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# The Structure, coherence and limits of inchoate liability: the new *ulterior* element

The wrongs targeted by the criminal law need not reside in a defendant's conduct and its effects (actus reus) or even in her willingness to allow or risk that conduct and its effects (mens rea as to actus reus). Rather, to a greater or lesser extent, wrongs may also reside in a species of mens rea that does not relate to the actus reus of an offence at all, but is rather ulterior to (goes beyond) it. Offences requiring such ulterior mens rea are numerous and varied,<sup>1</sup> ranging from the 'intention of permanently depriving' in theft,<sup>2</sup> or the role of improper intentions in bribery,<sup>3</sup> through to requirements (such as those within the general inchoate offences) that D should act with the ambition of bringing about a full principal offence. The use of ulterior mens rea thereby provides unique opportunities for framing offences that are able to take account of D's wrongful state of mind where it has not yet (or not yet fully) been actioned externally. In this manner, ulterior mens rea enables the creation of offences designed for early intervention within a criminal enterprise and, even where D's actions are complete or have already caused some lesser harm, more accurate labelling and punishment that takes account of D's more seriously wrongful state of mind. As a result, the

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<sup>1</sup> For an overview of such offences, see, Horder, 'Crimes of ulterior intent' in Simester and Smith (eds), *Harm and Culpability* (CP, 1996), 153.

<sup>2</sup> Theft Act 1968, s1.

<sup>3</sup> Bribery Act 2010, ss1-2. For offences under these sections, it is not necessary to show that D induced P to perform her duty improperly, or conversely under section 2, that D induced an advantage from P in exchange for her offer to act improperly. Rather, it is enough that this was her intention.

creation of new offences which employ ulterior mens rea (often as the foundation of the wrong being criminalised) has increased significantly.<sup>4</sup>

This increase is a matter of great importance, carrying with it and reenergising a number of seminal debates about the legitimacy of punishing intended (as opposed to completed) harms.<sup>5</sup> However, our aim in this paper is not to restate such debates. Rather, we aim to shed light on emerging concerns relating to the application of these offences in practice. This secondary issue of application, although often overshadowed by more fundamental debates, is no less important. Indeed, with various forms of ulterior mens rea now firmly established and expanding within the criminal law, it is contended that such application concerns are long overdue specific attention.

At the heart of these concerns is a relatively unusual area of uncertainty: the conceptual location of ulterior mens rea within the structure of an offence. By structure, we mean the potential separation of an offence into actus reus and mens rea, as well as element analysis divisions between acts,<sup>6</sup> circumstances<sup>7</sup> and results.<sup>8</sup>

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<sup>4</sup> See, for example, recent fraud and terrorism offences. Leader-Elliott, 'Benthamite reflections on codification of the general principles of criminal liability: Towards the panopticon' (2005) 9 *BCLR*, 391, 429, remarks upon the 'epidemic spread of offences that take the form of a prohibition of possession of a thing with intent to commit an offence.'

<sup>5</sup> See, Child and Hunt, 'Risk, pre-emption, and the limits of the criminal law' in Child, Doolin, Beech and Rain, *Whose Criminal Justice? Regulatory State or Empowered Communities* (Waterside, 2011) 51; McSherry, 'Expanding the boundaries of inchoate crimes: The growing reliance on preparatory offences' in McSherry et al (eds) *Regulating Deviance – The redirection of criminalisation and the futures of criminal law* (Hart, 2009) 141; Horder, n1.

<sup>6</sup> The act element represents the physical conduct of D necessary for the offence, e.g. the movement of D's body. The separation of the act element into actus reus and mens rea represents a controversial decision. However, as the acceptance of this choice is not directly relevant to the issue at hand, it will not be explored further in this paper.

<sup>7</sup> The circumstance element represents surrounding facts that are necessary for the offence, e.g. that property appropriated in theft should 'belong to another'.

	<b>Actus Reus</b>	<b>Mens Rea</b>
<b>Acts</b>	Element 1	Element 4
<b>Circumstances</b>	Element 2	Element 5
<b>Results</b>	Element 3	Element 6

Whereas most offence requirements can be (relatively) consistently categorised and analysed within these elements, ulterior mens rea appears to defy such groupings entirely. Thus, where element analysis has been employed, the result has been a series of strained attempts to present ulterior mens rea as a corollary of existing elements, or simply, as with the general part of both the US Model Penal Code<sup>9</sup> and the 1989 Draft Criminal Code for England and Wales,<sup>10</sup> to avoid any definition or conceptual engagement at all.<sup>11</sup> Such responses have always been unwelcome on a conceptual level and a source of confusion. However, because of recent changes in relation to the general inchoate offences, this conceptual problem is now also capable of distorting the substantive application of the law.

The position has changed because attempts and assisting and encouraging no longer simply require intention as to every part of the principal offence (the offence attempted or assisted or encouraged).<sup>12</sup> Rather, the mens rea required of D in relation to the principal offence is

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<sup>8</sup> The result element represents those things that have been caused by D's acts that are necessary for the offence, e.g. 'death' in murder.

<sup>9</sup> US Model Penal Code 1962 (hereafter US MPC). See, Leader-Elliott, n4.

<sup>10</sup> Law Commission, *A Criminal Code for England and Wales* (2 vols) (Law Com No.177, 1989).

<sup>11</sup> The exception to this, discussed in Part 1, is the recent Irish Draft Criminal Code. Criminal Law Codification Advisory Committee, *Draft Criminal Code and Commentary* (DC/04, 2010).

<sup>12</sup> Similar recommendations have been made for conspiracy, complicity and the intoxication rules: Law Commission, *Conspiracy and Attempts* (Law Com No.318, 2009); Law Commission, *Participating in Crime* (Law Com No.305, 2007) and Law Commission, *Intoxication and Criminal Liability* (Law Com No.314, 2009). For discussion of the later, see Child, 'Drink, drugs and law reform: A review of Law Commission Report No.314' (2009) *CrimLR*, 488.

specified separately and distinctly in relation to the elements of that offence (Elements 1-6).<sup>13</sup> For example, criminal attempt has been interpreted to require intention as to the act and result elements of a principal offence (Elements 1 and 3), but potentially a lesser form of mens rea – reflecting that for principal liability – as to circumstances (Element 2). Therefore, in order to apply such inchoate offences in practice, it is now essential for the principal offence to be dismantled within the element analysis structure. It is only when we have separated the requirements of the principal offence into the boxed elements that we are then able to identify what mens rea is required of D (for the inchoate offence) in relation to them.

Substantive concerns emerge where an inchoate offence of attempt or assisting or encouraging is applied to a principal offence that contains a requirement of ulterior mens rea. In order to reveal what mens rea is required of D (for inchoate liability) in relation to the principal offence's ulterior requirement, we must first locate that requirement within one of the boxed elements. However, as highlighted above, there are conceptual problems with locating this requirement within any current element (Elements 1-6). This issue first arose in the troublesome case of *AG's Reference (No.3 of 1992)*.<sup>14</sup> This case involved an offence of attempted aggravated arson<sup>15</sup> where D intended to cause damage to V's car by fire, but was merely reckless as to the potential endangerment of life. As D was merely reckless as to the element of endangerment (the ulterior requirement), it therefore became necessary to decide whether this element of the principal offence was a conduct or result element (in which case intention would be required for attempt liability), or whether it was a circumstance element (in which case recklessness would suffice). The problems experienced by the court, and

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<sup>13</sup> It is important to recognise that, in the context of these general inchoate offences, we are discussing the separation of elements within the principal offence (the offence attempted, assisted, encouraged or conspired). The separation of the D's conduct into elements (e.g. that D went beyond mere preparation or assisted, encouraged or agreed) is not currently at issue.

<sup>14</sup> [1994] 1 WLR 409.

<sup>15</sup> Criminal Damage Act 1971, s1(2).

surrounding commentaries, represent the first area of substantive concern explored in this paper.

The case also reveals a second substantive concern. This relates to the preference of the court and commentators in trying to fit ulterior requirements within existing elements (Elements 1-6). It is contended that, even if we adopted an approach that could accommodate ulterior mens rea within existing elements, this would be a mistake. This is because, just as current reforms of inchoate liability have set mens rea requirements separately for the conceptually distinct elements of act, circumstance and result, so the distinct element of ulterior mens rea requires similar consideration. However, if ulterior mens rea must be located within current offence elements, so as to merge the ulterior requirement with other elements of the principal offence, the possibility of distinct treatment is closed off.

Over three parts this paper attempts to clarify these issues, as well as to offer a potential solution. Part 1 begins with a discussion of the conceptual problem, exploring and evaluating several approaches that have attempted to accommodate ulterior mens rea within existing offence elements (Elements 1-6). In Part 2, we then re-evaluate these approaches in the context of inchoate liability where our focus shifts to the separation of the elements of a principal offence (for example, an offence attempted or encouraged) and the emerging substantive concerns outlined above. In each case we maintain that the approach of forcing ulterior requirements within existing elements is flawed, and that the appropriate way forward would be to adopt a new offence element isolated to ulterior mens rea. Finally, in Part 3, we consider the implications of the new recommended offence element. In the context of inchoate liability, we ask the normative question: what mens rea should be required of D

as to the new ulterior mens rea element of a principal offence? Offering a tentative response, we highlight the potential role of the new element to better control the reach of inchoate liability, particularly in the context of infinite inchoate liability.

Illustrated below is the current structure of element analysis with the addition of the recommended ulterior mens rea element (Element 7).

	<b>Actus Reus</b>	<b>Mens Rea</b>
<b>Acts</b>	Element 1	Element 4
<b>Circumstances</b>	Element 2	Element 5
<b>Results</b>	Element 3	Element 6
<b><i>Ulterior Mens Rea</i></b>		<i>Element 7</i>

***Preliminary issue: From ulterior intention to ulterior mens rea***

Before exploring current approaches to ulterior mens rea, it is necessary to reflect upon a common feature that has contributed to the problems outlined above. This is the continued insistence, common within textbooks and other academic writing, that discussion of ulterior mens rea should be confined to ulterior *intention* alone.<sup>16</sup>

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<sup>16</sup> See, Ormerod, *Smith and Hogan's Criminal law* (13th Ed, OUP, 2011) 136; Simester, Sullivan, Spencer and Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th Ed, Hart, 2010) 138; Horder, n1.

The ulterior element proposed in this paper extends to all ulterior mens rea. This broadening, it is contended, is essential in the context of the current law. Accepting nothing less than ulterior *intention* may be justified on normative grounds, by a belief that if the law is to punish unrealised thoughts then this should only be available in relation to what D is intending to bring about. Indeed, many offences, such as theft and bribery, do require intention. However, whatever one thinks of this normative position, it is clearly not descriptive of the current law. This is because several other offences require alternative levels of mens rea, most commonly (but not exclusively) recklessness. Examples include aggravated criminal damage, where D destroys or damages property ‘reckless as to whether the life of another would be thereby endangered’,<sup>17</sup> and even the general inchoate offences, where a requirement of recklessness as to aspects of the principal offence has become increasingly common.<sup>18</sup>

As with ulterior intention, these lesser mens rea requirements relate to external conduct or facts that do not have to be realised to establish liability (they are ulterior to the actus reus of the offence). If it is the *ulterior* status that makes ulterior intention distinct from other classes of mens rea, it is logical to view these other forms of ulterior mens rea as part of that same distinct class. This will be assumed within our ulterior mens rea element.

## **Part 1: The conceptual problem**

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<sup>17</sup> Criminal Damage Act 1971, s1(2).

<sup>18</sup> For example, the new assisting and encouraging crime offences. See, Child, ‘Exploring the Mens Rea Requirements of the Serious Crime Act 2007 Assisting and Encouraging Offences’ (2012) *JCL*, 220.



To understand the substantive concerns that will be discussed in Parts 2 and 3, in relation to general inchoate liability, it is first necessary to understand an underlying conceptual problem apparent within *all* offences that include an ulterior mens rea requirement.

This conceptual problem relates to the placement of ulterior mens rea within current offence structures, within actus reus and mens rea, and also within the element analysis structure of acts, circumstances and results (Elements 1-6).<sup>19</sup> As ulterior mens rea operates in the mind of D as opposed to the external world, it should not standardly be identified as an actus reus element (Elements 1-3). This would imply, as is usually assumed, that it is a species of mens rea.<sup>20</sup> However, when analysing the mens rea of an offence, the corresponding role of actus reus remains central. This is because mens rea requires a subject: for example, we cannot intend in abstract, intention requires the context of a fact or event that is intended. This subject is provided by the actus reus elements, and is reflected in the element analysis structure. Thus, to come within one of the traditional mens rea elements (Elements 4-6), the mens rea requirement will correspond to an act, circumstance or result element of the actus reus.<sup>21</sup> However, as ulterior mens rea by definition can never correspond to an element of the actus reus, the traditional mens rea categories seem equally ill-suited to accommodate it. For example, the ulterior mens rea requirement within theft is that D must act with the ‘intention of permanently depriving’. If the actus reus of theft required a permanent deprivation, then this would be a result element of the crime (Element 3) and the intention would attach to it as the mens rea of that result (Element 6). However, as there is no requirement (actus reus) of

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<sup>19</sup> Element analysis does not presume that every offence should include all six elements (eg, where conduct crimes will not include results). However, in order to operate as a consistent and universal tool, it must be possible for all offence requirements to be classifiable within an appropriate element.

<sup>20</sup> This is how ulterior intention is commonly presented in textbooks. See, Ormerod, n16, 136.

<sup>21</sup> This approach is reflected in codifications of mens rea terminology. United States (§ 2.02. US MPC); Australia (Div.5, Aus Commonwealth Criminal Code (1992)); New Zealand (Cl.21-24, Crimes Bill (1989)); England and Wales (Cl.18, Draft Criminal Code Bill (1989)).

permanent deprivation, the corresponding mens rea requirement loses its subject within the actus reus, becomes ulterior, and *it seems* cannot be accommodated within the structure.

### *Ulterior mens rea as part of the actus reus*

The idea of locating ulterior mens rea – as a state of mind anticipating a specific fact or event – within actus reus elements seems singularly inappropriate. However, just prior to *AG Ref (No.3 of 1992)*, Sullivan contended in the context of indecent assault (now sexual assault<sup>22</sup>) that ulterior mens rea could be analysed as a circumstance element (Element 2).<sup>23</sup> For sexual assault, the ulterior mens rea requirement relates to the ‘sexual’ dimension of the offence: D’s conduct must either be ‘by its nature’ sexual (clear on the actus reus alone), or be potentially sexual, and made sexual by circumstances or the *purpose* of D.<sup>24</sup> Thus, where D acts with the purpose of gaining sexual gratification she satisfies the sexual dimension even where no overtly sexual act or actual gratification can be demonstrated, even where her purpose is *ulterior* to events within the actus reus. However, for Sullivan, the lack of corresponding actus reus is not a reason to view D’s sexual purpose as ulterior at all. Rather, as D’s purpose acts to satisfy the sexual dimension of the offence, a dimension that is usually considered as a circumstance element within the actus reus, Sullivan contends that D’s purpose should be located similarly: D’s ‘reasons for acting are more than mental accompaniments to conduct and are a constituent element of the conduct itself.’<sup>25</sup>

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<sup>22</sup> The Sexual Offences Act 2003, s3.

<sup>23</sup> Sullivan, ‘Bad thoughts and bad acts’ (1990) *CrimLR*, 559.

<sup>24</sup> The Sexual Offences Act 2003, s78 (my emphasis).

<sup>25</sup> Sullivan, n23, 559.

Unlike the alternative approaches discussed below, Sullivan is not attempting to create or maintain a conceptual model. Rather, his analysis is useful to demonstrate the lack of conceptual consensus in this area. For Sullivan, as ulterior mens rea did not fit within traditional mens rea elements, it was better (in this example) analysed as part of the actus reus. A view, of course, that also challenges the actus reus/mens rea divide.

### *Ulterior mens rea as mens rea within the circumstance and result elements*

The alternative of locating ulterior mens rea within the mens rea of circumstances and results is most clearly exemplified by the English Law Commission, set out in their recent review of inchoate liability.<sup>26</sup> For the Commission, ulterior requirements are examples of mens rea as to circumstances and results (Elements 5 and 6), with the simple difference being that the ‘circumstance’ or ‘result’ intended does not need to come about and thus does not form part of the actus reus.<sup>27</sup> For example, in relation to results, the Commission contends:

‘We have been speaking of the need to prove intention with regard to a [act] or [result] element. That includes, by implication, cases in which, even for the substantive offence, there is a need to prove only an intention that something ... will occur, whether or not it does occur.’<sup>28</sup>

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<sup>26</sup> Law Commission, *Conspiracy and Attempts – A Consultation Paper* (Consultation No.183, 2007); Law Commission, *Inchoate Liability for Assisting and Encouraging* (Law Com No.300, 2006); Law Com No.318.

<sup>27</sup> Consultation No.183 [4.6-4.15]; Law Com No.318 [2.14-2.29].

<sup>28</sup> Law Com No.318 [2.57]. For a similar discussion regarding ulterior intention and circumstances, see [2.147-8]. Draft Bill cl.1ZA(2)(a) and 3A(2)(a).

Locating ulterior mens rea within mens rea elements, as corollaries of traditional mens rea elements as to circumstances and results, has an obvious appeal. For example, in relation to sexual assault, avoiding Sullivan's problematic interpretation, the Commission can categorise D's purpose to gain sexual gratification as an example of mens rea as to a result element (Element 6).<sup>29</sup> This is because, if the offence required D to gain sexual gratification in fact, then such gratification would be a result element (Element 3).<sup>30</sup> Despite the absence of this corresponding actus reus, the conceptual location of D's mens rea is unaffected and relatively easy to apply.<sup>31</sup>

However, the Commission's policy remains conceptually problematic. It deals tolerably well with one-dimensional ulterior requirements, such as sexual purpose for sexual assault or an intention to permanently deprive in theft.<sup>32</sup> Problems begin to emerge, however, when offences include an ulterior requirement that is not limited to a single aspect but, as with the general inchoate offences of attempt, conspiracy and assisting and encouraging, extends to a full principal offence.<sup>33</sup> Where an ulterior requirement extends to a full principal offence, the Commission's approach will have to accommodate every part of that offence within the mens rea of circumstances and results (Elements 5 and 6). This is extremely problematic. First, if the ulterior requirement relates to an offence to be committed by D, although any circumstances and results of that principal offence may be logically located within those

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<sup>29</sup> Law Com No.318 [2.58].

<sup>30</sup> Establishing sexual gratification (an internal event) as an actus reus result element requires further justification. However, as it is not essential for this paper, it will have to wait for another occasion.

<sup>31</sup> On the remaining uncertainty, see Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) *SLR* 681.

<sup>32</sup> The approach does not, however, escape the 'second substantive concern' discussed in Part 2.

<sup>33</sup> As Horder (n1, 156-7) has identified, offences of this type also include where D completes a crime with mens rea as to a further offence (eg committing a non-sexual offence with the intent to commit a sexual offence, Sexual Offences Act 2003, s62), where D commits a civil wrong with mens rea relating to a future offence (eg burglary, Theft Act 1968, s9(1)(a)), as well as where D's mens rea as to a future offence is accompanied by conduct that is otherwise innocent (eg possession of anything with intent to destroy or damage property, Criminal Damage Act 1971, s3).

mens rea elements (corollaries of traditional mens rea elements as to present circumstances and results<sup>34</sup>), this is not true of mens rea as to future *acts*. For example, for an offence like burglary D must intend to complete a future act element (relating to a future principal offence). However, such mens rea is not a corollary of mens rea as to circumstances or results, it would not be an example of either of these ‘but for its lack of a corresponding actus reus element’. Rather, D’s mens rea as to her own future actions is a distinct form of mens rea that does not fit within either of the Commission’s categories.<sup>35</sup>

Further problems arise for the Commission’s approach where an ulterior requirement relates to a full offence *to be committed by another party*, for example in the context of conspiracy. Some of this is simply an issue of complexity. For example, where D has conspired with P to commit murder, D’s conduct can be divided into acts, circumstances and results, as can her mens rea in relation to that conduct. However, within those same mens rea elements, we must now also locate D’s mens rea as to the actus reus elements of P’s principal offence, and her mens rea as to the mens rea elements of P’s principal offence. Such complexity is not desirable, but the structure fully breaks down when we realise that it is also not conceptually sound. This is most clearly evident in relation to result elements. Where D commits a choate offence that includes mens rea as to a result element, that mens rea does not simply relate to the chances of the result coming about, but rather reflects the requirement of a causal link with D’s action. For example, were D to commit murder as a principal offender, it would not be enough that she intended death or grievous bodily harm; liability requires D to intend *her acts to cause* death or grievous bodily harm.<sup>36</sup> In contrast, where D conspires for example,

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<sup>34</sup> For an opposing view, contending that such requirements are never conceptually equivalent, see Scottish Law Commission, *The mental element in crime* (Scot. Law Com No.80, 1983) [3.2-3.14].

<sup>35</sup> See Robinson, *Structure and Function in Criminal Law* (OUP, 1997) 131.

<sup>36</sup> *Cunningham* [1981] 2 All ER 863.

she need only intend that the result of the principal offence comes about. This intention relates to her anticipation of the result to be caused by another, not mens rea as to causing it to come about through her actions. By placing mens rea as to both categories of result within the same element (Element 6) despite their conceptual differences, the Commission's approach is flawed.

### *Ulterior mens rea as mens rea across existing elements*

Sharing several characteristics with the previous approach, a third alternative locates ulterior mens rea requirements across each of the mens rea elements, as well as a new element relating to future actions. It is an approach most clearly illustrated by Robinson.<sup>37</sup> Despite similarities with the Commission, Robinson's approach is nevertheless more sensitive to the possibility of ulterior mens rea relating to a full principal offence. Thus, rather than the two species of mens rea employed above, Robinson contends that the role of mens rea should be divided across a maximum of four separate culpability requirements (mens rea elements): 'present conduct intention' relating simply to the acts of D; 'future conduct intention' relating to ulterior mens rea as to D's future acts; 'present circumstance culpability' relating to present and potentially ulterior mens rea; and 'future result culpability' relating to the result of D's and other parties' actions.<sup>38</sup> We criticised the Commission's approach for not being able to locate mens rea as to D's future acts appropriately within the circumstance or result element. For Robinson, however, with the addition of 'future act intention' he is able to

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<sup>37</sup> See, Robinson, n35; Robinson, 'A functional analysis of criminal law' (1994) *Northwestern University Law Review* 857; Robinson and Grall, n31.

<sup>38</sup> Robinson, n35, 129-137.

locate such mens rea within this element without compromising the coherence of other culpability (mens rea) elements.

Despite recognising that conceptual and functional differences require the addition of a separate ulterior mens rea *act* element, Robinson does not take this logic forward into his analysis of the other mens rea elements. As a result, his analysis falls into many of the same problems discussed above, particularly with regard to ‘future result culpability’ which must again host mens rea as to results from both D and P. Beyond this, Robinson’s analysis also reveals a similar problem with regard to circumstances. This is because the device of ‘present circumstance culpability’, as the name suggests, is designed specifically to deal with mens rea as to existing ‘present’ circumstances. As Robinson remarks:

‘These culpability requirements may be called instances of ‘present circumstance culpability’, to remind us that they refer only to culpability as to then present facts.’<sup>39</sup>

Robinson’s focus on mens rea as to ‘present’ circumstances is important because it influences his definition of mens rea terms in relation to that element, for example the overlapping definitions of intention and knowledge.<sup>40</sup> The problem, however, is that when D’s ulterior mens rea relates to a full principal offence, it will be necessary to assess her mens rea as to a *future* circumstance element as well. Without an equivalent approach to that of the act element, we are therefore left with a placement within present circumstance culpability

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* 130.

(where mens rea definitions may not be appropriate to the anticipation of future circumstances), or future result culpability (where the problem regarding causation arises once more). Yet again, it seems that the conceptual differences within ulterior forms of mens rea require, but are not provided with, separate treatment.

Although we are exposing the conceptual differences between present mens rea elements and ulterior mens rea as a critique of Robinson's approach, it is interesting to note that the separate analysis of ulterior mens rea may benefit his wider thesis: the functional analysis of crime.<sup>41</sup> Distinguishing the functions of elements between 'rule articulation' (designed to guide behaviour), 'liability' (setting the rules for criminal intervention) and 'grading' (establishing the seriousness of a violation), Robinson often stresses the distinct role of the result element and result culpability (Elements 3 and 6).<sup>42</sup> This is because, for Robinson, unlike actions and circumstances, results (actus reus and mens rea) do not have a functional role in relation to liability. Rather, because of 'outcome luck',<sup>43</sup> the presence or absence of results will only play a role in relation to grading. However, when accounting for mens rea as to future (ulterior) results, this position is then compromised: in attempts liability, for example, D's actions may be otherwise innocent and so it must be her mens rea as to future events that justifies liability (serving the liability function). Although Robinson recognises this as an exception,<sup>44</sup> it is a compromise to his overall thesis that would be unnecessary if ulterior mens rea were separated from other offence elements. At minimum, the need for this exception provides further recognition of the conceptual differences we have identified.

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<sup>41</sup> See generally, Robinson, n35.

<sup>42</sup> See, Robinson, n35, 128-129 and 132.

<sup>43</sup> 'Outcome luck' arises from our inability to control consequences. Ashworth, 'The Problem of Luck' in *Action and Value in Criminal Law*, Shute et al (eds.) (OUP, 1993) 107.

<sup>44</sup> Robinson, n35, 132-137.



### *Ulterior mens rea as a distinct mens rea element*

The final approach to be considered was set out within the recent Irish Draft Criminal Code.<sup>45</sup> In line with the approach advocated in this paper, the Irish Code recognises conceptual differences between traditional mens rea elements and ulterior mens rea, severing its discussion of ulterior intention from other offence elements.

‘A person acts with “ulterior intention” where, with respect to *some objective that is neither a conduct, circumstance nor result element of an offence* (a) his or her mind is directed towards the achievement of that objective, or (b) he or she is aware that that objective will be achieved in the ordinary course of events as a consequence of the achievement of some other objective to which his or her mind is directed.’<sup>46</sup>

In this manner, the Irish approach provides an opportunity to avoid the conceptual problems discussed above, with no need to view ulterior mens rea as a corollary of other offence elements. However, the Irish Code still falls into error by limiting its separation to ulterior *intention* alone. An example of the confusion caused can be demonstrated in relation to aggravated property damage. Similar to its English equivalent, this offence is defined as requiring D to cause damage ‘intending by the damage to endanger the life of another *or being reckless as to whether the life of another would be thereby endangered.*’<sup>47</sup> Setting out the elements of this offence, the Code Commentary clearly recognises the required intention

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<sup>45</sup> Draft Code, n11.

<sup>46</sup> *Ibid.* Head 1111 (emphasis added).

<sup>47</sup> *Ibid.* Head 5103 (emphasis added).

as ulterior (separating it from acts, circumstances and results). However, when dealing with the recklessness equivalent, this is presented as mens rea as to a circumstance element (the potential endangerment of life).<sup>48</sup> This is plainly incorrect. Although the offence requires intention or recklessness as to the potential endangerment of life, in *neither* case is the potential endangerment required in fact: both should be separated as ulterior mens rea requirements.

### *Conclusion*

The conceptual problem discussed in this Part (the incoherence of locating ulterior mens rea within existing elements) forms the basis for our substantive concerns in Parts 2 and 3. However, it is contended the potential for conceptual coherence is sufficient to justify the recognition of the new ulterior mens rea element in its own right.

In this regard, the debate above has not simply been about which offence element is *best* suited to accommodate a particular offence requirement. Such debates are longstanding within element analysis;<sup>49</sup> they are important, but the problems identified are significantly less damaging than our current concern. With ulterior mens rea, we have offence requirements that appear to undermine the integrity of *any* traditional offence element that is employed. However, the new element provides the potential for coherence. Actus reus elements can be correctly confined to the physical conduct of D (Element 1), causal

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<sup>48</sup> *Ibid.*

<sup>49</sup> See, Buxton 'The Working Paper on Inchoate offences: Incitement and Attempt' [1973] *CrimLR* 656; Williams, 'Intents in the alternative' (1991) *CLJ* 120; Robinson and Grall, n31.

consequences of that conduct (Element 3) or the surrounding facts necessary for liability (Element 2). Equally, the established mens rea elements (Elements 4-6) can maintain their derivative nature, accompanying and attaching to elements of the actus reus. The new ulterior mens rea element (Element 7) is able to recognise and make sense of a genuinely unique additional category of offence element: mens rea requirements that are not connected to, that are ulterior to, the actus reus.

## **Part 2: The substantive concerns for inchoate liability**

Until recently, the general inchoate offences of attempt, conspiracy and incitement (now assisting and encouraging) have required D to act with the *intention* that a principal offence will be completed. Therefore, if that principal offence were to contain an ulterior mens rea requirement, that requirement must *also* be intended. This was unproblematic. The conceptual problem was present (we may have disagreed on *what* D was intending), but there was no substantive concern in application: whatever it was, it had to be intended.

However, in recent years, the general inchoate offences of attempt and assisting and encouraging have adopted an approach to mens rea that distinguishes between the elements of the principal offence attempted, assisted or encouraged. This change is explicit within the new offences of assisting and encouraging.<sup>50</sup> Within attempts, although section 1(1) of the Criminal Attempts Act 1981 specifies that D must act with the ‘intent to commit an offence’,

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<sup>50</sup> Serious Crime Act 2007, Part 2.

this has been interpreted in *Khan*<sup>51</sup> to apply only to the result element of a principal offence (Element 3), with mens rea as to circumstances (Element 2) reflecting that required for principal liability. Therefore, in order to apply either of these inchoate offences, it is essential that the target principal offence can be separated within the element analysis structure. It is only when the principal offence has been separated into these elements that we may then identify what mens rea (for inchoate liability) is required by D in relation to each part.

Therefore, in order to apply inchoate offences to a principal offence that contains an ulterior mens rea requirement, it must be possible to locate that ulterior requirement within an offence element (Elements 1-6). However, as discussed in Part 1, this is not conceptually viable. This impasse represents our first substantive concern for inchoate liability.

This concern was brought to life in the case of *AG Ref (No.3 of 1992)*, the first occasion in which the post-*Khan* approach to attempts was applied to a principal offence containing an ulterior mens rea requirement of less than intention.<sup>52</sup> It will be remembered that *AG Ref (No.3 of 1992)* involved an offence of attempted aggravated arson where D intended to cause damage, but was merely reckless as to the potential endangerment of life. D's liability therefore turned on whether the ulterior requirement of being reckless as to the endangerment of life should be classified as either a circumstance element (where D's recklessness would suffice for attempt liability) or a result element (where D's lack of intention would lead to acquittal).

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<sup>51</sup> [1990] 1 WLR 813.

<sup>52</sup> Where an ulterior requirement specifies intention, mens rea will not vary for attempts whether it is classified as a circumstance or result, making the distinction less problematic.

For the court, a choice between conceptually flawed alternatives was always going to leave their conclusions open to criticism and disagreement. Indeed, we see this with the court of first instance acquitting D (having concluded that the ulterior mens rea requirement was best analysed as a result element<sup>53</sup>), and the Court of Appeal concluding that liability *should* have been found. However, this disagreement was not simply a preference for different (equally problematic) alternatives, the Appeal Court did not disagree because they preferred to analyse the ulterior mens rea requirement as a circumstance element (allowing for liability post-*Khan*). Rather, what has made this case particularly interesting, and so controversial, is that despite concluding that liability should have been found, the Appeal Court did not explicitly reject the earlier Court's identification of ulterior mens rea as part of the result element. Instead, the Appeal Court attempted to avoid the conceptual debate altogether by adopting an alternative approach to the mens rea of attempts that had been recently outlined by Stannard.<sup>54</sup> However, with this alternative approach attracting little support,<sup>55</sup> the Court of Appeal simply succeeded in introducing a further layer of confusion. This is because, if the lower Court was right to identify the ulterior requirement as a result element, then *AG Ref (No.3 of 1992)* seems to be extending the *Khan* precedent by allowing for attempt liability where D is reckless as to a result (as opposed to circumstances only). However, if it is not a result element, if it is a circumstance, then there is no such implication.<sup>56</sup> Thus, not only is the conceptual problem left unresolved, but now it must be resolved in order to conclude whether the *Khan* precedent still applies.

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<sup>53</sup> *AG Ref (No.3 of 1992)* at 411 (quoting Judge Norrie).

<sup>54</sup> *Ibid.* 418 [C-D] (Schiemann J) referring to D's need to intend the 'missing physical element'. See, Stannard, 'Making up for the missing element – a sideways look at attempts' (1987) *LS*, 194.

<sup>55</sup> For criticism, see Duff, 'The circumstances of an attempt' (1991) *CLJ*, 100, 111-112; Duff, 'Recklessness in attempts (again)' (1995) *OJLS*, 309, 311-312; and Duff, *Criminal Attempts* (OUP, 1996) 14-15.

<sup>56</sup> Although it is important not to overcomplicate our analysis, it should be noted that at the time *AG Ref (No.3 of 1992)* was decided, 'recklessness' could be satisfied subjectively or objectively. Our analysis of this case, in line with the current law, will focus on subjective recklessness. For discussion in relation to conspiracy, see, Ormerod, 'Making sense of *mens rea* in statutory conspiracy' (2006) *CLP*, 185, 194-197.

Similar difficulties are also apparent within the surrounding academic commentaries, with very little agreement on how the case should be presented. For commentators following the interpretation of the court of first instance, *AG Ref (No.3 of 1992)* represents the often criticised extension of *Khan*.<sup>57</sup> However, others have interpreted the ulterior requirement as a circumstance element, making liability consistent with the *Khan* principle.<sup>58</sup> Indeed, others still have stated with confidence that the ulterior requirement is either not a result,<sup>59</sup> or not a circumstance,<sup>60</sup> but then struggled to fill the analytical void created.<sup>61</sup> Unfortunately, when looking to this debate for guidance on the root conceptual problem discussed in Part 1, little can be found. This is because, as the interpretation of *AG Ref (No.3 of 1992)* has the potential to significantly widen the scope of attempt liability (by allowing for recklessness as to result elements), the *normative* question of whether liability should be expanded in this manner has dominated and distorted any *conceptual* enquiry.<sup>62</sup> It is the merging of these two separate debates within *AG Ref (No.3 of 1992)*, inevitable where such conceptual problems affect the substance of the law, that confuses and undermines both.

As well as demonstrating the first substantive concern (the lottery of applying inchoate liability without the necessary conceptual guidance), the emergence of normative debates surrounding *AG Ref (No.3 of 1992)* also serves to highlight a second concern. As concluded in Part 1, ulterior mens rea is conceptually distinct from mens rea as to other offence elements. Therefore, just as the mens rea for inchoate liability is designed to take account of

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<sup>57</sup> See, Simester et al, n16, 339 and 342.

<sup>58</sup> See, Davis, 'Signals of symmetry in reckless attempts' (1996) *Anglo.Am.L.R.*, 367, 371; and Case Comment, 'Attempted aggravated criminal damage – "with intent to commit (the) offence"' (1994) *Arch.N.* 4, 5, the latter referring to the state of mind as 'a kind of circumstance.'

<sup>59</sup> See, Smith, 'Attempts' (Case Comment: *O'Toole* [1987] *CrimLR* 759) (1987) *CrimLR* 759, 761.

<sup>60</sup> See, Elliott, 'Endangering life by destroying or damaging property' (1997) *CrimLR* 382, 394.

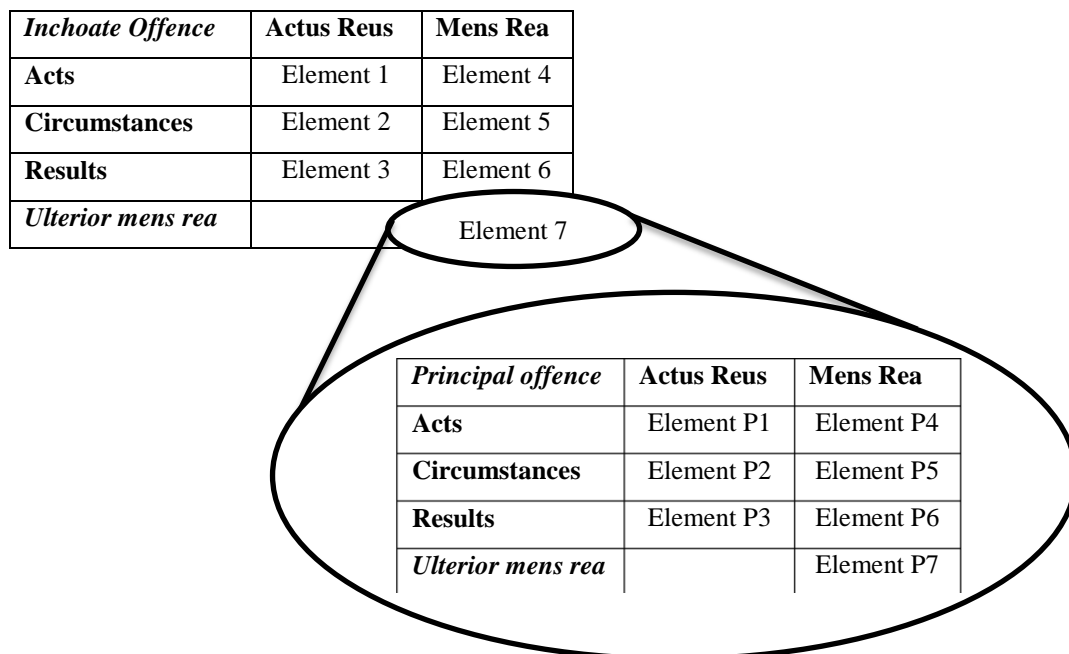
<sup>61</sup> See, Simester et al, n16, 340. Having discussed the requirement as a result element, the authors recognise that it could be interpreted as an ulterior part of the mens rea. However, they do not examine the implications.

<sup>62</sup> See, Smith, n59, 759, 761. See also, Case Comment, 'Attempted aggravated criminal damage – "with intent to commit (the) offence"' (1994) *Arch.N.* 4. Cf. Elliott, n60, 394.

the differences between circumstances and results within the principal offence (requiring different levels of mens rea), so the conceptually distinct requirement of ulterior mens rea requires equally separate normative consideration. Thus, our problem is not simply that current elements are unsuitable (the first substantive concern). Rather, in order to set an appropriate mens rea requirement for inchoate liability in relation to an ulterior mens rea requirement within a principal offence, that requirement must be capable of separate consideration and application (the second substantive concern).

This second substantive concern is important as part of our rejection of the alternative approaches discussed in Part 1 that attempt to locate ulterior mens rea within current offence elements. This is because, if our only substantive concern was *confusion* as to which offence element should be used to accommodate ulterior mens rea, we could simply adopt the approach of the Commission or Robinson explored above. Although such approaches are conceptually problematic, they would at least provide some certainty when applying inchoate offences that vary mens rea between principal offence elements. It would be clear in relation to *AG Ref (No.3 of 1992)* for example, that D's ulterior mens rea formed part of the result element mens rea of the principal offence (Element 6), requiring D to intend it for attempt liability (if we follow *Khan*). However, although this approach would make clear what mens rea is required, the choice of mens rea would not be drawn from a normative discussion taking account of the unique role of ulterior mens rea. Rather, in this example, it is the conclusion from a normative debate taking account of the conceptually distinct role of result elements. In this manner, the confusion may be removed, but its cost is a rigidly applied approach to mens rea that disregards the unique function of ulterior mens rea.

The only way to resolve both of these substantive concerns is through the recognition of a new ulterior mens rea element. The chart illustrates an inchoate offence that includes a requirement of ulterior mens rea as to a full principal offence. Every element of the principal offence is contained within element 7; they are relevant to D's liability only as requirements of ulterior mens rea. Within this principal offence, any ulterior mens rea specified by that offence will be located within element P7.



The simple inclusion of the new ulterior mens rea element provides the conceptual coherence that is essential to resolve both of the substantive concerns identified for inchoate liability. In relation to the first substantive concern, it is clear that any ulterior mens rea requirements within an offence should be located consistently within the new element. Element 7 represents the ulterior mens rea required of D for liability. Within element 7, where this applies to a full principal offence, this principal offence is also divided into elements



(Elements P1-7).<sup>63</sup> In line with the current approach to attempts and assisting and encouraging, we may then specify a distinct mens rea requirement for D (for inchoate liability) in relation to each element of the principal offence. Where that principal offence itself includes an ulterior mens rea requirement, this requirement does not need to be (inappropriately) accommodated within the other elements (Elements P1-6). Rather, such a requirement will come within element P7.

In relation to second substantive concern, by separating ulterior mens rea within a new offence element, it is now possible to ask (in the context of inchoate liability) what mens rea should be required of D where such an element is present within a principal offence (Element P7).<sup>64</sup> It is a debate that should take account of the mens rea required as to other elements of the principal offence (Elements P1-6), but it is separated from them. It is to this debate that we now turn.

### **Part 3: Setting the mens rea for inchoate liability**

In this Part, for the first time, we allow ourselves to consider normative debates about what the mens rea for inchoate liability *should* be. Within these debates, our primary focus will be the mens rea of D (for inchoate liability) as to an ulterior mens rea requirement within a

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<sup>63</sup> In the context of attempt, for example, elements 1-6 contain D's actus reus and mens rea as to going beyond mere preparation, where element 7 (separated into elements P1-7) contains D's mens rea as to the principal offence attempted.

<sup>64</sup> Despite separating their analysis of ulterior intention, the Irish Draft Code does not explore the substantive concerns with inchoate liability. Rather, this is left to the review of the Irish Law Commission. Unfortunately, the Irish Commission not only reject the use of element analysis (and the separation of ulterior mens rea), but recommend an approach that makes little effort to engage with inchoate liability as a conceptually distinct form of liability at all. See, Child and Hunt, 'Mens rea and the general inchoate offences: another new culpability framework' (2012) *NILQ*, 245.

principal offence (Element P7). Above, we introduced this in the context of *AG Ref (No.3 of 1992)*. In this case, the issue was what mens rea should be required of D for attempt liability, in relation to the anticipation of life being endangered (the ulterior requirement of the principal offence, aggravated arson).

Within this discussion, four key questions require attention. First, having explained that it may be desirable to consider D's mens rea as to the ulterior mens rea of the principal offence separately from other elements (the second substantive concern), we begin with a discussion of why this is always the case. Secondly, having established the rationale for separation, we ask whether the same can be, or even *has* been, achieved without the proposed element? Thirdly, concluding that the current law is inadequate, we set out the potential benefits of our proposed scheme. Finally, we explore a potential problem for the proposed scheme where the principal offence (the subject of the inchoate charge) is to be committed by D herself.

***Why should we consider mens rea as to ulterior mens rea separately from mens rea as to other principal offence elements?***

Although the proposed ulterior mens rea element provides a mechanism for separating ulterior mens rea from other offences elements, it is important to establish why such separation is desirable for the mens rea of inchoate liability. The most obvious answer to this is that it is desirable because ulterior mens rea is conceptually distinct from other elements. However, although this justifies separation within a conceptual model of analysis, it does little to satisfy the normative challenge: just because we *can* separate the elements of a

principal offence, this does not necessitate that we *should* distinguish them in relation to the mens rea required of D. Therefore, although the conceptual differences within ulterior mens rea highlight the potential for bespoke treatment within the mens rea of inchoate liability, the fact of difference should not (it is contended) be viewed as sufficient to establish the need for such treatment. The key to the normative challenge lays in the nature (not the simple fact) of conceptual differences.<sup>65</sup>

It is contended that the separate treatment of ulterior mens rea is indeed desirable in the context of the mens rea of inchoate liability. This is because, unlike other offence elements that focus on current facts and events, ulterior mens rea (by its nature) focuses on the future. As a result, the wrong within D's ulterior mens rea is always at least one step removed from its potential harm. For example, an intention to permanently deprive in theft (ulterior mens rea) involves the *potential* future harm of permanent deprivation, a harm that has not yet befallen V. As a result of this abstraction from harm, it is standard for offences including ulterior mens rea to require a high level of mens rea as to this element for liability to be found: since D has not completed the relevant harm, the criminal law should only take interest where D's commitment to bring it about was particularly strong. As Ashworth has neatly expressed:

... as the form of criminal liability moves further away from the infliction of harm, so the grounds of liability should become more narrow.<sup>66</sup>

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<sup>65</sup> This conclusion challenges the current laws approach to attempt and assisting an encouraging, both of which vary the mens rea required for the different elements of the principal offence. This challenge is examined in Child and Hunt, n64. However, it need not be explored further in this paper.

<sup>66</sup> Ashworth, *Principles of Criminal Law* (5<sup>th</sup> ed, 2006) 423; endorsed by the Law Commission in Consultation No.183 [1.6-1.7] and Law Com No.300 [5.86].

When designing the mens rea for general inchoate liability, there is therefore reason to require a higher level of mens rea as to the elements of a principal offence than is required for standard principal liability: in the context of an inchoate charge, D's commitment to the principal offence is an example of ulterior mens rea (Element 7). Beyond this, where that principal offence itself includes a requirement of ulterior mens rea (Element P7), there is therefore also reason for requiring a higher level of mens rea as to this element beyond other elements of the principal offence: the mens rea within this element is at least two steps removed from potential harm. However, as the current law (without an ulterior mens rea element) is unable to distinguish this second abstraction within the principal offence, there is potential for over-criminalisation. For example, if (as with assisting and encouraging) we have a policy that only requires recklessness as to the circumstances and results of the principal offence, without separating ulterior mens rea from those circumstances and results, recklessness is all that will be required here as well. The form of criminal liability has moved further from the infliction of harm, but we have no tools to isolate it in order to narrow the grounds of liability.

***Does the current law over-criminalise?***

The potential for over-criminalisation, in the present context, can arise whenever two factors are present. First, there must be an inchoate offence with mens rea requirements of less than intention as to certain elements of a principal offence (currently attempt and assisting and encouraging). Secondly, this inchoate offence must be applied to a principal offence that

itself includes a requirement of ulterior mens rea. Where this is the case, the concern is that despite the ulterior requirement within the principal offence being at least two steps removed from potential harm, without the tools to separate this requirement and increase the level of mens rea specified in relation to it, liability may be left unacceptably broad. It is our view (shared by other commentaries in this area<sup>67</sup>) that D should only be liable in relation to such an abstracted wrong if she *intended* that it should come about.

Although this potential for over-criminalisation may operate for any principal offence that contains an ulterior mens rea requirement, the dangers of over-criminalisation are most clearly evident in the context of infinite inchoate liability. Infinite inchoate liability describes a criminal construction where D's inchoate offence is targeted at a principal offence that is also inchoate in nature, and thus, the ulterior mens rea of the principal offence relates to a further full offence (let us call it the 'future' offence).<sup>68</sup> Although the paradigms of this class of liability involve general inchoate offences, it may include any combination of offences where the ulterior mens rea of the principal offence relates to a full future offence. For example, just as D commits an offence of this kind if she encourages P to conspire with X to commit an offence of criminal damage, so the same pattern will be employed where D encourages P to possess an item with the intention to commit criminal damage. These constructions are important because where the ulterior requirement of a principal offence itself contains a full future offence, D's mens rea as to that ulterior requirement is particularly crucial to defining liability. Where D's offence is encouraging P to conspire with X to commit criminal damage for example, this 'future offence' is the criminal damage. Our

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<sup>67</sup> See n69.

<sup>68</sup> Although we employ the label 'infinite inchoate liability', it is acknowledged that this is not strictly accurate: liability will always require a principal offence at the end of the chain even if there are several inchoate links. Indeed, it has been suggested on blind review that the label 'nested inchoate liability' may be preferable, and I agree. However, for ease of understanding, I continue to employ the label 'infinite' in line with contemporary Law Commission material.

question becomes: what mens rea is required of D in relation to P's mens rea as to X's commission of criminal damage? Must D intend that P will act with the required ulterior mens rea, or is it enough that she should be (for example) reckless?

In line with our preference, it is interesting that commentators have generally assumed that the current law will only allow for infinite inchoate liability where D *intends* that both the principal and future offences will be completed.<sup>69</sup> This view seems principally based on the Serious Crime Act 2007 (assisting and encouraging) where only section 44 (*Intentionally encouraging or assisting an offence*) can apply to other inchoate offences, with the other belief based offences (sections 45 and 46) explicitly excluded.<sup>70</sup> Thus, although D's conduct is at least two steps removed from the criminal harm, liability is justified by her *direct* intention that those steps should be completed.

Unfortunately, despite this assumption that infinite inchoate liability is limited by an intention requirement, this is not borne out within the legislation: there is a wish to maintain such a restriction, but a lack of tools to achieve it. The first problem relates to the method used within the Serious Crime Act 2007 to restrict infinite inchoate liability to the section 44 offence, providing a list of principal offences excluded from sections 45 and 46.<sup>71</sup> The problem here, simply, is that not all offences of the relevant class (requiring mens rea as to a full future offence) are included as listed offences. Such absences include, for example,

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<sup>69</sup> See, Simester et al, n16, 292-293, stating that D must 'intend D2 to assist, encourage, conspire to commit, or attempt the substantive offence'; Ormerod, n16, 472-473, stating that D's liability arises 'only if it was his *direct intention* that P should' commit the principal (inchoate) offence; Ormerod and Fortson, 'Serious Crime Act 2007: the Part 2 offences' (2009) *CrimLR.*, 409-410, stating that D's liability is again contingent on 'his *direct intention*' that P should complete the offence.

<sup>70</sup> Serious Crime Act 2007, s49(4)&(5).

<sup>71</sup> *Ibid.*

burglary,<sup>72</sup> a host of inchoate sexual offences<sup>73</sup> and even double inchoate sexual offences.<sup>74</sup>

Therefore, *even if* infinite inchoate liability can be justified under section 44, the current law is already allowing liability beyond this restriction.

The second (more serious) problem is that, even if liability of this type were limited to the section 44 offence,<sup>75</sup> despite contrary assumptions, this offence does not limit infinite inchoate liability by requiring D to intend the principal and/or future offences. For example, Ormerod and Fortson observe:

‘Under s.44 D can be convicted of an offence if he performs acts capable of assisting or encouraging P to *attempt* to commit an offence. The Commission proposed that D should be liable in such a case but *only if* it was his *direct intention* that P should attempt the offence’<sup>76</sup>

However, despite the appeal of this approach in terms of limiting infinite inchoate liability, it does not represent the approach recommended by the Commission,<sup>77</sup> and it does not represent the current law. In fact, although section 44 is characterised (and distinguished from the other

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<sup>72</sup> Theft Act 1968, s9(1)(a).

<sup>73</sup> For example, Sexual Offences Act 2003, s8 (Causing or inciting a child under 13 to engage in sexual activity); s10 (Causing or inciting a child to engage in sexual activity).

<sup>74</sup> Sexual Offences Act 2003, s14 (Arranging or facilitating commission of a child sex offence). A ‘child sex offence’ here includes inchoate offences under ss8 and 10.

<sup>75</sup> It is possible, of course, to add relevant offences to those already excluded from ss45 and 46. Serious Crime Act 2007, s49(6).

<sup>76</sup> Ormerod and Fortson, n69, 409. Interestingly, outside of the context of infinite inchoate liability, Ormerod and Fortson recognise that intention is not required (406).

<sup>77</sup> Ormerod and Fortson make reference to statements within Law Com No.300 [7.23] that D should ‘only’ be liable if she intends the principal offence (criminal attempt). However, in the following paragraph setting out their recommendations, the Commission clarify this to include ‘intending that P should attempt, *or be encouraged to attempt*, to commit the offence’ (my emphasis). Thus, as is also clear in the Commission’s appended draft Bill, D must intend her conduct to assist or encourage, but she does not have to intend P to complete the principal offence.

Part 2 offences) by requiring intention, it is clear that this requirement does not extend very widely at all. D must intend *her* acts to assist or encourage P to commit a principal offence, but it is debatable whether she must also intend any element of the principal offence to be completed.<sup>78</sup> Certainly, in relation to the circumstance element, result element and mens rea elements of the principal offence, it is clear that D need only foresee a *risk* that each would be completed by P.<sup>79</sup> Therefore, it is also clear that, whether the current law would categorise the ulterior mens rea of the principal offence (the future offence) as a circumstance, result or mens rea element, mere recklessness is required here (in relation to this ulterior mens rea) as well. In the absence of special rules relating to infinite inchoate liability, D's liability is more accurately characterised, not in terms of intending an offence, but rather in terms of intending to create a *risk* of future offending.<sup>80</sup>

The scope of infinite inchoate liability (even limited to the section 44 offence) is therefore considerably wider than the justificatory examples provided by the Commission. Taking one of those examples,

‘D, knowing that P is planning to act as X’s getaway driver in a robbery, lends a car to P so that P can provide assistance to X’<sup>81</sup>

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<sup>78</sup> If such an intention is required, then it is limited to the act element of P’s principal offence alone. However, as the Serious Crime Act is silent on this point, an alternative interpretation is that D need only be reckless as to the act element. See, Child, n18.

<sup>79</sup> Serious Crime Act 2007, s47(5).

<sup>80</sup> See, Child, n18.

<sup>81</sup> Law Com No.300, [7.1].



The Commission make a convincing case that this example of infinite inchoate liability (assisting P to assist X) should be a criminal offence.<sup>82</sup> We agree. However, let us consider some variations of this example in light of our discussion of section 44 above. D must *intend* to assist P to commit the act element of the principal offence: intend to assist P to drive. Beyond this, however, no more than recklessness is required. Thus, D may be reckless as to whether P will try to assist X; D may believe that, even if P did try to assist X that X would not commit the future offence; indeed D may even be merely reckless as to whether P thinks there is any chance that X might commit the robbery. If the paradigm of the criminal law is punishment for harms caused, here we have extended liability beyond D intending to cause harm or even intending to risk harm. Rather, D is liable for intending to create a risk that P will create a risk that X might cause harm. The potential breadth of these offences, well beyond the Commission's justificatory examples, becomes worryingly clear.<sup>83</sup>

### ***How can we prevent this form of over-criminalisation?***

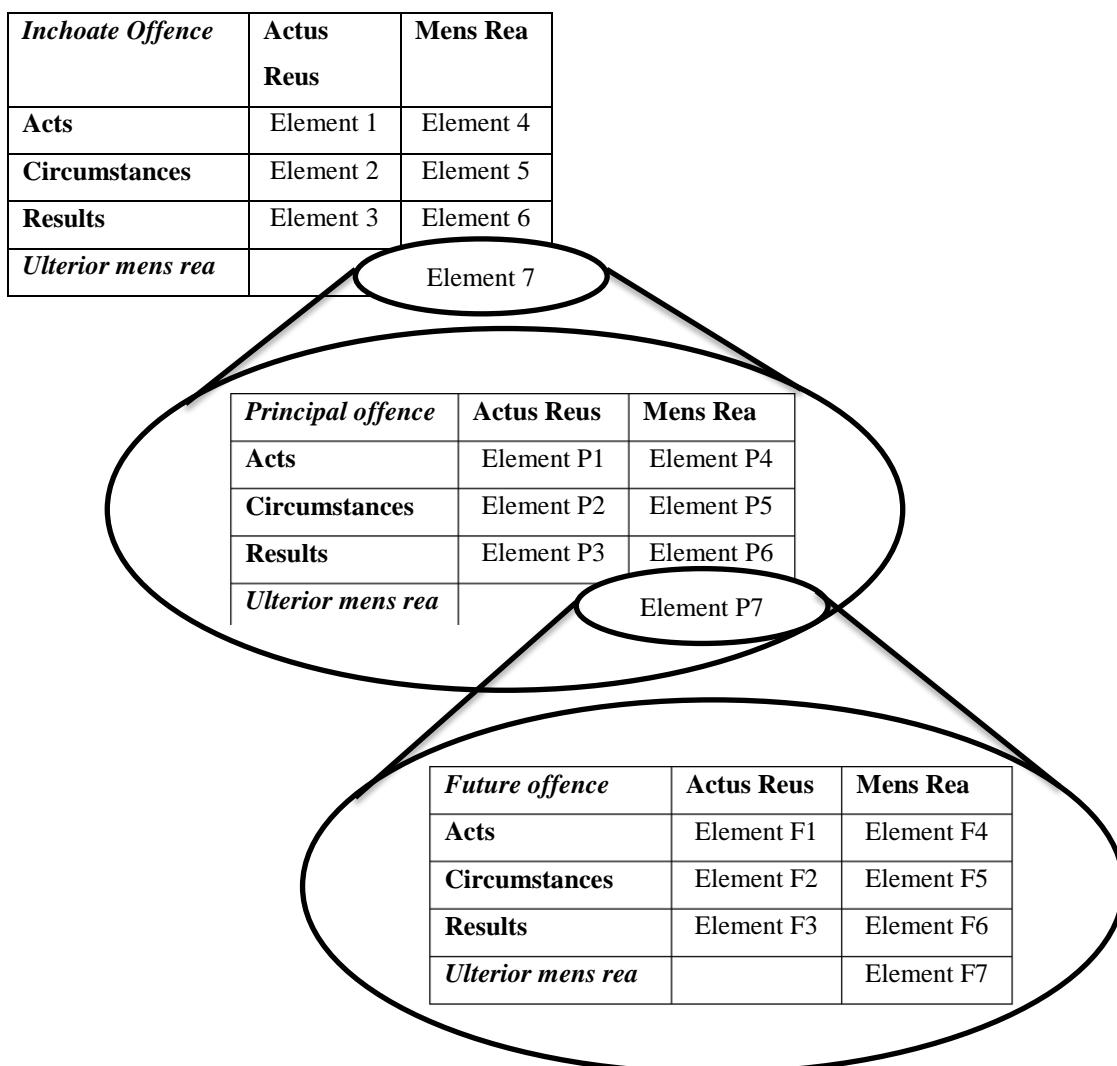
Having exposed the potential for liability far beyond that advocated and justified by the Commission and other commentators, our discussion now turns to how we might provide some more acceptable limits (limits that have been assumed, but are not present within the current law).

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<sup>82</sup> *Ibid.* Part 7.

<sup>83</sup> D's act of assistance or encouragement does not have to be as substantial as the lending of a car. The same mens rea requirements will apply when D performs any act that is *capable* of providing assistance or encouragement.

It is our belief that such limits are best achieved through the offence model (including the new ulterior mens rea element) advocated in this paper. This is because, just as inchoate offences (such as the new assisting and encouraging offences) can specify a certain mens rea requirement in relation to the other elements of the principal offence (Elements P1-6), so a specific mens rea requirement could be set in relation to P's ulterior mens rea element (Element P7). To provide the necessary restriction to liability, particularly in the context of infinite inchoate liability, it is contended that D should always be required to *intend* this element. Where the ulterior mens rea within the principal offence relates to a full future offence, element P7 can be analysed in a similar way to element 7, accommodating each element of that future offence. This can be illustrated in the following form:



In this case, as the ulterior element of the principal offence amounts to a full future offence, D must *intend* that (if the principal offence is completed) that the requirement of ulterior mens rea is also present (Element P7). Thus, to be liable for assisting P to assist X to commit robbery for example, D's mens rea in relation to P's acts, circumstances and results remain as stated within the current law. However, in relation to P's ulterior mens rea (Element P7), D must at least *intend* that P will have the requisite mens rea as to X committing robbery. Such a restriction has the potential to apply consistently as between different inchoate offences; it does not rely on a statutory listing exercise of inchoate offences; and it also isolates for special treatment only that element of the principal offence which looks forward to the second inchoate link.<sup>84</sup>

### ***A problem case: Criminal Attempts***

In the cases discussed above, chiefly relating to assisting and encouraging, D foresees that the principal offence will be committed by another party. However, a further complexity (often overlooked within the current literature) arises in cases where the principal offence is to be committed by D herself. This will arise in the context of attempts, and most bespoke inchoate offences, as well as certain conspiracies. It is a problem that is apparent within the current law, but also within our preferred approach.

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<sup>84</sup> The separation of the principal offence into elements is essential in order to identify the mens rea required of D that may vary between each. In a similar manner, rather than simply requiring intention as to element P7 of the principal offence, we could use the separation of the elements of the future offence (within element P7) to provide a similarly varied approach. However, the complexity involved does not appear to be balanced with any obvious advantages. Therefore, our policy is simply to require D to intend element P7 (and thus to intend every element of the future offence within element P7).

The problem with attempts (and other inchoate offences where D is to commit the principal offence), is that it becomes necessary for D to have certain mens rea in relation to *her own* mens rea for the ulterior element of the principal offence (Element P7). Where the principal offence is not to be committed by D this problem does not arise. For example, if D assists P to commit arson reckless as to the endangerment of life, it is perfectly logical to require D to (as preferred above) intend that P should be at least reckless.<sup>85</sup> However, where D has attempted (for example) to commit arson reckless as to the endangerment of life, it is now required that D should intend that she herself will be reckless. Unlike the two party cases, it is not immediately obvious how the law should make sense of such a requirement. Indeed, the court of first instance leading to *AG Ref (No.3 of 1992)* concluded that it would be 'impossible'.<sup>86</sup>

Before we consider how this problem might be resolved, it is important to acknowledge its limited scope. First, the problem does *not* extend to other mens rea elements within the principal offence (Elements P4-6). This is because, where D attempts (for example) to commit an offence under the current law, she must have certain mens rea in relation each actus reus element of the principal offence (Elements P1-3), a mens rea that is usually intention and never less than the mens rea required for principal liability. Thus, as D must satisfy this higher mens rea in relation to the actus reus elements of the principal offence, it is never necessary to consider her mens rea separately in relation to the mens rea elements: these are implicitly satisfied through her intention to bring about the actus reus. The problem with the ulterior mens rea element (as opposed to the other mens rea elements) is that because it does not correspond with an actus reus element that must be intended, we are forced to

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<sup>85</sup> D's intention need not be an intention to *cause* P's state of mind. Rather, D's intention need only demonstrate a desire or virtually certain belief that P will act with such mens rea.

<sup>86</sup> *AG Ref (No.3 of 1992)* at 415[B].

consider D's mens rea in relation to it directly. Secondly, the scope of the problem is also limited by the mens rea often required in relation to ulterior mens rea. Although we have criticised the use of the label '*ulterior intention*', it is nevertheless true that most ulterior mens rea requirements are based on intention. Where this is the case, and we have an inchoate offence relating to it, it is relatively easy to interpret an intention for oneself to intend as a requirement that D must (simply) intend the ulterior element. Thus, although troublesome, the problem will only arise for inchoate offences directed at principal offences that contain an ulterior mens rea requirement of less than intention. This is a very limited class, but one that remains important.

The question then, for this limited class, is how we make sense of a requirement that D should intend to be reckless as to an ulterior element of a principal offence. Perhaps the most obvious answer, and the one employed by the court of first instance leading to *AG Ref (No.3 of 1992)*,<sup>87</sup> is that intention should be required. Thus, where D must intend that she will be reckless within an ulterior element, this will translate into D having to intend the ulterior element. The advantage of this approach is that, through a requirement of intention, we can restrict infinite inchoate liability. Particularly in relation to offences like attempted assisting and encouraging for example, a requirement that D must intend that the elements of the future offence (the offence assisted or encouraged) should come about is considerably more restrictive than the alternative of recklessness. Thus, it would overturn the decision in *AG Ref (No.3 of 1992)*; D would avoid liability because he did not intend the endangerment of life.

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<sup>87</sup> *AG Ref (No.3 of 1992)* at 411 (quoting Judge Norrie).

However, we do not believe that this interpretation is correct. In fact, in the majority of cases,<sup>88</sup> it is contended that an intention to *personally* possess a certain mens rea (recklessness for example) should translate simply as a requirement to have that mens rea. This is because, although it is difficult to make sense of someone intending themselves to be reckless in terms of a *desire* to be reckless, it is plausible when we think of an expanded notion of intention based on knowledge and foresight of a virtual certainty.<sup>89</sup> Thus, if D attempts to commit aggravated arson for example, and D is reckless as to the endangerment of life, it is possible to say that she was intending to be reckless because she *knew* she was reckless at the point of attempt. Even in the case of *incomplete* attempts or conspiracy, it will almost always be the case that D's current recklessness as to an ulterior mens rea element can be translated into knowledge that she will also be at least reckless at the foreseen point of the principal offence.<sup>90</sup>

This interpretation, though perhaps controversial, would not create an over-criminalising exception to the multi-party cases discussed above. This is because, although in both cases recklessness is all that is required for the ulterior element of the principal offence, the multi-party case includes the added risk (mitigated, but not avoided by a requirement of intention from D) that the principal offender (P) may not in fact be reckless. By contrast, where D is intending herself to be reckless, her knowledge of her own recklessness does not include such an additional risk. Therefore, even when standing back from this rather formulaic analysis, it

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<sup>88</sup> See n90 below.

<sup>89</sup> *Woollin* [1999] AC 82.

<sup>90</sup> There will be limited circumstances where this may not be the case. For example, if D makes a plan to let off a bomb in a day's time she may be genuinely unsure (at the time of the conspiracy) if there will be an endangerment of life, but know that she will be aware one way or another when completing the principal offence. This, it is submitted, would be a case where D is reckless as to her future recklessness, and not intending or knowing it. This will fall short of liability.

is clear that our conclusion is also consistent in more general terms with the normative position advanced in this part of the paper.

If this approach were accepted, it is interesting to note that the decisions in *AG Ref (No.3 of 1992)* (allowing recklessness as to ulterior mens rea in attempt) and *Mir*<sup>91</sup> (requiring knowledge of another's recklessness for conspiracy) would *both* be correct. Both cases can rightly be criticised for the methods employed to reach those decisions, particularly through their identification of ulterior mens rea as either a circumstance or result element.<sup>92</sup> However, they should not be criticised, as they have been in *Archbold News* for example,<sup>93</sup> for being inconsistent. Although the mens rea requirements are different in each case, it is contended that this can be readily explained as a reflection of the structural differences currently under discussion. In both, we may say that intention is required from D as to the ulterior element of reckless endangerment within the principal offence (Element P7). However, whereas this translates into an intention that another party be reckless in multi-party cases like *Mir*, in single party cases like *AG Ref (No.3 of 1992)* this (intending oneself to be reckless) is best interpreted as a simple requirement of recklessness as to the ulterior element.

## Conclusion

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<sup>91</sup> *Mir* (Unreported, 1994) (CA). See, Case Comment, 'Conspiracy to commit aggravated criminal damage' (1994) *Arch.N.* 4; Law Com Consultation No.183, [A.1-3].

<sup>92</sup> See, for example, Consultation No.183, [A.1-3].

<sup>93</sup> Case Comment, n91.

Ulterior mens rea has been presented elsewhere as a ‘missing piece in a jigsaw puzzle’, lacking a clear definition and absent from codification.<sup>94</sup> In this paper, not only have we attempted to construct this missing piece (through recognition of a new ulterior mens rea element), but we have also sought to demonstrate the importance of its role within the law, both conceptually and substantively. Although our focus within the paper shifts rapidly to substantive concerns in relation to inchoate liability, the prospect of conceptual coherence within the analysis of *all* offences including ulterior mens rea should not be overlooked. Located as they are at the very edges of the criminal net, it is contended that consistent and coherent models for analysis are more important here than in almost any other area. This is made possible through the new ulterior mens rea element.

With regard to our substantive concerns, these relate to inchoate offences (that vary mens rea between principal offence elements) as they apply to principal offences containing requirements of ulterior mens rea. They are concerns exemplified within the confusion of *AG Ref (No.3 of 1992)*, and made more compelling by their potential application within infinite inchoate liability. Of course, it is important to remember that the factors that have created these concerns are still relatively new to the law, and it is possible to console oneself with the scarcity of cases like *AG Ref (No.3 of 1992)* that combine them. However, with each of these factors expanding rapidly, it is contended that without specific attention, such concerns will only increase. This expansion applies to inchoate (and other) offences that vary mens rea between the elements of a principal offence;<sup>95</sup> principal offences of all types that include ulterior mens rea requirements;<sup>96</sup> and even the possibility of infinite inchoate liability.<sup>97</sup> As

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<sup>94</sup> Leader-Elliott, n4, 430.

<sup>95</sup> See, for example, Law Commission recommendations on conspiracy (Law Com No.318); complicity (Law Com No.305) and even the rules on intoxication (Law Com No.314).

<sup>96</sup> See n4.



discussed in Parts 2 and 3, the restriction of such liability to acceptable (and often assumed) limits is crucial if we are to accept this form of liability at all. Again, this is made possible through the new ulterior mens rea element.

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<sup>97</sup> Most significantly, the Serious Crime Act 2007, s49 has expanded the combinations of infinite inchoate liability permitted within the old law (including attempt, conspiracy and incitement to incite and conspiracy and incitement to attempt) to include assisting, encouraging, conspiring and attempting to assist, assisting to encourage, assisting to attempt, and assisting or encouraging to conspire. The Commission also makes clear that they expect a greater use of infinite inchoate liability within the policing of serious crime (Law Com No.318, [3.9-3.10]); highlighting supportive research, Gallagher, Fraser, Christmann, Hodgson, *International and internet child sexual abuse and exploitation: Research report* (2006), [http://webserver.hud.ac.uk/schools/hhs/research/acs/staff/Inter\\_net\\_CSA.pdf](http://webserver.hud.ac.uk/schools/hhs/research/acs/staff/Inter_net_CSA.pdf).