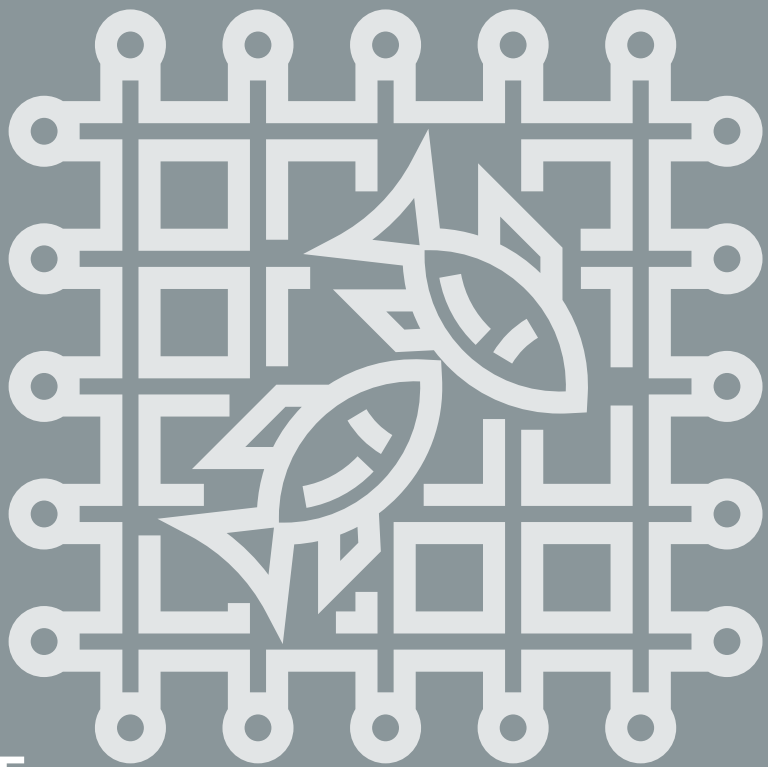
The legal dragnet

Joint enterprise law and its implications

by Nisha Waller



CENTRE FOR CRIME
AND JUSTICE STUDIES

About the author

Nisha Waller is a final year doctoral candidate at the University of Oxford, and Racial Justice Research Lead at *APPEAL*.

Acknowledgments

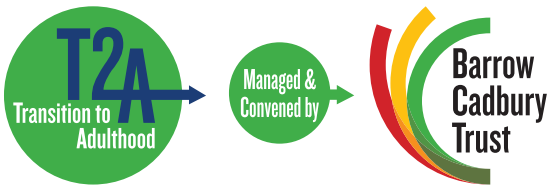
This report represents the collective thought and expertise emanating from discussions with campaigners, legal experts, academics, and others. Thanks to Gloria Morrison and Jan Cunliffe (Joint Enterprise Not Guilty by Association, JENGbA), Dr Patrick Williams (Manchester Metropolitan University), Becky Clarke (Manchester Metropolitan University), Naïma Sakande, Dr Felicity Gerry KC, Dr Louise Hewitt (University of Greenwich), Charley Allen, and Emeritus Professor Lee Bridges, for their insightful guidance. Special thanks to Professor Matthew Dyson, Dr Felicity Gerry KC, Becky Clarke, Charley Allen, Laurie Hunte and an anonymous reviewer for taking the time to review and comment on an early version of this report.

Also with gratitude to the staff and trustees at the Barrow Cadbury Trust, particularly Laurie Hunte, Criminal Justice Programme Manager at the Barrow Cadbury Trust, for providing the resources to make this report possible and their continued support for this work.

Young adult safety project

The legal dragnet is part of the *Young Adult Safety* project at the *Centre for Crime and Justice Studies*. This project aims to strengthen advocacy about key aspects of serious violence that affect young adults and is supported by the *Transition to Adulthood Alliance* convened and funded by the *Barrow Cadbury Trust*.

Young adults are particularly affected by joint enterprise laws. Those aged 18-25 years old are the largest age group prosecuted for homicide under secondary liability, according to the Crown Prosecution Service (Crown Prosecution Service, 2023). Those aged under 25 account for more than half of all those prosecuted. Around 500 people under 25 have received life sentences for murder or manslaughter in multidefendant cases in the past decade (FOI Home Office 6857, 2023).



Registered charity No. 1115476

Centre for Crime and Justice Studies 2 Langley Lane, London SW8 1GB
info@crimeandjustice.org.uk www.crimeandjustice.org.uk

© Centre for Crime and Justice Studies, September 2024. ISBN: 978-1-906003-85-2
Registered charity No. 251588. A company limited by guarantee. Registered in England No. 496821

CENTRE FOR CRIME AND JUSTICE STUDIES

Contents

Executive summary

The legal dragnet examines the law and prosecution practice concerning secondary liability, often referred to as 'joint enterprise'. Focusing on homicide cases, it highlights the risks posed by the current ambiguous law and makes a case for creating a safer framework for prosecution.

The report finds joint enterprise laws are vague and wide in scope, causing systemic injustice, including overcriminalisation, over punishment, discriminatory outcomes, and convictions where there is no compelling evidence of intent and a defendant's physical contribution is minimal.

In particular, the current law:

- was not 'fixed' by the Supreme Court in 2016.
- does not have clear parameters on secondary parties' conduct and contribution to an offence.
- lacks clarity about what counts as assistance and encouragement (the latter in particular).

Under the current vague law, suspects are routinely charged and cases constructed with an absence of rigour, quality, and precision as to the role of each defendant. The law encourages:

- the police and Crown Prosecution Service to charge suspects based on poor-quality evidence.
- 'storytelling' and highly speculative prosecution case theory to take precedence over strong evidentiary foundations.
- the use of gang narratives and vague concepts such as 'in it together' to construct collective intent. The risks of legal vagueness are particularly borne by young Black men and teenagers, who are most likely to be labelled and stereotyped as gang members.

Given the gravity and longstanding nature of concerns about the current law, the scope of secondary liability law needs to be narrowed in favour of a clearer and safer legal framework. Preventing wrongful convictions and their grave implications should take priority over the ease of prosecution.

The government must make good on their commitment to reform the laws of secondary liability as soon as is practically possible.

A minimum next step is for the government to request a Law Commission review. In addition to legal reform, urgent action is required regarding the various unjust processes that have flourished under the current vague law, highlighted in this report, particularly police and Crown Prosecution Service charging decisions, the overuse and misuse of gang evidence, and speculative and far-reaching prosecution case theory.

Foreword

Joint enterprise – also known as secondary liability – refers to the law by which multiple individuals can be jointly prosecuted and convicted in relation to the same crime. Concerns about how this law operates are longstanding. With colleagues, I have been involved in efforts to scrutinise and better understand joint enterprise for more than a decade, working alongside campaigners including Joint Enterprise Not Guilty by Association (JENGbA), legal experts, academics and others. *The legal dragnet* is the third publication about joint enterprise the Centre for Crime and Justice Studies has released.

Over this time, numerous official reforms and interventions have given this controversial law the appearance of change, but little seems to be fundamentally different in terms of the numbers and demographics of those prosecuted and convicted, and there remain pressing questions about their operation and legitimacy.

The problem, it seems, is not just a lack of political will – though that is part of it. There is also a gap in understanding. What is joint enterprise law? How do the continued well-documented racial disparities – and the many examples of convictions based on limited or seemingly no involvement in the crime – come to be? And, if legal reform is required, which there appears to be growing consensus around, what might need to be considered?

I can think of no better-placed person to answer these important questions than Nisha Waller.

Nisha's report makes clear the vagueness of current law, and shows that what makes this pernicious in practice is that this ambiguity is filled by evidence that is itself dubious, particularly regarding 'gangs' and 'bad character'. The consequences of this are not borne equally. As previous work by the Centre has shown, while anyone can be prosecuted under secondary liability law, it is young Black men who are consistently overrepresented in these prosecutions (Mills, Ford and Grimshaw, 2022; Williams and Clarke, 2016).

The result, Nisha argues, is that *'juries are left to make life-altering decisions with an absence of clear parameters and legal direction, heightening the risk of inconsistent and discriminatory outcomes, and wrongful conviction'.*

The careful and considered analysis offered here is a valuable resource not only to assess where we are and why but also to consider the future. Secondary liability law requires meaningful action on numerous fronts. This report presents a powerful diagnosis of the current problems and what meaningful future reform in this field needs to consider.

Reform of this controversial law is long overdue. Prior to forming the new government, the Labour party set out its ambition to reform joint enterprise. Given the importance of the issues raised here, I hope it does not take another decade for this opportunity to be grasped.

Helen Mills
Head of Programmes
Centre for Crime and Justice Studies

1 Introduction

For centuries, English law has allowed individuals to be prosecuted and convicted for crimes they did not carry out, as long as they encouraged, assisted or brought about those crimes and were deemed culpable for them. However, the law is criticised for bringing people on the periphery of the conduct that led to the offence into the scope of prosecution. Referred to as complicity or secondary liability in legal terms, this legal doctrine is often described as 'joint enterprise'.

The term 'joint enterprise' is used interchangeably with 'secondary liability' throughout this publication due to its recognisability among non-legal readers and communities affected by this law.

Calls for reforming joint enterprise date back more than a decade, primarily underpinned by concerns about the fairness of the law and its racially disproportionate application (see for example Justice Committee, 2014). Some proposals for reform, which have not been implemented, emanated from challenges to the legitimacy of sentences associated with joint enterprise homicide cases, including calls for reconsidering mandatory life sentences (Jacobson and Kirby, 2016) and introducing different degrees of murder charges (BBC, 2010).

While many people assume that the problems associated with the law itself have been resolved, calls for reform persist due to ongoing issues with the law and its application. Focusing on homicide cases, this report examines some of the contentions surrounding secondary liability today. In doing so, it highlights that the English law is vague and ambiguous, giving rise to uncertainty and injustice, while encouraging racialised and imprecise prosecution practices. The key issue outlined here is the absence of a clear and reasonable threshold for juries to determine the criminal liability of a secondary party. This lack of precision in the law raises profound concerns about the risks of wrongful convictions – particularly murder convictions, which carry a mandatory life sentence.

One way to address this issue is through legislation. A recent Private Members' Bill by Kim Johnson MP sought to amend the current law by making it more precise. It sparked considerable public discourse, renewed political discussion, and evidenced a degree of cross-party agreement that there remain legitimate concerns about joint enterprise.

The recent spotlight on the current use of joint enterprise is a motivating backdrop for the material covered here. This report intends to be a resource for those seeking a clearer understanding of the law and to inform ongoing debates about secondary liability and future reform efforts.

The evolution of the law and the concerns surrounding its use are complex, impeding both public and political understanding and, ultimately, positive legislative reform. This report aims to provide an accessible explanation of the law. It covers:

- what joint enterprise is and how it has evolved;
- a grounded analysis of why joint enterprise is equated with injustice, from the ambiguities of the law to the way the current law play out in the court room;
- consideration of the objections to restricting the law on joint enterprise;
- necessary avenues of enquiry and priorities for future action.

The focus here is with the English law and processes of prosecution in the context of secondary liability. It does not therefore focus on all the issues associated with secondary liability, including those relating to criminal appeals, the subject of a current Law Commission review and about which there is also a need for action.

This report was compiled following consultation with experts – comprising criminologists, legal scholars, researchers, lawyers and campaigners. It also incorporates insights from wider research on secondary liability spanning over a decade, and an ongoing research study conducted by the author. This research involved in-depth interviews with 41 people, which took place between 2021 and 2023. Interview participants included:

- young Black and Black mixed-race male adults prosecuted or convicted as a secondary party to murder since the 2016 Jogee Supreme Court judgment;
- the relatives of young Black and Black mixed-race male adults prosecuted or convicted as a secondary party to murder;
- legal practitioners, including prosecution and defence barristers, criminal defence solicitors and one recently retired Crown Court judge.

The analysis presented here draws on some of the key themes that arose out of these interviews, using some of the research participants' quotes and insights to articulate these themes. The full study will be accessible through the University of Oxford.[1]

The key issue outlined here is the absence of a clear and reasonable threshold for juries to determine the criminal liability of a secondary party. This lack of precision in the law raises profound concerns about the risks of wrongful convictions – particularly murder convictions, which carry a mandatory life sentence.

2 What is joint enterprise?

Joint enterprise is a non-legal term used to describe completed offences where more than one person was involved.

Each participant in a crime is tried, sentenced and labelled as if they had committed the crime themselves. Even where there are stark differences in the contribution each made, all are labelled the same way and, with minor differences, eligible for the same sentence. In the case of murder, this is a mandatory life sentence. If the murder involved a knife taken to the scene with intent, the starting point for sentencing is 25 years.

So, who is a participant? To decide if a person is a participant in a crime, each defendant's role might be described differently.

1. The principal – the person who carries out the crime.
   For them, the prosecutor must prove that the elements of the crime alleged were committed by the defendant.

2. Co-principals – two or more people who carry out the crime together.
   For them, the prosecutor must prove the elements of the crime alleged were committed by the defendants acting together.[2]

3. The secondary party, also known as the accessory or accomplice – the person or people who do not carry out the crime but are complicit in the crime.
   For them, the prosecutor must prove that the defendant assisted or encouraged the crime, not that they actually committed it; the prosecutor also needs to prove that they intended to help the principal to commit the crime.

A prosecutor does not have to distinguish between principals and secondary parties, and the courts do not systematically differentiate principals and secondary parties when recording convictions. In many cases, the evidence does not allow anyone to be sure who actually committed the conduct that led to the offence.

Joint enterprise is therefore a non-legal term that cuts across the legal categories described above as a sort of 'one size fits all' description. It covers offences involving:

1. co-principals;
2. at least one principal and at least one secondary party.

The most contentious uses of joint enterprise are those that involve secondary parties, i.e., those who do not carry out the crime but are held liable for the crime on the basis that they were complicit in it.

How has joint enterprise law evolved?

Secondary liability has existed in English case law for centuries and was consolidated in an Act of Parliament in 1861, the Accessories and Abettors Act. Section 8 of the Act states that anyone who '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'.

Since the 1861 Act, judges have shaped the law through their decisions in cases, cultivating different ways in which the law can be applied. Joint enterprise became an umbrella term for joint participation (co-principals who carry out the crime together) and two types of secondary liability:

1. **general or basic accessorial (secondary) liability**
   When an individual assists or encourages the

principal offender in the commission of a crime. (Assistance and encouragement is typically used in replacement of 'aid, abet, counsel and procure' as set out in the Accessories and Abettors Act 1861.)

2. **parasitic accessorial (secondary) liability (PAL)** Where the principal's commission of a second offence (e.g. murder) occurs during an original joint offence (e.g. robbery). Everyone who participated in the original offence (robbery) could be prosecuted for the second offence (murder), even if they did not intend for the second offence to happen. They would only have to foresee the possibility that the second crime would occur for them to be liable.

Until the second half of the twentieth century, to be convicted as a secondary party to a crime, an individual had to know of the principal's *intention* to commit that crime and to intend to support that. This was changed, at the latest, in the case of *R v Chan Wing Sui* [1985].[3] From that point, a person who merely foresaw that the principal might commit a second crime would be liable for that second crime once it was committed. The person did not need to contribute to the second crime in any way, other than by engaging in the first crime having foreseen the risk of the second crime taking place. The second crime was treated as being 'parasitic' to the first crime. Foresight was sufficient to convict a secondary party, and proving their intent was not necessary.

The standard for culpability was therefore watered down dramatically, from intending to assist the principal to just considering there was a possibility the principal might commit a further crime. Controversially, prosecutors still had to demonstrate that the principal offender *intended* to commit the offence. It was therefore easier to convict the secondary party than it was the person who carried out the conduct element of the offence.

The case of Chan Wing Sui concerned a PAL scenario where a murder arose out of an original joint venture. However, the foresight test was expanded beyond PAL cases[4] and was eventually applied in all cases concerning secondary liability.

This low threshold for conviction for secondary parties was widely criticised, and its appropriateness was eventually considered by the Supreme Court in *R v Jogee* [2016].[5] The court ruled that foresight was no longer sufficient for a conviction, including for second crimes occurring during the commission of a first crime. Since the Supreme Court judgment, foresight can stand as evidence of a defendant's intent but is not a reason of fault in and of itself. Prosecutors must once again prove that a secondary party assisted or encouraged the principal to commit the crime and that the secondary party intended to do so. PAL was effectively abolished, returning the law to basic secondary liability.

Language matters: Joint enterprise or secondary liability?

As well as returning the law to its normative standard, the Supreme Court encouraged a shift in the terminology used to describe the law, criticising the term joint enterprise:

> *"…the expression 'joint enterprise' is not a legal term of art… it unfortunately occasions some public misunderstanding. It is understood (erroneously) by some to be a form of guilt by association or of guilt by simple presence without more. It is important to emphasise that guilt of crime by mere association has no proper part in the common law." [77]*

Since the Supreme Court judgment, legal scholars and higher courts less frequently use the phrase joint enterprise. This is particularly true because PAL, which

was abolished by the Supreme Court, was the type of case scenario for which the phrase joint enterprise most properly describes. However, Crown Court judges sometimes still use the term in their directions to jurors.

As the Supreme Court stated, the term joint enterprise lacks strict legal precision. It therefore risks distorting public understanding of English law, as it has been equated with concepts such as 'guilt by association' that misrepresent the law as it pertains to statutory and case law provisions.

While campaigners have consistently used the term joint enterprise alongside phrases such as 'guilt by association', they are not necessarily unfamiliar with the law. Rather, they are utilising language that describes how the law operates from their perspective and experience, while aiming to communicate its practical shortcomings and unfairness in lay terms. The perceived fairness of law does not always align with its application in real-world scenarios, meaning that a wholly legal description of the law can often mask its practical reality and deficiencies.

However, when 'joint enterprise' is indiscriminately used to describe all completed offences involving multiple people, the term lacks the nuance to distinguish between those who did not actually perform the conduct element of the offence and those who did. Thus, there is nothing about the term that allows for distinguishing between cases of clear multi-handed offending and those for which alternative charges or non-prosecution might be more suitable. Using such a vague and wide term may inadvertently encourage imprecision in decision-making throughout the prosecution process.

The continued use of the term joint enterprise by campaigners and journalists has discouraged some legal professionals from supporting or engaging with recent proposals for reform. It is therefore imperative to set out briefly why it is used in this report despite the Supreme Court's criticism and the concerns above.

When compared to terms such as secondary liability or complicity, joint enterprise is recognisable outside of the legal sphere. It therefore has communicative benefits, particularly for social researchers exploring the topic and those seeking to raise awareness or advocating for change. Given that the law is widely perceived as unjust, the phrase joint enterprise also allows for the development of solidarity and support, both in prison and the wider community. Those impacted can identify one another, foster collective resistance and seek mutual understanding. The Supreme Court judgment also evoked the incorrect assumption that secondary liability was abolished, and abandoning the term joint enterprise may exacerbate this misconception.

Those opposed to the term joint enterprise should consider the wider social functions of non-legal terms. Likewise, journalists, campaigners and researchers should strive for legal accuracy in disseminating their message, differentiating between that which the English law prescribes and that which they observe in practice. Enhancing the legal accuracy of media, campaign communications and reform proposals could be facilitated through more sympathetic engagement from legal professionals, some of whom already support those advocating for reform.

There is value in further considering the contentions about language set out here.

The Supreme Court did not fix the law

> *"[Joint enterprise] is the legal doctrine which ensures that the getaway driver doesn't avoid culpability, that the lookout of the armed robbery*

> *is also culpable, that the person who supplies the murder weapon knowing that it will be used in that offence can also not escape liability. The [Supreme Court] has considered this at some length in the case of Jogee"*
> Alex Chalk, then Justice Secretary, HC debate, 26 June 2023

This statement, made by then Justice Secretary Alex Chalk, was not inaccurate but the contribution of a secondary party to the principal's offence is not always as clear or easy to determine as he suggests.

That the Supreme Court adequately dealt with or fixed the law is an overstatement. It is a convenient argument that has been frequently employed to justify inaction in response to calls for reform to joint enterprise law. For example:

> *"[The Supreme Court] set clear parameters for both the conduct element and the mental element which we think creates the correct framework of common law"*
> Laura Farris, HC debate, 30 January 2024

Whatever else the Supreme Court judgment achieved, it did not set a threshold for what physical conduct counts as assistance or encouragement. The judgment did not define the minimum level of contribution to a crime that is necessary for liability. As it currently stands, the jury just have to find 'assistance' or 'encouragement', and these are not clearly defined.[6]

A direct causal link between the secondary party's conduct and the principal's offence does not need to be established for liability. In other words, it does not matter if the principal's offence would still have happened in the absence of the secondary party's conduct. However, existing case law accepts that there should be some connecting link between the two.[7] In 2007, the Law Commission adopted the position that the secondary party's conduct should at least have the capacity to influence the principal offender, without the need to prove that there was a literal causative effect between the two (Law Commission, 2007).[8]

This expectation is somewhat implicit in the very meaning of the words assistance and encouragement. However, the Courts seem not to have entirely committed to this position and have not clearly or precisely set out what needs to be proven to show that such a connection exists (Dyson, 2022). For secondary parties, it is not clear what the accused person had to do to be complicit in the crime.

While the Supreme Court returned the law to its normative standard, this leading decision on secondary liability left a vague law that does not set clear parameters for a secondary party's conduct or contribution. Critics therefore conclude that the English law does not embody the true meaning of being complicit and presents a weak concept of causation in its practical application concerning assisting and encouraging (Dyson, 2022).

That the Supreme Court adequately dealt with or fixed the law is an overstatement. It is a convenient argument that has been frequently employed to justify inaction

3 The dangers of an imprecise law

Having thus far established how secondary liability law has evolved and that, despite the Supreme Court returning the law to its normative standard, the current law is still vague, in this section, *how* this vague law operates in practice is explored. Three key ways the current law risks prosecuting people who are not complicit are set out:

1. a lack of clarity about what counts as assistance and, particularly, encouragement.
2. wide parameters encouraging prosecutorial imprecision, leaving subsequent evidential deficits to be filled by speculative inferences, and a conviction-maximising narrative approach to prosecution.
3. the racialised use of the 'gang' in this narrative approach overcriminalising and overpunishing young Black men and boys in particular.

What counts as assist and encourage?

Lawyers interviewed as part of the wider research I have undertaken expressed concerns about the potential for the current legal vagueness of secondary liability to contribute to wrongful convictions.

They felt that a lack of parameters on what counts as assistance and encouragement made it difficult to safeguard defendants against miscarriages of justice. When it came to ensuring that defendants are safeguarded against wrongful conviction, the ambiguity of the concept of encouragement was the crux of lawyers' concerns. In comparison, assistance was considered more discernible and demonstrable, and presented a more-tangible foundation from which they could offer the jury clear arguments about whether a defendant was complicit.

A lack of parameters on what counts as assistance and encouragement made it difficult to safeguard defendants against miscarriages of justice

This distinction has also been raised by legal scholars. Professor Matthew Dyson, in his extensive work on secondary liability, argues that showing that a principal was able to stab the victim due to the secondary party providing a knife (assistance), is within the realm of proof through external evidence. It also implies that there is some causation between the secondary party's conduct and the principal's commission of the offence. However, to demonstrate that a principal was persuaded (encouraged) by a secondary party is far more difficult and relies more significantly on establishing a person's state of mind (Dyson, 2022, 398).

> *"...it's not that you held them down, it's not that you… helped to chase him into an alleyway where he was more vulnerable to attack… those are palpable acts of assistance, which would make a quite properly founded guilty verdict on joint enterprise because you assisted. But the fact you've got this encouragement in there as well… encouragement should just go… What does it even mean? There isn't any adequate definition of it…it's a problem."*
> Solicitor

Many cases concerning assistance are still not easy to demonstrate – for example, where the secondary suspect is said to have warned the principal where the victim is. Nonetheless, a case based on proving assistance is more likely to involve the provision of material or information in some tangible form when compared to encouragement. More generally, what can make secondary liability difficult to demonstrate is the common degree of remoteness of the secondary suspect.

The attribution of secondary liability according to English law does require a level of contribution beyond

mere presence; this was the case even before the 2016 Supreme Court judgment. However, physical actions beyond mere presence are not necessary; the necessity lies in the intentional and 'supportive' nature of an individual's presence. It is conceivable that a conviction on this basis could be justified when there is evidence that the defendant willingly went to the scene for the purpose of violence. However, where such evidence is not apparent it is more difficult to discern liability safely.

By being present at the scene, a defendant has potentially already done enough to fulfil the conduct element (actus reus) of the offence. A defendant's presence alone might be capable of influencing the principal offender. However, a genuine understanding of their intention (mens rea) can be extremely difficult to determine. Although mens rea and actus reus are separate elements of the offence, a jury's decision as to whether the defendant possessed the necessary intent will still be informed by the conduct of the defendant.

The challenge described here is especially pronounced in acts of violence, which frequently unfold in a spontaneous or evolving manner, escalating unpredictably. Initial intentions can quickly be replaced by emerging motivations, further complicating deciphering a defendant's role, particularly when they are a young adult or child.

Lawyers described how, in cases where defendants are present at the scene but abstain from direct participation in the events, the prosecution frequently rely on vague concepts such as 'moral support' to convince the jury that someone intended to encourage the principal. However, they noted that the prosecution often lack precise explanations of the meaning of such concepts. Specifically, it was reported that the prosecution adhere to a narrative of collective responsibility – 'all in it together' – avoiding a separation of each party's conduct, even when doing so is possible.

The challenge described here is especially pronounced in acts of violence, which frequently unfold in a spontaneous or evolving manner, escalating unpredictably

In other words, there are concerns that prosecutors rely heavily on their case theory (overarching narrative). This engenders a system reliant on establishing elaborate connections between defendants ostensibly to imply collective intent, illustrating why terms like 'guilt by association' remain prevalent.

> *"…We're convicting people of murder when they play a very small role, they're just more than merely present. In one case, I had the direction to the jury that moral support was enough… Force of numbers, you get that a lot… what does that mean?... We're not precise about what we mean… we're not explaining what we mean, we're not creating a system that really looks into what's happening… We are trained to come up with a case theory… that case theory is always they're all in it together."*
> Senior Barrister

Throwing the net wide

In a criminal trial, the prosecution present a story of what they claim happened based on the evidence (case theory), and there is little restraint on how they construct this narrative. This storytelling aspect of the prosecution's case becomes especially crucial where there is no clear and compelling evidence of intent and the defendant's physical contribution is minimal.

While one lawyer felt that the Supreme Court judgment had encouraged prosecutors to look more

closely at the physical conduct of each defendant, others felt that the absence of legal precision on contribution has maintained a climate in which the prosecution avoid illustrating the specific role of each defendant. Most concerningly, they argued that this also fostered a climate in which the prosecution do not adequately consider in cases of homicide whether a murder charge is actually appropriate for each defendant based on their individual role.

> *"What happens a lot now is you charge them all as having a shared intention. You're not really separating principals from accessories, everybody's in. I think if you say what someone's specific role is, you then have to… step back and think, is that really murder or manslaughter? Or is there something else?"*
> Senior Barrister

Without a clear legal threshold for a secondary party's contribution, then, the law encourages a system that does not always comprehensively examine the details of each case during the charging stage, nor provide a clearly articulated and nuanced account of the events at trial. As put by the barrister above, no one seems to want to determine 'what actually happened'. Because of this lack of precision, and despite the removal of the foresight test following the Supreme Court judgment in 2016, secondary liability continues to act as a 'catch-all' law, or 'dragnet'. This concern was captured by another barrister, who felt that police and prosecutors can rely on legal imprecision to draw a wide net at the charging stage.

> *"…the law allows them to draw so many people in they don't have to go to pinpointing an individual, so they grab as many people even as tangentially as they can… it almost feels as though even if they lose a couple of them… they'll get enough… that's what it feels like… throw the net as wide as we possibly can."*
> Junior Barrister

In addition to the commonly used term 'dragnet', used to depict the scope of the law's application, secondary liability has also been criticised as a perfunctory or 'lazy law', characterised by a pronounced reliance on circumstantial evidence. Police and prosecutors no doubt put time and effort into constructing a case, but the current law allows and indeed encourages cases to be constructed with an absence of rigour and quality.

While the aggregation of circumstantial evidence often yields substantial and compelling evidence of guilt, some cases rely almost entirely on telephone calls that aim to demonstrate that the defendant was in contact with the principal near to the time of the incident, and cell site data obtained from mobile phone networks that aims to establish the location of the secondary party around the time of the offence. Since prosecutors are not required to adhere to a precise threshold for demonstrating a secondary party's contribution, flexibility in the law inadvertently fosters the use of poor-quality evidence from which multiple (and often speculative) inferences about a defendant's behaviour are drawn.

For example, in one case, the prosecution drew the inference that, by taking a different route home, the defendant was disposing of evidence, despite no evidence being recovered on the route. While jurors are routinely advised against indulging in speculation based on the evidence before them, practitioners' disclosures highlighted a conspicuous absence of constraints on the narrative (case theory) that prosecutors can interweave alongside their evidence. For defence practitioners, inferences that were equally consistent with innocence were too often disregarded. The following case study demonstrates the concerns set out in this section.

Case study R v Hussain [2023]:[9] Where is the contribution in complicity?

Summary of the agreed facts

Colton Bryan was stabbed to death in his home following an altercation with one individual, Hammad Hussain. Following the incident, Hammad Hussain fled the country and remains at large. The appellants, who were tried as secondary parties, were Carpenter, Fiaz and Saddam Hussain, the brother of Hammad.[10] All three were convicted of murder and conspiracy to rob. Additionally, Saddam helped his brother leave the country after the offence and pled guilty to perverting the course of justice.

At trial, the judge reminded the jury of the defence submission that Saddam's conduct after the killing 'cannot show that he knew that his brother was going to Colton Bryan's flat or what he was going to do at Colton Bryan's flat', although Saddam's barrister submitted that an explicit direction on this matter should have been given to the jury.

The prosecution's case was that Hammad carried out this crime with the intentional assistance and encouragement of the three others. They contended that the murder was motivated by the victim and the defendants' involvement in cannabis dealing. According to the prosecution, the murder could have been part of a conspiracy to rob the victim of cannabis with the necessary conditional intent. In other words, the prosecution argued that the defendants' possessed the intention to seriously harm or kill the victim if certain conditions arose out of the robbery (e.g. if the victim tried to stop them). The prosecution argued that it was also possible that the defendants' intention was always to seriously harm or kill the victim under the premise of a so-called 'turf war'. The jury were provided with these two different routes to reaching their verdict for murder.

The prosecution presented a circumstantial case, relying mostly on evidence summarised in a timeline of contact and mobile phone calls between the applicants. Known to Bryan, Carpenter arranged to meet him at his home and then travelled to the flat with Hammad and Fiaz. Carpenter entered the building, propping open the outer door before proceeding to go inside Bryan's flat. Fiaz stayed in the car throughout. Text messages were then sent from Fiaz' phone to Carpenter. The messages stated: 'is the drop ready' and 'shall I send him in?' Defence counsel argued that these texts were consistent with a cannabis 'snatch' rather than a planned robbery or murder.

Hammad entered the flat soon after. On entering, the victim produced a baseball bat and Hammad produced a knife. They fought and the victim died from knife wounds. All three defendants left the scene together. Saddam was not with the others at any point but was in phone contact with them in the days before and on the day. From the phone contact, of which there was no evidence about the contents, the prosecution invited the jury to draw the inference that Saddam was involved in organising the attack. Saddam's barrister submitted that it was not possible for the jury to exclude alternative reasons for this contact with his co-accused.

All three received life sentences. Carpenter with a minimum term of 25 years, Saddam with a minimum term of 24 years 6 months, and Fiaz with a minimum term of 23 years.

All three appealed their convictions. The Court of Appeal ruled that the evidence produced by the prosecution was 'unarguably sufficient to enable a reasonable jury to conclude that each of the applicants was party to a plan to attack and/or to rob' the victim, 'if necessary causing him really serious injury'. The judge in the trial directed the jury that 'a crime may be committed by people who… engage very little or not at all in the activity of the crime'.

Case study commentary

Although the safety of the appellants' convictions was upheld on appeal, the case study illustrates the risks associated with establishing a defendant's complicity under the current law; it is an example of how the vagueness of the law can make it difficult to safeguard secondary parties against wrongful conviction.

Consider the case of Saddam. What was the evidence that he actually assisted or encouraged the murder? How could the jury be sure that his phone contact with his co-accused constituted assistance and encouragement? Without giving significant weight to the prosecution's case theory and his conduct after the attack (helping his brother leave the country), which is not evidence of assistance or encouragement of the murder, it is difficult to see how a jury could reject all other realistic possibilities consistent with his innocence.

Submissions made on behalf of Fiaz in this case directly related to contribution. It was submitted that a more-detailed direction was needed to assist the jury to distinguish between mere presence and intentional assistance or encouragement. Fiaz' legal representative submitted that the court ought to narrow, not widen, the scope of liability by laying down rules stating that a secondary party must make some 'measurable contribution' to the offence. The court stated that it had 'difficulty understanding' what was meant by a 'measurable contribution'. Pointing out that the Supreme Court confirmed that it must be proven that the secondary party did assist or encourage the principal, but that there is no need to prove any causal link, the Court of Appeal ruled that this submission was nothing more than a 'restatement of that requirement'.

'a crime may be committed by people who… engage very little or not at all in the activity of the crime'

This case therefore confirms that juries have no legal framework to determine what constitutes assistance or encouragement. Further, although juries may be told that a defendant's mere presence is insufficient to convict, they do not have a clear legal framework to distinguish between a secondary party who was merely present and one who by their presence had assisted or encouraged. Juries are left to make life-altering decisions with an absence of clear parameters and legal direction, heightening the risk of inconsistent and discriminatory outcomes, and wrongful conviction.

The racialised use of the 'gang'

This risk of prosecuting and convicting people who are not complicit is heightened by several factors that may influence police investigations, charging decisions and the prosecution's case at trial. One common example is where the suspect is believed by authorities to be a gang member.

> *"It's the default assumption… when referring to a group of usually young Black men, to refer to them as a gang, whether or not they are officially affiliated or there's any sort of formal connection… I think it's become a common narrative now to the point where no one questions it, where no one thinks should we actually be charging this, should we actually be going for murder for all of these people, it's just, 'it's a gang crime, there's been a death – joint enterprise."*
> Junior Barrister

As acknowledged by the Crown Prosecution Service (CPS), if used inappropriately, the gang label 'risks casting the net of liability beyond that which can be established' (CPS, 2021), and there are ongoing concerns that the label is applied erroneously and discriminatorily. There is also disagreement about what should constitute gang evidence.

"The word gang can be a powerful tool in the hands of a skilled prosecutor"
Mosley, 2021

It is crucial to recognise that the application of law and prosecution practices are not isolated from broader policies and police practices that inform decision-making. In terms of policy, academics have located the resurgence of joint enterprise in the early 2000s as part of a government strategy to tackle serious youth violence and gangs (Green and McGourlay, 2015; Squires, 2016; Williams and Clarke, 2016). Indeed, a recurring theme in the criticisms of joint enterprise concerns how the law has been developed and used under the purported guise of furthering these policy goals (see Jacobson and Kirby, 2016).

The effectiveness of joint enterprise as a response to youth violence has been robustly challenged by researchers and campaigners, partly due to disagreement over the definition of gangs and concerns about the racially discriminatory application of the gang label.

In terms of policing, police intelligence, which has been criticised for racial bias (see for example Amnesty International, 2018) and is formulated through tools like stop and search, shapes gang evidence and prosecution case theory. Black people, who are disproportionately prosecuted under joint enterprise (Mills, Ford and Grimshaw, 2022; CPS, 2023), are stopped and searched four times more often than White people, according to the most recently available figures (Stop Watch, 2023). Every interaction they have with the police 'leaves a trace' (Casey, 2023, 320) irrespective of whether a crime occurred. The proliferation of intelligence-led policies only exacerbates this concern, including the implementation of online intelligence gathering initiatives that are criticised for profiling young people

Juries are left to make life-altering decisions with an absence of clear parameters and legal direction, heightening the risk of inconsistent and discriminatory outcomes, and wrongful conviction.

on a large scale and 'harvesting' data on young Black men without 'any evidence of them committing a crime' (Stafford Scott, quoted in the *Guardian,* 2023).

"We're never going to get away from the intelligence-based policing that's led to the arrest, because it's going to feed into so much of the evidence that ends up before the prosecutor in so many ways"
Solicitor

Young Black men are also more likely to reside in communities that are disproportionately identified by the police as having a 'gang problem' (Williams and Clarke, 2016), and the prosecution rely on the police interpretation of gangs at trial. One young man, Ryan,[11] who was interviewed as part of the wider research informing this report, reported that cell site data indicating his time spent in a housing estate where his friends lived was used as evidence of his 'gang affiliation' as the police considered it a 'gang hotspot'.

Young Black men, even if not complicit in an offence, are more likely to enter the police station and the courtroom accompanied by a backdrop of information that could support the inference of complicity, simply by virtue of how they are policed. They are also more likely to be stereotyped as violent and gang-affiliated, even without evidence to support this assertion.

Underpinning this debate are concerns that aspects of Black youth culture and the innocent actions of young

One young man, Ryan, who was interviewed as part of the wider research informing this report, reported that cell site data indicating his time spent in a housing estate where his friends lived was used as evidence of his 'gang affiliation' as the police considered it a 'gang hotspot'.

people are being incorrectly conflated with gangs. For example, social media usernames, clothing and music, including a defendant's mere appearance in a rap music video, have been utilised to imply 'gang affiliation' in criminal trials (Williams and Clarke, 2016; Garden Court Chambers, 2021; Art Not Evidence, 2024; Quinn, Kane and Pritchard, 2024). Even in cases where 'gang evidence' is inadmissible, prosecutors use language that, as one barrister put it, would still 'allow an inference to be drawn that there is a gang issue'. This might include references to rap music or phrases like 'turf' or 'territory', which all evoke stereotypical assumptions associated with gangs.

This argument, which is both far more nuanced and wide-ranging than set out here, should prompt us to consider who is most vulnerable to bias and discrimination in decision-making without clear legal directions and parameters on contribution. Where the secondary party's conduct in relation to the offence is minimal (e.g. presence at the scene) and there is no direct evidence of their intention, it is often difficult to see how a jury could be sure that they were complicit. It is in such cases that advocates for reform express concern that jury decision-making may be predominantly driven by prosecution case theory and narratives, rather than by evidence.

A 'conviction-maximising' tool

So far I have illustrated how the absence of a legal test for contribution in secondary liability prioritises practicality over precision in prosecutions. However, legal vagueness can also present a challenge for prosecutors as they can be faced with the task of convincing a jury that a defendant who made no physical contribution to the crime intentionally assisted or encouraged the principal. This is where the prosecution's narrative and case theory become particularly significant. In such cases, a narrative linked to gangs might be particularly useful for prosecutors.

This section demonstrates how the prosecution can circumvent weaknesses in their case by evoking the gang, illustrating how the existing vague law may exacerbate racial disproportionality in joint enterprise convictions.

It is impossible to be certain of what motivates a jury. However, direct mentions of or discourse inferring 'gang affiliation' open a 'doorway to a host of pre-conceived stereotypes that often point towards a guilty verdict'. (Mosley, 2021)

Consider two scenarios where there is evidence that the following occurred:

1. **Burglary scenario**
   D1, D2 and D3 have planned to commit burglary. D3 supplies a tool and D2 uses it to open the door. D1 and D2 enter the building and D1 steals jewellery. D3 waits directly outside the premises and acts as a look-out until D1 and D2 leave the premises.

2. **Homicide scenario**
   D1, D2, D3, D4, and D5 are playing basketball near their homes. D1 is carrying a knife. V walks past the group playing basketball and makes a rude remark. D2 pushes V in response and V pushes D2 back. V then

runs away but D2 runs after V. D1, D3, D4, and D5 all run behind D2, and D3 shouts 'come on'. D1 and D2 catch up with V. D1 and D2 punch and kick V multiple times. Less than 30 seconds later, D1 pulls out a knife and stabs V, resulting in V's death. D3, D4 and D5 are more than 30 metres away when this occurs.

It is plausible to suggest that in both scenarios all defendants could be charged with the same crime. However, the complicity of D2-3 in the burglary scenario is far more demonstrable when compared to the complicity of D3-5 in the homicide scenario. In the burglary scenario, where there is clear evidence of assistance, a prosecution case theory centred around gangs is unlikely to offer any additional context that would assist a jury in deciding complicity. The same cannot be said for the homicide scenario.

The overrepresentation of young Black men in joint enterprise convictions is frequently attributed to the erroneous application of the stereotypical narrative of gangs. However, the prosecutorial function of the gang narrative and the specific mechanisms at play in court when it is used by prosecutors is under-explored.

Where a defendant's assistance or encouragement is not easily demonstrable, a prosecution narrative that evokes gangs could enhance the prospect of conviction by:

1. establishing a contextual backdrop and shared motive for the offence;
2. assuming shared knowledge between the defendants;
3. constructing a state of permanent conditional intent; or
4. portraying a criminal character.

Point four requires little explanation. The 'gang' immediately creates an impression of a person habitually engaged in harmful and violent group behaviour. However, let us consider points 1-3.

1. Shared motive

The prosecution is not obliged to prove motive for an offence. Nonetheless, doing so can weave a logical thread between the crime and the defendants, thereby influencing how juries perceive the defendants' state of mind. An example might be that a gang is attributed with a history of hostility towards the victim and the secondary defendant is said to be 'affiliated' with that gang. Consider that D1-5 in the homicide scenario are said to be part of the same gang and the victim is argued to be a 'rival gang member'. This framework lends itself to notions of 'revenge' and 'tit-for-tat' gang violence, which can signify a common intention to harm the victim, irrespective of each defendant's physical conduct.

A barrister accentuated the value of establishing motive, contending that juries often feel more comfortable rendering a conviction when they can discern the underlying reasons behind the incident. In this context, the 'gang' can function to elucidate the 'why' behind the crime:

> *"Although you don't have to prove a motive, I think juries always feel more comfortable if they can understand why something has happened. And it may be that the gang evidence provides the why."*
> Senior Barrister

Lawyers reported that defendants' mere appearance in rap music videos, in which the prosecution sometimes argue are references of hostility towards a purported gang, is often key evidence used to infer this collective motive. As expressed by one lawyer, even a 'cameo appearance' in a music video can therefore become 'a major plank in the prosecution's case'.

A 2017 joint enterprise murder case in Manchester captured these concerns. In this case, which has been referred to the Criminal Cases Review Commission,[12] 11 Black and mixed-race teenagers were sentenced to a total of 168 years for one murder. The prosecution gang narrative evoked in this case has been described as 'the glue that held the prosecution case together' (Keir Monteith KC, 2023), underpinned by a rap music video, used as evidence of the defendants' 'membership' or 'allegiance' to the 'gang'.

2. Shared knowledge

Joint enterprise has faced longstanding criticism for its perceived ability to render people 'guilty by association'. According to English Law, a person should not be held liable based on association alone. However, such connections are considered relevant evidence that could be leveraged to infer shared knowledge of the facts surrounding the offence and the principal's intention to the commit the crime.

By drawing on criminal affiliations between defendants, the prosecution gains an advantageous foundation from which to insinuate that secondary defendants were cognisant of the principal's intentions, notwithstanding their absence of physical conduct. This could stand as evidence of the secondary party's intention.

A barrister accentuated the value of establishing motive, contending that juries often feel more comfortable rendering a conviction when they can discern the underlying reasons behind the incident. In this context, the 'gang' can function to elucidate the 'why' behind the crime

While the gang narrative is not a prerequisite for inferring knowledge in this way, by establishing close associations rooted in a criminal enterprise, the gang narrative has a greater ability to infer that a secondary defendant would also be aware of the principal's prior violent conduct or possession of weapons. Consider D3-5 in the homicide scenario. If it could be inferred that they knew D1 was in possession of a knife, it would be easier to demonstrate that, by running behind D1 and D2, they were intentionally encouraging them to commit serious harm.

The problem here is that subjective knowledge is not actually demonstrated. The jury is invited to infer it, ultimately, by assumption. Juries are not given clear legal directions on the determination of a secondary party's knowledge. While knowledge of weapons alone is not considered enough to convict, as put by one lawyer, it is still 'doing a hell of a lot of work in terms of getting you closer to conviction'.

By constructing a combination of motive and knowledge, the 'gang' begins to provide a powerful story as to why those who did not physically contribute intended to assist or encourage the crime. This interplay between motive and knowledge within the gang narrative is therefore able to construct a robust story, providing a rationale behind the involvement of individuals who made little or no physical contribution.

One lawyer gave an example of a case they worked on. In this case, they said, the gang narrative provided the jury with an explanation as to why the defendants would be involved (motive), while also showcasing their awareness of their co-defendant's capabilities and likely intentions (knowledge), despite them being on the 'periphery' of the offence:

> *"[The gang] linked them all together and gave them all motive to be involved in the attack*

according to the prosecution. So the ones who were sort of involved on the periphery, the prosecution could still say well, they weren't there by accident, they came here deliberately for a purpose, with people, they knew what the people were like, they knew what the gang behaviour was like…"
Junior Barrister

By articulating criminal connections between all defendants and attributing them with a shared motive, the gang narrative lends credence to the idea that those who made no physical contribution, but were present, purposefully congregated with the principal while well-acquainted with their co-defendant's characteristic and tenor of violence.

3. A permanent state of conditional intent

The above illustrates how the gang narrative, by indicating a shared motive and common knowledge, can assist prosecutors in constructing a criminal purpose for the presence of an individual at the scene of a crime. It could therefore be argued that there is less need for the prosecution to focus on the defendant's physical conduct when the 'gang' is evoked. Put in a simplified way:

"They don't need to prove that you did anything. If you're part of a gang, it doesn't matter because the actus reus and the mens rea is being in the gang."
Solicitor

However, it is particularly concerning that the gang narrative could be used to make this inference, even in cases of spontaneous violence. The 'gang' indicates an identity that is consumed by violent conflict. The popular image of the 'urban Black gang' embroiled in so-called 'post-code wars' or other territorial feuds depicts young people who are always intent on violence should it arise. Consequently, the 'gang' produces a framework resemblant of conditional intent in cases of spontaneous violence. That is, if a spontaneous incident of violence breaks out due to ongoing 'gang conflicts', gang members are always 'ready' or acting in a supportive capacity, irrespective of their physical contribution.

The gang narrative can effectively void any notion of spontaneity or mere presence in a violent act. This was articulated by a recently retired Crown Court judge who used the example of two gangs bumping into one another unexpectedly.

"Gang A are armed and gang B are armed… it's spontaneous because they bump into each other, but it's planned because they're a little army…"

This observation was also reflected in a disclosure from a young man called Shaqueel, who was charged as a secondary party to murder and convicted of manslaughter when he was 17 years old. Shaqueel described how the incident at the centre of his case unfolded in a spontaneous manner. He says it was accepted that he and his friend were confronted by two people with knives, before his friend, in retaliation, stabbed one of two young people. The spontaneity of the incident is likely reflected in the fact that the jury found Shaqueel guilty of manslaughter as opposed to murder. Yet, he described how the prosecution evoked the gang narrative to suggest that the incident was not truly spontaneous. Rather, the prosecution argued that he and his friend were purposefully 'chilling on the block' waiting for or expecting their 'rivals'.

"That was [the prosecution's] whole thing, that I woke up one day, I called my friend and I said to him, let's stay outside, let's chill on the block, bring your knife… let's wait for people to come and then let's kill them… that was their whole thing init,

premeditated… For them, that means you're a gang… if you're just chilling on the block… that was the way my life was init."

The above demonstrates how the gang narrative can enhance the prospect of conviction in secondary liability cases. It does so by offering a frame through which the entirety of a case against a defendant who made little or no physical contribution to an offence can become more coherent and comprehensible to a jury. The gang narrative can address weaknesses within the prosecution case, which are more likely to present themselves because of the vagueness of the law on contribution. The risks presented by legal vagueness and flexibility in joint enterprise are therefore borne by those who are most likely to be labelled gang members – defendants who are young, Black and male. The current law and its vagueness are therefore likely to exacerbate problems relating to racism and disproportionality in secondary liability.

One lawyer likened the conviction-maximising capacity of the gang narrative to 'throwing petrol' onto a law that is 'hazy and undefined' to 'inflame it'

The true extent of how the gang narrative influences charging decisions and jury decision-making is difficult to discern, mostly due to a lack of transparency at these stages of the prosecution process. The legal safeguards that ensure the confidentiality of juror deliberations make it impossible to know precisely how certain types of evidence or discourse impact jury verdicts. CPS charging decisions are also not transparent, meaning the degree to which police gang intelligence reports about suspects, or police gang case theory, shape charging decisions is enigmatic.

Despite this, among most of the lawyers interviewed as part of the wider study informing this report (including those who predominantly did prosecution work), there was an acute awareness of the potential for the gang narrative to fill a deficit in the prosecution's case. One lawyer likened the conviction-maximising capacity of the gang narrative to 'throwing petrol' onto a law that is 'hazy and undefined' to 'inflame it'. Another felt that, where the prosecution lacked confidence in the strength of their case, they were more inclined to rely on the 'gang' in this way.

4 Considering objections to changing the law

The introduction to this report noted that English law in relation to joint enterprise 'is vague and ambiguous', with an 'absence of a clear and reasonable threshold for juries to determine the criminal liability of a secondary party who did not carry out the crime'. A legislative proposal to clarify the threshold in relation to secondary liability law was made earlier this year by Kim Johnson MP in the form of a Private Members' Bill. The Bill sought to amend the Accessories and Abettors Act 1861 so that only those who made a significant contribution to a crime could be held liable for it (Joint Enterprise [Significant Contribution] Bill, 2024). It set out a proposal to address the issue highlighted here of the broad scope of secondary liability law causing unjust convictions.

The Bill brought together a wide coalition of legal experts, academics, campaigners and parliamentarians to support the proposed parliamentary intervention. The author of this report and the Centre for Crime and Justice Studies supported the Bill.

Despite some bipartisan concern about the current joint enterprise law, neither main political party endorsed the Bill before it fell at the end of the parliamentary session. However, in response to the Bill, Janet Daby MP, then Shadow Minister for Youth Justice, stated 'Labour has previously said that it would look to reform joint enterprise, and that remains our ambition' (Janet Daby MP, HC debate, 2 February 2024).

Whilst the concrete action the new Labour government will take on this is uncertain, it raises the prospect of potential progress in the future. Given this, it may be useful to review the main arguments used against the Joint Enterprise [Significant Contribution] Bill, 2024, as they are likely to be revisited in any future debates about reform.

Some arguments against the Bill held little merit. Those that merely repeated claims that the Supreme Court adequately resolved the issues regarding joint enterprise prosecutions, or that regurgitated simplified case scenarios such as the 'getaway driver' in the bank robbery, wilfully or not, failed to engage with the nuances of the law and its practical application. Others expressed frustration about the acquittal of defendants or the (very rare) quashing of convictions in joint enterprise cases. These frustrations about case outcomes are often misdirected as they reflect an evidential deficit that is not isolated to secondary liability cases.

Concerns that 'significant contribution' is too difficult to determine and concerns that reducing the current vague law risks some guilty people being acquitted are two more substantive objections to consider.

Defining significant contribution

Those opposed to the Bill voiced apprehensions about the subjective interpretation of the term 'significant contribution', as well as the practicality of formulating a legal test and providing guidance to juries on its application. The specific framework for such a test and how it might work should be the subject of further work by legal experts such as the Law Commission; this is not an insurmountable barrier to reform, particularly since subjective terms like 'substantial' and 'reasonable' are already adopted in other legal tests.

The then government's most pertinent argument was that mandating prosecutors to demonstrate that a defendant made a significant contribution to the offence would be too difficult, citing cases where it was impossible to ascertain which suspect(s) carried out the offence and how each person contributed. Laura Farris MP cited a 2010 murder homicide case:

> *"A group of young men who chased another young man… down the escalator where they set upon him. In the course of that action where the*

young man was attacked, he was kicked in the head… he was also stabbed, and he died… it was impossible to say who had struck the fatal blow with the knife, who had enlisted the fatal kick to the head and the whole group of assailants was put on trial… a number were convicted of murder, a number were convicted of manslaughter… they could not identify who had made the significant contribution..."
HC debate, 30 January 2024

This argument is illustrative of a long-held approach by the state to prosecute all parties regardless of who actually contributed and how. That said, introducing a test for significant contribution might not prevent the prosecution of defendants in cases like this, in part depending on how jurors are directed by the judge on the matter. The prosecution could potentially still argue that the initial chase constitutes significant contribution. It would simply be up to a jury to decide whether this 'chase' and the circumstances surrounding it constituted a palpable act of assistance or encouragement that was intentional and had a clear effect on the principal's conduct. It is also worth noting that prosecutors would still be able to charge alternative offences for group altercations in line with individuals' conduct.

Guilty people might be acquitted

Responses the Bill received through media and outreach work also surfaced concerns that guilty people would not be convicted if some form of test, such as for significant contribution, was introduced, particularly if this encouraged a minimum threshold for a secondary party's physical conduct.

Physical conduct (the assistance or encouragement) and contribution, while somewhat distinct considerations, are interconnected issues. If there were stricter parameters defining physical conduct, it may, if anything, be easier to demonstrate that a significant contribution was made. However, where a person's presence at the scene of a crime or a series of phone calls can suffice as assistance or encouragement, it would become more difficult to demonstrate significant contribution. Introducing a test for significant contribution would therefore likely have little impact on the conviction of individuals whose physical conduct clearly demonstrated assistance or encouragement. However, it may change outcomes in cases where the defendant's physical conduct is not so clearly indicative of assistance or encouragement.

There are valid reasons for carefully considering the implications of such reform. Consider a scenario where somebody agrees to accompany the principal in a robbery, intending to act as an intimidating presence and intervene if necessary. Or a situation where an individual provides the principal with the whereabouts of a person through a phone call, with the knowledge of the principal's intention to murder that person. On the one hand, there are concerns that these guilty people could evade prosecution if the law is amended. However, it is equally conceivable that, under the current law, individuals who were merely present at the scene or made a phone call to the principal but did not intend to assist or encourage the crime could be prosecuted and convicted.

The arguments put forth in response to the Bill therefore highlight a contention between the perceived benefits and downfalls of legal precision vs legal vagueness:

- **Legal precision (reforming the law)**
  Should ensure that people who are convicted made a significant contribution to the crime and are

genuinely complicit, but might enable the acquittal of some people who are complicit.

- **Legal vagueness (maintaining the status quo)** Enables the conviction of people who made no significant contribution to the crime and risks convicting those who are not complicit, but allows for convictions where it is not possible to determine the contribution of each party who is suspected of being involved.

Moving forward, if resistance to law reform continues to be driven by concerns that prosecutions may become more difficult, the crux of the matter comes down to the priorities of justice and how much the government cares about preventing wrongful convictions and their grave implications for all those involved. In the wake of the exoneration of Andrew Malkinson and the Post Office scandal, the government cannot assume that British justice is operating fairly.

However, it is equally conceivable that, under the current law, individuals who were merely present at the scene or made a phone call to the principal but did not intend to assist or encourage the crime could be prosecuted and convicted

5 Conclusion and priorities for action

While acknowledging the lawbreaking and tragic loss of life at the centre of each joint enterprise homicide case, it is essential to confront the unrelenting concerns surrounding the application of this law and the harm that results from it.

This report demonstrates the unjust, risky consequences of the current vague law.

There are reasonable concerns about the feasibility and impact of joint enterprise reform. However, the current legal framework leaves the state unable to confidently assert that only those truly responsible are being convicted. Narrowing the scope of the law should encourage better precision from the police and prosecutors from the outset of charging a case, and allow greater confidence that juries are convicting defendants based on their contribution to the crime, rather than the prosecution's case theory and narrative.

A lack of meaningful engagement from law-makers on the urgency of this issue to date demonstrates a persistent disregard for the risks presented by the current law, including overcriminalisation, over punishment, discriminatory outcomes, and convictions where there is no compelling evidence of intent and a defendant's physical contribution is minimal.

There is a clear case to narrow the scope of the law to create a safer framework for prosecution and ensure greater consistency and fairness in outcomes.

There is a clear case to narrow the scope of the law to create a safer framework for prosecution and ensure greater consistency and fairness in outcomes.

A minimum next step is for the government to request a Law Commission review. Such a review could develop well evidenced proposals to:

- narrow the wide scope of the law.
- provide a fairer framework for secondary liability sentencing, including considering the appropriateness of mandatory life sentences.

Law reform however, is not a panacea to injustice. Narrowing the scope of the law will not eradicate wider issues, including those concerning the prosecution practices discussed in this report. It would also be naive to think that law reform could challenge systemic and institutional racism. Alongside legal reform, wider work needs to be done to challenge racialised and overzealous police and prosecution practices.

Various unjust processes have flourished under the current vague law. The current approach to group prosecutions is unsafe and discriminatory. Greater rigor, quality and precision as to the role of each defendant needs to be brought to police and CPS secondary liability charging decisions, and prosecution case theory. The overuse and misuse of gang evidence also needs to be addressed.

Action regarding these matters does not need to wait for a change in the law.

In exploring avenues for reform, the government must remember that communities, lawyers, campaigners and politicians, have been demanding change for decades. Some individuals' lives have been irreparably damaged by the current harms of joint enterprise prosecutions, illustrating the urgency of the need for change.

Notes

1 The author's research was carried out as part of a PhD at the University of Oxford, Centre for Criminology, Faculty of Law. At the time of writing it is not yet published in full.

2 In consulting legal experts while writing this report, concerns have been raised that a wider definition of 'principal' is potentially being adopted and used in practice. If so, the implications are that defendants are considered 'co-principals', not because the prosecution has proven that they committed the crime alleged, but because they made a more than minimal contribution to the crime. This, in effect, collapses the division between principal and secondary liability by making people into principals who should be considered as secondary parties. That different interpretations of what constitutes being a principal exist amongst legal actors speaks to the fact that the law is not clear enough.

3 *R v Chang Wing Sui* [1985] AC 168

4 See for example *R v Rook* [1993] 1 W.L.R. 1005 - the Court of Appeal ruled that foresight was still sufficient as a reason of fault and an intention to kill or cause serious harm was not required to convict. The court therefore decided that the downgrading of the mens rea requirement extended beyond PAL cases.

5 *R v Jogee* [2016] UKSC 8

6 See para 11 and 12 in *R v Jogee* UKSC 8

7 See for example *R v Calhaem* [1985] Q.B. 808 and para 48 in *R v Stringer* [2012] Q.B 160

8 See para 2.36

9 *R v Hussain* [2023] EWCA Crim 697

10 Appellants Hammad and Saddam are referred to by their middle names as they both have the same first and last names.

11 Any names used in this report to describe interview participants are pseudonyms.

12 The Criminal Cases Review Commission (CCRC) is the body that investigates potential miscarriages of justice in England, Wales and Northern Ireland.

References

Accessories and Abettors Act 1861, s. 8. Available at: https://www.legislation.gov.uk/ukpga/Vict/24-25/94/section/8 [Accessed: 08 Jun. 2024].

Amnesty International (2018). *TRAPPED IN THE MATRIX Secrecy, stigma, and bias in the Met's Gangs Database.* [online] Amnesty International. Available at: https://www.amnesty.org.uk/files/reports/Trapped%20in%20the%20Matrix%20Amnesty%20report.pdf [Accessed 8 Jun. 2024].

Art Not Evidence (2024). *Art Not Evidence: An open letter to the Secretary of State for Justice.* [online]. Available at: https://artnotevidence.org/ [Accessed 8 Jun. 2024].

Baroness Casey (2023). *The Casey Review: An independent review into the standards of behaviour and internal culture of the Metropolitan Police Service.* [online] Available at: https://www.met.police.uk/SysSiteAssets/media/downloads/met/about-us/baroness-casey-review/update-march-2023/baroness-casey-review-march-2023a.pdf [Accessed 8 Jun. 2024].

BBC (2010). Murder Sentence Changes Supported by Top Prosecutor. *BBC News.* [online] 8 Sep. Available at: https://www.bbc.co.uk/news/uk-11224583 [Accessed 8 Jun. 2024].

Crown Prosecution Service (2021). *Decision Making in 'Gang' Related Offences.* [online] www.cps.gov.uk. Available at: https://www.cps.gov.uk/legal-guidance/gang-related-offences-decision-making [Accessed 8 Jun. 2024].

Crown Prosecution Service (2023). *Crown Prosecution Service Joint Enterprise Pilot 2023: Data Analysis | The Crown Prosecution Service.* [online] www.cps.gov.uk. Available at: https://www.cps.gov.uk/publication/crown-prosecution-service-joint-enterprise-pilot-2023-data-analysis [Accessed 8 Jun. 2024].

Dyson, M. (2022). The Contribution of Complicity. The *Journal of Criminal Law,* 86(6), pp.389–419.

Garden Court Chambers (2020). *Part 4: Debunking prosecution myths: 'Gang' stereotypes, joint enterprise & racist driven stop & searches* Available at: https://www.gardencourtchambers.co.uk/events/part-4-debunking-prosecution-myths-gang-stereotypes-joint-enterprise-and-racist-driven-stop-and-searches [Accessed 8 Jun. 2024].

Green, A. and McGourlay, C. (2015). The Wolf Packs in Our Midst and Other Products of Criminal Joint Enterprise Prosecutions. *The Journal of Criminal Law,* 79(4), pp.280–297.

HC Debate (26 June 2023) vol. 735 col. 126 Available at: https://hansard.parliament.uk/commons/2023-06-27/debates/88071C4B-619C-4866-BCBF-04779F96CEE4/OralAnswersToQuestions [Accessed: 8 Jun. 2024].

HC Debate (30 January 2024) vol. 744 col. 483 Available at: https://hansard.parliament.uk/Commons/2024-01-30/debates/7d1d14c5-5336-444f-8a53-80468a1ac102/CriminalJusticeBill(FifteenthSitting) [Accessed: 8 Jun. 2024].

HC Debate (30 January 2024) vol. 744 col. 485 Available at: https://hansard.parliament.uk/Commons/2024-01-30/debates/7d1d14c5-5336-444f-8a53-80468a1ac102/CriminalJusticeBill(FifteenthSitting) [Accessed: 8 Jun. 2024].

HC Debate (2 February 2024) vol. 744 col.1148 Available at: https://hansard.parliament.uk/commons/2024-02-02/debates/206D12EF-7ACD-4848-8D23-A01311A2122B/JointEnterprise(SignificantContribution)Bill [Accessed: 8 June 2024].

Jacobson, J., Kirby, A. and Hunter, G. (2016). *Joint Enterprise: Righting a Wrong Turn? Report of an exploratory study. Prison Reform Trust.* [online] Available at: https://prisonreformtrust.org.uk/wp-content/uploads/old_files/Documents/Joint%20Enterprise%20Righting%20a%20Wrong%20Turn.pdf [Accessed 8 Jun. 2024].

Joint Enterprise (Significant Contribution) Bill (2024). Parliament: House of Commons. Private Members Bill. Available at: https://publications.parliament.uk/pa/bills/cbill/58-04/0027/230027.pdf [Last accessed 8 Jun. 2024].

Justice Committee (2014). *HC 310 House of Commons Joint Enterprise: follow-up Fourth Report of Session 2014-15.* [online] Available at: https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/310/310.pdf [Accessed 8 Jun. 2024].

Law Commission (2007). *The Law Commission Report 305, Participating in Crime.* [online] Available at: https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2015/03/lc305_Participating_in_Crime_report.pdf [Accessed 13 Jun. 2024].

Mills, H., Ford, M. and Grimshaw, R. (2022). *The Usual Suspects: Joint enterprise prosecutions before and after the Supreme Court ruling.* [online] Available at: https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/The%20usual%20suspects%2C%20April%202022%2C%20Superseded.pdf [Accessed 8 Jun. 2024].

Monteith, K. (2023). *Gross Miscarriage of Justice – Application to CCRC reveals jury misled to find Black teens guilty under Joint Enterprise.* Available at: https://www.gardencourtchambers.co.uk/news/gross-miscarriage-of-justice-application-to-ccrc-reveals-jury-misled-to-find-black-teens-guilty-under-joint-enterprise [Accessed 8 Jun. 2024].

Mosley, O. (2021). *The Use of Gang Affiliation as Evidence of Bad Character.* [online] QEB Hollis Whiteman. Available at: https://www.qebholliswhiteman.co.uk/cms/documents/gang-affiliation-as-evidence-of-bad-character-om.pdf [Accessed 8 Jun. 2024].

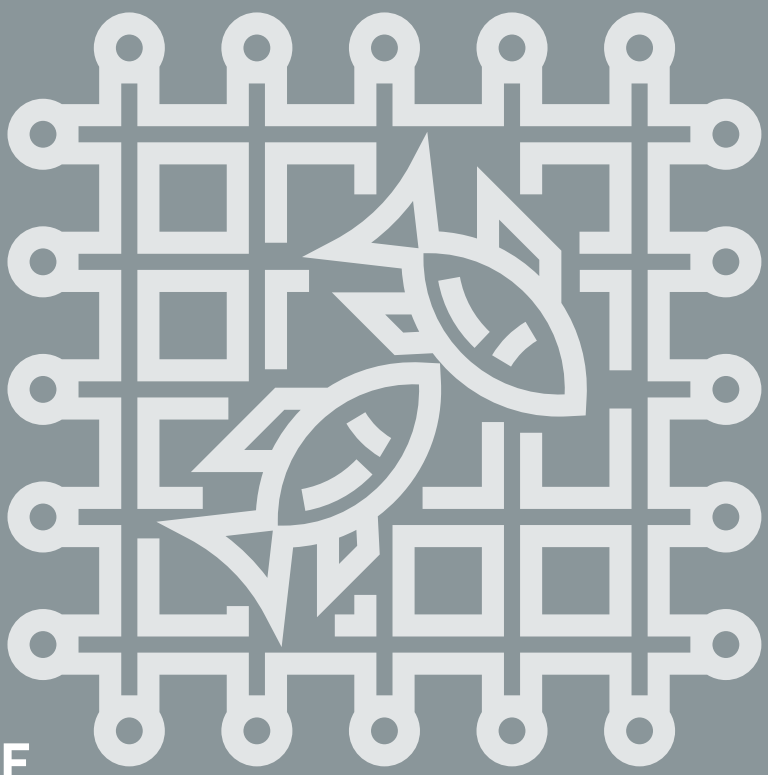
Quinn, E., Kane, E. and Pritchard, W. (2024). *Compound Injustice: A review of cases involving rap music evidence in England and Wales.* [online] Available at: https://documents.manchester.ac.uk/display.aspx?DocID=72455 [Accessed 8 Jun. 2024].

Stopwatch (2023). *Police powers procedures 2022/23: Section 60 signals lost in the noise* [online]. Available at: https://www.stop-watch.org/news-opinion/police-powers-procedures-202223-section-60-signals-lost-in-the-noise/ [Accessed: 8 Jun. 2024].

The Guardian (2023). *Met Police Operation Secretly Monitors Children Online.* [online] 6 Jun. Available at: https://www.theguardian.com/uk-news/2023/jun/06/met-police-operation-secretly-monitors-children-online [Accessed 8 Jun. 2024].

Williams, P. and Clarke, B. (2016). *Dangerous Associations: Joint enterprise, gangs and racism.* [online] Available at: https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Dangerous%20associations%20Joint%20Enterprise%20gangs%20and%20racism.pdf [Accessed 8 Jun. 2024].

At Centre for Crime and Justice Studies we create lively spaces for collaboration and learning, where conventional criminal justice policy agendas are scrutinised and challenged, fresh knowledge and ideas are discussed, and transformational solutions are developed



CENTRE FOR CRIME AND JUSTICE STUDIES