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Résumé de l'article

Cette note a pour objet l'institution juridique de ce qu'on appelle en droit criminel les infractions incluses. La jurisprudence nous enseigne que la « substance de l'infraction », au sens du par. 510(1) du *Code criminel*, dépend de l'acteur. Mais les concepts juridiques ne nous disent pas clairement quel est la nature de ce lien entre l'acteur et la substance des infractions.

Et ce principe, par ailleurs n'est pas absolu. En revanche, le fait qu'existe une ou des infractions incluses est d'une importance énorme pour l'acteur. Comme ces différentes données semblent avoir été perdues de vue, il devient impérieux que la jurisprudence en tienne compte.

Note

The Substance of the Offence: Included Crimes and the Philosophy of Substance

Christopher B. GRAY *

> [Substance of offence/ Substance de l'infraction] Each count in an indictment [...] shall contain in substance a statement that the accused [...] committed an offence therein specified. [1]

Cette note a pour objet l'institution juridique de ce qu'on appelle en droit criminel les infractions incluses. La jurisprudence nous enseigne que la « substance de l'infraction », au sens du par. 510(1) du Code criminel, *dépend de l'acteur. Mais les concepts juridiques ne nous disent pas clairement quel est la nature de ce lien entre l'acteur et la substance des infractions.*

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1. *Criminal Code,* R.S.C. 1970, c. C-34, as am. through 1988, s. 510(1). Though Canadian, this and the material to follow has wider relevance, since any jurisdiction must handle the same issues, as *f.i.* in U.S. law by: "Lesser Offences", 129 *Soll. J.* 386 (1985); C.R. BLAIR, "Constitutional Limitations of the Lesser Included Offence Doctrine", 21 *AM. CRIM. L. REV.* 445 (1984); J.L. ETTINGER, "In Search of a Reasoned Approach to the Lesser Included Offence", 50 *Brooklyn L. R.* 191 (1984); E.G. MASCOLO, "Procedural Due Process and the Lesser-Included Offence Doctrine", 50 *Albany L. R.* 263-304 (1986). Or, in U.K., E. CARYL-THOMAS, Indictments, *R. v. Staton,* [1983] *Crim. L. R.* 190. This study has benefited from criticism by Roger Shiner.

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The common phrase, "the substance of the offence", is a metaphor. It draws a comparison between a point of law, and the way we refer to things in our ordinary speech. Ordinarily, when we talk about the "substance" of something, we are drawing attention to its most important features, the features which are essential to it. We use this metaphor to help us conceive of the crucial features of a criminal act. The problem in law is to identify the crime of which a person is accused, by distinguishing it from the crimes it includes, or which include it.

However, more than a metaphor, the phrase is an analogy. We can examine it in order to find out more about each of the things which are compared. We know they share some features, and they differ in others. There are yet further features which we do not know, but which we may infer on the basis of those likenesses and differences we already know.

This can work in both directions. The notion of substance may help us to resolve some of the problems as to subsections 510(1) above and 589(1) to follow. But all that I will attempt here is the other side : to show how the jurisprudence of included offences both confirms the main philosophical features of substance, while generating still others.

Philosophically, substance was first defined by Aristotle. Initially, he asked what "being" means, and answered that it is talked about in many ways. The most basic way is as substance. "My son exists". By this we mean whatever we can say things about, but which cannot be said of other things. "My son is good", but not "goodness is my son".

Besides answering this basic question, substance also plays a role in solving the problem of change, which had plagued earlier philosophers. No longer need change be conceived as either the continual annihilation and creation of complete things, or else as their constant melting away in which no stable moments of identity can be found. Now, commonplace changes are seen as an exchange of accidents within the stable substance. "My son hurt his knee, but he's still my son".

But it is a third job the notion of substance does that is of interest here. It allows us to explain how beings can be coherent. Rather than made up of pieces which are jumbled together by happenstance, things are structured into wholes by the way their parts are ordered one to each other. The substance remains single; its many parts are fitted to just that kind of whole; but they are able to change in an orderly manner which does not disrupt it. "My son was hurt playing football last fall, but he's all right now".

This problem of the one and the many is posed every level of being — inanimate, living, and personal — even at the social level where law belongs. One branch of our western philosophical tradition encourages us to think of simple things, below the lifeworld, as what we can understand best. But an equally potent branch looks first to ourselves as what we know best, because we are closest to ourselves. According to this, we may learn most about substance by looking to its dynamics in our human actions. It is in law that we may find out the most about how being coheres into substances. To the "substance of offences" we must turn.

Offences are criminal actions. One of their part-whole relationships is that of included offences.

> [...] where the commission of the offence charged, as described in the enactment creating it or as described in the count, includes the commission of another offence, [...] the accused may be convicted a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved [...][2]

The reason for the law's entertaining of included offences is a double focus of justice. The person accused of a crime must be acquitted of it if the evidence does not prove she committed that crime. The same evidence may, however, prove that she committed a different crime. If she is acquitted of every crime, we the people are unjustly deprived of our protection. If she is convicted of a crime with which she was not charged, she is deprived unjustly of her right to a hearing; for this involves knowing and preparing a defence to the charge against her. If the newly evidenced crime is only slightly different, a new charge after acquittal of the original charge will be dismissed as an unfair second jeopardy. So the only way to preserve just protection and fair notice, both, is if the new charge is already included in the original charge. If included clearly, it gives enough notice for it to be judged at the same trial. The doctrine of included crimes is meant to determine whether this has happened.

The texts of law seldom state that an offence is an included crime in another[3]. That an offence is included is usually an inference from the

2. *Criminal Code*, s. 589(1) (a).
3. An exception is *id.*, s. 589(2-5).

definitions of the several crimes, or from the wording of the charge. An attempt to commit a crime is always an included offence to that crime [4]; and so is the entertaining of the *mens rea* for an offence lesser than the one an accused has become incapable of — usually some focused attention impeded by drunkenness. The intruder is so sodden that he cannot specifically intend to deprive the old man of his cash, but he is generally aware of throwing him twice into the bathtub; so on a charge of robbery a conviction for assault can be found [5]. But because the criminal attemps, and the crimes of "specific or strict intent" as against "general intent" under drunkenness, involve so many peculiar problems of their own, the only examples of included crimes here are those where, simply, some portion of the *actus reus* that is charged cannot be proven [6].

Neither is the included offence determinable as a "transferred intent", nor as a "related charge". That one tried to rob, and found no goods, but only a minor he then sexually assaulted, gives no access to a conviction for sexual assault on a robbery charge, as though a general criminal intent was present and was transfered onto a new crime. Nor does some "relation" between to two crimes: first-degree murder cannot be found on a second-degree count, simply because the two are related [7]. The charges must be not only related, but included.

1. Structural Features of Included Crimes

The included crime is a "lesser" crime, in doctrine if not in statute. But this does not mean that it is lesser in seriousness. The seriousness is determined by a comparison of their respective punishments. Thus impaired driving has as an included offence the crime of impaired care and control of a motor vehicle; yet the punishment for the two is equal, viz., up to two years imprisonment with a three-month minimum for a third offence [8].

The act which is both charged and included must be one and the same transaction [9]. It is this which "lifts it from the general to the particular". If a series of events forms a different whole for the included offence than for the

4. *Id.*, s. 589(1) (b).
5. *R. v. George*, (1960) 128 C.C.C. 289, [1960] S.C.C. 871.
6. Terminology is that of *D. P. P. v. Beard*, [1920] A.C. 479 (H.L.).
7. *R. v. Chabot*, (1981) 18 C.R. (3d) 258, 34 N.R. 361 (S.C.C.).
8. *R. v. Gaudet*, (1980), 26 Nfdl. & P.E.I.R. 464 (C.A.); Cr.C., s. 236(1).
9. *R. v. Cook*, (1985) 20 C.C.C. (3d) 18 (B.C.C.A.), 46 quoting *Brodie v. The King*, (1936) 65 C.C.C. 289, 297, [1936] 3 D.L.R. 81 (S.C.C.).

main offence, this is not met. The neighbour of the summer housemaid who during the drive back from a fishing trip puts his hand on her thigh, then on her stomach, later still her breast, then finally pulls over and rapes her, performed either sexual assault or the common assault it includes, because the acts formed one transaction — as well as being individually sufficient for the count, here [10]. But a company whose dealings alleged to be in violation of competition law were set into a plethora of counts was not liable for a lesser offence upon that set for they formed no single transaction [11].

The charge must be divisible into degrees of effective commission. Not all are [12]. Some offences must be committed whole, or not at all. While robbery includes theft, theft includes no other [13]; although one may "take fraudulently" without "intent to deprive the owner", this is no crime but a civil wrong [14]. Some criminal offences can be a simple substance-of-the-crime; but for the included offence to be its substance, the crime must be divisible.

What the offence is divided into is effective degrees of commission. This identifies the peculiarly moral context of the investigation. Unlike the conceptually ordered or "static" norms Kelsen excoriates, and just as unlike his own definition of norms by nothing but authority, this requirement recognizes that norms are to be defined primarily neither by concepts nor by "oughts", but by the nature of action. The performance itself is whole, but can be performed also less fully, whereupon it becomes a different whole, distinguishible but not separated until performed short.

This is what provides a corrective to the next observation, that the included crime is a part of an offence.

> The expression "lesser offence" is a "part of an offence" which is charged, and it must necessarily include some elements of the "major offence", but be lacking in some of the essentials, without which the major offence would be incomplete. [15]

This description has a pedestrian appearance, seeming to make an included offence into a heap of mechanically disjoint parts, an *omnium gatherum* of characteristics under comprehension (intension) no more integrated than the separate objects gathered under extension. Even as such, it is not without

10. *R. v. Cook ibid.*; Cr. c., s. 246.1, 244(1).
11. *R. v. W.I.S. Development Corp. Ltd.*, (1984) 12 C.C.C. (3d) 129, 40 C.R. (3d) 97, 53 N.R. 134, [1984] 1 S.C.R. 485, 9 D.L.R. (4th) 661.
12. *R. v. Gaudet, supra,* note 8, p. 472; Cr. C., s. 589(1).
13. *R. v. Robinson,* (1923) 34 B.R. 527 (Que.); Cr. C., s. 302.
14. Cr. C., s. 283(1).
15. *Fergusson v. The Queen,* [1962] S.C.R. 229, 233, 36 C.R. 271, 132 C.C.C. 112, 114, quotes *R. v. Ovcaric,* (1973) 22 C.R.N.S. 26, 29, 11 C.C.C. (2d) 565.

some relevance — a charge on theft of a list of objects includes a charge on the one object of which the theft can be proven [16]. But it involves much more, too.

The emphasis lies not on the fact that the main offence has the elements which the lesser also does; but conversely that the lesser bears its own elements, and that these are found also in the main offence. The lesser can exist on its own, that is, it can be performed separately. The main offence has performances which are essential to it, and that are not found in the included offence.

All this is better illustrated with a charge from an indictment than one from the criminal statutes. On a charge of "attempting murder by hitting in the head with a baseball bat", the included offence of "assault causing bodily injury" can be found [17]. But on a charge of "illegally stole and by violence committed robbery", no such included offence can be found, since violence may be to property or, in the example, by snatching a purse without harming the owner [18]. In such an offence put together in the count charged, once the essentials for murder in the first or robbery in the second are found missing on the evidence, the included assault causing bodily harm has its own ingredients stated by the first charge but not by the second.

The thrust of the logical attemps at parsing this as the comprehension of concepts, appears in an example of including impaired care and control under impaired driving. In denying this, the judge stated that driving involved one concept, the concept of putting into motion ; while care and control had many concepts, which embraced driving as one, but of which several others could be performed even totally apart from the vehicle. He concluded that the many ways in which an offence could be committed were conceptual features of the offence, which could not be included within the single "characteristic" features of the more extensive. The fallacy is highlighted by the irony that the very monitum which would hold it in check, namely that one must not confuse the method of proof (here, by driving, by overseeing, by entrusting,...) with the substance of the offence (here, of control), is quoted by the same judge immediately after that fallacy [19].

A better statement of these points does more justice to the context of action than does the previous test.

16. *R. v. Orford,* (1943) 79 C.C.C. 151 (S.C.C.).
17. *Tousignant v. The Queen,* (1960), 33 C.R. 234, 130 C.C.C. 285 (Que. C.A.).
18. *R. v. Bissonnette,* (1979) 47 C.C.C. (2d) 191 (Que. C.A.); also *R. v. Prince,* [1986] 2 S.C.R. 480.
19. *R. v. Gaudet, supra,* note 8, p. 475, per C. R. McQuaid, J.A.

> The test is to see whether it is a necessary step towards establishing the major offence to prove the commission of the lesser offence: in other words, is the lesser offence an essential ingredient of the major one?[20]

This is not the reverse of the preceding warning, but its correct application: not that it is necessary to prove the main offence (driving) in order to prove the lesser (care and control); but that one must prove care and control to prove driving. This means there can be overlapping of offences in the individual case without the offences ceasing to be separate and standing on their own feet; their being included one in the other is not affected by them being either separate or not[21].

The active sense in which the greater offence must necessarily include but not necessarily mention the lesser in the charge[22] is yet better stated by saying that the lesser is committed in committing the main offence[23]; one can do the lesser crime without doing the main one charged, but he cannot do the crime charged without doing the included offence[24]. Thus, one is not able to be convicted for an offence of trafficking drugs when he had been charged with unlawfully importing them. The trafficking is not an included offence in the importing, because the element of transporting which is in the definition of trafficking, is not included in the importing. One can import without transporting, as by being a factor or agent; so one can perform the main offence of importing without performing the included offence of trafficking[25].

To this point, the upshot of investigating the substance of the offence is that (1) substance is dependent on the agent; and (2) agency defines substance in a way that is not exhaustible in conceptual terms. The latter point has just been dealt with at lenght. A striking illustration is that on a charge of "breaking and entering with intent to steal", no included offence of stealing may be found, even if the intent to steal is established and the stealing as well. For the charge did not require stealing, so stealing is not included; and the intent to steal, which is included, is not an offence[26].

The first of these two conclusions should be expanded, however, because the next step will be to buffer it. Even when the charge is laid in terms defined

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20. *R. v. Springfield,* (1969) 53 Cr. App. R. 608, 611 (Engl. C. A.).
21. *R. v. Gaudet, supra,* note 8, p. 475, quoting *R. v. Ford,* (1979), 24 Nfld. & P.E.I.R. 91, (1980), 65 A.P.R. 91.
22. *Luckett v. The Queen,* (1980) 50 C.C.C. (2d), 489, (1981) 20 C.R. (3d) 393, [1980] 3 W.W.R. 673, 105 D.L.R. (3d) 577, 30 N.R. 344 (S.C.C.).
23. *R. v. Foote,* (1974) 16 C.C.C. (2d) 44 (N.B.C.A.).
24. *R. v. Young,* (1979), 21 Nfld. & P.E.I.R. 77 (P.E.I.C.A.).
25. *R. v. Jarque,* [1980] 1 W.W.R. 183 (Sask. C.A.).
26. *R. v. Rossignol,* (1923) 40 C.C.C. 253 (N.B.C.A.).

from the code, their composition is up to the prosecutor, and the way she does it will affect what is included or not. Even more is this true when the charge includes information about concrete activities performed by the accused. While the charge of murder does not include the offence of assault causing bodily harm[27], the charge of attempting murder by discharging a firearm does include the offences of discharging a firearm with intent to wound, and dangerous use of a firearm[28]. Where the substance in this context begins and ends is very much dependent upon what one does and how one talks, rather than almost completely upon the way things just are, even were we so trustful as to take the criminal statutes as themselves "the way things are".

2. Limitative Features

Yet the discretion to include offences is not untrammelled. A judge must decide on issues raised by the evidence to allow an included offence to go to the jury[29]. But once an included offence is made out, the judge cannot withdraw it from the jury[30]. Prior to that, the judge cannot simply substitute the included offence for the major offence, but must indicate that it is included; so she cannot accept a guilty plea of second degree murder on her own, without allowing a jury to hear evidence on the charge of first-degree murder[31]. As a result, no jury verdict can ignore this: on the charge of manslaughter included in murder, the verdict "guilty of manslaughter" is wrong; the verdict must be "not guilty of murder, but guilty of manslaughter"[32].

This is only a reflection of the initial limits upon including a charge. The offence must be one which can properly be included in a count. So while it is proper to state a charge of "robbery in that the accused did steal and at the same time used violence which caused bodily harm to the victim", and thereby include the offence of assault causing bodily harm[33], it is not proper to lay a charge of trafficking in drugs by transporting them, upon evidence that the accused was driving with the drugs in his car, and then seek conviction on an "included" charge of possession. For while the definition of *possession* does

27. *R. v. Chichak*, (1978) 38 C.C.C. (2d) 489 (Alta. C.A.).
28. *R. v. Longson*, (1976) 31 C.C.C. (2d) 421, [1976] 6 W.W.R. 534 (B.C.C.A.).
29. *Smith v. The Queen*, (1978) 43 C.C.C. (2d) 417, 91 D.L.R. (3d) 1, [1979] 1 S.C.R. 215.
30. *R. v. Scherf*, (1908) 13 C.C.C. 382 (B.C.C.A.).
31. *R. v. Dietrich*, (1968) 3 C.R.N.S. 361 (Ont. C.A.).
32. *R. v. Vincent*, (1957) 119 C.C.C. 188 (Ont. C.A.).
33. *R. v. Harmer and Miller*, (1977), 33 C.C.C. (2d) 17 (Ont. C.A.).

use the term *transporter*, as does the definition of *traffiquer,* it is improper to move from the factual evidence of possession to one sense of "transport", viz. the sense "to carry"; then to use the term with the changed sense of "to distribute" in order to charge with trafficking; and finally to move back to an included charge of possession by again seeking out the first sense of "transport". That would be to convict upon a charge that was not laid, which may not be done properly even in cases where that charge could have been laid [34].

The limits upon creating the substance of the offence arise not only from the lack of scope in the charge, but also from its lack of specificity. While the offence of robbery includes the offence of common assault because the section lists four alternative ways of committing it [35], of which "uses personal violence" is one [36], the crime of murder does not include the offences of causing bodily harm with intent to wound, assault causing bodily harm nor unlawfully causing bodily harm, because the section speaks only of causing murder "by any means" [37]. A bound alternative alone suffices for inclusions of lesser offences, and a free alternative does not, because the accused must know what charges he has to meet. While the bound alternatives are necessarily included in the offence, the loose ones are not necessarily included [38].

The upshot from the preceding section is that the creativity in delineating substance which appeared from the first section, is confined rather than unbounded. Limits upon the judge by the prosecutor, upon him by the code, and upon the code by what it is even possible to say of action, mean that the substance is a bounded choice, while not predetermined.

3. Consequential Features

Whether there is an included offence in a charge, whether the substance of the crime is some included offence or must be left with the offence stated in the charge, is of course important because it determines whether one can be convicted of a crime or not. But a few procedural consequences of the decision can highlight with greater finesse some ways this consequence can arrive.

34. *Turcotte v. R. (Qué.),* (1981) 22 C.R. (3d) 46 (Que. C. Sess. Peace); *Narcotic Control Act,* R.S.C. 1970, c. N-1, s. 2, 4(1).
35. Cr. C., s. 302.
36. *Luckett v. The Queen, supra,* note 22.
37. Cr. C., s. 222.
38. *Simpson v. The Queen (N° 2),* (1981) 20 C.R. (3d), 58 C.C.C. (2d) 122 (Ont. C.A.).

RE prescription: Prosecution for a lesser offence cannot be started beyond the time prescribed for launching the prosecution of that lesser offence, even if prosecution for the major charged offence has a longer prescription period, or was launched within its proper delay [39]. RE extradition: Again, an accused cannot be convicted of the lesser offence when he has been extradited for trial on a greater offence, unless the lesser offence also is an extraditable crime [40]. RE appeal: On another tack, the Crown does not have the right of appeal to the Supreme Court it otherwise would upon the accused's conviction only for a lesser offence, since there has been no acquittal on the charge as laid. Because the crime he was convicted for was included in that charge, it is upon that charge that he was convicted [41]. RE retrial: Although the details are complicated, in general this means that one convicted on either the greater or lesser charge, or acquitted on either, cannot be retried on either. Had they been simply different, and not included in one another, he could be tried anew on the other without any defence of *autrefois acquit, autrefois convict* or *res judicata* [42]. RE jurisdication: The court must have jurisdiction to try the included offence, not only the major offence, in order to do so; and even if it has, it cannot try the lesser unless it also has the jurisdiction to try the main offence [43].

RE amendment: Finally, an amendment to the indictment, which otherwise would be a question of law for the judge as to whether it need be returned to the grand jury, is in the case of an included offence only an amendment to form rather than substance. The substance, the included offence, is already included in the charged crime [44].

Conclusion

As to the substance of included crimes, the conclusions to be drawn from these features are that (1) human actions determine which things are substances

39. *R. v. Hoskins,* (1930) 52 C.C.C. 365 (Alta. C.A.); now, *e.g.,* s. 721(2), for summary convictions.
40. *R. v. Flannery,* (1923) 40 C.C.C. 263 (Alta. C.A.); now, *Extradition Act,* R.S.C. 1970, c. E-21, s. 34, 36, 37.
41. *R. v. Wilmot,* (1941), 75 C.C.C. 161 (S.C.C.); now s. 621(1). See now *Guillemette v. The Queen,* S.C.C., 24 avril 1986, #18145.
42. *Constitution Act, 1982,* (*Canada Act, 1982,* U.K. 1982, c. 11, Sch. B.) s. 11(h). See also *Head v. The Queen,* [1986] 2 S.C.R. 684.
43. *R. v. Letendre,* (1928) 50 C.C.C. 419 (Alta. C.A.): *R. v. Law,* (1916) 25 C.C.C. 251 (Alta. C.A.).
44. *R. v. Vincent,* (1957) 119 C.C.C. 188 (Ont. C.A.); s. 529 (6).

and which are not; but (2) human actions do not determine this in an unrestricted manner; and (3) it makes a great deal of difference to citizens that these propositions are true. These three conclusions sound like platitudes.

But while apparently platitudinous, these propositions run contrary to several equally commonplace counterparts. First, as to both inanimate and living substances, the identity of a substance is assumed to be a necessary effect from inexorable laws of nature. That is, (1) causes other than human action determine the identity of human substance. Next. we tend to think that the things which we make as cultural objects are completely different from this: we think of our associations, our institutions, and our laws, as being whatever we choose to make of them. That is, (2) human actions determine the identity of substance without limit. So, unlike among pre-social beings, (3) substance is an irrelevant consideration; it makes no difference to anyone that the truth about it happens to be.

What jurisprudence offers us is a disproof of these contrary commonplaces. So our results are not themselves so banal as they might have seemed. And, especially if it is true that our own actions are the best way to understand the world, the insights that included offences give us into the "substance of the offence" may also give us hints as to how best we can grasp a much wider horizon of being.