HOW COHERENT IS COHERENTISM? MISGIVINGS ABOUT TREATING SUPERIOR RESPONSIBILITY AS A FORM OF COMPLICITY

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Darryl Robinson has written a truly outstanding book, which draws on an enormous and varied body of research. The text is a testament to his role as one of—if not the leading exponent of—creative, insightful, and ground-breaking literature in the field of international criminal justice over the past decade or more. The sheer breadth of the literature Darryl draws upon in writing *Justice in Extreme Cases* (JEC) confirms his position as among the most important experts for the practice of international criminal law (ICL) and a leading theorist among scholars. It's a pleasure to be offered the opportunity to respond to his text alongside a range of other academics whose work I also very much admire. This will, no doubt, be the first of many conversations JEC inspires in the years to come.

I find Parts I and II of the book highly innovative and ground-breaking, but unsurprisingly, I disagree with much in Part III. I suspect that neither of these outcomes will be especially surprising to Darryl or others since I've also been tempted by a foray into philosophical pragmatism to explain aspects of issues in ICL that inspire me,[1] but it is also because Part III expressly disagrees with my view that a differentiated system of blame is hard to justify, especially for international crimes.[2] Indeed, he and I have had memorable jokes about our differences of opinion on that score, my favourite of which was his expression of dismay over dinner in Amsterdam some years ago that it would take a decade to rescue me from my thinking about abandoning modes of liability. Because there are still two years to go before my time runs out, I hoped to sneak in an eleventh-hour repetition of the argument in response to him here, since I am unconvinced by the method's application to superior responsibility.

Darryl's Part I reiterates his very significant work on the identity crisis in international criminal justice, highlighting how it has eschewed deontic concerns for fairness to the accused by drawing on sensibilities from human rights, humanitarian law, progressive teleological agendas, etc.[3] I won't labour the point here again, but I wasn't able to shake my earlier reactions to this argument—namely, that national criminal law's failure to take deontic concerns seriously is also a major cause of

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1. *See generally* James G. Stewart, *A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity*, 16 NEW CRIM. L. REV. 261 (2013) (using legal pragmatism to assess theories relating to corporate criminal liability).

2. *See generally* DARRYL ROBINSON, JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW 143–236 (2020).

3. *Id.* at 6–55.

international criminal justice's incongruence with conceptual standards.[4] There really is much to suggest that if ICL does have an identity crisis, this is inherited from national systems of criminal law where it is evident at every turn.

Simon Bronitt, for instance, aptly observes that within national criminal systems there is what he calls a "'gap' between the liberal rhetoric (of general principle) and reality (of pervasive exception)."[5] This gap is so wide in many legal systems that other leading scholars openly wonder whether the theory of criminal law is a "lost cause."[6] I reiterate this point here in part because I wondered whether Part I of Darryl's brilliant text, which charts competing normative attitudes from other branches of law that pull the interpretation of ICL away from deontological considerations, might also have considered the influence of national criminal law as one of or even the major influence in this dynamic. In other words, the identity crisis might be a feature of criminal law generally.

As will become apparent further below, my primary reason for reiterating this view is that I believe it sheds light on his principal methodological contribution: the idea of coherentism. Darryl describes this analytical method as anti-foundationalist, beginning with mid-level principles instead of trying to continually trace some doctrinal commitment to bedrock conceptual commitments. He illustrates this idea well by pointing to a generalized understanding that slavery is wrong, even if we cannot all agree on the scope, priority, or intensity of the underlying philosophical rationale why.[7] As he states, "[m]id-level principles can be supported by multiple foundational theories: people may agree on the mid-level principles even if they have different underlying reasons to do so."[8]

In this sense, I read his ideas about coherentism as at least partially emulating Amartya Sen's argument that although we cannot agree on justice, we have far greater capacity for reaching agreement about the meaning of injustice.[9] In fact, I sometimes think Sen's observation partially explains the immense popularity of ICL over the full course of the twentieth century. The stalemate between competing utopian visions for the world is contrasted with the shared distaste for atrocity.[10] Interestingly, however, Darryl is employing coherentism in its moral, not political, valence; if I read him correctly, his project is to arrive at mid-level principles that

4. *See* James G. Stewart, *The End of 'Modes of Liability' for International Crimes*, 25 LEIDEN J. INT'L L. 165 (2012) (exploring the effects of ICL's importation of imperfect theory from domestic criminal law).

5. Simon Bronitt, *Toward a Universal Theory of Criminal Law: Rethinking the Comparative and International Project*, 27 CRIM. JUST. ETHICS 53, 55 (2008).

6. ANDREW ASHWORTH, *Is the Criminal Law a Lost Cause?*, *in* POSITIVE OBLIGATIONS IN CRIMINAL LAW 28 (2013) ("[T]he criminal law is indeed a lost cause, from the point of view of principle.").

7. *See* ROBINSON, *supra* note 2, at 108 ("Often, we will have vastly more confidence in a mid-level determination [e.g. slavery is wrong] than we have about which supportive theory is the correct one.").

8. *Id.* at 97.

9. *See generally* AMARTYA SEN, THE IDEA OF JUSTICE (2009).

10. I do not see this as the same as Sam Moyn's argument that human rights only emerged when the contest between liberalism and communism produced an impasse. *See generally* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

can ground defensible standards of blame attribution rather than to offer a political vision of when ICL institutions should act.

The intellectual pedigree of coherentism is also particularly interesting. Darryl describes how coherentism is not only a scientific method but also a concept that draws on a number of normative theories, including philosophical pragmatism, the Rawlsian method of "reflective equilibrium," and Dworkin's "law as integrity."[11] Importantly, Darryl promises that these coherentist approaches allow us to bypass what he calls "the problem of pluralism."[12] By this, he emphasizes the absence of common ground within competing traditions of moral philosophies, meaning that a quest for solid ground will inevitably lead to unresolved debates between Kantian, Hegelian, contractualist, communitarian, and consequentialist theories of moral responsibility.[13]

I believe this methodology is extremely interesting. Aside from my own initial incursions into pragmatism as a basis for thinking about international criminal law,[14] there are a number of excellent scholars emerging into this space.[15] Darryl's outstanding book furthers these inquiries, potentially sounding the emergence of a pragmatic school in the area. I'm particularly attracted to his use of these ideas to ground normative content, and I see this work in morality as an important contribution to the politically oriented vision that employs the same lens. Some of the critiques against this method that Darryl convincingly addresses—about whether pragmatism is inherently conservative, uncertain, and untidy[16]—make a major and exciting contribution to both.

I hesitate, however, when it comes to applying this methodology to superior responsibility. My hesitations aren't so much born of the fact that Darryl and I disagree about modes of liability, which was apparent a long time ago. I'm more concerned about the ways in which coherentism is employed as a method to vouchsafe propositions that I believe are highly contested and to spirit away "clues," to use his language,[17] that do not favour the desired outcome he prefers. To be clear, I decided some time ago that my energies were not best spent defending a unitary theory of perpetration against its detractors, but I do think some of its history and underlying logic is interesting as a friendly and hopefully ameliorative critique of a very original methodology.

Part III of Darryl's great book is entitled "Illustration Through Application,"

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11. ROBINSON, *supra* note 2, at 98 (likening coherentism to Rawlsian "overlapping consensus" and Sunstein's "incompletely theorized agreements").

12. *See id.* at 94–95 (explaining how different normative theories affect the problem of pragmatism).

13. *See id.* (discussing the differences between theories of moral responsibility).

14. *See generally* Stewart, *supra* note 1.

15. *See, e.g.*, *id.*; Geoff Dancy, *Human Rights Pragmatism: Belief, Inquiry, and Action*, 22 EUR. J. INT'L REL. 512 (2015); COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE (2017) (providing examples of scholars using pragmatism as a basis for thinking about international criminal law).

16. *See generally* ROBINSON, *supra* note 2, at 106–12 (highlighting the most important objections to coherentism, namely conservatism, fallibility, and untidiness).

17. *See id.* at 14 (noting that coherentism accepts working with the clues available to us).

indicating that he intends to use his coherentist method to show how it assists in practice[18] (a theme consistent with pragmatists' commitment to symbiosis between theory and practice). As a preliminary point, unless I misread him, the two core mid-level principles that emerge from Darryl's anti-foundational, coherentist method are culpability and legality.[19] While I don't disagree with the outcomes his method generates, it's not entirely clear to me that we needed coherentism to produce these results. True, much of the case law on superior responsibility was highly unresolved about the existence, meaning, and practical significance of these terms, but it strikes me that a host of scholars have insisted upon these principles long before the advent of coherentism. In that sense, I wondered if coherentism's added value could be isolated more clearly.

To do this, I wondered if a comparison between the coherentist analysis of superior responsibility Darryl offers [20] and the more avowedly Cartesian foundational alternatives he tells us coherentism outperforms would be apt. How, for instance, would Kantian, Hegelian, contractualist, communitarian, and consequentialist theories of moral responsibility—whose intractable differences coherentism bypasses—explain superior responsibility? Perhaps an analysis of each of these approaches might fruitfully show that they indeed lead to irreconcilable differences that make coherentism as indispensable as promised in this realm. And again, maybe this analysis is necessary to showcase the method's added value.

In terms of his defense of superior responsibility, however, I am slightly concerned by the various ways that Darryl's use of coherentism operates. At an initial level, it appears to allow him to pick and choose factors that confirm inductive reasoning. I will not spend much ink on debates about legal indeterminacy, other than to say that American Realists and Crits would be greatly concerned by a process that involves going with "the best evidence available, taking into account all available clues, such as patterns of practice and normative argumentation."[21] The choice of these clues and identification of these patterns will be all important, but I worry their vast scope leads to a radical indeterminacy, inductive reasoning, and selection bias.

For one reason, I am slightly hesitant about the free oscillation between theory and doctrine in arriving at moral principles. In an article I authored some years ago about causation in international criminal justice, I began by setting out a debate about why causation should matter at all for responsibility, since these core issues set the stage for a more specific discussion of one species of causal responsibility that my piece focused on, namely overdetermined causes.[22] I discussed competing views about whether causation is requisite to all criminal offenses, or whether attempts and conduct-type offenses dispense with it. Then, I addressed whether causation should

18. *Id.* at 139–42.

19. *See id.* at 7 (focusing on the principles of culpability and legality as subsets of criminal law theory).

20. *Id.* at 139–222.

21. *Id.* at 178.

22. *See generally* James G. Stewart, *Overdetermined Atrocities*, 10 J. INT'L CRIM. JUST. 1189 (2012).

matter at all given that it tolerates the imposition of blame based on moral luck, which is anathema to genuine responsibility.[23]

These issues are, by and large, at the center of heated debates in the theory of criminal law as a field, at least in its English-speaking aspect. They are, in an important sense, *the field itself*. And yet, because I had little in the way of normative argument to advance these debates and limited willingness to choose sides, I fell back on doctrine by simply declaring that "international criminal law sides with neither extreme."[24] A critic rightly complained that this was a dodge on my part; it allowed me to avoid taking normative positions, which was especially objectionable when my argument was about advancing a normative proposition. I was, in effect, cheating because I was prepared to hide behind the very doctrine I was attempting to criticize when I ran out of bandwidth in the normative realm. I wonder if this is also a danger for coherentism.

My worries about his selection bias are most acute where Darryl discusses divisions between perpetration and complicity. Initially, he argues that it is:

> a surprisingly common misperception in ICL jurisprudence and literature is that the accessory liability model entails "pretending" or "deeming" that the accessory to have "committed" the crime. Accessory liability is not deemed commission; accessories are held responsible for their own role in contributing to the crime with the requisite level of fault.[25]

Later he states that "[l]ike most criminal law systems, ICL distinguishes between principals and accessories."[26] In my view, both statements are invalid and seize on one set of "clues" while overlooking others in ways that leave me slightly reticent about the method.

Here, for instance, is a small set of contrary propositions from international and national practice as well as normative argument:

1. The Nuremberg Tribunal merely considered whether an accused was "concerned in," "connected with," "inculpated in," or "implicated in" international crimes.[27] As many leading commentators now accept, this approach entailed what amounts to a unitary theory of perpetration,[28] which

23. *Id.* at 1195–97.

24. *Id.* at 1197.

25. ROBINSON, *supra* note 2, at 152.

26. *Id.* at 210.

27. See U.N. War Crimes Comm'n, Law Reports of Trials of War Criminals (Vol. XV) 49–58 (1947), for an overview of these cases. Like Héctor Olásolo, we conclude that this amounts to a unitary theory of perpetration insofar as it fails to distinguish modes of participation. *See* HÉCTOR OLÁSOLO, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 21 (2010) (noting that the IMT and IMTFE embraced a unitary model which did not distinguish between perpetration of a crime and participation in a crime committed by a third person).

28. *See* 1 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW 105 (2013) (noting that the IMT and IMTFE Statutes merely require causal contribution to a certain criminal result, thereby opting for a unitarian concept of perpetration); OLÁSOLO, *supra* note 27 ("[T]he IMT and IMTFE embraced a unitary model which did not distinguish between the perpetration of a crime . . . and participation in a crime committed by a third person . . . ."); Albin Eser, *Individual Criminal Responsibility: Mental Elements—Mistake of Fact and Mistake of Law*, *in* THE ROME STATUTE OF

does not disaggregate forms of attribution into perpetration or complicity.

2. International courts and tribunals do not mention the mode of liability within the disposition of their judgments in more than 95% of cases surveyed.[29] In the vast majority of instances, dispositions within verdicts that are set out in international judgments merely list the name of the offense an accused is convicted of. There is no qualification of this label when the accused is found guilty as an accessory.
3. International Criminal Court (ICC) Judges have disputed the need to distinguish between perpetrators and accomplices. Judge Van den Wyngaert, for instance, declared that "once the rigid division between [perpetrators and accomplices] is abandoned, there is no reason to qualify them as principals in order to attribute the level of blame which they deserve."[30] Similarly, ICC Judge Fulford argued against "the perceived necessity to establish a clear dividing line between the various forms of liability . . . to distinguish between the liability of 'accessories' . . . and that of 'principals' . . . ."[31]
4. A large number of states adopt a unitary theory of perpetration which does not distinguish between perpetrators and accessories at all. These include Denmark, Norway, Italy, Brazil, Austria, and others.[32] Moreover, the problems that led all these states to abandon differentiated systems are remarkably similar to those that plague modern ICL.[33]
5. In national criminal law, even in countries that operate what many would consider a differentiated system of blame attribution, accomplices are often

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INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 781 (Antonio Cassese et al. eds., 2002) (noting that a "holistic" model of perpetratorship seemed attractive enough by supranational courts and codes to be followed by the Nuremburg and Tokyo Tribunals).

29. The typical international trial alleging complicity concludes abruptly by declaring: "The Accused RADOSLAV BRĐANIN is found not guilty under Article 7(3) of the Statute but GUILTY pursuant to Article 7(1) of the following counts: Count 3: Persecutions . . . ." Prosecutor v. Brđanin, IT-99-36-T, Judgment, ¶ 1152 (Int'l Crim. Trib. for the Former Yugoslavia Sep. 1, 2004). A comprehensive review of all convictions for aiding and abetting, instigation, planning, and ordering reveals that international courts and tribunals follow this format in fifty-nine other situations, making no mention of the mode of liability within the disposition of the judgment. In only three scenarios, international courts state something like: "The Chamber finds the Accused Haradin Bala GUILTY, pursuant to Article 7(1) of the Statute, of the following counts: Count 4: Torture, a violation of the laws or customs of war, under Article 3 of the Statue, for having aided the torture of L12 . . . ." Prosecutor v. Limaj et al., IT-03-66-T, Judgment, ¶ 741 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005). Thus, in over 95% of cases, international courts' dispositions make no mention of complicity, even though it was the basis for conviction.

30. Prosecutor v. Ngudjolo, ICC-01/04-02/12, Concurring Opinion of Judge Van den Wyngaert, ¶ 29 (Dec. 18, 2012).

31. Prosecutor v. Lubanga, ICC-01/04-01/06, Separate Opinion of Judge Fulford, ¶ 6 (Mar. 14, 2012).

32. *See generally* James G. Stewart, *The Strangely Familiar History of the Unitary Theory of Perpetration*, *in* VISIONS OF JUSTICE: LIBER AMICORUM MIRJAN DAMAŠKA, (Studies in Int'l and European Criminal Law and Procedure Vol. 26, 2016) (describing the adoption of and reaction to a unitary theory of perpetration).

33. *Id.*

treated as perpetrators. To name a few such countries, France ("[t]he accomplice to the offence" is punishable as a perpetrator");[34] the United Kingdom ("[the accomplice] shall be liable to be tried, indicted, and punished as a principal offender");[35] and Canada ("[t]he person who provides the gun, therefore, may be found guilty of the same offence as the one who pulls the trigger.")[36]

6. A range of the very leading scholars within the field of criminal law theory have argued that complicity is "superfluous," precisely because its contours overlap perfectly with any defensible notion of perpetration.[37] These scholars include luminaries like Michael Moore, Larry Alexander, Kim Ferzan, Stephen Morse, Diethelm Kienapfel, Wolfgang Schöberl, and Thomas Rotsch.[38] (I would also place Sandy Kadish in this category for this piece,[39] although some would contest this.)

Moreover, even if most systems do adopt a separate hybrid category for accessorial liability, which I think remains highly doubtful, I am still concerned that these systems offer little necessary value as building blocks for a moral theory of responsibility. This is because the differentiated system was likely forced upon them and therefore provides little dependable evidence of a diversity of moral value or cosmopolitan political commitment. Darryl generously references my work with Asad Kiyani on the genealogy of national and international criminal law throughout the world,[40] concluding that "we must be ready to examine biases and impositions of power that may have led to the predominant formulations."[41] The difficulty, at least to my reading, is that this sensitivity does not re-emerge in Part III at the stage when the coherentist methodology is practically implemented using superior responsibility as exemplar.

In my opinion, that history is quite salient to the analysis. As I have argued elsewhere:

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34. CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 121–6 (Fr.).

35. Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (U.K.).

36. R. v. Briscoe, [2010] 1 S.C.R. 411, 420. Similar rules apply in other countries that also call modes of liability rules governing "parties to crime." For a discussion of "parties to offences" in § 66(1) of New Zealand's Crimes Act 1961, see, for instance, David Baragwanath, *A Unitary Theory of Perpetration? New Zealand and a Touch of the International*, JAMESGSTEWART.COM (Sept. 30, 2017), http://jamesgstewart.com/a-unitary-theory-of-perpetration-new-zealand-and-a-touch-of-the-international/.

37. MICHAEL S. MOORE, *The Superfluity of Accomplice Liability*, *in* CAUSATION AND RESPONSIBILITY 280, 280–323 (2009).

38. Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395 (2007); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009); DIETHELM KIENAPFEL, DER EINHEITSTÄTER IM STRAFRECHT (1971); WOLFGANG SCHÖBERL, DIE EINHEITSTÄTERSCHAFT ALS EUROPÄISCHES MODELL (2006); THOMAS ROTSCH, "EINHEITSTÄTERSCHAFT" STATT TATHERRSCHAFT (2009).

39. Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1997).

40. James G. Stewart & Asad Kiyani, *The Ahistoricism of Legal Pluralism in International Criminal Law*, 65 AM. J. COMPAR. L. 393 (2017).

41. ROBINSON, *supra* note 2, at 90.

> [T]he abundance of differentiated systems of blame attribution throughout the many systems of criminal law globally largely has forced imposition through colonialism to thank. With the partial exception of Italy, the European states that had adopted a unitary theory like that employed at Nuremberg and Tokyo were never colonial powers . . . England, France, Spain and Germany, by contrast, all adopted the differentiated system now ascendant in ICL (even while the first two treated complicity as a form of perpetration), then disseminated this system to the four corners of the globe as part of European colonial rule.[42]

Because it overlooks this history, I am concerned that coherentism may actually turn out to be inherently conservative, despite Darryl's explicit rejection of this concern in his earlier sections.

In addition, I worry that coherentism seems to allow highly controversial ideas to go undefended. The idea in German criminal law is that accessorial liability is a strange kind of hybrid, amalgamating accessorial liability with the crime assisted, then employing a sentencing range for the hybrid based on the standard that obtains for the completed offense, less 25%.[43] But justifications of this weird middle category are very hard to come by, even in Germany.[44] As Markus Dubber observes, "[r]emarkably little effort is spent on justifying this differentiation."[45] Is it a form of participation, an inchoate offense, an attempt, or its own thing entirely? In a different context, Darryl rightly argues that "[i]f there is indeed a new category that is neither a mode nor an offence, its proponents should clarify what this new twilight category *is*."[46] The same is true of the weird hybrid concept of accessorial liability in German law, especially if it is to be adopted in ICL.

Moreover, aside from my anxiety that coherentism as employed in this example further entrenches the absence of intellectual justification for this hybrid category, I confess I am not fully soothed by Darryl's argument that "roles matter."[47] To my mind, that response either states the obvious (since the very essence of the debate about modes of liability has always been how to accommodate those different roles without abandoning core commitments), or begs the question(s), which are numerous for and against a unitary theory of perpetration in the extensive literature on the topic, but one of which is whether these roles can be addressed adequately within a sentencing phase. So, I am concerned that coherentism here is avoidance rather than engagement with a difficult set of questions that still escape robust treatment.

This brings us to the bases for distinguishing perpetrators from accessories. I

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42. Stewart, *supra* note 32, at 343.

43. *See* Kai Ambos & Stefanie Bock, *Germany*, *in* PARTICIPATION IN CRIME 323, 339 (Substantive Issues in Criminal Law Ser. No. 1, 2013) (noting the mandatory statutory discount aiders receive under German law).

44. *See id.* at 332–35 (describing forms of secondary participation recognized by German criminal law).

45. Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. INT'L CRIM. JUST. 977, 984 (2007).

46. ROBINSON, *supra* note 2, at 171.

47. *Id.* at 213 (emphasis in original omitted).

will spare readers my usual recitation of the lack of consensus—historical or contemporary—about how and where to draw this line.[48] I'll also refrain from repeating my argument about modes of liability becoming an elitist technocratic legalese that very few victims, perpetrators, or members of the public could possibly be expected to understand (other than to say that I recently tried to explain indirect co-perpetration to a set of the world's most brilliant scholars in business and human rights with limited success, and I do not view this failure as reflecting on me or my audience). Suffice it to say that coherentist justifications of superior responsibility come with significant baggage the book does not engage with.

I do, however, want to respond to Darryl's idea that "[t]hose parties who are most directly responsible are liable as principals and more indirect, contributors are liable as accessories."[49] For me, this argument leaves out the very point of entry into the highly (overly) complex system of differentiation that the ICC has imposed upon itself by emulating German law.[50] At the beginning of the nineteenth century, scholars like Feuerbach objected to the objective theory of responsibility that effectively divided perpetrators and accomplices based on directness to the offense because it failed to take account of indirect perpetration (i.e. innocent agency).[51] Perhaps I am misreading him, but I am concerned about the text's overlooking of this history and the ways it precipitated the intellectual quagmires that inspire the book.

Similarly, I'm not sure that some of the ideas about causation in the book adequately divide perpetratorship and accessorial liability either. As one point in his text, Darryl argues that "[p]rincipal liability appears to require *sine qua non*, 'but for' type of causation."[52] But as I attempted to show in my piece on causation, overdetermined contributions through co-perpetration are probably the primary form of responsibility for atrocity.[53] A firing squad is a classic illustration. And yet, members of the firing squad are all perpetrators, even though they do not make "but for" contributions to the crimes they bring about. Here too, I'm not confident that the "clues" that are seized upon are inevitable or that they lead to the most coherent outcome.

Perhaps my primary misgiving in all this, though, is that superior responsibility's assimilation to a form of accessorial liability (as distinct from perpetration) does not seem to be justified in Darryl's text. The argument is announced at an early stage then repeated throughout, so I read much of the book in an excited state of anticipation for the moment the position would be defended, only to realise that it would not come. Thus, in the end, I couldn't help but think that

48. *See* Stewart, *supra* note 32, at 342 (noting disagreement between both judges and scholars regarding where the dividing line between perpetration and complicity in ICL exists).

49. ROBINSON, *supra* note 2, at 210 (emphasis in original omitted).

50. *See generally* Jens David Ohlin, *Co-Perpetration: German* Dogmatik *or German Invasion?*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 517 (Carsten Stahn ed., 2015) (discussing German influence on ICC jurisprudence).

51. This history is helpfully set out in Hans-Ludwig Schreiber, *Problems of Justification and Excuse in the Setting of Accessorial Conduct*, 1986 BYU L. REV. 611, 613–14 (1986).

52. ROBINSON, *supra* note 2, at 178.

53. Stewart, *supra* note 22.

superior responsibility was a form of complicity by stipulation, which troubled me on both methodological and normative grounds. Methodologically, I'm averse to stipulation, especially when so much turns on it. Substantively, the argument strikes me as highly debatable, even if we are operating within a (relatively rare) differentiated system of blame attribution that constructs a weird (and largely undefended) hybrid concept of accessorial liability in between perpetration and attempt.

First, many of the major fads in the development of modes of liability—from superior responsibility, to joint criminal enterprise, and now indirect perpetration—have emerged out of a reluctance to call leaders accomplices. Mark Osiel has argued that doing otherwise would "get the moral valences entirely wrong—almost backwards, in fact."[54] Surely those in ascendance are often equally if not more responsible than their underlings? And yet, accomplices are formally less culpable (in the weird undefended hybrid model at least). Second, I am not aware of any iteration of accomplice liability that would permit negligence as a mental element, meaning that on this ground too, assimilating superior responsibility to complicity feels like forcing a square peg into a round hole. Third, absent any stable metrics for determining whether a given mode of liability is a form of perpetration or of complicity, I worry that any controversial form of responsibility can be summarily legitimized by declaring it a form of accessorial liability.

All in all, I like the method far more than its application. I have, however, only touched the surface of a far more sophisticated text that covers considerably more ground. There is much that I have not included here, which I think is a really outstanding contribution to the field. Aside from the methodological work, which I think is very intriguing, I'm very attracted to the idea that there might be some basis for thinking of ICL as punishment beyond state authority. I'm also excited about a deontological approach to superior orders, neutral contributions in the context of complicity, and especially the idea that a commander's negligence might be more blameworthy than her recklessness. I also believe that Darryl has offered a groundbreaking defense of the law of superior responsibility as enshrined in the ICC Statute presently, which ultimately, matters a great deal to how these debates play out in practice. If we adopt a positivist frame, perhaps the book offers the very best form-specific ethical defense of how lawyers should interpret the statute as it stands. My thanks again for the opportunity to share thoughts on this important book.

54. MARK OSIEL, MAKING SENSE OF MASS ATROCITY 85 (2009).