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Commission de réforme du droit du Canada

CRIMINAL LAW

secondary liability

Working Paper 45

Canada

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SECONDARY LIABILITY: PARTICIPATION IN CRIME AND INCHOATE OFFENCES

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SECONDARY LIABILITY: PARTICIPATION IN CRIME AND INCHOATE OFFENCES

1985

Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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At the time of publication of this Working Paper, Professor Jacques Fortin had passed away.

He was Vice-President of the Commission when the work started on the topic, and his ideas are reflected in the Paper.

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Introduction

In general when a person incurs criminal liability, he does so by committing an act defined in the Special Part of criminal law as an offence. Doing such an act is usually both a necessary and sufficient condition of criminality.

This general rule is subject to two qualifications. First, the commission of the act may not suffice; a person doing the very thing prescribed in a provision may still fail to be liable. Second, it may not be necessary; a person not doing the act in question may nonetheless be liable for it.

These qualifications arise from the General Part of criminal law. For the definitions of offences in the Special Part are themselves subject to certain General Part provisions, which amplify the relatively bald Special Part prescriptions by laying down rules for their interpretation and application.

This amplification, however, works in two directions. On the one hand, some General Part provisions restrict the scope and ambit of the Special Part, negating criminal liability and providing that, despite the commission of an act defined as an offence, there can be no conviction. Other provisions extend it by widening the area of liability and imputing responsibility even in the absence of commission.

The former function of the General Part, that of restricting the ambit of the Special Part, was dealt with in Working Paper 29.[1] That Paper explored two separate but intimately connected items: (1) principles of liability and (2) general defences. These items are connected by having a common rationale to the effect that there should be no liability without fault, by being to some extent mirror images of each other (automatism and mistake are the converse of *actus reus* and *mens rea* requirements), and by resting ultimately on a normative as well as a descriptive notion of *mens rea*.

The first item, principles of liability, was dealt with in a novel way. At present, these principles exist outside the *Criminal Code* as guiding maxims of common law. In the proposed new Code, in the interest of comprehensiveness, they would be included in the General Part. But following the approach of Stephen in *Tolson*,[2] we recommend their formulation as rules of statutory interpretation whose definitions of offences are to be interpreted, unless otherwise provided, as requiring conduct and knowledge on the part of the defendant.[3]

1. Law Reform Commission of Canada, *The General Part: Liability and Defences*, [Working Paper 29] (Ottawa: Minister of Supply and Services Canada, 1982).
2. *R.* v. *Tolson* (1889), 23 Q.B.D. 168.
3. See *supra*, note 1.

The same applies to the second item, general defences. Currently some of these, for example, necessity and intoxication, are still left to common law. Again in the interests of comprehensiveness, in the new Code they would all be included in the General Part, preceded by an introductory provision to the effect that, even given conduct and knowledge, no liability would attach to cases falling under any of the following general offences.

Analogously, the extending function of the General Part is also performed by two different but related sets of rules. These concern liability without actual commission — what we term "secondary" liability, the subject of this Working Paper. One set of rules concerns cases where, strictly speaking, no Special Part offence whatsoever is committed. The other set relates to cases where a Special Part offence is committed, but not by the defendant in question.

Where no specific Special Part offence occurs and so there is no primary offender, there is, of course, no liability for committing a specific crime. There can be liability, however, for "secondary" offenders who do something to "further" that specific crime who counsel, incite, or procure its commission, or attempt themselves to commit it. Here liability will be for a general offence, usually defined within the General Part as an inchoate crime.

Where, in fact, a specific Special Part offence is committed, but by someone other than the defendant in question, he may in principle be liable in three different ways. He may be liable for doing something to further the crime committed for instigating or assisting its commission by the primary offender, that is, for being a party to it. He may be liable for helping that offender escape justice for being an accessory after the fact. Or, he may be liable because of his relationship (for example, that of employer) to the offender.

Of these three ways in which one person may be liable in respect of another's wrongdoing, only the first (participation) is a real case of what we call secondary liability. Here the secondary offender shares responsibility for that very wrongdoing. The second case, accessory after the fact, can more properly be regarded as a crime in its own right, namely, obstructing justice. The third case, vicarious liability, as we shall argue later[4] and as the Supreme Court of Canada has suggested,[5] has no proper place within the criminal law.

This being so, this Paper on secondary liability focuses on two items: (1) participation and (2) inchoate offences. Both items are treated for what in our view they really are — two aspects of one unified concept, the *furtherance* of crime.

For the participation and inchoate rules, like those on liability and defences, are connected in three ways. They share a common rationale to the effect that blame attaches not only to the commission of a wrongful act, but also to its deliberate furtherance.

4. In a separate Working Paper on corporate criminal liability.

5. See *R.* v. *City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353; *R.* v. *McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193.

They are to some extent mirror images — attempt and counselling are merely the inchoate versions of commission and accessory before the fact. Moreover, both sets of rules give rise to the same problems, for example, What constitutes attempts, or participation? What is the proper punishment? What is the effect of abandonment?

The General Part, then, manifests considerable symmetry. Looking in two opposite directions, it restricts the liability of primary offenders and extends liability to secondary offenders. On the one hand, it plays a "yes but" role and says to a defendant: "You may have done the act prescribed by the Special Part but you are not liable because...." On the other hand it plays a "not only but also" role and says: "Not only would you have been liable if you had done the act prescribed by the Special Part, but you are also liable because of certain other things you did, for example, attempting, inducing, helping, and so forth."

As to the "yes but" rules, there is one major problem. Many of them, for example, the principles of liability, the defence of intoxication and the defence of necessity, fall outside the present *Code*. To a large extent, therefore, in Working Paper 29 we tried to incorporate into a proposed new Code codifications of existing common law rules or improved versions of them.

The "not only but also" rules raise different problems. These rules are for the most part already contained in the present *Code*. However, they lack orderly arrangement, consistency and in some cases clear direction, and they are bedevilled by issues never satisfactorily resolved by common law.

Accordingly, this Working Paper will proceed by five stages. First, it will explore the idea, rationale and basic principles of secondary liability. Second, it will examine our present law on participation and inchoate offences. Third, it will highlight the shortcomings of the present law. Fourth, it will attempt a more principled approach to the whole question. Fifth, it will deal with conspiracy. Sixth and finally, it will make concrete recommendations for a new Code of criminal law.

Certain matters, however, will not be dealt with in this Paper. Some of these are matters of practice, procedure and evidence. As such, apart from the question of punishment, which is more intimately related to our present focus, they will be more appropriately treated in the context of procedure.

Another matter excluded from this Paper relates to specific offences which are defined as complete offences in their own right but are in essence inchoate offences. Arson, for example, consists in setting fire to property, that is to say, not burning it down but rather trying to do so. Theft consists in taking another's property in order to deprive him or her of it, again not necessarily depriving that person but rather trying to. Such offences are excluded as falling outside the scope of this Paper dealing with general inchoate crimes.

Finally, another matter excluded concerns offences whose participatory nature is apparent rather than real. For instance, the offence of assisting suicide is not a secondary or participatory offence because there is no crime of committing suicide in Canada. Or again, participating in a riot is not a secondary offence of helping others to strike, but rather is the way in which to commit the primary offence itself.

CHAPTER ONE

Idea, Rationale and Basic Questions

I. Idea, Rationale

With secondary liability we confront a general problem often found in criminal law, one already noted with respect to theft and fraud. That problem is the divergence between broad principle and detailed practice. In principle, the idea of secondary liability — of criminal liability for participation and inchoate offences — is straightforward, obvious and justifiable. In practice it often poses problems.

For this divergence there are several reasons. One is that law is founded on common sense, but often must go further. Concepts such as attempt, participation, possession, causation and many others used in law are based on common sense notions, but purely common sense considerations could never solve the detailed problems facing courts and lawyers in daily practice. Likewise, in secondary liability, the lawyer has to start with common sense but then refine it, trying of course always to keep faith with its underlying thrust and spirit.

In principle, then, the concept of secondary liability is straightforward, obvious and clearly justifiable. If doing something is wrong and reprehensible, then so is trying to do it. No one would restrict blame and responsibility merely to those who actually do the act itself. Pure common sense acknowledges the wrongfulness of participation in wrongdoing and of inchoate forms of wrongfulness. So, therefore, does our criminal law.

Clearly then, the rationale for secondary liability is the same as that for primary liability. Primary liability attaches to the commission of acts which are outlawed as being harmful, as infringing important human interests and as violating basic social values. Secondary liability attaches on the same ground to their attempted commission, to counselling their commission and to assisting their commission.

This is clear with participation. If the primary act (for example, killing) is harmful, then doing it becomes objectionable. But if doing it is objectionable, it is also objectionable to get another person to do it, or help him do it. For while killing is objectionable because it causes actual harm (namely, death), so too inducing and assisting killing are objectionable because of the potential harm: they increase the likelihood of death occurring.

The same arguments hold for inchoate crimes. Again, if the primary act (for example, killing), is harmful, society will want people not to do it. Equally, it will not want them even to try to do it, or to counsel or incite others to do it. For while the act itself causes actual harm, attempting to do it, or counselling, inciting or procuring someone else to do it, are sources of potential harm — they increase the likelihood of that particular harm's occurrence. Accordingly, society is justified in taking certain measures in respect of them: outlawing them with sanctions, and authorizing intervention to prevent the harm from materializing.

Problems arise, however, from the limits to the justifiable scope of criminal law, and these apply no less to secondary than to primary liability. We criminalize certain conduct to protect fundamental values, but at the cost of encroachment on other values. For instance, as some economists would put it, if an act causes harm, that is to the victim, then forbidding it also causes "harm," namely to those who are no longer legally free to do it. The potential victim's well-being is promoted at the expense of the liberty of others. In making criminal laws, therefore, society must seek a balance and beware of undue infringment on individual liberty through forbidding things which people should be free to do.

In common law, this balance shows itself in two different ways. On the one hand, the definitions of crimes are carefully drawn by the Special Part of criminal law, which leaves many things outside the criminal ambit. On the other hand, well-known requirements relating to conduct and to the mental element are provided by the General Part, which also therefore leaves certain behaviour beyond the scope of criminal law. In both cases, the aim is to avoid penalizing harmless and innocent behaviour: behaviour falling below the conduct threshold (that is, non-acts), acts done with no wrongful frame of mind (that is, acts unaccompanied by *mens rea*), and conduct in no way wrongful in itself (that is, an act in no way *reus*).

With secondary liability, the striking of this balance is particularly difficult. For in the case of primary liability, the act forbidden by the Special Part is usually clearly harmful and clearly prohibited by the criminal law. By contrast, in the case of secondary liability, the kind of conduct forbidden indirectly and in general terms through the rules on parties and inchoate offences is less clearly harmful and less clearly prohibited. To put it another way, acts such as murder and wounding clearly manifest their criminality, while acts of assisting or attempting murder or wounding may manifest it much less obviously. A murderer is always self-evidently bent on harm; a person trying to murder is not. In many cases we may only think the latter to be bent on harm because we infer this from his actions, or because he tells us so.

Here there are two different dangers. First, when we infer that a person is bent on harm, we may be wrong in doing so, because his act may be entirely innocent. Hence the strict criminal law requirement that the prosecution prove the defendant's wrongful intent beyond reasonable doubt. Second, when a person tells us that he was bent on harm, we may still regard him as not having acted otherwise than he could

have done in all innocence without such wrongful intent. Hence the common law reluctance to criminalize mere intent or "thought crime" and the insistence on a wrongful act, an *actus reus*.

These twin dangers of penalizing innocent behaviour or mere "thought-crime" are accentuated by the way our criminal law is formulated. Take, for example, the *actus reus* problem. In the case of primary liability, the *actus reus* is usually defined in some detail in provisions in the Special Part. However, in the case of secondary liability, the *actus reus* of counselling, helping and attempting is only defined in broad terms by sections in the General Part. What is the minimal conduct required for counselling, procuring, aiding, abetting, and attempting? When does aiding, abetting or attempting turn into committing? These questions, of necessity it seems, can receive no precise answer from statute or case-law.

The same appears true of *mens rea*. In cases of primary liability, the relevant Special Part provision will often spell out the required mental element, and, when it does not, there always remains the general principle that intention or knowledge is necessary. By contrast, in the case of secondary liability, neither the relevant General Part section nor the application of the general *mens rea* principle is crystal clear. Does an accessory before the fact have to intend to incite or merely to know he is likely to incite? Does an aider and abettor have to intend that the crime in question be committed or merely to know that its commission is likely? Such questions have never fully been resolved within the common law tradition.

II. Basic Questions

In addition, there are in this connection certain problems as to secondary liability that do not, in general, arise with primary liability. One relates to divergent purpose, another to impossibility and a third to abandonment.

The divergent purpose problem, which occurs in primary liability situations only in the case of constructive liability, arises when the act done by the primary offender is different from that intended or expected by the secondary offender. D urges A to commit crime X, and in consequence, A commits crime Y. To what extent should D be liable for crime Y?

Impossibility, a problem usually seen as arising especially with attempt, arises equally with counselling, inciting and procuring. D tries to commit crime X, incites A to commit X or counsels B to commit it. But crime X turns out to be impossible to commit. Should D attract secondary liability, and if so, to what extent?

Abandonment poses an issue both in cases of inchoate offences and in cases of participation. D starts trying to commit crime X, inciting B to commit it or counselling

C to commit it, but abandons the enterprise. D begins helping E to commit crime X but then stops giving assistance. How far should such abandonment reduce or negative D's secondary liability?

This brings us to the basic question of punishment. Should those involved in crime as secondary offenders receive the same punishment as actual committers? Given that a crime is committed, do all involved have equal moral responsibility? Should the effect of each person's actual contribution affect the penalty? Given that no crime is committed, do those who attempt, counsel, incite or procure its commission have as much responsibility as if it had actually been committed? Do considerations of deterrence justify a lesser, or indeed a greater penalty? Do common sense reactions justify a lesser punishment because no concrete harm resulted?

Given such difficulties over *actus reus* and *mens rea*, over divergent purposes, impossibility and abandonment, and over punishment, small wonder if our present law on secondary liability seems unsatisfactory. A brief survey, however, of its background, history and lay-out will reveal the soundness of its basic thrust and rationale. It will also highlight detailed shortcomings, and suggest improvements in line with that thrust and rationale.

CHAPTER TWO

Secondary Liability in Law

The concept of secondary criminal liability has long been recognized by Western legal systems. It is found in all those civil law systems originating in Europe and based ultimately on Roman law. It is equally found in all the common law systems derived from English law.

I. History

Within both kinds of Western legal systems, then, we find rules of secondary liability. In both, there seems to have been ready acknowledgment of liability for participation without actual commission. Meanwhile, the recognition of liability for inchoate offences, especially in common law, appears to have been more hesitant.

Indeed inchoate offences are the subject of two quite contrasting stories as related by conventional wisdom. In Roman law and in its civil law descendants, recognition of inchoate liability followed quite straightforwardly from the principle *voluntas reputabatur pro facto*.[6] In common law such recognition came more slowly since, as Pollock and Maitland put it, "our old law started from the other extreme: *factum reputabitur pro voluntate*."[7] Clearly, where all that matters is intent, there is no problem with inchoate liability; but where what matters is the deed, there is no room for liability without commission of the act itself.

Much as there may be to be said for this account, it grossly oversimplifies. A cursory look at legal history reveals a more confusing picture. In no way was civil law a slave to the *voluntas* principle or common law a captive of its opposite.

Roman law and its successors in Europe clearly recognized the notion of secondary liability. Participation was much discussed by Roman jurists who distinguished among *auctores*, *co-auctores*, *auxillarii*, *participes*, *consilii* and so on.[8] These distinctions,

6. See R. Merle and A. Vitu, *Traité de droit criminel* (Paris: Cujas, 1975), vol. 1, p. 613.
7. F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I*, 2nd ed. (Cambridge: Cambridge University Press, 1898), vol. 2, p. 477, note 5.
8. See *supra*, note 6.

however, made little difference to the liability or the sanction incurred. The resulting position, then, was much like that in common law regarding parties to treason and misdemeanours.

On this question of punishment for participation, however, Continental systems have been divided. France, for example, followed the lead of Roman law and made all parties liable to the same sanction.[9] Germany, on the other hand, assigned a lesser penalty for secondary participation than for commission.[10]

By contrast, inchoate offences were not so readily recognized in Roman law. Indeed some commentators, such as Bynkerskhoëk, contend that Roman law contained no general theory of attempted crime, but only some specific attempt offences.[11] Others, however — and indeed the majority of sixteenth century writers — claim that there existed an articulated doctrine whereby an attempt, *conatus*, was treated as equivalent to, and meriting the same penalty as, a consummated crime.[12]

Of course, in one important respect Roman law differed from its modern counterparts. Theft and many other acts which, in these modern systems, qualify as crimes were seen rather as torts or delicts — private wrongs for which the remedy was compensation and for which, therefore, actual harm was an essential ingredient. In consequence, attempts to steal and so on incurred no liability.

With public wrongs, however, a different rule developed. While early on, in these as in their private counterparts, resulting harm was a condition precedent to liability, things changed with the growth of the distinction between wrongs committed *casu*, by accident, and wrongs committed with *dolus*, intention. Where *dolus* became the prime ingredient, acts of preparation, commencement of execution and so on came to suffice for criminal liability as outward manifestations of the *dolus*.[13]

All the same, just as in modern law, in Roman law mere intent, *nuda cogitatio*, was never criminal. For *voluntas*, as in the maxim *voluntas reputabatur pro facto*, meant much more than this; it meant intent manifested by some overt act.[14]

For this reason, there was in fact no need in Roman law for a distinct concept of attempt in *dolus* crimes. Instead, Roman law relied on the concept of an act in furtherance of a crime without distinguishing between acts of preparation and acts of execution.

9. *The French Penal Code* of 1810, as amended, 1959, Article 59, in The American Series of Foreign Penal Codes (London: Sweet and Maxwell, 1960), vol. 1, p. 37.
10. *Das Deutsche Strafgesetzbuch* (1975), as amended to June, 1980, ss. 27(2), 49(1).
11. Bynkerskhoëk, Observ. jus rom. III, 10, app. I, p. 72; Feuerbach, *Lehrbuch des Gen. Peinl. Strafrechts* (Giessen: 1849), pp. 48 and 39, note I; Ortolan, *Éléments de droit pénal*, 1st ed. (Paris: 1855), p. 122, note.
12. See, for example, *Cujas Observat* VIII 32; XV, 25; Matthaeus D'Utrecht, *de Criminibus*, Comment. ad lib. pand., XLVII and XLVIII, Amst., 1644.
13. See Pliny, *Historia* 18, 3. Festus V parricid.
14. "Cogitationibus poenam nemo patitur": Aulus Gellis Digest XLVIII, 29.

The *lex Cornelia de sicariis*, for example, put murder, attempted murder and various secondary acts of murder on the same footing, and made them all liable to the same penalty. This was also the rule applying to *crimina ordinaria*, the major crimes.

On this basis, a theory of criminal liability was shaped by Continental textbook writers.[15] That theory distinguished between attempts, acts of preparation, internal psychological facts, and so on. These distinctions were given extra importance by the emerging rule of law which required precise legal definitions for any offence. Hence, the elusive quest for certainty in defining attempt and the inchoate offences. The inheritance of Roman law is more obvious, however, in attempt than in counselling and conspiracy. The development of counselling and conspiracy as specific crimes (generally considered by Continental law as a form of attempt), seems to have been an original contribution of English law.

Meanwhile, the common law was thought to have set out from the opposite starting-point to that adopted by civil law. Supposedly the deed and not the intent was all-important. In the words of Pollock and Maitland, "ancient law has as a general rule no punishment for those who tried to do harm but have not done it."[16]

This so-called general rule could easily be explained. Deeds are public property, part of the furniture of the external world and there for everyone to see, whereas thoughts are private events, part of a person's inner life and hidden from others. As Brian C.J. observed way back in 1477, "the intent of a man cannot be tried, for the devil knows not the intent of man."[17] The alleged approach of early common law could well be based on obvious reasons.

Equally obvious would be its consequences. An act would be both sufficient and necessary for criminal liability. Acts by themselves, with wrong intent perhaps inferred from them, would merit punishment. Intent by itself without the full *actus reus*, as in the case of participation, attempt and counselling, would escape penalty.

Such consequences did ensue to some extent. Certainly, the sufficiency of an *actus reus* is borne out by the concept of the deodand and also by the notion that a man intends the natural consequences of his actions.[18] Certainly too, the necessity of an *actus* is shown by hesitance in law to impose liability without a completed *actus*, witness

15. It should, however, be noted that the traditional analysis, and especially the French law, simplified the theory to four concepts: the author, the co-authors, accessory and *recelevi* (accessory participants). See Merle and Vitu, *supra*, note 6, p. 613; Dalloz, *Répertoire de droit pénal et de procédure pénale* (Paris: Jurisprudence Générale Dalloz, 1977), vol. 2, p. 1.

16. *Supra*, note 7, p. 477, note 5.

17. (1477), 17 Edw. IV 2 (Excheq.).

18. The concept of deodand grew out of the very ancient belief that guilt attached not only to the actor, but also to the inanimate object used to commit the harm. For example, if a sword was used to kill someone, not only was the defendant guilty, but the sword had to be forfeited to the Crown as a deodand (even if owned by an innocent third party). See Sir William Holdsworth, *A History of English Law*, 7th ed. (London: Sweet and Maxwell, 1956), vol. 3, p. 47.

the common law reluctance to convict an accessory before the principal's conviction[19] and the failure to convict attempters or inciters before the Star Chamber's establishment in the sixteenth century.[20]

Requirement of an *actus reus*, however, was not a universal rule. Treason at least — and this goes back at least to the *Statute of Treasons*, 1351 (25 Edw. III, c. 2) — included under some heads mere mental acts, for example, compassing the King's death, and arguably, the statutory requirement that the accused (as stated in the *Statute of Treasons*) "thereof be proveably attainted of open deed" goes only to evidence and not to substance.[21] More important for our purposes, there is some evidence of early common law recognition that one could be liable for an offence as a participator, whether it was actually committed or not. In one case, for example, a defendant plotting murder but failing in his attempt was punished for the full felony of murder.[22]

Even before the arrival, then, of the Star Chamber, we can see factors militating against the conventional theory that in common law the act was all-important. First, *mens rea* was apparently coming to be essential for conviction.[23] Second, attempts were coming to be punished like completed crimes.[24] Third, conspiracy in one form, namely, causing damage by combining to prefer false indictments, was already an offence before the *Case of Duels* (1615) in the Star Chamber.[25] Finally, participation and inchoate crimes were not seen as essentially different, but rather as two sides of the same coin.[26]

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19. *Ibid.*, p. 308.

20. It was Stephen's view that the doctrine of attempt originated in the Court of Star Chamber. See J. Stephen, *A History of the Criminal Law of England* (1883, reprinted New York: Burt Franklin, 1964), vol. 2, pp. 223-24. This view is supported by, among others, C. Kenny in J. W. Cecil Turner, ed., *Kenny's Outlines of Criminal Law*, 19th ed. (Cambridge: Cambridge University Press, 1966), p. 101, and F. B. Sayre in his article, "Criminal Attempt" (1928), 41 *Harvard L. Rev.* 821.

21. See Sir Matthew Hale, *The History of the Pleas of the Crown* (1736, reprinted London: Professional Books, 1971), vol. 1, p. 108:

> Compassing the death of the king is high treason, though it be not effected; but because the compassing is only an act of the mind, and cannot of itself be tried without some overt-act, to evidence it, such an overt-act is requisite to make such compassing or imagination high treason.

22. In 15 Edw. II 463, decided in 1322, Spigurrel J. referred to a case in which a woman and her lover had compassed the death of the woman's husband and had assaulted him, leaving him for dead. He survived, however, and yet the lovers were arraigned and convicted; he was hanged and she was burnt.

23. See J. W. Cecil Turner, *Russell on Crime*, 12th ed. (London: Stevens, 1964), pp. 18-26.

24. This was recognized by the early legal commentators. See, for example, E. Coke, *The Third Part of the Institutes of the Laws of England* (1644), p. 69; W. Hawkins, *A Treatise of the Pleas of the Crown*, 8th ed. (1824), p. 113; Stephen, *supra*, note 20, p. 222.

25. In fact, conspiracy has an interesting history. There is apparently no evidence that a specific offence of conspiracy was known to common law before the statutory enactments embodied in the 1305 *Ordinance of Conspirators*. Conspiracy is purely a creature of statute, a statute enacted to remedy a very particular wrong: the preferring of false indictments. The offence was more closely connected with offences against the administration of justice than anything else. Moreover, it was not the act of conspiring that was the gist of the offence, but rather the damage suffered by the plaintiff from the false indictment being brought against him. Conspiracy as originally enacted was a completed, substantive offence with no overtones of inchoate liability.

26. It seems that the courts were punishing intention rather than conduct, and the evil intent was the same whether or not the crime was completed. The conduct only served as evidence of the evil intent. This view is echoed in later cases as well. See, for example, *R.* v. *Scofield* (1784), Cald. Mag. Rep. 397,

Admittedly, conventional wisdom is correct to emphasize the Star Chamber contribution, particularly in the area of conspiracy. To strengthen royal power and centralize the lawful use of force, that court was obviously concerned to prevent duelling. To do so, it extended accessorial liability to seconds and others assisting in preparations, even for duels that never took place; it treated as accessories those who today would be more properly regarded as attempters, inciters or conspirators.[27] In doing so it built on earlier law, it seems, but put the emphasis, at least as regards conspiracy, on the notion of confederating, that is, plotting together.[28]

After the abolition of the Star Chamber, its developments and contributions to the law were taken over by the ordinary courts. In consequence, participation and inchoate offences subsequently went their separate ways. Participation was seen as one thing — as modes of involvement in a complete crime; inchoate offences were seen as another — as complete crimes in their own right.[29] Accordingly in *Gregory*,[30] in the mid-nineteenth century, a statute relating to participation was held to have no application to a case of inchoate incitement. The link between participation and inchoate offences — involvement in an offence by virtue of acts done to further it — was lost.

Interestingly, this link was clearly perceived both by Macaulay[31] and by Wright,[32] although not, it seems, by Stephen.[33] Rejecting the complex participation rules of common

p. 403, *per* Lord Mansfield:

> So long as an act rests in bare intention, it is not punishable by our laws, but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.

Also, see *R.* v. *Higgins* (1801), 2 East 5, 102 E.R. 269, p. 275, *per* Grose J.:

> If a robbery were actually committed, the inciter would be a felon. The incitement, however, is the offence, though differing in its consequences, according as the offence solicited (if it be felony) is committed or not. The guilt of an accessory before is in many cases as great as that of the principal; sometimes indeed it is even deserving of greater punishment.

27. This was done in the famous *Case of Duels* (1615), 2 St. Tr. 1033, where the court held:

> And the court with one consent did declare their opinions: That by the ancient law of the land, all inceptions, preparations, and combinations to execute unlawful acts, though they never be performed, as they be not to be punished capitally, except it be in case of treason, and some other particular cases of statute law, so yet they are punishable as misdemeanors and contempts: and that this court was proper for offences of such nature.

28. The court built on earlier law in that it professed to be merely interpreting the conspiracy statutes already on the books. See, for example, *The Poulterers' Case* (1610), 9 Co. Rep. 55.

29. The common law courts of the post-Star Chamber period do not appear to have given much credit to the Star Chamber for the invention of a liability for attempt and incitement. Instead, they harkened to the "ancient doctrine" which treated the will as the deed, and held that an evil intent manifested by an overt act is punishable. At first they modified the doctrine only to the extent that one who attempted felony was not liable for the full felony, but for a high misdemeanour. See *Mr. Bacon's Case* (1664), 1 Lev. 146; Mich. 16 Car II in B.R. 341; *R.* v. *Scofield*, *supra*, note 26; *R.* v. *Higgins*, *supra*, note 26, p. 269.

30. *R.* v. *Gregory* (1867), 1 L.R. 77.

31. In 1837, T. B. Macaulay drafted a criminal code that was subsequently enacted as the *Indian Penal Code*, Act XLV of 1860.

32. R. S. Wright, *Drafts of a Criminal Code and a Code of Criminal Procedure for the Island of Jamaica* (London: HMSO, 1877).

33. J. Stephen, *English Draft Code*, Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences with an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners (London: HMSO, 1879).

law, both these reformers utilized a more general concept of "abetment." Macaulay used this term to cover instigating, conspiring and intentional aiding, whether the full crime was committed or not.[34] Wright used it to cover aiding, instigating, counselling, procuring and facilitating, whether the full crime was committed or not.[35] Apart from their addition of a separate offence of attempt, both writers clearly treated all secondary parties — accessories before and at the fact, of a completed or inchoate crime — as falling under the general concept of "abetting."

By contrast, Stephen followed what had come to be the more traditional approach. Both in the *Digest*[36] and the *English Draft Code*[37] he treated participation and inchoate offences under quite separate headings. In effect then, he merely codified to a large extent the already existing rules of common law on participation, attempt, incitement and conspiracy.

This codification is what was taken over by the draftsmen of our *Criminal Code* of 1892[38] which, with minor modification, has remained the law until the present day.[39]

II. Present Law

This present law, however, is contained in a variety of places. On both participation and inchoate offences, the rules are to be found partly in general sections in the present *Criminal Code*, partly in numerous specific provisions and partly in case-law decisions as follows.

34. *Indian Penal Code*, Act XLV of 1860, c. V (s. 107 particularly).

35. Wright, *supra*, note 32, especially Chapters IV and V.

36. J. Stephen, *A Digest of the Criminal Law* (London: Macmillan, 1877), Chapter IV dealing with participation in completed crimes, and Chapter V dealing with liability for inchoate crimes.

37. Stephen, *supra*, note 33, reprinted in 6 Parl. Pap. sections 71, 72 and 73 dealing with participation in completed offences, and sections 74 and 419-424 dealing with liability for inchoate offences.

38. *The Criminal Code, 1892*, 55-56 Vict., c. 29, sections 61, 62 and 63 dealing with participation in completed offences; and section 64 dealing with liability for inchoate offences. It is interesting to note that the courts found the substantive offence of inciting (for which no separate provision was made in the 1892 *Code*) by reading it into paragraph 61(*d*), thus drawing the connection between the two strands of secondary liability for counselling and procuring. See, for example, *Brousseau* v. *The King*, [1918] 56 S.C.R. 22, 29 C.C.C. 207, 39 D.L.R. 114; followed in *R.* v. *Gordon and Gordon*, [1937] 2 W.W.R. 455, 79 C.C.C. 315 (Sask. C.A.).

39. *Criminal Code*, S.C. 1953-1954, c. 51, amended the 1892 *Code* by removing "counselling and procuring" from the general parties section (originally section 61); providing for "counselling and procuring" in a separate section (new section 22); and, adding new section 407 to cover inchoate inciting. These changes served to sever completely the link between the two kinds of secondary liability. Also, the phrase, "Every one is a party to and guilty of an offence who ..." found in section 61 of the 1892 *Code*, was changed to "Every one is a party to an offence who ..." in section 21 of the 1955 *Code*, thus obscuring the effect of being found to have participated in crime.
In the 1974-75-76 revisions of the *Code*, subsection 23(3), which excused married women from liability as accessories after the fact if they rendered their assistance in the presence and by the authority of their husbands, was repealed. Since enactment in 1892, the attempt provisions have undergone no substantive legislative changes.

A. Participation

(1) General Sections

Criminal Code, R.S.C. 1970, c. C-34, ss. 21, 22, 23:

21. (1) **[Parties to offence]** Every one is a party to an offence who

(*a*) actually commits it,

(*b*) does or omits to do anything for the purpose of aiding any person to commit it, or

(*c*) abets any person in committing it.

(2) **[Common intention]** Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

22. (1) **[Person counselling offence]** Where a person counsels or procures another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled or procured is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled or procured.

(2) **[Idem]** Every one who counsels or procures another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling or procuring that the person who counselled or procured knew or ought to have known was likely to be committed in consequence of the counselling or procuring.

23. (1) **[Accessory after the fact]** An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists him for the purpose of enabling him to escape.

(2) **[Husband or wife, when not accessory]** No married person whose spouse has been a party to an offence is an accessory after the fact to that offence by receiving, comforting or assisting the spouse for the purpose of enabling the spouse to escape.

(2) Specific Provisions

Sections 21 and 22 appear to have been intended to have universal application to all provisions of the Special Part of the *Code*, but in fact their broad scope is encroached upon by numerous and haphazard special sections that specifically impose "accessorial"

liability for aiding and abetting, procuring and inciting certain conduct. For example, there is: paragraph 72(*b*) (provoking a person to challenge to a duel); paragraph 76(*d*) (counselling or procuring piratical acts); section 402 (assisting in types of cruelty to animals).

(3) Case-Law Decisions

In spite of the general provisions and the overlapping special provisions, the *Criminal Code* does not provide a comprehensive statement of the law on participation. It is necessary to look to the case-law to determine what conduct amounts to criminal aiding and abetting,[40] the requisite *mens rea* of abetting,[41] and the effect of duress[42] and abandonment.[43]

B. Attempt

(1) General Sections

Criminal Code, R.S.C. 1970, c. C-34, ss. 24, 421, 587:

> **24.** (1) **[Attempts]** Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
>
> (2) **[Question of law]** The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.
>
> **421.** **[Attempts, accessories]** Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences, namely,

40. See *Dunlop and Sylvester* v. *R.* (1979), 8 C.R. (3d) 349 (S.C.C.); *R.* v. *Meston* (1975), 34 C.R.N.S. 323, 28 C.C.C. (2d) 497 (Ont. C.A.).

41. See *R.* v. *Curran* (1978), 38 C.C.C. (2d) 151 (Alta. C.A.), leave to appeal to the Supreme Court of Canada refused at 38 C.C.C. (2d) 151, footnote (S.C.C.); *R.* v. *Barr* (1975), 23 C.C.C. (2d) 116 (Ont. C.A.).

42. See *Paquette* v. *The Queen* (1976), 39 C.R.N.S. 257, 30 C.C.C. (2d) 417 (S.C.C.).

43. See *R.* v. *Miller and Cockriell* (1976), 38 C.R.N.S. 139, 31 C.C.C. (2d) 177 (S.C.C.).

(*a*) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to be sentenced to death or to imprisonment for life, is guilty of an indictable offence and is liable to imprisonment for fourteen years;

(*b*) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to imprisonment for fourteen years or less, is guilty of an indictable offence and is liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable; and

(*c*) every one who attempts to commit or is an accessory after the fact to the commission of an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.

587. [Full offence charged, attempt proved] Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.

(2) Specific Provisions

In addition to the general provisions, there are several specific attempt provisions. For example: section 72 (attempted provocation of a duel); subsection 108(1) (attempted corruption by judicial officers); subsection 112(2) (attempted corruption of a municipal official); section 222 (attempted murder); section 127 (attempted obstruction of justice); and subsection 326(1) (attempted utterance of a forged document).

(3) Case-Law Decisions

The case-law has grappled with the question of *actus reus* for attempt using various differing tests, from the unequivocality test in *Olhauser*[44] to the *Cheeseman* test in *Quinton*[45] and the "last step" test in *Courtemanche and Bazinet*.[46] The question of *mens rea* was addressed in *Ancio*.[47] *Burgess*[48] discussed the meaning of impossibility.

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44. *R.* v. *Olhauser* (1970), 11 C.R.N.S. 334 (Alta. C.A.). By this test one goes beyond preparation and gets to attempt when one's acts point unequivocally to one's criminal object.

45. *R.* v. *Quinton*, [1947] S.C.R. 234. The *Cheeseman* test originated in *R.* v. *Cheeseman* (1862), Le & Ca 140, and was espoused by Stephen in *supra*, note 36, Article 47. The test requires "an act ... forming part of a series of acts, which would constitute [the] actual commission [of a crime] if it were not interrupted."

46. *R.* v. *Courtemanche and Bazinet* (1970), 9 C.R.N.S. 165, [1970] 3 C.C.C. 139. This test holds that an accused is guilty of attempt when he has done all that it was necessary for him to do towards the completion of a crime.

47. *R.* v. *Ancio* (1984), 6 D.L.R. (4th) 577.

48. *R.* v. *Burgess* (1976), 33 C.C.C. (2d) 126 (B.C. C.A.).

C. Counselling

(1) General Section

Criminal Code, R.S.C. 1970, c. C-34, s. 422:

> **422. [Counselling, etc., offence which is not committed]** Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel, procure or incite other persons to commit offences, namely,
>
> (*a*) every one who counsels, procures or incites another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and is liable to the same punishment to which a person who attempts to commit that offence is liable; and
>
> (*b*) every one who counsels, procures or incites another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

(2) Specific Provisions

As is the case for participation, the *Code* contains numerous special sections imposing liability for incitement. To name a few, there is: section 76 (procuring piratical acts); section 81 (advising prize fights); and section 134 (procuring escape of a prisoner).[49]

(3) Case-Law Decisions

The *Code* is not explicit as to the requisite *actus reus* and *mens rea* of the offence of counselling, procuring or inciting, nor as to the effect of abandonment, divergent offences and impossibility. The sparse case-law makes some effort to clarify these issues.[50]

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49. In all, there are more than twenty-five special incitement provisions in the *Code*.

50. See, for example, *R.* v. *McLeod* (1970), 12 C.R.N.S. 193, 1 C.C.C. (2d) 5 (B.C. C.A.) explaining the meaning of "counsel." See also *R.* v. *Walia (No. 1)* (1975), 9 C.R. (3d) 293 (B.C. C.A.); *R.* v. *Glubisz (No. 2)* (1979), 9 C.R. (3d) 300 (B.C. C.A.); and *Attorney-General's Reference (No. 1 of 1975)*, [1975] 2 All E.R. 684 (C.A.) dealing with the meaning of the word "procure."

CHAPTER THREE

Shortcomings of Existing Law

In exploring the "yes but" side of the General Part, Working Paper 29, *The General Part — Liability and Defences*, argued that there is a threefold function to the General Part. This is (1) to organize the law by the provision of general rules and consequent avoidance of repetition; (2) to rationalize it by providing system, order and a resulting greater manageability; and (3) to illuminate it by uncovering its general thrust, direction and basic principles. In our view, this threefold function relates not only to the "yes but" side, but also to the "not only but also" aspect of the General Part; it concerns not only liability and defences, but also participation and inchoate offences.

A glance at the law set out above, however, suggests shortcomings as to each of these three functions. Clearly the law has not been sufficiently well organized to avoid repetition. Clearly too, there is a lack of system and order in the various provisions, which accordingly become open to a charge of unmanageability. Arguably also there is confusion as to thrust, direction and basic principle.

Mostly, these shortcomings relate more to form than to substance. The first relates to lack of generality, the second to poor arrangement and the third to want of comprehensiveness and to objectivism, vagueness and inconsistency.

I. Lack of Generality

The lack of sufficient generality in this whole area of law is shown by its excessive detail, repetitiveness and overlapping provisions. In participation, attempt and counselling, the general sections are supplemented by numerous specific sections dealing with participating in, attempting or counselling specific offences (for example, murder). These could possibly be supported by the need for aggravated penalties, but this need could be more straightforwardly satisfied by general sentencing provisions than by the creation of separate specific offences which may produce overlap and inconsistency with the general sections.

II. Poor Arrangement

Disorderly arrangement is manifest in two contexts. First, concerning attempt we find general provisions in two different places: the definition is provided in section 24 under the general heading, *Parties to Offences*, but the sanction is in a totally different Part of the *Code* in section 421. Second, with counselling we find the general provisions, namely sections 422 and 423, admittedly in one place, but this location only partially links this inchoate offence with the inchoate offence of attempt, and manifests no connection whatsoever between counselling a complete, and counselling an incomplete, offence.

III. Lack of Comprehensiveness

Want of comprehensiveness is evident from the various gaps and lacunae to be found in this area of law, some being left to common law and others being left out altogether. Some of them relate to serious matters; others to matters of comparative unimportance. However, taken together they prevent the provision of a complete picture.

Much of this want of comprehensiveness stems from drafting gaps and infelicities. Take for example the provisions on parties. In these, following common law tradition, the *Code* divides parties into committers, aiders, abettors, "common intent assisters" (subsection 21(2)) and counsellors. Nowhere, however, does it say one word as to the liability of a party. Throughout the *Code* it is only the committer of the offence who explicitly incurs criminal liability, while aiders and abettors do so only by implication.[51] Likewise, nowhere does the *Code* say one word about what constitutes committing — not one word on commission through an innocent agent, and no general provision on joint perpetration (subsection 21(2) is surely a quite special case). A third example, section 22 on parties talks of counselling and procuring, while section 422, under inchoate offences, talks of counselling, procuring and inciting. Is it the law, as could be argued on the statutory interpretation principle *expressio unius est exclusio alterius*,[52] that an incomplete offence may be instigated in a way in which a complete offence cannot?

Further want of comprehensiveness concerns the question of *actus reus*. Here admittedly, some of the problems arise because there are so many different things that can be done to aid, to attempt and so on. All the same, some things which could and

51. It is interesting to note that Canada's original *Code*, that is, *The Criminal Code, 1892*, stated in section 69 what was the effect of being a party to an offence: "Every one is a party to *and guilty of* an offence who ...." The emphasized words were deleted in the 1953-54 amendments, thus creating the existing uncertainty.

52. The express mention of one thing implies the exclusion of another. H. Broom, *A Selection of Legal Maxims*, 10th ed. (London: Sweet and Maxwell, 1973), p. 443.

surely should be spelled out in a comprehensive *Code* are passed over in silence. For instance, the words "does or omits to do anything for the purpose of aiding" (paragraph 21(1)(*b*))[53] and "does or omits to do anything for the purpose of carrying out" (section 24) are not self-explanatory, but must be read subject to general common law principles on criminal omissions. "Abet" — clearly not a term of ordinary usage — is nowhere defined. The sections on aiding and counselling are nowhere defined. They nowhere clarify whether it is necessary that the recipient in question be actually aided[54] or counselled.[55] The sections on attempt provide no help on the vexed question as to what makes acts so remote as only to qualify as mere preparation.[56]

The same lack of comprehensiveness applies to *mens rea*. As to aiding, paragraph 21(1)(*b*) of the *Code* restricts it to the purpose of aiding, but courts have extended it to foresight that one's conduct would aid, for example, to recklessness.[57] As to abetting, nothing whatsoever is said regarding the mental element.[58] With counselling, it is unclear whether intent is necessary or whether recklessness suffices.[59] In the case of attempt, the *Code* has left *mens rea* open enough to allow with some crimes, for example, murder, two different interpretations of what is required: (1) an intent to cause the harm prohibited (*Ancio*, for example); [60] and (2) an intent to do an act seen as likely to cause the harm prohibited (for example, *Lajoie*).[61]

Next, there are problems as regards defences. One relates to general defences. For while at common law such defences apply equally to all parties, where such a defence has been replaced by a *Code* defence, as is the case with duress,[62] it is unclear from

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53. See *infra*, note 66.

54. Legal commentators are divided on the issue. Some consider the fact that the aid is useless to be irrelevant. See J. Fortin and L. Viau, *Traité de droit pénal général* (Montréal: Thémis, 1982), p. 354; D. R. Stuart, *Canadian Criminal Law: A Treatise* (Toronto: Carswell, 1982), p. 495. See on the other hand V. Gordon Rose, *Parties to an Offence* (Toronto: Carswell, 1982), p. 17; J. C. Smith and B. Hogan, *Criminal Law*, 4th ed. (London: Butterworths, 1978), p. 116.

55. However, the courts have held that a person cannot be convicted as a party under section 22 if his incitement was unsuccessful: *R.* v. *Deutsch* (1983), 5 C.C.C. (3d) 41 (Ont. C.A.). It is unclear however, if, on a charge under section 22, it must be shown that an offence was committed in consequence of the incitement. See Rose, *supra*, note 54; *R.* v. *Soloway* (1975), 28 C.C.C. (2d) 212 (Alta. C.A.).

56. As a result, the courts have rarely relied on section 24 to answer the question. Instead they have relied on tests developed in our own and other jurisdictions. See *supra*, notes 44 to 46.

57. See, for example, *R.* v. *Halmo* (1941), 76 C.C.C. 116 (Ont. C.A.); *R.* v. *Kulbacki*, [1966] 1 C.C.C. 167 (Man. C.A.); *R.* v. *Farduto* (1912), 21 C.C.C. 144 (Qué. C.A.).

58. "Abet" appears to mean making a moral contribution to the commission of an offence — to instigate, promote or procure a crime. As such, the courts have required a mental element of intent. See, for example, *R.* v. *Curran* (1977), 38 C.C.C. (2d) 151 (Alta. C.A.); *R.* v. *Jupiter* (1983), 35 C.R. (3d) 286.

59. The courts have been left to grapple with the issue. See, for example, *R.* v. *Kyling*, [1970] S.C.R. 953; *R.* v. *McLeod*, *supra*, note 50; *David* v. *R.* (1979), 9 C.R. (3d) 189 (Qué. C.A.); *R.* v. *Gonzague* (1983), 9 W.C.B. 344 (Ont. C.A.).

60. *Supra*, note 47.

61. *Lajoie* v. *R.* (1973), 10 C.C.C. (2d) 313 (S.C.C.). See *infra* for an analysis of this decision.

62. The availability of the defence of duress to a charge under subsection 21(1) is uncertain. The Supreme Court of Canada in *Paquette* v. *The Queen*, *supra*, note 42, seemed to approve the English decision, *Director of Public Prosecutions for Northern Ireland* v. *Lynch*, [1975] A.C. 653 (H.L.) where an accused charged with aiding and abetting was allowed to rely on a defence of duress.

the *Code* itself whether it is the *Code* or common law defence that applies to parties other than committers. Another problem relates to possible special defences such as abandonment and impossibility, on which nothing is said under the rubric of parties or counselling.[63] Even under attempt, which purportedly excludes impossibility as a defence, questions still remain. Would acts done for the purpose of committing an impossible offence not fall under subsection 24(2), and so be too remote to be an attempt?[64] What about acts done for the purpose of committing things that are not crimes but are only mistaken for such by the defendant?

IV. Objectivism, Vagueness and Inconsistency

Finally, objections can be levelled against present law on the grounds of objectivism, vagueness and inconsistency. Objectivism appears in subsection 21(2) on parties, which provides that:

> Where two or more people form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or *ought to have known* that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence. [Emphasis added]

This provision runs counter to the general doctrine of *mens rea* as excluding negligence.[65] Vagueness and possible overcriminalization are evident in the failure to define what is the minimum act necessary for aiding, abetting and counselling, which could

63. Further, not much has been said on these defences in case-law. For example, it appears that in the area of attempt the closest the Supreme Court of Canada has come to addressing the issue is in *R.* v. *Carey*, [1957] S.C.R. 266, where the court seems implicitly to recognize a defence of abandonment. However, as the majority found that in this instance there was no evidence of abandonment, their words on the validity of such a defence are *obiter dictum*.

64. Another question is whether courts will include legal impossibility within section 24 — that is, rule it out also as a defence. As far as we are aware, no court in Canada has had to address this problem. Many legal writers, however, believe the courts would, despite subsection 24(1), follow the common law tradition which bars conviction for legally impossible attempts. See, for example, A. D. Gold, "To Dream the Impossible Dream: A Problem in Criminal Attempts (and Conspiracy) Revisited" (1979), 21 *C.L.Q.* 218; and G. Williams, "Attempting the Impossible — A Reply" (1979), 22 *C.L.Q.* 49.

65. The seriousness of this departure from the fault principle is nowhere more apparent than in cases involving constructive murder under sections 213 and 214. See, for example, *R.* v. *Trinneer*, [1970] S.C.R. 638; *R.* v. *Riezbos* (1975), 26 C.C.C. (2d) 1 (Ont. C.A.); *R.* v. *McLean* (1976), 31 C.C.C. (2d) 140 (Ont. C.A.); *R.* v. *Gamble and Nichols* (1978), 40 C.C.C. (2d) 415 (Alta. C.A.); Stuart, *supra*, note 54, p. 502.

almost cover anything other than mere presence at the scene of the crime.[66] Inconsistency is notable in two respects: (1) parties are liable to the same penalty as committers, but attempters and so forth are liable to varying penalties — to the full penalty in the case of summary offences, to half the penalty in the case of most indictable offences, but to fourteen years' imprisonment in the case of murder; and (2) while committing and accessory before the fact have their inchoate counterparts in attempt and counselling, aiding and abetting have no such counterparts — a lack of symmetry of which Macaulay and Wright would clearly be aware.[67]

66. Under both paragraphs 21(1)(*b*) and (*c*), any type of conduct, including mere words or gestures, may suffice if it encourages the perpetrator in the commission of the offence. See *Dunlop and Sylvester* v. *R.*, *supra*, note 40, pp. 353-4.
In order to be criminally liable for aiding and abetting, the accused must normally do something, but where he has the power to control the perpetrator and is present during the commission of the crime, it has even been held that mere acquiescence may suffice. See *National Coal Board* v. *Gamble*, [1959] 1 Q.B. 11, p. 25, approved in *Tuck* v. *Robson*, [1970] 1 W.L.R. 741. This principle has been extended in the case of driving offences to the point where the ability to control the perpetrator may be inferred from the mere fact of ownership of the vehicle. See *R.* v. *Halmo* and *R.* v. *Kulbacki*, *supra*, note 57. Mere presence at the scene of the crime may be evidence of aiding and abetting if accompanied by other factors. See, for example, *R.* v. *Black* (1970), 10 C.R.N.S. 17 (B.C. C.A.); *Re A.C.S.* (1969), 7 C.R.N.S. 42 (Qué. S.C.). However, there is no consistency in the case-law. See, for example, *R.* v. *Salajko* (1970), 9 C.R.N.S. 145 (Ont. C.A.); *R.* v. *Clow* (1975), 25 C.C.C. (2d) 97 (P.E.I. S.C.); *R.* v. *Cruise* (1970), 9 C.R.N.S. 225 (Man. Prov. Ct.).

67. See *supra*, notes 31 and 32.

CHAPTER FOUR

A New Approach

Arguably, then, our law on secondary liability is in general sound, but subject to shortcomings. To remedy these, a new Code should do four things. It should include all the relevant rules in one comprehensive chapter on secondary liability. It should ensure that the rules are consistent, free from self-contradiction, and based on coherent principles. It should cater to the need for restraint and avoid criminalizing acts which are essentially innocent and legitimate. And it should do all this in clear, straightforward provisions readily understood and easily manageable.

Comprehensiveness could be achieved by three improvements: (1) by locating all the rules in one place in the General Part and jettisoning reliance on specific provisions and on common law; (2) by spelling out rather than leaving to implication the liability of *all* persons involved in crime (not just committers); and (3) by clarifying that it is possible to be involved in crime in three ways — by oneself, jointly with another, and through an innocent agent.

Consistency could be increased by three new measures: (1) by showing in the relevant chapter of the General Part how participation and inchoate offences both relate to the furtherance of crime; (2) by restricting criminal liability for secondary offences to attempts and so forth to commit criminal (that is, not regulatory or provincial) offences; and (3) by rationalizing the penalties for secondary offenders.

Overcriminalization could be avoided by clarifying as far as possible and keeping within appropriate bounds the *actus reus* and *mens rea* required for secondary liability.

I. Suggested Scheme of Secondary Liability

In looking at the matter of commission, participation and inchoate offences, we can see two distinctions. One is that between persons involved in a completed and those involved in an uncompleted crime, that is, the distinction between choate and inchoate offences. The other is that between persons who commit specific crimes and those who do other acts intended in furtherance of such crimes, that is, the distinction between primary and secondary liability.

Now, a new scheme could adopt either of these distinctions as its starting-point. It could, for instance, begin by setting out that there are two ways of incurring criminal liability: by committing a crime, and by doing an act in the furtherance of a crime. It could then clarify that a crime can be committed or furthered severally, jointly or through an innocent agent. Finally, it could specify that a crime can be furthered either before or at the time the crime is committed, and either at, or away from, the scene of the crime.

Such a scheme would replace participation and inchoate offences by one offence — doing an act in furtherance of a crime. Its attraction would lie in revealing a basic unity, obscured by present law which looks on liability of parties as derivative but that of inchoate offenders as primary, in holding offenders liable for what they do themselves instead of (as with parties) for what someone else has done, and in rightly treating the eventual commission or noncommission of the crime in question by the primary offender as quite fortuitous from the standpoint of those who do an act in furtherance.

This last aspect makes perfect sense from the standpoint of logic. First, morally an accomplice may be as blameworthy as a committer, and an unsuccessful attempter as blameworthy as a successul one — the outcome is pure chance from his standpoint. Second, on occasion an accomplice, rather than the committer, may be the ringleader. Third, one who furthers a crime can be as dangerous as a committer — an unsuccessful attempter's lack of competence may be counterbalanced by his possible desire to have another try.

The life of the law, however, has not been logic but experience. Intuitively, albeit perhaps illogically, a committer seems worse than an accomplice or a mere attempter. Besides, we tend to measure punishment not only by reference to the harm intended, but also by reference to the harm resulting. Attempted murder, for example, seems naturally to merit a lesser penalty than murder. Finally, a lesser penalty for incomplete crimes could provide incentive to desist.

For these reasons, we think the new scheme, although using the unifying concept of furthering, should retain the traditional distinction between choate and inchoate offences. First, therefore, it should provide two parallel categorizations. To begin with, those liable in respect of completed crimes should be divided into:

(1) perpetrators;

(2) helpers; and

(3) inciters.

Next, those liable in respect of incomplete crimes should be similarly divided into:

(1) inchoate perpetrators (attempters);

(2) inchoate helpers (where the person helped does not commit the crime); and

(3) inchoate inciters (where the person incited does not commit the crime).

Second, it should, as would the alternative scheme, set out the three ways of perpetrating. One can perpetrate on one's own — one can do the act by oneself. One can perpetrate through an innocent agent — one can get another who lacks culpability to do the act. One can perpetrate jointly with others — one can do the act together with them. Moreover, this applies both to complete and incomplete offences.

Now, joint perpetration needs to be distinguished carefully from helping. Joint perpetration involves sharing the crime — one person does one part of it, another does another. Perhaps, as Glanville Williams pointed out, their contributions are indistinguishable: "If two ruffians belabour a man about the head and he dies as a result of the combined blows, both are perpetrators of murder."[68] Perhaps the crime involves two elements and each perpetrator commits one of them: "In robbery, which involves the two elements of theft and fraud, one person may steal while his companion makes the threat of force, and the two are co-perpetrators."[69] By contrast, a mere helper does no part of the criminal act itself: "Suppose Dirk stabs a man while his companion Dastard pinions the man's arms so as to prevent him from defending himself ... Dastard is [only] an accessory."[70]

Finally, the new scheme should rationalize the penalties. First, for reasons given earlier, penalties for incomplete crimes should be less than for complete crimes. We would suggest a half-penalty, as under present law. Second, penalties for all types of involvement in incomplete crimes should be the same. Thirdly, penalties for all types of involvement in complete crimes should be the same; the helper and inciter should be liable to the same sanction as the perpetrator, for sometimes they may be equally or even more culpable.

At the same time, however, the new scheme should still employ the unifying concept of furtherance. In each case of involvement other than perpetration of a complete offence, it should define the involvement as a substantial act intended to further the specific crime in question either by attempting, helping or inciting it. *Mens rea* would comprise an intent to further, and *actus reus* a substantial act in furtherance. In each case, the trier of fact would be confronted with the self-same question: Was there a substantial act in furtherance and intended to further?

Conspicuous in the new scheme would be a new addition to inchoate liability: inchoate helping. In present law, a helper, unlike an inciter, is criminally liable only if the crime in question is committed. Under the new scheme, he would be liable regardless of its commission.

This is surely as it should be. Present law contains a peculiar gap. A person is criminally liable if he embarks on a crime whether he completes it or not. He is liable

68. G. Williams, *Textbook of Criminal Law*, 2nd ed. (London: Stevens, 1983), p. 330.
69. *Ibid.*
70. *Ibid.*

if he incites another to commit a crime whether the other commits it or not. However, he is not liable if he aids another to commit a crime unless that other commits the crime.

Why should this be so? Should we make a distinction between furthering a crime that is or is not committed? It might be argued that assisting where no crime is committed is too trivial and too remote for sanctions. On the other hand, a person who does act intending to further a crime by assisting or inciting another to commit the crime, is no more dangerous and blameworthy if the crime furthered is committed than if it is not. Surely, it is the furtherer's own conduct that is inherently wrongful by being meant to further criminal activity. Its criminality should not depend on the commission of the principal offence.

Finally, the rule in present subsection 21(2) would disappear. Whether a person who forms a common intent with another to commit a crime should be criminally liable for such agreement is one thing to be considered later. Whether he should be deemed a party to a crime committed by the other in carrying out the common purpose is quite another matter. One objection to the present rule is that it treats him as a party to a crime which he *ought* to have known was a probable consequence of carrying out that purpose, whereas, in principle, criminal liability should be restricted generally to intent or recklessness. Another objection is that subsection 21(2) treats as a party to a crime a person who has himself done no substantial act in furtherance of it (one who merely agrees to do it), like a person who decides himself to do it, makes no actual contribution to its commission. For these reasons, we feel the rule in subsection 21(2) should disappear and have no counterpart in a new Code.

One of the most important objects of the new scheme is to articulate the mental and physical elements required for secondary liability. Traditionally, discussion starts with *actus reus* since in commission of a complete crime this is what causes concern (some act like wounding, whose obvious harmfulness manifests criminality). Only afterwards does the discussion proceed to consider *mens rea*, an element often inferred — one does not usually wound without intending to. On secondary liability, our discussion takes the opposite course because an act may often be innocent on its face and only cause concern because of the intent discovered from some other evidence. So, whereas in commission of complete crimes *actus reus* may point to *mens rea*, in secondary liability *mens rea* is often in search of an *actus reus*. For this reason we begin with *mens rea*.

II. *Mens Rea*

A. Principles

What should be the required mental element in secondary liability? Now, liability for doing something in furtherance of a criminal offence is similar to that for murder, arson and vandalism. Doing an act in furtherance is like a result-crime.

Such crimes, it will be recalled, admit of several different kinds of *mens rea*.[71] They can be committed with intent — the killer means to kill. They can be committed without direct intent but knowingly or with "oblique" intent — the saboteur does not want to kill the aircraft passengers but accepts their deaths as necessary to his actual purpose of destroying the airplane. They can be committed recklessly — a person continues shooting at the target knowing he may well hit the person standing next to it. Finally, they can be committed negligently — the offender does not realize the risk, but should have.

(1) Intent

Which of these four kinds of *mens rea* would be appropriate for secondary liability? Clearly intent is in order: if crimes are attacks on basic values such as the sanctity of life, then acts done with intent to further them are surely attacks in their own right as well. The same holds true of knowledge or oblique intent: attacks on basic values mounted only as essential means to, or inevitable side-effects of, some other actual goal are nonetheless attacks.

(2) Negligence

Negligence, however, is inappropriate. Here, the agent furthering the offence neither intends to further it nor knows that he is likely to do so. His fault is carelessness: he *ought* to have realized that his conduct would increase the likelihood of the offence occurring. Such carelessness is in itself neither an attack on, nor a challenge to, basic values and does not therefore merit criminal sanction. This is in line with our criminal law tradition which admits negligence as a ground of liability only in exceptional situations.

(3) Recklessness

What about the intermediate case of recklessness? Should someone be criminally liable if he does an act that furthers an offence, and does so knowing that it well may do so (not knowing that it certainly will, as is the case with oblique intent discussed above)? D tries to stupefy X, knowing that this may well kill him, says things to Y which he knows may well inflame him into killing X, or lends Z his car knowing that he may well use it to go and kill X. Should D be criminally liable for furthering homicide if X is not killed? Should he be liable for furthering it if X is killed? Should he be liable by virtue of his recklessness?

To answer these questions, let us recall the definition of "reckless." A vague and relatively imprecise word in ordinary language, it is often used synonymously with "very careless." Less vague in criminal law tradition, it signifies "knowingly incurring a serious unjustifiable risk."[72]

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71. See Law Reform Commission of Canada, *Homicide*, [Working Paper 33] (Ottawa: Minister of Supply and Services Canada, 1984), pp. 39-47.

72. See, for example, *R.* v. *Caldwell*, [1981] 1 All E.R. 961; *R.* v. *Lawrence*, [1981] 1 All E.R. 974.

Here the key word is "unjustifiable." How can we tell whether the risk incurred is justifiable or not? The civil law of negligence suggests a trio of factors: the gravity of the harm risked, the magnitude of the risk, and the burden on the agent of behaving otherwise. How far should he be precluded from doing acts which are of themselves legitimate and which may well have considerable social utility?[73]

In cases of secondary liability, a person furthering a crime does an act which he knows may make that crime more likely to occur. Reasoning from analogy with civil negligence, we could argue that the more serious the crime and the greater the likelihood of its commission, the more justification for imposing criminal liability on him who furthers it.

There is, however, another consideration. In ordinary result-crimes, the link between the act and the resulting harm is one of a directly causal nature. In furthering, for example, by aiding or counselling another to commit a crime (not, be it noted, by attempting), the causal link is indirect — it operates through a free human agent. Clearly the more responsible that agent, the less responsible the original furtherer.[74]

Yet another factor to be considered is the burden on the original actor. How far can he be justifiably required to stop what he is doing whenever he sees it may lead another to commit a crime? In the examples given earlier, is D no longer to be free to speak his mind to Y or lend his car to Z just because of what these two may do? What if the words are true? Must truth be muzzled? What if his business is car-hire? Must he forego his trade?

All this suggests that in a furthering offence *mens rea* should be restricted to intent (direct or indirect). Criminal liability should only apply to acts intended to further crimes or known as certain to do so. It should not be incurred for acts which are merely very likely to do so.

Would this be too restrictive? Suppose D lends X his gun knowing that X will probably use it to murder Y. Should D not be liable for such recklessness? Surely, the graver the probable offence, the more reprehensible the act of helping.

To this there can be various answers. First, the graver the probable offence, the smaller the likelihood that assistance will be given without intent to see the crime committed — people do not usually lend guns to known potential killers without intending them to use them.

Second, restricting secondary liability in respect of what others may do to cases of intent is in line with the common law approach to such "causation" cases. Consider *Beatty* v. *Gillbanks*,[75] where members of the Salvation Army marching through a street

73. See, for example, A. Linden, *Canadian Negligence Law* (Toronto: Butterworths, 1972); Sir J.W. Salmond, *Law of Torts* (London: Sweet and Maxwell, 1977).

74. See H. Hart and A. Honoré, *Causation in the Law* (1959, reprinted Oxford: Clarendon Press, 1967), p. 336 ff. for a good discussion of this whole issue.

75. *Beatty* v. *Gillbanks* (1882), 9 Q.B.D. 308.

where they knew they would be riotously opposed by thugs known as the "Skeleton Army" were held not guilty of unlawful assembly because a perfectly lawful act does not become criminal just because it may cause others to do unlawful acts. Contrast *Wise* v. *Dunning*[76] where a lecturer who held public meetings at which he used language and gestures highly insulting to the faith of many of the local inhabitants, leading them to commit breaches of the peace, was bound over to keep the peace and be of good behaviour. He was, suggest Smith and Hogan,[77] responsible because he had inflamed his audience, whereas the Skeleton Army had inflamed themselves. The former were no longer acting as free agents; the latter were.

Third, there is the ordinary meaning of words such as "attempting," "counselling" and "inciting." Such words imply an intent that the crime attempted and so forth be committed. One who attempts to do something must aim at it, therefore to do it has to be his purpose. One who incites another to do it must urge him on purpose, the purpose being to get him to do it.

Law, of course, can use words in a special sense. For reasons of convenience it may restrict the vague meaning of a word in popular usage. "Night," for example, has been defined by common law and subsequently by *Criminal Code* section 2 as "the period between nine o'clock in the afternoon and six o'clock in the forenoon of the following day."

With "incitement" and so forth, this has not happened. In law, as well as outside the law, incitement involves an intention by the inciter to get the "incitee" to commit the offence incited. Attempt involves intent by the attempter to complete the crime.[78]

B. Divergent Offences

Suppose D counsels or helps X to commit a crime. He intends X to commit crime A but X commits crime B. Should D be criminally liable for furthering crime B?

Sometimes he clearly should. Suppose X asks D to lend him his gun to shoot at V and wound him, D lends X the gun and X, as he intended all along, shoots V dead. Here "I only lent him the gun to wound V" sounds a poor defence. Surely D should be responsible for homicide, if not for murder.

Sometimes the opposite is true. Suppose X asks D to lend him his gun so that he can plant it on V and then allege that V had stolen it. D lends the gun to X, and X then kills V with it. Here "I only lent him the gun to help him frame V" sounds a reasonable defence to homicide.

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76. *Wise* v. *Dunning*, [1902] 1 K.B. 167, [1900-3] All E.R. 727.

77. *Supra*, note 54, p. 754.

78. See *R.* v. *Whybrow* (1951), 35 G. App. R. 141; *Ancio*, *supra*, note 47.

The relevant principle is surely this. Where one person encourages or helps another to do some harm, but that other person does some different harm, the former should not in general be responsible for that different harm. Exceptionally, however, where the difference relates only to the identity of the victim or to the degree of harm, then this principle should not apply. So, if D lends X his gun to kill Y, but X kills Z, D should be liable for assisting — he means to help X commit a murder. If he lends X the gun to wound Y seriously but the wound proves fatal, D should again be liable — no one can be sure such wounds will not prove serious enough to kill. If D lends X the gun to use as a threat in a bank robbery and in using it X kills a bank employee, D's liability or lack of it for helping murder should depend on whether the difference between the intended use of the gun (to threaten) and the actual use (to kill) is seen as a difference in degree or a difference in kind — a matter, in our view, best decided in each case by the trier of fact on all the evidence.

C. Impossibility

Suppose D attempts, urges E, or helps F, to commit crime X, and crime X turns out to be impossible. Should D be liable for furthering crime X?

Traditionally, impossibility is discussed under attempt, and for simplicity that will be done here too. However, the argument applies equally to any kind of furthering, for example, urging, encouraging or helping.

To begin with, there are different kinds of impossibility. Crime X may be impossible, in fact, in two ways. It may be impossible in the circumstances — there is no money in the pocket for the pickpocket to steal. It may be impossible in general — there is no way, we believe, of killing by voodoo. Alternatively, crime X may be impossible in law in two ways. It may be impossible in the circumstances — the goods cannot be stolen because, unknown to D, they are his own. It may be impossible given the state of the law — the "crime" intended, for example, suicide, is no longer an offence.

(1) Impossibility in Fact

On impossibility in fact, common law principle suggests the following solutions.[79] Where the impossibility results from some unknown circumstance, liability should be unaffected — the absence of money in V's pocket does nothing to reduce the culpability or dangerousness of the pickpocket. However, where the impossibility is inherent in the nature of things, there should be no criminal liability — trying to kill by voodoo, although no less reprehensible than an attempt using more appropriate methods, is itself relatively harmless — the would-be killer is never "on the job."[80]

79. See *R.* v. *Smith (Roger) (C.A.)*, [1975] A.C. 476 (H. of L.).

80. This phrase was used by the judge in *R.* v. *Osborn* (1920), 84 J.P. 63, where the accused was acquitted of attempted abortion because, despite his intention, his act of prescribing an innocuous substance to procure the abortion was "not on the job," and "not on the thing itself."

Accordingly, the first case presents no problem. Where D tries to steal from V's empty pocket, the theft is only impossible by accident. In general, pockets have money in them, so pickpockets cause apprehension even when in fact there is none there. D's act is one that normally results in loss of property. Ordinarily, we would not hesitate to say he tried to steal. Nothing in logic or policy prevents us from saying the same in criminal law.[81]

The second case is hardly less straightforward. Killing by voodoo is generally regarded as impossible. Using voodoo, therefore, which the user wrongly thinks can kill, is not seen as apt to bring about the harm intended. By contrast, trying to kill with a gun, wrongly believed to be loaded, is manifestly dangerous and apt in general to produce the harm intended. In cases of inherent impossibility in fact, then, we should hesitate to impose liability for furthering.[82]

(2) Impossibility in Law

First, there can be legal impossibility in the circumstances. When D tries to "steal" his own property, why should he not be liable for attempted theft? Like the unsuccessful pickpocket, he has wrongful intent and does an act towards it. On the other hand, the pickpocket intends to commit a specific offence, while the "self-stealer" only intends wrong in the abstract (to steal). The former's act can, if successful, be a theft; the latter's can be no crime at all. True, he could be blamed for being prepared to take the property, no matter whose it is, and break the law in general but this is not, as the law now stands, a criminal offence. Unless our whole approach to criminal law changes, he cannot incur liability.

Finally, there is inherent legal impossibility. Our law only penalizes conduct in fact prohibited by statute, it does not penalize conduct erroneously believed to be prohibited any more than it excuses conduct erroneously thought not to be prohibited. The law is made, not by the citizen, but by the lawmaker, and ignorance of the law is neither a defence nor an offence; it neither exculpates unlawfulness nor inculpates lawfulness. A person who tries to commit suicide, for instance, wrongly thinking it to be a crime, should not be guilty of attempt, for what he does is not specifically unlawful and there is no blanket offence of "attempting to break the law in general."

As to impossibility then, the new scheme takes the following approach. No criminal liability should attach for furthering a crime inherently impossible to commit by the means adopted. No liability should attach to furthering an act not qualifying for whatever reason as a crime in law. Otherwise criminal liability for furthering should in no way be affected by the impossibility of the crime furthered.

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81. Nor does the current criminal law. See, for example, *Detering* v. *The Queen*, [1982] 2 S.C.R. 583; *R.* v. *Scott*, [1964] 2 C.C.C. 257 (Alta. C.A.).

82. As the courts now do. See *Osborn*, *supra*, note 80.

D. Abandonment

Suppose D tries to commit crime X but abandons the attempt. Suppose he urges E to commit it but then gives up his urgings. Or suppose he starts helping F commit it but then stops helping. Assuming the abandonment is due to a real change of heart and not, for example, to seeing a police officer approach, and assuming that the furthering is not already complete, and is not merely a failed attempt, should D be fully liable?

To this question different answers have been given. Abandonment is allowed as a defence by some codes such as those of France[83] and Germany,[84] and is recommended by the *Model Penal Code* as "renunciation of criminal purpose."[85] It is rejected in most common law jurisdictions, for example, in England,[86] Australia[87] and apparently, despite *Criminal Code* silence on the matter, in Canada.[88]

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83. *The French Penal Code* of 1810, as amended, 1959, Article 2, in The American Series of Foreign Penal Codes (London: Sweet and Maxwell, 1960), vol. 1, p. 15.
    Every attempt to commit a felony manifested by commencement of execution is considered like the completed felony, unless the attempt has been terminated, or has fallen short of success only because of circumstances independent of the perpetrator's will.

84. *The German Penal Code of 1871*, as amended to 1961 in The American Series of Foreign Penal Codes (London: Sweet and Maxwell, 1961), vol. 4, pp. 37-8.
    Section 46. *Withdrawal, Active Regret*
    The attempt as such remains free from punishment if the perpetrator
    1. has abandoned the completion of the intended act, not having been prevented from such completion by circumstances independent of his will, or
    2. by his own activity has averted the occurrence of the effect necessary for the completion of the felony or gross misdemeanor, at a time when his act had not yet been discovered.
    The defence was retained in *The German Draft Penal Code E 1962*, s. 28, The American Series of Foreign Penal Codes (London: Sweet and Maxwell, 1966), vol. 11, p. 33, and was endorsed by the writers of the *Alternative Draft of a Penal Code for the Federal Republic of Germany*, s. 26, The American Series of Foreign Penal Codes (London: Sweet and Maxwell, 1977), vol. 21, p. 24.

85. *Model Penal Code* (10 U.L.A.), s. 5.01(4), pp. 499-500:
    When the actor's conduct would otherwise constitute an attempt under subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.
    Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

86. See the English Law Commission, *Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspirary and Incitement*, Law Com. No. 102 (London: HMSO, 1980), p. 68.

87. See E. Meehan, *The Law of Criminal Attempt* (Toronto: Carswell, 1984), pp. 219-20.

88. See *R.* v. *Goodman* (1873), 22 U.C.C.P. 338; *R.* v. *Rump* (1929), 51 C.C.C. 236 (B.C. C.A.); *R.* v. *Kosh* (1964), 44 C.R. 185 (Sask. C.A.).

The first view can be supported on three grounds. A person who abandons a crime is less to blame than one who persists in it, and stands less in need of stigma.[89] He is less dangerous to society and calls less for police intervention. Moreover, he may be induced by legal recognition of abandonment to withdraw from the enterprise — he will not feel he might as well be hanged for stealing a sheep as for only half-heartedly trying to steal it.

To this there are three counter-arguments. Admittedly less culpable than a persister, an abandoner is still more to blame than a total nonstarter — he cannot rewrite history and erase his wrong behaviour. Admittedly less dangerous too, if he really repented, he may still cause more concern than if he never started. And incentives to abandonment can well be provided flexibly in the process of sentencing.[90]

In our view, therefore, abandonment should go to mitigation of sentence. This approach would avoid the illogicality of acquittal where there is both *actus reus* and *mens rea* of furthering. At the same time, it would allow abandonment to be taken into account.

E. No Offence by the Prime "Offender"

Suppose D helps or encourages E to commit crime X, E commits X, but E is acquitted on account of some valid defence. To what extent should D be liable on account of furthering crime X?

On this, our present law is less than wholly clear. *Criminal Code* section 21 provides that aiders and abettors are only parties to crimes *committed* by primary offenders. Whether an offence committed by a primary offender with a valid defence qualifies for this purpose as "committed" is uncertain.[91] Under the new scheme, the problem would be dealt with as follows. Where the defence is a justification making the "offender's" act quite lawful, there would be no liability for any act in furtherance of that lawful act. Where the defence is an excuse making the "offender" excusable but leaving

89. As G. Williams argues in *Criminal Law: The General Part*, 2nd ed.(London: Stevens, 1961), p. 620: [W]here the accused has changed his mind, it would be only just to interpret his previous intention where possible as only half-formed or provisional, and hold it to be insufficient *mens rea*. Where this is not possible, a reduction of punishment would be justified as an incentive to other offenders to repent in time.

90. Furthermore, Fletcher, who embarks on an extensive analysis of the defence of abandonment, rejects the argument that the promise of immunity encourages attempters to desist from their wrongdoing and cites the experience in West Germany, where there is a defence of abandonment, to establish that the argument is naive. G. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Co., 1978), pp. 187-8.

91. See *R.* v. *Cogan*; *R.* v. *Leak*, [1976] Q.B. 217. But see *R.* v. *Else*, *R.* v. *Kemp*, [1964] 2 Q.B. 341; Williams, *supra*, note 68, p. 321.

the act unlawful, there would be full liability for any act in furtherance — anyone helping or inciting would be liable for helping or inciting the complete offence. Where the defence is an exemption (for example, immaturity) or a negation of *actus reus* (for example, automatism) or *mens rea* (for example, mistake of fact), but the person doing the act in furtherance does not labour under that exempting or negating factor (for example, he is of age, is acting voluntarily and is aware of all the circumstances), the latter would be liable for helping or inciting an incomplete offence and would be therefore liable to half the penalty for the specific offence — a compromise position which avoids holding him liable for an offence which is not actually committed and allowing him complete acquittal when in fact he tried to further a specific crime.

F. Conclusion

Accordingly, the following are the principles which, in our view, govern the mental element in secondary liability.

(1) No one should be liable for furthering an offence without intending that the offence be committed.

(2) Where the offence committed differs from that intended, there should be no liability unless the difference relates only to the identity of the victim or the degree of harm.

(3) There should be no liability for furthering crimes inherently impossible to commit or acts not qualifying in law as criminal.

(4) There should be no negation of liability but rather mitigation of sentence on account of abandonment.

(5) Liability for furthering should be affected by the primary offender's liability as follows:

(a) where the primary offender commits no offence because he has a justification, there should be no secondary liability;

(b) where he commits an offence but has an excuse, there should be full secondary liability for furthering a complete offence;

(c) where he commits no offence by reason of an exemption or lack of the requisite mental or physical element, there should be secondary liability for furthering an incomplete offence.

III. *Actus Reus*

A. Principles

Given an intent to further an offence, what must a person do to incur liability for furthering? What should be the *actus reus* of furthering by inducing, assisting and attempting?

This is particularly problematic with secondary liability. While the *actus reus* of specific offences can be spelled out precisely in Special Part provisions, that of attempting and so forth can only be expressed generally. What counts as committing a full offence is easier to define than what counts as furthering it.

One reason for this is that primary liability attaches normally to acts that are actually harmful, and secondary liability to acts that are only potentially or contributorily harmful. Full crimes usually produce consequences — death, injury, property loss or damage. Furthering merely tends to their production — it makes such consequences more likely. However, whereas it is usually clear whether such consequences result, it may be less clear whether an alleged act of assistance, inducement or attempt was really done in furtherance of them.

Another part of the problem stems from the common law's compartmentalizing the matter into specific topics such as attempting, counselling, aiding and so on, and then coping with borderline cases by further refining the terms "attempt, counsel, aid." However, borderline cases raise problems, not of meaning but of application. We know the meaning of "trying," "helping," and so forth, as well as that of any other words used to explain them. What we do not know is how to apply "helping" or "trying" and so forth to marginal cases. Is mere presence assistance? When does attempt begin and preparation end? These are judgment calls for triers of fact.

In our view, therefore, one should approach the problem of *actus reus* in this connection by resort to general principles. Essentially, there can be no liability for mere intention. There must be some act done accompanying that intention — some act of attempting, inducing or helping. Subject to qualifications discussed in our forthcoming Working Paper on omissions, negligence and endangering offences, doing nothing cannot incur liability — and this holds true in secondary as well as primary liability.[92]

Given that secondary liability, like other criminal liability, requires some physical element, what should be the minimum required? Guidance can be sought from the law on attempt. One of two possible approaches here is the objective approach.[93] This sees

92. There are basically three qualifications: (1) where "not-doing" is made a specific crime; (2) where duties arise out of certain relationships; and (3) where omitting to do something can equally well be described as a way of doing something.

93. See *R.* v. *Robinson*, [1915] 2 K.B. 342 (C.C.A.) for an example of the objective approach at work.

criminal attempts as conduct in itself so dangerous as to call for sanction. It holds that the *actus reus* of attempt should consist of a definite, independent act manifesting the attempter's criminal intent, which by itself cannot turn an otherwise innocent act into a criminal attempt. Generalizing, we could argue as to furthering that there must be independent acts of furtherance dangerous in themselves and manifesting criminal intent.

The other, namely, the subjective approach, concentrates on the doer rather than the deed.[94] It sees attempts as acts done with criminal intent by clearly dangerous persons who therefore merit sanction. The danger here is manifested rather by the person's starting to pursue his goal than by the actual steps he takes in pursuit. His criminal intent converts into a criminal act his otherwise innocent conduct. Generalizing again, we could argue that any act, no matter how remote, trivial or innocent, would be turned into an act of furtherance by an intent to further a crime.

On the other hand, the criminal law should be used with restraint and only for serious wrongdoing. The offence of furthering, then, should not extend to trivial acts innocent in nature and likely to be done in any event. For instance, a professional bank robber will start his criminal day by getting up and getting dressed, but this should surely not be taken as an act in furtherance of the morning's robbery. Likewise, an arsonist will have to provide himself with matches, but the mere purchase of a box of matches should hardly qualify as furthering arson. Getting up, getting dressed and buying matches are things we do in any event, regardless of our criminal intent or lack of it. To count them as acts of furtherance would be, in effect, to penalize mere guilty intent.

Accordingly, the *actus reus* of furthering should comprise conduct in clear and substantial furtherance of a crime. This is not easily translated into legislation with precision because we cannot pinpoint clearness and substantiality simply by definition. Much will depend on the circumstances, calling for judgment by the trier of fact. All criminal law can do is flag that more is required than simply *any* act. There must be a *substantial* act intended to further the crime in question. The law can do no better than provide a general definition such as that of the present *Criminal Code*.

Could the law go further and lay down guidelines in the form of badges of substantial furtherance? This is the approach taken by the *Model Penal Code* as to attempt. Yet criminal offences are so many and so varied as to render illusory a quest for badges apt to cover all the cases without resort to meaningless generality or undue complexity.

Would not the requirement of a substantial act of furthering detract from the preventive role of the new offence? To prevent harm, should the police not intervene as early as possible rather than waiting for a substantial act? Yes, but police intervention in this context need not be predicated on commission of an offence of furthering any more than it is in the context of preventive arrest. The two things are entirely separate.

94. See *R.* v. *Godfrey*, [1974] 4 W.W.R., 18 C.C.C. (2d) 90 (Alta. S.C.) for an example of the subjective approach.

Accordingly, the *actus reus* of furthering should be a substantial act intended to further a crime. This being so, what should be the *actus reus* of furthering by aiding, counselling, attempting and so on?

B. Counselling, Inciting and Procuring

Given that X intends Y to commit a crime, what should X have to do to incur criminal liability for counselling, inciting or procuring? First, must he actively persuade Y to commit it or is it enough to refrain from dissuading him? Second, is it enough to do something intended to induce Y regardless of whether he is actually induced by it?

With regard to the first question, principle cautions against liability for refraining from dissuading. Refraining, being an omission, should not attract criminal liability as "furthering," unless the refrainer owes a legal duty to the potential victim. "It is, however," said Dixon J. in *Smith* v. *Leurs*, "exceptional to find in law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another to prevent his doing damage to a third."[95]

The second question, "Must the inducement have effect?" is more difficult. In present law there are two types of counselling, one being an inchoate offence and the other being participation in the full offence. The former consists in trying to persuade another to commit a crime. The latter consists in actually persuading that other to commit it.

Under the new scheme there is no such distinction. The only question is Did the accused do a substantial act intended to induce another to commit a crime? The effect of the inducement is irrelevant. The liability, therefore, of the inducer depends solely on his own acts — the "inducee" need neither hear nor read the words advanced by the inducer.

What about counselling or incitement through the media? If D, on television, actively exhorts people to commit a crime, he clearly does a substantial act intended to further that crime. He is liable for furthering. However, if say for scientific, artistic or entertainment purposes, D makes a movie describing the perfect murder or writes a magazine article explaining how to grow marijuana, he would not be liable for furthering unless he knows so clearly that his advice will be acted on that the inescapable inference is that he actually intended this. Short of such intention, liability would unduly restrict freedom of speech.

95. *Smith* v. *Leurs* (1945), 70 C.L.R. 256, pp. 261-2.

C. Aiding and Abetting

Suppose D intends to help or encourage (psychologically help) E to commit a crime. What must D do to incur liability? Is presence as a spectator enough? What if D's help is useless or is not received? What if D is merely a necessary party to a transaction of which one side only (for example, selling) is prohibited? Should buying count as aiding and abetting unlawful selling?

Again the starting-point is that "not-doing" is no offence. A bystander, witness or victim in fact does nothing; at most he omits to prevent, or leave the scene of, the crime; but why should he be obliged, at his own risk, to prevent the crime or to leave where he has a perfect right to be simply because of another's wrongdoing there? Clearly, those who make no real positive contribution to the crime should not be liable for furtherance.

Exceptionally, of course, bystanders may make a positive contribution. Their applause may lend encouragement, their crowding round may hinder law enforcement, and their very presence as spectators may give point to illegal spectacles otherwise without *raison d'être*. In such cases, given an intent to help or encourage, they could justifiably be liable for in fact doing a substantial act in furtherance of the crime committed.

What about aid that is useless or not received? The new scheme, it will be recalled, makes no distinction between cases where the full offence is committed and where it is not. So, whether the aid was received and effective is only relevant insofar as it bears on the central question: Did D do a substantial act intended to help E commit the crime?

Finally, what about the mere necessary party, for example, the victim or the buyer in a sales transaction? Suppose they want the crime to be committed. Should their presence and complicity count as a substantial act of furtherance?

In these cases, their conduct is less an act of furtherance than the converse of the prime offender's act. Regardless of intent, a victim is not ordinarily taken to assist his assailant by mere nonresistance, or a buyer to assist a seller by his mere purchase. The very meaning of "aid," "help," and "assist" suggests the requirement of a somewhat more positive contribution.

Policy suggests the same. Statutes proscribing one side but not the other of a transaction (for example, selling but not buying prohibited drugs), imply two things: (1) that the other side of the transaction has been intentionally left lawful, and (2) that the prohibition was meant to protect those on the other side of the transaction. This being so, courts should not infer that there is an intent by the lawmaker to impose liability on those explicitly not penalized and presumably meant to be protected. Accordingly, a necessary or "facilitating" party doing nothing more than playing his part in a transaction should not automatically qualify as furthering another's crime.

D. Attempting

Nowhere has *actus reus* caused more problems than in attempt. Whereas with counselling, inciting, aiding and abetting the question is "How far must the accused do some positive act in furtherance of the crime?" — with attempt the question is "How far must he get beyond mere preparation?" For common law never criminalized mere preparation, but only attempt.[96] The distinction between the two, however, has proved far from clear, and courts have used various unsatisfactory tests to draw it.[97]

The traditional common law approach, if not the use of the tests themselves, is easily justified. First, in ordinary life we do distinguish between making plans and preparations and embarking on an enterprise. Second, the criminalization of mere preparation might allow policing and prosecution of conduct which may well be totally innocent.

The new scheme, however, would obviate the need for the distinction. Instead of looking for attempt in contrast to preparation, courts would have to look for a substantial act in furtherance of the crime. Most acts of preparation would not meet this test. Some might, however, and would then justifiably incur liability.

E. Conclusion

The *actus reus* for all secondary liability, then, should consist of a substantial act intended to further a crime. If the crime in question is committed, liability should be for furthering (by helping or inciting) a complete crime. If it is not committed, liability should be for furthering (by inchoate helping or inciting or by attempting) an incomplete crime.

IV. Double Jeopardy

The principle of double jeopardy clearly dictates that no one should be liable to conviction for committing and for helping, inciting or attempting. Accordingly, on the same lines as present law partly provides (*Criminal Code* sections 587 to 589), the *Code* should provide that where one type of involvement is charged but another is proved, there should be a conviction for that other offence only.

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96. See Meehen, *supra*, note 87, p. 79.

97. The major tests that have been used, as well as numerous others, are listed in the Appendix to this Paper. This proliferation of tests has prompted some authors and judges to conclude that there simply is no satisfactory or universal test. See, for example, Stuart, *supra*, note 54, p. 536; *R.* v. *Cline* (1956), 115 C.C.C. 18 (Ont. C.A.); *Henderson* v. *The King*, [1948] S.C.R. 226.
On the other hand, G. Williams appears to support the first step test. The American *Model Penal Code* advocates a substantial step test. According to this test, an attempt is made when an accused takes a step towards the commission of an offence which strongly corroborates his criminal purpose. The English Law Commission, *supra*, note 86, p. 27, para. 2.49, recommended a proximity test and that the *actus reus* be defined as "*any act which goes so far towards the commission of the offence attempted as to be more than an act of mere preparation.*" *The French Penal Code* states that an attempt occurs when there is commencement of execution.

V. Conclusion

For the above reasons, therefore, we conclude that a simpler and more rational approach to the whole question of secondary liability, that is, liability of those other than the actual committer of an offence, would be to base the rules concerning participation and inchoate offences upon a unified notion of "furthering." In both cases, that is, whether the offence is committed or not, in all modes of involvement other than actual perpetration, the *actus reus* would be a *substantial* act in furtherance of the offence, and the *mens rea* an *intent* to further the offence. Impossibility of law and inherent impossibility of fact would be a defence. Abandonment would be no defence but would be relevant to sentence. Those furthering a completed crime would be liable to the same penalty as the committer, and those furthering an incomplete crime would be liable to half that penalty. Finally, to avoid double jeopardy, furthering would be an included offence.

CHAPTER FIVE

Conspiracy

Conspiracy has been left for separate consideration. For, unlike the other topics in this Paper, conspiracy covers two quite different phenomena. On the one hand, it applies to simple agreements between two or more people to commit offences. On the other hand, it also applies to (and is used by law enforcers to attack) organized crime where large-scale criminal enterprises are systematically conducted, where the exact contributions of those involved are often hard to pin down, and where the basic concept of agreement may, in fact, play little part.

With regard to its first application, which is to simple agreements to commit crimes, conspiracy is analogous to attempt, incitement and participation. Like those other categories, it poses questions as to rationale, *actus reus*, *mens rea* and penalty. For these reasons, it is appropriately discussed in this regard within this Paper.

Conspiracy is unique with regard to its use against organized crime. It raises basic value questions as to collective responsibility, difficult practical questions about procedure and particularly evidence, and hard policy questions as to prosecution and penalty. These enormous questions cannot suitably be discussed within a more general Paper such as the present one, but merit separate treatment.

Accordingly, this Paper confines itself to looking at the first aspect of conspiracy — agreements to commit offences. It starts with an overview of the present law, continues with a discussion of its defects, moves on to a consideration of rationale and concludes with suggestions for its improvement.

I. Present Law

The law is contained in a general section, in specific provisions and in the case-law.

A. General Section

Criminal Code, R.S.C. 1970, c. C-34, s. 423:

423. (1) **[Conspiracy]** Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,

(*a*) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and is liable to imprisonment for fourteen years;

(*b*) every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and is liable

(i) to imprisonment for ten years, if the alleged offence is one for which, upon conviction, that person would be liable to be sentenced to death or to imprisonment for life or for fourteen years, or
(ii) to imprisonment for five years, if the alleged offence is one for which, upon conviction, that person would be liable to imprisonment for less than fourteen years;

(*c*) repealed, 1980-81-82, 83, c. 125. s. 23.

(*d*) every one who conspires with any one to commit an indictable offence not provided for in paragraph (*a*), (*b*) or (*c*) is guilty of an indictable offence and is liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction, be liable.

(2) **[Common law conspiracy]** Every one who conspires with any one

(*a*) to effect an unlawful purpose, or

(*b*) to effect a lawful purpose by unlawful means,

is guilty of an indictable offence and is liable to imprisonment for two years.

(3) **[Conspiracy to commit offences]** Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) or (2) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do in Canada that thing.

(4) **[Idem]** Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) or (2) in Canada shall be deemed to have conspired in Canada to do that thing.

(5) **[Jurisdiction]** Where a person has conspired to do anything that is an offence by virtue of subsection (3) or (4), the offence is within the competence of and may be tried and punished by the court having similar jurisdiction in respect of similar offences in the territorial division where he is found in the same manner as if the offence had been committed in that territorial division.

(6) **[Where previously tried outside Canada]** Where, as a result of a conspiracy that is an offence by virtue of subsection (3) or (4), a person has been tried and convicted or acquitted outside Canada, he shall be deemed to have been tried and convicted or acquitted, as the case may be, in Canada.

B. Specific Provisions

In addition to the general provision, there are the following specific conspiracy provisions: section 46 (conspiracy to commit treason), subsection 60(3) (seditious conspiracy), and subsection 424(1) (conspiracy in restraint of trade).

In addition, conspiracy sections are to be found in other statutes such as:

— *Animal Disease and Protection Act*, R.S.C. 1970, c. A-13 as amended by S.C. 1974-75-76, c. 86;
— *Customs Act*, R.S.C. 1970, c. C-40;
— *Customs Tariff Act*, R.S.C. 1970, c. C-41;
— *Divorce Act*, R.S.C. 1970, c. D-8;
— *National Defence Act*, R.S.C. 1970, c. N-4;
— *Trade Unions Act*, R.S.C. 1970, c. T-11.

C. Case-Law Decisions

The *Code* does not define conspiracy but case-law has attempted to do so. *O'Brien* is the seminal decision on the *actus reus* and *mens rea* of conspiracy.[98] Other decisions such as *Cotroni/Papalia*[99] and *Sokoloski*[100] also discuss these matters. Case-law has also dealt with the issue of husband and wife,[101] the connection of conspiracy with aiding and abetting[102] and the overlap with the substantive offence.[103]

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98. *R.* v. *O'Brien*, [1954] S.C.R. 666, 110 C.C.C. 1. The court said at page 668 (S.C.R.):
It is, of course, essential that the conspirators have the *intention to agree*, and this agreement must be complete. There must also be a common design to do something unlawful, or something lawful by illegal means. Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist *an intention to put the common design into effect*. A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement.

99. *R.* v. *Cotroni*; *Papalia* v. *The Queen* (1979), 45 C.C.C. (2d) 1 (S.C.C.).

100. *Sokoloski* v. *The Queen* (1977), 33 C.C.C. (2d) 496 (S.C.C.).

101. *Kowbel* v. *The Queen*, [1954] S.C.R. 498.

102. *Koury* v. *The Queen*, [1964] S.C.R. 212.

103. *Sheppe* v. *The Queen* (1980), 51 C.C.C. (2d) 481 (S.C.C.).

II. Shortcomings of Present Law

Once again in this area, shortcomings of the law relate less to substance than to form. First, there is a lack of generality — despite an apparent general provision in subsection 423(2), there are three specific provisions in subsection 423(1) and numerous other provisions both in the *Code* and in other statutes.

Second, there is a lack of comprehensiveness; conspiracy — surely a term of art — is given no definition. As a result, one is thrown back to the common law, which is still far from clear. What, for example, constitutes an unlawful purpose?

Third, the law is vague and brings a risk of overcriminalization. Consider the wide definition of conspiracy in paragraphs 423(2)(*a*) and (*b*) — agreement "to effect an *unlawful* purpose, or ... to effect a lawful purpose by *unlawful* means, ..." [Emphasis added] Consider too the possibility of double jeopardy in that a person can be guilty at one and the same time of committing an offence and of conspiring to commit it.

III. Rationale

As observed earlier, there are significant differences between conspiracy and the two other inchoate offences. For one thing, whereas incitement and attempt run roughly parallel to accessory and commission, conspiracy appears to have no counterpart at the choate level. For another, the *actus reus* of conspiracy (agreeing) would seem to reduce the "act" requirement almost to vanishing-point, while the *mens rea* (to effect an unlawful purpose or effect a lawful purpose by unlawful means) rides roughshod over the interests of certainty and the rule of law.

If conspiracy has no participation counterpart, what is its rationale? As argued earlier, the rationale for criminalizing participation, incitement and attempt is, in reality, the same as that for the complete offence: acts which are done to further violations of basic values, themselves violate such values. Thus, if two or more persons combine to commit a crime and thereby violate basic values, they do an act intended to further such violation. In short, the criminalization of conspiracy can be based on the same general rationale.

Many instances of such combination could, of course, attract criminal liability without recourse to the crime of conspiracy. In some cases, those who combine could be liable both as joint committers, or one as the committer and the other as an accessory or aider and abettor. In others, they might both be liable as joint attempters, or one person as an attempter and the other as an inciter. In these cases, law enforcement has no need of a separate conspiracy offence.

Some instances of combining, however, will not be covered by the rules on participation, incitement and attempt. Where two or more persons start planning an offence but have not gone beyond mere preparation, under present law they would not yet be

guilty of attempt; *a fortiori*, where they agree to commit an offence but have done nothing yet to further that agreement. Such cases at present incur criminal liability only by virtue of the offence of conspiracy.

However, should there be criminal liability in such cases? First, should there be liability for joint preparation? To this question, two answers could be given. One is that while mere preparation by a single individual may not seem harmful enough to count as an inchoate offence, preparation by two or more persons creates sufficient danger to do so: strength in numbers, division of labour, plotting together — all of these call for early intervention of the law. Another answer is that if, as we suggested, "attempt" were extended to cover any substantial act done in order to commit the crime intended, then acts of preparation, joint or several, could attract liability but without a separate crime of conspiracy.

Next, should there be criminal liability for mere agreement? Now while objection to the imposition of such liability might contend that this comes close to criminalizing mere intent, this is not so. Two parties who resolve to commit a crime and then agree together to do it have gone beyond mere resolution; they have done an act in the external world: the act of agreeing between themselves. They have done this, thinking presumably that doing it together will be easier; this could surely qualify as an act in furtherance of that crime.

Nonetheless, is it a substantial act? The act of agreeing is even more remote from the complete offence than is the act of mere preparation. Thus, further objection to subjecting it to criminal sanction might be mounted on the ground of its relative harmlessness as compared with joint plotting, planning and organization of crime. Here again, however, strength in numbers, division of labour and so on make even mere agreement a source of danger — organized crime, after all, begins with agreement.

Given, then, a need for a crime of conspiracy, of what should its elements consist? Under present law, the *actus reus* consists of "conspiracy," that is, agreeing, and the *mens rea*, in its widest sense, consists of the intent to effect an unlawful purpose, or a lawful purpose by unlawful means. How far are these definitions justifiable?

In our view, the *actus reus* presents no great problems. "Agreeing" is an easily understood concept — we all know what it means to come to some agreement. Of course, in line with general principles, some positive act is necessary. The parties must positively agree — mere failure to dissent should not attract liability. At the same time, such agreements are not in general made openly, so that their making will often be a matter of inference from other evidence. However, insofar as what must be inferred is an actual and not a tacit or implied agreement, no change is needed in this aspect of conspiracy.

The same cannot be said of the *mens rea* aspect. Under the present law, it is conspiracy to agree to commit a crime, a regulatory, provincial or a municipal offence, or even a mere civil wrong. In our view, however, it should not count as conspiracy

to commit regulatory, provincial or municipal offences, for two reasons. First, if we have a *Criminal Code*, this document is what should control the ambit of criminality; the *Code*, and nothing else, should lay down what counts as an offence. Second, the uniformity desirable in criminal law is marred by provisions making an agreement to do an act in one province a conspiracy and to do it in another not a conspiracy simply because of differences in provincial legislation.

Nor in our view should it be a conspiracy to agree merely to effect an unlawful purpose or to effect a lawful purpose by unlawful means. Whatever the difference between the two — Is it a distinction without a difference? — the term "unlawful" is far too vague and far too wide. Because of its use in the definition of conspiracy, no one can tell for certain what is and what is not covered by the offence. This contravenes the rule of law.

One further argument is crucial in the Canadian context. In Canada, the making of the criminal law has been entrusted to Parliament. Where Parliament regards behaviour as a grave enough social evil to require criminal sanctions, it can make it a crime. However, where Parliament has not seen fit to make an act a crime, the mere agreement to do such an act should not become, by the back door as it were, a crime by reason of provincial or other provisions. All criminal law belongs to Parliament.

In our opinion, the crime of conspiracy should consist of agreement by two or more persons to commit an act defined by the *Code* as a criminal offence. Whether or not the acts in question should be restricted to the more serious (that is, indictable) offences cannot be answered pending conclusions on the classification of offences. In principle, however, if conspiracy is to be a serious offence, then the acts agreed on ought also to be only those that are serious in nature.

IV. Double Jeopardy

In our view, no one should be liable to conviction for both an inchoate offence and the full offence in question. If the offence is completed and the person contributed to it, he should be liable as a party. If it is not completed or if he make no actual contribution to it, he should at most be liable for an inchoate offence. Accordingly, a person charged with an offence but proved only to have conspired to do it should be convicted, not of the offence, but of conspiracy.

A person charged with conspiracy but found to have been involved with the full offence presents a problem. On the one hand, he clearly should not be acquitted and should, at least, be convicted of conspiracy. On the other hand, it would hardly be fair to convict him of the full offence and subject him to the full penalty when that was not the charge he had to meet.

Our tentative view is that he should be liable for conspiracy and subject to penalty for half the offence.

CHAPTER SIX

Recommendations

1. That the law on participation and on inchoate offences be based on the general concept of doing an act in furtherance of a crime.

2. That the present law on parties be replaced by a provision to the effect that where a crime is complete a person may be charged with, liable for, and (except as regards conspiracy for which the penalty is always half) subject to the same penalty for:

(*a*) committing it,

(*b*) helping another to commit it,

(*c*) inciting another to commit it, or

(*d*) conspiring to commit it.

3. That the present law on inchoate offences be replaced by a provision to the effect that where a crime is not completed a person may be charged with, liable for, and subject to half the penalty for the complete offence for:

(*a*) attempting to commit it,

(*b*) helping another to commit it,

(*c*) inciting another to commit it, and

(*d*) conspiring to commit it.

4.(1) That the law provide that liability under Recommendations 2 and 3 can be:

(*a*) sole,

(*b*) joint, or

(*c*) through an innocent agent.

(2) That joint liability arises where two or more persons share in the *actus reus* of the specific offence or, share in a substantial act of furtherance as attempters, helpers, inciters or conspirators.

(3)(*a*) That in the case of conspiracy, liability should require agreement to commit a *Criminal Code* offence with intent to commit it.

(3)(*b*) That in all other cases except that of a committer, liability should require a substantial act in furtherance of a specific *Criminal Code* offence intended to further that offence.

(4) That impossibility of law and inherent impossibility of fact be a defence to attempting, helping, inciting and conspiring, but that abandonment and ordinary impossibility of fact be no defence.

(5)(*a*) That anyone charged in respect of a complete crime can, on appropriate evidence, be convicted of involvement in an incomplete crime.

(5)(*b*) That anyone charged in respect of an incomplete crime may be convicted thereof despite the evidence of involvement in a complete crime.

(6)(*a*) That anyone charged with one type of involvement in a complete or incomplete crime can, on appropriate evidence, be convicted of one of the other types of involvement.

(6)(*b*) That a conspirator who contributes to the commission of a complete crime be liable for helping in its commission and that a conspirator who makes no such contribution be liable for conspiracy as though the crime were incomplete.

APPENDIX

Tests Used to Distinguish Attempt from Mere Preparation

I. Five Major Tests

A. The Last Step or Final Stage Test

This test arose from the dicta of Baron Parke in *R.* v. *Eagleton* (1855), Dears. C.C. 515. The test holds that an accused is guilty of attempt when he has done all that it was necessary for him to do towards the completion of a crime. The test was applied in Canada in *R.* v. *Courtemanche and Bazinet*, *supra*, note 46, but was subsequently disapproved of by the Ontario Court of Appeal in *R.* v. *James*, [1971] 1 O.R. 661, p. 663.

B. The *Cheeseman* Test

This test originated in *R.* v. *Cheeseman*, *supra*, note 45, and was espoused by Sir James Fitzjames Stephen in *supra*, note 36, Article 47 (now 9th ed. (1950), Article 29). According to Stephens, the test requires "an act ... forming part of a series of acts, which would constitute [the] actual commission [of a crime] if it were not interrupted." The test has been widely used in Canada. See *R.* v. *Snyder* (1915), 24 C.C.C. 101, 34 O.L.R. 318; *R.* v. *Lepage* (1941), 78 C.C.C. 227, [1941] 4 D.L.R. 484; *R.* v. *Brown* (1947), 88 C.C.C. 242, 3 C.R. 412; *R.* v. *Quinton*, *supra*, note 45, *per* Estey J. and Rinfret J.; *R.* v. *Young* (1949), 94 C.C.C. 117.

C. The Proximity Test

This test assesses how close the accused's act came to the actual commission of the offence. It has been applied in Canada in *Kelley* v. *Hart* (1934), 61 C.C.C. 364 (Alta. C.A.); *Case of Duels*, *supra*, note 27; *R.* v. *Sorrell and Bondett* (1978), 41 C.C.C. (2d) 9 (Ont. C.A.); *R.* v. *Cline*, *supra*, note 97.

D. The First Step Test

This test holds that an attempt occurs when the accused engages in his first overt act toward the commission of an offence. This test appears in the criminal codes of several countries including those of Denmark and Australia. One of the earliest cases which refers to this test is *Commonwealth* v. *Eagan* (1889), 190 P.A. 10, p. 22.

E. The Unequivocality Test

This test was developed by Sir John W. Salmond in *Jurisprudence*, 12th ed. (London: Sweet and Maxwell, 1966), p. 404, and later adopted by New Zealand in its *Crimes Act 1908*. According to this test, an attempt is made when the act itself, apart from any statement of intention, unequivocally demonstrates that the accused's intention was to commit an offence. This test was rejected in Canada in *R.* v. *Cline*, *supra*, note 97.

II. Examples of Some Additional Tests

A. The Dangerous Proximity Doctrine

O. W. Holmes, in *The Common Law* (Boston: Little, Brown and Co., 1963), p. 56, proposed that to determine whether an act constitutes an *actus reus* one must consider "the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."

B. The Stages of Commission

This test is based on the premise that every criminal act consists of a discernible number of discrete acts which begin with the accused forming the idea to commit the crime and end with the execution of the crime. It then follows that proximity can be determined by counting back from the last act necessary for execution (see Fletcher, *supra*, note 90).

C. The Turner Test

This test is a variation on the unequivocality test. It is taken from J. W. C. Turner, "Attempts to Commit Crimes" (1933-35), 5 *Cambridge L.J.* 230, p. 236. He sets the following test:

> The *actus reus* of attempt is constituted when accused does an act which is a step towards the commission of that specific crime, and the doing of that act has no other purpose than the commission of that specific crime.

This test was applied in *Davey* v. *Lee*, [1967] 2 All E.R. 423.

D. The *R.* v. *Taylor* Test

This case (1 F. & F. 512; (1859), 175 Eng. R. 831) proposed the test that the *actus reus* must be an act, immediately and directly tending to the execution of the principal crime.

E. The Aptness Test

In this test, an accused's act will constitute an *actus reus* if it was an effort which was aptly related to his objective. This test has been used in cases where the completion of the offence was impossible. For example, using this test, employing voodoo to kill would not constitute an *actus reus* for attempted murder, since voodoo is ineffective in bringing about the accused's objective (see Fletcher, *supra*, note 90, pp. 150-1).

F. The "On the Job" Test

This test, developed in *R.* v. *Osborn*, *supra*, note 80, is a variation of the aptness test. It states that, to be guilty of attempt, the accused must have been "on the job" or "on the thing itself." For example, an accused who tries to poison using an innocuous substance cannot be said to be "on the job." However, if the attempt fails owing to insufficient dosage, the accused is nevertheless "on the job" and may be found guilty.

G. The *Hope* v. *Brown* Test

[1954] 1 All E.R. 330. This test resembles the *Cheeseman* test. It is really a proximity test plus a peculiar qualification. Judge Byrne stated, at page 332:

> [T]he respondent's acts were not interrupted because the time had not arrived for their completion. His acts ... were for that reason too remote. They certainly indicated an attempt but were not sufficiently connected with the offence ... to constitute an attempt.

H. The Probable Desistance Test

Probable desistance has been used in the United States. An accused's conduct will amount to an attempt when it would, if uninterrupted by any outside cause, have resulted "in the ordinary and natural course of events" in the completion of a crime. See Donald Stuart, "The *Actus Reus* in Attempt," [1970] *Crim. L.R.* 505, p. 509.

I. The Rational Motivation Test

This test was developed by Fletcher in *supra*, note 90. Fletcher seeks the true nature of attempt by looking at what effect a mistake of fact as to the circumstances surrounding an attempt has on attempt. Fletcher holds that an accused can be said to be attempting an offence, even if he is operating under a mistake when knowing the true facts would affect his incentive in acting, if it would give him a good reason to change his course of conduct. Under this theory, if a man tries to receive goods and he does not know they are stolen, he would be guilty of attempted possession of stolen goods only if the knowledge that the goods were stolen would have caused him not to receive the goods. In the ordinary case, such knowledge would not affect the offender taking possession of the goods, and therefore he would not be guilty of the offence of attempting to possess stolen goods.