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Withdrawal from Attempts?

Beatrice Krebs*

I. Introduction

I was very honoured to be asked to contribute to a *Festschrift* for a criminal law scholar and teacher whose work I have known and valued from my earliest student days. Then as now I admired Bob Sullivan's publications as much for their elegant prose as for the clarity and rigour of their argument. I came to know him as a person when he examined my DPhil on complicity – I was very grateful for his gentle, reassuring manner and his kindness. Since then, our paths have crossed in various places, and I am thankful for his continued support and the helpful advice he has given me on many occasions. Bob is, of course, a prolific writer who has published in almost every area relevant to the criminal law syllabus (and beyond). One topic that does not seem to have attracted his attention quite so much, however, is the 'defence' of withdrawal. I hope that Bob will find the below musings on this topic of interest.

Imagine the following situation: (1) D is jealous of V, his ex-wife's new partner. He decides to kill V by beating him to a pulp. He knows that V goes for a run in the evening, so one day D lies in wait for V with a baseball bat. As V jogs past him, D jumps out of the bushes and swings the baseball bat at him with force, but misses. D takes aim again, but seeing the fear in V's eyes, he experiences a sudden change of heart. He drops the baseball bat and walks away. Under the law as it stands, D will be criminally liable for assault by causing V to fear immediate harm. It is very likely that, in light of D's intention to kill V, D's swing of the bat makes for an act sufficiently proximate to the

* Associate Professor of Criminal Law, School of Law, University of Reading. I am profoundly grateful to Andrew Simester for helping me sharpen and focus the argument put forward in this chapter. Thanks are also due to Kesley Rati for her helpful research assistance.

killing of V as to amount to attempted murder. Yet at that point in time, D's better self leads him to abandon his deadly project. Withdrawal is no defence to attempted crimes at common law. This is so even though D abandoned his crime voluntarily, before any physical harm occurred to V, and whilst it was still possible for the crime to come to fruition.

Compare this instance with the following: (2) P tells S of his plans to cause V, his rival-in-love, grievous bodily harm by severely beating him. S considers this treatment too lenient and suggests that P kill V by shooting him in the head. He offers to get P a gun, which he does. The next day, S has a change of heart. Driving towards P's house, S calls P on his mobile, pleading with him not to go ahead with the shooting. By the time he arrives, and despite S's best efforts to persuade P to abandon his murderous plan, P has already gone ahead and shot V. In this case, S might well have done enough to withdraw from the criminal venture and thereby to extricate himself from liability. This is so even though the full crime has been committed; V was killed, and, what is more, because of S's prior involvement: without S's advice and assistance, P would not have thought of killing V, let alone have had the means to do so.

The difference in outcome for D and S arises because English law recognises withdrawal as a 'defence' only in the context of secondary participation (as in example 2); it does not avail principals who abandon their criminal purpose after having crossed the crucial threshold from mere preparatory acts to an attempt but before their crime has come to fruition (as in example 1).

The oddity of this distinction is graphically illustrated by considering the statutory offence of doing an act capable of assisting or encouraging a crime.[1] Liability for the statutory offence is incurred the moment that the act capable of assisting or encouraging P's crime has been done:[2] this liability is sustained whether or not the principal offence is committed. At common law, if S withdraws her assistance/encouragement prior to the commission of the

[1] Serious Crime Act 2007, s 44.

[2] ibid s 49.

principal offence in a manner that fulfils the conditions of the withdrawal 'defence', S will not be a party to P's offence. By contrast, her liability for the statutory offence of intentionally encouraging or assisting an offence by doing an act capable of encouraging or assisting P's crime *will*, in terms of the letter of the law, remain intact.[3] In other words, *on exactly the same set of facts*, recharacterising liability as inchoate leads to a different liability outcome: surely an undesirable state of affairs. As will be seen below, there are good reasons for allowing a withdrawal 'defence' in complicity. Those reasons extend to the statutory offence too. Indeed, they are part of the reason why the statutory offence is so problematic.

With all that said, withdrawal is rarely relied on even within the context of complicity. Concomitantly, what amounts to withdrawal and what legal consequences, if any, should follow a finding of withdrawal has attracted little interest from scholars in this jurisdiction,[4] even though other aspects of complicity have proved a fertile (battle)ground for academic discourse. This lack of interest may be due not only to the still uncertain state of the law and its theoretical underpinnings, but also to some ignorance of the defence on the part

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[3] S 50 of the Serious Crime Act 2007 does provide a defence of acting reasonably, but that provision only applies at the time of the actus reus of the statutory offence.

[4] Outside of what ME Badar and A Reed ('The Fault Element and Withdrawal Principles in Joint Criminal Enterprise: The Need for a Restatement' (2014) 1 *Journal of International and Comparative Law* 253, 274) refer to as 'a small circle of cognoscenti' writing mainly between 1981 and 2001: D Lanham, 'Accomplices and Withdrawals' (1981) 97 *LQR* 575; KJM Smith, 'Withdrawal from Criminal Liability for Complicity and Inchoate Offenses' (1983) 12 *Anglo-American Law Review* 200; KJM Smith, 'Withdrawal in Complicity: A Restatement of Principles' [2001] *Crim LR* 769. More recent publications include A Reed, 'Repentance and Forgiveness: Withdrawal from Participation Liability and the Proportionality Test' in A Reed and M Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Farnham, Ashgate, 2013) and C Sjölin 'A Step Away from Liability – Withdrawal and Fundamental Difference *Post*-Jogee' in B Krebs (ed), *Accessorial Liability after Jogee* (Oxford, Hart Publishing, 2019) 69. This can be contrasted with a vast literature on the topic produced in Germany.

of criminal law practitioners.[5] It may also be the case that the withdrawal 'defence' is more appealing in theory than in practice.[6] As Gideon Yaffe put it:

> Change of mind, as common as it is, is puzzling from a moral point of view. It is hard to know how to react to the person who acts in a way of which we disapprove, but changes his mind later. As the agent of a bad act, he seems worthy of censure; as the agent who prevented the bad act's occurrence, he seems worthy of praise. The puzzle arises from the fact that he is, indeed, both of these agents.[7]

This chapter will argue that withdrawal could be more readily available as a defence than it currently is. Allowing a voluntary withdrawal to let the defendant off the hook in example 2 but not in example 1 requires explanation. In what follows, I argue that a case can be made to treat both defendants alike, which is the position in German law. At least where the defendant's actions and the completion of the offence are distanced in time and/or space, extending the defence to principals is within the interpretative reach of English law and, indeed, warranted.

The chapter proceeds as follows: section II reviews the current state of English law, including the nature, scope and supporting rationales of withdrawal. What purpose is withdrawal meant to serve? What are its constituent elements? Is it a substantive *defence* or something else? And is it best justified as providing an incentive to offenders to rethink their crime and desist or because withdrawal demonstrates reduced dangerousness on their part? Building on the insights gained in section II, section III considers whether withdrawal should be more widely available, as a form of *actus contrarius* to criminal attempts by principal actors. The discussion here will reflect briefly on why the law criminalises attempts in the first place (ie what is the nature of the wrong involved in attempts?) and then consider whether attempt can justifiably be distinguished

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[5] This thought is supported by anecdotal evidence in form of conversations I had with practitioners at a criminal bar conference who confessed to not knowing much about withdrawal or rarely considering it as a defence.

[6] GP Fletcher, *Rethinking Criminal Law* (Boston, MA, Little, Brown, 1978) 197.

[7] G Yaffe, *Attempts* (Oxford, Oxford University Press, 2012) 309.

from complicity with reference to the recognition or otherwise of a withdrawal defence.

In gist, I argue that concerns which motivate the criminalisation of accessories also underpin the criminalising of attempts (whether the would-be perpetrator acts alone or complicitly), and that there are good reasons to treat the situations alike when it comes to defendants who, having gone beyond mere preparation, voluntarily desist from completion of a crime (even if not necessarily for laudable motives). At the least, it should be possible to treat those instances of attempted perpetration similarly to withdrawal in complicity where there is a gap in time between necessary preparation to enable commission of the principal offence and the time chosen for its commission. Examples are cases in which the perpetrator puts poison in one of many bottles or prepares an explosive trap, the poison to be consumed or the trap to be tripped later by an unwitting victim. In these examples, crimes relating to the possession of poisons and explosives may well have been committed. Those crimes are not our concern. Our concern is when the poison is on the point of being taken or the trap is about to be trodden on. In both these cases there is strong evidence of attempted murder. Suppose at the point when V was about to swallow poison, D grabbed the bottle and no harm was done. Similarly, when V was mere yards from the trap, perhaps D disabled the device and again no harm was done. Each of these harm-preventing interventions was voluntary. The argument will be made that in both cases there should be no conviction for attempted murder. In developing this argument, for comparison, I will draw in section IV upon aspects of German law, where withdrawal is recognised as a ground for excluding criminal liability both for sole offenders and people *committing* crimes *en groupe*. Section V summarises my proposal, and section VI concludes.

II. The Law of Withdrawal: Doctrine and Rationales

At common law, withdrawal leads to outright acquittal of the accomplice as opposed to conviction of a lesser offence or a sentence reduction. The leading

case, *Becerra and Cooper*,[8] involved the burglary of a house. The tenant of a first-floor flat surprised the two defendants inside the property. Becerra, who earlier on had handed Cooper a knife, exclaimed 'Let's go!', climbed out of a window and ran away. Cooper, however, responded by fatally stabbing the tenant. Both burglars were charged with murder. Becerra tried to defend himself by arguing that he had withdrawn from the joint enterprise before the fatal stabbing. His defence was rejected by the Court of Appeal which emphasised that withdrawal first and foremost required unequivocal notice to the other party of the intention to withdraw. What else might be required remains unclear because of the lack of guidance from any subsequent cases, including the review of complicity law by the Supreme Court in *Jogee*.[9] It is therefore generally assumed that the pre-*Jogee* case law on withdrawal remains applicable, even though its requirements are likely to have been distorted by the then existence of the doctrine of parasitic accessory liability.[10]

Requirements

If one were briefly to distil from the case law what makes for a successful case of withdrawal, it would look something like the following.[11] In order successfully to withdraw, an accessory needs to make:

[8] *Becerra and Cooper* (1976) 62 Cr App R 212 (CA).

[9] *Jogee* [2016] UKSC 8.

[10] Sjölin (n 4) 70, 74.

[11] The requirements of withdrawal are shaped by the rationale that underpins the defence. Since the rationale remains unclear (as explained below), the requirements, too, remain uncertain and unsettled, and this, as well as interpretative difficulties with concepts such as 'unequivocal notice', hampers any attempt at restating them.

(a) a voluntary[12] decision to withdraw[13] (not necessarily based on a penitent motive);
(b) the withdrawal must be made before commission of the (attempted or substantive) crime by the principal offender is complete,[14] which is when the accessory's criminal liability crystallises and becomes fixed. Repentance after the fact does not suffice;
(c) the voluntary decision to withdraw is communicated[15] to the principal offender in good time[16] (or, failing that, to the law enforcement agencies or the potential victim), in the form of an 'unequivocal' notice of withdrawal;
(d) which breaks the chain of responsibility[17] that otherwise would link the accessory's assistance or encouragement with the principal offence.

What (conduct) precisely is required appears to be governed by a proportionality requirement: the greater S's involvement up to the point at which he seeks to withdraw, the more substantial the effort he will need to make to succeed with the defence. The spectrum extends from S's simply attempting to communicate to P his decision to withdraw to S's having to take active steps seeking to thwart P's commission of the offence (such as warning the intended

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[12] *Otway* [2011] EWCA Crim 3.

[13] The case law and literature oscillate between change of mind and change of heart, see eg Smith, 'Withdrawal from Criminal Liability' (n 4) 211 ('D experiences a change of heart').

[14] It remains unclear whether withdrawal is possible once the threshold to an attempt has been passed but the crime remains incomplete. In *Perman* [1996] 1 Cr App R 24 (CA) 34, the Court observed: 'We would simply raise the question whether once the criminal activity contemplated in a joint enterprise has commenced, it is possible for a party to the joint enterprise to withdraw, and whether it is ever open to a party to a joint enterprise to say that he is not criminally responsible for all that is done in that criminal activity which is within the scope of the joint enterprise. … Certainly most of the instances given in Smith & Hogan, 7th ed at p 153, of withdrawal, are cases of withdrawal from a joint enterprise before the start of the contemplated criminal activity.'

[15] *Mitchell and King* [1990] Crim LR 496 (QBD) and *O'Flaherty* [2004] EWCA Crim 526, [2004] 2 Cr App R 20 (CA) found communication to be unnecessary in cases of spontaneous group violence.

[16] *Perman* [1996] 1 Cr App R 24 (CA).

[17] Older cases, eg *Whitehouse* [1941] 1 WWR 112 (CA BC), also speak of breaking the chain of causation, but modern case law does not presuppose a causal link in complicity.

victim, alerting the authorities or even physically preventing P from carrying out the previously joint plan).

An important factor in determining where on this spectrum S's case falls and what conduct is demanded of him to withdraw effectively seems to be the form of his complicity.[18] Cases such as *Mitchell and King*[19] suggest that the law distinguishes between preplanned and spontaneous criminal ventures, and that, in contrast to planned offending, it may be possible successfully to withdraw from spontaneous crimes without the need to communicate this to the other participants. While *Robinson*[20] casts doubt on the generality of this proposition, suggesting that communication of withdrawal is necessary even in situations of spontaneous violence unless it is not practicable or reasonable so to communicate, *O'Flaherty*[21] and *Rajakumar*[22] have since confirmed that 'what may suffice to constitute withdrawal in spontaneous and unplanned group violence may not necessarily so suffice in preplanned group violence.'[23] Both cases predate *Jogee*, however, and it may be that, with parasitic accessory liability gone, there no longer is any need to treat spontaneous violence differently from preplanned crimes. As Sjölin has argued, 'the generosity of approach in *Mitchell and King* and *O'Flaherty* is not necessary now that the prosecution must prove that S acted to assist/encourage P *in that offence* with the intention of so doing'.[24]

Nature and Scope

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[18] See Smith, 'Withdrawal from Criminal Liability' (n 4) 209.

[19] *Mitchell and King* [1999] Crim LR 496 (QBD).

[20] *Robinson* [2000] EWCA Crim 8.

[21] *O'Flaherty* [2004] EWCA Crim 526, [2004] 2 Cr App R 20 (CA).

[22] *Rajakumar* [2013] EWCA Crim 1512.

[23] ibid [42] (Davis LJ).

[24] Sjölin (n 4) 90.

The recognition of withdrawal as a 'defence' unique to complicity is usually supported by reference to complicity's distinctive features. As such, it has been said that complicity's derivative nature and the possibility of some pre-inculpatory interlude offer 'an accessory special exculpatory possibilities not found in relation to principal liability'.[25] Correspondingly, the Law Commission has found that '[t]here is no authority to suggest that withdrawal from an attempt to commit an offence may at present be raised as a defence'.[26] Such literature as there is agrees: where the issue is discussed at all, commentators largely reject a wider application of the withdrawal 'defence', on the basis that 'the obvious practical difficulties and dangers entailed in catering for a few remote examples rules [*sic*] out a withdrawal defence for perpetrators'.[27] It would thus seem that withdrawal is no 'defence' to liability outside the context of secondary parties.

We shall return below to the question whether the position of an accessory is all that different from that of a principal offender who abandons further commission of his crime (or attempts to undo what he has previously done). Another matter of some debate is whether withdrawal really is a *defence*. Confusion over the latter question is sometimes caused by the different meanings a claim of withdrawal can carry. Indeed, the language of defences is at times employed when all the actor is trying to say is that some part of the actus reus or mens rea of the offence has not been made out (wherefore there was no prima facie case against which the accused needs to raise a defence – he never incurred any prima facie liability).[28] These situations must be

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[25] See Smith, 'Withdrawal in Complicity' (n 4) 769.

[26] Law Commission No 102, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (London, HMSO, 1980) para 2.132. See, similarly, Smith, 'Withdrawal from Criminal Liability' (n 4) 205.

[27] KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford, Clarendon Press, 1991) 255.

[28] cp Smith, 'Withdrawal from Criminal Liability' (n 4) 207: 'A claim of withdrawal from a prior act of "complicity" can amount to an assertion that the [actus reus] of complicity does not exist.'

distinguished from instances where, having satisfied both the actus reus and mens rea, the actor seeks to extricate himself from criminal liability, by taking steps that comply with the requirements of withdrawal as an affirmative defence or as a bar to accountability. Typically, in the context of complicity liability, this occurs where S has, with appropriate mens rea, done what will amount to complicity should P commit the principal offence, where P has not yet completed the offence.

Advocates of withdrawal as an affirmative defence (for accessories) are divided over whether this provides a justificatory defence (on the basis that it recognises the appropriateness of the accessory's actions) or an excusatory defence (as a concession to the accessory's particular circumstances). A compromise might be to treat withdrawal as excluding *punishment* that sits outside the dichotomy of justificatory and excusatory defences.[29] That way, any verdict of culpable wrongdoing remains untouched (which might make the 'defence' more palatable to victims and society at large); all the exclusion would do is recognise that the party who has withdrawn does not now need to be punished, even though he had crossed the threshold towards wrongdoing and done so culpably. His subsequent repentance, however, has done away with the need for society to step in and punish him for the wrong he has culpably committed. In other words, recasting the 'defence' as an exclusion ground for punishment would allow us still to point the finger and blame the accused for ever having gone as far as he did before withdrawing. In that way, this conception would allow us to uphold some of the reasons for criminalising the accused's actions in the first place whilst still providing an incentive for would-be offenders to reconsider and undo, as much as possible in the circumstances of their case, their involvement in crime (for they can now expect to escape punishment, even though they may not necessarily be blameless). This reasoning, it is worth observing, applies to principals and attempts liability as much as it does to secondary parties.

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[29] See Badar and Reed (n 4) 275.

Rationales

Which brings us to the question why withdrawal should lead to freedom from punishment. Commentators are divided on the matter. They disagree over whether withdrawal operates to incentivise a secondary party to disengage from a criminal enterprise or, alternatively, to reflect his reduced level of social dangerousness and/or blameworthiness.[30] While these are the two main rationales discussed in the English literature, further theories have been put forward in other jurisdictions. None of them is by itself entirely satisfactory, and it is probably a combination, rather than any one theory alone, that informs and explains the current law. There is room only to sketch the main lines of argument here.

The Law Commission has in the past suggested an incentivising rationale:

> [S]ince the object of the criminal law is to prevent crime it is equally important to give reasonable encouragement to … [an] attempter … to withdraw. … The absence of such a defence may operate to dissuade an individual who might otherwise decide to cease participating in the planning of a crime from taking that decision since having become a party to the inchoate offence there is no inducement for him to cease his activities before commission of the substantive offence takes place.[31]

It has been objected that the credibility of this rationale depends largely on whether offenders are aware of the existence of a withdrawal defence.[32] In light of the uncertainties surrounding the requirements of withdrawal in complicity, it seems unlikely that people generally are aware of it (to the extent necessary to make the inducement theory work). As Badar and Reed have observed: 'The suggestion that D2 modify their criminal behaviour in relation to offence-definitional criteria of which they are highly unlikely to be aware is counterfactual, and the apotheosis of recalcitrant conduct.'[33] Even so, this is not

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[30] See Smith, 'Withdrawal in Complicity' (n 4).

[31] Law Commission Working Paper No 50, *Inchoate Offences: Conspiracy, Attempt and Incitement* (London, HMSO, 1973) 150.

[32] Smith, 'Withdrawal from Criminal Liability' (n 4) 204.

[33] Badar and Reed (n 4) 275.

an in-principle objection. Ignorance of the 'defence' might well be a matter of fact: this, however, generates not so much an argument against the cogency of the incentive rationale as an objection that the law is not doing enough to fulfil its guiding function by communicating the availability of a withdrawal provision and its requirements.

The other main justification for giving legal recognition to withdrawal is in order to recognise the diminished dangerousness of act or actor.[34] Whilst the Law Commission has suggested that 'the social danger already manifested by the defendant's conduct made it appropriate that any effort he might make to nullify its effects should instead be reflected by mitigation of penalty',[35] Badar and Reed argue that '[t]he redemptive actor who has voluntarily renounced his complicitous behaviour has revealed himself as possessing more limited society danger characterisations, and should be inculcated a quasi-excuse'.[36] Fletcher considers this to make 'intuitive sense', although he also raises the question 'whether the criminal law should be grounded in case-by-case assessments of dangerousness'.[37] In his view, a more promising approach would be one that reflects 'that the intent required for an attempt is not merely a firm resolve up to the time the attempt is complete as a punishable act. The intent required is one to carry through'.[38] Horder puts it this way: 'voluntary renunciation shows that the original criminal purpose was not sufficiently firm',[39] which seems to locate the rationale for the withdrawal 'defence' in the actor's reduced culpability.

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[34] Smith, 'Withdrawal from Criminal Liability' (n 4) 214.

[35] Law Commission No 102 (n 26) para 2.132.

[36] Badar and Reed (n 4) 275.

[37] Fletcher, *Rethinking Criminal Law* (n 6) 186–87.

[38] ibid 188.

[39] J Horder, *Ashworth's Principles of Criminal Law*, 9th edn (Oxford, Oxford University Press, 2019) 524.

Both of these major lines of argument find some resonance in the United States, where the criminal law frequently classifies offences by hierarchy (as in 'first degree murder', 'second degree murder', and so on). Amongst US academics, there is a school of thought that posits the idea that a similar structure should be imposed on the defences side. Thus, Moriarty has commented as follows:

> While people should be encouraged to commit no harm rather than some harm, those that commit some harm should be encouraged to commit less rather than more. Just as the degree structure of criminal law threatens greater punishment for more aggravated forms of a given crime, thereby providing greater deterrence for the higher degrees of crime, so too can the reward of remission of punishment motivate persons who have not yet caused the more aggravated species of harm to abandon their enterprise and refrain from causing more damage that they have already.[40]

While English law has, at least for now, eschewed a similar hierarchical structure, it is certainly correct to say that outcomes matter – the greater the harm, the greater the punishment. If we are serious in our commitment to preventing harm, there is something to be said for an approach that aims to reward those who desist from causing (greater) harm, even if at the last possible moment.

It has been possible only to outline the foregoing rationales here in order to give a sense of their flavour. They tend to be presented as alternatives; however, it is more fruitful to think of them as complementary. Abandonment of a criminal purpose as an indication of lack of firm antisocial intent (and hence the absence of any real public danger) is not irreconcilable with an understanding that considers the 'defence' first and foremost as a means to encourage people to abandon courses of criminal activity that they have already embarked upon. In fact, 'as a criminal plan nears fruition, the former notion diminishes in persuasive power, while the latter gains'.[41] For present purposes, the key point to add is that these defensive rationales for recognising withdrawal in law apply

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[40] DG Moriarty, 'Extending the Defense of Renunciation' (1989) 62 *Temple Law Review* 1, 5.

[41] P Buscemi, 'Conspiracy: Statutory Reform since the Model Penal Code' (1975) 75 *Columbia Law Review* 1122, 1168.

just as much to actions by the principal as they do to the accessory. They apply, that is to say, to attempts as well as complicity.

III. Withdrawal as a General *Actus Contrarius* to Criminal Attempts?[42]

Suppose that I am right about this. Suppose that many of the rationales for allowing withdrawal to *exculpate* in complicity carry over to attempts. That is not an end to the matter. We must also consider the grounds of *inculpation*. Before any argument can be made for extending the withdrawal 'defence' from complicity to criminal attempts, it is necessary to examine the grounds for criminalising attempts in the first place. As KJM Smith has observed, 'the acceptability of any excusatory defence turns on the underlying rationale for *imposition* of the specific form of liability concerned: would exculpation be consistent with the justifying aims of the particular form of liability at issue – would it undermine the basis for imposition?'[43] In other words, we need to consider whether there is something distinctive about the liability of principals, and in particular about attempts liability, that deprives the arguments for a withdrawal defence of their normative grip.

The Wrong in Attempted Crimes

Let us thus, briefly, investigate the grounds for imposing criminal liability for attempted crimes. Why do we criminalise attempts? Edwards and Simester suggest that 'those who try and those who succeed commit different wrongs'.[44]

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[42] *Actus contrarius* approaches are premised on the idea that 'just as much as an attempt may show that D defies the law, the withdrawal can be evidence that he embraces the societal order again': M Bohlander, *Principles of German Criminal Law* (Oxford, Hart Publishing, 2009) 146.

[43] Smith, 'Withdrawal from Criminal Liability' (n 4) 202–03.

[44] J Edwards and AP Simester, 'Crime, Blameworthiness, and Outcomes' (2019) 39 *OJLS* 50, 54.

The question, therefore, becomes: what is the (distinctive) *wrong* in attempts? As is often the case with matters of criminal law theory or doctrine, there is no single, or even unequivocal, answer. Three principal explanations for imposing criminal liability for attempts can be distilled from the case law and academic literature. While their justifying features differ, they are unified in their perception of attempt as a wrong in itself, not just an attempted wrong.

One classic explanation of the distinctiveness of attempts is objective. A core function of criminal law is the prevention of harm. While attempts may not result in actual harm, they tend to endanger: it is often a matter of sheer luck whether the attempt succeeds and results in harm. Concomitantly, one school of thought locates the reason for the criminalisation of attempts in the objective endangerment of a legally protected right or interest. However, such an objective theory is difficult to square with section 1(2) of the Criminal Attempts Act 1981, according to which a conviction may lie even when attempting offences that are impossible to commit. For example, one cannot be in possession of a controlled drug if the white powder possessed is not a drug, but conviction for attempted possession can be returned if D believes he has purchased cocaine.[45] It is the hallmark of impossible attempts that there is no actual endangerment of the protected right or interest in such instances.

That objection lends weight to an alternative school of thought, one that locates the ground of liability *subjectively*, in the defendant's willingness to commit crime, as evidenced by the attempt. Advocates of subjective theories stress that even objectively harmless conduct, inasmuch as it demonstrates an attitude that is hostile to our legal order, is capable of disturbing society and causing alarm and distress to the general public. Attempters, one might say, are culpable, and deserve punishment, even when they are not actually dangerous. It might be objected, however, that section 1(1) of the Criminal Attempts Act 1981 is clear

[45] Contrast a situation where the objective is feasible but the means inadequate as when the ladder brought to gain access to the eighth-floor flat is not long enough. No need to apply the impossibility rule to convict of attempted burglary.

that, whilst the defendant's intention is of particular importance, he must also have performed an act that was more than merely preparatory to the commission of the offence; a hostile intent alone thus cannot support the imposition of criminal liability. Alternatively, one might point to considerations of social security: notably, to the *impression* that attempts *in general* tend to create in the mind of the general public, and in turn to 'the advantage [punishment] brings to the social order'.[46] Ultimately, this more integrative proposal takes the reason for criminalising attempts to be the proclivity of manifested criminal intents to interfere with our sense of security and to shake the public's trust in law and order.

Whatever one's preferred account of the wrongness of attempts and the justification of their criminalisation, one must ask the question: is it possible to square that account with a 'defence' of withdrawal? Or would allowing such a 'defence' undermine the basis for the imposition of criminal liability on attempts? If the reason for criminalising attempts lies in the endangerment of legally protected interests (as proponents of objective theories suggest), and withdrawal – as seen earlier – reflects a reduction in said danger, then the two are not incompatible. Likewise, if attempts-liability is ultimately about the actor's commitment to crime (as the subjective theory posits), then a 'defence' that seeks to incentivise or reward D's change of mind would not undermine this rationale either. Explanations in terms of public perceptions of social order and security may seem more difficult to square. As KJM Smith has argued, albeit without giving concrete evidence or examples, 'the usually more overt and immediate nature of the act of attempt may cause types of social alarm which cannot be satisfactorily assuaged by withdrawal'.[47] It is not obvious, however, why those who assist or encourage others (who may not have committed any crime but for said assistance or encouragement) should benefit from a withdrawal defence, but principals should not. After all, one of the

[46] J Burchell, *Principles of Criminal Law*, 3rd edn (Cape Town, Juta, 2005) 73.

[47] Smith, 'Withdrawal from Criminal Liability' (n 4) 206.

reasons often given for imposing liability on accessories is the perception that crimes committed *en groupe* are more dangerous or likely to succeed/go ahead due to peer pressure and other group dynamics. Such pressure applies irrespective of what role an individual is playing. In any event, while it may be true that society's sense of security cannot always be fully vindicated where an offender abandons his offence only once the threshold from merely preparatory act towards an attempt has been crossed, it might cost society (and its sense of security) more dearly in the longer run not to leave open the door to legality for those who abandon their attempt, if at the last possible moment. It is submitted that withdrawal is not inherently incompatible with the rationales (surveyed above) underpinning the imposition of liability for criminal attempts.

Withdrawal from Attempted Crimes

Assuming, then, that extending the defence to cover criminal attempts could in theory be justified, could we make it work in practice?

Consider, first, the possibility of failed attempts. It may be objected that some attempts are abandoned not because the offender experienced a (genuine) change of heart but because the attempt went awry. If withdrawal were a defence to attempts, should we be concerned that it might benefit people who do not deserve freedom from punishment? To some extent, the requirement of voluntariness, noted above in section II, can take account of these concerns. Where the evidence suggests that D abandoned his crime because he believed he could no longer succeed (or that apprehension was imminent and D did not fancy being 'caught in the act'), we may conclude that the withdrawal was not voluntary (a conclusion that would, of course, require some clarification of doctrine). Perhaps more interesting is the question whether D can withdraw where the offence has become objectively impossible, but D has not realised this and believes it can still occur. If he now has a change of heart, should he be able to benefit from a withdrawal provision? I would suggest that the law should follow the lead of the Criminal Attempts Act 1971: if an offender can be punished for an impossible attempt, he should also be able to withdraw from an impossible attempt. This possibility would, of course, be subject to the proviso

that he subjectively believed he could still have succeeded – it does not seem appropriate for him to benefit from a withdrawal 'defence' where desistance is owed to external circumstances rather than to a free and autonomous decision by the actor.

Concerns around failed attempts led KJM Smith to suggest that the 'delineation of a point of no return could possibly be approached through a concept of "complete" and "incomplete" attempt, withdrawal being permitted only in the latter'.[48] He described 'incomplete' attempts as involving situations where 'the actor has still to perform a final act, such as pulling the trigger of a gun'.[49] In such a case, because the actor has not done all he needed to do for the attempt to be truly underway, and in that sense, the actor still has a choice whether or not to go ahead, there remains scope for a change of heart and hence withdrawal. By contrast, where the attempt is complete, because the actor has done all he needed to do, so that it is now out of his hands whether the attempt will succeed, it will be too late to withdraw. As a conceptual distinction, this is both coherent and compatible with the rationales for criminalising attempts that we canvassed earlier.

Of course, identifying the relevant last act can be difficult and even contrived. (Indeed, even a sufficient 'last act' might be susceptible of counteraction by the actor.) Smith himself conceded that 'identifying the last or final act is unlikely to prove much more satisfactory than it did when used to determine proximity for the imposition of liability for attempt'.[50] He thought that '[e]ven if the formula is modified so as not to exclude last acts until failure becomes apparent there remains the problem of identifying the relevant last act'.[51]

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[48] ibid.

[49] ibid 206.

[50] ibid.

[51] ibid.

Smith's 'last act' proposal is evocative of a similar distinction drawn by German criminal law, albeit that German law allows for withdrawal in both complete and incomplete attempt situations. Complete attempts[52] are governed by stricter requirements, however. A closer look at this rival conception appears warranted, if only to see whether any lessons can be learned when considering whether Smith's proposal might be adopted for English law.

IV. A Rival Conception: German Law[53]

While German criminal law rests on different foundations and has a different structure from the common law, the factual situations with which it – like any criminal legal system – must grapple are more or less the same. Looking at its approach can therefore be helpful in *illustrating* alternative ways of responding to the normative challenges that arise from those factual situations. The German penal code[54] contains two general provisions that deal with liability-extinguishing withdrawal:[55] § 31 StGB (governing withdrawal from attempted participation and conspiracy) and § 24 StGB (governing withdrawal from criminal attempts).

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[52] Bohlander (n 42) 146–51, 177, refers to these as 'finished attempts' which arguably better reflects that the defendant has done all he needed to do, albeit that this did not lead to 'complete' success. However, in keeping with the terminology used by KJM Smith whose discussion of 'completed' and 'incompleted' attempts inspired this chapter, I shall stick with the language of 'complete' and 'incomplete' attempts.

[53] There are also common law jurisdictions that allow for a withdrawal defence in the context of attempts, eg those US states that follow the Model Penal Code. The German law is of interest here because of the similarity to KJM Smith's proposal.

[54] *Strafgesetzbuch* (abbreviated StGB).

[55] There are also several withdrawal provisions that apply to specific offences (such as treason and subsidy fraud): see Bohlander (n 42) 138.

§ 31 StGB allows for withdrawal in situations where the accused conspired or attempted to participate in a serious crime.[56] The provision applies to situations that have not yet reached the attempts stage and thus covers preparatory acts/inchoate offending. It states:

> (1) Whoever voluntarily
>
> > 1. abandons the attempt to induce another to commit a serious criminal offence and averts any existing danger that the other may commit the offence,
> > 2. abandons his plans having declared his willingness to commit a serious criminal offence or
> > 3. prevents the commission of an offence having agreed to commit a serious criminal offence or having accepted the offer of another to commit a serious criminal offence
>
> does not incur the penalty under § 30 [conspiracy].
>
> (2) If the offence is not completed without any action on the offender's part or if it is committed independently of his previous conduct, the offender's voluntary and earnest efforts to prevent the completion of the offence suffices for exemption from punishment.

The scope of § 31 StGB extends to the conduct specifically mentioned in § 30 StGB, being attempts to induce or incite another person to commit a serious criminal offence as well as declarations of willingness or acceptance of the offer of another or agreements with another to commit or incite the commission of a serious offence. The two provisions together operate as the functional equivalent of what English law would term conspiracy, albeit that the German law is 'closely modelled on the general concept of attempts'.[57]

Once the offender has crossed the threshold from mere preparatory acts to a criminal attempt, § 31 StGB ceases to be applicable and § 24 StGB takes over. The latter allows for withdrawal from criminal attempts[58] if the offender either

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[56] Defined as the opposite of a misdemeanour.

[57] Bohlander (n 42) 175.

[58] Defined in § 22 StGB as requiring steps that will imminently lead to the completion of the offence as envisaged by the actor. § 23(1) StGB clarifies that attempts to commit a serious offence will generally incur criminal liability, whilst attempts of misdemeanours will only lead to liability where the penal code explicitly says so. Whether the attempts stage has been reached depends largely on the actor's subjective perspective, which according to the jurisprudence of

voluntarily desisted from committing the offence or prevented its completion. Specifically, § 24 StGB provides:

> (1) A person who of his own volition gives up the further execution of the offence or prevents its completion shall not be liable for the attempt. If the offence is not completed regardless of his actions, that person shall not be liable if he has made a voluntary and earnest effort to prevent the completion of the offence.
>
> (2) If more than one person participates in the offence, the person who voluntarily prevents its completion shall not be liable for the attempt. His voluntary and earnest effort to prevent the completion of the offence shall suffice for exemption from liability if the offence is not completed regardless of his actions or is committed independently of his earlier contribution to the offence.

Withdrawal as a Personal Exemption from Punishment (*Strafaufhebungsgrund*)

Under German legal doctrine, withdrawal does not negate an offence element; neither is it seen as a justificatory or excusatory defence. Rather, it is predominantly recognised as a *personal exemption from punishment* (*persönlicher Strafaufhebungsgrund*).[59] This categorisation acknowledges that the actus reus and mens rea of a criminal attempt were present, that this constituted a wrong committed with (some level of) culpability: but, provided the offender voluntarily abandoned his criminal venture, D becomes exempt from the punishment that would otherwise have followed. In practice, the accused is acquitted from the charge of having attempted a particular substantive offence.[60]

As can be seen above, § 24 StGB makes separate provision for sole offenders and those participating in a joint criminal enterprise. While different

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the Bundesgerichtshof is determined with reference to the surprisingly casual (for a legal test) formula of *Jetzt geht's los!* ('Here we go!'): see eg BGHSt 26, 201ff; BGHST 28, 162–63.

[59] B von Heintschel-Heinegg (ed), *Beck'scher Online Kommentar*, 53rd edn (Munich, CH Beck, 1 May 2022) K Cornelius § 24 StGB [3] (hereafter BeckOK StGB/Cornelius); BGHSt 7, 296, 299.

[60] Bohlander (n 42) 151.

requirements apply depending on the type of involvement, both § 24(1) StGB (sole offenders) and § 24(2) StGB (joint criminal enterprises) presuppose that the relevant crime has not been fully executed. Neither must the attempt have 'failed', in that the defendant comes to believe, rightly or wrongly, that he can no longer achieve success.[61] By contrast, where commission of the full offence has become objectively impossible, but the actor did not realise this, he can still successfully withdraw – provided the applicable requirements of § 24 StGB are met. To these we now turn.[62]

Complete Attempts

§ 24(1) StGB distinguishes between two situations which have come to be known as 'incomplete' (*unbeendeter Versuch*) and 'complete' attempts (*beendeter Versuch*), respectively (even though § 24 StGB itself eschews this terminology).[63] Starting with the latter, an attempt is 'complete' if the offender *believes* that he has done everything necessary for the prohibited consequence to come about.[64] For example, if D intended to kill V with a box of poisoned

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[61] BeckOK StGB/Cornelius § 24 StGB [12]–[13].

[62] In what follows, I focus on § 24(1) StGB, which governs withdrawal by sole perpetrators. The requirements for withdrawal become significantly more demanding where several offenders were involved in the attempt: they are governed by § 24(2) StGB (Withdrawal from Joint Criminal Enterprises).

[63] According to the wording of § 24(1) StGB, the law requires no more than that the actor voluntarily desisted from committing the crime or prevented its completion. The statutory provisions do not mention the concepts of *Fehlschlag* (failed attempt) or *beendeter* (complete) and *unbeendeter Versuch* (incomplete attempt). Nevertheless, the judiciary tends to commence analyses of withdrawal by asking whether the attempt had gone awry and then distinguishes between complete and incomplete attempts (see eg BGHSt 34, 53ff; BGHSt 39, 221, 228; BGH NStZ 2013, 156, 157). It does so because the statutory requirements (in terms of what action needs to be taken) imposed on the perpetrator who wishes to withdraw depend logically on whether he had already done everything he subjectively considered necessary to bring about the crime or not.

[64] BeckOK StGB/Cornelius § 24 StGB [22].

chocolates, and he sent these to V by post, he did everything *he* needed to do to poison V (that V still must eat the chocolates for death to occur is immaterial, for it is the steps that D himself needs to take that count). To withdraw in a complete attempt scenario, the offender must actively prevent completion of the crime.[65] While he does not need to select the most promising means available, his efforts must be causal for the crime's non-occurrence.[66] In the poisoned chocolates example, D would have to warn V not to eat the chocolates or visit him and take away the box. Another example would be the planting of a time-bomb in a building. Where D has activated the bomb so that it will explode at a preset time, he has done everything he needs to do to set the offence (depending on the circumstances, it will be criminal damage or a fatal or non-fatal offence against the person) in motion. To withdraw, he will need to disarm the bomb or warn the authorities so that they can prevent the explosion in a timely manner. If the offence did not occur for reasons unconnected to his efforts, D can still withdraw, provided he did everything that, from his perspective, would have been necessary and appropriate to prevent the full offence.[67]

Incomplete Attempts

An attempt remains incomplete if D believes he has not yet done everything he needs to do to bring about the crime.[68] In such a scenario, to withdraw from his attempt it will be enough for him to abandon his criminal endeavour.[69] For example, if D intended to kill V and had already pointed the gun at him, but then experienced a change of heart, he can successfully withdraw by lowering

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[65] ibid § 24 StGB [21].

[66] Bohlander (n 42) 149.

[67] ibid 149. Alerting the authorities must, of course, be grounded in a genuine wish to resile from the planned offence. Thus, a terrorist causing disruption by planting live bombs and then telling the police about them would not be taken to have withdrawn.

[68] BeckOK StGB/Cornelius § 24 StGB [22]; BGHSt 4, 180; BGHSt 31, 170.

[69] ibid [21].

the gun and abandoning his plan to shoot V. The attempt remained unfinished, for D still had to pull the trigger to complete his attempt of killing V by gunshot wound.

Failed Attempts

Withdrawal will be unavailable, however, where the attempt was abandoned because the defendant believed (rightly or wrongly) that he could no longer achieve success. This is known as *subjektiver Fehlschlag* (subjectively failed attempts).[70] Conversely, where commission of the full offence is objectively impossible, but D does not realise this, he can still successfully withdraw.[71] This follows from the last sentence in § 24(1) StGB, according to which an actor can withdraw even if it is impossible for his actions to result in completion of the crime, provided he engaged in a voluntary and earnest effort to prevent the completion of the offence. The following are (textbook) examples of withdrawal-preventing failed attempts:[72]

1. D breaks into V's house in order to steal money and other valuables. The house is empty, however, V having recently moved.
2. D goes for a walk by the river and sees his enemy V on the other bank. He discharges a pistol aimed at V, but misses. V flees and thus escapes being hit by D's further shots.
3. D burgles V's house in order to steal a valuable painting, only to discover that it is in fact a cheap copy.
4. D wants to rob V and hits him over the head. V pretends not to have any valuables on his person, claiming that his wallet and watch have just been stolen. D believes V and flees.

Unsurprisingly, determining whether an attempt has failed may be easier in abstract than in application. Imagine D had planned to shoot V dead, but missed. He only had one shot. Yet D could still bring about V's death by strangling him.

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[70] ibid [12].

[71] See BGHSt 9, 52; BGH NStZ 2011, 629; BGH NStZ-RR 2015, 105.

[72] V Krey and R Esser, *Deutsches Strafrecht Allgemeiner Teil*, 6th rev edn (Stuttgart, Kohlhammer Verlag, 2016) 557.

There is a debate in German law as to how this situation is to be resolved.[73] This is because trying faithfully to apply the principles in § 24(1) StGB might lead us to two different, diametrically opposed, propositions. On the one hand, it could be argued that the attempt (to shoot V dead) has *failed*, as it is now impossible to execute D's original plan and D is aware of this: he intended to shoot V dead and he knew he only had the one shot which missed its target. On the other hand, if D is aware that there are other immediate means by which he could bring about V's death, one might conclude that the attempt situation remains, in law, *incomplete*, in which case withdrawal would still be possible according to the second sentence in § 24(1) StGB.

The issue tends to arise in what German legal scholars call '*mehraktige Geschehensabläufe*':[74] that is, in instances where a series of criminal events form, in effect, one continuous sequence. In the past, the German judiciary treated such instances as involving a failed attempt whenever the accused had not considered and endorsed alternative means (to implement his criminal endeavour) prior to embarking on his first attempt.[75] The decisive element under this approach was the accused's 'planning horizon' (*Planungshorizont*). An attempt was deemed complete whenever the accused had done everything he had *planned* to do to bring about the offence. If this did not lead to the commission of the full offence, then the attempt would count as failed, even if other means by which the crime could still be executed (in temporal and spatial proximity to the acts already performed[76]) had become available. If, by contrast, the accused, when planning his crime, had contemplated and endorsed different ways in which he might proceed, then an attempt was not considered to have failed when one method could no longer succeed, and it remained possible for him to withdraw by desisting from further action. The problem with this

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[73] BeckOK StGB/Cornelius § 24 StGB [16].

[74] ibid.

[75] BeckOK StGB/Cornelius § 24 StGB [17]; BGHSt 14, 74; BGHSt 21, 319, 322.

[76] Bohlander (n 42) 148.

approach was that it benefited actors whose planning had considered alternative ways by which to achieve their criminal goal. Arguably, perpetrators who go to such lengths are more dangerous and exhibit greater criminal energy than those whose plans do not include 'fall-back' options. It is difficult to see why the former should be given more opportunity to withdraw than the latter.

More recent judgments have therefore been treating the so-called *Rücktrittshorizont* (ie the offender's 'withdrawal horizon') as decisive; or have adopted a holistic approach, favoured by the majority of academic commentators, which looks to how the actor imagined his crime would evolve *after* the last act he took towards its completion.[77] Under such an approach, an attempt remains incomplete if the actor, whilst considering his actions up to that point as failed, appreciates that he still has other means by which he could bring about the crime in a timely manner. If in such circumstances he desists from acting further, this amounts to a voluntary withdrawal from an incomplete attempt.[78] By contrast, if the accused considered it impossible to still achieve the crime after the last step he took towards its completion, his attempt would have failed. This (admittedly more generous) approach is grounded in the thought, echoing some of the Anglo-American theory canvassed earlier, that there is no need for punishment if an accused refrains from taking steps that, although different to his original plan, would be no less promising to bring about the relevant crime. An accused who desists in such circumstances is said to have returned to the path of legality.[79] Were the situation resolved any differently, so that the accused were treated as having committed a criminal attempt, there would be no incentive for him to withdraw at that point. Rewarding an accused who refrains from acting again after his initial attempt has failed also vindicates the victim's interests (in not being harmed any further).

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[77] BeckOK StGB/Cornelius § 24 StGB [18].

[78] BGH NStZ-RR 2017, 335.

[79] H Otto, 'Fehlgeschlagener Versuch und Rücktritt' (1992) *Juristische Ausbildung* 423, 428.

Going back to the example of D, who had one shot with which to kill V, but who appreciates that he can still achieve his goal by strangulation, under the current judicial approach this is likely to be held an incomplete attempt from which D can withdraw by refraining from further action, provided he desists 'of his own volition'.

Voluntariness

Withdrawal, in German law too, presupposes voluntariness. What voluntariness requires, however, is contentious – unsurprisingly; no legal system can side-step the underlying normative issues by definitional fiat. German academic literature tends to interpret this requirement as demanding that the accused desisted because of *autonomous motives* (at the time the decision to withdraw is taken). A decision to desist will count as autonomous if it was free and self-determined. It does not require a virtuous motive.[80] On such a view, withdrawal is precluded whenever the accused desisted because of heteronomous motives, ie reasons that are independent of the will of the actor. The judiciary takes a similar approach, enquiring whether the actor was 'master of his decisions' (*Herr seiner Entschlüsse*),[81] or whether these were rather the result of external pressures (*äußere Zwangslage*)[82] or psychological inhibitions/mental pressure (*psychische Hemmungen/seelischer Druck*)[83]. The so-called 'Frank Formula' (named after Professor Reinhard Frank who came up with the relevant test) can help decide whether withdrawal was voluntary or not. Under this approach, a withdrawal will be considered voluntary if D thought 'I do not want to continue

[80] Bohlander (n 42) 150.

[81] BeckOK StGB/Cornelius § 24 StGB [38]; BGHSt 35, 186; BGH NStZ-RR 2014, 241.

[82] See BGH NStZ-RR 2014, 171.

[83] See BGH NStZ 2014, 450.

even if I could' and involuntary if D thought 'I cannot continue even if I wanted to'.[84]

Some Comparative Observations

The German model is not bereft of hard cases, as we have noted: that is an inevitable feature of any sophisticated legal system. Yet it illustrates the possibility of a feasible alternative approach. It allows for withdrawal not just in the context of complicity but also makes provision for certain principals who wish to disengage from criminal attempts. English common law, by contrast, disallows withdrawal for attempts by would-be perpetrators. The latter, once they have engaged in a more than merely preparatory act, can no longer extinguish their liability by withdrawing, whereas under the German model withdrawal remains a possibility unless the attempt has failed and the offender lacked the (subjective) belief that he could still succeed in his crime.

We have seen that the German withdrawal provision for sole offenders differentiates between complete and incomplete attempts. A similar distinction has been proposed by KJM Smith for English law. He envisages extending withdrawal to *incomplete* attempts. His definition of 'incomplete' attempts, like the German conception, would look to whether there are one or more further acts that D needs to take to achieve his goal. Similar to the approach adopted by the German courts, Smith seems to envisage a *subjective* perspective when assessing whether an attempt ought to be considered completed or incomplete. Mindful that English law already takes a subjective approach to the issue of impossible attempts (considering the facts as the defendant believed them to be),[85] this seems in principle possible.

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[84] See Bohlander (n 42) 150.

[85] See s 1(3)(b) of the Criminal Attempts Act 1981.

V. A Proposal

Indeed, one might go further. Under certain circumstances, the German model allows withdrawal also in instances of *completed* attempts, specifically where D has further means by which he, imminently, could have another go at committing/attempting the offence. It is likely that such a move, in England, would require legislative reform. Be that as it may, it is also worth noting one category of complete attempts – understood as attempts where D has done all he needed to do to set the offence in motion – which one might want to include were one to extend the scope of the withdrawal 'defence' to would-be perpetrators. These might be termed 'non-proximate attempts'.

Non-proximate Attempts

One of the reasons given for treating secondary parties and sole offenders differently under English law when it comes to withdrawal is the argument that secondary liability is *structurally different*: whereas with inchoate offences, once the elements of attempt are satisfied, the offence is complete and cannot be 'uncommitted', secondary participation can be undone before the commission of an offence. In particular, it is argued that the perpetrator has a choice whether or not to go through with the crime, whereas a secondary party has no such choice (or chance to think again), once the assistance or encouragement is rendered. This can be seen most clearly in cases of conditional intent, ie where, at time T1,[86] P may intend to commit robbery and if met with resistance also murder. P's intent can change if and when (at T2) he finds himself in the actual situation of being met with resistance. S's intent, however, is fixed (for both robbery and murder) at point T1. So once assistance is given at T1, S is implicated and will now need withdrawal if, between T1 and T2, he

[86] I am adopting the terminology for 'future-conduct offence constructions' from JJ Child and A Hunt, 'Beyond the Present-fault Paradigm: Expanding Mens Rea Definition in the General Part' (2022) 42 *OJLS* 438.

has a change of mind, in order to escape liability for murder should P go on to commit it. Absent the possibility of withdrawal, S's liability is no longer in his hands. By contrast, P only needs to refrain from acting upon his original intent to escape liability. Refraining from doing more is not an option for S, who is committed (for both crimes) at T1.

Yet a similar logic applies to crimes where there is a delay (between T1 and T2) for the perpetrator during which he can experience a change of heart: as, for example, where he has planted a bomb with a timer or laid a trap that will be triggered at some future point by the victim. In such cases, even though, technically, a completed criminal attempt has occurred, there is a case for allowing the offender to repent and to benefit from withdrawal.

A General Test

Suppose that we accept the broad argument that I have made in this chapter. What should be asked of a perpetrator who wishes to withdraw from his attempt (whether incomplete or complete but non-proximate)? In parallel to what English law already requires from secondary parties who wish to withdraw, and drawing on the above distinctions between failed, incomplete and complete attempts, I would propose that withdrawal from a criminal attempt should be possible where:

(a) the criminal purpose has been abandoned voluntarily (ie for autonomous, though not necessarily penitent or virtuous, motives);
(b) whilst completion of the offence was still objectively possible or subjectively believed possible by the actor (in other words, the attempt must not have failed); and
(c) fair effort has been made by the actor to prevent completion of the relevant substantive offence (in incomplete attempt situations) and to countermand any endangerment for the protected legal interest (where the attempt was complete at the stage of withdrawal).

What amounts to ‘fair effort’ would be a question of fact and degree for the jury. As with accessories who wish to withdraw, this can be guided by a proportionality principle. Over time, case law might help to get a clearer picture of what is required in typical situations.

VI. Concluding Remarks

Jogee did not consider withdrawal in its restatement of the principles of accessorial liability. One problem with reforming, and possibly extending, the law of withdrawal is that its scope is shaped by the grounds for accepting the 'defence' in the first place, and these remain uncertain:

> The more credence given to the efficacy of the defence as an inducement to renounce, the less stringent are likely to be the qualifying demands. Alternatively, if the defence is viewed more as an instrument for demonstrating absence of entrenched criminal purpose then only rather more strenuous efforts are likely to be sufficiently convincing.[87]

The uncertainties around the scope and application of withdrawal might be considered a reason not to extend the 'defence' to cover perpetrators and their criminal attempts. However, as this chapter has sought to demonstrate, German law is not fully clear or explicit on the underlying theory either, yet has been able to make some provision to allow sole offenders to withdraw from criminal attempts. This is not to overlook that many aspects of the relevant law are contentious and subject to debate. However, even conceding the (practical) problems involved in fashioning a withdrawal 'defence' for criminal attempts, there are good reasons for extending it to at least some would-be perpetrators: although complicity is formally distinguishable from attempts (in that for the former the renunciatory conduct must precede rather than follow crystallisation of liability), the possible justifications for a defence of withdrawal are comparable.[88] As such, it should be possible – and warranted, if like cases are to be treated alike – to extend the scope of withdrawal to incomplete attempts, and even to those instances of complete attempts that are structurally akin to complicity, in that there is a gap between the time when the ingredients necessary to commit the crime are put in place and when it is finalised. In such cases, there remains a window of opportunity between commencement and completion of the crime, during which a perpetrator can experience and act upon

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[87] Smith, 'Withdrawal from Criminal Liability' (n 4) 204.

[88] ibid 215.

a change of heart such that he should not, ultimately, be punished. Allowing withdrawal in cases of what might be termed non-proximate attempts would not undermine the rationales underpinning attempts liability. As with accessorial liability, there are good reasons to allow a route back into legality for those who, albeit at the last possible moment, wish to change tack and abandon their criminal endeavour.