Cambridge Law Journal, page 1 of 23 © The Author(s), 2025. Published by Cambridge University Press on behalf of The Faculty of Law, University of Cambridge. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (https://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.
doi:10.1017/S0008197325000078

OVERWHELMING SUPERVENING ACTS – A CORRECTIVE

A.P. SIMESTER* AND FINDLAY STARK*

ABSTRACT. *In* R. v Jogee; Ruddock v The Queen*, the Supreme Court abolished "joint enterprise liability", thus removing the need for a doctrine that used to temper the harshness of joint enterprise: the "fundamental difference" rule. The Supreme Court nevertheless allowed this rule to linger on in the form of an "overwhelming supervening act" doctrine. That doctrine has led to the creation of yet another: an "escalation" doctrine. We argue that there is no place in the post-Jogee law of complicity for doctrines based on fundamental difference, overwhelming supervening acts or escalation. This is no mere semantic quibble. It has significant implications for the way in which complicity law should be applied, especially in homicide cases.*

KEYWORDS: criminal law, secondary liability, complicity, joint enterprise.

I. THE "A→B" SCENARIO

A notoriously difficult problem for criminal complicity law is what might be called the "A→B" scenario. Scenarios of this kind arise where a secondary party (S) intentionally aids or abets a principal (P) to do one crime (Crime A), but P introduces a variation by perpetrating a crime (Crime B) that is in some significant manner different from Crime A. For example, S might agree with P to inflict minor injury upon V (Crime A), but P stabs V (Crime B). Or, in more difficult cases, S might agree with P to cause serious injury to V with fists (Crime A), but P causes serious injury by stabbing V (Crime B). S will be liable straightforwardly for Crime A if that was (also) done by P. Yet what, if any, principles does the criminal law have to navigate S's liability for Crime B?

Historically, one set of principles was supplied by the so-called doctrine of "joint enterprise" or, as it was sometimes named, "parasitic accessorial

*Respectively, Amaladass Professor of Criminal Justice and Dean, Faculty of Law, National University of Singapore; Professor of Criminal Law, University of Cambridge. Addresses for Correspondence: simester@nus.edu.sg; fgs23@cam.ac.uk. We are grateful to John Child, James Manwaring and Bob Sullivan for comments on an earlier draft and to colleagues at the Cambridge Centre for Criminal Justice for their comments at a seminar in October 2022. We are additionally grateful to the anonymous referees for their very helpful comments.

liability".[1] As is well known, joint enterprise liability was concerned with offences that arose as a result of the commission of *agreed* crimes. It had an explicit two-crime, A→B structure. If S foresaw that P might commit Crime B in the course of their joint enterprise to commit Crime A, and P did so, S may become liable as an accessory for Crime B. S and P's common purpose to commit Crime A could be combined with S's foresight of Crime B to construct liability for Crime B, without the need to prove that S directly aided or abetted P's Crime B, or that she intended to do so. In 2016, this controversial doctrine was abolished in England and Wales by the Supreme Court in *R. v Jogee; Ruddock v The Queen* (*Jogee*).[2]

What replaced joint enterprise? According to the Supreme Court, nothing. This means that there is nowadays just one, standard path to ascribing secondary liability to S for P's offending. S must:[3]

(1) aid, abet, counsel or procure P's offence;[4] and
(2) intend to aid, abet, counsel or procure P's offence, having knowledge[5] of the "essential matters" of that offence.

In what follows, we call this the "Standard Test" for aiding and abetting.

By abolishing joint enterprise, the Supreme Court effected a considerable simplification of English and Welsh complicity law. Even so, there remains much complexity,[6] especially in A→B scenarios. In Section II, we shall see that the Standard Test contains various resources to help determine liability in situations where S contends that P's actual conduct differed significantly from what S had in mind at the time of her own act of intended assistance or

[1] These labels have not been used consistently and references to "joint enterprise" continue to be made after *R. v Jogee; Ruddock v The Queen* [2016] UKSC 8, [2017] A.C. 387, even though the doctrine with which that concept was most helpfully associated has been abolished. The language of "common purpose" is sometimes also used in this context, although that usage is distracting because the relevant doctrines covered situations where Crime B was in an important sense a *departure* from the common purpose to commit Crime A.

[2] *R. v Jogee* [2016] UKSC 8.

[3] More fully, S can only be liable for P's crime (X) if she intentionally does an act that assists or encourages P to do X, and if she does so either *in order* (i.e. directly intending) to help/encourage P to do X, or *knowing* (believing correctly, with no significant doubt) that P will thereby be helped/encouraged to do X.

[4] Procurement has distinctive *actus reus* and *mens rea* requirements, but those differences are irrelevant here and were, in any event, ignored by the Supreme Court in *Jogee*. These four varieties of complicity are entrenched by section 8 of the Accessories and Abettors Act 1861, albeit that provision is procedural and not the substantive legal source of secondary liability (cf. *R. v Jogee* [2016] UKSC 8, at [6]).

[5] The standard of "knowledge" is typically invoked by the courts: e.g. *Johnson v Youden and Others* [1950] 1 K.B. 544 (D.C.); *R. v Jogee* [2016] UKSC 8, at [9]. We take this standard to require that S has a settled (correct) belief, with no significant doubt, that P's conduct will (not may) satisfy the essential elements of his crime. This formulation dissolves the apparent tension sometimes thought to arise between "existing" facts (which can be known at the time of providing assistance or encouragement to the principal, at least in theory) and "future" facts (which often cannot and might therefore be thought by some writers to require intention). See e.g. D. Ormerod and K. Laird, "*Jogee*: Not the End of a Legal Saga but the Start of One?" [2016] Crim. L.R. 539, 544–45.

[6] See J.J. Child, A.P. Simester, J.R. Spencer, F. Stark and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 8th ed. (Oxford 2022), ch. 7.

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

encouragement. Historically, supplementing those resources, a rule had developed in the context of joint enterprise whereby, if P's Crime B was committed in a manner "fundamentally different" from the conduct S had foreseen, S was not liable for Crime B. In this paper, we contend that, by abolishing joint enterprise liability, *Jogee* made the fundamental difference rule redundant. All that was left behind were the resources, set out in Section II, of the Standard Test.

The Supreme Court, alas, failed to acknowledge the full implications of its own analysis. It created space for a version of the fundamental difference rule to live on and to find a new home within the Standard Test. The rule's continued existence was sustained by certain open-ended remarks in *Jogee* about the possibility that an "overwhelming supervening act"[7] by P might place a limit on S's liability for aiding and abetting. In subsequent homicide cases, the Court of Appeal has capitalised upon those remarks to develop an apparent dichotomy between overwhelming supervening events (which will negate S's liability for manslaughter) and mere foreseeable "escalations" of the violence that was intentionally encouraged or assisted by S (which will not). In escalation cases, it seems that S can once again be held liable for something going beyond what she intentionally assisted or encouraged. Our contention is that neither overwhelming supervening acts nor escalation has any place in a post-joint-enterprise world, whether in the context of homicide or elsewhere, and that the law is currently being misapplied, founding homicide liability that ought not to exist.

In order to defend these claims, we begin in Section II by setting out some of the basic principles of the Standard Test, and their limits, before turning in Sections III and IV to explain why those principles leave no room for doctrines of overwhelming supervening acts and escalation that the Supreme Court toyed with in *Jogee* and the Court of Appeal has subsequently developed. In Section V, we offer a tentative explanation of the Supreme Court's lack of clarity on this point: having ruled that joint enterprise liability had died out in the nineteenth century before being resurrected in the 1980s, the court was compelled to interpret certain decisions from the 1960s on overwhelming supervening acts in terms of standard aiding and abetting liability. This reading suggests, in turn, that those 1960s authorities survived the demise of joint enterprise in *Jogee* – thereby creating space for the Court of Appeal's recent innovations.

II. Back to Basics: Bridging between Variations in P's Offending

Our concern in this section is to outline how the Standard Test accommodates cases where the crime that P ultimately perpetrates

[7] The test is also sometimes expressed in terms of "overwhelming supervening events" and "overwhelming supervening occurrences": *R. v Jogee* [2016] UKSC 8, at [12], [33].

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

involves a variation from what S understood herself to be aiding or abetting. Joint enterprise doctrine made it possible to bridge even very significant variations between agreed Crime A and its offshoot Crime B, provided that S foresaw the possibility that Crime B might be committed by P. By contrast, the paths to liability under the Standard Test are more restrictive. There are a number of doctrines guiding the courts within the Standard Test. Broadly, they address two kinds of criteria:

(1) Whether Crime B is of the same *type* as Crime A; and
(2) Whether Crime B falls within the *scope* of S's encouragement.[8]

We take these criteria in turn.

A. Variations within a Type: Bainbridge *and* Maxwell

In general, S will remain liable for P's offence notwithstanding that its precise mode of commission differs from what S envisaged. The *locus classicus* of this proposition is *R. v Bainbridge*.[9] In that case, the Court of Appeal confirmed that, on a charge of aiding a burglary, it is unnecessary that S should have knowledge of the "particular date and particular premises" of the burglary which was in fact committed.[10] Dismissing S's appeal against conviction, the court endorsed the trial judge's direction, which had required that S intended to assist *the type* of crime perpetrated by P. Lord Parker C.J. clarified that this meant "the felony of breaking and entering premises and the stealing of property from those premises".[11]

The basic idea here is that the location of the burglary is legally irrelevant, because it is not part of the offence definition.[12] Just as one who steals a painting wrongly thinking it belongs to Victor, when in fact it belongs to Victoria, remains guilty of theft, S remained guilty of burglary even if he had thought it was a different bank that would be burgled. Similarly, it does not matter that an accomplice thought that the serious injury he encouraged or assisted P to inflict would be inflicted on a Tuesday, when in fact it was caused on a Thursday.

Understood in this way, Crimes A and B are of the same type when they have the same essential elements of liability. In such cases, the legally relevant ingredients of the offence that P commits are the same as the one that S intended to aid or abet.

[8] As explained below (note 32), we are sceptical that a "scope" restriction applies in cases where S has not provided P with encouragement and has merely provided aid.
[9] [1960] 1 Q.B. 129 (C.A.); cf. *R. v Jogee* [2016] UKSC 8, at [93].
[10] *R. v Bainbridge* [1960] 1 Q.B. 129, 133 (C.A.) (Lord Parker C.J.).
[11] Ibid., at 134.
[12] Child et al., *Simester and Sullivan's Criminal Law*, 187–90.

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

"Type", on this view, is relatively narrow. It does not extend to the broad *category* of P's offence, such as "offences against the person" or "property offences".[13] A useful analogy can be drawn here with the law of conspiracy. Where D1 agrees to commit theft, but D2 and D3 agree to commit theft with violence, D1 is rightly not guilty of conspiracy to commit robbery.[14] It makes no difference that both crimes can be, and often are, categorised as property offences.[15] Similarly, if S aids P to commit theft by informing P of where V keeps her laptop, it is submitted that application of the principle in *Bainbridge* means that S does not become guilty of robbery if P uses force to relieve V of her laptop.[16] Indeed, if all offences within a category were deemed to be of the same type, it is unclear why the legal mechanism of joint enterprise would have been thought necessary: despite its potentially having a wider reach, joint enterprise liability was applied by the courts principally in cases where S had agreed with P to use a certain level of violence against V, and P used greater violence, killing V. Non-fatal offences against the person and homicide offences might be thought to be of the same category (and we take no view on that debate here), but they clearly have different essential elements and – on the analysis here – are not of the same type.

One can, of course, put pressure on this analysis of what it means for offences to be of the same type. Consider David Ormerod, Karl Laird and Matthew Gibson's example where S provides P with a jemmy to break into V's home in order to steal: P uses the jemmy to break in but does so in order to cause grievous bodily harm.[17] Both scenarios involve the same crime (burglary), yet does P's differing ulterior intention render these offences of a different "type"? The case law offers no clear answer to this question. Arguably, however, the answer is "No". The difference does not matter, *legally*: either intention suffices for burglary under section 9(1)(a) of the Theft Act 1968.[18]

Despite its unclear boundaries, *Bainbridge* demonstrates that the Standard Test accommodates at least some unexpected variations in the commission of P's offence. Moreover, it is complemented by two supplementary

[13] Contrast K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford 1991), 163 (arguing that *Bainbridge* focused on a "class" of crimes). Compare the use of "category" of offence in section 101(1)(2)(b) of the Criminal Justice Act 2003.

[14] *R. v Barnard* (1980) 70 Cr. App. R. 28 (C.A.).

[15] Robbery and theft are, for example, in the same "category" of offences for the purposes of the rules on bad character evidence: Criminal Justice Act 2003 (Categories of Offences) Order 2004, SI 2004/3346, sched. 1, pt. 1.

[16] Robbery need not *only* be recognised as a property offence, of course. It is also an offence against the person. Our claim in the text translates straightforwardly. Suppose that S provides P with a weapon, intending to assist the assault of V. S should not become liable for robbery if P then uses the weapon to rob V.

[17] D. Ormerod, K. Laird and M. Gibson, *Smith, Hogan, and Ormerod's Criminal Law*, 17th ed. (Oxford 2024), 223.

[18] See Theft Act 1968, s. 9(2). Of course, the different forms of burglary within that single offence might differ significantly in their seriousness. Plausibly, it is more serious to enter as a trespasser with the intention to cause GBH than to steal.

doctrines that extend the range of A→B variations captured within the Standard Test.

1. *The "essential matters" doctrine*

The first of these is the "essential matters" doctrine. S must be proved to have known the "essential matters" of P's crime at the time of providing the relevant encouragement or assistance.[19] According to that doctrine, a strict-liability element is dealt with differently depending on whether: (1) it is essential to make P's conduct criminal in nature; or (2) it merely operates to aggravate P's already criminal conduct. Let us elaborate this distinction.

As to (1), where a strict-liability element is part of what makes P's conduct criminal in the first place, it is not a matter of strict liability for S. For instance, in *Callow v Tillstone*,[20] S, a vet, negligently inspected meat that P proposed to sell. P sold the meat, which was in fact unfit to be sold. Although the quality of the meat was a matter of strict liability for P, S was acquitted on the basis that S had not known that it was unfit to be sold.[21]

By contrast, where (2) the strict-liability element of P's offence merely aggravates what is already a crime, the same element is also a matter of strict liability for S.[22] This form of strict-liability aggravation is often referred to by academics as "constructive liability".[23] Such constructive-liability, aggravating elements lie outwith the essential matters pertaining to P's conduct that accessories must intend or know about. Consider, for example, murder, which at common law requires the killing of a human being with intent to kill or to cause grievous bodily harm.[24] If

[19] See note 5 above. The courts have variously referred to, for example, the "essential matters which constitute [P's] offence" (e.g. *Johnson v Youden* [1950] 1 K.B. 544, 546 (D.C.) (Lord Goddard C.J.); cf. *R. v Jogee* [2016] UKSC 8, at [16]), the "existing facts necessary for [P's conduct] to be criminal" (*R. v Jogee* [2016] UKSC 8, at [9]), or the "facts necessary to give [P's] conduct or intended conduct its criminal character" (at [16]). The variations are not important: what counts is that not all elements of P's *actus reus* need be contemplated by S.

[20] (1900) 64 J.P. 823 (Q.B.).

[21] Similarly, if P has sex with V, who is in fact 12 years of age, V's age is a matter of strict liability and P will be held liable for the offence of rape of a child under 13, contrary to section 5 of the Sexual Offences Act 2003: *R. v G (Secretary of State for the Home Department intervening)* [2008] UKHL 37, [2009] 1 A.C. 92. For S, who encouraged P to have sex with V, to be held similarly liable, however, according to *Callow v Tillstone* it will need to be proved that she knew V was under 13. It is not a crime to have sex with someone under 16 *unless* you have *mens rea* regarding their age (absence of a reasonable belief: Sexual Offences Act 2003, s. 9); that crime need not be established to found liability under section 5. With that said, the under-13 offence is clearly an aggravated *moral* wrong relative to the under-16 offence. As the law stands, however, it is a distinct legal wrong. (Thanks are due to one of the referees for raising this question.)

[22] Cf. *R. v Jogee* [2016] UKSC 8, at [99].

[23] For recent discussion of this concept and its theoretical underpinnings, see F. Stark, "Deconstructing Constructive Liability" [2023] Crim. L.R. 118. The terminology of "constructive liability" is well established: see e.g. A. Ashworth and K. Campbell, "Recklessness in Assault – and in General?" (1991) 107 L.Q.R. 187, 192; J. Gardner, "Rationality and the Rule of Law in Offences Against the Person" [1994] C.L.J. 502, 508.

[24] *R. v Cunningham* [1982] A.C. 566 (H.L.).

S intentionally aids or abets the deliberate causing of grievous bodily harm to V and V dies, S is liable for murder under the Standard Test. The "constructive" nature of murder liability carries over to secondary liability.[25]

The foregoing approach was confirmed in *Jogee*,[26] and restated by the Court of Appeal in *R. v Grant and others*:[27]

> On a charge of murder, if the accessory intentionally assisted or encouraged the perpetrator and intended that the perpetrator should cause grievous bodily harm with intent, he or she will have satisfied the elements of the offence of murder. The precise manner in which the victim happens to be killed and whether the perpetrator intended to kill as opposed to inflict really serious harm are by the way.

Similarly, in unlawful-act manslaughter, only the unlawful act counts as an essential matter for the purposes of secondary liability.[28]

For the purposes of complicity law, Crime B is of a different type from Crime A only when it has different *essential* matters, and constructive-liability elements of P's crime are simply not considered essential. Hence, S need not know about them in order to be an accessory to the aggravated offence.

2. *Secondary liability and multiple potential offences*

A second supplementary doctrine was articulated in *Director of Public Prosecutions for Northern Ireland v Maxwell*.[29] As was confirmed by the House of Lords in that case, S can be liable for P's crime when S has in contemplation the type of offence that P in fact commits, albeit alongside other possible types of crime:[30]

> [S] may have in contemplation only one [type of] offence, or several: and the several which he contemplates he may see as alternatives. An accessory who leaves it to his principal to choose is liable, provided always the choice is made from the range of offences from which the accessory contemplates the choice will be made. Although the court's formulation of the principle goes further than [*Bainbridge*], it is a sound development of the law and in no way inconsistent.

Maxwell extends the reach of complicity to a case where S knows that P will commit one of crimes X, Y or Z, but lacks certainty about which of them it will be. Like *Bainbridge*, it allows some (limited) flexibility

[25] See *R. v Jogee* [2016] UKSC 8, at [95].
[26] Ibid., at [14], [16].
[27] [2021] EWCA Crim 1243, [2022] Q.B. 857, at [38] (Fulford L.J.); see also *R. v Lanning and another* [2021] EWCA Crim 450, at [71]. Note that the court's statement in *Grant* is one of sufficiency rather than necessity. It should not be construed as suggesting that S *must* (directly) intend that P *will* cause grievous injury with intent. The law requires merely that S intended to assist or encourage P to do so.
[28] Cf. *R. v Jogee* [2016] UKSC 8, at [96].
[29] [1978] 1 W.L.R. 1350 (H.L.).
[30] Ibid., at 1363 (Lord Scarman).

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

for the law to accommodate offence-variations by P, provided that S was sufficiently aware of the essential matters regarding the crime that P ultimately commits. As such, the foregoing doctrines articulate the most important restrictions that the Standard Test contains for A→B scenarios. They operate to ensure that S's conviction is for a crime of the same type that she intended to encourage or assist.

Our argument is, then, that Crime B will be of a different type from Crime A only where it contains distinct, legally salient, essential matters. Indeed, on one view, the type-based approach in *Bainbridge* and *Maxwell* is simply another way of explaining the essential matters doctrine, which has been part of the Standard Test since at least *Johnson v Youden and Others*.[31]

B. *Going beyond the Scope: The* Calhaem *Principle*

There is an exception to the type-based analysis adopted in *Bainbridge* and *Maxwell*, and endorsed in *Jogee*. Sometimes, albeit rarely, S may be absolved of responsibility for Crime B even though that crime *is* of the same type as Crime A. As was explained in *R. v Calhaem*, P must also act "within the scope of the [S's] authority or advice, and not, for example, accidentally".[32] If P goes beyond that scope, S is not liable.

While nothing said in *Jogee* contradicts it, the limits of the *Calhaem* principle remain uncertain.[33] Something like the principle is found in ancient discussions of cases where S had procured P to commit an offence. Where P "wilfully and knowingly commiteth"[34] an offence different from the one S had procured P to perform, whether having different legal elements or directed against a distinct victim, S was not guilty of P's offence. Such cases were contrasted with variations "in circumstances of time and place, or in the manner of execution", where P "in substance complieth with the temptation".[35] In the latter situations, secondary liability flowed. There is no bright line here and the courts have never resolved how "finnicky"[36] S can be when, effectively, insulating herself from secondary liability for variations by P.

[31] [1950] 1 K.B. 544 (D.C.).

[32] *R. v Calhaem* [1985] Q.B. 808, 813 (C.A.) (Parker L.J.). Note that the reasoning in *Calhaem* applies most naturally to complicity via abetting, counselling or procuring. There remain difficult questions about whether the kind of scope restriction contemplated in *Calhaem* can apply to cases of bare aid. Suppose that S provides P with a crowbar, intending to assist P to attack V in particular, but S does nothing else to communicate this intention to P. It is not clear whether S is liable if P decides to attack T instead with the crowbar.

[33] For a discussion of this topic, which views such cases as being exceptions to the general doctrine of transferred fault, see S. Eldar, "Examining Intent through the Lens of Complicity" (2015) 28 Canadian Journal of Law and Jurisprudence 29.

[34] M. Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases: to which Are Added Discourses upon a Few Branches of the Crown Law*, 3rd ed. (London 1792), 369.

[35] Ibid.

[36] Smith, *Modern Treatise*, 202.

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

In *Calhaem* itself, S was alleged to have hired P to murder V. Having taken a down payment, P apparently decided not to kill V but, rather, to stage a failed attempt – even going to the lengths of removing the shot from his shotgun cartridges. P then visited V, shotgun in hand. When V understandably screamed in response to P's charade, P went berserk and attacked V with a hammer, before stabbing her with a knife. V died as a result of P's attack. The prosecution put its case on the basis that S had counselled or procured P to commit murder and S's conviction of murder was upheld by the Court of Appeal on the basis that even a "remote" instance of counselling could suffice for secondary liability.[37]

The facts of *Calhaem* were differentiated by the Court of Appeal from two other scenarios. First, the court considered variations where the relevant result was brought about by P "accidentally when the mind of the final murderer did not go with his actions".[38] The language of "accidents" here is potentially misleading. As the Supreme Court noted in *R. v Gnango*,[39] if S encourages P to shoot at V and P misses but hits T, an innocent bystander, the principle of transferred malice means that S can be liable for the injury suffered by T.[40] The shooting of T is, as the Supreme Court itself noted, "accidental" in the sense that neither P nor S meant for T to be shot. Primary liability for P, and secondary liability for S, nevertheless flows undisturbed, at least in terms of doctrine. This kind of accidental variation remains within the scope of S's encouragement, because it does not change the type of offence committed by P.[41]

The second comparison made in *Calhaem* involved an "unlikely"[42] example where it was asserted that S would *not* be a secondary party to P's offending. Suppose that P kills V during a riot, not realising that V is the person whom P was previously counselled by S to murder. In such a case, P would not "have been acting within the scope of [S's] authority; he would have been acting entirely outside it, albeit what he had done was what he had been counselled to do".[43] In other words, it is not sufficient that P coincidentally commits an offence with identical legal

[37] See also *Benford v Sims* [1898] 2 Q.B. 641 (Q.B.), discussed in *R. v Calhaem* [1985] Q.B. 808, 814 (C.A.).
[38] *R. v Calhaem* [1985] Q.B. 808, 813 (C.A.) (Parker L.J.).
[39] *R. v Gnango* [2011] UKSC 59, [2012] 1 A.C. 827. *Gnango* is a controversial decision, but not on this point, which has been followed post-*Jogee*. See e.g. *R. v Seed and Others* [2024] EWCA Crim 650, [2024] 2 Cr. App. R. 18.
[40] *R. v Gnango* [2011] UKSC 59, at [16], [60] (Lords Phillips and Judge).
[41] Presumably, the Court of Appeal in *Calhaem* meant by "accidental" a situation where P did not mean to do the act that killed V, for example where, having been procured to murder V, P carelessly drops his firearm, which discharges and kills V. (Thanks to Bob Sullivan for the example.) Should S be held criminally liable for V's homicide in such a case, that ought to be on the basis of *principal* liability (for gross negligence manslaughter, perhaps), not secondary liability.
[42] M. Lucraft (ed.), *Archbold: Criminal Pleading, Evidence and Practice 2025* (London 2024), [18.20].
[43] *R. v Calhaem* [1985] Q.B. 808, 813 (C.A.) (Parker L.J.).

elements to the one that S has counselled: there must be some rational connection between S's contribution and P's decision.[44]

This is about as far as one can safely go on the authorities. *Calhaem* is a narrow restriction upon the Standard Test for secondary liability. The restriction is, in our view, a justified one. Secondary liability is an inherently problematic area because it goes against the general grain of the criminal law, by placing S's liability in P's hands.[45] The *Calhaem* principle means that S can sometimes set parameters on her encouragement or instruction, and thus "delimit the scope of [her] participation in an intended crime", even if it remains, legally, the same type of crime envisaged by S.[46] For example, if S makes it sufficiently clear that she is encouraging or instructing the killing specifically of V, P's decision to kill T instead negates S's secondary liability, as in the famous case of *R. v Saunders and Archer*.[47] Similarly, if S is clear that her support is limited to a certain means of causing V grievous bodily harm (say, a "punishment" beating, or a knee-capping where the intention is that V survives) and P unexpectedly produces a knife and cuts V's throat, S should not be liable for murder.[48] That conclusion has been doubted as a matter of doctrine, post-*Jogee*,[49] and its defence lies beyond the scope of this article; but it can potentially be supported on our reading of *Calhaem*.

Cases such as *Bainbridge*, *Maxwell* and *Calhaem* help to delimit secondary liability in A→B variation cases under the Standard Test. They operate as qualifications upon the *actus reus* and *mens rea* requirements of complicity. They are not things apart from those basic building blocks of complicity liability. In terms of substantive legal doctrine, they do not operate as "supervening" *defences*. It is an unnecessary complication to the law of secondary liability to set the doctrines analysed above up as distinct, supervening doctrines. Clarifying this point allows one to see, across the next two sections, why, despite their appearance in *Jogee* and subsequent cases, there is no distinctive place for overwhelming supervening acts, let alone escalations, in the Standard Test.

[44] See the interesting account in D. Lanham, "Accomplices and Transferred Malice" (1980) 96 L.Q.R. 110.
[45] A.P. Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford 2021), 119–21, 157.
[46] G. Williams, *Textbook of Criminal Law*, 2nd ed. (London 1983), 356.
[47] (1573) 75 E.R. 706. This is especially the case if S is absent from the scene, a point to which we return in Section IV below. While *Saunders and Archer* was not a case of procurement, that distinction does not matter for present purposes. (In any event, the Court of Appeal has been sceptical of attempts to make much of the distinction post-*Jogee*: see *R. v Hussain and others* [2023] EWCA Crim 697.)
[48] See *R. v Gamble and others* [1989] N.I. 268 (C.C.).
[49] The Court of Appeal now assumes that *Gamble* was wrongly decided: *R. v Grant* [2021] EWCA Crim 1243, at [38]; see also *R. v Rahman and others* [2008] UKHL 45, [2009] 1 A.C. 129, at [40] (Lord Rodger).

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

III. Overwhelming Supervening Acts: An Exculpatory Doctrine?

Joint enterprise liability was controversial in part because it extended the liability of participants to Crime B when they merely *foresaw* that it might be committed in pursuit of their common purpose to commit Crime A. There was no need for the prosecution to prove that S had actually encouraged or assisted Crime B, or that S had intended that Crime B would be encouraged or assisted by their conduct.

Because the extension of liability to Crime B was predicated merely on foresight of its possible commission by P, this form of liability was potentially very broad and was subject to certain limiting exceptions. One such exception was the doctrine of "fundamental difference". If S formed a common purpose to perpetrate Crime A, with foresight that P might commit Crime B during that enterprise, S was nonetheless not guilty of Crime B should P perpetrate Crime B in a manner fundamentally different from what S had foreseen.[50] As explained in *R. v Powell and Another; R. v English*, "if the weapon used by [P] is different to, but as dangerous as, the weapon that the secondary party might use, [S] should not escape liability because of the difference in weapon"; otherwise, however, it was possible under certain circumstances for S to escape liability for murder or manslaughter.[51] For the most part, as this quotation suggests, the fundamental difference constraint was focused on matters such as whether S knew that P was armed and, sometimes, what kind of weapon P was armed with.[52] In general, where P committed Crime B in a manner that was far more likely to cause death than what S had foreseen, S was off the hook for Crime B altogether.[53] This point bears restatement: if Crime B was murder, then the fundamental difference rule meant not only that S was not guilty of murder; she was also not guilty of manslaughter.

After *Jogee* abolished joint enterprise, the fundamental difference rule became unnecessary. Secondary liability based simply on foresight of potential collateral offending was now unavailable and so no brake on such widespread liability was required.[54] Unfortunately, the Supreme Court

[50] *R. v Powell and Another; R. v English* [1999] 1 A.C. 1 (H.L.). For an elaboration of the then doctrine, see A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 5th ed. (Oxford 2013), 269–74.

[51] *R. v Powell* [1999] 1 A.C. 1, 30 (H.L.) (Lord Hutton).

[52] For discussion, see *R. v Rahman* [2008] UKHL 45.

[53] *R. v Powell* [1999] 1 A.C. 1, 30 (H.L.) (Lord Hutton). Subsequent authorities are summarised in *R. v Mendez and another* [2010] EWCA Crim 516, [2011] Q.B. 876, at [42].

[54] Two caveats are necessary here. First, depending on how one interprets the Supreme Court's comments in *Jogee* about "conditional intent", it might be that the present law is not in practice clearly distinct from joint enterprise law. There is good reason to doubt that the Court's comments on "conditional intent" were, in any event, coherent: A.P. Simester, "Accessory Liability and Common Unlawful Purposes" (2017) 133 L.Q.R. 73, 84–86. Second, it might be contended that a brake is needed on liability for "constructive" elements, such as the causing of death in murder. Although we countenance this possibility below in Section III(A), the law has long rejected any such brake, even under the fundamental difference doctrine.

did not disavow entirely the concept of fundamental difference. It recast it in terms of overwhelming supervening acts.[55] In the relevant extracts from *Jogee*, what appears to be at issue is whether P's ultimate crime was a *foreseeable* upshot of S's existing contribution, namely something that comes *after* S became *prima facie* an accessory to a crime. If the variation was unforeseeable, then S is not liable: "[I]t is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history."[56]

This type of thinking was apt to joint enterprise cases: to scenarios in which P went *further* than S's standard accessorial liability for aiding, abetting, counselling or procuring stretched. To be sure, if S has already become *prima facie* an accessory to one crime (A) and P's further crime (B) is an overwhelming supervening act, the Standard Test would not render S guilty of Crime B. But, once more, this is not because of any special supervention doctrine. It is because S would not be liable for Crime B on basic principles: she did not intentionally encourage or assist the commission of Crime B. Since *Jogee*, that liability for Crime B must be established *directly*, in its own terms. It cannot be constructed upwards from any liability that S has for Crime A. Previously, a bridge to Crime B liability was provided by joint enterprise: that bridge is now fallen.

Taken together, the comments in *Jogee* invite the following misreading: "Where P does something that was not reasonably foreseeable following S's intended contribution, then P's act is fundamentally different from the one that S intended to encourage/assist; it is an overwhelming supervening act, and S is not liable. *Otherwise*, S is liable for P's offence."

A reading of this sort fits poorly with the passages in *Jogee* which suggest that the language of overwhelming supervening acts simply denotes situations where the *actus reus* and/or *mens rea* of complicity under the Standard Test cannot be proved. Consider, for instance, the following statement from *Jogee*:[57]

> [T]here may be cases where anything said or done by [S] has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time [P's] offence was committed. Ultimately it is a question of fact and degree whether [P]'s conduct was so distanced in time, place or circumstances from the conduct of [S] that it would not be realistic to regard [P]'s offence as encouraged or assisted by it.

Similarly, immediately after referring to overwhelming supervening acts, the court confirmed that "[w]hat matters is whether [S] encouraged or

[55] *R. v Jogee* [2016] UKSC 8, at [98].
[56] Ibid., at [97].
[57] Ibid., at [12].

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

assisted the crime .... He need not encourage or assist a particular way of committing it, although he may sometimes do so".[58]

Both of these quotations suggest that there is no liability-limiting exception at work here. It is simply that, on the facts of the case at hand, it may be that the prosecution cannot prove beyond reasonable doubt that S *in fact* encouraged or assisted P's offence; notably, where what S did is "so distanced in time, place or circumstances" that its possible connection to P's offending is "spent".[59] It is not news that such factual encouragement or assistance is required for the *actus reus* of secondary liability – that requirement has been clear for decades.[60]

Consider a situation in which S joins P in confronting V and others. S knows that P has a knife, but P unexpectedly produces a revolver and shoots V at point-blank range.[61] Here, it might be argued that S had not in fact intentionally encouraged or assisted P's action, because S never anticipated that P would perform an act of this type. S's liability will, of course, depend on what the prosecution can prove. Perhaps they can prove an intention on S's part to encourage the use of the knife to cause grievous injury with intent, in which case S should be found guilty of murder, notwithstanding P's use of a more life-threatening means of killing V. Alternatively, perhaps it cannot be proved that S intended to do anything more than encourage the use of the knife to frighten V, in which case P's crime of murder is different, in terms of its legal definition, from what S intended to encourage (an assault). But that possibility has nothing to do with overwhelming supervening acts as a distinct legal category. Rather, it concerns the basic *actus reus* and *mens rea* of secondary liability – namely the very *prima facie* case against S.

Instead of using the language of overwhelming supervening acts, it would be more profitable to speak only in terms of those *actus reus* and *mens rea* requirements, just as does the Standard Test. So, for example, if S encourages P to kidnap V and demand a ransom and P uses a knife to cut off V's finger, talk of overwhelming supervening acts is an unnecessary distraction.[62] Without more, this is simply a case where S cannot be proved to have either encouraged or intended to encourage P to cause grievous bodily harm with intent.

The language of overwhelming supervening acts is, accordingly, unnecessary. But it is also dangerous. It risks misdirecting our focus, because we tend to think of "supervening" arguments as being things that come *after* the establishment of an *actus reus* and *mens rea*. For

[58] Ibid., at [98].
[59] Ibid., at [13].
[60] *R. v Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr. App. R. 35; *R. v Clarkson; R. v Carroll; R. v Dodd* [1971] 1 W.L.R. 1402 (C.M.A.C.).
[61] Cf. the example considered, tentatively, in *R. v Smith* [1963] 1 W.L.R. 1200, 1206–7 (C.A.).
[62] Cf. the example raised by counsel in *R. v McLeod* [2017] EWCA Crim 800, [2017] 2 Cr. App. R. (S.) 39, at [40].

instance, the nomenclature of "supervening defence" is sometimes used to signify a defensive argument that "denies neither *actus reus* nor *mens rea* but, rather, seeks to avoid liability by reference to accompanying considerations not contemplated in the offence definition".[63] P hit V (*actus reus*). P meant to (*mens rea*). But P was defending himself using proportionate force (supervening defence). The problem with certain aspects of the overwhelming supervening act discussion in *Jogee* is that they suggest some form of supervening defence exists in variation cases. In *R. v Rowe*, the Court of Appeal compounded matters by talking about overwhelming supervening acts as an "exclusion" of secondary liability, as opposed to being relevant to the establishment of the *actus reus*.[64] Language such as this leads Matthew Dyson to refer to overwhelming supervening act as a "specific defence"[65] to secondary liability and Beatrice Krebs to conceptualise it as a free-standing guarantee of just attribution of liability, something she believes to be particularly needed given the constructive nature of murder under English law.[66] But, as demonstrated above, there is no "supervenience" here; no work for bare foreseeability (as opposed to intention) to do. If one wishes to talk in terms of defence labels, there is merely a "failure of proof" argument:[67] the prosecution has failed to prove the elements of the Standard Test.

That this is the position under the current law is corroborated by the fact that the law's erstwhile fixation with the type of weapon that P used – the hallmark of joint enterprise's fundamental difference rule – is gone, post-*Jogee*. In murder, "the question is whether [S] intended to assist the intentional infliction of grievous bodily harm at least".[68] Evidence regarding S's knowledge of what P was armed with is relevant to that question, but not determinative of it.[69]

If the Standard Test is kept firmly in mind, ostensibly tricky cases can become relatively straightforward. In *Grant*,[70] S and P had a shared purpose to cause grievous bodily harm to V. Post-*Jogee*, that can be

[63] Simester, *Fundamentals*, 400.
[64] *R. v Rowe* [2022] EWCA Crim 27, at [130], [135] (Dame Victoria Sharp P.). The Court of Appeal nevertheless meant only to suggest that, in such cases, the *actus reus* has not been proved to have existed at the relevant time: at [136].
[65] M. Dyson, "Principals without Distinction" [2018] Crim. L.R. 296, 308. Admittedly, Dyson could be using the language of "defence" to encompass anything that militates against the prosecution's case, including a denial of the required *actus reus* elements: but it is then unclear what "specific" adds.
[66] B. Krebs, "Causation, Remoteness and the Concept of the 'Overwhelming Supervening Act': *R. v Grant* [2021] EWCA Crim 1243" (2022) 86 Journal of Criminal Law 42, 43; B. Krebs, "Overwhelming Supervening Acts, Fundamental Differences, and Back Again?" (2022) 86 Journal of Criminal Law 420.
[67] Child et al., *Simester and Sullivan's Criminal Law*, 770–73.
[68] *R. v Jogee* [2016] UKSC 8, at [98].
[69] *R. v Johnson and others; R. v Burton and another; R. v Moises; R. v Hore; R. v Miah and others; R. v Hall* [2016] EWCA Crim 1613, [2017] 4 W.L.R. 104, at [5]; *R. v Brown and others* [2017] EWCA Crim 1870, at [28]; *R. v Tas* [2018] EWCA Crim 2603, [2019] 4 W.L.R. 14, at [37]; *R. v Harper* [2019] EWCA Crim 343, [2019] 4 W.L.R. 39, at [28]–[29]; *R. v Lanning* [2021] EWCA Crim 450, at [70].
[70] *R. v Grant* [2021] EWCA Crim 1243.

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

interpreted as constituting mutual encouragement to cause such harm.[71] For that purpose, they had knives, a sledgehammer and a baseball bat in the boot of their car as P, with S beside him, drove around the neighbourhood looking for V. Suddenly, P spotted V and drove straight into him, killing him.

In post-*Jogee* currency, S's liability must be analysed in terms of abetment of murder. On this approach, S's liability is uncomplicated: S encouraged P to deliberately cause grievous injury to V and, within the scope of that encouragement, P intentionally killed V.[72] The killing was within the scope of the encouragement, at least so far as can be discerned from the facts recorded in the Court of Appeal's judgment, because S had not *insisted* that V must be caused grievous bodily harm using only the weapons in the car. We think that, on the reported facts, it would have been odd, for instance, for S to shout "What on earth are you doing?" as P accelerated towards V.

The Court of Appeal nevertheless entertained the submission that overwhelming supervening events were relevant to accomplice liability post-*Jogee* and gave the following guidance on cases involving such phenomena:[73]

> [T]he principal focus … will be on whether there is a credible basis for suggesting that anything said or done by the accessory by way of encouragement or assistance "has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed" … and which "nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history" …. [U]ltimately the question will be whether the accessory's conduct may have been "so distanced in time, place or circumstances from the conduct of [the principal] that it would not be realistic to regard [the principal's] offence as encouraged or assisted by it".

It would have been simpler, and more accurate, for the Court of Appeal to restrict itself to the point it had already made: that the precise means of killing V is not a legally relevant matter in a case like *Grant*. It is the *actus reus* of murder to kill V by whatever means, not specifically by stabbing, running over or the like. P's actions constituted a mere variation within the type of activity that S was abetting and no *Calhaem* point arose. Additionally, due to the operation of constructive-liability (i.e. aggravating strict-liability) elements of offences like murder, it is abetment of murder for S intentionally to encourage P to deliberately cause grievous bodily harm to V, if V thereby dies. One might baulk at the *fairness* of this approach (and, perhaps, at the fairness of similarly

[71] *R. v Jogee* [2016] UKSC 8, at [78].
[72] See *Solicitor General's Reference; R. v Parry and others* [2023] EWCA Crim 421.
[73] *R. v Grant* [2021] EWCA Crim 1243, at [34] (Fulford L.J.).

expansive constructive-liability elements in the law of involuntary manslaughter). Appealing to a redundant hangover from a dead mode of liability is not, however, an appropriate remedy.

The question in *Grant* was, accordingly, whether the type of crime that P perpetrated, and which caused V's death, was *in fact* encouraged by S. The same question could be put a slightly different way by asking whether the crime P perpetrated was *rationally connected* to the encouragement provided by S.[74] Plainly, the answer was affirmative: the group set out to cause serious injury to V and P used the car to effect that purpose (and perhaps even to kill, albeit that further intention did not matter, legally, when assessing S's liability).[75]

A. *Should the Law Recognise Such an Exculpatory Doctrine?*

Of course, one might contend that, even if there is no *need* for it following *Jogee*, there *should* be an overwhelming supervening act rule. Krebs, for instance, argues that the overwhelming supervening act doctrine can augment the law's existing, scope-based limitations on complicity found in cases such as *Bainbridge*, *Maxwell* and *Calhaem*.[76] Suppose that S agrees with P to inflict serious injury in a fist fight with another gang. Rather than pulling out a knife (a foreseeable escalation, say), P suddenly dashes to his car and returns with an assault rifle, with which he kills their antagonists. *Prima facie*, this variation is irrelevant to S's liability for murder: S intended to encourage the deliberate causing of grievous bodily harm and that is what happened; again, the constructive-liability elements of murder apply to accessories as well as principals. Yet it is, let us concede, unforeseeable that P would carry out the offence using that weapon. In *R. v Lanning and another*, the Court of Appeal dismissed the notion that use of a knife was an overwhelming supervening event by highlighting that "knives are produced in situations of this kind with a high degree of frequency".[77] The same cannot be said of assault rifles.

There is something to be said for recognising a novel doctrine of this sort and perhaps it is these kinds of possibilities that encouraged the Supreme Court to cling to the idea of "overwhelming supervening acts".[78] The essential matters doctrine allows for an expansive approach to constructive-liability crimes even under the Standard Test: something that a distinct overwhelming supervening act doctrine has the potential to trammel. In the light of *Grant* itself, however, it seems unlikely that a

[74] See, similarly, Lanham, "Accomplices and Transferred Malice".
[75] Cf. *R. v Rahman* [2008] UKHL 45.
[76] See Krebs, "Overwhelming Supervening Acts".
[77] *R. v Lanning* [2021] EWCA Crim 450, at [69] (Fulford L.J.).
[78] We are grateful to an anonymous reviewer for this suggestion.

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

scope restriction of this sort is part of the current law. Neither is the case for it incontestable. Unlike the special case discussed in *Calhaem*, the outcome in our example lies within the scope of what S abetted; moreover, there is no variation in the type of crime. Only the *means* of causing that outcome is different, a difference that is plausibly morally as well as legally irrelevant to S's culpability.

B. *When Variations Will Matter*

This is not to claim that all variations resulting in death are legally irrelevant under the current law. As the Court of Appeal noted in *R. v Tas*,[79] the facts of *R. v Rafferty*[80] offer an example where secondary liability is not made out on the Standard Test. S had participated in an attack on V, which took place on a beach. S then left to obtain money using V's bank card. Whilst S was away, the principals carried V out into the water and drowned him. Here, the Court of Appeal thought there was a credible case, albeit "on the unusual facts",[81] that S had not encouraged or assisted the principals to kill V. Neither had S intended to do so. S was a party to the initial attack, but not to the drowning; and the initial attack was not a cause of V's death.

Explaining the case by reference to the Standard Test is preferable to invoking a supervening doctrine of exculpation, either by relying on the claim that the killing was "a new and intervening act" (which suggests that Rafferty was already in principle liable for a homicide offence, before something came along to alter that fact),[82] or that S had "withdrawn" from a joint enterprise (which is simply inapposite on the facts, given the reason why Rafferty was absent when the victim was drowned).[83]

Notions of overwhelming supervening acts and fundamental differences are unnecessary distractions from the basic principles of secondary liability as reasserted in *Jogee*. Those notions should have been interred alongside joint enterprise, for they lack independent legal significance. As will be seen in the next section, however, the Supreme Court's failure to acknowledge this has effectively allowed for a resurrection of joint enterprise-type thinking by the Court of Appeal. This leads to convictions for manslaughter in cases where, we argue, there should be no liability for homicide at all.

[79] [2018] EWCA Crim 2603, at [43].
[80] [2007] EWCA Crim 1846.
[81] Ibid., at [50] (Hooper L.J.).
[82] *R. v Tas* [2018] EWCA Crim 2603, at [43] (Sir Brian Leveson P.).
[83] Ibid., at [44].

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

IV. "Escalation": An Inculpatory Doctrine?

To some extent, our objection to talk of overwhelming supervening acts could be seen as no more than formal. We have critiqued some "enigmatic and unsatisfactory"[84] aspects of *Jogee*, but, if one looks at the actual decisions post-*Jogee*, one finds that the Court of Appeal has not been willing to exculpate defendants on that basis. Effectively, the court has treated claims of overwhelming supervening acts as red herrings. One might, therefore, be inclined to sanguinity about overwhelming supervening acts. If the category is, in practice, empty, what does it matter if in theory it continues to exist?

Unfortunately, there is a practical difficulty here. It lies in the fact that invoking the language of overwhelming supervening acts has served to obscure what should be the courts' focus on the Standard Test for complicity's *actus reus* and *mens rea* elements. If one takes those requirements seriously, then, unless S intentionally encourages or assists the type of crime that causes death, S should not be guilty of manslaughter. S may be guilty of whatever non-fatal offence she deliberately encouraged or assisted P to perform, but – crucially – unless *that* offence was (also) a cause of V's death, she cannot be guilty even of manslaughter.[85]

Contrast the situation that has arisen post-*Jogee*, as a result of judicial preoccupation with overwhelming supervening acts. Where there is no overwhelming supervening act following S's encouragement or assistance of a crime of violence (Crime A), further violence (Crime B) is generally treated as a mere escalation of Crime A and V's death in such circumstances will render S guilty of manslaughter. In other words, unless there is an overwhelming supervening act in such cases, there *is*, apparently, intentional assistance or encouragement of (the essential matters of) a manslaughter. The effect of this misperception is to create a novel *inculpatory* doctrine for A→B scenarios. Moreover, the new doctrine appears to be one of substantive law, rather than an evidential thesis or a bare description of the facts of a particular case. If the jury finds that death did not result from an overwhelming supervening act by P, it ought to find that death resulted from an escalation of the violence that S intentionally encouraged or assisted. As a result, it ought to convict S of manslaughter.

This liability-constructing approach finds support in *Jogee* itself: "If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence

[84] Ormerod, Laird and Gibson, *Smith, Hogan, and Ormerod's*, 228.

[85] Simester, "Accessory Liability", 86–87. For further discussion, see B. Krebs, "Joint Enterprise Murder Is Dead – Long Live Joint Enterprise Manslaughter?" in B. Krebs (ed.), *Accessorial Liability After* Jogee (Oxford 2020), ch. 6, 107.

escalates and results in death, he will be not guilty of murder but guilty of manslaughter."[86]

Recall, too, that the Supreme Court and the Court of Appeal have generally explained overwhelming supervening acts by reference to what was unforeseeable in the circumstances of S's contribution to P's offending. When these two points are taken together, we find that the Supreme Court has facilitated the creation by the Court of Appeal of an apparently new form of manslaughter liability premised on the *foreseeability* of P's using more serious violence than was intentionally encouraged or assisted – or even foreseen – by S.[87] So, for example, in *Tas*, the Court of Appeal thought that the question to be resolved was whether "the production of a knife is a wholly supervening event rather than a simple escalation".[88] If the use of the knife was merely an escalation, it seems, S could not complain about a conviction for manslaughter.[89] But the Standard Test, which is the only form of complicity that *Jogee* leaves us with, makes it clear that what counts for S's liability is whether S *intentionally encouraged or assisted the type of act that caused V's death*. If she did not, then she is not guilty of a homicide offence. Escalation obscures this by looking beyond the type of act that S intentionally encouraged or assisted. It reintroduces joint enterprise-type thinking via the back door.

To illustrate further the impact of the wider test adopted by the Court of Appeal in the aftermath of *Jogee*, consider the facts of *English*.[90] S and P agreed to assault V with fence posts. During the attack, P produced a knife, which S did not know P had, and stabbed V to death. It was held that, even if S had foreseen the possibility of P's deliberately causing serious injury to V, P's act was fundamentally different from what S had foreseen. In consequence, S was not guilty of murder *or* manslaughter. Presumably it was foreseeable that the planned violence might escalate. In consequence, S would now become guilty of manslaughter even if S had not foreseen the possibility of P's going further than planned.

Strikingly, the escalation doctrine has been invoked to date only in situations where V dies. Imagine that V had survived being stabbed in *English*. On joint enterprise principles, presumably the knife wound would still have been fundamentally different from what S had foreseen

[86] *R. v Jogee* [2016] UKSC 8, at [96].

[87] Whereas unlawful and dangerous act manslaughter tends to focus on the type of *harm* that was foreseeable as a result of the unlawful act, it is notable that the overwhelming supervening act doctrine concentrates on the type of *act* performed by P. This point has not yet been capitalised upon, doctrinally, but for discussion, see R. Fortson, K. Laird and D. Ormerod, "Reflections on *Jogee*: Overwhelming Supervening Act" [2021] Archbold Review 7, 9.

[88] *R. v Tas* [2018] EWCA Crim 2603, at [40] (Sir Brian Leveson P.); see also at [41].

[89] See also the treatment of the question of whether P's grabbing V's weapon and using it against V was foreseeable to S when joining a group attack on V in *R. v Smith and Another* [2022] EWCA Crim 1808, at [31].

[90] *R. v Powell* [1999] 1 A.C. 1 (H.L.).

might happen and so S would not be liable for a section 18 offence. This same result would appear to follow subsequent to *Jogee*: however foreseeable it was that the violence would escalate, S is only responsible for that escalation if it was directly, and intentionally, aided and abetted by her on standard principles.[91] No justification is given in *Jogee* for why homicide should be anomalous.

It is also striking that the escalation doctrine seems only to have been invoked in situations where S is *present* and participating – that is, in the kind of scenario that was the paradigm of joint enterprise. Suppose that S lends P some brass knuckles in order to assist P's plan to attack and injure V the next day (for the sake of argument, S intends to assist P to inflict actual bodily harm). On the day, however, V fights back. P then produces a knife and stabs V, intending to cause grievous bodily harm. V dies of the stab wound. Certainly, S is guilty of a section 47 offence. But if S was absent throughout the events of that fatal day, it seems unlikely that the courts would be willing to convict her of manslaughter on the basis of escalation.[92] Certainly, that option would not be available on the Standard Test, even if it was foreseeable that P might end up using a knife. Yet, in principle, the same law applies, post-*Jogee*, *whether or not* S is present. There is nothing in *Jogee* that draws a legal distinction between present and antecedent assistance or encouragement – and if that is right, any new escalation doctrine ought to apply when S is absent too. Once again, any such distinction between presence and absence appears to have been relevant to joint enterprise alone, since the technical distinctions between aiding, abetting, counselling and procuring (including whether S was present at the time of P's offending) were excised by the Criminal Law Act 1967.

There are, to repeat, no longer any *two-crime*, A→B scenarios. S's guilt of a lesser offence cannot be constructed into the more serious crime merely on the basis that such a variation in P's offending was foreseeable – or even that it was (merely) foreseen. S must have directly and intentionally aided or abetted that more serious crime according to the basic principles of aiding and abetting that undergird the Standard Test. One can readily imagine why the Supreme Court and the Court of Appeal have been resistant to that conclusion. The retributive urge is strong when a life has been lost. But the point of law is to temper such urges.

All of this is to say that the question is not whether an escalation has become an overwhelming supervening act, such that accessorial liability is negated.[93] The question is whether S intentionally aided, abetted,

[91] In practice, of course, much will depend on whether the prosecution can prove that S "conditionally intended" to encourage or assist P to commit the more serious offence: see note 54 above.

[92] Indeed, such a case would seem to be indistinguishable, legally, from *R. v Rafferty* [2007] EWCA Crim 1846, discussed above in Section III(B).

[93] A question pondered in Fortson, Laird and Ormerod, "Reflections on *Jogee*", 8.

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

counselled, or procured the type of offence that P perpetrated (or at least its essential matters). Notions of overwhelming supervening acts and escalations are simply distractions. And dangerous ones at that, in as much as they have the potential to generate manslaughter convictions that are unwarranted on the Standard Test.

V. A Tentative Diagnosis

One might wonder why the appellate courts have not restricted themselves to the traditional criteria in the Standard Test, and have instead deployed the concepts and language opposed here. Here, we offer some tentative thoughts.

First, there are comments in *Jogee* that suggest that the Supreme Court shared the view articulated here, concerning the limited relevance of overwhelming supervening acts. As was shown above in Section III, the Supreme Court appears to have seen clearly at points that the question is one of satisfying the basic *actus reus* and *mens rea* elements of complicity liability, not a distinct problem of supervening interventions.[94] It may be that "overwhelming supervening act" is simply being used as a synonym for variations of crime-type that fall outside the range of *Bainbridge* and *Maxwell*.[95] On that view, the phrase remains compatible with the Standard Test, but it does no work of its own and serves only to confuse matters. Unfortunately, the judgment in *Jogee* is not always perspicuous, inviting the manoeuvres criticised above.

Second, the history of complicity is notoriously murky and this opaqueness may help to explain the Supreme Court's concern with overwhelming supervening acts and the language of escalation – preoccupations that have been seized upon in the Court of Appeal's subsequent jurisprudence. The Supreme Court's view in *Jogee* was that the Privy Council in *Chan Wing-Siu and Others v The Queen*[96] resurrected joint enterprise liability in 1984, following its demise at some point during the nineteenth century. On that version of history,[97] it becomes more pressing to find a role for overwhelming supervening acts in post-*Jogee* complicity. After all, the major references to this concept –

[94] It may be, as one reviewer has suggested to us, that the Supreme Court's use of the term "intervening" as synonymous with "overwhelming" further corroborates our view that the court understood the problem as being one of establishing the *actus reus* of complicity. Even granted this, however, since there is nothing upon which to "intervene", the use of that terminology seems problematic.

[95] Indeed, James Manwaring has pointed out to us that there is some textual support for this way of thinking in *Bainbridge* itself ([1960] 1 Q.B. 129, 134 (C.A.)), where the judgment quotes from Foster, *Crown Law*, 369, to the effect that "[i]f the principal totally and substantially varieth, if being solicited to commit a felony of one kind he wilfully and knowingly committeth a felony of another, he will stand single in that offence". The language of "total and substantial variation" is evocative of "overwhelming supervening act", understood as a denial that Crimes A and B are of the same type.

[96] [1985] A.C. 168 (P.C.).

[97] See e.g. Dyson, "Principals without Distinction", 301–8.

https://doi.org/10.1017/S0008197325000078 Published online by Cambridge University Press

in *Smith*,[98] *R. v Anderson Morris*,[99] *R. v Betty*[100] and *R. v Reid*[101] – are from the 1960s and 1970s. On the Supreme Court's version of history, these decisions *could not be* about joint enterprise. Accordingly, these decisions had to be understood as meaning something in relation to the Standard Test for complicity, or else be accounted wrong or misunderstood. For whatever reason, the Supreme Court chose to endorse those Court of Appeal decisions, arguing that they involved application of the Standard Test and not joint enterprise. That has facilitated continued interest in, and reliance upon, redundant concepts.

The historical account of complicity preferred in *Jogee* has been doubted,[102] although it is unnecessary to reopen that debate here. Our suggestion here is merely that, given the sheer opacity of the history, it is plausible that twentieth-century courts prior to *Jogee* had not explicitly recognised, let alone acknowledged, the demise of joint enterprise liability. As such, statements by those courts about overwhelming supervening acts and escalation could be read as being (per *Jogee*, misguided) references to joint enterprise liability and thus restricted to that context. Indeed, this seems to have been the view of Lord Hutton in *Powell and English*: his Lordship saw the "fundamental difference" rule as being an example *of* those 1960s and 1970s decisions, not a thing apart from them.[103] That explanation remains viable even if one accepts that *Chan Wing-Siu* did indeed resurrect a dead head of liability.

Reasonable disagreement is possible on the matters addressed in this section. It is a matter of great regret that the courts have never delineated the grounds of complicity liability as clearly as they might have and this is, of course, part of the reason why joint enterprise was so controversial.

VI. Conclusion

Whatever the history, there is no doubt where we are today as a matter of the law's logic. *Jogee* abolished joint enterprise liability. No longer is there need for a restriction upon such liability of the sort contemplated by rules about fundamental differences and overwhelming supervening acts. There is also no place for the view that the absence of such differences and acts establishes that there was simply an escalation in P's offending, rendering S liable as an accessory on account of her participation in a distinct, less serious offence. There are only single-crime scenarios. All that is left, as the Supreme Court repeatedly insisted in *Jogee*, is the

[98] [1963] 1 W.L.R. 1200 (C.A.).
[99] [1966] 2 Q.B. 110 (C.A.).
[100] (1964) 48 Cr. App. R. 6 (C.A.).
[101] (1976) 62 Cr. App. R. 109 (C.A.).
[102] See Simester, "Accessory Liability", 76–81; F. Stark, "The Demise of 'Parasitic Accessorial Liability': Substantive Judicial Law Reform, Not Common Law Housekeeping" [2016] C.L.J. 550.
[103] *R. v Powell* [1999] 1 A.C. 1, 31 (H.L.) (Lord Hutton).

approach set out in the Standard Test. The core questions post-*Jogee* are whether S *in fact* encouraged or assisted the essential matters of the crime committed by P and whether S intended to do so. Variations in P's offending are relevant only insofar as they alter the type of offence envisaged by S (as recognised in *Bainbridge* and *Maxwell*), or go outside of the explicit scope of S's encouragement (the *Calhaem* principle).

Circumnavigating these core questions, the Court of Appeal has created a foreseeability-based mode of homicide liability that goes entirely against the intention-focused approach left in the wake of *Jogee*. One might note that this mode of homicide liability is less harsh than its predecessor, insofar as it will impose liability for manslaughter (with its discretionary life sentence) and not murder (with its mandatory life sentence). But that is little consolation when, on the Standard Test, there should be no homicide liability at all.

As the Supreme Court noted in *Jogee* itself, where an apex court creates a problem with the common law, it has a responsibility to fix it.[104] This is particularly so when a corrective measure is needed in order to reduce the potential for criminal liability. The Supreme Court should revisit this area and begin the process of resolving the problems left in the wake of *Jogee*.

[104] *R. v Jogee* [2016] UKSC 8, at [85].