JOINT CRIMINAL ENTERPRISE

IN ENGLISH AND GERMAN LAW

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ABSTRACT

JOINT CRIMINAL ENTERPRISE IN ENGLISH AND GERMAN LAW

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This thesis explores the English doctrine of joint criminal enterprise by way of a comparative study. Joint enterprise allows for the conviction of an accomplice (S) of an offence (crime B) committed by his associate-in-crime (P) on the basis of S's *foresight* of its commission by P as a *possible* incident to their joint criminal venture (crime A).

While it is generally accepted that this common law principle needs reforming, successive governments have declined to take on the task. Against this backdrop, this thesis explores whether the contentious features of joint enterprise liability might be reformed by way of common law development. To this end, the thesis examines the doctrine's constituent elements, its function, underlying rationale and place within the structure of primary and secondary liability. Particular emphasis is put on the specific problems associated with the application of joint enterprise liability in the context of murder. Looking at the functional equivalents of joint enterprise in German law, the thesis challenges the orthodox view that joint enterprise is a head of liability available to the prosecution alongside co-perpetration and aiding and abetting. Indeed, it argues that an *inculpatory* function of the principle is difficult to justify and suggests that, both historically and as a matter of principle, it is better seen as an *exculpatory* device aimed at delineating the scope of co-perpetration and aiding and abetting. The thesis concludes that the current law does not serve this function very well, as its *mens rea* threshold (some form of recklessness, when proof of intention is needed to convict the principal offender) sets the hurdle for conviction of secondary parties indefensibly low. Informed by ideas taken from German law – especially an extended concept of intention known as *dolus eventualis* – the thesis's principal contention is that English law would do better defining joint enterprise liability in terms of *foresight plus endorsement*. Indeed, the thesis aims to show that English law was very close to such a conception, and that the common law took a wrong turn in *Powell*. It concludes that it is still open to the Supreme Court to adopt an endorsement-focussed approach to joint enterprise liability, thereby alleviating concerns that the law in this area is too harsh and over-inclusive, and bringing it closer to the threshold of liability for principal offenders which requires proof of intention. Such an approach would also make the law of complicity more principled and coherent.

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TABLE OF ABBREVIATIONS

§, §§	Section, sections
All ER	All England Law Reports
Ashworth and Horder	Ashworth A and Horder J, *Principles of Criminal Law* (7th edn, OUP 2013)
AT	*Allgemeiner Teil* (= General Part of the German Penal Code)
BeckOK StGB/contributor	*Beck'scher Online-Kommentar StGB*, Bernd von Heintschel-Heinegg (ed), (25th edn, CH Beck, updated: 10.11.2014)
BeckRS	*Beck Rechtsprechung*
BGBl. I, II	*Bundesgesetzblatt Teil I, Teil II*
BGH	*Bundesgerichtshof* (= Federal Court of Justice)
BGHSt	*Entscheidungen des Bundesgerichtshofs in Strafsachen* (= Official Gazette of the Decisions of the Federal Court of Justice in Criminal Matters, cited by volume and page)
BT	*Besonderer* Teil (Special Part of the German Penal Code)
BT-Drucks	*Drucksache des Deutschen Bundestages* (cited by legislative period and number)
BVerfG	*Bundesverfassungsgericht* (= Federal Constitutional Court)
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts* (= Official Gazette of the Decisions of the Federal Constitutional Court, cited by volume and page)
CA	Court of Appeal
CLJ	Cambridge Law Journal
Crim L Forum	Criminal Law Forum
Crim LR	Criminal Law Review
CUP	Cambridge University Press
GA	*Goltdammers Archiv für Strafrecht*, cited by year and page
GBH/gbh	grievous bodily harm
GG	*Grundgesetz* (= Basic Law, Constitution)
GVG	*Gerichtsverfassungsgesetz*
Harv Int'l LJ	Harvard International Law Journal
HL	House of Lords
HRRS	*Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht*
ICLQ	International Comparative Law Quarterly

JA	*Juristische Arbeitsblätter* (cited by year and page)
JICJ	Journal of International Criminal Justice
JR	*Juristische Rundschau* (cited by year and page)
Jura	*Juristische Ausbildung* (cited by year and page)
JuS	*Juristische Schulung* (cited by year and page)
JZ	*Juristenzeitung* (cited by year and page)
Kindhäuser/Neumann/Paeffgen/contributor	Kindhäuser U, Neumann U, Paeffgen H-U (eds), *Strafgesetzbuch* Vol 1 (4th edn, Nomos 2013, cited by section and marginal number)
Lackner/Kühl/contributor	Lackner K and Kühl K, *Strafgesetzbuch Kommentar* (28th edn, CH Beck 2014, cited by section and marginal number)
Law Com	Law Commission
LG	*Landgericht* (= District Court)
LK-contributor	*Leipziger Kommentar zum Strafgesetzbuch, Erster Band: §§ 1 bis 31,* Laufhütte HW, Rissing-van Saan R, Tiedemann K (eds) (12th edn, de Gruyter 2007, cited by section and marginal number)
LQR	Law Quarterly Review
MLR	Modern Law Review
MüKoStGB/contributor	*Münchener Kommentar zum Strafgesetzbuch* (Vol 1: §§ 1-37 StGB, von Heintschel-Heinegg, ed) (2nd edn, CH Beck 2012, cited by section and marginal number)
NJW	*Neue Juristische Wochenschrift* (cited by year and page)
NStZ	*Neue Zeitschrift für Strafrecht* (cited by year and page)
NStZ-RR	*Neue Zeitschrift für Strafrecht Rechtsprechungs-Report* (cited by year and page)
OAPA	Offences against the Person Act 1861
OJLS	Oxford Journal of Legal Studies
OLG	*Oberlandesgericht* (= State Supreme Court)
OUP	Oxford University Press
RG	*Reichsgericht* (= Imperial Court)
RGSt	*Entscheidungen des Reichsgerichts in Strafsachen* (= Official Gazette of the Imperial Court, cited by volume and page)
RuP	*Recht und Politik* (cited by year and page)
SC	UK Supreme Court

S Cal L Rev	Southern California Law Review
Schönke/Schröder/contributor(s)	Schönke A and Schröder H, *Strafgesetzbuch Kommentar* (29th edn, CH Beck 2014, cited by section and marginal number)
Simester and Sullivan	Simester AP, Spencer JR, Sullivan GR, Virgo GJ, *Simester and Sullivan's Criminal Law – Theory and Doctrine* (5th edn, Hart 2013)
Smith and Hogan	Ormerod D and Laird K, *Smith and Hogan's Criminal Law* (14th edn, OUP 2015)
StGB	*Strafgesetzbuch* (= German Penal Code)
StV	*Strafverteidiger* (cited by year and page)
Vor §	*Vorbemerkungen zu den §§* (= preliminary remarks to §§)
WLR	Weekly Law Reports
ZRP	*Zeitschrift für Rechtspolitik* (cited by year and page)
ZStW	*Zeitschrift für die gesamte Strafrechtswissenschaft* (cited by year, volume and page)

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Chapter 1: INTRODUCTION

A Introduction

Two individuals, P and S, are engaged in the burglary of V1's house. They gain access by prying open the back door with a metal bar which P then continues to carry with him. When, surprisingly, they come across the householder, P fears that V1's cries for help will alarm the neighbours. To silence him, he hits V1 forcefully on the head with the metal bar, realising that in doing so he is virtually certain to cause V1 serious harm. In the event V1 dies of his injuries.[1]

Later that day, P and S take part in a fight between rival gangs. While S expects a fist fight aimed at 'teaching' their rivals 'a lesson', he is aware that P, whom he now knows to be of a violent disposition, is still carrying the metal bar. As things become more heated, P uses the bar to hit V2 ferociously on the head. V2 dies.

There is little doubt that P has committed murder in both instances: he has caused the death of another person with (at least) intent to inflict really serious injury.[2] But what about S? Is he also guilty of murder? On both occasions, P and S were jointly involved in a criminal venture (burglary, assault). They were associates-in-crime. However, on neither occasion had they set out to commit murder specifically. If murder had been on their minds, there would be little difficulty in holding them both to account for V1's and V2's deaths: if not as co-perpetrators (for lack of participation in the *actus reus* on S's part), then P as the

[1] A similar example is used by AP Simester, 'The mental element in complicity' (2006) 122 LQR 578, 593. See also *Hyde* [1991] 1 QB 134 (CA) 138D (Lord Lane CJ): 'There are, broadly speaking, two main types of joint enterprise cases where death results to the victim (…) The second is where the primary object is not to cause physical injury to any victim but, for example, to commit burglary. The victim is assaulted and killed as a (possibly unwelcome) incident to the burglary.'

[2] *Cunningham* [1982] AC 566 (HL).

perpetrator and S on the basis of aiding and abetting (for he encouraged P to kill V1 and V2).[3]

In the above examples things are different, however, in that the *purpose* crime (burglary, assault) differs from the one that P and S are now accused of (murder). In a deviation from their common plan or purpose (burglary, assault), P has killed another person, albeit that each murder was committed on the occasion of, and hence *incidentally* to, carrying out the purpose crime.

The issue thus raised by the above examples is whether S is liable for a murder committed by P *incidentally* to their joint criminal venture (which was aimed at the commission of a crime other than murder). English common law gives an affirmative answer to this question, provided that S was engaged in the joint criminal enterprise *realising* that P *might* commit murder as a corollary offence (which requires S to have realised that P *might* attack V1 and V2 with the requisite *mens rea*, ie *intent to kill or to cause them serious harm.*)[4]

The imposition of liability on S for P's incidental crime has come to be known as the *doctrine of joint criminal enterprise*. Most agree that, while of great importance in practice, this doctrine is far from satisfactory: most academic commentary portrays it in overwhelmingly negative terms.[5] Even the case law, while insisting it is still good law, finds the principle wanting in some respects.[6] The Law Commission and the House of Commons Justice Committee have recommended statutory reform as a matter of some

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3 See *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [33] (Lord Rodger): '[I]f A and B agree to kill their victim and proceed to attack him with that intention, they are both guilty of murder, irrespective of who struck the fatal blow. In Lord Hoffmann's words (Brown v The State [2003] UKPC 10, para 13), they are engaged in a "plain vanilla" joint enterprise.'

4 *Powell* [1999] 1 AC 1 (HL); *Rahman* [2008] UKHL 45, [2009] 1 AC 129.

5 See eg CMV Clarkson, 'Complicity, Powell and manslaughter' [1998] Crim LR 556, 557-558; Graham Virgo, 'The doctrine of joint enterprise liability' (2010) Archbold Review 6, 9; Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 854; William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 5-21.

6 *Powell* [1999] 1 AC 1 (HL) 11 (Lord Mustill), 25 (Lord Hutton).

urgency.[7] However, successive Justice Secretaries have expressed little enthusiasm for following this advice.[8] Against this backdrop, this thesis will explore whether the contentious features of the current law could be improved by way of common law development.

The German *Strafgesetzbuch* does not recognise joint enterprise liability as such,[9] but German law has to grapple with issues of accomplice liability for incidental crimes as well, of course. They arise in the context of co-perpetration and aiding and abetting, where principles are needed which delimit the scope of these attribution principles. German law can dispense with a separate doctrine of joint criminal enterprise because it has a more differentiated, and ultimately broader, concept of intention. In this thesis, I will examine these aspects of German law in order to see whether similar approaches might be fruitful in advancing the joint enterprise debate in English law.

The English doctrine of joint enterprise is not restricted to murder,[10] but homicide is the context in which this principle of common law has been applied predominantly and against which its constituent elements have been developed. For this reason, this thesis will focus on *joint enterprise murder*.[11]

While most of what will be argued in the following chapters equally applies in the context of other crimes, some problems are specific to joint enterprise murder or at least come more acutely to the fore in this context:

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7 Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006); Law Commission, *Participating in Crime* (Law Com No 305, 2007); House of Commons Justice Committee, *Joint Enterprise – Eleventh Report of Session 2010-12*, vol I (HC 1597, 2012); House of Commons Justice Committee, *Joint Enterprise: follow-up – Fourth Report of Session 2014-15* (HC 310, 2014).

8 Kenneth Clarke indicated that the Committee's recommendations in relation to consulting on new legislation would not be taken up in the foreseeable future, see <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/1901/190104.htm> accessed 21 May 2015. Chris Grayling was even less sympathetic, see <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/1047/104704.htm> accessed 21 May 2015.

9 Kai 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' (2007) 5(1) JICJ 208, 209.

10 *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [8] (Lord Bingham).

11 This is not to be confused with *murder by joint enterprise* which requires two or more individuals to be involved in murder as a purpose rather than incidental crime.

First, a murder conviction results in a mandatory life sentence. From S's point of view, this seems overly harsh: he will receive the same punishment as the actual killer although he did not 'pull the trigger', nor – setting him apart from the ordinary aider and abettor – did he assist or encourage P's actions in any of the usual ways. All he did was get involved with P in a criminal enterprise aimed at the commission of a crime *other than murder*. While the law clearly assumes a parity of culpability between P and S, it might be argued that the *actus reus* of joint enterprise – participation in the original joint criminal venture – is too remote from the murder committed by P to justify holding S liable *on a par with P*,[12] thereby making him subject to the *mandatory life sentence*.

Secondly, murder is a constructive crime. Because an (indirect) intent to commit grievous bodily harm suffices to satisfy its mental element, S can be convicted when all he foresaw was P's attacking V with an (indirect) *intent to cause injury* which a jury considers serious; it is not necessary that S anticipated that the victim might die as a result of the (foreseen) infliction by P of serious harm on him.[13]

Thirdly, the *mens rea* standard applied to determine S's guilt in joint enterprise scenarios amounts to (a form of) subjective recklessness. As such, it is much less demanding than the mental element required to convict the actual killer: whilst P cannot be convicted for murder unless he *intended* to cause V at least serious harm – and this requires, at a minimum, that P foresaw that his actions *were virtually certain* to cause P harm a jury might consider serious – S can already be convicted for murder if he foresaw that P *might* attack V with *indirect intent to cause gbh* (ie foresight that his, P's, actions are virtually certain to cause V an injury that a jury considers serious).

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[12] See Graham Virgo, 'Making sense of accessorial liability' (2006) Archbold News 6, 9: 'This discrepancy [in the mens rea requirements] might be regarded as appropriate, with the conviction of the accessory for murder being justified on the basis of his or her voluntary involvement being aware that the principal might kill, *but the different degrees of culpability and involvement of the parties do suggest that a distinction should be drawn between the two offenders*' (emphasis added).

[13] *Rahman* [2008] UKHL 45, [2009] 1 AC 129; William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 5-6.

B Scope of Inquiry

Whilst it is evident from the foregoing that it is the combined effect of (1) the substantive law of murder (and in particular the gbh rule), (2) the mandatory life sentence, and (3) the specific rules of joint enterprise liability (especially the mental element), that makes the outcome for S particularly unforgiving in joint enterprise murders, this thesis will focus on (3). In other words, the inquiry is chiefly concerned with examining the constituent components of joint enterprise liability, and in particular the contentious mental element of the principle.

However, by necessary implication, aspects of the substantive law of murder will be explored as well, with the analysis here focusing on the nature and meaning of (indirect) intention. As Lord Steyn observed in *Powell*, in joint enterprise murder '*[t]here are two separate but complementary legal concepts at stake*. The first is the mental element sufficient for murder (…)' and the second concerns 'the criminal liability of accessories to a joint criminal enterprise.'[14]

The *mens rea* issue is also tied in with broader difficulties relating to the nature, proper function and (structural) place (within the body of law relating to participation and complicity) of the doctrine of joint enterprise. As such, whilst this thesis is predominantly concerned with the question of how the controversial *mens rea* element of the doctrine could be modified through development of the common law so as to make joint enterprise liability (intellectually) sounder, it will (by necessary implication) also address the following issues:

First, the proper nature of joint enterprise and its (structural) place within the law of participation and complicity: while there is much discussion on whether joint enterprise is a distinct and separate form of secondary liability or just an instance of aiding and abetting,

[14] *Powell* [1999] 1 AC 1 (HL) 12 (Lord Steyn, emphasis added).

this thesis will argue that joint enterprise cuts across the boundaries of primary and secondary liability and is therefore best seen as a *sui generis* principle (for want of a better term).

Secondly, the proper function of the doctrine of joint enterprise: whilst it is commonly perceived of as a principle of inculpation or, indeed, a separate head of liability which can be left to the jury alongside co-perpetration and aiding and abetting, this thesis will suggest that its proper role is to limit the liability of associates-in-crime (rather than extend it). As such, it is a principle of exculpation rather than inculpation. It will further be suggested that rather than a separate head of liability, it is but an 'add on' principle to the heads of liability known as co-perpetration and aiding and abetting.

Thirdly, whether, and if so how, an inculpatory function of the doctrine of joint enterprise can be justified: as such, this thesis will consider various approaches that have been put forward in the literature to rationalise joint enterprise liability as a principle of inculpation. It will be argued that none of these can satisfactorily explain the inculpatory role commonly ascribed to joint enterprise, which supports the thesis's conclusion that in developing the mental element regard should be had to the doctrine's exculpatory function.

Fourthly, even as understood as an exculpatory principle, the current rules on joint enterprise allow a participant to be found guilty of a more serious crime than he ever meant to participate in, and this is because the mental element required for his liability, be it as co-perpetrator or aider and abettor, has never been satisfactorily worked out. It will be argued that mere foresight of the more serious crime does not suffice. It will be suggested that a more demanding standard is required. Inspired by the intention debate in German law, it will be argued that a more appropriate test would be to ask if the participant could be said to have *endorsed* the commission of the more serious crime.

C Aim of thesis

The overall aim of this thesis is to show that doctrinal coherence and consistency are indeed discernable in an area of English common law – joint criminal enterprise – which is generally assumed to be governed by policy and pragmatic considerations rather than legal principle.[15]

More specifically, this thesis aims to demonstrate that conventional accounts pertaining to the *function* and *nature* of the doctrine of joint criminal enterprise as an *inculpatory principle* of *secondary liability* or, indeed, an *independent head of liability* (available to the prosecution as a third avenue to conviction alongside co-perpetration and aiding and abetting) are misconceived.

The thesis further aims to persuade the reader that while the conventional understanding has had knock on effects for the shaping of its mental element, the doctrine's proper function as a principle of exculpation which is but an 'add on' to the rules of co-perpetration and aiding and abetting would be better served by supplementing its current *cognitive mens rea* standard (foresight of consequences as a possibility) with a *volitional* element (endorsement of the consequences foreseen) similar to the concept of *dolus eventualis* known in German criminal law. This would in effect move the current *mens rea* standard away from (some form of) subjective recklessness and closer to intention, thereby bringing the accomplice's *mens rea* more in line with that of the principal offender.

Finally, this thesis aims to show that while statutory reform of the joint enterprise principle would be very welcome, the suggested modification of its mental element is within reach of the common law and its doctrinal traditions. Therefore, it might be

[15] Graham Virgo also argues that 'careful analysis of the law of accessorial liability indicates that there is a clear and rational structure which is fighting to get out', see 'Making sense of accessorial liability' (2006) Archbold News 6, 9. However, while Virgo argues that the key to structure is recognising subjective recklessness as the mental element for all types of accessorial liability, this thesis advocates lifting the current *mens rea* standard from (some kind of) subjective recklessness to one that resembles intention in the sense of *dolus eventualis* (ie foresight in the degree of a possibility plus endorsement of the consequences foreseen).

'implemented' by the courts, until such time that Parliament can properly deal with the matter and coherently reform the law relating to participation and complicity alongside the law of homicide.

D Methodology

Looking through the eyes of foreign law often enables us better to understand our own.[16] There are different ways in which this might be achieved. Dubber has identified three established modes of comparative criminal law scholarship.[17] These can be summarised as:

(1) *Reporting* of foreign criminal laws. This involves collecting and presenting materials and information on (aspects of) foreign criminal law.[18]

(2) *Integrating* descriptions of foreign criminal law into the doctrinal analysis of domestic law. This involves incorporating foreign criminal law materials into an underlying domestic framework and into one's exploration of issues of domestic criminal law.[19]

(3) *Establishing* a universal theory of criminal law through drawing upon foreign law materials. This involves the 'press[ing] into service' of aspects of various criminal law systems 'in the pursuit of a universal criminal theory'.[20]

This thesis adopts the second approach, which Dubber suggests is the most fruitful. As such, it utilises a comparative analysis of the structure and substance of the German law of complicity and voluntary homicide in order to address a particular problem in domestic

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16 Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 339, 342. See also Rene David and John EC Brierley, *Major Legal Systems in the World Today: An Introduction into the Comparative Study of Law* (3rd edn, Steven and Sons 1985) 4; Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir, tr, 3rd edn, OUP 1998) 16; Thomas Lundmark, *Charting the Divide between Common and Civil Law* (OUP 2012) 12.

17 Markus Dirk Dubber, 'Comparative Criminal Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 1287, 1302-1307.

18 ibid 1303, 1306. See also George P Fletcher, 'Comparative Law as a Subversive Discipline' (1998) 46(4) The American Journal of Comparative Law 683, 691 who refers to this approach as 'the height of boredom' and 'the reportorial trap'.

19 Markus Dirk Dubber, 'Comparative Criminal Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 1287, 1304-1305.

20 ibid 1305.

(English) criminal law, namely, the unsatisfactory state of the doctrine of joint criminal enterprise.

While the thesis's central arguments are thus inspired by, and developed with reference to, ideas taken from German criminal law and doctrine, it should be stressed that they are not based on a full-blown comparative investigation (which would require discussion of procedural, institutional, and historical backgrounds, as well as considerations of sociology, criminology, economics, politics and culture)[21]. This would not just exceed the scope of a dissertation; inasmuch as this thesis aims to explore the joint enterprise doctrine as part of the *system* of common law, and given its interest in identifying and exposing *structure*, it is by definition more concerned with the *legal* than, say, social background and function of the rules, principles and elements it investigates.

The claim made in this thesis is three-fold: first, it is argued that the interpretation of joint enterprise here put forward is inchoately present in current English law and could, second, be adopted in accordance with standard common law reasoning while, third, its merits are reinforced by the comparative material drawn from German law referred to in some of the following chapters. Therefore, the contentious question of a legal transplant does not even arise.[22]

E Outline of Chapters

Chapter 2 sets out the English law of homicide. This is necessary as the cases analysed and referred to in this thesis predominantly concern joint enterprise in the context of homicide offences. To fully understand the ramifications of joint enterprise liability in

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21 ibid 1292.

22 On the dangers of transplanting foreign laws into one's own legal system, see eg Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) MLR 1, 1-27. For a view defending legal transplants, see eg Alan Watson, *Legal Transplants – An Approach to Comparative Law* (2nd edn, first published Scottish Academic Press 1974, University of Georgia Press 1993).

this area, the reader needs to be familiar with the basic law of murder and manslaughter (which, as will be seen, has many problems of its own which then go on to combine with joint enterprise to produce some controversial outcomes).

Chapter 3 focusses on the German law of homicide. Again, to fully comprehend the approach advanced in this thesis, it will be necessary for the reader to become familiar with the general context within which the relevant German provisions have been developed and applied. The chapter also sets the scene more generally by introducing the common law reader to basic tenets of German criminal law.

Chapter 4 examines the English doctrine of joint enterprise within its context, namely the law of participation and complicity. In Chapter 5, the discussion focusses on whether joint enterprise in its current, inculpatory form can be justified. Chapter 6 returns to a comparative analysis; it sets out the structure of and law relating to the German concepts of perpetration (*Täterschaft*) and participation in crime (*Teilnahme*).

Chapters 7 and 8 are the thesis's central chapters. It is here that ideas and conceptions encountered in German law – *dolus eventualis*, co-perpetration, aiding and abetting, and liability for criminal excesses – will be drawn upon to inform a discussion on how the problems identified with the English doctrine of joint enterprise might be alleviated.

Chapter 9 sums up the conclusions drawn throughout this thesis.

Chapter 2: HOMICIDE IN ENGLISH LAW

A Introduction

The doctrine of joint criminal enterprise has predominantly been applied in the context of homicide offences. In this context, it has led to some highly controversial convictions and appeal cases.[23] As we will see, the problems dealt with in the case law often concerned the (comparatively) undemanding *mens rea* element to be proved by the prosecution in order to hold someone liable for an offence (the incidental crime) committed by his associate-in-crime, in circumstances where both had joined forces in order to commit another offence (the purpose crime). However, to some extent the issues raised in a series of Court of Appeal and House of Lords decisions are also due to the characteristics of the English law of murder. It is a feature of English criminal law that a murderer need not have intended to kill at all – an intention to inflict serious injury suffices to satisfy the *mens rea* requirement. On the other hand, as we shall see, German law requires not just intentional killing for a murder conviction; it sets the bar even higher: a killer will only be a *Mörder* if he satisfies one of the *Mordmerkmale*, for example, if his killing was particularly cruel, or was carried out to hide a different crime, or was done for particularly detestable motives. These significant differences in the law of homicide need to be explored if a comparative discussion of participation in crime in the two systems is to make any sense. In this chapter, we will examine the law relating to intentional homicide in England, while the following chapter will do the same for Germany.

Since what follows is primarily meant to provide the background for the later discussion of joint enterprise liability, it would go beyond the scope of this thesis to

[23] See the case studies in The Bureau of Investigative Journalism, *Joint Enterprise – An investigation into the legal doctrine of joint enterprise in criminal convictions* (April 2014) 19-31.

consider each and every detail of English homicide law. In particular, certain categories of killings dealt with by specific homicide offences[24] will be left out, as will the details of those partial defences[25] which reduce a murder charge to one of voluntary manslaughter. The only defence that will feature in a later chapter, duress, is, ironically, not a defence to murder.[26] This has implications for joint enterprise liability, as will be discussed in Chapter 8.

This chapter proceeds by setting out the basics of the general law of murder and manslaughter. The main focus of the discussion will be on the mental element in murder – the concept of intention – as the dividing line between murder and manslaughter. It will be shown that this concept, and in particular the (systemic) relationship between its two variants (direct and indirect intention) is still far from satisfactory. This is where the discussion of German law to follow in the next chapter might be useful – the concept of intention developed there is more differentiated, more finely-tuned, than its English counterpart and might provide a fertile source of ideas in developing English law. This is particularly relevant in the context of joint enterprise and will indeed form the basis of the central argument advanced in Chapter 8, namely that a more appropriate *mens rea* standard to determine the liability of the secondary party than mere foresight would be a concept of intention paying close attention to the attitude taken by the secondary party towards the eventual (usually fatal) outcome.

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[24] Such as infanticide (Infanticide Act 1922), child destruction (Infant Life (Preservation) Act 1929), assisting suicide (Suicide Act 1961), causing death by dangerous driving (Road Traffic Act 1988), corporate manslaughter (Corporate Manslaughter and Corporate Homicide Act 2007), and causing or allowing the death of a child or vulnerable adult (Domestic Violence, Crime and Victims Act 2004).

[25] Three partial defences are recognised: diminished responsibility, loss of control (formerly: provocation) and killing pursuant to a suicide pact. Horder considers 'excessive defence (under the aegis of loss of self-control)' a fourth partial defence, see Jeremy Horder, *Homicide and the Politics of Law Reform* (OUP 2012) 92.

[26] *Howe* [1987] AC 417 (HL); *Gotts* [1992] 2 AC 412 (HL).

B The Principal Offences

English law recognises two principal homicide offences: murder and manslaughter.[27] In reality there are even three basic offences, for manslaughter can be sub-divided into offences of voluntary (ie intentional) and involuntary (ie unintentional) manslaughter. The important distinction, however, is the one between involuntary manslaughter and murder. This is because the term 'voluntary' manslaughter refers to a killing which is subject to a particular (partial) defence[28] on the basis of which what would otherwise amount to murder is reduced to a charge of manslaughter.[29] Except for the availability of a specific defence, therefore, the requirements of voluntary manslaughter mirror those of murder exactly. Thus, the term voluntary manslaughter is somewhat of a misnomer: in effect, voluntary manslaughter is a form of mitigated murder.[30] Unless otherwise indicated, in the following, the term manslaughter will be used to mean involuntary manslaughter.

While the offences of murder and manslaughter share an *actus reus* – causing the death of another person by act or omission – they differ in their respective *mens rea* requirements: murder requires the killing to have been committed with an intention to kill the victim or to cause him gbh, ie an injury that is really serious but not necessarily life-threatening.[31] On the basis of the latter intent, the so-called 'gbh rule', a person can be convicted of murder in circumstances where he deliberately caused someone else an injury

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[27] Ashworth and Horder, 243; Law Commission, *A new Homicide Act for England and Wales?* (Law Com CP No 177, 2005) para 1.8; Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) paras 1.12; 1.32.

[28] These consist of diminished responsibility, loss of control (formerly: provocation) and killing pursuant to a suicide pact. The Law Commission further identifies infanticide and complicity in suicide as '"concealed" partial defences', see *A new Homicide Act for England and Wales?* (Law Com CP No 177, 2005) para 1.21.

[29] Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) paras 1.14; 2.122.

[30] Andrew Ashworth and Barry Mitchell, 'Introduction' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (OUP 2000) 8.

[31] *Cunningham* [1982] AC 566 (HL); *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [51] (Lord Brown); *Re A (Conjoined Twins)* [2001] Fam 147 (CA) 198.

considered serious by the jury,[32] such as by 'knee-capping'[33] or 'glassing'[34] him, and death followed rather unexpectedly, for example as a consequence of the wound becoming infected. In such a case, the defendant will be guilty of murder although he neither meant to kill nor was death an inherent danger of the injury caused. Indeed, as the late Lord Mustill has criticised, it is 'possible to commit a murder (…) without the least thought that [the death of the victim] might be the result of the assault.'[35] To the extent that the mental element in murder thus does not need to correspond to the conduct element ('killing'), murder is a constructive crime.[36]

The 'gbh rule' applies, of course, only to completed murders; proof of an intention to cause serious injury does not suffice where the offender is accused only of attempted murder,[37] so that if the prosecution cannot prove an intent to kill, it may in this context achieve no more than a conviction for wounding or causing grievous bodily harm with intent under section 18 of the Offences against the Person Act 1861.[38]

In contrast to murder, manslaughter requires neither an intention to kill nor an intention to cause really serious harm. It is committed grossly negligently,[39] recklessly[40] or

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[32] *DPP v Smith* [1961] AC 290 (HL); Law Commission, *A new Homicide Act for England and Wales?* (Law Com CP No 177, 2005) para 1.60; Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) paras 1.17; 2.86.

[33] Example given by Robert Goff, 'The Mental Element in the Crime of Murder' (1988) 104 LQR 30, 48.

[34] Another example given by Goff ibid 48-49.

[35] *Attorney General's Reference [No 3 of 1994]* [1998] AC 245 (HL) 250 (Lord Mustill).

[36] Andrew Ashworth, 'Reforming the Law of Murder' [1990] Crim LR 75, 79.

[37] Louis Blom-Cooper and Terence Morris, *With Malice Aforethought – A Study of the Crime and Punishment for Homicide* (Hart 2004) 35.

[38] Antje du Bois-Pedain, 'Intentional Killings: The German Law' in Jeremy Horder (ed), *Homicide Law in Comparative Perspective* (Hart 2007) 55, 57.

[39] *Adomako* [1995] 1 AC 171 (HL).

[40] Whether there is a separate offence category of reckless manslaughter (in addition to manslaughter by gross negligence) is controversial. The Law Commission accepts that such a category exists. However, the description given for this form of manslaughter differs between their 2005 Consultation Paper and their 2006 Report. In the consultation paper, the Law Commission describes reckless manslaughter as '[c]onduct that the defendant knew involved a risk of killing, and did kill', see *A new Homicide Act for England and Wales?* (Law Com CP No 177, 2005) para 1.10, whereas in the report reckless manslaughter is described as 'killing by conduct that D knew involved a risk of killing *or causing serious harm*' (emphasis added), see Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) paras 1.14, 1.24, 2.160 – 2.161, 3.54, 3.56.

through the deliberate commission of (an objectively) dangerous unlawful act[41] (excluding crimes of negligence and omissions) that results in death. The presence or absence of an intention to cause the victim at least a really serious injury is thus the dividing line between murder and manslaughter.

Murder is clearly the more serious of the two offences, which is reflected in the sentence of life imprisonment that has been mandatory following a conviction of murder ever since capital punishment was abolished in 1965.[42] It is a crime still only recognised at common law; there is hence no statutory definition that tells us with precision what its constituent elements are. Thus it is not surprising that case law and legal commentary offer slightly different accounts of the elements of the offence.[43] At its most comprehensive, murder is described as:

> where a man of sound memory, and of the age of discretion, unlawfully killeth within any country of the realm any reasonable creature in *rerum natura* under the [Queen]'s peace, with malice aforethought, either expressed by the party or implied by law, so that the party wounded, or hurt, etc die of the wound or hurt, etc (…).[44]

This definition goes back to a 17th century commentary by Lord Coke, who was then Lord Chief Justice. Modern authorities reduce his unwieldy definition to the more straightforward 'killing of another person committed with intent to kill or intent to do really

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41 *Newbury and Jones* [1977] AC 500 (HL).

42 The death penalty was abolished by the Murder (Abolition of the Death Penalty) Act 1965. Although offenders convicted of murder must mandatorily be sentenced to imprisonment for life, the trial judge has some flexibility in setting the minimum term, ie the initial period that the offender spends in custody before he is eligible for release on licence, see Criminal Justice Act 2003, s 269 and sch 21. The length of the minimum term reflects the seriousness of the particular murder, Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 1.58 – 1.62.

43 The Law Commission describes the law of homicide as a 'rickety structure set upon shaky foundations' with rules that 'are of uncertain content, often because they have been constantly changed to the point that they can no longer be stated with any certainty or clarity', Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 1.8. See also Law Commission, *A new Homicide Act for England and Wales?* (Law Com CP No 177, 2005) para 1.4.

44 Sir Edward Coke, *Institutes of the Laws of England* (1628-34) 3.47.

serious bodily injury',[45] although occasionally reference is still made to Lord Coke's account.[46]

It is important to note that, in contrast to the German conception of murder, which we will look at in Chapter 3, English law does not require that death be brought about in any specific way or by particular means or with a particular motive. Instead, the crucial ingredient, which in English law sets murder apart from manslaughter, is the state of mind (*mens rea*) with which the deed is done. In the past, the relevant mental element was described in (the broad, evaluative) terms of 'malice aforethought'[47]; today it is expressed in the (narrower)[48] concept of 'intention'.[49] As we will see, even the notion of intention is still elusive. There has been much debate as to whether there are two separate,[50] yet related, concepts of intention – direct and indirect intent – or whether these are two forms of a common conception.[51] It also remains unclear whether intention in form of indirect intention amounts to a rule of substantive law or a rule of the law of evidence.[52] A similar problem presents itself in the context of joint enterprise where, as will be argued in Chapter 8, the foresight requirement has changed from an evidentiary rule to one of substantive law, fixing participants in a joint criminal enterprise with criminal liability for all foreseen acts committed by their associates. The parallels merit a brief look at how the intention debate in the homicide context has evolved and where this leaves it today.

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45 *Woollin* [1999] 1 AC 82 (HL) 90 (Lord Steyn).

46 Law Commission, *A new Homicide Act for England and Wales?* (Law Com CP No 177, 2005) para 1.53: 'Even now, however, [Lord Coke's] definition is still regarded as having what lawyers call "persuasive authority". That means judges still look to Lord Coke's definition for guidance'.

47 *Vickers* [1957] 2 QB 664 (CA) 670 (Lord Goddard CJ).

48 Jeremy Horder, *Homicide and the Politics of Law Reform* (OUP 2012) 93.

49 *Woollin* [1999] 1 AC 82 (HL) 90 (Lord Steyn).

50 *Smith and Hogan*, 118.

51 Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579.

52 See *Smith and Hogan*, 118-121.

C The 'Intention Debate' in the Case Law

The difficulties were sparked by what Lord Bridge in *Moloney* described as the 'golden rule' according to which intention is not normally to be explained by the judge to the jury; rather it is to be left to the jury's common sense to apply the concept as ordinarily understood:[53] while all are agreed that if an outcome is aimed for, the ordinary usage of intention would cover the case, not all users of English would agree on whether the word 'intention' also covers cases where the outcome is not aimed for, but where it is a possible, likely, probable or certain consequence of a particular deliberate act.

I Before *Woollin*

Leading cases before *Woollin*,[54] such as *Hyam,*[55] *Moloney,*[56] *Hancock and Shankland*,[57] and *Nedrick*,[58] did not provide a substantive legal definition of intention, but maintained the idea of foresight (in varying degrees of probability)[59] as evidence of intention; they all allowed the jury to infer intention from the circumstances of the case, taking a variety of factors into account.[60] Primarily, of course, these focussed on the degree of foresight on the part of the defendant and the probability with which the fatal outcome was likely to be brought about by the defendant's acts.[61] Reading between the lines, however, it also appears relevant how the defendant related to that probability, and this insight is important

53 [1985] 1 AC 905 (HL) 926.
54 [1999] 1 AC 82 (HL)
55 [1975] AC 55 (HL)
56 [1985] AC 905 (HL).
57 [1986] 1 AC 455 (HL).
58 [1986] 1 WLR 1025 (CA).
59 *Hyam* [1975] AC 55 (HL): 'highly probable' (Viscount Dilhorne), 'likely' (Lord Diplock); *Moloney* [1985] AC 905 (HL) 925: 'a probability little short of overwhelming' (Lord Bridge); *Nedrick* [1986] 1 WLR 1025 (CA) 1028: 'a virtual certainty' (Lord Lane CJ).
60 See eg *Hancock and Shankland* [1986] 1 AC 455 (HL) 474 (Lord Scarman): 'In a case where foresight of a consequence is part of the evidence supporting a prosecution submission that the accused intended the consequence, the judge (...) could well (...) emphasise that the *probability, however high*, of a consequence *is only a factor* (...) to be considered with all the other evidence in determining whether the accused intended to bring it about.' (emphasis added).
61 See eg *Hyam* [1975] AC 55 (HL) 68 (Lord Hailsham); *Moloney* [1985] AC 905 (HL) 925 (Lord Bridge); *Nedrick* [1986] 1 WLR 1025 (CA) 1028 (Lord Lane CJ).

for the argument developed in later chapters (in the context of joint enterprise murder), namely that the more serious the offence, the more emphasis should be placed on volition rather than cognition when it comes to assessing the defendant's *mens rea*.

Thus, in *Hyam*[62] Lord Diplock suggested that a defendant who had set alight the house of a rival, with the aim to frighten her into leaving the area, but in effect killing the rival's daughters, should be held liable for murder, not just because she had appreciated the risk of serious injury or death to inhabitants, but because she had proved herself *willing* to produce the relevant deaths. He said:

> I agree with those of your Lordships who take the uncomplicated view that in crimes of this class no distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act. *What is common to both these states of mind is willingness to produce the particular evil consequence*: and this, in my view, is the mens rea needed to satisfy a requirement, whether imposed by statute or existing at common law, that in order to constitute the offence with which the accused is charged he must have acted with 'intent' to produce a particular evil consequence or, in the ancient phrase which still survives in crimes of homicide, with 'malice aforethought.'[63]

Interestingly, in identifying a 'willingness to produce' the fatal consequence as the common driving factor behind both states of mind, Lord Diplock's view comes close to the German concept of intention which, as we shall see, focusses on the defendant's attitude towards the outcome of his actions.[64] The idea of a 'willingness' to produce a particular outcome,

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62 [1975] AC 55 (HL).

63 *Hyam* [1975] AC 55 (HL) 86 (emphasis added).

64 A similar argument, relying on Lord Hailsham's account of intention in *Hyam*, has been put forward by Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579. See also Alan Norrie, 'Oblique Intention and Legal Politics' [1989] Crim LR 793, 796 who argues that the legal definition of (direct and oblique) intention can be squared with a commonsensical definition of intention which is based on a broader understanding of what it means to 'desire': 'Where I intend to bring X about and am sure that Y is a necessary corollary, but it turns out that X happens without Y, I have failed to produce the necessary corollary but not failed in my intention. (...) Y *was* part of my intention in that I was prepared to accept its necessity as a means to my end or as a side-consequence of it. I may not directly have wanted Y to happen, but I wanted X sufficiently to will the existence of Y too. I may be quite happy that X occurs without Y, but that does not mean to say the bringing about of Y was not part of my initial intention.' See also Alan Norrie, 'Intention: more loose talk' [1990] Crim LR 642.

although perhaps stronger in its connotations, expresses a similar mind-set as *billigendes Inkaufnehmen* (roughly: endorsement of the consequences)[65], the formula the German courts use to describe their concept of a *dolus eventualis* (of which more in Chapter 3). We will come back to the notion of endorsement (in Chapter 8), once we have looked at the German material, to see whether this idea can be developed in the context of joint enterprise liability so as to put a conviction for joint enterprise murder on a stronger and sounder intellectual footing.

The defendant's attitude towards the deadly outcome of her actions also took a central role in Lord Kilbrandon's account in *Hyam* of the necessary mental element for murder. In his view

> if murder is to be found proved in the absence of an intention to kill, the jury must be satisfied from the nature of the act itself or from other evidence that the accused knew that death was a likely consequence of the act *and was indifferent whether that consequence followed or not*.[66]

Finally, a volitional element forming part of the defendant's *mens rea* was strongly supported by Lord Hailsham's speech who concluded that there were three ways in which the prosecution could prove Mrs Hyam had acted with murderous *mens rea*, all of which, crucially, depended on a finding of intention rather than (any particular degree of) foresight:

> (i) The intention to cause death; (ii) The intention to cause grievous bodily harm (…); (iii) Where the defendant knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts. (...).[67]

Significantly, in explicitly requiring an intention to expose the victim to a risk, in addition to foresight of the relevant risk, Lord Hailsham seems to have endorsed the defence's argument that there is a distinction between 'forming an intention and foreseeing

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65 See Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579, 585.

66 *Hyam* [1975] AC 55 (HL) 98 (emphasis added).

67 ibid 79.

consequences'[68] and that '[f]oresight is a question of knowledge' whereas 'intention is a question of [the defendant's] attitude'.[69] This (the defence's) submission in *Hyam* may well be the clearest articulation of the volitional element involved in intention in the relevant case law, and it is regrettable that none of their Lordships directly engaged with the argument so framed or commented on the use and language of 'attitude' – although it could be argued that the idea of 'attitude' is implicit in Lord Diplock's account (of a willingness to produce the outcome), Lord Kilbrandon's idea of an 'indifference' towards the fatal outcome and in Lord Hailsham's re-phrasing of the central question as whether 'the intention wilfully to expose a victim to the serious risk of death or really serious injury [may] also be enough [to convict someone of murder]?'[70] Of course, of the three, the latter's opinion is more authoritative, seeing that the former two dissented. Still, it is interesting to note that three of five judges at that time considered, in one form or another, the defendant's attitude to be decisive for their account of the mental element in murder. We will come back to this in Chapter 8 where it will be suggested that *Hyam* has not remained the only decision in English law that bears echoes of *dolus eventualis* thinking, as developed and applied in German criminal law, although in the immediate aftermath of *Hyam*, the law took a different turn towards assessing intention.

It was unfortunate that, in *Hyam*, the House of Lords did not give an unequivocal – and univocal – answer to the question of the relation between foresight and intention; not only is it clearly unacceptable for a legal system that abides by the rule of law to 'tolerate such vagaries'[71] in 'a concept whose legal applications determine something as significant

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68 Charles McCullough QC and Brian Farrer, counsel for the appellant Mrs Hyam, [1975] AC 55 (HL) 64.

69 ibid 60.

70 Similarly Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579, 588, 593.

71 RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Basil Blackwell 1990) 33.

as a defendant's liability to punishment',[72] but the underlying assumption that the issue did not really arise (as long as foresight of death as probable constituted malice aforethought) contributed towards a development whereby the volitional element in intention (as exposed by Lords Diplock, Kilbrandon and Hailsham) took a back seat in the legal discourse in favour of the cognitive element of foresight: later cases have not taken up the ideas of wilfully exposing someone to a serious risk of death or injury or indifference towards the outcome, nor the notion of a willingness to produce the evil consequence, choosing instead to focus on a *mens rea* conception which focusses almost exclusively on the degree of foresight. As we will see in Chapter 4, this focus on the cognitive aspects of *mens rea* has had serious repercussions for the law of joint enterprise, where the defendant is convicted on the basis of his foresight alone, with the requisite degree of probability having been watered down to one of a mere possibility. Moreover, rather than a rule of evidence, foresight in that context has taken on the life of a rule of substantive law. Whether the same development has taken place in the general law of murder remains subject to some debate, as will be explained in the following.

II *Woollin*

The cases prior to *Woollin* had been adamant that foresight and intention are distinct, and that while intention might be inferred from foresight, such an inference needed to be drawn on the basis of *all* the relevant evidence. Lord Steyn's reasoning in *Woollin*, by contrast, leaves scope for the conclusion that a particular degree of foresight *amounts to intention as a matter of substantive law.* It is worthwhile to recap his argument in some detail, as it would appear that Lord Steyn's narrative is not entirely consistent with what earlier cases have said on the issue of intention. Indeed, his argument is not entirely consistent in itself, in that Lord Steyn's account contains ambiguous passages as to whether a finding that the

[72] ibid.

defendant acted with foresight automatically leads to a finding of intention (as a matter of substantive law) or whether there is leeway for the jury to accept or reject such a finding (as a matter of reasoning and, hence, the law of evidence). The point to make is that it is striking that while a potential shift (in assessing the defendant's *mens rea*) from evidential to substantive law has generated some debate in the general law of murder, similar developments in the context of joint enterprise have largely been ignored by practitioners, courts and academics,[73] even though in the latter context there is more evidence than in the former to suggest that such a shift has indeed taken place, as will be pointed out in Chapter 8.

Lord Steyn starts off by observing that their Lordships in *Hyam* based their decision on different levels of foresight: 'one', he explains, 'adopted the "highly probable" test; another thought a test of probability was sufficient; and a third thought it was sufficient if the defendant realised there was a "serious risk".'[74] It is noteworthy that Lord Steyn speaks in terms of a 'test' for intention, although neither *Hyam* nor any of the subsequent cases had done so. This use of language is consistent with later statements in Lord Steyn's opinion that come close to offering a (substantive law) definition of intention, although, as we will see, in the final analysis his account probably still falls short of taking such a step. In the following, Lord Steyn explains how the 'broad' approach of *Hyam* was narrowed down in *Moloney*, with Lord Bridge concluding that the case law to date (including *Hyam*) suggested that 'the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent.'[75] Lord Steyn puts emphasis on the fact that Lord Bridge 'paraphrased this idea (…) in terms of 'moral certainty' and that this is similar to the 'virtual certainty test' as proposed in

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73 But see Dennis J Baker, 'Foresight in Common Purpose Complicity/Joint Enterprise Complicity: It Is a Maxim of Evidence, Not a Substantive Fault Element' (Draft Chapter 2013/14: *Reinterpreting Criminal Complicity*, Forthcoming) <http://ssrn.com/abstract=2507529> accessed 21 May 2015.

74 [1999] 1 AC 82 (HL) 91.

75 ibid (citing Lord Bridge in *Moloney* [1985] AC 905 (HL) 925).

Nedrick.[76] He goes on to point out that 'in *Hancock* Lord Scarman did not express disagreement with the [*Moloney*] test of foresight of a probability which is "little short of overwhelming"'.[77] Lord Steyn then observes that 'Lord Scarman thought that where explanation is required the jury should be directed as to the relevance of probability *without expressly stating the matter in terms of any particular level of probability*.'[78]

Up to this point, Lord Steyn's analysis is unobjectionable; in particular he is clearly correct in observing that in *Hancock* there is no indication that a particular level of foresight should be relied on in jury directions. To the contrary: Lord Scarman's words imply that any level of foresight might suffice for a finding of intention, if supported by other evidence. He suggested, albeit tentatively, that the *Moloney* guidelines could be improved by adding 'an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended.'[79] In other words: the higher the probability, the easier to conclude that the defendant foresaw and, therefore, 'intended' the outcome.[80] Such an approach is inconsistent with a fixed minimum degree of foresight, such as introduced by the 'virtual certainty' approach in *Nedrick*. Yet, Lord Steyn, in an attempt to bridge the gap between *Hancock* and *Nedrick* plays down the inconsistency by reframing the issue in terms of an omission: Lord Scarman's speech, he argues, leaves unclear the precise manner in which trial judges ought to direct juries.[81] But there was need for such a direction as 'in practice, juries sometimes ask probing questions which cannot easily be ignored by trial judges.'[82] Lord Steyn thinks it unhelpful 'to deflect such questions by the statement that "intention" is an ordinary word in the English

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76 [1999] 1 AC 82 (HL) 91.
77 ibid 92.
78 ibid (emphasis added).
79 *Hancock and Shankland* [1986] AC 455 (HL) 473.
80 Alan Norrie, 'After Woollin' [1999] Crim LR 532, 534.
81 [1999] 1 AC 82 (HL) 92.
82 ibid.

language'.[83] Thus, in *Nedrick* 'the Court of Appeal felt compelled to provide a model direction for the assistance of trial judges'.[84] Presented in this way, *Nedrick* seems to build upon *Hancock,* although, in truth, the cases offer a somewhat inconsistent view on the issue of intention. It follows what must been seen as a crucial statement in Lord Steyn's speech: the suggestion that the effect of Lord Lane's model direction in *Nedrick*[85] is 'that a result foreseen as virtually certain *is* an intended result'.[86]

Lord Steyn seems aware of the tension between *Hancock* and *Nedrick*, but he rejects the argument that *Nedrick*, if taken to specify a minimum level of foresight, is in conflict with the House of Lords decision in *Hancock,* by pointing out that *Hancock* approved Lord Bridge's statement in *Moloney that* 'if a person foresees the probability of a consequence as little short of overwhelming, this "will suffice *to establish* the necessary intent."'[87] This does not resolve the issue, however, because even if *Hancock* approved of certain statements in *Moloney* which come close to the virtual certainty standard exposed in *Nedrick*, it would appear that in *Hancock* there are also dicta which support the opposite, ie that foresight with a lesser degree than virtual certainty may be sufficient for the jury to conclude that the defendant acted with intention.

Norrie has rightly criticised Lord Steyn's references to other judgements, and in particular his handling of the *Nedrick*-direction:[88] the passages he cites from Lord Lane's speech are ambiguous in that they lump together statements speaking in terms of a high probability ('[i]t may ... be helpful for a jury to ask themselves two questions. (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?') and those framed in terms of virtual certainty ('[i]f the jury

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83 ibid.

84 ibid.

85 '[T]he jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that [the defendant appreciated that] death or serious bodily harm was a virtual certainty… .'

86 [1999] 1 AC 82 (HL) 93 (emphasis added).

87 ibid 94 (emphasis in original).

88 Alan Norrie, 'After Woollin' [1999] Crim LR 532, 534-535.

are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm'). Lord Steyn avoids tackling the ambiguity head on, however, by singling out the passage dealing with virtual certainty as the centrepiece of his own model direction, and disposing of the others by saying that they are 'unlikely, if ever, to be helpful'[89] and that they do 'not form part of the model direction'[90].

Lord Steyn proceeds to defend this interpretation. He argues – and thereby rejects the prosecution's submissions – that '*Nedrick* does not prevent a jury from considering all the evidence: it merely stated what state of mind (in the absence of a purpose to kill or to cause serious harm) is sufficient for murder.'[91] This supports claims that Lord Steyn was indeed aiming to offer a definition of intention.[92] Lord Steyn further argues that no submissions were made to the effect that 'as a matter of policy foresight of a virtual certainty is too narrow a test in murder'[93] and that, on the contrary, 'the decision in *Nedrick* was widely welcomed by distinguished academic writers'.[94] He also points out that 'over a period of 12 years since *Nedrick* the test of foresight of virtual certainty has apparently caused no practical difficulties. It is simple and clear.'[95] Lord Steyn concludes by saying that he was 'satisfied that the *Nedrick* test (…) is pitched at the right level of foresight'[96] even though he assumes that it may not cover all terrorist cases, and suggests that 'a direction in accordance with *Nedrick* [be given] in any case in which the defendant may not have desired the result of his act',[97] with one minor adjustment: 'the use of the words

89 [1999] 1 AC 82 (HL) 96.
90 ibid.
91 ibid 94.
92 AP Simester, 'Murder, mens rea, and the House of Lords – again' (1999) 115 LQR 17, 18.
93 [1999] 1 AC 82 (HL) 94.
94 ibid.
95 ibid.
96 ibid 95.
97 ibid.

"to infer" [in the *Nedrick* direction] may detract from the clarity of the model direction' and should therefore be substituted with the words "to find"'.[98]

Lord Steyn finishes by reminding us that 'it would always be right for the judge to say, as Lord Lane C.J. put it, that the decision is for the jury upon a consideration of all the evidence in the case'.[99] This last statement, similar to Lord Bridge's assertions in *Moloney* that foresight of a consequence as 'little short of overwhelming' suffices to 'establish' intention, but that an 'inference' as to intention is to be drawn 'on all the evidence', is in apparent conflict with his earlier suggestion that 'a result foreseen as virtually certain *is* an intended result': if a result foreseen as virtually certain is an intended result, then surely there is no room left for the drawing of inferences.

III After *Woollin*

Woollin is the latest word of authority on the issue of intention,[100] but because of the ambiguity in Lord Steyn's speech, the law is still not entirely clear. The virtual certainty-'test' proposed by Lord Steyn could be taken to mean either of two things: first, if a consequence is foreseen as virtually certain to occur, this *amounts* to intention.[101] Such an interpretation could be derived from Lord Steyn's assertion that 'the effect of the critical direction [in *Nedrick*] is that a result foreseen as virtually certain is an intended result'[102] and his endorsement of Lord Bridge's speech in *Moloney* that 'if a person foresees the probability of a consequence as little short of overwhelming, this will suffice to establish

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98 ibid 96.

99 ibid.

100 See *Re A (Conjoined Twins)* [2001] Fam 147, 198-199 (Ward LJ): '[D]espite several earlier attempts by the House of Lords to clarify the mens rea required to establish murder, "The law of murder was in a state of disarray": per Lord Steyn in *R v Woollin* [1999] 1 AC 82, 91a. *Woollin* is binding upon us … . Law which has long needed to settle should be left to settle.'

101 AP Simester, 'Murder, mens rea, and the House of Lords – again' (1999) 115 LQR 17, 19- 20. See also *Re A (Conjoined Twins)* [2001] Fam 147, 250 (Walker LJ): '[I]f a defendant's action is of its nature certain, or virtually certain, to produce a harmful result, he cannot normally be heard to say that he did not intend that result.'

102 [1999] 1 AC 82 (HL) 93.

the necessary intent'.[103] In the same vein, it has been suggested that Lord Steyn's substituting 'find' for 'infer' in the *Nedrick* guidelines indicates that 'the connection between virtual certainty and intention is not merely evidential'.[104] This argument is, to some extent, reinforced by Lord Steyn himself: in explaining why he felt compelled to substitute 'infer' with 'find' in his approval of the *Nedrick* guidelines he refers to criticism by academic jurists (with which he agrees), suggesting that 'the use of the words "to infer" (...) may detract from the clarity of the model direction.'[105] Included in the sources to which he refers is one particular article by Glanville Williams[106] who writes:

> The only thing wrong with this formulation (apart from the unnecessary insertion of the word 'voluntary') is the use of 'infer'. (...) An intelligent jury may be fogged at being told that they can infer x, when they are not told what x is (but only what it is not). The proper view is that intention in its wider sense includes not only desire of consequence (purpose) but also foresight of the certainty of the consequence, *as a matter of legal definition*. What the jury infer from the facts is the defendant's direct intention or foresight of a consequence as certain; there is no additional element to be 'inferred.'

Williams here clearly advocates a conception of intention where consequences foreseen as virtually certain *constitute* intention as a matter of substantive law.

On the other hand, even on the *Nedrick* direction as amended by Lord Steyn in *Woollin* the jury is still only 'entitled'[107] to find intention if certain requirements are fulfilled. This wording contradicts the definitional interpretation and supports a conclusion that the model direction is still not a rule of substantive law, but an evidential proposition. It remains open to the jury to reject a finding of intention.[108] The latter view was endorsed by the Court of Appeal in *Matthews and Alleyne*,[109] with Rix LJ stating:

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103 ibid 91.
104 AP Simester, 'Murder, mens rea, and the House of Lords – again' (1999) 115 LQR 17, 20.
105 [1999] 1 AC 82 (HL) 96.
106 Glanville Williams, 'The mens rea for Murder: leave it alone' (1989) 105 LQR 378.
107 [1999] 1 AC 82 (HL) 96.
108 Alan Norrie, 'After Wollin' [1999] Crim LR 532, 537.
109 [2003] EWCA Crim 192, [2003] 2 Cr App R 30 (CA).

> In our judgment, however, the law has not yet reached a definition of intent in murder in terms of appreciation of a virtual certainty (...) [W]e do not regard *Woollin* as yet reaching or laying down a substantive rule of law. On the contrary, it is clear from the discussion in *Woollin* as a whole that *Nedrick* was derived from the existing law, at that time ending in *Moloney* and *Hancock*, and that the critical direction in *Nedrick* was approved, subject to the change of one word. (...) Having said that, however, we think that, once what is required is an appreciation of virtual certainty of death, and not some lesser foresight of merely probable consequences, there is very little to choose between a rule of evidence and one of substantive law.[110]

Whether or not this is indeed the interpretation most true to Lord Steyn's opinion in *Woollin*, for our purposes of establishing the English approach to intention (in the context of homicide), we can conclude that, for all practical purposes, the mental element in murder can be satisfied by either of two states of mind: first, intention in the 'direct' sense of a purpose, aim or objective; and, secondly, intention in the indirect sense of a consequence that is, and is foreseen as, a 'virtual' ('practical' or 'moral') certainty of the actor's chosen course of conduct, whether desired or not. Although *Hyam* has never been expressly overruled, under the law as it stands a killing will not be treated as 'murder' unless the defendant anticipated that his actions were virtually certain to cause death or really serious injury; on the other hand, a killing may not amount to murder despite the defendant having foreseen death or really serious injury as virtually certain to follow from his conduct, if the jury chooses to make use of its 'moral elbow-room'.

D Implications for Joint Enterprise Murder

After *Woollin*, it would seem that 'the legal territory of intention comprises two alternative categories',[111] direct and indirect intention. As the foregoing analysis has aimed to show, the status of the latter category remains controversial. While some commentators perceive of it as an *evidentiary* rule from which the core definition of direct intention can be inferred

110 ibid [43] – [45].
111 *Simester and Sullivan*, 127.

(so that there is but one substantive category of intention), others understand indirect intention to amount to an *independent* type of (substantive law) intention.[112] The latter view has been forcefully challenged by Antje Pedain who has drawn attention to the German notion of intention, and in particular its concept of *dolus eventualis*. As we will see in the next chapter, this turns on whether the offender endorsed the consequences which he foresaw as possibly following from his actions. Pedain suggested that a similar concept of endorsement might be helpful in understanding English law's conception of (direct and indirect) intention and presented a powerful argument that such an approach was already evident in Lord Hailsham's speech in *Hyam*.[113] As such, she argues that intention in its core sense of purpose and in its secondary sense of foresight of a consequence as virtually certain, rather than being conceptually independent, have a common denominator, in that they both 'signal *prior endorsement* of the outcome by the actor, leaving no room for the actor to meaningfully disassociate himself from the outcome once it has materialised.'[114] Using *Woollin* as an example, Pedain explains that '[t]he *reason* why we allow *Woollin* to distance himself from the foreseeable consequences of his actions is that he did not endorse injury or death even as a possibility. We allow him to *deny endorsement,* which we may not be prepared to do in any case of merely possible as opposed to virtually certain consequences.'[115]

Though widely cited, the idea put forward in her paper is still awaiting recognition by the courts. It may well be that it was either ahead of its time, or too ambitious, or both. In this thesis I would like to argue that a similar suggestion might well fall on more fertile ground in the context of joint enterprise. As we will see, the secondary party is not himself 'wielding the knife'; in fact, there is little, if any, causative link between his conduct and

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112 ibid 127, 135 (emphasis added).

113 Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR, 579, 593.

114 ibid 586.

115 ibid.

the victim's death: it is typical of joint enterprise situations that while S has participated with P in the commission of one particular offence (crime A), the killing (crime B) is done by P without any further acts of assistance or encouragement on S's part.[116] It may therefore be easier for a court to move from a foresight to an attitude test in this more limited context than in the general law of murder – which is not to say that such a more radical step might not be taken in due course.

There is a further parallel between the *mens rea* debates in murder and joint enterprise: if in murder there is a debate whether foresight of death as a virtual certainty *amounts to* or is merely *evidence* of intention, in the context of joint enterprise the participant's foresight of the perpetrator's acts is, on the current understanding of joint enterprise, sufficient to fix the participant with liability for the perpetrator's crime. The argument presented in Chapter 8 is that the House of Lords has, in *Powell*, turned what used to be a rule of evidence into a substantive *mens rea* element. One argument put forward in this thesis is that while foresight may well be good evidence of endorsement (in the sense to be identified in the discussion that follows), it is not in itself sufficient as a threshold for liability.

Before we can properly pursue these points we need, however, familiarise ourselves with the German concept of *dolus eventualis* (as applied in the case law). This is best done in the context of Germany's homicide laws to which we will turn in the next chapter. Before we can engage in a discussion of how the idea of endorsement might usefully be employed so as to improve the English law of joint enterprise, we will also need to look at the elements of joint enterprise liability, as commonly understood, and the context – complicity – in which they are rooted. This will be done in Chapters 4 and 5. In keeping with the comparative nature of our discussion, in Chapter 6 we will look at the German law

[116] See also Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 858-60.

of complicity, focussing in particular on the functional equivalent of the English doctrine of joint enterprise, before then applying any insights gained (on the law of intention and joint enterprise) to our discussion of how the doctrine of joint enterprise might be developed so as to alleviate the problems commonly associated with this principle (Chapters 7 and 8).

Chapter 3: HOMICIDE IN GERMAN LAW

A Setting the Scene

This chapter deals with voluntary homicide in German law. A basic understanding of *Mord* and *Totschlag*, the relevant offences in the *Strafgesetzbuch*, is necessary to enable the reader to understand fully how the German functional equivalents of joint enterprise (to be discussed in Chapter 6) operate. As with English law, the rules pertaining to participation in crime do not operate in a vacuum, and individual cases can only be understood against the backdrop of the applicable substantive law.

Before we look at the principal German homicide offences, it seems warranted to introduce the common law reader to the basic terminology, methodology and characteristic features of German criminal law. With no claims of completeness, the following overview is meant to set the scene for the subsequent discussion of Germany's homicide laws and its functional equivalent of the English joint enterprise principle.

I Salient Features of the *Strafgesetzbuch*

1 General Part and Special Part

The German penal code is divided into a general part (*Allgemeiner Teil*) and a special part (*Besonderer Teil*). The general part comprises of §§ 1-79 b StGB. It fulfils two functions: first, it deals with those elements pertaining to criminal liability that are common to all criminal offences. Examples include: the rules on attempts and withdrawal (*Versuch und Rücktritt vom Versuch, §§ 22 ff StGB),* perpetration and participation *(Täterschaft und Teilnahme, §§ 25 ff StGB)*, and liability for omissions (*Strafbarkeit durch Unterlassen, § 13 StGB).* Secondly, it contains general stipulations as to the legal consequences of crime, ie it deals with criminal sanctions (§§ 38 ff StGB) and so-called improvement and protection

orders (*Massregeln der Besserung und Sicherung*, §§ 61 ff StGB). For instance, § 38 (2) StGB sets out minimum and maximum prison terms while § 40 StGB contains stipulations concerning monetary fines payable in daily instalments (*Tagessätzen*).

The general part has been described as a 'product of the principle of abstraction' which deals with all those requirements and consequences of criminal conduct that, since common to all offences, can be placed 'outside the brackets of the individual offences described in the special part'.[117] Surprisingly, perhaps, the general part does not define many of the terms and concepts it employs. Definitions are either presupposed or have been left open precisely so that courts and legal scholars may flesh out the terminology.

An example – one that we will come back to in the context of voluntary homicide – is the notion of 'intent'. While many provisions either stipulate or presuppose that the offender must have acted intentionally to incur criminal liability, 'intent' as a legal concept is nowhere defined in the StGB.[118] Instead, when applying the notion of 'intent' the courts rely on a conception developed largely by academic discourse.[119]

Even where (as with § 25 (1) StGB) the code provides for a definition (of what it means to be a 'perpetrator'), this will often be found neither conclusive nor exclusive. Thus, further modes of perpetration (such as the so-called *Täter hinter dem Täter* – 'perpetrator behind the perpetrator') have over time been recognised by the courts.

As such, the StGB, by its very design, is an open-textured and incomplete document.[120] This may come as a surprise to some common lawyers who will perhaps have expected a code such as the StGB to be all-encompassing, but certainly addressing issues so

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117 Claus Roxin, *Strafrecht I*, § 1 para 15.

118 The legislator deliberately refrained from defining intention in order to leave room for future development of the concept, see BT-Drucksache V/4095 p 8-9 <http://dipbt.bundestag.de/doc/btd/05/040/0504095.pdf> accessed 28 January 2015.

119 Richard Honig, 'Zur gesetzlichen Regelung des bedingten Vorsatzes' GA 1973, 257, 257-259; Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 101; Markus D Dubber, 'The Promise of German Criminal Law: A Science of Crime and Punishment' (2005) 6 German Law Journal 1049, 1054.

120 See Markus D Dubber, 'The Promise of German Criminal Law: A Science of Crime and Punishment' (2005) 6 German Law Journal 1049, 1054.

fundamental to criminal law jurisprudence as the definition of mental elements. However, by leaving certain 'gaps', the StGB allows for the system of criminal law to evolve dynamically and remain flexible enough to integrate future results of doctrinal developments.[121]

In contrast to the general part, the special part lists specific criminal offences. These will usually be made up of an offence definition and a stipulation as to the applicable criminal sanction(s). Thus, the function of the special part is, first, to describe and classify individual offences (or offence families), and secondly, to specify the applicable punishment scales. As will be seen, *Mord* (roughly: murder) is the only offence (apart from genocide[122]) that comes with a mandatory criminal sanction (life imprisonment), ie the threatened punishment is outside the discretion of the court. For all other offences, the criminal law specifies a punishment regime from which the judge must choose the appropriate measure.

The advantage of the division into a general and a special part is that it allows the penal code to remain a fairly slim book: by regulating aspects applicable to all offences in the general part, the StGB avoids repetition. Offence definitions can be drafted in fewer words and thus stay reasonably short and (for the most part) well-ordered. This is also achieved by the technique of cross-referencing, ie some provisions of the special part (explicitly) refer back to one or several other provisions of the general or special part or will (implicitly) have to be read against the backdrop of (or in connection with) such provisions.

The cost at which this advantage is purchased is a fairly high level of abstraction in the formulation of individual provisions, which for German jurists, however, is more of a virtue than a vice. Whilst it seems fair to argue that criminal laws should be easily

[121] See Kai Ambos, 'Toward a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law*' (2007) 28 Cardozo Law Review 2647, 2648.

[122] *Völkermord*, see § 6 (1) Nr 1, (2) of the *Völkerstrafgesetzbuch*.

accessible for laypeople (to whom they are, after all, addressed), German lawyers take pride in the technicalities of what they perceive to be the subject matter of a branch of 'legal science'. Arguably, since German courts no longer rely on juries (although lay magistrates sit in trial courts alongside legally qualified judges),[123] there is no need to avoid complex doctrinal constructs that a jury could not understand. This makes German criminal trials differ from those in the common law world and may go some way to explaining why so much academic writing in German criminal law is highly abstract and dependent on the subtleties of legal construction. Academic writings in the common law world, by contrast, characteristically use simple language and many examples to illustrate a particular point. This would be frowned upon by German lawyers, for whom the idea that legal writings should be readily accessible for non-experts is bewildering; once the German lawyer has acquired the expertise to navigate the legal system and the complexities of its laws, to suggest that every layperson should in principle be able to do so, without spending as much time on legal training as any German law student is 'forced' to by the dual qualifying system of university law course and *Referendariat*, is often seen as somewhat belittling the achievement. This mindset is well reflected in the StGB, in that fully appreciating the content of its provisions often depends on understanding elaborate explanations to be found in legal commentaries (which in turn refer the reader to a vast academic literature on virtually any point of law).

2 Crimes of Intent and Crimes of Negligence

According to § 15 StGB, 'only intentional commission of a crime is punishable unless the statute explicitly extends liability to negligent conduct.'[124] The StGB thus presupposes two

[123] § 25 GVG, §§ 74 (2), 76 (2) GVG, see further BGH NStZ 2004, 56; Volker Krey, *German Criminal Procedure Law Volume I* (Kohlhammer 2009) para 137; Thomas Lundmark, *Charting the Divide between Common and Civil Law* (OUP 2012) 214-218.

[124] Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 252, 261.

offence categories differentiated by the stipulated type of *mens rea*: those that are committed intentionally (*Vorsatzdelikte*) and those that are committed negligently (*Fahrlässigkeitsdelikte*). Correspondingly, German criminal doctrine recognises two general types of mental state: *Vorsatz* (intention) and Fahrlässigkeit (negligence). These differ from their English counterparts, both in content and scope: recklessness as a concept in between intention and negligence is unknown to German law.[125] In German law, situations of common law recklessness are governed partly by a sub-category of negligence known as bewusste Fahrlässigkeit (advertent negligence) and partly by an extended concept of intention.

We have already noted that the StGB does not define intention, although the concept is clearly presupposed by many of its provisions. In legal doctrine, intent is described 'as the will to realise all objective elements of a crime definition, coupled with knowledge that these elements exist'[126] or in short: *Wissen und Wollen der Tatbestandsausführung*.[127]

Three forms of intent so demarcated are recognised, namely, *Absicht* (*dolus directus* I), *Wissentlichkeit* (*dolus directus* II) and *Eventualvorsatz* (*dolus eventualis*). The former two do not significantly differ from the English concepts of direct and oblique intention. *Dolus eventualis*, by contrast, is not thought to form part of the English concept of intention. It is sometimes rather confusingly described as 'conditional intent'[128] or erroneously likened to common law recklessness.[129] In a nutshell, it applies where the actor recognises the possibility that a certain (prohibited) result will follow from his actions *and*

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125 Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 102.

126 Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 252, 254, 261.

127 Taylor refers to this as the '"knowing and desiring" formula', see Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 110.

128 Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 252, 262.

129 Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd rev edn, OUP 2013) 46, 75; Allen O'Rourke, 'Joint Criminal Enterprise and *Bratanin*: Misguided Overcorrection' (2006) 47 Harv Int'l LJ 307, 313.

reconciles himself to the possibility of a harmful outcome.[130] As we will see, '[i]n homicide cases the courts sometimes use this formula to declare non-intentional the life-endangering acts of defendants whom they regard as generally hesitant to kill someone. The postulated volitional element of conditional intent thus permits the courts to distinguish between defendants on the basis of their general character and to refrain from convicting those whom they regard as "good guys" of intentional (attempted) homicide.'[131] While I am not going so far as to suggest that *dolus eventualis* might be a useful addition to the existing categories of the English law of intention,[132] it is one of the central pillars of this thesis that notions related to *dolus eventualis* might bolster the currently very weak *mens rea* requirements in the English law of joint enterprise.

I will not say more about the concept (which will be examined in more detail below)[133] at this stage, save that since on the German classification, *dolus eventualis* borders on to negligence, it needs to be distinguished from advertent negligence, 'which occurs when the actor is aware of a risk but thinks (or hopes) that the harmful result will not come about even if he or she performs an act he or she knows to be dangerous.'[134] The difference between *dolus eventualis* and this form of negligence hence is the attitude of the actor towards the foreseen consequences of his actions, as will be further explained below.[135]

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130 Johannes Wessels, Werner Beulke, Helmut Satzger, *Strafrecht AT* (44th edn, CF Müller 2014) para 214.

131 Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 252, 262.

132 More ambitious in this regard: Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579. However, the concept of *dolus eventualis* is – perhaps rightly – criticised in Germany for being insufficiently precise to tie a murder conviction to it (see p 64 ff below). Transplanting it to England, where the *mens rea* of murder is much less demanding than in Germany, might thus generate more problems than it would solve. These concerns do not exist in the context of joint enterprise, where the introduction of *dolus eventualis* ideas would make the *mens rea* standard more demanding.

133 At p 57 ff.

134 Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 252, 262.

135 At p 57 ff.

Under German law, there are four prerequisites for ordinary (ie inadvertent) negligence: 'the actor can foresee the risk for a protected interest; the actor violates a duty of care with respect to the protected interest; harm as defined by the statute occurs; the offender could have avoided the harm by careful conduct.'[136] As in English law after *G*,[137] the standard of foreseeability, as well as of care, is to be determined on the basis of the defendant's individual (ie subjective) capabilities. Unlike English law, however, simple negligence suffices, unless the law stipulates a higher degree of negligence.[138]

Most crimes contained in the StGB require some form of intent; negligence-based offences are the exception rather than the norm.[139] Still, the categorisation has practical ramifications: first, attempts are only punishable in relation to intentional crimes. Secondly, the rules of assistance and encouragement (*Teilnahme*) only apply to crimes of intent. There is no participation *in* negligence. Neither does the law recognise participation *by* negligence: incitement and facilitation require intentional conduct.[140]

3 Result-Qualified Offences

A special offence category, and one that is relevant to the subject matter of this thesis, are the so-called result-qualified offences (*Vorsatz-Fahrlässigkeits-Kombinationen*). These are offences which consist of a basic offence which needs to be committed intentionally (eg *Körperverletzung*, assault occasioning bodily harm) plus a specific consequence (eg death) for which, according to § 18 StGB, it suffices that this be caused negligently, unless the offence definition requires more, eg carelessness (*leichtfertige Verursachung,* as does § 251 StGB, robbery causing death). While a more serious offence is thus constructed out of a basic offence, this offence category must not be confused with English law constructive

136 ibid.
137 [2003] UKHL 50, [2004] 1 AC 1034.
138 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 16.
139 Volker Krey and Robert Esser, *Deutsches Strafrecht Allgemeiner Teil* (5th edn, Kohlhammer 2012) para 202.
140 §§ 26, 27 StGB.

liability: the latter does not require *mens rea* as to the prohibited result, whereas German result-qualified crimes require at least negligence before liability attaches (§ 18 StGB).[141] An example of this category of offences is § 227 StGB (*Köperverletzung mit Todesfolge*, causing bodily harm resulting in death) which requires the offender to have caused death negligently as the result of an intentional offence against the person. § 227 StGB is similar in its operation and effect to the English offence of unlawful dangerous act manslaughter, but note the difference in label. We will come back to this when discussing multi-handed homicides in German law.[142]

4 Basic, Aggravated and Privileged Offences

StGB offences can be further classified according to their nature as *Grundtatbestände* (basic offences), *Qualifikationen* (aggravated offences) or *Privilegierungen* (privileged offences). Basic offences describe the core elements of a particular offence. Aggravated offences build upon the basic offences; they usually require that the perpetrator have satisfied an additional element which makes the basic offence an aggravated crime with a more severe punishment. By contrast, privileged offences stipulate under what conditions a crime may be regarded as less severe, resulting in mitigated scales of punishment.

As we will see below,[143] there is a debate in German criminal law whether murder is best seen as an aggravated form of manslaughter or as a separate offence. The traditional view of the courts that murder is a separate offence penalising a distinct category of wrong has recently been doubted (albeit *obiter*) by the BGH 5th Senate in favour of the opposite school of thought which treats murder as an aggravated form of the manslaughter provision. The issue is not just academic; it has ramifications for the liability of a secondary party who participates in someone else's murder but himself lacks the relevant *personenbezogenes*

141 Likewise Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 31.
142 See p 227 ff.
143 At p 52 ff.

Mordmerkmal (a specified personal characteristic such as *Habgier* (greed) which the law treats as an aggravating factor in homicide, resulting in the killing being classified as murder rather than manslaughter): the two schools of thought arrive at different conclusions concerning whether the accomplice is liable as an accessory to murder or as an accessory to manslaughter, depending on which subsection of § 28 StGB ('special personal characteristics') they find applicable, which in turn is determined by the taxonomy applied to § 212 StGB and § 211 StGB. The issue is further addressed below,[144] so we need only take note here that the element of taxonomy might matter in the (for our purpose relevant) context of complicity.

II The Tripartite Offence Structure

In contrast to the bipartite offence structure of English law, which differentiates between *actus reus* and *mens rea*, the StGB is premised on a tripartite model (*dreistufiger Verbrechensaufbau*). [145] This differentiates between *Tatbestand* (offence definition), *Rechtswidrigkeit* (wrongfulness) and *Schuld* (culpability). Under German law, a criminal offence is thus defined as conduct which fulfills the offence definition and is committed both wrongfully and culpably.[146]

The *Tatbestand* (offence definition) lists the constituent elements of an offence. These consist of objective (or external) elements such as conduct, circumstances, causation, harm etc. as well as subjective (or internal) components (ie the mental element).[147] Conduct

144 ibid.

145 Volker Krey and Robert Esser, *Deutsches Strafrecht Allgemeiner Teil* (5th edn, Kohlhammer 2012) para 255. For an overview of how German criminal law theory came to recognise this structure, see Kai Ambos, 'Toward a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law*' (2007) 28 Cardozo Law Review 2647, esp 2650 - 2666.

146 German law further recognises categories which remain outside the tripartite structure, such as *Strafausschließungsgründe* (grounds relieving the accused from punishment, such as withdrawal from an attempt) and *objektive Bedingungen der Strafbarkeit* (factors that must be present before liability is triggered but are not subject to the *mens rea* requirements), see Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 17.

147 Albin Eser, 'Justification and Excuse: A Key Issue in the Concept of Crime' in Albin Eser, George P Fletcher, Karin Cornils (eds), *Justification and Excuse: Comparative Perspectives* (1987) 17, 62.

that satisfies both the objective and subjective *Tatbestand* is presumed to be wrongful (‘*Tatbestandsmäßigkeit indiziert Rechtswidrigkeit’)*.[148] However, this is only a (rebuttable) presumption, and it should be stressed that wrongfulness (*Rechtswidrigkeit*) is a separate and distinct analytical category; its absence, in contrast to some instances of English law, does not, therefore, negate the *objektiver Tatbestand*.[149]

A finding of *prima facie* wrongfulness can be rebutted if a justificatory defence applies. At the level of *Rechtswidrigkeit,* the question is therefore whether the accused’s conduct was justified (as measured not just against the permissive rules of the StGB but against the entire body of German law).[150] Justificatory defences include self-defence, justificatory necessity, consent, superior orders, and citizen’s arrest.[151] If one of these applies, the accused’s conduct does not amount to wrongdoing in the eyes of the law, with the consequence that no offence has taken place.

If no justification applies, the third and final analytical category, namely culpability (*Schuld*), comes into play: German law adheres to the notion of *nulla poene sine culpa* (*Schuldprinzip*); punishment thus presupposes individual guilt. The general rule is that conduct which fulfills the offence definition and was committed wrongfully is presumed also to have been committed culpably (meaning it attracts blameworthiness) unless the defendant can avail himself of an excusatory defence. Excusatory defences include insanity, diminished responsibility, duress, excessive self-defence, provocation, unavoidable mistake of law and errors about facts underlying a recognised justificatory defence.[152]

Much has been written about the (alleged) superiority of the German structure over

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148 Russel L Christopher, ‘Tripartite Structures of Criminal Law in Germany and other Civil Law Jurisdictions’ (2007) 28 Cardozo Law Review 2675, 2676.

149 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 16.

150 Volker Krey and Robert Esser, *Deutsches Strafrecht Allgemeiner Teil* (5th edn, Kohlhammer 2012) para 262.

151 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 16.

152 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 17.

the analytical framework of the common law, praising its logic and methodical sophistication.[153] However, the differences between the tripartite structure and the simpler bipartite structure of the common law must not be overrated: although it uses the same term in reference to both instances, English law also recognises a distinction

> between *mens rea* in a narrower (descriptive) sense (…) encompassing only the psychological subjective elements (all forms of intent, including specific or ulterior intent) and in a broader (normative) sense (…) referring to the normative-subjective elements in the sense of moral blameworthiness.[154]

Indeed, Dubber has argued that the analytical framework of the Model Penal Code, which mirrors the German offence structure in that it requires (1) conduct engaged in (2) without justification and (3) without excuse, can 'easily [be] mapped onto the traditional common law scheme'.[155] This is because *actus reus* and *mens rea* are only 'necessary, but not sufficient, prerequisites of criminal liability (…) criminal liability requires both a criminal "offence" (consisting of *actus reus* and *mens rea*) and the absence of "defences"'.[156] The latter can be divided into justificatory and excusatory defences, and so are amenable to the same analytical inquiry as the stages of wrongfulness and culpability under the German model.

Indeed, Dubber laments that the 'supposed structural incompatibility' has proved an 'unnecessary impediment to comparative analysis'.[157] In this spirit, and for ease of comparison, this thesis will use the familiar analytical framework of the common law. In other words, offences – of English as well as German law – will be described and analysed

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153 See George P Fletcher, *The Grammar of Criminal Law: American, Comparative, and International, Volume One: Foundations* (OUP 2007) 318-325.

154 Kai Ambos, 'Toward a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law*' (2007) 28 Cardozo Law Review 2647, 2657.

155 Markus Dirk Dubber, 'Comparative Criminal Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 1287, 1318.

156 ibid 1319.

157 ibid 1318. Dubber draws attention to some general differences such as the fact that German law attaches greater significance to the distinctions between the three stages which, on the German model, are not just 'convenient analytical devices' but 'thought to reflect the ontology, or the phenomenology, of criminal liability'. However, in his view the 'basic structural compatibility (…) should suffice for meaningful comparative analysis', see p 1319.

in terms of *actus reus* and *mens rea* elements. I shall, however, sometimes use 'mental element' to describe *mens rea* in its narrow or descriptive sense and 'culpability' to refer to it in its broader or normative sense to avoid confusion.

B An Overview of Homicide Offences

As we have seen, the English law of voluntary homicide is characterised by two main controversies: on the one hand, there is the gbh rule, under which a killing will be murder if it was committed with an intent to inflict serious harm (as opposed to death); on the other, there is the lack of clarity surrounding the concept of intention itself. The breadth of the gbh rule is sought to be contained by a strict intention requirement which is characterised by particular difficulties in cases where the infliction of serious harm is not the primary aim of the killer. In German law, the balance is struck rather differently. Homicide offences require an intention to kill, but 'intention' is more broadly defined, encompassing cases in which the killer realises that his actions carry the risk of causing the death of another but takes a 'so be it' attitude to that outcome, an attitude which reveals an acceptance or 'endorsement' of the fatal results of his actions. This species of intention is known as *dolus eventualis*.[158]

I will argue in Chapter 8 that a broader conception of intention which takes account of the offender's attitude towards the consequences of his actions (and, indeed, those of his companions-in-crime) may well be the answer to overcoming the criticisms made of the *mens rea* threshold in the English concept of joint enterprise liability. While it will not be suggested that the German concept be transplanted into English law, the German understanding of intention (and *dolus eventualis* in particular) is instructive from the

[158] Johannes Wessels, Werner Beulke, Helmut Satzger, *Strafrecht AT* (44th edn, CF Müller 2014) para 214.

common law point of view, and it will be argued that traces of a broader conception pertaining to the offender's attitude can be found in some pre-*Powell* case law.

Antje Du Bois-Pedain has observed that the 'recognition of *dolus eventualis* in the German system means that in practice there is a large overlap between what English law regards as murder under the constructive variant of this offence and what German law classifies as *Mord* or *Totschlag* because of the presence of an intention to kill in the form of *dolus eventualis*.'[159] It is important to note, however, that the demarcation lines between *Mord* and *Totschlag*, that is, murder and manslaughter, are drawn rather differently in German law. For a killing to be characterised as *Mord* under § 211 StGB, an intent to kill does not suffice. German law requires further aggravating factors, such as a particularly contemptible motive, or killing in a particularly heinous or cruel way. This has led commentators such as Bohlander to question whether the translation of the German '*Totschlag*' with the English 'manslaughter' can be sustained – indeed, there is a lot to be said for his view that most instances of murder in English law would merit no more than a *Totschlag* charge in German law, so that '*Totschlag'* might more accurately be translated with the English 'murder'.[160] In this thesis I have decided not to follow his lead in this respect. In translating '*Totschlag'* with 'murder' and '*Mord'* with 'aggravated murder', Bohlander follows a school of thought which considers § 211 StGB to be an aggravated version of the basic intentional homicide offence in § 212 StGB. However, German courts continue to treat § 211 StGB and § 212 StGB as separate offences. This thesis will use the terms 'manslaughter' for § 212 StGB and 'murder' for § 211 StGB and thus follow the lead of German judges.

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159 Antje du Bois-Pedain, 'Intentional Killings: The German Law' in Jeremy Horder (ed), *Homicide Law in Comparative Perspective* (Hart 2007) 55, 57.

160 Michael Bohlander uses the terms 'murder' in relation to the *Totschlag* provision in § 212 StGB and 'aggravated murder' in relation to the *Mord* provision in § 211 StGB, see his translation of the German penal code which is available online < http://www.gesetze-im-internet.de/englisch_stgb/ > accessed 28 January 2015 and in print, *The German Criminal Code: A Modern English Translation* (Hart 2008) as well as his *Principles of German Criminal Law* (Hart 2009), esp ch 9.

Our overview starts off by putting the provisions on *Mord* and *Totschlag* into their systemic context. This is followed by an introduction to the requirements of § 212 StGB (manslaughter) and § 211 StGB (murder) respectively. The focus in discussing the manslaughter provision will be on the meaning of intention, whereas for murder it will be on *Mordmerkmale,* ie those aggravating factors the presence of which 'upgrades' an intentional killing to murder. The chapter concludes with an overview of § 227 StGB (*Körperverletzung mit Todesfolge*) which criminalises the (intentional) infliction of bodily harm which (negligently) results in death. While this is not a homicide offence under the German taxonomy, it needs to be mentioned in this context so we can compare the scope of the English law of homicide and its functional equivalents in German law: some cases which as a result of the gbh rule in English law amount to murder would under German law be treated as *Körperverletzung mit Todesfolge*, ie not even as *Totschlag* (manslaughter).

I The Principal Offences

Three provisions[161] in the German penal code deal with instances of 'voluntary homicide'. German criminal law thus adopts a three-tier model of murder/manslaughter, although the particular relationship between the different levels of offence remains subject to debate. In providing for different offences that deal with intentional killings, German law is clearly premised on the understanding that not all cases of voluntary homicide merit the label 'murder'. The basic homicide offence is *Totschlag* (§ 212 StGB) which literally translates as 'manslaughter'. Although this translation suggests otherwise, the terminological correspondence between English and German does not coincide with functional correspondence: many cases that under German law would be decided on the basis of § 212 StGB (and hence qualify as 'manslaughter') will in England amount to murder. Under

[161] Leaving aside the provision on euthanasia which might be seen as a fourth provision on voluntary homicide in form of a less serious case of manslaughter (§ 216 StGB).

German law, the 'murder' tag remains reserved for killings which fulfil the elements of a particularly heinous homicide as set out in § 211 StGB. At the other end of the spectrum, §213 StGB deals with less serious cases of voluntary manslaughter.[162] The provision sets out mitigating circumstances that allow the court to reduce a defendant's sentence.[163]

The provisions on *Mord* and *Totschlag* are contained in the 16th part (*Abschnitt*) of the penal code which is headed 'offences against human life' (*Straftaten gegen das Leben*). 'Human life' thus is the legal interest (*Rechtsgut*) which the provisions contained in this part aim to protect. It is important to appreciate that murder and manslaughter are not the only provisions that so aim to protect human life. The StGB contains further provisions that relate to intentionally or negligently causing the death of another human being. Thus, apart from the provisions on murder and manslaughter, the 16th part deals with euthanasia (§ 216), homicide by negligence (§ 222) and abortion (§§ 218 – 219b).

Another important provision is § 227 StGB which can be found amongst the *Strafgesetzbuch*'s offences against the person. It applies to cases where death is caused negligently but consequent upon an intentional infliction of bodily harm. § 227 StGB is probably the most important provision penalising fatal outcomes of criminal conduct outside the murder/manslaughter dichotomy. As we will see, it serves as a functional equivalent both to unlawful dangerous act manslaughter and the gbh rule in murder under English law.

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[162] This provision does not have the status of an offence. It is considered to be a provision relevant to sentencing rather than one of substantive law. Nevertheless, where it applies it reflects that a particular incident is considered to be a less serious case of manslaughter.

[163] There are further instances – not referred to in § 213 StGB – in which a killing, by virtue of cross-referencing, may be classified as having been committed in mitigating circumstances, eg manslaughter by reason of diminished responsibility (§§ 212, 21, 49 (1) StGB), see Antje du Bois-Pedain, 'Intentional Killings: The German Law' in Jeremy Horder (ed), *Homicide Law in Comparative Perspective* (Hart 2007) 55, 66-67.

II The Relationship between Murder and Manslaughter

The interpretation of most of the offence elements contained in the murder and manslaughter provisions is contentious, and there is a vast amount of academic literature on the topic. Commentators agree that law reform is overdue,[164] and at the time of writing, it looks as if reforms will indeed be implemented in the medium term. It would, however, go beyond the scope of this thesis to discuss individual reform proposals,[165] just as it would to discuss every controversy of the law as it stands. What follows is, therefore, largely a summary of what could be termed the authoritative position, ie how the courts interpret the current provisions. One controversy is, however, noteworthy and will be dealt with at the beginning of this chapter as it has consequences for the liability of participants-in-crime: the relationship between murder and manslaughter within a (tiered) system of homicide offences.

The relationship between murder and manslaughter has long been the subject of a fierce debate between courts and academic lawyers. The amount of academic ink that has been spilt in the course of the resulting doctrinal discussion is staggering even by German standards.[166] The debate has recently been given new momentum with *obiter dicta* by the BGH's 5th Senate[167] which indicated a willingness to part with the view traditionally taken by the judiciary, ie that murder and manslaughter are independent offences,[168] in favour of

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164 See Albin Eser, *Empfiehlt es sich, die Straftatbestände des Mordes, des Totschlags und der Kindestötung (§§ 211 bis 213, 217 StGB) neu abzugrenzen? Gutachten zum 53. Deutschen Juristentag Berlin 1980*, Ständige Deputation des Deutschen Juristentages (ed) (1980); BeckOK StGB/Eschelbach § 211 para 1.

165 See eg Alexander Kubik and Till Zimmermann, 'Mord und/oder Totschlag? – Eine kritische Analyse aktueller Reformvorschläge zur vorsätzlichen Tötung' StV 2013, 582; Klaus Bernsmann and others, 'Zur Reform der Tötungsdelikte Mord und Totschlag – Überblick und eigener Vorschlag' NStZ 2014, 9; Tonio Walter, 'Vom Beruf des Gesetzgebers zur Gesetzgebung – Zur Reform der Tötungsdelikte und gegen *Fischer et al.* in NStZ 2014, 9' NStZ 2014, 368; Michael Köhne, 'Immer noch reformbedürftig: Strafvorschriften zur vorsätzlichen Tötung' ZRP 2014, 21; Stefan König, 'Überlegungen zur Reform der Tötungsdelikts-Normen' (2014) 50 RuP 9.

166 Klaus Bernsmann and others, 'Zur Reform der Tötungsdelikte Mord und Totschlag – Überblick und eigener Vorschlag' NStZ 2014, 9, 10.

167 BGH NJW 2006, 1008, 1012-1013.

168 BGHSt 01, 235, 238; BGHSt 01, 368, 371; BGHSt 22, 375, 377; BGHSt 36, 231; BGH NStZ-RR 2002, 139; BGH NJW 2005, 996, 997. Whether this view was shared by the *Reichsgericht* is difficult to

the opposing view (defended by the majority of legal scholars), ie that murder is an aggravated form of Totschlag (§ 212 StGB + *Mordmerkmal* = §211 StGB).[169] Thus, in contrast to English law, where it is accepted that involuntary manslaughter, voluntary manslaughter and murder are all offences of the *genus* homicide of differing degrees of seriousness,[170] the German courts take the stance that neither *Mord* nor *Totschlag* is an aggravated nor mitigated form of the other offence: on the case law, *Mord* and *Totschlag* involve distinctive wrongs rather than different degrees of the same wrong.[171]

This taxonomical question has some practical implications, particularly in the context of this thesis: in some instances, the extent of liability for accomplices to a homicide will depend on whether the requirements of § 211 (2) StGB constitute an aggravating qualification of the underlying offence of manslaughter (this is very much the prevailing view in the literature) or whether they constitute an independent offence (the view still taken by the courts): in the former case, an accomplice who did not realise the relevant *personenbezogenes Mordmerkmal* (comprising those of the aggravating factors listed in § 211 (2) StGB which relate to the actor and his motives, ie killing out of pleasure, in order to achieve sexual gratification, out of greed, out of other base motives, in order to facilitate or to cover up another crime)[172] in his own person would only be guilty of assisting manslaughter. In the latter case, such a person might be liable for assisting murder.

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ascertain, see Günter Lembert, *Die verfassungsrechtliche Korrektur des § 211* (Dissertations-Druckerei Charlotte Schön 1965) 5, 6.

169 Wilfried Küper, 'Die Rechtsprechung des BGH zum tatbestandssystematischen Verhältnis von Mord und Totschlag – Analyse und Kritik – Teil 1' JZ 1991, 761, 761-762; Gunther Arzt, 'Mord durch Unterlassen' in Bernd Schünemann and others (eds), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001* (Walter de Gruyter 2001) 855, 855; Ingeborg Puppe, 'Anmerkung zu BGH, Urteil vom 12.1.2005 – 2 StR 229/04 (LG Kassel)' JZ 2005, 902, 903; Christian Jäger, 'Anmerkung zum Urteil des BGH vom 12.1.2005, 2 StR 229/04' JR 2005, 477, 479-480.

170 The Law Commission refers to murder as the 'top tier' or 'highest category offence', see *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 1.18.

171 A position that Wilson argues is shared by English law, see William Wilson, 'Murder and the Structure of Homicide' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (OUP 2000) 21, 22.

172 Steffen Stern, *Verteidigung in Mord- und Totschlagsverfahren* (3rd edn, CF Müller 2013) para 259.

In the following, I will refer to *Totschlag* as the basic offence. This is not to say that I thereby mean to take a stance in the above controversy: in order to enable comparison of the law *as it stands*, this thesis follows the case law. Thus, any reference to manslaughter as the 'basic' offence is not to be understood as saying that manslaughter and murder stand in a relationship of basic and aggravated offence; rather 'basic' is here used to emphasise that *Totschlag* is the 'standard' voluntary homicide offence: most voluntary killings will amount to *Totschlag* rather than *Mord*. In similar vein, any reference to 'aggravated' in relation to murder is not meant to say that *Mord* is an upgraded version of manslaughter. Rather the term is used to stress the fact that murder requires proof of offence elements that include, but go beyond, those of manslaughter.

C Totschlag as the Basic Homicide Offence (§ 212 StGB)

I *Actus Reus*

§ 212 (1) StGB describes the standard case of intentional homicides. In somewhat convoluted terms, the provision stipulates that '[w]hosoever kills another person, without being a murderer under section 211, shall be convicted of manslaughter and be liable to imprisonment of not less than five years.' [173] This formulation governs all cases of intentional killing, whether by act or omission, unless the prosecution can prove the additional aggravating features (enumerated in § 211 StGB) which elevate a charge of manslaughter to one of murder.

[173] The sentencing provision needs to be read in conjunction with § 38 StGB, which stipulates that imprisonment cannot be 'for life' unless the law explicitly says so and lays down 15 years as the maximum length of a sentence which is not 'for life'. This means that for a basic voluntary homicide, the normal sentencing range is a prison sentence of between five and 15 years. § 212 (2) StGB offers further guidance to the court in sentencing (*Strafzumessungsregel*). The subsection provides that 'in particularly serious cases the penalty shall be imprisonment for life.' Accordingly, a serious instance of manslaughter, which is short of murder, may yet attract the life sentence otherwise, as we will see, reserved for murder cases.

II *Mens Rea*

We saw above[174] that German law recognises only two types of mental state: *Vorsatz* (intention) and *Fahrlässigkeit* (negligence). Recklessness, which covers the area between intentional and negligent conduct in the common law, is in German law partly governed by an extended concept of intention itself, and partly by a concept known as advertent negligence (*bewusste Fahrlässigkeit*).[175] The German concept of intention – as applicable to § 212 (1) StGB – is therefore broader than its English equivalent, extending beyond conduct that is committed with the aim of causing death (direct intention; *Absicht*; *dolus directus I*) or in the knowledge that death is almost certain to follow (indirect intention; *Wissentlichkeit*; *dolus directus II*)[176] to instances where the defendant realises that death might follow (cognitive element) and 'approvingly takes [this consequence] into account'[177] or, at a minimum, 'reconciles himself to' this consequence (*Eventualvorsatz*; *dolus eventualis*).[178] The first two forms of intention are not significantly different to the equivalent concepts in English law and will therefore only be explained briefly. They are fairly uncontroversial and have generated very little academic debate.[179] *Dolus eventualis*, on the other hand, is much more difficult to grasp and of much greater importance for later chapters of this thesis. The concept is sometimes equated with common law recklessness,[180]

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174 At p 40 f.

175 See LK-Joachim Vogel, *Strafgesetzbuch*, Vol 1 (12th edn, de Gruyter 2007) Vor § 15 para 89.

176 On the meaning and significance of *dolus directus I* and *dolus directus II* in German criminal law, see Erich Samson, 'Absicht und direkter Vorsatz im Strafrecht' JA 1989, 449; Johannes Wessels, Werner Beulke, Helmut Satzger, *Strafrecht AT* (44th edn, CF Müller 2014) paras 210-213.

177 BGHSt 36, 1.

178 BGH (23.02.2012) BeckRS 2012, 07423 [13].

179 Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 107.

180 See eg Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd rev edn, OUP 2013) 46, 75; Allen O'Rourke, 'Joint Criminal Enterprise and *Bratanin*: Misguided Overcorrection' (2006) 47 Harv Int'l L J 307, 313. It is also sometimes rather confusingly translated with 'conditional intent' (see eg Law Commission, *Reform of Offences against the Person: A Scoping Consultation Paper* (Law Com CP No 217, 2014) para 6.57; Sarah Finnin, 'Mental elements under article 30 of the Rome Statute of the International Criminal Court: a comparative analysis' (2012) ICLQ 325, 334; Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2011) 252, 254, 261; Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 63) which in English law means something else, namely that the actor has formed an intent to commit an offence only if

but in fact there is a crucial difference between the two notions,[181] and understanding this is vital to understanding the argument put forward in this thesis. The concept of *dolus eventualis* will therefore be discussed in much more detail than *dolus directus* I and II.

1 Dolus Directus I

Intention in form of *dolus directus* I, also known as *Absicht*,[182] is similar to the English notion of direct intention. It is 'characterized by the fact that it is the offender's primary purpose to achieve what the crime definition describes; it is not necessary that the offender is convinced that he or she will obtain that goal'.[183] What counts is that the offender *aims* to achieve what the law prohibits.

2 Dolus Directus II

In instances of *dolus directus* II, sometimes translated as 'knowledge' (*Wissentlichkeit*)[184], the offender is (almost) certain that his conduct will bring about a particular prohibited result.[185] In that it is irrelevant whether the almost certain result is welcome to the actor,[186] this concept resembles the English notion of indirect or oblique intention. To German lawyers it is clear, however, that this is a rule of substantive criminal law.[187]

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particular conditions are met, see George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 454.

181 Kai Ambos, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 Crim L Forum 1, 21; Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579, 588. See also Law Commission, *Reform of Offences against the Person: A Scoping Consultation Paper* (Law Com CP No 217, 2014) para 6.57: '[Dolus eventualis] covers some, but not all, of the same ground as the English concept of subjective recklessness.'

182 Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 106.

183 Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2011) 252, 262. See also BGHSt 55, 206, 210; BGHSt 21, 283; Detlev Sternberg-Lieben and Irene Sternberg-Lieben, 'Vorsatz im Strafrecht' JuS 2012, 976, 977.

184 See eg Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 106; Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2011) 252, 262.

185 Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2011) 252, 262. See also BGH NJW 2001, 980, 981; BGH NStZ-RR 2006, 174, 175.

186 BGH NStZ-RR 2006, 174, 175.

187 See LK-Joachim Vogel, *Strafgesetzbuch*, Vol 1 (12th edn, de Gruyter 2007) Vor § 15 para 73.

3 Dolus eventualis

Eventualvorsatz or dolus eventualis is habitually described in terms of billigendes Inkaufnehmen,[188] an expression which, if translated literally, seems to indicate that the defendant does not just foresee, but *bargains* for, the relevant consequence.[189] Fletcher and Ohlin describe the same idea as 'approval and identification with the evil result.'[190] Inasmuch as 'bargain', 'approval' and 'identification' suggest that the accused affirmatively sanctioned the foreseen consequence, those translations seem somewhat too strong in their connotations, given that the BGH has made it absolutely clear that the requisite level of endorsement (Billigung) may be found even where the foreseen consequence was evidently unwanted and extremely unwelcome to the defendant. This is well illustrated by the notorious Leather Strap Case of 1954 (Lederriemen Fall):[191] K and J intended to rob their acquaintance M. They needed to incapacitate M for the duration of the robbery. K and J initially considered choking M unconscious with a leather strap. However, they soon realised that this method was likely to result in strangulation, and since they wished M to live, they chose a small sandbag instead with which to hit M's head. When the sandbag did not achieve the desired result, however, K – who unbeknownst to J had brought along the leather strap – put this around M's neck. Realising what K aimed to do, J held back M's arms. Both assailants then grabbed one end of the strap and pulled tightly in opposite directions. That way, K and J choked M until he no longer resisted. They then attempted to constrain him. When M started struggling again, J pressed him to the floor

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188 See eg BGHSt 36, 1; BGHSt 44, 99; BGH NStZ 2014, 35, 35. Other, less commonly used expressions include '*akzeptieren'* (accept), '*Einverständnis'* (agreement) and '*innerliches Sichabfinden'* (internal reconciliation), see Wolfgang Frisch, *Vorsatz und Risiko* (Heymann 1983) 301; Kristian Kühl, *Strafrecht Allgemeiner Teil* (7th edn, Vahlen 2012) § 5 para 84 f.

189 Likewise Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 111, who has paraphrased this expression as: 'taking the possible criminal result of one's conduct into the bargain and approving of it'.

190 George P Fletcher and Jens David Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 JICJ 539, 555.

191 BGHSt 07, 363-371.

whilst K choked him again until he went limp. K and J left the leather strap in place until they had finished packing the things they intended to steal from M's flat. By the time they eased the strap, M had suffocated, and all attempts by K and J to revive him failed. K and J were convicted for murder. The court reasoned they had clearly contemplated that using the leather strap might result in M's death, and whilst they did not want M to die – and in that sense they did not positively approve of his death – they were still prepared to choke M when their preferred method of incapacitation failed. They had thus 'in the legal sense endorsed'[192] M's death, meaning they had put up with it for the sake of succeeding with their robbery, and in that sense they had intended M's death after all.

Crucially, the required endorsement of consequences – whether by way of affirmative approval or mere reconciliation – is not to be equated with indifference towards the foreseen consequences: if indifference was the hall mark of dolus eventualis, it should be possible for a defendant to rebut such a finding, as K and J attempted in the Leather Strap Case, by pointing towards a hope that the foreseen unlawful consequence could at the end of the day be avoided. Indeed, had indifference been the yardstick for intention in that case, K and J could have been convicted for negligence only, not intentional conduct, because their overall behaviour demonstrated that they were clearly not indifferent to whether M lived or died. As such, the German courts have stressed that the requisite endorsement of consequences will only then be absent if, on the facts, the defendant, despite foresight, 'sincerely, and not merely in a vague way, relied on [as opposed to 'hoped for'] the non-occurrence of the prohibited result'.[193] Typical (textbook) examples used to illustrate the difference between this state of mind and dolus eventualis concern

192 BGHSt 07, 363, 369.

193 BGHSt 36, 1, 2, 10; BGHSt 38, 345, 351; BGH NStZ 2006, 98, 99; BGH NStZ 2006, 169, 170.

drivers who knowingly take risks in the sincere belief that 'all will go well in the end'.[194] In one paradigm case, a driver overtakes on a blind corner, realising that he may cause a collision, and a collision in fact occurs, killing the driver of an oncoming car. Whether the overtaking driver caused the other's death intentionally (ie with dolus eventualis) or (advertently) negligently will depend on his attitude: if he overtook without earnestly relying on the non-occurrence of a collision, he is taken to have approved or, at least, reconciled himself to such a consequence, and therefore will have acted with *dolus eventualis*, ie intention, as to causing the other driver's death. If, on the other hand, he overtook believing that 'nothing will happen' in spite of an awareness of the risk of collision, his conduct is merely – if consciously – careless. Likewise, a driver who, trying to avoid arrest, speeds towards a police officer blocking the road, realising that he might overrun the latter, will have acted with advertent negligence rather than (dolus eventualis-type) intention if he sincerely believes that the officer would succeed in diving out of harm's way (eg because he is under the impression that the police regularly train for this very situation).[195] In these examples, the defendant's attitude, though far from innocent – he did, after all, appreciate that death was a real possibility – is not reprehensible enough to support a finding of intentional wrongdoing, since the defendant chose to act believing that his actions would have a 'happy ending'.[196] It is thus the element of Billigung (endorsement) of the consequences foreseen on the one side and an 'affirmative aversion'[197] to these consequences on the other which sets apart a conscious risk-taking amounting to intentional wrongdoing from one that is merely negligent under German law. However, a defendant who trusted in the non-occurrence of the prohibited consequence and

194 See eg Christian Jäger, Examens-Repetitorium Strafrecht Allgemeiner Teil (7th edn, CF Müller 2015) § 3 III 1 para 84. See also BGH (22.03.2012) – 4 StR 558/11, HRRS 2012 Nr 435 < http://www.hrr-strafrecht.de/hrr/4/11/4-558-11.php > accessed 5 February 2015.

195 See BGH NStZ 1983, 407, 407; BGH StV 1992, 420, 420.

196 Dan Morkel, 'Abgrenzung zwischen vorsätzlicher und fahrlässiger Straftat' NStZ 1981, 176, 178.

197 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 446.

thus acted with 'advertent negligence' (bewusste Fahrlässigkeit)) will not escape criminal liability altogether where the requisite offence of intention is underpinned by a lesser offence based on negligence, as is the case with homicide offences and crimes against the person.

The BGH has stressed that the possibility that the defendant earnestly trusted that all would be well needs to be given particular consideration in homicide cases, as an intention to kill usually requires the defendant to overcome greater inhibitions than an intention to endanger or injure (so-called Hemmschwellentheorie),[198] the idea being that since there is such a strong taboo against killing, forming an intention to kill requires the defendant to cross a psychological barrier that is not necessarily crossed when the defendant forms an intention to commit violence.[199] Accordingly, even if the defendant's violent conduct endangered the victim's life or caused him serious injury, the trial court should not, without more, conclude that intention in the form of *dolus eventualis* was present; the evidence must establish that the defendant, in his mind, had crossed the 'inhibition threshold'.

Whether the defendant acted with the requisite dolus, or whether he was just negligent in the advertent sense, is to be ascertained by way of a holistic approach (Gesamtbetrachtung) which takes into account all the circumstances of the case.[200] According to the established jurisprudence of the BGH,

> where a person engages in extremely dangerous and violent conduct, it is not difficult to conclude that he took the possibility that the victim could come to death as a result into account and, given that he persisted in his dangerous conduct nonetheless, accepted and endorsed such a consequence. *It is*

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198 BGH JZ 1981, 35, 35; BGH NStZ 1983, 407, 407; BGH NStZ 1984, 19, 19. See also Bernd von Heintschel-Heinegg, 'Zum Beweiswert der "Hemmschwellentheorie" bei Tötungsdelikten' JA 2012, 632, 633; Matthias Jahn, 'Hemmschwellentheorie' JuS 2012, 757-759; Lorenz Leitmeier, 'Bedingter Vorsatz bei Tötungsdelikten – Hemmschwellentheorie ohne Erklärungswert' NJW 2012, 2850, 2851-2853; Ingeborg Puppe, 'Zur "Hemmschwellentheorie" bei Tötungsdelikten – Anmerkung zu BGH, Urteil vom 22.3.2012 – 4 StR 558/11' JR 2012, 474, 477-479; Thomas Trück, 'Tötungsvorsatz ohne Hemmschwelle' JZ 2013, 179.

199 Antje du Bois-Pedain, 'Intentional Killings: The German Law' in Jeremy Horder (ed), *Homicide Law in Comparative Perspective* (Hart 2007) 55, 57.

200 BGH NStZ 2011, 699, 702.

> *therefore possible in such cases to infer contingent intention to kill from the very dangerousness of the accused's conduct*. It can normally be ruled out that the perpetrator trusted that death would not occur if he envisaged events to unfold in such a way that they came so close to a fatal outcome that such outcome would only be prevented by lucky chance. *It is nevertheless necessary to consider that the perpetrator in the case in question did not appreciate the danger of death or that he might still have trusted that a fatal outcome would be avoided*. In particular, this can be the case where he acts spontaneously and without considering his actions, in the heat of the moment. In such cases, *it is not always possible to infer from knowledge of the possibility of a fatal outcome that the volitional element of intention (which has to be established independently) is present alongside cognition*.[201]

Thus, the BGH recently accepted as (just about) justifiable the findings of the Landgericht Konstanz that a defendant, despite having engaged in objectively extremely dangerous conduct, did not act with dolus eventualis in the following circumstances:[202] D and the victim, V, were guests at a party where plenty of alcohol was being served. Partly under the disinhibiting influence of alcohol, they started a fight in the course of which V shoved D into a glass table which shattered as a result. D, feeling humiliated, straight away grabbed a large splinter and rammed it with force into V's neck. The resulting wound was so severe that V bled to death within minutes. Although D's conduct was dangerous in the extreme, the court found that he still had not acted with dolus eventualis, on the basis that, inter alia, D appeared deeply shocked about the consequences of his conduct to everyone who came across him in the immediate aftermath of the violence.[203] On the evidence, D tried desperately to stop the bleeding. He phoned the emergency services twice and begged them to hurry up. When they arrived, he was, in a state of visible panic, waiting for them outside

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[201] BGH NStZ 2009, 629, 630 (emphasis added). See also BGH NStZ 2003, 603, 604; BGH (22.03.2012) – 4 StR 558/11, HRRS 2012 Nr 435 < http://www.hrr-strafrecht.de/hrr/4/11/4-558-11.php > accessed 5 February 2015; Georg Steinberg and Fabian Stam 'Der Tötungsvorsatz in der Revision des BGH' NStZ 2011, 177, 179-180.

[202] BGH NStZ 2009, 629. See also BGH NStZ 2007, 150; BGH NStZ 2007, 331; BGH NStZ-RR 2007, 199; BGH NStZ-RR 2010, 144, 145; Georg Steinberg, 'Indizwert einer höchst lebensgefährlichen Tathandlung für den Tötungsvorsatz' JZ 2010, 712-718.

[203] However, as the BGH has pointed out in other judgments, regrets in the crime's aftermath and rescue attempts do only tell one so much about the perpetrator's (internal) disposition. This is because these are often the result of a sudden sobering effect and of worries about the consequences of the crime for the perpetrator himself, see BGH NStZ-RR 2001, 369, 370; BGH NStZ 2009, 629, 630.

to guide them quickly to the flat where V lay injured. D refused to accept that V was beyond help and insisted that he be reanimated. He pleaded with the paramedics to continue their efforts to save V's life even after they had realised that V was dead. When he finally accepted V could not be saved, he asked permission to spend time with the body to say goodbye to V and to come to terms with what he had done. The Landgericht Konstanz, where D was tried at first instance, took D's conduct in the aftermath as evidence that D neither wanted to cause V death at any stage of the events, nor that he had reconciled himself to such an outcome. He thus lacked dolus eventualis, ie intention to kill, and was accordingly convicted of an offence against the person, namely *Körperverletzung mit Todesfolge* (causing bodily harm resulting in death, § 227 StGB) rather than intentional homicide.

As this case shows, whilst extremely dangerous conduct (and thus foreseeability of the legally relevant consequence) can be (and often will be) indicative of intentional wrongdoing (in the sense that, the higher the likelihood of death, the easier to draw the inference that the defendant was reconciled to its occurrence), it is not sufficient to infer volition simply from dangerousness (and foresight); the cognitive and volitional elements are conceptually independent and need to be established separately.[204]

The conceptual independence of an attitude of endorsement (as the volitional element in *dolus eventualis*) from foresight (as its cognitive counter-part) is reinforced by the following case, which saw the BGH recently affirm the convictions of four youths for attempted manslaughter:[205] the four defendants had assaulted their victim by hitting and kicking him. They continued to do so even after one of them, with sufficient mens rea for murder,[206] had stabbed the victim repeatedly in the head and upper body. Although it

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[204] BGHSt 07, 363, 368-369; BGH NStZ 2007, 150, 151; BGH NStZ 2011, 699, 702.

[205] BGH (20.01.2004) - 5 StR 530/03 <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=28469&pos=0&anz=1> accessed 28 January 2015.

[206] Intent to kill and the aggravating factor of having killed in order to cover up another crime.

proved impossible to establish whether the other three assailants had foreseen their companion's use of the weapon with murderous intent, the court interpreted their subsequent continuation of the assault by hitting and kicking the victim as an endorsement of their companion's use of the knife, and thus confirmed the first instance court's finding that they had all acted with intention to kill (in the dolus eventualis variant).

Given the range of factors ('all the circumstances') to which the courts must have regard, the inquiry is necessarily highly fact-specific. However, the BGH has warned that the issue of attitude must not be approached in a formulaic way, this being a common criticism made of first instance judgments at the appellate stage:[207] the formulae of 'approvingly takes [the relevant prohibited consequence] into account' and 'reconciles himself to [the relevant consequence]' refer to a normative standard which needs to be fleshed out in each individual case (by way of 'viable' casuistic determinations).[208]

4 Dolus eventualis vs Cunningham *recklessness*

The driving force behind *dolus eventualis* is the defendant's endorsement of the foreseen consequences. In this the concept clearly differs from *Cunningham*[209] recklessness: the latter focusses on the actor's awareness of the risk and the weighing of this against the benefits to be gained from running it – is it reasonable? Is it justifiable? The conscious taking of an unreasonable or unjustified risk does not require the actor to take a particular posture towards the risk. Indeed, he may choose to run it trusting that nothing bad will happen, but if it does, he will be considered as reckless as the actor who did not care whether the risk materialised in the first place. His attitude makes no difference to his

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207 As noted by Ingeborg Puppe, 'Zu den Anforderungen an die Feststellung eines (bedingten) Körperverletzungsvorsatzes – BGH, Beschluß vom 20.11.1986 - 4 StR 633/86 (LG Essen)' NStZ 1987, 362, 363.

208 See eg BGHSt 57, 183, 191.

209 [1957] 2 QB 396 (CA).

liability for recklessness. It can thus be argued that *dolus eventualis* sets a higher threshold of *mens rea* than common law recklessness.[210]

III The Intention Debate

While the judicial concept of *dolus eventualis* also 'commands the allegiance of the majority of scholars'[211] it is by no means uncontroversial. The controversies centre around two questions: first, do we really need a volitional element, and secondly, if so, what should it look like?[212] We will not look at the second question in any detail: it would be beyond the scope of this thesis to examine all the alternative conceptions of *dolus eventualis* that have been put forward.[213] Moreover, the practical implications of the proposed alternatives are mostly negligible: they rarely arrive at a different conclusion to the judicially approved conception.[214]

For the purposes of this thesis the first issue – whether the idea of *dolus eventualis* needs a volitional element at all – is much more important. Accordingly, in the following, we will look at those criticisms levelled at the dominant concept that deny the necessity or

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210 Similarly Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579, 588.

211 Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 108.

212 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 64.

213 Some proposals let a cognitive element suffice which ranges from awareness of a possibility (*Möglichkeitstheorien*, see eg Eberhard Schmidhäuser, 'Die Grenze zwischen vorsätzlicher und fahrlässiger Straftat („dolus eventualis" und „bewusste Fahrlässigkeit")' JuS 1980, 241; Dan W Morkel, 'Abgrenzung zwischen vorsätzlicher und fahrlässiger Straftat' NStZ 1981, 176; Heiko H Lesch, 'Dolus directus, indirectus und eventualis' JA 1997, 802) to differing degrees of probability (*Wahrscheinlichkeitstheorien*, see eg Heinz Koriath, *Grundlagen strafrechtlicher Zurechnung* (Duncker & Humblot 1994) 632 ff; Heribert Schumann, 'Zur Wiederbelebung des "voluntativen" Vorsatzelements durch den BGH' JZ 1989, 427, 433; Cornelius Prittwitz, 'Die Ansteckungsgefahr bei AIDS' JA 1988, 486). Others require an additional volitional element (*Voluntative Theorien*, see eg Klaus Geppert, 'Zur Abgrenzung von Vorsatz und Fahrlässigkeit, insbesondere bei Tötungsdelikten' Jura 2001, 55, 56; Gerhard Altvater, 'Rechtsprechung des BGH zu den Tötungsdelikten' NStZ 2002, 20) with varying degrees of intensity, ranging from explicit approval (*Einwilligungstheorien*, see eg Günter Stratenwerth, 'Dolus eventualis und bewußte Fahrlässigkeit' ZStW 71 (1959) 51, 65) or conscious defiance of the risk-taking maxims of the legal order (*Entscheidungstheorien*, see Lothar Philipps, 'Dolus eventualis als Problem der Entscheidung unter Risiko' ZStW 85 (1973) 27, 38) over manifestations of avoidance efforts (so-called *Theorie von der Manifestation des Vermeidewillens*, see eg Armin Kaufmann, 'Der dolus eventualis im Deliktsaufbau' ZStW 70 (1958) 64, 74) to reckless indifference (so-called *Gleichgültigkeitstheorie*, see eg Karl Engisch, *Untersuchungen über Vorsatz und Fahrlässigkeit im Strafrecht* (Liebmann 1930) 207-208; Ulrich Schroth, 'Anmerkung zu Urt. des BGH v. 18.4.2002 – 3 StR 52/02' JR 2003, 248, 250). An English language account of the above theories is given by Greg Taylor, 'The Intention Debate in German Criminal Law' (2004) 17(3) Ratio Juris 346.

214 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 65.

expediency of (proving) the endorsement element. The relevant criticisms can be grouped into concerns of principle and practical objections. We will look at these in turn and consider if, and how, they might be overcome. It is suggested that whilst many of the criticisms might indeed have a point, we should never lose sight of the fact that they are aimed at a concept which, in the German context, is used to determine intention *generally*.[215] They are not concerned with the more limited context of joint criminal enterprise liability. Nevertheless, given that the proposals that will be made in Chapters 7 and 8 are derived from the German experience, it is necessary briefly to introduce and acknowledge critical voices.

1 Concerns of Principle

(a) Endorsement is unnecessary or irrelevant to determining Liability

Many critics of the dominant concept suggest that a cognitive element (ie foresight of the harmful consequence) is quite sufficient to trigger liability for intent crimes.[216] Thomas Weigend, for example, has argued that

> the actor's emotions (…) her desires and wishes with respect to the result of her conduct, have little relation to the purposes of the criminal law. The law needs to protect life, health, safety, and other important interests; it makes no difference whether the actor feels pleasure or reluctance when she consciously places these interests at serious risk.[217]

This argument is problematic for a number of reasons: first, in the German context, it overlooks that the penal code elsewhere clearly cares about the actor's attitude towards his

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[215] See also Greg Taylor, 'The Intention Debate in German Criminal Law' (2004) 17(3) Ratio Juris 346, 349.

[216] See eg Wolfgang Frisch, *Vorsatz und Risiko* (Heymann 1983) 263, 289-290, 300-301; Heiko H Lesch, 'Dolus directus, indirectus und eventualis' JA 1997, 802, 808-809; Horst Schlehofer, 'Risikovorsatz und zeitliche Reichweite der Zurechnung beim ungeschützten Geschlechtsverkehr des HIV-Infizierten' NJW 1989, 2017, 2019. See also Rolf Dietrich Herzberg, 'Der Vorsatz als "Schuldform", als "aliud" zur Fahrlässigeit und als "Wissen und Wollen"? in Claus Roxin and Gunter Widmaier (eds), *50 Jahre Bundesgerichtshof – Festgabe aus der Wissenschaft*, Band IV (Strafrecht, Strafprozeßrecht) (CH Beck 2000) 51, 70-71, 81.

[217] Thomas Weigend, 'Subjective elements of criminal liability' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) 490, 501.

actions. Take, for example, § 24 (1) sentence 1 StGB which stipulates: 'A person who voluntarily renounces the continued performance of the deed or prevents it from being completed is not punishable for attempt.' Voluntariness is here determined with reference to the actor's attitude: he can only successfully withdraw if his withdrawal results from autonomous motives, ie is a manifestation of the actor's individual autonomy rather than a response to pressing external circumstances.[218]

Secondly (and more generally), contrary to what is asserted by the proponents of conceptions which let a cognitive element suffice, it *does* make a difference whether someone who consciously engages in risky conduct acts regardless of the consequences or because he trusts all will go well in the end.[219] Consider the example of a driver who, aiming to arrive at work in good time, on a foggy day overtakes a lorry on a narrow road while overlooking an oncoming cyclist: he must clearly have been aware of the risk of a collision; any other interpretation of the facts seems unrealistic.[220] The same with a driver who, on an icy road in conditions of poor visibility drives too fast to make it to a friend's party, slips off the road, thus causing the car to overturn, as a result of which his passenger is killed. Again, it would be unrealistic to assume he did not realise that he was engaged in highly risky conduct and thus had foresight of the possibility of an accident occurring. Nonetheless, it appears inappropriate to reinterpret his (and the other driver's) evident carelessness into an intent to cause bodily harm and to hold him criminally responsible for intentional manslaughter (§ 212 StGB, *Totschlag*) rather than manslaughter by negligence (§ 222 StGB, *fahrlässige Tötung*), simply because he 'acted in spite of' his foresight.[221]

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[218] BeckOK StGB/Beckemper § 24 para 30.

[219] Rolf Schmidt, *Strafrecht AT* (13th edn, Dr Rolf Schmidt Verlag 2014) para 240. See also Klaus Geppert, 'Zur Abgrenzung von bedingtem Vorsatz und Fahrlässigkeit' Jura 1986, 610, 611.

[220] Johannes Wessels, Werner Beulke, Helmut Satzger, *Strafrecht AT* (44th edn, CF Müller 2014) para 217.

[221] ibid. Similarly Greg Taylor, 'The Intention Debate in German Criminal Law' (2004) 17(3) Ratio Juris 346, 352.

In fact, to avoid just such unacceptable results, some proponents of a purely cognitive conception fall back on the fiction that at the time of overtaking/speeding our drivers so suppressed their awareness of the relevant danger, that at the crucial time they lacked actual foresight.[222] Such an approach is not at all convincing, and it reinforces the view that foresight alone is inapt to accommodate (intuitively felt) moral differences in blameworthiness.[223]

That there is a difference in blameworthiness becomes even clearer when we compare our careless drivers to a bank robber in a get-away car who drives without any concern for the safety of others, simply because he puts his interests (in avoiding arrest) first and above those of other road users.[224] The attitude of the bank robber towards the protected legal interests put at risk (life and limb of other road users) differs markedly from that of the careless drivers who also put the lives and health of others at risk: the former case is characterised by indifference, gross selfishness or inner coldness;[225] the latter by carelessness and foolishness. The difference justifies different appraisal by the legal order.

In any event, a purely cognitive conception stretches the notion of intent too far;[226] it blurs the line between intent and advertent (ie conscious) negligence: both instances require the actor to have recognised the potential risk. If we do away with the volitional element, one concept collapses into the other, leaving the law with intention (encompassing advertent negligence) on the one side and inadvertent negligence on the other side of the dividing line. This would overinflate the concept of intention.

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222 Eberhard Schmidhäuser, 'Zum Begriff der bewußten Fahrlässigkeit' GA 1957, 305, 310; Eberhard Schmidhäuser, 'Die Grenze zwischen vorsätzlicher und fahrlässiger Straftat („dolus eventualis" und „bewusste Fahrlässigkeit")' JuS 1980, 241, 245.

223 Similarly Klaus Geppert, 'Zur Abgrenzung von Vorsatz und Fahrlässigkeit, insbesondere bei Tötungsdelikten' Jura 2001, 55, 56. See also Ulrich Schroth, 'Anmerkung zu Urteil des BGH vom 18.4.2002 – 3 StR 52/02' JR 2003, 248, 252.

224 See BGH JZ 1981, 35; BGH NStZ 1984, 19, 19.

225 BGH NStZ-RR 2007, 43.

226 Johannes Wessels, Werner Beulke, Helmut Satzger, *Strafrecht AT* (44th edn, CF Müller 2014) para 205.

(b) Endorsement is superfluous in determining Liability

A related criticism of the ruling *dolus eventualis* conception laments that any element that looks to whether or not the defendant accepted the consequences of his actions is actually *superfluous* because the idea of acceptance is already inherent in the foresight criterion. Thus Greg Taylor, writing on the German concept, asserts: 'One who foresees a possible consequence of her actions but goes ahead anyway *must approve to some extent of that consequence, or else she would not have gone ahead*.'[227]

But it is a fiction to say that risk-taking equals endorsement.[228] Granted, there may be instances where S's going ahead in the face of a real and significant risk leaves no room for any inference other than that he approved (at least in the weak sense of having reconciled himself to) the materialisation of the foreseen risk and harm. But this is not true under all circumstances, and certainly not inevitably so in the context with which this thesis is concerned, ie joint criminal enterprises (as will be argued in Chapter 8). The same is true of someone who realises his conduct is risky but truly believes all will be well in the end (eg because he had engaged in the same risky conduct before and nothing went wrong on that occasion). We have already seen that there have indeed been cases where, although foresight of injury was highly indicative of volition, a closer look at the facts shows that the actor did not appear to have endorsed the harm.[229]

But even if, for argument's sake, one were to accept the assertion as generally true that actors who knowingly harm others *by definition accept the harm*, the conclusion that the volitional element is therefore superfluous would still not follow inevitably. This is because it may, in fact, be precisely because of the volitional element rather than foresight that we blame risky conduct in the first place. As Michaels has argued, the reason why we

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227 Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 116.

228 Likewise Johannes Wessels, Werner Beulke, Helmut Satzger, *Strafrecht AT* (44th edn, CF Müller 2014) para 217.

229 See p 62.

deem knowing actors to be morally blameworthy is because of this psychological state of acceptance.[230] In similar vein, Kessler Ferzan has suggested that 'the actor's psychological feeling about the harm she is imposing' is always a constitutive aspect of an actor's culpability. She argues that 'the basis for our condemnation of David's killing Vic is not simply David's belief that Vic would die as a result of his action but David's failure to be sufficiently moved by this fact.'[231] If, as these authors assert, acceptance is (also) at the heart of knowledge, then an argument can be made for treating those who take a risk knowing full well that it is virtually certain to materialise the same as those who accept a foreseen harmful consequence even if they are not certain (and thus do not act knowingly) that the harm will indeed materialise.[232] Indeed, as Pedain has argued, the murder conviction imposed on the defendant in *Hyam* could be rationalised (and defended) in this way, although the degree of her foresight of harm to the victims did not reach the (now necessary for a murder verdict) level of virtual certainty.[233] If all this is correct, then far from being superfluous, the volitional element is actually the driving force within the dominant concept of *dolus eventualis*. As such, rule of law reasons (such as fair warning and fair labelling) would demand that one openly and explicitly acknowledge (and prove) the volitional element.

(c) Risk-taking with and without Endorsement are Like Cases

A further criticism of the court's conception asks: '[w]hy should the law favour those who consciously engage in risky undertakings while foolishly believing that harm will not

230 Alan C Michaels, 'Acceptance: The Missing Mental State' (1998) 71 S Cal L Rev 953, 967.

231 Kimberley Kessler Ferzan, 'Holistic Culpability' (2007) 28 Cardozo Law Review 2523, 2534.

232 Alan C Michaels, 'Acceptance: The Missing Mental State' (1998) 71 S Cal L Rev 953, 961, 964-965.

233 Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579, 587-588, 593.

result?'[234] In other words, cases of risk-taking with and without endorsement of harm foreseen should be treated alike.

This is of course first and foremost a question of policy. The problem with such an argument is, however, that it is open-ended; the same thinking could be applied, for example, to argue in favour of treating all culpable homicides as murder: why should those who cause death negligently whilst intentionally engaged in unlawful conduct (unlawful dangerous act manslaughter) be any better off than those who attack their victim with the very purpose of killing him (murder)? If we only look at the result – death – than there is no significant difference between the two instances. Yet, as the Law Commission found when consulting on reform proposals for the English law of homicide, public attitude towards actors who purposefully cause death differs decidedly from those who kill as a result of reckless conduct. In fact, as a result of their findings, the Law Commission proposed introducing more rather than fewer gradations into the law of homicide (and elsewhere), with a view (among other things) to accommodate intuitively felt differences in degree of moral blameworthiness. It seems counterintuitive to treat those who recognise a risk and go ahead because they do not care about the outcome the same as those who genuinely, albeit naively, believe that the foreseen risk will be avoided. The two actors do not exhibit the same level of criminal energy and, therefore, blameworthiness.

Granted, there may be instances where 'it may well be that a value-based assessment of an actor who unreasonably denies an obvious risk or refuses even to take a closer look before he acts, shows that he is as hostile to the interests involved as any other "intentional" perpetrator and therefore should be punished as severely.'[235] As a general proposition, however, it is not true that those who act in the face of an unreasonable risk always deserve

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[234] Luis E Chiesa, 'Comparative Criminal Law' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) 1089, 1112.

[235] Thomas Weigend, 'Subjective elements of criminal liability' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) 490, 501.

to be treated the same as those who intentionally cause harm. The former may in fact have been acting for motives which are a far cry from showing disregard for the values of the legal order (as will be argued in Chapter 8). The law should allow for nuanced determinations about an actor's culpability.

(d) The Concept is based on unrealistic assumptions ('no time to endorse')

Taylor has further objected that the ruling concept is based on unrealistic assumptions:

> Take the example of a person who, in a drunken rage, suddenly lashes out at a tormentor, damaging some valuable property as a result (although that was not inevitable or foreseen to be so). Such a person (…) will have just no dispositional attitude to [the possibility of causing damage) at all: the time and capacity to reflect on this question are simply not there.[236]

There is something to be said for this (rather realistic) assessment of the situation. However, the same objection could be raised vis-à-vis the foresight approach. Think of the English *Parker*[237] case: D in a fit of temper brought down the telephone receiver so forcefully that it broke. In his rage, did he have time even to anticipate what would happen next? Still he was found guilty, meaning his conduct was deemed to be reckless, and as the Court of Appeal explained, this was because he had closed 'his mind to the obvious'.

It is certainly true that events may unfold so quickly that it is a fiction to say that the actor consciously weighed the risk and by going ahead anyway took a stance one way or the other; however, inasmuch as the same criticism could me made of alternative conceptions focussing solely on the defendant's foresight, it is not a criticism against the prevailing concept of *dolus eventualis* specifically. Taylor further objects that even

> actors who give the matter some thought may be ambivalent about possible consequences of their actions; their psychological state may not be able to be described in such simple terms. Disposition is a complex psychological phenomenon, sometimes involving contradictory states of mind, not a simple matter of yes or no, on or off. (…) Who is to say that a Hyam-like person was not, at the time of the act, at least sub-consciously reconciled to the

236 Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 122.
237 [1977] 1 WLR 600 (CA).

> possibility of death or grievous bodily harm to her rival? If that is so, should we take her sub-conscious disposition into account (assuming that we can identify it), or do we ignore it in favour of her truthfully expressed, but possibly incomplete account of her 'surface' state of mind at the time? The ruling doctrine of *dolus eventualis* barely touches on this question.[238]

Actually, the German courts have – at least to some extent – engaged with this criticism. They state that while

> intent generally requires actual knowledge, where the circumstances are obvious it suffices that the actor would have realised them had he given them any thought – this can be described as 'being able to access a fact' which is situated just below actual knowledge.[239]

This may not be very precise, but the general gist seems clear enough.

(e) The legal conception is out of touch with psychology and psychiatry

A further objection to the dominant theory of *dolus eventualis* concerns 'its primitive psychological assumptions and lack of contact with psychology and psychiatry.'[240] Thus Taylor criticises that

> a theory as elaborate as *dolus eventualis,* which relies on such fine distinctions, cannot be taken seriously if developed in ignorance of psychology and psychiatry. (…) The basic dualist assumption – that there is a distinction between cognitive and volitional processes – has not been the subject of any form of testing, or if it has the criminal law scholars know nothing of it.[241]

It is certainly true that the law has been (and still is) developed without considering advances in psychology and psychiatry. However, commentators who have more recently assessed general concepts of *mens rea* (including ideas of *dolus eventualis*) in light of neuroscientific developments, have concluded that nothing fundamentally is amiss with the way we ascribe criminal responsibility: 'The new neuroscience does not pose, and is unlikely ever to pose, a real threat to our fundamental conception of personhood and all that

238 Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 122-123.
239 BeckOk StGB/Kudlich § 15 para 15.
240 Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 123.
241 ibid.

follows from it, including the concept of responsibility and related concepts, such as mens rea.'[242]

2 Practical concerns

(a) Prosecuting: Difficulties in Proving Endorsement

It is sometimes objected that

> it will often be very difficult to prove whether someone was aware of a risk but indifferent to it or whether he was aware but thought that he could prevent it. Requiring prosecutors to prove indifference/acceptance in addition to awareness imposes a probative burden in circumstances in which it is unclear whether the benefits of doing so outweigh the evidentiary costs that requiring such proof creates. This problem is compounded in jurisdictions that have jury trials. If the distinction between *dolus eventualis* and conscious negligence has baffled judges and scholars for decades, it is difficult to imagine how much added confusion it would sow in the minds of juries.[243]

However, as Pedain has pointed out, while these concerns are certainly real and serious, and some defendants will (literally) get away with murder because the prosecution is unable to prove that they endorsed the outcome of their actions, this

> should not confuse us about those cases where there is sufficient evidence of such endorsement to find that the defendant acted intentionally, as did the defendant in *Hyam* and as does the terrorist who warns the authorities about the presence of a live bomb he put in a busy place.[244]

Moreover, the same objections could be levelled against requiring the jury to assess foresight. Indeed, it may actually be more difficult to draw inferences as to a person's cognitive state of mind than to whether he possessed volition: as Kaveny has argued,

> [t]he materials – data, insights, and inferential reasoning – for a judgment about a defendant's foresight are typically the materials for a judgment about his intention(s), his purpose(s). Focusing on his foresight will typically be a

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[242] Stephen J Morse, 'Criminal Responsibility and the Disappearing Person' (2007) 28 Cardozo Law Review 2545, 2574.

[243] Luis E Chiesa, 'Comparative Criminal Law' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) 1089, 1112.

[244] Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579, 591.

> mere detour, neither necessary nor even helpful in determining whether or not he had a murderous purpose.[245]

Judges and juries are regularly called upon to make determinations of 'inner' facts that do not manifest themselves directly on the outside, for example whether the alleged thief realised that what he did was dishonest (by the standards of ordinary, reasonable people), or even that he had an intention to deprive the true owner permanently.[246]

(b) Defending: Judicial formula of 'earnest reliance' too imprecise

A further criticism asserts that 'the dispositional criterion appears, on analysis, to be devoid of content: the German Courts have never been able to give a convincing account of what it means to act in earnest reliance, as distinct from a pious hope, on the non-occurrence of a possible consequence.'[247]

This is a serious concern and one that is not easily dismissed. However, it is in the very nature of normative (ie evaluative) concepts that they cannot be defined with absolute precision, but call for commonsensical assessment of the facts taking into account the realities of the particular situation. They will need to be fleshed out on a case by case basis, and as long as the general gist is sufficiently clear – which proponents of the prevailing concept of *dolus eventualis* assert is indeed the case[248] – and there are case reports and/or legal commentaries to offer further guidance (of which there are plenty dealing with the German concept), in the German context there are reasonable grounds for trusting (the professional) judges to make the right call in individual cases.

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245 M Cathleen Kaveny, 'Inferring Intention from Foresight' (2004) 120 LQR 81, 95.

246 See also Ingeborg Puppe, 'Begriffskonzeptionen des dolus eventualis' (2012) <http://sofospartners.blogspot.co.uk/2012/07/begriffskonzeptionen-des-dolus.html.>.

247 Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 119.

248 See Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579, 591: 'While the precise judicial formulae differ, the general idea is clear: liability is founded on an attitude of "approval", "acceptance" or even indifference, towards the potential harm. Unlike the merely reckless actor, who would shy away from the act if he took the risk of harm really seriously, the intentional actor accepts the risk and deliberately chooses to bring it about. The basis of his criminal responsibility is the fact that he endorses the possible harmful outcome, not merely the fact that he realises the existence of a risk. The intentional actor is aware of the possibility of harm and puts up with it, taking a "so be it" attitude to its eventual occurrence.'

(c) Judicial practice: dolus eventualis = A court's assessment of blameworthiness masquerading as an investigation into the defendant's mental state?

It is sometimes asserted that the way in which the concept is applied in judicial practice amounts to

> a Court's assessment, disguised as an investigation into the disposition of an actor, of whether the actor is worthy of punishment as an intentional malefactor. The lack of content in the distinction between earnest reliance and reconciling oneself to a consequence, and its almost inevitable absence in the many cases involving acting on the spur of the moment or while intoxicated, make it easy for the Courts to substitute their view of what the actor's, or their own, dispositional state 'must' have been for the actual dispositional state (if any) of the accused.[249]

This criticism certainly has a point. However, a similar objection can also be made in relation to the cognitive element: what prevents the judge or jury to substitute the defendant's foresight with their own or that of the reasonable person, thereby turning the standard into one of foreseeability rather than subjective foresight? If endorsement can be 'fabricated' by the judge, so can foresight.

It should also be noted that the dominant concept of *dolus eventualis* does not pretend to be a psychological criterion, but a criterion of attribution:[250] the judge is not a psychologist who can diagnose the accused's mental state at the time of the act. He has to go by what he has, namely by facts that are in evidence. From those facts, he may be able to infer foresight; from foresight, he may in turn be able to infer endorsement; however, this inference may be strengthened or undermined and negatived by the existence of additional facts (such as the defendant's conduct after the deed, his general disposition, past conduct etc.).

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249 Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99, 124.

250 BeckOK StGB/Kudlich § 15 para 23.

3 Conclusion

In conclusion, while the dominant concept of dolus *eventualis* has many critics, and while many critical points are well taken, ultimately it is difficult to see what concept of intention could take its place. If vagueness is the main problem, then nothing has been suggested in the German debate that is less vague. However, as I have tried to show, it is simply not possible to be more precise: we do not have the tools to look into the defendant's head; similarly, language is inherently imprecise and any attempt to define the elusive concept of intention is doomed from the start. English judges have realised this in that, as we saw in Chapter 2, they eschew a precise definition and in the majority of cases let the question whether a defendant intended a given outcome to the jury without further elaboration. It may well be that, in the context of the subject matter of this thesis, joint enterprise, the English jury is in fact better equipped to handle the admittedly imprecise and difficult concept of endorsement than a German judge who, in contrast to the jury, needs to give reasons for his decision.

D Mord as the Aggravated Homicide Offence (§ 211 StGB)

§ 211 StGB defines the offence of *Mord*. The section contains two subsections: § 211 (1) StGB sets out the penalty, while § 211 (2) StGB contains the substantive requirements. According to § 211 (1) StGB '[w]hosoever commits murder under the conditions of this provision shall be liable to imprisonment for life.' Thus, under German law a convicted murderer is to be given a mandatory life sentence. This corresponds with the penalty for murder in England and Wales. However, the mandatory life sentence causes problems for a jurisdiction that aims strictly to adhere to the concepts of the 'rule of law' (*Rechtsstaatlichkeit*) and proportionality (*Grundsatz der Verhältnismäßigkeit*). In contrast to English law, where concerns about the mandatory life sentence have long since led to the

development of special partial defences applicable only to murder, German law has sought to develop a solution at the sentencing stage (*Rechtsfolgenseite*). If a battered wife kills her sleeping husband after having drugged him with liquor, this would count as a 'devious' killing under German law. Unless her responsibility was diminished as defined by § 21 StGB, which justifies the application of a reduced sentencing scale (imprisonment for between three and 15 years, § 49 (1) No. 1 StGB, read in conjunction with § 38 StGB), the court has no legal authority to impose a lesser sentence than life imprisonment on her. The same problem arises in all instances where an aggravating element, which makes the act murder, is present concurrently with a mitigating element, which but for the presence of the aggravating factor would make the act a less serious case of intentional homicide. The BGH's response to this (and like) situation(s) has been to view itself as 'constitutionally authorised' to impose a lesser sentence than life imprisonment, contrary to the letter of the statute, in cases where the imposition of the mandatory life sentence would result in disproportionate punishment.[251] Under this approach, the mandatory life sentence is replaced by a fixed term prison sentence (3-15 years, relying on §§ 49 (1) Nr 1, 38 (2) StGB).[252]

I *Actus Reus*

1 Basic Requirements

The substantive requirements of murder are set out in § 211 (2) StGB. *Mord*, like *Totschlag*, requires that the accused causes the death of another human being.

[251] BGHSt 30, 105, 120 ff. See also BVerfGE 45, 187, 259 ff.

[252] Schönke/Schröder/Eser/Sternberg-Lieben *StGB* § 211 para 57.

2 Conduct-oriented Aggravating Factors (§ 211 (2) Gr 2 StGB)

In addition, the subsection lists certain aggravating factors (*Mordmerkmale*), the presence of which makes the voluntary homicide murder rather than manslaughter. These pertain either to the killer's motive for killing (and are thus perpetrator-focussed) or the particular manner by which he has killed (and are thus conduct-focussed). Thus, subsection 2 stipulates that

> A murderer under this provision is any person who kills a person
>
> (1) for pleasure (*Mordlust*), for sexual gratification (*zur Befriedigung des Geschlechtstriebs*), out of greed (*Habgier*) or otherwise base motives (*sonstige niedrige Beweggründe*); or
>
> (2) by stealth (*heimtückisch*) or cruelly (*grausam*) or by means that pose a danger to the public (*mit gemeingefährlichen Mitteln*); or
>
> (3) in order to facilitate or to cover up another offence.

While the factors listed in the first and third groups are perpetrator-focussed (*täterbezogene Mordmerkmale*, § 211 (2) Gr 1 & 3), those in the second group are conduct-oriented (*tatbezogene Mordmerkmale*, § 211 (2) Gr 2).[253] Only the latter are considered to be elements of the *objektiver Tatbestand* (ie actus reus). Those in the first and third groups belong to the *subjektiver Tatbestand* and will therefore be mentioned below in the context of *mens rea*.[254] It would go beyond the scope of this thesis to look at the *Mordmerkmale* in detail. What follows is therefore an introduction to the three aggravating factors listed in § 211 (2) Gr 2 StGB which focusses on the bare essentials.

(a) Killing by stealth

Amongst the conduct-oriented *Mordmerkmale*, *heimtückisch* is the aggravating factor with the greatest relevance in criminal law practice. At the same time, it is one of the most

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253 Gerhard Altvater, 'Rechtsprechung des BGH zu den Tötungsdelikten' NStZ 2003, 21, 22.

254 See p 83 ff.

controversial.[255] It has been summarised rather memorably by one academic as a 'lack of fairness'.[256] In more conventional terms *Heimtücke* requires advantage-taking, with hostile intentions, of someone's guilelessness and corresponding defencelessness.[257]

(b) Killing cruelly

A killing is to be considered cruel, if the defendant caused the victim serious pain of a physical or psychological nature that goes beyond what would have been necessary to kill in terms of intensity, duration and repetition.[258] In other words, the law is looking for an increased infliction of suffering on the part of the victim (as where the killer ties his octogenarian father to his bed and leaves him to die of thirst in his own excrement).[259]

(c) Killing by means dangerous to public safety

The defendant kills by means that are dangerous to public safety if he relies on weapons the effects of which he cannot control properly and the use of which thus endangers an indeterminate number[260] of individuals.[261] At the heart of this aggravating factor is the carelessness of a defendant who seeks to accomplish his criminal goal despite unpredictable dangers to others.[262] Weapons like machine guns, explosives, accelerants, chemical weapons etc are generally recognised as particularly dangerous if the risk inherent in their

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255 BVerfGE 45, 187, 263 ff; BGHSt 09, 385, 389 ff; BGHSt 11, 139, 142; BGHSt 30, 105, 113 ff; Anette Grünewald, *Das vorsätzliche Tötungsdelikt* (Mohr Siebeck 2010) 88.

256 Gunther Arzt, 'Mord durch Unterlassen' in Bernd Schünemann and others (eds), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001* (Walter de Gruyter 2001) 855, 856.

257 BGHSt 02, 60, 61; BGHSt 07, 218, 221; BGHSt 48, 255, 256; Wilfried Küper, '"Heimtücke" als Mordmerkmal – Probleme und Strukturen' JuS 2000, 740, 741-742; Rainer Zaczyk, 'Das Mordmerkmal der Heimtücke und die Notwehr gegen eine Erpressung' JuS 2004, 750, 751.

258 BGHSt 03, 180, 181; BGHSt 03, 264 f; BGHSt 49, 189, 195; BGH NStZ 2007, 402, 403; BGH NStZ 2008, 29; BeckOK StGB/Eschelbach § 211 paras 59-60; Lackner/Kühl/Karl Lackner *StGB* § 211 para 10; Schönke/Schröder/Eser/Sternberg-Lieben *StGB* § 211 para 27; Wilfried Küper, 'Über grausames Töten – zur tatbestandlichen Koordination von "Tötung" und "Grausamkeit"' in Hendrik Schneider and others (eds), *Festschrift für Manfred Seebode zum 70. Geburtstag* (de Gruyter 2008) 197, 198.

259 Example based on Sabine Tofahrn, *Strafrecht BT I – Straftaten gegen Persönlichkeitswerte* (3rd edn, CF Müller 2014) para 54.

260 A group of three or more people fulfills this requirement, see Rudolf Rengier, 'Das Mordmerkmal „mit gemeingefährlichen Mitteln"' StV 1986, 405, 409.

261 BGHSt 34, 13, 14; BGHSt 34, 13, 14; BGHSt 38, 353, 354; BGH NStZ 2006, 167, 168; BeckOK StGB/Eschelbach § 211 para 66; Lackner/Kühl/Karl Lackner *StGB* § 211 para 11.

262 BGHSt 34, 13, 14; BGH NStZ 2006, 167, 168.

use affects several people and no measures for risk reduction were taken which appear to make the risk limited and controllable.[263] The *Mordmerkmal* can also be satisfied where a weapon that is not in itself dangerous is employed in such a way that it poses a risk for several people and where the perpetrator is unable to control that risk.[264] Thus in one case throwing a rock from a motorway bridge into busy traffic was held to be murder,[265] while the aimed throwing of a block of wood onto a particular vehicle, in the expectation that only that vehicle would be hit, did not satisfy the requirement.[266]

II *Mens Rea*

1 Intention

The basic *mens rea* requirement of *Mord* is the same as for *Totschlag*: death must be caused *intentionally*.[267] We have seen that, in the case of manslaughter, *intention* includes the concept of *dolus eventualis*. One might think that for the more serious offence of murder, a stricter concept of intention would be required. This is not generally the case. A killing becomes murder rather than manslaughter because one of the *Mordmerkmale* enumerated in § 211 (2) StGB is present. However, the *Mordmerkmale* are of two kinds: the ones so far discussed relate to the manner in which the killing is carried out and are thus part of the *actus reus*. They nevertheless have a *mens rea* element in that the killer must have intended to kill in the manner which realises the relevant *Mordmerkmal*. Again, the concept of intention includes *dolus eventualis*.[268] For example, where the accused throws rocks onto a busy motorway, he is reconciled to the fact that he may not be able to control the effects of his weapon, and so the *Mordmerkmal* that the means of killing employed endanger public

263 BeckOK StGB/Eschelbach § 211 para 70.
264 BGH NStZ 2007, 330, 330; BeckOK StGB/Eschelbach § 211 para 69.
265 BGH NStZ-RR 2010, 373, 374.
266 LG Oldenburg (20.05.2009) BeckRS 2010, 06220.
267 Schönke/Schröder/Eser/Sternberg-Lieben *StGB* § 211 para Rn. 1.
268 BGHSt 19, 101, 105; BeckOK StGB/Eschelbach § 211 para 12; Schönke/Schröder/ Eser/Sternberg-Lieben *StGB* § 211 para 40.

safety is satisfied. The remaining *Mordmerkmale* relate to the killer's mental state itself and, in particular, to the killer's motive. As his motive is closely related to the killer's aims and purposes, their application may have the incidental effect that the killing itself has to be carried out intentionally in the stricter sense of desiring death as the outcome if it is to be qualified as murder. This will be explained further in the context of the relevant *Mordmerkmal*.

2 Perpetrator-focussed Aggravating Factors (§ 211 (2) Gr 1 & 3 StGB)

(a) Pleasure to kill

Pleasure to kill is given when the perpetrator takes pleasure in the destruction of a human life as such,[269] if he kills out of boredom, to show off or to get a kick.[270] Since causing death is the actor's aim, logic dictates that *dolus directus I* is required where this aggravating factor is to be relied upon to make the killing murder.[271]

(b) Sexual gratification

A killing for sexual gratification is made out when the perpetrator aims to achieve sexual gratification through the actions that lead to the victim's death. This covers both cases where the act of killing itself gives the perpetrator sexual pleasure[272] and instances where a violent sexual act such as forcible rape is performed with *dolus eventualis* as to the victim's death.[273] It is also made out where the killer wants to use the victim's corpse for sexual purposes. This extends from straightforward necrophilic interaction with the corpse to the rather unusual case that sexual gratification arises from cannibalism.[274]

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269 BGHSt 34, 59, 61; BGHSt 47, 128, 133 f; BGH NJW 1994, 2629, 2630; BGH NStZ 2007, 522, 523; BeckOK StGB/Eschelbach § 211 para 16; Schönke/Schröder/Eser/Sternberg-Lieben *StGB* § 211 para 15.

270 BeckOK StGB/Eschelbach § 211 para 16.

271 Lackner/Kühl/Karl Lackner *StGB* § 211 para 15.

272 BGHSt 07, 353.

273 BGHSt 19, 101, 105; BeckOK StGB/Eschelbach § 211 para 19.

274 BGHSt 50, 80 ff.

(c) Greed

The 'greed' *Mordmerkmal* is present where the perpetrator kills in order to obtain direct or indirect economic advantages.[275] This is so both where the death of the victim is brought about in order to steal his or her property (robbery murder – *Raubmord*)[276] and where the perpetrator is the victim's heir[277] or beneficiary of a life policy,[278] or where the death of the victim enables the perpetrator to gain priority to an inheritance[279] (as where the cousin of a wealthy octogenarian kills that octogenarian's only, and childless, son). Murder on the grounds of greed also includes contract killings, as here the killing is carried out with a view to financial gain, too.[280]

(d) Otherwise base motives

Base motives are motives which according to general moral perception are particularly despicable and are thus 'beyond the pale'.[281] Clearly this is a 'catch-all' miscellaneous provision, which causes the courts particular difficulty given the constitutional exhortation to give a narrow reading to the *Mordmerkmale.* For the purposes of this thesis we do not need to go into details; suffice it to say that paradigm cases of base motives include killing out of trifling reasons, killing an innocent party out of frustration,[282] and killings motivated by racial hatred or terrorism. [283]

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275 BeckOK StGB/Eschelbach § 211 para 20.

276 BGH NJW 2001, 763, 763; BeckOK StGB/Eschelbach § 211 para 21; Schönke/Schröder/Eser/Sternberg-Lieben *StGB* § 211 para 17.

277 BeckOK StGB/Eschelbach § 211 para 21; Kindhäuser/Neumann/Paeffgen/Ulfrid Neumann *StGB* § 211 para 13.

278 ibid.

279 BeckOK StGB/Eschelbach § 211 para 21.

280 ibid.

281 See BGHSt 03, 132 (requiring base motives that are 'utterly contemptible').

282 BGH NJW 2002, 382, 383.

283 BGH NStZ 2005, 35, 36.

(e) To facilitate or to cover up another offence

The *Mordmerkmal* 'to facilitate another offence' is not the same as the 'felony murder rule', now defunct in England and Wales but still extant in a number of common law jurisdictions. To qualify as murder under this heading, it is not sufficient for the killing to be incidental to the commission of another offence – its aim must be to facilitate it. Even where, as in a robbery, the victim is killed in order to appropriate property belonging to him, the BGH has recently held that this will not satisfy this requirement (but might, of course, be murder because the victim is killed 'out of greed'). This is because the BGH is now looking for an unrelated offence to be facilitated, an offence not forming part of the same course of conduct.[284]

Where the killer's aim is to cover up another offence (whether it be his own or somebody else's), it follows logically that he must desire the covering up of that offence (*dolus directus* I), while to satisfy the requirement that he intend the killing *dolus eventualis* will suffice. Thus, where the perpetrator beats up a witness to a different offence to stop him from going to the police he will be liable for murder if the witness dies provided that he was reconciled to the possibility that the brutal beating he intended to give him might kill him; a fortiori, of course, the case where a witness is killed to prevent him from testifying.

E Causing Bodily Harm Resulting in Death (§ 227 StGB)

One instance of killing – the *intentional* infliction of injury which results in death (in circumstances where that death was not intended with at least *dolus eventualis*) – which in English law amounts to murder (provided gbh rather than abh was intended) is in German law treated as neither *Mord* nor *Totschlag*. Instead, cases where death is caused as a

284 See BGH NJW 2007, 2130, 2131.

consequence of an *intentional* offence against the person are dealt with by a special offence: § 227 StGB (*Körperverletzung mit Todesfolge*) which reads as follows:

> (1) If the offender causes the victim's death through the infliction of bodily harm (§§ 223 to 226a) the penalty shall be imprisonment of not less than three years.
>
> (2) In less serious cases the penalty shall be imprisonment from one to ten years.

As far as this provision applies to the intentional infliction of *some* (not necessarily serious) bodily harm, it can be described as the functional equivalent of the English concept of unlawful dangerous act manslaughter. Of course, where the offender acts with intent to inflict *serious* harm (but lacks intent to kill), the provision also serves as a functional equivalent to English law murder.[285] We should note, however, that § 227 StGB requires *negligence* as to the fatal result (§ 18 StGB), whereas unlawful dangerous act manslaughter and murder under English law are constructive crimes to the extent that liability can attach without proof of *mens rea* as to the fatal consequence.[286] The difference is negligible in most cases: [287] according to legislative intent the slightest negligence (*leichteste Fahrlässigkeit*) suffices for § 227 (1) StGB to be made out.[288] Given that the basic offence (inflicting bodily harm)[289] is committed intentionally, it will generally be the case that death ensues as the result of negligence. Thus foreseeability of the lethal consequence becomes

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[285] Likewise LK-Joachim Vogel, *Strafgesetzbuch*, Vol 1 (12th edn de Gruyter 2007) Vor § 15 para 88.

[286] Similarly Michael Bohlander *Principles of German Criminal Law* (Hart 2009) 31.

[287] See ibid 31-32 for an example (based on BGH NJW 2006, 1822) where English and German law would differ: a mother makes her daughter eat a quantity of salt, intending to make the child suffer an upset stomach but not realising that the amount will prove deadly for her. Since she lacked foresight of the risk of death, she was not liable under § 227 StGB. Under English law it is possible to convict for unlawful dangerous act manslaughter, as the mother had acted with the *mens rea* to commit an assault on her daughter.

[288] See BT-Drs 13/8587, 21, 61, 78 ff; BT-Drs 13/9064, 36; Georg Küpper, 'Unmittelbarkeit und Letalität. Zum Tatbestand der Körperverletzung mit Todesfolge' in Thomas Weigend and Georg Küpper (eds), *Festschrift für Hans Joachim Hirsch zum 70. Geburtstag am 11. April 1999* (de Gruyter 1999) 615, 624 f.

[289] § 227 StGB refers to §§ 223-226a StGB as possible underlying basic offences. In practice, § 223 StGB (assault occasioning bodily harm) and § 224 StGB (assault causing bodily harm by dangerous means) are the most relevant.

the sole criterion.[290] The standard the courts impose is subjective-objective: should the perpetrator, given his personal characteristics, his knowledge and abilities, have foreseen that the victim might die as a result of the infliction of the injuries. It does not matter, of course, that the perpetrator could not have foreseen the precise causal chain leading to death – as long as death was foreseeable by him, he will be liable. Only where death was so far removed from what he could have foreseen will it not be attributed to him via this provision.[291]

The sentencing range of § 227 StGB (three years imprisonment in less serious cases, up to a maximum of 15 years) is problematic in that it comprises the entire 'normal' sentencing range of *Totschlag* (which is five to 15 years (§ 212 I StGB), with life imprisonment being reserved for really serious cases).[292] For this reason, commentators and courts are agreed that the provision requires a *restrictive interpretation*. On the basis of the provision's spirit and purpose, the courts assume more is to be required connecting bodily injury and deadly consequence than mere causality (*Ursachenzusammenhang*): the provision should only be applied in instances where death was an inherent danger of the *Körperverletzung*, and where the victim's death was a realisation of this specific danger.[293] According to the case law, it is sufficient that the danger is inherent in the *conduct* (as opposed to the injury) which causes the *Körperverletzung*.[294] This is illustrated by the so-called *Gubener Hetzjagdfall*:[295] the victim, in an attempt to escape torture at the hands of a group of youths, jumped through a glass door with the aim to find refuge in the rooms

290 BGHSt 24, 213, 215; BGH NStZ 2001, 478, 478-479; BGH NJW 2006, 1822, 1823.
291 BGHSt 31, 96, 100; BGH NJW 2006, 1822, 1823.
292 Carl-Friedrich Stuckenberg, 'Körperverletzung mit Todesfolge bei Exzeß des Mittäters' in Michael Pawlik and Rainer Zaczyk (eds), *Festschrift für Günther Jakobs zum 70. Geburtstag* (Heymanns 2007) 693, 695; BeckOK StGB/Eschelbach § 227 para 16.
293 BGHSt, 31, 96, 98; BGHSt 32, 25, 28; BGHSt 33, 322, 323; BGH NStZ-RR 1998, 171 f.
294 BGHSt 14, 110, 112 f.
295 BGHSt 48, 34.

behind the door. He bled to death as a consequence of the cuts suffered when the glass broke upon impact. The youth who had been chasing him were found guilty of § 227 StGB.

§ 227 StGB is important in cases where the prosecution cannot prove an intention to kill, but can prove intent to do bodily harm and a concomitant negligence in causing death. In such cases, § 227 StGB has *Auffangfunktion.*[296] In this capacity, the provision is significant for the subject matter of this thesis: homicide committed *en groupe*. Thus, in some instances which under English law would lead to joint enterprise murder, a German court will convict under § 227 StGB, on the basis that whilst it cannot be proved that S acted with intent to kill (not even in the sense of *dolus eventualis*), he acted with intent to cause injury, in circumstances where he was negligent as to V being killed by the acts of S's companions-in-crime, the criterion for such negligence being foresight.[297]

F Taking Part in an Affray (§ 231 StGB)

Even though § 231 StGB is of very limited relevance in practice, a thesis on joint enterprise liability cannot ignore it. It represents an attempt to penalise the mere participation in an affray or joint attack which has led to the serious injury or death of another person. Crucially, the prosecution does not have to prove a causal link between the accused's actions and the harm inflicted. The underlying thinking is that the precise way in which events unfolded is usually difficult to reconstruct where violent affrays are concerned, so that an individual participant should not be able to escape liability by arguing that he cannot be proved to have contributed to the relevant harm itself. He is punished because, where several people are involved in violence, this in itself is seen as creating a danger.[298] One reason for the provision's limited practical relevance, interestingly, is that it is of doubtful

[296] Volker Krey and Manfred Heinrich, *Strafrecht Besonderer Teil I* (14th edn, Kohlhammer 2008) para 264.

[297] BGHSt 24, 213, 215; BGH NStZ 1982, 27, 27; BGH NStZ 1997, 82, 82-83; BGH NStZ 2004, 684, 684; BGH NStZ 2013, 280, 281.

[298] BeckOK StGB/Eschelbach § 231 para 2.

compatibility with constitutional principles, in particular with Arts 20 (3) (rule of law) and 103 (2) (principle of legality) GG.[299] This is striking because, while the requirements of § 231 StGB are similar to those of the English doctrine of joint enterprise (in that active participation in the affray is necessary while foresight of the risk of death or GBH is presumed), punishment is limited to a maximum of three years imprisonment (as opposed to a possible mandatory life sentence in English law). The low maximum sentence is also the reason why the prosecution, constitutional concerns aside, will generally indict a participant as co-perpetrator or aider and abettor under § 227 StGB (causing bodily harm resulting in death), which carries a *minimum* sentence of three years. It would therefore be a mistake to regard § 231 StGB as the functional equivalent of joint enterprise in English law. As we will see in Chapter 6, this is to be found in the principles of co-perpetration and *Mittäterexzess*, coupled with the substantive offences (in order of severity) of murder, manslaughter and causing bodily harm resulting in death.

G Conclusion

German criminal law draws the line between murder and manslaughter by way of aggravating factors (*Mordmerkmale*) rather than through its concept of intention. This is not to say that intention is not important to its voluntary homicide provisions. Quite the contrary: *both* murder and manslaughter presuppose that death was caused intentionally. In contrast to English law, however, intent to cause serious injury is not sufficient; the German murder and manslaughter provisions require intent *to kill*. On the other hand, 'intent' is construed more broadly under German than under English law. As a result, the German murder provision is both narrower and wider than the English law of murder: it is narrower because it requires presence of one of a closed-list of aggravating factors and because intent

[299] See further, Thomas Weigend, 'Germany' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Standford University Press 2011) 252, 254.

to do gbh does not suffice; it is wider because it does not insist on foresight in the degree of virtual certainty, although it requires endorsement of the foreseen fatality. Because the German murder provision is thus comparatively narrowly defined, many cases which in English law would be murder will under German law attract a conviction for manslaughter, while the functional equivalent of English unlawful dangerous act manslaughter is to be seen in Germany's special offence of causing bodily harm resulting in death.

In both jurisdictions, the concept of intention remains somewhat elusive: we saw in Chapter 2 that English law has been struggling with drawing the line between indirect intention and recklessness. In this chapter, we noticed that German law, too, is grappling with demarcating the boundaries of intent. Because German law does not know a concept of recklessness, here, the problem is with drawing the line between intention in form of *dolus eventualis* and negligence (in its advertent form of foresight of a possibility coupled with the actor's earnest reliance that the foreseen consequence can be avoided).

We further noted that whilst *Cunningham* recklessness and German *dolus eventualis* both turn on foresight of a risk, there is a crucial difference: recklessness requires that the risk be unreasonable or unjustifiable to run, but does not expect the defendant to have displayed a particular attitude towards it. *Dolus eventualis*, by contrast, requires endorsement of the foreseen consequences. The latter thus sets a more demanding *mens rea* standard.

In concluding this chapter, let us recall the examples given in the introductory chapter to see how P would fare under German and English law respectively. In the first example, P was engaged in a burglary when he came across V1 whom he killed by forcefully hitting him on the head with a metal bar. Under English law, this would be murder, because on a realistic interpretation of the facts P appreciated that hitting V forcefully on the head with a metal bar is virtually certain to cause him serious injury.

Under German law, foresight of gbh would not suffice for murder. However, on the facts P must have foreseen that hitting V1 on the head *might* cause death. Since he hit him 'forcefully' so as to silence him and avoid apprehension, it seems unlikely that P can convince a judge that he earnestly believed that 'all would be well in the end'. Intention in form of *dolus eventualis* is thus made out. Moreover, P hit V1 in order to cover up his crime of burglary. Thus, a *Mordmerkmal* is also present. Therefore, German law would hold P to account for murder, too.

In the second example, P beat V2 to death with the same metal bar in the course of a gang fight. As explained in the introduction, the manner of attack leads one to conclude that P acted at least with intent to do gbh. So under English law, this would be murder. Under German law, seeing that P hit V2 'ferociously', using a weapon rather than fists like everybody else, he will have a hard time asserting that he earnestly believed that the foreseen possibility of V2's death would not materialise. Thus, it seems likely that a court would find intention in form of *dolus eventualis*.[300] However, assuming P did not kill V2 out of pure pleasure (*Mordlust*),[301] his conduct does not seem to fit any of the *Mordmerkmale*. Therefore, under German law, P would be guilty of manslaughter only.

We cannot at this stage assess S's liability who, it will be remembered, was not directly involved in the killing of either V1 or V2 but had been engaged with P in a criminal enterprise. This is because we have yet to examine the German and English law on accessorial liability. To this we now turn, starting with the English law in the next two chapters, before moving on to the German law of participation in crime in Chapter 6.

[300] If P lacks *dolus eventualis*, he will neither be guilty of murder, nor manslaughter, but can be convicted under § 227 StGB (causing bodily harm resulting in death).

[301] In that case, P will need to have acted with *dolus directus* I.

Chapter 4: COMPLICITY IN ENGLISH LAW

A Introduction

In its central chapters,[302] this thesis will argue that the prevalent perception of joint criminal enterprise as an instrument of *inculpation*[303] is misguided. It will be suggested that the doctrine, properly understood, is an *exculpatory* principle which serves to separate one-sided criminal 'excess' by P from such of P's acts that are still within P's and S's joint wrongdoing and which can therefore be attributed to S. It will be further argued that joint criminal enterprise is neither *a separate head of liability*,[304] nor a principle of secondary liability only: the doctrine applies both in circumstances where S and P set out on their criminal venture as co-perpetrators and in instances where they started off as perpetrator and accessory; it thus cuts across the boundaries of primary (ie direct) and secondary (ie derivative) liability. These arguments will be developed partly by an analysis of past and existing authority, and partly by way of a comparative study drawing on: (1) the substantive law of homicide in English law; (2) the substantive law of homicide in German law; (3) the rules pertaining to participation in English law; and (4) the rules pertaining to participation in German law. In the preceding two chapters, we have looked at the law of homicide in England/Wales and Germany (focussing in particular on the concept of intention). In this and the following two chapters, we will examine the rules of complicity in these two jurisdictions. In order to understand this dissertation's central theses, and how they relate to the current law of joint criminal enterprise, it is necessary to retrace the 'existing,

302 Chapters 5, 7 and 8.

303 See eg GR Sullivan, 'The Law Commission Consultation Paper on Complicity: Part 2: Fault Elements and Joint Enterprise' [1994] Crim LR 252, 261: 'the inculpatory principle of joint enterprise.'

304 For a different view see Dennis J Baker, *Criminal Law*, para 14-049.

acknowledged legal position'[305] of joint enterprise liability and the context – complicity – within which it has been developed. As we will see, many aspects of the law of complicity are uncertain and subject to vigorous debate.[306] It is beyond the scope of this chapter to discuss all controversial issues and competing views in this area, and this chapter should not be understood as attempting to offer a comprehensive review of the current state of the law and legal debate. Its purpose is far more modest: it aims to set the scene for the later discussion on the direction in which the joint enterprise principle might be developed, focussing in particular (1) on its *underlying basis*, (2) its proper *place* within the structure of complicity, and (3) its *mental element*.

I Overview: Modes of incurring Criminal Responsibility

Where several individuals participate in the commission of a crime, they could be held to account on the basis of either of two competing models of delinquency: the so-called 'monistic' or 'dualistic' approaches. Under the monistic approach, a legal system treats each participant who has contributed towards the perpetration of a crime as a principal offender. This approach assumes that all causal conditions are equal.[307] The gravity of an individual's contribution towards the full commission of the crime, which may differ from that of other actors, is taken into account only at the sentencing stage. By contrast, under a dualistic model, each participant will be categorised according to the nature and level of his involvement by the rules of substantive law. Typically, under such an approach, an individual will incur criminal liability either as a result of his own acts or as a result of (his

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305 Peter Mirfield, 'Guilt by association: a reply to Professor Virgo' [2013] Crim LR 577, 583. While Graham Virgo, 'Guilt by association: a reply to Peter Mirfield' [2013] Crim LR 584, 584, contends that there is no acknowledged legal position but rather 'a wide variety of different interpretations of the law which seek to make sense of the contradictory authorities and divergent theories for the recognition of accessorial liability', it is nonetheless possible to identify some common themes which for the purposes of this thesis will be treated as constituting the orthodox position.

306 The Law Commission describes complicity as a 'very complex and difficult area of the criminal law' and secondary liability as '[a] doctrine characterised by uncertainty and incoherence', see *Participating in Crime* (Law Com No 305, 2007) paras 2.1, 1.12-1.13.

307 Claus Roxin, *Täterschaft und Tatherrschaft* (8th edn, Walter de Gruyter 2006) 5.

contributions to) the acts of another. The former mode of responsibility usually requires the individual to have committed the *actus reus* of the offence himself; the latter to have helped or encouraged someone else in doing so. The former leads to liability as a perpetrator (or principal or primary offender)[308]; the latter gives rise to liability as an accessory (or secondary party).[309] Liability as a perpetrator, since it is based on the individual's own wrongdoing, is termed primary or direct liability;[310] accessory liability, by contrast, is known as secondary or derivative liability, which indicates that the accessory's liability is one step removed from and depending on someone else's commission of the principal offence.

The advantage of the dualistic model over the monistic approach is that when it comes to crimes committed *en groupe* it allows for the *gradation* of individual conduct which, (only) when added up, results in the commission of a crime. As such, the wrongfulness inherent in each participant's contribution to the full offence is given a 'label' – at the charging stage – which reflects the participant's alleged role in the concerted commission of the full offence. On the downside, a dualistic model requires the law enforcement agencies to draw distinctions between perpetrators and accessories, which it might be quite difficult to draw at the *charging* stage. However, one might be confronted with the same problem – albeit at the *sentencing* stage – under the monistic model: the judge would still need to justify different sentences for partners-in-crime by reference to objective criteria, such as the gravity of individual acts in the commission of the particular offence.

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308 To avoid confusion, I will be using 'perpetrator' to denote an offender who has committed the crime by his own act. As Williams has noted, before the Criminal Law Act 1967, 'the "principal in the second degree" in felonies, though called a principal, was in fact an accessory' and '[a]ll the parties to misdemeanours and summary offences were indiscriminately called principals, whether they were the actual doers or were only indirectly responsible or performed secondary tasks', see Glanville Williams, 'Complicity, Purpose and the Draft Code: Part 1' [1990] Crim LR 4, 4-5.

309 The term 'accomplice' will be used for partners-in-crime, be they co-perpetrators or accessories.

310 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 637.

At first sight, English law seems to adhere to a monistic conception of criminal liability: as will be explained in the next section, under section 8 of the Accessories and Abettors Act 1861, perpetrators and accessories are treated alike when it comes to criminal procedure and punishment.[311] On the other hand, the courts require prosecutors, as a matter of 'proper practice',[312] to specify when charging the defendant whether he is accused as a perpetrator or accessory whenever it is possible to determine the level of his involvement at that stage.[313] It is, therefore, suggested that English law adheres to a dualistic conception, although, as we will see, the practical significance of the distinction between perpetrators and accessories is rather limited.

II Distinguishing Perpetrators from Accessories

Section 8 of the Accessories and Abettors Act 1861 stipulates that anyone who 'shall aid, abet, counsel or procure the commission of an indictable offence ... shall be liable to be tried, indicted and punished as a principal offender.' An accessory can thus expect to be charged with, and convicted of, the same offence as his principal. He will be subject to the sanctions prescribed by that offence; there is no independent crime of aiding and abetting. Although courts can hand down different sentences for perpetrators and accessories,[314] English law adheres to the notion of uniform punishment. This means that an accessory might receive the same sanction as his principal (or even be punished more severely than the actual perpetrator, for example, if he was the 'mastermind' of the crime),[315] a position that, as we will see in Chapter 6, can be contrasted with the German approach which

311 See Law Commission, *Participating in Crime* (Law Com No 305, 2007) paras 1.2, 1.5. The corresponding provision for summary offences is Magistrates' Courts Act 1980, s 44.
312 *Taylor* [1998] Crim LR 582 (CA) 583.
313 *Maxwell* [1978] 1 WLR 1350, [1979] 1 WLR 1350 (HL); *Taylor* [1998] Crim LR 582 (CA).
314 *Height* [2008] EWCA Crim 2500, [2009] 1 Cr App R (S) 117.
315 Dennis J Baker, *Criminal Law*, para 14-007.

formally mitigates the punishment for accessories.[316] In the case of murder, an accomplice will thus receive the mandatory life sentence, even though he did not actually kill and, indeed, his act of assistance or encouragement may have been really rather trivial.[317] All this is not to say that the distinction between perpetrator and accessory is not relevant: because the liability of an accessory derives from that of the principal offender,[318] an accessory will not be liable (subject to the inchoate offences in Part 2 of the Serious Crime Act 2007), unless the principal has at least attempted to commit the principal offence. It is thus always necessary to determine whether the principal offence has been committed before anyone can be charged with having aided and abetted it. While one consequence of the 1861 Act is that it is permissible for the prosecution to charge an individual without specifying upfront whether he is accused as a principal offender or accessory,[319] the courts have expressed a preference for prosecutors to make such a specification whenever possible, so that the defendant should know as precisely as possible the nature of the charge he has to meet,[320] and despite the wording of the 1861 Act, the distinction remains crucial in a number of situations. As such, for offences of strict liability, while the principal offender need not have acted with *mens rea*, this is a prerequisite for the liability of his accomplices.[321] Some crimes can only be committed by principal offenders,[322] while others require the principal offender to answer a particular description (eg being a member of a particular group) or to possess particular qualifications (eg being the licensee of a pub).[323] Vicarious liability remains restricted to acts of principal offenders; there is no vicarious

316 § 49 (1) StGB. See George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 650.
317 Ashworth and Horder, 420.
318 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) ch 8; KJM Smith, *Complicity*, ch 4; *Smith and Hogan*, 207.
319 *Giannetto* [1997] 1 Cr App R 1 (CA).
320 *Maxwell* [1978] 1 WLR 1350, [1979] 1 WLR 1350 (HL); *Taylor* [1998] Crim LR 582 (CA).
321 *Smith and Hogan*, 207, 232.
322 *Simester and Sullivan*, 204.
323 *Smith and Hogan*, 207.

liability for acts of accomplices.[324] While principal and accomplice are usually treated alike as concerns their punishment, some offences impose different sentencing regimes on principal and accessory.[325]

B Primary Liability: Criminal Responsibility for One's Own Acts

I Perpetration

The most straightforward way of incurring criminal responsibility is by actually committing a criminal offence. While it is often said that this requires the defendant to carry out all the relevant *actus reus* elements by his own conduct, this is only true for a sole perpetrator, ie an individual who commits the offence acting alone. As we will see, where the individual is 'in it' together with another individual, and the latter takes also part in the *actus reus* of the offence, both are co-perpetrators (also referred to as joint principals). They will be called co-perpetrators even if each of them individually has committed only part of the *actus reus*, as long as their combined efforts result in the commission of the full offence.[326] Finally, it is possible to become a perpetrator without having *directly* committed *any* part of the *actus reus*, by virtue of the doctrine of innocent agency. This mode of participation in crime attributes the actions of a third party to the defendant if certain conditions are fulfilled, the idea being that the former is just a tool (or 'puppet')[327] in the hands of the latter.

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324 ibid; *Simester and Sullivan*, 204.
325 See eg Road Traffic Offenders Act 1988, s 34(5).
326 KJM Smith, *Complicity*, 28.
327 Dennis J Baker, *Criminal Law*, para 14-103.

1 Direct Perpetrator

A person who commits the *actus reus* of a crime with the requisite *mens rea* without depending on anyone else's involvement is a direct perpetrator.[328] This requires him to engage in the prohibited conduct with the prescribed mental attitude and to bring about the prohibited result (if any).

This category also includes cases such as *Petters and Parfitt*[329] which are characterised by two or more individuals committing the *actus reus* of an offence alongside each other, but without a common plan or shared purpose. In other words, while these individuals may pursue the same objective, crucially, they do so *independently* of one another.

2 Joint or Co-Perpetrator

Where more than one individual commit (part of) the *actus reus*, the law speaks of co-perpetration or joint principalship.[330] We can conceive of two types of situation where the concept of joint principals so defined applies, ie where individuals, with the requisite *mens rea*, act jointly in the commission of a crime.[331] First, there are instances where P1's and P2's conduct is co-extensive, ie both P1 and P2 commit the entire *actus reus* of an offence with their own hands and the required *mens rea*. Thus, P1 and P2 *individually* (but, crucially, not independently[332]) satisfy *all* the required ingredients of the relevant crime. An example would be P1 and P2 holding the same knife and, together, stabbing V in the chest.

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328 KJM Smith, *Complicity*, 27; *Simester and Sullivan*, 203; Bob Sullivan, 'Acessories and Principals after *Gnango*' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 25, 33.

329 [1995] Crim LR 501 (CA). See also the example given by the Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 1.22, a variation of *Petters and Parfitt*: 'D is [in] the process of attacking V. P, who does not know D, watches from a distance. P, who hates V, decides to joint in when he sees that D has temporarily ceased his attack. P walks over and kicks V.'

330 *Bingley* (1821) Russ & Ry 446, 168 ER 890 (Crown Cases Reserved); *A and others* [2010] EWCA Crim 1622, [2011] QB 841 [9]; Richard Buxton, 'Joint Enterprise' [2009] Crim LR 233, 237; Richard Buxton, 'Being an accessory to one's own murder' [2013] Crim LR 275, 278.

331 KJM Smith, *Complicity*, 28; *Simester and Sullivan*, 205.

332 Where A and B each satisfy all the elements of a particular crime, but do so without any sort of agreement, they are sole rather than joint perpetrators.

Secondly, there may be situations where the individual acts of P1 and P2 *only when taken together* will result in the commission of a particular offence,[333] in circumstances where each act regarded on its own would result in the commission of no or only a lesser offence. Assume, for example, that P1 and P2 set out to commit a robbery. While P1 holds a knife to the victim's throat, P2 seizes the victim's purse. The use of force and the stealing are two separate elements of the definition of the offence of robbery. Only where the conduct of P1 and P2 can be added up has the offence of robbery been committed. If we looked at P1's and P2's conduct in isolation, we would have to conclude that P1 has committed an assault on V, while P2 is guilty of theft in relation to V's property. Both these offences are less serious than robbery and they alone do not adequately reflect the event: P1 and P2 set out to commit a robbery, not just an assault and a theft. Consequently, their *shared intention* should be the yardstick for assessing the criminality of their conduct, and on the basis of their common intention to commit a robbery as a concerted activity, acts done by P1 can be attributed to P2. The concept of joint perpetration thus takes into account that some crimes have an *actus reus* which is made up of several distinctive elements (thus leaving scope for a division of labour, with each offender tackling a separate element), while others consist of a single element (which can, however, be satisfied by joint activity).[334]

As such, it is implicit in the rules governing joint perpetration that acts can be *mutually attributed as between co-perpetrators*. This insight is key for the thesis advanced later on – that the first limb of the joint enterprise doctrine according to which where an offence is committed jointly and pursuant to a shared criminal purpose, individual acts undertaken in furtherance of the joint enterprise are mutually attributed as between all actors belonging to the joint venture – is redundant. We will return to this point in Chapter

[333] An example would be *Bingley* (1821) Russ & Ry 446, 168 ER 890 (Crown Cases Reserved) which concerned three individuals each forging part of a banknote. See also KJM Smith, *Complicity*, 28; *Smith and Hogan*, 212; Ashworth and Horder, 419; *Simester and Sullivan*, 205.

[334] KJM Smith, *Complicity*, 28.

7 (when considering the nature of joint criminal enterprise as a doctrine of exculpation rather than inculpation).

At this stage, it is important to note that under the principle of joint perpetration, there seems to be one significant limitation on the law's ability to impute acts from P1 to P2 (and vice versa): the mutual attribution of acts presupposes that the joint perpetrators have *each contributed to the actus reus* of the relevant offence.[335] Thus, in *Simester and Sullivan* we find the following example:

> if S and P attack [V] in concert, yet it is a particular blow by P that causes death independent of the effect of the earlier blows by S, then S cannot be convicted of murder as a principal and must be convicted as a secondary party.[336]

The editors arrive at this conclusion in the following way: murder is defined as 'causing the death' of another person. If one applies the above principle literally – and it was a particular blow by P which killed the victim – then S's earlier blows, since they were not causative of V's death, do not fulfil the *actus reus* requirement of (but for) causation. Hence, since S has not contributed to the *actus reus,* P's acts cannot now be attributed to him under the principle of joint perpetration.

This outcome strikes one as too narrow, however; it is also rather counter-intuitive. Indeed, one might be tempted to argue that S has nonetheless incurred liability as a principal offender: at the relevant time, S was jointly participating in the attack on V, on the mutual understanding that what was to be achieved, by combining skills and effort, was to cause V serious injury or death. In the given example, S did indeed land some blows on the victim, albeit that these did not result in his death. Nonetheless, S and P's attack was, from the outset, a joint undertaking,[337] and it is difficult to see why anything achieved by P and S

335 *Simester and Sullivan*, 205.

336 ibid.

337 The facts of *Childs* [2015] EWCA Crim 665 are different to this: there, the first blow by P was struck before S joined in the attack; on the medical evidence the possibility that that first blow was fatal could not be discounted. As such, S's involvement came too late to make him a joint perpetrator.

individually in pursuance of their shared goal should not be mutually attributable, just as in the above example of a robbery by combined efforts. Rather than singling out the individual blows within their concerted attack to determine P's and S's liability, it might be more appropriate to look at the overall plan and course of conduct. In other words, if *Simester and Sullivan* is correct, English law draws the boundaries of joint perpetration too narrowly. This is an important insight for the discussion of joint enterprise to follow. Indeed, it will be argued in later chapters that the boundaries of joint perpetration should mirror the common plan or purpose. It will, of course, be necessary to determine what the parties' common plan or purpose was, and in this context the rules of joint enterprise, as developed in later chapters, will become relevant. These rules can serve an *exculpatory* function in cases where the supposed joint principal cannot be said to have endorsed his co-principal's actions. In the above example, of course, there would be ample evidence of such an endorsement (seeing that the result achieved was envisaged and intended by both parties), so that there should be no difficulty in treating them as co-perpetrators of the relevant offence.[338] It is argued that this would have additional benefits from a fair labelling perspective: in the *Simester and Sullivan* example it is more apt to perceive of S as one who 'commits' rather than one who'facilitates' the crime.

3 Perpetration by means[339]

(a) 'Innocent Agency'

By virtue of the doctrine of 'innocent agency',[340] an individual may become a principal offender in circumstances where the *actus reus* of the offence is committed by a third party

338 See discussion below, 247 ff.

339 I am here adopting the terminology used by George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 639.

340 Since liability under the doctrine of innocent agency is not derivative, there are good reasons to classify this doctrine as a mode of principal liability. This is consistent with the view taken of a similar doctrine in German law (*mittelbare Täterschaft*). The matter is not beyond doubt, however, as noted by KJM Smith, *Complicity*, 94 fn 2.

– referred to as an innocent agent – who himself lacks criminal responsibility.[341] This approach is best illustrated by way of example: S wishes V dead. He hands P a bottle of poisoned water and asks him to give it to V. P does not know that the water is poisonous. V drinks the water and dies. S is guilty of murder. At first sight, this seems to be a case of S having incurred liability for the acts of another rather than on the basis of his own conduct. But if we take into account that S *intended* V to die,[342] that it was S who devised the way in which this should be achieved, and, furthermore, that the third party is not to blame – he did not realise that drinking the water would damage V's health, let alone kill him – it can be argued that P is really only a tool with which S commits what is essentially his (= S's) crime. S, in other words, is really the *author* of V's death.

While the doctrine thus allows for individuals to be convicted as perpetrators who have not actually committed the *actus reus*, thereby extending the idea of who should count as a principal offender, its application is restricted to result crimes.[343] It is also inapplicable where the relevant offence requires P to be a member of a particular class of defendants and he is not within that class, and cases in which the offence requires the perpetrator to commit it personally.[344]

Conceptually, the principle of innocent agency can be explained in two ways: on one view, P's acts are simply *imputed* to S.[345] The alternative view explains the principle on the

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341 ibid 95; Law Commission, *Participating in Crime* (Law Com No 305, 2007) paras 1.28-1.29; 2.11.

342 Smith has argued that '[t]here is no inherent conceptual restriction of innocent agency to cases where the defendant has intentionally or purposefully caused or brought about the innocent agent's actions', see KJM Smith, *Complicity*, 98. However, the Law Commission believes 'that the notion of "agency" in innocent agency implies that D intends to act through P', see *Participating in Crime* (Law Com No 305, 2007) para 4.19.

343 There are some decisions to the contrary. *Cogan and Leak* [1976] QB 217 (CA) (see n 377 below) may be one such example, although the decision is sometimes explained in terms of procurement rather than innocent agency, see *Simester and Sullivan*, 206 fn 26. Williams has doubted the usefulness of the distinction between result and conduct crimes, arguing that 'the distinction between doing and causing may sometimes be purely verbal', see Glanville Williams, 'Innocent Agency and Causation' (1992) 3(2) Crim Law Forum 289, 293.

344 Peter Alldridge, 'The Doctrine of Innocent Agency' (1990) 2 Crim Law Forum 45, 55.

345 KJM Smith, *Complicity*, 117.

basis of *causal* responsibility.[346] Although in our example, P most immediately caused V's death, the whole causal chain was set in motion by S.

While some commentators have argued that the boundaries of S's 'innocence' are not demarcated with sufficient clarity,[347] case law indicates that the third party will be considered innocent if he lacks *mens rea* (as in 'the *mental* element') or criminal capacity.[348] Ashworth and Horder, with reference to *Bourne*,[349] consider the inclusion of a further case category: where the third party has been commanded to commit the relevant crime, so that he may avail himself of the offence of duress.[350] Although otherwise aware of the criminal nature of his conduct, such a person may still be regarded as an innocent agent of the person threatening him: he is innocent in the sense that we cannot possibly blame him for giving in to the threats. Taking this line of reasoning further still, it is arguable that the doctrine of innocent agency extends to all cases where the third party can avail himself of an *excuse* (personal to him) and thus, although acting intentionally (ie with the requisite mental element) lacks *mens rea* (as in culpability or 'the *fault* element'). Support for this view can be drawn from the Law Commission's reform proposals for innocent agency, according to which S would be liable as a principal offender 'if he or she intentionally caused P, an innocent agent, to commit the conduct element of an offence but P does not commit the offence because P: (1) is under the age of 10 years; (2) has a defence of insanity; or (3) *acts without the fault required to be convicted of the offence...*'.[351]

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346 ibid 125.

347 It remains unclear what exactly counts as 'innocent' for the purposes of the doctrine, see ibid 97.

348 *Simester and Sullivan*, 206.

349 (1952) 36 Cr App R 125 (CA). The case concerned a wife who was forced by her husband to have sexual intercourse with a dog. It should be noted that the decision could be explained either as an example of innocent agency or as an instance of accessorial liability, see p 113 below.

350 Ashworth and Horder, 445-447.

351 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 1.52 (emphasis added).

(b) Semi-Innocent Agency

As we will see,[352] German criminal law recognises a further category of perpetration by way of agency: the so-called 'perpetrator behind the perpetrator' (*Täter hinter dem Täter*) which in limited (rather exceptional) circumstances allows for the imposition of liability on an individual as a perpetrator *despite his agent not being innocent at all*. English law does not go quite as far; however, it still seems to allow for the conviction of individuals as perpetrators who have used what can be described as a 'semi-innocent' agent.[353] Support for this position derives from an example discussed by Lord Lane CJ in *Howe*:

> [S] hands a gun to [P] informing him that it is loaded with blank ammunition only and telling him to go and scare [V] by discharging it. The ammunition is in fact live, as [S] knows, and [V] is killed. [P] is convicted only of manslaughter, as he might be on those facts. It would seem absurd that [S] should thereby escape conviction for murder.[354]

This seems correct: since P was at no point privy to all aspects of S's plan – he does not know that he is dealing with live ammunition – and therefore lacks the *mens rea* for murder, he was still, at least to some extent (that is, in relation to a charge of murder), innocent[355] and little more than a tool in the hands of S who, as the mastermind in full possession of all the relevant facts, has in reality engineered V's death. To this extent, S truly is a principal offender and is rightly guilty of murder.

II Three Inchoate Offences of Assisting and Encouragement

A person who encourages and assists an offence that is not in the end committed (or attempted) may incur liability under one of the three inchoate offences contained in sections 44-46 in Part 2 of the Serious Crime Act 2007. Section 44 prohibits intentionally encouraging or assisting an offence; section 45 prohibits encouraging or assisting an

352 See p 199 f.
353 Dennis J Baker, *Criminal Law*, para 14-121.
354 [1986] QB 626 (CA) 642.
355 KJM Smith, *Complicity*, 130.

offence whilst believing it will be committed; and section 46 prohibits encouraging or assisting multiple offences whilst believing one or more of these will be committed. Although all three offences require that the defendant does an act capable of encouraging or assisting the commission of an offence by the principal offender, the liability incurred is primary (ie direct), not secondary (ie derivative).[356] As section 49 (1) clarifies, they apply irrespective of 'whether or not any offence capable of being encouraged or assisted by [S] is committed.' Accordingly, the would-be assister will not be indicted with the principal offence he was seeking to assist or encourage (as there is no crime of attempting to be an accomplice)[357], but with a separate offence. It is for this reason that the provisions will be mentioned here rather than in the context of the rules of secondary liability, even though the inchoate offences of assisting and encouraging were implemented to close a gap in the rules of secondary liability: prior to the enactment of Part 2 of the Serious Crime Act 2007, a would-be assister (not, though, an instigator) would walk free where the principal offender, for whatever reason, never attempted, let alone committed, the principal offence.[358] In this sense, the provisions are *complementary* (even subsidiary)[359] to the rules of aiding and abetting.

They are based on the premise that a would-be accessory is equally blameworthy and dangerous whether or not the perpetrator actually benefits from his support: in both instances he has done all he could to facilitate P's wrongdoing; whether or not P commits the principal offence is outside his control.

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356 Dennis J Baker, 'Complicity, Proportionality, and the Serious Crime Act' (2011) 14(3) New Crim L Rev 403, 407; *Simester and Sullivan*, 204.

357 *Simester and Sullivan*, 258. See also Criminal Attempts Act 1981, s 1(4)(b).

358 Rudi Fortson, 'Inchoate Liability and the Part 2 Offences under the Serious Crime Act 2007' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 173, 173-74, 195. See also John Spencer, 'Trying to Help another Person commit a Crime' in P Smith (ed), *Criminal Law: Essays in Honour of J.C. Smith* (Butterworths 1987) 148, who thought it 'very strange' that one should be liable as an accessory if 'you commit the crime I knew you intended with my help to commit (...) but if you do not, I may well commit no offence at all.'

359 The Law Commission notes that 'secondary liability is a more serious form of liability than inchoate liability', see Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 1.2.

It should be noted that although S will be charged with, and convicted for, an offence contrary to sections 44-46 rather than the substantive offence he expected P to commit, the maximum penalty S incurs mirror those of the offence he anticipated P to commit.[360] There is no defence of withdrawal to these offences,[361] although a defendant will be able to escape liability if he knew or believed that 'certain circumstances existed' and that it was reasonable for him to have acted as he did.[362]

The three offences overlap with the law on aiding and abetting in that it remains open to the prosecution to charge a defendant for acts of assistance and encouragement which have actually facilitated someone else's criminal wrongdoing, even though it is not necessary for inchoate liability to be triggered that a principal offence has in fact been committed. This can be contrasted with S's liability under the rules of aiding and abetting which, as we will see now, are creatures of secondary liability and as such depend on the commission of a principal offence.

C Secondary Liability: Criminal Responsibility for the Acts of Another

While accessorial liability requires some act of assistance or encouragement on the part of S, S's liability ultimately depends on P's (attempt at the) commission of the principal offence. Not only is it implicit in the language of 'aiding and abetting' that there be an offence committed by someone else;[363] S is actually held to account for P's crime: there is

360 Dennis J Baker, 'Complicity, Proportionality, and the Serious Crime Act' (2011) 14(3) New Crim L Rev 403, 405; Ashworth and Horder, 478 fn 108.

361 *Smith and Hogan*, 267. However, there is a defence of 'acting reasonably', see Part 2 of the Serious Crime Act 2007, s 50.

362 Rudi Fortson, 'Inchoate Liability and the Part 2 Offences under the Serious Crime Act 2007' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 173, 174.

363 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 636.

no independent crime of aiding and abetting.[364] In Williams' words: 'to be convicted as an accessory to theft is to be convicted of theft. Technically, there is no crime of being an accessory to theft, only a crime of theft.'[365] It thus seems apt to refer to S's criminal responsibility as being imposed for the acts of another rather than his own acts, notwithstanding that it is a prerequisite of liability that S must have engaged in conduct capable of facilitating P's wrongdoing.

I The Derivative Basis of Secondary Liability

Liability for S as an accessory is not triggered until P has reached at least the attempt stage of the principal offence. This is usually explained by describing S's liability as derivative:[366] it depends upon the commission of a crime by P.[367] If P commits (or at least attempts to commit) the principal offence, S will be secondarily liable.[368] However, the implications of the underlying theory of derivative liability are not in each instance followed through to their logical conclusion: in certain situations, S can be convicted as an accessory even though P, the principal offender, is acquitted. In other instances S is convicted of a lesser offence than P committed, and there are dicta to suggest that it may even be possible to find S guilty of a more serious crime than P actually perpetrated.[369] All these outcomes are difficult to square with a *strict* application of a derivative theory of liability, which would require that the perpetrator be liable for the wrongful act himself before any accessory can be held to account on the basis of secondary liability.[370]

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364 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.2.

365 Glanville Williams, 'Innocent Agency and Causation' (1992) 3(2) Crim Law Forum 289, 291.

366 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 583; Graham Virgo, 'Making sense of accessorial liability' (2006) Archbold News 6, 6; Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.7; *Simester and Sullivan*, 202.

367 On the historical development of the derivative theory of accomplice liability in English law see KJM Smith, *Complicity*, 94-135.

368 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 1.32.

369 Graham Virgo, 'Making sense of accessorial liability' (2006) Archbold News 6, 6.

370 Fletcher calls this the 'narrow' theory of derivative liability, see George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 642.

Some cases which at first sight seem to contradict a derivative theory of liability can, however, on a closer look be explained on the basis of innocent agency:[371] S is in fact P and P is a (semi-) innocent party. The case of *Cogan and Leak*[372] illustrates this well. Mr Leak invited Mr Cogan to have sex with his wife. His intention was 'to punish [Mrs Leak who did not wish to engage in sexual activity with Mr Cogan] for past misconduct.'[373] Mr Cogan, however, believed that Mrs Leak was consenting, and for this reason his rape conviction was quashed on appeal. Mr Leak's conviction – he had been charged as an aider and abettor to rape – however was found not to have been vitiated by Mr Cogan's successful appeal. In arriving at this conclusion, the Court of Appeal suggested that Mr Leak had been using Mr Cogan as an innocent agent to perform the *actus reus* of rape. As Lawton LJ explained:

> The fact that Cogan was innocent of rape because he believed that she was consenting does not affect the position that she was raped. (...) Leak had wanted it to happen and had taken action to see that it did by persuading Cogan to use his body as the instrument for the necessary physical act. (...) Leak was using [Cogan] as a means to procure a criminal purpose. (...) *In our judgment [Leak] could have been indicted as a principal offender.* It would have been no defence for him to submit that if Cogan was an 'innocent' agent, he was necessarily in the old terminology of the law a principal in the first degree, which was a legal impossibility as a man cannot rape his own wife during cohabitation. The law no longer concerns itself with niceties of degrees in participation in crime; but even if it did Leak would still be guilty. The reason a man cannot by his own physical act rape his wife during cohabitation is because the law presumes consent from the marriage ceremony (...). There is no such presumption when a man procures a drunken friend to do the physical act for him.[374]

On such a reading of the case, *Cogan and Leak* is not really an instance of an accessory being convicted in the absence of his principal's liability or an accessory being convicted

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371 As Williams has pointed out, 'one must not suppose that the idea [of innocent agency] is invoked only when it is expressly mentioned', see Glanville Williams, 'Innocent Agency and Causation' (1992) 3(2) Crim Law Forum 289, 292.

372 [1976] QB 217 (CA). Although the case was argued on the basis of aiding and abetting ('procuring'), some passages suggest that the Court of Appeal viewed the facts as giving rise to innocent agency.

373 [1976] QB 217 (CA) 222.

374 ibid 223 (emphasis added).

for a crime lesser or greater than the principal committed, so that this and like cases do not actually challenge the idea of derivative liability.

In the following, we will look at other cases which, by contrast, do suggest that English law is less than fully committed to the idea of derivative liability for accessories. Although the judgments themselves often give few clues as to the underlying theoretical justification – indeed, it is frequently suggested that the English concept of accessorial liability remains underdeveloped[375] – it can be argued that many of the cases that seem to challenge the very concept can still be squared with a derivative theory of liability, albeit a *modified or restricted* version of derivative liability.[376] The argument is that English law has arrived at a limited notion of *what constitutes the principal offence for purposes of accessorial liability*: while commission of the *actus reus* (conduct, consequences etc) with *mens rea* (as in 'the mental element')[377] and unlawfulness are required, P need not have acted with culpability. The accessory's liability thus derives from less than the full substantive offence; it derives from 'the harm or wrongfulness of P's actions'[378] which is then coupled with the accomplice's own culpability.[379]

As we will see in Chapter 6, if this understanding of the English approach to derivative liability is correct, it will bring English law rather close to German criminal law, where it is sufficient for accessorial liability to be triggered that the principal offender committed the act intentionally and wrongfully; he need not have acted blameworthily.

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375 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 667.

376 Ashworth and Horder, 445. Fletcher describes this as the 'broad' theory of accessorial liability, see *Rethinking Criminal Law* (Little, Brown and Company 1978) 641-642.

377 *Cogan and Leak* [1976] 1 QB 217 (CA) suggests that a principal offence may be present giving rise to accomplice liability even in the absence of the requisite mental state on the part of the principal offender. However, the position is somewhat unclear as *Cogan* has also been explained as an (extended) application of the doctrine of innocent agency, see KJM Smith, *Complicity*, 116-117.

378 KJM Smith, *Complicity*, 122.

379 ibid.

1 Can S be convicted when P is acquitted?

Although historically an accessory could not be found guilty unless the principal offender had been convicted,[380] nowadays the law allows for the conviction of accessories without prior conviction of a principal offender.[381] This is because the acquittal of the principal is no longer seen as conclusive on the question whether a crime was committed, eg because the jury sitting on the accessory's case might draw different conclusions on the evidence than the jury which heard the principal's case or because incriminating evidence which was inadmissible against the principal is admissible against the accomplice.[382] In fact, it is not uncommon for accessories to be tried in circumstances where the identity of the principal offender remains unknown.[383] An example of an accessory's conviction in the absence of the principal's conviction (or even charge) is *Bourne*.[384] The alleged accessory had forced his wife to have sexual intercourse with a dog. Because she acted under duress, the wife, had she been charged with the principal offence, would have had an excuse and been acquitted. Nonetheless, the defendant was convicted of aiding and abetting the offence of buggery. This outcome seems to belie a derivative theory of accomplice liability: how can S be convicted in the absence of a principal offence?[385] However, it is possible to explain the decision in *Bourne* on the basis that for there to be a principal offence something 'less than the full offence'[386] suffices: it is noteworthy that all the ingredients for the offence of buggery were present, except for the principal offender's culpability. Other cases where S

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380 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 641; KJM Smith, *Complicity*, 110-112.

381 KJM Smith, *Complicity*, 112, 117.

382 *Davis* [1977] Crim LR 542 (CA); *Fuller* [1998] Crim LR 61 (CA); *Smith and Hogan*, 262.

383 *Anthony* [1965] 2 QB 189 (CA); *Gnango* [2011] UKSC 59, [2012] 1 AC 827.

384 (1952) 36 Cr App R 125 (CA).

385 The defendant could not be convicted as a perpetrator under the doctrine of innocent agency. Presumably, as Baker, *Criminal Law*, para 14-108, explains, because the 'definitions of sex crimes refer strongly to personal bodily behaviour. Only by a violent wrench of the English language could it be said that Bourne himself committed the act of bestiality.' This, however, did not preclude the court from applying innocent agency reasoning in the later rape case of *Cogan and Leak* [1976] QB 217.

386 *Simester and Sullivan*, 250. See also Dennis J Baker, *Criminal Law*, para 14-110: 'an offence that is excused for the "perpetrator" is still an offence in law, to which there can be an accessory.'

was found liable in circumstances where P could not be convicted involve a lack of criminal capacity on the part of the principal offender (eg as a result of infancy or insanity).[387] These, too, can be explained as instances where P wrongfully committed the *actus reus* of an offence with the requisite mental element, but was lacking culpability.

2 Can S be convicted of a less serious offence than P?

The case law suggests that S can also be convicted for a less serious offence than P. What seems to be required is that 'there are two offences constituted by the same *actus reus*, and differentiated only by degrees of culpability'.[388] For example, if S anticipates P committing an offence of violence against V, but he does not expect him to do so with intent to cause gbh or to kill, whereas P in the event commits murder, S will be guilty of manslaughter, but not murder. This is illustrated by the case of *Yemoh*.[389] The victim was chased by a group of youths. The chase resulted in a fight during which the victim was fatally stabbed. It could not be proven who had stabbed him, although at trial there were two main contenders for the role of principal.[390] On the assumption that both were at least secondary parties to the killing and, 'if not [themselves] the stabber [they] knew that the knifeman had a knife and [they] shared the knifeman's intention to kill or do really serious bodily harm',[391] two of the defendants were convicted of murder, whereas others were convicted of manslaughter. Concerning those who had been convicted of manslaughter, the Court of Appeal found that 'the jury must have been sure that he knew that the [principal] had a knife and intended to use it to cause some injury or harm, but falling short of killing or

387 *Simester and Sullivan*, 250.
388 ibid 252.
389 [2009] EWCA Crim 930.
390 ibid [17].
391 ibid [151] (Hooper LJ).

causing really serious bodily harm, or he realised that that person might use the weapon to cause some injury.'[392]

While the judgment is silent as to the underlying theory of derivative liability, the decision in *Yemoh* could be rationalised in either of two ways: first, it could be explained on the basis of a *strict* application of the derivative theory of liability: whatever else the principal offender may have committed (murder), the fatal stabbing certainly fulfils the criteria of the (lesser-included) offence of manslaughter for which his accomplices have been held to account. It is therefore possible to argue that the accomplices' liability, to this extent, *fully* derives from that of the principal: the principal offender has committed the *actus reus* of manslaughter (as a lesser-included offence to murder) with the requisite *mens rea* (intent to kill necessarily incorporates an intent to do some harm), in circumstances where he is neither justified nor excused (ie the principal has also acted with the degree of culpability requisite for manslaughter). Alternatively, the decision in *Yemoh* can be explained in terms of the limited notion of principal offence described above: the principal offender has unlawfully committed the *actus reus* and *mens rea* of manslaughter, while, as the court confirmed, the jury must have been convinced that each of the accomplices possessed the *mens rea* (culpability) for manslaughter. If the principal's crime (in the restricted sense) is coupled with the accomplices' own degree of culpability, the latter are guilty of manslaughter.

3 Can S be convicted of a more serious offence than P?

Whether S can be convicted of a more serious offence than P is a contentious question. We need to distinguish two situations: (a) P has committed the more serious offence but can avail himself of a partial defence which operates as an excuse and reduces his liability to a less serious offence than S intended to aid and abet; and (b) P has not committed all the

[392] ibid.

definitional (ie *actus reus* and *mens rea*) elements of the more serious offence, but his conduct fulfils the constituent elements of a less serious offence. Situation (a) is really a variant of the cases discussed above under the heading of 'Can S be convicted when P is acquitted?'[393] and the considerations made in that context equally apply to the situation where P is liable of a less serious offence than S intended to aid and abet: P will still have committed *the principal offence in its restricted sense* of *actus reus, mens rea* (mental element) and unlawfulness, so that S can be made liable as an accomplice to the more serious offence.

In the following, I will focus on category (b), ie P's conduct amounts to a less serious principal offence than S intends to aid and abet. In *Richards*,[394] English law seemed to accept that S cannot be guilty – as an accessory[395] – of a more serious offence than P where P has not committed all the definitional (ie *actus reus* and *mens rea*) elements of the more serious offence: the defendant, Mrs Richards, had paid two men to inflict injuries on her husband that should 'put him in hospital for a month.' The men wounded the husband but not as seriously as the defendant had expected. They were acquitted of wounding with intent, contrary to section 18 of the Offences against the Person Act 1861, and instead convicted of the lesser offence of unlawful wounding, contrary to section 20 OAPA. Mrs Richards, by contrast, was convicted of the more serious offence of wounding with intent: although the men she had hired acted without the intent necessary for the section 18 OAPA offence, she herself had harboured such intent when she approached them as would-be attackers. Mrs Richards appealed against her conviction, arguing that she could not be convicted as accessory before the fact to a crime more serious than that committed by the principals in the first degree. Her appeal was successful, and her conviction for wounding

393 At p 205 above.

394 *Richards* [1974] QB 776 (CA).

395 Of course an individual can be a perpetrator-by-means and, in that capacity, be guilty of a more serious offence than his (semi-)innocent agent, see the insightful discussion of the appeal in *Richards* by George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 672-673.

with intent was quashed and substituted by one for unlawful wounding. As James LJ argued: '[i]f there is only one offence committed, and that is the offence of unlawful wounding, then the person who has requested that offence to be committed, or advised that that offence be committed, cannot be guilty of a graver offence than that in fact which was committed.'[396] However, the decision has been much criticised, and some commentators have expressed doubt that it would be decided the same way today,[397] referring in particular to the critical remarks in *Howe*,[398] in which the Court of Appeal, albeit *obiter*, took the view that 'Richards was wrongly decided'.[399] Lord Lane CJ, who thought himself bound by *Richards*, preferred the following approach:

> In cases (...) where an accessory before the fact has prevailed upon another to commit a criminal act, a more satisfactory rule would be to allow each to be convicted of the offence appropriate to his intention, whether or not that would involve the accessory in being convicted of a more serious offence than the principal.[400]

He arrived at this view being persuaded that the approach in *Richards* could not adequately deal with the following example (relied on in argument):

> [S] hands a gun to [P] informing him that it is loaded with blank ammunition only and telling him to go and scare [V] by discharging it. The ammunition is in fact live, as [S] knows, and [V] is killed. [P] is convicted only of manslaughter, as he might be on those facts. It would seem absurd that [S] should thereby escape conviction for murder.[401]

In the House of Lords, Lord Mackay agreed with the Court of Appeal that *Richards* was wrongly decided. He said:

> I consider that the reasoning of Lord Lane C.J. is entirely correct and I would affirm his view that where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter *for some*

396 *Richards* [1974] QB 776 (CA) 780.
397 *Smith and Hogan*, 264; Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.19.
398 [1986] QB 626 (CA) 642 (Lord Lane CJ).
399 ibid.
400 ibid.
401 ibid.

> *reason special to himself* does not, in my opinion in any way, result in a compulsory reduction for the other participant.[402]

It might be objected, however, that this difficulty might be overcome by the idea of the semi-innocent agent, ie S could be held to account for murder as a principal offender.

Despite the critical remarks in *Howe*, the decision in *Richards* still has its advocates[403] who criticise the alternative approach suggested in *Howe* as going against principle and undermining the idea that accessorial liability is based on principles of derivative liability: how can S's liability derive from P when P never committed the more serious offence? Indeed, it would be difficult to square the approach favoured in *Howe* even with the limited notion of 'principal offence': the men hired by Mrs Richards lacked not just the fault but also the mental element for an aggravated assault. Imposing accessorial liability on Mrs Richards for a more serious offence would in these circumstances not just involve coupling the men's wrongful actions and the harm caused with her own culpability; it would also require coupling their actions with her mental state in order to produce a greater offence. This, it is suggested, would unduly stretch the idea even of a modified or restricted version of derivative liability, in that it would require adding to the *definitional* elements of the principal offence. While KJM Smith has forcefully argued that 'taking the wounding as the common source of objective harm from which an accessory's liability may be *derived* for either wounding with intent or unlawful wounding, it could be maintained that with the *necessary mental culpability* Mrs Richards's actions constituted complicity in the more serious offence of wounding with intent',[404] this approach blurs the distinction between mental state and culpability, a conceptual distinction that, admittedly, is not

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402 [1987] AC 417 (HL) 458 (emphasis added).

403 Kadish has argued that Mrs Richards could not be made liable for an aggravated assault that did not take place. He does not accept the idea of a semi-innocent agent: the men in *Richards* choose to act as they did freely; they were not in any meaningful way tools in Mrs Richards' hands, see Sanford H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 California L Rev 323, 389.

404 KJM Smith, *Complicity*, 131 (emphasis added).

strictly adhered to in English law but has, not least since the controversial decision in *Steane*,[405] been considered of some significance. For this reason, the argument advanced by KJM Smith, although compatible with some modified notion of derivative liability, is not in the end persuasive. Today, of course, a person in the position of Mrs Richards would be liable under section 44 of Part 2 of the Serious Crime Act 2007, so that the problem is unlikely to arise in the future.

4 Conclusion

There are 'certain circumstances where *something less than the full offence* by P is required'[406] for S to become liable as an accessory. As such, S can still be liable where P has committed the *actus reus*, but lacks *mens rea* (as in 'fault element') because he lacks criminal capacity (as a result of infancy or insanity).[407] The same applies where P can rely on duress and S was the source of the threat.[408] This case category possibly extends to all defences that offer an excuse *personal* to the principal offender,[409] such as diminished responsibility, loss of control, suicide pacts and infanticide, so that P, while acting without personal fault, has still objectively committed a wrong with the requisite *mens rea* (as in 'mental element'). Looking at all these instances, it could be argued that English law takes a limited view of what constitutes the principal offence in the context of complicity. Such a view would find support in the following statement of Lord Goddard CJ in *Bourne* who asserts that the fact that P would have been acquitted of buggery presented no impediment

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405 [1947] KB 997 (CA). The defendant had taken part in enemy broadcasts. He claimed that he had done so under pressure and only to protect himself and his family. His conviction was quashed by the Court of Criminal Appeal on the basis that it was doubtful whether he had acted with the specific intent to assist he enemy. The court's reasoning is problematic, however, in that it seems clear on the facts that in order to save his loved ones, the defendant needed to do acts which he intended, or at the least realised were virtually certain, to assist the enemy. Since he was acting under duress, however, he could not be blamed for intentionally doing acts of assistance. Because of a lack of culpability, his conviction could not stand in any event.

406 *Simester and Sullivan*, 250 (emphasis added).

407 ibid.

408 *Bourne* (1952) 36 Cr App R 125 (CA).

409 Simlarly *Simester and Sullivan*, 254. The editors note that the reasoning in *Bourne* would not carry over to situations of self-defence (p 251) and would thus seem to exclude justificatory defences.

to S's conviction for complicity because 'that [P] could have set up duress... means that she admits that she has *committed the crime* but prays to be excused from punishment'.[410] The editors of *Simester and Sullivan* comment that 'an acquittal means that [P] committed no crime'[411]; however, if the crime consists only of the building blocks of *actus reus*, *mens rea* (as in 'the mental element') and unlawfulness,[412] as opposed to fault, then a crime in this restricted sense would still have occurred in which S could have participated.

As we will see in Chapter 6, in German law, because of § 29 StGB which stipulates that '[e]ach participant-in-crime is to be punished according to his own guilt, irrespective of the guilt of others', the definition of 'principal offence' (*teilnahmefähige Haupttat*) is restricted to unlawful conduct which fulfils the *actus reus* and *mens rea* elements of an offence irrespective of whether the perpetrator also acted culpably, and based on cases such as *Bourne* it is arguable that a comparable restriction operates in English law.

II Aiding and Abetting

The hallmark of secondary liability is S's participation in P's criminal wrongdoing *without S directly partaking in the actus reus* of the offence (otherwise S would be a joint perpetrator with P). It requires some contribution,[413] but not causation (except in cases of procurement where a causal connection is essential).[414] The different modes of accessorial

410 (1952) 36 Cr App R 125 (CA) 128.

411 *Simester and Sullivan*, 252 fn 317.

412 This view finds further support in *Pagett* (1983) 76 Cr App R 279. The police officers, in that they were exercising their right of self-defence, did not commit a wrongful act in firing at the defendant, thereby killing the girl he had taken hostage and was using as a 'human shield': since their shots were justified by self-defence and hence not unlawful, the defendant could not have been held to account on the basis of accessorial liability. But it could be argued that the defendant, by challenging the officers to shoot, had orchestrated the events leading to the girl's death, so that he was correctly convicted as a principal offender.

413 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.33. The precise level of 'contribution' remains unclear: while Smith has argued that it is implicit in the concept of accessorial liability that S's involvement in P's crime should have made some difference to the outcome (see KJM Smith, *Complicity*, 88-90), Ashworth and Horder, 423, suggest that it is sufficient that S's conduct *might* have helped P in some way. The Law Commission, with reference to *Giannetto* (1997) 1 CR App R 1, writes that 'the contribution does not have to be significant' (para B.11).

414 Ashworth and Horder, 430.

liability are set out in section 8 of the Accessories and Abettors Act 1861 (as amended by the Criminal Law Act 1977) which provides:[415]

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

While the accessory will be charged with the same offence as the perpetrator, to secure a conviction the prosecution must establish that S fulfilled the distinct *actus reus* and *mens rea* elements of secondary liability. As indicated by section 8, the *actus reus* may consist of either of four modes of conduct, whilst the *mens rea* elements, in that they must also relate to the specific elements of P's crime, vary according to the crime with which S is charged. While it is not possible to incur secondary liability for an attempt to aid and abet[416] – the reason being that secondary participation does not constitute a criminal offence itself, but 'a conduit to S's responsibility for some other form of criminal wrongdoing'[417] – attempts to aid and abet are now subject to primary liability under the inchoate offences created under Part 2 of the Serious Crime Act 2007.

1 The Accessory's Actus Reus

There is authority to the effect that the prosecution does not need to spell out which of the four modes of conduct mentioned in section 8 of the Accessories and Abettors Act the defendant is specifically accused of,[418] but according to *AG's Reference (No 1 of 1975)*[419] aiding, abetting, counselling and procuring describe distinguishable modes of conduct. We will look at them in turn, with emphasis on the connection required between S's conduct

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415 For summary offences, section 44 of the Magistrates' Courts Act 1980 contains a similar provision.

416 Dennis J Baker, 'Complicity, Proportionality, and the Serious Crime Act' (2011) 14(3) New Crim L Rev 403, 416. See also Criminal Attempts Act 1981, s 1(4)(b).

417 *Simester and Sullivan*, 257. See also JC Smith, 'Secondary Participation and Inchoate Offences' in Colin Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths 1981) 21; John R Spencer 'Trying to Help Another Person Commit a Crime' in P Smith (ed), *Criminal Law: Essays in Honour of J.C. Smith* (Butterworths 1987) 148.

418 *Ferguson v Weaving* [1951] 1 KB 814 (DC).

419 [1975] QB 773 (CA).

and P's offence. As we will see, the precise relationship is somewhat difficult to discern; as a rule of thumb, however, JC Smith's assertion still holds true that 'procuring requires causation but not consensus; encouraging requires consensus but not causation; assisting requires actual [or potential][420] help but neither consensus nor causation.'[421]

(a) 'Aid'

While aiding requires actual or potential assistance (ie some contribution, but not 'but for' causal impact),[422] this need neither be substantial (let alone essential),[423] nor does the principal offender need to be aware that he is being assisted.[424] In other words, there does not have to be a meeting of minds between principal offender and accessory. Thus, it was sufficient for the defendant in *Wilcox v Jeffery*[425] who was part of a crowd to have attended and applauded an illegal performance by a jazz musician in circumstances where it was impossible to tell whether the musician felt in any way supported specifically by the defendant's acts. The emphasis seems to be very much on the *potential* of the defendant's act to provide assistance to the principal. Liability for S's acts of (actual or potential) aiding (as opposed to 'assisting' under sections 44-46 in Part 2 of the Serious Crime Act 2007) will, however, only be triggered if the principal has gone on to commit (or attempted to commit) the principal offence.

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420 Ashworth and Horder, 431 fn 68.

421 JC Smith, 'Aid, Abet, Counsel or Procure' in PR Glazebrook (ed), *Reshaping the Criminal Law, Essays in Honour of Glanville Williams* (Stevens 1978) 120, 134.

422 Ashworth and Horder, 431; *Simester and Sullivan*, 209 fn 45, citing from the judgment in the American case of *State v Tally* 102 Ala 25, 15 So 722 (1894); Barry Mitchell, 'Participating in Homicide' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 7, 7.

423 Indeed, Ashworth and Horder, 431, note that 'any contribution by the accomplice seems to suffice for liability, no matter how small'.

424 *Simester and Sullivan*, 209.

425 [1951] 1 All ER 464 (DC).

(b) 'Abet'

Abetting is synonymous with encouraging another to commit a crime. It can take the form of words or conduct.[426] There must be encouragement in fact,[427] which usually requires communication between P and S that results in awareness on the part of P of S's acts of encouragement.[428] In other words, there must be some meeting of the minds of principal and accomplice. It is not necessary, though, that the encouragement be effective in the sense that it induces P to commit the crime; indeed, no (but for) causation is required between S's conduct and P's crime.[429] Thus, S's mere presence at the scene of a crime can be sufficient, provided this supplies an incentive for the principal to engage in his wrongdoing,[430] as is the case, for example, where S watches a prize fight: while P might not be aware of S's conduct, he would have little incentive to engage in fighting in the absence of an audience of which S is one member. As with aiding, the emphasis seems very much to be on the *potential* of S's acts to encourage P's wrongdoing.

(c) 'Counsel'

The term 'counselling' refers to acts of encouragement such as the giving of advice or the passing on of information to P.[431] To trigger criminal liability for S, P's subsequent act must be in accordance with, or within the scope of, S's encouragement,[432] but there does not need to be a causal connection (in the 'but for' sense).[433] This mode of conduct also covers cases where S incites or instigates P to commit the offence in the first place.[434]

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426 *Simester and Sullivan*, 210.
427 ibid 211, with reference to *Clarkson* [1971] 3 All ER 344 (Courts-Martial Appeal Court).
428 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.35; *Simester and Sullivan*, 211.
429 *Simester and Sullivan*, 212.
430 ibid 210.
431 Ashworth and Horder, 429.
432 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.41; *Simester and Sullivan*, 214, with reference to *Calhaem* [1985] QB 808 (CA).
433 *Simester and Sullivan*, 213.
434 Ashworth and Horder, 429.

(d) 'Procure'

To procure has been defined as 'bringing about'[435] or 'produ[cing] by endeavour.'[436] It requires P to '[set] out to see that it happens and [to take] the appropriate steps to produce that happening.'[437] P's committing the *actus reus* of the relevant crime must thus be a consequence of S's actions;[438] however, it does not need to be a sine qua non consequence, so that liability is not precluded if there were additional factors playing a role in P's decision to commit the relevant offence.[439] Neither is it a requirement that P be aware of S's involvement.[440] It would thus seem that, for conduct crimes, procurement fills the gap that would otherwise result from the unavailability of the doctrine of innocent agency.

2 The Accessory's Mens Rea: Two Dimensions of Fault

The *mens rea* of the accessory is notoriously difficult to ascertain. This much is clear: it concerns a 'two-dimensional fault',[441] in that the accessory's *mens rea* must relate both to his own conduct and the conduct and mental state of the principal offender.

(a) Mens Rea as to S's own conduct

To satisfy the first dimension of fault, S must act with *intention* (direct or oblique)[442] *to assist or encourage* P's crime (although, apart from cases of procurement,[443] he does not

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435 Glanville Williams, 'Complicity, Purpose and the Draft Code: Part 1' [1990] Crim LR 4, 6.

436 Ashworth and Horder, 430.

437 *AG's Reference (No 1 of 1975)* [1975] QB 773 (CA).

438 JC Smith, 'Aid, Abet, Counsel or Procure' in PR Glazebrook (ed), *Reshaping the Criminal Law, Essays in Honour of Glanville Williams* (Stevens 1978) 120, 134; *Simester and Sullivan*, 212.

439 *Simester and Sullivan*, 212-213. But see Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.42: '[t]he prosecution must prove that P would not have committed the offence but for [S's] conduct.'

440 *Simester and Sullivan*, 213.

441 Ashworth and Horder, 431; Graham Virgo, 'Making sense of accessorial liability' (2006) Archbold News, 6, 6; *Simester and Sullivan*, 218.

442 *Webster* [2006] 2 Cr App R 6 (CA); John C Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) LQR 453, 454; Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.44. But see *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112 (HL) according to which a doctor will not act with intent to aid and abet unlawful sexual intercourse when providing contraceptive advice and prescriptions to a girl aged under 16.

need to intend the ultimate crime).[444] He must also act with the belief that his conduct has the *capacity* to assist or encourage P in his commission of the principal offence.[445] Whether he additionally needs to believe that his conduct *will* in fact assist or encourage P in the commission of the principal offence, remains unclear.[446]

(b) Mens Rea as to P's wrongdoing

The second dimension of fault is hard to pin down because of the varying expressions with which the courts (and relevant academic commentary) have described the applicable standard.[447] The Law Commission identifies 'no less than four different tests, each of which require something less than a belief that P will commit the conduct element.'[448] It is possible that the variations reflect attempts to find a more suitable term than 'knowledge', which seems not entirely apt to cater for cases where S has to discern P's future conduct, such as where S is not helping P during the commission of his crime but has assisted in the run-up to this.[449] In a nutshell, the relevant case law and commentary would allow for a finding that S must intentionally assist or encourage P's actions in circumstances where he (actually) knows[450], or foresees,[451] or believes it 'likely',[452] or is aware of,[453] or is wilfully

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443 *Simester and Sullivan*, 219, with reference to *AG's Reference (No 1 of 1975)* [1975] QB 773 (CA) 779.

444 ibid 218-219.

445 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.46.

446 ibid; *Smith and Hogan*, 229.

447 Barry Mitchell, 'Participating in Homicide' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 7, 9.

448 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.65: '(1) belief that P might commit the conduct element; foresight of the risk of a strong possibility that P will commit it; contemplation of the risk of a real possibility that P will commit it; and foresight that it is likely that P will commit it.'

449 *Simester and Sullivan*, 228. The editors argue, however, that 'there is no legal difficulty here. A requirement of knowledge is (...) satisfied whenever S believes with no substantial doubt that the fact exists or, in the case of future facts, will exist.'

450 *Johnson v Youden* [1950] 1 KB 544 (DC) 546 (Lord Goddard CJ). See also *Churchill* [1967] 2 AC 224 (HL) 236-237; *Maxwell* [1978] 1 WLR 1350 (HL); *Martin* [2010] EWCA Crim 1450 [35].

451 *Rook* [1993] 2 All ER 955 (CA) 960; *Simester and Sullivan*, 225-226.

452 *Webster* [2006] 2 Cr App R 6 (CA); Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 1.8.

453 Law Commission, *Assisting and Encouraging Crime* (Law Com CP No 131, 1993) para 2.58.

blind[454] towards the 'essential matters which constitute the crime'[455]. While these formulae give rise to a number of uncertainties, it is suggested that the prevalent standard of *mens rea* now boils down to (some form of) subjective recklessness.[456] The Law Commission has handily summarised the relevant standard as 'knowledge or belief as to whether P will or might [commit the relevant offence].'[457]

(i) Foresight of P's conduct as (virtually) certain, probable or possible?

It is readily apparent that the different terms used to describe the way in which S's mind relates to P's crime make it impossible to determine with certainty whether S is in the end required to anticipate (or even intend) that P *will* commit one of a number of crimes contemplated by S (in the sense that the risk of one of them being committed is virtually certain to materialise),[458] or whether it suffices that S thinks this *probable* or even just *possible*. More recent cases seem to favour a middle ground: as such, the Court of Appeal has held in a number of cases that foresight of an offence as a 'strong possibility'[459] or 'as a real or serious[460] (or substantial)[461] risk' is sufficient for S to incur liability as an accessory.[462] While this has led commentators to conclude that 'foresight of the *probable existence* of the essential matters of P's crime' now satisfies the *mens rea* of secondary liability,[463] the 1993 Law Commission Consultation Paper on *Assisting and Encouraging Crime* suggests that the law might go even beyond this. This asserts that 'there is no case which rejects the *awareness of a mere possibility* of the commission of the principal

454 Ashworth and Horder, 432.
455 *Johnson v Youden* [1950] 1 KB 544 (DC) 546.
456 *Simester and Sullivan*, 226; Bob Sullivan, 'Acessories and Principals after *Gnango*' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 25, 39.
457 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.47.
458 Glanville Williams, 'Complicity, Purpose and the Draft Code: Part 2' [1990] Crim LR 98, 102-103; Dennis J Baker, *Criminal Law*, para 14-052 fn 121.
459 *Reardon* [1999] Crim LR 392 (CA).
460 *Rook* [1993] 2 All ER 955 (CA) 960.
461 *Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr App R 35 [71].
462 These terms are used interchangeably: *R (Equality and Human Rights Commission) v Prime Minister and others, Regina (Al Bazzouni) v Same* [2011] EWHC 2401 (Admin), [2012] 1 WLR 1389 (QB Admin).
463 *Simester and Sullivan*, 226.

offence as a ground of accessorial liability, and at least some authority that seems to support that analysis.'[464]

Some commentators have suggested that a recent Supreme Court decision goes further still:

> In (...) *Gnango*, the justices intimate that a finding of complicity based on assisting or encouraging can use an objectively calibrated 'foreseeability' as its *mens rea* standard. This goes beyond even the previously accepted *mens rea* for joint enterprise: the subjective measure of 'foresight (...) Following *Gnango*, the *mens rea* criteria for complicity have collapsed into a broad requirement that may amount to *foreseeability* of the offence that subsequently occurs.[465]

If this analysis is correct, then this makes for a problematic development. As *Simester and Sullivan* points out: in aiding and abetting,

> S's actions need not be in themselves wrongful. Lending someone a knife is unproblematic *until* we know what P's plans are. What makes S's actions the stuff of criminal law, in other words, is her *mens rea* with respect to P's conduct. In turn, that is why we should be wary of criminalising aiding and abetting with low levels of foresight. It reduces an ordinary citizen's freedom to do things that may happen to help others to commit crimes.[466]

In other words, if the threshold of liability is set at too low (ie undemanding) a level, there is a danger of casting the net of liability too wide.

As we will see below, the 'first area to establish a level of fault for accessories lower than knowledge or intention was in joint enterprise.'[467] If joint enterprise is (wrongly) understood as a free standing head of liability, this would have given rise to an unfortunate disjunction between the *mens rea* standard there and in 'ordinary' aiding and abetting under

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[464] Law Commission, *Assisting and Encouraging Crime* (Law Com CP No. 131, 1993) para 2.58. *Simester and Sullivan*, 226, acknowledges that 'it might even be the case that foresight of a mere possibility will suffice.' Likewise Rudi Fortson, 'Inchoate Liability and the Part 2 Offences under the Serious Crime Act 2007' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 173, 195.

[465] Ben Livings and Emma Smith, 'Locating Complicity: Choice, Character, Participation, Dangerousness and the Liberal Subjectivist' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 41, 54 (emphasis added).

[466] *Simester and Sullivan*, 248.

[467] Matthew Dyson, 'Might alone does not make right: justifying secondary liability' [2015] Crim LR 967, 968.

Johnson v Youden,[468] which explains why the *mens rea* standard in aiding and abetting was also lowered in sync with the *mens rea* required in joint enterprise. It is one of the main claims of this thesis that the core idea underlying this development is indeed correct, namely that joint enterprise, rather than being an independent head of liability, is best understood as a principle determining the scope of the principal offence which S is alleged to have aided and abetted. However, it will be argued in Chapter 8 that, in working out the appropriate *mens rea* standard to apply in accessorial liability (and co-perpetration), what should matter is not so much the degree of foresight but the *attitude* displayed by S towards P's crime.[469] As such, it will be suggested that it might be preferable to limit S's liability (both where S is alleged to have aided and abetted and where S is alleged to have participated as a co-perpetrator) to cases where S did not just foresee P's crime but, crucially, *endorsed* it (in the sense that he reconciled himself to its occurring). The idea of endorsement will be developed in more detail in Chapter 8. For now, we can conclude that the *mens rea* standard in aiding and abetting suffers from uncertainty, with recent case law, under the influence of a misunderstood joint enterprise principle, suggesting that the earlier requirement of knowledge of P's crime may have been watered down to one of foresight (or even forseeability) of P's crime as a possibility.[470] In contrast, it is one of the main claims of this thesis that what should be required in aiding and abetting is *intention* to assist or encourage the principal offender *endorsing* one or a number of crimes which S has identified in their essential outlines.

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468 [1950] 1 KB 544 (DC).

469 A similar point has been made by GR Sullivan, 'Intent, Purpose and Complicity' [1988] Crim LR 641, 641, albeit not specifically about joint enterprise liability: '[L]ocate the essence of complicity not in the conduct of A but in A's attitude to the conduct of P. A's conduct becomes essentially evidence of his attitude to P's conduct.'

470 Likewise Matthew Dyson, 'The future of joint-up thinking: living in a post-accessory liability world' (2015) J Crim L 181, 185.

(ii) What are the 'essential matters' of P's crime?

Further difficulty in assessing whether S acted with the *mens rea* of an accessory is caused by the fact that S need only have foreseen the 'essential matters' of P's crime. This begs the question what aspects of P's crime make up the 'essential matters'. It is, perhaps, easiest to approach this question first by looking at what S need not to have appreciated: according to *Johnson v Youden*[471] S 'need not actually know that an offence has been committed because (...) ignorance of the law is not a defence.' Furthermore, he neither needs to know all the details – such as the when and where – of the relevant crime;[472] nor does it suffice for him to have general knowledge that P plans something illegal.[473] The Law Commission suggests that 'the essential matters of an offence include all the external elements of the offence',[474] ie S must foresee the conduct element of P's crime, the circumstances in which the conduct takes place, the possibility of the prohibited consequence occurring (unless the crime is one of constructive liability)[475] and the fact that P acts with *mens rea*.[476] However, from cases such as *Bainbridge*[477] and *Maxwell*[478] where the 'essential matters' were in issue, we can further glean that S's foresight must only relate to the *type of offence* (ie its distinguishing features or essential elements)[479] committed by P. It is not clear how far this notion extends. Indeed, there is no clear test or guiding principle by which to determine whether crime X is of the same type as crime Y.[480] The editors of *Smith and Hogan* give the following example to highlight the uncertainties with the 'type of offence' criterion: 'Is

471 [1950] 1 KB 544 (DC) 546.

472 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.52; *Simester and Sullivan*, 229, with reference to *Bainbridge* [1960] 1 QB 129 (CA) and *Bullock* [1955] 1 All ER 15 (CA).

473 *Bainbridge* [1960] 1 QB 129 (CA); *Scott* (1979) 68 Cr App R 164 (CA); *Patel* [1970] Crim LR 274 (CA); *Simester and Sullivan*, 229.

474 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.49.

475 ibid paras 2.60, 2.62, with reference to *Neary* [2002] EWCA Crim 1736 and *Rahman* [2007] EWCA Crim 342.

476 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.49; *Smith and Hogan*, 231-232.

477 [1960] 1 QB 129 (CA).

478 [1978] 1 WLR 1350 (HL).

479 *Simester and Sullivan*, 229.

480 Law Commission, *Participating in Crime* (Law Com No 305, 2007) paras 1.16, 2.57.

robbery an offence of the same type as blackmail?'[481] If the focus is on both offences being crimes of dishonesty, then one might conclude that they are. However, if the emphasis is on the actual mode of committing those crimes – the forceful taking away of a thing versus 'persuading' someone to hand something over – the answer may well be different.

What is clear is that where S considered a range of (types of) offences as possible candidates for P's wrongdoing, the one actually committed must have been included in that contemplation before S can be held liable.[482] Moreover, where the crime committed by P is one which contains an element of constructive liability, so that no *mens rea* as to a certain consequence need to be proved against P, S, too, can be convicted without proof of *mens rea* in respect of that consequence.[483] Such consequences therefore do not form part of the 'essentials of [P's] crime'.[484]

D Joint Enterprise Liability

I Introduction

In addition to the modes of complicity discussed so far, there is what some commentators perceive of as a doctrinally distinct mode of participation giving rise to a separate head of (accessorial) liability:[485] the so-called doctrine of joint criminal enterprise. This doctrine applies in instances where P and S have some form of understanding that a crime should be committed (= a common plan or purpose to commit crime A), and P then *deliberately* departs from this plan or purpose, by committing a further, usually more serious, offence (= crime B). This scenario has to be distinguished from situations where P's execution of the purpose offence (crime A) goes awry *accidentally*, in that P, for example, by mistake,

481 *Smith and Hogan*, 235.
482 *Maxwell* [1978] 1 WLR 1350 (HL) 1151 (Lord Scarman); *Rahman* [2008] UKHL 45, [2009] 1 AC 129.
483 *Simester and Sullivan*, 230.
484 ibid 231.
485 Dennis J Baker, *Criminal Law*, paras 14-060-14-061.

commits the crime against another victim than P's and S's plan foresaw. Such accidental departures are outside the scope of the joint enterprise doctrine; they are dealt with via the doctrine of transferred malice,[486] meaning the accomplice remains liable.[487]

The doctrine of joint criminal enterprise applies to situations where P *deliberately* strays from the common plan or purpose that S anticipated P to adhere to. The doctrine of transferred malice is not applied in this context.[488] Before we look at joint enterprise in more detail, it is interesting to note that the modern case law on *deliberate* deviations does not seem to differentiate between situations where S got involved as an aider and abettor and those where P and S started out as co-perpetrators. Although the Law Commission notes (albeit in passing and without reference to any particular case) that there is a 'deliberate variation in performance rule' for ordinary cases of aiding and abetting with 'unclear scope',[489] these days deliberate variations tend to be discussed under the heading of 'joint criminal enterprise'. The Law Commission's observation (which the report, unfortunately, does not elaborate upon)[490] is significant, however, in that it shows that there is a need to devise rules which tell us whether S is still to be considered a participant in P's wrongdoing where P has deliberately departed from the anticipated crime, whether or not P's conduct has resulted in the commission of a further crime (crime B) or simply another crime (a different crime A). This might be seen to support the argument which I will develop in Chapter 7 that the doctrine of joint enterprise, rather than comprising a separate head of liability in its own right, is in effect an exculpatory 'excess' principle which seeks

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486 *Gnango* [2011] UKSC 59, [2012] 1 AC 827 (SC) [16]; Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 3.164; *Simester and Sullivan*, 232. For an overview of the divergent approaches taken in such a situation in the past, see David Lanham, 'Accomplices and Transferred Malice' (1980) 96 LQR 110, 117-119.

487 *Saunders and Archer* (1576) 2 Plowd 473; Graham Virgo, 'Making sense of accessorial liability' (2006) Archbold News 6, 8.

488 *Saunders and Archer* (1576) 2 Plowd. 473; David Lanham, 'Accomplices and Transferred Malice' (1980) 96 LQR 110, 112.

489 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.54.

490 However, Smith has suggested that while 'judicial opinion is scarce (…) the general consensus of institutional authorities suggests that a principal's deliberate substantial variation from the originally anticipated action will prevent accessorial liability', see KJM Smith, *Complicity*, 200.

to determine, in instances of ordinary aiding and abetting and those of co-perpetration alike, whether P's wrongdoing is still attributable to S or whether it ought to be regarded as a one-sided, independent criminal excess by P for which S is not to be held responsible. Thus, while the doctrine of joint enterprise is usually applied to situations where P has committed two crimes (crime A and crime B) with S arguing that he only signed up to crime A and should not be held responsible for P's commission of crime B, the law also needs to provide rules to determine whether S can be held responsible for P's deliberate commission of crime A where that crime A differs from what S expected P to do. As I will explain below,[491] the principle underlying the so-called doctrine of joint enterprise is able to deal with both instances in that it determines whether a crime committed by P is still attributable to S, irrespective of whether P and S started out as principal and aider and abettor or co-perpetrators. It might thus be regarded not as a separate head of liability, but as a set of rules which supplement the 'ordinary' rules of aiding and abetting as well as the law governing co-perpetration.

II The 'existing, acknowledged legal position'

In the following, I will first set out what might be called the 'existing, acknowledged legal position'[492] on joint criminal enterprise (as a doctrine of *inculpation*), before proceeding (in Chapter 7) to offer an alternative account of the doctrine (as a mechanism of *exculpation*). Providing an 'acknowledged' account of joint enterprise liability is complicated by two factors: first, the term is used in two related, yet separate contexts: while most cases on joint enterprise have arisen in the context of a crime (usually dubbed crime B) committed

491 At p 245 ff.

492 Peter Mirfield, 'Guilt by association: a reply to Professor Virgo' [2013] Crim LR 577, 583. But see the reply by Graham Virgo to Mirfield's comment who doubts that there is an acknowledged legal position, 'Guilt by association: a reply to Peter Mirfield' [2013] Crim LR 584.

incidentally or collaterally,[493] albeit deliberately, to another offence (referred to as 'crime A' or the 'purpose crime') which had been embarked upon *en groupe*,[494] the terminology of joint enterprise is also used where no crime but the purpose crime (crime A) has occurred to indicate that the crime in question was committed by a plurality of offenders.[495] Secondly, discussions of the law in this area are often influenced by the diverging views taken as to the doctrine's underlying rationale and its place within the law of complicity.

We will look at these issues in turn. The objective of the subsequent investigation is two-fold: first, it aims to outline the uncertainties and controversies surrounding the doctrine of joint enterprise, so as to demonstrate the need for reform; secondly, in order to understand the suggestions made further on in this thesis on how the law in this area might be developed, we will need to become familiar with both the judicial view of joint enterprise liability and the current state of the academic debate.

III No settled taxonomy

Attempts to classify 'joint enterprise' have resulted in different answers to the question of how many scenarios one can usefully distinguish. In retracing the various attempts at categorisation for the purpose of finding out whether there is a dominant view which we might use as our point of reference for the later discussion on how joint enterprise liability might be reformed, difficulties are caused by the fact that commentators make their categorisations on the basis of differing premises: some seem to understand 'joint enterprise' as a technical term (or term of art) reserved for a principle dealing with deliberate deviations from an agreement, common plan or shared purpose between two or

493 Simon Parsons, 'Joint Enterprise and Murder' (2012) 76 (6) J Crim L 463, 464; *Simester and Sullivan*, 233;

494 KJM Smith, *Complicity*, 209.

495 See Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 1.10; Matthew Dyson, 'The future of joint-up thinking: living in a post-accessory liability world' (2015) J Crim L 181, 186.

more individuals,[496] whilst others interpret the term (also) as a general label for crimes involving multiple participants.[497]

Judicial statements likewise have moved between these two positions: according to earlier pronouncements, such as Lord Lane CJ's assertion in *Hyde*,[498] there are 'two main types of joint enterprise cases'.[499] As the Privy Council explained in *Brown and Isaac v The State*:

> The simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so. If both participated in carrying out the plan, both are liable. It does not matter who actually inflicted the fatal injury. This might be called the paradigm case of joint enterprise liability.[500]

As we have seen, it is also the paradigm case of co-perpretation.[501]

This type of joint enterprise is to be contrasted with what Sir Robin Cooke in *Chan Wing-Siu* called the 'wider principle':[502]

> [A] secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. (...) [This wider principle] turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise.[503]

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496 Graham Virgo, 'The Doctrine of Joint Enterprise Liability' (2010) Archbold Review 6, 8: 'The Court of Appeal [in *Gnango* [2010] EWCA Crim 1691] should have acknowledged that "joint enterprise" *is a term of art with substantive consequences* and not simply a description of a factual scenario. That term should only be used to impose liability for crime B where there is a common purpose to commit crime A and where D2 foresaw that crime B might be committed' (emphasis added). But see now *Stringer* [2011] EWCA Crim 1396, [2012] QB 160 [57] (Toulson LJ): '[J]oint enterprise is not a legal term of art.'

497 See Rudi Fortson, 'Inchoate Liability and the Part 2 Offences under the Serious Crime Act 2007' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 173, 202: 'The expression [joint enterprise] is often used by practitioners to refer to any situation where two or more defendants are jointly charged.'

498 [1991] 1 QB 134 (CA).

499 ibid 138: 'The first is where the primary object of the participants is to do some kind of physical injury to the victim. The second is where the primary object is not to cause physical injury to any victim but, for example, to commit burglary. The victim is assaulted and killed as a (possibly unwelcome) incident of the burglary'.

500 [2003] UKPC 10 [8] (Lord Hoffmann).

501 At p 100 above.

502 *Chan Wing-Siu v The Queen* [1985] AC 168 (PC) 175.

503 ibid (Sir Robin Cooke).

The difference drawn here is between a situation where only one crime is committed, albeit by a plurality of offenders (= the 'paradigm' case), and a situation where a plurality of offenders have agreed to commit one crime (crime A), but one of them goes on to commit a further crime, crime B, which is then attributed to all those who foresaw the commission of this crime B as a possible incident to the commission of crime A (= the 'wider principle'). Lord Hoffmann memorably dubbed the former the 'plain vanilla' version of joint enterprise;[504] the latter is also known as 'parasitic accessory liability', a term attributed to JC Smith.[505]

The view that there are two types of joint criminal enterprise is shared by the Law Commission which writes that '[j]oint criminal ventures are cases where [S] and [P] either agree to commit an offence or share with each other an intention to commit an offence and the offence is subsequently committed',[506] later adding that 'there will be cases where, pursuant to the joint criminal venture, [P] commits an offence that [S] did not intend [P] […] to commit'.[507] These quotations reflect the above distinction between the 'paradigm case' of joint enterprise and the 'wider principle'.

More recent decisions by the Court of Appeal have, however, concluded that it is useful to distinguish *three* types of joint enterprise.[508] On such a view, the 'paradigm' category is sub-divided into instances where P and S are co-perpetrators on the one side, and perpetrator and accessory on the other. As Hughes LJ explained in *A and others*,[509] the label of 'joint enterprise' may be used by the courts 'in at least three related but not identical situations':

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504 *Brown and Isaac v The State* [2003] UKPC 10 [13] (Lord Hoffmann). See also *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [9] (Lord Bingham).

505 John C Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR 453.

506 Law Commission, *Participating in Crime* (Law Com No 305, 2007) paras 1.10, 1.21.

507 ibid para 1.11.

508 *A and others* [2010] EWCA Crim 1622, [2011] QB 841 [9]; *Gnango* [2010] EWCA Crim 1691 [59].

509 *A and others* [2010] EWCA Crim 1622, [2011] QB 841 [9].

> (i) Where two or more people join in committing a single crime, in circumstances where *they are, in effect, all joint principals*, as for example when three robbers together confront the security men making a cash delivery.
>
> (ii) Where *D2 aids and abets D1 to commit a single crime*, as for example where D2 provides D1 with a weapon so that D1 can use it in a robbery, or drives D1 to near to the place where the robbery is to be done, and/or waits around the corner as a getaway man to enable D1 to escape afterwards.
>
> (iii) Where D1 and D2 participate together in one crime (crime A) and in the course of it D1 commits a second crime (crime B) which D2 had foreseen he might commit.[510]

All the above classification attempts have in common that they use the joint enterprise 'label' whenever we are faced with a criminal wrongdoing involving more than one individual. As such, they can be contrasted with another school of thought which maintains that joint enterprise assumes a distinctive role only in incidental crime scenarios, ie cases which involve the commission of *two* offences: an offence (A) that is jointly undertaken by S and P, and a further offence (B) then committed by P alone.[511] On such a view, there is but *one* (meaningful) category of joint criminal enterprise.

This thesis will examine these controversies in detail in Chapter 7. For now, it is important to note that whilst there is currently no settled taxonomy of joint enterprise, the different views taken in this regard are, however, all agreed that the 'wider principle' cases merit application of joint enterprise principles. For this reason, it seems pertinent to restrict our discussion in the following to this particular case category. Indeed, this is the category of joint enterprise that has most troubled the courts and which has been the subject of two

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[510] ibid, emphasis added.

[511] *Stewart and Schofield* [1995] 1 Cr App R 441 (CA) 447 (Hobhouse LJ); *Credit Lyonnais* v *ECGD* [1998] 1 Lloyd's Rep 19; Hobhouse J, 'Agency and the Criminal Law' in Francis Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* 39 (LLP, 2000) 46; Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 855; Graham Virgo, 'The Doctrine of Joint Enterprise Liability' (2010) Archbold Review 6, 8; *Simester and Sullivan*, 233 fn 205; Ashworth and Horder, 437. See also House of Commons Justice Committee, *Joint Enterprise: follow-up, Fourth Report of Session 2014-15* (HC 310, 2014) para 15.

inquiries by the House of Commons Justice Committee.[512] It is also in this context that the elements of joint enterprise liability, to which we will now turn, have been developed.

IV The Elements of Joint Enterprise Liability

In a nutshell, according to the 'wider principle' of joint criminal enterprise, if P and S agree[513] or share with each other an intention to commit crime A,[514] and in the course of their joint commission of crime A, P commits a further offence, crime B, S is also liable as an accessory for crime B (which he did neither intend nor directly[515] assist and encourage), provided (a) S *intentionally* encouraged or assisted the commission of crime A; (b) S *foresaw* that in the course of committing crime A,[516] P *might* perform crime B, crucially, with the requisite *mens rea*,[517] and (c) the manner of P committing crime B was *not fundamentally different* from what S foresaw might occur.[518] If S fulfils these requirements, he will be liable for crime A as well as for P's crime B, even though he did not directly assist or encourage crime B.[519] We will now look at the individual requirements in more detail.

1 Participation in crime A on the Basis of a Common Plan or Purpose

First of all, S needs to have participated with P in a joint criminal enterprise to commit crime A. This is often described as the *actus reus* element of joint enterprise liability. It

512 See House of Commons Justice Committee, Joint Enterprise – Eleventh Report of Session 2010-12, vol I (HC 1597, 2012); House of Commons Justice Committee, *Joint Enterprise: follow-up, Fourth Report of Session 2014-15* (HC 310, 2014).

513 Agreement is to be construed broadly – the principles of joint enterprise are not restricted to pre-planned wrongdoing, but apply also to spontaneous enterprises, see *Smith and Hogan*, 253.

514 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 1.10.

515 It is sometimes suggested that S's participation in crime A provides assistance or encouragement for P's commission of crime B, but this can be criticised as a fiction as concerns assisting and 'stretching the concept of encouragement beyond its limits', a point noted by Baker, *Criminal Law*, para 14-061 fn 149. Likewise Paul S Davies, *Accessory Liability* (Hart 2015) 67; *Simester and Sullivan*, 246.

516 *Hui Chi-ming* [1992] 1 AC 34 (PC).

517 *Powell* [1999] 1 AC 1 (HL) 13-14.

518 *Smith and Hogan*, 238, 247-252.

519 Dennis J Baker, *Criminal Law*, para 14-049.

requires some agreement or understanding[520] between P and S or a common plan or purpose[521] as well as concerted action.

While there is no case directly in point to confirm whether crime A needs to have been (fully) committed before liability for crime B is triggered, it is probably sufficient that crime A was embarked upon (ie attempted).[522] However, whether any earlier stage (ie planning or preparation) suffices remains untested.

The underlying agreement, plan or purpose need not be explicit or formal; neither does it need to have been pre-arranged.[523] A spur-of-the-moment enterprise is all it takes to make S complicit in a crime otherwise undertaken by P alone.[524]

Simester and Sullivan suggests a possible qualification to this requirement, in the form of a *seriousness* threshold, applicable

> where crime A, to which the common purpose relates, is an entirely different and much less serious offence than the crime (B) committed by P. So if, say, S and P are boys under 18 who agree to go to a public house to drink alcohol, arguably S should not be implicated in any offence of violence on the part of P even if S was aware of P's tendency to violence consequent on drinking alcohol.[525]

Mirfield has also discussed the seriousness issue. He gives the example of a P and S who agree to travel at excessive speed (a regulatory offence) with S foreseeing that P might kill any police officer who attempts to stop them. When P indeed kills an intervening officer, because P and S had an illegal agreement to speed (crime A), Mirfield suggests that [S]

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520 The term 'agreement' is not to be taken too literally, as Virgo points out in 'Making sense of accessorial liability' (2006) Archbold News, 6, 8: the 'agreement can be express, implied or tacit (...) [it] can be rationalised as a *presumed encouragement* to the commission of the substantive offence' (emphasis added).

521 *Gnango* [2011] UKSC 59, [2012] 1 AC 827 [25]; *Rajakumar* [2013] EWCA Crim 1512, [2014] 1 Cr App R 12 [48]. But see the criticism in *Smith and Hogan*, 242.

522 William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 5.

523 *Simester and Sullivan*, 203, 234.

524 *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876 [20]; *Mitchell* [2008] EWCA Crim 2552, [2009] 1 Cr App R 31; *Greatrex* [1999] 1 Cr App R 126, 138.

525 *Simester and Sullivan*, 234 fn 208.

'*would be* guilty of murder, unless there is some as yet unannounced notion that the joint enterprise must meet some criterion of seriousness of criminality.'[526]

Such a threshold, however, is firmly rejected by Virgo who has referred to Mirfield's example as a 'straightforward' case of joint enterprise liability: 'There is a common purpose to commit a crime, speeding, and if D2 foresees the possibility of D1 killing whilst speeding, then D2 should be convicted of manslaughter as an accessory; he is associated with that offence.'[527]

The issue is as yet without a (judicial) solution: as the editors of *Simester and Sullivan* concede, 'there is no direct authority on this point'.[528] Neither does there appear to be consensus amongst academic commentators in how to resolve such situations.

One way of dealing with it might be to draw the line between crimes proper and regulatory offences, in analogy to unlawful dangerous act manslaughter (which requires the unlawful act to be criminal rather than just tortious). If the law approached the problem in this way, Mirfield's speeding example would not without more trigger joint enterprise liability; S would only be guilty, on the 'ordinary' principles of aiding and abetting, if he had encouraged or assisted P with killing the interfering police officer. However, a better solution still would be to require evidence that S has not just foreseen but *endorsed* P's killing of the officer. It is suggested that merely agreeing to break the speed limit would not, without more, furnish such evidence.

2 Foresight of crime B as a Possibility

S must have participated in crime A both with the requisite mental state for crime A *and* foresight of the possibility that P might commit crime B.[529] In analogy to the rules of

526 Peter Mirfield, 'Guilt by association: a reply to Professor Virgo' [2013] Crim LR 577, 582.
527 Graham Virgo, 'Guilt by association: a reply to Peter Mirfield' [2013] Crim LR 584, 586.
528 *Simester and Sullivan*, 234 fn 208.

'ordinary' aiding and abetting, it suffices that S foresaw the essential matters of crime B.[530] While it is sometimes suggested that this amounts to a lower *mens rea* standard than applies in instances of 'ordinary' aiding and abetting,[531] this is now debatable in the light of the aforementioned Court of Appeal decisions which no longer seem to insist on a standard of 'knowledge' vis-à-vis the commission of P's crime (ie S has no serious doubt that P will commit the crime,[532] a standard bordering on intention),[533] letting instead (some form of)[534] subjective recklessness (ie foresight in the degree of a probability or possibility) suffice for 'ordinary' aiding and abetting.[535]

It is important to stress that – under the law of joint enterprise as it stands – foresight of crime B as a possibility is the touchstone of liability.[536] As Lord Hutton put it in *English*:[537]

> As a matter of strict analysis there is (...) a distinction between a party to a common enterprise contemplating that in the course of the enterprise another party may use a gun or knife and a party tacitly agreeing that in the course of the enterprise another party may use such a weapon. In many cases the distinction will in practice be of little importance because as Lord Lane C.J. observed in *Reg. v. Wakely*, at p. 120, with reference to the use of a pickaxe handle in a burglary, 'foreseeability that the pickaxe handle might be used as a weapon of violence was practically indistinguishable from tacit agreement that the weapon should be used for that purpose.' Nevertheless it is possible

529 *Powell and English* [1999] 1 AC 1 (HL) 12 (Lord Steyn), 18 (Lord Hutton); *Smith (Wesley)* [1963] 3 All ER 597 (CA); *Anderson and Morris* [1966] 2 QB 110 (CA); *Chan Wing-Siu* [1985] AC 168 (PC); *Hui Chi-ming* [1992] 1 AC 34 (PC).

530 *Simester and Sullivan*, 203, 236. It has been questioned whether in the context of murder S's foresight must relate to death or just to acts which are carried out with the intention of killing or causing GBH (see William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 5-6).

531 AP Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 593: 'For S to be a party to crime B under standard complicity rules, he would have (i) actually to aid or abet crime *B* directly (*not* crime A); and (ii) to *know,* rather than suspect, that crime B is to be committed.'

532 *Simester and Sullivan*, 149, 225.

533 See Matthew Dyson, 'The future of joint-up thinking: living in a post-accessory liability world' (2015) J Crim L 181, 185.

534 See Rudi Fortson, 'Inchoate Liability and the Part 2 Offences under the Serious Crime Act 2007' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 173, 195: '[I]t must always be remembered that "subjective recklessness" and "foresight" are different concepts.'

535 Dennis J Baker, *Criminal Law*, para 14-060. However, in that 'ordinary' aiding and abetting requires S to have rendered assistance or encouragement directly and intentionally, there remains a difference, as noted by Kirby J in the Australian High Court case of *Clayton* [2006] HCA 58, 63.

536 *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [11] (Lord Bingham), [103] (Lord Brown).

537 *English* [1999] 1 AC 1 (HL) 20 (Lord Hutton, emphasis added).

> that a case might arise where a party knows that another party to the common enterprise is carrying a deadly weapon and contemplates that he may use it in the course of the enterprise, but, whilst making it clear to the other party that he is opposed to the weapon being used, nevertheless continues with the plan. In such a case it would be unrealistic to say that, if used, the weapon would be used with his tacit agreement. However it is clear from a number of decisions, in addition to the judgment of the Court of Criminal Appeal in *Reg. v. Smith (Wesley)* [1963] 1 W.L.R. 1200, that as stated by the High Court of Australia in *McAuliffe v. The Queen*, 69 A.L.J.R. 621, 624 (…) 'the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose.' *Therefore when two parties embark on a joint criminal enterprise one party will be liable for an act which he contemplates may be carried out by the other party in the course of the enterprise even if he has not tacitly agreed to that act*.

This passage clearly suggests that it is not necessary that S has in any way acquiesced to P's commission of crime B. All that is required on his part is *foresight (or contemplation) of crime B as a possibility*.

We will consider the appropriateness of the mental element in joint enterprise cases in Chapter 8 where it will be argued that the current standard poses too low a threshold for implicating S in P's crime B. It will be suggested that it would be preferable to link S's liability not solely to his (level of) foresight, but to the *attitude* which he takes vis-à-vis P's potential commission of crime B. It will further be suggested that, despite the above dicta in *English*, the case law has not always been unequivocal that all that is required to satisfy S's mental element is mere foresight, and that on the basis of pre-*Powell* case law, a case can be made for a more demanding *mens rea* element built upon the idea of S's *endorsement* of P's crime B.

3 Crime B as an 'incidental' or 'collateral offence' to crime A

In *Hui Chi-ming*, the Privy Council said that 'the accessory, in order to be guilty, must have foreseen the relevant offence which the principal may commit *as a possible incident of the common unlawful enterprise*.'[538] Likewise in *English*, Lord Hutton explained that

538 [1992] 1 AC 34 (PC) 53 (emphasis added).

> where two parties embark on a joint enterprise to commit a crime, and one party foresees that in the course of the enterprise the other party may carry out, with the requisite *mens rea*, an act constituting another crime, the former is liable for that crime if committed by the latter *in the course of the enterprise*.[539]

The italicised formulae are long-established, but there is surprisingly little discussion of what they actually mean. The case law tends to focus on whether or not S had foresight of P's crime or whether or not P's conduct was fundamentally different to what S foresaw. It thus remains unclear how serious a hurdle for conviction the requirement that crime B must have occurred as an 'incident' to the joint enterprise or 'in the course of the enterprise' is. Does 'incident' or 'collateral offence' merely mean 'on the occasion of' or does is presage a rather closer connection between crime A and crime B, in the sense that crime B must be intrinsically linked to the commission of crime A or at least be a likely consequence of the latter's commission? *Simester and Sullivan* tends towards the latter interpretation of the law when it comments that 'the requirement that P's further crime must be an "incident of the common unlawful enterprise" does introduce *one additional constraint*, or at least a refinement of the requirement for foresight by S.'[540] By contrast, the House of Commons Justice Committee heard evidence from criminal law practitioners that the prosecution's case of foresight is frequently made on rather tenuous links such as signs of association and gang membership coupled with presence at the scene.[541] This seems to support an 'on the occasion of crime A' understanding of the requirement. Such a view finds further support in the Law Commission's report on *Participating in Crime*. Here, the Commission notes that it does

> not accept that the only collateral offences for which D may be made liable are those "perpetrated in realising" or that "grow out of" the agreed offence.

539 *English* [1999] 1 AC 1 (HL) 18 (Lord Hutton, emphasis added).

540 *Simester and Sullivan*, 203, 237 (emphasis added).

541 See the evidence given by Tim Moloney QC and Simon Natas, cited in House of Commons Justice Committee, Joint Enterprise – Eleventh Report of Session 2010-12, vol I (HC 1597, 2012) 8. See also Andrew Green and Claire McGourlay, 'The wolf packs in our midst and other products of criminal joint enterprise prosecutions' (2015) 79(4) Journal of Criminal Law 280, esp 282-287.

> In our view, it ought to be possible to hold D liable for a collateral offence committed by P, even when the offence did nothing to further the joint criminal venture, if D was aware that *the commission of that offence was just the sort of thing that P might do*.[542]

This position goes so far as almost doing away with any connection between crime A and crime B, a point also noted in the *Written evidence from the Committee on the Reform of Joint Enterprise (CRJE)* as cited by the first House of Commons Justice Committee report on joint enterprise. [543] We may therefore conclude that this element of the joint enterprise doctrine is far from certain.

4 The 'Fundamental Difference Rule'

Closely related are the scope and function of the so-called 'fundamental difference' rule.[544] It may be recalled that under the doctrine of joint enterprise S will be liable for any crime B committed by P unless 'crime B was performed by P *in a fundamentally different manner or was of a fundamentally different kind* (crime C) from any act that [S] foresaw or contemplated that P might commit.'[545] The Law Commission summarises S's position as follows:

> if the act of P that caused V's death was not foreseen by [S], [S] is not criminally responsible for V's death provided that the lethal act was 'fundamentally different' from that foreseen by [S]. If the lethal act was not 'fundamentally different', the mere fact that it was not foreseen by [S] will be of no avail.[546]

There is one important limitation on the availability of the rule: it will not assist S if he and P acted with a shared *intention to kill* the victim.[547] For example, if they had planned that V should be killed in a particular way, eg by being beaten to death with a wooden stake, and

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542 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 3.53 (emphasis added).

543 See House of Commons Justice Committee, *Joint Enterprise – Eleventh Report of Session 2010-12*, Vol II (HC 1597, 2012), Additional written evidence, Ev w20 para 8.

544 See *Simester and Sullivan*, 241-242; William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 6, 14-18.

545 *Smith and Hogan*, 247.

546 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.84.

547 *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [68]; *Yemoh* [2009] EWCA Crim 930 [134-36]; *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876 [44].

in effect P stabs V to death with a knife, S will still be guilty of murder on the basis of joint enterprise.[548] In essence, the proviso will be available to him only in the following circumstances:[549]

(1) if S foresaw that P might kill with intent to kill or cause gbh; or

(2) if S intended that gbh should be caused; or

(3) S foresaw that P might cause gbh with intent.

Whether an act is 'fundamentally different' is a matter of fact and as such for the jury to decide.[550] The courts have stressed that the term is 'not a term of art' and that the words are to be given their 'plain meaning'.[551] This is not an easy task, however: despite a number of appellate decisions dealing with the issue of whether P's actions were fundamentally different to what S foresaw, there is little (principled) guidance in the case law as to the meaning, scope and function of the 'fundamentally different' rule.[552] The decisions to date have turned on questions of fact rather than principle.

(a) Scope of Application: use of a 'different' and 'more lethal' weapon versus 'altogether more life-threatening' conduct?

The House of Lords considered the 'fundamental difference' proviso most prominently in the case of *English.*[553] P and S jointly attacked a police officer, V, with wooden posts. S contemplated that P might intentionally cause gbh to V with his wooden post. In the event, however, P killed V with a knife. At trial, S alleged that he did not know that P was

548 *Yemoh* [2009] EWCA Crim 930; *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876.
549 *Smith and Hogan*, 248.
550 *O'Flaherty* [2004] EWCA Crim 526, [2004] 2 Cr App R 20 [56]; Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.84; *Simester and Sullivan*, 238. Barry Mitchell, 'Participating in Homicide' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 7, 11.
551 *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [26] (Lord Bingham).
552 *Simester and Sullivan*, 242: '[A] survey of the cases offers some limited guidance concerning when conduct is fundamentally different… Beyond that there is only uncertainty'.
553 [1999] 1 AC 1 (HL).

carrying the knife. Nonetheless S was convicted of V's murder. The jury had been instructed along the lines of the joint enterprise principle as set out in *Hyde*:[554]

> If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture.

The problem that this jury direction caused on the facts of *English* was summarised as follows by Lord Hutton:

> if a jury is directed in the terms stated in *Hyde*, without any qualification (as was the jury in *English*), there will be liability for murder on the part of the secondary party if he foresees the possibility that the other party in the criminal venture will cause really serious harm by kicking or striking a blow with a wooden post, but the other party suddenly produces a knife or a gun, which the secondary party did not know he was carrying, and kills the victim with it.[555]

Relying on earlier judicial pronouncements to the effect that 'to say that adventurers are guilty of manslaughter when one of them *has departed completely from the concerted action of the common design* and has suddenly formed an intent to kill *and has used a weapon and acted in a way which no party to that common design could suspect* is something which would revolt the conscience of people today',[556] Lord Hutton concluded that in *English* 'the unforeseen use of the knife would take the killing outside the scope of the joint venture'.[557]

The qualification to the joint enterprise principle introduced by the 'fundamentally different' proviso is itself subject to a qualification, however. As Lord Hutton observes further on in his judgment: 'if the weapon used by the primary party *is different to, but as dangerous as, the weapon which the secondary party contemplated* he might use, the secondary party should not escape liability for murder because of the difference in the

554 [1991] 1 QB 134 (CA) 139 (Lord Lane CJ).
555 [1999] 1 AC 1 (HL) 28 (Lord Hutton).
556 *Anderson and Morris* [1966] 1 QB 110 (CA)120 (Lord Parker CJ). Emphasis added.
557 [1999] 1 AC 1 (HL) 30 (Lord Hutton).

weapon.'[558] Since on the evidence presented in *English*, the jury could have found that S did not know that P had a knife, and the knife attack was seen as being more dangerous than the anticipated attack with the wooden posts, the unqualified jury direction made S's conviction unsafe, and it was quashed.

The 'fundamental difference rule' was subsequently revisited in *Rahman*. On this occasion, the focus was on the significance of P's *mens rea* in deciding whether P's acts were fundamentally different. The victim had been fatally stabbed in an attack where most of the participants carried blunt instruments and weapons. Their Lordships found that if P killed with intent to kill and S foresaw that P might at the most intentionally cause really serious injury, P's greater *mens rea* did not make his act fundamentally different so as to absolve D of liability: whether S contemplated that P's *mens rea* would be of an intent to kill or an intent to cause serious injury was legally irrelevant as both mental states were sufficient to support a murder conviction.

Lord Brown (with agreement from Lords Neuberger[559] and Scott[560]) went on to restate the 'fundamental difference' rule as expressed in *English* in a way that might be seen to have restricted its scope of application.[561] He said:

> If [S] realises (without agreeing to such conduct being used) that P may kill or intentionally inflict serious injury, but nevertheless continues to participate with P in the venture, that will amount to a sufficient mental element for D to be guilty of murder if P, with the requisite intent, kills in the course of the venture *unless (i) P suddenly produces and uses a weapon of which [S] knows nothing and which is more lethal than any weapon which [S] contemplates that P or any other participant may be carrying and (ii) for that reason P's act is to be regarded as fundamentally different from anything foreseen by [S]*.[562]

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558 ibid.
559 *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [72].
560 ibid [31].
561 David Ormerod, 'Joint Enterprise' [2008] Crim LR 979, 982.
562 [2008] UKHL 45, [2009] 1 AC 129 [68].

In other words, even if S realised that P might kill or inflict gbh with intention, the use of a different[563] weapon can exonerate S as long as S (1) *did not know* about the weapon, (2) the weapon is *more lethal* than any weapon S had contemplated, and (3) '*for that reason'* P's act is to be regarded as fundamentally different. This way of putting it, however, seemingly limits the proviso's application to instances of 'different' and 'more lethal' weapons, in circumstances where S was *unaware* of the weapon which P uses to kill.[564] As Ormerod has pointed out, as a matter of legal principle, it is not readily apparent 'why (...) [S] who is aware that P has a weapon but does not foresee the possibility that P might use it [should] be in a worse position than [S] who is unaware of the weapon?'[565]

It is, perhaps, for this reason that more recent Court of Appeal decisions have returned to a broader view of what is 'fundamentally different'. Thus, in *Mendez and Thompson*, the Court of Appeal restated the 'fundamental difference' rule in the following way:

> In cases where the common purpose is not to kill but to cause serious harm, [S] is not liable for the murder of V if the direct cause of V's death was a deliberate act by P which was of a kind (a) unforeseen by [S] and (b) likely to be altogether more life-threatening than acts of the kind intended or foreseen by [S].[566]

Toulson LJ emphasised that '[w]hat matters is not simply the difference in weapon but the way in which it is likely to be used and the degree of injury which it is likely to cause.'[567]

The resulting conflicting lines of authority give rise to the following problem: while the prosecution may want to rely on *Rahman*, insisting that a different and more lethal

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563 This requirement is difficult to reconcile with *AG's Reference (No 3 of 2004)* [2005] EWCA Crim 1882 where it was accepted that P's actions were fundamentally different to what S had foreseen when P fired a gun *at* V instead of *near* him.

564 David Ormerod, 'Joint enterprise: murder – directions to jury as to liability of secondary parties' [2010] Crim LR 874, 877-878. This requirement seems to go against previous authority where S was not precluded from relying on the 'fundamental difference' proviso if he was aware that P carried the weapon, see *Smith and Hogan*, 250.

565 David Ormerod, 'Joint Enterprise' [2008] Crim LR 979, 982.

566 [2010] EWCA Crim 516, [2011] QB 876 [44] – [47].

567 ibid [42].

weapon is necessary for the 'fundamental difference' rule to be triggered,[568] the defence will want to refer the court to the more defendant-friendly formula used in *Mendez and Thompson* according to which fundamental difference can be shown whenever P's acts are 'more life-threatening'.

Despite the differences in the rule's scope of application thus identified, it may yet be possible to detect a common underlying theme. The editors of *Simester and Sullivan* have attempted to devise a taxonomy of situations where P's actions will be regarded as a fundamental departure from the joint enterprise. They identify three scenarios: (1) 'Entirely different type of act';[569] (2) 'A frolic of P's own: stepping outside the shared purpose';[570] and (3) 'Different order of dangerousness'.[571] It is category (3) that is of interest to the foregoing discussion, and Mitchell has recently drawn attention to its unifying merits. In his words,

> in homicide cases at least, the key criterion seems to be the degree of *dangerousness* that D envisaged and that was inherent in P's acts. This sits comfortably with the Court of Appeal's comment in *Mendez and Thompson* about the importance of the way in which a weapon is likely to be used rather than the weapon itself. In *English*, Lord Hutton explained that if the weapon used by P 'is different to, but as *dangerous* as' that which [S] contemplated P might use, then [S] should not escape liability (emphasis added)'.[572]

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568 David Ormerod, 'Joint enterprise: murder – directions to jury as to liability of secondary parties' [2010] Crim LR 874, 878: 'Prosecution advocates may well seek to argue that Lord Brown's statement at [68] of *Rahman* is what binds trial judges.'

569 *Simester and Sullivan*, 238, gives the example of P 'unexpectedly' committing rape during an agreed robbery. However, if the rape occurred 'unexpectedly', it will already fall foul of the foresight criterion.

570 *Simester and Sullivan* here envisages cases where, because P had 'departed entirely' from the original enterprise, S will not be responsible for any crime B committed in the course of the fundamentally changed crime A, see *Simester and Sullivan*, 239. It seems unnecessary, however, to have resort to the 'fundamental difference' rule in such a case: since P has not done what was agreed to be crime A, he is not acting in pursuance of P and S's joint enterprise at all, and if S is therefore not liable for crime A, no question of any liability for crime B arises.

571 ibid, 203, 238-242. Category (3) seems to cover the cases discussed above.

572 Barry Mitchell, 'Participating in Homicide' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 7, 12.

On such a reading of the case law, the fundamental difference rule will absolve S from liability whenever P's conduct departs from what S contemplated in such a way as to be much more dangerous.[573]

Which interpretation of the case law is to be preferred depends on the function of the 'fundamental difference' rule. Unfortunately, as we will now see, this remains somewhat unclear.

(b) Function

There is little doubt that the fundamental difference rule 'effectively acts as a potential defence (or limitation to [S]'s liability).'[574] But why? The case law does not provide a direct answer to this question, while academic opinion is divided.

Ashworth and Horder have suggested that

> [t]he logic of [the qualification in *English*] is that, if P has so far departed from the agreed course of criminal conduct that he should really be described as acting alone in causing V's death, then the crime committed by P that caused V's death – whether it be murder or manslaughter – is not attributable to D as an accessory.[575]

On this view, the fundamental difference principle serves to 'address the problem of the "moral remoteness" of the murder by P from what [S] anticipated.'[576]

In similar vein, Baker has described the rule as a mechanism by which the law determines whether S 'choose[s] to risk'[577] the act by which P brings about crime B. If he cannot be said to have chosen the relevant risk, it may not be attributed to him. He writes:

> [i]t may be suggested, then, that the rule is that the encourager or assister is liable if (1) the crime committed was within his contemplation (putting aside

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573 *Simester and Sullivan*, 240.

574 Barry Mitchell, 'Participating in Homicide' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 7, 11. See also House of Commons Justice Committee, *Joint Enterprise: follow-up, Fourth Report of Session 2014-15* (HC 310, 2014) para 10; Matthew Dyson, 'The future of joint-up thinking: living in a post-accessory liability world' (2015) J Crim L 181, 192.

575 Ashworth and Horder, 440.

576 Jeremy Horder, *Homicide and the Politics of Law Reform* (OUP 2012) 159.

577 Dennis J Baker, *Criminal Law*, para 14-070.

> the merely tactical details, as already noticed), or (2) the crime committed was of the same abstract kind as the one contemplated, and the perpetrator tried to carry out *what he understood to be the alleged accessory's intention*.[578]

In the latter case (ie the perpetrator does not realise that the accessory wants the killing to occur by a particular method), the instigator would remain a party to eg a murder committed by some other method, even though he wanted the killing to happen in a particular way.[579] Baker thus argues that the crucial distinction is between an understanding (between P and S) which limits the purpose and one which does not. On his view, any communication about the method by which the purpose is to be achieved is 'merely a matter of tactics which [does] not delimit the purpose.'[580]

Virgo, by contrast, doubts that the rule has any crucial function at all. As such, he has recently argued that

> the concerns which appear to underpin that test, namely that [S] should not be convicted of acts which are very different to those contemplated, can be accommodated within the existing principles relating to causation, connection or association and foresight of the substantive offence, as they already apply to general accessorial liability.[581]

The editors of *Simester and Sullivan* have also suggested that the fundamental difference rule is neither necessary nor appropriate, at least in relation to 'substantially more dangerous methodology'.[582] They write:

> Arguably, if S recognises there is a risk that P will commit the relevant crime, it should not matter that the actual level of risk was greater than was recognised. If that is right, then it should not matter for joint enterprise liability what specific weapons S thought that P was carrying. All that is necessary is that the level of appreciated risk meets the law's requirements.[583]

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578 ibid 14-078.
579 ibid.
580 ibid, with reference to *Calhaem* [1985] QB 808 (CA) 813.
581 Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 864.
582 *Simester and Sullivan*, 242.
583 ibid 243.

However, a strict application of this view would often have rather severe consequences for S: although the joint enterprise principle applies across the board of criminal offences, most cases involve murder. In this context, the doctrine arrives at rather harsh results as a consequence of a combination of the joint enterprise principle with the 'gbh rule'. The following example illustrates this point: P and S agree to burgle V's house. S knows that P is of a violent disposition. Although they have not agreed to commit acts of violence should they encounter resistance – indeed, S is opposed to any use of force, as P knows – S thinks it possible that P might nonetheless attack with intent to cause gbh, should they come upon the householder, V. In the event, P kills V with intent to cause him gbh. Since intent to cause gbh is sufficient *mens rea* for murder, P has murdered V. What is more, since S contemplated P's actions as a possible incident to their joint burglary, he, too, can be convicted of V's murder under joint enterprise principles.

By restricting the joint enterprise principle in this (and like) case(s) to instances where P's commission in essence followed the method foreseen by S, or in any event does not surpass the degree of dangerousness anticipated, the law keeps the 'gbh rule' within some bounds. Such an interpretation of the law would fit in with the one limitation on the operation of the 'fundamental difference rule', ie that it will not avail S if he and P acted with a *shared purpose to kill* the victim. For example, if they had planned that V should be killed in one particular way, eg by being beaten to death with a wooden pole, and in effect P stabs V to death with a knife, S will still be guilty of murder. In such instances, it could be argued, the 'gbh rule' is not in play and no further restriction is necessary to protect S from too harsh an outcome as a result of combining the 'gbh rule' with joint enterprise liability. On such an understanding of the fundamental difference rule, it operates to restrict the 'gbh rule'.

(c) Conclusion

We may conclude our discussion of the 'fundamental difference' element with the following observations: while its function remains in doubt, it is clear that only *a radical departure* from what S anticipated P might do will absolve the former of joint enterprise liability: the case law refers to a use of weapon or course of conduct which is 'altogether' or 'much' more dangerous.[584] Furthermore, this radical departure must have resulted in greater peril for the victim: the proviso does not apply where P and S, from the outset, shared a purpose to kill V; neither does it apply when a less dangerous weapon or method to commit crime B than S expected is used by P.[585]

V What is the Underlying Basis of Joint Enterprise Liability?

There are competing views as to the doctrinal basis of the joint enterprise principle. Most commentators broadly subscribe to either of two schools of thought, each of which finds some support in the case law.

1 Joint Enterprise as an Independent Head of Secondary Liability

According to one school of thought, joint enterprise liability is a 'special case of secondary participation and not merely a sub-species of assistance and encouragement'.[586] The Privy Council endorsed this view in *Chan Wing-Siu*.[587] It also found favour – at least at one stage

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584 *Simester and Sullivan*, 203, 240, with reference to *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876 [45, 47].

585 ibid 203, 240 fn 244, with reference to *Webb* [2006] EWCA Crim 962.

586 ibid 245. Similarly: *Stewart and Schofield* [1995] 1 Cr App R 441 (CA) (Hobhouse LJ); Simon Gardner, 'Joint Enterprise' (1998) 114 LQR 202, 205 ('the version of criminal accessory liability known as "joint enterprise"'); Dennis J Baker, *Criminal Law*, para 14-060 ('its conduct element is indisputably distinct'); Jonathan Rogers, 'Shooting (and judging) in the dark?' (2012) Archbold Review 8, 8; Ben Livings and Emma Smith, 'Locating Complicity: Choice, Character, Participation, Dangerousness and the Liberal Subjectivist' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 41, 43 fn 20.

587 [1985] AC 168 (PC). See also Lord Mustill in *Powell* [1999] 1 AC 1 (HL) 11.

– with the Law Commission.[588] Moreover, on one reading, the Supreme Court's decision in *Gnango* can be seen to support a similar position, in that it rejects joint enterprise as a possible basis of conviction for the appellant whilst at the same time upholding a conviction on the basis of aiding and abetting.[589]

Commentators who regard joint enterprise liability as distinct from 'ordinary' aiding and abetting draw attention to the fact that there are a number of differences between the *actus reus* elements of joint enterprise and aiding and abetting. Thus, they point out that, first, joint enterprise and ordinary aiding and abetting are 'structurally unlike',[590] in that joint enterprise liability involves two crimes – one committed on purpose, the other incidentally – whereas in 'ordinary' cases of aiding and abetting one crime is the norm, and that one is *actively* encouraged or assisted by S. Secondly, whereas joint enterprise is built around the notion of agreement or shared purpose, ordinary aiding and abetting neither presupposes an agreement, nor a shared purpose.[591] Indeed, inasmuch as the joint enterprise element of concerted wrongdoing requires some form of communication between P and S, it differs from the requirements of the ordinary modes of secondary liability which often do not even call for awareness on the part of P that he is being assisted, let alone some communication between both parties. Finally, there is no requirement that S must assist or encourage P's crime B; it is sufficient that S foresaw its commission by P as a

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588 Law Commission, *Assisting and Encouraging Crime* (Law Com CP No. 131, 1993) para 2.120. More recently, the Law Commission has refused to take a stance on what they perceive to be a doctrinal issue of little practical relevance, see *Participating in Crime* (Law Com No 305, 2007) paras 3.47 – 3.53, 3.56, 3.130.

589 *Simester and Sullivan*, 245. In *Gnango* [2011] UKSC 59, [2012] 1 AC 827 [93] Lord Dyson JSC observed: 'Several possible bases for upholding the defendant's conviction call for consideration. The first is the basis on which the case was left by the judge to the jury and on which they convicted. (…) I shall adopt Sir John Smith's phrase of "parasitic accessory liability" for this. The second is that the defendant aided and abetted Bandana Man to shoot at him (by encouraging him to do so). (…) The third basis is that the defendant and Bandana Man were liable as joint principals for the murder.' See also *A and others* [2010] EWCA Crim 1622, [2011] QB 841 [10].

590 *Simester and Sullivan*, 248.

591 See Graham Virgo, 'Making sense of accessorial liability' (2006) Archbold News, 6, 9 who, although subscribing to the view which regards joint criminal enterprise liability as a sub-set of 'ordinary' aiding and abetting, accepts that the requirement of an agreement is a distinguishing feature of joint enterprise liability which prevents a 'total assimilation' of this doctrine into the general law of accessorial liability.

possibility.[592] In the words of *Simester and Sullivan*, 'S's connection to crime B is *indirect*.'[593]

2 Joint Enterprise as a Sub-Category of 'Ordinary' Secondary Liability

Recent Court of Appeal decisions,[594] by contrast, accept as correct the view put forward in *Smith and Hogan* that joint enterprise is simply a sub-category of aiding and abetting.[595] As the editors explain:

> The only peculiarity of joint enterprise cases is that, once [S] has been shown to be aiding, abetting, counselling or procuring P in the commission of crime A, there is no need to look further for evidence of acts of assisting and encouraging in relation to crime B.[596]

A similar view has been defended by Buxton who has argued that '"[j]oint enterprise" cases are merely an incident of the general law of accessory liability.'[597] It also finds some support in the Supreme Court's reasoning in *Gnango*, although the actual decision in that case appears to support the contrary position. Thus, Lord Phillips PSC and Lord Judge CJ (with whom Lord Wilson SCJ agreed) stated: 'Parasitic accessory liability does not differ in principle from the more common basis for finding someone guilty of aiding, abetting, counselling or procuring the commission of a crime.'[598]

Virgo also seems to subscribe to this school of thought, although initially he did not think it apt fully to integrate joint enterprise principles into the general law of accessorial liability.[599] In a recent article he argues that

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592 *Simester and Sullivan*, 245.

593 ibid 248 (emphasis in original).

594 *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876; *Stringer* [2011] EWCA 1396, [2012] QB 160, 173 (Toulson LJ): 'Joint enterprise is not an independent source of liability.'

595 *Smith and Hogan*, 243: '[J]oint enterprise cases are merely examples of the principle of secondary liability in operation.'

596 *Smith and Hogan*, 260. See also John C Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) LQR 453, 461-462.

597 Richard Buxton, 'Joint Enterprise' [2009] Crim LR 233, 243.

598 [2011] UKSC 59, [2012] 1 AC 827 [45].

599 Graham Virgo, 'Making sense of accessorial liability' (2006) Archbold News, 6, 9. See also Graham Virgo, 'Guilt by association: a reply to Peter Mirfield' [2013] Crim LR 584, 586; Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 856.

> joint enterprise is not a distinct doctrine; it is simply an *evidential rule within the law of accessorial liability* to establish [S]'s association with crime B by means of a common purpose to commit crime A, where [S] is aware of the possibility of crime B being committed.[600]

The crucial point to take away from the position outlined above – and what sets this school of thought apart from the aforementioned view – is that it considers joint enterprise not to amount to a head of liability in its own right, but to be an instance of 'ordinary' aiding and abetting. This is most clearly expressed in *Hyde* where Lord Lane CJ, endorsing a phrase by JC Smith, described S's contribution to crime B as consisting in having 'lent himself to the enterprise and by so doing he has given assistance and encouragement to [P] in carrying out an enterprise which [S] realises may involve murder'.[601]

3 'Secondary Liability' as the Common Denominator?

Both the above views have in common that they firmly place the joint enterprise principle within accessorial, ie secondary, liability. As Hughes LJ said in *A and others*: '[G]uilt based upon common enterprise is a form of *secondary* liability. The principle is that D is implicated in the guilt of P not only for the agreed crime [A] but for the further crime [B] which he foresaw P might commit in the course of [A].'[602]

Likewise, by including joint enterprise in chapters that otherwise deal with accessorial liability, commentators of both schools of thought appear to take for granted that the doctrine of joint enterprise is rooted in the derivative theory that lies at the heart of secondary liability.[603] This thesis takes issue with this claim, and it will be argued in

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600 Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 869 (emphasis added).

601 *Hyde* [1991] 1 QB 134 (CA) 139.

602 [2010] EWCA Crim 1622, [2011] QB 841 [37].

603 See eg *Smith and Hogan*, 238 ff (§ 8.4: Basic secondary liability; § 8.5: Joint enterprise liability); *Simester and Sullivan*, ch 7 (secondary participation) § 7.5 (secondary parties pursuant to a common unlawful purpose (joint enterprise); James Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice 2015* (63rd edn, Sweet & Maxwell 2014) ch 18 section B (aiders and abettors) para 18-15 (joint enterprise/common design). See also William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 4.

Chapter 7 that the doctrine of joint enterprise actually cuts across the boundaries of primary (ie direct) and secondary (ie derivative) liability.

E Conclusion

The foregoing overview allows for a number of conclusions to be drawn about the current state of the English law on participation in crime. The findings of this chapter can be summed up as follows: we have seen that English law distinguishes between liability as a perpetrator and liability as an accessory. As such, it adheres to a dualistic conception of delinquency, although the practical significance of this distinction is limited as a result of section 8 of the Accessories and Abettors Act 1861 according to which accessories are to be tried, indicted and punished as principal offenders.

Liability of perpetrators, since this is solely based on their own wrongdoing, results in primary or direct liability. Accessorial liability, by contrast, depends on someone else's commission of the principal offence.

Under English law, an individual can incur primary liability by acting (1) as a sole perpetrator, (2) co-perpetrator, (3) or by committing a crime through an innocent agent.

In the context of accessorial liability, it has been argued that English law operates a limited notion of what constitutes the principal offence: while an unlawful commission of the *actus reus* with the requisite mental element is required, the principal offender need not also have acted culpably for accessorial liability to be triggered. The accessory's liability derives from the wrongfulness of the principal offender's actions, which is then coupled with the accessory's own culpability.

Section 8 of the Accessories and Abettors Act 1861 recognises four courses of conduct by which accessorial liability may be triggered: by aiding, abetting, counselling or procuring the principal offender's crime. These require some contribution (actual or

potential) towards the commission of the principal offence, but not causation (except in cases of procurement). All of them are premised on a two-dimensional notion of fault, in that the accessory's mental state must relate both to his own conduct and the conduct and mental state of the principal offender. As such, S must act with *intention to assist or encourage* P's crime (although, apart from cases of procurement, he does not need to intend the ultimate crime). He must also act with the belief that his conduct has the *capacity* to assist or encourage P in his commission of the principal offence. The second dimension of fault (ie that relating to P's conduct and mental state) is particularly difficult to ascertain, with recent developments suggesting that the standard applied in *Johnson v Youden* which required S to know of the essential matters which constitute P's crime may nowadays have been watered down to one of foresight of the essentials of P's crime as a possibility.

The relationship between the different forms of 'ordinary' secondary liability as set out in section 8 of the Accessories and Abettors Act 1861 and what has come to be known as the doctrine of joint criminal enterprise remains contested, with the judiciary oscillating between the school of thought which regards joint enterprise liability as a sub-category of 'ordinary' aiding and abetting and the one that regards it as an independent head of secondary liability.

We noted that there is no settled taxonomy for describing joint enterprise scenarios, and that the *language* of joint enterprise might be employed whenever the law is faced with wrongdoing committed by a plurality of offenders, although the *doctrine* of joint enterprise seems restricted to instances where two or more offenders agreed to commit one crime (crime A), and one of them then went on to commit a further, more serious offence (crime B).

According to the doctrine of joint enterprise, if P and S agree or share with each other an intention to commit crime A, and in the course of their joint commission of crime

A, P commits a further offence, crime B, S is also liable as an accessory for crime B (which he did neither intend nor directly assist and encourage), provided (a) S *intentionally* encouraged or assisted the commission of crime A; (b) S *foresaw* that in the course of committing crime A, P *might* perform crime B, crucially, with the requisite *mens rea*, and (c) the manner of P committing crime B was *not fundamentally different* from what S foresaw might occur.

It will be argued in the next chapter that using joint enterprise as a tool of *inculpation* in this way requires justification. A number of justifications and rationales that have been put forward will be examined and ultimately rejected.

Chapter 5: JOINT ENTERPRISE AS A PRINCIPLE OF INCULPATION?

A Introduction

As we saw in the previous chapter, the doctrine of joint enterprise is currently used to hold participants in crimes of violence committed *en groupe* which have escalated into death liable for murder whether they were the ones who actually administered the fatal blow or not. In the typical case, the fatal act has been committed by one individual, and the issue is whether other parties in the attack, who intended harm short of death, can be held liable for the killing.[604] In resolving this issue, the doctrine of joint enterprise has been applied numerous times in recent years.[605] As we saw in the previous chapter, questions of joint enterprise liability arise where P's criminal conduct goes beyond what S expected. The doctrine is then nevertheless used to inculpate S for the acts of P. The usual justification[606] for imposing liability on S based on his (causal) contribution to P's crime (in the form of assistance or encouragement) and the resulting parity of culpability[607] does not fit the fact pattern typical of such situations: S has neither directly assisted nor encouraged P's collateral crime. Judicial pronouncements that S's 'lending himself' to the joint enterprise with foresight equals assistance and encouragement for P's further wrongdoing amount to little more than a legal fiction.[608] For similar reasons, any attempt at justification arguing that S is implicated in P's crime because he forfeited his individual autonomy by joining forces with P, thereby becoming, metaphysically, one with him, is not particularly

604 *Powell, English* [1999] 1 AC 1 (HL); *Rahman* [2008] UKHL 45, [2009] 1 AC 129 (HL).

605 The Bureau of Investigative Journalism estimates that between 2005 and 2013 the CPS prosecuted 4,590 offenders for homicide, possibly on the basis of joint enterprise. The figures are to be taken with caution, as the Bureau had to rely on data indicating that the case involved two or more defendants, more differentiated statistics not being available.

606 Ian H Dennis, 'The Mental Element for Accessories' in P Smith (ed), *Essays in Honour of JC Smith* (Butterworths 1987) 40.

607 It is doubtful whether an accomplice's conduct always merits a finding of parity of culpability.

608 See also Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 860.

persuasive.[609] Moreover, any such argument does completely away with conceptual divisions relating to the status of offenders as perpetrators or accessories which the law (still) recognises as important. Some other justification is therefore needed. The House of Lords, in *Powell*,[610] put a stop to rationalisation attempts in terms of 'agreement' or 'authorisation' (and, presumably, with it all notions of agency).[611] In the light of this decision, what rationales remain open for discussion?[612]

Commentators on the theoretical underpinnings of the joint enterprise doctrine discuss, at present, essentially four approaches: the first expresses liability in terms of an 'assumption of risk'.[613] The second, in a slight variation on this theme, holds S liable for increasing the risk that P might commit a collateral crime.[614] The third grounds liability in a 'change of [S's] normative position'.[615] A fourth view suggests that joint enterprise liability is underpinned by a 'principle of association'.[616] A further possibility might be to draw on the existing law on omissions along the lines of *Miller*:[617] S is liable for having failed to prevent P from committing another crime in circumstances where S was under a duty to do

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609 See Joshua Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 Hastings LJ 91, 111: 'when an accomplice chooses to become a part of the criminal activity of another, she says in essence, "your acts are my acts," and forfeits her personal identity. (…) Thus, moral distinctions between parties are rendered irrelevant. We pretend the accomplice is no more than an incorporeal shadow'.

610 [1999] 1 AC 1 (HL).

611 On the notion of agency see Hobhouse J, 'Agency and the Criminal Law' in Francis Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* 39 (LLP 2000) 46. See also Sanford H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 California L Rev 323, 354-355; Joshua Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 Hastings LJ 91, 109-111, 114.

612 On the view here advocated the 'conditional *mens rea'* justification is beside the point: instances where the common purpose is conditionally extended to encompass the use of force if and when necessary are not instances of incidental crimes, but part of the purpose crime.

613 KJM Smith, *Complicity*, 221 ('culpability through conscious risk taking').

614 GR Sullivan, 'Participating in crime: Law Com No 305 – joint criminal ventures' [2008] Crim LR 19, 30 – 31.

615 AP Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 598; John Gardner, 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 CLJ 502; Jeremy Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] Crim LR 759, 764.

616 Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 860-862; Graham Virgo, 'Guilt by association: a reply to Peter Mirfield' [2013] Crim LR 584; Graham Virgo, 'JEF 11' para 10 < http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/joint-enterprise-followup/written/10873.pdf > accessed 19 May 2015.

617 [1983] 2 AC 161 (HL).

so because he had previously contributed to creating a situation where there was a danger that P might commit the crime in question.

In the following, I will examine these attempts to justify or rationalise the joint enterprise principle in its current inculpatory form. Ultimately, and in keeping with the view advanced in this thesis, I will conclude that none of them is convincing.

B Assumption of Risk

According to the assumption of risk model, S, by joining forces with P, signs up to the goals of the joint enterprise and accepts responsibility for all the wrongs (perpetrated by P) in realising that goal.[618] S's commitment to the common purpose is seen as implying an acceptance of the choices and actions taken by P over which S does not have precise control. On this model, he ends up liable because '[j]ust as risks attend the pursuit of the common purpose, an assumption of those risks flows from S's subscription to that purpose'.[619]

I accept that there is some merit in these observations, and that the assumption of risk model can account for (some) judicial practice. As the Privy Council observed in *Chan Wing-Siu*, '[t]he criminal culpability lies in participating in the venture with that foresight'.[620] Likewise in *Powell*, Lord Mustill spoke of 'wrongful participation in face of a known risk'.[621] These statements echo assumption of risk thinking.

However, as a matter of principle, it appears doubtful whether the assumption of risk rationale can, normatively as well as evidentially, be equated with mere foresight. Under an assumption of risk analysis the law generally does not let a *cognitive* element such as knowledge or foresight alone suffice. Usually, it requires that S *willingly* or at least

618 AP Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 599.
619 ibid.
620 [1985] AC 168 (PC) 175.
621 [1999] 1 AC 1 (HL) 11.

consciously accept running an objectively unreasonable risk.[622] This is a volitional element which, it is suggested, needs to be proved in addition to foresight. Of course, acting with foresight may be indicative of a deliberate acceptance of the risks anticipated (and this is for the jury to decide). However, the mere fact that S foresaw a criminal act becoming an incident to the purpose crime's commission does not automatically lead to the conclusion that he – by continuing to be a part of the joint enterprise – accepted to run the risk of it eventuating: while there may be risks that are so closely connected with the purpose crime that such a conclusion seems warranted, this will not hold true for each and every risk that S, with a little imagination, can foresee. For example, imagine that P and S, having committed a burglary, meet one of P's many enemies as they are making their get away. Should S be liable if P stabs his enemy with the screwdriver he had used to break into the victim's house? It could well be argued that, as he knew that P had lots of enemies, little self-control and a screwdriver, P's collateral murder was quite foreseeable. Defending the foresight test in terms of an 'assumption of risk' without articulating the exact parameters of such an assumption (especially with regard to the proper relationship between the purpose crime and the crime in the event committed) is problematic. In signing up for a particular purpose S can only really be said to have thereby accepted those choices and actions on the part of P which are intrinsically linked to the furthering of the purpose crime. It is not clear how far the current law goes in this regard. Many joint enterprise cases were concerned with offences against the person which resulted in murder – offences that could be regarded as belonging to the same 'offence family' in that they require violence and damage to the victim's health. Others, however, dealt with crimes that were less obviously related, such as burglary and murder.[623] The Law Commission has suggested that S ought

622 *Cunningham* [1957] 2 QB 396 (CA); *Parker* [1977] 1 WLR 600 (CA).

623 In *Slack* [1989] QB 775 (CA), S was held liable for P's murder of the occupant of a flat they had set out to burgle, in circumstances where it was understood between the parties that *as part of the common plan to burgle*, one would kill or do serious harm if necessary.

to be liable irrespective of any link with the purpose crime.[624] If this is the state of the law, it is suggested that the assumption of risk rationale cannot, without more, accommodate such a wide catchment of cases. Thus, while it seems that the model works well to explain S's liability for P's crime in cases where it can be said that the original joint criminal venture had certain risks built into it which S was aware of and had voluntarily undertaken, the assumption of risk approach is less persuasive in instances where purpose and collateral crime are not so connected.

C Enhancement of Risk

Sullivan has, tentatively, suggested that joint enterprise liability may be explained on the basis of a 'culpability-risk' model:[625] by participating with P in crime A, S has enhanced the risk of crime B occurring. Similar to the assumption of risk approach, the focus here is on S's previous conduct, but rather than S assuming responsibility for P's further conduct, the enhancement of risk model asserts that S is liable because his participation in the joint enterprise has increased the likelihood that P will commit the further offence.[626] On such an analysis, S's extra liability is triggered because S enhanced P's dangerousness, and the fact that he agreed or otherwise became complicit in crime A, aware that crime A might lead P

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624 They write: 'We do not accept that the only collateral offences for which D may be made liable are those "perpetrated in realising" or that "grow out of the agreed offence. In our view, it ought to be possible to hold D liable for a collateral offence committed by P, even when the offence did nothing to further the joint criminal venture, if D was aware that the commission of that offence was just the sort of thing that P might do', see Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 3.53.

625 It should be stressed that Sullivan does not thereby seek to justify the current law of joint enterprise which he believes is over-inclusive and beyond justification; he uses the 'enhancement of risk' rationale to advocate less severe legal consequences than are currently imposed upon S: rather than holding S to account for P's additional crime, Sullivan suggests that the penalty incurred for the part he played in the commission of the purpose crime be increased. The increased penalty should reflect the fact that S is also partly responsible for the occurrence of the additional crime in that he has increased the risk that P will commit another crime, see GR Sullivan, 'Participating in crime: Law Com No 305 – joint criminal ventures' [2008] Crim LR 19, 30-31.

626 Similarly Dennis J Baker, *Criminal Law*, para 14-062: 'It is the joint enterprise that put [P] in a "position" to endager others: a position from where he was much more likely to commit the collateral offence.'

to commit crime B, exacerbates the wrong that S does in agreeing to or becoming complicit in crime A.[627]

This approach is not without its attractions; in particular, it seems capable of taking account of individual autonomy in the sense that liability attaches to conduct on the part of S which is said to increase the likelihood that P will commit a further crime. Thus, what S is held to account for is his contribution to creating the setting which allows P to commit further wrongs. However, as with the assumption of risk approach, the problem with such a view is that it is not obvious that every time S participates in joint criminal activity, he has thereby enhanced the risk of P's committing a further wrong. This can only be said for crimes where the risk is inherent in the original enterprise – the more tenuous the link between purpose crime and collateral crime, the more difficult it is to argue that S has increased the risk of P committing the collateral crime. This is particularly so where S sought to distance himself from any further crime, for example, by telling P that he is strictly opposed to violence in the commission of a burglary. In such circumstances, it appears unduly harsh to hold S liable for murder on the basis that he enhanced the risk of P's killing another person. How can it be attributed to S that P, in the exercise of his own free will, chose to go against S's express wishes in committing an act of violence? Moreover, one could question whether the level of enhanced dangerousness in the typical cases is sufficient to justify the extent of liability imposed on S. The difficulty with basing joint enterprise liability in its current form on an enhancement of risk analysis lies with the fact that this still cannot explain adequately why we hold S *fully* responsible for P's crime. Few would deny that S has incurred some moral responsibility and that this ought, perhaps, translate into some legal responsibility. As Sullivan points out, it is definitely

[627] GR Sullivan, 'Participating in crime: Law Com No 305 – joint criminal ventures' [2008] Crim LR 19, 30.

> more reprehensible to commit burglary … in circumstances that carry the risk of violence, albeit on the part of someone else. … Even if [S] sincerely wishes to avoid violence in all circumstances and has forcefully expressed himself to P in those terms, by going ahead with the burglary aware of the risk of violence, he has demonstrated a less than full commitment to the avoidance of violence though not … a commitment to P's violence.[628]

Thus, the problem lies not with justifying why the law imposes responsibility on S at all, but rather why it imposes *the same amount* of responsibility on him as it does on P.[629] It is suggested that the 'enhancement of risk' model cannot account for this. Thus, it cannot be relied on as an adequate basis for an inculpatory role for the doctrine of joint criminal enterprise.

D Omissions-based Liability

An alternative explanation, closely related to the 'enhancement of risk' and 'assumption of risk' approaches, is that responsibility, rather than voluntarily assumed, is imposed upon the defendant by the law as a consequence of his prior dangerous conduct which has given rise to the relevant risk. This idea is recognised when it comes to imposing liability for omissions. Thus, in *Miller*,[630] the defendant was liable for his failure to put out a fire or call the fire brigade where it was his own lit cigarette which had set fire to the mattress he was sleeping on. Liability for omissions was justified on the basis that his own act had caused the risk which subsequently resulted in actual damage. Lord Diplock, in that case, appears to require the defendant, at the point at which he becomes aware of the risk, to possess the *mens rea* necessary for the relevant offence. Thus, the defendant was guilty of arson because, when he realised that the mattress was on fire, he was reckless as to whether any

628 ibid 29-30.

629 See also Christopher Kutz, *Complicity – Ethics and Law for a Collective Age* (CUP 2000) 165 who argues 'that agents are accountable even [when they would prefer that aspects of the shared project go unrealised], but that the responses due them must reflect the nature of their conceptions of their role and identity within the shared project.'

630 *Miller* [1983] 2 AC 161 (HL).

property would be damaged as a result of his failure to intervene: he simply left the room and went back to sleep elsewhere. Recklessness was here sufficient because it was sufficient for the crime he was charged with, ie arson.

Applied to the context of joint criminal enterprise, S is being held to account for having failed to intervene and prevent P from acting as he did. His duty to act would, on this analysis, arise because S's joining P in the criminal enterprise has given rise to a situation in which P might commit a collateral crime exceeding the common purpose or scheme. As such, the law imposes upon S a duty to prevent complications from the original crime.[631] Provided S had means and opportunity actually to hinder P's act, this looks like a sound rationale for explaining cases such as those where S and P set out together to burgle V's flat and P murdered V in the event.[632] S is being punished for having failed to stop P from murdering V in circumstances where he was under a duty to do so. In this type of case,

> the fault of [S] lies in engaging in conduct [burglary] that creates the danger (which in fact materializes) that some other person [P] will engage in criminal conduct, whether or not that conduct serves the purposes of the secondary actor.[633]

However, the duty imposed in *Miller*[634] is not a strict duty to prevent harm in any event, but, as pointed out above, must be accompanied by the relevant mental element necessary for the crime in question. By parity of reasoning, S in the above example would therefore have to possess the *mens rea* for murder (intention to kill or to cause grievous bodily harm). Where in the general law of murder, the relevant intention can be inferred from foresight of

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631 A similar, but distinct, idea is Fletcher's notion of a 'community of shared risks' (see George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978), 614. This is, ultimately, based on a concept taken from German private law, the so-called '*Risikogemeinschaft*', which engenders mutual duties of care between members of a joint risky undertaking. The problem is that, while this idea can explain why mountaineers, sailors and astronauts might be under reciprocal duties to assist one another in dangerous situations, it seems a stretch to extend this in order to argue that, where one member of the undertaking resorts to crime, the others should be held accountable for this.

632 *Slack* [1989] QB 775 (CA).

633 Sanford H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 California L Rev 323, 391.

634 [1983] 2 AC 161 (HL).

a virtual certainty of serious harm,[635] the cases suggest that a lesser degree of foresight might suffice in the joint enterprise context. It is difficult to square this with the above analysis. Thus, if we argue that the law imposes a duty to act on S because his conduct (joining of the enterprise) gave rise to a dangerous situation, we still need to prove that S (at the time the collateral crime unfolded) possessed the *mens rea* required for that collateral crime. This is precisely what the proponents of joint criminal enterprise as a doctrine of inculpation suggest the law can do without. Thus, while omissions-based liability can explain some cases, it cannot justify an inculpatory application of joint criminal enterprise.

E Change of Normative Position

The 'change of normative position' rationale holds that the defendant, by deliberately attacking another's legally protected interests, significantly changes his status in the eyes of the law.[636] Once he has passed over this moral threshold, he can be made liable for all the consequences that follow from his intentional criminal conduct. The decisive element is the initial attack deliberately done with a view to wrong the victim; it changes the defendant's normative position in relation to consequences that might otherwise be ascribed to chance.[637] In joint enterprise cases the wrong which so changes S's normative position is the agreement or confederacy with P.[638] It exposes S to liability for crimes committed by P, because

> [S's] new status has moral significance: [he] associates [him]self with the conduct of the other members of the group in a way that the mere aider and abettor, who remains an independent character throughout the episode, does

635 *Nedrick* [1986] 3 All ER 1 (CA); *Woollin* [1999] 1 AC 82 (HL).

636 Andrew Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 New Crim LR 232, 233.

637 Jeremy Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] Crim LR 759, 764.

638 AP Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 598; *Simester and Sullivan*, 248.

> not. […] As such, joint enterprise doctrines impose a form of collective responsibility, predicated on membership of the unlawful concert.[639]

At first sight, this is an attractive rationale; it seems capable of accounting for S's being liable for criminal conduct (which he neither caused[640] nor intended) by *linking* such conduct to S's *previous* intentional, wrongful and culpable commitment to criminal activity. Liability for one offence (crime B) is attributed on the basis of moral responsibility for another offence (crime A). Thus, taking the initial joint enterprise as its normative foundation, liability is imposed on S in what appears to be a constructive mode. While, generally speaking, constructive liability is not unknown to English criminal law,[641] it is not immediately evident why the two crimes should be so linked, and what, normatively speaking, actually constitutes the decisive link. *Simester and Sullivan* argues that the crucial element which changes S's position vis-à-vis the criminal law is the unlawful 'confederation', the joint criminal enterprise as such.[642]

Three objections may be raised against such an assertion. First, if the essence of joint criminal ventures, as is unanimously asserted, are the twin-requirements of 'shared purpose' and 'collaboration', then it is difficult to see how they can found the basis of liability for criminal conduct in which they are conspicuously absent: in cases such as we are concerned with here, P commits an additional or more serious offence than S intended to be a party to, and P does so *alone* (albeit during the course of criminal activity in which P and S have worked together). There is thus no shared purpose, and there is no division of labour, no contribution of S as regards this further crime. If the crucial element is simply the fact that P and S together embarked *on a criminal enterprise*, it is difficult to see why this joint embarkation should, automatically, make S liable for all things P does thereafter,

639 AP Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 596-597.

640 At least not to the degree generally considered sufficient by the legal order for the imposition of criminal liability. There may be causation in the sense that S's presence made it more likely for P to commit the collateral crime.

641 See eg *Church* [1966] 1 QB 59 (CA) (unlawful dangerous act manslaughter).

642 *Simester and Sullivan*, 245, 248-249.

be they connected to the enterprise's goals or not. One can certainly conceive of situations where the agreed enterprise provides only the 'context' or setting for another crime, as where on the way to (or from) an armed robbery P sees his enemy V and kills him with the gun he carries for purposes of the robbery.[643] Why should S, without more, be inculpated in such a case, even if he contemplated the possibility that P, whom he knows to be an easily excitable person, may use violence on the way to (or from) their anticipated crime scene? Offenders usually form a criminal venture with a specific purpose in mind; they do not usually combine simply to commit *crime*. The objection against letting any crime, however briefly contemplated as a possible corollary to the joint venture, suffice for implicating S is not resolved by broadening the definition of 'purpose'. In fact, extending the notion of 'shared purpose' to encompass all criminal incidents that S foresaw as possible, as seems to be the current trend in the case law,[644] goes against the essence of what it means to have a 'common purpose': a specific goal, objective, aim that both P and S wish to achieve. To extend the notion to include foreseeable possibilities may thus lead to the absurd result that S will be said to have *intended* criminal conduct which he foresaw as possible, even likely, but was manifestly opposed to, as where he knows P is carrying a knife but pleads with him not to use it under any circumstances.

Secondly, it is difficult to understand why, as a matter of principle, a person who commits to a joint enterprise should thereby *routinely* end up in a worse position than a person who actually encourages or assists a principal offence.[645] As seen, association with a joint enterprise triggers the lower threshold of liability; if P then goes on to commit a crime other than the crime for which the enterprise came into existence, S will automatically be liable for that additional offence if foresight can be established. S's culpability in agreeing to join the enterprise in the first place, however, may be comparatively small; yet the price

643 Richard Buxton, 'Joint Enterprise' [2009] Crim LR 233, 241.
644 See *Powell, English* [1999] 1 AC 1 (HL); *Rahman* [2008] UKHL 45, [2009] 1 AC 129.
645 Richard Buxton, 'Joint Enterprise' [2009] Crim LR 233, 239.

he pays may be so much higher than if he had started off as an aider and abettor – even where in the latter capacity his actual contribution is much more significant than under the joint enterprise example. The 'change of normative position' model does not provide an explanation for this; it can be criticised for being descriptive in nature rather than explanatory.

Finally, it is not obvious that the elements that are said to be morally crucial – common criminal purpose and joint embarkation – have the significance ascribed to them *in the first place*. The Law Commission argues that

> when [S] engages in the normative practice [of entering a promise or agreement], by agreeing to commit the offence or sharing an intention to commit an offence […] [S] can no more escape liability in this way than, in the civil law, someone can say that no contractual liability was ever created by a binding agreement simply because no one expected the contract to be fulfilled or relied on.[646]

However, in contrast to what the Law Commission asserts, if people enter into an agreement without the (objectively manifested) intention to be bound, they will not be bound; intention to create legal relations is an essential ingredient of an enforceable contract.[647] Moreover, the Commission's description of joint enterprises does not accord well with reality: in many cases, the most tenuous association was deemed sufficient – think, for instance, of the venture that gave rise to *Rahman*: youths congregating in the streets, more by chance than design.[648]

Indeed, to ask for a significant nexus between enterprise and incidental crime would bring this area of the law more in line with the cases in which the 'change of normative position' rationale is usually discussed. The model seems to have been developed with (sole) offenders in mind who commit an offence (against the person) which then results in

646 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 3.45.
647 *Balfour* v *Balfour* [1919] 2 KB 571 (CA).
648 [2008] UKHL 45, [2009] 1 AC 129.

greater harm than anticipated.[649] The rationale is drawn upon to explain why the criminal law, in such circumstances, attaches liability to P for consequences which were neither intended nor foreseen by him. In the joint enterprise context, by contrast, the 'work' to be done by the crucial normative element (the initial deliberate, wrongful and culpably committed criminal act) goes beyond fixing unintended consequences to an actor whose conduct can, at least, be said to have directly caused such a consequence: the 'crucial normative ingredient' needs to provide a good reason for why S may be held indirectly liable for consequences that were directly caused only by *another* actor, P. Ashworth has criticised the 'change of normative position' model for not (yet) offering a satisfactory explanation of what precisely brings about the normative change of position *in the single offender context*.[650] This criticism is even stronger in the joint enterprise context.

Ashworth and Horder offer a slightly different account of the change of normative position rationale: they argue that S's liability is based on his support for the criminal venture *combined* with his recklessness (defined as foresight of a real risk) as to the further crime committed.[651] This is an attractive justification in that it appears to require something in addition to the joint venture. However, the difficulty with this analysis is that it seems to put rather much emphasis on the presence of a 'real' risk. It seems unclear in how far the current law supports this requirement: in *Chan Wing-Siu* it would appear that the 'real' risk terminology is employed by the Privy Council not so much to identify cases where there was a substantial likelihood of the incidental crime occurring but to filter out those cases where the occurrence was too remote an incident to justify S's implication in it. Their Lordships stressed that in guiding juries

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649 The concept's origins are ascribed to John Gardner's article on 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 CLJ 502.

650 Andrew Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 New Crim LR 232, 242: 'Thus far, the reliance of moderate constructivists on the concept of "changing one's normative position" has been more salient than their explanations of the concept.'

651 Ashworth and Horder, 438.

> [w]hat has to be brought home to the jury is that occasionally a risk may have occurred to an accused's mind but may genuinely have been dismissed by him as altogether negligible, and if they think there is a reasonable possibility that the case is in that class, taking the risk should not make that accused a party to such a crime of intention as murder or wounding with intent to cause grievous bodily harm.[652]

As such, the adjectives 'real' and 'substantial' are used not to prescribe a certain degree of likelihood but to help the jury identify cases where the risk of the incidental crime occurring was altogether negligible. If the foreseen 'real' risk need only be more than trifling, then, arguably, the additional justifying element (recklessness) may carry little more explanatory force than a justification based on the 'confederation' alone. In any event, the criticism remains valid that foresight should be accompanied by acquiescence.

F 'Guilt by Association'

Virgo has recently suggested that joint enterprise liability might be explained on the basis of a 'principle of association'. He argues that the law allows accessorial responsibility – including joint enterprise liability – to be established via three different routes: (1) causation, (2) connection (defined as a 'contribution to the commission of the offence'),[653] and (3) association. On his account,

> [w]hereas the other explanations of accessorial liability, causation and connection, depend on establishing some effect on or link to the commission of the crime committed by [P], albeit that this may be a presumed connection, this need not be proved where the justification for the imposition of liability is association. The focus is instead on *the conduct of [S] in its own right and whether this can be considered to establish that [S] is associated with the crime committed by [P], without resorting to any artificial presumption of effect on [P]*. (...) By continuing with the joint venture, being aware that crime B might be committed, [S] is sufficiently associated with that crime to be regarded as responsible for its commission.[654]

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652 *Chan Wing-Siu* [1985] AC 168 (PC) 179 (Sir Robin Cooke).

653 Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 859.

654 ibid 860.

Virgo, who – as seen in Chapter 4 – subscribes to the school of thought which treats joint enterprise as closely related to the ordinary law of aiding and abetting, illustrates the operation of this principle with reference to 'audience cases' of which *Wilcox v Jeffery*[655] is one example. The defendant had attended a concert knowing that a condition of the musician's entry to the country was that he was to refrain from performing. Virgo argues that in such a case rather than justifying the imposition of liability on the defendant by reference to assumed encouragement, which he suggests is the approach taken by the court, the defendant should be considered as having become associated with the commission of the offence *by his knowing presence*. The same approach, he argues, underpins S's liability in joint enterprise cases: '[t]he principle of association can also be logically extended to impose accessorial liability where D2 assists or encourages D1 to commit crime A, foreseeing that crime B might be committed.'[656]

Virgo's explanation has met with much interest, and admittedly, it is not without merit in that it seems capable of categorising cases where S has been found liable as an accessory in circumstances where to say that he assisted or encouraged the perpetrator seems to over-stretch the everyday notion of what it means to assist or encourage someone else's conduct. However, the debate generated in the wake of Virgo's analysis has drawn attention to the elusiveness of the idea of 'guilt by association'. As such, Odgers, in a letter to the general editor of the *Criminal Law Review*, criticises the concept both as 'amorphous and unhelpful' and as lacking clear parameters.[657] Similar concerns have been voiced by Mirfield who has called the concept 'opaque',[658] pointing out that 'there is considerable

655 [1951] 1 All ER 464 (DC).

656 Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 862.

657 Steven J Odgers, 'Letter to the Editor' [2013] Crim LR 222, 222-223.

658 Peter Mirfield, 'Guilt by association: a reply to Professor Virgo' [2013] Crim LR 577, 582.

uncertainty as to when we should regard the secondary party's involvement as "associating" him with the perpetrator's offence'.[659]

Indeed, while Virgo suggests that association

> might be established by D2's knowing presence when D1 commits a crime, and also where D2 and D1 have a common purpose to commit crime A and, in the course or furtherance of committing that crime, D1 commits crime B' with this common purpose requiring 'there to be an express agreement or implicit understanding between the two parties rather than a simple coincidence that D1 and D2 happen to have the same purpose to commit a crime[660]

these suggestions do not answer the question *why* this kind of conduct should sufficiently associate S with what is otherwise P's crime (B). What is it about 'knowing presence' and an 'agreement', implicit or otherwise, to commit crime A that attracts liability for crime B?

Furthermore, while the argument, when first put forward in the context of discussing the Supreme Court's decision in *Gnango*, could be read as suggesting that association operates as a stand-alone principle, Virgo has since clarified that *association needs to be located within the language of aiding and abetting*. Thus he writes:

> [It] is an essential part of my thesis that all aspects of accessorial liability fall within the traditional analysis of complicity as involving procuring, encouraging or assisting the substantive offence. The principle of association can only be recognised as a justificatory principle for the imposition of secondary liability if it falls within one of those terms. (...) By *deeming (and I accept that such deeming is essential but also defensible) a common purpose to commit one crime as involving encouragement* by one party of the other to commit the crime, the principle of association becomes much more certain in its operation.[661]

This passage seems to be saying that 'association' – in the context of joint enterprise – is, in the end, based on S's knowing involvement in crime A and that this is to be equated with encouragement of crime B (whether it did in fact encourage or not). If this is correct, then

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659 ibid 580.

660 Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 862.

661 Graham Virgo, 'Guilt by association: a reply to Peter Mirfield' [2013] Crim LR 584, 585 (emphasis added).

Virgo's approach is also open to the same objections as the judiciary's suggestion that S's 'lending himself' to the joint enterprise with foresight equals assistance and encouragement for P's additional crime: it amounts to a fiction.

Thus, while the notion of 'association' may be useful as a *label* for the category of rather baffling cases (involving 'knowing presence' at concerts, fights, duels etc) where S, despite a lack of any of the usual manifestations of help or encouragement, has been found to be an aider and abettor by application of what appears to be a stretched-beyond-ordinary-limits notion of 'encouragement', as a rationalisation for joint enterprise liability it lacks *explanatory* force. As such, it is insufficient to justify the imposition of joint enterprise liability in its current inculpatory form.

G Policy and/or Pragmatism?

If not on legal principle, can the inculpatory version of the doctrine of joint criminal enterprise be justified on policy grounds? *Simester and Sullivan* concedes that the rationale underlying the current law of joint criminal enterprise is partly also one of dangerousness.[662] It points out that 'the law has a particular hostility to criminal groups' because they have a tendency to evolve into more serious crime.[663] '[The] danger', it continues, 'is not just of an immediate physical nature. A group is a form of society, and a group constituted by a joint unlawful enterprise is a form of society that has set itself against the law and order of society at large'.[664] While such an observation may hold true for gangs pursuing organised crime, the 'society within society' argument seems less

662 *Simester and Sullivan*, 249. Likewise: Lord Steyn in *Powell* [1999] 1 AC 1 (HL) 14-15; Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 3.58; Ashworth and Horder, 438 ('joint criminal ventures tend to have a momentum of their own that makes the commission of crimes more likely'). See also Ben Livings and Emma Smith, 'Locating Complicity: Choice, Character, Participation, Dangerousness and the Liberal Subjectivist' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 41, 54.

663 *Simester and Sullivan*, 249.

664 ibid.

persuasive in the context of loosely associated street-clash 'enterprises' such as in *Rahman* which lack fixed organisational structures. However, in that it draws attention to the fact that a group involved in criminal activity may innately be more dangerous than an individual offending, the analysis is not without its merits. Indeed, the Law Commission has recently cited a study according to which groups have been shown to be more apt to act violently than individuals.[665] Similar concerns have been expressed by their Lordships in *Powell*,[666] with Lord Steyn suggesting that '[e]xperience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences.'[667] Thus, there may be good reasons for society to aspire towards holding participants of joint criminal enterprises liable for 'excess' crimes committed by their associates where these can be said to stem from the enhanced dangerousness of the group's criminal activity. As such, joint criminal enterprise liability in its current form may be grounded in a policy that favours a broad approach to condemning group criminal activity in order to deter persons from 'teaming up' and forming joint criminal ventures in the first place.[668]

However, the policy reasons cannot justify the way the policy has been translated into legal reality.[669] As Kirby J has argued, there is no substitute for requiring the

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665 The Law Commission refers to Ben Marshall, Barry Webb and Nick Tilley, *Rationalisation of Current Research on Guns, Gangs and other Weapons: Phase 1*, Jill Dando Institute of Criminal Science, University College London (2005). See also Paul F Cromwell and others, 'Group Effects on Decision-Making by Burglars' (1991) 69 *Psychological Reports* 579, 586. But note the criticism in Andrew Green and Claire McGourlay, 'The wolf packs in our midst and other products of criminal joint enterprise prosecutions' (2015) 79(4) Journal of Criminal Law 280, 282, 292: 'Close examination shows that none of the research actually supports the Law Commission's arguments… The Law Commission is simply not entitled to draw the conclusion that existing studies support its arguments that significant changes of normative position occur when people form or join groups, and that secondary participation causes an escalation in violent crime.'

666 [1999] 1 AC 1 (HL) 14.

667 ibid.

668 See also House of Commons Justice Committee, *Joint Enterprise: follow-up, Fourth Report of Session 2014-15* (HC 310, 2014) paras 26-29.

669 See also the criticism by CMV Clarkson, 'Complicity, Powell and manslaughter' [1998] Crim LR 556, 557: '[c]rime control arguments do not necessarily dictate the level of liability that should be imposed.'

prosecution to prove a requisite intention of the secondary offender – to hold someone liable for murder merely on the foresight of a possibility is 'fundamentally unjust'.[670]

The Law Commission meets objections like these by arguing that '[a] test of foresight … is in any event the only practicable test for criminal proceedings in England and Wales.'[671] In similar vein, Lord Mustill has claimed that '[i]ntellectually, there are many problems with the concept of a joint venture, but they do not detract from its general practical worth'.[672] However, the supposed practical advantages are secured at the cost of undermining fundamental principles of criminal law.[673] As Sullivan argues, the way the doctrine is used 'is not merely a tweak in the interests of efficacy on the need to prove encouragement or assistance by [S]… This sort of pragmatism allows us to dispense entirely with the need to prove any encouragement or assistance… '.[674] Indeed, it is possible to go further and pray pragmatism in aid when justifying the indefinite detention of suspected terrorists or the relaxation of the criminal standard of proof whenever the prosecution is having a hard time meeting it. The criticism is, in effect, that the doctrine of joint enterprise as currently applied has turned into a 'lazy law' that unduly favours the prosecution and undercuts established principles of criminal law – at the cost of individual rights. Even if we agree that the aim of deterring group criminal conduct is worth pursuing, the current law is too drastic a departure from the ordinary requirements that the

670 *Clayton* [2006] HCA 58, 128. See also House of Commons Justice Committee, *Joint Enterprise: follow-up, Fourth Report of Session 2014-15* (HC 310, 2014) para 38: 'The concerns are, rather, with whether the doctrine, as it has developed through case law and is now being applied, is leading to injustices in the wider sense, including through a mismatch between culpability and penalty. The subjective and objective information which has been accumulated (…) all call into question (…) the compatibility of joint enterprise with a wider conception of justice.'

671 Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 4.11. Similarly Lord Steyn in *Powell* [1999] 1 AC 1 (HL) 14: 'The answer to this supposed anomaly, and other similar cases across the spectrum of criminal law, is to be found in practical and policy considerations. If the law required proof of the specific intention on the part of a secondary party, the utility of the accessory principle would be gravely undermined.'

672 *Powell* [1999] 1 AC 1 (HL) 11.

673 See also Paul S Davies, *Accessory Liability* (Hart 2015) 67.

674 GR Sullivan, 'Complicity for first degree murder and complicity in an unlawful killing' [2006] Crim LR 502, 508-509.

prosecution must establish, ie that the accused's conduct was accompanied by the requisite intent.

H Conclusion

While the rationale for joint enterprise liability remains underexplored in the case law, we have considered four approaches, as well as policy considerations, aimed at justifying the doctrine in its current, inculpatory form which have been put forward by academic commentators, namely: assumption of risk; enhancement of risk; change of normative position, and association. A further possibility has been discussed which draws on the law on omissions along the lines of *Miller*. It has been explained that none of these justifications is convincing, in that they either rely on a legal fiction or presuppose a stronger link between purpose crime and collateral crime than the tenuous connection currently deemed sufficient by the doctrine of joint enterprise. We will see in the following chapter that German law employs its functional equivalents of joint enterprise in order to exculpate rather than inculpate, in other words, it uses them to delineate the boundaries of accomplice liability (including co-perpetration). As we have just seen, the current English inculpatory approach is difficult to justify. In the light of the German experience, we will therefore, in Chapter 7, return to look at the English doctrine in some detail, arguing that the original function of the English doctrine was indeed very similar to the German exculpatory model and that it may well be the case that this original conception is still within interpretative reach of the common law. This, it will be suggested, would restore equilibrium to this area of criminal law. Co-perpetration and aiding & abetting both require rules determining at what point one person's conduct can no longer be attributed to another. Notwithstanding the different natures of these two modes of liability (primary and secondary), if like cases are to be treated alike, these rules should be the same for both.

Whether charged as an accessory or as a joint perpetrator, the accused will argue that his partner's conduct was 'excessive' and should therefore not be attributed to him. In other words, an *exculpatory* role of the joint enterprise doctrine should tell us where to draw the line in such cases. In chapter 8, inspired by the earlier discussion of the German concept of *dolus eventualis*, it will then be suggested that this line might be drawn by looking to whether S has endorsed P's commission of crime B. If he has endorsed the relevant crime, it can still be attributed to him, and S will be considered an aider and abettor or co-perpetrator. If conduct cannot be characterised as co-perpetration or aiding and abetting, it is, according to the joint enterprise model here advocated, a true excess crime which cannot be attributed to the relevant individual. As we will now see, this idea also prevails in the German law of complicity.

Chapter 6: COMPLICITY IN GERMAN LAW

A Introduction

In Chapter 4, we examined how an individual can incur criminal responsibility under English law. Now we will do the same with respect to German law. While the way in which German law structures its various modes of liability is *per se* instructive from the common law point of view – as seen, English law struggles to accommodate joint enterprise within a coherent taxonomy of primary and secondary liability – for our purposes the most important areas of comparison relate to the concepts of *Mittäterschaft* (co-perpetration) and *Teilnahme* (aiding and abetting), as well as the German theory of derivative liability (*Akzessorietätsprinzip*).

We will see that German law, while it does not know a doctrine of joint enterprise in the sense of an independent inculpatory principle, also encounters problems of deliberate deviations in the commission of criminal wrongdoing such as those tackled in England via the joint enterprise doctrine. German law addresses these via a special principle, known as *Mittäter- und Teilnehmerexzess*, within its substantive law of co-perpetration and aiding and abetting, in combination with the wider concept of intention, *dolus eventualis*, introduced in Chapter 3.

In particular, we will see that the German concept of co-perpetration, *Mittäterschaft*, is broader than its English equivalent: unlike English law, it does not insist on a contribution to the *actus reus* of the relevant offence by each co-perpetrator but lets (significant) contributions at the planning or preparational stages suffice. It is also more refined as concerns its rules of attribution in that it has developed an (exculpatory) *Exzess* principle to deal with situations which in English law would be classified as joint enterprise cases. Thus, in functional terms the German concept of *Mittäterschaft* addresses both

English law co-perpetration and joint criminal enterprise. The same is true of the German equivalent of aiding and abetting: the legal theory fleshing out the *Teilnahme*-provisions caters for cases which in English law would be classified as instances of 'ordinary' aiding and abetting as well as some which would be dealt with via the doctrine of joint enterprise.

These insights are relevant to our subsequent discussion on how the English law of joint enterprise might be reformed (albeit that the suggestions made will not require a legal transplant and will be defended on the basis of English case law). As such, I will argue in Chapter 7 that the English concept of co-perpetration remains underused and conceptually underdeveloped; that the rules of joint enterprise have been commandeered largely to achieve what the rules on co-perpetration ought already to achieve – that is to make it possible mutually to attribute acts as between co-perpetrators which have been done in order to achieve a shared goal; and that, as a result, joint enterprise has been shaped as a concept of *inculpation*, when its proper function is to delimit the mutual attribution of acts as between P and S, and hence to *exculpate*. If one were to bring the English concept of co-perpetration more in line with its broader German counterpart and use the joint enterprise principle to delimit (as opposed to extend) a secondary party's liability in instances where P deliberately went beyond the common plan or purpose, the law of participation would become both structurally sounder and more proportionate in its response.

I Overview: Modes of Incurring Criminal Responsibility

Most of the rules fleshing out Germany's approach to complicity can be found in §§ 25-31 StGB. These sections belong to the penal code's General Part. Unless the definition of a particular offence contains specific criteria by which participants in crime (*Beteiligte*)[675] are to be identified, the common rules of §§ 25-27 StGB for distinguishing perpetrators and accessories apply. Like English law, German law thus adheres to a dualistic model of

[675] § 28 (2) StGB defines 'participants in crime' as *Täter* (perpetrators) and *Teilnehmer* (accessories).

delinquency.[676] The scheme is rather elaborate, however, with the StGB recognising no less than five different categories of participants in crime: direct, indirect, and joint perpetrators on the one hand (§ 25 StGB) and inciters and facilitators on the other (§§ 26, 27 StGB). One further category – the so-called *Nebentäter* ('parallel perpetrator') – has been identified in the case law.[677] This form of participation assumes significance whenever the courts need to distinguish instances where several persons act *alongside* each other in the commission of a crime – we looked at *Petters and Parfitt*[678] as an example of such a situation in Chapter 4 – from those where they act *in concert*. The former will be labelled *Nebentäter* – with the consequence that each one of them will simply be treated as a direct (sole) perpetrator as described in § 25 (1) alternative 1 StGB.

II Distinguishing Perpetrators from Accessories

As we saw in Chapter 4, in English law, by virtue of section 8 of the Accessories and Abettors Act 1861, a person who is an accessory can be charged, indicted and punished as a principal offender. The situation is more complex under German law. For purposes of punishment, the *Strafgesetzbuch* clearly distinguishes between perpetrators and accessories who *instigate* criminal wrongdoing on the one hand, and accessories who *facilitate* criminal wrongdoing on the other. While instigators are to be punished at the same level as perpetrators, facilitators *mandatorily* receive a reduced sentence, as made clear by §§ 27 (2), 49 (1) StGB.[679] The provision which subjects instigators to the same punishment as principal offenders takes account of the fact that there may be cases where the defendant's culpability is such that he would be quite insufficiently condemned if he were, on the basis

676 BeckOK StGB/Kudlich § 25 para 2; Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 153. This holds true only for non-regulatory crimes which are committed intentionally. For regulatory crimes (*Ordnungswidrigkeiten*) and crimes of negligence, German law applies a monistic model of delinquency, see Rolf Schmidt, *Strafrecht AT* (13th edn, Dr Rolf Schmidt Verlag 2014) paras 925-927.

677 See eg BGHSt 04, 20; BGH NStZ 1996, 227; Martin Fincke, 'Der Täter neben dem Täter' GA 1975, 161.

678 [1995] Crim LR 501 (CA).

679 See also George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 671.

of being a secondary party rather than a principal offender, to receive a more lenient sentence than the actual perpetrator. The obvious scenario is where the defendant was the instigator of the offence: in all likelihood, were it not for his act of incitement, the crime would not have been committed.

According to §§ 26, 27 StGB, the liability of accessories depends on the commission of a principal offence which must have been committed both intentionally and wrongfully (ie without justification). However, according to § 29 StGB – which stipulates that 'each participant-in-crime is to be punished according to his own guilt, irrespective of the guilt of others' – it is not necessary that the principal offence have also been committed culpably. It suffices that the conduct in question meets the definitional requirements of the principal offence (*tatbestandsmäßige Haupttat*) and that it was unlawful (*rechtswidrig*), as stipulated by §§ 26, 27, 11 (1) Nr 5 StGB. It is therefore generally possible under German law to incur criminal responsibility as an accessory for the wrongdoing of another who himself acted without blame. This is described as *Grundsatz der limitierten Akzessorietät*[680] (principle of restricted derivative liability: it is restricted to *Tatbestandsmäßigkeit* and *Rechtswidrigkeit*).[681] As I have argued in Chapter 4, the position seems to be the same under English law, although in England it is not usually described as a *general principle* but rather as an *exception* to the rule that the liability of an accessory (fully) derives from that of the principal offender.

[680] Rolf Dietrich Herzberg, 'Täterschaft, Mittäterschaft und Akzessorietät der Teilnahme' ZStW 99 (1987) 49, 65.

[681] Bohlander translates this as 'limited dependence', see Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 168.

B Primary Liability: Criminal Responsibility for One's Own Acts

I Direct Perpetrator (*unmittelbarer Täter*)

Unmittelbare Täter (direct perpetrators) are those who themselves fulfil all the definitional elements of a particular offence,[682] committing the *actus reus*[683] (*strafbare Handlung*) with the requisite *mens rea* (*Vorsatz*). Thus, if P stabs V with a knife, intending to cause him death, but acting without any of the aggravating features mentioned in § 211 StGB to upgrade this homicide to murder, he will be liable for manslaughter (§ 212 StGB). Although the wording of the provision ('if he *commits* the offence') seems to envisage an act rather than an omission, § 25 (1) StGB has been held to apply also to those who choose to remain inactive despite being under a legal duty to act, in circumstances where the inactivity then results in a consequence that the law seeks to prevent (such as where a parent omits to feed his child, leading to the latter's death).[684] As in English law, where two people independently work towards the same criminal goal, as in *Petters and Parfitt*,[685] they are treated as sole perpetrators rather than co-perpetrators.[686] In German law, they are categorised as *parallel* perpetrators (*Nebentäter*).[687]

II Joint or Co-Perpetrator (*Mittäter*)

§ 25 (2) StGB recognises joint or co-perpetration (*Mittäterschaft)* as a distinct head of liability. The subsection provides that where 'several persons commit the offence together, each of them is to be punished as a perpetrator'. The crucial passage here is *committing the*

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682 BeckOk StGB/Kudlich § 25 para 18; Schönke/Schröder/Weißer/Heine *StGB* § 25 para 2; Lackner/Kühl/Karl Lackner *StGB* § 25 para 8.

683 The term is here used in the common law sense, namely as referring to conduct, circumstance and consequence as definitional elements of a particular offence.

684 See eg BGHSt 40, 257, 265.

685 [1995] Crim LR 501 (CA).

686 See eg BGHSt 04, 20.

687 See Kindhäuser/Neumann/Paeffgen/Wolfgang Schild *StGB* § 25 paras 147-152; Uwe Murmann, *Die Nebentäterschaft im Strafrecht: Ein Beitrag zu einer personalen Tatherrschaftslehre* (Duncker & Humblot 1993).

offence together. While there is some controversy as to how co-perpetrators are to be distinguished from aiders and abettors (see discussion below),[688] it is generally accepted that § 25 (2) StGB requires joint perpetrators to *act in concert* (*gemeinschaftlich*) and on the basis of *a common plan or purpose* (*Tatplan oder Tatentschluss*).[689] However, the concrete requirements of these two 'cornerstones'[690] of co-perpetrator liability remain hotly debated.

*1 Common plan or purpose (*Tatplan oder Tatentschluss*)*

That much is clear: the common plan or purpose can be express or tacit,[691] and it can be established during the commission of the crime (*sukzessive Mittäterschaft*) by way of implication or estoppel (*durch schlüssiges Handeln*).[692] Whether, and if so on what conditions, surrounding circumstances (*Tatumstände*) and aggravating factors (*Erschwerungsgründe*) can be attributed to a successively joining co-perpetrator is a matter of debate. There is no unanimity in the relevant case law, and much appears to depend on the particular facts of a case.[693] Commentators are, however, agreed with the case law that no attribution of acts to a successive co-perpetrator is possible concerning events that were completely over by the time he joined in.[694]

Generally the case law does not set 'too high a threshold' for finding a common plan or purpose, although it is not sufficient that one individual unilaterally decided to join in

688 At p 215 ff.

689 Rene Bloy, 'Grenzen der Täterschaft bei fremdhändiger Tatausführung' GA 1996, 424, 431; George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 638; Schönke/Schröder/Weißer/Heine *StGB* § 25 para 72; Lackner/Kühl/Karl Lackner *StGB* § 25 para 9.

690 Christoph Barthe, *Joint Criminal Enterprise (JCE) – Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?* (Duncker & Humblot 2009) 158.

691 BGHSt 37, 289, 292; BGH NStZ 1994, 349; BGH NStZ 2003, 85.

692 BGH NStZ 1985, 70; BGH NStZ 2003, 85; Lackner/Kühl/Karl Lackner *StGB* § 25 para 10; MüKoStGB/Wolfgang Joecks § 25 para 230.

693 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 164.

694 BGH GA 1977, 144; BGH NStZ 1997, 272.

with someone else's crime, however effective his contribution might be.[695] As the flipside of the coin, a contribution of which the other perpetrator is unaware does not suffice to establish *Mittäterschaft*: § 25 (2) StGB presupposes a reciprocal understanding (*Einverständnis*) that the criminal goal be achieved through informed and dedicated cooperation (*bewusstes and gewolltes Zusammenwirken*).[696] This is not to say, however, that all co-perpetrators need to know each other in person: the necessary reciprocal understanding will be present as long as each participant contributes in the awareness that there are others who are 'in it' on the same understanding, ie that the criminal goal be achieved by way of cooperation.[697]

*2 Execution of the common plan or purpose (***Tatausführung***)*

In executing the common plan or purpose, *teamwork* in the sense of a division of labour (*arbeitsteiliges Handeln*) between individuals who consider themselves free and equal partners-in-crime (*frei und gleichrangig Handelnde*) is required.[698] Each co-perpetrator must make a significant, but not necessarily causal,[699] contribution towards the common criminal goal and its achievement.[700] § 25 (2) StGB allows for individual contributions (*Tatbeiträge*) to be added up, and the resulting crime is – *in full* – attributed to each and every participant.[701]

What suffices for such a mutually attributable contribution is difficult to define in the abstract, and indeed, is a matter of debate in the relevant academic literature: while one

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695 BeckOk StGB/Kudlich § 25 para 49; Kindhäuser/Neumann/Paeffgen/Wolfgang Schild *StGB* § 25 para 128.

696 BGHSt 06, 248, 249 f; Lackner/Kühl/Karl Lackner *StGB* § 25 para 10; MüKoStGB/Wolfgang Joecks § 25 para 230.

697 BGH NStZ 2010, 342, 343; Schönke/Schröder/Weißer/Heine *StGB* § 25 para 72.

698 Kindhäuser/Neumann/Paeffgen/Wolfgang Schild *StGB* § 25 para 125.

699 See Simone Kamm, *Die fahrlässige Mittäterschaft* (Duncker & Humblot 1999) 60.

700 Christoph Barthe, *Joint Criminal Enterprise (JCE) – Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?* (Duncker & Humblot 2009) 159; BeckOK StGB/Kudlich § 25 para 45-46; Lackner/Kühl/Karl Lackner *StGB* § 25 para 10.

701 See BGHSt 24, 286, 288; BGHSt 34, 124, 125; BGHSt 37, 289, 292; BGHSt 48, 189, 192; Schönke/Schröder/Weißer/Heine *StGB* § 25 para 61; Lackner/Kühl/Karl Lackner *StGB* § 25 para 9.

school of thought insists on a significant contribution towards the *actus reus* of the offence in question (*wesentliche Mitwirkung im Ausführungsstadium*),[702] the case law and prevalent view amongst commentators is that it is sufficient that the potential *Mittäter* was involved only at the planning stage[703] or 'in the period between the actual completion of the *actus reus* (*Vollendung*) and the factual end of the commission of the offence (*Beendigung*)',[704] so long as he acts on the basis of the common plan or purpose. The tricky task in these instances is to draw the line between co-perpetration (*Mittäterschaft*) and aiding and abetting (*Beihilfe*). As already noted, the difference is crucial because of the mandatory reduction in sentence for aiders as opposed to principal parties. We will look at the criteria that have been developed to assist the courts in this difficult task in more detail below (in the context of the rules of aiding and abetting (*Beihilfe*));[705] suffice it to say at this stage that it is quite possible to become a co-perpetrator under German law even though one's conduct falls short of any of the *actus reus* elements, as long as one's involvement entails some degree of *functional control over the commission of the offence*.[706] Indeed, even a mere *intellectual* contribution to a crime has been deemed sufficient,[707] albeit that any lack of participation in the actual execution (*Beteiligungsminus*) has usually to be compensated for by way of greater involvement at the planning or preparation stages.[708]

This means that, in contrast to English law, a co-perpetrator under German law is not required to have actually participated in the offence's *actus reus*; it suffices that he has

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[702] Rene Bloy, *Die Beteiligungsform als Zurechnungstypus im Strafrecht* (Duncker & Humblot 1985) 196 ff; Rene Bloy, 'Grenzen der Täterschaft bei fremdhändiger Tatausführung' GA 1996, 424, 436-437; Wilfried Bottke, 'Mittäterschaft bei gemeinsam fahrlässiger oder leichtfertiger Erfolgserwirkung' GA 2001, 463, 472; Volker Erb, 'Mord in Mittäterschaft – BGH, NJW 1991, 1068' JuS 1992, 197, 199; Rolf Dietrich Herzberg, 'Täterschaft, Mittäterschaft und Akzessorietät der Teilnahme' ZStW 99 (1987) 49, 54-55, 59-60.

[703] RGSt 35, 13, 17; RGSt 53, 138; RGSt 67, 392; RGSt 74, 21, 23; BGHSt 11, 268, 271 f; BGHSt 14, 123, 128 f; BGHSt 16, 12, 14; BGHSt 33, 50, 53; BGHSt 37, 289, 292; BGHSt 40, 299, 301; BGH NStZ 2002, 200, 201; MüKoStGB/Wolfgang Joecks § 25 para 199.

[704] Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 164.

[705] At p 215 ff.

[706] Such a functional control has been found lacking eg in the case of individuals whose contribution did not go beyond driving the get-away car or keeping a lookout, see BGH NStZ 2006, 94; BGH NStZ-RR 2010, 139.

[707] BGHSt 11, 268; BGHSt 16, 12; BGHSt 32, 165.

[708] Schönke/Schröder/Weißer/Heine *StGB* § 25 para 66.

played a significant role in its planning, preparation or completion. It would thus seem that the German concept of co-perpetration is wider than its English counterpart which, as we have seen, requires execution of (part of) the *actus reus* of the offence. The rationale under German law for casting the net of liability for joint perpetration quite so widely is that otherwise, for example, the gang leader or mastermind (*Bandenchef*) who has done all the planning and effectively determined how the criminal event is to evolve, but who is not present at the scene of crime and thus plays no role in its actual commission, could only be held to account as an aider or abettor.[709] Apart from concerns that these labels would not adequately describe the true nature and level of his involvement or his position within the criminal enterprise,[710] in the case of aiding (*Beihilfe*), he would also undeservedly benefit from the mandatorily reduced scales of punishment.

The mutual attribution of acts is limited by the underlying common plan or purpose: an act that goes beyond the common plan or purpose is known as an *Exzess*. Such a deviation will not (without more) be attributed to any of the actor's co-perpetrators, as will be explained further on below.[711]

3 Mens Rea

While *actus reus* elements are mutually attributed as between the different co-perpetrators, *mens rea* elements are not imputable.[712] This means that each party needs himself to possess the requisite *mens rea* (including so-called *strafbegründende persönliche Merkmale*, ie personal characteristics which the offence definition prescribes as relevant). What exactly is needed to satisfy the *mens rea* requirements depends on the offence with which the co-perpetrator is charged: *Mittäterschaft* is a head of liability, not an offence in

709 ibid para 68.
710 Christoph Barthe, *Joint Criminal Enterprise (JCE) – Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft*? (Duncker & Humblot 2009) 159-160.
711 At p 220 ff.
712 ibid 160.

itself. As a general rule crimes committed by way of joint perpetration require *Vorsatz*, ie *dolus eventualis* (unless the offence in question stipulates for *dolus directus* I or II). This is because the scope of application of § 25 StGB is restricted to crimes of intent (*vorsätzliche Begehungsdelikte*).[713] Intent crimes for the purpose of § 25 StGB include intent-negligence combinations (so-called *erfolgsqualifizierte Delikte*, as introduced in Chapter 3) which require each co-perpetrator to have acted with intent as to the underlying basic offence (*Grunddelikt*) and to have been negligent or careless as to the occurrence of the particular prohibited consequence.

A co-perpetrator's *mens rea* must, of course, relate to the common plan or purpose (otherwise he would be a perpetrator, but not *co*-perpetrator, with the result that the others' actions could not be attributed to him and vice versa).[714] This requires that he conceive of his actions not merely as assisting others in their criminal wrongdoing but as furthering the actions of his fellow co-perpetrators 'as part of a common whole'.[715]

4 Legal Consequences

§ 25 (2) StGB allows for the co-perpetrators' individual contributions (*Tatbeiträge*) to be added up, and the resulting crime (*Tat*) is – *in full* – attributed to each and every participant.[716] This does not mean, however, that P1 and P2 will necessarily be punished for the same offence: co-perpetrators are only liable as such in so far as their criminal intent overlaps (*im Umfang ihrer Willensübereinstimmung*). One of them may well intend to comit a crime (eg manslaughter, § 212 StGB) which goes beyond what the other aims to achieve (eg assault occasioning bodily harm, § 223 StGB).[717] In such a case, it is quite

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713 Kindhäuser/Neumann/Paeffgen/Wolfgang Schild *StGB* § 25 para 1; Rolf Schmidt, *Strafrecht AT* (13th edn, Dr Rolf Schmidt Verlag 2014) paras 1021, 1025.

714 Schönke/Schröder/Weißer/Heine *StGB* § 25 para 99.

715 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 163-64.

716 See BGHSt 24, 286, 288; BGHSt 34, 124, 125; BGHSt 37, 289, 292; BGHSt 48, 189, 192; Schönke/Schröder/Weißer/Heine *StGB* § 25 para 61; Lackner/Kühl/Karl Lackner *StGB* § 25 para 9.

717 See eg RGSt 44, 321, 323.

possible for P1 to be convicted as a co-perpetrator to a jointly committed assault occasioning bodily harm only, while P2 will be liable for manslaughter. Differences in outcome are also brought about by specific rules of secondary liability (esp. §§ 28 (2), 29 StGB) and the so-called *Exzess* principle, both of which are discussed below in the context of accessorial liability.[718]

5 Comparative Observations

On its face, the German concept of *Mittäterschaft* is broader than the English law of co-perpetration. This does not mean, however, that *liability on the basis of a common plan or purpose* is wider under German than under English law: as we saw in Chapter 4, English law recognises joint enterprise as an additional and, possibly, distinct route to imposing criminal liability on the basis of a common plan or purpose. It is via joint enterprise that English law holds individuals who did not themselves act out the *actus reus* (eg of murder) to account for the (murderous) acts of others, provided it can be shown that that the former were party to a common plan or purpose underlying the events that led to murder and had foresight that their companion might commit murder on the occasion of their joint criminal wrongdoing.

Taking this into account, it seems fair to argue that the German concept of co-perpetration has in fact two functional equivalents in English law: joint perpetration and the doctrine of joint criminal enterprise.[719] More precisely, German co-perpetration seems to encompass co-perpetration as we know it under English law (requiring engagement in the *actus reus* of an offence) plus a principle of liability which looks very much like the first limb of the English joint enterprise doctrine (requiring a common plan or purpose, but no contribution to the *actus reus*).

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718 At pp 201 ff and 220 ff.

719 Similarly Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 161.

Yet there are differences between joint enterprise liability thus identified in English and German law: under the German functional equivalent participants are labelled *Mittäter*, ie principal offenders, whereas English law calls them secondary parties, holding them liable on the basis of accessorial (rather than primary) liability. In effect, the difference may be considered negligible, however, as we saw in Chapter 4, English law treats those convicted under joint enterprise *like* principal offenders by virtue of section 8 of the Accessories and Abettors Act 1861. The difference is thus one of labelling rather than legal consequence. On the other hand, the *mens rea* component of the German equivalent differs significantly from the relevant English law: intention (ie *dolus eventualis* at a minimum) is required before someone can be convicted as a co-perpetrator. In contrast to the English doctrine of joint enterprise, foresight of the harmful consequence does not suffice to trigger liability; German law insists on some form of endorsement. For this reason, it would seem that, all things considered, the English law relating to liability on the basis of a common plan or purpose is actually wider in its scope of application than its German functional equivalent.

III Perpetration by Means

*1 Innocent Agency (*Mittelbare Täterschaft*)*[720]

The concept of *mittelbare Täterschaft* serves to punish – as *perpetrators* – those that bring about a criminal offence through the conduct of another person. As such, it is the functional equivalent of the English notion of innocent agency.[721]

According to § 25 (1) alternative 2 'a person is to be punished as a perpetrator if he commits the offence … through another person'. This has been interpreted to mean that

[720] Bohlander refers to this as 'principal by proxy', see Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 153.

[721] Similarly Michael Bohlander, 'Problems of transferred malice in multiple-actor scenarios' (2010) Journal of Criminal Law 145, 155.

while the indirect perpetrator relies on another person to commit the *actus reus* of the specific offence, he himself needs to possess the requisite *mens rea* (ie mental state and culpability).

The 'other person' is commonly referred to as *Tatmittler* (agent) or *menschliches Werkzeug* (human tool); the indirect perpetrator is called *Hintermann* (actor-in-the off).[722] It is characteristic of instances of *mittelbare Täterschaft* that the agent will not normally be criminally liable himself, a fact which the indirect perpetrator calculatingly exploits in order to further his own criminal goals.[723] The indirect perpetrator outmatches the innocent agent and controls his conduct *tactically* – with the result that, *legally*, the ensuing commission of the offence appears as his 'handiwork', even though, *factually,* he did not commit the *actus reus* himself.[724] The indirect perpetrator, in other words, is the real author of the criminal wrongdoing that results from the innocent actor's conduct.

*2 Semi-Innocent Agency ('***Täter hinter dem Täter***')*

In accordance with the principle of individual criminal responsibility (*Verantwortungsprinzip*), the concept of indirect perpetration is generally assumed inapplicable where the 'agent' is himself criminally liable. However, having adopted a view predominantly advanced since the 1960s by Roxin and Schroeder,[725] the courts recognise a limited exception to this which has come to be known as *Täter hinter dem Täter* ('perpetrator behind the perpetrator' or semi-innocent agency). The most prominent group of cases concerns instances of so-called 'organisational control' (*Organisationsherrschaft*).[726] These are characterised by the indirect perpetrator's taking

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722 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 664.

723 BeckOk StGB/Kudlich § 25 para 20.

724 Peter Cramer, 'Gedanken zur Abgrenzung von Täterschaft und Teilnahme' in Arthur Kaufmann and others (eds), *Festschrift für Paul Bockelmann zum 70. Geburtstag* (Beck 1979) 389, 397.

725 See Claus Roxin, 'Organisationsherrschaft und Tatentschlossenheit' in Andreas Hozer and others (eds), *Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag* (CF Müller 2006) 387 ff.

726 BGHSt 35, 347, 353; BGHSt 40, 218.

advantage of hierarchical structures within a particular organisation and the fact that the organisation's activities, once set in motion, evolve almost automatically, in circumstances where the actual perpetrator (a member of the organisation) remains criminally responsible himself.[727] The concept resembles that of command responsibility in international criminal law, but is not restricted to military organisations.[728] Most recently, it assumed significance after Germany's Reunification in the context of fatal shootings at the East German–West German borders. Border guards of the German Democratic Republic who had fatally shot citizens trying to enter West Germany were held criminally responsible for the killings as principal offenders.[729] By contrast, those who had authorised those shootings were initially only found guilty as aiders and abettors. However, on appeal to the BGH, they were condemned as *Täter hinter dem Täter* and found guilty of manslaughter in *mittelbarer Täterschaft* (§§ 212, 25 (1) alternative 2 StGB).[730]

C Secondary Liability: Criminal Responsibility for the Acts of Another

When it comes to incurring secondary liability for the criminal acts of another, German law formally distinguishes between two types of accessories: those who assist or facilitate the criminal wrongdoing (*Beihilfe*), and those who instigate or solicit the offence in question (*Anstifting*). The latter mode of participation 'renders [the accessory's] status closer to that of a full partner in the crime',[731] which is reflected in the fact that according to § 26 StGB the instigator, unlike the facilitator, will be punished like a perpetrator. The facilitator, by

727 BeckOK StGB/Kudlich § 25 para 33.

728 Structures of organisational control can be found not only in the state or governmental context; they also occur in corporate and entrepreneurial environments, so that the category of *Täter hinter dem Täter* may be capable of capturing areas of organised crime, see Lackner/Kühl/Karl Lackner *StGB* § 25 para 2.

729 BGHSt 39, 1, 31; BGHSt 40, 218.

730 BGHSt 40, 218, 232.

731 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 640.

contrast, can expect to receive a reduced sentence (§§ 27 (2) sentence 2, 49 (1) StGB). The differentiation between instigator and facilitator has further practical significance: while attempted aiding and abetting is not a crime, attempting to incite someone to commit a serious offence remains punishable.[732]

I The Derivative Basis of Secondary Liability

*1 The principle of restricted derivative liability (*Limitierte Akzessorietät*)*

As seen,[733] the German concept of secondary liability follows a restricted model of derivative liability, coupling the perpetrator's wrongful act with the accessory's culpability, in much the same way as English law.

2 Akzessorietätslockerung *in § 28 StGB for Special Personal Characteristics*

§ 28 StGB contains a further easing of this principle of derivative liability (*Akzessorietätslockerung*). This provision entails stipulations regarding offence definitions with so-called 'special personal characteristics' (*besondere persönliche Merkmale*) that establish criminal liability or aggravate, mitigate or exclude punishment. Special personal characteristics cover 'qualities that adhere to a person permanently by nature, such as sex, age or being someone's relative, but also those that may be merely temporarily assigned, for example, whether someone is a civil servant, a judge, a soldier, whether he or she has been specifically entrusted with the care for a certain matter' etc.[734] As Bohlander has observed, the significance of § 28 StGB is that 'the liability of [S] and P or several Ps can go different ways if one has a special personal characteristic that the other has not.'[735]

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732 § 30 (1) StGB; §§111 (2), 159 StGB.

733 See p 189.

734 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 174. See also Schönke/Schröder/Weißer/Heine *StGB* § 28 para 10-14.

735 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 173.

§ 28 StGB assumes significance in relation to the murder statute's *täterbezogene Mordmerkmale* (those aggravating factors that describe the defendant's attitude or motive, ie killing for pleasure (*Mordlust*), for sexual gratification (*Befriedigung des Geschlechtstriebes*), out of greed (*Habgier*) or otherwise base motives (*niedrige Beweggründe*), in order to facilitate or to cover up another offence (*Ermöglichungsabsicht und Verdeckungabsicht*).

(a) § 28 (1) StGB

According to § 28 (1) StGB, '[i]f special personal characteristics (§14 (1)) that establish the principal's liability are absent in the person of *the secondary participant (abettor or aider)* the latter's sentence shall be reduced pursuant to § 49 (1).'

A special personal characteristic *establishes* criminal liability if the offence definition of which it is a part amounts to an independent offence (*eigenständiges Delikt*) rather than a mitigation or aggravation (to which § 28 (2) StGB applies) of another basic offence. The legal effect of § 28 (1) StGB is a reduction in sentence for accessories.[736]

(b) § 28 (2) StGB

According to §28 (2) StGB, '[i]f a rule of law provides that special personal characteristics aggravate, mitigate or exclude punishment this shall apply only to the accomplices (principals or secondary participants) in whose person they are present.'

In other words, any aggravation, reduction or exclusion only applies to those participants in crime who themselves possess the requisite qualities.[737]

The legal effect of § 28 (2) StGB is a shift in *the applicable provision* (*Tatbestand*) including the ensuing sentencing frames for the participant (be he a co-perpetrator or

[736] Schönke/Schröder/Weißer/Heine *StGB* § 28 para 24.
[737] Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 174.

secondary party), not just a shift in the applicable *scales of punishment* (*Strafrahmen*).[738] This might be compared to the effect the partial defences of diminished responsibility and loss of control have on a murder charge in English law which is then downgraded to one of voluntary manslaughter.[739]

(c) Two crucial differences between § 28 (1) StGB and § 28 (2) StGB

There are two important differencen between § 28 (1) StGB and § 28 (2) StGB: first, § 28 (1) StGB applies only to secondary parties, not to co-perpetrators, whereas § 28 (2) applies to both secondary parties and co-perpetrators. Secondly, the effect of § 28 (1) StGB is mitigating only (a reduction in sentence), whereas § 28 (2) also allows for an aggravation of punishment.

(d) § 28 StGB in the context of multi-handed homicides

In the context of multi-handed homicides, § 28 StGB may lead to different verdicts – murder versus manslaughter – for principal offenders and accessories, depending on whether the latter shared or lacked the formers' attitude or motive-based *Mordmerkmale* (ie the aggravating factors of the first and third group of § 211 StGB: killing for pleasure, for sexual gratification, out of greed or otherwise base motives, in order to facilitate or to cover up another offence).[740]

In this context, the application of § 28 StGB has proved troublesome and, indeed, has given rise to a fierce debate between academics and the courts. This is for the following reason: as seen in Chapter 3, the BGH treats § 211 and § 212 as independent offences.[741]

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738 ibid. See also Rolf Schmidt, *Strafrecht AT* (13th edn, Dr Rolf Schmidt Verlag 2014) paras 1141; Schönke/Schröder/Weißer/Heine *StGB* § 28 para 27.

739 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 192.

740 The aggravating factors listed in the second group of § 211 StGB go to the mode in which the killing is committed. As such, they do not amount to special personal characteristics and are not covered by § 28 StGB.

741 BGHSt 01, 368, 370; BGHSt 02, 251, 255; BGHSt 06, 329, 330; BGHSt 22, 375, 377; BGHSt 36, 231, 233. See also Horst Woesner, 'Zur Gefahr einer moralisierenden Auslegung der Mordmerkmale' NJW 1978, 1025, 1025.

On this view, the elements of both offences, in the language of § 28 StGB, *establish* liability; they do not *modify* (ie increase or reduce) it.[742] This, in turn, means that accessorial liability in the context of homicide is governed by § 28 (1) StGB rather than § 28 (2) StGB.

The prevailing view amongst academic commentators,[743] by contrast, considers § 212 StGB and § 211 StGB as basic and qualified offence respectively. According to this school of thought, the murder statute increases (ie modifies) criminal liability, it does not just establish it, so that § 28 (2) StGB rather than § 28 (1) StGB applies to multi-handed homicides.

In practice, the extent of liability of an accessory depends on which of the opposing schools of thoughts the trial court follows. This will usually be the BGH's view, but we noted that the 5th Senate disagreed, albeit obiter, with the view traditionally taken by the judiciary, which *may* indicate that the judiciary is slowly being persuaded by the prevailing academic opinion. Having said that, there have been no decisions since which have followed the 5th Senate's view.

3 Can the Liability of P and S 'go different ways'?

In the English chapter on complicity (Chapter 4), we noticed some problematic cases concerning the questions of (1) whether S can be convicted when P is acquitted; (2) whether S can be convicted of a less serious offence than P, and (3) whether S can be convicted of a more serious offence than P. Although the answers to these questions seem, at first sight, more straightforward in German law than under English law, owing to the tripartite *Verbrechensaufbau* which provides German criminal law and doctrine with a clear and structured framework, the answers to questions (2) and (3) are rather more complex in

742 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 175.

743 Wolfgang Mitsch, 'Grundfälle zu den Tötungsdelikten' JuS 1996, 26, 29; Harro Otto, 'Die Mordmerkmale in der höchstrichterlichen Rechtsprechung' Jura 1994, 141, 142.

the homicide context because of the murder statute's reliance on 'personal characteristics'-*Mordmerkmale,* the modifications of the theory of derivative liability imposed by the aforementioned § 28 StGB, and the uncertain relationship between the murder and manslaughter provisions.

(a) Can S be convicted when P is acquitted?

As an offshoot of the tripartite offence structure, when it comes to assessing whether S can be convicted when P has been acquitted, German law differentiates according to the basis for P's acquittal. In other words, the law looks to whether P was acquitted because (1) his conduct did not meet the *mens rea* requirements of the relevant offence definition, or (2) his conduct was justified, or (3) his conduct was excused.

(i) P's conduct did not meet the mens rea requirements

As seen, under German law a principal offence (*teilnahmefähige Haupttat*) is defined as one that has been committed intentionally. Therefore S cannot be liable – as an accessory (he may, of course, be guilty as a *mittelbarer Täter*) – where P is acquitted because he lacked intent to commit the offence in question.

(ii) P's conduct was justified

The same is true where P's conduct was justified: § 11 (1) Nr 5 StGB defines conduct as 'unlawful' if it fulfils the requirements of a criminal offence[744] without there being a justificatory defence. Fletcher gives the following example to illustrate the implications for accessorial liability:

> [s]uppose that [V] attacks [P] and [P] responds in knowing self-defense. [S] comes upon the scene, and thinking that [P] has started the fight, [S] hands [P] a club, the better to finish off his opponent. [S] acts with the intent to injure and believes that the act is wrongful. The question is whether [S]'s

[744] Regulatory offences (*Ordnungswidrigkeiten*) do not suffice.

> intent is sufficient to hold him accountable for the consequences of [P's] justified act of self-defense.[745]

Since P's conduct is *justified* and as such not unlawful, under the German concept of derivative liability, the requirements of a *teilnahmefähige Haupttat* are not made out and S cannot be charged as an accessory to P's actions. Which is not to say, however, that S cannot be held to account otherwise, eg as a perpetrator-by-means or on the basis of attempt.

(iii) P's act was excused

The fact that P could avail himself of an excuse, by contrast, does not preclude S from being convicted as an accessory. Excuses are personal to the actor: as seen, a principal offence is defined in terms of a crime that is committed intentionally and unlawfully; it does not need to have been committed culpably. Whether P acted culpably or not does thus not determine the extent of S's culpability. If P's deed was done intentionally and unlawfully, and S cannot avail himself of an excuse, he will be liable even though P is acquitted for lack of culpability.

(b) Can S be convicted of a less serious offence than P?

Generally speaking, it is possible for S to be convicted of a less serious offence than P. This is particularly true in situations where the offences concerned stand in a relationship of lesser-included and more serious offence. For example, under German law, theft (§ 242 StGB) is a lesser-included offence to robbery (§ 249 StGB, requiring theft plus use of force). Thus, if S persuades P to steal V's purse, and P, in doing so, resorts to violence, so that the latter in effect commits a robbery, S will be guilty of *Anstiftung* to theft only (§§ 242, 26 StGB).[746]

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745 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 667.

746 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 170.

(c) Can S be convicted of a more serious offence than P?

While some academic commentators answer this question in the affirmative, on the case law it is not generally possible for S to be convicted of a more serious offence than P has committed (leaving aside liability for an attempted inducement to commit a felony under § 30 (1) StGB).[747] Thus, if S induces P to kill V, but P does no more than cause V some injury, S will be liable for inciting P to commit an assault occasioning bodily harm (§§ 223 (1), 26 StGB). In a case such as *Richards*,[748] therefore, German law would arrive at the same conclusion as the (English) Court of Appeal when it quashed the appellant's conviction for wounding with intent and substituted it by one for unlawful wounding (although we noted in Chapter 4 that this approach has been much criticised in the subsequent case of *Howe*).[749]

(d) Added Complexities in Homicide Cases: § 28 StGB and täterbezogene Mordmerkmale

The issue of whether S can be convicted of a less or more serious offence than P becomes more complex in the context of homicide offences. This is because § 28 StGB, which, as explained above, modifies the general rules of (limited) accessorial liability, applies to certain (but not all) of the aggravating factors listed in § 211 StGB, so that in particular circumstances S's liability is not just determined by the general rules of accessorial liability but by the more specific rules contained in § 28 StGB. Further complexity is added by the fact that courts and academic commentators disagree as to which subsection of § 28 StGB applies in this context: the answer, as indicated above, depends very much on the classification of *Mord* and *Totschlag* as independent (so the BGH) or graded offences (so the prevailing academic opinion). The resulting complexities are bewildering and this is

747 See generally MüKoStGB/Wolfgang Joecks § 28 para 52 ff.
748 *Richards* [1974] QB 776 (CA).
749 [1986] QB 626 (CA).

one reason why the whole law of homicide is about to undergo root and branch reform. Fortunately it is not necessary for the purpose of this thesis to rehearse the different permutations. This is because, for homicides commited *en groupe*, the prosecution, in order to bring home a charge of manslaughter or murder, has to prove intention to kill on the part of all co-perpetrators, and an intention to assist a killing in the case of accessories. As we will see, notwithstanding the fact that *dolus eventualis* would suffice, the prosecution, in the cases that concern us here, is rarely if ever able to show an intention to kill as opposed to an intention to inflict personal injury. In German law, as we have seen, an intention to inflict even serious personal injury will not suffice for manslaughter or murder. The prosecution will therefore, in the paradigm joint enterprise cases, charge the participants in what English law might regard as joint enterprise murder with being co-perpetrators or accessories to *Körperverletzung mit Todesfolge*.

II Modes of Complicity

1 Incitement ***(§ 26 StGB)***[750]

According to § 26 StGB, an instigator is someone 'who intentionally incites another to intentionally and unlawfully commit a criminal offence'. Instigators need to be distinguished from aiders and abettors on the one hand and perpetrators-by-means on the other. A person who merely advises or counsels another to commit a crime is an aider, while someone who orders or solicits is an instigator.[751] Instigation differs from perpetration by means in that the instigator lacks control over the act or, in Fletcher's words, he does not 'exercise hegemony over the execution of the deed.'[752] The hallmark of instigation thus is that the instigator puts another up to committing an offence the execution

750 Bohlander refers to this as 'abetting', see Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 153.

751 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 672.

752 ibid.

of which he does not control. § 26 StGB stipulates that instigators are to be punished like perpetrators. The justification for putting instigators on a par with perpetrators is that, ultimately, the instigator's actions initiated the commission of the crime.[753]

(a) The Instigator's Actus Reus

The *actus reus* of instigation requires that S have ordered P to commit a crime (in the sense of an intentional and unlawful act). To 'order' (*bestimmen*) means to induce someone else to commit a crime.[754] The provision does not specify what exactly counts, and whilst the case law equates *bestimmen* with 'bringing about', 'causing' or 'contributing to' the decision to commit the relevant crime by any means[755] – so that the German concept encompasses instances of procurement[756] under English law – the dominant view amongst commentators requires some kind of communication between P and S which was causal for the principal's decision to commit the crime.[757] According to this school of thought it would not be enough, for example, for S to become an instigator of car theft that he, after having borrowed his friend's car, abandon the car (with keys attached) in an area where he knows car thieves are operating, in the hope that it will be stolen. However, in those circumstances S will have incurred responsibility for aiding P's theft of the car: aiding does not require any psychological contact between perpetrator and accessory.[758] Case law and commentators are agreed, however, that S's communication to P does not need to be the

753 BeckOK StGB/Kudlich § 26 para 1.

754 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 672. See also BGHSt 02, 279, 282; BGHSt 45, 373, 374; Matthias Krüger, 'Zum Bestimmen im Sinne von §§ 26, 30 StGB' JA 2008, 492-498.

755 BGHSt 02, 279; BGHSt 45, 373, 374; BGH NStZ 2000, 421, 421.

756 See Rene Bloy, *Die Beteiligungsform als Zurechnungstypus im Strafrecht* (Duncker & Humblot 1985) 328; Lothar Kuhlen and Frank Roth, 'Der praktische Fall – Strafrecht: Ein Experiment in der U-Bahn' JuS 1995, 711, 712; Michael Heghmanns, 'Überlegungen zum Unrecht von Beihilfe und Anstiftung' GA 2000, 473, 487; Lackner/Kühl/Karl Lackner *StGB* § 26 para 2.

757 Harro Otto, 'Anstiftung und Beihilfe' JuS 1982, 557, 560; Joachim Kretschmer, 'Welchen Einfluss hat die Lehre der objektiven Zurechnung auf das Teilnahmeunrecht?' Jura 2008, 265, 266. See also Christoph Barthe, *Joint Criminal Enterprise (JCE) – Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?* (Duncker & Humblot 2009) 154; George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 681.

758 Lackner/Kühl/Karl Lackner *StGB* § 27 para 4; Klaus Geppert, 'Die Beihilfe (§ 27 StGB)' Jura 1999, 266, 268.

sole cause for the latter to commit the principal offence: it suffices if the instigator's act is but one reason for the principal offender to commit the offence.[759] All are further agreed that if P is already determined to commit the crime, S will not be liable as an instigator, as one cannot incite someone to do something if that person is already determined to do so anyway; however, in such circumstances, S may incur liability as an aider and abettor, in that his attempt to put up P to commit the crime constitutes counselling (*psychische Beihilfe*),[760] or for an attempt to induce P to commit a serious crime according to § 30 (1) StGB.[761]

By contrast, it is quite possible for S to induce P to commit a different (*Umstiftung*) or more serious offence than P intended. In this case, S will incur liability as an instigator to the different or more serious offence.[762]

Since instigation is based on the concept of derivative liability, it is a prerequisite for liability that the principal offender have actually committed (or at least attempted, if attempts of the relevant crime incur liability) the principal offence.

(b) The Instigator's Mens Rea: Two Dimensions of Fault

The concept of instigation requires two dimensions of fault (so-called *doppelter Anstiftervorsatz*).[763]

(i) The first Dimension of Fault: *Mens Rea* as to S's own conduct

It does not matter how the instigator induces the perpetrator to commit the crime, as long as his act of instigation is done intentionally.[764] As Bohlander has observed, German law does

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759 BGH NStZ 2000, 421 f; BGH NStZ 2001, 42; Schönke/Schröder/Weißer/Heine *StGB* § 26 para 2.

760 Rolf Schmidt, *Strafrecht AT* (13th edn, Dr Rolf Schmidt Verlag 2014) para 1053.

761 ibid. See also Christoph Barthe, *Joint Criminal Enterprise (JCE) – Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?* (Duncker & Humblot 2009) 155; Michael Bohlander, Principles of German Criminal Law (Hart 2009) 168.

762 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 168; BeckOK StGB/Kudlich § 26 para 16.

763 BeckOK StGB/Kudlich § 26 para 19.

764 BGHSt 40, 304, 306 f.

not recognise 'a concept of procurement or assistance to negligence-based or even strict liability offences, nor is there provision for negligent instigation or assistance'.[765] *Dolus eventualis* suffices.[766]

(ii) The second Dimension of Fault: *Mens Rea* as to P's intentional wrongdoing

Similar to the English requirement of foresight of the 'essential matters' of P's crime, it is not enough under German law for the instigator to induce P simply to the commission of 'some crime'.[767] While S does not need to know all the particulars either, he must be aware of the main elements of the crime to be committed.[768] The attitude taken by the German courts as to what constitutes such main elements is very similar to the English approach under *Bryce*:[769] while the instigator need not have in mind all the minutiae of the deed (such as time, location of the crime, surrounding circumstances), his intention to instigate must encompass sufficient characteristics of the main deed that it becomes identifiable as the crime in question.[770]

§ 26 StGB further requires S to act with *Vollendungswillen*,[771] ie he must intend (*dolus eventualis*) that P will fully execute, not just attempt, the crime in question (although S may, of course, already incur liability for accomplished incitement where P's crime does not proceed beyond the stage of an attempt).[772]

2 Aiding and Abetting (§ 27 StGB)

§ 27 (1) StGB states that 'someone is guilty of aiding and abetting if he intentionally provides assistance to another in his intentional and unlawful commission of a criminal

765 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 168.
766 BGHSt 02, 279; BGHSt 44, 99; Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 169; Schönke/Schröder/Weißer/Heine *StGB* § 26 para 17.
767 Lackner/Kühl/Karl Lackner *StGB* § 26 para 5.
768 ibid. See also Schönke/Schröder/Weißer/Heine *StGB* § 26 para 20.
769 Likewise Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 169.
770 BGHSt 34, 59, 63, 67 f.
771 Mark Deiters, 'Straflosigkeit des agent provocateur?' JuS 2006, 302, 303; Lackner/Kühl/Karl Lackner *StGB* § 26 para 4; Schönke/Schröder/Weißer/Heine *StGB* § 26 para 17.
772 Mark Deiters, 'Straflosigkeit des agent provocateur?' JuS 2006, 302, 303.

offence'. According to subsection (2), the facilitator's punishment, while based on the sanction (*Strafdrohung*) that applies to the principal offender, is to be reduced in accordance with § 49 (1) StGB. This reduction in the scales of punishments makes it important carefully to distinguish aiding and abetting from instances of co-perpetration. How this is done will be discussed further below.[773] As with aiding and abetting in English law, the accessory's liability depends on the actual commission of the primary offence. In contrast to attempted instigation (which is punishable in so far as it relates to a felony, see § 30 (1) StGB), there is no liability for attempted aiding and abetting.[774]

(a) The Aider and Abettor's Actus Reus

As a rule of thumb, all acts which are neither perpetration nor instigation amount to *Beihilfe*.[775] The assistance rendered can be physical or psychological.[776] It needs to be rendered intentionally, but does not have to be causal for the commission of the principal offence;[777] it suffices that the assistance facilitated it or made it safer for the principal offender.[778] The (controversial)[779] German position on causality in this context seems to correspond to the English position which lets acts suffice which have the potential to assist or encourage the principal offender.[780]

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773 At p 215 ff.

774 Lackner/Kühl/Karl Lackner *StGB* § 27 para 9.

775 Schönke/Schröder/Weißer/Heine *StGB* § 27 para 1.

776 Klaus Geppert, 'Die Beihilfe (§ 27 StGB)' Jura 1999, 266, 267; Klaus Geppert, 'Zum Begriff der Hilfeleistung im Rahmen von Beihilfe (§ 27 StGB) und sachlicher Begünstigung' Jura 2007, 589, 591; Lackner/Kühl/Karl Lackner *StGB* § 27 para 4.

777 BGHSt 46, 107, 109; BGHSt 54, 140; BGH NStZ 2004, 499, 500; BGH NStZ 2012, 316, 316; BGH NStZ 2013, 483; Schönke/Schröder/Weißer/Heine *StGB* § 27 para 4.

778 BGH NStZ 1985, 318; BGH NStZ 1995, 27, 28; BGH NStZ 1996, 485, 488; BGH NStZ 2004, 499, 500; BGH NStZ 2007, 230, 232; Lackner/Kühl/Karl Lackner *StGB* § 27 para 3; George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 680.

779 The majority of academic commentators demand a causal link, see Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 172, Christoph Barthe, *Joint Criminal Enterprise (JCE) – Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?* (Duncker & Humblot 2009) 155; Schönke/Schröder/Weißer/Heine *StGB* § 27 para 3.

780 Likewise Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 172.

(b) The Aider and Abettor's Mens Rea: Two Dimensions of Fault

Like incitement, *Beihilfe* requires two dimensions of fault (so-called *doppelter Gehilfenvorsatz*): S must contemplate the essentials of the principal offence as well as intend his own act of aiding and abetting.[781]

(i) The first Dimension of Fault: *Mens Rea* as to S's own conduct

The first dimension of fault requires that S intend to assist or encourage P in the latter's criminal wrongdoing. As with instigation, *dolus eventualis* is sufficient.[782]

(ii) The second Dimension of Fault: Mens Rea as to P's intentional wrongdoing

The second dimension of fault requires that S's *mens rea* relate to the execution and accomplishment of a principal offence that is outlined in its essentials.[783] However, since aiding and abetting, contrary to instigation, does not involve S having an impact on the principal's decision to commit the crime, the *mens rea* requirements concerning the detail of knowledge required to trigger liability are less stringent.[784] It can thus suffice if the facilitator knows that his act will enable the main perpetrator to commit a particular type of crime, even if the details are not known to him. An example would be the compilation of a false valuation which might clearly be used for the commission of a fraud of some kind.[785]

III Theories of Demarcation (*Abgrenzungstheorien*)

It has long been contentious which criteria to apply when it comes to distinguishing secondary parties from co-perpetrators. While, for our purposes, the approach taken in

781 Klaus Geppert, 'Die Beihilfe (§ 27 StGB)' Jura 1999, 266, 273; Lackner/Kühl/Karl Lackner *StGB* § 27 para 7.
782 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 173.
783 Lackner/Kühl/Karl Lackner *StGB* § 27 para 7.
784 BGH NStZ 2002, 145, 146; Joachim Kretschmer, 'Welchen Einfluss hat die Lehre der objektiven Zurechnung auf das Teilnahmeunrecht?' Jura 2008, 265, 268; Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 173.
785 Lackner/Kühl/Karl Lackner *StGB* § 27 para 7.

contemporary case law is key, it is instructive briefly to look at rival and past approaches, as these have all influenced the current leading approach.

1 Past Approaches

At one time, the debate was dominated by two opposing schools of thought, one of which looked exclusively at the 'outer appearance' or external elements of the criminal act (so-called *formell objektive Theorie*),[786] while the other focussed primarily on the offender's mental state and his attitude towards the deed (*subjektive Theorie*).[787] While these no longer have advocates, it is worthwhile looking at them in outline, as elements of both views continue to influence the present debate.

(a) Formal Objective Theory (formell-objektive Theorie)

According to the *formell-objektive Theorie*, only those who directly (ie not through the use of an innocent agent) execute the *actus reus* elements of a particular offence are to be regarded as perpetrators.[788] By contrast, offenders whose conduct does not satisfy any element of the offence definition are accessories. This school of thought, once popular with academic commentators, resulted in a very restrictive category of principal offender and was, for this reason, rejected by the case law. It is irreconcilable with the provision on perpetration by means in § 25 (1) StGB.

(b) Extreme Subjective Theory (extrem-subjektive Theorie)

The *Reichsgerichtshof* and the BGH initially relied on a rival approach which has come to be known as the extreme subjective theory.[789] This school of thought treated the offender's

786 MüKoStGB/Wolfgang Joecks Vor § 25 para 10.

787 RGSt 02, 160; RGSt 03, 181; RGSt 35, 13; RGSt 53, 138; RGSt 67, 392; RGSt 74, 21; BGHSt 04, 20, 42; BGHSt 06, 226, 248; BGHSt 11, 268, 271 f.

788 BeckOK StGB/Kudlich § 25 para 12.1; Schönke/Schröder/Weißer/Heine *StGB* § 25 para 50; Thomas Fischer, *StGB mit Nebengesetzen* (62nd edn, CH Beck 2015) Vor § 25 para 2.

789 BeckOK StGB/Kudlich § 25 para 12.2; Schönke/Schröder/Weißer/Heine *StGB* § 25 para 52.

mens rea, and in particular his attitude towards the deed, as all-decisive.[790] As such, it differentiated between two mental states: *animus auctoris* (also referred to as *Täterwille*) and *animus socii* (*Teilnehmerwille*).[791] The crucial question was whether the offender wanted the deed 'as his own' (*animus auctoris*) or whether he merely wanted to further the deed of another (*animus socii*). If the former, the defendant was to be regarded as the crime's perpetrator; if the latter, he was to be treated as an accessory.'[792]

The 1940 *Bathtub Case*[793] illustrates this approach – and its deficiencies – rather well: the mother of an unwanted newborn asked her sister to drown the baby in the bathtub. The sister did as she was told and was later convicted of homicide as a principal offender. On appeal, her conviction was quashed, however, on the basis that, since she had merely aimed to assist the baby's mother, she was an accessory rather than a principal offender. Taken to its extreme, the subjective approach thus allowed for someone to be treated as a perpetrator even though he did not contribute to the offence's *actus reus*, whilst someone could be labelled an accessory even though he alone accomplished the *actus reus* (without being an innocent agent).

2 Contemporary Approaches

Today, there is no longer scope for an extreme subjective theory due to the wording of § 25 (1) StGB: 'a person is to be punished as a perpetrator if he commits the offence personally or through another person'. Accordingly, while, as we will see below,[794] the courts still employ a subjective approach, in determining whether an individual acted with *animus*

790 RGSt 02, 160; RGSt 03, 181; RGSt 35, 13; RGSt 53, 138; RGSt 67, 392; RGSt 74, 21; BGHSt 04, 20, 42; BGHSt 06, 226, 248; BGHSt 11, 268, 271 f.

791 RGSt 37, 58; Thomas Fischer, *StGB mit Nebengesetzen* (62nd edn, CH Beck 2015) Vor § 25 para 3.

792 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 655; Lackner/Kühl/Karl Lackner *StGB* Vor § 25 para 5.

793 RGSt 74, 84.

794 At p 218 f.

auctoris, they now take onboard (objective) elements of the so-called *Tatherrschaftslehre* (control of the deed theory).[795]

(a) 'Control of the Deed Theory' (Tatherrschaftslehre)[796]

This school of thought (which most commentators subscribe to) 'takes the criterion of perpetration to be hegemony and control over the execution of the criminal act. An accessory is defined negatively as someone who does not have the requisite hegemony and control'[797] … 'of the process leading to consummation of the crime. They "aid" in the "commission of the offense" but they neither "commit" the offense nor determine its commission.'[798] Thus a perpetrator is the 'central figure' of the action, he guides and shapes events, he can delay or accelerate the commission of the crime according to his own will; while an accessory is at the periphery, influencing and promoting the commission of the offence from there.[799]

(b) Modified subjective Theory

In recent years the jurisprudence of the BGH has accepted some of the main tenets of the *Tatherrschaftslehre* as developed by academics. In distinguishing between perpetrator and accessory it now requires an 'evaluation of all the circumstances' contemplated by the participant in question.[800] Important pointers for *animus auctoris* (and thus for a characterisation of the participant as a perpetrator) are the 'degree of the participant's own interest in bringing about the criminal goal',[801] the extent to which he is involved in the

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795 BeckOK StGB/Kudlich § 25 para 13.

796 Fletcher refers to this as the theory of 'hegemony over the act', see George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 659.

797 ibid 655.

798 ibid 667.

799 Johannes Wessels, Werner Beulke, Helmut Satzger, *Strafrecht AT* (44th edn, CF Müller 2014) para 513.

800 BGHSt 28, 349; BeckOK StGB/Kudlich § 25 para 13; Schönke/Schröder/Weißer/Heine *StGB* § 25 para 63.

801 BGH NJW 2002, 3788, 3788; BGH NStZ 2004, 330, 331.

commission of the crime,[802] as well as the *Tatherrschaft*[803] or at least the will to control the execution of the deed.[804] This has led Bohlander to conclude that the 'BGH thus merely treats the substantive concept of who is a principal as a question of inferring the necessary *mens rea* from the objective evidence, which in effect makes it almost congruent to the academic majority approach of *Tatherrschaft'*.[805]

D Joint Enterprise Liability

I Introduction

German law does not recognise a doctrine of joint criminal enterprise in the sense of an independent head of liability or separate mode of participation *which exists alongside* co-perpetration, incitement and aiding and abetting. However, like English law, German law has to deal with situations of (a) accidental and (b) deliberate deviations from the anticipated course of conduct by a principal offender, both in instances where S is P's co-perpetrator and where S is P's accessory. As far as accidental deviations are concerned, we are looking for the *functional equivalent* of the English doctrine of transferred malice. As concerns deliberate deviations, we are looking for the *functional equivalent* of the English doctrine of joint enterprise.

II Accidental Deviations: *Aberratio ictus* and *Error in persona vel objecto*

Instead of relying on a common doctrine of transferred malice as English law does, German case law distinguishes between two situations, known as *aberratio ictus* and e*rror in persona vel objecto* respectively. *Aberratio ictus* concerns instances where the principal

802 BGH NStZ 1990, 80, 81.
803 BGHSt 28, 246, 349, BGHSt 35, 347, 353, BGHSt 47, 383, 385.
804 BGH NJW 1998, 2149, 2150; BGH NStZ-RR 2003, 265, 276; BGH NStZ-RR 2004, 40. See also Christoph Barthe, *Joint Criminal Enterprise (JCE) – Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?* (Duncker & Humblot 2009) 158; BeckOK StGB/Kudlich § 25 para 14.
805 Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 163.

offender *misses the target* and hurts or kills another victim as a result. The doctrine of *error in persona vel objecto* applies in instances where another victim is hurt or killed because P *is mistaken about V's identity.* In other words, German legal doctrine differentiates between physical mishaps and human errors.

The law in this area is both complex and controversial, with the courts applying different rules depending on whether or not the intended and actual target are equal in terms of protected legal interest. We do not need to consider the controversies and disagreements that characterise the German debate in this area of the law.

III Deliberate Deviations: Criminal Excesses

We have seen above that the first limb[806] of the English joint enterprise principle finds it functional equivalent in Germany's substantive law of liability as a co-perpetrator or aider and abettor; now we will see that the second limb[807] of joint enterprise finds its equivalent in the rules of the so-called *Teilnehmerexzess* and *Mittäterexzess*.

1 Teilnehmerexzess

The rules for a *Teilnehmerexzess* mirror those of the *Mittäterexzess*, ie if what P did goes beyond what S anticipated, S will not be liable for P's offence. Since this thesis is primarily concerned with joint enterprise liability, ie liability arising out of a common plan or purpose, we will not look at *Teilnehmerexzess* in greater detail, focussing instead on the analogous rules that apply in situations where one joint perpetrator deliberately deviates from the common plan or purpose. The difference between *Mittäterexzess* and *Teilnehmerexzess* is that in the latter case the yardstick for assessing whether P's conduct

806 'A secondary party is guilty of murder if he participates in a joint venture realising that in the course thereof the principal might use force with intent to kill or to cause grievous bodily harm, and the principal does kill with such intent (…)', James Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice 2015* (63rd edn, Sweet & Maxwell 2014) [19-24].

807 '… but if he goes *beyond the scope* of the joint venture (*i.e. does an act not foreseen as a possibility*), the secondary party is not guilty of murder or manslaughter', ibid (emphasis added).

amounted to a non-attributable criminal excess is not a common plan or purpose but what S imagined P would do (*Vorstellung*).

2 Mittäterexzess

(a) The Basic Principle

The basic rule is that acts which amount to a *deliberate* departure from a common plan or purpose will not be attributed to any co-perpetrator.[808] As such, the common plan or purpose fulfils a double function: first, it has an *inculpatory* function in that it provides the basis for – and thus legitimises – attributing the acts of one joint perpetrator to another.[809] Secondly, it has an *exculpatory* function in that it delimits this mutual attribution of acts:[810] acts done deliberately which exceed the common plan or purpose amount to a criminal 'excess' for which the actor alone is liable.[811]

At first sight, the *Mittäterexzess* principle resembles the second limb of the English doctrine of joint enterprise.[812] Indeed, as with English law, the tricky issue for German law is to determine which acts are within or beyond a common plan or purpose. The necessary inquiry is highly fact-specific. However, the courts have fashioned a number of sub-principles that assist them in determining whether a particular act is still covered by the common plan or purpose. To these we now turn.

(b) 'Fleshing-out' the Basic Principle

The German inquiry into the scope of the common plan or purpose is ultimately about determining whether what P1 did was still covered by P2's intent (*Wille*). In the context of crimes of violence and homicide, this usually boils down to whether or not there is

808 RGSt 44, 321, 323; BGHSt 36, 231, 234.

809 See Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 163.

810 Christoph Barthe, *Joint Criminal Enterprise (JCE) – Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?* (Duncker & Humblot 2009) 161.

811 BGHSt 36, 231, 234.

812 An act that goes beyond the common purpose does not, without more, trigger liability for any party other than the actual perpetrator.

evidence that P2 *endorsed* P1's actions. This is well illustrated by the BGH's judgment in the following (seminal) case, which also neatly summarises the (three) sub-principles that flesh out the basic principle of *Mittäterexzess*.

In BGH NJW 1973, 377, the defendants, O and V, together with G (who committed suicide whilst on remand) had planned to rob H inside his flat. G's suggestion to overcome resistance by beating up H was rejected by the defendents who feared for H's wellbeing. They settled for drugging H with an ether-saturated cottonwool ball. This they believed was the mildest means by which to incapacitate H. Their plan was for G and V to search the flat for jewellery, whilst O should remain with, and look after, H. Events unfolded rather differently. H regained consciousness sooner than expected and started struggling with V who beat him with an empty beer bottle, breaking it in the process and inflicting cuts on H's arms and face. H cried for help. This, together with the sound of the sirens of a passing ambulance, made V panic and leave the flat. G then strangled H with intent to kill. G thus committed murder (killing H in order to facilitate another crime, ie robbery).

The issue was whether H's death could be attributed to O and V on the basis of § 251 StGB ('robbery causing death', a result-qualified offence requiring intention as to robbery and negligence as to the victim's death). The BGH found that the trial court had in this context not properly applied the law of *Mittäterschaft* and *Mittäterexzess*.

The BGH explained:

> § 251 StGB allows for an attribution of the consequences of only those acts which the defendants intended (in the sense of *dolus eventualis* at a minimum) … . It is true that not each and every departure from the common plan results in a criminal excess. [1] Departures which one ought to have reckoned with [in the sense of 'should have seen coming'] given the circumstances of the case, and [2] those where the manner of execution of the crime is replaced by another which is as severe and dangerous as the agreed one, *are covered by the associate's intent*, even if he has not specifically contemplated them. Likewise, [3] an associate-in-crime is responsible for any manner of execution of a crime that he has endorsed, if he does not care how his associates go about achieving it… . This does not mean, however, that the co-perpetrator of a robbery can be held responsible

> as soon as he endorses any use of violence at all. The [trial court's] decision could only stand if it was based on a finding to the effect that the defendants endorsed violence of the gravity that G employed. This is not the case. … When planning the crime, V expressly insisted that H be protected from G's beating him. The decision thus cannot stand. The *Schwurgericht* will have to re-assess whether the defendants possessed *dolus eventualis* as to those of G's actions which caused death.[813]

This case is instructive for two reasons: first, it sets out what has become the established jurisprudence of the BGH (albeit with a minor change in language):

> Departures which were to be reckoned with given the circumstances of the case, and those where the manner of execution of the crime is replaced by another which is as severe and dangerous as the agreed one, *will usually be covered by the associate's intent*,[814] even if he has not specifically contemplated the particular way in which the crime in the event unfolds. Likewise, an associate-in-crime is responsible for any manner of execution of a crime which he has endorsed, if he does not care how his associates go about achieving it.[815]

Secondly, it shows that what Lord Mustill referred to as the 'puzzling case' is regarded as going beyond the common plan or purpose: if P2 made it clear to P1 that it was not acceptable to inflict X-violence on V, but still goes on to participate in the criminal enterprise, and P1 inflicts X-violence on V, P2 will not be liable for this.

3 Comparative Observations

Like English law, German law does not treat all deliberate departures from a common plan or purpose as material. Immaterial departures will not absolve a co-defendant of liability. Three principles determine whether a deliberate departure is immaterial in this sense. These can be summarised – and compared to English law – as follows:

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813 BGH NJW 1973, 377, 377 (emphasis added).

814 The formulation is subtly different to the one in the 1973 case: there is now more emphasis on the subjective nature of the inquiry in that in appropriate circumstances the defendant is able to rebut the presumption that he intended (in the sense of endorsed) what happened. The previous formulation, omitting the word 'usually', was much more prescriptive and appeared to raise an irrebuttable presumption of intent.

815 BGH NStZ-RR 2005, 71 (emphasis added).

(a) Sub-principle No 1: The co-defendant did not care how his associates would achieve the agreed common criminal goal.

This sub-principle seems to be informed by the same rationale that underlies the English approach according to which the 'fundamental difference rule' is not applied to situations where P1 and P2 shared an intention that V be killed:[816] if it was P1's and P2's aim to kill V, P2 should not escape liability for V's death by arguing he did not foresee the specific act with which P1 would kill.

(b) Sub-principle No 2: The foreseen course of conduct is merely replaced with another course of conduct that is however equivalent in terms of severity and dangerousness.

This is similar to the 'fundamental difference rule' as set out in *Mendez and Thompson*.[817] Indeed, it can be contrasted with the more limited, 'weapons rule'-understanding of the 'fundamental difference proviso' in *Rahman*:[818] the German sub-principle is about degrees of dangerousness and severity of harm; it is not so much concerned with whether the weapon used differs from the one anticipated. Indeed, as BGH NStZ-RR 2006, 43 demonstrates, the use of a different and more lethal weapon does not automatically absolve P2 of all liability. In this case, the use of a knife was clearly different to the agreed beating up, and the actual extent of V's injuries was not attributable to the other participants in the event because the injuries were the result of what was evidently a criminal excess. However, even though all of V's injuries had been caused by the use of a knife – contrary to what the parties had agreed and were expecting, the beating never happened, so quickly had P1 had resort to the knife – the court did attribute some injuries to P1's co- defendants, on the basis that insofar as the defendants had endorsed the infliction

816 *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [68]; *Yemoh* [2009] EWCA Crim 930 [134-36]; *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876 [44].
817 [2010] EWCA Crim 516, [2011] QB 876.
818 [2008] UKHL 45, [2009] 1 AC 129.

of some injuries, albeit by beating only, those injuries caused by the knife that were comparable in degree of severity to the injuries caused by a beating could be attributed to the defendants.

This might in fact be a less forgiving approach than the 'fundamental difference rule' under *Mendez and Thompson* which appears to be a full defence[819] in the sense of an all-or-nothing approach: if it is clear that the manner of attack initiated by P1 was altogether more dangerous than what P2 expected, P2 will not be liable for any of the injuries caused. In German law, on the other hand, P2 will be liable for only those injuries he endorsed.

(c) Sub-principle No 3: The other participant ought to have reckoned with the departure.

At first sight, this looks rather similar to the English 'foresight of crime B as a possibility' test, albeit that the German approach lets (subjective) foreseeability suffice instead of foresight as required by English law. Looking at it more closely, however, the 'ought to have reckoned with'-principle appears to be setting a higher hurdle than English law: it applies to situations where it would have been obvious to anyone in the defendant's shoes that what he claims was not part of their common plan or purpose was surely going to happen and hence was part of that plan or purpose after all. Although difficult to quantify, the requisite standard seems higher than a mere possibility. This is well illustrated by a case which has come to be known as the 'bag-snatching case': P1 and P2 had agreed to 'make money' by 'waiting for a grandma' in a park. Their plan was to take the victim's handbag. Two elderly women, V1 and V2, walked past them, and P1 grabbed V1's handbag from behind. This happened so quickly that V1 did not have time to react and defend her bag. P1

[819] See Matthew Dyson, 'JEF 17' para 9.3.b < http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/joint-enterprise-followup/written/12993.pdf> accessed 19 May 2015

then tried to grab V2's bag. She, however, managed to hold on to her bag and offered some resistance. P1 pushed her forcefully, whereupon V2 and her bag fell to the ground. P1 took the bag. V2 was injured in the fall. The trial court found P1 and P2 liable as co-perpetrators of a robbery and assault occasioning bodily harm. P2 appealed, arguing that the force used by P1 exceeded their common plan or purpose of stealing a woman's handbag and should thus not be attributed to him. The appeal court (OLG Düsseldorf) disagreed with P2's submission:[820] 'The common purpose to take the handbags from the two witnesses included a taking with force if necessary. In any event, on the evidence, the defendant [P2] must have reckoned with P1's conduct given the specific circumstances. Such conduct was thus covered by his intention, even though [P2] did not explicitly contemplate it.'

It is important to stress that this is not the same as foresight of the events as they actually unfolded. As the bag-snatching case demonstrates, the court does not allow co-perpetrators to escape liability by claiming (against all reason and common sense) that they contemplated a wholly unlikely and unrealistic chain of events by which the common plan was to be realised. That is not to say that the secondary participant will be liable for all events that he foresaw (or should have foreseen) as a possibility. Thus, if, in the bag-snatching case, the main perpetrator (who had a track record of beating up elderly women) had proceeded to do so in a way that went far beyond what was necessary to get hold of the bag, this would clearly not have been attributed to the secondary participant. This is because the additional violence (in contrast to the violence actually used and attributed in the actual case) was not necessary or even instrumental for the realisation of the criminal goal: to snatch the bag.

It should also be emphasised that, when the German courts ask whether the participant 'ought to have reckoned with' the departure they do not do so because such

820 OLG Düsseldorf NJW 1987, 268, 269. See also BGH NStZ 2000, 29, 30.

'reckoning with' suffices for liability, but because they take it as *evidence* of *dolus eventualis*. They effectively say to the bag-snatcher: 'We do not believe you when you say that you thought the theft could be achieved without resorting to violence. In the light of this, you must be taken to have endorsed your co-perpetrator's violent acts.' We are thus talking about a rule of *evidence* rather than a rule of *substantive law*.

4 Application in Practice: Escalating Violence, Joint Enterprise Murder, and the BGH's 'three-step-approach' to assessing liability for other participants

Having set out the basic law of co-perpetration – as delimited by the principle of *Mittäterexzess* – we will now look at how this is applied in the context of multi-handed homicides. The paradigm cases[821] concern similar fact patterns, and raise the same issues, as, for example, *Powell* and *Rahman* in English law: can the (spur of the moment) murderous acts of one defendant, which allegedly go beyond the scope of the common plan or purpose, be attributed to others taking part in the violent event who lacked intent to kill but could foresee that the violence to be inflicted jointly might escalate to fatal levels? If so, under what circumstances can those murderous acts be attributed to other participants?

In exploring these questions we will draw on legal norms (and principles) introduced in this and earlier chapters of the thesis, namely, murder (§ 211 StGB), manslaughter (212 StGB), *Körperverletzung mit Todesfolge* (§ 227 StGB), assault occasioning bodily harm (§ 223); assault causing bodily harm by dangerous means (§ 224 StGB), *Mittäterschaft*, *Mittäterexzess*, and omissions-based liability stemming from *Ingerenz* (comparable to the principle in the English case of *Miller* set out in Chapter 5).

821 See eg BGH NStZ 2004, 684; BGH NStZ 2005, 93; BGH NStZ-RR 2005, 71; BGH NStZ 2013, 400; BGH NStZ 2013, 462.

We will see that the BGH, when faced with acts of extreme and ruthless brutality committed *en groupe* which escalate to a fatal degree, follows a three-step-approach.[822] The difficulties involved with this approach are particularly well demonstrated in what has become known as the *Schweinetrogfall*[823] (pig feeder case). The facts are exceptionally gruesome. After a night out drinking, the neo-nazi defendants – brothers P1 and P2 and their friend P3 – forced a teenage acquaintance, V, to accompany them to a remote pigsty. Their plan was to humiliate and assault V, whom they suspected of left-wing sympathies. P1, P2 and P3 took turns to beat up V. Eventually, they forced him to bite into the rim of a stone feeder. This was P2's idea. He wanted to terrify V by re-staging a brutal murder scene from a movie. The movie was also known to P3. When V, who by then was injured badly but not life-threateningly, succumbed to biting into the feeder a second time, P2, on a whim, decided to kill him by acting out the movie scene in every horrid detail. He jumped on V's head (wearing combat boots with steel toecaps). V sustained fatal head injuries. There was evidence that P1 and P3 might not have seen this coming. After P2's attack on V, P3, visibly shocked, turned away and kept at a distance from the other two defendants. P1, mistakenly believing V had survived P2's attack, decided to 'finish him off', so as to cover up the crime. P2 handed him a heavy piece of concrete which P1 twice threw onto V's head. All three then helped disposing of V's body by dropping it into a cesspit. P1, P2 and P3 were charged with murder as co-perpetrators (§§ 211, 25 (2) StGB).

The first instance court[824] found P2, who had inflicted the fatal injuries, guilty of having murdered V out of base motives (§ 211 StGB). P1, who had tried to cover up P2's assault, erroneously believing V was still alive, was found guilty of attempted murder (§§ 211, 22, 23 (1), 12 (1) StGB). The court absolved P1 and P3 of liability for V's death. They

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[822] Manfred Heinrich, 'Körperverletzung mit Todesfolge bei Exzess des Mittäters; Durchentscheidung in der Revisionsinstanz' NStZ 2005, 93, 95.

[823] BGH (19.8.2004) – 5 StR 218/04 <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=30349&pos=0&anz=1> accessed 22 April 2015.

[824] LG Neuruppin.

were merely convicted of assault causing bodily harm by dangerous means (*gefährliche Körperverletzung*, § 224 StGB). The prosecution appealed to the BGH, which found them guilty as joint perpetrators of *Körperverletzung mit Todesfolge* (§§ 227, 25 (2) StGB). The way in which this result was reached is controversial.[825] There are also surprising parallels with the equivalent English reasoning in joint enterprise cases. This is because *Körperverletzung mit Todesfolge*, as we have seen in Chapter 3, is a crime of constructive liability in a similar way to murder liability in English law. The similarities, while important, should nevertheless not be overstressed: while the BGH is considering the defendants' guilt for a crime of much lesser gravity than murder, a transplantation of its reasoning to English law would lead to an automatic life sentence. It is important not to lose sight of this important fact.

In the pig feeder case, the BGH held P1 and P3 liable by following a three-step-analysis.[826] The first step is to consider whether it is possible to hold all participants in a fatal assault to account for an intentional homicide offence. Here, the BGH was bound by the trial court's finding of fact that P1 and P3 did not share P2's intent to kill the victim (in the sense of *dolus eventualis*) which would otherwise have enabled the court to find them guilty as co-perpetrators of the murder committed by P2. It is interesting to note, however, that the BGH makes it quite clear that if it were charged with the finding of fact, it would have reached a different conclusion.[827] Its hands, however, were tied as, as a *Revisionsgericht*, it could not change the lower court's decision on a point of fact. Inspite of itself, therefore, the BGH had to uphold the lower court's finding and absolve P1 and P3 of

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825 See Christoph Sowada, 'Zum Mittäterexzess bei § 227 StGB' in Andreas Hoyer, Henning Ernst Müller, Michael Pawlik, Jürgen Wolter (eds), *Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag* (CF Müller 2006) 621, 624-627.

826 Manfred Heinrich, 'Körperverletzung mit Todesfolge bei Exzess des Mittäters; Durchentscheidung in der Revisionsinstanz' NStZ 2005, 93, 95; Hans Kudlich, 'Körperverletzung mit Todesfolge - Zurechnung des Todeserfolgs bei der Körperverletzung mit Todesfolge bei Exzess des Mittäters' JuS 2005, 568, 569.

827 BGH (19.8.2004) – 5 StR 218/04 < http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung /document.py?Gericht=bgh&Art=en&nr=30349&pos=0&anz=1> accessed 22 April 2015, p 10.

murder. The important point to note, however, is that it would have been quite possible, on facts such as these, for the trier of fact to conclude that P1 and P3 had the requisite *mens rea* to render them liable for murder in that they could have been held to have *endorsed* the possibility of the victim's death.

The BGH therefore had to move on to consider the second step: was it possible to hold the defendants (as *Nebentäter*) guilty of murder by omission? The trial court had concluded that the defendants did not owe the victim a duty of care to prevent P2 from killing him. The BGH disagreed; however, in the result this did not help the prosecution. The BGH thought that the defendants' involvement in torturing and assaulting V more than sufficed to saddle them with a duty to prevent P2 from killing him. However, the BGH, proceeding on the facts as found by the lower court, had to conclude that, given the speed with which P2 acted, killing V, P1 and P3 did not have a realistic chance to intervene.[828] To put it simply, they did not breach their duty of care. Again, therefore, the prosecution failed.

This only left the third step, holding the defendants liable for a lesser included offence while still holding the defendants liable for V's death, and this the BGH proceeded to do, finding them guilty as co-perpetrators to a *Körperverletzung mit Todesfolge* contrary to §§ 227, 25 (2) StGB.[829] The reasoning by which this result was reached, as mentioned above, has proved somewhat controversial. The problem facing the BGH was that it had already found (or rather, accepted) that the lethal blow struck by P2 was not endorsed by the defendants and as such could not be attributed to them. It represented a criminal excess (*Mittäterexzess*). However, as we saw in Chapter 3, in order to hold P1 and P3 liable under §§ 227, 25 (2) StGB, it would normally have been necessary to show that they endorsed the precise act leading (foreseeably) to death. This should have been difficult given that the BGH had already accepted that there was no such endorsement, as found by the trial court.

828 ibid 15-16.
829 ibid 3-4, 12.

The BGH, no doubt keen to hold the defendants liable for the victim's death, seems to gloss over this contradiction by arguing (in rather convoluted terms) that the fact that P2's actions presented a criminal excess should not have

> blinded the trial court to the fact that any further violence against the victim was still based on the common plan of causing bodily harm by dangerous means. … However extreme the intensification of violence on the part of P2, it was still intended as a further act of continued violence, and given the emotionally severely charged situation and the previous humiliating and damaging conduct which had increasingly become more serious, it had been foreseeable for the accused P1 and P3 also in its fatal effects.[830]

While this reasoning has rightly been criticised as somewhat feeble and ambiguous,[831] the result can be justified. Thus, Heinrich argues that the assaults (participated in and endorsed by P1 and P3) committed prior to the excess inherently carried the risk of a fatal outcome, justifying holding P1 and P3 liable for V's death, while criticising the BGH for not expressing this unambiguously.[832] Kudlich agrees, stressing, however, that the BGH should have put more effort into explaining how the above contradiction could be avoided on these facts.[833] Their attempt at explaining the result is not entirely convincing – it can be doubted if the previous acts of violence had yet reached life-threatening level – and in the end, we must simply conclude that the trier of fact got it wrong and the BGH is trying to make the best of a bad situation. There can be little doubt that a jury, faced with this fact scenario and instructed to consider whether P1 and P3 endorsed the victim's death, would not have hesitated to answer the question in the affirmative.

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830 ibid 12.

831 Manfred Heinrich, 'Körperverletzung mit Todesfolge bei Exzess des Mittäters; Durchentscheidung in der Revisionsinstanz' NStZ 2005, 93, 96-97; Hans Kudlich, 'Körperverletzung mit Todesfolge - Zurechnung des Todeserfolgs bei der Körperverletzung mit Todesfolge bei Exzess des Mittäters' JuS 2005, 568, 570.

832 Manfred Heinrich, 'Körperverletzung mit Todesfolge bei Exzess des Mittäters; Durchentscheidung in der Revisionsinstanz' NStZ 2005, 93, 96-97.

833 Hans Kudlich, 'Körperverletzung mit Todesfolge - Zurechnung des Todeserfolgs bei der Körperverletzung mit Todesfolge bei Exzess des Mittäters' JuS 2005, 568, 570.

The foregoing three-step-approach applied by the BGH,[834] particularly step 3, is nevertheless instructive and interesting for English law. There may well be cases where it is impossible to prove endorsement of death or even grievous bodily harm on the part of co-perpetrators, but where it would cause consternation not to hold them liable for the victim's death at all. Dropping the murder charge down to a lesser charge might well be the answer in such cases. In English law unlawful dangerous act manslaughter would be the obvious candidate, with the added advantage that the defendant would be held accountable for the loss of a life and not just for an act of wounding or gbh. We will come back to this idea in Chapter 8 where we will consider whether an endorsement-focussed approach can alleviate the problems associated with the English doctrine of joint enterprise and whether such an approach fits in with the doctrinal traditions of the common law.

E Conclusion

Both England and Germany have adopted a dualistic conception of delinquency, and their respective categories of perpetrator and accessory, some differences in scope of application notwithstanding, largely follow similar patterns. In particular, the German and English theories of derivative liability appear to be underpinned by a common logic which allows for the coupling of the principal offender's commission of a deliberate, wrongful act with the accessory's own culpability. 'This commonality of assumptions … suggests that the categories of our analysis have an intuitive appeal that transcends the positive law of particular legal systems.'[835]

For our purposes the most important insight from the preceding discussion is that, while Germany does not know a concept of joint enterprise in the sense of an independent

[834] As seen in Chapter 3, § 231 StGB (affray or joint attack) might be a fourth step, carrying a maximum sentence of three years. However, as pointed out there (see p 88 above), this is of such limited relevance in practice that the BGH does not even mention it in the pig feeder case.

[835] George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 673.

head of liability, the German concept of co-perpetration, according to which individuals incur liability for concerted criminal acts based on a common plan or purpose, can be considered the functional equivalent of the first limb of the English doctrine of joint enterprise, while the so-called *Exzess* principle is comparable to the second limb of the doctrine, if we understand its function to be to determine the scope of the common plan or purpose and thus the extent of a permissible attribution of wrongful acts from one participant-in-crime to another. This idea will be further explored in the next chapter where it will be suggested that English law could strengthen its taxonomy of participation in crime by focussing more on the exculpatory function of the joint enterprise doctrine whilst also putting greater emphasis (in charging decisions) on the inculpatory modes of aiding and abetting and co-perpetration.

In the context of joint enterprise liability, we have seen that German law, like English law, does not consider all deliberate departures from a common plan or purpose as material. According to the established jurisprudence of the BGH, departures which were to be reckoned with given the circumstances of the case, and those where the manner of execution of the crime is simply replaced by another which is as severe and dangerous as the agreed one, will usually be taken to have been covered by a companion-in-crime's intent, even if he has not specifically contemplated the particular way in which the crime unfolds. Likewise, an associate-in-crime remains responsible for any manner of execution which he has endorsed, if he does not care how his associates go about achieving the common criminal goal.

These principles have been contrasted and compared with similar principles fleshing out the English doctrine of joint enterprise. As such, it has been suggested that the proviso relating to the manner of execution being replaced with one which is as severe and dangerous as the anticipated one mirrors the 'fundamental difference rule' as set out in

Mendez and Thompson, albeit that the English rule operates as an all-or-nothing approach, whereas the German approach, where a different and more dangerous weapon is concerned, allows for the attribution of some injuries, namely those that equal in degree those that would have been inflicted had the actor stuck to the original plan and weapon. The 'fundamental difference' idea, interestingly, is relied on in both jurisdictions in the context of constructive crimes (assault resulting in death in Germany and murder in England), reinforcing the idea that it has a function as a 'safety valve' for offences of constructive liability. It follows that in the same way that the English 'fundamental difference rule' is not applied to situations where P1 and P2 shared an intention that V be killed, under German law, if it was P1's and P2's aim to kill V, P2 cannot escape liability for V's death by arguing he did not foresee the specific act with which P1 would kill. Finally, while at first sight, the proviso that the accused remains liable for acts which 'he ought to have reckoned with' bears some resemblance to the English 'foresight of crime B as a possibility' test, notwithstanding that the German approach lets foreseeability rather than foresight suffice, on closer examination the German principle appears to be setting a standard closer to probability than possibility.

To complete our comparative analysis on how cases such as *Powell* and *Rahman* would be dealt with under German law, we looked at how the principles of co-perpetration and *Mittäterexzess* (being functional equivalents of the joint enterprise doctrine) are applied in the context of violence committed *en groupe* which has escalated to a fatal degree. The 'pig feeder case' showed how the *dolus eventualis* standard, if applied correctly, can be very helpful in determining the extent to which participants in crime can be held to account as co-perpetrators of a homicide offence. The problem in that case, as we saw, was that the trial court's assessment of the facts was highly questionable, leading the BGH to adopt reasoning that is not entirely intellectually satisfying. We should always bear in mind,

however, that where the infliction of grievous bodily harm leads to death a German prosecutor can only charge the perpetrator with assault resulting in death, an aggravated offence against the person, while his or her English counterpart would be able to bring home a charge of murder. It was suggested that 'woolly thinking' is rather less worrisome against the background of the former than it is in the latter.

In the next chapter, I will argue that the common logic and structural similarities identified in this chapter concerning the taxonomy of participation in crime support the idea that conventional accounts pertaining to the *function* and *nature* of the English doctrine of joint criminal enterprise as an *inculpatory principle* of *secondary liability* or, indeed, an *independent head of liability* (available to the prosecution as a third avenue to conviction alongside co-perpetration and aiding and abetting) are misconceived. While the conventional understanding has had knock on effects for the shaping of the doctrine's mental element, the doctrine's proper function as a principle of exculpation which is but an 'add on' to the rules of co-perpetration and aiding and abetting would be better served by supplementing its current *cognitive mens rea* standard (foresight of consequences as a possibility) with a *volitional* element (endorsement of the consequences foreseen) similar to the concept of *dolus eventualis* known in German criminal law. This would in effect move the current *mens rea* standard away from (some form of) subjective recklessness and closer to intention, thereby bringing the accomplice's *mens rea* more in line with that of the principal offender, as will be explained in Chapter 8. The suggested move would also result in a narrowing down of the scope of application for the joint enterprise doctrine. However, as the next two chapters aim to persuade the reader, this is a price worth paying, as arguably reform along the suggested lines will refocus the joint enterprise law on deserving core cases, excluding from its reach actors who are at the mere periphery of events and those who tried to restrict their responsibility (aka Lord Mustill's 'puzzling' cases).

Chapter 7: JOINT ENTERPRISE AS A PRINCIPLE OF EXCULPATION

A Introduction

We saw in Chapter 5 that the doctrine of joint enterprise in its current form is difficult to defend. Insights from German law (in particular the concepts of co-perpetration and *Mittäterexzess*), explored in the last chapter, suggest an alternative, *exculpatory* role for joint enterprise.[836] This chapter will argue that such a role, policing the scope of liability of associates-in-crime for acts committed by their companions, is within interpretative reach for English criminal law. In fact, it will be shown that the doctrine's more recent development betrays an unwarranted change in use and purpose from an exculpatory towards an inculpatory mechanism, thereby encroaching upon the proper domain of the principles of joint perpetration on the one side and undermining the principles of aiding and abetting on the other. To that end, we will re-examine the doctrine, highlight its historical exculpatory function and assess the extent to which such a function is still evident in the modern law. The chapter concludes that the origins of the principle as a delimiting device for the attribution of criminal responsibility as between co-perpetrators and principal offenders and their accessories ought to inform reform efforts of joint enterprise as this might resolve the tensions caused by the current inculpatory conception.

836 If I say that joint enterprise is a principle of exculpation rather than inculpation it must, of course, be conceded that exculpation and inculpation are but two sides of the same coin. However, I will argue that inculpation is achieved by the requirements of aiding and abetting and co-perpetration, with joint enterprise (and its proposed mental element of endorsement) merely identifying the outer limits of these. Thus, if S cannot be shown to have endorsed P's murder, he must be found not guilty (of murder) even though he has aided and abetted the preceding burglary (or other crime). I stress the exculpatory function mainly because I want to emphasise that there is no place in English law for free-standing joint enterprise liability. It is never enough for the prosecution to prove that S endorsed P's murder – there *must* always be acts of aiding and abetting or co-perpetration, with endorsement establishing the link between those acts and the murder.

B The Basic Doctrine

As we saw in Chapter 4, the doctrine of joint criminal enterprise as currently applied consists of two principles. The first *extends* liability for offenders who operate as a joint enterprise beyond their own contributions to acts committed by their associates; the second *restricts* this type of liability – formerly to acts done in furtherance of the common criminal goal, now to acts done in furtherance of the common goal *and* to acts foreseen as a possible incident of the common goal's pursuance. Historical accounts make this two-limbed approach more obvious than contemporary law and commentary. According to Article 17 ('common purpose') of Stephen's *Digest of the Criminal Law*:[837]

> When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose. If any of the offenders commits a crime *foreign* to the common criminal purpose, the others are *neither principals in the second degree, nor accessories unless* they actually instigate or assist in its commission.[838]

The first sentence essentially asserts that where an offence is committed jointly and pursuant to a shared criminal purpose (the elements constituting a joint enterprise), the culpability of each participant is determined collectively rather than separately. Individual contributions to the *actus reus* of a particular offence no longer determine the extent of an individual's liability; criminal acts are being mutually attributed as between all actors belonging to the joint venture. Thus, individual offenders are held to account for the crime as a whole rather than their own share. In this sense, the doctrine of joint enterprise fulfils an inculpatory function reminiscent of the German concept of *Mittäterschaft*.

The second sentence of Article 17 makes clear, however, that there is a limit to this kind of collective liability. It establishes that an act that goes beyond the common purpose

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837 LF Sturge (ed), *JF Stephen: A Digest of the Criminal Law (Indictable Offences)* (9th edn, Sweet & Maxwell 1950). The text is the same as in the 4th edn published by JF Stephen in 1887.

838 Emphasis added.

cannot, without more, trigger liability for any party other than the actual perpetrator. The principle contained in this sentence is aimed at relieving parties to a joint enterprise from liability for crimes that are *extraneous* to the common criminal goal. On Stephen's wording, other parties will only be liable – on ordinary principles of aiding and abetting – if they have, in fact, assisted or encouraged the extraneous offence ('*unless* they actually instigate or assist'). Thus the second principle of the joint enterprise doctrine is *exculpatory* rather than inculpatory in nature. This, again, is an interesting parallel to the German *Exzess* principle.

The exculpatory dimension is reinforced, to differing extents, by the case law. For example, *Smith (Wesley)*[839] and *Lovesey and Peterson*[840] suggest that acts in breach of agreement would not (or not to the same degree) incriminate other parties to the joint enterprise. *Anderson and Morris*[841] even goes as far as to suggest that, before liability can be attached to S for incidental crimes committed by P, he needs to have *authorised* such crimes as being within the scope of the enterprise. Thus Lord Parker CJ accepted the following proposition put forward by Geoffrey Lane QC:

> If one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that *unauthorised* act, and it was for the jury to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act *unauthorised* by that joint enterprise.[842]

Powell[843] has since clarified that no such authorisation is necessary for S to be liable, but it is interesting to note that at one point the law seemed inclined to require something more than foresight, some kind of endorsement of P's act before S could be made responsible for it, and that this endorsement had to take a form that allowed the jury to conclude that the

839 [1963] 1 WLR 1200 (CA).
840 [1970] 1 QB 352 (CA).
841 [1966] 2 QB 110 (CA).
842 ibid 118-119 (emphasis added).
843 [1999] 1 AC 1 (HL) 21 (Lord Hutton).

'incidental' crime was still covered by the joint venture's criminal goals.[844] The second limb of the doctrine of joint enterprise, therefore, seems in the past to have been drawn upon to determine the scope of the joint enterprise *as limited* by the common purpose (in identical fashion to German law). This is reflected in judicial pronouncements which demand something along the lines of an 'agreement', 'arrangement', 'consent' or 'authorisation' before a secondary party can be held liable for criminal conduct that went beyond the common goal in the strict sense.[845] A typical example involves homicide resulting in the course of robbery or burglary,[846] as where P and S set out with the shared intent to burgle V's flat and, when coming upon V, P deliberately kills V. In these instances, the criminal purpose for which S and P combined skills and effort is the burglary. The homicide that is in the event committed by P can only be said to have been part of the shared criminal goal to break and enter if it was understood between P and S that, should they encounter resistance during the burglary, violent – even deadly – force would be applied.[847]

Restricting liability to conduct done in pursuance of a common goal in a strict sense proved too narrow a limit of liability, in particular in cases of concerted acts of aggression (such as street fights) which have a tendency to escalate into greater violence. The idea of a 'common purpose', which likely has its roots in the law of conspiracy, is resonant of ideas of premeditation and planning. This is too restrictive a conception for crimes of violence that are characteristically spontaneously committed, fast-moving and ferocious; individuals may join in on the spot with only a vague notion of the attack's initial motivation. The attackers' aims may also change during the assault, with acts becoming gradually more

844 We will return to the idea of endorsement, with its echoes of the German *dolus eventualis*, when we discuss the mental element in joint enterprise in the next chapter.

845 *Luck and Others* (1862) 176 ER 217, 221-222; *Pridmore* (1913) 8 Cr App 198 (CA) 200 ('arrangement'); *Slack* [1989] QB 775 (CA) 781 ('understanding').

846 The burglary example is also used by the Supreme Court in *Gnango* [2011] UKSC 59, [2012] 1 AC 827 [14] (Lord Phillips PSC and Lord Judge CJ).

847 *Slack* [1989] QB 775 (CA) 782-783. Similarly *Lovesey and Peterson* [1970] 1 QB 352 (CA).

violent and, ultimately, perhaps lethal. In these instances, it is very difficult to discern what the attackers' common goal is at any given moment. It is perhaps for this reason that the definition of 'common purpose' was gradually modified and its characterisation in terms of an (express or tacit) 'agreement' or 'authorisation'[848] over time substituted by one focusing on the parties' 'contemplation' or 'foresight' (with varying degrees of probability).[849] Not all crimes committed *en groupe* are perpetrated on the basis of a pre-planned scheme.[850] The 'foresight' language takes account of this and the fact that many group crimes are committed virtually on the spur of the moment.

In *Powell,* the House of Lords finally confirmed that 'participation in a joint criminal enterprise with foresight or contemplation of an act as a *possible* incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise'.[851] Thus phrased, the principle seems to inculpate rather than exculpate; it broadens S's liability to cover acts which were merely foreseen as a possible incident of the envisaged crime. Since Stephen's restatement of the law of joint enterprise (or common purpose, as the doctrine was known back in the 19th century), there has been a shift in language and focus from conduct (objectively) going beyond the scope of the enterprise (= exculpating) to a test of subjective 'foresight' or 'contemplation' of the principal's actions (= inculpating), with the result that the doctrine is nowadays used to extend rather than limit the liability of members of a joint criminal venture with regard to further crimes committed by an associate. The 'scope of the enterprise' has been

848 *Anderson and Morris* [1966] 2 QB 110 (CA); *Lovesey and Peterson* [1970] 1 QB 352 (CA).

849 *Davies* v *DPP* [1954] AC 378 (HL) 401; *Betty* (1964) 48 Cr App R 6 (CA) 10; *Penfold* (1980) 71 Cr App R 4 (CA) 8-12; *Chan Wing-Siu* [1985] AC 168 (PC) 175-178; *Hyde* [1991] 1 QB 134 (CA); *Powell* [1999] 1 AC 1 (HL); *Rahman* [2008] UKHL 45, [2009] 1 AC 129; *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876; *A and others* [2010] EWCA Crim 1622, [2011] QB 841; *Stringer* [2011] EWCA Crim 1397, [2012] QB 160; *Carpenter* [2011] EWCA Crim 2568, [2012] Crim LR 256; *Gnango* [2011] UKSC 59, [2012] 1 AC 827; *Jogee* [2013] EWCA Crim 1433.

850 See eg *Mitchell* [2008] EWCA Crim 2552, [2009] 1 Cr App R 31; *Yemoh* [2009] EWCA Crim 930; *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876. *Carpenter* [2011] EWCA Crim 2568; *Odegbune and others v The Queen* [2013] EWCA Crim 711; *Winston and Collins* [2015] EWCA Crim 524 are examples of pre-planned violence.

851 *Powell* [1999] 1 AC 1 (HL) 21 (Lord Hutton, emphasis added).

supplemented with a 'scope of possible incidents to the enterprise' which, ultimately, extends the scope of S's liability.[852] Thus, the editors of Archbold state:

> A secondary party is guilty of murder if he participates in a joint venture realising that in the course thereof the principal might use force with intent to kill or to cause grievous bodily harm, and the principal does kill with such intent; but if he goes *beyond the scope* of the joint venture (*i.e. does an act not foreseen as a possibility*), the secondary party is not guilty of murder or manslaughter.[853]

This formulation reflects attempts to connect the two concepts, whereby the inculpatory goal of the new formula is somewhat played down by the earlier 'scope of the enterprise' terminology, because the joint enterprise is said to include not only what was planned but also what was foreseen as possible. In similar vein, in *Rahman*, Lord Brown suggested that the foresight test simply subsumes the older approach:[854]

> Once the wider principle was recognised (or established) … namely that criminal liability is imposed on anyone assisting or encouraging the principal in his wrongdoing who realises that the principal may commit a more serious crime than the secondary party himself ever intended or wanted or agreed to, then the whole concept of common purpose became superfluous. … If the relevant acts were within the scope of the principal's and accessory's common purpose, necessarily the secondary party would realise that the principal might thereby commit the more serious offence. And if the secondary party did not foresee even the possibility of the more serious offence, such could hardly have been within the scope of any shared purpose.

This makes it look as if the foresight test was just a more convenient test for jurors to apply. However, the difference between the two approaches is not purely verbal; it changes the nature of the inquiry. It is true that evidence of an agreement to use force is evidence of foresight of its use. 'But employing consensus terminology implies that a [secondary party] who is aware of his partner's possible use of force, contrary to an express understanding,

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852 Similarly William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 8.

853 James Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice 2015* (63rd edn, Sweet & Maxwell 2014) [19-24].

854 [2008] UKHL 45, [2009] 1 AC 129 [63]. Similarly Lord Hutton in *Powell* [1999] 1 AC 1 (HL) 30.

would not share in criminal responsibility for it'.[855] By contrast, if foresight is the yardstick, a purely cognitive concept, he would be liable even if the foreseen conduct went against his express wishes.

Simester is more open about what the realigned concept of joint enterprise does. He asserts that in instances of joint enterprise '[t]he parties have a common purpose to commit crime A, wherefore the law *extends* S's liability to [the further offence B committed by P alone]'.[856] On this account, the 'very distinctiveness of joint enterprise doctrine is that it extends liability to certain crimes that occur *beyond*, albeit pursuant to, the common purpose'.[857] This is a remarkable shift in focus.

The inculpatory effect of the foresight formula has been strengthened by the decision in *English*[858] according to which the frontiers of liability have been pushed forward to the extent that S will be liable for P's crime unless the latter's act was *fundamentally* different from anything S contemplated.[859] This means that if P's act was not fundamentally different, the mere fact that it was not foreseen by S will be of no avail to him.[860]

In homicide cases, the very fact that someone ended up dead, usually in circumstances where death was not too remote an outcome (violence escalating into greater violence), may perhaps go some way towards persuading the jury to conclude that any

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855 KJM Smith, *Complicity*, 221. Of course, where the express understanding in question is not credible in the sense that the secondary party *knows* full well or *believes* that the principal is planning to use more force than ostensibly agreed, his continued participation can be taken as an endorsement of the principal's true plans.

856 AP Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 593 (emphasis added).

857 ibid 595.

858 [1999] 1 AC 1 (HL).

859 In *Rahman* [2008] UKHL 45, [2009] 1 AC 129, the House of Lords held that S need to foresee only P's act, not his precise *mens rea*. The case arose in the context of murder and their Lordships were reluctant to interfere with the substantive requirements (discussed in Chapter 2) according to which an intention to kill (which the defendant had not contemplated) or intent to do GBH (which he foresaw) is sufficient. It appears, therefore, that a solution to a murder-specific problem was sought rather than a principle established according to which consideration of P's precise intention is unnecessary in all joint enterprise cases. Likewise Richard Buxton, 'Joint Enterprise' [2009] Crim LR 233, 235.

860 Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 2.84.

secondary party must indeed have foreseen death as a possibility.[861] There is a real danger, then, that the *foresight* test, not very demanding in and of itself, is in practice further diluted to one of *foreseeability*. Taking all this into account, the doctrine of joint enterprise as understood today seems to have very little in common with its historical predecessor: it is inculpatory in nature rather than exculpatory.

C The Redundancy of the Doctrine's First Limb

Most cases on joint criminal enterprise have arisen in the context of crimes committed incidentally to another offence deliberately embarked upon *en groupe*.[862] However, as we saw in Chapter 4, the courts have resort to joint enterprise terminology also where no crime but the purpose crime has occurred.[863] On the view taken in this thesis, 'joint criminal enterprise' is, in fact, a rather clumsy misnomer suggesting that it represents a separate head of liability alongside aiding and abetting and co-perpetration.[864] It will be demonstrated that the doctrine, properly understood, is not a mode of liability at all but a device which describes the limits of aiding and abetting and co-perpetration; it answers the question whether, where P goes further than agreed or expected by S, his acts can still be attributed to S. As such, there is no 'crime A' and 'crime B', but a single 'criminal event', the function of joint enterprise being to determine to what extent S should be answerable for that event, taking into account that he is alleging that part of that event was committed

[861] Criminal Justice Act 1967, s 8 requires the jury to consider what the defendant himself intended or foresaw, not what a reasonable person would have intended or foreseen. But in assessing what the defendant actually foresaw, the jury is likely to draw on their own frame of reference which is by definition what a reasonable person would have foreseen. See further M Cathleen Kaveny, 'Inferring intention from foresight' (2004) 120 LQR 81, 102.

[862] KJM Smith, *Complicity*, 209.

[863] See also Law Commission, *Participating in Crime* (Law Com No 305, 2007) para 1.10; Jeremy Horder and David Hughes, 'Joint Criminal Ventures and Murder: The Prospects for Law Reform' (2009) 20 KLJ 379-401, 379; GR Sullivan, 'Participating in crime: Law Com No 305 – joint criminal ventures' [2008] Crim LR 19, 22-26.

[864] A view reinforced by *A and others* [2010] EWCA Crim 1622, [2011] QB 841 [9-10] and *Gnango* [2011] UKSC 59, [2012] 1 AC 827 [93] which identify joint enterprise by joint perpetration and joint enterprise by aiding and abetting as bases for conviction separate to joint enterprise 'parasitic' liability.

by P alone. The confusion about the doctrine's proper nature and function stems from the label 'joint criminal enterprise', which suggests that, where the requirements of aiding and abetting or co-perpetration cannot be met, the prosecution has a third avenue available to it to secure a conviction which catches all crimes committed *en groupe*. In fact, there is no such independent head of liability. In other words, on the view here put forward, there is no scope for joint criminal enterprise to impose liability where there would be none under the headings of aiding and abetting or co-perpetration. We need to focus, therefore, on the proper relationship between the doctrine of joint enterprise, co-perpetration and aiding and abetting.

I Joint enterprise and joint perpetration

As we saw in Chapter 4, principals are offenders who actually commit (part of) the *actus reus* of a crime with the requisite *mens rea*.[865] Where more than one individual commits (part of) the *actus reus*, the law speaks in terms of 'joint principalship'.[866] It will be remembered that there are at least two types of situation where the concept of joint principals so defined applies, ie where individuals, with the requisite *mens rea*, act jointly in the commission of a crime,[867] namely on the one hand where P1 and P2 commit the entire *actus reus* of an offence with their own hands, and on the other where the individual acts of P1 and P2 *only when taken together* will result in the commission of a particular offence,[868] in circumstances where each act regarded on its own would result in the commission of no offence at all or only a lesser one. In neither situation, crucially, do we need the notion of joint enterprise to attribute acts done by P1 to P2 and vice versa. Such an

865 KJM Smith, *Complicity*, 27.

866 *Bingley* (1821) Russ & Ry 446, 168 ER 890 (Crown Cases Reserved); *A and others* [2010] EWCA Crim 1622, [2011] QB 841 [9]; Richard Buxton, 'Joint Enterprise' [2009] Crim LR 233, 237.

867 KJM Smith, *Complicity*, 28; *Simester and Sullivan*, 205.

868 An example would be *Bingley* (1821) Russ & Ry 446, 168 ER 890 (Crown Cases Reserved) which concerned three individuals each forging part of a banknote. See also Ashworth and Horder, 419-420; *Smith and Hogan*, 189; KJM Smith, *Complicity*, 28.

attribution of acts is implicit in the rules governing joint perpetrators. A joint enterprise analysis thus adds nothing to an analysis in terms of joint perpetration.[869] If anything, the joint enterprise terminology obscures the true extent of P1's and P2's involvement in the crime they jointly commit: they are principal offenders, not merely parties to a joint criminal enterprise, and it is preferable to label them as such.

The only situation where such an analysis might be thought to run into difficulties concerns cases such as *Odegbune*[870] where an individual assumes a significant role in the planning of an attack, is also present at the scene and armed – even actively involved in chasing victims – but who does not actually strike the fatal, or indeed any, blow on the deceased. In other words, while the defendant 'was a principal organiser of the entire incident',[871] he took no part in the *actus reus* of murder. As we saw in Chapter 4, in contrast to German law which allows for a conviction of 'mastermind'-defendants as co-perpetrators to the actual killers, the English concept of joint perpetration is traditionally thought to be restricted to cases where both offenders are (at least partly) executing the *actus reus*. The defendant, Mr Odegbune, was not involved in attacking the particular victim (as he ran after someone else), and on a strict application of the traditional approach he could not be held to account for murder as a co-perpetrator (although he might, of course, be convicted like a principal offender on the basis of aiding and abetting, provided it can be proved he intentionally encouraged the actual killers).

In the actual case, Odegbune was convicted of murder (because of his leading role),[872] on the basis of what appears to be joint enterprise reasoning. It is worthwhile to look at his case in some detail. The Court of Appeal noted that

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869 AP Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578 599. Likewise Ashworth and Horder, 421. See also David Ormerod, 'Case comment – R v Montague' [2014] Crim LR 615, 618.

870 *Odegbune and others v The Queen* [2013] EWCA Crim 711.

871 ibid [14] (Leveson LJ).

872 ibid [78] (Leveson LJ): '[H]is leading role must be underlined (and doubtless led to his conviction for murder)…'.

> although [Odegbune] was not part of the group that attacked and killed the deceased (having chased [another boy]), he was convicted of murder on the basis that he had *intended* that in the course of his attack on the opposing group someone should be killed or caused really serious bodily harm, or that he *realised* that such might be the consequence but nevertheless took part in the violence.[873]

The firstly mentioned *mens rea* standard ('intention to kill or commit gbh') is consistent with a charge of murder as a joint perpetrator; however, the difficulty with this route, as noted above, would be proving involvement in the *actus reus* of murder. Unless one takes the whole sequence of events (arranging the fight, assembling, threatening displays of weapons, chasing the victims etc) leading up to the killing as forming part of the *actus reus* of murder, which might be seen as stretching the 'causing death'- requirement beyond permissible limits, the traditional view of what is required of joint perpetrators would preclude a conviction on this basis. It seems clear that convicting the defendant as an aider and abettor would have been possible, but was probably not considered adequately to reflect his guilt. The facts of this case thus raise the interesting issue of whether we might in fact need the first limb of the joint enterprise principle to inculpate defendants who, like the appellant, take a leading role in the organisation and orchestration of a crime but are not involved in its actual execution, so that they cannot be charged as co-perpetrators, when it seems inadequate, given the extent of their involvement at the planning stage, to charge them 'only' as aiders and abettors.

It is suggested that the answer is 'no'. If we are unhappy to accept that such a scenario is, on the law as it stands, covered by 'ordinary' aiding and abetting principles because this seems inconsistent with our notions of fair labelling, then surely the woolly language of 'joint enterprise' is no better suited to meet our fair labelling concerns. 'Joint enterprise' is in fact a label less telling and precise than either co-perpetration and aiding and abetting, so that nothing would be gained in respect of 'fair warning' either. It is

873 ibid [15] (Leveson LJ, emphasis added).

suggested that the preferable solution for such a situation would be to extend the scope of our principles of co-perpetration, perhaps in analogy to the German equivalent concept which, as explained in Chapter 6, has been developed through case law to apply to criminal masterminds and gang leaders whose lack of execution is made up for by a significant contribution to the crime's planning. As far as labelling is concerned, taking into account such an individual's true extent of involvement with the overall criminal scheme, the mastermind or leader fits the description of a principal offender much better than that of a participant in a joint enterprise (whose involvement, just judging by the term used, could be minor or major). There is also nothing to prevent the common law from developing incrementally so as to have mastermind-defendants etc covered by its perpetration principles (by putting significant planning on a par with execution of the *actus reus*), because in effect, this result is already achieved by application of aiding and abetting principles (whereupon the defendant is punished like a principal offender), and more recently, by the rather indiscriminate use of joint enterprise.

Even if the law of co-perpetration were never to extend this far, a defendant such as Odegbune could be charged and convicted (like a principal) on the basis of aiding and abetting, albeit that this requires more effort on part of the prosecuting authorities than proving joint enterprise. The crucial point to make is that in neither instance does the terminology of joint enterprise add anything to the legal analysis of the situation (ie the defendant goes down for murder). Far from it, it may, in fact, just confuse the jury as to what it is the prosecution needs to prove precisely (ie participation in the *actus reus* of murder with the requisite intent or the deliberate rendering of assistance and encouragement to the actual killers).

This is not to say that there is no room whatsoever for a principle of joint enterprise in English law: quite the contrary. Where one of two or more offenders exceeds the original

plan, we need tools which tell us if and to what extent the other will still be liable for these excessive acts. It will be argued that this is the proper domain of the joint enterprise doctrine. First, however, we need to examine its relationship with the rules governing accessorial liability. In this context, the dangers of treating joint enterprise as an autonomous head of liability become particularly apparent: it must not be allowed to undermine, or water down, the well-established rules and requirements of aiding and abetting.

II Joint enterprise and aiding and abetting

As we saw in Chapter 4, accessories aid, abet, counsel or procure the commission of an offence by the principal offender. This conduct requirement is independent of the particular offence to which it relates: in aiding and abetting P, S himself need not satisfy any part of the *actus reus* of the substantive offence.[874] By virtue of section 8 of the Accessories and Abettors Act 1861, individuals who so assist or encourage commit the same offence as their principal. Because of this provision, it is not necessary to indict offenders as either principal or accessory, although the courts have pointed out that it is preferable to do so:[875] where it is clear that a party contributed to a crime in either capacity, it does not matter which one; should they be convicted, it will be for the principal offence in any event.[876] Thus, it is not surprising that the case law does not always distinguish between principals and accessories, but simply speaks in terms of parties to a joint enterprise.[877] This development has been given additional momentum by the fact that, although an aider or abettor does not have to share the principal's purpose in committing the crime – a requirement that is central to the concept of joint enterprise as commonly understood – in practice, such a shared purpose

874 AP Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 588.

875 *Maxwell* [1978] 1 WLR 1350 (HL) 1360 (Lord Edmund-Davies); *Taylor, Harrison and Taylor* [1998] Crim LR 582 (CA).

876 Where P does not commit the principal offence, S will still be liable under the inchoate offences of assistance and encouragement, see Part 2 of the Serious Crime Act 2007, ss 44-46.

877 *Williams and Davis* [1992] 1 WLR 380 (CA); *Ryan* [2015] EWCA Crim 521 [14].

may often exist by virtue of S's knowledge of P's plans and some interest on S's part to further it intentionally. As *Smith and Hogan* asserts: '[i]n most cases where D has given assistance or encouragement to P to commit crime X (for example, burglary) they have a common purpose to commit that crime'.[878] Because of this, relying on 'common purpose' as the criterion by which to distinguish joint enterprises from instances of aiding and abetting does not work very well in practice – another reason, perhaps, why the courts prefer to use the rather loose language of 'joint enterprise'.[879]

As a consequence of this rather imprecise use of (complicity) terminology, and because the law is not sufficiently explained while its theoretical underpinnings remain obscure,[880] there is considerable confusion about the relationship between joint enterprise and aiding and abetting. Those cases which have touched on the relationship between the two have come to different conclusions: while the Privy Council in *Chan Wing-Siu*[881] and the Court of Appeal in *Bryce*[882] concluded that the two concepts are different, other cases (amongst them House of Lords decisions) seem to have accepted that association with a joint enterprise may be but one way in which to aid or abet.[883] The most recent case law is ambiguous on the point in that while it acknowledges that aiding and abetting gives rise to

878 David Ormerod, *Smith and Hogan's Criminal Law* (12th edn, OUP 2008) 210. The quoted passage seems to be omitted in the 13th (OUP 2011) and 14th (OUP 2015) editions; however, the 13th edition still acknowledged (on p 214) that perpetrator and aider and abettor might act on the basis of a common purpose: 'D and P share a common purpose to commit crime(s). P alone commits the *actus reus* of the crime(s); D aids, abets, counsels or procures P to do so. P is liable as a principal and D as an accessory. Together they are rather misleadingly described by some as being in a joint enterprise.' Similarly *Kupferberg* (1919) 13 Cr App R 166 (CA) 168: '[i]t is true that in many cases aiding and abetting is done by the mutual consent of the criminals, but it is not essential that it should be' (Lawrence J); KJM Smith, *Complicity*, 218.

879 A recent example of such loose use of terminology is *Montague* [2013] EWCA Crim 1781, as noted by David Ormerod, 'Case Comment – R v Montague' [2014] Crim LR 615, 618.

880 IH Dennis, 'The Mental Element for Accessories' in Peter Smith (ed), *Essays in Honour of JC Smith* 40 (Butterworths 1987) 40.

881 [1985] AC 168 (PC) 175.

882 [2004] 2 Cr App R 35; [2004] EWCA Crim 1231 [71] (Potter LJ): 'We are of the view that, outside the *Powell and English* situation (violence beyond the level anticipated in the course of a joint criminal enterprise), where a defendant, D, is charged as the secondary party to an offence committed by P in reliance on acts which have assisted steps taken by P in the preliminary stages of a crime later committed by P in the absence of D, it is necessary for the Crown to prove intentional assistance by D … .'

883 See eg *Slack* [1989] QB 775 (CA) 783; *Hyde* [1991] 1 QB 134 (CA) 139; *Rook* [1993] 1 WLR 1005 (CA) 1009; *Powell* [1999] 1 AC 1 (HL) 26 (Lord Hutton); *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [36] (Lord Rodger) and [53] (Lord Brown); *Mendez and Thompson* [2010] EWCA Crim 516, [2011] QB 876 [17] (Toulson LJ); *Stringer* [2011] EWCA Crim 1396, [2012] QB 160 [57] (Toulson LJ).

a joint enterprise, it lists this type of joint enterprise alongside joint perpetration and, crucially, joint enterprise in its 'parasitic' form, thereby suggesting that although the concepts are related and, indeed, may overlap,[884] they enjoy independence as heads of liability.[885]

Often the courts have fallen back on a formula by Sir John Smith to the effect that the secondary party 'has "lent himself" to the enterprise. By so doing, he has given assistance and encouragement to P in carrying out an enterprise which he knows may involve murder'.[886] This assertion has been taken to mean, first, that joint enterprise liability has no independent existence in the criminal law but is a sub-category of aiding and abetting;[887] and secondly, that a party to a joint enterprise may assist and encourage by the mere fact of his association.[888] However, JC Smith's formula is really geared towards offering guidance in instances where *two* crimes are committed – the purpose crime and an incidental one. It thus does not help us establish what the relationship between aiding and abetting and joint enterprise is when it comes to the paradigm cases of criminal activity, ie cases where S gets involved but where there is no deviation from P's plan or purpose. It is suggested that in the latter instance there is no room to apply joint enterprise law or, indeed, joint enterprise terminology: the rules on aiding and abetting accommodate all possible scenarios of facilitation. In fact, joint enterprise plays the role of an 'interloper' here,

884 *A and others* [2010] EWCA Crim 1622, [2011] QB 841 [9] (Hughes LJ).

885 ibid [10] (Hughes LJ): '[T]he third [joint enterprise] scenario depends upon a wider principle than do the first and second.' See also *Gnango* [2011] UKSC 59, [2012] 1 AC 827 [93] (Lord Dyson JSC): 'Several possible bases for upholding the defendant's conviction call for consideration. The first is the basis on which the case was left by the judge to the jury and on which they convicted. … I shall adopt Sir John Smith's phrase of "parasitic accessory liability" for this. The second is that the defendant aided and abetted Bandana Man to shoot at him (by encouraging him to do so). … The third basis is that the defendant and Bandana Man were liable as joint principals for the murder.'

886 JC Smith, 'Murder in course of aggravated burglary' [1990] Crim LR 119, 121; *Hyde* [1991] 1 QB 134 (CA) 139 (Lord Lane); *Powell* [1999] 1 AC 1 (HL) 26A (Lord Hutton); *Rahman* [2008] UKHL 45, [2009] 1 AC 129 [36] (Lord Rodger) and [53] (Lord Brown). Likewise the editors of *Archbold: Criminal Pleading, Evidence and Practice 2015* (63rd edn, Sweet & Maxwell 2014) [17-67].

887 JC Smith, 'Secondary Participation in Crime – Can we do without it?' (1994) NLJ 679, 680-682; JC Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR 453, 461-462.

888 See Graham Virgo, 'Guilt by association: a reply to Peter Mirfield' [2013] Crim LR 584, 585.

undermining the more rigorous *mens rea* requirements of aiding and abetting.[889] The doctrine's scope should be restricted to those cases in which an *established* aider and abetter is sought to be made liable for acts on the part of P which allegedly went beyond the crime which he intended or believed to assist.

As we noted in Chapter 4, traditionally, the aider and abettor is required to act with intent *and* in the knowledge of the essential matters of the crime committed by the principal.[890] The latter is important, as it makes clear that S's act of assistance needs a reference object; help is not rendered in a vacuum but with a view to furthering a particular offence. Thus, when carrying out the act of assistance, S needs to have the essentials of P's crime in mind. Sometimes S will render assistance – deliberately, even purposefully – in circumstances where he does not know what crime exactly P is going to commit. This does not pose a problem, however, as long as S has considered specific types of offence as possible candidates when rendering assistance, which is thus still given with a view to furthering an identifiable crime. This was established in *Maxwell.*[891] Moreover, according to *Bryce*,[892] S does not even need to know that P will commit the crime in question; it is sufficient that he be reckless as to whether P commits the contemplated crime. As long as S has given P assistance *intentionally*, ie deliberately, desiring or knowing his acts would further P's offence, recklessness as to whether P commits his crime will be enough for S to be implicated in it. Thus, cases such as *Maxwell* and *Bryce* give us an idea as to how well-defined, in S's mind, the principal offence needs to be in order for derivative liability to bite. However, as the court in *Bryce* was careful to point out, the first step in such cases is always to establish that S *meant to* aid and abet, ie that he had the *intention* to contribute to a crime the commission of which he contemplated as a real possibility.

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889 The *mens rea* required by joint enterprise will be discussed in the next chapter.
890 *Johnson* v *Youden* [1950] 1 KB 544 (KB) 546.
891 [1978] 1 WLR 1350 (HL).
892 [2004] EWCA Crim 1231, [2004] 2 Cr App R 35.

Joint enterprise cases, on the other hand, impose liability on S merely on the basis of S having foreseen P's crime. There is no requirement to establish that S *intentionally rendered assistance* to P as far as the crime in question, the 'incidental' or 'collateral' crime, is concerned – presumably because this question *has already been answered in the affirmative* in establishing that a joint enterprise between S and P existed as to the commission of another crime, the purpose crime, which in fact is the setting for the collateral crime's occurrence. At least this is what should have happened. There is, however, a danger that this crucial first step is omitted (or that the existence of a joint enterprise is affirmed without much ado on the basis of an arrangement to commit a different offence than the one under consideration, an offence which may be much less serious than the one charged). Even worse, there is a risk that joint enterprise will be charged as an *alternative* to aiding and abetting (rather than a doctrine that builds upon aiding and abetting as a tool to determine how far liability *under the ordinary principles of aiding and abetting* should extend when it comes to actions that are in excess of what was agreed or anticipated by S), sometimes even giving the jury a choice between these two seemingly distinct modes of liability,[893] thereby undermining the stricter *mens rea* requirements of aiding and abetting.

This danger already seems to have materialised in Australia, as is illustrated by the recent decision in *Clayton*.[894] The facts of the case are fairly straightforward: the three defendants drove to the victim's house in order to 'get back at him'. They carried several poles and at least one knife. At first, the victim managed to flee, but then he reappeared on the scene, armed with a knife. A struggle ensued, at the end of which the victim was dead from a stab-wound. At the trial, the prosecution could not prove which of the three

[893] See *Gnango* [2011] UKSC 59, [2012] 1 AC 827 [93] (Lord Dyson JSC).

[894] [2006] HCA 58. The Australian High Court had to decide whether the 'doctrine of extended common purpose', as joint enterprise is known in Australia, had occasioned injustice in the law of homicide and should be abolished or at least modified by replacing foresight of the possibility of a murderous assault with foresight of the probability of such an assault.

defendants had administered the fatal stab. However, they argued that a murder conviction could be reached for all of them in three different ways. The first was joint perpetration, in that each defendant had gone to the victim's home in the agreement and with the intention to inflict really serious injury on him, and this plan was put into practice. The second was (the Australian equivalent of) 'joint criminal enterprise'. The prosecution argued that the defendants had agreed to assault the victim with weapons and that each of them foresaw *as a possibility* in the carrying out of the agreed understanding or arrangement that death or really serious injury would occur.[895] The third was aiding and abetting. The prosecution claimed that the two defendants who did not inflict the fatal wound had aided and abetted the person who did, by intentionally helping, encouraging or conveying their assent to that person in his or her commission of the murder. The jury found the defendants guilty. As in England, they did not give reasons.

The High Court of Australia, by a majority, refused to grant the defendants permission to appeal. In a powerful dissent, Kirby J pointed out the dangers of leaving it to the jury to work out on which basis to convict the defendants.[896] To secure a conviction of murder based on either joint perpetration or aiding and abetting, the jury needed to be satisfied that each accused had the requisite specific *intention* in relation to the crime charged. By contrast, to secure a conviction on the basis of joint criminal enterprise, it was sufficient that the jury thought that each defendant *foresaw* the *possibility* that death or really serious injury might occur on the occasion of 'getting back at the victim'.[897] Since the three bases had been put in front of the jury as alternatives, there was nothing to stop them from convicting on the basis of joint enterprise in circumstances where they were not satisfied that the prosecution had established aiding and abetting or co-perpetration. Surely, it was much easier for the jury to adduce, from the evidence, what each applicant *foresaw*

895 ibid [65].
896 ibid [61] – [65].
897 ibid [63].

might happen, than to establish what each applicant *agreed* was to happen or what each applicant *did* during the assault? As Kirby J said, the jury could convict all three defendants of murder, 'although [they] might, if they had been required to do so, have decided that one, two or all three of [the defendants] had not actually intended the deceased's death or had not regarded it as a virtually certain or a "probable" outcome'[898] of acting out their shared purpose of assaulting the victim. He criticised the prosecution's approach as leading 'to lazy and unprincipled determinations (…) particularly in homicide cases where the doctrine is specially important, wor[king] injustice and depart[ing] from the basic principles of criminal responsibility now accepted in our law.'[899]

Since the courts and many commentators in England assume that joint enterprise is a distinct form of complicity liability rather than a principle aimed at differentiating between those crimes that are still part of a criminal scheme and one-sided excesses, there is a danger that joint enterprise terminology may be used in English courts as an easy way of implicating individuals in the crimes of others without careful assessment of their actual involvement and culpability. There are good reasons, however, why the law should pay careful attention to the exact level of involvement and degree of culpability. Even though secondary parties will be convicted of the actual offence, they are given a distinct label: we refer to them as accessories rather than principal offenders. This is to reflect the fact that secondary parties assist and encourage crime; they do not commit it. Their *actus reus* deficit is usually counterbalanced by a *mens rea* 'surplus'. Often acts that do, in the event, assist the principal offender are lawful to begin with and only become wrongful through the mental attitude (intention or knowledge) with which they are being carried out. Selling DIY tools in the course of an ordinary business, for example, is, by itself, an innocent activity, even though many such tools can be used for criminal purposes. This is common

898 ibid [47].
899 ibid [46].

knowledge, and the person behind the counter who sells these items ought to be aware that there is (always) a possibility that any tool he sells may be used for unlawful purposes. But unless he intends his customer to use the specific tool for committing a crime or believes that the latter intends to do so, his conduct is blameless.[900] The *actus*, so to speak, only becomes *reus* if the *mens* is *rea*.[901] The salesperson's example shows why the law should take care in assessing whether S indeed possessed a degree of *mens rea* sufficient to hold him *fully* to account for the crime that P has perpetrated, lest there be over-criminalisation. This careful assessment is, however, undermined by an overzealous application of joint enterprise terminology and a strategic (ab)use of the joint enterprise doctrine as a distinct head of liability in cases which are really only instances of aiding and abetting.[902] Where joint enterprise law is applied *instead of* or *alongside* the more stringent elements of aiding and abetting, as an alternative route to conviction as in *Clayton*,[903] this in effect erodes any need to assess S's intentions, thereby exposing him to liability where there may have been none (or liability for a lesser offence only) on the ordinary aiding and abetting standards. Such an approach is detrimental, not only because it plays havoc with the coherence of the complicity rules (if the prosecution could always have resort to joint enterprise *mens rea* standards, there would be no scope left for the more demanding aiding and abetting principle), but also because it undercuts mechanisms which are, in fact, also aimed at protecting S from over-criminalisation, however little sympathy we may feel for him on the facts. English law should continue to decide cases of alleged assistance on the basis of the ordinary aiding and abetting principles. The doctrine of joint enterprise only serves to help

900 Similarly: AP Simester, 'The Mental Element in Complicity' (2006) 122 LQR 578, 590.

901 Apologies to the late Lord Diplock for the extremely bad Latin: see *Miller* [1983] 2 AC 161 (HL) 174.

902 The House of Commons Justice Committee has concluded that 'publication of the CPS's guidance represents a step forward, but the extent to which the guidance has improved prosecutorial practice in the way that we envisaged it might do, by reducing levels of overcharging, is open to question. One refrain in the evidence we received was that there was no sign of any change having taken place; another theme was that the available information on the use of joint enterprise was inadequate to make any assessment', see *Joint Enterprise: follow-up, Fourth Report of Session 2014-15* (HC 310, 2014) para 14.

903 [2006] HCA 58.

us decide where to draw the line when there is doubt whether P's acts can still be attributed to S because *P has gone beyond the crime S thought he was assisting*. The doctrine here serves to distinguish between crimes that can be said to have still been aided by S in any meaningful sense of the word and one-sided criminal excesses on the part of P which destroy the link between S's contribution and P's actions. It will be remembered from the discussion in Chapter 6 that German law also has an 'excess principle' operating in the context of aiding and abetting: the so-called *Teilnehmerexzess* exculpates a participant who would otherwise be liable as an aider and abettor in circumstances where the principal departed from the crime that the participant thought he was assisting.

The fact that both *Mittäterexzess* and *Teilnehmerexzess* in German law operate in the contexts of co-perpetration and aiding and abetting, but do not in any way form an independent head of liability, reinforces the argument that joint enterprise, notwithstanding its somewhat misleading name, forms likewise part of 'joint perpetration' and 'aiding and abetting' and does not represent its own head of liability. Joint enterprise law and terminology should only enter the picture if there has been a deliberate variation in P's crime which S claims goes beyond what he signed up for as an accessory or co-perpetrator. As such, the joint enterprise doctrine is no more than a tool which helps us decide whether acts done by P and of which S claims that they are one-sided criminal excesses can still be attributed to S.

D Conclusion

The joint enterprise doctrine must logically also apply to situations where liability is not derivative in the *vertical* sense associated with secondary liability (as in the case of P and S), but where it rests *horizontally* on a mutual attribution of acts (as where the actors are P1 and P2). The latter is a type of *primary* (not secondary) liability: the principle of attribution,

in that it operates reciprocally, is not derivative in the (one-way) sense of accessorial liability, and the actors are usually classified by the law as principals. As the doctrine thus operates irrespectively of whether the underlying conduct is one properly classified as belonging to the sphere of primary or secondary liability, it is best, if inelegantly, referred to as a principle *sui generis*. The error underlying current expositions of the doctrine is precisely that they either regard the doctrine as an independent head of liability or as a doctrine of secondary liability only. The doctrine is, in fact, neither. Only if joint enterprise is recognised as what it is, namely a principle of general application both to co-perpetration *and* secondary liability, can it be the subject of meaningful reform.

Meaningful reform is necessary, however. The criteria by which the doctrine distinguishes between acts that are to be attributed to S and acts which are not must be related to S's mental state. English law currently seems to require that S *foresaw* P's criminal acts in order to attribute them to him. If joint enterprise is properly understood as an exculpatory principle, this low standard threatens to render it superfluous (because it is usually not difficult to establish foresight). On the other hand, requiring participants to have *intended* the consequences that ensued, in the sense in which *intention* is currently used in English criminal law, would, it is argued, put the bar too high. An intermediate *mens rea* standard is required. Again, a look at German law, as will be argued in the next chapter, might prove fruitful. While, as we have seen in Chapter 3, the structure of the German criminal law as it relates to homicide is simply too different to English law to draw any exact parallels, the German idea of *dolus eventualis* does, it will be argued, bear a lot of promise for joint enterprise. We have seen in Chapter 3 that the crux of this idea is the attitude that a person has to a given outcome. This is short of what English law requires of intention, but more demanding than the current foresight test employed in the context of

joint enterprise. The argument put forward in the next chapter is that it would strike exactly the right balance.

Chapter 8: *MENS REA* IN JOINT ENTERPRISE – A ROLE FOR ENDORSEMENT?

In this chapter, I will argue that the problems with the joint enterprise doctrine identified in Chapters 4 and 5 might be alleviated by supplementing the cognitive mens rea standard of foresight with a volitional element that looks to how the defendant related to the foreseen risk. Examining judicial pronouncements on the *mens rea* elements necessary and sufficient to trigger joint enterprise liability, the chapter's principal contention is that English law would do better to define the joint enterprise principle in terms of foresight plus endorsement.

While the argument put forward is inspired by the German concept of *dolus eventualis*, as introduced in Chapter 3, it will be demonstrated that English common law, prior to the House of Lords decision in *Powell*,[904] was surprisingly close to an endorsement-focussed conception of the joint enterprise principle, and that, arguably, English law took a wrong turn in that case by elevating what used to be an evidentiary rule to a substantive principle of foresight.

After explaining how an endorsement-focussed *mens rea* test would fit in with the common law framework, this chapter will consider possible objections to such a development and discuss how these might be overcome. Against the backdrop that legislative reform is unlikely to happen in the near future, the chapter concludes that it is not necessary to wait for Parliament to put in place reforms: joint enterprise is a creature of the common law, and the common law is able to tame it unaided.

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[904] [1999] 1 AC 1 (HL).

A Introduction

As we saw in Chapter 4, a series of appeal cases,[905] including the Supreme Court decision in Gnango,[906] leave no doubt that under the doctrine of joint enterprise as currently understood an individual '[S] may be guilty of an offence (crime B) that he did not want or intend [P] to commit, providing that he foresaw that [P] might commit it in the course of their common enterprise in crime A.'[907] Whereas the actual culprit, P, needs to have acted with intention (in the *Woollin*-sense of purpose or foresight of death or serious harm as a virtual certain consequence) if he is to be liable for murder, it is sufficient for S to be convicted of the same offence that he was reckless[908] as to P's causing death or grievous bodily harm with the requisite murderous intent.[909] The law, in other words, 'requires a less blameworthy mental standard for the non-acting co-adventurer than for the person who actually commits the murderous act.'[910]

In the last chapter, I argued that this joint enterprise principle, while it is often left to the jury as a third, independent avenue to liability alongside joint perpetration and aiding and abetting, actually is a mechanism by which the law decides whether a person who has participated in the commission of one crime (whether as co-perpetrator or aider and abettor) can be said to have been involved in another that is committed on the same occasion. On

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905 A and others [2010] EWCA Crim 1622, [2011] QB 841; Carpenter [2011] EWCA Crim 2568, [2012] QB 722; Lewis and others [2010] EWCA Crim 496; Mendez and Thompson [2010] EWCA Crim 516; Stringer [2011] EWCA Crim 1396, [2012] QB 160; *Jogee* [2013] EWCA Crim 1433; *Yusuf* [2014] EWCA 1586, [2015] 1 Cr App R (S) 4.

906 [2011] UKSC 59, [2012] 1 AC 827.

907 A and others [2010] EWCA Crim 1622, [2011] QB 841 [8], 845 (Hughes LJ).

908 *Powell* [1999] 1 AC 1 (HL) 14 (Steyn LJ). S's mental state, falling short of intention (even in the oblique sense) must be one of subjective recklessness. However, it can be doubted whether this amounts to *Cunnigham*-recklessness. Jury directions focus on S's foresight; foresight is not synonymous with recklessness in the *Cunningham*-sense which requires the defendant consciously to have taken an unreasonable risk. This latter limb is conspicuously absent in cases decided under joint enterprise principles. See also Ashworth and Horder, 439: 'Thus the basis of joint enterprise liability is now a restricted form of (subjective) recklessness, similar in spirit to the *Maxwell* decision'.

909 JC Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR 453, 464. See also *Appiah* [2012] EWCA Crim 359 [23] (Hughes LJ).

910 Law Commission, *Assiting and Encouraging Crime* (Law CP No 131, 1993) para 2.123. See also Matthew Dyson, 'More appealing joint enterprise' (2010) CLJ 425.

this understanding of how the concepts of co-perpetration, aiding and abetting and joint enterprise relate to one another, there are only two ways in which an individual can become complicit in someone else's crime: joint perpetration and aiding and abetting. Joint enterprise only comes into play to determine the scope of either head of liability. In this it fulfils a necessary and important function.

To put this another way, while joint enterprise is commonly thought of as having both inculpatory and exculpatory dimensions, we have seen in the previous chapter that it has no inculpatory function going beyond the work done by the requirements for aiding and abetting or co-perpetration. The first limb of the doctrine, its inculpatory limb, has therefore been shown to be redundant, leaving just the exculpatory dimension of the doctrine, operating as a delimiting device for aiding and abetting and joint perpetration. For joint enterprise to operate in this way, we need criteria to determine where the line between attributable and non-attributable acts is to be drawn, in other words, how wide the net of liability is to be cast. To speak in terms of 'crime A' and 'crime B' in this context is unhelpful and may even be misleading: what the doctrine is doing is determining the scope of the (common) plan or purpose S has subscribed to which, of course, may include a number of distinct offences such as burglary followed by murder, criminal damage followed by assault followed by murder etc. The prosecution's main goal will be to bring home a murder conviction, and the question for the jury will therefore be whether S was 'in it' as far as the murder is concerned. How is the jury meant to do this?

This is where endorsement comes in. As we saw in Chapter 3, where S is charged as an accomplice to P's intentional homicide, the idea underlying the German *dolus eventualis* concept is that it is S's accepting mind-set (when it comes to P's crime) that is reprehensible and attracts blame, not the fact that S had a (possibly fleeting) realisation of the fatality as such (coupled with the fact of his continued participation in the underlying

criminal event). Using the same idea in the English context of joint enterprise, it might be argued that S's accepting mind-set, not just his foresight, vis-à-vis murder supplies the requisite mental element to settle him with liability as an accessory to or joint perpetrator of P's murder.

This is not to say that foresight does not have a role to play in determining where to draw the line of accomplice liability. However, under the suggested approach, foresight would be just one factor of the evidential matrix to be considered to establish whether S endorsed the consequences brought about by P's actions. In other words, foresight would remain relevant as a matter of evidence; the substantive principle determining how wide to cast the net of joint enterprise liability would, however, be endorsement. Indeed, it is possible to argue that endorsement is the overarching principle underlying secondary liability and joint perpetration generally.[911]

In the following, I will first explain in which situations in particular the current foresight-based mens rea can lead to inconsistency and injustice. The main part of the chapter puts forward the suggested alternative of focusing on S's attitude (of endorsement) towards P's further crime as opposed to his mere foresight of that crime and explains why this would be preferable to the law as it stands. The chapter considers possible objections to such a development and explains how these might be overcome. It will be suggested that the case law has not always been unequivocal that all that is required to satisfy S's mental element is mere foresight, and that on the basis of pre-*Powell* case law, a case can be made that originally, the joint enterprise principle (as a delimiting device for accomplice liability) was built around the idea that S had sanctioned P's crime B, similar to the German concept

[911] See eg the sentencing remarks by Treacy J in *Dobson and Norris* (2011, unreported, WL14586 [6]-[7]), a case decided on ordinary principles of secondary liability: 'The evidence does not prove so that I could be sure that either of you had a knife, but the person who used it did so with your knowledge and *approval*. (…) It is not as if, for example, one person unexpectedly did something that no one else expected or *approved* of.' (Emphasis added).

of *dolus eventualis*. The chapter concludes that such an approach might still be within interpretative reach of the common law and its doctrinal traditions, so that the Supreme Court might be able to adopt it, and without having to wait for unlikely legislative intervention, raise the *mens rea* standard for non-acting accomplices to a level that is morally more acceptable than the current law, in determining whether they are to be held to account for P's crime B on the basis of aiding and abetting or joint perpetration.

B The Blunt Tool of the Foresight Test

Where joint enterprise principles are brought into play, the applicable mens rea standard will, in essence, be one of foresight [of P's murder] (rather than foresight plus an intention to aid and abet [P's murder], normally required to prove aiding and abetting, or intention [to inflict really serious harm], normally required to support a charge of principalship):[912] while the Supreme Court stressed in Gnango that mens rea in joint enterprise actually requires both 'a common[913] intention to commit crime A' and foresight by S of the possibility that P might commit crime B,[914] the common intention to commit crime A is usually not hard to find.[915] For example, in Badza[916] Sir Anthony May described the joint enterprise as 'a late night outing together which, as the appellant must have foreseen, might result in their participation in violence during which [the principal offender] ... might use the knife aggressively with the requisite intent for murder.' Such a loosely circumscribed venture (crime A) is not a particularly strong candidate to bear the load of S's conviction, especially where P's offence (crime B) constitutes murder. In fairness to his Lordship, it

912 Kirby J in *Clayton v The Queen* (2006) 168 A Crim R 174 [63].

913 This choice of terminology – *common* rather than *joint* intention – is potentially misleading: a joint enterprise requires *concerted* action on the basis of an understanding that is *shared* between the actors. To describe an intention as common (to two or more actors) might suggest that it can be held *concurrently*, ie individually, without one actor being aware that the other has the same intention.

914 Gnango [2011] UKSC 59, [2012] 1 AC 827 [42] (Lord Phillips PSC and Lord Judge CJ).

915 Similarly Matthew Dyson, 'The future of joint-up thinking: living in a post-accessory liability world' (2015) J Crim L 181, 188.

916 [2009] EWCA Crim 2695 [32-33].

becomes clear later in his judgment that he does not think that a 'late night outing', not being criminal in itself, can ever constitute 'crime A' for the purposes of joint enterprise. The quote nevertheless demonstrates that we are on a slippery slope. It does indeed not take much to infer an agreement to commit a crime, and this becomes clear in the trial judge's directions to the jury expressly approved by his Lordship. Thus, the judge said that 'agreement to commit an offence may arise on the spur of the moment. Nothing needs to be said at all. An agreement can be inferred from the behaviour of the parties'.[917] Liability for S thus essentially turns on whether the jury believes he had foresight of P's commission of crime B. This is an unsatisfactory standard of assessing liability in joint enterprise cases, because in contrast to (straightforward) cases of (co-) perpetration or aiding and abetting, S has neither contributed to the actus reus of the offence he is charged with, nor has he directly helped with or encouraged that crime.[918] The mental element – foresight of a possibility – thus has to do all the work linking S to P's crime. The rather undemanding *actus reus* stage[919] is not counter-balanced, as one might have expected, by a particularly demanding mens rea requirement.[920] Apart from concerns that the prosecution's case of foresight may be made on the basis of rather weak evidence (turning on signs of association and gang membership),[921] which do not concern the (in)adequacy of the substantive legal rules with which this thesis is concerned, the foresight criterion on its own fails to make

[917] ibid.

[918] In Mendez and Thompson [2010] EWCA Crim 516 [18-23] and Stringer [2011] EWCA Crim 1396, [2012] QB 160 [47-51] Toulson LJ suggested that in such cases, S's liability is based on a broad concept of causation.

[919] An implied agreement between P and S to commit crime A seems to suffice.

[920] See also Christopher Kutz, *Complicity – Ethics and Law for a Collective Age* (CUP 2000) 215: 'When accomplice liability is predicated on foreseeable consequences, the normal subjective conditions are not met (…), foreseeable-consequence liability is very hard to justify.'

[921] See evidence given by Tim Moloney QC and Simon Natas, cited in House of Commons Justice Committee, *Joint Enterprise – Eleventh Report of Session 2010-12*, vol I (HC 1597, 2012) 8; Matthew Dyson, 'The future of joint-up thinking: living in a post-accessory liability world' (2015) J Crim L 181, 187-188; Andrew Green and Claire McGourlay, 'The wolf packs in our midst and other products of criminal joint enterprise prosecutions' (2015) 79(4) Journal of Criminal Law 280, 283-287.

some (morally) significant distinctions which the law, arguably, ought to reflect.[922] One possible consequence is that participants that are very much on the periphery of events are treated on a par with the main perpetrators.[923] Where crimes of violence are concerned (as is usually the case where joint enterprise is invoked), escalation is always a possible, and hence foreseeable, consequence. It is thus difficult for a defendant to escape liability on the basis that he did not actually foresee that the harm anticipated might result in much greater, and ultimately fatal, harm. We may feel that someone who does not disassociate himself from violent events before they turn really nasty is rightly caught by the net of liability if death results (even though not at his, but someone else's hands). But is this true under all circumstances? And is it right to hold him liable for murder, carrying a mandatory life sentence? S may have quite different reasons for his continued association with the enterprise:

(1) Maybe he genuinely, albeit naively, believes that his presence might help to avoid the worst, in the sense that he trusts his being there might have a moderating influence on others, although he can foresee that there is still a (significant) risk that one of his associates may do V serious harm.

(2) Maybe he does not care what happens, does not care whether the potential victim, V, lives or dies.

(3) Maybe he desires events to unfold as they then do.

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922 On the (contested) idea that criminal liability is to be ascribed in accordance with moral responsibility, see RA Duff, *Intention, Agency & Criminal Liability* (Basil Blackwell 1990) 103-104 (with reference to RA Duff, *Trials and Punishment* (CUP 1986) chs 3-4).

923 See the case studies in The Bureau of Investigative Journalism, *Joint Enterprise – An investigation into the legal doctrine of joint enterprise in criminal convictions* (April 2014) 19-31.

In all these instances, he remains associated with the enterprise, and does so with the requisite level of foresight (of death/ghb as a possibility)[924]; yet his attitude towards the harm foreseen differs markedly in the three scenarios:

(1) In the first instance, S remains involved precisely because he wants to reduce the likelihood that V is seriously hurt.

(2) In the second example, S is indifferent as to whether V is caused serious harm or not.

(3) In the final scenario, S positively wants V to be seriously harmed.

People generally would think worse of S in scenario (2) than in scenario (1), and still worse in scenario (3). The intuitively recognised differences in attitude reflect differences in moral culpability, which, it is suggested, ought to translate to differences in criminal responsibility.[925]

There may be cases in which the same evidence suggests both that S clearly foresaw the ensuing violence and that he was not 'okay' with it. They demonstrate particularly clearly that focusing on foresight alone cannot be correct. P and S agree to 'torch' some cars. P has a propensity for violence and usually carries a knife, as S knows, but using violence is not part of their plan. The two succeed in setting alight a Mercedes and are in the process of 'torching' a BMW when a local resident, V, comes upon the scene and threatens to call the police. Fearing apprehension, P fatally stabs V. What impact on S's liability would the following alternative findings have?

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924 Some raise the question whether the foresight element does even have to relate to death as opposed to *acts* committed by P with the intention of killing or causing GBH by those acts, see William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 5-6.

925 Similarly Steven J Odgers, 'Letter to the editor' [2013] Crim LR 222, 223. See also Ben Crewe and others, 'Joint enterprise: the implications of an unfair and unclear law' [2015] Crim LR 252, 267: 'Often expressed in [statements made by prisoners convicted under joint enterprise] was a feeling that, even if they were *legally* guilty, they were not *morally* guilty of murder, and could not reconcile what they had done with the connotations of a murder charge, the label of being a murderer, and the penalties that went with it.'

(1) S was happy to come along even though he foresaw the risk that someone might get hurt.

(2) S only agreed to come along if P promised that no one would get hurt.

It is clear that there is more evidence of foresight in scenario (2) than in scenario (1). At the same time, S's (moral) culpability is lower in the second case than in the first. This is because extracting the promise from P that no one will get hurt is good evidence not just of foresight (that P may hurt someone), but also of the attitude that S has towards the harm caused by P. In the second example, S does not want anyone to be harmed; in the first example, he is indifferent to harm being caused: S is 'happy' to come along, although he can foresee that P's propensity for violence might result in someone being injured. S's attitude (of 'so be it') towards the fatal outcome produced by P is blameworthy, not his foresight of the fatality as such (albeit coupled with the fact that he remains associated with P). The two cases illustrate a morally relevant distinction which the current law does not acknowledge: as soon as S foresees that P might kill with the requisite murderous intention, he is put on a par with P and becomes liable to a conviction for murder should P indeed kill with the requisite intention (ie with foresight of gbh or death as a virtual certain consequence of his, P's, actions);[926] the alternative of a manslaughter conviction[927] is currently only relevant where S foresees violence on P's part, but does not expect him to harbour murderous intentions in the Woollin-sense. Assuming S does indeed contemplate

[926] This indiscriminate use of the foresight standard is criticised by Ben Crewe and others, 'Joint enterprise: the implications of an unfair and unclear law' [2015] Crim LR 252, 269 as making 'a mockery of the criminal law which is founded on fundamental principles of the rule of law, namely the need to identify degrees of criminality and to reflect this in the hierarchy of offences and the sentence which is imposed.'

[927] While *Powell* [1999] 1 AC 1 (HL), which was not entirely clear on this point, has been taken to mean that joint enterprise is an all or nothing approach (resulting either in a murder conviction or acquittal) – for a recent example see *Mendez and Thompson* [2010] EWCA Crim 516 [21]-[22], [38] (Toulson LJ) – Carpenter [2011] EWCA Crim 2568, [2012] QB 722 now clarifies that in appropriate cases the defendant may still be charged with murder and manslaughter in the alternative. This is in line with dicta in *Yemoh* [2009] EWCA Crim 930, which was heard in the Court of Appeal after *Powell*, and reconfirms pre-*Powell* Court of Appeal decisions such as *Roberts* [2001] EWCA Crim 1594, which support the view that someone, who takes part in a joint venture realising that this will involve some degree of violence, will usually be guilty of (unlawful dangerous act) manslaughter (or murder, if he had the requisite mens rea) if death results.

that P might act with lethal mens rea in the two situations described above, the current law would allow a jury to convict him of murder in both instances. Such an outcome seems fundamentally unjust,[928] even if we take into account that in scenario (2) S is not entirely innocent: he has demonstrated a less than full commitment to the avoidance of harm;[929] if he wanted to err on the safe side, he could have chosen to stay behind. However, he is not on a par with the actual killer: to be convicted of murder, a person needs to *cause* death with intention (at least) to do really serious harm. S's contribution (if any) does not amount to a but for cause of the victim's death, nor does his level of foresight of murder as a possibility allow for a finding of *intention* in the *Woollin*-sense.

That S's culpability in joint enterprise situations rarely equals P's was acknowledged by the late Lord Mustill in his speech in *Powell*.[930] Moreover, his Lordship was unhappy that the foresight test ties itself into (conceptual) knots over scenario 2 of the 'car torching' example. Thus he said:

> In one particular situation there is, however, a problem which [joint enterprise] cannot solve. Namely, where S foresees that P may go too far; sincerely wishes that he will not, and makes this plain to P; and yet goes ahead, either because he hopes for the best, or because P is an overbearing character, or for some other reason. Many would say, and I agree, that the conduct of S is culpable, although usually at a lower level than the culpability of the principal who actually does the deed. Yet try as I may, I cannot accommodate this culpability within a concept of joint enterprise. How can a jury be directed at the same time that S is guilty only if he was party to an express or tacit agreement to do the act in question, and that he is guilty if he not only disagreed with it, but made his disagreement perfectly clear to P? Are not the two assertions incompatible?[931]

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928 Likewise Kirby J in *Clayton v The Queen* (2006) 168 A Crim R 174 [98]. See also Rudi Fortson, 'Inchoate Liability and the Part 2 Offences under the Serious Crime Act 2007' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 173, 203: '[I]t is submitted that persons ought not to be stigmatised as "murderers", and sentenced as such, on mere foresight of what another might do.'

929 GR Sullivan, 'Participating in crime: Law Com No 305 – Joint criminal ventures' [2008] Crim LR 19, 29.

930 [1999] 1 AC 1 (HL) 11: 'Many would say, and I agree, that the conduct of S is culpable, although usually at a lower level than the culpability of the principal who actually does the deed.'

931 *Powell* [1999] 1 AC 1 (HL) 11.

It is certainly true that the two assertions are contradictory; nonetheless, under the law as it stands, such a case would be covered by the joint enterprise doctrine. As Lord Rodger confirmed in *Rahman* if

> B contemplates that A may take a gun and use it in the course of the attack on the victim [then], even if B is vehemently opposed to the use of a gun and tries to dissuade A from carrying one, nevertheless, if, being aware of the risk, B takes part in the joint assault, he will be guilty of murder if A shoots the victim.[932]

In covering this case, joint enterprise is not just over-inclusive[933] and counter-intuitive, it is also conceptually unsound.

The problem is compounded by the rule that in English law, duress is not a defence to murder.[934] Returning to our 'car torching' example, imagine a young, aspiring member of the 'car torching' gang who is seriously worried about himself becoming a victim if he refuses to come along when it becomes clear that violence against people rather than cars is very much on the cards. The current foresight test renders him liable to be convicted of murder, and the fact that he was, or believed that he was, under duress in failing to disassociate himself from the violence that ensued will not assist him. Such a case of coercion would be a fortiori the case mentioned by Lord Mustill in which S only stays on the scene because P is an 'overbearing character'.[935] It may be just about arguable that a person who himself actively brought about another person's death, or actively assisted another in killing, should be barred from the defence if he did so under coercion.[936] I would argue that it is quite a different thing to find someone who was merely on the periphery of

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932 Rahman [2008] UKHL 45, [2009] 1 AC 129 [36].

933 Similar in outcome, though not reasoning, Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 862. See also Barry Mitchell, 'Participating in Homicide' in Alan Reed and Michael Bohlander (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 7, 13.

934 *Howe* [1987] AC 417 (HL); *Gotts* [1992] 2 AC 412 (HL).

935 *Powell* [1999] 1 AC 1 (HL) 11.

936 Though the Law Commission notes that '[a]lmost all our consultees were agreed that duress should be a defence to murder in some manner or form', see *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 1.56.

events and not actively involved guilty of murder in circumstances where he remained at the scene out of fear or intimidation.

The morally relevant distinctions between participants who might share foresight of their associates' actions but whose attitudes to such actions may differ present a jury with a dilemma. On the one hand there are the clear directions or 'steps to verdict' given to them by the trial judge which require them to focus on foresight, and foresight alone. On the other hand, in Lord Mustill's 'puzzling case' or a case involving duress, some juries may feel morally compelled to depart, at least to some extent, from their instructions by treating the foresight test merely as a rule of evidence, with foresight being (instinctively) used as an indicator, but only an indicator, of a reprehensible disposition. Other juries will take their oaths more literally and feel duty-bound to follow 'the law' as the judge has explained it to them. Since empirical research into jury deliberations is not permitted in this country, we do not know if this is in fact the case. However, it seems clear that there is a danger of inconsistent decisions when the law and the moral good sense of ordinary people part company, as they do in the *mens rea* standard applied in joint enterprise cases: during its 2012 inquiry into the doctrine of joint enterprise, the House of Commons Justice Committee in fact heard (anecdotal) evidence to the effect that the current law is applied inconsistently.[937] While the Committee acknowledged that such claims are difficult to verify in the absence of official statistics,[938] it recommended to Parliament that the law of joint enterprise should be overhauled as a matter of urgency by way of statutory reform and that the Law Commission should be asked to consider, in particular,

> the appropriateness of the threshold of foresight in the establishment of culpability of secondary participants in joint enterprise cases. It should also consider the proposition that in joint enterprise murder cases it should not be possible to charge with murder secondary participants who did not

[937] House of Commons Justice Committee, Joint Enterprise – Eleventh Report of Session 2010-12, vol I (HC 1597, 2012) 3, 10-11.

[938] The Committee has recommended that the relevant data be collected in future, see ibid.

> encourage or assist the perpetration of the murder, who should instead be charged with manslaughter or another lesser offence.[939]

Hopes that this recommendation would be acted upon were, however, dashed when Chris Grayling, then Justice Secretary, responded in the following terms:

> I have carefully considered the evidence that has been submitted to the Committee. It is worth emphasising that the law on joint enterprise only applies when a group of people are already engaged in criminal activity (sometimes very serious criminal activity) and in the course of that activity another offence is committed. The law means that all those who foresaw that the 'collateral' offence might be committed in the course of the original criminal activity can be prosecuted for that offence. The law certainly does not criminalise innocent bystanders as has been portrayed in some sections of the media. … I recognise that families of convicted offenders and academics believe that the 'foresight' principle is too harsh, particularly where the conviction is for murder and a mandatory life sentence is imposed. However, there are many law-abiding citizens and families of victims who disagree and who may be concerned if the changes suggested by academics meant that certain offenders could no longer be prosecuted for murder. … It would not be appropriate for me to ask the Law Commission to launch a review prior to the General Election, as this would effectively tie incoming Ministers to a particular course of action. The scope of any review and who should lead it are issues that should rightly be left to new Ministers.[940]

This unsympathetic response makes it clear that joint enterprise reform is not on the agenda of the new, now entirely Conservative, government. In the short to medium term, therefore, any reform must come from the judges, in other words, the Supreme Court. It is certainly part of the Supreme Court's role to continue to shape and develop the common law, and given that the doctrine of joint enterprise, and its recent (re-)interpretation in *Powell*, was developed by the common law, judicial reconsideration of the doctrine would not be illegitimate even in the face of governmental unwillingness to get involved.

If judicial reform is on the cards, we need to consider how the instinctive response by our hypothetical jury could be translated into a rule of substantive law and jury

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939 House of Commons Justice Committee, *Joint Enterprise: Follow-up – Fourth Report of Session 2014-2015* (HC 310, 2014) para 47.

940 Letter from Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice to Rt Hon Sir Alan Beith MP, Chair, Justice Committee (27 January 2015) <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/1047/104704.htm > accessed 29 May 2015.

direction. In other words, what reprehensible disposition are we looking for? This question will be considered in the main part of the chapter which is to follow.

C Supplementing Foresight with Endorsement?

The law on joint enterprise would be less controversial if it allowed for more subtle distinctions to be drawn when it comes to S's mind-set.[941] This might be achieved if, in assessing the defendant's mental state, the focus shifted from foresight of the consequences (cognitive standard) to foresight plus endorsement of the consequences foreseen (cognitive-volitional standard), along the lines of the German concept of *dolus eventualis*. As we saw in Chapter 3, in applying the German concept the courts look to evidence suggesting that the defendant realised that death might follow (cognitive element) from a particular course of conduct and 'approvingly takes [this consequence] into account'[942] or, at a minimum, 'reconciles himself to' this consequence.[943] We further noticed that, under the German approach, the requisite endorsement of consequences will only then be absent if, on the facts, the defendant, despite foresight, 'sincerely, and not merely in a vague way, relied on [as opposed to 'hoped for'] the non-occurrence of the prohibited result'.[944]

In what follows, I will explore whether, and how, a similar approach would fit in with the general framework of the common law. It will be argued that an attitude-oriented approach towards assessing mens rea in joint enterprise is already within interpretative

941 It might be objected that introducing greater subtleties into the jury direction will lead to more scope for appeals. However, ultimately this is an argument premised on an inherent lack of confidence in the jury system. The Law Commission has recently consistently proposed that more gradations of criminal culpability should be introduced. It could also be argued that the recent abundance of appeals from joint enterprise convictions is a function of a (possibly rightly) perceived mismatch between the crude test of foresight and the ordinary person's intuitive moral judgment. It might also be objected that differences in responsibility should be dealt with at the sentencing rather than conviction stage. This raises a more general issue of criminal law – why have gradations of responsibility reflected at the offence stage at all (eg murder versus manslaughter) rather than dealing with them at the sentencing stage?

942 BGHSt 36, 1.

943 BGH (23.02.2012) BeckRS 2012, 07423 [13].

944 BGHSt 36, 1, 2, 10; BGHSt 38, 345, 351; BGH NStZ 2006, 98, 99; BGH NStZ 2006, 169, 170.

reach of the common law courts:[945] some (pre-Powell) cases can be read as presaging an element of approval or endorsement as to P's conduct (which S has foreseen as a possible incident to their joint venture), while more recent ones are at least ambiguous on this point. Indeed, it is arguable that, prior to *Powell,* in the same way that foresight (albeit in the degree of virtual certainty) can be used as evidence of intention in the general law of murder,[946] foresight (of crime B) in the context of joint enterprise was similarly used to infer approval or endorsement on the part of S. The problem is that this has been lost sight of, as will be explained in the following, with foresight taking on a life of its own in a substantive rather than an evidential role.[947]

The starting point for our analysis is the realisation that statements about the mental element in joint enterprise do not speak with one voice;[948] they are, at least, ambivalent on what exactly is required. As such, there are some cases which, in establishing S's liability, have focussed (almost) exclusively on whether S contemplated or foresaw that P might commit the extra crime as a possibility.[949] Others, by contrast, seem to have required such

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945 It is striking that, following a discussion of *Dobson and Norris* (2011, unreported, WL 14586) in which the defendants were sentenced on the basis of their *approval* of the use of a knife to harm the victim, Matthew Dyson, 'The future of joint-up thinking: living in a post-accessory liability world' (2015) J Crim L 181, 194, without exploring this further, comments that: 'This is not foresight, but intention.'

946 See *Woollin* [1999] 1 AC 82 (HL); *Matthews and Alleyne* [2003] EWCA Crim 192, [2003] 2 Cr App R 30 [43-45] (Rix LJ): 'In our judgment, however, the law has not yet reached a definition of intent in murder in terms of appreciation of a virtual certainty… .'

947 See also Dennis J Baker, 'Foresight in Common Purpose Complicity/Joint Enterprise Complicity: It Is a Maxim of Evidence, Not a Substantive Fault Element' (Draft Chapter 2013/14: *Reinterpreting Criminal Complicity*, Forthcoming) <http://ssrn.com/abstract=2507529> accessed 21 May 2015. However, while Baker concludes that joint enterprise liability should not be established unless it is 'shown that the accessory intended the perpetrator to perpetrate the collateral crime (should the need for it arise) for the purpose of effecting their joint enterprise' and that historically, a jury could infer from S's foresight that S 'conditionally intended the collateral crimes that resulted from the unlawful joint enterprise', my view is that liability depended, and should again depend, on whether or not the accomplice has endorsed the perpetrator's collateral crime, with foresight being part of the evidential matrix from which such endorsement can be proved.

948 Likewise Graham Virgo, House of Commons Justice Committee, Joint Enterprise – Eleventh Report of Session 2010-12, vol I (HC 1597, 2012) 8.

949 *Gnango* [2011] UKSC 59, [2012] 1 AC 827 [42] (Lord Phillips PSC and Lord Judge CJ): '[L]iability arises where (i) D1 and D2 have a common intention to commit crime A (ii) D1, as an incident of committing crime A, commits crime B, and (iii) D2 had foreseen the possibility that he might do so'.

foresight plus an additional element (such as 'agreement'[950], 'authorisation'[951] or 'wrongful participation in face of a known risk'[952]) which, arguably, connotes endorsement, not just contemplation, of the foreseen offence. Most cases, however, appear equivocal on the issue, in that they contain statements – usually framed in terms of (continued) participation in the criminal enterprise 'with' or 'despite' foresight – which could be read to support either of the aforementioned positions: the issue boils down to whether or not S's (continued) participation in the joint enterprise (which comprises the *actus reus* element) also has a *mens rea* dimension (going beyond cognition): it might imply volition on S's part, in the sense that by having *chosen* to participate *despite foresight* S demonstrates not just a willingness to run the risk of further wrongdoing by P, but some endorsement of the consequences foreseen as possibly resulting from P's actions. In *A and others*, for instance, the Court of Appeal said: 'the liability of D2 in the third type of joint enterprise scenario ... rests ... on his having continued in the common venture of crime A when he realises (even if he does not desire) that crime B may be committed in the course of it.'[953] Arguably, the focus here is as much on foresight (= cognitive element) as it is on S's decision (= volitional element) to remain a participant in the common criminal endeavour, so that it would not be fair to say that S is held to account on the basis of his foresight alone. Rather, S may here be held to account for his decision to remain in the enterprise, a decision which is not just constitutive of a willingness to run the risk of a harm foreseen – in which case it would still be difficult to explain why that should be sufficient to constitute the *mens rea* for murder – but, arguably, is constitutive of S's reconciliation to such harm. Such an understanding would go beyond recklessness (in its traditional common law sense), and

950 *Wakely* [1990] Crim LR 119 (CA).

951 *Chan Wing-Siu* [1985] AC 168 (PC) 175 (Sir Robin Cooke).

952 *Powell* [1999] 1 AC 1 (HL) 11 (Lord Mustill).

953 *A and others* [2010] EWCA Crim 1622, [2011] QB 841 [27], 850 (Hughes LJ). Similarly *Sanghera* [2012] EWCA Crim 16, [2012] 2 Cr App R 17 [90] (Aikens LJ).

whilst not amounting to intention in the common law sense either, might at least bring S's responsibility closer to one for intentional conduct.

However, there are statements in two House of Lords decisions which seem to suggest that the current law is built around an entirely foresight-centred approach to establishing S's liability. Thus, in Powell, the House of Lords concluded that 'it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm.'[954] Similarly, Lord Bingham said in the subsequent decision in Rahman that 'the touchstone [of joint enterprise liability] is one of foresight.'[955] Calling foresight 'sufficient' and 'the touchstone of liability' suggests that the doctrine of joint enterprise, at present, does not require a volitional mens rea element – and, indeed, no *mens rea* ingredient other than foresight – to establish S's liability.

Lord Steyn, in Powell, was particularly explicit that we need look no further than what S contemplated to found liability:

> [F]oresight is a necessary and sufficient ground of the liability of accessories. That is how the law has been stated in two carefully reasoned decisions of the Privy Council: see *Chan Wing-Sui* [sic] *v. The Queen* [1985] A.C. 168 and *Hui Chi-ming v. The Queen* [1992] 1 A.C. 34.[956]

Indeed, some passages in Chan Wing-Siu[957] lend support to Lord Steyn's proposition that 'foresight is a necessary and sufficient ground' of liability. Thus, Sir Robin Cooke who gave the judgment in Chan Wing-Siu said:

> It is what the individual accused in fact contemplated that matters. ... The prosecution must prove the necessary contemplation beyond reasonable doubt, although that may be done by inference as just mentioned. If, at the end of the day and whether as a result of hearing evidence from the accused or for some other reason, the jury conclude that there is a reasonable possibility that the accused did not even contemplate the risk, he is in this

954 [1999] 1 AC 1 (HL) 27 (Lord Hutton).

955 Rahman [2008] UKHL 45, [2009] 1 AC 129 [11], [21]. Likewise Lord Neuberger [103].

956 [1999] 1 AC 1 (HL) 13 (emphasis added).

957 [1985] AC 168 (PC).

> type of case not guilty of murder or wounding with intent to cause serious bodily harm.[958]

However, an earlier passage indicates that Sir Robin Cooke may here have been using the expression 'contemplation' with a rather specific meaning:

> That there is [a principle of joint enterprise] is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in *participating in the venture with that foresight*.[959]

In this passage, 'contemplation' is equated with 'authorisation',[960] a term that seems to require more than just foresight: 'authorisation' implies approval, sanction or endorsement of the acts and consequences foreseen. Arguably, the way that 'authorisation' is further linked ('it meets the case of...') with 'participating' suggests that the expression 'participation' is here used as shorthand for a *participation that gives rise to an inference of approval*: in continuing to participate, the defendant shows that he has authorised (in the sense of approving or deciding to live with) the consequences. In other words, he has endorsed the potential outcome of P's actions, if only to achieve some other goal. On such a reading, the very concept of 'participation' would include an element of volition, and foresight, although still a necessary ingredient, would no longer be sufficient to ground S's liability.

The other case Lord Steyn cites in support of his proposition is Hui Chi-ming.[961] Lord Lowry delivered the judgment in that case. With regard to an alleged misdirection concerning joint enterprise, he observed that passages in subsequent cases which were aimed at rewording the joint enterprise principle as enunciated in Chan Wing-Siu had often been misleading. In particular, Lord Lowry cites with approval a lengthy passage from

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958 ibid 177-78.

959 ibid 175 (emphasis added).

960 A point also noted in *Hui Chi-ming* [1992] 1 AC 34 (PC) 53 (Lord Lowry). But see Ashworth and Horder, 438: 'The element of prior agreement or "authorization" seems to be rather weak here …'.

961 [1992] 1 AC 34 (PC).

Hyde[962] in which Lord Lane CJ disapproves of the statement in *Wakely*[963] that '[t]he suggestion that a mere foresight of the real or definite possibility of violence being used is sufficient to constitute the mental element of murder is prima facie, academically speaking at least, not sufficient.'[964] Lord Lane explains that this 'passage is not in accordance with the principles set out by Sir Robin Cooke which we were endeavouring to follow and was wrong, or at least misleading.'[965] He goes on to offer the following reformulation of the joint enterprise principle:

> If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture. As Professor Smith points out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realises may involve murder.[966]

This statement is not so much restating or clarifying the passage in Chan Wing-Siu as putting a new gloss on the joint enterprise doctrine. Evidently, 'realisation' is a lot closer to foresight than 'contemplation'; however, the idea of the defendant having 'lent' himself to the enterprise and thereby having given assistance and encouragement clearly requires more than foresight on the part of the defendant, and may require even more than 'authorisation': it implies that the defendant, S, has somehow been instrumental[967] in the commission of P's crime. The quoted passage also suggests that the defendant's mental state must relate to his being so instrumental, because it requires that he deliberately lent himself to the enterprise.

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962 [1991] 1 QB 134 (CA).
963 [1990] Crim LR 119 (CA).
964 [1992] 1 AC 34 (PC) 50 (Lord Lowry citing Lord Lane CJ in *Hyde* [1991] 1 QB 134 (CA) 139).
965 ibid.
966 ibid 50-51 (emphasis added).
967 Not necessarily in the sense that S has caused crime B.

Arguably, a further passage in the judgment makes clear that the opinion in Hui Chi-ming is in fact ill-suited to support Lord Steyn's proposition. Thus, further on, Lord Lowry says the following (about the meaning of 'participation'):

> This was a strong case of at least tacit agreement that Ah Hung should be attacked accompanied by foresight, as admitted by the defendant, that a very serious assault might occur, even if that very serious assault had not been planned from the beginning. It is, moreover, easier to prove against an accomplice that he contemplated and by his participation accepted the use of extra force in the execution of the planned assault than it normally would be to show contemplation and acceptance of a new offence, such as murder added to burglary.[968]

Lord Lowry's words quite clearly suggest that the joint enterprise principle might originally have been built upon contemplation plus acceptance [by conduct] (ie participation) of the consequences foreseen. Such an acceptance clearly goes to the defendant's mental state. It is thus difficult to see how Lord Steyn's proposition that foresight is necessary and sufficient is supported by the reasoning in Hui Chi-ming. Indeed, Lord Steyn himself seems to realise that his view is not all that well supported by authority, for he continues at length to justify the imposition of liability in Powell with reference to policy and practical considerations.[969]

Bearing in mind how the Privy Council in the above cases initially associated 'participation' with both 'authorisation' and 'acceptance', it might be argued that, notwithstanding the fact that the language of 'authorisation' was rejected in *Powell* (upon which the focus in modern cases shifted to foresight), the law on joint enterprise, in that it continues to rely on the 'participating with foresight' formula, still has at its core an element of volition, and that ultimately S might be held to account because he has endorsed, as judged by his overall behaviour, the consequences foreseen by him as possible to result from his companion's actions. The view put forward here is admittedly not easily

968 [1992] 1 AC 34 (PC) 53 (emphasis added).

969 *Powell* [1999] 1 AC 1 (HL) 14.

reconciled with the two House of Lords decisions in *Powell* and *Rahman*. However, I have tried to demonstrate that those decisions, in turning foresight from an evidential into a substantive requirement, are based on an unsound footing in terms of authority. I would argue that, in *Powell*, the House of Lords took a wrong turn as a matter of principle and I will explain the reasons for this view in the following section.

D Why Endorsement is preferable to mere Foresight

There are five good reasons why the common law might want to adopt an endorsement-based approach to assessing *mens rea* in joint enterprise situations. First, identifying an element of endorsement provides us with a stronger link between S's conduct and P's crime than the foresight approach and the justifications put forward to defend it which place emphasis on S's having joined P in the original enterprise.

As we saw in Chapter 5, the usual justifications for the joint enterprise principle locate the crucial trigger for liability in S's commitment to and the role he plays in the initial joint enterprise (crime A); they do not point to a link between S and crime B other than S's having been involved in crime A with foresight of the possibility of crime B. Under the endorsement approach, S would not just have to have foreseen the risk (eg of murder) and assessed it as more than negligible; the jury would also have to believe beyond a reasonable doubt that he had reconciled himself to his companion's murderous intent and actions and, ultimately, the victim's death. It is not doubted, of course, that foresight will have a role to play in reaching that conclusion, but the jury will have to consider it as part of the overall factual matrix. Whilst S's murder conviction would thus still not be based on intention,[970] the endorsement test would raise the *mens rea* standard from what is currently

[970] Wilson and Ormerod suggest that S should be liable for joint enterprise murder if he intended or believed that P would kill with murderous *mens rea* or intentionally cause gbh, see 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 22-23. Likewise Matthew Dyson,'The future of joint-up

a watered-down version of subjective recklessness, bringing it closer to what is required to convict the main perpetrator. It avoids the practical difficulties connected with basing liability on intention, namely that intention in the *Woolin*-sense is difficult to prove against secondary parties in cases in which it is often unclear who the main perpetrator even was, while making convicting the secondary party more palatable morally. S's involvement with crime A is now linked with crime B because of his reprehensible attitude towards the commission of crime B by the principal perpetrator. This is preferable to a link based on foresight alone, which, as explained above, does not provide a moral connection between S and crime B.

The second good reason for preferring an endorsement-based approach to the current law is that it would make the basis of S's conviction intellectually sounder, in that endorsement can actually *explain* why S is to be held responsible for what is essentially P's crime: by his endorsement of crime B, the scope of the enterprise (crime A) is extended, so that S now has participated in a venture that includes P's further wrongdoing. In other words, the joint enterprise to which S is a party consists of *both* crime A and crime B. Endorsement thus furnishes the vital criterion by which the jury can decide whether the killing formed part of P's and S's common plan or purpose, so that it can then, justifiably, be attributed to S. If, for instance, in my 'car torching gone wrong' example, S had continued to set fire to other cars after P had killed the intervener, it would be possible for the jury to infer that he had thereby adopted P's act of killing. In contrast, had S in the same situation exclaimed 'What are you doing?' in a voice of disbelief, this might be taken to indicate that he was not, in any sense of the word, 'okay' with what his companion, P, was doing, giving rise to an inference that he did not endorse the latter's actions, although it

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thinking: living in a post-accessory liability world' (2015) J Crim L 181, 196: 'intention or belief that [crime B] will take place.'

cannot be denied that, on the facts, he had foresight that P might do just such a thing, knowing as he did of the presence of the knife and P's violent disposition.

Thirdly, the endorsement approach thus supports the argument advanced in Chapter 7 that joint enterprise is not a head of liability in its own right,[971] but a principle complementing the ordinary rules of aiding and abetting and co-perpetration, helping to determine how far to cast the net of liability. Where, for example, S participates in a burglary which results in the murder of the householder at the hands of P, S may defend himself against a charge of being an accessory to murder by arguing that he only signed up for burglary, not for murder. The prosecution will then have the burden of proving that, by his words or conduct, S endorsed the fatal acts by P. The joint enterprise principle, with the volitional *mens rea* element of endorsement,[972] is thus used to define the scope of the criminal incident that S was involved in.

Fourthly, the endorsement test is to be preferred to one looking to mere foresight because it excludes from the reach of the joint enterprise doctrine the case Lord Mustill found impossible to accommodate within a principle of liability which puts S on a par with P, because S's culpability is 'at a lower level than the culpability of the principal who actually does the deed':[973] 'S foresees that P may go too far; sincerely wishes that he will not, and makes this plain to P; and yet goes ahead … .'[974] In excluding this case, the joint

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971 See eg *Gnango* [2011] UKSC 59, [2012] 1 AC 827 [45] (Lord Phillips PSC and Lord Judge CJ); *Mendez and Thompson* [2010] EWCA Crim 516 [17] (Toulson LJ), *Stringer* [2011] EWCA Crim 1396, [2012] QB 160 [57] (Toulson LJ); Richard Buxton, 'Joint Enterprise' [2009] Crim LR 233, 243; Peter Mirfield, 'Guilt by association: a reply to Professor Virgo' [2013] Crim LR 577, 579; *Smith and Hogan*, 228-30; JC Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR 453, 461-462; Graham Virgo, 'Making sense of accessorial liability' (2006) Archbold News 6, 9; Graham Virgo, 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850, 865; Graham Virgo, 'Guilt by association: a reply to Peter Mirfield' [2013] Crim LR 584, 586.

972 Similarly GR Sullivan, 'Intent, Purpose and Complicity' [1988] Crim LR 641, 641 who locates 'the essence of complicity not in the conduct of A but in A's attitude to the conduct of P. A's conduct becomes essentially evidence of his attitude to P's conduct, it being irrelevant that his conduct may lack any facilitative, let alone casual, impact on the commission of P's offence.' Sullivan's position however differs from the view defended in this thesis in that he would redefine 'the mental element in complicity to incorporate an element of purpose' (p 642).

973 [1999] 1 AC 1 (HL) 11.

974 ibid.

enterprise doctrine becomes more coherent. It also becomes more proportionate and just in its application. This may be particularly relevant in cases in which S feels pressured or coerced to remain with the group notwithstanding, or even because, he foresees that conflict may escalate into (greater or even lethal) violence. The law is very clear that duress is not a defence to murder. An endorsement approach would solve this problem at the liability stage and might prevent serious injustice in such cases (by reducing S's liability to unlawful dangerous act manslaughter in appropriate cases).

Finally, commentators seem to be agreed that the current test sets the hurdle for conviction too low, while there are fears that requiring intention would set the hurdle too high (in that it is impossible to prove in practice).[975] If, in accordance with the law as set out in *Johnson v Youden*,[976] one were to limit the scope of what S assists or encourages to those crimes only which S knows or believes P will commit, the net of liability is not cast very widely: in situations such as murder arising out of burglary, unless it can be proved that S intentionally assisted or encouraged P's burglary either (1) knowing or believing that P would kill, or (2) having conditional intent that P should kill should the need arise, S would be able to escape liability for the murder. This might be so even though he had reconciled himself to P's lethal acts (without sharing P's purpose, however): he would escape liability, applying the *Johnson v Youden* standard of intention plus knowledge, because he thought they were merely possible and thus not something he believed would happen. The English conception of intent is too narrow in such a case, nor is the knowledge criterion satisfied. Endorsement might provide a middle ground from which to work out a practicable solution.

975 See ibid 14 (Lord Steyn).
976 [1950] 1 KB 544 (DC).

E What Endorsement might look like in Practice

If, as has been argued, 'participating with foresight' can be construed, or at least developed, so as to involve an element of volition (in the sense of endorsement of the foreseen harmful consequences), it would be preferable to have this articulated openly. As it is, juries struggle to make sense of the participation requirement, as evidenced, for example, by Stringer where the jury sent a note to the judge asking for clarification on what 'constituted participation as defined in his summing up'.[977] It is not obvious on an 'ordinary English meaning' interpretation of 'participation' that this requirement might aim for a finding that the defendant endorsed P's crime: while 'participating' may imply that the defendant chose to run a risk, it does not without more invite the jury to draw further-reaching inferences as to the defendant's disposition or volitional state of mind in the sense of an acceptance of or reconciliation to the harmful consequences of P's crime. As Wilson has pointed out, albeit in the context of homicide law reform, 'a willingness to run risks is not the same as being reconciled to their outcome',[978] and it is the latter that, arguably, links S to P's crime under the doctrine of joint enterprise, not the former (which seems ill-suited to bear the load of a murder conviction).

Some examples might help. Endorsement of P's crime B could, for instance, be inferred from S communicating his acquiescence of P's conduct to third parties before or during the commission of crime B, as evidenced by text messages sent from the crime scene. While such communications do not help or encourage the perpetrator (which is why this is not a straightforward case of aiding and abetting) they might tell the jury something about S's state of mind in relation to the foreseen consequences. Similarly, it might be possible to infer acquiescence or reconciliation to the foreseen consequences from S's

977 *Stringer* [2011] EWCA Crim 1396, [2012] QB 160 [33].

978 William Wilson, 'Murder and the Structure of Homicide' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (OUP 2000) 21, 30.

conduct at the relevant time (again, falling short of encouragement). Arguably, *Odegbune*[979] is a case of this kind: although S had orchestrated the event, a fight between rival groups, he was chasing another boy at the time of the murder and so did not actually encourage the killing of V. However, it is entirely conceivable that his overall conduct demonstrates not just foresight, but endorsement of the possibility of the fight turning lethal. Finally, there might be evidence suggesting subsequent approval, either verbal or conclusive, from which endorsement at the time the crime was committed can be inferred. The case of *Broda*[980] might fall into this category: S did not take part in the assault. However, he clearly foresaw the infliction of violence by others, and, indeed, bought those who participated in it a beer afterwards. On these or similar facts, it is suggested, a jury might infer endorsement of the relevant assault.

There might, of course, be cases in which the requisite endorsement cannot be demonstrated or proved, but where the jury will nonetheless be reluctant to absolve the defendant of all liability for the victim's death. It is therefore important to remember that an acquittal of a joint enterprise murder charge does not necessarily mean that the defendant is not liable for the victim's death: following the Court of Appeal decision in *Carpenter*[981] it is arguable that a participant in crime A who foresaw at least some harm coming to the victim can be guilty of (unlawful dangerous act) manslaughter where P ends up killing V.[982] The prosecution would need to show that S participated in an unlawful act which was

979 [2013] EWCA Crim 711.

980 [2015] EWCA Crim 1000 (CA).

981 Carpenter [2011] EWCA Crim 2568, [2012] QB 722.

982 See Alan Reed, 'Joint enterprise and inculpation for manslaughter' 74(3) [2010] J Crim L 200, 201; William Wilson and David Ormerod 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 22-23. Graham Virgo advocates substituting joint enterprise murder with joint enterprise manslaughter, see "JEF 11" (written evidence submitted to the 2014 Justice Committee follow-up inquiry into joint enterprise) <http://data.parliament.uk/writtenevidence/ committeeevidence.svc/evidencedocument/justice-committee/joint-enterprise-followup/written/ 10873.pdf> accessed 21 May 2015, paras [15-16].

intentionally performed (crime A) in circumstances rendering it objectively dangerous, leading to death.[983]

Interestingly, such an approach would be consistent with the BGH's approach to imposing liability on S for crimes by P which S has foreseen, but not endorsed, under the constructive crime of *Körperverletzung mit Todesfolge*. As we saw in Chapter 6, when analysing the 'pig feeder case', the assaults (participated in and endorsed by the killer's two associates) committed prior to V's murder (which, it might be recalled, was considered a criminal excess solely attributable to the actual perpetrator) were said inherently to have carried the risk of a fatal outcome, thereby justifying holding P's associates liable for V's death as co-perpetrators of *Körperverletzung mit Todesfolge* contrary to §§ 227, 25 (2) StGB. As we noted, the difficulty for the German court was that it needed to find that it was an injurious act either inflicted or intended (ie endorsed) by S that caused V's death, and it had already been found that the *specific* injurious act had not been either. Faced with this conundrum, the BGH argued that the risk of death was inherent in the risk of escalation which was present in the original affray. In the English context, one might similarly, if not entirely tidily, argue that P's act of killing, although unendorsed and therefore non-attributable to S, in that it arose out of a situation to which S's participation had contributed, namely crime A, is the realisation of the risk of escalating violence which was inherent in acts he *did endorse*. The problem did not present itself in *Carpenter*, because in that case S had foreseen, and indeed assisted, the specific act (stabbing) which resulted in death, albeit that she had assumed such an act would result in actual bodily harm, not grievous bodily harm, so that S lacked *mens rea* for murder, but was guilty of unlawful dangerous act manslaughter. However, it is quite conceivable that cases may present themselves where S foresaw, but crucially did not endorse, the specific act which resulted

983 *Smith and Hogan*, 540.

in death so that this act, under the suggested approach, cannot be attributed to S, necessitating a reasoning along the lines of the BGH to justify a manslaughter conviction.

To sum up, joint enterprise murder based on endorsement rather than mere foresight, coupled with an alternative charge of unlawful dangerous act manslaughter, would lead to a more finely tuned system of liability, giving the jury the 'moral elbow room' to find significant distinctions in attitudes displayed by participants, in turn giving judges the freedom further to reflect these distinctions at the sentencing stage, should the jury hand down a manslaughter rather than murder verdict.

F Objections to an Endorsement-based *Mens Rea* Approach

It might be objected that any reform along the lines suggested in this chapter raises practical concerns, and in particular (1) that joint enterprise in its current form is needed to tackle gang violence effectively, (2) that the proposed change would deprive the prosecution of a bargaining chip vital in securing accomplice testimony and/or guilty pleas, and (3) that adding an element of endorsement would make jury instructions too complex. Let us take them one by one.

I Fighting Gang Violence

Gang violence is a serious problem and one that requires a firm and effective response. Where a gang kills it may not always be easy to prove who fired the fatal shot, guided the fatal blade or landed the fatal blow. Joint enterprise as it stands makes it easy for prosecutors to avoid these problems by charging everybody involved with joint enterprise murder. It is therefore perceived to be a vital weapon in the fight against gang violence,

even though its intellectual and conceptual shortcomings are, at least implicitly, acknowledged.[984]

As we saw in Chapter 3, German law, too, recognises that jointly committed violent offences might be inherently more dangerous than violence by individuals. The StGB therefore contains a special provision, § 231, which penalises the mere participation in an affray leading to serious injury or death. However, in stark contrast to English law, the maximum sentence for this offence is a mere three years. Despite this, most commentators regard the provision as difficult to square with the rule of law.[985] This reinforces the argument that it would be a mistake for English law to tackle problems created by gang membership and escalating acts of violence committed *en groupe* by lowering the requirements of participation and accessorial liability.[986] Joint enterprise as it stands is a common law principle which as a matter of legal doctrine does not fit in well with the rest of the common law which normally insists that a defendant will only be punished according to his own moral culpability. Imposing a mandatory life sentence on a 'non-acting co-adventurer'[987] merely because he *foresaw* that somebody else *might*, in the course of a joint criminal act, commit a more serious crime also raises serious rule of law concerns, in particular as to whether such a defendant is given fair warning and whether his wrongdoing is fairly labelled.[988]

It is not at all obvious that the *mens rea* standard put forward in this thesis, and designed to address the above concerns, would significantly weaken the prosecution's

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984 See eg Lord Mustill in *Powell* [1999] 1 AC 1 (HL) 11 'Intellectually, there are problems with the concept of a joint venture (…).'

985 See p 86 above.

986 Wilson and Ormerod also advocate a tightening of the *mens rea* requirement. In 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 23 they suggest that the joint enterprise law should be reformed so that 'D would now have to believe that P will intentionally kill or do GBH, or would do so if a particular condition was met.'

987 Law Commission, *Assiting and Encouraging Crime* (Law Com CP No 131, 1993) para 2.123.

988 See eg House of Commons Justice Committee, Joint Enterprise – Eleventh Report of Session 2010-12, vol I (HC 1597, 2012) 3, 8-9, 12-15; The Bureau of Investigative Journalism, *Joint Enterprise – An investigation into the legal doctrine of joint enterprise in criminal convictions* (April 2014) 23-31; William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3.

hand. Joint enterprise based on foresight plus endorsement would still not require the prosecution to prove who committed the fatal act. In struggling to reach a verdict, however, juries would be required to consider rather more pertinent and finely tuned questions than whether or not the individual gang member foresaw that one of their number would turn lethally violent.

There might, of course, be cases in which the endorsement required for joint enterprise murder cannot be proved. As discussed above, however, an alternative charge of unlawful dangerous act manslaughter might be available.[989] In gang violence cases this will be even less problematic than in other scenarios (such as burglary, criminal damage etc), in that the risk of escalation will usually have been inherent in crime A.[990] The advantage of this approach is that the judge will be able to sentence S according to S's culpability rather than being compelled to pass a life sentence.

II Depriving the Prosecution of a Bargaining Chip

Another objection that I have encountered in discussions is that the proposed approach would deprive the prosecution of a powerful weapon in plea bargaining and/or securing accomplice testimony. The idea is that the threat of being charged with joint enterprise murder is so powerful as to incentivise cooperation with the prosecution.[991] However, the scope for guilty pleas under the current law is, perhaps, more limited than the general public would expect.

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989 See also William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 22-23.

990 As Lord Steyn observed in *Powell* [1999] 1 AC 1, 14: 'Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences.'

991 See Matthew Dyson, 'The future of joint-up thinking: living in a post-accessory liability world' (2015) J Crim L 181, 188: 'Prosecutors (…) are incentivised to charge the most serious offences and see what the defendant replies. In effect, they "put the ball in the defendant's court" with a serious charge based on simple evidence: the charge is viable on its own, but even better if it elicits more evidence or a guilty plea to the offence charged or the offer of a plea bargain to a lesser offence.' See also Andrew Green and Claire McGourlay, 'The wolf packs in our midst and other products of criminal joint enterprise prosecutions' (2015) 79(4) Journal of Criminal Law 280, 288-289.

First, given that murder carries a mandatory life sentence, there is little scope for reducing the time to be served in consideration of a defendant pleading guilty. As far as the minimum prison term is concerned, the starting points are set high (whole life, 30 years, 25 years, 15 years, 12 years, depending on a number of criteria set out in Schedule 21 of the Criminal Justice Act 2003) and the maximum discount a defendant can expect in exchange for a guilty plea is one sixth of the minimum term.[992]

Secondly, para 60 of the *2012 CPS Guidance on Joint Enterprise Charging Decisions* appears to bar the prosecution from threatening a defendant with joint enterprise in order to secure his guilty plea on a lesser charge:

> Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.[993]

While the Guidelines say nothing about securing accomplice testimony, there must be a serious question mark over the probative value of any accomplice testimony thus obtained. This view might be regarded as naïve and 'academic' by those actually operating the criminal justice system. It cannot be denied that the threat of being charged with joint enterprise, be it express or implied, may make it more likely that gang members will turn on other gang members. However, it is open to doubt that modifying the mental element the prosecution would be required to prove along the lines suggested would change this very much.

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[992] William Wilson and David Ormerod, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3, 20.

[993] Note, however, that the House of Commons Justice Committee in its follow-up inquiry into Joint Enterprise found that '[p]ublication of the CPS's guidance represents a step forward, but the extent to which the guidance has improved prosecutorial practice in the way that we envisaged it might do, by reducing levels of overcharging, is open to question', see House of Commons Justice Committee, *Joint Enterprise: Follow-up – Fourth Report of Session 2014-2015* (December 2014) <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/310/31002.htm> accessed 30 May 2015, para [14].

III Complexity of Jury Instructions

One further obstacle to having a test of endorsement play a more prominent part in the *mens rea* of joint enterprise is the belief that the current foresight-centred approach alone is capable of keeping the *mens rea* inquiry in joint enterprise sufficiently simple, so that a jury comprised of non-lawyers can work with it. In Lord Mustill's words: 'What the trial judge needs is a clear and comprehensible statement of a workable principle ... .' This, however, is precisely what the current law does not provide. One only needs to look to the number of cases [994] that have reached the appellate courts in recent years because of alleged misdirections to conclude that jury directions turning on S's foresight in joint enterprise cases are anything but uncomplicated. There is an additional problem with the supposedly simple instruction that foresight is sufficient for liability, and that is that different juries will take foresight to mean different things, with some tending to see foresight as evidence of endorsement, acquiescence or authorisation, and some taking the judge at his word, applying the foresight test literally. A little more complexity might thus not be a bad thing if it allows jury directions to lead to what juries may intuitively feel to be the just result. In fact, an analogy might be drawn with the 'moral elbow room' given to the jury by the *Woollin*-direction on intention with regard to finding (or denying) intention concerning the main perpetrator. In similar fashion, the endorsement test could be seen to give them an opportunity to do the morally right thing: they should not find S culpable of joint enterprise murder unless they are certain beyond a reasonable doubt that S endorsed P's crime B.

A related objection might be that a refined *mens rea* standard incorporating an element of 'endorsement' would be too hard to translate into jury instructions and that the relevant standard would, in any event, be too complex for juries to apply. However, any objection along these lines seems premised on the debateable assumption that questions of

994 In 2010 alone the Court of Appeal dealt with eight cases involving joint criminal enterprise.

attitude are intrinsically harder to discern than questions of foresight. Arguably, in very much the same way that a person's behaviour provides some insight into his cognitive state of mind, it may tell us something about his volitional state of mind, his feelings, his dispositions, including the stance taken towards any risks and consequences foreseen, so that a person's attitude may in the end be no harder to determine than what he foresaw (and it is fore*sight*, it should be stressed, not foresee*ability*,[995] which is still the recognised standard of *mens rea* in joint criminal enterprise). Indeed, it may actually be more difficult to draw inferences as to a person's cognitive state of mind than to whether he possessed volition: as Kaveny has argued,

> [t]he materials – data, insights, and inferential reasoning – for a judgment about a defendant's foresight are typically the materials for a judgment about his intention(s), his purpose(s). Focusing on his foresight will typically be a mere detour, neither necessary nor even helpful in determining whether or not he had a murderous purpose.[996]

Any instruction given to the jury will need to mention one vital piece of information: that endorsement must not be inferred from foresight (of a risk of harm) alone (although foresight might be indicative one way or another), because if endorsement is automatically inferred from foresight, nothing of substance is added to a test which looks to foresight alone. By analogy to the approach taken by the German courts to assessing *dolus eventualis*, one might invite the jury to consider not just whether the defendant foresaw the death of a third party at the hands of his associate-in-crime as a possible incident to their joint criminal activity, but also how he stood by the risks foreseen: as a matter of inference, did the defendant, on all the evidence, by his words or conduct, by the general nature of his behaviour, taking into account all the surrounding circumstances at the time of the incident,

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[995] The first report on Joint Enterprise by the House of Commons Justice Committee describes the relevant mens rea rather inaccurately as involving a determination of 'what the offender could have anticipated or foreseen', which amounts to a foreseeability standard rather than one of actual foresight, see House of Commons Justice Committee, Joint Enterprise – Eleventh Report of Session 2010-12, vol I (HC 1597, 2012) 8 (emphasis added).

[996] M Cathleen Kaveny, 'Inferring Intention from Foresight' (2004) 120 LQR 81, 95.

before and during its immediate aftermath, display a particular blameworthy attitude, namely of endorsement (in the sense of acquiescence, approval, or reconciliation) towards the relevant harmful consequences? Endorsement should not be presumed where there is evidence to suggest that the defendant 'earnestly relied on the non-occurrence of the fatal result'.[997]

In cases of spontaneous violence there is, of course, the problem that events may unfold too quickly for the defendant to even form a view on how he is to relate to the acts of violence that are playing out before his eyes. In such cases, the jury might be instructed to pay particular attention to the immediate aftermath of the events: did the defendant stay with the principal perpetrator, did he reproach him, or, in contrast, did he applaud him or slap him on the back? Did he take steps to help the victim? Did he remain passive or did he continue fighting? Where there is no evidence of this type from which the jury can properly infer or rule out endorsement, foresight alone should not be enough for conviction and the jury should be instructed to acquit of murder. As explained above, a subsidiary charge of (unlawful dangerous act) manslaughter might be appropriate and, on facts such as these, it is suggested that a jury might have enough evidence to find its requirements fulfilled.

If a judge, in whatever terms exactly, directs the jury to interpret the 'participation' requirement in the suggested way, the majority of cases that are currently dealt with under the heading of joint enterprise could still be accommodated within the refined approach.[998] However, the basis of any conviction would be stronger – and intellectually sounder – in that the endorsement approach can explain why S is to be held responsible for P's crime: by

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997 Taylor's translation of the German *dolus eventualis* formula: see Greg Taylor, 'Concepts of intention in German criminal law' (2004) OJLS 99, 100.

998 Although in joint enterprise cases involving a multitude of defendants there usually is uncertain and/or contradictory evidence, in many appeal cases where a joint enterprise conviction has been upheld, the jury was assumed to have believed that the defendant's participation in the events went beyond mere presence at the scene with foresight. Evidence such as the defendant's chasing the victim down the road might (as seen against all the evidence) lead a jury to infer endorsement of the fatal consequences, see eg Rahman [2008] UKHL 45, [2009] 1 AC 129; *Yemoh* [2009] EWCA Crim 930.

his endorsement of crime B, the scope of the enterprise (crime A) is extended, so that S now has participated in a venture that includes P's further wrongdoing. In other words, the joint enterprise to which S is a party consists of both crime A and crime B.

G Conclusion

The doctrine of joint criminal enterprise has been criticised as unjust, over-inclusive and lacking both in clarity and principle, first and foremost because it allows for S to be convicted for a murder which P alone has committed, on the strength of S's foresight of such crime as a possible incident to their joint criminal venture, when P himself can only be convicted for such offence if intention is proved. The foregoing discussion has suggested that the criticisms levelled against the doctrine and, in particular, its rather undemanding mens rea standard, may be alleviated if the mental element in joint enterprise focussed not just on S's foresight, but also on his attitude vis-à-vis the consequences foreseen. On the approach here advocated, the mens rea inquiry would take into account whether S in fact endorsed the fatal outcome produced by his associate, be this by way of positive approval or in (the weaker) form of having reconciled himself to the foreseen consequences for the sake of achieving another goal, similar to the German law concept of *dolus eventualis*.

It has further been argued that, inasmuch as the prevalent *mens rea* requirement in joint enterprise is hard to pin down and leaves room for interpretation, such an approach might already be within interpretative reach of the common law. The relevant starting point would be the well-established 'participation with foresight'-formula, the precise meaning of which remains, however, elusive: while it is commonly assumed that the mens rea standard in joint enterprise is common law recklessness, so that S is held liable – upon a finding of foresight and continued participation in the enterprise – for having chosen to run an unjustified risk of further wrongdoing by his associate-in-crime, P, the 'participation with

foresight' element, as a requirement that goes to both actus reus and mens rea, seems to allow for a more far-reaching reading, which finds support in some pre-Powell case law. As such, the expression 'participating with foresight' might be construed (or, at least, developed) so as to presage a requirement that S, by continuing to be a participant in the enterprise, has not just assumed the risk of P's further wrongdoing, but has in fact endorsed P's additional crime. On such a construction (or development), the joint enterprise doctrine would hold S to account on the basis of more than foresight of a possibility: S would ultimately be punished because he, in at least the weak sense of reconciliation, accepted the harm caused by his associate.

While it may not prove easy to formulate an endorsement-test for the jury to apply to a charge of joint enterprise, it has been suggested that juries can be trusted to understand the complexities of such an attitude-oriented approach to mens rea, in that it would require them to draw inferences, on all the evidence, in much the same way that people generally draw inferences about other people's feelings and mind-sets in everyday life, a task no harder to fulfil than determining what a person foresaw at any given time.

The suggested approach, in that it links S to P's further crime on the basis of S's endorsement of P's crime and its harmful consequences, would provide us with a more potent connection between S and P's action than the current foresight test. Indeed, it has been briefly suggested that it may be an overarching principle which applies, as a necessary condition of liability, to all forms of secondary liability and co-perpetration. At the same time, it would allow for an exclusion of cases where the doctrine, as commonly understood, appears over-inclusive, ie cases where S is expressly opposed to P's further wrongdoing, but continues to be associated with the original enterprise. It would also allow the jury 'moral elbow room' in cases where he remains at the scene because he is being coerced or because he fears reprisals from the other members of the group should he refuse to go along

with them – a particular problem for the application of the current doctrine because there is not even a partial defence of duress to murder. Such secondary parties would not necessarily escape liability for homicide, however: it may well be possible to bring home a charge of unlawful dangerous act manslaughter on the basis that the jointly committed crime A inherently came with the risk of an escalation of violence. The suggested approach would thus lead to a narrowing of the scope of the joint enterprise doctrine, whilst putting it on a principled footing.

Finally, while statutory reform in this area would be very welcome – indeed, the 2012 House of Commons Justice Committee Report on Joint Enterprise urges the Ministry of Justice to 'take immediate steps to bring forward legislation'[999] – successive Justice Secretaries have expressed little enthusiasm for taking up this advice. Inasmuch as the suggested approach seems within reach of the common law and its doctrinal traditions, it might be 'implemented' by the courts, and thus alleviate some of the problems associated with the doctrine as it stands, until such time that Parliament finally deals with the matter and coherently reforms the law relating to participation and complicity alongside, it is hoped, the law of homicide.

[999] House of Commons Justice Committee, Joint Enterprise – Eleventh Report of Session 2010-12, vol I (HC 1597, 2012) 3.

Chapter 9: CONCLUSION

This thesis has examined the English doctrine of joint enterprise by way of a comparative study. This chapter sums up the thesis's main findings. The conclusions to be drawn build upon insights across the various chapters, and so rather than offering findings chapter by chapter, the following summary draws the strings together across the overall discussion.

A Two Central Claims

Two principal claims have been made: the first concerns taxonomy, ie that joint enterprise is not an independent head of liability, but a principle which helps determine the scope of those heads of liability known as co-perpetration and aiding and abetting. It is thus exculpatory in nature rather than inculpatory, although, of course, the application of the principle in an individual case can result in a defendant being found liable, as a co-perpetrator or aider and abettor, to the principal offender's homicide. The second claim concerns the content of this demarcating principle, ie that the common law should revert to what I have argued is a previous and principled approach according to which the participant's *mens rea* is assessed not just on the basis of whether he foresaw that his associate in crime might commit murder, but on the basis of whether or not there is evidence that he endorsed the crime foreseen.[1000]

B Compounded Problems

In order to substantiate these claims, a number of observations have been made about the law relating to homicide and participation in crime in England and Germany. Whilst the main focus of the analysis was on the problems created by the constituent elements of the

[1000] See Appendix 2 for a tabular representation of the established and proposed taxonomies.

so-called doctrine of joint enterprise, as commonly understood, the chapters dealing with homicide and participation in crime provided vital background to this discussion: it is not possible to appreciate the seriousness of what joint enterprise does without knowing the problems of the substantive law of murder or without knowing the requirements of those heads of liability joint enterprise threatens to undermine and subsume. To add the problems caused by joint enterprise to the problems identified in the homicide and participation chapters is to compound them.

In the homicide context, we saw that the (combined) problems are three-fold: first, because murder is a constructive crime, an (indirect) intent to commit gbh satisfies its mental element, so that S can be convicted of joint enterprise murder when all he foresaw was the possibility of P's attacking V with an (indirect) intent to cause injury which a jury considers serious; it is not necessary that S realised that the victim might die as a result of the foreseen infliction by P of serious harm on him. Secondly, the *mens rea* standard applied to determine S's guilt in joint enterprise murder amounts to (a form of) subjective recklessness. As such, in the context of intent crimes such as murder it is much less demanding than the mental element required to convict the actual perpetrator: whilst P cannot be convicted for murder unless he *intended* to cause V at least serious harm, S can already be convicted for joint enterprise murder if he foresaw that P *might* attack V with (indirect) intent to cause gbh. Thirdly, since any murder conviction results in the imposition of a mandatory life sentence (albeit with different tariffs, almost all of which are, however, high), a verdict of joint enterprise murder for S means that he will receive the same punishment as the actual killer although he neither assisted nor encouraged his acts of homicide. In imposing the same liability on P (who actively killed V with the requisite intention) and on S (who did not kill V and only foresaw P's act as a possibility) the law

applies two different yardsticks, and this is both counter-intuitive and difficult to explain, let alone justify.

Whilst some of the harshness of the law of joint enterprise is thus an upshot of the substantive law of murder, other problems with the doctrine are the product of casuistic reasoning paying insufficient attention to structure. This was the *leitmotif* in the sections dealing with participation in crime. The most obvious problem, as we noted, is the lack of a settled taxonomy in English law for joint enterprise scenarios, combined with a tendency to use the language of joint enterprise rather indiscriminately whenever an offence has been committed by a plurality of offenders. Although there is a clearly identifiable case category of non-accidental deviations from a common plan or purpose, which all are agreed is certainly governed by the doctrine of joint enterprise, it is striking that it is not at all clear how this principle fits in with the common law framework of complicity and participation in crime. As such, we noticed that the case law is ambivalent as to whether joint enterprise is just one way in which to aid and abet or a distinct form of secondary liability. While the Supreme Court in *Gnango*[1001] considered joint enterprise to be a basis of liability quite distinct from both aiding and abetting and joint perpetration, the case law has not always been clear on this. Most recently, the doctrine of joint enterprise seems to have taken the status of a head of liability in its own right, however. If this is correct, then there is a danger that joint enterprise will subsume or substitute the other two heads of liability. This would be the result of the less demanding *mens rea* requirements of joint enterprise (ie foresight of crime B as a possibility) which are easier to prove than the intention to assist and encourage in knowledge of the crime's essential elements traditionally required of the aider and abettor, or the contribution, rendered with intention to commit the relevant offence, to the *actus reus* required of co-perpetrators of intent crimes such as murder. It was suggested that

[1001] [2011] UKSC 59, [2012] 1 AC 827.

the latter head of liability in particular is underused in contemporary legal practice and, as a result, remains conceptually underdeveloped in that its scope is rather too restrictive.

We noted that neither case law nor legal commentary offers a convincing rationale for the joint enterprise doctrine's function as a principle of inculpation. Indeed, the case law does not offer any principled justification beyond policy-based statements of its assumed usefulness in fighting street violence.

C The Use of Comparative Law

Comparative law can sometimes help to sharpen our eye for structures and problems in our own law by identifying parallels and differences in other jurisdictions. This was the primary purpose of the chapters dealing with German law.

In the context of complicity, we noted many similarities between the German and English approaches to categorising perpetrators and accessories, differences in scope and legal consequence notwithstanding. We also noted striking parallels concerning the requirements of accessorial liability in both jurisdictions: it was explained that both England and Germany employ a restricted model of derivative liability that couples the perpetrator's intentional and wrongful act with the accessory's own culpability.

While German law does not recognise a doctrine of joint enterprise as a freestanding head of liability, it, too, encounters deliberate deviations from an agreed or foreseen course of conduct on the part of a principal offender and thus has to answer the question whether his associates in crime can be held to account for any crime resulting from this deviation. We saw that the first limb[1002] of the English joint enterprise principle finds it functional equivalent in Germany's substantive law of liability as a co-perpetrator or aider and abettor,

[1002] 'A secondary party is guilty of murder if he participates in a joint venture realising that in the course thereof the principal might use force with intent to kill or to cause grievous bodily harm, and the principal does kill with such intent (…)', James Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice 2015* (63rd edn, Sweet & Maxwell 2014) [19-24].

whilst its second limb[1003] finds its equivalent in the rules of the so-called *Mittäterexzess* and *Teilnehmerexzess*.

The German excess-principle is fleshed out by rules that are very much reminiscent of joint enterprise reasoning, albeit that it operates in the context of co-perpetration and aiding and abetting, rather than as a freestanding principle, and is aimed at demarcating these heads of liability, rather than offering an additional and distinct route to founding liability for the principal offender's associate in crime.

Given that Germany and England employ comparable concepts of co-perpetration and aiding and abetting, differences in scope and legal consequences notwithstanding, our analysis of joint enterprise's German functional equivalent highlighted the merits of applying the English doctrine of joint enterprise, the place of which within the framework of complicity has never been satisfactorily worked out, similarly within the English concepts of co-perpetration and aiding and abetting, rather than as a free-standing head of liability. In this way, a look at German law provided us with a clearer idea of how, and where, the doctrine of joint enterprise fits in with the rest of the English law of participation in crime. In other words, the comparative material helped us identify taxonomy in the English context, and suggested a way in which to restore coherence to the area of law known as participation in crime.

We noted, however, that German law differs rather fundamentally from English law when it comes to the substantive law of homicide. As such, under German law it is much harder to commit manslaughter, let alone murder: both offences require an intent to kill, while murder requires additional aggravating factors (*Mordmerkmale*). It is useful to bear in mind, therefore, that many joint enterprise murder cases would never lead to a homicide conviction in Germany because neither intent to kill nor aggravating factors required for a

[1003] '… but if he goes *beyond the scope* of the joint venture (*i.e. does an act not foreseen as a possibility*), the secondary party is not guilty of murder or manslaughter', ibid (emphasis added).

murder conviction are present. Given that culturally the two societies are relatively similar, punishing violence resulting in death in such fundamentally different ways should perhaps give courts and legislators in both countries pause for thought. It does, for our purposes, demonstrate how problematic joint enterprise is, particularly in the context of murder.

German law also differs from English law in that it employs a wider conception of intention referred to by the Latin label of *dolus eventualis*. This applies where the actor recognises the possibility that a certain (prohibited) result will follow from his actions *and* reconciles himself to the possibility of a harmful outcome. The standard thus set requires more than foresight yet less than full blown (common law) intention. There is an argument, already put forward by others,[1004] that English law should follow the German experience and adopt a similar notion to supplement its concepts of direct and indirect intention which, as we noted, are very similar to the German concepts of *dolus directus* I (Absicht) and *dolus directus* II (knowledge). Given the difficulties in satisfactorily defining intention in English law this point has merit, although one should be mindful that the *dolus eventualis* concept is not without its critics in Germany, the main criticism being that it is insufficiently precise to ground a murder conviction. These concerns do not exist in the English context of joint enterprise murder, however, where the introduction of a standard akin to *dolus eventualis* would make the *mens rea* element more demanding. It may, in fact, be precisely the middle ground that is needed to make the English law of joint enterprise morally more palatable, an idea that is reinforced by the argument developed in the final chapters of this thesis that traces of an attitude-focussed *mens rea* standard are discernible in joint enterprise cases decided prior to the House of Lords decision in *Powell*. The well established requirement that S needs to have 'participated (in crime A) with foresight (of crime B)' was possibly best understood as a requirement that S, by continuing to be a

[1004] Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579.

participant in the enterprise, has not just assumed the risk of P's further wrongdoing, but has in fact endorsed P's additional crime. On such a reading, the joint enterprise doctrine holds S to account for P's crime B because he has not just foreseen, but ultimately has accepted the harm caused by his associate in crime. Such an approach, in that it links S to P's further crime on the basis of S's endorsement of P's crime and its harmful consequences, would provide us with a more potent connection between S and P's actions than the current foresight test. At the same time, it would allow for an exclusion of cases where the doctrine, as commonly understood, is over-inclusive, namely cases where S is expressly opposed to P's further wrongdoing, but continues to be associated with the original enterprise, as well as cases where S remains at the scene because he is being coerced or because he fears reprisals from his associates in crime should he refuse to go along with them. The latter is a problem for the application of the current doctrine because there is not even a partial defence of duress to murder. This does not mean, however, that such parties would necessarily escape liability for homicide: as we noted in the final chapter, it may well be possible to bring home a charge of unlawful dangerous act manslaughter on the basis that crime A, which was jointly committed, inherently came with the risk of an escalation of violence.

D The Future

The case for law reform is overwhelming. However, Parliament is unlikely to change the law of joint enterprise in the foreseeable future. Against this backdrop, this thesis has presented an argument in favour of judicial reform of the joint enterprise principle by way of common law development. In doing so, it has drawn on ideas and concepts from German criminal law, and in particular the concept of intention known as *dolus eventualis* and the notions of *Teilnehmer*- and *Mittäterexzess*. In accordance with established methods of

comparative law analysis, these concepts were not introduced with a view to advocating their 'transplantation' into English law; rather they were here used as sources of inspiration and ideas from which a solution to the particular problems posed by the doctrine of joint enterprise might be developed which fits the framework of English common law. Such a solution, it has been argued, is indeed in reach of the common law courts, albeit that this would involve abandoning a line of House of Lords authority in favour of what I have argued is a previous and more principled approach.

APPENDIX I – SELECTED PROVISIONS OF THE STGB

*This Appendix contains a number of relevant provisions of the German Penal Code (*Strafgesetzbuch*) and their 'official' English translation (by Michael Bohlander) which can be found on the website of the Federal Ministry of Justice and Consumer Protection. Where I depart from the 'official' translation this is indicated in red.*

Strafgesetzbuch (StGB)	**Penal Code (StGB)**
§ 11 Personen- und Sachbegriffe	**Definitions**
(1) Im Sinne dieses Gesetzes ist …	(1) For the purposes of this code
5. rechtswidrige Tat: nur eine solche, die den Tatbestand eines Strafgesetzes verwirklicht ….	5. 'unlawful act' only means an act that fulfils all the elements of a criminal provision;
(2) Vorsätzlich im Sinne dieses Gesetzes ist eine Tat auch dann, wenn sie einen gesetzlichen Tatbestand verwirklicht, der hinsichtlich der Handlung Vorsatz voraussetzt, hinsichtlich einer dadurch verursachten besonderen Folge jedoch Fahrlässigkeit ausreichen läßt.	(2) An act is also deemed intentional for the purposes of this code if it fulfils the statutory elements of an offence requiring intent in relation to the offender's conduct but lets negligence suffice as to a specific result caused thereby.
§ 12 Verbrechen und Vergehen	**Felonies and misdemeanours**
(1) Verbrechen sind rechtswidrige Taten, die im Mindestmaß mit Freiheitsstrafe von einem Jahr oder darüber bedroht sind.	(1) Felonies are unlawful acts punishable by a minimum sentence of one year's imprisonment.
(2) Vergehen sind rechtswidrige Taten, die im Mindestmaß mit einer geringeren Freiheitsstrafe oder die mit Geldstrafe bedroht sind.	(2) Misdemeanours are unlawful acts punishable by a lesser minimum term of imprisonment or by fine.
(3) Schärfungen oder Milderungen, die nach den Vorschriften des Allgemeinen Teils oder für besonders schwere oder minder schwere Fälle vorgesehen sind, bleiben für die Einteilung außer Betracht.	(3) Aggravations or mitigations provided for under the provisions of the General Part, or under especially serious or less serious cases in the Special Part, shall be irrelevant to this classification.
§ 14 Handeln für einen anderen	**Acting for another**
(1) Handelt jemand 1. als vertretungsberechtigtes Organ einer juristischen Person oder als Mitglied eines solchen Organs, 2. als vertretungsberechtigter Gesellschafter einer rechtsfähigen Personengesellschaft oder 3. als gesetzlicher Vertreter eines anderen, so ist ein Gesetz, nach dem besondere persönliche Eigenschaften, Verhältnisse oder Umstände (besondere persönliche Merkmale) die Strafbarkeit begründen, auch auf den Vertreter anzuwenden, wenn diese Merkmale zwar nicht bei ihm, aber bei dem Vertretenen vorliegen.	(1) If a person acts: 1. in his capacity as an organ authorised to represent a legal entity or as a member of such an organ; 2. as a partner authorised to represent a partnership with independent legal capacity; or 3. as a statutory representative of another, any legal rule according to which special personal attributes, relationships or circumstances (special personal characteristics) form the basis of criminal liability, shall apply to the representative, even if these characteristics do not exist in his person but in the entity, partnership or person represented.
(2) … .	(2) ... .

§ 15 Vorsätzliches und fahrlässiges Handeln	**Intent and negligence**
Strafbar ist nur vorsätzliches Handeln, wenn nicht das Gesetz fahrlässiges Handeln ausdrücklich mit Strafe bedroht.	Only intentional commission of a crime is punishable unless the statute explicitly extends liability to negligent conduct.
§ 18 Schwerere Strafe bei besonderen Tatfolgen	**Aggravated sentence based on special consequences of the offence**
Knüpft das Gesetz an eine besondere Folge der Tat eine schwerere Strafe, so trifft sie den Täter oder den Teilnehmer nur, wenn ihm hinsichtlich dieser Folge wenigstens Fahrlässigkeit zur Last fällt.	If the law imposes a more serious sentence based on a particular result of an offence, any principal or secondary participant is liable to the increased sentence only if they were guilty of negligence as regards that result.
§ 22 Begriffsbestimmung [des Versuches]	**Definition [of Attempt]**
Eine Straftat versucht, wer nach seiner Vorstellung von der Tat zur Verwirklichung des Tatbestandes unmittelbar ansetzt.	A person attempts to commit an offence if he takes steps which will immediately lead to the completion of the offence as envisaged by him.
§ 24 Rücktritt	**Renunciation**
(1) Wegen Versuchs wird nicht bestraft, wer freiwillig die weitere Ausführung der Tat aufgibt oder deren Vollendung verhindert. Wird die Tat ohne Zutun des Zurücktretenden nicht vollendet, so wird er straflos, wenn er sich freiwillig und ernsthaft bemüht, die Vollendung zu verhindern.	A person who voluntarily renounces the continued performance of the deed or prevents it from being completed is not punishable for attempt. If the deed is not completed irrespective of his attempt to prevent it, he shall not be liable if he has made a voluntary and serious effort to prevent its completion.
(2) Sind an der Tat mehrere beteiligt, so wird wegen Versuchs nicht bestraft, wer freiwillig die Vollendung verhindert. Jedoch genügt zu seiner Straflosigkeit sein freiwilliges und ernsthaftes Bemühen, die Vollendung der Tat zu verhindern, wenn sie ohne sein Zutun nicht vollendet oder unabhängig von seinem früheren Tatbeitrag begangen wird.	(2) If more than one person participate in the offence, the person who voluntarily prevents its completion shall not be liable for the attempt. His voluntary and serious effort to prevent the completion of the offence shall suffice for exemption from liability if the deed is not completed irrespective of his conduct or is committed independently of his earlier contribution to the offence.
§ 25 Täterschaft	**Principals**
(1) Als Täter wird bestraft, wer die Straftat selbst oder durch einen anderen begeht.	(1) A person is to be punished as a perpetrator if he commits the offence personally or through another person.
(2) Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter).	(2) Where several persons commit the offence together, each of them is to be punished as a perpetrator.
§ 26 Anstiftung	**§ 26 Incitement**
Als Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt hat.	Any person who intentionally incites another to intentionally and unlawfully commit a criminal offence shall be liable to be sentenced as if he were a principal.
§ 27 Beihilfe	**§ 27 Facilitation (Aiding & Abetting)**
(1) Als Gehilfe wird bestraft, wer vorsätzlich einem	(1) Someone is guilty of aiding and abetting if he

anderen zu dessen vorsätzlich begangener rechtswidriger Tat Hilfe geleistet hat.	intentionally provides assistance to another in his intentional and unlawful commission of a criminal offence.
(2) Die Strafe für den Gehilfen richtet sich nach der Strafdrohung für den Täter. Sie ist nach § 49 Abs. 1 zu mildern.	(2) The sentence for the aider shall be based on the penalty for the principal. It shall be mitigated pursuant to section 49(1).
§ 28 Besondere persönliche Merkmale	**§ 28 Special personal characteristics**
(1) Fehlen besondere persönliche Merkmale (§ 14 Abs. 1), welche die Strafbarkeit des Täters begründen, beim Teilnehmer (Anstifter oder Gehilfe), so ist dessen Strafe nach § 49 Abs. 1 zu mildern.	(1) If special personal characteristics (§14 (1)) that establish the principal's liability are absent in the person of the secondary participant (abettor or aider) the latter's sentence shall be reduced pursuant to § 49 (1).
(2) Bestimmt das Gesetz, daß besondere persönliche Merkmale die Strafe schärfen, mildern oder ausschließen, so gilt das nur für den Beteiligten (Täter oder Teilnehmer), bei dem sie vorliegen.	(2) If a rule of law provides that special personal characteristics aggravate, mitigate or exclude punishment this shall apply only to the accomplices (principals or secondary participants) in whose person they are present.
§ 29 Selbständige Strafbarkeit des Beteiligten	**Separate criminal liability of the accomplice**
Jeder Beteiligte wird ohne Rücksicht auf die Schuld des anderen nach seiner Schuld bestraft.	Each participant-in-crime is to be punished according to his own guilt, irrespective of the guilt of others.
§ 30 Versuch der Beteiligung	**Attempted participation**
(1) Wer einen anderen zu bestimmen versucht, ein Verbrechen zu begehen oder zu ihm anzustiften, wird nach den Vorschriften über den Versuch des Verbrechens bestraft. Jedoch ist die Strafe nach § 49 Abs. 1 zu mildern. § 23 Abs. 3 gilt entsprechend.	(1) A person who attempts to induce another to commit a felony or to induce somebody else to commit a felony shall be liable according to the provisions governing attempted felonies. The sentence shall be mitigated pursuant to section 49 (1). Section 23 (3) shall apply mutatis mutandis.
(2) Ebenso wird bestraft, wer sich bereit erklärt, wer das Erbieten eines anderen annimmt oder wer mit einem anderen verabredet, ein Verbrechen zu begehen oder zu ihm anzustiften.	(2) A person who declares his willingness or who accepts the offer of another or who agrees with another to commit or induce the commission of a felony shall be liable under the same terms.
§ 38 Dauer der Freiheitsstrafe	**Term of imprisonment**
(1) Die Freiheitsstrafe ist zeitig, wenn das Gesetz nicht lebenslange Freiheitsstrafe androht.	(1) Imprisonment shall be for a fixed term unless a rule of law provides for life imprisonment.
(2) Das Höchstmaß der zeitigen Freiheitsstrafe ist fünfzehn Jahre, ihr Mindestmaß ein Monat.	(2) The maximum term of fixed-term imprisonment shall be fifteen years, the minimum term one month.

§ 49 Besondere gesetzliche Milderungsgründe	**Special mitigating circumstances established by law**
(1) Ist eine Milderung nach dieser Vorschrift vorgeschrieben oder zugelassen, so gilt für die Milderung folgendes: 1. An die Stelle von lebenslanger Freiheitsstrafe tritt Freiheitsstrafe nicht unter drei Jahren. 2. Bei zeitiger Freiheitsstrafe darf höchstens auf drei Viertel des angedrohten Höchstmaßes erkannt werden. Bei Geldstrafe gilt dasselbe für die Höchstzahl der Tagessätze. 3. Das erhöhte Mindestmaß einer Freiheitsstrafe ermäßigt sich im Falle eines Mindestmaßes von zehn oder fünf Jahren auf zwei Jahre, im Falle eines Mindestmaßes von drei oder zwei Jahren auf sechs Monate, im Falle eines Mindestmaßes von einem Jahr auf drei Monate, im übrigen auf das gesetzliche Mindestmaß.	(1) If a rule of law requires or allows for mitigation under this provision, the following shall apply: 1. Imprisonment of not less than three years shall be substituted for imprisonment for life. 2. In cases of imprisonment for a fixed term, no more than three quarters of the statutory maximum term may be imposed. In case of a fine the same shall apply to the maximum number of daily instalments. 3. Any increased minimum statutory term of imprisonment shall be reduced as follows: a minimum term of ten or five years, to two years; a minimum term of three or two years, to six months; a minimum term of one year, to three months; in all other cases to the statutory minimum.
(2) Darf das Gericht nach einem Gesetz, das auf diese Vorschrift verweist, die Strafe nach seinem Ermessen mildern, so kann es bis zum gesetzlichen Mindestmaß der angedrohten Strafe herabgehen oder statt auf Freiheitsstrafe auf Geldstrafe erkennen.	(2) If the court has discretion to reduce the sentence pursuant to a rule of law which refers to this provision, it may reduce the sentence to the statutory minimum or impose a fine instead of imprisonment.
§ 211 Mord	**Murder**
(1) Der Mörder wird mit lebenslanger Freiheitsstrafe bestraft.	(1) Whosoever commits murder under the conditions of this provision shall be liable to imprisonment for life.
(2) Mörder ist, wer aus Mordlust, zur Befriedigung des Geschlechtstriebs, aus Habgier oder sonst aus niedrigen Beweggründen, heimtückisch oder grausam oder mit gemeingefährlichen Mitteln oder um eine andere Straftat zu ermöglichen oder zu verdecken, einen Menschen tötet.	(2) A murderer under this provision is any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence.
§ 212 Totschlag	**Manslaughter**
(1) Wer einen Menschen tötet, ohne Mörder zu sein, wird als Totschläger mit Freiheitsstrafe nicht unter fünf Jahren bestraft.	(1) Whosoever kills another person, without being a murderer under § 211, shall be convicted of manslaughter and be liable to imprisonment of not less than five years.
(2) In besonders schweren Fällen ist auf lebenslange Freiheitsstrafe zu erkennen.	(2) In particularly serious cases the penalty shall be imprisonment for life.
§ 213 Minder schwerer Fall des Totschlags	**Mitigated manslaughter**
War der Totschläger ohne eigene Schuld durch eine ihm oder einem Angehörigen zugefügte Mißhandlung	Where a person kills in response to the victim's mistreatment of him or his relative, or having been

oder schwere Beleidigung von dem getöteten Menschen zum Zorn gereizt und hierdurch auf der Stelle zur Tat hingerissen worden oder liegt sonst ein minder schwerer Fall vor, so ist die Strafe Freiheitsstrafe von einem Jahr bis zu zehn Jahren.	provoked by the victim, leading to a sudden loss of self-control, the penalty for manslaughter shall be one year to ten years. The same applies in other less serious cases of manslaughter.
§ 222 Fahrlässige Tötung	**Negligent homicide**
Wer durch Fahrlässigkeit den Tod eines Menschen verursacht, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.	Whosoever causes the death of another person through negligence shall be liable to imprisonment not exceeding five years or a fine.
§ 223 Körperverletzung	**Assault occasioning bodily harm**
(1) Wer eine andere Person körperlich mißhandelt oder an der Gesundheit schädigt, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.	(1) Whosoever physically assaults or damages the health of another person, shall be liable to imprisonment not exceeding five years or a fine.
(2) Der Versuch ist strafbar.	(2) The attempt is punishable.
§ 224 Gefährliche Körperverletzung	**Assault causing bodily harm by dangerous means**
(1) Wer die Körperverletzung 1. durch Beibringung von Gift oder anderen gesundheitsschädlichen Stoffen, 2. mittels einer Waffe oder eines anderen gefährlichen Werkzeugs, 3. mittels eines hinterlistigen Überfalls, 4. mit einem anderen Beteiligten gemeinschaftlich oder 5. mittels einer das Leben gefährdenden Behandlung begeht, wird mit Freiheitsstrafe von sechs Monaten bis zu zehn Jahren, in minder schweren Fällen mit Freiheitsstrafe von drei Monaten bis zu fünf Jahren bestraft.	(1) Whosoever causes bodily harm 1. by administering poison or other noxious substances; 2. by using a weapon or other dangerous instrument; 3. by acting by stealth; 4. by acting jointly with another; or 5. by methods that pose a danger to life, shall be liable to imprisonment from six months to ten years, in less serious cases to imprisonment from three months to five years.
(2) Der Versuch ist strafbar.	(2) The attempt is punishable.
§ 226 Schwere Körperverletzung	**Assault causing grievous bodily harm**
(1) Hat die Körperverletzung zur Folge, daß die verletzte Person 1. das Sehvermögen auf einem Auge oder beiden Augen, das Gehör, das Sprechvermögen oder die Fortpflanzungsfähigkeit verliert, 2. ein wichtiges Glied des Körpers verliert oder dauernd nicht mehr gebrauchen kann oder 3. in erheblicher Weise dauernd entstellt wird oder in Siechtum, Lähmung oder geistige Krankheit oder Behinderung verfällt, so ist die Strafe Freiheitsstrafe von einem Jahr bis zu zehn Jahren.	(1) If the injury results in the victim 1. losing his sight in one eye or in both eyes, his hearing, his speech or his ability to procreate; 2. losing or losing permanently the ability to use an important extremity; 3. being permanently and seriously disfigured or contracting a lingering illness, becoming paralysed, mentally ill or disabled, the penalty shall be imprisonment from one to ten years.
(2) Verursacht der Täter eine der in Absatz 1	(2) If the offender intentionally or knowingly causes

bezeichneten Folgen absichtlich oder wissentlich, so ist die Strafe Freiheitsstrafe nicht unter drei Jahren.	one of the results indicated in subsection (1) above the penalty shall be imprisonment of not less than three years.
(3) In minder schweren Fällen des Absatzes 1 ist auf Freiheitsstrafe von sechs Monaten bis zu fünf Jahren, in minder schweren Fällen des Absatzes 2 auf Freiheitsstrafe von einem Jahr bis zu zehn Jahren zu erkennen.	(3) In less serious cases under subsection (1) above the penalty shall be imprisonment from six months to five years, in less serious cases under subsection (2) above imprisonment from one to ten years.
§ 227 Körperverletzung mit Todesfolge	**Causing bodily harm resulting in death**
(1) Verursacht der Täter durch die Körperverletzung (§§ 223 bis 226a) den Tod der verletzten Person, so ist die Strafe Freiheitsstrafe nicht unter drei Jahren.	(1) If the offender causes the victim's death through the infliction of bodily harm (§§ 223 to 226a) the penalty shall be imprisonment of not less than three years.
(2) In minder schweren Fällen ist auf Freiheitsstrafe von einem Jahr bis zu zehn Jahren zu erkennen.	(2) In less serious cases the penalty shall be imprisonment from one to ten years.
§ 231 Beteiligung an einer Schlägerei	**Taking part in an affray**
(1) Wer sich an einer Schlägerei oder an einem von mehreren verübten Angriff beteiligt, wird schon wegen dieser Beteiligung mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft, wenn durch die Schlägerei oder den Angriff der Tod eines Menschen oder eine schwere Körperverletzung (§ 226) verursacht worden ist.	(1) Whosoever takes part in an affray or an attack committed against one person by more than one person shall be liable for this participation to imprisonment not exceeding three years or a fine if the death of a person or grievous bodily harm (section 226) is caused by the affray or the attack.
(2) Nach Absatz 1 ist nicht strafbar, wer an der Schlägerei oder dem Angriff beteiligt war, ohne daß ihm dies vorzuwerfen ist.	(2) Whosoever took part in the affray or the attack without being to blame for it shall not be liable under subsection (1) above.
§ 249 Raub	**Robbery**
(1) Wer mit Gewalt gegen eine Person oder unter Anwendung von Drohungen mit gegenwärtiger Gefahr für Leib oder Leben eine fremde bewegliche Sache einem anderen in der Absicht wegnimmt, die Sache sich oder einem Dritten rechtswidrig zuzueignen, wird mit Freiheitsstrafe nicht unter einem Jahr bestraft.	(1) Whosoever, by force against a person or threats of imminent danger to life or limb, takes chattels belonging to another from another with the intent of appropriating the property for himself or a third person, shall be liable to imprisonment of not less than one year.
(2) In minder schweren Fällen ist die Strafe Freiheitsstrafe von sechs Monaten bis zu fünf Jahren.	(2) In less serious cases the penalty shall be imprisonment from six months to five years.

§ 250 Schwerer Raub	**Aggravated robbery**
(1) Auf Freiheitsstrafe nicht unter drei Jahren ist zu erkennen, wenn 1. der Täter oder ein anderer Beteiligter am Raub (a) eine Waffe oder ein anderes gefährliches Werkzeug bei sich führt, (b) sonst ein Werkzeug oder Mittel bei sich führt, um den Widerstand einer anderen Person durch Gewalt oder Drohung mit Gewalt zu verhindern oder zu überwinden, (c) eine andere Person durch die Tat in die Gefahr einer schweren Gesundheitsschädigung bringt oder 2. der Täter den Raub als Mitglied einer Bande, die sich zur fortgesetzten Begehung von Raub oder Diebstahl verbunden hat, unter Mitwirkung eines anderen Bandenmitglieds begeht.	(1) The penalty shall be imprisonment of not less than three years if 1. the offender or another accomplice to the robbery (a) carries a weapon or other dangerous instrument; (b) otherwise carries an instrument or means in order to prevent or overcome the resistance of another person by force or threat of force; (c) by the deed places another person in danger of serious injury; or 2. the offender commits the robbery as a member of a gang whose purpose is the continued commission of robbery or theft under participation of another member of the gang.
(2) Auf Freiheitsstrafe nicht unter fünf Jahren ist zu erkennen, wenn der Täter oder ein anderer Beteiligter am Raub 1. bei der Tat eine Waffe oder ein anderes gefährliches Werkzeug verwendet, 2. in den Fällen des Absatzes 1 Nr. 2 eine Waffe bei sich führt oder 3. eine andere Person (a) bei der Tat körperlich schwer mißhandelt oder (b) durch die Tat in die Gefahr des Todes bringt.	(2) The penalty shall be imprisonment of not less than five years if the offender or another accomplice to the robbery 1. uses a weapon or other dangerous instrument during the commission of the offence; 2. carries a weapon in cases under subsection (1) No 2 above; or 3. during or by the offence (a) seriously physically abuses another person; or (b) places another person in danger of death.
(3) In minder schweren Fällen der Absätze 1 und 2 ist die Strafe Freiheitsstrafe von einem Jahr bis zu zehn Jahren.	(3) In less serious cases under subsections (1) and (2) above the penalty shall be imprisonment from one to ten years.
§ 251 Raub mit Todesfolge	**Robbery causing Death**
Verursacht der Täter durch den Raub (§§ 249 und 250) wenigstens leichtfertig den Tod eines anderen Menschen, so ist die Strafe lebenslange Freiheitsstrafe oder Freiheitsstrafe nicht unter zehn Jahren.	If by the robbery (section 249 and section 250) the offender at least by gross negligence causes the death of another person the penalty shall be imprisonment for life or not less than ten years.

APPENDIX II: TAXONOMICAL TABLES

Table 1: The 'existing acknowledged legal position'

Joint Criminal Ventures

	Aiding and Abetting	**Co-Perpetration**	**Joint Enterprise Liability**
Actus Reus	Assisting or encouraging ('aid, abet, counsel or procure') P's crime	Committing (part of) Actus Reus of crime charged	Participation in Crime A
Mens Rea	Intent to assist or encourage with knowledge or foresight of essentials of P's crime	Common plan or purpose that whole offence be committed jointly	Common plan or purpose to commit Crime A Foresight of Crime B (=crime charged)

Table 2: Proposed taxonomy (and mental element)

	Aiding and Abetting	**Co-Perpetration**
Actus Reus	Assisting or encouraging ('aid, abet, counsel or procure') P's crime	Committing (part of) Actus Reus of crime charged
Mens Rea	Intent to assist or encourage P's crime	Common plan or purpose that whole offence be committed jointly
	Scope of crime determined by endorsement	

BIBLIOGRAPHY

Alldridge P, 'The Doctrine of Innocent Agency' (1990) 2 Crim Law Forum 45

Altvater G, 'Rechtsprechung des BGH zu den Tötungsdelikten' NStZ 2002, 20

— 'Rechtsprechung des BGH zu den Tötungsdelikten' NStZ 2003, 21

Ambos K, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 Crim Law Forum 1

— 'Toward a Universal System of Crime: Comments on George Fletcher's *Grammar of Criminal Law*' (2007) 28 Cardozo Law Review 2647

Arzt G, 'Mord durch Unterlassen' in Schünemann B, Aschenbach H, Bottke W, Haffke B, Rudolphi H-J (eds), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001* (Walter de Gruyter 2001) 855

Ashworth A, 'Reforming the Law of Murder' [1990] Crim LR 75

— 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 New Crim L Rev 232

— and Horder J, *Principles of Criminal Law* (7th edn, OUP 2013)

— and Mitchell B (eds), *Rethinking English Homicide Law* (OUP 2000)

Baker DJ, 'Complicity, Proportionality, and the Serious Crime Act' (2011) 14(3) New Crim L Rev 403

— 'Glanville Williams – Textbook of Criminal Law' (3rd edn, Sweet & Maxwell 2012) (cited: Baker, *Criminal Law*)

— 'Foresight in Common Purpose Complicity/Joint Enterprise Complicity: It Is a Maxim of Evidence, Not a Substantive Fault Element' (Draft Chapter 2013/14: *Reinterpreting Criminal Complicity*, forthcoming) <http://ssrn.com/abstract=2507529> accessed 18 August 2015

Barthe C, *Joint Criminal Enterprise (JCE) – Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?* (Duncker & Humblot 2009)

Beck'scher Online-Kommentar StGB, von Heintschel-Heinegg, B (ed) (25th edn, CH Beck, updated: 10.11.2014) (cited as: BeckOK StGB/*contributor*)

Bernsmann K, Deckers R, König S, Fischer T, 'Zur Reform der Tötungsdelikte Mord und Totschlag – Überblick und eigener Vorschlag' NStZ 2014, 9

Blom-Cooper L and Morris T, *With Malice Aforethought – A Study of the Crime and Punishment for Homicide* (Hart Publishing 2004)

Bloy R, *Die Beteiligungsform als Zurechnungstypus im Strafrecht* (Duncker & Humblot 1985)

—'Grenzen der Täterschaft bei fremdhändiger Tatausführung' GA 1996, 424

Bohlander M, *The German Criminal Code: A Modern English Translation* (Hart 2008)

—Principles of German Criminal Law (Hart 2009)

—'Problems of transferred malice in multiple-actor scenarios' (2010) Journal of Criminal Law 145

Bottke W, 'Mittäterschaft bei gemeinsam fahrlässiger oder leichtfertiger Erfolgserwirkung' GA 2001, 463

BT-Drucksache V/4095

BT-Drucksache 13/8587

BT-Drucksache 13/9064

Bureau of Investigative Journalism, *Joint Enterprise – An investigation into the legal doctrine of joint enterprise in criminal convictions* (April 2014)

Buxton R, 'Joint Enterprise' [2009] Crim LR 233

—'Being an accessory to one's own murder' [2013] Crim LR 275

Cassese A and Gaeta P, *Cassese's International Criminal Law* (3rd rev edn, OUP 2013)

Chiesa LE, 'Comparative Criminal Law' in Dubber MD and Hörnle T, *The Oxford Handbook of Criminal Law* (OUP 2014) 1089

Christopher RL, 'Tripartite Structures of Criminal Law in Germany and other Civil Law Jurisdictions' (2007) 28 Cardozo Law Review 2675

Clarkson CMV, 'Complicity, Powell and manslaughter' [1998] Crim LR 556

Coke E, *Institutes of the Laws of England* (1628-34)

Cramer P, 'Gedanken zur Abgrenzung von Täterschaft und Teilnahme' in Kaufmann A, Bemmann G, Krauss D and Volk K (eds), *Festschrift für Paul Bockelmann zum 70. Geburtstag* (Beck 1979) 389

Crewe B, Liebling A, Padfield N and Virgo G, 'Joint enterprise: the implications of an unfair and unclear law' [2015] Crim LR 252

Cromwell PF, Marks A, Olson JN and Avary DW, 'Group Effects on Decision-Making by Burglars' (1991) 69 Psychological Reports 579

David R and Brierley JEC, *Major Legal Systems in the World Today: An Introduction into the Comparative Study of Law* (3rd edn, Steven and Sons 1985)

Davies PS, *Accessory Liability* (Hart 2015)

Deiters M, 'Straflosigkeit des agent provocateur?' JuS 2006, 302

Dennis IH, 'The Mental Element for Acessories' in P Smith (ed), *Essays in Honour of JC Smith* (Butterworths 1987) 40

Dressler J, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1985) 37 Hastings LJ 91

Dubber MD, 'The Promise of German Criminal Law: A Science of Crime and Punishment' (2005) 6 German Law Journal 1049

— 'Comparative Criminal Law' in Reimann M and Zimmermann R (eds) *The Oxford Handbook of Comparative Law* (OUP 2008) 1287

Du Bois-Pedain A, 'Intentional Killings: The German Law' in Horder J (ed), *Homicide Law in Comparative Perspective* (Hart 2007) 55

Duff RA, *Trials and Punishment* (CUP 1986)

— Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law (Basil Blackwell 1990)

Dyson M, 'More appealing joint enterprise' (2010) CLJ 425

— 'The future of joint-up thinking: living in a post-accessory liability world' (2015) J Crim L 181

— 'JEF 17' para 9.3.b < http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/joint-enterprise-followup/written/12993.pdf> accessed 15 July 2015

— 'Might alone does not make right: justifying secondary liability' [2015] Crim LR 967

Engisch K, *Untersuchungen über Vorsatz und Fahrlässigkeit im Strafrecht* (Liebmann 1930)

Erb V, 'Mord in Mittäterschaft – BGH, NJW 1991, 1068 (Besprechungsaufsatz zu BGH, Urt. V. 15.1.1991 – 5 StR 492/90)' JuS 1992, 197

Eser A, *Empfiehlt es sich, die Straftatbestände des Mordes, des Totschlags und der Kindestötung (§§ 211 bis 213, 217 StGB) neu abzugrenzen? Gutachten zum 53. Deutschen Juristentag Berlin 1980*, Ständige Deputation des Deutschen Juristentages (ed) (1980)

—'Justification and Excuse: A Key Issue in the Concept of Crime' in Eser A, Fletcher GP, Cornils K (eds), *Justification and Excuse: Comparative Perspectives* (1987) 17

Ferzan KK, 'Holistic Culpability' (2007) 28 Cardozo Law Review 2523

Fincke M, 'Der Täter neben dem Täter' GA 1975, 161

Finnin S, 'Mental elements under article 30 of the Rome Statute of the International Criminal Court: a comparative analysis' (2012) ICLQ 325

Fischer T, *Strafgesetzbuch mit Nebengesetzen* (62nd edn, CH Beck 2015)

Fletcher GP, *Rethinking Criminal Law* (Little, Brown and Company 1978)

—'Comparative Law as a Subversive Discipline' (1998) 46(4) The American Journal of Comparative Law 683

—The Grammar of Criminal Law: American, Comparative, and International, Volume One: Foundations (OUP 2007)

—and Ohlin JD, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 JICJ 539

Fortson R, 'Inchoate Liability and the Part 2 Offences under the Serious Crime Act 2007' in Reed A and Bohlander M (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 173

Frisch W, *Vorsatz und Risiko: Grundfragen des tatbestandsmäßigen Verhaltens und des Vorsatzes. Zugleich ein Beitrag zur Behandlung außertatbestandlicher Möglichkeitsvorstellungen* (Heymann 1983)

Gardner J, 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 CLJ 502

Gardner S, ‘Joint Enterprise’ (1998) 114 LQR 202

Geppert K, ‘Zur Abgrenzung von bedingtem Vorsatz und Fahrlässigkeit’ Jura 1986, 610

— ‘Die Beihilfe (§ 27 StGB)’ Jura 1999, 266

— ‘Zur Abgrenzung von Vorsatz und Fahrlässigkeit, insbesondere bei Tötungsdelikten’ Jura 2001, 55

— ‘Zum Begriff der Hilfeleistung im Rahmen von Beihilfe (§ 27 StGB) und sachlicher Begünstigung’ Jura 2007, 589

Goff R, ‘The Mental Element in the Crime of Murder’ (1988) 104 LQR 30

Grayling C MP, Lord Chancellor and Secretary of State for Justice, ‘Letter to Rt Hon Sir Alan Beith MP, Chair, Justice Committee’ <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/1047/104704.htm > accessed 18 August 2015

Green A and McGourlay C, ‘The wolf packs in our midst and other products of criminal joint enterprise prosecutions’ (2015) 79(4) Journal of Criminal Law 280

Grünewald A, *Das vorsätzliche Tötungsdelikt* (Mohr Siebeck 2010)

Hamdorf K, ‘The concept of a joint criminal enterprise and domestic modes of liability for parties to a Crime: a comparison of German and English law’ (2007) 5(1) JICJ 208

Heghmanns M, ‘Überlegungen zum Unrecht von Beihilfe und Anstiftung’ GA 2000, 473

Heinrich M, ‘Körperverletzung mit Todesfolge bei Exzess des Mittäters; Durchentscheidung in der Revisionsinstanz’ NStZ 2005, 93

Herzberg RD, ‘Täterschaft, Mittäterschaft und Akzessorietät der Teilnahme’ ZStW 99 (1987) 49

— ‘Der Vorsatz als “Schuldform”, als “aliud” zur Fahrlässigkeit und als “Wissen und Wollen”? in Roxin C and Widmaier G (eds), *50 Jahre Bundesgerichtshof – Festgabe aus der Wissenschaft*, Band IV (Strafrecht, Strafprozeßrecht) (CH Beck 2000) 51

Hobhouse J, ‘Agency and the Criminal Law’ in Rose F (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP 2000) 39

Honig R, ‘Zur gesetzlichen Regelung des bedingten Vorsatzes’ GA 1973, 257

Horder J, ‘A Critique of the Correspondence Principle in Criminal Law’ [1995] Crim LR 759

—Homicide and the Politics of Law Reform (OUP 2012)

—and Hughes D, 'Joint Criminal Ventures and Murder: The Prospects for Law Reform' (2009) 20 KLJ 379

House of Commons Justice Committee, *Joint Enterprise – Eleventh Report of Session 2010-12, Vol I and II* (HC 1597, 2012)

—Joint Enterprise: follow-up – Fourth Report of Session 2014-15 (HC 310, 2014)

Jäger C, *Examens-Repetitorium Strafrecht Allgemeiner Teil* (7th edn, CF Müller 2015)

Jahn M, 'Hemmschwellentheorie' JuS 2012, 757

Joecks W and Miebach K, *Münchener Kommentar zum Strafgesetzbuch* Vol 1 (§§ 1-37 StGB, von Heintschel-Heinegg, ed) (2nd edn, CH Beck 2012) (cited as: MüKoStGB/contributor)

Kadish SH, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 California L Rev 323

Kahn-Freund O, 'On Uses and Misuses of Comparative Law' (1974) 37(1) MLR 1

Kamm S, *Die fahrlässige Mittäterschaft* (Duncker & Humblot 1999)

Kaufmann A, 'Der dolus eventualis im Deliktsaufbau' ZStW 70 (1958) 64

Kaveny MC, 'Inferring Intention from Foresight' (2004) 120 LQR 81

Kindhäuser U, Neumann U, Paeffgen H-U (eds), *Strafgesetzbuch* Vol 1 (4th edn, Nomos 2013) (cited as: Kindhäuser/Neumann/Paeffgen/contributor)

Köhne M, 'Immer noch reformbedürftig: Strafvorschriften zur vorsätzlichen Tötung' ZRP 2014, 21

König S, 'Überlegungen zur Reform der Tötungsdelikts-Normen' (2014) 50 RuP 9

Koriath H, *Grundlagen strafrechtlicher Zurechnung* (Duncker & Humblot 1994)

Kretschmer J, 'Welchen Einfluss hat die Lehre der objektiven Zurechnung auf das Teilnahmeunrecht?' Jura 2008, 265

Krey V, *German Criminal Procedure Law, Volume I: Basics – Prosecution – Authorities – Glossary* (Kohlhammer 2009)

—and Heinrich M, Strafrecht Besonderer Teil Band 1: Besonderer Teil ohne Vermögensdelikte (14th edn, Kohlhammer 2008)

—and Esser R, *Deutsches Strafrecht Allgemeiner Teil* (5th edn, Kohlhammer 2012)

Krüger M, 'Zum Bestimmen im Sinne von §§ 26, 30 StGB' JA 2008, 492

Kubik A and Zimmermann T, 'Mord und/oder Totschlag? – Eine kritische Analyse aktueller Reformvorschläge zur vorsätzlichen Tötung' StV 2013, 582

Kudlich H, 'Körperverletzung mit Todesfolge - Zurechnung des Todeserfolgs bei der Körperverletzung mit Todesfolge bei Exzess des Mittäters' JuS 2005, 568

Kühl K, *Strafrecht Allgemeiner Teil* (7th edn, Vahlen 2012)

Küper W, 'Die Rechtsprechung des BGH zum tatbestandssystematischen Verhältnis von Mord und Totschlag – Analyse und Kritik (Teil 1)' JZ 1991, 761

— '"Heimtücke" als Mordmerkmal – Probleme und Strukturen' JuS 2000, 740

—'Über grausames Töten – zur tatbestandlichen Koordination von "Tötung" und "Grausamkeit"' in Schneider H, Kahlo M, Klesczewski D and Schumann H (eds), *Festschrift für Manfred Seebode zum 70. Geburtstag* (de Gruyter 2008) 197

Küpper G, 'Unmittelbarkeit und Letalität. Zum Tatbestand der Körperverletzung mit Todesfolge' in Weigend T and Küpper G (eds), *Festschrift für Hans Joachim Hirsch zum 70. Geburtstag am 11. April 1999* (de Gruyter 1999) 615

Kuhlen L and Roth F, 'Der praktische Fall – Strafrecht: Ein Experiment in der U-Bahn' JuS 1995, 711

Kutz C, *Complicity – Ethics and Law for a Collective Age* (CUP 2000)

Lackner K and Kühl K, *Strafgesetzbuch Kommentar* (28th edn, CH Beck 2014) (cited as: Lackner/Kühl/contributor)

Lanham D, 'Accomplices and Transferred Malice' (1980) 96 LQR 110

Law Commission, *Assisting and Encouraging Crime* (Law Com CP No 131, 1993)

—A new Homicide Act for England and Wales? (Law Com CP No 177, 2005)

—Murder, Manslaughter and Infanticide – Project 6 of the Ninth Programme of Law Reform: Homicide (Law Com No 304, 2006)

—*Participating in Crime* (Law Com No 305, 2007)

—Reform of Offences against the Person: A Scoping Consultation Paper (Law Com CP No 217, 2014)

Leipziger Kommentar, *Strafgesetzbuch Erster Band (§§ 1 bis 31),* Laufhütte HW, Rissing-van Saan R, Tiedemann K (eds), (12th edn, de Gruyter 2007) (cited as: LK-contributor)

Leitmeier L, 'Bedingter Vorsatz bei Tötungsdelikten – Hemmschwellentheorie ohne Erklärungswert' NJW 2012, 2850

Lembert G, *Die verfassungsrechtliche Korrektur des § 211* (Dissertations-Druckerei Charlotte Schön 1965)

Lesch HH, 'Dolus directus, indirectus und eventualis' JA 1997, 802

Livings B and Smith E, 'Locating Complicity: Choice, Character, Participation, Dangerousness and the Liberal Subjectivist' in Reed A and Bohlander M (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 41

Lundmark T, *Charting the Divide between Common and Civil Law* (OUP 2012)

Marshall B, Webb B and Tilley N, *Rationalisation of Current Research on Guns, Gangs and other Weapons: Phase 1*, Jill Dando Institute of Criminal Science, University College London (2005)

Michaels AC, 'Acceptance: The Missing Mental State' (1998) 71 S Cal L Rev 953

Michaels R, 'The Functional Method of Comparative Law' in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 339

Mirfield P, 'Guilt by association: a reply to Professor Virgo' [2013] Crim LR 577

Mitchell B, 'Participating in Homicide' in Reed A and Bohlander M (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 7

Mitsch W, 'Grundfälle zu den Tötungsdelikten' JuS 1996, 26

Morkel D, 'Abgrenzung zwischen vorsätzlicher und fahrlässiger Straftat' NStZ 1981, 176

Morse SJ, 'Criminal Responsibility and the Disappearing Person' (2007) 28 Cardozo Law Review 2545

Murmann U, *Die Nebentäterschaft im Strafrecht: Ein Beitrag zu einer personalen Tatherrschaftslehre* (Duncker & Humblot 1993)

Norrie A, 'Oblique Intention and Legal Politics' [1989] Crim LR 793

—'Intention: more loose talk' [1990] Crim LR 642

—'After Wollin' [1999] Crim LR 532

Odgers SJ, 'Letter to the editor' [2013] Crim LR 222

Ormerod D, 'Joint Enterprise' [2008] Crim LR 979

—'Joint enterprise: murder – directions to jury as to liability of secondary parties' [2010] Crim LR 874

—'Case comment – R v Montague' [2014] Crim LR 615

—Smith and Hogan's Criminal Law (12th edn, OUP 2008)

—Smith and Hogan's Criminal Law (13th edn, OUP 2011)

—and Laird K, *Smith and Hogan's Criminal Law* (14th edn, OUP 2015) (cited as: *Smith and Hogan*)

O'Rourke A, 'Joint Criminal Enterprise and *Bratanin*: Misguided Overcorrection' (2006) 47 Harv Int'l L J 307

Otto H, 'Anstiftung und Beihilfe' JuS 1982, 557

—'Die Mordmerkmale in der höchstrichterlichen Rechtsprechung' Jura 1994, 141

Parsons S, 'Joint Enterprise and Murder' (2012) 76 (6) Journal of Criminal Law 463

Pedain A, 'Intention and the Terrorist Example' [2003] Crim LR 579

Philipps L, 'Dolus eventualis als Problem der Entscheidung unter Risiko' ZStW 85 (1973) 27

Prittwitz C, 'Die Ansteckungsgefahr bei AIDS' JA 1988, 486

Puppe I, 'Zu den Anforderungen an die Feststellung eines (bedingten) Körperverletzungsvorsatzes – BGH, Beschluß vom 20.11.1986 - 4 StR 633/86 (LG Essen)' NStZ 1987, 362

—'Anmerkung zu BGH, Urteil vom 12.1.2005 – 2 StR 229/04 (LG Kassel)' JZ 2005, 902

— 'Zur "Hemmschwellentheorie" bei Tötungsdelikten – Anmerkung zu BGH, Urteil vom 22.3.2012 – 4 StR 558/11' JR 2012, 474

— 'Begriffskonzeptionen des dolus eventualis' (2012) <http://sofospartners.blogspot.co.uk/2012/07/begriffskonzeptionen-des-dolus.html> accessed 15 July 2015

Reed A, 'Joint enterprise and inculpation for manslaughter' (2010) 74 (3) Journal of Criminal Law 200

Rengier R, 'Das Mordmerkmal „mit gemeingefährlichen Mitteln"' StV 1986, 405

Richardson J (ed), *Archbold: Criminal Pleading, Evidence and Practice 2015* (63rd edn, Sweet & Maxwell, 2014)

Rogers J, 'Shooting (and judging) in the dark?' (2012) Archbold Review 8

Roxin C, *Täterschaft und Tatherrschaft* (8th edn, Walter de Gruyter 2006)

— Strafrecht Allgemeiner Teil, Band I: Grundlagen – Der Aufbau der Verbrechenslehre (4th ed, CH Beck 2006) (cited as: Roxin, Strafrecht I)

— 'Organisationsherrschaft und Tatentschlossenheit' in Hozer A, Müller HE, Pawlik M, Wolter J (eds), *Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag* (CF Müller 2006) 387

Samson E, 'Absicht und direkter Vorsatz im Strafrecht' JA 1989, 449

Schlehofer H, 'Risikovorsatz und zeitliche Reichweite der Zurechnung beim ungeschützten Geschlechtsverkehr des HIV-Infizierten' NJW 1989, 2017

Schmidhäuser E, 'Zum Begriff der bewußten Fahrlässigkeit' GA 1957, 305

— 'Die Grenze zwischen vorsätzlicher und fahrlässiger Straftat („dolus eventualis" und „bewusste Fahrlässigkeit") JuS 1980, 241

Schmidt R, *Strafrecht Allgemeiner Teil: Grundlagen der Strafbarkeit, Aufbau des strafrechtlichen Gutachtens* (13th edn, Dr Rolf Schmidt Verlag 2014)

Schönke A and Schröder H, *Strafgesetzbuch Kommentar* (29th edn, CH Beck 2014) (cited as: Schönke/Schröder/contributor)

Schroth U, 'Anmerkung zu Urteil des BGH vom 18.4.2002 – 3 StR 52/02' JR 2003, 248

Schumann H, 'Zur Wiederbelebung des "voluntativen" Vorsatzelements durch den BGH – Zugleich Anmerkung zu dem Urteil des BGH vom 15.11.1987, 3 StR 449/87' JZ 1989, 427

Simester AP, 'Murder, mens rea, and the House of Lords – again' (1999) 115 LQR 17

—'The Mental Element in Complicity' (2006) 122 LQR 578

—and Spencer JR, Sullivan GR, Virgo GJ, *Simester and Sullivan's Criminal Law – Theory and Doctrine* (4th edn, Hart Publishing 2010)

—and Spencer JR, Sullivan GR, Virgo GJ, *Simester and Sullivan's Criminal Law – Theory and Doctrine* (5th edn, Hart 2013) (cited as: Simester and Sullivan)

Smith KJM, *A modern Treatise on the Law of Criminal Complicity* (OUP 1991)

Smith JC, 'Aid, Abet, Counsel or Procure' in PR Glazebrook (ed), *Reshaping the Criminal Law, Essays in Honour of Glanville Williams* (Stevens 1978) 120

— 'Secondary Participation and Inchoate Offences' in CFH Tapper (ed), *Crime, Proof and Punishment, Essays in Memory of Sir Rupert Cross* (Butterworth 1981) 21

—'Murder in course of aggravated burglary' [1990] Crim LR 119

—'Secondary Participation in Crime – Can we do without it?' (1994) NLJ 679

—'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR 453

Sowada C, 'Zum Mittäterexzess bei § 227 StGB' in Hoyer A, Müller HE, Pawlik M, Wolter J (eds), *Festschrift für Friedrich-Christian Schroeder zum 70. Geburtstag* (CF Müller 2006) 621

Spencer JR, 'Trying to Help Another Person Commit a Crime' in Smith P (ed), *Criminal Law: Essays in Honour of J.C. Smith* (Butterworths 1987) 148

Steinberg G, 'Indizwert einer höchst lebensgefährlichen Tathandlung für den Tötungsvorsatz' JZ 2010, 712

—and Stam F, 'Der Tötungsvorsatz in der Revision des BGH' NStZ 2011, 177

Stern S, *Verteidigung in Mord- und Totschlagsverfahren* (3rd edn, CF Müller 2013)

Sternberg-Lieben D and Sternberg-Lieben I, 'Vorsatz im Strafrecht' JuS 2012, 976

Stratenwerth G, 'Dolus eventualis und bewußte Fahrlässigkeit' ZStW 71 (1959) 51

Stuckenberg C-F, 'Körperverletzung mit Todesfolge bei Exzeß des Mittäters' in Pawlik M and Zaczyk R (eds), *Festschrift für Günther Jakobs zum 70. Geburtstag* (Heymanns 2007) 693

Sturge LF (ed), *JF Stephen: A Digest of the Criminal Law (Indictable Offences)* (9th edn, Sweet & Maxwell 1950)

Sullivan GR, 'Intent, Purpose and Complicity' [1988] Crim LR 641

— 'The Law Commission Consultation Paper on Complicity: Part 2: Fault Elements and Joint Enterprise' [1994] Crim LR 252

— 'Complicity for first degree murder and complicity in an unlawful killing' [2006] Crim LR 502

— 'Participating in crime: Law Com No 305 – joint criminal ventures' [2008] Crim LR 19

— 'Acessories and Principals after *Gnango*' in Reed A and Bohlander M (eds), *Participation in Crime – Domestic and Comparative Perspectives* (Ashgate 2013) 25

Taylor G, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99

— 'The Intention Debate in German Criminal Law' (2004) 17(3) Ratio Juris 346

Tofahrn S, *Strafrecht Besonderer Teil I – Straftaten gegen Persönlichkeitswerte* (3rd edn, CF Müller 2014)

Trück T, 'Tötungsvorsatz ohne Hemmschwelle' JZ 2013, 179

Virgo G, 'Making sense of accessorial liability' (2006) Archbold News 6

— 'The Doctrine of Joint Enterprise Liability' (2010) Archbold Review 6

— 'Joint enterprise liability is dead: long live accessorial liability' [2012] Crim LR 850

— 'Guilt by association: a reply to Peter Mirfield' [2013] Crim LR 584

> —'JEF 11' <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/joint-enterprise-followup/written/10873.pdf> accessed 15 July 2015

Von Heintschel-Heinegg B, 'Zum Beweiswert der "Hemmschwellentheorie" bei Tötungsdelikten' JA 2012, 632

Walter T, 'Vom Beruf des Gesetzgebers zur Gesetzgebung – Zur Reform der Tötungsdelikte und gegen *Fischer et al.* in NStZ 2014, 9' NStZ 2014, 368

Watson A, *Legal Transplants – An Approach to Comparative Law* (2nd edn, first published Scottish Academic Press 1974, University of Georgia Press 1993)

Weigend T, 'Germany' in Heller KJ and Dubber MD (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 252

—'Subjective elements of criminal liability' in Dubber MD and Hörnle T, *The Oxford Handbook of Criminal Law* (OUP 2014) 490

Wessels J, Beulke W, Satzger H, *Strafrecht Allgemeiner Teil: Die Straftat und ihr Aufbau* (44th edn, CF Müller 2014)

Williams G, 'The mens rea for Murder: leave it alone' (1989) 105 LQR 378

—'Complicity, Purpose and the Draft Code: Part 1' [1990] Crim LR 4

—'Complicity, Purpose and the Draft Code: Part 2' [1990] Crim LR 98

—'Innocent Agency and Causation' (1992) 3(2) Crim Law Forum 289

Wilson W, 'Murder and the Structure of Homicide' in Ashworth A and Mitchell B (eds), *Rethinking English Homicide Law* (OUP 2000) 21

—and Ormerod D, 'Simply harsh to fairly simple: joint enterprise reform' [2015] Crim LR 3

Woesner H, 'Zur Gefahr einer moralisierenden Auslegung der Mordmerkmale' NJW 1978, 1025

Zaczyk R, 'Das Mordmerkmal der Heimtücke und die Notwehr gegen eine Erpressung' JuS 2004, 750

Zweigert K and Kötz H, *An Introduction to Comparative Law* (Weir T, tr, 3rd edn, OUP 1998)