See: Minutes of Subcommittee No. 1
6/13/69, p. 2, Vol. X
Tape #76

CRIMINAL LAW REVISION COMMISSION

Salem, Oregon

Article 3. PARTIES TO CRIME

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Subcommittee No. 1

ARTICLE 3. PARTIES TO CRIME

Section 1. Criminal liability based upon conduct.

A person is guilty of a crime if it is committed by his own conduct or by the conduct of another person for which he is criminally liable, or both.

Existing Law
ORS 161.210 161.220

COMMENTARY - CRIMINAL LIABILITY BASED UPON CONDUCT

A. Summary

The underlying purpose of this section and those that follow is to declare the general principles under which criminal liability will be imposed for accessorial conduct.

Section 1 states the fundamental rule that liability is based upon one's own conduct or the conduct of another for which he may be liable. As noted in the Model Penal Code, all modern criminal justice systems are founded upon this principle of accountability. (Commentary, MPC, Tent. Draft No. 1, p. 14 (1956))

B. Derivation

The section is derived from MPC S. 2.06 (1) except that the words "criminally liable" are used instead of the language "legally accountable". Similar provisions are contained in Michigan Revised Criminal Code S. 401 and Illinois Criminal Code S. 5-1.

C. Relationship to Existing Law

The section is consistent with Oregon statutory law which long ago abolished the common law distinction between principals and accessories before the fact. The field of accessories after the fact is not covered by the Draft; such behavior amounts to an interference with the administration of justice and should be dealt with under a separate article as such. Existing Oregon statutes relating to parties to crime:

ORS 161.210 Principals and accessories. (1) The parties to crimes are classified as principals and accessories.

(2) There are no accessories in misdemeanors.

ORS 161.220 Common law distinctions abrogated' principals defined. The distinction in felonies between an accessory before the fact and a principal, and between principals in the first and second degree, is abrogated; all persons concerned in the commission of a felony or misdemeanor, whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals and shall be indicted, tried, and punished as principals.

ORS 161.230 Accessories defined. All persons are accessories who, after the commission of any felony, conceal or aid the offender, with knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction or punishment.

ORs 161.240 Punishment of accessory. Except where a different punishment is prescribed by law, an accessory, upon conviction, shall be punished by imprisonment in the penitentiary for not more than five years, or by imprisonment in the county jail for not less than three months nor more than one year, or by fine of not less than $100 nor more than $500.

ORS 161.250 Accessory punishable though principal not tried. An accessory may be indicted, tried and punished though the principal is not indicted or tried.

Section 2. Criminal liability for conduct of another; complicity.

Existing Law
ORS 161.210
161.220

A person is criminally liable for the conduct of another person constituting a crime if:

(1) He is made criminally liable by the statute defining the crime; or

(2) With the intent to promote or facilitate the commission of the crime he:

(a) Solicits or commands such other person to commit the crime; or

(b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime; or

(c) Having a legal duty to prevent the commission of the crime, fails to make an effort he is legally required to make.

COMMENTARY - CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER.

A. Summary

Section 2 sets forth the modes and extent of complicity in criminal conduct and the requisite mental state.

Subsection (1) fixes liability if it is so provided by the specific criminal statute and will not disturb those situations where special legislation may impose extraordinary liability upon a person for the behavior of another. An example of such a statute would be one which places vicarious criminal liability on a tavern owner for the act of an employe resulting in sale of liquor to a minor. See, State v. Brown, 73 Or 325, 144 P 444 (1914).

Paragraphs (a) and (b) of subsection (2) comprise a comprehensive statement of criminal liability based on conspiracy, solicitation or aiding in the commission of the crime. The mens rea is an intent

"to promote or facilitate" the commission of the crime. Note, however, that "conspiracy" as such, is not the basis of complicity in substantive offenses committed in furtherance of its aims. The type of conduct covered is phrased in terms of "solicits", "commands", "aids", "abets" or "agrees or attempts to aid or abet". Solicitation has the same meaning for the purposes of this section as is proposed in the Inchoate Crimes Article. (See, Section 4, Preliminary Draft No. 1, March 1969) A lengthy discussion of the subject is found in Model Penal Code (Commentary, Tent. Draft No. 1, pp 20-26) wherein the reason advanced for this treatment of conspiracy is that there appears to be no better way to confine within reasonable limits the scope of liability to which a criminal conspiracy may give rise.

Paragraph (c) refers to the failure to act by one having a legal duty to do so. In such situations, if the omission is undertaken with the intent to facilitate the commission of a crime, it should make the individual as much an accomplice as one who gives affirmative aid.

B. Derivation

Subsection (1) is taken from MPC S. 206 (2) (b) with the words "criminally liable" used instead of the word "accountable".

The language of "intent to promote or facilitate" the commission of the crime in subsection (2) comes from Michigan Revised Criminal Code S. 415. The balance of the subsection is based on MPC S. 2.06 (3), but follows the Michigan view that retaining the common law verb "abets" is desirable because the word has been well defined by the courts.

C. Relationship to Existing Law

Subsection (1) restates the existing rule, although Oregon now has no comparable statute, that a principal may be held liable for the criminal acts of his agent done by the principal's authority. State ex rel. Kruckman v. Rogers, 124 Or 656, 256 P 784 (1928)

Paragraphs (a) and (b) of subsection (2) do not differ substantially from present law governing accessorial liability, whether that liability arises by virtue of aiding and abetting or by virtue of conspiracy liability for substantive crimes. See, ORS 161.220; State v. Blackwell, 241 Or 528 407 P 2d 617 (1965); State v. Shannon, 242 Or 404, 409 P 2d 911 (1966); State v. Moczygemba, 234 Or 141, 399 P 2d 557 (1963); State v. Brown, 113 Or 149, 231 P. 929 (1925); State v. Johnson, 7 Or 210 (1879).

The same language that is suggested for the crime of Solicitation (Inchoate Crimes, Prelim. Draft No. 1, March 1969) has been used in

paragraph (a). Although the crime of solicitation could be utilized as a basis for prosecution even where the substantive crime was actually committed, it is anticipated that solicitation will be employed primarily where the solicitation was unsuccessful, and that prosecution as an accomplice will be the normal course in cases where the solicitation did lead to the commission of a crime.

The terms "aids" and "abets" have been utilized in paragraph (b) without definition inasmuch as they have been interpreted in a number of Oregon cases. State v. Rosser, 162 Or 293, 344, 91 P 2d 295 (1939) defined an "aider and abettor" as "one who advises, counsels, procures or encourages another to commit a crime, though not personally present at the time and place of the commission of the offense." State v. Start, 65 Or 178, 182, 132 P 512 (1913) defined "abet" as meaning "to countenance, assist, give aid" and to include "knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime". Accord, State v. Wedemeyer, 65 Or 198, 132 P 518 (1913).

The principle enunciated in paragraph (c) can be illustrated by a case cited in the Michigan Commentary. In People v. Chapman, 28 N.W. 896 (Mich. 1886), a husband seeking grounds for divorce, had hired a man to commit adultery with his wife. The wife did not cooperate and instead was raped by the husband's accomplice. The husband was in the next room but made no effort to come to the aid of his wife. The court had no difficulty in finding that his failure to interfere under the circumstances, constituted aid and assistance rendering him liable for the offense.

Another kind of case in which there clearly would be a duty to try to prevent the crime would be that of a police officer who permits a prisoner to escape from official detention without making an effort to prevent the escape. (ORS 162.324 provides that this is one of the means of committing the crime of Escape.)

Section 3. Criminal liability for conduct of another; no defense. In any prosecution for a crime in which criminal liability is based upon the conduct of another person pursuant to Section 2 of this Article, it is no defense that:

(1) Such other person has not been prosecuted for or convicted of any crime based upon the conduct in question or has been convicted of a different crime or degree of crime; or

(2) The crime, as defined, can be committed only by a particular class or classes of persons to which the defendant does not belong, and he is for that reason legally incapable of committing the crime in an individaul capacity.

COMMENTARY - CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER; NO DEFENSE.

A. Summary

Subsection (1) codifies the case rule that lack of conviction of the principal is no defense to prosecution of an accomplice. See Oregon cases cited infra.

Subsection (2) states the generally accepted principle that a person who is not capable in his individual capacity of committing a crime may nevertheless be liable for the behavior of another who has the capacity to commit the crime. For example, A, who is not a public servant, aids B, who is a public servant, to receive a bribe. The fact that A is incapable of committing the crime of bribe receiving alone because he does not belong to the class of persons to whom it applies (public servants) does not preclude his conviction thereof on the basis of his accessorial conduct. See Oregon cases infra.

B. Derivation

The section is based upon language appearing in MPC S. 2.06 (7), New York Revised Penal Law S. 20.05 and Michigan Revised Criminal Code S. 425.

C. Relationship to Existing Law

Oregon now has no comparable statute; however our court decisions have articulated the same rules. Pertinent cases relating to subsection (1):

> A principal may be convicted of murder in the second degree and an accessory before the fact of the crime of manslaughter.--State v. Steevea, 29 Or 85, 43 P 947 (1896)

> The fact that a codefendant was acquitted does not prevent the conviction of the accused.--State v. Casey, 108 Or 386, 217 P 632 (1923). Cf. Rooney v. U.S., 203 F. 928 (C.C.A. 1913).

Subsection (2):

> Since anactment of ORS 161.220 the Oregon court has consistently adhered to the doctrine that who cannot alone commit a crime defined by statute may, by aiding and abetting one within the class against which the statute is directed, render himself criminally liable though the statute does not in express terms extend to persons not within the class. State v. Case, 61 Or 265, 122 P 304 (1912); State v. Fraser, 105 Or 589, 209 P 467 (1922).

Section 4. Exemptions to criminal liability for conduct of another.

Except as otherwise provided by the statute defining the crime, a person is not criminally liable for conduct of another constituting a crime if:

(1) He is a victim of that crime; or

(2) The crime is so defined that his conduct is necessarily incidental thereto.

COMMENTARY - EXEMPTIONS TO CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER.

A. Summary

This section states certain principles for relieving a person from accountability for the conduct of another.

Under subsection (1), unless the statute defining the crime provides to the contrary, a "victim" of the criminal act does not share the guilt of the actor. Thus, a victim of a blackmail plot who pays over money, even though he "aids" the commission of the crime, or the girl under the age of consent in statutory rape, even though she "solicits" the criminal act, are not deemed guilty of the substantive offense.

Subsection (2) extends the same concept to situations wherein the person may not be characterized exactly as a "victim". The MPC suggests the following examples: Should a man accepting a prostitute's solicitation be guilty of prostitution? Should a woman upon whom an illegal miscarriage is produced be guilty of abortion? (See, State v. Barnett, infra) Should a bribe taker be guilty of bribery? (Commentary, Tent. Draft No. 1, p. 35 (1953).)

B. Derivation

The origin of section 4 is MPC S. 2.06 (6); New York Revised Penal Law S. 20.10 and Michigan Revised Criminal Code S. 420. It more closely resembles the last cited section.

C. Relationship to Existing Law

There are no comparable existing Oregon statutes; however, the two exemptions are well recognized in general common law throughout

the United States and by the Oregon Court.

The justification for Subsection (1) is stated in the Model Penal Code commentary:

> "It seems clear that the victim of a crime should not be held as an accomplice in its perpetration, though his conduct in a sense assists in the commission of the crime. The business-man who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or even may be thought immoral; [but] to view them as involved in the commission of the crime confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection. So, too, to hold the female an accomplice in a statutory rape upon her person would be inconsistent with the legislative purpose to protect her against her own weakness in consenting, the very theory of the crime." (Model Penal Code, supra at 35).

This position is consistent with Oregon case authority, State v. Knighten, 39 Or 63, 63 P 866 (1901) (prosecutrix is not an accomplice to statutory rape); State v. Mallory, 92 Or 133, 180 P 99 (1919) (prosecutrix is not an accomplice to fornication).

The justification for subsection (2) also is well put in the Model Penal Code commentary:

> "Exclusion of the victim does not wholly meet the problems that arise. Should a woman be deemed an accomplice when an abortion is performed upon her? Should the man who has intercourse with a prostitute be be (sic) viewed as an accomplice in the act of prostitution, the purchaser an accomplice in the unlawful sale, the unmarried party to a bigamous marriage an accomplice of the bigamist, the bribe-giver an accomplice of the taker?
>
> "These are typical situations where conflicting policies and strategies, or both, are involved in determining whether the normal

principles of accessorial accountability ought to apply. One factor that has weighed with some state courts is that affirming liability makes applicable the requirement that testimony be corroborated; the consequence may be to diminish rather than enhance the law's effectiveness by making any convictions unduly difficult. More than this, however, is involved. In situations like prostitution, prohibition, even abortion, there is an ambivalence in public attitudes that makes enforcement very difficult at best; if liability is pressed to its logical extent, public support may be wholly lost. Yet to trust only to the discretion of prosecutors makes for anarchical diversity and enlists sympathy for those against whom prosecution may be launched.

"To seek a systematic legislative resolution of these issues seems a hopeless effort; the problem must be faced and weighed as it arises in each situation. What is common to these cases is, however, that the question is before the legislature when it defines the individual offense involved. No one can draft a prohibition of adultery without awareness that two parties to the conduct necessarily will be involved. It is proposed, therefore, that in such cases the general section on complicity be made inapplicable, leaving to the definition of the crime itself the selective judgement that must be made. If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime. And since the exception is confined to behavior "inevitably incident to" the commission of the crime, the problem, we repeat, inescapably presents itself in defining the crime." (Model Penal Code, supra at 35-36.)

In State v. Barnett, 86 Adv. Sh. 131 (Feb 1968), a prosecution for manslaughter by abortion, the defendant argued that the mother upon whom the abortion was performed was an accomplice within the meaning of ORS 161.220 and that therefore, the defendant could not be convicted on her testimony alone because of ORS 136.550 (requiring corroboration of accomplice testimony.) The Court in affirming the conviction stated: "It is our opinion that it was not the intention of the legislature by the passage of this statute (ORS 161.220) to make the consent and solicitation of the mother culpable when such actions had not been previously so considered. ***The fact that certain actions have been held to constitute the aiding and abetting of crimes other than manslaughter by abortion does not result in the necessary conclusion that historical precedent must be disregarded and that the consent and solicitation of the mother should be treated as sufficiently concerning her with the commission of the crime so that she is an accomplice. We do not believe the legislature intended any such result." (Id. at 133-4)

Adoption of the proposed section would clearly show that, indeed, the legislature does not intend any such result and would undoubtedly be of great aid to the courts in deciding whether or not as a matter of law a person is an accomplice in any given case.

The rule in this state is that an accomplice is one who is subject to be indicted and punished for the same crime for which the defendant is being tried. State v. Barnett, supra at 132. See, also, State v. Coffey, 157 Or 457, 72 P2d 35 (1937) (a bribe giver is not an accomplice of the public officer receiving the bribe); State v. McCowan, 203 Or 551, 280 P2d 976 (1955) (a prostitute is not an accomplice of a man who receives her earnings in violation of ORS 167.120.)

An accomplice has been further defined in Oregon cases as "a person who knowingly, voluntarily and with common intent with the principal offender, unites in the commission of a crime." State v. Stacey, 153 Or 449, 53 P2d 1152 (1936); State v. Ewing, 174 Or 487, 149 P2d 765 (1944); State v. Nice, 240 Or 343, 401 P2d 296 (1965).

Section 5. Criminal liability for conduct of another; renunciation as defense.

(1) In any prosecution for a crime in which criminal liability is based upon the conduct of another person pursuant to section 2 of this Article, it is a defense that, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the actor terminates his complicity prior to the commission of the crime and;

(a) Wholly deprives his complicity of its effectiveness in the commission of the crime; or

(b) Gives timely warning to law enforcement authorities or otherwise makes proper effort to prevent the commission of the crime.

(2) The defense of renunciation is an affirmative defense which shall be proved by the defendant by a preponderance of the evidence.

COMMENTARY - CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER; RENUNCIATION AS DEFENSE.

A. Summary

This section sets forth the requirements for making out a defense of renunciation and is based on the premise that even though acts of complicity have occurred, criminal liability may be averted if the reason for its imposition disappears before the crime has been committed. There must be a voluntary renunciation plus appropriate steps to deprive the complicity of its effectiveness.

The Model Penal Code, in noting the course of action that will suffice, states:

> "The action needed for that purpose will, of course, vary with the accessorial behavior. If that consisted of aid, as by providing arms, a statement of withdrawal ought not be sufficient; what is important is that he get back the arms. If, on the other hand, complicity inhered in request or encouragement, countermanding disapproval should suffice to nullify its influence,

provided it is heard in time to allow reconsideration by those planning to commit the crime.

"There will be cases where the only way that the accomplice can deprive his conduct of its effectiveness is to make independent efforts to prevent the crime. When that is so, the law should nonetheless accord the possibility of gaining an immunity provided there is timely warning to the law enforcement authorities or there otherwise is proper effort to prevent commission of the crime. The sort of effort that should be demanded turns so largely on the circumstances that it does not seem advisable to attempt formulation of a more specific rule". (Tent. Draft No 1, pp 37-38)

The basic rationale supporting the adoption of a renunciation provision is thoroughly discussed in Commission Article on Inchoate Crimes (Prelim. Draft No. 1, sec. 3, pp 14-18). The comments relating to renunciation being an affirmative defense with the burden of proof allocated to the defendant apply equally to the instant section.

B. Derivation

The language in subsection (1) is derived from MPC S. 2.06 (6) (c); however, the phrase "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose", which is used in the Inchoate Crimes Draft, has been inserted here.

Subsection (2) is identical to the Inchoate Crimes proposal.

C. Relationship to Existing Law

This section would create new provisions in Oregon law. The section is submitted conditionally by your reporter for examination by the Commission because the policy considerations are basically the same as are involved in connection with renunciation as it applies to the area of inchoate crimes, i.e., attempts, solicitation and conspiracy. The actions required of the defendant to successfully invoke the defense under section 5 should, however, be distinguished from those required when the substantive crime has not been committed. See, Inchoate Crimes, Prelim. Draft No. 1, sections 3,5,10.

Section 6. Criminal liability of corporations.

(1) Definitions. As used in this section:

(a) "Agent" means any director, officer or employe of a corporation, or any other person who is authorized to act in behalf of the corporation.

(b) "High managerial agent" means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employes.

(2) A corporation is guilty of an offense if:

(a) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation and the offense is a misdemeanor or a violation, or the offense is one defined by a statute that clearly indicates a legislative intent to impose criminal liability on a corporation; or

(b) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.

Section 7. Criminal liability of an individual for corporate conduct.

A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf.

COMMENTARY - CRIMINAL LIABILITY OF CORPORATIONS

A. Summary

Section 6 indicates the circumstances under which a corporation may be held criminally liable.

Section 7 assures that a person is not exempted from personal criminal liability performed through or in the name of a corporation.

Paragraph (a) of Subsection (2) indicates the offenses for which a corporation may be held criminally liable for the conduct of an agent acting within the scope of his employment. It adopts the agency principle of respondeat superior, qualified by the additional requirement that the conduct be "in behalf of the corporation". Liability based upon respondeat superior is limited to offenses that are misdemeanors or violations. The only exceptions to this limitation would need to be clearly indicated by the legislature in the statute defining a felony that imposed corporate liability.

Paragraph (b) affirms the responsibility of corporations for the commission of an offense through omission of a duty specifically imposed on corporations by law.

Paragraph (c) also states a basis for liability that relates more to the actual responsibility of the corporation than the theory of respondeat superior. It applies to those activities which were known specifically to high corporate executives.

The policy issues to be considered are well stated in the Model Penal Code:

> " In approaching the analysis of corporate criminal capacity, it will be observed initially that the imposing of criminal penalties on corporate bodies results in a species of vicarious criminal liability. The direct burden of a corporate fine is

visited on the shareholders of the corporation. In most cases, the shareholders have not participated in the criminal conduct and lack the practical means of supervision of corporate management to prevent misconduct by corporate agents. This is not to say, of course, that all the considerations of policy which are involved in imposing vicarious responsibility on the human principle are present in the same degree in the corporate cases. Two fundamental distinctions should be noted. First, the very fact that the corporation is the party nominally convicted means that the individual shareholders escape the opprobrium and incidental disabilities which normally follow a personal conviction or those which may result even from being named in an indictment. Second, the shareholder's loss is limited to his equity in the corporation. His personal assets are not ordinarily subject to levy and the conviction of the corporation will not result in loss of liberty to the stockholders. Nevertheless, the fact that the direct impact of corporate fines is felt by a group ordinarily innocent of criminal conduct underscores the point that such fines ought not to be authorized except where they clearly may be expected to accomplish desirable social purposes. To the extent that shareholders participate in criminal conduct, they may be reached directly through application of the ordinary principles of criminal liability.

"It would seem that the ultimate justification of corporate criminal responsibility must rest in large measure on an evaluation of the deterrent effects of corporate fines on the conduct of corporate agents. Is there reason for anticipating a substantially higher degree of deterrence from fines levied on corporate bodies than can fairly be anticipated from proceeding directly against the guilty officer or agent or from other feasible sanctions of a non-criminal character?

"It may be assumed that ordinarily a corporate agent is not likely to be deterred from criminal conduct by the prospect of corporate liability when, in any event, he faces the prospect of individually suffering serious criminal penalties for his own act. If the agent cannot be prevented from committing an offense by the prospect of personal liability, he ordinarily will not be prevented by the prospect of corporate liability.

"Yet the problem cannot be resolved so simply. For there are probably cases in which the economic pressures within the corporate body are sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain, especially where the penalties threatened are moderate and where the offense does not involve behavior condemned as highly immoral by the individual's associates. This tendency may be particularly

strong where the individual knows that his guilt may be difficult to prove or where a favorable reaction to his position by a jury may be anticipated even where proof of guilt is strong. A number of appellate opinions reveal situations in which juries have held the corporate defendant criminally liable while acquitting the obviously guilty agents who committed the criminal acts. See e.g., United States v. General Motors Corp., 212 F. 2d 376, 411 (7th Cir. 1941) ("We cannot understand how the jury could have acquitted all of the individual defendants."); United States v. Austin-Bagley Corp., 31 F. 2d 229, 233 (2d Cir. 1929) ("How an intelligent jury could have acquitted any of the defendants we cannot conceive."); American Medical Ass'n. v. United States, 130 F. 2d 233 (D.C. Cir. 1942).

"This may reflect more than faulty or capricious judgment on the part of the juries. It may represent a recognition that the social consequences of a criminal conviction may fall with a disproportionately heavy impact on the individual defendants where the conduct involved is not of a highly immoral character. It may also reflect a shrewd belief that the violation may have been produced by pressures on the subordinates created by corporate managerial officials even though the latter may not have intended or desired the criminal behavior and even though the pressures can only be sensed rather than demonstrated. Furthermore, the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy. In some cases, such as the Elkins Act, legislatures have added corporate liability to the criminal penalties on the belief founded on experience that such additional sanctions are necessary. N.Y. Central R.R. v. United States, 212 U.S. 481, 494-495 (1909).

"The case so made out, however, does not demonstrate the wisdom of corporate fines generally. Rather, it tends to suggest that such liability can best be justified in cases in which penalties directed to the individual are moderate and where the criminal conviction is least likely to be interpreted as a form of social moral condemnation. This indicates a general line of distinction between the "malum prohibitum" regulatory offenses, on the one hand, and more serious offenses, on the other. The same distinction is suggested in dealing with the problem of jury behavior. The cases cited above involving situations in which individual defendants were acquitted are all cases of economic regulations. It may be doubted that such results would have followed had the offenses involved a more obvious moral element. In any event, it is not clear just what conclusions are to be drawn from the cited cases. In each, the jury

had corporate liability available as an alternative to acquittal of all the defendants. Conceivably, if that alternative had not been available, verdicts against the individuals in some of the cases might have been returned. Thus, it is at least possible that corporate liability encourages erratic jury behavior. It may be true that the complexities of organization characteristic of large corporate enterprise at times present real problems of identifying the guilty individual and establishing his criminal liability. It would be hoped, however, that more could be pointed to in justification of placing the pecuniary burdens of criminal fines on the innocent than the difficulties of proving the guilt of the culpable individual. Where there is concrete evidence that the difficulties are real, however, the effectuation of regulatory policy may be thought to justify the means.

"In surveying the case law on the subject of corporate criminal liability one may be struck at how few are the types of common-law offenses which have actually resulted in corporate criminal responsibility. They are restricted for the most part to thefts (including frauds) and involuntary manslaughter. Conspiracy might also be included, but generally the cases have involved conspiracies to violate regulatory statutes (such as the anti-trust laws), and often these statutes include specific conspiracy provisions made applicable to corporate bodies. No cases have been found in which a corporation was sought to be held criminally liable for such crimes as murder, treason, rape or bigamy. In general, such offenses may be effectively punished and deterred by proscriptions directed against the guilty individuals. One would not anticipate the same reluctance on the part of juries to convict which seems sometimes to be present where the offense is a regulatory crime. Moreover, in many of the situations, such as those involving involuntary manslaughter, there is a strong possibility that the shareholders will be called upon to bear the burden of tort recoveries. The prospect of tort recoveries may also be expected to encourage supervision of subordinate employees by executive personnel." (Model Penal Code, Tent. Draft No. 4, pp 148-150)

B. Derivation

Source of section 6 is New York Revised Penal Law S. 20.20, Michigan Revised Criminal Code S. 430 and Model Penal Code S. 2.07.

Section 7 is identical to Michigan S. 435 and New York S. 20.15.

C. Relationship to Existing Law

At present there is no specific statutory provision dealing generally with corporate criminal liability, although there are statutes dealing with some individual fields relating thereto and a definitional criminal statute that includes corporations.

ORS 161.010 contains definitions of terms used in statutes relating to crimes and criminal procedure and includes "(11) 'Person' includes corporations as well as natural persons."

ORS 135.840 provides that a plea of guilty to an indictment against a corporation may be put in by counsel.

State v. Fraser, 105 Or 589, 209 P 467 (1922) held that a corporation is capable of committing the crime of selling and offering securities for sale as a dealer without complying with the Blue Sky Law.

Oregon, along with the vast majority of states, has refused to extend corporate criminal liability to crimes of personal violence such as homicide or manslaughter. State v. Pacific Powder Co., 226 Or 502, 360 P.2d 530 (1961). The draft section would leave this position unchanged but should assist the courts in construing future criminal statutes that may involve corporate responsibility and in determining the legislative intent with respect to each particular crime.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 2.06. Liability for Conduct of Another; Complicity.

(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 person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of an offense, he

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it; or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

(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

Text of Model Penal Code, Cont'd.

is inconsistent with the purpose of the provision establishing his incapacity.

(6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

(a) he is a victim of that offense; or

(b) the offense is so defined that his conduct is inevitably incident to its commission; or

(c) he terminates his complicity prior to the commission of the offense and

(i) wholly deprives it of effectiveness in the commission of the offense; or

(ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

(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.

Section 2.07. Liability of Corporations, Unincorporated Associations and Persons Acting, or Under a Duty to Act, in Their Behalf.

(1) A corporation may be convicted of the commission of an offense if:

(a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the atents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors

Text of Model Penal Code, Cont'd.

or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

(2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.

(3) An unincorporated association may be convicted of the commission of an offense if:

(a) the offense is defined by a statute other than the Code which expressly provides for the liability of such an association and the conduct is performed by an agent of the associateion acting in behalf of the association within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the association is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on associations by law.

(4) As used in this Section:

(a) "corporation" does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(b) "agent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

(5) In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1) (a) or Subsection (3) (a) of this Section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph

Text of Model Penal Code, Cont'd.

shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

(6) (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

Text of Michigan Revised Criminal Code

[Liability Based Upon Behavior]

Sec. 401. A person may be guilty of an offense if it is committed by his own behavior or by the behavior of another person for which he is legally accountable as provided in this chapter, or both.

[Liability Based Upon Behavior of Another: Specific Provision]

Sec. 405. A person is legally accountable for the behavior of another person if he is made accountable for the conduct of such person by the statute defining the offense or by specific provision of this code.

[Liability Based Upon the Behavior of Another: Conduct of an Innocent Person] ;

Sec. 410. (1) A person is legally accountable for the behavior of another if, acting with the culpable mental state sufficient for the commission of the offense in question, he causes an innocent person to engage in such behavior.

(2) As used in this section, an "innocent person" includes any person who is not guilty of the offense in question, despite his behavior, because of:

(a) Criminal irresponsibility or other legal incapacity or exemption.

Text of Michigan Revised Criminal Code, Cont'd.

(b) Unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose.

(c) Any other factor precluding the mental state sufficient for the commission of the offense in question.

[Liability Based Upon the Behavior of Another: Complicity]

Sec. 415. A person is legally accountable for the behavior of another constituting a criminal offense if:

(a) With the intent to promote or facilitate the commission of the offense:

(i) He solicits such other person to commit the offense;

(ii) He aids or abets such other person in planning or committing the offense; or

(iii) Having a legal duty to prevent the commission of the offense, he fails to make an effort he is legally required to make; or

(b) Acting with knowledge that such other person was committing or had the purpose of committing the offense, he knowingly provided means or opportunity for the commission of the offense that substantially facilitated its commission.

[Liability Based Upon Behavior of Another: Exemptions]

Sec. 420. Unless otherwise provided by the statute defining the offense, a person shall not be legally accountable for behavior of another constituting a criminal offense if:

(a) He is a victim of that offense;

-- (b) The offense is so defined that his conduct is inevitably incidental to its commission;

(c) Prior to the commission of the offense, he terminated his effort to promote or facilitate its commission and either gave timely warning to law enforcement authorities, gave timely warning to the intended victim, or wholly deprived his complicity of its effectiveness in the commission of the offense. The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.

Text of Michigan Revised Criminal Code

[Liability Based Upon the Behavior of Another: No Defense].

Sec. 425. In any prosecution for an offense in which criminal liability is based upon the behavior of another person pursuant to this chapter, it is no defense that:

(a) Such other person has not been prosecuted for or convicted of any offense based upon the behavior in question or has been convicted of a different offense or degree of offense.

(b) The defendant belongs to a class of persons who by definition of the offense are legally incapable of committing the offense in an individual capacity.

[Criminal Liability of Corporations]

Sec. 430. (1) A corporation is guilty of an offense if:

(a) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation, and the offense is a misdemeanor or a violation, or the offense is one defined by a statute that clearly indicates a legislative intent to impose such criminal liability on a corporation;

(b) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.

(2) As used in this section:

(a) "Agent" means any director, officer or employee of a corporation, or any other person who is authorized to act in behalf of the corporation.

[Criminal Liability of an Individual for Corporate Conduct]

Sec. 435. A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf.

Text of New York Revised Penal Law

Sec. 20.00 Criminal liability for conduct of another

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

Sec. 20.05 Criminal liability for conduct of another; no defense

In any prosecution for an offense in which the criminal liability of the defendant is based upon the conduct of another person pursuant to section 20.00, it is no defense that:

1. Such other person is not guilty of the offense in question owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose or to other factors precluding the mental state required for the commission of the offense in question; or

2. Such other person has not been prosecuted for or convicted of any offense based upon the conduct in question, or has previously been acquitted thereof, or has legal immunity from prosecution therefor; or

3. The offense in question, as defined, can be committed only by a particular class or classes of persons, and the defendant, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity.

Sec. 20.10 Criminal liability for conduct of another; exemption

Notwithstanding the provisions of sections 20.00 and 20.05, a person is not criminally liable for conduct of another person constituting an offense when his own conduct, though causing or aiding the commission of such offense, is of a kind that is necessarily incidental thereto. If such conduct constitutes a related but separate offense upon the part of the actor, he is liable for that offense only and not for the conduct or offense committed by the other person.

Sec. 20.15 Convictions for different degrees of offense

Except as otherwise expressly provided in this chapter, when, pursuant to section 20.00, two or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating fact or circumstance.

Text of New York Revised Penal Law, Cont'd.

Sec. 20.20 Criminal liability of corporations

1. As used in this section:

(a) "Agent" means any director, officer or employee of a corporation, or any other person who is authorized to act in behalf of the corporation.

(b) "High managerial agent" means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.

2. A corporation is guilty of an offense when:

(a) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation; or

(c) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation and (i) the offense is a misdemeanor or a violation, or (ii) the offense is one defined by a statute which clearly indicates a legislative intent to impose such criminal liability on a corporation.

Sec. 20.25 Criminal liability of an individual for corporate conduct

A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf.