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Criminal code reform in New Zealand? A Martian's view of the Erewhon Crimes Act 1961 with some footnotes to the 1989 Bill

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In this article, Professor Clark examines a range of issues arising from the structure and content of the Crimes Act 1961. He discusses first the effects of the Act's lack of a general part. He then examines jurisdiction; punishments; justification and excuse; parties, conspiracies and attempts; and homicide.

I INTO EREWHON AND FIRST IMPRESSIONS

This is a fable of a hypothetical person from Mars who travelled to a progressive little country named Erewhon. It was 1990 and the person from Mars found the locals celebrating the hundred and fiftieth anniversary of the commencement of colonization. That seemed a trifle bizarre, even perverse.

But the real goal of the Martian was a mission to study criminal law and its codification and re-codification. On this front, the Martian quickly discovered that Erewhon is a little odd also. It has what purports to be a criminal code, the Crimes Act 1961. But this is a code with some surprising gaps, where the drafters simply gave up the ghost and left pockets of pretty basic issues in the hands of the courts. Indeed, Erewhon's law students spend much time seeking enlightenment in the law of England. The code's jurisdictional provisions - which nobody seems to study - are weird. Moreover, the Crimes Act could use some up-dating to deal with current issues like computer crime and theft of trade secrets and to repeal offences that are no longer of any moment, such as sedition, criminal libel and blasphemy.

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A reform-minded Minister of Justice had, in the year before the Sesquicentennial, introduced a Bill for a new code into the legislature, where it was referred to a Committee and languished. Many people assured the Martian that since the 1961 Act was so perfect and worked so well it should be left alone. She decided therefore to ignore The Bill (aside from the occasional footnote) and to concentrate on The Masterpiece of 1961. She asked your writer to record her impressions of its perfection.

Initial study by the Martian showed that Erewhon had proudly joined the ranks of the codified nearly a century ago. From time to time there had been some tinkering with the details - notably in the 1961 enactment, the title of which was "An Act to consolidate and amend the Crimes Act 1908 and certain other enactments of the General Assembly relating to crimes and other offences".[1] In the past dozen years, in fact, there have been amending Bills nearly every year, as many as four in some years, adopted to deal with problems as they crop up. Some of these amendments have dealt with issues of considerable significance, like the law relating to sexual assaults[2] and homosexual relations between consenting adults.[3]

Nonetheless, the Act is largely in the same form, and contains much of the same language, as the first Crimes Act adopted in 1893. That came about after a Bill to codify the criminal law had lain fallow in the legislature for a decade. The Martian was impressed. Her study of codification and re-codification in the English-speaking world suggested that a decade was a very short time for such an exercise, and quite consistent with Erewhon's radical image of the late nineteenth century. After all, the English had introduced a Crimes Bill in 1880 which has still not been adopted!

The English .... A little green light flashed in the Martian's brain. Erewhon's code of 1893 was not the home-grown product of people of vision plotting the course of a new society in a new land in a new dialect of the language. It was largely the work of an English judge, Sir James FitzJames Stephen, a conservative English judge at that![4]

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1 In fact, the title lied a little; the Act also included in the code, or in many cases simply junked, a whole host of offences contained in Imperial statutes which had remained the law of New Zealand. See s 9 Crimes Act 1961 (prohibiting conviction in New Zealand under Imperial legislation). See also Schedule Four of the Act (list of repealed British Acts) and various sectional source notes to eg s 98 (dealing in slaves). Common law crimes had been abolished since 1893, but some imperial statutory ones arguably survived until 1961. On the 1961 changes in general, see I Campbell "Criminal Law" in J Robson (ed) *New Zealand: The Development of its Laws and Constitution* 361, 368-69 (2nd ed 1967).

2 Crimes Amendment Act (No 3) 1985.

3 Homosexual Law Reform Act 1986. For a mere $53.70 at the Government Bookshop the Martian obtained a copy of the Crimes Act 1961 reprinted "as on" April Fool's Day 1979 and nineteen subsequent Crimes Amendment Acts so labelled. She thus initially missed such items as the Homosexual Law Reform Act, the Abolition of the Death Penalty Act 1989 and the legislation referred to in ns 60 and 63 below.

4 M Friedland "RS Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981) 1 OJLS 307; M Friedland "Codification in the Commonwealth: Earlier Efforts" (Paper prepared for the Conference on Criminal Code

It was his efforts that had borne fruit in Canada in 1892 and Erewhon in 1893, and later on with minor variations in parts of Australia, much of Anglophonic Africa, in Cyprus and thence to Israel.

The Martian was not one to be swayed by arguments based on nationalism or professional pride[5] - or even ideology - and she decided to look a little deeper into the document to see what was to be seen. She detected among the legal profession and the judiciary some sort of religious awe in the way in which they revered the document. She thought of how one branch of another religion had in her liftime - and even in the lifetime of many earthlings - gone from conducting its transactions in Latin, thus keeping the faithful in blissful ignorance of the details, to doing it in the vernacular, the language that people actually spoke. And yes, the Anglican branch of the religion had even cast aside the King James version of the Bible, translated it into the language of the twentieth century, and cut out much of the sexist phraseology from its Bible and Prayerbook. Might it be time to re-examine this religious text too?[6]

Reform, Washington DC, January 1990). Stephen is, of course, the conservative heavy who turns up in the great law and morality debate between Hart and Devlin - the nineteenth century counterpoint to John Stuart Mill. Stephen's conservatism was reflected in his approach to items such as sedition, sodomy and abortion. Erewhon has a way to go on at least two of these three. Further, the 1893 Act omitted Stephen's sections on criminal libel, but after the Court of Appeal decried this in *R* v *Mabin* (1901) 20 NZLR 451 they were speedily enacted in the Criminal Code Amendment Act 1901. Sedition, abortion and criminal libel all need some modernizing work. Sedition, blasphemous libel and criminal libel were, indeed, dropped in the 1989 Crimes Bill. On the modern desuetude of sedition, see Rt Hon G Palmer "The Reform of the Crimes Act 1961" in N Cameron & S France (eds), above n *, 9, at 19.

5 She noted that one of the prime movers of the current Canadian effort at re-codification had stooped to such crass appeals: Hon Mr Justice A Linden "Recodifying Criminal Law" (1989) 14 Queen's LJ 3. It was also notable that, of current efforts at codification, the Canadian one was guilty of being the most tersely written and tried hardest to use the vernacular. See Law Reform Commission of Canada *Recodifying Criminal Law* (1986).

6 The Minister seems to have had something like this in mind. See Rt Hon G Palmer "The Reform of the Crimes Act 1961" in N Cameron & S France (eds), above n *, 9 at 21: "A good criminal code promotes the justice of the individual case and the long term interests of society. But a good criminal code must also reach the people whose rights it seeks to preserve. It is too important to be the sole preserve of lawyers and judges. It is not a matter of arcane legal delight but of robust and basic social policy. By this I mean that a criminal code educates as well as prescribes and regulates. It is a social as well as a legal instrument. I am convinced that the Crimes Bill meets these requirements to a substantial degree. The process of refinement which has now begun will ensure that we build on the advances already made."

II WHAT WAS AND WASN'T THERE (HEREIN PARTICULARLY OF A "GENERAL PART")

1 SEXIST LANGUAGE

So the Martian began to read. Like some churchgoers she was mildly offended by the constant use of the pronoun "he". But even in Mars it had not proven politically feasible to straighten that out on its own. This was just something that would have to come along with the turf, if a re-writing could be generated for other reasons. Indeed, since 1986 in Erewhon, new statutes were drafted in gender-neutral language.[7] The resources were just not there to go back over the old ones for this reason alone.

2 CONTENTS IN GENERAL

She looked at the provisions of Section 1 which told her the name of the Act, when it came into force, and that it was divided into Parts, numbered Roman one through Roman fourteen,[8] listed as follows:

I Jurisdiction
II Punishments
III Matters of Justification or Excuse
IV Parties to the Commission of Offences
V Crimes Against Public Order
VI Crimes Affecting the Administration of Law and Justice
VII Crimes Against Religion, Morality, and Public Welfare
VIII Crimes Against the Person
IX Crimes Against Reputation
X Crimes Against Rights of Property
XI Threatening, Conspiring, and Attempting to Commit Offences
XII Procedure
XIII Appeals
XIV Miscellaneous Provisions

The Martian loved the lists like this that earthlings made. It gave her some indication of the things they considered important, their worldview of the topic. She realized that her stay would not be long enough to understand everything, and she had no wish to appear tedious. Accordingly, she limited herself, in the thoughts she dictated to her scribe, to some speculations about what the Erewhonians had not included in their

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7 See Press Statement 268/86 by Rt Hon Geoffrey Palmer, Attorney-General.

8 In fact, there were really seventeen, counting the first four sections which included the titles and some definitions, Part IXA on Crimes Against Personal Privacy (added by the Crimes Amendment Act 1979) and Part XIA, headed Obtaining Evidence by Listening Devices (added by the Crimes Amendment Act (No 2) 1987 which was aimed at organized crime). The consequential amendments had not been made to Section 1 of the 1961 Act.

code,[9] to some thoughts about the first four parts of the code and to observations on a few selected sections in other parts that struck her as of great significance.[10]

3 NO GENERAL PART

She looked eagerly for a "General Part" of the code which gathered together principles of responsibility general to various specific offences. This is hardly a novel idea. The European codes do it. The modern United States codes do it. The current Canadian and English efforts do it. Why, an eminent English barrister who later served with distinction on the bench had even drafted a code for Jamaica in the 1870s which made a good stab at defining intent, negligence and causation. But his efforts had largely vanished into the limbo reserved for good ideas.[11] A general part encapsulates fundamental assumptions about when it is appropriate to use the blunt tool of the criminal law. It provides a road map for the terms used in describing the elements of the offences contained in the Special Part that follows. Writing a general part is hard work. But it forces out to the surface some rather important matters. The Martian offered a few thoughts about some of those items.

(i) Culpability issues - guilt and all that

One set of issues surrounds the question: What are the proper requirements for culpability before sending someone to gaol? Is strict liability appropriate? Is liability based on negligence appropriate? What is the standard of negligence? Is it a departure from the care of a reasonable person? A gross departure from that standard?[12] If the test was to be recklessness (in some or all cases) what did this mean? Was it a subjective[13] or objective test? Did that distinction make sense? Were more categories needed to

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9 She was persuaded by the argument that "[a]t least one of the characteristics of a code is that it should aspire to comprehensiveness"; A Smith "The Case for a Code" [1986] Crim LR 285, 287. Smith also talks about accessibility, comprehensibility, consistency and certainty.

10 In particular, this meant that she ignored procedure - as have many attempts at codification - but she did not mean to denigrate its importance. One commentator on the 1989 Bill even felt that that was where the exercise of re-codification should have begun: J Hannan "The Act Requirement" in N Cameron & S France (eds), above n *, 35. It also meant that she gave less attention to particular crimes, other than homicide, discussed in Part VII below, than might have been ideal - but she did think that the questions of principle were the ones that had been buried in much of the Erewhon debate and were therefore worthy of resurrection.

11 Drafts of a Criminal Code and a Code of Criminal Procedure for the Island of Jamaica with an Explanatory Memorandum, by RS Wright, Esq [C-1893] (1877).

12 The Martian liked to think that the difference was between the reasonable person standard and the reasonable moron standard, but her editors kept taking this idea out of her footnotes. On negligence, see further text at ns 153-157 below.

13 As in the 1989 Bill, cl 22.

explain different shades of guilt (heedlessness,[14] perhaps)? Would fewer categories be better?

But there were no general statements about culpability. Nobody had tried to ask, let alone answer, these questions in any systematic way.

(ii) Presumptions on mens rea

Closely related to this is the problem of statutory construction. In the best of all worlds, the legislature would plainly spell out in each case what element of culpability was required under a particular section. In the real world, it is necessary for the courts to have some benchmarks on where to start.

The Model Penal Code, for example, has two provisions on point. One says that when the culpability sufficient to establish a material element of an offence is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly thereto.[15] (The Code's categories of culpability are purpose, knowledge, recklessness and negligence.) Thus, if the legislature wants to impose strict liability or liability for negligence, it has to say so explicitly. Reasonable people might differ about where the default position should be - higher on the scale (knowledge?) or lower (negligence?) - but the basic point ought to be made.

The second Model Penal Code provision is that, when the law defining an offence prescribes the kind of culpability that it is sufficient for the commission of an offence without distinguishing among the material elements of it, such provisions shall apply to all the material elements of the offence, unless a contrary purpose plainly appears.[16] Thus, if the legislature wants some elements of the offence to carry a recklessness culpability and some to imply negligence or strict liability it must say so or the courts would normally be required to plump for recklessness across the board.

The Martian thought that some such presumptions of interpretation should be clearly stated.

(iii) An act requirement?

Perhaps even prior to the question of culpability is the need for some voluntary act on the part of the accused, or an omission of the kind of which the criminal law is prepared to take cognisance. A distinguished Erewhonian judge had a brief place in the

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14 Included in the 1989 Bill - an unnecessary complication in the Martian's view. And see S France "The Mental Element" in N Cameron & S France (eds), above n *, 43 at 51.

15 Model Penal Code, Section 2.02(3).

16 Model Penal Code Section 2.02(4). Erewhonians, in speaking of their treasured 1961 Act, were fond of using the catchy old American line (apparently coined by that memorable authority "Anon") that "If it ain't broke, don't fix it" but not so keen on reading the classic American effort to fix the common law of crimes.

sun[17] with an elegant little opinion, *Kilbride* v *Lake*,[18] in which he discussed this basic proposition. Said his Honour:[19]

> It is fundamental that quite apart from any need there might be to prove *mens rea*, "a person cannot be convicted of any crime unless he has committed an overt act prohibited by the law or has made default in doing some act which there was a legal obligation on him to do. The act or omission must be voluntary.": 10 *Halsbury's Laws of England*, 3rd ed, 272. He must be shown to be responsible for the physical ingredient of the offence. This elementary principle obviously involves proof of something which goes beyond any subsequent and additional enquiry that might become necessary as to whether *mens rea* must be proved as well ... .

The drafters of the Model Penal Code had thought this rather fundamental too, and had encapsulated the basic act requirement in their code.[20] The Martian would certainly do so.

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17 But how soon they forget! The case was included in the second (1969) and third (1975) editions of S Kadish & M Paulsen *Criminal Law and Its Processes*, the leading set of teaching materials in the United States, but was gone in the fourth (1983) edition. Your scribe used it as the conceptual basis for his Victoria University LLM thesis *Defences to Offences of Strict Liability* (1966), long since sunk without trace, and for a previous attempt at humour: "Accident - or What Became of *Kilbride* v *Lake*?" in R Clark (ed) *Essays on Criminal Law in New Zealand* (1971) 47. Its author, Sir Owen Woodhouse, spent many years on the High Court and rose to be President of the Court of Appeal. Yet the present President of the Court dismisses the opinion: "That was a decision by a single Judge of the High Court of a simple case. ... The judgment does include an interesting theoretical excursus, citing textbooks and other writings but no cases. It is criticised in *Adams on Criminal Law* [the leading New Zealand text] (at 352) as advancing a proposition based on 'no authority, and which can only lead to confusion'. Garrow and Caldwell [the other standard New Zealand text] do not mention *Kilbride* v *Lake* and I do not recollect in 13 years of hearing criminal appeals being called upon to consider the case. One must respectfully query whether it is a repository of a fundamental". Sir Robin Cooke, above n * at 241. (The President did concede in an understated footnote that "There was some discussion of [*Kilbride*]" in *Tifaga* v *Department of Labour* [1980] 2 NZLR 235(CA), the impossibility case, where Woodhouse J and Richardson J in fact discussed it extensively and - quite correctly - distinguished it.)

18 [1962] NZLR 590. On the facts accepted, the appellant parked a car bearing a current warrant of fitness ("inspection sticker" in some dialects) which had disappeared by the time the Ticketing Person arrived. An acquittal was entered. The Court held that the question was not whether the offence was one of strict liability or not, but whether the appellant was responsible for the physical ingredient of the offence.

19 Above n 18, 591-92.

20 Model Penal Code, Section 2.01. See discussion of this and Canadian and English formulations in S Kadish "Act and Omission, Mens Rea and Complicity: Approaches to Codification" (1989) 1 Crim L Forum 65, 67-70. And see Crimes Bill 1989, clause 19, discussed by J Hannan "The Act Requirement" in N Cameron & S France (eds), above n *, 35.

(iv) Causation - "atomic" thinking

Another general part matter that the Martian was curious about was that of causation. Many common law jurisdictions had a substantial case-law on the issue - particularly, but not only, in the homicide area - but Erewhonian lawyers seemed to be lacking in imagination on the point. The Martian could find only a handful of interesting cases where the court talked about the principles involved.[21] Was Erewhon so dull, she thought, that there were no assaultees with egg-shell skulls, or mortified victims of sexual assault who took poison[22] or jumped out the window,[23] or Jehovah's Witnesses who declined to take a blood transfusion after being injured?[24]

Tucked away in the homicide sections were, however, some random sections dealing with specific items of causation[25] that had been of moment in the 1600s[26] and perhaps even in the nineteenth century when the code was drafted. (Finding these provisions applying only to homicide was strange since the same problems - and probably the same range of solutions - surely applied in cases of assaults or even negligence causing injury short of death.) One section, a sceptical commentary perhaps on the state of nineteenth century psychology, talked about killing by influence on the mind.[27] No one, it said, is criminally liable for the killing of another by any influence of the mind alone, except by wilfully frightening a child under the age of 16 years or a sick person, nor for the killing of another by any disorder or disease arising from such influence, except by wilfully frightening any such child or sick person. An interesting exception - but what was the general rule? What if I taunted my wife to jump off the bridge or be seen as a coward? If she jumped, is that more than killing by the influence of the

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21 *R* v *Storey* [1931] NZLR 417 (CA) ("contributory negligence" of deceased no defence but negligence of victim after act of defendant was spent may be); *R* v *Fleeting (No 1)* [1977] 1 NZLR 343 (discussed below in n 35); *R* v *Tomars* [1978] 2 NZLR 505 (CA) (discussed below in text at n 33); *R* v *Kirikiri* [1982] NZLR 648 (murder charged where death arguably the result both of blows by defendant and procedures that followed at hospital; defendant ultimately acquitted of murder but convicted of attempt; see Note by N Cameron (1983) 7 Crim LJ 168). And see *R* v *McKinnon* [1980] 2 NZLR 31.

22 *Stephenson* v *State* 205 Ind 141, 179 NE 633 (SC Indiana 1932).

23 *R* v *Valade* 26 Can Crim Cas 233.

24 *R* v *Blaue* [1975] 1 WLR 1411. (Take your victim as you find him/her.)

25 Crimes Act 1961, ss 163-166. And see *R* v *Kirikiri*, above n 21. Further causation issues are lurking even more obscurely in the "definitions" of culpable homicide, murder and manslaughter, discussed in Part VII below. Because of the way the 1961 Act is drafted the sections respond to the basic homicide question "did A *kill* B?" but the essence of the question is really directed to what is causation. The question is at heart not a merely factual one, but a question of fact wrapped up in a question of whether it is *just* to attribute B's death to A. The drafters of the 1989 Bill recognized this - and increases in forensic knowledge - when they quietly dropped the old common law year-and-a-day rule in homicide.

26 The origin of much of the material seems to be M Hale *Pleas of the Crown* 428, cited in S Kadish & S Schulhofer *Criminal Law and Its Processes* (5th ed 1989) 607.

27 Crimes Act 1961, s 163.

mind?[28] If it is possible to state the killing by the mind alone exception, why is it not possible to devise a principle to state the general rule? Then there was the section on acceleration of death - a widely accepted principle. You cause the death of another within the meaning of the criminal law, even though the injury caused merely hastens death while that person is labouring under some disorder or disease arising from another cause.[29] My wife is terminally ill and in absolute agony. I shoot her and she dies instantly. This is murder. Another section catches the Jehovah's Witness case. It provides that "Every one who by any act or omission causes the death of another person kills that person, although death from that cause might have been prevented by resorting to proper means".[30] Finally, another section[31] says that every one who causes to another person any deadly injury, in itself of a dangerous nature, from which death results, kills that person, although the immediate cause of death be treatment, proper or improper, applied in good faith.

Two more causation rules were to be found concealed in the definition of culpable homicide in the 1961 Act. Culpable homicide included killing by causing the deceased by threats or fear of violence to do an act which causes his death and by wilfully frightening a child under the age of 16 years or a sick person.[32] The first of these had given rise to the 1978 *Tomars* case.[33] The deceased, on a motorcycle, was being pursued by the defendants in a car. They travelled close and threw bottles from time to time. The victim stopped and endeavoured to cross the road with his cycle but was struck by another passing car and killed. A manslaughter conviction was reversed for other grounds, but the Court of Appeal was of the view that the causation requirements might well be met on such facts. The Court suggested a fourfold test: (1) Was the deceased in fear of violence when he attempted to cross the road in the path of the oncoming car? (2) Did such fear cause him to cross the road as he did? "Cause" is used in the sense of "playing a not insignificant part". (3) If so, was the attempt to cross a natural consequence of the actions of the accused in the sense that it was the kind of action that could reasonably have been foreseen by reasonable and responsible persons in the accused's shoes?[34] (4) If so, did the act of the deceased cause his death?[35] This

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28 If the victim were not a family member, some abstruse duty questions would arise to complicate an already complicated causation question.

29 Crimes Act 1961, s 164.

30 Crimes Act 1961, s 165.

31 Crimes Act 1961, s 166.

32 Crimes Act 1961, s 160(2)(d) and (e). There is no conceptual reason for confining these propositions to homicide cases - they might easily apply in assault also - but that is left to the common law.

33 Above n 21.

34 The "reasonable thug" test?

35 [1978] 2 NZLR at 510-11. In some jurisdictions the question here is did A cause B's death? The way the Crimes Act is worded, it becomes did A cause B to do an act which caused B's death? The Martian thought the fear category too narrow. What of a case where the accused dumps a drunken victim on the middle of the highway where he is thereupon struck by a truck? There must be liability but the code gives no framework for reaching this answer. The New York Court of Appeals affirmed a murder conviction on such facts, *People* v *Kibbe* 35 NY 2d 407, 321 NE 2d 733 (1974). The 1961 Act's

seemed like a sensible interpretation, but it meant abandoning the literal language of the Act and adding the gloss about foreseeability - substantially what the common law would do.

The Martian also pondered an Erewhonian *cause celebre* that, had it gone to trial, might have raised some aspects of the issue nicely. It seemed that a Great Power that lived half a world away found it necessary to test, in Erewhon's neighbourhood, a weapon capable of killing all the earthlings. In order to give a salutary warning to those who would protest this, agents of the Power set out to sink a vessel called the "Rainbow Warrior" in a harbour in Erewhon. They did and killed the photographer on the vessel. Or did they? It seems that he did not die from the blast of terrorist quality explosives. He was stunned and then drowned. There was absolutely no framework in the Act on which to hang the causation aspects of a murder/manslaughter prosecution. The prosecution was doubtful that it could make its original murder charge stick and was happy to go along with an agreed upon[36] plea of guilty to manslaughter.[37] The prosecution seems to have doubted that it could prove either the necessary *mens rea* for murder or the necessary causal link. It is the latter that concerns us here. But if there was no causation for murder, why was manslaughter different? In tort law, the rule probably runs the other way - there is more likely to be causation if the defendant acts with intent or recklessness, because of the greater moral fault involved.[38] But the prosecution's instincts that the criminal law might be different found some support in the Model Penal Code's formulation which posited a broader scope of causation in the negligence cases than in the purpose cases.[39] In particular, in the purpose cases, the consequence had, for the most part, to be within the scope of what the defendant *actually* contemplated; in the negligence cases it was a question of what the defendant *ought* to have contemplated.[40] Either way, the Martian thought that the Model Code's

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causation provisions similarly gave no guidance in *R* v *Fleeting (No 1)* [1977] 1 NZLR 343 where the accused punched the victim who landed on the road in Queen Street at 10.30 pm and was run over by a passing car. In holding that there was a case to go to the jury for manslaughter, Barker J discussed mainly the unlawful act requirement and flirted with foreseeability and with whether the accused's causation has been spent.

36 The circumlocution is necessary because Erewhon does not recognize plea bargains.

37 See "Sentencing for manslaughter-pleas of guilty-mitigation of sentence for terrorist activities" Commonwealth Law Bulletin, April 1986, 380, 381.

38 A proposition as old as the torts teacher's beloved squib case, *Scott* v *Shepherd* 96 ER 525 (KB 1773).

39 In *Tomars*, above ns 33-35, the Court was thinking only of manslaughter and its decision contains no hint that there is any difference in the test as between murder and manslaughter.

40 Model Penal Code, Section 2.03. The section also extends liability to cases where the actual result involves the same kind of injury or harm as that "designed or contemplated" [in the case of offences of purpose or knowledge] or as the "probable result" [in cases of recklessness and negligence] and "is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offence". Ultimately the MPC acknowledges that there is a judgment question for the jury. This is emphasized by the bracketed "just" in the drafters' alternative formulation. The important point is to put it to the jury in a coherent way. The Canadian Draft Code, above n 5, s 2(6) is

formulation provided a perfectly sensible framework for leaving the case to the jury, limiting their discretion in an intelligible way, but nonetheless leaving them the final judgment call.[41]

The Martian thought that the causation provisions in the 1961 Act, which surely belonged in a general part rather than in the homicide sections, since they raised questions of general application, were a classic example of a type of earthly legal analysis which she was just starting to understand - laying down some of the *rules*, either of inculpation or of exculpation, but balking at explaining the *general principle*. "Atomic thinking" was what the Martian called it tentatively, aware that she may have been thinking too much about The Bomb.

(v) Burden of proof

She also looked in vain for something on the burden of proof,[42] that great tool for the protection of the presumption of innocence.[43] She quickly found that "[t]hroughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject [to the special case of] the defence of insanity and subject also to any statutory exception".[44] Why, the House of Lords had said so in an English murder case as recently as 1935 and the Erewhon Court of Appeal had faithfully given effect to what the Lords had wrought. It was a sophisticated matter, though.[45] As in other common law jurisdictions, a distinction had to be drawn between the burden of persuasion (or legal burden) and the evidentiary burden (or burden of going forward). The burden of going forward was not as onerous as the burden of persuasion. It did not require proof beyond reasonable doubt (like the prosecution's persuasive burden), or even on the balance of probabilities (the standard

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breathtaking in its simplicity when it replaces the random Stephen provisions and the whole common law with: "Everyone causes a result when his conduct substantially contributes to its occurrence and no other unforeseen and unforeseeable cause supersedes it". Sexist, but it probably does the job!

41 The 1989 Bill made no attempt to rationalize the causation sections or to attack the general issue. The Martian was pretty sure that, if she worked for the prosecutors, she could get the Terrorists of the Rainbow convicted of either murder or manslaughter under the Model Penal Code approach.

42 She would have put that in her general part, but it might belong somewhere else, say under Procedure, which is where the drafter of the 1989 Bill, clause 293, lodged it.

43 The Martian was learning about human rights too. Article 14 of the International Covenant on Civil and Political Rights, GA Res 2200 (XXI), 21 UN GAOR, Supp (No 16), 52, UN Doc A/6316 (1966), to which Erewhon is a party, guarantees the presumption of innocence.

44 *Woolmington* v *DPP* [1935] AC 462, 481 (HL). In the absence of a written constitution the "statutory exceptions" could easily swallow up the rule but the legislature has exercised some restraint.

45 See Sir Francis Adams "Onus of Proof in Criminal Cases" in R Clark (ed) *Essays on Criminal Law in New Zealand* 67 (1971).

required when the defence shouldered the persuasive burden).[46] Sometimes the burden of going forward was on the prosecution; sometimes on the defence. The courts had pretty much worked out which was which. You had only to study their decisions - although some of them were unreported, which was not all that sporting. For good measure, as the House of Lords noted, the legislature (or the courts working from the whole cloth)[47] sometimes placed the burden of persuasion as to some issues - insanity was the paradigm case - on the defence. There was no particular rationality in all of this and the Crimes Act itself has a few seemingly out of place provisions which "proved" a bit puzzling when you asked what they meant.[48] The Martian kept asking herself why it was not possible to state the general rule and even its exceptions - and the rationale for them - succinctly.[49]

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46 Since the 1961 Act did not deal with the *burden* of proof, it also ignored the related question of the *standard* of proof and left that to the common law.

47 Such as *Civil Aviation Department* v *Mackenzie* [1983] NZLR 78 (CA) ("public welfare offences") (the Martian found McMullin J's dissent more persuasive than the majority judgment).

48 The Martian's informant noted, for instance: (i) Section 124, which permits a person charged with distribution or exhibition of indecent matter (showing dirty art works or provocative disgusting plays perhaps) to avoid liability by proving that the public good was served by the acts alleged to have been done. "Prove" may simply refer to the evidentiary burden, but then it may not - especially if the thrust of *Jayasena* v *R* [1970] AC 618 (PC) and *R* v *Hunt* [1987] AC 352 (HL) were to be applied. Why should either burden lie with the defendant for any reason other than some compromise made in the legislative process - or sloppy drafting? That "prove" might refer to the evidentiary burden is suggested by a later subsection which says that it is no defence that the defendant did not know about the indecency "unless that person also satisfies the Court [why not the jury?] - (a) That he had no reasonable opportunity of knowing it; and (b) That in the circumstances his ignorance was excusable". (ii) Section 244, which makes it an offence for a person to have in his possession an instrument capable of being used for burglary "in circumstances that prima facie show an intention to use it for burglary". Subsection (2) provides that it is a defence to this if the person charged "proves that he had lawful excuse for having the instrument in his possession". (iii) Sections 291 and 292 which prohibits certain acts with counterfeit coin, done "without lawful justification or excuse (the proof whereof shall lie on him)". Variations on such horrors appear in the Crimes Amendment Act 1986 (No 2) which was designed to "get tough" on violent crime, inter alia, by cracking down on those with firearms or weapons "in circumstances that prima facie show an intention" to use them. (Can the accused "prove" his or her way out of this, or is this a conclusive presumption? The drafting is appalling.) And see Crimes Bill 1989, clauses 160, 161.

49 A start was made on this in clause 293 of the 1989 Bill but it needs more explanation about when the defendant carries the burden of going forward with evidence. There are some very helpful suggestions for approaching these problems in A Ashworth "Towards a Theory of Criminal Legislation" (1989) 1 Crim L Forum 41, 54-57, 61.

(vi) Corporate liability

She then looked at the "interpretation" section - section 2. She thought it might overcome the lack of a general part and define some basic terms like "act" and "intention" and "negligence" - but it was not to be.

There was one gem in the definitions that raised more questions than it answered: "Person" and "owner", and "other words and expressions of the same kind"[50] she found "include the Crown and any public body or local authority, and any board, society, or company, and any other body of persons, whether incorporated or not, and the inhabitants of the district of any local authority, in relation to such acts and things as it or they are capable of doing or owning". She never did get to the bottom of what the "inhabitants of the district" means as a matter distinct from a local body. That was lost in the mists of local body law. Nor could she find anything in the Act that explained, so far as a corporation (company)[51] or a partnership - or even the Crown - was concerned, what was meant by "in relation to such acts and things as they are capable of doing or owning". That had been left to the judges in their infinite wisdom to work out, bearing in mind the framework of other provisions of the Act. Some of the results have been a little strange. A company can commit many crimes, but not manslaughter, because the definition of "homicide" in section 158 says that homicide (of which manslaughter is an example) is "the killing of a human being by another" not a killing by a "person".[52] Moreover, no attempt has been made by the legislature to figure out the parameters of the most important aspect of corporate liability: which employees' acts are attributable to the company under what circumstances?[53] She did think that a reasonable code would do these things - both what crimes a company could commit and who acts for the company in criminal matters. A legislature concerned with organized crime, with drug abuse and with the environment should be concerned with a fundamental conceptual aspect of the role of criminal law in dealing with those problems.[54]

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50 "One" and "every one" were favourites of the drafters which perhaps required specific mention rather than being lumped generically with "others" of like kind.

51 "Corporation" was a slight lapse of thinking by the Martian. She learned the American dialect of English in school. "Company" was new to her.

52 *R* v *Murray Wright Ltd* [1970] NZLR 1069 (CA).

53 See generally R Green "Corporate Criminal Responsibility" (1971) 6 VUWLR 85; I Muir "Tesco Supermarkets, Corporate Criminal Liability of Corporations" (1973) 5 NZULR 357; J Clad "The Criminal Liability of Corporations" [1977] NZLJ 420; Note "Developments in the Law - Corporate Crime; Regulating Corporate Behaviour Through Criminal Sanctions" (1979) 92 Harv L Rev 1227. And see *Canadian Dredge & Dock Co* v *R* (1985) 19 CCC (3 ed) 1 (SC Can) which contains an exhaustive review of the Commonwealth and United States authorities.

54 There is a burgeoning literature on corporate compliance and the role of criminal law and other strategies to that end. See, eg, WB Fisse "Responsibility, Prevention and Corporate Crime" (1973) 5 NZULR 250; J Sigler & J Murphy *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion* (1988); WB Fisse "Sentencing Options Against Corporations" (1990) 1 Crim L Forum 211.

III JURISDICTION

The Martian stopped looking for categories that were not there and read on into what was. She came to Part I of the Act, dealing with Jurisdiction. She noticed a number of things here. For the most part, Erewhon follows the basic British approach of basing jurisdiction on territoriality - the code primarily[55] anchors the jurisdiction of the courts on activities occurring within the territory of Erewhon.[56] Continental systems, on the other hand, often take cognizance of what the citizenry does abroad as well as what is done territorially, and thus base jurisdiction over a broad range of situations on citizenship or residence. By and large Erewhon does not care. An Erewhonian commits homicide in Paris. France can prosecute; Erewhon cannot. A French citizen commits homicide in Auckland. Erewhon can prosecute if it catches the person in time - within Erewhon; France can prosecute if the offender returns to the French fold, since France exercises jurisdiction on the basis of nationality while Erewhon does not.[57]

There are some exceptions. The most notable one under the Crimes Act is bigamy.[58] If an Erewhonian dares to commit bigamy in Paris along with the homicide, now Erewhon will act to stamp that out. The bigamy in Paris *is* an offence under the Crimes Act, even though the homicide is not![59] Moreover, under some other

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55 Crimes Act 1961, s 6: "Subject to the provisions of section 7 of this Act [below n 56], no act done or omitted outside New Zealand is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment". See generally, G Orchard "Jurisdiction Over Extraterritorial Conspiracy" [1986] NZLJ 185.

56 There are some exceptional cases. Note, for example, ss 68 and 69 which deal with one who in New Zealand "aids, counsels or procures" murder and other offences elsewhere. Some of the s 68 cases may also be packaged as conspiracy to murder under s 175. (It is still the territorial-based acts of the defendant that give jurisdiction, but the transaction is anchored in the New Zealand courts even though part of the *actus reus* is to occur elsewhere.) Section 92 goes further and impliedly creates jurisdiction on a universal basis for piracy, as does s 98 for slave trading. Note also the extended definition of "place of commission of offence" in s 7: "For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event". Somebody sends in a rocket from, say, New Caledonia. If the sender comes to New Zealand the courts have jurisdiction. There may also be some conspiracy possibilities in such cases under s 310 of the Act.

57 The French jurisdictional rule is in part an adaptation to its extradition rule. France, like many civil law countries, does not extradite its nationals. If France does not prosecute a perpetrator who returns home, no-one will. New Zealand will extradite nationals and thus the need to prosecute itself is less.

58 Also notable is s 8(1)(e) of the Act which extends jurisdiction over crimes committed by a New Zealand citizen or resident "on board any aircraft" - anywhere it seems. And see: s 73 (treason); s 77 (inciting to mutiny); s 78 (espionage); s 78A (wrongful communication, retention or copying of official information); and s 105(1) (accepting or obtaining bribes) - all of which may be committed outside New Zealand.

59 Crimes Act 1961, s 205. Afficionados of constitutional history will recall the debate, long dead, about New Zealand's power to thus legislate "extraterritorially". See *R* v

provisions, Erewhon sometimes exercises jurisdiction on the basis of nationality, for example offences committed abroad by Erewhon's diplomats or members of the police on United Nations service who would be immune from jurisdiction at the place of commission.[60]

It probably makes no sense to retain the bigamy anomaly, even if Erewhon must be perfectly entitled to do it as a matter of international law. But the Martian is onto a bigger point here. Increasingly, as a result of multilateral treaty developments, there is a body of sophisticated international penal law, particularly in the terrorism area, which both authorizes and requires the taking of jurisdiction over a number of offences defined by international law.[61] The basis of jurisdiction in such cases is sometimes the nationality of the actor, sometimes the nationality of the victim (the so-called passive personality theory of jurisdiction) and sometimes even a theory of universal jurisdiction.[62] If one were simply to read the Crimes Act, one would barely guess that Erewhon has signed on to such developments. The legislative basis for so doing is tucked away somewhere else.[63] The Martian has a good question here: should all this be contained in the penal code? What good is a code when one needs to hunt elsewhere for some politically and conceptually significant modifications of the general principle laid down in the code? It is good enough to bury such issues in specialized legislation hidden out there? What is more, the piracy and slavery offences, sitting isolated in the Part of the Act dealing with Crimes Against Public Order, seem to be in something of a time warp.[64] Important as they are, there are other pressing contemporary offences that undermine the international order and are candidates for inclusion in the code. This line

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Lander [1919] NZLR 305 (CA), *R* v *Fineberg* [1968] NZLR 119 and *R* v *Fineberg* (No 2) [1968] NZLR 443 (CA).

60 Crimes Act 1961, s 8A as substituted by s 14(1) of the External Relations Act 1988; United Nations (Police) Act 1964. The Martian wondered why the rules on diplomats were included in the Crimes Act but those on the Police merely incorporated the Act by reference. See also as to sailors, below n 70.

61 R Clark "Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg" (1988) 57 Nordic J Int'l L 49.

62 Espoused in all versions of the New Zealand code for piracy (see now ss 92, 93, 95, 96 and 97 of the Crimes Act 1961). Section 98 of the 1961 Act also introduced jurisdiction over dealing in slaves, wherever it occurs. On slavery, see also below n 64.

63 Aviation Crimes Act 1972; Crimes (Internationally Protected Persons and Hostages) Act 1980. The Fiji Penal Code, as amended, ss 69-78 and the Vanuatu Penal Code (Rev ed 1988) s 5 both deal in a much broader way with international crimes than does the New Zealand Act.

64 Even in terms of the drafting, piracy and slavery could use some work. The piracy definition in Crimes Act 1961, ss 92 and 93, could be improved by tracking the language in the 1982 United Nations Convention on the Law of the Sea, UN Doc A/Conf 62/122. The definition of the slavery offences, Crimes Act 1961, s 98, contains detailed definitions of sophisticated types of slavery, notably debt-bondage and serfdom, taken almost verbatim from the 1956 Supplementary Slavery Convention, 266 UNTS 3 (acceded to by New Zealand in 1962), but omits the definition of the basic offence itself contained in the 1926 Slavery Convention, as amended, 212 UNTS 17 (ratified by New Zealand in 1953). Since the Act presumably gives effect to New Zealand 's obligations under both conventions, both should be covered.

of thought soon led the Martian to ponder the drug offences - themselves the subject of international legislation.[65] Why, she thought, are they not consolidated in the Crimes Act?

These were fairly heady thoughts, but the Martian did not pause to find a definitive answer. She plunged on with the reading and reached section 8 of the Act. It deals with jurisdiction in respect of crimes on ships or aircraft beyond Erewhon. Its effect, particularly so far as ships are concerned,[66] is startling. Erewhon has jurisdiction under section 8(1) over "any act done or omitted" by any person "[o]n board any Commonwealth ship",[67] or "[o]n board any ship or aircraft, if that person arrives in [Erewhon] on that ship or aircraft in the course or at the end of a journey during which the act was done or omitted", or "being a British subject,[68] on board any foreign ship (not being a ship to which he belongs)[69] on the high seas, or on board any such ship within the territorial waters of any Commonwealth country".[70]

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65 New Zealand is a party to the 1961 Single Convention on Narcotic Drugs, UNTS 204 (1964), but surprisingly not to its 1972 Protocol or to the 1971 Convention on Psychotropic Substances. Its recently signed and plans to ratify the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

66 In respect of aircraft, the main jurisdiction grants under s 8(1) are over *any* acts or omissions by any person on board a New Zealand aircraft beyond New Zealand, and over those by a New Zealand citizen or person ordinarily resident in New Zealand, on board *any* aircraft. It also includes the broad jurisdiction quoted in the text over persons who act on any aircraft if the aircraft subsequently lands in New Zealand. On this latter jurisdiction, see also n 74 below.

67 "Commonwealth ship" is defined in s 2 as "a ship registered in any Commonwealth country, or recognized by the law of any Commonwealth country as a ship belonging to that country; and includes any ship for the time being used as a ship of any of the armed forces of a Commonwealth country". Section 8(4) treats the Republic of Ireland as if it were a Commonwealth country.

68 Is there any longer such an animal in New Zealand law?

69 The Martian was intrigued to discover that while a corporation could not commit homicide, a natural person could belong to a ship.

70 The Martian found s 8(3) too much to comprehend and merely asked that your author footnote it: "Where at any place beyond New Zealand any person who belongs, or within 3 months previously has belonged, to any Commonwealth ship does or omits any act, whether on shore or afloat, not being an act or omission to which subsection (1) of this section applies, and that act or omission would, if it occurred in New Zealand, be a crime, then this section shall apply in respect of that act or omission in the same manner and in the all respects as if it had occurred on board a Commonwealth ship". I think I have it! A sailor of Outer Mongolian citizenship leaves a Ghanaian ship to which she belongs for a holiday in Paris. After two and a half months, she kills someone there. She may be tried in New Zealand. (So may a New Zealand sailor in like circumstances, whether from a Ghanaian ship or from a New Zealand ship, since the Commonwealth apparently includes New Zealand.) Sailor beware! New Zealand sailors, like diplomats and police on United Nations service, may be riff-raff who should be severely dealt with at home if they do embarrassing things abroad. But other Commonwealth and non-Commonwealth citizens?

The Martian enquired if the Commonwealth ship part is done pursuant to some agreement with the rest of the Commonwealth. But no, it seems merely to be a hangover of the days when Britannia ruled the waves. Then it made sense to give jurisdiction to the courts at the End of the Empire over what any part of the merchant marine and the navy did anywhere in the system. Why take them back to London first if those who are not hanged would ultimately be shipped back to Australia? Jurisdiction was originally conferred on the colonies by a series of Imperial acts dealing with admiralty jurisdiction, culminating in the Merchant Shipping Act 1894.[71] Somebody feeling trendy about the evolving relationship with the former Colonial Power must have put in the word "Commonwealth" in place of the Empire when some of this material was incorporated in the Crimes Act in 1961.[72] But it makes no sense in the modern post-colonial world. A citizen of Ghana kills somebody on a Sierra Leone ship off the coast of Sierra Leone. The Ghanaian takes a holiday in Erewhon. Oops. There is jurisdiction in the Erewhonian courts.[73] There is not even any need for the ship to come to Erewhon. A Russian kills another Russian in the Pacific. The boat comes to Wellington. There is jurisdiction in Erewhon. Now it is nice that we can co-operate with the Russians in this way, but the Martian doubted that it makes much sense to prosecute for them.[74] It is true that there is a safeguard. Where the ship is not an Erewhon ship, the trial may not proceed without the certificate of the Attorney-General that it is "expedient that the proceedings should be instituted". And, where jurisdiction is over events on a non-Commonwealth ship, that consent requires the further consent of the Government of the country to which the ship belongs.[75] Heaven knows exactly

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71 See discussion in C Evans-Scott *Garrow's Criminal Law in New Zealand* (3rd ed, 1950) 470-76.

72 It was also suggested to the Martian that this happened because New Zealand did not have a shipping registry at the relevant time and that it therefore made sense to refer to Commonwealth ships since local ones were on the Commonwealth registry. Now there is a New Zealand one.

73 Murder (or culpable homicide) is probably universally illegal but consider something that is an offence in Sierra Leone (home of the ship) and New Zealand, but not Ghana. Section 8(2) of the Act has a proviso which reads: "Provided that where any proceedings are taken by virtue of the jurisdiction conferred by this section it shall be a defence to prove that the act or omission would not have been an offence under the law of the country of which the person charged was a national or citizen at the time of the act or omission, if it had occurred in that country". If the Ghanaian meets the proper burden of "proof" (see above n 48) an acquittal results!

74 Clause 14 of the Crimes Bill 1989 changes most of the rules at which fun is poked in the text, but retains jurisdiction over any acts or omissions on any ship or aircraft which then arrives in New Zealand. In the case of aircraft this is broader than is required by New Zealand's obligations in the aircraft terrorism area which require jurisdiction over only a limited range of offences set out in the treaties. The treaty obligations are, in any event, specifically dealt with in the Aviation Crimes Act 1972.

75 No consent is required in my Sierra Leone/Ghana hypothetical (see above text at n 73). Two kinds of objections might be made to the expansive Erehwonian jurisdiction - that it is silly policy and that it is contrary to international law. For the most part, the Martian thought that the problems were problems of policy rather than international law. Thus, exercising jurisdiction over what citizens do abroad, or over matters started abroad which have effects in Erewhon, or even over plotting in Erewhon to do things abroad, probably

what "expedient" means here[76] and the Attorney-General has a broad discretion to take domestic and foreign policy concerns into account - probably too much in the Martian's view.[77]

The punch line of it all though is probably the proviso to section 400(1) of the Act. It provides that "a person charged with any such offence may be arrested, or a warrant for his arrest may be issued and executed, and he may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General to the institution of a prosecution for the offence has not been obtained; but no further or other proceedings shall be taken until that consent has been obtained". What this probably invites is for Erewhon to provide its friends some custodial facilities in transit, as it were. The defendant will be held long enough for the state of origin to get its act together to apply for extradition or to arrange a deportation into its custody. The Martian had some doubts about the human rights aspects of this kind of disguised mutual assistance in criminal cases. She also felt that if such assistance is "expedient" it should be set out in treaty form with those who want it and not left at large as it is at present.

Section 9 of the Jurisdiction Part carried forward earlier prohibitions of common law crimes. It added that no offences against Imperial legislation might be tried in Erewhon. But it left intact the power of the House of Representatives and the courts to punish for contempt, and the power of the military to conduct courts martial. The Martian thought it a little strange that Parliament and the courts had retained a little pocket of unbridled power, but left it at that.[78]

This Part of the Act, then, raised some serious questions about what Erewhon could and should do on the extraterritorial front; and about what should be incorporated in the fundamental penal code, and what could be left elsewhere in the statute book.

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passes muster under the approach of the *SS Lotus* case, PCIJ, Series A, Part 2, No 10 at 4, that a state can do it if there is no rule against it. Potential problems with the Russian hypothetical are probably resolved by the need for consent. The Sierra Leone/Ghana hypothetical stretches the forum state's latitude to extreme, even absurd, limits and is probably unlawful as is jurisdiction in my Outer Mongolia hypothetical (see above n 70).

76 In spite of the Court of Appeal's assertion in *R* v *Fineberg (No 2)* [1968] NZLR 443, 451 that there is "nothing difficult or ambiguous about the construction of the section". The significant issue surely is what the standards are - none. According to the Court, the Attorney-General must take into account both the domestic and the external implications, but these are left at large.

77 A requirement that something be "expedient" is probably no standard at all. The drafter of the 1989 Bill, clause 15, which requires the consent of the Attorney-General in some of the remaining cases in which jurisdiction would be extended, apparently realized this and does not pretend to give any standard.

78 Part I was rounded off by some provisions the Martian found unexceptionable, dealing notably with double jeopardy (s 10, and expanded upon in s 358 later in the Act), non-retrospectivity (s 10A) and a limitation period for the bringing of some prosecutions (s 10B).

IV PUNISHMENTS

Part II of the Act was headed Punishments but it was hardly enlightening about sentencing or other penal policy. With the passage of time and amendments, it had largely been superseded by other legislation, notably the Criminal Justice Act 1985, which goes into great detail on sentencing.

A few months before the Martian arrived, capital punishment (which had been abolished for murder by the 1961 Act) had been abolished for the last crimes (treason, and treachery and mutiny in the armed forces) for which it had theoretically been available.[79] The Martian was impressed and noted in her human rights file that, before abolition, capital punishment in Erewhon had a merciful face, not always found elsewhere.[80]

No sentence of solitary confinement could be passed (although solitary might be possible for disciplinary purposes).[81] People could be required to pay a fine and there were collection procedures.[82] An amendment to the Act permitted an order of community service for non-payment of fines.[83]

There was not much to come to grips with here. It merely raised the question of the relationship between sentencing and substance. And if one looked at the scale of penalties for particular offences in the Act, it was hard to be sure what pattern the legislature had in mind. There are many efforts these days to deal with disparities in sentencing and to give judges some guidance.[84] The 1985 Criminal Justice legislation went some way down this street and emphasized that violent offenders should be imprisioned except in special circumstances but that offenders against property should not be detained except in special circumstances.[85] But dealing legislatively with sentencing discretion did not make much sense to the Martian, absent some effort to sit down and figure out a tariff of some sort when the theoretical penalty was being written

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79 Abolition of the Death Penalty Act 1989. Extradition may be refused if the accused is liable to the death penalty, see ss 6-9. New Zealand followed this up by being the first country to ratify the 1989 United Nations Second Optional Protocol to the International Covenant on Civil and Political Rights on Abolition of the Death Penalty.

80 A sentence of death could not be passed on a pregnant woman, Crimes Act 1961, s 15, or on a person who is under the age of 18 years at the time of the commission of the offence, Crimes Act 1961, s 16. Cf *Stanford* v *Kentucky* 106 L Ed 2d 306 (1989) where the US Supreme Court held that the death penalty was not unconstitutional for persons 16 and 17 at the time of the offence.

81 Crimes Act 1961, s 17.

82 Crimes Act 1961, ss 19, and 19A-19F.

83 Crimes Act 1961, s 19DA as inserted by Crimes Amendment Act 1985 (No 2), s 5. On community service in general, see Criminal Justice Act 1985, ss 29-36.

84 See, eg, P East "Modern Sentencing Developments" [1990] NZLJ 11.

85 Criminal Justice Act 1985, ss 5 and 6.

into each particular section of the legislation.[86] Like everything else, this was hard work, but some effort should be made. Beyond that task, though, the remaining orphan sections of the 1961 Act on punishment should simply be folded into the Criminal Justice Act.

V JUSTIFICATION AND EXCUSE

(i) In general

Part III of the Act, headed "Matters of Justification or Excuse", left the Martian bemused. Sir James the Drafter had done a strange thing. In not drafting a general part, he had not set out to define the basic structure of what elements go into the prosecution's case. He had, however, taken a stab at codifying some of the defences - justifications and excuses[87] - open to the accused.[88] But he had hedged his bets and left some areas to the judges. "All rules and principles of the common law," the code said,[89] "which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment."[90]

The topics dealt with were fairly standard for an exercise of this ilk: infancy,[91] insanity,[92] compulsion,[93] ignorance of law,[94] sentence or process (even if erroneous),[95]

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86 See Breyer "The Sentencing Guidelines and Substantive Criminal Code Revision" Paper delivered at the Conference on Criminal Code Reform, Washington DC, 21-15 January 1990.

87 Nothing turns in the Stephen Code on the distinction between justification and excuse, damned by one recent commentator in an excellent discussion of the relevant parts of the present law and of the 1989 Bill as "of considerable heuristic value": N Cameron "Defences and the Crimes Bill" in N Cameron & S France (eds), above n *, 57, at 58.

88 One anomalous piece of drafting was the inclusion of a definition of "colour of right" in s 2 of the Act. In one sense this is a matter of justification or excuse and might reasonably have appeared in the part of the Act on that topic. But it is also a term which appears in the definition of certain offences, such as theft (s 220) and criminal damage (s 293).

89 Crimes Act, s 20.

90 The Martian was curious about whether "the common law" meant the English common law of 1840, or 1893, or 1961. Or did it mean the later (later than when?) creations of the New Zealand courts?

91 Crimes Act 1961, s 21 (no criminal responsibility under 10). Crimes Act 1961, s 22 (between 10 and 14 prosecution must prove accused knew either that the act or omission was wrong or that it was contrary to law). The 1989 Bill would have abolished the anachronistic two-tier approach in favour of having no responsibility under 12, but no special rule for minors after that. And see Children, Young Persons and Their Families Act 1989 which precludes criminal proceedings against persons 14 and under for all but homicide.

92 Section 23 of the Crimes Act 1961 essentially codifies the McNaghten test for insanity. The Martian had concluded that this was not so terrible. The important thing was to get as much helpful material as possible to the jury, from whatever professionals had

arrest (including the prevention of suicide, which is not a crime),[96] dealing with breaches of the peace and riots,[97] defence against assault,[98] defence of property,[99] powers of discipline (domestic and by "every schoolmaster"),[100] discipline by authority of person in charge of a ship or aircraft,[101] surgical operations,[102] and some "general provisions" on liability for the use of excess force,[103] on the invalidity of consent to death,[104] and on the absence of criminal liability for obedience to "those in possession *de facto* of the sovereign power in and over the place where the act is done".[105]

The Martian had some thoughts about the details of what had been included, notably the material on compulsion, on consent, and on police powers. She also had some thoughts on items that had been omitted.

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something to contribute. But the question of lack of responsibility by reason of insanity was ultimately a question of community standards - a quintessential jury question - not a clinical question for doctors or psychologists. A distinguished Erewhon health official has weighed in with criticism of McNaghten, without acknowledging the travails of its alternatives such as the widely discussed *Durham* v *US* 214 F2d 862 (1954). B James "Mental Disorder and the Crimes Bill" in N Cameron & S France (eds), above n *, 83 at 89: "They are now a set of criteria which are almost universally criticized ...". McNaghten has in fact had something of a comeback, at least in the United States. See S Kadish & S Schulhofer *Criminal Law and Its Processes* 997-1002 (5th ed 1989).

93 Crimes Act 1961, s 24, discussed below at ns 106-110.

94 Crimes Act 1961, s 25. An odd person out - unlike most of the others which do justify or excuse, it is included to make the point that it is *no* excuse.

95 Crimes Act 1961, ss 26-29.

96 Crimes Act 1961, ss 30-41.

97 Crimes Act 1961, ss 42-47.

98 Elegantly revised in a 1980 amendment, which is arguably a little open-ended but certainly much more intelligible than the Stephen version. See W Brookbanks "Self-Defence in New Zealand" [1989] NZLJ 258. What is now s 48 of the Act reads: "Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use". The 1989 Bill merely repeats this in gender neutral language.

99 Crimes Act 1961, ss 52-58.

100 Crimes Act 1961, s 59. The 1989 Bill limits the privilege to parents and "every person acting as a parent" which seems to dispose of the power of school teachers to engage in corporal punishment. [Ed: Crimes Act 1961, s 59 was amended by the Education Amendment Act 1990, s 28 which limits the justification to parents and those "in the place of the parents" and specifically excludes school teachers from this rather unhappily expressed class unless they are the "guardian of the student or child".]

101 Crimes Act 1961, s 60.

102 Crimes Act 1961, ss 61, 61A.

103 Crimes Act 1961, s 62 said that everyone authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act that constitutes the excess. It seems to be addressed to the question whether someone who uses excess of force in legitimate self defence and kills is guilty of murder or only manslaughter - a much debated question. It does not provide any clear answer.

104 Another non-excuse. Crimes Act 1961, s 63, discussed below at ns 114-117.

105 Crimes Act 1961, s 64.

(ii) Compulsion

There was first the section[106] in the current Act dealing with compulsion (known as coercion or duress in some other dialects). It was a fairly narrow provision[107] which said that a person who commits an offence under compulsion by threats of immediate death or grievious bodily harm from a person who is present when the offence is committed[108] is protected from criminal responsibility if he believes that the threats will be carried out and he is not a party to any association or conspiracy whereby he is subject to compulsion. The defence does not apply to a number of serious offences, including murder, piracy, injuring with intent to cause grievous bodily harm, robbery and arson.

The Martian thought that this ought to be re-considered and more understanding be given to human frailty. She would prune the list of exceptions. She would not have excluded applying it to serious offences like robbery and even to murder in at least some cases. What of the person forced by gangsters or terrorists to drive a getaway car, after a robbery or homicide, for example? Nor would she insist that the person doing the threatening should be present in a literal sense. Telephone threats might be sufficient in some cases. Nor need they be of immediate harm - surely a credible threat to do something horrible tomorrow was just as frightening to ordinary people? Indeed, she was not so sure even about the need for threats to be of a serious bodily harm where the evil which the victim was forced to do was relatively trivial. (What of the criminal who threatened assaults short of serious bodily injury if I did not exceed the speed limit?) She ultimately agreed with the Erewhonian Devil's Advocate who suggested that threats to property might even be sufficient (a demand to destroy someone else's dog on threat of having one's house torched). Might not a more flexible standard[109] be sensible? She would certainly continue the emphasis on what the accused subjectively believes would be done to him or her, rather than some objective view of the actual danger.[110]

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106 Crimes Act 1961, s 24.

107 Its narrowness has been attributed to Stephen's views. W Brookbanks "Compulsion and Self-defence" in N Cameron & S France (eds), above n *, 95 at 96. Stephen thought that it should never be a defence, only a factor in mitigation of penalty.

108 See on the presence requirement *R* v *Joyce* [1968] NZLR 1070 (CA). See this case also on the further statutory requirement that the defendant may only rely on the defence if "he is not a party to any association or conspiracy whereby he is subject to compulsion".

109 The Model Penal Code, Section 2.09 speaks of the use of or threat to use "unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist". This avoids allowing the defence to the unduly timorous but permits at least some of the accused's particular situation to be taken into account ("person in his [or her] situation"). The hypothetical person here shares some of the characteristics of the "ordinary person" in the provocation section, s 169 of the 1961 Act, below n 142. The Code does not encompass threats to property.

110 The 1989 Bill, clause 31, provided that "A person is not criminally responsible for any act done or omitted to be done because of any threat of immediate death or serious bodily harm to that person or any other person from a person who is immediately able to carry out that threat". The Martian thought that this was an improvement over the 1961 Act in that it omitted the exceptions, and did not require actual presence by the person doing

(iii) Consent

The provisions on surgical operations and on consent to death struck the Martian as another exercise like the causation provisions, dealing with random aspects of a more general question - in this instance the issue of consent to invasion of one's own bodily integrity - without trying to rationalize the general question. Section 61 protects "every one"[111] from criminal responsibility (but not civil liability) for performing with reasonable care and skill any surgical operation upon any person for his benefit, if the performance of the operation was reasonable, having regard to the patient's state at the time and to all the circumstances of the case. Presumably this is written against the general common law notion that the application of force - even helpful force - to the person of another must be justified, excused or consented to. One who is, for example, lying comatose at the scene of a motor accident cannot consent. Consent is either presumed or, as in the Erewhon statute, dispensed with.

Section 61A, inserted by the Crimes Amendment Act 1977, makes what are described as "further provisions relating to surgical operations". Every one is protected under subsection (1) from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person if the operation is performed with the consent of that person, or of any person lawfully entitled to consent on his behalf to the operation and *for a lawful purpose*. (The final words are paradigm question-beggars; the section contains no clue as to what is lawful.) Asserting the basic consent point this late in the game cannot have been the real goal of the amendment. That emerges in subsection (2). It provides that, without limiting the term "lawful purpose" in subsection (1), a surgical operation that is performed for the purpose of rendering the patient sterile is performed for a lawful purpose.

Then there is the proposition of section 63 that no one has the right to consent to the infliction of death upon himself, and that any such purported consent shall not affect the criminal responsibility of any person who is a party to the killing. I kill my wife who pleads to be put out of the agony of a horrible terminal illness. This is contrary to the policy of the law. I am a murderer.

But this is not the whole story. There is a common law gloss. In *R* v *Donovan*[112] the English Court of Criminal Appeal suggested that it was not lawful to consent to a sado-masochistic caning, a case which raises some difficult questions of degree for the

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the threatening. The requirement of immediacy was, however, too stringent. The draft did not, moreover, extend to threats to property and the words "is immediately able" are open to the interpretation that it was the objective situation, not the accused's perceptions that counted. By and large the Bill had adopted a subjective fault position and something closer to that was required here. The Model Penal Code, above n 109, represented something of a compromise on this issue.

111 Not only medical practitioners, who must be the main beneficiaries of the section.

112 [1934] 2 KB 498 (CCA).

fact-finder.[113] The Erewhon Court of Appeal had already weighed in on this area in the sharpshooter case, *R* v *McLeod*.[114] As part of his Wild West show, McLeod had a volunteer from the audience sit smoking a cigarette while McLeod shot off the ash. This time, the participant moved at the crucial moment and was shot in the face.[115] In response to a special verdict finding the facts, the Court held that McLeod should be convicted of causing actual bodily harm in such circumstances that if death had resulted he would have been guilty of manslaughter. Stout CJ, for the Court, seems not to have been aware of the 1908 predecessor to section 63. He referred, however, to the policy against allowing someone to consent to death and to a number of English cases[116] and authorities which he characterized as dealing with consent to death. Yet consent to death was not quite the issue. The volunteer was hardly consenting to death in any meaningful sense - he had substantial confidence in the marksman and at most contemplated an outside risk. The case thus makes it fairly plain that it is a lot more than certain death that may not lawfully be the subject of consent - at the least a risk of death or significant injury. And someone's criminal liability may turn on how this is articulated after the event by a court.

The Model Penal Code suggests a framework designed to cover risks of bodily injury and not just death like the Erewhon section. It also deals with sporting cases. It is at least a good starting point for drafting a more comprehensive provision and the Martian commends it to Erewhon drafters. Even so, it probably still needs some work to catch the full flavour of the Erewhon common law and begs some questions by referring to "lawful" sporting activities.[117]

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113 "As a general rule, although it is a rule to which there are well established exceptions, it is unlawful to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial". Above n 112, at 507. The Court of Appeal, Criminal Division more recently described the reasoning in *Donovan* as "tautologous" but did not dissent from the result. *Attorney General's Reference (No 6 of 1980)* [1981] 2 All ER 1057, 1059.

114 (1915) 34 NZLR 430 (CA).

115 The bullet did no serious harm. The volunteer lived at least long enough to be shipped off to Gallipoli to be shot at by the Turks instead of by Mr McLeod. Above n 114, at 431.

116 Notably the prize fight case, *R* v *Coney* (1882) 8 QBD 534 (bare fist fighters commit assault on each other; cf normal incidents of boxing with gloves, or other sports). And see *Attorney-General's Reference (No 6 of 1980)*, above n 113 at 1059 (no defence to charge of assault arising from fight that other consented to fight since it "is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter".)

117 Model Penal Code, section 2.11(2) provides that:

When conduct is charged to constitute an offence because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if:

(a) the bodily harm consented to or threatened by the conduct consented to is not serious; or

(b) the conduct and harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport ....

It is not so clear whether *McLeod* deals with a "lawful athletic contest or competitive sport". The Martian, a fan of spectacles, thinks the MPC is not broad enough. She

(iv) Police powers

The material in Part III on police powers[118] seemed to the Martian to be unnecessarily prolix and the situation was also complicated by the existence of numerous powers under other legislation. It needs careful re-examination and rationalization, as does the material on arrest by citizens.[119] Some suggestions have been made in this direction,[120] but much more work is needed.

(v) Ignorance and mistake of law

There were also some striking omissions in the 1961 Act's matters of excuse and justification. In particular, the Martian thought that it ought to be a defence that the statute, regulation, by-law, or other legislation under which the defendant was charged had not been published or otherwise made available.[121] Ignorance of the law should probably not generally excuse but some non-culpable ignorance at least should. Moreover, what if the accused had relied on an official interpretation of the law - by a judge, say, or the Attorney-General - later shown to be erroneous. Ought not that to excuse in a criminal case?[122]

(vi) Intoxication

And what about intoxication? The Erewhonian Court of Appeal had made more sense about voluntary intoxication than the courts had in most places[123] - it is relevant

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would find a way to acquit in such cases as *McLeod* where the (small) danger of error was obvious to the participant, even if discounted - but reasonable earthlings might differ. Perhaps, she thought, a distinction should be drawn between a volunteer smoker and the marksman's helper who sits there every night for pay. The latter consents in a more informed way. In any event, there are some quite profound questions of public policy and culture here. Is having ash shot off of more or less redeeming social value than inviting mayhem on a rugby field? There are also some specialized consent provisions in the sexual violations area that were adopted in the Crimes Amendment Act (No 3) 1985 which could either be left where they are or incorporated into a more general section (The Model Penal Code Section 2.11 (3) is such a general provision).

118 Particularly Crimes Act 1961, ss 26-38 and, in Part XII of the Act, ss 315-317.

119 Notably Crimes Act 1961, ss 35-38.

120 T Arnold "Arrest" (unpublished LLM thesis, Victoria University of Wellington, 1972); T Arnold "Why Arrest?" in R Clark (ed) *Essays on Criminal Law in New Zealand* 203 (1971); T McBride *New Zealand Civil Rights Handbook* (1980).

121 Cf Model Penal Code, Section 2.04 (3)(a), and Crimes Bill 1989, clause 26. The latter applies only to subordinate legislation - which is most likely to be the problem. But why not extend it to Acts of Parliament, just in case? And see discussion in New Zealand Law Commission, Report No 11, Legislation and Its Interpretation, Statutory Publications Bill 3-8 (1989).

122 Cf Model Penal Code, Section 2.04(3)(b). The 1989 Bill does not go this far.

123 *R* v *Kamipeli* [1975] 2 NZLR 610. At 616 the Court said: "Drunkenness is not a defence of itself. Its true relevance by way of defence ... is that when a jury is deciding whether an accused has the intention or recklessness required by the charge, they must

along with all the other evidence on *mens rea*. But why should this not be faced and codified by the legislature?[124] Then there was involuntary intoxication - the Mickey Finn drink cases, and the strange-reaction-to-medication cases. An acknowledgement that there ought to be some relief in such cases is as old as Hale's *Pleas of the Crown*.[125] Could not a modern rule be fashioned for those? All the intoxication issues were difficult; the policy considerations tended to obscure the conceptual framework. But it could be done.

(vii) Necessity

Mars allowed a defence of necessity which dealt with threats by the physical environment, as distinct from threats by other people (the compulsion cases). But the stoical English had until recently[126] studiously refused to go down such a route and the Stephen Code omitted it. When the castaways in *Dudley and Stephens*[127] ate the cabin boy, Lord Coleridge denied the existence of any broad principle of necessity and seemed to want to limit necessity almost exclusively to the self defence cases. Indeed, he quoted Mr Justice Stephen's Code Commissioners to the effect that:

> We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of the law to the circumstances of the particular case.

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regard all the evidence, including evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances. It is the fact of intent rather than the capacity for intent which must be the subject matter of the inquiry. The alternative is to say that when drunkenness is raised in defence there is some special exception from the Crown's general duty to prove the elements of the charge. We know of no sufficient authority for that, nor any principle which justifies it". And see discussion in Criminal Law Reform Committee *Report on Intoxication* (1984).

124 As the 1989 Bill, clause 29, tried to do. The Martian thought that effort was a good start but defective in trying to wrap up in one formula both voluntary and involuntary intoxication.

125 "[I]f a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink any such thing as causeth such a temporary or permanent phrenzy, as *aconitum*, or *nux vomica*, this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him". I Hale *History of the Pleas of the Crown* (Wilson ed 1778). Hale seemed to assimilate the involuntary intoxication defence in insanity (as some US jurisdictions have done) but this was in the days when an insanity verdict resulted in what amounted to an acquittal. Something different is needed where an insanity verdict results in a more or less automatic incarceration.

126 See the excellent discussion of recent English and other common law developments in N Cameron "Defences and the Crimes Bill" in N Cameron & S France (eds), above n *, 57 at 68-74.

127 *R* v *Dudley & Stephens* (1884) 14 QBD 273.

Cannibalism by castaways seems to have been something of a norm in the nineteenth century[128] and the decision did not result in the execution of Dudley and Stephens - their sentence was commuted to one of six months imprisonment. Indeed, it was difficult to know what "principles of law" were to be applied to the circumstances of a particular case, since no-one was prepared to articulate them, other than at a very high level of generality.[129] A law which sentenced someone to death but left it to the executive to modify it to six months in prison was perhaps an ass. Why not face the issue frontally at the guilt stage? Runaway juries were not all that likely - jurors are potential victims too.[130] The Martian thought that the 1989 Bill got it just right.[131]

VI PARTIES, CONSPIRACIES AND ATTEMPTS

The heading of Part IV of the Act spoke of "Parties to the Commission of Offences". In fact the contents dealt not only with defining parties, but also with defining attempts. Moreover, later in the Act, Part XI dealt with threatening, conspiring and attempting to commit offences by prescribing penalties. Nowhere was conspiracy defined. The Martian was pretty sure that this material could all be combined together and simplified. Conspiracy could and should be defined.[132] The attempt section could be improved in at least two ways. First, it said that every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not. A normal interpretation of this is that it disposed of the distinction drawn in some jurisdictions between impossibility of fact and impossibility of law. The Erewhon Court of Appeal had, however, decided otherwise in the classic situation in which this issue arose,

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128 A Simpson *Cannibalism and the Common Law: The Tragic Last Voyage of the* Mignonette *and the Strange Legal Proceedings to Which It Gave Rise* (1984).

129 Thus Lord Coleridge CJ spoke, with appropriate disdain for lesser races, above n 127 at 287, of the posited duty in his own culture to sacrifice lives for others "from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk". He continued, a little later: "It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, from Horace and Juvenal, from Cicero, from Euripides, passage after passage in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow".

130 The Martian was quite persuaded by the argument along these lines in Cameron, above n 126.

131 Crimes Bill 1989, clause 30: "A person is not criminally responsible for any act done or omitted under such circumstances of sudden or extraordinary emergency that a person of ordinary common sense and prudence could not reasonably be expected to do otherwise".

132 The 1989 Bill, clause 61, is a sensible effort at defining it. The New Zealand Police submissions to the Select Committee make the very reasonable point that more thought should be given to modes of dealing with criminal enterprises of an organized crime nature.

receiving stolen goods that had now lost their characteristic of being stolen.[133] This should be dealt with. Second, in 1961, the legislature had abolished the older "unequivocality" test for attempts and replaced it with a "proximity" test.[134] In so doing, it had added that the "question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and is too remote to constitute an attempt to commit it, is a question of law".[135] It was thus a question for the judge. This was an unnecessary restriction on the right of the jury to decide a fundamental part of the question of guilt or innocence and should be changed.

VII HOMICIDE

The Martian was almost done. She had now seen the sheer wisdom of the 1961 Act - and why it did not need change. It was time to think about homicide. This was the part of the 1989 Bill that had generated most public response, overwhelmingly hostile response at that, and she thought that she should get to the bottom of this matter.

It is useful to sketch the background to the 1989 proposals. The provisions of the 1961 Act on homicide, "the killing of a human being by another, directly or indirectly, by any means whatsoever",[136] required some mental gymnastics to understand. Homicide might be culpable or not culpable. Homicide that is not culpable is not an offence. It is said to be culpable when it consists in the killing:

(a) by an unlawful act; or
(b) by an omission without lawful excuse to perform or observe any legal duty; or
(c) by both combined ... .[137]

The Martian did not have too much trouble with the further proposition that culpable homicide could be either murder, manslaughter or infanticide.[138] It was complicated, but

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133 *R* v *Donnelley* [1970] NZLR 980 (CA). The Martian was amused to note that in *US* v *Berrigan* 482 F 2d 171 (3rd Cir 1973), the court read s 72 as having made sense of the law. It did not realize that a majority of the Court of Appeal had already emasculated it. The risks of inadequate comparative research!

134 Crimes Act 1961, s 72(3).

135 Crimes Act 1961, s 72(2).

136 Crimes Act 1961, s 158.

137 Crimes Act 1961, s 160. The omitted provisions, of less practical significance, refer to killing by causing a person "by threats of fear or violence, or by deception, to do an act which causes his death", and "wilfully frightening a child under the age of 16 years or a sick person". These provisions may be characterized in part as random causation provisions and the "threats" provision has been discussed above at n 33 in that context.

138 Section 178 of the 1961 Act reduced the penalty for a mother who killed her child under ten to three years imprisonment "where at the time of the offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or another child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth, or by reason of any disorder consequent upon

basically murder caught those cases where the accused meant to kill, or meant to cause bodily injury which the accused knew was likely to cause death and was reckless whether death ensued.[139] Manslaughter, aside from the special case of mothers killing children called infanticide,[140] was what was left of culpable homicide. It was manslaughter that caused the serious conceptual difficulties in Erewhon.

First was the kind of manslaughter that the Americans called "voluntary". The accused meant to cause death or serious bodily harm but was provoked. The common law had got into some difficulties with the notion of applying a reasonable person standard to a somewhat irrational situation. When Mr Bedder killed the prostitute who taunted him because of his impotence the question arose whether to apply the reasonable person test or the reasonable impotent person test. The House of Lords said the former - his special problems were irrelevant.[141] The Martian's Criminal Law teacher, Professor ID Campbell, waxed outrage at this and his effort to change the result was reflected in section 169 of the 1961 Act.[142] There were certainly those who felt that this was not a bad effort and the Court of Appeal did its best to gloss the section in *R* v *McGregor*.[143]

The Erewhon Criminal Law Reform Committee concluded in a 1976 Report,[144] however, that the whole thing had become hopelessly complicated and full of anomalies and that it was time to scrap the distinction between murder and manslaughter based on provocation. Instead they proposed a single offence of "unlawful killing"[145] to include what was now murder, manslaughter of the provocation variety and what would become a slightly reduced version of what is currently the rest of the current manslaughter offence. The maximum punishment would be life imprisonment and the precise penalty would be for the judge to decide.[146]

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childbirth or lactation, to such and extent that she should not be held fully responsible ...". See also below n 158.

139 Crimes Act 1961, s 167. Section 168 contains a "further definition of murder", a much truncated felony murder doctrine that probably does not catch many cases in practice that would not be caught by s 167.

140 Above n 138.

141 *DDP* v *Bedder* [1954] 1 WLR 1119 (HL).

142 The relevant part reads:

(2) Anything done or said may be provocation if:

(a) In the circumstances of the case it was sufficient to deprive a person having the power of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and

(b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

143 [1962] NZLR 1069 (CA).

144 Criminal Law Reform Committee, New Zealand *Report on Culpable Homicide* (1976).

145 Rendered in the 1989 Bill as "culpable homicide".

146 Giving the judge some discretion on the penalty for at least run of the mill murders is consistent with United States practice. It is not necessary to abolish the categories to do this - indeed, the Americans have tended to create more categories with degrees of murder and manslaughter, leaving the determination of the categories in the hands of juries.

Then there were what the Americans called the "involuntary" types of manslaughter. First were the "unlawful act" cases.[147] As in other common law jurisdictions, the Erewhonian courts had declined to take the proposition that killing by an unlawful act constituted culpable homicide completely literally. In the inevitable unreported decision in 1927,[148] the Court of Appeal, without giving reasons, quashed a conviction of manslaughter based upon the unlawful act of an accused in driving a motor vehicle without a driver's licence. This is usually interpreted in practice as indicating that the unlawful act must be one that carries with it the risk of some harm, albeit not serious harm.[149] Since an assault with intent to cause grievous bodily harm or recklessness as to causing such harm results in a murder conviction, then the subsidiary unlawful acts cases must usually be assaults not so intended. I slap you on the face - an assault for which some harm, if only of the dignitary variety, may be anticipated - you die; I am apparently guilty of manslaughter.[150] The result seems to be the same whether I think about the "harm" or not. A reasonable question is whether such liability should exist or whether these cases should be narrowed and assimilated into some other category. The Erewhon Criminal Law Reform Committee in its 1976 Report seemed inclined to assimilate such cases into the gross negligence category, which would probably result in fewer convictions.[151] The 1989 Bill[152] narrowed the unlawful act category

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147 The definition of culpable homicide in s 160 spoke of unlawful acts in relation to both murder and manslaughter, but people seldom thought of the unlawful acts - serious assaults or breaches of duty with intent or recklessness - in relation to murder. The unlawful act part simply got subsumed in the *mens rea* point. With manslaughter, however, since there was no definition akin to that in ss 167 and 168, the common law was needed to provide some explanation of what was meant.

148 *R* v *Faigan*, referred to in *R* v *Grant* [1966] NZLR 968 (CA). *Grant* is an interesting case with overtones (not noted by the Court) of the consent problem noted above n 116. The deceased died in a fight which the trial judge had said would pass muster as an unlawful act. ("Fighting" was a statutory offence.) The Court narrowed this some. Turner J said, at 973: "Each of the two participants in a fight in which two persons only are taking part will therefore in our opinion be guilty of manslaughter if death of the other is caused by his acts in assaulting that other or in the course of legitimate self-defence on the part of that other; but not if it is caused by the acts of the deceased himself in conducting a counter-attack". Without some understanding of the consent rule, the word "assault" begs the question here.

149 See *R* v *Church* [1966] 1 QB 59 (CA); *R* v *Tomars*, above n 21; *R* v *Kirikiri*, above n 21.

150 The proposition in the text is made with slight hesitation; the cases speak of "harm" and it is possible that something (slightly) more than dignitary harm is meant, but this is obscure. Of course, it *may* be possible to avoid conviction by manipulating the rules of causation. Since those rules are obscure, one cannot be sure of that, above at ns 21-23. The Court in *Grant*, above n 148, was apparently groping for some causation limits on the unlawful act rule. What *is* the *just* result of a painful slap to the face and the death of a victim with an egg-shell skull?

151 *Report on Culpable Homicide* at 31-32 ("prosecution should be required to prove *either* that the accused realized that his act might cause harm or that he was grossly negligent in failing to appreciate and guard against the risk").

152 Clause 122.

considerably by imposing responsibility only where the accused *intended* thereby to cause the other's death or *knew* that the act was likely to cause death. This is probably the right result - how far to base liability on an unlawful act is certainly an issue that should be faced.

The omission-to-perform-a-duty cases have also created some difficulty in Erewhon. In *R* v *Storey*[153] the Court of Appeal faced the issue of the standard of negligence which would establish a breach of the duty of care required of persons in charge of dangerous things. (That duty is now contained in s 156 of the 1961 Act.) The Court held that the prosecution must prove merely a failure to exercise reasonable care in order for a manslaughter conviction to follow. Reasonable care is essentially the same as the tort standard and does not require the gross negligence that the common law is said to require.[154] There are two significant policy issues here: should there be liability for negligence at all; if so, on what standard? The argument usually made for not having any criminal liability for negligence is that it is unfair to punish for inadvertence and that it is not possible to deter people who, by hypothesis, are not thinking, by threatening them with punishment. The main argument *for* such liability is that the potential for liability will encourage otherwise blank minds to think. A subsidiary argument is that it is just in a desserts sense to punish those who by their careless acts create social havoc - such as dead citizens. The argument for gross negligence is that simple negligence is just too high a standard for criminal responsibility and thus unfair.

The 1976 Report on Culpable Homicide accepted, without explaining which, some version of the case for negligence liability,[155] but settled for gross negligence as the appropriate standard.[156] The 1989 Bill opted for abolishing negligence liability completely for homicide - although it would be kept for some cases of endangering,[157] which would in fact catch some cases where death had ensued.

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153 [1931] NZLR 417. But see *R* v *Burney* [1958] NZLR 745 (CA) requiring a "high degree" of negligence under what is now s 151 of the 1961 Act, the duty to provide necessaries of life. *Storey* was recently confirmed by a full bench in a medical negligence case, *R* v *Yogasakaran* [1990] 1 NZLR 399.

154 Indeed, Canadian and Australian decisions interpreting their editions of the Stephen code have interpreted it as declaratory of the common law gross negligence standard. *R* v *Baker* (1929) 2 DLR 282 (SC Can), *R* v *Callaghan* (1952) 87 CLR 115 (HCA).

155 Criminal Law Reform Committee Report, above n 144.

156 Above n 155, 38. The Committee's position is very plainly stated there. When it came to drafting legislative language, the Committee used the words "reckless disregard", Appendix 1 at 9, which would later cause some confusion about whether they really had in mind a subjective test.

157 Crimes Bill 1989, cls 130 and 132. The reaction to the Bill's endangering proposals indicates that most of those who commented on the subject see a substantial difference between a risk taking person who creates a risk which, through the protection of the Erewhonian Gods, does not result in harm to anyone, and the same risk taking by another person who angers the Gods and is unfortunate enough to generate a dead body. The Erewhonians seemed to want to limit criminal liability - not necessarily a bad thing - in some retributive way. The Bill tried to indicate - as offences like careless or negligent driving try to indicate - that some risk taking is, in itself, sufficiently anti-social that it

There were some quite profound questions raised by the Committee's suggestions and the way they were incorporated in the 1989 Bill - which included removing homicide liability completely for negligent, even grossly negligent, killings. Most of the details - the rationality of the provocation defence, the sense and scope of "unlawful act" killings as an offence, the negligence issue - got lost in reaction to the big question about "abolishing murder". Whether to have distinctions between murder and manslaughter is an important question, but it is unfortunate that it swallowed up the other important issues that ought to be faced in a re-codification. The Martian hoped that when it came time to complete the re-examination of the 1989 Bill, questions such as those just raised would be faced explicitly and not lost behind the categories. For her part, she had no qualms about retaining a category of "murder" with the jury deciding who deserved this more heinous label.[158]

VIII CONCLUSION - THE MARTIAN REFLECTS

Samuel Butler's Erewhon ends with a chapter from the Erewhonian philosopher on the rights of vegetables. The Martian's thoughts were more mundane. What lessons did she learn from her visit to Erewhon and similar visits to Canada, the United Kingdom, France, Israel and the United States where analagous efforts at codification or re-codification were under way?

One was, that if a penal code was to be a document of some social significance - and she thought that the criminal law might just be *the* most significant social legislation except perhaps for a constitution - it should probably be revised fairly thoroughly every few generations. It was bound, with the effluxion of time, to end up like the Erewhonian code, written in a language no one quite spoke any more. It probably needed to be translated into gender-neutral language appropriate to our times. It needed a face-lift by re-vamping an organizational structure and numbering system which had taken on more of a crazy-quilt appearance as inevitable amendment was piled on inevitable amendment. In short, it needed basic maintenance on the basis of the Erewhonian bard's dictum: "Dip the sheep or they'll get the scab".

But there was more to it than just that. The criminal law was becoming increasingly internationalized. Yet the Erewhon code, to the extent that it recognized

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should be punished. It seems that many Erewhonians are comfortable with the notion that the blunt tool of the criminal law should only be used in cases where there is tangible harm, fortuitous or otherwise. The message to risk takers is that they will be punished - severely - if death (or perhaps serious injury) results, but not otherwise. Perhaps both in terms of deterrence and the symbolic aspects of criminal law this is sufficient. The endangering clauses were badly drafted in the 1989 Bill and included the unnecessary element of "heedlessness".

158 She also agreed with the commentator, B James, above n 92 at 92, that - if the categories were to be abolished and the sentence left at large - it made no sense to keep the separate offence of infanticide, above n 138.

this, was caught in a time warp before the dramatic developments of the past few decades on that front.

Further, there were areas of general principle that should be tidied up - like the law relating to attempts and to the liability of corporations. Something as basic as conspiracy, an increasingly significant issue with the internationalization of crime and of the response to it, should at least be defined in the statute. In addition, its parameters should be re-examined to see if it meets the needs of legitimate prosecution strategies to deal with organized crime.

Some new crimes, such as computer offences and illicit dealings in trade secrets, need to be crafted. Some old ones could use re-vamping - perhaps the homicide offences, certainly the complex package of theft offences. The justifications and excuses could use some re-thinking and even expansion.

Random provisions on matters such as causation and on consent were wandering through the old code in search of a general rationalizing principle. The principles should be articulated.

Sentencing and procedure were certainly worthy of close attention, perhaps in a separate exercise.

Then there was the question of adding a general part, a road map to the whole endeavour. The Martian would not have hesitated to go down that route.

It was all a pretty exciting agenda. Yet people kept telling her that the 1989 Bill was dead in its tracks? Why? Was there a dearth of legal talent in Erewhon? It did not seem that way. Many of the submissions and articles contained very helpful suggestions for improvement.[159] Was it complacency, or a lack of will, or an inferiority complex that somehow Erewhon could not do it as well as the British?

Nobody was foolish enough to suggest that it was possible to get codification absolutely right, but the Martian thought that a legal profession that could not rise to a challenge like this one was doomed to end up as a cabbage. She left for home in her supersonic balloon pondering the thoughts of the last traveller from afar who tried to capture the ways of the Erewhonians. She decided that the following paragraph neatly captured the attitude they had for the 1961 Code and what she perceived as its shortcomings:[160]

> It is a distinguishing peculiarity of the Erewhonians that when they profess themselves to be quite certain about any matter, and avow it as a base on which they are to build a system of practice, they seldom quite believe in it. *If they smell a rat about the precincts of a cherished institution, they will always stop their noses to it if they can.*

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159 The New Zealand Police submissions in particular contained much food for thought and some practical suggestions for improving the draft and there were a lot of good ideas among the other submissions.

160 S Butler *Erewhon*, above n * at 162 (the Martian's italics).

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