COMPLICITY, PROPORTIONALITY, AND THE SERIOUS CRIME ACT

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This paper evaluates proportionate punishment and fair labelling in the context of complicity liability. It is argued that only full intentional and extreme (subjective) reckless assistance or encouragement is sufficient for holding a secondary party equally responsible for the principal's primary wrongdoing. It is also submitted that lesser mens rea states such as mere knowledge or belief provide a justification for grading certain forms of complicity as independent and less serious forms of criminality. More specifically, I examine the new provisions found in the United Kingdom's Serious Crime Act 2007 and argue that those provisions could be used in place of the older provisions dealing with accessorial liability to ensure that those who are only subjectively reckless in contributing to the criminality of others are punished less than the principal. If a person is going to be sent to prison for life for merely supplying a gun to a principal, then justice and fair punishment require that the assistance be intentional or at least extremely reckless

INTRODUCTION

In this paper, I critically examine the way in which participation in the crimes of others has been labelled and punished. I take issue with the way in which all degrees of participation are labelled as equivalent to principal offending under the *Accessories Abettors Act 1861*. Professor Glanville Williams, in his classic work on criminal law, noted that there are "degrees

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of complicity."[1] There are three core levels of participation that need to be labelled and punished in proportion with the wrongdoing involved—that is, intentional participation, extreme subjective reckless (labelled as "oblique intention"[2] in the United Kingdom) participation, and ordinary subjective reckless participation. The current law makes no distinction between these three levels of involvement, and unfortunately, the new offenses found in the sections 44–46 of the Serious Crime Act 2007 (hereinafter, the 2007 Act) only recognize two levels of participation, that is, intentional and arguably extreme subjective reckless participation. However, it is not clear whether the subjective reckless standard found in sections 45–46 of the 2007 Act require extreme subjective recklessness or ordinary subjective recklessness, both of which need to be labelled and punished separately because of the different degrees of wrongdoing involved. If the 2007 Act merely requires ordinary subjective recklessness, then, those who act with extreme subjective recklessness would be punished no differently than those who act with a lesser degree of culpability. Surely the former should be punished less severely. If 2007 Act requires extreme subjective recklessness, then many culpable offenders who are only subjectively reckless in the ordinary rather than oblique intention sense will evade criminalization and punishment altogether, unless they are prosecuted under the Accessories Abettors Act 1861. The latter, however, requires the perpetrator to commit or attempt some principal offense, as liability derives from the perpetrator's offending.

The enactment of the new offenses in sections 44–46 provided the government with an opportunity to address this issue, but it failed to set clear sentence tariffs or label the varying degrees of wrongdoing as independent offenses. The new provisions seem to make a distinction between intentional and extreme subjective reckless participation, but do not distinguish extreme subjective reckless participation from ordinary subjective reckless participation. Coupled with this, as originally conceived by the English Law Commission, these offenses were to replace the existing law of complicity.

1. Glanville Williams, Textbook of Criminal Law 330 et seq. (1983).

2. There is a slight distinction between "oblique intention" and "extreme subjective recklessness" of which I discuss infra. The core issue that I take with "oblique intention" is that, applied literally, it would barely catch any criminality. I take the view that a defendant can manifest a high degree of subjective recklessness without actually foreseeing a consequence as a virtual certainty and suggest foreseeing a consequence as extremely probable is sufficient.

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Unfortunately, the government when enacting these new offenses decided not to abolish the existing law of complicity. So they live side by side but they are separate. This allows the prosecutor to cherry-pick; if the principal actually uses the defendant's assistance to commit or attempt a crime, the prosecutor will be able to charge under the Accessories Abettors Act 1861, which in effect allows the defendant to be convicted and sentenced as a principal. If the perpetrator does not use the defendant's assistance or does not rely on defendant's encouragement, the prosecutor can go for one of the inchoate offenses found in sections 44–46 of the 2007 Act.

There are two basic criteria for grading crimes and determining proportional labelling and sentencing, culpability and harmfulness.[3] When we are considering complicity or inchoate liability, the best marker of harm is to consider the nature of the primary offense that is being assisted or encouraged. There is also the separate issue of the defendant's level of participation: did D merely sell a gun, or did she do more, such as drive the killer to the victim's house, assist the killer to dispose of the body, and so on. As far as the culpability element is concerned, it is necessary to examine whether the defendant not only intentionally did the acts of assistance, but also intended that those acts be used for the purpose of furthering the perpetrator's criminal goal, or did so with either extreme reckless or reckless foresight of that possibility. The degree and gravity of the defendant's participation and her state of mind in participating should affect the way her wrongdoing is labelled and punished. In what follows, I critique the mens rea standard that has been adopted for accomplice liability and argue that only purposeful or extremely reckless encouragement/assistance is sufficient to justify punishing an assister or encourager as a perpetrator.

Furthermore, if defendants manifest a lower level of subjective recklessness, then their lower level of participation should be recognized in a separate provision so that an appropriate sentence tariff can be set. The standard of subjective recklessness expounded in *R. v. Bryce*[4] falls well short of extreme recklessness, but was used to impose full liability. Only extreme subjective recklessness would be sufficient to justify punishment equal to that set for the principal offense, the assisted murder and so forth. Section 58 of the 2007 Act allows for punishment equal to that available for the reference offense, although the defendant is not being punished or convicted

3. See Andrew von Hirsch, Censure and Sanctions (1993).

4. [2004] EWCA Crim. 1231.

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for anything other than the section 44 offense.[5] If the subjective reckless assister supplies a gun "believing" it "will" be used in a murder, then he may get life under section 58. It is not clear why all the sentencing discretion has been left for the judges. What is needed is a set of tariffs that link with the type of wrongdoing involved. The sentencing provisions in section 58 should be sufficiently comprehensive to ensure that the different types of participation are punished proportionately. In addition, steps should have been taken to ensure that trivial acts of facilitation would no longer be prosecuted under the Accessories Abettors Act 1861.

The new offenses found in sections 44–46 of the 2007 Act are not without their advantages, but some clear guidelines are needed to ensure that they are used instead of the Accessories Abettors mechanism when appropriate, and to ensure that offenders are punished proportionately for their wrongdoing. The assister/encourager may receive the maximum sentence for the crime encouraged or assisted under the 2007 Act, but that decision lies within the discretion of the court. So in a case where the crime assisted or encouraged is murder, the defendant may receive a life sentence alongside the principal, the murderer, if, say, his or her assistance was substantial and he or she shared a common purpose with the principal. However, the defendant may receive a much lesser sentence if his or her assistance was not substantial and he or she did not share a common purpose with the principal. Contrast if the defendant was charged as an accomplice to the principal's murder under the Accessories Abettors Act 1861. Under the current law of complicity, acts of peripheral assistance by a defendant will suffice despite the lack of a common purpose. As an accomplice, he or she will be guilty of murder and subject to the mandatory life sentence. The new offenses might provide an opportunity for the sentencing judge to consider the degree of subjective recklessness (level of belief) manifested by defendants convicted of section 45–46 offenses, thereby to ensure that defendants are punished in proportion to their culpableness and the harm caused by their participation or attempted assistance/incitement.[6] The 2007

5. Section 58 allows for the maximum penalty available for the reference offense. So if X sells a gun believing that her customer Y is going to use it to commit a murder, she could face a life sentence. Section 58(2) holds: "If the anticipated or reference offence is murder, he is liable to imprisonment for life." And 58(3) holds: "In any other case he is liable to any penalty for which he would be liable on conviction of the anticipated or reference offence."

6. The offenses found in the 2007 Act do not require the encouragement or incitement to be communicated to the principal. Cf. the earlier position, Williams, supra note 1, at 357.

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Act creates offenses in their own right—inchoate offenses of assisting and encouraging (inciting) crimes that live alongside complicity but do not replace it. So prosecutors are not likely to rely on the new offenses unless the principal has failed to do the principal or primary offense, because the new offenses are nonderivative.

It is submitted below that complicit wrongdoing should be labelled as serious or less serious depending on the degree of culpability that accompanies the particular participation. Naturally, the harmfulness of the crime encouraged or assisted will also play a role. Sections 44–46 of the 2007 Act enact a general facilitation offense, but also cover everything else including situations covered by the Accessories Abettors Act 1861. These sections make a core distinction between intentional and subjective reckless assistance/encouragement, but do not go any further. Subjective reckless assistance might involve mere facilitation (i.e., a careless gun seller sells a gun to a person of whom he believes might misuse it) or substantial involvement (i.e., where the defendant provides substantial assistance and believes that she is facilitating offending that is extremely likely to occur). The culpability factor is the core criterion for calibrating punishment and fair labelling for complicity criminality, but as we will see the sections 44–46 offenses incorporate some rather complex fault provisions.

I. GRADING PARTICIPATORY OFFENSES

Just deserts involves showing that the defendant intentionally and directly aimed or attempted to bring about harm or some other sufficiently serious bad consequence for others.[7] If X makes an indirect contribution[8] to Y's criminality, then it must be shown why it is fair to hold X responsible for Y's independent direct wrongdoing.[9] Desert-constrained criminalization and punishment is reconcilable with fairness and justice because it allows a person to be punished only when she has made a choice (this includes choosing to run a risk: subjective recklessness; and running a risk that a

7. The bad consequence does not necessarily have to result in harm. Dennis J. Baker, The Right Not to be Criminalized: Demarcating Criminal Law's Authority, ch. 2 (2011).

8. A direct contribution would make the participant a joint-principal.

9. Dennis J. Baker, The Moral Limits of Criminalising Remote Harms, 10 New Crim. L. Rev. 370 (2007).

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reasonable person would not run: objective recklessness) to (directly or indirectly) wrong others.[10] The general facilitation[11] offenses found in sections 44–46 of the legislation should be fine-turned to allow subjectively reckless participation to be punished differently from extremely reckless acts of participation, which often involve substantial involvement in a consummated primary offense. The 2007 Act failed to consider the problems with the current *mens rea* doctrine for complicity and as such treats all involvement in the criminality of another as though it is worthy of the same crime and punishment label. It is worth noting that section 44 stands on its own in requiring actual intention. That would be significant if the Accessories Abettors Act 1861 had been repealed, and if the section 45 offense required (oblique intention—extreme subjective recklessness) had been supplemented with a further offense for those cases involving ordinary subjective recklessness. Criminalizing the categories of participation separately would have allowed appropriate penalties to be set for the different degrees of participation.

The current law provides no discount for subjective reckless assistance/encouragement. In *R. v. Bryce*[12] it was held that an intentional act of assistance plus "foresight of the real possibility that an offense would be committed by the person to whom that accessory's acts of assistance were directed" were sufficient for holding the accomplice liable for the perpetrator's act of murder. One commentator has suggested that the *R. v. Bryce* court adopted an oblique intention standard, but such an assessment is erroneous.[13] The *R. v. Bryce* court might have referred to *R. v. Woolin*, but it did not categorically and clearly embrace an oblique intention standard. If it had, we would have the opposite problem to that being addressed in this paper: that is, all those with less than oblique intention would evade any punishment.

Grading complicity offenses involves an assessment not only of the secondary party's acts of assistance/encouragement, but also an assessment of

10. Dennis J. Baker, Constitutionalizing the Harm Principle, 27 Crim. Just. Ethics 3, 4–16 (2008).

11. The label "general facilitation" is not meant to suggest that the offenses are anything but inchoate offenses, nor is it intended to overlook the conceptually distinct offense of incitement, which is now covered by this legislation.

12. [2004] 2 Cr. App. R. 35.

13. Ormerod suggests that Bryce expounds an "oblique intention" standard. See David Ormerod, Smith & Hogan Criminal Law 195 (2008).

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the strength of the secondary party's culpability link with the substantive offending of the perpetrator. The responsibility link is established by demonstrating that the secondary party made a culpable choice to underwrite or associate herself with the perpetrator's wrongdoing. "Accomplice liability is derivative in nature. That is, an accomplice is not guilty of an independent offense of 'aiding and abetting'; instead, as the secondary party, he derives his liability from the primary party with whom he has associated himself."[14] A responsibility link in the accessory situation hinges on the secondary party's culpability. If the secondary party's contribution to the perpetrator's harm doing is unintentional (or objectively reckless), then there will be no justification for imputing blame to her. *Per contra*, if X gives Y a gun intending that Y use it to murder another, then X clearly underwrites Y's act of murder.[15] It is fair to impute blame to her for Y's more serious wrong (murder), as she has participated in a normative way by intentionally supplying the murder weapon with the intention that it be used to commit murder. She culpably associates herself by intentionally assisting and there is a strong responsibility link between her act and the primary harm doing, murder, as she causally assisted (in fact assisted) the principal to achieve the direct harm and had it has her purpose that the principal use the assistance to bring the particular direct harm about. Dressler[16] notes that in the United States, most state courts:

> hold that a person is not an accomplice in the commission of an offence unless he "share[s] the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking." In the words of Judge Learned Hand, the complicity doctrine requires that the secondary party "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. . . ."

However, limiting criminalization to purposeful assistance/encouragement would be too generous to criminals and unfair to victims. It seems fair also to penalize those who recklessly assist others to commit crimes. If a person intentionally assists a perpetrator, and believes that her intentional assistance will be used by the perpetrator to commit a crime that

14. See Joshua Dressler, Understanding Criminal Law 409 (2006).
15. Cf. Backun v. United States, 112 F. 2d 635, 637 (4th Cir. 1940).
16. Dressler, supra note 14, at 514.

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the perpetrator is extremely likely to commit, then her extreme subjective recklessness makes it fair to hold her equally responsible. But a sentence discount will be appropriate in cases where the assistance was trivial rather than substantial. The English courts use the doctrine of oblique intention to impute intention to those who have acted with extreme subjective recklessness in causing the death of another.[17] In Britain the jury may find that the result was intended even when it was not the wrongdoer's purpose to cause it, so long as the result was a virtually certain consequence of the wrong committed, and the wrongdoer believed it would transpire, or could foresee it as a virtually certain consequence of her acting as she did. Oblique intention is a form of extreme subjective recklessness.[18] In the United States, a standard of extreme subjective recklessness slightly less demanding than that envisaged in the British oblique intention doctrine is used to impute intention in homicide cases. In the United States, full intention is imputed when a person unintentionally kills another in circumstances where it is evident that she "[c]onsciously disregarded a substantial and unjustifiable risk to human life."[19] The emphasis should be on "consciously" as this is a subjective standard, and its objective aspects to do not make it an objective test.

This type of imputation of intention for extreme recklessness is normally applied in murder cases.[20] Professor Kadish convincingly argues that the U.S. standard could also be used to impute intention to secondary parties in certain circumstances. In particular, Sanford Kadish asserts that a secondary party should be held fully blameworthy for another's criminality

17. Most English textbook writers now identify oblique intention as an element in many offenses. Such an approach should be resisted. There are ample other constructive liability doctrines for dealing with less serious criminality. Oblique intention is a special doctrine that should be used for murder cases and nothing else. The gravity of murder makes it permissible to allow the concept of intention to be distorted slightly. The sanctity of human life means that those who are extremely reckless with human life had better expect to be dealt with as though they intended the results that flowed from their recklessness.

18. R. v. Woolin [1999] A.C. 82. I use the term "extreme subjective recklessness" because I am of the view that purpose or aim—intention—cannot derive from extreme subjective recklessness; you have either one or the other. Thus, the term "oblique intention" is a misnomer. See John Finnis, Intention and Side-Effects, in Liability and Responsibility 32–64 (R. G. Frey and C. W. Morris eds., 1991).

19. This standard is used to impute intention for second degree murder. See Dressler, supra note 14, at 556.

20. Id. Cf. R. v. Woolin [1999] A.C. 82.

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when she consciously disregards "a substantial and unjustifiable risk that the other person would commit the crime, the risk being 'of such a nature and degree that, considering the nature and purpose of his conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that law-abiding persons would observe. . . .'"[21] The focus on the defendant's awareness means that this should be interpreted as a subjective standard: it requires the defendant to appreciate the potential harmfulness of her risky choice.

In many cases a mere belief (i.e., mere subjective recklessness as opposed to extreme subjective recklessness) has been sufficient for satisfying the intention requirement. I refer to ordinary subjective recklessness as involving those situations where the secondary party believed that there was a (real) possibility that an offense would be committed by the person whom she had intentionally assisted.[22] If X, a gun seller, is in the process of selling a gun to regular customer Y and overhears Y saying, "If I was not a decent man, I would kill my cheating wife and her lover," but sells the gun to Y anyway, X would do so with knowledge of Y's thoughts (not plans), but might not firmly believe that Y will go on to commit double murder. Given that Y is a regular customer, has made no direct threat, and qualified his statement with "If I was not a decent man," it is arguable that X's sale would, if anything, merely involve a low level of subjective recklessness. Would this level of mens rea be sufficient for the purposes of imputing full blame to X for double murder? It would not be if the extreme recklessness standard were to be applied.

Arguably when a person sells a gun without sharing the purchaser's criminal intent with respect to the substantive offense, she should not be held fully liable for the perpetrator's criminality unless she acted with extreme subjective recklessness. The virtual certainty standard would provide the defendant with the most protection, but as we will see, it provides too

21. See Sanford Kadish, Reckless Complicity, 87 J. Crim. L. & Criminology 369, 385 (1996–1997).

22. The English courts seem to be of the view that intentional assistance with mere-subjective-reckless as opposed to extreme-subjective-reckless foresight of the principal's proposed criminality is sufficient for holding a secondary party liable. See R. v. Bryce [2004] EWCA Crim. 1231. Oblique intention is about imputing intention for murder where the risk-taking was of such a high and serious degree that "it might be fairly said that the actor 'as good as intended to kill his victim and displayed . . . unwillingness to prefer the life of another person to his own objectives.'" Dressler, supra note 14, at 555.

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much protection. If the extreme recklessness doctrine adopts the virtual certainty standard found in the English oblique intention doctrine, many culpable offenders would evade justice. The oblique intention culpability requirement would relieve the reckless gun seller of criminal liability, because even if the seller intends to sell the gun with a belief that that it might be used for murder, it would be a stretch to hold that the seller foresaw or believed that the virtually certain side-effect of her intentional sale would be double murder. Merely overhearing someone saying he would "kill his cheating wife if he was not a decent man" might put a gun seller on her guard, but it would not be sufficient information for the seller to conclude with certainty that the purchaser would go on to commit double murder after leaving the store. The jury is not likely to infer that the gun seller foresaw or believed that double murder was virtually certain to transpire. Oblique intention would require that the foreseen side-effects of the wrongdoer's intentional assistance be "so immediately and invariably connected with the action done that the suggestion that the action might not have that outcome would by ordinary standards be regarded as absurd. . . ."[23] The oblique intention standard as accepted in *Woolin* seems to set the bar too high, because it might also allow the defendant in *R. v. Bryce*[24] to evade justice.

The U.S. type of extreme recklessness test is preferred because it would not catch the lower level of subjective recklessness involved when a person sells a gun believing it possible that the gun will be misused, but would catch the extreme subjective recklessness involved in *R. v. Bryce*.[25] Arguably, Bryce's participation was reasonably substantial, since he supplied a gun, drove the principal to the crime scene, helped the principal to clean up

23. "Thus if a man struck a glass violently with a hammer, knowing that the blow would break it, he would be said to have broken the glass intentionally (though not, perhaps, to have intentionally broken the glass, even if he merely wanted the noise of the hammer making contact with the glass to attract attention." H. L. A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 20 (1968). See also, Glanville Williams, Oblique Intention, 46 Cambridge L. J. 417 (1987).

24. [2004] EWCA Crim. 1231. The actual standard adopted in *Bryce* only called for a very low form of subjective recklessness—the defendant must have foreseen the likelihood of the primary criminality transpiring as a real possibility.

25. [2004] EWCA Crim. 1231. In *Bryce*, the defendant also arranged accommodation for the principal in a caravan near where the victim resided, and drove the principal to the crime scene the day before the murder was committed, with full knowledge of the fact that the principal was armed and intended to kill the victim.

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after killing, knew that the principal had been ordered to kill by his drug baron boss, and so forth. The defendant in *Bryce* consciously disregarded a substantial and unjustifiable risk that the principal would commit murder; and his reasonably substantial participation (i.e., he did not merely sell a gun to a stranger) was a gross deviation from the standard of conduct that law-abiding persons would observe. He was an extremely reckless participant, because he had full knowledge of the plan that was already underway and was sufficiently involved in the preparatory acts to be able to form a belief that it was very likely that the murder would take place and that his assistance would assist that end. Substantial participation is still indirect, unless it becomes joint participation. If X gives murderer Y a gun, drives him to the crime location, and keeps a lookout, he participates more substantially than if he had merely sold the gun to Y.

The U.S. substantial and unjustifiable risk standard refers to consciously taking a great risk where there is little or no justification for taking that risk.[26] The standard of "great risk" is more flexible than that of "virtual certainty" and much fairer than the "real possibility" standard laid down in *R. v. Bryce*, if it is full liability being imposed. In *Bryce* the court did not clarify whether it was setting an extreme recklessness standard or an ordinary recklessness standard, but the words "real possibility" suggest that it preferred the latter. This type of low culpability threshold would allow all offenders to be punished equally regardless of the degree of culpability involved. The real possibility standard is best suited for describing ordinary subjective recklessness as opposed to extreme recklessness. Since sections 45–46 of the 2007 Act require the defendant "believe" his assistance/encouragement "will" not only assist, but "will" be used by a principal who "will" commit some primary offense, it is arguably best interpreted as a form of extreme subjective recklessness.[27] It does not require virtual certainty; it merely requires the prosecution to prove beyond reasonable doubt that the assister/inciter consciously took a substantial and unjustifiable risk and therefore was extremely reckless; and thus is deserving substantial punishment or the same punishment as is set for the reference offense under section 58 of 2007 Act. Ultimately it should be shown that the secondary party consciously disregarded a substantial and unjustifiable risk that the perpetrator "would

26. See Dressler, supra note 14, at 556, and the cases cited therein.

27. Professor Ashworth seems to share this view. See Andrew Ashworth, Principles of Criminal Law 460 (2009).

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commit the principal crime, and that risk was of such a nature and degree that it was totally unreasonable for her to disregard it. "Consciously" means that the defendant must appreciate the nature of the risk taking.

The extreme subjective recklessness standard would also catch those who intentionally assist crimes of recklessness, that is, those who either have it their purpose to encourage another to engage in particular reckless acts (e.g., a passenger who demands that the driver speed through a school zone and intends that the driver do so)[28] or intentionally assist the principal to engage in reckless criminal acts (e.g., a government official who takes bribes to allow a company to recklessly produce substandard medicines and is indifferent to the likely end consequences).[29] If X sells melamine to Y knowing that Y is going to add it to watered-down milk to give the impression that the milk has not been diluted, X would be a full accomplice so long as X was extremely reckless in supplying the melamine (that is, knowing that there was a great risk that it would be used for such a reckless purpose).[30] In a recent scandal in China, many infants died after ingesting melamine-tainted milk. The suppliers of the melamine assisted the dairy farmers' criminality by selling them the melamine.

As the suppliers were aware that melamine is a chemical that is normally used for the manufacture of synthetic resins, and that the purchasers intended to use it for the illicit purpose of faking the protein level in diluted

28. Here the passenger encourages a dangerous act that could lead to further unintentional harm; it is her intention to encourage the acts (the substantial and unjustifiable risk-taking involved in dangerous driving) that would make her an accomplice to the dangerous driving and any unintentional harm that results. See Sanford Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Cal. L. Rev. 323, 347 (1985). See also, State v. McVay 132 A. 436 (R.I. 1926).

29. Dennis J. Baker & Lucy X. Zhao, Responsibility Links, Fair Labeling and Proportionality in China: A Comparative Analysis, 15 UCLA J. Int'l L. & Foreign Aff. 274 (2010). There is an important conceptual distinction between recklessly aiding the reckless criminality of another and intentionally aiding the reckless criminality of another. First, if N knows that his son has a habit of driving in a reckless manner, N would recklessly aid his son to drive recklessly if N realized after leaving the house for a long walk that he had forgotten to secure his car keys, so that his son would not be able to use the car in his absence, and instead of returning to secure the keys, N took the chance that his son would not find the keys. Second, N would intentionally assist his son's reckless driving if he allowed his son to use the car knowing that his son has a tendency to drive recklessly. These examples are reworked examples of Glanville Williams. See Glanville Williams, Complicity, Purpose and the Draft Code: 2, Crim. L. Rev. 98, 99 (1990).

30. Baker and Zhao, supra note 29.

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infant milk supplies, it is arguable that the acts of supply were extremely reckless and that they would have subjectively appreciated the recklessness of their risk taking. Their extremely reckless sales assisted others to engage in extremely reckless conduct—rather than intentional harm doing. This was not the first scandal involving adulterated milk in China,[31] and the manufacturer of the melamine even went to the trouble of constructing an underground factory to produce it. Extreme subjective recklessness would be sufficient for the purposes of imputing equal blame to both the perpetrator and the secondary party in these types of cases. However, a less stringent standard of subjective recklessness could bring within the purview of the criminal law the subjective reckless gun seller or the genuine melamine supplier who believed that it would be used to produce plastic or to tan leather but was suspicious. If the melamine supplier or gun seller was suspicious that it might be misused, then this lower level of subjective recklessness would justify a lower level of punishment and criminalization. The latter type of wrongdoing should be criminalized by supplementing section 45 of the 2007 Act with another offense. This would also allow section 45 of the 2007 Act to be interpreted as requiring extreme subjective recklessness, without allowing those who are less culpable to avoid criminalization altogether.

It would not be fair to punish equally those who act only with ordinary subjective recklessness as to the likely consequences of their acts of assistance (i.e., those who recklessly assist and are indifferent to the primary harmer's criminal intentions), because they do not share the primary harmer's intent to bring about the ultimate harm and only foresee the perpetrator's criminality as a real possibility. Nonetheless, in such situations the accessory is suspicious of the perpetrator's intentions and of the possibility that the perpetrator will engage in criminality, and thus is worthy of some form of criminalization for his or her facilitation. It is not too much, after all, to ask the seller to forfeit a single gun or melamine sale in certain circumstances. In these cases, criminalization should reflect the secondary party's lower level of culpability. Therefore, it would be appropriate to enact a further offense to distinguish the type of offending that ought to be caught by section 45 of the 2007 Act from mere facilitation. The facilitator should be punished in proportion with the harmfulness of the wrongdoing of the offending that she facilitated,

31. Id.

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but should receive a much lower sentence than the perpetrator because of her lower level of culpability.

II. SERIOUS CRIME ACT OFFENSES AND GRADING

The new offenses found in sections 44–46 of the 2007 Act replace the general offense of incitement[32] and supplement the law of complicity, because they allow the criminalization of complicit contributions both to consummated and to attempted but nonconsummated[33] contributions to nonexistent or potential primary criminality. The Accessories Abettors Act 1861 criminalizes those who assist both consummated and nonconsummated criminality,[34] but assisting anything less than an attempt is not criminalized. Coupled with this, the former offense of incitement targeted inchoate conduct such as attempts to incite others to commit criminality, but required the incitement to be communicated to the potential perpetrator. Hence, the new offenses, while inchoate in nature, also catch the type of conduct that would typically be caught by the Accessories Abettors Act 1861, the exception of course being cases where the perpetrator has not acted or attempted to act in response to the encouragement/assistance.

Section 44 criminalizes intentionally encouraging or assisting an offense; section 45 criminalizes encouraging or assisting an offense and believing it will be committed; and section 46 criminalizes encouraging or assisting multiple offenses and believing one or more will be committed. These offenses can result in a conviction and punishment even if the principal offense is not committed.[35] These sections also expose the defendant to the same maximum penalty that applies to the completed offense that was being encouraged or assisted. On their face, the offenses found in sections 44–46 of the 2007 Act are fairly straightforward, but the provisions requiring subjective recklessness do not clarify the type of subjective recklessness that is required.

32. Many specific statutory offenses of incitement remain.

33. Schedule 3 of the 2007 Act makes it clear that section 45 does not apply to attempts or conspiracies.

34. R. v. Dunnington [1984] 1 Q.B. 472.

35. Section 58 of the 2007 Act imposes punishment on the assister/encourager for the primary offense even though the principal might not have committed or attempted to commit it.

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The clearest provision is section 44, as it clarifies that the defendant must intend to encourage or assist the commission of an offense and that oblique intention will not do.[36] The actus reus requirement set by section 44 is also relatively clear: the act must be "capable of encouraging or assisting the commission of an offence." However, there is a difference between intending that another use your assistance to commit a crime and having a desire for that person to commit the particular crime. A defendant might intend to assist and might desire that the perpetrator do the substantive offending, but the defendant cannot intend or cause the perpetrator's state of mind, even though she might give the perpetrator reasons for acting, or might try to persuade the perpetrator to form the mens rea for the substantive offense.

Section 47(5)(a)(i) holds that intentional assistance/encouragement must also be accompanied by a belief that the perpetrator "will" do the underlying substantive offense with the requisite fault required for that offense. If the defendant intentionally does an act for the purpose of assisting or encouraging some primary criminality and believes the perpetrator will do the primary offense with the requisite fault, then that defendant is extremely reckless about whether the defendant will do the substantive offense with the requisite fault. Notwithstanding that "believes" seems to be sufficient to make it clear that the secondary party needs an extreme state of subjective recklessness, as far as foresight of the perpetrator's fault is concerned, section 47(5)(a)(ii) goes on to expressly state that recklessness will be sufficient. This reinforces the believe concept in subsection (i) but is superfluous and has the potential to lead judges astray; that is, they might end up interpreting the section as merely requiring ordinary subjective recklessness. It is not clear what level of subjective recklessness is envisaged, but if a defendant intends to assist a perpetrator and believes that the perpetrator will do the principal offense with the requisite fault, that defendant would be acting with a high level of recklessness; and this

36. Section 44(2) provides: "But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act." Subsection 2 was introduced because the government intended to exclude the virtual certainty test from being adopted as a part of the mens rea for this offense. As noted in the parliamentary debates: "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 offence." Hansard, HC Public Bill Committee, 6th Sitting, July 3, 2007, col.211.

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seems to be what section 44 envisages. Therefore, the correct interpretation is that it requires extreme subjective recklessness regarding D's fault. Notably, there is no "or" between subsections 47(5)(a)(ii) and 47(5)(a)(1), so arguably they are to be read in conjunction as requiring a high level of recklessness.[37] Thus, merely suspecting that the perpetrator will commit the principal crime with the requisite fault is not likely to be sufficient. The core constraint in section 44 is that the defendant must intend to do the act capable of assisting, such as selling a gun to the perpetrator, and intend that the perpetrator use it to kill another. If this requirement is satisfied, then we ask, did she also believe that the perpetrator would use the gun to kill with the requisite mens rea for murder? Subsection 47(5)(a)(ii) is to be read disjunctively, as it applies to the conceptually distinct innocent agency type of situation, and rightly so. It is also drafted as a disjunctive provision.

Subsections 47(5)(a)(i) and (ii) simply mean that: (1) If the anticipated offense requires proof of fault, the encourager/assister must "believe" or "suspect" that the perpetrator will commit the actus reus with any fault required for it. (2) If the anticipated offence requires proof of fault as to circumstances or consequences, then the encourager/assister must believe or suspect that: (a) if he assists or encourages the perpetrator to commit the actus reus of the anticipated offense, then those consequences will result; (b) if he assists or encourages the perpetrator to commit the actus reus of the anticipated offense, then it will be committed in circumstances that make it criminal (i.e., that the perpetrator's act of sexual intercourse with V will be done in circumstances where she is not consenting).

Section 45 has to be interpreted in conjunction with section 47, and the same rules apply with respect to the perpetrator's fault for the (potential) primary or reference offending. But as far as the actual act that is capable of assisting or encouraging the principal offending is concerned, extreme reckless acting is sufficient. If X sells Y fertilizer and mistakenly "believes" that Y "will" use it for terrorism purposes merely because Y fits a certain stereotype, X may be convicted under section 45 and could be punished for

37. Unfortunately, a full discussion of the very technical aspects of these provisions is beyond the scope of the current discussion, which focuses on proportionality and labelling. For a very detailed breakdown and analysis of these complex provisions, see Dennis J. Baker, Glanville Williams: Textbook of Criminal Law, ch. 17 (2011). Similar fault requirements are set for circumstances and consequences; see section 47(b)(i) and (ii) of the 2007 Act.

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the maximum penalty available for an act of terrorism. X's belief is mistaken but it is genuine, and it would be extremely reckless for her to sell the fertilizer in such circumstances. The false but genuine belief that another "will" misuse fertilizer for terrorism is an actual belief, and if the seller also believes that the potential perpetrator will do the act of terrorism with the requisite fault for that offense, then she seems to satisfy the section 45 and 47 requirements. The case of extreme subjective recklessness would be even stronger if Y were a known terrorist who has appeared in wanted photos in the mass media, enters X's store seeking to purchase fertilizer, and X sells it to him believing that he is the wanted terrorist and will misuse it. The words "believes" and "will" make if fairly clear that section 45 requires a very high level of subjective recklessness.

Now, if this is the case, then the new offenses fail to fill a gap in the law: that is, those who assist with an ordinary level of subjective recklessness. These people could be prosecuted under the Accessories Abettors Act 1861, but only if the perpetrator attempts or consummates the reference offense. After all, the latter is derivative liability, so it has to derive from the perpetrator's wrongdoing. But what about X, who is in the business of selling guns and overhears customer Y muttering something about how he wants to kill someone? X might become suspicious but might not have sufficient information to form a belief that the customer will go on to commit murder. The gun seller might form the belief that the customer "might," rather than "will," do the reference offense. We would not want to see the gun seller evade liability altogether, especially if she has sufficient information to form a belief that the customer "might" possibly kill others but decides to sell the gun anyway. But it is disproportionate to continue to bring such defendants within the purview of the Accessories Abettors Act 1861, where they are treated effectively as perpetrators. The new provisions found in the 2007 Act do not seem to make any provision for dealing with those who merely facilitate the criminality of others with a low level of subjective recklessness.

Proportionate punishment considers not only culpability and dangerousness[38] but also the actual impact that the wrongdoing has on the interests of the relevant victims. Feinberg argues that one has to be careful not to

38. The basic proportionate punishment formula is Harm × Culpability. However, harm is too narrow for a general formula. The general formula would have to be: Bad Consequence (or conduct in the case of inchoate and endangerment wrongdoing) × Culpability.

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think of retribution in terms of compensation for victims.[39] Feinberg, like many others, argues that moral luck should not play a role in sentencing. I disagree. If moral bad luck is sufficient to impose constructive liability for murder, for example, then moral good luck should also be sufficient to justify sentence discounts when the defendant's wrongdoing does not result in actual harm. If we accept that retribution is not merely about seeking revenge, but is a form of psychological compensation for the victim (or when the victim has been killed, for the victim's family, friends, community, and society more generally) then results matter. This type of retributive psychological security and satisfaction[40] cannot be substituted with pecuniary compensation, although the latter too could offer further comfort to the victims of crime. It also matters to the rest of the community, as we all have a stake in seeing that those who commit gross harms are proportionately incapacitated, deterred,[41] and punished for their past wrongs.

Although the absence of harm in inchoate criminality does not reduce the wrongdoer's culpability, it does give the victim less to be angry about. If a failed attempt means the victim has escaped injury, she is going to feel much happier than someone who has not. At this level results matter and would provide a justification for granting a lighter sentence. I would qualify this in the case of irreparable physical harm. In cases where the harm would have been irreparable if it had transpired (as would be the case with attempted murder, because the completed crime would have resulted in the irreversible harm of death for the victim) the inciter/encourager/assister's wrongdoing should not be graded much differently than the perpetrator's. Unlike attempted theft and assault, attempting irreversible harm of a grave kind (such as murder) is worthy of almost as much punishment as the

39. Joel Feinberg, Problems at the Roots of Law 77 et seq. (2003).

40. As J. R. Lucas notes: "It makes a great difference to the victim whether the community takes his wrong seriously, or passes it off as of no consequence. If he sees the man who cared nothing for him go scot-free, he is given to understand that society cares nothing for him either. But if the wrongdoer is made to see the error of his ways, the man to whom the wrong was done sees his rights vindicated, and is assured that society cares for him, even if one of its members does not, and will uphold his rights in face of assault and injury." J. R. Lucas, Responsibility 104 (1993).

41. Once an offender is released he many reoffend, but at least he has been incarcerated proportionately in accordance with the gravity of his past wrongdoing. The utilitarian effect is to send a message to potential wrongdoers that wrongdoing results in proportionate hard treatment from the state.

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completed offense, because the offender is risking irreparable harm doing of the most grave kind.

The degrees of complicity are not only affected by culpability but also by the nature and remoteness of the defendant's harm doing. An accomplice might be substantially involved in the criminality of another: that is, he or she might supply a gun, drive the perpetrator to the victim, assist the perpetrator to dispose of the victim's body, and so on. This type of substantial involvement would not only bring the defendant closer to the end harm, but also make it fair to label his or her acts as more serious. The harmfulness of the criminality assisted or encouraged has some bearing on labelling and sentencing. If you assist a trivial harm, then you should not be criminalized at all; Professor Williams provides the example of someone helping another to get an unroadworthy vehicle out of a muddy ditch.[42] Furthermore, a defendant might encourage or assist nonexistent or potential criminality: that is, the potential perpetrator neither attempts nor does the actual crime that the accomplice aims to assist or encourage.

Proportionality and fair labelling means that a sentence discount should be given when the assistance or encouragement does not in fact assist or encourage a perpetrator to commit some primary crime.[43] Professor Dressler correctly argues that if a secondary party's contribution does in fact assist the principal, then this is reason to grade her contribution as more serious.[44] If a contribution does in fact assist or encourage the principal's wrongdoing, then it adds dimension to the secondary party's wrongdoing. This is similar to the discount that is given for attempts: completed crimes are usually punished more severely because of their greater impact on the actual interests of victims. Thus, the inchoate forms of participation that are caught under the 2007 Act should be punished less. For instance, where the defendant recklessly sells fertilizer and mistakenly believes that it will be used in terrorism, she has not taken any personal (direct) step[45] toward committing or encouraging terrorism, even though she may have

42. See Williams, supra note 1, at 341.

43. Joshua Dressler, Reforming Complicity Law: Trivial Assistance as a Lesser Offence, 5 Ohio St. J. Crim. L. 427, 436 (2007–2008). See also Joshua Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem, 37 Hastings L.J. 91 (1985–1986).

44. Id.

45. See generally Douglas N. Husak, The Nature and Justification of Nonconsummate Offences, 37 Ariz. L. Rev. 151 (1995).

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been extremely reckless in selling the fertilizer; and the fertilizer has not in fact been used for such a purpose. The new offense would allow her to be jailed for a lengthy period, because she mistakenly imagined the fertilizer would be used for terrorism purposes. Providing a sentence discount for such defendants seems appropriate. In practice, such a defendant is not likely be detected by the authorities, but with modern surveillance it cannot be ruled out.

In his early work, Professor Spencer proposed a general facilitation offense to catch facilitation regardless of whether "the ultimate crime was committed or attempted."[46] Professor Spencer[47] argued that the normative foundations of such an offense would be the inchoate harmfulness of attempted assistance, and his proposals, to some extent, are reflected in the new offenses. There is some support for such an approach,[48] but the punishment for this type of offense has to be proportionate with the defendant's dangerousness and his or her level of culpability. We might finally have something akin to a general facilitation offense, but its effectiveness as a tool for serving justice is not likely to be significant unless the Accessories Abetters Act is repealed and some clear tariffs are set to demarcate intentional, extremely reckless, and ordinary reckless offending. Sentences should be calibrated with the defendant's culpability and the harmfulness of his or her actions.

I have not said much about encouragement, but it is worth mentioning briefly that the offense of reckless encouragement found in section 45 is likely to raise a number of conceptual issues.[49] Section 44 of the 2007 Act refers to actual purpose. This means little in practice, as section 44 offense is backed up with section 45. Encouragement in the complicity jurisprudence covers a wide range of acts, including acts that have a negligible influence

46. J. R. Spencer, Trying to Help Another Person Commit a Crime, in Criminal Law: Essays in Honour of J. C. Smith 148–67 (Peter Smith ed., 1987). Spencer argued that his general facilitation offense "would only be broader than the existing liability of accessories because there would be no need for any further behaviour by somebody else over whom the helper, once he has helped, has no further control." Id. at 160.

47. Id.

48. See Larry Alexander et al., Crime and Culpability: A Theory of Criminal Law 197–224 (2009).

49. I have dealt with this issue at length elsewhere and will not provide a deep analysis here: Dennis J. Baker, Collective Criminalization and the Constitutional Right to Endanger Others, 28(2) Crim. Just. Ethics 168 (2009). See also Beatty v. Gillbanks (1882) 9 Q.B.D. 308. However, section 50 of the 2007 Act could provide a defense in such cases.

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on the principal. For instance, a secondary party has been held equally responsible for attending a principal's illegal performance and applauding, as well as equally liable in cases where he or she uttered words of encouragement at the crime scene.[50] Similarly, it appears uttering "Oh goody" to a perpetrator after being told by the perpetrator that he had a preexisting plan to kill the defendant's wife would be sufficient to constitute sufficient encouragement.[51]

Incitement offenses in most jurisdictions require that the defendant have a specific intention to incite the end harm.[52] And for good reason, too. As Professor Glanville Williams[53] points out, it is possible for a secondary party to give a terrorist a reason for committing terrorism without intending to encourage/influence the terrorist's choice. Terrorists are motivated, inter alia, by the media attention that terrorism attracts for their cause. Does this mean that every television station that chooses to cover terrorist attacks also encourage terrorists at large to commit terrorism? Under section 45 of the 2007 Act, it might be argued that if a television station publicizes a particular act of terrorism, it should be held liable for recklessly inciting further acts of terrorism. Likewise, if X and his fellow Salvation Army members "believe" that Y and her fellow Skeleton Army members "will" attack them if they hold a meeting at a particular town,[54] might they be held criminally responsible for encouraging the Skeleton Army to engage in public disorder?[55]

50. Wilcox v. Jeffery [1951] 1 All E.R. 464; R. v. Coney (1882) 8 Q.B.D. 534. Cf. R. v. Clarkson (1971) 55 Cr. App. R. 445, where it was held that being present at the crime scene in and of itself would not be enough to constitute encouragement.

51. R. v. Giannetto (1997) 1 Cr. App. R. 1.

52. In most U.S. jurisdictions specific intention is required for solicitation offenses; furthermore, in most U.S. states solicitation is graded and punished as less serious than the substantive offense. See Wayne R. LaFave, Substantive Criminal Law 188 et seq. (Vol. 2, 2003). Similarly, in some Australian states, the punishment for incitement is considerably less than it is for the actual offense incited. See sections 554 and 555A(2) of the Criminal Code of Western Australia.

53. Glanville Williams, Complicity, Purpose and the Draft Code: Part 1, Crim. L. Rev. 4, 10–12 (1990).

54. This scenario is based on the facts of Beatty v. Gillbanks (1882) 9 Q.D.B. 308, where the court held that the unlawful must yield to the lawful. The Salvation Army members were exercizing their lawful rights.

55. See for example, sections 4A, 5, 6 of the Public Disorder Act 1986.

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Section 50 of the 2007 Act provides a "defence of acting reasonably," which would allow the media outlet to take a reasonable risk to exercise its lawful right to freedom of expression.[56] The television station could argue that general media coverage of terrorism does not involve a conscious disregard of a substantial and unjustifiable risk that specific terrorists somewhere one day might commit further acts of terrorism. This can be distinguished from situations where a fanatic encourages particular followers from the world of followers at large to commit acts of terrorism. The link between its activities and the choices of terrorists at large is too tenuous. The Salvation Army would be caught by section 45, as it "believes" that its actions "will" encourage public disorder by the opposing army, and it in fact did. But it too could raise the section 50 defense, as it is not taking an unjustifiable risk. Notwithstanding this, the preferred solution would be to limit encouragement to cases where the inciter/encourager intentionally encourages a principal to commit a crime with the specific intent that the principal consummate the encouraged crime.

CONCLUSION

I have argued that the core criteria for grading complicit wrongdoing are culpability and harm doing. I have put a particular emphasis on culpability, as participatory wrongdoing involves remote harm doing. I have argued that if a person is merely subjectively reckless, he or she could not be said to have the same responsibility link with the perpetrator's wrongdoing as the person who intended to assist/encourage the perpetrator's wrongdoing. The middle ground covers those who do not intend the end harm (the murder, for example) but are extremely reckless in assisting or encouraging the perpetrator to do some primary offense. Furthermore, I have argued that the "belief that D will" standard expounded in sections 45–46 of the 2007 Act only covers cases involving extreme subjective recklessness. A "belief" that the assistance/encouragement "will" in fact assist or encourage the defendant's primary criminality means that the defendant does not have to believe it is virtually certain that the principal

56. Reckless speech should be protected, but extremely reckless speech should not be protected. See Kent Greenawalt, Speech, Crime, and the Uses of Language (1992).

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will commit the primary offense, but something more than believing it is a real possibility is required. Believing there is a real possibility that the principal might use the assistance (or be influenced by the encouragement) to commit some primary wrong would not be sufficient to justify punishing the assister equally with the perpetrator or potential perpetrator. It is fair to punish the perpetrator and the secondary party equally where the secondary party shares the perpetrator's intent to bring about the primary criminal wrongdoing.

It is also necessary to grade the secondary party's wrongdoing as less serious where she was only moderately reckless in assisting the primary harm (i.e., when she merely believed that there was a possibility that the gun she was selling was going to be misused). However, if the assister/encourager is extremely reckless, then equal punishment would be justifiable. The core problem with offenses in the 2007 Act is that they aim to deal with a wide range of criminal wrongs, but the legislation does not set clear sentence tariffs, which are required to ensure that the many degrees of wrongdoing that might be caught by this legislation are punished proportionately. As the legislation stands, fairness and proportionality is at the discretion of the prosecutor and sentencing judge. This is entirely unsatisfactory. Furthermore, citizens are entitled to proper notice about the nature and seriousness of the offending of which they might be convicted. The prosecution will have its cake and get to eat it, too. It will be able to charge under the Accessories Abettors Act 1861 when the principal offense has been consummated or attempted and under the 2007 Act when it has not. But what is certain is that the prosecution will not use its discretion to charge under the 2007 Act when an offender has assisted or encouraged a principal, but is not deserving (i.e., is merely subjectively reckless in assisting) of being punished as a perpetrator under the Accessories Abetters Act 1861.

I have tried to deal with a number of grading and proportionality problems concerning complicity liability and inchoate liability under the new provisions found in the 2007 Act. As far as grading complicity is concerned, I have argued that the appropriate form of criminalization would be to enact a further offense to deal with participants who only manifest ordinary subjective recklessness. This approach also deals with the problem that arises when a lawful supplier of routine goods or services foresees a real possibility that a particular customer is likely to use such goods and

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services to engage in criminality. In trivial cases, proportionality would rule out criminalization altogether. Reckless contributions to trivial crimes such as assisting a prostitute by dry cleaning a dress that she intends to use to attract curb crawlers[57] should not be criminalized, because criminalizing the perpetrator per se is sufficient to deter such conduct.

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57. For this and further examples, see Rollin M. Perkins and Ronald N. Boyce, Criminal Law 746–47 (1982).