The Indefensibility of the Current Law on Attempts.

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The law on attempts, especially of impossible attempts is indefensible. The court's decision for liability of attempts to mirror the maximum complete offence (s.4 Criminal Attempts Act (CAA) 1981) based on choice and intention alone is insufficient to punish attempts. Rather, a jury must be asked whether it is has confidence that the defendant will commit the offence or not. Though partially justified on the basis of causing harm to society, overall, the law on attempts is indefensible upon establishing dangerousness, unjust enrichment, the shortcomings of deterrence and failure to consider moral luck.

Complete and incomplete attempts:

The UK has criminalised such attempts- a defendant who tries and fails to kill another face criminal charge. A core issue arises from incomplete attempts: defendant tries to commit an offence but someone/thing intervenes, preventing them committing the unlawful act. Ashworth[1] contends, the law must also punish those who are trying to cause harm. A defendant will satisfy the actus reus of their offence regarding complete attempts. However, where there's an incomplete attempt, a jury must have confidence in whether the defendant will commit the crime. There's concern with attributing liability to incomplete attempts, since a defendant may be charged even though they may have a change of heart.

Attempts as endangerment:

Defendants are punishable for endangering victims and exposing them to risk of harm. Attempt can be categorised with other crimes based on creating risk of harm such as, dangerous driving. This is unconvincing- some actions would be characterised as attempts under the current law, and have no baring under endangerment. Where an act isn't dangerous in itself, e.g., defendant arrested for standing outside a victim's door just before the victim exited is guilty of battery under s.47 Offences Against the Person Act 1861 under the current law. However, under endangerment, that defendant wouldn't be committing a dangerous act in itself.

Under the law of attempts, mens rea (MR) asks what offence the defendant intended to commit. Where treated as endangerment, the MR asks whether the defendant intended/foresaw the creation of a dangerous situation. This fails to distinguish between an attack and endangerment. The wrong committed to the victim when they are attacked is morally different to when their interests are endangered.

It may be possible to view attempts as endangerment and consider the defendant's intended harm as an aggravated feature of the MR. This enables us to say a defendant standing outside his victim's door, intending to hit the victim is endangering. However, this questions the extent to which the defendant's intention is relevant in assessing an

[1] Ashworth, A. Principles of Criminal Law (2009)

act's dangerousness. E.g., raising an arm may be dangerous as to prelude a punch, or innocuous, as stretching. Thus, the law on attempts is indefensible- it's only when we know the defendant's intention, can we classify his act. The issue remains, if considering the intent of a defendant, any act can be regarded as dangerous, causing liability to spiral.

Attempted offence causing harm to society:

The law on attempts is defensible since even where a victim may be unhurt, society will be disrupted by the attempt. People feel more nervous about going out from the belief that within the society, there are individuals who reject its values to an extent that they are willing to commit a crime.

The law on attempts as deterrence:

Ferrante[2] argues criminal law must 'deter agents from committing such an act [by] fixing an amount of punishment.'[3] This isn't convincing as difficulties arise in attempting to 'fix and amount of punishment.' One cannot be sure why a defendant's attempted failed, as this may not be luck-based. Ohana[4] rationalises a number of variables including: lack of determination or wavering attitudes towards committing the crime. The law on attempts should be restricted to cases where a jury can be fairly certain that a defendant was going to commit an offence.

Unjust enrichment from committing crimes:

The law of attempts is indefensible for not treating completed and attempted crimes differently. An attempter hasn't benefited from the crime in the same way a defendant who has successfully completed the crime has. Where a criminal unjustly enriched from successfully committing a crime, a punishment of removing the benefit is need. This isn't necessary for attempts as no gain has been made. Though this may be challenging to apply to some crimes, it's true of others. E.g., theft or property crime- defendant who committed the offence is required to return the property and compensate the victim. For an attempt there's no need to return property or compensate since the defendant failed to acquire property in the first place. Accordingly, liability of a successfully committed offence and an attempt cannot be the same.

Issue of moral luck and attempts:

Is a defendant who shoots at a victim intending to kill them, but misses because the victim unexpectedly moves, or third-party intervenes[5] any less culpable than a defendant who shoots at a victim intending to kill them, and does successfully[6]?

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[2] Ferrante, D. 'Deterrence and Crime Results' (2007)

[3] Ibid, n.2

[4] Ohana, D. 'Desert and Punishment for Acts Preparatory to the Commission of a Crime' (2007)

[5] Yaffe, G. Attempts (2011)

[6] Ibid, n.1

Morse[7] argues there should be no difference between an attempt and completed crime, since the essence isn't whether the victim was harmed. Similarly, Ashworth[8] emphasises criminal liability should be based on what a defendant was trying, intended to do, and what he believed he was doing, rather than the outcome. It 'would be wrong to allow…chance factors to determine the threshold of criminal liability or the quantum of punishment.'[9] Similarly, Winch[10] states, moral blame and liability should only be based on choice and control of the defendant.

Ignoring 'moral luck,' isn't a convincing and is indefensible. It's reasonable to account for the result of a defendant's actions. Solely basing liability on choice and control is an insufficient reason to punish attempts. According to principle crime minimalization, criminal law should only attribute liablity where absolutely necessary, i.e., where harmed is endured. In an attempt, it's accepted that the defendant behaved immorally; this isn't sufficient to warrant liability. Perlman[11] contends, this would strain the currently stretched prisons, which are already at capacity without having to add defendants who haven't even caused a victim harm, but only attempted to do so.

The law fails to account for the difference between, e.g., killing and an act that endangered life but didn't cause harm. This wouldn't be supported by the general public. Attributing no consideration to the consequence of an unlawful act fails to acknowledge wrongdoing suffered by the victim.[12] Those advocating consequences shouldn't matter are 'a bread that exists (and will probably always exist) only in academic.'[13]

Perlman[14] identifies attempts and completed offences being punished the same is indefensible since it means a defendant intending to commit an offence, has no incentive to stop mid-way through their attempt if they had a change of heart. Additionally, Honoré[15] argues, not considering consequences is indefensible since to account for them is important to humanity. Ascribing responsibility this way is a normative principle, since it isn't just others attributing identity and character to us, but to others, in turn for holding each other responsible for our actions and their outcomes. Moore[16] agrees that we are responsible more so for our actions.

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[7] Morse, 'Reasons, Results and Criminal Responsibility,' (2004)

[8] Ibid, n.1

[9] Ibid, n.1

[10] Winch, 'Ethics and Action' (1972)

[11] Perlman, M. 'Punishing Acts and Counting Consequences' (1995)

[12] Fletcher, G. A. 'Crime of Self-Defence: Bernhard Goetz and the Law on Trial' (1988)

[13] Robinson, P. (1997)

[14] Ibid, n.11

[15] Honoré, A. 'Responsibility and Luck' (1998)

[16] Moore, M. 'Placing Blame: A Theory of the Criminal Law' (1997)

The current law on attempts is indefensible in considering choice alone. Jareborg[17] expresses the risks punishing individuals for things that lie outside of their control or possibilities of control. Duff[18] is unconvinced on the moral luck argument held by current law, disregarding outcomes. Duff contends, the importance of considering the outcomes of our actions in wrongdoing.

The law on impossible attempts:

Where there is evidence, the defendant believed he was committing an offence, even though in fact he isn't, should he be liable for an offence? This discusses physical impossibility, whereby the reason for the failed attempt isn't ineffective means, but the crime simply cannot be committed. E.g., defendant is found with a bag of white powder and drug-taking kit, but the power is chalk.

As in case law, the subjectivist view: a defendant is as blameworthy as if the fact he believed had been true. This is justified by the fact that a defendant would've shown similar contempt for the values the law upholds and seeks to protect of a person who actually commits the offence. Identifiable in *R v Shivpuri* [1986] having overruled *Anderton v Ryan* [1985], to hold, if, on the facts as the defendant believed them to be, the defendant's act was more than merely preparatory, he can be convicted of attempt. Upheld in *R v S* [2005]- the defendant was convicted of attempting to aid suicide though the victim had no intention of committed suicide- the defendant believed they did. This raises significant doubt surrounding the meaning of 'belief' and if suspected beliefs sufficiently fulfil s.1(2) CAA 1981.

Though the subjectivist is implemented in current law, a more convincing argument is made for the objectivist stance. The complete lack of harm means it's illegitimate to punish an impossible attempt even though the defendant believed it to be true, it's false in fact. There's no objective criminality, thus, to attribute liability to impossible attempts is indefensible. Favouring 'luck,' this is the case where the facts aren't as the defendant believed them to be. In support, Temkin[19] argues the law of attempt must be restricted for situations where it's 'genuinely necessary.'[20] Where a defendant by his own luck mistakenly believes the facts, liability shouldn't be attributed as, no harm or endangerment has been endured.

Conclusion

The current law on attempts, and of impossible attempts is indefensible, for its lack of consideration to the consequences of a defendant's actions, placing choice, and mistaken belief of the facts in relation to impossible attempts, as the basis of attributing liability.

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[17] Jareborg, N. 'Criminal Attempts and Moral Luck' (1993)

[18] Duff, R.A. 'Criminal Attempts' (1996)

[19] Temkin, J. 'Impossible Attempts: Another View' (1976)

[20] Ibid, n.19

The current law's decision to adopt a subjectivist stance means attempts that have caused no harm or endangerment to a victim at all, are given the same liability of completed offences. Basing liability solely on choice is an insufficient reason to punish attempts; criminal law should only attribute liability where absolutely necessary- doing so for attempts is a misuse of criminal law.