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1 September 2011**

ATTEMPTS AND CONSPIRACY

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Attempts

The three major problems created by the current law of attempts are 1) justifying the absence of a defence of abandoned intention; 2) delineating acts of preparation as distinct from those of attempt; and 3) dealing effectively with the various types of impossibility. Using the broad guidelines of restraint, clarity and fairness, though, it is possible to distill the useful elements from various reform proposals and create a coherent attempt provision.

Our starting point for this exercise is the American Law Institute's recommendation in s.5.01 of its Model Penal Code.¹⁵⁵ Although the section includes much unneeded specificity in ss.(2) and (3), its structure is compatible with our goals.

First, it establishes a clear and just defence of renunciation of criminal purpose.¹⁵⁶ No mention is made of this defence in the Law Reform Commission of Canada's Draft Code¹⁵⁷, but in the LRCC's Working Paper 45, it is recommended that it not be recognized in Canada.¹⁵⁸ This may be consistent with the current law in Canada, but this does not mean that it is the best course of action to take. There are many jurisdictions which allow this defence (such as France and

¹⁵⁵ *Supra*, note 23.

Section 5.01. Criminal Attempt.

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believed them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct That May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose....

(4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, effect the liability of an accomplice who did not join in such abandonment or prevention

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

¹⁵⁶ *Ibid.*, s.5.01(4).

¹⁵⁷ *Supra*, note 20 at 45.

(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.

¹⁵⁸ Law Reform Commission of Canada, Secondary Liability - Participation in Crime and Inchoate Offences (Working Paper 45)(Ottawa: Law Reform Commission of Canada, 1985),s.4(4) at 50.

Germany), and there are many fact situations which call for its application. If the Commission is serious about its policy of restraint in the criminal law¹⁵⁹, it seems difficult to justify their stance on abandoned intention. The LRCC argues that account can be taken of abandonment in the sentencing procedure, but this is only after the stigma of criminal liability has attached to an accused. Why should such consequences befall someone who has renounced his criminal purpose before any harm has been created? Using a linear model of a course of criminal conduct, it would seem that the "line of criminal conduct" disappears when the actor abandons his purpose. At that point, there is no possibility of an end point of harm, so there can be no point on the line at which preparation becomes an attempt. Under the LRCC's proposal, though, the defence does not exist. The ALI, on the other hand, creates such a defence in ss.5.01(4).¹⁶⁰ While the expression of this defence may be too verbose for the LRCC's purposes, there is no reason to sacrifice words at the expense of justice.

The definition section of the ALI proposal is also useful for our purposes, although its substantive effect is to overextend the ambit of criminal liability. Sections (1)(a) and (b) can be transported verbatim into our new section as they meet our concerns about the current rules on impossibility. The sections erase the distinctions between the various types of impossibility and instead base culpability on perceived circumstances. Section (c), however, needs to be changed in order to conform with current Canadian views of criminal liability. The ALI's "substantial step" test, coupled with the "strongly corroborative" requirement, creates the danger that too much innocent activity will be caught in the web of criminal responsibility. Neither the LRCC nor the U.K. Law Commission¹⁶¹ have formulated tests which explicitly avoid this danger, but the common law that has developed in those two countries creates a narrower field of liability.

Further, the ALI's test still leaves us with the problem of clearly defining the threshold of criminal attempts. It appears from the proposals examined and the surrounding literature¹⁶² that there simply is no test which will pin point the threshold with unerring accuracy. The best we can do is to include in our recommendation some direction to the courts on the appropriate test to be applied. To withhold such direction is to risk the common law's expansion of criminal liability

¹⁵⁹ On the title page of the Law Reform Commission of Canada, *Our Criminal Law - A Report of the Law Reform Commission of Canada* (Ottawa: The Commission, 1976) there appears the proverb, "The more laws, the more offenders", and on page 31 of that policy paper, the Commission recommends "that in all these four aspects - ambit, responsibility, procedure, and sentencing - the watchword must be restraint."

¹⁶⁰ *Supra*, note 23.

¹⁶¹ *Supra*, note 24.

U.K. Law Commission proposal

49(1) *A person who, intending to commit an indictable offence, does an act that is more than merely preparatory to the commission of the offence is guilty of attempt to commit the offence.*

¹⁶² See *supra*, note 20 at 45; *supra* note 23 at 329; *R. v. Deutsch* (1986), 52 C.R. (3d) 305 (S.C.C.) at 322 per Le Dain J.

beyond that intended by legislators. Currently, the Canadian test as enunciated in Deutsch¹⁶³ captures our intuition about the threshold of attempts in a course of criminal conduct. The test combines a "substantial step" requirement with that of sufficient proximity to produce guidelines which are more appropriate and restrained than those of the ALI.

Specifying a sentence for an attempt conviction is a difficult exercise. Attempt charges, by their very nature, can be laid at a variety of points in a course of criminal conduct and after an infinite number of acts have taken place. Police can intervene at any time after the actor has crossed the threshold of attempt, and it is only fair that the time of intervention be reflected in the sentence for the attempt. If someone shoots at an intended victim and misses by accident, we would want a more severe sentence than for the would-be killer who is intercepted on his way to the victim's house. In the latter case, there is still a possibility that the actor could not try to complete his final purpose. As well, no danger or fear has occurred in the victim's mind.

These different circumstances must be reflected in a flexible sentencing provision. The LRCC proposal would restrict the sentence for an attempt conviction to half that of the offence attempted. The intuitive justification for this is that attempters are not as blameworthy as successful criminals because they have not created their desired harm. This intuition may be true, but punishment is not the sole purpose of the criminal law - it must also prevent crimes and protect society. Further, this intuition does not necessarily lead to the strict "one-half sentence" rule.

A more satisfactory provision would allow the sentencing judge to exercise her discretion, taking into account all of the surrounding circumstances. To allow the judge full flexibility, the maximum sentence for an attempt should be the same as for the complete offence. Admittedly, it is difficult to conceive of an attempt which could attract the same penalty as that for a complete offence, but this approach is the only one which allows judges the requisite flexibility. This maximum sentence, combined with a defence of abandoned intention, provides strong incentives to actors to renunciate their criminal purposes at any stage in their courses of conduct.

¹⁶³ B. v. Deutsch, *ibid.* at 323.

The recommendation, then, is for the following attempt provision:

Attempt. (1) A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, he:

(a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believed them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime and is proximate to the commission of the crime.

(2) When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, effect the liability of an accomplice who did not join in such abandonment or prevention

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

(3) A person found guilty under s.(1) of attempting to commit an offence is liable to a maximum penalty equal to the maximum penalty for the offence.

Conspiracy

The LRCC's proposed conspiracy provision solves most of the structural problems created by the various current *Criminal Code* provisions. Section 4(5) of the Draft Code reads:

Conspiracy. Everyone is liable for conspiracy who agrees with another person to commit a crime and is subject to half the penalty for it.

The section is clear and concise and codifies the accepted definition of "conspiring". Quite clearly, the essence of the offence as proposed by the LRCC, is the act of agreeing to commit an offence. It cannot be any more clear. This approach is wholly consistent with the current Canadian common law and does not create any further complications. As well, this section provides a comprehensive conspiracy offence in one provision. The current Code contains many specific conspiracy offences¹⁶⁴, and it was the Commission's stated goal that these provisions be consolidated into one section.¹⁶⁵

Having accepted the basic structure of the LRCC proposal, then, there remain only two outstanding issues to be resolved. First, we must decide whether or not a new provision should allow for a defence of abandoned intention. And second, we must address the efficacy of the LRCC's sentencing proposal.

With respect to abandonment, it is noteworthy that the U.K. Draft Code contains provision for such a defence.¹⁶⁶ In s.48(5) it provides that

A conspiracy continues until the agreed act or acts is or are done, or until all or all save one of the parties to the agreement have abandoned the intention that such act or acts shall be done.

This section provides for the "termination" of a conspiracy offence if the parties abandon their criminal purpose.¹⁶⁷ As well the ALI provides for a similar defence if the actor "thwarts the success of the conspiracy" in a way which exhibits a full and voluntary renunciation of criminal

¹⁶⁴ See for example sections 465(1), 466 and 7(3.6) of the *Criminal Code*.

¹⁶⁵ *Supra*, note 20 at 46.

¹⁶⁶ *Supra*, note 24.. Also note the U.K. Law Commission proposal:

48(1) *A person is guilty of conspiracy to commit an offence or offences if -*

(a) he agrees with another or others that an act or acts shall be done which, if done, will involve the commission of the offence or offences by one or more of the parties to the agreement; and

(b) he and at least one other party to the agreement intend that the offence or offences shall be committed.

¹⁶⁷ This codifies the position on abandonment taken by the House of Lords in *D.P.P. v. Doot* [1973] A.C. 807.

purpose.¹⁶⁸ These defences make sense given the inchoate character of the offence. All of the justifications for having an offence of conspiracy are based on the idea that certain activity must be stopped *before it can cause any harm*. If this justification is to be taken seriously, then we must allow for the voluntary avoidance of harm by the actors involved. The Canadian rejection of an abandonment defence suggests, as with attempts, that the very act of conspiring is harmful in itself. However, from its character as an inchoate crime, we know that conspiracies are only dangerous in their relation to some future harm. If this future harm is avoided by a full and complete renunciation of criminal purpose, once again the preventative function of the criminal law has done its job and the erstwhile conspirators should be acquitted.

As between the ALI and U.K. enunciations of the defence, the former serves our purposes more fully. The U.K. Draft Code s.48(6) makes no mention of a conspirator's reasons for abandoning his intention and this leaves it open to acquit a conspirator who has simply been thwarted by some unknown externality. The ALI proposal, on the other hand, requires 1) that the actor thwart the success of the conspiracy; 2) that he renounce his criminal purpose; and 3) that the renunciation be complete and voluntary. This section provides an incentive not only to withdraw from a conspiracy but also to actively stop its course. Surely this is the kind of incentive that the criminal law should provide for would-be criminals.

The final issue we need to examine is that of sentencing. The LRCC's proposal, as with its attempt law proposal, sets the sentence for conspiracy to commit an offence at one half of the penalty for that offence. Once again, we must decide whether or not this limit provides sufficient flexibility to allow judges to properly reflect the seriousness of an offence in the sentence. When looking at sentencing considerations in the context of conspiracy, we must remember what the substantive offence involves. It is simply the agreement to commit an offence. This in itself can never create harm and can never be as serious as the commission of the intended offence. Further, the Canadian law allows that a charge of conspiracy can coexist along side a charge for committing the full offence.¹⁶⁹ If an actor proceeds beyond the simple agreement required for a conspiracy charge, he is liable to further charges of aiding and abetting, attempting, and/or

¹⁶⁸ *Supra*, note 23, s.5.03(6).

ALI proposal:

Section 5.03. Conspiracy.

(1) **Definition of Conspiracy.** *A person is guilty with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:*

(a) *agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or*

(b) *agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.*

...

(6) **Renunciation of Criminal Purpose.** *It is an affirmative defence that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.*

¹⁶⁹ See *Sheppe v. B.* (1980), 15 C.R.(3d) 381 (S.C.C.).

soliciting. Each new charge provides its own penalties and this negates the need for a more severe sentence for the original conspiracy.

As argued above, the LRCC proposal contains all of the necessary elements for a clear and concise offence of conspiracy. However, it is deficient in that, by its silence on the subject, it retains the common law rejection of a defence of abandoned intention. In this respect the ALI Model Penal Code offers a fair and workable addition to the section.

The recommendation, then, is for the following conspiracy provision:

Conspiracy. (1) Everyone is liable for conspiracy who agrees with another person to commit a crime and is subject to half the penalty for it.

(2) It is an affirmative defence that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.