Theories on Negligent Co-perpetrators: An overview II

Lou Jie

Abstract

On the issue of the existence of negligence co-perpetrators, positive theories and negative theories have been formed. The development of the theories on negligent co-perpetrators has generally gone through four phases, during which the positive theory and the negative theory oppose each other all the time and prevail over each other alternately. This article following on from the previous one, discusses the positive theories on co-perpetrators, to explore the evolution and present situation of theoretical studies of negligent co-perpetrators. Based on the old theory of negligence, the doctrine of jointness in crime denies the existence of negligent co-perpetrators on the ground that negligent offenders lack common consciousness subjectively. In contrast, with the new theory of negligent offenses, the essence of a negligent offense is regarded as a violation of a duty of care, and it becomes possible to acknowledge negligent co-perpetrators on the basis of the doctrine of violation of a duty of care. However, the discussion on negligent co-perpetrators is still based on the structure of intentional co-perpetrators. Doctrines arguing for the existence of jointness in subjective unlawfulness among negligent offenders through “mental causation” and has failed to explore the establishment elements of negligent co-perpetrators based on the structure of a negligent offense itself.

Contents

I. Introduction

In Japan's criminal law academia, the controversies on negligent co-perpetrators started from the opposing model of "the doctrine of jointness in crime = the negative theory and the doctrine of jointness in conduct = the positive theory",

but in the 1970s, such opposition has gradually disappeared.(1) The doctrine of jointness in partial crime shifted to advocate the positive theory of negligent co-perpetrators. Such change is partly because of the emergence of practical jurisprudence recognizing negligent co-perpetration; and partly by the advent of the new negligence theory, which has changed the past practice of not discussing the criminally proscribed conduct in the cases of negligent co-perpetration. Under the framework of the old negligence theory, the negligence was only considered as a form of guilt, and from the standpoint of the doctrine of jointness in the crime, the co-perpetrators are equivalent to intentional co-perpetrators, which require a common consciousness between/among offenders to commit a specific crime. With the advent of the new negligence theory, the idea that negligent conduct is "a criminally proscribed conduct of violating the objective duty of care" has been acknowledged in the cases of negligent offenses. Jointness of crime or joint commission of a crime can also be interpreted as "jointly committing a negligent conduct". Therefore, the positive theory of negligent co-perpetration becomes the majority view in academia.

II. The Positive Theory based on the Doctrine of Jointness in conduct

Unlike the doctrine of jointness in crime and the Doctrine of the subject with common consciousness, the doctrine of jointness in conduct (also known as the doctrine of jointness in fact) holds that co-perpetration refers to that offenders jointly commit natural conduct rather than a specific crime. It is sufficient to establish a co-perpetration when offenders have the consciousness to jointly commit natural conduct. There is no need for offenders to have a common consciousness to jointly achieve a certain consequence. That is to say, offenders do not have to have a common consciousness, and in addition to intentional offenders, negligent offenders

（1） 北川陽祐「過失犯の共同正犯について」法学研究 13 号（2011 年）72-73 頁。

can constitute co-perpetrators. The doctrine of jointness in conduct, based on the idea of "plural persons committing plural crimes", holds that offenders meet the feature of co-offenders by aiming at realizing respective crimes, offenders enlarge the causal influence of his/her own conduct by utilizing another person's conduct.

Based on such feature, the doctrine of jointness in conduct further points out that if the essence of a joint crime is to utilize other's conduct to enlarge the influence of one's own conduct, co-perpetrators can be established when the physical causality is satisfied. According to the doctrine of jointness in conduct, the communication of consciousness (the jointness of criminal consciousness) is not the essence of co-perpetration.(2) Makino Eiichi and Miyamoto Hidenaga represent the doctrine of jointness in conduct. From the perspective of subjectivist criminal law, Makino Eiichi holds that

> the crime is the manifestation of "evilness" of the offender; then, a joint crime can be established if offenders manifest their respective evilness in the joint conduct. A joint crime is that plural persons commit their respective crimes. Because respective conduct directs toward the same goal, which is unnecessarily established through a common plan, and relates by correspondence and related, all offenders can be regarded as co-offenders.(3)

If a crime is understood as the manifestation of evilness, a joint crime cannot

---

（2） 内海朋子『過失共同正犯について』（成分堂、2013 年）73 頁。山中敬一「共同正犯の諸問題」芝原邦爾･堀内捷三･町野朔･西田典之編『刑法理論の現代的展開［総論Ⅱ］』（日本評論社、1990 年）197 頁。西田典之『共犯理論の展開』（成分堂、2010 年）6 頁。趙欣伯『刑法過失論』（清水書店、1926 年）238 頁。中山研一『刑法総論』（成分堂、1982）463 頁。

be considered the joint commission of a crime by plural persons, but rather it is proper to understand a joint crime as that a criminal consequence occurs because of the joint conduct of plural persons. Based on this consideration, a joint fact is predetermined first, and then the fact of whether or not establishing a crime will be discussed on this basis. Moreover, such joint fact is not equivalent to the legal constitution of the criminal facts, i.e., jointness can be established based on several criminal facts (plural persons establish plural crimes) or based on some part of one criminal fact (plural persons commit a single crime)(4) . Therefore, regarding the subjective element, in order to establish co-perpetrators, it is sufficient for offenders to have common consciousness of committing a pre-*Tatbestand* conduct, and a common consciousness of realizing the consequence (jointness in consciousness) is not necessary. In this way, the theoretical foundation may be found in the doctrine of jointness in conduct to recognize negligent co-perpetrators' establishment.

The problem with the subjectivist doctrine of jointness in conduct is that, in this doctrine, co-perpetrators are established according to the jointness in natural

---

（3） The idea of subjectivist criminal law focuses on punishing the anti-social character of an offender, arguing that the offender's dangerousness or danger to society is the main reason for punishment and the conduct is merely the external manifestation of inner malice. Thus, the subjectivism agrees with the doctrine of jointness in conduct in terms of the theoretical proposition that in a joint crime each offender respectively manifests their own evilness and their danger to society, and only because of the factual correspondence of the conduct, they are considered as joint conduct. Further, subjectivism's another difference from objectivism is that, according to objectivism, in order to regulate a certain social phenomenon by criminal law, a specific crime is priorly established in the law and then such crime is shared through the concept of jointness. Subjectivism, on the other hand, presupposes the joint fact, that is, it infers whether a certain social phenomenon establishes the jointness according to daily experience, and then considers its legal effect. 牧野英一『刑法研究［第一巻］』（有斐閣、1919 年）38 頁。

（4） 牧野英一『日本刑法［改訂版］』（有斐閣、1932 年）361 頁。

conduct, despite providing the theoretical foundation for the negligent co-perpetration, such non-criminal jointness, i.e., pre-*Tatbestand* joint consciousness, cannot serve as a basis for the culpability of co-perpetrators.(5) After the Second World War, with the decline of the subjectivist criminal law doctrine, the objectivist doctrine on co-perpetrators became dominant. Accordingly, scholars began to advocate the doctrine of jointness in conduct from the objectivist perspective. The objectivist doctrine of jointness in conduct holds no contradiction between the doctrine of jointness in conduct and the doctrine of *Tatbestand*. To establish co-perpetrators, all the offenders must perform criminally proscribed conduct which satisfies the *Tatbestand*. The joint conduct of offenders refers to illegal conduct satisfying the *Tatbestand* rather than a pre-*Tatbestand* one.

II. Positive Theories based on the Doctrine of Jointness in Crime

(1) The Positive Theory based on the Doctrine of Purposeful Act

The dichotomy of the doctrine of jointness in crime (=the negative theory) and the doctrine of jointness in conduct (=the positive theory) is due to their different understanding of the subjective elements of co-perpetrators. However, influenced by Hans Welzel, a German legal philosopher, Japanese scholar Kimura Kameji's position on the crime was shifted from subjectivism to objectivism and proposed the positive theory on negligent co-perpetrators based on the doctrine of the purposeful act. Due to Kimura's theory, the confrontation between the doctrine of jointness in crime and the doctrine of jointness in conduct began to ease.(6) The doctrine of purposeful act starts with the analysis of the construction of the conduct and considers an offender's conduct as a purposeful activity.

（5） 曽根威彦『刑法の重要問題［総論］』（成文堂、1996 年）131 頁。

（6） 内海朋子『過失共同正犯について』（成分堂、2013 年）84 頁。西原春夫「刑法学会の 50 年と刑法理論の発展」『刑法雑誌』39 巻 2 号（2000 年）15 頁。

Previously, the intent was regarded as a condition for recognizing the culpability, i.e., intent refers to the intent to the facts and the knowledge of the facts. However, the important insight into the purposeful act's doctrine is that the intent is an element of conduct, understanding the intent as a subjective element of unlawfulness in the *Tatbestand*. Based on this, it criticizes the dominant doctrine of conduct (the doctrine of conduct based on causation) that the doctrine of conduct based on causation only discusses the causation, ignoring the conduct's partial structure. Kimura holds that the conduct should be decomposed into two aspects: (1) objective causation; (2) mental element of culpability in the subjective term.(7) In other words, factual conduct is a mixture of subjective + objective. The essence of an offender's conduct is the purposeful activity that utilizes the causation to achieve a certain consequence (purpose).(8) In the case of negligent offense, Kimura argues that even though a negligent offender is not like an intentional offender that requires knowledge of the critical consequence of the *Tatbestand*, negligent conduct is not a mere incurring conduct that incurs the causation without any consciousness, but the conduct has an element of purpose, except that its purpose is not essential in terms of *Tatbestand*, i.e., a purpose of inattention. A negligent offender incurs the consequence because he/she commits the conduct of inattentive purpose. Such a purposeful act is conduct with consciousness, and with the jointness of the conduct with

---

（7） According to the prevailing view, the conduct refers to a physical movement based on the consciousness and the content of consciousness is an issue of culpability, thus the content of consciousness is excluded from the concept of conduct. In other words, regardless of the content of an offender's consciousness, only that the offender is motivated by some kind, and whether or not the offender has a knowledge of the consequence is not considered, the core issue of the doctrine of conduct is the causation between a physical movement and a consequence. 木村亀二『刑法［総論］』（青林書院新社、1973 年）86-88 頁。

（8） 木村亀二『刑法［総論］』（青林書院新社、1973 年）89-94 頁。

consciousness, it is possible to establish co-perpetration.(9)

Kimura disagrees with the German view that "the conduct-dominated standard is only applicable to intentional conduct, and in the case where the negligent conduct of a plurality of offenders incur a certain consequence, as long as the negligent conduct causally contributes to the consequence, such negligent offender is considered a perpetrator"(10) , and Kimura argues that

> if the conduct is simply understood as factual domination of conduct, it is unable to distinguish a perpetrator from an accomplice in the occasion of attempted crimes which only has the possibility of dominating a certain consequence.(11) Even though the conduct-domination concept is adopted, a distinction should be made between factual domination and possible domination. Furthermore, negligent conduct cannot be simply appraised as causal conduct.(12) Although the offender does not get the knowledge of a certain consequence of the *Tatbestand* due to negligence, if the offenders exercise a necessary duty of care, he /she possibly gets the knowledge of such consequence, and according to the possible knowledge, the consequence is possibly avoided; thus, the existence of "conduct-dominated possibility" must be acknowledged.(13)

（9） 木村亀二『刑法総論［阿部純二増補版］』（有斐閣、1978 年）382 頁。

(10) 内海朋子『過失共同正犯について』（成分堂、2013 年）86 頁。

(11) 木村亀二「過失の共同正犯」平野龍一･福平田･大塚仁編『判例演習［刑法総論］』（有斐閣、1960 年）178 頁。

(12) 木村亀二「過失の共同正犯」平野龍一･福平田･大塚仁編『判例演習［刑法総論］』（有斐閣、1960 年）178 頁。

According to Kimura's theory, the criminally proscribed conduct in a negligence offense is the offender's negligent purposeful act that incurs the consequence of the *Tatbestand* by lacking the necessary care when he/she is performing natural conduct. The difference between a perpetrator and an accomplice is that the offender performing criminally proscribed conduct based on his or her own resolution is the perpetrator. In contrast, the one performing criminally proscribed conduct according to the other's decision is an accomplice. Regarding the standard for distinguishing a perpetrator from an accomplice in negligence offense, Kimura criticizes the idea that "the offender's resolution in negligence conduct is not important in criminal law" and argues that a negligent purposeful act (negligent conduct) is of significance to all the constitutive elements of offenses.(14)

(2) Discussion on the Doctrine of Purposeful Act

According to Kimura's view, the consciousness of criminally proscribed conduct should be strictly distinguished from intent. Even from the doctrine of jointness in crime, since the intent of the subjective term is not required, if only there is a consciousness of joint commission, co-perpetration is established. The consciousness of joint commission refers to a consciousness to jointly commit the same criminally proscribed conduct that meets the *Tatbestand*. If participants intend to jointly commit criminally proscribed conduct of negligence with other people, it is certainly possible for them to establish co-perpetrators. Also, Article 60 of the Japanese Criminal Code (co-perpetrators) stipulates that if two or more persons

---

（13） 木村亀二「正犯と共犯」日本刑法学編『刑法講座［第 4 巻］未遂・共犯・罪数』（有斐閣、1963 年）75-81 頁。橋本正博『［行為支配論］と正犯理論』（有斐閣、2000 年）195 頁。内海朋子『過失共同正犯について』（成分堂、2013 年）86-88 頁。

（14） 木村亀二「正犯と共犯」日本刑法学編『刑法講座［第 4 巻］未遂・共犯・罪数』（有斐閣、1963 年）82 頁。

jointly commit a crime, both (all) of them are perpetrators. Although the consciousness of joint commission is required, it does not specify that the consciousness of joint commission must be a common consciousness from the perspective of literal interpretation. Thus, in the situation that offenders possess "the consciousness to jointly commit a criminally-proscribed conduct of negligence", it can be assumed that there is a consciousness of joint commission.

The positive theory on the negligent co-perpetrators based on the doctrine of purposeful act tries to demonstrate that there is a communication of consciousness between negligent offenders. However, firstly, the doctrine of the purposeful act is that it is always incapable of explaining the inaction offense of negligence. Moreover, there is also doubt concerning the communication of consciousness between negligent offenders. For example, Dando Shigemitsu cited an example that,

> by misperceiving a person as a beast, Party A and Party B jointly shot the "beast" based on the communication of consciousness, and if such non-criminal communication of consciousness is considered sufficient, this situation may be regarded as co-perpetration. However, such non-criminal communication of consciousness is insufficient to serve as a consciousness of jointly committing a crime. A negligent act straddles the realm of consciousness and unconsciousness, and the conscious part is by no means the essence of a negligent act. Expounding the co-perpetrators of a negligence offense by stressing the communication of consciousness in the conscious part is deviating from the essence of a negligence offense.[(15)]

（15） 団藤重光『刑法綱要［総論］』（創文社、1972 年）299 頁。

III. The Doctrine of Common Violation of Common Duty of Care

In the 1960s, the positive theory on negligent co-perpetrators based on the doctrine of the purposeful act came on the stage. In the 1970s, scholars began to interpret co-perpetrators of a negligence offense in the form of a joint commission of a negligence offense. Then, the common duty of care as the condition for establishing negligent co-perpetrators was proposed, and the doctrine of violation of the common duty of care was gradually developed into a powerful doctrine.(16)

(1) Uchida Fumiaki's Opinion

Uchida Fumiaki tries to explore the theory concerning the consciousness of joint commission in a negligence offense based on the doctrine of the purposeful act. He holds that neither the conscious nor the unconscious part of the negligent conduct enjoys the significance in criminal law, but the two's conjunction.(17) In the case of negligent conduct, the joint conduct with consciousness, which is associated with a pre-legal fact carries the juncture of negligent jointness. Thus, the conduct in the legal fact and the pre-legal fact is regarded as integral conduct, and satisfies the *Tatbestand* and unlawfulness element. Such conduct leads to the occurrence of a consequence, so that joint negligence can be confirmed.(18) The negligent co-perpetrators are those who

---

（16）　内海朋子『過失共同正犯について』（成分堂、2013 年）91 頁。

（17）　内田文昭「過失共同正犯の成否」北海道大學法學會論集 8 巻 3・4 号（1958 年）52-53 頁。

（18）　内田文昭「過失共同正犯の成否」北海道大學法學會論集 8 巻 3・4 号（1958 年）52-53 頁。In addition, Uchida wrote in his book named『刑法における過失共働の理論』that as for the consciousness of common commission, "the jointness in consciousness and consciousness related to a pre-legal fact" is necessary, and negligent offenders can have a common sense of inattentiveness and purposeful conduct. Thus it is possible to constitute the important jointness of conduct in the sense of criminal law in the form of negligent co-perpetrators. 内田文昭『刑法における過失共働の理論』（有斐閣、1973 年）260 頁以下。

jointly perform the conduct that is sufficiently dangerous to meet the *Tatbestand* but fails to pay no attention to their dangerous conduct. Although there exists a danger that can be avoided by taking care of partners' work, co-offenders fail to pay attention to each other, and the predicted danger (consequence) is realized.(19) To prevent the situation mentioned above, each offender shall pay attention to his/her own share and the share of other joint offenders' when performing joint dangerous conduct to ensure the safe and factual completion of joint performance. If such prudence is not performed and a consequence is realized, resulting in casualty, all offenders can be evaluated as "jointly commit the dangerous and negligent conduct".(20)

Due to the appearance of "the doctrine of common violation of the common duty of care", a part of scholars who denied negligent co-perpetrators based on the doctrine of jointness in crime then turned to the position of the positive theory.(21) However, some scholars have different opinions regarding the elements under which the common duty of care can be recognized. Recently, based on the positive theory on negligent co-perpetrators, quite a few scholars maintain the structure of "common violation of the common duty of care", and they began to make efforts to promote the topic of judgment criteria of the establishment of a common duty of care.

(2) Fujiki Hideo's Opinion

Regarding the judgment criteria for determining a common duty of care, Fujiki holds that such duty is not a mere common duty to prevent a danger that arises in the course of jointly conducting an abstract and general dangerous operation, but the specific and certain consequence-avoiding measures that must be taken by the

---

（19） 内田文昭「最近の過失共同正犯論について」研修 542 号（1993 年）92 頁。

（20） 内田文昭「最近の過失共同正犯論について」研修 542 号（1993 年）92 頁。

（21） 内海朋子『過失共同正犯について』（成分堂、2013 年）93 頁。

offenders based on their relationship of reciprocal utilization and complementation. Specifically, offenders who jointly perform dangerous operations are obligated not only to take specific consequence-preventing measures to prevent their own work from causing dangerous consequences, but also to advise, monitor, and assist other co-operators to prevent their work from leading to harmful consequences.(22) Co-operators become integrated with the relationship of mutual utilization and complementation in the work of carrying out specific countermeasures to prevent accidents. If the integrated subject performs negligently, the co-operators can establish co-perpetratorship of a negligence offense.(23)

(3) Otsuka Hitoshi's Opinion

Regarding circumstances under which a common duty of care may be imposed on the offenders, Otsuka Hitoshi holds that if two or more than two persons engage in joint conduct that is likely to produce a criminal consequence and contains high-degree danger, a common duty of care is imposed upon each of the co-offenders. If each offender violates the duty described above and causing a certain consequence occurs, their negligence satisfies the *Tatbestand* of a negligent co-offense.(24) Therefore, Otsuka Hitoshi aggress with Uchida Fumiaki's view that the co-offenders who are engaged in the work that involves a high-degree danger, the co-offenders undertake a common duty of care. Besides, Otsuka Hitoshi interprets the content of a common duty of care, that

each offender shall not only observe the duty of care himself/herself to prevent

---

（22）　藤木英雄『新版 刑法演習講座』（立花書房、1970 年）227 頁。

（23）　藤木英雄『新版 刑法演習講座』（立花書房、1970 年）294 頁。

（24）　福田平・大塚仁『刑法総論Ⅰ』（有斐閣、1979 年）380 頁。大塚仁『注解刑法［増補第 2 版］』（青林書院、1977 年）402 頁。

a certain consequence, but also take the duty of promoting other offenders to obey rules. Based on this common duty of care, the liability can be attributed to all the offenders if such duty of care is violated. Each offender is liable for the negligence not only for his/her own violation of the duty of care, but also for other offenders' breach of duty of care.(25)

According to Otsuka Hitoshi, "high-degree danger" is a prerequisite of the establishment of a common violation of the common duty of care. It means that the mere existence of common consciousness and common conduct between/among the offenders is insufficient to establish a negligent co-perpetration. For example, in a construction site, a plurality of construction workers tossed a log from a height. Before pursuing their joint liability, the facts such as the diameter and weight of the log, the height of the tossing point, the traffic situation under the tossing point (other people's possibility of approaching the tossing point), et cetera, and various circumstances related to the danger of the tossing conduct must be considered.

Another characteristic of Otsuka Hitoshi's opinion is that he proposes that, as an element of establishing a common duty of care, co-offenders must enjoy legally equal status. The common duty of care is not formed, where the co-offenders cannot be evaluated as legally equal, such as the relationship between an on-site supervisor and a builder at the construction site, or the relationship between a train driver and the attendant.(26) In other words, according to the judgment standard of a common duty of care, co-offenders are required to be legally equal and to carry out the dangerous conduct satisfying the *Tatbestand*. Therefore, when co-offenders are not legally equal,

---

（25） 福田平・大塚仁『刑法総論Ⅰ』（有斐閣、1979 年）380 頁。大塚仁『注解刑法［増補第 2 版］』（青林書院、1977 年）402 頁。

（26） 福田平・大塚仁『刑法総論Ⅰ』（有斐閣、1979 年）380 頁。

but in a superior-subordinate relationship, the superior has the duty of supervision over a subordinate, then it cannot establish a common duty of care. For instance, there is no common duty of care between a construction site supervisor and a builder. The supervisor bears a duty of supervising the builder, while the builder only has a direct duty of avoiding a certain consequence, and they cannot establish negligent co-perpetrators. In this regard, some scholars have put forward a different viewpoint, arguing that what is important is not the equality of status, but the commonness of the content of the duty. It cannot be denied that persons with different statuses may have the same content of duty. Regardless of their statuses, negligent co-perpetrators' establishment is affirmed if a plurality of persons shares the same content of duty.[(27)]

(4) Otsuka Hiroshi's Opinion

Otsuka Hiroshi argues that the elements for establishing a negligent co-perpetration should be a unified superordinate concept that covers all punishable conduct of both intentional and negligent. He advocates "the common violation of a common duty to avoid a certain consequence" as the element of establishing negligent co-perpetrators. In his opinion, the criminally proscribed conduct of a sole negligent perpetrator refers to the violation of the consequence-avoidance duty; thus, the joint commission of negligent co-perpetration is a common violation of the consequence-avoidance duty. Meeting the jointness of the violation of the consequence avoidance duty is based on co-offenders' common violation of common duty.[(28)]

（27）　松宮孝明「『過失犯の共同正犯』の理論的基礎について : 大塚裕史教授の見解に寄せて」立命館法学 339・340 号（2011 年）513 頁。

（28）　大塚裕史「過失犯の共同正犯の成立範囲―明石花火大会歩道橋副署長事件を契機として―」神戸法学雑誌 62 巻 1・2 号（2012 年）16 頁。

Then, what is the case to recognize the common violation of common duty? In other words, what is the content of jointness? Regarding this question, Otsuka Hiroshi explains it in terms of reciprocal contribution. Joint commission refers to that co-offenders realize the crime by utilizing each other's conduct and complementing each other's conduct. It is characterized by the reciprocal contribution of each other's conduct (the reciprocal contribution of joint commission).[29] The content of communication of consciousness required in intentional offenses is to jointly incur the consequence. However, it is impossible for negligent offenders, who have little knowledge of the imminent consequence of the crime, to have the communication of consciousness on a criminal consequence. The content of communication of consciousness between/among negligent offenders does not lie on the point of causing the consequence, but in the fact of their joint commission of dangerous conduct. The joint commission of dangerous conduct can be based on the communication of consciousness of plural offenders, or there can be no communication of consciousness. To establish co-perpetrators of a negligent offense, communication of consciousness is not a necessary element of jointness; instead, the reciprocal contribution is the indispensable element of jointness.[30]

(5) Discussion on the Doctrine of Common violation of the Common Duty of

---

（29） 大塚裕史「過失犯の共同正犯の成立範囲―明石花火大会歩道橋副署長事件を契機として―」神戸法学雑誌 62 巻 1・2 号（2012 年）20 頁。

（30） 大塚裕史「過失犯の共同正犯の成立範囲―明石花火大会歩道橋副署長事件を契機として―」神戸法学雑誌 62 巻 1・2 号（2012 年）20-21 頁。Matsumiya Takahashi further comments that if the fact of joint violation of a common duty is the constitutive element of the negligent co-perpetratorship, then the existence nor non-existence of the common duty of care is not decided by the presence or absence of communication of consciousness between/among offenders, therefore it is unnecessary to discuss about the consciousness of joint commission. 松宮孝明『刑法総論講義 [第 5 版』（成文堂、2017 年）271 頁。

Care

The doctrine of common violation of the common duty of care received many supports because it does not only demonstrate the foundation for the establishment of negligent co-perpetrators, i.e., the joint conduct of violating the common duty of care (objective aspect), and the negligence of joint inattention and imprudence (subjective aspect), but also clarifies the content of "jointness" in negligent co-perpertratorship, which is the jointness of the duty of care and the jointness of the conduct of violating the duty of care. The prerequisite for the common duty of care is that negligent offenders are at legally equal status.

Such doctrine, on the other hand, is criticized by some scholars. According to the critique, affirming the offender's negligent liability when the respective causation between each negligent conduct and the consequence cannot be proved, will improperly expand the scope of punishment.(31) In this regard, the author maintains that punishing criminal conduct by expanding the causation always exists; for example, the doctrine of epidemiology causation adopted in public nuisance crimes is an expansion of the general causation. The practice of punishing co-perpetrators through the expansion of causation also exists in intentional co-perpetration, such as the case of alternative causation (alternative concurrence). Therefore, this is not a reliable argument to refute the doctrine of common violation of common duty. Whether the crime is committed intentionally or negligently, co-perpetrators are imputed for the consequence based on the jurisprudence of "full liability due to partial conduct". Therefore, the question that deserves further exploration is the jurisprudential foundation for "full liability due to partial conduct" rather than denying the jurisprudence itself. In short, this is an issue of the foundation for

（31）　大谷実・曽根威彦「共犯に関する諸問題」受験新報 42 巻 10 号（1992 年 33）頁以下。

punishing co-perpetrators.

Although the doctrine of common violation of common duty is the dominant doctrine in the Japanese criminal law academia, it does have its own imperfections. The doctrine is the viewpoint on how a negligent co-perpetration is established, while the scope of the establishment of the co-perpetrators of a negligent offense is not yet clear. The previous discussions have frequently focused on the positive view or negative view towards the establishment of co-perpetrators of a negligent offense. The research revolving around demarcating the establishment scope of negligent co-perpetrators is lagging. Besides, the distinction between negligent co-perpetratorship and concurrent negligence is also problematic.(32) Scholars have realized that it is insufficient to discuss whether negligent co-perpetratorship is established or not. It is of more theoretical and practical significance to discuss the establishment criteria for negligent co-perpetrators and its specific content.

Based on the old theory of negligence, the doctrine of jointness in crime denies the existence of negligent co-perpetrators on the ground that negligent offenders lack common consciousness subjectively. In contrast, with the new theory of negligence, the idea that negligent conduct refers to criminally proscribed conduct, which is different from intentional conduct, appears on the stage. In the new theory of negligence, specifying what is negligent conduct makes the objective jointness in conduct the essential element for establishing co-perpetratorship, even if the communication of consciousness in a subjective sense is not recognized. The adoption of objective jointness as the essential element of establishing negligent co-perpetratorship leads to an easier attitude towards the requirement of the

（32） 大塚裕史「過失犯の共同正犯」刑事法ジャーナル 28 号（2011 年）12 頁。

consciousness of joint commission.[33] The doctrine of common violation of common duty is created under the new theory of negligence. Additionally, by advocating the doctrine of jointness of objective duty of care, the discussion on the issue of the consciousness of joint commission can be avoided. However, if we consider the coexistence of criminally proscribed conduct, i.e., the physical causation, as the only essential foundation for establishing co-perpetratorship, the distinction between a co-perpetratorship and a concurrent offense will disappear. Meanwhile, it does not fundamentally solve the problem of the subjective element of negligent co-perpetrators, which has laid the ground for the emergence of the doctrine of dissolution through negligent concurrent offenses.

IV. The Positive Theory based on the Doctrine of Causation-based Determination of Co-offenders and the Development of the Doctrine of a Common Violation of Common Duty

The use of causality to explain the relationship of co-offenders is a strong view in Japan. This view holds that the foundation in criminal law for punishment is the incurrence of damage to legal interests or the danger of damage to legal interests. The foundation for punishing co-offenders is the same as the one for a sole perpetrator, that is, the consequence's incurrence. The difference between co-offenders and a sole offender is that a sole perpetrator solely incurs the consequence, and co-offenders jointly (co-perpetratorship) or indirectly (abetting, aiding) incur the consequence.[34]

（33）　大塚裕史「過失犯の共同正犯」刑事法ジャーナル 28 号（2011 年）11 頁。

（34）　佐伯仁志『刑法総論の考え方・楽しみ方』（有斐閣、2013）370-371 頁。平野龍一『刑法―総論Ⅱ』（有斐閣、1975 年）343 頁以下。松宮孝明『刑法総論講義 [第 5 版』（成文堂、2017 年）320-328 頁。町野朔「惹起説の整備・点検 -- 共犯における違法従属と因果性」松尾浩也・芝原邦爾編『内藤謙先生古稀祝賀・刑事法学の現代的状況』（有斐閣、1994 年）113 頁。

This view, from the standpoint of "unlawfulness in consequence" (Erfolgsunwert), as well as the perspective of the causational incurrence of damage to legal interests, seeks the foundation for the punishment in a broad sense, with which it explains the punishability of all kinds of criminals including co-offenders. Furthermore, this view looks for the foundation of the legal effect of co-perpetratorship, i.e., "full liability due to partial conduct", through the causality between a piece of conduct and a fact required by the *Tatbestand*. The doctrine of causation-based determination of co-offenders divides the causality into two parts, which are physical causation and mental causation.

(1) Yamaguchi Atsushi's Opinion

The characteristic of Yamaguchi Atsushi's theory is dividing negligent co-perpetratorship into two types: the offense by action and the offense by inaction. Regarding the former, in the offense committed by positive acts, co-offenders can constitute co-perpetrators according to the doctrine of causation-based determination of co-offense. Regarding the latter, in the case of inaction, co-offenders can also establish co-perpetratorship, but with another doctrine, i.e., the duty of care in the case of inaction equals the duty to act. And then, based on the doctrine of common violation of common duty, co-perpetratorship can be affirmed between/among the offenders with inaction. First of all, in the case of offense by action, if the offender intervenes in the co-offender's conduct, creating a causal link with the consequence, and on this basis, if such offender has the predictability to the consequence, negligent co-perpetratorship can be established. However, in the above cases, the causal link can be affirmed only if offenders mutually promote or enhance negligence. Besides, negligent co-perpetrators are culpable and punishable rather than the negligent aiders; thus, the co-perpetrators are limited down to those who make an essential causal contribution to the realization of *Tatbestand*. In a case of a derivative offense by

inaction, co-offenders' conduct is considered integrated, and each co-offender has the duty to prevent their co-active conduct from certain consequence. If offenders jointly fail to fulfill the "common duty to act" through the mutual promotion of negligence, negligent co-perpetratorship is established.(35)

This theory's characteristic is to classify the negligent offenses into the offense by positive acts and the offense by inaction and then discuss their respective co-perpetratorship. In the case of plural participants negligently committing the offense by inaction, the existence of "common duty to act" of the co-perpetrators is acknowledged if there is joint antecedent conduct of co-offenders and co-offenders jointly dominate the criminal fact. Each participant is subject to a shared duty of consequence-avoidance for their joint conduct. When any participant causes the consequence, it can be assumed that other participants also violate the common duty of consequence avoidance and result in the consequence; therefore, they are jointly liable for the consequence. Yamaguchi Atsushi disapproves of the doctrine of dissolution into the spontaneous offense.(36) He holds that in the case of offenders committing a negligent offense by action, if there is a causation between the consequence of the *Tatbestand* and participants' conduct, during which participants mutually promote or enhance each other's conduct, and it is possible to predict the consequence, the establishment of negligent co-perpetratorship can be affirmed.

（35）　山口厚「犯罪論の基礎―共同正犯の成立要件」法学教室（1997 年）198 号 77 頁以下。

（36）　山口厚『刑法総論［第 3 版］』（有斐閣、2016 年）385 頁。Kai Katsunori, based on Yamaguchi Atsushi's view, further limits the establishment scope of negligent co-perpetratorship. He distinguishes between cognitive negligence and non-cognitive negligence, based on the doctrine of consciousness -based liability. Only cognitive negligence is punishable. In the case of non-cognitive negligence, Kai Katsunori holds that no negligent co-perpetratorship can be established. Detailed discussion is carried out in the author's another article, i.e., the Jointness of Negligent Co-perpetrators.

(2) Otsuka Hiroshi's Opinion

Otsuka Hiroshi points out that a duty to act and a duty of consequence avoidance should be understood as different even though they overlap in content. The violation of a duty of consequence avoidance is a shared element in the *Tatbestand* of an intentional offense and a negligent offense. The conduct of *Tatbestand* of negligent offense can be understood as the violation of the duty of consequence avoidance, regardless of the negligence by action or the negligence by inaction. The content of co-negligence is the violation of a common duty of consequence avoidance, which is not an exclusive feature of the negligent offense by inaction. Instead, a duty to act is inherent in an offense with inaction, and the determination of it is to identify the subject of the duty of consequence avoidance. Therefore, the evaluation criterion of the common violation of a common duty is applicable to both an offense by action and an offense by inaction. It is not the same matter of the duty to act, but should be placed in the position with the concept of a common duty of consequence avoidance.(37)

(3) Discussion on Relationship between the Duty to Act and the Duty of Consequence Avoidance

Matsumiya Takaaki disagrees with Otsuka Hiroshi's view that the common violation of a common duty is not a matter of the duty to act but a matter of the common duty of consequence avoidance. He argues that in the case of derivative inaction offenses, a duty to act is the matter of a duty of consequence avoidance. At least, in the case of co-perpetratorship of negligent inaction, it is unnecessary to distinguish between a duty to act and duty of consequence avoidance.(38) In response, Otsuka argues that the duty to act is a matter of who is obligated to avoid a

---

（37） 大塚裕史「過失犯の共同正犯」刑事法ジャーナル 28 号（2011 年）16-17 頁。大塚裕史「過失犯の共同正犯の成立範囲―明石花火大会歩道橋副署長事件を契機として―」神戸法学雑誌 62 巻 1・2 号（2012 年）12 頁。

consequence, while a duty of consequence avoidance refers to what measures the offenders are obligated to take among the various measures for avoiding a consequence. The two should be distinguished from each other.

The abovementioned disputes stem from the different understanding of the relationship between a duty to act (who holds a guarantor's status and has the obligation of guarantee) and a duty of consequence avoidance in the case of negligent offense by inaction. One view is that, when discussing negligent inaction cases, it is sufficient to discuss the presence or absence of the duty of consequence avoidance, and there is no need to discuss the duty to act (the issue of the guarantor's status) in particular.(39) Another view is that a duty to act and duty of consequence avoidance should be differentiated.(40) If a duty to act is confused with a duty of consequence avoidance, the participant of inaction, who does not possess the status of a guarantor, namely, the one who has no duty to act, will be included in the violation of a duty of care. The distinction between action and an inaction becomes blurred, expanding the scope of punishment, since a non-guarantor's inaction is also punished as a negligence offense.

V. The Positive Theory based on the Doctrine of Objective Attribution (Objektive Zurechnung)

（38）　松宮孝明「『過失犯の共同正犯』の理論的基礎について : 大塚裕史教授の見解に寄せて」立命館法学 339・340 号（2011 年）503 頁。

（39）　For scholars upholding this position, in addition to the aforesaid Matsumiya Takkaki, see 日高義博「管理・監督過失と不作為犯論」斉藤豊治ほか編『神山敏雄先生古稀祝賀論文集（第 1 巻）過失犯論・不作為犯論・共犯論』（2006 年）153 頁。

（40）　In addition to Otsuka Hiroshi' s opinion, see：神山敏雄「過失不真正不作為犯の構造」福田雅章ほか編『福田平・大塚仁博士古稀祝賀刑事法学の総合的検討（上）』（有斐閣、1993 年）46 頁。

(1) Kaneko Hiroshi's Opinion

The idea of negligent co-perpetratorship shifted from the negative theory as the prevailing one to the positive theory as the dominant one. In addition to such change, the discussions on negligent co-perpetratorship mostly revolve around the element of "jointness" and have formed two viewpoints: (1) Subjectively, negligent offenders have communication of consciousness; (2) Objectively, negligent co-perpetrators enjoy the jointness in causation. Kaneko Hiroshi argues that the research into negligent co-perpetratorship in Japan is influenced and dominated by the history of the discussion of "whether there exists co-perpetrtorship of a negligent offense". The theoretical focus has not yet shifted to the ambit of joint conduct. From the theoretical changes, the doctrines of negligent co-perpetration are derived from the theories of intentional offense, especially from the offense by action, and this trend is still vigorous at present.(41) If we examine the theory of "common violation of common duty", we will find that its establishing foundation and condition are not clear because it is premised on the "jointness" that mixes the naturalistic and mental aspects with the normative aspects.(42) Kaneko Hiroshi argues from the standpoint of the doctrine of objective attribution (Objektive Zurechnung) that jointness (the joint conduct) refers to a violation of the group duty where each offender has the possibility of undertaking the objective attribution.(43) In other words, if each offender

---

（41） 金子博「過失犯の共同正犯について―『共同性』の規定を中心に―」立命館法学（2009年）326号43頁。

（42） 金子博「過失犯の共同正犯について―『共同性』の規定を中心に―」立命館法学（2009年）326号168頁。

（43） Regarding provisions of co-offenders in a broad sense, Kaneko Hiroshi maintains that participants' respective area of responsibility is combined with each other and that whether or not a consequence satisfying the *Tatbestand* occurs is examined in the combined areas of the participants' respective responsibility. 金子博「過失犯の共同正犯について―『共同性』の規定を中心に―」立命館法学（2009年）326号167頁。

has a duty to cooperate to prevent certain consequences, but they neglect to carry out preventive measures, incurring the consequence of the *Tatbestand*, a joint crime is established. The area of responsibility (Verantwortlichkeit) for the realization of *Tatbestand* is determined from the perspective of society as a third party, considering what significance the participants' ex-ante conduct has on the consequence, and then the scope of the duty and the area of responsibility of offenders is determined.(44)

Otsuka Hiroshi criticizes Kaneko Hiroshi's view of granting normative foundation to a common duty of consequence avoidance from an objective view of the society. Otsuka points out that if a common duty is acknowledged when there exists a social expectation, the scope of such acknowledged common duty is excessively unclear. He further suggests that the criterion for establishing co-perpetrators of a negligent offense is deductively explained from the basic principle of co-perpetratorship, and the decision is not made based on the feeling of social expectation.(45)

(2) Discussion on the Doctrine of Objective Attribution (Objektive Zurechnung)

In general, the debate on negligent co-perpetratorship in the criminal law theory of Japan has focused on whether negligent offenders can form jointness of consciousness or not. Confronting the opposing view, the positive view tries to prove that negligent offenders are mentally integrated through the concept of mental causation in the doctrine of causation-based determination of co-offenders, thus satisfying the element of jointness of consciousness.(46) As criticized by Kaneko

---

（44）　金子博「過失犯の共同正犯について―『共同性』の規定を中心に―」立命館法学（2009 年）326 号 166-167 頁。

（45）　大塚裕史「過失犯の共同正犯の成立範囲―明石花火大会歩道橋副署長事件を契機として―」神戸法学雑誌 62 巻 1・2 号（2012 年）38 頁。

Hiroshi, these controversial views are carried out in the naturalist and mentalist senses, using the structure of an intentional co-perpetratorship as a model to discuss negligent co-perpetratorship. The construction of a negligent offense is different from that of an intentional offense; thus, when discussing the establishment elements of negligent co-perpetratorship, there is no need to stick to the establishment elements for an intentional offense. Regarding this issue, Kaneko Hiroshi's advocacy of the doctrine of jointness based on the doctrine of objective attribution (Objektive Zurechnung) is methodologically groundbreaking. However, what the doctrine of objective attribution has accomplished so far is only the two basic concepts, i.e., impermissible danger creation and impermissible danger realization. The inner structure under the two concepts has not yet been mature. Thus Kaneko Hiroshi draws a conclusion only with the basic concepts of the doctrine of objective attribution, without a concrete development on the inner structure for judging the jointness, and the defenses for excluding imputation, which leaves room for further research.(47) It is necessary to furtherly expound that under the doctrine of objective attribution, what society expects as a consequence avoidance measure, and under those above two fundamental concepts, i.e., the creation of unpermitted danger and the realization of danger, what reasons for imputation are and what defenses for excluding imputation are.

VI. Summary

（46） 内田幸隆「共犯の諸問題」曽根威彦・松原芳博編『重点課題刑法総論』（成文堂、2008 年）259 頁。佐伯仁志『刑法総論の考え方・楽しみ方』（有斐閣、2013 年）429 頁。甲斐克則『責任原理と過失犯論』（成文堂、2005 年）191-192 頁。

（47） Additionally, Otsuka Hiroshi's criticism is not unreasonable. Although all concepts in the criminal law are associated with social concepts, common duties are legal duties. Finding a common duty between/among co-participants merely on the basis of the existence of social expectation would improperly unduly expand the scope of the establishment of common duty.

Through the above analysis and review of the theories of negligent co-perpetratrors, this article holds that there are at least three unresolved issues in the doctrine of negligent co-perpetrators: (a) the concept of the negligent perpetrator and the nature of perpetratorship of negligent co-perpetrators; (b) the issue of communication of consciousness; (c) the issue of the unlawfulness of a negligent offense. The three issues above are intertwined, and there are several unresolved theoretical issues, and they provide the basic research framework for future research.

(1) The Concept of a Perpetrator of a Negligent Offence and Negligent Co-perpetrators

The question of adopting which concept of a perpetrator of a negligent offense is closely related to the establishment of negligent co-perpetrators. Since Welzel proposed the dual concept of a perpetrator[(48)] , and Article 26 of the German Criminal Code defines an abettor as "whoever intentionally induces another to intentionally commit an unlawful act"; Article 27 defines an aider as "whoever intentionally assists another in the intentional commission of an unlawful act", the idea of adopting an expanded concept of a perpetrator in negligent offenses occupies a strong position in German criminal law theory. The expanded concept of a perpetrator advocates that it is impossible to distinguish between a perpetrator and an accomplice in the case of negligent offenses, and each offender can be considered as a perpetrator.[(49)] So that among the negative opinions on negligent co-perpetrators, the doctrine of denying the necessity of establishing negligent co-perpetrators based on the expanded concept of a perpetrator of a negligent offense becomes powerful in both Japan and Germany.

（48） Welzel's theory is expounded in the author's another article (The Nature of Perpetratorship of Negligent Co-perpetrators).

（49） 汉斯・海因里希・耶赛克（Hans Heinrich Jescheck）、托马斯・魏根特（Thomas Weigend）《德国刑法教科书》徐久生译（中国法制出版社，2001 年）791-792 页、819 页。

Therefore, it is necessary to clarify whether it is suitable to adopt the expanded concept of a perpetrator, which is different from the system of intentional offense, or to adopt the same concept as that of intentional offenses, i.e., a restrictive perpetrator concept.

If the restrictive perpetrator concept is adopted in a negligent offense, then there is a distinction between a perpetrator and an accomplice in a negligent offense. Adopting the restrictive perpetrator concept in a negligent offense further raises the question of how to distinguish a perpetrator from an accomplice in a negligent offense, which eventually returns to the issue of the nature of perpetratorship in negligent co-perpetrators. On the issue of the distinction between a perpetrator and an accomplice in a negligent offense, the doctrine has not yet reached a consensus, and it is worthy of further in-depth study.

(2) Communication of Consciousness and Negligent Co-perpetrators

The discussion of negligent co-perpetrators is modeled on theories of intentional co-perpetrators. The "communication of consciousness" element becomes the focus of dispute on the establishment or otherwise of co-perpetrators. The doctrine of jointness in crime and the doctrine of jointness in conduct based on the doctrine of causation-based determination of co-offenders both hold that the establishment of negligent co-perpetrators requires the consciousness of joint commission. However, due to different understanding of the specific content of the consciousness of joint conduct, they reach different conclusions and form into a positive view and a negative view.

According to the doctrine of jointness in crime, the consciousness of joint conduct means that each offender has the common consciousness to realize a specific

criminal consequence; thus, the existence of intent is required, and negligent offenders cannot constitute co-perpetrators. In contrast, according to the doctrine of jointness in conduct based on the doctrine of causation-based determination of co-offenders, the common consciousness of a joint conduct is sufficient. Their opposition lies in the advocacy of "communication of consciousness to realize the same crime" and the view of "jointness in causation". However, doctrines are not presented in a form only based on subjective elements or objective elements, for example, the doctrine of jointness in conduct which advocates "jointness in causation" tries to argue for the existence of jointness in subjective unlawfulness among negligent offenders through the concept of "mental causation". Doctrines remain to discuss in both subjective and objective aspects of co-offenses. Only in the subjective aspect, there is a disagreement on the content of the consciousness of joint conduct.

It seems that doctrines have differences on the issue of "jointness". More specially, in fact, the discussion on negligent co-perpetrators is still based on the structure of intentional co-perpetrators and attempts to incorporate negligent co-perpetratorship into the traditional structure of co-perpetratorship. That is why the communication of consciousness among negligent offenders has been regarded as an unavoidable issue. The doctrine of jointness in conduct denies the communication of consciousness to realize a consequence between/among negligent offenders, but asserts mental jointness in unlawfulness; the postwar doctrine of jointness in crime shifted its attention to the jointness in negligent conduct and downplayed the requirement of communication of consciousness, but still doubts such non-traditional sense of the communication of consciousness, and thus the doctrine of dissolution through concurrent offenses of negligence has emerged.

(3) Unlawfulness of a Negligent Offence

If a co-offense is a matter of *Tatbestand* and thus a matter of the unlawfulness, the question of what the content of unlawfulness in a negligent offense is, directly concerns the content of jointness of negligent co-perpetrators. In turn, the content of the unlawfulness of negligent offenses is closely related to the structure of negligent offenses and the theories of negligent offenses. Theories of negligent offenses have been reconstructed through the transition of the old doctrine of a negligent offense, the new doctrine of a negligent offense, and the new-new doctrine of a negligent offense, besides, the strong view in Germany, i.e., the doctrine of objective attribution. Different theories of negligence have a substantial impact on the establishment or otherwise of the negligent co-perpetrators. Under the old doctrine of a negligent offense, the conduct of a negligent offense was neglected; thus, negligent co-perpetrators are denied on the ground of the absence of jointness in conduct. After the appearance of the new doctrine of a negligent offense, the essence of a negligent offense is regarded as a violation of a duty of care, and it becomes possible to acknowledge negligent co-perpetrators on the basis of the violation of a duty of care.

Studying negligent co-perpetrators from a naturalistic and mental perspective is inevitably confined to the traditional framework of the establishment conditions for an intentional offense. It is unable to explore the establishment elements of negligent co-perpetrators based on the structure of a negligent offense itself. From the perspective of the doctrine of objective attribution, it is of new guiding significance for the development of theories of negligent co-perpetrators to seek a theoretical foundation for the establishment of negligent co-perpetrators. The discussions concerning the structure of negligent co-perpetratorship through unlawfulness proposed by different negligence theories has been discussed in the author's another article, i.e., the Old and New Doctrines of Negligence.