

# THE FAULT ELEMENT AND WITHDRAWAL PRINCIPLES IN JOINT CRIMINAL ENTERPRISE: THE NEED FOR A RESTATEMENT

Mohamed Elewa Badar\* and Alan Reed\*\*

**Abstract:** Joint enterprise principles have extended accomplice liability to establish a form of guilt by association. Judicial sleight of hand has been adapted, in general, to common design rationale, and it has been used as a prosecutorial expedient towards establishing derivative inculcation. The pro-prosecution bias attached to joint enterprise doctrine is self-evident, and courts have zealously favoured its application as an inculpatory tool. This article focuses on extant law relating to fault elements for homicide within common design, and comparatively reviews alternative juridical precepts. New proposals are adduced on appropriate fault threshold levels that ought to be supererogatory to satisfy the specific intention offence-definitional element for a murder conviction. The debate then extends to review withdrawal principles as part of reverse conduct prophylaxis. A new restatement is chartered that identifies imputed normative proportionality for withdrawal, penitent motive, and reverse burden of persuasion as key factorisations.

**Keywords:** *joint venture; collateral crimes; foresight; contemplation; fundamentally different rule; public policy considerations; withdrawal; reform*

## I. Introduction

The concept of joint criminal enterprise (JCE) has grown to play a major inculpatory factorisation before English courts. The first available statistics on the number of individuals to be convicted using the doctrine of joint enterprise shows that between 2005 and 2013, 1,853 persons were prosecuted for homicides that involved four or more defendants.<sup>1</sup> Between the same period, 4,590 persons were prosecuted for homicides involving two or more defendants. The actual figure is

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\* Reader in Comparative and International Criminal Law and Islamic Law, Northumbria Law School, Northumbria University; and Former Judge and Senior Prosecutor, Ministry of Justice, Egypt. PhD and LL.M, National University of Ireland, Galway; LLB and Bachelor of Police Sciences, Police College, Police Academy, Egypt.

\*\* Professor of Criminal and Private International Law, Associate Dean (Research and Innovation). Faculty of Business and Law, Northumbria University, and Editor of *The Journal of Criminal Law*.

1 Maeve McClenaghan, Melanie McFadyean, and Rachel Stevenson, "Joint Enterprise: An Investigation into the Legal Doctrine of Joint Enterprise in Criminal Convictions" (2014) *The Bureau of Investigative Journalism* 7–8, available at <https://www.documentcloud.org/documents/1100186-joint-enterprise-investigation.html> (accessed 30 August 2014).

greater as these findings are based solely on the use of joint enterprise in cases of homicide.<sup>2</sup> The same statistics shows that the number of published Court of Appeal rulings that dealt with convictions based on joint criminal liability, among other modes of liability, doubled in five years. In 2008, the figure was 11% and by 2013 had increased to 22%.<sup>3</sup>

In England and Wales, members of a JCE who formed the criminal plan are responsible not only for those crimes they agree to but for all other crimes (collateral to the primary principal offence) that would be considered a foreseeable consequence of the plan regardless of whether they carry out the physical conduct or possess the requisite mental state of the collateral crime. In recent years, the doctrine of JCE and its relationship to general complicity concepts and requirements have been the centre of much confusion and uncertainty, and the House of Commons Select Committee has recommended that the JCE doctrine needs statutory reform.<sup>4</sup> The application of joint enterprise, particularly in murder cases, has been far-reaching to the extent that it has been infamously considered as a “jack of all trades”,<sup>5</sup> and pervasively that the doctrine has shifted from exculpatory to inculpatory, resulting in a “catch-all” method of fault attribution,<sup>6</sup> widening the scope of criminalisation, and consequently that the doctrine is “no longer fit for purpose”.<sup>7</sup>

In contradistinction, some commentators view JCE liability as an imperative part of the English legal system and crucial for ensuring justice for innocent victims. Ormerod, however, has stigmatised the doctrine as complex, controversial and harsh.<sup>8</sup> There are many areas of the doctrine that are proving to be problematic for the courts, but arguably the main and recurring issue is to what extent, if any, D (the accessory) should be liable for any act that P (the principal) commits outside the agreed joint venture. Other concerns regarding the applicability of this doctrine by English courts were addressed by KJM Smith nearly 25 years ago.<sup>9</sup> Smith wondered whether, in determining the liability for collateral offences, the basis of responsibility is different from that used in setting liability for the primary offence.<sup>10</sup> In relation to specificity of knowledge, does the *mens rea* necessary for complicity in the primary offence in any way act as a substitute for or dilute the full accessorial

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2 *Ibid.*

3 *Ibid.*

4 House of Commons — Justice Committee, “Joint Enterprise Eleventh Report of Session 2010–12” HC Paper No. 1597 (2012) 15, available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/1597/1597.pdf> (accessed 30 Aug 2014).

5 Johannes Keiler, *Actus Reus and Participation in European Criminal Law* (Intersentia, 2013) 258.

6 Beatrice Krebs, “Joint Criminal Enterprise” (2010) 73 *The Modern Law Review* 578, 585.

7 House of Commons – Justice Committee, “Joint Enterprise, Written Evidence from Professor Graham Virgo”, available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/1597/1597vw07.htm> (accessed 30 Aug 2014).

8 David Ormerod, Commentary to *R v Yemoh* [2009] Crim LR 888, 894; Commentary to *R v Lewis* [2010] Crim LR 870, 872.

9 KJ Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford University Press, 1991).

10 *Ibid.*

*mens rea* that would normally be required for the collateral offence?<sup>11</sup> Whether the joint enterprise doctrine is no more than a linguistic variant of a single general culpability standard or whether it embodies a substantive culpability distinction also remains opaque.<sup>12</sup> Considerable uncertainty still persists as to the standard of *mens rea* an accessory (D) is required to have in respect of any collateral offence committed by the principal offender (P). This prevailing uncertainty as to the *mens rea* offence-definitional element extends also to the realm of any affirmative withdrawal defence to potentially exculpate the complicitous actor. In truth, the parameters of this defence have developed solipsistically in an ad hoc manner, and it is difficult to distil an effective overarching rationalisation.

The initial sections of the article examine the problems inherent in the common law doctrine of JCE focusing on the significance of liability under this doctrine, its requisite elements and its place in the law of complicity. The authors argue that the current law of JCE is unsatisfactory due to inconsistencies and lack of clarity on issues surrounding the requisite fault element.

The debate then extends to re-examine the affirmative defence of withdrawal, deconstructed in terms of extant law, but comparatively extirpated in terms of alternative legal system perspectives. The authors suggest as part of a restated new optimal pathway that the conceptual edifice of withdrawal from joint enterprise is predicated on three central tenets:

- (i) imputed normative proportionality in terms of a general standard of reasonableness of action to be applicable;
- (ii) a focus on attitudinal motivation for disavowal vis-à-vis voluntary and complete renunciation. This engages a comparison between the reasonableness — proportionality standardisation attached to the withdrawal defence and individual liability created by supervening fault; and
- (iii) the introduction of a reverse burden of proof standardisation, replicating U.S. precepts, on a preponderance of the evidence standardisation.

## II. The Joint Enterprise Enigma in England and Other Common Law Jurisdictions

Even though there is no statutory definition of joint enterprise in English criminal law, it is commonly recognised that there are at least two scenarios in which a joint venture can materialise. The first scenario or the basic form covers situations best referred to as co-perpetration, ie cases where D and P agree or act in concert to commit crime X. In such basic form, D will be party to the joint enterprise if he

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

intended that crime X be committed, or if he foresaw that P or any other members of the venture might commit crime X. The second scenario and more controversial form is where P and D in the course of committing crime (A), P commits an unplanned crime (further crime B) which D had foreseen P might commit. This *extended* form of JCE allows juries to convict a person who neither carries out any of the material elements of the identical crime nor possesses the requisite mental state for that crime. The extended form of JCE was noted by the Privy Council in *Chan Wing Siu v R*.<sup>13</sup> It was later implemented into the English law following the appellate decision in *R v Hyde*<sup>14</sup> and as such became known as the “*Hyde principle*”.

In England, there are two different opinions regarding the law which governs cases where two or more persons have embarked on the commission of a criminal offence.<sup>15</sup> In *R v Powell*; *R v English*, as well as in *R v Mendez*, the House of Lords and the Court of Appeal, respectively, considered parties to the JCE as accessories<sup>16</sup> and that joint enterprise liability is an application of the normal rules of secondary liability.<sup>17</sup> The same view was upheld by the Court of Appeal in *R v Stringer*<sup>18</sup> and the Supreme Court in *R v Gnango*.<sup>19</sup> However, in *R v Stewart*, the Court of Appeal ruled that a party to a JCE is different from a mere aider and abettor or secondary party.<sup>20</sup>

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13 [1985] AC 168.

14 [1991] 1 QB 134, 139 (Lord Lane CJ).

15 Simester and Sullivan disagree with Smith and Hogan’s opinion that joint enterprise is “governed by the ordinary principles of secondary participation”. The former argue that joint enterprise “is a special case of secondary participation and not merely a sub-species of assistance and encouragement”. See AP Simester and GR Sullivan, *Criminal Law: Theory and Practice* (Hart, 3rd ed., 2007) 228. John Smith held the view that there is no separate doctrine of joint enterprise and no separate rules; see JC Smith, “Criminal Liability of Accessories: Law and Law Reform” (1997) 113 *Law Quarterly Review* 453.

16 *R v Powell*; *R v English* [1999] 1 AC 1.

17 *R v Mendez* [2011] QB 876, [17]: “Although some distinguished scholars consider that joint enterprise liability differs doctrinally from ordinary principles of secondary criminal liability, we incline to the view that joint venture liability is an aspect of them”. The Court sustained its position by making reference to David Ormrod, *Smith and Hogan Criminal Law* (Oxford University Press, 12th ed., 2008) 207: “The only peculiarity of joint enterprise cases is that, once a common purpose to commit the offence in question is proved, there is no need to look for further evidence of assisting, and encouraging. The act of combining to commit the offence satisfies these requirements of aiding and abetting. Frequently, it will be acts of encouragements which provide the evidence of the common purpose. It is simply necessary to apply the ordinary principles of secondary liability to the joint enterprise”. See also *R v A* [2011] 2 WLR 647.

18 [2012] QB 160.

19 [2012] 1 AC 827. In this case it was clear that the Lords favoured the principles of accessory liability and they replaced joint criminal enterprise with the term “parasitical accessory liability”. See Graham Virgo, “Joint Enterprise Liability Is Dead: Long Live Accessorial Liability” [2012] *Criminal Law Review* 850–870, 854.

20 [1995] 1 Cr App R 441, 447 (CA). In the present case, the Court of Appeal held that: “The allegation that a defendant took part in the execution of a crime as a joint criminal enterprise is not the same as an allegation that he aided, abetted, counselled or procured the commission of that crime. A person who is a mere aider or abettor, etc., is truly a secondary party to the commission of whatever crime it is that the principal has committed although he may be charged as a principal. If the principal has committed the crime of murder, the liability of the secondary party can only be a liability for aiding and abetting murder. In contrast, where the allegation is joint criminal enterprise, the allegation is that one defendant

The vast array of inconsistent decisions by the English courts vis-à-vis joint enterprise has provoked an intemperate and splenetic debate on the part of the academicians as to the nature of this concept.<sup>21</sup> Simester views joint enterprise liability as doctrinally distinct from “standard forms of secondary liability” based on “aiding, abetting, counselling or procuring” the commission of an offence. He explained the normative difference in the following way:

Through entering into a joint enterprise, [D]changes her normative position. [D]becomes, by her deliberate choice, a participant in a group action to commit a crime. Moreover her new status has moral significance: she associates herself with the conduct of the other members of the group in a way that the mere aider and abettor, who remains an independent character throughout the episode does not. Whereas aiding and abetting doctrines are grounded in [D’s] contribution to another’s crime, joint enterprise is grounded in *affiliation*. [D] voluntarily subscribes to a co-operative endeavour, one that is identified by its shared criminal purpose. As such, joint enterprise doctrines impose a form of collective responsibility, predicated on membership of the unlawful concert.<sup>22</sup>

Interestingly, other commentators have viewed joint enterprise principles through a different legal prism altogether, and a more straitened topography: Krebs asserts that the opinion that “the prevalent understanding of the doctrine of joint enterprise is a distinct head of liability is misguided and has led to an unwelcome extension of liability for associates in crime”.<sup>23</sup> The Law Commission in its Consultation Paper “Assisting and Encouraging Crime” identified the essence of the separate nature of joint enterprise liability:

Any assumption that a person who lends himself to an enterprise, with foresight of a collateral crime, necessarily provides assistance or

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participated in the criminal act of another. This is a different principle. It renders each of the parties to a joint criminal enterprise criminally liable for the acts done in the course of carrying out that joint enterprise. Where the criminal liability of any given defendant depends upon the further proof that he had a certain state of mind, that state of mind must be proved against the defendant. Even though several defendants may, as a result of having engaged in a joint enterprise, be each criminally responsible for the criminal act of one of those defendants done in the course carrying out the joint enterprise, their individual criminal responsibility will, in such a case, depend upon what individual state of mind or intention has been proved against them. Thus, each may be a party to the unlawful act which caused the victim’s death. But one may have had the intent either to kill him or to cause him serious harm and be guilty of murder, whereas another may not have had that intent and may be guilty only of manslaughter”.

21 See Simon Parsons, “Criminal Liability for the Act of Another: Accessorial Liability and the Doctrine of Joint Enterprise” (1998) *Journal of Criminal Law* 352–359.

22 APSimester, “The Mental Element in Complicity” (2006) 122 *Law Quarterly Review* 578, 589 (emphasis in original).

23 Krebs (n.6), p.579.

encouragement in relation to *that* crime, as is required if he is to be liable for aiding and abetting, is simply not correct.<sup>24</sup>

In *R v A*,<sup>25</sup> Hughes LJ pointed out that there are at least three common but not identical situations in which the expression “joint enterprise” or “common enterprise” has been used conveniently by English courts:

- (1) Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals, as for example when three robbers together confront the security men making a cash delivery.
- (2) Where D2 aids and abets D1 to commit a single crime, as for example where D2 provides D1 with a weapon so that D1 can use it in a robbery, or drives D1 to near to the place where the robbery is to be done and/or waits around the corner as a getaway man to enable D1 to escape afterwards.
- (3) Where D1 and D2 participate together in one crime (crime A) and in the course of it D1 commits a second crime (crime B) which D2 had foreseen he might commit.<sup>26</sup>

In each of these scenarios, a person may be responsible for acts which his own hand did not physically commit, if those acts are within the common purpose.<sup>27</sup> The third scenario depends on a wider principle of the joint enterprise doctrine than do the first and second. In *R v Rahman*, it was held that in this third-type scenario, D2 may be guilty of an offence (crime B) that he did not want or intend D1 to commit, provided that he foresaw that D1 might commit it in the course of their common enterprise in crime A.<sup>28</sup>

It is questionable whether mere foreseeability is sufficient to trigger the criminal responsibility of D, particularly for specific intent crimes such as murder. It has been argued that the framework of the law of murder and JCE has been heavily influenced by practical and policy considerations, and that the principle established in previous cases by which a party to a joint enterprise can be guilty of a collateral offence by virtue of mere foresight, has, for policy reasons, created a form of constructive liability for murder. A prosecution inculpatory tool beyond the strict requirements of appropriate gradations of relational fault attribution has consequentially been effected.<sup>29</sup>

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24 UK Law Commission, Consultation Paper No. 131, “Assisting and Encouraging Crime” (1993). See also the UK Law Commission, “Participating in Crime” Law Com No. 305 (2007), available at [http://lawcommission.justice.gov.uk/docs/lc305\\_Participating\\_in\\_Crime\\_report.pdf](http://lawcommission.justice.gov.uk/docs/lc305_Participating_in_Crime_report.pdf) (accessed 30 Aug 2014).

25 *R v A* (n.17).

26 *R v A* (n.17), 650, [9].

27 *Ibid.*, p.650.

28 [2009] 1 AC 129, [63] (Lord Brown).

29 Arguments submitted by Adrian Waterman (QC) for Mendez, quoted in *Mendez* (n.17) [15].

**A. *Foresight and contemplation as sufficient mens rea for collateral offences in joint enterprise***

In the common law of England, the accessory's foresight and contemplation is essential to the determination of responsibility arising out of participation in a joint enterprise. As will be examined below, several decisions rendered by English courts, reveal that the very scope of such doctrine depends on what was contemplated by members of that enterprise sharing a common purpose. Hence, it is important to contextualise fault ingredient derivations from extant law. In *Chan Wing Siu*, as well as in *Powell*, the Court of Appeal and the House of Lords, respectively, confirmed that "participation in a joint criminal enterprise with foresight or contemplation of an act as a *possible* incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise".<sup>30</sup> In the former case, three assailants armed with knives entered the flat of D with the intent to commit a robbery. One of them murdered D's husband. The trial judge's direction in that case, so far as it is relevant, was as follows:

You may convict ... of murder if you come to the conclusion ... that the accused *contemplated* that either of his companions might use a knife to cause bodily injury on one ... of the occupants.<sup>31</sup>

In upholding the conviction, Sir Robin Cooke provided more clarification as to the nature of contemplation required:

The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former *foresees* but *does not necessarily intend*. That there is such a principle is not in doubt. It turns on *contemplation* or, putting the same idea in other words, *authorization*, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal liability lies in participating in the venture with that foresight.<sup>32</sup>

In *Hui Chi Ming v R*,<sup>33</sup> the Judicial Committee of the Privy Council introduced an extra constraint on the JCE liability. It was suggested that when the other crime committed by the primary party is "an incident of the joint enterprise ... mere foresight is not enough: the accessory, in order to be guilty, must have foreseen the relevant offence which the principal may commit as a *possible incident* of

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30 *Powell* (n.16) 21 (Lord Hutton) (emphasis added).

31 *Chan Wing Siu* (n.13) 175 (emphasis added).

32 *Ibid.*

33 [1991] 2 HKLR 537, 551; [1992] 1 AC 34, 53.

the common unlawful enterprise”.<sup>34</sup> As one academician rightly observed, “mere foresight as a cognitive concept, however, is not capable of taking into account the volitional element involved in accepting to run a risk”.<sup>35</sup>

The Law Commission report on Participating in Crime<sup>36</sup> suggested the following regarding the *mens rea* required to be proved on the part of the participant in a joint venture for crimes which are beyond the common enterprise:

[T]here will be cases, where, pursuant to the joint criminal venture, P commits an offence that D did not intend P (or another participant in the joint venture) to commit. In the context of a joint criminal venture between D and P, it is our view that the principle of parity of culpability does not require that D actually intend the conduct element of a particular offence to be committed by P. D’s agreement (or shared joint intention) to participate in the joint criminal venture itself provided a substantial element of culpability, meaning that there can be parity of culpability between D and P even if D did not in addition intend P to engage in the conduct element of an offence. There will be such parity of culpability if, for example, D foresaw that P might engage in the conduct element of a particular offence. In such circumstances, it is acceptable to label and punish D and P in the same way.<sup>37</sup>

The Commission suggested that foresight of probability on the part of the participant that a crime which goes beyond the “common purpose” may be committed by a member of the joint venture is sufficient to hold the participant guilty for this crime. Generally, in criminal law, foresight is relied upon as an “evidentiary criterion” that allows jury to make appropriate inferences there from.<sup>38</sup>

In light of the aforementioned, it is obvious that the focal point of the JCE doctrine, as applied by English courts, is the foreseeable objective conduct of P by D, ie an objective act, the possible commission of which was contemplated by D.<sup>39</sup> Hence, foresight appears to have claimed independent status as a sufficient requirement for liability in its own right. It has been argued that such an approach “objectifies the participant’s liability which leads to a broader scope of liability” than in the Romano/Germanic legal systems, namely, Germany and the Netherlands.<sup>40</sup> In practice, subjective foresight is sometimes further diluted to one of (objective) foreseeability.<sup>41</sup> In addition, the *Chan Wing Siu* principle, discussed above, has

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34 *Ibid.*

35 Krebs (n.6), p.579.

36 UK Law Commission, “Participating in Crime” (n.24).

37 *Ibid.*, 2, para.1.11.

38 Krebs (n.6), p.603.

39 Keiler (n.5), p.261.

40 *Ibid.*

41 Krebs (n.6), p.584.

been subject to criticism by the Justice Committee as it “increases the likelihood that cases will be prosecuted on the basis of weak and tenuous evidence”.<sup>42</sup>

On this point, one might recall Lord Scarman’s assertion in *R v Hancock* with regard to the exact meaning of foresight vis-à-vis the mental element of murder:

The *mens rea* of murder is a specific intent, the intent to kill or inflict serious bodily harm; nothing less suffices. The jury must be sure that the intent existed when the act was done which resulted in death before they can return a verdict of murder;

Foresight does not necessarily imply the existence of intention, though it may be a fact from which, when considered with all the other evidence, a jury may think it right to infer the necessary intent;<sup>43</sup>

The probability of the consequences resulting was an important matter for the jury to consider, and could be critical in their determining whether the result was intended.<sup>44</sup>

Hence, it is obvious that the foresight of a high degree of probability, even virtual certainty, is not in itself intention *stricto sensu*, but a jury may, if it thinks proper, “infer” intention from such foresight.

### ***B. The fundamental difference “rule”***

The fundamentally different rule was first introduced in 1999 in *English*, where D’s liability was to be established not only if he foresaw the act committed by P but also in cases where he foresaw an act that was not *fundamentally different* from the one committed by P. Lord Hutton, who delivered the leading speech said that “to be guilty under the principle stated in *Chan Wing-siu v R [D]* must foresee an *act* of the *type* which [P] committed, and that in the present case the use of the knife was *fundamentally different* to the use of a wooden post”.<sup>45</sup>

D was therefore not found guilty of murder because although he had foreseen that P might attack V with a wooden post, intending to cause serious harm, the act that killed V, ie stabbing with a knife, was “fundamentally different” from the act that D had anticipated. P’s act was considered to be outside the scope of the joint criminal venture, and D was not inculpated for murder. Since then English courts have been struggling to define the illusive meaning of the “fundamentally

<sup>42</sup> House of Commons — Justice Committee (n.4), Written Evidence from Tim Moloney (QC) and Simon Natas.

<sup>43</sup> *R v Hancock* [1986] AC 455, 471–472.

<sup>44</sup> *Ibid.*, p.472.

<sup>45</sup> *Powell* (n.16), 21, 28 (emphasis added).

different” rule. The rule has been heavily criticised, creating frequent difficulties in subsequent cases.

The possibility of taking advantage of the “fundamentally different” test was to be confined to cases where D foresees that P might cause serious harm to V, intending to cause serious harm, while P in turn intentionally kills. Subsequently, in *Rahman*, the Court of Appeal held that the rule can also be used in situations where D foresaw the possibility of P killing V, with intent to only cause serious bodily harm, while P intentionally kills in some other manner than the one anticipated by D.<sup>46</sup> If, however, D foresees that P might kill with intent to kill, the means used by P for achieving that goal are irrelevant and even if “fundamentally different” from what D foresaw, will not guard D from liability. Both P and D will be held guilty of murder.

At the appellate level in *Rahman*, Hooper LJ had laid down these questions as a guide to the answer on D’s liability:

- (1) What was P’s act which caused the death of V? (eg stabbing, shooting, kicking, beating).
- (2) Did D realise that one of the attackers might do this act? If yes, guilty of murder. If no go to the next question.
- (3) What act or acts did D realise that one of the attackers might do to cause V really serious injury?
- (4) Is this act or are these acts which D realised that one of the attackers might do, of a fundamentally different nature from P’s act which caused the death of V? If yes, not guilty of murder. If no, guilty of murder.<sup>47</sup>

This guidance, however, has two weaknesses. In one respect it can be too harsh on D, holding him liable, when he anticipated the act done by P, but did not anticipate that P intended the act to be lethal. On the other hand, it can be too generous to D, not holding him liable when he did not anticipate the act done by P, yet appreciated not only that P might act with the intent to cause serious harm, but that V might die as a result.<sup>48</sup>

The question of what makes P’s act “fundamentally different” from that contemplated by D was subject of an ongoing debate before English courts. In the House of Lords in *Rahman*, the appellant argued that if P had the intention to kill and not merely the intention to inflict serious injury, as D foresaw, this would render P’s actions “fundamentally different” and thus outside the common design,

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<sup>46</sup> *R v Rahman* [2007] 1 WLR 2191. The factual circumstances included a victim stabbed to death with a knife during an attack by a group of men, many of whom were armed with blunt instruments. It was not known which person inflicted the fatal blow, as each of them denied possessing a knife, and claimed that they had not foreseen, believed, known or realised that anyone else in the group had a knife and that the person inflicting the wound had been acting outside the scope of the joint criminal venture.

<sup>47</sup> *Rahman*, quoted in UK Law Commission, “Participating in Crime” (n.24) 56.

<sup>48</sup> UK Law Commission, “Participating in Crime”, (n.24), 47.

obviating D's liability for murder. Their Lordships were, however, unanimous that the appeal should be dismissed and did not recognise the "fundamentally different" rule in such a case. The focus of the "fundamentally different" rule was prescribed to the conduct of P, engaging the lethal weapon, not his undisclosed intention. In the words of Lord Bingham:

Given the fluid, fast-moving course of events in incidents such as that which culminated in the killing of the deceased, incidents which are unhappily not rare, it must often be very hard for jurors to make a reliable assessment of what a particular defendant foresaw as likely or possible acts on the part of his associates. It would be even harder, and border on speculation, to judge what a particular defendant foresaw as the intention with which his associates might perform such acts. It is safer to focus on the defendant's foresight of what an associate might do, an issue to which knowledge of the associate's possession of an obviously lethal weapon such as a gun or a knife would usually be very relevant.<sup>49</sup>

In *Rahman*, Lord Brown restricted the scope of "fundamental difference" as follows:

If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture, *unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B.*<sup>50</sup>

Lord Brown's formulation was viewed as problematic because it limits the "fundamental difference" to cases where "(i) there is a change of weapon (or the use of a weapon when none at all was contemplated); (ii) B was unaware of the weapon which A uses to kill V; (iii) the weapon used by A is different from that which B foresaw might be used *and* more 'lethal'; (iv) because of the change of weapon and its more lethal nature A's act may be regarded as fundamentally different".<sup>51</sup> This formulation was simplified by the Court of Appeal in *Mendez* where the Court endorsed in principle the argument of the appellant's counsel:

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49 *Rahman* (n.46), [24].

50 *Ibid.*, [68] (emphasis in original).

51 David Ormerod, "Joint Enterprise: Murder — Directions to Jury As to Liability of Secondary Parties" (2010) 11 *Criminal Law Review* 874, 877–878.

In cases where the common purpose is not to kill but to cause serious harm, D is not liable for the murder of V if the direct cause of V's death was a deliberate act by P which was of a kind (a) unforeseen by D and (b) likely to be altogether more life-threatening than acts of the kind intended or foreseen by D. The reference to a "deliberate act" is to the quality of the act — deliberate and not by chance — rather than any consideration of P's intention as to the consequences.<sup>52</sup>

A further question regarding the "fundamentally different" rule has surfaced once again before English courts. It was questioned whether this rule applies to the difference in weapons used by P, P's conduct or P's state of mind, or the consequences of P's conduct. In the Court of Appeal in *R v Yemoh*,<sup>53</sup> the appellant was convicted of manslaughter V. In this case V was stabbed to death after being chased by a group of youth. There was evidence that one member of the group carried a Stanley knife, while another sometimes carried a knife. The appellant claimed that the actual stab wound was of a fundamentally different character from the injury intended or foreseen by the defendant, ie a wound that could be caused with the use of a Stanley knife and was thus outside the scope of the joint enterprise. The question was also posed whether D could be held liable, if he foresaw the possibility that P might intentionally cause less than serious injury, while P kills, with intent to at least cause grievous bodily harm. The appellate court dismissed the appeal and upheld the conviction for manslaughter, holding that if D knew or realised the possibility that the person with the knife intended to cause some injury to V, then the fact that P stabbed the deceased intending to kill was not "fundamentally different" from what D had intended or foreseen.

Applying this test, the Court of Appeal in *Yemoh* found that the two knives in the case concerned were sufficiently similar in their capacity to cause death or serious injury, either primarily by stabbing (the knife that was used) or by slashing (a Stanley knife), and therefore, what was foreseen was not fundamentally different.<sup>54</sup>

A similar conclusion was drawn in *R v Gilmour* before the Northern Ireland Court of Appeal.<sup>55</sup> In this case, the defendant (D) had driven P to a house, knowing that he would petrol bomb it. D, however, contemplated a much smaller bomb than the one actually used and only foresaw damage to property and cause of fear to the occupants, but not physical harm to them. The occupants were killed, and D was convicted of murder. The Court of Appeal of Northern Ireland overruled the conviction for murder in the light of D's belief in the size and impact of the bomb, but convicted D of manslaughter because the act itself was nevertheless the very

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52 *Mendez* (n.17) [44]–[47].

53 [2009] EWCA Crim 930, [2009] Crim LR 888.

54 Alan Reed, "Joint Enterprise and Inculcation for Manslaughter" (2010) 74 *Journal of Criminal Law* 196–208, 204.

55 [2000] 2 Cr App R 407.

act contemplated by D. The fact that the bomb used was much larger than the one contemplated did not render the course of conduct fundamentally different.

The “fundamentally different” rule as applied by English courts was interpreted by Simester and Sullivan “to be most closely related to the degree of dangerousness, that is, if the weapon used by P was different from the weapon which D contemplated he might use but equally dangerous, D will still be liable under joint enterprise liability”.<sup>56</sup> From a comparative law perspective, the objective criteria used by English courts for determining whether or not D contemplated P’s additional conduct (collateral crime) is not alien to Islamic jurisprudence. In fact because the inner intention of a person is difficult to determine, and truly only known to Allah, Muslim jurists, in murder cases, do not imagine an exploration of the psyche of the killer or any extensive examination of behaviour patterns.<sup>57</sup> Instead, they consider the tool used in carrying out the proscribed conduct in order to distinguish between intention in *stricto sensu* (*‘amd*) and quasi intent (*shibh al-‘amd*) particularly in murder cases.<sup>58</sup>

Another troubling question is whether causation is a primordial factorisation within the “fundamentally different” rule. In *Mendez*,<sup>59</sup> Toulson LJ in the Court of Appeal asserted that: “Conduct by P which involves a total and substantial variation from that encouraged by D could not properly be regarded as the ‘fruit’ of D’s encouragement, nor with propriety be said to have been committed under D’s influence”.<sup>60</sup> This causative perspective, adopted by the Court, in *Mendez*, was subject to criticism by Ormerod on the predicate that joint enterprise liability does not rest on whether D’s act is causally connected to the collateral crime committed by P but what is determinative is whether D contemplated that P might commit the unlawful act with the requisite intent.<sup>61</sup>

### C. All duck or no dinner — a lesser form of liability?

In English law, there seems to have been some conflict between cases dealing with a scenario where the direct party (P) formed an intention to kill or cause grievous bodily harm while the indirect party (D) contemplated a lesser degree of harm only.<sup>62</sup> In *R v Smith*,<sup>63</sup> the Court of Appeal held that the party who intended grievous bodily harm would be guilty of murder, while the party who intended lesser harm

56 See Neha Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Hart, 2014) 168 citing AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (Hart, 4th ed., 2010) 205–206.

57 Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart, 2013) 215–216 (footnotes omitted).

58 *Ibid.*

59 *Mendez* (n.17).

60 *Ibid.*, p.109.

61 See Jain (n.56) citing D Ormerod, “Case Comment: *R v Mendez* (Reece) (2010) *Criminal Law Review* 874, 877.

62 David J Lanham *et al.*, *Criminal Laws in Australia* (The Federation Press, 2006) 495.

63 [1963] 1 WLR 1200, 1205–1206. See also, *R v Betty* (1964) 48 Cr App R 6; *R v Jervis* [1993] 1 Qd R 643.

would be guilty of manslaughter, but in *R v Anderson; R v Morris*,<sup>64</sup> it did not allow such an option. More recent case law has reinforced the principles from *Anderson*, and clarified that where the killing is outside the scope of the joint venture, the appellant should be held neither guilty of murder nor manslaughter.<sup>65</sup> In *Rahman*, the House of Lords held that “*English’s* appeal, like *Morris’s* before it, succeeded on the basis that in each case the killer had ‘used a weapon and acted in a way which no party to [their] common design could suspect’”.<sup>66</sup> In this regard, the House of Lords cited the Court of Appeal in *Anderson*:

It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.<sup>67</sup>

It was held that *Gilmour* could not “be read as laying down any principle”<sup>68</sup> and that “under the doctrine of JCE as currently applied D will either be held liable to the same extent as P — or not at all”.<sup>69</sup> Hence, the choice for the jury will thus be to convict or to acquit.

In Ireland, a number of extant English law principles are replicated. Recently, in *DPP v Brian Ryan*,<sup>70</sup> the Court of Criminal Appeal found that the trial judge had been correct, when he claimed that one who engages in a joint enterprise “is responsible for the actions of his fellow participant or participants providing the act or actions of his fellow participant or participants falls within the scope of the enterprise but he is never responsible for any conduct or action that exceeds the joint enterprise”.<sup>71</sup> The further determination in the case meant there was, “no ... legal basis on which to invite the jury to bring in a verdict of manslaughter as an alternative to a verdict of guilty of murder. As the learned trial judge put it, ‘It is all duck or no dinner’”.<sup>72</sup>

The High Court of Australia has tended to adopt the *Smith* approach.<sup>73</sup> In *R v Barlow*,<sup>74</sup> six prisoners were charged with the murder of a fellow prisoner. Five

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64 [1966] 2 QB 110 (CA).

65 *Powell* (n.16).

66 *Rahman* (n.46), 357.

67 Lord Parker (CJ) giving the judgment of the Court of Appeal in *Anderson* (n.64) quoted in *Rahman* (n.46) 357.

68 *Rahman* (n.28), [22].

69 Krebs (n.6), p.583.

70 [2011] IECCA 6.

71 *Ibid.*

72 *Ibid.*

73 Lanham *et al.* (n.62), referring to cases: *Gillard v The Queen* (2003) 219 CLR 1; *Harwood v The Queen* (2002) 188 ALR 296; *R v Barlow* (1997) 188 CLR 1.

74 *Barlow* (n.73) 19.

of them were convicted of murder, while one was convicted of manslaughter as a secondary party. McHugh J held, in a dissenting judgment, that the conviction of manslaughter would have been correct had the case been one at common law, but that the Criminal Code of Queensland, under which the case was decided, did not allow such a conviction. The majority, however, held that a conviction of manslaughter was open both at common law and under the Code.<sup>75</sup>

In *R v Jackson*,<sup>76</sup> the Supreme Court of Canada found that when a person who aids and abets another in the offence of murder, but does not have the *mens rea* requirement for murder, he may be guilty of the lesser offence of manslaughter if he possesses the requisite *mens rea* for that offence, which does not require a subjective appreciation of the consequences of the act:

The test is objective. Nor is it necessary that the risk of death is foreseeable. As long as the unlawful act is inherently dangerous and harm to another which is neither trivial nor transitory is its foreseeable consequence, the resultant death amounts to manslaughter. A person may thus be convicted of manslaughter who aids and abets another person in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken.<sup>77</sup>

The same principle applies also to cases of common intent or common purpose.<sup>78</sup>

#### ***D. The Australian doctrine of common purpose***

In Australia, the simulacrum of the English doctrine of JCE is the doctrine of *common purpose*. The law on extended common purpose liability has been dealt with by the High Court of Australia in *Johns v The Queen*,<sup>79</sup> reaffirmed in *McAuliffe v The Queen*,<sup>80</sup> in *Gillard v The Queen*<sup>81</sup> and in *Clayton v The Queen*.<sup>82</sup>

In *McAuliffe*, three accused decided to go to a park for a purpose variously described as to “roll” or “rob” or “bash” someone. At the park, two of the accused severely beat a victim and the third one side kicked him in the chest, causing him to eventually fall off the cliff into the sea and drown. The principal perpetrator pleaded

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75 *Ibid.*, pp.12, 44.

76 [1993] 4 SCR 573.

77 *Ibid.*, p.3.

78 Justin Benseler, *Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks in Canada* (Max-Planck-Institut für ausländisches und internationales Strafrecht, 2005) (on file with the authors) 14.

79 (1980) 143 CLR 108.

80 (1995) 183 CLR 108.

81 (2003) 219 CLR 1.

82 (2006) 168 A Crim R 174.

guilty to the murder while the other two were convicted for being principals in the second degree. At the High Court, the judges held unanimously that:

[A] common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.<sup>83</sup>

The Court stressed that the test of what fell within the scope of the common purpose was not to be determined objectively. The emphasis was to be placed on the actual state of mind of the accused and what he contemplated as a possible incident of the originally planned particular venture.<sup>84</sup> To be held liable for murder, therefore, the two participants must have contemplated the possibility of the intentional infliction of grievous bodily harm by the principal perpetrator.

In *Clayton* — while acknowledging that the extended common purpose liability did not require proof of actual common intention or even actual foresight of the virtual certainty or probability of what in fact occurred — the prosecution “emphasized that the requisite foresight nonetheless imposed a type of subjective criterion, albeit one that needed only to be proved to the level of a ‘possibility’”.<sup>85</sup> The applicants submitted that proof by the prosecution of no more than the *possibility* that a principal offender *might* intentionally cause grievous bodily harm to a victim who did not, of himself, establish conduct sufficiently culpable to warrant conviction of the offence of murder.<sup>86</sup> They contested that to punish persons who have “neither mentally nor physically committed an offence to the same extent as ... those who have was an unjustifiable departure from the fundamental tenet of the Australian criminal justice system”.<sup>87</sup> On this point, it is worth mentioning Kirby J’s opinion in this particular case:

To hold an accused liable for murder merely on the foresight of a possibility is fundamentally unjust. It may not be truly a fictitious or “constructive liability”. But it countenances what is “undoubtedly a lesser form of mens rea”. It is a form that is an exception to the normal requirements of criminal

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83 *McAuliffe* (n.80), [12].

84 *Ibid.*, [13], [15].

85 *Clayton* (n.82), [74].

86 *Ibid.*, [92].

87 *Ibid.*

liability. And it introduces a serious disharmony in the law, particularly as that law affects the liability of secondary offenders to conviction for murder upon this basis.<sup>88</sup>

He went further asserting that:

Foresight of what might possibly happen is ordinarily no more than evidence from which a jury can infer the presence of a requisite intention. Its adoption as a test for the presence of the mental element necessary to be guilty of murder amounts to a seriously unprincipled departure from the basic rule that liability does not attach to criminal conduct itself, unless that conduct is accompanied by a relevant criminal intention.<sup>89</sup>

However, in contrast with the above-mentioned opinion, the majority of the High Court refused to reconsider the law as laid down in *McAuliffe* and *Gillard*, and dismissed the applications.<sup>90</sup> They stated that it had not been demonstrated that the application of these principles had occasioned injustice in the application of the law of homicide<sup>91</sup> and noted that there is no other court of final appeal, which accepts the proposition “that the doctrine of extended common purpose should be abolished or modified by replacing foresight of the possibility of a murderous assault with foresight of the probability of such an assault”.<sup>92</sup>

There is some variation in the approach taken in the common law and under codes regarding this form of “reckless accessoryship”.<sup>93</sup> The Northern Territory follows the common law approach, while Queensland, Tasmania and Western Australia retain the nineteenth-century approach, adopting an objective test in assessing whether the crime committed by the principal offender was a probable consequence of carrying out the common purpose. The High Court has recently held in *R v Keenan*<sup>94</sup> that liability under s.8 of the Queensland Criminal Code requires the offence committed to be of such a nature that it is a probable consequence of embarking on the common purpose.

### *E. Canadian doctrine of common purpose*

In Canada, s.21(2) of the Criminal Code applies to cases where two or more people agree to carry out an unlawful purpose and another crime occurs in the course of

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88 *Ibid.*, [108].

89 *Ibid.*, [97].

90 *Ibid.*, [3].

91 *Ibid.*, [15].

92 *Ibid.*, [18].

93 See Simon Bronitt, “Australia” in Kevin J Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2010) 61.

94 (2009) 236 CLR 397 in Bronitt (n.93), 88.

carrying out that purpose. Section 21(2) holds such persons to be parties to any offence that they knew or ought to have known would be the probable consequence of carrying out the unlawful purpose. This means that a common unlawful purpose and either subjective knowledge or objective foresight that the actual offence would be a probable consequence of carrying out that purpose would suffice, while for the main offender subjective *mens rea* has to be proven. There is no constitutional principle that requires parties to an offence to have the same *mens rea* as the principal offender; however, the objective part of s.21(2) violates s.7 of the above-mentioned Canadian Charter of Rights and Freedoms and is of no force and effect if the person is charged with murder, and attempted murder, war crimes or crimes against humanity.<sup>95</sup> Due to the stigma and penalties attached to these crimes, a subjective fault is required.<sup>96</sup>

### F. Public policy considerations

The view adopted by English courts reflects overarching societal protection public policy considerations and moral responsibility arguments despite the fact that they run contrary to accepted substantive criminal law principles.<sup>97</sup> In the words of the Privy Council in *Chan Wing Siu*, public policy requires “that when a man lends himself to a criminal enterprise knowing it involves the possession of potentially murderous weapons which in fact are used by his partners with murderous intent, he should not escape the consequences to him of their conduct by reliance upon the nuances of prior assessment of the likelihood that such conduct will take place. In these circumstances an accomplice who knowingly takes the risk that such conduct might, or might well, take place in the course of that joint enterprise should bear the same responsibility for that conduct as those who use the weapons with the murderous intent”.<sup>98</sup>

Obviously, the doctrine acts as a deterrent to those involved in gang violence. The House of Lords in *Powell*, expressly stated that the adoption of such an approach “was required for reasons of public policy which were concerned with the practical need to control crime in the course of joint enterprises”.<sup>99</sup> Likewise, in *Gnango* before the UK Supreme Court, the *ratio decidendi* was heavily reliant on public policy considerations in which the “victim rule” was supererogatory, and Gnango was found guilty as a point of public policy.<sup>100</sup> In this case, Lord Brown asserted that were the liability of the murder of V to be attached to only Bandana Man (had he been caught) and not Gnango, the general public would be “astonished

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95 Kent Roach, “Canada” in Kevin J Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2010) 112.

96 *R v Logan* [1990] 2 SCR 731 in Roach, “Canada” (n.95).

97 Alan Reed, “Criminal Law” (2011) *All England Annual Review* 140.

98 *Chan Wing Siu* (n.13) 168, 172.

99 *Powell* (n.16).

100 *Gnango* (n.19).

and appalled”.<sup>101</sup> Counterfactually, a survey conducted by the Nuffield Foundations has revealed that the views of the general public are not in kilter within this suggested perspective: their opinions on two hypothetical joint enterprise scenarios intimated otherwise, and the polar — opposite expectation in terms of inculpation for murder.<sup>102</sup> The survey evidenced that the vast majority of both samples [two different scenarios of joint enterprise] rejected a conviction for murder, even where they were told about the lesser and included offence of manslaughter which carries a less severe sentence.<sup>103</sup> Only one-fifth of both samples favoured a murder conviction.<sup>104</sup> Such conclusion runs directly counter to Lord Brown’s assumption, and the survey reveals that the public were not “*appalled*” of D not being held accountable for P’s conduct.

This development cannot be defended either in terms of legal principle or policy consideration, and contravenes appropriate offence definition analysis in terms of individual fault attribution.<sup>105</sup> The primordial policy considerations of extant law, according to Beatrice Krebs, are not justifiable as the doctrine of JCE becomes “*lazy law*”, which excessively favours the prosecution and undermines established principles of criminal law to the detriment of the individual’s rights.<sup>106</sup>

### ***G. Joint enterprise and fault element: the way ahead***

The distinctive feature of the extended form of JCE is the fault element which, subject to certain conditions, permits criminal liability to be extended to crimes other than the one(s) initially agreed upon in the original plan or design so long as these consequences were foreseeable by (D) the accessory.

One serious problem which confronted, and will continue to confront English courts, is the applicability of the extended form of JCE to specific intent crimes, notably, murder. It is questionable whether individuals should be convicted of such high profile and morally culpable crimes, on the basis of mere foresight. It is submitted that the application of a mode of liability cannot replace an essential element of a crime. The prosecutorial authorities, as well as English courts, confuse mode of liability and the crimes themselves. Conflating the extended form of joint enterprise and the crime of murder or any other specific intent crime would result in the requisite mental state being so watered down that it is extinguished.<sup>107</sup>

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101 *Ibid.*, 68 (Lord Brown).

102 Barry Mitchell and Julia V Roberts, “Public Opinion and Sentencing for Murder: An Empirical Investigation of Public Knowledge and Attitudes in England and Wales”(Nuffield Foundations, 2010), available at [http://www.nuffieldfoundation.org/sites/default/files/files/Public%20Opinion%20and%20Sentencing%20for%20Murder\\_Mitchell&Robertsv\\_FINAL\(1\).pdf](http://www.nuffieldfoundation.org/sites/default/files/files/Public%20Opinion%20and%20Sentencing%20for%20Murder_Mitchell&Robertsv_FINAL(1).pdf)

103 *Ibid.*, p.39.

104 *Ibid.*

105 Krebs (n.6), p.579.

106 *Ibid.*, p.602.

107 See *Prosecutor v Milomir Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003, [530].

A major source of concern with regard to the applicability of the extended form of joint enterprise by English courts is that under both the objective and subjective standards, the participant is unfairly held liable for criminal conduct that he neither intended nor participated in. Moreover, if D had actually participated in crimes outside the initial plan “common purpose” as an aider or abettor, they would arguably have an increased chance of acquittal, as the prosecution would be confronted with having to prove a higher level of fault attribution, namely, that the accused knew that the principal perpetrator had the state of mind required for the crime at issue.<sup>108</sup>

The specific intent required for a conviction of murder cannot be reconciled with the *mens rea* standard of the extended form of JCE (the foreseeability trap). The accused’s contemplation that murder would be committed by other members of the JCE is incompatible with and falls short of the threshold needed to satisfy the specific intent required for a conviction for murder. The *mens rea* of accomplice liability in JCE requires proof of cognitive and volitional components. The authors recommend that consideration should be given to reforming the “foreseeability” standard of the extended form of joint enterprise, particularly in murder cases, to reach the culpability threshold of s.210.2(b) of the United States Model Penal Code (MPC).<sup>109</sup> Accordingly, in order to hold D accountable for the collateral crime (murder) committed by P, the prosecution has to prove that D’s liability stems from his conscious disregard of a substantial and unjustifiable risk that death will result from P’s conduct. The risk must be of such a nature and degree whose disregard involves a *gross deviation from the standard of conduct that a law-abiding person would observe* in D’s situation.<sup>110</sup> By demonstrating such indifference to the value of human life, D deserves to be bracketed with P who kills V intentionally.<sup>111</sup>

### III. Withdrawal Principles and Complicity: The Need for a Restatement

The preceding sections have identified that derivative complicity principles have, in a broad sense, been used as an expedient to obfuscate proof of an accomplice’s guilt for subsequent crimes; it operates automatically with resort to one form of sophistry after another.<sup>112</sup> The debate now extends to explore the manner in which English

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108 See Mohamed Elewa Badar, “‘Just Convict Everyone’, Joint Perpetration from Tadić to Stakić and Back Again” (2006) 6 *International Criminal Law Review* 293–302.

109 On the degree of culpability under the Model Penal Code, see Mohamed Elewa Badar, “The Concept of Mens in International Criminal Law” (Hart, 2013) 102–120.

110 See Model Penal Code, s.2.02(2)(c).

111 *Ibid.*

112 See generally, Joshua Dressler, “Reforming Complicity Law: Trivial Assistance As a Lesser Offense?” (2008) 5 *Ohio State Journal of Criminal Law* 427; Robert Weisberg, “Reappraising Complicity” (2000) 4 *Buffalo Criminal Law Review* 217; John Gardner, “Complicity and Causality” (2007) 1 *Criminal Law and Philosophy* 127; GR Sullivan, “Complicity for First Degree Murder and Complicity in an Unlawful

law, and alternative legal systems, recognise that a person who has embarked on a criminal enterprise may withdraw from it, consequently expunging criminal liability.<sup>113</sup> This applies, of course, unless the actor has already reached the stage of an inchoate offence such as conspiracy or attempt for which extant law does not recognise the possibility of withdrawal.<sup>114</sup> The ambit of such a defence is unfortunately extremely unclear, providing another illustration of the uncertainty pervading the whole substantive area of complicity; a danger applies in extending the defence to those judged truly repentant although facially beneficent.<sup>115</sup> Moreover, the limits of the defence remain controversial, and it is also opaque as to whether it operates within the sphere of incentivisation for a defendant to disengage or alternatively as an iteration of their reduced level of blameworthy engagement.<sup>116</sup> As stated, however, by the English Law Commission, “considerations of social policy support the argument that if an accessory counters their assistance with equally obstructive measures, an acquittal ought to follow given their efforts to right the wrong”.<sup>117</sup>

The subsequent contextualisation examines the underlying bases upon which the withdrawal defence ought to be constructed, evaluates the precedential edifice currently in place, and suggests a reformulated template for the future.<sup>118</sup> It considers the most recent Law Commission proposals set out in *Participating Crime*, wherein the contours of the defence were mechanistically set as “negating the effect of the assistance, encouragement or agreement”, and the jury as fact-finders were promoted to determine this prescribed threshold.<sup>119</sup> In this regard, it is important that the criminal law should take pains to avoid contamination by sham and cant. It is necessary to re-examine the putative search currently engaged in a proportionality test for the constituents of an effective withdrawal as a defence to liability.<sup>120</sup> This is deconstructed in the following three particularised sections

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Killing” [2006] *Criminal Law Review* 502; David Lanham, “Accomplices, Principals and Causation” (1980) 12 *Melbourne University Law Review* 490; RA Duff, “Can I Help You? Accessorial Liability and the Intention to Assist” (1990) 10 *Legal Studies* 165; and Bauruch Weiss, “What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law” (2002) 70 *Fordham Law Review* 1341.

113 Smith (n.9), pp.250–262.

114 Note also that the Serious Crime Act 2007 in ss.44–46 imposes inchoate liability for acts capable of assisting or encouraging the principal (P), and are not derivative from offence completion.

115 Michael G Heyman, “Losing All Sense of Proportion: The Peculiar Law of Accomplice Liability” (2013) 87 *St John’s Law Review* 129, 148.

116 See William Wilson, *Criminal Law: Doctrine and Theory* (Longman, 4th ed., 2011) 587; GR Sullivan, Andrew Simester, John Spencer and Graham Virgo, *Criminal Law: Theory and Doctrine* (Hart, 4th ed., 2011); and Richard Card, Card, Cross and Jones, *Criminal Law* (Oxford University Press, 18th ed., 2008) 785.

117 Law Commission, *Participating in Crime* (n.24), para.3.60.

118 See David Ormerod, *Smith and Hogan’s Criminal Law* (Oxford University Press, 13th ed., 2011) 436; Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th ed., 2009) 430; and Dennis Baker, *Glanville Williams: Textbook of Criminal Law* (Sweet and Maxwell, 3rd ed., 2013) 506.

119 Law Commission (n.24), para.3.60.

120 See Michael G Heyman, “The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform” (2010) 15 *Berkeley Journal of Criminal Law* 388, 395.

of the article: (1) considerations of extant English common law principles, and the conceptual nature of the defence; (2) comparative evaluation of withdrawal perspectives adduced in alternative jurisdictions and (3) a reformulated pathway for the way ahead emphasising: (i) penitent motive; (ii) a reasonableness — imputed proportionality normative assessment for exculpation and (iii) a reverse burden of proof for conduct prophylaxis.

#### IV. The Conceptual Edifice of the Withdrawal Defence: English Common Law and Imputed Proportionality

It is interesting that whilst complicity principles *per se* have received extensive consideration by academics and the judiciary, the nature of penitent withdrawal has only been reviewed by a small circle of cognoscenti.<sup>121</sup> The temporal individuation factorisation attached to withdrawal is significant in that a small pre-inculpatory interlude may apply wherein an individual actor may potentially renounce, and countermand their earlier defalcations and complicitous behaviour.<sup>122</sup> A few prefatory observations, however, are necessary to review the conceptual edifice that applies to this redemptive change of heart, aligned with appropriate reductive criminal deprecation. The predicate for withdrawal exculpation has, as KJM Smith has suggested, polarised around two diverse rationales: (a) incentivisation for an individual to withdraw from his criminal pathway and facilitate crime prevention or (b) a reflection of reduced culpability and/or social dangerousness of D2.<sup>123</sup>

The too familiar shibboleth of common design sits uneasily with withdrawal principles. The quagmire from which we emerge suggests that the rule of law has not simply been ignored at times: it has been eviscerated. The simulacrum of the incentivisation for exculpation rationale is that it provides an opportunity for an individual to recalibrate what they have done, and the likely impact, and this consequentially may reduce the likelihood of the offence being committed.<sup>124</sup> The premise is that it is socially desirable to give intending offenders an opportunity to prevent the consequences of their actions.<sup>125</sup> The rationalisation, as Gross has cogently stated, is that renunciation rests, in part, “upon policy of the law that aims at providing an incentive for abandonment of criminal projects by those who pursue

121 See David Lanham, “Accomplices and Withdrawals”(1981) 97 *Law Quarterly Review* 575; KJM Smith, “Withdrawal from Criminal Liability for Complicity and Inchoate Offences” (1983) 12 *Anglo-American Law Review* 200; and KJM Smith, “Withdrawal in Complicity: A Restatement of Principles” [2001] *Criminal Law Review* 769.

122 Paul Hoerber, “The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation” (1986) 74 *California Law Review* 377, 378; and see SJ Schulhofer, “Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law” (1974) 122 *University of Pennsylvania Law Review* 1497.

123 Smith, “Withdrawal in Complicity: A Restatement of Principles” (n.121), pp.772–773.

124 Daniel G Moriarty, “Extending the Defense of Renunciation” (1989) 62 *Temple Law Review* 1, 16–17.

125 Gerald Gordon, *The Criminal Law of Scotland* (W. Green, 1976) 183.

them before they do harm. It is, thus, the carrot of immunity whose complementary stick is punishment".<sup>126</sup> The reality, however, seems rather different in that this particularised theoretical underpinning presupposes D2's knowledge of the law to take exculpatory effect. This altitudinal indicia must, therefore, conjoin together with beliefs attached to pre-existing imposition of attendant inchoate liability.<sup>127</sup> The quasi-justificatory nature of incentivisation as a defence codeterminant is counter-intuitive. 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.<sup>128</sup>

The reality is that the reduced social dangerousness model of withdrawal reflects the gravamen of any potential defence and rationale for exculpation.<sup>129</sup> On an inwardly prognostic basis, the 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.<sup>130</sup> A "positive premium" should apply for a genuine change of heart that is driven by a voluntary motive of genuine contrition.<sup>131</sup>

Withdrawal should be construed in general terms as an excuse defence: a defence that invokes concession that the action is wrong, but nonetheless the individual's characteristics or prevailing state of affairs indicate that they should not be inculcated for their infractions: "Rather than excusing an accessory's complicitous actions because of conditions prevailing at the time, here excuse looks to the redemptive quality of the later withdrawing actions: showing, either that the irresolute accessory is not culpable or insufficiently culpable; or that he merits excusing because he has shown himself to be insufficiently socially dangerous to attract a criminal sanction".<sup>132</sup>

It is important to reflect upon the significance of accomplice location and temporal relationship to the criminal event. The defence of withdrawal is *sui generis* in that it cannot be pigeon holed into the traditional justification/excuse dichotomy, revealed by dissection of other general defences, including self-defence, involuntary intoxication, diminished responsibility or duress: "It is not a defence of reasonable reaction. Neither is it a defence of impaired voluntariness".<sup>133</sup> In terms of the

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126 Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press, 1979) 166.

127 Moriarty (n.124), pp.17–18.

128 Smith, "Withdrawal in Complicity: A Restatement of Principles" (n.121), p.773.

129 See Wilson (n.116), p.589; Sullivan, Simester, Spencer and Virgo (n.116), p.255; and Martin Wasik, "Abandoning Criminal Intent" [1980] *Criminal Law Review* 785, 793.

130 See Paul H Robinson, "A Theory of Justification: Societal Harm As a Prerequisite for Criminal Liability" (1975) 23 *University of California, Los Angeles Law Review* 266–267; A Katz, "Dangerousness: A Theoretical Reconstruction of the Criminal Law, Part I" (1920) 19 *Buffalo Law Review* 3; and Paul H Robinson, *Structure and Function in Criminal Law* (Clarendon Press, 1997) 95.

131 Smith, "Withdrawal from Criminal Liability for Complicity and Inchoate Offences" (n.121), pp.253–254.

132 Smith, "Withdrawal in Complicity: A Restatement of Principles" (n.121), p.773.

133 Wilson (n.116), p.589.

balancing of legitimate social interests, appropriate thresholds of culpability, and overarching public policy concerns, withdrawal most closely mirrors consent as an individuated defence, akin to quasi-excuse in potentially exculpating the actor.<sup>134</sup> It is distinctive as a defence in that complicity liability as an accessory is derivative in nature from completion of the full substantive offence.<sup>135</sup> Accessory liability may attach to D2 from pre-offence defalcations where constitutive external and fault elements are adduced, but a defence of withdrawal may be superimposed *ex post facto* to conduct during the brief pre-incipulatory interlude to exculpate.<sup>136</sup> The defence should, in such a context, be available to reflect redemptive behaviour and reduced levels of culpable dangerousness. It is a defence, as Robinson has partially indicated, that is independent in nature as constitutively it does not necessarily operate to diminish the normal rules for proof of offence elements (negating *actus reus* or *mens rea*), but rather it operates within the spectrum of offence-modification as an element of the criminalisation reflection underpinning the offence.<sup>137</sup>

In English law for the withdrawal defence to be effective, as recently interpreted in *R v Otway*, the withdrawal must be voluntary, real, communicated in some form in good time, and incorporate an effort to dissuade others from continuing.<sup>138</sup> In essence, a simple change of heart or mere repentance by D2 is insufficient: for more is needed for salvational redemption and to benefit from a plea of withdrawal, a defendant must show that he has communicated his unequivocal withdrawal, either to the principal offender, or where there are several co-perpetrators to all of them, or possibly to law enforcement officers or the potential victim.<sup>139</sup> The difficulties of cabining effective withdrawal principles, and the timeliness requirement for disavowal, were addressed in *R v Becerra*; *R v Cooper*.<sup>140</sup> The common design was one of burglary from an elderly householder, while in the house, the tenant of a flat on the first floor surprised the defendants during the course of their intrusion. Becerra, calling “let’s go”, climbed out of a window and ran away. Cooper, meanwhile, who had been handed a knife by his co-adventurer, stabbed and killed the tenant. They were both charged with murder. Becerra (D2), as an accessory, contended by his words and actions he had withdrawn from the joint enterprise before the attack on the tenant, thereby negating complicitous behaviour, and therefore was not liable to be convicted of murder. The defence of withdrawal was rejected by

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134 Daniel L Rotenberg, “Withdrawal As a Defense to Relational Crimes” [1962] *Wisconsin Law Review* 596, 598.

135 See, generally, D Unterhalter, “The Doctrine of Common Purpose: What Makes One Person Liable for the Acts of Another?” (1988) 105 *South African Law Journal* 671.

136 Patrick Doherty, “A New Crime: Criminal Facilitation” (1971) 28 *Loyola Law Review* 103, 11.

137 Robinson, *Structure and Function in Criminal Law* (n.130), p.69; and see, generally, Paul H Robinson, “Criminal Law Defenses: A Systematic Analysis” (1982) 82 *Columbia Law Journal* 199.

138 [2011] EWCA Crim 3.

139 *R v Perman* [1996] 1 Cr App R 24.

140 (1976) 62 Cr App R 212; and see also *R v Mitchell* (1998) 163 JP 75; *R v Mitchell* [2009] 1 Cr App R 31; and *R v Campbell* [2009] EWCA Crim 50.

the appellate court, relying on the earlier authority of *R v Whitehouse*<sup>141</sup> before the Court of Appeal of British Columbia. Roskill LJ stated an effective withdrawal must: “serve unequivocal notice on the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw”.<sup>142</sup> It is essential that, in order to allow the principal offender (D1) the opportunity to desist rather than complete the offence, the co-adventurer must make a timely and unequivocal communication to D1 of his change of heart and of the fact that, if continuance of liability occurs, it is on the principal offender’s own account, without the aid and assistance of the person who is purporting to withdraw.

In English law, as stated in *R v O’Flaherty*,<sup>143</sup> the notice of withdraw (by words or actions) must be unequivocal: perfunctory verbal disclaimers of liability,<sup>144</sup> failure to attend on the day of commission of criminal purpose (omission)<sup>145</sup> or fleeing the scene of the crime<sup>146</sup> are all ineffectual manifestations of imputed countermand. The constitutive timeliness (or otherwise) of an attempt to withdraw from complicitous joint enterprise activity arose in *Campbell*,<sup>147</sup> in a group of participants, D2 had engaged in the first attack, not the second, but only a short time span accrued between the two assaults and the Court of Appeal determined that the conduct during the course of the earlier attack still represented a significant and operating cause of death. The bases and requirements of an effective withdrawal will depend very much on the assistance or encouragement that the accessory has provided. This imputed proportionality standardisation has developed in England in an unstructured and individuated manner to disparate modes of participatory engagement.<sup>148</sup> More redemptive disavowal is required where an individual has supplied the very means of the crime as in *Becerra*: “retracting assent is a fish from a very different kettle from neutralizing assistance”.<sup>149</sup> The defendant had provided the weapon and lent support to a co-adventurer. The appellate court determined that conduct “vastly different” and “vastly more effective” was required than merely stating, “come on, let’s go”, and decamping through the window.<sup>150</sup> As a co-adventurer, an “express countermand was needed that may have only been effected by direct and active physical interventions. A far greater threshold applied to withdrawal in terms of positive conduct to prevent the criminal effectuation;

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141 (1940) 55 BCR 420 (Sloan JA).

142 *Becerra* (n.140) 218.

143 [2004] 2 Cr App R 20, [60]: “To disengage from an incident a person must do enough to demonstrate that he or she is withdrawing from the joint enterprise. This is ultimately a question of fact and of degree for the jury”.

144 See *R v Fletcher* [1962] Crim LR 551; *R v Navaz*, (unrep., 13 May 1999); and *R v Baker* [1994] Crim LR 444.

145 *R v Rook* [1993] 1 WLR 1005; and see also *R v Goodspeed* (1911) 6 Cr App R 133.

146 *Becerra* (n.140) and *O’Flaherty* (n.143).

147 *Campbell* (n.140); and see also *Gallant* [2008] EWCA Crim 1111.

148 Lanham (n.121), p.580.

149 Wilson (n.116), p.590.

150 *Becerra* (n.140) 218 (Roskill LJ).

simple encouragement may, in contrast, normally be countermanded by an express statement on individual disengagement.<sup>151</sup>

English juridical precepts, as stated, are ambiguous as to the form that withdrawal should take set against the contours of the mode of initial participatory engagement: “the more directly and actively involved in the participation, the more direct and active the steps necessary to withdraw”.<sup>152</sup> The corollary, however, of accepting withdrawal as an affirmative offence — modification defence, and not simply of relevance to mitigation of sentence as some have suggested — is that it becomes incumbent to articulate a set of gradation thresholds for exculpatory conduct.<sup>153</sup> A reasonable — imputed proportionality normative assessment is needed of effective disassociation principles, embraced also with consideration of attitudinal motivation for disavowal.<sup>154</sup> Thus, it is important to extend our analysis beyond English law, to look more broadly at comparative legal systems and alternative theories of withdrawal, and to chart optimal reform pathways to indicate a preferred domestic equipoise.

## V. Withdrawal and Comparative Standardisations: Lessons From Alternative Legal Systems

A baroque maze of notions pervade the common law of withdrawal, and difficulties prevail in determining the causal efficacy (if any) of such salvational disengagement. Judicial sleight of hand has been adapted, in general, to common design rationale, and it has been used as a prosecutorial expedient towards establishing derivative inculcation.<sup>155</sup> More broadly, a normative assessment should apply to individuated withdrawal behaviour, predicated upon an imputed proportionality test. To be effective, the withdrawal needs to be unequivocal, timely, and voluntary, and should incorporate a genuine effort to undo earlier complicitous action.<sup>156</sup> The normative assessment that is adduced herein as an optimal reform pathway is developed and enhanced by examination and evaluation of comparative juridical precepts. These

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151 Sullivan, Simester, Spencer and Virgo (n.116), p.261.

152 Wilson (n.116), pp.589–590.

153 See, generally, Doherty (n.136); and see also Richard Buxton, “The Extent of Criminal Complicity” (1979) 42 *Modern Law Review* 315 and Meir Dan-Cohen, “Decision Rules and Conduct-Rules: An Acoustic Separation in Criminal Law” (1984) 97 *Harvard Law Review* 625.

154 See Richard Taylor, “Complicity, Legal Scholarship and the Law of Unintended Consequences” [2009] *Legal Studies* 1, 3 and Chris Clarkson, “Complicity, *Powell* and Manslaughter” [1998] *Criminal Law Review* 556.

155 Heyman (n.115), pp.130–131 and see Markus D Dubber, “Criminalizing Complicity: A Comparative Analysis” (2007) 5 *Journal of International Crime Justice* 977, 979.

156 See, generally, Kai Hamdorf, “The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law” (2007) 5 *Journal of International Criminal Justice* 208.

perspectives acknowledge withdrawal as an affirmative defence in reliance upon reasonable efforts of disengagement and as part of the “price” of exculpation.<sup>157</sup>

### ***A. North-American perspective on withdrawal and renunciation***

An important dichotomy prevails in terms of extant U.S. principles relating to abrogation of liability for inchoate offences or complicity; inchoate liability, in more constrained terms for exculpation, requires that the individual has “directly” prevented the harm from occurring.<sup>158</sup> A more relaxed and generous standardization applies to complicitous derivative liability where D2 can effectively withdraw by making “proper effort” to prevent D1 from committing the substantive offence, and failure to prevent that commission does not constitute a total bar to defence applicability provided reasonable efforts to desist can be promulgated before fact-finders.<sup>159</sup> A modified proportionality test is supported by the MPC s. 2.06(6)(c)(ii) which provides a defence where the defendant terminates his complicity prior to the commission of the offence, and gives timely warning to the law enforcement authorities or otherwise makes “proper effort” to prevent the commission of the offence.<sup>160</sup> By way of illustration, in *Commonwealth v Huber*,<sup>161</sup> where D2 had provided assistance through supply of the tools of the trade (a rifle for use in a robbery), the court determined that an escape route from liability was provided to D2 via reporting the actions of D1 to the police in time to thwart the robbery.

The withdrawal “escape” mechanism adopted in the MPC, appurtenant to “proper effort” of disavowal, appears more generous than English precepts, and significantly more enlightened than the Australian position adopted in *White v Ridley*<sup>162</sup> (see below), in the requirement that redemptive efforts must be aimed at crime commission prevention rather than simply undoing the efforts of the original behaviour.<sup>163</sup> In general terms, a reasonableness — proportionality of remedial action standard is imposed in the U.S., requiring a duty of reasonable negation that charts a pathway for an English reformulated template:

Most formulations of this defence permit it only if the defendant terminates his complicity and does none of a variety of other things....All of these formulations permit the defense for conduct short of prevention of the

157 Smith, “Withdrawal in Complicity: A Restatement of Principles” (n.121), p.776.

158 Gross (n.126), p.165 and see also *State of Utah v Eagle* 611 P 2d 1211, 1213 (Utah, 1980) and, generally, Moriarty (n.124).

159 See, generally, Paul H Robinson, *Criminal Law Defences* (West, 1984).

160 *Ibid.*

161 15 D and C 2d 726, noted in George E Dix and Michael Sharlot, *Criminal Law: Cases and Materials* (West, 1973) 638–641.

162 (1978) 140 CLR 342.

163 Australian juridical precepts indicate that the putative accessory may redemptively escape liability if reasonable steps to “undo” the effectiveness of their complicitous behaviour are carried out, but such actions must be timely and proportionate.

offence. They essentially require, in the words of the catch-all clause, a “proper effort” to prevent the offence... [This standard] is clearly more lenient than the “actual prevention” standard that must be satisfied in many jurisdictions to gain a renunciation defense to attempt, conspiracy, solicitation and facilitation.<sup>164</sup>

Renunciation must be complete and voluntary.<sup>165</sup> Imputed proportionality is significant in most American jurisdictions in that where the defendant decides to withdraw long before the commission of the offence, it may suffice to negate liability that the accessory makes it very clear to the others that any further activity will go ahead without their assistance.<sup>166</sup> Where the offence is about to be committed, it may well be that the accused must try, by force if necessary, to prevent the commission of the offence.<sup>167</sup> If the assistance has been in the form of supplying a gun for a murder, then the court would certainly require something more than mere communication by the accessory to the would-be killer that D2 wants nothing more to do with the offence. In such a case, or where communication with the other parties is impossible, it may be that the only effective action the individual can take is to inform the police so that the crime can be stopped.<sup>168</sup>

The proportionality test will not apply in American jurisdictions where the pre-incipitatory interlude has expired, and the possibility of withdrawal is no longer timely. The constituents of sufficient termination depend on the type of assistance given by the perpetrator, and evaluation of whether, because of temporal individuation, facial disengagement is rendered futile.<sup>169</sup> In *State of Montana v Radi*,<sup>170</sup> for example, the defendants were apprehended late at night in Montana, circumnavigating an alley behind a hardware store and, “in the general area of some disused apartments located above (a neighbouring Safeway grocery store)”.<sup>171</sup> Counterfactually, it was presented that they had abandoned their attempt to force open the hardware store’s back door, but when apprehended still had in their possession a crowbar (secreted into the sleeve of one of the co-perpetrators) that had been used in their illegal joint enterprise.<sup>172</sup> The court determined that “the jury might have reasonably concluded that burglary was terminated because the participants found their efforts to be futile”.<sup>173</sup> The co-adventurers had been caught “pink-handed”, and their marginal efforts to desist, coterminous with an

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164 Robinson (n.160) s.81(e) at 363.

165 Moriarty (n.124), p.26.

166 Lanham (n.121), pp.579–585.

167 *Ibid.*

168 Ormerod (n.118), pp.237–239.

169 *See*, generally, Paul H Robinson, “Imputed Criminal Liability” (1984) 93 *Yale Law Journal* 609.

170 542 P 2d 1206 (1975).

171 *Ibid.*, 322.

172 *Ibid.*, 322–323.

173 *Ibid.*, 324.

unsuccessful attempt to prise open the door of the property, was an insufficient disavowal of burglarious intention.

The attitudinal motivation that lies behind an actor's withdrawal from complicitous behaviour should form an essential element behind our normative assessment of imputed proportionality, and is of far greater significance to deliberations of fact-finders in American courts than across the Atlantic in England.<sup>174</sup> The individual's ratiocination towards withdrawal, for good or ill reasons, constitutes an important diagnostic tool for fact-finders in terms of reduced societal dangerousness. Motivation should be based on a genuine decision taken by the participant to desist independently and voluntarily their criminal pathway, and is a fundamental calibration for beneficent exculpation.<sup>175</sup>

Attitudinal motivation, as stated, plays a crucial role before U.S. state courts as a solipsistic judicial divining-rod determination of withdrawal, viewed through a legal prism of disengagement as an affirmative defence on a preponderance of the evidence.<sup>176</sup> Exculpation must be based on a "genuine decision" taken by the participant to independently and voluntarily desist their criminal pathway derived from legitimate and verifiable phenomenological calculations.<sup>177</sup> As Moriarty has identified, redemptive fault disavowal has enhanced significance for the American judiciary: "[A] further, related consequence of the Model Penal Code's definition of 'voluntary' is that, when employed in state statutes, it has proved susceptible to judicial interpretations which require 'repentance or a change of heart' or 'a change of mind and heart' before renunciation is considered voluntary within the intent of the statute".<sup>178</sup>

An improper motive can be of constitutive significance to abrogate the redemptive quality of D2's conduct. Illustratively, this has been supererogatory in a number of U.S. precedential authorities. In *People v Kimball*,<sup>179</sup> the defendant was engaged in the attempted robbery of a convenience store, but when accosted by a female operator, he decided to abandon the venture declaring: "I won't do it to you; you're good looking and I won't do it to you this time but if you're here next time it won't matter".<sup>180</sup> Clearly, where the defendant's motivation for withdrawal relates simply to the physical appearance of the victim, or the defendant awaits a more opportune moment for criminal engagement, then this needs to frame part of the normative assessment of culpability. It would, for example, be disingenuous to allow a withdrawal defence if the rationale for disavowing further

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174 Moriarty (n.124), pp.30–32.

175 Smith, "Withdrawal in Complicity: A Restatement of Principles" (n.121), pp.782–784.

176 See Sanford H Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" (1985) 73 *California Law Review* 323 and Joshua Dressler, "Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem" (1985) 37 *Hastings Law Journal* 91.

177 Hoerber (n.122), pp.384–385.

178 Moriarty (n.124), p.29.

179 311 NW 2d 343, modified on other grounds, 313 NW 2d 285.

180 *Ibid.*, 311 NW 2d 343, 344.

criminal behaviour centred on a relationship with the partner of a co-adventurer. An improper motive can be identified, as in *Commonwealth v Doris*,<sup>181</sup> where D2 only seeks to withdraw to avoid imminent arrest or to attempt to expunge liability during the actual furtherance of a robbery. The flame of culpability is not duly doused in such circumstances, and effectual motive is causally linked diagnostically to enduring social dangerousness.

Withdrawal because of fear of apprehension is cognitively different from the redemptive quality of behaviour that springs from the genuine pricking of conscience,<sup>182</sup> highlighted by the court in *Weaver v State*,<sup>183</sup> and delineated by “whether [the defendant] was frightened by the approach of the officers or deterred by the voice of conscience and repented of his wicked intentions”.<sup>184</sup> Inculcated motivations for disaggregation of criminal behaviour are addressed in the draft commentaries to the MPC,<sup>185</sup> and adopted in a plethora of state legislatures:

A renunciation is not voluntary and complete [in respect of complicity and inchoate liability] if it is motivated in whole or in part by: (a) a belief that circumstances exist which increase the probability of detention, or which render more difficult the accomplishment of the criminal purpose, or (b) a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective.<sup>186</sup>

In contrast, withdrawal principles in Canadian law are best viewed via a kaleidoscope of negation of motivational intention; the overarching principle is that renunciation can raise a reasonable doubt about specific offence-definitional element *mens rea*.<sup>187</sup> In *R v Kirkness*,<sup>188</sup> for instance, the Canadian Supreme Court upheld the acquittal of an individual for murder who participated in a household burglary, but who instructed D1 to stop strangling the victim because he was going to kill her. This instruction, deconstructing any pervading fault for homicide, provided “timely notice” to the principal offender that they were acting individually in this regard. D2 is only liable for offence(s) that he knows or in most cases ought to have known would be a probable consequence of carrying out the illegal joint venture.<sup>189</sup> This is aligned with the Dutch Penal Code Article 46b which provides: “Neither preparation nor an attempt to commit a crime obtains where the felony is not committed due

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181 135 A 313.

182 Smith, “Withdrawal in Complicity: A Restatement of Principles” (n.121), p.783.

183 42 SE 745 (1902).

184 *Ibid.*, 747.

185 See Model Penal Code s.5.01(4). (Proposed Official Draft 1962) (complete and voluntary renunciation is an affirmative defence).

186 New York Penal Code 1965, as amended, s.40.10, para.5.

187 Morris Manning and Peter Sankoff, *Criminal Law* (Butterworths, 4th ed., 2009) 269.

188 [1990] 3 SCR 74, citing *Whitehouse* (n.141), quoted with approval in *Miller* (n.247).

189 Kent Roach, “Canada”, in Alan Reed and Michael Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate, 2013) 319.

to circumstances which depend on the volition of the perpetrator".<sup>190</sup> The Supreme Court, however, has idiosyncratically recently provided in this respect that "a co-perpetrator" who voluntarily prevents a felony from being completed (for example by stopping the other co-perpetrator from going any further) will be clear by virtue of Article 46b, but this does not affect the liability of the other co-perpetrator who was not involved in the 'non-completion' of the felony".<sup>191</sup>

### ***B. International comparisons: the withdrawal defence and negation of harm***

South African conceptual principles *vis-à-vis* redemptive withdrawal mirror that in the U.S., to the extent that they are based on legal policy; quintessentially a determination by moral arbiters (the court) taking into account all relevant facts.<sup>192</sup> This engages an examination of the defendant's intention and attitudinal motivation in the context of *dolus eventualis*: a primordial focus upon whether D2 has foreseen the possibility that a nexus of events would be precipitated via their initial inculpatory conduct, but nonetheless persisted with their criminal delfalcations.<sup>193</sup> The South African Court will measure moral desert as part of their evaluation of the individual actor's mental calculus, and the extent to which they engaged in the planning or commission of the crime on the part of the perpetrator:<sup>194</sup> "the more advanced an accused person's participation in the commission of the crime, the more pertinent and pronounced his conduct, after the event, that he genuinely meant to dissociate himself from it at the time.<sup>195</sup> The guiding principles for fact-finder deliberation were purveyed in *S v Musingadi*,<sup>196</sup> establishing a non-exhaustive panoply of relevant factorisations: "[M]uch will depend on the circumstances: On the manner and degree of the accused's participation; on how far the commission of the crime has proceeded; on the manner and timing of disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime".<sup>197</sup>

In U.S. jurisdictions that adopt the MPC, a more relaxed attitude to withdrawal from accessory liability has been promulgated, in terms of proper efforts of disavowal normative standardisation for fact-finder determination.<sup>198</sup> This stands in

190 Hein D Wolswick, "The Netherlands" in *Participation in Crime: Domestic and Comparative Perspectives* (n.78) 374–375.

191 *Ibid.* and see HR 12 April 2011, NJ 2011, 358.

192 See, generally, Gerhard Kemp (ed.), *Criminal Law in South Africa* (Oxford University Press, 2012) Ch.24 and Jonathan Burchell, *South African Criminal Law and Procedure* (Vol.I, 4th ed., 2011).

193 Andrew Paizes and Matthew Chakalson, "Criminal Law" [1992] *Annual Survey of South African Law* 491, 511.

194 *Ibid.*

195 *S v Nduli* 1993 (2) SACR 506 (A) (504F) and see Kemp (n.192).

196 2005 (1) SACR 395 (SCA).

197 *Ibid.*, [35].

198 See, generally, Wayne R LaFave, *Substantive Criminal Law* (West, 2nd ed., 2011) s.13.

contradistinction to the conceptual edifice for withdrawal that permeates Australian law, and adoption of a more stringent threshold for exculpation of a potentially recalcitrant co-perpetrator. The Anglo-American reasonableness-proportionality nexus that underpins withdrawal as a defence template has been subjected to a degree of consideration in Australian jurisprudence, and outcome determination has been more constrained.<sup>199</sup>

A diversity of views prevail more broadly in Australian law as to whether withdrawal is only applicable where the actor's behaviour "negates" the conduct requirement of culpability or whether it should be viewed as an affirmative defence by itself.<sup>200</sup> The matter was considered by the High Court in *White v Ridley*, albeit that the defendant therein was a constructive principal offender in reliance upon the doctrine of innocent agency and so not complicitously engaged. Nonetheless, the perspectives adduced were analogous to secondary participation liability in abstraction. The defendant was convicted of an offence of importing prohibited goods into Australia. These goods had been despatched to an airline in Singapore for putative consignment to Australia, and this delivery occurred despite a last minute attempt by the importer (a telegram was sent to the airline's office in Singapore) to circumvent forward carriage. Gibbs J (drawing an analogy with earlier precedential authorities related to the cessation of accessorial involvement) determined that positive and timely actions to counteract earlier conduct were required: "It seems entirely reasonable to insist that a person who has counselled another to commit a crime, or who has conspired with others to commit a crime, should accompany his countermand or withdrawal with such action as he can reasonably take to undo the effect".<sup>201</sup>

The perspective in *White*, acknowledging withdrawal as an affirmative and independent defence in its own right in reliance of "reasonable" efforts of redemptive conduct and change of heart to undo complicitous behaviour, was subsequently accepted as extant law by the New South Wales Court of Criminal Appeal in *R v Tietie*.<sup>202</sup> A recalibrated defence of withdrawal ought to adopt similar balanced principles, rather than the more stringent threshold advocated in the recent English Law Commission Report<sup>203</sup> and by Murphy J in *White* that D2 must effectively neutralise all aspects of their act of complicity.<sup>204</sup> An accessory should be exculpated

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199 See, generally, Andrew Hemming, "In Search of a Model Code Provision for Complicity and Common Purpose in Australia" (2011) 30 *University of Tasmania Law Review* 53.

200 See Robin Stanley O'Regan, "Complicity and the Defence of Timely Countermand or Withdrawal under the Griffith Code" (1986) 10 *Criminal Law Journal* 236; Brent Fisse, *Howard's Criminal Law* (Law Book Co, 5th ed., 1990) and Mirko Bagaric, Ken Arenson and Peter Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 2011); and see, generally, Peter Gillies, *The Law of Criminal Complicity* (Law Book Co, 1980).

201 *White v Ridley* (n.162), 350–351. Note that this was followed by Thomas J in *R v Menitti* [1985] 1 Qd R 520, 527 and *R v Heaney* (1992) 61 A Crim R 241, 274.

202 (1988) 34 A Crim R 438.

203 See Law Commission No 305 (n.24) para.3.60.

204 *White* (n.162) 363 (Murphy J) asserting that for exculpation the issue was whether D2 had, "done all he reasonably could to prevent the importation".

if reasonable steps are proportionately taken to undo the overarching effect of their complicitous behaviour. The implication from *White* that withdrawal must be voluntarily motivated and not causally related to simple detection — avoidance after arousing the suspicions of Australian customs officers resonates with articulated principles on genuineness of independent action in alternative legal systems.<sup>205</sup>

Interestingly, contrary views were expressed in *White* by Stephen J and Aickin J determining that withdrawal did not exculpate D2 unless the conduct directly breaks the chain of causation.<sup>206</sup> This returns us full circle to our earlier debate on complicity liability derived from *Gnango*,<sup>207</sup> and contextualisation of causation principles, or otherwise, to guide complicity principles. It reflects, to a degree, the *sui generis* “neutralisation” principles on disavowment that apply in Germany: “[I]n the so-called preparation stage of a crime (*Vorbereitungs phase*) in which normally no criminal responsibility arises — it is sufficient that if the participant completely neutralises his preparatory contribution ... if, however, the participant is not able to neutralise his contribution and the offence is completed, his intention to abandon his involvement does not relieve him from criminal responsibility”.<sup>208</sup> A causation-plus substantial participation approach has been strongly advocated by Dressler to reform the “disgrace”, more broadly, of American accomplice law:

[A]n alternative reform proposal is the following: A person is not accountable for the actions of the perpetrator unless her assistance not only satisfies the causation requirement but there is evidence that the accomplice was a substantial participant, not a big player, in the multi-party crime. Conceptually, an accomplice who satisfies both the causation and substantial — participant standards would be accountable for the conduct of the primary party and subject to the same punishment. The causal-but-minor accomplice would also derive her guilt from the principal (since she satisfies the but-for standard) and thus be guilty of the same offence as the principal, but she should be entitled as a matter of right to a reduced sentence because of her minor assistance. The non-causal participant would not derive liability for the completed offence but would instead be guilty of a lesser crime and, thus, be punished less severely for that reason alone.<sup>209</sup>

The causation-plus approach, however, runs into difficulties when applied to the apposite withdrawal edifice. Withdrawal, as previously highlighted, is at its core not a defence predicated upon neutralisation of either *actus reus* (all causal

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205 See *Otway* (n.138); *Becerra* (n.140); and *Campbell* (n.147).

206 *White* (n.162) 357–363.

207 *Gnango* (n.19).

208 Hamdorf (n.156).

209 Dressler (n.112), p.447.

elements) or *mens rea* components of complicitous behaviour to which separate principles are determinative.<sup>210</sup> It represents an affirmative defence which operates within the spectra of offence-modification as an element of the criminalisation reflection underpinning the charged offence. It is distinctive in ambit as a defence in that complicity liability in general operates as a derivation from completion of the full substantive offence.<sup>211</sup> Mode of participation was pithily, but correctly identified in this respect in *Rahman*<sup>212</sup> by Lord Bingham in the English House of Lords: “Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because, the instigator was not regarded as causing the crime that the notion of accessories had to be developed”.<sup>213</sup> Most important as Girgis has recently affirmed<sup>214</sup> will be attitudinal motivational beliefs for accomplice liability and withdrawal exculpation: what should make someone an accomplice is their beliefs towards the principal offender’s intention to commit the offence, and the individual actor must intend that D1 form (or retain) his own plan to commit an offence without the intention that the design will be eviscerated.<sup>215</sup>

## VI. Withdrawal: A New Pathway

The pro-prosecution bias attached to complicity doctrine is self-evident, and courts have zealously favoured its application as an inculpatory tool.<sup>216</sup> A broad definition of conduct has been applied, often predicated on presence at a criminal event, and a form of guilt by association has applied at odds with legitimate notions of criminal liability.<sup>217</sup> It is in this context that it is important to rebalance effective withdrawal principles, and review extant law in terms of comparative extirpation and reappraisal *de novo* of this affirmative defence. The deconstruction of alternative legal system approaches in the preceding section suggests three vital central tenets for our new optimal pathway:

- (1) Imputed normative proportionality in terms of a general standard of reasonableness of action to be applicable.
- (2) A focus on attitudinal motivation for disavowal *vis-à-vis* voluntary and complete renunciation. This engages a comparison between the

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210 Robinson (n.130).

211 See Jacob Kreutzer, “Causation and Repentance: Re-examining Complicity in Light of Attempts Doctrine” (2008) 3 *New York University Journal of Law and Liberty* 155, 164.

212 *R v A* (n.17).

213 *Ibid.*

214 Sherif Girgis, “The Mens Rea of Accomplice Liability: Supporting Intentions” (2013) 123 *The Yale Law Journal* 460.

215 *Ibid.*, p.463.

216 Heyman (n.115), p.389.

217 Heyman (n.115), p.129.

reasonableness — proportionality standardisation attached to the withdrawal defence and individual liability created by supervening fault.

- (3) The introduction of a reverse burden of proof prophylaxis on a preponderance of the evidence standardisation.

The reformulated pathway for withdrawal should address the requirements of a proportionality test for fact-finders in terms of gradation of excusing action, and identify a manifestly normative question of whether the individual actor's repentant behaviour was reasonable in all the circumstances.<sup>218</sup> A cathartic panacea to some of the current ills can be achieved by adoption of a general standard of reasonableness of action. Did the individual actor do all he could be reasonably expected to do in an effort to ameliorate prior fault and properly disengage from the effect of his complicity? The "price of exculpation"<sup>219</sup> should be standardised and contextualised against an individuated normative assessment predicated upon an imputed proportionality test of withdrawal: "In crude terms: the greater the extent of inculpatory behaviour the more demanding will be the price of exculpation. However, the authorities have consistently fought shy of offering any reasonable clarification of the rules settling just what defendants must do to withdraw".<sup>220</sup>

A correlation should exist between an individual actor's mode of participation in criminal activity (exculpatory conduct) and requirements for a successful withdrawal (inculpatory disengagement). In this regard, demarcations ought to apply in terms of a qualitative proportionality standardisation across different gradations of complicitous behaviour. A dichotomy exists between co-adventurers and "mechanical assisters" in that a higher threshold level of renunciatory conduct applies to the former category of participants in crime. The need for express countermand in this respect was made apparent in *R v Croft*.<sup>221</sup>

The complicitous parties in *Croft* had entered into an agreement together to affect a suicide pact in a summerhouse. The loaded revolver was supplied by D2, who then reneged and climbed out of the window in order to summon medical assistance after D1 shot herself, and suffered minor initial injuries. Immediately thereafter, D1 fired a further shot that proved fatal. The co-perpetrator's conviction for murder was upheld on the ground that in order to withdraw from accessorial liability, the actor had to directly and expressly countermand earlier conduct.<sup>222</sup> If D2 is acting as a co-adventurer and provided material assistance, then direct countermand should be required in terms of retrieval of the weapon or physical intervention proactively to protect the victim, including restraint of D1.<sup>223</sup> If the "tools of the crime" are supplied by D2, then more is needed proportionally for an effective withdrawal. In

218 Smith, *A Modern Treatise* (n.9).

219 Smith, "Withdrawal from Criminal Liability for Complicity and Inchoate Offences" (n.121), p.211.

220 Smith, "Withdrawal in Complicity: A Restatement of Principles" (n.121), p.776.

221 [1944] KB 295.

222 *Ibid.*, 296.

223 Lanham (n.121), p.572 and *see* Sullivan, Simester, Spencer and Virgo (n.116), pp.259–260.

*Huber*,<sup>224</sup> as previously stated, a wider rule of disengagement by reporting conduct to the police was determinative. The defendant had lent a weapon to D1 for use in a robbery, but the court stated that their subsequent refusal to participate in the robbery itself was not a sufficient act of withdrawal. The recalcitrant actor may only have escaped liability if he had demanded and received back the rifle, or if he had reported the principal offender to the police in time to actually thwart the robbery. The reasonableness standardisation dictated that an enhanced level of redemptive counter-action is needed to effectively absolve D2.<sup>225</sup>

The imputed proportionality standardisation for withdrawal, as adduced herein, looks to direct attempts to eviscerate the commission of the principal offence, such as physically intervening to stop the conduct of the principal offender or by efforts to reclaim essential equipment previously provided.<sup>226</sup> It also embraces indirect methods of disavowal, concentrated on warning the potential victim, or informing the police or similar authorities.<sup>227</sup> In terms of the correlation between mode of participation and proportionality of withdrawal behaviour, conduct of an irreducibly minimal nature is inadequate, as identified, to meet the threshold test: perfunctory verbal disclaimers of liability, failure to attend on the day of criminal purpose (omission) or fleeing the scene of the crime are all ineffectual manifestations of imputed countermand.<sup>228</sup> Normatively, these types of limited remedial disengagement are not sustainable or adequate as a vignette of redemptive behaviour: the cost of exculpation has not been satisfied. This was revealed in sharp focus in *R v Goodspeed*<sup>229</sup> in terms of non-remedial omission. The mere fact that D2 did not keep his promise to directly commit a burglary, an offence that he had actively encouraged others to engage in, did not exculpate him from liability as an accessory before the fact. The omission on the part of D2 was not even enough to serve as an implied countermand: the encouragement in Goodspeed's promise may have been lessened by his failure to turn up, but it was not transcendental.

A reasonableness test, as we suggest, will allow sufficient flexibility to examine individuated circumstances in terms of required direct or indirect countermands. It will also facilitate determination by fact-finders whether renunciation for salvational redemption has been "complete and voluntary".<sup>230</sup> The proportionality test will clearly not apply when the pre-inculpatory interlude has expired, and the possibility of withdrawal is no longer timely, as in *Thomas v State of Texas*.<sup>231</sup> The defendant and D1 had attempted to surreptitiously affect a burglary. The perpetrators, equipped with rubber gloves and a knife, had attempted to remove some cement

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224 *Huber* (n.161).

225 Lanham (n.121), pp.588–560.

226 See Wilson (n.116), pp.589–590.

227 Smith, "Withdrawal from Criminal Liability for Complicity and Inchoate Offences" (n.121), p.212.

228 *Ibid.*

229 (1911) 6 Cr App R 133.

230 See David Lanham, "Complicity, Concert and Conspiracy" (1980) 4 *Criminal Law Journal* 276.

231 708 SW2d 861 (Tex Crim App 1986) (*en banc*).

from a window-sill, but were apprehended by police officers in the garden of the property “walking towards the back fence ... looking over their shoulders”.<sup>232</sup> The defendant, whilst admitting his attempted burglary, provided a statement asserting that, after removing the cement, “I changed my mind and decided to leave. That’s when the police came and arrested us”.<sup>233</sup> Thomas had been caught “pink-handed” and any pre-inculpatory interlude had already passed on their part. Withdrawal to be effective must be complete and voluntary, and attitudinally should not be motivated by a fear of impending discovery and apprehension.<sup>234</sup>

The reduced dangerousness rationale, as previously identified, implicates a nexus between the extent of D2’s initial inculpatory conduct and the cost of redemptive action: “a form of premium payable for his initial culpable behaviour”.<sup>235</sup> Required modes of countermands for different modes of participation should be clearly identified and equated across a continuum for fact-finder consideration. A different perspective ought to apply where D2 has simply provided encouragement, or basic agreement to the commission of a crime, and in such limited circumstances, the price of exculpation should be lowered. The premium may not be as high as taking additional steps to prevent the commission of the crime, but penitent behaviour may involve strictures of indirect countermand.<sup>236</sup> The countermand, dependent on prevailing factual variants in different circumstances, may incorporate either notification to law enforcement authorities or to the victim, or attempt comportation with both sets of reductionist disengagement.<sup>237</sup> The preferred analysis of withdrawal as a quasi-excuse, extrapolated from derivations of reduced social dangerousness, should allow fact-finders to consider an individuated proportionality standardisation within a normatively compartmentalised set of indicators to indirect countermands. Set against this contextualisation, it will be easier to withdraw, as in *R v Grundy*,<sup>238</sup> where the defendant had simply aided the principal through the supply of information concerning a burglary. Here, efforts to prevent the principal offender actually committing the offence, and attempts to dissuade in two weeks prior to commission of the substantive crime, were sufficient evidence of a valid withdrawal to have been left to the jury. An indirect countermand constituted an adequate withdrawal without the need for additional steps facilitative of crime prevention.

Anglo-American withdrawal principles are dissonant in the significance attached to penitent motive. As previously adumbrated, English juridical precepts in this regard contain no primary reference to this important consideration.<sup>239</sup> By

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232 *Ibid.*, 862.

233 *Ibid.*

234 See George P Fletcher, *Rethinking Criminal Law* (1978) 190–191: “Voluntariness ... is [only] ... a framework for inquiring whether the external pressures influencing the actor’s decisions are sufficiently great to say that he should be held accountable for his decision nor take credit for it”.

235 Smith, “Withdrawal in Complicity: A Restatement of Principles” (n.121), p.780.

236 Ormerod (n.118).

237 *Ibid.*

238 [1977] Crim LR 543.

239 Taylor (n.154).

way of contrast, attitudinal motivation that lies behind renunciation is of primordial significance in a number of statutory formulations of the withdrawal defence in the U.S. The rationalisation is predicated on the notion that verifiable disavowal must not derive from scant imputations that prevailing circumstances simply increase the probability of detection or basic inculcations that offence commission has become more problematical.<sup>240</sup> It is apt, in light of our suggested diagnostic utilisation of withdrawal as an indicator of reduced culpability via lessened social dangerousness, that motivational factorisation is of supererogatory effect. Regard for penitent motive should be conjoined together with a reverse burden of proof prophylaxis as part of a new restatement, allowing the jury as moral arbiters to legitimately consider redemptive circumstances: “[T]he law should encourage persons who participate in criminal arrangements to change their mind and to take steps to prevent the crime reaching consummation but the law does not need to hold out a similar incentive to those who are in effect forced to pull out of the criminal enterprise”.<sup>241</sup>

The requirement of a “complete and voluntary” withdrawal can best be assessed through the prism attached to the main determinant of the defence, measuring the dangerousness of the individual actor for salvational redemption: “Repent therefore, and turn again that our sins may be blotted out”.<sup>242</sup> The utilitarian objective of the defence is embodied by the prerequisite of complete and voluntary disassociation, demarcating the truly recalcitrant offender with penitent motivation: “unlike leopards, which cannot change their spots, we know that people can and do change their behaviour”.<sup>243</sup> Moral judgment of just desserts applies for determination by fact-finders as moral arbiters of culpability and gradations of blameworthiness. A line must be drawn, as made by the New Zealand Court of Appeal in *R v Malcolm*,<sup>244</sup> between voluntary withdrawal accentuated by the “pangs of conscience”, as opposed to simply an increased fear of apprehension by law enforcement officers or ineffectual timidity.<sup>245</sup>

In *Malcolm*, the defendant and principal offender hatched a common plan (joint enterprise) to carry out a burglary. Malcolm kept watch whilst lying in wait to complete the illegal purpose, and kept D1 aware of the potential victim’s approach. D1 requested that D2 pass him an axe, but the latter’s reply was: “You get the bloody thing; I’m going; I’m going like hell”. D2 then started to decamp from the scene, at which juncture D1 killed the victim. The Court of Appeal, upholding the defendant’s conviction for murder, determined that the defence of withdrawal was inapplicable where penitent motive simply attached to “timidity” or “squeamishness” on the part of the accomplice not offence commission dissociation. Genuine proof as to

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240 Smith, “Withdrawal from Criminal Liability for Complicity and Inchoate Offences” (n.121), p.211 and see also Girgis (n.214).

241 Lanham (n.121), p.579.

242 Acts 3:19, King James Version of The Holy Bible, The New Testament.

243 Moriarty (n.124), p.47.

244 [1951] NZLR 470.

245 Smith, “Withdrawal in Complicity: A Restatement of Principles” (n.121), p.783.

voluntary denunciation should form the basis of the restated defence, and whether the individual actor has done enough to suggest that their social dangerousness has diminished to a level at which punishment is no longer justifiable.<sup>246</sup>

The redemptive conduct requirements for the affirmative defence of withdrawal may be aligned with principles of supervening fault doctrine. In similar vein, the creation of a dangerous situation should generate a proportionate duty to abate the risk: in *Miller*,<sup>247</sup> the defendant fell asleep while smoking and unintentionally set fire to a mattress; and in *Evans*,<sup>248</sup> the defendant's initial act of providing heroin to her half sister created a situation which D had a corresponding responsibility to remedy, albeit the self-administration of heroin was voluntarily effected. An individual remains liable in the context of supervening fault theory on realisation that their conduct had created a danger, but fail to take "reasonable" (imputed proportionality) steps on a normative assessment to prevent further harm arising.<sup>249</sup> Imputed proportionality applies to redemptive disengagement that mirrors the "proper efforts" defence for renunciation before American courts. A defendant who voluntarily recognises their potential wrongfulness in exposing others unjustifiably to a substantial risk of personal or property harm, but then takes reasonable steps to remedially counteract this harm, has represented on a utilitarian calculus that they no longer present a societal danger for inculcation.<sup>250</sup>

Finally, it is important to reiterate that withdrawal should be viewed as an affirmative defence that is *sui generis* in terms of quasi-excusatory redemptive behaviour.<sup>251</sup> The concomitant of viewing it as a defence through this particularised lens is that English law, perhaps controversially, needs to follow U.S. precepts in reversing the burden of proof for the defence in terms of conduct prophylaxis.<sup>252</sup> In this respect, it has been legitimately concluded by Robinson that "[T]he burden of production for the defences of renunciation, abandonment and withdrawal is always on a defendant. The burden of persuasion is generally on the defendant, by a preponderance of the evidence".<sup>253</sup> It would not be unconstitutional, viewing withdrawal in terms of offence-modification rather than neutralisation of *actus reus* or *mens rea* definitional elements, for a jurisdiction to require an individual to prove their complete and voluntary disavowal on a preponderance of the evidence standardisation.<sup>254</sup> As a definitional element of the offence *per se* is not at issue in terms of constructive liability, the implication is that a legal system should be

246 Smith, "Withdrawal from Criminal Liability for Complicity and Inchoate Offences" (n.121), p.214.

247 [1983] 2 AC 161.

248 [2009] 1 WLR 1999; and see Glenys Williams, "Gross Negligence and Duty of Care in Drugs Cases: *R v Evans*" [2009] *Criminal Law Review* 631.

249 See, generally, Andrew Ashworth, "A Change of Normative Position: Determining the Contours of Culpability in Criminal Law" (2008) 11 *New Criminal Law Review* 232.

250 Williams (n.248).

251 Robinson (n.130).

252 Moriarty (n.124), p.32.

253 Robinson (n.159), pp.349–350.

254 Dressler (n.112), p.447.

able to allocate the burden of proof for “true” defences in a fashion that is most efficacious.<sup>255</sup>

The practical reality is that offence-modifications cohere to the realm of defence, and consequently are better placed for proof by the recalcitrant defendant than by the prosecution: “it can be argued that offence modifications, especially when they hinge on a characteristic or status of the defendant, as they commonly do, are likely to be peculiarly within the knowledge of the defendant”.<sup>256</sup> The commentary to the U.S. MPC advances three important arguments for imposing a burden on the defendant to allow reliance on a complete and voluntary withdrawal:

- (1) Instances of renunciation are apt to be infrequent and therefore in any given case the defence is improbable.
- (2) The facts relevant to the defence are most likely to be within the control of the defendant.
- (3) Its classification as an “affirmative defence” is useful in order to gain political acceptance for such a newly drafted defence.<sup>257</sup>

The nature of the defence, as identified in terms of penitent motive and reasonable efforts of dissuasion, lies peculiarly within the province of the defendant to explain to fact-finders, and this needs to be reflected in any restatement. This review should extend to reconsideration of appropriate fault-level gradations for inculcation via joint enterprise principles: a new restatement of the fault element is required.

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255 *Ibid.*

256 Robinson (n.130), p.254.

257 See Model Penal Code and Commentaries s.5.01 comment 361 (Official Draft 1962) and Revised Comments 1985.