Principals without Distinction

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"[I]n cases of an agreed pursuit of a criminal purpose, one is not concerned with the criminal responsibility of a party whose involvement is merely "secondary". One is concerned with the criminal responsibility of each of two principal parties to a criminal enterprise for incidents which occur in carrying it out…To say that those who joined together to organise the commission of a crime, in circumstances which involve the acceptance of the risk of the commission of an incidental crime in the course of carrying out their enterprise are less morally culpable for the incidental crime than their consort who actually does the dirty work, is to appeal to a sense of morality which would commend itself only to the criminal elite"

Keane J, *Miller v The Queen* [2016] HCA 30, [140]-[141]

"Very few, either at the time or since, have thought [*Director of Public Prosecutions v Smith* [1961] AC 290] to have been correct or clear [D is liable for murder if a reasonable man must have contemplated that D's conduct was likely to cause GBH to another]. The general reaction has been that of Mr Justice Fullagar, then a judge of the High Court of Australia, who one morning said to Sir Owen Dixon: "Well, Dixon, they're hanging men for manslaughter in England now.""[1]

J.D. Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 Law Quarterly Review 205, 212

When more than one person participates in a criminal offence, lawyers have to decide what distinctions are important. Three possible distinctions are immediately apparent: (1) between a principal offender and an accomplice; (2) between individual crimes: whether it should be substantively easier to convict parties to further crimes beyond a first? (3) between fault elements, most importantly, intention, foresight of a risk, and the role of future conditions.

We have to understand why these distinctions have or have not been made over time. Well intentioned lawyers have been engaging with these three issues for hundreds of years but the current debate has become unhelpfully polarised. In particular, this article will first explore the distinction between principals and accessories, why we draw it, when we have ignored it and what its consequences are. The article will show that by drawing that distinction poorly we risk collapsing the second and third distinctions, between a further offence from a first, and between our fault elements. That is, we have to understand each distinction, and also how they are tightly bound together.

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[1] P. Ayres, *Owen Dixon* (Melbourne: Miegunyah Press, 2003), 276. See then, *Parker v The Queen* (1963) 37 ALJR 3, 11-12.

For example, in the first introductory quote, Keane J, a Justice of the High Court of Australia, was criticising the direction English law had taken in complicity in the landmark case of *Jogee*.[2] In England and Wales, *Jogee* now prevents accomplices being convicted of murder on a substantive test of foresight of what the principal might do, instead reinstating the possibility of convictions for manslaughter or acquittal in respect of the death. Any secondary party must intentionally assist or encourage the principal. Keane J. dismissed the distinction between principals and accessories, and he dismissed the distinction between a first and further crimes, treating all as "incidents" of some "criminal enterprise"; he therefore had no interest in drawing the traditional distinctions between intention and mere risk-taking.

By comparison, 65 years earlier, a different Justice of the High Court of Australia, Fullager J, was also criticising English law, but with wryer wit. He described English law's (temporary) wide and objective definition of intention as hanging manslaughterers, who would not face the death penalty, as if they were murderers, who would. This is particularly remarkable because Keane J's criticism came from fiercely defending a harsh nineteenth century rule, while Fullagar J's criticism was based on English law turning back to such a rule. Fullagar J thought that too little fault was proven for liability for murder in *DPP v Smith*, by a reasonable person foreseeing a likely result, while Keane J asserted that a risk foreseen and run must have been 'accepted' and thus be a sufficient basis for liability for murder.

Now is a sensible time to look closely at these three distinctions. The UK Supreme Court has reinforced them in *Jogee*, but the High Court of Australia in *Miller* and the Hong Kong court of Final Appeal in *Chan Kam Shing* has undermined them.[3] Understanding why lawyers have addressed them so differently might set us on the path to a more intellectually robust and practically effective criminal law.

1. Distinction 1: between principals and accomplices

1.1 Why distinguish?

Should the law distinguish between participants to a crime? English law has not exhaustively answered the question, but has instead removed most consequences of the answer.

On a very practical level, most offences are phrased around a person doing or achieving something, implying that person, the principal, is different to others, the accessories/accomplices, who merely contribute to those physical components. But this implication does not entirely stand up.

On the one hand, many standard complicity scenarios involve the accomplice doing less, and being less blameworthy, than the principal; S (secondary party) might be one of many to lend P (principal) equipment for the crime, or act as a look out in a robbery. Typical tests for complicity prove less for the accomplice: asking only for "assistance" or "encouragement" towards the commission of the offence, without setting a minimum threshold.[4]

[2] [2016] UKSC 7; UKPC 8.
[3] *Chan Kam Shing* [2016] HKCFA 87.
[4] Discussed in section 1.4 below.

On the other hand, the accessory might be morally as deserving of censure as the person who brings about the physical components of an offence. Conan Doyle's Professor Moriarty, might be thought morally as bad (or worse) as the pawns he uses to do his bidding. Sometimes related offences can do some of this work, such as the greater maximum penalty for handling stolen goods compared with theft.[5]

One response would be to employ a rule of interpretation to treat those who contribute but do not bring about the physical components to be deemed to do so. An example is ss. 323–324, Crimes Act 1958 in Victoria, Australia:[6] an assistor, encourager or director of an offence is "involved in the commission of an offence" and all such persons are "taken to have committed the offence", and thus, in English terms, 'principals'.[7] It might also happen on a smaller scale, such as by having wide individual offences, such as offences under the Public Order Act 1986 like riot which aggregate the conduct of those present.

A less fictional response is to limit the distinction: accept it is relevant to liability, but not to trial process nor to mandatory rules quantifying punishment. This is not a solution to the underlying breadth of responsibility and culpability in participation, but a significant reduction in value of the distinction.

This was the early solution for the common law in respect of treason and misdemeanour, and more recently, felonies. In respect of treason, all participants were treated as principals, since it was such a serious crime that no involvement was in practice treated as less than any other;[8] the same was true for participants in misdemeanours, since, by the opposite reasoning, misdemeanours were so minor as not to merit the articulation of any distinction between participants. Felonies, serious crimes short of treason, were long thought to merit the distinction and the procedural consequences that flowed from it. All these distinctions began to fall away in the nineteenth century and were fully removed in 1967. By s. 1 of the Criminal Law Act 1967, any distinction between felony and misdemeanour has been removed and thus the entry point for procedure today is a provision of a statute which had previously only applied to misdemeanours, the Accessories and Abettors Act (AAA) 1861, as amended, s. 8:

> "Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender."

The AAA 1861 was a procedural statute, enshrining earlier rules permitting all participants to be treated the same for trial and sentencing.[9] It, and the discussions around it, have focused on the practical consequences of making the distinction, not on why it should or should not be made.

A key benefit of this response is that it also makes trials simpler to organise and deals with potentially difficult cases of evidence. Where it is unclear what role a participant played, whether principal or accessory, the AAA permits that party to be charged, convicted and sentenced without

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[5] Theft Act 1968: s. 22 (handling), 14 years; s. 1 (theft), 7 years.
[6] As amended by No. 63/2014.
[7] See also, New Zealand Crimes Act 1961, s. 66.
[8] Foster, *Crown Law* (3rd ed., 1792), 347.
[9] *Gould v Houghton* [1921] 1 KB 509, 515

specifying, although it is preferable to do so;[10] a jury might even disagree between themselves.[11] In some other legal systems, the defendant would be convicted as an accessory despite the risk she is a principal, rather than, harshly, as a principal when there is the chance she was an accessory.[12] In England, there is no separate crime of "secondary participation in an offence".[13]
The key cost of this approach is that it removes the practical reasons to decide whether a defendant is a principal or accessory. That has had some significant consequences in the development of the law and the clarity of legal reasoning.

1.2 Defining the principal and accessory

When a distinction between principal and accessory does have to be drawn as a matter of substantive law, the principal is the person (or persons) who brought about the physical components of the offence. One way to express this might be to ask for a direct causative connection, but not to require the 'last act', as that would underestimate joint action.[14] While it has sometimes been said that the defendant (D) need only "contribute" to the physical components of the crime,[15] "bringing about" those components is a better test and avoids making accessories into principals too easily:

1. *D1 and D2 each stab V at the same time, and both wounds contribute to V's death.* They are joint principals.
2. *D1 holds V, and D2 stabs V.* D1 is an accessory and D2 is the principal. D1 makes it much easier to commit the crime, but again, is not why the crime is committed.
3. *D1 holds a knife out, and D2 pushes V against the knife.* D1 is an accessory, D2 is the principal. D1 makes the crime easier to commit, in the same way that a large open window would allow D2 to push V to her death.
4. But what if *D1 pushes the knife forward as D2 pushes V onto the knife?* D1 and D2 are probably joint principals. A slight forward movement by D1 will be enough to turn him from principal to accessory.

There has been little pressure to develop principles to guide this determination when an accessory can be treated as a principal for trial and punishment, and particularly when accessory liability required less fault and responsibility than principalship.

But we can unpick this problem from another angle: where a crime is only committed because the defendants together commit the offence. This is usually where that crime has two or more physical components, with at least one carried out by a different defendant.[16] For example, in forgery contrary to the Forgery and Counterfeiting Act 1981, s. 1,[17] if D1 makes the material, and D2

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[10] *Maxwell v DPP for Northern Ireland* [1978] 1 WLR 1350, 1360 per Lord Edmund-Davies.
[11] E.g., *R v Giannetto* (1997) 1 Cr App R 1.
[12] E.g., in Germany, § 27 Strafgesetzbuch.
[13] *Gould & Co v Houghton* [1921] 1 KB 509; *Surujpaul v R* [1958] 3 All ER 300.
[14] See, e.g., KJM Smith, *Modern Complicity*, 79-81.
[15] *Gnango* [2012] 1 AC 827, [127] per Lord Kerr.
[16] Cf. where D1 threatens V with a gun, and D2 takes V's money, both commit theft by acting as owner over the money: Theft Act 1968, s. 1; *R v Morris* [1983] 3 WLR 697; thus D1 is liable for robbery by threatening force, and D2 either also a principal or an accessory, depending on the facts.
[17] *R v Bingley* (1821) R. & RCC 446, 168 ER 890.

applies the inks and marks, both are liable as joint principals for forging a banknote whereas neither would be liable alone. They need not be acting for the same purpose: the "joint" in "joint principals" describes the way the physical components of the offence are brought about, not why they are brought about.[18]

By contrast, some legal systems deal with an identifiable class of significant moral wrongdoing, 'instigating' another to act, by putting the instigator in the same category as the person who carries out the offence. Germany is a leading example.[19] In the Spanish Criminal Code, Art. 28, the "author" of a crime is someone "who brings about the physical components of the offence, by their own act or together with or through the means of another who is used as an instrument", but, also, to be treated as principals under paragraph a), are those who directly incite ('induce') one or more persons to do it or b) those who co-operate towards its execution by an act without which it could not have been achieved. Art. 29 then gives the meaning of accomplice as "those who, not being covered by the previous article, co-operate in the execution of the physical components of the offence either before or at the time of its commission."[20] While English law rejects instigation of crime X as being equal to performing crime X, and with good reason,[21] it has nonetheless employed two means of making a participant into a principal: innocent agency and common purpose.

1.3 Innocent Agency

The doctrine of innocent agency makes a participant into a principal where the human agent of the physical elements of the offence was "innocent", that is, lacking in capacity and/or lacking fault. Common examples involve delivery, such as the postman who delivers a blackmailing or explosive letter or the child administering a poison according to the plan of the mother.[22]

It should be seen as a doctrine recognising true principalship, but is treated as one deeming principalship.[23] Some have argued[24] that the English language does not easily permit one to have sexual intercourse or drive through another; such situations were better criminalised, as a form of complicity, through *procuring the physical components of those offences.* The classic example is

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[18] Cf. Beatrice Krebs 'Joint Criminal Enterprise' (2010) 73(4) MLR 578, 592; Beatrice Krebs, 'Hong Kong Court of Final Appeal: Divided by a Common Purpose' (2017) 81 Journal of Criminal Law 271, 273-274. *R v Petters and Parfit* [1995] Crim LR 501 holds that for a "joint enterprise" Ds must have a common purpose or intention rather than separate intentions to cause harm. That is not the same as a case put on the basis of joint principalship in a particular harm, since principalship does not include the fault elements relevant to a common intention. Where the evidence suggests a kick from only one defendant, not both, causing the death, as in *Petters and Parfit* joint principalship was not relevant.

[19] E.g., Art. 26, Strafgesetzbuch in Germany.

[20] Author's translation.

[21] S might be the only significant cause of P's crime: if communicated, S is the instigator; if un-communicated, S is a procurer. But S might only be one of many causes, or indeed, might have made the crime factually less likely, by P rejecting S's counsel or S's bungling the arrangements, and we have no means to prove the effect on P.

[22] *Michael* (1840) 9 C & P 356. English law is still unclear when it will permit "semi-innocent agency", where the agent is liable for an offence, but the deemed principal might be liable for a greater offence.

[23] Hence why there can be an insane innocent agent; see generally KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: Clarendon Press, 1991), 95-110.

[24] E.g., J.C. Smith, Aid, Abet, Counsel, or Procure, in P.R. Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (London 1978), 135.

Cogan and Leak,[25] where D1 tricked his friend, D2, into thinking D1's wife consented to have sex with D2. D1's wife did not consent; D2's conviction for rape was quashed as he, having believed his friend, was not reckless about the wife not consenting while D1's conviction was affirmed. However, it was expressly decided on "justice and common sense", and because D1 admitted liability as a procurer, not on technicalities of pleading.[26] Similarly, what of where the wrong only exists because of some quality of the person who actually carries out the physical components? Thus, the offence of bigamy is constituted when D *marries during the course of the lifetime of his wife*. If P, unmarried, tricks D into marrying again while D's wife still lives, it is difficult to say that P has "married during the course of the lifetime of P's wife" since P has no wife. The principal is a person who brings about the commission of the physical components of the offence, it does not matter whether those components are results, conduct, or even states of affairs. Innocent agency should apply to *Cogan and Leak*; nor need P have a wife, only that he causes D to marry during the course of D's wife's life. Thus, the doctrine is not deeming S a principal to avoid the limits of language, it is recognising the mechanics of principalship.

1.4 Historic Common Purpose

Common purpose made all participants in a common criminal venture into principals to avoid difficulties from different categories of participant being subject to different procedural rules, just like the AAA 1861 did later on. The common purpose attributed the physical elements of the offence to each participant. It also provided sufficient fault, perhaps combined with the felony-murder rule (discussed below). Foster, writing in 1762, held that even a bare trespass,

> "committed in prosecution of some unlawful purpose… would have amounted to murder in him, and in every person present and joining with him… For in combination of this kind the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument, by which the others strike."[27]

It is particularly important to understand why common purpose deemed S to be a principal because it ultimately led to "parasitic accessory liability" (PAL) found in *Chan Wing Siu*,[28] and now removed from English law by *Jogee*. Under PAL, where P and S "participate together in one crime (crime A) and in the course of it D1 commits a second crime (crime B) which [S] had foreseen [P] might commit"[29], *then S was liable for crime B but is not deemed a principal, only an accessory who can be tried, convicted and sentenced as a principal.*

The history of common purpose is elusive, contested and constrained by limited contemporary discussion. The most likely explanation is that common purpose was a way to avoid four procedural limitations for accessories to misdemeanours: (1) that an accessory could not be tried until a principal had been convicted; (2) an accessory could not be liable for more than the

[25] [1976] QB 217.
[26] As of 1 May 2004, D2 would have had to have a reasonable belief in consent: s. 1(1)(c), Sexual Offences Act 2003.
[27] Foster, *Crown Law* (3rd ed., 1792). See also *Macklin* (1838) 2 Lew. CC 225, 226; 168 ER 1136, 1136 per Alderson B.
[28] [1985] AC 168.
[29] *R v ABCD* [2011] QB 841, [9] per Hughes LJ.

principal;[30] (3) some offences left uncertain whether an accessory could be liable for the full punishment of a principal;[31] and (4) that the evidence of a party to an offence could not be admitted against other parties without corroboration.[32] Since S might escape justice because of these procedural rules, *Russell on Crime* explained "to obviate this mischief the judges by degrees adopted a different rule; and at length it became settled law that all those who are present aiding and abetting when a felony is committed are principals in the second degree."[33] Accordingly, there was no separate form of indictment for common purpose.[34]

The first step in avoiding these procedural limits was to focus on presence. It would have appeared obviously unjust that mere absence at the moment of commission could insulate a planner or encourager from liability for the crime when it happened. And so, by the middle of the sixteenth century, being present and aiding or abetting made D a principal; otherwise D was an accessory.[35] Such injustice was not, however, enough to challenge the underlying distinction, merely to blur it. It was hardly surprising that "common purpose" was not referenced originally, or consistently.[36] Cases where parties to a crime did not have it as part of their common purpose were rare since: (1) a person was taken to intend what was natural and probable; (2) he could not give his own evidence about his state of mind until 1898;[37] and (3) all complicity asked for was "felonious intention to be part of the plan" which asks very little of D's purpose.[38] Indeed, *NCB v Gamble* in 1959,[39] was one of the first widely reported examples of disinterested assistors, with the few earlier examples also finding indifference to the crime being committed nonetheless sufficient.[40] In due course, the common purpose came to do more work, so that a contribution made prior to the crime, and presence, was sufficient to make D into a principal.[41] In effect, "aiding and abetting" was no longer required; counselling and procuring within the common purpose was enough.

There was no deeper explanation for common purpose. On the infrequent occasions when any explanation for common purpose was given courts said (1) P's act was "as if done by D", so simply a fictional attribution; or occasionally also said that (2) D's presence was also deemed a "terror to

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[30] Blackstone, 4 *Commentaries* Ch. 3, IV.

[31] D could also not be convicted of a misdemeanour, having been indicted for a felony, in part because prior to Prisoners' Counsel Act 1836 he could have had counsel in a misdemeanour trial, but not in a felony.

[32] See, e.g., Samuel Prentice, *Russell on Crime* (5th ed, 1877), 600-611. Further limitations on assize jurisdiction also applied.

[33] William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanours*, vol 1, 2nd ed, London, Joseph Butterworth and Son 1826, 21; Peter S. Gillies, *The Law of Criminal Complicity* PhD thesis 11 May 1981, University of Sydney, 183.

[34] The available indictment simply alleged the party was present, and thus a principal in the second degree: *Royce* (1767) 4 Burr. Rep. 2073.

[35] Baker, *Introduction to Legal History*, 4th edition, OUP, 2002, 525-526; see also KJM Smith, *Modern Complicity*, 22-23; William Addington, *An Abridgment of Penal Statutes* (3rd ed, 1786, London, Thomas Whieldon), 1.

[36] See, e.g., CS Kenny, *Outlines of Criminal Law* (CUP, 1907), 85-86, whose work makes no mention of "common purpose" as a separate set of substantive rules.

[37] Criminal Evidence Act 1898.

[38] Joseph Chitty, *A practical treatise on the Criminal Law*, vol 1, 2nd ed (London, Samuel Brooke, 1826), 255a, 258.

[39] [1959] 1 QB 11, 25.

[40] *Benford v Sims* [1898] 2 QB 641; *Cook v. Stockwell* (1915) 38 TLR 426.

[41] 1 East PC 257, 1 Hale 442, 3; Archbold, 12th ed, 1853 London, S. Sweet and VR Stevens and GS Norton, WN Welsby, 766-767; *R v Soares* (1802) Russell and Ryan 25; 168 ER 66; *R v Manners* (1837) 7 Carrington and Payne 801; 173 E.R. 349, 802-803.

[V]" (since such offences typically involved violence) so suggesting some level of causation towards P's offence.[42]

Similarly, if common purpose had normative content, why was it not used in misdemeanour (or treason) cases? In fact, the very same phrasing of "act of one is the act of all" was occasionally found in misdemeanour cases, explained not by common purpose but by the procedural rule that "all are principals in cases of misdemeanour".[43] In other cases, no explanation was given.[44]

Five further issues can complicate the analysis of common purpose but the underlying procedural explanation is still the most persuasive explanation.

First, a "common purpose" was probably first used as the substantive test for offences such as riot[45] and conspiracy,[46] offences which overlapped with paradigm participation problems,[47] blurring the line between the offence and the mode of participation. Note that riot required that the rioters were present, part of a common purpose to commit a crime, felony or misdemeanour with an "intent to commit it at all hazards"[48] or "to resist all opposers".[49]

Second, there is a chance that phrasing the events as within a common purpose was simply a means to treat "collateral", "incidental" or otherwise separate offences as being included. Findlay Stark has recently made this claim,[50] and KJM Smith took a slightly more ambivalent line in 1991.[51] Stark argues that a PAL-like doctrine is evident in very early cases where the language of common purpose is used. Stark's definition of PAL is that "D1 could be liable for Offence B without proof that she encouraged or assisted its commission, let alone that she did so intentionally."[52] But this interpretation downplays the extent to which courts and commentators focussed, in their explanations of accessorial liability, on common purpose. They sometimes found that design or purpose by objective characteristics, much as they found intention.[53] They sometimes found it by what had been contemplated and proceeded with, in a time when that sufficed for "malice".[54] It

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[42] *R v Griffith* (1553) Plowd. 97, 98; 75 ER 152, which went on to say that the act of each was the act of all.
[43] *R v Rumble* (1864) 4 Foster and Finlason 175; 176 E.R. 519, 184; 524. See also *R v William Greenwood,* (1852) 2 Denison 453; 169 E.R. 578, 579; 456-7.
[44] *Athea's Case* (1834) 2 Lewin 191, 168 E.R. 1125; 192-3.
[45] *R v Edmeads and Others* (1828) 3 Carrington and Payne 390; 172 ER 469, *Pitchers v Surrey CC* [1923] 2 KB 57; *Munday v Metropolitan Police District Receiver* [1949] 1 All ER 337.
[46] E.g., *R v Blake* (1844) 6 QBR 126; 115 ER 49; *R v Plummer* [1902] 2 KB 339; *R v Greenwood* (1852) 2 Denison 453; 169 ER 57.
[47] See, e.g., the early poaching example, *Attorney-General's Question* Sav. 67; 123 ER 1016; and+ 1 Hale 461-464.
[48] *R v Skeet* (1866) 4 Foster and Finlason 931, 933-934; 176 E.R. 854, 855-856 per Pollock C.B.
[49] *R v Tyler and Price* (1838) 8 Carrington and Payne 616, 620; 173 ER 643, 645 per Lord Denman C.J. (Maidstone Assizes); Baker, *The Oxford History of the Laws of England: Volume VI 1483–1558* (OUP, 2003), 556, see also *Snook's Case* (1560) Sav. 67; *R. v Griffith* (1553) 12 Plowd. 97; *Lord Dacre's Case* (1535) Moore K.B. 86; *R v Howell, Roberts, Jones, and Wilkes* (1839) 9 Carrington and Payne 437; 173 ER 901.
[50] Findlay Stark, 'The Demise of "Parasitic Accessorial Liability": Substantive Judicial Law Reform, Not Common Law Housekeeping' (2016) 75 Cambridge Law Journal 550.
[51] K.J.M. Smith, *A Modern Treatise on Criminal Complicity* (Clarendon, 1991), 210–11.
[52] Stark, *Demise*, 550-551.
[53] E.g., *Mansell and Herbert's case* (1555) 2 Dyer 128b; 73 ER 279; (1556) in Dalison's reports, 124 Selden Soc. 127-9, 130-1 (a rare reported criminal cause in this period); *R v Ashton* (1698) 12 Mod. 256, 88 ER 1304: "Two, three, or more, are doing an unlawful act"; *R v Wallis* (1703) 1 Salkend 334; 91 ER 294.
[54] *R v Griffith* (1553) 1 Plow. 97, 75 ER 152; *Lord Mohun* (1692) Holt KB 479, 90 ER 1164.

also risks the artificial division of a *purpose* into *specific offences*, something deprecated most recently by the UK Supreme Court.[55] Without thinking in terms of a 'collateral' offence, the same evidence Stark uses looks rather more like it supports a much narrower and non-PAL reading of the case law.[56]

Third, the counsellor and incitor was liable for any further crimes naturally or probably flowing from the one(s) suggested. This was not a problem specific to common purpose,[57] but a common purpose was typically communicated sufficiently to constitute the physical component of incitement and counselling. The link with such 'commanding' and complicity is long-standing. In *R v Saunders & Archer* (1575),[58] S counselled his friend on using poison to kill P's wife so P could pursue another woman but P then did nothing when his wife innocently gave the poisoned apple to P's daughter, who died. After some doubt, P was liable for murder.[59] S was held not liable for murder. Dyer, Chief Justice of the Common Bench held the death of the child was a "distinct thing", but neither he, nor Plowden's detailed commentary, explain what the test for "distinctness" is. This was still the position according to Hale,[60] Blackstone,[61] Stephen in 1887,[62] and *Russell on Crime* as recently as 1964.[63]

Fourth, and very importantly, until 1957, the felony-murder rule applied in that an intention to commit a felony where death resulted would generate liability for murder.[64] The nineteenth century saw the rule develop from applying to all "unlawful acts",[65] to objectively dangerous felonies.[66] It might also be that any unlawful purpose which was to be committed "against all hazards", involved a conditional intention to commit a felony such as serious injury to anyone resisting and the felony-murder rule was somehow triggered. Pollock CB certainly thought common purpose was a creature of policy, to convict for murder all parties jointly engaged in a felony that lead to death, and linked to the felony-murder rule.[67]

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[55] *R v Gnango*, [2011] UKSC 59, [43].
[56] Subject always to the overarching lack of clarity in the sources.
[57] E.g., Seymour F. Harris, *Principles of the Criminal Law*, London, Stevens and Haynes 1877, 34-35, refers only accessories before the fact in this regard. Cf. the simplification in, JC Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR 453, 456-457; Jogee, [21]; and the more detailed Stark, *Demise*, 560-566.
[58] (1575) 2 Plowden 473; 75 ER 706.
[59] (1575) 2 Plowden 473, 474; 75 ER 706, 708.
[60] 1 Hale P.C. 617.
[61] Blackstone, 4 *Commentaries* ch. 3, II.2 writing in the 1760s. See also J. Chitty's, *A Practical Treatise on the Criminal Law*, London, 1816, Butterworth and Son, Vol 1, 263.
[62] Stephen, *Digest of the Criminal Law* (4th ed., 1887), Art. 41.
[63] *Russell on Crime* (12th ed., 1964), 161-162.
[64] See, e.g., *R v William Appleby* (1943) 28 Cr. App. R. 1, 4.
[65] Originating in Coke, 3 Inst. 56; which might include a tort e.g., RJ Buxton, 'By Any Unlawful Act' 82 LQR 174 (1966); see further JM Kaye, 'The Early History of Murder and Manslaughter' (1967) 83 LQR 569, 593; *R. v Ashton* (1703) 12 Mod. 256, 256 per Holt CJ, dealing with "abusing the passers-by in a street", but it was unclear whether that abuse was merely verbal, or physical, such as would be a felony.
[66] *R v Skeet* (1866) 4 Foster and Finlason 931, 933-934; 176 E.R. 854, Pollock CB, 936-7; Foster, *Crown Law* (3rd ed., 1792), 351
[67] *Skeet* (1866) 4 F. & F. 931, 176 ER 854 at 857.

Finally, until the twentieth century, a person was taken to intend the natural and probable consequences of his actions.[68] A defendant was not even allowed to give evidence in his own defence until 1898.[69] This was clearly related to including within a common purpose the natural and probable extensions of offence(s) counselled, since a person would be taken to intend those as well. The importance of this on fault standards cannot be underestimated, as KJM Smith put it,

> "The operation of this leading rule of evidence frequently obscured, if not totally subsumed, positive proof of the substantive culpability requirement in any particular case. So much so that in many nineteenth century and earlier authorities it is often quite impossible to disentangle the substantive from the evidential."[70]

The technical fault terms used to describe offences had even broader meanings. They used morally loaded terms like "wickedness"[71] and "malice".[72] According to the Criminal Law Commissioners of 1843, *mens rea* covered both intending a result, and those who wilfully incur the likely risk of injuring another.[73] This objective form of intention was given a final lease of life in *DPP v Smith*, phrased similarly to the felony-murder rule removed in 1957, but was ultimately removed by the Criminal Law Act 1967, s. 8.

Any substantive effect to common purpose fell away with the Criminal Law Act 1967, s. 1 removing the distinction between felony and misdemeanour. English lawyers were finally discarding procedure as the starting point for legal problem-solving. The Criminal Law Revision Committee, in proposing that effect in a single paragraph,[74] missed all the complications that ended up following.[75] Certainly reported cases and commentary on the rule are much rarer in the twentieth century. In *R v Pridmore* (1910), common purpose was accepted in principle, but not for all crimes "not improbable to happen" in pursuit of it.[76] That was an instructive case, as the jury had found a common purpose to "resist arrest at all costs" by how the defendant held a stick, while his partner had a gun.[77] One of the last was *R v Appleby* which was decided in 1940, again featuring common purpose making all parties to it principals.[78]

If we accept the procedural explanation, we can also see why the doctrine was fading away in the twentieth century: the need for it ended as the procedural distinctions fuelling it were removed.

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[68] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769), vol 4, 200; *R v Dixon* (1814) 3 Maule and Selwyn 11; 105 ER 516.
[69] Criminal Evidence Act 1898.
[70] KJM Smith *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence* 1800-1957 (Clarendon, Oxford, 1998), 166, see generally 162-166.
[71] E.g., James Fitzjames Stephen, *A History of The Criminal Law of England* (London, Macmillan and Co., 1883), 120: "wicked pleasure in giving pain".
[72] See generally, G. Williams, The Mental Element in Crime (Oxford University Press, 1965), 61-73.
[73] Royal Commission on Criminal law, 7th Rep (1843) Parl Pap, xix, 22.
[74] CLRC. 7th Report. Felonies and Misdemeanours. Cmnd. 2659. May 1965, [24].
[75] Which happened elsewhere as well, e.g., in the effect on the rule that a trespass merges in a felony and so a civil claim was suspended until the felony was prosecuted: Matthew Dyson, 'The Timing of Tortious and Criminal Actions for the Same Wrong' [2012] CLJ 85, especially at 99, 110-112.
[76] *R v Pridmore* (1913) 8 Cr App R 198, 201.
[77] *R v Pridmore* (1913) 8 Cr App R 198, 203. See also *Short* (1932) 23 Cr App R 170
[78] *R v William Appleby* (1943) 28 Cr. App. R. 1; see also *Mohan v The Queen* [1967] 2 AC 187.

This process really began with the Criminal Law Act 1826,[79] permitting the trial of an accessory before the fact by deeming him a felon, even without the principal being found and convicted. The only remaining distinction was that the accessory could only be punished as an accessory.[80] At first, this would have made no difference since the penalties were normally the same, but statutes began to give defences like benefit of clergy to some participants but not others.[81] The gap was narrowed by the Criminal Procedure Act 1848, s. 1 of which treated accessories as if principals not only for trial process,[82] but for punishment as well. In due course, yet another consolidating statute, the Accessories and Abettors Act 1861, s. 1 repeated the 1848 rule.[83] The more familiar provisions in s. 8, originally only for participants in misdemeanours, were generalised for all indictable offences in 1977.[84]

The foundational writers, Hale, Blackstone and Foster, were writing about a rule of attribution, a rule which merely developed from the fact of presence to add the slight limit of the common purpose. Once that attribution was no longer necessary, the doctrine nonetheless continued to be referred to for a while, in a not uncommon example of lag in the foundations of a rule.[85] That lag is particularly evident in a number of criminal codes drafted by English lawyers in the nineteenth century. They focus on wrongs, not underlying rights,[86] and frequently failed to remove obsolete rules. James Fitzjames Stephen's Draft Code failed to remove a variety of obsolete offences, and did not always generalise effectively: he retained separate offences for the theft of wills, post letter bags, post letters and cattle.[87] Stephen did have a specific article dealing with common purposes, within his wider treatment of participants.[88] However, he does not explain how it was different to the surrounding articles on principalship or accessoryship and contrary to Andrew Simester's claim,[89] neither describes relevant principles in general, nor gives any explanation for having that separate article. It seems likely it was simply a hangover from when common purpose used to have substantive work to do in deeming accessories into principals. Similar drafts by Edward Dillon Lewis, and the Criminal Code Commissioners, also made clear that the criminal purpose was the limit of liability. Dillon's makes clear that parties to a common purpose are "deemed to have committed and be guilty" of all offences with the purpose,[90] which the Commissioners expressed in two separate articles, where D was "deemed to be equally guilty in respect of any act done by

[79] Section 9; picking up some slight threads from 1 Ann. statute 2, c. 9. S. 1; 4 Geo 1, c. 12, s. 3; 11 G. 1, c. 29, ss. 5-7; 43 G 3 c. 113, s. 5.
[80] And hence specific provisions on this, e.g., 7 & 8 G. 4, c. 29, s. 61 re larceny; 9 and 10 Vict c. 25, s. 10: malicious injuries by fire or explosive substances.
[81] William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanours*, vol 1, 1st ed, London, Joseph Butterworth and Son 1826, 25-26.
[82] See, e.g., *R v Hughes* (1860) Bell 242; 169 E.R. 1245; see later *Froggett* [1966] 1 QB 152, 157-8.
[83] Including an almost identical s. 2.
[84] While s. 1, Criminal Law Act 1967 had removed the distinction between felony and misdemeanour, it was not until the Criminal Law Act 1977, s. 65(7), Sch. 12 that the AAA 1861 was fully amended.
[85] Oliver Wendell Holmes, *The Common Law* (1881).
[86] Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45' (2000) 18 Law and History Review 397, 418: the comment is apt for the late nineteenth century codifications as well.
[87] See generally, Sanford H. Kadish, 'Codifiers of the Criminal Law: Wechsler's Predecessors' (1978) 78 Columbia Law Review 1098, 1126.
[88] Articles 35-39; article 38 is on common purpose.
[89] A Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 596-7.
[90] Edward Dillon Lewis, *A Draft Criminal Code of Law and Procedure* (London, C. Kegan & Co, 1879), art. 476, extending liability to offences which were necessary or probably consequences of the purpose, or offences which were incited.

one or more in pursuance of the purpose".[91] The Commissioners also had a specific provision treating it as murder in each member of a common purpose to commit an unlawful act with violent, tumultuous, or riotous manner against all opposition, and someone died in consequence. They clearly thought the common purpose approach separable from felony-murder, as well as being an example of the duplication common to these codifications.[92]

Andrew Simester has recently stated that it was *Jogee* that removed common purpose; that even in early 2016, prior to *Jogee*, S was liable for battery *via a common purpose*, where S and P decide to attack and P strikes the blow.[93] This is not so. Simester does not give any authority, and for good reason. Though this is what prosecutors might have thought or hoped, it was not the way legal doctrine worked. For the most part, proof of a common purpose would have provided evidence of mutual encouragement. In the rare cases outside that, until the nineteenth century, and perhaps in careless phrasing until 1967, common purpose might have done some substantive work, and made S a principal in the battery. But its heyday was more than a century earlier, and was given game by its utility to avoid rules of procedure.

By contrast, common purpose liability as a form of principalship has recently been emphasised in the concurring judgment of Keane J in the High Court of Australia in the case of *Miller*.[94] It was a classic case of an intoxicated group, one of who had been slighted in an earlier confrontation, going after a victim, and one of the group killed the victim. The case was a challenge to the Australian doctrine of Extended Joint Criminal Enterprise (EJCE) in light of the UKSC decision in *Jogee*. That EJCE doctrine "holds that a person is guilty of murder where he or she is a party to an agreement to commit a crime and foresees that death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention and he or she, with that awareness, continues to participate in the agreed criminal enterprise".[95] The majority in *Miller* affirmed this position. Since 1998, it seems each party is made a principal.[96] Keane J in *Miller* agreed, asserting that, because of authorisation and agency, each party to a common purpose is a principal and an agent and thus a principal, not an accessory.[97] The significant difficulty with the concept of authorisation aside, why principalship should extend to offences beyond the common purpose is not explained. Similarly unsupported and surprising was the fact that the editors of *Archbold* felt able to ask whether courts in England be swayed by *Miller* rather than *Jogee*.[98]

1.5 The content of complicity

English law now only draws a distinction between principal and accessory and the language of "aid, abet, counsel and procure" has given way to the two terms "assist or encourage".

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[91] Criminal Code Commissioners, 7th report (London, HMSO 1843): Arts. 16 and 17, and expressly not offences to which they were not privy or assenting.
[92] Ibid, art. 54.
[93] A Simester, 'Case Comment: Accessory Liability and common unlawful purpose' (2017) 133 LQR 73, 74-75, 76-77. Simester does not explain why any rule of common purpose existed, nor the substantive work it must have been doing, and hence does not explain whether in his example S would have been an accessory or a principal.
[94] See e.g., Beatrice Krebs, 'Accessory Liability: Persisting in Error' [2017] CLJ 7.
[95] *Miller*, [1].
[96] *Osland v The Queen* (1998) 197 CLR 316.
[97] *Miller*, [139], and [142], though that passage is somewhat contradictory.
[98] Archbold 2017, 19-31.

Any assistance or encouragement will be sufficient to establish the physical components of the complicity. Under *Jogee*, "[S] has encouraged or assisted the commission of the offence by [P]"[99] but there is no need for agreement between S and P.[100] This general statement pushes the work of defining and finding "assistance or encouragement" onto the jury.[101] Whether procurement still exists as a separate category of complicity seems not to be discussed as much today, and its absence from *Jogee* is an example of that silence. The vast majority of situations which could be covered by procuring would be covered either by assistance or encouragement. The exception appears to be where P was not "assisted", that is, P was not seeking that outcome and where there was no communication between S and P, so there could not be encouragement. An example is where S 'spikes' P's drink with alcohol, intending to tell P so P stays the night with S instead of driving home and committing an offence, but S does not get the chance to tell P.[102]

Once there is assistance or encouragement, it is still possible for S to avoid liability. First, in rare circumstances, S's contribution has become mere background; it has faded away to no longer satisfy assistance or encouragement. Second, it has always been possible for S to withdraw before the crime is committed, and the facts of *Jogee* did not call for discussion of this rule.[103] *Jogee* did recognise a specific defence, namely that "some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history".[104] There is no guidance as to what such events might be and whether this defence subsumes any other defences; for example, it might cover the deliberate change of victim of *Saunders and Archer.*[105] But while this rule is clear in principle, in practice it is hard to predict when a trial judge will be bold enough to accept a submission of no case to answer, or withdraw complicity from a jury.

Turning to the fault element in complicity, *Jogee* appears to roll four traditional stages into one step.

First, S's act which assisted or encouraged was deliberate rather than accidental. Of course, this requirement does not make much of a difference, because any accidental assistance would be very unlikely to satisfy the other fault elements.[106]

Second, S intended by his act to assist or encourage P, in the sense of some furthering of P's purpose. This does not mean that S must intend P to commit the crime. As the House of Lords said in *Lynch v DPP for Northern Ireland*, in which S drove P to where S knew P was intending to

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[99] *Jogee*, [8].
[100] *Jogee*, [95].
[101] See e.g., [11]-[12], citing *R v Calhaem* [1985] QB 808.
[102] See, e.g., *Blakely and Sutton v DPP* [1991] RTR 405; proving that S intended to bring about the relevant offence may be difficult.
[103] The burden to withdraw certainly increases with the contribution of S and the closeness of the crime to being committed: see, e.g., *R v O'Flaherty* [2004] 2 Cr App R 20 (CA), [60].
[104] *Jogee*, [97], see also [12], [32]-[37], [64]. Thus a small safety valve remains, narrower than the "fundamental difference" test where the level of GBH foreseen was fundamentally further from the likelihood of causing death that P's acts had: *R v Powell and Daniels; English* [1999] 1 AC 1.
[105] *Saunders and Archer* (1575) 2 Plowden 473; 75 ER 706.
[106] One exception being where S intended to assist P to commit a crime but intended the assistance to take place next week and only accidentally helped P now; S should arguably be liable there.

murder a police officer, S would have been liable for murder as a secondary party, but for a defence.[107] This was so "even though he regretted the plan or indeed was horrified by it."[108]

Third, S must intend to assist or encourage the commission of P's crime. The new test's apparent simplicity makes it very appealing for working with juries. *Jogee* simply states that "the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal",[109] supplementing this "existing facts" position, by adding a view to the future: "knowledge by D2 of any facts necessary to give the principal's conduct or intended conduct its criminal character".[110]

S need not intend, or believe, *in a specific crime* but only one from a class of similar crimes. *Jogee* endorsed *R v Maxwell*[111], a case where S knew that a violent terrorist attack was being contemplated without knowing specifically that a bomb would be involved. P's offence only needed to be "within the range of possible offences which [S] intentionally assisted or encouraged him to commit".[112]

Finally for strict liability crimes, S is liable if he assists or encourages P, intending to assist or encourage P in doing what is in fact a crime.[113] However, and very importantly, for crimes requiring fault, S must also intend P to act with whatever fault element is required for the crime.[114]

What does it mean that for a crime requiring fault, S must intend P to act with that fault? Most importantly, it offers the chance for greater specificity in what S is liable for. PAL had previously not distinguished in such a way, since D was liable merely for foreseeing that P might kill intending to kill or cause serious bodily harm. In English law, like many others, there are groups of offences which prohibit the same harm but where different offences censure different levels of fault in respect of that harm. Indeed, there are often lesser offences with strict liability in respect of the harm incurred, typically in the form of constructive liability from a fault element in respect of a lower level of harm. Thus, where S did not intend P to act with the required fault element, S is still liable for any strict, constructive, or objective liability offences which P committed. One grouping of offences is in respect of death, and there are others in road traffic offences, property offences, and some of the offences against the person.[115] For example, while S is not liable for murder if S did not intend to assist or encourage P to cause serious bodily harm to V with intent, S could still be liable for manslaughter. The court suggested that this would amount to the crime of unlawful act manslaughter and it appears that S is liable as an accessory, rather than as a principal.[116] Some

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[107] [1975] AC 653; duress was made available to a secondary party to murder, but this has since been removed: *R v Howe* [1987] AC 417 (HL).
[108] Ibid., 678 per Lord Morris.
[109] *Jogee*, [9].
[110] *Jogee*, [16].
[111] [1978] 1 WLR 1350 (HL).
[112] *Jogee*, [14].
[113] *Jogee*, [99].
[114] *Jogee*, [10]. It may be that this includes where S *believes* P will act with that fault. Certainly there is a strong argument that such a belief would be sufficiently culpable compared to intention.
[115] However, there is no requirement that offences are "laddered" in this way, and any existing ladders rarely have properly spaced "rungs".
[116] *Jogee*, [96]. S would have assisted or encouraged an unlawful act which caused death rather than having been a "cause" of death (since P made a free, informed choice to kill and thus broke any chain of causation between S and

have found it unpalatable that disinterested assistors will not be liable as accomplices to P's crimes which require fault, only to strict liability versions of the same offences; nonetheless, it is right in principle, and any arguments of policy which might exist are not be enough on their own.[117]

Requiring S to intend P to act with any fault required for the offence also affects innocent agency. If S deliberately manufactures a scenario to prevent P having the fault needed, such as in *Cogan and Leak* discussed above, S would have to be a principal or not liable at all. The better solution remains recognising principalship as bringing the physical components about and not seeing merit in linguistic distinctions.

More generally though, *Jogee* does not set out what S's mental state must be in relation to *whether* P will commit what is in fact a crime. Given the express rejection of foresight as being equivalent to intention in respect of *intending to assist or encourage*,[118] it might seem obvious that the court would not accept foresight of what P might do. However, the court did not say that when they could have done so.

For example, S might assist P, thinking that there are 99 things P might do which are lawful and one which is unlawful; S might even intend that, *if* P does the one unlawful thing, P should do so with any fault element required for the offence. It is doubtful that S is sufficiently culpable if P does the one unlawful thing instead of any of the other 99 lawful things S contemplated. This is also not a conditional intent that S have for that one thing to be done.

The court did not try to resolve this longstanding difficulty in S's view of P's offence. Instead, it appeared to push this question solely within the idea of "intentionally assisting or encouraging". The problem is live only in cases where S does not intend P to commit the offence, nor, which is often contiguous, that S intend the crime to happen. Such "disinterested assistors" do not appear in reported cases that often, but do occur in the supply of weapons or drugs and the principle is important. The leading case prior to *Jogee* had been *Johnson v Youden* in 1950: the accessory was required to "know the essential matters which constitute that offence".[119] There, since two of three solicitors accessories had not known of an extra, illegal payment, they were not accessories to the crime. The test was knowledge of the principal's plan to do the acts which constituted the crime, and an intention to assist in that plan. In practice, a belief about that mental state would also be sufficient, and would be necessary where the facts concerned the future, to avoid any linguistic difficulty about "knowing" the future, where "believing" is in any case sufficiently culpable. Partly under the influence of PAL, "knowledge" of whether the offence would be committed was interpreted in a series of cases from 1993 as being satisfied by mere recklessness.[120]

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the death: *Kennedy (No 2)* [2007] UKHL 38 [2008] 1 AC 269). It would have been even better if the UKSC had explicitly stated that there was an offence of reckless manslaughter (where D foresees the risk of death and goes on, unjustifiably, to take that risk). See recently, F Stark, 'Reckless Manslaughter' [2017] Crim LR 763.

[117] A Simester, 'Case Comment', 83-84.

[118] E.g., *Jogee*, [100].

[119] [1950] 1 KB 544, 546, 547.

[120] See, e.g., Dyson, "Might Alone Does Not Make Right: Justifying Secondary Liability" [2015] Crim LR 967, 970-972, and *Rook* [1993] 1 W.L.R. 1005 at 1009–1010.

The ideal position would be that S is liable if he believed that P *would* commit the relevant crime.[121] This was the position in *NCB v Gamble*,[122] a case approved as authority for S' ignorance of the criminal law not being relevant to his liability.[123] In *Gamble*, S knew P's coal lorry weighed too much to be driven lawfully on a public road but S passed the ticket to proceed to P. S being personally uninterested in what P did next, and P could have left the weighbridge without driving onto a public road. P was convicted, as was S. However, S *believed* P would commit the relevant offence, even if S did not *intend* that P would do so. An alternative interpretation of the case is that the court were employing some notion of oblique intention, which would later become recognised in *Woollin*,[124] discussed in section 3 below. That interpretation is difficult on the face of what the court said, but might be possible. It would nonetheless be rather ahistorical and could imply the *Woollin* direction was used far more than the very rare occasions it is in fact used. It is also unnecessary given the sufficient fault proposed by a test of belief. In addition, there are some cases that suggest a valid overriding alternative purpose will prevent S being liable, despite believing the crime will take place,[125] while the awareness of the possibility of a principal intending to commit the offence in the future might be enough for S to be liable,[126] and recklessness of a circumstance being present has been sufficient on a charge of procuring.[127]

In most cases, the prosecution will continue to allege that S intended P to commit the relevant acts and, in fact, intended P to commit the crime. Prosecutors thus present a simpler narrative for the jury, where the defendants were "in it together". The prosecution might attempt to lead evidence that S foresaw P might commit the crime in an attempt to persuade the jury that this meant S intended P to commit it.

1.6 The effects of the distinction between principal and accessory

Despite the mechanisms to avoid the distinction, four effects can still be felt.

Secondary parties need different levels of physical contribution and fault to the principal. These are typically lower levels, but where the full offence is one of strict liability, the accomplice will need to have the fault required for complicity. Thus, an accessory to the offence of "making" an indecent image needed to know the victim was under the age of 18. A recent attempt by the prosecution to argue everyone featured in the image or who facilitated making it was a principal to avoid this fault requirement failed; for example, it could not be said that in a wedding photograph, the mother of the bridge is in any real sense "making" the photograph, only the photographer is.[128]

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[121] This is even what Ormerod and Wilson recognised as a core minimum when they called, pre-Jogee, for the UKSC to retain a form of PAL in the form of a "criminal venture": W. Wilson and D. Ormerod QC, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 22-25.
[122] [1959] 1 QB 11.
[123] *Jogee*, [9], [99].
[124] *R v Woollin* [1999] 1 AC 82 (HL).
[125] *Gillick v West Norfolk and Wisbech AHA* [1986] A.C. 112
[126] *Attorney-General v Able* [1984] QB 795.
[127] *Carter v Richardson* [1974] RTR 314.
[128] *R v Maughan* (unreported, 29 July 2016, QBD), [2] per Spencer J in respect of s.1(1)(a) of the Protection of Children Act 1978.

Secondary liability also *derives from* a principal offence, an offence which must normally be proven and which S is normally liable for as well. That said, S can be liable for a *lesser* offence than P, as recently affirmed in *Jogee*;[129] S can be liable for a *greater* offence than P, where S has greater fault or P has a personal defence,[130] where S procured P's physical acts, performed without fault.[131]

In addition, there are some limitations on secondary liability which do not apply to liability as a principal. Some defences, such as excuses like duress, might not benefit a secondary party, while justifications would, perhaps because in justifications there is no underlying wrong to charge S with assisting or encouraging.[132] There is also limit in the rare instances of vicarious liability for crimes: such as in *Ferguson v Weaving*, where an employer could not be vicariously liable for his waiters' complicity in clients' consumption of liquor out of hours. [133]

Finally, there might be some difference in the way the case against different participants is presented. There may be different lengths of sentence, such as a longer tariff for murder even where the *sentence* is life, such that the person thought to have killed receives, for example, 25 years as a tariff and the accessory 18 years.[134] There are also other offences where there is a mandatory sentence for the principal but not for the accessory.[135]

2. Distinction 2: between an accomplice to one crime and to further crimes

Why is it some legal systems have accepted lower substantive components for liability for further crimes which are connected to a first? The problem is made particularly acute where the distinction between principal and accessory is blurred. In addition, lawyers have normally focused on why S was liable more easily than P, itself a valid question, but not gone on to explain why S should be liable for further crimes more easily than for a first.

Prior to *Jogee*, where P and S participated together in crime A, out of which P committed crime B, and S foresaw crime B, S was liable for crime B as an accessory, not as a principal. S had not assisted or encouraged crime B. Crime B was not part of S and P's common purpose. S had not intended to assist or encourage crime B. S had only foreseen the possibility of crime B. In short, it was easier to convict of crime B than crime A.[136]

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[129] [2016] UKSC 8, [96].
[130] *Howe* [1987] AC 417; *R v Bourne* (1952) 36 Cr App R 125.
[131] As in *Thornton v Mitchell* [1940] 1 All ER 339.
[132] It is difficult to be certain. Certainly, in *Bourne* (1952) 36 Cr App R 125, noted above, S was convicted when P had a duress-based defence.
[133] *Ferguson v Weaving* [1951] 1 KB 814.
[134] E.g., *Jogee* [2013] EWCA Crim 1433, [31].
[135] E.g., Road Traffic Offenders Act 1988, s. 34(5) on disqualification not being mandatory for an accomplice.
[136] It seems that reported cases always involved crime A being completed. It is not clear that S must ultimately be liable for crime A, but that seems to the paradigm situation, and arguably, the logic of its origins in a common purpose to commit crime A.

This 'parasitic' liability developed from common purpose but it is unclear precisely when.[137] The Privy Council decision in *R v Chan Wing-Siu* reported in 1985[138] is probably the first statement by a higher court making S liable for a crime outside the common purpose by this route. There was, according to Sir Robin Cook, a wider principle which:

> "turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal liability lies in participating in the venture with that foresight."[139]

In other words, foresight went from evidencing a common purpose to creating liability for crimes beyond that purpose. The explicit idea of 'authorisation' was soon dropped,[140] most likely because it made no sense to suggest that carrying on automatically 'authorises' all risks foreseen. *Chan Wing-Siu* was later expressly adopted as English law but was expressed in terms even further from 'authorisation': PAL would impose liability on S even where S actively discouraged P from committing crime B, which does not seem to be authorisation at all.[141] Andrew Simester has described PAL's role in this active discouragement situation as "sustain[ing] liability" but it is entirely unclear why there should be liability to begin with, which is then "sustained".[142] Rephrasing 'authorisation' into 'endorsement' does not provide any further justification in any context other than conditional intent (discussed below in Section 3).

The UK Supreme Court in *Jogee* disagreed with the reasoning underlying *Chan Wing-Siu*:

> "We respectfully differ from the view…that there is any occasion for a separate form of secondary liability such as was formulated in *Chan Wing-Siu*…there is no reason why ordinary principles of secondary liability should not be of general application."[143]
>
> "The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second is important…"[144]

But *Jogee* did not address what arguments there might have been for making it easier to convict for further crimes. Given the extensive academic criticism, there was ample material to do so. Instead the court focused on why *Chan Wing-Siu* was an unsupported extension of the law, and which, since it did not require sufficient responsibility or culpability from S, was causing significant uncertainty and unfairness.[145] And it could do because the rules were in the common

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[137] For a general account, see KJM Smith, *Modern Complicity*; Stark, *Housekeeping*; The present author's views formed the basis of counsel's submissions in *Jogee*, see e.g., Julian Knowles QC, 'Joint Enterprise after *Jogee* and *Ruddock*: What next?' (2016) 7 Supreme Court Yearbook 72.
[138] [1985] AC 168.
[139] Ibid., 175.
[140] *Hui Chi Ming v The Queen* [1992] 1 AC 34, 53.
[141] *R v Powell and Daniels; English* [1999] 1 AC 1, see especially 11 and 20.
[142] A Simester, 'Case Comment: Accessory Liability and common unlawful purpose' (2017) 133 LQR 73, 74.
[143] *Jogee*, [76].
[144] Ibid., [100].
[145] *Jogee*, [80]-[87].

law.[146] Notably, the extensive criminal trial experience of the bench in *Jogee*, particularly Lords Hughes and Toulson, was marshalled just before their retirements.[147]

Nor did *Jogee* engage with why complicity exists at all and it is sensible to start there. First, S might be liable for *causally contributing* to P's crime[148] but it is a very weak form of causation, below even 'but for' and is often expressly not required.[149] Second, the focus could be on S's culpability in intentionally assisting or encouraging P but there has been no significant effort to explain this.[150] Third, it cannot be said that S necessarily "authorised" P to act, as to do so would require a hierarchy with S above P and S actually authorising P to commit the relevant crime. In addition, while the most common allegation against participants to a crime is that they were all pursuing a common purpose and thus "authorisation" might be relevant,[151] no such authorisation need in fact be proved.

So what arguments are there in favour of a parasitic complicity rule? So far, no serious attempt has been made to establish S's responsibility for crime B. S did not assist or encourage crime B, nor could it be attributed to S as it was by definition outside the common purpose. That S merely participates in one crime has never been enough to show responsibility for a further separate crime committed by P.[152] Similarly, if it were true that multi-handed crimes escalate more than solo endeavours, but in the particular case that cannot be shown, why should S be responsible for any further crimes?

Arguments for PAL have instead focused on the fault required. To recap, S is made liable for those crimes he has not intended to assist or encourage, but only foreseen as possible. As will be discussed in the next section, this is the one area where modern English law has toyed with conscious risk-taking as being no different to intention. It, and other common law legal systems, have done so unpersuasively.[153] One of the only principled[154] arguments in favour has been put forward by Andrew Simester, with his typical care and skill. Simester suggested that by being party to a common illegal enterprise, S has passed through a gateway offence and normatively changed his/her position with respect to future crimes.[155] By then continuing with an enterprise with a foreseen risk of a further criminal offence, Simester argues S has *changed his or her*

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[146] Cf. legal systems with criminal codes derived from the nineteenth century drafts: *Uhrle v The Queen* [2016] NZSC 64 and similarly, South African: Jonathan Burchill, *Principles of Criminal Law*, Juta 2016, 477-491.

[147] See Matthew Dyson, 'Ever working in practice, but never in theory? The new English law of criminal complicity' [2017] Zeitschrift für die gesamte Strafrechtswissenschaft 232, Part V.

[148] *R v Mendez and Thompson* [2011] QB 876 (CA), [18] per Toulson LJ; generally, KJM Smith, *Modern Complicity*.

[149] In encouraging, no causation is required: *R v Calhaem* [1985] QB 808; causation is required when D is alleged to have brought about P's crime by endeavour, i.e., to have procured it: *Attorney General's Reference (No.1 of 1975)* [1975] QB 773, 779 per Lord Widgery.

[150] E.g., *Jogee; Ruddock* [2016] UKSC, [1].

[151] E.g., *R v Anderson; Morris* [1966] 2 QB 110 (CA), 118-119 per Lord Parker CJ.

[152] If this argument were indeed attempted, it would clearly be wrong. See, the recent example of DJ Baker, 'Unlawfulness's doctrinal and normative irrelevance to complicity liability: a reply to Simester' (2017) 85 Journal of Criminal Law 393, 402-411.

[153] Noted, e.g., by Richard Buxton, 'Joint Enterprise' [2009] Crim LR 233; Beatrice Krebs, 'Joint Criminal Enterprise' (2010) 73(4) MLR 578.

[154] Notwithstanding that many judicial and prosecutorial proponents have claimed to be. A principle must contain a clear, coherent and tested normative statement, not an assertion without evidence or reasoning.

[155] Adopted by the HCA in *Miller*, [34].

normative position with respect to P's crime.[156] This argument does not seem to supply any responsibility. Simester has merely stated it is "grounded in affiliation" rather than, as in normal complicity, in "contribution",[157] and to say participation in a common unlawful purpose is itself "a form of participation per se",[158] one assumes, participation in crime B. But this does not prove anything, it merely asserts. Even where a change of normative position argument focuses on culpability, it comes short. It is similar to the felony-murder rule abolished in 1957, and indeed has its roots in John Gardner's exploration of constructive liability in the late 1990s.[159] Gardner later clarified that he was not suggesting a substantive moral explanation, just to make something morally intelligible, not morally acceptable.[160] More importantly, as has been explained many times before,[161] S's moral position cannot simply become "outlaw" by agreeing to commit one crime. Indeed, no minimum criminality a defendant must have committed to is set, it is simply asserted that after a gateway offence, the lowest subjective fault element in the criminal law, foresight, is sufficient in respect of the further crime.[162]

The reality was that difficulties of evidence in multi-handed offences and, above all, policy concerns, caused the fault standard drop from an intention to assist and a belief that the crime would take place to mere foresight that it might. Lord Hutton came close to saying as much in *R v Powell and Daniels; English* when he justified the PAL rule by "practical concerns" and the "need to give effective protection to the public against criminals operating in gangs", both of which overrode "considerations of strict logic".[163] That is, PAL was illogical but said to be practical. The difficulty is how it protects the public if those who are not meaningfully connected to the murder can be easily convicted of the most serious crime that took place. Similarly, PAL needed only two people, not whatever a "gang" was or is. In the end, there does not appear to be much in favour of PAL, at least, not much unless one is willing to look past the traditional distinctions in our fault elements.

3. Distinction 3: between fault requirements

The third difficult distinction underpinning complicity is between different fault elements, in particular between intention, risk-taking and conditional intention. The particular problems in complicity highlight the lack of clear definition across English fault elements. What is perhaps most remarkable is that it is only in complicity those definitions have been being blurred. A significant part of the problem stems from failing to distinguish between principals and accessories.

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[156] A Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 584-588, 598-599.
[157] Ibid., 598.
[158] A Simester, 'Case Comment: Accessory Liability and common unlawful purpose' (2017) 133 LQR 73, 77.
[159] John Gardner, 'On the General Part of the Criminal Law' in Duff (ed.), *Philosophy and the Criminal Law* (CUP, 1998). Also picked up by CMV Clarkson, 'Context and Culpability in Involuntary Manslaughter: Principle of Instinct' in A Ashworth and B Mitchell, *Reforming the English Law of Homicide* (OUP, 2000). The point that constructive liability and common purpose cases are only superficially similar was made most neatly over a hundred years ago: DA Stroud, *Mens Rea* (London: Sweet & Maxwell, 1914), 186-7.
[160] John Gardner, *Offences and Defences: Selected Essays in the Criminal Law* (2007, OUP), 331.
[161] See, e.g., A Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 New Crim LR 232. See also Baker, 'Unlawfulness', 412-416, though Baker's suggestion to use the Serious Crime Act 2007 is surprising and highly regrettable.
[162] See recently, the masterful dissent of Gageler J in *Miller v The Queen* [2016] HCA 30, [120].
[163] [1999] 1 AC 1 (HL), 25.

Intention[164] covers mental states ranging from desiring or committing to a result, through to, in rare cases, foreseeing it as virtually certain when it is virtually certain. However, English law is fairly 'rough and ready:' in almost all cases, the finder of facts will not be given any legal definition for intention, but merely be invited to consider all the evidence.[165]

While much academic work has been undertaken to delimit the concept of intention, none has achieved complete acceptance. D need not "desire" an outcome to intend it, but alternatives like whether D would think he had failed if the outcome did not come about[166] are still not complete answers.[167] Distinctions that are recognised in some legal systems, such as between an intention to do *z* and an intention that necessarily encompasses *z* (such as shooting through a window to kill a target: the window will be smashed) are known in English law but are not normally called upon in practice. In rare instances, simply telling a jury to convict if they are sure that D intended the prohibited result will not work because the facts confuse the jury's sense of what "intention" is. After much trial and error,[168] English law reached the position that a trial judge can give the jury the *choice*[169] to convict in cases where D foresaw the outcome as virtually certain and that outcome was in fact virtually certain. Such foresight was, according to the facts of the case, sufficient to find intention.[170] This test was confirmed by the House of Lords in *Woollin* where the defendant had thrown his three-month old son down onto a hard surface, killing him, but it was difficult to think D had 'intended' to kill his son.[171] Normally the jury infer intention from other evidence, including evidence of what he foresaw might happen from his actions before he went on to perform them. That is perfectly permissible, and happens in charges of intentional crimes all the time. The prosecution would not have to show the foresight of a virtual certainty that constitutes *Woollin*'s oblique intention.[172] The jury is simply asked whether they find that each defendant intended X (whatever component of liability X is), a decision the jury will make in light of what the jury think of his state of mind, including what they might be more sure of. The jury might be more sure of what D foresaw, and that might be a stepping stone to working out what D intended. In the rare cases it is simply not possible for the facts to fit within a purpose model, a judge can give the

[164] The literature is extensive, see, e.g., JC Smith, 'Intention in Criminal Law' (1974) 27 CLP 93; Lord Goff, 'The Mental Element in the Crime of Murder' (1988) 104 LQR 30; G. Williams, 'The Mens Rea for Murder – Leave it Alone (1989) 105 LQR 387; A. Duff, Intention Revisited in: DJ Baker and J Horder (eds), *The Sanctity of Life and the Criminal Law*, Cambridge 2013.

[165] Criminal Justice Act 1967, s. 8; Maddison, Ormerod, Tonking, Wait, *Crown Court Compendium: Part 1* (Judicial College, May 2016), [8.1]-[8.2], [8.11].

[166] As explored in Antony Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford 1990).

[167] E.g., John Gardner and Heike Jung, 'Making Sense of Mens Rea: Antony Duff's Account' (1991) 11(4) OJLS 559.

[168] See, e.g., Matthew Dyson, *R v Hancock and Shankland* (1986) in P. Handler et al. (eds), *Landmark Cases in Criminal Law* (Hart, 2017).

[169] *R v Matthews and Alleyn* [2003] 2 Cr App R 30 (CA).

[170] Jeremy Horder, 'Intention in the Criminal Law – A rejoinder '(1995) 58 MLR 678, 687: directions like this provide "moral elbow room".

[171] *R v Woollin* [1999] 1 AC 82. See generally, Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge 2010), Part II.

[172] Cf. David Ormerod and Karl Laird, 'Jogee: not the end of a legal saga but the start of one?' [2016] Crim LR 539, 544-548 and Beatrice Krebs, 'Hong Kong Court of Final Appeal: Divided by a Common Purpose' (2017) 81 Journal of Criminal Law 271, 274.

Woollin direction and leave it to the jury to decide if D foreseeing a virtual certainty of X was equivalent to intention.

In recklessness, unless specified otherwise, D must foresee a risk and go on, unjustifiably, to take it.[173] The practical question is for the jury: what did D foresee and was it justified to then do what he did. The theoretical questions of what level of risk and what justifications could have existed seem never to trouble the courts. The objective limb is under-theorised, in part because there are other general and well-known *defences* which cover some of the same grounds of justification, like self-defence or acting to prevent crime, and the residual cases are filtered out by prosecutorial discretion.[174]

English law does not recognise advertent risk-taking as a form of intention. Some legal systems recognise foreseeing a risk and a volitional element of willingness to take that risk as a form of intention, called *dolus eventualis*,[175] but has been rejected in England throughout the twentieth century. In England, intention requires more than a mere willingness to take a foreseen risk, and recklessness does not require that willingness, only that it was foreseen and taken; in any case proving that willingness seems remarkably difficult in practice.[176] Recognising *willing risk-taking* as a form of intention across the criminal law would significantly expand the range of English intentional offences while rendering crimes of recklessness vestigial. Attempts to insert such a standard only into complicity, as Keane J demonstrated in the second introductory quote, are as fascinating and surprising as they would be unprincipled and anomalous.

Rather than see risk-taking as part of intention, English law has long accepted a choice made in anticipation of future condition as a form of intention. This was the core of an agreement to steal, poach or riot "against all opposers" and is not novel. While still under-theorised,[177] it has the potential to be a more effective test than *dolus eventualis*. This is especially because we all willingly take risks every day but they should not lead to criminalisation. For example, driving a car typically entails foreseeing that you might kill but you accept that risk because you think it is small (and, if processed through recklessness, it would normally be a reasonable risk to take). If handled through conditional intention, you are not liable as you did not decide to drive *even if* that meant you killed, or to kill *only if* necessary to drive. Conditional intention is cleaner for a particular reason: it accepts that all volitional mental states about the future have conditions, and responds by requiring a choice demonstrating that the condition gave way to the defendant's purpose. If the defendant intended *z* he is liable. If the jury are convinced D would not ordinarily intend *z* they can only convict if they find that D made the choice to that *z* should happen as a

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[173] Restated in *R v G* [2004] 1 AC 1034, [41] per Lord Bingham, adopting the Law Commission's definition in Law Commission Report No 177, *Draft Criminal Code for England and Wales* (1989), cl. 18 (c). Cf. objective test in *R v Caldwell* [1981] 1 All ER 961 applicable between 1981 and 2003.

[174] See Stark, *Culpable Carelessness*; Matthew Dyson, 'Might does not make right: justifying secondary liability' [2015] Crim LR 967, 978-9, 983-4.

[175] Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24 OJLS 99, 111: 'taking the possible criminal result of one's conduct into the bargain and approving of it'.

[176] The rare suggestions to do so have not been successful: Antje Pedain, 'Intention and the terrorist example' [2003] Crim LR 579, picked up by Beatrice Krebs, 'Mens rea in joint enterprise: a role for endorsement?' (2015) 75 CLJ 480.

[177] For a recent effort, see John Child, 'Understanding Ulterior Mens Rea: Future Conduct Intention is Conditional Intention' (2017) 76 CLJ 311.

means to the intended thing, *y*.[178] Merely foreseeing and taking a risk is not the same as deciding and expressing your volition that *z* should happen in order for *y* to happen. There appear to be at least five ways for S to argue that he had foreseen *z* (here, the risk of death) but that he did not conditionally intend *z* in order to achieve his purpose *y* (here, robbery).

1. No need to link the risk foreseen (*z*) to his purpose (*y*)
Example: S thought the chance of *z* was too small to be linked to S's purpose, thus the risk was simply dismissed. S might or might not have taken steps to minimise the risk (such as by telling P not to use weapon to cause harm)

2. Could not link *z* to *y*
Example: S had foreseen *z* but had forgotten about it before considering whether *z* would be relevant to *y*.

3. Failed to link *z* to *y*
Example: S did not realise two contradictory things, akin double-booking in one's diary; a claim of error or stupidity.

4. Focus on *y*
Example: possibility of *z* not relevant, since S is focused entirely on *y* and does not go on to have any volition about other factors.

5. Focus on a purpose greater than *y*
Example: the underlying goal denies the relevance of other possibilities; for instance, focusing on using the money from the robbery for a new car and thus not thinking about the risk foreseen.

This analysis works well for strict liability crimes but the problem is much more complex in crimes requiring fault. S must *intend* to assist P, *intending* P to have the required fault. Either (or both) of these intentions could be conditional, and the intentions need not have the same conditions. However, there is a further complication. Notice that many of the relevant risks in complicity are what P will do, as compared to what S himself might do. One position would be to simply say one cannot "intend" another's actions, since an intention can only relate to one's own action. This has rigour in principle, but is more fundamentally a problem of intention, and English law's loose definition of it. Addressing this concern would require a suite of new terminology to complicate the trial process, and in practice, nothing significant is lost by using intention about another's actions. Most of the time conditional intention will not be difficult, but it is possible for S to intend to assist P, but only for P to commit a crime if a condition is met, and thus S cannot, at the point of acting, be said to have crystallised all his intentions out of conditions.[179]

[178] The law should also require that the condition actually be met. For example, where there is a condition in S's plan, that an assassin (P) only kill V if V is being unfaithful to S; V is not cheating, but the assassin kills V anyway, S should not be liable. That could be reasoned as the condition not having been satisfied, or as the decision to kill V even without that satisfaction being an overwhelming supervening event, similar to *Saunders and Archer*.
[179] For example, S knows that P should only kill V if given the order to do so by Q. S drives P to the location of the potential murder. S does not intend P to kill unless Q gives the order. Cf. generally, Simester, 'Case Comment', 84-86.

In practice, the temptation is simply to ask the jury whether D intended z happening "if needed". However, the question the jury should be asked is:

Did D make a choice that y *should happen even if that meant* x*, a thing D did not otherwise intend, must happen?*

Returning to Keane J's introductory quote on accepting a risk. If Keane J meant a case of conditional intention, he was on all fours with *Jogee*. If Keane J meant what Australian EJCE requires, namely, foreseeing a risk and continuing with conduct, there was no "acceptance" demonstrated. If there was acceptance, but no demonstration of acceptance *towards a purpose*, it was not conditional intention, and Keane J was regressing one part of Australian law to the nineteenth century, or inserting *dolus eventualis*. The majority's more nuanced position merely held the law was not obviously against liability in such a situation,[180] and so does not provide any more clarity.

A similar set of remarkable assumptions seems to underlie the decision of the court in *Chan Kam Shing*,[181] comprising Ribeiro PJ, Ma CJ, Tang PJ, Fok PJ and Hoffmann NPJ. The case concerned a triad member who was ordered to 'chop' members of a rival group, but arrived at one attack after fellow gang members had fatally injured V. He was convicted of murder based on his participation in a joint enterprise to 'chop' their rivals. The court rejected a challenge after *Jogee* to a PAL conviction. First, Ribeiro PJ held that common purpose was a separate set of rules to those deciding when a party was a principal or an accessory through the rules of complicity. No evidence for where the rules came from, or why they were separate, was given. It was similarly unclear why, even if, for some unexpressed reason, parties to a common purpose should be principals, so too should parties to such a common purpose be principals in crimes beyond that common purpose which are not contributed to but are foreseen.[182] The assertion that conditional intention would exculpate a defendant who merely foresaw P committing a further crime (crime B) really does put the cart before the horse. Why was that defendant inculpated with respect to crime B to begin with? D was not responsible for crimes outside the common purpose, and nowhere else in English law at least is mere foresight sufficient for culpability for serious offences.

4. Conclusion

This article set out to examine three distinctions within participation: between principal and accessory, between a first crime and further ones and between intention, risk-taking and conditions. Each of these has been drawn in different ways, at different times, but the common law has shown a remarkable willingness to get itself into trouble by ignoring each distinction, or its consequences. In fact, we make sensible distinctions between those three things: they express underlying values, approaches and shed light on what is thought persuasive to lawyers and laypeople.[183] Is there a greater truth in labelling conduct as an "enterprise" and thus outside the

[180] *Miller* [2016] HCA 30, [38].
[181] *Chan Kam Shing* [2016] HKCFA 87.
[182] Ibid., [34] and [40].
[183] A final normative distinction meriting further work is when the law should we *aggregate* the conduct of individuals (e.g., Public Order Act 1986, ss 1 and 2), and when should we *attribute* the conduct of one person to another.

normal rules of principals and accessories and fault? That is what Keane J did, as highlighted by the first introductory quote to this article, and it appears to be Andrew Simester has suggested. The most likely answer is no, labelling events as an “enterprise”, and convict for “participation” in it does not reveal any greater insight into legal history or legal theory. It is nonetheless fascinating that that approach would have appealed to distinguished lawyers. The article has attempted to explore what distinctions the common law has made, even incompletely, and the consequences of doing so. It has shown the advantages of properly and universally distinguishing between principals and accessories for the purpose of liability. That distinction should be maintained, and its consequences only removed where truly necessarily, not just where it is convenient to paper over it. By thus fully forming the first distinction, we avoid blurring the second. In making it easier to convict a participant of further crimes that were outside the common purpose, English law used to ignore a distinction within participation in a way that was anomalous and unsupported; it no longer does so. By both these distinctions, we also avoid tacitly wiping away the third distinction, between intention and risk-taking. Indeed, by strengthening our understanding of that third conceptual category, and requiring logic not prosecutorial practicality, we might better resist the temptation to make further principals without distinction.