

Doctrine of Common Purpose as a Ground of Criminal Liability under the Criminal Laws of Jordan and Australia: A Comparative Study

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Abstract

This Article is a comparative study of the doctrine of common purpose as a ground of criminal liability for the commission of an additional offence under the criminal laws of Jordan and Australia. Despite its various problematic aspects, there is no explicit regulation on this area of criminal complicity in the Jordanian Penal Code 1960 No 16 JPC. Whereas, in NSW although this doctrine is considered in many case laws, yet the approach adopted by the courts in setting its ambit is inconsistent and obscure. This Article considers the substantive law on this aspect of criminal complicity in both jurisdictions, and explores how such criminal liability can be understood in terms of the notion of individual autonomy. To this end, the Article is divided into three sections. In section 1, it addresses the concept and components of individual autonomy, while in Sections 2 and 3 it uses this notion to analyze the common purpose doctrine as a ground of criminal liability in NSW and Jordan. The comparative analysis conducted in this paper shows that the criminal law in NSW holds liable offenders who embark upon a primary criminal venture contemplating as a possible outcome the commission of another incidental offence by the co-offender during the course of carrying out that primary criminal venture. Various different possibilities as to the type of such contemplation are considered in this regard. Comparatively, it is demonstrated that there is no explicit legal provision in the JPC concerning this area of criminal complicity towards which specific suggestions for possible law reform are provided.

Keywords: Common purpose; Criminal liability; Jordan; Australia; Additional (Incidental) Offence

1 Introduction

In situations involving group-based criminality, under the criminal laws of both Jordan and New South Wales (NSW) Australia, a person incurs criminal liability either pursuant to the doctrine of straightforward joint criminal enterprise (acting in concert), or on the basis of accessory liability when intentionally renders help and assistance to the commission of an offence by another. Beyond these situations, offenders who engage in a primary criminal venture to commit an offence (the foundational offence) might be held liable for the commission of any incidental or additional offence committed by other participants in the course of carrying out their primary criminal venture. The set of rules usually used to deal with this form of liability is known as the doctrine of common purpose. Despite its many problematic aspects, there is not explicit regulation of this area of criminal complicity under the Jordanian Penal Code 1960 No 16 (JPC). Comparatively, the doctrine of common purpose has been the subject of many case laws in NSW, yet the approach adopted by the courts in setting its ambit is not devoid of obscurity and inconsistency. Attempting to address the substantive rules governing this doctrine raises various questions. Among others, these questions involve: Must the incidental offence be in the joint contemplation of the parties or will individual contemplation suffice? Must the incidental offence be within, or can it be outside, the scope of common purpose?

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Is it possible for the doctrine of common purpose to apply to participation in a venture not involving the commission of an offence? What is the mental requirement of the doctrine of common purpose? Given this focus, the purpose of this paper is to provide a comparative study of the doctrine of common purpose as a ground of criminal liability for the commission of an additional or incidental offence which is committed in the course of carrying out a primary criminal venture by a group of individuals under the laws of NSW (a common law jurisdiction) and Jordan (a civil law jurisdiction). Central to the purpose of this paper is to explore the extent to which such liability can be explained in terms of the notion of individual autonomy which has been integral to western ethical, political, and legal thinking since the seventeenth century. In so doing, the paper maps out some of the key developments of this tradition, by drawing particularly upon the work of the contemporary analytical philosopher John Searle,² and Mappes and DeGrazia,³ to explain the nature and operation of individual autonomy and autonomous action in section 1, while sections 2 and 3 use this notion as a basis to critically analyze some difficult areas of criminal law relating to the doctrine of common purpose in both jurisdictions. This involves analyzing and discussing the way in which this doctrine is dealt with in both jurisdictions, identifying some of the problems associated with its application, and offering some possible solutions. Central to the purpose of this comparative study is to provide insights into how both jurisdictions can inform each other with respect to any potential law reform in relation to this contentious issue. In particular, it is expected that the comparative study will contribute to informing changes to the JPC. To achieve this purpose, the paper is divided into three sections. Section 1 considers the concept and components of the principle of individual autonomy. Section 2 examines the doctrine of common purpose as a ground for the extension of criminal liability for the commission of an additional offence under the criminal law of NSW, and explains the way according to which such liability can be understood in terms of the principle of individual autonomy. Section 3 explores the same issue under the criminal law of Jordan. The paper concludes by comparing and contrasting the respective position in both jurisdictions to provide insight into how the two systems can inform each other on this important and complex area of the law of complicity.

2 The Concept and Components of Individual Autonomy

2.1. The Concept of Individual Autonomy

One of the fundamental concepts involved in the justification of criminalization is the principle of individual autonomy, and as Ashworth points out this principle has two elements: factual and normative.⁴ The factual element of the autonomy principle perceives individuals as having the capacity and sufficient free will to make meaningful choices. An autonomous person is one who has the ability to choose, formulate and carry out his or her plans along with his or her ability to govern personal conduct by rules and values.⁵ In principle, commentators recognize that criminal law perceives individuals as having freedom to make choices⁶ although this might be displaced in certain circumstances by factors such as duress or necessity. In other words, with the acknowledgment of the role of influences and circumstances, criminal law regards individuals as autonomous and rational agents who have conceptions of what they are doing, generally considered as not compelled in their decisions and actions.⁷ In this regard Barbara Hudson states that: The notion of free will that is assumed in ideas of culpability... is a much stronger notion than that usually experienced by the poor and powerless.

² J.R. Searle, *Intentionality* (Cambridge University Press, 1983); J.R. Searle, *Mind, Language and Society* (London: Weidendfeld & Nicolson, 1999); J.R. Searle, *Rationality in Action* (Massachusetts Institute of Technology, 2001).

³ T. A. Mappes & D. DeGrazia, *Biomedical Ethics* (New York: McGraw-Hill, Inc, 1996).

⁴ A. Ashworth, *Principles of Criminal Law*, 3rd ed (New York: Oxford University Press, 1999),27.

⁵ R. S. Downie & K.C. Calman, *Healthy Respect: Ethics in Health Care*, 2nd ed (New York: Oxford University Press, 1994),52.

⁶ D. Hodgson, 'Guilty Mind or Guilty Brain? Criminal Responsibility in the Age of Neuroscience', *The Australian Law Journal* (74) (2000): 661-680 at 655.

⁷ J. Jacobs, *Choosing Character: Responsibility for Virtue and Vice*, (Ithaca: Cornell University Press, 2001), 10-11; E.M. Coles & D. Jang, 'A Psychological Perspective on the Legal Concepts of Volition and Intent', *Journal of Law and Medicine* 4 (1996): 60-71 at 64.

That individuals have choices is a basic legal assumption: that circumstances constrain choices is not.⁸ (p302). The second element of the principle of individual autonomy is the normative one. That is, individuals should be respected and treated as agents capable of choosing their actions; and without allowing such independence of actions it would hardly be possible to regard individuals as moral persons.⁹ The respect of an individual as an autonomous being involves taking into account that he or she is self-determining and self-governing along with his or her capability to act autonomously.¹⁰ Ashworth points out that in liberal theory, the principle of autonomy goes much further than this¹¹. It postulates that individuals should be left to decide for themselves in every aspect of their lives. This is well demonstrated in the statement of the liberal theorist Joel Feinberg:¹² The most basic autonomy-right is the right to decide how one is to live one's life, in particular how to make the critical life-decision -what course of study to take, what skills and virtues to cultivate, what career to enter, whom or whether to marry, which church if any to join, whether to have children, and so on. Thus, the principle of individual autonomy assigns great importance to the freedom and liberty of individuals while preventing harm being caused by others. That is, individuals should be protected from the interference of criminal law through criminalization and the imposition of criminal liability unless they can be shown to have chosen the actions for which they might be held criminally liable, and that these affect others.

2.2 Components of Individual Autonomy

Three components are considered in the following analysis: Consciousness, intentionality in the narrow sense, and free will.

2.2. 1. Consciousness

2.2.1.1 The Nature of Consciousness

The notion of consciousness plays a central role in the model of criminal culpability. Yet the nature of consciousness has only recently become a subject for serious philosophical and psychological investigation, and there are a number of major theoretical conflicts between the investigators. Searle maintains that consciousness is treated as a metaphysically distinct, non-physical phenomenon by the dualists,¹³ while materialists¹⁴ deny its existence as real and irreducible phenomenon and maintain that there is no such thing as consciousness over and above 'material' and 'physical' processes described in third-person terms. As Searle asserts, materialism comes in many different varieties.¹⁵ This includes 'physicalism' which describes mental states as simply brain states and 'strong artificial intelligence', with minds conceived as computer programs implemented in the brain. Furthermore, the so-called 'eliminative materialists' refer to our everyday vocabulary of 'mental states' (including beliefs, desires, perceptions etc) as 'folk psychology'. They maintain that folk psychology as theory is now refuted and in need of replacement by a neuroscience of brain states and operations. Searle points out that others have argued that the essential subjectivity of consciousness prevents us from producing a scientific account of consciousness, placing it beyond the reach of scientific investigation'.¹⁶ Science is by definition objective, consciousness is by definition subjective, thus there can be no science of consciousness. Searle himself argues that dualism in any form makes the status and existence of consciousness utterly mysterious.¹⁷ Dualists cannot explain how consciousness relates to the material world, having postulated a separate mental realm. For instance, how are we to think of any sort of causal interaction between consciousness and the physical world? Furthermore, dualism is particularly problematic insofar as it implies gaps in the physical sequence of brain states.

⁸ B. A. Hudson, 'Punishing the poor: a critique of the dominance of legal reasoning in penal policy and practice', in *Penal Theory and Practice: Tradition and Innovation in Criminal Justice*. A. Duff & S. Marshall & R.E. Bobash & R. P. Bobash, eds. (London: Manchester University Press in Association with the Fulbright Commission, 1994) 292-304.

⁹ D. N. MacCormick, *Legal Right and Social Democracy* (New York: Oxford University, 1982), 22-4.

¹⁰ Downie & Calman, *supra* note 4, at 54.

¹¹ Ashworth, *supra* note 3, at 29.

¹² See J. Feinberg, *Harm to Self* (New York: Oxford University Press, 1986), 54.

¹³ Searle 1999, *supra* note 1, at 68. Dualists say that mental states and physical states must be states of two quite distinct kinds of things, minds and bodies: R. Norman, *Humanism* (London: Routledge, 2004), 66.

¹⁴ Materialism is defined as connoting the view that human beings are just physical system: *ibid*, at 58.

¹⁵ Searle 1999, *supra* note 1, at 47.

¹⁶ Searle 1999, *supra*, note 1, at 43-44.

¹⁷ *Ibid.*, p47.

That is, the processes in the brain must stop when they are transformed into mental processes of experiencing hunger and deciding to eat, and then start again when the mental events produce more brain processes and muscle movements. Norman argues that this cannot be valid, claiming there is every reason to suppose that the sequence of physical processes is continuous and uninterrupted, with each physical event causing the next, from stomach contractions to brain processes to movements of the muscles and limbs.¹⁸ He further acknowledges that we may not be able to describe the complete sequence in detail, but the current state of scientific knowledge in physiology and neuro-physiology can identify the kinds of physical processes taking place at each stage, thus asserting the absence of gaps in the sequence. At the same time, eliminative materialism is equally inadequate. According to Searle 'it ends up denying the existence of consciousness and thus denying the existence of the phenomenon that gives rise to the question in the first place'.¹⁹ Along these lines, Norman points out that an obvious objection to eliminative materialism is that, in abandoning folk psychology, eliminativists would be 'depriving themselves of the very language which they need in order to state and defend their theory'.²⁰ They would no longer be able to talk of beliefs, claims and assertions, or reasons and the evidence of experience'.

While many philosophers today still adhere to some form of dualism, most practicing philosophers endorse some form of materialism.²¹ In this sense, they do not believe that there is such a thing as consciousness 'over and above' the physical features of the physical world. But as Searle points out, this sort of adherence is problematic in the sense that it denies any possible objective knowledge about consciousness. Searle himself argues that consciousness is both a unique phenomenon not reducible to any physical process describable exclusively in the third person terms, and at the same time an ordinary material-biological phenomenon like digestion or photosynthesis, amenable to scientific investigation and explanation. However, he states, the fact that conscious states have an essentially subjective mode of existence, as experiences of a human or animal, does not preclude objective knowledge about such states by way of description and explanation 'true independently of the feeling or attitudes of individuals'.²² In his attempt to overcome the limitations of both materialists and dualists, Searle identifies consciousness in the first instance as Those states of sentience or awareness that typically begin when we wake up in the morning from a dreamless sleep and continue throughout the day till we fall asleep again. The essential feature of consciousness in all forms is its inner, qualitative and subjective nature.²³ At the same time, Searle argues that consciousness consists of higher level processes realized in the structure of the brain and caused by lower level neuronal brain processes 'in the same way as digestion is a higher level feature of the stomach or liquidity a higher level feature of the system of molecules that constitutes our blood'.²⁴

According to Searle conscious states can affect the body in various ways and bodily changes can affect consciousness.²⁵ For example, a lack of water in the system leads to certain actions in our kidney, which in turn secrete a substance into the blood that affects the brain in such a way as to produce a conscious desire to drink. The objects we experience cause our experience via the relevant bodily sensory systems. On the other hand, when we consciously intend to move our bodies, this intention causes the relevant bodily movement. As noted earlier, the physical causal sequence of events is continuous and unbroken. So too is the flow of conscious awareness. However, as Norman points out, 'the mental sequence of sensations and desires and decisions and the physical sequence of neural events are not two separate and independent sequences'.²⁶ According to Norman these sequences are correlated, so that different mental acts and experiences will involve correspondingly different brain states. He further asserts that talk of mental states and corresponding physical states are, in some sense, different ways of describing the same set of phenomena.

¹⁸ Norman, *supra* note 12, 68.

¹⁹ Searle 1999, *supra* note 1, at 47.

²⁰ Norman, *supra* note 12 at 64.

²¹ Searle 1999, *supra* note 1, at 46.

²² *Ibid*, p44.

²³ *Ibid*, 40-41.

²⁴ *Ibid*, 52.

²⁵ *Ibid*, 104.

²⁶ Norman, *supra* note 12 at 69.

2.2.1. 2. The Structure of Consciousness

Searle proceeds to identify what he refers to as the 'fundamental structural features of consciousness'.²⁷ These include ontological subjectivity: all conscious states exist as experienced by an agent. It is also crucial to understanding consciousness to perceive it as coming to us in unified forms. The ability of the agent to bind together all of the diverse stimuli that come into his or her body by way of the sensory nerve endings and to unite them into a unified, coherent perceptual experience is a remarkable capacity of the brain. The unity of consciousness comes in two forms. First, all conscious states are united at any given instant into a single, unified conscious field- vertical unity. And the preservation of the unity of the agent's experience requires at least a minimal short-term memory. An agent could not have the consciousness of a coherent thought unless both a beginning and an ending of the thought were part of a single, unified field of consciousness united by memory. In short, without memory, there is no organized consciousness-horizontal unity. The feature of consciousness considered most essential to the survival of an agent in the world is that consciousness gives the agent access to the world other than his or her own conscious states. The two modes in which consciousness does this are through the cognitive mode, where the agent represents how things are, and the volitive or conative mode, representing how he or she wants them to be. In this respect, consciousness is essentially tied to intentionality.

As Searle explains, intentionality in this first and broad form 'is simply that feature of mental states by which they are directed at or about objects and states of affairs other than themselves'.²⁸ As an example, Searle states that just as an arrow can be fired at a target and miss, or fired even in the absence of a target so too can an intentional state be directed at an object and be misdirected, or fail altogether because no object exists. Intentional states in this sense include beliefs, desires, hopes, fears, imaginings, perceptions and so on. They also include intentions in the narrow sense of 'intending to perform some action in the future'. Although there are many unconscious intentional states and many conscious states which are not intentional, an essential connection exists between consciousness and intentionality. In this regard, the attribution of a mental state to an agent is either the attribution of a conscious state or an attribution of a state that is the sort of thing that could be conscious. For example, I can say that A believes that B is the president of X country even if A is asleep. What is attributed to A here is not a conscious belief but rather a brain capacity that enables A to have a conscious belief that B is the president of X. While there may be many unconscious states, an unconscious state is mental only in virtue of its capacity, in principle, to produce a conscious mental state.²⁹ An important feature of consciousness is that all conscious states come to the agent in one mood or another. For example, we are always in some mood even if it does not have a name like elation or depression. This mood is what one might refer to as a certain flavour of the experience. Any conscious state a person may have always comes with some sort of coloration, and this becomes clear during a dramatic shift. If a person suddenly receives some bad news causing a state of depression, or receives some good news sending him or her into a state of elation, then he or she will become aware of the shift in his or her mood.³⁰

Another feature of conscious states is that in their non-pathological forms they are always structured. Namely, an agent structures his or her conscious experiences into coherent wholes in one aspect, and in the other, he or she has his or her experiences of any intentional object as a figure against the background. This is obvious in the case of vision. For example, the agent sees a book against the background of a desk, and can see the desk against the background of the room. Consciousness comes in various degrees of attention. In any conscious experience, it is necessary to distinguish the center from the periphery of our attention within the field of consciousness, and a person is typically able to shift his or her attention at will. For example, a person can pay attention to a computer screen and ignore the pressure of his or her body against the chair. This is not to say that he or she is unconscious of the pressure, but it is just that the pressure is on the periphery of his or her consciousness. Peripheral consciousness is not the same as unconsciousness, which explains why the person can shift his or her attention away from the computer to the pressure of his or her body on the chair. Conscious states are always pleasurable or unpleasurable to some degree. For any conscious experience, there is always a question: did you enjoy it? Was it fun? Were you happy, unhappy, and pleased? Although conscious experiences range in differing degrees of pleasantness and unpleasantness, the same conscious experience can of course contain both pleasant and unpleasant aspects.

²⁷ Searle 1999, *supra* note 1, at73-83.

²⁸ *Ibid*, 85.

²⁹ *Ibid*, 76.

³⁰ *Ibid*,77.

Explaining the difficulties involved in describing consciousness and how it fits into the world, Searle points out that: Any attempt to describe consciousness, any attempt to show how consciousness fits into the world at large, always seems to me inadequate. What we are leaving out is that consciousness is not just an important feature of reality. There is a sense in which it is *the* most important feature of reality because all other things have value, importance, merits, or worth only in relation to consciousness. If we value life, justice, beauty, survival, reproduction, it is only as conscious beings that we value them. In public discussions, I am frequently challenged to say why I think consciousness is important; any answer one can give is always pathetically inadequate because everything that is important is important in relation to consciousness. As far as coping with the world is concerned, the important feature of consciousness is that it is essentially connected to intentionality.³¹

2.2.2. Intentionality in the Narrow Sense

Searle states that intention, in the narrow sense, refers to a mental state that is both a reason for action and a cause of action. We intend to achieve X, we believe that we can achieve X by performing action Y. This desire and this belief together provide at least part of the cause of our deciding and hence intending to perform an action. And this intention becomes at least part of the cause of our performing action Y, along with actual access to relevant material means. Thus, the paradigm case involves what Searle calls 'prior intention' where the agent has the intention to perform the action prior to the performance of the action itself, where, for example, he 'knows what he is going to do because he already has an intention to do that thing'.³² However, it also involves the intentional action itself, which includes an 'intention-in-action' as cause of a particular bodily movement. The prior intention causes the action which itself involves the intention-in-action causing a particular bodily movement. Often the prior intention will be of quite high order such as getting to work, and requires a complex sequence of specific subsidiary actions for its achievement such as opening the car's door. In fact, intentions come in nested hierarchies, with some higher order 'plans' possibly taking years to unfold, through innumerable more specific sub-plans and intentional actions. At the other end of the scale, there is often no prior intention at all. Searle states that 'many of the actions one performs, one performs quite spontaneously, without forming, consciously or unconsciously, any prior intention to do those things'.³³ Yet even spontaneous actions still involve the causation of bodily movement by intention-in-action.

Prior intentions can be at least in part preconscious in the sense of involving abiding beliefs and desires accessible to conscious introspection and deliberation, while not actually accessed. They also can be unconscious in the form of repressed beliefs and desires of the kind investigated by psychoanalysis. We might form, for example, a desire to hurt our boss, but this desire might then be subject to repression or intentional forgetting and might later emerge through internal mental transmutation of displacement in the intention-in-action of hitting our child. In this case, we might well rationalize such an action by reference to a supposed prior intention of recognizing the need to discipline the child for their own good. Obviously, this would not be the real prior intention. So just because people do not always deliberate prior to engaging in conscious action does not mean that such action is not intentional. Prior intention can be non-conscious i.e. pre-conscious or even unconscious and just because the intention is not immediately present to consciousness as a representation does not mean that it is non-mental or mechanistic. Intentional bodily movement can still be seen as caused by intention-in-action, whether or not such intention-in-action is caused by prior intention. It is true that unconscious intentions, like conscious intentions, must be both produced by and released in the electrochemical operation of the brain and the operations producing all mental phenomena presumably commence prior to the production of the phenomena in question. It is true that in some cases 'moral responsibility' seems to be as much concerned with prediction of our likely or possible spontaneous response as with decision alone. We choose to avoid situations in which we know there is a risk that we will respond in some undesirable fashion. Here, we treat ourselves as an object in the world rather than a subject, where memories of our past behaviour act as material for inductive generalization and causal explanation. Nevertheless, we are still choosing an action in the light of such understanding, and this is not so different from action directed by belief about the likely behaviours and responses of other subjects and objects in our environment. We now see that the phrase 'resulting from conscious intention' is crucially ambiguous.

³¹ Ibid, 83.

³² Searle 1983, supra note 1, at 84.

³³ Ibid.

It could mean action which is intended and conscious in Searle's sense of an intention-in-action as the cause of bodily movement. It could refer to the existence of a conscious or non-conscious prior intention as the cause of intention-in-action. Or it could refer to the intervention of conscious deliberation between reason and decision or between decision as prior intention and action or intention-in-action. For criminal legal purposes, it is possible to interpret the expression 'action resulting from conscious intention' as conscious action resulting from intention. This is because the action which is not conscious is not an action (rather a bodily movement), and intentionality is crucially connected to consciousness as it operates to direct individual behaviours.

2.2.3. Free Will

Human behaviour, where rational, functions on the basis of reasons which explain the behaviour only if the relation between reason and behaviour is logical and causal. In other words, intentional causation explains human behaviours. In explaining the relation between intention and action, Searle states that prior intention causes intention-in-action which causes the bodily movement.³⁴ But the intentionalistic explanation of behaviour does not imply that the action had to occur. When a person explains his or her own behaviour by stating the beliefs and desire that motivated their actions, he or she does not normally imply that they could not have done otherwise. This is because there are some volitional gaps³⁵ between the stages of deliberation up to the completion of the action. The name usually given to these gaps is 'freedom of the will'. First, a gap exists between deliberation and the prior intention that is the result of such deliberation. When a person reasons from his or her desire or belief as to what course of action should be taken, there is a gap between the causes of his or her decision in the form of beliefs and desire and the actual decision. This gap provides a space not just for adjudicating between conflicting reasons for action, but for re-thinking the nature of our obligations and commitments in the light of new information and experience. Such re-thinking need not just be a matter of internal thought process; it can also involve external discussion and debate with others. Second, there is a gap between the prior intention and the intention-in-action. That is, the gap between the decision and the performance of the action.

Thirdly, in the course of the performance of the action, gaps may exist between the original initiation of the action and its completion. Just as the gap between desires and decision allows for the possibility of moral/legal decision and action, so does the gap between decision and action (and gaps within ongoing sequences of actions) allow for further reconsideration and changes of mind and action. Gaps do not always exist, as individuals do not always form intentions to perform actions prior to the actual performance of the action themselves. Often, an individual merely responds to external or internal stimuli of some kind without deciding before hand that he or she would respond in this way or knowing that he or she was going to do so. But, as Searle argues, it is important to recognize that this does not render our actions unintentional.³⁶ For example, even in the case of a quite spontaneous response of hitting someone who has hit you, you would, in many cases, say that you still hit that person intentionally and the action was done with the intention of hitting. Here, the intention and action are inseparable, but the intention-in-action as Searle calls it can still be distinguished from the bodily movement which it causes. Furthermore, it is also possible that the action in question can be traced back to some earlier decision-situation involving a choice or decision to put oneself in a situation or type of situation or not to avoid a situation in which such a spontaneous action was possible or likely. More broadly, in some sense, individual actions result from deep structures of thoughts and personality which themselves, to some extent, are products of conscious decision-making. Individuals are sometimes in a position to choose a particular 'pattern of life' through self-commitment to a period of education, training or psychotherapy, through moving into a radically different social environment or failing to make such changes.

2.2.3.1. Autonomy and the Limits of Free Will

So far I have mapped out only the barest of necessary conditions for free decision and action. I now consider some more concrete conditions for, and possible restrictions upon such free action. In the western moral philosophical tradition individuals are deemed to act autonomously when they, and not others, make the decisions that affect their lives and act on the basis of their decisions.

³⁴ Ibid, 79-101.

³⁵ The gap is that feature of conscious decision-making and acting where a person can sense some alternative future decisions and actions as causally open to him or her (Searle 2001, *supra* note 1 at 40-50, 62).

³⁶ Searle 1983, *supra* note 1, 84.

Mappes and DeGrazia distinguish three different ideas or dimensions of autonomy which go along with different sorts and degrees of possible obstacles and restrictions to free conscious actions.³⁷ First is autonomy as liberty of actions, which is close to the traditional criminal legal conception, where an individual is autonomous if his or her action results from his or her conscious intention rather than external coercion or duress. In this sense, autonomy connotes the individual's conscious intention to voluntarily act or refrain from action. Where A sits under a tree not having been forced by anyone to do so, and if A is free to leave at any time, A can be said to be acting autonomously insofar as his or her action is intentional and voluntary. But if A were physically forced to sit under the tree, then A's autonomy would be violated, meaning A could not be deemed to have acted autonomously.³⁸ Second is autonomy as freedom of choice, which refers to the range of choices actually available to an individual in terms of access to material means for the realization of particular goals or desires. Suppose A wants to undergo a vasectomy, and there is only one surgeon who can perform that surgery in A's area of residence. The surgeon refuses to perform the surgery based on the conviction that it is an unwise decision for a young man like A, and A's financial status does not allow him to travel in search of surgery elsewhere. In this example, A's lack of freedom is not due to any coercion; his autonomy is limited since his choices are narrowed.³⁹ As noted earlier, intention is a part of the causation of action but such intention only ever becomes 'operative' in effective causation of action if the actor has effective control of the necessary resources of strength, skill, knowledge, tools, machines, assistance and opportunity.

Third is autonomy as effective deliberation, which refers to internal rather than external resources available for, or restrictions upon, the exercise of individual autonomy. In particular, it refers to the individual's 'capacity' for making rational and informed decisions. In this sense, autonomy is allied with rationality, and an individual is characterized as one who is capable of making rational and unconstrained decisions and acting accordingly. On the one hand, an individual is described as rational when he or she is capable of choosing the best means to some chosen ends and capable of reasoning well on the basis of good evidence to choose the best means to achieve such ends. It also entails a capacity for choosing the appropriate timing to achieve any chosen goals. On the other hand, an individual is described as rational if he or she is capable of choosing appropriate ends, although what counts as appropriate ends is a notorious matter of dispute. As Mappes and DeGrazia point out, These abilities can be limited in many ways. When they are, decisions and actions may be less than fully rational. First, some individuals may not have sufficiently developed the necessary abilities or may even be incapable of sufficiently developing them. Second, even individuals who have the requisite abilities may be unable to *exercise* them on a particular occasion due to various internal factors. For example, emotions such as fear may make the impartial weighing of information impossible...the presence of pain or the use of drug may also affect the exercise of reasoning abilities. It may be best, therefore, to speak of *degrees* of rationality and irrationality since many factors can make decisions and actions less than fully rational without pushing them to the irrational end of the spectrum. Furthermore, autonomy as effective deliberation may be constrained in ways that do not affect the "rationality" of the decision. Lies, deception, and a lack of appropriate information can all limit the effective exercise of the abilities required for rational deliberation.⁴⁰ In sum, an individual is autonomous only to the extent that he or she possesses the abilities necessary for effective deliberation and reasoning free of internal constraints to exercise those abilities (autonomy of effective deliberation), and is neither coerced by others (autonomy of liberty of actions) nor has his or her range of options narrowed by material constraints (autonomy as freedom of choice).

Insofar, brief account of the notion of individual autonomy is provided, and in what follows I explore how such notion forms the ground of criminal liability in relation to the doctrine of common purpose under the criminal laws of both NSW and Jordan. In other words, the following discussion considers how criminal liability in both jurisdictions pursuant to the doctrine of common purpose can be explained in terms of individual autonomy.

³⁷ Mappes & DeGrazia, *supra* note 2, at 25-28.

³⁸ *Ibid*, 25.

³⁹ *Ibid*, 25-26.

⁴⁰ *Ibid*, 27.

3. The Doctrine of Common Purpose under the Criminal Law of New South Wales

At the outset, it is useful to provide a definition of the doctrine of common purpose, and then highlight some of the problematic aspects associated with this area of law. It is commonly accepted by legal commentators that the doctrine of common purpose operates to render individuals who engage in a primary criminal venture to commit an offence (the foundational offence) liable for the commission of any incidental or additional offence committed by other participants in the course of carrying out their primary criminal venture.⁴¹ However, legal commentators differ on whether the doctrine is to be regarded as an extension of the rules relating to joint criminal enterprise (acting in concert) or as an extension of the law of accessorial liability. On one view, Gray refers to the doctrine of common purpose as an extension of the law of accessorial liability when he states: The High Court [in *McAuliffe*]...draws the apparently fine distinction between consequences which are within the scope of the common purpose, and those which are outside the scope of the common purpose and are similarly foreseen...Within this apparently unexceptionable extension to the law of accessorial liability is concealed an important conceptual leap.⁴² Another view is expressed by Brown et al who argue that 'it is more accurate to conceive of the [doctrine of common purpose] as an extension of the special rules relating to joint criminal enterprise'.⁴³ To similar effect, Bronitt and McSherry assert that the doctrine of common purpose is 'a mode of secondary participation that renders individuals who embark on a joint criminal enterprise or plan to commit an offence (the foundational crime) liable for any further crime (the incidental crime) committed by other group members in the course of that joint criminal enterprise or plan'.⁴⁴

As between these two perspectives, the second is the one which conforms with the way this doctrine has been formulated by the Courts. For example, it was held by Hunt CJ in *Tangye* (1997) 92 A Crim R 545 that the prosecution 'needs to rely upon the extended concept of the joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed'⁴⁵ (p556). But, as Gillies points out, 'although the doctrine [of common purpose] has been applied in the context just described (the commission of crime Y by one of the parties, during the commission by them of the expressly agreed upon crime X), the doctrine has never been formulated in terms of confining its application, in directing juries, to this situation'.⁴⁶ For example, in *Johns*,⁴⁷ the majority (Mason, Murphy and Wilson JJ) held that 'the object of the doctrine [of common purpose] is to fix with complicity for the crime committed by the perpetrator those persons who encouraged, aided or assisted him, whether they be accessories or principals'. The application of the doctrine of common purpose (as elaborated below) is not confined to situations involving the commission of foreseen (but not agreed) offences by one or more of the parties acting pursuant to an agreement (straightforward joint criminal enterprise/acting in concert). Rather, it also allows the extension of criminal liability for the commission of such foreseen offences to the accessories who have helped and encouraged the commission of the primary offence. The parties to a primary criminal venture can be both individuals acting pursuant to an agreement and accessories who have rendered help or encouragement to the carrying out of that venture. To illustrate the point, it is useful to consider the following example: suppose that P1 and P2 agreed to commit theft (straightforward joint criminal enterprise/acting in concert). A assisted and encouraged them to commit that offence. Suppose also that, in the course of committing theft, P1 assaulted V. In this example, is it possible to hold P2 and A liable for the commission of the additional offence (assaulting V)? And if the answer is yes, what is the ground for extending criminal liability to both P2 and A for the commission of such offence?

⁴¹ P. Gillies, *The Law of Criminal Complicity* (Sydney: The Law Book Company Limited, 1980), 90; P. Gillies, *Criminal Law*, 4th ed (Sydney: LBC Information Services, 1997), 173; S. Bronitt & B. McSherry, *Principles of Criminal Law* (Sydney: LBC Information Services, 2001), 412; D. Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales*, 3rd ed (Sydney: The Federation Press, 2001), 1357; P. D. Rush & S.M.H. Yeo, *Criminal Law Sourcebook* (Sydney: Butterworths, 2000), 683-684.

⁴² S. Gray, 'I Didn't Know, I Wasn't There: Common Purpose and The Liability of Accessories to Crime', *Criminal Law Journal* (23) (1999): 201-217 at 205.

⁴³ Brown et al, *supra* note 40, at 1364.

⁴⁴ Bronitt & McSherry, *supra* note 40, at 411-412.

⁴⁵ See also *R v Youkhana* (unreported, NSWCCA) 87, 6 April 2004.

⁴⁶ P. Gillies, *Criminal Law*, 4th ed (Sydney: LBC Information Services, 1997), 174.

⁴⁷ (1980) 143 CLR 108 at 125.

As there was no agreement between P1 and P2 to commit crime V, the principles which govern the liability of the parties to a straightforward joint criminal enterprise does not provide the basis for extending criminal liability to P2 for assaulting V by P1. Moreover, the principles which govern accessorial liability do not support the conviction of A as an accessory to commission of that additional offence. This is because A did not provide any intentional assistance or encouragement to the commission of the crime of assaulting V. Therefore, the question arises as to how the attribution of criminal liability, if any, to P2 and A for assaulting V can be made possible, explained and justified. The set of rules which might operate so as to allow the extension of criminal liability to P2 and A for assaulting V by P1 are known as the doctrine of common purpose.⁴⁸ It has been pointed out 'although conceptually distinct, common purpose is regarded as simply another way of participating in crime as an accessory'.⁴⁹ It needs to be emphasized that, pursuant to the doctrine of common purpose, complicity of the participants in the subsequent incidental crimes is based on the participant's earlier criminal association with the principal offender. As Bronitt points out: Common purpose regulates criminal liability for individuals who jointly set out to commit one crime, in the course of which another crime is committed. Participants in the original unlawful enterprise do not become accessories to the subsequent crime by any direct act of assistance or encouragement on their part. Rather, it is their act of involvement in the original foundational offence which is the basis for incrimination in the subsequent incidental crime.⁵⁰ In determining the liability for the additional or incidental offence pursuant to the doctrine of common purpose, the critical question is whether the mental requirement of criminal liability for the commission of the additional or incidental offence differs from the mental requirement of criminal liability for the commission of the primary offence (this point is elaborated below). As argued below, any resolution of what the law should be is assisted by considering the underlying issue of individual autonomy.

3.1. Individual Autonomy as the Basis for Criminal Liability Pursuant to the Doctrine of Common Purpose

In terms of the analysis of individual autonomy as the basis for criminal liability, such liability can be understood in terms of an individual's free decision and action to break the law through the commission of a wrongful and prohibited act. The emphasis upon individuals' free choices as the basis for their liability requires confining the reach of criminal liability to the situation where the conscious individual intentionally involves himself or herself in a criminal venture either alone or with others to commit a crime. In group-based criminality, an individual might either agree with others to commit a particular offence (straightforward joint criminal enterprise) or that individual might intentionally render help and assistance to the commission of a particular offence (accessorial liability). Beyond these situations, it is also arguable that individuals act autonomously when they freely choose to engage in a particular course of conduct in circumstances where they foresee that further criminal consequences may occur. An individual does not always form a prior intention to perform an act. Rather, his or her actions might be seen as a response to external or internal stimuli of some kind, without deciding beforehand that he or she would respond in this way or knowing that he or she was going to do so. For example, an external threat to our life may produce an internal surge of anger leading to someone lashing out at the source of the threat; and a traffic light changing to red produces a response of someone pushing down on the brake. Clearly, these examples suggest that an individual's spontaneous responses are partly a result of particular external factors which might not allow for deliberation, and partly a result of internal factors involving his or her tendency or propensity for particular responses in a given situation. Individuals' responses are determined by their perceptions of situations, and these perceptions are shaped by the individuals' patterns of belief (including, in the above example, their belief about the operation of traffic lights). It is certainly possible that their earlier free choices can be relevant in causing certain spontaneous responses. If someone knows that it is possible that they are going to respond in a particular way in particular sorts of situations, then they might choose either to retain such propensities or work to try to change them. Individuals might even choose to avoid the sort of situations likely to trigger undesirable responses by keeping away from situations likely to 'make them angry'.

⁴⁸ Brown et al, *supra* note 40, at 1357.

⁴⁹ Bronitt & McSherry, *supra* note 40, at 411.

⁵⁰ S. Bronitt, 'Defending Giorgianni- Part One: The Fault Required For Complicity', *Criminal Law Journal* (17) (1993): 242-263 at 262.

Once an individual recognizes the role of such earlier choices in shaping later spontaneous intentional actions, so he or she can see how such earlier choices can also place them in situations which render unintentional responses of one sort or another possible. Here again, individuals might choose to avoid situations possible to produce undesirable or criminal unintended consequences. In cases like these, culpability is as much concerned with, and can be explained by, our prediction of the likelihood of the possible outcomes as with our decisions alone. Individuals can choose to avoid situations where there is a risk of producing a particular result.

They also use their past memories and experiences as materials for inductive generalization and causal explanation of their behaviours. Here, individuals treat themselves as an object in the world rather than a subject. Yet, they still choose an action in light of such understanding. This does not differ fundamentally from actions directed and caused by some prior intention. Along these lines, it is possible to explain and understand the extension of criminal liability pursuant to the doctrine of common purpose for foreseen offences. In keeping with the emphasis upon individual autonomy as the basis for culpability, the common law determines the liability for incidental offences committed in the course of the execution of a primary criminal venture on a subjective basis (according to what the accused has foreseen). In the case of *McAuliffe and McAuliffe*,⁵¹ it was held by Brennan CJ and Deane, Dawson, Toohey and Gummow JJ that: Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose (p114). As the following discussion will indicate, the body of the case law reveals that the extension of criminal liability on the basis of the doctrine of common purpose is contingent on whether the incidental offence was within the scope of the original common purpose and was contemplated by the party other than the principal perpetrator as a possible outcome of the carrying out of the primary criminal venture.⁵² Just as an individual can foresee his or her possible responses, so too can he or she foresee those of others together with whom they collaborate in criminal ventures. However, as the following discussion reveals, the approach adopted by the courts in setting the ambit of the doctrine of common purpose is not always devoid of obscurity and inconsistency. There are several questions raised in the analysis of the case law. Must the incidental offence be in the joint contemplation of the parties or will individual contemplation suffice? Must the incidental offence be within, or can it be outside, the scope of common purpose? Is it possible for the doctrine of common purpose to apply to participation in a venture not involving the commission of an offence? What is the mental requirement of the doctrine of common purpose, and how can this be reconciled with the mens rea for murder? I consider each of these questions in the following discussion.

3.1.1. Joint Contemplation of the Incidental Offence

In *Johns*⁵³ the majority (Mason, Murphy and Wilson JJ) appear to endorse the view that the incidental offence was in the joint contemplation of the parties. In that case, J and W agreed that J would drive W to Kings Cross, where W in the company of X was to rob M, whom W had told J was in possession of a large amount of money and jewellery. J knew that W always carried a pistol. After the robbery W was to return to J's car, deposit the money with him, and make his getaway. J knew that W was a quick-tempered person and capable of becoming quite violent. On the way to Kings Cross, W told J that he would not stand for any nonsense, and that M was 'always armed and would not stand for any mucking around if it came to a showdown'. J delivered W to Kings Cross where W transferred cars. W with X accosted M but found that he was not carrying any money or jewellery.

⁵¹ (1995) 183 CLR 108 per Brennan CJ and Deane, Dawson, Toohey and Gummow JJ.

⁵² See *McAuliffe and McAuliffe* (1995) 183 CLR 108 at 113-118; *Kalinnowski* (1930) 31 SR (NSW) 377 at 380; *Surriddg* (1942) 42 SR (NSW) 278 at 282; *Borg v R* [1972] WAR 194 at 199; *Johns* [1980] 143 CLR 108 at 115-120, 130-131; *McLean* (1981) 5 A Crim R 36; *Fuller* (1982) 6 A Crim R 424; *Hitchens* [1983] 3 NSWLR 318 at 330; *Mills v R* (1986) 68 ALR 455; *R v Rees* (unreported, NSWCCA) 23, 16 February 2001; *R v Murrell* (unreported, NSWSC) 618, 5 July 2000; *R v Gosling and Others* (unreported, NSWSC) 850, 28 September 2001; *R v Cotter* (unreported, NSWCCA) 273, 1 October 2003; *R v Youkhana* (unreported, NSWCCA) 87, 6 April 2004; *R v Pye* (unreported, NSWCCA) 544, 21 December 2000; *R v Bikic* (unreported, NSWCCA) 227, 20 June 2002; *R v Hung Duc Dang* (unreported, NSWCCA) 321, 31 October 2001; *Chan Wing Siu v R* [1985] 1 AC 168 at 175. By 'possibility' is meant a substantial risk, and not a slender of chance that an incidental offence will be committed: *R v Youkhana* (unreported, NSWCCA) 87, 6 April 2004; *Johns* (1980) 143 CLR 108 at 119.

⁵³ (1980) 143 CLR 108.

There was a struggle and W shot M dead. The next day J learned that M was killed. The trial judge directed the jury that they could find J guilty of the murder of M as an accessory before the fact if 'the parties must have had in mind the contingency that for the purposes of carrying out their joint enterprise or attempting to carry it out the firearm might be discharged and kill somebody'. And he further said that the jury are entitled to hold that all parties must be taken to have in mind the possibility of the lethal use of the firearm when they assented to and encouraged the joint enterprise or robbery with arms. J was convicted and appealed to the Court of Criminal Appeal where his appeal was dismissed. J then sought special leave to appeal to the High Court against the dismissal of his appeal. On appeal, J contended that the direction of the trial judge to the jury was erroneous, and he submitted two grounds against his conviction for the death of M on the basis of the doctrine of common purpose. First, J argued that the doctrine of common purpose does not apply to the accessory before the fact as it does to the principal in the second degree. Secondly, J contended that pursuant to the doctrine of common purpose, the participants in the commission of an offence are liable for the probable, as distinct from the possible, consequences of the carrying out of their venture. The majority (Mason, Murphy and Wilson JJ) of the High Court rejected J's submissions.

In relation to the J's first submission, the majority held that the doctrine applies to both types (accessory before the fact and principal in the second degree) by stating that there is nothing in this to suggest that the criterion of complicity and liability should differ as between accessory and principal in the second degree. If they are both parties to the same purpose or design and that purpose or design is the only basis of complicity relied upon against each of them, there is no evident reason why one should be held liable and the other not. In each case liability must depend on the scope of the common purpose. Did it extend to the commission of the act constituting the offence charged? This is the critical question. It would make nonsense to say that the common purpose included the commission of the act in the case of the principal in the second degree but that the same common purpose did not include the commission of the same act in the case of the accessory before the fact... there would...be no logical or legal justification for distinguishing between the complicity and liability of the driver whether he be a principal in the second degree or an accessory before the fact (pp125-126). The majority also rejected the second submission of J, expressing the principles of the doctrine of common purpose in the following terms An accessory before that fact bears, as does a principal in the second degree, a criminal liability for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention - an act contemplated as a possible incident of the originally planned particular venture. Such an act is one which falls within the parties' own purpose and design precisely because it is within their contemplation and is foreseen as a possible incident of the execution of their planned enterprise (pp130-131).⁵⁴ [Emphasis added]. This statement made in *Johns*, suggests that the fault element of the doctrine of common purpose requires 'consensus' between the parties regarding the commission of the additional or alternative offence. As Bronitt points out, it requires the parties to 'jointly contemplate' the commission of the additional or incidental offence.⁵⁵ Another statement which appears to require joint contemplation is found in *McAuliffe and McAuliffe* (elaborated below) where the Court stated: The scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose...criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight and that is so whether the foresight is that of an individual party or is shared by all parties (pp114, 118).

If the fault element is joint contemplation, the doctrine of common purpose overlaps with the fault element of the doctrine of straightforward joint criminal enterprise/acting in concert. It is established that 'an agreement, understanding or arrangement which amounts to an agreement' between the parties is the mental requirement for criminal liability pursuant to the doctrine of straightforward joint criminal enterprise. The requirement of 'consensus or joint contemplation by all parties to a criminal venture' as the mental requirement of the doctrine of common purpose, is, in effect, equivalent to requiring an agreement between those parties. If so, the liability of the parties to that venture should depend upon that 'agreement' rather than 'contemplation' of the commission of the additional offence.

⁵⁴ *Johns*, was applied in *Hitchens* [1983] 3 NSWLR 318 at 330. See also *Miller v The Queen* [1981] 55 ALJR 23.

⁵⁵ Bronitt, *supra* note 49, at 260.

Gray argues that the statement by the majority in *McAuliffe and McAuliffe*, that the accused can be held liable for 'the possible consequences which...were within the contemplation of the parties to the understanding or arrangement', in effect extends the concept of agreement to include the notion of contemplation. As Gray points out It is not quite clear what the notion of contemplation adds to the term agreement in this context. The term agreement includes an express or implied understanding or arrangement, provided it is within the scope of the common purpose. It is difficult to see how something could be contemplated by both parties, and within the scope of the common purpose, and yet not be part of an express or implied understanding or arrangement.⁵⁶ Arguably, the formulation of the fault element of the doctrine of common purpose in terms of 'joint contemplation', along with the interchangeable use of the terms 'common purpose' 'common design' to describe the doctrine of straightforward joint criminal enterprise (acting in concert) and vice versa, have resulted in confusion as to the doctrinal limits of each doctrine. For example in *McAuliffe and McAuliffe*,⁵⁷ the High Court held that: The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms- common purpose, common design, concert, joint criminal enterprise- are used more or less interchangeably to invoke the doctrine which provide a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime... Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances (pp113-114). [Emphasis added]

In *Osland*,⁵⁸ Gummow and Gaudon JJ (in the minority) held that It will shortly be necessary to turn to the principles that hold a person guilty for a crime committed pursuant to an understanding or arrangement with another that, together, they will commit the crime in question, or, as it is sometimes said, they act in concert or pursuant to a common purpose... principle dictates the conclusion that those who form a common purpose to commit a crime together are liable as principals if they are present when the crime, or any other crime within the scope of the common purpose, is committed by one or more of them (pp327, 329). [Emphasis added] The interchangeable usage of the language in this way is a source of confusion which makes it difficult to strike a firm distinction between the two doctrines. As it has been pointed out, acting in concert (straightforward doctrine of joint enterprise) must be distinguished from the doctrine of common purpose.⁵⁹ The former doctrine relates to the imposition of criminal liability where the parties embark on the commission of an offence pursuant to an agreement, whereas, the latter imposes criminal liability for foreseen (but not agreed) offences committed by one or more of the parties to a primary criminal venture. It can be argued that a clear distinction between the two doctrines can be achieved by confining the application of the doctrine of common purpose to situations involving 'individual' rather than 'joint' contemplation of the commission of the additional offence. This is because as pointed out by Gray earlier, if the commission of an offence is jointly contemplated by all parties to a criminal venture, then their joint contemplation would in effect amount to an implicit agreement between them. If so, the doctrine of straightforward joint criminal enterprise/acting in concert would form the basis for their culpability and not the doctrine of common purpose. For example, suppose that P1 and P2 agree to murder V. Both P1 and P2 find V in the company of X, and in the presence of each other (P1 and P2), P1 shoots V. Suppose also that, in the course of carrying out the murder, P1 uses a knife to inflict grievous bodily harm upon X. In this example, P1 and P2 are liable as principals in the first degree for murdering V on the basis of their agreement pursuant to the doctrine of straightforward joint criminal enterprise. The question arises whether P2 is to be held liable for the infliction of grievous bodily harm upon X by P1. The extension of criminal liability to P2 for the commission of crime X, is made possible at common law through the application of the doctrine of common purpose according to which the liability of P2 is contingent upon P2's contemplation of the commission of crime X as a possible outcome of the carrying out of crime V. In *Tangye*,⁶⁰ Hunt CJ criticises the failure to distinguish between circumstances in which it is appropriate to rely on the doctrine of common purpose, and those in which it is appropriate to apply the doctrine of straightforward joint criminal enterprise. Hunt CJ states: The Crown needs to rely upon a straightforward joint enterprise only where... it cannot establish beyond reasonable doubt that the accused was the person who physically committed the offence charged.

⁵⁶ Gray, supra note 41, at 204.

⁵⁷ (1995) 183 CLR 108.

⁵⁸ [1998] 197 CLR 316.

⁵⁹ Bronitt & McSherry, supra note 40, at 413.

⁶⁰ (1997) 92 A Crim R 545.

It needs to rely upon the extended concept of the joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed. This Court has been making that point for years⁶¹. And it is a pity that in many trials no heed is taken of what has been said... common purpose becomes necessary only where there has been an agreement to carry out a particular crime (some text books call it the foundational crime) but some other crime has been committed which had been within the contemplation of the accused as a possible incidence in the execution of their agreed joint criminal enterprise (some texts call it the incidental crime) which said to be within the scope of the common purpose(pp556, 558).⁶²

3.1.2. Individual Contemplation of the Commission of the Incidental Offence

Subsequent restatement of the fault requirement of the doctrine of common purpose has not been restricted to joint contemplation between the parties. In *Chan Wing-Siu v The Queen*⁶³ (which was applied by the New South Wales Court of Criminal Appeal in *Sharah*)⁶⁴ three persons were charged with murdering V and wounding his wife with intent to cause her grievous bodily harm. The prosecution case against them was that the three persons went to V's flat armed with knives intending to rob him. When V's wife answered the door, they rushed in and drew their knives and ordered her to kneel. While one of them guarded her, the other two forced her husband into the kitchen where he was stabbed. As the three persons left the house, V's wife was slashed across the head. V died from his wounds. The three persons admitted that they went to V's house with the purpose of collecting a debt owed by V to one of them. Two of the three persons admitted taking a knife, and knowing that the other had a knife. Whereas, the third person denied having any knives or knowing that his co-adventurers were armed with knives. They alleged that V had attacked them and one of them stated that he stabbed V in self-defence. In relation to the three persons on both charges, the prosecution submitted that a crime of the type charged must have been contemplated as a possible occurrence in the course of their joint venture. The jury was directed that each one of the three people was guilty on both counts if proved to have contemplated that a knife might be used by his co-offender in the course of carrying out their venture. The three persons were convicted on both charges and appealed. On appeal, the appellants submitted that it was not enough for them to be held liable for foresight of death or grievous bodily harm as a possible consequence of their joint enterprise. Rather, they argued it was necessary to be proven that one of those consequences must have been foreseen as a probable consequence. In delivering the judgment, Sir Robin Cook rejected their submission and held that: A person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert. In view of the terms of the direction to the jury here, the Crown does not seek to support the present conviction on that ground. The case must depend rather on a wider principle whereby a secondary party is criminally liable for the acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorization,⁶⁵ which may be express but is more usually implied.

⁶¹ See Stokes and Difford (1990) 51 A Crim R 25 at 35-37; Clough (1992) 28 NSWLR 396 at 400; 64 A Crim R 451 at 455.

⁶² Johns (1980) 143 CLR 108 at 130-131; Mills (1986) 61 ALJR 59; 68 ALR 455 at 455; McAuliffe and McAuliffe ((1995) 183 CLR 108 at 113-116; 233-236; R v Youkhana (unreported, NSWCCA) 87, 6 April 2004.

⁶³ [1985] AC 168. In *Sharah* (1992) 30 NSWLR 292 at 301-303, per Carruthers J (Gleeson CJ and Smart J agreeing), the principles laid down in *Chan Wing-Siu* were applied. See also *Hui Chi-Ming v The Queen* [1992] 1 A.C. 34 at 52-53 per Lord Lowery. In that case, Lord Lowery accepted that in many cases the contemplation of the primary and secondary party is likely to be the same. But he stated that it does not follow that joint contemplation is required in every case before the secondary party can be proved guilty. Applying the principle laid down in *Chan Wing-Siu*, Lord Lowery asserted that foresight of the possible consequence of the carrying out of a joint venture by the secondary party alone is enough to establish his or her liability pursuant to the doctrine of common purpose.

⁶⁴ (1992) 30 NSWLR 292 at 301-303 per Carruthers J (Gleeson CJ and Smart J agreeing).

⁶⁵ The use of the terms 'authorisation' as synonymous terms with 'contemplation' has been criticised on the ground that there is a difference between contemplation of a particular possibility and the authorisation of that possibility: M. Giles, 'Complicity- the Problem of Joint Enterprise', *Criminal Law Journal* (1990): 383-393 at 385; A.P. Simester & G. R. Sullivan, *Criminal Law: Theory and Doctrine* (North America: Hart Publishing, 2000), 214. This is because contemplation incorporates a wider principle of foresight, whereas authorisation implies more strongly a narrower principle of foresight, in that it suggests some communication

It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal liability lies in participating in the venture with that foresight (p175).⁶⁶[Emphasis added] In *Duong v R*,⁶⁷ D and three other persons (Lu, Do and Tran) were convicted of manslaughter of B. B was stabbed during the course of an altercation at his house involving Lu, Do, Tran and another two persons. D was not present at the time of the stabbing, but it was at his invitation that the other persons went to D's house to discuss "talking to" B, whom D believed had stolen his property. One of the persons had a knife and there was no evidence that D or any of the others knew about it. The persons went to B's house and during an altercation B was stabbed. Lu, Do and Tran were convicted as principals in the second degree while D was convicted as an accessory before the fact to B's death. D appealed against his conviction, submitting that he believed the other participants were going to confront the victim non-violently to recover the property. On appeal, the New South Wales Court of Criminal Appeal held that D may have foreseen that violence might be used against B, that such violence would not exceed some minor punches, and quashed D's conviction. The Court held: It is important here to recognise the distinction between unexpected incidental acts of a principal and unexpected consequences of the principal's action. The law has long provided for accessorial liability in relation to unforeseen and unusual consequences, so long as they are caused during the carrying out of the common design. But it has never created liability in respect of acts (and therefore the consequences of those acts) which fall entirely outside the ambit of the common design... [a person] can only be guilty of manslaughter if there is evidence from which the jury can infer that the use of a weapon such as a knife should have been perceived as a possible incident in the carrying out of the common design (pp149-150). [Emphasis added] In *McAuliffe*, the High Court in its exposition of a broad definition of the doctrine of common purpose (as discussed in the following section), extended the fault element of common purpose to cover those situations where there was not necessarily joint contemplation of the incidental offence.

3.1.3. Incidental Offence Within and Outside the Scope of Common Purpose

In *McAuliffe and McAuliffe*,⁶⁸ three youths decided to go to and bash someone at a nearby park. One went with a hammer and another with a stick. Two of them were experienced in kick-boxing. At the park, two of them attacked a man who was standing near the top of a high cliff. They kicked and beat him with the stick. The other youth then side-kicked the man in the chest, causing him to fall from the edge of the cliff. The youths then left, and the next day the body of the man was found in the bottom of the cliff. The prosecution case against the youths was that the common purpose of all of them was to rob or roll someone. And part of that common purpose is that the victim or victims would be attacked by one or more of the group with the intention to inflict grievous bodily harm. Each of the youths contemplated the intentional infliction of grievous bodily harm as a possible incident in carrying out a common purpose to assault someone. The common purpose was carried out and none of the three youths withdrew until the injuries were inflicted upon the victim. At the trial of two of the youths for murder, the trial judge directed the jury in relation to the common purpose in the following terms the prosecution has to establish that: A common intention on the part of the three youths to bash someone, that an act on the part of one of them which caused the death was done with the intention of inflicting grievous bodily harm on the deceased, and that the accused either shared the common intention of inflicting grievous bodily harm or contemplated the infliction of grievous bodily harm by one or other of them was a possible incident in the common criminal enterprise (p108).

on the matter between the parties. However, the conflation between these two terms as used in *Chan Wing-Siu* was subsequently clarified in *Hui Chi- Ming* [1992] 1 AC 34 at 53. In *Hui Chi- Ming*, Lord Lowery commented on the usage of the term 'authorisation' in the context of setting the ambit of what is required to be contemplated by the secondary party so as to establish his or her liability pursuant to the doctrine of common purpose. Lord Lowery stated that the term 'authorisation' explains what is meant by contemplation, but it does not add a new ingredient. His Lordship pointed out that, this is so manifested from Sir Robin's pithy conclusion when he stated that 'the criminal liability lies in participating in the venture with that foresight'. See also, *R v Britten and Eger* (1988) A Crim R 48 at 50 per King CJ who explained the concept of authorisation in the following terms: 'the fundamental notion is that by participating in the enterprise, each participant impliedly authorises all criminal acts which are in his contemplation as being part of the common design or as being a substantial risk associated with its implementation'.

⁶⁶See also *Hui Chi-Ming v The Queen* [1992] 1 AC 34 at 52-53 per Lord Lowery. In that case, Lord Lowery accepted that in many cases the contemplation of the primary and secondary party is likely to be the same. But he stated that it does not follow that joint contemplation is required in every case before the secondary party can be proved guilty. Applying the principle laid down in *Chan Wing-Siu*, Lord Lowery asserts that foresight of the possible consequence of the carrying out of a joint venture by the secondary party alone is enough to establish his or her liability pursuant to the doctrine of common purpose.

⁶⁷ (1992) 61 A Crim R 140.

⁶⁸ (1995) 183 CLR 108.

The accused were convicted. Their appeal against the conviction to the Court of Criminal Appeal of NSW was rejected, and they then appealed to the High Court. The accused contended that the trial judge was erroneous in his direction to the jury, submitting that the realisation, by one of the parties to a common design that the infliction of grievous bodily harm by another is a possible incident of the joint enterprise is not sufficient to render that party liable for a murder committed by another. Rather, it has to be proved that the possibility was within the contemplation of all parties so as to form part of the common purpose. The High Court rejected the submission, affirming that there are two types of common purpose (narrow and wide). The Court (Brennan CJ and Deane, Dawson, Toohey and Gummow JJ) endorsed the narrow formulation of the common purpose (as laid down in *Johns*), holding that: The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design... If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.⁶⁹ Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose... the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose(pp113-114).⁷⁰ [Emphasis added]

After that, their Honors in *McAuliffe and McAuliffe* affirmed that there is a wider principle of liability pursuant to the doctrine of common purpose. They held that: The Court [in *Johns*] did not consider the situation in which the commission of an offence which lay outside the scope of the common purpose was nevertheless contemplated as a possibility in the carrying out of the enterprise by a party who continued to participate in the venture with that knowledge. That situation would occur where, for example, a party knows that another party to a joint criminal enterprise is carrying a weapon which that other party might use to kill or inflict grievous bodily harm in carrying out the enterprise and expressly reject any agreement that the weapon might be used but nevertheless continues with the venture. The question arises whether both parties are liable if the weapon is used to inflict harm in the course of executing the common purpose, that action being one which lay outside the scope of the common purpose or agreement, but within the contemplation of the secondary party... [After reviewing some authorities⁷¹ the court held that] There was no occasion for the Court to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose (pp115, 117). [Emphasis added] The High Court's approach in broadening the scope of common purpose has been criticized by Odgers who appeared in the court for one of the offenders. Odgers argues that 'the judgment of the High Court on the scope of the doctrine of common purpose is a major development in the principles relating to secondary liability for crimes committed by others. Unfortunately, it is also a development which is much to be regretted. Indeed... it is one of the most regressive of the High Court's judgments in the field of substantive criminal law'.⁷² In a similar vein, Gray (1999) criticizes the High Court approach in *McAuliffe and McAuliffe* in extending the doctrine of common purpose to include crimes which fall outside its scope as involving a conceptual leap. Gray states: The High Court thus draws the apparently fine distinction between consequences which are within the scope of the common purpose, and those which are outside the scope of the common purpose and are similarly foreseen. In both cases, however, according to the High Court in *McAuliffe*, the accessory is criminally liable. Within this apparently unexceptionable extension to the law of accessorial liability is concealed an important conceptual leap. This is the leap between accessorial liability based on a purpose or state of mind shared with the principal offender, and one possessed, at the time the aid or encouragement is given, by the accessory alone.⁷³

⁶⁹ R v Lowery and King [No 2] [1972] VR 560 at 560 per Smith J.

⁷⁰ R v Johns [1978] 1 NSWLR 282 at 287-290 per Street CJ. See also Regina v Chai [2000] NSWCCA 320.

⁷¹ Chan Wing-Siu v The Queen [1985] AC 168; R v Hyde [1991] 1 QB 134; Hui Chi-Ming v The Queen [1992] 1 AC 34.

⁷² S. J. Odgers, 'Criminal Cases in the High Court of Australia', Criminal Law Journal (20) (1996): 43-47 at 44.

⁷³ Gray, supra note 41, at 205.

It has been pointed out that following the High Court decision in *McAuliffe and McAuliffe*, the distinction between additional or incidental offences within the common purpose and additional or incidental offences outside the common purpose is effectively made redundant.⁷⁴ Although the court did not formally abandon the distinction, the test for criminal liability of the parties other than the primary offender is the same, that is, contemplation of the possibility that the additional crime may be committed in the course of carrying out the primary criminal venture. But, if the principal offender commits an offence which goes beyond the common purpose, and that offence was not foreseen by the other parties as a possible consequence of the carrying out of the primary venture, then the other parties to that venture will not be liable for the commission of that offence.⁷⁵

3.1.4. Doctrine of Common Purpose and Participation in a Venture not involving the Commission of an Offence

Commentators have raised the issue of whether or not the doctrine of common purpose can apply to participation in a venture not involving the commission of an offence. These discussions arise from the High Court decision of *Miller v The Queen*.⁷⁶ In that case, Worrell (W) killed a number of girls after having had sexual intercourse with them. Miller (M) had assisted W by driving him to find a girl and then drop him in a deserted place where W would have intercourse with her. On seven occasions, W murdered his sexual partner after having intercourse with her. M was acquitted on the charge of murdering the first victim but was convicted on the charges of murdering the other six. M appealed on the ground that the jury should have been directed that he could be held liable only if he had foreseen that, on any one occasion, the death of the victim was more probable than not. M submitted that given the large number of occasions on which W did not harm his sexual partner, on any one occasion, M had foreseen at most the possibility that W would kill his partner, and he argued this was insufficient to hold him liable for that killing. In the judgment refusing special leave to appeal, the High Court rejected that submission stating that after the first murder had occurred, it was open to the jury to conclude that the common purpose of taking a girl for sexual intercourse had broadened into a common purpose involving the possibility of murder. The Full High Court held: If it was within the contemplation of [Miller] and Worrell that the girl the subject of the charge might be murdered, [Miller] would be guilty of murder if she were murdered... The scope of the common purpose of the applicant and Worrell, as it applied to each occasion upon which Worrell murdered a girl, would, on any view, have included the following: the applicant driving the car throughout the enterprise; Worrell finding a suitable girl and inducing her to get into the car; the applicant driving it to a secluded site and then leaving Worrell and the girl together so that they might have sexual intercourse. It was open to the jury to conclude that after the first murder had occurred the scope of the common purpose had altered.

Miller now knew that Worrell not only intended sexual intercourse with the girls but might also murder them, while Worrell knew that when Miller participated in further expeditions he was fully aware of the fatal outcome of earlier expeditions. Because of these additional elements the jury might conclude that the purpose common to them both on these subsequent expeditions had altered. Because of their knowledge of one another's state of mind a new factor would be present in the recurring common purpose of the pair: when Miller would leave Worrell and a girl together, he would no longer be leaving them merely so that they might have sexual intercourse but also so that, if the mood took him, Worrell might, in Miller's absence, murder the girl. The intended role of the girl was no longer merely that of Worrell's partner in intercourse, she had become also a possible murder victim. It was significant that Miller's evidence was that he found Worrell's murderous moods to be wholly unpredictable, sudden in their onset and due to no apparent cause, thus to his knowledge putting each girl in turn at risk of death (p25). As Fisse suggests, it appears from this decision that the common purpose was not to commit a particular crime, but was for 'the object of satisfying PO's sexual appetite in a situation of potential danger to the consenting sexual partner'.⁷⁷ In this sense, recklessness as to the principal offence, in that case murder would suffice. However, liability on the basis of straightforward joint criminal enterprise involves an agreement that the crime will be committed, and liability for accessorial liability requires intentional assistance in the commission of a criminal offence.

⁷⁴ Brown et al, *supra* note 40, at 1364.

⁷⁵ *Sharah v R* (1992) 30 NSWLR 292; *Duong v R* (1992) 61 A Crim R 140; *R v Anderson and Morris* [1966] 2 QB 110; *Markby v R* (1978) 140 CLR 108; *Varley v R* (1976) 12 ALR 347.

⁷⁶ [1980] 55 ALJR 23.

⁷⁷ B. Fisse, *Howard's criminal law*, 5th ed (Sydney: The Law Book Company Limited, 1990), 342.

In contrast, *Miller* implies that a lesser form of culpability (recklessness) is required in a situation where there is no underlying criminal enterprise. This arguably pays insufficient attention to the principle of individual autonomy, in the sense of freely choosing to engage in a criminal venture. Thus, if this interpretation of *Miller* is correct, it should not be followed.⁷⁸

3.1.5. The Mental Requirement of the Doctrine of Common Purpose and the Mens Rea of Murder

At common law, the mens rea of murder is satisfied by either intent to kill or inflict grievous bodily harm upon another,⁷⁹ or by foresight of the probability of such a consequence.⁸⁰ In NSW, the current law of murder is found in section 18 of the *Crimes Act* 1900⁸¹. The difference between the head of reckless murder found at common law and in section 18 of the *Crimes Act*, is that the latter is confined to foresight of the probability of death, not extending to foresight of the probability of grievous bodily harm.⁸² Thus, under the current law in NSW, to be liable as a perpetrator of reckless murder, foresight of the probability of death is required. However, an accessory participating in a common purpose can be found guilty of murder when that person only foresees the possibility that the perpetrator may kill another person in the course of carrying out the primary criminal venture. It has been pointed out that the doctrine of common purpose standard of mens rea represents a departure from the mental requirement of murder.⁸³ The lowering of the threshold for criminal culpability by the High Court to foresight of the possibility (instead of probability) in cases involving murder has been criticised. Odgers argues that, as the High Court of Australia has rejected the notion of recklessness as a sufficient mental requirement for accessorial liability in *Giorgianni*, it is anomalous to have the notion of recklessness revived in *McAuliffe and McAuliffe*.⁸⁴ According to this view, holding an individual criminally liable as an accessory for the commission of an offence when that person has merely foreseen its commission by the principal offender as a possibility contradicts the principle as laid down by the same court in *Giorgianni*.⁸⁵ intentional assistance or encouragement of the commission of an offence by the principal offender.

Odgers further points out that the High Court's explanation for the extension of criminal liability to members of a joint criminal enterprise who foresee the possibility of another crime being committed is remarkably thin.⁸⁶ Similarly, Cato argues that there is 'no compelling reason why in the public interest a secondary party to a joint enterprise should be at a greater risk of conviction for murder than a person who actually kills'.⁸⁷ In a similar vein, Bronitt and McSherry state that 'regrettably, while common purpose is regarded as a form of accessorial liability, there has been limited consideration by Australian courts of the lack of symmetry between the fault required for accessorial liability by aiding, abetting, counselling or procuring and common purpose'.⁸⁸ However, another view which tries to explain the rationale for the extension of liability to foresight pursuant to the doctrine of common purpose is found in the judgment of Stephen J in *Johns* (1980) 143 CLR 108 at pp117-122.

⁷⁸ Further, as Bronitt and McSherry (2001:416) point out, because the judgment was delivered in the context of refusing special leave to appeal, little weight should be attached to the Court's discussion of the principles in *Miller*.

⁷⁹ *Miller* [1951] VLR 346 at 355; *Terry* [1955] VLR 114 at 115.

⁸⁰ *R v Crabbe* (1985) 156 CLR 464 at 469-470; *R v Jakac* [1961] VR 367; *R v Hallet* [1969] SASR 141. *Royall v The Queen* (1990) 172 CLR 378.

⁸¹ Section 18 of the *Crimes Act* 1900 (NSW) provides that: "18. (1)(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by penal servitude for life or for 25 years. (b) Every other punishable homicide shall be taken to be manslaughter. (2) (a) No act or omission which is not malicious, or for which the accused had lawful cause or excuse, shall be within this section. (b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only, or in his or her own defence.

⁸² See Solomon [1980] 1 NSWLR 321 at 327.

⁸³ *Brown et al*, supra note 40, at 1362; *Bronitt & McSherry*, supra note 40, at 422.

⁸⁴ Odgers, supra note 71, at 46.

⁸⁵ (1985) 156 CLR 473.

⁸⁶ Odgers, supra note 71, at 45.

⁸⁷ C. Cato, 'Foresight of Murder and Complicity in Unlawful Joint Enterprise Where Death Results', *Bond Law Review* 2 (1) (1990): 182-206 at 206.

⁸⁸ *Bronitt & McSherry*, supra note 40, at 415.

According to Stephen J, criminal liability in such situations, does not relate to the crime which was the primary object of the criminal venture. His Honor explains that 'as to that crime, one who, while not actually physically present and participating in its commission, nevertheless knows what is contemplated, and both approves of it and in some ways encourages it thereby becomes an accessory before the fact...his knowledge, coupled with his actions, involves him in complicity in that crime' (p118). However, if, in the course of the execution of the primary offence, another crime is committed, the question arises in relation to the liability of those who did not directly engage in its commission. In this regard, Stephen J states that 'the concept of common purpose provides the measure of complicity' (p118) in that other crime. As His Honor asserts, if the scope of the common purpose of the principal offender and the accessory was found to include 'the other crime', then the accessory will be responsible for its commission.

According to Stephen J, determining of the scope of the common purpose can be made either by reference to what the accessory has regarded as a probable consequence of the primary venture, or it may be extended to include what the accessory has foreseen as a possibility involved in that venture. While acknowledging these alternatives, Stephen J took the view that, in cases involving the commission of another crime other than that which was the primary object of the venture 'to apply to such a situation a criterion of what is probable, as contrasted with what is merely possible, seems singularly inappropriate' (p118). According to him, this is because 'the other crime' was not the primary object of the criminal venture, and in all cases it will have been committed as a reaction to whatever response is made by the victim or by others who attempt to frustrate the venture. There can be a variety of possible responses to a criminal act, and with each of these contingencies, what the offender might conceive of as a contingent reaction to each possible response will at least be a sequence of spontaneous and relatively unpredictable events. In those circumstances, it is understandable that criminal liability should be extended to what the accessory was aware of as a possible response by the victim or others which would produce the reaction of the principal offender. Furthermore, Stephen J states that, another objection to the application of a test of probability instead of possibility, in situations like this, lies in the standard of blameworthiness and responsibility which is presupposed. According to him, if a criterion of probability is applied as a test of liability for the commission of 'the other crime', this would mean that the accessory who knows that the principal is armed with a deadly weapon and is ready to use it on the victim if needed, will bear no liability for the killing which ensues so long as his or her state of mind was that he thought it rather less likely than not that the occasion for the killing would arise. Yet, his or her complicity seems clear, in that the killing was within the contemplation of the parties.

The majority (Mason, Murphy and Wilson JJ) in *Johns*⁸⁹ also rejected foresight of the probability (as opposed to possibility) as the appropriate test for the extension of criminal liability to foreseen offences committed by the principal perpetrator. According to them, culpability lies in the accessory's prior assent to participate in the criminal venture. Their Honors held: The narrow test of criminal liability proposed by the applicant [that parties in a common purpose should only be responsible for the probable, as distinct from the possible consequences of the execution of that common purpose] is plainly unacceptable for the reason that it stakes everything on the probability or improbability of an act, admittedly contemplated, occurring. Suppose that a plan is made by A, the principal offender, and B, the accessory before that fact, to rob premises, according to which A is to carry out the robbery. It is agreed that A will carry a loaded revolver and use it to overcome resistance in the unlikely event that the premises are attended, previous surveillance having established that the premises are invariably unattended at the time when the robbery is to be carried out. As it happens, a security officer is in attendance when A enters the premises and is shot by A. It would make nonsense to say that B is not guilty merely because it was an unlikely or improbable contingency that the premises would be attended at the time of the robbery, when we know that B assented to the shooting in the event that occurred (p131). Between these two perspectives (the one expressed by Odgers, 1996 and Cato, 1990 and that expressed by Stephen J and the majority in *Johns*), the second is preferable. As noted above, the rationale for extending criminal liability to offences foreseen as a possible outcome of the carrying out of a primary criminal venture in situations involving more than one person, can be understood in terms of individuals' free choice to participate in the venture, and it also relates to deterring group-based criminal activity. The essential role of criminal law is to protect the socially permissible free action of individuals (centered upon their enjoyment of their life) through punitive redirection of the anti-social free choices of others. In group-based criminal enterprises, individuals choose to participate knowing, or at least expecting, that some undesirable consequences might ensue.

⁸⁹ (1980) CLR 108.

If the individual is aware that it is possible that someone will be killed by one member of the group in the course of carrying out their primary criminal venture, that individual might choose to work toward changing such a possibility. He or she might even choose (from the beginning) to avoid situations of this kind which would possibly escalate into the commission of some other offences. Because the participant has freely chosen to continue to participate in the light of the relevant possibility, so he or she has chosen to expose himself or herself to criminal liability for offences which he or she has contemplated as a possible outcome of the primary venture. Arguably, the rationale for extending criminal liability to foreseen offences is crucially dependent upon these ideas.

In sum, this section has considered the basis for the extension of criminal liability to an individual for foreseen offences (committed in the course of carrying out a primary criminal venture) pursuant to the doctrine of common purpose. It was shown that the law imposes criminal liability pursuant to this doctrine when the offence committed is contemplated as a possible outcome of the carrying out of the primary criminal venture. Two major points can be emphasized here. The first relates to the relation between the doctrine of common purpose and the doctrine of straightforward joint criminal enterprise/acting in concert. It was shown that the formulation of the fault element of the former doctrine in terms of 'joint' contemplation of the commission of the additional offence has resulted in an overlapping between that doctrine and the doctrine of straightforward joint criminal enterprise. It was argued that such overlapping can be removed by confining the application of, or formulating the fault element of the doctrine of common purpose to 'individual' rather than 'joint' contemplation of the commission of the additional offence. The second point concerns the formulation of the fault requirement of the doctrine of common purpose in terms of contemplation of the 'possibility' rather than of the 'probability' that an additional offence will be committed in the course of carrying out the primary criminal venture. Contemplation of the 'possibility' rather than 'probability' is to be preferred because it takes into account both the individual autonomy of the victim and offender.

4. The Doctrine of Common Purpose in Jordan

At the outset, it must be emphasized that, there is no explicit regulation in the Jordanian Penal Code No. 16 year 1960 (*JPC*) in relation to the participants' liability for foreseen offences committed in the course of carrying out a primary criminal venture by their co-adventurers.⁹⁰ Article 76 of the *JPC* governs only the accomplices' criminal liability for committing an offence pursuant to their agreement or joint intention.⁹¹ Furthermore, accessorial criminal liability according to Article 80(2) of the *JPC* is confined to situations involving the commission of an offence (by the principal offender) which the accessory has intentionally helped or encouraged.⁹²

⁹⁰ K. Alseid, *Explanation of the General Principles in the Penal Code of Jordan: Comparative Study: Crime, Criminal Participation, Criminal Liability and punishment* (Amman: The Arabic Centre for Students Services, 2002), 403; M. A. Alhalabi, *Explanation of the Penal Code: The General Part* (Amman: Dar Althkafah Press, 1997), 285; M. N. Hussni, *Criminal Participation in Arabic Legislations* 2nd ed (Cairo: Dar Alnahtah Alarabiyah, 1992), 488.

⁹¹ Article 76 stipulates that: "If more than one person jointly commits a felony or a misdemeanor, or if that felony or misdemeanor consists of more than one act and each one of them commits one act or more of those constituting that offence with the intention of bringing about that felony or misdemeanor, then all offenders are to be considered as accomplices in the commission of that offence and punishable with the specific punishment of that offence as indicated in the Code as a primary perpetrator of that offence."

⁹² Article 80(2) provides that:

"A person is an accessory to the commission of a felony or misdemeanor where such person:

- a. Helps the commission of such an offence by providing instructions;
- b. Helps the commission of such an offence by giving the principal perpetrator a weapon or tools or anything else which helps the commission of such an offence;
- c. Presents at the scene where the offence is committed for the purpose of frightening the victim or supporting/encouraging the determination of the principal perpetrator or to ensure the commission of the intended offence;
- d. Helps the principal perpetrator to set up acts which prepare or facilitate or complete the commission of the offence;
- e. Agreed with the principal perpetrator or accessories prior to the commission of the offence and participates in covering up the commission of that offence or hiding or marketing the whole or part of the things obtained by its commission or harboring one or more of the offenders who participated in its commission;

The problem in the law of complicity arises where, in the course of carrying out a primary criminal venture, another additional or collateral offence is committed by one or more members of the group to that venture (to which other participants did not agree or render any assistance). Most typically, situations of this kind are encountered where during the course of a robbery, a person is killed by one of the robbers. The central issue here is, whether the reach of criminal liability for the killing should be extended to the participants (other than the principal offender), or not. If the answer is affirmative, the crucial question is whether the basis of culpability (for the commission of the additional offence) is different from that relied upon in deciding liability for the primary offence.

4.1. Individual Autonomy and Criminal Liability Pursuant to the Doctrine of Common Purpose

As with the preceding analysis in NSW, the rationale for the extension of criminal liability to additional offences pursuant to the doctrine of common purpose under the *JPC*, can be understood in terms of an individual's voluntary choice to embark upon a criminal venture with the contemplation that some other collateral offences may possibly be committed. Therefore, arguably, what has been noted above in connection with the doctrine's rationale in NSW might apply likewise under the *JPC*. Notwithstanding the absence of any explicit reference in the *JPC* to this area of the law of complicity, the limits of criminal liability under this doctrine can be charted. Along the lines of the analysis of this issue in NSW, the extension of criminal liability in Jordan pursuant to the doctrine of common purpose to other participants other than the principal offender for foreseen offences, does not depend on any direct physical involvement in the commission of that offence. Rather, it is the participant's earlier physical contribution to the primary criminal venture which forms the physical element of their responsibility for the additional offence. Under the *JPC*, complicity cases either involve some kind of agreement between the offenders (Article 76), or, according to Article 80(2), a person can become involved in the commission of an offence by another person by intentionally helping its commission. However, many other cases of complicity can be interpreted as involving some kind of common purpose between offenders, and in this sense, the discussion of criminal liability turns into providing an answer to the following questions. What is the position in law, if one or more party to a criminal venture deviates from that venture and some undesirable consequences ensue? What is the accomplice and accessory's liability if the principal offender commits an additional offence while carrying out the primary criminal venture? What principles should govern this area of the law of complicity? In Jordan, and in the absence of any explicit law on this area, the common approach adopted by legal commentators in answering these questions involves an analysis of this issue in relation to both the accomplice's liability, and the accessory's liability, to which the following discussion turns.

4.1.1. The Accomplice's Liability for the Commission of an Additional Offence

As noted above, Article 76 of the *JPC* (which governs the liability of accomplices who commit an offence pursuant to their agreement or joint intention) does not make any reference to the liability of the accomplice if one or more of the parties act beyond the agreed offence (the subject of their primary criminal venture) and commit an additional offence. For example, suppose that P1 agrees with P2 to break into C's house to steal some of C's property. In the course of committing theft, C surprises P1 and P2, and in response, P1 produces a knife and stabs C causing injury. Pursuant to Article 76, both P1 and P2 are responsible for theft. But the problem in relation to the doctrine of common purpose arises in relation to P2's liability for P1 injuring C. The common view held by legal commentators concerning the liability of P2 for the commission of the additional offence is that P2 should not be responsible for that offence unless he or she has contemplated its commission as a possible consequence of carrying out the theft, and has accepted to continue to participate in the venture.⁹³ By contrast, if the accomplice did not foresee or contemplate the commission of the additional or alternative offence, that accomplice should not be liable for its commission. Accordingly, in the above example, if P2 did not foresee the injuring of C as a possible result of his primary venture with P1, no criminal liability should be extended to P2 for that additional crime. The underlying philosophy for extending criminal liability to foreseen offences, based on common purpose, is culpability through conscious risk taking.

f. Although having knowledge of the criminal history of offenders who have committed banditry/robbery/brigandage, violent acts against the security of the state or the public safety or against persons or property, proceeds with providing such offenders with food or a place to hide or assemble".

⁹³ Alseid, *supra* note 89, at 403; Alhalabi, *supra* note 89, at 285-286; R. Behnam, *The Crime, The Criminal and The Punishment* (Cairo: Mansha'at Almaarif Press, 1976), 485-487; M.N. Hussni, *Explanation of the Penal Code of Lebanon: The General Part* (Beirut: Dar Alnakri Press, 1975), 586; A. Mahdi, *Explanation Of The General Rules of the Penal Code: Crime and Liability* (Cairo: Atlas Press, 1983), 371.

In keeping with the notion of individual autonomy as the basis of criminal liability, the view held by legal commentators tends to oppose the extension of culpability for additional offences except where the individual is found to have been aware of the risk involved, and freely chosen to involve himself or herself in the criminal venture. Most importantly, in order to keep the reach of criminal liability to this level, it is necessary that the legislature should intervene and explicitly regulate this area of the law of complicity. As the doctrine of common purpose in both NSW and Jordan appears to be underpinned by similar theoretical foundations, it can be argued that any potential reform of the *JPC* can be enriched by considering the principles as established at the common law. In this regard, any potential reform of the *JPC* regarding the accomplice's liability for the commission of the additional offence, should supplement Article 76 with a new subsection as follows: If, during the carrying out of a primary criminal venture, an additional or alternative offence is committed by one or more of the parties, other accomplices shall not bear responsibility for the commission of that additional or alternative offence unless it is proven that the accomplice foresaw or contemplated the commission of that offence as a possible consequence of the carrying out of their primary criminal venture, and with that contemplation continues to participate in that venture.

4.1.2. The Accessory's Liability for the Commission of an Additional Offence by the Principal Offender

As mentioned above, Article 80(2) of the *JPC* regulates accessorial liability where the offence committed by the principal offender is that for which the accessory provided help or assistance. There is no explicit reference in this Article as to the liability of the accessory where the principal offender commits an additional offence during the carrying out of the primary criminal venture. For example, suppose that A intentionally helps P to rob the house of C. To facilitate P's crime, A provides P with a gun to threaten C if C is found at home. P enters C's house, and when confronted by C, P shoots causing C serious injury. Although A's accessorial liability for theft might not raise problems, the question arises as to whether A should be held responsible for the additional offence committed by P. In the absence of explicit reference in Article 80(2) on this question, it is commonly argued by legal commentators that the principles concerning the liability of the accomplice (as discussed above) for the commission of the additional offence should likewise apply in relation to the liability of the accessory for the commission of an additional offence by the principal offender. Namely, the accessory shall not be liable for the additional offence unless he or she has contemplated its commission as a possible consequence of the primary criminal venture and yet continued to participate in that venture.⁹⁴ As with the preceding suggestion in relation to the accomplice's liability for the additional offence, it is important that the legislature should regulate the liability of the accessory for foreseen offences with an explicit provision. In this regard, a suggested additional subsection to Article 80 should be phrased in the following terms: If, during the carrying out of a primary criminal venture, the principal offender commits an additional or alternative offence from the one to which the accessory has provided help or assistance, that accessory shall not be liable for the commission of that additional offence unless he or she has contemplated its commission as a possible consequence of the carrying out of the primary venture, and with such contemplation the accessory continued to participate in the venture.

5. Conclusion

This paper sought to provide insight into how the extension of criminal liability to foreseen offences resulting from the carrying out of a primary criminal venture can be understood by reference to the notion of individual autonomy under the laws of NSW and Jordan. Central to the exploration of this complex area of the law of complicity was to see how the two systems can inform each other regarding any potential reform on this issue. Based on the discussion in this paper, it was shown that, it is the individual's conscious risk-taking which furnishes the basis for the extension of criminal liability for the commission of the additional or alternative offence pursuant to the doctrine of common purpose. The discussion revealed that, an individual is made liable for the commission of the additional offence if he or she had contemplated its commission by his or her co-adventurer/s as a possible outcome of the carrying out of their primary criminal venture. This formulation is in line with the analysis of individual autonomy as providing the ground for culpability.

⁹⁴ Alseid, *supra* note 89 at 446-450; Husseni, *supra* note 92, at 613; Behnam, *supra* note 92, at 486-487; Aldawoodi K, *Explanation of the Penal Code of Iraq: The General Part* (Baghdad: Dar Altebaha Alhadetha,1968),399.

In group-based criminality, blameworthiness lies in the individuals' choice to put themselves into situations where they predict that their conscious-risk taking is possible to produce further criminal outcomes. Blameworthiness here is grounded in the individual's capability to avoid such situations having been consciously aware of their undesirable but possible outcomes. Following this type of reasoning, the criminal law in NSW holds responsible those who embark upon a primary criminal venture contemplating (as a possible outcome) the commission of another additional or incidental offence by the co-offender during the course of carrying out that primary criminal venture. However, there are different possibilities as to the type of contemplation required by the parties. On one view, 'joint contemplation' by all parties to a criminal venture that the commission of the additional or incidental offence was foreseen as a possible outcome of carrying out the primary venture is required.⁹⁵

However, more recently, the High Court has held that individual foresight by a secondary or other offender, of the possibility that an incidental offence will be committed in carrying out a joint venture is sufficient to establish liability pursuant to that doctrine.⁹⁶ It was argued that the application of the doctrine of common purpose is better formulated in terms requiring 'one party or more, but not all,' to contemplate the commission of the additional or incidental offence as a possible outcome of the carrying out of the primary criminal venture. This is because if 'all parties jointly contemplate' the commission of an offence and explicitly or implicitly agree to continue the execution of their venture, their liability will rest on their agreement rather than contemplation of a particular undesirable outcome. Consequently, if an agreement is to be regarded as the basis for the participants' criminal liability, then the appropriate doctrine to govern that liability would be the doctrine of straightforward joint criminal enterprise/acting in concert, and not the doctrine of common purpose.

Moreover, in NSW, the mental requirement of the doctrine of common purpose has been phrased in terms of foresight of the possibility that an additional or incidental offence might be committed during the carrying out of the primary criminal venture. As mentioned above, this formulation is inconsistent with the mental requirement of accessory liability and murder. It is argued as to how this lack of symmetry can be removed in the body of this paper in relation to murder. As established above, in NSW, an overlapping between the doctrine of common purpose and the doctrine of straightforward joint criminal enterprise (acting in concert) is evident in the case law. It was noted that, the intermingling between these two doctrines is misleading and confusing, and that it is important to distinguish between these two doctrines. The doctrine of straightforward joint criminal enterprise/acting in concert governs criminal liability when, pursuant to an 'agreement' between two or more persons, they are both or all present at the scene and one or other of them does, or they do between them, all the things that are necessary to constitute the crime. Whereas, the doctrine of common purpose (as illustrated in this paper) is a conduit through which criminal liability can be extended to the parties of a primary criminal venture when, in the course of carrying out that venture, an additional or incidental offence is committed. The basis for the extension of criminal liability pursuant to the latter doctrine is foresight of the possibility that the incidental offence will be committed. Comparatively, it was shown that in Jordan, unlike in NSW, there is no explicit provision in the *JPC* on the liability of accomplices (Article 76) and accessories (Article 80(2)) for the commission of an additional or incidental offence by their co-adventurers during the course of carrying out a primary venture. As such, it is suggested that the Articles are amended in terms which reflect the substantive law in NSW which requires that an accessory or accomplice will be liable for incidental offences which were in such accomplice's or accessory's contemplation when carrying out the primary venture.

⁹⁵ Johns [1980] 143 CLR 108 at 130-131.

⁹⁶ McAuliffe and McAuliffe (1995) 183 CLR 108.