What’s Wrong with Collective Punishment?

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EDITORIAL NOTE

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WHAT’S WRONG WITH COLLECTIVE PUNISHMENT?

HOLLY LAWFORD-SMITH

Suppose that a group of individual agents meets plausible conditions for collective agency, and that the collective agent thereby constituted performs a harmful action. The collective may be blameworthy for having performed that action, and it may be appropriate that the collective be punished for having performed it. But this raises a difficult question: how to punish collectives. Some have argued that we can’t, because we cannot punish collectives without punishing at least some of their members. I argue that this is not an objection to collective punishment, so long as members are punished in their role as members, rather than in their role as private individuals. I discuss several issues that come up when we think about punishing groups: the forms punishment can permissibly take; the distribution of collective punishment among members; the relation between this view of collective punishment and the law of joint enterprise.

I. INTRODUCTION

IN 1993 IN ELTHAM, LONDON, a young man named Stephen Lawrence was murdered by a group of five white youths in a racially motivated hate crime. Lawrence and his friend Duwayne Brooks, both young black men, were waiting at a bus stop when the group approached them. Members shouted racial abuse, and one used a bat to assault Lawrence, the other a 10-inch knife to stab him, severing an artery in his neck. The boys ran away laughing, and Lawrence died soon afterwards from his wounds. Brooks escaped. A note left in a telephone box the next day, together with information provided by Brooks, identified the five men. They were Neil and James Acourt (brothers), Gary Dobson, David Norris, and Luke Knight. (The note named the first four; Brooks identified Neil Acourt and Luke Knight; the Daily Mail later printed the names of all five on its front page).

Of course, there’s an open question about whether this group of five youths were a collective agent, in the sense used by people working in social ontology. There are various accounts of collective agency on offer, and they will give different answers in the case of this actual group. Let us first suppose that they weren’t, on any plausible account. In that case, each boy is responsible for his individual actions, and that’s the end of the story: two for assault with a deadly weapon, five for racist hate speech, three for
being accessories to a murder (supposing that the knife attack and the assault with the bat were jointly sufficient in causing Lawrence’s death). Each ought to be punished as would be appropriate for his particular package of actions. In particular, the most severe punishment ought to go to the boy who stabbed Lawrence, the next most severe to the boy who hit him with a bat, and the least most severe, comparatively, to the three others in equal measure.

But now let us suppose that they were a (singular) collective agent. Then we’d have a group, responsible for its actions. This agent would be responsible for the murder of Stephen Lawrence. It is highly likely that there was no excuse available to the collective: the murder was not performed in self-defence, or in a moment of temporary insanity. (Two of the group’s members were later arrested for a racially-motivated attack on an off-duty black police officer, so the murder looks to be very much ‘in character’ for the group). Therefore, the agent is blameworthy; and it looks to be appropriate, as it often is when an agent has performed a wrongful action for which she is blameworthy, that the agent be punished. But for some reason, many people balk at this conclusion. They do not like the idea of collective punishment. In fact, grassroots groups have sprung up to protest it, like JENGbA (Joint Enterprise Not Guilty by Association) in the UK. This is so even though it was joint enterprise law that allowed the eventual conviction of the killers of Stephen Lawrence.

What’s the payoff of arguing that collective punishment is morally permissible? One payoff is that when individual contributions add up to a collective outcome, collective punishment will give a different story than individualist punishment will give. This was demonstrated by the example just given, where the individualist story gave us assault with a deadly weapon, racist hate speech, and accessory to murder, while the collectivist story gave us murder. But another payoff is that the collective punishment story is not just different, but better, in at least some cases. Murder is more wrongful than assault with a deadly weapon, so collective punishment gets us more punishment for wrongs, rather than forcing us to take what we can get on an individualist analysis (Lawrence ended up dead, after all, whether by one hand or by five). And indeed, in some cases individual contributions may not themselves be wrongs, or harms, and so may only be punishable with a story about collective punishment. We can’t always resolve these cases because there’s not always a collective, but where there is, we should be happy to be able to resolve them. In this paper, I will argue that there’s nothing in principle wrong with collective punishment. I’ll begin in §II by setting several objections aside, to clear the way for a

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1 For more on these ‘culpability gap’ or ‘moral remainder’ cases, as they are known, see e.g. Smith 2009; Braham & van Hees 2012; Collins forthcoming.
discussion of when collective punishment is appropriate and provides an advance on the punishing practices we already make use of. In §III I’ll ask which distributions of collective punishment across members of the collective are permissible, and in §IV I’ll wrap up with a discussion of the implications of all of this for the law on collective punishment.

II. EARLY OBJECTIONS & CLARIFICATIONS

‘Collective punishment’ and collective punishment. The first thing to flag is that there are two senses of ‘collective punishment’, and I’m only going to be interested in one. One is pejorative, the other is neutral. I’m interested in the neutral sense. The pejorative sense shows up in the BBC One drama Common, where the character Johnjo drives his friends to a pizza parlour, where unbeknownst to him they ‘sort out’ a problem by stabbing someone. Johnjo ends up being prosecuted for murder as part of the UK law’s joint enterprise provisions. Johnjo’s parents say that he is innocent; joint enterprise law permits ‘collective punishment’ in the sense of punishing one person for what another person has done. We can imagine the parents of the three boys who were accessories to the murder of Stephen Lawrence, on the individualist interpretation, making the same objection. ‘Luke is innocent’, his mother might say, ‘he should not be punished for what David (Norris) and Gary (Dobson) did’. This is also the sense encoded in Article 33 of the Geneva Convention, which states that ‘no persons may be punished for an offence he or she has not personally committed. Collective penalties [...] are prohibited’. Most of us will have an instinctive reaction against this kind of punishment, given that individualism is an important commitment of liberalism. We don’t think that sisters can be punished for what their brothers have done, or that community members can be punished for what one of their number has done, even though these practices do exist in some parts of the world.

Using ‘collective punishment’ pejoratively as a result of having cases like these in mind is perfectly reasonable. But these kinds of cases give collective punishment a bad name. When social ontologists talk about collectives, they mean something special, namely, groups that meet the conditions for counting as a collective agent (throughout the paper, I will have singular collective agents in mind). There are no plausible accounts of collective agency that count brothers and sisters as collective agents (at least, not merely in virtue of their familial relation), or communities as collective agents, or all of the nationals of a particular state as collective agents (which also means the worries about the ‘collective guilt’ of the German people after WWII had by Hannah Arendt (1987) and Karl Jaspers (1961) are beside the point). Groups of people that simply share features, like having brown eyes, or black skin, are not collective
agents. Groups that members do not opt into voluntarily will not be collective agents unless some further conditions—conditions which can be met voluntarily—are met. The Geneva Convention, while seeming to universally prohibit punishing one person for what another person has done, in fact only applies to people who fall into enemy hands during wartime: ‘persons protected by the Convention are those who, [...] find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. [...] Nationals [...] shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are’ (Article 4).

Furthermore, there’s a difference between (i) one person being punished for what another person has done, and each of a group of persons being punished for either (ii) what they have done together, or (iii) what the group that they are members of has done. Neither (ii) nor (iii) is identical to (i). So we can uphold the intuitions encoded in the pejorative sense of ‘collective punishment’ while maintaining that collective punishment, neutrally understood and applied strictly to collective agents in the case of (ii) or (iii), is morally permissible. (Note that so far I have only said that it might be, not that it is).

Groups and their members. Leibniz’s law tells us that if two things are identical, they must have all and only the same properties. Let’s return to the example I opened the paper with, for a moment, supposing that the group of racist white boys were indeed a collective agent. The group has the property of having murdered Stephen Lawrence. But no member has the property of having murdered Stephen Lawrence—at least, not on the supposition that the assaults were jointly necessary, and neither was individually sufficient, for Lawrence’s death. There is at least one property that the group has that each member lacks. So, no member is identical to the group. In fact, there is an even quicker way to this conclusion: the group is one, the members are many. But this puts us back in the same position as we were just a moment ago. Above we were worried about punishing one (individual) for what another (individual) did. Here we are worried that punishing any one member for the murder of Stephen Lawrence would mean punishing one (individual) for what another (collective) did.

But this objection also misses the mark. The claim is not ‘the group murdered Lawrence, therefore each member of the group murdered Lawrence’. The claim is rather ‘the group murdered Lawrence, therefore the members (together, standing in particular relations to one another) murdered Lawrence’. And as I have said already, there is a difference between punishing one for what another has done, and punishing many
for what they together have done. There is simply no analogue at the individual level of collective punishment, because individuals are not composed of agential parts or members such that what it takes to punish them is to punish the agential members or parts. Collective punishment, at least in the sense that I am interested in here, is about the latter. So, it remains an open question whether such punishment is permissible.

**Rationales for Punishment.** There are multiple rationales on offer for punishment, including retributive, restorative, rehabilitative, deterrent, expressive, and symbolic rationales. An easy objection to collective punishment might appear to be that all of these depend on characteristics that humans have, and collective agents lack. For example, suppose that we’re interested in inflicting suffering on a criminal individual, as retribution for the suffering she has caused to a third party, or in order to make her feel guilt and remorse and so restore good relations between her victims and herself. It seems that this wouldn’t cross over to the collective case, because collectives aren’t the kinds of things that suffer. It’s not even clear that collectives are the kinds of things that ‘deserve’ retribution (see also discussion in Wringe 2016, Ch. 1). But this objection is easily set aside. Rationales that depend on phenomenological or specifically emotional features of individuals can be given a cognitive reinterpretation in the case of groups, as Margaret Gilbert establishes in her (2002). And many rationales do not depend on this: one can communicate to a collective that it has done wrong just so long as a collective has the capacity to judge that it has done wrong (one version of the expressive theory); one can deter a collective from acting so long as the collective has the capacity to consider the consequences of its actions; one can rehabilitate a collective so long as the collective has the capacity to change its practices; one can restore relations between a collective and its victims so long as the collective has the capacity to perform certain actions that would fulfil this function. Plausible accounts of collective agency give collectives all of these capacities and more (see e.g. List & Pettit 2011 for one influential account). So there is no objection to collective punishment that comes from the rationale for punishment itself.

**Forms of punishment.** The final thing we need to do before getting into the heart of the discussion is to clarify what is meant by ‘punishment’. I’ll assume that punishment can be self-imposed, but is more typically imposed by others. Social punishments are imposed in an *ad hoc* way by members of the society, while legal punishment is imposed in a principled way by the state against a wrongdoer within its jurisdiction. Keeping these differences in mind, I’ll count all of the following as ways of punishing a collective: dissolution of the collective’s legal status (where it has one); prevention of members meeting one another; restrictions to the activities
of the collective; the imposition of fees and fines; public statements of
disesteem by officials; being required to or choosing to make a public
apology; being required to or choosing to take steps to remedy the fault;
undertaking community service projects; making public expressions of
remorse, e.g. donations to charities. This list is not exhaustive, but should
be indicative. (In case you’re wondering why the list does not include the
paradigmatic criminal punishment, namely jail time, I’m assuming that
groups—as they are not embodied—cannot be punished with jail time).2

I take the most plausible rationale for collective punishment to be
that defended by Bill Wringe in his (2016) book An Expressive Theory of
Punishment. Wringe argues that only an expressive theory of punishment
can overcome the objections against punishment put forward by David
Boonin and Nathan Hanna, namely that it involves the intention to inflict
suffering (see discussion in Wringe 2013; Wringe 2016, Ch. 2). Having
restricted his focus to expressive theories, Wringe argues against what he
calls the ‘communicative’ theory, put forward by Antony Duff, in favour
of what he calls the ‘denunciatory’ theory. He argues that punishment
is an expression of disapprobation—a denunciation—aimed at society at
large. It is about the agent that committed the wrongful act, but it is not
a communication with that agent. When the state punishes a corporation,
then, it is expressing to the nation at large that what the corporation did
was wrong, that it violates norms that are important within the nation. It
would take up more space than I have available here to defend expressive
theories against other theories of punishment (although see also Feinberg
1968), or to go into the details of the disagreement between Duff and
Wringe. I shall simply assume, going forward, that collective punishment
is adequately rationalized by the denunciatory theory. Those who prefer a
different theory are welcome to substitute the required changes.

III. DISTRIBUTING COLLECTIVE PUNISHMENT.3

There are two main kinds of collectives. The first are egalitarian. Their
members participate in the life of the group on a more or less equal
footing. Collectives formed around shared interests, such as playing sport
or music, or reading literature, or dancing, or protesting against perceived
injustice, are generally like this. The second are hierarchical. Their members

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2 The main objection to punishing members of groups with jail time, I think, is that it
punishes the whole person, rather than punishing the person in their role as a member of
the group (see also discussion on p. 6). If there’s a way to work out jail time that does the
latter, such as part-time jail, then in principle we could add it back into the list.

3 The discussion in this section draws in part on Chapter 6 ‘Culpability in Hierarchical
Groups’, of my book Not In Their Name: Are Citizens Culpable for Their States’ Actions?
(Oxford University Press, forthcoming).
participate in the life of the group in very different ways, some with more influence and control than others. Collectives maintained by the state, like government departments, or the military, tend to be like this. Both kinds of group can involve the further complication of involving nested agency, which means that subgroups within the collective are themselves collective agents. This complication tends to show up more within hierarchical groups. Because I’m interested in the question of whether there’s anything wrong with collective punishment, which is to say, whether collective punishment is in principle morally permissible, I’ll focus on the best case. Thus I’ll set aside the complications that arise when collectives are hierarchical, and when there is nested agency, and focus on the simple case of a single-layer (non-nested) egalitarian group. This takes us back to the case I opened the paper with, namely the group of racist white boys who committed a racist hate crime. I’m simply assuming from this point on that they meet some plausible conditions for collective agency. Those who are interested in the collective punishment of hierarchical groups and groups with nested agency should consult my (Lawford-Smith forthcoming, Ch. 6).

Assuming the group of racist white boys (hereafter ‘the gang’) has no excuse for its actions, it will be blameworthy for the murder of Stephen Lawrence. Because murder is a very serious violation of a norm against killing, in particular against wanton racist killing, the state—indeed, society more generally—will have an interest in denouncing the gang’s actions. It can do this by punishing the gang. I said above that the following are ways of punishing a collective: dissolution of the collective’s legal status; prevention of members meeting one another; restrictions to the activities of the collective; the imposition of fees and fines; being the subject of officials’ statements of disesteem, alienation, or boycotting; being required to or choosing to make a public apology; being required to or choosing to take steps to remedy the fault; undertaking community service projects; making public expressions of remorse, e.g. donations to charities.

One thing that will be clear from revisiting this list in the context of thinking about the gang is that the first is inapplicable. There can be groups that meet the conditions for collective agency, and yet are not formally incorporated as legal persons. There need be no real difference between groups that are incorporated and groups that are not, as far as members’ relations to the group go, but not being incorporated means that certain kinds of punishments are off the table. The state could, however, effectively prevent all activities of the gang by issuing trespass notices or restraining orders to make sure that no member can be within the proximity of any other, or restrain the activities of the gang by issuing trespass notices or restraining orders to make sure that no member appears in a particular location or after a particular time. The state could also levy a fine upon
the gang, require the gang to make a public apology, perform community service, or make a donation to a suitable charity (e.g. a charity working against racism).

This raises an immediate question: in what way may these punishments of the group be distributed among the group’s members? Because the groups I am interested in here are roughly egalitarian (at least, non-hierarchical), I take it that the ideal distribution of collective punishment across members is egalitarian. (In the next section, I’ll talk about a problem that arises when it isn’t). An egalitarian distribution is uniquely placed to accommodate the fact that it will very often be arbitrary in such groups which members ended up taking which roles, a fact that a distribution in proportion to causal contribution cannot accommodate. That means, if the state punishes the gang by imposing a fine of $10,000 on it, the collective should distribute this penalty equally across its five members. Each boy should pay $2,000 each. Similarly if the state imposes a punishment of 1,000 hours of community service, each boy should work for 200 hours. But this makes two objections possible. The first is that changes in membership change the punishment in ways that look to be intuitively objectionable. The second is that this distribution of collective punishment passes costs on from the group to members in a way that is objectionable. Specifically, it involves a form of collective punishment in the pejorative sense we started off with, where we punish the one (an individual) for what another (the group) has done. I’ll take these in turn.

Changes in membership. Imagine that the gang has been brought before the court. The jury has found the group guilty of murder, and declared that it must perform 10,000 hours of community service. There are five members in the group, so an egalitarian distribution of this punishment would amount to 2,000 hours per person; about a year of full-time work. At the time of the sentencing, then, it looks like each of Acourt, Acourt, Norris, Dobson, and Knight all get a distributed collective punishment of 2,000 hours community service. But now imagine that Knight leaves the gang, or a new person joins it. When Knight leaves, should his 2,000 hours be redistributed back among the remaining four, so that each must do 2,500 hours instead? When the new person joins, should the 10,000 hours be reallocated so that each get some 1667 hours instead? Neither of these seem intuitively correct. Knight was part of the collective’s action of murdering, so it looks appropriate that he take a share of the punishment, and not be able to simply leave the group and escape it. The new person wasn’t part of the collective’s action of murdering, so it doesn’t look appropriate that he take a share of the punishment. (For discussion of a structurally similar problem, directed at moral responsibility for fractional contributions to collective acts, see Beerbohm 2102, pp. 70-72).
This consideration helps to bring out an important difference between two different kinds of groups. Some groups have their particular members necessarily, others have their particular members contingently. For example, ‘Brangelina’ is the name given to the celebrity couple Brad Pitt and Angeline Jolie. Brangelina has its members necessarily: if Jolie were to get together with someone else there would be no more Brangelina. On the contrary, if Vodafone were to have some of its employees quit, and others take their places, it would still be Vodafone. Vodafone has the particular members it has at any one time only contingently. All incorporated groups have their members contingently (it is possible for them to persist as legal persons through changes in membership), but some non-incorporated groups do too, like bands, or sports teams, or hobby groups, or the political groups at the heart of social movements.

In thinking about the gang, the question is whether they’re a group that has its members necessarily, or only contingently. If the gang has its members necessarily, attempted changes in membership will have no effect on the permissible distribution of punishment from the group to its members (prospective members cannot join *that* group, they can only cause a new group to be formed, which overlaps in part with the old group). Knight cannot quit and thereby escape a share of the group’s punishment, any more than someone new can join the group and inherit a share. But if the gang had its members only contingently, he can. To bring out the sense in which the gang could have its members only contingently, imagine that it had taken a name. Suppose Acourt, Acourt, Norris, Dobson, and Knight called themselves ‘Eltham Whites’, and even had gang patches which they wore around proudly. The name, and the patches, would suggest that members (and perhaps outsiders too) had a conception of the group as a singular collective agent. Would these small changes suffice to make it plausible that Knight could quit and thereby escape punishment, and someone new join and thereby inherit it?

I think they would. Two considerations help to make this more palatable. The first is that this conclusion seems to be exactly right for groups that are incorporated as legal persons, like companies and corporations. If Vodafone commits corporate manslaughter and is handed a sentence of 10,000 hours of community service, it’s still *Vodafone* that is performing that service so long as it sends its employees out to do it (i.e. it’s paying for their time), regardless of when those employees joined the company. Some who were employees at the time of the corporate manslaughter might have left by the time the community service gets underway, and some who were not employees until after the time of the sentencing might have joined. But as employees they are simply a means for Vodafone to carry out the penalty it has been given. So too with the ‘Eltham Whites’,
which plausibly persists through changes in membership. The second is that collective punishment is not the only option available to the state. Individuals might also be responsible, as individuals, for joining, remaining in, and performing certain actions as a part of, collectives with morally repugnant ends. If Knight leaves the gang under these new suppositions, he won’t get a distributed share of the collective punishment, but he might still be punished as an individual for joining the gang in the first place, or for remaining in it, or for shouting racist abuse at Lawrence as part of the gang’s assault (see also Pettit 2007, p. 192).

Costs to members. One might object that even when a group has its members necessarily, and so in our running example ‘the gang’ supervenes necessarily on {Acourt, Acourt, Norris, Dobson, and Knight} each standing in a particular relation to the others, there’s still a difference between imposing a ‘total’ punishment of 10,000 hours community service on the group and imposing a ‘distributed’ punishment on each member of 2,000 hours community service. The 10,000 punishes the group, but the 2,000 goes a step too far and punishes a member for something a group did. This idea that collective punishment necessitates passing on costs to members has been a reason for some theorists resisting collective punishment altogether (see in particular Smith 2009). Avia Pasternak (2011) has argued that punishments often involve negative side effects for innocent parties, and this does not mean that the punishment cannot be justified. For example, when a father is sent to prison, this has negative side effects for his partner and children. But we do not think of these as punishments of the partner and child for the crime committed by the father. Rather, we think of them as permissible side effects of the punishing of the father (Pasternak 2011).

We can think about the distribution of collective punishment in the same way. What it takes to have the gang perform 10,000 hours of community service is (on an egalitarian distribution) to have each member perform 2,000 hours of community service. This is not a punishment of each member for what the group has done, but rather a permissible side effect of punishing the group. It most cases, punishing members together as the group is just what it takes to punish the group. Groups are made up of their members. As I said already, there is no useful analogue of this situation at the individual level, because the parts, members, or constituents of individuals are not agents in their own right.

One might still be inclined to worry about the fact that an individual is being forced to perform 2,000 hours of community service. Isn’t this going beyond a mere side effect and directly punishing the individual? No, for a few reasons. The first is that it’s not punishing the individual per se.
the case of incorporated groups and groups with contingent membership, she could quit, and someone else would take up that performance. She’s not being made to perform community service in her own time, outside of work. She’s being made to use her work hours to enable the collective of which she is a part to make penance for a wrong that it has done. In the case of groups with necessary membership, this is harder to see, because there’s a less obvious demarcation between what is the individual’s ‘group time’ and what is her ‘own time’. But that only means the same distinction is harder to make clearly, not that it cannot be made. Second, we don’t think it’s objectionable for individuals who play multiple roles to feel the impacts of one in another. For example, suppose a woman is a wife, a mother, and a doctor. She cheats on her partner, who becomes angry and reacts in a way that causes the woman to lose sleep. This has impacts on her in her role as a doctor, where she underperforms. We could say that her behaviour in the ‘wife role’ has led to punishment (in the form of a negative emotional reaction from her partner) that also impacts upon her in the ‘doctor role’. But we wouldn’t think to complain that the ‘doctor role’ is suffering from collective punishment in the pejorative sense; that the doctor is being punished for something the wife did. They are a unified bundle, such that the impacts of one’s behaviour will be felt by the others. So too for the collective agent. This is a reason to be cautious about the collectives that we join, and to be vigilant about what they are doing while we’re in them. It’s not a reason to deny that collectives can be punished for what they do.

There are further avenues available in light of both of these challenges—changes in membership, and costs to members. One is to distinguish groups with a morally repugnant shared purpose from groups with a morally permissible shared purpose and deny that there should ever be treatment of the former as a collective. Consider the gang we’ve been talking about compared against a group of five women who get together to dance Lindy Hop, who on one drunk evening also end up perpetrating a stabbing. The shared purpose of the former group is racist hate crime. The shared purpose of the second is swing dancing. It is morally repugnant to commit racist hate crime; it is not morally repugnant to dance (unless you cannot keep the beat). Because the shared purpose of the gang was racist hate crime, we simply deny there’s a collective, even if it would otherwise have the relevant structure. That’s a way to insist upon an individualist treatment of certain sorts of collective outcomes. Even if it took the five members of the gang acting together to murder Stephen Lawrence, it would still be the case that each is treated according to his contributions. Because the shared purpose of the second group was dancing, it’s open to us to treat them as a collective. When one of their members ends up stabbing someone, while acting as a member of the group, it might—depending on what happened
and how—be appropriate to hold the group responsible as a group.

The main worry with taking this avenue of response is that even though it looks to solve the relevant problems, it is objectionably stipulative. No conditions for collective agency include actually acting morally. We should use collective punishment to punish collectives, not to punish some collectives but not others depending on how we feel about the kind of collective they are.

Another avenue we can take is to agree that groups with any kind of purpose can be given treatment as a collective, but say that actions aimed at morally repugnant ends can never accrue to the group. In my (forthcoming) I argue that when employees of corporations ‘go rogue’, abusing their positions in the pursuit of their own ends, the responsibility for their actions lies with them, rather than the group they’re members of. What I’m proposing here would go one step further and claim that certain actions count as ‘going rogue’ whether or not the individual was acting on her own ends or the group’s. So whoever carried the bat and whoever carried the knife in the Lawrence murder would have individual responsibility (and therefore individual blame and punishment) for their actions. These actions could not accrue to the collective.

It seems to me, however, that there’s no good motivation for taking this further step. We shouldn’t want to rule out that groups can have corrupt institutional cultures or ‘characters’ such that members are pursuing the group’s ends when they perform criminal or otherwise immoral actions. Indeed, that is part of why it’s so important to have a provision for collective punishment. There might well be cases where individual members’ contributing actions were themselves wrong and added up to further wrong at the level of the group, and where punishment of the group distributed across members is appropriate. On the assumptions I have made about the Lawrence murder, that is exactly one such case. In the case explored in Common, on the other hand, this would not be justified, because Johnjo was not a member of the collective agent (he was only recruited to drive the boys when his older brother didn’t pick up his phone; he wasn’t party to any dispute with the boy who was assaulted; he wasn’t aware that one of the others was carrying a knife or was likely to stab someone).

IV. COLLECTIVE PUNISHMENT VIA ‘JOINT ENTERPRISE’ LAW

What is discussed in the popular media under the title of ‘joint enterprise’ covers three different types of cases. In the first, several people intend to commit the same crime at the same time, and perform actions contributing
to that crime. The law in the UK tends to punish each of these people for the whole crime. In the second, a ‘principal’ commits a crime, and others assist or encourage. The latter may be found guilty of the same crime, if they intended to assist or encourage the crime, and either knew or intended that the crime might take place. (So merely being present at the scene of a crime is insufficient to make someone an accessory to the crime). In the third, several people agree to commit one crime, and during the commission of the offence one of the people commits another offence. For example, a group agree to carry out a burglary, and one member kills someone during the burglary. Those in the group might also be found guilty of the killing so long as they knew that a murder was possible, e.g. knew that a member of the group was carrying a weapon or had a personality that meant a murder was on the cards (Virgo 2014).  

Graham Virgo (2014) argues that punishing all parties as murderers in the first type of case is uncontroversial. The second and third types of cases are more controversial. In the second, the law permits punishing an accessory to a crime to the same degree as the principal. In the third, the law permits what is known as ‘parasitic accessorial liability’, where someone who only intended to commit one crime can be punished as an accessory to another crime to the same degree as the principal of that crime. The rationale for the latter two is that people should not go along with others’ actions when they foresee the possibility of a very serious crime being done. Virgo argues that punishing the accessories to the same degree as the principals sends the wrong message: there are differences in the degree of responsibility of those involved in joint crimes, and these should be recognized in the law. Furthermore, treating everyone involved in this blanket way might make it more likely that people who are merely present at the scene of a crime be punished. And finally, it is difficult to establish whether there is knowledge, intention, or foresight over the crime in the second and third kind of case. Indeed, this is what the plot of Jimmy McGovern’s film Common (2014) depended upon. Johnjo drove the group, but he wasn’t aware they were going to the pizza parlour to ‘sort someone out’, or that one of the group were carrying a knife.

Are these joint enterprise provisions individualist, or collectivist? They might appear to be collectivist, because the group has done wrong and the members are being punished. We could say, the group in Common murdered someone, and the members were held accountable. There was

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4 A recent Supreme Court decision declared that the law had been incorrectly interpreted for 30 years: it had been understood that those associated with the crime in joint enterprise knew, intended, or foresaw the crime being done. The correct interpretation is that foresight is evidence of knowledge or intention, not a sufficient feature of liability in its own right. See discussion in (Bowcott 2016).
just a mistake about who the members were; the miscarriage of justice portrayed in the film depended on Johnjo being counted as a member, not the fact that the group were held accountable for what they did. But if we think more carefully about joint enterprise punishment, it looks individualist. Each person is assessed for her individual knowledge, intention, foresight, and contribution, from active participation in, through to assisting and encouraging of, a crime. She can be punished with jail time, the paradigmatic individual punishment which I’ve said is off the table for collectives. She can be punished to the same extent as (but not more than) the principal wrongdoer. This all strongly suggests that joint enterprise punishment is individualist. It’s not a punishment of a collective for a culpable collective action, but a punishment of individual members of collectives for participating in causing a collective-level outcome.

The UK law does have provision for explicitly collective punishment, under the heading of ‘Corporate Manslaughter’. But this ‘can be committed only by organizations, and not by individuals’ (Sentencing Guidelines Council 2010, p. 2). The wrong done by the group must involve ‘a breach of a duty of care, under the law of negligence’, stemming from the activities of senior management (ibid). This means that two groups might be almost identical in their structure and function, and yet one be registered as a legal person and one not, and this make all the difference to how they can be punished under British law. Because the law doesn’t count informal groups as the kind of thing that can be punished in their own right, it may be interpreted as compensating for culpability gaps by ‘maxing out’ on individual punishment. That is to say, instead of holding one person to be liable for a murder, and others to be liable for lesser crimes, it simply makes the judgement that it is so bad to be jointly involved in murdering, that it deserves the maximum penalty for the principal’s crime. If the law had a better way of resolving the culpability gap, it wouldn’t need to max out on individual punishments. It could punish the group for its collective wrongdoing.
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