Kutz, Christopher. *Complicity: Ethics and Law for a Collective Age*. Cambridge: Cambridge University Press, 2000. Pp. xii + 331. $70.00 (cloth).

An accomplice is someone who commits a wrong that consists in his contributing to someone else's committing a wrong. Morally as well as legally, accomplices fall into two classes. Some accomplices are *co-principals*. Suppose that two burglars set about ransacking a house together. As well as being a burglar in his own right, each is an accomplice in the burglary committed by the other, just by virtue of the fact that the two of them are acting together in a joint enterprise. Other accomplices are *accessories*. Suppose that one burglar ransacks a house, but only after a corrupt postal worker passes him the information that the owners are on vacation. The postal worker is an accomplice in burglary (and in some legal systems can be convicted of burglary) whether or not there was a joint enterprise.

Although his book is titled *Complicity*, Christopher Kutz does not compare and contrast these two modes of complicity. Nor does he explore either of them comprehensively. He focuses on one special case of complicity. It is the case in which people commit a wrong together that none of them commits in his or her own right. In such wrongdoing the only principal is a collectivity: a nation, a corporation, a team, a group. And the individuals who make up that collectivity are at most accessories to the collectivity's wrong. Most of Kutz's book is about the moral position of the individuals who make up the collectivity. Are they indeed complicit, and if so what follows? But the book's longest chapter is reserved for a thorough discussion of the conditions under which one can regard the collectivity itself as a principal. What does it take to turn the actions of various individuals into a different action that is the action of another agent, namely *them collectively*? This is not a question about complicity. It is relevant to complicity because it sets the scene for a discussion of the accessorial position of the collectivity's

members. Mightn't it also be relevant to establishing what turns individual agents into co-principals? If we have a collective agent, don't we also have individual agents acting together in a joint enterprise, such that an individual wrong of any may be a wrong of each? Perhaps. But Kutz says relatively little about the moral position of the individual agents in their role as co-principals in each other's (smaller) wrongs. He concentrates on the moral position of the individual agents in their role as accessories to the (larger) wrong of the collective principal.

Why such a narrow focus? Kutz wants to help us cope with a major problem of our age. "The most important and far-reaching ... wrongs of contemporary life," he says, "are the products of collective actions ... and individual agents rarely make a difference to their occurrence" (p. 113). This fact, according to Kutz, facilitates a widespread abdication of individual responsibility. He wants to restore a better understanding of the moral position of accessories so that we can give shorter shrift to this abdication of individual responsibility. Contrary to today's folk wisdom, argues Kutz, the fact that I didn't and couldn't make any difference to the commission of a collective wrong is not sufficient to exclude my individual responsibility for it, where I am part of the collectivity that committed the wrong. Nor is my accessorial (as opposed to my "direct") responsibility diminished, the less difference I made or could have made. The "Individual Difference Principle" and the "Control Principle" are the wrong principles for allocation of accessorial responsibility in such cases. The correct principle is the "Complicity Principle" which bases responsibility on intentional participation in a wrong, as opposed to causal contribution to it. This principle, says Kutz, "is fundamentally teleological rather than causal" (p. 140).

The Complicity Principle provides a teleological basis for allocating responsibility inasmuch as it requires intention. But doesn't it also provide a causal basis inasmuch as it requires *participation*? Can one participate in something without making

any causal contribution to it? Of course to answer "no" we will have to allow that one can make a causal contribution to something without making an individual difference to it. But this we should indeed allow. Think about the infamous "arms dealer" defence: "If I don't supply the weapons, someone else will." That someone else will do it means that the individual arms dealer makes no difference to whether the arms will be supplied. But it doesn't follow that the dealer makes no causal contribution to their being supplied. Of course he does: he supplies them. It is an overdetermination case and such cases show that not all causal antecedents are necessary conditions of their consequents. As Kutz remarks, the cases that interest him, such as the case of the bombing of Dresden, are overdetermination cases too. They are just a bit more complex than the arms dealer case. What the arms dealer does is still sufficient, even though not necessary, for the arms to be supplied. What the bomber pilot over Dresden does is neither necessary nor sufficient for the destruction of Dresden (the collective wrong in question). But this only goes to show that there are cases in which causal antecedents are neither necessary nor sufficient conditions of their consequents. Rather each is a necessary element of at least one set of jointly sufficient conditions. In the firebombing of Dresden there are numerous such overlapping sets. Every pilot on the mission (bar those who were shot down, missed the city, or arrived too late) is a necessary member of various sets of pilots on the mission who between them ensured Dresden's destruction. Every one of them therefore made a casual contribution to it. That is how they participated in the collective act of destroying Dresden. That is why they were sent. If none of them made a causal contribution – the alternative verdict apparently favoured at one point by Kutz (p. 147) but rejected at another point (p. 126) – then there was nothing to be gained in sending any of them.

This does not yet establish that there is no participation without causation. It does not yet, for example, bring mere

aiding and abetting into the causal field. What it does show is that, so far as understanding the nature of individual participation in collective wrongdoing is concerned, the theory of causality calls for more attention than Kutz gives it. He gives short shrift to the "necessary element of sufficient set" test of causality, arguing that "metaphysical differences are not (always) moral differences" (p.126). True, but this one is a moral difference. It is the moral basis of the accessorial liability of the Dresden bombers. They did not merely attempt to participate. They actually participated, i.e. made a causal difference. Kutz seems to reject this causal interpretation of the *actus reus* element of his Complicity Principle: after all, the principle is "teleological rather than causal". But he does not say much about what to replace it with. Many careful pages are devoted to refining the *mens rea* – the intention that an individual needs to have before his action will count as a contribution to the action of the collectivity (p. 81ff). Kutz rightly prides himself on having exposed the excesses of the common law on this point: "if liability is justified only when there is a tight connection between S's participatory intention and P's act, the foreseeable consequence rule of liability [that applies at common law] is likely to violate that requirement" (p. 229). But as Kutz notes, an insufficiently strict *mens rea* only accounts for some of the common law's excesses in doling out accomplice liability. A no less important factor has been the common law's insufficiently strict *actus reus* requirement. In my view, Kutz's explanation of his Complicity Principle does little to improve on the common law in this respect. In my view the only way to do so is to recognise that the *actus reus* for complicity must always, in one way or another, be causal. Having rejected this approach Kutz gives us too little sense of what he means to put in its place.

Just occasionally, indeed, Kutz seems to abandon the need for an *actus reus* altogether. Just occasionally he talks as if the liability of an accomplice were a vicarious rather than a personal liability. A personal liability is a liability that attaches to something one did

(or failed to do) oneself. A vicarious liability is a liability that attaches something done by someone else, never mind what one did (or failed to do) oneself. Parents are vicariously liable, legally and morally, for many of the wrongs of their children. But they are more rarely complicit in the wrongs of their children. Complicity liability is a type of personal liability. It is liability for contributing to someone else's commission of a wrong. To make one liable as an accomplice, it matters what one did oneself, as well as what someone else did. In general Kutz seems to stand up for this feature of complicity liability. But once in a while he seems to take his Complicity Principle across the line into the domain of the vicarious. For instance, he says, shareholders' "intentional participation in the collective endeavour [of the company] does not make them blameworthy – they have done nothing wrong by purchasing stock, nor have they failed in any way in their duties as shareholders (whatever those might be). But it does render them accountable in the domain of repair for the company's accidents, when the company cannot meet its warranted claims" (p. 246).

The shareholders in this story have of course acted. They have assumed responsibility for the derelictions of the company. That is how their liability is created. But the liability that is created thereby is vicarious, not personal: it does not depend on the shareholders' doing anything further, any act or omission of their own, to which their liability attaches. Shareholders do not need to contribute (causally or otherwise) to the company's commission of a wrong in order to be liable for that wrong. So there is no longer any requirement of an *actus reus* for complicity. Once the shareholding is established, and until it is terminated, shareholders are covered by Kutz's Complicity Principle *whatever else they do*, and in particular notwithstanding that they have not "failed in any way in their duties as shareholders."

True, there are some corners of the law and ethics of complicity in which vicarious liability has its part to play. Joint principals, for example, are normally vicariously (not

accessorially) liable for the foreseeable excesses, beyond the joint enterprise, of their partners in crime. If one burglar foreseeably resorts to rape or murder, then the other burglar, barring exceptional circumstances, faces a rape or murder charge as well. But notice that to trigger this liability one must first be a partner in crime, a joint principal in burglary. The vicarious liability depends on the personal liability. Not so in the shareholder case as Kutz describes it. In the shareholder case, the liability that Kutz has in mind seems to be vicarious all the way down. The shareholder need not do anything wrong. Only the company need do something wrong for the shareholder to be liable.

I may have misinterpreted Kutz when I say that he locates the shareholder case inside his Complicity Principle rather than beyond it. Here, as at some other points, I found the book unexpectedly hazy. But that itself is a fact worth recording. It seems to me a reasonable complaint about an otherwise excellent book called *Complicity* that, in the end, it leaves at least some of us in doubt about whether it really is a book about complicity. Is it really, as its title suggests, a book about the personal liability of people who commit wrongs by contributing to the commision of wrongs by others? Or is it rather a book about the purely vicarious liability that some people may have, albeit they commit no wrongs themselves, for the wrongs of collectivities to which they belong? Or is it even perhaps a slightly oversubtle attempt to suggest that the distinction between personal liability and vicarious liability is not as morally important as it looks?