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Voodoo Liability: Joint Enterprise Prosecution as an Aspect of Intensified Criminalisation

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Abstract

Following the collapse of a number of 'gang-related' prosecutions in England and Wales from the late 1990s, the police and Crown Prosecution Service revived a practice of 'joint enterprise' prosecution. Joint enterprise was a historic common law principle holding co-defendants equally responsible for offences which appeared to evince a common collective purpose. Unfortunately, over time, a combination of (apparently 'wayward') judicial interpretation, and police and prosecutorial practice contributed to a lowering of the threshold of 'joint liability' such that involvement in a gang, and 'bad character' evidence admitted at trial were taken to imply the 'foreseeability' of violent offences. The apparent tendency of the police to over-define criminal activity by young black males as 'gang-related' has led to the construction of a spurious and 'voodoo criminal liability' leading to the intensified criminalisation (over-prosecution and over-incarceration) of young black men. Between the first presentations of the paper and the written version which follows, the law was amended (*R v Jogee* 2016) but, as will be argued, not in a way which fundamentally changes the construction of 'joint liability' discussed here.

Key words

Over-criminalisation; gang related; prosecution; foresight; joint liability

Resumen

Después del colapso de una serie de procesos relacionados con bandas criminales en Inglaterra y Gales desde finales de los años 90, la policía y el Servicio de Fiscales de la Corona retomaron la práctica de los procesos de "asociaciones criminales". La asociación criminal fue un principio histórico del derecho consuetudinario, que consideraba a los co-demandados responsables al mismo nivel de crímenes que se demostraba respondían a un propósito colectivo común. Por desgracia, a lo largo del tiempo, una combinación de una interpretación jurídica (aparentemente "torpe"), y la práctica policial y fiscal contribuyeron a reducir el umbral de la responsabilidad conjunta, de forma que la implicación en una banda, y

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un "mal carácter" demostrados en un juicio podrían implicar la "previsión" de delitos criminales. La tendencia aparente de la policía de sobre-definir la actividad criminal de hombres jóvenes negros como "relacionada con una banda" ha llevado a la construcción de una "responsabilidad penal de vudú" que lleva a la intensificación de la criminalización (exceso de procesamiento y de encarcelamiento) de hombres jóvenes negros. Entre las primeras presentaciones del artículo y esta versión escrita, la ley ha cambiado (*R v Jogee* 2016), pero, como se va a defender, no de forma que cambie fundamentalmente la construcción de la "responsabilidad conjunta" que se analiza aquí.

Palabras clave

Exceso de criminalización; relacionado con bandas; previsión; responsabilidad conjunta

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1. Introduction: 'voodoo liability'

Notwithstanding the recent (February, 2016) Supreme Court decision to introduce a stricter test of criminal foresight in joint enterprise (JE) prosecutions than that which has prevailed since the mid 1980s (*Chan Wing-Siu v The Queen* 1984) the principle of joint enterprise is likely to continue to underpin British gang prosecution strategy. Juries will continue to have to interpret copious amounts of leading police evidence of gang involvement in order to reach decisions about the responsibility of 'secondary parties' (gang members, 'affiliates' or 'associates') for violent crimes committed by gangs. For, as Lord Neuberger remarked when delivering the 2016 verdict: 'This necessary correction to the wrong turning taken by the law does not mean that every person convicted in the past as a secondary party, where the law as stated in *Chan Wing-Siu* was applied, will have suffered an unsafe conviction' (*R v Jogee* 2016). Moreover, governments of varying political complexions have steadfastly refused to reform this area of law, advocating instead the populist tough deterrent strategy of joint enterprise prosecution to confront perceived problems of gang violence. As this paper argues, however, JE prosecutions have compounded the over criminalisation of young people and created a substantial legacy of - acutely racialised - injustice.

The title of this paper explicitly invokes Jock Young's conception of 'voodoo criminology' (Young 2004) but extends the idea to the construction of a dubious criminal liability in *joint enterprise* prosecution cases. Young's original argument, although the concept 'voodoo criminology' itself appeared only in the title of his article, developed a critique of orthodox, positivist and quantitative criminology. Not unlike a great deal of pseudo-science (Pasquino 1991, Park 2001), this criminology not only denied its own selective ideological foundations but represented, according to Young, a 'denatured... desiccated' and 'othered' world in which criminal actors are perceived as fundamentally different from 'us', embracing contrary values, driven by different desires and dangerously immune to the calls of conscience (Young 2007, 2011, p. 64-65). Within this worldview, Young claimed, criminological actors 'inhabit an arid planet where they are either driven into crime by social and psychological deficits or make opportunistic choices in the criminal marketplace. They are [the] miserable or mundane digital creatures of quantity, [obeying] probabilistic laws of deviancy – they can be represented by statistical symbolism [and] their behaviour captured in the intricacies of regression analysis and equation' (Young 2004, p. 13). These criminals are necessarily endowed with free will, for we have to hold them responsible for their crimes, but this is by no means always exercised in circumstances of their own choosing. Even so, coming to the crux of the matter as regards 'joint enterprise' prosecution, they are not endowed with infinite foresight or an ability to predict the consequences of essentially fluid, often fleeting and unpredictable, sometimes unwitting, transitory or spontaneous social interactions.

Voodoo criminology entailed the doubtful presumption that 'deviance' could be understood from the exterior by drawing causal inferences and attributing personal motivations on the basis of the generic behaviour of aggregates; voodoo liability entails the companion and entirely self-fulfilling notion that liability can be presumed, legally inferred or juridically established by proximity, appearance, and implied normative association. If it looks like a gang - and especially if the police call it a gang, it *is* a gang (Hagedorn 1988); if you associate with gang members, you *are* responsible for what they do; and if you know about gangs (and are cognisant of 'gang culture'), don't claim you didn't foresee the potential for violence.

While voodoo criminology entailed the construction of an entirely predictive science facilitating the targeted deployment of a risk strategy of 'precautionary criminalisation' (Zedner 2009, Squires and Stephen 2010); voodoo liability, fabricated in the alchemy of legalism and the arcane language of case construction,

then played out in the theatre of the courtroom, seamlessly endorses the guilt of a familiar parade of the unfortunate and culpable: the 'others' and the 'usual suspects'. Voodoo liability plays handmaiden to criminal injustice, sustaining a fundamentally unequal power to punish the most marginal and deprived for *who* they are, *who* they know, *where* they were and *what* they should have foreseen, rather than for what they did.

Retrospectively, the voodoo liability of joint enterprise prosecution vindicates the original police targeting practices and justifies the initial cycle of racialised delinquency amplification (Smithson *et al*. 2013) surrounding 'unattached' and allegedly 'anti-social' young men. It affirms the tough law and order credentials of politicians and endlessly recycles the media's favourite gang dramas. It perpetuates - even completes - the drama of *intensified criminalisation* beyond policing, into the prosecution, the courts and sentencing processes and then, beyond, into penal policy and practice. Implicitly and, taken together with a number of related measures, such as gang injunctions (the 'gangbo': see Treadwell and Gooch 2015), 'Operation Shield'[1], criminal profiling - and, not forgetting, section 45 of the 2015 Serious Crime Act - which criminalises participation in the activities of crime groups, these legal innovations nudge us closer towards a 'strict liability' category offence of gang membership. The new provisions strip the necessity for establishing 'mens rea' (or 'intent', the guilty mind and foresight) from what, as recently as 2007,[2] were defined as distinct 'inchoate offences' - such as conspiracy offences, *intentionally* contributing to the furtherance of other offences. As Treadwell and Gooch (2015) note, gang injunctions risk returning something similar to the 'SUS' laws to British policing 'and the statutorily mandated harassment of largely young (often Black and ethnic minority) inner city men'. But whilst the 'SUS' laws conferred a power of arrest, the voodoo liability of joint enterprise prosecution, or guilt without intention or foresight, can entail a life sentence.[3]

2. Evaluating the unthinkable?

In a more direct way, the inspiration for the work project from which this paper derives was a never realised invitation to assist in the evaluation of the Metropolitan Police's '*Joint Enterprise: Knife Crime*' schools education programme.[4] Metropolitan Police officers would visit schools, show a video containing challenging footage of interviews with young men serving life sentences for murder, following 'joint enterprise' prosecutions, who had never realised the full 'dragnet' potential of a law that could find them guilty of things they had not done, did not intend and had not foreseen. A classroom question and answer session would follow where the attending officers reiterated the overall message about the dangers of getting involved in gangs. Paradoxically this was a danger not originating with the gangs themselves, but from police over-criminalisation and the principle of collective

[1] Operation Shield is a Metropolitan police gang control initiative loosely based upon the renowned Boston 'Operation Ceasefire' 'targeted deterrence' project (Kennedy 2011) which sought to communicate with gang members that they would all be prosecuted as responsible for offences committed by members of their gang. Critics expressed reservations about the largely 'enforcement driven' character of Operation Shield, calling it 'joint enterprise by the back door' and expressing doubts about the reliability of police gang intelligence u8pon which it was based (something we discuss later in this article). See *JENGbA* statement (Institute of Race Relations 2015).

[2] The Serious Crime Act 2007, sections 44-46. Section 44 reads: A person commits an offence if: (a) he does an act capable of encouraging or assisting the commission of an offence; and (b) he intends to encourage or assist its commission.... But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a *foreseeable* consequence of his act.

[3] Evidence emerged in October 2015 of police using joint enterprise principles to prosecute in cases of criminal damage. In this case the 'criminal damage' alleged amounted to nothing more than a protest sticker placed on a window by a person other than the person prosecuted. The joint enterprise of the protest was claimed to be the 'common purpose' during which, it was suggested, participants ought to have foreseen that damage was likely. The court threw out the prosecution (Elgot and Gayle 2015).

[4] Myself and a colleague, Greta Squire, had originally been approached regarding an evaluation of this 'joint enterprise' education programme.

liability which held all young and supposedly 'gang affiliated', people responsible for the offences of their peers. The evaluation plan had envisaged that researchers would question the young people at the end of the session to see how far the message had been absorbed. Whilst not belittling the potentially important work undertaken by this programme, in alerting young people to the potential arbitrariness of the net-widening, criminalisation, over-charging and 'dragnet justice' associated with joint enterprise, we felt it even more important to add our own criticisms to this unfortunate and recently resurrected area of prosecutorial 'enterprise'.

3. Resurrecting 'dragnet' justice: a short history of collective liability

The law of 'Joint Enterprise' has been likened to a 'dragnet law' (Prison Reform Trust 2011, Bowcott 2014) which draws into the prosecution process people who may only be peripherally involved in criminal activities but who find themselves perhaps in the wrong place at the wrong time, or friends with the wrong people or with the wrong 'gang affiliations' (whatever they might be construed to be), or simply on the wrong police gang intelligence data-base. The law has likewise been described in a fashion very similar to the classic description of 'net-widening' in criminology: 'Genuine anxiety about gang violence lies behind this use of joint enterprise. There is a tenable view that if you join a gang, you must take responsibility for what other gang members do. But joint enterprise can work like a drift-net, drawing in people who on a commonsense view are too remote from the killing to share responsibility for it' (Fitzgibbon 2012).

The 'Joint Enterprise' principle rests upon a piece of English judge-made Common Law dating back to the sixteenth century which has, for around a decade, been resurrected as a matter of policy in the course of the 1990s gang 'moral panic'. The law makes the 1824 Vagrancy Act 'SUS' laws which the police used in London, prior to PACE,[5] to impose street control on young black men allegedly 'out of place' and looking (to police eyes) 'suspicious' (Demuth 1978), seem positively modern.

The more recent resurrection of Joint Enterprise prosecution is a late addition to the 'punitive turn' and the hyper-criminalisation witnessed under New Labour, an aspect of the Blair initiated 'rebalancing act' intended to make justice 'fit for purpose' in the 21st century (Home Office 2006, Tonry 2010). Following the Birmingham gang shootings on New Year 2003 - and in the wake of a number of failed gang prosecutions, including the circumstances surrounding the eventual prosecution of the killers of Stephen Lawrence[6] - a number of strategic summits were held involving the police and the CPS which were intended to develop more effective ways to bring successful gang prosecutions to court.

From the mid 1980s to 2016, the essence of the joint enterprise prosecution entailed that anyone contributing to the furtherance of a criminal offence, whether or not they reasonably foresaw the likelihood of an offence actually occurring, or whether the offence which actually occurred differed from that which may have been intended, they are nevertheless guilty.[7] Recognising the policy-led resurrection of the JE principle and several difficulties in the law as it had developed incrementally via judicial precedent, the Law Commission published an extensive

[5] The Police and Criminal Evidence Act, 1984, which replaced 'Sus' with the Section One 'stop and search' power, which has, arguably, been no less controversial.

[6] The person who struck the fatal blow to kill Stephen Lawrence was never discovered, but this was not necessary for the JE prosecution. The defendants did not incriminate one another but the prosecution argued - and the jury accepted - they shared a 'common purpose' in committing the racial attack and murder. This issue of 'common purpose' and how it is evidenced is precisely one of the key questions in dispute in many JE prosecutions.

[7] According to Simester and Sullivan (2000, p. 210-213), the original doctrine of joint enterprise required two offences, the one intended and another possibly more serious offence which resulted, and which all the offenders should have foreseen. Later, they contend that 'the rationale for joint enterprise liability is somewhat unclear' (Simester and Sullivan 2000, p. 216).

review of several different forms of participatory or 'secondary' liability in 2007 (Law Commission 2007). During this analysis they sought to distinguish joint enterprise from aiding, abetting, counselling or procuring offences, although, as Amatrudo (2015, p. 117) has noted, the Commission failed to tackle the complex questions of individual liability for 'collective action'. Rather pragmatically avoiding the core issue, the Commission advanced a strictly limited conception of joint enterprise liability (Law Commission 2007, Recommendations 7.8-7.12) linking 'joint' responsibility to clear evidence of intention, demonstrable foresight that the offence would be committed, and conduct clearly contributing to that end.[8] Had the Commission's overall report been more persuasive, establishing clear limits to the expansion of this area of law, a satisfactory outcome may have resulted. Instead, pragmatism prevailed, the Government declined to act (Horder and Hughes 2009) and in pursuit of deterrent gang policies a blanket form of 'catch-all' injustice persisted, even though the link from individual behaviour to collective action and back to individual culpability remains unclear and proceeds primarily by inference (Amatrudo 2015).

Perhaps a classic case of 'joint enterprise - murder' would be where a group of men set out to assault another, to avenge some perceived offence, but actually end up killing him. All those guilty of participating in the initial attack might be guilty of the murder unless they could demonstrate to the satisfaction of a jury that the attacker who delivered the fatal blow did something wholly unanticipated, exceptional and distinctively different to that which had been originally agreed. Understandably, this is difficult to prove. Joint enterprise differs from the law on 'conspiracy' to commit crime and on 'aiding and abetting' in the first place because it represents a prosecutorial judgement reached in the wake of a substantive crime having *already* occurred (rather than, as in conspiracy cases, plans to commit future offences, or inchoate (incomplete) offences or where evidence of *active* involvement in an eventual crime does not exist. In the second place, JE differs from the criminal law of 'aiding and abetting' in that the latter offences involve the provision of direct assistance or encouragement in the commission of a specific offence whereas the controversial extension brought to JE law in 1984 by the Chan Wing-Siu case precisely concerns the 'forseeability' of the ultimate offence, and inferences made regarding the course of conduct of an accused person (such as, being seen as a member of a 'gang' and therefore sharing a responsibility for the gang's actions).

The prosecutorial strategy which emerged from the Police and CPS collaboration after 2003 drew upon several sources of inspiration. In the first practical sense, it drew together a number of new and innovative gang and 'organised crime' control strategies (developed both at home and especially certain US jurisdictions, as discussed later) as well as new intelligence-development practices of the police. Secondly, the JE prosecution assumption applied to gang violence closely paralleled the 'collective liability' principle recently introduced in Section 5(i) of the Domestic Violence, Crime and Victims Act 2004. This law held that where a child or vulnerable adult was killed by a member of the same household or someone having regular contact with them, the prosecution was under no obligation to prove whether the defendant actually carried out the unlawful act or was simply someone who 'ought to have been aware of the risk', or failed to take reasonable steps to protect the victim or where the defendant 'ought to have foreseen' the illegal act and its likely consequences (2004 Act: S.5.1). This implication regarding what someone 'ought to have foreseen' is precisely the same assumption sustaining JE

[8] Fourteen years earlier the Law Commission had also urged a rethink of joint enterprise law. 'There is … a substantial degree of uncertainty in relation to the exact status of joint enterprise liability' they noted, especially 'the question whether the fact of participation in such an enterprise does, and should, create liability different from, and more extensive than, that imposed under the law of accessoryship' (Law Commission 1993a, p. 7). Then, as now, pragmatic considerations were acknowledged. 'Pragmatic considerations, namely the desire to inculpate to as high a degree as possible those who willingly lend themselves to criminal enterprises, have led to the development of this doctrine. However, the operation of the doctrine is unsound in principle' (Law Commission 1993b, p. 22).

prosecution (Squire 2009). The 2004 legislation put one aspect of 'joint liability' on a clarified statutory footing, something that, as we have seen, governments have otherwise been rather reluctant to do.

Having dredged up a 300 year old law, originally established to prosecute the seconds and aides of persons embarking upon duels to resolve 'gentlemanly' disputes (McClenaghan *et al*. 2014), to serve a contemporary purpose, anomalies and uncertainties abound as, over the year judges have sought to apply principles to the specifics of particular cases. Under Common Law where one of the disputants was killed in a duel then all parties facilitating the illegal practice of duelling could be prosecuted for their part in bringing about the illegal death, not just the surviving duellist with his sword or pistol. By the early 19th century, military codes attempting to impose rank and 'chain of command' discipline had begun to prohibit participation in duels - by all parties (Norris 2009) and Kiernan reports a duel in 1802 where a victorious lieutenant and his second were both jointly prosecuted for murder and transported to Australia for, respectively, 14 and 7 years (Kiernan 1988, p. 205, 297).

Another nineteenth-century case, from 1845, involved two men racing their horse-drawn carts at a reckless pace (*R v Swindall and Osborne* 1846). A pedestrian was killed, although it was uncertain which cart had caused the fatality, or even if *both* had run over the victim. The judge held that, 'when two persons are driving together, inciting each other to drive at a dangerous pace, then, whether the injury is done by the one driving the first or the second carriage, I am of opinion that in point of law the other shares the guilt' (ibid.). The 1845 case shares some apparent similarities with a prosecution begun in 2007 concerning an incident during which two men engaging in a gunfight in South East London shot and killed an innocent passer-by (*R v Gnango*). During the case and subsequent appeal hearings substantial dilemmas arose for the interpretation of joint enterprise liability. In the first place, Gnango, whose conviction was eventually upheld by the Supreme Court, did not initiate the shooting, but (being in possession of an illegal firearm) fired only to defend himself. Secondly, the fatal bullet which killed the innocent passer-by did not come from Gnango's weapon, although lack of evidence meant that prosecution of the original assailant was not possible (Davies 2011). As Davies has argued, the strange rationale behind the Supreme Court's restoration of the original conviction was that the two men shared a 'common purpose' by participating in a gunfight whereas, in fact, their real purposes were directly opposed; they acted 'independently and antagonistically'. Gnango had been attacked and was attempting to defend himself, there was no common purpose, the other man was trying to kill him. Despite knowing this sequence of events, the court misrepresented both men as if they were both willing participants in a duel, implicitly agreeing to an exchange of shots.

For Davies, on the one hand, the verdict spelled a disturbing *a priori* assumption built into gang-related prosecutions and over-extended the principle of reasonable foresight. In other words, Gnango was prosecuted for being gang-involved, carrying an illegal weapon and, effectively, being the kind of person someone else might attempt to shoot and therefore failing to anticipate his likelihood of shooting back. Irrespective of the broader - and laudable - aims of public policy, preventing young men carrying illegal firearms, these assumptions, removed his right to pursue self-defence by the most appropriate means to hand. On the other hand, for Davies, the eventual guilty verdict, four years after the incident, marked a distinctly 'American' turn in the legal construction of joint enterprise. In other American 'bystander killed in crossfire' cases, US courts (eg. *David L. Alston v Maryland* 1995) have attributed the notion of a 'depraved heart' to all the gang shooting participants for their 'wanton disregard' of human life. This determination amounts to a moral threshold that gang members are deemed to have crossed and for which they acquire and share a principle joint liability/joint culpability. Gang membership therefore becomes a legally relevant moral threshold for principles of collective guilt to apply,

it is no longer necessary to know, precisely, who did what. Individual justice is replaced by the collective guilt of those successfully categorized as gang-members.

Although our current discussion concerns the *resurrection* of JE prosecutions as a particular issue of 21st century criminal justice policy, the highly controversial Bentley and Craig case from the early 1950s[9] anticipates a number of the dilemmas associated with this form of prosecution (not least because, in 1998, the Court of Appeal finally quashed the 1953 conviction, fully 45 years after Bentley's execution).

4. Resurrecting joint enterprise: current issues

Like the SUS laws, contemporary 'Joint Enterprise' prosecutions are substantially targeted at young black men, because young black men (Bridges 2013, Williams and Clarke 2016), just as they were in the preceding Tackling Gangs Action Programme (Dawson 2008, Squires *et al*. 2008, p. 109), are the chief targets of police anti-gang initiatives.[10] According to the campaign group JENGbA[11] over 400 people are serving life sentences for 'Joint Enterprise' murder convictions, while an analysis by the Bureau of Investigative Journalism (McClenaghan *et al*. 2014) reported that 479 so-called secondary parties had been convicted of JE murder between 2005/06 and 2012/13. Similarly, a survey reported to the House of Commons Justice Select Committee (HCJSC 2012, 2014) indicated that over 50% of incarcerated JE offenders were black or mixed race, and fully 40% of young (aged under 25) life sentence prisoners were sentenced as a result of joint enterprise prosecutions. The survey by Williams and Clarke (2016), comparing separate cohorts of 'gang identified' offenders and those accused of 'serious youth violence', found that the former group were overwhelmingly black whilst the latter were predominantly white. As it is the 'gang' identification which appears to prompt

[9] Derek Bentley (19) and Christopher Craig (16) set out to burgle a warehouse in Croydon, Bentley was said to be educationally sub-normal and 'borderline feeble-minded'. Craig had armed himself with a revolver. They were witnessed breaking in and subsequently the police arrived. The two men hid, but Bentley was discovered and arrested. Craig began firing his revolver at the surrounding police officers. The Police urged the surrounded Craig to surrender and give up his gun. Still under arrest, Bentley is alleged to have shouted the ambiguous phrase "let him have it, Chris". Shortly afterwards Craig shot and killed one of the police officers. Out of ammunition, Craig attempted to jump from the roof but was injured and arrested. Both men were charged under the joint enterprise principle with the murder of PC Miles.
A number of issues arose during the case: whether Bentley ever shouted the words attributed to him, - and what they actually meant; whether Bentley was mentally fit to stand trial; the fact that he was under police arrest when the fatal shot was fired; the alleged ambiguities in the police ballistics evidence and the judge's claimed 'misdirection of the jury' as to the meaning of joint enterprise responsibility. In the end, however, after both men had been found guilty of murder, it was Bentley's age which counted against him. Craig was 'detained at her Majesty's pleasure' and eventually released in 1963 whereas Bentley was sentenced to hang. The execution was delayed pending an appeal (which failed) and the Home Secretary subsequently refused to grant a reprieve on sentence. Bentley was hanged in January 1953 at Wandsworth Prison despite much public disquiet, a jury recommendation for mercy and a petition signed by 200 MPs. Foreshadowing the debate about JE prosecution today, the decision to continue with the execution appears to have been overlain by pragmatic and political concerns - supporting the police, being tough on crime, and discouraging armed criminality (Yallop 1990). That was not the end of the affair, the 1957 Homicide Act introduced a defence of 'diminished responsibility' for murder and, following a long campaign, Bentley was eventually granted a Royal Pardon in respect of the death sentence. Finally, in July 1998, following a very similar police killing from 1993 in which a murder conviction was overturned by the House of Lords (Davies and Watson-Smith 1997), the Court of Appeal quashed Bentley's conviction. Together, the two cases were said to herald the establishment of 'new parameters for the law of "joint enterprise"', but despite the Law Commission's 2007 proposals, these were never realised.

[10] Data from the 2008 *Tackling Gangs Action Programme* found that of 714 supposedly 'gang-involved' individuals targeted by police in four intervention areas, 98% were male and 75% were of Black Caribbean ethnic origin. 655 of these were matched to Police National Computer criminal history records (the remainder - although deemed to be 'gang-involved by police - had no identified criminal history (Squires *et al*. 2008, p. 109). The relationship between race and gang identification closely parallels the Williams and Clarke (2016, p. 12) findings.

[11] JENGbA: Joint Enterprise Not Guilty by Association, website: http://jointenterprise.co

the joint enterprise prosecution approach, the racial implications of this gang labelling demand further attention.

In total, the BIJ reported that, in the 8 years from 2005-6, over 1,800 people were prosecuted in England and Wales in homicide cases involving four or more people (some 17% of all homicide cases), during the same period, 4,590 people were prosecuted in homicide cases involving two or more defendants (44% of homicide prosecutions). From a peripheral, ancient Common Law principle, joint enterprise has become a primary and frequently employed component of British gang prosecution strategy, with, as we have seen, profound racial overtones.

The risks associated with the use of the JE principle are manifold, and although the BIJ survey evidence suggests that there is a slightly higher likelihood of acquittal in two-or-more and, especially, four-or-more defendant trials, the risk of a miscarriage of justice also grows stronger. Juries can seem reluctant to question the seemingly compelling swathes of often circumstantial police evidence amassed to demonstrate gang affiliations, connections and involvements, although whether or not these establish the requisite levels of intent, responsibility or foresight demanded in JE prosecutions (as recommended by the Law Commission in 2007) remains debateable. It seems enough in practice to establish that a defendant was 'affiliated' to a gang in order to imply cause and effect: intention and crime. Although this seems hardly enough for justice. The accusation at the heart of a JE prosecution effectively reverses the burden of proof and can be difficult to refute: what evidence can a suspect deploy to dispute what the prosecution alleges ought to have been foreseeable? If we also factor in the fear of gangs and crime; the demonised misunderstanding of what gangs are represented to be (Hallsworth and Young 2008, Ilan 2015); the dangers they are said to pose; the not infrequent racial overtones and a widespread 'institutionalised mistrust' of youth (Kelly 2003); copious circumstantial police evidence suggesting gang 'affiliation'; a profound failure to appreciate the complex and dangerous street worlds of urban youth (Heale 2008, Hallsworth 2013); and, finally, a tendency for British juries to believe the police, then we have a powerful prosecutorial presumption taking shape even before a trial begins. These are still the dangers associated with the contemporary JE prosecution machine.

The resurrection of the joint enterprise principle in the 21st century allied it with a complex and overlapping series of contemporary legal questions and disputes regarding group offending, conspiracy, aiding and abetting as well as difficult questions of *Mens Rea* (the guilty mind), foresight and forseeability, intention, consent to crime and levels of responsibility - not to mention how each of these components of a prosecution's case might be evidenced. Discussion of such laws has also coincided with: increasing concerns about the especially dangerous character of collective or organised criminality (Simester and Sullivan 2000); considerations arising from the US *RICO* statutes,[12] where successful prosecution rests upon the ability of attorneys to demonstrate a pattern of behaviour (criminal conspiracies) conducive to the furtherance of organised crime, or knowing membership of criminal organisations; and, finally, wider international debates about the development of JE in international criminal law (specifically demonstrating common purpose when bringing prosecutions for genocide: Van Sliedregt 2007, Ohlin 2007)[13].

[12] RICO Laws: The Racketeer Influenced and Corrupt Organisations Act, 1970 introduced under the Nixon administration as part of the new 'war on crime'. The US Federal law was originally passed to combat Mafia type criminal organisations, but has since been widened in its application to prosecute gang activities.

[13] Parallel concerns about joint enterprise have arisen in international criminal law, for instance, for Ohlin (2007) the three problems of that such prosecutions must overcome are: [1] 'the mistaken attribution of criminal liability to persons who do not intend to further the criminal purposes of the enterprise'; [2] the foreseeability of other's criminal actions and; [3] the mistaken attribution of *equal* responsibility to all members of an illegal enterprise.

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Such debates have also anticipated further questions (deriving from UN and EU law) regarding strategies for criminalising organised crime in the UK. For instance, should organisations themselves be proscribed (and membership of them rendered criminal) or should the law simply concentrate on the prosecution of criminal *activities* conducive to organised criminality (Sergi 2015). To some degree these debates have been overlapped by the new s.45 of the Serious Crime Act 2015 which criminalises 'participation in the activities of an organised crime group' where a person knows or could 'reasonably expect' that his involvement would perpetuate criminal activities. In many respects, however, the JE law, as resurrected, establishes a raft of prosecutorial tools to be deployed by prosecutors as circumstances allow and as judges and evidence permit: perhaps the bluntest, vaguest and most generic of these tools being the evolving, non-statutory JE presumption itself.

When, in 2010, an argument reiterated in 2014, the House of Commons Justice Select Committee raised several profound concerns about the practice of Joint Enterprise prosecution (HCJSC 2012, 2014) their arguments and concerns were effectively squashed by the then Justice Secretary, Kenneth Clarke. Whilst he accepted that there were some "areas of the law on secondary liability which might benefit from clarification" he made it abundantly clear that these were not a priority for Government and certainly not during the lifetime of the parliament. It is worth citing his response at length not least because, as is indicated in the italicised words, every aspect of Clarke's rebuttal assertion about JE prosecution, precisely frames the questions that juries are often left to decide. These are precisely the issues in dispute. Nonetheless, according to Clarke:

> We remain to be convinced about the need for law reform. If two or more people *embark upon an agreed plan to commit an offence*, they will be liable for any offences *they foresaw* might be committed by any other members of the group when *putting that plan into effect*. They will not be liable for offences they could not have foreseen would be committed by others (the 'fundamental difference rule'). In my view these are sound legal principles and I am keen to avoid consulting on measures that could weaken the law in this area or undermine the Government's efforts to tackle crime committed by gangs. [Kenneth Clarke: From the Government response to the Justice Select Committee Report 2010.]

It transpires that the retention of the JE prosecution process may in fact have more to do with pragmatic and political 'deterrent policy' considerations.

5. Legal and sociological aspects

The 'joint enterprise' issue raises both legal and sociological questions and both have a profound bearing upon the prosecution process. The intention here is to demonstrate this by developing the argument that the legal and sociological issues are mutually reinforcing and self-fulfilling aspects of the criminalisation and prosecution process and that only when the two strands of critique are brought together can the full 'injustice potential' of JE process be revealed.

Sergi (2015) has drawn attention to the twin strands of 'common purpose' or JE 'organised' crime prosecution, making the point that other jurisdictions criminalise *illegal actors* (so-called members of defined OCGs), whereas other jurisdictions focus upon illegal activities (which reasonably and foreseeably) can be said to contribute to organised criminal outcomes. In a crude and inclusive fashion, the doctrine of JE binds together both aspects. Likewise in *Criminal Enterprise* Christopher Harding (2007) attempts to piece together the separate components which contrive to produce a balanced, just and reasonable, sense of criminal responsibility from the involvement of individuals in organisations. Likening the attribution of guilt in organised (and semi-organised crime) to the nuances of the agency/structure debate in contemporary social science, he specifies four areas of question that need to be settled in order to be able to attribute responsibility. These are:

- Questions relating to the nature of gangs as social organisations
- Questions relating to the assignation of normative (moral and legal) responsibility arising from perceptions of risk, danger, or threats posed
- Questions relating to the attribution of social and legal significance to aspects of personal agency (belonging, identity)
- And, finally, questions concerning the relationship between agency (actions) and responsibility

Harding's point is that, while each of these questions require separation and separate answers, in the JE prosecution they are frequently conflated. As he remarks: "the kind of conduct and the resulting level of harm are usually considered to justify the extreme legal response embodied in the use of criminal responsibility and its associated sanctions. In this way, issues of agency - of identifying the relevant actor - and of criminal responsibility are brought together" (Harding 2007, p. 2). Furthermore, he continues, answering specific sociological questions as to the nature of criminal organisations, the attribution of normative significance to aspects and levels of agency, the assignation of moral status and responsibility in relation to threats posed and the establishment of connections between acts engaged in and assumed consent and responsibility for remote, perhaps unanticipated, outcomes "are necessarily prior to any specifically juristic analysis of legal responsibility, criminal law and criminal sanctions." (Harding 2007, p. 3)

As we have already noted, the addition of the Serious Crime Act 2015 and its establishment of new criminal liabilities for belonging, conspiring, aiding, abetting, organising or directing adds substantial breadth to existing prosecutorial discretion. In the case of so-called 'serious' and 'organised' crime, the legislation effectively criminalises the implied agreement to commit serious and organised crime, for the more ambiguous disorganised and gang related (affiliated or associated) offending, a successful prosecution will rely upon the 'guilty mind' test - the attribution of a reasonable foresight that activities undertaken will contribute to the overall aims and purposes of the group. In the case of so-called *organised* crime this is still no simple matter even though part of the very purpose of the 2015 SCA has been to superimpose - in precisely the fashion of the earliest US definitions of 'organised crime' (for example, Cressey 1969) - a coherent and amenable definition of OC upon a reality that is flexible, diverse, net-worked, multi-form, semi-normalised, prolific, localised and diverse. It is not a single entity or phenomenon, however much the SCA 2015 tries to construct it in its most criminally amenable fashion. SCA 2015 fabricates OC in a manner that is most useful to the enforcement and prosecution processes. This is also especially true of 'gangs', as semi-organised crime - and has been since the origins of gang studies in USA, a case of law enforcement constructing models of criminal enterprise in their own preferred image. For, as Hagedorn (1988) has argued, the gang is essentially what the police say it is.

Regarding the *legal* debates concerning the construction of criminal liability for joint enterprise prosecution, Krebs (2010), commencing with the suggestion that the doctrine of JE is 'in disarray', has articulated much of the ambiguity, confusion, changed interpretations and prosecutorial over-reach associated with Joint Criminal Enterprise prosecution. In the first place she echoes earlier concerns about the way in which JE fudges established notions of primary, secondary and collective liability in ways which make it near impossible for defendants to respond effectively. Secondly, she disputes the strong inferences as to consent (to a course of criminal action) drawn from ambiguous evidence of common purpose, and the implied assumption of risks arising from a criminal course of action. She describes JE as a loose and lazy legal construction of a sub-class of 'aiding and abetting'. Perhaps most importantly, her argument makes the point that the use of JE prosecution in recent times has seen a shift in the interpretation of the law and the liabilities

attached to criminal involvement. This evolution is, after all, a characteristic of judge-made Common Law developing incrementally by precedent. As Ashworth argued in his *Principles of Common Law*, JE prosecutions 'are replete with uncertainty and conflict. [They] betray the worst features of the common law: what some would regard as flexibility appears here as a succession of opportunistic decisions by the courts *often extending the law*, and resulting in a body of jurisprudence that has little coherence (Ashworth 2003, p. 441 - emphasis added).

There has been a significant shift, Krebs (2010) argues, in the treatment of a defendant's presumed *foresight* of the consequences of embarking upon a course of criminal actions. In the past the conception of foresight was applied in a way that held that, if a defendant could not reasonably have foreseen the criminal outcome to which the course of behaviour had contributed, then he could not be found to be jointly responsible for the resulting offence. In the case of the claimed originating rationale for the JE law - to curb duelling - it was reasonably foreseeable to duellists and their seconds alike that a potential outcome of two men facing one another, drawn pistols at dawn, might be the death or serious injury of at least one of them. Therefore all parties were jointly responsible for what transpired.

By contrast, that which was unforeseen was exonerated.

Now, however, according to Krebs (2010), the foresight test has been widened and its meaning altered; foresight has become *foreseeability*.[14] The test in the new application of JE liability involves a more subtle calculation on the part of prosecutors and jurors who are asked to rule upon the subjective perception of what a criminal accessory, at the beginning of a course of collective behaviour (at the early stage the behaviour need not even be in and of itself criminal), ought reasonably have been able to foresee where the chosen course of action would lead and what offences might transpire. Equally significantly, the application of the foresight test by juries is weighted down by a prior assumption (deriving from the prosecutorial strategy and police evidence of gang affiliation) that the course of conduct was part of a pattern of gang-related behaviour and the *sine qua non* of gang behaviour is feuding, fighting and violence. As Moloney's evidence to the Justice Select Committee confirmed: 'the prosecution will always find it easier to adduce evidence that the defendant foresaw what the principle might do than to adduce evidence that he actually intended the principal to cause serious injury or to kill - indeed, such evidence may not go far beyond evidence of association (or alleged 'gang membership') added to alleged presence at the scene.' And, for this reason, he concluded, the foresight principle 'increases the likelihood that cases will be prosecuted on the basis of weak and tenuous evidence' (Moloney QC., quoted in HCJSC 2012, para. 11). The argument was extended in evidence from Professor G. Virgo where it was claimed that the court's approach to determining the mental state (the *Mens Rea* or 'guilty mind') required for a guilty verdict on grounds of joint enterprise was 'inconsistent'. 'In some cases the secondary participant in the criminal venture was only required to foresee the commission of the offence. In others, the secondary participant was apparently required to foresee the state of mind of the principal offender, as well as foreseeing the criminal act itself' (HCJSC 2012, para. 12).

In other words, the effective result of the outcome of these principles was that the presentation of evidence which implied that a co-accused was a gang member could be a significant step towards attributing an inclination for criminal violence tying all gang members into a shared responsibility for resultant criminal acts. It is at this stage, as we shall see later, that the weight of police ancillary details and circumstantial evidence becomes important in establishing a credible (to the jury), portrait of gang 'membership', or 'affiliation'. The shift here is not unlike the changing Governmental narrative applied to the 2011 riots. In its first assessment

[14] This is the same conclusion as drawn by the Supreme Court in February 2016.

of the 'causes' of the riots, government ministers blamed gangs directly, however, following evidence that only a minority of arrested rioters were members of or 'affiliated' to gangs, the cross-Governmental action programme *Ending Gang and Youth Violence* (HM Government 2011) settled upon the rather looser and more ephemeral - but all the more inclusive - notion of 'gang culture' as the cause. From the point of view of JE prosecution, being in the culture, knowing the culture, meant knowing where it could lead: guilt by association. Defendants were to be found guilty based upon what juries, primed by copious police evidence, thought they ought to have known or realised.

Rather like Harding (2007), cited earlier, Krebs (2010) also argues that JE prosecution relies upon what is referred to as a 'normative shift' in the attribution of responsibility. Gangs are defined as the 'dangerous other'. This is especially so in the USA where some of the most extensive gang suppression programmes have been developed (Pitts 2014). Malcolm Klein, one of US criminology's leading gang commentators has argued that, judged in terms of the spiralling numbers of specialist (paramilitarised) anti-gang task forces, specialist squads and the like at every jurisdictional level, gang control - as an objective of policing - eclipses both anti-communist, anti-terror and anti-organised crime as a police institutional priority (Klein 1995). According to Miethe and McCorkle (1997) the attachment of gang labels served as a kind of 'master status' concept which triggered differential enforcement initiatives, greater police harassment and tougher sentencing decisions. Subsequently other jurisdictions have adopted gang prohibition statutes and specialist gang prosecution units (Pyrooz *et al*. 2011) designed to streamline gang status prosecutions[15] still other jurisdictions have introduced sentence enhancements for gang aggravated offending.

Specialist gang prosecution units are nowhere near as developed in the UK although, certainly at the level of policing operations and intelligence development, gang intervention strategies have followed. It is also possible to find, in the ways described above, analogous evidence of the gang related 'master status' identity (Miethe and McCorkle 1997) shaping and facilitating the prosecution of gang affiliated offenders. One illustration of this concerns the so-called 'Gang-bo', introduced in 2011 and modelled on similar US gang interdiction strategies. Legally such orders represent a variation on the Anti-social Behaviour Order (ASBO) established by New Labour's 1997 Crime and Disorder Act. Simester and von Hirsch (2006) describe such orders as involving a 'two-step criminalisation' process. The award of the order, a low-threshold, even 'pre-criminal', process employing streamlined due process, represents the first step. The order could specify a range of conditions such as places and people to avoid, curfew restrictions, as well as behavioural requirements. Once the ASBO was awarded the sub-set of people subject to an order could be fast-tracked (up-tariffed) to prison (adults for up to five years; juveniles for a year) simply for breach of the order. This marks the second step. Pitts (2014) has argued that the purpose of the 'Gang-bos' has been primarily preventive rather than punitive, they are intended to discourage gang affiliated young people from associating with fellow gang members, be that as it may, the up-tariff, fast track to prison still follows for those who breach their orders.

In the case of JE prosecutions however, nothing so formal or procedural as the award of a behaviour restriction order establishes the first step. On the contrary, merely implicating the defendant as a gang member, 'affiliate', or 'associate', establishes the first step, and this dangerous outsider 'status' is simply established

[15] The 2011 study by Pyrooz and his colleagues (Pyrooz *et al*. 2011) demonstrated that specialist gang prosecution units were able to reduce rates of gang homicide case attrition and provide a more effective prosecutorial response to gang violence and homicides. It is not unreasonable to assume that Lessons from America, as ever, are likely to have filtered into the police and prosecution gang summits held in the UK.

during the course of the trial. Police evidence confirms the dangerous, violent 'otherness' of the offender - his normative distinctiveness from the 'law abiding citizen', and the jury does the rest. By becoming positioned as 'gang member' the accused takes on the symbolic status of dangerous non-citizen (perhaps like the 'terrorist' or the 'illegal immigrant') for whom rather draconian measures and scant 'due process' are considered suitable. As several witnesses to the Justice Select Committee hearings testified, JE charging, 'places an unusually heavy burden on the jury by obliging them to convict people who they may well think are barely involved' (Fitzgibbon 2012).

6. Concluding criminological and 'policy' questions

As we have already seen, reaching judgements about individual responsibility when people act criminally in a group raises important questions about attribution of culpability for eventual outcomes. Harding has insisted that a first requirement should be our understanding of 'the functioning of different types of organisation and the role of individuals within such organisations, and of the impact of organisations on human life' (Harding 2007, p. 3). Unfortunately, the greater proportion of what we think we know about gangs and their violence comes from the police, news media - and fiction. As Pitts (2014) has argued, a wealth of circumstantial data 'produces' the gang. In court, police evidence might comprise 'CCTV footage, RAP videos, phone trace records and intercepts, downloads of texts and photographs, social media records and observations from local beat officers or PCSOs working in gang affected neighbourhoods … [all] in order to establish *connection*, *reputation* and *affiliation*' (Pitts 2014). In turn, connection, reputation and affiliation are the three props upon which prosecutions under Joint Enterprise frequently rest and the context in which juries have to reach decisions. As evidence from Tim Moloney QC and Simon Natas to the Justice Select Committee demonstrated: 'prosecutions for murder on the basis of joint enterprise ... are increasingly focussed on evidence of association of alleged gang membership. There is increasing potential for cases to be left to juries largely on the basis of evidence of association between defendants' (HSJSC, quoted in Parsons 2012, p. 465). Amongst the consequences of this are increasingly arbitrary verdicts and, in turn, more appeals (Dyson 2010).

To avoid such unjust and invidious outcomes, Parsons suggests that future JE prosecutions should only proceed when the case is bolstered by clear evidence of the secondary defendants directly assisting or clearly encouraging the commission of the ultimate offence - that is to say 'there is both Actus Reus and Mens Rea'. This is, essentially, what the February 2016 Supreme Court verdict has finally established. These changes, he suggests 'should prevent secondary party convictions for murder being based upon not much more than mere association. It would mean that accessorial liability and joint enterprise would completely overlap' (Parsons 2012, p. 471), rather than the latter being a convenient, low threshold, and catch-all alternative to the evidential rigour of the former - referred to as a 'lesser form of mens rea' by Lord Steyn in 1997 (*R. v Powell and English* 1997). As has been noted, however, recent Governments, of different political persuasions, have declined to take up the challenge of clarifying this law (Horder and Hughes 2009). Despite the Supreme Court's recent ruling, they may continue to resist. For as Lord Neuberger noted in explaining the Court's decision, it will continue to be for juries 'to decide what inferences they can properly draw about intention from an accused person's behaviour and what he knew' (*R v Jogee* 2016). It is likely that the new ruling will prompt some appeals, but the new judgement is far from marking a blanket change in the law. As Neuberger continued, 'it will remain relevant to enquire *in most cases* whether the principal and secondary party shared a common criminal purpose, for often this will demonstrate the secondary party's intention to assist. The error was to treat foresight of crime B as *automatic authorisation of it*, whereas the correct rule is that foresight is simply evidence

(albeit sometimes strong evidence) of intent to assist or encourage. It is *a question for the jury in every case* whether the intention to assist or encourage is shown' (*R v Jogee* 2016, emphasis added). An anomaly, involving an overly liberal conception of criminal foresight established in the mid 1980s has been tightened up; successful prosecution will henceforth require clear evidence of intention and conduct contributing to the primary offence.[16]

Although it is not unreasonable to expect that prosecutors will continue to introduce circumstantial evidence of gang affiliation to prop up suggestions of common purpose. The joint enterprise principle is far from dead.

As a consequence gang prosecutions will continue to reproduce the racialised over-criminalisation which sociology and criminology have long associated with gang suppression policing. The perverse alchemy of the criminal law will systematically reconstruct and distort the lived reality of the urban street life experienced by marginalised young men, who will continue to be condemned for where they live or 'belong', while their rituals of identity, meaning, affiliation and respect will continue to confirm a sense of 'dangerous and violent otherness'. Complex, fleeting, spontaneous, situational, unwitting and transitory, even sometimes 'reluctant' associations will acquire a significance and a permanence (and sometimes a record in the police intelligence logs) they do not merit (Pitts 2008). Routine socialising behaviours, even 'safety in numbers' will acquire a darker, and conspiratorial aspect, and the only lens through which such behaviour will be viewed, as Zimring remarked of the USA, almost twenty years ago, will be that of crime control (Zimring 1998).

Insofar as these developments represent a form of selective, utilitarian, bespoke criminalisation, furthering the Blairite project of 'rebalancing criminal justice' in a way which fundamentally erodes a conception of individual justice and contemporary human rights. Taken together these practices of intensified criminalisation and expanded prosecution conform to a crude, populist and pragmatic, deterrent politics that resonates with worryingly pre-modern and rough justice conceptions of class and race. In evidencing this, the reactions of two senior politicians - of right and left - both of whom held key legal offices during their time in Government, are revealing. Both appeared to prefer the populist political advantages of draconian punitiveness - even at the cost of sacrificing a few peripheral, reluctant and unwitting so-called 'gang affiliates'. As Chris Grayling, Justice Secretary under the Conservative-led Coalition from 2012-2015, put it, invoking the interests of the law-abiding:

> While academics and families of convicted offenders might disagree with me, relatives of victims and large sections of the law-abiding public – many of whom may not be as vocal as those groups which are calling for change - are likely to be concerned if we were suddenly to announce a review which could lead to a dilution of this important area of law. (Grayling: 2014: Evidence to HCJSC 2012, para 32).

On the other hand, Lord Falconer, Lord Chancellor in the Blair Government from 2003, downplayed the risk of convicting the innocent in a 'rebalanced criminal justice', when he insisted upon the necessity of 'joint enterprise' prosecution.

> The message we are sending out is that we are very willing to see people convicted if they are a part of gang violence and that violence ends in somebody's death. Is it unfair? Well what you've got to decide is not 'does the system lead to people being wrongly convicted?' I think the real question is 'do you want a law as draconian as our law is which says juries can convict even if you are quite a peripheral member of the gang which killed?' And I think, broadly, the view of reasonable people is that you probably do need a quite draconian law in that respect. (Falconer 2010 on BBC Radio 4 quoted on McFadyen 2014).

[16] The tighter definition of 'foresight' now more closely reflects the provisions of s.44 of the Serious Crime Act, 2007, see note 3.

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We might expect such answers from politicians, but when lawyers depart the law, they often leave justice behind too. Discussing the *R v Powell and English* appeal cases which reiterated the liberal interpretation of foresight - as 'foreseeability' - in 1997, Lord Steyn remarked that the answer to the problem of collective liability in gang-related prosecution 'is to be found in practical and policy considerations'... because... 'the criminal justice system exists to control crime [and] a prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises' and which all too frequently escalate into violent and dangerous offending. In order to deal with this serious social problem, he concluded, the criminalisation of accessories is essential and cannot be abolished or relaxed. As we have seen, however, despite a wealth of new sources of police evidence - mobile phone tracking and intercepts, social media, CCTV - we have to be very careful in understanding the implications of Lord Steyn's phrase 'join with others' and even then recognise that this is not the same as sharing a *common purpose*, *intending* a particular crime or harbouring specific criminal *foresight*. A loose attribution of gang 'affiliation' and the inclusive characterisation of 'gang culture' should never be the basis for a finding of individual guilt, still less for some of the most serious crimes with the most severe sentences. The Supreme Court has chipped away some of the presumptive liability entailed in many recent joint enterprise gang prosecution cases but there is still some way to go and at least a decade's legacy of doubtful convictions and miscarriages of justice to reconsider.

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