

PART II
Distributing Accountability

Reparative Justice

Erin I. Kelly

This chapter argues for a notion of reparative justice: when persons participate in an injustice, they may incur reparative obligations. Reparative obligations will take different forms depending on the nature of the injustice and a person's relation to it. When the injustice in question is a crime, reparative obligations could be a basis for criminal punishment. Under this rationale, it would be important that the punishment serve a productive social purpose, such as deterrence or the codification of relevant social norms, or the reparative aim is not accomplished. Other reparative aims could include truth telling, repudiation of wrongs done, restitution or aid to victims, community service, and institutional reform. Obligations to promote reparative aims need not presuppose criminal liability. When the burdens of reparative justice are less onerous than criminal punishment, they may be underwritten by weaker notions of fault than what is required by criminal law. An aim of this chapter is to develop a notion of reparative justice that could include, but is broader than, criminal justice. This renders a reparative approach a fitting response to the various forms collective wrongdoing might take.

I am led to the topic of reparative justice from skeptical worries about the nature of individual responsibility. Our understanding of human psychology should lead us to be skeptical about notions of freedom that individual culpability requires. We are shaped by environment, genetics, and experience in a way that affects what we perceive as reasons and narrows the horizon of possibilities for action. Environmental, genetic, and psychological factors all shape what count as reasons for a person.

I am grateful for comments I received from participants at the Collective Punishment conference, The University of Western Ontario (UWO), April 2009. I would also like to thank Richard Vernon, Tracy Isaacs, and the Nationalism and Ethnic Conflict Research Group at UWO for sponsoring the conference.

Recognizing this should challenge our confidence that a given wrongdoer was morally capable of doing better. Without this confidence, I argue, we should give up retributive notions of justice and become more modest about blaming. We should revise judgments and attitudes that commonly underlie our practices of punishment. Judgments of culpability and desert are modes of evaluation that should consult the agent's perspective. If reasons to act as morality requires are unavailable to an agent, this undermines judgments of culpability and desert, or at least significantly weakens their force. As a consequence, punitive responses become hard to justify, particularly when they are retributive in character.¹

Reparative justice is an alternative to retributive justice. Instead of focusing on the condemnation and suffering that blameworthy wrongdoers deserve, where what is deserved is determined apart from any beneficial consequences of dealing it out, reparative justice articulates a conception of what wrongdoers could and should do: to repair the damage they have done, to address the needs of victims, and to prevent similar harms from occurring. I submit that a notion of reparative justice puts less pressure on notions of individual culpability than does retributive justice. This is because its rationale depends heavily on the value of producing outcomes that are beneficial to persons who have unjustly suffered, rather than on punishment itself as the aim of justice. Reparative justice represents a way to shift the burdens of wrongful harms from victims to those who caused or were complicitous in the unjust harm. Although this burden shifting must be justified, the conditions of its justification are weaker than what would be required for any reasonable defense of retributive justice.

To justify obligations of reparative justice, an agent's behavior must be faulty enough to support the conclusion that it would be morally better for her or him to absorb reparative costs rather than (1) to allow persons whom the person has harmed to absorb the costs of those harms or (2) to distribute the reparative costs more broadly to persons who have done nothing wrong. I submit that the threshold of fault may be met without establishing deep responsibility – full moral culpability or deservingness on the part of the agent who caused or contributed to unjust harms.² For the purposes of this chapter, I understand full moral culpability as a condition of agency that would be required to render retributive sentiments appropriate. Morally culpable agency, in this sense, requires more than wrongdoing. It requires the agent's capacity to understand and to

¹ For further discussion, see Erin I. Kelly, "Criminal Justice without Retribution," *The Journal of Philosophy* 106 (2009): 419–39.

² Thus we may have something like a notion of shared liability without guilt. See Avia Pasternak, "The Distributive Effect of Collective Punishment," Chapter 8, this volume.

feel moved by moral reasons. I submit that some wrongdoers lack the capacity to understand and to be motivated by morality. It might be true of a person that a harmful action is attributable to her and that what she has done is morally objectionable even though her capacity for morality is diminished or even nonexistent. Perhaps she is morally unperceptive, and her heart is cold. Still, because she has acted with disregard for others and caused objectionable harm, it may be morally better for her to absorb reparative costs rather than to allow persons whom she has harmed to be burdened by the costs of those harms or to distribute the reparative costs more broadly to persons who have done nothing wrong. It may be morally unacceptable to impose burdens on fully innocent persons, some of whom have already suffered unjustly. Thus, it seems that wrongfully causing harms makes a moral difference that can render wrongdoers, but not uninvolved third parties, liable to reparative obligations. Even blameless wrongdoers are not like bystanders, although there is considerable room for moral bad luck in the reparative obligations that befall us. We may not be able fully to establish the moral blameworthiness of those who incur reparative obligations, even when the wrongs are criminal.

I am especially interested in reparative duties that are incurred by the way a person's actions interact with the objectionable actions of other people. When persons are complicitous in a collectively generated outcome, reparative duties would be jointly incurred. This might be the case in a strong sense, even when collective aims are not jointly intended.³ Participants may not all share the same aims. The intentions of participating members might overlap without converging, and when the group is large enough or its structure complex, the coordination required for the group to act may not extend to all members. Some members may adjust their plans in response to the actions and intentions of other group members only quite locally and as needed. The sense in which each participant coordinates his actions with other members may be limited in these ways. A person might participate in a broader economic system primarily by working together with others in a particular firm. Citizens might help to fund their government's unjust foreign intervention through a desire to avoid penalties for tax evasion. Some may participate more directly in a larger war effort by seeking employment through the military. In

³ Margaret Gilbert analyzes a strong notion of joint intention that involves joint commitment to pursuing the same aim together; see *Sociality and Responsibility* (Lanham, MD: Rowman and Littlefield, 2000), especially chap. 2. Christopher Kutz develops an account of complicity that depends on overlapping intentions; see Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000), especially chap. 2. Gilbert and Kutz's work has been helpful to me in understanding collective action and collective responsibility.

all these cases, the broader aims and implications of the group's actions might remain largely unexamined by many, and perhaps even all, of the group's members. The contributions of individual members may have been marginal and causally inefficacious and have come from seemingly innocuous motives. These factors may well be taken to mitigate the blame individual members deserve, but they do not necessarily undermine the case for reparative obligations that could burden all participants.

Reparative justice addresses collectively generated wrongs and harms while avoiding many of the difficulties involved in distributing blame among group members for what the group has done. Participation in collective action schemes is an important source of moral pressure to accept reparative obligations for harms participants may not intend or foresee and for which members may not individually be to blame. This is not the only source of moral pressure, which derives also from more general duties of humanitarian assistance, fair play, or political membership, but a principle generating reparative obligations may not be superseded by these other principles. Further, it may work in tandem with other principles to make a sense of obligation harder to evade.

Acknowledging that the influences of our social and natural world compromise the sense in which individual choices and actions are autonomous does not negate the possibility that people might take responsibility for their actions, whether acting on their own or as members of groups. What I am proposing, more narrowly, is that we replace the enterprise of dealing out desert with an acknowledgment of the ethical and political importance of taking responsibility for wrongs done and harms caused.⁴ Taking responsibility involves acknowledging that a morally objectionable outcome was attributable to you and responding appropriately to this fact by, for example, taking steps to acknowledge, to rectify, or to compensate for wrongs done and harms caused. Reasons to take responsibility may stem from a person's causal responsibility for wrongdoing or from her participation in a group that acts unjustly. Individual or collective wrongdoing may be adequate to support the demands of reparative justice, even though it fails to justify retributive responses.

TAKING RESPONSIBILITY

In 1946, not long after the defeat of the Nazi regime, Karl Jaspers delivered a series of lectures titled "The Question of German Guilt." In these

⁴ See the helpful discussion by Jeffrey Blustein, especially on the point that taking responsibility need not presuppose blameworthiness. *The Moral Demands of Memory* (Cambridge: Cambridge University Press, 2008), chap. 3.

lectures, he grappled with the question of the German people's responsibility for World War II and for the atrocities of the Nazi regime. He was addressing a defeated and demoralized population that had suffered greatly. The allies had bombed Germany heavily in the last phases of the war. Its cities lay in ruins. Poverty and the devastation of war marked the entire country, and Germany seemed to be left with little to build a future. The German people were also a population lacking sympathy from the rest of the world. Germany had come to represent evil on a heretofore unknown scale. The allies demanded reparations from the German people, and Nazi leaders accused of war crimes would be tried in Nuremberg.

Jaspers and other anti-Nazi professors were returning to their posts after having been banished from the universities under the Nazis. As Jaspers addressed students at the University of Heidelberg, he assumed the task of helping young people to face both the past and future of Germany. Naturally Jaspers would have to address the meaning of guilt, the point of guilt, and where an acknowledgment of guilt might leave Germany and its citizens. Although his audience was German, Jaspers must have felt the scrutiny of the rest of the world.

The lectures bear some striking themes. Despite the dangers of appearing to "excuse" German citizens for their complicity, Jaspers acknowledges the power of culture and politics to shape our individual experience and possibilities for action. He writes, for example, that "the conduct which made us liable rests on a sum of political conditions whose nature is moral, as it were, because they help to determine individual morality. The individual cannot wholly detach himself from these conditions, for – consciously or unconsciously – he lives as a link in a chain and cannot escape from their influence even if he was in opposition."⁵ By describing individuals as links in a chain from which they cannot escape, Jaspers emphasizes the social context that shapes our moral possibilities. He argues that a people's way of life restricts the possibilities for individual choice and sets political events into motion. History attests to a cycle of influence between culture and politics. As Jaspers puts it, "The way of life effects political effects, and the resulting political conditions in turn place their imprint on the way of life."⁶ This picture may seem to leave no room for personal guilt. Where and how in this chain of causes could personal guilt be located? How might individual responsibility enter the cycle?

⁵ Karl Jaspers, *The Question of German Guilt*, trans. E. B. Ashton with intro. by Joseph W. Koterski, S. J. (New York: Fordham University Press, 2000), 70.

⁶ Jaspers, *The Question of German Guilt*, 71.

One might insist on the “compatibilist” position that natural causes pose no threat to moral responsibility. Persons are accountable for the role they have actually played unless the causes or consequences of their behavior were of an “abnormal” sort. Common causes do not exculpate. In fact, the idea that guilt is compatible with lack of control and even lack of agency pervades Jaspers’s notion of “metaphysical guilt.” Metaphysical guilt is survivors’ guilt: the guilt a person might feel for living when others are killed. This notion of guilt can accompany complete powerlessness; one might feel guilty even when there is nothing one could have done that would have made any difference. Its basis is not individual freedom but human solidarity and sympathy. In that sense, it seems to go to the core of an impartial morality. Metaphysical guilt expresses the felt connectedness of persons who have transcended the limits of self-concern and group partiality and are sensitive to the value of human life. Yet, it also lacks moral edge. Guilt is set adrift from any recognizable sense of wrongdoing. For that, human agency is required.

Yet, something important is acknowledged through Jaspers’s notion of metaphysical guilt. Specifically, through it we might acknowledge that others did not deserve their fate and that the moral standing of each of us is influenced by contingencies that we do not control. Others have recognized the moral relevance of contingency through the notion of “moral luck.” Nagel defines moral luck as follows: “where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment.”⁷ Nagel believes we accept moral luck in how things turn out when a person acts, in the circumstance in which a person is faced with questions about how to act, in the facets of a person’s character, and in the causal antecedents, in mental space, of a person’s choices themselves. If you leave the baby in the bathtub while you answer the phone, you have done something far worse if the baby happens to drown. Of course, moral luck infects praiseworthy qualities as well. As Frog remarks to Toad after their all-too-desirable cookies are eaten by birds, “Now we have lots of will power.”⁸

Nagel’s point is that although our ordinary idea of moral assessment maintains that persons are not responsible for what is not their fault or due to factors beyond their control, in practice we find it acceptable

⁷ Thomas Nagel, “Moral Luck,” in *Mortal Questions* (Cambridge: Cambridge University Press, 1979), 26.

⁸ Arnold Lobel, *Frog and Toad Together* (New York: Scholastic Books, 1971).

morally to judge persons even when a significant aspect of what they do depends on factors beyond their control. We do in fact hold people accountable for the way things turn out when they act badly. We judge people for character traits they have developed, almost whatever the cause. We blame people for failing to make good choices under difficult circumstances that most of us are fortunate not to have faced. However, the relevance of contingency to morality is difficult to reconcile with retributive notions of blame and punishment. In particular, I have emphasized the troublesome nature of moral luck in the horizon of a person's possible reasons to act. Retributive notions of blame and punishment presuppose that a blameworthy person could have acted as she morally ought to have acted. If she is not capable of taking moral reasons seriously, her culpability should be accordingly limited. Yet, as compatibilists would readily affirm, this possibility haunts any of our ascriptions of culpability. Moral reasons may or may not have been available to a person who has violated morality's requirements, and we might not be able to tell the difference. Retributive notions of blame and punishment are in trouble.

In response, we might reject the notion that responsibility is a wholly backward-looking notion. We could relinquish retributive notions of moral desert and look instead to the role ascriptions of responsibility play in an obligation-centered morality. Reparative obligations are responsive to what has happened. They are historically rooted in what we have done, yet they also involve a forward-looking directive. They can largely abstract from questions of blame. Their point is to guide us in understanding and responding to what we have done. Jaspers construes responsibility as a task that the citizens of Germany ought to take on for the sake of Germany's future, as well as their own. He thought the hope of dissociating from a horrifying and shameful past and committing to a better future depended on it.

How one has acted is a basis for reflection, reconsideration, and change in a context in which we can recognize, nevertheless, the many factors that impinge on our agency. An appreciation of our own agency that is grounded by a sensible grasp of our limitations can produce, ironically, a stronger sense of identity, purpose, and self-control. It can lead us to understand more clearly the importance of the choices available to us and prepare us to negotiate our way around difficulties and troublesome incentives we do not create. It can also strengthen and humanize relationships by opening possibilities for reconciliation.

What unifies a person as an agent over time is a person's self-conception – a self-conscious appreciation of and identification with principles

of action.⁹ We make sense of action-possibilities by reference to a reasons framework of practical deliberation. A deliberate course of action is identifiable as such in terms of reasons that justify or at least rationalize it; we cite an agent's motives or reasons for acting. We analyze what a person should and will do, as well as what she has done, in this way. Unless we situate his actions within a framework of normative considerations, we cannot discriminate deliberate bodily movements from those merely preceded by certain thoughts (such as that I ought to do something).

In making sense of our past behavior, we cite reasons we can understand, even if we are now critical of them. An action might be understandable, given an agent's priorities at the time of acting, although those priorities were misguided. Misguided priorities provide a basis for criticism, including self-criticism. Of course, self-criticism can produce a serious sense of alienation from self and, accordingly, a sense of disunity. This is avoided and a unified self-conception is preserved when self-understanding relies on principles that contain something with which the self-critical agent can identify – for instance, the notion that a person's personal goals and commitments present her with some reasons to act. Principles such as this function as a kind of bridge between a person's current values and the values she held at the time of acting.¹⁰ She can rely on such a principle to take responsibility for what she has done and to orient her future behavior and obligations. Although she may now reject her former goals, she can understand how at the time she could have taken herself to have reasons to act as she did, reasons that were rooted in her commitment to the goals she had. She can identify with herself as a person who had commitments that she tried rationally to realize.

Without active identification, a person's behavior is indistinguishable from mere happenings, for instance, that she happened to be someone (or that there happened to be someone) with misguided priorities. Our tendency to dissemble and to rationalize actions we are ashamed of is evidence of the value we place on unified agency and its underlying principles. Persons seek a way to reconcile themselves with what they have

⁹ See Christine M. Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (New York: Oxford University Press, 2009). See also Harry G. Frankfurt, *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988).

¹⁰ Charles Griswold makes the point that a wrongdoer's repudiation of past wrongs depends on a recognizable continuity of self, something the offender offers through a narrative account of how she came to do wrong. See Charles L. Griswold, *Forgiveness: A Philosophical Exploration* (Cambridge: Cambridge University Press, 2007), especially 47–53.

done, even if this means lying to themselves. Self-deception preserves agency, but a self-deceived agent is also fragile and vulnerable to fragmentation. By contrast, an agent who finds a way to identify with her mistakes can take responsibility for what she has done while affirming principles for better choices. By specifying some normative bridging principles, identification through self-criticism and change is possible. The self-critical agent can put acknowledging her past faulty conduct and the mistaken values that guided it in the context of some (if more abstract) continuity in her values. At the same time, her present commitment to better principles of action allows for the possibility of growth. A person can identify with something that contributed to her decision to act as she did while asserting that principles she now affirms would have led her to act differently. Her current values help her to understand and to claim her mistakes without repudiating her own agency.

In sum, an action is oriented toward a goal, aim, or purpose the agent commits herself to as worthwhile. This orientation calls attention to principles or norms guiding an agent's pursuits. These norms include a principle of instrumental rationality, but also substantive commitments and principles that characterize someone as a person of a certain sort. Adherence to norms unifies agency over time. Even with revision of some aims and their supporting norms, a subset of relevant principles may provide continuity over time sufficient for agency and identity. Action-guiding principles provide a basis for the agent to take responsibility for her mistakes, a stance from which a person could acknowledge reparative obligations.

COMPLICITY

Taking responsibility extends to acknowledging the role one has played as a member of a group. A person contributes to the action of a group of which she is a part through her complicity with what the group does. We can understand this by considering what it is for a group to act and what it means for an individual to be complicit with a group's wrongdoing. A group or collective action should be distinguished from the aggregated effects of separate individual actions. In the latter case, there is no collective agent.

Like individual agents, a collective agent commits itself to goals, aims, or purposes it takes to be worthwhile. There is something at which it aims in acting and it does so for reasons that it accepts as having normative force. A collective agent achieves a meaningful conception of itself

as subject to normative directives through its representatives and participants. Collective self-understanding is attained through each member's conception of her aim in acting as shared with some other members of the group and as guided by rules or principles to which they are committed. Each participant understands oneself to be doing something together with other members: electing a leader, doing business, fighting a common enemy, abiding by the law. In acting, each member intends to play a part in advancing a shared and mutually affirmed enterprise. Furthermore, the relevant aims and action-coordinating principles are public. They are not merely held privately by individuals but are affirmed by the group through, for example, legislation, delegation, or an agreement on plans. This is true even if the group's aims are multiple and not all endorsed by all members.

Thus, aims and action-guiding principles expressed in collective action are set together by a group of people or by individuals who represent the group and are authorized to act on its behalf. Those with representative authority advance aims in the name of collective interests, principles, and goals. The coordination of multiple aims and of the parts played by various participants to advance those aims is achieved through accepted structures of authority, decision-making procedures, public conventions that express norms and values characterizing a shared way of life, and the like. Multiple aims might be coordinated institutionally without the oversight of particular persons.

When people act according to a common scheme, each person enlarges the scope of his or her agency. Each person acts together with other people at the same time she does something herself. It follows from this that collective agency can have ethical ramifications for individual members. First of all, collective commitments and actions that serve them can be subjected to moral criticism. Members whose contribution to harms done by a group is marginal or causally inefficacious may nevertheless be at fault together with their comembers for harms the group causes, and, I submit, they may incur reparative obligations together with comembers for their participation in collective wrongdoing. While you are not generally responsible for acts that are committed by another person, harms committed by other people are a basis for your accountability when a person whom you have empowered to represent you, or with whom you coordinate actions that together bring about the objectionable result, commits the harmful act. Delegation and other forms of coordination establish an ethically relevant sense in which you are a collective agent and have generated the harmful result together. This means that

each participant bears some responsibility for what other group members do.

When there is no collective agency, by contrast, individuals whose relation to a harmful outcome is marginal or causally inefficacious may bear no responsibility. They have not significantly participated in its creation. The last driver who crossed the I-35W Bridge in Minneapolis before the bridge collapsed may have weakened it to the breaking point, but surely that person would not be thought to have caused the collapse nor to be at fault, even in a small way or together with other persons.

The picture I have just sketched posits the ethical significance of collective action for evaluating individual behavior. This picture might be challenged. It might be thought that collective responsibility is an illusion and that all reparative obligations must be traced to individual contributions and proportionally distributed. A robust conception of individual responsibility may be thought to be an adequate basis for distributing reparative obligations – for example, a conception of responsibility maintaining that marginal contributions can be morally significant and that causally inefficacious contributions are morally significant if they might foreseeably have made a difference. Thus, it might be argued, reparative duties can be rooted entirely in individual responsibility. We need only to acknowledge the reasonably foreseeable results of what individuals do, in a social context in which other people act or might act. Notions of collective action and complicity are not required to generate the full range of reparative obligations.

There is something to these claims. It does seem true that we tend to underappreciate the moral significance of marginal contributions and the counterfactual properties of our actions. Individual polluters are open to moral criticism, even if their overall contribution to the problem of pollution is small. Moral criticism could be proportioned in accordance with the commonly recognized moral intuition that we are each responsible for what we ourselves do, but not for what other people do. Indeed, this intuition may seem to be fundamental to morality. Yet, it does not stand up to its intuitive appeal. In morally evaluating – what a person has done, we should not underestimate the moral and political significance of coordination: what a person does together with other people. Many harmful results, for example, those generated in war or through corporate greed, would not have occurred but for socially coordinated schemes in which we most meaningfully analyze agency in collective terms. Persons act as they do because they share intentions and plans. They enable each other to act for shared reasons that can be evaluated ethically. Social

cooperation implies that individual contributions should be understood, ethically speaking, not merely in terms of their causal interaction but also as a matter of their common design.

Because collective agency can be understood by plausibly expanding our understanding of what participants do to include what they do together, we should reject the common belief that we cannot be responsible for what other people do. Each participant may be responsible, albeit to varying degrees, for what the group does. In this way, moral criticism of participants is not confined only to the role a participant has played in the group's action. Each participant can also be criticized for what she did together with other group members, that is, for what the group has done.

In sum, complicity relates individual members of a group to what a group does and, accordingly, expands the domain of personal responsibility. Coordination, delegation, and strategic planning raise the moral stakes of seemingly inconsequential actions, linking these actions to what the group does, even though the group's action is also the product of other people's choices. When participation creates a group agent, responsibility for its actions extends in some measure to all individual members. Thus, a person's willingness to plan and coordinate with others can be morally significant, beyond merely marginal, if any, harms that person directly causes.

COLLECTIVE CRIMINALITY

The ethical significance of complicity has been recognized in the criminal law. Notions of collective criminality are developed in both domestic law and international law. These notions include doctrines of conspiracy as well as other modes of complicity, such as aiding and abetting, through which persons who are not the direct agents of a criminal act are nonetheless liable as coperpetrators. The crime of conspiracy enlarges the scope of individual accountability to include concrete criminal plans made with other persons. All conspirators are liable to criminal sanctions, whether or not the criminal plan is executed. In other words, conspiracy is a separate crime that can be added to charges for particular substantive criminal acts. In U.S. law, a person is guilty of conspiracy when it has been established that he was party to an agreement to achieve an unlawful objective and that he knowingly participated in the joint criminal enterprise with the intention of helping it to succeed. Thus conspiracy requires both intention and knowledge on the part of coperpetrators.

Modes of participation, such as aiding and abetting, derive coperpetrators' liability from the criminal acts of their associates. These modes of participation also require knowledge and intention on the part of coperpetrators. They clearly emphasize the agency of coperpetrators, even those who are not the direct agents of the crime.

More controversial are statutes that expand criminal liability to include "reasonably foreseeable consequences" of a criminal associate's behavior. The Pinkerton Rule in U.S. federal law maintains that coconspirators are liable for all reasonably foreseeable substantive crimes committed by their coconspirators in furtherance of the conspiracy.¹¹ Criminal liability requires neither direct participation nor knowledge. "In furtherance of the conspiracy" seems to be interpreted to mean, "in the course of carrying out the conspiracy," whether or not the substantive crime in question was instrumental or necessary for completing the conspiracy. This statute and others like it loosen requirements of intention and knowledge, permitting criminal liability to be ascribed to members of a criminal enterprise for crimes committed by their associates even though liable members may not have intended or known about the particular criminal acts in question. The notion here is that the crime in question was a reasonably foreseeable consequence of the joint criminal enterprise. This standard is "objective" rather than "subjective" – in other words, it does not entail that the offender actually foresaw the result. The standard appeals instead to the judgment of a "reasonable person."

My concern is with what is required to meet the agential requirements of criminal liability, and whether "reasonably foreseeable consequences" can plausibly be said to meet these requirements. We have seen that when a person is complicit with group wrongdoing, that individual may incur reparative obligations for harmful actions committed by other group members. The question with which we are now occupied concerns how tightly coordinated and planned the group's actions must be, if each member is to be held criminally liable for what comembers do.

I submit that less here in the way of individual fault is required than would be required for the retributivist to show that individual members deserve punishment, but something more than "reasonably foreseeable"

¹¹ *Pinkerton v. United States*, 328 U.S. 640 (1946). See discussion by David Luban, Julie R. O'Sullivan, and David P. Stewart, in *International and Transnational Criminal Law* (New York: Aspen Publishers, 2010), chap. 17. Chapter 17 also discusses a similar criterion, "joint criminal enterprise," found in international law as shaped by the Yugoslav Tribunal. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (July 15, 1999).

results of what the group does must be established. Foreseeability is too weak a basis criminally to implicate each individual member of the offending group. Another person's act that was not assisted or intended by an alleged coconspirator typically breaks the causal chain, in the eyes of the law.¹² This is how boundaries of responsibility are typically drawn in the law so as to preserve *mens rea* considerations designed to ensure that the main focus of law is to guide people's choices and that only persons who had a fair opportunity to avoid committing a discrete crime are liable to criminal charges.¹³ Only thus are individual rights respected. We need some compelling grounds to override this presumption. We need some ground for thinking not just that B's action P was predictable given what A did, but that B and A share criminal responsibility for P.

This can be seen as a question about how the boundaries of agency should be drawn for the purposes of criminal law. If we are to understand collective criminality such that culpable participation does not require conspiring, inducing, or assisting, some other relevant criterion must be established. Moreover, as I have suggested, this criterion must be compatible with the notion of agency that gives a system of law its point: to guide choices without encroaching on individual rights. The question is whether reasonably foreseeable results of one party delegating responsibility or empowering another party to act establish joint criminal liability. Because I will assume that there are good moral reasons not to eliminate the notion of responsibility that *mens rea* considerations aim to capture, we need an account of how weakening their requirements could be compatible with treating individuals fairly and with acknowledging the moral significance of choice.

We have seen that marginal causal contributions could be a basis for complicity when coordination produces collective action, but I also expressed skepticism about whether complicity entails blameworthiness. When it comes to criminal charges, it would seem that something akin to blameworthiness is required. There must be a relevant way directly to connect complicitous individuals with objectionable outcomes if those outcomes are to count as their crime. Unless a person has chosen to participate in a given crime, whether or not she is involved with the

¹² H. L. A. Hart and Tony Honore, *Causation in the Law*, 2nd ed. (Oxford: Oxford University Press, 1985), ch. XII.

¹³ See H. L. A. Hart, "Legal Responsibility and Excuses," and "Punishment and the Elimination of Responsibility," in *Punishment and Responsibility* (Oxford: Oxford University Press, 1968).

agents of that crime, she cannot meaningfully be said to have disregarded a fair opportunity to have avoided liability to criminal charges. Guilt by association is an inadequate notion of criminal responsibility.

A promising strategy is to argue that expressing approval of results that are directly connected to collective wrongdoing in which one has participated is evidence of the requisite *mens rea* and implies that one shares criminal responsibility for the group's wrong. The same might be said about accepting benefits that are so connected. Expressing approval or accepting benefits is evidence that coperpetrators were reconciled to the harmful results that in fact occurred, even if they did not conspire to commit the criminal act in question nor directly assist in its execution. Evidence might include accepting stolen property, rewarding corrupt employees, consolidating political power after the illegal use of force by associates, affirming victory in a rigged election, claiming territory that was obtained illegally, and the like. The approval by or benefit to coperpetrators points to their culpable disregard for the laws directives.¹⁴ Without evidence that an alleged coperpetrator was reconciled to the result, there may be no relevant description of his participation in the crime that fits with principles on which he has acted. Thus, there would be no relevant sense in which she is criminally implicated by the group's action, even if other people's actions would count as reasonably foreseeable results of a scheme in which she is involved. On the other hand, when a coperpetrator is reconciled to the results of foreseeable collective wrongdoing, she can be said to endorse the group's action as her own.

I submit that if an individual was not herself the direct agent of a collectively produced wrong, her criminal liability must presuppose that she agreed to participate, enabled the harm, approved of the wrong, or accepted benefits from it. Otherwise, even if the event was reasonably foreseeable, it could not be said to express the coperpetrator's culpable agency.

Thus, criminal responsibility may be generated by complicity in group behavior, provided there is evidence that coperpetrators were reconciled to the criminal result, even if they did not all in fact intend or know

¹⁴ I am indebted to David Luban for suggesting to me that an individual may demonstrate *mens rea* by being reconciled to an unjustifiable risk. Luban and his coauthors discuss this idea and its connection with the German notion of *dolus eventualis* in Luban, O'Sullivan, and Stewart, *International and Transnational Criminal Law*, chap. 17. See also *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges (January 29, 2007).

about it in advance. The form their reparative obligations may take could include nonretributive forms of criminal punishment, provided that culpability, thus understood, can be established, or so I have argued.

CONCLUDING THOUGHTS

In noncriminal cases, the criterion for establishing a morally relevant sense of collective responsibility could be considerably weaker. Specifically, accepting benefits that are only indirectly connected to the wrong in question might suffice. Institutional sources of support for racial discrimination, for example, may cast the net of complicity quite broadly. Accepting indirect benefits such as financial advantage, status advantage, or political power may establish the complicity of individuals with a group's actions they do not intend or foresee, even when their participation is marginal. Reconciliation with the results of collective wrongdoing in this sense may not even be necessary to establish an individual's complicity with group wrongdoing that the individual participant did not intend or directly assist. It may be enough that a group member has embraced principles that rationalize aspects of the group's organization as he participates in facets of the group's activities and that the group's wrongdoing was a significant possibility. Complicity, so understood, may constitute moral grounds to shift the burdens of liability onto complicitous members, rather than burdening those who have not participated, even marginally, in wrongdoing. Complicity provides members of a group with reasons to take responsibility for the group's action, by acknowledging, compensating, repairing, and the like. It would not, however, justify collective or individual punishment.

Reparative obligations acknowledge the moral importance of an individual or a group's causal responsibility and allow wide scope for moral luck. It is often appropriate that an agent (individual or collective) who caused harm take responsibility for it, even when that agent is not fully to blame for the harm, or perhaps is not blameworthy at all. The alternative is that others who have done nothing wrong nor caused harm should absorb the cost of her harmful and morally objectionable acts. These costs provide compelling reasons for persons who are causally connected with the harms in question, either directly or via complicity, to take responsibility for them. We should protect persons who are not the agents of their own suffering from other people's harmful behavior. This is imperative within a rights-based conception of justice. I have been discussing factors

that bear on how the costs of this “responsibility to protect” ought to be distributed.¹⁵

Socially responsible persons aim to counteract the possibility of injustice. Responsible membership in a collective agent is not best gauged by a shared sense of pride and celebrated values but by a cautious thinking ahead to how things might go wrong. This requires critical analysis that acknowledges past wrongs and grapples with the political and social dynamics that made them possible. The historical record of the social institutions in which we participate, willingly and even unwillingly, influences our responsibilities as members of groups. Our critical grasp of these influences may open action possibilities that would not otherwise have been available to us. This is especially true when critical appreciation of the dynamics of injustice is public and shared. Then critical scrutiny can be joined with a collective commitment to taking responsibility for social injustice.

I have contrasted reparative justice with retributive justice. Reparative justice enables us to recognize that how one has acted and been complicit is a basis for reparative duties in a context in which we can also recognize the many factors that impinge on our agency. It may be a person’s bad moral luck that she morally ought to assume responsibility for what she has done. Taking responsibility involves aiming to acknowledge, self-examine, and rectify or compensate for wrongs done and harms caused. Central to this moral conception of responsibility is a recognition that participation in group wrongdoing has moral implications for the group’s members, despite the influence of factors beyond an individual participant’s control.

¹⁵ For illuminating discussion of the notion of “responsibility to protect,” see Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: The International Development Research Centre, 2001).