Complicity, *Jogee,* and the Principles of Criminal Law

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ABSTRACT

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This thesis explores the rules of complicity and parasitic accessory liability (PAL) in England and Wales and their relationship with the principles of criminal law. Complicity creates a general liability for assisting or encouraging a crime. PAL allowed for the conviction of an accessory to a joint criminal venture, for a possible collateral offence of the principal, as long as it was foreseen as a possible incident of the initial crime.

Complicity is important because it attributes responsibility to individuals who contributed in some way to a substantive offence of another, without committing the offence itself. PAL did not work well in practice but was followed for thirty years until *Jogee* in 2016, which was considered to be a breakthrough in the requisite mental element of complicity and also the abolition of PAL.

This thesis examines the relationship of both complicity and PAL with a set of criminal law principles. It then moves on to consider the impact of *Jogee* on the relationship of both doctrines with these principles. The thesis challenges the idea that the judgment was a major change in the law and concludes that many criminal law principles remain breached, post-*Jogee*, in some factual scenarios.

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TABLE OF ABBREVIATIONS

AC	Appeal Cases
ALJR	Australian Law Journal Reports
All ER	All England Law Reports
Apr	April
BAME	Black, Asian, Minority, Ethnic
CA	Court of Appeal
Cal LR	California Law Review
Cam LJ	Cambridge Law Journal
CLJ	Criminal Law Journal
CLR	Commonwealth Law Reports
CPS	Crown Prosecution Service
Crim	Criminal Division
Crim LR	Criminal Law Review
Crim App R	Criminal Appeal Review
Crim Law and Philo	Criminal Law and Philosophy
CUP	Cambridge University Press
Edn	Edition
EWCA	England and Wales Court of Appeal
HC	House of Commons
HCA	High Court of Australia
HKCFA	Hong Kong Court of Final Appeal
HKCFAR	Hong Kong Court of Final Appeal Reports
HL	House of Lords

JENGbA	Joint Enterprise Not Guilty by Association
J Crim L	Journal of Criminal Law
JCCL	Journal of Commonwealth and Criminal Law
JPN	Justice of the Peace, now Criminal Law and Justice Weekly
KB	Kings Bench
Law Com	Law Commission
LJ	Law Journal
LQR	Law Quarterly Review
LS	Legal Studies
LSG	Law Society Gazette
Ltd	Limited
MLR	Modern Law Review
No	Number
NwUL	Northwestern University Law Review
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
PAL	Parasitic Accessory Liability
QB	Queen's Bench
S	Section
SS	Sections
SC	Supreme Court
RTR	Road Traffic Reports
WLR	Weekly Law Reports

UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court

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CHAPTER 1: INTRODUCTION

The legal system in England and Wales accepts that the reach of the criminal law extends beyond those who commit an offence to include individuals who assist or encourage a criminal offence. Complicity creates a general liability for assisting or encouraging another in a crime. Furthermore, the unitary system of liability treats an accomplice as a principal in terms of conviction, so that both are guilty of the substantive offence.[1] This, together with complicity, is how the law attributes responsibility to individuals who contributed in some way to the substantive offence of another, but who did not carry out the *actus reus* of the crime with the relevant mental element.

In addition to this basic form of complicity, the doctrine of parasitic accessory liability (PAL) developed following *Chan Wing-Siu.*[2] This case held that, if a number of defendants agreed to carry out a particular crime but one participant went further and carried out a different crime, all defendants could be liable for the principal's collateral crime, if in participating in the first offence they had foreseen that the subsequent crime might take place.[3] Crucially, the prosecution did not have to prove that the accessory intended the second offence to be committed, allowing a jury to convict an

[1] Section 8 Accessories and Abettors Act 1861.
[2] [1985] AC 168 (PC).
[3] ibid 175.

accomplice on mere foresight of a crime.[4] PAL was part of the law of complicity[5] and the doctrine was followed and extended[6] for thirty years.

Despite this, in February 2016 the Supreme Court and the Privy Council, following what they deemed to be thirty years of misinterpretation of the law, delivered their decision in *Jogee and Ruddock* (hereinafter *Jogee*).[7] This case held that *Chan Wing-Siu* could not be supported and claimed it was based on an incomplete and erroneous interpretation of earlier criminal case law.[8] Indeed, judges, lawyers and academics had battled with both complicity and PAL for the previous three decades.[9]

Following *Jogee*, a secondary party can no longer be convicted based on mere foresight of the principal's crime. An accomplice's foresight of a principal's crime is now only evidence of an intention to assist or encourage the second offence.[10] The jury do not have to find the secondary party liable if she foresees that the principal might carry out the collateral crime. Ultimately, it is the jury's decision based on the evidence.

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[4] ibid.
[5] This has been contested and is discussed further in Chapter 3, 58-64.
[6] For example *Powell; English* [1999] 1 AC 1 (HL); *Rahman* [2008] UKHL 45, [2009] 1 AC 129.
[7] [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.
[8] ibid [79].
[9] *Rajakumar* [2013] EWCA 1512, [27]; Dyson M, 'The future of joint-up thinking: living in a post-accessory liability world' [2015] J Crim L 181; Wilson W, Ormerod D, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3; Crewe B, Liebling A, Padfield N, Virgo G, 'Joint enterprise: the implications of an unfair and unclear law [2015] Crim LR 252.
[10] *Jogee* (n 7) [100].

Jogee captured the interest of the nation because it followed years of campaigning against the use of PAL.[11] When the judgment was first handed down, it was widely considered to be a major break through in the requisite mental element for complicity and also the abolition of PAL.[12] One of the key questions in this thesis is whether *Jogee* will have the impact initially expected. It is anticipated that the importance of this case may have been over emphasised by judges, some academics and lobby groups. [13]

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[11] Walton G. 'Hundreds of convicted killers may seek to appeal after 'joint enterprise' law wrongly interpreted for 30 years' *The Telegraph* (London, 18 February 2016) http://www.telegraph.co.uk/news/uknews/law-and-order/12162445/Supreme-Court-joint-enterprise-ruling-accessories-to-murder.html accessed 24 September 2016; McGovern J, Common < http://www.bbc.co.uk/news/uk-england-28148073> accessed 7 April 2018. BBC, Guilty by Association http://www.bbc.co.uk/programmes/b049bb31 accessed 7 April 2018. Crewe B, Hulley S, Wright S. (2014] 'Written evidence on joint enterprise', Institute of Criminology, University of Cambridge <http://www.crim.cam.ac.uk/research/ltp_from_young_adulthood/evidence_to_justice_committee.pdf > accessed 7 April 2018; McClenaghan M, McFadyean M and Stevenson R, 'Joint Enterprise: An investigation into the legal doctrine of joint enterprise in criminal convictions (The Bureau of Investigative Journalism 2014), 7. Williams P and Clarke B, 'Dangerous associations: Joint enterprise, gangs and racism' (Centre for Crime and Justice Studies, January 2016); Joint Enterprise Not Guilty by Association (JENGbA).

[12] Persaud S and Hughes C, 'In Practice: Joint enterprise' (2016) LSG 11 Apr, 22; Buxton R, '*Jogee*: upheaval in secondary liability for murder' (2016) Crim LR 324; Robins J, 'Masterpiece of Modern Reasoning' (2016) 180 JPN 147; Grell M, 'Joint enterprise ruling: How many people serving life sentences should not be in prison?' http://thejusticegap.com/2016/02/what-does-this-mean-for-my-boy-what-does-this-mean-for-my-ken-uk-supreme-court-rules-on-joint-enterprise/ accessed 7 April 2018; Doughty Street Chambers 'R v Jogee – The Supreme Court Re-Writes the Law of Joint Enterprise' http://doughty-street-chambers.newsweaver.com/flyercampaign/mfkhnqdc7p8 accessed 7 April 2018.

[13] Joint Enterprise after *Jogee*: Reconsidering Law and Policy Conference', University of Liverpool, London Campus, 1st September 2016; Stark F, 'The demise of "PAL': substantive judicial reform, not common housekeeping' (2016) CLJ 550; Dyson M, 'Case Comment – Shorn-off complicity' [2016] Cam LJ 196.

The aim and structure of this thesis

The overarching aim of this thesis is to investigate whether complicity and PAL conformed to the evaluative principles of criminal law prior to *Jogee* and the extent to which the decision in *Jogee* responded to the concerns raised. This work seeks to establish whether there was an awkward relationship between both standard complicity and PAL with these principles.

Jogee gave the Supreme Court the opportunity to review and reframe complicity. Given its apparent importance, the case is analysed to explore the impact of the judgment on the relationship of complicity and PAL with the principles. This includes consideration of the question whether PAL and joint enterprise[14] still exist. It can then be established whether *Jogee* has improved the relationship of complicity with these principles and the impact of the judgment.

The criminal law principles selected are used as a critical bench-mark against which the law of complicity, PAL, and *Jogee,* can be assessed. They have been identified because of their relevance to complicity and PAL. These principles are causation, individual autonomy, *mens rea*, fair warning, correspondence, legality and fair labelling. A brief overview of each principle is detailed at the end of this Introduction.[15]

Jogee will have wider ramifications than those set out in this thesis. For example, the judgment will impact on how the rules of complicity are used in practice by

[14] See Note on terminology below, 9.
[15] Below, 10.

prosecutors and on sentencing. These issues are important, but within the context of this work they do not fall for consideration on grounds of space. As such, the approach in this thesis is doctrinal rather than socio-legal. In addition, other aspects of complicity remain problematic post-*Jogee*, such as the defence of withdrawal. Withdrawal of the accomplice was not an issue in *Jogee* and was not discussed in the judgment. As a result, a discussion of withdrawal does not form part of this thesis. Similarly, space does not permit an analysis of the purposes of criminal law in relation to complicity and PAL, nor an historical analysis of the development of PAL.

While complicity applies throughout the criminal law, it is particularly controversial in relation to the law of murder, due to the mandatory life sentence that follows conviction for both a principal and an accomplice. This thesis considers the issues arising in the context of murder but is not confined to this offence.

Chapter 2 examines the issues surrounding the basic law of complicity in relation to the principles of criminal law identified above[16] and summarised below.[17] The chapter begins with the rationale for basic accessorial liability, in terms of how the criminal law justifies its ability to criminalise one person for the crime of another. The chapter then explores whether this area of law complies with the identified principles. It will be shown that the unitary theory of liability in England and Wales has procedural and evidential advantages and allows for a wide variety of accomplices. Yet, it does not allow for the varying contributions of secondary parties and unfair labelling may arise. Further, the role of individual autonomy in complicity may be contradictory and

[16] Above, 4.
[17] Below, 10.

causation is attenuated. The chapter advocates that the *mens rea* of complicity has been controversial and is hard to define, resulting in a dilution of meaning over the years. Ultimately, the mental element was conflated with the *mens rea* of PAL, leading to breaches of the principles of fair warning, legality and correspondence.

Chapter 3 focuses on PAL. This chapter analyses the issues arising from PAL with the same criminal law principles, to assess whether these issues provide one reason why the Supreme Court decided to restate the common law in *Jogee*. The chapter starts by setting out the rationale for PAL, followed by an analysis of its relationship with basic accessorial liability. The chapter will suggest that PAL was always part of complicity. The chapter moves on to highlight areas of PAL that were problematic, prior to *Jogee,* with reference to the same principles. It will be shown that causation in PAL was even more remote than in complicity and the requisite mental element could cause injustice to secondary parties in terms of the principles of fair labelling, warning, legality, correspondence and autonomy.

Chapter 4 centres on the case of *Jogee*. The aim of this chapter is to evaluate the impact of the judgment on the relationship of the law of complicity with the same principles of criminal law. Consideration of these principles was not instrumental to the decision in *Jogee,* but it helps establish the impact of the case on future group crime. The concern is that while *Jogee* has been held up as an important case in the law of complicity,[18] in reality the judgment may not be as great as first anticipated. Furthermore, the decision may even create more issues than it resolves.

[18] n 12.

The chapter begins by setting out the restatement of law from *Jogee* and the reasons given for this restatement by the Supreme Court. The decision is considered in detail, in relation to the same principles of criminal law. This includes an analysis of the *actus reus* and *mens rea* for complicity, after *Jogee*, how the case dealt with the use of weapons and the possibility of manslaughter as an alternative verdict. Finally, the chapter reviews whether PAL and joint enterprise still exist post-*Jogee* and the general application of *Jogee* to the criminal law is debated.

It will be shown that while *Jogee* restated an intention to assist or encourage as the mental element in complicity in an attempt to remove the injustices caused by PAL, many issues remain unresolved. *Jogee* confirmed that PAL is part of complicity, so that an accomplice must intentionally encourage or assist every crime of the principal. With the issue of intention left to the jury to decide based on the evidence, complicity will increasingly become a jury prescribed offence, leading to the potential for inconsistent decisions and a breach of the principle of legality. Breaches of the principles of fair labelling, warning and correspondence may well remain following *Jogee*. The debates on causation are left untouched and even the restatement of intention, as the mental element of complicity, may not succeed in removing the injustices present prior to *Jogee*.

This thesis concludes that, prior to *Jogee*, the law of basic complicity breached the principles of fair warning, labelling, correspondence and legality in some factual scenarios. The causal contribution required of an accomplice was unclear and the mental element was diluted over the years. These breaches were even greater for

PAL. Furthermore, the most recent case on this area of law to reach the Supreme Court, *Jogee*, did not resolve these breaches and any changes made will have little impact in practice. In fact, *Jogee* may have muddled the law by creating additional issues, particularly in relation to the interpretation of intention and the level of foresight required to find intention in complicity. With the demise of PAL in *Jogee*, it is doubted whether basic complicity can adequately accommodate the fast moving developments of violent group crime, which often escalate rapidly. Therefore, Parliament should intervene to reconsider the law of complicity as a whole.

Facts of *Jogee*

To help understand the impact of *Jogee* on complicity, it is important to consider a brief set of facts. The principal (Hirsi) and the accomplice (Jogee) arrived at the victim's house having spent the evening drinking and taking drugs. The victim's girlfriend gave evidence at the trial that Jogee was angry and earlier in the evening had picked up a kitchen knife and threatened to 'shank him'. Both participants left but returned sometime later that evening. Jogee remained outside, striking a car with a bottle and shouting encouragement to Hirsi to do something to the victim. At one point Jogee came to the doorway with the bottle raised and leant forward towards the victim saying he wanted to smash it over the victim's head. Soon after, Hirsi stabbed the victim who died as a result of this attack.

Jogee was initially convicted of murder as a secondary party following *Chan Wing-Siu.* Jogee appealed against his conviction to the Court of Appeal, who dismissed his

case,[19] and an appeal to the Supreme Court followed, who were asked to review PAL. The Supreme Court decided that *Chan Wing-Siu* had misinterpreted earlier case law and it overturned the decision of the lower courts in *Jogee* by restating the common law of PAL.[20] Jogee was sent for a retrial. At the retrial Jogee was found not guilty of murder but guilty of manslaughter. [21]

Note on terminology

'PAL' was previously referred to as 'joint enterprise' by academics and judges.[22] However, 'joint enterprise' has been used in different ways over the last thirty years and some of the issues arising from this area of law may be caused by this differing use of the terminology.[23] It has been used to refer to the initial joint criminal venture out of which a collateral offence may arise.[24] It has also been used to refer to the rule from *Chan Wing-Siu,* which allowed for a secondary party to be convicted for the collateral crime of a principal beyond that agreed as part of the joint venture, where the secondary party had foreseen it as a possibility.[25] More recently, the courts have adopted the term PAL to refer to the rule from *Chan Wing-Siu* and the term PAL is

[19] *Jogee* [2013] EWCA Crim 1433.
[20] *Jogee* (n 7) [79].
[21] Importantly, the trial judge at the retrial, HH Judge Dickinson QC, stressed that the new verdict was more of a matter of a change of evidence by the primary witness, than a change in the law. This is an important point that could be easily overlooked; Grell M, Justice Gap 'Ameen Jogee cleared of murder sentenced to 12 years' <http://thejusticegap.com/2016/09/ameen-jogee-cleared-murder-sentenced-12-years-manslaughter> accessed 7 April 2018.
[22] Discussed below, 84 – 87, 142 -145.
[23] ibid.
[24] Baker DJ, *Reinterpreting Criminal Complicity and Inchoate Participation Offences* (Taylor and Francis 2016).
[25] *ABCD* [2010] EWCA Crim 1622, [2011] QB 841 [9] (Lord Hughes).

used in this thesis, unless citing original work.[26] Further, the term principal or primary actor is used in this work to denote an individual whose criminal liability is direct and independent of all other parties. The term accessory, accomplice, or secondary party is used to denote those individuals who are criminally liable for the offence of another. For reasons of brevity, this thesis adopts the female pronoun but this includes both genders.

The principles and doctrines of criminal law under scrutiny

The principles of criminal law discussed in this study of complicity and PAL are causation, individual autonomy, *mens rea*, fair warning, legality, correspondence and fair labelling. Some of these principles have been compromised, others have been conflated over the years, in this area of criminal law. They are a set of judicial guidelines that allow for critical appraisal of the criminal law.[27] These principles have evolved over time and are a set of general ideals to which the criminal law of England and Wales aspires.[28] Causation and *mens rea* from the general part of criminal law, on the other hand, lay down how, rather than why, an action is criminalised and these are also advisory or permissive. [29]

[26] *Gnango* [2011] UKSC 59, [2012] 1 AC 827 [15].
[27] Raz J, 'Legal Principles and the Limits of the Law' [1972] 81 Yale Law Journal 823, 847.
[28] For a full discussion of what is a principle, see Gardner J 'Ashworth on Principles' in Zedner L and Roberts J, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012).
[29] Gardner J, 'On the General Part of the Criminal Law' in Duff RA *Philosophy and the Criminal Law: Principle and Critique* (CUP 1998) 208.

These principles are not absolute and some overlap.[30] However, there is an underlying notion of autonomy. If the criminal legal system is allowed to interfere in the lives of individuals and to respect their autonomy at the same time, the criminal law should abide by the rule of law principles of fair warning, certainty and clarity of legal rules and subjective requirements for liability.[31] This means that a defendant should not be convicted of a criminal offence unless she intended to cause or knowingly risked causing a particular harm. In this way, all these principles maximise the choice of individuals on how they go about their lives in order to choose whether to risk committing a crime and so be subject to conviction and punishment.[32] The next few paragraphs of this Introduction set out an overview of the identified principles starting with causation.

Criminal offences, in particular result crimes, are often defined in terms of whether the conduct of the defendant has caused a specific harm.[33] The courts have suggested a common sense approach should be taken, but over the years cases have shown that this is not always straightforward.[34] Causation in complicity is more complex than factual and legal causation and moral issues are often taken into account to allow for just decisions in particular circumstances. In *Jogee,* causation in complicity was not seen as a pressing issue. However, it has been the subject of debate over the years and this is discussed further in Chapters 2, 3 and 4.[35]

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[30] Ashworth A, *Positive Obligations in Criminal Law* (Hart 2013) 132-133.
[31] ibid 133.
[32] ibid 135.
[33] Hart H and Honore T, *Causation in the Law* (2nd edn, OUP 1985) 84.
[34] ibid 26.
[35] Below, 28, 64, 101.

However, the role of causation in complicity may be contradicted by the principle of individual autonomy as a basis of liability. This is because the principle of individual autonomy reflects the view that each individual is entitled to choose his acts (and failures to act) as long as they are within their control and have no defence available to them. In turn, this necessitates responsibility for those choices.[36] The principle of individual autonomy stops any possibility of moral luck being responsible for actions that were beyond the control of the actor.[37]

That said, a free and deliberate voluntary act of an individual could break a chain of criminal causation and act as a *novus actus interveniens*.[38] This is why the criminal law generally associates punishment with the actions of the actor who is the most immediate cause of the offence and not the acts of others.[39] The primary actor has made their choice to carry out a proscribed harm and so only they should be liable for their behaviour.[40] This is contradictory to the notion of complicity where the actions of the secondary party results in her liability for the actions of the primary actor but

[36] Horder J, *Ashworth's Principles of Criminal Law* (8th edn, OUP 2016), 72; *Kennedy* (No 2) (2007) UKHL 38, [2008] 1 AC 269. *Broome v Perkins* [1987] Crim LR 271.
[37] Horder J, 'A critique of the correspondence principle in criminal law' [1995] Crim LR 759, 760. Horder argues there are 3 types of moral luck. For a full discussion on luck see also Ashworth A, 'Taking the Consequences' in Shute S, Gardner J and Horder J *Action and Value in Criminal Law* (OUP 1993) 107.
[38] *Kennedy* (n 36).
[39] Williams G, 'Finis for Novus Actus' [1989] CLJ 391, 398.
[40] Kadish S, 'Complicity, Cause and Blame: A Study into the Interpretation of Doctrine [1985] 72 Cal LR 324, 405. A free, deliberate and informed intervention will not break the chain of causation if the act was reasonably foreseeable or in self-defence *Roberts* `[1971] 56 Cr App R 95 (CA); *Pagett* [1983] 76 Cr App R 279 (CA).

illustrates that the important issue in terms of causation is often who should be held responsible for the result.[41] This is discussed further in Chapter 2.[42]

While causation relates to the prohibited act and how it came about, one role of *mens rea* in criminal law, on the other hand, is to make certain that a defendant has an adequate level of fault before being punished (except strict liability offences).[43] *Mens rea* is so fundamental that it has been stated as a presumption of the criminal law.[44] While this presumption can be rebutted, its existence reflects the basis of our criminal law that liability should not arise unless the defendant has acted to cause harm advertently or at least negligently.[45] The stigma of a criminal conviction requires accountability to be attributed appropriately. For serious criminal law offences it is usual for a subjective *mens rea* to be required (involuntary manslaughter is an exception).[46] The most commonly used terms to reflect fault for serious offences are intention and recklessness.[47] The criminal law also recognises conditional intention as a form of *mens rea*.[48]

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[41] Simester AP, Sullivan GR, ' Causation without limits: causing death while driving without a licence, while disqualified, or without insurance' [2012] Crim LR 753, 757.
[42] Below, 28.
[43] Mitchell B, 'In defence of a principle of correspondence' [1999] Crim LR 195, 205.
[44] *Sweet v Parsley* [1970] AC 132, (HL) 148 (Lord Reid).
[45] Chan W and Simester A, 'Four Functions of *mens rea'* [2011] CLJ 381, 381.
[46] The history of this development has been open to criticism in Horder J, 'Two histories and four hidden principles of *mens rea'* [1997] LQR 95.
[47] Stark F, 'It's only words: on meaning and *mens rea'* [2013] CLJ 155; 155. Ashworth A, 'Taking the Consequences' in Shute S, Gardner J and Horder J *Action and Value in Criminal Law* (OUP 1993) 116. The criminal law has struggled to define the precise boundary between these two ways of committing a crime: see Fletcher G, *Rethinking Criminal Law* (Little Brown and Company Canada Ltd 1978) 442. Also see Simester AP, 'Why Distinguish Intention from Foresight?' in Simester AP and Smith ATH *Harm and Culpability* (OUP 1996).
[48] Simester AP, 'Accessory liability and common unlawful purposes' [2017] LQR 73, 85.

In theory, a crime should have a fault element so as to warn the individual that he is about to break the law.[49] If a crime could be committed accidentally there would be no fair warning to the defendant of his impending criminal offence.[50] This criminal principle posits that an accused individual should only be liable for conduct, circumstances or a result of which they intended or knowingly risked taking.[51] The essence is that a criminal offence may only be committed if the accused are sufficiently aware of their conduct and its result, or circumstances, so that they have chosen their actions with no element of surprise.[52] This is directly related to the principle of autonomy discussed earlier.[53] That said, many new criminal offences are strict liability offences that do not require a fault element for policy reasons. As a result, the fair warning role of *mens rea* has reduced over the years in relation to lesser crimes.

The principle of fair warning requires law to be stated clearly.[54] It requires a language understandable to lawyers and defendants.[55] Individuals are entitled to know what the criminal law expects of them.[56] While this principle is a criminal law aspiration, it is clear that in practice that most people only gain knowledge of the law from

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[49] Chan and Simester (n 45) 384.
[50] Gross negligence manslaughter is another exception to the requirement for a subjective mental attitude. Fair warning for this offence should be provided by the duty of care that is required.
[51] Horder *Ashworth's Principles of Criminal Law* (n 36) 174.
[52] Chan and Simester (n 45) 389; Stark 'Its only words' (n 47) 163.
[53] Above, 11 - 12.
[54] Chan and Simester (n 45) 389.
[55] Duff DA 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18 OJLS 189, 197.
[56] Robinson P 'A Functional Analysis of Criminal Law' (1994) 88 NwUL Rev 857, 876 http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1609&context=faculty_scholarship accessed 26 February 2017.

educational institutions, word of mouth, parental influence, moral intuition and press reports of criminal offences.[57] These sources of knowledge have shortcomings. Individuals may have differing moral intuitions, the press is not always accurate and word of mouth can be unreliable. It cannot be presumed that most people know the law.[58] As a result, criminal prohibition should be publicised sufficiently.[59] The criminal law aspiration of fair warning may be hard to fulfill in reality.

In addition, the principle of fair warning requires that the law should be stated prospectively to give predictability.[60] This is more achievable and is important to allow lawyers to advise clients with some certainty how to plead to a criminal charge and trial judges to give clear directions to juries.[61] While the principle of fair warning is an ideal, it is open to criticism as to whether defendants take into account any intended warning prior to a crime.[62]

The principle of fair warning overlaps with the principle of legality.[63] The two can, however, be differentiated.[64] Fair warning reflects the idea that potential criminals should be warned of their potential criminal behaviour. The principle of legality

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[57] ibid.
[58] Gardner J 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 CLJ 502, 513.
[59] Von Hirsch A, 'Extending the Harm Principle: Remote Harms and Fair Imputation' in Simester AP and Smith ATH *Harm and Culpability* (OUP 1996) 270.
[60] *Rimmington and Goldstein* [2005] UKHL 63, [2006] 1 AC 459 [33].
[61] From a constitutional perspective, both the rule of law and Article 7 of European Convention of Human Rights also require the law to be fixed and certain.
[62] Ashworth A, 'Interpretation of criminal statute: a crisis of legality' [1991] LQR 419, 442.
[63] Chan and Simester (n 45) 388.
[64] *Rimmington* (n 60) [33].

promotes that there should be no crime without law: *nullum crimen sine lege*.[65] This also means that the law should be fixed, certain and prospective.

On the other hand, the correspondence principle, first coined by Ashworth, requires that a defendant should not be found guilty of a crime unless the requisite fault of the offence refers to the harm which the law is trying to prevent.[66] The defendant should be found to have the necessary *mens rea* of an offence and that this *mens rea* in terms of intention, knowledge or recklessness should relate to the *actus reus* of that particular crime.[67]

If applied strictly, the correspondence principle entails every element of the *actus reus* having a corresponding mental element which should be fulfilled simultaneously.[68] This helps justify liability for the relevant crime. A looser version of this doctrine requires a moral guilt to be attached to the prescribed acts as opposed to every element having a matching *mens rea* requirement.[69] For complicity, this means that if the accomplice assists or encourages the principal, they must intend to assist or encourage the principal in their offence.

However, the correspondence principle in complicity can be given a different interpretation, so that the mental attitude of the accessory towards the offence being

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[65] Chan and Simester (n 45) 388.
[66] Ashworth A, *Principles of Criminal Law* (4th edn OUP 2003); Tadros V, *Criminal Responsibility* (OUP 2007) 94.
[67] Horder, *Ashworth's Principles of Criminal Law* (n 36) 175; Tadros V, 'The Homicide Ladder' 68 MLR 601, 608.
[68] Horder, 'A critique of the correspondence principle' (n 37) 767.
[69] Simester A P, Spencer J R, Sullivan G R and Virgo G R, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn, Hart 2013), 196.

assisted or encouraged has to match the mental element for the principal offence. Therefore, the accomplice should have the same mental attitude towards the principal offence that is required of the primary actor himself. This would help to justify the unitary system of liability. Whether this is achieved for both basic complicity and PAL is considered in this thesis.

Criminalisation results in a label being attached to offenders, which should not be imposed lightly due to the stigma attached.[70] Accordingly, any label attached to a defendant should accurately describe the crime for which they have been convicted.[71] It would be unfair if the label attached to an offence were too strict or too lenient. It would either overstate or understate to the public the defendant's fault.[72] Therefore, crimes should be separated out and labelled to ensure that the nature and seriousness of the offence is clearly identified.[73] A label has a meaning and sends a message to people that harm was, or could be, done.[74] The label indicates to the accused, and the public, why she is being punished and so should be fair. [75] This is

[70] Ashworth, *Positive Obligations in Criminal Law* (n 30) 19; Gardner J, 'On the General Part of the Criminal Law' in Duff RA *Philosophy and the Criminal Law: Principle and Critique* (CUP 1998) 236.
[71] Ashworth A, 'The Elasticity of the *Mens Rea'* in Tapper CFH *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth 1981). Shute, Gardner and Horder, *Action and Value in Criminal Law* (Oxford Clarendon Press 1993) 9. Horder J, 'A critique of the correspondence principle in criminal law' [1995] Crim LR 759, 761.
[72] Williams G, 'Convictions and Fair Labelling' [1983] 42 CLJ 85, 85.
[73] Mitchell B, ' Multiple Wrongdoing and Offence *Structure*: A Plea for Consistency and Fair Labelling' [2001] 64 MLR 393, 393.
[74] Baker D, *Reinterpreting Criminal Complicity and Inchoate Participation Offences* (Routledge 2016)
[75] Chalmers J and Leverick F, 'Fair labeling in Criminal Law' [2008] 71 MLR 217, 226.

known as the principle of fair labelling[76] which is necessary in a democratic society in order to give confidence in the legal system.[77]

The principle of fair labelling also has a role to play in relation to victims, the judiciary and public solidarity.[78] This is so that victims know that their suffering is recognised by the law, judges may be influenced in sentencing and public respect for the content of the law is maintained. [79]

Fair labelling could be successfully achieved by the creation of a structure of individual offences reflecting the causal contribution of each party. The offender could be labelled according to their contribution, giving legitimacy to the law by indicating accurately the nature of the wrongdoing to be punished and deterred. Participants with higher causal contributions could be held responsible and labelled with the same offence as the principal. While this would be the ideal solution, unfortunately, offences that are labelled by way of numerous sub-divisions would be a 'law professor's dream' and is totally unrealistic in an already overloaded criminal justice system.[80]

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[76] Originally termed 'representative labeling' by Ashworth, Williams coined the use of fair labelling in Williams G, 'Convictions and Fair Labelling' (n 72) 85.
[77] Tadros V, 'Fair Labelling and Social Solidarity in Zedner L and Roberts J, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012), 68. Simester AP, Review of Shute, Gardner and Horder, *Action and Value in Criminal Law* (Oxford Clarendon Press 1993) (1994) 53 CLJ 605, 605.
[78] Tadros V, 'Fair Labelling and Social Solidarity' (n 77) 69.
[79] ibid 69-71. Tadros gives an account of fair labelling, social justice and public solidarity.
[80] Ashworth A 'Conceptions of Overcriminalisation' (2008) 5 Ohio State JCL 407, 410.

The key principles of criminal law against which complicity, PAL, and the criminal law post-*Jogee* will be evaluated in this thesis are set out above. These are the principles of causation, individual autonomy, *mens rea*, fair warning, legality, correspondence and fair labelling. The aim of Chapter 2 is to evaluate the law of basic complicity against these principles. This is important to consider prior to the evaluation of PAL in relation to the same set of principles and the extent to which *Jogee* improves the issues raised.

This thesis is up to date until July 2018.

CHAPTER 2 - COMPLICITY AND THE PRINCIPLES OF CRIMINAL LAW

In criminal law, an individual is primarily accountable for his own conduct and not for the acts of others.[1] Despite this, people other than the primary actor can also be criminally liable.[2] The criminal law recognises that it can be appropriate to punish other participants who were complicit in the commission of an offence, but who did not carry out the *actus reus* of the crime.[3] As such, a defendant can be liable for the actions of another individual. This is the design of complicity.[4] *Jogee*[5] is an example of complicity, despite the focus of the judgment being on PAL, because the defendant, Jogee intentionally encouraged the principal, Hirsi, to commit the principal offence. Jogee did not carry out the act of stabbing which resulted in the victim's death. He encouraged Hirsi to carry out the fatal act. It is this act of culpable encouragement, or assistance, which was criminalised.

This chapter examines the basic law of complicity against the identified principles of criminal law set out in the Introduction.[6] The chapter starts by setting out the statutory basis and rationale of complicity. It will show that this rationale is not totally sound and exceptions to the derivative nature of complicity have been created to allow for particular circumstances. The chapter then moves on to explore whether this area of

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[1] Ashworth A, *Positive Obligations in Criminal Law* (Hart 2013) 162; Williams G, 'Finis for Novus Actus' [1989] CLJ 391, 391.
[2] Simester A P, Spencer J R, Stark F, Sullivan G R and Virgo G R, *Simester and Sullivan's Criminal Law Theory and Doctrine* (6th edn, Hart 2016) 211.
[3] Ashworth, *Positive Obligations in Criminal Law* (n 1) 162.
[4] Smith KJM, 'The Law Commission Consultation Paper on complicity: Part 1: A blueprint for rationalism' [1994] Crim LR 239, 239.
[5] [2016] UKSC 8, [2017] AC 387.
[6] Above, 10 - 18.

law complies with the identified principles. It suggests that in some factual scenarios the law breaches the principles of fair warning, labelling, correspondence and legality. The causal contribution required of an accomplice is unclear and the mental element was diluted over the years. Yet, the most recent case on this area of law, *Jogee*, has not resolved these breaches and the changes made will have little impact on the law.

The current law on basic accessorial liability is statutory and derives from s 8 Accessories and Abettors Act 1861 (hereinafter 1861 Act), as amended, which states that:

> Whosoever shall aid, abet, counsel or procure the commission of any indictable offence ... shall be liable to be tried, indicted and punished as a principal offender.

However, the terminology of aiding and abetting from the 1861 Act is out of date making the statute hard to use in practice.[7] For certain, there has been a plethora of debate seeking to define these various terms.[8] In an attempt to update the language of the original act, the Law Commission has more recently referred to this conduct as assisting or encouraging the commission of an offence.[9] These words are more often used today[10] and were adopted in *Jogee*. This is a sensible change of terminology and aids compliance with the principle of legality. However, this is merely one small simplification in an overly complicated area of law.

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[7] Horder J, *Ashworth's Principles of Criminal Law* (8th edn, OUP 2013), 443.
[8] *AG Reference* (No 1 of 1975) [1975] QB 773 (CA); *Coney* (1882) 8 QBD 534 (QB); Smith JC 'Aid, Abet, Counsel or Procure' in *Reshaping the Criminal Law*, Essays in Honour of Glanville Williams (Glazebrook 1978), 130.
[9] Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.21.
[10] *Stringer* [2011] EWCA Crim 1396, [2012] QB 160 [45].

Under this unitary system of liability, the accomplice is to be convicted as if she had carried out the offence herself.[11] The accessory is convicted and eligible for the same sentence as the principal, whatever their role. In practice, the culpability of an accomplice may be reflected in sentencing. However, this is problematic where the offence committed is murder, due to the minimum mandatory life sentence. Yet the role of the accomplice in the murder may have been minor.

Despite their eligibility to be convicted as a primary actor, the *actus reus* of an accessory is different and independent from that of the principal offender.[12] The accessory does not carry out the *actus reus* of the substantive offence, she aids or abets the offence.[13] Nevertheless, the liability of the accomplice is dependent on the principal's conduct. In *Jogee*, for example, Jogee did not himself carry out the killing. He encouraged Hirsi to do so and for Jogee to be liable for homicide, Hirsi had to carry out the killing. The resulting harm that justifies liability in complicity is not included within the definition of the actual offence of complicity itself, which is assisting or encouraging the offence.[14]

The rationale of basic accessorial liability

The idea that a secondary party who did not commit the *actus reus* of the offence with the relevant *mens rea* can be convicted of the same offence as the principal has been around for hundreds of years.[15] The aim is to punish those involved in a crime

[11] Smith JC, 'Criminal liability of accessories: law and law reform' [1997] LQR 453, 453.
[12] Simester A P, 'The mental element in complicity' [2006] LQR 578, 588.
[13] Krebs B, 'Joint Criminal Enterprise' [2010] 73(4) 578, 586.
[14] Simester AP and von Hirsch A, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 44.
[15] Smith JC, 'Criminal liability of accessories' (n 11) 453.

that have encouraged or participated in it yet did not actively commit the proscribed harm. These parties, who may or may not be present at the time of the offence, are often equally as blameworthy and are viewed in the eyes of the law as just as culpable as the primary offender, so should be accountable for their involvement. [16] For example, in *Jogee*, Jogee was charged with murder because he was considered by the prosecution to have contributed to the killing by his encouragement, so should be held accountable for his actions.

Complicity is controversial because in some factual scenarios the act carried out by the participant may fail to reach that required to convict the principal of either an attempt or the full offence.[17] In *Jogee*, the defendant's encouragement would not have been sufficient for him to be convicted of an attempted murder, murder or manslaughter as a principal. Yet, in accordance with the unitary system set out in s 8 of the Accessories and Abettors Act 1861, an accessory is convicted as a primary actor, despite the fact that an accomplice could be liable merely by driving a getaway car or selling a gun in the normal course of their business. Whether all participants should be held equally accountable as the principal in all factual scenarios may be questionable where the involvement of the accomplice is minor.

Complicity in England and Wales allows for a wide variety of accomplices with both minor and major contributions to the *actus reus* of the principal's offence. [18] This

[16] *Rook* [1993] 1 WLR 1005 (CA).
[17] Wilson W, 'A rational scheme of liability for participating in crime' [2008] Crim LR 3, 3.
[18] Smith KJM, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: Clarendon Press 1991) 93.

approach may be severe on some accessories but there are positive benefits to a flexible system of accessorial liability, which enable the many types of accomplice to be convicted where their actions justify accountability.

One of the advantages of the unitary basis of liability is a practical one.[19] Procedural and evidential advantages allow for a group of criminals to be convicted even if it is not possible for the principal who carried out the ultimate crime to be identified.[20] In *Jogee*, there was no dispute over the identity of the principal, but this is not always the case. All parties can be treated as principals and the same sentence may be imposed.[21] Despite the procedural advantages, it has been described as 'simplicity at the expense of justice'.[22] Indeed, it appears that by enacting s 8 the legislature favoured a simpler process for dealing with accomplices, in spite of the potential injustice caused to defendants. Parliament allows for any accomplices to be charged as principals, to avoid the prosecution having to prove the identity of the primary actor. This is not justice to the accomplice who may have only been a minor player in the offence.

Furthermore, the extent of the primary actor's guilt necessary for complicity has been diluted over the years. The requirement was that the principal had to have been convicted in order for liability to accrue to any accomplice. This has been lessened to the need to show some harmful act or result, which has been brought about by

[19] Wilson (n 17) 4.
[20] *Swindall and Osborne* (1846) 175 ER 95, 2 C and K 230 (Assizes).
[21] Smith JC 'Aid, Abet, Counsel or Procure' in *Reshaping the Criminal Law*, Essays in Honour of Glanville Williams (Glazebrook 1978) 121; Wilson (n 17) 4.
[22] Dressler J, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' [1985] 37 Hastings LJ 91, 140.

another party.[23] The initial approach was stringent in terms of the ability to prosecute an accessory and again prosecutorial ease has been prioritised.

The problem is that a unitary system does not allow for the varying contributions of secondary parties. Some accessories are instigators and some are not, yet all participants are treated as if they were the principal in both charging and conviction. [24] This can be harsh in some factual scenarios. For example, an accomplice may be the mafia boss masterminding and controlling a group of participants but who does not take part in the executory stage of the offence. Alternatively, she may be the person that drives the getaway car or provides the weapon before the crime is committed, not realising it will used on multiple occasions years later. Further, the shopkeeper carrying out her normal retail business can be an accessory to a crime where the item sold is used as a weapon.

In complicity, a participant is held responsible for what the principal does.[25] Whether an individual is to blame depends first on whether they have done something wrong and second whether they should be responsible and accountable for that wrong.[26] Complicity is concerned with sharing responsibilities. The secondary party shares liability with the principal because they have contributed to the criminal actions of the

[23] Smith KJM, *A Modern Treatise* (n 18) 73.
[24] Fletcher G, *Rethinking Criminal Law* (Little Brown and Company Canada Ltd 1978) 645.
[25] Kadish S, 'Complicity, Cause and Blame: A Study into the Interpretation of Doctrine [1985] 72 Cal LR 324, 330.
[26] Gardner J, 'On the General Part of the Criminal Law' in Duff RA *Philosophy and the Criminal Law: Principle and Critique* (CUP 1998) 237; Simester, 'The mental element in complicity' (n 12) 579.

primary actor.[27] Jogee shared liability with Hirsi because he was encouraging Hirsi to injure the victim.[28] Jogee was responsible because he had a choice whether to contribute to the Hirsi's offence or not. He had become the Hirsi's 'shadow'.[29] It is this role of the accomplice behind the actions of the primary actor that justifies their liability. The criminal law only holds those people accountable if they are responsible in some way.[30]

Liability of an accomplice derives from the acts of the principal.[31] As a result, if the crime does not take place, then any other co-participants would also be relieved of any liability for the offence (the defendants may be liable instead for an inchoate offence).[32] In *Jogee*, Jogee's liability derived from Hirsi's fatal attack on the victim. If Hirsi had not carried out the attack, Jogee would not have been liable for homicide. The derivative nature of complicity has been described as one of the 'clear and enduring foundational requirements of (complicity) liability'.[33]

Despite the derivative nature of accessorial liability, an accessory can be liable for a greater offence than the principal in some circumstances. For example, if the principal is not found to be legally responsible (because they were under the age of criminal responsibility), or if the primary actor lacks *mens rea* in their conduct or if

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[27] Kadish, 'Complicity, Cause and Blame' (n 25) 338.
[28] Hirsi was also convicted of murder.
[29] Dressler J, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' [1985] 37 Hastings LJ 91, 103.
[30] Fletcher (n 24) 455.
[31] ibid Ch 8; Duff RA, 'Can I Help You? Accessorial Liability and the intention to Assist' (1990) 10 LS 165, 168.
[32] Fletcher (n 24) 680.
[33] Smith KJM, *A Modern Treatise* (n 18) 4.

they have been subjected to duress. Under these circumstances, the principal will not be liable. It follows that under a strict interpretation of the derivative theory, an adult accomplice would also not be liable.[34] Despite this, any culpable accomplice who did have the necessary mental attitude for the primary actor's offence should be responsible for their crime.[35] To allow for this the criminal law has developed exceptions to the derivative theory.[36] As a result, the liability of the secondary party cannot be said to purely derive from the criminality of the principal's offence. Instead derivative liability derives from the carrying out of the *actus reus* of the offence.

It is clear from the above discussion that the derivative nature of accessorial liability has had to adapt to enable just convictions of culpable and responsible participants in appropriate circumstances. *Jogee* merely accepts the role of complicity in the criminal legal system. It would not have been the Supreme Court's role to question the role of complicity in the legal system, but it could have explained the rationale behind this area of law.

The role of Individual autonomy and causation in complicity

The role of individual autonomy in complicity is contradictory. To be guilty an accessory must choose to intentionally assist or encourage the principal in the commission of their criminal offence fulfilling the principle of individual autonomy.[37]

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[34] ibid 122.
[35] *Cogan and Leak* [1976] QB 217 (CA). Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.9.
[36] For example, the doctrine of innocent agency. This doctrine differs from complicity but that is not the subject of this thesis. Innocent agency is used, however, to avoid awkward results if derivative liability is applied rigorously.
[37] See above, 11 - 12.

By making her choice to contribute to the offence the accomplice should be held responsible for her actions. On the other hand, individual autonomy could contradict the role of causation as a basis of liability in complicity.[38] The autonomy of the principal could serve as a *novus actus interveniens*.[39] The choice of the primary actor to carry out the elements of the principal offence acts as a break in the chain of causation between the actions of the accessory in assisting or encouraging the principal and the principal crime being committed. As a result, it is the individual who has made the decision to do harm that is culpable, not the original contributor.[40]

One issue for complicity is that the encourager or assister may contribute by providing advice or verbal encouragement but they do not, strictly speaking, 'cause' the principal to commit the crime.[41] This is a debate which has raged for many years. Yet the courts seem reluctant to settle this issue by providing any form of guidance to judges as to how to direct juries, other than to say a strict application of the 'but for' test is inappropriate.[42] This reluctance from the courts continues in *Jogee* and is discussed further in Chapter 4.[43]

This indecision on the role of causation has an impact on the relationship of complicity with other principles. For example, fair labelling could be breached because if the courts are unclear about the requisite causal contribution of the

[38] See above, 11 - 13.
[39] *Kennedy* (No 2) (2007) UKHL 38, [2008] 1 AC 269.
[40] Von Hirsch A, 'Extending the Harm Principle: Remote Harms and Fair Imputation' in Simester AP and Smith ATH *Harm and Culpability* (OUP 1996) 267.
[41] Fletcher (n 24) 635.
[42] *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876; *Stringer* [2011] EWCA Crim 1396, [2012] QB 160.
[43] Below, 99 – 103.

secondary party it may not be fair to label them as a principal when their causal contribution is minimal.[44] Furthermore, if the courts are not clear on the causation issue then the law is not fixed, certain and prospective because it gives too much discretion to judges when directing juries, breaching the principle of legality.[45] Similarly, those with a propensity to crime will not be fairly warned that minimal causal contribution to an offence can be criminalised.[46]

Hart and Honore, Kadish and Williams have suggested that the doctrine of secondary liability was developed because the accessory cannot have caused the result of the principal's offence supporting the *novus actus interveniens* principle.[47] This will depend on the facts but may over simplify the causational issue. The problem with their approach is how to justify the conviction and punishment of secondary parties without any reference to causational principles.

A conviction is, in itself, a penalty irrespective of the sentence imposed. By having a criminal conviction a person is labelled as a criminal in a public condemnatory statement that affects their ability to obtain employment or a mortgage.[48] There is also a stigma attached to having a criminal conviction. If, as Hart and Honore, Kadish and Williams suggest, the secondary party is not seen as having a causal influence on the principal's crime, because the actions of the principal break any chain of

[44] Below, 47 - 51.
[45] Above, 15 - 16.
[46] Above, 14 - 15.
[47] Hart H and Honore T, *Causation in the Law* (2nd edn, OUP 1985); Kadish, 'Complicity, Cause and Blame' (n 25) 335; Williams, '*Finis* for *Novus Actus*?' (n 1) 398.
[48] Chalmers J and Leverick F, 'Fair labelling in Criminal Law' [2008] 71 MLR 217, 223.

causation, then the liability of a secondary party needs to be grounded in some other theory. With eligibility of equal punishment under the unitary system of liability, the justification for the criminality of a secondary party becomes even greater. Yet, as will be shown in Chapter 4, *Jogee* did not attempt to justify the unitary system or the liability of the secondary party by way of causation.[49] *Jogee* will have little impact on the causation debate.

Virgo based the liability of a secondary party on his 'association' with the principal.[50] This has the advantage that causation, a connecting link or an association can justify liability, but some defendants may believe that they can be held liable by mere association with another individual, which is not correct. The problem with this approach is that association is not defined and can be broad. It raises issues of the principle of legality by not being fixed, clear and prospective. If the basis of association were to be used, it would have to be an association with the crime itself to justify conviction and to support fair labelling. Association does not support a unitary theory of liability. The judgment in *Jogee* merely confirmed that mere association with the principal is not sufficient to justify liability.[51]

Gardner has argued that liability of a secondary party can be justified because they have partly caused the harm to the victim, but that their causal contribution differs to

[49] Below, 99 - 103.
[50] Virgo G, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 860. Mirfield disagrees see Mirfield P, 'Guilt by association: a reply to Professor Virgo' [2013] Crim LR 577, 580.
[51] *Jogee* (n 5) [11].

that of the principal.[52] Indeed, given the varying roles of accomplices, it is true that not only will the causal contribution of an accomplice vary from that of the principal, but also the causal contribution of each accessory will differ depending on their level of involvement. It was suggested in the Introduction that causation issues are often decided on moral grounds.[53] By not entering into the causation debate, it could be implied that *Jogee* supports the idea that the causal contributions of accessories can differ from the causal contribution of the principal. Flexibility is maintained allowing judges to convict in appropriate circumstances.

Gardner's approach to causation in complicity is preferred to that of Hart and Honore, Kadish and Williams because it maintains a distinction between principals and accessories by the difference in their wrongs. Sometimes the accessory may play an important role such as the mafia boss, others may provide a weapon a few weeks before, in the hope it would not be used. Both types of secondary party, however, had some sort of a causal role, which is different to that of the principal who carried out the *actus reus* with the necessary mental attitude. There appears to be some causal influence by the accessory, even if less than the criminal law idea of the 'but for' causal contribution. Gardner's view also provides flexibility to the law. *Jogee* does not conflict with Gardner's view.

KJM Smith takes a more radical approach and sees a causal element as an 'essential ingredient' for complicity. He suggests a structure of offences could be created to reflect the causal contribution of the accomplice to the substantive

[52] Gardner J, 'Complicity and Causality' (2007) Crim Law and Philo 1:127,128.
[53] Above, 11 - 13.

offence.[54] This would also avoid the criticisms of the criminal law being used to over criminalise defendants and allows the role of each individual accessory to be taken into account in conviction. There is often a moral justification in punishing an accomplice at the same level as the perpetrator, particularly in the gang crime scenario set out above. Equally, there can be a moral justification for differentiating between the role played by each party where the main player has control over the other participants or where an accessory plays a lesser role, as a result of their inability to commit the ultimate offence. A structure of offences would allow all scenarios to be reflected in conviction and sentencing.

A structure of offences may be the ideal reform but whether this would work in practice is open to debate. This structure of offences would result in a substantial increase in criminal offences with the advantage of more accurate labelling, but this approach would increase the workload of an already over worked criminal court system.[55] A fundamental restructuring of complicity, such as this, would require legislation by Parliament and would not have been the constitutional role of the Supreme Court in *Jogee*.

Academic views may differ on the role of causation, but the courts seem to allow an attenuated causal influence of the accomplice to be criminalised, as well as the stricter causal acts of the principal, even if the latter is considered to have made a free and informed voluntary act. *Jogee* continues this approach. Only a 'sufficient

[54] Smith KJM, *A Modern* (n 18) 93.
[55] Tur RHS, 'Subjectivism and Objectivism: Towards Synthesis' in Shute, Gardner and Horder, *Action and Value in Criminal Law* (Oxford Clarendon Press 1993) 223.

connection' in fact appears necessary.[56] While it may be hard to define exactly what connection is required to justify a conviction,[57] we know that the level of causal contribution need not be high because the principal need not necessarily even be aware of the assistance and it could be as simple as a cough.[58] That said, it should be a real connection justifying accountability and not just some distant association with the principal. This would help to justify the stigma attached to a conviction. This gives judges the flexibility to hold accomplices responsible in appropriate circumstances and this may be why they have not been forthcoming with their guidance on the requisite causal contribution of an accomplice.

It is apparent from the above discussion that the courts have not provided a clear coherent account of the necessary causal relationship between the secondary party's conduct and the substantive offence.[59] *Jogee* does not provide any additional guidance on this debate, as will be shown in Chapter 4.[60] This may be because, in practice, there is no set doctrine of causation and causational issues are often decided on moral grounds, rather than legal ones, to allow for just decisions in individual circumstances.[61] By not entering directly into this debate, *Jogee* maintains this flexibility. However, guidance from the Supreme Court in *Jogee* would have provided clarity to judges sitting in the inferior courts and assisted them in directing

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[56] Despite the implied chain of causation in *Anderson Morris* [1966] 2 QB 110 (CA). *AG v Able* [1984] QB 795 (QB), 812.
[57] The Law Commission described the extent of this connection as 'elusive' *in* Law Commission *Participating in Crime* (Law Com No 305, 2007) para 2.33.
[58] *Giannetto* [1997] 1 Cr App R 1 (CA).
[59] Smith KJM, 'The Law Commission Consultation Paper on complicity: Part 1: A blueprint for rationalism' [1994] Crim LR 239, 243.
[60] Below, 99 - 103.
[61] *Pagett* (1983) 76 Cr App R 279 (CA).

juries. Importantly, for the purposes of this thesis, additional guidance may have allowed complicity to better fulfil the principles of legality, fair warning and fair labelling.

Mens rea of complicity prior to *Jogee* and the principles of criminal law

Historically, little was said in relation to the mental element of complicity. Unusually, there was no mention of *mens rea* in the Accessories and Abettors Act 1861, so it fell to the courts to consider. However, it is clear that even before the 1861 Act came into force there was a necessity to find that the defendant had *mens rea.*[62]

The mental element of complicity was, and still is, that the secondary party must intend to assist or encourage the commission of the relevant crime committed by the principal.[63] The correspondence principle appears to be fulfilled. Despite this, in reality, the *mens rea* was uncertain and controversial prior to *Jogee*.[64] It has been asserted[65] that *Jogee* clarifies the *mens rea* of complicity but on further analysis this may not be the case and many of the issues will remain, post-*Jogee*. This is

[62] Chitty J, *A Practical Treatise on the Criminal Law* (2nd edn, G and C Merriam 1836) 258. Historically, parties to a crime were defined by different terminology. The primary actor, who carried out the *actus reus* and *mens rea* of the offence, was the principal in the first degree. A defendant who was present at the scene of the crime, and aided or abetted the carrying out of the crime, was known as a principal in the second degree. A defendant who was not present at the time of the crime but procured, counseled, abetted or incited the commission of the crime was an accessory before the fact and an accessory after the fact was a defendant who comforted or assisted the principal after the crime had taken place, knowing the crime had been committed.
[63] Duff RA, 'Can I Help You? (n 31) 165.
[64] Simester, 'The mental element in complicity' (n 12) 578.
[65] Persaud S, Hughes C, 'In practice: Joint enterprise' [2016] 22 LSG 11 Apr.

discussed in further detail in Chapter 4.[66] The discussion below sets out the issues arising from the law prior to *Jogee*.

Before *Jogee*, part of the uncertainty arose because the *mens rea* for complicity was diluted over the years so that, in practice, only recklessness was required.[67] Yet, in the case of murder by a principal, the accessory would be sentenced to the mandatory life sentence by virtue of s 8 Accessories and Abettors Act 1861. This dilution of *mens rea* provided potential for breaches of the principles of fair labelling, warning, legality and correspondence. This is because it may not be fair to label a defendant as a principal where they were merely reckless to the possibility of a future criminal offence. This depends on the level of foresight of the primary actor's crime by the secondary party.

Similarly, adequate warning was not provided that a defendant was about to commit a criminal offence even though, for example, they were going about their normal course of business. With the continual dilution of *mens rea* over a number of years, the law did not comply with the principle of legality because the parameters of the mental element kept changing, so that it was not fixed, clear and certain. How this came about is discussed in Chapter 3.[68] For specific intent crimes, the wider definition of the correspondence principle set out in the Introduction[69] was breached because the principal had to intend the offence, yet the accomplice was reckless

[66] Below, 108 -132.
[67] Dyson M, 'The future of joint-up thinking: living in a post-accessory liability world' [2015] J Crim L 181, 185; Simester, 'The mental element in complicity' (n 12) 578.
[68] Below, 71 - 73.
[69] Above, 16 - 17.

towards the offence. The *mens rea* requirement for the parties differed, dependent on their role.

The mental attitude of a complicit party is not straightforward. In accessorial liability there are two sets of conduct, the principal's and the accessory's, and two mental attitudes, both relating to the accessory.[70] The requisite *mens rea* for accomplices is independent of the final crime.[71] She is required to intend her own contribution of assisting or encouraging the principal. In addition, however, the secondary party must appreciate the nature of their actions.[72] This relates to the secondary party's mental attitude towards the conduct and fault element of the principal's criminal offence. It is this second aspect of fault which has become controversial and has been diluted over the years.[73] Each of these mental elements will be discussed in turn below. It is disappointing that the judgment in *Jogee* did not clearly identify the two separate elements of *mens rea* because this would have provided clarity to this complicated area of law.

An accomplice's *mens rea* for her own act of assisting/encouraging

This first element is that the secondary party must intend to assist or encourage the primary actor in the crime, with the intention, or belief that their conduct is capable of assisting or encouraging the crime.[74] This appears to conform to the correspondence

[70] Virgo G, 'Making sense of accessorial liability' [2006] Arch News 6, 6.
[71] Simester, 'The mental element in complicity' (n 12) 583.
[72] Simester, Spencer, Stark, Sullivan and Virgo, (n 2) 229.
[73] Below, 71 - 73.
[74] Duff, 'Can I Help You?' (n 31) 165. The trend of the courts has been towards oblique intention being sufficient. *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL); *DPP for Northern Ireland v Lynch* [1975] AC 653 (HL). *Gillick* implied that direct intention was a necessary requirement but the defence of necessity could have been used instead. See Ormerod D and Laird K, Smith and

principle, because if the *actus reus* in complicity is assistance or encouragement and the *mens rea* is an intention to assist or encourage, the mental attitude of the accomplice has a direct relationship with the prohibited conduct. However, an intention to assist or encourage in complicity does not mean that it was defendant's aim or purpose to assist or encourage, which is the usual definition of intention.[75] For example, *Gamble*[76] implied that an intention to assist or encourage the primary actor meant that the secondary party's act was merely voluntarily and deliberate, not an accident or involuntary. This approach was followed in later cases to include not acting by turning a blind eye.[77] In addition, the criminal law has never allowed motive to be a consideration in conviction, although it is taken into account on sentencing.[78]

Criminalising a defendant for merely acting deliberately (or for deliberately not acting), in order to assist or encourage a principal, does not attribute accountability accurately. It is not a high level of *mens rea* and does not fulfil the criminal law aspiration of fair labelling, fair warning or correspondence for criminal acts.

For example, an individual who acts deliberately (or turns a blind eye) in order to carry out their usual commercial business, has a different mental attitude to the person who acts with a criminal purpose in mind or acts with foresight of the virtual certainty of a result. The latter has far greater culpability. The retailer of kitchen

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Hogan's Criminal Law (14th edn, OUP 2015) 227; Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.24.

[75] *Mohan* [1976] QB 1 (CA).

[76] *National Coal Board v Gamble* [1959] 1 QB 11 (QB) 20.

[77] *JF Alford Transport* [1997] 2 Cr App R 326 (CA).

[78] For an analysis of motive and intention see Duff RA, 'Principle and Contradiction in the Criminal Law: Motives and Criminal Liability' in Duff RA *Philosophy and the Criminal Law* (CUP 1998) 170.

knives may deliberately assist a criminal by selling them a knife, but it is not the shopkeeper's aim or purpose to assist or encourage a stabbing. If the primary actor kills a victim with an intention to kill or cause serious harm, an accomplice would be convicted of murder and labelled a murderer, with a mandatory life sentence, yet it may not have been the accomplice's aim or purpose that the victim should die or even suffer serious harm. This is unfair labelling.

Similarly, by just acting deliberately in their business a potential accomplice is not warned that they may be about to commit a criminal offence. There is no requirement that the accomplice wants the principal to commit the offence or even that they know it will take place. Further, the principle of correspondence is not fulfilled because the *mens rea* of the shopkeeper does not correlate with their prohibited act because their mental attitude was determined by the development of their business. Despite these breaches of principle, *Gamble* was endorsed in *Jogee,* so it appears that this idea that the accomplice merely has to act deliberately remains unchanged.[79] Fair labelling in standard complicity is considered in further detail below.[80]

Despite these concerns, there may be good reason for only requiring a deliberate act of the secondary party for liability. For example, if a defendant does not want, or it is not their purpose, to kill an occupant of a house yet they still drive the getaway vehicle, they should be responsible for their contribution. Their conduct is wrongful because it assists the commission of the offence. Instead, they should refuse to be the driver or should report the potential offence to the relevant authorities. Their

[79] *Jogee* (n 5) [9].
[80] Below, 47 - 51.

actions are deserving of accountability and punishment, whether at the same level as the principal is open to debate and is fact dependent.

Furthermore, the uncertainty regarding the definition of intention in complicity for offences, other than murder, is disappointing and breaches the principle of legality. While the definition of intention has been settled in relation to murder,[81] complicity relates to most offences, not just murder. However, a trend towards definitional uniformity does not necessarily lead to a rational and principled criminal law, albeit this would help to fulfil the principles of fair warning, fair labelling, correspondence and legality.[82]

The above discussion shows that merely requiring a deliberate act by an accomplice may conflict with the principles of criminal law. It appears that *Jogee* does not fully improve the relationship of this element of *mens rea* with these particular principles and that these breaches will continue post-*Jogee*. This is discussed in further detail in Chapter 4.[83]

An accomplice's *mens rea* as to the primary actor's crime

The second element of *mens rea* is an accessory's mental attitude in relation to the principal's crime itself. Disappointingly, *Jogee* was not clear on this element and left questions unanswered, as will be seen in Chapter 4.[84]

[81] *Woollin* [1999] 1 AC 82 (HL).
[82] Gardner, 'On the General Part of the Criminal Law' (n 26) 247.
[83] Below, 108-132.
[84] ibid.

There is no statutory definition of *mens rea* in complicity and no mention of this aspect of *mens rea* in the courts until 1950 in *Johnson v Youden.*[85] In *Johnson*, Lord Goddard CJ held that an accessory should, at least, know the essential matters which constitute the principal's offence.[86] Strictly interpreted, therefore, recklessness would not suffice.[87].

Johnson v Youden was not without criticism. One criticism was that the decision did not expand on what essential matters had to be known, only that whether it was known that these essential matters were unlawful, was irrelevant.[88] Crucially, the judgment did not set out how much knowledge and detail the accomplice was required to have.[89] Presumably the judges could not expand on this element, as the essential facts would vary from case to case. Yet, not even any guidelines were set out, resulting in the potential for inconsistencies between judges in directing juries and differing verdicts in similar circumstances.

Contradictions in the application of this mental requirement in the courts arose and confusion among academics was apparent.[90] It was hard for lawyers to predict the law and advise their clients how to plead. Inconsistent decisions allowed the criminal law aspirations of fair warning to prospective offenders and the principle of legality to

[85] [1950] 1 KB 544.
[86] ibid 546 (Lord Goddard CJ).
[87] Simester, 'The mental element in complicity' (n 12) 583.
[88] Dyson M, 'Might Alone Does Not Make Right: Justifying Secondary Liability' (2015) Crim LR 967, 968.
[89] ibid.
[90] Child J and Ormerod D, *Smith and Hogan's Essentials of the Criminal Law* (OUP 2015) 490. Herring J, *Great Debates in Law* (3rd edn Palgrave 2015) 183; Simester, 'The mental element in complicity' (n12) 578.

be breached due to this lack of clarity. Offences should be stated prospectively to give predictability to the law.[91]

Johnson was one of the most commonly cited cases for the *mens rea* requirement of an accessory.[92] It was recited again in *Jogee* but this did not provide clarity.[93] *Jogee* amended the words from *Johnson v Youden* to a requirement of knowledge of any existing facts necessary for the crime, but level of knowledge of the facts required are later diluted in the decision, as will be seen in Chapter 4.[94]

Knowing the essential matters from *Johnson v Youden* was considered by the Law Commission to be fulfilled, if the secondary party knew or believed the principal was committing or would commit the *actus reus* of the offence, with the necessary circumstances and result.[95] This sounds straightforward, but case law has shown that this approach was not strictly adhered to, because this could be unduly lenient to defendants.[96] This is because an accomplice cannot know whether the elements of the crime will be present before they have occurred and at the encouragement or assistance will have taken place before the principal's offence.[97]

This potential for undue leniency to accomplices led to a dilution of *mens rea.* In fact,

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[91] Above 15.
[92] Dyson, 'Might Alone Does Not Make Right' (n 88) 968; Simester, 'The mental element in complicity' (n 12) 583.
[93] *Jogee* (n 5) [16].
[94] Below, 108 - 132.
[95] Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.64.
[96] Below 43 - 47.
[97] Virgo G, 'Making sense of accessorial liability' [2006] Arch News 6, 6.

there was evidence of this dilution in earlier cases.[98] Therefore, while in *Jogee*, *Chan Wing-Siu*[99] was seen as the turning point after which the *mens rea* of complicity was reduced, this does not appear accurate.[100] The requisite mental attitude may have even been diluted in *Johnson v Youden* itself. It was clear from Lord Goddard's judgment that wilful blindness was sufficient to impose liability on a secondary party. His judgment implied that the third defendant in that case must have realised the principal was committing an offence by taking an illegal payment, so he must have turned a blind eye to the principal's offence. He was convicted as having aided and abetted the principal.[101] If an individual turns a blind eye, this could mean that they had knowledge but chose to ignore that knowledge. This is constructive knowledge. This deserves responsibility on the part of the accomplice, similar to a failure to act in particular circumstances.

Yet, turning a blind eye could also mean that the defendant had a suspicion of the knowledge, but did not make further enquiry. If this is also willful blindness, then judicial precedent from the criminal law offence of conspiracy shows that a defendant should not be made accountable for mere suspicion.[102] Conflicting decisions between conspiracy and complicity did not provide clarity to an already confused area of law.

[98] For example see *Carter v Richardson* [1974] Crim LR 190 (QB).
[99] [1985] AC 168 (PC).
[100] *Jogee* (n 5) [62].
[101] *Johnson* (n 85) 547.
[102] *Saik* [2006] UKHL 18, [2007] AC 18.

Without doubt, the amount of knowledge of the principal's crime required for an accessory to be liable under *Johnson v Youden* was diluted in *Bainbridge*[103] and again in *DPP for Northern Ireland v Maxwell*.[104] On a strict application of *Johnson v Youden,* the defendants in *Bainbridge* and *Maxwell* would not have been convicted because they did not know the essential matters of the crime committed by the principal. Despite this, these cases held that an accomplice was not required to know the exact details of the crime in terms of time and place in order to be convicted, as long as she knew the type of crime (guidance provided by the court on 'a type of crime' was limited) or was aware of the range of crimes that the principal intended to commit. [105]

Ashworth and Horder, before Ashworth passed over the rewriting of this book to Horder, suggested that this may be because a person who willingly helps a principal knowing that one of a number of offences may be carried out, without realising which, should be held responsible.[106] This is correct because by assisting in the criminal venture they have endorsed whichever crime, within a range of crimes known to the accomplice, the principal chooses to carry out. The accessory contributes to one of a potential range of crimes by, for example, driving the getaway car or providing the weapon or information and so should be held responsible because by participating they authorise the substantive offence. *Jogee* endorses *Maxwell* and so again

[103] [1960] 1 QB 129 (CA).
[104] [1978] 1 WLR 1350 (HL).
[105] The Law Commission speculated that the defendant must have knowledge that *some* burglary, but not necessarily *this* burglary would be carried out: Law Commission, *Assisting and Encouraging Crime* (Law Com No 131, 1993) para 2.72.
[106] Ashworth A and Horder J, *Principles of Criminal Law* (7th ed, OUP 2013), 436.

appears to confirm the dilution of *mens rea* from a strict basis of knowledge. This is discussed further in Chapter 4.[107]

Bainbridge was helpful in terms of enforcing the law, but it also widened the *mens rea* to a form of recklessness for accessories allowing them to be convicted even if they were not aware of an aspect of the crime committed.[108] This may breach the correspondence principle because if they did not have full knowledge of the impending crime the *mens rea* would not relate to the prohibited act. However, to require the accomplice to know all the details of the collateral crime in order to fulfil this principle would not work well in practice.

The Law Commission speculated that the rule referred to in *Johnson v Youden* was too strict and that *Bainbridge (*and presumably *Maxwell)* was a compromise.[109] This may well be true, because it would have been all too easy for accomplices to say they did not have the knowledge of the precise details of the intended crime by the primary actor. It could also have been argued that it is not possible to have knowledge of something in the future.[110] This, strictly speaking, is not accurate.[111]

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[107] Below, 111 - 112.
[108] Law Commission, *Assisting and Encouraging Crime* (Law Com No 131, 1993) para 3.22.
[109] ibid para 3.5.
[110] Dyson M, Conference held by University of Liverpool 'Joint Enterprise after *Jogee*: Reconsidering Law and Policy' 1st September 2016 who said this at the conference; Ormerod D, Laird K, 'Jogee: not the end of a legal saga but the start of one?' [2016] Crim LR 539, 544; Sullivan G R, 'Knowledge, Belief and Culpability' in Shute S and Simester S, *Criminal Law Theory: Doctrines of the General Part* (OUP 2002) at section 4.
[111] For example, it is known that tomorrow it will get light in the morning and dark at night, but both of these events happen in the future. See Shute S, 'Knowledge and

Despite this, it is often impossible to know at present time the outcome of some forthcoming act. These issues were not satisfactorily dealt with in *Jogee* leaving questions unanswered, which are considered further in Chapter 4.[112]

Bainbridge also illustrated an anomaly of the derivative nature of the law of complicity.[113] If the accomplice is liable even though she does not know the precise details in terms of time, place or victim, she could be liable for countless offences carried out by the principal, even though the accomplice did only one act of, say, providing the necessary equipment.[114] The accessory may provide the equipment for one crime, but under a strict interpretation of the derivative theory, they could be liable for subsequent offences carried out by the principal using the same equipment, even years later. This would breach the correspondence principle, because their mental attitude would not relate to the later offences. This could lead to unjust convictions. An earlier accomplice should not be held guilty for later crimes carried out by a principal that the accomplice was unaware of. *Jogee*[115] may resolve this particular issue by requiring the secondary party to assist or encourage every crime of the primary actor, as will be seen in Chapter 4.[116]

The words from *Johnson v Youden* have continued to be diluted over the years. *Bryce*, held that it was not necessary to prove that the accomplice intended the

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Belief in the Criminal Law' in Shute S and Simester S, *Criminal Law Theory: Doctrines of the General Part* (OUP 2002) 186.
[112] Below, 111 - 112.
[113] Above, 26 - 27.
[114] Smith JC, 'Criminal liability of accessories' (n 11) 459.
[115] *Jogee* (n 5) [8].
[116] Below, 99 -103.

principal to carry out the crime. It was enough that when the accessory assisted or encouraged the principal by her acts, that they contemplated the offence or that there was a 'real or substantial risk or real possibility' that it would be committed.[117] While Ormerod prefers the approach to *mens rea* from *Johnson v Youden,* Herring prefers the route to *mens rea* for accessorial liability from *Bryce*.[118] *Bryce* is to be preferred because it has already been shown that *Johnson v Youden* could be too lenient to defendants, if strictly interpreted, and it has been watered down on more than one occasion, raising doubts about its application. *Bryce* is also a more practical approach. It is easier for the prosecution to show that the accomplice contemplated a 'real or substantial risk or real possibility' that the substantive crime would be committed than the application of *Johnson v Youden,* as amended by *Bainbridge* and *Maxwell,* which requires proof of knowledge of a specific range of crimes.

To summarise, the *mens rea* requirement of knowledge of the essential matters of the principal's offence, from *Johnson v Youden,* was ill-defined. It led to numerous appeals and a dilution of the words to enable convictions in appropriate circumstances. This dilution breached the principles of correspondence, legality and fair warning by being unclear and uncertain. This was not addressed in anyway by *Jogee,* as will be seen in Chapter 4.[119] *Jogee* amends the words from *Johnson v Youden* to a requirement of knowledge of any existing facts necessary for the crime, but the level of knowledge of the facts required are later diluted in the decision, following *Maxwell* and *Bainbridge*. *Bryce* is not cited at all, so the standing of *Bryce*

[117] [2004] EWCA Crim 1231; 2 Cr App R 35 [71].
[118] Herring J, *Great Debates in Law* (3rd edn, OUP 2015) 184.
[119] Below, 108 -132.

remains uncertain. Many of the issues raised above from *Johnson v Youden* therefore continue post-*Jogee*. Further, there was evidence of the dilution of *mens rea* in other earlier cases[120] as well as in *Johnson v Youden* itself, despite *Chan Wing-Siu* being seen as the turning point in *Jogee*.[121]

Is the principle of fair labelling reflected in complicity?

Section 8 of the Accessories and Abettors Act 1861 raises issues of fair labelling, by allowing accomplices to be labelled and convicted as principals. There is no conviction of aiding and abetting *per se*. The accomplice commits the same offence as the principal and is given the same label, whatever the contribution of the accessory, unless negligible.[122] Whether the accessory drives the other participants to the scene of the crime, or stands on look out while a burglary takes place does not matter. Their contribution is seen as assistance or encouragement to the substantive offence and so they should be held responsible. In practice, however, the level of participation may be relevant when it comes to sentencing.[123]

As shown above,[124] the requisite *mens rea* for complicity was, and still is, subject to a slight change in terminology from *Jogee,*[125] an intention to assist or encourage, with knowledge of the essential matters that comprise the substantive offence. If a secondary party intended to assist or encourage the principal in the commission of a

[120] For example see *Carter v Richardson* [1974] Crim LR 190 (QB).
[121] *Jogee* (n 5) [62].
[122] Horder, *Ashworth's Principles of Criminal Law* (n 7) 438.
[123] Dyson, 'The future of joint-up thinking' (n 67) 189.
[124] Above, 40.
[125] Below, 108 - 111.

particular offence, it could be fair to label them with the same offence.[126] As an autonomous agent they chose to assist or encourage the offence and so should be held responsible for their actions and given the same label as the principal. This would be correct if the accomplice's purpose was that the conduct element of the principal's offence be carried out by the principal, with the requisite mental attitude. In these circumstances it would be fair to label them as a substantive offender and so should be held responsible for their proscribed conduct of assisting and encouraging.[127]

However, it is unfair to label a mechanical assistant as a principal, if they did not intend the substantive offence be committed.[128] It could be argued that the driver of a car who did not want or intend the victim to die, should not be labelled as a murderer, just because they gave the principal a lift to the scene of the crime knowing that the principal had this in mind. Yet, the courts have consistently shown that the secondary party could be liable, however small their contribution is to the crime of the principal.[129] The label could be justified on the basis that the secondary party could have refused to participate or could have informed the relevant authorities.

The accomplice can be given the same label, yet it is the principal who makes the decision, as an autonomous agent, whether or not to commit the substantive offence and may make the decision not to do so. Furthermore, the primary actor may not

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[126] Horder J, 'A critique of the correspondence principle in criminal law' [1995] Crim LR 759, 761.
[127] Wilson (n 17) 16.
[128] ibid.
[129] *Giannetto* (n 58).

actually be encouraged by the actions of the accomplice. While the assister has to assist the principal, the encourager's acts need not have an impact on the actions of the principal.[130] It is unfair to the encourager to label them with the same offence as the principal when their contribution did not have an effect on the conduct of the primary actor. *Jogee* does not address this point, except to confirm that proved encouragement need not have a positive impact on the principal.[131] Unfair labelling will continue in these circumstances post-*Jogee*.

This issue of fair labelling in complicity arises because the definition of aiding, now assisting or encouraging, is broad. As a result, a jury is open to find almost anything as aiding. This can lead to uncertainty and potentially unjust decisions.[132] It can also lead to over criminalisation.[133] While this allows for flexibility in the law, a balance has to be reached which is fair to both defendants and victims. *Jogee* does not assist here, since this would be a role for Parliament.

The possibility of unfair labelling is stark where a retailer sells a potential weapon, say a baseball bat, to a purchaser where they are aware that the purchaser has a propensity towards violence and that it may be used in a fight. By selling the bat the retailer's purpose is to develop their business and make a profit, it is not to assist or encourage the potential defendant. If the bat was subsequently used as a weapon and a fatality resulted, the shopkeeper could be held liable for the offence of the

[130] *Calhaem* [1985] QB 808 (CA).
[131] *Jogee* (n 5) [12].
[132] Horder, *Ashworth's Principles of Criminal Law* (n 7) 443.
[133] Ashworth A 'Conceptions of Overcriminalisation' (2008) 5 Ohio State JCL 407, 413.

principal and convicted of murder. To label them as a murderer, in this situation, seems wrong. They were just going about their daily commercial business. *Jogee*[134] did not enter into the debate on fair labelling, except to confirm the liability of the shopkeeper. Accordingly, this aspect of fair labelling will continue post-*Jogee.*

Crucially, if the *mens rea* for the secondary party's mental attitude towards the principal's offence has been diluted from intention to recklessness, then labelling is not applied consistently.[135] The label of murder is applied to a principal if she intentionally kills or causes serious harm to the victim, yet the same label is given to a secondary party for the reckless version of the same offence.[136] Consistency of offence labelling is to be preferred, as it is reflective of a reasoned and principled legal system.

Furthermore, the rights of victims should not be overlooked. All of the above discussion ignores the fact, as referred to in the Introduction,[137] that fair labelling also has a role to play towards victims. The label can be important to the rights of victims to know that their suffering, due to the wrongdoing of the accomplice, is recognised by the law.[138] The more involved an accomplice is, the more a victim will expect their suffering to be respected by the law. Even when an accomplice has a relatively minor

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[134] *Jogee* (n 5) [90].
[135] Baker D, *Reinterpreting Criminal Complicity and Inchoate Participation Offences* (Routledge 2016) 32.
[136] ibid.
[137] Above, 17 - 18.
[138] Tadros V, 'Fair Labelling and Social Solidarity' in Zedner L and Roberts J, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 69.

role, if that role was indispensible, it could be argued that a victim should have their suffering reflected in the labelling of the accomplice.

In theory, fair labelling should be achievable, but whether the rights of defendants and victims can both fully be respected is more debatable. Fair labelling is often given as one of the grounds for creating multiple offences.[139] A restructuring of complicity based on a defendant's causational contribution could achieve this but is unrealistic due to the creation of numerous new offences and the practical difficulties that would arise in enforcing these offences.

Conclusion

Complicity offences have been described as *ad hoc*, because they criminalise the neutral act of an individual in particular circumstances.[140] It has been shown above that the participation offences potentially breach the principles of autonomy, fair warning, fair labelling, correspondence and legality. Furthermore, whether a causal connection is required between the act of the secondary party and the offence of the perpetrator is uncertain and the *mens rea* requirement is complicated. All these issues suggest that this area of law is ripe for reform, yet the most recent case on complicity to reach the Supreme Court, *Jogee*, failed to address many of these issues, as will be seen from Chapter 4.[141]

[139] Mitchell B, ' Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' [2001] 64 MLR 393, 411.
[140] Simester and von Hirsch (n 14) 80.
[141] Below, 89.

Simester and von Hirsch raise the idea of Parliament enacting prophylactic offences that proscribe acts, which raise the risk of eventual harm.[142] Prophylactic offences incriminate acts that are not necessarily inherently wrong, but stand as offences in their own right, without any mental requirement. They offer an offence of preventing retailers from selling particular weapons, as an example. While fair warning and labelling could ultimately be achieved, this approach would be unrealistic in terms of prosecution, along similar lines to complicity based on an accomplice's causal contribution.[143] Furthermore, it would necessitate numerous prophylactic offences to cover all potential risks of future harm.

Parliament took a different approach when it enacted ss 44-46 Serious Crime Act 2007 (2007 Act). It created separate inchoate offences of assisting or encouraging a crime, so that a secondary party is labelled as an assister or encourager. Accordingly, in comparison with basic complicity, the principle of fair labelling is better fulfilled, from both the defendant's and the victim's perspective. Furthermore, this new Act allows for a maximum penalty for the accomplice, dependent on the facts, as if the main offence had been committed, so that culpability can be reflected through punishment. Individuals are treated as autonomous agents responsible for their own actions, respecting the principle of individual autonomy. This is to be preferred to individuals being judged based on actions of others.

The need to establish causation is also resolved because offences under the 2007 Act can be committed whether or not the principal commits the substantive offence,

[142] Simester and von Hirsch (n 14) 80.
[143] Above, 32.

whereas complicity requires the substantive offence to have taken place. Offences under the 2007 Act relieve the prosecution from the burden of proving the commission of the offence. Before 2007 there was no criminality unless the substantive offence had been committed or attempted. Yet, complicity remains with its inherent breaches of criminal law principles so that accessories are still prosecuted and convicted as principals. The court in *Jogee* had no remit to change this.

Having considered the relationship between basic complicity and the principles under discussion, Chapter 3 moves on to consider the relationship of PAL with the same principles.

CHAPTER 3 – PAL AND THE PRINCIPLES OF CRIMINAL LAW

While the law of basic accessorial liability discussed in Chapter 2 is statutory, PAL developed in a piecemeal basis from common law, although this doctrine's exact development has been the subject of some debate[1] since the case of *Jogee.*[2] Whatever the roots of PAL, it is clear that in addition to the basic law of complicity, the question has arisen on many occasions as to whether the principal has in fact gone beyond the agreed course of conduct.[3] Until *Jogee*, an accomplice involved in an initial offence was liable for a principal's subsequent offence if the secondary party foresaw that the later offence might take place as a possible consequence of jointly carrying out the first crime, reflecting the rule from *Chan Wing-Siu*.[4] The secondary party was liable even if they did not factually encourage or assist the principal in the second offence or intend it to take place.

Having considered the role of basic complicity and its relationship with the identified principles of criminal law in Chapter 2, Chapter 3 focuses on the common law rule of PAL, which existed *pre Jogee*. The aim of this chapter is to consider the relationship of PAL with basic complicity and to identify some of the issues arising from PAL in relation to the same criminal law principles. The chapter begins by setting out the

[1] See Stark F, 'The demise of "parasitic accessorial liability": substantive judicial reform, not common housekeeping' (2016) CLJ 550; Simester A P, 'Accessory liability and common unlawful purposes' [2017] LQR 73; Baker DJ, *Reinterpreting Criminal Complicity and Inchoate Participation Offences* (Taylor and Francis 2016); Baker DJ, 'Unlawfulness's doctrinal and normative irrelevance to complicity liability: a reply to Simester' [2017] J Crim Law 393.
[2] [2016] UKSC 8, [2017] AC 387.
[3] *Soldiers'* case (1697) and *Hyde* (1672) as cited in Foster M, *Crown Law* (3rd edn, 1809) 353.
[4] [1985] AC 168 (PC).

justifications for the use and development of PAL before *Jogee*. It identifies that the continued use of the doctrine was primarily based on policy. An analysis of the relationship between PAL and basic accessorial liability follows, where it is advocated that PAL was always part of complicity and was not a separate rule of law. The chapter then attempts to consider the relationship of PAL with the identified principles of criminal law. It suggests that PAL breached many of these fundamental principles, such as legality, fair warning, correspondence and fair labelling because the law prior to *Jogee* was too complicated, leading to a plethora of appeals.[5] It shows that the breaches continued, and in some areas increased, over the thirty years running up to *Jogee*. It will be argued below that this was untenable and change was necessary if these breaches were to be resolved. Whether the restatement of the law from *Jogee* resolved these breaches, is discussed in Chapter 4.

The role of PAL in criminal law, *pre-Jogee*

The rule from *Chan Wing-Siu* was endorsed in *Powell; English*,[6] which identified that protection of the public played a part in the rationale for PAL.[7] Gang crime was seen as a particular issue, which needed to be deterred by the sanctions of the criminal law.[8] For example, individuals were recognised as acting differently when in a group. Green and McGourlay identified that 'a pack is held to be more dangerous than its

[5] Sullivan G R, 'Doing without complicity' [2012] JCCL 199, 201.
[6] *Powell; English* [1999] 1 AC 1 (HL) 25.
[7] For the distinction between principle and policy, see Gardner J, 'On the General Part of the Criminal Law' in Duff RA *Philosophy and the Criminal Law: Principle and Critique* (CUP 1998) 209 - 210.
[8] Green A, McGourlay C, 'The wolf packs in our midst and other products of criminal joint enterprise prosecutions J Crim L 280.

members would be if they were acting alone'.[9] This is often true. A gang is stronger and so more dangerous due to the various participants supporting each other. Greater harm can arise when groups of people come together to act as one unit and it was this harm that the courts were trying to deter. *Jogee* confirmed this as one of the rationales for PAL.[10]

This rationale behind PAL was good, but the use of PAL increased as a result of a potentially lower level of *mens rea* than complicity, based on mere foresight of an offence. This meant that it was easier for prosecutors to use PAL against secondary parties than to charge them in accordance with the Accessories and Abettors Act 1861. While this thesis is doctrinal, rather than socio-legal, it is important to note that PAL helped the police and the Crown Prosecution Service in the battle against group violence.[11] The law is hostile to violent gangs and rightly so.[12] Any law aimed to prevent gang crime must be good as long as it works in practice, is fixed and clear and provides fair warning to potential offenders.[13]

It will be argued in this chapter that PAL breached the principles of legality and fair warning because it was overly complicated. Defendants did not understand why they were being convicted of say murder, when they did not stab the victim or shoot the gun. If defendants did not understand why their actions were criminalised using PAL, the law could not be said to be clear and prospective or give fair warning that an

[9] ibid 290.
[10] *Jogee* (n 2) [74].
[11] Krebs B, 'Joint Criminal Enterprise' [2010] 73(4) 578, 592.
[12] Simester A P, Spencer J R, Stark F, Sullivan G R and Virgo G R, *Simester and Sullivan's Criminal Law Theory and Doctrine* (6th edn, Hart 2016) 247.
[13] Above, 15 - 16.

offence was about to be committed. Indeed, a breach of the principle of legality was part of the defence's case in *Jogee*.[14]

The Law Commission took a different approach to justifying the existence of PAL, following a line of respected academics.[15] In its view the accomplice has adopted the 'normative position' of the other participants.[16] It stated that 'a significant moral threshold is crossed when a person knowingly embarks on an unlawful enterprise…(so) may be liable for whatever consequences are caused'.[17] By involving themselves with known criminals the secondary party is liable for all consequences as a result of this involvement. This approach would comply with the principles of fair warning and legality, if potential offenders understood the rationale and were aware of their possible criminality, which is doubtful. It does not justify the labelling of an accomplice to PAL as a principal.[18]

More recently, the rule from *Chan Wing-Siu* was justified in *Rahman*.[19] Lord Neuberger confirmed that legal coherence, protection of the public, fairness to defendants and the realities of jury trials were all important in seeking to resolve

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[14] *Jogee* (n 2) 392.
[15] Ashworth A, *Positive Obligations in Criminal Law* (Hart 2013) 137; Simester, Spencer, Stark, Sullivan and Virgo, (n 12); Horder J, 'A critique of the correspondence principle in criminal law' [1995] Crim LR 759, 764. Simester AP, 'The mental element in complicity' [2006] LQR 578, 598. For critical analysis of the change of normative position see Baker DJ, 'Unlawfulness's doctrinal and normative irrelevance' (n 1) 413. Gardner apologises for his use of this term in Gardner J, *Offences and Defences*, (OUP 2007) 246.
[16] Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 1.5.
[17] ibid.
[18] Baker DJ, 'Unlawfulness's doctrinal and normative irrelevance' (n 1) 412.
[19] [2008] UKHL 45, [2009] 1 AC 129 [79], [79], [85]. See also *Smith (Dean Martin)* [2008] EWCA Crim 1342; [2009] 1 Cr App R 36 [96] (Moses LJ).

criminal law principles.[20] In his view, the criminal law could only work in practice if it was acceptable and understandable to law-abiding individuals.[21] His judgment, therefore, reflected an appreciation of the principle of legality, yet it is not clear that there was legal coherence or necessarily fairness to defendants.

The relationship between complicity and PAL, prior to *Jogee*

Prior to *Jogee*, academics and the judiciary debated whether PAL was part of the law of complicity or a separate doctrine.[22] This thesis advocates that PAL was, and always has been, part of complicity. PAL developed out of basic accessorial liability but always remained part of it. To consider otherwise would require judicial creativity beyond their constitutional role.[23]

JC Smith, as long ago as 1994, considered PAL to be part of secondary liability.[24] Smith believed that the existence of PAL depended on basic accessorial liability.[25] This, perhaps, explains his use of the term 'parasitic'. In contrast, the Law Commission[26] and the court in *Stewart and Schofield*[27] believed PAL was separate from ordinary accessorial principles. In their view, the rule from *Chan Wing-Siu* did not overlap with basic complicity because under joint enterprise (the term used to

[20] *Rahman* (n 19) [79] (Lord Neuberger).
[21] ibid [85] (Lord Neuberger).
[22] cf Smith JC, 'Criminal liability of accessories; law and law reform' [1997] LQR 453 with Simester, 'The mental element in complicity' (n 15).
[23] Ashworth A, 'The Elasticity of the *Mens Rea'* in Tapper CFH *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworth 1981) 65.
[24] Smith JC, 'Criminal liability of accessories' (n 22) 463.
[25] ibid, 455.
[26] Law Commission, *Assisting and Encouraging Crime* (Law Com No 131, 1993) para 2.120.
[27] [1995] 3 All ER 159 (CA).

reflect PAL at the time)[28] there was no need for the prosecution to prove acts of assistance or encouragement for the second offence, just the participation of the accomplice in an unlawful venture with foresight of the second crime.[29] This approach separated the initial crime from the subsequent crime, yet the second crime was carried out as a consequence of the initial joint crime. The encouragement or assistance to the collateral offence could have been provided by the participation of the accomplice in the initial offence.

In any event, the idea that PAL was a separate rule from basic complicity could not be correct, because there is only one form of complicity, that set out in s 8 of the Accessories and Abettors Act 1861. While judges have to interpret primary legislation they are not democratically permitted to create a separate doctrine from that legislation. Therefore, any form of complicity should fall within the provisions of this Act. It follows that, the rule from *Chan Wing-Siu*, should have fallen within the realms of complicity as soon as it was handed down. The idea that PAL was separate from complicity, should not have been suggested by the courts, or the Law Commission.

To comply with the 1861 Act an accessory should have factually assisted or encouraged the collateral offence, as well as the initial offence.[30] This is where the error was made in cases following *Chan Wing-Siu.* The modern cases following *Chan Wing-Siu,* but prior to *Jogee,* appeared to dispense with the conduct element

[28] Above, 58.
[29] Law Commission, *Assisting and Encouraging Crime* (n 26) para 2.120; *Stewart and Schofield* (n 27).
[30] Baker, *Reinterpreting Criminal Complicity* (n 1) 56.

for complicity in group crime scenarios when considering a participant's liability for another's collateral crime. Instead of requiring factual participation (by factual assistance or encouragement) by the accessory in the collateral crime, juries have been permitted to infer encouragement where there appeared to be no evidence of actual encouragement.[31] This became a presumption of implied encouragement, which was presumed by the accessory joining the initial criminal venture.[32]

This presumption of encouragement, as a substantive rule of law, should not have been permitted by the courts because s 8 makes clear that liability under that section requires factual assistance or encouragement. If the accessory did not factually participate in the collateral crime then their liability could not be derivative.[33] *Jogee* is helpful in that it reinstates the need for factual assistance or encouragement for the collateral crime, as will be seen in Chapter 4, so abolishing PAL.[34]

Simester saw PAL to be a special case of secondary participation, not merely a sub-species of assistance and encouragement.[35] He considered there to be a 'structural difference' between aiding and abetting and PAL because there was only one crime involved in aiding or abetting and the secondary party would be involved in that

[31] Baker, Dennis J, Reinterpreting the Mental Element in Criminal Complicity: Change of Normative Position Theory Cannot Rationalize the Current Law (February 4, 2015). Law & Psychology Review, Vol. 40, 2016. Available at SSRN: https://ssrn.com/abstract=2683971 accessed 30 May 2017, 8.
[32] Baker, *Reinterpreting Criminal Complicity* (n 1) 49.
[33] ibid 69.
[34] Below, 99.
[35] Simester, 'The mental element in complicity' (n 15) 592.

particular offence.[36] He contrasted this with PAL, where the first crime opened the way for further liability for foreseen crimes committed by the principal in carrying out that first offence. In his view, the accomplice's connection with the principal was direct for aiding or abetting but indirect in PAL.[37] While this initially appears to be a sound argument by Simester, the two doctrines are only structurally different because a factual conduct element in the parasitic form was dispensed with after *Chan Wing-Siu*. If, however, the encouragement for the collateral crime was provided by the secondary party's contribution to the initial crime together with the continued participation by the accessory, despite their foresight of the potential later offence, then the structural difference is removed or at least reduced. The difference was that the conduct element in basic complicity was factual assistance or encouragement but was implied assistance or encouragement in PAL prior to *Jogee*.

Jogee removed this difference by requiring the accomplice to assist or encourage the principal in all offences. Presumably, it can still be implied from the facts that by participating in the first offence the accomplice encouraged or assisted the principal in the substantive offence, but it is no longer a presumption.

Baker has argued convincingly that the reference to foresight in *Chan Wing-Siu* by Sir Robin Cooke was only intended to refer to providing evidence of a conditional intention.[38] If Baker was correct then the conduct element of assisting or encouraging the collateral crime should have remained a necessity prior to the criminalisation of a

[36] ibid 593.
[37] ibid.
[38] Baker, *Reinterpreting Criminal Complicity* (n 1) 117.

co-participant, in which case the two doctrines would have been structurally alike, dismissing Simester's view.

As was shown in Chapter 2,[39] Virgo, on the other hand, used his requirement of a need for an 'association' between the accessory and the principal's collateral crime to allow PAL to be part of the general law of complicity. Virgo appeared to be trying to provide the encouragement or assistance element, dispensed with by modern courts, by allowing an association instead. The problem with this approach was that the nature of association is very broad and the 1861 Act does not include mere association within its participatory conduct.[40]

Despite the various debates over the years, there seemed to be a trend from the courts towards PAL being part of secondary liability.[41] Yet despite this, they failed to show how the factual participation in the collateral offence required by s 8 of the 1861 Act was achieved, instead an implied encouragement was permitted. It was this implied encouragement that became so controversial.

Whether PAL was part of complicity may sound like an academic argument, but the issue became important in practice. With the increasing use of the PAL doctrine by the prosecution, basic complicity was effectively 'swallowed up' and became surplus

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[39] Above, 30.
[40] Baker, *Reinterpreting Criminal Complicity* (n 1*)* 108. Baker, Reinterpreting the Mental Element in Criminal Complicity: Change of Normative Position Theory (n 31) 63.
[41] *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876 [17]; *Stringer* [2011] EWCA Crim 1396, [2012] QB 160 [57]; *ABCD* [2010] EWCA Crim 1622, [2011] QB 841 [37].

law in gang violence crimes.[42] Every multi handed act of violence became a PAL to the prosecution because it permitted implied encouragement, rather than the need to show actual encouragement. It was easier to prove implied encouragement through foresight of the later offence than it was to prove direct assistance or encouragement to that offence. Yet, it appeared on the surface that there was no backbone to PAL. It was merely a route to liability without any statutory backing. While many laws are founded on common law, it would be constitutionally wrong for judges to allow a statutory provision such as the 1861 Act to be ignored or circumvented.

In fact, PAL did have statutory backing from the 1861 Act because it was part of complicity all the time, but this was not always made clear by judges or understood by academics. PAL should have been accepted as part of basic complicity, with the requirement that any collateral crime had to be factually assisted or encouraged in accordance with s 8 of the 1861 Act.

This particular point has now been resolved in *Jogee*. Lord Hughes and Lord Toulson confirmed that there was no need for PAL to be a separate form of secondary liability.[43] In their view, the basic principles of complicity could be of general application.[44] At least there appears to be some consistency among judges in this respect, albeit Toulson LJ was a common denominator in many of these judgments.

[42] Dyson M, 'The future of joint-up thinking: living in a post-accessory liability world' [2015] J Crim L 181, 182.
[43] *Jogee* (n 2) [76] (Lord Hughes and Lord Toulson).
[44] ibid.

Indeed, the rules of PAL should be part of standard complicity for the benefit of fair labelling and fair warning. A defendant who was convicted of a serious criminal offence, such as murder, following the PAL route to liability was convicted, labelled and punished by the courts as a principal offender. It was the statutory provisions of complicity in s 8 that provided the courts with the authority for this. Liability arises from basic complicity and was derivative as a result. *Jogee* confirmed that there is only one form of complicity and that is the basic form.[45] The accomplice must assist or encourage every crime of the principal to be liable as a secondary party.[46] It is disappointing that it has taken so long for this issue to be resolved, when PAL should have been part of complicity all the time.

How were causation and individual autonomy reflected in PAL?

It was suggested in Chapter 2 that upholding liability of a basic accomplice on the basis of a strict application of the causation theory of criminal law was weak.[47] All that seemed to be required was a connecting link between the act of the accomplice and the resulting harm.[48] In PAL, prior to *Jogee*, the arguments for the causation theory upholding liability were even more remote than for basic complicity. It was hard to say that an accomplice who merely foresaw the possibility of the second crime had caused the offence.[49] Yet, the accomplice was still liable for the principal's collateral

[45] ibid [9].
[46] ibid.
[47] Above 28 - 33.
[48] Above, 33.
[49] Virgo G, 'Case in detail: Mendez and Thompson' [2010] Arch Rev 4, 5.

offence. *Jogee* did not directly refer to causation in PAL and the indirect references made are contradictory, as will be shown in Chapter 4.[50]

In PAL scenarios, there would have been a connecting link between the primary actor and the accomplice by the joint contribution to the initial criminal offence. However, the only link between the accessory to the first crime and the harm caused by principal's collateral one, was the contribution to the initial venture with foresight of the second. This has a flavour of guilt by association.[51] An accessory should not be liable merely by being associated with the principal, unless it was an association with the actual harm caused by the principal. *Jogee* confirmed this.[52] Otherwise all the rules of culpable responsibility and accountability of defendants discussed in Chapter 2 would be breached.[53] *Jogee* resolved this by insisting on foresight as only evidence of an intention to assist or encourage the collateral crime.[54] The connecting link is strengthened, as a result, if this evidence is found to exist.

Further, similar to the same idea put forward for standard complicity in Chapter 2,[55] following the principle of individual autonomy the primary actor in PAL should assume responsibility for their actions, thereby relieving any other party of liability.[56] As a

[50] Below, 99 -103.
[51] Above, 30.
[52] *Jogee* (n 2) [11].
[53] Above, 26.
[54] *Jogee* (n 2) [83].
[55] Above 28.
[56] *Kennedy* [2007] UKHL 38, [2008] 1 AC 269.

result, any suggestion that an accessory contributing to PAL is liable for a collateral offence of a principal appears to go against this fundamental principle.[57]

It is clear that the issues raised earlier[58] in relation to the causal contribution of an accomplice under the 1861 Act were even more pronounced in PAL scenarios. By finding a secondary party to the initial crime liable for the subsequent crime of the principal based on mere foresight of the collateral crime, the rule that a third party's autonomous act of breaking a chain of causation was contradicted. The inconsistency between the common law of PAL and *Kennedy*[59] was unhelpful to judges in directing juries and did not support the principle of legality requiring clarity and consistency of law. It seems that a 'moral component' was given priority.[60]

Jogee strengthened the link between the accomplice and the principal by requiring an intention to assist or encourage by the accessory for every act of the principal and this intention would provide the individual autonomy for the accomplice in their actions. Yet, as will be seen in Chapter 4,[61] the inconsistency of the individual autonomy of the principal breaking the chain of causation between the secondary party and the harm,

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[57] *Kennedy* is a very recent statement of principle and for more than ten years appeal cases show that a supplier of illegal drugs was guilty of manslaughter if an individual died due to taking the drugs, which she had supplied.[57] However,, it would seem that this fundamental principle of criminal law does not apply to strict liability cases regarding the environment: *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 (HL) and *Natural England v Day* [2014] EWCA Crim 2683, [2015] 1 Cr App R 53.

[58] Above, 28.

[59] *Kennedy* (n 56).

[60] *Mendez* (n 41) [37]; Virgo G, Case in detail: *Mendez and Thompson* [2010] Arch Rev 4, 5.

[61] Below, 99 - 103.

discussed in Chapter 2,[62] was not resolved, because the accomplice is still eligible to be convicted as a principal.

The *mens rea* of PAL and the principles of criminal law

The prosecution in PAL had to prove the state of mind of the accomplice was sufficient for their conviction, where the offence carried out by the principal differed from that agreed. Similar to complicity, the *mens rea* in PAL could be broken down into the *mens rea* of the secondary party for her own act of assisting and encouraging the first crime and also the secondary party's *mens rea* as to the conduct and fault element of the principal's collateral criminal act. It was the latter mental element in PAL that became so controversial following *Chan Wing-Siu*.

In *Jogee,*[63] *Chan Wing-Siu* was seen as the turning point in relation to the law of violent group crimes, due to the development of what had been considered a new substantive rule of law for PAL scenarios.[64] This rule from *Chan Wing-Siu* raised issues of fair labelling, particularly where a homicide arose. Secondary parties who participated in group crime without any real intention that a victim would be killed or seriously harmed could be convicted of murder, and labelled a murderer, if they had foreseen the possibility of death or serious harm. It was shown earlier in this chapter that PAL was part of complicity.[65] As a result, in accordance with the 1861 Act a judge would then have no choice but to give a life sentence to the secondary party

[62] Below, 28 - 35.
[63] *Jogee* (n 2) [62].
[64] ibid [87].
[65] Above, 58 - 64.

even when, based on the contribution of the accessory, a shorter sentence may have been more appropriate.[66]

A mental attitude that merely requires foresight as the relevant test raises issues of the threshold of that foresight.[67] While the vagueness of foreseeability applies throughout criminal law, it posed a potential problem for trial judges who needed to have a clear workable statement with which to direct juries.[68] Prior to *Jogee,* the law did not provide this, leading to a possible breach of both the principles of legality and fair warning. The issue was that different juries could apply the foresight test at varying thresholds, some requiring a higher level of foresight than others. This may have led to inconsistent decisions and a breach of these fundamental principles. In fact, *Jogee* may have muddled the level of foresight in the context of murder even further, as will be seen in Chapter 4.[69]

While *Woollin*[70] set a high threshold of foreseeability for the definition of intention for a principal of a murder, PAL caused a legal anomaly because a secondary party, who did not contribute to the collateral crime in any way, could be convicted on mere foresight that murder might take place. This was hard to justify to secondary parties and hard for them to understand, potentially breaching the principle of legality.

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[66] Bentley D QC, 'Joint enterprise: lifting a flawed dragnet' (*Law Society Gazette*, 7 April 2016) https://www.lawgazette.co.uk/comment-and-opinion/joint-enterprise-lifting-a-flawed-dragnet/5054581.article accessed 10 April 2017.
[67] Moore M 'Foreseeing Harm Opaquely' in in Shute S, Gardner J and Horder J *Action and Value in Criminal Law* (OUP 1993) 126.
[68] Krebs B, '*Mens rea* in joint enterprise: a role for endorsement?' [2015] Cam LJ, 74(3) 480, 501.
[69] Below, 117 - 123.
[70] [1999] AC 82 (HL).

In *Powell* Lord Hutton expressed sympathy with this *mens rea* anomaly.[71] He posited that the common law was not always based on logic and considerations such as the need to protect the public against gang related crime were also important. He justified the approach of the courts by stating that public policy outweighed the strict application of logic.[72]

Simester argued that the *mens rea* for PAL was not lower than that for the substantive offence. It was just different.[73] He suggested that the difference arose because the secondary party had a different *actus reus* to fulfil and so having a different *mens rea* should not be an issue.[74] In his view, whether the secondary party was sufficiently culpable was the important point.[75] Yet eleven years before he had said that culpability was not enough and that responsibility was more important.[76] Liability should rest on culpability and responsibility. It is only those participants who are sufficiently blameworthy that should be held responsible for the crime of the principal. The issue then becomes whether foresight of a collateral crime justifies conviction and punishment as a principal. Further, fair warning to those with a propensity to commit crime is unlikely to be given where the *mens rea* requirement for the accomplice is lower than that for the principal.

Details of the criminal law are not well known and fair warning may rely on society's everyday moral sense of wrong doing to ensure compliance. The more remote the

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[71] *Powell; English* (n 6) 25 (Lord Hutton).
[72] ibid.
[73] Simester, 'Accessory liability and common unlawful purposes' (n 1) 88.
[74] ibid.
[75] ibid.
[76] Simester, 'The mental element in complicity' (n 15) 600.

link between the initial actor and the resulting harm, the greater the need for the publicity of the potential criminal censure.[77] There was a lack of publicity around PAL, until *Jogee*, and even the more recent publicity was provided by pressure groups arguing for the demise of this area of law. It was not publicity provided by Parliament, the judiciary or government officials. It should also be remembered that even if this area of law was well known among the public, this does not endorse it as a fair law.[78]

The lower *mens rea* of the accomplice in PAL also breached the correspondence principle. The prohibited act of the secondary party was assistance or encouragement to one crime but the mental element related to foresight of a different crime. In addition, adopting the alternative approach to correspondence outlined in the Introduction,[79] if the mental attitude of the accomplice was lower than that required of the principal who actually carried out the fatal act, the *mens rea* did not correspond between principal and accomplice, prior to *Jogee*. There is no good reason why the mental element for the conviction of an accomplice was at a lower level than that of the principal in PAL.

One of the aims of *Jogee* was to remove the anomaly of differing *mens rea* for principals and accomplices where a fatality arose in PAL. Whether this has been fully achieved is analysed in Chapter 4.[80]

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[77] Simester AP and Von Hirsch A, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 64.
[78] Ashworth, *Positive Obligations* (n 15) 141.
[79] Above, 16 - 17.
[80] Below, 117 – 128.

The merging of complicity and PAL

Prior to *Jogee*, PAL and basic accessorial liability had effectively merged due to the dilution of the *mens rea* of complicity and the complicated nature of this area of the law.[81] PAL first started to be conflated with basic accessorial liability after *Rook.*[82] In doctrinal terms, the judgment in *Rook* was not well considered because it appeared to allow for mere foresight of a crime as the *mens rea* for the basic offence, even though *Johnson v Youden* had required knowledge of the essential matters of the offence. Dyson saw *Rook* as a 'weak*'* decision of the Court of Appeal.[83]

Bryce[84] also illustrated how basic liability and PAL rules were conflated, prior to *Jogee*. In *Bryce*, the accomplice was exactly that, an accomplice that had driven the principal and weapon to the scene of the crime. He could therefore have been convicted of murder under the 1861 Act. Instead, Lord Justice Potter referred to the requirements of deliberate assistance and foresight of the murder.[85] There was no need for any reference to foresight of the crime by the accomplice. This was a clear case of basic complicity whereby the secondary party deliberately assisted a principal to commit an offence by driving the main actor and the weapon to the scene of the crime. This accomplice had knowledge of the essential matters of the crime, namely the intended murder.

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[81] Dyson M, 'Bases and Baselessness in Secondary Liability' [2015] Legal Studies Research Paper 31/2015 https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2612815 accessed 1 March 2017, 2.
[82] [1993] 1 WLR 1005 (CA) 1009.
[83] Dyson, 'The future of joint-up thinking' (n 42) 185.
[84] [2004] EWCA Crim 1231; 2 Cr App R 35.
[85] ibid [58] [71] (Lord Justice Potter).

Dyson argued that the *mens rea* for PAL was lower following *Chan Wing-Siu*, which only required foresight of the collateral crime, than for even basic accessorial liability, which demanded a 'real or substantial risk' of a crime following *Bryce*.[86] This appears to be correct because in some factual instances it would be easier to convict a secondary party under the PAL route, than it was as a basic accomplice following *Bryce*. Yet, a basic accomplice who had actually assisted or encouraged a principal in the commission of a crime should be more responsible for his actions than a secondary party who merely foresaw a collateral crime. It followed that prosecutors started to use PAL with enthusiasm. Dyson called for a return of the court system to requiring knowledge or intention that the crime would take place.[87] It was *Jogee* that answered this request but the impact of this change is not as great as first anticipated and the case is analysed in greater detail in Chapter 4.

Even judges seemed to conflate the two doctrines.[88] For a law to be so complicated that judges direct juries incorrectly conflicts with the rule of law and the principles of legality and fair warning. Ironically, evidence that the rules of basic accessorial liability and PAL had merged was provided by the case of *Jogee* itself. The facts of *Jogee* were an example of basic complicity. Jogee encouraged Hirsi to attack the victim. He clearly intended Hirsi to cause serious harm to the victim. He could have been charged and convicted using the rules from the 1861 Act. Instead the prosecution and the lower courts approached the facts of the case using the doctrine of PAL, which allowed for risk taking to require responsibility.

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[86] Dyson M, 'More appealing joint enterprise' Cam LJ [2010] 425, 425.
[87] Dyson, 'The future of joint-up thinking' (n 42) 195.
[88] *Rook* [1993] 1 WLR 1005 (CA) 1009; *Bryce* (n 84); *ABCD* (n 41).

Dyson has suggested that, prior to *Jogee,* there were two standards of risk-taking, giving rise to a potential breach of the principle of legality: mere foresight of a substantial or real risk for secondary parties and traditional recklessness, defined as foresight of a risk by a principal, which was unjustifiably taken.[89] This dual approach risked tainting the respect given to the legal system of England and Wales.[90] Based on Dyson's more recent analysis, outlined above,[91] that the level of risk for secondary parties in PAL was lower than for basic complicity following *Bryce*, there may have even been three different levels of risk taking in the criminal law. In multi-party crimes it can be hard to prove the individual roles of the various participants. All parties are tried and sentenced as principal offenders, so it is surprising that there were different tests for risk taking for accomplices and principals.[92]

The conflation of standard complicity and PAL may have been one aspect that the Supreme Court was keen to resolve in *Jogee*. The rules of this doctrine were complicated and following repeated calls for reform, the Supreme Court was asked to reconsider the rules. It may not have been the most appropriate case in which to do so, as will be shown in Chapter 4, but the Supreme Court in *Jogee* may have seen an opportunity when the Court of Appeal decision was appealed and decided to take it, in view of the increasing criticism of the doctrine. *Jogee* reinstated intention as the requisite mental attitude for all complicity offences. Whether this judgment fully resolves the *mens rea* issues in complicity is discussed in Chapter 4.

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[89] Dyson M, 'Might Alone Does Not Make Right: Justifying Secondary Liability' (2015) Crim LR 967, 980.
[90] ibid, 981.
[91] Above, 72.
[92] Dyson, 'Might Alone Does Not Make Right' (n 89) 981.

The fundamental difference rule and the principles of criminal law

The House of Lords in *Powell; English*[93] recognised that the direction from *Chan Wing-Siu* could be harsh to secondary parties and, as a result, they introduced a rule which allowed for complete acquittal of a secondary party in particular circumstances. This fundamental difference rule, allowed for a defendant to be acquitted of murder and manslaughter if the principal carried out the crime with a weapon that was fundamentally different to that foreseen by the accomplice.[94] Yet, there was no clear basis for this new rule, other than if the principal's conduct was a fundamental departure from the joint purpose, the carrying out of the collateral offence could not have derived from the initial crime itself.[95] The rule also breached the criminal law principles under discussion in this thesis as will be seen below. Despite this, *Jogee* appeared to introduce a narrow application of the fundamental difference rule and as such, some of these breaches may continue post-*Jogee*. This is considered in further detail in Chapter 4.[96]

The fundamental difference rule from *Powell*; *English* may have breached the principle of fair labelling. By not substituting manslaughter as the offence, the court implied that where a fundamental difference arose the accomplice would not be liable for any homicide offence. In terms of fair labelling this could be too lenient to some defendants. While *Chan Wing-Siu* could be harsh to secondary parties, the new rule from *Powell; English* appeared to be favourable to accessories that were, in any event, still intending to commit grievous bodily harm, despite the change of weapon.

[93] *Powell; English* (n 6).
[94] ibid 28.
[95] Virgo G, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 863.
[96] Below, 103 - 104.

They were still culpable and should have been held accountable for their role. *Jogee* allowed for a manslaughter verdict in particular circumstances and so appeared to rectify this potential breach, but this opportunity for a manslaughter conviction may in fact be doctrinally awkward. This is explored in further detail in the next chapter.[97]

The rule from *Powell; English* was controversial because it was not consistently applied, with the potential for a breach of the principle of legality.[98] A definition of 'fundamentally different' was not provided in the judgment. This allowed for flexibility in the rule but it also provided uncertainty, which was unhelpful to lawyers and trial judges when directing juries. Unsurprisingly, numerous appeal cases on this point arose as secondary parties tried to prove that the act committed by the primary actor was fundamentally different to that contemplated by them. As will be seen in Chapter 4,[99] *Jogee* introduced a similar rule based on an overwhelming supervening act, which may suffer from similar criticisms.

English placed too much emphasis on the type of weapon used by the principal. For example, a boot is not a weapon *per se*, but could be just as dangerous as a weapon if used to kick a victim in the head. Greater consideration should have been given by the courts, pre-*Jogee*, to the way an item was used by the principal as a weapon, in comparison with what weapon had been foreseen by the accomplice. This would have allowed for conviction and punishment based on the criminal law principles of attributing responsibility according to the mental attitude of the defendant towards the

[97] Below, 132 - 138.
[98] Wilson W, Ormerod D, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 15.
[99] Below, 132 - 138.

resulting harm. The only guidance provided by Lord Hutton in *Powell; English* was that if the weapon used by the primary actor was 'different, but just as dangerous' as the weapon which the accessory contemplated she might use, the accomplice would still be liable.[100] This may have breached the principle of legality because it just led to fine distinctions being made in court as to whether a weapon foreseen by the accessory was equally as dangerous as the one actually used.[101] The decision in *Jogee* has resolved this particular issue, as will be seen in Chapter 4.[102]

In addition to the controversial approach to the use of weapons, *pre Jogee*, it appeared for a while that an accomplice could simply be convicted based on foresight of what the principal may do. *Rahman*[103] implied the foresight of the principal's *mens rea* was irrelevant. The appellant in *Rahman* had claimed he did not foresee that the primary actor would intentionally kill the victim, only that they intended to do grievous bodily harm and so the difference in *mens rea* was a fundamental change by the principal.[104] The House of Lords disagreed.[105] To hold otherwise would have undermined the established law of murder, which allows for the intent to kill or the intent to cause really serious harm as founding a conviction. *ABCD*[106] confirmed that it did not matter if the accessory contemplated an intention to kill or just serious harm. Foresight of either was satisfactory for a conviction. *Jogee* supported this approach as will be shown in Chapter 4.

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[100] *Powell; English* (n 6) (Lord Hutton).
[101] *Yemoh* [2009] EWCA Crim 930, [2009] Crim LR 888, a Stanley knife was not fundamentally different to a long bladed knife.
[102] Below, 130 - 132.
[103] *Rahman* (n 19) [24].
[104] *Rahman* (n 19) 135-136, referred in the judgment at [22]-[26].
[105] ibid [24].
[106] *ABCD* (n 41) [35].

Rahman left the legal profession debating whether foresight of the principal's intention was always irrelevant. This lack of clarity may well have breached the principle of legality. Furthermore, the five judges in *Rahman* unanimously dismissed the appellants' appeals, yet their reasoning varied substantially but had equal weighting. This was not helpful in an already complicated area of law. Judges in the lower courts are required to follow the decisions of the higher courts, but trial judges were left to decide which judgment they should follow when directing juries.

Lord Brown, *obiter dicta*, even redefined the fundamental difference rule so that it appeared that an accessory could in some situations use the rule even though she contemplated that the primary actor may have the intention to kill. [107] In some factual circumstances, this could have breached the principle of fair labelling by being too lenient because an accomplice should not have been relieved of liability just because of a different method of killing. What should have mattered was the harm that the principal brought about and what the accomplice thought the primary actor intended, not what method was used. If the accessory contemplated that the primary actor might have had an intention to kill or cause serious harm, she was still responsible and should have been accountable if they continued with the initial criminal venture because, despite their contemplation of the principal's *mens rea*, the accessory continued to participate. *Jogee* did not directly deal with this issue, as will be seen in Chapter 4, but appears to resolve the debate by requiring the secondary party to

[107] *Rahman* (n 19) [68] (Lord Brown). The courts regularly referred to Lord Brown's speech despite the fact it was *obiter dicta*. This went against usual common law principles whereby the *ratio decidendi* is binding and anything said *obiter dicta* can only be persuasive in similar circumstances.

intend to assist or encourage the principal to act with the particular intent required of the offence.[108]

Commenting on *Rahman,* Dyson suggested the idea of an alternative 'fundamentally more dangerous test'.[109] Two years later, *Mendez* refined Lord Brown's controversial rule when it was held that in a joint plan to cause serious harm, the defendant was not liable for murder if the direct cause was the unforeseen 'deliberate act' by another, which was likely to be 'more life-threatening' than the acts foreseen by the accused.[110] At least the courts had started to look at how a weapon was used rather than just the type of weapon used. This was a good refinement, albeit by the Court of Appeal rather than the Supreme Court. It was the dangerousness of the conduct of the principal's act as a whole that mattered. This may have resulted in more secondary parties being acquitted. If the accomplice foresaw the use of a particular weapon by the principal to cause the victim serious harm in a non-life threatening way, but the principal actually used it to fracture his skull and the victim died as a result, the secondary party would be acquitted. The actual use of the weapon by the principal was more life threatening and so the accomplice was not held responsible.[111]

Finally the courts attributed responsibility according to the harm that was foreseen. If the defendant had foreseen the principal using a knife to cut the victim's hand but it

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[108] *Jogee* (n 2) [10].
[109] Dyson M, 'Rahman [2007] EWCA Crim 342: fundamental similarity in secondary liability' [2007] Arch News 4, 6.
[110] *Mendez* (n 41) [48].
[111] *AG Reference case No 3 of 2004* [2005] EWCA Crim 1882, [2006] Crim LR 63.

was actually used to cut the victim's throat, the fact the same weapon was used was immaterial. What was important was how the accomplice had foreseen that it would be used.

The availability of a manslaughter verdict for an accessory reduced after *Powell: English* and subsequent case law revisiting the fundamental difference rule. Many accomplices who would have been committed of a homicide offence before the case were either convicted of murder or acquitted altogether.[112] If a secondary party joined an attack but other participants went further than foreseen, the accomplice would still have deserved punishment, albeit different to that of the killer. Manslaughter would have fulfilled that role.[113] This would have reflected fair labelling, subject to the doctrinal criticisms raised by Baker, discussed in Chapter 4.[114]

While *Powell* acquitted defendants of any homicide if the act carried out by the principal was fundamentally different to that contemplated by the accomplice, a number of cases,[115] before *Jogee*, confirmed that an accessory should be convicted where the very deed carried out was that contemplated, even though she did not realise that the principal intended a more serious consequence. The accomplice should be found guilty for the offence appropriate to the intent with which she had acted.

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[112] Toulson R, 'Sir Michael Foster, Professor Williams and complicity in murder' in Baker DJ and Horder J (eds), *The Sanctity of Life and the Criminal Law. The Legacy of Glanville Williams* (OUP 2013) 244.
[113] ibid 245.
[114] Below, 132 - 138.
[115] *Gilmour* [2000] NICA 367, [2000] 2 Cr App Rep 407, *Roberts; Day* [2001] EWCA Crim 1594, [2001] Crim LR 984 and *Carpenter* [2011] EWCA Crim 2568, [2012] QB 722.

The secondary party did not have to share the same *mens rea* as the principal and foresight of what the principal may do was held to be sufficient in these cases. For example, where an accessory participated in a fight and so encouraged or assisted the principal, if only some minor harm was foreseen (as opposed to serious harm or death) but death resulted due to an unforeseen *mens rea* of the principal, the accomplice would be liable for manslaughter, but not murder. Again, this approach fulfilled the principle of criminal law requiring a culpable mental attitude before the stigma of a conviction and punishment could be imposed. Similarly, the punishment appeared to reflect the criminal law aspirations of fair labelling. This approach, however, is open to the criticisms recently raised by Baker following *Jogee*, that these defendants are being labelled based on a crime that might, but did not, take place. This is discussed further in Chapter 4.[116]

This complicated area of law was refined over a number of years and it is anticipated that *Jogee* was intended to simplify and settle this area of law. With the introduction of a narrow version of the fundamental difference rule some of the above criticisms may remain. This is analysed in Chapter 4.[117]

How PAL applied to cases of spontaneous group violence before *Jogee*

PAL applied to spontaneous group violence, but did not readily suit these circumstances.[118] Events can spiral out of control very quickly in spontaneous scenarios and proving an agreement for an initial joint venture with foresight by the

[116] Below, 132 - 138.
[117] ibid.
[118] For example *Mendez* (n 41).

secondary party of a collateral crime proved hard. If one defendant was a passer-by and suddenly joined in an attack on a victim this would be considered to be the initial crime, but establishing what she had agreed with the principal and what she foresaw could be difficult. In spontaneous violence participants only consider their own actions and intentions. They do not usually consider the actions and mental attitude of others.[119] Despite this, PAL was often used in spontaneous violence scenarios.

In *Mendez*,[120] Lord Toulson identified the problems with PAL in spontaneous group violence. He stated:

> All that a jury can in most cases be expected to do is form a broad brush judgment about the sort of level of violence and associated risk of injury which they can safely conclude that the defendant must have intended or foreseen.[121]

The criminal law norm is for the prosecution to prove their case beyond reasonable doubt. This should not allow the jury to make 'broad brush' decisions, which could lead to inconsistent decisions and breach the principle of legality by not being clear and precise. It may also breach the principle of fair warning because, without adequate publicity of PAL, potential defendants may only expect to be punished for their own role in the violence and not the role of others. However, in practice, the facts of a case often require juries to take a 'broad brush' view and at least this maintains flexibility to allow for individual circumstances to be taken into account by the jury.

[119] *Uddin* [1999] QB 431 (CA).
[120] *Mendez* (n 41).
[121] ibid [48] (Lord Toulson).

Over the years the courts justified the *Chan Wing-Siu/Powell* direction on the basis of the deterrence and punishment of gang crime,[122] yet when the violence was spontaneous the law did not work well in practice. This was one of the reasons given in *Jogee* for restating the law to effectively abolished PAL. Whether *Jogee* adequately deals with situations of spontaneous violence is discussed in further detail in Chapter 4,[123] where it will be shown that it is anticipated that problems will remain. This is because juries will continue to have to take a 'broad brush' approach to the mental element of the participants and whether they intended to assist or encourage the substantive offence.

Was fair labelling reflected in PAL?

It was shown in Chapter 2[124] that the law of complicity has the potential to breach the principle of fair labelling and similar arguments applied to PAL. JC Smith opined that PAL had 'a savour of constructive crime where a person is convicted of a greater offence because it resulted from a lesser offence of which she was guilty.'[125] The *actus reus* of the greater offence was effectively just participating in the initial crime with the principal. There was no need for any direct assistance or encouragement in relation to the second offence, resulting in a potential for unfair labelling upon conviction.

There was no mental attitude attaching to the collateral offence. The defendant may have intended one result but be liable and labelled for a more serious outcome,

[122] Above, 55 – 56.
[123] Below, 105.
[124] Above, 28 - 34.
[125] Smith JC, 'Criminal liability of accessories' (n 22) 465.

which was hard to justify unless responsibility attached to the defendant. PAL was considered by the courts to be part of complicity,[126] meaning that the contribution of the secondary party to the initial crime was considered as encouragement for the second crime, providing the necessary culpability of an intention to encourage. This helped justify the accomplice being labelled with the principal's crime but fair warning was not provided to defendants who were unaware of PAL. This is because prior to *Jogee* there was little publicity on PAL, so that most defendants would have been unaware of their impending criminality for the principal's collateral offence. Even if they were aware of PAL, it was hard for them to understand, providing a possible breach of the principle of legality because the law was not clear. The law was complicated. Judges and academics alike struggled with PAL yet alone those in the criminal world.[127]

The moral justification for constructive crimes and their labelling can be understood in relation to a conviction of the principal for murder because the defendant is to blame for the result of an attack, where serious harm was intended, but death in fact resulted. This same justification is not so straightforward for PAL. The secondary party's involvement in PAL is not more blameworthy than a person who commits unlawful act manslaughter by assaulting a victim, which resulted in death. The latter secondary party would be labelled with the offence of manslaughter. Yet, an accomplice under the doctrine of PAL could be liable for murder if the principal kills

[126] Above, 58 – 64.
[127] *Rajakumar* [2013] EWCA 1512, [2014] 1 Cr App R 12 [27]; Dyson, 'The future of joint-up thinking' (n 42); Wilson and Ormerod, '(n 98); Crewe B, Liebling A, Padfield N, Virgo G, 'Joint enterprise: the implications of an unfair and unclear law [2015] Crim LR 252.

the victim and the accessory assisted an attack with only foresight of a possible death.[128] This clearly illustrates the potential of unfair labelling in PAL.

Further, the breach of the principle of fair labelling was greater for PAL than for basic complicity. In standard accessorial liability, the principal may have to intend an offence for conviction and the accessory would have to intend to assist or encourage the principal in their offence.[129] In theory, the *mens rea* element of the accessory would match that of the principal for a specific intent crime. However, in a PAL factual matrix, labelling was not applied consistently between a principal for murder and a secondary party to PAL. Intention was required for the label of a principal as a murderer but only foresight of the killing or serious harm was necessary for the secondary party. Labelling between the offence of the principal and that of the accomplice was not consistent in relation to the requisite mental element of both parties.

In addition to the usual principle of fair labelling described above, there was a further issue regarding the labelling of PAL. Originally, the term 'joint enterprise' was used as an 'umbrella' term.[130] 'Joint enterprise' has been given various definitions over the years. Lord Lane in *Hyde*[131] explained that there were two main types of 'joint enterprise' cases where death resulted to the victim. The first was where the principle aim of the participants was to do some kind of physical injury to the victim. The second was where the principal aim was not to cause physical injury to any victim

[128] Wilson and Ormerod, (n 98) 11.
[129] See above, 34-47 for issues with the definition of intention in basic complicity.
[130] House of Commons Justice Committee*, Joint Enterprise* (HC 2010-2012, 1597).
[131] (1991) 1 QB 134 (CA) 138 (Lord Lane).

but, say, to commit burglary and the victim is assaulted and killed as a possibly unwelcome incident of the burglary.[132] This approach from *Hyde* was more recently confirmed by Krebs, although she subsequently argued that the first limb was redundant because, more correctly, it should be considered as part of the basic law on complicity.[133] This is correct because the first limb would have fallen within the requirements of the 1861 Act. It was an unnecessary definition from the start.

The use of the term 'joint enterprise' was confused over time. Lord Mustill in *Powell; English* recognised the contradiction in using the term 'joint enterprise' to reflect liability for a secondary party who was a party to an express or tacit agreement to do the act in question and also for the individual who disagreed with the act and made this clear to the principal, so did not intend the principal to commit the collateral crime.[134] The definition of the term 'joint enterprise' was muddled further in *ABCD*[135] when Lord Hughes set out three situations when the term 'joint enterprise' or 'common enterprise' might be used. This guidance has not been without criticism because two of these definitions were more accurately defined as joint principalship or basic complicity. [136]

Ultimately, the basic form of secondary liability became redundant as 'everything is a joint enterprise' and the various levels of liability were conflated.[137] Only the third definition from *ABCD* was the true offence of 'joint enterprise', more recently called

[132] ibid 138.
[133] Krebs B, 'Joint Criminal Enterprise' (n 11) 581.
[134] *Powell; English* (n 6) 11 (Lord Mustill).
[135] *ABCD* (n 41) [9] (Lord Hughes).
[136] Dyson, 'The future of joint-up thinking' (n 42) 183.
[137] ibid.

'PAL', which has become so controversial. Yet, judicial literature often seemed to use the term 'joint enterprise' for all accessorial offences.[138] The CPS and the courts appeared to merge other forms of secondary liability with the label 'joint enterprise' instead of acknowledging a distinction between them. It was this third definition that was the more usual application of 'joint enterprise', discussed in detail in *Jogee* as PAL.[139]

The ambiguities in terminology were exacerbated by the adoption of different terms to cover both basic and parasitic complicity.[140] In addition to 'joint enterprise', terms such as 'common enterprise', 'common purpose', 'common purpose complicity', 'collateral joint enterprise' as well as 'PAL' were in common use prior to *Jogee*.[141]

The more recent term PAL has been described as 'inelegant'.[142] However, the ability of prospective offenders to understand this term is important. *Pre-Jogee*, it could be suggested that it was not fair to label a defendant and convict her for an offence for which the label, PAL, was unintelligible to them. This would breach the principle of fair labelling and potentially the principle of legality. The law should describe the criminal offence to society with precision, so that society can understand the nature of the secondary party's wrong. As such, the state is bound by the everyday

[138] Above, 9.
[139] Confusion on terminology remains, post-*Jogee,* as can be seen in *Hong Kong Special Administrative Region v Chan Kam Shing* [2016] HKCFA 87, (2016) 19 HKCFAR 640 where the HKCFA thought abolishing PAL would also abolish basic joint enterprise.
[140] Wilson and Ormerod, (n 98) 5.
[141] ibid 6.
[142] ibid.

understanding of the terminology it adopts.[143] Neither the label joint enterprise nor PAL fulfilled this role.

Conclusion

The doctrine of PAL was initially developed by the courts in order to protect the public from the potential for group violence to rapidly escalate and the difficulties of proving which participant wielded the knife or pulled the trigger. Despite the procedural and evidential advantages of this doctrine, it has been shown above that it could be harsh to defendants. To compensate, *Powell English* introduced the fundamental difference rule, which swung the pendulum in the other direction by being too lenient on some defendants, relieving them of any homicide offence.

It has been shown in this chapter that the legal foundations of PAL in terms of causation were uncertain and the doctrine breached the principles of fair warning, correspondence, fair labelling, and legality in many respects. Furthermore, the rules did not translate well into cases of spontaneous violence.

In addition, the *mens rea* of this route to liability was controversial. JC Smith recognised the harshness of this doctrine twenty years ago.[144] He suggested that it could be altered to necessitate intention of the accomplice that the principal should carry out the collateral crime and there was no reason why the House of Lords could not modify the law.[145] It took until 2016 in *Jogee* for this to happen, so that intention

[143] Simester and Von Hirsch, *Crimes, Harms and Wrongs* (n 77) 203.
[144] Smith JC, 'Criminal liability of accessories' (n 22) 465.
[145] ibid.

on the part of the accessory is now a requisite element for all acts of the accomplice. This is discussed in further detail together with the resulting impact of *Jogee* on the identified principles in the next chapter.

It was shown in Chapter 2 that issues arise from the relationship of complicity with the various principles under discussion in this thesis and that these principles are not always fulfiiled. This current chapter has focused on PAL and its relationship with the same principles, identifying that these breaches were even greater in PAL. Whether *Jogee* has improved the relationship of complicity with these principles is considered next in Chapter 4.

CHAPTER 4 – *JOGEE*'S IMPACT ON COMPLICITY AND PAL IN RELATION TO THE IDENTIFIED PRINCIPLES OF CRIMINAL LAW

It was shown in Chapter 3 that PAL was always part of complicity and, despite its continued application by the courts, PAL breached many of the principles of criminal law. In 2016, *Jogee*[1] restated the law of complicity which, in the Supreme Court's view, had been misinterpreted for 30 years, in an attempt to remove any potential for injustice to defendants. The purpose of this chapter to is evaluate the judgment from *Jogee,* in order to assess whether it will improve the relationship of complicity with the principles of criminal law under discussion in this thesis and whether PAL still exists after *Jogee*.

The chapter starts by setting out the restatement of law from *Jogee,* followed by consideration of why the Supreme Court chose to make this decision. It then moves on to analyse the *Jogee* judgment in detail, in relation to the identified principles of criminal law. In particular, the *actus reus* and *mens rea* of complicity are analysed together with the use of weapons and manslaughter as an alternative verdict following *Jogee*. Difficulties are identified with *Jogee,* while respecting that the overall aim of the judgment was to remove the injustice caused by the previous law from *Chan Wing-Siu*[2] and *Powell; English*.[3] It is shown that many of the breaches of criminal law principles that existed with complicity prior to *Jogee* still remain. The chapter moves on to consider whether PAL exists, post-*Jogee,* and the general

[1] [2016] UKSC 8, [2017] AC 387.
[2] [1985] AC 168 (PC).
[3] [1999] 1 AC 1 (HL).

application of the case to criminal law. It will show that PAL may no longer exist, but joint enterprise, referring only to joint group criminal ventures,[4] will remain. It also suggests that *Jogee* applies throughout the criminal law and not just to the law of murder.

While *Jogee* appeared to improve the relationship of complicity with the principles of fair warning, fair labelling, correspondence and individual autonomy, this apparent improvement may not be as great as that first expected by some academics and lobby groups.[5] On closer reading and analysis, the judgment may actually raise further issues, resulting in potential for continuing breaches of these principles and confusion in terms of *mens rea*. Furthermore, the debate on causation in complicity remains post-*Jogee*.

The restatement of the law of complicity from *Jogee*?

Following *Jogee,*[6] the secondary party must now factually assist or encourage every crime for which she is to be held liable. *Jogee*[7] held that accessorial liability requires the defendant to assist or encourage the commission of the offence of the principal, with the intention to assist or encourage the commission of the crime. This requires knowledge of any existing facts necessary for it to be criminal.[8] If the collateral crime requires a particular intent, the accomplice must intend to assist or encourage the

[4] See Note on terminology above, 9.
[5] Joint Enterprise after *Jogee*: Reconsidering Law and Policy Conference', University of Liverpool, London Campus, 1st September 2016; Stark F, 'The demise of "PAL": substantive judicial reform, not common housekeeping' (2016) CLJ 550; Dyson M, 'Case Comment – Shorn-off complicity' [2016] Cam LJ 196.
[6] *Jogee* (n 1) [76].
[7] ibid [9].
[8] ibid.

principal to act with that intent.[9] Association between the two participants and the presence of the accomplice is only evidence whether assistance or encouragement were provided.[10] Furthermore, assistance and encouragement do not have to have a positive effect on the actions of the principal or the outcome.[11] Secondary liability no longer requires the existence of an agreement between the parties.[12]

Jogee[13] decided that authorisation of the collateral crime cannot automatically be inferred by the accomplice continuing in the initial crime, having foreseen the possibility of the second crime. Foresight by the secondary party of the second crime carried out by the principal, is now only evidence of intention to assist or encourage that further crime.[14] Subsequent to *Jogee,* the Court of Appeal in *Anwar*[15] confirmed that it will be up to the jury 'to look at the full picture or factual matrix' to see if the necessary intent can be inferred. In effect, *Jogee* confirmed that there is no, and probably never was,[16] a separate route to liability called PAL. It must be shown that all acts of the principal were intentionally encouraged or assisted by another participant, whether it is an initial joint criminal venture or a further collateral crime subsequently carried out by one party alone.

[9] ibid [10], [90].
[10] ibid [11].
[11] ibid [12].
[12] ibid [17], [78].
[13] ibid [66].
[14] ibid [66], [87].
[15] [2016] EWCA Crim 551, [2016] 4 WLR 127 [20].
[16] Below, 143 - 145.

Jogee[17] also suggested that if a defendant is party to a violent attack on a victim, without an intention to assist in causing death or serious harm, but the violence escalates and a fatality arises, they would be guilty of manslaughter and not murder. The Supreme Court[18] qualified this by stating that if death was caused by some overwhelming supervening act by the principal, which nobody could have contemplated so that the accomplice's act is confined to history, the accessory will not be liable for the death.

By restating the law, the Supreme Court was presumably intending to clarify the elements of accessorial liability and rectify any areas of law that have caused injustice. Yet, it will be argued below that this may not have been achieved and that breaches of the principles of fair labelling, legality, correspondence and individual autonomy remain. This is unfortunate because it means that the decision in *Jogee* may not have the impact that was initially expected by many commentators immediately after the decision.[19]

Why did the Supreme Court restate the law of complicity in *Jogee*?

The Supreme Court gave five reasons for restating the principles in *Jogee*. The first reason was that the rule from *Chan Wing-Siu* was based on an incomplete, and sometimes erroneous, understanding of earlier case law and that the Supreme Court in *Jogee*[20] had had the benefit of a fuller analysis of the law than other courts. Doubts have been raised on whether the Supreme Court had in fact undertaken a fuller

[17] *Jogee* (n 1) [96].
[18] ibid [97].
[19] See n 5.
[20] *Jogee* (n 1) [79], [80].

analysis of the law but this work does not have space to explore this issue further.[21] *Jogee*[22] used *Chan Wing-Siu* as the starting point and so this thesis takes the same approach. The development of PAL from common law could form an inquiry in its own right.

The second reason provided by the Court[23] was that the law was not working well in practice, was controversial and had led to numerous appeals. Indeed, this is correct and many of the problems with the *Chan Wing-Siu* principle have been discussed in Chapter 3.

The third reason was based on the importance of complicity in the common law.[24] Complicity is a vital area of law responsible for upholding the liability of secondary parties for their part in the criminal actions of others and the Supreme Court agreed that if the courts have taken a wrong turn then it should be corrected. This thesis will suggest that despite the focus of *Jogee* on PAL, PAL was part of complicity. As the facts in *Jogee* were an example of basic complicity, not PAL, the court could have given greater consideration to both basic complicity and the unitary system of liability, in order to highlight the potential for breaches of the principles of criminal law. While complicity was put into statutory form in 1861, so any fundamental changes would fall to Parliament, the Supreme Court missed an opportunity to highlight inconsistencies.

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[21] See Stark, 'The demise of "PAL"' (n 5); Simester A P, 'Accessory liability and common unlawful purposes' [2017] LQR 73; Baker DJ, *Reinterpreting Criminal Complicity and Inchoate Participation Offences* (Taylor and Francis 2016); Baker DJ, 'Unlawfulness's doctrinal and normative irrelevance to complicity liability: a reply to Simester' [2017] J Crim Law 393.
[22] *Jogee* (n 1) [62].
[23] ibid [81].
[24] ibid [82].

The fourth and fifth reasons have the most importance. The fourth reason given[25] was that foresight of what might happen was only evidence from which a jury may find a requisite intention in criminal law. Following *Chan Wing*[26] foresight of a criminal offence became a substantive rule requiring a jury to find that intention in a defendant. This resulted in a reduction in manslaughter and an over extension in murder convictions for accessories. This problem was compounded by the already over-inclusive nature of the common law of murder, which allowed for a mental element of an intention to cause serious harm, without any intent to kill.[27] It is anticipated that this was one of the primary reasons for the judgment in *Jogee*. Judges and academics were aware of the increased use of PAL by the prosecution together with continual pressure on the courts and Parliament to intervene.[28] Parliament had shown no enthusiasm for legislation and so it fell to the judiciary.[29]

The fifth reason provided in *Jogee*[30] was the resulting anomaly of a lower mental element for an accessory than for the principal, in the case of specific intent crimes such as murder. Prior to *Jogee*, to be guilty of murder a principal had to kill with an intention to kill or cause serious harm, whereas the accomplice only had to foresee

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[25] ibid [83].
[26] *Chan* (n 2).
[27] ibid [83].
[28] Justice Committee, *Joint Enterprise* (HC 2011-2012); Justice Committee, *Joint Enterprise: follow-up* (HC 2014 - 5); McClenaghan M, McFadyean M and Stevenson R, 'Joint Enterprise: An investigation into the legal doctrine of joint enterprise in criminal convictions (The Bureau of Investigative Journalism 2014); Williams P and Clarke B, 'Dangerous associations: Joint enterprise, gangs and racism' (Centre for Crime and Justice Studies, January 2016)
[29] Grayling C, 'Government Response to the Committee's Fourth Report of Session 2014-15' https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/1047/104704.htm accessed 4 October 2017.
[30] *Jogee* (n 1) [84].

that the principal might kill the victim, with an intention to kill or cause serious harm. It was easier to convict the accomplice than it was the primary actor, in some factual scenarios. Indeed, this anomaly had been raised on a number of occasions by the courts[31] and was discussed in Chapter 3.[32]

In addition to the reasons outlined above, *Jogee* provided an important clarification of *Rahman*[33] in relation to murder. *Jogee*[34] confirmed that an intention to assist an infliction of serious harm was no different to the intention to assist an intentional killing and is sufficient for secondary liability. This aligns complicity with the law of murder. This is an important clarification, because to differentiate between an intention to cause serious harm and an intention to kill in complicity would have undermined the whole basis of our law of murder.[35]

More concerning was the Supreme Court's later reference to bringing the common law back into line with other statutory provisions. The Court referred to s 8 of Criminal Justice Act 1967, which states:

> 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; but

[31] *Powell; English* (n 3); *Rahman* [2008] UKHL 45, [2009] 1 AC 129.
[32] Above, 67 - 70.
[33] *Rahman* (n 31).
[34] *Jogee* (n 1) [95].
[35] Whether the law of murder is too wide by being constructive is not the subject of this thesis.

b. shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances. [36]

Even if the result is natural or probable, the jury does not have to find that the defendant intended the consequence. It is just a question of evidence for the jury. *Jogee* also appeared to be consistent with the approach taken in the context of intention for the purposes of murder.[37]

Jogee[38] also referred to Parliament's enactment of s 44 Serious Crime Act in 2007. This provides that:

(1) A person commits an offence if –
(a) he does an act capable of encouraging or assisting the commission of an offence; and
(b) he intends to encourage or assist its commission.

(2) But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act.

While not totally without ambiguity, Parliament appears to state that foresight is not an adequate mental requirement for the inchoate crime of intentionally assisting or encouraging another to commit an offence and so *Jogee*[39] endeavoured to bring the law of complicity in line with this.

However, complicity and the Serious Crime Act offences should not be compared in this way, because they are different types of offence. Buxton argues that s 44 of the

[36] *Jogee* (n 1) [86] (Lord Toulson and Lord Neuberger).
[37] *Matthews and Alleyne;* [2003] EWCA Crim 192, (2003) 2 Cr App R 30.
[38] *Jogee* (n 1) [86] (Lord Toulson and Lord Neuberger).
[39] ibid [86].

Serious Crime Act is unique in that it inculpates the accomplice before the commission of the principal offence and that the purpose behind this provision was not to widen the law so as to convict an individual who was just indifferent to (but foresaw) an offence that did not in the end take place.[40] The mental element of intention, not based on mere foresight, provides this.[41] The circumstances anticipated in s 44 are inchoate and a defendant is liable whether or not the ultimate crime is committed. To incriminate an individual because of their reckless behaviour despite the fact that the offence was not carried out would almost certainly be too wide a form of criminality. Intention as a mental element avoids this.

Complicity, on the other hand, is concerned with liability for another party's crime, which does take place. All those responsible should be held to account, even if they were indifferent to the commission of the offence, if they intended to assist or encourage the principal. The restatement of intention in *Jogee* ensures this. Indeed, an accessory is subject to the same criminal label and associated stigma as the principal, whereas the label for an inchoate offence is independent to the principal offence. It follows that the reference to foresight as an inadequate *mens rea* in the Serious Crime Act 2007, should have no connection to foresight as an inadequate mental element in complicity. The arguments for *mens rea* in each offence should be considered on their own merits because they are different types of offence. Indeed,

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[40] Buxton R, 'Jogee: Upheaval in secondary liability for murder' (2016) Crim LR 324, 330.

[41] Virgo opines that recklessness is specifically accepted as a mental element for these inchoate offences and that the Supreme Court was too simplistic in their approach to these inchoate offences in *Jogee*. See Virgo G, 'The relationship between inchoate and accessorial liability after *Jogee'* [2016] Arch Rev 6. An analysis of the mental element in the Serious Crime Act 2007 is not included here on grounds of space.

this may be the reason why Parliament did not legislate on accessorial liability so as to reinstate intention as the *mens rea* for complicity at the same time as their enactment of the Serious Crime Act 2007.

Ormerod and Laird agreed that the reference in *Jogee* to both these statutory provisions was illogical. In their view, s 8 relates to intention as to consequences and s 44 relates to intent as to purpose, whereas *Jogee* is about an accessory's intent as to the principal's likely intention to commit the crime.[42] Their approach has some strength; s 8 states that a jury 'shall not be bound in law to infer that 'he intended or foresaw a result' (a consequence) and s 44 refers to the fact that the accessory is not to be taken to have intended to encourage or assist the commission of an offence (a purpose).

However, Ormerod and Laird omitted to state that the intention for complicity after *Jogee*, may be similar to s 44 in that it is an intention to assist or encourage (a purpose) which has to be proved, as well as the added element that they also need that intention in relation to the required *mens rea* of the offence of the principal (Ormerod and Laird's accessory's intent as to the principal's likely intention to commit the crime).

It is suggested in this thesis that the mental element of an offence should be considered on an individual basis and not just because another offence uses a legal term in a particular way. If this is correct, then the reference to other statutory

[42] Ormerod D, Laird K, 'Jogee: not the end of a legal saga but the start of one?' [2016] Crim LR 539, 545.

provisions is inappropriate. In practice, this may just be an academic point as the Supreme Court[43] made clear that consistency of statutory provisions was just one of a number of reasons given to justify their decision to change the law. It is not listed as the only or even principle reason, just one which is noteworthy.

Encouragement or assistance and causation in complicity after *Jogee*

The conduct element for complicity is encouragement or assistance.[44] This is not new. However, little further guidance was provided in *Jogee,* other than it has to be more than a remote contribution, which was left up to the jury.[45]

Importantly, *Jogee* held that the secondary party must assist or encourage every act of the principal.[46] This is new and results in the demise of PAL. If an accessory and a principal agree to carry out one crime but the principal goes further than agreed and commits a collateral crime, the secondary party may not be liable for the second crime depending on whether their contribution to the first crime is interpreted as assisting or encouraging the second. Prior to *Jogee*, the secondary party's contribution to the initial crime was inferred to provide the necessary assistance or encouragement for the collateral crime, if the accomplice had foreseen the possibility of the second offence. Following *Jogee*, actual assistance or encouragement must be proved in relation to the collateral crime. It may be that the contribution to the initial crime may still provide the necessary conduct element for complicity but it will

[43] *Jogee* (n 1) [86].
[44] ibid [8].
[45] ibid [12].
[46] ibid [8] [76].

be up to the jury. Complicity appears to be increasingly a jury prescribed law, which can lead to inconsistent decisions and a potential to breach the principle of legality.

For example, if two parties agree to commit burglary and yet one party kills the occupier of the property when they are disturbed, whether the accomplice to the burglary is liable for the murder will depend on whether their contribution to the burglary is considered to be encouraging murder. The secondary party may not have assisted directly in the murder by words of support or restraining the victim, but by participating in the burglary itself, they could still be considered by a jury to be encouraging a potential murder. This is not what the Supreme Court in *Jogee* was necessarily anticipating. It is suggested that the Court required the secondary party to assist or encourage the principal in the act of murder itself, to be liable as an accomplice to murder. It is disappointing that *Jogee* did not discuss this point in detail in order to provide a fixed, clear criminal law, as a framework for the lower courts.

If this assistance or encouragement is established, *Jogee* confirmed that a positive impact on the principal's actions or on the result is unnecessary.[47] Yet, this may result in unfair labelling of the accomplice and fair warning may not be provided by the criminal law. This is because by not requiring a positive impact from the encouragement or assistance on the principal's conduct or the outcome, there is no material relationship between the actions of the accomplice and the conduct of the principal. Accordingly, it is hard to claim that the accessory is implicated in the primary wrong of the principal and there appears to be no culpability and

[47] ibid [12].

responsibility by the secondary party in respect of the primary actor's criminal offence.[48]

By contrast, this approach respects the role of individual autonomy. By actively assisting or encouraging the principal, the accomplice exercises their right to choose whether to assist or encourage the principal and is held responsible for their choice. This has always been a problem with complicity, because liability can derive from the actions of the principal alone. The remit of the Supreme Court was not to change the derivative nature of complicity, yet it is the unitary system and its derivative nature that has been the cause of many of the breaches of the criminal law principles.

Alternatively, it could be suggested that *Jogee* supported the idea that there is no need for the accomplice's acts to have caused the principal to commit the second offence. If correct, *Jogee* ignored *Mendez,*[49] which held that secondary liability was based on causation. Dyson believes *Jogee* 'fudged' the causation issue, although he suggested this approach allows for the situation where, for example, a number of defendants offer a knife to the principal but the principal only takes one.[50] This is because all defendants could be liable, even though the principal was assisted in fact by only one participant. All the defendants were prepared to assist the primary actor and intended to do so. It was just the principal's choice which knife she took, but any one of the knives could have been selected. The principal's choice did not alter the

[48] Sullivan GR 'First degree murder and complicity – conditions for parity of culpability between principal and accomplice' [2007] 1 (3) Crim Law and Philos 271, 283.
[49] [2010] EWCA Crim 516, [2011] QB 876.
[50] Dyson M, Buxton R, 'Letter to the Editor' Crim LR 638, 639.

fact that all participants intended to assist the principal and had their knife been selected they would have had the requisite conduct element for complicity.

This approach also deals with issues of evidential uncertainty of what actually assisted the primary actor.[51] It may be hard to prove that the encouragement or assistance of a particular accomplice, where there are a number of accomplices, actually had a positive impact on the conduct of the principal. This maintains flexibility for judges to allow for individual circumstances.

However, despite potentially implying that accomplice's acts need not have caused the principal to commit the second offence, words of causation were included in *Jogee*. The case[52] held that a secondary party should not be liable for the death of a victim by the principal where the death was caused by 'some overwhelming supervening act' by the primary actor 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; in that case the defendant will bear no criminal responsibility for the death'. This implied that the secondary party will be liable, unless there is some overwhelming supervening act which was a *novus actus interveniens* breaking the chain of causation. If the acts of the accomplice do not need to cause the act of the principal, then there will not be a chain of causation to break.

The approach in *Jogee* in this respect is unhelpful. Instead of clarifying the issues of causation in relation to accessorial liability, the Supreme Court appears to have

[51] ibid.
[52] *Jogee* (n 1) [97].

muddled it further. Causation has always been an issue in both basic complicity and PAL, yet *Jogee* made no reference to this. Owing to the failure of the Supreme Court to confront the causal requirement for complicity in *Jogee*, uncertainty will continue.

Has a new fundamental difference rule been created in *Jogee*?

Jogee appears to have replaced the fundamental difference rule, discussed in the previous chapter,[53] with another similar rule. While the judgment stated that a secondary party would not be liable where there is 'some overwhelming supervening act by the perpetrator',[54] this is potentially the fundamental difference rule in a different guise. The judgment continued that there should be no need to refer to the fundamental difference rule enunciated in *Powell; English,* unless there was an overwhelming supervening event. This implies that they are to be based on the same rule. All the issues relating to fair labelling due to the old fundamental difference rule may well still apply to the new test.[55] Furthermore, it is not clear whether the earlier case law interpreting the old fundamental difference test will apply to this new rule.

Dyson describes this new test as 'vague*'.*[56] It does appear vague, with the potential to breach the principle of legality. This is because *Jogee* does not set out what is needed to establish an overwhelming supervening event. This would have helped judges direct juries on this new test. No doubt it will take future case law to establish the definition of an overwhelming supervening act, similar to the plethora of appeals following the development of the fundamental difference rule in *Powell; English*. It is

[53] Above, 74 - 80.
[54] *Jogee* (n 1) [97].
[55] Above, 74 - 80.
[56] Dyson, 'Case Comment' (n 5) 197.

unfortunate that the Supreme Court in *Jogee* did not take the opportunity to prevent a similar set of appeals arising from the new test by setting out a statement of principles upon which this new test could be based. This would have provided clarity to those involved in the criminal legal system, complying with the principle of legality and potentially fair warning to the criminal fraternity.

Is prior agreement still a requirement post-*Jogee?*

Before *Jogee*, PAL required a prior agreement between the parties to carry out one crime, as a result of which a foreseeable second crime was committed by the principal. This is no longer the case. *Jogee* made clear that prior agreement between the parties for secondary liability is no longer required.[57] Very often there is prior agreement between two or more defendants to carry out a criminal offence, which would provide the necessary encouragement for secondary liability.[58] In these circumstances, it would be fair to label the secondary party as a principal (dependent on the level of the accomplice's involvement). Furthermore, by choosing to enter into the agreement with the principal the accomplice exercises their individual autonomy. This has not changed the law and has always been the situation for basic complicity.

Following *Jogee*, whether there was prior agreement is now largely irrelevant. An accessory has to assist or encourage the principal in every offence whether or not they were agreed. This is why the doctrine of PAL no longer exists. *Jogee* may appear to detract from fair labelling and individual autonomy because if there is no

[57] *Jogee* (n 1) [17] and [78].
[58] ibid [78].

prior agreement then it may not be fair to label the accessory as the principal and they may not have exercised their right to choose to carry out the crime. However, because the secondary party now has to have assisted or encouraged every offence of the principal, it will be fair to label her with the offence of the principal (again dependent on her level of involvement). Similarly, if they have assisted or encouraged the principal in every offence and have chosen to do so without being under any form of duress, then the principle of autonomy is respected.

This new approach is particularly helpful when it comes to spontaneous violence, where it can be hard to prove prior agreement between the participants. Subject to later comments on the *mens rea* for complicity, *Jogee* appears to make convictions for spontaneous violence easier, as long as assistance or encouragement by the secondary parties of the primary actor's crime can be shown. This assistance or encouragement can take the form of support by words or actions or by a supportive presence.[59] This will assist with fair labelling in that it may be appropriate to label an individual as a 'criminal', if they have supported the principal in his crime. Whether it is fair to label her with the offence of the principal in accordance our unitary system of complicity, is more open to debate.

In practice, following *Jogee,* the problem may be an evidential one of proving intentional assistance or encouragement by every defendant.[60] These evidential problems prior to *Jogee* did not arise because proof of mere foresight was sufficient.

[59] ibid [78].
[60] Below, 108-132.

This is where the prosecutorial advantage of the *Chan Wing-Siu* direction can be seen.

Association and presence at the crime post-*Jogee*

Jogee[61] confirms that 'neither association nor presence is necessarily proof of assistance or encouragement'. Association with the principal or presence at the scene of the offence may be evidence of assistance and encouragement but no more than that. Just because a defendant has some association with the defendant or happens to be present at the scene of the crime or in the vicinity, it will not necessarily be established that she assisted or encouraged the principal to carry out the offence. Again, this is a matter of fact for the jury to decide.

Association will be relevant when it relates to previous acts by both parties, towards but prior to the commission of the ultimate offence. Similarly, a group of people can encourage an offence by their presence. It would be up the jury to decide whether this presence provided intentional support to the principal, so encouraging her to commit the crime. This should be decided on a case-by-case basis.

Jogee identified a *de minimis* principle in terms of assistance and encouragement. This is where the acts of the accomplice are remote in terms of time, place or circumstances to the acts of the primary actor, so that the secondary party should not be considered to have assisted or encouraged the principal.[62] Again, whether the acts are too remote to be assistance or encouragement is for the jury to decide. For example, if a secondary party provided the principal with tools a long time before the

[61] *Jogee* (n 1) [11] (Lord Toulson and Lord Neuberger).
[62] ibid [12].

principal's crime took place and for a different purpose, this would not be seen as encouragement. This reflects the principle of fair labelling because it would be unfair to label an individual with the offence of the principal, if conduct of the accomplice was too remote.

Jogee recognised that defendants gain courage when supported by a large group of people 'lending force' to the acts of the primary actor.[63] Force of numbers can provide the necessary encouragement in secondary liability.[64] For example a group of friends watching another attack a victim may well encourage the primary actor. The principal would know by the spectators' presence that she could rely on them to join in if necessary. If, on the other hand, the spectators were a group of elderly people, incapable of coming to the principal's assistance, then there would be no encouragement by their presence.

This recognition of support providing encouragement has the advantage that it may help justify the label attached to an accomplice upon conviction. If the presence of the defendant as part of a large group does in fact encourage the principal, then the accomplice should be held responsible for their actions and the label may be supported, depending on the level of their involvement. Where a defendant present is one of a large number of defendants, it may be relatively straightforward to show that by the presence of the large group the principal was encouraged. However, an issue remains, post-*Jogee*. The prosecution still has to prove that each member of the

[63] ibid [11] (Lord Toulson and Lord Neuberger).
[64] ibid [89].

group intended by her presence to encourage the principal.[65] This may be hard to achieve in practice.

Beyond stating that 'numbers matter' the judgment from *Jogee* provides no guidance on when a group of individuals will encourage a principal merely by their presence.[66] As a result, adequate warning to those with a tendency towards crime is questionable. More publicity of liability by presence at the scene of a crime is necessary, in order to provide warning to potential criminals. There was initial publicity of *Jogee* after the judgment was handed down, but little advice to those with a propensity to crime setting out the continuing criminalisation based on mere presence.[67]

The *mens rea* of complicity after *Jogee*

The restatement of the law following *Jogee* related mostly to *mens rea,* which held that complicity requires an intention to assist or encourage a criminal offence with knowledge of any of the existing facts necessary to make it criminal. [68] However, this is problematic and the issues raised are discussed below. In particular, it was shown in Chapter 2 that the *mens rea* for complicity has two components: the mental element in relation to the accessory's own conduct and the mental element of the accessory relating to the actions of the principal. *Jogee* did not clearly identify these

[65] Below, 108-132.
[66] *Jogee* (n 1) [11].
[67] BBC News 'Joint enterprise: Ameen Jogee jailed for manslaughter' http://www.bbc.co.uk/news/uk-england-leicestershire-37336830 accessed 24 August 2018.
[68] *Jogee* (n 1) [9].

two separate aspects, creating confusion with a potential breach of the principle of legality.

Jogee held that the *mens rea* for assisting and encouraging a crime is 'an intention to assist or encourage the commission of the crime'.[69] This seems straightforward and confirms that a defendant cannot recklessly, negligently or accidentally assist or encourage a criminal offence. However, *National Coal Board v Gamble*[70] was endorsed implying that the secondary party may just have had to act voluntarily.[71] It was shown earlier in this thesis that merely requiring an accomplice to act voluntarily is not a high level mental element.[72] *Jogee* does not change this.

Intention *versus* knowledge

The Supreme Court[73] continued that this intention 'requires knowledge of any existing facts necessary for it to be criminal'. Ormerod observed that the Court 'has been less rigorous with the language than might have been expected'.[74] He referred to the use of the term 'intention' which is then said to require 'knowledge'. In this way, the Court appeared to equate intention with knowledge.[75] Yet, in the area of conspiracy, it has been established that knowledge is a true belief and relates to a present set of facts, whereas intention relates to a future set of facts.[76] Therefore, an accomplice cannot show future intention by having some sort of present knowledge.

[69] ibid [9] (Lord Toulson and Lord Neuberger).
[70] [1959] 1 QB 11.
[71] ibid.
[72] Above, 37-40.
[73] *Jogee* (n 1) [9] (Lord Toulson and Lord Neuberger).
[74] Ormerod and Laird, 'Jogee: not the end of a legal saga' (n 42) 544.
[75] *Jogee* (n 1) [9].
[76] *Saik* [2006] UKHL 18, [2007] 1 AC 18 [20], [26].

In Ormerod's view, use of the word 'intention', instead of 'knowledge', was what the Supreme Court intended and would have been more accurate. If so, the discussion in the case of foresight becomes relevant, because what is intended depends on what is foreseen.[77]

While Ormerod is correct that knowledge often speaks to the present and intention to the future, knowledge could be important to prove conditional intention by a secondary party. *Jogee* held that there was still a role for conditional intention in complicity, one that will be argued below may now be increasingly used by the prosecution.[78] This is where knowledge may become relevant. The accessory must have knowledge of the possible conditional collateral crime, in order to conditionally intend it. The secondary party cannot know the future actions of the principal (future facts can be known but not future actions of another participant) so the present knowledge of the principal's plan to commission the future conditional target crime, if necessary, may be relevant.[79]

This is where *Maxwell*[80] and *Bainbridge*[81] are important. These cases held that the knowledge of the secondary party of a range of potential crimes means that they had the conditional intention that the primary actor would carry out one of these crimes.[82] *Maxwell* was endorsed in *Jogee.*[83]

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[77] Ormerod and Laird, 'Jogee: not the end of a legal saga' (n 42) 544.
[78] Below, 123 – 128.
[79] Baker, *Reinterpreting Criminal Complicity* (n 21) 53.
[80] [1978] 1 WLR 1350 (HL).
[81] [1960]1 QB 129 (CA).
[82] Above, 43-46.
[83] *Jogee* (n 1) [9].

The use of the phrase 'knowledge of any existing facts necessary for it to be criminal' in *Jogee*[84] is similar to the phrase 'knowledge of the essential matters' frequently quoted prior to *Jogee* from *Johnson v Youden*.[85] The phrase from *Johnson v Youden* was never easily understood by juries or lawyers and presumably the Supreme Court in *Jogee* were trying to assist with this. It is doubtful that merely replacing 'essential matters' with 'existing facts' will remove confusion because *Jogee* did not expand on the level of knowledge of these facts required necessary to provide a fixed, certain and prospective law.

If intention and knowledge cannot be directly equated, Dyson has suggested that whether the secondary party believed that the principal would carry out the collateral offence should be the mental element.[86] This would be hard to prove in practice.[87] The problem with belief is that a level of belief would need to be established, which may ultimately result in a form of recklessness by falling back on the need for foresight of the crime, which the Supreme Court was trying to avoid.

The accessory's level of knowledge of the principal's crime

The level of knowledge required by the accessory of the principal's crime was not resolved in *Jogee*. Ormerod and Laird have confirmed that where knowledge is required, foresight should not be relevant because a defendant cannot know what will happen in the future.[88] It was because of the strict nature of knowledge being in the

[84] ibid [9].
[85] [1950] 1 KB 544 (KB) 546.
[86] Dyson M, Que sera, sera, Joint Enterprise Conference (n 5).
[87] Virgo G, 'Making sense of accessorial liability' [2006] Arch News 6, 7.
[88] Ormerod and Laird, 'Jogee: not the end of a legal saga' (n 42) 544.

present tense that the courts started to dilute this *mens rea* requirement in *Bainbridge* and *Maxwell*, discussed earlier.[89]

The judgment in *Jogee*[90] later stated that the accomplice 'does not have to "know" (or intend) in advance the specific form of crime that will be carried out' and *Maxwell* was endorsed. It is sufficient that the crime carried out by the secondary party is within the range of possible offences, which the accessory intentionally assisted or encouraged the principal to commit.[91] It appears that while the Supreme Court stated that the *mens rea* of complicity required knowledge of the essential matters of the crime, it immediately diluted this requirement. Foresight may still remain important in some circumstances, those where the accomplice encourages or assists the principal to commit one of a range of offences.[92]

Does the accomplice have to intend the principal's crime?

In addition to the lack of clarity on intention and knowledge, the Supreme Court was not rigorous in its statement on the *mens rea* requirement of the accessory in relation to the principal's offence. *Jogee* held that the accomplice should intend to assist or encourage the principal to act with the required *mens rea* for the offence.[93] What this means has been the subject of subsequent debate.[94] The wording is not clear and could have been more explicit.

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[89] Above, 43-46.
[90] *Jogee* (n 1) [14] –[16].
[91] ibid [14].
[92] Virgo G, "The relationship between inchoate and accessorial liability' (n 41) 6.
[93] *Jogee* (n 1) [10].
[94] See the debate between Buxton, '*Jogee*: upheaval in secondary liability for murder' (n 40) and Dyson and Buxton, 'Letter to the Editor' (n 50).

What seems certain, however, is that the Supreme Court intended that the secondary party may intend the principal to carry out the offence, but this need not necessarily be the case.[95] The accomplice need not intend the principal to carry out the offence in terms of it need not be her aim or purpose.[96] A retailer carrying out her everyday business may deliberately sell a kitchen knife or baseball bat to a known violent criminal in order to progress her business, but it may not be her purpose to assist the criminal. However, *Jogee* confirmed that she might be liable as a secondary party. On this basis, it may not be fair to label the secondary party as a principal and furthermore, fair warning of an impending criminal offence may not have been provided. If the retailer does not have to intend the principal to carry out the offence, adequate warning that liability for that offence is not provided to the secondary party.

Where an accessory provides the assistance prior to the commission of the offence, it will be even harder to be sure that they intended the principal to carry out the offence with the required mental element, particularly if the principal has not finalised her plans. However, *Jogee* confirmed that if the accessory, intending to help the principal, provides a weapon to enable the principal to carry out a crime in the future, this will be sufficient to convict the accessory, even if they do not care whether the crime is carried out. Intention is different to desire.[97] This confirms *National Coal Board v Gamble.*[98] The result is that *Jogee* does not necessarily resolve the potential

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[95] *Jogee* (n 1) [10].
[96] Buxton has suggested that following *Jogee* the accomplice must intend the principal to carry out the offence. Even if the Supreme Courts wording is unclear they later confirm that the secondary party need not have it as their aim or purpose. See Buxton, '*Jogee*: upheaval in secondary liability for murder' (n 40) 328.
[97] *Jogee* (n 1) [91].
[98] *Gamble* (n 70).

unfair labelling of a retailer as a murderer in accordance with our unitary system of liability, who is merely interested in furthering their business by the sale of an item to an individual with a propensity to crime.

Dyson has argued that *Jogee* leaves a 'gap for us in whether (the secondary party) intended the crime to take place' because the case did not state that the accomplice had to have intended the crime to be carried out.[99] Dyson's preference was for this to be specifically included within the *mens rea*. If *Jogee* had required the accomplice to have a positive intent that the crime be committed then this would have provided a more principled approach to fair labelling. The *mens rea* of complicity would, without doubt, have been higher as a result and this may have been Dyson's preference.

In addition, the correspondence principle would have been fulfilled for specific intent crimes. The accomplice by her intentional encouragement or assistance would intend the primary actor to commit the offence. Also, both the principal and the accomplice would have to intend the substantive offence. Despite this, proving this intention may be hard for prosecutors. As it is, the accomplice just has to intend to assist or encourage the principal in her commission of the crime with the relevant *mens rea*. She does not have to intend the principal to commit the offence.

Dyson's alternative of a belief by the secondary party that the principal would carry out the crime may prove easier to establish but necessitates a level of belief similar

[99] Dyson and Buxton, 'Letter to the Editor' (n 50) 642.

to foresight which existed prior to *Jogee*. It was this use of a foresight based *mens rea* that the Supreme Court was trying to amend in *Jogee.*

Buxton agreed with Dyson that there is a gap in *Jogee* in relation to this aspect of the mental element for complicity. He concluded that 'we may in practice have arrived back at that case [*Gamble]* as the ruling authority'.[100] Indeed, the Supreme Court actually endorsed *Gamble* in *Jogee*[101] and the judgment includes an example of where it would be appropriate to direct the jury that it is sufficient that the secondary party intended to assist the principal to act with the required mental element. The example given was:

> … where D2 supplies a weapon to D1, who has no lawful purpose in having it, intending to help D1 by giving him the means to commit a crime (or one of a range of crimes), but having no further interest in what he does, or indeed whether he uses it at all.[102]

This clearly shows that the Supreme Court does not require the secondary party to have intended the crime be committed to find liability. All that is required to justify liability is an intention by the accomplice to assist or encourage the principal to carry out the crime with whatever mental element makes up the crime. If the accessory selling the weapon has no interest in what the buyer does with it or whether they use it at all, even though she knows it is giving the principal the means to commit an offence, then the accessory does not desire or intend it to take place. It is not their aim or purpose that the gun is used in an offence. Despite this they are still liable as an accessory to whatever crime the principal carries out and can still be labelled with

[100] Dyson and Buxton, 'Letter to the Editor' (n 50) 643.
[101] *Jogee* (n 1) [9].
[102] ibid [90] (Lord Toulson and Lord Neuberger).

the same offence as the principal. *Jogee* does not seem to resolve the fair warning or labelling issues of our unitary system of liability.

In summary, the restatement of intention in *Jogee* as the requisite mental element for complicity may initially appear to help fulfil the principle of fair labelling because a secondary party has to assist or encourage every act of the principal. If a secondary party intends to assist or encourage the principal to commit a crime and does so, then it may be fair to label them as a principal. In addition, the decision appeared to improve the fair warning provided to potential criminals because, as shown in the previous chapter, merely allowing the foresight of a crime to provide the necessary mental element for an accessory did not provide adequate warning to them that they could be criminalised. They now have to intend to assist or encourage the offence.

Further, individual autonomy is supported by the *mens rea* set out in *Jogee*. By intending to assist or encourage the principal the accomplice is exercising his right to choose to do so.

However, it has been shown above that this apparent improvement in fair labelling and fair warning may be too simplistic, due to the decision's lack of clarity in respect of the accessory's mental element in relation to the principal's offence. This may also permit a breach of the principle of legality. It would be expected that a judgment from the Supreme Court, after so many years of academic debate and calls for reform, would clarify the law, not muddle it further.

In any event, unfair labelling may also arise from the restatement of *mens rea* in *Jogee* for a different reason. If a secondary party does not intend to assist or encourage the principal's criminal offence, but is still reckless towards the principal's offence, it may still be appropriate to hold them responsible, even if at a different level to an accomplice who intended to assist or encourage the primary actor.[103] If a participant takes part in one crime but the principal carries out a collateral crime which was foreseen by the accomplice, should the secondary party's contribution to the first crime not be considered by the jury to be encouragement of the second crime, then the reckless behaviour of the accomplice may not be criminalised at all. If *Jogee* decriminalises reckless complicity, then the acquittal of an accomplice may unfairly understate to the public, and the victim, the defendant's fault. Furthermore, it would not reflect the individual autonomy of the secondary party that by participating in the initial joint venture they chose to continue, despite the unjustified risk of a subsequent collateral crime.

What threshold of foresight is necessary for intention in complicity, post-*Jogee* and has the *mens rea* for accomplices been aligned with that of principals*?*

Following *Woollin*,[104] there is now a high threshold of foresight for liability of a principal in the context of murder and that is foresight of a virtual certain result, death or serious harm. However, *Woollin*[105] also held that this did not necessarily apply throughout the criminal law, although in practice it has become of general application.

[103] Moriarty DG 'Dumb and dumber: encouragement to reckless wrongdoers' [2010] 34 Southern Illinois Univ JL 647 sets out some good examples of potential reckless complicity.
[104] *Woollin* [1999] 1 AC 82 (HL).
[105] ibid 90 (Lord Steyn).

Jogee held that the foreseeability of consequences in complicity can be evidence of intention to assist or encourage the principal offence but should 'not necessarily be inferred'.[106] Unfortunately, no threshold of the level of foreseeability for complicity was included in the judgment.[107] There was no reference to *Woollin* and no guidance on the level of foresight of the collateral crime that is required in order to prove an intention to assist or encourage. If the secondary party believes that there is a small, but real, chance that the principal will intentionally act to commit a crime, it is uncertain whether the jury can infer the necessary intention to assist or encourage or whether there has to be a high level of foresight, as *per Woollin*.

While it is disappointing that the level of foresight required to find an intention to assist or encourage was not set out in *Jogee*, this is unsurprising as it would not have been the constitutional role of the Supreme Court to analyse and amend the definition of intention in criminal law. The Court's role was to reconsider the law of PAL, not the definition of intention. However, it would have been helpful if the decision had referred to *Woollin* in order to confirm whether the high level of foresight required for a principal to murder applied to accomplices as well, particularly as *Jogee* was a murder case. *Jogee,* as a case on complicity, applies to crimes other than just murder, and so doubt remains as to the level of foresight required by accomplices in order to find an intention to assist or encourage other offences.

[106] *Jogee* (n 1) [73].
[107] Ormerod and Laird, 'Jogee: not the end of a legal saga' (n 42) 546.

Instead, the judgment in *Jogee* held:

> …in the common law foresight of what might happen is ordinarily no more than evidence from which a jury can infer the presence of a requisite intention.[108]

By using the word *'*might*'* the Court in *Jogee* implied a potentially wider level of foresight in complicity than that from *Woollin*.[109] The outcome from *Jogee* is that in the context of murder there are potentially differing thresholds for intention, dependent on whether the defendant is a principal or a secondary party.

A breach of the wider application of the correspondence principle would arise because the *mens rea* for the principal differs from that of the accessory. If the defendant is a principal, then she must have foreseen that the death of the victim was virtually certain to have resulted as a consequence of her act, in order to be guilty of murder. On the other hand, an accomplice may be liable if they foresaw that the principal might kill the victim with intent, as long as this level of foresight was more than *de minimis.*

This problem could be particularly acute in group crime where the prosecution cannot show which party was the principal.[110] There could be an issue as to which threshold the jury should be directed to apply. This is unfortunate, resulting in a potential breach of the principles of legality and fair warning, because trial judges may give different directions to juries on this point.[111] Inconsistencies in jury decisions may

[108] *Jogee* (n 1) [83] (Lord Toulson and Lord Neuberger).
[109] Parsons S, 'Case Comment – Joint enterprise murder' [2016] J Crim L 173, 176.
[110] Ormerod and Laird, 'Jogee: not the end of a legal' (n 42) 546.
[111] ibid 546-8.

arise. Furthermore, with this potentially much broader level of foresight left to the jury to decide, opinions are bound to differ. Unanimous decisions may be hard to reach.

Chapter 1 illustrated that the *mens rea* for complicity of an intention to assist or encourage (endorsed by *Gamble* in *Jogee)* together with a low potential threshold of foresight, means that the accomplice must merely have acted voluntarily with a low level of foresight of the collateral crime. It is highly unlikely that this was what the Court in *Jogee* intended in their judgment. This approach would not achieve fair labelling or fair warning. It would not be fair to label an accomplice as a principal if she had merely acted voluntarily with a low level of foresight of the collateral crime.

The law prior to *Jogee* allowed for a number of defendants to be convicted of an offence, even though it could not be established which party carried out the fatal act. This is a common scenario, particularly in group crime and spontaneous violence. The ability to try and convict offenders even if the primary actor could not be identified is paramount. Otherwise, it would be too easy for criminals to achieve acquittal by simply denying responsibility for the fatal act in the absence of evidence to the contrary. This may no longer be the case because the threshold of foresight required may vary dependent on the role of the participants. While this has not been problematic in other areas of criminal law (for example, the *mens rea* of the inchoate offence of conspiracy is different from the *mens rea* of the main offence)[112] it becomes a problem for the law of complicity when the principal in a group cannot be

[112] *Saik* (n 76) [13].

identified. Further, it is important that juries can be given consistent directions when the principal cannot be identified.

In addition, to provide a fair labelling system of criminal law, offences should leave no room for confusion, with open-ended concepts avoided.[113] By not setting out the threshold of foresight necessary to provide evidence of intention, the requisite *mens rea*, following *Jogee*, is too vague to provide for fair labelling. If different trial judges direct juries in different ways then the label attached to the secondary party may not be applied consistently. All the concerns regarding fair labelling discussed in Chapter 2 may reappear.[114]

Simester differed to Ormerod in his approach to the definition of intention. He applied *Woollin,* without question*,* to the law of complicity following *Jogee*.[115] However, he suggested that the decision in *Jogee* is equally as flawed.[116] He posited that *Jogee*[117] held a retailer would be criminally complicit if they sold a baseball bat knowing that the primary actor was buying it to use as a weapon, just in case it was necessary, because the retailer would have intended to sell the bat to the principal.[118] Simester adopted the definition of oblique intention from *Woollin*, to show that the retailer does not act so as to assist or encourage the primary actor, nor are they virtually certain

[113] Simester AP and von Hirsch A, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011) 200.
[114] Above, 47 – 51.
[115] Simester, 'Accessory liability and common unlawful purposes' (n 21) 84.
[116] ibid.
[117] *Jogee* (n 1) [90].
[118] Simester, 'Accessory liability and common unlawful purposes' (n 21) 84.

that the principal will use the bat to kill a victim. In his view, the retailer should not be liable as a secondary participant.

On these facts and the definition of oblique intention from *Woollin*, Simester is correct. The retailer should not be liable. She was merely trying to progress her business venture. Even if she has some level of culpability, it should not be at the same level as the principal offender required by our unitary system of liability. Whether Ormerod's or Simester's view is right, both have a sound basis, the Supreme Court should have been clearer in their approach to this element of *mens rea*. While it was not the Supreme Court's role in *Jogee* to reconsider the definition of intention *per se*, it would have been helpful to trial judges and juries if the Court had been more transparent on the level of foresight required to find intention in complicity. Instead, it has been left to the courts to reconsider.

The Supreme Court recognised that the secondary party's intention to assist or encourage may be co-extensive on the facts of the case with an intention by her that the crime be committed.[119] Even where this is so, *Jogee* does not recognise the problem highlighted by Lord Steyn in *Powell; English* that 'the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases'.[120] *Jogee* seems to ignore the practical difficulties of proving intention where a group of participants is involved. This was one of the advantages of the *Chan Wing-Siu* principle of equating foresight with intention.

[119] *Jogee* (n 1) [10].
[120] *Powell* (n 3) 14 (Lord Steyn).

It is clear from *Jogee*[121] that the Court was endeavouring to bring the *mens rea* of an accessory to murder in line with the threshold for the principal. Yet it has been shown above that whether this has been achieved is uncertain. *Jogee* established that foresight of a crime by an accomplice can be evidence of an intention by her to assist the principal in their crime, but it is only evidence of this intention, not a substantive rule of law. The level of foresight necessary to find intention was not specified in *Jogee* and so the potential arises for differing thresholds dependent on whether the participant was an accomplice or principal. Differing thresholds may breach the principles of legality, fair warning, fair labelling and correspondence.

The use of conditional intention in *Jogee*

The aim in *Jogee*[122] was to return the law to where it was before *Chan Wing-Siu*.[123] The judgment stated:

> …the proper course for this court is to re-state, as nearly and clearly as we may, the principles which had been established over many years before the law took a wrong turn. … The long-standing *pre Chan Wing-Siu* practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one; what was illegitimate was to treat foresight as an inevitable yardstick of common purpose.[124]

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[121] *Jogee* (n 1) [84].
[122] ibid [87].
[123] If the Supreme Court in *Jogee* wanted to return to the law prior to *Chan Wing-Siu*, then is the law on the definition of intention to be defined by the law prior to *Chan Wing-Siu*? The decision in *Chan Wing-Siu* was given in 1985. Presumably, the Supreme Court did not intend to reinstate the probability basis of intention prior to 1985, such as *Hyam v DPP* [1975] AC 55 (HL).
[124] *Jogee* (n 1) [87] (Lord Toulson and Lord Neuberger). Use of the word 'inferring' is unfortunate. In *Woollin* (n 104), the House of Lords substituted '(the jury) are not entitled to infer the necessary intention' in the *Nedrick* direction to the jury 'are not entitled to find the necessary intention'. Yet, the Supreme Court in *Jogee* has returned to the inference of intention.

This quotation implies that the Justices intended a return to a 'scope' based approach. This was confirmed later in *Jogee,* when the Justices held that juries should be directed to consider:

> … whether they are sure that D1's act was within the scope of the joint venture, that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did, and committing crime B, if the occasion arose.[125]

The term 'scope' is not set out by the Court, other than to say that to be liable the accomplice appears to have had to agree (expressly or by implication) to the later offence being carried out, if necessary. This is conditional intention.[126] The secondary party intends the principal to carry out the collateral offence, if the circumstances require it.

Jogee reinstated intention to assist or encourage the principal in his offence as the mental element for complicity. Yet, this idea of conditional intention may prevent the restatement of *mens rea* having the impact intended by the Supreme Court. While foresight by the defendant that the principal will kill or cause serious harm to the victim is only evidence of intention, the Supreme Court confirmed there was still a concept of conditional intention.[127] Ormerod has speculated that the Court may have expected this concept to only apply in limited circumstances, but in practice a defendant convicted under *Chan Wing-Siu* may now be held liable by having a

[125] *Jogee* (n 1) [93] (Lord Toulson and Lord Neuberger).
[126] The lack of guidance on the use conditional intention has been raised in *Hong Kong Special Administrative Region v Chan Kam Shing* [2016] HKCFA 87, (2016) 19 HKCFAR 640.
[127] *Jogee* (n 1) [90] –[95].

conditional intention that the principal would carry out the crime.[128] For example, if the parties agree to carry out a burglary and the secondary party intends the principal to cause serious harm to any intruder, should the situation arise, then this would be conditional intention and the secondary party would be liable for any serious harm caused by the primary actor. If the accomplice knew that the principal was carrying a weapon during the burglary, conditional intention may be easier to establish if the principal uses the weapon against an intruder.[129] As a result, it is anticipated that prosecutors may now use this conditional intention route to overcome the demise of PAL.

However, foresight by the accomplice of the principal's crime as evidence of a conditional intention may mean that a juror's role has got harder and a potential breach of the principle of legality could arise. Juries will have to be sure that by foreseeing a future potential crime the secondary party intended the principal to commit that crime. This will depend on the jury's interpretation of the facts of the case. Some scenarios may be hard for them to read, particularly where the offence is unplanned and spontaneous.[130] While juries are guided on the law by the trial judge, they have to interpret the facts of the case in accordance with the law. Law that is too fact based can lead to inconsistent jury decisions and an unclear basis of law.

If conditional intention is proved, then the ability of the court to label the accomplice as a criminal may be fair. However, the question as to whether it is fair to label an

[128] Ormerod and Laird, 'Jogee: not the end of a legal (n 42) 543; Dyson, 'Case Comment ' (n 5) 198.
[129] Ormerod and Laird, 'Jogee: not the end of a legal (n 42) 542.
[130] Dyson, 'Case Comment' (n 5) 199.

accomplice at the same level as the principal remains. This will depend on the facts and circumstances of the case. Whether potential offenders are aware of their potential liability based on conditional intention is doubted and the principle of fair warning may still not be fulfilled, following *Jogee*.

Simester has suggested that conditional intention may have been mishandled in *Jogee*.[131] Indeed, the inclusion of conditional intention appears to allow defendants to be criminalised based on foresight. Using Simester's baseball bat example mentioned earlier,[132] a retailer as a secondary party does not have a conditional intention at the time of the sale of the bat to the primary actor. It is the primary actor's intention to use the bat that is conditional.[133] This would also apply where the assistance of the accomplice was provided sometime earlier, because the principal may not have decided what to do at the time of the accomplice's assistance and encouragement.

For Simester the discussion of conditional intention was a 'red herring'.[134] Doctrinally this is correct because all future conduct is conditional, either explicitly or implicitly.[135] If any conduct has not yet taken place then there is always the possibility that the actor may change their mind for some reason. *Jogee* appeared to continue the idea

[131] Simester, 'Accessory liability and common unlawful purposes' (n 21) 84-85.
[132] Above, 121.
[133] Simester, 'Accessory liability and common unlawful purposes' (n 21) 84.
[134] Simester, 'Accessory liability and common unlawful purposes' (n 21) 85.
[135] Dyson, 'Case Comment' (n 5) 198 and Child JJ, 'Understanding ulterior mens rea: future conduct intention is conditional intention' CLJ [2017] 311 for a full discussion on this point.

raised in conspiracy cases[136] that conditional intention is a special form of intention, yet all future intention is conditional. *Jogee* stated that

> 'If it (the jury) is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support'. [137]

This statement is doctrinally problematic because it implies that the jury may, but does not have to, find a conditional intention. Yet, all future conduct is conditional in some way. So this special form of intention may not exist.

In complicity, the secondary party's act is completed when her assistance or encouragement is finished. It is at that time that they must have the certain intention to assist or encourage the particular crime (or one of a range of crimes) that the principal carries out.[138] The intention of present conduct can never be conditional by its very nature.[139] Any previous conditions must have been resolved by the time of the conduct. At this point the principle of individual autonomy is upheld, because the accomplice made the choice to assist or encourage the principal with a particular mental element at that time.

However, a secondary party cannot intend that the primary actor will do a particular future act because it is not necessarily virtually certain to happen. The principal is

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[136] *Saik* (n 76).
[137] *Jogee* (n 1) [94] (Lord Toulson and Lord Neuberger).
[138] Simester, 'Accessory liability and common unlawful purposes' (n 21) 85-86.
[139] See Child, 'Understanding ulterior mens rea (n 135) for a full discussion on this point.

open to change her mind beforehand. A secondary party cannot intend a principal's future conduct but they can still desire it or believe it may take place. The secondary party can act in order to assist or encourage the principal to carry out a particular crime, but the secondary party cannot intend the principal's crime (with the exception of procuring). She can only intend her own conduct of assisting or encouraging.

Similar to Ormerod, Simester reflected on the lack of precision in *Jogee*.[140] This is disappointing after years of academic debate and calls for reform.[141] It is this lack of refinement which may leave open the possibility for a breach of the principle of legality, by being unclear and uncertain.

Is there a *lacuna* in the law, following *Jogee?*

With only intentional assistance or encouragement criminalised following *Jogee*, a *lacuna* in the law may arise if reckless participation is not covered by the Serious Crime Act 2007.[142] There has been debate on the *mens rea* required under this Act but the trend seems to be towards a set of intentional inchoate offences.[143] As a result, defendants who recklessly assist or encourage an offence may not be criminalised at any level, following *Jogee*. Moriarty provides an example: the principal who killed a victim while trying to disarm a gun found under the sofa at a drug fuelled

[140] Simester, 'Accessory liability and common unlawful purposes' (n 21) 86.
[141] Chapter 1 n 11; See also Simester, 'Accessory liability and common unlawful purposes' (n 21) 86.
[142] Baker, *Reinterpreting Criminal Complicity* (n 21) 42.
[143] Contrast Child JJ, 'Exploring the mens rea requirements of the Serious Crime Act 2007 assisting and encouraging offences' [2012) 76 JCL 220 with Baker, *Reinterpreting Criminal Complicity* (n 21). Also see Virgo, 'The relationship between inchoate and accessorial liability' (n 41).

party could be charged with homicide.[144] Despite this, whoever put the loaded gun under the sofa aided the homicide by providing the gun in the first place. If this was intentional assistance, then complicity would arise and the accomplice could be liable as the principal.

If, on the other hand, no intentional assistance could be proved, liability as an accomplice to a homicide would not arise. Yet, they are culpable. If they saw the risk of the gun being used and still left it under the sofa for someone to find, they should be held responsible for their reckless actions. If a person was injured as a result of the use of the gun, the person who placed the gun ready to be found should bear responsibility for the results that follow from its use, even if at a different level to an accomplice who intended to assist or encourage the perpetrator.[145] *Jogee* does not allow for liability in this factual scenario.

By restating the *mens rea* for complicity as intention, unfair labelling may arise. Following *Jogee*, the potential decriminalisation of reckless accomplices may unfairly understate to the public and the victim the defendant's fault. It would also not reflect the individual autonomy of the secondary party because they chose to provide reckless assistance or encouragement.

Further, the correspondence principle is breached. The accomplice was reckless in their actions, yet no criminal liability attaches to these actions. It seems clear that a

[144] Moriarty (n 103) 656. Moriarty sets out a number of examples of reckless complicity.
[145] Moriarty (n 103) sets out some good examples of potential reckless complicity.

lacuna in the law may exist, post-*Jogee*, and it follows that many of the principles of criminal law are compromised.

The use of weapons to establish *mens rea*

Jogee has improved the approach to establishing an intention to assist or encourage by an accomplice where a principal has used a weapon. The decision held:

> In particular, his (the accomplice's) intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. The tendency which has developed in the application of the rule in *Chan Wing-Siu* to focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged.[146]

Jogee recognised that the decision in *Powell; English* had resulted in judges focusing on whether the defendant knew the principal had a weapon and what weapon it was, instead of the intentions of the secondary party. By including the word 'only' in the above statement, it would appear a defendant could still claim that she did not intend to assist the principal, because she did not know that the principal had a particular weapon. However, this is not now the only factor to be considered. Whether she did, or did not, know the principal had a weapon may help provide evidence of what the secondary party intended. In any event this is to be decided by the jury.

Discussing weapons, *Jogee* held:

> Very often he (the secondary party) may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least. [147]

[146] *Jogee* (n 1) [98] (Lord Toulson and Lord Neuberger).
[147] ibid [98] (Lord Toulson and Lord Neuberger).

The Justices in *Jogee* specifically adopted the type of weapons used in the facts of *Powell; English* as an example. It is irrelevant whether a wooden post or a knife was used, all that matters is the secondary party's intention. The issue is whether the accessory intended to assist in the principal's infliction of grievous bodily harm or an intentional killing. The difference in weapon cannot be used to absolve the secondary party of liability, where she did have one of these intentions. This allows for the jury to ignore any difference in weapon and just consider the secondary party's intention. Presumably *Jogee* was trying to prevent the use of fundamental difference rule where a different weapon was used.[148]

This clarification of the law in relation to the use of weapons may also aid fair labelling. If the accomplice intended to assist in the infliction of serious harm or death and a fatality arose then it would be fair for the accomplice to be labelled with a homicide offence, whatever weapon was used. *Jogee* also allowed a court to consider how a weapon was used by the principal. This aids fair labelling because how a weapon is used may help establish the intentions of the accomplice to assist the principal in her offence. This removed earlier criticisms of *Powell; English* that the way a weapon was used was not taken into account under the *Powell*; *English* direction and *Jogee* placed greater reliance of the principle of legality by providing a clear and consistent law.

Lord Toulson and Lord Hughes continued:

> Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was,

[148] Above, 74 - 80.

> and may be irresistible evidence one way or the other, but it is evidence and no more.[149]

It is for a jury to decide based on all the evidence. This still leaves the secondary party open to claiming that they were not aware that the principal had a weapon and so they did not intend to assist the principal to use the weapon, hoping that the court would decide that the use of the weapon was an overwhelming supervening act.[150]

Manslaughter as an alternative verdict, following *Jogee*

Jogee confirmed that a secondary party who took part in a crime which led to the death of a victim could be liable for murder or manslaughter, dependent on their *mens rea*.[151] If an accomplice is part of a group attacking a victim but without the *mens rea* for murder, but the violence escalates and proves fatal, then the secondary party will be liable for manslaughter and not murder.[152] This is because they did not intend to kill or cause serious harm. This approach concurs with the liability of the accomplice being derived from the principal's act alone.[153]

However, the cases relied on in *Jogee* to support an alternative verdict of manslaughter were surprising. *Reid*[154] and *Smith (Wesley)*[155] were included to show that a participant who did not have the intention to kill or cause serious harm, but took part in an attack, could be liable for manslaughter, even if the principal was

[149] *Jogee* (n 1) [98] (Lord Toulson and Lord Neuberger).
[150] Above, 103 - 104.
[151] *Jogee* (n 1) [96].
[152] ibid [96].
[153] Above, 26.
[154] (1976) 62 Cr App R 109 (CA).
[155] [1963] 1 WLR 1200 (CA).

guilty of murder.[156] Yet, in *Smith* the principal was actually also convicted of manslaughter, not murder. Similarly, neither *Reid* nor *Smith* made any direct reference to complicity or the 1861 Act at all. The courts in these cases focused on the liability of the defendant for manslaughter as a result of an unlawful act and whether the participants were acting together as part of that unlawful act to give rise to a manslaughter verdict. These were inappropriate cases for *Jogee* to follow*,* which was a clear case of complicity.

Furthermore, it is unclear from *Jogee* whether this liability of the accessory is as a principal to manslaughter or as a secondary party to a homicide.[157] Dyson correctly suggests that the better route is via complicity. As a secondary party she would have assisted or encouraged an unlawful act which caused death. As a principal, she would have had to directly cause the fatality. However, the actions of the individual who carried out the stabbing may break the chain of causation required for manslaughter of the assister as a principal. Liability as a secondary party would be the preferred route and it is anticipated that this was the intention of the Supreme Court, albeit the Court was not specific on this point.

Following *Jogee*, convictions for murder are likely to reduce but convictions for manslaughter will increase, as accessories start to plead that they did not have the intention to cause serious harm or to kill. Where group violence results in a fatality all the active participants will be open to a manslaughter conviction.[158] This will give the

[156] *Jogee* (n 1) [27].
[157] Dyson, 'Case Comment' (n 5) 197.
[158] Buxton, 'Jogee: upheaval in secondary liability for murder' (n 40) 332.

judge more flexibility in sentencing, which can be from outright acquittal to a life sentence, dependent on the judge's view of the culpability of the accomplice.[159] The facts of each case can be taken into account, including mitigating circumstances. The discretion of judges in terms of sentencing allows for fair labelling to be better reflected in comparison with the law prior to *Jogee*.

This approach also reduces the potential for unfair labelling in some factual circumstances where, prior to *Jogee*, there was a complete acquittal of a secondary party in accordance with the fundamental difference rule in *Powell; English*.[160] Following *Jogee*, where an accomplice cannot be shown to have intended to assist or encourage the principal in the crime of murder, but only an intention to cause some harm which results in death, the accomplice may now be liable to manslaughter.[161] Therefore, the accomplice is not completely relieved of liability and instead, is labelled as a manslaughterer.[162]

The relationship of complicity with the correspondence principle is also improved. The actions of an accomplice are criminalised in accordance with a *mens rea* that relates directly to their actions.

Notwithstanding this, the possibility of an alternative manslaughter verdict for a secondary party, when the principal is liable for murder, appears to conflict with s 8 of

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[159] ibid.
[160] Above, 74 - 80.
[161] *Jogee* (n 1) [96].
[162] Issues regarding the fair labelling of a defendant as a manslaughterer, and the breach of the correspondence principle of this constructive crime, remain but are not the subject of this thesis.

the 1861 Act, which requires an accessory to be tried, indicted and punished as a principal offender.[163] The principal carried out a murder but the accessory is only guilty of manslaughter. Under s 8 if the principal commits murder then the accessory should be convicted of murder and the judge reflects the extent of the accessory's role through sentencing with different starting tariffs.[164] It also seems awkward to say the accomplice encouraged manslaughter if the primary actor did not carry out manslaughter.[165] It cannot be said that that the accessory assisted or encouraged the primary actor's actual crime, murder, because the principal carried out a different crime to the one with which the accomplice is labelled as having assisted.

Despite the above criticisms, the restatement of intention as the requisite mental element of the accessory in *Jogee* is important. If the accessory intends the principal to carry out an offence with whatever mental element is expected, then they will be punished as a principal offender in accordance with s 8. Where the accomplice does not intend the principal to carry out an offence, say an intentional killing (murder) but intends them to cause only actual bodily harm, the accessory cannot be liable under s 8 because they do not have the intention to assist the principal's offence. Nevertheless, the accomplice should be held responsible for their contribution, even if their intentions were different to that of the primary actor and that is where manslaughter can be substituted following *Jogee.*

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[163] Baker DJ, Letter '*Jogee:* jury directions and the manslaughter alternative' Crim LR [2017] 51, 54.
[164] *Howe* [1987] AC 417 (HL) 458 established that an accessory could be liable for murder when the principal is only liable for manslaughter where procuring was established. Procuring is a special form of complicity. This is different to the current discussion where the principal is liable for murder but the accomplice only manslaughter.
[165] Baker, Letter '*Jogee:* jury directions' (n 163) 54.

The issue for the jury then becomes a matter of evidence as to what the accomplice intended. Following a change of evidence by the primary witness, it was shown at the retrial in *Jogee* that the accomplice only intended to commit actual bodily harm (not serious harm or death as first proved at the initial trial). As a result, Jogee was held liable for manslaughter.[166] In spite of this, s 8 does not incorporate provision for an alternative offence.[167] Derivative liability for a lesser-included offence[168] should only be possible when the accomplice intentionally assists or encourages an offence, which is part of a greater substantive offence.[169]

A manslaughter verdict for a secondary party appears to accord with the fair labelling principle on the basis that if there is no intention to assist or encourage the principal in the causing of death or serious harm, it would be wrong to label her as a murderer. However, to label an offender with manslaughter can only be justified by transferred liability. Liability transfers from the principal's offence of murder which took place, to manslaughter which might have taken place.[170] To label an offender for a crime that could, but did not, take place, seems to go against the principles of fair labelling, fair warning and correspondence. Baker has argued that the accomplice should not be

[166] ibid.
[167] Baker DJ, 'Lesser Included Offences, Alternative Offences and Accessorial Liability [2016] 80 JCL 446, 450, 457.
[168] A lesser-included offence is an offence where all the elements necessary to impose liability are also elements for a more serious crime; Baker DJ, 'Lesser Included Offences' (n 167) 450, 455.
[169] Baker, 'Lesser Included Offences' (n 167) 450, 457.
[170] ibid 450, 455.

convicted of manslaughter because it is not a lesser-included offence to murder, but an alternative offence with different elements.[171]

Instead of the manslaughter verdict from *Jogee*, Baker recommended an accomplice be charged for an inchoate crime under ss 44 and 45 of the Serious Crime Act 2007.[172] If an accomplice were labelled as an inchoate offender, this would more accurately reflect fair labelling for their crime. The accessory encouraged or assisted in an offence (say actual bodily harm) that did not take place, instead grievous bodily harm or killing by the principal took place. The label attached to the accessory under ss 44 and 45 more accurately reflects the fact that the crime they had intended to assist did not take place. Baker's argument has depth because if the principal has deliberately departed from the plan to cause actual bodily harm and instead caused serious harm or even death, all we know is that the accomplice attempted to assist an assault contrary to s 47 of the Offences against the Person Act 1861.[173] It cannot be proved whether that assault would have caused death, had it taken place, giving rise to a manslaughter charge.[174]

Therefore, to allow fair labelling and fair warning, the inchoate offences of the Serious Crime Act 2007 should be invoked. Also, the correspondence principle would

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[171] Baker, 'Unlawfulness's doctrinal and normative irrelevance to complicity liability' (n 21) 395. Whether or not manslaughter is a lesser-included offence is not the subject of this thesis and could form a separate inquiry. For a full analysis of lesser-included offences see Hoffheimer MH, 'The Rise and fall of Lesser Included Offenses' [2005] 36 Rutgers LJ 351 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1094083 Accessed 21 April 2018.
[172] Baker, Letter '*Jogee:* jury directions' (n 163) 54.
[173] Baker, 'Lesser Included Offences' (n 167) 452.
[174] ibid.

be more accurately fulfilled because the mental attitude of an intention to assist by the accomplice would match the attempted act actually carried out.

These issues are compounded because *Jogee* is of general application to the criminal law[175] and what the position will be in non-homicide cases is unclear.[176] A problem arises where the accomplice does not intend to assist or encourage the principal in his crime but is still culpable in some way. If there is no lesser-included offence, it is uncertain how the jury should be directed and the accomplice may be relieved of liability. This could also be an illustration of unfair labelling by being too lenient. For example, where the principal intends to commit theft but the accomplice is reckless as to locking a door and is aware of the risk of theft as a result. There is no lesser-included offence to theft and so the accomplice could be acquitted, unless negligence could be proved.

It has been suggested that *Jogee* alters the established law of unlawful act manslaughter.[177] This could form an inquiry in its own right and does not form part of this thesis on grounds of space.

Leave to appeal and the requirement for a substantial injustice

A change in the law can lead to a surge in the number of appeals. In order to allay these fears, the Supreme Court specifically referred to the effect of *Jogee* on past convictions. It was said that in order for an appeal to be successful, if out of time,

[175] Below, 147.
[176] Baker, Letter '*Jogee:* jury directions' (n 163) 56.
[177] Krebs B, 'Joint Enterprise murder is dead: long live joint enterprise manslaughter' Joint Enterprise Conference (n 5).

exceptional leave of the Court of Appeal must be given and they would only grant this leave if a 'substantial injustice' could be shown.[178] An appeal would not be allowed simply because the law had changed. This was justified in part by reference to earlier drink driving cases where the court had expressed its concern of 'alarming consequences' from allowing the general reopening of old cases.[179] The offence of murder, however, is very different to dangerous driving and the sentences are different to reflect this. [180]

The phrase 'substantial injustice' has been described as 'elusive'.[181] Indeed, if a secondary party has been labelled a murderer instead of guilty of manslaughter, this must be a substantial injustice. It results in a stigma to the defendant for life.[182] That person is labelled as one of the 'most heinous offenders against social norms'.[183] Furthermore, there is a great difference in the starting point for sentencing between the two offences.

Similarly, *Jogee* held that an appeal should be allowed despite a time lapse.[184] This is a good decision of the Supreme Court. If somebody was wrongly convicted of murder, and labelled as a murderer many years ago, there is no reason why that

[178] *Jogee* (n 1) [100] (Lord Toulson and Lord Neuberger).
[179] ibid.
[180] Kavanagh D, 'The world post-Jogee' (Counsel Magazine April 2016) < http://www.counselmagazine.co.uk/articles/the-world-post-jogee accessed 4 August 2016
[181] Ormerod and Laird, 'Jogee: not the end of a legal saga' (n 42) 550.
[182] ibid 551.
[183] Ashworth A, 'Reforming the law of murder' [1990] Crim LR 75, 76.
[184] *Jogee* (n 1) [100].

should be ignored in favour of a defendant convicted more recently.[185] To the contrary, there would be a greater injustice to the person convicted historically. She will have spent more time in prison and labelled as a murderer based on an erroneous decision. This could be a 'substantial injustice'.

It is understandable that the Court in *Jogee* wished to limit the potential number of appeals following their restatement of the law but 'substantial injustice' needed defining or an alternative set of words adopted. This would have provided clarity to *Jogee* and helped fulfil the principle of legality. This issue may have been compounded by the first Court of Appeal decision following *Jogee*. *Johnson*[186] held that first the Court of Appeal should consider whether a substantial injustice had been suffered and, if so, was the conviction unsafe. The reverse would be more appropriate. The decision should be made as to whether the conviction was unsafe and then had a substantial injustice been suffered, because no appeal would be available unless the conviction was unsafe.[187] This would save court time.

Buxton raised two issues, which may have an impact on fair labelling for the defendant. First, facts could arise where the conviction is unsafe, based on *Jogee,* but a substantial injustice is not found for policy reasons. If Buxton is correct, it would be unfair to label an offender as a principal if her conviction was unsafe, particularly if the offence is murder with the stigma attached. Second, Buxton suggested that substantial injustice considerations could be used as a 'makeweight' where a

[185] Ormerod and Laird, 'Jogee: not the end of a legal' (n 42) 550.
[186] [2016] EWCA Crim 1613, [2017] 4 WLR 104 [23].
[187] Section 2 Criminal Appeal Act 1968; Buxton R, 'Joint enterprise: Jogee, substantial injustice and the Court of Appeal' [2017] 2 Crim LR 123, 124.

conviction is unlikely to be unsafe but this is not absolute.[188] In *Hall,*[189] part of the *Johnson* appeal applications, the Court asked the question:

> Can it therefore be said that there is a sufficiently strong case that the defendant would not have been convicted of murder if the law had been explained to the jury as set out in *R v Jogee*?

In their view, the answer was no and the appeal was dismissed. This may be the correct decision for the facts of this particular case, but Buxton has suggested that this test from *Johnson* may put the threshold for unsafety too high. In other words, there has to be a high level of certainty that the defendant would have been found not guilty under *Jogee,* before an appeal will be allowed. It is understandable that the Court of Appeal in *Johnson* was keen not to open the floodgates to out of time appeals. However, it may not be fair to label an offender as a principal, particularly where a fatality is concerned, if there is a possibility, even if it is a low possibility, that she may have been acquitted under *Jogee*.

Since *Jogee*, the first appeal where the defendant was able to show a substantial injustice, *Crilly,*[190] confirmed the need for a high threshold from *Johnson*. The appeal was allowed due to the particular facts of the case. However, *Crilly* confirmed that for an appeal to be successful the judgment in a case must have been based on foresight.[191]If the evidence cannot safely infer an intention for the collateral offence to be committed, then the judgment may cause a substantial injustice and leave for appeal will be granted. This supports the basis of the judgment in *Jogee*.

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[188] ibid.
[189] *Johnson* (n 186) [191].
[190] [2018] EWCA Crim 168, [2018] 2 Cr App R 12 [36].
[191] ibid [40]. See also, Krebs B, 'Joint enterprise, murder and substantial injustice: the first successful appeal post-Jogee' (2018) 82 (3) J Crim L 209, 211.

The term 'substantial injustice' is discussed above in the context of its use in *Jogee.* This thesis does not consider the term in the wider context of the general theory of justice on grounds of space.

Does PAL/joint enterprise exist post-*Jogee*?

The answer to this question depends on the use and definition of the term 'joint enterprise'. The term was used by academics[192] and judges[193] in different ways. This has been part of the reason for the complicated nature of this doctrine.[194]

Prior to *Jogee,* 'joint enterprise' was used as an 'umbrella term',[195] referring to all complicity liability.[196] Dyson has shown that when searching Westlaw for cases in 2014, all 68 cases found used the term 'joint enterprise' to describe offences of basic accessorial liability on the basis that they were 'in it together'.[197] These words are more correctly words of basic accessorial liability because if they were 'in it together' then the accessory must have assisted or encouraged the principal with a common purpose in mind that was intended. *ABCD* added to the confusion when it held that there were three different uses of the term 'joint enterprise' which included both basic complicity and PAL.[198]

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[192] See Baker, *Reinterpreting Criminal Complicity* (n 21) and Dyson M, 'The future of joint-up thinking: living in a post-accessory liability world' [2015].
[193] *ABCD* [2010] EWCA Crim 1622, [2011] QB 841 [9]; *Gnango* [2011] UKSC 59, [2012] 1 AC 827.
[194] Ormerod D, 'R v Bristow: joint enterprise-burglary- owner of premises intervened' [2014] Crim LR 457, 460.
[195] Justice Committee, *Joint Enterprise* (HC 2011-2012) para 7.
[196] Dyson, 'The future of joint-up thinking' (n 192) 185.
[197] ibid.
[198] *ABCD* (n 193) [9]. See Chapter 3, 85.

Baker referred to 'joint enterprise' as the initial joint criminal venture out of which a collateral offence may arise.[199] This form of 'joint enterprise' will still exist post-*Jogee* because there will continue to be group crime. To avoid confusion, it is recommended in this thesis that the use of the term 'joint enterprise' in this context should be avoided altogether. Instead, another term should be used to refer to group violence.[200]

The definition of joint enterprise as group crime is different to the rule discussed in *Chan Wing-Siu,* which was based on the idea that defendants could be convicted for foreseen collateral offences of the primary actor, beyond those agreed as part of the joint venture. This was also termed 'joint enterprise' by the Court in *ABCD*[201] but more recently labelled PAL in both *Gnango*[202] and *Jogee*, in an attempt to avoid the previous confusion.

Jogee appeared to remove the possibility of any prosecutions for PAL altogether.[203] The decision held that 'there is no reason why ordinary principles of secondary liability should not be of general application'. [204] The secondary party must now

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[199] Baker, *Reinterpreting Criminal Complicity* (n 21).
[200] Confusion on terminology remains post-*Jogee* as can be seen in *Hong Kong Special Administrative Region v Chan Kam Shing* [2016] HKCFA 87, (2016) 19 HKCFAR 640 where the HKCFA thought abolishing PAL would also abolish basic joint enterprise.
[201] *ABCD* (n 193) (Lord Hughes).
[202] *Gnango* (n 193).
[203] Persuad S and Hughes C dispute this in [2016] 'In Practice: Joint enterprise' LSG 11 Apr 22 and state that *Jogee* has not done away with joint enterprise, but they seem to be in the minority.
[204] *Jogee* (n 1) [76].

physically assist or encourage every crime for which they are to be held liable.[205] This is the backbone of why PAL no longer exists.[206] While *Chan Wing-Siu* appeared to create a separate route to liability, which became known as joint enterprise (then PAL) for where a principal goes beyond what was originally agreed between the parties, *Jogee* held that these actions can be covered by the Accessories and Abettors Act 1861. It would seem that there is now no need for a separate doctrine (if there ever was one) and PAL no longer exists as a legal rule.

Stark, commenting on *Jogee*, has said that following this case 'ordinary accessorial liability is all there is'.[207] Dyson believes that *Jogee* has 'shorn off' joint enterprise (PAL) from criminal law. In his view 'parasitic complicity is history'.[208] Simester says '…that boat has now sailed from English shores. No longer can S become guilty of foreseen ancillary crimes by pursuing a shared criminal purpose with P. S must be a party *directly* to any crime of which S is convicted. *Extended* joint criminal purpose (terminology from Australia) is thus interred, at least for now'.[209] The trend is that PAL as a separate doctrine no longer exists.

Undoubtedly, the basic form of joint enterprise referring to general group criminal offences will remain. With the demise of PAL there are now only three bases of

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[205] ibid [76].
[206] Dyson M, 'Que sera, sera' Joint Enterprise Conference (n 5).
[207] Stark F, 'Supreme Court rules earlier cases wrong to treat foresight as sufficient test for murder' (Scottish Legal News 18/2/2016) http://www.scottishlegal.com/2016/02/18/supreme-court-rules-earlier-cases-wrong-to-treat-foresight-as-sufficient-test-for-murder/>accessed 3 August 2016.
[208] Dyson, 'Case Comment' (n 5) 196; Dyson and Buxton, 'Letter to the Editor' (n 50) 638.
[209] Simester, 'Accessory liability and common unlawful purposes' (n 21) 74.

liability.[210] A criminal can now be liable as a principal (or joint principal), having carried out the *actus reus* with the relevant *mens rea*, or as an accessory under Accessories and Abettors Act 1861 because she assisted or encouraged the principal in the acts which made up the crime, or under the Serious Crime Act 2007 for an inchoate offence.[211]

If there is no separate liability for PAL because it falls within ordinary secondary liability, the secondary party must assist or encourage every act of the principal to be liable as an accessory.[212] It follows that, in secondary liability, it does not matter whether the accomplice assists or encourages the principal in a crime with or without the prior agreement of the principal, or whether the accomplice aids or abets the principal in one crime but the primary actor goes on to commit a second crime, the same legal rules apply.

In the case of a burglary by two defendants where one of them goes on to commit murder of the occupier who confronts them, the accomplice must now intentionally

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[210] Ormerod D, Laird K, 'Jogee loose ends' (Counsel Magazine May 2016) http://www.counselmagazine.co.uk/articles/jogee-loose-ends>accessed 4 August 2016

[211] A defendant who assists or encourages another in a crime can be liable as an accessory under the law of complicity or under one of the new offences in sections 44,45 and 46 of the Serious Crimes Act 2007. These two distinct forms of liability have some overlap and the prosecutors may be able to choose which route to use. There is one important difference between the two. A defendant can only be convicted as an accomplice if the principal actually carries out the offence. By contrast, if the perpetrator chooses not to proceed with the crime he or she may still be charged under the Serious Crime Act 2007. There is no need to prove the principal actually committed the offence. All that is required is that the defendant's conduct was capable of *encouraging or assisting the commission of the offence.*

[212] *Jogee* (n 1) [8]; Dyson, 'Case Comment' (n 5) 197; Stark F, 'Supreme Court rules earlier cases wrong' (n 207).

assist or encourage the principal to commit the murder to be guilty of murder. This thesis advocates that this approach is what the Supreme Court intended. Yet, earlier sections in this chapter have shed doubt on this simplistic interpretation of intention. However, if PAL always was part of complicity, the assistance or encouragement for the collateral offence must have been provided by the secondary party's participation in the initial criminal venture.

Whether the secondary party has in fact assisted or encouraged the principal continues, after *Jogee*, to fall to the jury to decide. Different juries may have different views on both assistance and more particularly encouragement, although this is no different to the law before *Jogee*. What one jury may consider encouragement, another may not. A breach of the principle of legality may arise in view of the potential for inconsistent decisions. This is inherent in a jury system but provides flexibility in individual circumstances. This flexibility allows for juries to take into account all the evidence, facts and circumstances of each defendant in each case.

The general application of *Jogee* to criminal law

It has been debated as to whether *Jogee* applies only to murder or whether it applies throughout the criminal law.[213] Dyson believes that *Jogee* applies throughout the criminal law.[214] Buxton said that it 'may do so',[215] although added that a subsequent

[213] Dyson and Buxton, 'Letter to the Editor' (n 50).
[214] ibid 641.
[215] Buxton, '*Jogee*: upheaval in secondary liability for murder' (n 40) 324.

court may hold that the Supreme Court were simply eradicating the doctrine of joint enterprise (if it existed in the first place).[216]

While *Jogee* was based on the offence of murder, the Court did not state that their decision was confined to murder. In fact, the first few paragraphs of the judgment introduce the basic law of complicity under the Accessories and Abettors Act 1861. This Act covers all areas of complicity, not just murder. Similarly, in the paragraphs setting out the restatement of the principles, there is no reference to the newly enunciated law applying only to murder.[217] Therefore, it seems likely that the new approach applies to most areas of criminal law. Indeed, the previous approach under *Chan Wing-Siu* also applied throughout the criminal law, so there is no reason why this should change. This thesis assumes that *Jogee* applies to all relevant areas of criminal law.

Conclusion

Jogee restated intention to assist or encourage as the *mens rea* for complicity following years of uncertainty as a result of the conflation of the *mens rea* for basic complicity and parasitic liability.[218] This decision appears to have been made following concerns that the application of PAL had produced significant injustice.[219] Despite this restatement of *mens rea*, it has been shown above that many issues remain unresolved following *Jogee*.

[216] Dyson and Buxton, 'Letter to the Editor' (n 50) 642.
[217] *Jogee* (n 1) [88] – [98].
[218] Above, 71 – 73.
[219] Simester, 'Accessory liability and common unlawful purposes' (n 21) 88.

The Supreme Court restated the principles of complicity but provided little by way of detail to support their restatement, in terms of examples for future reference by the lower courts. Too much has been left for the jury to decide. The jury must decide whether the accomplice has assisted or encouraged the principal, even if by mere presence or association. The jury must decide whether the accomplice intended to assist or encourage the principal with the relevant knowledge of the offence. The jury must decide whether foresight of the collateral offence provides the necessary intention for complicity. The jury must decide if there has been an overwhelming supervening event that relieves the accomplice of liability for the principal's offence. The result is increased pressure on the jury, which may lead to inconsistent decisions due to limited guidance from the Supreme Court as to how juries should be directed by trial judges. Inconsistent decisions could signify a potential breach of the principle of legality due to the law not being fixed clear and prospective.

Jogee did not enter into or resolve some of the debates from earlier cases and may have raised further issues. For example, there is little reference in *Jogee* to the causation debate. On the one hand *Jogee* held that the assistance or encouragement need not have an impact on the actions of the principal, implying that the acts of the accomplice need not cause the result, yet later the decision referred to an overwhelming supervening event which may break the chain of causation between the actions of the accessory and those of the principal. Furthermore, this simply appears to be the fundamental difference rule under a new name.

However, the primary change from *Jogee* relates to *mens rea*, but even this is not rigorously laid out. The judgment seems to equate intention with knowledge and there is ongoing uncertainty regarding the threshold of foresight necessary for juries to find an intention of the accomplice. The outcome is a potential breach of the principles of correspondence, legality, fair labelling and fair warning. The use of conditional intention is anticipated to replace the foresight test but conditional intention may not be an appropriate tool in complicity, as all future intentions are conditional. In any event, there is a fine line between conditional intention and foresight as evidence of an intention to commit a crime, which will be left to the jury to decide. As a result, it is important that judges give consistent directions to juries, but little guidance to the lower courts is provided in *Jogee*. These issues provide further potential for a breach of the principle of legality, fair labelling and fair warning.

Jogee has not provided advice on what the secondary party's mental state must be as to whether the principal will commit the crime, other than to endorse *Gamble,* which merely required the accomplice to act voluntarily. An individual merely going about their lawful business may still be liable as an accomplice, if they are merely reckless towards a principal's offence. It appears that the fair labelling and fair warning issues that existed prior to *Jogee* may well remain.

Similarly, the restatement of *mens rea* of intention to assist or encourage the principal offence requires the accessory to aid every offence of the principal and so appears to improve the fair labelling and fair warning of complicity. However, a *lacuna* in the law may arise resulting in a potential for reckless complicity to go

unpunished. This may result in unfair labelling by being too lenient on some offenders who recklessly aid a principal offence.

There are also concerns whether complicity alone can accommodate the fast moving developments of violent group crime, which often escalate rapidly and which were previously accommodated within PAL.[220] Simester has predicted that this could result in pressure to restore PAL or the dilution of the *mens rea* of basic complicity again.[221] He suggests that PAL could have been 'tweaked to avoid overreach'.[222] How this could be achieved is beyond the scope of this thesis on grounds of space. However, it is clear that PAL had prosecutorial advantages in situations of violence that could quickly get out of hand. Placing more decisions on the jury was not necessarily the best solution to the injustice caused by PAL. In any event, the injustice from *Chan Wing-Siu* and *Powell; English* may have been caused more by the injustice of the law of murder and the mandatory life sentence, rather than PAL itself.[223]

Further, while *Jogee* confirmed that prior agreement between the parties is no longer a requirement for liability, the prosecution now has to prove that every participant intentionally assisted or encouraged the crime of the principal. In cases of large-scale violence this may prove difficult to achieve, resulting in potential criminals being acquitted of any homicide with unfair labelling consequences (if manslaughter is not an alternative verdict). While an acquittal does not label a defendant, unfair labelling arises because the acquittal may be too lenient from a victim's perspective.

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[220] Simester, 'Accessory liability and common unlawful purposes' (n 21) 90.
[221] ibid.
[222] ibid 89.

By restating the *mens rea* of complicity as an intention to assist or encourage, the Supreme Court were almost certainly attempting to remove some of the injustices caused by PAL. In doing so, it initially appears to improve issues of fair labelling, fair warning, and correspondence. Also, it allows for individual autonomy. On closer analysis, issues with the compliance of these principles remain, due to less than careful wording.

Adopting recklessness as the mental element for complicity was an alternative.[224] Prior to his involvement in the *Jogee* case itself, Dyson had suggested that if a risk-based test for fault in violent group crime were to be used, the accepted definition of common law recklessness should be adopted.[225] In his view, albeit as a second best to intention, the test of foreseeing a risk and going on to unjustifiably taking that risk could be applied across all of secondary liability.[226] This could be more rigorous, practical and consistent with other areas of criminal law.[227]

Dyson's approach would have improved the relationship of the *mens rea* for secondary liability with many of the principles of criminal law. By only criminalising unjustified risk taking, the principles of correspondence, fair labelling and fair warning are better fulfilled. If a defendant foresees a risk of an offence taking place and continues to participate, it is more likely to be fair to label them with the same crime as the principal. If it was unjustifiable for them to take that risk, fair warning has been

[224] Virgo, 'Making sense of accessorial liability' (n 87) 8.
[225] Dyson M, 'Might Alone Does Not Make Right: Justifying Secondary Liability' (2015) Crim LR 967, 967, 972.
[226] ibid 967.
[227] ibid 972.

considered. There would be greater correspondence between the foresight of the principal's offence and the accomplice's *mens rea* requirement. Furthermore, the inconsistency of the dual risk-taking approach, which existed prior to *Jogee,* is removed. Having one test for risk taking instead of two would also make the role of the jury more straightforward.[228] This would help secondary liability fulfil the principle of legality by providing a consistent approach.

Finally, the use of manslaughter as an alternative verdict also raises concerns. A manslaughter verdict for a secondary party initially appears to accord with the fair labelling principle, because if there is no intention to assist or encourage the principal in the causing of death or serious harm it would be wrong to label her as a murderer and a conviction for manslaughter would be a better approach. However, it has been shown that doctrinally it could be incorrect to approach the convictions of co-participants in this way. It could be wrong to label an offender with a crime that did not take place. This also goes against the derivative nature of complicity. On the other hand, the principle of correspondence would be better fulfilled because the act carried out by the accessory would correspond with the requisite mental element.

The primary aim of this chapter is to show that while *Jogee* appeared to improve the relationship of complicity with the principles of legality, fair warning, fair labelling, correspondence and individual autonomy, this apparent improvement may not be as great as it is anticipated the Supreme Court might have liked. On closer reading and analysis, the judgment may actually raise further issues resulting in a potential for

[228] Dyson, 'Might Alone Does Not Make Right' (n 225) 981.

continuing breaches of these principles and confusion in terms of *mens rea*. Furthermore, the debate on causation in complicity remains post-*Jogee*.

CHAPTER 5 – CONCLUSION

This thesis has examined the law of complicity and also the doctrine of PAL, which existed in England and Wales prior to February 2016, in relation to a set of evaluative principles of criminal law. This work includes consideration of the most recent case to reach the Supreme Court on complicity, *Jogee,*[1] and whether this decision has improved the issues raised. This chapter sets out the main findings of this research and draws on findings across the various chapters.

Three principal claims have been made in this research. The first is that in some factual scenarios, the law of basic complicity breached many of the principles of criminal law, prior to *Jogee.* Furthermore, the causal contribution required of an accomplice was unclear and the mental element was diluted over the years. The second claim relates to PAL. This thesis suggests that the breaches of the principles of criminal law found in relation to complicity were even greater for PAL. The final claim is that the most recent case, *Jogee*, has not resolved these breaches and any changes made will have little impact on the law of complicity in practice. Further, *Jogee* may have muddled the law by creating additional issues, particularly in relation to the interpretation of intention in complicity and the level of foresight required for a jury to find intention in complicity.

Each of these claims is summarised in turn below. The first claim is that before *Jogee*, standard complicity breached many of the principles of criminal law. It was

[1] [2016] UKSC 8, [2017] AC 387.

shown in Chapter 2, that while complicity allows for a wide variety of accomplices with both minor and major contributions to the principal's offence, the unitary basis of liability could be harsh on some accessories. It does not allow for differing contributions made by secondary parties to be reflected in their conviction. Parliament appears to have given preference to the practical advantages of the unitary system, at the expense of complying with the criminal law principles.

For example, the role of individual autonomy in complicity is contradictory. An accomplice may choose to assist or encourage the principal in their offence but a system that allows the accomplice to be charged and convicted as a principal ignores the autonomy of the principal to act as a *novus actus interveniens*. Furthermore, whether the actions of the secondary party have to cause the principal offence has never been settled and it seems that the courts will allow an attenuated causal influence of the accomplice to be recognised.

Moving on to the *mens rea* for complicity, it seems that the apparent simplicity of an intention to assist or encourage an offence is deceiving. In truth, the *mens rea* has been hard to define. The requirement of an intention to assist or encourage appears to fulfil the correspondence principle. However, it has been shown that an intention of the accomplice to assist or encourage merely requires them to have acted voluntarily. There was no requirement for the accessory to intend the principal to carry out the substantive offence. In any event, the mental attitude of the accomplice towards the conduct and fault element of the principal's criminal offence was diluted over the years to a form of recklessness. Yet, in the context of murder, a principal

had to intend to kill or cause serious harm to be liable. It follows that the differing mental attitudes between an accomplice and a principal to murder breached the correspondence principle, adopting the wider approach to correspondence set out in the Introduction.[2]

Part of the problem is that no statutory definition of *mens rea* in complicity has been provided by Parliament, leaving it to the courts to decide. A strict interpretation of the requirement of knowledge of the essential matters of the principal's offence, from the most commonly cited case on *mens rea* in complicity, *Johnson v Youden,*[3] could have led to undue leniency to some accomplices. This resulted in a dilution of *mens rea* to allow for conviction of a secondary party if she turned a blind eye or was aware of the range of crimes that the primary actor intended to commit. This dilution of *mens rea* resulted in breaches of the principles of fair warning and legality.

Section 8 of the Accessories and Abettors Act 1861 also raises issues of fair labelling, by allowing accomplices to be labelled and convicted as principals. The accomplice can be given the same label, yet it is the principal who makes the decision, as an autonomous agent, whether or not to commit the substantive offence and may make the decision not to do so. Furthermore, the primary actor need not be encouraged by the actions of the accomplice.[4] It is unfair to label an encourager as the principal when their contribution did not have an effect on the conduct of the primary actor.

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[2] Above, 16 - 17.
[3] [1950] 1 KB 544 (KB).
[4] *Calhaem* [1985] QB 808 (CA).

An issue of fair labelling in complicity also arises because the definition of aiding, now assisting or encouraging, is broad, resulting in uncertainty with the potential for a breach of the principle of legality.[5] A jury is open to find almost anything as aiding leading to inconsistent decisions. This leads on to the second claim in this research.

The second claim in this thesis is that the breaches of these principles found in relation to complicity were even greater for PAL. In PAL the arguments for the causation theory upholding liability were even more remote than for basic accessorial liability. This is because it was hard to say that an accomplice, who merely foresaw the possibility of the second crime, had caused the offence. Yet, in accordance with the unitary theory of liability, the accomplice was liable for the principal's collateral crime. Furthermore, similar to the problem in complicity, the principle of individual autonomy suggests that the primary actor would assume responsibility for their own actions, thereby relieving any other party involved.[6] As a result, any suggestion that the secondary party who has contributed to a PAL is liable for a collateral offence of a principal appears to go against this fundamental principle.[7]

On the other hand, the *mens rea* for PAL and basic complicity eventually merged so that both required a form of recklessness. The lower *mens rea* following the PAL

[5] Ashworth A and Horder J, *Principles of Criminal Law* (7th ed, OUP 2013), 431.
[6] *Kennedy* [2007] UKHL 38, [2008] 1 AC 269.
[7] This is a very recent statement of principle and for more than ten years appeal cases show that a supplier of illegal drugs was guilty of manslaughter if an individual died due to taking the drugs, which she had supplied.[7] Similarly, it would seem that this fundamental principle of criminal law does not apply to strict liability cases regarding the environment: *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 (HL) and *Natural England v Day* [2014] EWCA Crim 2683, [2015] 1 Cr App R 53.

route to liability meant it was easier for prosecutors to use PAL against secondary parties than to charge them in accordance with the Accessories and Abettors Act 1861. The result was two standards of risk taking: foresight of a substantial or real risk for secondary parties to a PAL and traditional recklessness, defined as foresight of a risk by a principal, which was unjustifiably taken.

At the same time, PAL breached the principles of fair labelling, fair warning, legality and correspondence, particularly where a homicide arose. Secondary parties who participated in group crime could be convicted of murder and labelled a murderer, yet they had only foreseen the possibility of death or serious harm. They did not have to intend death or serious harm themselves. The actions of the accessory did not correlate with their mental attitude leading to a breach of the correspondence principle. A breach of this principle also arose in relation to a murder, and other specific intent crimes, because while the principal would only be liable if they intended to kill or cause serious harm, the accomplice could be liable on mere foresight that the principal may intentionally kill or cause serious harm. The *mens rea* for the secondary party did not correspond with that of the principal.

A mental attitude that requires mere foresight as the relevant test raises issues of the threshold of that foresight, because the foreseeability test does not spell out how foreseeable a harm must be to be legally foreseeable'.[8] Prior to *Jogee,* the law did not provide this, leading to a possible breach of the principles of legality, fair labelling and fair warning. The harshness of PAL was mitigated by the courts using the

[8] Moore M 'Foreseeing Harm Opaquely' in in Shute S, Gardner J and Horder J *Action and Value in Criminal Law* (OUP 1993) 126.

fundamental difference rule. This rule, from *Powell; English,*[9] was controversial because it was not consistently applied and too much emphasis was placed on the type of weapon used by the principal instead of the intention of the accessory.

Finally, accurate labelling of the PAL route to liability has also been identified as an issue. Many different terms were in use for the same set of rules and the term 'joint enterprise' has been used to include basic as well as PAL. This caused confusion among judges and academics.

The third claim in this thesis is that although *Jogee* has improved some aspects of complicity, it has not resolved all the breaches of principle raised in this research and the decision will have little impact on the criminal law. *Jogee* may have even created additional issues, particularly in relation to the interpretation of intention and the level of foresight required to find intention in complicity. The result is that the restatement of an intention to assist or encourage as the *mens rea* for complicity may not work well in practice.

Jogee confirmed that the *actus reus* of complicity is assisting or encouraging a criminal offence. Also, it asserted that the accomplice must assist or encourage every criminal act of the principal. This is the essence of why PAL no longer exists. If the accomplice must assist or encourage every act of the principal, then there is no need for PAL, because basic complicity will suffice. Despite this, *Jogee* held an accessory's conduct need not have a positive impact on the principal's actions or on

[9] [1999] 1 AC 1 (HL).

the result. If this is right, it is hard to claim that the accessory is implicated in the primary wrong of the principal and there appears to be no culpability by the secondary party in respect of the primary actor's criminal offence. This could lead to a potential breach of the principles of fair labelling and fair warning in some circumstances.

Similarly, if a positive impact on the actions of the principal is not required, no causal contribution by the accessory is also implied. Yet, later in the *Jogee* judgment words of causation were used, where 'some overwhelming supervening act' was said to break the chain of causation between the acts of the accomplice and that of the principal. The Supreme Court did not enter into the debate regarding the necessary causal contribution of an accomplice. This does not bring clarity to this area of law but the advantage is that flexibility is maintained for individual circumstances to be taken into account.

This new 'overwhelming supervening act' rule may be the fundamental difference rule in a different guise. However, *Jogee* provided helpful guidance on the use of weapons in complicity. Prior to *Jogee*, the courts tended to focus on whether the accomplice knew the principal was carrying a weapon or a particular weapon. Following *Jogee*, the courts should centre on whether the accomplice intended to assist or encourage the crime committed by the principal. Knowledge or ignorance of a weapon, or a particular weapon, is now only evidence of whether the accessory intended to assist or encourage the principal in her offence. A mere difference in

weapon can no longer be used to absolve the secondary party of liability. It is what she intended that matters.

Jogee also provided good clarification that prior agreement between the parties to commit an initial criminal venture is no longer a prerequisite for liability. This is particularly helpful in cases of spontaneous violence, when PAL was most commonly used, where proving prior agreement has been hard for the prosecution. In practice, post-*Jogee* the problem may be an evidential one of proving intentional assistance or encouragement by every defendant.

An association with the principal or presence at the scene of the crime can now be evidence of assistance and encouragement by an accomplice but no more than that. *Jogee* confirmed that presence in numbers could show an intention to encourage. This is good guidance from the Supreme Court, although no further detail was provided, presumably to allow for flexibility in individual circumstances.

The main outcome from *Jogee* related to *mens rea,* which has now been reinstated as an intention to assist or encourage a criminal offence with knowledge of any of the existing facts necessary to make it criminal.[10] This appears to improve the relationship of complicity with the principles of fair labelling and fair warning. If the accessory intends to assist or encourage the principal it will be fair to label them as a principal in some, but not necessarily all, factual scenarios and fair warning is provided. The correspondence principle appears to be better fulfilled because the

[10] *Jogee* (n 1) [9].

accomplice has to intend to assist every act of the primary actor. However, this restatement of the mental element is problematic because *Jogee* endorsed earlier case law, such as *Maxwell*[11] and *Bainbridge,*[12] that had diluted this intention. In addition, *Gamble* was supported which implied that the secondary party in her assistance or encouragement may just have to act voluntarily which is not a high level mental element.[13]

The restatement of intention by *Jogee* as the requisite mental element appears to improve the relationship of complicity with the principles of fair labelling, correspondence and fair warning. On closer analysis, this improvement is compromised by the fact that the accomplice does not have to intend the principal to carry out the substantive offence. This is because *Jogee* held that the secondary party may intend the principal to carry out the offence, but this need not necessarily be the case.[14] Post-*Jogee*, a retailer carrying out her everyday business appears to remain liable as an accomplice, with implications of unfair labelling.

Furthermore, following *Jogee*, foresight of this substantive offence by the accessory is now only evidence of an intention to assist or encourage the principal offence by the accomplice, but no guidance as to the threshold of this foresight is provided in the case. There was no reference to *Woollin*,[15] with the result that in the context of murder there are potentially differing thresholds for intention, dependent on whether

[11] [1978] 1 WLR 1350 (HL).
[12] [1960]1 QB 129 (CA).
[13] *Jogee* (n 1) [9].
[14] ibid [10].
[15] [1999] 1 AC 82 (HL).

the defendant is a principal or a secondary party, again providing a potential breach of the wider interpretation of the correspondence principle. This is an issue that the courts may need to clarify in the future.

The Supreme Court endeavoured to bring the *mens rea* of an accessory to murder back in line with that for the principal. By restating intention as the *mens rea* for complicity, the Court appears to achieve this for specific intent crimes, so rectifying the previous breach of the correspondence principle. Whether this will succeed is uncertain. The restatement of intention in *Jogee* only relates to an intention to assist or encourage by the accomplice, not an intention by the accessory that the principal commit the crime. The correspondence principle may remain unfulfilled as liability can still arise if the accomplice is merely going about their daily business but in doing so assists or encourages the primary actor in their offence. Yet in the case of a specific intent offence the principal still has to intend the offence.

Also, the judgment in *Jogee* seems to mishandle another aspect of *mens rea*, the use of conditional intention, resulting in a continuing breach of the principle of legality. This is because a secondary party can act in order to assist or encourage the principal to carry out a particular crime but a secondary party cannot intend the principal's crime (with the exception of procuring). She can only intend her own conduct. Strictly speaking, she cannot conditionally intend a future crime.

Moving on to a different aspect of *Jogee*, the introduction of manslaughter as an alternative verdict for an accomplice who did not intend death or serious harm, allows

for the conviction of an accomplice where reckless culpability is found. This is a good outcome from *Jogee*. Otherwise, an accessory that was reckless to a result could be absolved of liability, which would be too lenient.

It can be seen from the above discussion that while *Jogee* purported to improve the injustice caused by the law post-*Chan Wing-Siu* and *Powell; English,* when the decision is evaluated against the principles of fair labelling, fair warning, individual autonomy, legality and correspondence, it may not have fully achieved this. Statutory reform in complicity would be welcome and indeed the House of Commons Justice Committee recommended intervention by Parliament in their Report in 2012.[16] In 2014 the same committee recommended the Government request the Law Commission to undertake an urgent review of the law of PAL in murder cases for codification in statute.[17] Disappointingly, the Government has not shown any enthusiasm for reform in this area of law. It may be for this reason that the Supreme Court chose to review this area of law in *Jogee*.

A reconsideration of the Supreme Court's reasons for the restatement made in *Jogee*

The judgment in *Jogee* set out five reasons for restating the law.[18] An analysis of the first reason given based on the history of PAL does not form part of this thesis on grounds of space. The second reason provided was that the law was not working well in practice, was controversial and had led to numerous appeals. Despite the

[16] Justice Committee, *Joint Enterprise* (HC 2011-2012) [36].
[17] Justice Committee, *Joint Enterprise: follow-up* (HC 2014 - 5) [47].
[18] Above, 92 - 95.

change from *Jogee*, this thesis contends that the case will have less impact than commentators first thought and actually raises further issues.

The third reason given by the Supreme Court was that in view of the importance of complicity, if the courts had taken a wrong turn then it should be corrected. This research suggests that the corrections made may not have the impact intended.

The fourth reason was that foresight of what might happen was usually only evidence from which a jury may find a requisite intention for complicity in criminal law. Yet, the Supreme Court did not mention the level of foresight arising from *Woollin* and whether this applied to complicity. As such, the level of foresight required to find intention in complicity remains uncertain after *Jogee*.

The fifth reason provided in *Jogee* was the anomaly of a lower mental element for an accessory than for the principal, in the case of specific intent crimes, such as murder. By restating an intention to assist or encourage with knowledge of the essential facts of the offence, the Supreme Court appeared to remove this anomaly. However, the Court did not specifically state that the accomplice had to intend the primary actor to commit the crime. As a result, in some circumstances this anomaly may still arise. For example, where the accomplice assists the principal because the secondary party is trying to further her business, but she does not actually intend the principal to commit the substantive offence.

The future

Limited case law was included in *Jogee* supporting the changes made and this authority was not compelling.[19] More importance seems to have been given to decisions of the High Court of Australia.[20] These cases are not binding precedent and do not have to be followed. Importantly, subsequent decisions from this court have chosen not to follow *Jogee* and have endorsed the existence of PAL.[21] It will be interesting to follow how future courts in Australia continue to handle the doctrine of PAL. The continued use of PAL has also been endorsed in Hong Kong, [22] subsequent to *Jogee*, although this may be based on a misunderstanding of terminology.[23]

In addition, the judgment in *Jogee*, did not make any reference to the 1966 Practice Statement[24] or clearly state that it was overruling earlier case law. This means that earlier court decisions have not been officially overruled and *Jogee* potentially sits alongside them.[25] While unlikely, this could mean that a later court may arguably distinguish *Jogee* and follow an earlier decision of the Supreme Court endorsing the previous foresight based test.

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[19] Buxton R, 'Jogee: upheaval in secondary liability for murder' (2016) Crim LR 324, 331.
[20] *Johns* (1980) 143 CLR 108; *Miller* (1980) 55 AJLR 23; *McAuliffe* [1995] HCA 37; *Clayton* [2006] HCA 58.
[21] *Miller v The Queen* [2016] HCA 30. Joint Enterprise has also been endorsed in Hong Kong in *Hong Kong Special Administrative Region v Chan Kam Shing* [2016] HKCFA 87, (2016) 19 HKCFAR 640. For a critical analysis of *Miller v The Queen* [2016] HCA 30, see Baker, 'Unlawfulness's doctrinal and normative irrelevance to complicity liability: a reply to Simester' [2017] J Crim Law 393.
[22] *Hong Kong Special Administrative Region v Chan Kam Shing* [2016] HKCFA 87.
[23] Krebs B, 'Hong Kong Court of Final Appeal: divided by a common purpose' [2017] J Crim L 271.
[24] *Practice Statement (HL: Judicial Precedent)* [1966] 3 All ER 77.
[25] Simester AP, 'Accessory liability and common unlawful purposes' [2017] LQR 73, 88.

The principles of autonomy, fair labelling, fair warning, legality and correspondence and the doctrines of causation and *mens rea* discussed in this thesis are all guiding limits on the scope of the prohibitions set by the courts. The argument put forward in this research is that, prior to *Jogee,* the law of complicity and the doctrine of PAL breached many of these guiding principles. Furthermore, the judgment by the most recent case to reach the Supreme Court on complicity, may not have significantly improved the relationship of complicity with these principles.

It has also been contended that *Jogee* effectively abolished PAL. Whether basic complicity can adequately deal with gang crime, in particular spontaneous violence, remains to be seen.[26] If it becomes evident that the return to an intention based mental element in complicity is too lenient on defendants, due to the evidential difficulties, this research recommends that Parliament finally reviews and updates the original statute from 1861. This could allow for a reckless based mental element of an accomplice where the principal's crime is a basic intent one.

Alternatively, Parliament should amend the Serious Crime Act 2007 to allow for an independent offence that criminalises the conduct of joining a criminal venture, as suggested by Baker.[27] Similarly, the Supreme Court could give further consideration to the 'authorisation' approach suggested by Virgo and Krebs.[28]

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[26] The HKCFA doubted basic accessorial liability would be sufficient in *Hong Kong Special Administrative Region v Chan Kam Shing* [2016] HKCFA 87, (2016) 19 HKCFAR 640 [94-96].

[27] Baker DJ, 'Unlawfulness's doctrinal and normative irrelevance to complicity liability: a reply to Simester' [2017] J Crim Law 393, 415.

[28] Virgo G, 'Case in detail: Mendez and Thompson' [2010] Arch Rev 4, 5; Krebs B, 'Hong Kong Court of Final Appeal: divided by a common purpose'

In *Jogee*, the Supreme Court did not have the remit to amend existing statutory rules. While a deeper analysis of the current law of complicity as a whole could have been undertaken, the Supreme Court was not in a position to amend the Accessories and Abettors Act 1861. The most the Court could do was to bring the common law back into line with common law principles of an intention based offence. The Supreme Court has done as much as it can in terms of rectifying this area of law, so it is hoped that Parliament may finally intervene, if the restatement from *Jogee* does not operate well in practice.

[2017] J Crim L 271; Krebs B, '*Mens rea* in joint enterprise: a role for endorsement?' [2015] CLJ, 74(3) 480; Krebs B, 'Accessory liability: persisting in error' [2017] CLJ 7. An analysis of the authorisation approach was not included in the thesis on grounds of space.

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Lectures and Conferences

Joint Enterprise after *Jogee*: Reconsidering Law and Policy Conference, University of Liverpool, London Campus, 1st September 2016