

COMPLICITY LIABILITY: ENGLISH AND CHINESE APPROACHES COMPARED

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Abstract: This article compares the English and Chinese approaches to criminal liability of participants in crime. The differential approach of the English law considers the criminal liability of an accessory as derived from the liability of the principal offender of the crime. In contrast, the unitary approach punishes each participant according to their level of participation. While it is debatable which approach Chinese law has adopted, Chinese courts are empowered to draw a distinction between the principal offender and other participants in crime at the sentencing stage. This article will show that while there are many similarities between English law and Chinese law of complicity liability, there are significant differences as well. For instance, while English law requires that the accessory must have intended to encourage or assist in the commission of the crime, Chinese law considers it sufficient that the accessory intended or was reckless as to the commission of the crime. It focuses on the liability of accessories in situations where the principal offender is not liable for, or has deviated from, the intended crime. In such situations, both English and Chinese legislation seem to impose an inchoate form of liability for assistance or encouragement. To analyse situations where a person intending a crime to be committed procures an innocent agent to perpetrate the intended crime, this article argues that the doctrine of innocent agency is much preferable to the differential approach of imposing derivative liability on the accessory. It also considers whether the accessory could be found liable for a lesser-included offence when the principal has deviated from what was assisted or encouraged.

Keywords: *derivative complicity; common intention; foresight; innocent agency; lesser-included offence; fair labelling; collateral crime; inchoate offence of assisting and encouraging*

I. Introduction

A person may commit a crime with the help of other participants. It is therefore important that not only the direct wrongdoer but also others who are complicit in the offence are held to account. The doctrine of complicity has been developed to

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impose criminal liability on participants in a crime who have not perpetrated the crime but have assisted or encouraged other people to perpetrate it. An examination of the law of different jurisdictions shows that there are two basic approaches to participation in crime: the “differential approach” and the “unitary approach”.¹ The differential approach has been adopted in countries such as the United Kingdom and Germany and draws a distinction between principal offenders and accessories.² Under such an approach, a principal offender is the one who commits the *actus reus* of a crime with the requisite *mens rea*,³ and an accessory is one who contributes to the commission of the crime by providing tools or information, acting as a lookout, encouraging or inducing the principal offender and so on.⁴ The accessory’s liability under this differential approach is derived from that of the principal offender.⁵ The unitary approach has been adopted in countries such as Italy and Austria and treats

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- 1 See Albin Eser, “Individual Criminal Responsibility” in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, Vol 1, 2002) p 781; and Kai Ambos, “Is the Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections” (2005) 12(2) *Maastricht Journal of European and Comparative Law* 173, 183.
 - 2 See Antje Du Bois-Pedain, “Participation in Crime” in Kai Ambos and others (ed), *Core Concepts in Criminal Law and Criminal Justice* (Cambridge: Cambridge University Press, 2020) pp 94–97; Mile Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015) p 20; Mingxiang Liu, “To Challenge the Tendency of Treating the Principal as Perpetrator” (2013) 5 *Chinese Journal of Law* 113, 114 (a journal article in Chinese). Jackson points out that there are three kinds of differentiation: (1) doctrinal differentiation, which distinguishes among participants in wrongdoing at the level of legal doctrine; (2) differentiation in the attribution of responsibility, which distinguishes participants in wrongdoing at the stage of ascribing responsibility and (3) differentiation in the consequences of responsibility, which distinguishes among participants in wrongdoing at the stage of punishment. It can be said that both English and Chinese criminal law draw a doctrinal distinction between participants in crime. It is only because the conduct of an accessory does not fit the definitional elements of crime that the law has developed the doctrine of complicity to criminalise accessories. However, neither English law nor Chinese law distinguishes among participants at the level of ascription of responsibility. Both jurisdictions label accessories in the same way as the principal offender. Chinese law gives different punishments to participants depending on their level of contribution to the crime. English law sets the same punishment range for all participants but allows for judicial discretion at the sentencing stage. That said, both jurisdictions recognise the third kind of differentiation.
 - 3 “Principal offender” and “perpetrator” are synonymous in current English law. See *R v Jogee* [2016] UKSC 8, [1]. Before the enactment of Criminal Law Act 1967 s.1, English law distinguished principal in the first degree from principal in the second degree. The former referred to those who had actually, and with their own hands, committed the crime, that is the perpetrator. The latter referred to those who were present at the crime scene aiding and abetting the commission of the crime. See WO Russell, *A Treatise on Crimes and Misdemeanors* (London: Butterworths, 1819) Vol 1, p 30. “Principal offender” in current Chinese law has a different connotation, which I will turn to shortly.
 - 4 See AD Bois-Pedain, “Participation in Crime” (n.2), 96; and Mingxiang Liu, “The Advantages and Disadvantages of China’s Not Adopting the Theory of Derivative Complicity” (2015) 2 *China Legal Science* 282, 283 (a journal article in Chinese).
 - 5 Derivative complicity can be seen in jurisdictions such as England and Wales, the United States, Australia, Germany, France and Japan. See, Accessories and Abettors Act 1861 (UK) (AAA 1861) s.8; *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350, *R v Jogee* [2016] UKSC 8; Model Penal Code (US) s.2.06; Criminal Code (West Australia) s.7; Crimes Act 1958 (Victoria) ss.323–324; Criminal Law Consolidation Act 1935 (South Australia) s.267; German Criminal Code ss.25–27; French Criminal Code arts.121–6 and 121–7; Japanese Penal Code ch.XI.

everyone who contributes in some way to the commission of the crime as principal offenders.⁶ Under this approach, each party is punished according to his own level of participation in the crime. Each approach has its own advantages and disadvantages, and each approach has different variants.⁷ The structure of the doctrinal framework of complicity greatly affects the scope of it.

The English common law doctrine of complicity was put on a statutory footing by s.8 of the Accessories and Abettors Act 1861, which provides as follows: “Who-soever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender”.

English complicity law reflects the differential approach: one cannot be liable as an accessory unless the target crime has been perpetrated or attempted.⁸ English law regards the principal offender as the one who perpetrates a crime, with the requisite *mens rea*. If two persons each finish part of the *actus reus* with the requisite *mens rea* and their actions in combination fulfil the complete *actus reus* of the offence, they are co-principals.⁹ English law also recognises the principal offender as the one who uses an innocent agent to commit the crime. Where a person uses an innocent agent, such as an underage child, an insane person or a person who lacks *mens rea* for the crime, he will be regarded as the principal offender just as if he has used his own hands to commit the crime.¹⁰

The rules regulating complicity liability in China are found in arts.25–29, s.3, Chapter II of the Criminal Law of the People’s Republic of China (as of 2020). Article 25 provides:

A joint crime is an intentional crime committed by two or more persons jointly.

A negligent crime committed by two or more persons jointly is not to be punished as a joint crime; those who should bear criminal responsibility are to be punished separately according to the crimes they have committed.

6 Italian Criminal Code art.110; Austrian Penal Code s.12; AD Bois-Pedain, “Participation in Crime” (n.2); and A Eser, “Individual Criminal Responsibility” (n.1).

7 AD Bois-Pedain, “Participation in Crime” (n.2), 96–98.

8 *Surujpaul v The Queen* [1958] 1 WLR 1050, 1053; *R v Dunnington* [1984] QB 472, 476; Dennis J Baker, *Glanville Williams Textbook of Criminal Law* (London: Sweet & Maxwell, 4th ed., 2015) para.17–149; David Ormerod and Karl Laird, *Smith, Hogan and Ormerod’s Criminal Law* (Oxford: Oxford University Press, 15th ed., 2018) p 175; and AP Simester *et al.*, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (Hart Publishing, 6th ed., 2016) p 212.

9 *R v Gnango* [2011] UKSC 59 (Lords Brown, Clark and Dyson). Some scholars contend that reasons for holding Gnango liable as a co-principal are unconvincing. Dennis J Baker, “Liability for Encouraging One’s Own Murder, Victims, and Other Exempt Parties” (2012) 23(3) *King’s Law Journal* 257; and Richard Buxton, “Being an Accessory to One’s Own Murder” (2012) 4 *Criminal Law Review* 275.

10 *R v Tyler* (1838) 173 ER 643; *R v Michael* (1840) 9 C & P 356; and *Stringer and Banks* [1991] Crim LR 639 (CA). An innocent agent who was procured to perform the *actus reus* of a strict liability offence might also be liable for the offence.

Article 26 provides:

A principal offender is one who organises and leads a criminal group in conducting criminal activities or plays a principal role in a joint crime.

A crime syndicate is a more or less permanent crime organisation composed of three or more persons for the purpose of jointly committing crimes.

The head who organises or leads a crime syndicate shall bear criminal liability for all the crimes committed by the syndicate.

A principal offender other than the one stipulated in the third paragraph shall bear criminal liability for all the crimes he participated in, organised or directed.

Article 27 provides:

An accomplice is one who plays a secondary or supplementary role in a joint crime.

An accomplice shall be given a lesser punishment or mitigated punishment or be exempted from punishment.

Article 28 provides:

One who is coerced to participate in a crime shall, according to the circumstances of his crime, be given a mitigated punishment or be exempted from punishment.

Article 29 provides:

One who instigates others to commit a crime shall be punished according to the role he plays in the joint crime. One who instigates a person under the age of eighteen to commit a crime shall be given a heavier punishment.

If the instigated person does not commit the instigated crime, the instigator may be given a lesser punishment or mitigated punishment.

It is not clear whether such provisions instantiate a differential approach or unitary approach. The prevailing viewpoint is that Chinese law distinguishes between a participant who perpetrates the target crime and a participant who does not and that differing the roles different participants have played has more influence on sentencing than crime labelling.¹¹ Chinese law categorises participants in crimes

11 Many Chinese scholars who favour German law and Japanese law tend to interpret complicity provisions in Chinese Criminal Code as having adopted the differential model. See Hong Li, *Criminal Law: The General Part* (Beijing: Law Press China, 2nd ed., 2014) p 255 (a book in Chinese); and

into principal offenders, accomplices, coerced parties and instigators. It is worth mentioning that in Chinese law “principal offender” is a much broader category. It covers ringleaders in a criminal group and other participants who play a principal role in the crime. A principal offender in English law may be taken as principal offender in Chinese law only if his contribution to the crime is taken as primary: where a principal offender’s contribution is minor, he may be held liable as an accomplice. An accessory in English law who organises or leads the commission of a crime will be taken as the principal offender in Chinese law. A coerced party in Chinese law may be a principal offender or an accessory in English law. An instigator in English law may be a principal offender or an accomplice under Chinese law, depending on the level of his contribution to the commission of the crime. In this article, unless otherwise indicated, I will use “principal offender” and “accessory” as they are understood in English law.

Both jurisdictions have encountered problems in determining the criminal liability of an accessory where the principal offender is not liable for the target crime or has deviated from the target crime. Neither jurisdiction has developed an entirely satisfactory way of dealing with this type of situation.

This article is structured as follows: In Section II, I examine the elements and the scope of complicity liability in England and China. This discussion will show that while the *actus reus* elements of complicity liability—actual assistance or encouragement—are largely the same in both jurisdictions, the *mens rea* element of complicity in Chinese law, unlike in English law, covers both intention and recklessness. Section III will show that, unlike English law, Chinese law continues to regard reckless assistance and encouragement as complicity. Section III argues that labelling an accessory in the same way as the principal offender violates the principle of fair labelling. It is submitted that assistance or encouragement is different from perpetration of the target crime, and the harmfulness of assistance or encouragement is contingent on the principal offender’s independent and autonomous choice to perpetrate the target crime. It is further submitted that there is a moral difference between intending the principal offender to perpetrate the target crime and intending to perpetrate it personally.

Section IV will examine the tension between the doctrines of innocent agency and complicity liability. The doctrine of innocent agency works well where the innocent agent is a minor or an insane person but encounters problems when the crime committed is, as termed by some scholars to be, non-proxyable. It is submitted that

Xingliang Chen, “Complicity: Comparing the Differential Approach with the Unitary Approach” in The Research Centre for Criminal Justice of Renmin University of China (ed), *The International Perspectives on Hot Topics in Criminal Law* (Beijing: Peking University Press 2010) p 155 (book chapter in a Chinese publication). Others contend that complicity liability in Chinese law manifests the unitary approach. See generally, M Liu, “The Advantages” (n.4); and Shuo Jiang, *Participation in Crimes—A Unitary Approach* (People’s Public Security University of China Press 2010) p 242 (a book in Chinese). A minority viewpoint states that Chinese law has adopted a unique model which does not necessarily fit into either the derivative approach or the unitary approach. See Xingcheng Pan, “Thesis on Participation in Crimes” (2010) 2 *Lingnan Journal* 60, 63 (a journal article in Chinese).

the function of the doctrine of innocent agent is to attribute the criminal liability for the innocent agent's conduct to the other, rather than regard the act of the innocent agent as the act of the other. Where the principal offender committed the *actus reus* without having the requisite *mens rea*, the doctrine of innocent agency should be preferred to an overstretched form of derivative complicity.

Section V will consider the problems complicity liability has encountered in both jurisdictions when the principal offender has deviated from what he was assisted or encouraged to do. It will be argued that where the crime the principal offender committed is totally different in nature from the crime the accessory assisted or encouraged, the accessory should be held liable for an inchoate form of assistance or encouragement as envisaged in ss.44–46 of the Serious Crime Act 2007 (UK) and the second paragraph of art.29 of the Criminal Law of PRC. Where the crime intended by the accessory is a lesser-included offence of the crime committed by the principal offender, or where the accessory intended a more serious crime but the principal offender committed a lesser-included offence, the accessory should be held liable for the lesser-included offence. Moreover, it will be argued that making an accessory liable for a collateral crime which was merely foreseen by him goes against the principle of fair labelling and that such risk-taking should be captured by a new lesser generic offence if criminalisation is needed at all.

II. An Overview of Complicity Liability in English Law and Chinese Law

Section 8 of the Accessories and Abettors Act 1861 uses four different words (aid, abet, counsel and procure), but today the *actus reus* of complicity liability means assisting or encouraging the commission of a crime.¹² Assistance could come in various forms such as providing tools or information, acting as a lookout, driving the principal offender to the crime scene, preventing the victim from escaping or imparting criminal methods. Encouragement could cover all kinds of conduct that helped to embolden the principal offender's mind, such as instigating, inducing, advising, persuading, requesting and demanding. Mere association or presence without something more will usually be insufficient to constitute factual assistance or encouragement.¹³ There need not be causation, as is understood in the context of perpetration liability, between the accessory's assistance or encouragement and the perpetration of the crime, nor is it required that assistance or encouragement had a substantial effect on principal offender's conduct or on the outcome of his conduct.¹⁴ The *actus reus* of complicity is actual assistance or encouragement.

12 *R v Jogee* [2016] UKSC 8, [6]; and Law Commission, *Participating in Crime* (Law Com No 305, 2007) paras.2.21 and 3.9.

13 *R v Jogee* [2016] UKSC 8, [11].

14 *Ibid.*, [12]; Dennis J Baker, "Reinterpreting the Mental Element in Criminal Complicity: Change of Normative Position Theory Cannot Rationalize the Current Law" (2016) 40 *Law & Psychol Rev* 119, 122.

The *mens rea* element of complicity in English law is an intention to assist or encourage the commission of the target crime by the principal offender, and this requires the knowledge of any existing facts necessary for the conduct of the principal offender to be criminal.¹⁵ Where the target crime requires particular *mens rea*, the accessory must intend to assist or encourage the principal offender to act with such *mens rea*.¹⁶ Where the target crime is a strict liability offence, it is enough that the accessory intended to assist or encourage the principal offender to do the prohibited conduct, with the knowledge of any facts and circumstances necessary for it to be criminal.¹⁷ In the case of a crime which requires the proof of *mens rea*, the accessory's intention regarding the principal offender's crime could often be satisfied if the accessory had the requisite *mens rea* for that crime, but it is not necessary to prove that he had such requisite *mens rea* as long as he intended the principal offender to act with such *mens rea*. Merely foreseeing that the principal offender might commit the crime is no longer enough, although such foresight can be used to infer that the accessory intended to assist or encourage.¹⁸ There is no requirement of meeting of minds. Both might have a direct intention, but it need not be a common purpose. D1 might know that D2 intended to kill V, so D1 left a gun and ammunition near D2's front door intending D2 to find it and use it to kill V. D2 then found it and used it to kill V. Here, D1 will be liable for murder too; it is irrelevant that he never met D2 and thus did not form an agreement with D2. Where the accessory was unsure about which crime would be committed out of a range of intended options, he will be liable for any crimes the principal committed as long as it was one of the crimes he intended to assist or encourage.¹⁹

The "joint crimes" section in the Criminal Law of PRC provides rules for complicity situations.²⁰ The *actus reus* of complicity in Chinese law takes three forms: (1) organising or leading the commission of the target offence; (2) instigation and (3) facilitation. First are the organisers of crime: they are usually referred to as masterminds or ringleaders in English law. Usually, organisers are considered as contributing more substantially than those who commit the crime, as reflected in sentencing.²¹

The second form of complicity, instigation, takes place where the principal offender did not have any thought of committing a crime and was initiated or induced by the instigator to commit it. English law treats an accessory who instigates the commission of a crime as an encourager. In Chinese law, if the instigated

15 *R v Jogee* [2016] UKSC 8, [9].

16 *Ibid.*, [10].

17 *Ibid.*, [99].

18 *Ibid.*, [83].

19 *Ibid.*, [14]–[16].

20 Criminal Law of the People's Republic of China (CLPRC 2020) Chapter 2, Section 3, arts.25–29.

21 CLPRC 2020 art.26. See *Xuxu Niu and Others (kidnapping)* [2013] The Supreme Court, China Law Information Database, Case Citation: CLI.C.8328938. There Niu organised and led the whole process of kidnapping and killing. He was found guilty as the principal offender. In English law, he would have been held liable as an accessory rather than principal offender.

person had prepared,²² attempted²³ or committed the instigated crime, the instigator would be punished as either the principal offender or an accomplice, depending on his contribution to the crime.²⁴ If the instigated person did not in fact commit the crime, the instigator would still be convicted of that crime but could get lesser or mitigated punishment.²⁵ This is attempted instigation, and it could cover situations such as in cases where the instigator did not succeed in instigating the target person, the instigated person rejected the instigation, or the instigated person accepted the instigation but did not commit the crime or committed another crime.²⁶ In such a case, English law would see the instigators charged with ss. 44–46 of the Serious Crime Act 2007, which labels such an instigator as an encourager rather than a participant in the crime instigated.²⁷

22 Chinese law punishes preparation. A person who prepares the tools or paves the way for a crime is liable for preparation. CLPRC 2020 art.22. Preparation is not an independent crime but a way to make one liable for a crime.

23 If D instigates P to kidnap V and P is arrested while he is tying up V, both D and P will be liable for attempted kidnapping. Attempt may attract lesser or mitigated punishment, compared to the sentence for the commission of the crime. CLPRC 2020 art.23. See *Huo and Others (criminal damage; theft; robbery and intentional injury)* [2015] Intermediate Court of Alxa League, Inner Mongolia Autonomous Region, China Law Information Database, Case Citation: CLIC.16668584.

24 In *Pan*, Pan arranged Yin and Yang to hire criminals to murder V. Yin engaged Zheng and Wang for the task and gave them information about V as well as a muffled pistol. Zheng shot V in the head while Wang acted as a lookout. Pan was held liable as a principal offender because he initiated the crime and hired others to kill V; Yin was held liable as a principal offender too because he played a primary role in the commission of the crime by providing the pistol, planning the killing and instructing others to execute the plan; and Yang was regarded as a principal offender because he conspired with Pan and Yin, kept the money and paid it to Zheng and Wang after the killing. All three of them received heavier punishment than the perpetrator of the crime, Zheng. *Pan (intentional killing)* [2003] High Court of Shanghai Municipality, China Law Information Database, Case Citation: CLIC.40217.

25 CLPRC 2020 art.29, para.2.

26 Mingxiang Liu, “Reinterpreting ‘the Instigated Person Did Not Commit the Crime Instigated’” (2014) 12 *Law Science* 116, 116–121 (a journal article in Chinese); Mingxiang Liu, “Interpreting ‘the Instigated Person Did Not Commit the Crime Instigated’” (2001) 1 *Chinese Journal of Law* 139 (a journal article in Chinese); Guisheng Cai, “An Analysis of s.29 of the Criminal Code” (2014) 1 *The Jurist* 67, 68–70 (a journal article in Chinese); and *Xueyou Wu (intentional injury)* [2001] Richang County Court, Jiangxi Province, China Law Information Database, Case Citation: CLIC.238888.

27 Section 44(1) states that a person commits an offence if (1) if he does an act which is capable of encouraging or assisting the commission of an offence and (2) he intends to encourage or assist its commission. Section 44(2) adds: “But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act”. Section 45 states that “a person commits an offence if (a) he does an act which is capable of encouraging or assisting the commission of an offence; and (b) he believes (i) that an offence will be committed and (ii) that his act will encourage or assist its commission”. Section 46(1) states that “a person commits an offence if (a) he does an act which is capable of encouraging or assisting the commission of one or more of a number of offences and (b) he believes (i) that one or more of those offences will be committed (but has no belief as to which) and (ii) that his act will encourage or assist the commission of one or more of them”. These three inchoate offences of encouraging and assisting are based on an independent form of liability rather than derivative liability. Unlike derivative complicity, liability for offences under ss.44–46 is not dependent on the commission of the principal offence. See *R v Blackshaw* [2011] EWCA Crim 2312; and AP Simester *et al.*, *Simester and Sullivan’s Criminal Law* (n.8), 294.

The third form of conduct caught by China's complicity provisions is facilitation, which covers both physical assistance and encouragement falling short of strong encouragement that is categorised as instigation. In China, a person who encourages a principal offender who is already harbouring an intention to commit the target crime will be liable as a facilitator rather than instigator.

Just as in English law, a connection between the accessory's conduct and the commission of the target crime must be proved, although there need not be any causation.²⁸ Chinese law speaks in terms of a causal connection between the prohibited harm and all participants' joint conduct as a whole,²⁹ but it recognises the difference that accessories contribute to the occurrence of the prohibited harm through the conduct of the principal offender who causes the prohibited harm. This requirement is similar to that in English law.³⁰ There is no need to show the prohibited harm would not have occurred but for the accessory's conduct.

The *mens rea* for complicity in Chinese law requires common intention.³¹ This Chinese concept of common intention is quite different from the English concept of common intention or common purpose. Common intention in Chinese law refers to a situation where two or more participants knew their conduct would or might cause the harm prohibited by the target crime and hoped such harm would be caused or were indifferent to whether or not such harm might be caused.³² Where the participants hoped for the prohibited harm to be caused, they would have a "direct common intention". Such mental state equals the English concept of common intention/purpose. Where all participants foresaw the possibility of the prohibited harm but were indifferent as to its occurrence, they would have an "indirect common intention". This mental state equals subjective recklessness in English law.

Three observations may be made. First, the common intention element of complicity in Chinese law requires all parties to have realised that they were acting

28 "I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it and tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before": Glanville Williams, "Finis for Novus Actus?" (1989) 48 *Cambridge LJ* 391, 398; See also DJ Baker, *Reinterpreting Criminal Complicity and Inchoate Participation Offences* (Oxford: Routledge, 2016) ch.2.

29 See for instance *Chen and Others (intentional injury)* [2016] High Court of Guangdong Province, China Law Information Database, Case Citation: CLI.C.9968469, where Chen and a group of people had beaten up V who died of complications of pneumonia. The onset of pneumonia was a natural consequence of the injuries he received. Therefore, there was found to be causation between the group's beating up and V's death, though it could not be proved that Chen's act caused V any serious bodily harm or the eventual death.

30 Xingliang Chen, "On Joint Crime Causation" (1991) 6 *Science of Law* 21, 23 (a journal article in Chinese). For the English law, see *R v Stringer* [2011] EWCA Crim 1396, [47]–[50].

31 CLPRC 2020 art.25.

32 *Bin Li and Nanjing Yuan (kidnapping)* [2011] High Court of Tianjin Municipality, China Law Information Database, Case Citation: CLI.C. 104008; see Wei Jiang, "On Common Intention" (1994) 4 *Studies in Law and Business* 36, 37–38 (a journal article in Chinese).

together pursuing the same criminal goal.³³ If one believed he was acting on his own, there is no complicity liability. There has to be a mutual awareness, but not the sort of agreement that English conspiracy law requires. As long as both the accessory and principal offender had a clear understanding of what was afoot and what the risks were, they can be held liable for pursuing their course of conduct.³⁴ This does not require the accessory to have communicated with all the participants in the crime as long as he realised that others were acting in concert with him. Accordingly, if D1 saw D2 stealing from inside a house and decided to stay outside as D2's lookout, D1 would not be liable for burglary if D2 was not aware that D1 was assisting. Unlike Chinese law, English law would make such an assister liable for the target crime even though the principal offender did not know assistance was provided.³⁵

Second, the common intention element also requires that the accessory should know the nature and quality of his own conduct and the principal offender's conduct and the prohibited harm that would/might result.³⁶ This is similar to the requirement in English law that an accessory has to intend the principal offender to do a type of crime without knowing all the details.³⁷ For instance, where D1 provided a tool for D2's bank robbery, it is enough that D1 knew the crime was robbery; there is no need to prove that D1 knew which bank would be robbed by D2 or when D2 would carry out the robbery.

Third, common intention has volitional ingredients. It requires that the accessory must hope that their conduct, together, would cause³⁸ the prohibited harm or that the accessory must foresee the possibility of the prohibited harm but is indifferent as to whether their conduct may cause it.³⁹ Such *mens rea* requirement is almost the same as the *mens rea* of complicity laid down in the English case of *R v Powell and English*.⁴⁰ I will explain the slim difference between the two in Section III.

If a crime has advertent negligence and/or inadvertent negligence as its *mens rea*, there will be no complicity liability for such offence under Chinese law. The Chinese concept of "advertent negligence" refers to a situation where the defendant

33 Mingxuan Gao and Kechang Ma, *Criminal Law* (Beijing: Peking University Press, Higher Education Press, 5th ed., 2006) p 165 (a textbook in Chinese).

34 See *Xianggen Jiao and Others (intentional killing)* [2009] The Supreme Court, China Law Information Database, Case Citation: CLIC.1762427; and Zhang Yan, "Meeting of Guilty Minds in Joint Crimes" (2009) 7 *Legal System and Society* 335 (a journal article in Chinese).

35 See *R v Fury* [2006] EWCA Crim 1258, [16].

36 See Mingxuan Gao (ed), *Treatise on Criminal Law* (Higher Education Press, 2nd ed., 2006) p 332 (a book in Chinese); and Xingliang Chen, *The Theory of Joint Crime* (Beijing: China Renmin University Press, 2006) p 95 (a book in Chinese).

37 *R v Jogee* [2016] UKSC 8, [93].

38 The principal offender's conduct directly causes the prohibited result, and the accessories' conduct indirectly causes the prohibited harm. Although the word "cause" is used when talking about the relationship between an accessory's conduct and the prohibited harm, it means a causal connection that is different to the causation we mean in the context of perpetration liability.

39 See Xingliang Chen, *The Theory of Joint Crime* (n.36); Yu Jia and Dongming Wang, "On Cognitive Factor of Common Intention" (2009) 6 *China Legal Science* 82, 84 (a journal article in Chinese).

40 [1999] 1 AC 1 (HL).

foresaw that his conduct might cause a prohibited harm but credulously believed he could avoid it. Such a mental state would fall into the category of recklessness in English law. “Inadvertent negligence” refers to a situation where the defendant ought to have realised that his conduct might cause a prohibited harm but did not because of his carelessness. It is very similar to the English concept of negligence. According to Chinese law, a person cannot be complicit in a crime which has advertent negligence and/or inadvertent negligence as its *mens rea*, such as negligently causing death of another⁴¹ and negligent arson.⁴² Suppose D2 drove D1’s car to V’s house to beat V, intending to cause V some minor bodily harm, but accidentally caused his death. D2 is liable for negligently causing death if he foresaw his punching might cause death but thought that he could control his force and avoid any serious injury or death. In English law, his mental state is one of recklessness, but in Chinese law it will be taken as advertent negligence. According to Chinese law, D1 who assisted D2 could not be liable as an accessory because the offence of negligently causing the death of another is a negligence crime, but he could be liable as an accessory for intentional injury⁴³ which is an intentional crime. If English law is applied to this case, surely D2 would be liable for constructive manslaughter or reckless manslaughter (for he foresaw the possibility of death), and D1 would be liable for either crime as an accessory.

The use of strict liability in English law, especially in regulatory offences, is usually justified on the basis that it increases the efficiency and effectiveness of law enforcement, enhances deterrent effect and better serves the purpose of allocating the cost of risk-taking activities.⁴⁴ Chinese law does not recognise strict liability in criminal law and is premised on the idea that one can only be criminally responsible for their autonomous choice to violate the law not for conduct they cannot control or avoid.⁴⁵ Since Chinese law does not recognise strict liability for criminal offences, there is no liability for complicity in a strict liability offence.⁴⁶

Overall, the *actus reus* elements of complicity in both jurisdictions are very similar, but the *mens rea* elements are quite different. In the following sections, I shall examine how far complicity liability reaches in both jurisdictions.

III. Reckless Assistance or Encouragement

The landmark case of *R v Jogee*⁴⁷ restored the *mens rea* requirement of intention for complicity: a person can be held liable for another’s crime only if he intended to

41 CLPRC 2020 art.233.

42 *Ibid.*, art.115, para.2.

43 *Ibid.*, art.234.

44 AP Simester, “Is Strict Liability Always Wrong?” in Andrew Simester (eds), *Appraising Strict Liability* (Oxford: Oxford University Press, 2005) p 25.

45 M Gao and K Ma, *Criminal Law* (n.33), 171–172.

46 CLPRC 2020 art.16.

47 *R v Jogee* [2016] UKSC 8.

assist or encourage the commission of the target crime. Early English cases insisted on proof that (1) an accessory approved or assented to the commission of the principal offender's crime⁴⁸ or (2) intended the commission of the target crime knowing all its essential matters that constitute the target crime.⁴⁹ For example if the accessory intended to assist the principal offender to commit burglary, he must know that the principal offender would steal from the victim's house.

In the late twentieth century, leading cases including *Chan Wing-Siu v The Queen*⁵⁰ and *R v Powell and English*⁵¹ had developed the doctrine of joint enterprise. According to this doctrine, an accessory would be liable for a collateral crime committed by the principal offender if he joined a criminal enterprise to commit an underlying crime foreseeing that the collateral crime might be committed. For example, D1 who joined D2 to commit robbery (the underlying crime) would be held liable for murder (the collateral crime) as well if he foresaw that D2 might commit murder during the course of committing robbery. Although English courts regarded joint enterprise liability as an aspect of complicity,⁵² the foresight test of this doctrine made it remarkably different from standard complicity. Under the doctrine of joint enterprise, it was not necessary to prove that the accessory had actually assisted or encouraged the principal offender's collateral crime,⁵³ neither was it necessary to prove that the accessory had intended to assist or encourage the commission of that crime. All that was required was his participation in the underlying crime with a foresight of possible commission of the collateral crime.⁵⁴ This foresight test was later used in standard complicity cases too.⁵⁵ *R v Jogee* has not only reinstated the intention requirement but also emphasised that there must be an actual encouragement or assistance.

Chinese law requires that there must be a common intention between all the participants with regard to their criminal goal. However, as mentioned in Section II, such a broad concept of common intention covers both intention and recklessness as a result of which the mental element of complicity in Chinese law is almost the same as the mental element of complicity in pre-*Jogee* English law.⁵⁶ In *Ruichun Shen and Others*,⁵⁷ Shen hired seven others to detain the victim in order to force him to pay off his debt. Two of the hired henchmen stabbed V to death during the confrontation. The organiser of their joint criminal venture, Shen, was held liable

48 *R v Fretwell* (1862) 9 Cox CC 152.

49 *Johnson v Youden* [1950] 1 KB 544; *Ferguson v Weaving* [1951] 1 KB 814.

50 [1985] AC 168 (HL).

51 *R v Powell and English* [1999] 1 AC 1 (HL).

52 *R v ABCD* [2011] QB 841, 854. Smith has also argued there is only one doctrine of complicity: JC Smith, "Criminal Liability of Accessories: Law and Law Reform" (1997) 113(3) *The Law Quarterly Review* 453, 465.

53 GR Sullivan, "Doing without Complicity" (2012) *Journal of Commonwealth Criminal Law* 199, 209.

54 *R v Powell and English* [1999] 1 AC 1 (HL).

55 *R v Bryce* [2004] 2 Cr App R 35 (CA).

56 *R v Jogee* [2016] UKSC 8.

57 *Ruichun Shen and Others (intentional killing and false imprisonment)* [2008] High Court of Zhejiang Province, China Law Information Database, Case Citation: CLIC.1762181.

for intentional killing⁵⁸ on the ground that she must have foreseen that violence might be used if the victim attempted to resist. Shen foresaw a possibility, maybe a very slim one, that V might suffer serious bodily injury or even death but was indifferent about those potential consequences. One of the henchmen, Longjiang You, knew the plan was to detain someone and demand money but remained in another car while two others were stabbing V. Therefore, You was held liable only for false imprisonment.⁵⁹

In *R v Powell and English*, it was suggested that the accessory's participation in the underlying crime and his foresight of the collateral crime made him fully liable for the collateral crime.⁶⁰ However, Chinese complicity law requires the accessory to have actually assisted or encouraged the principal offender to commit the collateral crime; foresight of the collateral crime can be used by the court to infer what is covered in their common intention. Common intention in Chinese law may be established if both parties willingly participated in an underlying crime with a foresight that the collateral crime might be committed. Furthermore, such a common intention requirement will rule out cases where the accessory expressly disagreed with the commission of the collateral crime, even if he went on to commit the underlying crime being aware of what might happen.

The broad concept of common intention in Chinese law means that a person who is engaged in a lawful activity may be held liable for another's crime if he foresees the commission of the crime as a possibility. Suppose D1, a shopkeeper, sold D2 a kitchen knife, being suspicious that D2 might use it to attack someone. D1 sold it nonetheless as he was only interested in making a profit. If D2 killed V with that knife, D1 would be liable as an accessory under Chinese law. This is because D1's act of selling the knife assisted D2's intentional killing and D1 foresaw D2 might commit such crime with the knife. It is no excuse that D1 had no stake in the killing or that D1 was not sure that D2 would kill.

There are many cases in China where persons who acted under legal duty or engaged in normal business transactions are held liable as accessories because they knew the principal offender might commit a crime facilitated by such lawful conduct.⁶¹ This is problematic. People who engage in everyday normal business are acting lawfully, and the fact that they know someone else may commit a crime consequently should not turn an otherwise lawful act into a criminal one. It is one thing to become an accessory by helping, knowing it is virtually certain that another *will* use his assistance to commit a crime, but quite another thing to become an

58 CLPRC 2020 art.232.

59 *Ibid.*, art.238.

60 *R v Jjee* [2016] UKSC 8 (Lord Hutton).

61 See for instance *Hong and Others (selling food not up to the food safety standards)* [2013] Lu Cheng District Court of Wenzhou Municipality, China Law Information Database, Case Citation: CLI.C.3659091; and *Song and Zhao (group assembled to disrupt public order)* [2016] Wuchang City Court, Heilongjiang Province, China Law Information Database, Case Citation: CLI.C. 25900512.

accessory by helping, knowing that another *may* use such assistance to commit a crime.⁶² The assister in the former situation is implicated in the principal offender's crime, but the assister in the latter situation cannot, with any certainty, be said to be so implicated. It is unfair that, in order to be free of possible criminal liability, we are required to enquire whether others are engaging or proposing to engage in unlawful activities assisted by our lawful conduct: people's "freedom to act within the law should not be restrained by considerations of wrongs others might commit".⁶³

Chinese complicity law also would make an accessory liable for a crime which requires intention when the accessory merely foresees the principal offender may commit it. The principal offender cannot be liable for the crime unless he intends to cause the prohibited harm, but the accessory would be held liable for the same crime if he is merely reckless as to the possibility of the occurrence of the prohibited harm. It is submitted that making one liable for a crime, which he merely foresaw the principal offender might commit, infringes the principle of fair labelling. The principle of fair labelling requires that the crime label should fairly represent the defendant's wrongdoing.⁶⁴ Labelling such an accessory in the same way as the principal offender does not correctly represent the accessory's harm-doing or personal culpability.

First, assistance or encouragement is different from perpetration. Perpetration causes the prohibited harm in the target crime, while assistance or encouragement merely contributes to the occurrence of that prohibited harm. The factual causation and legal causation rules in the context of perpetration liability do not apply to complicity. In some complicity cases, especially those involving instigators and organisers, the "but-for" test may be satisfied, but the legal causation test will never be satisfied. The principal offender's independent and autonomous choice of committing the target crime would break any chain of causation between an accessory's conduct and the prohibited harm in the target crime.⁶⁵

Second, assistance or encouragement is less harmful and less dangerous than perpetration. Assistance or encouragement is a remote harm⁶⁶ in that its harmfulness is contingent on the principal offender's independent and autonomous choice to commit the target crime. Assistance or encouragement is also less dangerous

62 See Glanville Williams, "Complicity, Purpose and the Draft Code: Part 2" [1990] *Criminal Law Review* 98, 102.

63 Sanford H Kadish, "Reckless Complicity" (1997) 87 (2) *The Journal of Criminal Law and Criminology* 369, 391.

64 See Glanville Williams, "Convictions and Fair Labelling" (1983) 41(1) *Cambridge Law Review* 85, 85; and Andrew Ashworth, "The Elasticity of Mens Rea" in CFH Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworth, 1981) p 53.

65 Bo Wang, *Participation in Crimes: An End to Derivative Complicity Liability?* (Beijing: Law Press China, 2018) pp 75–94.

66 See Andrew von Hirsch, "Extending the Harm Principle: 'Remote' Harms and Fair Imputation" in AP Simister and ATH Smith (eds), *Harm and Culpability* (Oxford: Clarendon Press, 1996) p 263.

than perpetration as the accessory has no control over the principal offender's conduct or the occurrence of the prohibited harm.⁶⁷

Third, there is a moral difference between intending another to cause the prohibited harm in the target crime and intending to cause such harm using one's own hands. It takes more nerve to perpetrate a crime than to assist or encourage its commission.⁶⁸ Foreseeing another might commit a crime is even less blameworthy than intending another to commit a crime. Therefore, labelling reckless assistance or encouragement as perpetration does not correctly reflect the normative difference between assistance/encouragement and perpetration, nor does it correctly reflect the accessory's personal culpability. The English approach in light of *R v Jogee*⁶⁹ has eliminated the unfairness of complicity by requiring an intention to assist or encourage the commission of the target crime. Chinese law still allows such reckless assistance or encouragement to be labelled in the same way as perpetration, which urges legal reform.

IV. Innocent Agency: Where the Principal Offender Is not Liable

The doctrine of innocent agency has been used to impose personal liability on a person who uses an innocent person to commit a crime.⁷⁰ Both jurisdictions allow a defendant to be punished as a principal offender through the doctrine of innocent agency if he used a child under the age of criminal responsibility as an instrument to commit a crime.⁷¹ The only difference is that in China the age of criminal responsibility is 14, while in the United Kingdom it is 10. Similarly, where one manipulated an insane person to commit a crime, he will be liable as a principal offender, because the insane person was a mere instrument in his hands.⁷²

In Chinese law, a lesser sentence is imposed on a person who is coerced to commit a crime.⁷³ However, duress is not a defence, so the coerced party will be liable for what he did unless the defence of necessity applies.⁷⁴ One who coerced

67 B Wang, *Participation in Crimes* (n.65), 99.

68 Bo Wang, "A Normative Case for Abolishing the Doctrine of Extended Joint Criminal Enterprise" (2019) (83) 2 *The Journal of Criminal Law* 144, 156.

69 *R v Jogee* [2016] UKSC 8.

70 See Sanford H Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" (1985) 73(2) *California Law Review* 323, 372; Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford: Oxford University Press, 8th ed., 2019) p 463; and Genlin Liang, "The Destiny of Indirect Perpetration in China" (2019) 5 *Journal of Comparative Law* 50, 55 (a journal article in Chinese).

71 For English law, see *DPP v K and B* [1997] 1 Cr App R 36, 42; and for Chinese law, see *Shiqun Yue (poisoning causing death)* [2002] High Court of Jiangsu Province, China Law Information Database, Case Citation: CLI.C.23097.

72 *R v Tyler* (1838) 173 ER 643, 644; CLPRC 2020 art.18 states that a mentally ill person who causes prohibited harm when he is unable to recognise or control his own conduct is not to bear criminal responsibility.

73 CLPRC 2020 art.28.

74 *Ibid.*, art.21.

another into committing a crime would be liable as an accessory. If a gang forced D1 at gunpoint to rape and kill a woman, they could be liable as accessories for both rape and intentional killing.⁷⁵ Under English law, gang members would be liable for murder as accessories, because D1 was the principal offender and duress is not a defence to murder; and they would also be liable for rape even if D1 was excused, because they procured the *actus reus* of rape with a personal intention that it be done.⁷⁶ Thus, in both jurisdictions, the fact that the principal offender was coerced into committing the crime would not affect complicity liability.

The doctrine of innocent agency would also apply where the innocent agent lacked essential knowledge about the circumstances. Usually, an innocent agent who is not aware of the relevant circumstances lacks the requisite *mens rea*. In *R v Michael*,⁷⁷ the defendant passed poison to the nurse telling her it was medicine for V. The nurse's 5-year-old son administered the poison to V while the nurse was away, causing V's death. Both the nurse and the son were innocent agents, because they did not know that the bottle contained poison. Similarly, in the Chinese case of *Peng Li*, the defendant Li falsely represented to Wang that his parents were high-ranking officials and made Wang believe that he could secure household registration in Beijing. Wang collected money (about £100,000 in total) from four people who wanted to get their household registrations done and gave part of the money to Li as commission. It was held that Wang was used as an innocent agent by Li to commit fraud. Wang was unaware of the fact that Li had lied about his being able to secure household registration legally.⁷⁸

The doctrine of innocent agency works well in practice, but it has led to some difficulties when applied to crimes that require personal conduct of a particular description.⁷⁹ In the English case of *R v Cogan and Leak*,⁸⁰ Leak misled the intoxicated Cogan into thinking that Leak's wife wanted to have sex with Cogan. Cogan was not liable for rape as he believed the victim consented to the intercourse, although it might not be a reasonable belief. The Court of Appeal considered two ways of making Leak liable. The first was to regard him as the principal

75 Xingliang Chen, "Study on the Ability to Act Otherwise" (2009) 1 *Chinese Journal of Law* 119, 120 (a journal article in Chinese). In recent years, there have been many cases where the coerced persons are not charged though technically they committed the crime according to Chinese law. The reasons behind this are unknown. See Xuan Chen, "Life Conflict, Necessity and the Impediment of Liability" (2016) 5 *Chinese Journal of Law* 130, 131 (a journal article in Chinese).

76 In *R v Bourne* (1952) 36 Cr App R 125 (CA), it was held that the coercer's complicity should not be affected by the fact that the principal offender had a personal defence of duress.

77 (1840) 9 C & P 356.

78 *Peng Li (fraud)* [2016] No. 2 Intermediate Court of Beijing Municipality, China Law Information Database, Case Citation: CLI.C.81849597. The household registration system in China is used to control population mobility and determine eligibility for certain state-provided services and welfare.

79 See John Beaumont, "Abetting without a Principle: A Problem in the Law of Complicity" (1979) 30 *N Ir Legal Q* 1, 8; and David Lanham, "Accomplices, Principals and Causation" (1979) *Melb U L Rev* 490, 500–506.

80 [1976] QB 217.

offender by applying the doctrine of innocent agency.⁸¹ Some scholars argue that non-proxyable crimes such as rape cannot be committed through the conduct of an innocent agent.⁸² It was probably because of this concern that the court considered the second way of making Leak liable. It is submitted that the objection that certain crimes cannot be committed through the conduct of others is technical rather than conceptual.⁸³ The function of the doctrine of innocent agency is to attribute criminal liability for the innocent agent's conduct to the other, rather than regard the act of the innocent agent as the act of the other. When Leak was made liable for rape through the doctrine of innocent agency, the message the law conveyed to the public was that Leak used another person as a tool to violate the victim's sexual autonomy by penetration.

The second suggestion made in *R v Cogan and Leak* is the route English courts adopt in the majority of cases where the innocent agents do not have *mens rea*. It was held that where the principal offender had committed the *actus reus* of the crime, his lack of *mens rea* for the crime should not affect the accessory's liability.⁸⁴ This approach could avoid the problems innocent agency doctrine has when it is applied to non-proxyable crimes. For example if Leak was a woman, she could still be held liable as an accessory on the basis that the *actus reus* of rape was committed by Cogan anyway. But this approach is a major step of departure from the derivative nature of complicity. In *R v Bourne*,⁸⁵ the defendant who forced his wife to commit buggery with a dog was held liable as an accessory. The wife was not liable for buggery because she had a defence of duress. In a case like *R v Bourne*, it can still be said that the target crime had been committed as the principal offender committed the *actus reus* with the *mens rea* for that crime, although she was excused. But in a case like *R v Cogan and Leak*, it would be inappropriate to say that Cogan had even committed the crime of rape, because the non-consensual penetration becomes rape only if it is accompanied by the requisite *mens rea*.⁸⁶ Making a person fully liable for a crime when the innocent agent merely committed the *actus reus* of the crime is creating a new form of liability. According to this new form of liability, the accessory's liability is decided by coupling the innocent agent's conduct with the accessory's own mental state. This form of liability is no longer derivative because the accessory's liability will not be derived from that of the principal offender (the innocent agent). It is only derivative in the very limited sense that the innocent agent's conduct is attributed to the accessory. Such a position is

81 *Ibid.*, 223.

82 See SH Kadish, "Complicity, Cause and Blame" (n.70), 374.

83 Daniel Yeager, "Helping, Doing and the Grammar of Complicity" (1996) 15 *Crim Just Ethics* 25, 28.

84 *R v Cogan and Leak* [1976] QB 217, 223–224; *DPP v K and B* [1997] 1 Cr App R 36, 45; *R v Millward* [1994] Crim LR 527.

85 *R v Bourne* (1952) 36 Cr App R 125.

86 Of course, according to Sexual Offences Act 2003 (UK) s.1, Cogan would be liable as his belief that V was consenting could be regarded as unreasonable. But as the law stood then, Cogan could not have the *mens rea* for rape when he had a genuine belief that V was consenting.

also hard to reconcile with *R v Jogee*,⁸⁷ which has held that the accessory must have intended the principal offender to act with the requisite *mens rea* for the crime. It is submitted that, in cases where the principal offender committed the *actus reus* without having the requisite *mens rea* of the crime, the doctrine of innocent agency should be preferred to an overstretched form of derivative complicity.⁸⁸

V. Deviation from the Assisted or Encouraged Crime

Both English law and Chinese law have encountered difficulties when dealing with cases where the principal offender committed a more or less serious crime than the accessory assisted or encouraged. Under a derivative theory of complicity, the accessory's criminal liability derives from that of the principal offender, and therefore there will be no complicity if no crime or a different crime is committed.⁸⁹ Assume that D1 gave D2 a knife and intended D2 to use it to kill V, but D2 changed his mind and merely used the knife to frighten V. While D2 is liable for assault, D1 cannot be held liable for murder or attempted murder because what he encouraged had not even been attempted.⁹⁰ Can D1 be held liable for the assault? I will try to address that question in this section. Strictly speaking, where the principal offender commits a more or less serious crime than what was assisted or encouraged, the target crime has not taken place and therefore there was nothing for the accessory's liability to be derived from. However, both English and Chinese courts have stretched complicity liability to make accessories liable when their principal offenders deviated from the crime they assisted or encouraged.

A. Where a more serious offence is committed

An accessory's liability is derived from that of the principal offender; therefore, when the principal offender committed a more serious crime which is totally different in nature from the one assisted or encouraged, there will be no derivative complicity liability. Such assister or encourager should be liable for an inchoate form of assistance or encouragement as provided for by ss.44–46 of the Serious Crime Act 2007 and the second paragraph of art.29 of the Criminal Law of the PRC. It has been argued that the second paragraph of art.29 provides an independent form of liability for instigation rather than derivative complicity liability, because the accessory is held liable when there is no target crime committed.⁹¹ If D1 hired D2 to rape V, but

87 [2016] UKSC 8, [10].

88 The Law Commission (UK) suggested a broadened innocent agency doctrine to deal with cases where the principal offender lacked *mens rea* for the target crime. Law Commission, *Participating in Crime* (n.12), paras.4.8–4.27.

89 See DJ Baker, *Glanville Williams Textbook* (n.8), para.17–149; and AP Simester *et al.*, *Simester and Sullivan's Criminal Law* (n.8), 212.

90 *R v Dunnington* [1984] QB 472.

91 See G Cai, "An Analysis" (n.26), 71.

D2 did not commit rape, D1 will be liable for the inchoate offence of assisting and encouraging under s.44 of the Serious Crime Act 2007. If these facts are established before a court in China, D1 will be held liable for rape but will be given a lesser or mitigated punishment according to the second paragraph of art.29 of the Criminal Law of PRC. Assistance is distinguished from instigation in Chinese law, and thus an assister would be punished only when the principal prepared, attempted or committed the target crime. If D1 assisted D2 in the above-mentioned case rather than instigating D2, D1 will not be liable for any crime under Chinese law; but D1 can still be held liable for the inchoate offence of assisting and encouraging under s.44 of the Serious Crime Act 2007. Chinese law's approach to inchoate assisting and encouraging is functionally similar to the English law before the Serious Crime Act 2007, when incitement was an inchoate offence⁹² while assistance was not.

In both English law and Chinese law, an assister or encourager will be liable as an accessory for the crime he assisted or encouraged if it is a “lesser-included offence” of the crime the principal offender actually committed. For instance, if a person incited a friend to steal, but the friend used force during the theft when the victim encountered him, the inciter would be liable for theft and the friend would be liable for robbery.⁹³ A lesser-included offence is the one for which all of the definitional elements are comprised within the definitional elements of a more serious crime.⁹⁴ Making the accessory liable for theft when his principal offender is liable for robbery does not infringe the requirements of derivative complicity. It can be argued that because the principal offender committed theft with the use of violence to facilitate theft (robbery), the principal offender committed the crime incited (theft).

Unfortunately, it is not always clear whether a crime is a lesser-included offence or an alternative offence. Historically, manslaughter was treated as a lesser-included offence of murder. But the old authorities seemed to be based “on an obsolete conception of the offences of murder and manslaughter being a single felony and on an obsolete understanding of malice aforethought”.⁹⁵ Gross negligence manslaughter and constructive manslaughter have evolved with distinct fault and conduct elements. Murder in English law requires that the defendant has caused the death of the victim with the intention to kill or cause serious bodily harm.⁹⁶ Gross negligence manslaughter requires that the defendant has caused death by breaching a duty of care, a breach which is reasonably foreseeable to give rise to a serious

92 See for instance *R v Higgins* (1801) 2 East 5; and *R v Curr* [1968] 2 QB 944.

93 See *Huang (robbery and theft)* [2011] Xiaoshan District Court of Hangzhou Municipality, Zhejiang Province, China Law Information Database, Case Citation: CLI.C.806080. A similar statement can be seen in Sir Matthew Hale, *The History of the Pleas of the Crown* (Printed by E and R Nutt *et al.*, 1736) Vol 1, p 617. See also *Easter v The Queen* (1961) 38 CR 21.

94 See Glanville Williams, “Included Offences” (1991) 55 *Journal of Criminal Law* 234, 234–235; and *R v Springfield* [1969] 53 Cr App R 608.

95 Dennis J Baker, “Lesser Included Offences, Alternative Offences and Accessorial Liability” (2016) 80 *Journal of Criminal Law* 446, 452.

96 *R v Cunningham* [1982] AC 566 (HL).

and obvious risk of death.⁹⁷ It also requires that the defendant acts in a way that falls far below the standard expected of a reasonable person in his position.⁹⁸ Constructive manslaughter requires that the defendant has caused death by committing a base crime (such as assault occasioning actual bodily harm or robbery) which is objectively dangerous in that it threatens some harm, albeit not serious bodily harm.⁹⁹ The only common element in these offences is that someone is killed. Gross negligence manslaughter and constructive manslaughter have elements that are not encompassed in the definitional elements of murder; therefore, it cannot be said that manslaughter is a lesser-included offence of murder. However, in *R v Jogee*, their Lordships observed:¹⁰⁰

If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable would realise carry the risk of some harm (not necessarily serious) to others, and death in fact results.

Similar views have been expressed by Chinese judges. For instance, in *Weiguo Chen and Jianhua Yu*,¹⁰¹ Yu, Chen and another acted in concert to beat V with whom Yu had a previous altercation. During the attack, Chen stabbed V several times thereby causing V's death. Yu and another person were fighting V's two friends when Chen stabbed V. Yu, as the organiser of the attack, did not ask Chen to bring a knife, and there was no evidence that Yu was aware that Chen was carrying a knife. Yu did not discuss the use of a knife with Chen in advance or during the attack. In the trial court, both Yu and Chen were convicted of intentional killing. They appealed on the ground that they did not have the *mens rea* for intentional killing. The High Court of Zhejiang Province dismissed Chen's appeal and quashed Yu's conviction for intentional killing, substituting it with intentional injury (causing death)¹⁰² which is functionally similar to constructive manslaughter in English law. The rationale for making Yu liable for intentional injury (causing death) while the principal offender was liable for intentional killing is that intentional injury is a lesser-included offence of intentional killing. However, it is more reasonable to take intentional injury as a lesser-included offence of intentional killing in Chinese law than to take constructive manslaughter as a lesser-included offence of murder

97 *R v Rose* [2017] EWCA Crim 1168 (CA).

98 *R v Adomako* [1995] 1 AC 171 (HL).

99 *R v Church* [1966] 1 QB 59.

100 [2016] UKSC 8, [96]; *R v Turlej* [2018] EWCA Crim 2123 followed the ruling.

101 *Weiguo Chen and Jianhua Yu (intentional killing)* [2006] High Court of Zhejiang Province, China Law Information Database, Case Citation: CLIC.87861.

102 CLPRC 2020 art.234.

in English law. In Chinese law, the *actus reus* of intentional killing (ie causing death) does cover the *actus reus* of intentional injury (ie causing bodily harm), and there is no requirement for intentional injury that it has to be an objectively dangerous act as is required by the English offence of constructive manslaughter. The *mens rea* of intentional killing (ie the defendant knew that death would be caused and hoped it to be caused or foresaw that death might be caused but was indifferent as to its occurrence) does cover the *mens rea* of intentional injury (ie the defendant knew that bodily harm would be caused and hoped it to be caused or foresaw that bodily harm might be caused but was indifferent as to its occurrence),¹⁰³ and there is no requirement that the *mens rea* of a base crime be satisfied as is required by constructive manslaughter in English law.

In *R v Jogee*, by providing manslaughter as an alternative, their Lordships distorted the derivative principles upon which complicity liability rests. They created a legal fiction that a person could be liable for a lesser form of homicide when the principal offender deliberately departed from the original plan and committed murder. Williams correctly points out that the approach taken by Lord Roskill in *R v Wilson*¹⁰⁴ in defining an included offence is misleading.¹⁰⁵ According to Lord Roskill, if crime A can in fact be committed by means of doing crime B, then crime B is included in a charge of crime A.¹⁰⁶ Applying the *Wilson* approach, a defendant charged with robbery could be convicted of possessing an offensive weapon because possessing and using an offensive weapon are means by which robbery can in fact be committed.¹⁰⁷ Surely, the elements of possessing an offensive weapon cannot be automatically established in every robbery case for robbery can be committed without using any weapon. Manslaughter is an alternative offence to murder, rather than a lesser-included offence of murder.¹⁰⁸ Making an accessory liable for manslaughter while his principal offender deliberately departed from their plan and committed murder cannot be justified.

Moreover, making an accessory, who merely assisted or encouraged in the causing of actual bodily harm, liable for constructive manslaughter while the principal offender deliberately departed from their plan and committed murder fails to acknowledge the difference between constructive manslaughter in an individual offender's case and constructive manslaughter in a complicity case. Where a person did an unlawful and dangerous act causing death, he could be constructively liable for manslaughter.¹⁰⁹ It is his conduct that directly caused the death though

103 *Ibid.*, art.232 (intentional killing) and art.234 (intentional injury) read together with art.14. See Mingxiang Liu, "Exploring Some Issues Concerning the Offence of Injuring" (2007) 3 *Jianghai Academic Journal* 117, 121 (a journal article in Chinese).

104 [1984] AC 242 (HL).

105 Glanville Williams, "Alternative Elements and Included Offences" (1984) 43(2) *Cambridge Law Journal* 290, 298–300.

106 *R v Wilson* [1984] AC 242, 261.

107 G Williams, "Included Offences" (n.94), 242.

108 DJ Baker, "Lesser Included Offences, Alternative Offences and Accessorial Liability" (n.95), 454.

109 *R v Church* [1966] 1 QB 59.

unintentionally, and he had full control over his own conduct. It might be plausible to argue that by committing that unlawful and dangerous act he had crossed the threshold of criminal law and therefore should take responsibility for the death caused.¹¹⁰ In a complicity case where D1 intended to assist or encourage D2 to cause actual bodily harm and D2 inflicted moderate force aiming to cause some harm but caused death *unintentionally*, it could be said that by participating in D2's crime of causing actual bodily harm D1 changed his normative position vis-à-vis V's bodily integrity. If such infringement of the bodily integrity resulted in death *unintentionally*, D1 should be derivatively liable for constructive manslaughter. However, things become very different in a case where D3 intended to assist or encourage D4 in causing actual bodily harm, but D4 during the course of the attack *deliberately departed* from their agreement and murdered V. It would be problematic to argue that D3 changed his normative position vis-à-vis V's life when he merely joined D4 to cause actual bodily harm. Thus, it seems misleading to argue that the accessory's liability for constructive manslaughter can be derived from the principal offender's liability for murder.

In addition, it is hard to square the intention requirement¹¹¹ laid down in *R v Jogee* with its ruling that in murder cases the accessory could be liable for manslaughter as an alternative, because he did not intentionally encourage murder.¹¹² There is a big difference between a person taking the consequences of his own personal acts and taking consequences of another's independent acts.¹¹³ It is not against derivative complicity to make an accessory liable for constructive manslaughter when he participated in the principal offender's offence of causing actual bodily harm and death was caused *unintentionally*, because the principal offender did exactly what the accessory intended to assist or encourage (using moderate force to cause actual bodily harm).¹¹⁴ However, making constructive manslaughter an alternative when the principal offender *deliberately* departed from what was assisted or encouraged seems to be based on a legal fiction that if the principal offender did not depart his conduct of inflicting actual bodily harm might end up being constructive manslaughter.¹¹⁵

110 This is the argument of the "change of normative position theory". See John Gardner, "Rationality and the Rule of the Law in Offences against the Person" (1994) 53 *Cambridge Law Journal* 502, 509; and KW Simons, "Is Strict Criminal Liability in the Grading of Offences Consistent with Retributive Desert?" (2012) 32(3) *Oxford Journal of Legal Studies* 445.

111 [2016] UKSC 8, [8]–[11].

112 *Ibid.*, [96].

113 DJ Baker, *Reinterpreting Criminal Complicity* (n.28), 133.

114 For English law, see *R v Smith* [1963] 1 WLR 1200 (CA); and for Chinese law, see *Xingbai Wang, Tao Han and Yongyang Wang (intentional injury)* [2004] Intermediate Court of Qingdao Municipality, Shandong Province, China Law Information Database, Case Citation: CLI.C.87862.

115 Dennis J Baker, "Prosecuting Complicity: The CPS Legal Guidance on Secondary Liability" (2018) 82(4) *Journal of Criminal Law* 334, 347.

B. *Where a less serious offence Is committed*

Where the principal offender commits a less serious offence different in nature to what was assisted or encouraged, there would be no complicity liability though liability for the inchoate form of assistance or encouragement could be incurred.¹¹⁶ Tricky issues arise when the crime the principal offender committed and the crime the accessory assisted or encouraged have overlapping elements. In such cases, both jurisdictions are struggling to find a balance between adhering to the derivative requirement of complicity liability and punishing those accessories who deserve criminal punishment. It has been held in English law that in a situation where the accessory intended the principal offender to commit murder, the mere fact that the principal offender might be convicted of the lesser offence of manslaughter does not affect the accessory's liability for murder.¹¹⁷ Chinese law would deal with such cases according to the second paragraph of art.29 and make the accessory liable for intentional killing with lesser or mitigated punishment.¹¹⁸ It is submitted that none of these approaches provide a satisfactory solution.

Assume that D1 gives a gun to D2 saying that it is loaded with blank ammunition and asks D2 to scare V by discharging the gun when, in fact, the ammunition is live as D1 intends to kill V. A strict application of derivative complicity liability would mean D1 is not liable for murder as the principal offender does not commit murder. However, in *R v Howe*, Lord MacKay held that in such a case it would be absurd if D1 escaped conviction of murder while D2 was liable for manslaughter.¹¹⁹ His Lordship held that where an accessory intends his principal to commit murder, the fact that the latter may be convicted only of the reduced charge of manslaughter for some reason special to himself does not reduce the accessory's conviction of murder to one of manslaughter.¹²⁰ This seems misleading. In this hypothetical case, the principal offender is liable for unlawful act manslaughter¹²¹ which is a form of involuntary manslaughter where no intention to kill or cause grievous bodily harm is required, rather than voluntary manslaughter where the principal has committed

116 *Tan and Others (intentional killing, fraud and extortion)* [2015] Intermediate Court of Guigang Municipality, Guangxi Zhuang Autonomous Region, China Law Information Database, Case Citation: CLI.C.15542564. Such cases will be caught by Serious Crime Act 2007 s.44 in England.

117 *R v Howe* [1987] AC 417, 458 (HL).

118 The legislative interpretation issued by the Legislative Affairs Commission of the Standing Committee of the National People's Congress has clarified that the second paragraph of art.29 applies to two situations. One is where the instigation has no effect on the person instigated or the instigated person does not commit any crime, and the other is where the instigated person has committed a crime that is not instigated. See, Legislative Affairs Commission of the Standing Committee of the National People's Congress (Criminal Law Office), *Explanation of the Provisions of the Criminal Law of the People's Republic of China, Legislative Reasons and Related Regulations* (Beijing: Peking University Press, 2007) p 42 (a statute book in Chinese).

119 [1987] AC 417, 458.

120 *Ibid.*

121 See *R v Church* [1966] 1 QB 59; and *R v Watson* [1989] Crim LR 730 (CA).

murder but has a partial defence such as loss of control or diminished responsibility. Here, it can be argued that D2 is a semi-innocent agent who is used by D1 to commit murder. D2 is not a fully innocent agent because he does have an intention to commit common assault.¹²² But in terms of the unlawful killing of the victim, he is used as a tool. He thought he was merely committing common assault, but objectively his conduct was the unlawful killing of the victim. If a person can be liable through a completely innocent agent, there is no reason why he should not be liable through a semi-innocent agent.¹²³ It is correct that D1 should be liable for murder, but he should be held liable as the principal offender through the doctrine of innocent agency, rather than as an accessory through an overstretched form of complicity.

It was held in *R v Howe*¹²⁴ that *R v Richards*¹²⁵ was wrongly decided. In *Richards*, the accessory paid the two principal offenders to seriously injure her husband, but only minor injury was caused. The principal offenders were convicted of an offence under s.20 of the Offences against the Person Act 1861, and the accessory's appeal against her conviction for s.18 of the Offences against the Person Act 1861 was allowed. The court held that the accessory could not be liable for a more serious crime than that which was committed by the principal offenders.¹²⁶ This ruling is in line with the derivative requirement of complicity liability. Cases like *Richards* are distinguishable from the hypothetical case mentioned in the last paragraph. This is because the principal offenders in *Richards* made their own independent and autonomous choice not to commit the more serious crime, but the principal offender in the hypothetical case where the accessory gave a loaded gun saying that it contained blank ammunition was tricked into committing an unlawful killing when he thought he was committing common assault. Making an accessory liable for a more serious crime than the principal offender committed is contradictory to the derivative requirement of complicity. *R v Jogee* clearly states that it is a fundamental principle of criminal law that the accessory is liable for the same offence as the principal offender.¹²⁷

It is submitted that an accessory like Richards should be held liable for the less serious crime his principal offender has committed if this crime is a lesser-included offence of what the accessory intended to assist or encourage. The *actus rei* of s.20 and s.18 are the same (ie wounding or causing grievous bodily harm),¹²⁸ and the *mens rea* of s.18 (an intention to cause grievous bodily harm or to resist or prevent lawful apprehension or detention)¹²⁹ covers the *mens rea* of s.20 (intention to cause

122 See *R v Ireland* [1998] AC 147 (HL); and *R v Venna* [1976] QB 421.

123 Dennis J Baker, *Glanville Williams Textbook of Criminal Law* (Sweet & Maxwell, 3rd ed., 2012) para.14–120.

124 *R v Howe* [1987] AC 417, 458.

125 [1974] 1 QB 776.

126 *Ibid.*, 780.

127 [2016] UKSC 8, [1].

128 Although s.20 uses the term “inflict” and s.18 uses the term “cause”, it is now settled law that “inflict” should mean the same as “cause”. *R v Wilson* [1984] AC 242.

129 *R v Taylor* [2009] EWCA Crim 544 (CA).

some bodily harm).¹³⁰ Therefore, s.20 is a lesser-included offence of s.18. The principal offender's crime forms part of the crime intended by the accessory, so it is not against the derivative complicity to hold the accessory liable for that part.

C. *Where a collateral crime Is committed*

So far, we have dealt with situations where the accessory intended to assist or encourage the commission of a particular offence, but the perpetrator committed another offence. We now turn to cases where the principal offender committed not only the crime that was assisted or encouraged, but also a collateral crime. English complicity law requires actual assistance or encouragement with the intention to assist or encourage, and therefore an accessory is not liable for any collateral crime that is not actually assisted or encouraged by the accessory's conduct or is not intended by the accessory.

Chinese complicity law requires actual assistance or encouragement, but it has a broader *mens rea* element, which can be satisfied if the accessory either hoped his principal offender would commit the target crime or foresaw its commission but was indifferent towards it. However, if the accessory realised that a collateral crime might be committed in addition to the target crime, this is taken as sufficient to make him liable for the collateral crime too. In a case where four defendants decided on the spot to jointly assault and verbally abuse others, and one of them suddenly produced a knife and fatally stabbed the victim, it was argued that the other three defendants did not foresee that he would use a knife and fatally wound the victim.¹³¹ The fatal stabbing was considered to be outside what was mutually understood to be the risks of the joint act of violence. But if the accessories knew that the killer always carried a knife with him and might use it, yet still went on with their plan, the fatal stabbing would fall within their contemplation and the accessories would be liable for the collateral crime of intentional killing.

In both jurisdictions, the collateral crime would be regarded as falling outside of the scope of what was assisted or encouraged if the accessory did not even foresee it.¹³² If the accessory had foreseen it, according to Chinese law, he would be held liable for it unless there was evidence showing he did not hold an indifferent attitude towards it. Such a defendant may not necessarily be held liable for the collateral crime according to *R v Jogee*¹³³ which requires the accessory to have an

130 *R v Mowatt* [1968] 1 QB 421; and *R v C* [2007] EWCA Crim 1068 (CA).

131 Weimin Liu and Jiayang Zhang, "The Application of Theories of Joint Crime in the Offence of Disturbing the Peace (2015) 7 *Legal System and Society* 293, 294 (a journal article in Chinese).

132 For English law, see *R v Jogee* [2016] UKSC 8, [65]–[66] and for Chinese law, see *Haifeng Chen and Others (intentional injury and robbery)* [2011] Intermediate Court of Shangluo Municipality, Shaanxi Province, China Law Information Database, Case Citation: CLI.C.462281; and *Yuanhua Tan and Others (false imprisonment and robbery)* [2011] Changshou District Court of Chongqing Municipality, China Law Information Database, Case Citation: CLI.C.386755.

133 [2016] UKSC 8.

intention to assist or encourage the collateral crime. In *R v Dreszer*,¹³⁴ the defendant joined others in kidnapping and imprisoning V who was assaulted and beaten during two days of torture and succumbed to his injuries. The defendant's conviction for murder was quashed because the Court of Appeal could not rule out the possibility that the jury convicted him on the basis of foresight (ie by participating in the joint plan to kidnap and imprison V, the defendant foresaw that at least one of his companions might assault V with an intention to kill or cause grievous bodily harm). Chinese law would regard Dreszer as having an indifferent attitude towards the occurrence of death or grievous bodily harm, unless evidence shows otherwise.

Conditional intent plays a more important role in English law than in Chinese law. It was held in *R v Jogee* that if D1 joined D2 in committing crime A and D1 foresaw that in the course of it D2 might also commit crime B, it might in appropriate cases be justified in drawing a conclusion that D1 had the conditional intention that crime B should be committed if the occasion arose.¹³⁵ Conditional intention rests on what people intended in the alternative. In a Chinese badger game case,¹³⁶ a woman and two men conspired to get money by entrapping old, married men. One day, the woman enticed V to her flat, and the two men burst into the flat. One of the two men claimed he was the woman's husband and demanded justice (in the hope that V would give them money). V said he did nothing improper with the woman and refused to give money. The two men punched him. The woman stayed in her flat while the two men beat V in an alleyway 20 meters away from the flat and took his purse and mobile phone. If this case happened in the United Kingdom, in order to make the woman liable for robbery, it has to be proved that she, by joining the plan to blackmail the victim, intended that the two men should use violence to demand money if their plan failed and that she did in fact give assistance or encouragement when the two men were committing the robbery. The evidence showed that the woman, fearing things would go wrong after hearing them beat V, called one of them asking what she should do. She was told that V was beaten badly and that she should pack up and run. It might well be inferred that using violence to demand money was not within their shared intention to blackmail or even in their contemplation; it might also be possible to infer that all they wanted was to get money from V and that they all had sufficient information of what was conditionally intended if blackmailing, by itself, did not work. All of them might have conditionally intended that violence should be used as an alternative way of getting money. Under Chinese law, the woman would be held liable for robbery without having a conditional intention that her confederates should commit robbery as an alternative, because she knew they were beating him while demanding money from him but expressed no dissent. Where the accessory assisted or encouraged the principal offender but did not make it clear which crime or crimes the latter

134 [2018] EWCA Crim 454.

135 [2016] UKSC 8, [94].

136 Discussed in Yingju Feng, "Determining Excessive Perpetration in Joint Crimes—The Female Assister's Role in Badger Game Cases" (2005) 2 *Criminal Science* 104, 104 (a journal article in Chinese).

should commit, Chinese law would make the accessory liable for every crime he contemplated, unless he made it clear that certain crimes should not be committed. In Chinese law, this type of intention is known as “general intention”, which refers to a situation where the defendant is not quite sure which crimes will be committed out of a range of crimes he chooses to assist and encourage and is indifferent as to which crime will be committed.¹³⁷ Cases like *DPP of Northern Ireland v Maxwell*¹³⁸ would fit in well with this concept of general intention.

The Chinese law’s approach to collateral crime is very much similar to the pre-*Jogee* law in England and Wales. Such an approach equates foresight with intention and causes unfairness and injustice. It is submitted that English law adheres to the principle of fair labelling when dealing with a collateral crime committed by the principal offender, but its Chinese counterpart does not. Participation in one crime (crime A) does not necessarily mean agreement to commit another crime (crime B) as well. Making an accessory liable for the collateral crime in such cases shows a double layer of constructive liability. The accessory’s participation in crime A is constructed as assistance or encouragement in crime B, and his foresight of crime B is constructed as sufficient *mens rea* for assisting or encouraging crime B.¹³⁹ Such fictitiously constructed *actus reus* and *mens rea* of complicity are further constructed as the requisite *actus reus* and *mens rea* of crime B. Labelling an accessory in the same way as a principal offender already shows a form of constructive liability; the unfairness of such constructive liability is doubled when an accessory is held liable for the collateral crime which was foreseen (but not intended) by him. If there is any social need to criminalise an accessory risking a collateral crime by the principal offender, a new lesser generic offence in the form of inchoate reckless assistance or encouragement would be more appropriate.¹⁴⁰

VI. Conclusion

The scope of derivative complicity is heavily affected by its mental element. Chinese complicity law applies to reckless assistance or encouragement and is broader in scope. It could make people who engage in everyday lawful activities liable as accessories for someone else’s crime, which would be a threat to people’s freedom and security of lawful conduct. The labelling of a reckless assister or encourager in the same way as a principal offender infringes the principle of fair labelling. English law has fared better in eliminating such unfairness by requiring intention as opposed to foresight.

137 Yonghong Zhang, “Study on General Intention” (2008) 1 *Science of Law* 79, 80 (a journal article in Chinese).

138 [1978] 1 WLR 1350.

139 B Wang, “A Normative Case” (n.68), 156–158.

140 *Ibid.*, 158–160.

The scope of derivative complicity is greatly affected by the extent of its derivativeness too. The more dependent derivative complicity is on the description of perpetration, the narrower the scope of it. This article has demonstrated that the derivative requirement of complicity in English law is less strict than that in Chinese law in that it only requires the principal offender to have committed the *actus reus* of the target crime in order for derivative complicity liability to be imposed on the accessory. Consequently, D1 who uses D2 to commit his crime, when D2 does not have the *mens rea* for the crime, is punished as an accessory to the crime even though D2 is not criminally liable. It is submitted that the Chinese approach is preferred to deal with such cases, which would regard D1 as the real principal offender by applying the doctrine of innocent agency. Such a case is no different to cases where D1 uses a minor or an insane person to commit his crime. D1 is intending to commit his own crime, by using innocent D2, not intending to participate in D2's crime.

A relaxed derivative requirement of complicity would also allow the accessory and principal offender to be labelled with different crimes. The principal offender's conduct will be coupled with the accessory's own mental state to decide which crime the accessory should be liable for. The ruling in *R v Howe*¹⁴¹ instantiates such a relaxed derivative requirement, according to which an accessory can be liable for murder when his principal offender is liable for manslaughter. Chinese law would make such an accessory liable for intentional killing but would allow sentence discount according to the second paragraph of art.29. Both approaches are extending the reach of derivative complicity liability in such cases. It is submitted that where the principal offender has committed a more or less serious crime than the crime he is assisted or encouraged to commit, the accessory can still be held liable for the crime which is a lesser-included offence of the other. Beyond that, greater use needs to be made of the inchoate offences of assisting and encouraging when the crime committed is not the one assisted or encouraged by the accessory. It is further argued that manslaughter is not a lesser-included offence of murder because not all the elements of it are encompassed in the elements of murder, and therefore making an accessory liable for manslaughter when his principal offender has deliberately deviated from their original plan is unprincipled and unjustified.

Moreover, where the principal offender has committed a collateral crime in addition to the crime that is assisted or encouraged by the accessory, it would be unjust and unfair to make the accessory liable for the collateral crime on the basis that he has participated in the crime assisted or encouraged, foreseeing that a collateral crime may be committed. This kind of double constructive liability needs urgent reform. *R v Jogee* has eliminated the extreme unfairness of such double constructive liability by requiring intention for complicity, but it leaves the door open for unfairness by holding that where the principal offender has committed murder in the course of executing their original plan, the accessory can still be held

141 [1987] AC 417.

liable for manslaughter even if it is not his intention to kill or cause grievous bodily harm.¹⁴² Chinese law however sets no limits for such double constructive liability. If we are to pursue the goal of fair labelling, having a new lesser generic offence of risking another's collateral crime would be a choice to catch such cases.

Participation in crimes has always been a complex area of law. More empirical research is needed to assess whether English law is more efficient and effective than Chinese law in crime control. At least, it is clear that the post-*Jogee* English law allows fairer labelling than Chinese law as it has abolished collateral joint enterprise liability and has established inchoate assisting and encouraging offences which are based on individual liability rather than derivative liability. An overstretched form of derivative complicity may have great deterrent effect, but this is achieved at the cost of justice and fairness. If a system that allows for fair labelling and proportionate punishment can achieve the same goal, why do we not adopt it?

142 *R v Jogee* [2016] UKSC 8, [96].

