

## THE *OSLAND* ‘WRONG TURN’ AND THE PROBLEMS THAT FICTIONS PRODUCE

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*While much academic attention has been devoted to whether the doctrine of extended joint criminal enterprise (‘EJCE’) can be justified, the basic joint criminal enterprise doctrine (‘JCE’) has escaped much scrutiny. The extraordinary recent case of *IL v The Queen* (2017) 262 CLR 268, however, has demonstrated that JCE is more problematic than was thought. It is argued here that the difficulties exposed in *IL* arose because of a ‘wrong turn’ in *Osland v The Queen* (1998) 197 CLR 316. The High Court’s insistence in that case that all JCE participants are principals in the first degree might have been convenient, but it was also fictitious and unprincipled – as Sir John Smith argued at the time. For as long as the law proceeds as though JCE participants have struck blows that they have not in fact struck, and fails to acknowledge that they are accessories, the Australian common law of complicity will be dishonest, obscure and unnecessarily complex.*

### I INTRODUCTION

In the latest edition of Smith, Hogan, and Ormerod, the authors note that ‘the current law of secondary liability’ in England and Wales ‘remains unsatisfactorily complex, and displays many of the characteristic weaknesses of a common law doctrine that has been allowed to develop in a pragmatic and unprincipled way’.<sup>1</sup> The same comments apply, but with far greater force, to the Australian common law position concerning criminal complicity.<sup>2</sup>

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1 David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod’s Criminal Law* (Oxford University Press, 15<sup>th</sup> ed, 2018) 176.

2 Following the Victorian Parliament’s recent decision to place the law of complicity largely on a statutory footing, South Australia (SA) and New South Wales (NSW) are the only two Australian jurisdictions in which the common law of complicity applies. For the Victorian position, which was introduced after the delivery of the Weinberg Report – but which to an extent departs from its recommendations, see *Crimes Act 1958* (Vic) ss 323–324C. See also Mark Weinberg, ‘Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group’ (Report, Victorian Department of Justice and the Judicial College of Victoria, August 2012) ch 2 (‘*Weinberg Report*’).

Perhaps the most glaring problem with the Australian law in this area is the existence of the doctrine of extended joint criminal enterprise ('EJCE'). Under that doctrine, a person who agrees with another or others to commit a crime will be guilty of a *further* crime committed by one of his/her co-venturers in the course of the foundational enterprise, provided merely that s/he foresaw the possibility of that further crime's commission.<sup>3</sup> As I have argued elsewhere,<sup>4</sup> a truly principled law of complicity would allow the passive participant to be convicted of the further crime only upon proof that s/he intentionally assisted or encouraged the perpetrator to act with the requisite intent for that crime if the occasion arose during the primary criminal venture. For, where just one crime is committed, a person can be held liable as an accessory only if s/he intentionally assisted or encouraged the principal offender to commit the relevant offence<sup>5</sup> (or procured its commission).<sup>6</sup> The same is true where the Crown uses the basic joint criminal enterprise doctrine ('JCE') to establish a person's guilt.<sup>7</sup> Leaving aside policy and pragmatic considerations, why should the position be different where the perpetrator has committed an incidental offence?<sup>8</sup>

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- 3 *Miller v The Queen* (2016) 259 CLR 380, 388 [4] (French CJ, Kiefel, Bell, Nettle and Gordon JJ) ('Miller'); *Clayton v The Queen* (2006) 81 ALJR 439, 442 [11] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ) ('Clayton'); *Gillard v The Queen* (2003) 219 CLR 1, 11–12 [19], 13–14 [24]–[25] (Gleeson CJ and Callinan J), 15 [31] (Gummow J), 36 [112] (Hayne J) ('Gillard'); *McAuliffe v The Queen* (1995) 183 CLR 108, 117–18 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ) ('McAuliffe'). It appears that, if the foreseen crime is a result-crime, such as murder, the Crown need only prove that the accused foresaw that another participant might act with the requisite mental element for that crime. It seemingly need not also prove that the accused foresaw that the relevant consequence might ensue: *R v Presley* (2015) 122 SASR 476, 487 [74]–[76] (The Court). See also William Wilson and David Ormerod, 'Simply Harsh to Fairly Simple: Joint Enterprise Reform' [2015] *Criminal Law Review* 3, 5–6. Cf Jenny Richards and Luke McNamara, 'Just Attribution of Criminal Liability: Consideration of Extended Joint Criminal Enterprise Post-Miller' (2018) 42 *Criminal Law Journal* 372.
- 4 Andrew Dyer, 'The "Australian Position" Concerning Criminal Complicity: Principle, Policy or Politics?' (2018) 40 *Sydney Law Review* 289, 317.
- 5 *Giorgianni v The Queen* (1985) 156 CLR 473, 503–8 (Wilson, Deane and Dawson JJ) ('Giorgianni'); *Stokes v The Queen* (1990) 51 A Crim R 25, 37–9 (Hunt J) ('Stokes').
- 6 *Attorney-General's Reference* [1975] 1 QB 773, 779–80 (Lord Widgery CJ).
- 7 In a basic JCE case, the Crown must prove that the parties agreed – expressly or tacitly – to commit a crime (*Miller* (2016) 259 CLR 380, 388 [4] (French CJ, Kiefel, Bell, Nettle and Gordon JJ)); and, as the UK Supreme Court pointed out in *Jogee v The Queen* [2017] AC 387, 415 [78] (Lord Hughes and Lord Toulson) ('Jogee'), an 'intention to assist ... is inherent in the making of the agreement'. Further, the Crown must prove that the passive participant(s) participated in the joint enterprise (*Huynh v The Queen* (2013) 87 ALJR 434, 439 [22], 442 [37]–[38] (The Court) ('Huynh')); and, as the NSW Court of Criminal Appeal ('NSWCCA') pointed out in *Tangye v The Queen* (1997) 92 A Crim R 545, 557 (Hunt CJ at CL) ('Tangye'), such a person does participate by '(with knowledge that the crime is to be or is being committed) ... intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime'.
- 8 The High Court seems now to have indicated that the party who merely foresees the further crime, and continues to participate in the joint criminal enterprise despite such foresight, has not intentionally assisted or encouraged the commission of that crime: *Miller* (2016) 259 CLR 380, 397 [31] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). Cf *McAuliffe* (1995) 183 CLR 108, 118 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Gillard* (2003) 219 CLR 1, 14 [25] (Gleeson CJ and Callinan J), 15 [31] (Gummow J), 36 [112] (Hayne J). Certainly, this is Gageler J's view: *Miller* (2016) 259 CLR 380, 419 [109]–[110].

It is well-known that, in *Jogee v The Queen* (*'Jogee'*),<sup>9</sup> a joint sitting of the Privy Council and the United Kingdom (UK) Supreme Court abandoned 'parasitic accessory liability' ('PAL'), which was the English equivalent of EJCE. A 'wrong turn'<sup>10</sup> had been made in *Chan Wing-Siu v The Queen*,<sup>11</sup> the Court declared, and the law should revert to its pre-*Chan* state. But it is probably equally well-known that, in *Miller v The Queen* (*'Miller'*),<sup>12</sup> a majority of the High Court of Australia refused the appellants' invitation to follow their Lordships' lead and excise EJCE from Australian law. While much academic attention has been devoted – both before and after *Jogee* and *Miller* – to whether EJCE can be justified,<sup>13</sup> the basic (or 'plain vanilla')<sup>14</sup> JCE doctrine has escaped much scrutiny. This has no doubt been because, in the words of the New South Wales Law Reform Commission, it has been considered to be 'relatively straightforward and uncontroversial'.<sup>15</sup> The extraordinary recent case of *IL v The Queen* (*'IL'*),<sup>16</sup> however, has dramatically dispelled such a notion.

In this article, I argue that the problems with JCE that were brought to light in *IL* arose because of a 'wrong turn' in *Osland v The Queen* (*'Osland'*).<sup>17</sup> The High Court's insistence in that case that all JCE participants are principals in the first degree might have been convenient, but it was also fictitious; and as Sir John Smith argued at the time, 'fictions should have ... [no] place in modern criminal law'.<sup>18</sup>

On this point, too, it is submitted that the English position is superior to that prevailing at common law in Australia. In *Jogee*, Lords Hughes and Toulson refused to accept the Australian view that all participants in a JCE can be regarded as having struck the blows that in fact only the perpetrator has struck.<sup>19</sup> Rather, their Lordships treated such offenders as what they are: aiders and

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9 [2017] AC 387.

10 Ibid 417 [87] (Lord Hughes and Lord Toulson).

11 [1985] AC 168 (*'Chan'*).

12 (2016) 259 CLR 380.

13 See, eg, Stephen J Odgers, 'Criminal Cases in the High Court of Australia: *McAuliffe* and *McAuliffe*' (1996) 20 *Criminal Law Journal* 43; Stephen Odgers 'Editorial: *McAuliffe* Revisited' (2004) 28 *Criminal Law Journal* 5; Stephen Odgers, 'Editorial: *McAuliffe* Revisited Again' (2016) 40 *Criminal Law Journal* 55; Stephen Odgers, 'The High Court, the Common Law and Conceptions of Justice' (2016) 40 *Criminal Law Journal* 243; Stephen Gray, "'I Didn't Know, I Wasn't There": Common Purpose and the Liability of Accessories to Crime' (1999) 23 *Criminal Law Journal* 201; Robert Hayes and F L Feld, 'Is the Test for Extended Common Purpose Over-Extended?' (2009) 4 *University of New England Law Journal* 17; Luke McNamara, 'A Judicial Contribution to Over-Criminalisation?: Extended Joint Criminal Enterprise Liability for Murder' (2014) 38 *Criminal Law Journal* 104; Timothy Smartt, 'The Doctrine of Extended Joint Criminal Enterprise: A Wrong Turn in the Australian Common Law' (2018) 41 *Melbourne University Law Review* 1324; A P Simester, 'The Mental Element in Complicity' (2006) 122 *Law Quarterly Review* 578; A P Simester, 'Accessory Liability and Common Unlawful Purposes' (2017) 133 *Law Quarterly Review* 73; Beatrice Krebs, 'Joint Criminal Enterprise' (2010) 73 *Modern Law Review* 578.

14 *Brown v The State (Trinidad and Tobago)* [2003] UKPC 10, [13] (Lord Hoffmann).

15 New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) 72 [4.2].

16 (2017) 262 CLR 268.

17 (1998) 197 CLR 316.

18 Sir John Smith, 'Joint Enterprise and Secondary Liability' (1999) 50 *Northern Ireland Legal Quarterly* 153, 157. See also Ormerod and Laird, above n 1, 184.

19 *Jogee* [2017] AC 387, 415 [76]. See also *R v Mendez* [2011] QB 876, 882 [17] (Toulson LJ).

abettors.<sup>20</sup> This approach does not prevent the conviction of culpable 'secondary participants' in cases where the perpetrator is, for some reason special to him/herself, not guilty of the relevant offence.<sup>21</sup> Indeed, it is contended here that, because most such 'secondary participants' have *caused* the relevant harm, they can properly be dealt with as principals in the first degree;<sup>22</sup> that is, by using the doctrine of innocent instrumentality<sup>23</sup> to secure their conviction. In cases where such an approach is unavailable, such offenders can be convicted on the alternative basis that they have assisted, encouraged or procured an actus reus. This is more or less the approach taken by English law.<sup>24</sup> It is also the view that was essentially adopted by Bell and Nettle JJ, dissenting on this point in *IL*.<sup>25</sup> Their Honours' analysis is, with respect, far preferable to the insistence of the other five members of the Court that, in JCE cases, all acts of the perpetrator that are within the scope of the agreed upon enterprise must be attributed to the passive participant(s).<sup>26</sup>

Moreover, if the High Court is ever called upon to decide whether EJCE liability is primary or derivative,<sup>27</sup> it should find that it is the latter. Justice Keane's contention in *Miller* that such participants are principals in the first degree, is predicated on the unsustainable view that they have used the perpetrator as an 'instrument ... to deal with the foreseen exigencies of carrying their enterprise into effect'.<sup>28</sup> His analysis also ignores the fact that these participants lack the mental element for the principal offence. Nevertheless, JCE participants who foresee that another participant in the foundational enterprise might act with the mental state for a further crime should be liable for that further crime, even if the perpetrator: (i) performs the actus reus of that offence, but without the requisite mental element; or (ii) performs the actus reus with the mental element, but successfully raises a partial or full defence. A device similar

20 *Jogee* [2017] AC 387, 415 [78]. See also *R v Stringer* [2012] QB 160, 173 [57] (Toulson LJ) ('*Stringer*').

21 See, eg, *R v Bourne* (1952) 36 Cr App R 125 ('*Bourne*'); *R v Cogan* [1976] 1 QB 217 ('*Cogan*'); *R v Austin* [1981] 1 All ER 374 ('*Austin*'); *Matusевич v The Queen* (1977) 137 CLR 633 ('*Matusевич*'); *R v Hewitt* [1997] 1 VR 301 ('*Hewitt*'); *Osland* (1998) 197 CLR 316.

22 See Glanville Williams, 'Finis for Novus Actus?' (1989) 48 *Cambridge Law Journal* 391, 398. See also *R v Kennedy [No 2]* [2008] 1 AC 269, 276–7 [17]–[18] (Lord Bingham) ('*Kennedy*').

23 I use this terminology instead of the usual, innocent agency, language for this reason. It might be more accurate to describe, say, the child who steals at the instigation of an adult, as an instrument that the adult has used to accomplish his/her purpose, than as an agent acting with the adult's authority and on his/her behalf, who thus creates legal relations between that adult and a third party: see *Pinkstone v The Queen* (2004) 219 CLR 444, 465–6 [60] (McHugh and Gummow JJ) ('*Pinkstone*'); *White v Ridley* (1978) 140 CLR 342, 353–4 (Stephen J) ('*White*'); Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 4<sup>th</sup> ed, 2017) 422 [7.105]; Richard Taylor, 'Procuring, Causation, Innocent Agency and the Law Commission' [2008] *Criminal Law Review* 32, 42.

24 I say 'more or less' because it has not yet been established that liability attaches when a person assists or encourages – as opposed to procures – an actus reus: see *R v Millward* [1994] Crim LR 527 ('*Millward*'); *R v Wheelhouse* [1994] Crim LR 756 ('*Wheelhouse*'); *R v Pickford* [1995] 1 Cr App R 420, 430 (Laws J) ('*Pickford*'); *DPP v K* [1997] 1 Cr App R 36, 44–5 (Russell LJ) ('*K*').

25 (2017) 262 CLR 268, 296–7 [65]–[66].

26 *Ibid* 272 [2], 281–287 [26]–[40] (Kiefel CJ, Keane and Edelman JJ), 311–12 [103]–[107] (Gageler J), 323–25 [147]–[154] (Gordon J).

27 In *IL*, Gageler J noted that this is a point that has not yet authoritatively been decided: *ibid* 312 [107].

28 *Miller* (2016) 259 CLR 380, 427 [138].

to that used in the English line of authority starting with *R v Millward* ('*Millward*')<sup>29</sup> would seem to be the best way of achieving this result. In other words, for as long as EJCE remains part of the common law of Australia, liability should attach when a JCE participant has foreseen that another participant might act with the mental state for an incidental offence, and another participant has in fact performed the actus reus of that offence.

## II THE LITIGATION IN *IL*

### A The Facts, the Decisions of the Primary Judge and the NSWCCA, the Appellant's Argument in the High Court, and the Judgments of Gageler and Gordon JJ

In *IL*, the appellant and the deceased had been using a house owned by the appellant to refine methylamphetamine.<sup>30</sup> They did this by dissolving a solute containing raw methylamphetamine in an inflammable solvent, acetone, over a low heat.<sup>31</sup> The deceased was killed as a result of a fire in the bathroom of the relevant residence. The Crown identified the act causing death as the lighting of a ring burner in the bathroom.<sup>32</sup> But it could not prove that the appellant lit the burner;<sup>33</sup> indeed, as Simpson JA noted in the New South Wales Court of Criminal Appeal ('NSWCCA'), it seems probable, given the injuries that he sustained, that the deceased performed this conduct.<sup>34</sup> Nevertheless, the Crown proceeded against the appellant not merely for manufacturing a large commercial quantity of methylamphetamine, but also for her co-offender's murder.<sup>35</sup>

At this juncture, it can be noted that there are two reasons why it seems unjust to convict of murder a person who did what *IL* did.

The first and most obvious reason why *IL* seems insufficiently culpable to be convicted of that offence was that the deceased, by his own free and voluntary act, killed only himself. If the deceased's lighting of the ring burner had not been free and voluntary, then *IL* would have been guilty of a homicide offence as a principal in the first degree. So, in *Vaux's Case*,<sup>36</sup> it was held that *Vaux* was a 'principal murderer' in circumstances where he had tricked the deceased into drinking poison. The deceased's mistake as to the contents of the cup – *Vaux* had led him to believe that he was consuming a fertility drug<sup>37</sup> – meant that he could not be regarded as having chosen to kill himself.<sup>38</sup> Rather, the chain of causation between the accused's act of supply and the deceased's death remained intact.

29 [1994] Crim LR 527. See also the other cases listed at n 24.

30 *IL* (2017) 262 CLR 268, 290 [48] (Bell and Nettle JJ).

31 *Ibid* 290 [50].

32 *Ibid* 291 [52].

33 *Ibid*.

34 *R v IL* [2016] NSWCCA 51, [11] (Simpson JA) ('*IL NSWCCA*').

35 *IL* (2017) 262 CLR 268, 291 [52] (Bell and Nettle JJ).

36 (1591) 4 Co Rep 44a; 76 ER 992.

37 See D J Lanham, 'Murder by Instigating Suicide' [1980] *Criminal Law Review* 215, 215.

38 *Justins v The Queen* (2010) 79 NSWLR 544 ('*Justins*') is a more recent case in which it was open to a jury to regard the deceased's act of self-killing as not having resulted from a 'reasoned choice' on his part: at 604 [365] (Johnson J), see also 585 [269] (Simpson J).

But the act of the deceased in *IL* did not result from a mistake; it was not done under duress; and there was no other vitiating factor.<sup>39</sup> He was an adult of sound mind, and his conduct was the legal cause of his death.<sup>40</sup> Now, of course, if the deceased's act had caused the death of a *third party*, it would have been right to hold IL liable for homicide.<sup>41</sup> Such liability would not properly be direct – again, the deceased's free and voluntary act would prevent IL's conduct from being regarded as having *caused* death – but accessorial. As Glanville Williams argued:

If one person instigates another to commit murder, the philosophy of autonomy teaches that the instigator does not cause the death, responsibility for causation being confined to the person who does the deed, and who is therefore the latest actor in the series. In order to bring in the instigator and helpers ... the judges invented the doctrine of complicity, distinguishing between principals and accomplices. Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish.<sup>42</sup>

But, as just noted, IL did *not* assist the deceased to commit a crime that resulted in the death of a third party. She assisted him to perform unlawful conduct that resulted in his own death. To assist a self-killing – whether that killing is intentional or unintentional – is not to assist a murder.<sup>43</sup>

The distinction between principals and accessories to which Williams refers in the above passage is crucial to this article's contention that the High Court made a 'wrong turn' in *Osland*. But, before reaching that issue, it is necessary to note that, even if the deceased *had* killed a third party, there is a good argument that IL would have been culpable enough only to warrant being convicted of manslaughter, not murder. She did not agree with the deceased to kill or inflict grievous bodily harm.<sup>44</sup> She did not foresee that the deceased might perform an act with murderous intent during the foundational enterprise.<sup>45</sup> She appears merely to have assented to the deceased's performing the unlawful and dangerous act of lighting the ring burner in the course of a joint enterprise to manufacture a large commercial quantity of drugs.<sup>46</sup> There are difficulties

39 See *Burns v The Queen* (2012) 246 CLR 334, 364 [86] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

40 *Ibid*, citing H L A Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2<sup>nd</sup> ed, 1985) 136–8.

41 See *IL* (2017) 262 CLR 268, 304 [80] (Bell and Nettle JJ).

42 Williams, 'Finis for Novus Actus?', above n 22, 397–8.

43 The person who assists an intentional self-killing in NSW is, however, guilty of the statutory offence of aiding and abetting suicide: *Crimes Act 1900* (NSW) s 31C(1). The person who assists another to commit a crime, during the commission of which s/he unintentionally kills her/himself, is seemingly guilty of no offence: *IL* (2017) 262 CLR 268, 281 [25] (Kiefel CJ, Keane and Edelman JJ), 302–3 [79] (Bell and Nettle JJ), cf 318 [121] (Gageler J).

44 *IL NSWCCA* [2016] NSWCCA 51, [33] (Simpson JA).

45 *R v IL* [No 2] [2014] NSWSC 1710, [81] (Hamill J) ('*IL NSWSC*'). Although even if she had, and a third party had been killed by the deceased with the mens rea for murder, it is doubtful whether IL's culpability would have been high enough to justify a murder conviction: see, eg, Dyer, 'The "Australian Position"', above n 4, 303–8; Simon Bronitt, 'Defending *Giorgianni* – Part One: The Fault Required for Complicity' (1993) 17 *Criminal Law Journal* 242, 261–3.

46 *IL* (2017) 262 CLR 268, 319 [126] (Gageler J).

involved in arguing that a person who neither exhibits subjective fault in respect of a death, nor has herself performed the act causing death, is truly a murderer.<sup>47</sup>

Despite these questions concerning whether it would be just to convict IL of murder, the relevant authorities seemed to bear out the Crown's allegation that she was guilty of that offence. It is true that the primary judge, Hamill J, upheld a defence application for a directed verdict of not guilty on the murder charge.<sup>48</sup> His Honour's reasoning was consistent with the first normative objection to this prosecution set out above. But this reasoning failed to take *Osland* into account. According to Hamill J, any murder liability incurred by IL would be derivative (or secondary) liability:<sup>49</sup> it could only arise if the Crown first were able to prove that the deceased was guilty of murder. That it could not do, because the deceased had killed himself.<sup>50</sup> But while it is true that accessorial liability is derivative,<sup>51</sup> the Crown was using *the JCE doctrine* to establish IL's guilt; and as the High Court made clear in *Osland*, the liability of passive participants in JCEs is not derivative, but primary.<sup>52</sup> Such participants, that is, are not accessories; they are principals. As McHugh J explained, this result is achieved by attributing 'the acts ... of the actual perpetrator ... to the person acting in concert'.<sup>53</sup> Accordingly, on a Crown appeal from the trial judge's directed verdict in *IL*, the NSWCCA held that the murder case was viable.<sup>54</sup> On that case, the deceased's act of lighting the ring burner was attributed to IL; it followed that her act caused the death of another person (her co-offender); and she could be convicted of murder because that act was performed during her or an accomplice's commission of a sufficiently serious offence (the drugs offence) to attract the operation of the constructive murder rule.<sup>55</sup>

In the High Court, IL challenged neither *Osland* nor the NSWCCA's understanding of the reasoning in that case.<sup>56</sup> Rather, she attacked her prosecution for murder on grounds that were more in keeping with the second reason noted above for doubting whether she was morally culpable enough justifiably to be convicted of that offence. In other words, she challenged the established understanding of how the constructive murder rule operates in cases where the Crown seeks to have convicted of murder an accomplice to the foundational offence, who has not personally performed the relevant killing.

47 See New South Wales Law Reform Commission, above n 15, 159 [5.76].

48 *IL NSWSC* [2014] NSWSC 1710.

49 *Ibid* [82].

50 *Ibid* [83].

51 *Likiardopoulos v The Queen* (2012) 247 CLR 265, 276–7 [27] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 282 [44] (Heydon J) ('*Likiardopoulos*'); *Osland* (1998) 197 CLR 316, 324 [14] (Gaudron and Gummow JJ), 351 [95] (McHugh J); *R v Demirian* [1989] VR 97, 105, 107–8 (McGarvie and O'Bryan JJ), 131 (Tadgell J) ('*Demirian*'); *Surujpaul v The Queen* [1958] 1 WLR 1050, 1053 (Lord Tucker); *Cain v Doyle* (1946) 72 CLR 409, 419 (Latham CJ), 419 (Rich J), 426 (Dixon J).

52 *Osland* (1998) 197 CLR 316, 329–30 [27] (Gaudron and Gummow JJ), 342–3 [72]–[73], 350 [93] (McHugh J), 383 [174] (Kirby J), 413 [257] (Callinan J).

53 *Ibid* 344 [75].

54 *IL NSWCCA* [2016] NSWCCA 51, [65] (Simpson JA).

55 *IL* (2017) 262 CLR 268, 273 [4]–[5] (Kiefel CJ, Keane and Edelman JJ).

56 *Ibid* 281 [26].

Under section 18(1)(a) of the *Crimes Act 1900* (NSW), a person will be guilty of murder if his/her act or omission causes the death of another person, and that conduct: (i) was accompanied by an intention to kill or inflict grievous bodily harm on some person, or foresight of the probability of death;<sup>57</sup> or (ii) was done in an attempt to commit, or during or immediately after the commission by the accused, or his/her accomplice, of a crime punishable by at least 25 years' imprisonment.<sup>58</sup> Section 18(2)(a) then goes on to provide that the accused's conduct will give rise to murder liability only if it was 'malicious'. According to IL's argument,<sup>59</sup> in a case, such as hers, where the Crown seeks a conviction on the basis of the constructive murder rule, the act or omission causing death will be 'malicious' within the meaning of section 18(2)(a) only if the Crown can prove that it was done or omitted with foresight of the possibility that death would result.<sup>60</sup> Further, IL submitted that any liability that she incurred would be EJCE, not JCE, liability. To be liable for murder, she contended, she would have to be proved to have agreed to the foundational drugs offence, and to have foreseen that the deceased might (at least)<sup>61</sup> perform an act with the malice just noted<sup>62</sup> – and so commit the 'incidental crime [of] ... constructive murder'.<sup>63</sup>

This argument was inconsistent with the settled view that the *Crimes Act* gave statutory effect to much of the common law regarding murderous malice,<sup>64</sup> and that, as at common law, an act would be accompanied by such malice if it was done in any of the circumstances envisaged by section 18(1).<sup>65</sup> It was also inconsistent with how the constructive murder rule had always been thought to operate respecting accomplices. Regarding the latter point, in *R v Surridge*,<sup>66</sup> it had been accepted that the liability that arises in a case such as *IL* is basic JCE liability. On that reasoning, to secure a conviction, the Crown need only prove that: (i) the accused agreed with the perpetrator to commit the foundational offence; and (ii) in an attempt to commit that offence, or during or immediately after its commission, the perpetrator caused the death of another.<sup>67</sup> In *R v Sharah*,<sup>68</sup> the NSWCCA did add a further foresight requirement. In

57 *Royall v The Queen* (1990) 172 CLR 378, 395 (Mason CJ), 405 (Brennan J), 415–17 (Deane and Dawson JJ), 430–1 (Toohey and Gaudron JJ), 455 (McHugh J) ('*Royall*').

58 Manufacturing a large commercial quantity of methylamphetamine is punishable by life imprisonment: *Drug Misuse and Trafficking Act 1985* (NSW) ss 24(2), 33(3)(a).

59 For an analysis of this argument, see Andrew Dyer, 'IL v The Queen: Joint Criminal Enterprise and the Constructive Murder Rule: Is This where Their "Logic Leads You"?' (2017) 39 *Sydney Law Review* 245.

60 IL, 'Appellant's Submissions', Submission in *IL v The Queen*, S270/2016, 21 December 2016, [45]–[46].

61 The appellant's primary submission seems to have been that the Crown also had to prove that she foresaw the possibility of the relevant consequence (death): *ibid* [88]. On this point, see above n 3.

62 IL, 'Appellant's Submissions', Submission in *IL v The Queen*, S270/2016, 21 December 2016, [88].

63 *Ibid* [28].

64 *Lavender v The Queen* (2005) 222 CLR 67, 78 [25]–[26] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Lavender*').

65 *Royall* (1990) 172 CLR 378, 428 (Toohey and Gaudron JJ). See also *Mraz v The Queen* (1955) 93 CLR 493, 505 (Williams, Webb and Taylor JJ), 512–13 (Fullagar J). Section 18(1) did, however, narrow the scope of the common law felony murder rule: *Ryan v The Queen* (1967) 121 CLR 205, 241 (Windeyer J); see also below n 73.

66 (1942) 42 SR (NSW) 278 ('*Surridge*').

67 *Ibid* 283 (Jordan CJ).

68 (1992) 30 NSWLR 292 ('*Sharah*').

circumstances where the foundational offence was armed robbery with wounding,<sup>69</sup> it was held to be necessary for the Crown to prove not only that: (i) there was an agreement to rob while armed with an offensive weapon; and (ii) during the robbery, the perpetrator wounded one victim and caused the death of another; but also that (iii) the appellant had contemplated that the perpetrator might perform the act causing death (in that case, the firing of a gun).<sup>70</sup> But because it was assumed that no malice need be proved in a constructive murder case beyond that involved in the foundational offence, the Court did not insist upon proof that the appellant foresaw any such malice.

It is submitted that, in her dissenting judgment in *IL*, Gordon J provided a persuasive response to the appellant's argument. Her Honour seemed to accept that the constructive murder rule might produce 'unattractive' consequences.<sup>71</sup> But, predictably, she rejected the appellant's contention that such a killing will only be 'malicious' within the meaning of section 18(2)(a) if the accused foresaw the possibility of death. To use the words of the Full Court of the Supreme Court of South Australia, when responding to a similar argument in *R v R*, *IL*'s contention was 'really an attack on the felony murder rule itself'.<sup>72</sup> There would need to be far clearer statutory words than those in section 18(2)(a) before the courts would consider it possible to hold that the legislative intention was not, after all, to make murderers of those who killed unintentionally – or whose accomplice did so – while committing a very serious offence (as had been so at common law before the enactment of the precursor to section 18).<sup>73</sup> Accordingly, it was no surprise to find Gordon J,<sup>74</sup> and her colleagues,<sup>75</sup> adhering to the view stated a few months previously in *Aubrey v The Queen* that:

[Section] 18(1) replaced the common law concept of malice aforethought with a list of matters that would previously have established malice aforethought. Consequently, if the Crown proved any of those matters, s 18(2)(a) (which excluded from the definition any act or omission which was not malicious) had no role to play.<sup>76</sup>

As explained in *Lavender v The Queen*,<sup>77</sup> this does not render section 18(2)(a) meaningless. That paragraph was inserted in 1883 to confirm, in response to concerns expressed by some parliamentarians,<sup>78</sup> that the reckless indifference

69 See *Crimes Act 1900* (NSW) s 98.

70 *Sharah* (1992) 30 NSWLR 292, 297 (Carruthers J).

71 *IL* (2017) 262 CLR 268, 323 [143]; see also 326 [155].

72 (1995) 63 SASR 417, 421 (King CJ). Similar arguments to *IL*'s were also rejected in the following cases: *R v Ryan* [1966] VR 553, 563–4 (The Court); *R v Van Beelen* (1973) 4 SASR 353, 403 (Bray CJ, Mitchell and Zelling JJ); *R v Munro* (1981) 4 A Crim R 67, 69–70 (Street CJ); and *R v Spathis* [2001] NSWCCA 476, [312]–[313] (Carruthers AJ).

73 Though, unlike at common law, the relevant section limited crimes capable of being foundational offences for the purposes of the constructive murder rule to capital felonies or those punishable by life imprisonment: *Criminal Law Amendment Act 1883* (NSW) s 9. See also Sir Alfred Stephen and Alexander Oliver, *Criminal Law Manual: Comprising the Criminal Law Amendment Act of 1883* (Government Printer, 1883) 201.

74 *IL* (2017) 262 CLR 268, 330–1 [168]–[169].

75 *Ibid* 307 [89] (Bell and Nettle JJ), 309 [95] (Gageler J).

76 (2017) 260 CLR 305, 329 [46] (Kiefel CJ, Keane, Nettle and Edelman JJ).

77 *Lavender* (2005) 222 CLR 67, 85 [48] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

78 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 March 1883, 1095–8.

mental state in section 18(1)(a) would not facilitate the conviction of negligent killers.

Moreover, Gordon J rightly held that, in a case such as *IL*, where the Crown was using the basic JCE doctrine to establish the accused's complicity in the foundational offence, it could secure her/his conviction for murder without proving the third element identified in *Sharah*.<sup>79</sup> On this point, her Honour was at odds with her fellow dissident, Gageler J, who appeared implicitly to accept the appellant's argument that *IL*'s liability for murder would be based on EJCE, not JCE;<sup>80</sup> and that therefore the Crown would have to prove that she agreed to the drugs offence *and* foresaw that the deceased might light the burner.<sup>81</sup> It is true of course that, in *IL*, there were two crimes (the drugs offence and murder), not one. But the same is true in a case where multiple accused agree to commit an unlawful and dangerous act that, in the event, results in someone's death. In neither case is there any room for EJCE, because, by agreeing to perform conduct with the requisite mens rea for the foundational offence, the parties also necessarily simultaneously agree to perform that conduct with the mens rea for the further offence. Once this is accepted, it logically follows that the passive participant should not be required to have foreseen anything if s/he is to be convicted of murder on the basis of the constructive murder rule. As Gordon J argued, it ought be enough for the Crown to prove merely that s/he agreed to commit the foundational offence, and that the perpetrator in fact killed someone, however unintentionally, in an attempt to commit that offence, or during or immediately after its commission.<sup>82</sup>

Nevertheless, with respect, both Gageler and Gordon JJ erred when they suggested that the constructive murder rule was solely responsible for any injustice in *IL*. For the former:

The Court of Criminal Appeal's holding that constructive murder was an available verdict in this case was, I am convinced, the inexorable result of the statutory assimilation and perpetuation of an outmoded common law doctrine.<sup>83</sup>

And, for the latter, if the NSWCCA's reasoning led to a 'harsh and potentially absurd' result, this did 'no more than highlight the continued difficulties of this method of establishing murder remaining on the statute books'.<sup>84</sup> Certainly, as suggested above, it *is* unjust to convict of murder a person

79 *IL* (2017) 262 CLR 268, 329–30 [166]. This element has also been questioned by the NSW Law Reform Commission and some NSW judges: New South Wales Law Reform Commission, above n 15, 148–9 [5.34]–[5.39]; *Batchelor v The Queen* (2014) 249 A Crim R 461, 475 [79] (Hidden J), 484 [130]–[131] (R A Hulme J); *IL NSWCCA* [2016] NSWCCA 51, [35]–[36] (Simpson JA).

80 See *IL* (2017) 262 CLR 268, 310 [99], where his Honour treated *IL*'s liability as arising from *Johns v The Queen* (1980) 143 CLR 108 ('*Johns*'), a case involving liability for a crime other than that which was the primary object of the relevant criminal venture. It was the principles in *Johns* that the High Court has been said to have 'buil[t] on' (*Miller* (2016) 259 CLR 380, 399 [37] (French CJ, Kiefel, Bell, Nettle and Gordon JJ)) when laying down the EJCE doctrine in *McAuliffe* (1995) 183 CLR 108.

81 On this analysis, the Crown would not also have been required to prove that *IL* foresaw that the deceased might act with any intent beyond the mens rea for the foundational offence, because, as just noted, no such mens rea needs to be proved for the accused's act to satisfy the malice requirement in s 18(2)(a).

82 *IL* (2017) 262 CLR 268, 322–3 [142], 324–5 [149]–[151], 326 [156].

83 *Ibid* 309–10 [97].

84 *Ibid* 326 [155].

who has killed unintentionally.<sup>85</sup> It is perhaps even more unjust to convict of that crime such an offender's accomplices. Accordingly, if the deceased in *IL* had killed a third party, a manslaughter conviction would better have reflected *IL*'s culpability than would have a conviction of murder. But while murder liability in such circumstances might well be 'harsh', it would not exactly be 'absurd'. The absurdity in *IL* was caused not by the constructive murder rule, but by *Osland*. For it was *Osland*'s insistence that passive JCE participants such as *IL* are principals in the first degree that allowed the Crown to prosecute her for murder, even though, because the perpetrator had killed only himself, nothing even resembling a murder had taken place.

### B The Judgment of Kiefel CJ, Keane and Edelman JJ

Chief Justice Kiefel, Keane and Edelman JJ appeared to recognise that it was normatively problematic for the Crown to base a murder prosecution on a self-killing. They also seemed to recognise that it was not the constructive murder rule that caused these difficulties to arise. But their Honours were unwilling to reverse or modify *Osland*. Where there is a JCE between two or more persons, these Justices reasoned, all acts performed in the course of that enterprise, or that are incidental to it, are attributed to the other participant(s).<sup>86</sup> This had been established by *Osland*, their Honours thought,<sup>87</sup> and it followed that, ordinarily, *IL* would have been personally responsible<sup>88</sup> for the acts of her co-venturer, the deceased.

But, according to their Honours, the prosecution of *IL* could not succeed even so. This was because the conduct at issue did not fit within section 18 of the *Crimes Act*:

The offences of murder and manslaughter in s 18 of the *Crimes Act 1900* (NSW) require that one person kill *another* person. Section 18 is not engaged if a person kills himself or herself intentionally. Nor is it engaged if the person kills himself or herself in the course of committing a crime punishable by imprisonment for life or for 25 years or by an unlawful and dangerous act.<sup>89</sup>

The origins of section 18, their Honours observed, lay in section 9 of the *Criminal Law Amendment Act 1883* (NSW), which was intended largely to restate the common law concerning murder and manslaughter.<sup>90</sup> For centuries, they continued, the common law had divided the felony of homicide into three categories: manslaughter, murder and *felo de se* (felonious self-killing).<sup>91</sup> This

85 On this point, see, eg, Dyer, 'The "Australian Position"', above n 4, 304–8; David Lanham, 'Felony Murder – Ancient and Modern' (1983) 7 *Criminal Law Journal* 90; Brent Fisse, *Howard's Criminal Law* (Law Book Company, 5<sup>th</sup> ed, 1990) 70–1. Cf Prue Bindon, 'The Case for Felony Murder' (2006) 9 *Flinders Journal of Law Reform* 149; David Crump, 'Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend upon the Particular Rule at Issue?' (2009) 32 *Harvard Journal of Law & Public Policy* 1155.

86 *IL* (2017) 262 CLR 268, 272–3 [2], 281 [26], 282 [29].

87 *Ibid* 272–3 [2], 282 [29].

88 *Ibid* 281 [26].

89 *Ibid* 272 [1] (emphasis in original).

90 *Ibid* 274 [7]. See also above nn 73–6 and accompanying text.

91 *Ibid* 274 [8], 275–6 [11]–[12].

distinction was drawn by Blackstone,<sup>92</sup> Hale,<sup>93</sup> Coke,<sup>94</sup> Hawkins<sup>95</sup> and Kenny.<sup>96</sup> It was rejected by Stephen,<sup>97</sup> their Honours conceded, but apparently only for a 'rhetorical purpose'.<sup>98</sup> Further, the courts had held that: *felo de se* and murder were different offences;<sup>99</sup> accessories to *felo de se* were not accessories to murder;<sup>100</sup> survivors of suicide pacts were guilty of *felo de se*, not murder;<sup>101</sup> and an attempt to commit suicide was not an 'attempt to commit murder' within the meaning of a particular statute.<sup>102</sup> Accordingly, their Honours argued, it was not the NSW legislature's intention in 1883 that self-killing should fall within the ambit of section 18's forerunner.<sup>103</sup> Nor was it possible to hold that, at that date, a person such as IL, 'whose accomplice unintentionally killed himself in the course of carrying out a joint criminal enterprise, was guilty of murder'<sup>104</sup> – either at common law<sup>105</sup> or, it followed, under the newly enacted section.<sup>106</sup>

The first thing to note about this reasoning is that it might fail at the first step. That is, it is not clear that their Honours were correct to hold that *felo de se* and murder were distinct offences at common law in 1883. It is true that, in *R v Ward*<sup>107</sup> and *Tombes v Etherington*,<sup>108</sup> it was held that, as a matter of statutory construction, a *felo de se* had not committed murder so as to fall within the exception to a pardon. But, a century before that, in *Hales v Petit*, Dyer CJ had found that, when Sir James Hales committed suicide:

the quality of ... [his] offence ... [was] in a degree of murder, and not of homicide or manslaughter, for homicide is the killing a man feloniously without malice prepense, but murder is the killing a man with malice prepense. And here the

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- 92 Ibid 274 [8], citing William Blackstone, *Commentaries on the Laws of England: Book the Fourth* (Clarendon Press, 1769) 189–90.
- 93 *IL* (2017) 262 CLR 268, 274–5 [9], citing Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (Sollom Emlyn, first published 1736, 1800 ed) vol 1, 411–13.
- 94 *IL* (2017) 262 CLR 268, 275 [10], citing Sir Edward Coke, *The Third Part of the Institutes of the Laws of England; Concerning High Treason and Other Pleas of the Crown and Criminal Causes* (W Clarke and Sons, first published 1644, 1817 ed) 54.
- 95 *IL* (2017) 262 CLR 268, 275 [11], citing William Hawkins, *A Treatise of the Pleas of the Crown; Or, a System of the Principal Matters Relating to That Subject, Digested under Proper Heads* (C Roworth, 8<sup>th</sup> ed, 1824) vol 1, 78.
- 96 *IL* (2017) 262 CLR 268, 279 [19], citing Courtney Stanhope Kenny, *Outlines of Criminal Law* (University Press, 1902) 112, 115, 132–3.
- 97 *IL* (2017) 262 CLR 268, 275 [10], citing Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (MacMillan and Co, 1883) vol 3, 107.
- 98 *IL* (2017) 262 CLR 268, 275 [10].
- 99 Ibid 275–6 [12], citing *R v Ward* (1663) 83 ER 270 ('*Ward*'); *Tombes v Etherington* (1663) 83 ER 327 ('*Tombes*').
- 100 *IL* (2017) 262 CLR 268, 276 [13]–[14], citing *R v Russell* (1832) 168 ER 1302 ('*Russell*'); *R v Fretwell* (1862) 169 ER 1345 ('*Fretwell*').
- 101 *IL* (2017) 262 CLR 268, 278–9 [18], citing *R v Dyson* (1823) 168 ER 930, 931 ('*Dyson*'); *R v Jessop* (1877) 16 Cox CC 204, 206 ('*Jessop*').
- 102 *IL* (2017) 262 CLR 268, 276–7 [15], citing *R v Burgess* (1862) 169 ER 1387 ('*Burgess*').
- 103 Ibid 281 [25].
- 104 Ibid 280 [23].
- 105 Ibid.
- 106 Ibid 281 [25].
- 107 (1663) 1 Lev 8, 8; 83 ER 270, 270.
- 108 (1663) 1 Lev 120, 121; 83 ER 327, 328.

killing of himself was premeditated and resolved in his mind before the act was done.<sup>109</sup>

Moreover, in a series of 19<sup>th</sup> century cases, it was held that both an accessory before and at the fact of a suicide, were guilty of murder. So, in *R v Dyson*,<sup>110</sup> if the accused had encouraged the deceased to drown herself, he would have been guilty of that offence – and not of any standalone offence of *felo de se*. And in *R v Gaylor*,<sup>111</sup> although the accused was convicted of manslaughter, the Court found that he was in fact guilty of murder, in circumstances where he had supplied his wife with poison, which she then took for the purpose of procuring an abortion. Certainly, in *R v Russell* (*‘Russell’*)<sup>112</sup> and *R v Leddington*,<sup>113</sup> it had been found – again, as a matter of statutory construction – that an accessory to a self-killing<sup>114</sup> could not be convicted in the absence of a convicted principal. But of course that does not establish that the principal’s crime was *felo de se*. Nor does the decision in *R v Fretwell*<sup>115</sup> – a case in which, importantly, the Court accepted that *Russell* was authority for the proposition that a person who ‘instigate[s] ... and persuade[s]’ another to take arsenic for the purpose of procuring an abortion, is guilty of murder.<sup>116</sup> Rather, the Court in *Fretwell* distinguished *Russell* on the basis that, in the case before it, it was *the deceased* who had urged the reluctant accused to provide her with the poison.<sup>117</sup> However sound this reasoning was,<sup>118</sup> there was no denial in *Fretwell* that the accessory before the fact to a self-killing was guilty of murder.<sup>119</sup>

Likewise, if two persons agreed to commit suicide together, but only one of them succeeded, the survivor was guilty of murder. As much was established by *Dyson*,<sup>120</sup> *R v Alison*<sup>121</sup> and *R v Jessop*<sup>122</sup> – and, indeed, this continued to be the law in England until the passage of section 4 of the *Homicide Act 1957*, 5 & 6 Eliz 2, c 11.<sup>123</sup> With respect, there are difficulties involved in saying, as Kiefel

109 (1562) 1 Plowden 253, 261; 75 ER 387, 399 (*‘Hales’*).

110 (1823) Russ & Ry 523, 524; 168 ER 930, 931.

111 (1857) Dears & Bell 288, 292–3; 169 ER 1011, 1013 (Erle J) (*‘Gaylor’*).

112 (1832) 1 Mood 356, 367–8; 168 ER 1302, 1306.

113 (1839) 9 Car & P 79, 80; 173 ER 749, 749 (*‘Leddington’*).

114 By ‘self-killing’, I mean an intentional self-killing or a self-killing done during the deceased’s commission of a felonious act (although, concerning the latter type of killing, there was authority for the view that it was enough that the act was unlawful: see *Gaylor* (1857) Dears & Bell 288, 290; 169 ER 1011, 1012; Norman St John-Stevan, *Life, Death and the Law: Law and Christian Morals in England and the United States* (Beard Books, 1961) 237.

115 (1862) Le & Ca 161; 169 ER 1345.

116 Ibid 163–4; 1346 (Erle CJ). Cf *IL* (2017) 262 CLR 268, 276 [13] (Kiefel CJ, Keane and Edelman JJ).

117 *Fretwell* (1862) Le & Ca 161, 163–5; 169 ER 1345, 1346–7 (Erle CJ).

118 The deceased’s act in *Fretwell* might well have been free and voluntary, whereas the deceased’s act in *Russell* possibly cannot be so characterised: Lanham, ‘Murder by Instigating Suicide’, above n 37, 217–18. But of course that did not prevent *Fretwell* from being an accessory; indeed, as noted above, accessorial liability can only arise if there is a principal offender who has performed such an act. Rather, the Court in *Fretwell* might have stretched the rules to prevent an offender for whom it had some sympathy from going to the gallows.

119 Cf *IL* (2017) 262 CLR 268, 276 [14] (Kiefel CJ, Keane and Edelman JJ).

120 (1823) Russ & Ry 523, 524; 168 ER 930, 930–1.

121 (1838) 8 Car & P 419, 423–4; 173 ER 557, 559.

122 (1877) 16 Cox CC 204, 206.

123 As noted recently in *R (Nicklinson) v Ministry of Justice* [2015] AC 657, 672 [31] (Toulson LJ).

CJ, Keane and Edelman JJ did in *IL*, that the crime that the principal had committed 'could only have been *felo de se* even if, on occasion, it was loosely, and inaccurately, described as "self-murder"<sup>124</sup>. Even if it was possible for a principal in the second degree to be guilty of a more serious<sup>125</sup> offence than the principal,<sup>126</sup> the same was not true of accessories before the fact;<sup>127</sup> and yet, as we have seen, *Russell* established that the accessory before the fact to a suicide was guilty of murder, even though s/he was not triable for that crime.<sup>128</sup> Further, there was more than a tendency to describe the principal's offence as 'self-murder'. It was so described by Coke,<sup>129</sup> Hale,<sup>130</sup> Hawkins,<sup>131</sup> Blackstone,<sup>132</sup> Dyer CJ<sup>133</sup> and Stephen.<sup>134</sup> For the latter:

Suicide is by the law of England regarded as a murder committed by a man on himself ... and the true definition of murder of one's self seems to be where a man kills himself intentionally, to which Hale would add, 'or accidentally,' by an act amounting to felony ... Suicide is held to be murder so fully, that every one who aids or abets suicide is guilty of murder. If, for instance, two lovers try to drown themselves together, and one is drowned and the other escapes, the survivor is guilty of murder.<sup>135</sup>

It is true that many of these writers – and East<sup>136</sup> and Kenny<sup>137</sup> – dealt separately with murder, manslaughter and *felo de se*.<sup>138</sup> But was this simply because the suicide, though his/her guilt was usually the same as a murderer's, was 'by the guilty act itself, placed beyond the reach of all ordinary legal punishment'?<sup>139</sup> It is also true that, in *R v Burgess*,<sup>140</sup> it was held that attempting to commit suicide was not attempting to commit murder within the meaning of a particular statute. Indeed, in that case, Pollock CB went so far as to say that '[t]here is a vast difference between inflicting a wound on another and inflicting a wound on oneself with ... intent [to kill]'.<sup>141</sup> But in other cases the attempted suicide was treated as having attempted to commit a felony<sup>142</sup> (though there was

124 *IL* (2017) 262 CLR 268, 278–9 [18].

125 Or, at least an equally serious, but different, offence from the one of which s/he was convicted. Note in this regard East's statement that 'he who voluntarily kills himself is with respect to the public as criminal as one who kills another': Edward Hyde East, *A Treatise of the Pleas of the Crown* (A Strahan, 1803) vol 1, 219.

126 See *R v Richards* [1974] 1 QB 776, 779 (James LJ) ('*Richards*').

127 *Ibid* 779–80.

128 For a suicide pact case in which an accessory before the fact was held liable for murder, see *R v Croft* [1944] 1 KB 295.

129 Coke, above n 94, 54.

130 Hale, above n 93, 411.

131 Hawkins, above n 95, 77–8.

132 Blackstone, above n 92, 189.

133 *Hales* (1562) 1 Plowden 253, 261; 75 ER 387, 399. See also *Gaylor* (1857) Dears & Bell 288, 293; 169 ER 1011, 1013; *Leddington* (1839) 9 Car & P 79, 79; 173 ER 749, 749.

134 Stephen, above n 97, 104.

135 *Ibid*.

136 East, above n 125, 214.

137 Kenny, above n 96, 112–42.

138 A point also remarked upon by Twysden and Wyndham JJ in *Ward* (1663) 1 Lev 8, 8; 83 ER 270, 270.

139 Kenny, above n 96, 112.

140 (1862) Le & Ca 257, 262; 169 ER 1387, 1389 (Pollock CB).

141 *Ibid*.

142 *R v Doody* (1854) 6 Cox CC 463; *R v Mann* [1914] 2 KB 107, 108 (Lord Reading CJ).

silence as to whether that felony was murder); and there were policy reasons that might have explained the Court's approach in *Burgess*. If the Court had held that Elizabeth Burgess was guilty of attempted murder, it appears that no Court would have had jurisdiction to hear the charge against her.<sup>143</sup>

In short, while it cannot conclusively be stated that suicide<sup>144</sup> was (always) murder at common law, there is much support for the view that it was. This view has been taken by some commentators and judges,<sup>145</sup> and was accepted by Bell, Gageler and Nettle JJ in *IL*.<sup>146</sup> Alternatively, given the tension between cases such as *Ward* and *Burgess* on one hand, and *Dyson, Alison* and *Jessop* on the other, it is possible that 'English law ... [said] that suicide both is and is not self-murder for different purposes'.<sup>147</sup>

But even if Kiefel CJ, Keane and Edelman JJ were right to hold that murder and *felo de se* were distinct offences at common law, and that therefore self-killings were never covered by section 18(1)(a), it does not follow that IL's conduct fell outside the scope of that provision. It might be that 'no case can be found' where the 'accomplice' of an unintentional self-killer was *held liable* for murder before 1883.<sup>148</sup> But cases such as *Gaylor* and *Russell* made it clear that such persons were murderers. And, more fundamentally, on Kiefel CJ, Keane and Edelman JJ's reasoning, IL was *not* an accomplice. She was a principal offender, who had killed a person other than herself – and no one can claim that such conduct falls outside section 18(1)(a)'s purview.<sup>149</sup> In other words, these Justices wanted to have it both ways. On their Honours' reasoning, IL was a principal, who was to be treated as being personally responsible for all of the acts that the deceased in fact performed in the course of the drug manufacturing enterprise.<sup>150</sup> Surely, then, she was guilty of murder? The act of lighting the ring burner was an act of hers that caused the death of another, and was performed during her commission of a crime punishable by life imprisonment. Chief Justice Kiefel, Keane and Edelman JJ were only able to avoid that conclusion by suddenly treating IL not as someone who had killed another, after all, but rather as an accomplice to a self-killing.

143 *Burgess* (1862) Le & Ca 257, 260; 169 ER 1387, 1388 (Pollock CB).

144 By this term, as with the term 'self-killing' (see above n 114), I am referring both to intentional self-killings and to self-killings done during the person's commission of a felonious act.

145 William E Mikell, 'Is Suicide Murder?' (1903) 3 *Columbia Law Review* 379, 391; Sir John Vincent Barry, 'Suicide and the Law' (1965) 5 *Melbourne University Law Review* 1, 3–4; *Demirian* [1989] VR 97, 105, 107–8 (McGarvie and O'Bryan JJ), 131 (Tadgell J). St John-Stevas, above n 114, held suicide to be 'a felony, a species of self-murder' (at 236) and attempted suicide to be a 'form of attempted murder' (at 237).

146 *IL* (2017) 262 CLR 268, 302–3 [79] (Bell and Nettle JJ), 314–16 [111]–[115] (Gageler J).

147 Glanville Williams, *The Sanctity of Life and the Criminal Law* (Alfred A Knopf, 1957) 298.

148 *IL* (2017) 262 CLR 268, 280 [23] (Kiefel CJ, Keane and Edelman JJ).

149 As Gordon J pointed out: *ibid* 325–6 [154]; see also 318 [121] (Gageler J).

150 *Ibid* 281 [26] (Kiefel CJ, Keane and Edelman JJ).

### C The Judgment of Bell and Nettle JJ

This raises the question of how we should view IL. Was she a principal in the first degree? Or was she an accessory to the deceased's drug manufacturing offence – and thus to his unintentional self-killing?

In their Honours' judgment, Bell and Nettle JJ accepted *Osland's* insistence that 'the liability of each participant in a joint criminal enterprise is direct, primary liability'.<sup>151</sup> But that was merely formal; in substance, their Honours treated IL as an accessory. The purpose of the JCE doctrine, their Honours implied, is not to facilitate the conviction of those who actually perpetrated the actus reus of a crime.<sup>152</sup> Rather, it is to 'fix with complicity for the crime committed by the perpetrator those persons who encouraged, aided or assisted him'.<sup>153</sup> Accordingly, their Honours found that a person can be held liable on the basis of the JCE doctrine only if s/he has participated in an actus reus<sup>154</sup> performed by another person.<sup>155</sup> In doing so, they reasoned that, when McHugh J held in *Osland* that the acts of the perpetrator are attributed to other JCE participants, what his Honour meant was that such acts will be attributed *provided that* they 'constitute the actus reus of the crime [charged]'.<sup>156</sup> Because the actus reus of murder is an act or omission causing the death of another,<sup>157</sup> and because the deceased's act of lighting the ring burner in *IL* had *not* killed another, this act was not attributed to IL – and she was therefore not guilty of murder.<sup>158</sup>

It is submitted, consistently with what I have argued elsewhere,<sup>159</sup> that Bell and Nettle JJ were right effectively to regard passive JCE participants, such as IL, as accessories. The actus reus of accessorial liability is assistance or encouragement<sup>160</sup> (or procuring).<sup>161</sup> The mens rea is an intention to provide such assistance or encouragement.<sup>162</sup> The accessory will only have such an intention if, when s/he provides the relevant assistance or encouragement to the principal, s/he knows of the principal's intention to act with the requisite mens rea for the principal offence.<sup>163</sup> Similarly, with JCE, the passive participant must be proved to have participated in the actus reus of a crime, pursuant to an agreement to

151 Ibid 297 [66]. This was in keeping with Bell J's approach in previous cases: *Handlen v The Queen* (2011) 245 CLR 282, 287 [4] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Huynh* (2013) 87 ALJR 434, 442 [37] (The Court).

152 Ibid 297 [66]. On this point, see also *Huynh* (2013) 87 ALJR 434, 442 [37] (The Court); *Tangye* (1997) 92 A Crim R 545, 556 (Hunt CJ at CL).

153 Ibid 299 [73], quoting *Johns* (1980) 143 CLR 108, 125 (Mason, Murphy and Wilson JJ).

154 An actus reus, not a crime, for reasons that will become clear: see Part III of this article.

155 *IL* (2017) 262 CLR 268, 296–302 [65]–[77].

156 Ibid 299–300 [74], quoting *Osland* (1998) 197 CLR 316, 343 [73] (McHugh J).

157 Ibid 302–4 [79]–[80].

158 Ibid 304 [80].

159 Dyer, 'The "Australian Position"', above n 4, 298–9.

160 *Giorgianni* (1985) 156 CLR 473, 506 (Wilson, Deane and Dawson JJ); *Jogee* [2017] AC 387, 397 [8] (Lord Hughes and Lord Toulson).

161 *Attorney-General's Reference* [1975] 1 QB 773, 779–80 (Lord Widgery CJ).

162 *Giorgianni* (1985) 156 CLR 473, 503–8 (Wilson, Deane and Dawson JJ).

163 Ibid.

perform such conduct.<sup>164</sup> Certainly, the language here is different from that of accessory liability. But that should not be allowed to obscure the fact that JCE is a ‘subset’ of such liability.<sup>165</sup> This is because: (i) participation is nothing more or less than assistance or encouragement,<sup>166</sup> and (ii) the parties’ agreement establishes that such assistance or encouragement was given with knowledge of the perpetrator’s intention to perform the actus reus, and thus intentionally.

Further, the significant overlap between accessory and JCE liability shows that the latter is really concerned with convicting those who assist or encourage (accessories), and not those who cause (principals).<sup>167</sup> ‘In some cases’, the majority remarked in *Clayton v The Queen*,<sup>168</sup> ‘the accused may be guilty both as an aider and abettor and as [a] participant in a joint criminal enterprise’ (in this passage, their Honours might have substituted ‘many’ for ‘some’).<sup>169</sup> If JCE were really concerned with convicting principals – those whose free and voluntary conduct has broken the chain of causation between any accessory’s act of assistance or encouragement and the resulting harm – it would not be possible so often to convict an offender *either* as an accessory or on the basis of JCE.

Finally, the language used in some of the leading Australian cases gives the game away. In *McAuliffe v The Queen* (*McAuliffe*), for instance, after discussing the liability of accessories before the fact and principals in the second degree, the Court remarked: ‘[b]ut the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others’.<sup>170</sup> Here we have the High Court, in a case where pragmatic considerations were placing no pressure on it to treat JCE liability as being something that it is not, openly acknowledging that, in JCE cases, the only principals are those who perform or co-perform the actus reus. The other participants are ‘secondary’ participants, who are ‘complicit’ in an actus reus performed by another or others.

But it is less clear that Bell and Nettle JJ were right to argue that, in *Osland*, McHugh J meant that passive JCE participants will have attributed to them only those acts of the perpetrator that amount to the actus reus of a crime. As noted

164 *Huynh* (2013) 87 ALJR 434, 442 [37] (The Court); *Osland* (1998) 197 CLR 316, 342–3 [72]–[73] (McHugh J); *McAuliffe* (1995) 183 CLR 108, 114 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Dickson v The Queen* (2017) 94 NSWLR 476, 486 [41] (Bathurst CJ); *Tangye* (1997) 92 A Crim R 545, 556–7 (Hunt CJ at CL).

165 Odgers, ‘*McAuliffe* Revisited Again’, above n 13, 58. See also *Miller* (2016) 259 CLR 380, 427 [139] (Keane J), though his Honour rejected this analysis.

166 J C Smith, ‘Criminal Liability of Accessories: Law and Law Reform’ (1997) 113 *Law Quarterly Review* 453, 462; *Tangye* (1997) 92 A Crim R 545, 557 (Hunt CJ at CL); *R v B* (2012) 114 SASR 170, 178–9 [23]–[24] (Kourakis CJ) (‘B’); *Stringer* [2012] QB 160, 173 [57] (Toulson LJ).

167 See above n 42 and accompanying text.

168 *Clayton* (2006) 81 ALJR 439, 444 [20] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

169 See, eg, Lord Widgery CJ’s statement in *Attorney-General’s Reference* [1975] 1 QB 773, 779, that ‘[a]iding and abetting almost inevitably involves a situation in which the secondary party and the main offender are together at some stage discussing the plans which they may be making in respect of the alleged offence’.

170 *McAuliffe* (1995) 183 CLR 108, 114 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ). See also *Gillard* (2003) 219 CLR 1, 35 [109] (Hayne J).

above, his Honour unequivocally stated that such participants are principals in the first degree.<sup>171</sup> Once it is accepted that principals in the first degree are those who cause the actus reus,<sup>172</sup> generally by actually performing it,<sup>173</sup> it becomes clear that McHugh J was probably saying that *all* acts that the perpetrator performs in the course of the enterprise are attributed to the other participants. For if, like Bell and Nettle JJ in *IL*, his Honour had viewed JCE as being concerned with complicity in another person's conduct,<sup>174</sup> it seems likely that he would have described these participants in terms more consonant with the secondary nature of their liability.

In any event, the majority in *IL* of course accepted that that is the correct interpretation of what was held in *Osland*.<sup>175</sup> In upholding that approach, it has reinforced the 'wrong turn' that was made in that case. It was a 'wrong turn' essentially because, as Sir John Smith observed the year after *Osland* was decided, once the perpetrator's acts are attributed to his/her co-venturers, this 'seems to mean that we have to pretend that [those co-venturers performed the actus reus], which they did not'.<sup>176</sup> Certainly, in *IL*, Kiefel CJ, Keane and Edelman JJ rejected the notion that the attribution of the perpetrator's act to the other participants 'involve[s] a fiction that the act was undertaken by [those participants]'.<sup>177</sup> But to deal with a person not on the basis of what s/he has done (assisting or encouraging another person to commit a crime), but rather on the basis that s/he has caused a death that s/he has not in fact caused, is surely to proceed on a fictitious premise. Justice Edelman has recently noted – with respect, correctly – that '[t]he law does itself no credit by deeming one concept to be another'.<sup>178</sup> Nor does it reflect well on the law when, as was the case in *Osland*, it 'deems to be true that which is known not to be so or that which is unproved'.<sup>179</sup> Further, as Bob Williams has observed, there are practical reasons why fictions should be avoided: '[t]he experience of the common law ... is that the adoption of fictions ultimately gives rise to new problems as the internal contradictions of the fiction become apparent'.<sup>180</sup>

It is submitted that this is exactly what happened in *IL*. The logic of *Osland* led inexorably to the conclusion that, even if the deceased lit the ring burner, *IL* was guilty of murder. It was only by retreating from and 'explaining' *Osland*, in the case of Bell and Nettle JJ, and deploying dubious and contrived reasoning, in

171 *Osland* (1998) 197 CLR 316, 342 [72], 343 [73], 346 [80], 346 [81], 349 [89], [91], 350 [93]. See also 329 [27] (Gaudron and Gummow JJ), 413 [257] (Callinan J).

172 Ormerod and Laird, above n 1, 179.

173 *Ibid* 179–80; *Osland* (1998) 197 CLR 316, 341 [70] (McHugh J); New South Wales Law Reform Commission, above n 15, 14 [2.5].

174 See above n 153 and accompanying text.

175 *IL* (2017) 262 CLR 268, 272–3 [2], 281 [26], 282 [29], 287 [40] (Kiefel CJ, Keane and Edelman JJ), 311 [103], 312 [106] (Gageler J), 323–6 [145]–[154] (Gordon J).

176 Smith, 'Joint Enterprise and Secondary Liability', above n 18, 157. For a similar view, see *IL* (2017) 262 CLR 268, 304–5 [82] (Bell and Nettle JJ).

177 *IL* (2017) 262 CLR 268, 285–6 [36]; see also 281 [26].

178 *STZAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936, 957 [100].

179 *Chiro v The Queen* (2017) 260 CLR 425, 476 [122] (Edelman J) ('*Chiro*').

180 C R Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16 *Monash University Law Review* 161, 183.

the case of Kiefel CJ, Keane and Edelman JJ, that the High Court majority was able to avoid this ‘deeply disquieting’<sup>181</sup> conclusion.

### III ON WHAT BASIS SHOULD WE CONVICT THE ‘EVIL PERSON STANDING BEHIND’<sup>182</sup> THE PERPETRATOR WHO IS NOT GUILTY – OR NOT AS GUILTY?

#### A The Problem Confronting the High Court in *Osland*

Why are fictions adopted? Immediately after the passage just quoted, Williams suggests that the courts use them to deal with a ‘difficult issue’;<sup>183</sup> their purpose is to facilitate a legal result that gives effect (generally) to what Edelman J has described as an ‘unexpressed consideration of social and economic policy’.<sup>184</sup>

The ‘difficult issue’ in *Osland* arose from the fact that the jury at the joint trial of Mrs Osland and her son, David Albion, for the murder of Mrs Osland’s husband, Frank, had convicted Mrs Osland of murder while failing to reach a verdict in the case of David. It arose because the evidence at trial was that David had in fact perpetrated the killing, bashing the sleeping Frank Osland to death in Mrs Osland’s presence.<sup>185</sup> Could Mrs Osland’s conviction for murder stand, in circumstances where the jury must have been satisfied that she was not acting in self-defence or under provocation at the time of the relevant conduct, but had failed to make such a finding regarding David?<sup>186</sup> If JCE liability were derivative, as the majority in *R v Demirian*<sup>187</sup> had held it to be, the answer would be ‘no’ – even though: (i) Mrs Osland had agreed with David to kill a third party; (ii) he had done so; and (iii) unlike him, it was certain<sup>188</sup> that she could successfully raise no defence.

There have been other cases in which such problems have arisen. In *R v Cogan* (‘*Cogan*’),<sup>189</sup> for instance, Leak procured Cogan to have sexual intercourse with Leak’s wife. A jury thought it reasonably possible that Cogan believed that Mrs Leak was consenting, though in fact she was not.<sup>190</sup> He was, accordingly, not guilty of rape.<sup>191</sup> In the England and Wales Court of Appeal (‘EWCA’), Leak, who had been convicted of rape as an aider and abettor,

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181 *IL* (2017) 262 CLR 268, 310 [98] (Gageler J).

182 Glanville Williams, ‘Causing Non-crimes: The Procedural Questions’ (1990) *New Law Journal* 921, 921.

183 Williams, ‘Psychopathy, Mental Illness and Preventive Detention’, above n 180, 183.

184 *Chiro* (2017) 260 CLR 425, 476 [122] (Edelman J), citing Lon Fuller, *Legal Fictions* (Stanford University Press, 1967) 71; *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 387 [163] (Gummow JJ).

185 *Osland* (1998) 197 CLR 316, 322 [9] (Gaudron and Gummow JJ).

186 *Ibid* 323 [12] (Gaudron and Gummow JJ).

187 [1989] VR 97, 123–5 (McGarvie and O’Byrne JJ).

188 At a second trial, the possibility that David could successfully raise self-defence was converted into a certainty; he was acquitted, presumably on this basis: *Osland* (1998) 197 CLR 316, 367 [154] (Kirby J).

189 [1976] 1 QB 217.

190 *Ibid* 222 (Lawton LJ).

191 *R v Morgan* [1976] AC 182.

claimed that his conviction had to be set aside due to there being no principal offender.<sup>192</sup>

*Cogan* was a case in which the alleged principal was not guilty because he acted without the mental element required for the relevant offence. Similar to such cases are cases where the perpetrator has successfully pleaded the mental illness defence, or was *doli incapax* at the time of the relevant events, and therefore lacked capacity to commit an offence.<sup>193</sup> In *Matusevich v The Queen*,<sup>194</sup> Thompson was within the *M'Naghten* Rules when he killed a fellow prisoner with an axe.<sup>195</sup> The man with whom he was apparently acting in concert, Matusevich, had no such plea available to him. Likewise, in *Director of Public Prosecutions v K*,<sup>196</sup> the appellants had procured an act of sexual intercourse between the complainant, whom they knew was not consenting, and a boy who might have been under the age of 14.<sup>197</sup>

But, as *Osland* shows, there are other cases where the 'principal' has acted with the requisite mental state, and has capacity, but is not guilty even so. First, s/he might have a defence available to him/her. For example, in *R v Bourne*,<sup>198</sup> ('*Bourne*') the appellant had twice compelled his wife to have penile-vaginal intercourse with a dog. Because the wife was assumed to have been acting under duress, she was not guilty of buggery.<sup>199</sup> Secondly, the perpetrator might have an immunity from prosecution. S/he might enjoy diplomatic immunity,<sup>200</sup> for example, or be protected by a provision such as that considered in *R v Austin*.<sup>201</sup> In that case, King had unlawfully and forcibly taken his two-year-old child from the custody of his estranged wife, with intent to deprive her of the possession of the child.<sup>202</sup> His conduct thus fell squarely within the ambit of section 56 of the *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100, subject to one matter: a proviso to the section protected from prosecution a person, such as King, who could properly claim a right to possession of the child.<sup>203</sup> Did his lack of guilt prevent the conviction of the 'inquiry agents'<sup>204</sup> who were assisting him at the scene of the abduction?

Finally, there are cases where, though the principal is guilty of an offence, the secondary participant has the mens rea for a more serious offence. A case of this sort was *R v Richards*,<sup>205</sup> where the appellant paid two men to 'beat [her

192 *Cogan* [1976] 1 QB 217, 222 (Lawton LJ).

193 *RP v The Queen* (2016) 259 CLR 641, 648 [8] (Kiefel, Bell, Keane and Gordon JJ); *Hawkins v The Queen* (1994) 179 CLR 500, 517 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

194 (1977) 137 CLR 633.

195 *Ibid* 650 (Aickin J).

196 [1997] 1 Cr App R 36.

197 The boy could not be identified, and it was possible that he was both between the age of 10 and 13 and *doli incapax*: *ibid* 40 (Russell LJ).

198 (1952) 36 Cr App R 125.

199 *Ibid* 128 (Goddard LCJ).

200 An example provided by Peter Gillies, *The Law of Criminal Complicity* (Law Book Company, 1980) 147.

201 [1981] 1 All ER 374.

202 *Ibid* 376–8 (Watkins LJ).

203 See *ibid* 377–8.

204 *Ibid* 376.

205 [1974] 1 QB 776.

husband] ... up bad enough to put him in hospital for a month'.<sup>206</sup> She thus had the mens rea for the offence of wounding with intent to cause grievous bodily harm, and was convicted of that offence.<sup>207</sup> But the men, who in the event had inflicted relatively trivial injuries on Mrs Richards' husband,<sup>208</sup> were convicted of the lesser offence of unlawful wounding.<sup>209</sup> Could an accessory before the fact such as Mrs Richards properly be guilty of a more serious offence than that of which the perpetrators had been convicted?

In all of the above cases in which the apparent principal was guilty of no crime, it was held that his/her 'accessories' nevertheless could be convicted of the offence with which they had been charged.<sup>210</sup> But they were not all held liable on the same basis. In the English cases, two devices have been used to fix defendants with liability in cases such as this. As the Law Commission of England and Wales ('Law Commission') has explained:

The first of these is the doctrine of innocent agency by virtue of which D is convicted as a *principal offender* rather than as a secondary party. The second is to hold D liable as a *secondary party* on the basis that, although no principal offence has been committed, D has 'procured' the commission of the *conduct element* of the offence. On one occasion, the Court of Criminal Appeal upheld D's conviction on both bases.<sup>211</sup>

The case to which the Law Commission is referring is *Cogan*. In that case, the EWCA upheld Leak's conviction for rape as a principal in the first degree, finding that he had 'used [Cogan] ... as a means to procure a criminal purpose'.<sup>212</sup> Cogan, that is, was the innocent instrument of Leak. It did not matter that, because of the marital immunity, Leak could not by his own physical act have been guilty of the principal offence.<sup>213</sup> Nor, evidently, did it matter that rape is an offence that, because of its strong bodily connotations, has been said not to be capable of being committed through an innocent instrument.<sup>214</sup> But the Court also suggested that Leak could have been convicted as an aider and abettor.<sup>215</sup> By implying that this was because Cogan had raped Mrs Leak,<sup>216</sup> the Court fell into

206 Ibid 778 (James LJ).

207 Ibid 777 (James LJ).

208 Ibid 778 (James LJ).

209 Ibid.

210 *Bourne* (1952) 36 Cr App R 125, 128–9 (Goddard LCJ, Hilbery and Slade JJ); *Cogan* [1976] 1 QB 217, 223–4 (Lawton LJ); *Matusевич* (1977) 137 CLR 633, 637–8 (Gibbs J), 639 (Stephen J), 645 (Mason J), 648 (Murphy J), 663–4 (Aickin J); *Austin* [1981] 1 All ER 374, 378 (Watkins LJ); *K* [1997] 1 Cr App R 36, 45 (Russell LJ). In *Richards*, by contrast, the Court held that the appellant's liability could rise no higher than that of the principals: *Richards* [1974] 1 QB 776, 780 (James LJ); but that decision was controversial (see, eg, I R Scott, 'Proof of Principal Offences and Liability of Secondary Party' (1974) 90 *Law Quarterly Review* 314, 318) and the rule established by it was soon reversed: *R v Howe* [1987] 1 AC 417, 426, 436 (Lord Hailsham), 438 (Lord Bridge), 438 (Lord Brandon), 446 (Lord Griffiths), 457–8 (Lord Mackay).

211 Law Commission (UK), *Participating in Crime*, Law Com No 305 (2007) 179 [B.16] (emphasis in original).

212 *Cogan* [1976] 1 QB 217, 223 (Lawton LJ).

213 Ibid.

214 See, eg, Glanville Williams, 'The Theory of Excuses' [1982] *Criminal Law Review* 732, 737; J L I J Edwards, 'Duress and Aiding and Abetting' (1953) 69 *Law Quarterly Review* 226, 231–2.

215 *Cogan* [1976] 1 QB 217, 223–4 (Lawton LJ).

216 Ibid 223.

error: his acquittal of course established that there was no principal offence.<sup>217</sup> Rather, if he were to be held liable as an aider and abettor, this could only be because it is enough, to establish such secondary liability, for the Crown to prove that he had procured an actus reus.

Which of these two approaches is the correct one? As I will presently argue, the answer is that both might be required if the law is to respond adequately to the problem with which we are currently dealing. I will also argue that, in *Osland*, rather than adopting the fiction discussed above, the High Court should have upheld Mrs Osland's conviction on one or other of these bases; and that the second is very similar in substance to Bell and Nettle JJ's approach in *IL*.

### B The Innocent Instrumentality Approach

It was contended above that, in *Osland*, the Court took a 'wrong turn' when it held that, in the case of JCE, the acts of the perpetrator must be attributed to all other participants, so as to make those participants principals in the first degree. But there are circumstances where it is right to proceed against an offender as a principal, even though another actor has performed (or at least seemingly performed)<sup>218</sup> the actus reus. A classic example of this is provided by a case decided in 1634, where it was held that:<sup>219</sup>

if A giveth poison to B to give unto C and B not knowing it to be poison and B not believing it to be poison, but believing it to be a good medicine, giveth it to C who dieth of it; in this case A ... is principal, or else a man should be murdered and there should be no principal: for B who knew nothing of the poison, is in no fault, tho' he gave it to C.

In such circumstances, as Brooking JA put it in *R v Franklin*,<sup>220</sup> the law regards the apparent secondary participant as a 'puppet-master', who has 'caus[ed] the mischief done by the puppet'. The language here is important. It will be recalled that my objection to treating JCE passive participants as principals is that, generally, they have *not* caused the relevant harm. The perpetrator's free and voluntary act has intervened.<sup>221</sup> Where there is no such act – as is so when, for example, the perpetrator is an infant, is within *M'Naghten*,<sup>222</sup>

217 See, eg, Glanville Williams, 'The Extension of Complicity' (1975) 34 *Cambridge Law Journal* 182, 184. For Williams' criticisms of similar reasoning in *Bourne*, see Glanville Williams, 'Secondary Parties to Non-existent Crime' (1953) 16 *Modern Law Review* 384, 384.

218 In a case such as *Cogan*, the other actor has performed the actus reus (non-consensual sexual intercourse). But in a case such as *Anon* (1634) 84 ER 1078, 1079, which I am just about to discuss, s/he has only apparently done so: because his/her act was other than free and voluntary, it was not an act *causing* death (which of course is the actus reus of murder).

219 *Anon* (1634) Kel 52, 53; 84 ER 1078, 1079. In a similar vein, see, eg, *R v Saunders* (1576) 2 Plowd 473, 475; 75 ER 706, 708; *R v Michael* (1840) 9 Car & P 356; 173 ER 867.

220 (2001) 3 VR 9, 21 [35].

221 Indeed, this is suggested in *Anon*, where a distinction is drawn between the case just noted, where B is ignorant that s/he is giving poison to C, and the case where such a person knows full well what s/he is handing over. In the latter case, it is said, such a person is principal and A is 'but accessory before the fact': *Anon* (1634) Kel 52, 52; 84 ER 1078, 1079. See also *Pinkstone* (2004) 219 CLR 444, 451–2 [9]–[10] (Gleeson CJ and Heydon J), 468 [63] (McHugh and Gummow JJ), 481 [104]–[106] (Kirby J).

222 See *R v Tyler* (1838) 8 Car & P 616; 173 ER 643; *Matusevich* (1977) 137 CLR 633, 637–8 (Gibbs J).

is acting under duress,<sup>223</sup> or is mistaken<sup>224</sup> or ignorant as to what s/he is doing<sup>225</sup> – such an objection cannot be made.

It follows that, while the High Court was, with respect, wrong in *Osland* to find that Mrs Osland was a principal in the first degree *because of her participation in a JCE*, it is seemingly right to treat a person in her position as a principal in the first degree. Because it remained possible that David Albion was acting in self-defence at the time that he struck the fatal blows, his conduct could not be regarded as free and voluntary; and therefore the chain of causation between Mrs Osland's encouragement and Frank Osland's death remained intact.<sup>226</sup>

In fact, while it is often said that the doctrine of innocent instrumentality cannot be used to convict a culpable 'secondary' participant in certain cases where the perpetrator is innocent of criminal wrongdoing, there are reasons to doubt whether this should be so. As noted above,<sup>227</sup> it has often been said that the doctrine does not operate where the offence is one that is defined in such a way as to make it 'impossible to say that [the apparent accessory] has *personally* performed the conduct required by the definition of the actus reus'.<sup>228</sup> But such a view depends upon our accepting that, under the doctrine, the perpetrator's acts are attributed to the passive party. And as K J M Smith has explained:<sup>229</sup>

[T]here is nothing inherent in the notion of agency nor any firm and consistent line of authority requiring innocent agency to be conceived of and expressed in such a fashion. Rather, ... the doctrine ... [has a] causal core: that P has *caused* A to perform in a certain way. Therefore in using the doctrine it should be alleged that P assaulted ... by 'causing' V to strike ... or that P burgled premises by 'causing' V to enter and remove property therefrom.

It follows that, in *R v Hewitt*,<sup>230</sup> the Victorian Court of Appeal was, with respect, right to find that a person will be guilty of rape as a principal if s/he causes non-consensual intercourse to take place between his/her instrument and the complainant.

For similar reasons, it seems hard to accept that innocent instrumentality should be inapplicable where the principal offence is one that can be committed

223 See *Bourne* (1952) 36 Cr App R 125, though note that the appellant's conviction was not upheld on the basis of innocent instrumentality there: cf Williams, 'Secondary Parties to Non-existent Crime', above n 217, 384.

224 See, eg, *Cogan* [1976] 1 QB 217; *R v Hewitt* [1997] 1 VR 301.

225 See, eg, *R v Brisac* (1803) 4 East 164, 172; 102 ER 792, 795–6; *White* (1978) 140 CLR 342, 346–7 (Gibbs J).

226 *R v Pagett* (1983) 76 Cr App R 279, 289 (Robert Goff LJ) ('Pagett').

227 See above n 214 and accompanying text.

228 Ormerod and Laird, above n 1, 183. See also A P Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 6<sup>th</sup> ed, 2016) 216.

229 K J M Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press, 1991) 110 (emphasis in original). See also, in like vein, Gillies, above n 200, 141. Interestingly, in *IL*, Bell and Nettle JJ, citing Gillies with approval, accepted that 'where in the criminal law it is recognised that an accused may commit an offence by a "non-responsible" ... agent, the act of the agent remains in fact the act of the agent': (2017) 262 CLR 268, 304–5 [82].

230 [1997] 1 VR 301, 311–13 (Winneke P), 320–2 (Callaway JA), 324 (Hampel AJA). See also Gail Hubble, 'Rape by Innocent Agency' (1997) 21 *Criminal Law Journal* 204, where the author supports the Court of Appeal's stance.

only by a person who has a particular status, and the defendant lacks that status.<sup>231</sup> As noted above, in *Cogan*, Leak was the complainant's husband. Therefore, if he had actually had non-consensual intercourse with the complainant, he would have been immune from prosecution as a principal offender. But in circumstances where he caused the non-consensual intercourse to take place between his wife and a third party, there seems to be nothing wrong with convicting him as a principal in the first degree. As Ashworth<sup>232</sup> has said, and Horder<sup>233</sup> has maintained, while certain offences can be committed only by particular persons, 'there is no reason why the law should be constrained by a barrier that is linguistic rather than substantive'.<sup>234</sup> In substance, that is, Leak did exactly the same thing as did the offender in *Anon*: he caused an actus reus.

Nevertheless, innocent instrumentality clearly cannot be used in a case such as *Austin*. Because the father's act of child-snatching was free and voluntary, there can be no suggestion that the men who assisted him caused such conduct to occur. Therefore, if they were guilty, this was not because they were principals. Similarly, in cases such as *Richards*, there are difficulties involved in claiming that the passive party has caused the perpetrator's actus reus. Because the men who assaulted Mrs Richards' husband were sane adults who knew what they were doing – and were not acting from necessity,<sup>235</sup> under duress or in self-defence – Mrs Richards was on no view a principal in the first degree.<sup>236</sup> Finally, in *Osland*, there was a more technical reason why it was said that the appellant's conviction could not be upheld on the basis of innocent instrumentality. In response to the Crown's submission that it *could* be, Gaudron and Gummow JJ noted that, whatever had happened in *Cogan*,

principle requires that neither this Court nor a court of criminal appeal adopt that approach. ... a guilty verdict cannot be upheld on a basis not left to the jury because that would be to trespass on the constitutional function of the jury.<sup>237</sup>

So while, as argued above, Mrs Osland does appear to have been acting through the innocent instrumentality of her son, the Crown's failure to conduct the trial on this basis meant that another device had to be used to maintain her

231 See Law Commission (UK), above n 211, 180 [B.19].

232 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6<sup>th</sup> ed, 2009) 430.

233 Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 8<sup>th</sup> ed, 2016) 464.

234 Cf Taylor, 'Procuring, Causation, Innocent Agency', above n 23, 43; Sanford H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 *California Law Review* 323, 377–8.

235 *Kennedy [No 2]* [2008] 1 AC 269, 275 [14] (Lord Bingham). *Royall* (1990) 172 CLR 378, 412–13 (Deane and Dawson JJ), 425 (Toohey and Gaudron JJ), establishes that the chain of causation between the accused's conduct and the deceased's death will remain unbroken if the deceased has died when escaping from the accused's life-threatening violence, provided that such a response was reasonable. See also *R v Pitts* (1842) Car and M 284; 174 ER 509; *R v Grimes* (1894) 15 NSW 209, 220–1 (Windeyer J), 223–4 (Innes J). In these circumstances, the deceased has seemingly acted from necessity. His/her conduct is an act of self-preservation that is a proportionate response to an unjust human threat; but because that conduct has not been directed against the source of the threat, it of course is not an instance of self-defence: see Jeremy Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) 11 *Canadian Journal of Law and Jurisprudence* 143, 146–50.

236 As noted by Kadish, above n 234, 378.

237 *Osland* (1998) 197 CLR 316, 326 [19]–[20].

conviction (according to these two Justices, anyway).<sup>238</sup> It is contended that the Court should have used a device similar to the procuring an actus reus approach referred to above.<sup>239</sup> Such an approach would also facilitate the conviction of offenders such as Mrs Richards and the appellants in *Austin*.

### C The Procuring an Actus Reus Approach

In *Millward*,<sup>240</sup> H took a tractor with a defective towing mechanism onto the road. The trailer became detached and collided with an oncoming car, causing the death of a passenger. H had thus performed the actus reus of the offence of reckless driving causing death. But because he did not know of the tractor's defects, he lacked the requisite mens rea, and he was acquitted of that offence. Millward, who had been convicted as an aider and abettor, argued on appeal that his conviction had to be set aside due to the absence of a principal offence.<sup>241</sup> But the EWCA rejected this submission, holding that, because Millward had procured the actus reus of reckless driving causing death, he was properly convicted of that crime as a secondary party.<sup>242</sup> This principle has since been affirmed on a number of occasions.<sup>243</sup>

The first thing to note is that there is authority that the procurer of an actus reus, like Millward, has invariably *caused* that actus reus.<sup>244</sup> Does this mean that the Court in *Millward* proceeded fictitiously when it held him to be a secondary party? After all, in the above quotation,<sup>245</sup> Glanville Williams assures us that it is principals who cause; accessories assist or encourage.

The answer to this question is that no fiction was upheld in *Millward*. Rather, Williams' statement must be qualified slightly. As argued in this article, generally s/he who causes is a principal and nothing else. But, as the Law Commission has observed,<sup>246</sup> if a person procures another to commit a *no-fault offence*:

It is at least understandable that [s/he] ... should be convicted of the offence as a secondary party rather than as a principal offender. After all, it is [another person]

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238 Cf *Cogan* [1976] 1 QB 217, 223–4, where it was held that Leak's conviction could be upheld on the basis of innocent instrumentality, though he had been proceeded against as an aider and abettor, because this had not prevented him from knowing what the case against him was. When it is taken into account that the Crown has long been permitted to prove that an individual was *either* an accessory or a principal – that is, it is not required to particularise which of these categories s/he fell within (see, eg, *Jogee* [2017] AC 387, 417 [88] (Lord Hughes and Lord Toulson); cf *King v The Queen* (1986) 161 CLR 423, 436–7 (Dawson J) ('*King*')) – it might be that the more relaxed approach in *Cogan* was right.

239 See above n 211–17 and accompanying text.

240 [1994] Crim LR 527.

241 Because the offence charged was a driving offence, it was considered to be one that could not be committed through an innocent instrument: see Simester et al, above n 228, 216, 252–3; *Wheelhouse* [1994] Crim LR 756, 757.

242 *Millward* [1994] Crim LR 527, 528 (The Court).

243 *Wheelhouse* [1994] Crim LR 756; *Pickford* [1995] 1 Cr App R 420, 430 (Laws J); *K* [1997] 1 Cr App R 36, 44–5 (Russell LJ).

244 *Attorney-General's Reference* [1975] QB 773, 780 (Lord Widgery CJ).

245 See above n 42 and accompanying text.

246 Law Commission (UK), above n 211, 182 [B.22].

... who has committed the offence and it is inappropriate and inaccurate to describe [the offenders] ... as joint principals.<sup>247</sup>

Where, as in *Osland*, a person procures, assists or encourages another to perform an actus reus, the position is similar, though slightly different. As in the case of the no-fault offence, Mrs Osland caused the actus reus. But, unlike in that case, the perpetrator, David Albion, was guilty of no offence. Therefore, as argued above,<sup>248</sup> he was an innocent instrument, and Mrs Osland could properly have been dealt with as a principal in the first degree. But she could also properly be dealt with as a secondary participant. This is because Mrs Osland did not *only* cause; she also assisted and encouraged.

In *Osland*, McHugh J said that, when David Albion struck the blows, Mrs Osland had the 'relevant mens rea'.<sup>249</sup> But that statement conceals a difficulty. Did she have the mens rea required of a principal on a charge of murder? Or did she have the mens rea required of an accessory? The answer is seemingly that she had only the latter.<sup>250</sup> While Mrs Osland intended Frank Osland to die, she did not intend to kill him.<sup>251</sup> It was David Albion who was to do the killing.<sup>252</sup> But, by mixing sedatives in Frank Osland's food, and by being present as David killed Frank pursuant to her and David's agreement to do so,<sup>253</sup> Mrs Osland intentionally assisted and encouraged her son.<sup>254</sup>

It will be noted that, in the last two paragraphs, there has been a movement from the *Millward* language of procuring to the language of procuring, *assisting or encouraging*. This is because I respectfully reject the idea, tentatively supported by some English commentators,<sup>255</sup> that the *Millward* principle should

247 As was the case in *Attorney-General's Reference* [1975] QB 773.

248 See above n 226 and accompanying text.

249 *Osland* (1998) 197 CLR 316, 350 [93].

250 See Peter Alldridge, 'The Doctrine of Innocent Agency' (1990) 2 *Criminal Law Forum* 45, 57. John Beaumont, 'Abetting without a Principal: A Problem in the Law of Complicity' (1979) 30 *Northern Ireland Legal Quarterly* 1, 17, has made the same point about the defendant Leak in *Cogan* [1976] 1 QB 217, though I am not sure that this is right. Leak intentionally procured Cogan's actus reus. But he also had the mens rea required of a principal: he knew that his wife was not consenting.

251 On this point, see *Justins* (2010) 79 NSWLR 544, 563 [126]–[129] (Spigelman CJ), 604–5 [368] (Johnson J), cf 581–2 [246]–[251] (Simpson J). See also *Jogee* [2017] AC 387, 417 [90] (Lord Hughes and Lord Toulson). On the other hand, if Mrs Osland knew that David was acting in self-defence, perhaps it could be said that she intended to kill (i.e. cause the death of) Frank. If that is right – and maybe she did *not* know this – she seemingly had the mens rea of both a principal and an accessory, because she also provided intentional assistance and encouragement to David to kill.

252 Subject to what is said at n 251, nor did Mrs Osland intend to *inflict* grievous bodily harm on Frank: see *Crimes Act 1900* (NSW) s 18(1)(a). Any harm was to be inflicted by David, not his mother.

253 See *Huynh* (2013) 87 ALJR 434, 442 [38] (The Court).

254 It is true that, because David was acting in self-defence, Mrs Osland intentionally assisted him to kill Frank; she did not intentionally assist or encourage him to *cause* Frank's death. Technically, therefore, she did not assist or encourage an actus reus. But because in substance she did precisely what the defendants in cases such as *Cogan* did – that is, she assisted another to perpetrate the relevant harm (in *Cogan*, non-consensual intercourse; in her case, the killing of another) – it is hard to see why her legal position should be any different from theirs.

255 See, eg, Sir John Smith, '*R v Millward*' [1994] *Criminal Law Review* 527, 530. See also Richard Taylor, 'Complicity, Legal Scholarship and the Law of Unintended Consequences' (2009) 29 *Legal Studies* 1, 16; Taylor, 'Procuring, Causation, Innocent Agency', above n 23, 47 (though note that Taylor's definition of procuring is wider than that favoured here).

apply only in cases where the accused has *procured* an actus reus. Such a limitation would apparently prevent the ‘inquiry agents’ in *Austin* from being convicted. They did not procure the father’s actus reus;<sup>256</sup> rather, they assisted him to steal the child. But if they had intentionally assisted the father to commit a *crime*, without also intentionally procuring its commission, they would have been guilty of that crime. Why should intentional assistance suddenly not be enough when the principal performs an actus reus? Because *Millward* extends *secondary* liability, it is no answer to say that the procurer, unlike the assister or encourager, causes the actus reus.

Furthermore, and again with great respect, there is reason to doubt Fletcher’s well-known claim that a person should only be held liable as an accessory to the excused – as opposed to justified – actus reus of another.<sup>257</sup> The idea here is that the justified actor has done nothing wrong,<sup>258</sup> and that ‘therefore there is no wrong objectively to attribute to the accessory’.<sup>259</sup> Fletcher provides the following example to illustrate his argument:

Suppose that X attacks F and F responds in knowing self-defense. R comes upon the scene, and thinking that F has started the fight, R hands F a club, the better to finish off his opponent. R acts with the intent to injure and believes that the act is wrongful. The question is whether R’s intent is sufficient to hold him accountable for the consequences of F’s justified act of self-defense.<sup>260</sup>

To this question, my answer is an emphatic ‘yes’. Of course, the position would be different if R had realised that F was acting in self-defence. Then, his act of assistance would have been done in the lawful defence of another;<sup>261</sup> and he would have been innocent on this account. It would also be different if, as in *R v Loukes*<sup>262</sup> and *Thornton v Mitchell*,<sup>263</sup> F had performed no actus reus. But, as it is, R has intentionally assisted and encouraged F to injure X, and has no defence available to him. He is therefore as culpable in respect of the harm as were the appellants in *Bourne* and *Cogan*; and it is difficult to see why he should be treated any differently from such people.

## D Conclusions

In *IL*, Bell and Nettle JJ held that a passive participant in a JCE may be convicted of a crime, provided that s/he has agreed with the perpetrator to commit that crime and the perpetrator has in fact performed the actus reus of that offence. For those Justices, the passive party’s liability does not hinge on

256 See above nn 201–4 and accompanying text.

257 George P Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000) 664–70.

258 R D Taylor, ‘Complicity and Excuses’ [1983] *Criminal Law Review* 656, 657. On the other hand, the excused actor – the person who, for example, acts under duress or without mens rea – has acted wrongly: *ibid* 664.

259 Fletcher, above n 257, 668.

260 *Ibid* 667.

261 See, eg, *Crimes Act 1900* (NSW) s 418(2).

262 [1996] 1 Cr App R 444, 449–50 (Auld LJ).

263 [1940] 1 All ER 339.

whether the perpetrator was justified or excused.<sup>264</sup> Nor does it depend on whether s/he *procured* – as opposed to assisted or encouraged – the perpetrator's actus reus.<sup>265</sup>

It follows from the argument just presented that I support their Honours' approach. Indeed, it is submitted that accessorial liability, too, ought to operate along the lines that their Honours considered that JCE liability should. In *Likiardopoulos v The Queen* ('*Likiardopoulos*'),<sup>266</sup> the High Court found that it was unnecessary to respond to the Crown's invitation<sup>267</sup> to hold that a person could be convicted as an accessory so long as the perpetrator had performed the actus reus of the relevant offence. Though the perpetrators in that case had not been convicted of murder, the evidence at *Likiardopoulos*'s trial was capable of establishing that they had murdered the deceased.<sup>268</sup> But if a case were to arise in which: (i) there was no agreement between the parties to commit the crime (thus excluding JCE liability); (ii) the secondary participant had nevertheless assisted the perpetrator to commit the actus reus of that crime; and (iii) the conviction could not be upheld on the basis of innocent instrumentality, the Court should uphold the conviction on the basis pressed in *Likiardopoulos*. Of course, this might be thought to 'alter the criminal law retrospectively and adversely to the interests of accused persons'.<sup>269</sup> But, as we have seen, the Courts have a longstanding practice of convicting passive participants in accordance with their own culpability. Given this record, it would seem that the hypothetical offender just considered has been given fair warning that his/her behaviour will give rise to liability reflecting his/her, and not the perpetrator's, blameworthiness.

## IV EXTENDED JOINT CRIMINAL ENTERPRISE

### A Two Moot Points

Until now, it has been unnecessary to discuss in any detail the controversial doctrine of EJCE, which of course only operates when, after a JCE has been embarked upon, one of the participants commits a crime other than that which is the primary object of the venture. In *IL*, however, Gageler J referred to two moot points regarding this doctrine. They are:

Whether criminal responsibility attributed by operation of the doctrine of extended joint criminal enterprise is primary or derivative and how, if at all, the doctrine of extended joint criminal enterprise might intersect with constructive murder ...<sup>270</sup>

264 This is demonstrated by their Honours' approval of the decision in *Osland: IL* (2017) 262 CLR 268, 299–300 [74].

265 As noted above, it is well-established that a person participates in a JCE by assisting or encouraging the perpetrator: see above n 7 and text accompanying above nn 164–6.

266 (2012) 247 CLR 265, 276 [27] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

267 Crown, 'Respondent's Submissions', Submission in *Likiardopoulos v The Queen*, M24/2012, 1 May 2012, 11 [6.43].

268 *Likiardopoulos* (2012) 247 CLR 265, 275 [24], 276 [27] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 283 [45] (Heydon J).

269 *Ibid* 282 [43] (Heydon J).

270 *IL* (2017) 262 CLR 268, 312–13 [107].

The question that is of greater relevance to this article is the first one;<sup>271</sup> but before dealing with that question, I will briefly attempt to answer the second.

The EJCE doctrine would seem to be capable of producing ‘constructive murder’ liability in a case where: (i) a passive participant in a JCE has foreseen that, during the enterprise, one of his/her co-venturers will commit a sufficiently serious offence to attract the operation of the constructive murder rule; and (ii) in an attempt to commit that offence, or during or immediately after its commission, one of the co-venturers has killed someone. For example, if: IL had agreed with her co-offender to manufacture a commercial quantity of methylamphetamine,<sup>272</sup> foreseeing that he might manufacture a large commercial quantity; he had in fact manufactured a large commercial quantity; and in the course of doing so, he had caused the death of a third party, it is difficult to see why IL would have escaped liability for murder. It might be objected that IL would additionally have to be proved to have foreseen the act causing death (say, the lighting of a ring burner). But, as we have seen,<sup>273</sup> a JCE participant can be convicted of ‘constructive murder’ by virtue of his/her agreement to commit the foundational offence, without there being a need for the Crown to prove that s/he agreed that the act causing death be committed.<sup>274</sup> It might well be that the EJCE participant would likewise not be required to have foreseen such an act.

We can now turn to the first point. In the hypothetical case just noted, would IL’s liability be primary or derivative? Consistently with the analysis presented in Part III of this article, I believe that it should be derivative. Justice Keane, however, thinks that it is primary.<sup>275</sup>

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271 It could be argued that, contrary to what Gageler J says, this point is not in fact moot at all, on the ground that *Osland* establishes that both JCE and EJCE participants are principals in the first degree. After all, when justifying his conclusion that JCE liability is primary, McHugh J referred to four cases in which the Courts considered liability for a crime other than that which was the primary object of the parties’ venture. These were *Markby v The Queen* (1978) 140 CLR 108; *Johns* (1980) 143 CLR 108; *Chan* [1985] AC 168; and *Hui Chi-Ming v The Queen* [1992] 1 AC 34. But *Markby*’s conviction for manslaughter did not necessarily mean that his liability was primary: cf *Osland* (1998) 197 CLR 316, 346 [81] (McHugh J). For, it is well-established that an accessory can be liable for a less serious crime than the principal: see, eg, *Stokes* (1990) 51 A Crim R 25, 27, 39 (Hunt J). Moreover, in *Johns*, the appellant was described repeatedly as an ‘accessory before the fact’, and the perpetrator was said to be a ‘principal in the first degree’: see, eg, (1980) 143 CLR 108, 125 (Barwick CJ and Stephen J), 130–1 (Mason, Murphy and Wilson JJ); in *Chan*, we find Sir Robin Cooke announcing that ‘[this] case must depend rather on the wider principle whereby a *secondary* party is criminally liable for acts by the *primary* offender of a type which the former foresees but does not necessarily intend’: [1985] AC 168, 175 [emphasis added]; and in *Hui Chi-Ming*, no criticism was made of (a) the Crown’s having proceeded at trial on the basis that the defendant could be convicted of murder only if the perpetrator, Ah Po, was guilty of that offence: [1992] 1 AC 34, 42 (Lord Lowry); or (b) its description of the appellant as a ‘secondary party’ and Ah Po as a ‘principal’: [1992] 1 AC 34, 47 (Lord Lowry). Indeed, the Court in *Hui Chi-Ming* used such language itself: [1992] 1 AC 34, 48, 51, 52 (Lord Lowry).

272 Because this offence is punishable by 20 years imprisonment, it is not serious enough to be a foundational offence for the purposes of the constructive murder rule: *Drug Misuse and Trafficking Act 1985* (NSW) ss 24(2), 33(3)(b).

273 See above nn 66–7 and accompanying text.

274 *Surridge* (1942) 42 SR (NSW) 78, 83 (Jordan CJ); New South Wales Law Reform Commission, above n 15, 147 [5.32].

275 *Miller* (2016) 259 CLR 380, 426–7 [137]–[140] (Keane J).

## B Are EJCE Participants (Parasitic) Accessories? Or Is the Perpetrator Such Participants' Agent or Instrument?

The view that EJCE liability is derivative, or accessorial, liability can be shortly stated. An EJCE offender is convicted of the further crime not because s/he has caused the actus reus of that crime. As is so with JCE liability, because the perpetrator's free and voluntary act has normally intervened between the passive participant's conduct and the harm that has resulted, the perpetrator has usually caused that harm. Rather, the passive participant's liability comes about because of his/her involvement in a crime committed by another. Accordingly, that liability must be secondary liability.

But what precisely does this mean? Does it mean that the passive participant should only be convicted if the perpetrator can be proved to have committed the further crime? Or should it be enough for the Crown to prove that s/he has performed the actus reus of that crime? The latter seems the correct position. Similarly to a JCE case such as *Matusevich*, for example, if a person agrees to commit a robbery with foresight that a mentally ill co-offender might act with murderous intent during the robbery, and that person does so and kills a third party, why should the passive participant be acquitted of murder just because the perpetrator was within *M'Naghten*?

Admittedly, such a rule would be capable of producing a murder conviction for the passive participant in circumstances where the perpetrator lacks the mens rea for murder and is guilty only of involuntary manslaughter. But that is unlikely in practice. It is not usual for the Crown to seek an EJCE murder conviction where it is proceeding against the perpetrator only for involuntary manslaughter;<sup>276</sup> and it is hard to believe that, in cases where they were given this option, juries would find the passive party guilty of murder on the basis that s/he foresaw that the perpetrator might act with an intent that, in the event, s/he did *not* act with.<sup>277</sup> And even if the passive party were convicted in such a case, the injustice that s/he would suffer would result from the EJCE doctrine itself, not from the rule proposed here. As stated above,<sup>278</sup> if the law of complicity were principled, a person could be convicted of a crime other than that which was the object of a criminal venture only if s/he intended that that crime be committed if the occasion arose during the foundational enterprise. It would work no obvious injustice to convict such a person of murder even though the perpetrator of the relevant killing was guilty only of involuntary manslaughter. The law would in fact be doing the same thing as it does in the type of case envisaged by Lord Lane CJ in *R v Howe*:

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276 Such a prosecution case would couple (a) an allegation that the passive party foresaw that the perpetrator might act with an intention to kill or inflict grievous bodily harm, with (b) a concession that the perpetrator did not act with such intent.

277 It is much easier to imagine a jury convicting of murder a passive EJCE party whose principal was within *M'Naghten* at the time of the killing. Unlike the passive party whose principal has been convicted only of involuntary manslaughter, such a party has foreseen something that, usually at least, *has* happened: ie, that the perpetrator might act with murderous intent.

278 See above nn 4–8 and accompanying text.

Counsel before us posed the situation where A hands a gun to D informing him that it is loaded with blank ammunition only and telling him to go and scare X by discharging it. The ammunition is in fact live, as A knows, and X is killed. D is convicted only of manslaughter, as he might be on those facts. It would seem absurd that A should thereby escape conviction for murder.<sup>279</sup>

Lord Lane's case is a JCE case; the scenario that I am dealing with is one where a *further* crime has been committed. But if the fault element in the latter type of case were that favoured in *Jogee* (conditional intent),<sup>280</sup> the passive party would be in the same position as A. S/he would intend that the relevant offence be committed. The fact that the perpetrator lacked the mens rea for that further crime would make the passive party no less culpable.

Like Lord Hobhouse<sup>281</sup> before him, however, Keane J does not accept that JCE and EJCE participants are accessories.<sup>282</sup> His Honour thinks that the person who agrees with another or others to commit an offence, unlike a 'mere aider or abettor etc'<sup>283</sup>

becomes, by reason of that commitment, both the principal and the agent of the other participants: for the purposes of that enterprise they are partners in crime. Each participant also necessarily authorises those acts which he or she foresees as possible incidents of carrying out the enterprise ...<sup>284</sup>

That is, for Keane J, because the passive participants have given authority to their agent (or 'instrument'),<sup>285</sup> the perpetrator, to deal with the foreseen risks of the enterprise, their liability is direct and not secondary.<sup>286</sup> I have criticised this reasoning elsewhere,<sup>287</sup> primarily on the basis that passive EJCE participants have *not* given authority to the perpetrator to commit the further crime. In *Gillard v The Queen*, for instance, the perpetrator, Preston, regarded the passive participant, the appellant, as 'thick and simple' and an 'errand boy'.<sup>288</sup> So, when Gillard drove Preston to the scene of what he said he thought would be an armed robbery, *he* was the one who was following instructions.<sup>289</sup> With respect, it is simply false to argue that, when Preston shot two men dead inside the relevant premises, he was acting as Gillard's 'agent'. Still less was he his 'instrument'.

But even if Preston had been authorised by Gillard to kill, this would not have made Gillard a principal in the first degree. The point can be illustrated using a JCE case in which it is at least plausible to regard the perpetrator as the passive participant's agent – a case, that is, where the passive party has

279 [1986] 1 QB 626, 642.

280 *Jogee* [2017] AC 387, 418 [92] (Lord Hughes and Lord Toulson).

281 *R v Stewart* [1995] 3 All ER 159, 165 (Hobhouse LJ) ('*Stewart*'); Lord Hobhouse of Woodborough, 'Agency and the Criminal Law' in Francis D Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP, 2000) 39, 45–6.

282 *Miller* (2016) 259 CLR 380, 427 [139].

283 *Stewart* [1995] 3 All ER 159, 165 (Hobhouse LJ). See also, in a similar vein, *Miller* (2016) 259 CLR 380, 427 [139] (Keane J).

284 *Miller* (2016) 259 CLR 380, 427 [139] (Keane J).

285 *Ibid* 427 [141].

286 *Ibid* 427 [140].

287 Dyer, 'The "Australian Position"', above n 4, 301–2.

288 (2003) 219 CLR 1, 7 [3] (Gleeson CJ and Callinan J).

289 As Gleeson CJ and Callinan J put it: '[t]he appellant had a long association with Preston, but in a subservient role': *ibid*.

contracted the perpetrator to kill and s/he has done so. Because the perpetrator's act in such a case is still a free and voluntary one – as is shown, among other things, by the apparent regularity with which such 'agents' withdraw from such agreements before any harm is done<sup>290</sup> – the passive participant has not caused the relevant death. Of course, there are cases where it is almost fortuitous that the perpetrator rather than the passive party has performed the relevant conduct.<sup>291</sup> Accordingly, it must be acknowledged that there is a temptation to regard particularly those who are present at the scene of a crime pursuant to an agreement as having *all* performed the deeds.<sup>292</sup> Nevertheless, this is a shortcut.<sup>293</sup>

Another problem with Keane J's analysis is that it ignores the fact that the EJCE participant lacks the mens rea required of a principal offender.<sup>294</sup> In a murder case, for example, s/he has foreseen the possibility that another person will perform an act with murderous intent. S/he has not formed an intention to kill or to inflict grievous bodily harm. It is true that offenders such as Mrs Osland, too, might lack the mens rea for the principal offence.<sup>295</sup> It is also true that I have argued above that such offenders can properly be convicted of that offence as principal offenders, on the basis of the innocent instrumentality doctrine. But because these offenders intend that the crime be committed, their mental state is far more similar to that required of the perpetrator than is the mental state of an EJCE accused. In other words, innocent instrumentality is usually considered to apply only where 'D *intends* to act through P'.<sup>296</sup> The person who has such an intention will either have the mens rea required of a principal (for example, in *Cogan*, Leak knew that his wife was not consenting) or a mental state that is just as culpable (for example, in *Osland*, the appellant intended that Frank Osland die, even if she did not intend to kill him).

A still further problem with Keane J's analysis is that it seems to imply that the person who assists another person to commit a crime, without agreeing with

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290 See, eg, *King* (1986) 161 CLR 423, 430 (Dawson J).

291 In *Osland*, for example, one reason at least why David Albion performed the acts causing death was apparently that he considered his mother not to be strong enough to do so: (1998) 197 CLR 316, 322 [9] (Gaudron and Gummow JJ).

292 See, eg, *R v Macklin* (1838) 2 Lewin CC 225; 168 ER 1136.

293 It follows that I support the decision of the Western Australian Court of Appeal in *L v Western Australia* (2016) 49 WAR 545 ('L'). In that case, the Court considered s 7(a) of the *Criminal Code Act 1902* (WA), which provides that, where an offence is committed, a person is guilty of that offence if s/he 'actually does the act or makes the omission which constitutes the offence'. It found, in obiter, that s 7(a) does not provide for the common law doctrine of JCE, because, among other considerations, '[a] person who is merely present when an agreed crime is committed cannot be said to have actually done any of the acts which constitute the offence': at 557 [51] (The Court). But in *Campbell v Western Australia* (2016) 50 WAR 331, the approach in *L* was disapproved by McLure P (at 339 [10], 341–2 [21]–[24]) and doubted by Corboy J (at 397 [304]), cf Buss JA: at 368 [168].

294 On this point, see David Lanham, 'Primary and Derivative Criminal Liability: An Australian Perspective' [2000] *Criminal Law Review* 707, 718.

295 See above nn 249–53 and accompanying text.

296 Law Commission (UK), above n 211, 101 [4.19] (emphasis added); cf Smith, *A Modern Treatise on the Law of Criminal Complicity*, above n 229, 98–9. Therefore, it would seem that this doctrine cannot be used to deal with the EJCE party whose 'principal' is not guilty. This is because the EJCE party foresees, but does not necessarily intend, the further crime.

him/her to do so,<sup>297</sup> cannot be guilty of a further crime committed by the other person – even if that crime is committed and the passive party foresaw that it might be.<sup>298</sup> Because there is no agreement in such a case, there has been no authorisation of the foreseen acts. Yet, in reality, the assister who foresees the possibility of a further crime is no less culpable than the JCE participant who does so, if that further crime occurs.<sup>299</sup> Accordingly, it is submitted that for as long as foresight of the possibility is enough, the liability of the party who does foresee should be built on an accessorial foundation.<sup>300</sup> This would reflect the fact that, in cases where there *is* an agreement, such a party has not ‘deployed’ agents to do her/his ‘dirty work’,<sup>301</sup> but rather is a ‘parasitic accessory’.<sup>302</sup>

## V CONCLUSION

‘We are not here to answer an exam question’, Bell J reminded counsel for the appellant during argument in *IL*.<sup>303</sup> After reading some of the judgments in that case, one is tempted to say that it is probably just as well. Certainly, the Court’s role in *IL* was not ‘to solve every issue in the law of complicity, merely the issues presented by this case’.<sup>304</sup> But surely it should have done so in a way that did not perpetuate *Osland*’s disregard of the fundamental ‘conceptual division between principals ... and accessories’ to which Glanville Williams refers in the passage above.<sup>305</sup>

In short, there are two glaring problems with the Australian common law regarding criminal complicity. The first is the continuing existence of the EJCE doctrine. I have written about that elsewhere. The second, which I have dealt with here, is *Osland*’s – and now *IL*’s – claim that JCE liability is direct, not secondary. It has been argued in this article that Sir John Smith’s criticisms of *Osland* were justified; and that English law has now *rightly* fallen into line with his view that, because JCE participants assist or encourage, they are accessories.

297 For an example of this, see Dyer, ‘The “Australian Position”’, above n 4, 305, citing David Lanham, ‘Case Note: *Johns v The Queen*’ (1980) 12 *Melbourne University Law Review* 425, 426.

298 Certainly, this was the view of the majority in *Clayton*: their defence of EJCE was built upon the idea that the person who *agrees* to commit an offence has changed his/her normative position sufficiently to warrant being held liable for any further crimes: *Clayton* (2006) 81 ALJR 439, 444 [20] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ), citing with approval Simester, ‘The Mental Element in Complicity’, above n 13, 596–8. See also *Miller* (2016) 259 CLR 380, 398 [34] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

299 As I have argued elsewhere: Dyer, ‘The “Australian Position”’, above n 4, 304–7. See also *B* (2012) 114 SASR 170, 176 [15] (Kourakis CJ).

300 That is, ‘parasitic liability’ should apply in cases where there is assistance or procuring, but no agreement: see Sir John Smith, ‘*R v Reardon*’ [1999] *Criminal Law Review* 392, 393.

301 *Miller* (2016) 259 CLR 380, 427–8 [141] (Keane J).

302 Smith, ‘Criminal Liability of Accessories’, above n 166, 455. See also *Jogee* [2017] AC 387, 396 [3] (Lord Hughes and Lord Toulson); *R v Gango* [2012] 1 AC 827, 835 [15] (Lord Phillips and Lord Judge CJ).

303 Transcript of Proceedings, *IL v The Queen* [2017] HCA Trans 65 (4 April 2017).

304 *Ibid* (Bell J).

305 See above n 42 and accompanying text. That is, once the majority decided to resolve the case on a basis other than that which *IL* had urged on the Court, it should have adopted like reasoning to that deployed by Bell and Nettle JJ.

The failure of the Australian courts to do so has caused the Australian law in this area to become obscure, dishonest, unprincipled and unnecessarily complex. It has also led judges to promote misconceived theories. Just as there has been no successful attempt to justify EJCE,<sup>306</sup> the idea that JCE and EJCE participants are each other's agents cannot justify the view that liability is primary under these doctrines. *Osland* is founded in pragmatism, not principle. The prosecution of IL has shown that there are dangers in pursuing pragmatism at the expense of the truth.

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306 See, eg, Dyer, 'The "Australian Position"', above n 4, 300–8.