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Ever working in practice, but never in theory? The new English law of criminal complicity

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I. Introduction

The law of complicity, or secondary liability, is responsible for a large number of convictions and represents the pinnacle of one person's responsibility for the actions of another. That law in England and Wales has recently undergone significant and somewhat surprising changes. In February 2016, the UK Supreme Court and the Judicial Committee of the Privy Council decided the conjoined cases of *R v Jogee* and *Ruddock v The Queen* henceforth referred to as *Jogee*[1]. The Supreme Court is the highest court in the UK and Judicial Committee of Privy Council is the highest UK court which still receives appeals from any British commonwealth countries, with *Ruddock* itself being on appeal from the Court of Appeal of Jamaica), *Jogee* changed the structure and substance of complicity, as well as the perception of law. In each case, there is an unresolved tension between what the English are using the law to do and what theories can justify it.

1 [2016] UKSC 8; UKPC 7; [2016] 2 WLR 681; [2016] 2 All ER 1; [2016] 1 Cr App R 31.
See generally, *Matthew Dyson*, Shorn-off complicity (2016) CLJ 196; Sir *Richard Buxton*, Jogee: upheaval in secondary liability for murder [2016] Crim LR 324; with responses: [2016] Crim LR 638 and 642. *David Ormerod QC/Karl Laird*, Jogee: not the end of a legal saga but the start of one? [2016] Crim LR 539; *F. Stark*, The demise of "parasitic accessorial liability": substantive judicial law reform not common law housekeeping (2016) 75(3) CLJ 550; *Andrew Simester*, Accessory liability and common unlawful purposes (Case Comment) (2017) 133 LQR 73.
On the law prior to *Jogee*, see generally, e.g., *C.M.V. Clarkson*, Complicity, Powell and manslaughter [1998] Crim LR 556; *J.C. Smith*, Criminal Liability of Accessories: Law and Law Reform (1997) 113 LQR 453; *Andrew Simester*, The Mental Element in Complicity (2006) 122 LQR 578; *Graham Virgo*, The doctrine of joint enterprise liability (2010) Archbold Review 6; *Beatrice Krebs*, Joint Criminal Enterprise (2010) 73(4) MLR 578; *William Wilson/David Ormerod*, Simply harsh to fairly simple: joint enterprise reform [2015] Crim LR 3; *Ben Crewe* et al., Joint enterprise: the implications of an unfair and unclear law [2015] Crim LR 252.

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First, *structurally*, *Jogee* removed a route to liability which had been established for 30 years. That route, best known as "Parasitic Accessorial Liability" (PAL), set lower thresholds of liability to convict for a second crime which arose out of a common purpose to commit a first. In particular, there did not need to be any assistance or encouragement to the second crime, and the accessory need only have foreseen the crime as possible. PAL was difficult to justify but had seemed to be firmly entrenched in the criminal law over the last 30 years. It was particularly useful for convicting groups for the most serious offence committed by any one of them. With PAL removed, trials will be simpler, relying on standard complicity alone. English law is also easier to explain and justify.

Second, *substantively*, the test for complicity liability was adjusted and simplified. On the physical elements of complicity, the court made minor changes but reinforced that the questions were strictly for the jury to decide. On the fault level in complicity, the court changed the law's emphasis. The formal fault requirement in complicity in *Jogee* focused on "intention to encourage or assist," including knowledge of the facts making the conduct criminal, rather than, as previously, there being a *separate* test of what mental state the Secondary party (S) had about the Principal (P) committing the crime. The new tests might well be easier for juries to use in practice. Nonetheless, it is not clear that the normative foundations for complicity, or the concepts of fault which underpin it, are sufficiently strong to bear the weight they must.

Third, *in terms of law reform*, *Jogee* challenges some accepted wisdom about how the law in England should be changed and why. The case is surprising for a number of reasons but particularly in how it relates to English law's conventions on judicial development of the law. English law manages to rely on centuries old cases while simultaneously developing and adapting the law to suit the perceived values of society. Whether it does so according to any single convincing theory or norm is certainly open to doubt.

The overarching message is that English criminal law seems to be practically effective rather than driven by intellectual purity. The first step to showing this is to set out two groups of underlying principles in English criminal law, participation and fault, in order to put *Jogee* in context.

II. Underlying principles and rules

The facts of *Jogee* and *Ruddock* are good examples of what the law of complicity has to deal with. Together, the two sets of facts covered a large part of the work of doctrines of complicity and provided the launchpad for the combined panel of five judges to review and alter that law.

Jogee was "egging [P] on" to do "something" at around the time P fought and ultimately fatally stabbed the victim; the only witness who gave evidence was the deceased's girlfriend. P and Jogee were convicted of murder: Jogee on the basis that, at the very least, he was an accomplice to an attack on the victim and had foreseen that P might stab V with the intent to cause serious harm.

Ruddock was prosecuted in Jamaica on the basis that he and P had carried out a common criminal purpose to steal a car: a robbery which had included a further outcome, the death of the car's owner. The judge directed the jury that they could find this common intention where each defendant "knew that there was a real possibility the other defendant might have a particular intention and … went on to take part in [the offence]." Ruddock gave only an unsworn statement from the dock, saying he had had no knowledge of the murder and was merely getting a lift in the car; the police alleged that Ruddock had made other statements to them suggesting that he had been part of a robbery.

Two points stand out. In neither case was there strong eye-witness evidence: in *Jogee*, there was one witness who could not see or clearly hear what Jogee did; in Ruddock, there were alleged statements that Ruddock claimed had been induced by the police using force against him. And in neither case did the defendants themselves give detailed evidence; the rules on liability do not encourage much evidence when foresight was the test of fault. With this factual context in mind, we turn now to the principles underlying complicity.

1. Participation in crime

English law recognises distinctions between parties to a crime for some reasons of substance but not in terms of evidence of procedure[2]. There is no separate crime of "secondary participation in an offence"[3]: an accomplice is convicted as if he were a principal. Finally, there may also be a moral difference between principal and accessory that will vary with the facts. A principal may well be the more culpable participant, but perhaps not. A 'mob boss' might be more culpable than the less intelligent thugs he sends to do his bidding. Any such differences do not need to be dealt with at the stage of liability but can instead be dealt with at the sentencing stage.

2 No longer so in some jurisdictions: e.g., Victoria/Australia: see ss. 323–324, Crimes Act 1958, as amended by No. 63/2014.

3 *Gould & Co v Houghton* [1921] 1 KB 509 (King's Bench Division); *Surujpaul v R* [1958] 3 All ER 300 (Privy Council: PC).

Historically, the law drew a distinction between participants only for felonies, one of the three types of crimes. Prior to 1967, the classes of crime were treason, misdemeanour, and felony. In respect of treason, all participants were principals, since it was such a serious crime that no involvement was minor[4]; similarly all participants in misdemeanours were principals, since, by the opposite reasoning, misdemeanours were so minor as not to merit further distinctions. Felonies were different. Felonies were serious crimes, short of treason, and participants were divided into principals and accessories. In simple terms, principals brought about the physical components of the offence, accessories assisted or encouraged. For felonies, an accomplice could not be prosecuted until a principal had been convicted or outlawed or died. This meant that without a principal, known accessories ##Symbol mit Code:F02D## even to a common purpose ##Symbol mit Code:F02D## would not have been able to be convicted without attributing the principal's actions to them[5]. A special rule existed for 'common purpose' offences: participants who assisted while present and typically while being part of a common purpose with the principal to commit a crime[6], were made principals "in the second degree," in part in order to avoid the procedural limits on prosecuting accessories. All these distinctions fell away 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 statute which had previously only applies to misdemeanours, the Accessories and Abettors Act (AAA) 1861, as amended:

> "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 main thing that has changed since 1861 is drafting style: perhaps most obviously, the ideas of "aid, abet, counsel, or procure" are commonly expressed today as "assistance or encouragement".

The AAA 1861 was a procedural statute, enshrining earlier rules permitting all participants to be treated the same for trial and sentencing. This certainly makes trials simpler to organise and deals with potentially difficult cases of evidence. There are cases where it is unclear what role a participant played, whether principal or accessory, and the AAA permits that party to be convicted and sentenced without answering this question (indeed, a jury might disagree

4 Foster, *Crown Law* (3rd ed., 1792), 347.

5 Additionally, an accomplice could not be convicted of a more serious offence than the principal; see further Blackstone, 4 Commentaries Ch. 3, IV.

6 Ibid., 349, 351.

amongst themselves what role D played[7]). Nonetheless, the distinction between accessory and principal does have four *substantive* implications.

First, secondary liability *derives from* a principal offence, an offence which must normally be proven and which S is normally liable for as well. That said, if P is liable, S can be liable for a *greater* offence than P[8], and S can be liable for a *lesser* offence than P, as recently affirmed in *Jogee*[9]. It is slightly more complicated where P is not liable at all since in some circumstances S can still be liable. One difficult situation is where P has performed the physical acts of a crime[10] but lacked the fault required for the offence. S can be liable either through treating P as an innocent agent[11] or for *procuring P's commission of the physical acts that constituted the crime*. This is a strange extension of the law, dealing with situations in which it is said you cannot use another as an innocent agent, most famously having sexual intercourse[12] or driving 'through' another person[13]. Finally, P might not be liable because he has a defence which applies only to him, such as duress; in such circumstances S could still be liable[14]. It is possibly surprising that S is liable even though P is not, because P lacks fault or has a defence, but it seems a rare situation in practice and at least the physical components of the crime have taken place[15].

Second, and importantly in practice, even where the full offence is one of "strict liability", that is, where at least one physical element that has no corresponding fault element[16], the accomplice will need to have the fault required for complicity. A

7 *R v Giannetto* (1997) 1 Cr App R 1 (Court of Appeal: CA).

8 *Howe* [1987] AC 417 (House of Lords: HL).

9 [2016] UKSC 8, [96].

10 As in *Thornton v Mitchell* [1940] 1 All ER 339 (Division Court: DC): slowly reversing a bus around a corner while relying on the conductor's instructions was not dangerous driving and hence the conductor's poor instructions could not make him liable as a secondary party.

11 E.g., *Michael* (1840) 9 C & P 356 (Court of Crown Cases Reserved).

12 *R v Cogan and Leak* [1976] QB 217 (CA): tricking a friend into thinking S' wife consents to sex with the friend when she does not.

13 *R v Millward* (1994) 158 J.P.N. 715 (CA): attaching a trailer which S knew was dangerous but the driver did not.

14 *R v Bourne* (1952) 36 Cr App R 125 (Court of Criminal Appeal: CCA): husband forces his wife to have sexual intercourse with a dog; the wife had the duress-based defence of marital coercion but the husband was liable as a secondary party to a sexual offence.

15 There are also some procedural rules relating to trial process and proof: e.g., evidence of the principal's acquittal in a different trial is not admissible in defence of the accomplices at their trial: *Hui Chi Ming* [1992] 1 AC 34 (PC).

16 *R v Lemon* [1979] AC 617 (HL), 656 where Lord Edmund-Davies quotes with approval one of the leading criminal law textbooks, *Smith and Hogan*'s Criminal Law (then, the 4th edition from 1978, p. 79). For strict liability generally, see *Andrew Simester* (ed), Appraising Strict Liability, Oxford

recent example concerns the offence of "making" an indecent image: the prosecution tried to argue that not only the cameraman was the "maker" but also anyone featured in the image or who facilitated the making of the image; this argument was rejected, and only the cameraman was the maker of it[17].

Third, there are some limitations on secondary liability which do not apply to liability as a principal. There may be some limits as to which defences apply to a secondary party, one possibility being that that excuses (like duress) do not benefit a secondary party whereas justifications (like self-defence) do, perhaps because in justifications there is no underlying wrong to charge S with assisting or encouraging[18]. There is also limit in the rare instances of vicarious liability for crimes. Some crimes can entail vicarious liability for the employer; however, even for such a crime, a person cannot be vicariously liable for an employee's *complicity* in that crime[19]. An example is *Ferguson v Weaving*, where an employer could not be vicariously liable for the waiters' complicity in the client's consumption of liquor out of hours.

Fourth and finally, there might be some difference in the way the case is presented in order to persuade the jury (or magistrate(s), if a summary trial in a lower court) during the trial or, indeed, that become relevant at the sentencing stage. 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[20]. There are also other offences where there is a mandatory sentence for the principal but not for the accessory[21].

When a distinction between principal and accessory does have to be drawn for one of these four reasons, the principal is the person (or persons) who brought about the physical components of the offence. While it has sometimes been said that the defendant (D) need only "contribute" to the physical components of the crime, this must be interpreted as a high level of contribu-

2005; *Andrew Ashworth*, Should Strict Criminal Liability Be Removed from all Imprisonable Offences?, in: *Andrew Ashworth*, Positive Obligations in Criminal Law, Oxford 2013, and *J. Horder*, Strict Liability, Statutory Construction and the Spirit of Liberty (2002) 118 LQR 458.

17 *R v Maughan, Price and Connors* (unreported, 29 July 2016, Queen's Bench Divison: QBD), [2] per Spencer J in respect of s.1(1)(a) of the Protection of Children Act 1978.

18 Some of this is theoretical but it is certainly the case that in *Bourne* (1952) 36 Cr App R 125 (CCA), noted above, S was convicted when P had a duress-based defence.

19 E.g., *Ferguson v Weaving* [1951] 1 KB 814 (DC).

20 These were the sentences for the principal and Jogee himself, prior to the Supreme Court decision: [2013] EWCA Crim 1433, [31].

21 E.g., if disqualification from driving is mandatory for the principal, it might not be so for the accessory: Road Traffic Offenders Act 1988, s. 34(5).

tion[22]. If more than one person carries out or brings about the relevant physical elements, they can both be principals; and if they both contribute to the completion of the offence, they are joint principals.

- This might be easy. *D1 and D2 each stab V at the same time, and both wounds contribute to V's death*. They are joint principals.
- Similarly, *D1 prevents V escaping out of a door, and D2 then kills V*. D1 is a secondary party and D2 is the principal.
- *D1 holds V, and D2 stabs V*. D1 is an accessory and D2 is the principal.
- *D1 holds a knife out, and D2 pushes V against the knife*. D1 is an accessory, D2 is the principal.
- But what if *D1 pushes the knife forward as D2 pushes V onto the knife?* D1 and D2 might be joint principals but it is hard to tell for sure.

A slight forward movement by D1 might be enough to turn him from principal to accessory. There appear to be no principles on which to base the distinction; it comes down to a judgment on the degree of physical contribution.

English law similarly has not developed an agreed set of principles explaining why an accomplice is liable at all. Given their procedural history, courts simply have not had to decide, and commentators have not found themselves able to agree either. First, S might be liable for *causally contributing* to P's crime[23] but it is a very weak form of causation, below even 'but for' and is often expressly not required[24]. Second, the focus could be on S' culpability in intentionally assisting or encouraging P but there has been no significant effort to explain this[25]. 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. 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[26], no such authorisation need in fact be proved.

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22 In *Gnango* [2012] 1 AC 827 (Supreme Court: SC), [127] per Lord Kerr.

23 *R v Mendez and Thompson* [2011] QB 876 (CA), [18] per Toulson LJ; *K.J.M. Smith*, A Modern Treatise on the Law of Criminal Complicity, Clarendon 1991.

24 In encouraging or counselling another, no causation is required: *R v Calhaem* [1985] QB 808 (CA); 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 (CA), 779 per Lord Widgery.

25 E.g., *Jogee; Ruddock* [2016] UKSC 8 per Lords Toulson and Hughes, [1]: "He shares the physical act because even if it was not his hand which struck the blow, ransacked the house, smuggled the drugs or forged the cheque, he has encouraged or assisted those physical acts. Similarly he shares the culpability precisely because he encouraged or assisted the offence."

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

2. Concepts of Culpability

The second foundational issue concerns the components of liability and, in particular, the concepts of fault used in English criminal law. What follows is a significant simplification of English law, which almost revels in practical context-driven solutions rather than systematic answers[27].

First, in the traditional core of the criminal law, the offences against the person, sexual offences, homicide, and property damage, the defendant is normally liable only if he intended, or was reckless about, his conduct or a prohibited result. Intention or recklessness may well be accompanied by other mental states, particularly about one aspect of the physical components of a crime, circumstances. Examples such other mental states include foresight, suspicion, belief, knowledge, none of which are fully defined in English law. In general terms, there is an increasing scale of personal certainty from foresight to knowledge, capped with some additional elements like justification and truth in knowledge. That said, perhaps half[28] of all English criminal offences are offences of strict liability.

Intention[29] 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. Prior to the development of the modern criminal law from around the 1960s, the test was different. In particular, there was a long period when English law used an objective standard based on what was 'natural and probable' and not what D

27 For instance, there is a modern trend to think that any one fault element should have the same meaning across all offences (e.g., *Findlay Stark*, It's only Words: On Meaning and Mens Rea (2013) 72 Cambridge Law Journal 155), but that is precisely contrary to the traditional common law view, which allowed for flexibility across different offences.

28 *Andrew Ashworth*/*Meredith Blake*, The presumption of innocence in English criminal law [1996] Crim LR 306, 308–309. This study was undertaken in 1995, but mirrored one undertaken twenty years earlier, showing at least 7200 offences. The Law Commission for England and Wales has suggested that between 1997 and 2010 a further 3000 offences were added to the statute book, *Law Commission* Consultation paper no 195. *Criminal Liability in Regulatory Contexts*, London 2010, para 1.17. But see especially *James Chalmers*, Frenzied Law Making: Overcriminalization by Numbers (2014) Current Legal Problems 483. See also *Nicola Lacey*, Historicising Criminalisation: Conceptual and Empirical Issues (2009) 72 Modern Law Review 936.

29 The literature is extensive, see, e.g., *J.C. 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: *D.J. Baker*/*J. Horder* (eds), The Sanctity of Life and the Criminal Law, Cambridge 2013.

himself actually intended[30]. Today, the starting point is the Criminal Justice Act 1967, s. 8:

> "A court or jury, in determining whether a person has committed an offence,—
> (a)shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; …"

Instead, all the evidence available would be appropriate for finding intention. While much academic work has been undertaken to delimit the concept of intention, none has achieved wide 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[31] are still not complete answers[32]. Divisions 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) are known but are not often called upon in practice.

There is one further layer of intention which has the potential to excite in theory, but in practice is almost never used, and that is *oblique intention*. 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[33], English law reached the position that a trial judge can give the jury the choice to convict in cases where D foresaw the outcome as virtually certain and that outcome was in fact virtually certain. This test was confirmed by the House of Lords in a case called *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[34]. It was held that the jury *may*[35] decide that such foresight was, according to the facts of the case, equivalent to intention[36]. This is a rejection of an objective definition of intention

30 4 Bl Comm 200; *R v Dixon* (1814) 3 Maule and Selwyn 11 (Court of King's Bench); 105 ER 516; *Woolmington v DPP* [1935] AC 462 (HL), 472–3; even once the tide had turned against this approach, there was a temporary restatement of it in *DPP v Smith* [1961] AC 290 (HL), against which the Criminal Justice Act 1967, s. 8 was enacted.

31 As explored by *Antony Duff*, Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law. Oxford 1990.

32 E.g., *John Gardner/Heike Jung*, Making Sense of Mens Rea: Antony Duff's Account (1991) 11(4) OJLS 559.

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

34 *R v Woollin* [1999] 1 AC 82 (HL).

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

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

but is instead a blurring of contemplation of a virtual certainly and volition.[37] There has been no clear judicial or academic explanation why this is sufficient in theory but it does not appear to cause any difficulties in practice.

Recklessness is a fault standard for risk-taking separate from intention[38]. As of 2003, unless specified otherwise, D must foresee a risk and go on, unjustifiably, to take it[39]. From 1982 to 2003, there had been pockets of an objective test for "recklessness", such as in criminal damage[40]: that D foresaw the risk or that the risk would have been obvious to a reasonable person in that position. However, those forms of recklessness have now been removed.

The practical question is for the jury: what did D foresee and was it justified to then do what he did. They jury typically answer that question by inferring from the evidence whether D foresaw the relevant risk. The theoretical questions of what level of risk and what reasons of justification 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.[41]

Negligence plays a minimal role in the traditional heartland of the criminal law, offences covering bodily injury or death, damage or appropriation of property, and sexual offences[42]. There is an offence of gross negligence manslaughter, but that obviously requires more than simple negligence, even if what precisely it does require might be unclear[43]. Failing to live up to a standard of reasonable care in a duty owed to another is used in a range of other offences, including those under the Health and Safety at Work Act 1974 and in cognate form in driving offences based on carelessness under the Road Traffic Act 1988.

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37 A good general work is *Alan Norrie*, Crime, Reason and History: A Critical Introduction to Criminal Law. Cambridge 2010, Part II.

38 See, e.g., *Matthew Dyson*, Might does not make right: justifying secondary liability [2015] Criminal Law Review 967, 976–981.

39 *R v G* [2004] 1 AC 1034 (HL), [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) and [41]; see also Appendix B, 18 (iii)-(v).

40 See *R v Caldwell* [1981] 1 All ER 961 (HL).

41 Some discussion can be found in *Findlay Stark*, Culpable Carelessness
Recklessness and Negligence in the Criminal Law. Cambridge, 2016 and in *Matthew Dyson*, Might does not make right: justifying secondary liability [2015] Criminal Law Review 967, 978–9, 983–4.

42 See generally, *H.L.A. Hart*, Punishment and Responsibility, Oxford 1968, Ch VI.

43 Cf. a relatively clear case like *R v Adomako* [1995] 1 AC 171 (HL) with *R v Misra* [2005] 1 Cr App R 21 (CA) or, indeed, *R v Evans* [2009] 1 WLR 1999 (CA).

Much could be said about whether the English use of strict liability or the recent growth in negligence liability, including for serious crimes[44]. For the moment, the key point is that the concepts used in English law are rigorous *enough* rather than simply rigorous. They let English law proceed, resolve cases, and claim some intellectual basis, rather than comprehensively express a single norm, multiple norms or even theories of criminal law.

It is also important to understand that there is no concept of *dolus eventualis* in English criminal law. If *dolus eventualis* is taken to include foresight of a risk and a volitional element of willingness to take that risk, English law does not use it[45]. Instead, English lawyers regard risk-taking as a separate and lower form of fault to intention. In England, intention requires more than some element of willingness or volition to take a foreseen risk, and recklessness does not require that willingness. In practice, many situations governed by this principle in, say, German law would arrive at similar outcomes in English law through other means. For example, liability for *the same* offence might be satisfied (a) by a lower fault element than intention, such as where criminal damage can be committed intentionally or recklessly[46], or (b) by intention as regards some lower level of harm[47], such as in murder, where D is liable for causing or accelerating the death of a human being, *intending to kill or intending to cause serious bodily harm*[48]. There are some gaps between English law's intention and *dolus eventualis*. An example would be a game of Russian roulette with a six-barrelled gun. On the first random barrel being fired, *dolus eventualis* might be satisfied, but an English court would not convict on the basis of intention. Even if this were one of the exceptional categories for which the *Woollin* oblique intention direction would be given, death or serious injury would neither be foreseen as virtually certain nor be virtually certain.

If English law were to expand our definition of intention to include *dolus eventualis* now, we would significantly expand liability for our most serious offences, since such offences are often denoted by requiring intention as regards

44 E.g., Domestic Violence, Crime and Victims Act 2004, s. 5, creating a negligence-based homicide liability, including for omissions, and extended recently by the Domestic Violence, Crime and Victims (Amendment) Act 2012, s.1 to now cover serious harm as well as death. See more generally *J.R. Spencer*/*Marie-Aimeé Brajeux*, Criminal Liability for Negligence ##Symbol mit Code:F02D## a Lesson from Across the Channel? (2010) 59 ICLQ 1.

45 *Greg Taylor*, Concepts of Intention in German Criminal Law (2004) 24(1) OJLS 99, 111: 'taking the possible criminal result of one's conduct into the bargain and approving of it'.

46 Criminal Damage Act 1971, s. 1(1).

47 A form of strict liability known as constructive liability, as the law builds liability for the greater harm from the lesser.

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

a significant physical component[49]. More generally, it is unclear how the volitional element in *dolus eventualis* can be shown in practice. Defendants will rarely give clear testimony that they not only foresaw a risk but were willing to take it, and inferring that willingness instead could be difficult. There are also questions of over-criminalisation: we all willingly take risks every day but they should not lead to criminalisation. For example, driving a car typically entails the foreseeing that you might kill but you seem to accept that risk because you think it is small. Without recklessness' objective limb stating that the risk was unreasonable to take, or some further requirement, all such risk-taking could lead to prosecution and perhaps liability, with the thin protection of prosecutorial discretion as your only shield.

The one area where English legal theory does bring intention and *dolus eventualis* close together is conditional intentions, an area of the law which has long been unclear and yet relatively uncontroversial and which *Jogee* has thrown into sharp relief. In a conditional intention scenario, prosecutors seek to show first that D foresaw the risk of *z* as part of doing *x*, and then suggest that, by carrying on with *x*, D intended that if *z* were necessary for *x*, *z* would happen. This is so even if D would not ordinarily intend *z*, such as where *z* is something terrible or unpleasant when considered in isolation. In practice, this is another way to suggest a volitional element towards an otherwise unintended consequence, but it at least has the merit that one could meaningfully argue on facts and law about whether a condition was sufficiently important to a larger purpose to count as having been intended to continue even if the condition were to have been met. We will come back to conditional intention at the end of this paper.

So far, it can clearly be seen that English law favours a practical law, one that can be expressed simply enough for a jury. Key concepts, like the difference between a principal and an accessory, the reason for complicity liability, and the definitions of intention and recklessness are given working forms rather than ones which might satisfy deep intellectual enquiry. It should not be assumed, of course, that there are persuasive and comprehensive answers to these issues, but English law in any case starts from the position that what is sought is an answer that works in practice, not an answer that solves the issue. Instead, significant substantive work is left to the jury to decide whether the facts as they see them match 'morally loaded' fault terms. The scene has thus been set to understand what *Jogee* has changed.

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49 The very occasional attempt to suggest otherwise, arguing that the German concept of *bedingter Vorsatz* or *Eventualvorsatz* has merit for English law: *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, has been taken up.

III. Structural changes from *Jogee*

The first change *Jogee* made was to remove the category of parasitic accessorial liability (PAL). To understand this, we could look at the three modes of complicity English law has recognised at some point: normal complicity, common purpose liability, and parasitic complicity. Normal complicity is the only form to survive with its own substantive rules, where D intentionally assists or encourages another to commit a crime. As a result, liability is not substantively simpler to establish where criminal activity escalates from crime to a further crime, although those circumstances might provide evidence of intentional assistance or encouragement.

- **Complicity**: If you assist or encourage another to commit a crime, intending to assist or encourage the other, you are liable. The traditional phrasing was that S is liable for aiding, abetting, counselling, or procuring P: aiding means assisting, abetting and counselling meant encouraging (abetting took place at the scene of the crime, counselling did not), and procuring meant to bring about the crime. It was long required that S *knew* of P's plans and *intended*, by his acts, to aid or encourage P. Complicity does not require that S and P share a common purpose, although one might in fact be present.
- **Common Purpose Liability**: a relative of complicity but one which made accessories in felonies into principals; since 1967, it has no separate substantive rules but it remains the overriding narrative put to the jury by the prosecution: the defendants were "in it together."
- **Parasitic complicity or parasitic accessorial liability**: Regrettably, this has sometimes been known as "joint enterprise" but that is not a term of art[50] and could mean joint principals, complicity, or parasitic complicity.

Prior to *Jogee*, 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 D2 had foreseen he might commit"[51], *then S is liable for crime B*. That is, S' liability for crime B is parasitic on S' liability for crime A.

Note at once that this could not be a form of either of the original strands of liability because the traditional physical elements and fault elements are missing. It was not complicity *simpliciter* for crime B, since S did not assist or encourage P to commit crime B, and S did not intend to assist crime B nor did S know or intend that P would commit crime B. It was not liability pursuant to the common purpose

50 *Jogee*, [77].

51 *R v ABCD* [2011] QB 841 (CA), [9] per Hughes LJ.

rule, since P's actions cannot be ascribed to S by reason of them being part of the same purpose and, by definition, crime B is outside the common purpose of S and P. Instead, S is being made liable for further crimes outside of the common purpose to commit at least one crime on the basis that S foresaw the risk of them and continued with the common purpose. Parasitic complicity was always best understood as a means to convict accomplices more easily, particularly in situations of evidential difficulty or group violence where the principal had not been identified.

Starting with complicity: the level of fault required was relatively stable from the 1800s until the 1990s. Historically, S had to have been present, providing assistance with a "felonious intention" to be part of the design[52]. This could be thought of as a mix of knowledge and intention: knowledge of the plan and an intention to play a part in it. This meant that where S joined P in committing harm, not knowing of P's intention to kill, S was not an accessory to murder but only a party to manslaughter[53]. Prior to *Jogee*, these requirements were seen most clearly in *Johnson v Youden* in 1950 which held that the accessory must "know the essential matters which constitute that offence"[54]. A builder had been convicted of offering a house for sale in excess of the price permitted, the issue was whether there had been accomplices. Two of the three solicitors involved in the purchase had not known of the further payment which exceeded the statutory limit and were acquitted; one solicitor had known and was convicted as an accessory. Thus, the test was *knowledge* of the principal's plan do the acts which constituted the crime in mental state was prohibited. In practice, a *belief* about that mental state would also be sufficient.

Turning now to PAL: this form of complicity was developed over the space of about thirty years from its first seed in 1957 to its first unambiguous use in 1985. The first reference to a doctrine like it was in 1957 but it was merely *obiter dicta*[55]. The earliest and least helpful name for it, since it did not distinguish between joint principals, complicity, and PAL, was "joint enterprise," casually used in 1960[56]. It was nearly 40 years before the term "parasitic accessorial liability" was

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

53 Ibid., 258. See also *James Fitzjames Stephen*, A Digest of the Criminal Law, London, Macmillan and Co., 1883, 3rd ed., 31, § 37.

54 *Johnson v Youden and Others* [1950] 1 KB 544 (DC), 546, 547. Affirmed a year and a week later by the Court of Appeal, again led by Lord Goddard, C.J., *Ferguson v Weaving* [1951] 1 KB 814 (DC), 820.

55 *Davies v DPP* [1954] AC 378 (HL), 401.

56 *R v Stally* [1960] 1 WLR 79 (CCA), 81, 82. Picked up immediately by *D (An Infant) v Parsons* [1960] 1 WLR 797 (DC). That said, Westlaw databases do find references to "joint enterprise" in

bestowed by an academic, in 1997[57]. PAL's historical development could be debated[58]. Definite descriptions of the law in practice were difficult even into the early twentieth century. The notions of *mens rea* or fault during this period were much more open-textured even than today. A person was taken to intend the natural and probable consequence of his actions as discussed above. If D's commission of a felony caused death, it was murder even without any fault in connection with the death (the felony-murder rule was abolished in 1957)[59]. Many of the earlier cases appear to demonstrate conditional intentions to use force to resist anyone seeking to prevent the parties' crime[60]. There were also much more restrictive rules of evidence, making it much harder to know what D was thinking[61].

Despite this uncertainty, it does seem clear that the Privy Council decision in *R v Chan Wing-Siu* reported in 1985[62] was the first statement by a higher court creating PAL in its modern form. That is, that S' foresight alone of what further

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their commentary and materials associated with cases going much further back. These results do not reflect the language used in the case but appear to be applications of modern terminology to the older cases.

57 Created by J.C. Smith: *J.C. Smith*, Criminal Liability of Accessories: Law and Law Reform (1997) 113 LQR 453, 455.

58 For a general account, see *K.J.M. Smith*, A Modern Treatise on the Law of Criminal Complicity, Clarendon 1991. One academic argued that rules like parasitic complicity go further back than 1985: *F. Stark*, The demise of "parasitic accessorial liability": substantive judicial law reform not common law housekeeping (2016) 75(3) CLJ 550. The present author's views formed the basis of counsel's submissions to the court in *Jogee* and have been reproduced in part by senior counsel for Ruddock in that appeal, *Julian Knowles* QC, Joint Enterprise after *Jogee* and *Ruddock*: What next? (2016) 7 Supreme Court Yearbook 72; see similarly *Catarina Sjolin-Knight*, Killing the Parasite in R v Jogee (2016) 25 Nott LJ 129.

59 Homicide Act 1957, s. 1.

60 E.g., *Mansell and Herbert's Case* (1555) 2 Dyer 128b (Court of King's Bench); 73 ER 279. A fuller report has been made available more recently: *R.* v. *Herbert* (1556) in Dalison's reports, 124 Selden Soc. 127-9, 130–1. See further, *J.H. Baker*, *R v Saunders and Archer*, in: *P. Handler* et al. (eds), Landmark Cases in the Criminal Law, Oxford forthcoming; *R v Macklin* (1838) 2 Lew. C.C. 225 (CCR), 226; *R v Tyler and Price* (1838) 8 Carrington and Payne 616 (Court of Queen's Bench at Maidstone Assize), 620; 173 ER 643, 645 per Lord Denman CJ; *R v Howell, Roberts, Jones, and Wilkes* (1839) 9 Carrington and Payne 437 (Assize); 173 ER 901168 E.R. 1136, 1136; *R v Skeet* (1866) 4 Foster and Finlason 931 (Assize), 933–934; 176 E.R. 854, 855–856 per Pollock C.B; *R v William Appleby* (1943) 28 Cr. App. R. 1 (CCA), 4.

61 It was only with the Criminal Evidence Act 1898 that D was competent and, in practice, compellable to give evidence. See generally, *Christopher Allen*, The Law of Evidence in Victorian England, Cambridge 1997, ch. 5; *Keith Smith*, Criminal Law, in: *William Cornish* et al. (eds), Oxford History of the Laws of England Vol XIII, Oxford2010, 71–115, esp. 100–107.

62 [1985] AC 168 (PC).

crime (crime B) P might commit was sufficient culpability once S was already participating in crime A. In *Chan Wing-Siu*, a man was killed and his wife was injured after knife-wielding robbers forced entry to their home; the defence claimed (somewhat implausibly) that some of the accessories had only foreseen the risk of serious harm, not intended it. Sir Robin Cooke gave the opinion of the Privy Council and affirmed the convictions on the basis of a wider form of secondary liability, in due course to become known as parasitic accessorial liability. 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."[63]

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[64], most likely because it made no sense to suggest that carrying on automatically 'authorises' all risks foreseen.

These Privy Council decisions were followed around the common law, the most important case in English law being the House of Lords in *R v Powell and Daniels; English*[65]. Powell and Daniels had visited a drug dealer's flat with a third man and, in the course of purchasing drugs, one, it was not known which, shot and killed the dealer. In *English*, English and others had attacked a police officer with wooden posts but the officer was killed when one of those present stabbed him with a knife. English denied both that he had been present or known about the knife in advance. At their respective trials, the juries were directed that a secondary party could be liable for the act of a principal if he or she foresaw that the principal might commit the crime (physical components plus fault elements). According to Lord Hutton, giving the leading speech:

> "I consider that the test of foresight is a simpler and more practicable test for a jury to apply than the test of whether the act causing the death goes beyond what has been tacitly agreed as part of the joint venture."[66]

In *English*, a narrow defence was created which surprisingly meant the appeal against conviction was allowed in its entirety. The level of serious harm that English foresaw through the use of the wooden post he thought would be used

63 Ibid., 175.
64 *Hui Chi Ming v The Queen* [1992] 1 AC 34 (PC), 53.
65 [1999] 1 AC 1 (HL).
66 Ibid., 31.

was *fundamentally less dangerous* than what actually happened with the knife. This meant that knowledge of P's deadly weapons became key evidence to conviction to acquittal[67]. This slim ground was all that defendants could hope for, and multiple appeals were brought over the next 16 years[68].

Perhaps even more troubling than the extension of liability in PAL was that it led to the downgrading of the requirements for basic complicity over the last twenty years: essentially every situation was conceived of as a "joint enterprise" so that the same rules, particularly the low level of fault of foresight, were applied across the board. Ultimately, even in normal complicity cases, where there was no second crime at issue, S was liable for assisting or encouraging another person, foreseeing that the other might commit a crime[69]. This degradation of the underlying complicity rules, and the general blurring of all forms of complicity into "joint enterprise"[70] was even worse than the very low levels of culpability in PAL alone.

The UKSC in *Jogee* disagreed with the reasoning underlying *Chan Wing-Siu* and *Powell*:

> "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."[71]

"The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second is important…"[72]

Was there sufficient normative justification for PAL? *Jogee* did not directly engage with this question, simply deciding that *Chan Wing-Siu* was in error, as will be discussed in section 5. The balance of academic opinion had clearly been

67 Instead of convicting of manslaughter, which was arguably the outcome better reflecting earlier authorities and logic.

68 E.g., *R v Uddin* [1999] QB 431 (CA); *R v Rahman* [2009] 1 AC 129 (HL); *R v Mendez* [2011] QB 876; *R v ABCD* [2011] QB 841; the last two cases are particularly interesting, as the lead judgments were given by Toulson LJ and Hughes LJ, respectively, before they were appointed to the Supreme Court.

69 E.g., *R v Rook* [1993] 1 WLR 1005 (CA), 1010; Law Commission Consultation Paper 131: Assisting and Encouraging Crime 1993, [3.12]; *R v Webster* [2006] 2 Cr App R 6 (CA), [25]. The language of "running the risk" is sometimes used, e.g., Law Commission Report 305, Participating in Crime (2007, Cm 7084), [3.143]. See, e.g., *Matthew Dyson*, Might does not make right: justifying secondary liability [2015] Criminal Law Review 967, 970–972.

70 See, e.g., *Matthew Dyson*, The future of joint-up thinking: living in a post-accessory liability world (2015) 79 Journal of Criminal law 181.

71 *Jogee*, [76].

72 Ibid., [100].

against PAL. One of the only coherent arguments in favour was put forward by Andrew Simester. 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. By passing the threshold of criminality and then continuing with an enterprise with a foreseen risk of a further criminal offence, S has still *changed his or her normative position* with respect to P's crime[73]. Based on this analysis, even if one cannot link S to P's crime with a meaningful amount of *responsibility*, the fact of S' foresight was sufficient for liability. This argument seems to endorse a form of constructive liability similar to that which was removed when the felony-murder rule was abolished in 1957.

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"[74]. The difficulty is how it protects the public if those who are not meaningfully connected to it can be easily convicted of the most serious crime that took place. Similarly, there is no requirement that a joint enterprise require a gang, only two people are required. The reality was that PAL, and the corrupted test for complicity prior to *Jogee*, convicted on the basis of foresight alone, the lowest subjective fault element in English law, and in PAL did so without proving that S had played any role in the parasitic crime, crime B.

By removing PAL, the law of complicity has become a lot simpler and would be easier to justify if English lawyers were to feel the need to explicitly set out its normative basis.

IV. Substantive changes from *Jogee*

After *Jogee*, attention must now shift to the requirements for the sole form of complicity that remains. *Jogee* did not address the physical elements of complicity in any detail. The simple position is that any assistance or encouragement[75] will

73 *Andrew Simester*, The Mental Element in Complicity (2006) 122 LQR 578, 584–588. See also *idem*, in: Criminal Law Theory and Doctrine, 5th ed., Oxford 2013, 248–249.

74 [1999] 1 AC 1 (HL), 25.

75 Whether procurement exists as a separate category is not discussed at all. 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", i.e., did not intend that

be sufficient to establish the physical components of the offence. "[S] has encouraged or assisted the commission of the offence by [P]"[76] but there is no need for agreement between S and P[77]. This general statement pushes the work of defining "assist or encourage" onto the jury. Juries might be told negatives: that any encouragement need not have any positive effect on P's conduct[78]; and that there is no rule against mere presence or association generating liability, but encouragement or assistance must be proven on the facts[79].

Once there is encouragement or assistance, it is still possible for S to avoid liability. 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[80]. *Jogee* did insert a new 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"[81]. There is no guidance as to what such events might be and whether this defence subsumes any other defences. With the demise of PAL, there is no "fundamental difference" test as in *English,* and the "overwhelming supervening act" defence might be the closest there is to a replacement[82].

What *Jogee* really changed was the fault element in complicity. The fault element can be understood in four steps. The traditional view is that each step is sequential but *Jogee* appears to roll almost all of the work into the third step.

The first step is simple: 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[83].

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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 but S does not get the chance to tell P: neither party wanted the offence of driving while intoxicated and there was no communication between S and P.

76 *Jogee*, [8].

77 *Jogee*, [95].

78 ([12], citing *R v Calhaem* [1985] QB 808 (CA).

79 *Jogee*, [11].

80 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].

81 *Jogee*, [97], see also [12], [32]-[37], [64].

82 *Jogee*, [98]. It might also cover a deliberate change of victim by the principal, e.g., from wife to young daughter, S no longer being liable for supplying the poison: *Saunders and Archer* (1575) 2 Plowden 473; 75 ER 706.

83 One exception being where you intended to assist P to commit a crime but intended to do so next week and only accidentally helped P now; S should probably be liable there.

Second, S intends to assist or encourage P, in the sense of some minimal 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 murder a police officer, S would have been liable for murder as a secondary party, but for a defence[84]. This was so "even though he regretted the plan or indeed was horrified by it."[85]

Third, S must intend to assist or encourage the commission of P's crime. This is the test that *Jogee* focuses on, instead of the *Johnson v Youden* test of "knowing the essential elements". The new test's apparent simplicity makes it very appealing for working with juries yet also for convicting defendants of being accomplices to the right level of crime. The key point was that "P's crime" entailed both P's physical contribution and the fault with which P committed it. The test for fault could then distinguish between not between outcomes, such as death, but rather the fault in respect of that outcome. PAL had previously not distinguished in such a way, since D was liable merely for foreseeing that P might kill, and as he killed, P intended to kill, or intended to cause serious bodily harm. Under *Jogee,* 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[86]. For crimes requiring fault, S must also intend P to act with whatever fault element is required for the crime[87]. 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[88]. For example, while S is not liable

84 [1975] AC 653. The House of Lords held that duress could be a defence for a secondary party to murder but this decision has since been overturned and duress is no longer a defence to murder: *R v Howe* [1987] AC 417 (HL).

85 Ibid., 678 per Lord Morris. Lord Simon, 698–99 seemed to suggest that S must have "foreseen that the instrument or other object or service supplied will probably (or possibly and desiredly) be used for the commission of a crime" but that foresight should only ever be evidence of an intention to assist or encourage P.

86 *Jogee*, [99].

87 *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.

88 However, there is no requirement that offences are "laddered" in this way, and any existing ladders rarely have properly spaced "rungs".

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[89].

However, *Jogee* does not set out what 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*[90], 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. The judgement discusses "knowledge of any existing facts" and "knowledge by [P] of any facts necessary to give the principal's conduct or intended conduct its criminal character."

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 as culpable as P if P does the one unlawful thing instead of any of the other 99 lawful things S contemplated. Such a possibility has none of the normal markers of the typical solutions: accepting volitional risk-taking (*dolus eventualis*) or finding some purpose which S values more than S' normal rejection of the unlawful possibility (conditional intent). The court did not try to resolve this longstanding difficulty about justifying the fault element in complicity. Instead, it appeared to push this question solely within the idea of "intentionally assisting or encouraging":

> "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"[91].

89 *Jogee*, [96]. This is probably the right form of participation, since 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 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). Such an offence is commonly thought sensible among academics but prosecutors find unlawful act manslaughter (an unlawful and objectively dangerous act causing death) and gross negligence manslaughter (a breach of a duty to take care that was so gross that it is criminal and which caused death) so wide as not to need to test whether the better labelling of reckless manslaughter will apply. The theoretical gap, e.g., where D omits to do *x*, which is not grossly negligent but which D foresees will create a risk of death that would be unjustifiable to take, does not seem to have caused much concern.

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

91 *Jogee*, [9].

At the same time, as already noted, they require S to intend P to have any fault requirement for the full offence, showing that some elements we previously described as "essential elements", of "facts" under the previous law in *Johnson v Youden*, are now matters that must be intended.

So, what fault must S have about whether P will commit the offence? The ideal position is that S is liable if he knew that P *would* commit the relevant crime and, for this purpose, "belief" in future events should suffice for knowledge. This was the position in *NCB v Gamble*[92], a case approved as authority for S' ignorance of the criminal law not being relevant to his liability[93]. In *Gamble*, P took his lorry to a colliery of the National Coal Board, where it was filled with coal from a hopper, and then taken to a weighbridge, where the Board's weighbridge operator, S, told the driver that the load was nearly 4 tons overweight. The driver said that he would risk getting caught and convicted for driving an overweight vehicle on a public road. P was caught and convicted; S was convicted as an accomplice although he was personally neutral as regards any future criminality, since it was possible for P to leave the weighbridge and simply park without going onto a public road. However, S *believed* P would commit the relevant offence, even if S did not *intend* that P would do so.

S need not intend, or believe, *in a specific crime* but only one from a class of similar crimes. Jogee also endorsed *R v Maxwell*[94], 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"[95].

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", even if the effect is that they prove substantively more than is required to make out S's liability. 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. 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[96].

92 [1959] 1 QB 11.
93 *Jogee*, [9], [99].
94 [1978] 1 WLR 1350 (HL).
95 *Jogee*, [14].
96 Cf. *David Ormerod/Karl Laird*, Jogee: not the end of a legal saga but the start of one? [2016] Crim LR 539, 544–548 and *Graham Virgo*, The Relationship between Inchoate Accessorial Liability after *Jogee* [2016] 9 Archbold Review 6.

That jury direction is given where truly merited to allow a jury to treat such *consideration* as equivalent to *volition*. Rather, the prosecution is simply arguing that S did intend P to commit the crime, nor had a fault standard equivalent to that. The *Woollin* jury direction is rare in practice and difficult, let alone uncertain, to take before a jury.

However, many of the convictions obtained by means of the foresight standard might now be achieved by relying upon the uncertain concept of a conditional intention, as the court itself made clear[97]. Almost all mental states about the future have conditions. The paradigm instances of relevant conditions are where a defendant intends to do *x* or achieve *y even* or *only if* something otherwise unintended occurs, *z*. Examples include robbing a bank *even if* there is resistance or taking a shotgun to shoot a guard *only if* he resists a robbery. Simply to foresee or "endorse" a possibility of this sort is not necessarily to intend them. If these states of mind are treated as the same an intention, we risk dramatically expanding intention so that it subsumes recklessness, which is a lower level of fault defined by unjustifiable risk-taking. The Court of Appeal, in one of the first cases decided after *Jogee*, affirmed that the prosecution would have to prove more than foresight of a consequence in order to prove a conditional intention: in a case of an armed robbery where P killed, to be liable for murder S must have "intentionally assisted or encouraged the [P], intending him to use the gun to kill the victim if the need arose"[98]. It is also important to remember that conduct or a result can be intended no matter how unlikely it is (so even unlikely and undesirable possibilities can be accepted and thus intended) as part of the wider purpose ##Symbol mit Code:F02D## the issue is how to prove that intention.

In practice, prosecutors will almost certainly present foresight of a possibility as evidence of an intention that *z* should happen in order to do *x* or achieve *y*. This approach will force juries to make difficult decisions when they have little direct evidence of S' state of mind. This is most simply expressed by considering a strict liability crime, like manslaughter, with no subjective fault element required concerning the death. S foresees the possibility that, in the course of an armed robbery, P might kill. P does kill, and S is charged with being an accessory to manslaughter[99]. The prosecution argue that S foresaw a risk of death and went ahead anyway, showing he conditionally intended that he wanted to commit the robbery *even if* that meant someone died.

97 *Jogee*, [90]-[95].

98 *R v Anwar* [2016] 4 WLR 127 (CA), [12] per Leveson P.

99 Note: if S had foreseen the risk of P killing V, intending to kill V, or intending to seriously injury V, the prosecution would argue that S conditionally intended murder, not merely manslaughter.

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 death in order to achieve his purpose *y* (here, robbery):

- **No need to link the risk foreseen (*z*) to his purpose (*y*)**Example: the chance of *z* was too small to be linked to the purpose, thus the risk was merely dismissed. This includes the category where S takes steps to minimise the risk (e.g., by telling P not to use weapon to cause harm)
- **Could not link *z* to *y***Example: S had foreseen *z* but had forgotten about it at point of execution of plan for *y*.
- **Failed to link *z* to *y***Example: S did not realise two contradictory things, akin double-booking oneself; this is essentially a claim to error, or stupidity, in failing to realise that the purpose itself could bring about the risk foreseen.
- **Focus on *y***Example: possibility of *z* not relevant, since S is focused entirely on *y* and is not moving to have any volition about risks he consider extraneous.
- **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 or paying off debt to gangsters, 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. Nonetheless, the same five reasons might apply as to why foreseeing what P might do might not show that S conditionally intended P to. The chance of juries getting into this level of detail seems slim, and they seem likely to be left merely the "if the need arose" epithet to a normal direction on intention.

V. Law reform changes?

The third change from *Jogee* concerns how we perceive judicial law reform. *Jogee*'s reforms were surprising for six reasons.

First, the Supreme Court's willingness to hear an appeal against the PAL rule was surprising. There had been regular appeals against PAL up to the Court of Appeal, but none had been given permission to reach the Supreme Court. It seems likely that the most important point here was the Supreme Court suddenly had two of its 12 justices who were particularly interested in this area. Lord Toulson had been Chairman of the Law Commission, the law reform body in England and Wales since 1965, when it had considered this area of the law in the run-up to its

report in 2007[100]. Lord Toulson has also had written on its history extra-judicially, in an analysis which seems to show some resemblance to his analysis in the case[101]. Lord Hughes was a specialist in criminal law at the bar and in his judicial career. Each had decided a significant case while in the Court of Appeal[102]. Their interest, honed by both at the coalface of the criminal law, was quite possibly key to the UKSC finally looking again at a difficult area of law which was evidently working injustice. It should also be noted that the window for hearing the case was relatively narrow: both having been appointed in 2013, Lord Toulson reached the statutory retirement age of 70 a mere 9 months after hearing the case, and Lord Hughes will retire in 2018.

There are important questions about how our UKSC decides which cases are important enough to get a second appeal, and who sits on the panels which ultimately hear them which *Jogee* has brought into sharp relief. There are almost certainly numerous other problematic areas of English law which might merit the attention of the UKSC but which the court has not yet noticed or thought itself ready to deal with. The court hears around 100 cases a year, compared to thousands in the Court of Appeal, so selection is a difficult task. It reminds us once again of the pragmatic and case-by-case analysis favoured by English criminal law and English law more generally. Even in the Supreme Court, the court most able to take a systematic view of the law, there are still individual stories of coincidence or kismet. English law might even be thought of as a collection of such stories, driven and decided by experience and practicality rather than theories and norms.

Second, it was surprising for the court to sit conjointly as the UKSC and the Judicial Committee of the Privy Council. The likely reason was that the facts of Jogee's case did not constitute a PAL case, despite how it was at times argued by the Crown and others. Rather, they were facts suggesting simple complicity[103]. However, by joining with the facts in Ruddock's case, which clearly engaged PAL, the full range of complicity could be considered; the review could also directly to

100 Law Commission, LC305, Participating in Crime, Cm 7084 (2007).

101 *Roger Toulson*, Sir Michael Foster, Professor Williams and complicity in Murder, in: *Dennis J. Baker/Jeremy Horder* (eds), The sanctity of life and the criminal law: the legacy of Glanville Williams, Cambridge 2013. It might be suspected that the first half of the joint judgment was primarily written by Lord Toulson, perhaps up to around [60] or [87], with the rest by Lord Hughes.

102 *R v Mendez and Thompson* [2011] QB 876 (CA) (Toulson LJ) and *R v ABCD* [2011] QB 841 (CA) (Hughes LJ).

103 Unless an artificial distinction between a plan to have a fight short of fatal violence and an further crime of murder, came about, which the Supreme Court had previously discouraged: *R v Gnango* [2011] 1 AC 827 (SC), [43].

face up to the international implications of *Chan Wing-Siu*, as well. Given that the two courts were also housed in the same building (since the creation of the Supreme Court in 2009), it was also certainly physically easier than it had been before.

Third, the court heard the case as a panel of 5, when there has been a trend recently to decide significant or important cases in larger panels.[104] For example, as a panel of 7 most commonly, 9[105] on occasion, or even, for the case on the constitutional process to withdraw from the EU, 11[106]. It might be argued that, with the President, the Lord Chief Justice (head of the judiciary of England and Wales, and presiding judge of the criminal division of the Court of Appeal), Lords Toulson and Hughes; the fifth judge was originally Lord Kerr, but later the Deputy President, Baroness Hale took that place, the panel was sufficiently strong and obviously distinguished enough not to merit simply filling further seats. Larger panels might provide more perspectives – enough judges that no other panel from among the 12 justices would likely decide differently. However, since the 19th Century, the highest court in England and Wales has decided cases in panels to balance those benefits against speed, time, cost, and the use of distinctive voices. Since 1966, this continued to be the case even when the House of Lords was departing from an earlier decision of its own[107]. As compelling as it may be to extend the panel beyond five judges, a five person panel does balance competing merits and drawbacks well[108].

Fourth, it is unusual for the Supreme Court to alter such an established rule in criminal law. They did so by determining that *Chan Wing-Siu* and thus *Powell and Daniels; English* were wrong in law, though the facts might have led to the same outcome under the correct test of intention. Such a significant change in the criminal law is rare though not unheard of. For example, in 2003 the House of Lords removed a wider strand of *objective* recklessness[109], thus narrowing liability. However, the courts have sometimes widened liability. A famous example of

104 UK Supreme Court, `Panel Numbers Criteria' <www.supremecourt.uk/procedures/panel-numbers-criteria.html> gives the key criteria the court has used recently. See generally

105 As Justices of the Court have sometimes stated, e.g., *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 (SC), [132] (with thanks to Christopher Sargeant for this example).

106 *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583 (SC).

107 Under the Practice Direction (Judicial Precedent): [1966] 1 WLR 1234.

108 For discussion of the context of judicial decision-making see *Matthew Dyson*, Judicial Decision-making in England Today, in: *J. Basedow*/*H. Fleischer*/*R. Zimmermann* (eds), Legislators, Judges, and Professors, Tübingen 2016.

109 *R v G* [2003] 1 AC 1034 (HL).

the House of Lords expanding liability was in 1991 when it convicted a husband of raping his wife: sex with one's wife had previously been thought lawful even without consent[110]. Such retroactivity issues could be avoided by leaving matters to Parliament, who can change legal rules with prospective effect only, if it wishes. Instead, *Jogee* was retrospective in narrowing the criminal law by declaring *Chan Wing-Siu*'s rule of law to have been in error. This also had the effect of raising the slim chance of an appeal by those convicted under *Chan Wing-Siu*. Any such appeals more than 28 days after conviction would, as the court stated, have to show "substantial injustice", and that is a very high threshold[111]. Such appeals are particularly unlikely to succeed, as was normally the case, if the trial judge directed the jury to find intention from evidence of foresight, *or* to convict on the basis of foresight alone, since the jury would simply have answered "guilty" and there would often have been plausible grounds for thinking the jury had found intention, not mere foresight. The UKSC said it decided to overturn *Chan Wing-Siu* for six reasons[112], which might be paraphrased as follows:

- 'Fuller analysis': the UKSC had had the benefit of much greater analysis of precedents in particular.
- 'Controversy and appeals': the previous law had not been working and had generated a large number of appeals, some successful but all slowing down justice for everyone.
- 'Importance of complicity': the law should be right given how often it is used and arguably how many prisoners have to understand their lengthy sentences.
- 'Use of foresight out of line with the rest of the criminal law for a serious offence': foresight should normally only be evidence of intention, intention should be required with complicity, and to do otherwise "savours…of constructive crime," which implicitly is incorrect for complicity.
- 'S lesser fault anomaly removed': S was liable on the basis of a lower culpability than P under PAL.
- 'Parliament not needed: courts' own error correction': PAL had been created by the courts and could, and should, be removed by them. It was noted that the basic argument, that S should assist or encourage *each* crime, also mirrored the last time Parliament had intervened in complicity, in creating an inchoate offence of assisting or encouraging another to commit a crime in ss.

110 *R v R* [1992] 1 AC 599 (HL). The wrongfulness of the conduct is hard to doubt today but if the defendant had asked a lawyer prior to his conduct, the likely response would have been that it was lawful unless, e.g., the married couple had separated or were living apart.

111 *Jogee*, [100].

112 *Jogee*, [80]-[87].

44-46, Serious Crime Act 2007. In fact, under s. 47(5), S might only be reckless about any consequences or circumstances in the offence but nonetheless, S must intend to assist or encourage each act which would constitute the crime.

One of the common ways for courts to avoid making significant legal changes themselves is to state that the matter is one for Parliament, particularly after an investigation by the Law Commission. Yet the Law Commission had examined complicity in the decade before *Jogee* and had recommended retaining PAL. The merits of that Law Commission report could be debated, but he practical reality was that no government would wish to remove PAL and thus open themselves to being painted as soft on crime, so there was no point in the Law Commission proposing to remove it[113]. The argument that a particular matter should be left to Parliament can certainly carry weight but it is often used simply as a means to preserve the status quo, since Parliamentary time for non-political reform is so scarce. In *Jogee*, it would obviously have been futile: only a year earlier, a Parliamentary committee had called for such reform, expressly not on the terms of the earlier Law Commission report, but was rebuffed by the then Lord Chancellor[114].

These reasons do seem persuasive, largely because the initial move into PAL was a decision of the courts, and it was clear that PAL had been criticised extensively and lacked a theoretical basis. The arguments about precedent could be debated but there is certainly a strong case that PAL was only 30 years old and was a decision taken without significant authority or explicit justification. The move in *Jogee* is less novel than the move in *Chan Wing-Siu* and is definitely workable in practice – the classic test for English lawyers.

Fifth, it was somewhat surprising that the court removed PAL completely. It was also slightly surprising that the law changed at all, given how established PAL and the foresight test were. But if it was to change, the most likely course had seemed to be simply replacing foresight of what P might do with intention to assist P. Counsel's argument on paper and before the court had focused on intention. And, given the wide reach of the physical components in complicity, effectively presuming such a component for crime B was likely not doing that much work. However, it was built into the core of the new law that S must *intend* to and *in fact* assist or encourage *each* crime, leaving no space for PAL. This

113 Law Commission, LC305, Participating in Crime, Cm 7084 (2007).

114 House of Commons Justice Select Committee, "Joint enterprise: follow-up" Fourth Report of Session 2014-15, HC 310. See generally, *Matthew Dyson*, The future of joint-up thinking: living in a post-accessory liability world (2015) 79 Journal of Criminal law 181.

approach is novel, and interesting; time will tell how practical, and how theoretically viable, it is.

The sixth and final aspect of legal change is more subtle: despite the significance of the formal legal change, it is not clear how much will be different in practice. Much of the work of PAL, and the foresight standard in normal complicity, both formally removed by *Jogee*, could continue to be done by other means. Juries might convict Ds of intending to assist or encourage on the same kinds of evidence of foresight that prosecutors presented in cases prior to *Jogee*, simply because the jury believed that foresight in fact demonstrated intention. An intention is especially easier to find if a conditional intent allows the jury to accept that the defendant *normally* would not have intended that consequence but that he in fact did so here in order to achieve a wider purpose. The point is that formal legal change might not change the law in practice without persuading the legal actors who use it of the value of the change. Prosecutors still wish to convict, even in marginal cases, and juries have been surprisingly willing to convict on finding that a defendant foresaw. The UKSC tried to explain carefully that their change would neither overly complicate the law nor make trials impossible. They did not, however, produce a model route on how to reach a verdict for trial judges to give to juries, which would conceivably assist with rolling out the change in the law fully and effectively. Such a route to verdict (also known as a model jury direction) was offered to them by counsel for the appellants but the UKSC has generally preferred not to give prescriptive judgments, particularly as they could become hostages to fortune.

Have we seen a change in cases after *Jogee*? Space precludes a detailed discussion of the few but important cases to have arisen so far. For the majority of cases, the allegation is that the parties were involved in a common purpose to commit a crime and *Jogee* does not significantly affect such cases. Where the foresight standard might have been used, the law seems not to have changed much, neither domestically, nor internationally. In the most significant test case to date in England, of parties convicted under the pre-*Jogee* rules, the conjoined case of *R v Johnson*[115], the Court of Appeal had to deal with some appeals in time and some appeals out of time. None were successful. In some of the appeals, the Court was somewhat remarkably willing to conclude that the jury would have convicted on the basis of a conditional intent had the direction to do so been given to them. This might suggest that, at least for appeals against convictions under the old law, courts will be unlikely to "open the floodgates" even for a trickle of cases. We mighthope that in new cases prosecutors, judges, and juries

115 [2017] 1 Cr App R 12 (CA).

will be more demanding as regards what proof is sufficient to satisfy the newly enshrined test of intention. At least in such new cases, no one will be casting doubt on what the criminal justice system has already done which is a risk in appeals against conviction. The government and Parliament thankfully appear to have little time to legislate to reinstate PAL as an effort to appear tough on crime, though sadly the change might not even be large enough to actually justify intervention.

We might also consider *Jogee* and *Ruddock* themselves. Jogee was retried in front of a jury in August 2016 and convicted of manslaughter, being sentenced to 12 years in prison[116]; Ruddock was not retried but a conviction of manslaughter with a sentence of 17 years was imposed, without any reference to the significant procedural problems with the case[117]. Clearly, liability for manslaughter has a weaker public censure, but these are still very large sentences. In Jogee's case, it was a jury decision; in Ruddock's case, it was not.

Finally, the reach of *Jogee* is likely to be much less than might be hoped. Internationally, the highest courts in the two jurisdictions which had been key in the development of *Chang Wing-Siu*, Hong Kong[118] and Australia[119], have both rejected the removal of PAL. Those two decisions deserve articles of their own. Suffice to say neither seems to find anything sufficiently objectionable in treating an accessory as equivalent to a principal on the basis of no physical contribution to a second crime and mere foresight that that crime might take place. Nor do they meaningfully justify why such a rule should exist. What other countries will do, whether they might be countries bound by the common law through the Privy Council, or who could be persuaded by the reasoning of *Jogee* even if not bound by it remains to be seen.

116 https://www.theguardian.com/law/2016/sep/12/ameen-jogee-jailed-manslaughter-police-officer-joint-enterprise-test-case; Jogee's original sentence had been 20 years, reduced on appeal to 18.

117 [2017] JMCA Crim 6.

118 *HKSAR v Chan Kam Shing* [2016] HKCFA 87.

119 *Miller v The Queen* [2016] HCA 30. Australian cases had played an important role in *Chang Wing-Siu*. See also *Uhrle v The Queen* [2016] NZSC 64 for a similar net result in New Zealand, but there the Supreme Court of New Zealand were effectively being asked to countenance an appeal to change the clear meaning of the Crimes Act 1961, s. 66(2): "Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose." Quite obviously the Supreme Court were not in a position to do that.

VI. Conclusion

The English law of complicity continues to do what is needed: it works in practice but it is not clear it works in theory. This paper has only been able to scratch the surface of the practical and theoretical complexities of this position. English law is certainly based on underlying principles but resolves the tensions in them on a case- by-case basis by asking what solution will work in practice. When the chance to examine some of those underlying principles more deeply arises, the response is more commonly to focus on how cases will be resolved in practice. For example, a newly enunciated test for accessories could have necessitated greater clarity on the role of principals and accessories, but *Jogee* itself did not attempt this.

One issue will certainly need further thought and that is innocent agency. Innocent agency has long made a participant into a principal, where the actual human agent was "innocent", that is, lacking in capacity or lacking fault. However, it has also been said that one could not have sexual intercourse or drive through another, so such situations were better criminalised, some said,[120] as *procuring the physical components of those offences*. Yet as *Jogee* now requires S to intend P to have the fault required, if S deliberately manufactures a scenario where P does not have the fault, S cannot be liable as an accessory. S would have to be a principal or not liable at all.

Similarly, *Jogee* provided an opportunity to set out more clearly what physical contributions of assistance and encouragement should be enough as a matter of law, as well as intention, and what conditional intention meant. Instead, the practical solution was to push the questions even more squarely onto the jury. This is a solution often reached for by English criminal lawyers and a solution lost to English civil lawyers once civil juries began to die off, particularly from the 1930s. Aside from the benefits in connecting the public with the criminal justice system and operating as a restraint on the state's coercive power, there are some risks. Juries can supply moral or societal content for otherwise vague notions like "reasonableness" or "dishonesty",[121] but it can also be tempting simply not to define those notions as a matter of law at all and pretend it is a matter that must be a jury question. "Intention" comes close to being undefined in law, even with

120 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.

121 Within the offence of theft, after checking for the non-exhaustive statutory rules under Theft Act 1968, s. 2, the jury is asked what the relevant standard of honesty was and only convict if D fell below it and knew he was falling below it when he acted: *v Ghosh* [1982] QB 1053 (CA); cf. *E. Griew*, Dishonesty: The Objections to Feely and Ghosh [1985] Crim LR 341.

the supplemental partial definitions of oblique intent and conditional intention[122].

Future questions about how law reform takes place in England and Wales will also have to be faced at some point. Like much of English law, we know it happens in practice but we just do not have a theory to explain it. Yet[123].

Danksagung: This paper was inspired by a very stimulating visit to the Max Planck Institute in Freiburg in the summer of 2016; with thanks to Findlay Stark and Benjamin Vogel.

122 See also what counts as gross negligence: so gross with regard to the risk of death that the jury think it must be criminal. See *R v Adomako* [1995] 1 AC 171 (HL) and the other cases in fn 40.

123 For a recent collection of essays on the contribution of the Law Commission on its 50th anniversary, see: *Matthew Dyson/James Lee/Shona Wilson Stark* (eds), Fifty Years of the Law Commissions: The Dynamics of Law Reform, Oxford 2016.