

CONCEPTUALIZING INCHOATE
COMPLICITY:
THE NORMATIVE AND DOCTRINAL
CASE FOR LESSER OFFENSES AS AN
ALTERNATIVE TO COMPLICITY
LIABILITY

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TABLE OF CONTENTS

I. INTRODUCTION504

II. HISTORY AND DOCTRINE509

III. THE LETTER OF THE LAW UNDER THE SERIOUS CRIME ACT
2007514

IV. RECKLESSLY ENCOURAGING AND ASSISTING SEVERAL AND
ALTERNATIVE CRIMES.....532

V. ENCOURAGING AND ASSISTING AN INNOCENT AGENT
.....537

VI. CAUSATION, ACT CAPABLENESS, AND IMPOSSIBILITY540

VII. IMPOSSIBILITY AND CAPABILITY552

VIII. WHEN IS TRIVIAL ENCOURAGEMENT CAPABLE OF
ENCOURAGING?557

IX. ATTEMPTS TO ATTEMPT AND THE SERIOUS CRIME ACT 2007
.....566

X. REMOTE ENCOURAGEMENT575

XI. CONCLUSION586

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I. INTRODUCTION

The Serious Crime Act 2007 (U.K.) not only grades and labels offenses according to the level of fault involved, but also gives the sentencing judge the discretion to determine an appropriate sentence in all cases including murder.¹ Contemporary standards demonstrate that a mandatory life sentence is not appropriate when the accessory has been reckless only. Lord Hutton, referring to complicity liability, said:

My Lords, I recognise that as a matter of logic there is force in the argument advanced on behalf of the appellants, and that on one view it is anomalous that if foreseeability of death or really serious harm is not sufficient to constitute mens rea for murder in the party who actually carries out the killing, it is sufficient to constitute mens rea in a secondary party.²

When accessories have not intentionally authorized or otherwise encouraged and assisted a murder or other specific intent crime, they should be given a lighter sentence. In addition, they should be charged with some lesser offense. In *Enmund v. Florida*, the Supreme Court of the United States held that co-defendants who had “plainly different” levels of culpability for a joint enterprise killing could not all receive the same sentence.³ The Court held that sentencing the perpetrator and the other participants alike where they had different degrees of responsibility contravened the Eighth and Fourteenth Amendments to the United States Constitution.⁴

“In determining whether a death sentence is proportionate, and therefore, not arbitrary, the Supreme Court directs reviewing courts to not only evaluate the defendant’s culpability individually, but also relative to his co-defendants and accomplices in the same case. . . . Whether the issue is that of ‘plainly different’ defendants receiving the same sentence of death, or that of similarly-culpable defendants receiving different sentences, the inquiry remains the same: whether the sentences are arbitrarily or unreasonably disparate.”⁵

1 See generally Serious Crime Act 2007, c. 27 (U.K.).

2 R v. Powell [1999] AC 1, 25 (U.K.).

3 *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

4 *Id.* at 782, 798, 800.

5 *State v. Gamble*, 63 So. 3d 707, 723 (Ala. Crim. App. 2010). In *Larzelere v. State*, 676 So. 2d 394, 406 (Fla. 1996), it was held: “When a co-defendant . . . is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant’s punishment disproportionate.”

Such an inquiry is pertinent in the United States with respect to the capital sentences, as it is in the United Kingdom with respect to the mandatory life sentence.⁶

The mandatory life sentence is a disproportionate punishment for the non-perpetrator who did not intend anyone to be seriously injured or killed.⁷ Such punishment contravenes the proportionate punishment right. In *People v. Kliner*, it was held that similarly situated codefendants should not be given arbitrarily or unreasonably disparate sentences.⁸ However, there is no requirement that both parties receive the exact same sentence.⁹ If *A* gives an insane person, *P*, a gun so that *P* can kill another person, it would not be disproportionate to sentence *A* to life imprisonment even though *P* is sent to a psychiatric hospital for treatment. *A*'s personal fault and derivative harm-doing are sufficient to warrant a life sentence for a murder that *A* intended to assist and desired *P* to perpetrate.¹⁰ Similarly, if the co-defendants manifest an almost identical level of culpability it does not matter that the accessory is only derivatively linked to the end harm.¹¹ The Supreme Court of the United States has held:

A claim that punishment is excessive is judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in [*Trop v. Dulles*]: 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' . . . Proportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent.' We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'¹²

The Supreme Court can be guided by policy considerations when it is engaging in judicial review, but it cannot use policy considerations to

⁶ When England and Wales had capital punishment, "[a]ll were liable to the same punishment, except murder was capital only for a party who himself killed or used force." See GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 404 (2d ed. 1961)

(citing Homicide Act 1957, 5 & 6 Eliz. 2 c. 11, § 5 (repealed)). See also *State v. Cruz*, 794 A.2d 165 (N.J. 2002).

⁷ See generally *Williams v. State*, 461 So. 2d 834 (Ala. Crim. App. 1983); *Gavin v. State*, 891 So. 2d 907 (Ala. Crim. App. 2003); *Hamm v. State*, 564 So. 2d 453 (Ala. Crim. App. 1989); Cf. *Tison v. Ariz.*, 481 U.S. 137, 157 (1987); *People v. Taylor*, 48 Cal. 4th 574, 661 (2010); *People v. Letner*, 50 Cal. 4th 99, 193 (2010).

⁸ *People v. Kliner*, 705 N.E.2d 850, 897 (Ill. 1998).

⁹ See *id.*

¹⁰ The crucial factors for an individualized determination are the wrongdoer's personal culpability and the circumstances of the harm-doing. See *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002); *State v. Gamble*, 63 So. 3d 707, 724 (Ala. Crim. App. 2010); *Graham v. Florida*, 560 U.S. 48, 60 (2010).

¹¹ *Atkins*, 536 U.S. at 319 ("With respect to retribution—the interest in seeing that the offender gets his 'just deserts'—the severity of the appropriate punishment necessarily depends on the culpability of the offender.")

¹² *Id.* at 311–12 (quoting *Trop v. Dulles*, 356 U.S. 86 (1958)).

expand criminal offences.¹³ Judges have no power to create new offenses or extend existing offenses for policy reasons.¹⁴ Judges have to interpret the law in accordance with the precedents,¹⁵ and should only depart from the precedents when adhering to them would cause an injustice.¹⁶ The “danger of gang crime” justification for dispensing with fundamental principles of justice is entirely unconvincing.¹⁷ The danger of gang crime rationale does not provide a justification for dispensing with the requirement that the prosecution establish equal personal fault, both in the perpetrator and accessory, if they are to receive equal punishment and be convicted of the same crime.¹⁸ Blame and punishment have to rest on personal fault.¹⁹ If the various parties manifested different levels of personal fault, then they have to be blamed and punished differently.²⁰ Coupled with this, there is often enough leeway in the sentence for crime that is the underlying joint enterprise preceding the collateral crime, to punish gang members sufficiently to deter them.²¹

This Article tries to identify the limits of derivative liability and its alternatives. The Article provides a doctrinal and theoretical analysis of the new independent direct liability offenses found in section 44–46 of Britain’s Serious Crime Act 2007 to highlight how independent offenses punishing acts of assistance and encouragement are fairer than making accessories and perpetrators equally liable under the law of complicity. I also examine the conduct element for these offenses to determine whether it is apt for catching the sort of reckless encouragement that is often present in the joint enterprise (common purpose) complicity cases and conclude that it is. The main shortfall of the offenses found in the Serious Crime Act 2007 is that they do not cover reckless participation.

In this Article, I argue that if reckless complicity is to be criminalized, then the Serious Crime Act 2007 should be amended to create a new offense of reckless participation. An independent offense would allow for fair labeling and proportionate punishment. In *U.S. v. Peoni*, the great jurist, Learned Hand, J., drawing on centuries of English law when interpreting a provision with wording almost verbatim to section 8 of the Accessories and Abettors Act 1861 (U.K.), held:

It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the

13 See *R v. Rimmington* [2005] UKHL 63, [2006] AC 459 (HL) 37–38 (appeal taken from Eng.).

14 *R (Nicklinson) v. Ministry of Justice* [2012] EWHC 2381 [79] (Eng.) (“As to constitutionality, it is one thing for the courts to adapt and develop the principles of the common law incrementally in order to keep up with the requirements of justice in a changing society, but major changes involving matters of controversial social policy are for Parliament.”).

15 *Rimmington*, [2005] UKHL 63, 25–26.

16 Practice Statement (Judicial Precedent), [1966] 1 WLR 1234.

17 See *Clayton v The Queen* (2006) 168 A Crim R 174, 193 (Austl.).

18 See *id.*

19 See *id.*

20 See *id.*

21 See *id.*

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 colorless, 'abet'— carry an implication of purposive attitude towards it.²²

In *Rosemond v. U.S.*, Kagan, J. (delivering the majority opinion in the Supreme Court of the United States) said:

And the canonical formulation of that needed state of mind—later appropriated by this Court and oft-quoted in both parties' briefs—is Judge Learned Hand's: To aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'²³

The problem is that many states in the United States, and the common law in England, make people liable for recklessly participating in the crimes of others. It is true that many complicity cases involve reckless acts of encouragement or assistance, but not intentional acts of encouragement and assistance. While limiting the mental element in complicity to intention would remove the injustice that is caused when people are held liable for murder because they were *reckless* in selling a gun to a murderer (such as if they sold the gun not intending to assist the murderer to kill, but with foresight of the risk that the purchaser might use the gun to unjustifiably and inexcusably kill), it would leave a gap in the law because a person who sells a gun to another believing that person might misuse it to kill or perpetrate some other serious crime should be liable for some sort of offense. Most theorists have focused on the injustices caused by allowing accessories to be liable for crimes of intention for recklessly assisting and encouraging those crimes of intention, but what is needed is an entirely new scheme to deal with reckless assisters and encouragers. Those who have it as their purpose to assist and encourage should be equally liable, but those who are merely reckless should be charged with less serious and independent offenses. This sort of reckless encouragement should be criminalized in an independent offense that allows for fair labeling and proportionate punishment. I will make reference to the new offenses found in the Serious Crime Act 2007 to explore the conceptual problems of having inchoate offenses of assistance and encouragement and also having lesser non-inchoate offenses of assistance and encouragement. I will also show how such a scheme can produce much fairer results than the traditional complicity provisions found in the United States and United Kingdom, which deem accessories to be perpetrators even when they lack the fault required for perpetration liability.

²² United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

²³ *Rosemond v. United States*, 134 S. Ct. 1240, 1245, 1248 (2014). Like Learned Hand, J., Kagan, J. draws on the common law.

A. ACT CAPABILITY AND IMPOSSIBILITY

“I shall form these conclusions, first, that all endeavor, is an offense against the Common-wealth: though nothing follow thereupon.”²⁴

“Abetting is only encouraging: it may be innocent: for it may be without effect. Aiding, indeed, cannot be innocent: but abetting may.”²⁵

The second statement above is only partly true since assisting may also be innocent, or not wrongful. A person may accidentally or mistakenly assist another to perpetrate a crime. For example, *R*,²⁶ the *remote party*—that is the party who is remotely involved in that he or she assists, encourages, or is the party that at least *tries* to assist or encourage a putative crime, might drive *P*,²⁷ the *perpetrator* of the anticipated target offense, to a house believing that he or she is assisting *P* to collect her own property, when in fact, unbeknownst to *R*, *P* is using *R* to get to the location of the next burglary (the anticipated target crime).²⁸ On these facts, *R*'s act of driving *P* to the house that *P* burglarizes is not done with the aim of assisting *P*'s burglary. *R* believes that he or she is assisting *P* to engage in non-criminal conduct. Thus aiding may be innocent as well. Under the Serious Crime Act 2007, both assisting and encouraging are deemed criminal conduct regardless of whether the attempt to aid or encourage is with effect.²⁹

However, the second of the two quotations above draws attention to a more fundamental point. That is the issue of putative causation. The new inchoate offenses require the remote party's act to be an act that is capable of assisting or encouraging *P*. It is likely to be more difficult to establish a putative causal connection when the remote party's encouragement is without effect than when the assistance is without effect. Proof of a putative causal connection is not difficult to establish for assistance, since an act that is factually capable or putatively capable of assisting will not be difficult to define and prove. A determination of whether or not the remote party's conduct was factually capable of assisting the perpetrator to perpetrate the target crime is not likely to be as difficult as a factual

²⁴ ANDREW ANDERSON, THE LAWS AND CUSTOMS OF SCOTLAND IN MATTERS CRIMINAL 5–6 (2d ed. 1699).

²⁵ R v. Royce (1767) 98 Eng. Rep. 81, 85–86.

²⁶ In this Chapter, I use “*R*” to refer to the “remote party.” In the earlier chapters I used “*A*” for “accessory.” I use the term “remote party” in this Chapter because in cases where *P* has not even attempted the anticipated target crime, the remote party *R* is not an accessory/derivative participant. *R* cannot participate in a crime that *P* does not even attempt because a person cannot participate in a non-existent crime. Thus, *R* will be used in this Chapter in all references to the remote party, both for those remote parties who are accessories in the normal sense and for those remote parties who *try* to participate in the potential crime of another.

²⁷ “*P*” refers to the perpetrator of the anticipated target crime not to the assistor/encourager who perpetrates a crime of her own under the Serious Crime Act, 2007, c. 27 (U.K.).

²⁸ See generally *People v. Molano*, 61 Cal. Rptr. 821 (Cal. Ct. App. 1967); SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW 399–400 (6th ed. 1904).

²⁹ Serious Crime Act 2007, c. 27, §§ 44–46 (U.K.).

determination that attempts to determine whether the remote party's conduct was capable of encouraging the perpetrator to offend.

In this Chapter, I shall try to provide an interpretation of the provisions that can be reconciled with the fundamental requirements of justice including fair labeling and fair criminalization and also the right to freedom of expression. I shall also consider the defense of impossibility. The new provisions could deal with joint enterprise complicity cases where it is proved that *P* was in fact encouraged to perpetrate the anticipated collateral crime because of *R*'s participation in the underlying criminal joint enterprise. However, the inchoate form of the offenses found in the Act of 2007 should not be applied to joint enterprises where no collateral crime has been perpetrated, simply because it was foreseeable that a collateral crime might be perpetrated, unless there is strong evidence that *R*'s reckless participation in the underlying joint enterprise was capable of encouraging *P* to perpetrate the anticipated target crime. The offenses in the Act of 2007 do not cover reckless participation, so unless the law is amended to cover reckless participation including reckless encouragement via participating in an underlying criminal enterprise, those who recklessly encourage the perpetration of a collateral crime by participating in an underlying criminal enterprise will not be caught.

II. HISTORY AND DOCTRINE

It is important to have a clear view of the new statutory provisions and the history that underlies them before we can analyze the core doctrinal and conceptual problems these provisions pose. At common law the offense of incitement (or solicitation)³⁰ was committed when a person "counseled, procured or commanded" another to commit a crime, whether as perpetrator or as accessory, and whether or not the person incited did what she was urged to do.³¹ This was an inchoate crime that covered encouragement only.³² If *P* had in fact been encouraged by the inciter's incitement, the inciter would of course have been an accomplice and would normally have been charged as such under section 8 of the Accessories and Abettors Act 1861 and its predecessors.³³ However, on a charge of incitement, it was no defense to show that the crime was actually

³⁰ This offense has ancient roots. *See* *R v. Bacon* (1663) 83 Eng. Rep. 1256 (Bacon "was indicted for offering 100l. in a bagg to Parry to murder Sir Harbottle Grimston the Master of the Rolls . . ."); *R v. Turvy* (1708) 90 Eng. Rep. 1101, 1102 ("To persuade and solicit is a crime, but that is not the crime laid here. He is found guilty of the whole; but if he had been found guilty of the persuasion, it may be that would have helped it."). *See also* *R v. Scofield* (1784) Cald. 397 (Eng.); *R v. Higgins* (1801) 102 Eng. Rep. 269; *R v. Vaughn* (1769) 98 Eng. Rep. 308; *contra* *R v. Collingswood* (1704) 91 Eng. Rep. 680.

³¹ *R v. Gregory* [1867] 1 CCR 77 (Eng.).

³² *See id.*

³³ Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.).

committed.³⁴ Incitement covered acts of encouragement only, so it did not cover attempts to *assist* another to commit a crime.³⁵

People who attempted to assist crime did not commit an offense at common law if their assistance was not used. After supplying assistance, accomplices can make quite strenuous attempts to prevent it being used and thus might evade criminal liability. However, under the Serious Crime Act 2007 they will be liable even if they prevent their assistance from facilitating *P*'s criminal conduct.³⁶ Lawmakers thought that a new inchoate offense was needed to criminalize inchoate participation by assistance. The old common law offense of incitement already criminalized attempted participation by encouragement,³⁷ so the lawmakers decided to reform the law to catch assistance.³⁸

A. PERSONAL LIABILITY NOT DERIVATIVE LIABILITY

The core difference between sections 44–46 of the Serious Crime Act 2007 and section 8 of the Accessories and Abettors Act 1861 is that the former are offenses of personal liability, whereas section 8 is merely a procedural mechanism for holding a person derivatively liable for a crime

³⁴ See Criminal Law Act 1967, c. 58, § 6(3) (Eng.); *R v. Curr* [1968] 2 QB 944 (Eng.); *R v. Poland* [2012] EWHC (Admin) 205 [18] (Eng.). See also *Gawen v. Hussee*, (1537) 73 Eng. Rep. 84.

³⁵ See *id.*

³⁶ Serious Crime Act 2007, c. 27, § 49(1) (U.K.).

³⁷ See *Higgins*, 102 Eng. Rep. at 276 (“This is a charge of an act done; namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so. A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment . . .”). Cf. *Eaton v. Allen* (1598) 76 Eng. Rep. 896 (where incitement is contradistinguished from conspiracy); See also *R v. Best* (1705) 87 Eng. Rep. 895; *R v. Johnson* (1678) 87 Eng. Rep. 157; *R v. Brown* (1899) 63 JP 790 (Eng.); *R v. Roberts* (1855) 169 Eng. Rep. 836. There also were cases concerning the subornation of perjury. For some early examples, see *Partridge v. Strange* (1552) 75 Eng. Rep. 123; *Prowse v. Cary* (1587) 78 Eng. Rep. 351. The concept of solicitation/encouragement also arose in the ecclesiastical cases concerning the spiritual offense of solicitation of chastity. See *R v. Peirson* (1705) 91 Eng. Rep. 333; *Rigaut v. Gallisard* (1685) 87 Eng. Rep. 1106. Cf. *Hicks v. Gore* (1685) 87 Eng. Rep. 53.

³⁸ THE LAW COMM’N, INCHOATE LIABILITY FOR ASSISTING AND ENCOURAGING CRIME 23 (2006), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272319/6878.pdf (U.K.) (“Parliament has enacted a considerable number of statutory offenses that criminalize particular instances of inchoate assistance. However, there are no statutory inchoate offenses of assisting some of the most serious crimes, including murder, robbery, blackmail or burglary. . . . We agree with Professor John Spencer that there ‘is a general problem, and it needs a general solution.’”). In his early work, Professor John Spencer proposed that unused assistance be criminalized. J.R. Spencer, *Trying to Help Another Person Commit a Crime*, in CRIMINAL LAW: ESSAYS IN HONOUR OF J.C. SMITH 148 (1987). Kadish thought about the same issue a couple of years before Spencer penned his paper. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 359 (1985). Prior to that, Richard Buxton argued that attempted assistance warranted a criminal response. See Richard Buxton, *Complicity in the Criminal Code*, 85 LAW Q. REV. 252, 268 (1969). Some jurisdictions in the United States adopted such an approach many decades ago. See MODEL PENAL CODE §2.06 (2001); KY. REV. STAT. ANN. § 506.010(3) (West 1994) (“A person is guilty of criminal attempt to commit a crime when he engages in conduct intended to aid another person to commit that crime, although the crime is not committed or attempted by the other person, provided that his conduct would establish complicity under KRS 502.020 if the crime were committed by the other person.”). Similar provisions can be found in about ten other statutes in the United States. See e.g., ARIZ. REV. STAT. ANN. § 13-1001(A)(3) (West 1977); N.J. STAT. ANN. § 2C:5-1(c) (West 1979) as discussed in *State v. Sunzar*, 751 A.2d 627, 631 (N.J. Super. Ct. Law Div. 1999); *State v. Jovanovic*, 416 A.2d 961 (N.J. Super. Ct. App. Div. 1980).

perpetrated by another person. What is criminalized under the new law? An old evidential maxim was *voluntas reputabatur pro facto* (the will is to be taken for the deed), but a thought crime is no crime at all.³⁹ Under the new law there must be an act that could be capable of assisting the perpetrator to perpetrate the anticipated target crime should the perpetrator try to perpetrate it. *R*'s act should be such that it would establish complicity liability under section 8 of the Accessories and Abettors Act 1861, were *P* to perpetrate the anticipated target crime. The new offense of encouragement, just like the old common law offense of incitement, criminalizes conduct that *attempts* to move another to perpetrate a crime or does in fact move that person to perpetrate the anticipated target crime. Consequently, the offense of encouragement, like the old common law offense of incitement, has to be proved by some *apertum factum*.⁴⁰

R's act might be the fact that *R* has posted a message on a social media website to encourage followers to riot and commit criminal damage.⁴¹ The encouragement might even be proved by omission. If *R* is a security guard in a department store, *R* has a contractual duty to ensure that customers do not shoplift.⁴² If by chance⁴³ *R* sees a sibling, *P*, shoplifting and fails to tell *P* to stop, or fails to report *P* and *P* continues because of *R*'s omission, *R* encourages by omission. Similarly, let us assume *P* steals more goods than originally intended because *P* sees *R* is failing to take action. On these facts it could be argued that the shoplifter is encouraged to continue stealing, not only because of the circumstantial fact that the security guard on duty

39 Sir Harbert Crofts v. Brown (1616) 81 Eng. Rep. 141; Eaton v. Allen (1598) 76 Eng. Rep. 896.

40 R v. Nichols & Robins (1676) 84 Eng. Rep. 1021.

41 R v. Blackshaw (Jordan Philip) [2011] EWCA (Crim) 2312 (Eng.).

42 See R v. Pittwood [1902] 19 TLR 37 (Eng.). In the thoroughly shocking case of *State v. Ainsworth*, 426 S.E.2d 410, 425 (N.C. Ct. App. 1993), a parent failed in her duty to protect her son from being sexually violated. A legal issue that arose in *Ainsworth* was whether "a mother may be found guilty of rape on a theory of aiding and abetting when her twelve-year-old child engaged in intercourse with an adult woman in her presence and the mother did not take any reasonable steps to prevent the intercourse." In *State v. Walden*, 293 S.E.2d 780, 786 (N.C. 1982), Mitchell, J. said: "[W]e believe that to require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent. Further we believe this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute. This is not to say that parents have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children. To require such, would require every parent to exhibit courage and heroism which, although commendable in the extreme, cannot realistically be expected or required of all people. But parents do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children." Cf. R. v. Dytham [1979] QB 722 (Eng.). See also R. c. Rochon, [2011] 357 D.L.R. 4th 391 (Can. Que.) (where the defendant discovered that her son had been growing marijuana on her property, the Quebec Court of Appeal held that the defendant had no duty to report her son to the police or to control his criminal activities on her property); *Sneddon v. Stevenson* [1967] 1 WLR 1051 (Eng.) (suggesting that mere presence for the purposes of entrapping the defendant was not an act of solicitation).

43 In this hypothetical there is no prearrangement/agreement (conspiracy to steal) and no positive encouragement from *R*.

happens to be the shoplifter's sibling, but also because of that sibling's intentional omission.⁴⁴

The core offenses are now found in sections 44–46 of the Serious Crime Act 2007, which targets acts that are “capable” of encouraging or assisting people to commit crimes.⁴⁵ There is no normative difference between encouragement and assistance; both can be used to participate in the crime of another or to participate in the crimes of many others.⁴⁶ A person could stand on a podium and use speech to incite thousands to riot and perpetrate acts of criminal damage. Such a person could also use social media to encourage thousands to riot and to commit criminal damage as some did during the 2011 England riots.⁴⁷ Encouragement has the potential to move thousands of people.⁴⁸ Many of the incitement offenses prior to the decision in *R. v. Higgins*⁴⁹ were concerned with conduct that was likely to incite the masses to engage in public disorder offenses such as treason.⁵⁰ The early incitement statutes seemed to focus on conduct that had the potential to incite the masses to rise up against the state. Of course there were some exceptions.

Likewise, assistance can facilitate the crimes of many. Those who set up webpages to assist people to download pirated movies assist thousands,

44 See Serious Crime Act 2007, c. 27, §§ 65(1), 65(2)(b) (U.K.) (“A reference in this Part to a person’s doing an act that is capable of encouraging the commission of an offense includes . . . failing to take reasonable steps to discharge a duty.”).

45 Serious Crime Act 2007, c. 27, §§ 44–46 (U.K.). I use the label “anticipated offense” (as used in the Serious Crime Act) because the inchoate offenses are substantive offenses *per se*.

46 “Attempted participation” is what the encourager does if the attempt to participate has no effect.

47 *R. v. Blackshaw* (Jordan Philip) [2011] EWCA (Crim) 2312 (Eng.) (holding that the defendant’s tweets, inciting thousands to riot, were in fact capable of encouraging some of those who received the tweets to riot).

48 See *e.g.*, *R. v. Badger* (1843) 114 Eng. Rep. 975, 975–76 (“Large meetings of such persons were held, whose passions were inflamed by seditious harangues addressed to them by strangers travelling about the country under the name of chartists; there was imminent danger that the peace would be broken and anarchy become universal.”); See also *R. v. Blackshaw* (Jordan Philip) [2011] EWCA (Crim) 2312 (Eng.).

49 *R. v. Higgins* (1801) 102 Eng. Rep. 269, 271.

50 There are numerous modern statutes that target conduct which has the potential to incite people to engage in criminal conduct. See *e.g.*, Terrorism Act 2006, c. 11, §§ 1–2 (U.K.); Public Order Act 1986, c. 64, §§ 18–22 (U.K.); Incitement to Disaffection Act 1934, 25 & 26 Geo. 5 c. 56, § 1 (U.K.); Ministry of Defense Police Act 1987, c.4, § 6 (U.K.); Cable and Broadcasting Act 1984, c. 46, § 27 (U.K.); Aliens Restriction (Amendment) Act 1919, 9 & 10 Geo. 5 c. 92, § 3 (U.K.). See also *R. v. Abu Hamza* [2007] QB 659 (Eng.); *O’Connell v. R* (1844) 8 Eng. Rep. 1061; *R. v. Murphy* (1837) 173 Eng. Rep. 502; *R. v. Carlile* (1831) 172 Eng. Rep. 763; *R. v. Shipley* (1784) 99 Eng. Rep. 774, 775 (Defendant was charged with criminal libel for publishing material that had the potential to “incite the subjects of our lord the King to attempt by force and violence, and with arms, to make alterations in the Government, state, and constitution of this kingdom.”). Calls for non-violent protests to bring about constitutional change would be protected by the freedom of expression right: *Lehideux v. France*, 30 Eur. Ct. H.R. 665 (2000). Communications Act 2003, c. 21, § 239(1) (U.K.) (“OFCOM must serve a notice under subsection (2) on the holder of a license to provide a television licensable content service if they are satisfied—(a) that the holder of the license has included in the service one or more programmed containing material likely to encourage or to incite the commission of crime, or to lead to disorder.”) See also SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 339 (London, R. Nutt *et al.* 1736); SIR EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 100 (1803); *R. v. Casement* (1917) 1 KB 98 (Gr. Brit. & Ir.); *Story’s Case* (1570) 73 Eng. Rep. 670; *R. v. Fuller* (1797) 126 Eng. Rep. 847; *Johnson v. Wicherley* (1674) 86 Eng. Rep. 607 (Eng. & Wales); *R. v. Count de Castlemain* (1679) 83 Eng. Rep. 198; *Crosby’s Case* (1700) 90 Eng. Rep. 259.

if not millions, to illegally download movies. In 2010, a United States District Court held:

Secondary liability for copyright infringement may be imposed on a party that has not directly infringed a copyright, but has played a significant role in direct infringement committed by others, for example by providing direct infringers with a product that enables infringement. . . . The rationale for secondary liability is that a party who distributes infringement-enabling products or services may facilitate direct infringement on a massive scale, making it ‘impossible to enforce [copyright protection] effectively against all direct infringers.’ In such circumstances, ‘the only practical alternative is to go against the distributor of the copying device for secondary liability.’⁵¹

B. DO WE NEED LIABILITY FOR ATTEMPTED PARTICIPATION?

Is it necessary to criminalize the attempt to assist and encourage? Is it not enough to prosecute the webpage creators when someone actually uses their page to download an illegal movie? This sort of conduct could be tackled as a case of personal liability by making it a crime to operate pirate websites or to sell items that can be used in fraud (section 6 of the Fraud Act 2006 criminalizes those who possess articles that can be used in fraud and liability is personal for the personal choice to possess).⁵²

There are situations where particularly vulnerable victims need special protection from being encouraged to engage in conduct that victimizes them. However, these sorts of cases are best dealt with by enacting narrowly tailored incitement offenses similar to those found in the Sexual Offenses Act 2003, which aim to protect children and vulnerable adults.⁵³ Also, there are narrowly tailored incitement offenses that deal with particularly heinous conduct such as inciting murder.⁵⁴ In addition, there are incitement offenses that target those who incite individuals rather than collectives of people to commit offenses against the state.⁵⁵ The advantage of the Serious Crime Act 2007 is that it plugs any gaps that might be left by relying on *ad hoc* laws by providing catchall provisions that cover all facilitation and incitement.⁵⁶

Nonetheless, the person who merely attempts to assist or encourage a single person to commit a crime poses little danger to society. It is true that

51 Arista Records, L.L.C. v. Lime Group, L.L.C., 715 F. Supp. 2d 481, 506 (S.D.N.Y. 2010).

52 Fraud Act 2006, c. 35, § 6 (U.K.).

53 See generally Sexual Offenses Act 2003, c. 42 (U.K.).

54 See Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, § 4 (Gr. Brit. & Ir.); R v. Winter [2007] EWCA (Crim) 3493 (U.K.).

55 Police Act 1996, c. 16, § 91 (U.K.); Armed Forces Act 2006, c. 52, § 40 (U.K.); Official Secrets Act 1920, 10 & 11 Geo. 5 c. 75, § 7 (Gr. Brit. & Ir.); Perjury Act 1911, 1 & 2 Geo. 5 c. 6, § 7(2) (Eng. & Wales). There are a few offenses that target those who incite individuals to commit specific offenses that are not against the state. See, e.g., Misuse of Drugs Act 1971, c. 38, § 19 (U.K.); Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, § 4 (Gr. Brit. & Ir.) (inciting murder); Criminal Justice Act 1993, c. 36, § 52(2)(a) (U.K.) (encouraging insider trading); Suicide Act 1961, 10 & 11 Eliz. 2 c. 60, § 2(1) (Eng.) (encouraging or assisting suicide).

56 See generally Serious Crime Act 2007, c. 27 (U.K.).

a person who attempts to assist an act of terrorism poses a greater danger to society than one who attempts to assist an act of shoplifting, but that is a different conceptual point. Deterrence at this level does not require inchoate offenses, rather it requires terrorism to be labeled and punished more severely than shoplifting and it requires those who consummate their assistance of terrorism to be punished more severely than if they have consummated their assistance of shoplifting. There seems no pressing case for criminalizing attempted participation by assistance or encouragement.

Greater harm is risked when the assistance or encouragement is aimed at many potential offenders,⁵⁷ but the new offenses make no distinction between attempted participation in a single crime and attempted participation in the crimes of many. Nonetheless, any criminal harm is contingent on the third party making the choice to offend. When the third party offends or attempts to offend, complicity liability is sufficient for criminalizing both that third party and the encourager or assister.⁵⁸ Generally, people should be punished for their past wrongdoing and harm-doing, not for what others *might have done* with their assistance or because of their encouragement.⁵⁹ It would be enough to criminalize encouragement that actually (or in part) moves a perpetrator to perpetrate or attempt to perpetrate a crime, or assistance that actually assists a perpetrator to either consummate or attempt to consummate a crime. In the case of those who set up pirate movie websites, the assistance will nearly always be consummated since a user somewhere will have made use of the website. Similarly, where a person uses social media to encourage many to riot, the encouragement, if capable of encouraging, will reach someone somewhere and thus will nearly always be consummated by participation in the riot.

Even if the “acts that have the potential for assisting or encouraging great numbers of people to perpetrate crime” argument provides a good justification for this sort of inchoate liability, it was not one given as a special justification by the Government or the Law Commission.

III. THE LETTER OF THE LAW UNDER THE SERIOUS CRIME ACT 2007

The common law offense of incitement was abolished and three new offenses were enacted. Those offenses target those who:

⁵⁷ Cf. *Arista Records, L.L.C. v. Lime Group, L.L.C.*, 784 F. Supp. 2d 398 (S.D.N.Y. 2011); *R v. Most* [1881] 7 QB 244 (Gr. Brit. & Ir.).

⁵⁸ *R v. Dunnington* [1984] QB 472 (U.K.); *R v. Crangle* [1987] (N. Ir. unreported judgments); *R v. Hapgood* [1870] 1 LRCCR 221 (Gr. Brit. & Ir.); *R v. Clayton* (1843) 174 Eng. Rep. 743; *R v. Williams* (1844) 174 Eng. Rep. 950.

⁵⁹ Dennis J. Baker, *Punishment Without a Crime: Is Preventive Detention Reconcilable with Justice?*, 34 AUST. J.L. PHIL. 120 (2009).

1. Intentionally do an act that is capable of encouraging or assisting another person's putative or actual offending intending to assist or encourage that offending.⁶⁰
2. Do an act that is capable of encouraging or assisting another person's putative or actual offending *believing* that person *will* perpetrate the target crime.⁶¹
3. Do an act that is capable of encouraging or assisting another person's putative or actual offending *believing* she *will* perpetrate an anticipated target crime within a certain range of crimes.⁶²

A. DECIDING WHICH OFFENSE TO CHARGE

The Law Commission recommended that these new offenses, along with five other proposed offenses, replace the old law of complicity, but the Government enacted only some of the Commission's proposed offenses and left the old law of complicity in place.⁶³ As a consequence, complicity law as provided for in Accessories and Abettors Act 1861 stands side-by-side with the new independent offenses.⁶⁴ The overlap is apparent. The problem with this approach is that it allows the Crown Prosecution Service to cherry-pick. If the encouraged or assisted perpetrator actually attempts or consummates the anticipated substantive crime, the prosecutor will be able to charge under the Accessories and Abettors Act 1861, which in effect allows the defendant to be convicted and sentenced as a perpetrator of the target crime.⁶⁵ If the perpetrator is not encouraged or assisted by the remote party's act of assistance or encouragement, the prosecutor can go for one of the offenses found in sections 44–46 of the Serious Crime Act 2007, however, sections 44–46 can also be invoked where the assistance or encouragement is consummated.⁶⁶

B. SENTENCING AND LABELING

Under the Act of 2007 the assister/encourager is not labeled as a perpetrator of the anticipated target offense.⁶⁷ For example, if a person is convicted of assisting or attempting to assist murder under the Act of 2007, that person will not be labeled as a murderer as would occur under section 8 of the Act of 1861.⁶⁸ Instead, the crime label would be for one of the offenses found in sections 44–46 of the Act of 2007. Therefore, the

60 Serious Crime Act 2007, c. 27, § 44 (U.K.).

61 Serious Crime Act 2007, c. 27, § 45 (U.K.).

62 Serious Crime Act 2007, c. 27, § 46 (U.K.).

63 See THE LAW COMM'N, PARTICIPATING IN CRIME 15–17 (2007), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243300/7084.pdf (U.K.).

64 See generally Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94 (Eng.).

65 *Id.*

66 Cf. Dennis J. Baker, *Complicity, Proportionality, and the Serious Crime Act*, 14 NEW CRIM. L. REV. 403 (2011).

67 Serious Crime Act 2007, c. 27, §§ 44–46 (U.K.).

68 Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.).

assister/encourager will be convicted of assisting or encouraging (or attempting to assist or encourage) contrary to section 44 of the Serious Crime Act 2007 and so on. Similarly, under the new Act of 2007, the sentencing judge has the discretion not to impose a life sentence for murder, because none of the new offenses carry a mandatory life sentence.⁶⁹ The sentencing judge might give a light sentence where the remote party has provided trivial or ineffectual assistance and encouragement and where that party did not intend *P* to perpetrate a murder. Likewise, the sentencing judge could impose a life sentence under the Act of 2007, where *R* has provided *P* with major assistance and where *R* intended *P* to use that assistance for the purpose of perpetrating murder and where *P* has in fact killed.⁷⁰ Where *P* has not killed or attempted to kill *V*, a life sentence for *R* would be disproportionate punishment.⁷¹ *R* should not be given a life sentence merely for trying to persuade *P* to kill *V*.

However, section 58(3) of the Serious Crime Act 2007 provides that in any case other than murder, the remote party “is liable to any penalty for which she would be liable on conviction of the anticipated or reference offense.”⁷² This provision allows for fair sentencing, but at one level seems to allow for unfair crime labeling. The provision allows for fair sentencing because the defendant’s sentence is calibrated with the gravity of the crime that was attempted to participate in. However, the crime labels are somewhat asymmetrical, because sections 44–46 criminalize both inchoate participation and consummated participation, and use the same label for both forms of participation.⁷³

A person who supplies a gun that is used by *P* to kill is labeled the same under sections 44–46 as a person who attempts to supply a gun that is not used to kill.⁷⁴ Hence, under the Serious Crime Act, consummated participation is labeled the same as attempted participation.⁷⁵ However, the sentencing judge does have the discretion to punish consummated participation more severely than inchoate participation as long as the sentence is calibrated with the anticipated target crime.⁷⁶ Where the anticipated target crime has been perpetrated or attempted, it is likely that the prosecution will invoke section 8 of the Accessories and Abettors Act 1861. Where the encourager and the perpetrator agree that *P* should

69 See generally Serious Crime Act 2007, c. 27 (U.K.).

70 See Serious Crime Act, 2007, c. 27, § 58(1) (U.K.).

71 See generally DENNIS J. BAKER, THE RIGHT NOT TO BE CRIMINALIZED: DEMARCATING CRIMINAL LAW’S AUTHORITY (2011); ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1996).

72 Serious Crime Act 2007, c. 27, § 58(3) (U.K.).

73 Serious Crime Act 2007, c. 27, §§ 44–46 (U.K.).

74 *Id.*

75 *Id.*

76 Nonetheless, some would argue that results do not matter and that attempts should be labeled and punished the same as consummated offenses. For a fuller discussion, see Joel Feinberg, *Criminal Attempts: Equal Punishment for Failed Attempts*, in PROBLEMS AT THE ROOTS OF LAW 100 (Joel Feinberg ed., 2003). Cf. Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057 (1992). For an interesting account of the wrongness of attempts, see Stephen P. Garvey, *Are Attempts Like Treason*, 14 NEW CRIM. L. REV. 173 (2011).

perpetrate the crime, the prosecution is likely to charge them with conspiracy.⁷⁷

C. THE MENTAL ELEMENT FOR SECTION 44

Let us start by examining the section 44 offense. Section 44 provides:

- (1) A person commits an offense if—
- (a) he does an act capable of encouraging or assisting the commission of an offense; 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 offense merely because such encouragement or assistance was a foreseeable consequence of his act.⁷⁸

The fault element for the new offenses has been set out in a convoluted set of provisions. The mental element for the section 44 offense is set out in both section 44 and in section 47.⁷⁹ The assister/encourager is liable under section 44 if intent to encourage or assist *P* to commit the anticipated target crime is found.⁸⁰ Intention does not include oblique intention. It is not enough that *R* intends to assist *P* in circumstances where *R* foresees that it is virtually certain that *P* will use her assistance to commit the anticipated target crime. *R* is caught by section 44 if *R* shares the perpetrator's purpose that the "anticipated or reference" offense be committed.⁸¹ *R* must intend to assist or encourage *P* to perpetrate the particular anticipated crime. This means that *R* must, through assistance or encouragement, seek to bring about the perpetrator's offending.⁸² A clear example is where *R* gives *P* a gun to assist *P* to kill *V*, because *R* hates *V* and wants to see *P* succeed in killing *V*. Since *R* provides the gun to *P* and has an ulterior purpose that *P* use that assistance to unlawfully kill *V*, that conduct is caught by section 44.⁸³ This is a straightforward case.

⁷⁷ In many cases the prosecution's use of the Serious Crime Act will be for inchoate liability, where *R* has attempted to participate in the inchoate crimes of others. See the discussion *infra*.

⁷⁸ Serious Crime Act 2007, c. 27, § 44 (U.K.).

⁷⁹ Serious Crime Act 2007, c. 27, §§ 44, 47 (U.K.).

⁸⁰ Serious Crime Act 2007, c. 27, § 44 (U.K.).

⁸¹ *Id.*

⁸² The intention requirement found in section 44 of the 2007 Serious Crime Act seems to impose a fault standard akin to that expounded by Judge Learned Hand in *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), where he said: "[I]t [is] . . . nothing whatever to do with the probability that the forbidden result would follow upon the [assister's/encourager's] conduct . . . he must in some sort associate himself with the venture, in that he participates in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

⁸³ On defenses, see DENNIS J. BAKER, *GLANVILLE WILLIAMS TEXTBOOK OF CRIMINAL LAW* (4th ed. 2015). See also *Gillick v. West Norfolk and Wisbech AHA* [1986] AC 112 (Eng.); Joshua Dressler, *Reflections on Dudley and Stephens and Killing the Innocent: Taking a Wrong Conceptual Path*, in *THE SANCTITY OF LIFE AND THE CRIMINAL LAW: THE LEGACY OF GLANVILLE WILLIAMS*, 126 (Cambridge, 2013).

Section 44(2) holds that a defendant “is not to be taken to have intended to encourage or assist the commission of an offense merely because such encouragement or assistance was a *foreseeable consequence* of his” intentional act of assistance or encouragement.⁸⁴ Parliament was aiming to exclude “oblique intention” from section 44.⁸⁵ Coupled with this, section 45 is an offense of oblique intention.⁸⁶ We can safely interpret section 44 as an offense of intention. Under section 44, it is not enough to demonstrate that the encourager or assister obliquely intended to assist or encourage *P*’s act of perpetration.⁸⁷ A literal interpretation of the section suggests that the prosecution is required to prove beyond reasonable doubt that the assister/encourager intended to assist or encourage *P* to perpetrate the anticipated target crime. A person does not necessarily intend to assist or encourage a crime merely because that person sees its perpetration as a virtually certain consequence of intentional assistance or encouragement. *R* must intentionally do some act of assistance or encouragement with the ulterior direct intention that the assistance or encouragement be used by *P* to perpetrate the anticipated target crime.

The act of assistance or encouragement has to be the product of voluntary action. Automatism might provide a defense in rare cases. Similarly, the defense of duress might also apply in some cases. Nonetheless, it is difficult to imagine a case where *R* will have formed the ulterior direct intention that his or her assistance be used to facilitate *P*’s anticipated target crime, if the initial act of assistance or encouragement was involuntary or unintended. *R* will not be liable if *R* intended to assist *P* to kill in self-defense. Injustices may arise in problematic double-effect cases where there is no legal defense for the perpetrator’s morally excusable or justifiable conduct, such as where *R* assists *P* to kill as a matter of necessity or under duress of circumstances.

Take the example where a group is stranded in an overloaded lifeboat in icy waters. Suppose one of the passengers, *V*, weighs 150 kilograms. *P* asks *V* to get off the boat to save the lives of five children weighting thirty kilograms each. *V* refuses so *P* asks *R* for the gun so that *P* can force *V* off the boat. *P* uses the gun to force *V* to jump from the boat into the icy waters where *V* drowns to death. Since three of the children belong to *R*, *R* is psychologically compelled to assist *P*. Here *R* has assisted *P* to kill *V* in circumstances where necessity and duress of circumstances are not

84 Serious Crime Act 2007, c. 27, § 44(2) (U.K.).

85 When the relevant bill was introduced, the Parliamentary Under-Secretary of State for Justice said: “The notion of intention is given a particular meaning by subsection (2) . . . I hope that it assists the hon. Member for Hornchurch if I say that what we are trying to get at is that intention should be interpreted in a narrow way, and should exclude the concept of *virtual certainty*. It is equivalent to meaning that *D*’s purpose must be to assist or encourage the offense.” Hansard, *HC Public Bill Committee, 6th Sitting* (July 3, 2007), <http://www.publications.parliament.uk/pa/cm200607/cmpublic/serious/070703/pm/70703s01.htm>. *Pepper v. Hart* [1993] AC 593 (U.K.) (Courts should look at Parliamentary proceedings in Hansard “for the purpose of resolving ambiguity in the construction of statutes.”).

86 Serious Crime Act 2007, c. 27, § 45 (U.K.).

87 Serious Crime Act 2007, c. 27, § 44 (U.K.).

defenses to murder. Necessity and duress of circumstances could provide *R* with a defense under section 44 because it is not murder but an independent offense.⁸⁸ However, if the prosecution were to charge *R* with murder via the procedural mechanism found in section 8 of the Accessories and Abettors Act 1861, *R* would be liable for murder.⁸⁹ Since section 8 is a mechanism for deeming that the accessory also was a perpetrator of the target crime, *R* would not be able to raise duress as a defense where the charge is murder.⁹⁰

D. THE MENTAL ELEMENT FOR SECTION 45

Let us start by examining the section 45 offense. Section 45 provides:

A person commits an offense if—

- (a) he does an act capable of encouraging or assisting the commission of an offense; and
- (b) he believes—
 - (i) that the offense will be committed; and
 - (ii) that his act will encourage or assist its commission.⁹¹

Section 45 covers obliquely intended (inchoate) participation.⁹² Section 45 requires the remote party to ‘believe’ that encouragement or assistance ‘will’ assist or encourage the perpetrator and that the perpetrator ‘will’ commit the anticipated offense.⁹³ This requires oblique intention.⁹⁴ Obviously there is a point at which foresight (recklessness) becomes foresight of virtual certainty (oblique intent), but foreseeing that something *will* happen, rather than could or might happen, is to see the certainty of it happening. At least the conduct element of the offense must be obliquely intended for either section 45 or 46 of the Serious Crime Act of 2007.⁹⁵ The wording of the provision seems to leave the courts no option but to hold

88 Cf. *Miller v. Com.*, 391 S.W.3d 801, 804 (Ky. 2013) (“But Miller was actually convicted of criminal attempt to commit that crime. This is a separate, inchoate offense created by KRS 506.010. Unlike complicity to a crime, which is simply a means to commit the other crime and results in conviction for the other crime, criminal attempt is a separate crime.”). The new offenses found in the Serious Crime Act work in a similar fashion, because they are offenses *per se*. See also *McMillan v. State*, 956 A.2d 716, 733–34 (Md. Ct. Spec. App. 2008) (“At common law, the rationale for barring the duress defense in a prosecution for murder was that a person ‘ought rather to die himself than escape by the murder of an innocent.’ . . . This rationale disappears when the sole ground for the murder charge is that the defendant participated in an underlying felony, under duress, and the defendant’s co-felons unexpectedly killed the victim, thereby elevating the charge to felony-murder. We conclude that if duress would serve as a defense to the underlying felony, it is also available as a defense to a felony-murder arising from that felony, assuming the criteria for such a defense are otherwise satisfied. Therefore, we shall proceed to consider whether, under the circumstances of this case, appellant was entitled to a jury instruction as to the defense of duress.”)

89 *R v. Howe* [1987] AC 417 (U.K.).

90 Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.).

91 Serious Crime Act 2007, c. 27, § 45 (U.K.).

92 *Id.*

93 *Id.*

94 *See id.*

95 *See* Serious Crime Act 2007, c. 27, §§ 45–46 (U.K.).

that the ‘believe will’ test requires oblique intention, even though this will produce absurd results in practice.⁹⁶

It will produce absurd results in practice because reckless (inchoate) participation will not be caught by the Serious Crime Act 2007. This has implications for the theory presented in this Article, because I have argued that the law under section 8 of the Accessories and Abettors Act 1861 covers intentional participation only. The oblique intention offense found in section 45 of the Serious Crime Act 2007 leaves a gap in the law because it leaves reckless (inchoate) participation outside the reach of the criminal law. Coupled with that, it is not clear that the oblique intention offense found in section 45 will add much to the direct intention offense found in section 44 because in many cases the jury will infer direct intention from foresight of virtual certainty.

E. A PRACTICAL APPLICATION OF SECTIONS 44 AND 45

In *R v. Fretwell*, Fretwell (hereinafter *F*) was induced by *P*, who was pregnant by him, to obtain a substance for the purpose of producing an abortion, which *F* did with full knowledge of the fact that *P* would use it for that purpose.⁹⁷ *P* took the abortifacient when *F* was not present and against his wishes.⁹⁸ There was ample evidence for a jury to infer that *F* believed that *P* would use the abortifacient, but the evidence also showed that *F* commanded *P* not to use it and that he hoped she would not use it.⁹⁹ The question was whether *F* assisted *P*'s self-murder (which at the time was a crime)¹⁰⁰ by supplying her with an abortifacient.¹⁰¹ Erle, C.J., (Martin, B.; Channell, B.; Blackburn, J.; and Keating, J. concurring) held that even if *P* were *felo de se*, *F* could not be convicted of murder, either as a principal or as an accessory because he had not administered the poison to *P*, nor had he caused *P* to take it.¹⁰² Hence, it was held in that case that nothing but ulterior direct intention was sufficient for accessorial liability.¹⁰³ Fretwell's act of assistance was intentional; he intended to supply the abortifacient.¹⁰⁴ It was not his ulterior direct intention that the

⁹⁶ *Id.*

⁹⁷ *R v. Fretwell* (1862) 169 Eng. Rep. 1345.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ The crime of suicide was summed up in the Latin term *Felonia de se* or *felo de se*: “felon of himself”. In our ancient common law, an adult who committed suicide was deemed to be a felon, and the crime was punishable by forfeiture of property to the king. See *Lady Margaret Hales v. Petit* (1561) 75 Eng. Rep. 387 at 258–60; *Foxley's Case* (1600) 77 Eng. Rep. 224 at 110b; *Anonymous Case* (XXII) [1397] Jenk. 65 (Eng.). The offense was made out when the perpetrator intended to kill herself or when she did some unlawful act that resulted in her own death. *R v. Russell* (1832) 174 Eng. Rep. 42; see also WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 189 (Oxford: Clarendon Press, 1769). This was in a time when the felony murder rule played a role. Cf. *R v. Buck* (1960) 44 Crim. App. 213 (Eng.); *R v. Creamer* [1966] 1 QB 72 (Eng.) at 82; *R v. Gaylor*, (1857) 169 Eng. Rep. 1011.

¹⁰¹ *R v. Fretwell* (1862) 169 Eng. Rep. 1345.

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ *Id.* *P* tried to obtain an abortifacient, but the pharmacist refused to sell it to her. Thereafter, she asked Fretwell to obtain it for her and told him that she would commit suicide if he did not assist

drug be used to procure an abortion, but it was his ulterior *oblique* intention that it be used for such a purpose.¹⁰⁵ On such facts, the jury could have inferred that *F* believed that *P* would use the abortifacient.

If a person is threatening suicide to get an abortifacient, then it seems that that person will use the abortifacient. Fretwell did not intend to assist *P* to perpetrate self-murder, but he must have believed *P* would perpetrate an offense contrary to section 58 of the Offenses against the Person Act 1861.¹⁰⁶ If these facts arose under the Serious Crime Act 2007, Fretwell would be liable for the oblique intention offense found in section 45 but not for the direct intention offense found in section 44.¹⁰⁷

We have seen that the law of complicity under section 8 of the Accessories and Abettors Act 1861 has been held to no longer require direct ulterior intention as far as the anticipated target crime is concerned. As I have already pointed out, in recent decades judges have held that mere recklessness is sufficient.¹⁰⁸ Nonetheless, it is clear that section 44 of the Serious Crime Act 2007 requires a direct ulterior intention.¹⁰⁹

F. WHAT DOES SECTION 47 ADD TO THE MENTAL ELEMENT IN SECTION 44?

To ascertain whether the assister/encourager is liable for assisting or encouraging a crime that has unintended consequences, or takes place in unintended circumstances, we need to examine the rules set out in sections 47(5), (6), and (7) of the Serious Crime Act 2007. Subsection 47(5) provides:

In proving for the purposes of this section whether an act is one which, if done, would amount to the commission of an offense—

(a) if the offense is one requiring proof of fault, it must be proved that—

her. Fretwell was under duress. *Cf.* *Louth v. Diprose* (1991) 175 CLR 621 (Austl.); *R v. Steane* [1947] KB 997 (Gr. Brit.). Fretwell's act of supply was voluntary, even though he did not act willingly. Fretwell's freedom was not fully unfettered. Duress is not a defense to murder, but it would provide a defense where the remote party is convicted of one of the offenses found in the Serious Crime Act 2007. *E.g.*, *R v. Howe* [1987] AC 417 (U.K.).

¹⁰⁵ *Id.* I shall use the term "ulterior oblique intention," even though it is not the most apt term. Conceptually, such a term is problematic as oblique intention is a species of recklessness. It is a very high degree of recklessness, but it is recklessness. It is about risking a virtually certain consequence/state of affairs. *Cf.* John Finnis, *Intention and Side-Effects*, in *LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS* (R.G. Frey & Christopher W. Morris eds., 1991) at 32 *et seq.*

¹⁰⁶ Offenses Against the Person Act 1861, 24 & 25 Vict. c. 100, § 58 (Gr. Brit. & Ir.). *Cf.* *R v. Buck* (1960) 44 Crim. App. 213 (Eng.) *per* Edmund Davies, J.

¹⁰⁷ If *R v. Fretwell* were decided today, Fretwell would not be liable under section 2 of the Suicide Act 1961. This is because his act of assistance was not "intended to encourage or assist suicide or an attempt at suicide." Instead, Fretwell by his assistance, obliquely intended to assist abortion or attempted abortion. This sort of illegal abortion risks the life of its recipient, but the aim is not to kill her. The aim is to abort the fetus.

¹⁰⁸ In *R v. Bryce* [2004] EWCA (Crim) 1231, 2 Crim. App. 35 (U.K.), it was held that the mental element in complicity requires no more than reckless foresight.

¹⁰⁹ Serious Crime Act 2007, c. 27, § 44 (U.K.).

- (i) *D* believed that, were the act to be done, it *would* be done with that fault;
 - (ii) *D* was *reckless* as to whether or not it would be done with that fault; or
 - (iii) *D*'s state of mind was such that, were he to do it, it *would* be done with that fault; and
- (b) if the offense is one requiring proof of particular circumstances or consequences (or both), it must be proved that—
- (i) *D* believed that, were the act to be done, it *would* be done in those circumstances or with those consequences; or
 - (ii) *D* was *reckless* as to whether or not it would be done in those circumstances or with those consequences.¹¹⁰

Let us apply section 44 and 47 to an offense where fault as to circumstances is an issue. In English law the offense of rape is made out when it is proved beyond reasonable doubt that *D* intentionally penetrated the vagina, anus, or mouth of *V* with his penis in circumstances where *V* did not consent to the penetration, and where *D* did not reasonably believe that *V* consented.¹¹¹ The perpetrator need only be negligent as to the circumstance of whether or not the woman is consenting.¹¹² Let us look at the facts of a couple of cases to ascertain where a person who assists or encourages another to have (non-consensual) sexual intercourse stands under section 44. The case is straightforward where the remote party intends to assist or encourage the perpetrator to have non-consensual sexual intercourse as opposed to consensual sexual intercourse. For example, in *R v. Lord Baltimore*, Harvey and Griffenburg were charged with being accessories to rape.¹¹³ The victim had been inveigled into Lord Baltimore's house, "[w]here she was confined five days, during which she neither eat [sic] nor drank; and upon her still refusing to comply with my lord's will, . . . two women forcibly lifted her into bed to Lord Baltimore" where he raped her.¹¹⁴

In *Baltimore*, the evidence showed that the accessories intended to assist Baltimore to have non-consensual sexual intercourse.¹¹⁵ The accessories knew that the young woman had refused to have sexual

110 Serious Crime Act 2007, c. 27, § 47(5) (U.K.).

111 See Sexual Offenses Act 2003, c. 42, § 1 (U.K.).

112 *Id.*

113 *R v. Lord Baltimore* (1768) 96 Eng. Rep. 376, 376.

114 *R v. Lord Baltimore* (1768) 96 Eng. Rep. 376, 376–77. In Barrow's report of the case, he reports: "They were committed as being charged upon the oath of the said Sarah Woodcock, for being feloniously assisting aiding and abetting him in feloniously ravishing and carnally knowing her against her will and consent, against the form of the statute. But they were not charged, either by the oath or warrant of commitment, with being present: and therefore they were agreed to be only accessory before the fact." See *R v. Lord Baltimore* (1768) 98 Eng. Rep. 136. Cf. *R v. Ram* (1893) 17 Cox C.C. 609 (Eng.).

115 *R v. Lord Baltimore* (1768) 96 Eng. Rep. 376, 378.

intercourse with Baltimore for five days when they physically forced her into his bed.¹¹⁶ Similarly, there are numerous cases where gang members have taken it in turns to rape a woman, each helping the other by taking turns holding her down.¹¹⁷ If *R* rapes *V* and thereafter holds her down so that his fellow gang member, *P*, can also have sexual intercourse with her, a jury would have no difficulty inferring that *R* knew for a fact that *V* was not consenting and thus intended to assist *P* to rape her.

To *intend* to assist or encourage the offense of rape, the assister/encourager has to have present knowledge of the relevant circumstance that the intercourse is non-consensual. If all the assister/encourager believed was that there was a chance that *V* might not have been consenting, then the assister/encourager cannot be said to have intended to assist or encourage rape. The knowledge that is required for a person to be able to intend the relevant circumstances has to be of the circumstances that are present at the time when the assister/encourager forms the intention to assist or encourage.¹¹⁸ A *belief* in future circumstances is not actual knowledge of those circumstances—because no one can know the future.¹¹⁹ A person can intend future facts or intend to operate in certain circumstances *in futuro*, but does not know for a fact that those future circumstances will exist.¹²⁰ The person desires that they will exist, but that is different from knowing that they will exist.¹²¹

¹¹⁶ *Id.*

¹¹⁷ Where gang members jointly hold down (or abduct) a woman so that a fellow gang member can have sexual intercourse with her in circumstances where she is screaming and trying to escape, a jury could infer that they knew for a fact she was not consenting and intended to assist non-consensual intercourse. *See* *R v. Dunlop*, (1979) 2 S.C.R. 881 (Can.), where two men held down a girl while eighteen other men from their motorcycle gang raped her. For similar cases, *see generally* *R v. Salajko*, (1970) 1 C.C.C. 352 (Can.); *Waters v. Kassulke*, 916 F.2d 329 (6th Cir. 1990); *State v. Fortner* 387 S.E.2d 812 (W. Va. 1989); *Com. v. Medeiros*, 899 N.E.2d 905 (Mass. App. Ct. 2009). Similarly, if *R* drives a van while *V* is imprisoned in the back and is being raped by *R*'s fellow gang members, *R* clearly assists the gang members' acts of rape in circumstances where *R* has present knowledge of the fact that *V* is not consenting. *See* *State v. Adams*, 958 A.2d 295, 299–301 (Md. 2008), where the driver's continuing act of driving a van assisted the perpetrator's continuing act of non-consensual intercourse in the back of the moving van. *See also* *State v. Eker*, 697 P.2d 273 (Wash. Ct. App. 1985).

¹¹⁸ The Law Lords in a complicity case, *R v. Saik* [2007] 1 AC 18 (U.K.), termed "actual knowledge" as "true knowledge"—but both terms simply mean knowledge of the present facts. *Cf.* *Cook v. Stockwell* [1915] 79 JP 394 (Eng.), where there was sufficient evidence for a jury to infer that *D* had knowledge of the fact that he was assisting *P* to perpetrate an offense. *Cf.* *Cafferata v. Wilson* [1936] 3 All ER 149 (Eng.), which, on the facts, seemed more borderline. There is no such thing as reckless knowledge. Knowing there is a risk that circumstance *X* might exist when *P* does act *Y* is not the same as knowing circumstance *X* presently exists. A person either knows the facts or does not. Recklessness refers to a belief that the facts might be *X*, *Y*, *Z*, and so on, not to present knowledge of those facts. *D* risks assisting *P* to perpetrate an offense when *D* believes that *P*'s act might take place in circumstances that make it criminal, but this does not mean that *D* intends *P*'s act to take place in circumstances that make it criminal. In some cases, *D*'s recklessness will be so extreme that the jury might infer that *D* was not merely reckless, but in fact had present knowledge of the relevant circumstances or alternatively intended those circumstances to exist. It is worth bearing in mind that in *Johnson v. Youden* [1950] 1 KB 544, 546 (Eng.), Lord Goddard, C.J. said: "Before a person can be convicted of aiding and abetting the commission of an offense he must at least know the essential matters which constitute that offense. He need not actually know that an offense has been committed, because he may not know that the facts constitute an offense and ignorance of the law is not a defense."

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ *See id.*

The only substitute for knowledge of the present facts is intention. If *R* intends to assist or encourage *P* to have sexual intercourse with *V* and intends that the sexual intercourse take place in circumstances where *V* is not consenting, then it does not matter that *R* does not know for sure whether *V* will be consenting or not. In this situation, *R*'s fault rests on what *R* intends the circumstances to be. Hence, if *R* intends to assist *P* to rape *V*, *R* will be liable even if at the time when the sexual intercourse takes place, *V*, by pure chance, consents. *R*'s mistaken belief about what the future circumstances would be does not negate the intention to assist the rape. *R* intended to assist or encourage a rape, and fault for the inchoate offense found in section 44 is set in stone from the time when *R* formed the intention to assist or encourage the rape and did an act capable of assisting or encouraging it.

R tried to assist *P* to rape *V*, even though it was impossible for *P* to succeed because unbeknown to *P* and *R*, *V* was willing to consent to the sexual intercourse and did in fact consent to it when it took place. On these facts, it is no defense for the assister/encourager to argue that his or her knowledge of the circumstantial facts was incorrect—that is, to argue that he or she wrongly believed that *V* would not consent.¹²² It is true that the assister/encourager was only guessing that *V* would not consent, but in the hypothetical the assister/encourager *intended* to assist or encourage non-consensual intercourse.

The sort of direct intention requirement that is found in section 44 is satisfied when the offender assists or encourages a rape (or other offense where fault as to circumstances or consequences is relevant) intending the relevant circumstances to exist.¹²³ Alternatively, the direct intention requirement would be satisfied where the relevant circumstances already exist and *R* has full (present) knowledge of those circumstances.¹²⁴ The jury can infer from the evidence that *R* had present knowledge of the fact that *V* was not consenting and thus intended to assist or encourage *P* to rape.¹²⁵

If the remote party is present and can see that the victim is protesting and is physically fighting to escape from the sexual encounter, then clearly that party has full knowledge of facts that would allow him or her to

122 Serious Crime Act 2007, c. 27, § 44 (U.K.).

123 This is encapsulated in the “intends or knows” test recognized by the lords in a conspiracy case. *See* *R v. Saik* [2007] 1 AC 18 (U.K.). *See also* section 2 of the Criminal Law Act 1977, c. 45, § 1 (Eng.), which provides: “intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offense is to take place.”

124 *Cf.* *Sanders v. State*, 348 N.E.2d 642, 643–44 (Ind. 1976), where Hunter, J. said: “[t]he evidence contained in the record discloses more than negative acquiescence on appellant’s part. It discloses that appellant agreed to drive the car away after the robbery and continued driving the vehicle while his accomplice was forcefully fondling the victim in the back seat. It discloses that appellant went inside the house to check on its suitability for the rape, reported that it was o.k., and that appellant remained in voice contact with the accomplice while the accomplice was raping the victim. These actions represent affirmative conduct from which the jury could reasonably find appellant guilty of rape as an accessory.” *See also* *State v. Adrian*, 522 P.2d 1091, 1093–94 (Ariz. 1974); *Suber v. State*, 168 S.E. 585, 590–91 (Ga. 1933).

125 *Id.*

determine there and then that the victim is not consenting.¹²⁶ In *DPP v. K & B*, the accessories had present knowledge of the fact that the victim was not consenting when they encouraged a boy to rape her.¹²⁷ Similarly, if *R* encourages *P* to have sexual intercourse with his twelve-year-old son (knowing for a fact his son is aged twelve because he was in the hospital twelve years before when his son was born), *R* could hardly claim he did not have present knowledge of the fact that his son was only twelve.¹²⁸ *R*'s knowledge of the relevant circumstances would allow a jury to infer that *R* intentionally encouraged *P* to commit a sexual offense against his child.¹²⁹ In these sorts of cases it is not a question of ascertaining whether assisters or encouragers intended or knew that the fact or circumstance would exist because their assistance or encouragement is given in a situation where they have present knowledge of the existence of the relevant circumstance.

A literal interpretation of section 44 in isolation from section 47 requires the prosecution to prove that the assister or encourager directly intended to do the act that was capable of assisting and encouraging *P* and had an ulterior direct intention that the intentional act of assistance or encouragement would assist or encourage *P* to perpetrate the anticipated target crime.¹³⁰ A person can only directly intend in this sense if the person knows the present circumstantial facts or intends that the perpetrator's conduct (such as sexual intercourse) take place in certain circumstances (such as where the woman is not consenting). A person cannot know the consequences of another's actions that are to take place in the future. Nonetheless, a person can intend the consequences of another's actions. *R* could give *P* a gun intending not only that *P* use it to shoot *V*, but also that *V* be killed as a result of *P* firing the gun at *V*. Under section 44, *R* must at least intend to encourage or assist *P* to do the relevant act that forms the conduct element of the anticipated target crime even though *R* need not intend the consequences of *P*'s act nor need *R* intend the circumstances of *P*'s act.¹³¹ Furthermore, *R* need only be reckless as to whether *P* will have the requisite fault for the anticipated target crime.¹³²

126 See *DPP v. K & B* (1997) 1 Crim. App. 36 (U.K.).

127 *Id.*

128 See *State v. Ainsworth*, 426 S.E.2d 410, 415–16 (N.C. Ct. App. 1993), where the encourager/assister (*A* assisted *P* by encouraging the child (*V*) to have sexual intercourse with *P*) had present knowledge of the fact that the child was underage and thus was not providing legal consent. The encourager was not merely negligent or reckless as to the circumstances (that is, that the sexual intercourse that he was encouraging was taking place in circumstances where *V* was underage and thus incapable of consenting) because *A* knew for a fact that the child was aged only twelve. *A* had present knowledge of the relevant circumstances—*A* was not merely trying to guess what the circumstances might be in the future.

129 See the various offenses in the Sexual Offenses Act 2003, c. 42 (U.K.).

130 Serious Crime Act 2007, c. 27, § 44 (U.K.).

131 *Id.*

132 *Id.*

G. RECKLESSNESS AS TO P'S FAULT AND CONSEQUENCES AND
CIRCUMSTANCES OF P'S ACT

The corollary of the literal interpretation of section 44 in isolation from section 47 is that it would allow the remote party to evade liability in cases where that party did not intend the relevant consequences of *P*'s act and where that party did not intend *P*'s act to take place in the particular circumstances.¹³³ What's more is that it would exclude liability where the remote party was only reckless as to whether *P* would act with the requisite fault for the anticipated target offense.¹³⁴ Section 47 broadens the section 44 offense so that it criminalizes *R*'s recklessness as to *P*'s fault for the anticipated target crime and *R*'s recklessness as to the circumstances and consequences of *P*'s act.¹³⁵

Let us start by considering an example of constructive liability. A perpetrator can be held constructively liable for murder where that perpetrator intends to inflict grievous bodily harm upon *V* if the intended non-fatal harm accidentally causes *V*'s death. However, if *R* gives *P* a cricket bat intending to assist *P* to inflict grievous bodily harm upon *V* with the harm resulting in *V*'s death, *R* would not be liable under section 44 for assisting *P*'s constructive murder because *R* did not intend to assist *P* to commit murder.¹³⁶ Nonetheless, since *R* intended to assist *P* to perpetrate an offense contrary to section 20 of the Offenses Against the Person Act 1861, *R* would be liable for the inchoate form of the offense found in section 44.¹³⁷ Hence, section 47 adds nothing with respect to consequences when the act that *R* intends to assist or encourage is criminal *per se*.¹³⁸

Section 47 seems to do more work when the remote party intends to assist or encourage *P* to do an act and is reckless as to the circumstances in which that act will be done.¹³⁹ If *R* intends to help a friend have sexual intercourse with *V*, and is reckless as to whether he or she will be helping *P* have non-consensual sexual intercourse, then section 47 could be invoked to obtain a conviction under the Serious Crime Act 2007. Generally, when *R* is reckless as to the relevant circumstances that make *P*'s conduct criminal there will be sufficient evidence to demonstrate that *R* was reckless as to whether *P* would act with the requisite fault for the anticipated target crime.

It is important to note that section 47 does not convert section 44 into a crime of reckless (inchoate) participation.¹⁴⁰ Section 47(2) provides: "If it is alleged under section 44(1)(b) that a person (D) intended to encourage or assist the commission of an offense, it is sufficient to prove that he intended

133 *Id.*

134 *See id.*

135 *See id.*

136 *See id.*

137 *See id.*; Offenses Against the Person Act 1861, 24 & 25 Vict. c. 100, § 20 (Gr. Brit. & Ir.).

138 *See id.*; See Serious Crime Act 2007, c. 27, § 47 (U.K.).

139 Serious Crime Act 2007, c. 27, § 44-47 (U.K.).

140 *Id.*

to encourage or assist the doing of an *act* which would amount to the commission of that offense.¹⁴¹ Section 44 means that *R* will be liable only if *R* *intended* to assist or encourage *P*'s act of sexual intercourse.¹⁴² If *R* is reckless as to whether he or she is assisting or encouraging *P* to have sexual intercourse, then section 44 is not satisfied and there is no need to consider section 47.¹⁴³ But if it can be proved beyond reasonable doubt that *R* intended to assist or encourage *P* to have sexual intercourse with *V*, then the Crown need only demonstrate that *R* was reckless as to whether that intercourse would be non-consensual and was reckless as to whether *P* would have the intercourse in circumstances where a reasonable person would have realized *V* was not consenting. Hence, *R* would be liable where he or she intended to assist or encourage *P* to have sexual intercourse with *V* (*P*'s act) and is *reckless* as to whether *V* will consent (the circumstances of *P*'s act).

Section 47 introduces a recklessness element into the section 44 offense, but it is still an offense of direct intention.¹⁴⁴ *R* must intend to assist or encourage *P*'s act. If *R* does not intend to assist or encourage *P*'s act as required by section 44, then there is no need to consider whether *R* was reckless as to the circumstances in which it took place.¹⁴⁵ Suppose *P* (a 17-year-old) asks *R* for the use of *R*'s apartment because *P* wants somewhere private to have a date with his new girlfriend, *V*. *R* has heard a rumor that *V* is aged 15, but has no way of confirming *V*'s age. *R* lets *P* use the apartment, but tells *P* not to have sexual intercourse in the apartment and that he is to use it merely to cook dinner for *V*. However, *R* suspects *V* might ignore the instructions and have sexual intercourse in the apartment because *R* has heard from his or her 16-year-old, *X* (*X* attends the same school as *P* and *V* and knows them both socially), that *P* and *V* are already in a sexual relationship. As it turns out, *P* and *V* have sexual intercourse in *R*'s apartment, and *P* is arrested because *V* turns out to be aged only 15.

R would not be liable under section 44 because *R* does not intend to assist *P* to have sexual intercourse with *V*.¹⁴⁶ *R* only intends to assist *P* to have a dinner date with *V*. *R* recklessly assists the intercourse because *R* suspected *V* might use the assistance (the use of the apartment) to have sexual intercourse with *V*, but section 44 requires intentional assistance as far as *P*'s act is concerned. It is true that *R* is also reckless as to whether *V* is of the age of consent (an issue for section 47 as consent is a circumstance), but since *R* did not intend to assist *P*'s act of intercourse we do not get to the question of whether *R* was reckless as to the relevant circumstances of that act. Hence, while section 47 incorporates a

141 *Id.*

142 *Id.*

143 *See id.*

144 *Id.*

145 *See id.*

146 *See id.*

recklessness element into the section 44 offense, it does not make that offense a crime of recklessness.¹⁴⁷

H. WHAT DOES SECTION 47 ADD TO THE MENTAL ELEMENT IN SECTION 45?

The remote party must obliquely intend to assist or encourage *P*'s act, even though the party need not obliquely intend the consequences of that act or the circumstances of that act for either section 45 or section 46.¹⁴⁸ Additionally, *R* need not obliquely intend that *P* act with the requisite fault for the anticipated target crime.¹⁴⁹ *R* need only be reckless as to whether *P* will perpetrate the anticipated target crime with the requisite fault for that crime.¹⁵⁰ Under section 45 the defendant need not intend to assist or encourage the perpetrator's offending.¹⁵¹

Section 47(5)(b)(ii) does not dilute the fault element found in section 45 as far as *P*'s "act" is concerned, but it does with respect to whether *P* will act with the requisite fault for the anticipated target offense.¹⁵² Likewise, it is enough to show that *R* was reckless as to whether *P*'s act would have certain consequences or would take place in circumstances that would make it a criminal act.¹⁵³ Mere recklessness as to the unintended consequences and circumstances of *P*'s act is sufficient to make *R* liable where *R* obliquely but intentionally participated in *P*'s act.¹⁵⁴ Let us start with an example of unintended circumstances. Consider the crime of rape again. A person might assist (or encourage) conduct that takes place in circumstances that make it criminal even though this person does not intend to assist or encourage the conduct in those circumstances. Sexual intercourse between unrelated adults is not criminal conduct, but it is if it takes place in circumstances where there is no consent. Consequently, if *R* obliquely intends to assist or encourage *P* to engage in the act of sexual intercourse with *V* and is reckless as to whether *V* is consenting, *R* can be liable for encouraging or assisting *P* to perpetrate rape if *V* does not consent.¹⁵⁵ It need be shown only that *R* suspected that *P* would have the requisite fault and that the sexual intercourse might take place in circumstances where *V* was not consenting.¹⁵⁶

Since recklessness as to consequences and circumstances is sufficient for making a remote party criminally liable, *R*'s lack of oblique intention *vis-a-vis* circumstances and consequences will provide no defense.¹⁵⁷

147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *See id.*
153 *Id.*
154 *Id.*
155 *See id.*
156 *Id.*
157 *See id.*

Nonetheless, *R* will not be liable for assisting or encouraging *P*'s act of sexual intercourse if *R* did not suspect that *V* might not consent and if *R* did not suspect that *P* might act with the requisite fault for rape.¹⁵⁸ Under the Serious Crime Act 2007, it has to be shown that *R* at least suspected that *P* would act (or was acting) with the requisite fault for the anticipated target offense (section 47(5)(a)), and that *R* was personally reckless as to whether circumstances existed (or would exist) that made the conduct criminal or would have made it criminal (section 47(5)(b)).¹⁵⁹

It will not be enough to show that *R* was negligent in not foreseeing that *P*'s conduct would take place in particular circumstances.¹⁶⁰ *R* will not be liable for assisting or encouraging *P* to engage in apparently innocuous conduct such as consensual sexual intercourse merely because a reasonable person would have foreseen that the conduct might take place in circumstances that would make it criminal conduct.¹⁶¹ Suppose *P* and *V* attend *R*'s pharmacy to purchase prophylactics to assist them to have protected sexual intercourse; *P* is aged thirty and *V* is aged fourteen. *V* looks underage, and a reasonable person would have suspected that *V* was underage and thus unable to consent in sexual relations with a thirty-year-old. Suppose *R* does not suspect *V* is underage and gives it no real thought. (Where the victim of rape is over the age of thirteen but under the age of sixteen, section 9 of the Sexual Offenses Act 2003 uses a negligence standard. The perpetrator would be liable for an offense under section 9 of the Sexual Offenses Act 2003 where he has sexual intercourse with a fourteen-year-old girl and “does not reasonably believe that [V] is 16 or over.”¹⁶² *R* intends to assist *P* to do the act, that is, have sexual intercourse.) Since *R* is not reckless as to whether the act of intercourse will take place in circumstances where *V* is under the age of sixteen, *R* is not reckless as to the relevant circumstances. Negligence as to the relevant circumstances is sufficient for making the perpetrator liable, but the remote party will be liable only where he or she is subjectively reckless as to the relevant circumstances.¹⁶³

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*; Compare the example of the lawful act that was used to ground a conviction under section 46 in *R v. Sadique (No 2)* [2013] EWCA (Crim) 1150, [2014] 1 WLR 986 (Eng.), where “The case against the appellant was that his national distribution business was used to supply cutting agents like benzocaine and lignocaine to drug dealers and to distributors of cutting agents. These were misused for the purposes of criminal drug supply. Of itself possession of these chemicals was not unlawful, and they could be lawfully sold.”

162 Sexual Offenses Act 2003, c. 42, § 9 (U.K.).

163 *Cf. R v. Skaf* (2004) 60 NSWLR 86 (Austl.). This was a case involving Australia's worst ever serial gang rapists, where *R*'s part in *P*'s rape was to entice *V* to accompany him in a car, then take her to a park, “[t]o persuade her to remain in the park until *P* and the other men, with whom he had been in constant communication by mobile phone, arrived in the park to seize her. On the Crown case, his part in the crime was complete when he left *V* in the company of *P* (and *P*'s other accomplices) and then he left the vicinity. . . . There was little or no dispute as to Skaf's conduct. The critical issue was his state of knowledge and his intent in bringing *V* to the park and leaving her (at least temporarily) shortly before she was sexually assaulted. Before they could convict [under the law of N.S.W.], the jury had to be satisfied beyond reasonable doubt that Skaf's intention was to make *V* available to *P* (his brother)

It is important to note that section 47 does not make section 45 an offense of reckless participation.¹⁶⁴ Recklessness will be sufficient for core components of the offense, but the initial assistance or encouragement of *P*'s act must be obliquely intended.¹⁶⁵ The remote party must obliquely intend to assist or encourage the act of sexual intercourse before that party can be held liable for assisting or encouraging the crime of rape.¹⁶⁶ If *R* lets seventeen-year-old *P* use the apartment for a dinner date believing *P* might use it to have sexual intercourse with fifteen-year-old *V*, *R* is not liable under section 45.¹⁶⁷ For section 45 to apply *R* would have to believe that *P* would use the apartment to have sexual intercourse with *V*.¹⁶⁸ If it is proved that *R* believed *P* would use the apartment for that purpose, then the issue of *R*'s recklessness as to the circumstances of that act of intercourse can be addressed under section 47.¹⁶⁹ The same rule applies with respect to whether *R* suspects *P* will act with the requisite fault for the anticipated target offense.¹⁷⁰

Similarly, the same rule applies with respect to consequences. Suppose *R* gives *P* a croquet mallet believing *P* might use it to inflict grievous bodily harm upon *V*. *P* uses it to beat *V* to a pulp, and as a result, *P* accidentally kills *V*. In this scenario, *R* is not liable under section 44 or 45 because *R* does not intend nor obliquely intend to assist the aggravated assault.¹⁷¹ If *R* had believed that *P* would use the mallet to inflict grievous bodily harm upon *V*, then section 45 would apply. Section 47 might also be relevant in regards to whether *P* would act with the requisite fault for sections 18 or 20 of the Offenses against the Person Act 1861. Since *R* would be liable for assisting and encouraging aggravated assault, it seems recklessness as to the consequences of *P*'s act would have no bearing on liability for the section 45 offense, but it might have some influence on the sentence. The sentencing judge might give a higher sentence where it can be shown that *R* suspected that the assault might kill *V*.¹⁷²

and that he was doing this so that his brother could have non-consensual sexual intercourse." In that case, there was ample evidence for the jury to infer that Skaf's ulterior direct intention was that *P* rape *V*. Skaf was reckless as to whether or not the sexual intercourse would take place in circumstances where *V* would not be consenting and where *P* would act with the requisite fault for rape.

¹⁶⁴ Serious Crime Act 2007, c. 27, §§ 44–47 (U.K.).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Section 57 of the Serious Crime Act 2007 does not apply because the offenses found in sections 18 and 20 of the Offenses Against the Person Act 1861, unlike manslaughter, are not lesser included offenses for murder. Notwithstanding this, the inchoate nature of the offenses found in sections 44 and 45 mean that once a person encourages or assists another to commit an aggravated assault, that person is liable for the section 44 or 45 offense regardless of whether the assault is perpetrated and regardless of whether the assault results in *V*'s death. Liability hinges on intention at the time when the assistance or encouragement was provided and on the fact that an act that was capable of encouraging and assisting *P* to perpetrate an aggravated assault was performed. Offenses Against the Person Act 1861, 24 & 25 Vict. c. 100, § 18, 20 (Gr. Brit. & Ir.).

I. WHY DO CONSEQUENCES MATTER?

In the case of murder, a conviction under sections 44–45 does not carry a mandatory life sentence.¹⁷³ In extreme cases a life sentence might be justifiable, but in other cases a more lenient sentence will be appropriate.¹⁷⁴ Where the remote party intended to assist or encourage an offense contrary to section 20 of the Offenses against the Person Act 1861, rather than assist or encourage murder, a life sentence should not be invoked.¹⁷⁵ If it can be proved that *R* suspected that *P*'s aggravated assault might kill *V*, then the sentencing judge would have the discretion to impose a life sentence, but it is not likely that the judge would impose such a sentence.

Similarly, where *P* perpetrates the unlawful and dangerous act of manslaughter, *R* will not be sentenced for encouraging or assisting manslaughter unless *R* suspected that *P*'s unlawful and dangerous act might cause *V*'s death.¹⁷⁶ When *R* encourages *P* to inflict minor harm upon *V*, *R* will not be sentenced on the basis that *R* assisted or encouraged manslaughter, if it is proved that *R* did not suspect *V* would be killed by *P*'s unlawful harm-doing. Where the unlawful and dangerous act that *R* has assisted or encouraged *P* to perpetrate ends up as constructive manslaughter, *R* will be liable for manslaughter as an accessory under section 8 of the Accessories and Abettors Act 1861, regardless of whether *R* suspected that *P*'s unlawful act might kill *V*.¹⁷⁷

Section 47 does not make the sections 44 and 45 offenses reckless participation.¹⁷⁸ Therefore, reinterpreting the mental element in complicity under section 8 of the Accessories and Abettors Act 1861 as requiring nothing less than intention would leave a *lacuna* in the law.¹⁷⁹ Reckless participation ought to be criminalized under the Serious Crime Act 2007, not under the Accessories and Abettors Act 1861, because the former allows for fair labeling and proportionate punishment.¹⁸⁰ The Serious Crime Act 2007 should be amended to include a new section 45A. The new provision should read:

A person commits an offense if—

- (a) he does an act capable of encouraging or assisting the commission of an offense; and
- (b) he believes—

173 Serious Crime Act 2007, c. 27, § 44–45.

174 *See id.*

175 Offenses Against the Person Act 1861, 24 & 25 Vict. c. 100, § 20 (Gr. Brit. & Ir.).

176 A person “is guilty of involuntary manslaughter when he intends an unlawful act and one likely to do harm to the person and death results which was neither foreseen nor intended. It is the accident of death resulting which makes him guilty of manslaughter as opposed to some lesser offense such as assault . . .” *R v. Creamer* [1966] 1 QB 72, 82 (Eng.).

177 *R v. Buck* (1960) 44 Crim. App. 213 (Eng.); *R v. Creamer* [1966] 1 QB 72, 82 (Eng.); *R v. Smith* (1847) 2 Cox C.C. 233 (Gr. Brit.).

178 Serious Crime Act 2007, c. 27, §§ 44–47 (U.K.).

179 Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.).

180 Serious Crime Act 2007, c. 27, §§ 44–47 (U.K.).

- (i) that the offense *might* be committed; and
- (ii) that his act *might* encourage or assist its commission.

Such a provision would allow those who recklessly participate or recklessly attempt to participate in the crimes of others to be tried and convicted of an independent facilitation or encouragement offense and be punished for their personal wrongdoing for that offense. Such a provision would catch many of the joint enterprise cases, thereby ensuring that those who recklessly participate in collateral crimes as a result of joining some underlying joint enterprise will not be held liable as perpetrators of the collateral crimes under section 8 of the Accessories and Abettors Act 1861. This is particularly important when the collateral crime is a specific intention crime, such as murder, which carries a mandatory life sentence. As we will see, section 46 of the Serious Crime Act 2007 also requires a supplementary crime of reckless participation.¹⁸¹

IV. RECKLESSLY ENCOURAGING AND ASSISTING SEVERAL AND ALTERNATIVE CRIMES

Section 46 of the Serious Crime Act 2007 provides:

- (1) A person commits an offense if—
 - (a) he does an act capable of encouraging or assisting the commission of one or more of a number of offenses; and
 - (b) he believes—
 - (i) that one or more of those offenses will be committed (but has no belief as to which); and
 - (ii) that his act will encourage or assist the commission of one or more of them.
- (2) It is immaterial for the purposes of subsection (1)(b)(ii) whether the person has any belief as to which offense will be encouraged or assisted.
- (3) If a person is charged with an offense under subsection (1)—
 - (a) the indictment must specify the offenses alleged to be the “number of offenses” mentioned in paragraph (a) of that subsection; but
 - (b) nothing in paragraph (a) requires all the offenses potentially comprised in that number to be specified.¹⁸²

The *actus reus* for this offense is the same as for the section 44 and section 45 offenses.¹⁸³ The defendant must do some act which is capable of encouraging or assisting another to commit one or more offense within a

181 Serious Crime Act 2007, c. 27, § 46 (U.K.).

182 *Id.*

183 *Id.*

certain range.¹⁸⁴ For example, if *R* gives *P* a gun, *R* does an act that is capable of assisting a number of offenses. *P* might use it to commit murder, or to commit robbery, or to commit rape, or to abduct a child, or to commit criminal damage, etc.

Under section 46 the assister/encourager need not intend to assist or encourage the perpetrator's offending.¹⁸⁵ It is enough that the assister/encourager believes the intentional act of encouragement or assistance will assist or encourage the perpetrator to commit one or more offenses and that the perpetrator will commit one or more of the anticipated offenses.¹⁸⁶ Section 46 requires the defendant to believe not only that the perpetrator *will* commit one of the anticipated offenses, but also that the assistance or encouragement will assist or encourage the perpetrator to do so.¹⁸⁷ The section requires oblique intention as far as these elements are concerned.¹⁸⁸

This offense could deal with three situations. Firstly, there are cases where the defendant believes he or she is assisting or encouraging the other defendant to commit more than one offense. *R* might give *P* a crow bar so that *P* can burglarize houses *X*, *Y*, and *Z*. If *R* believes that *P* will burglarize those houses and that the crow bar will assist *P* to do so, then *R* is liable. But if *P* uses the crow bar to burglarize a fourth house, *R* should not be liable unless *R* believed *P* would also burglarize that house (in this case, it seems better to charge *R* with three counts under section 45).¹⁸⁹

Secondly, *R* might supply the perpetrator with oxyacetylene cutting equipment, which *R* believes will be used to commit some kind of property offense, such as melting down stolen goods, or burglary, and so on.¹⁹⁰ In this situation, *P*'s offending is not conditional on contingencies; it is a case of *P* believing that one of the crimes within a certain range will be perpetrated with the assistance. As long as it can be shown that the crime that *P* perpetrated was one within the range that *R* believed *P* would perpetrate with the assistance or encouragement, section 46 can be invoked.¹⁹¹ In *R v. Sadique*, Lord Judge, C.J., summed the law up nicely:

Before the appellant in the present case could be convicted, the jury had to be satisfied that (a) he was involved in the supply of the relevant chemicals and (b) that, if misused criminally, the chemicals were capable of misuse by others to commit offenses of supplying or being concerned in the supply of, or being in possession with intent to supply class A or class B drugs. None of this would be criminal unless it was also proved (c) that at the time when

184 *See id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 *See* Serious Crime Act 2007, c. 27, §§ 49(2), 57 (U.K.).

190 *Cf.* *R v. Bainbridge* [1960] 1 QB 129 (Eng.).

191 *R v. Sadique* [2013] EWCA (Crim) 2872 (Eng.). *Cf.* the *obiter* in *R v. Sadique* [2011] EWCA (Crim) 2872 (Eng.).

the relevant chemicals were being supplied, the appellant believed that what he was doing would encourage or assist the commission of one or more of these drug related offenses and (d) that he also believed that this was the purpose, or one of the purposes, for which the chemicals would be used by those to whom he supplied them. If those ingredients were established, as the chemicals could be used for cutting agents for class A drugs or class B drugs, or both, it was not necessary for the Crown to prove that he had a specific belief about the particular drug related offense which those he was encouraging or assisting would or did commit.¹⁹²

The scenario in *R v. Sadique* is a situation where section 46 is likely to be very useful. In this sense, the section is designed to deal with a case like *DPP N. Ir. v. Maxwell*, where Maxwell was a member of a terrorist organization that used firearms and bombs to carry out attacks against Roman Catholics and their property.¹⁹³ Maxwell was told by a member of the organization to act as an escort for another car containing a number of men.¹⁹⁴ Maxwell was asked to lead them to a particular inn.¹⁹⁵ After Maxwell reached the inn he drove off, but after he left, one of the men he had led to the inn attempted to bomb it.¹⁹⁶ Maxwell was charged and convicted of unlawfully and maliciously doing an act with intent to cause an explosion likely to endanger life, contrary to section 3(a) of the Explosive Substances Act 1883, and possession of the bomb, contrary to section 3(b) of the Act of 1883.¹⁹⁷ Maxwell's defense was that he did not know which crime would be committed out of the range of crimes that he believed the terrorists would commit.¹⁹⁸

What if *R* believes that the possible offenses include murder, aggravated assault, abduction, robbery, and so on? Under section 46, it would be necessary to demonstrate that *R* believed the perpetrator would commit any one of those offenses.¹⁹⁹ It is not necessary to demonstrate that *R* believed that a particular alternative was more likely than the others,²⁰⁰ but it must be proved *R* believed any offense he or she is being held liable for attempting to assist or encourage would have been committed.²⁰¹ It is not enough to show that *R* believed crime *X* would be committed and that crimes *Y* and *Z* might be committed.²⁰² It has to be shown that *R* believed *X*, *Y*, and *Z* would be committed; or that *R* believed *X* would be committed, or alternatively *Y* would be committed, or alternatively *Z* would be

192 *R v. Sadique* (No 2) [2013] EWCA (Crim) 1150 [34] (Eng.).

193 *DPP N. Ir. v. Maxwell* [1978] 1 WLR 1350 (N. Ir.).

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.*; Explosive Substances Act 1883, 46 & 47 Vict. c. 3, § 3 (Gr. Brit.).

198 *DPP N. Ir. v. Maxwell* [1978] 1 WLR 1350 (N. Ir.).

199 Serious Crime Act 2007, c. 27, § 46 (U.K.).

200 *Id.* Section 46(1)(b)(i) of the Serious Crime Act 2007 provides: "(1) A person commits an offense if—(b) he believes—(i) that one or more of those offenses will be committed (but has no belief as to which)."

201 Serious Crime Act 2007, c. 27, § 46 (U.K.).

202 *Id.*

committed; or that *R* believed that *X* and *Y* or *Z* would be committed; and so on.²⁰³ The remote party is liable only for encouraging the offenses that party believed would be committed. The question will always be: Did the defendant believe that the perpetrator would commit the particular offense(s), which he or she is now being held liable for encouraging and assisting? Therefore, if *R* believes he or she is assisting *P* to produce both Class A and Class B drugs, it does not matter that *R* does not believe that *P* will produce Class A drugs instead of Class B drugs, as long as *R* believes *P* will produce either, both, or one of them. If *R* believes *P* will produce only the Class A drug, then *R* should be charged under section 45 rather than 46. Section 46 is available only where *R* believes that *P* will commit either offense *A* or an alternative offense. The law under the Accessories and Abettors Act 1861 has been given a wider interpretation. Under that Act, the courts have held that the restriction to crimes foreseen by *R* means *kind of crime* rather than incidence of a specific crime or specific alternative crime.²⁰⁴

Thirdly, there are cases where *P* conditionally intends to perpetrate crimes in alternative of each other depending on the contingencies that arise on the day in question. The offense found in section 46 is well suited for dealing with the conditional intention cases. Suppose *R*'s intentional act of assistance or encouragement is intended to facilitate *P* to perpetrate alternative offenses. When *R* assists or encourages *P*, *P*'s potential crimes are *in futuro*, but *P* may have formulated in *P*'s own mind an intention to perpetrate more than one crime depending on the contingencies—or one crime instead of the other depending on the contingencies. At this stage *P* has no belief as to which crime will be perpetrated, so it does not matter that the remote party has no belief as to which crime *P* will perpetrate. If *P* intends to perpetrate one of the crimes within a range of crimes depending on the contingencies, and if *R* has knowledge of *P*'s plans and has formed a belief that *P* will perpetrate robbery instead of burglary should *P* be confronted during the burglary, section 46 could be invoked.²⁰⁵ It is irrelevant that *R* had no belief as to which crime *P* would perpetrate as long as *R* believed *P* would perpetrate burglary, or alternatively robbery, should the need for robbery arise. It would have to be shown that *R* believed that *P* would perpetrate robbery instead of burglary should the contingencies make robbery necessary. Another example is where *R* gives *P* a gun believing *P* will use it to commit a robbery and that it will assist *P* to do so, but also believing that if the robbery goes wrong *P* will use it to kill.²⁰⁶

203 See *id.*

204 Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94 (Eng.).

205 See Serious Crime Act 2007, c. 27, § 46 (U.K.).

206 *R* need only encourage or assist acts, which would amount to offenses. Section 47(4) of the Serious Crime Act 2007 provides: "If it is alleged under section 46(1)(b) that a person (D) believed that one or more of a number of offenses would be committed and that his act would encourage or assist the commission of one or more of them, it is sufficient to prove that he believed—(a) that one or more of a number of acts would be done which would amount to the commission of one or more of those

The section 46 offense, like the section 44 and section 45 offenses, is governed by section 47.²⁰⁷ If the anticipated offense is one requiring proof of fault, section 47(5)(a)(i) and (ii) apply and *R* will only be liable if *R* believed or suspected the perpetrator had the requisite fault for the anticipated offense.²⁰⁸ If not, it will be sufficient to show that if *R* were to do the offense, that *R* would have the requisite fault for the anticipated offense: section 47(5)(a)(iii) (this latter provision catches a situation where an innocent agent is used to perpetrate an offense).²⁰⁹ Like sections 44 and 45, if the anticipated offense is one requiring proof of particular circumstances or consequences (or both), section 46 is governed by section 47(5)(b)(i) and (ii).²¹⁰ It must be shown that *R* believed that the perpetrator would commit one of the anticipated offenses, and also believed or suspected that “it would be done in those circumstances or with those consequences.”²¹¹

Again, the oblique intention requirement excludes liability for reckless participation. Given that section 46 allows for fair labeling and proportionate punishment, it should be supplemented with a new section 46A. The new provision should provide:

- (1) A person commits an offense if—
 - (a) he does an act capable of encouraging or assisting the commission of one or more of a number of offenses; and
 - (b) he believes—
 - (i) that one or more of those offenses *might* be committed (but has no belief as to which); and
 - (ii) that his act *might* encourage or assist the commission of one or more of them.
- (2) It is immaterial for the purposes of subsection (1)(b)(ii) whether the person has any belief as to which offense will be encouraged or assisted.

Conditional intention will be difficult to prove in practice. Therefore, an offense of reckless participation seems better suited for many of the situations targeted by section 46.

offenses; and (b) that his act would encourage or assist the doing of one or more of those acts.” Serious Crime Act, c. 27, § 47(4) (U.K.).

²⁰⁷ Serious Crime Act 2007, c. 27, § 47 (U.K.).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

A. SENTENCING

Section 58(6) of the Serious Crime Act 2007 provides:

If none of the reference offenses is murder but one or more of them is punishable with imprisonment, he is liable—(a) to imprisonment for a term not exceeding the maximum term provided for any one of those offenses (taking the longer or the longest term as the limit for the purposes of this paragraph where the terms provided differ); or (b) to a fine.²¹²

V. ENCOURAGING AND ASSISTING AN INNOCENT AGENT

This requires a discussion of the rationale for the alternative mental element found in section 47(5)(a)(iii). That subsection holds that *R* will be liable for trying to encourage or assist the criminality of *P*, if “[*R*’s] state of mind was such that, were he to do it, it would be done with that fault.”²¹³ The subsection has to be read in conjunction with section 47(6) which provides: “For the purposes of subsection (5)(a)(iii), *D* is to be assumed to be able to do the act in question.”²¹⁴ Under the Act of 2007 it is irrelevant that the encouraged party lacks *mens rea* or is exempt from liability for some other reason. If *R* encourages an exempt party (a child under ten)²¹⁵ to steal a watch from a store, *R* will be caught by section 47(5)(a)(iii) because *R* intends the store to be permanently deprived of its property.²¹⁶ *R* encourages the child (an innocent agent) to steal knowing that the child cannot be convicted of theft because children are exempt from criminal liability. *R* uses an innocent agent to bring about the *actus reus* of the offense. *R*’s state of mind is such that, if *R* were to steal the watch, *R* would intend to permanently deprive the store of it. It is irrelevant that *R* knew that the assisted party as she was could not in law commit the offense.

Section 47(5)(a)(iii) not only catches cases involving encouraged parties who are “exempt” from criminal liability, but also “innocent agents” in the pure sense.²¹⁷ In *R v. Ahmed*, the defendant took his non-English speaking wife to an abortion clinic and asked the medical team to perform an abortion on her.²¹⁸ *R* acted as her interpreter and falsely told the medical

²¹² Serious Crime Act 2007, c. 27, § 58 (U.K.).

²¹³ Serious Crime Act 2007, c. 27, § 47 (U.K.).

²¹⁴ *Id.*

²¹⁵ *Cf. DPP v. K. & B* (1997) 1 Crim. App. 3636 (U.K.); *Walters v. Lunt* (1951) 35 Crim. App. 94 (Eng.); *McGregor v. Benyon* [1957] Crim. LR 608. *See also* MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN (1776).

²¹⁶ Serious Crime Act 2007, c. 27, § 47 (U.K.).

²¹⁷ *Id.* Some exempt parties, of course, may also be innocent agents in that they do not understand that they are being used to commit a crime. A fifteen-year-old girl is not likely to be an innocent agent in this sense, if she realizes that her stepfather is committing a crime by trying to sleep with her. On the other hand, some children under the age of ten, who are exempt from criminal liability will understand that they are being used to commit a crime.

²¹⁸ *R v. Ahmed* [2010] EWCA (Crim) 1949 (Eng.). For a cornucopia of other examples where section 47(5)(a)(iii) could be invoked (were those sorts of offenses made out in England and Wales), see

team that his wife wanted an abortion, when he knew she did not.²¹⁹ *R* told his wife that she was having a minor operation to cure her blood.²²⁰ *R*'s false representations were discovered before the abortion took place.²²¹ If the abortion had been performed the doctors would not have been liable as they were acting lawfully.²²² *R* was effectively using the doctors as innocent agents.²²³ The doctors were being conned into performing an illegal abortion, as the pregnant patient was not consenting.²²⁴ If *R* had performed the abortion himself, he would have committed an offense contrary to section 58 of the Offenses against the Person Act 1861.²²⁵ Additionally, *R*'s state of mind was such that, were he to do the abortion himself, it would have been done with the fault required by section 58 of the Act of 1861.²²⁶

In *R v. Cogan*, the Court of Appeal took the step of applying the doctrine of innocent agency to an act of sexual intercourse.²²⁷ A husband compelled his wife to have sexual intercourse with Cogan, who believed that the wife was consenting.²²⁸ Cogan had his conviction of rape quashed on appeal but the question arose whether a conviction of the husband as the aider and abettor could stand.²²⁹ The Court of Appeal held that it could, since the defendant was liable as perpetrator and the form of the conviction did not matter.²³⁰ The decision was rendered possible by the fact that the defendant happened to be a man.²³¹ Only a man can perpetrate rape; the statute says so.²³² Parliament has now embraced the notion of sexually violating another by using the genitals of another, and thus has taken steps to make sure that those who cause another to be sexually violated come within the ambit of the criminal law.²³³ Consequently, in the context of sexual offenses the new inchoate offenses are likely to add little.

Take the example where bordello madam *X* uses trafficked ladies from developing countries in her London brothel. Let us assume she takes their passports, locks them up, and forces them to have non-consensual sexual intercourse with non-suspecting customers. Suppose she encourages the customers to use the ladies by advertising her services on a website. The advertisements include rates and photos of scantily clad ladies. If the customers are innocent agents (mere instruments), because they have no

Annotation, *Criminal Responsibility of One Co-operating in Offense Which he is Incapable of Committing Personally*, 131 ALR 1322 (1941).

219 *R v. Ahmed* [2010] EWCA (Crim) 1949 (Eng.).

220 The wife was a young woman who was brought from Pakistan as a part of an arranged marriage and was forced to marry a man 20 years her senior. *Id.*

221 *Id.*

222 *Id.*; It is assumed they were acting within the terms of the Abortion Act 1967, c. 87 (Eng.).

223 *See id.*

224 *See id.*

225 Offenses Against the Person Act 1861, 24 & 25 Vict. c. 100, § 58 (Gr. Brit. & Ir.)

226 *Id.*

227 *R v. Cogan* [1976] QB 217, 217–18 (Eng.).

228 *Id.*

229 *Id.*

230 *Id.*

231 *See Sexual Offenses Act 2003, c. 42, § 4 (U.K.).*

232 *Id.*

233 *Id.*

idea that the women they use are not consenting, they cannot be liable for rape. (Since these women are forced to have sexual intercourse with non-suspecting customers who are innocent agents—the customers effectively rape them. The pimps and people traffickers cause them to be raped by the innocent and non-suspecting customers.)²³⁴ If the customers use the non-consenting women for sexual purposes, the bordello madam would be liable under section 4 of the Sexual Offenses Act 2003.²³⁵ If the offense found in section 4 of the Sexual Offenses Act 2003 is consummated, then it is best to charge the bordello madam with that offense. Nonetheless, her advertisements could count as attempts that are capable of encouraging the innocent agents (non-suspecting customers) to have non-consensual sexual intercourse with the ladies under her control. A jury could infer that the bordello madam believed that her encouragement would lead to her customers having non-consensual sexual intercourse with (virtually) imprisoned women under her control and that “[R’s] state of mind was such that, were she to do it, it would be done with that fault.”²³⁶

R’s encouragement of an innocent agent was not incitement at common law, since incitement presupposed a guilty incitee. Suppose that R has been ‘working on’ the innocent agent, trying to get her to agree to do the act, and much remains to be done by R by way of preparation if the agent does agree to do it. The encouragement may not be sufficiently proximate to be an attempt. The problem at common law was that it did not constitute incitement either; it had been held that one could only commit incitement of a guilty agent, so to speak, not of an innocent one. If, for instance, a person tried to encourage another to commit the *actus reus* of a crime requiring *mens rea*, concealing from that person the facts that made the act criminal, the encourager would not have been guilty of incitement.²³⁷ Under the Serious Crime Act 2007, it need only be shown that the encouragement was capable of encouraging P to perpetrate the anticipated target crime.

234 Sexual Offenses Act 2003, c. 42, § 53 (U.K.) also criminalizes the innocent agent, even though he lacks any fault. It is sufficient that the innocent agent “ought” to have known that the prostitute was being forced into prostitution by a third party. These new offenses cannot be reconciled with the constitutional principles of justice including the presumption of *mens rea*. See Dennis J. Baker, Note, *Collective Criminalization and the Constitutional Right to Endanger Others*, 28 CRIM. JUST. ETHICS 168, 189–90 (2009).

235 See Sexual Offenses Act 2003, c. 42, § 4 (U.K.).

236 See Serious Crime Act 2007 § 47(5)(iii) (U.K.).

237 R v. Curr [1968] 2 QB 944 (Eng.). *Contra* DPP v. Armstrong [1999] EWHC (QB) 270 (Eng.); R v. C [2006] 1 Crim. App. 20 (Eng.). Later courts have held that the knowledge of *mens rea* of the incitee was irrelevant. Section 47(5)(a)(iii) and 47(6) of the Serious Crime Act, 2007, c. 27 (U.K.) also make it clear that the incitee’s state of mind is irrelevant.

VI. CAUSATION, ACT CAPABLENESS, AND IMPOSSIBILITY

A. SUBJECTIVITY VS. OBJECTIVITY

In this section the main focus will be on acts of encouragement with a minimal discussion of acts of assistance since acts of encouragement seem to raise more complex conceptual questions. It will be argued below that putative encouragement or assistance is established only where it is capable of making a (indirect) causal contribution to the perpetrator's *putative* crime. The Court of Appeal has held that an objective standard is used to determine when an act is capable of assisting and encouraging the perpetrator.²³⁸ Does this mean that *R* is guilty of the section 44 offense when *R* attempts to assist or encourage *P*, even though *P* does not commit or attempt to perpetrate the anticipated target crime, provided *R*'s act of assistance or encouragement would establish complicity under section 8 of the Accessories and Abettors Act 1861 were *P* to perpetrate or attempt to perpetrate the anticipated target crime? The answer is not straightforward since we need to factor in mistakes, factual impossibility, context, and circumstances.

The problem is more complex when we focus on acts of encouragement. Might it not be argued that a purely objective test would be too strict, because an unjustifiable or inexcusable act would not be capable of encouraging a reasonable and prudent person to perpetrate a crime?²³⁹ Criminal conduct is unjustified conduct and therefore a reasonable person would not be persuaded by unjustifiable reasons to perpetrate a crime.²⁴⁰ A reasonable person might engage in crime when justified by self-defense or necessity, but this reasonable person would not engage in crime without a legitimate justification.²⁴¹ (The excused agent does not act reasonably, but is excused from criminal liability because the agent could not help offending. This applies to defenses such as insanity.) A reasonable and prudent person is someone we would assume would not commit a crime. When a hoodlum uses Twitter to incite riots, it can be assumed that such encouragement is not capable of inciting reasonable law-abiding citizens to riot. Would a message posted on a social media website be capable of

238 *R v. Sadique* (No. 2) [2013] EWCA (Crim) 1150 (Eng.). Hooper, L.J., giving the judgment for the Court of Appeal, (Supperstone, J., Sir Geoffrey Grigson, concurring) said: "D's act must objectively be capable of encouraging or assisting the commission of one or more of a number of offenses." *Id.*

239 Gardner writes: "Any attempt to justify oneself, in any context, is an attempt to show that one did not defy the balance of reasons. More precisely, it is an attempt to show that the following three conditions were met: first, that there were reasons for one to do as one did (or think as one thought, feel as one felt, *etc.*); secondly, that these reasons stood undefeated by conflicting reasons; and, thirdly, that one did as one did (thought as one thought, felt as one felt, *etc.*) for one of these undefeated reasons. This much is built into the very idea of justification. People who have different moral beliefs may disagree, of course, about which reasons stand undefeated in which conflicts of reasons." See John Gardner, Review, *The Mysterious Case of the Reasonable Person*, 51 U. TORONTO L.J. 273, 275-76 (2001) (reviewing ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY AND THE LAW* (1999)).

240 *See id.*

241 *See id.*

encouraging priests, police officers, law professors, lawyers, retired schoolteachers, and other professionals to riot? Is it capable of encouraging hardworking blue-collar workers to riot?²⁴² It might be capable of encouraging likeminded hoodlums, but the jury decides as a question of fact whether that was the case and whether the message was aimed at such an audience.

The question is more complex when *R* does not make a mistake, but knowingly targets an audience that *R* believes is impossible to encourage or assist. Suppose *R* emails a group of police officers to ask them to riot at a given place and time. The jury might conclude that the private emails to the police officers were not capable of encouraging such strong-willed and duty bound citizens to join a criminal riot. The test is not whether the particular type of person who receives the encouragement could be encouraged. Rather, the test works on objective generalities. The evaluative assessment of *R*'s conduct does not involve the jury hypothetically looking into the mind of the potential perpetrator(s) to determine whether as a question of fact they could have been encouraged by *R*'s act of encouragement. It is enough for the jury to infer from all the evidence that the act was capable of encouraging someone within the potential target audience.

In *People v. Duffy*, *R* gave *P* a loaded gun and taunted *P* to kill himself.²⁴³ A reasonable person would not be persuaded to commit suicide merely because someone gives him or her a gun and says to do so. However, in *People v. Duffy*, *P*'s circumstances were that he "had been drinking heavily and was in an extremely depressed and suicidal state."²⁴⁴ It was in these circumstances that *R* taunted *P* to "put the gun in his mouth and blow his head off."²⁴⁵ *R* also gave *P* a rifle and ammunition knowing full well that *P* was intoxicated, depressed, and suicidal.²⁴⁶ A jury would have no difficulty inferring that *R*'s acts were capable of encouraging a person in *P*'s circumstances to commit suicide.²⁴⁷ *R*'s act was not the only reason why *P* committed suicide, but it was enough to tip *P* over the edge.²⁴⁸ *R*'s act was capable of providing *P* with a more than negligible reason for acting as he did. Suicide itself is not a crime, but section 2 of the Suicide Act 1961 provides: "(1) A person ("D") commits an offense if—(a) D does an act capable of encouraging or assisting the suicide or attempted

242 It would depend on the context. See *R v. Badger* (1843) 4 QB 468, 469–70 (Eng.).

243 *People v. Duffy*, 595 N.E.2d 814, 611 (N.Y. 1992). See also *State v. Lassiter*, 484 A.2d 13, 15–17 (N.J. Super. Ct. App. Div. 1984), where *V* threatened to jump out of a window after being beaten badly by *D*. *D*'s response to *V*'s threat was: "go ahead and jump." *V* did, and *D*'s conviction of murder was upheld. See also *Persampieri v. Commonwealth*, 175 N.E.2d 387 (Mass. 1961); but cf. *Vaux's Case* (1592) 76 Eng. Rep. 992; *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959), the latter being a civil case. Suicide is not an offense, so technically it is better to think of the victim as the doer, rather than as a criminal perpetrator.

244 *Duffy*, 595 N.E.2d at 612.

245 *Id.*

246 *Id.*

247 See *id.*

248 See *id.*

suicide of another person, and (b) D's act was intended to encourage or assist suicide or an attempt at suicide."²⁴⁹ Notably, section 2 of the Act of 1961 requires nothing less than direct intention.²⁵⁰ The difficulty in this sort of case will be in establishing *mens rea* for the sections 44 and 45 offenses, not in establishing the conduct element.

R's knowledge of the relevant circumstances is important for determining whether *R* intended or obliquely intended to encourage *P*. *P*'s circumstances would also provide evidence with respect to whether *R*'s act was capable of encouraging *P*. Circumstances and context are relevant factual matters for determining the evaluative question of whether the encouragement or assistance was objectively capable of encouraging or assisting in the particular situation. Clearly, if *R* is on Twitter encouraging riots while continuing mass riots are in progress then that is an evidential matter that is relevant, not only for determining *mens rea*, but also for determining whether the act was objectively capable of encouraging riots. If *R* is encouraging a suicidal person to commit suicide, then the fact that *P* was suicidal is an evidential matter that is relevant to the particular case. The jury has to consider all the evidence in a given case, but this does not collapse the objective standard into a subjective standard. Where *R* believes that encouragement or assistance will not be taken up by the putative perpetrator, then *R* will lack *mens rea* for the section 45 offense, and *a fortiori* for the section 44 offense.

B. FACTUAL MISTAKES AND THE PUTATIVE FACTUAL NEXUS

R might give *P* a gun and also offer *P* £500,000 to kill *V*. It turns out that *P* is an undercover police officer and therefore it is impossible for *P* to be persuaded on this occasion. The test for impossibility for attempt liability is that *D* is liable if the attempt would have succeeded had the facts been as believed.²⁵¹ If *D* tries to rape *V* believing *V* is alive, but *V* is in fact dead, then *D* is liable for attempted rape because if the facts had been as *D* believed, it would have been possible to perpetrate rape.²⁵² Similarly, if *D* tries to kill *V* by shooting *V* point blank in the head, but fails because *V* is already dead, *D* will be liable for attempted murder because if the facts had

²⁴⁹ Suicide Act 1961, 10 & 11 Eliz. 2 c. 60, § 2 (Eng.)

²⁵⁰ *Id.*

²⁵¹ *But cf.* *R v. Fitzmaurice* [1983] 2 WLR 227, QB 1083 (Eng.); *DPP v. Armstrong* [1999] EWHC (QB) 270 (Eng.); *R v. Jones* [2007] EWCA (Crim) 1118, [2008] QB 460 (Eng.). *See also* *People v. Breton*, 603 N.E.2d 1290 (Ill. App. Ct. 1992); *People v. Pagliuca*, 458 N.E.2d 908 (Ill. App. Ct. 1983). *Cf.* *R v. McDonough* (1963) 47 Crim. App. 37 (Eng.). *P* is not liable where enforcement officers encourage her to perpetrate a crime that she would not have perpetrated but for their encouragement, but they may set a bait and may allow *P* to attempt to encourage them to commit a crime in order to obtain a conviction. Hence, law enforcement officers can take a passive role to obtain a conviction, but they cannot actively persuade a person to commit a crime. *See R v. Looseley* [2001] UKHL 53 (U.K.); *Teixeira de Castro v. Portugal*, 52 Eur. Ct. H.R. 101 (1999).

²⁵² *Cf.* Suicide Act 1961, 10 & 11 Eliz. 2 c. 60, § 2(1) (Eng.) ("Where the facts are such that an act is not capable of encouraging or assisting suicide or attempted suicide, for the purposes of this Act it is to be treated as so capable if the act would have been so capable had the facts been as *D* believed them to be at the time of the act or had subsequent events happened in the manner *D* believed they would happen (or both).").

been as *D* believed it would have been possible for *D* to kill *V* with that chosen method.²⁵³ The new offenses found in sections 44–46 of the Serious Crime Act 2007 criminalize both inchoate participation and consummated participation.²⁵⁴ Consequently, the issue of impossibility and mistake of fact raise issues for attempted participation under the *capable of assisting or encouraging* requirement.²⁵⁵

We are told that the act's assistance or encouragement has to be capable of assisting or encouraging, but the new Act does not include a provision on impossibility.²⁵⁶ Suppose *R* gives *P* a gun and offers *P* £500,000 to kill *V*. *R* believes *P* is a professional assassin. Unbeknownst to *R*, *P* is an undercover police officer who will not try to kill *V*, because *P* is undercover to protect *V*. These facts do not involve a situation where there is *inherent* factual impossibility,²⁵⁷ rather the situation is a straightforward case of factual impossibility *simpliciter*. *R*'s act would have been capable of encouraging *P* had the facts been as *R* believed (had *P* been a professional assassin).

Suppose *R* gives a putative perpetrator *P* a gun knowing full well that *P* is a pacifist who will never kill. Following a subjective test, provision of a gun is only capable of assisting a murder if the person to whom it is given will use it to kill. If it is given to a pacifist then it is not an act capable of assisting murder. This is clearly not the law under the Serious Crime Act 2007.²⁵⁸ Supplying a gun is an act that is objectively capable of assisting the person supplied to perpetrate a murder. However, if *R* believes that *P* will not use that gun for that purpose, then *R* lacks *mens rea* for the offenses found in sections 44–46 of the Act of 2007. If *R* mistakenly believes that *P* is a professional assassin, then *R* will be liable since her mistake of fact does not negate *R*'s *mens rea*, nor does it change the nature of the physical act of assistance.

The word “capable” means that it must be proved beyond reasonable doubt that *R*'s act of encouragement was capable of (causing/moving) encouraging *P* to perpetrate the anticipated target crime. In the case of inchoate participation it is a matter of establishing that the act was putatively capable of assisting the perpetrator. It is not too difficult to assess when the remote party's unused assistance could have factually assisted the perpetrator. For example, if the remote party, *R*, supplies the perpetrator, *P*, with a high-powered gun intending to assist *P* to commit murder in circumstances where *P* changes his or her mind and decides not to even attempt to perpetrate the murder, it would not be too controversial for a jury to infer that as a matter of fact *R*'s act of equipping *P* with a gun was objectively capable of assisting *P*'s putative murder.

253 See generally *State v. Santiago*, 49 A.3d 566 (Conn. 2012).

254 Serious Crime Act 2007, c. 27, § 44–46 (U.K.).

255 See *id.*

256 *Id.*

257 Inherent factual impossibility is discussed *infra* in Part VI.

258 Serious Crime Act 2007, c. 27 (U.K.).

Attempted assistance makes no causal contribution to the anticipated target crime, because the end crime, if perpetrated, is not perpetrated with assistance that is never supplied. Attempted assistance is no assistance at all. Likewise, if *P* does not even attempt to perpetrate the anticipated target crime, the remote party cannot be said to have made an indirect causal contribution to a crime that never takes place. Suppose *R* leaves a ladder in front of *V*'s house intending to assist *P* to burglarize *V*'s house. Suppose also that *P* decides not to go ahead with the burglary. *R* does not make an indirect causal contribution to the burglary, because it never takes place. *R* may have caused a ladder to be in a certain location, but it is not a crime *per se* to leave a ladder near another's house. Nonetheless, *R*'s act of leaving the ladder in front of the house is an act capable of assisting the putative burglary and *R* will be liable on the basis that it would have made a causal contribution had *P* used it to perpetrate or attempt to perpetrate the burglary.²⁵⁹ Inchoate liability criminalizes potential harm.

Compare this with the case of complicity under section 8 of the Accessories and Abettors Act 1861 where *P* is burglarizing a house with *A* assisting by acting as a lookout.²⁶⁰ Suppose that the lookout for *P* does not need to warn *P* of someone approaching, because no one interrupts *P*'s burglary. On these facts, the accessory has provided factual assistance even though *P* did not need to be warned. The accessory not only assisted *P* by making it less risky for *P* to perpetrate the burglary, but also by encouraging *P* to perpetrate it. The accessory keeping lookout has the effect of encouraging *P* to perpetrate the burglary. It may not be the sole motivator for *P*'s burglary, but the accessory reducing the risk of detection for *P* would provide *P* with a more than negligible motivation for perpetrating the particular burglary on the day in question. Similarly, suppose *R* supplies *P* with a gun hoping to assist *P* to kill *V*. *P* already has a knife, which equips *P* to kill with a single hit. When *P* goes to kill *V*, *P* takes the gun supplied by *R* and also takes the knife. *P* decides to use the knife to kill *V* and thus never uses the gun supplied by *R*. The inchoateness of the offenses found in the Act of 2007 means that it does not matter whether *P* uses the knife rather than the gun supplied by *R*.²⁶¹

The courts have to take care to identify sufficient (putative) indirect causation to satisfy the "capable of" test. *R*'s encouragement need not be the predominate motivator for *P* perpetrating the anticipated target crime, but it must have the potential to be a more than negligible motivator if the "capable of" encouraging element is to be satisfied. When *P* has not attempted to consummate the anticipated target crime, the court might have great difficulty in deciding whether *R*'s encouragement would have been

²⁵⁹ See generally *R v. Dunnington* [1984] QB 472 (U.K.); *R v. Crangle* [1987] NICC (N. Ir. unreported judgments); *R v. Hapgood* (1870) 1 LRCCR 221 (Gr. Brit. & Ir.); *R v. Clayton* (1843) 174 Eng. Rep. 743; *R v. Williams* (1844) 174 Eng. Rep. 950.

²⁶⁰ Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.).

²⁶¹ The Penal Code of Kentucky has a provision that works in the same way. See KY. REV. STAT. ANN. § 506.010(3) (West 1994).

capable of providing the *particular perpetrator* with a more than negligible motivation (reason) for perpetrating the anticipated target crime.

C. FACTUAL NEXUS IN CONSUMMATED PARTICIPATION V. INCHOATE PARTICIPATION

The common law offense of incitement was made out even when the encouragement was to the world at large, but the encouragement had to reach the mind of the potential recipient.²⁶² Glanville Williams wrote: “Since incitement relates to incomplete criminal conduct, it is immaterial that the words had no effect on the person solicited; but they must have reached his mind. If they do not, there may be a conviction for attempt to incite.”²⁶³ This differs from attempted participation by encouragement pursuant to the offenses found in the Serious Crime Act 2007, because those offenses require *R*’s act to be an act that is putatively capable of encouraging *P* to perpetrate the anticipated target crime.²⁶⁴

The act need not in fact encourage *P* to offend, but it must be putatively capable of factually encouraging *P* to offend. If *P* has ignored the encouragement, then it has to be demonstrated that it could have influenced a person communally situated in contemporary Britain and in the same circumstances as *P*, to offend. This is an objective test, but the jury will have to consider all the evidence to determine whether the act was capable of encouraging *P* even though *P* ignored it.

Complicity at common law is made out only if the perpetrator is “in fact . . . encouraged” to perpetrate the anticipated target crime as a result of the accessory’s encouragement.²⁶⁵ If there is no factual encouragement, then there is no factual participation.²⁶⁶ If there is no factual participation, then the secondary party’s liability cannot be derivative.²⁶⁷ Derivative liability hinges on the “derivative offender,” who participates in the anticipated target crime.²⁶⁸ When *R*’s encouragement does not in fact encourage *P* to perpetrate the anticipated target crime, *R* only attempts to participate in the anticipated target crime. Attempted participation is not participation in fact; therefore, it cannot be used to convict a putative accomplice of the perpetrator’s crime pursuant to section 8 of the Accessories and Abettors Act 1861.²⁶⁹

262 See generally *R v. Most* [1881] 7 QB 244 (Gr. Brit. & Ir.); *R v. Diamond* (1920) 84 JPR 211 (Eng.); *Invicta Plastics Ltd. v. Clare* [1976] RTR 251 (Eng.).

263 GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 612 (2d ed. 1961).

264 Serious Crime Act 2007, c. 27, §§ 44–47 (U.K.).

265 *R v. Schriek* (1997) 2 NZLR 139 (CA) at 150 (N.Z.); *Charnley v. R* [2013] NZCA 226 at [46] per Arnold, J. (Simon, France and Dobson J.J. concurring) (N.Z.). But cf. *R v. Calhae* [1985] QB 808 (Eng.); *R v. Mendez* [2010] EWCA (Crim) 516, [2011] QB 876 (Eng.). Cf. also *R v. Welham* (1845) 1 Cox C.C. 192 (Eng. and Ir.); *R v. M’Inerney* [1886] 8 ALT 71 (13 September 1886) (Austl.).

266 See cases cited *supra* note 265.

267 See cases cited *supra* note 265.

268 To use a term coined by Street, C.J. See *R v. Johns* [1978] 1 NSWLR 282, 286 (Austl.).

269 Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.).

D. FACTUAL ENCOURAGEMENT UNDER SECTION 8 OF THE ACCESSORIES
AND ABETTORS ACT 1861

Under section 8 of the Accessories and Abettors Act 1861, a person may take delight in witnessing a crime such as where one sees a rival's car being criminally damaged, but one has no duty to prevent the crime or to report it to the police.²⁷⁰ Where a bystander approves of the crime that bystander sees another perpetrating, he or she only becomes liable if he or she participates in that crime.²⁷¹ It is not enough that one takes delight in seeing a rival's property being damaged; one has to provide intentional assistance or encouragement before one can be linked to that crime.²⁷² There is no need to demonstrate that *P* was aware of *R*'s act of assistance, if the assistance has in fact assisted *P* to perpetrate the anticipated target crime.²⁷³ Where *R* has physically assisted *P*, factual participation will not be an issue; the focus will be on whether *R* acted with the requisite *mens rea*. It is necessary to establish only that *R* had the requisite fault for complicity liability when *R* in fact assisted *P*. The case is different when *R* encourages *P*, because factual encouragement cannot be present where *P* is unaware of it.²⁷⁴ "There must be an intention to encourage; and there must also be encouragement in fact."²⁷⁵ Acts of encouragement cannot be encouragement in fact, unless *P* is aware of them. A person cannot be encouraged by encouragement that never reaches the mind. Attempted encouragement is not consummated encouragement.

In *R v. Lam*, in the Supreme Court of Victoria, Redlich, J. said:

No causal connection is required between the act of aiding and abetting and the offense committed. The authors of Smith and Hogan suggest that it is unnecessary that the principal offender be influenced in any way by the

²⁷⁰ See HALE, *supra* note 50, at 439; *R v. Coney* [1882] 8 QBD 534 [577] *per* Hawkins, J. (Eng.); *R v. Clarkson* [1971] 1 WLR 1402 [1406] (Eng.).

²⁷¹ *Id.*

²⁷² *R v. Coney* [1882] 8 QBD 534 [577] *per* Hawkins, J. (Eng.); *R v. Clarkson* [1971] 1 WLR 1402 [1406] (Eng.); See *R v. Allen* [1965] 2 QB 295 (Eng.); *R v. Phan* [2001] NSWCCA 29, 69 (Austl.); *Randall v. The Queen* (2004) 146 A Crim R 197 (Austl.); *Roughley v. The Queen* (1995) 78 A Crim R 160, 3 (Austl.) *per* Cox, J.; *State v. Walden*, 293 S.E.2d 780, 472 (N.C. 1982) (where Mitchell, J. said: "It is necessary, in order to [be liable as an accomplice], that he should do or say something showing his consent to the felonious purpose and contributing to its execution, as an aider and abettor."); See also *Kirchner v. State*, 744 S.E.2d 802 (Ga. Ct. App. 2013); *State v. Birchfield*, 70 S.E.2d 5 (N.C. 1952); *Charmley v. R* [2013] NZCA 226 (N.Z.).

²⁷³ *State v. Tally*, 15 So. 722, 738 (Ala. 1893). To the extent that McClellan, J. suggests in his judgment in *State v. Tally*, that unused assistance is sufficient, his opinion is wrong. For *R* to be said to have factually participated in *P*'s crime, *P* must use *R*'s assistance. It is true that *P* need not be aware of factual assistance for *R* to factually participate, but unused assistance is no participation at all. The dissenting opinion of Head, J. in *State v. Tally* is the correct view as far as ineffectual assistance is concerned. *Id.* (Head, J., dissenting). *But cf. R v. Fred* [2001] QCA 561 (Austl.) (where there was no factual assistance, even though *R* knew that *P* planned to kill *V*. *R* also hoped *P* would kill *V*, but *R* did nothing to assist or encourage *P*). See also *Way v. State*, 46 So. 273 (Ala. 1908); *Commonwealth v. Kern*, 1 Brewst. (Pa.) 350 (1867).

²⁷⁴ *Hall v. Commonwealth*, 93 S.W. 904 (Ky. 1906); *contra* *Bast v. Commonwealth*, 99 S.W. 978 (Ky. 1907).

²⁷⁵ *R v. Clarkson* (1971) 1 WLR 1402 at 1407 (Eng.) *per* Megaw, L.J. (Geoffrey Lane and Kilner Brown, J.J. concurring).

principal in the second degree. They argue that the natural meaning of the terms of aiding and abetting does not imply a causal element. If the acts of the secondary participant were ignored or if the offense would have been committed even if such acts had not been proffered, secondary participation would have been established.

....

[I]t would be ‘manifest nonsense’ to require proof that the principal offenders were aware of the encouragement provided by each accused or that there had to be a causal connection between the acts of the secondary participant and the commission of the offense.²⁷⁶

I take the view that in the law of complicity it would be manifest nonsense not to prove factual participation beyond reasonable doubt. It would be manifest nonsense not to prove factual participation, because such an approach would conflate attempted participation with actual participation. It also would dispense with the *actus reus* requirement for derivative liability. Redlich, J.’s approach suggests that it is acceptable for the jury to infer factual participation, even when the evidence demonstrates that the remote party only attempted to participate in the perpetrator’s crime. Such an approach would allow all attempted participation by encouragement to be prosecuted as complicity, when it should be dealt with as an inchoate offense.

The law of complicity deals with consummated participation, not with attempted participation.²⁷⁷ The law of complicity, unlike the Serious Crime Act 2007, requires factual influence or assistance, even if that influence is of a minor nature.²⁷⁸ The perpetrator has to be factually influenced, in part at least, by the encourager and must attempt to perpetrate or perpetrate the anticipated target crime.²⁷⁹ In cases where *P* does not even attempt to

²⁷⁶ *R v. Lam* (2005) 159 A Crim R 448 (Austl.) (citing J. C. SMITH & BRIAN HOGAN, CRIMINAL LAW 145 (7th ed., 1992)).

²⁷⁷ Cf. Lord Toulson, *Sir Michael Foster, Professor Williams and Complicity in Murder*, in DENNIS J. BAKER, ET AL., THE SANCTITY OF LIFE AND THE CRIMINAL LAW: THE LEGACY OF GLANVILLE WILLIAMS 230 (Cambridge, 2013).

²⁷⁸ *R v. Giannetto* (1997) 1 Crim. App. 1, 13 (Eng.).

²⁷⁹ *R v. Coney* [1882] 8 QBD 534, *per* Denman, J., Huddleston, B., Manisty, Hawkins, Lopes, Stephen, Cave, and North, JJ. (Lord Coleridge, C.J., Pollock, B., and Mathew, J., dissenting); *R v. Allen* [1965] 2 QB 295 (Eng.), *per* Edmund Davies, J. (Marshall and Lawton JJ. concurring); *R v. Clarkson* [1971] 1 WLR 1402 (Eng.), *per* Megaw L.J. (Geoffrey Lane and Kilner Brown JJ. concurring); *R v. Jones* (1977) 65 Crim. App. 250, 252 (Eng.); *Hutt v R* (1989) 14 Tas R 182 (Austl.), Cox, J. (Underwood, Crawford, J.J. concurring) (“In the circumstances of this case an error of law occurred by reason of the omission to tell the jury that . . . there had to be proof to the requisite degree that the principal offender was in fact encouraged by the conduct of the accused to commit the crime.”). Drawing on a long line of precedents, a line of recent American cases, hold that there must be intentional encouragement that influences the perpetrator. Influence is inferred from the evidence. *See* *People v. Nunez*, 302 P.3d 981 (Cal. 2013); *Hines v. State*, 740 S.E.2d 786, 794–95 (Ga. Ct. App. 2013); *State v. James*, 738 S.E.2d 420, 424 (N.C. Ct. App. 2013); *State v. Gonzalez*, 41 A.3d 340, 344–45 (Conn. App. Ct. 2014); *Davis v. Lafler*, 658 F.3d 525, 544 (6th Cir. 2011); *Henderson v. State*, 80 S.W.3d 374 (Ark. 2002); *United States v. Heath*, 188 F.3d 916 (7th Cir. 1999); *Hopewell v. State*, 712 A.2d 88, 92–93 (Md. Ct. Spec. App. 1998); *Ybarra v. Illinois*, 444 U.S. 85 (1979); *People v. Durham*, 449 P.2d 198 (Cal. 1969); *United States v. Williams*, 341 U.S. 58 (1951); *Hicks v. United States*, 150

perpetrate the offense he or she was encouraged to perpetrate, *R* cannot be derivatively liable, because there is no target crime for liability to derive from.²⁸⁰ The perpetrator must perpetrate the anticipated target crime partly “in consequence” of the remote party’s encouragement.²⁸¹ Where there is no influence, the remote party’s liability has to be for inchoate participation rather than for derivative participation.

Take the example where *R* is standing on the balcony of a fiftieth floor apartment when *R* observes, with the use of binoculars, *P* on the street below with a gun pointed at *V*’s head (*V* is *R*’s old school enemy). *R* screams out to *P*, “Kill *V*.” Thirty seconds later *P* pulls the trigger and kills *V*. When the evidence is presented in court, it emerges that *P* did not hear *R*. *P* had no awareness of the fact that *R* was watching from the balcony and had no idea that *R* was attempting to encourage *P* to kill *V*. *P* did not hear *R*’s words of encouragement, because *R* was too far away and there was too much traffic noise on the street. Nonetheless, CCTV footage shows that *R* did in fact attempt to encourage *P* to kill *V*. On these facts, *R* cannot be liable as an accessory to murder, because *R* did not in fact participate in *P*’s crime. Even though the encouragement did not in fact influence *P*, *R* could be liable for an inchoate offense under the Serious Crime Act 2007, because encouraging a person to kill when that person is already minded to kill is an act that is capable of encouraging such a person to kill. When *P* is already intent on killing *V*, minor encouragement could be the tipping point. If the encouragement had reached *P*’s mind, it would be no defense for *R* to assert that *P* was already intent on killing *V*, because a reasonable jury could infer that *R*’s encouragement was an additional factual influencer that pushed *P* over the edge.²⁸²

The jury might conclude that *R*’s encouragement was too trivial to have been capable of making any difference. If so, the encouragement will be deemed to have been incapable of encouraging *P* in the particular case. But it is no defense for *R* to assert that the offense would have been committed even if he or she had not assisted and encouraged *P*, if *R* has in fact encouraged or assisted *P*. If *R* supplies *P* with a gun to assist *P* to kill *V*, it is irrelevant that *P* could have easily obtained a gun from another source. The fact is that *P* did not use a gun from another source; instead *P* used the

U.S. 442 (1893). In *State v. Bennett*, 59 A.3d 221, 229 (Conn. 2013), Harper, J. said: “Mere presence as an inactive companion, passive acquiescence, or the doing of innocent acts which may in fact aid the one who commits the crime must be distinguished from the criminal intent and community of unlawful purpose shared by one who knowingly and willfully assists the perpetrator of the offense in the acts which prepare for, facilitate, or consummate it.”

²⁸⁰ *R v. Dunnington* [1984] QB 472 (U.K.); *R v. Hapgood* (1870) 1 LRCCR 221 (Gr. Brit. & Ir.); *R v. Clayton* (1843) 174 Eng. Rep. 743; *R v. Williams* (1844) 174 Eng. Rep. 950.

²⁸¹ STEPHEN, *supra* note 28.

²⁸² *But cf.* *State v. Tally*, 15 So. 722 (Ala. 1893). *Cf.* Kadish writes: “The secondary party may be liable if the principal is aware of the proffered aid, since knowledge of the efforts of another to give help may constitute sufficient encouragement to hold the secondary actor liable.” Kadish, *supra* note 38, at 359 (citing *State v. Tazwell*, 30 La. Ann. 884 (La. 1878); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 677–82 (1978)).

gun *R* supplied and thus *R* has made a factual (indirect causal) contribution to *P*'s crime.

In *R v. Lam*, Redlich, J. goes on to assert:

Gillies similarly submits that it would be irrelevant to establish that the principal did not see or hear or was indifferent to the act of the secondary participant. Legal texts recognize that in criminal trials in which the secondary participant is not said to be acting pursuant to an agreement with the principal offender, it would be unrealistic and most often impossible to establish that the principal offender knew of the secondary participant's act and was influenced by it to commit the crime. Gillies suggests *that it is sufficient if the accessory's act, viewed objectively, is considered by the jury to be reasonably capable of having encouraged or assisted the principal offender. It need not do so in fact.*²⁸³

Gillies's assertion is incorrect as far as accessorial liability under section 8 of the Accessories and Abettors Act 1861 is concerned.²⁸⁴ It may be difficult to prove factual encouragement, but that is no justification for treating attempted participation as consummated participation.

E. PRESUMPTION OF FACTUAL ENCOURAGEMENT AND INCHOATE PARTICIPATION

A person cannot participate in an unattempted crime, but one can attempt to participate in potential crimes.²⁸⁵ In this section, the focus shall be on the incredible breadth of the concept of "attempted participation by encouragement."²⁸⁶ Attempted participation by assistance is not more harmful or wrongful than attempted participation by encouragement, but the latter has porous boundaries. It is more difficult to define the cutoff point for determining when an act of encouragement is clearly capable of encouraging.

Any persuasion or encouragement (including a threat) is sufficient for the purposes of sections 44–46 of the Serious Crime Act 2007.²⁸⁷ It need not be shown that the act of encouragement actually moved the perpetrator to perpetrate the anticipated target offense, because it need be shown only

²⁸³ *R v Lam* (2005) 159 A Crim R 448 (Austl.) (emphasis added) (citing PETER GILLIES, *THE LAW OF CRIMINAL COMPLICITY* 54–55 (1980)).

²⁸⁴ Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.).

²⁸⁵ *Id.* A person can be liable as an accessory for participating in the perpetrator's attempted crimes, but not for attempting to participate in the perpetrator's unattempted crimes. See generally *R v. Dunnington* [1984] QB 472 (U.K.); *R v. Hapgood* (1870) 1 LRCCR 221 (Gr. Brit. & Ir.); *R v. Clayton* (1843) 174 Eng. Rep. 743; *R v. Williams* (1844) 174 Eng. Rep. 950; *R v. Anderson*, [1986] AC 27 (Eng.); *but cf.* *State v. Jovanovic*, 416 A.2d 961 (N.J. Super. Ct. App. Div. 1980).

²⁸⁶ For an example of its incredibly wide application, see *R v. Blackshaw* (Jordan Philip), 2011 WL 4832482 (Oct. 18, 2011) (Eng.), where it was not clear that Blackshaw's ostensibly childish acts of encouragement were *capable* of encouraging rational autonomous adults to riot and commit criminal damage. Of course, there is nothing new about this concept. The common law offense of incitement, in effect, criminalized attempted participation. For a discussion of that offense, see BAKER, *supra* note 83; see also DOUGLAS AIKENHEAD STROUD, *MENS REA* 153 (1914).

²⁸⁷ Serious Crime Act 2007, c. 27, § 65 (U.K.).

that the encourager's act was capable of encouraging (psychologically moving) the perpetrator to offend.²⁸⁸ Not only does the adjective *capable* imply a causation requirement, but so too does the verb *encourage*. For an example of a statute that uses the verb "move" instead of the verb "encourage," see section 3 of the Treason Felony Act 1848, which makes it an offense "to move or stir any foreigner or stranger with force to invade the United Kingdom"²⁸⁹

Dalton uses the noun "mover," among others, to refer to the encourager.²⁹⁰ Dalton writes that a person is an accessory to a crime "if he were either a Procurer, or Mover or Aider, Comforter or Consenter thereto."²⁹¹ Dalton goes on to use the verbs: "command, procure, move, aid, or consent thereto."²⁹² It is arguable that the concept of *move* requires the encouragement to have been a motivator. Putative indirect causation is a relevant consideration, because it must be shown that *R*'s act was capable of moving *P* to offend (that it was capable of having an indirect causal impact, even though on this occasion it did not). *R*'s encouragement need not be *P*'s sole motivator for acting, but it must be a motivator or a putative motivator. The causation requirement is satisfied when the jury is able to infer that the act of encouragement was in fact *capable* of putting the perpetrator in a state of being motivated to perpetrate the anticipated target crime. The remote party's act of encouragement is something that motivates; it has to be capable of providing the perpetrator with an inducement or incentive or reason for perpetrating the anticipated target crime.

It might be factually impossible for an act to be capable of encouraging (or assisting) in a given situation, but unless it is inherently factually impossible for that act ever to encourage (or assist) *R* should be liable for attempting to encourage *P*. Similarly, if *R* sends *P* a letter offering *P* money if *P* kills *V*, but the letter never reaches *P* because it is discovered by the police before it arrives, *R* is liable for attempting the section 44 offense. Here, *R*'s act is not capable of encouraging *P*, since *P* does not receive the message. If the letter had reached *P*, it would have been an act capable of encouraging *P* and therefore *R* should be liable for attempting the section 44 offense. Compare the case where the message does reach *P* (a complete attempt), but *P* ignores it. In the latter situation, *R* is liable for the section 44 offense, not for attempting the section 44 offense since *R* has completed an act that was capable of encouraging *P*. When objectively judged, the act

288 See MICHAEL DALTON, THE COUNTRY JUSTICE 396 (1697); HALE, *supra* note 50, at 145, 293, 312–13, 337–38, 376, 613, 625; R v. Fuller (1797) 126 Eng. Rep. 847; The Lord Sanchar's Case (1612) 77 Eng. Rep. 902; R v. Caspar (1839) 173 Eng. Rep. 839; R v. Watson (1817) 171 Eng. Rep. 591; R v. Winifred (1789) 168 Eng. Rep. 359; R v. Pow (1754) 168 Eng. Rep. 125; R v. Urlyn (1670) 85 Eng. Rep. 1107; R v. Anonymous (1685) 3 Mod. 97 (Eng.); R v. Thomson (1675) 3 Keb. 735 (Eng.); Francis Throgmorton's Case (1596) Cro. Eliz. 563 (Eng.).

289 Treason Felony Act 1848, 11 & 12 Vict. c. 12, § 12 (U.K.).

290 DALTON, *supra* note 288, at 396.

291 *Id.*

292 *Id.*

is capable of encouraging *P* even though it failed to have any effect.²⁹³ Similarly, when *R* attempts to send a message of encouragement, the incomplete act of encouragement when objectively judged would have been capable of encouraging *P* had it been complete.

There is no presumption of influence or assistance; the evidence must be sufficient for the jury to infer that *P* was in fact influenced by *R*'s act or that *R*'s act was capable of encouraging or assisting *P*.²⁹⁴ In *The Queen v. Coney*, Hawkins, J. said:

Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or *he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not.*²⁹⁵

In many cases the evidence of factual encouragement will be so strong that the issue will not be contested by defense counsel; it is only in this sense that factual encouragement might be (presumed) taken as a given.²⁹⁶

Accessory liability under section 8 of the Accessories and Abettors Act 1861 is made out only when there has been factual participation.²⁹⁷ Where proof of factual encouragement is an issue, the jury will need to consider all the evidence to determine whether factual encouragement is inferable on the facts.²⁹⁸ This is different from holding that factual encouragement is not required.²⁹⁹ Under the Serious Crime Act 2007 it will

²⁹³ *R v. Sadique* (No 2) [2013] EWCA (Crim) 1150 [1710] (Eng.), where Hooper, L.J., giving the judgment for the Court of Appeal, (Supperstone, J., Sir Geoffrey Grigson, concurring) said: "D's act must objectively be capable of encouraging or assisting the commission of one or more of a number of offenses."

²⁹⁴ See *R v. Clarkson* [1971] 1 WLR 1402 [1407] (Eng.), per Megaw L.J. (Geoffrey Lane and Kilner Brown, J.J., concurring). See also *Charnley v. R* [2013] NZCA 226 at [46] per Arnold, J. (Simon, France and Dobson, J.J., concurring) (N.Z.).

²⁹⁵ *R v. Coney* (1882) 8 QBD 534, 557 (Eng.) (emphasis added); see also *R v. Chishimba* [2010] NSWCCA 228 (Austl.). Foster wrote: "But the persons engaged with him [D] will not be involved in his guilt, unless they *actually aided and abetted him in the fact*; for they assembled for another purpose which was lawful and consequently the guilt of the person actually killing cannot, by any fiction of law be carried against them beyond their original intention." Foster, *supra* note 215, at 354–55.

²⁹⁶ Glanville Williams writes: "[I]t is necessary to show that the words of the accessory really had an effect on the mind of the principal, and played a part in bringing about the crime? . . . Usually the words directing another to commit a crime can, where the other actually commits the crime, be presumed to have had some effect upon his mind." See GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART, (2d ed. 1961) at 382. Williams suggests that in cases where the evidence is categorical, factual encouragement might be presumed. But this is just another way of saying that it would be pointless for defense counsel to contest the point where the evidence is very strong, because the jury will ultimately infer factual encouragement where the evidence of it is very strong.

²⁹⁷ Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.).

²⁹⁸ *State v. Acker*, 111 So. 3d 535, 541–42 (La. App. 3 Cir. 2013). See also *State v. Anderson*, 707 So. 2d 1223 (La. 1998).

²⁹⁹ *Nat'l Coal Bd. v. Gamble* [1959] 1 QB 11 [24] (Devlin, J.) (Eng.); *Allen v. Ir.* [1984] 1 WLR 903 (Eng.); *Charnley v. R* [2013] NZCA 226 at [46] (N.Z.); *State v. Goodwin*, 118 N.H. 862 (N.H. 1978).

be enough to establish that the encouragement or assistance was capable of encouraging or assisting even though it had no effect in the given case.

VII. IMPOSSIBILITY AND CAPABILITY

Suppose *R* attempts to assist *P* to kill *V* by trying to send *P* a gun via the post. When *R*'s attempt to assist *P* fails, because the gun *R* tries to post to *P* is lost in the post, *R* is not liable under the Serious Crime Act 2007, because the ineffectual attempt to assist is not an act capable of assisting *P*.³⁰⁰ When *R* attempts to send *P* a gun to assist *P* to kill *V*, *R* can be liable only for attempting to commit one of the crimes found in sections 44–46 of the Serious Crime Act 2007. Apart from the exception found in section 49 of the Act of 2007, to be discussed shortly, there is no limitation on charging *R* with attempting the crimes found in sections 44–46.³⁰¹

If the words of encouragement do not reach their intended audience, then they cannot motivate or influence. At common law, the prosecution used to charge the remote party with attempted incitement in such cases.³⁰² For example, in *R v. Krause*, *D* sent a letter soliciting *P* to murder *V*.³⁰³ The letter was sent to Johannesburg, but the solicited party never received it.³⁰⁴ *Krause* had not in fact encouraged *P*, because his message never reached *P*.³⁰⁵ Nonetheless, it was held that the defendant could be convicted of an attempt to commit the crime of incitement.³⁰⁶

What's more, factual impossibility would not provide *R* with a defense. It will not do for *R* to assert that the act was incapable of assisting and encouraging *P*, because the facts were not as *R* believed them to be.³⁰⁷ Suppose *R* supplies *P* with what *R* believes is a teaspoon of cyanide salts for the purpose of assisting *P* to kill *V*. Unbeknownst to *R*, the teaspoon of substance that *R* gives *P* is merely common cooking salt. *R* wrongly believes the cooking salt is cyanide. It is factually impossible to kill a person by putting a teaspoon of normal cooking salt in that person's food. *R*'s act of attempted assistance is factually incapable of assisting *P* to kill. Nonetheless, factual impossibility provides no defense for attempts.³⁰⁸ If

300 Serious Crime Act 2007, c. 27, §§ 44–47 (U.K.).

301 Serious Crime Act 2007, c. 27, § 49 (U.K.).

302 See generally *R v. Banks* (1873) 12 Cox C.C. 393 (Eng.); *R v. Ransford* (1874) 13 Cox C.C. 9 (Eng.); *Hornton v. Mead* [1913] 1 KB 154 (Phillimore, J.) (Eng.); but cf. *R v. Vaughan* (1769) 98 Eng. Rep. 308. See also *R. v. Giambalvo*, [1982] 39 O.R. 2d 588 (Can. Ont.) (where putative *P* refused to perpetrate the crime that *D* had asked her to perpetrate).

303 *R v. Krause* (1902) 66 JP 121 (Eng.).

304 *Id.*

305 *Id.*

306 *Id.*

307 But cf. *State v. Jovanovic*, 416 A.2d 961 (N.J. Super. Ct. App. Div. 1980).

308 *Baker*, *supra* note 83, at 17-050. Criminal Attempts Act 1981, c. 47, § 1 (U.K.): “(2) A person may be guilty of attempting to commit an offense to which this section applies even though the facts are such that the commission of the offense is impossible. (3) In any case where—(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offense; but (b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offense.”

the facts had been as *R* believed them to be, then *R*'s act would have been capable of assisting *P* to kill *V*. It is possible to kill a person by putting a teaspoon of cyanide salts in one's food. *R*'s act was an act that was more than merely preparatory to perpetrating one of the offenses found in sections 44–46 of the Serious Crime Act 2007. *R*'s attempt to perpetrate one of the offenses found in sections 44–46 was complete.

A. INHERENT FACTUAL IMPOSSIBILITY

Inherent factual impossibility would provide a defense because inherent factual impossibility refers to acts that are not more than merely preparatory to attempted perpetration. When *R* uses means that make perpetration of the crime inherently (factually) impossible to achieve, *R* performs an innocuous lawful act unless those means have been criminalized in themselves. Let me simplify by providing two examples. Suppose *R* tries to use telepathy in an attempt to encourage *P* (a professional assassin) to kill *V*.³⁰⁹ Since it is inherently impossible to communicate with another human being via telepathy, *R* has not done an act that is capable of encouraging *P* to kill. Nor is *R*'s act a failed attempt; it is an act that is not even mere preparation for perpetrating one of the offenses found in sections 44–46 of the Serious Crime Act 2007.³¹⁰ Since it is not a crime to telepathize *per se*, there is no crime to charge *R* with.

In the hypothetical just mentioned, *R* used inherently ineffective means, but the defense would also apply where *R* encourages *P* to use means that make perpetration of the anticipated target crime inherently impossible. For example, *R* encourages *P*, a witchdoctor, to kill *V* by putting a death spell on her.³¹¹ On these facts, *R* encourages *P* to kill by means of a curse, but

³⁰⁹ State v. Jones, 873 P.2d 122, 141 (Idaho 1994) (“telepathy is ‘communication through means other than the senses, as by the exercise of mystical powers’”). See also the bizarre facts in *People v. Anderson*, 25 Cal.4th 543, 597 (Cal. 2001). Natural telepathy is impossible, but electronic devices might be used to facilitate other forms of telepathy. See Lukasz Pawela et al., *Enhancing Pseudo-Telepathy in the Magic Square Game*, 8 PLOS ONE 1 (2013).

³¹⁰ “If a statute simply made it a felony to attempt to kill any human being, or to conspire to do so, an attempt by means of witchcraft, or a conspiracy to kill by means of charms and incantations, [sic.] would not be an offense within such a statute. The poverty of language compels one to say ‘an attempt to kill by means of witchcraft,’ but such an attempt is really no attempt at all to kill. It is true the sin or wickedness may be as great as an attempt or conspiracy by competent means; but human laws are made, not to punish sin, but to prevent crime and mischief.” *Attorney General v. Sillem* (1863) 159 Eng. Rep. 178, 221. See also *U.S. v. Lundy*, 676 F.3d 444, 449 (5th Cir. Miss. 2012), where Clement, J. said two elements must be proved when factual impossibility is raised as a defense: “first, that the defendant acted with the kind of culpability otherwise required for the commission of the underlying substantive offense, and, second, that the defendant had engaged in conduct which constitutes a *substantial step* toward commission of the crime. The substantial step must be conduct that strongly corroborates the firmness of defendant’s criminal attempt. The Model Penal Code endorses this approach.” See MODEL PENAL CODE § 5.01 (1985) (emphasis added). Clearly, pinning a voodoo doll or casting a death spell would not be a substantial physical step in attempting to murder another human being.

³¹¹ As fanciful as the example sounds, I managed to find a case with similar facts. *U.S. v. Francis*, 131 F.3d 1452 (11th Cir. Fla. 1997) (“Francis and Rendiff Green were arrested for selling crack cocaine. Shortly thereafter, Green and another inmate began making arrangements to have a Jamaican Obeah priest put a voodoo curse on Ernest Hardy, the informant to whom Green and Francis sold crack. Francis joined the voodoo plot.”). Some people believe they can kill by curse. See *Bradshaw v. U.S.*, 55

encourages *P* to use means that are inherently incapable of killing a human being. If *R*'s act is limited to encouraging *P* to kill by curse, then *R* has encouraged *P* to perpetrate an act that is not even merely preparatory to murder and therefore *R* should not be liable under the Serious Crime Act 2007. If the encouragement was more general, such as kill *V* either by using a curse or by using any other means you can conjure up, then the case would be different.³¹²

R's encouragement should be that *P* do an act that in the normal course of events could result in a crime. Where *R1* and *R2* encourage *P* to cast a death spell on *V*, their belief that inherently ineffective means could be used to kill should be distinguished from the standard case of factual impossibility, where *R* is only mistaken about the relevant facts. There may be extreme cases where a victim is killed by fright,³¹³ or commits suicide because of a spell,³¹⁴ but such cases are likely to fall outside the compass of the law of participatory and inchoate liability.³¹⁵ Factual impossibility as opposed to "inherent factual impossibility" is no defense in the law of attempts.³¹⁶

Compare this to a case where *R* attempts to hypnotize *P* into perpetrating a criminal offense. Since it is possible to hypnotize people, the latter would be factually possible and thus could be an attempt to perpetrate one of the offenses found in the Act of 2007.³¹⁷ *P* would act as an

A.3d 394 (D.C. 2012). Where a person genuinely believes in voodoo, such severe delusions, if medically verified, might be evidence of insanity or diminished responsibility. *But cf.* *Conaway v. State*, 663 S.W.2d 53 (Tex. App. Houston 1st Dist. 1983); *Genius v. Pepe*, 147 F.3d 64 (1st Cir. Mass. 1998); *Outler v. State*, 322 So. 2d 623 (Fla. Dist. Ct. App. 1975). AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 701 (4th ed. 2000) states: "The diagnostic criteria for Schizotypal Personality Disorder include: A pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and reduced capacity for, close relationships as well as by cognitive or perceptual distortions and eccentricities of behavior, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following: (1) ideas of reference (excluding delusions of reference) (2) odd beliefs or magical thinking that influences behavior and is inconsistent with subcultural norms (e.g., superstition, belief in clairvoyance, telepathy, or 'sixth sense'; in children and adolescents, bizarre fantasies. . . ." For another case where black magic has been used to try to influence, see *Humber College v. O.P.S.E.U.*, 1987 CarswellOnt 4166 (Can. Ont.) (WL).

³¹² Offenses Against the Person Act 1861, 24 & 25 Vict. c. 100, § 4 (Gr. Brit. & Ir.) could also be invoked. Such threats are not protected by the freedom of expression right. *See U.S. v. Turner*, 720 F.3d 411 (2d Cir. N.Y. 2013) (where Turner had discussed killing Judges Easterbrook, Bauer and Posner).

³¹³ *R v. Hayward* (1908) 21 Cox C.C. 692 (Eng.).

³¹⁴ In primitive societies where beliefs in magic might be the norm cursing could have a powerful psychological impact. *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 502 (2d ed. 1961).

³¹⁵ In such a case, *mens rea* and causation would have to be established. *See* BAKER, *supra* note 83, chs. 4, 11. *P* would have to target a particular victim, and the victim would have to be aware of the cause for a causal connection to be established.

³¹⁶ Criminal Attempts Act, 1981, c. 47, § 1 (U.K.); Glanville Williams, *The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodes*, 45 Cambridge L.J. 33 (1986). *But cf.* *R v. McDonough* (1963) 47 Cr. App. R. 37 (Eng.). *Cf. also* *R. v. Shephard* [1919] 2 KB 125 (Eng.); *R v. Whitchurch* [1890] 24 QBD 420 (Eng.); *R v. West* [1948] 1 KB 709 (Eng.); *R v. Brown*, (1899) 63 JP 790 (Eng.).

³¹⁷ *See* *People v. Poplaski*, 616 N.Y.S. 2d 434, 439 (N.Y. Dist. Ct. 1994) (where it is observed that the "defendant met children through a computer bulletin board, spoke to them over the phone, attempted to hypnotize them, and asked the victims to engage in the same sexual activity, to wit: masturbation"). Some medical studies suggest hypnosis may be medically possible. *See* Gary Elkins,

automaton and as an innocent agent and should be able to rely on the defense of automatism.³¹⁸ The defense of *inherent* factual impossibility has been recognized by some legislatures and courts in the United States. For instance, in the Supreme Court of Kansas in *State v. Logan*, McFarland, J. said:

An example of inherent impossibility contained in the Minnesota statutory comment is trying “to sink a battleship with a pop-gun.” . . . An act may be an attempt notwithstanding the circumstances under which it was performed or the means employed to commit the crime intended or the act itself were such that the commission of the crime was not possible, *unless such impossibility would have been clearly evident to a person of normal understanding*.³¹⁹

The same defense applies to inherently ineffectual assistance. Suppose *R* gives *P* a water pistol to assist *P* to shoot down a jumbo jet. Clearly, *R*'s act of assistance is inherently incapable of assisting *P* to shoot down the passenger jet. *R*'s act of assistance is incapable of assisting *P* because it is inherently impossible to shoot down a passenger jet with a water pistol.³²⁰ Similarly, if *R* sells *P* a voodoo doll so that *P* can use it to cast a death spell upon *V*, *R* would not be liable for attempting to assist *P* to kill. There are physical limits to what a person can achieve with given assistance. Acts of encouragement also have their limits. “Loyal and natural boy! I will work the *means*—To make thee capable.”³²¹ *R* should not be caught by the Serious Crime Act 2007 when attempted assistance or encouragement is inherently incapable of assisting or encouraging *P* (providing *P* with means) to perpetrate the anticipated target crime or where *R* encourages *P* to do the inherently impossible. If the act of assistance or encouragement could have no effect in any circumstances, then *R*'s fallacious belief that it could assist or encourage should not be enough to make *R* liable for one of the offenses found in sections 44–46 of the Serious Crime Act 2007.

B. LEGAL IMPOSSIBILITY

Legal impossibility would provide *R* with a defense where *P*'s anticipated target crime is in fact a lawful activity. It is important to note

Mark P. Jensen & David R. Patterson, *Hypnotherapy for the Mgmt. of Chronic Pain*, INT. J. CLIN. EXP. HYP., 275 (2007); THE BRITISH PSYCHOLOGICAL SOC^{'Y}, THE NATURE OF HYPNOSIS (2001).

318 STROUD, *supra* note 286, at 245.

319 *State v. Logan*, 656 P.2d 777, 780 (Kan. 1983) (emphasis added) (citing Subd. 2 of the Minnesota attempt statute Minn. Stat. § 609.17 (1978)). In *State v. Bird*, 285 N.W. 2d 481 (Minn. 1979), Sheran, J. said: “inherent impossibility (in which an actor uses means which a reasonable person would view as completely inappropriate to the objectives sought) [is a defense] to a charge of attempt.” See also *People v. Elmore*, 276 N.E. 2d 325 (Ill. 1971); *Commonwealth v. Johnson*, 167 A. 344, 348 (Pa. 1933).

320 Inherent factual impossibility would provide a defense under the Serious Crime Act 2007 because *R*'s assistance or encouragement has to pass a capability standard. On the “inherent factual impossibility” defense, see Baker, *supra* note 83, para. 17-050.

321 WILLIAM SHAKESPEARE, HIS TRUE CHRONICLE HISTORIE OF THE LIFE AND DEATH OF KING LEAR AND HIS THREE DAUGHTERS act 2, sc. 1 (corrected for clarity).

that since attempted participation is a form of attempt liability, the legal impossibility, factual impossibility, and inherent factual impossibility rules apply. A person cannot be held liable for attempting to assist or encourage a non-existent crime, because it is impossible to charge a person with trying to encourage or assist a non-existent crime. *R* is liable under the Serious Crime Act 2007 only when *R* attempts or is successful in encouraging another person to perpetrate a criminal offense.³²² Suppose *R* and *P* go to the beach and *R* attempts to encourage *P* to take her bikini top off; both *R* and *P* believe that it is a crime in England and Wales for a woman to go topless on a public beach. Suppose also that *P* ignores *R*'s encouragement and keeps her top on. *R*'s ineffectual attempt is not conduct that would be caught by the Serious Crime Act 2007, because *R* does not attempt to encourage *P* to commit a crime. Rather, *R* encourages *P* to perpetrate a lawful and innocuous act.³²³ Some courts in the United States have mistaken legal impossibility for factual impossibility and thus have suggested a person could be liable for attempting a non-existent crime.³²⁴

C. THE COMMON LAW AND IMPOSSIBILITY

It is worth noting that the Act of 2007 is silent on impossibility.³²⁵ There is nothing in the new Act that suggests the common law interpretation of impossibility should not apply.³²⁶ At common law, a person could not attempt to conspire or do the impossible unless the impossibility related solely to means and not to the end in view.³²⁷ The rule was changed by statute for attempt and conspiracy, but nothing was enacted for incitement.³²⁸ It was held in *R v. Fitzmaurice*, that the impossibility rule governed the common law offense of incitement.³²⁹ Many decades ago, the Law Commission in recommending the change for attempt and conspiracy, refrained from making any recommendation for incitement chiefly because the Commission expressed the opinion that the courts might be able to declare that the law of incitement is in line with the law for the other

322 For a full discussion of the impossibility rules, see BAKER, *supra* note 83, at para. 17-050.

323 See Serious Crime Act 2007, c. 27 (U.K.).

324 See *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000), where Williams, J. said: "Pure legal impossibility is always a defense. For example, a hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place." See also *United States v. Fernandez*, 722 F.3d 1, 31 (1st Cir. P.R. 2013); *United States v. Hsu*, 155 F.3d 189, 199-203 (3d Cir. Pa. 1998). Cf. *United States v. Lundy*, 676 F.3d 444, 449 (5th Cir. Miss. 2012) (holding that: "Factual impossibility is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be."). Inherent factual impossibility is contradistinguishable, because it is impossible for the facts that the defendant believes to exist to ever exist in the real world. See also BAKER, *supra* note 83, para. 17-050.

325 Serious Crime Act 2007, c. 27 (U.K.).

326 *Id.*

327 On the difficulty of the means-end distinction, see *R. v. Harris* (1979) 69 Crim. App. 122 (Eng.).

328 Criminal Attempts Act 1981, c. 47, §§ 1, 5 (U.K.). See also *R v. Hollinshead* [1985] AC 975 (Eng.).

329 *R v. Fitzmaurice* [1983] QB 1083 (Eng.).

offenses without statutory help.³³⁰ The suggestion was received with some skepticism, and has now been falsified by the decision in *R v. Fitzmaurice*. However, the court made it clear that nothing but the most complete impossibility would exclude liability; if the projected crime, though impossible at the time, might become possible before it was expected to be committed, the encouragement would be an offense.³³¹

When the Law Commission revisited the issue in 2006, it thought that it was unnecessary “for the Bill to include a clause expressly addressing the issue of [impossibility],” because the inchoate nature of the offenses meant that they would catch the standard cases of factual impossibility—attempts to steal from an empty pocket, attempts to kill a person who is already dead, attempts to import drugs, and so on.³³² If *R* encourages *P* to steal from *V*'s pocket, *R* is liable as soon as the encouragement is uttered; it does not matter whether the pocket contains a wallet. Similarly, if *R* pays *P* to kill *V*, it is irrelevant that *V* is killed in a car accident before *P* gets the chance to carry out the assassination.³³³ *R*'s liability depends on whether the act was capable of encouraging *P* to kill and on the culpability for the inchoate offense.³³⁴ But none of this deals with the issue of inherent factual impossibility with respect to the means used by *R* to assist (*R* gives *P* a water pistol to sink a cruise liner) or to encourage *P* (*R* uses telepathy to encourage *P* to kill *V*).

VIII. WHEN IS TRIVIAL ENCOURAGEMENT CAPABLE OF ENCOURAGING?

Many acts of encouragement may seem trivial, but in certain circumstances they will be capable of encouraging others to offend.³³⁵ Section 65 of the Serious Crime Act 2007 provides:

- (1) A reference in this Part to a person's doing an act that is capable of encouraging the commission of an offense includes a reference to his doing so by threatening another person or otherwise putting pressure on another person to commit the offense.
- (2) A reference in this Part to a person's doing an act that is capable of encouraging or assisting the commission of an offense includes a reference to his doing so by—
 - (a) taking steps to reduce the possibility of criminal proceedings being brought in respect of that offense;

330 THE LAW COMM'N, PARLIAMENT, CRIMINAL LAW: ATTEMPT, AND IMPOSSIBILITY IN RELATION TO ATTEMPT, CONSPIRACY AND INCITEMENT Part IV (1980).

331 See *R v. Shepherd* [1919] 2 KB 125 (Eng.).

332 THE LAW COMM'N, *supra* note 38, para. 6.62.

333 Cf. *DPP v. Armstrong* [1999] EWHC (QB) 270 (Eng.).

334 See *id.*

335 *State v. Barnum*, 14 S.W.3d 587, 591 (Mo. 2000); *State v. Jackson*, 385 S.W.3d 437, 441–42 (Mo. Ct. App. 2012).

(b) failing to take reasonable steps to discharge a duty.

(3) But a person is not to be regarded as doing an act that is capable of encouraging or assisting the commission of an offense merely because he fails to respond to a constable's request for assistance in preventing a breach of the peace.³³⁶

In *R v. Blackshaw*, *R*'s acts of encouragement were trivial and remote, but the context in which they were done convinced the court that they were capable of encouraging the putative perpetrators to riot and perpetrate criminal damage.³³⁷ The decision was a sentencing decision, but it contains some useful observations.³³⁸ Blackshaw used social media to encourage people to riot and perpetrate criminal damage.³³⁹ Posts on Twitter may seem too trivial to encourage fully autonomous adults to go out rioting and smashing up buildings, but the context in which Blackshaw posted his messages of encouragement was as follows:

At 00.45 on 9 August a police station in Handsworth in Birmingham was set on fire, and shortly afterwards Merseyside police confirmed that they were dealing with a number of incidents in South Liverpool, which included cars being set alight. Some 200 rioters hurled missiles at officers in Smithdown Road, Liverpool. A few minutes later BBC staff reported that hundreds of youths were ransacking a Panasonic store in West Ealing, and there were then disturbances and troubles in Derby. . . . To underline one specific aspect of all these offenses we mention that a friendly international soccer match between England and Holland was called off that morning because of the rioting in London. The story of the public disorder in this country had a vast international dimension. Television films of London burning were seen throughout the world. We have no doubt they were a source of incredulity abroad as they were at home, and of considerable dismay among those who retain affection for this country. The rioting also enabled a spokesman for a dictatorial regime abroad to equate those conducting demonstrations for greater civil liberties with the rioters here.

. . . .

At 22.30 on 8 August 2011 [Blackshaw] used Facebook to set up and plan a public event called '*Smash down in Northwich Town*'. It would start behind the premises of McDonalds at 13.00 next day. The riots were in full flow. The defendant knew perfectly well that they were. The purpose of his website was to wreak criminal damage and rioting in the center of Northwich, and the event called for participants to meet in a restaurant in Northwich at lunchtime on 9 August. The website was aimed at his close associates, who he referred to as the '*Mob Hill Massive*', and his friends,

336 Serious Crime Act 2007, c. 27, § 65 (U.K.).

337 *R v. Blackshaw* [2012] 1 WLR 1126 (Eng.).

338 *Id.*

339 *Id.*

but he also opened it to public view and included in the website references to on-going rioting in London, Birmingham and Liverpool. He posted a message of encouragement on the website that read: ‘we’ll need to get on this, kicking off all over.’ . . . Fortunately members of the community who saw the website were revolted by it and alerted the police. In addition, some of them left messages on the website expressing their disgust in no uncertain terms. The police infiltrated the website and posted messages on it, warning of the consequences if the website were followed. By the time it was closed down by the police, nine people had confirmed their intention to attend. In the result, the offense which the defendant was inciting did not take place.³⁴⁰

There was no doubt that Blackshaw’s Facebook event was capable of encouraging likeminded people to participate in the continuing riots in the context of the 2011 England Riots.³⁴¹ The 2011 England riots were the worst riots in recent history, because they involved thousands of people from many London boroughs, cities, and towns across England perpetrating arson and criminal damage.³⁴² There were mass riots up and down the country.³⁴³ One reputable newspaper called them “The BlackBerry riots,” because the organizers used mobiles and social media to instigate and organize them.³⁴⁴ There was a mass of unemployed and disadvantaged people rioting because a supposedly unlawful police shooting of a notorious criminal enraged them.³⁴⁵ In this context, Blackshaw’s post on social media had the potential to encourage further acts of rioting and criminal damage. When a mob is on the rampage, it does not need much prodding. The fault constraint offers such defendants some protection. Under section 45 of the Serious Crime Act 2007, *R* would need to know the relevant circumstances for the jury to infer that *R* believed encouragement would encourage *Ps* to perpetrate the anticipated target crimes; this would be a fortiori under section 44 of the Act of 2007.³⁴⁶

Furthermore, *R*’s encouragement need not be the predominate motivator for *P* perpetrating the anticipated target crime, but it must be a more than a negligible motivator if the “capable of” encouraging element is to be satisfied.³⁴⁷ *R*’s encouragement would not be capable of providing a perpetrator with a more than negligible motivation (reason) for perpetrating the anticipated target crime, if it is very trivial. All the circumstances would have to be considered because in special cases trivial encouragement can tip the balance.

340 *Id.* at 1137–38, 1142 (emphasis added).

341 *Id.*

342 *Id.*

343 *Id.*

344 *The Blackberry Riots*, *ECONOMIST* (Aug. 13, 2011), <http://www.economist.com/node/21525976>.

345 *Id.*

346 Serious Crime Act 2007, c. 27, §§ 44–45 (U.K.).

347 *See id.*

In order to establish a causal or factual nexus in the full sense, *R*'s encouragement would have to overbear the will of *P*; duress that overbears a person's will would make that person a quasi-innocent agent.³⁴⁸ Fraud,³⁴⁹ duress, or undue influence could be used to encourage a person to perpetrate a crime or to commit suicide, but lesser forms of persuasion also have a causal bearing.³⁵⁰ Causation for the purposes of establishing attempted participation does not require anything this strong. It is enough to establish that *R*'s encouragement provided *P* with a solid *extra* reason for perpetrating the anticipated target crime. *R*'s act need not be *P*'s predominant reason for perpetrating, but it must be one of the reasons behind *P*'s general reason for perpetrating the anticipated target crime. There may be many factors motivating *P* to perpetrate the anticipated target crime, but as long as *R*'s act of encouragement has some impact in that it tips the balance, *R* can be liable. In the headnote to *State v. Jones*, it is asserted: "In order for one who incites to suicide to be guilty of murder, a causal connection must exist between the incitement and the suicide; the incitement must be not necessarily the sole cause, but an inducing cause of the crime."³⁵¹

If the encouragement when judged objectively in all the circumstances is too trivial to have been capable of influencing *P*'s decision to perpetrate the anticipated target crime, the jury should not infer that it did in fact influence *P*'s decision to perpetrate the anticipated target crime or that it would have been capable of influencing *P*'s decision to perpetrate the anticipated target crime. In *R v. Giannetto*, Kennedy, L.J. observed:

Supposing somebody came up to [D] and said, 'I am going to kill your wife', if [D] played any part, either in encouragement, as little as patting [P] on the back, nodding, saying, 'Oh goody', that would be sufficient to

348 See the discussion in *R v. Kennedy* (No. 2) [2008] 1 AC 269 (Eng.); *Lewis v. State*, 474 So. 2d 766 (Ala. Crim. App. 1985). See also Sue Woolf Brenner, *Undue Influence in the Criminal Law: A Proposed Analysis of the Criminal Offense of 'Causing Suicide'*, 47 ALB. L. REV. 62 (1982); Luis E. Chies, *Punishing Without Free Will*, UTAH L. REV. 1403 (2011).

349 Such as where *R* tells *P* a lie that *V* has been sleeping with *P*'s wife and at the same time tells *P* that he should kill *V* to seek revenge. Or where *R* lies to *V* to convince her to commit suicide, such as where *R* uses undue influence and fraud to convince *V* that she is dying with cancer.

350 See *State v. Melchert-Dinkel*, 816 N.W. 2d 703 (Minn. Ct. App. 2012), where "Mark Drybrough hanged himself in England in 2005, and Nadia Kajouji drowned herself in Canada three years later, both shortly after 46-year-old William Melchert-Dinkel, who knew that Drybrough and Kajouji were contemplating suicide, sent each a series of Internet messages from his home in Faribault, prodding them to kill themselves. Melchert-Dinkel instructed Drybrough and Kajouji how to commit suicide by hanging, tried to persuade them to hang themselves, and convinced them that he was a distraught young woman who would commit suicide simultaneously with them or shortly afterward. . . . [The evidence was that] *D* falsely presented himself as a woman, particularly as a 'kind, sympathetic emergency room nurse' who 'befriends his victims by pretending to be suicidal.' Police linked Melchert-Dinkel to the described email addresses." (Emphasis added.) Compare the now repealed Ga. Code Ann. § 16-5-5(c), which made a person liable for encouraging suicide when that person "knowingly and willfully commits any act which destroys the volition of another, such as fraudulent practices upon such person's fears, affections, or sympathies; duress; or any undue influence . . . and thereby intentionally causes or induces such other person to commit or attempt to commit suicide." This provision was repealed by Act of May 1, 2012, Ga. Laws 639 § 1.

351 *State v. Jones*, 67 S.E. 160, 162 (S.C. 1910) (prior history headnote quoting jury instructions delivered by trial judge, Memminger, J.).

involve him in the murder, to make him guilty, because he is encouraging the murder.³⁵²

It is doubtful that this sort of trivial indirect encouragement would be capable of influencing a person to perpetrate a very serious crime such as murder. However, the jury would have to consider all the circumstances. If a person is already intent on committing murder or on committing suicide, then very trivial encouragement could be the tipping point. In the hypothetical, “Oh goody” is uttered to someone who is already intent on perpetrating a murder, so perhaps it is capable of influencing *P*’s final decision in a more than negligible way. Hence, the jury could infer that it was capable of tipping the balance, but it would need firm evidence demonstrating that *P* was very serious about perpetrating the anticipated target crime. The better view is that it would have made no causal difference and thus would have been too trivial to count as an act that is capable of providing *P* with a more than negligible reason for perpetrating murder.

Kadish writes: “It is often said that any amount of influence or aid suffices, no matter how slight. Is this evidence that a successful contribution is not required after all?”³⁵³ A person who gives very minor encouragement ought not to be held as an accessory, because such assistance, unless there are special circumstances, would not be capable of influencing a fully autonomous adult to perpetrate a crime. Would mere suggestion be encouragement that is capable of having a more than negligible influence on a fully autonomous adult perpetrator’s decision to perpetrate a crime? Shakespeare said: “They’ll take suggestion as a cat laps milk.”³⁵⁴ Children and the very gullible might take suggestion as a cat laps milk, but this surely cannot be the case with respect to fully autonomous adult agents. It would be harsh to use trivial encouragement to convict a person of an offense under the Serious Crime Act 2007, especially if one allegedly had some minor influence on another’s decision to perpetrate a very trivial crime. For example, in *State v. Butler*, Scott, J. said:

The reasons given in that case showing why solicitation should not be held an attempt to commit adultery apply with equal force whether adultery be a misdemeanor or a felony. These relate to the difficulty of determining what is a solicitation. ‘What expressions of the face,’ says the court, ‘or double entendres of the tongue, are to be adjudged solicitation? What freedoms of manners amount to this crime? Is every Cyprian who nods or winks to the married men she meets upon the sidewalk indictable for soliciting to adultery? And could the law safely undertake to decide what recognitions in

³⁵² *R v. Giannetto* (1997) 1 Crim. App. 1, 13 (Eng.). Similarly, it is doubtful that the conduct in *Wilcox v. Jeffery* [1951] 1 All ER 464, (Eng.), when objectively judged, could be said to have been an act capable of encouraging the fully autonomous perpetrator to perpetrate the relevant target offense.

³⁵³ Kadish, *supra* note 38, at 361–62.

³⁵⁴ WILLIAM SHAKESPEARE, *THE TEMPEST, OR THE ENCHANTED ISLAND COMEDY, AS IT IS NOW ACTED AT HIS HIGHNESS THE DUKE OF YORK’S THEATRE* act 2, sc. 1.

the street were chaste, and what were lewd? It would be a dangerous and difficult rule of criminal law to administer.³⁵⁵

The offenses found in sections 44–46 of the Serious Crime Act 2007 seem to require the suggestion to be made in a context where it would be capable of making a more than negligible difference to *P*'s decision to perpetrate the anticipated target crime.³⁵⁶ When a person is not hypnotized one is able to make up one's own mind. Merely suggesting something to a sane person is different from putting a gun to one's head and demanding one do as suggested. If *R* provides information in a gardening book about growing cannabis, does *R* really encourage others to grow it? The courts think so.³⁵⁷ Surely the autonomous agent is not so easily encouraged.³⁵⁸ *R*'s act is capable of assisting, but it is a stretch to argue that it is capable of encouraging. It would be possible to convict *R* under section 45 of the Act of 2007, if *R* intends or believes that one of the customers will be assisted. The encouragement may be directed to persons generally, as it was in *Invicta Plastics Ltd. v. Clare*, and it may encourage a general course of crime.³⁵⁹ If the person encouraged gives ear and assents to the plan proposed, that person and the encourager become conspirators.

A. INCHOATE PARTICIPATION BY ASSOCIATION AND OMISSION

Factual encouragement cannot be inferred from the remote party's mere presence at the scene of the crime. But, mere presence considered along with the remote party's relation to the perpetrator and the remote party's actions before, during, and after the commission of the crime might be enough to allow the jury to infer factual encouragement.³⁶⁰ In *R. v.*

355 *Steve v. Butler*, 35 P. 1093, 1094 (Wash. 1894); *cf. U.S. v. Bagdasarian*, 652 F.3d 1113 (9th Cir. Cal. 2011). "It has been urged in strong terms that solicitation of adultery ought not to be criminal whether adultery is a felony or a misdemeanor, as it is feared that many innocent gestures, remarks, and innuendos will be interpreted as invitations to commit adultery. The danger of false charges, however, is not a problem limited to the adultery situation; it is a risk implicit in the punishment of almost all inchoate crimes." Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 623 (1961).

356 Serious Crime Act 2007, c. 27, §§ 44–46 (U.K.).

357 *R v. Marlow* (1998) 1 Crim. App. 273 (Eng.).

358 On at least one occasion, the court has held that selling articles (articles whose telos is to facilitate fraud) to a middleman who would then encourage others to use them was not sufficient for establishing incitement at common law. As the defendants had not encouraged the middleman personally to use the articles, they were able to evade justice. *See R v. James* (1986) 82 Crim. App. 226, 232 (Eng.). They would now be caught by section 66 of the Serious Crime Act 2007, which criminalizes indirect encouragement. In addition, such defendants directly encourage the middleman to possess an article for use in fraud and thus encourage him to commit an offense contrary to section 6 of the Fraud Act 2006.

359 *Invicta Plastics Ltd. v. Clare* [1976] RTR 251 (Eng.). *See also R v. Jones* [2007] EWCA (Crim) 1118, [2008] QB 460 (Eng.); *cf. Baney v. State*, 42 So. 3d 170 (Ala. Crim. App. 2009).

360 *Diggs v. State*, 73 A.3d 306, 338 (Md. Ct. Spec. App. 2013) (Kehoe, J. said: "The mere presence of the defendant at the time and place of the commission of the crime is not enough to prove the defendant aided and abetted. But if presence is proven, it is a fact that may be considered, along with all the surrounding circumstances."). *See also State v. Novotny*, 307 P.3d 1278, 1286 (Kan. 2013); *Maddox v. State*, 746 S.E.2d 280 (Ga. Ct. App. 2013); *State v. Merritt*, 738 A.2d 343 (N.H. 1999); *State v. Laudarowicz*, 694 A.2d 980 (N.H. 1997); *State v. Vaillancourt*, 453 A.2d 1327 (N.H. 1982). The court

Salajko, a girl was raped by a gang of thugs.³⁶¹ Three men were charged with rape.³⁶² It was proved beyond reasonable doubt that two of these men had in fact raped the victim.³⁶³ It had been established that the third accused, *Salajko*, had been present when the girl was raped, but that he had not had sexual intercourse with her.³⁶⁴ The evidence was that while *V* was being raped by *P*, *Salajko* stood nearby with his pants down and in a visible state of sexual excitement.³⁶⁵ It was clearly open to the jury to infer encouragement by conduct, but the Ontario Court of Appeal held otherwise. Gale C.J.O., delivering the judgment of the court, said:

The accused gave an explanation as to the incident but quite apart from it we do not think that the evidence can be translated into a conclusion that the accused was aiding or abetting the others when they were ravaging the girl. Passive acquiescence is not sufficient to induce such a finding and [there was no] other evidence to suggest anything in the way of aiding or counseling or encouragement on the part of the accused with respect to that which was being done by the others.³⁶⁶

It is arguable that *Salajko*'s act was capable of encouraging the continuing act of rape because standing naked in association with other gang members who are perpetrating a rape clearly sends a message of encouragement.³⁶⁷ *R. v. Salajko*³⁶⁸ is not likely to be followed in light of the decision of the Supreme Court of Canada in *R. v. Kirkness*.³⁶⁹ Not only can it be inferred that by attending the gang rape, *Salajko* approved of it, but the fact that he took his pants off and stood nearby in a visible state of lust sent a message of encouragement to the perpetrator. The message was that *Salajko* approved of the perpetrator's continuing rape. The fact that *Salajko* stood nearby in the nude sent the message that he also was waiting to rape

will need more than mere presence to prove that the remote party was an inchoate participator; other relevant factors might include companionship and conduct before and after the offense. *See* *People v. Miranda*, 121 Cal. Rptr. 3d 231, 239 (Cal. App. 2d Dist. 2011). The court has to determine that the perpetrator was in fact influenced by the remote party's intentional encouragement, but it need not prove that there was a prearrangement or that the remote party had prior knowledge of the perpetrator's purpose because a mutual intention (purpose) may be formed instantaneously at the time when the crime is perpetrated. *See* *People v. Nguyen*, 26 Cal. Rptr. 323, 331 (Cal. App. 3d Dist. 1993); *Powell v. State*, 733 S.E.2d 294, 297 (Ga. 2012); *State v. Palubicki*, 700 N.W.2d 476, 486. (Minn. 2005); *see also* *People v. Johnson*, 108 Cal. Rptr. 671, 680 (Cal. App. 1973); *People v. Boyer*, 42 Cal. Rptr. 3d 677, 724 (Cal. 2006); *State v. Gonzalez*, 283 P.3d 840 (Kan. 2012) (unpublished opinion). *Cf.* *United States v. Jones*, 713 F.3d 336 (7th Cir. Ill. 2013).

³⁶¹ *R. v. Salaiko*, [1970] 1 O.R. 824 (Can. Ont.).

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ "A reference in this Part to an act includes a reference to a course of conduct, and a reference to doing an act is to be read accordingly." Serious Crime Act 2007, c. 27, § 67 (U.K.).

³⁶⁸ *See* *R. v. Salaiko*, [1970] 1 O.R. 824, para. 4 (Can. Ont.). *Cf.* *R. v. Black*, (1970) 72 W.W.R. 407 (Can. B.C.).

³⁶⁹ *R. v. Kirkness*, [1990] 3 S.C.R. 74, para. 50 (Can.) (finding that "the decision in *R. v. Salajko* is anomalous and should not be followed").

V. That sort of sexual conduct in the context of a gang rape would allow a reasonable jury to infer encouragement by conduct.

The case of *R. v. McCarry* is also troubling.³⁷⁰ In that case, it was reasonable for the jury to infer that Waters had encouraged McCarry to rape V, but it was not reasonable for the jury to infer that Waters intended to encourage McCarry to murder V.³⁷¹ Waters and McCarry had taken V to a remote location to have sexual intercourse with her.³⁷² McCarry raped V and Waters attempted to rape her.³⁷³ If Waters' attempt to rape V preceded McCarry's rape of V, then it was reasonable for the jury to infer that by his conduct he encouraged McCarry to rape V. However, it is not clear how attempting to rape a person encourages a fellow rapist to depart from the common purpose (gang rape) and murder V. It is arguable that there was encouragement of an unlawful dangerous act, because Waters drove McCarry to a remote location knowing that he "had a long established history of strangling during sexual intercourse."³⁷⁴ Sir Anthony May said: "It should be remembered that . . . Waters had given evidence that the strangling continued while he drove to a more secluded spot. This by itself could be seen as participating encouragement."³⁷⁵ If it had been established that Waters had encouraged the unlawful dangerous act of sexual strangulation (erotic asphyxiation, which is the intentional restriction of oxygen to the brain for sexual arousal³⁷⁶), then he would have been rightly convictable of manslaughter.

When a person encourages another to perform an unlawful dangerous act, such as erotic asphyxiation (even if V had consented to the erotic asphyxiation, consent is no defense to actual bodily harm³⁷⁷), and it causes V's death, both can be held liable for manslaughter.³⁷⁸ If V died as a result of McCarry forming a direct intention to kill her, Waters should not have been held liable for murder unless he encouraged murder.³⁷⁹ McCarry was an asphyxiophiliac who had a history of engaging in erotic asphyxiation and Waters had full knowledge of this fact.³⁸⁰ There was ample evidence for the jury to infer that Waters, at the very least, knew that McCarry intended to take V to an isolated place to have sexual intercourse involving erotic asphyxiation, but, it was not clear on the evidence that Waters intended to encourage McCarry to depart from the normal pattern of

370 *R v. McCarry* [2009] EWCA (Crim) 1718 (Eng.).

371 *See also Miller v The Queen*, (1980) 32 ALR 321 (Austl.).

372 *R v. McCarry* [2009] EWCA (Crim.) 1718 (Eng.).

373 *Id.*

374 *Id.*

375 *See id.* para. 26.

376 "Both the appellants told interviewing police officers that McCarry had had sexual intercourse with the deceased and that she had encouraged him to strangle her to increase her sexual pleasure. Her death, they said, was accidental." *Id.* para. 6.

377 *R v. Brown*, (1993) 97 Crim. App. 44 (Eng.).

378 *Cf. Miller v. The Queen*, (1980) 32 ALR 321 (Austl.).

379 *R v. Creamer*, [1966] 1 QB 72 (Eng.); *R v. Buck* (1960) 44 Crim. App. 213 (Eng.); *R v. Gaylor* [1857] Dears. & B. 288, 291 (Bramwell B.) (Eng.); *R v. Smith* (1847) 2 Cox C.C. 233 (Gr. Brit.).

380 *See R v. McCarry* [2009] EWCA (Crim.) 1718 (Eng.).

conduct (sexual intercourse involving erotic asphyxia) and kill *V*.³⁸¹ The normal pattern of conduct involved sexual intercourse where McCarry would perform erotic asphyxiation; there was no pattern of conduct where McCarry had killed or had attempted to kill women.³⁸² The evidence suggests that Waters' intention was to encourage McCarry to have sexual intercourse involving erotic asphyxiation, but that is all.³⁸³ Since Waters authorized the unlawful dangerous act of erotic asphyxiation, a conviction for manslaughter would have been appropriate had that act accidentally killed *V*. Since that act did not cause *V*'s death, Waters should not have been liable for either murder or manslaughter. McCarry's deliberate act of murder broke the chain of causation between the act that Waters authorized and encouraged and *V*'s death.

I am assuming that McCarry's act of strangulation was more violent and involved greater pressure to the neck area than was necessary for erotic asphyxiation. In other words, his act of strangulation was designed to kill rather than achieve erotic asphyxiation. If McCarry's act of strangulation was a standard act of erotic asphyxiation (whatever that may be) with him secretly intending to kill *V*, then it might have been argued that the unlawful dangerous act that was authorized by Waters was the cause of *V*'s death. There is a very fine line here. If a jury finds that the unlawful dangerous act encouraged by *R* caused *V*'s death, *R* can be liable for manslaughter even though *P* has the requisite mens rea for murder and is liable for murder.³⁸⁴

Lord Toulson takes the view that *R v. Rahman* prevents an accomplice being convicted of manslaughter where the perpetrator has been convicted of murder, but this is not correct.³⁸⁵ As I explained above, if the act that causes *V* death is authorized and encouraged by the accomplice, that accomplice is liable for the unintended consequences of that act. If the unintended consequence of an unlawful dangerous act is *V*'s death, *R* should be liable for constructive manslaughter or for one of the offenses found in the Serious Crime Act 2007. If the same unlawful act kills *V* in circumstances where *P* (secretly or otherwise) intended to kill or cause *V* great bodily harm, *P*'s mens rea is for murder and *P* should be convicted of murder. It is irrelevant that *R*'s mens rea was for assisting and encouraging manslaughter only and that *R* is liable only for manslaughter. *R* will not be liable for constructive manslaughter when the unlawful act that causes *V*'s death is fundamentally different from the unlawful dangerous act that *R* encouraged *P* to perpetrate, because the act *R* authorized or encouraged did

381 *Id.*

382 *Id.*

383 *Id.*

384 *R. v. Kirkness*, [1990] 3 S.C.R. 74, para. 39 (Can.); *R. v. Kent*, (1986) 40 Man. R. 2d 160 (Can. Man.); *R. v. Hartford*, 1979 CarswellBC 777 (Can. B.C.); *R. v. Trudeau*, (1985) 12 O.A.C. 189 (Can. Ont.); *Murray v The Queen* [1962] Tas SR 170 (Austl. Tas.).

385 Toulson, *supra* note 277. *R v. Rahman* [2008] UKHL 45, (2009) 1 Crim. App. 129 (Eng.).

not get a chance to cause *V*'s death.³⁸⁶ The chain of causation is broken by *P*'s fundamentally different and more lethal act.

Compare the obiter dicta comments in *Peppersharp v. DPP*, where it was stated the fact that a protestor was passively “wearing a black hat and hooded jacket” and “was also carrying a banner” was sufficient to infer that he encouraged the other protestors to trespass and commit criminal damage.³⁸⁷ Alas, the court was influenced by the fallacious proposals put forward by the Law Commission.³⁸⁸ The assertion made by the Law Commission that a person can be liable for the crimes of another simply because one recklessly attended a place where one knew or believed the crime might be committed, is not supported by the authorities.³⁸⁹ *Peppersharp*'s dress in itself was not an act capable of encouraging protestors to trespass and engage in acts of criminal damage.³⁹⁰ One has the right to wear a black hat and a hooded jacket. Unless there were express messages on the banner encouraging the perpetrators to commit the crime in question, it is not clear how *Peppersharp* encouraged them. In any case, *Peppersharp*'s conviction was personal rather than derivative; he was personally liable for his own act of trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994.³⁹¹

IX. ATTEMPTS TO ATTEMPT AND THE SERIOUS CRIME ACT 2007

Let us now consider attempts to attempt with reference to section 47(8)(c) of the Serious Crime Act 2007, which provides: “(8) Reference in this section to the doing of an act includes reference to— an attempt to do an act (*except an act amounting to the commission of the offense of attempting to commit another offense*).”³⁹² Since the perpetrator cannot be liable for an attempt to attempt, it is not clear why section 47(8)(c) was included in the new Act. If *P* cannot be liable for an attempt to attempt, then *R* cannot be liable for encouraging *P* to do an act that is an attempt to attempt to perpetrate a crime. The focus of section 47(8)(c) is on the act that *R* attempts to encourage or assist *P* to perpetrate. The provision does not exclude liability for assisting or encouraging crimes that *P* fails to consummate.³⁹³ If *R* gives *P* a gun intending to assist *P* to murder *V* with *P* firing at *V* but missing, *R* will be liable for assisting *P*'s attempted murder of *V*. The provision seems to be limited to excluding liability for *R* where *R* has assisted or encouraged *P* (or attempted to assist or encourage *P*) to do an act that would be an attempt to attempt a crime.

386 R v. Gamble [1989] NI 268 (N. Ir.).

387 *Peppersharp v. Dir. Of Pub. Prosecutions* [2012] EWHC (Admin) 474 [10], [24–25] (Eng.).

388 *Id.*

389 See THE LAW COMM'N, *supra* note 63, para. 2.23.

390 *Id.*

391 Criminal Justice and Public Order Act 1994, c. 33, § 68 (U.K.).

392 Serious Crime Act 2007, c. 27, § 47 (U.K.).

393 *Id.*

It seems it is aimed at excluding liability for encouraging or assisting *P* to do an act that would only be criminal for *P* if double inchoate liability were invoked for *P*. The provision focuses on the inchoateness of the act that *R* assists or encourages (or attempts to assist or encourage), rather than on the inchoateness of *R*'s act of assistance or encouragement. The provision clearly excludes liability for assisting or encouraging (or attempting to assist or encourage), with the requisite section 44, 45, or 46 mens rea, acts that would amount to attempts to attempt to perpetrate a crime.³⁹⁴

It does not preclude section 44, 45, or 46 liability for assisting or encouraging attempts or attempts to encourage or assist crimes that subsume attempts such as the abrogated offense of embracery.³⁹⁵ Section 47(8)(c)'s *raison d'être* is to avoid participation and inchoate participation liability for encouraging or assisting conduct that would be criminal only if double inchoate liability were recognized as making the putative perpetrator liable for attempting to attempt the anticipated target crime.³⁹⁶

It is worth noting that section 1(4) of the Criminal Attempts Act 1981 makes it an offense to attempt to perpetrate:

any offense which, if it were completed, would be triable in England and Wales as an indictable offense, *other than*—(a) a conspiracy (at common law or under section 1 of the Criminal Law Act 1977 or any other enactment); (b) aiding, abetting, counseling, procuring or suborning the commission of an offense; (ba) an offense under section 2(1) of the Suicide Act 1961 (encouraging or assisting suicide . . .).³⁹⁷

Before the enactment of the Criminal Attempts Act 1981, England and Wales had no general statute criminalizing all attempts to perpetrate crimes.³⁹⁸ There were numerous statutes criminalizing crimes in the nature of specific attempts, but the rest was left to the common law. Section 1(4) of the Criminal Attempts Act 1981 was not amended to include the Serious

³⁹⁴ *Id.*

³⁹⁵ Closely related is the idea of legal impossibility: "It is singular, but it is also true, that there are a large number of crimes which it is impossible to attempt to commit. For instance, high treason by imagining the king's death cannot be attempted, because the crime consists in displaying by an overt act a treasonable intention, but an attempt to do something (*e.g.* an attempt to fire a loaded pistol at the Queen) would be an overt act displaying a treasonable intention just as much as actual firing, indeed the actual murder of the Queen would (as appears from the case of the regicides) be no more than an overt act manifesting a treasonable intent to put Her Majesty to death. Similarly a man could hardly attempt to commit perjury, or riot, or libel, or to offer bad money, or to commit an assault, for an attempt to strike is an actual assault." JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* II 227 (1883). On attempting perjury and libel, compare *Miskovsky v. Jones*, 559 Fed. Appx. 673 (10th Cir. 2014); and *State v. Espinoza*, 310 P.3d 52, 57 (Ariz. Ct. App. 2013); with *R v. Deller*, (1952) 36 Crim. App. 184 (Eng.).

³⁹⁶ If *P* has consummated the offense, then that is what *R* should be charged with encouraging or assisting. See KENNY COURTNEY STANHOPE, *OUTLINES OF CRIMINAL LAW* 75 (1958) (citing *R v. Meredith* (1838) 173 Eng. Rep. 630).

³⁹⁷ Criminal Attempts Act 1981, c. 47, § 1 (U.K.).

³⁹⁸ STEPHEN, *supra* note 395, at 224. See also J. W. CECIL TURNER, *RUSSELL ON CRIME* 187–89 (1958); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 559–99 (2nd ed. 1960).

Crime Act 2007 offenses because it aims to criminalize attempted participation.³⁹⁹

Like the offenses found in the Serious Crime Act 2007, many enactments criminalize both attempt and success. A person cannot be charged with an attempt to perpetrate a crime that is itself defined as an attempt or where the offense itself criminalizes both attempt and success. Consequently, a person cannot be convicted of an offense for encouraging or assisting another to do an act that is an attempt to perpetrate an attempt crime. Numerous statutory offenses make it an offense to do *X* or “to attempt” *X*.⁴⁰⁰ Similarly, other statutes criminalize certain incitements *per se*, as was the case with embracery and subornation of perjury.

In *State v. Davis*, Lampron, J. said:

We recognize that if the essence of a certain crime is the attempt to do a certain act there can not be an attempt to commit the crime because it is committed whether or not the [offense is consummated]. Such a crime is an attempt to induce prostitution. Embracery, which is an attempt to corrupt or influence a jury, is another. As to crimes of this sort it is true as argued by defendant that ‘there can be no crime of an attempt to commit an attempt.’⁴⁰¹

In *Rooks v. State*, McMurray, J. said:

We know of no law authorizing the conviction for an attempt to commit a crime which itself is a particular type of attempt to commit a crime. . . . ‘The refinement and metaphysical acumen [sic] that can see a tangible idea in the words an attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity.’⁴⁰²

It is not surprising that Spencer and Virgo, referring to section 48(8)(c) of the Serious Crime Act of 2007, asked: “Can any reader of this paper

³⁹⁹ Criminal Attempts Act 1981, c. 47, § 1 (U.K.).

⁴⁰⁰ For example, section 101(1) of the Reserve Forces Act 1996 criminalizes, “A person who . . . by any means (a) procures or persuades, or attempts to procure or persuade, a member of a reserve force to commit an offense of desertion or absence without leave” Reserve Forces Act 1996, c. 14, § 101 (U.K.). There are many statutory offenses that criminalize both the “attempts to” as well as success. *E.g.*, Fair Trading Act 1973, c. 41, § 120 (Eng.); Theft Act 1968, c. 60, § 21 (Eng.); Farriers (Registration) Act 1975, c. 35, § 5 (Eng.); Perjury Act 1911, 1 & 2 Geo. 5 c. 6, § 6 (U.K.); Road Safety Act 2006, c. 49, § 3 (Eng.); Wireless Telegraphy Act 2006, c. 5, § 47 (Eng.); Courts Act 2003, c. 39, § 49 (Eng.); Licensing Act 2003, c. 17, §§ 136, 141–43, 149, 157 (Eng.); Adoption and Children Act 2002, c. 7, § 95 (Eng.); Merchant Shipping Act 1995, c. 21, § 246 (Eng.); Official Secrets Act 1989, c. 6, § 11 (Eng.); Road Traffic Act 1988, c. 52, § 5 (Eng.); Crossbows Act 1987, c. 32, § 3A (Eng.); Ministry of Defence Police Act 1987, c. 4, § 6 (U.K.); Insolvency Act 1986, c. 45, §§ 208(2), 356 (Eng.); County Courts Act 1984, c. 28, § 92 (Eng.); Submarine Telegraph Act 1885, c. 49, § 3 (Eng.); Road Traffic Regulation Act 1984, c. 27, § 35A (Eng.); British Fishing Boats Act 1983, c. 8, § 4 (Eng.); Representation of the People Act 1983, c. 2, § 65 (Eng.); Wildlife and Countryside Act 1981, c. 69, § 18 (Eng.); Town Police Clauses Act 1847, 10 & 11 Vict. c. 89, § 26 (Eng.); Animal Health Act 1981, c. 22, §§ 68, 71 (Eng.); Immigration Act 1971, c. 77, § 26A (Eng.). Other enactments have a general attempt provision, *e.g.*, Prison Act 1952, 15 & 16 Geo. 6 & 1 Eliz. 2 c. 52, § 40C (Eng.); Official Secrets Act 1920, 10 & 11 Geo. 5 c. 6, § 7 (U.K.).

⁴⁰¹ *State v. Davis*, 229 A. 2d 842, 845 (N.H. 1967).

⁴⁰² *Rooks v. State*, 458 S.E.2d 667, 669 (Ga. Ct. App. 1995).

make sense of the wording of subsection 47(8)(c)? The authors of this article cannot—and think that if anybody can, they deserve to win a prize.⁴⁰³ The provision is paradoxical as it serves no purpose whatsoever. Since an attempt to perpetrate an attempt is not a crime itself, a person could not be liable for encouraging another to perpetrate an act that is an attempt to attempt some other crime. Section 47(8)(c) is not needed as a safeguard here, because one cannot be liable for encouraging or assisting (or attempting to encourage or assist) a non-existent crime.

It is true that a person could be liable for attempting to encourage a person to perpetrate a crime such as the abrogated crime of embracery, but a person could not be liable for encouraging or assisting a person to attempt to perpetrate a crime like⁴⁰⁴ the abrogated crime of embracery.⁴⁰⁵ Presumably, all the provision tries to do is make sure that people are punished only for encouraging or assisting another's attempted crime rather than another's attempt to attempt another crime.

How does this work in practice? Let us use the abrogated common law crime of embracery to shed some light on the subject.⁴⁰⁶ “Embracery is a corrupt attempt to influence a jury in their verdict, although no verdict is given.”⁴⁰⁷ If the definition of the attempt crime covers *P*'s act of attempting to encourage or assist *P* to perpetrate the anticipated target crime, then section 47(8)(c) means *R* will be liable for encouraging or assisting *P*'s crime of embracery.⁴⁰⁸ However, if *R* only intends to encourage *P* to

403 John Spencer & Graham Virgo, *Encouraging and Assisting Crime: Legislate in Haste, Repent at Leisure*, 9 ARCHBOLD NEWS 7 (2008).

404 Biased jurors would perpetrate the offense of contempt of court were they to allow themselves to be influenced. Cf. AG v. Fraill [2011] EWHC (Admin) 1629, [2011] 2 Crim. App. 21 (Eng.); AG v. Dallas [2012] EWHC (Admin) 156, [2011] 2 Crim. App. 21 (Eng.).

405 Some jurisdictions in the United States expressly exclude criminal liability for attempted participation. See the discussion of the relevant statutory exclusion in *State v. Eames*, 365 So. 2d 1361 (La. 1978). To the contrary, the Serious Crime Act 2007 aims to criminalize attempted and successful participation. Compare *Stewart v. Wright*, 147 F. 321 (8th Cir. Mo. 1906), where *V* attempted to participate in a fraud, but was unwittingly the victim of the fraud he tried to participate in. In *Stewart v. Wright*, at 333, (a civil case in the Circuit Court of Appeals, Eighth Circuit), Hook, J. said: “It would seem anomalous if Wright were held to be *particeps criminis* [an equal participant] to a larceny of his own money, and equally so if he were held to be in *pari delicto* [equally at fault] with those who stole it. Conduct similar to that under consideration has been held to constitute larceny, even though the fraud or pretense practiced on the victim, and by which he was despoiled of his money, assumed the simulated form of a violation of the law, in which he participated.” It was held that Wright was not deprived of a remedy by the maxim *ex dolo malo non oritur action*. *Id.* Nonetheless, if this case were to be tried in the U.K. in the 21st century, the inchoate offenses found in the Serious Crime Act 2007 would allow the victim, Wright, to be prosecuted for his attempted participation. After all, he was attempting to participate in a fraud (Wright attempted to encourage the fraudsters to make false representations to other potential victims because he mistakenly believed he would profit from their lies) for the purpose of making a property gain for himself.

406 This offense was abolished by section 17 of the Bribery Act, 2010 (U.K.). Cf. *R v. Roderick* (1837) 173 Eng. Rep. 347.

407 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 773 (E. and R. Nutt, et al., 1734). See also *R v. Owen* [1976] 1 WLR 840 (Eng.); *Pomfreit v. Brownsal* (1599) 78 Eng. Rep. 968; *R v. Mein* (1791) 78 Eng. Rep. 968.

408 See *State v. Sales*, 2 Nev. 268 (Nev. 1866) (where, in the Supreme Court of Nevada, Lewis, C.J., said: “It is a general rule of the common law that an attempt to commit a crime is itself a crime, but, in our opinion, from the very nature of the crime of embracery, there can be no attempt to commit

attempt to do an act that is an attempt to perpetrate embracery, *R* will not be liable under section 44 of the Serious Crime Act 2007. *R* will not be liable because *R* has not encouraged *P* to do an act that is a crime in itself.⁴⁰⁹ The solicitation of embracery or contempt of court is complete when the request to commit the crime is made, regardless of whether the crime solicited is ever committed or attempted. Since the abolition of the common law offense of embracery, *R*'s act is likely to be treated as contempt of court or an attempt to pervert the course of justice.⁴¹⁰

Hence, if *R* encourages *PI* to do some act that would only be an attempt to perpetrate some crime that is an attempt in itself, or is otherwise an act that is only an attempt to attempt to perpetrate a crime, then section 47(8)(c) would apply. This prevents *R* from being convicted of encouraging or assisting *P*'s attempt to attempt to commit a crime—a non-existent crime, meaning section 47(8)(c) is utterly superfluous. Another example of an attempt that is a crime per se is given in *People v. Jelke*,⁴¹¹ where the relevant provision made it an offense for a person to “attempt to induce, entice, procure or compel [a woman] to live a life of prostitution.”⁴¹²

A. DOUBLE INCHOATE LIABILITY FOR THE ASSISTER/ENCOURAGER

The term “double inchoate liability” seems to have been coined by Glanville Williams in 1978.⁴¹³ Sections 49(3), (4), and (5) of the Serious

it”). See also *State v. Campbell*, 657 So. 2d 152, 155 (La. App. 3d Cir. 1995); *R v. Darby* (1702) 87 Eng. Rep. 1121; *R v. Cole*, (1902) 3 O.L.R. 389 (Can. Ont.).

⁴⁰⁹ Cf. *Patterson v. State*, 385 S.E.2d 311 (Ga. Ct. App. 1989).

⁴¹⁰ “At common law, attempting to pervert the course of justice, like perverting the course of justice, is a substantive offense.” *R v. Rogerson* (1992) 174 CLR 268, 279 (Austl.) (citing *e.g.*, *R v. Andrews* [1973] QB 422, 425 (Eng.); *R v. Rowell* [1978] 1 WLR 132, 138; *R v. Machin* (1980) 71 Crim App. 166, 170 (Eng.)). See also *R v. Vreones* [1891] 1 QB 360 (Eng.); *R v. Kellett* [1976] QB 372 (Eng.); *R v. Kenny* (2013) 1 Crim. App. 23 (Eng.); *R v. Owen*, [1976] 1 WLR 840 (Eng.).

⁴¹¹ *People v. Jelke*, 135 N.E.2d 213 (N.Y. 1956).

⁴¹² See *People v. Loocerello*, 233 N.Y.S.2d 206 (N.Y. County Ct. 1962). See also *People v. Lupinos*, 674 N.Y.S.2d 582, 583 (N.Y. City Crim. Ct. 1998), where Garnett, J. said: “[W]here a certain crime is actually defined in terms of either doing or attempting a certain crime, then the argument that there is no crime of attempting this attempt is persuasive. . . . These principles are easy of application when the penal statute includes the word ‘attempt’ within its definition. For example, a defendant cannot be charged with Attempted Resisting Arrest, *People v. Howlett*, 351 N.Y.S.2d 289 (N.Y. App. Term 1973) or Attempted Obstruction of Governmental Administration, *People v. Schmidt*, 352 N.Y.S.2d 399 (N.Y. City Crim. Ct. 1974), because the statutory definition explicitly includes an attempt. *Penal Law*: Sections 205.30, 195.05.” At 855, Garnett, J. said: “The prosecution’s argument that the statute is written in the disjunctive is not persuasive. If the word ‘or’ permitted the District Attorney to choose one of the theories in the statute and charge an attempt, then those crimes such as Resisting Arrest and or Obstructing Governmental Administration, which include ‘or attempts’ (*Penal Law* Sections 205.30, 195.05) could be charged as attempts under the alternate statutory theory.” (Emphasis added.) This reasoning applies to the English statutory offenses referred to above.

⁴¹³ See GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 388 (1978). The first case to make reference to the term was *Women’s Ctr., Inc. v. McMonagle*, 689 F. Supp. 465 (E.D. Pa. 1988), where: “[t]he defendants asserted error in the court’s instructions that a person is guilty of extortion if they find any of the defendants ‘conspired to attempt extortion’ in that a conspiracy to attempt a crime is a double inchoate crime and therefore no crime at all.” A year later, Robbins published a lengthy paper on the subject. See Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 91 (1989). See *People v. Boyce*, 27 N.E.3d 77 (Ill. 2015); *State v. Wade*, 346 P.3d 838, 853 (Wash. Ct. App. 2015); *State v. Jensen*, 195 P.3d 512, 517 (Wash. 2008) (discussing the double inchoate crime of attempt to conspire).

Crime Act 2007 seem to be aimed at limiting liability for those who encourage certain inchoate forms of the offenses found in sections 44–46.⁴¹⁴ Liability is excluded for the section 45 and 46 offenses where the crime encouraged or assisted is one of a number of statutory incitements, but there is no bar to invoking section 44.⁴¹⁵ An attempt to encourage or assist another to perpetrate an inchoate crime pushes liability too far back.

Sections 49(4) and (5) are used to limit liability as follows:

- (3) A person may, in relation to the same act, commit an offense under more than one provision of this Part.
- (4) In reckoning whether—
 - (a) for the purposes of section 45, an act is capable of encouraging or assisting the commission of an offense; or
 - (b) for the purposes of section 46, an act is capable of encouraging or assisting the commission of one or more of a number of offenses; offenses under this Part and listed offenses are to be disregarded.
- (5) “Listed offense” means—
 - (a) in England and Wales, an offense listed in Part 1, 2 or 3 of Schedule 3.⁴¹⁶

Section 49 does not exclude section 44 from applying to sections 45 and 46 or to any of the statutory incitements and offenses of preparation listed in Schedule 3.⁴¹⁷ Section 49 only limits the application of the offenses found in sections 45 and 46 because it holds that those offenses cannot be invoked where *R* attempts to encourage or assist or in fact encourages or assists *P* to perpetrate one of the offenses found in sections 44, 45 or 46 or Schedule 3 of the Serious Crime Act 2007. However, the section 44 offense can be applied to any offense including itself.⁴¹⁸ Nor does the provision exclude liability for indirect assistance (see section 66) or for bilateral transactions under section 44. For example, offering bribes

⁴¹⁴ Serious Crime Act 2007, c. 27, § 49 (U.K.).

⁴¹⁵ *Id.*

⁴¹⁶ The listed offenses mainly cover statutory incitements, *see* Serious Crime Act 2007, c. 27, sch. 3 (U.K.). Corporate manslaughter is also excluded.

⁴¹⁷ *See also* Forgery and Counterfeiting Act 1981, c. 45, § 1 (U.K.) where the offense of forgery is complete when the instrument is “made,” although it is never published or used. Similarly, the Bribery Act 2010, c. 23, § 1 (U.K.), criminalizes the “offer to bribe” regardless of whether the offer succeeds at inducing the bribed party to improperly perform a function or activity. Bribery could be attempted, however: *see* *R v. Smith* (1960) 2 QB 423 (U.K.); *R v. Cassano* (1805) 170 Eng. Rep. 231; *R v. Plympton* (1724) 92 Eng. Rep. 397. Similarly, the offense of blackmail found in section 21 of the Theft Act, 1968 is perpetrated as soon as the demand is made; nothing need have been handed over. However, if *P* attempts to blackmail *V* but fails as the blackmail demand gets lost in the post, *P* could be convicted of the attempt. *See, e.g., State v. Austin*, 716 P.2d 875 (Wash. 1986).

⁴¹⁸ The only exception is found in section 51A, which provides: “Section 44 does not apply to an offense under section 2(1) of the Suicide Act 1961.” Serious Crime Act 2007, c. 27, § 51 (U.K.).

is an offense in itself, but it is also an attempt to encourage another party to perpetrate the offense of taking a bribe.⁴¹⁹

There is no bar to section 44 being applied to other facilitation offenses, such as the offense found in section 25 of the Immigration Act 1971, which makes it an offense to do “an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union.”⁴²⁰ A person could be liable for attempting to encourage or assist another to facilitate a breach of immigration law. Section 44 has the potential to create a vast territory of inchoate liability. The section 45 and section 46 offenses also have a wide reach, because Schedule 3 excludes only a narrow range of statutory incitements and offenses of preparation from the reach of those offenses. There are many statutory incitements and offenses of preparation that are not listed in Schedule 3; therefore, sections 45 and 46 are not excluded from applying to those offenses. The justice in allowing, and the need to allow, the law to reach such remote wrongs is questionable.⁴²¹ In such circumstances, the operation of the law is pushed back in the realm of what (from the point of view of the ultimate criminal intent) is not much more than an overt manifestation of a thought crime! It is true that in other areas of the law the line between inchoate and substantive offenses is not firm, for a number of crimes are defined in such a way as to include what the person in the street might regard as an attempt. This is so with assault, abortion, and blackmail. The full crime of burglary is committed as soon as the premises are trespassed upon with the requisite intent.

In addition, there also is a range of crimes that criminalize mere preparation. For example, there are statutes that create various offenses of possessing prohibited articles, the object of which is frequently to prevent the articles from being used for criminal purposes. Examples are statutory offenses of possessing explosives⁴²² or firearms,⁴²³ and possessing implements for certain forgeries and counterfeiting,⁴²⁴ articles for use in fraud,⁴²⁵ and possessing anything with intent to commit an indictable offense against the person⁴²⁶ or any damage to property.⁴²⁷ The offenses found in section 3A of the Computer Misuse Act 1990 include:

419 See Bribery Act 2010, c. 23, §§ 1–2 (U.K.).

420 Immigration Act 1971, c. 77, § 25 (U.K.).

421 For a discussion of the reasonable limits of “inchoate” criminalization, see Douglas N. Husak, *The Nature and Justifiability of Non-consummate Offenses*, 37 ARIZ. L. REV. 151 (1995).

422 Explosive Substances Act 1883, 46 Vict. c. 3, § 4(1) (UK).

423 Firearms Act 1968, c. 27, § 16 (UK).

424 Forgery and Counterfeiting Act 1981, c. 45, § 17 (U.K.).

425 Fraud Act 2006, c. 35 § 6 (UK). See also Theft Act 1968, c. 60, § 21 (Eng.).

426 Offenses Against the Person Act 1861, 24 & 25 Vict. c. 100, §§ 64 (Gr. Brit. & Ir.) (as amended by the *Criminal Law Act 1967*).

427 A conditional intent, namely to use the article if necessary, is sufficient. See *R. v. Buckingham* (1976) 63 Crim. App. 159, 162 (Eng.).

(1) A person is guilty of an offense if he makes, adapts, supplies or offers to supply any article intending it to be used to commit, or to assist in the commission of, an offense under section 1 or 3.

(2) A person is guilty of an offense if he supplies or offers to supply any article believing that it is likely to be used to commit, or to assist in the commission of, an offense under section 1 or 3.

(3) A person is guilty of an offense if he obtains any article with a view to its being supplied for use to commit, or to assist in the commission of, an offense under section 1 or 3.⁴²⁸

As we have seen, subsections 49(4) and (5) of the Serious Crime Act 2007 hold that a person cannot be guilty under section 45 or section 46 for oblique intentionally encouraging or assisting the offenses found in sections 44, 45, or 46 or any of those offenses listed in Schedule 3, because sections 45 and 46 do not apply to sections 44, 45, and 46 or to any of the offenses that are listed in Schedule 3 of the Act of 2007. The list of excluded offenses does not merely cover statutory incitements, but also preparatory and inchoate assistance type offenses. For example, the offenses found in section 3A of the Computer Misuse Act 1990 are listed in Schedule 3.⁴²⁹ It is difficult to fathom why Schedule 3 lists the offenses found in section 3A of the Computer Misuse Act 1990, but ignores almost identical offenses found in sections 6 and 7 of the Fraud Act 2006. It is an oversight to exclude sections 45 and 46 from applying to certain statutory incitements and offenses of preparation, but not to others. A general exclusion would make more sense than using an ad hoc list. Coupled with this, section 44 also should be excluded from applying to itself, to statutory incitements, and to the section 45 and 46 offenses.

The Serious Crime Act 2007 should be amended to provide for a general exclusion. For example, the Texas Penal Code provides: "Attempt or conspiracy to commit, or solicitation of, a preparatory offense defined in this chapter is not an offense."⁴³⁰ If the enactment of subsections 49(4) and (5) and section 47(8)(c) was an attempt to include inchoate liability for attempting to encourage or assist a perpetrator to engage in independent inchoate crimes, then it was a very poor attempt. The exemptions are contradictory, narrow, and self-defeating. It would have been far better to have a general provision. A little more research on the part of the Law Commission would have produced results because there are jurisdictions in the common law world that have dealt with this problem. The Maine Criminal Code provides: "It shall not be a crime to conspire to commit, or to attempt, or solicit, any [inchoate] crime."⁴³¹ Similarly, the commentary

428 Computer Misuse Act 1990, c. 18, § 3A (U.K.).

429 Serious Crime Act 2007, c. 27, sch. 3 (U.K.).

430 TEX. PENAL CODE ANN. § 15.05 (2015). Preparatory offenses in the Texas Penal Code include criminal attempt, criminal conspiracy, and criminal solicitation. As to preparatory offenses more generally, see TEX. PENAL CODE ANN. §§ 15.01–15.031 (2015).

431 ME. REV. STAT. 17-A, § 154 (2015).

on construction with other Statutes annexed to Section 14:27 of the Louisiana Revised Statutes provides: “If the definition of another crime includes the attempt to do something, this section cannot be employed, for then a defendant would be charged with an attempt to attempt to do an illegal act.”⁴³² In *R. c. Déry*, Forget, J.C.A. said:

There is some uncertainty about whether inchoate offenses can be combined. On the one hand, there is long-standing English authority supporting some ‘doubling-up.’ For example, there are cases holding that it is an offense at common law to attempt to incite someone to commit an offense. In addition, before they were abolished by a 1977 statute, attempting to conspire and inciting to conspire were recognized as offenses at common law in England. On the other hand, in the leading Canadian case, *R. v. Dungey*, the Ontario Court of Appeal refused to accept the idea of an attempt to conspire. The case originally involved a charge of conspiracy to defraud. There has been a request to enter into an agreement but the trial judge was not convinced that an agreement had actually been made. The Crown appealed the acquittal seeking a verdict of attempted conspiracy to defraud, but it was held that there is no such offense in Canadian law.

In its reasoning the court emphasized the inchoate character of conspiracy and the analogy to attempt. It was stressed that the various inchoate offenses are facets of an integrated scheme of liability for preparation which would be distorted if doubling-up were permitted. If the conduct of the respondent was not sufficiently proximate to the substantive offense to be an attempt to commit it, and if there was not a conspiracy to commit it, it would be inappropriate to push inchoate liability any further back. It was also said that an offense of attempting to conspire to defraud would be “tantamount to convicting a person of an attempt to attempt to defraud.”

The reasoning in *Dungey*, together with the statutory abolition of the offense of attempting to conspire in England, is some evidence of a trend against acceptance of doubling-up. This trend may be the result of increasing attention to the interrelationships between the inchoate offenses and the common rationale of restraint which underlies their particular limitations.⁴³³

432 LA. REV. STAT. ANN. § 14:27 (2015). The commentary quotes *State v. Eames*, 365 So. 2d 1361 (La. 1978). See also *United States v. Riddle*, 44 M.J. 282, 288 (C.A.A.F. 1996); *United States v. Awan*, 459 F. Supp. 2d 167, 184 (E.D.N.Y. 2006); *United States v. Roeseler*, 55 M.J. 286, 298 (C.A.A.F. 2001); *United States v. Ortiz*, 738 F. Supp. 1394, 1401 (S.D. Fla. 1990). In *Riddle*, Sullivan, J. said: “The double inchoate offense of attempt to conspire is unnecessary in those jurisdictions that have adopted either a solicitation statute or a conspiracy statute that embodies the unilateral theory of conspiracy, or both.” *Riddle*, 44 M.J. 282, 285. However, many jurisdictions in the U.S. do allow for double inchoate liability. See also *United States v. Lanzon*, 639 F.3d 1293, 1298 (11th Cir. 2011).

433 *R. c. Déry*, 2005 CarswellQue 13731 (Can. Que.) (WL).

B. INDIRECT (INCHOATE) PARTICIPATION

Section 66 of the *Serious Crime Act 2007* has a specific provision that targets indirect encouragement or assistance. Section 66 provides: “If a person (D1) arranges for a person (D2) to do an act that is capable of encouraging or assisting the commission of an offense, and D2 does the act, D1 is also to be treated for the purposes of this Part as having done it.”⁴³⁴ If *R* encourages *P1* to encourage *P2* (an assassin) to kill *V*, *R* will be liable for the section 44 offense even when *P1* ignores *R*’s encouragement.⁴³⁵ If *P1* attempts to encourage *P2* to kill *V* with *P2* ignoring the encouragement, both *R* and *P1* will be liable for the section 44 offense. If *P2* kills or attempts to kill *V* as a result of *P1*’s encouragement, both *P1* and *R* will be liable for the section 44 offense,⁴³⁶ but the Crown is more likely to prosecute *R* and *P1* as accessories to murder under section 8 of the Accessories and Abettors Act 1861.⁴³⁷ There is nothing unfair about criminalizing *R*’s actions, but criminalizing *R*’s failed attempt to encourage *P1* to encourage *P2* to kill should not result in *R* receiving a life sentence simply because the reference offense was murder. There would be no justification for imposing a life sentence in such a case.⁴³⁸

X. REMOTE ENCOURAGEMENT

The new offenses need to have some sort of defense because they are so incredibly wide that they have the potential to chill free speech and also result in unfair and unnecessary criminalization.⁴³⁹ People can participate in an activity directly, indirectly, remotely, and at various degrees. Take a game of football in a public stadium for example. The direct participants

434 *Serious Crime Act 2007*, c. 27, § 66 (U.K.). See *The Trial of Robert Carr Earl of Somerset, May 25, for the Murder of Sir Thomas Overbury: 14 James I. A.D. 1616*, in 2 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 966 (R. Bagshaw, 1809). This sort of case is also caught in some jurisdictions in the United States. For example, in *State v. Manthey*, 487 N.W.2d 44, 50 (Wis. Ct. App. 1992), where Myse, J. said: “Section 946.31(1), Stats., provides: ‘Whoever under oath or affirmation orally makes a false material statement which the person does not believe to be true, in any matter, cause, action or proceeding, before [a court] . . . is guilty of a Class D felony.’ The question presented here is whether one can be guilty of solicitation of perjury where ‘A’ solicits ‘B’ to solicit ‘A’ to commit perjury. This phenomenon is referred to as a ‘double inchoate crime.’ There is no question that under current Wisconsin law, ‘A’ is guilty of solicitation if ‘A’ advises ‘B’ to procure ‘C’ to commit a felony.”

435 *Cf. State v. Santiago*, 49 A.3d 566, 581 n.4 (Conn. 2012).

436 *R v. Dunnington* [1984] QB 472, 472 (U.K.); *R v. Haggood* (1870) 1 LRCCR 221, 221 (Gr. Brit. & Ir.); *R v. Clayton* (1843) 174 Eng. Rep. 743, 743; *R v. Williams* (1844) 174 Eng. Rep. 950, 950.

437 Compare *R v. Cooper* (1835) 172 Eng. Rep. 1087, 1088, where Parke, J. said: “With respect to an accessory before the fact, it is not necessary that there should be any direct communication between the accessory and the principal. It is enough if the accessory direct an intermediate agent to procure another to commit the felony; and it will be sufficient, even though the accessory does not name the person to be procured, but merely directs the agent to employ some person.”

438 Section 58 of the *Serious Crime Act 2007* should be amended to give judges clearer guidance on how to sentence these quasi-thought crime cases.

439 Western states are over-criminalized and more inchoate offenses have the potential to add to the over-criminalization crisis. For a discussion of the over-criminalization crisis, see DOUGLAS N. HUSAK, *OVERCRIMINALISATION: THE LIMITS OF THE CRIMINAL LAW* (2008). See also the classic paper by Sanford H. Kadish, *The Crisis of Overcriminalisation*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967).

are the football players. The spectators observe but they do not participate. The cheerleaders engage in an independent act of cheerleading, but they do not participate in the football game per se. The coach is a participant in the football game even though she does not play. She directly counsels and advises the players and thus is involved in their game. The coach shares some of the blame for any mistakes made by the players and the rewards when the game goes well. The spectators are not responsible for mistakes in the game, nor are they responsible for it being played well. Their presence gives the players a reason for playing at the particular location on the particular day, but it does not give the players a reason for breaking the rules or for criminally assaulting the other players. The players give the football organization a reason for staging such games. The organizers give the football players a reason for playing, because they pay them to play and make them celebrities. It could be argued that it is the organizers and players that encourage the spectators to spectate the game in question, because they market the game to draw in spectators. The organizers host such games to make money from the spectators. Encouragement runs both ways here as the demand for such games also induces the organizers to supply such games. This sort of remote and collective encouragement is too diffused to be measured as encouragement for the purpose of establishing participation.⁴⁴⁰ There has to be some sort of direct encouragement or assistance aimed at an identifiable (putative) perpetrator.

A more individualized example of remote participation is provided in *Evans v. Jones*, where Lord Abinger, C. B. said:

A strong feeling at that time prevailed against Napoleon Bonaparte, who threatened an invasion of this kingdom; but it gave great satisfaction to myself, and all who took an interest in the administration of public justice, to hear the principle pronounced by Lord Ellenborough, and the first common law authorities, that a wager on the duration of his life was illegal, as being against public policy,—as having a tendency to encourage his assassination, which, even in the instance of a public enemy, should receive no encouragement from the law.⁴⁴¹

This sort of encouragement is indirect, as putting down a wager was not conduct that directly encouraged another to kill Napoleon Bonaparte.

If a person in London had placed a wager on Muammar al-Gaddafi's life during the Arab Spring in 2011, it would have been a stretch to count the wager as tangible encouragement against his life. In such a case the perpetrator alone should be held responsible for the killing. This can be rationalized in psychological terms by saying that the intervention of the responsible actor diverts our retributive wrath from the remote encourager, who is not sufficiently connected to the end harm to warrant censure. It

⁴⁴⁰ *R v. Clarkson* [1971] 1 WLR 1402, 1406 (Eng.); *R v. Coney* [1882] 8 QBD 534, 558 (Eng.). See also *R v. Vanderstein* (1865) 10 Cox C.C. 177, 182 (U.K.).

⁴⁴¹ *Evans v. Jones* (1839) 151 Eng. Rep. 34, 35. For the case discussing the wager against Napoleon Bonaparte, see *Gilbert v. Sykes*, (1812) 104 Eng. Rep. 1045.

would not be right to make people responsible for the subsequent behavior of others, merely because they foresaw or could have foreseen that behavior as a consequence of their remote action. There is no pressing necessity to regard more remote authors as responsible for the harm itself, though they may well be prosecuted for other offenses, such as attempt, or in appropriate circumstances, for independent offenses such as possession offenses.

A. REMOTE (INCHOATE) PARTICIPATION AND PERSONAL WRONGS

A person who inadvertently provokes another to kill without encouraging one to do so does not become guilty of murder or manslaughter, even though one realised or should have realised what would be the effect of the conduct.⁴⁴² Unintentionally provoking another person to break the peace⁴⁴³ or to drive recklessly⁴⁴⁴ does not make the provoker criminally liable for that other person's personal wrongdoing. Generally, the courts have not held people liable where their lawful conduct has had the unintended effect of influencing another's criminal choices. Take the example of *X*, the owner of a corner store. *X* sells an ice cream to customer *Y*; *Y* subsequently walks out of *X*'s shop and throws the ice cream's packaging on the ground. Should *X* be held responsible for *Y*'s littering? The harm is contingent on *Y* making an intervening choice to throw the packet on the ground, but it would not have come about but for *X* selling the ice cream to *Y*. It is clear that *X* is not morally blameworthy (criminally condemnable) for this kind of remote harm. The appropriate measure is to punish those who actually throw papers on the street.⁴⁴⁵

In *Schneider v. State of New Jersey*, Clara Schneider was a protestor who stood in the street and distributed handbills to passing pedestrians.⁴⁴⁶ Schneider was convicted of canvassing without a permit as required by an ordinance of the Town of Irvington. The handbills contained information about a labour dispute with a meat market and outlined the position of the organised labour movement.⁴⁴⁷ The handbills were an attempt to persuade people to refrain from patronising the relevant meat market. Many of those who accepted the handbills threw them on the street either after reading them or without reading them at all.⁴⁴⁸ The end result was that the street

442 *Cf. R. v. Dubois*, 1959 CarswellQue 11 (Can. Que.) (WL).

443 *Beatty v. Gillbanks* [1882] 9 QBD 308, 314 (U.K.); *Cf. Wise v. Dunning* (1902) 1 KB 167, 177 (U.K.).

444 *R v. Mastin* (1834) 172 Eng. Rep. 1292, 1293.

445 *Schneider v. State*, 308 U.S. 147, 148 (1939); *Martin v. Struthers*, 319 U.S. 141, 142 (1943); *Van Nuys Publ'g Co. v. Thousand Oaks*, 489 P.2d 809, 810–11 (Cal. 1971); *Int'l Soc'y For Krishna Consciousness, Inc. v. Kearnes*, 454 F. Supp. 116, 118 (E.D. Cal. 1978); *Schaumburg v. Citizens For Better Env't*, 444 U.S. 620, 622 (1980); *Schad v. Mount Ephraim*, 452 U.S. 61, 64 (1981); *Jews for Jesus v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1321 (1st Cir. 1993); *Miller v. City of Laramie*, 880 P.2d 594, 595 (Wyo. 1994).

446 *Schneider*, 308 U.S. at 155.

447 *Id.*

448 *Id.*

and gutter were littered with the discarded handbills.⁴⁴⁹ The police arrested the petitioner instead of those who were responsible for discarding the handbills.⁴⁵⁰ The Milwaukee County convicted the petitioner under a local ordinance.⁴⁵¹ The Supreme Court of New Jersey upheld the petitioner's conviction.⁴⁵² The petitioner appealed to Supreme Court of the United States. Roberts, J. (delivering the opinion of the Court) said:

The motive of the legislation under attack . . . is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them *encouraged or resulted* in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. *Amongst these is the punishment of those who actually throw papers on the streets.*⁴⁵³

In *R v. Goldman*, Goldman was convicted of attempting to incite his potential supplier to distribute photographs of children under the age of sixteen.⁴⁵⁴ As we saw above, an attempt to encourage is, by and large, caught by the Act of 2007.⁴⁵⁵ Goldman responded to an advertisement placed by *X* (the potential supplier) by requesting pornographic videotapes of girls aged seven to thirteen.⁴⁵⁶ Goldman sent *X* payment for the videotapes, but *X* did not supply them.⁴⁵⁷ Goldman was convicted because he had attempted to encourage *X* to distribute the illegal videos.⁴⁵⁸ Nevertheless, it would be wrong to leave *X* out of the equation, as *X* was the original instigator. Arguably, *X* was trying to encourage Goldman and his ilk to possess child pornography.⁴⁵⁹ *X* might not have encouraged Goldman to distribute the videos, but the advertisement surely encouraged

449 *Id.*

450 *Id.*

451 *Id.*

452 *Town of Irvington v. Schneider*, 200 A. 799, 800 (N.J. 1938).

453 *Schneider*, 308 U.S. at 162 (emphasis added).

454 *R v. Goldman* [2001] EWCA (Crim) 168, [2] (Eng.). Goldman attempted to commit a substantive offense. The substantive offense, which he attempted to incite another to commit, is set out in the Protection of Children Act 1978, c. 37, § 1 (U.K.).

455 *Cf. R v. Jones* [2007] EWCA (Crim) 1118, [2008] QB 460 (Eng.); *Baney v. State*, 42 So. 3d 170 (Ala. Crim. App. 2009).

456 *R v. Goldman* [2001] EWCA (Crim) 168, [2] (Eng.).

457 *Id.*

458 *Id.*

459 There were jurisdictional issues involved, however.

him to possess them.⁴⁶⁰ *X* must have believed that by encouraging people to purchase child pornography those same people would commit the offense of possessing it. *X* must also have believed that by selling child pornography to certain people that *X* would assist them to possess it. If the supplier is the person who initiated the idea, then that supplier encouraged the crime. But, if the would-be perpetrator goes to the supplier and asks for the supply, the fact of supply in itself should not be regarded as an encouragement, any more than it should be regarded as conspiracy.

When many pedophiles purchase child pornography they create the demand for the market in child pornography. But this type of remote encouragement is not caught by the Serious Crime Act 2007.⁴⁶¹ The Act of 2007 does not criminalize pedophiles at large merely because they collectively encourage others to go into the business of producing and supplying child pornography.⁴⁶² Rather, there has to be an individualized act of encouragement. The Act of 2007 deals with individual requests (acts of encouragement) for such material when those requests are conveyed (or there is an attempt to convey such requests) to a particular producer/supplier.⁴⁶³ The producer/supplier would be liable when placing an advertisement to the world at large, because such an advertisement has the potential to encourage a pedophile within the general population to possess child pornography.⁴⁶⁴ It is true that pedophiles create the demand for self-service websites containing these ghastly materials, but if they serve themselves they have not encouraged another to serve them.⁴⁶⁵ A supplier is encouraged to stay in business as the funds accumulate automatically into the account, but is not encouraged to distribute to a particular individual. If the offending images and movies have been uploaded on a website three years before *R* purchases them, then it is difficult to see how *R* is responsible for encouraging *P*'s past uploading of the illegal images. Furthermore, it is difficult to see how *R* encourages an act of supply, if all *R* has to do is pay a fee for the images and movies to automatically download to a computer. Similarly, if a person leaves a pile of melons and pumpkins on an old table on the side of a highway and leaves an honesty box on the table, that person encourages the world at large to purchase the goods, but is not encouraged by any particular

460 Protection of Children Act 1978, c. 37, § 1, sch. 1(c) (U.K.) criminalizes only those who possess the images for the purpose of distribution or for the purpose of showing others them. If the pedophile intends only to look at them himself, he is not caught by that provision.

461 Serious Crime Act 2007, c. 27 (U.K.).

462 *Id.*

463 *Cf.* *R v. Jones* [2007] EWCA (Crim) 1118, [2008] QB 460 (Eng.); *Baney v. State*, 42 So. 3d 170, 174 (Ala. Crim. App. 2009).

464 *See Invicta Plastics Ltd. v. Clare* [1976] RTR 251 (Eng.).

465 The court points out in *O'Shea v. City of Coventry Magistrates' Court*, [2004] EWHC (Admin) 905, [31] (Eng.), that somewhere within the process a human agent will send a videotape or product. But this is not true with respect to websites where the images may be digital and may be posted in advance for anyone to download for payment without any further human action being required. In such cases, it appears that the encourager does not encourage an act of supply, but merely creates the demand for the producer/supplier to create an automated mechanism of supply via the Internet.

individual to supply to that individual. The criminal law targets individuals not collectives.⁴⁶⁶

There would be no justification for using the inchoate offenses of encouragement found in the Serious Crime Act 2007 to prosecute possessors of child pornography for creating the demand for producers and distributors to go into the business of producing these horrible materials. The encouragement is too remote. It would be enough to charge the possessor with a possession offense and the distributor with a distribution offense. There is nothing wrong with prohibiting people from possessing or distributing these sorts of materials. In *U.S. v. Stevens*, Alito, J., observed that the underlying crime (sexually violating children) “could not be effectively combated without targeting the distribution of child pornography.”⁴⁶⁷ Hence, it is necessary and justifiable to have possession, distribution and production offenses. It is also necessary and justifiable to have offenses that target those who directly encourage others to produce, distribute or possess such materials. The encouragement must be direct and proximate.⁴⁶⁸ It is worth noting that possessing child pornography is a remote harm because those who merely purchase child pornography do not come into contact with the children. The possessors are not the people who directly harm the children; it is the producers who harm the children who are violated to produce such materials.

The majority decision in *U.S. v. Stevens* is too indulgent in holding that distributing graphic films depicting dogfighting is protected speech.⁴⁶⁹ In that case, Stevens sold videotapes showing dogs viciously tearing each other apart. Stevens did not create the dogfights, nor did he incite others to do so, but he was given a thirty-seven-month prison sentence under a federal law (18 U.S.C. § 48) that banned dealing in depictions of animal cruelty.⁴⁷⁰ The Supreme Court of the United States held the law that was used to imprison him was substantially overbroad, and thus was invalid under the First Amendment to the U.S. Constitution.⁴⁷¹ This sort of case

466 See generally BAKER, *supra* note 83.

467 *United States v. Stevens*, 559 U.S. 460, 494 (2010) (Alito, J., dissenting) (citing *New York v. Ferber*, 458 U.S. 747, 759 (1982)). Alito, J. also said: “As the Court put it, ‘the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. . . . [T]here is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. . . . The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.’” *Id.* Cf. *Reno v. ACLU*, 521 U.S. 844 (1997); *Podracky v. Commonwealth*, 662 S.E.2d 81 (Va. Ct. App. 2008). For a full survey of American law concerning the Internet and child pornography, see generally Lori J. Parker, *Validity, Construction, and Application of Federal Enactments Proscribing Obscenity and Child Pornography or Access Thereto on the Internet*, 7 A.L.R. FED. 2d 1 (2005) (updated in 2015).

468 See generally *Stevens*, 559 U.S. 460.

469 See *id.* where Roberts, C.J., delivered the opinion of the Court, in which Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer and Sotomayor, J.J., concurred. Alito, J., filed a dissenting opinion. Alito, J.’s opinion is more convincing than that of the majority. A normative case can be made for criminalizing distribution *per se*.

470 *Id.*

471 *Id.*

satisfies the harm justification for criminalization and punishment, even though a thirty-seven-month prison sentence was a disproportionate sentence. A six-week prison sentence might have been justified, since the speech was an unjustifiable and inexcusable remote harm. It was remotely harmful in a way that counts, because the defendant was culpable for benefiting from the original harm. This is a case where it would have been justifiable to criminalize the distribution itself.

The moral justification for criminalization in such cases is not utilitarian. The justification for criminalization is that the possessor/distributor chooses to benefit from the fruits of the underlying criminal harm. The case is analogous to the case where a person handles stolen goods. Such a person does not harm anyone directly by purchasing stolen goods at a discount, but one culpably benefits from the underlying criminal harm. It is the culpable extraction of a benefit from the criminal harm that makes it fair to criminalize the ancillary role.⁴⁷² The purchasers of ivory collectively form the lucrative ivory market that is poaching's *raison d'être*. It is also true that the purchases of child pornography form the lucrative market that is the *raison d'être* of child pornography distribution and production. The market for ivory increases the risk of harm to the endangered elephant population, because the market itself encourages production. The ivory possessor should be charged with a possession offense rather than with an encouragement offense, because possession is a benefit that one receives as a result of the original harm. One receives the fruits of a criminal harm and thus perpetrates a personal wrong in itself. *X* does not kill the elephants or even come into contact with them, but intends to benefit from the poacher's criminal harm. When a pedophile chooses to possess images of real children, the pedophile chooses to take the benefit of a criminal harm. The possessor/purchaser intentionally and knowingly receives the fruits of a grave criminal harm. By receiving a product that can be produced only through wrongful harm, the possessor underwrites the wrongful harm. Knowledge of the underlying harm is certain and one chooses to benefit from the fruits of the harm. When *X* sells a gun to a potential killer, *X* might not know for sure whether the buyer will use it to kill, but when *Y* purchases ivory or child pornography *X* knows as a matter of fact that a harm has been committed to produce such products. Similarly, the gravamen of the offense of receiving stolen goods is the receiving of the goods with knowledge that they were stolen. It is wrong for a person to possess or receive goods that one knows are stolen, because one knows the goods have become available only because someone has committed a wrongful harm against an innocent other. In the aforementioned cases, liability is personal not derivative.

An example of unjust remote harm criminalization can be found in section 53A of the Sexual Offenses Act 2003, which provides:

472 Baker, *supra* note 83, ch. 4.

- (1) A person (A) commits an offense if—
 - (a) A makes or promises payment for the sexual services of a prostitute (B),
 - (b) a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and
 - (c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).
- (2) The following are irrelevant—
 - (a) where in the world the sexual services are to be provided and whether those services are provided,
 - (b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.
- (3) C engages in exploitative conduct if—
 - (a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or
 - (b) C practices any form of deception.
- (4) A person guilty of an offense under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.⁴⁷³

The problem with criminalizing prostitution use on the basis that it creates the market for people trafficking and forced prostitution is that the encouragement from the existence of the general market for prostitution is too remote. Furthermore, unlike ivory possession and child pornography possession, harm *per se* cannot be used to justify criminalization, because the prostitute user does not necessarily benefit from harmful prostitution (non-consensual prostitution) as opposed to harmless prostitution (consensual prostitution involving consenting adults entering a valid contract for sexual services). In this sort of case, it is enough to criminalize those who traffic and force people to prostitute themselves.⁴⁷⁴ If the punter has sexual intercourse with a woman he suspects is not consenting, then he would be liable for rape.⁴⁷⁵ There is no need to criminalize those who have sexual intercourse with a prostitute when a reasonable person in his position would have believed that there was genuine consent.

⁴⁷³ Sexual Offenses Act 2003, c. 42, § 53A (U.K.).

⁴⁷⁴ See Sexual Offenses Act 2003, c. 42, § 4 (U.K.), which makes it an offense to cause a person to engage in non-consensual sexual activity. The Sexual Offenses Act 2003 also criminalizes trafficking: trafficking into the U.K. for sexual exploitation is covered by section 57; trafficking within the U.K. for sexual exploitation is covered by section 58; trafficking outside the U.K. for sexual exploitation is covered by section 58A; trafficking out of the U.K. for sexual exploitation is covered by section 59; and trafficking people for sexual exploitation is covered by section 59A.

⁴⁷⁵ Negligence as to consent is sufficient for establishing rape under section 1 of the Sexual Offenses Act 2003.

Does a prostitute encourage prostitution use by merely standing in the street in a low-cut dress? Would this be an act that is capable of encouraging a curb crawler to perpetrate an offense contrary to section 51A of the Sexual Offenses Act 2003?⁴⁷⁶ The curb crawler is in that area cruising the curb because he already intends to find a prostitute. It would be too much to prosecute the prostitute under section 44 or 45 of the Serious Crime Act 2007 for encouraging the punter to curb crawl simply because she and other prostitutes create the demand for curb crawlers. Prostitution results in curb crawling, because the curb crawler crawls where he knows he will find prostitutes. Vice versa, the curb crawlers create the demand for prostitution supply. To criminalize people merely for creating the demand for distributors/suppliers/producers to exist would result in unfair remote harm criminalization.⁴⁷⁷ The offenses found in the Serious Crime Act 2007 should be invoked only when there is proximate direct encouragement. After all, there are narrowly tailored offenses that criminalize curb crawling in itself and thus there is no need to use encouragement type offenses to rope in the prostitutes as well.

B. THE REASONABLE CONDUCT DEFENSE

Section 50 of the Serious Crime Act 2007 includes a reasonableness defense. The defense provides:

- (1) A person is not guilty of an offense under this Part if he proves—
 - (a) that he knew certain circumstances existed; and
 - (b) that it was reasonable for him to act as he did in those circumstances.
- (2) A person is not guilty of an offense under this Part if he proves—
 - (a) that he believed certain circumstances to exist;
 - (b) that his belief was reasonable; and
 - (c) that it was reasonable for him to act as he did in the circumstances as he believed them to be.
- (3) Factors to be considered in determining whether it was reasonable for a person to act as he did include—
 - (a) the seriousness of the anticipated offense (or, in the case of an offense under section 46, the offenses specified in the indictment);

⁴⁷⁶ Sexual Offenses Act 2003, c. 42, § 51A (U.K.), provides: “(1) It is an offense for a person in a street or public place to solicit another (B) for the purpose of obtaining B’s sexual services as a prostitute. (2) The reference to a person in a street or public place includes a person in a vehicle in a street or public place.”

⁴⁷⁷ Dennis J. Baker, *The Moral Limits of Criminalizing Remote Harms*, 10(3) NEW CRIM. L. REV. 371, 372 (2007); Dennis J. Baker & Lucy X. Zhao, *The Normativity of Using Prison to Control Hate Speech: The Hollowness of Waldron’s Harm Theory*, 14(4) NEW CRIM. L. REV. 621, 627 fn. 17 (2013); Andrew von Hirsch, *Extending the Harm Principle: ‘Remote’ Harms and Fair Imputation*, in HARM AND CULPABILITY 259, 261 (A.P. Simester & A.T.H. Smith eds., 1996). Of course, it is no longer a criminal offense to libel others.

- (b) any purpose for which he claims to have been acting;
- (c) any authority by which he claims to have been acting.⁴⁷⁸

Long ago it was held libelous allegations could incite violence and breaches of the peace. Is libel too remote? In *De Libellis Famosis Case*, it was said:

Every libel (which is called *famosus libellus, seu infamatoria scriptura*), is made either against a private man, or against a magistrate or public person. *If it be against a private man it deserves a severe punishment*, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience: *if it be against a magistrate, or other public person, it is a greater offense*; for it concerns not only the breach of the peace It is not material whether the libel be true,⁴⁷⁹ or whether the party against whom it is made, be of good or ill fame; for in a settled state of Government the party grieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, either by the odious course of libeling, or otherwise⁴⁸⁰

This type of provocative conduct would not be caught by the Serious Crime Act 2007 because the libeler does not encourage the putative perpetrator to perpetrate a particular anticipated target crime. Nor would the libeler, apart from special facts, have the mens rea required for the offenses found in the Act of 2007. In *Beatty v. Gillbanks*, it was held that the Salvation Army had acted lawfully in congregating in a public place in Weston-super-Mare even though its officers believed from past experience that this would provoke an attack from an opposing organization, the Skeleton Army.⁴⁸¹ The Salvation Army believed that the Skeleton Army would behave unlawfully, but it was not its purpose to encourage it to behave unlawfully. Its aim was merely to congregate in public for the purposes of preaching their religion to followers. Field, J. (Cave, J. concurring) said:

The appellants have, with others, formed themselves into an association for religious exercises among themselves. . . . No one imputes to this association any other object, and so far from wishing to carry that out with violence, their opinions seem to be opposed to such a course, and, at all events in the present case, they made no opposition to the authorities. That

⁴⁷⁸ Serious Crime Act 2007, c. 27, § 50 (U.K.).

⁴⁷⁹ These days Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, (entered into force generally on 3 September 1953) could be invoked for *true* speech.

⁴⁸⁰ *De Libellis Famosis Case* (1606) 77 Eng. Rep. 250, 251. *Cf.* *Paris v. Levy* (1860) 142 Eng. Rep. 135, 136.

⁴⁸¹ *Beatty v. Gillbanks* [1882] 9 QBD 308, 313 (U.K.). *Cf.* *Wise v. Dunning* [1902] 1 KB 167, 175 (U.K.); *Duncan v. Jones* [1936] 1 KB 218, 223 (U.K.).

being their lawful object, they assembled as they had done before and marched in procession through the streets of Weston-super-Mare. No one can say that such an assembly is in itself an unlawful one. The appellants complain that in consequence of this assembly they have been found guilty of a crime of which there is no reasonable evidence that they have been guilty. . . . [T]he evidence set forth in the case . . . shews that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them.⁴⁸²

In *Redmond-Bate v. DPP*, Ms. Redmond-Bate had been preaching on the steps of a cathedral when a police constable arrested her.⁴⁸³ A crowd of more than one hundred had gathered around Ms. Redmond-Bate and some members of that crowd were becoming hostile.⁴⁸⁴ A police officer asked Redmond-Bate to stop preaching, because he feared that if she continued to preach it would result in a breach of the peace.⁴⁸⁵ Redmond-Bate refused to stop preaching and as a result the police officer arrested her for willfully obstructing him in the execution of his duty under section 89(2) of the Police Act 1996.⁴⁸⁶ Sedley, L.J. (Collins J. concurring) said: “If the threat of disorder or violence was coming from passers-by who were taking the opportunity to react so as to cause trouble, then it was they and not the preachers who should be asked to desist and arrested if they would not”⁴⁸⁷ Sedley, L.J. also said:

I am unable to see any lawful basis for the arrest or therefore the conviction. . . . There was no suggestion of highway obstruction. Nobody had to stop and listen. If they did so, they were as free to express the view that the preachers should be locked up or silenced as the appellant and her companions were to preach.⁴⁸⁸

482 *Beatty v. Gillbanks* [1882] 9 QBD 308, 313–14 (U.K.). It is worth noting that the members of the Salvation Army were passive and were not inciting crime or hatred against themselves—nor were they threatening. If they had made true threats—or had engaged in conduct of a genuinely threatening nature, then they might have been liable for a breach of the peace. *Cf.* *U.S. v. Turner*, 720 F.3d 411, 420 (2d Cir. N.Y. 2013); *Virginia v. Black*, 538 U.S. 343, 362 (2003).

483 *Redmond-Bate v. DPP* (1999) 163 JP 789 (Eng.).

484 *Id.*

485 *Id.*

486 *Id.*

487 *Id.*

488 *Id.* (Sedley, L.J. also said: “Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speaker’s Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of State control of unofficial ideas. A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power. We in this country continue to owe a debt to the jury which in 1670 refused to convict the Quakers William Penn and William Mead for preaching ideas which offended against State orthodoxy.”) *See also* *United States v. Polouizzi*, 687 F. Supp. 2d 133, 169 (E.D.N.Y. 2010) (citing *Bushell’s Case* (1670) 124 Eng. Rep. 1006) (Weinstein, J. observed: “The Quakers, William Penn and William Mead, were prosecuted in London in 1670 for preaching to an unlawful assembly and for breach of the peace. After the jury acquitted Mead of all charges and found Penn not guilty of disturbing

In *R* (on the application of *Laporte*) v. Chief Constable of Gloucestershire, Lord Brown said:

Take Mr. Beatty, the Salvation Army captain, or Ms. Redmond-Bate, the Wakefield preacher. The Divisional Court was in each case clearly right to have set aside their respective convictions. I repeat, the police's first duty is to protect the rights of the innocent rather than to compel the innocent to cease exercising them.⁴⁸⁹

The section 50 defense will require some sort of balancing of harm and public interest. It will be left to the jury to evaluate the social value of the conduct involved. Feinberg has written: "The more valuable (useful) the dangerous conduct . . . the more reasonable it is to take the risk . . . and for extremely valuable conduct it is reasonable to run risks up to the point of clear and present danger."⁴⁹⁰ Should the television crew be held criminally liable for creating the demand for nude and violent street protests? Would it not be an intolerable extension of criminal responsibility if television crews and others were held criminally liable for exercising their lawful rights and liberties, simply because it might encourage others to engage in criminal conduct to attract publicity for their cause?⁴⁹¹ The courts are likely to hold that media coverage of protests involves free speech and serves a highly valuable purpose—informing the public about what is going on in the world. This is the sort of valuable conduct that Parliament had in mind when it enacted section 50.

XI. CONCLUSION

I have tried to identify the limits of derivative liability and its alternatives in an attempt to build a case for having lesser crimes of assistance and encouragement. I provided a doctrinal and theoretical analysis of the new personal liability offenses found in section 44–46 of the Serious Crime Act 2007 to ascertain whether they cover reckless participation and reckless inchoate participation. I also examined the conduct element for those offenses to determine whether it is apt for catching the sort of reckless encouragement that is often present in the joint enterprise (common purpose) complicity cases and conclude that it is.

The main shortfall of the offenses found in the Serious Crime Act 2007 is that they do not cover reckless participation. I concluded that section 44 covers only intentional (inchoate) participation and that section 45 covers

the peace, it was deprived of food, water and heat. Despite these coercive tactics, the jury still refused to find guilt, and was fined. Some jurors, including a man named Bushell, refused to pay; they were imprisoned, until ordered released by the Chief Justice on the ground that the jury in effect determines the law when deciding by general verdict."); *Hamond v. Howell* (1677) 86 Eng. Rep. 1035.

⁴⁸⁹ *R v. Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 155. See also *Austin v. Commissioner of Police of the Metropolis* [2007] EWCA (Civ), [2008] QB 660, 680–81 (Eng.).

⁴⁹⁰ JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW VOLUME I: HARM TO OTHERS* 215–16 (1984).

⁴⁹¹ See Glanville Williams, *Complicity, Purpose and the Draft Code: Part I*, *CRIM. L. REV.* 4, 10 (1990).

2016]

Conceptualizing Inchoate Complicity

587

only oblique intentional (inchoate) participation. Oblique intentional participation would only be caught where the individual foresees that it is virtually certain that the act of assistance will assist the perpetrator to perpetrate the anticipated target crime. It will not catch one who merely foresees that one's assistance might assist the perpetrator to perpetrate the anticipated target crime. Consequently, interpreting the mental element in complicity as requiring nothing less than intention will leave a lacuna in the law. It is submitted that section 45 of the Act of 2007 should be supplemented with a section 45A offense criminalizing reckless (inchoate) participation. Section 45 is an independent offense that criminalizes personal wrongdoing—as it is not a form of derivative liability, but rather personal liability, it allows for fair labeling and proportionate punishment for the independent wrong involved in encouraging and assisting another to perpetrate a crime.

In this Article I have demonstrated that we do not need complicity liability in the 21st century. Independent lesser offenses of assistance and encouragement are more apt and would allow for fair labeling and proportionate punishment. I have also outlined some of the core conceptual and doctrinal problems that will need to be addressed when enacting alternative offenses to replace the old law of complicity.

