Joint enterprise in England and Wales: Why problems persist despite legal change

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Acknowledgements

Thank you to Professor Felicity Gerry KC, Professor Findlay Stark and Professor Nicola Padfield for their comments on earlier versions of this paper. Thank you also to the anonymous reviews for their constructive feedback. Thank you to Gary Pritchard for his research assistance.

Funding

The authors disclosed receipt of the following financial support for the research, authorship and publication of this article: *The work was supported by the Economic and Social Research Council [grant number ES/P001378/1] and the Isaac Newton Trust.*

Abstract

The law in England and Wales (as in Australia and other jurisdictions) enables a person to be convicted of an offence committed by another using complicity liability, sometimes termed 'joint enterprise'. In England and Wales, joint enterprise has been widely criticised for: failing to distinguish between the moral and legal culpability of the person who commits the substantive offence and those on the periphery of it; being used disproportionality in cases involving young men from black and mixed ethnic backgrounds; and for lacking legal legitimacy. Thus, it was hoped that the abolition of the extended form of complicity liability in England and Wales – known as Parasitic Accessorial Liability (PAL) – by the Supreme Court in 2016, would rectify these issues. Reporting on interviews with police detectives, and prosecution and defence lawyers in England involved in cases of serious youth violence, this paper argues that the problems associated with 'joint enterprise' in England and Wales remain, despite the change in the law. This is due to the only 'subtle shift' in practice and a continued reliance on racialised inferences about young men from black and mixed ethnic backgrounds. We suggest changes in practice are required, alongside meaningful law reform.

Key words: extended joint criminal enterprise, joint enterprise, law reform, secondary liability, complicity liability

Introduction

The law in England and Wales, as in Australia, Hong Kong and other jurisdictions (van Sliedregt 2019), enables the responsibility for a criminal offence to fall 'beyond the person who commits the

crime itself', to others who are implicated in it (Weinberg 2019: 209). In England and Wales, the complex set of legal principles that cover such complicity, or secondary, liability has become known as 'joint enterprise', while in Australia, the term 'joint criminal enterprise' has been used (Weinberg 2019: 212; Stark 2016). In both jurisdictions an *extended* form of this liability has existed for many years, called Parasitic Accessorial Liability (PAL) in England and Wales and Extended Joint Criminal Enterprise (EJCE) in Australia (Smartt 2018). PAL allowed, and EJCE allows, a person who embarked on the commission of one crime (crime A) with another person to be convicted of a second crime (crime B) that the other person committed, if the second crime was considered to be part of the joint criminal enterprise.

In England and Wales there has been no consistent, official monitoring of the use of joint enterprise in practice (in its standard or extended form), over time. Analysis of longitudinal data on the prosecution and conviction of multiple defendants in homicide cases has offered a best estimate of its use and has indicated that joint enterprise has been used to charge up to 7,649 people and convict up to 5,783 people with homicide in England and Wales, over a period of 15 years (2005-2020) (Mills, Ford and Grimshaw 2022). In a recent pilot, monitoring the use of joint enterprise in homicide and attempted homicide cases in six geographical areas in England and Wales, the Crown Prosecution Service (2023) reported that it had been used in 190 cases, involving 680 defendants over an eight-month period (February-September 2023), although around two thirds of cases had not been finalised at the time of reporting. Research has also shown that joint enterprise has also been used to prosecute multiple individuals for violent offences other than homicide, such as robbery and assault (Kirby, Jacobson, and Gillian 2016) and that it is often used in cases of group violence involving young men (Green and McGourlay 2015, Williams and Clarke 2016). The recent Crown Prosecution Service (2023) data showed that 93% of the defendants in the homicide cases recorded as part of the pilot were male and 53.5% were aged 14-24 years old (compared to 29% of people aged under 25 years old in the general population of England and Wales (National Statistics 2023)). Green and McGourlay (2015: 282) argue that the use of joint enterprise in cases involving young men in England and Wales has been driven by policy designed to respond to 'a perceived serious problem of group or gang violence'.

In this context, critics have raised significant concerns about joint enterprise, and PAL in particular; specifically that it fails to distinguish between the moral and legal culpability of the principal and secondary parties, that it is used disproportionately in cases involving defendants from black and mixed ethnic backgrounds, and that it lacks legal legitimacy (see, for example, Hulley, Crewe and Wright 2019, Williams and Clarke 2016, Young, Hulley and Pritchard 2020). Therefore, critics were hopeful that the abolition of PAL, by the Supreme Court in England and Wales in 2016, would resolve these issues. However, although the lack of official monitoring of cases in which joint enterprise was used has prevented a systematic impact evaluation of the abolition of PAL in practice, a recent analysis of homicide convictions over time concluded that the change in the law had 'no discernible impact' on the use of joint enterprise in practice in England and Wales, noting that issues of disproportionality continue (Mills, Ford and Grimshaw. 2022: 5). Yet, little is known about why this may be the case and, specifically, how joint enterprise has been applied in practice either prior to, or since the change in the law, to help make sense of these findings.

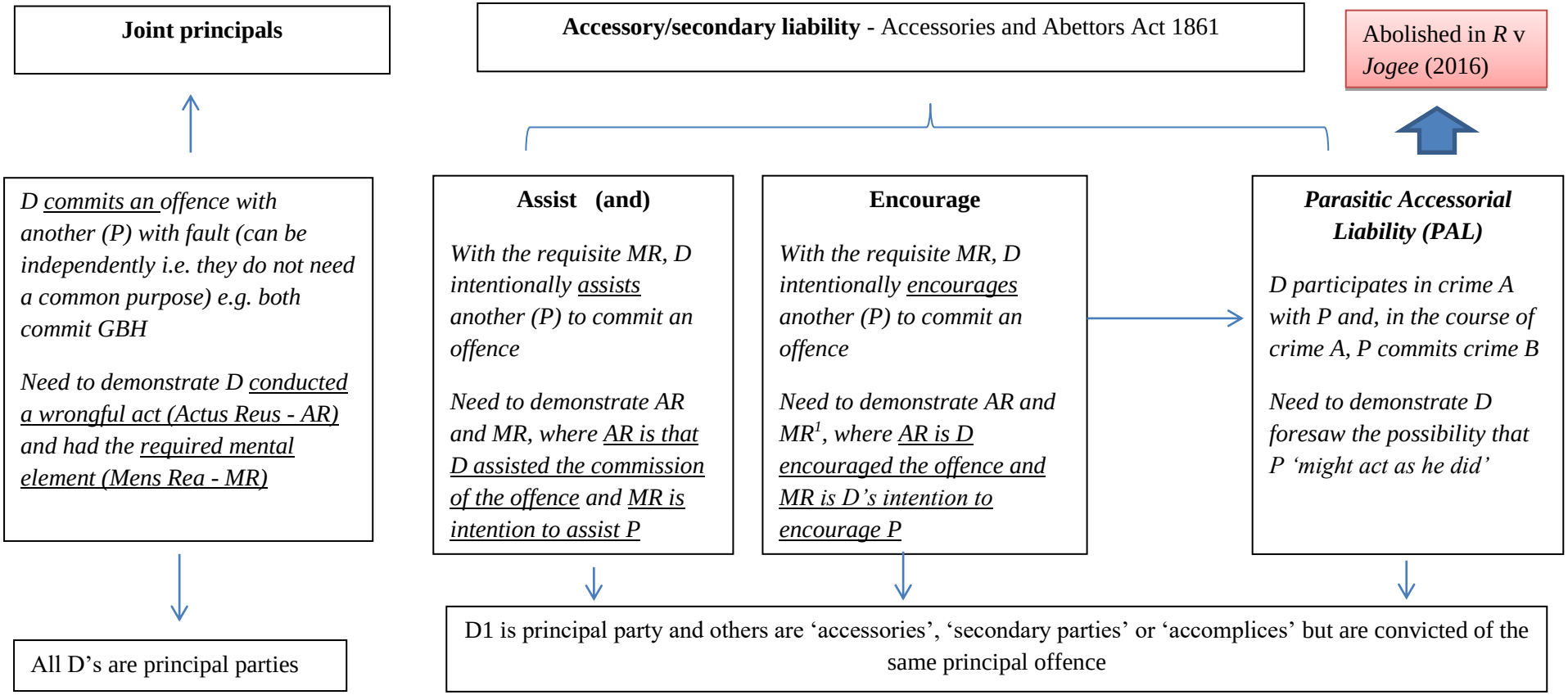
Drawing on interviews with legal practitioners involved in applying joint enterprise in cases involving serious youth violence, this paper demonstrates that the change in the law resulted in only a 'subtle shift' in their practice. Although practitioners were cognisant of the abolition of PAL, in their day-to-

day practice they continued to rely on the same assumptions and inferences about young men implicated in group violence, particularly young men from black and mixed ethnic backgrounds. This enabled them to narrate young men's involvement in violence in much the same way as they had prior to the change in the law, supporting prosecution lawyers' charging decisions. The paper argues that further changes are needed in England and Wales, to the way joint enterprise is applied in police and legal practice, but also to the drafting of the law, to resolve the significant and ongoing problems associated with joint enterprise.

The law in England and Wales - joint enterprise and the abolition of PAL

In England and Wales, 'joint enterprise' has been used as an informal term to describe a complex area of law. Until the change in the law in 2016, it was used as a term to describe three scenarios in which individuals could be convicted of an offence committed by another (Hulley, Crewe and Wright 2019), These are outlined in Figure 1.

Figure 1: Four[1] circumstances in which individuals may be jointly liable for a single criminal offence[2]



[1] 'Assisting and encouraging often described as one, elsewhere they are distinguished as two types.

[2] Procuring also makes D an accessory. This is included in the four types in the Crown Court Compendium where D *ordered or suggested an offence committed by another (P) and P committed with necessary fault*

In the first scenario, two (or more) people take part in a criminal act, for which they both possess the mental element and are therefore considered 'joint principals' (Maddison et al 2016). In the context of murder, this would involve for example, two people stabbing the victim (who dies), with the intention to kill. In the second scenario, a principal party commits an offence, which others (the 'secondary parties') intend to 'assist or encourage'. For example, this might involve four people chasing a victim, one of whom stabs them with the intention to kill, while the others hold the victim down shouting encouragement, which they intend to encourage the principal party who is stabbing the victim. In the third scenario, an individual (secondary party) is liable for the substantive offence committed by the principal party, if it was considered they could have foreseen the possibility that the crime would be committed by one of their co-venturers during the joint criminal enterprise. This is known as 'Parasitic Accessorial Liability' (PAL) and is exemplified in a scenario in which two people carrying weapons that they both know about, burgle a house and one stabs the homeowner who has confronted them. If it is established that the secondary party could have foreseen that the homeowner would have been killed by their co-offender, who intended to kill the homeowner, they too are guilty of murder. Although PAL has existed since the 16th century in England and Wales (Stark 2016, cf. Dyson 2018), it was confirmed by the Privy Council in *Chan Wing-Siu v R* in 1984 (Stark 2016) and has been systematically developed since to respond directly to concerns regarding the growing threat of dangerous, violent 'gangs' of young men involved in serious violence (Green and McGourlay 2015, Krebs 2018, Kirby, Jacobson and Gillian 2016).[3] It was considered particularly valuable in such cases, as it allowed multiple individuals to be convicted in circumstances where it could not be proven who committed the substantive offence (Krebs 2018).

The case that led to the abolition of PAL, *R v Jogee and Ruddock (2016)*, offers a notable example of its use in the context of serious violence involving young men. In this case, Ameen Jogee and his co-defendant Mohammed Hirshi travelled to the victim's home and became involved in an altercation with the victim. Inside the home, Hirshi stabbed the victim, while Jogee stood outside, although he had been heard shouting aggressively at the victim. In the original trial, the judge's direction to the jury explained that Jogee was guilty of murder if they considered that he participated in the attack on the victim and foresaw the possibility that Hirshi might use the knife with the intention to cause serious harm (van Sliedregt 2019). However, on appeal, the Supreme Court ruled that to convict Jogee of murder it was necessary to prove that Jogee intended to encourage and assist Hirshi to commit murder, in line with the non-extended form of secondary liability (the second scenario in Figure 1). Thus, the Supreme Court abolished PAL resulting in foresight no longer being sufficient to convict the secondary party of the substantive offence. It is notable that the Supreme Court ruled that foresight could still be used as evidence of intention, including circumstances in which the secondary party's intention was conditional, e.g., in cases where the secondary party intended to commit crime A and shared the common intention to commit crime B 'if things came to it' (Crown Prosecution Service 2019).

Although the non-extended version of joint enterprise remained (termed 'secondary liability') (Crown Prosecution Service 2019), the change to the law brought about by *Jogee* was welcomed by critics of PAL in England and Wales, who were hopeful that it would resolve a number of problems associated with joint enterprise.

[3] Although it has been used in other types of cases, including to convict women of fatal violence committed by their male partners (see Hulley 2021, Clarke and Chadwick 2023), it is most associated with cases involving young men involved group violence.

Criticisms of joint enterprise

The criticisms of joint enterprise have coalesced around three key issues: the lack of distinction that this form of liability makes between the moral and legal culpability of the principal and secondary parties; the disproportionate use of joint enterprise to convict men from black and mixed ethnic backgrounds of serious violent offences; and the lack of legal legitimacy associated with joint enterprise. It is to these criticisms that the paper now turns.

Distinction between moral and legal culpability

Joint enterprise, and its international equivalents, holds all parties equally legally culpable for an offence committed by an individual and, in doing so, fails to differentiate between the moral position of the secondary party, who foresaw that a serious offence may occur, and the principal party *who intended* the offence (van Sliedregt 2019). Weinberg (2019: 222) asserted, in the Australian context, that extended forms of complicity liability allow a passive participant to be liable for an offence 'which they may have strongly disapproved, and which they did not carry out, agree to, authorise, intend, assist, encourage or even acknowledge was likely to transpire.'. The seriousness of this is most striking in England and Wales in murder cases, which attract a mandatory life sentence (van Sliedregt 2019).

Yet, this criticism is rebutted by supporters of extended forms of secondary liability, who argue that a joint criminal venture is a moral commitment shared by those involved in the collective action (Armatrudo 2016). Simester (2006) explains that once a secondary party has engaged in one crime, they have changed their 'normative position' towards immoral action. Therefore, they should be held morally and legally responsible for any further offences that occur which they foresaw. However, this approach ignores that possibility that some individuals may feel unable to 'extricate themselves from a group as violence gets out of hand', including 'potentially weak and vulnerable secondary offenders' who were 'in the wrong place at the wrong time' (Justice Gageler, cited in Weinberg 2019). For example, commentators have noted the problematic use of joint enterprise in practice to convict young people with Autism Spectrum Disorders (ASD) – defined as 'neurodevelopmental disorders characterised by reciprocal social interaction and communication impairments and restricted repetitive behaviours' (Gerry, Allely and Rowland 2021) – and research in England has documented the ways in which women's experiences of domestic violence and coercive control have contributed to them being convicted of serious violence as secondary parties, by being implicated in serious violence perpetrated by their partners and ex-partners (Hulley 2021).

Critics of PAL in the England and Wales were, therefore, hopeful that the abolition of PAL would rectify the peculiar (and, some argued, particularly unjust) anomaly that allowed a secondary party to be convicted of murder based on a 'lower mental threshold' for guilt than the principal offender, who had to intend to cause grievous bodily harm or kill (van Sliedregt 2019: 208). Following the change in the law, only those who *intended* to assist and encourage a principal offender were expected to be considered blameworthy of killing and convicted of murder. In this way, it was also anticipated that the change could reduce problems of ethnic disproportionality associated with joint enterprise.

Ethnic Disproportionality

In England and Wales studies have repeatedly exposed ethnic disproportionality in samples of prisoners convicted using joint enterprise (Williams and Clarke 2016, Hulley, Crewe and Wright 2019, Mills, Ford and Grimshaw 2022). Similarly, the recent Crown Prosecution Service (2023) pilot data found that 30.2% of defendants in the joint enterprise cases they recorded were from black ethnic

backgrounds and 8.4% were from mixed ethnic backgrounds. This was over seven times higher than the proportion of people from a black ethnic background in the population (4.0%), and almost three times higher than the proportion of people from mixed ethnic backgrounds in England and Wales (2.8%). In their study of young men and women serving long life sentences from a young age, Hulley, Crewe and Wright (2019) found that there were 11 times as many men from black ethnic backgrounds convicted of murder using joint enterprise as there were men from black ethnic backgrounds in the community.

Research has shown the role that racialised tropes related to 'gang signifiers', such as tattoos, specific colours, music videos and lyrics, have played in convicting men from black and mixed ethnic backgrounds on the periphery of violence, due to the low evidential threshold for guilt required by joint enterprise and PAL in particular (foresight of the possibility that the second crime would occur) (Williams and Clarke 2016; Young, Hulley and Pritchard 2020; Owusu-Bempah 2022; Young and Hulley, under review). For example, Young, Hulley and Pritchard (2020) found that police officers inferred that young men from black ethnic background were involved in 'gangs' due to young black male gang 'culture' which perpetuated violent criminality. Williams and Clarke's (2016) research with men convicted of serious violence using joint enterprise revealed that 69% of BAME participants reported that the gang discourse was used at their trial, compared to 30% of white British participants, and that friendships between BAME men were imbued with inferences about shared criminal attitudes in a way that young white men's friendships were not. The deeply embedded racialized 'gang narrative' in England and Wales helps to create a 'plausible' story at trial that ties the violence being judged to the multiple defendants presented in court, based on jury understandings of what 'typically happens in the world' (Kern Griffin 2013: 294).

It was hoped that the abolition of PAL in England and Wales would reduce the disproportionate criminalisation of minority ethnic men implicated in multi-handed trials, as courts were required to present more compelling evidence of secondary parties *intention to encourage or assist* rather than being able to use inferences to suggest that secondary parties foresaw the possibility of the substantive offence occurring. In this way, raising the threshold of culpability was also expected to improve the perceived legitimacy of the law.

Legal (il)legitimacy

Murphy, Tyler and Curtis (2009: 3) have described legal legitimacy as: 'an authority itself may be seen to have legitimate authority, but the rules and laws it tries to enforce may be seen to be illegitimate.' Hulley, Crewe and Wright's (2019) research in England has shown that men and women convicted of murder as secondary parties when they were young perceived joint enterprise to be unfair, in terms of both the *conviction* it resulted in *and* the *punishment* they received.

Fair labelling is one of the 'normative principles governing criminal liability' (Chalmers and Leverick 2008: 219) based on the need: to support the communicative function of the law in maintaining and emphasising 'social standards' by delivering a proportionate response to wrongdoing; and to reflect differences in wrongdoing as recognised by society (Ashworth 2006: 88, also see Duff 2011). This is particularly necessary in complex areas of criminal law, such as joint enterprise (Chalmers and Leverick 2008). On an individual level, fair labelling is crucial. Being labelled a 'murderer' for one's actions when they did not involve perpetrating the fatal act itself, and being sentenced to a long indeterminate period of custody (sometimes as long as the principal party's sentence), feels deeply illegitimate and generates strong feelings of anger and frustration (Hulley, Crewe and Wright 2019). Inaccurate labelling of one's actions is also stigmatising and can significantly curtail an individual's

life chance post release (e.g., leading to difficulties in finding employment) (Chalmers and Leverick 2008).

Meanwhile proportionate punishment is a 'requirement of justice', as the *'severity of punishment should be commensurate with the seriousness of the wrong'* (von Hirsch 1976: 609, emphasis in original). An assessment of seriousness should consider the gravity of the offence itself ('cardinal proportionality') and where the offence fits within a framework of overall offence seriousness ('ordinal proportionality') (von Hirsch 1992). This assessment is expected to be conducted both when offences are initially 'graded' for the purpose of legislation and at the point at which an individual is sentenced in court. The constraining of joint enterprise in England and Wales, it was hoped, would speak to the issue of unfair labelling and disproportionate punishment and therefore improve the legitimacy of the law.

Despite the hope that the judgement in *R v Jogee* would resolve the issues set out above, recent research suggests that it has had 'no discernible impact' on the use of joint enterprise in practice with issues of ethnic disproportionality, for example, persisting (Mills, Ford and Grimshaw. 2022: 5). This data shows that, since *R v Jogee*, there has been an increase in both the number of secondary suspects indicted for homicide offences and the number of secondary suspects from black and Asian ethnic groups (compared to a reduction in the number of white secondary suspects) (Mills, Ford and Grimshaw 2022). This paper complements this quantitative analysis of current practice, with qualitative data based on interviews with police detectives and lawyers in England undertaken 18 months after the ruling in *R v Jogee*. It argues that the underwhelming impact of the law change in England and Wales and the increase in disproportionality can be explained by the only 'subtle shift' in how joint enterprise has been applied in practice post *Jogee*. It calls for further changes to both the law and legal practice, to respond to the significant problems of joint enterprise that persist.

Methodology

This article draws on interviews undertaken with criminal justice practitioners in London, England, as part of a broader qualitative study of youth violence, friendship and legal consciousness in the context of joint enterprise in England and Wales.[4] Given that the focus of the study, the content of the interviews attended to the application of joint enterprise in the context of serious youth violence.

Police detectives, working in the Homicide and 'gang-violence' units in the Metropolitan Police Service and prosecution and defence lawyers, were approached to take part in the study. Detectives were accessed through a senior officer in each of the units, who requested volunteers for the study via email. Contact was then undertaken directly by the research team. A purposive sample of lawyers was sought, specifically those with experience of prosecuting or defending cases of serious violence involving multiple young people. Prosecution lawyers at the Crown Prosecution Service (the public agency who prosecutes criminal cases in England and Wales) were contacted through senior staff in the organisation, who identified individuals with relevant experience and prepared a schedule of those who volunteered to participate. Barristers (including those who work as prosecution lawyers) were identified through key contacts, snowballing and internet research focusing on lawyers with experience of prosecuting and defending cases of serious violence involving multiple young people. The Criminal Bar Association also advertised the study on its website and, as a result, a small number of individuals contacted the research team. Each lawyer was contacted either through their chambers

[4] The study was approved by the Institute of Criminology's Research Ethics Committee at the University of Cambridge.

or directly. As part of this snowballing process, one retired judge with experience of multi-handed trials also participated in an interview.

Initially 20 police detectives volunteered to participate in the research, although one officer did not respond to further correspondence, so nineteen officers were interviewed in total. A short survey was also undertaken with each individual to ascertain basic demographic data and work experience. At the time of the interview, all but two of the participants were serving officers (one had retired from duty a week prior to the interviews and the other been retired for three years) and occupied a variety of ranks of seniority (from Detective Constable to Detective Superintendent). Nearly all had served longer than 10 years (17). The two remaining detectives had served between seven and ten years. Twenty-one lawyers (12 barristers and nine solicitors) and one retired judge were interviewed. Eleven lawyers identified themselves as primarily involved in prosecution work, and nine primarily identified themselves as defence lawyers. The majority had over 10 years' experience (85 per cent), two lawyers had between seven and ten years experience (10 per cent) and one lawyer had between four and six years' experience (five per cent). Table 1 shows the demographic details of the interview samples.

Table 1 – demographic details of research participants

Participants	**Source of recruitment**	**No. of participants**	**Age range in years (mean)**	**Gender**	**Ethnicity**
Police officers	Metropolitan Police Service, London (Homicide and Trident 'Gang' command)	19	32 – 58 (43.5)	11% female 89% male	89% White 11% Mixed
Lawyers	Crown Prosecution Service, private chambers (involved in defence and prosecution work)	22	27 – 61 (42.8)	32% female 68% male	60% White 10% Black 23% Asian 5% 'Other'

Interviews lasted between one and three hours, all were audio-recorded. Questions related to participants' professional histories; the process of investigating, prosecuting or defending in cases of serious 'group-related' violence involving young people; understandings and perceptions of the doctrine of joint enterprise and the law related to serious violence; and perceptions of young people and their understandings of the law. The data were analysed on a computer software package (NVivo) using an iterative approach. This is a reflexive process, whereby the data is repeatedly revisited to develop and refine meaning and understanding (Srivastava and Hopwood 2009).

Findings

The findings below outline the practice narratives of police detectives and prosecution and defence lawyers around 18 months after PAL was abolished by the Supreme Court in *R v Jogee*. They show

that all practitioners' recognised the law change. However, while some emphasised that their focus was now on the 'intention' of all parties in their assessment of culpability, rather than relying on the foresight of secondary parties, for most, the change in the law appeared to have only resulted in a 'subtle shift' in practice. This was due to practitioners continued reliance on inferences that they had prior to the law change, regarding what young people 'must have known' or intended, particularly for young men from black and mixed ethnic backgrounds when a 'gang narrative' was invoked as part of the police and prosecution narrative.

Focusing on intention–- bringing together moral and legal culpability

The change in the law on joint enterprise in England and Wales meant that practitioners were expected to focus on the extent to which the secondary party *intended* to encourage and assist the principal party, rather than relying on foresight as a route to conviction, bringing the moral and legal culpability of the secondary party closer together. One police detective, Connor,[5] reflected on the post *Jogee* changes, agreeing that he and his colleagues now looked for *more than* foresight:

> For us, the starting point is what physical action they did. Is it enough that they just shout encouragement? These are very difficult things. Foresight, if you're aware they have the knife, aware that a knife might be used, so that bit of evidence goes before the jury. I think you've got to have more than that – you've got to have actual involvement. Stamping on the head, that sort of real intent. I think it becomes uncomfortable to convict them of the same offence as the main principal if it's just 'go on'. Now what does that mean? That's ambiguous. (Connor, police detective)

While Connor, reflecting on a fatal stabbing, highlights a move away from focusing on knowledge of the weapon as evidence of foresight of the substantive offence, he illustrates the ongoing complexity of applying the law of secondary liability post-*Jogee*, as foresight can still be used as evidence of assisting and encouraging. Although his example of 'stamping on the head' of the victim, arguably meets the definition of intention, as acting 'in order to bring [the consequence, in this case serious harm] about' or making the outcome [serious harm] 'virtually certain' (Krebs 2018:3). In this sense, he recognised that conviction should require *more* than foresight.

Prosecuting lawyers also noted that the boundary between secondary liability and PAL remained blurred, despite the change in the law, making distinctions in practice sometimes difficult to ascertain. One admitted that, post *Jogee*, prosecuting lawyers had 'tended to charge everyone, including 'what historically we called 'tail-end Charlies' (Viv, prosecuting lawyer),[6] indicating that there had continued to be an over-charging of individuals, based on an inappropriately low threshold of contribution.

> Certainly, [at that time], I thought we were prosecuting a few people that we really couldn't prove that participation, and I think we've tightened up on that. It's appropriate for us to tighten up on that. Is that any major change in policy? No. Actually, it's just applying the law as it should have always been applied. […] That we have to show that someone knew what was happening and they participated, that they joined in. We can't prosecute someone who is just part of a group and we don't. (Viv, prosecuting lawyer)

[5] All names used in the findings are pseudonyms, to preserve the anonymity of participants.

[6] 'Tail-end Charlies' was a phrase Viv used to describe the people who were furthest from the incident.

Here Viv highlights the central role of professional practice in affecting existing policy changes (Forde 2021). For example, in the context of youth justice Smith and Gray (2019: 567) have shown the way in which 'practice 'models'' mediate the way policy plays out in the real world: 'After all, practice is only realized on the basis of what practitioners believe to be legitimate, credible, achievable, effective and right in any given context' (Forde 2021: 566). The current study highlights the extent to which changes to outcomes for individuals implicated in multi-handed cases were reliant on practitioners' implementation of the change to the law. The next section reports on the way in which, in this context, there was practice stasis post *Jogee*, as practitioners continued to rely on the same inferences about the actions and intentions of young men (particularly those from black and mixed ethnic backgrounds).

The ongoing place of inference in decision-making and the 'subtle shift' in practice

Despite Viv's reassurances that prosecutors had 'tightened up' their approach, above, the data showed that practitioners' decisions were more subjective and less clear-cut than this, due to the key role that inference continued to play in their assessments of individual participation. Many detectives and prosecution lawyers still drew on notions of 'association' between the principal and secondary parties when applying the law in practice, rather than focusing on an individual's intention. Here, 'the connection was linked to "joining a group" rather than through influencing another's actions.' (du Bois-Pedain 2016: 1062). As Viv explained, when describing their approach to building a case:

> […] we would say, "this was a group of five, all of whom chased this individual, we say that as part of the group, they knew what was happening and they all participated." They all chased him, and because we have knowledge of participation, we would say that is sufficient for a jury to infer that they were part of a joint enterprise. (Viv, prosecution lawyer)

In this statement, Viv is drawing on the evidence that the individuals in the group were associated with each other, to infer that by chasing, the secondary parties 'knew what was happening' or, in legal terms, had knowledge of the essential facts (or that they had the conditional intent to support the use of fatal violence 'if it came to it') (Reid, Sarch and Walker 2019, Crown Prosecution Service 2019). This may not be the case for young people involved in spontaneous incidents, in particular. Rather Viv's analysis relies on their own interpretation of the secondary party's knowledge.

Some practitioners who relied on association between parties to demonstrate secondary liability, went further to include an evaluation of an individual's awareness of what *might* occur:

> Joint enterprise for me […] there has to be evidence of just something. It has to be more than just merely being there. So there has to be some evidence of […] knowledge in relation to what you could have foreseen, what was likely to have foreseen... […] Because if you actively put yourself in that situation, again, you have to take the consequences of that action. (Vincent, police detective)

In his assessment, Vincent is straying into the realms of the now abolished PAL. Relying on what the secondary party was 'likely to have foreseen', is arguably beyond the scope of foresight being used as evidence of intention to encourage and assist. In his quote Vincent appears to be supporting the 'change of normative position' theory, arguing that once a person 'actively' puts themselves into 'a situation' they must be responsible for all of the consequences. Keith offered a similar assessment:

> Simply because somebody didn't inflict the fatal blow they then can't acquit themselves of all responsibility, that there is an understanding that you were there, you understood that your

> colleague was armed, you understood that this was a likely outcome, you can't just abdicate all responsibility for this. (Keith, police detective)

In this quote, Keith clarifies his understanding of joint enterprise: when a person associates with an armed accomplice, they become morally and legally responsible for the substantive violent offence that results, which they (he argues) foresaw (Simester 2006). However, the law requires that the young person intended to encourage or assist the substantive offence, or that there is evidence of conditional intent – that they intended the outcome in the particular circumstances that unfolded. The decision in *Jogee* suggests that where an individual has no intent to kill but is party to a violent attack, which they ought to realise carries a risk of some harm, and death results, they are guilty of manslaughter rather than murder (van Sliedregt 2019).

In the current study, practitioners' assessment of intention and culpability was strongly influenced by their beliefs about what people *must* have known, based on their perceptions of the suspects' relationships with one another, as Vincent explains:

> [when investigating] you might look and say, "Well, he's got four associates. Actually, associate two is the stabber.". So you concentrate on that, and then you try and build up the picture from there in relation to that association. […] But what you know is that they are all together and they all have - and I don't care what anybody says - they all have an understanding of what is going on. They all have it. And I will go as far as to say in this day and age, if your mate is carrying a knife, you've probably got a good idea that he's got it. (Vincent, police detective)

Vincent infers knowledge of a weapon from his beliefs about young people's relationships 'in this day and age'. This 'fact' is key to developing a case against a secondary party, he believes. However, it is some distance from intention – that the secondary party understood that the outcome was a virtual certainty of their actions. This highlights the continued role of foresight in pulling multiple young people into criminal trials involving very serious charges, such as murder. Patrick, below, expresses similar sentiments:

> If four of you go out in a car with a gun and someone gets murdered by someone in that car, then you are all culpable. […] If I can't find that text message or that agreement, does it make anyone less guilty? I'd say no. […] A chance meeting, you don't know your mate has a knife? Fine, but I would imagine there is a rule that if your mate has a knife on him, *everyone knows* your mate has a knife on him. I think it opens up the window of naivety that people can say 'maybe he didn't know there was that two-foot-long shotgun in the footwell of the car' [laughter] 'What's this, Dave?'. (Patrick, police detective)

Both Vincent and Patrick's reflections rely on their own interpretations of young people's relationships, substantial leaps of 'imagination' and assumptions of 'probability', which move us back towards PAL (Krebs 2019).

Crucially, the reflections of practitioners in this study show that, at that time, understandings of secondary liability lagged behind the changes made in *R v Jogee.* Indeed, prosecution lawyers themselves reflected on the only 'subtle shift' that the abolition of PAL had produced in charging practice:

> Well [*R v Jogee* has] changed the test obviously that I'm applying, because foresight versus looking at foresight as evidence of intention. So, it's a subtle shift, that is in real terms,

> because some of the evidence that you would have used to prove foresight, that foresight will be evidence of intention. On a practical level, you're looking at the case, […] do any of these potential defendants encourage or assist the offence practically during the course? And that might be by doing something physical or it might be by… As we know, mere presence is a possibility. […so…] It's made a difference in the sense that the analysis has become finer and more careful about the way that you express it and think about it. I personally have not had a case where I've thought "I wouldn't have charged that person under the old law, but I would charge them now" or vice versa. (Alex, prosecution lawyer)

The findings show that, in practice, the distinction between foresight and intention remains blurred, not least because the law, post *Jogee*, allows practitioners to use continue to use foresight as evidence of intention and conditional intent remains. Inference also continues to play a key role in practitioners' deliberations about the extent to which individuals foresaw or intended to encourage or assist the substantive offence. Such inferences were rooted in practitioners' own subjective interpretations of the actions of secondary parties and these have shown little evidence of changing despite the change in the law. The following section highlights the racialised nature of such interpretations, and the role of the gang narrative in this.

The low threshold of association and the prominence of the 'gang narrative'

The emphasis on association by practitioners to establish intention, outlined above, relied on inferences about what the suspects knew – explicitly or implicitly. Alex's quote below highlights the process by which information is inferred from what is thought to be known 'implicitly':

> Most of what you're dealing with is where there's an implicit understanding among the group either that they're going to cause serious harm or if he resists or struggles.
> *And how would you know that? How do you know if it's implicit?*
> That is about inference and about building a picture of the group, how they know each other, how friendly they are, do they know for example that their mate always carries a knife? Do they know that he's got a hair trigger for violence? Because some of those things matter, which is why everything comes down to the facts. (Alex, prosecution lawyer)

For Alex, the key 'facts' from which evidence of secondary parties' intention – or conditional intent – was deduced, included how close individuals were perceived to be, their prior knowledge of their associate's weapon carrying behaviour and their propensity to violence. While such information might be factually established in some cases, research has shown how racial stereotyping impacts assumptions that the police and legal practitioners make about the attachments between young boys from black and mixed ethnic backgrounds, their knowledge about one another's weapon carrying and involvement in violence (Williams and Clarke 2016, Young, Hulley and Pritchard 2020). These are entangled in a racialised discourse which associates blackness with gang involvement (Young, Hulley and Pritchard 2020). This is demonstrated in the interview with Viv, another prosecution lawyer, who emphasised the role that the gang narrative played in the way information was inferred from the facts, for the purpose of prosecuting multiple individuals in cases of serious youth violence:

> So, in a joint enterprise case, frequently you will have a situation where a great deal of the preamble is captured on CCTV, but often when someone is attacked they run away and frequently they run down a side street [where there is no CCTV]. So, we will see one person pursued by four or five others and then we'll see them all running and we may be able to see that some of them are carrying weapons, but we won't be able to demonstrate which of them

> actually killed the person that was running away from them. So, we would say, 'This was a group of five, all of whom chased this individual, we say that as part of the group, they knew what was happening and they all participated.' They all chased him, and because we have knowledge of participation, we would say that is sufficient for a jury to infer that they were part of a joint enterprise. […] Then it becomes relevant to show: 'Look, this group were part of…' say the 'guns and shanks gang' […] 'and here is some footage that they posted of all the gang members together,' posturing, singing, chanting, whatever it is. (Viv, prosecution lawyer)

Viv makes an explicit link between the murder committed by *one* of the group in pursuit of the victim, and the other *four* individuals who are assumed to be a cohesive group, with a shared a moral commitment to the murder (Simester 2006), based on the belief that they are members of a gang. Viv's quote shows how the posting of music videos online is used as evidence to confirm that this *group* is in fact a *gang* each of whom must have known the essential facts and intended the serious violent act because gangs have such a shared purpose. However, research in the UK has demonstrated the ways in which practitioners misunderstand and misrepresent minoritised young people who engage in the art of making music and music videos, particularly in the genre of hip hop, rap and grime (Ilan, 2020, Owusu-Bempah 2022, Fastis 2019, Young and Hulley, under review). Lyrics and music videos that contain references to violence are mistaken for confessions, rather than being seen as a creative outlet for young people embroiled in difficult life worlds (Dunbar 2020, Young and Hulley, under review). Viv's belief that each individual captured on CCTV was part of a 'gang', because they appeared in a music video together, leads them to infer that all individuals in the CCTV footage intended for the victim to be seriously injured or killed. The racialised nature of such assumptions (Young, Hulley and Pritchard 2020) contribute to the over-representation of young men from black and mixed ethnic backgrounds in samples of people convicted of murder using joint enterprise (Hulley, Crewe and Wright 2019).

Defence lawyers who took part in the study raised concerns about the way in which the gang narrative drove prosecution decision making:

> I think […] if the CPS or the prosecution as a whole [including the police] think they're capable of identifying a gang phenomenon in a case, then I think that has a huge influence on them jointly charging defendants because, so far as they're concerned, if you're in the same gang, then you all sign up to the same action, and that's not necessarily true at all, actually, especially obviously in more informal kind of less organised gangs, but even sometimes in organised gangs that's not so. (Hugo, defence lawyer)

Hugo's unease is supported by findings from the repeated research studies (Young, Hulley and Pritchard 2020, Williams and Clarke 2016).

Defence lawyers asserted that assumptions about young men in gangs oversimplified the reality of the ways in which young people become implicated in violence and failed to establish that an individual young person *intended to encourage or assist* the substantive offence. Participants underlined the damaging impact on the secondary party, of being 'tarred with the same brush' (Simon, defence lawyer), as explained by Gita:

> …everyone gets labelled: 'gang', 'murder'. Seven of them is a 'gang' but it might not be a gang, five of them play football together and the driver of the car, and they went. Things got heated, someone acted out, suddenly they're all convicted of murder. They're just seven,

> normal, 17-year-old lads playing football, someone starting on his sister, there was a bit of a fight, someone pulled out a knife. One person pulled out a knife, seven of them got convicted because they didn't stop him. Is that fair to have the same label, the same mandatory sentencing? (Gita, defence solicitor)

Gita highlights the issue of young people being misidentified as members of cohesive, criminally active gangs and the resultant overcriminalisation of young men, particularly those from a black or mixed ethnic backgrounds as shown in data (Crown Prosecution Service 2023, Mills, Ford and Grimshaw 2022). This perpetuates the problem of unfair labelling and disproportionate punishment of secondary parties.

The persisting problem of fair labelling and proportionate punishment

For prosecution lawyers, secondary liability, including PAL, was considered an effective legal tool, as it allowed *all* suspects involved in an offence to be brought into the courtroom as defendants so as to paint 'the whole picture' for jury members. By pulling everyone in to be tried in court, prosecutors maximised the chances of conviction for all individuals whom they identified as being morally and legally responsible for the serious violent incident. Police and prosecutors were satisfied that once all defendants had been convicted by a jury of the same substantive offence, individual accountability would be differentiated at sentencing. As noted by Connor and Austin:.

> It doesn't necessarily mean [that the secondary party] gets exactly the same sentence, but they can be convicted of the same offence and the role that they played within it is then taken into consideration on sentence. (Connor, Homicide detective)

> *So, it's the sentencing part which you think is what differentiates the kind of roles that people played?*
> Most definitely, it's not the conviction. (Austin, Homicide detective)

Such comments neglect or downplay the problem reported by secondary parties who have been convicted of murder, that being convicted of murder and labelled a murderer feels unfair (Hulley, Crewe and Wright 2019). Connor and Austin's view also ignores the issue of the mandatory life sentence for murder in England and Wales. Although judges are able to take account of differences in culpability and harm in their application of aggravating and mitigating factors, the scope of differentiation is limited by mandatory starting points which are based on the type of offence and the age of the perpetrator. This, in practice, leads to relatively small differences in custodial terms for principal and secondary parties convicted of the same substantive offence (Hulley, Crewe, and Wright 2019).

Defence lawyers in our study agreed that secondary parties continued to be unfairly stigmatised by the offence label when convicted of murder, post *Jogee,* as it gave the false impression that the individual had killed another human being, failing to accurately represent their part in the substantive criminal act (Chalmers and Leverick 2008). They called for clearer distinctions to be drawn between the principal and secondary parties at conviction, as well as sentencing, supporting Wang's (2019: 155) argument that there is good reason to distinguish between the autonomous, independent actions of the principal party who *directly caused* the ultimate harm and the secondary party, who does 'not have control over the occurrence of the prohibited harm'.

Some defence lawyers believed that juries responded to perceived overcharging by the Crown Prosecution Service, by distinguishing between the actions of the principal and secondary parties in their verdicts, when possible. This was demonstrated in cases that defence lawyers had been party to, in which individuals were charged with murder but convicted of manslaughter by the jury, or acquitted altogether. Defence lawyers believed that this was a silent (and undetectable) protest against secondary liability:

> [Juries] might think "well actually he wasn't as bad as the principal but actually he still signed up for something really bad and so manslaughter is a medium of sorts". Not necessarily a happy medium, but it's a compromise. (Josie, defence lawyer)

> [In the case I told you about] where the guy got completely acquitted, if there was an offence of accessory before the fact, and they thought "Well, actually, he should be guilty for something" then they may have convicted him for that. But they were never going to convict him of murder because, Jesus Christ, he absolutely did nothing! So, they're going to take 25 years off this lad's life away because [of nothing]? (Simon, defence lawyer)

Post *Jogee* juries may be more likely to convict individuals of manslaughter *(*Krebs 2019) and participants in the current study reported that, in their experience, juries were particularly likely to distinguish between the culpability of the principal and secondary parties in cases involving young people. They hypothesized that jury members felt uncomfortable convicting some young people who were charged as secondary parties with murder, for which they would receive a life sentence and a long minimum period in custody. This could generate inconsistency in convictions, as some young defendants in particular cases (with juries who were sympathetic to their situation) were 'saved' from receiving the label of murderer and the severe punishment of a life sentence, while others continued to be convicted of murder and given a life sentence. This led to calls for a more consistent system based on fair rules that could be applied in similar cases, as illustrated by Hugo:

> I suppose that […] one factor of consideration [is] how often do the prosecution actually charge manslaughter? How often are they prepared to look at circumstances and say, 'Despite the fact of death, we're not sure that an inference is available to us that this person meant really serious harm, or had an intent to kill.' In many circumstances, that may be a fair assessment, but […] I've never had a case charged with manslaughter, even in circumstances where there are, what can be said to be mitigating circumstances surrounding the death. Never once. […] Only, as I said, rarely actually I had a jury return a manslaughter verdict. It's usually not guilty completely, or guilty. (Hugo, defence lawyer)

In this context, defence lawyers called for a further, systematic change in English and Welsh law to ensure that the principles of fair labelling and proportionate punishment could be achieved by embedding fair charging into the process.

Alternative approaches post Jogee – suggested changes to practice

The practitioners interviewed for the purpose of this study offered alternative solutions to counter the issues associated with secondary liability that continued to persist post *Jogee.* A modest alternative, suggested by Baj, involved legislating for an automatic reduction in the sentence length of secondary parties compared to their principal counterparts:

> I don't agree with what tariffs are dished [out] at the moment […] For example, if it's a stabbing, you're looking at a starting point of 25 [years minimum tariff]. If the principal

> [party] is getting 25, then it should be significantly less I think for the other members of a joint enterprise and lower still for the accessory. So different gradations. […] (Baj, defence lawyer)

Baj's suggestion reflects Horder's (2019: 52) recommendations to develop a 'general guideline' in which the starting point for a secondary party's sentence is set at 'no more than half' that of the principal. Although a reduction in sentence could be considered a significant step in the right direction towards more proportionate punishment, as noted above, it does not adequately address the issue of liability and the unfair labelling of the secondary party, who would still receive the same conviction.

An alternative solution proposed by participants, was for prosecution lawyers to offer different charges for each individual in a multi-handed case, depending on their specific actions. This would require prosecution lawyers to specify the role that each individual played in the incident:

> I'd love to see a case where there were five different charges for five kids who were all present at the time of the murder, because that's really clever, sensible – that's doing a proper appreciation of everybody's role there. (Simon, defence lawyer)

In *R v Jogee,* the Supreme Court in England and Wales urged that manslaughter be explicitly offered to individuals who are party to violence that resulted in death, but who did not intend to assist in causing death or really serious harm. It is possible that the charging of manslaughter *instead of murder* has increased (see Krebs 2019 for a full analysis) but the extent to which this is the case is currently unknown due to the lack of data collection.

In cases of 'spontaneous, unplanned violence', Du Bois-Pedain (2016) suggests that a separate charge should be offered based on an independent assessment of each participant's contribution to the wrongful harm. For example, where an individual does 'something' but they are not clear about the objective of the incident and they do not act in an organised, cooperative manner, a charge of affray or public violence should be pursued. If death or serious injury results from the incident, this could be considered as an aggravating factor at sentencing for the public order offence. Du Bois-Pedain (2016) notes that the German Criminal Code (section 231) provides an alternative aggravated offence of "taking part in a fight during which serious injury or death is caused to any person"' (see Du Bois-Pedain 2016).

While the need for reform was clearly stated in participants' narratives there was recognition that the appropriate balance needed to be achieved, between holding individuals' responsible for their actions and avoiding over-criminalisation however difficult this was in practice. Some feared that further changes to joint enterprise could 'embolden' individuals, giving them 'carte blanche' to behave without sanction. However, we argue that rather than allowing individuals to get away with murder, reform to the law of complicity and prosecution practice is essential to ensure those involved in multi-handed violence are *fairly labelled* and *proportionately punished.*

Concluding comments

Based on the experiences and reflections of practitioners, this article offers a unique perspective on the impact of changes to the law related to joint enterprise in England and Wales. It shows that, despite this, little had changed in practice at the time of the research, supporting data indicating an increased use of secondary liability in homicide cases and the continued disproportionate impact of this on men from minority ethnic backgrounds (Mills, Ford and Grimshaw. 2022, Crown Prosecution Service 2023).

Our findings show that practice statis was rooted in the blurring of foresight and intention and the inferences that practitioners continued to draw about young people involved in violence, particularly young men from black and mixed ethnic backgrounds. They persistently conflated association between individuals with intention to assist and encourage, particularly when a 'gang' narrative was invoked. Weak links between parties were strengthened by practitioners' own interpretations about who young people were, the nature of their relationships with one another and what they 'must have' known, rather than what they *did* know, generating the potential for injustice. While it is essential that individuals are held accountable for their wrongdoing, it is a necessity of justice that they be appropriately labelled and proportionately punished. This is particularly marked in relation to the immense force of a murder label and the (literally) lifelong impact of a mandatory life sentence in England and Wales, which comes at a significant human cost to those convicted and their families (see Crewe, Hulley and Wright 2020).

On the basis of the findings presented here we call for changes to the law and legal practice in England and Wales to ensure that the criminal wrongdoings of individual parties are distinguished. In some instances, this might mean charging the principal party with murder, but charging others with alternative, existing offences that more accurately represents their actions – such as manslaughter, assault or a public order offence. However, where an individual's contribution to an offence is not thought to be accurately represented by an existing offence, changes to the law must be considered to provide an different offence. In England and Wales this could involve developing the law on conspiracy (Sullivan 2019) or creating a new aggravated offence, such as that offered in the German Criminal Code (outlined above). Such an approach allows the law to 'develop distinctive typologies of structurally different wrongs' and to respond in a more nuanced way to the actions of individuals caught up in a group incident, by recognising the personal wrongdoing of those who had substantial involvement in causing the ultimate harm, as well as appropriately responding to those whose wrongdoing was minimal (Du Bois-Pedain 2016). At the time of writing, a Private Member's Bill has been presented to the UK parliament, called the 'Joint Enterprise (Significant Contribution) Bill, which seeks to change the wording of the law that underpins secondary liability so that a secondary party would need to make a 'significant contribution' to the crime to be convicted (Centre for Crime and Justice Studies 2023).

The use of alternative charges for secondary parties may not be supported by some criminal justice practitioners. However, in a principled criminal justice system, we argue that restraint is needed in the application of the law of complicity: 'No individual, even an offender, should have his or her interests sacrificed except to the extent that it is both absolutely necessary and reasonably proportionate to the harm committed or threatened.' (Ashworth 2006: 67). This would also fulfil another key principle of the criminal justice system – that of 'minimalism', which requires governments and courts to demonstrate 'side-constraints' to limit the extension of the processes of punishment (Horder 2019). In this context, minimalism also supports the need for a humane response to offending, which involves:

> minimizing criminalization, because this response acknowledges that the censure and punishment of a fellow human being is a distasteful duty, not a legitimate means by which full vent can be given to the righteous indignation of those affected by or informed of the crime. (Horder 2019: 73).

The law of secondary liability, as it is applied in practice, violates the principle of minimalism, particularly when it relies on weak assessments of culpability and subjective assessments of knowledge. As Wang (2019: 154) argues: 'There is nothing to be gained by obtaining easy convictions at the cost of circumventing the core principles of justice.'

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