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Table of Contents

INTRODUCTION.....	1
RECODIFYING CRIMINAL LAW: RECOMMENDATIONS AND COMMENTARIES	7
[Preamble].....	7
THE GENERAL PART	9
TITLE I: General Principles	10
Chapter 1: Principles of General Application and Interpretation	10
(1) Title	10
(2) Definitions	10
(3) Interpretation	16
(4) Application in Law	16
Chapter 2: Principles of Liability	17
(1) Principle of Legality	17
(2) Conduct and Culpability	18
(3) Conduct.....	18
(a) General Rule	18
(b) Omissions	19
(c) Duties	20
(d) Medical Treatment Exception	20
(4) Requirements for Culpability	21
(a) General Requirements as to Level of Culpability	21
(b) Definitions	23
“Purposely”	23
“Recklessly”	24
“Negligently”	25
(c) Greater Culpability Requirement Satisfies Lesser	25
(d) Residual Rule	25
(5) Corporate Liability	26
(6) Causation	27

Chapter 3: Defences	28
Absence of Conduct or State of Mind Necessary for Culpability	28
(1) Lack of Control	29
(a) Compulsion, Impossibility, Automatism	29
(b) Exception: Negligence	29
(2) Lack of Knowledge	30
(a) Mistake of Fact	30
(b) Exception: Recklessness and Negligence	30
(3) Intoxication	30
(a) General Rule	30
(b) Proviso: Criminal Intoxication	30
Exemptions	32
(4) Immaturity	32
(5) Unfitness to Plead	32
(6) Mental Disorder	33
Justifications and Excuses	34
(7) Mistake or Ignorance of Law	34
(8) Duress	35
(9) Necessity	36
(a) General Rule	36
(b) Exception	36
(10) Defence of the Person	36
(a) General Rule	36
(b) Exception: Law Enforcement	36
(11) Protection of Movable Property	37
(12) Protection of Immovable Property	38
(a) General Rule	38
(b) Exception	38
(13) Protection of Persons Acting under Legal Authority	38
(a) General Rule	38
(b) Force Used by Peace Officers	39
(14) Authority over Children	40
(15) Superior Orders	40
(16) Lawful Assistance	41
(17) Mistaken Belief as to Defence	41
(a) General Rule	41
(b) Exception	42
Chapter 4: Involvement in Crime	42
Involvement in Complete Crimes	43
(1) Committing	43
(2) Furthering	44
Involvement in Incomplete Crimes	45
(3) Attempt	45
(4) Attempted Furthering	46

(5) Conspiracy	46
(6) Different Crime Committed from That Furthered	47
(a) General Rule	47
(b) Exception.....	47
(c) Qualification.....	47
(7) Alternative Convictions	47
(a) Committing.....	47
(b) Furthering	47
(c) Attempting	47
(d) Attempted Furthering.....	47
(e) Unclear Cases	48
 Chapter 5: Territorial Jurisdiction	49
(1) General Rule.....	49
(2) Jurisdiction Rules	49
 THE SPECIAL PART.....	55
 TITLE II: Crimes against the Person	55
 Part 1: Crimes against Personal Safety and Liberty.....	55
 Chapter 6: Crimes against Life	55
(1) Negligent Homicide.....	56
(2) Manslaughter	57
(3) Murder.....	57
(4) First Degree Murder	58
[Alternative — Homicide	60]
(5) Furthering Suicide	60
(6) Palliative Care	60
 Chapter 7: Crimes against Bodily Integrity	61
(1) Assault by Touching or Hurting	61
(2) Assault by Harming.....	62
(3) Exceptions	62
(a) Medical Treatment	62
(b) Sporting Activities	63
 Chapter 8: Crimes against Psychological Integrity	64
(1) Harassment	64
(2) Threatening	64
(3) Immediate Threatening.....	64
(4) Extortion.....	64

Chapter 9: Crimes against Personal Liberty	65
(1) Confinement	66
(2) Kidnapping	66
(3) Child Abduction	66
Chapter 10: Crimes Causing Danger.....	66
(1) Endangering	67
(2) Failure to Rescue	67
(a) General Rule	67
(b) Exception.....	67
(3) Impeding Rescue.....	68
(4) Endangering by Motor Vehicle, Etc.....	68
(5) Impaired or with More than Eighty Milligrams of Alcohol in One Hundred Millilitres of Blood	69
(6) Failure or Refusal to Provide Sample	69
(a) General Rule	69
(b) Exception.....	69
(7) Failure to Stop at Scene of Accident.....	70
(8) Driving a Motor Vehicle While Disqualified	70
(9) Interfering with Transportation Facilities.....	70
(10) Aggravating Factors.....	71
Part 2: Crimes against Personal Security and Privacy	71
Chapter 11: Unlawful Surveillance	72
(1) Auditory Surveillance.....	72
(a) General Rule	72
(b) Exception.....	72
(2) Unauthorized Entry of Private Premises.....	73
(3) Unauthorized Search of Private Premises	73
(4) Use of Force to Gain Entry	73
(5) Disclosure of Private Communications	74
(a) General Rule	74
(b) Exceptions.....	74
Chapter 12: Criminal Intrusion	75
(1) Criminal Intrusion	75
(2) Aggravated Criminal Intrusion	76

TITLE III. Crimes against Property	76
Part 1: Crimes of Dishonesty	76
Chapter 13: Theft and Related Crimes	77
[Alternative 1]	
(1) Theft	78
(2) Obtaining Services	79
(3) Fraud	80
[Alternative 2]	
(1) Theft	81
(2) Obtaining Services	81
(3) Fraud	81
Chapter 14: Forgery and Related Crimes	82
(1) Forgery of Public Documents	82
(2) Forgery of Other Documents	82
(3) Fraudulent Documentary Misrepresentation	83
(4) Obliteration of Identifying Marks	83
Chapter 15: Commercial Frauds and Related Matters	83
(1) Bribery of Agent	84
(2) Agent Accepting Bribe	84
(3) Disposal of Property to Defraud Creditors	84
(4) Receipt of Property to Defraud Creditors	84
(5) Criminal Lending	84
Part 2: Crimes of Violence and Damage	85
Chapter 16: Robbery	85
(1) Robbery	85
(2) Aggravated Robbery	85
Chapter 17: Criminal Damage	86
(1) Vandalism	87
(2) Arson	88

Part 3: Crimes of Possession	88
Chapter 18: Miscellaneous Property Crimes	88
(1) Possession of Things in Suspicious Circumstances	89
(2) Possession of Prohibited Things	91
(3) Possession of Things Dangerous in Themselves	91
(4) Possession of Forgeries	91
(5) Unauthorized Use of Canadian Passports and Certificates of Citizenship	91
(6) Possession of Things Obtained by Crime	91
(7) Criminal Dealing	92
TITLE IV: Crimes against the Natural Order	92
Chapter 19: Crimes against the Environment	93
(1) Disastrous Damage to the Environment	93
[(2) Non-compliance	95]
Chapter 20: Crimes against Animals	97
(1) Cruelty to Animals	98
(2) Exceptions: Necessary Measures	98
(3) Sporting Events	99
(4) Animal Neglect	99
TITLE V: Crimes against the Social Order	99
Chapter 21: Crimes against Social Harmony	100
(1) Stirring up Hatred	100
(2) Inciting Genocide	100
[(3) Stirring up Hatred in Public Place	101]
Chapter 22: Crimes against Public Order	101
(1) Disturbing Public Order	103
(2) Disturbing Public Order by Hatred	103
(3) Unlawful Assembly	103
(4) Riot	104
(5) Failure to Disperse	104
(6) Raising False Alarm	104
(7) Public Nuisance	105
(8) Loitering	105

TITLE VI: Crimes against the Governmental Order	106
Chapter 23: Corrupting Public Administration	109
(1) Bribery	109
(2) Accepting Bribes.....	109
(3) Breach of Public Trust.....	110
Chapter 24: Misleading Public Administration.....	110
(1) Perjury.....	111
(2) Other False Statements.....	111
(3) Forging Documents or Fabricating Evidence	112
(4) Using Forged Documents, Fabricated Evidence	112
(5) Impersonation.....	112
(6) Withholding Information.....	113
(7) Misleading Public Officer.....	113
(a) General Rule	113
(b) Exception.....	114
Chapter 25: Obstructing Public Administration	115
(1) Obstructing Public Officers	116
(2) Disrupting Proceedings	117
(3) Failing to Help Public Officers	117
(4) Publishing Identities in Sexual Crimes	118
(a) General Rule	118
(b) Exceptions.....	118
(5) Publication in Violation of a Court Order.....	118
(6) Publishing Prejudicial Matters	119
(a) General Rule	119
(b) Exceptions.....	119
(7) Disobeying Lawful Court Order	120
(8) Bringing Justice into Contempt	121
(9) Jury Offences	123
(10) Escape	123
(11) Obstructing the Course of Justice	124
Chapter 26: Crimes against State Security	125
(1) Treason	126
(2) Failing to Prevent Treason	128
(a) General Rule	128
(b) Exception.....	128
(3) Espionage.....	129
(4) Gathering and Disclosing Information.....	129
(5) Exception	129
(6) Sabotage	130

International Crimes.....	131
The <i>Code</i> Crimes	132
The Non- <i>Code</i> Crimes	133
The Seven Statutes.....	133
APPENDIX A: Summary of Recommendations	135
APPENDIX B: Illustrative Draft Legislation	169
APPENDIX C: Acknowledgements.....	207

Introduction

This is a revised and enlarged edition of Report 30 proposing a new Code of Substantive Criminal Law for Canada. Report 30, also entitled *Recodifying Criminal Law*,¹ was tabled in Parliament on December 3, 1986, by the Minister of Justice, the Honourable Ray Hnatyshyn, who commented: "This report is a valuable contribution to criminal law reform and should be recognized as an important first step in the process of renewal."²

Preliminary reactions to Report 30 by bench, bar, police, media and public were highly encouraging. The Commission has, therefore, decided to propose a revised and enlarged edition of the new Code. We recognize that this is only a first step in a long process leading ultimately, we hope, to the enactment of a new Criminal Code made in Canada by Canadians for Canadians and more accurately reflecting our national identity and our common values.

Our present *Criminal Code*³ was originally enacted in 1892⁴ — the fulfilment of Sir John A. MacDonald's dream of giving our fledgling nation a uniform set of criminal laws. Its enactment put Canada in the vanguard of criminal law reform. The ravages of time, however, took their toll, and Canada is no longer in that happy position.

The present *Criminal Code* has served us well over the past ninety-five years but is no longer adequate to our needs. Even though amended many times, with a major revision in 1955,⁵ it remains much the same in structure, style and content as it was in 1892. It is poorly organized. It uses archaic language. It is hard to understand. It contains gaps, some of which have had to be filled by the judiciary. It includes obsolete provisions. It over-extends the proper scope of the criminal law. And it fails to address some serious current problems. Moreover, it has sections which may well violate the *Canadian Charter of Rights and Freedoms*.⁶

As we mentioned in Report 30, the new Criminal Code proposed by the Commission results from fifteen years of philosophical probing, researching, thinking, debating, writing, consulting and publishing on numerous criminal law subjects. It also represents the full co-operation of federal and provincial governments in the Accelerated

1. Law Reform Commission of Canada, *Recodifying Criminal Law*, vol. 1 (Report 30) (Ottawa: LRCC, 1986) [hereinafter Report 30]. **The present revised and enlarged edition supersedes Report 30.**

2. "Justice Minister Tables Report of Law Reform Commission Recodifying Criminal Law, Vol. 1," *News Release* (Ottawa: Department of Justice, 3 Dec. 1986).

3. *Criminal Code*, R.S.C. 1970, c. C-34 [hereinafter *Criminal Code*].

4. *Criminal Code*, S.C. 1892, c. 29 [hereinafter 1892 *Code*].

5. *Criminal Code*, S.C. 1953-54, c. 51.

6. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

Criminal Law Review. The work of these fifteen years was presented prior to publication of Report 30 in various Reports and Working Papers which should be consulted for a fuller understanding of the present Report. Attention is drawn in particular to the following:

- Report 3, *Our Criminal Law* (1976)
- Report 12, *Theft and Fraud* (1979)
- Report 17, *Contempt of Court* (1982)
- Report 20, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1983)
- Working Paper 2, *The Meaning of Guilt: Strict Liability* (1974)
- Working Paper 10, *Limits of Criminal Law: Obscenity: A Test Case* (1975)
- Working Paper 16, *Criminal Responsibility for Group Action* (1976)
- Working Paper 19, *Theft and Fraud: Offences* (1977)
- Working Paper 20, *Contempt of Court: Offences against the Administration of Justice* (1977)
- Working Paper 26, *Medical Treatment and Criminal Law* (1980)
- Working Paper 28, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1982)
- Working Paper 29, *The General Part: Liability and Defences* (1982)
- Working Paper 31, *Damage to Property: Vandalism* (1984)
- Working Paper 33, *Homicide* (1984)
- Working Paper 35, *Defamatory Libel* (1984)
- Working Paper 36, *Damage to Property: Arson* (1984)
- Working Paper 37, *Extraterritorial Jurisdiction* (1984)
- Working Paper 38, *Assault* (1984)
- Working Paper 44, *Crimes against the Environment* (1985)
- Working Paper 45, *Secondary Liability — Participation in Crime and Inchoate Offences* (1985)
- Working Paper 46, *Omissions, Negligence and Endangering* (1985)
- Working Paper 47, *Electronic Surveillance* (1986)
- Working Paper 48, *Criminal Intrusion* (1986)
- Working Paper 49, *Crimes against the State* (1986)
- Working Paper 50, *Hate Propaganda* (1986)

In producing all this work we have profited enormously from the practical advice of our consultants. These were drawn from across Canada and include eminent judges, criminal lawyers, law teachers, representatives of provincial and federal governments, police chiefs and the general public (Appendix C). We have also benefitted from the flowering of criminal law scholarship in Canada and the burst of judicial creativity on criminal law.

The proposed Criminal Code expresses the essential principles of criminal law and rules of general application. It defines most of the crimes of concern to a modern industrialized society. At the same time it drops archaic provisions but addresses modern day social problems like pollution and terrorism.

In style the new Code aims to be intelligible to all Canadians. It is drafted in a straightforward manner, minimizing the use of technical terms and avoiding complex sentence structure and excessive detail. It speaks, as much as possible, in terms of general principles instead of needless specifics and *ad hoc* enumerations. Finally, it

avoids deeming provisions, piggybacking and other indirect forms of expression, on the basis that the direct way of saying anything is the simplest, the clearest and most readily understandable.

In structure the new Code is like the present *Criminal Code* but begins with crimes against the person instead of crimes against the State. Substantive criminal law is divided into a General Part containing rules of general application and a Special Part defining the particular crimes. Title I is the General Part; Title II contains most of the crimes against the person; Title III enumerates most of the crimes against property; Title IV lists crimes against the natural order; Title V deals with crimes against the social order; and Title VI encompasses crimes against the governmental order.

Each title is subdivided where appropriate by reference to the interests infringed. Crimes against the social order, for example, are divided into crimes against social harmony and crimes against public order.

Each subcategory is further subdivided where appropriate. Crimes against social harmony, for example, are divided into: stirring up hatred and inciting genocide.

Finally, the crimes in these subcategories are mostly listed in ascending order of gravity. Less serious crimes precede more serious ones which include or build upon them. In crimes against public order, disturbing public order precedes unlawful assembly (disturbing by three or more) which in turn precedes riot (unlawful assembly resulting in risk of injury or property damage). Naturally, the provisions in all these titles affect and are affected by the principles set out in the General Part.

Our proposed new Code whose recommendations are summarized in Appendix A is not yet in the form of a Bill to be presented to Parliament; rather it is a proposal for a new statute. What that statute might look like can be seen in the illustrative draft legislation in Appendix B. **All references to the proposed Code, however, are to the recommendations and not to the legislative draft.** Moreover, though the recommendations and draft Bill are written in the traditional style, the final draft, it is envisaged, will ensure that as far as possible its provisions are gender neutral.

A few topics, because of their specialized nature or because others have dealt with them, are left to be considered later. They include trade and securities frauds, abortion, sex offences, prostitution and pornography. Sentences have not been ascribed to the crimes, as that task has been performed by the Canadian Sentencing Commission.⁷ Our work on criminal law procedure, which continues apace, will be put into the form of a proposed new Code of Criminal Procedure in the near future.⁸

Absent from our proposed Criminal Code are provisions dealing with burden of proof and presumptions. Although the present *Criminal Code* contains many such provisions, the Commission has eliminated them entirely from its recommendations to reflect its views on inculcation. Substantive criminal law provisions define conditions

7. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987).

8. Our forthcoming **Code of Criminal Procedure** (to be published in 1989) will contain our recommendations on the general principles of criminal procedure already described in LRCC, *Our Criminal Procedure* (Report 32) (Ottawa: LRCC, 1988) [to be released soon]. **All references to the Code of Criminal Procedure are to the former publication.**

of inculcation and exculpation relevant to all offences. They define elements of inculcation which must be proved by evidence in the absence of formal admissions and matters of exculpation or mitigation which may be raised by evidence. By doing so they impliedly define to some extent the evidentiary obligations of the parties in a criminal trial. Particularly significant in this connection is the presumption of innocence recognized by common law and now guaranteed by paragraph 11(d) of the *Charter*.

This presumption casts on the prosecution the burden of proving an accused's guilt beyond reasonable doubt. In the Commission's view the prosecution should prove all necessary conditions of liability by evidence which is admissible and which in the judgement of the trier of fact proves them beyond reasonable doubt, while the accused should not have to prove any fact in issue in a criminal trial. This burden of proof obliges the prosecution, therefore, not only to prove all inculpatory elements of a crime but also to disprove any matter of exculpation for which the evidence adduced (irrespective of its source) discloses a foundation. By contrast, an accused, when seeking to plead a matter of exculpation not already raised by the evidence, need only produce sufficient evidence to disclose such a foundation. Meanwhile the prosecution need not disprove any matter of defence, justification or excuse before such foundation is disclosed.

In line with this approach, the Commission has refrained in Report 30 and in this revised and enlarged edition of its proposed Code from casting a legal burden on an accused regarding any matter of exculpation. On the one hand such reverse onuses may well be contrary to the presumption of innocence and paragraph 11(d) of the *Charter*. On the other hand they are also unnecessary, because sufficient protection against unwarranted acquittals lies in the requirement that any matter of exculpation be based on a demonstrable evidentiary foundation.

In addition, the Commission has tried in drafting the substantive provisions to separate exculpatory from inculpatory elements in order to help clarify the evidentiary obligations of the parties. Defences of general application have been included in the General Part. Defences of limited application, where necessary, are appended to the charging provision in a separate clause. For example, the crime of refusal to provide a sample defined in clause 10(6)(a) allows a special defence of reasonable excuse. This defence is appended in 10(6)(b).

Report 31 then, contains most of our substantive criminal law. There will still be, however, penal provisions in other Acts of Parliament. Because of this, and the need for consistency in our criminal law, the new Code provides that its General Part will govern all federal penal provisions, wherever found, that carry a sentence of imprisonment. There will also be offence-creating sections in provincial legislation. Because these fall under provincial, not federal, jurisdiction, the new Code's General Part will not apply to them, unless of course the provinces in question adopt it by way of reference.

In offering this proposed Code, we are not advocating change for its own sake: we believe the changes we propose are for the better and are needed to improve the criminal law. We are not trying to fix something that is not broken; we believe that many aspects of our criminal law are broken and in urgent need of major reform.

This new draft Code, which we believe reflects modern Canadian values and the principles of the *Charter*, is presented as our contribution to the process of recodifying Canadian criminal law. It is an evolutionary not revolutionary document. We hope that over the next few years, along with the Report of the Canadian Sentencing Commission,⁹ it will stimulate further study and work by Parliament and lead ultimately to the enactment of a new Criminal Code which is modern, logical, clear, comprehensive, restrained where possible, and strong where necessary.

Our hope is that its enactment will put Canada once again in the vanguard of criminal law reform and serve future generations of Canadians as well as the work of Sir John A. MacDonald's generation has served us.

9. *Supra*, note 7.

RECODIFYING CRIMINAL LAW

Recommendations and Commentaries

[Preamble]

Comment

One item which greatly exercised the Commissioners' minds was the question of a preamble. A minority felt that a preamble and declaration of principles would help interpret the Code in difficult cases. The majority felt that preambles and declarations of principles were unnecessary and inadvisable.

The majority, then, view a preamble as unnecessary in a well-drafted Act. In such an Act the object and purpose should be readily discernible from the specific provisions themselves and from the Act as a whole. Besides, a preamble is undesirable because its vagueness may lead to ambiguity and be used to narrow or broaden specific provisions in ways never intended by the legislator. In addition, a declaration of principles, specially such as the one suggested by the minority, would become a yardstick for measuring any subsequent criminal law provision, would bring about endless litigation as to whether there were other adequate and appropriate means of dealing with the same issue and would transfer to the courts a responsibility properly belonging to, and so far satisfactorily assumed by, Parliament and our elected representatives.

The minority, on the other hand, sees a definite role for a preamble in this Code. First, it could clarify the essential aim of the Code as well as its specific provisions — a role particularly important in a new Code with a principled and logical arrangement. Second, it would link the new Code to, and show it to be a continuation of, the *Constitution Act, 1982* with its *Charter*. Finally, it would signal that this is not an ordinary statute but a comprehensive and distinctly Canadian statement of the law that crucially concerns our own society's fundamental values.

Accordingly, the minority would have wished to include the following:

[PREAMBLE]

WHEREAS the Canadian Charter of Rights and Freedoms enshrined in the Constitution guarantees all Canadians their individual rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society;

AND WHEREAS the criminal law is designed to reinforce fundamental social values, to maintain social order and to protect individual rights and freedoms;

AND WHEREAS the criminal law should fulfil this function by prohibiting and punishing culpable conduct which causes or threatens serious harm, while at the same time allowing excuses, justifications and exemptions consistent with fundamental social values;

AND WHEREAS it is desirable that the criminal law of Canada should now be set out in a new, systematic, understandable, restrained and comprehensive Code made in Canada by Canadians for Canadians;

DECLARATION OF PRINCIPLES

This Code is based upon the following principles:

- (a) the criminal law should be used only in circumstances where other means of social control are inadequate or inappropriate;*
- (b) the criminal law should be used in a manner which interferes no more than necessary with individual rights and freedoms;*
- (c) the criminal law should set out clearly and understandably
 - (i) what conduct is declared criminal, and*
 - (ii) what culpability is required for a finding of criminal liability.]**

THE GENERAL PART

The new Code's four objectives are comprehensiveness, simplicity, systematization and principle. To achieve these goals, the new Code begins with an extensive General Part containing rules of general application on definitions, liability, defences, criminal involvement and jurisdiction. This covers all matters of general import whether dealt with at present by the existing Code or by the common law; deals with them straightforwardly, replacing for example the present *Criminal Code*'s unsystematic rules on defence of person and of property by general rules followed by exceptions; provides in its rules on liability starting-points for the derivation of other rules; and highlights in the rules on liability the moral basis of the Code — that only those at fault deserve punishment.

Comprehensiveness and integrity is aimed at by the interpretation and application provisions. The interpretation of the Code is to be regulated by the Code itself and not by common law or by extraneous statutory rules of interpretation. The application provision lays down that the General Part shall apply to all crimes, whether Code or non-Code crimes, being defined as imprisonable offences.

Simplicity, systematization and principle are aimed at by the liability provisions. For simplicity the provisions are set out straightforwardly and for the most part in parallel format: "no one is liable except" In the interests of systematization they move step by step from the general to the less general. For example they provide that no one is criminally liable except for conduct defined as a crime by the Code or some other statute, that no one is liable without committing that conduct with the level of culpability specified by its definition, and that in general no one is liable except for an act or omission performed by himself.

This arrangement systematizes not only the provisions on liability themselves but also the whole Code. In the first place, it shows the rules on conduct and culpability as being basically rules for interpreting the Special Part definitions of crimes. Secondly, it makes the entire Code — the General and the Special Parts — a coherent whole so that all the Special Part provisions have to be construed in the light of the General Part.

The moral basis of the Code, highlighted in the liability provisions, is further amplified by the General Part defences. The first three of these are really cases of absence of conduct and culpability. The next three exempt special categories of people: the young, those unfit to plead and those suffering from mental disorder. The remaining eleven are types of justification or excuse.

Another chapter in the General Part which is of major significance for substance and principle is Chapter 4, "Involvement in Crime." This ensures that liability will accrue not only to those fulfilling the general liability conditions but also in some circumstances to others involved in a secondary way in the crime charged.

The last chapter in the General Part deals with the extraterritorial jurisdiction of Canadian courts thereby recognizing our treaty obligations.

THE GENERAL PART

TITLE I. General Principles

Chapter 1: Principles of General Application and Interpretation

1(1) Title. This Act may be cited as the Criminal Code.

1(2) Definitions.¹⁰

“Agent” includes an employee.

“Animal” means any living non-human vertebrate.

“Another’s premises” means premises in the lawful occupation of that other person.

“Another’s property” means property that another owns or has any legally protected interest in.

“Appropriate” means to take, borrow, use or convert.

“Armed hostilities” means use of armed forces by a large number of people to achieve some general or public objective.

“Canada” includes the land territory, the Canadian Arctic, the internal and inland waters, the territorial sea of Canada, the airspace above the territory and the seabed and subsoil below it.

“Canadian aircraft” means an aircraft registered in Canada under the *Aeronautics Act* or an aircraft of the Canadian Forces.

“Canadian ship” means a ship registered in Canada under the *Canada Shipping Act* or a vessel of the Canadian Forces.

“Captive” means an animal caged, bound or confined outside its natural habitat.

“Classified information” means information that has been marked or otherwise identified in accordance with the federal government classification scheme as reasonably likely, if disclosed, to cause serious injury to the national interest.

“Consent” means consent given by a competent person and not obtained by force, threat or deceit.

“Criminal rate” means an annual rate of interest exceeding sixty per cent on the principal advanced.

10. Contrary to the present *Criminal Code*, our proposed clause 1(2) groups together all of the definitions contained in our new Code, whether these apply to the entire Code or to a title, chapter or clause.

“Document” means any writing, recording or marking capable of being read or understood by people or machines.

“Dwelling-house” means:

- (a) premises used as a residence;
- (b) a building communicating with or connected to such premises;
or
- (c) a mobile unit used as a residence.

“Enters.” A person “enters” as soon as any part of his body or any part of an instrument that he uses is within anything that is being entered.

“Exclusive economic zone of Canada” means the exclusive economic zone as defined in Article 55 of the *United Nations Convention on the Law of the Sea*, 1982.

“Explosive substance” means any substance capable of causing, and anything capable of being used with such a substance, to cause an explosion.

“False solemn statement” includes one which contradicts a solemn statement previously made by the same person in a public proceeding or as required by law.

“Firearm” means any barrelled weapon which can discharge a bullet or other missile, or any imitation of such a weapon.

“Fishing zones of Canada” means the fishing zones of Canada as defined in section 4 of the *Territorial Sea and Fishing Zones Act*.

“Forge” means:

- (a) to make a document purport to be made by a person who did not exist or did not make it or did not authorize it to be made;
or
- (b) to tamper with a document by making some material alteration, addition, erasure or obliteration.

“Harm” means to impair the body or its functions permanently or temporarily.

“Hurt” means to inflict physical pain.

“Identifiable” means identifiable by race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

“Initiated.” Criminal proceedings are “initiated” by the issuance of compulsory process, the laying of a charge, or an arrest.

“Inland waters” are the rivers, lakes and other fresh waters in Canada and include the St. Lawrence River as far seaward as the straight lines drawn:

- (a) from Cap-des-Rosiers to the westernmost point of Anticosti Island; and
- (b) from Anticosti Island to the north shore of the St. Lawrence River along the meridian of longitude sixty-three degrees west.

“Internal waters of Canada” include any areas of the sea that are on the landward side of the baselines of the territorial sea of Canada and any areas of the sea other than the territorial sea, in respect of which Canada has an historic or other title of sovereignty.

“Internationally protected person” means:

- (a) any head of State, head of government or minister of foreign affairs outside the jurisdiction of his own State;
- (b) any member of the family of a person listed in (a) accompanying such a person;
- (c) any representative or official of a State or international organization who is entitled at international law to special protection; and
- (d) any member of the family of a person listed in (c) who forms part of his household.

“Non-disclosure” means failure to perform a duty to disclose arising from:

- (a) a special relationship entitling the victim to rely on the defendant; or
- (b) conduct by the defendant or another person acting with him creating or reinforcing a false impression in the victim’s mind or preventing him from acquiring information.

“Nuclear material” means:

- (a) plutonium, except plutonium with an isotopic concentration of plutonium-238 exceeding eighty per cent;
- (b) uranium-233;
- (c) uranium containing uranium-233 or uranium-235 or both in such an amount that the abundance ratio of the sum of those isotopes to the isotope uranium-238 is greater than 0.72 per cent;
- (d) uranium with an isotopic concentration equal to that occurring in nature; and
- (e) any substance containing anything described in clauses (a) to (d),

but does not include uranium in the form of ore or ore-residue.

“Optical device” means any device or mechanism capable of permitting surreptitious viewing of persons, things or places.

“Peace officer” includes:

- (a) a sheriff, deputy sheriff, sheriff’s officer and justice of the peace;¹¹
- (b) a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison;
- (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process;
- (d) an officer or person having the powers of a customs or excise officer when performing any duty in the administration of the *Customs Act* or the *Excise Act*;
- (e) a person appointed or designated as a fishery officer under the *Fisheries Act* when performing any of his duties or functions pursuant to that Act;
- (f) officers and non-commissioned members of the Canadian Forces who are
 - (i) appointed for the purposes of section 134 of the *National Defence Act*, or
 - (ii) employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purposes of this clause, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers;
- (g) the pilot in command of an aircraft
 - (i) registered in Canada under regulations made under the *Aeronautics Act*, or
 - (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft registered in Canada under those regulations,while the aircraft is in flight.

“Pending” means:

- (a) in a criminal case, from the time at which criminal proceedings have been initiated by the issuance of compulsory process, the laying of a charge, or an arrest, until their determination by discharge, stay, verdict, or other disposition whether formal or informal;

11. Whether “peace officer” should include “justice of the peace” needs further consideration specially in view of the *Charter*. Such consideration will be given in the forthcoming Code of Criminal Procedure.

- (b) in a civil case, from the time at which a trial date is set until determination of the proceedings by abandonment, adjudication or other disposition;
- (c) in relation to publication by public officers or prosecutors, from the time the officer or prosecutor has reasonable grounds to justify the initiation of criminal proceedings until their determination in accordance with (a).

“Person” means a person already born by having completely proceeded in a living state from the mother’s body, or a corporation.

“Premises” means:

- (a) any building or part thereof; or
- (b) any part of a structure, vehicle, vessel or aircraft used
 - (i) for overnight accommodation, or
 - (ii) for business.

“Private communication” means any oral communication or any telecommunication made under circumstances in which it is reasonable for any party to it to expect that it will not be intercepted by any surveillance device.

“Prohibited weapon” means:

- (a) any knife with an automatically opening blade;
- (b) any machine gun;
- (c) any sawn-off rifle or shotgun with a barrel less than 457 mm in length or with an overall length of less than 660 mm; or
- (d) a silencer.

“Property” includes electricity, gas, water, and telephone, telecommunication and computer services.

“Public administration” means:

- (a) the administration of justice;
- (b) the administration of federal, provincial or local government; and
- (c) the proceedings in Parliament or in a provincial legislature or in the council of a local authority.

“Public officer” means:

- (a) a peace officer, or
- (b) any officer engaged in enforcing the law relating to revenue, trade or navigation.

“Public official” means a person who

- (a) holds a public office, or**
- (b) is appointed to perform a public duty.**

“Public proceedings” means proceedings before Parliament, any provincial legislature, a court or judge, or any federal, provincial or municipal body exercising powers to investigate or inquire for which such body is authorized by law to take evidence by way of solemn statement.

“Public record” means any document or records kept:

- (a) under the authority of a court, judicial officer or tribunal;**
- (b) as forming part of proceedings in Parliament; or**
- (c) in a public system required or authorized by law to be maintained in the public interest.**

“Regulated weapon”

- (a) means any firearm other than a prohibited weapon which:**
 - (i) is designed to be fired with one hand,**
 - (ii) has a barrel of less than 470 mm in length or an overall length of less than 660 mm and is capable of producing semi-automatic fire,**
 - (iii) is designed to be fired when reduced to length less than 660 mm by folding or telescoping, or**
 - (iv) is a machine gun forming part of the collection of a collector in good faith;**
- (b) does not include:**
 - (i) a flare gun,**
 - (ii) a firearm exclusively used for:**
 - (A) firing blanks,**
 - (B) slaughtering domestic animals or tranquillizing animals,**
 - (C) discharging projectiles attached to lines, or**
 - (D) firing bullets or other missiles with a velocity less than 152.4 m per second, or**
 - (iii) antique firearms other than machine guns.**

“Representation” means a representation whether express or implied (including impersonation) as to a past, present or future fact, but does not include exaggerated statements of opinion concerning the attributes or quality of anything.

“Solemn statement” means a statement made orally or in writing on oath, solemn affirmation or solemn declaration.

“Surveillance device” means a device or apparatus capable of being used to intercept a private communication.

“Territorial sea of Canada” means the territorial sea of Canada as determined in accordance with the *Territorial Sea and Fishing Zones Act*.

“Valuable security” means any order or security giving title or evidence of title to property.

“Weapon” means any instrument including a firearm, capable of being used to inflict harm.

1(3) Interpretation.

- (a) The provisions of this Code shall be interpreted and applied according to the ordinary meaning of the words used read in the context of the Code.
- (b) Where a provision of this Code is unclear and is capable of more than one interpretation it shall be interpreted in favour of the accused.

Comment

Clause 1(3) in one sense departs from, but in another sense returns to, the position under present law. In theory that position is that like all other statutes, the *Criminal Code* should be interpreted in accordance with section 11 of the *Interpretation Act*, which lays down that “[e]very enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”¹² In practice, and specially when construing offence-creating sections, our courts for the most part interpret it according to the “literal rule” which requires that the meaning of a statute be gathered from the plain and ordinary meaning of the words used taken in context.¹³ By adopting the literal rule, clause 1(3)(a) brings the rule of interpretation in line with present judicial practice and signals that the new Code is not so much a remedial statute as a comprehensive statement of the law.

Clause 1(3)(b) deals with cases of ambiguity. In such cases, a strictly literal interpretation could sometimes disadvantage an accused. While strict interpretation protects the accused by confining offences to what they clearly cover it puts him at risk by confining defences or exceptions to what they clearly cover. By providing that in all cases of ambiguity the Code shall be interpreted in favour of the accused, clause 1(3)(b) brings the new Code into line with traditional common law principle.

1(4) Application in Law.

- (a) This title applies to any crime defined by this Code or any other Act of the Parliament of Canada.

12. *Interpretation Act*, R.S.C. 1970, c. I-23, s. 11 [hereinafter *Interpretation Act*].

13. See Jacques Fortin and Louise Viau, *Traité de droit pénal général* (Montréal: Éditions Thémis, 1982) at 31.

- (b) **An offence defined by any other Act of the Parliament of Canada is a crime if the person who committed it is liable to be sentenced to a term of imprisonment as punishment.**

Comment

While all the major crimes will be contained in the new Code, Parliament under its criminal law jurisdiction has created, and will no doubt continue to create, criminal offences in other statutes. User convenience dictates that many such offences, for example those under the *Bankruptcy Act*,¹⁴ remain in those particular statutes and not be transferred to the Code. Principle requires that all offences serious enough to carry a sentence of imprisonment be governed by the new Code's General Part so that those accused of non-Code crimes receive the same protection as those accused of Code crimes. This is provided by clause 1(4).

Chapter 2: Principles of Liability

Comment

This chapter, and the following chapter on defences, form the heart of the General Part. The function of that General Part is threefold: to avoid repetition in the Special Part, to systematize the criminal law, and to articulate its basic premises. These premises — the necessary conditions for criminal liability — are at present left to the common law. Their inclusion in the new Code is dictated by the need for comprehensiveness.

The fundamental premises of criminal liability are grounded in ordinary notions of morality and justice. Basically there are three such notions. First, no one can justly be held to blame for contravening a rule unless it was in place at the time of the alleged contravention. Second, no one can fairly be held to blame except for his own conduct — for what he himself does or in some cases does not do. Third, no one can legitimately be held to blame for conduct unaccompanied by some kind of personal culpability such as carelessness, recklessness or wrongful intention.

These notions are developed in the following four clauses. Clause 2(1) articulates the requirement for criminal law to be already in effect before there can be criminal liability for its contravention — the principle of legality. Clause 2(2) specifies that both conduct and culpability are prerequisites for such liability. Clause 2(3) spells out what amounts to conduct, and clause 2(4) what amounts to culpability.

- 2(1) Principle of Legality. No one is liable except for conduct defined at the time of its occurrence as a crime by this Code or by some other Act of the Parliament of Canada.**

14. *Bankruptcy Act*, R.S.C. 1970, c. B-3.

Comment

The principle of legality rules out conviction and punishment for acts which were not crimes when committed: *nulla poena sine lege*. The rationale is that in such cases conviction and punishment would be unjust, self-contradictory and pointless: unjust because no punishment is deserved, self-contradictory because it stigmatizes as wrongdoers those who clearly are not, and pointless because no one can be deterred from doing what is not as yet against the law. For this reason, *nulla poena* has been recognized as an ideal by common law writers, included in international and other documents on human rights, and expressly articulated in paragraph 11(g) of the *Charter* which provides that any person charged with an offence has the right "not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations" Clause 2(1) incorporates this provision and further defines it by requiring that, so far as concerns criminal liability, the offence must be already defined in the new Code or in some other federal statute.

2(2) Conduct and Culpability. No one is liable for a crime without engaging in the conduct and having the level of culpability specified by its definition.

Comment

Central to common law doctrine is the notion that criminal liability requires both conduct and culpability on the part of the accused. As that doctrine puts it, a crime has both a physical and a mental element: *actus reus* and *mens rea*. Explicit articulations of this can be found in writings of scholars on criminal law from Stephen on, and in case-law¹⁵ but not in the present *Criminal Code* itself. Such an articulation is put up front in the new Code not only to highlight the central premise of the criminal law, but also to show that in any given case the question whether the facts proved add up to the conduct and culpability required by the definition of a crime, is essentially a question of interpreting that definition.

2(3) Conduct.

- (a) General Rule. Unless otherwise provided in the definition of a crime, a person is only liable for an act or omission performed by that person.**

Comment

Basic to criminal law tradition is the idea that liability is only for acts and omissions performed by the accused himself and not for acts of God, acts of others or "non-acts" like twitches. This idea, enshrined in the doctrine that there must be an

15. See *R. v. Tolson* (1889), 23 Q.B.D. 168; *R. v. Corporation of Sault Ste. Marie* (1978), [1978] 2 S.C.R. 1299; *Reference Re Section 94(2) of the Motor Vehicle Act* (1985), [1985] 2 S.C.R. 486 at 513.

actus reus, is well recognized by writings of scholars, by decided cases¹⁶ and by several other Criminal Codes, but is not articulated in our own *Criminal Code*. Explicit articulation is given, therefore, in this clause. As to conduct outside an accused's control, see clause 3(1) ("Lack of Control"). The words "[u]nless otherwise provided" recognize that a person may be liable, through the rules on involvement in crime, for acts or omissions performed by others. It is to be noted that while traditionally crimes have been divided into acts, omissions and states (for example possession), the last of these three can readily be included under the rubric of "act" since a person has to do something to put or keep himself in the state in question.

(b) Omissions. No one is liable for an omission unless:

- (i) it is defined as a crime by this Code or by some other Act of the Parliament of Canada; or**
- (ii) it consists of a failure to perform a duty specified in this clause.**

Comment

Generally speaking, our criminal law imposes liability for acting rather than not acting. Most crimes require the commission of a positive act. This can be seen from decided cases, from writings on criminal law and from the majority of statutory definitions of offences in the *Criminal Code* and elsewhere.

Criminal liability may be imposed for not acting, however, in three different ways. First, not acting may itself form part of a wider whole consisting of acting, for example failure to keep a proper look-out on the road which is part of driving dangerously. Whether in any such case the accused's conduct is more appropriately to be regarded as doing or not doing must be decided in the particular circumstances by the trier of fact. Second, not acting may be specifically prohibited as a crime, for example not stopping at the scene of an accident (*Criminal Code*, section 236). Third, where a crime consists expressly or impliedly in causing a result, for example death, damage, danger, that result can be caused by an omission provided that there is a legal duty to act — "commission by omission."¹⁷

Clause 2(3)(b) explicitly recognizes the general principle about liability for omissions. It makes the criminal law on omissions wholly subject to the new Code. It does so by explicitly allowing for two of the above exceptions: specific omission crimes and result crimes involving failure to perform a legal duty. Result crimes are crimes of homicide, bodily harm, endangering, vandalism and arson — crimes consisting in the effecting of some harm, damage or risk. It is to be noted that in certain situations, then, a person could commit the crime of endangering (clause 10(1)) by omission. In this regard the new Code is wider than Working Paper 46, which took the more traditional approach of restricting this crime to endangering by acts. It noted, however, that many of the present specific endangering offences, such as dangerous driving, can

16. See *R. v. Tolson*, *supra*, note 15. See also *Leary v. R.* (1977), [1978] 1 S.C.R. 29 [hereinafter *Leary*]; *R. v. King* (1962), [1962] S.C.R. 746; and *Perka v. R.* (1984), [1984] 2 S.C.R. 232 [hereinafter *Perka*].

17. See LRCC, *Omissions, Negligence and Endangering* (Working Paper 46) (Ottawa: LRCC, 1985) at 12 [hereinafter Working Paper 46].

be committed by omission.¹⁸ On reflection it was thought that these specific provisions were a better policy guide than traditional doctrine concerning result crimes.

In addition, clause 2(3)(b) requires that in the case of result crimes the duty breached be a duty specified in clause 2(3)(c). This is a departure from the present *Criminal Code* which provides in subsection 202(2) that so far as concerns criminal negligence "duty" means "a duty imposed by law." Since "law" extends to provincial law, a person's liability for criminal negligence may vary from province to province.¹⁹ To remedy this and render the criminal law of homicide uniform across Canada, clause 2(3)(b) restricts liability to failure to perform a duty "specified in this clause."

- (c) **Duties. Everyone has a duty to take reasonable steps, where failure to do so endangers life, to:**
 - (i) **provide necessities to**
 - (A) **his spouse,**
 - (B) **his children under eighteen years of age,**
 - (C) **other family members living in the same household, or**
 - (D) **anyone under his care****if such person is unable to provide himself with necessities of life;**
 - (ii) **carry out an undertaking he has given or assumed;**
 - (iii) **assist those in a shared hazardous and lawful enterprise with him; and**
 - (iv) **rectify dangers of his own creation or within his control.**
- (d) **Medical Treatment Exception. No one has a duty to provide or continue medical treatment which is therapeutically useless or for which informed consent is expressly refused or withdrawn.**

Comment

Common law divided general duties such as those specified by clause 2(3)(c) into natural (owed by parents to children) and assumed (for example by nurses towards their patients). The present *Criminal Code* enacted them in Part IV on "Offences against the Person and Reputation" in sections 197, 198 and 199. Section 197 imposes on parents and others in charge of children a duty to provide necessities; section 198 imposes a duty of reasonable skill and care on surgeons and others undertaking acts dangerous to life; and section 199 imposes on everyone undertaking an act a duty to do it if its omission is dangerous to life. It is nowhere explicitly stated in the *Criminal Code*, however, that liability for omissions requires either a specific provision or else breach of an actual legal duty.

The new Code clarifies, rearranges and to some degree extends the present rules. First, clause 2(3)(b) clarifies that liability requires breach of an actual legal duty

18. *Ibid.* at 39.

19. *R. v. Fortier* (17 November 1980), Longueuil, Québec 500-01-00501-805 (Sup. Ct.).

specified in clause 2(3)(c) of the General Part. Second, clause 2(3)(c) imposes a duty in four situations subject to two qualifications. The qualifications restrict the duty to that of taking reasonable steps to do the things required in each situation and of doing so only if failure to do so endangers life.

Clause 2(3)(c)(i) replaces section 197 and articulates the duty to provide necessities to children under eighteen (this being generally the age of majority in Canada) and spouses but extends it to other family members living in the same household and to anyone in that person's care where these persons are unable to provide themselves with necessities. Clause 2(3)(c)(ii) replaces sections 198 (medical treatment) and 199 (dangerous acts). This clause would cover foster-parents, guardians and others undertaking to look after children, and also doctors, nurses and others undertaking the care of patients, except when ceasing to give therapeutically useless medical treatment (see clause 2(3)(d)). Clauses 2(3)(c)(iii) and 2(3)(c)(iv) extend the law: (iii) relates to people such as fellow mountaineers engaged in shared hazardous and lawful enterprises; and (iv) generalizes specific provisions such as *Criminal Code*, subsection 243.3(1) (duty to safeguard opening in ice). So, for example, a person who made a dangerous opening in ice or whose land had a dangerous hole in it would be under a duty imposed by clause 2(3)(c)(iv) to take reasonable steps to rectify such dangers. If others were killed, injured or endangered as a result, he would then commit the crime of negligent homicide (clause 6(1)), assault by harming through negligence (clause 7(2)(c)) or endangering through negligence (clause 10(1)(c)).

2(4) Requirements for Culpability.

Comment

This clause articulates in detail the common law principle that a person is not liable for his conduct unless he has some fault or blameworthiness: *actus non facit reum, nisi mens sit rea*. This principle is evidenced in the specific definitions of crimes, in the case-law,²⁰ and in the writings of scholars in criminal law. Clause 2(4) incorporates the principle in the General Part in order to manifest its centrality to criminal law, to obviate repetition in the Special Part definitions and to clarify the meaning of the various *mens rea* (or culpability) words used in the new Code.

The provision is structured as follows. Clause 2(4)(a) gives general rules of interpretation for definitions requiring purpose, recklessness and negligence. Clause 2(4)(b) defines the terms "purposely," "recklessly" and "negligently." Clause 2(4)(c) clarifies that a charge involving one level of culpability is satisfied by proof of a higher level. Clause 2(4)(d) provides a general rule of interpretation for definitions which are silent as to culpability.

(a) General Requirements as to Level of Culpability. Unless otherwise provided:

20. See *supra*, note 15.

- (i) **where the definition of a crime requires purpose, no one is liable unless as concerns its elements he acts**
 - (A) **purposely as to the conduct specified by that definition,**
 - (B) **purposely as to the consequences, if any, so specified, and**
 - (C) **knowingly or recklessly as to the circumstances, if any, so specified;**

Comment

In the new Code "intent" is replaced by "purpose" because of the difficulties surrounding the former term. These stem largely from the blurring in the case-law of the distinction between intention (often called "specific intent") and recklessness (often called "general intent"). This has resulted in two views on "intention."

One view is that a consequence cannot be said to be intended unless it is the actor's desire or purpose, but others favour an artificial legal meaning according to which a consequence is taken to be intended whenever the actor is aware that it is probable. On the latter interpretation, intention would cover recklessness or at least a large part of it.²¹

To be liable for a "purpose" crime under the new Code a person must do the initiating act, for example pull the trigger of a gun, on purpose; mere carelessness, and *a fortiori* accident, is not enough. Where the crime by definition involves consequences, for example death or damage, those consequences must be part of the defendant's purpose; mere foresight is not enough. This is the common law tradition.

The same is not wholly true of circumstances. As to circumstances specified by the definition of a crime the accused at one time had to know of them; for example he had to know in an assault case that the victim did not consent. Recent authorities are tending to the position that mere recklessness will suffice; for example, in an assault case, it is enough to be reckless whether the victim consents or not.²² However, as to circumstances not specified in the definition (for example that the gun was loaded or the drink was poisoned), mere recklessness is not enough. In "purpose" offences, nothing less than actual knowledge of such facts will do.

- (ii) **where the definition of a crime requires recklessness, no one is liable unless as concerns its elements he acts**
 - (A) **purposely as to the conduct specified by that definition,**
 - (B) **recklessly as to the consequences, if any, so specified, and**
 - (C) **recklessly as to the circumstances, whether specified or not;**

21. Glanville Williams, *Textbook of Criminal Law* (London: Stevens and Sons, 1978) at 63. See also Hyam and Director of Public Prosecutions (1974), [1975] A.C. 55 for conflicting views on intent; J.H. Buzzard, "Intent" (1978) Crim. L.R. 5; and LRCC, *The General Part: Liability and Defences* (Working Paper 29) (Ottawa: Supply and Services Canada, 1982) at 32 [hereinafter Working Paper 29].

22. Don R. Stuart, *Canadian Criminal Law: A Treatise* (Toronto: Carswell, 1982) at 130.

Comment

Where the definition of a crime requires recklessness, the position is as follows. (A) The initiating act must still be done on purpose, as in “purpose” crimes, because “recklessly” (unlike “on purpose” and “negligently”) has no obvious application to acts in the narrow sense of muscular contractions. (B) Recklessness as to consequences suffices, in contrast to the requirement in “purpose” crimes that there be purpose as to consequences. (C) Recklessness as to circumstances also suffices. Recklessness as to circumstances specified in the definition of the crime suffices, as it does in “purpose” crimes. But recklessness as to other circumstances also suffices, in contrast to the requirement in “purpose” crimes for knowledge as to such circumstances. A person who does not actually know, for instance, that the gun is loaded cannot logically be said *purposely* to kill someone with it, but can be said to do so recklessly.

Accordingly, the difference between “reckless” and “purpose” crimes relates to consequences and to circumstances not specified in the definition.

- (iii) **where the definition of a crime requires negligence, no one is liable unless as concerns its elements he acts**
 - (A) **negligently as to the conduct specified by that definition,**
 - (B) **negligently as to the consequences, if any, so specified, and**
 - (C) **negligently as to the circumstances, whether specified or not.**

Comment

In negligence crimes the minimum requirements are a negligent initiating act, negligence as to the consequences, and negligence as to the circumstances. An accused not even negligent as regards any one of these will not be liable for a crime of negligence. An accused negligent as to one or more of these requirements, but reckless or purposeful as to the others, will still be liable only for a crime of negligence (see clause 2(4)(c)).

(b) Definitions.

“Purposely.”

- (i) **A person acts purposely as to conduct if he means to engage in such conduct, and, in the case of an omission, if he also knows the circumstances giving rise to the duty to act or is reckless as to their existence.**
- (ii) **A person acts purposely as to a consequence if he acts in order to effect:**
 - (A) **that consequence; or**
 - (B) **another consequence which he knows involves that consequence.**

Comment

As applied to conduct, that is, the initiating act, the definition of “purposely” is straightforward: the accused must do the act on purpose, or mean to do it. In the case of an omission, he must also know the facts giving rise to the duty to act or be reckless as to their existence — negligence is not sufficient. As applied to consequences, the term “purposely” covers not only the usual case where the consequence is what the accused aims at but also cases (sometimes termed cases of oblique or indirect intent) where his aim is not that consequence but some other result which, to his knowledge, will entail it: for example, if D destroys an aircraft in flight to recover the insurance money on it and thereby kills the pilot V, he is still guilty of killing V on purpose even though this is not in fact his aim.

“Recklessly.” A person is reckless as to consequences or circumstances if, in acting as he does, he is conscious that such consequences will probably result or that such circumstances probably obtain.

[Alternative

“Recklessly.” A person is reckless as to consequences or circumstances if, in acting as he does, he consciously takes a risk, which in the circumstances known to him is highly unreasonable to take, that such consequences may result or that such circumstances may obtain.]

Comment

Both formulations are in line with traditional understanding of the word “recklessly” in criminal law rather than with recent House of Lords jurisprudence.²³ The first formulation of “recklessly” locates the central meaning of the term in the notion of consciousness of probability. The accused need not aim at the consequences but need only know that they are probable; he must foresee their likelihood. Likewise he need not know of the existence of the circumstances specified by the definition but need only know that they probably exist; he must realize their likelihood.

The alternative formulation defines “recklessly” as a function of two factors: (1) the risk consciously taken, and (2) the objective unreasonableness of taking it in the circumstances known to the accused. A risk may be one of less than fifty per cent but may still be most unreasonable and therefore reckless: if D deliberately points a loaded gun at V, this would generally be regarded as reckless despite a less than fifty per cent chance of the gun going off. Conversely, there may be high probability of a consequence without recklessness if the risk is not unreasonable in the circumstances: a surgeon performing an operation with more than a fifty per cent chance of death will not necessarily be reckless, as when, for example, he performs a dangerous operation on a consenting patient to save his sight, hearing or other faculty.

23. See *R. v. Lawrence* (1981), [1981] 1 All E.R. 974 and *R. v. Caldwell* (1981), [1981] 1 All E.R. 961.

“Negligently.” A person is negligent as to conduct, circumstances or consequences if it is a marked departure from the ordinary standard of reasonable care to engage in such conduct, to take the risk (conscious or otherwise) that such consequences will result, or to take the risk (conscious or otherwise) that such circumstances obtain.

Comment

The essence of civil negligence is departure from the standard of reasonable care. Criminal negligence, however, requires more than just this; it requires what recent case-law has termed “a marked departure.”²⁴ As to the initiating act, or conduct, it means behaving without due care rather than intentionally or accidentally. As to the circumstances and consequences, it means taking a risk, consciously or otherwise, which one ought not to take. Where the risk is taken consciously, the difference between negligence and recklessness is that, in the latter instance, it is much more unreasonable to take it; this calls for a value judgement in each individual case.

(c) Greater Culpability Requirement Satisfies Lesser.

- (i) Where the definition of a crime requires negligence, a person may be liable if he acts, or omits to act, purposely or recklessly as to one or more of the elements in that definition.**
- (ii) Where the definition of a crime requires recklessness, a person may be liable if he acts, or omits to act, purposely as to one or more of the elements in that definition.**

Comment

This provision simply prevents the avoidance of liability by the defendant's actually having a higher level of culpability than that charged. A person charged with negligent killing will not escape conviction because he kills on purpose.

- (d) Residual Rule. Where the definition of a crime does not explicitly specify the requisite level of culpability, it shall be interpreted as requiring purpose.**

Comment

Where nothing is said in the definition of a crime, that definition is to be taken as creating a “purpose” crime. This rule avoids the repetition of culpability requirements in “purpose” crimes, but of course necessitates it in “reckless” and “negligent” crimes.

24. *R. v. Waite* (1986), 28 C.C.C. (3d) 326 (Ont. C.A.).

2(5) Corporate Liability.

- (a) **With respect to crimes requiring purpose or recklessness, a corporation is liable for conduct committed on its behalf by its directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy.**

Comment

This clause is intended to articulate and clarify the criteria for imposing corporate criminal liability. The present *Criminal Code* simply states in section 2 that "person" includes bodies corporate, without attempting to articulate the criteria for imposing criminal liability on a corporate entity.

At common law, a corporation may be held criminally liable for acts or omissions committed on behalf of the corporation by its officers, agents or employees who can be identified as part of the corporation's "directing mind and will." The new Code retains this identification doctrine as the basis for corporate criminal liability but clarifies its scope. It provides that a corporation may be held criminally liable for the conduct of directors, officers or employees identifiable as persons with managerial or supervisory authority over the formulation or implementation of corporate policy, acting on behalf of the corporation and not exclusively on their own behalf or in fraud of the corporation.

- (b) **With respect to crimes requiring negligence a corporation is liable as above, notwithstanding that no director, officer or employee may be held individually liable for the same offence.**

Comment

The sort of harm prohibited by criminal law may well result from corporate activity involving negligence in the organizational process rather than in the conduct of any single individual. It may result from the collective participation of numerous directors, officers or employees, no one of whom may individually have had the requisite culpability. For this reason the new Code provides that a corporation may be liable for "negligence" crimes on account of the conduct of its directors, officers or employees even if no such person is individually liable.

[Alternative

- 2(5) Corporate Liability. A corporation is liable for conduct committed on its behalf by its directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy, notwithstanding that no director, officer or employee may be held individually liable for the same offence.]*

Comment

The alternative provision widens the proviso in clause 2(5)(b) to apply to all crimes, on the ground that collective participation may well lead in similar circumstances to commission of a "purpose" or "recklessness" crime. One director might do the *actus reus*, another might have the *mens rea*, but neither might be liable. If the corporation were a real person, the *actus* and *mens* would combine. The alternative provision puts the fictitious person constituting the corporation on the same footing as such a real person.

There are two situations however, which are not addressed by this clause. First is the more general problem of group collective participation in a crime. Clause 2(5) limits liability to corporations. However, there is the larger question — When should the collective be liable for actions taken in its name? It may be that liability should extend to other kinds of collective action, such as partnerships, joint ventures and non-profit organizations.

The problem of diffusion of the elements of a crime among members of the group, discussed above in the context of corporations, also applies to other forms of collective group action. For example, one member of a partnership might do the *actus reus*, another might have the *mens rea*, but neither might be liable. Similarly, in a joint venture of individuals, partnerships, corporations or some mix thereof, the elements of a crime may be spread out among the different members. These situations may warrant imposition of criminal liability on the collective. However, this notion of collective responsibility for group action is very complex and we have not been able to formulate any definitive recommendations on this particular issue in our proposed Code. We are of the view that further study on the whole issue of collective responsibility for group action is needed before any radical changes are made in the substance of our criminal law as it relates to this subject.

The second situation not addressed by clause 2(5) nor indeed anywhere in the proposed Code is how far an employer should be liable for the criminal acts of his employee. It is clear that an employer cannot be held responsible for the acts of an employee who goes off on a frolic of his own, unbeknownst to the employer. Much less clear though is the situation where the employer who has control over the employee knows of the employee's criminal activities but stands to benefit from them and acquiesces in them for the purpose of obtaining the benefit. Should there be a positive duty on an employer to prevent such a crime? Or should the employer be liable as a furtherer? This is an issue deserving of further careful consideration.

2(6) Causation. Everyone causes a result when his conduct substantially contributes to its occurrence and no other unforeseen and unforeseeable cause supersedes it.

Comment

Though usually a question of fact and evidence, causation can raise questions of law. Given that D did X and consequently V suffered Y, was D's doing of X really the cause of V's suffering Y? D injures V, V is taken to hospital, a nurse very negligently

(maybe deliberately) maltreats V and V dies. Has D caused V's death? This sort of question receives no general answer in the *Criminal Code*, but rather a set of specific answers in sections 205(6), 207 to 209 and 211. For a more general answer one must look to the case-law, to the writings of scholars and, of course, to common sense.²⁵ What these suggest, although each case has to be judged on its own facts, is: (1) that there must be a significant or substantial link between the accused's conduct and the result, that is to say, his conduct must not be a mere *sine qua non* or necessary condition (otherwise marriage has to be seen as a cause of divorce); and (2) that there must not be any other unforeseeable cause intervening to snap the chain of causation.

Whether rules about causation have any greater place in a Criminal Code than rules of logic, mathematics or science is open to question. But if they do, their place is surely not in the part on homicide but rather in our proposed General Part.

Chapter 3: Defences

Comment

A person accused of a crime will be free from criminal liability if he did not really commit the crime charged, if he did "commit it" but is for special reasons exempt from liability, or if he did do the act charged but did so for special reasons qualifying as an excuse or justification. These three kinds of general defence, which were worked out over the years by common law, are mostly, but not entirely, contained in the present *Criminal Code*. The new Code aims to include them all in the interest of comprehensiveness. Defences of a procedural nature, however, such as entrapment, are left to be dealt with in the Code of Criminal Procedure. Meanwhile, it remains open to the courts to develop other defences insofar as is required by the reference to "principles of fundamental justice" in section 7 of the *Charter*.

Absence of Conduct or State of Mind Necessary for Culpability

Comment

Since Chapter 2 has already spelled out the need for conduct and culpability as prerequisites for criminal liability, a separate division on absence of conduct (compulsion, impossibility and automatism) and on culpability (mistake) is strictly speaking unnecessary. The clauses on automatism, mistake and intoxication with their special policy restrictions could have been inserted under the appropriate conduct and culpability clauses. They have been set out as defences, however, in accordance with criminal law tradition and in view of their special nature.

25. For case-law and writings on the subject refer to *Smithers v. R.* (1977), [1978] 1 S.C.R. 506; *Jordan* (1956), 40 Cr. App. R. 152 (C.C.A.); *R. v. Smith* (1959), [1959] 2 Q.B. 35; Alan W. Mewett and Morris Manning, *Criminal Law*, 2d ed. (Toronto: Butterworths, 1985) at 530-31; Stuart, *supra*, note 22 at 96-111; Glanville Williams, *Textbook of Criminal Law*, *supra*, note 21 at 325-48; and Glanville Williams "Causation in Homicide" (1957) Crim. L.R. 429.

3(1) Lack of Control.

- (a) Compulsion, Impossibility, Automatism.** No one is liable for conduct which is beyond his control by reason of:
 - (i) physical compulsion by another person;
 - (ii) in the case of an omission, physical impossibility to perform the act required; or
 - (iii) factors, other than loss of temper or mental disorder, which would similarly affect an ordinary person in the circumstances.
- (b) Exception: Negligence.** This clause shall not apply as a defence to a crime that can be committed by negligence where the lack of control is due to the defendant's negligence.

Comment

Clause 2(3)(a) defines "conduct" as an act or omission "performed by that person." Clause 3(1) deals with lack of control arising from three special causes. None of these are dealt with in the present *Criminal Code*,²⁶ but common law clearly recognizes physical compulsion,²⁷ and automatism²⁸ and perhaps impossibility in cases of omission (*lex non cogit ad impossibilia*).

Automatism, which has generated many cases recently, presents a special problem. On the one hand, a person is not generally liable for involuntary behaviour, that is, behaviour outside his control, and an involuntary actor certainly cannot be censured for intentional wrongdoing. On the other hand, the law has to consider two other factors: (1) a person may be to blame for being in a state where his behaviour is beyond his control and (2) even if he is not blameworthy, he may still be a danger to society.

Clause 3(1)(a) deals with these factors as follows. First, it excludes the defence altogether: (1) in cases where the lack of control results from rage or loss of temper; and (2) by virtue of clause 3(1)(b), in cases where it results from negligence and the crime charged is one of negligence. So, where D through negligence fails to take his medicine and as a result gets into a state of automatism in which he kills or harms V, he will be liable for causing death or harm, as the case may be, by negligence.

Second, clause 3(1)(a)(iii) excludes the defence from cases where the accused is mentally disordered or where he is affected by the factors in question in a way in which an ordinary person would not be affected. In both these cases the accused, though not to blame, remains a possible social danger. In the case of mental disorder, therefore, he must be dealt with under the mental disorder provision of clause 3(6). In the case of undue sensitivity to the affecting factor (for example a susceptibility to be overcome by strobe lights that would have no effect on the average person) he remains

26. It is to be noted that "compulsion" as used in section 17 of the *Criminal Code* refers to duress.

27. See Sir Matthew Hale, *The History of the Pleas of the Crown*, vol. 1 (1736, reprinted London: Professional Books, 1971) at 434.

28. See *Rabey v. R.* (1980), [1980] 2 S.C.R. 513.

straightforwardly criminally liable and has no defence under clause 3(1)(a)(iii). In such case, if it thinks fit, a court may remand the defendant for medical or psychiatric investigation.

3(2) Lack of Knowledge.

- (a) **Mistake of Fact.** No one is liable for a crime committed through lack of knowledge which is due to mistake or ignorance as to the relevant circumstances; but where on the facts as he believed them he would have committed an included crime or a different crime from that charged, he shall be liable for committing that included crime or attempting that different crime.
- (b) **Exception: Recklessness and Negligence.** This clause shall not apply as a defence to crimes that can be committed by recklessness or negligence where the lack of knowledge is due to the defendant's recklessness or negligence as the case may be.

Comment

Mistake of fact, which of course in purpose and reckless crimes may negative *mens rea*, is well known to common law if not to the present *Criminal Code*. Present law, however, is unsatisfactory in two respects. First, it has not fully solved the problem of the accused who mistakenly thinks he is committing, not the crime charged, but some different offence. Sometimes such a mistake results in complete acquittal although the accused thinks he was engaged in crime; sometimes it results in conviction for the crime charged although he lacks *mens rea* for it.²⁹ Clause 3(2) provides that in such cases the accused is liable for attempting to commit the crime he thinks he is committing.

Second, present law has not completely solved the problem of the accused who is mistaken but is to blame for his mistake. Sometimes such culpable mistakes result unjustly in a complete acquittal, sometimes illogically, on the ground that mistake must be reasonable to be a defence, in a conviction for the crime charged despite lack of purpose or knowledge. Clause 3(2)(b) provides that, in such cases, if the crime charged can be committed by recklessness or negligence, the accused may be convicted if his mistake arose through recklessness or negligence, as the case may be.

3(3) Intoxication.

- (a) **General Rule.** No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.
- (b) **Proviso: Criminal Intoxication.** Notwithstanding clauses 2(2) and 3(3)(a), unless the intoxication is due to fraud, duress, compulsion or reasonable mistake,

29. See *R. v. Kundeus* (1975), [1976] 2 S.C.R. 272.

- (i) everyone falling under clause 3(3)(a) who satisfies all the other elements in the definition of a crime is liable, except in the case of causing death, for committing that crime while intoxicated; and
- (ii) everyone falling under clause 3(3)(a) who causes the death of another is liable for manslaughter while intoxicated and subject to the same penalty as for manslaughter.

[Alternative

3(3) Intoxication.

- (a) *General Rule.* No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.
- (b) *Exception.* This clause shall not apply as a defence to a crime that can be committed through negligence unless the intoxication arose through fraud, duress, compulsion or reasonable mistake.]

Comment

Lack of control or culpability may arise through intoxication. Where such intoxication is not the defendant's fault, he has no criminal liability; there simply is no *actus reus* or *mens rea* as the case may be. Hence at common law it was recognized that involuntary intoxication is a complete defence. Where the intoxication is the defendant's fault, the position is more complex. There may or may not be a defence.

Whether there is a defence or not depends on whether the crime is one of "general or specific intent." In "general intent" offences such as manslaughter and assault, intoxication will be no defence. In "specific intent" offences, such as murder and theft, it will be a defence. Much court time has been devoted to the attempt to articulate the distinction between the two categories of offence, a distinction condemned by Dickson J. in *Leary*³⁰ and acknowledged as illogical by Lord Salmon in *Majewski*.³¹

The problem is similar to that posed by automatism. The accused may through intoxication lack the purpose required for the crime charged (for example murder) but still be to blame because the intoxication was his fault, and also be dangerous because he has caused harm (for example another's death). Logic precludes conviction, and policy and principle preclude complete acquittal.

To avoid this problem, clause 3(3) adopts the following approach. It starts with a general rule, which is strictly speaking unnecessary, stating that lack of culpability owing to intoxication excludes liability. There follows a proviso that where the intoxication is the accused's fault, he is (with one exception) liable for "committing that crime while intoxicated" The exception relates to killing and provides that everyone killing another while intoxicated is liable for manslaughter.

30. *Supra*, note 16.

31. See *Director of Public Prosecutions v. Majewski* (1976), [1976] 2 All E.R. 142 (H.L.).

A minority of the Commissioners preferred a simpler, more straightforward approach. Keeping the same general rule, they would then provide an exception, namely, that if the intoxication is the accused's own fault, that is, if it arose for some reason other than fraud, duress, compulsion or reasonable mistake, it is no defence to a crime that can be committed by negligence. So, a person charged with murder but lacking purpose on account of self-induced intoxication could be convicted of negligent killing. To ensure conviction in similar circumstances for arson and vandalism, negligence would have to be included as a level of culpability for these two crimes.

Exemptions

Comment

Persons who commit crimes may be exempt from criminal liability because they are not, in the full sense, moral agents. Two obvious categories of such persons are the very young and the mentally disordered. Both are recognized as such by the present *Criminal Code*.

- 3(4) Immaturity. No one is liable for conduct committed when he was under twelve years of age.**

Comment

The present law is contained in section 12 of the *Criminal Code* which provides that no one can be convicted for an act or omission on his part while he was under the age of twelve years. The exact age, if any, at which a person attains the age of reason, or becomes responsible, will vary from person to person. For criminal law a general rule is needed, and common law followed Christian tradition in fixing the age at seven. Recently, after much investigation and research, the age was raised to twelve. The present rule is reproduced in clause 3(4).

- 3(5) Unfitness to Plead. Any person who, at any stage of the proceedings, is incapable of understanding the nature, object or consequences of the proceedings against him, or of communicating with counsel owing to disease or defect of the mind which renders him unfit to stand trial, shall not be tried until declared fit.**

Comment

This is the only procedural defence included in this chapter. It does not appear in the appended draft legislation (see Appendix B) since it is more properly to be regarded as a matter for the Code of Criminal Procedure. The reason for its tentative inclusion here is its close relation to the defence of mental disorder.

Justice, and indeed paragraph 11(d) of the *Charter*, requires that no one be convicted and punished without fair trial. But fair trial requires, among other things,

that the accused be able to understand the proceedings and answer the charge. This is impossible for someone mentally disordered.

Sections 543, 544 and 545 of the *Criminal Code* deal with this problem in detail and basically require a court that finds an accused unfit to plead, not to try him, but to order him to be detained at the lieutenant governor's pleasure. Clause 3(5) roughly continues present law but leaves matters of procedure to the forthcoming Code of Criminal Procedure.

3(6) Mental Disorder. No one is liable for his conduct if, through disease or defect of the mind, he was at the time incapable of appreciating the nature, consequences or legal wrongfulness of such conduct [or believed what he was doing was morally right].

Comment

Those not in their right mind and therefore not responsible for their actions should not be punished. Insanity, therefore, has long been recognized as a defence at common law. What counted as insanity was spelled out in the M'Naughten Rules in 1843.³² Those rules were largely reproduced in section 16 of the *Criminal Code*.

That section does four things. It provides a general rule against convicting the insane. It gives a definition of insanity. It has a special rule about insane delusions. Finally, it places the burden of proof on the person wishing to prove insanity.

Clause 3(6) largely follows section 16 of the *Criminal Code* except in three aspects. It has nothing corresponding to the insane delusion provision, a provision seldom applied but frequently criticized because as Maudsley pointed out "it compels the lunatic to be reasonable in his unreason, sane in his insanity"³³ and because the idea of partial insanity is not in accordance with modern medical opinion. It says nothing about presumptions of sanity or burden of proof, but leaves this, along with other evidential matters, to evidence provisions. Finally, while keeping the definition of "insanity" contained in section 16, it replaces that word by "mental disorder," a term more in line with modern medical and social attitudes.

A minority of the Commissioners wished to add the words which are in brackets. To them it seemed that although in general a person cannot be allowed to substitute his views of right and wrong for those contained in the law, nevertheless a mentally disordered person who acts as he does because he thinks it morally right to do so, merits treatment rather than punishment. The words in brackets were drafted to allow for this but at the same time to prevent exemption for the psychopath, who acts as he does not because he thinks it right to do so, but rather because he is indifferent to right and wrong.

32. In Glanville Williams, *Criminal Law — The General Part*, 2d ed. (London: Stevens and Sons, 1961) at 441-42.

33. *Ibid.* at 504.

Justifications and Excuses

Comment

A person committing the conduct with the culpability requisite for a crime may still escape liability on account of special circumstances excusing or justifying his behaviour. They justify it when it is right for him or anyone else in those same circumstances to act that way. They excuse it when, though the act itself is wrong, he should not be censured or convicted for doing it on account of special pressures liable to make any other ordinary person do the very same. As has been pointed out, justifications and excuses overlap and one and the same defence, for example necessity, may operate now as an excuse, now as a justification.³⁴ For this reason, no attempt has been made to categorize each defence as either one or the other.

Many of these defences are based on the principle that it is right, when necessary, to choose the lesser of two evils. Some of them, for example duress, self-defence and advancement of law, are simply specific instances of that principle. Then there is the residual defence of necessity to deal with cases not covered by specific provisions. Most of them are contained in the present *Criminal Code*. Some, for example necessity, are presently left to case-law. However, all currently recognized substantive defences are included in this Code for the sake of completeness.

3(7) Mistake or Ignorance of Law. No one is liable for a crime committed by reason of mistake or ignorance of law:

- (a) concerning private rights relevant to that crime; or**
- (b) reasonably resulting from**
 - (i) non-publication of the law in question,**
 - (ii) reliance on a decision of a court of appeal in the province having jurisdiction over the crime charged, or**
 - (iii) reliance on competent administrative authority.**

Comment

Mistake of law in general is no defence. This is the position at common law, under section 19 of the *Criminal Code* and under clause 3(7) of this Code. It is up to the citizen to find out what the law is and comply with it.

On the other hand no one can fairly be punished for breaking a law which he has no reasonable chance of ascertaining. For this reason present law has created two exceptions to the general rule. Ignorance of law owing to non-publication of regulations is a defence.³⁵ Mistake of law resulting from officially induced error may also be a defence.³⁶

34. Eric Colvin, *Principles of Criminal Law* (Toronto: Carswell, 1986) at 178-79.

35. See *Statutory Instruments Act*, S.C. 1970-71-72, c. 38, s. 11(2).

36. See *R. v. MacDougall* (1982), [1982] 2 S.C.R. 605.

Clause 3(7)(b) codifies these two exceptions, extending one of them and adding another. It extends the first exception to non-publication of any law. It adds an exception in the case of mistake resulting from reliance on the law as stated by the court of appeal in the province where the charge is tried. No one can reasonably be expected to be wiser than the highest court in his jurisdiction; rather he is entitled to assume the law is what that court says it is until the Supreme Court of Canada states otherwise.

In addition there are certain crimes, such as theft and fraud, where honest but erroneous belief in a claim of right negates criminal liability. Insofar as such belief is based on error of law, mistake of law will operate as a defence. This is the position under present law and also under clause 3(7)(a) of this Code.

Clause 3(7)(b) then provides three exceptions to the general rule, but all three relate solely to mistakes *reasonably* resulting from the factors specified.

3(8) Duress. No one is liable for committing a crime in reasonable response to threats of immediate serious harm to himself or another person unless he himself purposely causes the death of, or seriously harms, another person.

Comment

One's duty to obey the law may conflict with pressure stemming from the threats of others. Where the pressure is great and the breach of duty relatively small, the breach becomes unfit for punishment. This is the thrust of the criminal law defence of duress.

The defence of duress is presently contained partly in section 17 of the *Criminal Code* and partly in the common law. According to the case-law, the section concerns the position of the actual committer; the common law that of other parties.³⁷ Section 17 allows the defence only where there is a threat of immediate death or bodily harm from a person present, where the accused is not a party to a conspiracy subjecting him to the duress and where the crime committed is not one of those listed in the section. The common law is less strict and detailed, does not require the threatener to be present, has no rule on conspiracy and excludes duress only in the case of murder by an actual committer.

Clause 3(8) simplifies and modifies the law in four ways. First, it specifies that the accused's response to the threat must be reasonable. Second, it provides the same rule for all parties. Third, it drops the need for the threatener's presence at the crime and the accused's absence from a conspiracy, on the ground that both are factors going ultimately to the reasonableness or otherwise of the accused's response. Finally, it abandons the *ad hoc* list of excluded crimes and replaces it with a general exclusion for an accused who himself purposely kills or seriously harms another person, the principle being that no one may put his own well-being before the life and bodily integrity of another innocent person.

37. See *Paquette v. R.* (1976), [1977] 2 S.C.R. 189.

3(9) Necessity.

(a) General Rule. No one is liable if:

- (i) he acted to avoid immediate harm to the person or immediate serious damage to property;**
- (ii) such harm or damage substantially outweighed the harm or damage resulting from that crime; and**
- (iii) such harm or damage could not effectively have been avoided by any lesser means.**

(b) Exception. This clause does not apply to anyone who himself purposely causes the death of, or seriously harms, another person.

Comment:

The duty to obey the law may conflict with pressure stemming from natural forces or from some other source not covered by the more specific defences known to law. Such cases may be covered by the residual defence of necessity. Though not included in the present *Criminal Code*, it is well recognized by case-law and has been clarified by the Supreme Court of Canada.³⁸ For the sake of comprehensiveness, clause 3(9) incorporates and codifies the rule laid down there.

The application of the defence in any given case involves a judgement call. The trier of fact must consider whether the harm to be avoided was immediate; necessity relates only to emergencies. He must decide whether the harm avoided substantially outweighed the harm done, once again a matter for assessment.

At common law it was clear that necessity was no defence to murder. This Code replaces that restriction with a more general one parallel to that used in duress and based on the same principle. The defence will not therefore avail one who himself purposely causes the death of, or seriously harms, another person.

3(10) Defence of the Person.

(a) General Rule. No one is liable if he acted as he did to protect himself or another person against unlawful force by using such force as was reasonably necessary to avoid the harm or hurt apprehended.

(b) Exception: Law Enforcement. This clause does not apply to anyone who uses force against a person reasonably identifiable as a peace officer executing a warrant of arrest or anyone present acting under his authority.

38. See *Perka*, *supra*, note 16.

Comment

The paramount value set on life and bodily integrity underlies both the prohibitions against crimes of violence and many of the defences in this chapter, specially that of defence of the person. The present law is contained in sections 34 to 37 and subsection 215(4) of the *Criminal Code* in somewhat complex fashion. Section 34 rules out force meant to kill or cause bodily harm; sections 35 and 36 restrict the amount of force permissible to an aggressor in self-defence; section 37 states the general rule allowing unlawful force to be repelled by necessary proportionate force; and subsection 215(4) restricts the right of self-defence against illegal arrest.

Clause 3(10) roughly retains the law but sets it out more simply in one rule with one exception. Clause 3(10)(a) articulates the right to use reasonably necessary force against unlawful force. It provides an objective test and restricts the defence to resisting unlawful force. It does not cover, therefore, resisting lawful force such as lawful arrest or justifiable measures of self-defence. It also omits details about force intended to cause death and about self-defence by an aggressor since these relate really to the question whether the force used is reasonably necessary. On the other hand it does cover force used to protect anyone and not just force used to protect the accused himself or those under his protection.

The exception relates to self-defence against unlawful force used in law enforcement. Clause 3(10)(b) excludes force altogether against arrest made in good faith but in fact under a defective warrant by a person who is clearly a peace officer. The policy is to restrict violence, to render it as far as possible a State monopoly and to make the arrestee submit at the time and have the matter sorted out later by authority.

3(11) Protection of Movable Property. No one in peaceable possession of movable property is liable for using such force, not amounting to purposely causing the death of, or seriously harming, as is reasonably necessary to prevent another person from unlawfully taking it or to recover it from another person who has just unlawfully taken it.

Comment

A society recognizing a right to property must allow protection of that right. This is provided in sections 38 and 39 of the *Criminal Code*. Subsection 38(1) provides that peaceable possessors may defend their property against trespassers. Subsection 38(2) provides that a trespasser resisting a peaceable possessor commits an assault. Section 39 provides that a peaceable possessor with a claim of right may defend the property even against a person lawfully entitled to it.

Clause 3(11) retains but simplifies the present law. It allows a peaceable possessor (including one who has just lost possession), whether or not with a claim of right, to defend his property by reasonable force against anyone trying to take it unlawfully. Any force used against the peaceable possessor by the latter will not be lawful, and will therefore automatically qualify as an assault. Thus the special provision contained in subsection 38(2) of the *Criminal Code* is neither necessary nor desirable; offences should not be defined in defence provisions. Insofar as clause 3(11) extends the defence

of protection to peaceable possessors without claim of right, it is based on the policy of restricting the use of force to change the *status quo* and of compelling non-possessors to look to authority rather than to use self-help.

The exclusion of force amounting to purposely causing the death of, or seriously harming, is not found in the provision on defence of the person; it reflects the higher value set on persons than on property.

“Peaceable possession” is left undefined under the new Code as under the present *Criminal Code*. It means possession in circumstances unlikely to lead to violence resulting in personal injury or property damage.

3(12) Protection of Immovable Property.

- (a) **General Rule.** No one in peaceable possession of immovable property is liable for using such force, not amounting to purposely causing the death of, or seriously harming, as is reasonably necessary to prevent trespass, to remove a trespasser or to defend the property against another person unlawfully taking possession of it.
- (b) **Exception.** This clause does not apply to a peaceable possessor without a claim of right who uses force against a person who he knows is legally entitled to possession and who enters peaceably to take possession of that property.

Comment

Land and buildings differ from goods and chattels in that the occupier's right can be seriously infringed by mere trespass; trespass to goods is rarely harmful in itself. For this reason slightly different rules are needed for their protection. These are presently contained in sections 40 to 42 of the *Criminal Code*. Section 40 gives a right of defence of a dwelling-house against forcible break-in or entry; section 41 gives a right of protection of real property against trespass and makes the trespasser's resistance an assault; and section 42 gives a right to a person entitled to real property to enter peaceably by day.

Clause 3(12) simplifies the law as follows. First, it provides one rule for all immovable property; the fact that the property is a dwelling-house may affect the degree of force that can reasonably be used. Second, it uses the term “immovable” as the logical contrast to “movable”; “real” contrasts not with “movable” but with “personal.” Third, like clause 3(11) and for the same reasons, clause 3(12) avoids categorizing resistance as assault. Fourth, it disentitles a peaceable possessor without claim of right from using force against a non-possessor lawfully entitled to possession and entering peaceably to take possession.

3(13) Protection of Persons Acting under Legal Authority.

- (a) **General Rule.** No one is liable for performing an act required or authorized by or under federal or provincial statute or for using such force, short of force meant to cause death or serious harm to another

person, as is reasonably necessary to do so and as is reasonable in the circumstances;

- (b) **Force Used by Peace Officers.** No peace officer is liable for using such force as is reasonably necessary and as is reasonable in the circumstances to arrest, recapture or prevent the escape of a suspect or offender.

Comment

Clearly, a person would be put in an impossible position if one provision of law (federal or provincial)³⁹ required him to do something while another forbade him to do it. To avoid such an eventuality the present law in subsection 25(1) of the *Criminal Code* states the general rule that anyone required or authorized by law to do anything in the administration or enforcement of the law is justified, if he acts on reasonable and probable grounds, in doing what he is required or authorized to do and in using as much force as is necessary for that purpose. Subsection 25(2) protects people in good faith executing a process or carrying out a sentence which is in fact defective. Subsections 25(3) and 25(4) limit the degree of force permissible; force intended or likely to cause death or grievous bodily harm is ruled out except when necessary for protection of the person or to effect arrest for an offence for which a person may be arrested without warrant. Section 27 allows force to be used to prevent offences. Sections 28, 29, 31, 449 and 450 deal with arrest, section 30 with preventing breach of the peace, and sections 32 and 33 with suppression of riots.

Clause 3(13) retains but simplifies present law. It breaks it down into a general rule provided in clause 3(13)(a) corresponding to subsection 25(1) and an exception concerning force provided by clause 3(13)(b) corresponding to subsections 25(3) and 25(4).

The general rule has two parts. The first relates to acts required or authorized by or under statute, that is, acts required or authorized by a statute itself or by valid subordinate legislation. These only include acts specifically required or authorized and not acts falling only under a blanket authorization such as that given to police officers to investigate crime: a police officer cannot arrest people, seize property or enter private houses simply because these acts are ways of investigating crime — he needs authority under some specific provision to do so.⁴⁰ All such provisions, for example powers of arrest, will be found in the Code of Criminal Procedure or elsewhere and are therefore not included here. For that reason the provisions in sections 27 to 31, 449 and 450 are omitted from this chapter.

The second part of the general rule relates to force. Force may lawfully be used to do an act required or authorized by law if two conditions are fulfilled. First, the force must be no more than is necessary to perform the act. So, for example, force cannot be used in the seizure of stolen goods if such seizure could have been effected without force at all. Second, the force must be reasonable in the circumstances. Deadly force can never be used to seize stolen property even though it might be necessary for the

39. See *R. v. Coyne* (1958), 124 C.C.C. 176 (N.B.S.C.A.D.).

40. See *R. v. O'Donnell*, *R. v. Cluett* (1982), 3 C.C.C. (3d) 333 (N.S.C.A.).

effecting of such seizure. The amount of force that is reasonable in the circumstances requires a judgement call and the person using force will be judged on the circumstances as he perceived them.

Clause 3(13)(b) relates to the privilege given by the present *Criminal Code* to peace officers for certain purposes to use force intended or likely to cause death or grievous bodily harm. Under the present *Criminal Code*, such force can only be used in two cases. It can be used by *anyone* believing it on reasonable and probable grounds to be necessary for the purpose of preserving himself or anyone under his protection from death or grievous bodily harm: subsection 25(3). It can also be used by a *peace officer* when reasonably necessary for the lawful arrest of anyone for an offence for which he may be arrested without warrant: subsection 25(4).

Under the proposed Code, the first exception is retained in clause 3(10), "Defence of the Person." The second exception is preserved in clause 3(13)(b) for peace officers but subject to the same principles as in the general rule — the force must be the minimum necessary and must be reasonable in the circumstances.

3(14) Authority over Children. No one is liable who, being a parent, foster-parent or guardian or having the express permission of such a person, touches, hurts, threatens to hurt or confines a person under eighteen years of age in his custody in the reasonable exercise of authority over such person.

[Alternative — A minority of Commissioners would not provide for such a defence.]

Comment

Section 43 of the *Criminal Code* justifies use of reasonable force by every schoolteacher, parent or person standing in a parent's position by way of correction towards a pupil or child under his care. Section 44 of the *Criminal Code* justifies use of reasonable force by the master of a ship to maintain good order and discipline.

The new Code abandons the provisions regarding both teachers and masters of ships. Teachers may only use force if given express permission by parents so to do. In addition, they may in appropriate cases rely on a defence of necessity (clause 3(9)). Ship captains also, in appropriate cases, may rely on necessity and even perhaps on law enforcement (clause 3(13)(a)).

As for parents, the Commission was divided. A minority felt that clause 3(14) blunts the general message of the criminal law on force, and singles out children as not meriting full personal security and equal legal protection. The majority felt that such a provision should be retained to prevent the intrusion of law enforcement into the privacy of the home for every trivial slap or spanking.

3(15) Superior Orders. No one bound by military law is liable for anything done out of obedience to his superior officer's orders unless those orders are manifestly unlawful.

Comment

Military personnel can be put in a specially difficult position. On the one hand, their superior may order them to do a certain act, while on the other hand, the criminal law may forbid it. If they do the act, they may commit a crime and incur criminal liability. If they do not, they may be liable for disobeying the lawful command of their superior, an offence punishable under section 73 of the *National Defence Act*⁴¹ with up to life imprisonment.

The present legal position is uncertain. Subsection 32(2) of the *Criminal Code* justifies those bound by military law in obeying the command of their superior for suppression of a riot unless the order is manifestly unlawful. Apart from this, the *Criminal Code* leaves the matter to common law in which there are few precedents.

Clause 3(15) widens subsection 32(2) of the *Criminal Code* to cover obedience to all orders not manifestly unlawful. Whether an order is manifestly unlawful will often involve questions of fact as well as law, and the individual soldier's perception of the facts will usually be much influenced by the issue of the order itself. But this will have to be decided in each situation on a case-by-case basis.

3(16) Lawful Assistance. No one is liable who helps, advises, encourages, urges or incites another person, or acts under the authority or on behalf of another person, if that other person has a defence under clauses 3(1) or 3(8) to 3(15).

Comment

Under present law, sections 34 to 45 on defence of person, defence of property and protection of persons in authority provide separately that anyone lawfully assisting a person acting under the section in question shall also enjoy the benefit of the section. To avoid repetition the new Code replaces these individual provisions by a general rule applying to everyone the analogous defences in clauses 3(1) or 3(8) to 3(15). This general rule, which was outlined in Working Paper 29, *The General Part: Liability and Defences*, covers the possibilities listed in clause 3(16) including the situation of one acting under the authority of, and acting on behalf of, another person with certain defences. It covers both the committer and the furtherer and attempted furtherer by reason of the fact that furthering and attempted furthering are defined as crimes. This defence of course is not available to those who, under colour of helping another with one of the listed defences, in fact further their own wrongful purposes. A court would have no difficulty in finding that such persons were not really helping because of their bad faith.

3(17) Mistaken Belief as to Defence.

(a) General Rule. No one is liable if on the facts as he believed them he would have had a defence under clauses 3(1) or 3(8) to 3(16).

41. *National Defence Act*, R.S.C. 1970, c. N-4.

- (b) **Exception.** This clause does not apply where the accused is charged with a crime that can be committed through negligence and the mistaken belief arose through his negligence.

Comment

Generally, people should be judged on the facts as they perceive them. Where they are mistaken as to facts relevant to the culpability requirement, this result follows from the present law on *mens rea*, reproduced in clause 3(2)(a) ("Mistake of Fact"). Where they are mistaken as to facts grounding an excuse or justification, the present law is unclear; but perhaps mistake as to the former will suffice if genuine, and mistake as to the latter, only if reasonable.⁴² If so the law is oddly inconsistent. On the one hand, justification is a more powerful plea than excuse because it claims that what was done was not just excusable but in fact right. On the other hand, mistaken belief in a justification seems less powerful than belief in an excuse because the mistake must not only be genuine but also reasonable.

Accordingly, clause 3(17) provides that in general a mistaken belief in circumstances grounding a defence negates liability. This will be so whether the defence is a justification, an excuse or some other defence specifically provided by the Special Part or by the statute creating the crime. It will also be so, by virtue of clause 3(13)(a), with mistaken belief in facts giving rise to a legal duty or entitlement to act.

It is to be noted that clause 3(17) applies to clause 3(16). A person helping or acting on behalf of another may mistakenly think that that other has a defence under one of the clauses listed. Such a person has no defence himself under clause 3(16) because the other has none of the requisite defences. But judged on the facts as he believed them he would have a defence himself under clause 3(17).

Where the mistake arises through the accused's criminal negligence and the offence charged is one that can be committed by criminal negligence, then under clause 3(17)(b) he can be convicted of negligent commission of that crime. To this extent an unreasonable belief is no defence. In this respect, clause 3(17)(b) is similar to clause 3(2)(b).

Chapter 4: Involvement in Crime

Comment

When a crime is committed, liability should attach not only to the person actually committing it, but also to secondary offenders who help or encourage its commission, or who try to commit it or get others to commit it. Present law, therefore, has rules imposing liability on: (1) parties to offences; and (2) those committing inchoate offences. Parties incur derivative liability, that is, liability deriving from that of the actual committer. Inchoate offenders essentially (for the rules on conspiracy provide an exception) incur original liability, that is, liability incurred solely on account of what they do themselves.

42. See Colvin, *supra*, note 34 at 167.

The new scheme in Chapter 4 attempts to unify this area of law. It imposes original liability on committers, other parties and inchoate offenders. It therefore makes secondary offenders basically liable for what they do themselves, subject to one exception concerning conspiracy (see clauses 4(5) and 4(6)). It thus provides a mini-Code regarding secondary liability and criminal involvement.

The scheme is as follows. First, involvement is divided into involvement in complete crimes and involvement in incomplete crimes. Second, except in the case of conspiracy, under each heading a distinction is drawn between the prime mover and others: in complete crimes between committing and furthering, for example by helping; and in incomplete crimes between attempting to commit and attempted furthering, for example by trying to help. Third, there are supplementary rules about alternative convictions and related matters.

Involvement in Complete Crimes

Comment

Present law is contained in sections 21 and 22 of the *Criminal Code*. Section 21 defines a party to an offence as a person who: (a) actually commits it, (b) aids another to commit it, or (c) abets another to commit it. Section 22 qualifies as a party to an offence a person who counsels another to be a party to it. But curiously, in the Special Part of the *Criminal Code*, liability is explicitly imposed only on those committing offences.

Under the new Code the position is clearer. Clauses 4(1) and 4(2) divide involvement in complete crimes into committing and furthering. Committers will of course be liable by virtue of the crime-creating provisions in the Special Part. Furtherers will be explicitly liable by virtue of the provision in clause 4(2).

4(1) Committing. A crime may be committed:

- (a) **solely, where the committer is the only person doing the conduct defined as that crime; or**
- (b) **jointly, where the committer and another person (or other persons) together do the conduct so defined.**

Comment

Clause 4(1) articulates the different ways known to common law (not expressed in the *Criminal Code*) of actually committing a crime. A crime is committed by two (or more) people jointly when both do the *actus reus* together (for example D1 and D2 together beat up V) or where one does one part of it and the other another part (for example D1 and D2 rob V, D1 holding the gun on him while D2 takes the money from his pocket). Contrast the case of helping where the helper does no part of the act defined as a crime, but leaves this entirely to the committer. No special provision is made regarding crimes committed through an innocent agent (for example where D

gets X, a person under twelve, to steal for him or D gets Y unknowingly to give V a poisoned drink). Under the new Code, such situations are covered by clause 4(2) which provides that a person who urges, incites or uses another to commit a crime is guilty of furthering, even though the doer of the wrongful act has no culpability and thus no liability.

- 4(2) Furthering. Everyone is liable for furthering a crime and is subject to the penalty for it if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that person completely performs the conduct specified by its definition.**

Comment

As already mentioned, present law on parties is contained in sections 21 and 22 of the *Criminal Code*. In addition, certain other sections prohibit specific kinds of furthering (for example section 402, assisting cruelty to animals). But the *Criminal Code* is silent as to the *mens rea* required for aiding or abetting.

Clause 4(2) provides one rule to cover all types of furthering crimes that are completed, but spells out the different ways of furthering. Like section 21 of the *Criminal Code*, it makes furtherers all liable to the same penalty as the committer on the basis that a secondary party may often be as culpable as the actual committer and sometimes more so.

Furtherers, of course, like those who commit more specific crimes, will benefit from all the defences in the General Part. When D helps X to administer poison to Y, D will not be liable for furthering if he is unaware that the poison is in fact poison. Then D has a defence of mistake of fact applying to D himself.

In addition furtherers will also benefit from certain defences enjoyed by the actual committer. Where D helps X to reasonably resist an attack on him by Y, X has a defence of self-defence and commits no crime. This follows from clause 3(16). It follows that D cannot be liable for furthering a crime.

Sometimes, however, a furtherer will not benefit from a defence available to the committer. Where the committer labours under a mistake of fact such as to prevent him having the requisite culpability for the crime or such as to lead him to think his act is justified, the liability of the furtherer will depend, not on whether the committer was mistaken, but on whether he himself knew the true facts. D incites X to administer poison to Y, X is unaware that the poison is poison but D is aware of this fact; X is not liable for murder or causing harm, as the case may be, but D is liable. X has a defence of mistake of fact and is to be judged on the facts as he imagined them to be. D has no such defence and is to be judged on the facts as he knew them to be. The same principle applies where X has a defence like that of immaturity. In all these cases, D can be said to be using X. At common law D would be said to commit the crime through X as an innocent agent. The use in clause 4(2) of the term "uses" makes a special "innocent agent" rule unnecessary.

By virtue of clause 2(4)(d), the culpability required is purpose; the furtherer must act for the purpose of having the crime in question committed. As to the problem

arising when the committer commits a different crime from the one intended to be furthered, clause 4(6) deals with the "common purpose" rule set out in subsection 21(2) of the *Criminal Code*.

Involvement in Incomplete Crimes

Comment

Present law is contained in the *Criminal Code* provisions on the three inchoate offences: attempt, counselling and conspiracy. Clauses 4(3) and 4(4) replace these with a more unified approach relating to furthering. Just as involvement in complete crimes is divided into committing and furthering (for example by helping), so involvement in incomplete crimes is divided into attempting and attempted furthering (for example by helping a person to commit a crime which is not ultimately committed). Involvement in incomplete crimes, therefore, runs parallel to involvement in complete crimes instead of being treated quite separately.

4(3) Attempt. Everyone is liable for attempt who, going beyond mere preparation, attempts to commit a crime, and is subject to half the penalty for it.

Comment

The present law on attempt is contained in sections 24, 421 and 587 of the *Criminal Code*. There are also numerous specific attempt provisions (for example section 222, attempted murder and subsection 326(1), attempted utterance of forged document). There is also much case-law on the *actus reus* and *mens rea* of attempt.⁴³

Clause 4(3) replaces the above sections by one general rule. It gives no definition of the physical element except to state that the attempt must go beyond mere preparation. This is because nothing more can be done than give synonyms such as "try" and "endeavour" which are likewise unanalysable. As for the question: When does the accused get beyond mere preparation? (the real problem about the *actus reus* of attempt), there is no way of formulating any satisfactory answer, as is clear from the inadequacy of each of the tests known to the law. Ultimately the trier of fact faces a judgement call in each particular case.

Unlike section 421 of the *Criminal Code*, clause 4(3) provides one penalty for attempt, and fixes it at half that for the full offence on two grounds. First, the main deterrence and stigma for a crime are contained in the penalty for its actual commission, and not in the penalty for attempt. Second, an attempter creates less actual harm than a successful committer. Finally, clause 4(3) makes unnecessary any specific attempt provisions in the new Code. In the cases where a crime would be punishable by life imprisonment, the length of sentence would have to be established by a specific rule.

43. On *actus reus* see LRCC, *Secondary Liability: Participation in Crime and Inchoate Offences* (Working Paper 45) (Ottawa: LRCC, 1985). On *mens rea* see *Lajoie v. R.* (1973), [1974] S.C.R. 399; *R. v. Ancio* (1984), [1984] 1 S.C.R. 225.

- 4(4) Attempted Furthering.** Everyone is liable for attempted furthering of a crime and is subject to half the penalty for that crime if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that other person does not completely perform the conduct specified by its definition.

Comment

Present law relates only to counselling. This is dealt with by section 422 of the *Criminal Code*. There are also various specific procuring provisions, for example paragraph 76(d) (procuring piratical acts).

Clause 4(4) makes attempted furthering parallel to furthering (clause 4(2)). Again, clause 4(4) spells out the different ways of attempted furthering. The penalty for attempted furthering is the same as for attempt, just as the penalty for furthering is the same as for committing. Attempted furtherers, like furtherers, will benefit from all the defences in the General Part and also from certain defences enjoyed by the committer. (See comment on clause 4(2) above.)

Finally, the inclusion of "helps" is new. Under present law, liability arises for aiding and counselling another to commit a crime which he actually commits, for counselling another to commit a crime which he does not commit, but not for aiding a person to commit a crime which he does not commit. Clause 4(4) closes this gap in present law.

- 4(5) Conspiracy.** Everyone is liable for conspiracy who agrees with another person to commit a crime and is subject to half the penalty for it.

Comment

The law on conspiracy is principally contained in section 423 of the *Criminal Code*. There are also three specific provisions: section 46 (treason), and subsections 60(3) (sedition) and 424(1) (restraint of trade). There are also specific sections in other federal statutes. Basically conspiracy consists of any agreement between two or more persons to commit an offence.

Clause 4(5) roughly retains but simplifies the law. It replaces the various provisions contained in section 423 and the other sections of the *Criminal Code* by one single rule. It restricts conspiracy to agreements to commit *crimes*, on the ground that the *Criminal Code* should control the ambit of the crimes within it, that criminal law in this as in all other contexts should be, as far as possible, uniform across Canada and that if an act does not merit criminalization, then neither does an agreement to do it.

A conspirator who goes further than agreement may become liable, of course, for committing or furthering, or for attempting or attempted furthering as the case may be.

4(6) Different Crime Committed from That Furthered.

- (a) **General Rule.** No one is liable for furthering or attempting to further any crime which is different from the crime he meant to further.
- (b) **Exception.** Clause 4(6)(a) does not apply where the crime differs only as to the victim's identity or the degree of harm or damage involved.
- (c) **Qualification.** A person who agrees with another person to commit a crime and who also otherwise furthers it, is liable not only for the crime he agrees to commit and intends to further, but also for any crime which he knows is a probable consequence of such agreement or furthering.

Comment

Present law is contained in subsections 21(2) and 22(2) of the *Criminal Code*. Subsection 21(2) makes parties having a common intention liable for any offence committed by one of them which they knew or ought to have known would be a probable consequence of carrying out that common purpose. Subsection 22(2) provides an analogous rule for counsellors.

Clause 4(6) changes the law to some extent. Clause 4(6)(a) sets out the general rule that a furtherer is liable only for furthering the crime he intends to further. This is subject to two qualifications. First, clause 4(6)(b) itself provides that where the crime committed differs from that intended only as regards the victim's identity or the degree of harm, the general rule does not apply. Second, clause 4(6)(c) incorporates a "common purpose" rule analogous to that in subsection 21(2) of the *Criminal Code*, but restricts liability to crimes which the furtherer actually *knows* to be probable consequences of the agreement or furthering. It does so on the basis that negligence has no place in this context.

4(7) Alternative Convictions.

- (a) **Committing.** Everyone charged with committing a crime may, on appropriate evidence, be convicted of furthering it, of attempting to commit it or of attempted furthering of it.
- (b) **Furthering.** Everyone charged with furthering a crime may, on appropriate evidence, be convicted of committing it, of attempting to commit it or of attempted furthering of it.
- (c) **Attempting.** Everyone charged with attempting to commit a crime may, on appropriate evidence, be convicted of attempted furthering of it, and, where the evidence shows that he committed or furthered it, may nevertheless be convicted of attempting to commit it.
- (d) **Attempted Furthering.** Everyone charged with attempted furthering of a crime may, on appropriate evidence, be convicted of attempting

to commit it, and, where the evidence shows that he committed or furthered it, may nevertheless be convicted of attempted furthering of it.

(e) Unclear Cases.

- (i) Where two or more persons are involved in committing a crime but it is unclear which of them committed it and which of them furthered it, all may be convicted of furthering.
- (ii) Where two or more persons are involved in attempting to commit a crime but it is unclear which of them attempted to commit it and which of them attempted to further it, all may be convicted of attempted furthering.

Comment

A person charged with committing a crime may turn out only to have helped its commission and vice versa. Likewise one charged with committing may turn out only to have attempted to commit it and vice versa. Clause 4(7) provides rules for these problems.

Present law needs no rule as to committers and helpers since all count equally as parties. It does provide rules in sections 587 and 588 about inchoate offences. Where a complete offence is charged but only an attempt is proved, there may be conviction for attempt as an included offence (section 587); where an attempt is charged but the complete offence is proved, there may be conviction for the full offence (section 588).

Clause 4(7) provides five rules. The first four deal with the four possibilities, namely, committing, furthering, attempting and attempted furthering. Whichever is charged, the evidence may show that one of the other three in fact obtained. In the case of committing and furthering, clauses 4(7)(a) and 4(7)(b) allow for the appropriate conviction. In the case of attempting and attempted furthering, it would be unfair to allow conviction for involvement in the complete offence carrying the full penalty of an accused charged only with involvement in an incomplete offence carrying a half penalty. Accordingly, where the evidence shows the offence to be complete, clauses 4(7)(c) and 4(7)(d) allow conviction, nevertheless, for involvement in an incomplete offence. Clause 4(7)(e) provides for situations where it is clear that all of the accused were involved, but it is unclear who had primary involvement.

Nothing is said here on abandonment or on attempting the impossible. As for the former, though a defence of abandonment could acknowledge reduced culpability on the part of the accused and could provide incentives to desist from further involvement, there are counter-arguments. First, abandonment may often result less from genuine change of heart than from awareness that police are watching. Second, even where this is not so, reduced culpability is not the same as complete innocence. For these reasons, abandonment is best left to be dealt with as a mitigating factor going to sentence.

As for attempting the impossible, no special provision is necessary. Where the offence attempted is impossible because the facts are other than imagined by the attempter, his error does not decrease his culpability or dangerousness. If D tries to kill V, who is, unknown to him, already dead, he is surely as blameworthy and as much a

social menace as one who tries to kill a living victim and should accordingly be liable for attempted murder; D should be judged (analogously with the defence of mistake of fact) not on the facts as they are, but as he wrongly thinks them to be. Where the offence attempted is impossible because the law is other than imagined, then no crime has been attempted. If D tries to buy contraceptives, wrongly believing that this is (as it once was) an offence against the *Criminal Code*, he is attempting to do something which in law is not a crime and which, therefore, should incur no liability; D should be judged (analogously with the defence of mistake of law) on the law as it is, not as he erroneously thinks it to be. Attempting the impossible, then, can be adequately dealt with by the proposed Code provisions.

Chapter 5: Territorial Jurisdiction

5(1) General Rule. Subject to clause 5(2), no person shall be convicted in Canada for a crime committed wholly outside Canada.

5(2) Jurisdiction Rules. Subject to diplomatic and other immunity under the law, the Code applies to, and the Canadian courts have jurisdiction over:

- (a) crimes committed wholly inside Canada (including on Canadian ships and aircraft);
- (b) crimes where one of the elements (including the direct resulting harm or damage) occurs in Canada and that element establishes a real and substantial link with Canada;
- (c) conduct engaged in outside Canada which constitutes either
 - (i) a conspiracy to commit a crime in Canada,
 - (ii) attempting to commit a crime in Canada, or
 - (iii) furthering or attempting to further a crime in Canada,
 where the conduct took place on the high seas or in a State where the crime in question is also a crime in that State;
- (d) conduct engaged in inside Canada which constitutes either
 - (i) a conspiracy to commit a crime outside Canada,
 - (ii) attempting to commit a crime outside Canada, or
 - (iii) furthering or attempting to further the commission of a crime outside Canada,
 if the crime in question is a crime both in Canada and in the place where the crime is to be committed;
- (e) crimes committed in "special zones" in which Canada has sovereign rights and either the offender or the victim is present in such zone for the purpose of engaging in an activity over which Canadian sovereign rights extend, this rule being applicable to crimes committed
 - (i) within a fishing zone or exclusive economic zone of Canada,

- (ii) on, under or within a distance to be determined by regulation of any artificial island, installation or structure
 - (A) in a fishing zone or exclusive economic zone of Canada, or
 - (B) on or over the continental shelf of Canada, or
 - (C) (other than a ship of non-Canadian registry) under the administration and control of the Government of Canada;
- (f) crimes against State security committed outside Canada by Canadian citizens and others who benefit from the protection of Canada and, where the crime involves classified government information, by persons who were Canadian citizens or benefitted from the protection of Canada when such information was obtained;
- (g) crimes committed outside Canada where the crime in question is a crime both in Canada and in the place where it was committed by
 - (i) persons subject to the Code of Service Discipline under the *National Defence Act* when serving abroad,
 - (ii) Government of Canada employees serving abroad and members of their families forming part of their households who are Canadian citizens or who benefit from the protection of Canada, and
 - (iii) R.C.M.P. members serving abroad and members of their families forming part of their households who are Canadian citizens or who benefit from the protection of Canada;
- (h) crimes committed by those on board private ships or aircraft outside the territorial jurisdiction of any State and consisting of:
 - (i) crimes against personal safety and liberty of those on board other ships or aircraft;
 - (ii) theft, vandalism or arson of another ship or aircraft; or
 - (iii) theft, vandalism or arson of the property of those on board other ships or aircraft;
- (i) crimes committed outside Canada by anyone consisting of:
 - (i) theft of,
 - (ii) forgery of,
 - (iii) making false applications for,
 - (iv) possession of or use of when stolen or forged, or
 - (v) unauthorized use of
 Canadian passports or certificates of Canadian citizenship;
- (j) crimes committed outside Canada by anyone and consisting of:
 - (i) forgery of Canadian currency, and
 - (ii) using forged Canadian currency;
- (k) crimes committed outside Canada by Canadian citizens or by persons present in Canada after their commission and consisting of:

- (i) crimes against personal safety and liberty by means of nuclear material,
 - (ii) theft of nuclear material, or
 - (iii) vandalism or arson of, or by means of, nuclear material;
- (l) crimes against personal safety and liberty of internationally protected persons committed outside Canada by:
 - (i) Canadian citizens or persons present in Canada after their commission, and
 - (ii) anyone if the victim was exercising functions on behalf of Canada;
- (m) kidnapping committed outside Canada where
 - (i) the alleged offender is a Canadian citizen, is a stateless person ordinarily resident in Canada, or is present in Canada after the commission of the offence,
 - (ii) the person kidnapped is a Canadian citizen, or
 - (iii) the crime is committed in order to influence the actions of the Government of Canada or a province;
- (n) crimes committed outside Canada by anyone consisting of crimes against personal safety and liberty of those on board an aircraft or ship or of interfering with transportation facilities consisting of an aircraft or ship where the aircraft or ship in question is
 - (i) a Canadian aircraft or ship, or an aircraft or ship leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence in Canada,
 - (ii) the aircraft or ship in question arrives in Canada with the alleged offender on board, or
 - (iii) the alleged offender is present in Canada after the commission of the offence.

Comment

Clause 5 sets out the rules on the extraterritorial jurisdiction of our courts in criminal matters. Clauses 5(1) and 5(2)(a) contain a general rule, in conformity with common law tradition and international law, giving our courts jurisdiction only over crimes committed wholly in Canada. Clauses 5(2)(b) to 5(2)(n) provide a number of exceptions to that rule and give our courts jurisdiction in some instances over crimes committed wholly or partly outside Canada. These exceptions are also based upon generally accepted principles of international law and subject to the various diplomatic and other legal immunities.

Clauses 5(2)(a) to 5(2)(d) reflect the *territorial* principle of international law which gives States jurisdiction over crimes committed wholly inside their territory and over

crimes committed partly inside it where material elements or direct harmful effects occur therein. Clause 5(2)(a) sets out the general rule that the Code applies to, and Canadian courts have jurisdiction over, crimes committed wholly inside Canada, Canadian ships and aircraft being considered extensions of Canadian territory. Clauses 5(2)(b), 5(2)(c) and 5(2)(d) apply to transnational offences — crimes committed partly inside and partly outside Canada. Clause 5(2)(b) consistently with the recent *Libman* decision of the Supreme Court of Canada⁴⁴ gives Canadian courts jurisdiction where an element of a crime occurs in Canada and establishes a real and substantial link with this country. Clauses 5(2)(c) and 5(2)(d) cover similar aspects of conduct outside Canada which constitutes conspiracy, attempt, furthering, or attempt to further a crime in Canada, and vice versa. Both rules are subject to a double criminality test: the crime in question must contravene the criminal law of Canada and of the State where the conduct is engaged in.

Clause 5(2)(e) extends the ambit of Canadian criminal law to activities occurring in a number of "special zones" which are strictly speaking outside Canadian territory but over which Canada has sovereign rights. For Canadian law to apply, either the offender or the victim must be present in the zone in connection with some activity over which Canadian sovereign rights extend. Under this rule, Canadian courts would have jurisdiction, for example, over an assault committed in a fishing zone by or against anyone in that zone connected with the fishing industry but not over an assault committed there by and against someone on board a foreign pleasure craft who is not there in connection with that industry.

Clauses 5(2)(f) and 5(2)(g) apply the active *nationality* principle of international law. Clause 5(2)(f) gives our courts jurisdiction over crimes against State security committed outside Canada by Canadian citizens or people benefitting from Canada's protection. Such crimes are contained in Chapter 26 of the proposed Code. Clause 5(2)(g) gives our courts jurisdiction over crimes committed outside Canada by certain categories of Canadians, such as government employees serving abroad and their families living with them.

Clause 5(2)(h) applies the *universal* principle of international law to crimes of piracy and to analogous crimes concerning aircraft. The present crime of piracy, which is defined in sections 75 and 76 of the *Criminal Code* but for which there are no jurisdictional provisions, consists of doing certain acts on the high seas and is triable as a universal crime by the courts of any State. The acts in question, which are set out in clause 5(2)(h), would all constitute ordinary crimes if committed in Canada. The amendment therefore gives our courts jurisdiction over such acts when committed outside the ordinary jurisdiction of any State.

Clauses 5(2)(i) and 5(2)(j) apply the *protective* principle of international law. Clause 5(2)(i) gives our courts jurisdiction over certain crimes involving Canadian passports and certificates of Canadian citizenship committed outside Canada by anybody. Clause 5(2)(j) does the same with certain crimes involving Canadian currency.

Clauses 5(2)(k) to 5(2)(n), which are not based upon any particular principle of international law, implement Canada's various treaty obligations to exercise criminal jurisdiction over various crimes with international ramifications. Clause 5(2)(k) replaces

44. *Libman v. R.* (1985), [1985] 2 S.C.R. 178 [hereinafter *Libman*].

subsection 6(1.6) of the *Criminal Code* which confers jurisdiction over certain crimes wherever committed involving nuclear material. These comprise theft, fraud, fraudulent concealment, false pretences, robbery, extortion and intimidation. Clause 5(2)(k) covers most of these by reference to theft, but adds vandalism, arson and crimes against personal safety and liberty. It should be noted that with such crimes and also with crimes referred to in clauses 5(2)(l), 5(2)(m) and 5(2)(n) the State in whose territory the crime was committed may well apply pursuant to treaties with Canada for extradition of the offender. In such a case it would be for the executive in Canada to decide whether to prosecute here or to comply following due procedures with such request.

Clause 5(2)(l) replaces subsection 6(1.2) of the *Criminal Code*, which deems certain crimes against internationally protected persons to have been committed in Canada if the committer is a Canadian citizen or is present in Canada after their commission. Clause 5(2)(l) simply confers extraterritorial jurisdiction, given such conditions, over crimes against personal safety and liberty committed against such persons.

Clause 5(2)(m) which deals with kidnapping, replaces subsection 6(1.3) of the *Criminal Code*. That subsection confers extraterritorial jurisdiction over certain crimes of hostage taking. Clause 5(2)(m) speaks instead in terms of kidnapping, defined in clause 9(2) as confining "another person, without that other's consent, for the purpose of making him or some other person do or refrain from doing some act." This covers hostage taking, therefore, and obviates the need for any other term.

Finally, clause 5(2)(n) deals in effect with hijacking and endangering aircraft and ships. These crimes are defined in relation to aircraft by sections 76.1 and 76.2 of the *Criminal Code* and extraterritorial jurisdiction over them is conferred by subsection 6(1.1). The acts covered by both crimes, however, constitute crimes against the personal safety and liberty of those on board aircraft or ships or the crime of interfering with transportation facilities defined by clause 10(9). It will be noted that the crime of interference defined by clause 10(9) is only committed when the interference causes risk of death or serious harm. Those types of hijacking in section 76.1 not forming specific crimes against safety or liberty will in fact be covered since they will all cause some risk of death or serious harm. Clause 5(2)(n), therefore, confers extraterritorial jurisdiction over these crimes given fulfilment of one of the three conditions listed. In addition, in the interests of principle and in the light of recent events at sea, it extends Canadian jurisdiction to hijacking of ships.

THE SPECIAL PART

The Special Part of the new Code divides crimes into five categories. These consist of crimes against:

- the person,
- property,
- the natural order,
- the social order, and
- the governmental order.

Each category is subdivided, where appropriate, by reference to the interests infringed. So crimes against the person are divided into:

- crimes against personal safety and liberty, and
- crimes against personal security and privacy.

Each subcategory is, where necessary, further subdivided. So, crimes against personal safety and liberty are divided into:

- crimes against life,
- crimes against bodily integrity,
- crimes against psychological integrity,
- crimes against personal liberty, and
- crimes causing danger.

In each of these further subcategories crimes are for the most part listed in ascending order of gravity. Thus, less serious crimes usually precede more serious ones which include them or build upon them. The basic crimes against life, for instance, are listed in order as negligent homicide, manslaughter and murder.

THE SPECIAL PART

TITLE II. Crimes against the Person

Part 1: Crimes against Personal Safety and Liberty

Chapter 6: Crimes against Life

Comment

The common law on homicide was relatively straightforward. Unlawful killing was murder if done with malice aforethought, manslaughter if done without. What counted as malice was worked out in detail over the centuries. In 1874 Stephen drafted

a mini-Code on homicide. This was later incorporated in the *English Draft Code* of 1879, which formed the model for the Canadian 1892 *Code*.⁴⁵

Based on the 1892 *Code*, the present *Criminal Code* now contains a complex network of sections on homicide. As to the crimes themselves: subsection 205(1) defines homicide; subsections 205(4), 205(5) and section 210, culpable and non-culpable homicide; sections 212 and 213, murder; section 217, manslaughter; sections 216 and 220, infanticide; section 221, child destruction; and section 222, attempted murder. Then, section 214 divides murder into first and second degree, while sections 218 and 669 to 672 deal with sentencing for murder. Section 219 provides the penalty for manslaughter. Sections 197 to 199 deal with duties and omissions; section 200, with child abandonment; sections 202 and 203, with causing death by criminal negligence; section 206, with the meaning of "human being"; sections 207 to 211, with specific causation matters; and section 223, with accessory after the fact to murder.

The new Code simplifies this arrangement through the following changes. The culpable/non-culpable distinction is dropped as unnecessary. The duty provisions are relocated in clause 2(3)(c) of the General Part. Specific causation provisions are subsumed under the general causation provision in the General Part. Infanticide is dropped as being covered by the ordinary homicide provisions. Attempted murder is left to the general provisions on attempt. Accessory after the fact to murder is left to the general provisions on obstructing justice. Lastly, child destruction is left to be dealt with under crimes against birth in a forthcoming publication.

Accordingly, Chapter 6 entitled "Crimes against Life" defines four basic crimes of killing persons already born: negligent homicide, manslaughter, murder and first degree murder. To these it adds a special crime of furthering suicide. It ends with an exception relating to palliative care.

This chapter, then, concerns killing those already born. All the homicides here listed consist in killing a "person," which term is defined by clause 1(2) as "a person already born by having completely proceeded in a living state from the mother's body" Crimes against the unborn are left to be dealt with in a forthcoming publication.

The crimes in this chapter therefore are culpable homicides. The new Code, however, does not need to say this because all killing with negligence, recklessness or purpose is culpable and criminal unless excused or justified in accordance with the provisions of the General Part. Reference to "culpable" and "non-culpable" then becomes unnecessary.

6(1) Negligent Homicide. Everyone commits a crime who negligently causes the death of another person.

45. Sir James Fitzjames Stephen, *English Draft Code*, Report of the 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).

Comment

Under present law, this kind of homicide is covered by sections 202 and 203 (causing death by negligence) and section 217 (manslaughter). Two points, however, remain unclear. One is the extent of possible overlap between sections 202 and 203 and section 217. The other is the meaning of "criminal negligence" in section 202, the definition of which refers to "wanton or reckless disregard."

The new Code clarifies both points. First, clause 6(1) creates a crime of negligently, as opposed to recklessly, causing the death of another person. Second, clause 2(4)(b) in the General Part defines negligence as something clearly different from and less than recklessness.

6(2) Manslaughter. Everyone commits a crime who recklessly causes the death of another person.

Comment

"Manslaughter" is not defined by the present *Criminal Code* but is simply stated to be "[c]ulpable homicide that is not murder or infanticide ..." (section 217). As such, it includes negligent killing and some kinds of reckless killing: negligent killing by reason of the fact that causing death by negligence (section 203) is a culpable homicide that is not murder or infanticide; and reckless killings other than those covered by sections 212(a)(ii) and 212(c). It is accordingly a crime of broad and unclear dimensions.

The new Code defines "manslaughter" as recklessly causing the death of another person. "Recklessly" is defined in clause 2(4)(b) of the General Part as something worse than negligence but less heinous than wrongful purpose. Manslaughter, then, is singled out as falling between negligent homicide and murder and as meriting an intermediate penalty.

6(3) Murder. Everyone commits a crime who purposely causes the death of another person.

Comment

Murder at common law was killing with malice aforethought. Killing with malice was defined by Stephen to consist in killing: (1) with intent to kill or cause grievous bodily harm; (2) with knowledge that one's act was likely to kill or cause grievous bodily harm; (3) in the course of furtherance of a violent felony; and (4) with intent to oppose by force an officer of justice.⁴⁶ The present *Criminal Code* replaces "intent to ... cause grievous bodily harm" and "knows that one's act is likely to kill or cause bodily harm" by "means to cause ... bodily harm that he knows is likely to cause ...

46. See Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. 3 (1883, reprinted New York: Burt Franklin, 1964) at 80.

death, ..." (subparagraph 212(a)(ii)). It replaces the two heads of constructive malice ((3) and (4) of Stephen's definition) by "for an unlawful object, does anything that he knows ... is likely to cause death, ..." (paragraph 212(c)) and by the performance of certain listed acts in the course of certain listed offences (section 213).

Clause 6(3) abandons constructive malice and restricts murder to killing purposely. "Purposely" is defined in clause 2(4)(b) of the General Part to include oblique or indirect purpose, sometimes referred to as indirect intent. So where D causes V's death, which he does not desire, as a necessary step to some other objective, which he does desire, he commits murder. All other unintended killings, whether or not in the course of other offences, are either manslaughter or negligent homicide. So, where D kills V in the course of a robbery, he will be guilty of murder if he kills him on purpose, of manslaughter if he kills recklessly, and of negligent homicide if he kills with negligence; D will be liable for the kind of killing he actually does. The fact that the killing may be worse because if done in a robbery can be reflected in the sentence.

[Alternative

6(3) Murder. Everyone commits a crime who:

- (a) purposely causes the death of another person; or*
- (b) causes the death of another person by purposely causing him bodily harm that he knows is likely to cause death and is reckless whether death ensues or not.]*

Comment

A minority of the Commissioners would retain the *Criminal Code* approach expressed in subparagraph 212(a)(ii) on the basis that this kind of reckless killing is more akin to killing on purpose than to ordinary reckless homicide. The reason is that such a killer not only exposes the victim to a risk of death, but also purposely takes unwarranted liberties with his physical person. The majority consider such reckless killing to be more akin to other kinds of reckless homicide than to killing on purpose.

6(4) First Degree Murder. Murder is first degree murder if committed:

- (a) pursuant to an agreement for valuable consideration;**
- (b) with torture;**
- (c) for the purpose of preparing, facilitating or concealing a crime or furthering an offender's escape from detection, arrest or conviction;**
- (d) for terrorist or political motives;**
- (e) during the course of robbery, confinement, sexual assault or interference with transport facilities consisting of aircraft and ships;**
- (f) by means which the accused knows will cause the death of more than one person; or**

- (g) by premeditation in terms of a calculated and carefully considered plan other than for the purpose of mercy killing.

Comment

Although there is nothing in the new Code on sentencing, the Commission's recommendation is that ordinary murder should carry no fixed or minimum penalty.⁴⁷ Some murders, though, are heinous enough to merit very severe penalty. To reassure the public at this time that they will receive such penalty, the Code retains a provision on first degree murder.

Clause 6(4) simplifies and somewhat alters the present law contained in section 214 of the *Criminal Code*. First, to some extent it categorizes murders in terms of activity and motive rather than by a list of offences and victims: for example, it replaces "[m]urder of police officer, etc." by murder "for the purpose of ... furthering an offender's escape" Second, it replaces "planned and deliberate" by a new formulation deliberately excluding mercy killings (clause 6(4)(g)). In line with recent amendments to the *Criminal Code*, the "repeated murder" provision has been dropped. It has been replaced by one relating to multiple killings (clause 6(4)(f)) although a minority of Commissioners considers that simultaneous multiple killings are no worse than consecutive multiple killings. It adds "with torture" (clause 6(4)(b)) as being particularly heinous.

[Alternative

6(4) *First Degree Murder.* Murder is first degree murder if the offender deliberately subordinates the victim's life to his own further purpose of:

- (a) advancing terrorist or political objectives;
- (b) influencing the course of justice;
- (c) preparing, facilitating or concealing a crime or furthering an offender's escape from detection, arrest or conviction;
- (d) obtaining financial gain; or
- (e) obtaining consideration pursuant to an agreement to cause the death of another person.]

Comment

A minority of the Commissioners would prefer to articulate the distinction between first degree and other murders by reference to some principle. This principle they see as the murderer's deliberate subordination of the victim's life to his own purpose by doing one of the things listed in the clause. The things listed, with the exception of premeditation, correspond roughly to the provisions in the majority alternative, but contain no reference to torture, specific crimes or multiple killings.

47. See LRCC, *Homicide* (Working Paper 33) (Ottawa: Supply and Services Canada, 1984).

[Alternative

Homicide. Everyone commits a crime who causes the death of another person:

- (a) *purposely;*
- (b) *recklessly; or*
- (c) *through negligence.]*

Comment

A minority of the Commissioners would like to get away from the confusion surrounding older concepts and to have one crime of homicide that could be committed with one of three different levels of culpability. This would put homicide on the same footing as causing bodily harm and many other "result offences." The majority, however, prefer to retain the existing labels.

6(5) Furthering Suicide. Everyone commits a crime who helps, advises, encourages, urges or incites another person to commit suicide whether suicide results or not.

Comment

Under present law, there is no crime of attempted suicide but it is a crime to counsel, aid or abet another's suicide according to section 224 of the *Criminal Code*. This may be justified on the basis that while a person should be left free to take his own life, others should not be free to help or encourage him to do so. Without their ministrations he might well recover from his suicidal frame of mind.

Clause 6(5) retains the present law. Since the suicide furthered must by definition be that of another, it can only be furthered by helping, urging and so on and not by attempting. The only suicide one can attempt is one's own. Attempting another's death remains attempted murder.

6(6) Palliative Care. Clauses 6(1) to 6(5) do not apply to the administration of palliative care appropriate in the circumstances for the control or elimination of a person's pain and suffering even if such care shortens his life expectancy, unless the patient refuses such care.

Comment

Under present law, administration of palliative treatment likely to shorten life would in theory fall under subparagraph 212(a)(ii) and give rise to liability for murder. In practice, Canadian case-law has no record of conviction of a doctor for shortening a terminal patient's life by administering pain-relieving drugs.⁴⁸ Moreover, most people,

48. See LRCC, *Euthanasia, Aiding Suicide and Cessation of Treatment* (Working Paper 28) (Ottawa: Supply and Services Canada, 1982) at 8.

including religious leaders, see nothing wrong in giving treatment for the purpose of relieving pain in certain circumstances even though one result of such relief may be to shorten life. Clause 6(6) clarifies the law, reconciles it with present practice and brings the Code into line with current moral thinking.

Chapter 7: Crimes against Bodily Integrity

Comment

At common law, non-fatal crimes against the person consisted of assault (threatening immediate violence) and battery (inflicting violence). Statute added other more serious offences. The present *Criminal Code* deals with such crimes in Part VI which concerns assault (section 244), aggravated assaults (sections 245.1, 245.2 and 246), unlawfully causing bodily harm (section 245.3) and numerous other offences (for example sections 228, 229 and 230). As well, there are several offences contained in sections outside Part VI (for example: sections 38 to 42, assaults by trespassers; section 69, assaulting person reading riot proclamation; section 172, assaulting clergyman celebrating divine service). In addition, sexual assaults are prohibited specifically by sections 246.1, 246.2 and 246.3.

The new Code restricts this area of law to crimes of actual violence, relocates the crime of threatening immediate violence in Chapter 8 on "Crimes against Psychological Integrity" and reduces the rest of the law to two crimes: (1) touching or hurting, and (2) harming. Many of the specific crimes are dealt with in terms of aggravating factors. Exceptions are created regarding medical treatment and sporting activities. Sexual assaults are left to be dealt with later.

7(1) Assault by Touching or Hurting. Everyone commits a crime who, [offensively] touches or hurts another person without that other's consent.

Comment

Subsection 244(1) of the *Criminal Code* makes it a crime to apply force intentionally to another without his consent. According to case-law, "force" covers any touching, however slight and brief, without the exertion of strength or power.⁴⁹ Consent must be real, that is not induced by threats or fraud (*Criminal Code*, subsection 244(3)). But it can be express or implied: according to case-law, a person impliedly consents to harmless non-hostile contacts in ordinary social life, to non-hostile contact for treatment, and to contact reasonably incidental to a lawful game or sport. The culpability specified in paragraph 244(1)(a) is "intentionally"⁵⁰ although in England (and, according to Stuart, in Canada too)⁵¹ assault can be committed recklessly.

49. See *R. v. Burden* (1981), [1982] 1 W.W.R. 193; 64 C.C.C. (2d) 68; 25 C.R. (3d) 283 (B.C.C.A.).

50. See *R. v. George* (1960), [1960] S.C.R. 871 and *Leary, supra*, note 16.

51. See Stuart, *supra*, note 22 at 132.

Clause 7(1) basically reproduces subsection 244(1). It clarifies that the crime can only be committed purposely (see clause 2(4)(d) in the General Part), retains the need for consent but replaces “apply force” by “touches or hurts.” “Consent” is defined in the general definition clause. “Hurt” is defined in that same clause as “to inflict physical pain.”

A minority of the Commissioners would add the word “offensively” before “touches” to rule out trivial touching not ordinarily considered objectionable, and avoid resort to the fiction of implied consent as a means of excluding liability for non-hostile social contact.

The majority, however, feel that this result is achieved already by the General Part and specially by the defence of mistake of fact (clause 3(2)(a)).

7(2) Assault by Harming. Everyone commits a crime who harms another person:

- (a) purposely;**
- (b) recklessly; or**
- (c) through negligence.**

Comment

Present law on harming is contained primarily in sections 204 (causing bodily harm by criminal negligence) and 245.3 (unlawfully causing bodily harm), and secondarily in related sections, for example sections 228 (discharging firearm), 229 (administering noxious thing) and 245.2 (wounding, maiming). Problems arise regarding consent and culpability. Consent is clearly a defence to any crime piggybacked on subsection 244(1) (assault), but less clearly a defence to sections 204 and 245.3.⁵² Culpability, except in crimes based on subsection 244(1), clearly extends to recklessness, but how far it includes negligence depends on the meaning to be given to that term in the light of section 202 (see comment to clause 6(1) above).

Clause 7(2) reduces the law to one crime of harming. It clarifies that this crime can be committed purposely, recklessly or negligently. It further clarifies, by omitting all reference to it, that the victim’s consent is irrelevant. “Harm” is defined in clause 1(2) as “to impair the body or its functions”

7(3) Exceptions.

- (a) Medical Treatment. Clauses 7(2)(a) and 7(2)(b) do not apply to the administration of treatment with the patient’s informed consent for therapeutic purposes, or for purposes of medical research, involving risk of harm not disproportionate to the expected benefits.**

52. See Fortin and Viau, *supra*, note 13 at 297 and specially at 299; see also Stuart, *supra*, note 22 at 457 and specially at 460.

- (b) Sporting Activities. Clauses 7(2)(a) and 7(2)(b) do not apply to injuries inflicted during the course of, and in accordance with, the rules of a lawful sporting activity.**

Comment

Under present law, a person performing a surgical operation for the benefit of the patient is protected from criminal liability by section 45 if it is performed with reasonable skill and care and it is reasonable to perform the operation having regard to all the circumstances. This section, however, does not cover other kinds of therapeutic treatment. Nor does it cover surgical treatment for another's benefit, for example, an operation on D1, in order to transplant an organ into D2. Nor does it cover operations for the sake of medical research.

Clause 7(3) extends present law by providing that clauses 7(2)(a) and 7(2)(b) do not apply to the administration of any kind of treatment, given two conditions. First, there must be informed consent on the part of the patient if he is conscious. In the case of an unconscious patient, there can be a defence of necessity which, of course, would not be available to a homicide charge; hence the different wording of clause 6(6). Second, the treatment must be for therapeutic purposes or for purposes of medical research. Moreover, whether the treatment is for therapeutic or research purposes, the risk of harm must not be disproportionate to the expected benefits. A surgeon who administers therapeutic treatment with the patient's consent will still be liable, however, if he is criminally negligent, because clause 7(3) provides exceptions only to clauses 7(2)(a) and 7(2)(b), and not to clause 7(2)(c).

Medical treatment, it should be noted, is to be understood in a broad sense, as recommended in Working Paper 26, *Medical Treatment and the Criminal Law* to cover not only surgical and dental treatment but also procedures taken for the purpose of diagnosis, prevention of disease, prevention of pregnancy or as ancillary to treatment.⁵³

Clause 7(3)(b) provides an exception for lawful sporting activities. "Lawful" here means not forbidden by law, since it is a basic principle in our law that everything that is not forbidden is allowed. Many lawful contact and combat sports, however, are specifically authorized and regulated by provincial statutes. In most such sports the participants consent to, and the law acknowledges the lawfulness of, the infliction of harm according to the rules. Where the injuring party goes beyond the rules, he will of course fall outside the clause 7(3)(b) exception. The same is true where he is guilty of criminal negligence because that too falls outside the exception, which refers only to clauses 7(2)(a) and 7(2)(b).

53. See LRCC, *Medical Treatment and Criminal Law* (Working Paper 26) (Ottawa: Supply and Services Canada, 1980) at 57 and 61.

Chapter 8: Crimes against Psychological Integrity

Comment

Present law deals in various ways with threats of force. Paragraph 244(1)(b) of the *Criminal Code* makes it an assault to attempt or threaten, by act or gesture, to apply force to another person. Subsection 381(1) of the *Criminal Code* defines as intimidation various acts done wrongfully to compel another to abstain from doing what he has a right to do or to do what he has a right to abstain from doing. Section 243.4 makes it a crime to utter certain kinds of threats.

The new Code restricts this area of law to threatening. It therefore drops the provision relating to attempts to apply force since these automatically qualify as attempts to commit assault by touching, hurting or harming, depending on the circumstances. It then divides crimes of threatening into four offences listed in ascending order of gravity.

8(1) Harassment. Everyone commits a crime who harasses and thereby frightens another person.

Comment

This replaces paragraphs 381(1)(c) to 381(1)(g) of the *Criminal Code*, which outlaw an illogical array of conduct ranging from hiding tools to using violence. Clause 8(1) focuses simply on the characteristics of the conduct, namely, its persistent and frightening nature. By virtue of clause 2(4)(d) this is a “purpose” crime; the accused must mean to harass and frighten.

8(2) Threatening. Everyone commits a crime who threatens to hurt, harm or kill another person or to damage his property.

Comment

This replaces paragraphs 381(1)(a) and 381(1)(b) of the *Criminal Code*, which outlaw acts going beyond what is covered by clause 8(1).

8(3) Immediate Threatening. Everyone commits a crime who threatens another person with immediate hurt, harm or death.

Comment

This replaces paragraph 244(1)(b) of the *Criminal Code* (assault). The immediacy of the threats renders them more serious than those covered by clauses 8(1) and 8(2).

8(4) Extortion. Everyone commits a crime who threatens:

(a) to harm another person’s reputation;

- (b) to hurt, harm or kill another person or to damage his property; or
 - (c) to inflict on another person immediate hurt, harm or death
- for the purpose of making someone, whether the person threatened or not, do or refrain from doing some act.

Comment

“Extortion” is defined at present by section 305 of the *Criminal Code* as having six elements. The defendant must (1) without reasonable justification or excuse (2) with intent to extort or gain anything (3) by threats, accusations, menaces or violence (4) induce or attempt to induce (5) any person (6) to do anything or cause anything to be done. Subsection 305(2) provides that threats to institute civil proceedings are not threats under this section. Section 266 makes it an offence to publish or threaten to publish a defamatory libel with intent to extort.

Clause 8(4) reproduces present law, simplifies it and builds it partly on the crimes defined in clauses 8(2) and 8(3). Clause 8(4)(a) reproduces section 266 of the *Criminal Code* and clauses 8(4)(b) and 8(4)(c) replace section 305. Of the six elements in section 305, element (1) is omitted since any threat falling under clause 8(4) will be criminal automatically without one of the justifications or excuses provided by clauses 3(7) to 3(17); elements (2), (4), (5) and (6) are reproduced in the words “for the purpose of making someone ... do or refrain from doing some act”; and element (3) is replaced by the word “threatens.” It is envisaged that the penalties for crimes defined in clauses 8(4)(a), 8(4)(b) and 8(4)(c) would be in ascending order of gravity.

Chapter 9: Crimes against Personal Liberty

Comment

Wrongful deprivation of liberty constituted at common law either the crime of false imprisonment (unlawful confining) or kidnapping (unlawful confining and taking away). Statute added various crimes of abduction.

The *Criminal Code* provides three general crimes. Subsection 247(1) prohibits the kidnapping of someone with intent to confine him against his will, send him outside Canada or ransom him. Subsection 247(2) prohibits the simple unlawful confining or forceful seizing of another person. Subsection 247.1(1) prohibits hostage taking in order to compel a third party to do an act or to abstain from doing an act. The provision in subsection 247(3), to the effect that non-resistance is no defence unless proved by the accused not to have been caused by duress, threats or force, has been held invalid as contrary to the *Charter*.⁵⁴ In addition, the *Criminal Code* defines four crimes of abduction: abduction of a person under sixteen (subsection 249(1)); of a person under fourteen (section 250); by a parent in contravention of a custody order (section 250.1); and by a parent when there is no such order (subsection 250.2(1)).

54. See *R. v. Gough* (1985), 43 C.R. (3d) 297 (Ont. C.A.).

The new Code provisions on liberty simplify the law and create two offences of confinement and one of abduction.

9(1) Confinement. Everyone commits a crime who confines another person without that other's consent.

Comment

Clause 9(1) replaces subsections 247(1) and 247(2) of the *Criminal Code*. It clarifies that the deprivation must be without the victim's consent. By omitting all reference to culpability, it creates a "purpose" crime (see clause 2(4)(d)).

9(2) Kidnapping. Everyone commits a crime who confines another person, without that other's consent, for the purpose of making him or some other person do or refrain from doing some act.

Comment

Clause 9(2) replaces paragraph 247(1)(c) and subsection 247.1(1) of the *Criminal Code*. It clarifies that this crime is an aggravated form of that defined by clause 9(1), the aggravation being the purpose for which the victim is confined.

9(3) Child Abduction. Everyone commits a crime who takes or keeps a person under fourteen years of age, whether that person consents or not, for the purpose of depriving a parent, guardian or person who has lawful care or charge of that person of the possession of that person.

Comment

Clause 9(3) simplifies the law and creates one single crime of abduction. The reason for providing for a crime of abduction is that in many cases the child being abducted consents to go with the defendant so that the latter does not commit confinement or kidnapping. The crime of abducting a child under sixteen has been dropped as out of keeping with modern views on child development.

Chapter 10: Crimes Causing Danger

Comment

Although traditionally criminal law concentrates on acts causing actual harm to identifiable victims, it also criminalizes acts causing mere risk of harm in three ways: (1) through inchoate crimes, (2) through public nuisance, and (3) through specific crimes of endangering. These last acts divide into dangerous activities such as

dangerous driving (subsection 233(1) of the *Criminal Code*), acts related to dangerous things such as explosives (sections 77 and 78), and those related to dangerous weapons (sections 82 to 84).

The new Code supplements all these specific crimes with a general crime of endangering.⁵⁵ Chapter 10, therefore, contains the general crime. It also contains specific crimes of failure to rescue, impeding rescue, and crimes relating to motor vehicles and transportation facilities which are included on account of their present social importance. Crimes relating to firearms and explosives are contained in Title III on "Crimes against Property." Crimes relating to public nuisance are contained in Title V on "Crimes against the Social Order."

10(1) Endangering. Everyone commits a crime who causes a risk of death or serious harm to another person:

- (a) purposely;
- (b) recklessly; or
- (c) through negligence.

Comment

Clause 10(1), which creates the new general crime of endangering, shows the general principle underlying this chapter of offences and affords a residual provision for acts not covered by more specific clauses. It thereby facilitates early law enforcement intervention to prevent harm before its actual occurrence and brings our law into line with section 211.2 of the Model Penal Code,⁵⁶ with most State codes in the United States and with European codes such as those of Austria and Sweden. The crime is limited, however, to causing risk of death or *serious* harm.

10(2) Failure to Rescue.

- (a) **General Rule.** Everyone commits a crime who, perceiving another person in immediate danger of death or serious harm, does not take reasonable steps to assist him.
- (b) **Exception.** Clause 10(2)(a) does not apply where the person cannot take reasonable steps to assist without risk of death or serious harm to himself or another person or where he has some other valid reason for not doing so.

55. See *supra*, note 17.

56. American Law Institute, *Model Penal Code and Commentaries* (Philadelphia: ALI, 1980) art. 211.2 [hereinafter Model Penal Code].

Comment

Clause 10(2)(a) creates a new crime, as recommended in the Law Reform Commission of Canada's Working Paper 46.⁵⁷ It thereby builds on the principle recognized in section 2 of the Québec *Charter of Human Rights and Freedoms*⁵⁸ and brings our law into line not only with ordinary notions of morality but also with the laws of many other countries, for example Belgium, France, Germany, Greece, Italy, Poland, and some of the United States (for example Vermont). The penalty is envisaged as being relatively low. The exception in clause 10(2)(b) is modelled on the Québec Charter.

10(3) Impeding Rescue. Everyone commits a crime who impedes the rescue of another person in danger of death or serious harm.

Comment

This clause replaces section 243.2 of the *Criminal Code*. Unlike that section it does not divide impeding into: (1) impeding someone attempting to save his own life; and (2) impeding someone attempting to save another's life. Both are covered by impeding rescue and mostly also by endangering contrary to clause 10(1).

10(4) Endangering by Motor Vehicle, Etc. Everyone commits a crime who purposely, recklessly or negligently operates a means of transportation (other than one humanly powered) in such a way, or in such condition of disrepair, as to cause a risk of death or serious harm to another person.

Comment

This clause first replaces section 233 of the *Criminal Code*. It replaces "dangerous to the public" by the more concrete wording "in such a way, or in such condition of disrepair, as to cause a risk of death or serious harm to another person." It drops the words in paragraph 233(1)(a), "on a street, road, highway or other public place" and extends the crime to cover operating a means of transportation anywhere. It clarifies the culpability as extending to all three levels. Finally, it excludes specific provisions on causing death or bodily harm as being already covered by homicide and assault.

Second, clause 10(4) replaces section 235 of the *Criminal Code* relating to unseaworthy vessels and unsafe aircraft by using the words "in such condition of disrepair" But unlike section 235, clause 10(4) applies only to actually operating a means of transportation and not to sending it on a voyage. Sending an unseaworthy vessel on a voyage constitutes furthering the actual operation and is covered by the furthering provisions in Chapter 4. On the other hand, clause 10(4) is not restricted to registered vessels or to the points of the voyage, because the essence of the crime,

57. *Supra*, note 17 at 20.

58. *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

being the endangering, makes such details irrelevant. Again, the three levels of culpability are expressly spelled out.

- 10(5) Impaired or with More than Eighty Milligrams of Alcohol in One Hundred Millilitres of Blood.** Everyone commits a crime who operates or has care and control of a means of transportation (other than one humanly powered) when he knows or ought to know that his ability is impaired by alcohol or a drug, or that he has more than eighty milligrams of alcohol in one hundred millilitres of blood (see Code of Criminal Procedure).

Comment

This clause replaces and reproduces section 237 of the *Criminal Code*, criminalizing conduct obviously tending to endanger. The detailed procedures in connection with arresting and taking samples are to be located, not in the text of the Code, but in the Code of Criminal Procedure, so as to confine the Special Part to creation of offences. Although this is a crime of negligence, the culpability requirement is not a marked departure from the standard of care but rather that the accused “knows or ought to know.” In contrast to the general rule on criminal negligence, “ought to know” is inserted for policy reasons to impose liability for ordinary civil negligence. If criminal negligence were required it might often be unduly difficult to prove that a defendant’s ignorance fell markedly below the standard of reasonable care; after a bout of drinking such ignorance might not be criminally negligent.

10(6) Failure or Refusal to Provide Sample.

- (a) **General Rule.** Everyone commits a crime who, after operating or having care and control of a means of transportation (other than one humanly powered), fails or refuses to comply with a request made pursuant to the Code of Criminal Procedure for a breath or blood sample suitable for determining the concentration of alcohol in the blood.
- (b) **Exception.** No one is liable under this clause who has a reasonable excuse for failing or refusing to provide a proper sample.

Comment

This clause replaces and reproduces present law with one exception — it does not impose liability for failure to provide a breath sample for “an approved screening device” (*Criminal Code*, subsection 238(1)). Stopped motorists cannot expect to consult with counsel at the roadside and yet are placed in jeopardy of conviction under the present law if they fail or refuse to provide a breath sample for roadside screening purposes. Under our revised regime a failure or refusal to provide a roadside screening device breath sample would yield a sufficient basis upon which a peace officer could detain and convey a stopped motorist to the station house for possible breathalyser testing. Once there the detained person would be advised of his rights, including the

right to consult with counsel, prior to being asked to submit to breathalyser testing. Effective administration of drunk driving laws is maintained while at the same time ensuring that basic rights are respected. The details contained in subsections 237(3) and 237(4) will be relocated in the Code of Criminal Procedure. Given the lack of specific reference to culpability, clause 10(6) creates a "purpose" crime (see clause 2(4)(d)).

- 10(7) Failure to Stop at Scene of Accident.** Everyone commits a crime who, while operating or having care and control of a means of transportation (other than one humanly powered), is involved in an accident with another person or another's property and leaves the scene of the accident for the purpose of escaping civil or criminal liability.

Comment

This clause replaces subsection 236(1) of the *Criminal Code*. It widens the offence to apply to those involved in accidents involving another's property instead of restricting it as regards property, to accidents involving other vehicles or cattle. It replaces the requirement to stop at the scene of the accident by a simple prohibition against leaving the scene of the accident. Finally, like subsection 236(1), it makes the crime a "purpose" crime.

- 10(8) Driving a Motor Vehicle While Disqualified.** Everyone commits a crime who operates a means of transportation knowing that he is disqualified from driving on account of having committed a crime under this Code.

Comment

This clause replaces former subsection 238(3) of the *Criminal Code*, which has now been repealed. Clause 10(8) restricts the offence to cases of disqualification (under federal or provincial law) for Code crimes. In this it reproduces in effect the new *Criminal Code* subsections 242(4) and 242(5). Here the culpability is that of actual knowledge, for this is not so much a crime of negligence as one of disobedience to a disqualification order.

- 10(9) Interfering with Transportation Facilities.** Everyone commits a crime who interferes with anything used for, or in connection with, or anyone engaged in, transportation, and thereby causes risk of death or serious harm to another person.

Comment

This clause reproduces and replaces section 232 of the *Criminal Code* in a simplified form.

A crime is committed only by interference with something actually being used. This includes interference with an aircraft in flight, taxiing to and from the runway and

revving up. It does not include interference with an aircraft in general use but not being actually used, for example one standing empty at the airport in between flights.

10(10) Aggravating Factors. The crimes in Chapters 7 to 10 are aggravated where appropriate if committed:

- (a) pursuant to an agreement for valuable consideration;
- (b) with torture;
- (c) for the purpose of preparing, facilitating or concealing a crime or furthering an offender's escape from detection, arrest or conviction;
- (d) for terrorist or political motives;
- (e) with a weapon;
- (f) by means which the accused knowingly or recklessly uses to harm more than one person; or
- (g) knowingly against the offender's spouse, child, grandchild, parent or grandparent.

Comment

This clause applies where appropriate to all crimes in Part 1 on "Crimes against Personal Safety and Liberty" except crimes of homicide. Instead of numerous clauses creating particular aggravated offences or specifying aggravating factors for each separate offence, it allows the new Code to use one unifying provision. The aggravating factors are largely parallel to those rendering a murder one of first degree, but also contain references to use of a weapon and to special categories of victims — factors which hardly aggravate murder but which clearly make non-fatal violence additionally alarming to the victim.

It is intended that the Code of Criminal Procedure will contain provisions relating to the effect of such factors on sentence, the need to bring them to the defendant's notice before trial, the method of establishing them at trial, and the result as regards verdict and record.

Part 2: Crimes against Personal Security and Privacy

Comment

The right to privacy, although not expressly acknowledged by the *Charter*, is recognized both by Article 12 of the *Universal Declaration of Human Rights* (1948) and Article 17 of the *International Covenant on Civil and Political Rights* (1976)⁵⁹ to which this country is a party. The right itself has different aspects. There is the right to

59. See *Universal Declaration of Human Rights*, General Assembly, Third Session, Official Records, Part I, Res. 217A (III), A/810 (1948) and *International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 172.

live one's life free from unwelcomed monitoring and observation, specially by those in authority — a right protected by provisions on unlawful surveillance. There is the right to keep the details of that life private and free from the glare of unwanted publicity — a right adequately protected by the law of civil libel and in some provinces by privacy statutes, and therefore not needing special criminal provisions. Thirdly, there is the right of inviolability of one's dwelling-house and other personal space — a right protected by provisions on break and enter, or, in the new Code's terminology, criminal intrusion.

Chapter 11: Unlawful Surveillance

Comment

In the past, simple precautions could be taken by individuals to protect their privacy against unwanted monitoring and observation. With the advances in modern technology, such precautions are no longer adequate. There is a need for special legislative protection to govern the use of electromagnetic, acoustical, mechanical or other listening or optical devices capable of intruding upon the privacy of the individual. This is the role of sections 178.1 to 178.23 of the *Criminal Code*.

Many of these sections, however, deal with the procedure and conditions surrounding the use of these devices, not with crimes as such. The new Code includes only the substantive provisions, that is, crimes and defences relating to the contravention of the relevant procedural provisions which will be included in the Code of Criminal Procedure.

11(1) Auditory Surveillance.

- (a) **General Rule.** Everyone commits a crime who, without the consent of at least one of the parties to the communication, intercepts a private communication by means of a surveillance device.
- (b) **Exception.** This clause does not apply to anyone engaged in providing a telephone, telegraph or other communication service to the public who intercepts a private communication where it is a necessary incident of providing the service.

Comment

Clause 11(1) basically retains the current law found in section 178.11 of the *Criminal Code*. "Surveillance device" is defined in clause 1(2) as a device capable of intercepting a private communication. "[P]rivate communication" refers to any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended to receive it. This is meant to cover those situations

where a communication would normally be considered to be private. In such situations, even if one of the parties knows the conversation is being intercepted, the conversation remains a private communication. But, if at least one of the parties consents, there is no crime.

As to the exceptions in subsection 178.11(2) of the current *Criminal Code*, consent has been built into the offence; the authorization is covered by clause 3(13) in the General Part; operating a communication service has been retained, but the random monitoring of radio frequencies has been excluded because it is already covered by federal statute and would also be covered by clause 3(13).

- 11(2) Unauthorized Entry of Private Premises.** Everyone commits a crime who, without the consent of the owner or occupier, enters private premises for the purpose of installing, servicing or removing a surveillance or optical device.
- 11(3) Unauthorized Search of Private Premises.** Everyone commits a crime who, being authorized to enter private premises for the purpose of installing, servicing or removing a surveillance or optical device, searches the premises.
- 11(4) Use of Force to Gain Entry.** Notwithstanding clause 3(13), everyone commits a crime who uses force against a person for the purpose of gaining entry into private premises to install, remove or service a surveillance or optical device, or for the purpose of exiting from such premises.

Comment

Installation of auditory surveillance devices may be necessary for the advancement of justice. The authorization procedures to enter premises and install devices will be set out in the Code of Criminal Procedure.

It is to be noted that clause 11(3) also extends to optical devices for the reasons set out in the Law Reform Commission of Canada's Working Paper 47, *Electronic Surveillance*.⁶⁰

As the Ontario Court of Appeal pointed out in *R. v. McCafferty*,⁶¹ a search warrant must be strictly interpreted, and cannot be used to plant a listening device. Similarly, an entry under an authorization is not authority to conduct a search of the premises. This is made clear in clause 11(3).

Clause 11(4) prohibits the use of force for the purpose of installing a device. This prohibition is necessary because use of force is inappropriate for effecting surreptitious entry and could put innocent parties unjustifiably at risk.

60. See LRCC, *Electronic Surveillance* (Working Paper 47) (Ottawa: LRCC, 1986).

61. *R. v. McCafferty* (1984), 13 W.C.B. 143 (Ont. C.A.).

11(5) Disclosure of Private Communications.

- (a) General Rule.** Everyone commits a crime who, without the consent of at least one of the parties to a private communication that has been intercepted by a surveillance device:

 - (i) discloses or threatens to disclose the existence or the contents of the communication; or**
 - (ii) uses the contents of the communication.**
- (b) Exceptions.** No one is liable under clause 11(5)(a) if the disclosure is:

 - (i) in the course of, or for the purpose of, giving evidence in a judicial proceeding where the private communication is admissible;**
 - (ii) in the course of, or for the purpose of, any criminal investigation if the private communication was lawfully intercepted;**
 - (iii) to a peace officer or to the Attorney General or his agent, if it is in the interests of the administration of justice;**
 - (iv) for the purpose of giving notice or furnishing particulars in accordance with the Code of Criminal Procedure;**
 - (v) to an employee of the Canadian Security Intelligence Service, if it is for the purpose of enabling the Service to perform its duties and functions;**
 - (vi) in the course of the operation of a communication service; or**
 - (vii) to an investigative or law enforcement officer in a foreign jurisdiction, if it tends to reveal a past, ongoing or prospective crime in such jurisdiction.**

Comment

Although the use or disclosure of information obtained as the result of an intercepted private communication without the express consent of the originator or the person intended to receive the communication should be penalized, it is equally desirable to subject to criminal liability any person who intentionally threatens to disclose the existence or contents of any such communication.

The exceptions to the clause 11(5)(a) crime are those found in section 178.2 of the current *Criminal Code* with two additions: for disclosing a private communication in certain circumstances to the Attorney General or his agent, or to a law enforcement officer in a foreign jurisdiction. This is consistent with Canada's obligation of international co-operation in criminal law enforcement.

Chapter 12: Criminal Intrusion

Comment

At common law, one's private space was protected against intruders with criminal intent by the law on burglary (break and enter of a dwelling-house by night) and housebreaking (break and enter by day). In due course, statutes extended the latter to cover shops, warehouses and many other types of buildings. Our present law is to be found in sections 173 and 306 to 308 of the *Criminal Code*.

Basically those sections define three offences. Section 173 prohibits trespass at night — loitering or prowling at night upon another's property near a dwelling-house thereon. Subsection 307(1) prohibits being unlawfully in a dwelling-house — entering or being in it without lawful excuse and with intent to commit an indictable offence. Section 306 prohibits break and enter, a crime which has three forms: (a) break and enter of a place with intent to commit an indictable offence therein; (b) break and enter and commission of such an offence; and (c) breaking out of a place after (i) commission of an indictable offence therein, or (ii) entering it with intent to commit such an offence.

The new Code replaces these by a crime of criminal intrusion which falls midway between crimes against the person and crimes against property. This is committed by: (a) entering or remaining in another's premises to commit a crime; or (b) doing so and committing a crime. "Premises," as defined in clause 1(2), includes dwelling-houses (also defined in clause 1(2)), while "remains" covers "therein." No special provision, therefore, is needed for being unlawfully in a dwelling-house. However, the fact that the premises are a dwelling-house is made by clause 12(2)(a) an aggravating factor. Finally, since criminal intrusion, like the present crime of break and enter, requires criminal intent or criminal commission, it does not cover mere trespass by night. This offence, used mainly to deal with peeping Toms, is best located (if at all) in the context of public order provisions.

12(1) Criminal Intrusion. Everyone commits a crime who enters or remains in another's premises without that other's consent:

- (a) for the purpose of committing a crime; or
- (b) does so and commits a crime.

Comment

Criminal intrusion differs in three ways from break and enter. First, it does not require a breaking. In theory, this differentiates it from break and enter. In practice, owing to presumptions and case-law decisions, it is rarely necessary to prove a breaking. Hence the new Code drops this requirement.

Second, unlike sections 306 to 308 of the *Criminal Code*, clause 12(1) explicitly states that the entry or remaining must be without the occupier's consent. This clarifies that criminal intrusion is a crime against a non-consenting victim.

Finally, clauses 12(1) and 12(2) have no counterpart to paragraph 306(2)(a) of the *Criminal Code*. That paragraph creates a rebuttable presumption of intent once break and entry is proved. No such presumption, however, is necessary to enable the trier of fact to conclude, in the absence of a satisfactory explanation, that an intruder had some criminal intent. And no such presumption is desirable in the light of paragraph 11(d) of the *Charter*.

12(2) Aggravated Criminal Intrusion. The crime defined in clause 12(1) is aggravated if:

- (a) the premises are a dwelling-house;
- (b) the accused is reckless as to the presence of people in the premises; or
- (c) a weapon is carried.

Comment

Subsection 306(1) of the *Criminal Code* provides a greater penalty for break and enter when it is committed in relation to a dwelling-house. This effect is reproduced by clause 12(2)(a), which provides that criminal intrusion is aggravated when the premises are a dwelling-house. The rationale is that intrusion into a dwelling-house is a particularly gross violation of privacy and is potentially more dangerous than other intrusions by reason of the potential alarm to people in the dwelling.

Other premises, however, such as shops, banks and offices, may be occupied by people during certain hours. In such hours intrusion may be likewise more dangerous and alarming. For this reason clause 12(2)(b) adds a second aggravating feature not recognized in present law.

Finally, intrusion becomes all the more dangerous when done by people carrying guns or other weapons. For one thing, there is the added alarm caused by the carrying of guns. For another, there is the risk that they will be discharged — deliberately or accidentally. Accordingly, clause 12(2)(c) adds carrying of a weapon as a third aggravating factor.

TITLE III. Crimes against Property

Part 1: Crimes of Dishonesty

Comment

Property crimes are of two kinds. One consists of wrongful redistribution of the property with resulting deprivation of the owner's rights over it. The other consists of wrongful damage or destruction of the property with resulting annihilation of all rights over it. The former kind is dealt with by theft and related crimes, the latter by crimes of damage and arson.

Chapter 13: Theft and Related Crimes

Comment

Against wrongful redistribution of property the common law gave protection through tort law and through criminal law. Through the latter, it protected goods and chattels by provisions on theft and fraud, and real property through the provisions on forgery. Our present law on theft, which is taking property without the owner's consent, is contained in section 283 of the *Criminal Code* and in twenty-four other specific provisions. Our law on fraud, which is deceiving an owner into consensually parting with his property, is to be found in paragraphs 320(1)(a), 320(1)(b) and subsection 338(1) of the *Criminal Code*, in sixty-five other specific provisions and in numerous other non-*Criminal Code* provisions (for example in the *Bankruptcy Act*, the *Food and Drugs Act* and the *Combines Investigation Act*).⁶² Our law on forgery, which is making or using documents that lie about themselves, is dealt with in sections 324 to 326 of the *Criminal Code* and in over a dozen other sections.

The new Code simplifies this area of law by reducing it to three crimes. They are theft, fraud and forgery. These are supplemented by three other crimes: (1) obtaining services, (2) fraudulent documentary misrepresentation, and (3) obliteration of identifying marks. It thus concentrates on general offences and basic principle and avoids undue specificity and *ad hoc* detail. These crimes are described in Chapters 13 and 14.

The Commissioners were divided, however, on how best to formulate theft, obtaining and fraud. Some thought the best solution was that proposed by our Working Paper 19 and Report 12,⁶³ that is, to use the word "dishonestly," the ordinary word which judges often employ to explain the term "fraudulently" in the present law. Others found "dishonestly" objectionable on two grounds. First, it is a culpability word or a type of *mens rea*, which is not defined in the culpability clause in the General Part. Second, it is a word whose use in the English *Theft Act 1968*⁶⁴ has created problems for courts in the United Kingdom. In these circumstances, two alternatives are presented — the first based on the above-mentioned Working Paper and using "dishonestly," the second avoiding the use of this term to describe the requisite culpability.

62. *Bankruptcy Act*, *supra*, note 14; *Food and Drugs Act*, R.S.C. 1970, c. F-27; *Combines Investigation Act*, R.S.C. 1970, c. C-23.

63. See LRCC, *Theft and Fraud Offences* (Working Paper 19) (Ottawa: Supply and Services Canada, 1977) and *Theft and Fraud* (Report 12) (Ottawa: Supply and Services Canada, 1979).

64. *Theft Act 1968* (U.K.), 1968, c. 60.

[Alternative 1]

13(1) Theft. Everyone commits a crime who dishonestly appropriates another's property without his consent.

Comment

Under present law the basic offence of theft is defined in section 283 of the *Criminal Code* as already noted. One commits theft either by taking or by converting another's property, but in either case the offender must act fraudulently, without colour of right and with a specific intent. The intent must be one of four types: (a) to deprive the owner temporarily or absolutely of the property; (b) to pledge or deposit it; (c) to part with it under a condition regarding its return which the person parting with it may be unable to comply with; or (d) to deal with it in such manner that it cannot be restored in its original condition.

The more specific offences fall into three categories. They relate to special kinds of property, for example oysters (section 284). They relate to special victims, for example bailees of goods under lawful seizure (section 285). Or they relate to connected behaviour, for example fraudulent concealment (section 301).

Clause 13(1) radically simplifies all this. First, it provides one general offence to extend to both what is presently covered by section 283 and what is covered by the more specific sections. Second, it streamlines the general offence by merging "takes" and "converts" into "appropriates," by merging "fraudulently" and "without colour of right" into "dishonestly," and by dropping reference to the four types of intent, because the first type (intent to deprive temporarily or absolutely) is necessarily involved in every taking, necessarily covers the other three types, and in fact adds nothing.

The gist of theft is not the taking or the converting itself. These are only modes of doing what theft seeks to prohibit, that is, usurping the owner's rights — appropriating another's property. Hence clause 13(1) singles out appropriation as the kernel of the crime.

Next the appropriation must be dishonest. This means two things. First, it means that the appropriation must be without a claim of right. If the owner consents to it or if the law allows it, then of course it is not dishonest. If the defendant wrongly but genuinely believes that he has a right to appropriate, (for example that the owner consents or the law allows the appropriation), then he has a defence of mistake and once again the taking is not dishonest. If his error relates to fact (for example he wrongly thinks he has the owner's consent), then he has a defence of mistake of fact under clause 3(2)(a). If it relates solely to law (for example he thinks he has a legal right to property), then he has a defence of mistake of law under clause 3(7)(a). If, however, he thinks simply that stealing is not against the law or that, though illegal, it is justifiable, he has no defence. To act dishonestly, therefore, is to act in a way which would be ordinarily described as dishonest, whatever the agent's own personal morality. Second, the appropriation must be not merely wrongful but also "crooked." A person may wrongfully retain another's property out of orneriness and thereby render himself

liable in civil law — without necessarily being a thief. A thief is one who takes another's property dishonestly or fraudulently; typically he does so by stealth and cheats the owner. The first kind of wrongdoing is open and therefore can adequately be dealt with by the civil law. The second is surreptitious and underhanded and, if successful, cannot be pinned on the wrongdoer. It therefore needs to be deterred and stigmatized by criminal law.

Clause 13(1) says nothing about the level of culpability. According to clause 2(4)(d), therefore, theft is a "purpose" crime: the defendant must mean to misappropriate. Accidental or mistaken appropriation is excluded.

"Appropriate" is defined by clause 1(2) as to "take, borrow, use or convert" property. It means, therefore, usurping the owner's rights of ownership — assuming ownership or possession of the property. It would not apply to trespass, damage or destruction, the first of which is left to civil law while the other two constitute the crime of vandalism.

"Property" is defined by clause 1(2) to include "electricity, gas, water, and telephone, telecommunication and computer services." In consequence, theft is not restricted to misappropriation of goods or other items of tangible property.

"Another's property" is defined by clause 1(2) as property which that other owns or has any special interest in. Thus, as under present law, an owner may steal from a joint owner, a lender from a borrower, a pledger from a pledgee and so on. No special provision that spouses may not steal each other's property is included; in keeping with changing ideas about cohabitation, section 289 of the *Criminal Code* is not replaced.

13(2) Obtaining Services. Everyone commits a crime who dishonestly obtains for himself or another person services from a third party without full payment for them.

Comment

This crime covers such acts as dishonestly getting a ride, a haircut, accommodation and so on without paying. Such acts at common law did not amount to theft since services are not property. Under present law, dishonest obtaining of accommodation is covered by section 322 of the *Criminal Code*, of transportation by subsection 351(3) and of other services by paragraph 320(1)(b) (obtaining credit by fraud). These are all covered in the new Code by clause 13(2).

A person may in all honesty obtain services without paying for them because the person whose duty it is to charge him gives him a "free ride": for example, a cinema usher allows him to enter the theatre free. If this leads the customer to believe it is all right to come in without paying, he is not dishonest and commits no crime. But the dishonest usher's conduct falls under clause 13(2): "obtains for ... another person"

Like theft, obtaining services is by reason of clause 2(4)(d) a purpose crime. And as with theft, the accused's conduct must be underhanded, fraudulent or in some way "crooked."

13(3) Fraud. Everyone commits a crime who dishonestly, by false representation or by non-disclosure, induces another person to suffer an economic loss or risk thereof.

Comment

To defraud has been defined as to deprive by deceit. It differs from theft in that the deprivation takes place with consent but with consent obtained by deception. The *Criminal Code* recognizes three fraud offences: first, a basic offence of fraud defined by subsection 338(1); second, obtaining property by false pretence contained in paragraph 320(1)(a); and third, obtaining credit by false pretence in paragraph 320(1)(b). In addition, as mentioned above, there are numerous other *Criminal Code* and non-*Criminal Code* provisions.

Subsection 338(1) of the *Criminal Code* prohibits defrauding a person, that is, depriving him, of any property, money or valuable security by deceit, falsehood or other fraudulent means. This subsection clearly overlaps with, and covers the offence defined by, paragraph 320(1)(a) (obtaining property by false pretence). It also may, since section 2 of the *Criminal Code* defines "property" to include "real and personal property of every description ...," overlap with, and cover the offence defined by, paragraph 320(1)(b) (obtaining credit by false pretences or by fraud).

Clause 13(3) reduces fraud to one offence with two elements. First, there must be either false representation or non-disclosure. Second, this must induce the victim to suffer an economic loss or *risk thereof*.

The first element is further explained in clause 1(2) by the definition of "representation." This basically reproduces the law set out in subsection 319(1) of the *Criminal Code* ("matter of fact either present or past"). But it extends the law in line with the implications of section 338 ("other fraudulent means, whether or not it is a false pretence within the meaning of this Act") to cover representation as to future facts. However, it retains the exception in subsection 319(2) concerning exaggeration or "puffing." "Non-disclosure" relates to misrepresentation by omission when there is a duty to disclose arising from a special confidential relationship (for example solicitor/client) or a duty to correct a false impression created by, or on behalf of, the defendant.

The second element is that the victim must be induced to suffer an economic loss or risk thereof. While a literal reading of sections 320 and 338 of the *Criminal Code* might suggest that clause 13(3) extends the law by adding the words "or risk thereof," this is not so. As explained by the Supreme Court of Canada in *R. v. Olan, Hudson and Hartnett*,⁶⁵ the element of deprivation necessary for an offence against section 338 of the *Criminal Code* is satisfied on proof of detriment, prejudice or risk of prejudice to the victim's economic interest. In this regard clause 13(3), therefore, merely reproduces existing law.

There being no express reference in clause 13(3) to level of culpability, fraud is by virtue of clause 2(4)(d) a purpose crime. In addition, the accused must act dishonestly, that is, fraudulently or deceitfully.

65. See *R. v. Olan, Hudson and Hartnett* (1978), [1978] 2 S.C.R. 1175.

Finally, no presumption is included similar to that contained in subsection 320(4) of the *Criminal Code* regarding cheques issued without funds. Such a presumption is both unnecessary and undesirable. It is unnecessary because, in the absence of a satisfactory explanation, the trier of fact can always infer fraudulent intent, and undesirable because it conflicts with paragraph 11(d) of the *Charter*.

[Alternative 2]

13(1) Theft. Everyone commits a crime who appropriates another's property without his consent and without any right to do so.

Comment

In this formulation, the kernel of the crime lies in the appropriator's having no right to appropriate. If he has a right, he commits no wrong at all, civil or criminal. If he has no right but thinks he has, he commits a civil wrong but not necessarily a crime. If he is just factually mistaken, he has a defence of mistake of fact. If he is mistaken as to the effect of the law on his rights, he has the special defence of mistake of law under clause 3(7)(a). If he is simply mistaken in that he does not know that one has, in law, no right generally to appropriate another's property, then he commits theft.

13(2) Obtaining Services. Everyone commits a crime who, without any right to do so, obtains for himself or another person services from a third party without fully paying for them.

Comment

Again the nub of the crime is the obtaining when there is no right to do so. The same considerations as to mistake apply as in clause 13(1).

13(3) Fraud. Everyone commits a crime who, without any right to do so, by dishonest representation or dishonest non-disclosure induces another person to suffer an economic loss or risk thereof.

Comment

Again the culpability of the offence is formulated in terms of there being no right to justify the inducement. The same considerations as to mistake apply as in clauses 13(1) and 13(2). But the force of the deceitfulness or fraud is brought out by using "dishonest" to describe the representation or non-disclosure. These terms are defined in clause 1(2).

Chapter 14: Forgery and Related Crimes

Comment

Theft and fraud require actual appropriation by the defendant or risk of loss by the victim. Absent such appropriation or risk of loss, the crime committed will usually be attempted theft or fraud. In some cases, however, the accused may not have gone far enough to commit an attempt. For some of these cases criminal law has created the special preparatory crimes of forgery and of falsification of documents. The former is primarily dealt with in sections 324, 325 and 326 of the *Criminal Code*, the latter in sections 355 to 358.

14(1) Forgery of Public Documents. Everyone commits a crime who forges or uses a forged:

- (a) item of currency;
- (b) stamp;
- (c) public seal;
- (d) exchequer bill;
- (e) passport;
- (f) certificate of citizenship;
- (g) proclamation, order, regulation or appointment or notice thereof purporting to have been printed by the Queen's Printer for Canada or for a province; or
- (h) public record.

14(2) Forgery of Other Documents. Everyone commits a crime who for the purpose of fraud, forges or uses a forged document, other than one falling within clause 14(1).

Comment

The essence of forgery is making a document not just give false information but misrepresent itself as genuine when it is not. The forger makes it tell a lie about itself. Under the present *Criminal Code*, it is covered by sections 324 (making a false document) and 326 (uttering such a document). In addition, there are numerous specific offences relating to exchequer bill paper, public seals, stamps, registers of birth, trade marks and so on. The law, however, is difficult and confusing. No clear distinction is drawn between forgery and falsification, and there is considerable piggybacking.

Clauses 14(1) and 14(2) replace all this by two crimes. The first consists of forging or using forged documents of such special nature that commission is complete without any fraudulent purpose. The second comprises forging or using a forged document for the purpose of fraud. The documents falling under clause 14(1) are those,

like public records, which are so relied on in our society that their mere faking should be prohibited. Both “forge” and “document” are defined in clause 1(2) which basically reproduces existing law in this regard.

14(3) Fraudulent Documentary Misrepresentation. Everyone commits a crime who for the purpose of fraud:

- (a) makes a document or valuable security that misrepresents such facts as it refers to; or**
- (b) uses such document or valuable security.**

Comment

Falsification of books and other documents, that is, making them give false information about the outside world rather than about themselves, is the other preparatory offence. It is something usually done as a first step towards carrying out a theft or fraud. At present, such crimes are covered by sections 355 to 358 of the *Criminal Code*. Clause 14(3) replaces these by a single crime of fraudulent documentary misrepresentation.

14(4) Obliteration of Identifying Marks. Everyone commits a crime who for the purpose of facilitating the commission of a crime, obliterates, simulates or applies any identifying mark.

Comment

Clause 14(4) replaces in part sections 398 and 399 and subsection 334(2) of the *Criminal Code* and concerns boundary and other identifying marks.

Chapter 15: Commercial Frauds and Related Matters

Comment

The present *Criminal Code* contains numerous specific offences designed to ensure honesty and fair dealing in commerce. Some of these offences are found in Part VII, “Offences against Rights of Property,” while the bulk of them are in Part VIII, “Fraudulent Transactions Relating to Contracts and Trade.” Most of these offences are specific instances of fraud or attempted fraud, for example section 344 (fraudulent registration of title) or paragraph 352(1)(a) (fraud in relation to minerals). Others are more akin to forgery, for example section 332 (drawing document without authority) or section 364 (forging a trade mark). The redrafting of fraud, forgery of non-public documents, and falsification makes most of the specific trade offences unnecessary. In the interests of simplifying the *Criminal Code* and avoiding useless detail, we propose to deal with most of these offences under the revised fraud and forgery offences in Chapters 13 and 14. Thus the present chapter on “Commercial Frauds and Related

Matters'' will only proscribe conduct which does not fit within the offences defined in Chapters 13 and 14 but which nevertheless warrants criminalization.

We envisage that Chapter 15 will also contain among other things crimes relating to the securities market (presently dealt with in sections 338(2), 340, 341, 342 and 358 of the *Criminal Code*) although they may fall under the general crime of fraud in Chapter 13. However, until we complete our consultations on these matters with securities experts across the country, we cannot finalize the draft concerning them. Here, then, we only wish to indicate their location in the overall scheme.

15(1) Bribery of Agent. Everyone commits a crime who confers or agrees to confer a benefit on an agent for the purpose of corruptly influencing him in the performance of his functions as agent.

15(2) Agent Accepting Bribe. Everyone commits a crime who, being an agent, accepts or agrees to accept a benefit given in order to corruptly influence him in the performance of his functions as agent.

Comment

Clauses 15(1) and 15(2) simplify and replace the secret commissions offence found in section 383 of the present *Criminal Code*. The definition of "agent" in clause 1(2) ensures that these bribery offences catch persons in employment relationships as well as the more traditional agency relationships. (See comments to clauses 23(1) and 23(2)).

15(3) Disposal of Property to Defraud Creditors. Everyone commits a crime who transfers, conceals or disposes of his property for the purpose of defrauding his creditors.

15(4) Receipt of Property to Defraud Creditors. Everyone commits a crime who, for the purpose of defrauding creditors, receives property that has been transferred, concealed or disposed of for such purpose.

Comment

These clauses reproduce in simplified form the offence in section 350 of the present *Criminal Code*.

15(5) Criminal Lending. Everyone commits a crime who:

- (a) enters into an agreement or arrangement to receive interest at a criminal rate; or**
- (b) receives a payment or partial payment of interest at a criminal rate.**

Code). Others may be offences which provide assistance after, and indeed the incentive for, the commission of other crimes, for example possession of stolen goods (subsection 312(1)).

Chapter 18 reduces these to seven crimes, which are mostly self-explanatory. Clause 18(1) covers possession in suspicious circumstances for criminal purposes of housebreaking instruments and other implements of crime. Clause 18(2) covers possession by itself of two kinds of items. Clause 18(3) criminalizes possession of weapons. Clause 18(4) prohibits possession of forged documents. Clause 18(5) deals with unauthorized use of Canadian passports and certificates of citizenship. Clause 18(6) replaces subsection 312(1) of the *Criminal Code* and forbids possession of things obtained by crime. Clause 18(7) is new and makes special provision for professional receivers of stolen goods.

18(1) Possession of Things in Suspicious Circumstances. Everyone commits a crime who possesses

- (a) a device or instrument in such circumstances that the reasonable inference is that he used it or means to use it to commit:
 - (i) theft;
 - (ii) criminal intrusion;
 - (iii) forgery; or
- (b) a weapon or explosive substance in such circumstances that the reasonable inference is that he used, or means to use it, to commit a crime against personal safety and liberty.

Comment

This crime would replace the various offences in the present *Criminal Code* of unlawful possession of instruments, devices or weapons for criminal purposes. Clause 18(1) provides a general rule rather than a list of items as is afforded by the present law. The present provisions in fact relate to three general headings:

- (1) *theft* — section 287.1 (device to obtain telecommunication service) and section 310 (instruments for breaking into coin-operated or currency exchange devices);
- (2) *criminal intrusion* — section 309 (housebreaking instruments);
- (3) *forgery* — paragraphs 327(a), (b) and (c) (instruments for forgery), paragraph 334(1)(c) (instruments for forging stamps), and section 367 (instruments for forging trade marks).

It is to be noted that possession of a surveillance device is covered by clause 18(2) below.

Under clause 18(1), the reasonable inference may of course be rebutted if a satisfactory explanation transpires. In this case no crime is committed.

Comment

This clause forbids people from entering into agreements to lend money at an interest rate that is “a criminal rate,” that is, more than sixty per cent per annum (see definition in clause 1(2)). The culpability required for this crime is to enter into such agreements purposely.

The aim of the clause is to protect borrowers from being charged exorbitant rates of interest. The message being communicated to the public is a clear and necessary one. The clause also aims at protecting the public from the evils of loan-sharking, which involves the exploitation of the poor and the possible threat and harm to persons who are sometimes associated with these practices. The majority of the Commissioners feel that these practices must be denounced by the criminal law, even though they recognize that the civil law tries to confront the problem as well.

There are technical problems of definition with this clause, but these are left for future resolution.

A minority of the Commissioners believes that this provision should not be contained in the new Code. According to the minority, the principle of restraint requires such contractual matters to be left to civil law, which provides means for setting aside unconscionable agreements and that a “criminal lending” crime cannot solve the problem of excessive interest charges because schemes can usually be devised to circumvent its effect.

Although these transactions are objectionable because they often lead to threats and violence, under present law a loan shark who resorts to threats to obtain repayment of a loan may be charged with extortion, and, where bodily harm results, with assault. Under the proposed Code this would also be so.

Part 2: Crimes of Violence and Damage

Chapter 16: Robbery

Comment

Theft and fraud cover getting another's property by stealth, representation or dishonest non-disclosure. More reprehensible yet is getting it by force. At common law this was covered by the crimes of robbery. Present law is contained in section 302 of the *Criminal Code* (robbery). Chapter 16 largely reproduces present law.

- 16(1) Robbery.** Everyone commits a crime who for the purpose of, or in the course of, theft uses immediate violence or threats of immediate violence to person or property.
- 16(2) Aggravated Robbery.** The crime in clause 16(1) is aggravated if committed with a weapon.

Comment

Robbery is theft aggravated by, or combined with, assault. Section 302 of the *Criminal Code* covers four acts:

- (a) using violence or threat thereof to person or property to steal or overcome resistance to the stealing;
- (b) using personal violence immediately before, immediately after or during theft from the person;
- (c) assaulting with intent to steal; and
- (d) stealing from the person while armed with an offensive weapon or imitation thereof.

Clause 16(1) consolidates these into one crime of robbery. It consists in the use of immediate violence or threats of immediate violence to person or property for the purpose of, or in the course of, theft. Where the violence threatened is not immediate, the crime is not robbery but extortion (clause 8(4)). Violence and threat of violence include immediate threatening. They do not necessarily include being armed, though the display of the weapon may, in the circumstances, constitute a threat of violence. Violence "in the course of ... theft" includes violence used, not only during, but also immediately before and after.

Chapter 17: Criminal Damage

Comment

At common law, the only kind of property damage ranking as criminal was the wilful and malicious burning of a dwelling-house. Statutes later criminalized the burning of other buildings. Later still they criminalized malicious damage to various kinds of property.

All such offences are now found in Part IX of the *Criminal Code*. That part creates five groups of offences: (1) mischief, (2) arson and other fires, (3) other interference with property, (4) injury to cattle and other animals, and (5) cruelty to animals. The property damaged need not be owned by another. A person can be criminally liable for damaging property of which he is a part owner and even for damaging property of which he is an absolute owner if he does so with intent to defraud.

Chapter 17 simplifies the law by reducing it to two crimes, (1) vandalism and (2) arson, which cover the first four groups described above. Vandalism covers mischief, other interference with property and injury to animals in another's ownership. Cruelty to animals not in another's ownership, being clearly not a property offence, is dealt with in Title IV dealing with "Crimes against the Natural Order."

In one respect clauses 17(1) and 17(2) appear to extend current law. In general the crimes contained in Part IX of the present *Criminal Code* can only be committed wilfully, whereas clauses 17(1) and 17(2) allow for their commission recklessly. But

section 386 of the *Criminal Code* defines “wilfully,” in line with the English case-law on the *Malicious Damage Act* (1861),⁶⁶ to include recklessly. In fact clauses 17(1) and 17(2) in this regard are faithful to existing law.

17(1) Vandalism. Everyone commits a crime who, without another person’s consent, damages that other’s property or by physical interference renders it useless or inoperative:

- (a) purposely; or**
- (b) recklessly.**

Comment

The main *Criminal Code* offence is mischief, defined by section 387. It can be committed in four ways: (1) by damaging or destroying property, (2) by rendering it dangerous, useless, inoperative or ineffective, (3) by obstructing its lawful use, and (4) by obstructing a person lawfully using it. *Mens rea* is usually taken to be intent or recklessness. Higher penalties are available for mischief endangering life. Section 385 of the *Criminal Code* defines “property” for the purposes of Part IX as “real or personal corporeal property,” but subsection 387(1.1) specifically extends mischief to destruction of data. In addition to the main offence, there are numerous specific offences relating to the nature of the property in question (buildings, wrecks, sea-marks, boundary lines, animals).

Clause 17(1) creates one crime, renamed “vandalism,” since “mischief” carries too trivial a connotation. It can be committed purposely or recklessly and different penalties are envisaged for each level of culpability. The crime is restricted to damaging (which clearly covers destroying) or interfering with “another’s property” as defined by clause 1(2). The fraudulent damaging of one’s own property (property in which no one else has any legally protected interest) is, and should be dealt with as, attempted fraud. The damaging of one’s own property which endangers life, should be dealt with as the crime of endangering as defined by clause 10(1). Finally, clause 17(1) specifies that the damaging must be without the owner’s consent; an owner cannot only damage his property, but can also license another to do so.

It should be noted that no reference is made to the exception relating to strikes. Subsection 387(6) of the *Criminal Code* provides that no one commits mischief solely by reason of stopping work and so on. Under the new Code the position would be as follows. If as a result of the stoppage damage was caused to property, this would result from an omission. In order to constitute a crime, it would have to result from an omission to perform one of the duties laid down in clause 2(3)(c) in the General Part. These, however, arise only where there is danger to life. Accordingly, where mere property damage is caused, no crime would be committed by the strikers; but where life was endangered, a crime might well be committed, depending on the facts. No special provision, therefore, is needed to replace subsection 387(6).

66. *Malicious Damage Act* (U.K.), 24 & 25 Vict., c. 97.

17(2) Arson. Everyone commits a crime who, without another person's consent, causes a fire or explosion damaging or destroying that other's property:

- (a) purposely; or**
- (b) recklessly.**

Comment

Though in reality merely a special form of vandalism, arson has always been treated separately, and was indeed the first form to become a crime, presumably because of the danger and uncontrollability of fire. Arson at common law was setting fire to a dwelling-house. Legislation extended it to setting fire to other buildings and haystacks. Setting fire to personal property was arson only to the extent that it threatened real property. No great change was made to the *Criminal Code* until 1921.

Since then the following changes were made. First, setting fire to personal property became arson if done with fraudulent intent. Second, setting fire by negligence was criminalized.

The main provision today is to be found in section 389 of the *Criminal Code*. Subsection 389(1) makes it a crime wilfully to set fire to various listed items of property and subsection 389(2) makes it a lesser crime to do the same for a fraudulent purpose to any other personal property. In addition, section 390 makes it a crime: (a) wilfully to set fire to anything likely to set fire to property listed under subsection 389(1); and (b) wilfully to set fire for a fraudulent purpose to anything likely to set fire to other personal property. Finally, section 392 makes it a crime to cause a fire wilfully or by violating a law in force where the fire occurs, if the fire results in loss of, (but curiously not injury to,) life or in destruction or damage to property.

Clause 17(2) replaces these different offences with one crime of arson, which like vandalism, can be committed either purposely or recklessly. It extends arson to damage by explosion, which is clearly as dangerous as fire. It restricts it for the same reasons as given regarding clause 17(1), to burning another's property without his consent, leaving fraud and endangering to be dealt with in their appropriate chapters. It also restricts the crime to cases of actual damage; those without actual damage are best dealt with as attempts. The section 391 fraud presumption is omitted since arson no longer relates to fraud.

Part 3: Crimes of Possession

Chapter 18: Miscellaneous Property Crimes

Comment

In addition to the major property crimes, a Criminal Code will typically contain numerous related and ancillary offences. Many of these may be preparatory offences, for example possession of housebreaking instruments (subsection 309(1) of the *Criminal*

Code). Others may be offences which provide assistance after, and indeed the incentive for, the commission of other crimes, for example possession of stolen goods (subsection 312(1)).

Chapter 18 reduces these to seven crimes, which are mostly self-explanatory. Clause 18(1) covers possession in suspicious circumstances for criminal purposes of housebreaking instruments and other implements of crime. Clause 18(2) covers possession by itself of two kinds of items. Clause 18(3) criminalizes possession of weapons. Clause 18(4) prohibits possession of forged documents. Clause 18(5) deals with unauthorized use of Canadian passports and certificates of citizenship. Clause 18(6) replaces subsection 312(1) of the *Criminal Code* and forbids possession of things obtained by crime. Clause 18(7) is new and makes special provision for professional receivers of stolen goods.

18(1) Possession of Things in Suspicious Circumstances. Everyone commits a crime who possesses

- (a) a device or instrument in such circumstances that the reasonable inference is that he used it or means to use it to commit:
 - (i) theft;
 - (ii) criminal intrusion;
 - (iii) forgery; or
- (b) a weapon or explosive substance in such circumstances that the reasonable inference is that he used, or means to use it, to commit a crime against personal safety and liberty.

Comment

This crime would replace the various offences in the present *Criminal Code* of unlawful possession of instruments, devices or weapons for criminal purposes. Clause 18(1) provides a general rule rather than a list of items as is afforded by the present law. The present provisions in fact relate to three general headings:

- (1) *theft* — section 287.1 (device to obtain telecommunication service) and section 310 (instruments for breaking into coin-operated or currency exchange devices);
- (2) *criminal intrusion* — section 309 (housebreaking instruments);
- (3) *forgery* — paragraphs 327(a), (b) and (c) (instruments for forgery), paragraph 334(1)(c) (instruments for forging stamps), and section 367 (instruments for forging trade marks).

It is to be noted that possession of a surveillance device is covered by clause 18(2) below.

Under clause 18(1), the reasonable inference may of course be rebutted if a satisfactory explanation transpires. In this case no crime is committed.

The mental element of such crimes is no longer located in the definition of “weapon” as in section 2 of the *Criminal Code* because we have defined this word more objectively (see clause 1(2)). Our definition also differs from that in the present *Criminal Code* in that the new Code defines a weapon to cover any instrument capable of use for harming, that is, anything other than a part of one’s own body. Section 2 of the present *Criminal Code* includes “anything used or intended for use for the purpose of threatening or intimidating” This is too wide since it would cover the telephone being used to call and intimidate someone. The essence of a weapon is its use to inflict harm and the new Code defines it accordingly.

The present *Criminal Code* has two sections on dangerous substances. Section 77 imposes a legal duty of care on everyone possessing or having care or control of an explosive substance. Section 174 makes it a summary offence for anybody other than a peace officer engaged in the discharge of his duty to possess in a public place, or to deposit or throw near any place, an offensive volatile substance likely to alarm, inconvenience, and so on, or a stink bomb from which such a substance can be liberated.

Under the new Code these substances are dealt with as follows. Explosives are taken care of by two provisions. Clause 18(1)(b) treats explosives like weapons and criminalizes their mere possession where the reasonable inference is that they are intended to be used or have been used to commit a crime. Absent such inference, possession creating risk of harm is covered by the general endangering crime defined by clause 10(1). In this regard note should be taken of the general duty imposed on everybody by clause 2(3)(c)(iv) to take reasonable steps, where failure to do so endangers life, to “rectify dangers of his own creation or within his control.”

At first, the Commission thought that explosives should be included in clause 18(3), “Possession of Things Dangerous in Themselves.” Further consideration, however, showed problems with this approach since the clause would then cover quite innocent possession of things like gasoline or paint-thinner. Since these substances, unlike certain kinds of weapons, are not at present governed by legal regulations authorizing their use and possession in certain circumstances, such innocent possession would not be protected by clause 3(13), “Protection of Persons Acting under Legal Authority.” For this reason, this Report adopts the approach described above and refrains from making all possession of explosives *prima facie* criminal.

Our definition of “explosive substance” differs from that given in section 2 of the present *Criminal Code*. That section gives no principled definition but merely extends the term artificially to cover things used in conjunction with explosive substances and then defines it to cover certain specific items such as molotov cocktails. The new Code defines the term straightforwardly as any substance capable of causing an explosion.

Volatile substances are similarly dealt with. Possession in public places of volatile substances likely to alarm, inconvenience, and so on, is covered by the general crime of public nuisance defined by clause 22(7) — inconveniencing those exercising rights common to all members of the public. Possession, depositing, throwing and so on of volatile substances in a manner likely to cause harm is covered, along with explosives, by the general endangering crime in clause 10(1).

18(2) Possession of Prohibited Things. Everyone commits a crime who possesses:

- (a) any exchequer bill paper, revenue paper or paper used to make bank notes; or**
- (b) any device capable of being used to intercept a private communication.**

Comment

Clause 18(2) replaces paragraph 327(a) of the *Criminal Code* (exchequer bill paper) and section 178.18 (interception device). In both cases simple possession of the items described suffices, for their general circulation carries such risk of social harm as warrants prohibition. By contrast, section 311 of the *Criminal Code* (simple possession of automobile master key) is not retained. On the one hand, there could be justifiable reasons for people such as car dealers to possess such master keys. On the other hand, while section 311 only permits possession under the authority of a licence issued by the provincial Attorney General, our information is that the provinces do not have and do not intend to introduce such licensing schemes.

18(3) Possession of Things Dangerous in Themselves. Everyone commits a crime who possesses:

- (a) a prohibited weapon, or**
- (b) an unregistered regulated weapon.**

18(4) Possession of Forgeries. Everyone commits a crime who:

- (a) possesses a forged public document falling under clause 14(1), or**
- (b) possesses for the purpose of fraud any other forged document.**

18(5) Unauthorized Use of Canadian Passports and Certificates of Citizenship. Everyone commits a crime who uses as his own another person's Canadian passport or certificate of Canadian citizenship.

Comment

Section 58 of the *Criminal Code* only criminalizes use of passports that have been forged or obtained by false application. Subsection 59(1) criminalizes use of certificates of citizenship for a fraudulent purpose. Clause 18(5) makes the law consistent regarding both and applies the notion of subsection 59(1) to passports as well as certificates.

18(6) Possession of Things Obtained by Crime. Everyone commits a crime who has possession of any property or thing, or the proceeds of any property or thing, obtained by a crime committed in Canada or committed anywhere, if it would have been a crime in Canada.

- 18(7) Criminal Dealing.** Everyone commits a crime who carries on a business of dealing in prohibited or unregistered regulated weapons or in things obtained by crime anywhere, if the crime would have been a crime in Canada.

Comment

It is often said that the receiver of stolen goods is a greater social menace than the actual thief. For without the market provided by the former there would be little profit in the activities of the latter. This is particularly true of the professional receiver or dealer in stolen property. For this reason the new Code adds a novel provision to articulate something which at present is reflected, if at all, only in sentencing.

TITLE IV. Crimes against the Natural Order

Comment

Traditionally criminal law primarily concerns conduct harming persons and property. Acts harming the rest of creation have largely been ignored. Harm to the environment, however drastic, has escaped the notice of the criminal law. Maltreatment of animals has been unsatisfactorily dealt with under the general rubric of "Wilful and Forbidden Acts in Respect of Certain Property" (*Criminal Code*, Part IX).

This older tradition, however, is now yielding to a newer approach. Growing awareness of the damage humankind is doing to the earth itself, together with a series of man-made environmental catastrophes, has highlighted the need to protect the planet and underline the value of respect for the environment.⁶⁷ Meanwhile, recent thinking on animals' rights has shown the need, which Bentham saw, to protect animals against human cruelty and underline the value of respect for other sentient creatures sharing in our planet.⁶⁸

Accordingly the new Code proposes to include a new title on the natural order. This title contains two chapters, one on the environment, the other on animals. Both are quite short and aim to use the criminal law only by way of last resort and in line with the notion of restraint. The provision on the environment supplements provisions more appropriately found elsewhere, that is in environmental protection legislation in both federal and provincial sectors. The provisions on animals are a logical development from those already in the present *Criminal Code*.

67. See LRCC, *Crimes against the Environment* (Working Paper 44) (Ottawa: LRCC, 1985) at 11 [hereinafter Working Paper 44].

68. See Jeremy Bentham, "An Introduction to the Principles of Morals and Legislation" in John Bowring (ed.), *The Works of Jeremy Bentham* (New York: Russell & Russell Inc., 1962) vol. 1 at 143, note; see also *R. v. Ménard* (1978), 43 C.C.C. (2d) 458 (Qué. C.A.) at 464.