This judicial definition is an improvement on the uncertainty that preceded it, but the resulting offence is still distinctly vague. In particular, this formula does not limit the active form of the offence, as I believe it should be limited, to the improper exercise of the public function, so that it does not extend to behaviour merely incidental to it, like making fraudulent expenses claims.

At the risk of stating the profoundly obvious, the case of *W* is yet another demonstration of the need for English criminal law to be reduced to a comprehensive statutory code. In the twenty-first century there is surely no room in the criminal justice system of a civilised country for common law offences, the scope of which is vague and ill-defined. But to add another obvious but pessimistic point, unless common law offences are codified carefully and thoughtfully, they are better left alone. When confronted with the new statutory definition of the previously common law offence of conspiracy created by section one of the Criminal Law Act 1977, the late Professor Glanville Williams was heard to say: "I've spent my academic life campaigning for codification – but when I look at this I wondered why I bothered!"

J.R. SPENCER

MORE APPEALING JOINT ENTERPRISE

"ANYONE who thought that the House of Lords' decision in *Rahman* [2008] UKHL 45 had clarified the law on secondary participation in murder would have had that view disabused if he had been in this court yesterday." These were the words of the trial judge, repeated by the Court of Appeal, in *R* v. *Mendez and Thompson* [2010] EWCA Crim 516, [46]. Despite more than 15 Court of Appeal and House of Lords decisions in the last 11 years, the doctrine of joint enterprise remains unclear.

Joint enterprise liability enables parties to one crime to be convicted of a second crime where they foresaw that this second crime might take place (*Chan Wing-Siu* [1985] A.C. 168). This seems to set the bar for joint enterprise liability lower than for basic accessorial liability which, though in flux, appears to require some encouragement or assistance towards the second crime as well as a slightly higher level of foresight of a crime ("real or substantial risk" *per Bryce* [2004] 2 Cr.App.R. 35, [70]).

Mendez and Thompson presents a paradigm set of facts for joint enterprise liability. A group of men chased down a victim who was attacked with a variety of weapons and eventually stabbed to death.

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It was not proved who had actually used the knife which had killed the victim, but the two appellants were convicted as secondary parties to murder. At first it had been argued that Thompson stabbed the victim, but the trial judge left it to the jury to convict him as a secondary party rather than as a principal. It was never suggested that Mendez had known about the knife until it was used.

The Court of Appeal allowed the appeals against conviction on the basis that the trial judge's direction to the jury had underplayed the role of the knife and especially Mendez's lack of knowledge of it. Convictions for violent disorder were substituted. So far, there is little remarkable about the case and the outcome seems perfectly reasonable. However, the Court of Appeal considered two significant issues about joint enterprise liability.

First, the Court recognised that the orthodox view of joint enterprise liability is that it is doctrinally an aspect of the ordinary principles of secondary criminal liability. Although Toulson L.J. noted the academic controversy surrounding this, he preferred the orthodox view as identified in Smith and Hogan's *Criminal Law*, 12th ed. (2008), 207. While this is probably the right answer, there is usually a deeper purpose in even raising the question. Here it was as a portal for Toulson L.J.'s view of the core of both: causation. Identifying this core has been an elusive quest for criminal lawyers. It may be that no one idea suffices. Certainly there appear to be inconsistencies if the core is causation. First, a secondary party's acts do not need to be a "but for" causation so it is unclear what minimal standard is to be applied. It would also ignore the principle that the principal's free, informed and deliberate act in committing the second crime would make any earlier causal contribution of the accessory irrelevant. It even sits uncomfortably with the rules for basic accessorial liability, where only procuring requires proof of causation (*Attorney-General's Reference (No. 1 of 1975)* [1975] Q.B. 773, 780). Secondly, the case does not offer any normative grounds for causation being relevant. Causation would be strained if the first crime was relied on to supply such grounds. In practice a "joint enterprise" can be inferred when two people happen to be committing the same crime at the same time and even then there is no clear minimum connection between the first and second crime. In short, there is a detailed legal and philosophical debate on the role of causation in secondary participation (see, *e.g.*, Smith [1986] Crim. L.R. 663) but that debate has not matured into a doctrine coherent enough to support Toulson L.J.'s reliance on it.

Second, and much more promising, is the discussion of the "fundamental difference" test. Even where the accessory foresees that his partner will commit another criminal offence, he is not liable where the

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offence is committed in a "fundamentally different" way from that foreseen: *Powell and English* [1999] 1 A.C. 1. While some view this defence as an afterthought to joint enterprise, the better view is the one expressed by counsel for Mendez that it is "essential protection against the law of murder going too far" ([15]). However, the difficulty in giving a clear test of fundamental difference makes it one of the principal grounds for joint enterprise appeals, despite much discussion in appellate decisions. Luckily, Toulson L.J.'s analysis is one of the best yet. At [47] he said (emphasis added):

> *It would not be just* that D should be found guilty of the murder of V by P, if P's act was of a *different kind from, and much more dangerous than*, the sort of acts which D intended or foresaw as part of the joint enterprise.

This explanation is not grounded on technical arguments, but on a clear sense that without the defence joint enterprise is unjust. The Court's terminology is also more expansive than simply using foresight of the existence of a particular type of weapon as evidence of foresight of future acts. The fundamental difference principle should also be available where other circumstances make the acts more dangerous. Foreseeing an assault around the corner from a hospital is one thing, but it may well be "altogether more life-threatening" ([48]) if the assault is the same except that it takes place in the wilderness, 100 miles from help.

It is not just difficult questions of fact about foresight and dangerousness which make the "fundamentally more dangerous" defence so commonly pleaded: if the plea is successful the accessory cannot be liable at all for the death. In *English* the House of Lords ignored earlier case law cited to them, including *Stewart and Schofield* [1995] 1 Cr.App.R 441, which had allowed a conviction for manslaughter when the principal was convicted of murder. The availability of a conviction for a lesser offence than the principal would be fairer, more appropriate and more logical than an acquittal. If an accessory foresees grievous bodily harm caused intentionally and the victim dies, albeit with the involvement of more dangerous means, the accessory is connected to that death sufficiently for a manslaughter conviction. Courts had not previously faced up to *English*'s silent dismissal of earlier cases, and it is to be hoped that Toulson L.J. is wrong that the case closed the door to a conviction for a lesser offence ([21]–[22]), [38]).

Mendez and Thompson is a significant attempt to explain the law. While the focus on causation may not be optimal, there is much of value. Given the supposed panacea of the fundamental difference principle in *English* and the increasing trend of prosecutors to use joint

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enterprise even when basic accessorial liability is more appropriate, more appeals seem likely.

MATTHEW DYSON

ONCE A SEX OFFENDER, ALWAYS A REOFFENDING RISK?

IN an increasing number of jurisdictions, those convicted of certain kinds of sexual offences will find themselves subject to restrictions and disabilities beyond the fines or custodial sentences imposed on them as punishment for their crimes; impositions which continue to apply to them even after they have served their sentences and potentially for the rest of their lives. The array of measures ranges from notification requirements to limitations on access to certain types of employment (*e.g.* no contact with children), goods and services (*e.g.* no or restricted internet access) and leisure activities (*e.g.* no foreign travel). Offenders' names and addresses may be kept on special police registers and revealed to other state agencies and qualifying members of the public in certain circumstances. Some of these measures are imposed separately and individually (for instance, prohibitions on travelling abroad in so-called foreign travel orders), others apply automatically as a concomitant to the sentence to all qualifying offenders. An example of the latter type of provision can be found in section 82 of the Sexual Offences Act 2003, to the effect that anyone sentenced to 30 months' imprisonment or more for a sexual offence must, for an indefinite period, keep the police notified of his place of abode and of any travel abroad. No provision is made to enable affected offenders to seek a review of these notification requirements.

In *R (on the application of F) and Thompson* v. *Secretary of State for the Home Department* [2010] UKSC 17, the Supreme Court held that, in the absence of any possibility of review, this notification regime was a disproportionate interference with a convicted offender's right to private life under Article 8 of the European Convention on Human Rights and declared section 82 incompatible with the Convention on this basis. In the view of the court, while the regime was directed towards the legitimate aim of helping the police in the prevention and detection of crime, it potentially imposed serious burdens on affected offenders. Those burdens were not justifiable in relation to offenders who no longer were a significant risk of reoffending. Since it was logically possible that an affected former sex offender might be able to demonstrate that he no longer posed a risk, to rule out the possibility of review was not only unnecessary in order to secure the effectiveness of the regime but might even undermine it (to the extent that the register

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