The Doctrine of Innocent Agency

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INTRODUCTION

In Dickens's *Oliver Twist*, Fagin presides over a gang of thieves that includes homeless boys, Bill Sikes, and Bill's companion, Nancy.[1] Over the course of the story, Fagin is party to many crimes, but two are of particular interest. First, he sends out boys under the age of criminal responsibility to steal handkerchiefs. Second, Fagin approaches Bill and makes certain accusations against Nancy in such a way as to raise in Bill a violent passion, in the throes of which he brutally kills Nancy. Now Fagin was found guilty in court and hanged, but we are never told for what. Perhaps Dickens thought it did not matter. To many people, it might not. Fagin was, after all, a bad lot. But to criminal law theorists, the precise nature of Fagin's liability highlights difficult doctrinal questions in the law of complicity.

This article is about the treatment of similar cases, in which the defendants are obviously guilty, such that if anyone should be punished by the criminal law, it is they. These cases pose a particular danger to the principle of legality[2] because in this sort of situation, courts are prone to bend the rules to secure a conviction. The cases are crimes for which there is no convictable

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1 C. Dickens, *Oliver Twist* (1838).

2 *See infra* pp. 46, 55–56.

perpetrator and thus no liability to which the Fagins of this world can be accessories (the stolen handkerchiefs example) and crimes in which the degree of responsibility of the actual perpetrator (Bill Sikes) may be less than that of the accessory (Fagin). The doctrinal matters that arise are, respectively, *innocent* and *semi-innocent agency*.

This article will suggest that when codification of criminal laws takes place, no special provision is necessary to deal with the questions arising from innocent and semi-innocent agency. I will consider the proposals of the Law Commission of England and Wales, the draft Criminal Codes of New Zealand and Canada, and the American Law Institute's Model Penal Code in attempting to show that the greater the departure from this hands-off precept, the greater will be the difficulties thereby created.

LIMITATIONS OF THE DOCTRINE

According to the principle of legality, one may legitimately be punished only if one falls squarely within a specific penal statute or common law crime.[3] In light of the overwhelming importance of this principle, we need a precise understanding of the relationship between the crime committed and the liability of the accessory.[4] Eighteenth-century England espoused a *narrow theory* of accessorial liability.[5] On this view, the accessory can be liable only if there is a liable perpetrator. There is also a *broad theory* of accessorial liability that draws a distinction between the *wrongfulness of the act* and its *attribution to a particular actor*: "[W]hile wrongfulness is a feature of acts considered abstractly, culpability is always personal . . . . [I]n a prosecution against the accessory, it is the latter's culpability that is relevant; the perpetrator's culpability is incidental."[6] Thus, the broad theory allows conviction of an accessory where the perpetrator cannot be convicted, so long as the

[3] Although academics generally are quick to criticize judicial derogations from the legality principle, *e.g.*, Shaw v. Director of Pub. Prosecutions, 1962 App. Cas. 220 (1961), in the area of complicity, where the behavioral requirements of the law are often least clear, *see* Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. Chi. L. Rev. 729, 734–46 (1990), there has been a curious apathy.

[4] *See* G. Fletcher, *Rethinking Criminal Law* §§ 8.5–8.8 (1978).

[5] *Id.* at 641.

[6] *Id.* at 642.

latter did what is forbidden by law.[7] Accessorial liability is derivative not from a *convictable crime* but from a *wrongful act.*[8]

This article takes the position that the conviction of "constructive" perpetrators, by resort to the doctrine of innocent agency, creates consequential problems both in terms of satisfying the principle of legality and in terms of defining the appropriate mental state. It can and should be avoided by the adoption and elaboration of the broader theory.[9]

The English Cases

The question arises, why the doctrine of innocent agency developed at all. The answer is clear. The doctrine developed in the context of the narrow theory of accomplice liability: the common law embraced a dogma that without someone who can be shown, as against an accessory, to have been convictable as perpetrator, there can be no conviction as accessory.[10]

Until the late eighteenth century this substantive rule was linked to a procedural rule that the principal actually had to have been convicted before

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[7] The broad theory is espoused in some civil law jurisdictions, notably Germany. It is also implicit, but never articulated, in a number of twentieth-century common law decisions. *E.g.*, R. v. Cogan, 1976 Q.B. 217 (C.A.); R. v. Bourne, 36 Crim. App. 125 (Crim. App. 1952).

[8] There is some contemporary support in England for distinguishing between criminal act and convictable actor. The Criminal Justice Act, 1988, § 109(4), provides compensation to victims of crimes committed by persons who "may not be convicted of the offence by reason of age, insanity or diplomatic immunity." Notice, however, that this provision fails to go far enough because it neglects cases of noninsane automatism, mistaken belief in consent (as in rape), mistaken self-defense, excuses, and so on. A recent case involving breach of the Misuse of Drugs Act, 1971, § 20, similarly distinguished between convictable actor and criminal act. R. v. Ahmed, 1990 Crim. L. Rep. 648.

[9] Other possibilities (such as recognizing an "action-causing" basis of liability) are considered *infra* pp. 65–80.

[10] The authority generally cited, *see, e.g.*, Beaumont, *Abetting without a Principal*, 30 N. Ir. L.Q. 1, 2 (1979), is Vaux's Case, 76 Eng. Rep. 992 (Q.B. 1591); *see also* G. Williams, *Criminal Law: The General Part* 350 (2d ed. 1961) ("There cannot be a secondary party to a crime in the absence of a principal in the first degree . . . ."). Strictly, the assertions in *Vaux* are dicta.

an accessory could be indicted.[11] Although this rule was relaxed,[12] it was not finally abolished until 1826.[13] It must have influenced the development of the substantive law.[14] The seminal innocent agency cases did not give the courts the choice between convicting as principal and convicting as accessory: rather, they presented the choice between convicting as principal and not convicting at all. So, in spite of Professor Williams's opinion that the "doctrine of innocent agency enables the law to escape from a logical difficulty in which it might otherwise find itself. There cannot be a secondary party to a crime in the absence of a principal in the first degree; but an apparent secondary party may himself, on closer inspection, be the principal in the first degree"[15]—a more cynical view, but one that may fit the history better, is that the doctrine is not one that has always formed a part of the criminal law but developed toward its nineteenth-century zenith in response to the constraints of the procedural and substantive law of complicity. In nineteenth-century criminal statutes, offenses tended to be more narrowly drawn and more often to be "nonproxyable" and commissible only by members of particular groups.[16] The doctrine of innocent agency was and is a card to be pulled from the sleeve of the prosecutor, or the analyst, or the codifier when all else seems to fail.[17]

In the early cases—typically, murder cases—the innocence of the agent was the innocence of ignorance or infancy. In *Saunders & Archer*,[18] Saunders

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[11] This rule apparently survived in at least one jurisdiction in the United States until 1979. Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979).

[12] 2 J.F. Stephen, *A History of the Criminal Law of England* 235–36 (1883).

[13] Geo. 4, ch. 64, § 9.

[14] *See generally* Spencer, *Criminal Law and Criminal Appeals: The Tail That Wags the Dog*, 1982 Crim. L. Rev. 260.

[15] G. Williams, *supra* note 10, at 350.

[16] *See infra* p. 55.

[17] There is a final matter that enters into consideration here—the rules as to benefit of clergy. Suffice it to say that for some crimes, benefit of clergy was extended to accessories but not to perpetrators. It is not clear in what way, if at all, this affected the substantive law, but the differential penalties may well have caused the courts to strain the law in a manner that would not now be necessary.

[18] R. v. Saunders, 75 Eng. Rep. 706 (Assizes 1575).

placed poison in an apple and gave it to his wife to eat. She ate only a little of the apple and gave the rest to their child, who died. Saunders was convicted of murder. His wife has been described as his innocent agent.[19] In *Anonymous*,[20] the victim's estranged wife gave their daughter a medicinal powder to treat the victim's cold. The victim's other daughter administered the medicine, which turned out to be a fatal poison. The wife was convicted as "principal in the murder . . . but the two daughters were in no fault, they both being ignorant of the poison . . . ."[21] Finally, in *Michael*[22] the victim was an infant boarded with a nurse. The infant's mother, wishing to kill the child, gave the nurse a preparation of laudanum, which she claimed to be medicine. The nurse put the preparation away, thinking the baby did not need any medicine. Later, the nurse's own young son gave a fatal dose of the supposed medicine to the infant. The infant's mother was convicted of murder.

Over the years, the doctrine has been extended to cover other situations, but it has always had a far narrower application than is supposed in the standard English texts.[23] Indeed, *Tyler & Price*[24] is the only nonmodern English case said to involve innocent agency in which the innocence of the agent was not the innocence of either ignorance or infancy.[25] In this case, an admittedly insane man assembled a mob and, at its head, killed a constable. The defendants, who had assisted in the commission of acts fatal to the constable, were found to have possessed the necessary mental state ("aware[ness] of the malignant purpose entertained by" the mob leader)[26] and were convicted as

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19 G. Williams, *Textbook of Criminal Law* § 15.16 (2d ed. 1983).

20 84 Eng. Rep. 1078 (Assizes 1665).

21 *Id.* at 1079.

22 R. v. Michael, 173 Eng. Rep. 867 (Cent. Crim. Ct. 1840).

23 *E.g.*, J.C. Smith & B. Hogan, *Criminal Law* 131–32 (6th ed. 1988).

24 R. v. Tyler, 173 Eng. Rep. 643 (Assizes 1838).

25 R. v. Butt, 15 Cox 564 (Cr. Cas. Res. 1884), is the other nineteenth-century case cited in support of the doctrine. In *Butt*, the defendant gave false information to his employer's bookkeeper, intending that it be entered in the books. The bookkeeper innocently made the entry and the defendant was convicted as principal of falsifying accounts.

26 173 Eng. Rep. at 644.

principals in the first degree. But *Tyler & Price* is not an innocent agency case at all.[27] The decision turns upon the far wider reading of the notion of perpetration then current,[28] not upon the extremely dubious claim that the madman was the agent of the mob.

By and large, the twentieth century has seen the doctrine fall into disfavor.[29] The strongest recent support for a wide reading of the doctrine is to be derived from a rape case. In *Cogan & Leak*,[30] a man persuaded a drunken friend to have intercourse with the man's wife. The friend (Cogan) was led

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[27] *Contra* G. Williams, *supra* note 10, at 352; 2 Law Comm'n, Report No. 177, *A Criminal Code for England and Wales* ¶ 9.13 (1989).

[28] 2 W. Hawkins, *Pleas of the Crown* ch. 29, § 7 (1716–21), states that "all those who assemble themselves together with a felonious intent, the execution whereof causes either the felony intended, or any other to be committed . . . are principals in the highest degree . . . ."

[29] *E.g.*, in Thornton v. Mitchell, [1940] 1 All E.R. 339 (K.B.), the defendant was a bus conductor who had given negligent directions to the driver. The bus driver followed these directions without any breach of his own duty of care. The conductor—charged with aiding and abetting the offense now embodied in the Road Traffic Act, 1988, § 3—was properly acquitted. Of course, if negligent behavior by nondrivers becomes a serious problem, Parliament may have to create criminal liability, but at present there is none. The same answer applies to those offenses mentioned by Kadish, *Complicity, Cause, and Blame*, 73 Calif. L. Rev. 323, 383–84 (1985), under 18 U.S.C. § 2(b). In connection with this case, see Williams, *The Theory of Excuses*, 1982 Crim. L. Rev. 732, 737; Taylor, *Complicity and Excuses*, 1983 Crim. L. Rev. 656.

In Regina v. Else, [1964] 2 Q.B. 341 (Crim. App.), a man named Kemp was charged with knowingly and willfully solemnizing a marriage according to the rites of the Church of England, falsely pretending to be in holy orders, contrary to the Marriage Act, 1949, § 75(1)(d). Else was the putative groom, who had arranged this mock wedding to deceive the mother of the bride: he was charged with aiding and abetting the commission of the offense by Kemp. Kemp's conviction was quashed on the ground that he had believed he was taking part in a charade and was no more falsely pretending to be in holy orders than an actor would have been. It appears, in fact, that he might have been duped by Else. The court assumed that the two convictions must stand or fall together. Under the analysis suggested here, Kemp, the defendant who officiated over the mock marriage ceremony, was clearly not guilty, nor probably was Else, the defendant who played groom.

[30] R. v. Cogan, 1976 Q.B. 217 (C.A.).

to understand that the wife consented, when in fact she did not. The husband (Leak) was charged with, and convicted of, aiding and abetting rape. According to the court, Leak

> could have been indicted as a principal offender. It would have been no defense for him to submit that if Cogan was an "innocent" agent, he was necessarily . . . a principal in the first degree, which was a legal impossibility as a man cannot rape his own wife during cohabitation. . . . The law no longer concerns itself with niceties of degrees of participation in crime; but even if it did, Leak would still be guilty. The reason a man cannot by his own physical act rape his wife during cohabitation is because the law presumes consent from the marriage ceremony . . . . There is no such presumption when a man procures a drunken friend to do the physical act for him. . . . Had Leak been indicted as a principal offender, the case against him would have been clear beyond argument. Should he be allowed to go free because he was charged with "being aider and abettor to the same offence"? *If we are right in our opinion that the wife had been raped (and no one outside a court of law would say that she had not been), then the particulars of offence accurately stated what Leak had done, namely he had procured Cogan to commit the offence.*[31]

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[31] *Id.* at 223–24 (emphasis added). It is important to note that this is the ratio of the case.

Cogan & Leak highlights an assumption implicit in many innocent agency cases; namely, that conduct that does not result in criminal liability is *not prohibited* by the criminal law. Kadish, *supra* note 29, at 381–82, argues that because the man who had intercourse with the unwilling wife did not incur criminal liability, it follows that what he did was not *prohibited* by English criminal law. This incorrect assumption stems from the common law notion that a verdict of not guilty conveys the court's permission to perform the behavior in question. Alldridge, *Rules for Courts and Rules for Citizens*, 10 Oxford J. Legal Stud. 487 (1990).

In connection with *Cogan & Leak*, consider R. v. Bourne, 36 Crim. App. 125 (Crim. App. 1952), where a husband forced his wife to have sexual relations with a dog. The husband was convicted of aiding and abetting his wife to commit the offense. He argued unsuccessfully on appeal that his conviction should not stand because had his wife been charged herself with committing the offense, she would have had a defense of duress; therefore, he could not be guilty of aiding an offense that in law had not taken place.

While no one wants Leak to escape conviction, the remarks about innocent agency have been the subject of much criticism.[32] An indictment charging Leak with rape as perpetrator would have had to allege in the particulars of the offense that he had had intercourse with his wife without her consent. The two major difficulties are that this is not what happened and that, had this been what had happened, it would not have constituted a crime. In addition, if rape could be committed in this way, there is no reason why it should not be capable of being committed by a woman.[33]

The answer appropriate to the case of *Cogan & Leak* is to say that the norm laid down by the law relating to rape is that it is wrongful for a man to have intercourse with a woman who does not in fact consent. That wrongful act is rape.[34] Even when he believes that she does consent, she may still use force to resist if she does not, in fact, consent. The excuse (mistaken belief in the existence of consent) is personal to the defendant, and there is no reason why there should not be liability as accessory. The same kind of approach can be adopted wherever an excuse is available to the "perpetrator."[35]

The latest chapter in the history of the doctrine was written quite recently in *Howe & Bannister*,[36] a case I return to later. In *Howe* the House of

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[32] *E.g.*, Buxton, *Vicarious Rape*, 125 New L.J. 1133 (1975).

[33] *Cogan & Leak* was considered in R. v. Cooper (N.Z.H.C. 1988), an unreported case cited in Dawkins, *Parties, Conspiracies, and Attempts*, in *Essays on Criminal Law in New Zealand* 117, 121 (N. Cameron & S. France ed. 1990). On a preliminary question, Justice Williamson ruled that "a person may actually commit an offence by using the bodies of others, who could not be convicted of that offence, in order to perform the necessary physical acts involved in that particular crime." *Id.* at 121. For U.S. decisions on the application of the innocent agency doctrine to sexual offenses, see Kadish, *supra* note 29, at 374–76.

[34] Kadish, *supra* note 29, at 378, dismisses the strong argument that the wife was raped "because nonlawyers would think so." There is nothing strange about a court's trying to render decisions that are acceptable and explicable to the public. As noted *supra* note 31, Kadish also argues that because the man who had intercourse with the unwilling wife did not incur criminal liability, it follows that what he did was not *prohibited* by English criminal law.

[35] In United States v. Azadian, 436 F.2d 81 (9th Cir. 1971), an accessory was convicted notwithstanding the acquittal of the "perpetrator" on the ground of entrapment. *See generally* Husak, *Justifications and the Criminal Liability of Accessories*, 80 J. Crim. L. & Criminology 491 (1989).

[36] R. v. Howe, 1986 Q.B. 626 (C.A.), *aff'd*, 1987 App. Cas. 417.

Lords addressed a question of law certified by the Court of Appeal and in so doing mistakenly addressed a point not strictly raised by the case—the liability of one who makes another the subject of duress. The certified question asked: "Can one who incites or procures by duress another to kill or to be a party to a killing be convicted of murder if that other is acquitted by reason of duress?"[37] This question arose in the context of Burke's conviction for murder. One of the defendants, Burke, argued on appeal that the trial court should have allowed his defense of duress to go to the jury; the court had ruled, instead, that duress is not a defense to murder. It does not appear to have been argued that in the event Burke's conviction were overturned on the ground that the judge had erred in not permitting the defense of duress to go to the jury, Burke's co-defendant, Clarkson, would not be liable, even though it was agreed that he had instigated the murder and put Burke under duress.

Although there was argument in *Howe* that one who places another under duress acts through the latter's innocent agency,[38] there is no suggestion in any of the speeches in the House that this view was adopted.[39] *Howe* suggests, then, that the doctrine of innocent agency does *not* apply in determining the liability of one who subjects another person to duress.[40] So, in spite of the enthusiasm of the commentators and the law reform bodies, there is precious little authority in English law for the existence of a doctrine of innocent agency.[41]

Result-Crimes and Conduct-Crimes

Much of the credibility that the doctrine of innocent agency has acquired stems from the attempt to create general principles of criminal law and,

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[37] 1987 App. Cas. at 423.

[38] *Id.* at 421.

[39] *E.g.*, *id.* at 426 (Lord Hailsham).

[40] Notice, however, that the certified question did not specifically address the case of *aiding, abetting, counseling*, or *procuring* murder. This may be either because the Accessories and Abettors Act, 1861, § 8, permits the conviction of an accessory for the full offense or because the point of law to be resolved did not attract as much attention as it should have done. The other defendant in this case, Clarkson, allegedly counseled or procured the murder carried out by Burke. 1987 App. Cas. at 425.

[41] *See* Woby v. B&O, 1986 Crim. L.R. 183.

more specifically, to create them by generalizing from the offense of murder, which is unusual in so many respects. But if the doctrine is to be of general application, it is necessary to have regard to the wide range of types of crime to which it may apply.

An important preliminary distinction to be made in carrying out this task is that between *result-crimes* and *conduct-crimes*.[42] Result-crimes are those crimes a necessary ingredient of which is that D should cause something, for example, homicide or criminal damage. Results are always occasioned by some means, animate or inanimate. Where A pushes B into the path of an oncoming car, such that C, the driver, is conscious of what is happening but powerless to avoid killing B (or, perhaps, where C chooses to kill B to avoid some greater harm), it is not necessary to have a "deeming" provision[43] to convict A as perpetrator. In this case, A has done an act with intent to kill and this act has killed. In similar fashion, Michael, intending that her child be killed, gave the nurse the laudanum and the child died from ingesting it.[44] In such cases, guilt can be established without resort to the fiction that the act of the agent *is* the act of the defendant. It suffices to say that the act of the agent was a (generally intended but, in any event, causally linked) consequence of the act of the defendant.[45]

Yet it is precisely in result-crimes that the supposed doctrine fits best,

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[42] *See* J.C. Smith & B. Hogan, *supra* note 23, at 33–35.

[43] In current English usage, this term refers to a provision that deems one thing to be in a category that it would not, as a matter of ordinary language, occupy.

[44] *See supra* note 22 and accompanying text. Likewise, Saunders intended to kill a person when he gave his wife the poisoned apple. As it happened, the apple did kill someone. *See supra* note 18 and accompanying text. And the woman in *Anonymous*, who gave her daughter poisonous powder to administer to the woman's estranged husband, also had the intent to kill; the powder had the intended effect. *See supra* note 20 and accompanying text.

[45] This was established very early in Vaux's Case, 76 Eng. Rep. 992 (Q.B. 1591). The defendant gave his victim poison to drink on the pretext that it was a fertility potion. When alone, the victim drank the potion, and the defendant was found guilty of murder by the act of supplying the poison.

Cf. G. Williams, *supra* note 19, at 393. According to the law of causation, "if D has done the last act he intended to do, he causes the result notwithstanding that the immediate cause was the act of another (the innocent agent), if there was no subsequent criminal volition of another." *Id.* (citing *Michael* to show that "this principle is wider than the simple doctrine of innocent agency").

because in such cases the agent merely *completes* the criminal act. It is easy to say Michael killed via the agency of the nurse's son. In contrast, in a conduct-crime the agent actually *performs* the criminal act, as in rape, theft, or most inchoate offenses. In conduct-crimes, as in crimes that are often seen as either outside or at the fringes of the general body of criminal law (status offenses, passive offenses,[46] licensing offenses, strict liability offenses, and so forth), we may need some kind of doctrinal device to generate convictions absent a convictable perpetrator. However, the doctrine of innocent agency is not the appropriate mechanism.

In two types of conduct-crime, there is particular difficulty convicting a perpetrator who acts by means of an innocent agent[47]—crimes that can be committed only by a particular class of persons to which the proposed perpetrator does not belong,[48] and those in which the crime is defined in such a way that the perpetrator must commit it personally.[49] Of course, *Cogan & Leak*—if the suggested solution were to convict the husband as perpetrator—fails on both counts. First, a husband is outside the class of persons who can be convicted of rape of his wife. Second, it is not possible to have sexual intercourse by proxy.

Unfortunately, focus on these sorts of crimes has fostered the assumption that the doctrine of innocent agency can be applied appropriately to other types of conduct-crime. To the contrary, there is no need in principle, and no support in the English authorities, for such an extension of the scope of liability for perpetration. Moreover, there is a fundamental doctrinal reason militating against convicting the defendant *as perpetrator*:[50] the principle

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[46] An example of a passive offense is to *be found drunk* (in contrast to *being drunk*) in a public place.

[47] *See* J.C. Smith & B. Hogan, *supra* note 23, at 132.

[48] R. v. Austin, [1981] 1 All E.R. 374 (C.A. 1980) (father who kidnapped his own child was legally incapable of committing the offense of child stealing but persons assisting him were convicted).

[49] Kadish, *supra* note 29, at 373, calls these "nonproxyable" crimes.

[50] *Contra id.* at 374 (footnote omitted).

> [T]he limits to the reach of the innocent-agency doctrine are wholly technical, both in the case of nonproxyable actions and actions limited to a defined class of persons. They derive from definitional considerations rather than moral or policy ones. If a defendant may fairly be held liable when he aids or encourages a *guilty* principal to commit the crime (even where the defendant is not

of legality. Defendants must not only be convicted. They must be convicted *of something*. The indictment must describe conduct that is attributable to the defendant. It violates the legality principle to punish defendants for one thing when they did other things that were equally bad. To extend the scope of the criminal law in this manner involves "an element of metaphor, if not fiction."[51] Even if there were no alternative means of ascribing liability—for example, as accessory within the framework proposed in this article—the principle of legality must be respected. It is not the function of criminal law doctrine to provide the means of convicting persons who have not violated express legal prohibitions or to make good, deficiencies in statutory drafting.[52]

Consider, in this regard, the limitations of the doctrine in several conduct-crimes. When Fagin sent out children under the age of criminal responsibility to steal, what should his liability have been? According to Hale, Fagin would have been liable as "principal in the second degree"—that is, as aider and abettor.[53] Nevertheless, the received doctrine down from the early nineteenth century is that Fagin committed theft, as principal in the first degree, whenever one of his boys took another's property.[54]

When Fagin sends Twist (aged under 10) to steal handkerchiefs, Fagin

within the defined class or where the criminal action is nonproxyable) there is no moral or policy reason why he should not be similarly treated if he causes the prohibited actions of an *unwitting* primary actor.

51 *Id.* at 371.

52 "Although it is not likely that a criminal will carefully consider the text of a law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." McBoyle v. United States, 283 U.S. 25, 27 (1931). Contrary to Kadish, *supra* note 29, at 374 (quoted at length *supra* note 50), this consideration is by no means "wholly technical."

53 1 M. Hale, *Pleas of the Crown* 514 (1678).

54 R. v. Manley, 1 Cox 104 (Assizes 1844), contains dicta to the effect that a child—old enough that criminal liability could have been established if mischievous intent had been shown—can be the innocent agent of another for the purpose of generating liability for larceny, but this case is weak authority because the offense was of a highly specific nature. *Contra* Walters v. Lunt, [1951] 2 All E.R. 645 (K.B.) (suggesting that parents, who were acquitted of receiving stolen goods, could have been guilty of larceny, but either as bailees or by finding, *not* by having attributed to them the act of their child).

"appropriates" a handkerchief, within the meaning of the Theft Act, at the moment when Twist takes it. Fagin is the perpetrator, though absent, since a child under 10 cannot commit a crime.[55]

There are, however, serious problems of contemporaneity and coincidence between what Fagin thinks and what Oliver Twist, or any one of his fellow pickpockets, does. By way of solution, one might attribute *both* the thoughts and the acts of Twist to Fagin. However, this approach is at odds with the doctrine of innocent agency, which supports a finding of liability by bringing together the *mental state of one person* with the *acts of another.* To adopt this solution would be to create a system of vicarious liability, depending not upon the innocence but upon the guilt of the agent.[56]

Another solution would be to convict where there is an appropriate coincidence between Fagin's mental state and Twist's acts. But the law usually requires both contemporaneity *and* coincidence in time between mental state and act. What if Fagin were asleep at the time of a theft or, alternatively, thinking about something wholly unrelated? Clearly, those who advocate Fagin's conviction for theft assume that the law should look to his mental state *before* the theft—when sending Twist out—and would limit his liability to those thefts he contemplated at that point in time.[57] But to ask what is contemplated before the crime is committed, when any one of a number of things may subsequently be appropriated, is precisely the question we ask to determine whether or not someone is liable as an *accessory* to the crime of another. This analysis points up a flaw in charging the Fagins among us as perpetrators under the doctrine of innocent agency. In fact, Fagin did not steal. He procured thefts and then handled stolen goods. To describe him as stealing is to be constrained by dogma and to distort language.[58]

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[55] G. Williams, *supra* note 19, at 368.

[56] "Qui peccat per alium peccat per se is not a maxim of criminal law." Tesco Supermarkets Ltd. v. Nattrass, 1972 App. Cas. 153, 199 (1971) (Lord Diplock); *see also* 1 Law Comm'n, *supra* note 27, cl. 29(2).

[57] *See* Director of Pub. Prosecutions for Northern Ireland v. Maxwell, [1978] 1 W.L.R. 1350 (H.L.); R. v. Slack, [1989] 3 All E.R. 90 (C.A.).

[58] Nevertheless, this approach is "plainly acceptable" to the Law Commission. 2 Law Comm'n, *supra* note 27, ¶ 9.11.

Consider in this regard Director of Pub. Prosecutions v. Stonehouse, 1978

Consider also liability for burglary in the case of a child or even a monkey trained to burgle. Section 9(1)(a) of the Theft Act, 1968, makes it an offense to enter as a trespasser a building (or part of a building) with one of four ulterior intents enumerated in section 9(2), and section 9(1)(b) makes it an offense, having entered as a trespasser, to commit one of the named offenses. Thus, there must be entry in addition to trespass. Attempts to construct liability on the basis of innocent agency propose that there is an entry by the controlling adult at the time at which the child or the monkey (or the robot) enters. Now, there is some doubt as to whether entry by means of an instrument can amount to entry for the purposes of section 9.[59] If it cannot, then, a fortiori, entry by means of a child or animal would not generate a conviction under the present state of the law.

Support for this view can be derived from *Pratt v. Martin*.[60] The divisional court held in *Pratt* that a person who sent a dog onto another's land did not enter the land for purposes of section 30 of the Game Act, 1831. Judge Bray found it dispositive of the appeal that "[t]he appellant did not enter or be upon the land."[61] These words are like the recognition that the emperor was wearing no clothes.

To extend the crime of burglary to cases in which the entry is accomplished by a child, an animal, or some type of mechanical device gives rise to the same kinds of problems as to the nature and time of the required mental state as arise in the case of Fagin. In order to find liability for the offense, there must be entry with one of the ulterior intents, and such intent

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App. Cas. 55 (1977), which involved a prosecution for attempting to obtain property by deception. The defendant staged his disappearance, intending among other things that his wife obtain the proceeds of various insurance policies on his life. The defendant's wife was innocent of any wrongdoing. Had the defendant not been discovered before the wife claimed the insurance proceeds, she would have been the means by which the plan was completed. Although the wife may be loosely described as an innocent agent, her actions and the receipt of the insurance money were foreseeable consequences of the defendant's staged disappearance and "innocent agent" is here plainly a label of convenience, not a necessary doctrinal designation.

59 J.C. Smith, *The Law of Theft* ¶ 347 (6th ed. 1989).

60 [1911] 2 K.B. 90.

61 The two leading texts on the law of theft, E. Griew, *The Theft Acts 1968 & 1978* ¶¶ 4–21 (6th ed. 1990); J.C. Smith, *supra* note 59, ¶ 345 (without citing *Pratt v. Martin*), disagree.

must exist at the moment of entry. It may very well be no such intent existed at that precise moment. Even if it did, that would often be mere coincidence. However, if the appropriate time to assess the intent of the putative principal is the time at which the principal sends forth the agent, then the question would be one that typically arises in the context of accessorial liability—what was the scope of the contemplated unlawful enterprise?

In light of these considerations, I propose the following treatment of the cases discussed earlier:

- In the early murder cases, *Saunders*, *Anonymous*, and *Michael*, the defendants were properly convicted as perpetrators; the intermediaries merely constituted the means whereby the offense was committed.
- In *Tyler & Price*, if the facts were to arise today, the defendant should be guilty of aiding and abetting murder; the act of the mob leader was unlawful, but the excuse of insanity was personal to him.
- In *Cogan & Leak*, the husband was guilty of aiding and abetting rape; the excuse of mistake was personal to the husband's friend and did not affect the unlawfulness of the act.
- Finally, Fagin would be guilty of procuring thefts and handling stolen goods.

Accomplices to Justified Acts[62]

This line of analysis suggests the solution to another theoretical and, on occasion, practical problem: there can be no liability as an accomplice to an act that causes harm but is justified since there is no wrongful act of a "perpetrator" from which accomplice liability can be derived. Liability in the instigator, if there is liability, must be original. Under the approach advocated here, justification does not pose difficulties in result-crimes but may do so in conduct-crimes.

Consider these examples. (1) In a jurisdiction that has capital punishment, D, by perjury, causes V to be executed.[63] Similarly, (2) D exposes V

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[62] *See generally* Husak, *supra* note 35.

[63] J.C. Smith & B. Hogan, *supra* note 23, at 327, suggest that there may be a public policy reason against allowing such prosecutions, but they certainly do not fail for lack of causation.

to lethal force from the police.[64] There is no difficulty finding D liable for homicide as perpetrator. He has done an act that causes death and he is liable to the extent of his mental state. The same kind of argument for original liability can be made with respect to the other crimes likely to arise out of the use of force by the police. The conduct of the justified actor who kills is analogous to the conduct of the driver who runs over someone pushed into the street ahead of his vehicle—the conduct is lawful and, therefore, no accomplice liability can attach to it, but there is no reason why it should not form part of a chain of causation,[65] leading from the defendant's act to a harmful consequence, so as to generate original liability.

In conduct-crimes, the possibility of ascribing original liability to the instigator of a justified act will not arise because the verb that the indictment will have to use to describe D's behavior cannot be used without abuse of language.

Semi-innocent Agency

The considerations that apply to restrict the doctrine of innocent agency, and in particular the degree of respect commanded by the principle of legality, also dictate the approach to *semi-innocent agents*, that is, accessories to whom it is sought to attribute a more serious offense than to the perpetrator.[66] Cases of innocent agency draw attention to the precise scope of the concept of perpetrator and to the possibility of convicting an accessory when there is no convictable perpetrator. Cases of semi-innocent agency cause reflection upon the very nature of accomplice liability.

Accomplice liability is derivative, yet it derives not from the *liability* of the perpetrator but from the *breach of a norm* by the perpetrator. There are

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[64] *See* Lanham, *Accomplices, Principals, and Causation*, 12 Melb. U.L.R. 490, 493 (1980); Bailey v. Commonwealth, 229 Va. 258, 329 S.E.2d 37 (1985); R. v. Pagett, 76 Crim. App. 279 (C.A. 1983).

[65] Kadish, *supra* note 29, at 336, excludes this possibility by insisting that any voluntary human act performed when the actor is conscious of all relevant facts and in a state of autonomy breaks the chain of causation (otherwise, many accomplices would be perpetrators). Perhaps this line of reasoning should be limited to the commission of convictable crimes.

[66] G. Williams, *Textbook of Criminal Law* 322 (1979). The argument of this article is that separate categories are confused by using the heading *semi-innocent agent* and that the result depends upon the specific offense in question.

two crude approaches to the semi-innocent agency problem of the more culpable accessory. The first is the old common law view that under no circumstance can the accomplice bear legal liability for a crime more serious than that for which the perpetrator is liable. This approach is unsatisfactory since it fails both to acknowledge the clear moral perception that the culpability of the accomplice can be far greater than that of the perpetrator and to recognize that differential sentencing will not, in all cases, suffice. Although this view was relaxed fairly early with respect to accomplices who were present at the crime (and were treated as principals in the second degree),[67] such piecemeal relaxation probably has discouraged root-and-branch reform.

The second approach is to regard the liability of the perpetrator as irrelevant to the question of the liability of the accomplice. According to this view, the law should simply take the wrongful act of the perpetrator and add to it the mental state of the accomplice, such that where two or more offenses, or degrees of the same offense,[68] can be committed by the same act, each participant is liable to the extent of her own mental state.[69] This is unsatisfactory for two reasons. First, like the doctrine of innocent agency, it violates the principle of legality.[70] Second, it ignores the derivative nature of accessorial liability. Although it may well be that we need a wholesale reorganization of the categories of participation in crime,[71] even if that is accomplished, the criminal law will still consist of primary proscriptions with the

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[67] For a useful review of the history of complicity, see Law Reform Comm'n of Can., Working Paper No. 45, *Secondary Liability* 9–14 (1985); 2 J.F. Stephen, *supra* note 12, at 229.

[68] Degrees of the same offense are not known in English law, but are common in many United States jurisdictions.

[69] This is the position in Sweden. Swedish Nat'l Council for Crime Prevention, Report No. 13, *Swedish Penal Code* ch. 23, § 4 (T. Sellin trans. 1984). It has also prevailed in some jurisdictions in the United States. Jones v. State, 302 Md. 153, 486 A.2d 184 (1985).

[70] The legality principle is transgressed because the defendant is charged and punished under an indictment that, in effect, lies. It is not true that Mrs. Richards aids and abets the felony or that Clarkson, in the hypothetical case where the gun goes off accidentally, procures murder.

[71] Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability*, 37 Hastings L.J. 91, 121–30 (1985); G. Fletcher, *supra* note 4, § 8.5.

law of complicity grafted onto them. Unless there is a breach of a primary proscription, there can be no accomplice liability.[72]

Until recently, the leading English case of semi-innocent agency was *Richards*.[73] Mrs. Richards procured two men to beat up her husband. The latter, who did not actually occasion the victim as much harm as Mrs. Richards had intended, were convicted of malicious wounding under section 20 of the Offences against the Person Act, 1861. Mrs. Richards was convicted under section 18 with counseling and procuring the aggravated offense of wounding with intent to cause grievous bodily harm. On appeal, the court set aside Mrs. Richards's conviction and substituted a conviction for procuring the section 20 offense.[74] Although *Richards* was heavily criticized by academics in the United Kingdom,[75] the decision found its defenders in the United States.[76]

One commentator proposed treating the assailants as semi-innocent agents of Mrs. Richards: "If a person can act through a completely innocent agent, there is no reason why [s]he should not act through a semi-innocent agent. It is wholly unreasonable that the partial guilt of the agent should operate as a defence to the instigator."[77] The major problems with this proposal are, first, that it involves telling untruths. It is simply not true that Mrs. Richards procured an aggravated wounding. Second, the premise—that a person can act through an innocent agent—has been shown, partly at least, to be false.

A somewhat better solution is to treat Mrs. Richards as an accessory to the section 20 offense who procured the section 18 offense.[78] So far, so good.

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[72] It follows from the derivative nature of the liability of an accomplice that it is doctrinally unsound simply to attach the mental state of the accomplice to the act of the perpetrator to generate liability. Two oranges plus two pears do not make four apples. Kadish, *supra* note 29, at 386–96.

[73] R. v. Richards, 1974 Q.B. 776 (C.A. 1973).

[74] But the court left the sentence unaltered. This is typical, unprincipled English pragmatism.

[75] *E.g.*, J.C. Smith & B. Hogan, *Criminal Law* 139–40 (5th ed. 1983).

[76] *E.g.*, Kadish, *supra* note 29, at 388–91.

[77] G. Williams, *supra* note 19, at 374.

[78] J. Dressler, *Understanding Criminal Law* 432 (1987). Perhaps part of the problem is that incitement is not generally perceived as having anywhere near the gravity

But the crime of incitement will not solve the Fagin and Sikes problem.[79] In this sort of case, it is the intention of the inciter that the incitee become inflamed and commit the offense while in the state of mind that gives rise to liability only for manslaughter. It would be impossible, therefore, to hold there to be incitement to murder. Nor is it a crime under English law to attempt to be an accomplice.[80]

Now, the defense open to Sikes is provocation. He can admit all the elements of murder but claim the existence of partially exculpatory factors.[81] Just as in cases where the perpetrator has a complete excuse (say, infancy or ignorance), whatever the personal liability of a so-called semi-innocent agent like Sikes, there can be a "murder," for purposes of determining the liability of accomplices, where the perpetrator is partially excused but still acts with the appropriate mental state for a murder conviction.

While the foregoing "excuse is personal" theory provides a satisfactory account for voluntary manslaughter, consider the hypothetical question concerning involuntary manslaughter that the House of Lords addressed in *Howe & Bannister.* Two cases were consolidated on appeal. With regard to Howe's appeal, the House held that duress cannot be a defense to a charge

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of the consummated offense. Many incitements to kill author Salman Rushdie—which have had the effect of causing him great fear and extreme inconvenience in leading his life—have gone unprosecuted in the United Kingdom.

79 Or the Othello and Iago problem. This example is given in 3 J.F. Stephen, *supra* note 12, at 8, and in Kadish, *supra* note 29, at 385. The difference is that Fagin tells Sikes the truth, whereas Iago lies to Othello.

80 *See* Spencer, *Trying to Help Another Person Commit a Crime,* in *Criminal Law: Essays in Honour of J.C. Smith* 148 (P. Smith ed. 1987).

81 I am assuming here that the defense of provocation provides a partial excuse in English law. R. v. Doughty, 83 Crim. App. 319 (C.A. 1986). This view is not uncontroversial. *See* Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 Mod. L. Rev. 467 (1988); Alldridge, *The Coherence of Defenses*, 1983 Crim. L. Rev. 665.

The same approach can be taken with the other two forms of voluntary manslaughter in English law—diminished responsibility and suicide pacts. Homicide Act, 1957, §§ 2, 4. Of course, the same evidence that will support a provocation defense may also support a defense of no mens rea, R. v. Martindale, [1966] 3 All E.R. 305 (Cts.-Martial App. Ct.), but that does not affect the argument in the text.

of murder for either perpetrator or accomplice and laid down the test for the availability of the defense of duress. The companion case, *Burke & Clarkson*, raised a question about complicity. Burke argued that Clarkson (with whom he had been jointly tried) had been the prime mover in the killing and that the jury had been influenced toward convicting him (Burke) of murder by the instruction that if they convicted Burke only of manslaughter,[82] they could not convict Clarkson (who had not been present at the killing) of murder. This instruction was consistent with *Richards*, but the majority of the House agreed that that case should be overruled: "[W]here a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not . . . result in a compulsory reduction for the other participant."[83]

The hypothetical case dealt with in *Howe* was that Clarkson wanted Burke to kill X, and threatened Burke, as a result of which Burke went out with a gun. When Burke encountered X, the gun went off accidentally, killing X. Burke was liable for manslaughter. It is quite a leap from holding Fagin[84] liable for procuring murder to saying that Clarkson procured murder in this hypothetical case. This is the leap the House made. There is not really anything resembling a murder by Burke from which liability can be derived. While no one wants Clarkson to escape liability, the most appropriate doctrinal solution is not the one the House chose. In this case, the same solution can be adopted as was suggested for *Saunders & Archer* and the other early innocent agency cases: Clarkson performed an act (sent Burke forth) with intent to kill, which actually did kill. The issue then becomes

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[82] Burke claimed that the gun had discharged accidentally. R. v. Howe, 1986 Q.B. 626, 637 (C.A.), *aff'd*, 1987 App. Cas. 417.

[83] 1987 App. Cas. at 458 (Lord Mackay). What appears to have happened in *Howe* is that Lord Hailsham answered the point of law certified as being of general public importance (the *Bourne* point), *id.* at 422–36, and Lord Mackay answered the point that was actually raised by the appeal (the *Richards* point), *id.* at 446–59. Yet the overruling of *Richards* did not lead to a reduction of Burke's conviction to manslaughter perhaps because the whole hypothesis as to the jury's possible line of reasoning was regarded as "fanciful." In all likelihood, both results will be followed in England.

[84] And Iago. *See supra* note 79.

one of causation—the case where an intended consequence occurs as a result of an unexpected sequence of events.[85] There is no voluntary act by Burke that breaks the chain of causation because, by hypothesis, Burke's killing of X is not deliberate. There is no reason why there should not be original liability both in Burke (for manslaughter) and in Clarkson (for murder). In this case, therefore, the most honest analysis is that Clarkson was a perpetrator of murder, not that he procured it.

In sum, under current English law, an accessory, whether present or absent, may be convicted of a more serious offense than the perpetrator. Liability depends upon the mental state of the accessory. In my view, this approach is not theoretically defensible: the same results (in terms of persons behind bars) could be achieved by a solution that gives greater respect to the principle of legality and is more doctrinally coherent. I suggest that an apparent accessory should be convicted for the more serious offense when either (1) the accessory is actually able to be treated as perpetrator or (2) the crime is complete but some mitigating factor personal to the "perpetrator" enables the reduction of her liability, but not otherwise.[86]

RECENT LAW REFORM PROPOSALS

What follows from this is that in any draft code, or any statute laying down the law of complicity, no provision is necessary for innocent agency at all, because no such doctrine is necessary to a coherent criminal law and because the uses to which the supposed doctrine is put infringe the principle of legality.[87] To the extent that there is such provision, it is at best redundant, but it is more likely to be contrary to principle. The defendant either commits the offense, or is an accessory to it, or he does not. All that *is* necessary is provision to the effect that the nonconvictability of the performer of an act that contravenes a norm laid down by the criminal law should not bar the liability of accomplices to that act.

As to semi-innocent agency, again no independent provision is neces-

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[85] *See* G. Williams, *supra* note 19, at 386.

[86] Following *Howe*, this scheme cannot be effected by the courts but must be achieved, if at all, by statute.

[87] *See generally* Ashworth, *Towards a Theory of Criminal Legislation*, 1 Crim. L. Forum 41 (1989).

sary, and whatever provision is made may tend only to obscure. The accessory may be guilty of incitement to commit the more serious offense and may be guilty of procuring the more serious offense. But it will depend upon the precise nature of the primary offense.

Notwithstanding the concerns discussed in this article, recent codification efforts in various common law jurisdictions—the draft criminal codes for England and Wales, Canada, and New Zealand, along with the older Model Penal Code in the United States—have not rejected the doctrine of innocent agency and, indeed, have insisted upon making special provision for it. There are two strategies open to the legislator who takes a theoretical position different from the one advocated in this article and who wishes to draft a provision on innocent agency. On the one hand, the provision may incorporate the *fiction* that one person acts through another.[88] Under this approach, an indictment against Fagin would allege, and the prosecution would have to prove, that Fagin stole when the boys appropriated property. This approach must either meet or ignore the difficulties that arise when the defendant does not belong to the statutorily defined class of potential offenders or when the offense is nonproxyable. On the other hand, the provision can follow the *attribution* approach, under which the action of the agent is not regarded as the action of the principal but responsibility for the criminal conduct is nonetheless attributed to the latter. The allegation that must be proved is that the defendant acted in such a way that another, for whose actions she was responsible, committed the offense or performed the acts that constituted the offense (or a similar formulation).[89] I shall consider each codification proposal in turn to determine what route has been taken and whether any has resolved the difficulties inherent in the doctrine.

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[88] Following R. v. Butt, 15 Cox 564 (Cr. Cas. Res. 1884).

[89] Although the second alternative would not resort to a legal fiction, it would nonetheless infringe the principle of legality. Ashworth, *supra* note 87, notes that statutory departures from general principles of law are common and argues that any such departures must have independent and sufficient justification. It would clearly be a departure from the common law of crimes and from the notion of individual responsibility to adopt the attribution approach. In this regard see Law Reform Comm'n of Can., Report No. 31, *Recodifying Criminal Law* cl. 4, at 173 (1987) ("A person is only criminally liable for conduct engaged in by that person unless otherwise provided in this Code or another Act of Parliament.").

England and Wales

The Law Commission of England and Wales produced a draft Criminal Code in 1989.[90] It has yet to be introduced into Parliament. It is not clear what the chances of enactment are, but if this code is enacted this will probably take place in parts, followed by the enactment of a consolidating statute.

Clause 26[91] of the draft Criminal Code provides:

> (1) A person is guilty of an offence as a principal if, with the fault required for the offence—.
>
> (a) he does the act or acts specified for the offence; or
>
> (b) he does at least one such act and procures, assists or encourages any other such acts done by another; or
>
> (c) he procures, assists or encourages such act or acts done by another who is not himself guilty of the offence because—
>
> (i) he is under ten years of age; or
>
> (ii) he does the act or acts without the fault required for the offence; or
>
> (iii) he has a defence.
>
> . . . .
>
> (3) Subsection (1)(c) applies notwithstanding that the definition of the offence—
>
> (a) implies that the act or acts must be done by the offender personally; or
>
> (b) indicates that the offender must comply with a description which applies only to the other person referred to in subsection (1)(c).

Thus, the proposal is to extend the doctrine of innocent agency beyond the range of application advocated by its proponents. The Law Commission has explained that the purpose of this provision

> is to treat all persons acting through innocent agents as principals (subsection (1)(c)) and to make clear . . . that this includes those in the troublesome exceptional cases (subsection (3))—thereby incidentally ac-

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[90] 1 Law Comm'n, *supra* note 27.

[91] Criticism of the 1985 draft, Law Comm'n, Report No. 143, *Codification of the Criminal Law* ¶ 10.9, cls. 30(2)(b), 30(3) (1985), prompted the current text.

> knowledging by implication that the designation of principal is somewhat odd in those cases. But in truth the oddity is one of nomenclature and not of substance.[92]

In this approach, however, the claim is no longer that the defendant acts through the agent. Rather, the agent's action—even if independent—is attributed to the principal. This represents a complete and unwelcome reversal of the history of the doctrine.

The Law Commission has offered two reasons for not adopting a general approach of convicting as accessory one who performs actions that would generate accessory liability if there were, in fact, a convictable principal:

> First, it might well be difficult for lay persons to understand the description as an "accessory" to murder of someone who, for instance, killed another by causing an innocent nurse to administer poison or a postman to deliver a letter bomb. Secondly, the special fault requirements and defences applying to accessories would apply inappropriately in innocent agency cases, unless their application was excluded by drafting of unacceptable complexity.[93]

The first objection can be met by saying that these are simple causation cases. In the bomb example, the criminal act is giving the postal worker a bomb, with intent to kill. The entirely foreseeable consequence is that the bomb does kill. The person who provides the bomb is plainly guilty of murder. There is no need for a deeming provision to make this defendant guilty of murder. The postal worker (or the nurse) is simply a means, like guns, whereby the result is achieved. The Law Commission's second objection can be met, for example, by pointing out that the problems of the required mental state for liability[94] are, in fact, more serious when the defendant is charged as principal acting through an innocent agent.[95] In short, the commission's reasons do not bear examination.

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92 2 Law Comm'n, *supra* note 27, ¶ 9.12.

93 *Id.* ¶ 9.11.

94 *See supra* p. 57.

95 Murder cases (and misunderstanding the application of the doctrine of innocent agency to them) caused the draft code to be written as it is. *See supra* notes 56–58 and accompanying text.

This is all the more serious because the provision fails to achieve the professed objectives of codification—accessibility and comprehensibility.[96] In detail, the objections to the Law Commission approach are as follows.

Failure to Distinguish the Attribution from the Fiction Approach

In general, the strategy adopted by the Law Commission is the attribution approach. Under the commission's proposal, the allegation against Fagin would be something along the lines of theft as principal, in that he procured the doing of the acts specified in the offense by another (for example, Twist) who is not guilty because he was under the age of criminal responsibility. The allegation against the husband (Leak) in *Cogan & Leak*[97] would be something like rape as principal, in that he procured the doing of the acts specified in the offense by another who is not guilty because he has a defense.

No element of fiction is required because the claim is not being made that Fagin or Leak actually performed the prohibited acts but, rather, that they caused them. However, the Law Commission does not realize that it has moved the goalposts—clause 26(3) applies to the very sorts of cases that create particular difficulties for the fiction approach, that is, cases in which the defendant does not belong to the statutorily defined class of potential offenders or in which the offense is nonproxyable.

Indictments More Difficult to Frame

Since clause 26 extends the doctrine of innocent agency, it will necessarily complicate the drafting of indictments. For example, in a case like *Cogan & Leak*, the indictment would have to be framed in the alternative, to take account of the possibility that the jury might acquit or convict Cogan. If they acquitted, Leak would be the principal; if they convicted, Leak would be an accessory. Wherever the "perpetrator" relied on a defense[98] that did

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[96] 1 Law Comm'n, *supra* note 27, ¶ 2.4.

[97] R. v. Cogan, 1976 Q.B. 217 (C.A.); *see supra* notes 30–35 and accompanying text.

[98] Clause 26(1)(c)(iii) does not distinguish between justification and excuse. So, in the case of accessories to justified actions (for example, supplying weapons for use in self-defense), rather than say that there is no unlawful act upon which to hang accessorial liability (which would be in tune with the general theoretical position advocated here), it is necessary to say that prima facie there is an offense

not go to the lawfulness of the act but, instead, was personal to him, and where there were joint trials, it would always be necessary to draft in the alternative—creating more work for both prosecution and defense attorneys.

Juries More Difficult to Instruct

Of course, the complications would not cease with the indictment. A strong argument against the Law Commission's provision is the difficulty of conveying to jurors matters of the complexity of those to which the rules give rise. As a general proposition, the nature of the liability of one defendant in a trial, against whom only one account of her actual conduct is alleged, should not be made contingent upon the liability of another.[99] If nothing else, this raises the specter of inconsistent verdicts and appeals on this ground.

The Mental State—When and What?

As we saw earlier, in so-called result-crimes the agent is simply the means by which the result is achieved; to convict the instigator as perpetrator[100] requires that the act of sending forth the agent be accompanied by the appropriate intent.[101] In conduct-crimes, the perpetrator must exercise very close control over the agent and the latter must be not guilty by virtue of ignorance[102] or infancy.[103] So, in each of these scenarios, the requirements

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and then to look at the definition of the defense to see whether it extends to the accessory recast as principal.

99 Thus, in *Cogan & Leak*, Leak incited his friend to rape Leak's wife. How Leak's conduct should be described, and what sentence he should get, should not depend, in the slightest, upon Cogan's liability. There are, of course, occasional cases in which such contingency is unavoidable or doctrinally necessary. *See supra* notes 30–35 and accompanying text.

100 For example, Michael, with intent to kill the child, gave the foster mother the bottle of poison. *See supra* note 22 and accompanying text. The giving of the bottle became the act of murder. *See* A.R. White, *Grounds of Liability* chs. 3, 4 (1985).

101 G. Williams, *supra* note 10, at 350, noted the limitation to cases of intended crimes, but there seems no reason why the doctrine should not apply, for example, to reckless damage.

102 *See* R. v. Butt, 15 Cox 564 (Cr. Cas. Res. 1884), discussed *supra* note 25.

103 R. v. Manley, 1 Cox 104 (Assizes 1844).

of contemporaneity[104] and coincidence[105] of act and mental state are quite readily satisfied. If, however, the doctrine is to be extended in the manner envisaged by the Law Commission, it is necessary to be far more specific as to mental state.

The draft code is fairly clear as to what is required for a conviction under clause 26(1)(c). The words "[w]ith the fault required for the offence" must mean "with the fault required to be convicted as perpetrator." As to the time at which this mental state must exist, the clause provides: "with the fault required for the offence— . . . he procures, assists or encourages such act or acts done by another." This implies that the mental state must exist at the time of the act that constitutes procuring, assisting, or encouraging. So the solution offered by the commission is an amalgam of the rules about perpetration and complicity.

Ordinarily in accessory liability, the mental state of the perpetrator is assessed *at the time of the crime* and is the same as the mental state requirement for the particular crime. The mental state of the accessory is assessed at the time of the act of procuring, assisting, or encouraging—which will be *either before or at the time of the crime.* Where the act of procuring, assisting, or encouraging takes place before the act that constitutes the crime, there will be difficulties in cases where the definition of the crime requires a mental state to be held as to a circumstance. Consider the case where the agent is a child who enters a building and the principal is charged with burglary under clause 147(1)(b) of the draft code. At what point in time do we locate ulterior intent and by whom is it to be held? The code suggests that the mental state required of the principal is knowledge or recklessness at the time of entry as to the occurrence of a trespass, along with intent to perform one of the ulterior offenses. But if we look at the time when the child is sent out, the mental state that would be required is something like intention or recklessness as to whether there *will be* a trespassory entry, plus, in the event of entry, one of the ulterior intents. But the latter does not satisfy the "fault required for the offence" standard.

Dual Legal Personality

The attribution to an actor of a dual legal personality—as autonomous agent (as is generally assumed by the criminal law) and as innocent agent of an-

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104 G. Williams, *supra* note 19, at 154.

105 *Id.* at 70.

other—is bound to give rise to conceptual difficulties. Suppose A and B threaten C, as a consequence of which threats C enters her own home, removes articles, and gives them to A and B. Clearly, there is a robbery when the goods are handed over. If C is treated as an innocent agent, there is also a burglary. But there can hardly be said to be the element of invasion that is the hallmark of trespass. This introduces an element of double jeopardy: A and B (for whom, doubtless, few will have sympathy) have C treated as their agent for the purpose of burglary and their victim for the purpose of robbery. In such circumstances, a robbery conviction alone is adequate.

Animals

Clause 26(1)(c) of the draft code specifies that the agent be "another"—another "person" by implication from earlier language in this clause. Thus, the category of innocent agent excludes one class of agent that traditionally has been included in the doctrine—that is, animals.[106] There is, of course, no reason in principle why the concept of innocent agency, if it is to be adopted, should not extend to animals. Indeed, if the origin of the doctrine lies in an extension of perpetration by means of instruments,[107] the argument for applying it to animals is in some ways stronger than the argument for applying it to human beings. Consider, for instance, D, with intent to kill V, letting a poisonous snake free in circumstances in which it is likely to kill V. The view argued for here is that the act of letting the snake loose is an act done with intent to kill that does indeed kill; therefore, under the normal causation rules, liability for murder can attach. No special rule as to innocent agency is required. The code, however, is drafted from the assumption that a special provision *is* required to convict someone like Michael.[108] If the Law Commission is correct, it becomes difficult to see how a conviction could be obtained in such cases without also making provision for nonhuman agents.

Licensing Cases

One area in which the enactment of the code would have a great effect is that of licensing offenses, typically those relating to the sale of alcohol. The strategy of English law has been hitherto that premises are licensed for the sale

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[106] J.C. Smith & B. Hogan, *supra* note 23, at 131.

[107] J. Dressler, *supra* note 78, at 428.

[108] 2 Law Comm'n, *supra* note 27, ¶ 9.11(i).

of alcohol and that if offenses are committed on the premises (for example, sales to minors) the licensee is fixed with liability. The licensee has even been held knowingly to permit activities on the premises when the only "knowing" person is an employee.[109] The employee might be an accomplice under these circumstances but will not fall within the class of person (licensees) capable of being perpetrators.

If clause 26 is enacted, and if the constructive knowledge doctrine—embodied in the much criticized decision of *Allen v. Whitehead*[110]—is abolished, then the employee, not the licensee, would be liable as perpetrator, and the basis of the licensing system, in identifying in advance the responsible party, would disappear.[111]

Failure to Deal with Thornton v. Mitchell

The commission apparently does not know what effect enactment of the code would have upon cases like *Thornton v. Mitchell*:[112]

> [T]he point is not entirely clear and may require to be resolved by the courts. The offence in question, as an offence of negligence, is exceptional; general propositions such as those in clauses 26 and 27 have difficulty in catering plainly for it without an undue sacrifice of general clarity.[113]

This passage suggests that the codification project for England and Wales derives general principles of criminal law from the law of homicide. In fact, there are many offenses of negligence: homicide is an exceptional crime. The public needs a principled solution to this issue, not an abdication of responsibility on the part of the codifiers.

Consistency in the Penal Law

It will be possible, expressly or impliedly, for statutes enacted after adoption of the draft code to exclude its application.[114] The code's expansion of the

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109 Allen v. Whitehead, [1930] 1 K.B. 211; *see* G. Williams, *supra* note 19, at 955.

110 *See* sources cited *supra* note 109.

111 Refusal to renew a license upon reapplication is often, of course, the real penalty in Licensing Act cases.

112 [1940] 1 All E.R. 339 (K.B.); *see supra* note 29.

113 2 Law Comm'n, *supra* note 27, ¶ 9.15.

114 1 Law Comm'n, *supra* note 27, at 43–44.

doctrine of innocent agency makes it far more likely that courts will hold the doctrine to be excluded.[115] For example, consider an act that stated: "A person shall not . . . either himself or by his servant or agent . . . ."[116] Now suppose another section of the same statute began: "A person shall not, himself or by his servant or agent . . . ."[117] And another: "A person shall not . . . ."[118] It could be argued that the application of the code was excluded by these variations in language and that the common law of accessories should be invoked instead.

It would be most unfortunate if, after enactment of the code, there arose a body of case law on the question of whether particular postcodification penal statutes, by their treatment of accessory liability, excluded application of the code. While the code could be revised so that the general principles of criminal law did not apply to licensing and certain other offenses, by creating different sets of rules for complicity, this would have the unfortunate effect of making the application of the criminal law more complicated.

Semi-innocent Agency

According to the Law Commission, the defendant can be convicted as perpetrator (principal) where a so-called semi-innocent agent has the fault required for a less serious offense but not for the offense in question:

> D encourages E to trip up P. D knows, but E does not, that P suffers from a bone condition which makes him peculiarly vulnerable to fractures. D intends that P shall break his leg. E foresees only that P may be cut or bruised by the fall. E trips P who breaks his leg in the fall. E is guilty of recklessly causing personal harm, but is not guilty of a more serious offence of causing serious personal harm since he lacks both intention and recklessness in respect of the causing of serious harm. D is guilty as a principal of intentionally causing serious personal harm.[119]

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115 For examples of the perversity of English courts in their treatment of statutes, see R. v. Fitzmaurice, 1983 Q.B. 1083 (C.A. 1982); Anderton v. Ryan, 1985 App. Cas. 560.

116 Licensing Act, 1964, § 163(1).

117 *Id.* § 163(3).

118 Such differences are often to be found in consolidating statutes.

119 1 Law Comm'n, *supra* note 27, app. B, ex. 26(iii); 2 Law Comm'n, *id.*, ¶ 9.13.

This case could be accommodated within the principles outlined earlier—that is, without special provision. But from this unexceptionable result, the commission derives the general proposition that the accessory with the more culpable mental state (D) should now become a principal[120] since the real perpetrator (E) falls within clause 26(1)(c)(ii). This solution not only is unjustifiable in principle but also gives rise to severe practical problems in instructing juries. In a trial in which P and A were charged with murder, and the prosecution claimed that P was the perpetrator and A an accessory, the judge would have to instruct the jury:

1. If P is guilty of murder, A may be liable, as accessory, for murder or manslaughter, depending upon A's mental state.
2. If P is guilty of manslaughter, A may be liable
   (a) for murder, as principal (the judge would have to explain clause 26).
   (b) for manslaughter (i) as accessory; or (ii) as principal in the event that the reasons that P and A are not guilty of murder differ.
3. If P is not guilty, A may be liable as principal for murder or manslaughter.

It would be impossible to make any satisfactory inference as to the factual basis for sentence solely from a verdict of manslaughter against A.

The "Victim" Rule

It is clear that under the code a distinction will exist in the law of complicity between the person who does what is prohibited and the person who helps. The liability of the latter is dependent upon the acts of the former, but not vice versa. However, if any further significance is attached to the distinction, and persons are treated as principals who are not perpetrators (in the sense that they do not personally perform the prohibited acts), anomalies will arise. The Law Commission draws a distinction between principals and accomplices,[121] partly because there are defenses available to accomplices that are not open to perpetrators. In particular,[122] a person who belongs to the

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120 1 Law Comm'n, *supra* note 27, app. B, ex. 26(iii).

121 2 Law Comm'n, *supra* note 27, ¶ 9.5.

122 This follows from R. v. Tyrell, [1894] 1 Q.B. 710 (Cr. Cas. Res. 1893).

class of persons protected by criminalization of certain conduct cannot be convicted as an accomplice to this offense.[123] The effect of making a person whose acts are those of an accomplice (assisting or encouraging, but not actually performing, the proscribed act) into a principal will have the effect of removing this very defense. Take the case, under clause 94 of the draft code, of a man who has intercourse with a girl under the age of sixteen. The man has a defense if he believed the girl to be sixteen or older: that is, he falls within clause 26(1)(c)(iii)—he "has a defence." Oddly enough, however, the girl herself would be liable under clause 26(1)(c) as principal. Thus, enactment of clause 26 would have the effect of creating an exception to the victim rule wherever the ostensible perpetrator had a defense.

There are doubtless many other objections to clause 26 as drafted. Indeed, one of the problems with such a radical statutory departure from the common law is that it becomes very difficult to foresee potential difficulties.

Canada

The present law of complicity is set out in the Canadian Criminal Code.[124] There is no provision for either innocent or semi-innocent agency. The language, so far as is relevant, is elegant and simple:

> 21. (1) Every one is a party to an offence who
> (a) actually commits it,
> (b) does or omits to do anything for the purpose of aiding any person to commit it, or
> (c) abets any person in committing it.
>
> . . . .
>
> 22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, . . .
>
> . . . .
>
> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

Although this is an excellent provision, far more straightforward than its counterpart in the draft Criminal Code for England and Wales, the Law

123 1 Law Comm'n, *supra* note 27, cl. 27(7), at 55.

124 R.S.C. ch. C-34, § 22 (1970) (amended 1985; first enacted 1892).

Reform Commission of Canada has muddied the waters with a proposal for situations in which there is no offense by the "prime offender":

> Whether an offence committed by a primary offender with a valid defence qualifies for this purpose as "committed" is uncertain. Under the scheme, the problem would be dealt with as follows. Where the defence is a justification making the "offender's" act quite lawful, there would be no liability for any act in furtherance of that lawful act. Where the defence is an excuse making the "offender" excusable but leaving the act unlawful, there would be full liability for any act in furtherance—anyone helping or inciting would be liable for helping or inciting the full offence. Where the defence is an exemption (for example, immaturity) or a negation of *actus reus* (for example, automatism) or *mens rea* (for example, mistake of fact), but the person doing the act in furtherance does not labour under that exempting or negating factor (for example, he is of age, is acting voluntarily and is aware of all the circumstances) the latter would be liable for helping or inciting an incomplete offence and would be therefore liable to half the penalty for the specific offence—a compromise position which avoids holding him liable for an offence which is not actually committed and allowing him complete acquittal when in fact he tried to further a specific crime.[125]

Thus, the Law Reform Commission of Canada draft is unique among the proposals under consideration in distinguishing excuses from justifications and in aiming for a more theoretically sophisticated position. The foregoing recommendations form the basis for the draft Canadian Criminal Code, which deals with the liability of perpetrators and accessories as follows:

> 25. No person is guilty of a crime who helps, advises or incites, or acts under the authority of or on behalf of a person who has a defence under sections 15 or 19 to 24.
>
> 26. The person who commits a crime is the person who, either solely or jointly with another person, engages in the conduct specified in the definition of the crime.
>
> . . . .

[125] Law Reform Comm'n of Can., *supra* note 67, at 35.

> 28. Every one who helps, advises, incites or uses another person to commit a crime is guilty of a crime and is liable to the punishment prescribed for the crime that was so furthered, where the crime intended to be committed was committed or some other crime was committed that involves a similar degree of harm or that differs from the crime intended to be committed by reason only of the identity of the victim.[126]

The Law Reform Commission of Canada does not attempt to resolve the question of innocent agency[127] by a fiction but, instead, makes it an offense to "use" another person to commit a crime.[128] This formulation meets many of the practical objections to the English Law Commission draft. The nature of the liability does not change according to whether the "perpetrator" is convicted or not. This is the only draft under consideration to regard the accomplice to a "ghostly" crime—a crime with no convictable perpetrator—as an accomplice, not as a principal, requiring whatever mental state is required for accomplices. In short, Canada's approach is the most theoretically coherent, and the draft code avoids the problems over mental states encountered in other codification proposals. The Canadian draft is also relatively easy for juries to understand.

If any provision is to be made for innocent agency, then this draft has taken the best tack. It retains the principle of personal commission, with the concept of using another to commit a crime as a form of secondary liability. Still, it is difficult to see how the draft code would improve Canadian law as it currently exists.

Moreover, the draft does not offer any solution to the semi-innocent agency problem, and the attempt to distinguish between justification and excuse may have led the commission into difficulties. Clauses 15 and 19–24 deal with automatism, duress, necessity, defense of person, defense of property, and lawful authority. Clause 25 describes the acts for which there can be no liability as accessory—"No person is guilty of a crime who helps, advises or incites, or acts under the authority of or on behalf of a person who has a defence under sections 15 or 19 to 24." Although it excludes insanity and immaturity, this provision appears to contemplate exclusion from lia-

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126 Law Reform Comm'n of Can., *supra* note 89, at 179.

127 *See* Law Reform Comm'n of Can., *supra* note 67, at 34.

128 Section 25 omits to say "uses," but that hardly answers the case where the perpetrator incites *and* uses another to commit an offense. In that event, § 25 protection would be available.

bility as accessory when the "perpetrator" has available exculpatory defenses either of a justificatory or of an excusatory nature. Consider the case of D, who incites Y to act when Y has a defense of duress. Under clause 25, D commits no offense. But the source of the duress will be the incitement itself, so it is absurd to suggest that D should not incur liability. The Canadian draft code must make clear that although there can be no liability derivative from a justified act, there may still be original liability when a justified act forms part of a chain of causation flowing from D's act.

The Model Penal Code

The Model Penal Code departs from the common law doctrine of personal liability:

> 2.06.
> (1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
>
> (2) A person is legally accountable for the conduct of another person when:
>
> (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible to engage in such conduct; . . . .
>
> . . . .
>
> (5) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.
>
> . . . .
>
> (7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.[129]

[129] American Law Inst., *Model Penal Code: Official Draft and Explanatory Notes* (1985).

As in the drafts for England and Wales and for Canada, clause 2.06(2) avoids the use of fiction by introducing a separate action-causing ground of liability. Furthermore, like the former, the Model Penal Code adds the mental state of one person to the actions of the other to generate liability. By recognizing that this is a separate ground from that under the fiction approach, the Model Penal Code avoids the gratuitous confusion of clause 26(3) of the English Law Commission. Finally, in clause 2.06(2)(a) the Model Penal Code resolves the question of mental state in the case where the defendant sends forth an innocent or irresponsible actor—the required mental state must exist at the time when the agent is sent forth.

New Zealand

The Crimes Act, 1961, makes no provision for innocent agency, but the New Zealand courts have tried to incorporate into the construction of the act a fairly wide reading of the supposed English doctrine.[130] The Crimes Bill, 1989, under consideration by the New Zealand Parliament, uses the term *innocent agent* as a term of art:

> 54. Every person who is, in accordance with any of the succeeding provisions of this Part of this Act, a party to an offence is guilty of that offence and liable to the penalty prescribed by law for that offence.
>
> 55. Every person is a party to an offence who personally commits the offence.
>
> 56. (1) Every person is a party to an offence who intentionally causes an innocent agent to commit the act that constitutes the offence.
>
> (2) In subsection (1) of this section, the term "innocent agent" means a person who at law cannot be held criminally responsible for the offence.

Under clause 2, the definitions section of the bill, a person not "criminally responsible" means one who is not "liable to punishment for an offence," whether because of age, insanity, lack of mens rea, or some other reason comprehended by the general principles of criminal responsibility set out in part II of the bill.

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130 R. v. Paterson, [1976] 2 N.Z.L.R. 394 (C.A.). *See generally* Dawkins, *Parties, Conspiracies, and Attempts*, in *Essays on Criminal Law in New Zealand* 117 (N. Cameron & S. France ed. 1990).

The definition in the Crimes Bill contains an important limitation to cases in which it is the intent of the principal that the agent commit the act constituting the offense.[131] Other mental states will not suffice. This raises an important point of principle. There is clearly no support in the history of the doctrine at common law for any restriction upon the principal's mental state toward the acts of the agent. In the case where the principal can properly be described as *acting* via the agency of another, the only test of liability must be whether the principal had the required mental state for the crime. Restricting liability to acts intended to be performed by the agent may well generate difficulties, for example, in "shield cases,"[132] where the principal may have been merely reckless as to consequences. In addition, the crimes bill errs in trying to make the principal in an agency case something between a perpetrator and an accessory. Since the law of complicity requires (at least) one person to have performed a prohibited act in order to engraft upon that act the liability of accomplices, any attempt to collapse the distinction between perpetrator and accomplice altogether must fail.

Notwithstanding these criticisms, the New Zealand Crimes Bill is generally superior to both the Model Penal Code and the English Law Commission draft. Notably, because the bill does not distinguish between parties, it is not necessary to make the accomplice to a ghostly crime either a perpetrator or an accessory, which avoids undue complications.

CONCLUSION

There are two major movements active in criminal law scholarship: the movement for codification and the movement for criminal law theory. They do occasionally give the impression of being countervailing forces. Yet they should operate symbiotically. It would be a matter for regret if a criminal code were to be enacted that is theoretically insupportable. The requirement for concrete answers to questions before courts does not necessarily give rise to a demand for the sort of proposals under consideration.

A code should not cut itself off from the historical foundations of the legal culture out of which it arises. Nor does it need "deeming" provisions.

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131 This limitation does not appear either in the English Law Commission's draft or in the Model Penal Code. *See* Kadish, *supra* note 29, at 384–85, 395–96.

132 *See, e.g.*, Lanham, *supra* note 64, at 493; Bailey v. Commonwealth, 229 Va. 258, 329 S.E.2d 37 (1985); R. v. Pagett, 76 Crim. App. 279 (C.A. 1983).

The discussion by the reformers and the textbook writers of the cases on innocent agency seems to proceed on the basis that it does not really matter for what the various hypothetical defendants are convicted, so long as convicted they are. But there are other considerations. Criminal legislation should clearly cover conduct before a conviction is brought in—if the words of the legislation are not satisfied, it is unconstitutional to convict. If this means that more care should be taken in drafting criminal statutes, then more care should be taken. It is not the function of criminal law theory, or indeed of the courts, to provide remedies for bad statutory drafting.

Of course, it might be argued that so long as a criminal code or a complicity statute makes provision for the conviction of persons who cause prohibited acts to be performed by another, the objection on the basis of legality loses its force. Indictments need, then, no longer assert untruths.

This is correct, and none of the drafts under consideration requires the framing of indictments that lie—which is what would be required by following the fiction approach. The action-causing formulations clearly meet this objection.

At the same time, all these formulations have been developed in response to a problem that does not, in fact, exist. That all of them require actions to be *caused* and not *performed* is enough to show that the breach of the primary norm is by someone other than the person charged. There seems to be no reason in legal systems that do not differentiate between the punishment of accessories and the punishment of perpetrators[133] why any of these formulations should not be regarded as describing ways of being an accessory. Nothing is gained, and much may be lost (for example, defenses available to accomplices but not principals), by the insistence of England and Wales, New Zealand, and the Model Penal Code on labeling this group of defendants "principals," "perpetrators," or "the person who commits the crime."

In addition, where a crime is defined so that it can be performed through an agent, it should be thus defined explicitly, rather than by way of a general provision in a complicity statute or a chapter dealing with complicity in the criminal code. Under this approach, problems involving mental state and licensing crimes can be resolved when the particular offense is considered

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133 In common law jurisdictions, an accessory to crime generally is subject to the same maximum punishment as the perpetrator. G. Fletcher, *supra* note 4, § 8.5, at 636–37; *see also* Dressler, *supra* note 71, at 109–20.

for enactment. The drafts under consideration generally have the effect (save in respect of offenses that survive enactment and those that expressly or impliedly exclude its application) that each and every type of crime is able to be committed via an innocent agent, however unsuitable the doctrine to the particular type of crime and whatever analytical problems this causes.

In short, the law is now clearer, less complicated, and more principled in England, Canada, New Zealand, and those United States jurisdictions that make no special provision for innocent agency than it would be under the current codification proposals discussed here. It may well be that a more thoroughgoing reappraisal of the law of complicity is what is required.[134] The project would involve defining different categories of participant in offenses so as to classify participants according to the degree of gravity of each one's participation. That is a worthy project, but one facing serious difficulties. But that is not what any of the proposals under consideration seeks to do. They wish only to place the law of complicity upon a rational footing, commencing from the understanding that the maximum sentences will be the same for all participants and that at sentencing the court should determine the gravity of the participation of each. What I have tried to show is that where the so-called doctrine of innocent agency is concerned, no provision is better than some.

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[134] *See* Dressler, *supra* note 71.