MEMORANDUM

TO: Criminal Code Reorganization Committee

FROM: Jim Tomkovicz, Chair, Foundational Provision Subcommittee

RE: Brief Explanation of Proposals; Future Progress

DATE: September 8, 2008

The Foundational Provision Subcommittee has met twice since the last meeting of the full committee. As a result of those meetings and subsequent deliberations, the subcommittee has agreed to propose that the Iowa Code include foundational provisions regarding the **act requirement, the culpability requirement, mistake, and criminal liability for the acts of others**. Each of these proposals is based on the Model Penal Code provision on the subject, but none of them is identical to the MPC provision. The following are some brief, explanatory comments on the proposed provisions.

I. EXPLANATIONS OF PROPOSALS

▸ ACT REQUIREMENT

This proposal specifies and clarifies a basic requirement that is already part of Iowa law, the need for an "act" that is "voluntary" as a basis for criminal liability (subsection (1)). After specifying the requirement, the provision defines voluntariness (note the alternatives proposed in subsection (2)), specifies when one is liable for an omission/failure to act (subsection (3)), and provides that possession can constitute an act (subsection (4)). This section would flesh out Iowa law, but would not modify any currently controlling rule or principle.

▸ CULPABILITY REQUIREMENT

This proposal is the most significant and far-reaching of all that will be made by the subcommittee. It first recognizes the basic criminal law rule that criminal liability requires a guilty mind (culpability) for each element of an offense, but preserves the legislature's ability to enact strict liability crimes (those that omit a culpability requirement for one or more elements) (subsection (1)). Again, this fundamental principle is already a part of Iowa law. The provision, however, following the Model Penal Code, takes the clarifying step of identifying and defining four different culpabilities (purpose, knowledge, recklessness, negligence) (subsection (2)). In so doing, the provision assumes that the crimes recognized in Iowa law will be defined in terms of these four, and only these four, culpabilities. Currently existing mental states such as willfulness, specific intent, and general intent, which are models of ambiguity and inconsistency, would be eliminated and replaced by the defined culpabilities. Adoption of this culpability proposal will require re-examination of every offense currently found in the Iowa Code. The subcommittee believes that the clarity and consistency that result from this revision will be well worth the effort. Many other jurisdictions have adopted this MPC provision in whole or in part and have drafted their crimes in accord with the culpabilities recognized here.

In addition to enactment of the culpability/mens rea *rule* and the *definitions*, this provision includes an important tool to assist in interpreting the culpability requirements in crimes. It recognizes that if the legislature does not specify strict liability and does not specify a particular culpability, then recklessness (or purpose or knowledge) will suffice, but that negligence will not suffice (subsection (3)). It also provides that if a particular culpability is prescribed for an offense, a higher level of

culpability (i.e., a *more blameworthy* state of mind than is necessary) will suffice (subsection (4)). Finally, it provides that unless the legislature specifies, no culpability is required with regard to whether one is committing an/the crime he/she is charged with committing (subsection (5)). This is, in essence, adoption of the basic criminal law principle that ignorance or mistake about the criminal law that you are charged with violating is *not* a defense to criminal liability.

▸ MISTAKE OF FACT OR LAW

The mistake provision proposed modifies current Iowa case law which, if followed literally, allows conviction of an individual whose mistaken state of mind means that he or she lacks the culpability the legislature has required for the crime. (The illogical, judicially-recognized rule is that a mistake must be reasonable no matter what culpability is required.) The logical rule proposed here is that whenever a mistake—whether one of fact or law—demonstrates that the accused did not have the guilty mind/culpability required by legislature, it will be a defense (subsection (1)). This subsection does seem to reflect (and clarify) the basic intent of the very ambiguous provision on mistake of fact and law that is currently in the code.

In subsection (2), this provision prevents a defendant from escaping liability because of an oddity in the law. It basically says that if he/she does not have the culpability for a greater offense because of a mistake (although he/she satisfies the other requirements), but does have the culpability for a lesser offense (but does *not* satisfy the other elements), it does not make sense to recognize his/her mistake defense and allow him/her to avoid liability. It eliminates the mistake defense that would otherwise be provided by subsection (1) and then provides that the offense should be graded in accord with the accused's level of fault. In essence, the mistake lessens his liability, but does not prevent conviction.

Subsection (3) is an addition to current Iowa law, recognizing some very narrow exceptions to the basic rule that ignorance/mistake about the criminal law you are charged with violating is not a defense. These exceptions apply only when the law is not known or reasonable available or when some official has given advice that the defendant *reasonably* relies on in forming his/her mistaken belief about the law. These defense apply only when the defendant is truly lacking culpability and only when the state has some fault/responsibility for the mistaken understanding of the law and it requires that the defendant carry the burden of proof (subsection (4)).

▸ CRIMINAL LIABILITY FOR THE ACTS OF OTHERS

This proposed provision specifies two instances in which a defendant is criminally liable based on the acts of other persons—when the defendant *causes an innocent or irresponsible agent* to act and when the defendant is *an accomplice* of the guilty person who commits the offense (subsection (1)). Both of these bases for liability are recognized in current law. The problem with current law is that it is not clear or thorough in providing when one is an accomplice of another. Subsection (1) also preserves the current Iowa rule that all who are subject to conviction, including accomplices, can be charged, tried, and punished *as principals*.

Subsection (2)(a) provides that if a person causes an innocent or irresponsible agent to commit the acts that constitute an offense, he is liable as long as he/she has the culpability required for the offense. This means that the acts of the innocent or irresponsible person are, in essence, treated as if the defendant did them him/herself. This is a universal principle of criminal law.

Subsection (3) specifies what is required for *accomplice liability* (sometimes called complicity or aiding and abetting). Addressing the required culpability/guilty mind first, the proposal preserves the current Iowa case law requirement that it is enough for a defendant to "knowingly" promote the acts of the person who commits the crime (subsection (3)(a)). While a purpose to promote those acts also is sufficient (because a greater culpability always suffices), the proposed Iowa provision, unlike the MPC provision on which it is based, would *not* require purpose. With regard to the other elements of the crime committed (other than the acts), the provision says that an accomplice can be convicted based upon the same culpabilities that would be required for those elements if he were to commit the crime him/herself (*i.e.*, no more and no less is required) (see subsection (4) and subsection (5)). Iowa law on these mens rea issues in unclear/uncertain.

In subsection (3)(a)(i),(ii), and (iii), the provision specifies the acts that are sufficient to make one an accomplice: commanding, encouraging, requesting, aiding, agreeing to aid, *attempting to aid*, and failing to act when one has a legal duty to act. All of these acts (and omissions), except attempting to aid, are probably enough under the current law. Adding attempting to aid is a modest *expansion* of potential liability as an accomplice and rests on the notion that "chance" should not preclude liability.

Subsection (6) prevents someone who is legally incapable of committing an offense him or herself from claiming that this legal incapacity prevents his/her conviction as an accomplice to another who can commit the offense. As a general rule, there is no reason to extend the basis he or she cannot be convicted to accomplice liability situations.

Subsection (7) recognizes two very narrow defenses to liability as an accomplice. First, a *victim* of a crime cannot be convicted as an accomplice to the person who victimizes him/her. Second, a persons who adequately ends his or her involvement in the crime and makes sufficient efforts to stop the offense may claim a *withdrawal* defense *if* he or she carries the burden of proof by a preponderance of the evidence. This defense is designed to encourage such withdrawal and preventive efforts by those who have become involved in crimes.

Subsection (8) allows conviction of a person as an accomplice even though the person who committed the crime has not been prosecuted, has not been convicted, has been convicted of a different offense, has been acquitted, or has an immunity from prosecution. The premise, in keeping with modern law, is that none of these situations should prevent the guilty accomplice from being convicted—as long as the crime is proven and he or she is proven to qualify as an accomplice.

Subsection (9) incorporates the substance of a current Iowa statute.

Subsection (10) is highlighted because the subcommittee is currently evenly split over whether to preserve the current principle it reflects—that an accomplice will be liable not only for the crime he or she knowingly aids (etc.), but also for any other crimes he or she could reasonably expect to be committed by the principal actor.

Finally, the subcommittee proposes retention of the current, separate offense of being an "accessory after the fact."

II. FUTURE PROGRESS

Although it may be difficult to meet monthly during the Fall (especially during election season), the subcommittee intends to make every effort to do so in order to make similar progress on the remaining foundational topics by the end of the year. The topics still to be discussed include: inchoate crimes (attempt, solicitation, and conspiracy); defenses (intoxication, insanity, diminished capacity, duress, self-defense, defense of others, necessity, etc.); and perhaps some basic definitional provisions. If the subcommittee has not completed work on the foundational provisions by the end of the year, the chair is willing to schedule meetings during the Spring to conclude any business. Once the subcommittee completes its work, it will present all of its proposals to the entire committee for its consideration.