cover conduct “that the actor knows, or should know” are likely to cause harm.\(^\text{200}\) Florida’s statute requires “culpable negligence,” a rather comprehensive term of not entirely clear meaning, but which has been held to include conduct of which “the defendant must have known, or reasonably should have known” was dangerous.\(^\text{201}\) The language about what the actor should have known would seem consistent with a standard of inadvertent negligence, but the issue seems not to have been definitively decided.

\(^{194}\) Model Penal Code §§ 2.02(2)(c), (d), especially cmt.3 at 238 (1985).
\(^{195}\) See Perkins & Boyce, supra note 8, at 840-49; Dressler, supra note 7, at 130-32.
\(^{196}\) Model Penal Code §§ 2.02 (2)(c), (d) (1985).
\(^{197}\) See Perkins & Boyce, supra note 8, at 849-51; Dressler, supra note 7, at 132-33; Alexander & Ferzan, supra note 124, at 69-85; Model Penal Code §§ 2.02 (2) cmt. 4 at 243-44 (1985).
\(^{198}\) See, e.g., Model Penal Code §§ 210.4 (Negligent Homicide, a felony of the third, and lowest, degree); 211.1(b) (Simple Assault, negligently causing bodily injury with a deadly weapon, a misdemeanor) (1980); Model Penal Code § 220.3(1)(a) (Criminal Mischief, negligently damaging another’s property by use of fire, explosives, poison gas, radioactive materials or other potentially catastrophic means; graded as a violation).
\(^{201}\) See Carrin v. State, 875 So.2d 719, 721 (Fla. Dist. Ct. App. 2004) rev’d. on other grounds 978 So.2d 115 (Fla. 2008).
Texas has several statutes dealing with endangerment; its statute which deals specifically with children less than 15 years old also punishes endangering acts done with “criminal negligence” as well as with recklessness\(^\text{202}\). Otherwise it appears, although other wording is sometimes used\(^\text{203}\), that recklessness in the form of advertent risk taking is universally required. It would seem that advertent negligence in the form of “reckless” behavior has found favor with legislators and probably ought to be retained in the proposed new statute.

However, whether there should be an aggravated form of the offense when the actor has exhibited an especially heinous form of recklessness, an “extreme indifference” to the occurrence of harm, is a matter open to some question. Among the States which have adopted a general reckless endangerment offense, six have divided the offense into degrees in which recklessness so extreme as to constitute “extreme indifference” or “utter disregard” of human life constitutes an element of an aggravated form of the offense\(^\text{204}\). Usually the addition of “extreme indifference” beyond ordinary recklessness elevates the offense from misdemeanor to felony grade, however in Connecticut\(^\text{205}\) both levels of the offense are only misdemeanors while in Wisconsin\(^\text{206}\) both levels are felonies. “Extreme indifference” is the modern statutory analogue of the old common law concept employed in homicide law of a “depraved heart, devoid of social duty, and fatally bent on mischief.”\(^\text{207}\) Murder, a capital offense, was distinguished from manslaughter, a non-capital offense, by the presence of “malice aforethought.” Purposeful homicides, unless committed in a legally recognized “heat of passion,” were malicious while accidental homicides were not and were punished as manslaughter rather than murder. There was thought to be a great golf between purposeful and accidental homicides which required separate treatment for each. But there was a special exception made for those who killed not on purpose

\(^{202}\) Tex. Penal Code Ann. § 22.041(c) (Vernon 2003) (intentional and knowing conduct is covered also).

\(^{203}\) See, e.g., Ky. Rev. Stat. Ann. §§ 508.060 – 070 (West 2006) (“wanton endangerment” where “wanton” is defined in the terms used by the Model Penal Code to define “reckless” behavior and recklessly is defined as the Model Code would define negligently (Id. § 501.020 (3), (4). See also Mont. Code Ann. § 45-5-208 (2009) (negligent homicide wherein negligence defined as Model Penal Code defines recklessness (id. § 45-2-101(43)).


\(^{207}\) See LaFave, supra note 79, at 739.
but with an “abandoned and malignant heart.” Like the North and South poles, which are supposed to be poles apart but which look pretty much the same when you get there, people who killed on purpose and those who killed callously with no regard for the life they extinguished seemed equally wicked and dangerous.\footnote{See Model Penal Code § 210.2 cmt. 4 at 21 (1980) (“This provision reflects the judgment that there is a kind of reckless homicide that cannot be fairly distinguished in grading terms from homicides committed purposely or knowingly.”).} Persons who simply did not “give a damn” as they furiously drove heavy wagons heedlessly through crowds or hurled heavy beams from city rooftops onto crowded thoroughfares below seemed to be similarly situated when it came time to pass moral judgment on their conduct.\footnote{See Clark & Marshall, A Treatise on the Law of Crimes § 10.06 (1958) (collecting many common law authorities, as does Justin Miller’s Handbook of Criminal Law § 88 (1934)).} Both seemed equally evil and both were treated as murderers if they killed someone, even if one actually intended to kill while the other did not. I believe that this moral judgment, that there is a qualitative difference in culpability between the “merely” reckless and those who exhibit a depraved indifference to the value of human life, is sound and deserves to be reflected in the grade of crime attributable to each in a law dealing with reckless encouragement and facilitation. I believe that the six states which aggravate their reckless endangerment offense when committed with “extreme indifference” have established a sound policy which should be followed by others.

Part III B: Definition of Proposed Statute

So, having discussed the desirability of a statute dealing directly with compound negligence and having addressed some of the issues to be confronted in drafting such a thing, I suggest the enactment of a statute similar to the following:

Compound Recklessness

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

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

There are several things to note about this proposed statute. As discussed above, the conduct elements are similar to those employed in the case of accomplice liability. Special emphasis was placed on the elements of aid and encouragement because of the wide range of potential acts of encouragement and aid and the concomitant potential for excessive or oppressive statutory reach in those areas. In contrast a command or request for conduct is usually quite specific in its nature and not nearly as likely to lead to statutory overbreadth. Should the phrase “substantially facilitates” be thought unduly vague, one could borrow from the suggested alternative of the Model Penal Code’s original proposal on complicity, defining aid and encouragement as “providing means or opportunity for the commission of the crime, substantially facilitating its commission.”

No special provision is made for cases of omission. The consequence would be that as “conduct” is generally defined as including a failure to act only when there is a legal duty to do so, the absence of a legal duty would leave the conduct element of the offense unfulfilled in the case of an omission. However, as discussed in the case of Joshua Paniccia above\(^\text{210}\), the presence of a legal duty would allow its application to an omission, all other elements being present of course.

The offense applies only to the case of “serious physical injury or death.” As discussed above\(^\text{211}\) I believe it prudent to define the statute so as to apply only to instances where serious physical injury or death has resulted; lesser harms are deliberately excluded and will be covered,

\(^{210}\) See supra notes 144-47 and accompanying text.

\(^{211}\) See supra notes 148-57 and accompanying text.
if at all, only by already extent statutes which may prohibit such conduct as recklessly endangering. If the proponents of such a statute feel particularly bold, as for example if their jurisdiction already has a reckless endangerment statute incriminating recklessly risking simple “physical injury” vice “serious physical injury”, then simple “physical injury” could be substituted. The possibility of inclusion of catastrophic loss of or damage to property was discussed above.212 at pages 58 – 59. The bracketed inclusion of “catastrophe” is designed to allow incrimination of such conduct should a decision to do so be made.

The mens rea element is specified as “recklessly”, i.e., advertent negligence. Inadvertent negligence on the part of the original actor is regarded as an insufficient mens rea unless a legislature should deliberately choose to make such a choice. Purposeful and knowing wrong doing are not considered directly in the proposed statute. If the initial actor should act purposely or knowingly to cause a death or serious injury we are beyond the care of this proposal: complicity in the act of the second actor and or proximate cause will provide a mechanism to deal with the situation. Extreme recklessness, or depraved indifference, is included as an aggravated form of the offense. One might choose either of the bracketed words, probably depending upon whether one wished to emphasize the moral condemnation being visited upon the actor213, which would tend toward “depraved”, or to adopt a more dispassionate description of the actor’s conduct, leading in the direction of “extreme” indifference214. As discussed previously such a malignant form of recklessness should be sufficient to call forth more serious penal consequences than those appropriate for merely “ordinary” forms of reckless behavior.

The sentence appropriate to such an offense is not specified. It should be a felony grade offense of appropriately significant proportions. The length of the sentence imposable however ought to be in harmony with the general run of other offenses in the particular jurisdiction’s criminal law. As these vary considerably, there is none specified in this proposal. However, it is

212 See supra notes 158-59 and accompanying text.
213 See, e.g., PERKINS & BOYCE, supra note 8, at 60 (where they speak of the “element of viciousness” which distinguishes the negligent murderer from one guilty only of manslaughter).
214 See, e.g. People v. Phillips, 64 Cal.2d 574, 587-88, 414 P.2d 353, 363-64, 51 Cal. Rptr. 225, 235-36 (1966) (the court cautioned against using the metaphor of an “abandoned and malignant heart” while instructing a jury as it invites confusion and “could lead a jury to equate the malignant heart with an evil disposition or a despicable character; the jury then, in a close case, may convict because it believes the defendant a ‘bad man.’”).
submitted that the judgment is wise which was expressed in the comments to the Model Penal Code that a sentence measured in decades would be extravagant. The aggravated degree of the offense should be punished with an appropriately aggravated sanction.

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215 See MODEL PENAL CODE § 211.2, cmt. 1 n.1 (“A more satisfactory formulation” than the current Wisconsin statute which allows more than 10 years imprisonment, is an earlier draft of the statute which provided possible imprisonment for “not more than one year.”).