Abolishing Australia’s Judicially Enacted Sui generis Doctrine of Extended Joint Enterprise

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Abstract

In this paper it is argued that the decision in Miller v The Queen [2016] HCA 30 is not supported by the common law precedents in Australia nor the historical English precedents. It is argued that the change of normative position theory invoked by the majority judges is just stated as a rule rather than as a positive justification, which is an assertion that has never been developed into a plausible theory. Moreover, the policy considerations cannot work as convincing justifications for extended joint enterprise liability. It is submitted that assisting/encouraging is normatively different from and less harmful and dangerous than perpetration; and that making an assister/encourager fully liable for the target crime goes against principles of fair labelling and proportionate punishment. It is further submitted that the unfairness and injustice in complicity liability is doubled in the context of extended joint enterprise showing the urgency of abolition of it in Australia.

I Introduction

Arguably, a doctrine of ‘extended joint enterprise’ was enacted by judicial fiat in Australia in 1995.1 It appears the judges deciding McAuliffe v The Queen were

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1 McAuliffe v The Queen [1995] 183 CLR 108. The majority judges in Miller v The Queen [2016] HCA 30, para 2 acknowledge its doctrinal foundations cannot be traced beyond the 1980s when they state, ‘These criticisms were invoked in support of an application to re-open and overrule McAuliffe in Clayton v The Queen (2006). By majority, the Court declined to do so. Among the majority’s reasons for that refusal was the observation that
confounded by *Chan Wing-Siu v The Queen*—a 1985 decision of the Privy Council. Their confusion about what Sir Robin Cooke was expounding in *Chan Wing-Siu v The Queen* 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. There were factual situations involving a common purpose, underlying crime and collateral crime, but these cases when examined closely prove to be straightforward cases of intentional encouragement. 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 P to perpetrate the anticipated collateral crime.

A similar error was made in *R v Powell*, but the Supreme Court of the United Kingdom and Privy Council corrected that error in 2016. In *R v Jogee* and *Ruddock v The Queen* the Supreme Court of the United Kingdom and the Board of the Privy Council overruled *R v Powell* and *Chan Wing-Siu v The Queen* to bring the law back into line with the common law as it stood for centuries prior to *Chan Wing-Siu v The*
Queen. The High Court of Australia has refused to follow suit and has given some doubtful policy reasons to justify retaining the doctrine of extended joint enterprise that it minted in 1995. In this paper Miller v The Queen (2016) will be used to explore the moral foundations of complicity with the aim of demonstrating that the law of complicity should be abolished in its entirety and be replaced with independent crimes of assistance and encouragement akin to those provided for in sections 44-46 of the Serious Crime Act 2007 (UK).

The moral foundations of complicity has been said to rest on culpable indirect causation. It will be argued that assistance and encouragement does not have a sufficient causal or normative connection with crimes of another to make the normative claim that culpable assistance/encouragement is a moral wrong equal to culpable direct perpetration of the anticipated target crime. Free and informed human acts break the chain of causation. The assister or encourager is one step removed from the direct harm doing, which is caused by the independent autonomous choice of the perpetrator to use the assistance or to act on the encouragement when perpetrating the anticipated target crime. What marks out assistance and encouragement as a distinct wrong is that such acts are harmless in themselves, because any harm is contingent on the autonomous, informed and free choice of the perpetrator. The normative difference between the harmfulness of perpetration and assistance/encouragement also rests on the fact that assisting and encouraging is far less dangerous than direct perpetration where the perpetrator has the sole say and control over whether the anticipated target crime is perpetrated. In this type of case

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there is no duress, deception or coercion; the perpetrator is not an innocent agent and consequently is fully responsible for the end harm.

There is also a moral difference between intending to assist and encourage and intending to perpetrate. If D1 intends to kill V and picks up a knife and pushes it through V’s heart, D1 is in a very different ‘state of evilness of mind’ (motivation to directly kill a human being up front and live) than D2, who has supplied the knife intentionally, but is a person who would never kill 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 be done through the autonomous free acts of another. It is easier to imagine killing someone than actually doing it. Did Shakespeare’s Lady Macbeth have the same mental wherewithal as Macbeth? He certainly had the wherewithal to encourage, but perhaps not to perpetrate.

It is unfair and unjust to treat a mere assister/encourage in the same way as a perpetrator while their wrongdoing and personal culpability are quite different. Such unfairness and injustice is doubled in the context of extended joint enterprise liability where the defendant is made fully liable for a crime which he did not perpetrate or assisted/encouraged another to perpetrate, nor did he intended that crime being perpetrated by his confederates. Such a defendant is taking a risk that the collateral crime might be committed by joining in the enterprise to do the underlying crime. Labelling and punishing such a defendant in the same way as the perpetrator goes against the principles of fair labelling and proportionate punishment because the crime label and punishment given do not reflect the nature and degree of the defendant’s wrongdoing.

The change of normative position theory and the policy considerations adopted in Miller v The Queen cannot provide a convincing justification for extended
joint enterprise doctrine. The change of normative position theory has never been
developed into a plausible theory to justify constructive liability in the context of
perpetration as it cannot answer the questions why the normative position is changed,
how it is changed and to what extent it is changed. It is hard to see how this theory
can do the job in the context of extended criminal enterprise when a person is made
liable for another’s incidental crime. There is a big moral difference between a person
taking consequences of his own conduct and taking consequences of the independent
and autonomous conduct of another. Moreover, the policy reasons given in the
judgment are not satisfactory either. We cannot achieve easy prosecution at the cost
of justice and fairness.

II Common Law Principles of Complicity

The current debate concerns the mental element in complicity and whether it should
be limited to intention or whether it should also include recklessness. The current law
in England and Wales\(^1\) and most states in the United States\(^2\) require intention and
consequently do 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 perpetrate the anticipated target crime. D must intend that P act with the requisite
fault for the anticipated target crime.\(^3\) A further constraint in those jurisdictions
concerns the conduct element, because actual assistance or encouragement is
required. Association \textit{per se} is not sufficient for establishing the conduct element.

\(^1\) R v Jogee [2016] UKSC 8.
\(^3\) D J Baker, ‘Reinterpreting the Mental Element in Criminal Complicity: Change of Normative Position Theory
Below it will be argued that the debate should be extended to consider whether complicity in its full sense (that is, the procedural mechanism which deems an assister/encourager to be a principal/perpetrator) should be abolished and replaced with independent crimes of assistance and encouragement. An independent crime would label the assister/encourager as an assister or encourager rather than as a principal perpetrator. Under such a scheme a person who assists a murder would not be convicted and punished for murder, but instead for contravening the assistance/encouragement offence. As a consequence, the double constructive liability in extended joint criminal enterprise should be abolished as well because the defendant’s full liability for the collateral crime is based on the fictitious conclusion that by joining in the underlying crime foreseeing the collateral crime he has provided assistance/encouragement for the collateral crime.

In this section a brief outline of why the decision in *Miller v The Queen* was wrongly decided is provided. It will be submitted that the academic research and the decision in *R v Jogee* itself demonstrate that the decision in *Miller v The Queen* was not only wrongly decided, but is grossly unjust. The joint majority (French CJ, Kiefel, Bell, Nettle and Gordon JJ) in *Miller v The Queen* held:

1) ‘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).’

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2) ‘The 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.’

The High Court of Australia holds that foresight is sufficient fault for the defendant even when the mens rea for the collateral crime is specific intention and that there needn’t be any encouragement or assistance regarding the collateral crime if the accessory foresaw the collateral crime might be perpetrated as an incident of the joint enterprise.

In England and Wales the Supreme Court, held that in complicity cases foresight was only ever evidence of intention and that encouragement or assistance was needed to establish the conduct requirement in complicity. 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

\[2016\] HCA 30 at para 34. Compare R v Britten [1988] 49 SASR 47, 53-54, holding, ‘The judgment, delivered by Sir Robin Cooke in Chan Wing-Siu, 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.’

enterprise was merely evidence from which an accessory’s intention or conditional intention that the perpetrator perpetrates the collateral crime could be inferred.\textsuperscript{17}

The Supreme Court held that the law of common purpose complicity took a wrong turn since \textit{Chan Wing-Siu v The Queen}\textsuperscript{18} equating foresight with intention to assist and therefore treating foresight as an inevitable yardstick of common purpose.\textsuperscript{19} 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.\textsuperscript{20} The point made here is that the substantive fault doctrine in crimes of 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 as possible or probable conduct of the given action. A reasonable person might foresee that the ‘conduct’ he is assisting will be rape, even though D 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.\textsuperscript{21} Scholars have also suggested that foresight of a virtually certainty can be a substantive fault doctrine.


\textsuperscript{18} [1985] AC 168.


\textsuperscript{21} \textit{R v Woollin} [1999] 1 A.C. 82, 96.
for crimes such as murder, rather than just an evidential standard for inferring direct intention.

What is particularly puzzling about the majority decision in Miller v The Queen is the judges’ fixation with the Privy Council decision Chan Wing-Siu, because the High Court of Australia delivered a more insightful judgement on the law of complicity that year. In 1985, Gibbs CJ held,\(^25\)

> ‘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.”

Gibbs CJ held that knowledge can be used to infer intention and that oblique intention can be inferred in cases where D believed as a matter of virtual certainty that


\(^{23}\) Compare R v Matthews [2003] 2 Crim. App. 461, 476 suggesting it is mere evidence of direct intention and therefore is not also an alternative substantive fault element for murder.

\(^{24}\) Baker, above note 30, §4.3; Simester et al, Criminal Law Theory and Doctrine, (London: Hart, 2016), §5.1(iv);

\(^{25}\) Giorgianni v The Queen [1985] 156 CLR 473 at para 6. Gibbs CJ uses the term willful blindness to refer to oblique intention, which does make his judgment appear somewhat confused. Gibbs CJ states, ‘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 willful blindness.’ Id para 15.
a circumstance existed and deliberately avoided checking whether it did or would exist. The judgment uses confusing terminology in trying 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’. Notwithstanding that issue, it is clear that case does not allow recklessness as an alternative substantive fault element in complicity. In 2014, Learned Hand J’s interpretation of the law, which persuaded Gibbs CJ, was invoked by the Supreme Court of the United States in support of its interpretation of the law as requiring intention, even though Peoni itself was argued as a natural probable consequence case. The majority in Miller v The Queen 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. After all, the High Court held that ‘extended joint enterprise’ is a sui generis doctrine. It claims the doctrine started to develop in Johns v The Queen, but scholars have argued to the contrary that Johns supports R v Jogee. The majority in R v Jogee also held that Johns was supportive of its decision. More importantly, there is a line of significant Australian authorities involving joint enterprise factual situations that hold that the mental element in complicity is intention. The general principle announced in these cases is taken from the poaching cases referred to in R v Jogee.

27 ‘The prosecution's argument is that, as Peoni put the bills in circulation and knew that Regno would be likely, not to pass them himself, but 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 [1938] 100 F.2d 401.
28 See the comments in Clayton v The Queen [2006] 81 ALJR 439, para 102; Gillard v The Queen [2003] 219 CLR 1, para 50.
The law in Australia before \textit{McAuliffe v The Queen} is summarised in a passage from \textit{R v Surridge}.\footnote{[1942] 42 SR (NSW) 278, 282-83.}

‘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.”’

These cases adopt the general principle that could be traced right back to \textit{Lord Dacre’s Case}.\footnote{[1535] 72 ER 458.} There have been aberrant decisions over the centuries. Unquestionably, the natural probable consequence doctrine and also the foresight of possibility doctrine have been used as substitutes for a doctrine of intention in some of the cases over the centuries,\footnote{\textit{R v Jogee} [2016] UKSC 8, para. 20.} but the scholarly research demonstrates that the bulk of cases required intention.\footnote{Baker, above note 3, ch. 2.} This also is buttressed with the supporting arguments, principles and precedents quoted in the dissenting judgments of Kirby J in \textit{Clayton v Dowdle} [1901] 26 VLR 637, 639-41; \textit{R v Surridge} [1942] 42 SR (NSW) 278, 282-83; \textit{R v Grand} [1903] 3 SR (NSW) 216, 218..
The Queen\textsuperscript{37} and Gageler J in Miller \textit{v} The Queen. The majority in Miller \textit{v} The Queen\textsuperscript{38} also misquote Foster by failing to quote in full the passages from Foster so that the meaning and context of what was being asserted is lost. Foster held:

\begin{quote}
‘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 alone in that Offence, and the Person soliciting will not be involved in his Guilt.’
\end{quote}

\begin{quote}
‘But if the Principal in Substance completh 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 Accessary 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 Accessary to this Murder. For the Murder of C, was the Object principally in his Contemplation, and that is Effected.’
\end{quote}

\begin{quote}
‘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 Accessary 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 Accessary to this Murder.’\textsuperscript{39}
\end{quote}

\textsuperscript{37} [2006] 81 ALJR 439. Kirby J was regarded as the intellectual leader in the Court in his day.

\textsuperscript{38} [2016] HCA 30 at para 6 where they reference the use of the ‘natural probable consequence’ maxim out of the context in which Foster discussed and applied it. The majority in \textit{R v Jogee} [2016] UKSC 8, para 20 also quote the wrong passages from Foster, but seem not to confuse the evidential maxim from the substantive fault element.

‘These Cases are all governed by One and the Same Principle. The Advice, Solicitation, or Orders in Substance were pursued, and were extremely flagitious on the Part of A.’

Thereafter, Foster refers to what would now be conceptualised as a conditional intention case and an oblique intention case.\(^{40}\) 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 intends or obliquely intends the end crime and therefore it is irrelevant whether different means are used by the perpetrator to achieve the end that was intended.\(^{41}\) 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 D intended to encourage P to perpetrate. Foster holds it is no defence for D to assert that D only intended P to inflict GBH, if that GBH causes V’s death—since a natural probable consequence of GBH could be death. The probability of death being caused by GBH 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 is as stated in the *Three Soldiers case*.\(^{42}\) The *Three Soldiers case* required a common intention with respect to any collateral

\(^{40}\) Foster *id* gives the following examples. ‘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 Accessary to this Murder.’ In the context of oblique intention, Foster provides this example, ‘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 Accessary to the Burning of this Latter House.’

\(^{41}\) Baker, note 24, 226; 232-239.

\(^{42}\) [1762] Fost. 353.
crime and it like *Lord Dacre’s Case*\(^{43}\) and the later poaching cases from 1800s onwards,\(^{44}\) which are accepted as authoritative in *R v Jogee*, develop and set the fault element for complicity.

The majority in *Miller v The Queen*\(^{45}\) also misquote Stephen by giving a selection of quotes from Stephen out of context and in isolation from his views on joint enterprise. If they had quoted the Article immediately below the one they quote from Stephen’s *Digest*, the entire meaning of what Stephen was stating in that Article would have been apparent. Stephen in his own books did not adopt an objective fault element for complicity.\(^{46}\) The quotations referred to in *Miller v The Queen* were discussing accessorial liability in cases where the perpetrator was constructively liable for an unintended consequence of an intended act. Beyond that, the quotations referred to simply reiterate the statement of the law from Foster, which was that it was no defence to accessorial murder that the perpetrator used different means from what the accessory intended her to use. Foster, on the very next page, continues his analysis with reference to transferred malice and the famous case of *Archer and Saunders*.\(^{47}\) Stephen’s views about joint enterprise liability are not in the passages quoted by the High Court. Rather Stephen also quotes the *Three Soldiers case* and *R v Plummer*\(^{48}\) under a different Article in his *Digest* concerning common purpose fact scenarios.\(^{49}\)

No more space will be dedicated to this issue, because the majority in *R v Jogee* has held, that even if the objective test was ever a part of the common law, it

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\(^{43}\) [1535] 72 ER 458.

\(^{44}\) For an analysis an application of the poaching cases in Australian law, see Baker, note 24, 220. See also *R v Dunn* [1930] 30 SR (NSW) 210, 214.

\(^{45}\) [2016] HCA 30 at paras 13-16.

\(^{46}\) Baker, above note 24, 235.

\(^{47}\) [1762] Fost. 371.

\(^{48}\) [1706] 84 ER 1103.

\(^{49}\) See Baker, above note 24, 235-236.
has not been so for more than 300 years. Consequently, it is hard to see how it has any relevance on the current law. Gageler J (dissenting in *Miller v The Queen*) got the gist of this when he stated,\(^50\) ‘the 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 Sir James Stephen in the second half of the nineteenth century, need to be read cautiously in that light.’

It was submitted above that *R v Jogee* holds that, 1) foresight of possible collateral crimes was used as evidence of intention including conditional intention in the joint enterprise cases; 2) that there isn’t any independent doctrine of joint enterprise, because all complicity has the same conduct element under section 8 of the *Accessories and Abettors Act 1861*. The conduct element involves an act of aid, abetment, counselling or procurement. In modern terminology these categories have been reduced to two categories of acts, which are acts of assistance or acts of encouragement. Procurement is a third category, but it only applies in the unusual innocent agency cases.\(^51\)

The decision in *Miller v The Queen*\(^52\) does not accept either of these propositions. It holds that fault can be established in complicity cases if the accessory’s state of mind involved either intentional (association) assistance/encouragement or recklessness (association) assistance/encouragement.

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\(^{50}\) [2016] HCA 30, para 87.


\(^{52}\) [2016] HCA 30.
The most controversial theory invoked in *Miller v The Queen* to justify a doctrine of extended joint enterprise is Professor Simester’s ‘change of normative position’ theory as presented in a 2006 paper. According to such explanations of the change of normative position theory, a participant, who voluntarily and intentionally joined a criminal enterprise, had changed his normative position and therefore should be made fully liable for any collateral crime he foresaw as a possibility. But such an explanation overlooks the fact that in an individual perpetration liability situation like assault occasioning actual bodily harm it is the defendant’s own act which results in the unintended harm but in collateral joint enterprise liability it is another autonomous and independent human being’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 which has caused the unintended harm. But a participant in an extended joint criminal enterprise case has no control over the conduct, which has caused the unintended harm because that conduct is the independent and autonomous choice of the perpetrator. The change of normative position theory faces strong challenges in trying to justify constructive liability in the context of perpetration. In the first place, it is implicit what kind of normative position it is to be changed by committing a crime. In the second place, it is unequivocal how the position is changed. Some scholars observe that it is the intentionality that changes the normative position. However, based on the notion of intentionality it encounters problems in applying to impulsive conduct or acts done in

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53 [2016] HCA 30, para 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 accessorial liability’.
temper.\textsuperscript{56} Even if we omit its inapplicability in such cases, we still see vagueness in interpreting how the normative position has been changed. Because an intention to commit a crime does not indicate an intention to bring \textit{any} harm of \textit{any} description. There is a big moral difference between a person taking the consequences of her own personal acts and taking the consequences of the autonomous and independent conduct of another.\textsuperscript{57} As I have just argued in the above paragraphs, change of normative position theory cannot provide a convincing justification for constructive liability in the context of perpetration liability; we can hardly see it can do this job in the context of extended joint criminal enterprise liability where D will be held liable for the conduct of the independent and autonomous perpetrator, over which D has no control at all.

Professor Gardner, the original author of the ‘change of normative position’ theory, has not only abandoned his original assertions\textsuperscript{58} on change of normative position theory but also repudiated any suggestion that his aim was to present a positive justification for constructive liability. Gardner writes:

\begin{quote}
‘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 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.’\textsuperscript{59}
\end{quote}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{56} Ibid, Ashworth, at 244.
\item \textsuperscript{57} See Baker, above n. 5, at 82.
\item \textsuperscript{58} Gardner did not develop a justification for the claim and was not aiming to do so.
\item \textsuperscript{59} Gardner, above note 15, 246-247.
\end{itemize}
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Simester, among others, 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 it puts on liability by mere association is foresight. Hence, association plus foresight is sufficient to convict a person of murder in Australia. These scholars have misunderstood Gardner and have put forward a vacuous assertion as a positive justification for the extended joint enterprise doctrine. It is submitted that the arguments by Baker and also more generally by Gardner and Ashworth, are far more convincing. It is difficult to see how the normative position explanation can provide a substantive justification for the unjust form of criminalisation that ‘the extended doctrine of joint enterprise liability’ permits.

What the High Court of Australia has not done is provide a precedential justification let alone a positive normative justification for its decision to extend the criminal law. Specifically, it has not provided a justification that is supported by the common law precedents nor by any other principles of justice. In the older Australia authorities there isn’t any precedent that replaces the assistance and encouragement requirement for complicity liability with a conduct element that requires nothing more than association. These same authorities also support interpreting the mental
element in complicity as limiting liability to intentional assistance and encouragement. The High Court of Australia has invoked the change of normative position theory to defend a doctrine of extended joint enterprise that it acknowledges was created by judicial fiat in 1995, consequently, it should have developed a positive justification to show the validity and justice of adopting this approach.

Finally, it is submitted that the interpretative methodology adopted by the High Court of Australia in Miller v The Queen was unorthodox. In the 21st century it is unexpected that Supreme Court decisions from the United Kingdom and from the United States, drawing on centuries of common law precedents, haven’t any persuasive influence. The appeal was from the common law jurisdiction of South Australia. South Australia is a common law jurisdiction where until relatively recent times (1986) an appeal could be made to the Privy Council. When appeals were made to the Privy Council the Board of the Council drew on the English common law authorities to resolve legal issues. It is recognised that, there have been no appeals to the Privy Council from Australia since 1980 and the expense of appealing to London was such a deterrent that there hasn’t been any criminal law appeal since the 1964 appeal in Parker v The Queen.


65 See Baker, above note 3, ch. 2.


68 The Privy Council (Appeals from the High Court) Act 1975 (Cth) 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 (U.K. and Cth.)

Nevertheless, *Parker v The Queen* uses the common law method of drawing on English precedents to contextualise and historicizes the law as a part of the interpretive approach. 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. Moreover, in this paper it has been submitted that many watertight authorities from Australia’s common law jurisdictions convincingly underwrite the reasoning adopted by the majority in *R v Jogee* and *Ruddock v The Queen*. The same precedents convincingly undermine the majority decision of the High Court of Australia in *Miller v The Queen*.

The policy arguments given by the High Court to defend its decision not to reinterpret the law so that it can be reconciled with centuries of common law authorities and contemporary standards of justice shows that the Court misunderstood its role. It 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 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

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with intent to kill and killing with intent to cause really serious injury.’\textsuperscript{73} 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. It refers to the sorts of policy and big picture arguments that are in the remit of law commissions and parliaments. Some of the other policy ‘assertions’ stated in \textit{Miller v The Queen} for not overruling \textit{McAuliffe v The Queen} included, 1) it would cause great inconvenience since many wrongly convicted parties might appeal; 2) there wasn’t any substantive injustice in the current law.\textsuperscript{74} These sorts of wider policy considerations are not the business of the courts. ‘Judges ought to remember that their office is \textit{Ius dicere}, and not \textit{Ius dare}; to interpret law, and not to make or give law.’\textsuperscript{75}

The High Court of Australia was not bound to follow the Supreme Court and Privy Council decision in \textit{R v Jogee} and \textit{Ruddock v The Queen}, but that decision should have been much more persuasive than it was, taking into account the compelling academic research on the point and, taking into account that the Supreme Court of the United States recently held that the early English authorities mandated that the \textit{mens rea} for complicity liability is intention.\textsuperscript{76} It is also incongruous that it instead decided to apply the decision in \textit{R v Powell} that was overruled for being an erroneous decision.\textsuperscript{77} Not only did the High Court of Australia pay no attention to the common law as it existed before \textit{Chan Wing-Siu v The Queen}, it also relied on a very narrow selection of academic works and terse case commentaries. Perhaps the most

\textsuperscript{73} \textit{Miller v The Queen} [2016] HCA 30, para 40.
\textsuperscript{74} ‘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.’ \textit{Miller v The Queen} [2016] HCA 30, 39.
\textsuperscript{75} Francis Bacon, Essays, \textit{Moral, Economical, and Political} (London: T. Bensley, 1798), 198.
\textsuperscript{76} \textit{Rosemond v U.S.} [2014] 134 S.Ct. 1240.
\textsuperscript{77} ‘Moreover, most of the arguments in favour of change had been thoroughly considered and rejected by the House of Lords in \textit{Powell}.’ \textit{Miller v The Queen} [2016] HCA 30, para 40.
controversial argument invoked was Simester’s ‘change of normative position’ theory. Keane J also was in the majority but gave a separate judgment. The controversial and flawed reasoning of Keane J will be discussed in the next section of this paper.

III Perpetration vs. Assisting/Encouraging and the Double Constructive Nature of Extended Joint Enterprise Doctrine

In *Miller v The Queen* Keane J starts his 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.’ Keane J does not explain how one can recklessly authorise. One cannot accidentally, negligently or recklessly authorise, even if one can negligently or recklessly send a message of encouragement. Authorisation has to be intentional. If you authorise something then the concept of ‘authorise’ suggests a desire or purpose that it happen. Authorise is to approve or permit—it suggests that D gives his permission—which D cannot do accidentally or recklessly, since that would not be any permission at all. It would be a putative permission based on P’s mistaken belief that D is genuinely authorising or permitting. Keane J then asserts that Australian law recognises 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. Keane J asserts,

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78 *Miller v The Queen* [2016] HCA 30.
79 Baker, above note 3.
‘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 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.’

Keane J then goes not 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.’

It seems that Keane J was confounded about the difference between moral culpability and legal culpability and also the difference between perpetration and assistance/encouragement. His Honour also seems to conflate joint perpetration with assistance/encouragement. Moreover, there seems to be a misunderstanding about

80 Miller v The Queen [2016] HCA 30, para 138.
81 Miller v The Queen [2016] HCA 30, para 139.
82 Baker, above note 12.
the difference between innocent agency and perpetration. 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. The 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 provisions to tackle organized crime and it is unhelpful for it to be discussed 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 some other 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. See the earlier High Court case of Miller v The Queen where there was no unlawful joint enterprise and where there were only two parties involved. In that case D drove P to locations so he could have sexual relations with prostitutes. The locations were places such as parks. 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. P was hardly

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83 His Honour relies on agency or vicarious liability theory which and fails to see how it differs from complicity liability. In particular, see Keane J’s discussion at para 140-141.
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. To argue that P was merely D’s instrument in such case is erroneous.

What makes an accessory equally liable as a principal is a deeming provision that deems that the perpetrator intended to kill (or perpetrate whatever the crime was committed) using his own hands while the accessory did not personally intend to kill and did not in fact personally do an action that killed, 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 he intended to kill and deems that he killed with his own hands; it is on that fiction that he is held equally liable for the crime perpetrated by the actual perpetrator. These deeming provisions are based on a legal fiction that D personally killed and personally intended to kill, when that is not the case. Furthermore, Keane J seems to assert that there is no moral distinction should be drawn between the parties to a crime. For Keane J, they should all be deemed principals at all stages of the inquiry. The English Parliament has been more progressive in this sense, because in 2007 it enacted the Serious Crime Act 2007, which criminalises assistance/encouragement as a lesser independent offence. Notwithstanding that, Keane J’s assertion is flawed even under the law of complicity, since complicity has its own mental element and conduct element. Coupled with that, it will be submitted

87 See further Baker, above note 24.
below there is a great normative difference between the wrong of perpetrating and the wrong of assisting/encouraging.

A person who assists or encourages the commission of a crime is an assister/encourager of that the crime, not a perpetrator of that crime. Why is participation (assistance or encouragement) 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:88

‘The 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 accomplices 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.’

The House of Lords in the leading case R v Kennedy (No.2) held that:89

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88 Williams, above note 10, 398.
89 R v Kennedy (No.2) [2008] 1 A.C. 269, at 275.
‘The 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 voluntary and informed decision to act in that way rather than another.’

Hart and Honoré also came to a similar conclusion in their famous treatise on causation. 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”. 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; it isolates 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. D supplies P with bullets and P puts these in his gun and uses these particular bullets to kill V. D has caused P to be assisted, but D has not caused P to load the gun and kill V. P has caused himself to be armed and caused himself to aim at the human target and pull the trigger. P was not insane, under duress or deception and therefore made a fully informed and autonomous choice to kill another human being.

90 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 and T Honoré, Causation in the Law (Oxford: Oxford University Press, 2002), 326.
91 R v Kennedy (No.2) [2008] 1 AC 269, 276; R v Gnango [2012] 1 AC 827, 867.
92 Baker, above note 12, 260-261.
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.’ Gardner argues that accessories cause through the conduct of the perpetrator 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.” Causation, as used by Gardner in analysing complicity liability, is not the central type of causal relationship we refer to in perpetration liability; instead, it is understood in a more tenuous sense. Moore also argues that an intervening act does not break the chain of causation in fact 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. Sullivan holds very similar viewpoint to that of Moore. But this argument is unconvincing and indefensible as long as perpetration liability is still the core of criminal liability. It has long been recognised that one’s conduct is deemed to be an autonomous and free choice if it is not done under deception or coercion. Free, voluntary human actions cannot be caused, even if it could be said in a sense as heavily influenced by another, because human beings are total sovereign over their

93 Gardner, above note 8, 443.
95 Hart and Honoré, above note 103, at 43.
97 Sullivan, above note 16, at 221.
own actions and human actions therefore are treated differently from natural events.\textsuperscript{100}

If we accept that causation covers both but-for cause and legal cause, then we have to admit that the one who has caused the prohibited harm is, \textit{in fact}, the perpetrator. Assistance/encouragement in many cases will not be the but-for cause of the prohibited harm in the target crime,\textsuperscript{101} let alone the legal cause of that harm. Because in many case, the perpetrator would commit the target crime anyway even if he did not get assistance/encouragement from that accessory. In some cases, the assistance/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.\textsuperscript{102} It is plausible to say that in such a case, 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 D’s assistance is legal cause of the eventual harm, because P’s bombing the city is a free, voluntary and informed human intervention and can therefore break the chain of causation between D’s facilitation and the resulting death.

If the above arguments are accepted we can see that there is a normative difference between assisting/encouraging and perpetration. 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/encouraging almost never involves any

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\textsuperscript{100} Kadish, above note 8, at 330.
\textsuperscript{101} Ibid, 360.
direct criminal harm-doing. It is not impossible to think of examples where the encouragement or assistance is criminal in itself, but in most cases the encouragement/assistance is not harmful or criminal. The harmfulness of assisting/encouraging is contingent on P’s independent and autonomous choice to use that assistance/encouragement to perpetrate a crime.

D’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 P 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.

What buttresses the above thesis is 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. 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 harmful crime. The crux of the matter is that the accessory’s participation is a remote harm in that its harmfulness and

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103 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 be result from running a pirate website such as Putlocker to facilitate copyright theft. See also sections 6 and 7 of the Fraud Act 2006 (U.K.). These wrongs are crimes per se and are treated as such.

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, it 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, we have the capacity to choose to violate the law or not. The perpetrator is made fully liable because he unjustifiably and inexcusably chose to kill the victim or chose some other criminal harm. The perpetrator is more dangerous not only because he has the will to kill whereas the assister/encourager only has the nerve and will to assist/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/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 and would then be directly liable through the innocent or semi-innocent agent doctrines. The accessory leaves the act of killing etc. in the hands of another autonomous agent he is one step removed from the direct control that is required to bring about the harmful crime. The accessories leave it all to chance. Accessories have only increased the risk that the target crime might be committed by providing

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106 Even these sorts of innocent agency cases can be dealt with through an independent offence. Section 44 of the *Serious Crime Act 2007* (U.K.) holds, ‘(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.’ Section 47 of that same Act holds, ‘In proving for the purposes of this section whether an act is one which, if done, would amount to the commission of an offence—(a) (iii) D’s state of mind was such that, were he to do it, it would be done with that fault…’
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. A person should not be made fully liable for what he cannot control. We should be very hesitant to punish a person for conduct that is not within her control. What is in the control of the accessory is his act of assisting or encouraging and he should be punished for that wrongdoing only. Furthermore, the assister or encourager is 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 crimes. Such a person 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. While he remains a remote assister/encourager there is no case for deeming him a murderer.

Treating an assister/encourager fully liable in the same way as the perpetrator for the crime assisted/encouraged goes against the principles of fair labelling and proportionate punishment. A person who has assisted rape is not a rapist because he does not do the penetration and assisting rape is removed one step away from the penetration. Therefore, punishing an assister in rape the same as the rapist does not

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108 See R A Duff, 'Who is Responsible, for What, to Whom?', (2005) 2 Ohio St J of Crim L 441, 452-454.
reflect the nature and degree of the assister’s wrongdoing. The unfairness and injustice of complicity liability is doubled in the context of extended joint enterprise liability where a person neither perpetrated the collateral crime nor assisted/encouraged the commission of the collateral crime. 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/encouragement to the collateral crime automatically. The defendant’s participating in the underlying crime is regarded as assisting/encouraging of the collateral crime and this fictitiously constructed assisting/encouraging in the collateral crime will be further constructed as sufficient actus reus of the collateral crime. Moreover, the defendant’s mere foresight that the collateral crime might be committed is constructed as an intention to assist/encourage knowing all the essential matters of the collateral crime, and this fictitiously constructed mens rea will be further constructed as the required mens rea for the collateral crime. Consequently, the double constructive nature of extended joint enterprise liability make a person fully liable for a crime while his wrongdoing is much less harmful and his mens rea is much less culpable.

Retributive justice as well as utilitarianism requires that the crime label and punishment should reflect the defendant’s past harm-doing and personal culpability.\textsuperscript{111} From the abovementioned analyses we can see that the wrongdoing in assisting and encouraging is less than that in perpetrating; and therefore even if culpability for assisting/encouraging and perpetrating is not substantially apart (for instance both D and P intend V should be killed), the crime label and punishment should still be less for assisting or encouraging.

In the context of extended joint enterprise, the defendant’s full liability for the collateral crime is based on two layers of fictitious assumption. Firstly, it is fictitiously held that by participating in the underlying crime, the defendant is giving assistance/encouragement to the commission of the collateral crime and that the defendant’s foresight of the collateral crime is constructed as an intention to assist/encourage the collateral crime knowing all the essential matters of the collateral crime. Secondly, the defendant’s fictitiously constructed assistance/encouragement in the commission of the collateral crime is further constructed as sufficient actus reus for the collateral crime and the defendant’s fictitiously constructed mens rea for assisting/encouraging the collateral crime is further deemed as sufficient mens rea of the collateral crime. Assisting/encouraging a crime is less harmful than perpetrating the crime, and risking another’s commission of a crime is less than assisting/encouraging the commission of that crime; therefore, risking another’s offending is far less than perpetrating that offence. The unfairness and injustice of complicity liability is doubled in the context of extended joint enterprise liability. Such harsh and unjust law should be abolished in our 21st century.

IV The Unconvincing Policy Considerations in Justifying the Doctrine of Extended Joint Enterprise

Keane J also gives his own conservative policy reasons for not adopting the legal interpretation of the law as presented by the Supreme Court of the United Kingdom, where the law was interpreted by drawing on the precedents, not by drawing on conservative policy opinions that are not underwritten with solid empirical research. The lack of empirical research to support the bold policy claims is just one reason
why the particular 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 can 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.\textsuperscript{112}

The majority judgment has adopted the policy considerations in \textit{R v Powell and English} \textsuperscript{113} asserting that the goal of crime control provides good reasons for maintaining the doctrine of extended joint enterprise because it would be well nigh impossible in the majority of joint enterprise cases to prove D’s sufficient intention for murder; and that experiences show that joint enterprises too readily escalate into more serious crimes and for the purpose of dealing with this social problem the extended joint enterprise doctrine should not be abolished. \textsuperscript{114} However, the deterrence function is not as effective as the court has alleged. Adopting extended joint enterprise doctrine which allows for double constructive liability produces extreme injustice and unfairness as a person would be labelled and punished in the same way as the perpetrator when his wrongdoing should be labelled and punished as a distinct crime. Such a person would not be deterred from killing, because he has not killed.\textsuperscript{115} Leading professors like Posner\textsuperscript{116} and Shavell\textsuperscript{117} have argued that without

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\bibitem{R v Rimmington} R v Rimmington [2006] 1 AC 459. Baker, above note 30, paras 1-019; 1-025 notes that it is an ‘ancient principle that in case of doubt a criminal statute is to be “strictly construed” in favour of the defendant.’
\bibitem{R v Powell and English} R v Powell and English [1999] 1 AC 1.
\bibitem{Miller v The Queen} Miller v The Queen [2016] HCA 30, at paras 36 and 146.
\end{thebibliography}
any deterrent benefit, punishment is pointless. Punishing a participant in a joint enterprise for any collateral crime he foresaw as a possibility may serve the purpose of general deterrence for 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 the underlying crime. No extra benefit will be gained from having unfair crime labels and disproportionate punishments based on double constructive liability which collateral joint enterprise liability allows for. Unjust punishments lead to disutility as far as deterrence is concerned.\textsuperscript{118}

Furthermore, allowing double constructive liability seems incapable of fulfilling the specific deterrence goal as well. The defendant in the context of extended joint enterprise has no control whatsoever over his perpetrator in committing the collateral crime; and the cost-benefit evaluation may not work in the mind of him over an act which he has no control. Special deterrence can only work well when those it aims to deter know the law or have a chance of guessing what the law might be, but most defendant had no idea that they could be liable for the collateral crime. Publicly available information about collateral joint enterprise liability is patchy and \textit{ad hoc}\textsuperscript{119} and many who were convicted through collateral joint enterprise perceived the law only after having been convicted. People are much less likely to cooperate with the authorities if they take the law as unjust and unfair, and custodial sentences have been shown to increase, not reduce, reoffending.\textsuperscript{120} Specific deterrence goal


would be better achieved if we adopt a fair and just scheme allowing fair labelling and proportionate punishment.

In addition, the argument that extended joint enterprise doctrine could relieve the prosecution from impossible proof burden is unconvincing. Joint enterprise liability has caused serious difficulties for juries due to its complexity and lack of clarity.\textsuperscript{121} It is reported that collateral joint enterprise liability has been the subject of a high number of appeals in recent years.\textsuperscript{122} Most of the difficulty has to do with the complexity of the rules, not with proving the facts or proving who did it. This pragmatic consideration is unprincipled, even though it might make convictions easier to obtain. Any practical benefits are outweighed by fundamental principles of criminal justice. There are many cases where it is difficult for the prosecution to prove beyond reasonable doubt the required elements of a crime, but this does not mean that the fault element should be supplanted with one that is easier to prove—or with strict collective liability for the entire group. There is nothing to be gained by obtaining easy convictions at the cost of circumventing the core principles of justice. Failures of justice due to difficulties of proof in multi-party cases should be addressed directly and not by creating fictitious rule.

We now know that Lords Steyn and Mustill (in \textit{R v Powell}\textsuperscript{123}) 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. the were mistaken to think Sir Robin Cooke’s interpretation of the law as stated in \textit{Chan Wing-Siu v The Queen} was right and that they were bound by it), but the difference between those Lords and the

\begin{itemize}
\item \textsuperscript{121} Justice Committee, "\textit{Joint Enterprise}" (Eleventh Report of Session 2010-12, House of Commons, 2012) 10.
\item \textsuperscript{122} It is reported in Justice Committee, "\textit{Joint Enterprise: Follow Up}" (Fourth Report of Session 2014-15, House of Commons, 2014) at 16 that 22 per cent of all convictions appealed to the Court of Appeal in 2013 had an element of joint enterprise, which is regarded as a terrifying statistic
\item \textsuperscript{123} [1999] 1 AC 1.
\end{itemize}
majority in *Miller v The Queen* is that those Lords were very open about the fact that they thought the law they were bound to state was extremely unfair. The difference between the decision in *R v Jogee* and the decision in *Miller v The Queen* is that *R v Jogee* interpreted the law so that it could be reconciled with centuries of common law precedents. Principles of justice akin to those mentioned by Gageler J and Kirby J and, more 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, but straightforwardly on legal interpretation. Similarly, the decision of the Supreme Court of the United States in *Rosemond v U.S.* draws on centuries of precedents including the English law authorities cited by Learned Hand J in *United States v. Peoni*, rather than policy arguments, to hold that the mental element in complicity is intention. Policy arguments are the business of parliament, not that of judges who are meant to interpret law according to precedents and principles of justice. *United States v Peoni* itself was argued as a natural probable consequence case, but Learned Hand J tracing the law back as far as Bracton held that the mental element in complicity is intention. The Supreme Court of the United States in *Rosemond v U.S.* held that Learned Hand’s statement of the law was correct and applied it. Moreover, a

124 Baker, above note 3, ch. 6.
125 *Miller v The Queen* [2016] HCA 30, where Gageler J states, ‘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 McAluliffe, 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”.’
127 Lord Toulson is not one for judicial activism, even when it might bring about a fair result. See for example his judgment in *R (on the application of Nicklinson) v Ministry of Justice* [2012] EWHC 2381, para 79.
128 [1938] 100 F 2d. 401.
number of the world’s leading criminal law experts have held that the precedents require intention. If anything, the decision in *Miller v The Queen* helps to highlight the injustices and the urgent need for law reform in Australia.

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 paper argues that the principled way forward is to completely abolish the doctrine of extended joint enterprise and replace it with lesser offences of risking another’s collateral offending. Such an offence is justified by a risk-taking rationale. A participant in a criminal joint enterprise should be liable for risking collateral crime by joining the underlying crime. The participant’s continuing participation in the underlying crime with a foresight that the perpetrator might commit the collateral offence increases the risk of the collateral crime being perpetrated. If the participant did not join the joint underlying foundation criminal enterprise such as a bank robbery or gang violence, the perpetrator might not have been willing to perpetrate the underlying crime on his own and thus the risk of the perpetrator perpetrating a collateral crime would have been reduced simply due to him not being willing to perpetrate the underlying crime on his own. Such risk-taking does not warrant full criminal liability for the collateral crime committed by the perpetrator, but it is enough to justify some sort of criminal liability. The joint enterprise of the underlying offence is the background of the collateral offending. As a consequence, the accessory acted positively in setting that background.

The *actus reus* of this new proposed crime is joining a risky criminal venture to do an underlying crime, and the mental element requires subjective recklessness.

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as to the commission of the collateral crime. If the collateral offending by the perpetrator is fundamentally different from what the defendant has foreseen or contemplated, the defendant will not be liable for that offence because he does not risk it with awareness. This new crime would allow fair labelling and proportionate punishment. The offender would not be labelled as a perpetrator of the collateral offence, but a remote participant in the collateral offence. The punishment would correspond with the harmfulness of D’s remote participation and his lower level of culpability. The punishment for the new lesser offence of risking another perpetrating a collateral crime would be left to some extent to the discretion of the judge. But what is clear is that any punishment would have to be calibrated with the collateral offence D foresaw as a possibility. Thus risking a collateral crime of murder should be punished more severely than risking a collateral crime of theft. However, the punishment of a person under this new lesser offence of risking another perpetrating a collateral crime should not exceed that of an assister or encourager because there is no actual assistance or encouragement to the collateral crime on D’s part.

**V Conclusion**

It would be inapt to introduce new material here in the conclusion. Nevertheless, to make a strong conclusion it is helpful to acknowledge that some jurisdictions

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131 Similar claim can be found in the situation of remote harm where a person whose conduct is in itself harmless, but may be prohibited because it may in some manner creating a risk that some other people will make their autonomous and informed choice to commit crimes. The crux of remote harm is that D, through his or her conduct, in some sense affirms or underwrites the intervening actor’s subsequent choice. See A P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs* (Oxford: Hart Publishing, 2011) at 70-88. See also A P Simester and A von Hirsch, “Remote Harms and Non- Constitutive Crimes” (2009) 28 *Crim. Justice Ethics* 89, 99. Baker, above note 104, 386.
developed independent extended joint enterprise mechanisms. 132 Some of these require not more than negligence as the fault element, because early statutes adopted the natural probable consequence maxim as substantive fault doctrine in these provisions. 133 However, these early statutory enactments that were enacted in a time when the death penalty and the felony murder rule were in full force. Moreover, they were enacted in a time when there were no clear distinctions drawn between recklessness, intention and oblique intention as substantive fault elements. They are found only in a few jurisdictions and by and large applied to facts where there was intention and therefore this probably has kept the media’s focus of reform. Some U.S. states, as do some Australian states, have these sorts of extended joint enterprise doctrines, but these olds statutes are an accident of history and the injustice they provide for should not be taken as a standard of justice in the 21st century. Kadish writing about these statues has likened extended joint enterprise complicity to the felony murder rule. Professor Kadish states, ‘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.’ Kadish also recognises that this form of liability was never part of the law of complicity in England. It also was never part of the law in the non-Code states in Australia.

The only theoretical justification given in Miller v The Queen for trying to show why extended joint enterprise is fair was Simester’s change of normative position theory. However this theory is simply a rule akin to the felony murder rule—

133 Baker, above note 3, ch. 2.
it is a statement of what is going to be applied, but it does not supply a positive justification to explain the fairness of holding a person liable for murder simply for associating with another in an underlying crime such as robbery with foresight that person might kill or cause GBH to a guard during the robbery. The change of normative position theory is not supported with argument when argument is clearly needed—Simester’s change of normative position justification is a *non sequitur*.

The judges in the majority in *Miller v The Queen* misquote Foster and Stephen, because the passages cited referred to accessorial liability for unintended consequences flowing from an act that was intentionally encouraged and to cases where different means were used to achieve a result that was intended by both parties. There is nothing in Foster or Stephen that supports the decision in *Miller v The Queen*. The majority in *Miller v The Queen* also seem to focus on out-dated policy points that were made in passing in *R v Powell and English*, without paying any intention to the concerns raised by the Lords about the injustice the Chan Wing-Sui interpretation of the law was causing.

Finally, while not the business of the courts, law reform seems long overdue in Australia. More robust law reform is required than has been presented by the law reform bodies in Victoria and NSW. *Miller v The Queen* has made law reform a matter of urgency. Double constructive liability manifested in extended joint enterprise doctrine attaches too much criminal liability to the defendant and therefore infringes the principles of fair labelling and proportionate punishment. A new lesser offence of risking another’s collateral offending would enable us to label and punish the defendant fairly according to the harmfulness of his own conduct and his personal culpability. Such fair criminalisation would achieve the deterrence goal better as well.