

2018

## Abolishing Australia's Judicially Enacted SUI GENERIS Doctrine of Extended Joint Enterprise

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### CU Commons Citation

Wang, Victoria Bo (2018) "Abolishing Australia's Judicially Enacted SUI GENERIS Doctrine of Extended Joint Enterprise," *Concordia Law Review*. Vol. 3 : No. 1 , Article 3.

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ABOLISHING AUSTRALIA'S JUDICIALLY ENACTED *SUI GENERIS*  
DOCTRINE OF EXTENDED JOINT ENTERPRISE

*Victoria B. Wang\**

*This Article argues that the decision in Miller v The Queen [2016] HCA 30 is supported neither by common law precedent in Australia nor the historical English precedents that informed the development of Australia's common law doctrines. It is submitted that the majority judgment misquoted old English authorities to try to equate foresight with intention and argues that the High Court of Australia engaged in judicial activism, because its decision rested predominantly on the policy views of the judges. Moreover, it is argued that the case highlighted the urgent need for law reform in Australia. The Article puts forward a theory to demonstrate that treating a person who did not perpetrate the collateral crime or assist or encourage its commission the same as the perpetrator of that collateral crime is unfair and unjust. Therefore, this Article argues that the extended joint enterprise doctrine created in Miller should be rejected in the 21<sup>st</sup> century.*

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## INTRODUCTION

The doctrine of “extended joint enterprise” was enacted by judicial fiat in Australia in 1995 in the case of *McAuliffe v The Queen*.<sup>1</sup> It appears the judges deciding *McAuliffe v The Queen* were confounded by *Chan Wing-Siu v The Queen*—a 1985 decision of the Privy Council.<sup>2</sup> Their confusion about what Sir Robin Cooke was expounding in *Chan Wing-Siu* led them to create a new doctrine of complicity liability. The doctrine of extended joint enterprise complicity has no doctrinal lineage in the common law in Australia before 1995.<sup>3</sup> There were factual situations involving a common purpose over the underlying crime, and then there was a collateral crime, but these cases, when examined closely, prove to be straightforward cases of intentional encouragement.<sup>4</sup> On the facts as presented in the earlier precedents, there was ample evidence for a jury to infer that, by joining the underlying criminal enterprise, the accessory sent a message of encouragement to the perpetrator in relation to the collateral crime. Moreover, in these cases, there was ample evidence to infer that the encouragement was intended to encourage the perpetrator to commit the anticipated collateral crime.

A similar error was made in *R v Powell*,<sup>5</sup> but the Supreme Court of the United Kingdom (The Supreme Court) and Privy Council corrected that

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<sup>1</sup> [1995] 183 ALJR 621, ¶ 19 (Austl.). It is also acknowledged by the majority in *Miller v The Queen* that the doctrine’s doctrinal foundations cannot be traced beyond the 1980s when they stated:

These criticisms were invoked in support of an application to re-open and overrule *McAuliffe* in *Clayton v The Queen*. By majority, the Court declined to do so. Among the majority’s reasons for that refusal was the observation that principles consistent with *McAuliffe* form part of the common law in other countries. These principles are commonly traced to the decision of the Privy Council in *Chan Wing-Siu v The Queen*.

*Miller v The Queen* [2016] HCA 30, ¶ 2 (Austl.) (citations omitted). The majority goes on to say, “*McAuliffe* builds on the principles enunciated in *Johns*.” *Id.* at ¶ 37.

<sup>2</sup> *Chan Wing-Siu v The Queen* [1985] AC 168 (U.K.).

<sup>3</sup> The earlier cases required intention and factual encouragement. The encouragement was inferred by the fact that the accessory intentionally joined the joint enterprise, intending his act of joining to send a message of encouragement to the perpetrator of the anticipated collateral crime. DENNIS J. BAKER, REINTERPRETING CRIMINAL COMPLICITY AND INCHOATE PARTICIPATION OFFENCES 48–49 (2016).

<sup>4</sup> *Id.* at 46–141.

<sup>5</sup> *R v Powell* [1999] 1 AC 1 (HL) (U.K.).

error in 2016. In *R v Jogee*<sup>6</sup> and *Ruddock v The Queen*,<sup>7</sup> the Supreme Court of the United Kingdom and the Board of the Privy Council overruled *R v Powell* and *Chan Wing-Siu* to bring the law back into line with the common law as it stood for centuries prior to *Chan Wing-Siu*. The High Court of Australia (The High Court) refused to follow suit and gave some doubtful policy reasons to justify retaining the doctrine of extended joint enterprise that The High Court minted in 1995.<sup>8</sup>

The main theory the High Court in *Miller v The Queen* used to justify extended joint enterprise liability was the “change of normative position” theory.<sup>9</sup> According to this theory, a person has changed his normative position by taking part in a criminal enterprise to commit an underlying crime and should, therefore, take responsibility for any collateral crimes following from that enterprise.<sup>10</sup> The High Court also relied on

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<sup>6</sup> *R v Jogee* [2016] UKSC 8 (U.K.).

<sup>7</sup> *Ruddock v The Queen* [2016] UKPC 7 (U.K.).

<sup>8</sup> There is a similar doctrine in the United States that is comparable to the extended joint enterprise doctrine in Australia—among other common law countries—namely the natural probable consequence rule. See ARIZ. REV. STAT. ANN. § 13-303(A)(3) (West 2008); IOWA CODE ANN. § 703.2 (West 2003); KAN. STAT. ANN. § 21-3205(2) (West 2007); ME. REV. STAT. ANN. Tit. 17-A, § 57(3)(A) (West 2007); MINN. STAT. ANN. § 609.05(2) (West 2017); WIS. STAT. ANN. § 939.05(2)(c) (West 2017); *State v. Jefferson*, 574 N.W.2d 268 (Iowa 1997); *State v. Edwards*, 498 P.2d 48 (Kan. 1972); *State v. Filippi*, 335 N.W.2d 739 (Minn. 1983); John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237 (2008). According to this rule, a participant in a criminal joint enterprise should be liable as an accessory, not only for the underlying crime, but also for any incidental crime committed by his confederate if it was a reasonably foreseeable consequence of committing the underlying crime. This rule is even stricter than the extended joint enterprise doctrine in that it makes the defendant liable for any reasonably foreseeable consequence of the underlying crime, even if the defendant himself did not subjectively foresee it. Although, the Model Penal Code rejected this rule, it still has fairly wide application in many states as well as in federal courts. See Model Penal Code § 2.06 (West 2016); see also *Brewner v. State*, 804 S.E.2d 94 (Ga. 2017); *United States v. Wills*, 88 F.3d 704 (9th Cir. 1996); *United States v. Miller*, 22 F.3d 1075 (11th Cir. 1994); *United States v. Vaden*, 912 F.2d 780 (5th Cir. 1990); *State v. Filippi*, 335 N.W.2d 739 (Minn. 1983); *State v. Edwards*, 498 P.2d 48 (Kan. 1972); Michael G. Heyman, *The Natural Probable Consequence Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 395 (2010). In a recent case, the Supreme Court of the United States held that the *mens rea* element of complicity liability requires both that the accomplice intentionally provided assistance or encouragement and that the accomplice intended the full scope of the crime to be committed. *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014). It is not clear whether this case has the effect of abrogating the natural probable consequence rule or not.

<sup>9</sup> *Miller v The Queen* [2016] HCA 30, ¶ 123 (Austl.).

<sup>10</sup> Jeremy Horder & David Hughes, *Joint Criminal Ventures and Murder: The*

policy considerations to justify extended joint enterprise liability.<sup>11</sup> It held that criminal enterprises posed greater threats to society than individual criminals and that the extended joint enterprise doctrine was necessary to protect the public against criminal gangs.<sup>12</sup> However, none of these justifications were solid and convincing enough to justify extended joint enterprise liability. This Article shows the unfairness and injustice of the doctrine of extended joint enterprise and the doctrinal and normative grounds on which it should be rejected.

In Part II, the Article briefly examines the common law principles of complicity liability, which requires intention and actual assistance or encouragement. The Article shows that precedents in English common law required intention rather than foresight in complicity liability and that *Miller* misquoted old English authorities. It argues that neither the theoretical nor policy considerations in *Miller* can provide convincing justifications for extended joint enterprise doctrine. The Article argues that the policy reasons<sup>13</sup> to promote deterrence are not empirically improved and that they cannot override basic criminal law principles, such as fair labelling and proportionate punishment.

The moral foundations of complicity have been said to rest on culpable, indirect causation.<sup>14</sup> But it will be argued in Part III that this assertion is not true. This Article argues that assisting or encouraging a perpetrator is a remote harm because its harmfulness is contingent on the autonomous, free, and informed choice of the perpetrator to commit the target crime.<sup>15</sup> Therefore, treating an assister or encourager the same way as a perpetrator is unfair and unjust, because the former is less harmful and less dangerous than the latter. This Article then argues in Part IV that treating the actual perpetrator of a collateral crime the same as a person who did not

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*Prospects for Law Reform*, 20 KING'S L. J. 379, 398 (2009); A.P. Simester, *The Mental Element in Complicity*, 122 LAW Q. REV. 578, 598–99 (2006).

<sup>11</sup> *Miller*, HCA 30 at ¶ 34–35.

<sup>12</sup> *Id.* at ¶¶ 36, 146.

<sup>13</sup> *Id.* at ¶ 101; *R v Powell* [1999] 1 AC 1 (HL) (U.K.); see Heyman, *supra* note 8, at 401; see also Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129, 152 (2014).

<sup>14</sup> SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 162 (1987); John Gardner, *Moore on Complicity and Causality*, 156 U. PA. L. REV. PENNUMBRA 432, 436 (2008); Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 407 (2007).

<sup>15</sup> Glanville Williams, *Finis for Novus Actus?*, 48 CAMBRIDGE L.J. 391, 392 (1989).

assist or encourage the collateral crime, but merely foresaw it as a possibility in executing the joint enterprise to do an underlying crime, makes even less sense. It is proposed that such an extremely unfair and unjust doctrine should be rejected. Part V concludes that The High Court's decision in *Miller* was unsupported and, therefore, should be overturned.

#### I. COMMON LAW PRINCIPLES OF COMPLICITY AND THE DOCTRINE OF EXTENDED JOINT ENTERPRISE IN AUSTRALIAN LAW

The current debate concerns the mental element in complicity and whether the element should be limited to intention or should also include recklessness. The current law in England, Wales,<sup>16</sup> and most states in the United States<sup>17</sup> requires intention and does not include recklessness as an alternative fault element. In those jurisdictions, there must be an intentional act of encouragement or assistance, and that act must be done with the ulterior intention of assisting or encouraging the perpetrator to commit the anticipated target crime. The defendant must intend that the perpetrator act with the requisite fault for the anticipated target crime.<sup>18</sup> A further constraint in those jurisdictions is the conduct element, because actual assistance or encouragement is required.<sup>19</sup> Association *per se* is not sufficient for establishing the conduct element.<sup>20</sup> This section briefly outlines why *Miller* was wrongly decided. This Article submits that academic research and *R v Jogee* demonstrate that *Miller* was not only wrongly decided, but was grossly unjust.

##### A. *Foresight vs. Intention*

The joint majority in *Miller* held:

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<sup>16</sup> *R v Jogee* [2016] UKSC 8, ¶ 9 (U.K.).

<sup>17</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1242 (2014); *Giniebra v. State* 787 So. 2d 51, 53 (Fla. Dist. Ct. App. 2001); *White v. State*, 919 So. 2d 1029, 1033 (Miss. Ct. App. 2005); *State v. Moreno*, 104 P.3d 628, 629 (Or. Ct. App. 2005); *Commonwealth v. Murphy*, 844 A.2d 1228, 1232 (Pa. 2004); *Wooden v. State*, 101 S.W.3d 542, 546 (Tex. Crim. App. 2003).

<sup>18</sup> Dennis J. Baker, *Reinterpreting the Mental Element in Criminal Complicity: Change of Normative Position Theory Cannot Rationalize the Current Law*, 40 LAW & PSYCHOL. REV. 119, 122 (2016).

<sup>19</sup> *Supra* note 16–17 and accompanying text.

<sup>20</sup> *Rosemond*, 134 S. Ct. at 1241; *Pereira v. United States*, 347 U.S. 1, 12 (1954); *Nye v. United States*, 336 U.S. 613, 619 (1949).

Each party is also guilty of any other crime (“the incidental crime”) committed by a co-venturer that is within the scope of the agreement (“joint criminal enterprise” liability). . . . Moreover, a party to a joint criminal enterprise who foresees, but does not agree to, the commission of the incidental crime in the course of carrying out the agreement and who, with that awareness, continues to participate in the enterprise is liable for the incidental offence (“extended joint criminal enterprise” liability).<sup>21</sup>

Furthermore, the majority went on to say “[t]he wrong in the case of the party to the joint criminal enterprise lies in the mutual embarkation on a crime with the awareness that the incidental crime may be committed in executing their agreement.”<sup>22</sup>

The High Court held that foresight was sufficient to find fault for the defendant even when the *mens rea* for the collateral crime was specific intention.<sup>23</sup> The High Court also held that there need not be any encouragement or assistance regarding the collateral crime if the accessory foresaw that the collateral crime might be perpetrated as an incident of the joint enterprise.<sup>24</sup>

In the leading United Kingdom complicity case, the Supreme Court held that foresight was only evidence of intention and that encouragement or assistance was needed to establish the conduct requirement in complicity.<sup>25</sup> In *R v Jogee*, foresight of possible collateral crimes was used as evidence of intention, including conditional intention, in joint enterprise. There was no independent doctrine of joint enterprise, because all complicity has the same conduct element under Section 8 of the Accessories and Abettors Act 1861.<sup>26</sup> The conduct element in that Act involves an act of aiding, abetting, counselling, or procuring. In modern terminology, these categories have been reduced to two categories of acts, which are acts of assistance or acts

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<sup>21</sup> *Miller v The Queen* [2016] HCA 30, ¶ 4 (Austl.).

<sup>22</sup> *Id.* at ¶ 34; *R v Britten* [1988] 49 S.A.S.R. 47 (Austl.) (holding that “[t]he judgment, delivered by Sir Robin Cooke, discussed the authorities, including *Johns v The Queen* which lay down the well-established principles governing liability of participants in a joint criminal enterprise. The judgment gives no indication of any intention to break new legal ground or to extend the grounds upon which criminal liability arises in such cases”).

<sup>23</sup> *Miller*, HCA 30 at ¶ 33–36.

<sup>24</sup> *Id.*

<sup>25</sup> *R v Jogee* [2016] UKSC 8, ¶¶ 8, 11 (U.K.).

<sup>26</sup> *Id.* at ¶ 4–6.

of encouragement. Procurement is a third category, but it only applies in unusual innocent agency cases.<sup>27</sup>

Prior to the decision in *R v Jogee*, Baker argued:

[U]ntil the decision in the House of Lords in *R v Powell* changed law, the foresight of possibility rule (i.e. the accessory's foresight of the collateral crime as a possible incident of the underlying joint enterprise), like the probable and natural consequences maxim, was a mere maxim of evidence for inferring that the common purpose extended to the collateral crime .... What was a maxim of evidence has been invoked as a substantive fault element in complicity since 1999, which has had the effect of extending the mental element in common purpose complicity to cover recklessness.... A crime as a foreseen collateral crime of an underlying joint enterprise was merely evidence from which an accessory's intention or conditional intention that the perpetrator perpetrates the collateral crime could be inferred.

<sup>28</sup>

In *R v Jogee*, the Supreme Court held that the law of common purpose complicity took a wrong turn since *Chan Wing-Siu*,<sup>29</sup> equating foresight with intention to assist or encourage and therefore treating foresight as an inevitable yardstick of common purpose.<sup>30</sup> The “maxims of evidence such as foresight of probable and possible consequences, not only mirror substantive criminal law fault elements, but [also] have been blurred with them for centuries.”<sup>31</sup> Thus, the substantive fault doctrine in crimes of

<sup>27</sup> See *Matusевич v The Queen* (1977) 137 CLR 633, ¶ 3 (Austl.); see also David Lanham, *Complicity, Concert and Conspiracy*, 4 CRIM. L.J. 276, 278–79 (1980).

<sup>28</sup> BAKER, *supra* note 3, at xxxiv.

<sup>29</sup> *Chan Wing-Siu v The Queen* [1985] AC 168 (U.K.).

<sup>30</sup> *Jogee*, UKSC at ¶ 87. There are some other voices contending that *Chan Wing-Siu* did not take a wrong turn and that the Supreme Court's judgement in *Jogee* is not strongly convincing. See Richard Buxton, *Jogee: Upheaval in Secondary Liability for Murder*, 5 CRIM. L. REV. 324, 328 (2016); A. P. Simester, *Accessory Liability and Common Unlawful Purposes*, 133 LAW Q. REV. 73, 76 (2017); Findlay Stark, *The Demise of “Parasitic Accessorial Liability”: Substantive Judicial Law Reform, not Common Law Housekeeping*, 75 CAMBRIDGE L.J. 550 (2016); David Ormerod & Karl Laird, *Jogee: Not the End of a Legal Saga but the Start of One?*, 8 CRIM. L. REV. 539, 552 (2016).

<sup>31</sup> Dennis J. Baker, *Foresight in Common Purpose Complicity/Joint Enterprise Complicity: It is a Maxim of Evidence, not a Substantive Fault Element*, (manuscript at 51), <https://ssrn.com/abstract=2507529>; Baker, *supra* note 18, at 243.



recklessness is foresight of a possibility or probability that the prohibited consequence or conduct might occur. In crimes of negligence, the substantive fault element is what a reasonable person would have foreseen as the possible or probable consequence or conduct of the given action. A reasonable person might foresee that the “conduct” he is assisting will be rape, even though the defendant did not intend as much. Added to this mix is the maxim that foresight of a virtual certainty can be used to infer that the virtual certainty was intended.<sup>32</sup> Scholars have also suggested that foresight of a virtual certainty can be a substantive fault doctrine for crimes such as murder,<sup>33</sup> rather than just an evidential standard<sup>34</sup> for inferring direct intention.<sup>35</sup>

The High Court of Australia delivered an insightful judgement on the law of complicity in 1985, where Chief Justice Gibbs held:

The very words used in s.351, and the synonyms which express their meanings - e.g. help, encourage, advise, persuade, induce, bring about by effort - indicate that a particular state of mind is essential before a person can become liable as a secondary party for the commission of an offence, even if the offence is one of strict liability. . . . “It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory’s conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used - even the most colourless ‘abet’ - carry an implication of purposive attitude towards it.”<sup>36</sup>

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<sup>32</sup> *R v Woollin* [1998] 1 AC 82, 96 (HL) (appeal taken from Eng.) (U.K.).

<sup>33</sup> Alan R. White, *Intention, Purpose, Foresight and Desire*, 92 LAW Q. REV. 569, 570 (1976); Glanville Williams, *Oblique Intention*, 46 CAMBRIDGE L.J. 417, 424 (1987).

<sup>34</sup> *R v Matthews* [2003] 2 Crim. App. 461, 476 (U.K.) (suggesting it is mere evidence of direct intention and therefore is not also an alternative substantive fault element for murder).

<sup>35</sup> A P SIMESTER ET AL., SIMESTER AND SULLIVAN’S CRIMINAL LAW: THEORY AND DOCTRINE 143 (6th ed. 2016); Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 655–56 (1916).

<sup>36</sup> *Giorgianni v The Queen* (1985) 156 CLR 473, ¶ 6 (Austl.) (citation omitted). Gibbs C.J. uses the term willful blindness to refer to oblique intention, which does make his judgment appear somewhat confused. He states:

Chief Justice Gibbs held that knowledge can be used to infer intention and that oblique intention can be inferred in cases where the defendant believed, as a matter of virtual certainty, that a circumstance existed and deliberately avoided checking whether it did or would exist.<sup>37</sup> The judgment uses confusing terminology to try to explain that a belief that it is virtually certain that a circumstance exists is the same thing as actual knowledge, because it used the ambiguous term “wilful blindness.”<sup>38</sup> Notwithstanding that issue, it is clear that the case does not allow recklessness as an alternative substantive fault element in complicity.<sup>39</sup> In 2014, Justice Learned Hand’s interpretation of the law, which persuaded Chief Justice Gibbs, was invoked by the Supreme Court of the United States<sup>40</sup> to support its interpretation of the law as requiring intention, even though *Peoni*<sup>41</sup> itself was argued as a natural, probable consequence case. The majority in *Miller* might assert that the decision in *Giorgianni v The Queen* does not apply, since the facts in that case did not involve a joint enterprise.<sup>42</sup> After all, the High Court held that “extended joint enterprise” is a *sui generis* doctrine.<sup>43</sup> The High Court claims the doctrine started to develop in *Johns v The Queen*,<sup>44</sup> but scholars have argued to the contrary that *Johns* supports *R v Jogee*.<sup>45</sup> The majority in *R v Jogee* also held that *Johns* supported its decision.<sup>46</sup> More importantly, there is a line of

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Further it is not correct to say that a person may be convicted of aiding, abetting, counselling or procuring the commission of an offence simply because he has acted recklessly . . . Recklessness, in the sense of not caring whether the facts exist or not, would be relevant only if it too was virtually equivalent to knowledge, in other words only if it amounted to wilful blindness.

*Id.* at ¶ 15.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at ¶ 17.

<sup>39</sup> *Id.* at 15.

<sup>40</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1250 (2014).

<sup>41</sup> “The prosecution’s argument is that, as Peoni put the bills in circulation and knew that Regno would be likely . . . to sell them to another guilty possessor, the possession of the second buyer was a natural consequence of Peoni’s original act, with which he might be charged.” *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

<sup>42</sup> See *Clayton v The Queen* [2006] HCA 58, ¶ 102 (Austl.); *Gillard v The Queen* [2003] HCA 64, ¶ 50 (Austl.).

<sup>43</sup> *Clayton*, HCA 58 at ¶ 20.

<sup>44</sup> *Miller v The Queen* [2016] HCA 30, ¶ 37 (Austl.).

<sup>45</sup> Baker, *supra* note 18, at 218 n.408.

<sup>46</sup> *R v Jogee* [2016] UKSC 8, ¶ 67 (U.K.).

significant Australian authorities involving joint enterprise factual situations that all hold that the mental element in complicity is intention.<sup>47</sup> The general principle announced in these cases is taken from the poaching cases referred to in *R v Jogee*.<sup>48</sup>

The law in Australia before *McAuliffe* is summarised in a passage from *R v Surridge*:

Thus, if two persons agree that one of them shall kill or inflict grievous bodily harm on another party whilst the other stands by and keeps watch or otherwise assists, the latter is guilty of murder as an accomplice if the third party is killed, since he is a principal in the second degree. Again, if they agree that the active party shall commit a crime, and agree also, expressly or tacitly, that if resistance is offered any necessary violence may be used to overcome it, including killing or inflicting grievous bodily harm, then if the active party intentionally kills or inflicts grievous bodily harm which causes death, in order to overcome resistance, the other party is guilty of murder, because the killing was within the common purpose. If the killing amounted only to manslaughter by the active party, the other party is also guilty only of manslaughter.<sup>49</sup>

These cases adopt the general principle that can be traced right back to *Lord Dacre's Case*,<sup>50</sup> although there have been aberrant decisions over the centuries. Unquestionably, the natural, probable consequence doctrine and the foresight of possibility doctrine have both been used as substitutes for a doctrine of intention in some cases over the centuries,<sup>51</sup> but the scholarly research demonstrates that the bulk of cases require intention.<sup>52</sup> This also is buttressed by the supporting arguments, principles, and precedents quoted in the dissenting judgments of Justice Kirby in *Clayton v*

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<sup>47</sup> *R v Johns* (1978) 1 NSWLR 284, 285–86 (Austl.); *R v Doorey* (1970) 3 NSWLR 351, 353 (Austl.); *R v Dunn* (1930) 30 SR (NSW) 210, 214 (Austl.); *R v Kalinowski* (1930) 31 SR (NSW) 377, 380–81 (Austl.); *R v Surridge* (1942) 42 SR (NSW) 278, 282–83 (Austl.); *R v Adams* [1932] VLR 222, 223–24 (Austl.); *R v Grand* (1903) 3 SR (NSW) 216, 218 (Austl.); *R v Dowdle* (1900) 26 VLR 637, 639–41 (Austl.).

<sup>48</sup> *Jogee*, UKSC 8 at ¶ 23.

<sup>49</sup> *R v Surridge* (1942) 42 SR (NSW) 278, 282–83 (Austl.).

<sup>50</sup> *Le Seignior Dacres' Case*, [1535] 72 Eng. Rep. 458.

<sup>51</sup> *Jogee*, UKSC 8 at ¶ 20 (U.K.).

<sup>52</sup> BAKER, *supra* note 3, ch 2.

*The Queen*<sup>53</sup> and Justice Gageler J in *Miller*. However, ever since *McAuliffe*, the Australian law followed the *Chan Wing-Siu* approach, which has now been reconfirmed in *Miller*. Yet the majority in *Miller*<sup>54</sup> misquoted Foster by failing to quote in full the passages from Foster, so the meaning and context of what was being asserted was lost. Foster stated:

If the principal totally and substantially varieth, if being solicited to commit a felony of one kind he wilfully and knowingly committeth a felony of another, he will stand single in that Offence, and the person soliciting will not be involved in his guilt.

...

But if the principal in substance complieth with the temptation, varying only in circumstance of time or place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact, if present a principal. For the substantial, the criminal part of the temptation, be it advice, command, or hire, is complied with. A. commandeth B. to murder C. by poison, B. doth it by sword, or other weapon, or by any other means. A. is accessory to this murder: for the murder of C, was the object principally in his contemplation, and that is effected.

...

So where the principal goeth beyond the terms of the solicitation, if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony. A., upon some affront given by B., ordereth his servant to way-lay him and give him a sound beating; the servant doth so, and B. dieth of this beating. A. is accessory to this murder.<sup>55</sup>

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<sup>53</sup> *Clayton v The Queen* [2006] HCA 58, ¶¶ 31–33 (Austl.).

<sup>54</sup> The majority in *Miller v The Queen* referenced the use of the “natural probable consequence” maxim out of the context in which Foster discussed and applied it. *Miller v The Queen* [2016] HCA 30, ¶ 6 (Austl.). The majority in *R v Jogee* also quote the wrong passages from Foster, but seem not to confuse the evidential maxim from the substantive fault element. *Jogee*, UKSC 8 at ¶ 20–21 (U.K.).

<sup>55</sup> MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY SURRY; AND OF OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 369–70 (3d ed., 1809).

Thereafter, Foster referred to what would now be conceptualised as a conditional intention case and an oblique intention case.<sup>56</sup> When these passages are read in full, it is plain for all to see that they do not adopt objective fault as the substantive fault element. The facts in these cases refer to direct instigation, where the accessory directly or obliquely intends the end crime, and therefore it is irrelevant whether different means are used by the perpetrator to achieve that intended end.<sup>57</sup> These cases also refer to unintended consequences (consequences that are unintended but which might be said to be a natural probable consequence) flowing from acts that the defendant intended to encourage the plaintiff to perpetrate. Foster stated that it is no defense for the defendant to assert that he or she only intended the plaintiff to inflict great bodily harm, if that harm causes the victim's death—since a natural probable consequence of great bodily harm could be death. The probability of death being caused by such is debatable, but that is beside the point, since this is no more than an early maxim for inferring fault and equally an early attempt to justify constructive liability for both the accessory and perpetrator. None of these cases refer to joint enterprise liability. Foster's view on joint enterprises was stated in the *Three Soldiers* case.<sup>58</sup> The *Three Soldiers* case required a common intention with respect to any collateral crime and, like *Lord Dacre's Case*<sup>59</sup> and the later poaching cases from the 1800s onwards,<sup>60</sup> which are accepted as authoritative in *R v Jogee*, it developed and set the fault element for complicity.

However, the majority decision in *Miller* does not accept either of these propositions.<sup>61</sup> That decision holds that fault can be established in complicity cases if the accessory's state of mind involved either intentional association, assistance, or encouragement or reckless association, assistance,

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<sup>56</sup> *Id.* at 370. Foster provides examples of a conditional intention, stating, “*A. adviseth B. to rob C., He doth rob him, and in so doing, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery, killeth him. A. is [an] accessory to this murder.*” Foster provides an example of an oblique intention, stating, “*A. soliciteth B. to burn the house of C., he doth it; and the flames taking hold of the house of D. that likewise is burnt. A. is [an] accessory to the burning of this latter house.*” *Id.*

<sup>57</sup> BAKER, *supra* note 3, at 226–39.

<sup>58</sup> FOSTER, *supra* note 55, at 353 (describing the facts surrounding *The Three Soldiers Case*).

<sup>59</sup> *Le Seignior Dacres' Case*, [1535] 72 Eng. Rep. 458.

<sup>60</sup> See BAKER, *supra* note 3, at 79, 106 (analyzing the poaching cases in Australian law); see also *R v Dunn* (1930) 30 SR (NSW) 210, 214 (Austl.).

<sup>61</sup> See generally *Miller v The Queen* [2016] HCA 30 (Austl.).

or encouragement.<sup>62</sup> The majority in *Miller* misquote Stephen by giving a selection of quotes from Stephen out of context and in isolation from his views on joint enterprise.<sup>63</sup> If they had quoted the Article immediately below the one quoted from Stephen's *Digest of the Criminal Law*, the entire meaning of Stephen's statement in that Article would have been apparent.

Stephen did not adopt an objective fault element for complicity in his own books.<sup>64</sup> The quotations referred to in *Miller* were discussing accessorial liability in cases where the perpetrator was constructively liable for an unintended consequence of an intended act.<sup>65</sup> Beyond that, the quotations in *Miller* simply reiterate the statement of the law from Foster, which was that it is no defence to accessorial murder that the perpetrator used different means from what the accessory intended to be used.<sup>66</sup> Foster, on the very next page of the decision, continues his analysis with reference to transferred malice and the famous case of *Archer and Saunders*.<sup>67</sup> But Stephen's views about joint enterprise liability are not in the passages quoted by the High Court. Instead, Stephen quotes the *Three Soldiers case* and *R v Plummer*<sup>68</sup> under a different Article in his digest concerning common purpose fact scenarios.<sup>69</sup>

However, the majority in *R v. Jogee* removed the need for further discussion, as that decision noted that the objective test has not been a part of the common law for 300 years, if it ever was. Consequently, it is hard to see how that test has any relevance on the current law. Justice Gageler got the gist of this when he stated:

[t]he common law for a long time treated intention as a matter for objective determination: a party was taken to intend a probable consequence of an act which that party did or to which that party agreed. Early commentaries on criminal liability at common law, particularly those of Sir Michael Foster in the middle of the eighteenth century and

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<sup>62</sup> *Id.* at ¶ 84.

<sup>63</sup> *Id.* at ¶ 13–16.

<sup>64</sup> BAKER, *supra* note 3, at 235.

<sup>65</sup> *Miller*, HCA 30 at ¶ 12.

<sup>66</sup> *Id.*

<sup>67</sup> FOSTER, *supra* note 55, at 353.

<sup>68</sup> *R v Plummer*, [1706] 84 Eng. Rep. 1103.

<sup>69</sup> BAKER, *supra* note 3, at 48–49.

Sir James Stephen in the second half of the nineteenth century, need to be read cautiously in that light.<sup>70</sup>

B. *The Court's Reasons Why Extended Joint Enterprise Should be Retained*

The most controversial theory to justify a doctrine of extended joint enterprise invoked in *Miller*<sup>71</sup> is Professor A. P. Simester's "change of normative position" theory, presented in a 2006 paper.<sup>72</sup> According to the change of normative position theory, a participant who voluntarily and intentionally joins a criminal enterprise has changed his normative position and therefore should be made fully liable for any collateral crime he foresaw as a possibility.

However, such an explanation overlooks the difference between individual perpetration liability and extended joint enterprise complicity liability. In an individual perpetration liability situation, such as assault occasioning actual bodily harm, it is the defendant's own act which results in the unintended harm. However, in the context of extended joint enterprise liability, it is another autonomous and independent human being's act (the perpetrator's act) that results in the unintended harm proscribed in the collateral crime. A person who assaults his victim and then causes unintended harm has control, at least, over his own conduct that has caused the unintended harm. But a participant in an extended joint criminal enterprise case has no control over the perpetrator's independent conduct that caused the unintended harm. The participant merely has assisted or encouraged the perpetrator to do the underlying crime, but he has no control over whether the perpetrator will commit other collateral crimes.

The change of normative position theory faces strong challenges in trying to justify constructive liability in the context of perpetration liability. First of all, it is unclear what kind of normative position it is to be changed by committing a crime. Secondly, it is ambiguous how the position is changed. Some scholars observe that the intentionality of the defendant must lead to the changes in the normative position of the perpetrator.<sup>73</sup> However,

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<sup>70</sup> *Miller*, HCA 30 at ¶ 84 (Justice Gageler dissenting).

<sup>71</sup> *Id.* at ¶ 33. The alternative view, proposed by Professor Simester, is that joint criminal enterprise is a *sui generis* form of secondary participation in a crime and not merely a sub-species of accessory liability. See generally Simester, *supra* note 10.

<sup>72</sup> See generally Simester, *supra* note 10.

<sup>73</sup> Andrew Ashworth, *A Change of Normative Position: Determining the Contours of*

based on the notion of intentionality, the theory encounters problems when applied “to impulsive conduct or acts done in temper.”<sup>74</sup> Even if its inapplicability in such cases is ignored, the advocates of this theory do not clearly state how the normative position has been changed in other circumstances, because an intention to commit a specific crime does not indicate an intention to bring *any* harm of *any* description. There is a big moral difference between a person facing the consequences of his own personal acts and facing the consequences of the autonomous and independent conduct of another.<sup>75</sup>

The change of normative position theory cannot provide a convincing justification for constructive liability in the context of individual perpetration liability; it can do this no better in the context of extended joint criminal enterprise liability, where the defendant will be held liable for the conduct of the independent and autonomous perpetrator over which the defendant has no control at all. Professor John Gardner, the original author of the change of normative position theory, has not only abandoned his original assertions on the theory but has also repudiated any suggestion that his aim was to present a positive justification for constructive liability. Gardner writes:

I suggested a possible way of thinking about constructive crimes. I said that by committing the lesser crime one “changes one’s normative position” such that a certain outcome that would not otherwise have counted . . . now counts against one, and adds to one’s crime. . . . I regret that my remark about “changing one’s normative position” was taken . . . to be an attempt at offering a “substantive moral justification for any constructive criminal liability. . . . I only meant to analyse the law’s own moral outlook. I meant . . . to set out the thing that needs to be justified rather than the justification.”<sup>76</sup>

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*Culpability in Criminal Law*, 11 NEW CRIM. L. REV. 232, 243 (2008); Jeremy Horder, *A Critique of the Correspondence Principle in Criminal Law*, 1995 CRIM. L. REV. 759, 763–65 (1995).

<sup>74</sup> Ashworth, *supra* note 73, at 244.

<sup>75</sup> See BAKER, *supra* note 3, at 82.

<sup>76</sup> JOHN GARDNER, OFFENCES AND DEFENCES 246–47 (2007).



Simester and others<sup>77</sup> have seized Gardner's analysis of the law's moral outlook concerning constructive liability as a substantive justification for not only permitting constructive liability, but also for dispensing with the conduct element in complicity, which should be either assistance or encouragement. The only check such a position puts on liability by mere association is foresight. Hence, association plus foresight is sufficient to convict a person of murder in Australia.<sup>78</sup> These scholars have misunderstood Gardner and have put forward a vacuous assertion as a positive justification for the extended joint enterprise doctrine. This Article submits that the arguments by Baker and also more generally by Gardner<sup>79</sup> and Professor Andrew Ashworth<sup>80</sup> are far more convincing. It is difficult to see how the normative position explanation can provide a substantive justification for the unjust form of criminalization that this extended doctrine of joint enterprise liability permits.

In addition to using the unsound justification of change of normative position theory, the majority judge in *Miller* gives conservative policy reasons for not adopting the legal interpretation of the law as presented by the Supreme Court in *R v Jogee*.<sup>81</sup> In that case, the law was interpreted by drawing on the existing precedents, not policy opinions that are not underwritten with solid empirical research.<sup>82</sup> The lack of empirical research to support these bold policy claims is just one reason that those policy justifications should not have been invoked to interpret the law. In extreme cases, policy might compel a court to reduce the scope of the criminal law, but it should never give a court permission to extend the criminal law. It is an ancient common law principle that doubtful law be interpreted in favour of the defendant. Moreover, neither precedent nor policy empowers a court to create new common law doctrines of criminal liability.<sup>83</sup>

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<sup>77</sup> Horder & Hughes, *supra* note 10, at 398.

<sup>78</sup> It has been suggested that joint enterprise liability "allows a form of 'guilt by association' or 'guilt by simple presence without more.' Nothing in *McAuliffe* supports either conclusion . . . the secondary party must continue to participate in the agreed criminal enterprise." *Miller v The Queen* [2016] HCA 30, ¶ 45 (Austl.).

<sup>79</sup> GARDNER, *supra* note 63.

<sup>80</sup> Ashworth, *supra* note 73.

<sup>81</sup> *Miller*, HCA 30 at ¶ 145–47

<sup>82</sup> *Id.*

<sup>83</sup> *R v Rimmington* [2006] 1 AC 459 (U.K.). It is an "ancient principle that in case of doubt a criminal statute is to be "strictly construed" in favour of the defendant." ALAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW

The majority judgment in *Miller* adopted the policy considerations in *R v Powell*,<sup>84</sup> asserting that the goal of crime control provides good reasons for maintaining the doctrine of extended joint enterprise.<sup>85</sup> However, adopting the extended joint enterprise doctrine produces extreme injustice and unfairness, as a defendant would be labelled and punished in the same way as the perpetrator when the defendant's wrongdoing should be labelled and punished as a distinct crime. Under the extended joint enterprise doctrine, such a person would not be deterred from killing because he did not perpetrate the *actus reus* of the collateral crime.<sup>86</sup> Punishing a participant in a joint enterprise for any collateral crime he foresaw as a possibility may serve the purpose of general deterrence if it gives the general public a signal that joining a criminal joint enterprise is something they should avoid. But such a deterrence goal is already targeted by punishing the defendant for participating in the underlying crime.

The policy arguments in *Miller*, which were given by the High Court to defend its decision not to reinterpret the law to reconcile it with centuries of common law authorities and contemporary standards of justice, show that The High Court misunderstood its role. The High Court is not a legislature, and therefore its role is not to look at the wider policy arguments that might justify legislative reform. Rather its job is to interpret the specific legal doctrines before it by drawing on precedents. For an example of one of its wide policy justifications, The High Court stated:

Importantly, in *Clayton* it was said that no change should be undertaken to the law of extended joint criminal enterprise without examining the whole of the law with respect to secondary liability for crime. As was observed, it would be undesirable to alter the doctrine as it applies to the law of homicide, which is its principal area of application, without consideration of whether the common law of murder should be amended to distinguish between killing with intent to kill and killing with intent to cause really serious injury.<sup>87</sup>

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14 (2014).

<sup>84</sup> *R v Powell* [1999] 1 AC 1, 19–20 (HL) (U.K.).

<sup>85</sup> *Miller v The Queen* [2016] HCA 30, ¶ 145 (Austl.).

<sup>86</sup> See generally PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH (2008).

<sup>87</sup> *Miller*, HCA 30 at ¶ 40.

This statement is followed by three more paragraphs stating that the entire law would have to be considered and that changes in the law should not be made without reforming the entire law of complicity.<sup>88</sup> It refers to the sort of policy and big picture arguments that are in the remit of law commissions and parliaments. Some of the other policy “assertions” stated in *Miller* for not overruling *McAuliffe* included that it would cause great inconvenience, since many wrongly convicted parties might appeal, and there wasn’t any substantive injustice in the current law.<sup>89</sup> These sorts of wider policy considerations are not the business of the courts. “Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.”<sup>90</sup>

The High Court was not bound to follow the Supreme Court and Privy Council decisions in *R v Jogee* and *Ruddock*, but those decisions should have been much more persuasive than they were. This is especially true, considering the compelling academic research on the point and taking into account that the Supreme Court of the United States recently noted how the early English authorities mandated that the *mens rea* for complicity liability is intention.<sup>91</sup> It is also incongruous that The High Court instead decided to apply the decision in *R v Powell*, which was overruled for being an erroneous decision.<sup>92</sup> Not only did The High Court pay no attention to the common law as it existed before *Chan Wing-Siu*, it also relied on a very narrow selection of academic works and terse case commentaries.<sup>93</sup> Perhaps the most controversial argument invoked was Simester’s “change of normative position” theory.<sup>94</sup> Justice Keane was also in the majority but gave a separate judgment, the controversial and flawed reasoning of which will be discussed in the next section of this article.

The High Court failed to provide a precedential justification, let alone a positive normative justification, for its extension of the criminal law in *Miller*. Specifically, it did not provide a justification that is supported by

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<sup>88</sup> *Id.* at ¶ 41 – 43.

<sup>89</sup> *Id.* “The submissions are in abstract form and do not identify decided cases in which it can be seen that extended joint criminal enterprise liability has occasioned injustice.” *Id.* at ¶ 39.

<sup>90</sup> FRANCIS BACON, *ESSAYS: MORAL, ECONOMICAL, AND POLITICAL* 251 (1798).

<sup>91</sup> *See* *Rosemond v. United States*, 134 S. Ct. 1240, 1255 (2014).

<sup>92</sup> *Miller*, HCA 30 at ¶ 40. “Moreover, most of the arguments in favour of change had been thoroughly considered and rejected by the House of Lords in *Powell*.” *Id.*

<sup>93</sup> *Id.* at ¶ 132–34.

<sup>94</sup> *Id.* at ¶ 131.

the common law precedents or by any other principles of justice. In the older Australian authorities, there is no precedent that replaces the assistance and encouragement requirement for complicity liability with a conduct element that requires nothing more than association.<sup>95</sup> These same authorities also support interpreting the mental element in complicity as limiting liability to intentional assistance and encouragement.<sup>96</sup> The High Court invoked the change of normative position theory to defend a doctrine of extended joint enterprise that it acknowledged was created by judicial fiat in 1995.<sup>97</sup> Consequently, the High Court should have developed a positive normative or precedential justification to show the validity and justice of adopting this approach.

The interpretative methodology adopted by The High Court in *Miller* was unorthodox. In the 21<sup>st</sup> century, it is unexpected that Supreme Court decisions from the United Kingdom and the United States, drawing on centuries of common law precedents, are given no persuasive influence. The appeal was from the common law jurisdiction of South Australia.<sup>98</sup> South Australia is a common law jurisdiction where, until 1986, an appeal could be made to the Privy Council.<sup>99</sup> When appeals were made to the Privy Council, the Board of the Council drew on the English common law authorities to resolve legal issues. There have been no appeals to the Privy Council from Australia since 1980 and the expense of appealing to London has been such a deterrent that there have not been any criminal law appeals since the 1964 appeal in *Parker v The Queen*.

Nevertheless, *Parker* used the common law method of drawing on English precedents to contextualise and historicize the law as a part of the

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<sup>95</sup> See generally *R v Johns* (1978) 1 NSWLR 284 (Austl.); *R v Doorey* (1970) 3 NSWLR 351 (Austl.); *R v Surridge* (1942) 42 SR (NSW) 278 (Austl.); *R v Dunn* (1930) 30 SR (NSW) 210 (Austl.); *R v Kalinowski* (1930) 31 SR (NSW) 377 (Austl.); *R v Grand* (1903) 3 SR (NSW) 216 (Austl.); *R v Adams* [1932] VLR 222 (Austl.); *R v Dowdle* (1900) 26 VLR 637 (Austl.).

<sup>96</sup> See generally BAKER, *supra* note 3.

<sup>97</sup> See, e.g., *McAuliffe v The Queen* (1995) 183 ALJR 621 (Austl.).

<sup>98</sup> See generally KENNETH J ARENSON ET AL., AUSTRALIAN CRIMINAL LAW IN THE COMMON LAW JURISDICTIONS: CASES AND MATERIALS (4th ed., 2014).

<sup>99</sup> *The Privy Council (Appeals from the High Court) Act 1975* (Cth) (Austl.). The act abolished the right to appeal from the High Court to the Privy Council in all matters of state jurisdiction, but it remained possible for appellants to choose between appealing to the High Court or the Privy Council on state matters until 1986. *Australia Act 1986* (Cth) s 11 (Austl.).

interpretive approach.<sup>100</sup> In that case the Privy Council drew on ancient English authorities to build a narrative for interpreting the law within the common law context in which it evolved.<sup>101</sup> Moreover, this Article has submitted that many watertight authorities from Australia's common law jurisdictions convincingly underwrite the reasoning adopted by the majorities in *R v Jogee* and *Ruddock*.<sup>102</sup> The same precedents convincingly undermine the majority decision of The High Court in *Miller*.

## II. PERPETRATION VS. ASSISTING OR ENCOURAGING

In *Miller*, Justice Keane starts his separate judgment by suggesting that intention is required for standard complicity and that “the criminal responsibility of a participant in a joint criminal enterprise is grounded in the authorisation of a crime which is incidental to the enterprise.”<sup>103</sup> But Justice Keane does not explain how one can recklessly authorize. One cannot accidentally, negligently, or recklessly authorize, even if one might negligently or recklessly send a message of encouragement. Authorization has to be intentional. If you authorize something then the concept of “authorize” suggests a desire or purpose that it happen.<sup>104</sup> To authorize is to approve or permit, suggesting that the defendant gives his permission—this the defendant cannot do accidentally or recklessly, since that would not be any permission at all. It would be a putative permission based on the perpetrator's mistaken belief that the defendant is genuinely authorizing or permitting the perpetrator's action. Justice Keane then asserts that Australian law recognises that criminal liability should be proportionate to individual culpability, but that this can be achieved by making a person who recklessly associates with a murderer liable for a murder perpetrated by that murderer:

In particular, where two or more persons agree to commit a crime together knowing that its execution includes the risk of the commission of another crime in the course of its

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<sup>100</sup> *Parker v The Queen* (1964) 111 CLR 665, ¶ 43–45 (Austl.).

<sup>101</sup> *Id.* at ¶ 46.

<sup>102</sup> See generally *R v Doorey* (1970) 3 NSWLR 351 (Austl.); *R v Surridge* (1942) 42 SR (NSW) 278 (Austl.); *R v Dunn* (1930) 30 SR (NSW) 210 (Austl.); *R v Kalinowski* (1930) 31 SR (NSW) 377 (Austl.); *R v Grand* (1903) 3 SR (NSW) 216 (Austl.); *R v Adams* [1932] VLR 222 (Austl.); *R v Dowdle* (1900) 26 VLR 637 (Austl.).

<sup>103</sup> *Miller v The Queen* [2016] HCA 30, ¶ 136 (Austl.).

<sup>104</sup> BAKER, *supra* note 3.

execution, there is no obvious reason, in terms of individual moral culpability, why the person who commits the *actus reus* should bear primary criminal responsibility, as between himself or herself and the other participants to the joint criminal enterprise, for the incidental crime. Because of the fact of the agreement to carry out jointly the criminal enterprise, the person who commits the *actus reus* of the incidental crime is necessarily acting as the instrument of the other participants to deal with the foreseen exigencies of carrying their enterprise into effect.<sup>105</sup>

Justice Keane then goes on to expound some sort of agency theory:

Where parties commit to a joint criminal enterprise, each participant becomes, by reason of that commitment, both the principal and the agent of the other participants: for the purposes of that enterprise they are partners in crime. Each participant also necessarily authorises those acts which he or she foresees as possible incidents of carrying out the enterprise in which he or she has agreed, and continues, to participate.<sup>106</sup>

It seems that Justice Keane was confused about the difference between moral culpability and legal culpability and the difference between perpetration and assistance or encouragement. He also seems to conflate joint perpetration with assistance or encouragement.<sup>107</sup> Moreover, Justice Keane seems to misunderstand the difference between innocent agency and perpetration.<sup>108</sup> Those who participate in criminal joint enterprises are not mere instruments in the hands of each other—they are not innocent agents but fully autonomous wrongdoers. They are self-governing and self-determining agents. Liberal states do not adhere to the notion of collective agency.<sup>109</sup> Justice Keane's reference to organised crime is also unhelpful, as it involves many conceptual aspects and distinctions that make it very different from standard complicity. Most jurisdictions have enacted special

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<sup>105</sup> *Miller*, HCA 30 at ¶ 138.

<sup>106</sup> *Id.* at ¶ 139.

<sup>107</sup> *Id.* at ¶ 135–42.

<sup>108</sup> Justice Keane relies on agency or vicarious liability theory and fails to see how it differs from complicity liability. *Miller*, HCA 30 at ¶ 140–41.

<sup>109</sup> George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES L. 163, 168 (2004); Jeff McMahan, *Collective Crime and Collective Punishment*, 27 CRIM. JUST. ETHICS 4, 5 (2008).

provisions to tackle organized crime,<sup>110</sup> and it is unhelpful to discuss it in the context of complicity; such a discussion is not relevant or helpful for interpreting the law of complicity, because it is a conceptually distinct form of wrongdoing.

By and large joint enterprises do not involve organised crime, but usually involve a couple of criminals engaging in a robbery or even some lawful activity. There are a couple of high profile cases involving gangs of youths where an escalation of violence has resulted in a murder by one of the gang, but such cases are not the norm.

In the earlier High Court case of *Miller v The Queen*,<sup>111</sup> D drove P to locations, such as parks, so he could have sexual relations with prostitutes. P started to kill the prostitutes and D with this knowledge continued to assist him by driving him to the locations. D knew that P had started to randomly kill some of the women, but continued to help. In this case, P was hardly an instrument of D, nor was D a joint perpetrator. The enterprise was lawful since it involved consensual sexual relations between two adults. P did not intend to kill on many occasions, but merely intended to have consensual sex. It could be inferred that D conditionally intended to assist P to kill whenever the compulsion struck P, since D had full knowledge of what was taking place but chose to continue to assist.<sup>112</sup> To argue that P was merely D's instrument in such case is erroneous.<sup>113</sup>

An accessory is deemed equally liable as a principal when the perpetrator intended to kill (or perpetrate whatever crime was committed) using his own hands, while the accessory did not intend to kill and did not in fact cause the death, but merely intended that the perpetrator intentionally kill (or in Australia was reckless as to whether the perpetrator might kill) and intentionally assisted or encouraged the perpetrator. The law deems that the defendant intended to kill and that he killed with his own hands; it is on that fiction that he is held equally liable for the crime committed by the actual perpetrator. These deeming provisions are based on a legal fiction that the defendant personally killed and personally intended to kill, when

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<sup>110</sup> Liz Campbell, *The Offence of Participating in Activities of Organised Crime Group: Section 45 of the Serious Crime Act 2015*, 10 ARCHBOLD REV. 6, 6 (2015); Anna Sergi, *Organised Crime in Criminal Law: Conspiracy and Membership Offences in Italian, English and International Frameworks*, 25 KING'S L.J. 185, 185 (2014).

<sup>111</sup> *Miller v The Queen* (1980) 32 ALR 321, 325–26 (Austl.).

<sup>112</sup> See *supra* Baker, note 3.

<sup>113</sup> *Miller*, 32 ALR at 321.

that is not the case. Justice Keane seems to assert that this means no moral distinction should be drawn between the parties to a crime. For Justice Keane, they should all be deemed principals at all stages of the inquiry.

A. *Assisting or Encouraging does not Cause the Prohibited Harm in the Target Crime*

Justice Keane's interpretation, however, is not true. A person who assists or encourages the commission of a crime is an assister or encourager of that the crime, not a perpetrator of that crime. This begs the question, why is participation different from perpetration? The core difference between participation and perpetration is that the latter causes the prohibited criminal harm while the former merely contributes to the prohibited harm by assisting or encouraging the independent and autonomous perpetrator. The accessory is one step removed from the prohibited harm, and the perpetrator's free, deliberate, and autonomous perpetration has broken any chain of causation between the accessory and the prohibited harm. The canonical statement of the difference between perpetration and participation is provided by Professor Glanville Williams. Williams states:

[t]he *novus actus* doctrine is at the root of the law of complicity . . . Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed. This is the irrefragable argument for recognising the *novus actus* principle as one of the bases of our criminal law.<sup>114</sup>

The House of Lords in the leading case *R v Kennedy (No.2)* held:

[t]he criminal law generally assumes the existence of free will . . . . But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act . . . . Thus D is not to be treated as causing V to act in a certain way if V makes a

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<sup>114</sup> Williams, *supra* note 15, at 398.



voluntary and informed decision to act in that way rather than another.<sup>115</sup>

Hart and Honoré also came to a similar conclusion in their famous treatise on causation.<sup>116</sup> The rule that free, voluntary, and informed human actions can break the chain of causation has been confirmed as a principle that is “fundamental and not controversial.”<sup>117</sup> In the context of complicity, the perpetrator, and only the perpetrator, directly causes the end criminal harm; he causes it directly through his personal actions. Moreover, the free, informed, and autonomous action theory deals with fully culpable agents, isolating them from the special case of innocent agents. The assister’s (or encourager’s) action is in the background and has no direct influence on the end criminal harm—the criminal harm is contingent on the perpetrator’s choice to use the assistance supplied or to listen to the encouragement that is proffered.

To illustrate: the defendant supplies the perpetrator with bullets and the perpetrator puts these in his gun and uses these particular bullets to kill the victim.<sup>118</sup> The defendant has assisted the perpetrator, but the defendant has not caused the perpetrator to load the gun and kill the victim.<sup>119</sup> The perpetrator has caused himself to be armed and caused himself to aim at the human target and pull the trigger.<sup>120</sup> Provided the perpetrator was not insane or under duress or deception, he or she made a fully informed and autonomous choice to kill another human being, independent of the defendant’s actions.

According to Gardner, “there is no way of contributing to any result, directly or indirectly, except causally. That is the only kind of contribution to results that exists, and since the only kind of complicity is complicity by contribution to results, complicity is always a kind of causal wrong.”<sup>121</sup>

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<sup>115</sup> *R v Kennedy (No.2)* [2008] 1 A.C. 269 ¶ 14 (U.K.).

<sup>116</sup> Hart and Honoré wrote: “The 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.” H. L. A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 326 (2d ed., 2002) (footnote omitted).

<sup>117</sup> See e.g., *R v Gnango* [2012] 1 AC 827 ¶ 131 (U.K.); *Kennedy (No.2)*, [2008] 1 AC at ¶ 14.

<sup>118</sup> BAKER, *supra* note 3, 260–61.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Gardner, *supra* note 14, at 443.

Gardner argues that accessories cause through the conduct of the perpetrator,<sup>122</sup> but what Gardner seems to call indirect causation cannot really be conceptualised as causation. People who have argued that accessories can “cause” use a word “in a special or technical sense that need not conform to our ordinary use of the word, while still trading on what we normally mean by it.”<sup>123</sup> Causation, as used by Gardner in analyzing complicity liability, is not the central type of causal relationship referred to in perpetration liability; instead, it is understood in a more tenuous sense.<sup>124</sup> Professor Michael Moore also argues that an intervening act does not actually break the chain of causation, but it is construed to be so because some reasons of legal policy make it justified that an intervening act does break the chain of causation.<sup>125</sup> Professor G.R. Sullivan holds a very similar viewpoint to that of Moore.<sup>126</sup> But this argument is unconvincing and indefensible as long as perpetration liability is still the core of criminal liability. It has long been recognized that one’s conduct is deemed to be an autonomous and free choice if it is not done under deception or coercion.<sup>127</sup> Free, voluntary human actions cannot be caused, even if it could be said in a sense to be heavily influenced by another,<sup>128</sup> because human beings are totally sovereign over their own actions and human actions are treated differently from natural events.<sup>129</sup>

It is the thrust of this Article that causation rules are understood as they currently stand in the paradigm criminal liability form, which is perpetration liability; and causation’s two prongs in that form are but-for cause and legal cause. Therefore, the one who has caused the prohibited harm in the crime is in fact the perpetrator rather than the assister or encourager, if the two prongs of causation rules are applied. Assistance or

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<sup>122</sup> *Id.*

<sup>123</sup> Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25, 29 (1996).

<sup>124</sup> Hart and Honoré, *supra* note 120, at 43.

<sup>125</sup> MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 291–92 (2009).

<sup>126</sup> G. R. Sullivan, *Doing Without Complicity*, 4 J. COMMONWEALTH CRIM. L. 199, 221 (2012).

<sup>127</sup> See e.g., *R v Gnango* [2012] 1 AC 827 ¶ 131 (U.K.); *R v Kennedy (No.2)* [2008] 1 AC 269, ¶ 14 (U.K.); *R v Latif* [1996] 1 WLR 104 ¶ 61 (U.K.).

<sup>128</sup> Williams, *supra* note 15, at 392.

<sup>129</sup> Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 330 (1985).

encouragement in many cases will not be the but-for cause of the prohibited harm in the target crime,<sup>130</sup> let alone the legal cause of that harm. This is because, in many cases, the perpetrator would commit the target crime anyway, even if he did not get assistance or encouragement from the accessory. In some cases, the assistance or encouragement is essential and indispensable. For example, “the brilliant scientist . . . [D] purposely provides . . . [P] with the means to blow up the city of Los Angeles, which outcome would have been well beyond . . . [P’s or any ordinary person’s] expertise or capacity . . . [but for D’s] assistance.”<sup>131</sup> It is plausible to say that, but for the accessory’s help, the perpetrator would not have committed the crime as he did. However, it would be problematic to say that the defendant’s assistance is the legal cause of the eventual harm, because the perpetrator’s bombing of the city is a free, voluntary, and informed human intervention and can therefore break the chain of causation between the defendant’s facilitation and the resulting death. “The reason why complicity emerges as a separate ground of liability is that causation doctrine cannot generally deal satisfactorily with results that take the form of another person’s voluntary action.”<sup>132</sup> If causation is understood as it stands in perpetration liability, then there is no causation between an accessory’s assisting or encouraging and the prohibited harm in the target crime.

B. *Assisting or Encouraging as a Remote Harm*

Perpetration (depending on the crime) almost always involves direct criminal harm-doing. In a case of murder, it involves the victim’s life being deprived. In a case of rape, it involves a victim’s sexual autonomy being violated. In a case of robbery, it involves a victim suffering injury and losing property. However, assisting or encouraging almost never involves any direct criminal harm-doing. It is possible to think of examples where the encouragement or assistance is criminal in itself,<sup>133</sup> but in most cases the

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<sup>130</sup> *Id.* at 360.

<sup>131</sup> Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 440 (2008).

<sup>132</sup> Kadish, *supra* note 133, at 405.

<sup>133</sup> For example, a rapist is encouraged to rape in a gang-rape situation because he sees his fellow gang members first raping the victim. Technically, each gang rapist could be liable for multiple counts of rape, including his own personal act of rape. Illegal assistance might result from running a pirate website such as Putlocker to facilitate copyright theft. *See also* The Fraud Act 2006 c. 35, §§ 6–7 (U.K.). These wrongs are crimes *per se* and are treated as such.

encouragement or assistance is not harmful or criminal. The harmfulness of assisting or encouraging is contingent on the perpetrator's independent and autonomous choice to use that assistance or encouragement to perpetrate the target crime.

The defendant's encouragement or assistance, even when substantial and culpable, is less dangerous than perpetration, because it is contingent on another person being willing to follow through. No empirical study has ever been conducted on cases of inchoate assistance and encouragement, but one would suspect there are many cases where assistance or encouragement is given without the perpetrator acting on it. If this can be proven empirically, then that would be evidence of the fact that harmless conduct (remote harms) that are only harmful by slightly increasing the risk of a perpetrator's success are less dangerous and wrongful than acts of direct perpetration.

This Article's thesis is buttressed by the remote harms theory as sketched above. There are several kinds of situations involving remote harms such as abstract endangerment, intervening choices, and accumulative harms.<sup>134</sup> For present purposes the focus is on the second category of remote harm, where the harm occurs when another person's innocuous conduct becomes remotely harmful because it helps another or encourages another to commit a crime. The crux of the matter is that the accessory's participation is a remote harm in that its harmfulness and wrongfulness is contingent on the perpetrator making an independent choice to commit the target crime. The harmfulness of perpetration is certain because it initiates the prohibited harm; the harmfulness of participation is not certain in itself, but is contingent on the perpetrator's choice. Therefore, participation is less harmful than perpetration.

Another aspect of this is that remote contributions are far less dangerous than direct contributions. As moral agents, people have the capacity to choose to violate the law or not.<sup>135</sup> The perpetrator is made fully liable because he unjustifiably and inexcusably chose to kill the victim or chose to perpetrate some other criminal harm. The perpetrator is more

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<sup>134</sup> See Andrew von Hirsch, *Extending the Harm Principle: 'Remote' Harms and Fair Imputation*, in HARM AND CULPABILITY 259, 263–65 (A. P. Simester & A. T. H. Smith eds., 2003); Dennis J. Baker, *The Moral Limits of Criminalizing Remote Harms*, 10 NEW CRIM. L. REV. 370, 372 (2007).

<sup>135</sup> See LARRY ALEXANDER ET AL., CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 196 (2009).

dangerous not only because he has the will to kill, whereas the assister or encourager only has the nerve and will to assist or encourage, but also because the perpetrator has direct control over the end harm. It is the perpetrator who controls and decides whether the end harm will be brought about, not the remote harmer (assister or encourager). Accessories have no control over whether their assistance will be used or whether their encouragement will be adhered to, unless they use duress or fraud, which would lead to direct liability through the innocent or semi-innocent agent doctrines.<sup>136</sup> The accessory leaves the act in the hands of another autonomous agent and is one step removed from the direct control that is required to bring about the prohibited harm in the target crime. The accessory leaves it all to chance. Accessories have only increased the risk that the target crime might be committed by providing assistance or encouragement. The end result is fully dependent on the perpetrator and what he decides to do when the moment for perpetration comes.

People have control over their choices and therefore are subject to liability and punishment for the harms they choose to produce.<sup>137</sup> A person should not be made fully liable for what he cannot control.<sup>138</sup> The law should be very hesitant to punish a person for conduct that is not within his control. The accessory only controls his act of assisting or encouraging and he should be punished for that wrongdoing only. The decision of whether the target crime will be committed is in the hands of the perpetrator. The

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<sup>136</sup> Even these sorts of innocent agency cases can be dealt with through an independent offense. The Serious Crime Act 2007 states:

- (1) A person commits an offence if—
  - (a) he does an act capable of encouraging or assisting the commission of an offence; and
  - (b) he intends to encourage or assist its commission.
- (2) But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act.

Serious Crime Act 2007, c. 27, § 44(1)(a-b) (U.K.). Section 47 of that same Act states: “In proving for the purposes of this section whether an act is one which, if done, would amount to the commission of an offence . . . [the defendant’s] state of mind was such that, were he to do it, it would be done with that fault.” *Id.* at § 47(5)(a)(iii) (U.K.).

<sup>137</sup> See DOUGLAS HUSAK, *THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS* 34 (2010); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 211–18 (2012).

<sup>138</sup> See R.A. Duff, *Who is Responsible, for What, to Whom?*, 2 OHIO ST. J. CRIM. L. 441, 452–54 (2005).

assister or encourager has no control over the perpetrator, let alone the occurrence of the prohibited harm in the target crime. Furthermore, the assister or encourager is likely a person who does not have the fortitude or resolve to perpetrate the *actus reus* of the crime himself. This kind of person is not as dangerous as a person who has the fortitude and resolve to directly perpetrate the crime.

There is a moral difference between intending to assist or encourage and intending to perpetrate. If a given defendant intends to kill a victim and picks up a knife and pushes it through the victim's heart, that defendant is in a very different "state of evilness of mind" (motivation to directly kill a human being up front and live) than another defendant who has merely supplied the knife intentionally, but is a person who would never himself to do the killing, as he does not have the evilness of mind, nerve, or psychology to directly kill using his own hands and is only able to intend such an act to be done through the autonomous free acts of another. It is easier to imagine killing someone than to actually do it. The person who merely assisted or encouraged another to kill might be one who could never kill if he had to use his own hands to do the dirty work. If not, and he kills, then he should be punished for his personal wrongdoing as a murderer. But so long as he remains a remote assister or encourager there is no case for deeming him a murderer.

### III. REJECTING THE DOCTRINE OF EXTENDED JOINT ENTERPRISE

Treating an assister or encourager fully liable in the same way as the perpetrator for the crime assisted or encouraged goes against the principles of fair labelling<sup>139</sup> and proportionate punishment.<sup>140</sup> A person who has assisted rape is not a rapist because he does not penetrate the victim, and assisting rape is one step removed from the penetration. Therefore, punishing an assister of rape the same as the rapist does not reflect the nature and degree of the assister's wrongdoing.

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<sup>139</sup> Barry Mitchell, *Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling*, 64 MOD. L. REV. 393, 398 (2001).

<sup>140</sup> ANDREW VON HIRSCH, CENSURE AND SANCTIONS 29 (1993); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, in 16 CRIME AND JUSTICE: A REVIEW OF RESEARCH 55, 69 (Michael Tonry ed., 1992); ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 131–32 (2005); Douglas Husak, *Desert, Proportionality, and the Seriousness of Drug Offences in FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH* 187, 189 (Andrew Ashworth & Martin Wasik eds., 1998).

The doctrine of extended joint enterprise liability is even worse. It makes a defendant fully liable as the perpetrator for the collateral crime, when the defendant did not perpetrate, assist or encourage the perpetration, or even intend such a crime to be committed. The full criminal liability for the collateral crime is based on a legal fiction that, by participating in the underlying crime, he has provided assistance or encouragement to the collateral crime automatically. The defendant's participation in the underlying crime is regarded as assisting or encouraging the collateral crime and this fictitiously constructed assistance or encouragement is then construed as sufficient *actus reus* of the collateral crime. Moreover, the defendant's mere foresight that the collateral crime might be committed is construed as an intention to assist or encourage with knowledge of all the essential matters of the collateral crime. This fictitiously constructed *mens rea* is further construed as the required *mens rea* for the collateral crime. The defendant is therefore labelled and punished much more than his personal harm-doing and personal culpability would warrant.

Retributive justice and utilitarianism require that the crime label and punishment should reflect the defendant's past harm-doing and personal culpability.<sup>141</sup> Criminal law has an expressive function,<sup>142</sup> communicating the society's disapproval and condemnation of certain conduct to the defendant, the victims and their families, legal professionals as well as the general public. Therefore, labelling and punishing the defendant in accordance with his personal wrong-doing and individual culpability is necessary if this communicative function is to be achieved. It matters that the defendant is not just convicted and punished but also that he is labelled and punished to the degree he deserves. Obedience to and respect of the criminal law is better achieved when people accept and approve of the law than when they draw only on their own moral convictions.

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<sup>141</sup> See generally Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959 (2000) (analyzing the theory of retribution in the criminal justice system); Michael Tonry, *Can Twenty-First Century Punishment Policies be Justified in Principle?*, in RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 3 (Michael Tonry ed., 2011) (discussing proportionality in the every evolving eye of punishment).

<sup>142</sup> Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship between The Moral Limits of Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 161 (2001); see generally Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207 (2004) (discussing the use of the criminal system as a last resort only after addressing the underlying matter that was expressed through the criminal act).

Based on the abovementioned analysis, the wrongdoing of assisting or encouraging is less than that of perpetrating, so even if the levels of culpability for assisting or encouraging and perpetrating are not substantially separate (for instance both defendant and perpetrator intend that the victim should be killed), the crime label and punishment should still be less for assisting or encouraging. Labelling and punishing assisters or encouragers in the same way as perpetrators does not reflect their personal wrong-doing, which is assisting or encouraging rather than perpetrating, and their individual culpability, which is not the same as the *mens rea* in the target crime.

A person who assisted or encouraged another to murder, for example, is not a murderer in fact and therefore should not be labelled and punished as a murderer. Additionally, his intention to assist or encourage the perpetrator's commission of murder is not the same as intending to kill or cause great bodily harm by his own hands. Labelling and punishing assisters or encouragers in the same way as the perpetrator attaches more stigma than their wrong-doing deserves. Such unfairness and injustice is aggravated in the context of extended joint enterprise liability for a person who, although only assisting or encouraging an underlying crime, is made fully liable as a perpetrator for the collateral crime, which he did not perpetrate, assist or encourage its perpetration, or intend to be committed. Assisting or encouraging a crime is less harmful than perpetrating the crime, and risking another's commission of a crime is less than assisting or encouraging the commission of that crime; therefore, risking another's perpetration of an offense is far less than perpetrating that offense.

It is now clear that Lords Steyn and Mustill (in *R v Powell*) were mistaken in thinking they were bound to apply the evidential maxim of foresight of possibility as a substantive fault element in complicity (i.e., they were mistaken to think that Sir Robin Cooke's interpretation of the law as stated in *Chan Wing-Siu* was right and that they were bound by it). However, the difference between those Lords and the majority in *Miller* is that those Lords were very open about the fact that they thought the law they were bound to state was extremely unfair.<sup>143</sup> The difference between the decision in *R v Jogee* and the decision in *Miller* is that *R v Jogee* interpreted the law so that it could be reconciled with centuries of common law

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<sup>143</sup> BAKER, *supra* note 3, at ch. 6.



precedents. Principles of justice akin to those mentioned by Justice Gageler,<sup>144</sup> Justice Kirby,<sup>145</sup> and, most significantly, by leading academic experts also add weight to the case, but the decision in *R v Jogee* rests simply on an application of the historical precedents. It does not rest on policy arguments nor judicial activism,<sup>146</sup> but straightforwardly on legal interpretation. Similarly, the decision of the Supreme Court of the United States in *Rosemond v. US* draws on centuries of precedents, including the English law authorities cited by Justice Learned Hand in *United States v. Peoni*,<sup>147</sup> rather than policy arguments to hold that the mental element in complicity is intention.<sup>148</sup> Policy arguments are the business of parliament, not that of judges, who are meant to interpret law according to precedents and principles of justice. *Peoni* itself was argued as a natural probable consequence case, but Justice Learned Hand, tracing the law back as far as Bracton, held that the mental element in complicity is intention.<sup>149</sup> The Supreme Court of the United States, in *Rosemond*, held that Learned Hand's statement of the law was correct and applied it.<sup>150</sup> Moreover, a number of the world's leading criminal law experts have argued that the precedents require intention.<sup>151</sup> If anything, the decision in *Miller* helps to highlight injustices and the urgent need for law reform in Australia.

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<sup>144</sup> Justice Gageler stated:

To hold a secondary party liable for a crime committed by a primary party which the secondary party foresaw but did not intend does not measure up against the informing principle of the common law "that there should be a close correlation between moral culpability and legal responsibility." In the language of King CJ, who stood against the introduction of the doctrine of extended joint criminal enterprise into the common law of Australia during the period after *Chan Wing-Siu* and before *McAuliffe*, the doctrine results in "the unjust conviction of persons of crimes of which they could not be said, in any true sense, to be guilty."

*Miller v The Queen* [2016] HCA 30 ¶ 119 (Austl.) (footnote omitted).

<sup>145</sup> *Clayton v The Queen* [2006] HCA 58 ¶ 78–80 (Austl.).

<sup>146</sup> Lord Toulson is not one for judicial activism, even when it might bring about a fair result. See *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38 ¶ 79 (U.K.).

<sup>147</sup> *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938).

<sup>148</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1244 (2014).

<sup>149</sup> *Peoni*, 100 F.2d at 403.

<sup>150</sup> *Rosemond*, 134 S. Ct. at 1244.

<sup>151</sup> See BAKER, *supra* note 3; Kadish, *supra* note 133, at 378–79; Glanville Williams,

The fairness and just demand in criminal law also has its bearing in U.S. law regarding the natural probable consequence rule, which works in a way similar to but stricter than the extended joint enterprise doctrine. In the United States, if labelling and punishing a person for the collateral crime as a perpetrator, *based on his participation in an underlying crime and his foresight of the collateral crime*, infringes the requirement of fair labelling and proportionate punishment that retributive justice seeks to achieve, then labelling and punishing a person as a perpetrator *based merely on his participation in an underlying crime, with nothing more*, should be absolutely prohibited.<sup>152</sup> The natural and probable consequence rule was applied in a time when the death penalty and the felony murder rule were in full force and when there were no clear distinctions drawn between recklessness, intention, and oblique intention as substantive fault elements. The rule is found only in a few jurisdictions and is by and large applied to facts where there was intention. Professor Kadish has pointed out the link between extended joint enterprise complicity and the felony murder rule:

It also shares a resemblance to the American felony-murder rule, long since abandoned in England, which is a particular application of the lesser-crime doctrine to murder: a killing committed in the course of a felony (nowadays only certain felonies) becomes murder even if, apart from the felony, it would be manslaughter or not criminal at all.<sup>153</sup>

Such harsh and unjust law should be abolished in the 21<sup>st</sup> century.

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*Complicity, Purpose and the Draft Code: Part 1*, 1990 CRIM. L. REV. 4, 4 (1990); Glanville Williams, *Complicity, Purpose and the Draft Code: Part 2*, 1990 CRIM. L. REV. 98, 99 (1990).

<sup>152</sup> It is pleasant to see that the Supreme Court of the United States in *Rosemond v. United States* contends that complicity requires intention. *Rosemond*, 134 S. Ct. at 1244. The footnote 7 of the judgment has left, at least, an opportunity to interpret the judgment as rejecting the natural probable consequence rule. *Id.* at 1248 n.7. Many U.S. scholars oppose the natural probable consequence rule, but their arguments focus on the *mens rea* element stating that it goes against the basic requirement of mental state in criminal law. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 468 (6th ed., 2012); WAYNE R. LAFAVE, CRIMINAL LAW 886–922 (6th ed., 2017); Audrey Rodgers, *Accomplice Liability for Unintentional Crimes: Remaining within the Constraints of Intent*, 31 LOY. L.A. L. Rev. 1351, 1360 (1998); Heyman, *supra* note 8, at 402.

<sup>153</sup> Sandford H. Kadish, *Criminal Law: Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 376 (1997).

In light of the unsound decision in *Miller v The Queen*, it is hoped that the relevant parliaments in Australia will consider wholesale reform. If that were to happen, this Article argues that the principled way forward is to completely abolish the doctrine of extended joint enterprise and replace it with a lesser offense that labels and punishes the defendant according to his own harm-doing and personal culpability.

#### CONCLUSION

The doctrine of extended joint enterprise arose from the need to make an accessory liable for an unintended crime committed by the perpetrator. It was an unreasonable stretch of the law based mainly on policy grounds. The new development in the common law world indicates a demand for a requirement of intention for complicity liability: a person should not be made liable for a crime committed by his confederate if he did not intend such a crime to be committed with his assistance or encouragement.<sup>154</sup> However, the Australian court in *Miller* refused to follow *R v Jogee*, instead holding that the change of normative position theory and the pragmatic policy considerations can fairly justify the doctrine of extended joint enterprise.

Foster and Stephen are misquoted in *Miller* by the majority judgment. The old English law required nothing other than intention for complicity liability. *Chan Wing-Siu* had extended the law unreasonably wide, which has now been corrected by the Supreme Court of England and Wales in *R v Jogee*. The court in *Miller* did not provide valid precedential or convincing principle justifications for extended joint enterprise liability.

The change of normative position theory cannot justify extended joint enterprise liability. One's participation in an underlying crime cannot be construed automatically as participation in a collateral crime, let alone deemed as the *actus reus* of the collateral crime; one's foresight of a collateral crime cannot equal an intention to assist or encourage the collateral crime, nor can it equal the *mens rea* of the collateral crime.

The pragmatic policy grounds used in *Miller* cannot override the requirements of basic criminal law principles such as fair labelling, proportionate punishment, and personal culpability. The alleged deterrence effect of extended joint enterprise doctrine is not empirically proved. More

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<sup>154</sup> *R v Jogee* [2016] UKSC 8 ¶ 8–11 (U.K.); *Rosemond*, 134 S. Ct. at 1244.

importantly, courts should not aim to obtain easy prosecution at the cost of justice and fairness. Fair and just criminalization serves deterrence purposes as well or better.

The extended joint enterprise doctrine goes against the basic requirements of retributive justice. It fails to label and punish the defendant for his own personal wrongdoing and individual culpability and therefore should be abolished. A person who participated in an underlying crime while foreseeing the commission of a collateral crime merely took the risk that such a crime might be committed. He is not the perpetrator of that crime, nor is he the assister or encourager of that crime. Such risk-taking conduct should not be labelled and punished as perpetration of that collateral crime. If there is any need to criminalize such risk-taking, it is better done with a new, lesser offense. It is hoped that relevant parliaments in Australia will abolish this extremely unfair doctrine and replace it with an offense that could fairly represent the defendant's wrongdoing and personal culpability.