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Editorial

Counselling Murder and the Problems Presented by Hamilton

The recent conviction and seven-year sentence of Abu Hamza al-Masri, a former preacher at London’s Finsbury Park Mosque, for soliciting murder, as well as pending soliciting murder charges against some who protested against the Danish cartoons, raises the question of how Canada would and should respond to extreme speech that calls on people to kill political or religious figures. The prosecution of such speech raises important questions about the limits of both freedom of expression and the criminal law.

In Canada, charges of soliciting murder would fall under s. 464(a) of the Criminal Code, which provides a general offence of counselling the commission of an indictable offence that is not committed.

The actus reus of counselling should be restricted to active persuasion and inducement of a crime. Counselling is defined in s. 22(3) of the Criminal Code to include procuring, soliciting or incitement of a crime. What all of these terms have in common is active persuasion of a person to commit a crime. Section 22(3) does not contain the broader concept of advocacy.

Counselling should not be equated with advocacy of an unlawful course of conduct. In R. v. Hamilton, [2005] 2 S.C.R. 432, the court referred to R. v. Sharpe, [2001] 1 S.C.R. 45 at para 56, but this latter case dealt with the separate offence under s. 163.1(1)(b) of the Code, which applies to written material that either advocates or counsels sexual offences against those under 18 years of age. The plain words of ss. 464(a) and 22(3) suggest that the act of counselling requires more than advocacy.

The mens rea of counselling should be limited to those who intentionally and actively attempt to induce or persuade a person to commit a crime with the additional intent that the crime be committed. The intent that the completed crime be committed, as with attempted crimes under R. v. Ancio, [1984] 1 S.C.R. 225, is a crucial feature of inchoate offences that by definition focus on the accused’s intent because the intended harm has not occurred.

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Unfortunately, the high double intent mens rea requirement of counselling has been thrown into doubt by the Supreme Court’s recent 6:3 decision in R. v. Hamilton. Justice Fish for the majority diluted the mens rea requirement by describing it as “advertent conduct with a ‘conscious disregard of unjustified (and substantial) risk’ that it entails” (ibid., at para 27). Conscious disregard of an unjustified risk is a standard of recklessness, not intent: ibid., at para 28.

Justice Fish elaborated, however, that “it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused’s conduct” (ibid., at para 29). These references to knowledge of the likelihood of the counselled offence being committed may raise the mens rea from recklessness, in the sense of advertence to a possibility, to knowledge, in the sense of knowledge of a likelihood. Nevertheless, Justice Fish’s prior references to conscious disregard of an unjustified risk support recklessness.

Regardless of how the confusion in the majority’s judgment between knowledge and recklessness is resolved, the preferable approach was clearly articulated by Justice Charron in her dissent. Justice Charron clearly stated that in order to make adequate allowance for freedom of expression, recklessness about whether the person counselled will commit the crime is insufficient (ibid., at paras 76 and 79). Following the Ontario Court of Appeal’s helpful analysis in R. v. Janeteas (2003), 172 C.C.C. (3d) 97, Justice Charron also concluded that that the Crown must prove both that the accused intends to persuade the person counselled to commit the crime and that the accused intends the commission of the crime.

Lowering the mens rea of counselling a crime that is not committed to recklessness about whether the crime counselled will be committed raises some serious Charter concerns. Justice Charron is concerned that speech such as the famous statement in Henry VI, “let’s kill all the lawyers”, not be caught by expanded understandings of the actus reus or the mens rea of counselling. She also argued that a high intent requirement, as in R. v. Keegstra, [1990] 3 S.C.R. 697, should help to ensure that the limit on freedom of expression is proportionate and justified.

In addition, a recklessness mens rea could also violate s. 7 of the Charter. One broad argument would be that in order to maintain constitutional principles of proportionality, inchoate offences should generally be based on an intent to commit the completed crime. It is important to remember that s. 464 is a form of inchoate liability because the crime counselled has not been committed. Different considerations apply to secondary liability under s. 22, including Parliament’s explicit departure from subjective fault principles in that separate section.

A narrower s. 7 argument revolves around a soliciting murder charge. If a person was charged with counselling murder, there is a good argument