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## Violent Dynamics: Exploring Responsibility-Attribution for Harms Inflicted During Spontaneous Group Violence

ANTJE DU BOIS-PEDAIN\*

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### Abstract

Violent encounters between groups of individuals often leave one or more of the participants dead, and it may be clear from the evidence that the physical cause of death was set by the single, deliberate act of one of the participants only. When this happens, the question arises whether, and how, responsibility for the fatal act and/or for its consequences can be attributed to other participants in the punch-up. Criminal law has long sought – and found – ways of holding others apart from the direct agent responsible for the harms caused in such encounters, although the legal constructions used differ between legal systems and often change significantly over time even within the same jurisdiction. This paper investigates the appropriateness of different criminal-law responses to these cases from two directions: first, by exploring the possible doctrinal grounds within the criminal law for attributing responsibility for the fatal act/outcome to all participants; and then by investigating the extent to which these responsibility-ascriptions are supported or challenged by insights from psychological studies of group action.

### Key words

Group violence; crowd psychology; participation in crime; secondary liability; joint enterprise

### Resumen

Los encuentros violentos entre grupos de individuos a menudo acaban con la muerte de uno o más de los participantes, y las pruebas pueden demostrar que la causa física de la muerte fue el acto único deliberado de uno solo de los participantes. Cuando esto ocurre, se plantea la pregunta de si se puede atribuir a

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\* Dr Antje du Bois-Pedain (First and Second State Examinations in Law, Hamburg; M.Jur., University of Oxford; Dr. iur., Humboldt University Berlin) is a University Senior Lecturer in the Faculty of Law and Deputy Director of the Centre for Penal Theory and Penal Ethics in the Institute of Criminology, University of Cambridge. Her main research interests are in criminal law, transitional justice, and penal theory. Institute of Criminology, Sidgwick Avenue, Cambridge CB3 9DA, United Kingdom. [alp22@cam.ac.uk](mailto:alp22@cam.ac.uk)



otros participantes en la pelea la responsabilidad por el acto fatal y/o sus consecuencias, y cómo hacerlo. Durante mucho tiempo, el derecho penal ha buscado, y encontrado, formas de retener a otros participantes, además del responsable directo de los daños causados, aunque las construcciones legales utilizadas difieren entre sistemas jurídicos y a menudo cambian significativamente a lo largo del tiempo, incluso dentro de la misma jurisdicción. Este artículo investiga la conveniencia de diferentes respuestas del derecho penal a estos casos, desde dos enfoques: primero, explorando los posibles fundamentos doctrinales dentro del derecho penal para atribuir la responsabilidad del acto / resultado fatal a todos los participantes; y a continuación, investigando hasta qué punto los estudios psicológicos sobre acciones grupales confirman o rechazan esta imputación de responsabilidad.

**Palabras clave**

Violencia de grupo; psicología de masas; participación en delitos; responsabilidad secundaria; asociación

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## 1. Introduction

Some years ago, friends of my parents, ethnic Germans who had emigrated in the 1990s from the former Soviet Union to reunified Germany, were telling tales about what life had been like in their small Siberian town to which, courtesy of Stalin, they had been forcibly resettled in the 1950s. The locals had not taken kindly to the new arrivals. Things were tense, even violent. Eventually a *modus vivendi* evolved. For most of the week the locals would leave the newcomers to get on with things, and vice versa, but on Saturday nights, everybody would drink. Then the young men would meet, size each other up, and violent fist-fights would follow. Sometimes someone would be injured quite badly and then there might be less fighting the following weekend but eventually things would go back to the previous level. Going out on Saturday night meant going out to drink, and going out to drink meant going out to fight. As a young man living in that place, this was how you spent your Saturday nights, until you grew older and had a family and were no longer one of the young men.

If during such a fight anyone had been killed, who, apart from the one who struck the fatal blow, should have been held responsible for that outcome? Should that turn on the exact intentions of the one who struck the fatal blow – maybe he wanted to go after this victim especially, due to some particular personal enmity, and even intended to kill him? Or should it turn on whether the fatal act was outwardly within the unspoken conventions of these fights – fists, but no weapons, like glass shards or knives, and (though that is getting us in something of a grey area already) no kicks with boots against the head of someone already down? Or was it a simple matter of the foreseeability of such an outcome to everyone involved? There was probably no granny in that village who didn't worry every Saturday night that something as bad as this might happen. And who, exactly, should count as "involved"? All the young men out and about that night on the slayer's side? Would that include or exclude those who may still have been finishing their beers when the fatal act happened? Or should we only hold those responsible who were right there with the slayer, egging him on, when he struck? Or, to the contrary, should we perhaps assign responsibility for what happened to *all* the young men present, no matter what side of the fight they were on? After all, it could well be said that they all contributed to the escalation of the violence that night. And while we're at it: what, exactly, should prevent us from extending liability to all young men usually participating in these fights, even if they had stayed home with a cold on that particular Saturday night?

These questions matter not just to philosophers and to ordinary people in social discourse: they matter also to the criminal law. There probably isn't a criminal court judge in history who has never tried a case of spontaneous group violence. One could therefore be forgiven for assuming that, by now, the criminal law anywhere has its answers to these questions ready; answers that moreover reflect the settled judgments of decades, if not centuries. Nothing, alas, could be further from the truth. Like ordinary moral judgment, criminal law has at different times been tempted into giving positive answers to all the questions posed above, which – given that some of these answers pull in different directions – has embroiled the law in contradiction and unresolved tension.

This paper is an extended search for an analytical framework best able to guide us towards defensible responsibility-ascriptions for serious injuries or fatalities that happen through spontaneous group violence. The violent encounters in which this question arises are precisely not the work of (by comparison) orderly and structured groups of people forming a distinctive social entity, such as a government or a management committee or even a club or association. In institutional or quasi-institutional settings, attribution-relations may well be based on legal or social relations of representation/agency, or on other formal authority relations within the group. What I am interested in exploring here are

responsibility-attributions that may be possible between individuals acting together spontaneously in pursuit of a common objective that consists in the infliction of violence against another person or persons. My hypothesis is that the violent nature of the objective, and the spontaneous manner in which it is pursued, matter for an analysis of these scenarios from a psychological perspective. This then raises the question whether, and how, the psychological analysis may be made relevant to the responsibility-attributions supported by criminal law doctrine.

Questions of joint enterprise liability have been much debated in English criminal law circles in recent years (see, eg. Simester 2006, Horder and Hughes 2009, Krebs 2010, 2015, Crewe *et al.* 2015, Dyson 2015, Wilson and Ormerod 2015). That debate has shifted, but not died down, with the Supreme Court and Privy Council's combined decisions of 18 February 2016 in *R. v. Jogee* and *Ruddock v. The Queen*. I should state at the outset that my concern in this paper is not with the doctrine (nor with the phenomenology) of joint enterprises as such. My topic is, specifically, the question when and on what basis a participant in spontaneous group violence shares responsibility for an act performed or an outcome caused by someone else in the group. I introduce this problem through the facts and the reasoning of a fairly typical case of this kind decided by the Court of Appeal for England and Wales in 2004, which highlights the concepts the courts rely on: causation, connection, and association. Next, I try to make sense of these notions from a psychological perspective on group action. By connecting the psychology of these interactions to legal doctrine I hope to demonstrate that association is a problematic basis for responsibility-ascriptions for outcomes in that it potentially holds supporters on the margins liable for what they attempt to do rather than for what they succeed in doing. I also argue that the question of how the law should respond to behaviour that sends supportive signals but may not otherwise be effectual is subsumed under the wider question regarding the responsibility-ascription paradigm appropriate to such cases. The two paradigms most often relied upon in law and philosophy – the “group-act” and the “secondary liability” paradigm – are both, I argue, a bad fit for most cases of spontaneous group violence. A preferable approach is found in the Swedish “independent evaluation” model concerning parties to a crime.

## 2. Attribution of responsibility to other group members in criminal law doctrine

### 2.1. A typical case

Let us start with a fairly typical case of violent group action leading to a fatality; a case decided by the English Court of Appeal in 2004.

#### 2.1.1. The facts

In *R. v. O'Flaherty, Ryan and Touissant* [2004], the appellants (and three others, who did not appeal their convictions) had been convicted of the murder of one Marcus Hall (“the victim”). On the evening in question, the victim and about 15 of his friends – a group known as the “Peckham boys” – had come to the appellants' home town to attend a nightclub. They were refused entry, but hung out outside. The appellants and some of their friends, who were at the club, encountered the victim and his group in the street outside the club. The judgment notes that “some from [the victim's] group became involved with two men from what might loosely be called the appellants' group”. The latter included a certain James, a friend of O'Flaherty's, who was chased down the street by “a number of men one of whom was wielding a big stick”. The victim together with others was chasing another man, Hendrickson, down the same street. The victim carried a baseball bat.

O'Flaherty decided to come to the aid of James and equipped himself with a cricket bat to do so. He caught up with the victim and his group in a street called Flower Street, and they exchanged blows with their respective bats. Despite the fact that

Ryan and Touissant, armed with a claw hammer and a beer bottle respectively, had by this stage joined O'Flaherty and were also delivering blows, O'Flaherty, Ryan and Touissant were forced to back off. Ryan and Touissant then took no further part in the events.

O'Flaherty, however, went on chasing after the victim's group. By the time O'Flaherty caught up with the victim and his group in another street, Park Street West, the victim was surrounded by a number of people, friends as well as enemies, and had been stabbed multiple times by one of the non-appealing co-accused. The stab wounds were the dominant and direct cause of the victim's death. The victim had also received some other minor injuries, not as such fatal. There was in any event no evidence connecting any of these other injuries to the appellants' earlier encounter with the victim in Flower Street.

#### 2.1.2. The ruling of the court

The appeals of Ryan and Touissant were allowed on the basis that none of the fatal injuries were inflicted during the time that they had joined O'Flaherty's attack against the victim. While this was equally true for O'Flaherty, O'Flaherty's appeal against conviction was dismissed. Unlike his successful co-appellants Ryan and Touissant, who had limited the enterprise they were participating in to the incident that took place in Flower Street, O'Flaherty was said by the court to have joined a wider enterprise which involved pursuing the victim and his group a farther distance after that encounter. It did not matter, said the court, that he had lost the victim and his group temporarily and only found them again after the fatal wounds had already been inflicted by others. O'Flaherty had made himself part of a wider enterprise to win the fight against the victim and his group while being aware that some of the other pursuers had weapons such as knives on them.

#### 2.1.3. The court's reasoning

The court suggests that "withdrawal or disassociation" from a joint enterprise, and the determination of the scope of the enterprise, often raise the same issue. Simply "walking away" suffices for a participant who never joined any enterprise that was larger in scope or objective than what had occurred up to the point he walked away; "notification" of the other participants that the defendant withdraws from the enterprise is, in such circumstances, unnecessary. By contrast, someone who joined a "bigger joint enterprise" can only disassociate himself up to the point where the bigger joint enterprise has reached the stage of an attempt, and he will ordinarily need to notify the others of his withdrawal in order for the withdrawal to be effective.<sup>1</sup> When the common purpose that spontaneously arises between a group of people is not obviously a murderous one, the "murderous attempt" does not yet begin with the initial attack on the victim. It only begins when that further purpose is formed by one of the participants (in this case, then, when the stabber drew out his knife and lunged at the victim).

#### 2.1.4. Analysing the court's decision

The decision of the Court of Appeal in *O'Flaherty* only makes sense on the assumption that one treats Ryan, Toussaint and O'Flaherty as spontaneously forming and then jointly engaging in a "mini joint enterprise" on occasion of O'Flaherty's encounter with the victim in Flower Street. This "mini joint enterprise"

<sup>1</sup> A later case, *R. v. Stringer* [2011], suggests that where a person initially joins others in chasing the victim with hostile intent but then thinks better of it and stops, "[s]uch limited action on their part would not have properly founded a case that they were guilty of murder" (*R. v. Stringer* 2011, para. 53). The court goes on to suggest that this is so because the act-to-be-attributed was then not performed with the drop-out's assistance or encouragement – this is, however, doubtful since their initial participation in the chase may well have egged the central agent on. A better explanation is that in such a case, the court permits a withdrawal simply by giving up the chase, even if that withdrawal is not communicated to the central agent, when it isn't realistically feasible to communicate the withdrawal to the agent. The *Stringer* case is discussed further, in a different context, below.

is analytically separate from, and additional to, a larger attack on the victim's group that is already happening at this time and which O'Flaherty then joins by further pursuing the victim in the knowledge that other people he was in the nightclub with are also going after the victim's group.

The acquittal of Ryan and Touissant is then explained by the fact that these two merely formed a "mini-joint enterprise" with O'Flaherty that consisted in helping O'Flaherty when he attacked the victim in Flower Street. But their behaviour never betrayed an intention to join any wider attack on the victim and his group that continued beyond this point (what the court calls "the pursuit"). Since they weren't part of this wider attack, they could simply walk away. Also, it doesn't really matter whether Ryan and Touissant knew that other people who were still pursuing the victim's group carried deadly weapons on them, since they never associated themselves with the larger enterprise of taking down the victim and his group. They merely helped O'Flaherty out during his encounter with the victim in Flower Street.

But the court's analysis still leaves questions to be answered regarding the basis of O'Flaherty's liability. If O'Flaherty wasn't part of a larger enterprise to take down the victim and his group from the start, but only joined that larger enterprise when he pursued the victim further after the encounter in Flower Street, how does that make him a participant in the victim's killing? O'Flaherty has responsibility for the stabber's actions attributed to him even though he has not yet arrived in the street where the victim is stabbed and the stabber may well be completely unaware of O'Flaherty's contribution to the attack on the victim. On what basis, then, does the court connect O'Flaherty to what the stabber did?

Since O'Flaherty did not communicate with the stabber, nor was the stabber likely to have been in any way advantaged by O'Flaherty's having joined the pursuit, there is no encouragement or assistance by O'Flaherty of the stabber that could somehow form the connecting link between these two. The injuries O'Flaherty had caused the victim during their earlier encounter were also in themselves too minor to facilitate the victim's getting stabbed by the stabber. Thus, a direct causal contribution is likewise not made out. Even if we were to assume (contrary to what the court assumed) that O'Flaherty had already upon leaving the club, and before his first encounter with the victim and his gang, made himself part of the larger enterprise to "take the Peckham boys on", this does not solve the difficulty. How and why is O'Flaherty connected to the stabber's actions, when the stabber may not be aware at all of O'Flaherty's contribution to the overall endeavour?

It appears that only responsibility-attribution based on something like O'Flaherty's unilateral decision to join the "larger attack on the victim and his gang" will do the trick. And for such attribution to occur, it appears to be unnecessary that any of the other agents are aware of who is part of their group. An agent can join in without the others knowing of him and his joining-up at all; and once he has joined (on terms that the others already follow), his actions are attributed to the others, and their actions are attributed to him. What model of liability would support such an attribution?

## *2.2. Grounds of attribution: the possibilities*

Courts and writers on English criminal law have identified three main possible grounds of attribution of the actions of one group member to other members of the group: causal contribution, connection, and association (see eg Virgo 2012, pp. 857-862 with further references, and reply by Mirfield 2013 with response by Virgo 2013). Each of these concepts are drawn upon and employed to denote the basis on which responsibility for the acts performed by the central agent, P (in our case, the stabber's stabbing of V), is attributed to another group member who did not perform this act, A (in our case, the unsuccessful appellant, O'Flaherty).

Where responsibility is attributed on the basis of a causal contribution,<sup>2</sup> the concept is used in a wide sense. Both factual and psychological causal contributions qualify, and the familiar limitation that the free and informed act of a subsequent agent breaks the causal chain set in motion by an earlier agent, does not apply (or applies only in the sense that the earlier agents do not count as principals) (for detailed analysis, see KJM Smith 1991, Ch.3).

While the case law on participation in crime often speaks of a causal contribution also in cases where A's conduct is not a "but-for" cause of P's conduct in the sense that P would not have committed the act in question "but for" what A has done, some courts, and many writers, have come to prefer to describe the link that must exist between A's and P's conduct in terms of a "connection".<sup>3</sup> The relevant connection is constituted by some involvement that A has in P's crime – made out by the kind of conduct that makes a "contribution" (by some form of assistance or encouragement) but that need not qualify as a but-for cause. Some want to differentiate here further between practical assistance and verbal encouragement – for the former, it is said that the assistance must make a real contribution whereas encouragement only needs to be perceived by P. But, in fact, the basis for that further line is spurious. The concept of a "connection" is wide enough to cover A1, who gives P a gun that P takes along to carry out an attack on V, even if P in the event does not use the gun on V because V already dies from a kick to the chin delivered by P to knock V out, and A2, who recommends that P take a gun along (even if P decides against doing that). In effect, the notion of a connection resides in some discernible influence that A has exercised in the situation.

The real problem arises when courts have to face up to the question how thoroughly, and through what, A and P need to connect. In *R. v. Stringer* [2011], an altercation at the home of one of the appellants between the victim, who had a reputation for violence, and his main attacker, led to a sequel when the main attacker and some others went after the victim and discovered him again, now armed with a baseball bat, a few houses down the street. The main attacker then gave chase to the victim; the appellants and some others followed at some distance and eventually caught up with the main attacker, who had by then chased the victim down and begun stabbing him with a knife. Whether at this point the appellants did anything to help, or (as they claimed) to put a stop to further stabbing, could not be determined. The prosecution's case rested on the claim that the appellants (with the requisite knowledge and intent) had done a number of acts in support of the main attacker, of which the only allegation that could be established beyond reasonable doubt on the facts was that they had joined him in chasing the victim. In rejecting the appeal, the court concludes that:

"there was ample evidence on which it was open to the jury to conclude that the [main attacker] was encouraged and assisted in the attack which he carried out on [the victim] by the conduct of the appellants in joining the chase. [The main attacker] had the comfort and spur of knowing that he was not on his own, but had the support of the appellants and the reasonable expectation that they would come to his aid if he needed it. We reject the argument that the judge ought to have directed the jury that the appellants' conduct in chasing [the victim] (with the requisite mental intent) could not be sufficient for them to be convicted of murder." (*R. v. Stringer* 2011, para. 55)

Just what connects the appellants in this case to the main attacker, sufficiently for criminal liability for the main attacker's actions to attach to them, remains, however, ambiguous. The final sentence of the quotation could mean that *all* that needs to be shown is that the appellants chased after the victim with the same general objective as the main attacker. The preceding sentence, however, points to

<sup>2</sup> See, e.g., *R. v. Mendez and Thompson* [2010] (paras 18-23). Lord Toulson (who delivered the main speeches in *Mendez* and in *Stringer*, discussed below), writing extrajudicially, refers to this basis of attribution as "a broad theory of causation" (Toulson 2013, p. 238).

<sup>3</sup> This is, again, made explicit by Toulson (2013, p. 239). See also Law Commission (2007, para. 2.33).



the main attacker having “the comfort and spur of knowing that he was not on his own” but that the appellants were ready to help him, and this suggests that it is *some influence* their conduct has on the main attacker that constitutes the necessary connection. It implies that it is only when, and because, the appellants in joining the chase encouraged and assisted the main attacker in this particular way – by rendering effective psychological support – that their joining of the chase amounts to encouragement and assistance sufficient to found attribution of responsibility to them for the main attacker’s actions.

The case of *Stringer* differs in this respect from O’Flaherty’s case, described at the outset. In *Stringer*, there is no doubt that the main attacker knows that the appellants are chasing the victim with him (even though they run more slowly, and it takes them a while to catch up). In *O’Flaherty*, by contrast, it remains unclear throughout whether the stabber was at any stage aware that O’Flaherty (or: a person he didn’t recognise who later turns out to have been O’Flaherty) had joined the pursuit of the victim and his gang. Certainly, in *O’Flaherty* the prosecution case was not put on the basis that O’Flaherty’s joining the pursuit contributed to the stabber having “the comfort and spur of knowing that he was not on his own”. True, as a matter of fact the stabber had that “comfort and spur” because other attackers were with him on the scene of the stabbing. What isn’t clear is how O’Flaherty’s running around in a different street looking for the main action could have contributed to that sense of comfort and support.

Difficulties of this sort have led writers to propose that (at least in cases of joint enterprise) the ground of attribution is even less factually influential than the notion of a connection suggests (see eg Virgo 2012). A link merely through “association” has been proposed. For the defendant to be associated with the central agent in the relevant way, it is taken to be sufficient that the defendant (with the relevant *mens rea*) performed an act that, to an all-knowing observer, would indicate that the defendant shares the central agent’s purpose and does what he can to support it.

The association principle was also drawn on to explain responsibility-attribution in “further act” scenarios in joint enterprise cases, where it was invoked to explain why (provided they foresaw the possibility that the central agent would commit this further act) other parties to the enterprise need not have made any direct contribution to the commission of the “further act” by the central agent in order to be held liable for the further crime. Following a terminology first introduced by JC Smith (1997) this form of liability came to be referred to as “parasitic accessorial liability”. This doctrine, and the extension of liability that it represented for secondary parties who merely foresaw the possibility, but did not actively support and directly intend, that the principal offender would commit this further act, has been abolished in English law by the decision in *R. v. Jogee; Ruddock v. The Queen* (2016). Even so, it is worth considering from a more theoretical basis the question whether, in logic, association could form the basis of the attribution of responsibility to the first (and only) crime the central agent commits (cf also Virgo 2013, p. 586) – and, indeed, this appears to be the only basis on which O’Flaherty could be linked to the stabber’s act. O’Flaherty’s case does not concern a “further act” scenario. There is simply a multiplicity of individual acts by individual actors, all performed concurrently as part and parcel of the endeavour to take down the victim and his group. There is a basic asymmetry at work, in that the “joiner-in” must realise what he joins and intends to join on these terms (and if he doesn’t, like O’Flaherty’s co-appellants, Ryan and Toissant, he can slink away again). But the “joined-up” need not realise that the joiner has joined them at all. Even though they may be unaware of the new group member, the joiner is still considered a party to their crime.<sup>4</sup> In what would (post *Jogee and Ruddock*) likely be considered a significant

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<sup>4</sup> Note that the judgment does not address whether the acts of the joiner within the scope of the endeavour are also attributed to the other group members. This point did not arise in O’Flaherty’s case, because the case was not about tying the stabber to O’Flaherty’s acts. But it follows from the mutuality

extension of liability beyond the “ordinary principles of secondary liability” which that court insists should be “of general application” in all cases (*R. v. Jogee; Ruddock v. The Queen* 2016, para. 76), the connection is then not between two minds, or two actions. Rather, the connection would appear to be brought about through “joining a group” rather than through influencing another’s actions. The link is created by the joiner’s unilateral decision, and efforts, to do something that is effective in furthering the realisation of the goal that he shares with those he has joined in the group.

One way of making sense of this would be to think of every individual act performed within the scope of the enterprise as an act of “the group”, and (via their group membership) to attribute each individual act to each of the group’s members. Whose acts get attributed in this way would then depend simply on who made himself part of that group by joining it through his acts. Association thus appears to be quite different from causal contribution or connection. Could the psychology of group action support act-attribution based on association?

### 3. The psychology of violent group action

It is difficult to find psychological studies of the sort of violent group actions that form the subject matter of the cases presented above. I have not been able to discover any publication directly on point (and not concerned with, say, adolescent behaviour or “peer pressure”).<sup>5</sup> Psychologists, especially social psychologists, have however long shown an interest in the behaviour of crowds (e.g. Le Bon 1968). In an early article, Helen Clark (1916, p. 29) points out that crowd behaviour may well be observable in small groups as well as in large ones:

“Under certain conditions, three, or even two, individuals may – for psychological purposes – constitute a crowd. The difference between the conditions of no-one-else-present and of some-other-person-present may be as significant as, if not more significant than, the difference between the presence of one other or of twenty or two-hundred.”

Clark proposes a basic differentiation between three classes of congregates of persons, or crowds: aggregates, “when there is no initial leader, when the members become congregated [by means of] a common social object or event”; mobs, “a crowd in which there is one initial leader and also a number of subsidiary leaders ... [who also] exert a comparatively great influence upon the other individuals”, and audiences, where “the influence of the leader is by far the most important, and the effect of the other members of the crowd upon each other is relatively slight” (Clark 1916, p. 30). Although the kind of social event Clark has in mind is something like a 4<sup>th</sup> of July celebration, in her classificatory scheme the groups that formed in the *O’Flaherty* and *Stringer* cases can probably best be classified as aggregates. There was no clear leadership of the group in either case, and yet the members of the group were connected by sharing a “social object” or purpose, namely to take down the victim’s group (in *O’Flaherty*), and to conclusively defeat the victim (in *Stringer*). One phenomenon Clark highlights in her discussion of an aggregate of

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of the act-attribution among group members. If, based on what the court found, O’Flaherty was in the group, then he was in the group both for the purpose of attributing the acts of other group members to him, and for the purpose of attributing his acts to other group members. Of course, the legal basis for O’Flaherty’s conviction is to some extent unsettled by the decision in *Jogee and Ruddock* since that decision explicitly rejects the notion of “guilt by association or guilt by simple presence without more” and explicitly requires “the giving of intentional support by words or deeds, including by supportive presence, .. on ordinary principles [of secondary liability]” (*R. v. Jogee; Ruddock v. The Queen* 2016, paras. 77 and 78).

<sup>5</sup> This paper focuses on the psychological literature because it is (like the criminal law) primarily interested in what goes on – consciously or unconsciously – within individual human agents (the “unit” to which criminal responsibility is ascribed). In much of the sociological and anthropological literature on violence, by contrast, the group or collective tends to be the behavioural unit that is being studied. One sociologist whose work has also focused on what enables individuals to act violently is Randall Collins. Connecting the insights of his work to criminal law conceptions of responsibility is, however, a larger and more complex task than can be attempted in this paper.

persons is that: "When others act as we act, and toward the same objects, we usually feel that they sympathize with us and approve of our conduct" (Clark 1916, p. 31). Clark then turns her attention to the consciousness and performance of members of a crowd, pointing out that "consciousness may be predominantly emotional, cognitive, or volitional" (Clark 1916, p. 32) and people in crowds automatically influence each other's emotions, beliefs and actions. As Clark (1916, p. 32) observes,

"Some emotions, especially fear and sorrow, are produced or intensified by witnessing in others the expression of like emotions, [and] it is evident that we tend to interpret objects as our fellows interpret them, to consider as real what others, by their behaviour, seem to recognize as real, and to accept as true the ideas which our companions appear to accept".

We also tend to copy each other's behaviour, especially where that behaviour indicates a course of action taken to satisfy a perceived general need (Clark 1916, p. 32). Clark points out that these behavioural tendencies reflect evolutionary successful behaviours. While we may often engage in them without much thought, they do not, however, make us incapable of rational reflection.

Later studies of mob violence suggested that participants in these groups do more than just influence each others' behaviour in the ways described in the previous paragraph. As participants in a mob, they would experience a psychological state psychologists label "deindividuation" – a "loss of one's sense of individuality and personal accountability that can sometimes occur in large, noisy, emotional crowds" (Colman 1991, p. 1072 citing studies by Festinger *et al.* 1952 and Zimbardo 1969, Dipboye 1977) and, suppressing self-monitoring, which makes people especially vulnerable to external, situational pressures (Colman 1991, p. 1073). Whereas the earlier studies of crowd psychology suggested how the actions of one may have inspired and influenced the actions of another (offering a possible basis for attributing responsibility for these actions to others in the group), the research on deindividuation convinced courts to consider the direct agents less responsible than they would have considered them, had they acted outside a mob context (Colman 1991, p. 1075). (As would, presumably, be those who, by forming the mob, contributed to the phenomenon of deindividuation experienced by the direct agents.)

This research is taken one step further in studies suggesting that, not only does the direct agent in some crowd situations not relate to his actions as actions for which he is responsible – he has no sense of ownership of them –, but that the very actions themselves are more extreme than the group members would be minded to perform outside the group context. This has been explored in research on group polarisation. Group polarisation refers to the phenomenon that "group decisions are riskier than the previous private decisions of the group's members" (Stoner 1961 cited in Isenberg 1986, p. 1141. Stoner's experiment is described in Myers and Lamm 1976). The psychological mechanism that plays itself out (*inter alia*) in such "risky shifts", is, however, a more general one of "group polarisation" that can affect all sorts of decisions. The "group polarisation hypothesis" is thus stated as the hypothesis that "the average postgroup response will tend to be more extreme in the same direction as the average of the pregroup responses" (Myers and Lamm 1976, p. 603). The various explanatory models developed for observed polarisation effects include interpersonal comparisons and awareness of other group members' views, whereas group decision rules seem to play no particular role (Myers and Lamm 1976, p. 610 ff.). More recently, the behavioural tendencies that underlie the effect achieved through "interpersonal comparisons" engaged in (consciously or not) by group members have been further explored in research on attitudes. The findings suggest that people in groups interact on a permanent "feedback loop" where their own attitudes not only influence their perception of others' attitudes, but are also adjusted and influenced by reference to the presumed attitudes of others (Ledgerwood and Chaiken 2007).

The latter research suggests that the influence one group member has on another may operate entirely inside the second group member's head. It is not something that the first group member says or does, but an assumption the second group member makes about what the first group member would say or think or do, that leads the second group member to revise his attitudes and, presumably, actions.

Psychology, then, leaves us with a better understanding of how humans acting in proximity to each other – and, in some sense, in concert – influence each other's decisions and conduct in ways that will often be untraceable and remain below the radar of their conscious reflection and thought. Psychology also suggests that when extremely violent actions emerge from a mob of people, the direct agents probably go further than they would have done if left to their single agency. The very objective that persons in a group may set themselves tends to be more extreme than the objective they would have set themselves individually. This can ground arguments that the direct agents should be viewed as acting under conditions where their responsibility for their actions is to some extent diminished – but it does not, as such, establish that responsibility can accrue to others in the group. These others are presumably subject to the same de-individuation and polarising effects of “group action” as the direct agents. Hence everyone's responsibility appears to be diminished (if we think that full responsibility requires that an act is a true expression of our individual character or selves). But we do not, on the basis of psychology, have a plausible case for “offloading” the responsibility for the extreme act onto other group members.

What the psychology of group action also does is to provide us with an understanding of what kind of “de facto” influence and support is occurring in certain contexts. From a psychological perspective, the argument that “I didn't say anything to him or help him do it, therefore I didn't influence him”, may well be hollow. In certain situations, “being there” or even just “being around” may well be all that is necessary to have a direct and perceptible effect on the actions of another.

#### **4. Connecting law with psychology?**

The criminal law, however, is set up to care about who does what. It starts with the direct agent, connected in a unique and crucially important way to his act, and its outcome. All other people's possible connection to that very same outcome must contend with this – the doer's act – as the object to which their responsibility must attach. The criminal law thus resists the idea of a “group's act” in the true sense of the word. Whether or not the direct agent would have done what he did without the role played by others, such that a social psychologist might begin to think of the direct agent as a “vessel” or “conduit” for the emotions and objectives generated within and by the group, the criminal law's regime of responsibility-judgments centres on the individual or individuals (e.g., when A and B together push C off the cliff) carrying out the fatal act.

##### *4.1. Connection between A and P as a basis for responsibility-attribution*

Let us come back, then, to the idea that responsibility-attribution for the central agent's actions to others is based on a connection, which – as explained in section II – resides in some discernible influence that A has exercised in the situation. The psychological literature supports the conclusion that the court drew in *Stringer*, that merely by following the direct agent in his search for the victim – given that the direct agent was aware that the appellants had followed him when he went to look for the victim –, the appellants would have motivated the direct agent to stick to his plan to sort the victim out for good, and to act decisively once he found the victim. For these psychological effects to occur, the appellants did not have to be in the immediate vicinity when the stabbing occurred. It was sufficient for P to have a

reasonable expectation that they were close enough for him to call on their help if need be.

Historically, the salient connection appears to have been perceived in slightly different ways, depending on the degree of interdependence between A's and P's actions. Where A is not present at the scene of the crime but made his contribution before the fact of the crime's commission, Foster's annotated Crown Cases of 1762 suggests that what matters for A's liability is whether what P did can "with any propriety be said to have been committed under the influence of [the] temptation" created by A (Foster 1762, p. 369). The formulation chosen by the same writer to capture the necessary connection between "[s]everal persons [who] set out together, or in small parties, upon one common design ... and each takes the part assigned to him", is, however, subtly different: what matters here is that "the part each man took tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise" (Foster 1762, p. 350). The difference lies in the following: an act that "tend[s] to give ... protection" is not necessarily an act that, in the circumstances, delivers that protection. It may even be an act that, as matters turn out, gives the enterprise away (say, a lookout who is so incompetent that he draws attention to the whole enterprise, and then fails to notice an observer who succeeds in calling the police). Likewise, an act that "tend[s] to give ... encouragement" will not necessarily do so. What suffices for an act to have the relevant tendency is that it is the sort of act that can typically be expected to further the execution of the joint enterprise. What need not be shown is that, on the facts of the case, it had any contributory effect. By contrast, the question whether the direct agent's actions were "committed under the influence of [A's] temptation" implies that this temptation must indeed have played itself out in what P did. At least to my mind, then, the historical sources appear to have a wider principle of attribution in mind for what a continental lawyer would think of as cases of "co-perpetration", as compared to the grounds of attribution in standard secondary liability scenarios.<sup>6</sup>

Even if the case of joint activity "on the scene of the crime" does, in this sense, appear to allow for a slightly wider principle of attribution, the basis for this attribution still remains some perceptible difference that A made to P. At least, this is what another example given by Foster, of a case where A withdrew in time, suggests: Where A, B and C set out together to commit a crime, but C then openly walks away, thereby signalling to the others that he will not participate in implementing their earlier plan, C is not liable<sup>7</sup> when A and B later carry out the plan together, because at the time that the crime was committed, there was no "engagement or reasonable expectation of mutual defence and support, so as to affect him" (Foster 1762, p. 354), meaning that C's conduct could not have given A and B, at the time they committed the offence, any reasonable expectation that he would support them.

In all these cases, then, the other participants' connection to the outcome runs *through* the direct agent. This is undoubtedly so whenever the direct agent is an innocent or semi-innocent instrument of someone who stands behind him and who, as it were, acts through him. But it is also the case when the direct agent is a fully responsible agent to whom others have connected themselves in ways that constitute exerting an influence on the agent, albeit that the influence falls well short of controlling, governing, or determining the acts of the agent. Yet, one may

<sup>6</sup> To this extent, I doubt the conclusion drawn by Toulson (2013, p. 235) from these quotations, that "joint criminal enterprise is an example of mutual assistance or encouragement" and "not a doctrinally separate basis of secondary liability". The "mutual assistance or encouragement" that connects the parties of a joint criminal enterprise is such that it suffices that their acts *tend to* assist or encourage the success of the enterprise; and to this extent, they need to be less effective than the acts of a simple secondary party.

<sup>7</sup> Under today's legal doctrine, effective withdrawal may require more of C than merely to walk away. This is not an issue addressed in this paper.

question whether this factual connection is what matters for the attribution of responsibility.

#### *4.2. Conduct that signals a contribution to the flouting of a criminal-law norm*

Günther Jakobs, a German criminal law theorist, suggests that for responsibility-attribution to be appropriate, the salient connection between the central agent's criminal act and further parties is not constituted by any "communicative relationship between the further party and the direct agent", but obtains "between the norm, the conduct [of the direct agent], and the punishment [of the further party]" (Jakobs 2014, p. 22). For Jakobs, the essence of criminal conduct is conduct that contradicts, or one might say flouts, a criminal-law norm. The further party's conduct does not, as such, flout the substantive criminal-law prohibition: when it takes place before the commission of the offence by the direct agent, its objective communicative significance – its social meaning – is that of enabling or furthering a flouting of the norm in the future by the direct agent. From this vantage point, what matters for Jakobs is when the central agent's flouting of the norm can be attributed to the further party. Jakobs' answer is that it can be so attributed when the further party's conduct can fairly be said to have "advanced" (*vorangebracht*) the norm-violation by the central agent, that is, when the further party moved ahead the sequence of conduct that culminated in the norm-violation (Jakobs 2014, p. 22).

This relationship of "advancing" the norm-violation by the central agent does, for Jakobs, not just obtain between the central agent and any accessories before the fact. It also constitutes the link between the central agent and further parties active during the commission of the offence. Jakobs stresses that it is perfectly plausible that a party can advance the direct agent's criminal norm-violation even though her contribution is (in the end) unnecessary for the offence's success. Someone who explains to the direct agent how to disable an alarm system advances the commission of a burglary by the direct agent even if the direct agent finds the alarm system already disabled due to a technical malfunction (Jakobs 2014, p. 23; example adapted). Nor is it necessary for the central agent to be aware that another party takes steps to advance his project. Someone who places a weapon conveniently in the vicinity of the direct agent, hoping that the direct agent will discover it and use it to commit the offence in question, advances the direct agent's movement towards the breach of the criminal law in a way that makes him liable for this breach (provided the direct agent does indeed find the weapon, and uses it) (Jakobs 2014, p. 22).

Jakobs' theory remains a conservative one, in that he requires some effect of A's contribution on P. But his approach is of interest in the present context because he stresses that a theory of participation in crime must engage with the social reality of participatory conduct, in that it must capture the social significance and reflect the social meaning of various contributory acts (Jakobs 2014, p. 21). He later expresses this idea in the formulation that "the conduct of the further party signals that the central agent carry out the offence" (Jakobs 2014, p. 26). This signalling is, evidently, a wider concept than the still essentially fact-based notion of "advancing" the central party's offending behaviour. The further party, as it were, hoists a flag: a flag that flies to tell other social agents, including the central agent, that the further party supports the commission of the offence. It is with the social significance of signalling behaviour in mind that we can take another look at the remaining ground of responsibility-attribution discussed in section 2.2: association.

#### *4.3. Association as a basis for responsibility-attribution*

The question posed by cases like O'Flaherty's is whether it is possible to be connected to an outcome in the absence of any "broadly causal" connection to the actions of the central agent. Recall that O'Flaherty joined the "wider enterprise"

only when he continued to pursue the victim after their first, spontaneous, encounter during which O’Flaherty had merely come to the aid of one of his mates, and that O’Flaherty only came upon the victim again after the victim had already been stabbed, apparently before the stabber had become aware of O’Flaherty’s support for the attack. Whatever O’Flaherty’s connection to that outcome, it cannot possibly be causal – even in the broadest possible sense.

What we can say, however, is that O’Flaherty, by continuing the pursuit, sent a signal to his social surroundings that he was part of the chase of “the Peckham boys” (the victim and his group). That signal was there to be received by others who were equally part of the chase. Whether any particular one of the other group members received that signal, may be irrelevant (so long as it is clear that some did). This is because the socially significant act is that of joining the group – an act that tends to reinforce the commitment of all group members to their common objective –, and (in the circumstances) all that O’Flaherty needed to do to join was to enter the pursuit. (It cannot be in doubt that the others would perceive him as a member of their group the moment he arrives on the scene of the stabbing, rather than as someone who is a mere observer. That he would be perceived in this way because they assume that he had supported the fight against the victim’s group as well as he could, is likewise beyond doubt.)

While this explains why the court may have plumped for a wider principle of association in the absence of evidence that O’Flaherty’s actions had reached the horizon of situational perception of the stabber, it is still a problematic solution.<sup>8</sup> This is so because, at the end of the day, association then rests on the social significance not of an interaction but of a unilateral act performed with an intention to make oneself part of a group endeavour, and it is unclear how such unilateral activity can tie a person to another person’s acts and their results.

On the association view, the essence of “joining a group effort” consists in committing oneself to the “common purpose” shared between the members of the group. And one comes to share in the group’s “common purpose” by adopting the group’s goal as one’s own, and by signalling one’s commitment to further the achievement of this goal through one’s own efforts. The actions taken by a joiner-up matter only to the extent that they manifest a sharing of the common purpose of the members of the group. When the actus reus of participation need not be any more than this, particularly when the actions need not be at all effective in furthering the achievement of the group’s aims, then the acts of a participant matter only as tokens of his sharing in the common purpose. If that suffices, his liability is not for any influence he exercises over the actions of another, but is (as Baker 2015, p. 43, observes) structurally the equivalent of liability for an inchoate crime: D does something that expresses and implements his commitment to a criminal norm-violation, but he does not effectuate that norm-violation through his acts.

Such a wide basis for contributory criminal responsibility would have serious consequences for individuals only vaguely associated with joint endeavours. Think of the young men in the Siberian village I alluded to in the introduction. A boy growing up in this village will at some point want to show that he has grown to be a teenager, old enough to drink. He will join the others who are drinking on Saturday nights (just as, on the other hand, young adults who have settled down with a family will begin to drop out of the group, or at least out of the fights that ensue later on the street, it being understood that their new responsibilities mean that they have outgrown participation in these fights). A particular young man can, perhaps, choose not to join in at all. But not to join in the fighting means not to join in the drinking, and this (if nothing else) means not to participate in the only social

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<sup>8</sup> Note that, after the decision in *Jogee and Ruddock*, that solution in any event appears no longer to be open to English courts (see *R. v. Jogee; Ruddock v. The Queen* (2016), para 77).

activity on a Saturday night of the young men in his village. If he doesn't mind a reputation for being weird, that would perhaps not affect too much how his life fares in the village. But he will be a loner, someone on the margins. Of course any of the young men who have joined the drinking and the fighting, perhaps not very zealously but enough to be a part, can sometimes stay home on a Saturday night or occasionally slink away before the fighting stage is reached. But a young man cannot do that every Saturday night without being challenged about it. Should we then say that anyone who does enough to signal to the others through his conduct across various Saturdays that he is "one of the group", should be responsible for any after-drinking violence that happens on any particular Saturday? Assuming that P is spurred on by a sense that there are others around who are ready to help him if things go badly for him in the fight, and that all of the young Saturday-night-"regulars" contribute to this sense with which P acts, should this really suffice to make them responsible for what P does on a particular Saturday night, even if they are still finishing their beers in the pub? If that kind of support sufficed, whole populations of youngsters in certain localities would have to be held responsible for any Saturday night fighting that occurred. Precisely this is the odiousness of collective criminal responsibility. It is not that the psychological analysis is a bad one. It is perhaps a perceptive one. But this sort of "support" just isn't enough to justify treating the psychological reassurance-providers as involved in the direct perpetrator's act for the purposes of the criminal law.

This result is both philosophically and doctrinally significant. It establishes that mere association does not furnish us with a basis on which responsibility for a result brought about by another participant's acts can be attributed to A. A's association, which consists in his joining a common enterprise by an act that manifests his sharing of the group's common purpose, is "full support of the purpose", but nevertheless only an attempt to contribute to the achievement of the goal. If the goal is achieved by another group member who acts quite independently from A, then responsibility for the outcome of that act cannot be attributed to A. In line with what the UK Supreme Court has held in *R. v. Jogee; Ruddock v. The Queen* (2016), responsibility for the direct agent's actions may only run through a connection establishing that A made a contribution in the broad causal sense explained above.

This, it should be stressed, does not leave criminal law incapable of response. But we need to think carefully about what kind of offence adequately captures the kind of responsibility that flows from this sort of "signalling behaviour". What should be out of the question is to bring liability for a homicide offence to bear on the joiner-in who merely signalled his supportive attitude but remained at the incident's margins. It is far more appropriate to hold him liable for public order offences such as affray (Public Order Act 1986, s. 3) or public violence (Public Order Act 1986, s. 2), which criminalise aggressive conduct that would cause a person of reasonable firmness to fear for her personal safety. That death or serious injury is caused during an incident of public violence may appropriately be treated as an aggravating factor in passing sentence but it should no longer (as in the older jurisprudence, for which see KJM Smith 1991, p. 211 note 5) lead to an ascription of responsibility for the death.

The most appropriate legal response to participatory conduct whose impact was limited to the signalling effect described above might well be to hold such a participant responsible for an aggravated offence of "taking part in a fight during which serious injury or death is caused to any person" (German Criminal Code, section 231). Note that this provision requires no *mens rea* beyond the (blameable) intention to join the fight, that is, no intention to cause (or support others in causing) serious injury or death. It makes liability to punishment depend on a purely external fact – that death or serious injury is brought about somehow, whether through a deliberate, conscious, murderous act, or through an unhappy, unexpected fall, or anything else in between.



While the German “participation in a fight”-prohibition does include serious injury or death of any person caused by the fight among the criteria for liability, it is interesting to note that, this requirement notwithstanding, the provision is not strictly speaking one that holds every participant criminally liable *for the injury or death* of the victim. Liability attaches to the culpable participation in the fight, when the fight (objectively) turns out to have been a particularly bad one: bad because someone got seriously injured or died. The sentencing range (punishment by fine or imprisonment up to three years) is moderate compared to homicide offences – even negligent manslaughter (German Criminal Code, section 222), the least serious homicide offence, can be punished more harshly (by a fine or imprisonment up to five years). These punishments are quite comparable to those imposed under English law’s public order offences: Under the Public Order Act 1986, imprisonment for a term not exceeding three years, or a fine, or both, is the sentencing range opened up when a charge of affray is brought on indictment, and the more serious offence of violent disorder allows the court (on indictment) to impose a term of imprisonment of up to five years. The advantage of a special provision would simply be to capture through the offence label the indirect yet morally traceable connection in which A’s signalling behaviour stands to the serious outcome.

But liability for manslaughter or murder, which both (in different ways) rest on an attribution of responsibility for the death of the victim to the defendant, requires more, and in the next section of the paper I want to address specifically when and on what basis ascription of responsibility for the death caused is in order.

#### 4.4. *The true significance of (dis-)association*

Before I leave the topic of association, I however want to draw attention to the important way in which association does matter for responsibility-ascription under the secondary-liability paradigm. Its true significance lies in the severing of a causally-based connective link through disassociation. To see this, let us briefly turn our attention to Bernard Williams’ (1973, pp. 98-99) tale of Jim and the Indians, which Gardner (2007) has employed as a platform for his own contention that in some situations it does not matter who is doing the evil deed. Jim, a tourist travelling in some South American country, stumbles upon a clearing where a local paramilitary is about to shoot and kill all the inhabitants of a small village, but offers to let the other villagers go if Jim himself takes the gun and shoots one of the villagers. Why should Jim care that if he takes the paramilitary up on the offer, it will be him, Jim, who shoots the villager and not the paramilitary? After all, the one villager who is shot will be shot in any event, but by shooting the one villager he chooses to shoot, Jim will save all the others.<sup>9</sup> Shouldn’t we say that it really doesn’t matter, morally speaking, that Jim would fire the fatal shot? Whatever the allure of this line of thought, it is deeply unattractive from Jim’s perspective, and also – more pertinently in the present context – from the perspective of the criminal law. If we ask what, if anything, connects Jim to the dead villager(s), it matters enormously who was “doing the doing”. If Jim shoots the Indian, with the *mens rea* required for murder, it is he who murders him. If the paramilitary shoots the villagers, it is the paramilitary who murders them.

Under modern English secondary liability doctrine, this is however not the end of the story for Jim, but rather the beginning. Can we not say that Jim “encourages”, possibly even “procures by endeavour”, the paramilitary’s shooting dead of all the villagers by refusing to take the gun and shoot one? If this is thin –the paramilitary was, after all, committed to shooting the villagers before Jim arrived on the scene–, imagine that Jim had initially accepted the gun offered to him by the paramilitary,

<sup>9</sup> Various people have pointed out that, in order for Jim’s dilemma to get off the ground, one also has to assume that Jim somehow cannot shoot the paramilitary once he takes the gun. Imagine, therefore, that the paramilitary’s colleague keeps his own gun trained on Jim, and (since he is a far better and quicker shot than Jim) would successfully shoot Jim if he were to try and turn the tables on the paramilitaries once he holds the gun.

but then handed it back to the paramilitary, saying “I’m sorry, I just can’t do this”. Giving the gun back to the paramilitary surely facilitates the latter’s shooting of the villagers, and that the paramilitary would go ahead and shoot the villagers is, of course, exactly what Jim foresees as certain (thus, arguably, what he intends in the secondary sense of intention recognised in *R. v. Woollin* (1998)). Is Jim then a secondary party to all the villagers’ murders in the event that the paramilitary kills them all? We would want to say: he is not. The social meaning of Jim’s actions – whether they consist in refusing to take the gun, or in handing it back to the paramilitary – is simply not that he wishes the paramilitary to proceed, or is indifferent to whether he will do so. It is that he, Jim, does not want to have any part in the murder(s).

The kernel of truth in the association view is that we do indeed need the social signal, the token of support, in order to hold A liable for P’s act. The error lies in the thought that this is all we need to attribute responsibility for P’s act to A. In truth, this is an additional requirement or element in order for an (objectively) furthering or facilitating contribution to count as such for the purposes of the criminal law. It is the hidden “mental element” in the *actus reus* of complicity – bound up with the act of participation, in that it is what makes this a “participatory” act, and thus quite separate from, and additional to, the “*mens rea*” elements that doctrinal law sets out. Put simply: A’s contribution doesn’t count as a contribution to P’s act, unless it was indeed (factually speaking) a contribution in the broad causal sense, and (socially speaking) a token of support.

## **5. Different paradigms of responsibility-ascription and their suitability for the assessment of spontaneous group violence**

The previous sub-section leaves us with a broader concern: how should the criminal law assess the responsibilities of participants in unplanned violent interactions in a way that is sufficiently sensitive to the self-experience of these agents and to external factors that – perhaps without these actors’ awareness – influence how those caught up in the situation act? The difficulties encountered by the courts when applying the principles of secondary liability to these situations leave one wondering whether the problem lies perhaps less with unwieldy sets of facts than with the doctrinal structures through which the criminal law insists on processing these facts. In recognition of this possibility, this section poses the open question of what paradigms of responsibility-ascription are best suited to cases of spontaneous group violence. I start with the secondary participation paradigm that governs the assessment of multiple actors in English criminal law. I then turn to the philosophical concept of a group-act. Finding both paradigms wanting in typical cases of spontaneous group violence, I then introduce a third ascription paradigm, based on an independent assessment of parties’ roles, which I argue is best suited to cases of unplanned group violence.

### *5.1. The secondary participation paradigm*

The classic secondary participation model attributes responsibility to A for a crime P commits by focusing on the influence that A exerted over P’s actions. To be a secondary party to P’s crime, A must (in the ideal form of this model) do something that encourages or assists P in the commission of his crime, intending (i) for P to commit the crime, and (ii) for his action to support or influence P in doing so. Under the secondary participation paradigm, A’s liability derives from P’s commission of the crime with A’s supportive contribution. Were it not for the connection to P’s crime, what A does would be harmless, perhaps even innocuous. A’s contribution brings evil into the world “through P” – and A is held responsible for that evil, along with P, because he intends for his, A’s, agency to be effective in precisely this way, through P.

Responsibility attribution under the secondary participation paradigm also serves as a scaffold on which responsibility attributions for “further” or “collateral” crimes committed by P in the course of committing the target offence rest. Legal systems differ in how prepared they are to depart from the secondary participation model when assessing A’s liability for P’s commission of a further or collateral crime. Some follow a “strict liability” model where A is held liable for the collateral crime when the commission of that crime by P was a “natural and probable consequence” of P’s commission of the target offence – a solution that cannot be motivated under the secondary participation paradigm but has overtones of historic ascriptions of *mens rea* based on the notion that agents always intend the natural and probable consequences of their acts (on this point, see further Stuckenberg 2007, pp. 697-704). For a time, English criminal law ascribed responsibility to A for P’s “further crime” on what is perhaps best thought of as a “modified” secondary liability paradigm, where – to put this in a simplified manner – instead of A intending that P commit the further crime in question it is held sufficient that A foresaw the possibility that P might commit that further crime (for details and criticism, see Dyson 2015). This position was abandoned in *R. v. Jogee; Ruddock v. The Queen* (2016), but “extended common purpose liability” continues to exist in Australia where it was recognised by the High Court in *Clayton v. The Queen* (2006).

I do not now want to address the question whether A’s “foresight of the possibility” that P may commit a collateral crime of the sort he commits, together with an intention to encourage or support P in his endeavours, constitutes an appropriate *mens rea* standard for holding A liable as a secondary party to P’s intentionally committed collateral crime (for extensive discussion of the appropriate *mens rea* requirement for the secondary party in such cases, see Simester 2006, Sullivan 2007, Baker 2015 and Krebs 2015). The main downside of this model when it comes to incidents of spontaneous violence is that, as Baker (2015, p. 43 highlights), the case law applying it often runs roughshod over the requirement that A exert an influence also over P’s “further act” – as exemplified by the case discussed above, *O’Flaherty*. While the secondary participation model would undoubtedly succeed in tying A to P’s collateral crime in situations where A stands next to P, egging P on, while P carries out the collateral criminal act, it cannot deal satisfactorily with the far more frequent situation in which A may be nowhere near P when P decides to carry out the collateral criminal act and does not become aware of P’s collateral offence until it is too late. In many of these cases, it is strained if not outright counterfactual to assert that A’s involvement in the target crime provided any tangible encouragement or assistance to P’s commission of the collateral crime.

The secondary participation paradigm also seems incapable of capturing the psychological experiences of participants in spontaneous violent encounters. What ordinary secondary liability recognises is that P’s actions are sufficiently influenced by A, such that P, in doing what he, P, chooses to do, also does what A wants P to do, and does so (at least in part) as a result of the influence that A exerted on P with the aim of assisting or encouraging P’s act. In situations unfolding in a spontaneous and unplanned fashion, however, the idea that “A acts through P” reflects neither P’s nor A’s situational perceptions and agential experiences.<sup>10</sup> When A takes himself to be “joining a fight”, the distinctive feature of that joining-in is not that he wants to make a difference in the world by exerting an influence over the other fighters. Even if he had an awareness that others who fight on his side might feel comforted and supported by the knowledge that A has joined in, this is not the point of A’s joining-in. A intends for his agency to be effective in the world through the things he himself does after joining. Interpreting A’s joining-in as an act through which A wants his agency to affect the world through the activities of

<sup>10</sup> In the striking words of a prisoner serving a life sentence for murder of which he was convicted as a secondary party under joint enterprise rules: “So we’re not at the murders and don’t know the victim or nothing but we’re still joint enterprise ... Courts are full of shit.” Quoted in Crewe *et al.* 2015, p. 263.

others distorts the character of A's choice. It cannot simply be assumed that by joining in A means to *make* the others do their acts. That A anticipates further fighting activity by the others cannot be equated with A intending to make the others do what they do. What A does is not about exerting an influence on another through encouragement or assistance: it is about doing his own thing by taking part.

### 5.2. *The collective action or "group act" paradigm*

The last-mentioned point suggests that an appropriate liability paradigm for these kinds of cases might be supplied by the notion of collective agency. The criminal laws of different jurisdictions invoke such a notion through their conceptions of co-perpetration. Rather than relying on a legal example, I will however introduce this paradigm through the philosophical literature, specifically by drawing on Kutz's "group act" analysis of complicity.

At the heart of the "group act" model lies the idea of concerted action taken in the execution of a common plan. Kutz (2000, p. 69) identifies it as a "common structural feature" of a group act (which he calls a "collective action") that "individual members of a group intentionally do their parts in promoting a joint outcome". For this structural feature to be present, the participants (at a minimum) (i) have to have a particular outcome in mind, which is broadly the same outcome intended by them; they (ii) have to have the notion that they will bring about this outcome by acting together (rather than by each of them trying to bring about the outcome on his or her own); this notion of acting together also usually requiring (iii) some plan or shared idea about how they will collaborate and coordinate their activities in order to bring the outcome about.<sup>11</sup> Kutz maintains that "what makes a set of individual acts a case of jointly intentional action is the content of the intentions with which the individuals act", and, specifically, that "jointly intentional action is primarily a function of the way in which individual agents regard their own actions as contributing to a collective outcome" (Kutz 2000, p. 74, referred to as "participatory intention"). What is special about collaborating actors, according to Kutz, is that: "Jointly acting individuals do not merely act in parallel: Each responds to what the others do and plan to do" (Kutz 2000, p. 76).

The behaviour of participants in incidents of spontaneous group violence tends to lack a number of features that Kutz identifies as necessary for a group act. Take O'Flaherty's case: At a stretch, some of the behaviour of the participants in this encounter might meet the Kutz criteria for joint action of strategic responsiveness, shared goals, and mutual openness (at least if each of these criteria is construed widely – the goal being perhaps not even the defeat of the Peckham boys, but simply to engage them in a fight; responsiveness being constituted by a general preparedness to fight in conjunction with others whom one recognises as being on one's own side; mutuality understood in an open-ended way as including anyone else who might be on one's side, whoever they may be). Even so, a problem arises with Kutz's last criterion, a sort of horizontal intention that all the participants have "to do his or her part of promoting the group activity or outcome" which, according to Kutz, is a "further intentional component, by which agents conceive of their actions as standing in a certain instrumental relation to the group act" (Kutz 2000, p. 78). For this criterion to be satisfied, participants must at least each know what his or her "part" is and how it serves the collective aim. O'Flaherty certainly does not meet this criterion – he has only the vaguest sense of what it is that the others aim for (other than pursuing the Peckham boys, continuing the fight), nor has he

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<sup>11</sup> Note that when it comes to group acts, it is perfectly coherent to hypothesise that "accountability appears to accrue first to the jointly acting group, and then derivatively to its individual members" (Kutz 2000, p. 69). Kutz stresses, however, that at the end of the day a collective act will always be "explicable in terms of the intentionality of individuals" who take themselves to be acting on behalf of the collectivity, as well as "the expectations and beliefs of others regarding what [the collective agent] is and what it is capable of" (Kutz 2000, p. 71).

got any conception of what “his role” in the fight may be. And O’Flaherty’s case is not unusual in this regard. Most spontaneously erupting fights will not meet the Kutz criteria for a collective act. Their goal is too undefined to allow participants in the fight to relate to each other with the nuanced Kutzian participatory intent of doing their bit towards a collective end. This is, incidentally, why it is unsatisfactory for the law to treat even spontaneous, unplanned violent fights – labelled as “public violence” or “affray” – as genuine collective acts. These may be group offences in the sense that they are offences that can only be committed by more than one participant, but the interrelation between these participants is not ordinarily governed by the interwoven intentions that mark an act out as a group-act (cf. Kutz 2000, pp. 82-83). The responsibility ascription paradigm of “group action” – which allows us to treat the actions of each of the participants as an action performed by all, and thus to hold everyone responsible for an outcome brought about by an act of one of the group’s members only – requires that “I do my bit because I expect you to do your bit, having some sort of idea in my head about what my bit and your bit are and what the ultimate goal is that we both want to contribute to”. Absent this special contributory intent behind my actions I cannot be said to intend to participate in a “group act” by doing what I do. In these cases, it would be unjust to hold me responsible for anything other than my own actions.

### 5.3. *The independent assessment paradigm*

What, however, does it mean to hold someone responsible for “their own actions” performed in a situation that involved more than one participant? To see how the law might conceptualise an independent assessment paradigm for parties to crime, it is worth looking at the provision concerning participants in crime in Swedish criminal law.

Section 23:4 of the Swedish Penal Code (*Brottsbalken*) provides:

- (1) Punishment provided for in this Code for an act shall be inflicted not only on the one who committed the act but also on others who furthered it by advice or deed. A person who is not regarded as a perpetrator shall, if he induced another to commit the act, be punished for instigation of the crime or else for aiding and abetting it.
- (2) Each party to the crime shall be judged according to the intent or the negligence attributable to him. (...) (translation by Herlitz 1992, p. 163)

*Brottsbalken* section 23:5 adds (*inter alia*) that someone who “has been a party to the crime only to a small degree” may be given a punishment which is “milder than that otherwise established for the crime”, and that “in trifling cases no punishment shall be imposed”.

These provisions were first introduced into Swedish law in 1948 and marked – at least according to the intentions of the scholar who most strongly promoted their adoption, Ivar Strahl – a radical break with the secondary participation model based on the notion of derivative liability. Just how radical the break was has been much disputed among Swedish writers, and is – unsurprisingly – connected to different possible interpretations of the provision itself. The main area of dispute relates to the proper interpretation of the reference object of section 23:4 sub-section (1): the “act” for which punishment is provided in the Code. This “complicity object”, as it is referred to in the literature, can be differently construed – in particular, by requiring either a “wrongful act” which could exist independently of the defendant’s contribution, or a “wrongful act” arising through, and in conjunction with, whatever it was that the defendant intended and/or did (see Herlitz 1992, pp. 183-226). The application of this provision has thus brought back into Swedish law, by the back door as it were, many of the problems (and solutions) of responsibility ascription familiar from the secondary participation and the group act models. But one difference remains: the existence of the provision makes it possible to choose

between different responsibility ascription paradigms in different cases, and these paradigms are not exhausted by quasi-derivative and group-act models. Where these models threaten to distort rather than capture the quality of a defendant's contribution to a crime, recourse should be had to Strahl's original vision for the new law, brought out most clearly in an article he wrote in 1943, where he argued forcefully that the cornerstone of the reform should be "the principle that each and every one of the parties is only liable in accordance with what he has *done*, irrespective of what the other parties have committed." (Strahl 1943 quoted Herlitz 1992, pp. 210-211).

Where a natural description of what a party has done does not lead us to describe that party's connection to the wrongful harm in terms of the influence that party exerted over the activities of the direct agent, or to focus on some consciously coordinated behaviour between the participants that would allow us to attribute the activities of each of their number to all of them, we should jettison the secondary-participation and the group-act models in favour of a different ascription paradigm. The decisive question in instances of loose, spontaneous, disorganised group action is, simply, "how does what A did implicate him in the fatal outcome?"

This question, in fact, accords with what participants in spontaneous violent encounters that turn nasty and lead to fatalities are reported to ask themselves after the event. Not "What did I do to make him do it?", but "What did I do to make this happen?", is the question that preys on their minds (see the interviews reported in Crewe *et al.* 2015, pp. 266-267). They see themselves as potentially standing in a relation to the outcome brought about through their broad involvement in an incident during which one of the things that happens is that one of their group performs the violent act in question that leads to the fatal outcome quite on his own, and motivated by his own objectives and feelings that have arisen out of the incident. It would seem to those also part of the group that one asks the wrong question about their responsibility if one were now to hang this on how their earlier behaviour may somehow have influenced the perpetrator at the moment when he performed the fatal act. This is a distraction from what matters: it is clear to these others that the relation in which they stand to the fatal act is not mediated through anything like any influence they exerted on the perpetrator at that very moment: the perpetrator was not their "agent" (in a civil law sense) or instrument, they did not act "through him". But that observation does not – and ought not to – settle the question whether they can completely disassociate themselves from what the perpetrator did by pointing to their lack of secondary-participatory influence. The answer is that this observation only blocks responsibility attribution on the derivative liability model. But it does not block responsibility attribution under an "independent contribution through risk-creation" model.

The strength of the Swedish model is that it instructs the judge to ask the question: Where is the gravamen of each party's wrong? It is in my view entirely appropriate when, under this general heading, the courts then develop distinctive typologies of structurally different wrongs. The secondary-participation paradigm serves us well in cases where the wrong that A commits is essentially the wrong of bringing harm into the world through P. The group-act paradigm serves us well when the gravamen of the wrong lies in doing the criminal or harmful thing together. The independent contribution perspective is the appropriate one when the focus is not on what A brings into the world through or with P, but through his own act's ultimate connection to the wrongful harm. We cannot say in advance which of these three perspectives is the most appropriate for capturing the quality of A's actions during a specific incident of initially unplanned escalating violence. But we can say that allowing for these different avenues to co-exist would enable the courts to bring the legal evaluation of such incidents into line with the psychological realities of group action.

## 6. Conclusion

Semi- or unplanned violent fights have given rise to criminal cases for as long as any legal system can remember. It is ironic, then, that in “a branch of law which is concerned with the affairs of man generally speaking in their simplest and least complicated forms” (Lord Coleridge CJ in *R. v. Coney* (1882, p. 569), the law’s least simple and most complicated doctrines have been developed and invoked to provide these cases with adequate legal solutions.

Propelled on the tracks of doctrinal analysis, judicial decisions can easily lose sight of the bigger question of what model of responsibility ascription fits the ontology of spontaneous group violence and the experienced psychological reality of those participating in such incidents. The Supreme Court’s decision in *Jogee* with its explicit reference to “a more or less spontaneous outbreak of multi-handed violence” (*R. v. Jogee; Ruddock v. The Queen* 2016, para. 95) comes within touching distance of addressing this question head-on but retreats to the supposedly doctrinally safe position that the “ordinary principles of secondary liability” (*R. v. Jogee; Ruddock v. The Queen* 2016, para. 76) can handle all cases. Yet when the judgment refers to how a person who “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 escalates and results in death” becomes “guilty of manslaughter”, as does someone who “participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm ... to another, and death in fact results” (*R. v. Jogee; Ruddock v. The Queen* 2016, para. 96), we are immediately left to ponder what the true basis for this liability is. Is it really based on the secondary party’s participation in the principal’s murderous act, which is by reason of the secondary party’s insufficient mens rea to be ascribed to that party as liability for manslaughter, or does it rather represent, in substance, a direct ascription of responsibility for a fatal outcome by reason of the fact that this party’s contribution to the initial crime also contributed to the risk of violent escalation?

Perhaps the courts would be better served by an approach that, as Farmer (2007, p. 154) advocated, would be concerned “less with the question of who is the principal and who the accomplice ... than with recognising appropriate modes of responsibility to match ... the moral (and political and legal) positions of the people in the world – the all important context within which liability would be assessed.” There are many multiple-actor scenarios where it is entirely appropriate to focus on the question of who is a principal and who is an accomplice, and in which we should resolve this question according to the standard model of secondary liability. There are cases of co-ordinated human activity where we cannot even describe what’s going on unless we draw on the philosophical concept of a “group act” and engage with theories of collective action. But in most cases of spontaneous unplanned violence, these two responsibility-ascription models are better cast aside as unsuited to the facts before us. The fluidity of these events, their spontaneously evolving nature, shifting participant roles and inbuilt tendency towards sudden escalation makes it impossible to tie participants down to clear or stable functions. The self-understanding of participants is that they “do something to further an objective” which is neither very clearly defined nor pursued in an organised, co-operative manner. Their focus is not on acting with or through the other parties but on acting alongside them, and only in this sense, jointly. The psychological situational action structure is best reflected in an independent assessment of each participant’s contribution to the wrongful harm.

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