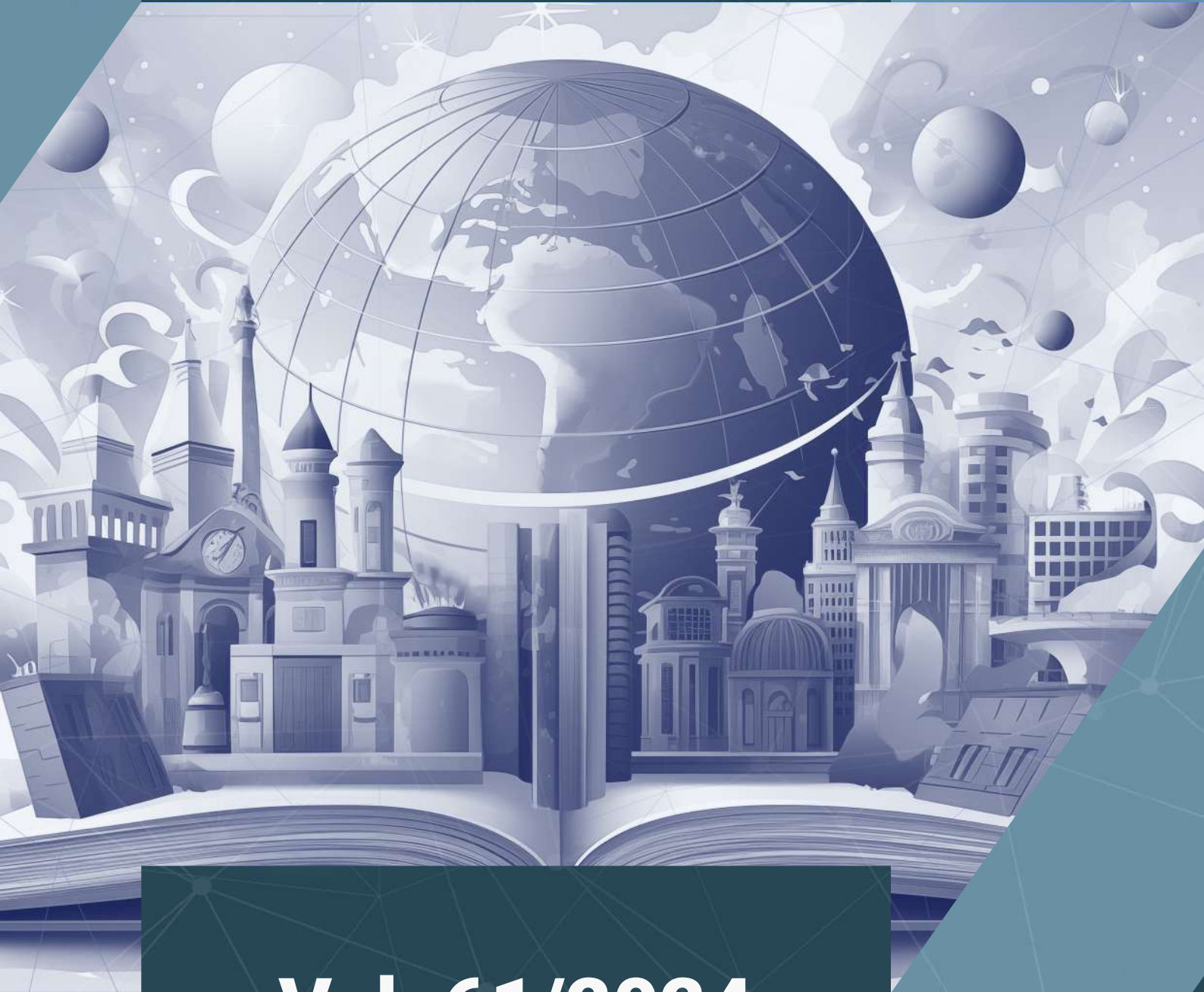




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## Reevaluating Joint Criminal Enterprise: Legitimacy and Reform in the Wake of *R v Jogee*

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**Abstract.** This article examines the legitimacy and rationale of the Joint Criminal Enterprise (JCE) principle in international criminal law, focusing on the implications of the UK Supreme Court's decision in *R v Jogee*, which fundamentally abolished JCE as a legal principle. JCE, characterized by its complexity and contentious nature, has been criticized for being driven more by policy considerations than legal precedents. The article first explicates the concept and evolution of JCE, including common purpose liability and parasitic accessory liability, and highlights the irrationalities within these principles. Through an in-depth analysis of the *R v Jogee* decision, the author argues that the ruling successfully rectified residual errors in criminal law, deeming the abolition of JCE consistent with legal logic and tradition. The article concludes with recommendations for enhancing transparency and clarity in prosecution and sentencing processes to restore public confidence in the criminal justice system. It also underscores the disproportionate negative impact of JCE on minority groups and young offenders, advocating for reforms to mitigate these effects.

**Keywords.** Joint Criminal Enterprise (JCE), *R v Jogee*, Parasitic Accessorial Liability, Judicial Transparency, Minority Groups, Young Offender

### I. Introduction

The principle of joint criminal enterprise (“JCE”) has received a contentious status in international criminal law due to the complexity and obscurity around its definition and governing laws. Recently, JCE once again gained traction followed by the ground-breaking judgment *R v Jogee*<sup>1</sup> in which the UK Supreme Court fundamentally abolished the principle of JCE in the criminal law.

The question invites us to examine the legitimacy of JCE. In other words, this essay is tasked to assess if JCE can be defended with justification or logic for its existence as a criminal offence. This essay argues that the concept of JCE has been over-extended and the governing principles are overly complicated through the development of case law. Given the fact that JCE's judgments are mainly driven by policy consideration and perception of injustice it imposed, JCE itself is arguably not a legitimate form of criminal liability and should be not allowed for a place in the modern criminal justice system. To illustrate this thesis, Part I will scrutinise the concept of JCE and reveal the confusing and illogical rationales of establishing

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<sup>1</sup> [2016] UKSC 8

such criminal liability. It shares academic concerns surrounding policy consideration behind JCE cases. Part II will critically analyse the *ratio decidendi* of the decision of *Jogee*, demonstrate that a complete abolishment of JCE is consistent and logical and challenge the Supreme Court's view that the law of abetting and aiding cannot effectively replace JCE. Finally, this essay proposes a recommendation to restore the confidence in the criminal justice system to increase transparency and clarity of conviction and sentencing.

## II. Conceptualization of JCE

JCE is an area of law that has no statutory definition and has been developed through the common law.<sup>2</sup> In its basic form, it enables holding secondary party/parties (**D2**) criminally liable for the crime that was committed by the principal-perpetrator (**D1**) while D1 and D2 are pursuing an unlawful common (**Crime A**).<sup>3</sup> The collateral modality of joint enterprise, in which D2 is responsible for the additional or extended crime perpetrated by D1 (**Crime B**) when performing Crime A, and which D2 foresaw while proceeding to engage in the enterprise, is a more contentious case.<sup>4</sup> In English law, the collateral modality is known as "parasitic accessory liability," while in Australian law, it is known as "extended" JCE liability.<sup>5</sup> The most contentious instances of parasitic accessory liability are those in which secondary participant D2 is found guilty of murder while having no motive to kill or inflict serious bodily harm.

To unpack JCE and understand the origins and rationales behind parasitic accessory liability, we must return to the beginning to investigate (1) common purpose liability and (2) the liability theory from which parasitic accessory liability was created.

### Common Purpose Liability

It is uncertain what inspired the existence of the doctrine of common intent, as well as its meaning, standing, and connection to general complicity, according to KJM Smith in his incredible work on criminal complicity.<sup>6</sup> The idea that D1 and D2 have a shared criminal intent to commit crime A and that D2, though present without evidence of aiding or facilitating D1, is similarly guilty of A has been understood in common law for centuries.<sup>7</sup> This is the most fundamental type of common purpose liability, under which offences are covered by the arrangement. Along with accessory liability, it was recognized as a separate principle of liability. Simultaneously, common purpose liability has been linked to participation since its conception. The *mens rea* and *actus reus* conditions of guilt of abettors, those that instigate or promote others during the crime, are combined in common interest. In older case law, intangible reinforcement by means of appearance was the cornerstone of common purpose liability.<sup>8</sup> Rather than an accomplice, the individual present is referred to as "principal."<sup>9</sup> According to Hale, "if divers come to perform an illegal crime and are involved at the moment of the felony

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<sup>2</sup> Jonathan Herring, *Criminal Law: Text, Cases, And Materials* (9th edn, Oxford University Press 2020), 845-900.

<sup>3</sup> *ibid*; see also Jonathan Herring, *Criminal Law* (11th edn, Macmillan Education UK; 2018), 334-336.

<sup>4</sup> *ibid*.

<sup>5</sup> *ibid*.

<sup>6</sup> K.J.M Smith, *A Modern Treatise On The Law Of Criminal Complicity* (Clarendon Press 1991), 150-160.

<sup>7</sup> *ibid*.

<sup>8</sup> Andrew Perry Simester, 'Accessory Liability And Common Unlawful Purposes.' (2021) 133 *Law Quarterly Review*, 85.

<sup>9</sup> *ibid*.

performed, they are both principals," even if only one of them does so.<sup>10</sup> Courts also expanded the definition of what forms the *actus reus* of helping or abetting, which is classic complicity, over time.<sup>11</sup> It is not often essential to be present at the scene of a crime.<sup>12</sup> For assisting and abetting responsibility, moreover, mere existence is insufficient. If D2's involvement is part of pursuing an arrangement to perform a felony, it is considered reinforcement or assistance.<sup>13</sup>

### **Parasitic Accessorial Liability**

Although parasitic accessorial liability is cloaked in the guise of common purpose liability, it can usually be tracked back to collateral types of accessorial liability prior to the event, which is cases of "variation." This means that D1 goes against the grain for committing Crime B. Foster's Crown Law includes an early example: B was instructed by A to rob C, and he does so, killing him either as a result of his opposition, or to hide the truth, or for some other reason operating at the time of the robbery.<sup>14</sup> A is a co-conspirator in the assassination. The *mens rea* test, which defends attributing blame for crime B, has been called into question. Liability in Foster's case was based on an impartial examination of whether crime B, perpetrated by D1, was a likely result of D2's advice/instigation.<sup>15</sup> Initially, the probability test was only used in counselling and purchasing. It was eventually extended past those instances and became part of the general lexicon. With respect to Crime B, the statute began to include a discretionary test (intent and foresight) in later situations. As a result, parasitic accessorial liability evolved from an instigation/abetting liability (A recommended B and C) to a subjective foresight evaluation.

Occurring before *Jogee, Chan Wing-Siu*<sup>16</sup> is the leading case for this area of law. D2 was held criminally responsible for actions by the primary perpetrator of a kind which the former foresees but does not actually expect, confirming the "wider principle" of foresight.<sup>17</sup> In this case, having paid to settle a mortgage, the debtor's family had arrived at the home to collect a different set of negative consequences. Two of the three defendants understood knives were being held by the others while two said they were not present during the stabbing. Any defendant was found guilty of the capital offence of first-degree murder. The foreseeability of death and forethought with respect to culpability are synonymous with being liable for a murder charge. In *Gnango*<sup>18</sup>, the Court of Appeal and the Supreme Court backed the wider principle.

In this interpretation, parasitic accessorial liability refers to causation-based complicity responsibility. D2's liability is derived from D1's. The police instigate D1's offence and is prosecuted on an even basis with D1. As with collusion, parasitic accessorial liability will include evidence of a connection to the offence, as well as motive and understanding of the base crime's basic facts. Foresight falls short of this, as shown by the Supreme Court's decision in *Jogee*, where it reinstated parasitic accessorial liability as a guilty party, insisting on finding the

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<sup>10</sup> Elies van Sliedregt, 'Joint Criminal Confusion: Exploring the merits and demerits of joint enterprise liability' in Beatrice Krebs, *Accessory Liability After Jogee* (Hart Publishing 2020).

<sup>11</sup> *ibid.*

<sup>12</sup> Herring (n 2), 864.

<sup>13</sup> *ibid.*

<sup>14</sup> 'Criminal Law. English Crown Cases Reserved' (1859) 7 *The American Law Register* (1852-1891); see also Matthew Dyson, 'Shorn-Off Complicity' (2016) 75 *The Cambridge Law Journal*, 196-199.

<sup>15</sup> *ibid.*

<sup>16</sup> *R v Chan Wing-Siu* [1985] AC 168.

<sup>17</sup> Herring (n 3).

<sup>18</sup> *Regina v Armel Gnango* [2011] UKSC 59.

motive. However, this essay agrees with the Committee on the Reform of Joint Enterprise's finding that the causation-based responsibilities are in contrary to three fundamental principles in criminal law, which calls the legitimacy of JCE into question. The first aspect is the absence of clear *mens rea*. Criminal law practitioners and scholars find it difficult to reconcile how D1's mental element can be transferred to D2.<sup>19</sup> The second aspect is the proof of causation. Crown prosecution is not required to show the causal link between the victim's death/injuries and D2's action. D2's liability is construed solely from his association with D1.<sup>20</sup> Finally, Bridges is concerned that there is a risk of a potentially disastrous slide in guiding juries in finding JCE.<sup>21</sup> The law strictly requires D2 to "subjectively foresee or know" the elements of Crime B. Yet, for instance, it is observed that the courts and prosecutors willingly encourage a jury to find that D2 saw the possibility of weapons usage as the basis for the "foresight test", which detracts from the subjective aspect of *mens rea*. It is admitted that the perilous slope is a result of ambiguous and complex law itself. However, one cannot deny that the fundamental rules governing criminal evidence finding is at stake.

One claim put forward by Law Commission for retaining the Chan Wing-Siu principle is that D2 is armed with two defenses under the case law to prove his/her disassociation with D1's crime.<sup>22</sup> The first is withdrawal. This refers to a situation that D2 leaves the joint enterprise before D1 commits the crime. Although the law is relatively straightforward, the application is extremely restrictive. For instance, D2 must timely inform the rest of the group his/her intention to withdraw during the crime, which is challenging to achieve in real life. In fact, Moloney and Natas argues that the withdrawal defense is so tightly drawn that D2 finds himself/herself almost impossible to argue that Crime B is too remote.<sup>23</sup> The second defense is "fundamentally different rule." Establishing foresight needed D2 to demonstrate awareness that D1 was wielding a weapon that was later used to murder the victim. There was no responsibility in instances where the concealed weapon was radically different from what D2 believed D1 would use. However, in *Powell and English*<sup>24</sup>, House of Lords failed to give precise and clear guidance to the meaning of "fundamental difference". This present lower courts with difficulties in evaluating such defense. Thus, Justice Committee found that such defense was rarely successful.<sup>25</sup> Given the obscurities, complexities and difficulties surrounding the defense, it is questionable how a wrongful convicted defendant is able to clear his/her name.

Another argument in support of JEC is the "agency theory". Some scholars argue that parasitic accessorial liability is more akin to an agency responsibility as it is founded on an act of authorization and consent.<sup>26</sup> Thus, complicity may be perceived as an agent-based conduct.<sup>27</sup> Rebecca Williams explores how the law of complicity exists at the intersection of the conflicting roles of agent and causation.<sup>28</sup> Numerous critics argue that complicity is not firmly anchored

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<sup>19</sup> Lee Bridges, 'The Case Against Joint Enterprise' (2013) 54 *Race & Class*, 40.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

<sup>22</sup> House of Commons Justice Committee, 'Eleventh Report Of Session 2010–12: Joint Enterprise' (2012), 8-9.

<sup>23</sup> *ibid.*

<sup>24</sup> *R v Powell and English* [1999] 1 AC 128

<sup>25</sup> Justice Committee (n 19).

<sup>26</sup> Sarah Tromans, 'Complicity, Jegree, And The Principles Of Criminal Law' (Degree of Magister Juris, University of Birmingham 2018), 55-58.

<sup>27</sup> *ibid.*

<sup>28</sup> Rebecca Williams, 'Jegree, Parasitic Accessory Liability and Conditional Intention', in Beatrice Krebs, *Accessory Liability After Jegree* (Hart Publishing 2020).

in the causal system and is best understood in terms of agency/authorization.<sup>29</sup> As an agent, D2 is liable for D1's behavior, where the accomplice authorizes the principal's behavior. Causation plays a minor role. It illustrates the relationship between D2 and the offence but is not needed. However, this characterization of D1 and D2's relationship is highly questionable and unconvincing. An example to rebate this theory is that *Chan Wing-Siu* case itself which an authorization from D1 to D2 never took place.

### **The case against JEC**

One major criticism of the JEC is that judgements with reference to the JEC are mainly driven by policy consideration rather than based on legal precedents.<sup>30</sup> Admittedly, since the decision of *Chan Wing-Siu*, judges have been clear about the policy relevance of the JEC doctrine. Sir Robin Cooke suggests in *Chan Wing-Siu* that it is aligned with the public policy to hold D2 accountable if he/she "lends himself/herself to a criminal enterprise,"<sup>31</sup> knowing a murder will be committed. In the same vein, in *Powell and English*<sup>32</sup>, Lord Hutton emphasizes that the public needs to be effectively protected against criminals operating in gangs.<sup>33</sup> Accordingly, in reaching the judgment, he explicitly acknowledges that practical "considerations of public policy" take precedence of considerations of strict logic." The tendency to adjudicate on the ground of policy over legal rules can be worrisome. The English Supreme Court calls this "generalized policy argument" into question in *Jogee*, warning the danger of wrongful conviction.

Comparing the previous JEC judgments, Jessica Jacobson observes that the doctrine of JEC has been over-expanded and developed to further other policy goals.<sup>34</sup> In particular, Krebs suggests that the JEC appears to be utilized by Crown prosecution and the police as a "discipline tool" to deter and tackle gang-related crimes among teenagers and young adults.<sup>35</sup> Yet, Susie Hulley argues that it would be almost impossible to determine if the principle of JEC has a deterrence impact.<sup>36</sup> Moreover, Facilities Fighting for Justice, an organization seeks to raise awareness of law among young people in gang-related crimes, warns being prosecuted for even minor crime has a direct, irreversible and negative impact on young people's behavior.<sup>37</sup>

Although deterrence effect is challenging to measure, what is more probable, according to Hulley, is that views of the joint enterprise doctrine's inequality have eroded defendants' confidence in the legal procedure, resulting in a lower rather than higher rate of conformity with the statute. The greatest concerns about JEC have expressed on the wide scope that defendants can be convicted of. It is said that many individuals are convicted of serious

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<sup>29</sup> *ibid.*

<sup>30</sup> Jessica Jacobson, Amy Kirby and Gillian Hunter, 'Joint Enterprise: Righting A Wrong Turn? Report Of An Exploratory Study' (Institute for Criminal Policy Research, Birkbeck, University of London 2016), 15.

<sup>31</sup> *Chan Wing-Siu* (n 16), para 177.

<sup>32</sup> *R v Powell and English* [1997] UKHL 57.

<sup>33</sup> *Ibid.*, para 621.

<sup>34</sup> Jacobson (n 27).

<sup>35</sup> Beatrice Krebs 'Joint Enterprise Murder is Dead – Long Live Joint Enterprise Manslaughter?' in Beatrice Krebs, *Accessory Liability After Jogee* (Hart Publishing 2020).

<sup>36</sup> Susie Hulley, British Society of Criminology Newsletter, No. 79, 'Joint Enterprise And Legitimacy Among Long-Term Prisoners' (2021) <[https://www.britisocrim.org/wp-content/uploads/2016/04/bscn\\_79\\_Hulley.pdf](https://www.britisocrim.org/wp-content/uploads/2016/04/bscn_79_Hulley.pdf)> accessed 19 April 2021.

<sup>37</sup> (n 22).

crimes and receive severe sentences for offences that they have very little involvement. A related point to Kreb's argument above is Wilson and Ormerod's finding that individuals convicted of murder on a joint enterprise basis who are often young men who refuse to accept that the label and sentence they have received fairly reflect their culpability. They remain embittered with the criminal justice system and refuse to engage with the prison system.<sup>38</sup>

On a study of prisoners conducted by Crewe et al, which included 125 inmates, Crewe et al found that every third prisoner had behavioral problems in adjustment by the time they entered their first decade of incarceration.<sup>39</sup> The survey did not conduct a formal investigation into joint enterprise, but the results reflected it. To take one example, respondents who were found guilty on a joint enterprise perspective generally reported that their punishment was unjust. Claims of absolute innocence were also heard. Yet several people were prepared to admit to having committed a crime but did not believe themselves murderers. Joint enterprise frequently serves to increase feelings of discrimination due to unfairness in the legal system. Crewe et al. found that the emotions of deprivation were found to have a variety of consequences, including a prisoner's disengagement from prison rules and an unwillingness to discuss their behavior when it is about to an ending. The result also showed that there was a notable differential effect on young black criminals under the shared business doctrine. Joint enterprise in the survey showed that 37% reported themselves as black, relative to the 13% of the general population (and the 3 percent of black people in the national population of England and Wales). According to Crewe et al, a significant portion of the interviewees thought the joint enterprise was used as an indiscriminate racial vacuum, convicting them of little but sheer prejudice.<sup>40</sup>

In the same vein, Becky Clarke and Patrick Williams maintain that joint enterprise is deployed as a convenient legal device to punish those who are identified and recognized as "threatening the normative boundaries of the British state."<sup>41</sup> In their analysis, they reveal police and the Crown Prosecution have intentionally characterized criminal activities as a "gang" collective venture and reproduced racialized associations to criminality. As a result, a large number of ethnic minority groups served lengthy sentences for crimes they did not commit. Williams and Clarke also explain how racialized discourses have exacerbated the criminalization of young men, male gang members, leading to disparate punishments, and how such policies have simultaneously lowered levels of youth violence.<sup>42</sup>

Misperceptions of joint enterprise can partially affect perceptions of the complexity and the disparity of the criminal justice system.<sup>43</sup> The *Jogee and Ruddocky* judgement is typically misunderstood to mean guilt by affiliation or guilt by mere appearance. Campaigning

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<sup>38</sup> W Wilson and D Ormerod, 'Simply Harsh To Fairly Simple: Joint Enterprise Reform' [2015] Crim. L.R., 23-27.

<sup>39</sup> Hulley (n 33); See also Ben Crewe, Susie Hulley and Serena Wright, 'Experiencing Long Term Imprisonment From Young Adulthood: Identity, Adaptation And Penal Legitimacy' (Ministry of Justice 2019), 7-8.

<sup>40</sup> *ibid.*, 6.

<sup>41</sup> Becky Clarke and Patrick Williams, '(Re)Producing Guilt In Suspect Communities: The Centrality Of Racialization In Joint Enterprise Prosecutions' (2020) 9 International Journal for Crime, Justice and Social Democracy, 117.

<sup>42</sup> *ibid.*

<sup>43</sup> Patrick Williams and Becky Clarke, 'Dangerous Associations: Joint Enterprise, Gangs And Racism' (Centre for Crime and Justice Studies 2016)

<<https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Dangerous%20associations%20Joint%20Enterprise%20gangs%20and%20racism.pdf>> accessed 19 April 2021.

by the police might indeed in fact add to these stereotypes. It was discovered that only a few media outlets, such as newspapers and films, have reported on the misinterpretation of foresight, with the bulk of sources reporting on the detrimental effect of joint enterprise under the statute from the standpoint of the offender.<sup>44</sup> Numerous media believe that the statute has been used to unfairly intimidate young people with African, Asian, and minority racial origins by associating them with “gangs.” According to a poll undertaken by an expert at Manchester Metropolitan University, “87 percent of those on the Metropolitan Police's 'gang matrix' (Trident) were black and minority ethnic people...half of those accused of extreme juvenile crime were black and minority ethnic people.”<sup>45</sup> This bolsters the point that joint enterprise is a “lazy prosecutor's fantasy,” since it can be exploited by judges to exclude any possible criminals, even though they participated insignificantly.<sup>46</sup> However, this is contentious since certain gangs (potential offenders) are ethnically diverse, which has contributed to the public's negative view of the rule on cooperative business (explaining why many media sources have written about the bad implications of joint enterprise only).

Nonetheless, notwithstanding the unfavorable perception of joint enterprise, one media outlet discussed that Joint enterprises are helpful to society. One example is young women who have been traumatized or medicated to the point that they are unable to recall precisely a perpetrator did something to them after a sexual attack, but whose testimony, along with other corroborating facts, may establish that a variety of others were involved.”<sup>47</sup> Joint enterprise is said to be necessary in this case from the victim's viewpoint because it enables the victim to feel secure and confident that all future suspects have been sentenced.<sup>48</sup> This source was unique in that it examined the victim's viewpoint and their reasons for believing that joint enterprise is necessary—this may be because people feel that utilizing joint enterprise to prosecute black and ethnic minority gangs outweighs the victim's perspective.<sup>49</sup> As a result, it is evident that joint enterprise is a particularly contentious issue in the media and is expected to stay future owing to the opposing views of the perpetrator and survivor.

### **III. Assess the legitimacy of JCE through *R v Jogee***

In 2016, the law governing JCE was upended when the Supreme Court was ordered to reconsider the doctrine of parasitic accessory liability established by the Privy Council 30 years earlier in *Chan Wing-Siu*. The Court ultimately found that it did not accept the “wider principle” of foresight, which was founded on shaky legal reasoning, as well as an oversimplification of procedure in regard to past and current JEC cases.

The prosecutors charged that the defendant conspired with his co-defendant to perform an offence that culminated in the victim's death. The judge told the jurors that the suspect was

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<sup>44</sup> Owen Bowcott, 'Joint Enterprise Law Wrongly Interpreted For 30 Years, Court Rules' (the Guardian, 2016) <<https://www.theguardian.com/law/2016/feb/18/joint-enterprise-law-wrongly-interpreted-for-30-years-court-rules>> accessed 19 April 2021.

<sup>45</sup> See Oumou Longley, 'Black People In The UK Are Going To Jail For Crimes They Didn'T Commit. Here'S Why' (*Vice.com*, 2020) <<https://www.vice.com/en/article/n7wqg/what-is-joint-enterprise-impact-black-bame>> accessed 19 April 2021.

<sup>46</sup> Williams and Clarke (n 39).

<sup>47</sup> Carlene Firmin, 'Joint Enterprise Law Seems To Unfairly Target Young People' (*the Guardian*, 2014) <<https://www.theguardian.com/society/2014/jul/22/joint-enterprise-law-targeting-young-people>> accessed 19 April 2021.

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*



guilty of murder if he took part in the assault and "knew" that his co-defendant might stab the victim with the intent to do him "very severe injury." The perpetrator was found guilty and sentenced to life in jail, with the defendant's subsequent claim of prosecution being dismissed by the Court of Appeal. The appellant appealed to the Supreme Court, arguing that the judge's jury instructions on joint enterprise were erroneous and that the case law governing trial judges' jury instructions ought to be revised. It was proposed that anticipating a danger was insufficient for secondary liability. The Appeal was granted because the Chan Wing-Siu principle could not be sustained, and hence the judgement was reversed.

Repealing a principled statement rendered and upheld by the Privy Council and House of Lords on many occasions for several years was undeniably a significant and rare measure. The decision was benefited from a wider, in-depth, and extensive research regarding the JCE than the previous judgements. Many scholars have welcomed the decision with gusto, arguing the decision was delivered with logical consistence and aligned with legal precedents. Several rationales from criminal practitioners and House of Lords are examined below to demonstrate the unreasonableness of JCE as a legal principle in criminal law.

First, while reviewing relevant authorities, it is clear that the *Chan Wing-Siu* brought forth a new legal principle when it established that an individual can be guilty of Crime B if he foresees or has knowledge of it. However, arguably the new rule was not *necessarily intended*.<sup>50</sup> This view be supported by chain of cases cited by Privy Council - *Davies v DPP*<sup>51</sup>, *Wesley*<sup>52</sup>, *Anderson* and *Morris*<sup>53</sup> in *Chan Wing-Siu*. In *Wesley*, for instance, the Court of Appeal only laid down the rule that if a criminal activity starts but then the "co-adventurer" departs from an agreed enterprise, the party from which he was supposed to commit the same crime, cannot be held responsible for any associated acts of the one who undertakes the unauthorised venture." *Wesley* did not discuss what was appropriate to determine joint liability, knowledge or foresight for D1's doing. In other words, they did not look at whether D2 had merely assisted or merely foresaw what was about to happen. It provided no real guidance for determining which considerations or conditions that was later applied in *Chan Wing-Siu*. In the same vein, in the *R v Rahman (Islamur)*<sup>54</sup>, Lord Brown also supports the claim that "the rule in Chan makes guilty those who foresee crime B but never intended it/ wanted it to happen. Although there can be no doubt that if D2 continues to participate in crime A with foresight that D1 may commit crime B, that is evidence, and sometimes powerful evidence, of an intent to assist D1 in crime B. But it is evidence of such intent, not conclusive of it."<sup>55</sup>

The second reason in support of this reversal cited by House of Lords is attributed to that the principle has not worked successfully since its inception.<sup>56</sup>

The joint enterprise, in general, that is a source of concern, is extremely contentious. Since *Chan Wing-Siu*, the admissible expansions have ensued. Professor Ormerod observed despite judicial difficulties and jury's unpredictability in these cases, "a steady flow of appeals continues". Eight cases on JCE were advanced to the Court of Appeal in 2010 alone.<sup>57</sup> The

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<sup>50</sup> Nick McBride, 'Accessory Liability' (2016) 27 King's Law Journal, 285-288.

<sup>51</sup> *Davies v DPP* [1954] AC 378.

<sup>52</sup> [1963] 1 WLR 1200.

<sup>53</sup> [1966] 2 QB 110

<sup>54</sup> [2009] 1 AC 129 [63].

<sup>55</sup> *ibid*.

<sup>56</sup> K. Hamdorf, 'The Concept Of A Joint Criminal Enterprise And Domestic Modes Of Liability For Parties To A Crime: A Comparison Of German And English Law' (2005) 5 Journal of International Criminal Justice.

<sup>57</sup> *ibid*.

decisions of the trials and even outcome of the appeals are often considered as unfair and illogical.

This further leads to the third factor for the need for change. Under the common law, correction of mistakes involves a senior judge to have the opportunity to right a wrongful judgment.<sup>58</sup> In the criminal law, it is originally stated that a secondary party to the commission of a crime or, classified as an accessory, is classed as someone who supports the criminal through encouragement, whereas the primary one is classed as the perpetrator.<sup>59</sup> It is a theory in criminal law whereby the accomplice is guilty of the same offence as the one on which the principle was committed, regardless of whether his/her hand performed the action or not. This list of principles has been well known and agreed upon in the past. The concept of “parasitic liability” has only been described over the last 20 years in the field of English law, starting first with the usage of the phrase “inclusive parasitism” in Sir John Smith's 1997 case. The trend gained greater significance with the advancement of inclusive parasitism to be referred to as “inclusive parasitism” in the House of the *Glassford* decision (together with *Powell*, the legislative paras had been specified and outlined in 2002).<sup>60</sup> Secondary responsibility does not rely on whether or broadened by the courts.

Another contributing factor was that at common law, which is, the understanding of “foresight” (or guesswork) that a jury may infer the requisite motive from circumstantial evidence was only adequate in limited circumstances.<sup>61</sup> Using a policy expansion as proof of motive for a secondary party's intent might seem good, but it is seriously anomalous, and therefore, has overextended the law of manslaughter and reduced the intent requirement for murder in cases where the suspect has an accompanying motivation for an abnormality of his/her anxiety or bias as a factor. This definition allows murder to be committed if the defendant intended to inflict injuries to a minor that results in a risk of death to someone else, thereby extending blame from the basic definition of intending to cause substantial bodily harm to the Chan (carrying less than minimum culpability) (foresight of the possibility that the principle might commit murder, with no need for an intention to assist him). In the last example (the Westley Pearce murder), the defense succeeded in getting the law changed such that those convicted of being accessories to the crime were now not subject to the same enhanced penalties as those who committed the actual crime.<sup>62</sup> With this understanding of the values of Supreme Court precedents in mind, the Supreme Court then concluded that the best step to take was to state the principles that had been applied over many decades in Chan's case. This is an oversimplification of “to compare purpose to foresight, as proof of intent. This is an oversimplification of intent: seeing foresight as evidence of intent as well.”<sup>63</sup>

#### **IV. Promoting Clarity and Transparency**

Many of the current disputes and uncertainties about joint business deals has been with regards to joint enterprise. Parasitic accessorial responsibility has gained much attention, with both victims' rights advocates and prosecutors demanding an accused party's “foresight” or

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<sup>58</sup> Susie Hulley, Ben Crewe and Serena Wright, 'Making Sense Of 'Joint Enterprise' For Murder: Legal Legitimacy Or Instrumental Acquiescence?' (2019) 59 *The British Journal of Criminology*.

<sup>59</sup> Victoria Bo Wang, 'A Normative Case For Abolishing The Doctrine Of Extended Joint Criminal Enterprise' (2019) 83 *The Journal of Criminal Law*.

<sup>60</sup> Jessica, Kirby and Hunter (n 27).

<sup>61</sup> Herring (n 3).

<sup>62</sup> *ibid*.

<sup>63</sup> *ibid*.

participation in their own crime be treated the same as an explicit assumption or knowledge of the presence of guilt. The Court found the establishment of secondary liability defined as PAL to be defining a serious "error." The Supreme Court held that secondary liability is indeed an error, as was found in *Jogee*. It is anticipated that this ruling will considerably diminish the risk of injustices and misconduct that come from applying the joint enterprise and reduce the number of miscarriages of justice that arise from doing so. Although not always favorable, it is also acknowledged that it was quite strange to claim that policies over rationality were the overarching influence on the creation of the legal principles in Hutton's comment on the way courts, which, suggests that it is realistic and persuasive for them to want policies to have authority and preeminent authority to prevail over the rules.

However, we do not yet know any of the ramifications of *Jogee*'s achievement. Those people who received an indeterminate sentence before the Supreme Court decision would have to go through just one further appeal due to the expansion of the Joint enterprise theory but might or will be left frustrated if they believed the decision would not provide a chance for additional appeals.

The ruling in *Jogee and Ruddock* has established that the function of accessory to a crime of commission in the sense of motive, as a guilty conviction is possible only when one works in agreement or cooperation with the perpetrator to help, counsel, procure, or enable "their crime." Around the same time, motive is no longer sufficient proof of commission of committing a crime if defendants' comprehension of the potential co-plans conspirator's or intentions cannot be accepted as proof of their own. It is anticipated that this decision would have a significant effect on the incidence by criminal trials of people who might be thought to be colluding to derail the tracks and on wrongful arrest and conviction due to the shared venture theory. However, it is too early to tell how the ruling would turn out, as of its effect on the market.<sup>64</sup> Furthermore, the integrity of the judiciary procedure has been damaged by the idea of justice was damaged by the legal theory and its practice in the years preceding this text's composition.<sup>65</sup> The shortfall of public confidence would certainly need some time to repair.

The effects of the confusion about joint enterprise on discourse will continue, at this time, for the general public's lack of comprehension and misuse of the criminal law of joint enterprise would hinder the process of law-making. And if the Supreme Court strikes certain advances on the general principle of reducing the burden of proof for cooperative business, it will also need more legislation to really unravel whether some defendants should be found guilty and why others cannot, and what levels of complicity they have been seen to have. Lastly, there are actually no arrangements in place for keeping track of shared enterprise, and tracking the detail is still unknown.

Culmination of joint enterprise knowledge has become increasingly important. It is critical to clarify the system for justice and create a greater level of accountability of joint enterprise prosecutions. It is also apparent that after the major revisions introduced to the rule on apportioned responsibility, the need to ensure consistent prosecution aims and objectives and increase accountability has been greatly outweighing the importance of just rendering the statute more straightforward. Completing this mission would allow suspects, as well as victims' family members, complainants, and prospective jurors to more to grasp the prosecution's argument. Transparency and clarity are equally as important to many in the criminal justice

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<sup>64</sup> Stephen Knight, 'Joint Enterprise In The Wake Of The Jogee Verdict' [2017] Socialist Lawyer.

<sup>65</sup> *ibid.*

system, who ought to apply the legislation day-to-to-day with an established comprehension of its rules and workings.

## **V. Conclusion**

This essay argues that the JCE is not a legitimate form of criminal liability. This illegitimacy is mainly driven by the unexplainable and illogical generalized public policy arguments advanced in most English JCE cases. Due to these rulings, the JCE convictions are used to target specific minority groups and gang activities, leading to unnecessarily harsh punishment on young offenders. Public confidence in the criminal justice system is badly damaged as a result. Part II analyses the Jøgee's decision and argues the judgement is rational and plausible, successfully correcting a residual error in the criminal law. However, we still need to wait for more appeals to determine how revolutionary is the decision. In the meanwhile, more clarity and transparency regarding prosecution and conviction processes should be introduced to improve public confidence in the system.

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