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Special Comment

CRIMINAL LAW REVISION IN KENTUCKY: PART II— INCHOATE CRIMES

BY ROBERT G. LAWSON*

*Introduction*¹

Kentucky, like other jurisdictions, imposes criminal sanctions for conduct that is designed to achieve a criminal result but fails for some reason to accomplish its anti-social objective. Such conduct is punishable, if at all, as criminal attempt, criminal conspiracy, or criminal solicitation. In looking toward revision, attention should be focused initially upon the objectives to be promoted by classifying unsuccessful, anti-social conduct as criminal behavior:

First: There is obviously need for a firm basis for the intervention of law enforcement agencies to prevent a person dedicated to the commission of a crime from consummating it. In determining that basis, attention must be paid to the danger of abuse; equivocal behavior may be misconstrued by an unfriendly eye as part of an endeavor to commit a crime. On the other hand, it is no less important that lines should not be drawn so rigidly that the police confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime may be committed, while if they act there may not yet be a valid charge.

Second: Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards criminal activity, not on this occasion alone, but on others. There is a need, therefore, subject again to proper safeguards, for a legal basis upon which

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¹ This is the second of a series of comments designed to identify the major needs for revision of the Kentucky criminal law. See Lawson, *Special Comment—Criminal Law Revision in Kentucky: Part I—Homicide and Assault*, 58 Ky. L. J. 242 (1969). Stimulation for the comments is an existing project of the Kentucky Commission on Crime and Law Enforcement directed toward the preparation of a modern criminal code for Kentucky.

law enforcement agencies may assess and deal with the special danger that such individuals present, thus making them amenable to the corrective process that the law provides.

Third: Quite apart from considerations of prevention, when the actor's failure to commit the substantive offense is due to a fortuity, as when the bullet misses the intended victim or when the expected response to solicitation is withheld, exculpating the actor would involve inequality of treatment that would shock the common sense of justice. Such a situation is unthinkable in any mature system designed to serve the proper goals of penal law.²

The discussion which follows should indicate one thing very clearly. A substantial part of the existing law has developed without thoughtful consideration of the purposes for which inchoate offenses exist.

I. CRIMINAL ATTEMPT

A. Introduction

Criminal attempt is typically defined as "a step towards a criminal offense with specific intent to commit that particular crime."³ Absent statutory authorization to the contrary, it is punishable in most jurisdictions as a misdemeanor, with no consideration given to the seriousness of the crime attempted.⁴ Thus, attempt to commit murder has the same penalty structure as attempt to commit larceny. The situation in Kentucky is not greatly different. In 1968 the legislature created a general offense of attempt to commit a felony. Attached to the offense were sanctions which served to classify it as a misdemeanor.⁵ With the enactment of this statute, the legislature did not attempt in any manner to affect the multitude of statutory attempts already in existence. Nor did it attempt to consider any of the problems which have always caused difficulty in the law of attempt. These questions were completely ignored: What is an

² Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 COLUM. L. REV. 571 (1961).

³ R. PERKINS, CRIMINAL LAW 476 (1957) [hereinafter cited as PERKINS].

⁴ *Id.*

⁵ KY. REV. STAT. [hereinafter cited as KRS] § 431.065 (1968).

individual's responsibility for an attempt to commit a crime which cannot possibly be committed? How far toward completion of an offense must an individual go before he commits criminal attempt? How should the sanction for a criminal attempt relate to the sanction for the crime attempted? These are the problems that are relevant to a thoughtful revision of this area of Kentucky law.

B. Impossibility—A Defense to Criminal Attempt?

One of the problems mentioned above is whether or not to convict an individual of criminal attempt when completion of the crime which he intended or contemplated was "impossible". The following examples serve to illustrate the problem: (a) *D-1*, possessing a harmless substance believed to be lethal, administers it to *V-1* for the purpose of causing death; (b) *D-2*, with intent to influence a jury, offers a bribe to a person erroneously believed to be a juror; (c) *D-3*, intending to take illegal whiskey across state lines, unknowingly transports barrels that are filled with water; and (d) *D-4*, unaware that his intended victim is already dead, stabs him in the chest with a knife for the purpose of causing death. In each of these examples, there exists a fact, unknown to the actor, which makes his criminal effort futile from the outset. The question to be answered in a revision of the law of attempt is the extent to which the *actual facts*, rather than the *apparent facts*, are criminologically significant.

In considering this question, the courts of this country have divided into two groups. Some have allowed impossibility of performance as a defense to a charge of criminal attempt.⁶ Apparently they have reasoned that an attempt to do what cannot possibly be a crime cannot be an attempt to commit a crime. In other words, an act of stabbing a corpse with intent to kill cannot constitute attempted murder since a corpse cannot be killed. Other courts have refused to recognize the defense,⁷ reasoning

⁶ See, e.g., *State v. Guffey*, 262 S.W.2d 152 (Mo. 1953); *State v. Taylor*, 345 Mo. 325, 138 S.W.2d 336 (1939); and *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906).

⁷ See, e.g., *People v. Dogoda*, 9 Ill.2d 198, 137 N.E.2d 386 (1956); *Commonwealth v. Williams*, 312 Mass. 553, 45 N.E.2d 740 (1942); and *People v. Jones*, 46 Mich. 441, 9 N.W. 486 (1881).

that an "actor's liability is to be determined by reference to his state of mind and does not depend upon external considerations."⁸

The position of the Kentucky Court of Appeals on this question is unclear, although most cases seem to deny the existence of the defense of impossibility. Typical of these cases is *McDowell v. Commonwealth*,⁹ which involved a charge of detaining a female with intent to have carnal knowledge (an offense in the nature of criminal attempt without being designated as such). In this case, the defendant introduced proof that he was physically incapable of intercourse. In refusing to accept this as a defense, the Court of Appeals ruled that the offense required "only that the detaining should be made with the intention of accomplishing it."¹⁰ An identical decision was reached in a later case involving an intended victim incapable of having intercourse.¹¹ The most recent case involving the "impossibility" issue is *Doyte v. Commonwealth*.¹² In this case, the defendant, charged with attempted abortion, defended on the ground that his intended victim was not pregnant. The Court of Appeals ruled that attempted abortion was statutorily punishable even though the woman was not in fact pregnant so long as the accused believed her pregnant.¹³ Indeed, since all of these cases involved special statutory attempts, their application to general criminal attempt is somewhat questionable.¹⁴

Virtually all of the modern statutes have expressly repudiated

⁸ MODEL PENAL CODE § 5.01, Comment 31 (Tent. Draft No. 10, 1960).

⁹ 207 Ky. 680, 269 S.W. 1019 (1925).

¹⁰ *Id.* at 683, 269 S.W. at 1020.

¹¹ *Poston v. Commonwealth*, 281 Ky. 460, 136 S.W.2d 565 (1940).

¹² 289 S.W.2d 206 (Ky. 1956).

¹³ The statutory offense that was involved in the *Doyte* case imposes sanctions upon any person "who prescribes or administers to any pregnant woman or to any woman whom he has reason to believe pregnant" any substance with intent to procure a miscarriage. KRS § 436.020(1) (1946). This language clearly compelled the decision of the Court of Appeals.

¹⁴ The case of *Young v. Commonwealth*, 4 Ky. L. Rep. 55 (1882), has caused the uncertainty that exists in Kentucky on this matter. The crime involved in that case was knowingly receiving stolen property, and the issue presented to the Court of Appeals was whether the trial court had properly instructed the jury that a defendant could be guilty by believing the property to be stolen. In reversing a conviction under this instruction, the Court of Appeals indicated that the property had to be *stolen in fact*. It is significant that the charge in this case was "knowingly receiving stolen property." Although the opinion does not so indicate, the conviction might have been affirmed if the charge had been "attempted knowingly receiving stolen property."

"impossibility" of completion as a defense to attempt.¹⁵ The offense is defined so that an offender is guilty if he engages in conduct that would be criminal if the circumstances he perceives to exist had existed in fact. Thus, a person who attempts to steal from an empty pocket commits the offense of attempt to commit larceny. Justification for this result was stated as follows by the drafters of the Model Penal Code:

The basic rationale of these decisions, [those allowing impossibility of performance as a defense to criminal attempt], is that, judging the actor's conduct in the light of actual facts, what he intended to do did not amount to a crime. This approach, however, is unsound in that it seeks to evaluate a mental attitude—'intent' or 'purpose'—not by looking to the actor's mental frame of reference, but to a situation wholly at variance with the actor's beliefs. In so doing, the courts exonerate defendants in situations where attempt liability most certainly should be imposed. In all of these cases (1) criminal purpose has been clearly demonstrated, (2) the actor has gone as far as he could in implementing that purpose, and (3) as a result, the actor's 'dangerousness' is plainly manifested.¹⁶

C. *The Line Between Preparation and Perpetration in Criminal Attempt*

The criminal law has always been unwilling to impose sanctions upon an individual for mere "criminal intention," unaccompanied by external consequences.¹⁷ There are at least two reasons for this unwillingness. First of all, there would appear to exist a significant difference in dangerousness of character between a person who has anti-social ideas and one whose conduct

¹⁵ See, e.g., ILLINOIS CRIMINAL CODE of 1961 § 8-4(b) (Smith-Hurd 1964); NEW YORK PENAL LAW § 110.10 (McKinney 1967); PROPOSED DELAWARE CRIMINAL CODE § 309 (Governor's Committee for Revision of the Criminal Law, 1967); PROPOSED MICHIGAN CRIMINAL CODE § 1001 (Special Committee of the Michigan State Bar for Revision of the Criminal Code, 1967); and PROPOSED NEW HAMPSHIRE CRIMINAL CODE § 574:1 (Commission to Recommend Codification of Criminal Laws, 1969).

¹⁶ MODEL PENAL CODE § 5.01, Comment 31 (Tent. Draft No. 10, 1960).

¹⁷ See J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 13 (1947):

... [A] mental or emotional state, no matter how vicious, is not alone legally significant. The relevant requirement in penal law is stated in the principle that a harm must have occurred, specifically . . . that a harm proscribed in penal law must have occurred.

is controlled by such ideas. Secondly, and perhaps more significantly, the difficulty in determining the existence of an actual intention to engage in harmful behavior, without the presence of external activity, is virtually insurmountable. For these reasons, the law has always started from this point: "The intent with which a harmful act was done is a matter of special interest to the criminal law, but a wrongful intent which has no consequence in the external world,—which exists only in the secret recesses of the mind, is not."¹⁸

Criminal sanctions for an attempt to commit a crime, to some extent, involve a departure from the notion that criminal intention without external consequences is legally insignificant. Justification for this departure has been stated as follows:

Firstly, it can be said that the man who intends to kill and does not succeed is just as wicked as the man who does succeed, and should be punished as severely as if he had succeeded. . . .

Secondly, it is only common sense to lock the stable door once the horse has shown signs of intending to get out, and foolish to wait until it has gone: prevention is better than cure. If a man shows that he intends to kill someone, it is clearly foolish to leave him to get on with it. The law may not be able to intervene until he has actually tried to kill, but once he has tried there can be no objection to seeing that he does not remain at liberty to try again.¹⁹

As indicated by this statement, the law has not completely abandoned the fundamental concept described above. No conviction for criminal attempt is permissible without proof of some "external activity" by the accused. And, with regard to this proof, the following principle has been universally accepted: *Every act done with intent to commit a crime is not sufficient to satisfy the "external activity" requirement for criminal attempt.* Only conduct that is generically termed an "overt act" will suffice for the offense.²⁰

The rationale for this requirement is not so much that sanc-

¹⁸ PERKINS 470 (1957).

¹⁹ A. GORDON, *THE CRIMINAL LAW OF SCOTLAND* 149-50 (1967) [hereinafter cited as GORDON].

²⁰ See, e.g., *People v. Lardner*, 300 Ill. 264, 266, 133 N.E. 375, 376 (1921); *People v. Sullivan* 173 N.Y. 122, 65 N.E. 989 (1903).

tions would be unjustified without it. Rather it is a fear that equivocal behavior, perhaps innocent, might be misinterpreted as preparation for criminal conduct. For example, an individual who purchases a gun and ammunition could well intend to murder someone; but he could also intend to use the weapon for self-protection. In trying to develop a criterion for distinguishing acts directed toward a criminal objective from those not so directed, the courts have developed several distinct theories. One such theory, known as the physical proximity doctrine, requires that the overt act "be proximate to the completed crime, or that the act be one directly tending toward the completion of the crime, or that the act must amount to the commencement of the consummation."²¹ This theory seeks to distinguish objectively between acts having legal significance (designated as proximate acts) and those that have not yet passed from the sphere of "mere" preparation (designated as remote acts). The difficulty with this theory is that it is "so vague that it allows the court to adopt an individual approach to each case and to decide whether or not there has been an attempt by reference to whether or not it wishes to punish the accused."²² Another theory, known as the probable desistance test, provides that an actor's conduct "constitutes an attempt if, in the ordinary and natural course of events, without interruption from an outside source, it will result in the crime intended."²³ The major fault with this theory is that it virtually nullifies the purpose for creating the offense of criminal attempt, *i.e.*, to prevent harmful consequences to society by apprehending prospective criminals whose objectives have not yet been attained. Under the probable desistance standard, apprehension is not permissible until the underlying offense is dangerously close to completion. A third theory, known as the unequivocal act theory, provides an entirely different approach to the problem of defining criminal attempt. It requires for commission of the offense "an overt act of such a nature that the only reasonable inference which can be drawn from a consideration of the act is that it was committed with the intention of going on to commit the crime attempted."²⁴ This theory views the re-

²¹ MODEL PENAL CODE § 5.01, Comment 40 (Tent. Draft No. 10, 1960).

²² GORDON 161 (1967).

²³ MODEL PENAL CODE § 5.01, Comment 42 (Tent. Draft No. 10, 1960).

²⁴ GORDON 155 (1967).

quirement of an overt act for the offense of criminal attempt as a means of establishing the existence and firmness of a defendant's criminal purpose. Properly confined, this approach is nothing more or less than an evidentiary concept, with the overt act of attempt serving only as proof of criminal intention. Like most of the other theories, this one has received considerable criticism.²⁵

Existing Kentucky law attempts to deal with this problem in two ways. The first consists of specific statutes which create criminal offenses that are in the nature of attempts without being designated as such. The following are typical:

1. Detaining a female with intent to have carnal knowledge;²⁶
2. Drawing a gun with intent to shoot into an occupied motor vehicle;²⁷
3. Concealing merchandise with intent to convert;²⁸
4. Possession of burglary tools;²⁹ and
5. Transporting a female with intent to cause her to become a prostitute.³⁰

Statutory attempts, such as these, serve to provide a definite dividing line between non-criminal, preparatory conduct and an overt act that is necessary for criminal attempt. Still, a conviction is inappropriate without a showing of criminal purpose on the part of an accused. This means that statutes such as those listed above are limited in their function. Once the act requirement of the statute is shown to exist, the trier of fact must be given an opportunity to decide whether the accused intended to culminate his conduct in the commission of a crime.

The second way in which existing law has tried to deal with this problem is through an endless effort to formulate a general standard for distinguishing equivocal acts of preparation from unequivocal acts of perpetration. The standard that was used in early cases was borrowed from other jurisdictions and stated in this way:

²⁵ See J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 106-17 (1947); MODEL PENAL CODE § 5.01, Comment 43-47 (Tent. Draft No. 10, 1960).

²⁶ KRS § 435.110 (1946).

²⁷ KRS § 435.170(5) (1946).

²⁸ KRS § 433.234 (1968).

²⁹ KRS § 433.120(2) (1946).

³⁰ KRS § 436.040(5) (1946).

An attempt is an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act towards the doing, sufficient both in magnitude and in proximity to the act intended, to be taken cognizance of by the law that does not concern itself with things trivial and small. Or, more briefly, an attempt is an intent to do a particular criminal thing, with an act toward it, falling short of the thing intended.³¹

Without changing the substance of the standard, the Court of Appeals, in a later case, expressed it in slightly different language:

There must be an overt act . . . and the overt act must be sufficiently proximate to the intended crime to form one of the natural series of acts which the intent requires for its full execution. . . . There must be an act done which more or less directly tends to the commission of the crime.³²

The problems that have been created by this dual approach to the question of preparation versus perpetration may be shown by an examination of a series of cases involving acts alleged to have been directed toward the consummation of unlawful sexual intercourse. Two of the cases involve a special statutory attempt, *i.e.*, detaining a female with intent to have carnal knowledge,³³ while a third involves common law attempt to commit rape. In the first of these cases, *Payne v. Commonwealth*,³⁴ the defendant had exposed himself to two young girls on a rural road. When he moved toward the girls they ran. He pursued them for a short distance before stopping. The Court of Appeals ruled that the defendant's conduct was sufficient for a conviction of attempted rape, implying thereby that the proof was adequate to satisfy the requirements of "intention" and "overt act." In a subsequent case, *Tinsley v. Commonwealth*,³⁵ the defendant's conduct was virtually identical to that which occurred in the *Payne* case. On the occasion in question, the victim had walked along a railroad track which passed beside the defendant's house. The defendant

³¹ *Nider v. Commonwealth*, 140 Ky. 684, 689-90, 131 S.W. 1024, 1026-27 (1910).

³² *Gilley v. Commonwealth*, 280 Ky. 306, 316, 133 S.W.2d 67, 73 (1939).

³³ KRS § 435.110 (1946).

³⁴ 33 Ky. L. Rep. 229, 110 S.W. 311 (1908).

³⁵ 222 Ky. 120, 300 S.W. 368 (1927).

waved at her from his porch and then started running toward her. When she ran, he followed until she reached a store. He then turned back. This conduct was held insufficient to constitute the offense of detaining with intent to have carnal knowledge, even though this offense had previously been held to require less of an overt act than attempted rape.³⁶ Finally, in a third case, *Lockhart v. Commonwealth*,³⁷ the defendant made improper proposals to his female employer and placed his hands gently around her shoulders. When asked to leave, he readily complied with her request. The defendant's conduct in this case was held to be sufficient for a conviction of detaining a female with intent to have carnal knowledge.

In examining these decisions, it is virtually impossible to determine when conduct crosses the line of preparation and becomes an attempt to commit a crime. Most of the cases indicate in one way or another that the defendant must have been in such proximity to the victim as to enable him reasonably to make an assault, or, stated differently, to complete his criminal objective. The major fault with this approach to the problem is that it obscures the principal function of the act requirement, which should be simply to corroborate the existence and firmness of the actor's intention to commit an offense. In most of the cases, emphasis has been upon what the actor has done toward completion of the offense rather than upon what he intended to do.

On a few occasions, however, the Court of Appeals has taken a significantly different approach to this problem. The first such occasion was the case of *Commonwealth v. Riley*.³⁸ The offense charged was possession of burglary tools with intent to commit burglary. With this offense, the task of distinguishing conduct directed toward criminal objectives and conduct not so directed is complicated by the fact that such tools are not distinctively suitable for criminal purposes. Physical proximity of the possessor of such tools to the premises to be burglarized is perhaps the best indicator of his intention. But that proximity is bound to vary with every single case. It was this factor that caused the Court of Appeals in *Riley* to frame the issue for such cases as follows: Are the circumstances such "as to lead a reasonably

³⁶ *Merriss v. Commonwealth*, 287 Ky. 58, 151 S.W.2d 1030 (1941).

³⁷ 244 S.W.2d 164 (Ky. 1951).

³⁸ 192 Ky. 155, 232 S.W. 630 (1921).

prudent man to believe beyond doubt that the intention of [the possessor of the tools] was to use them for [the illegal purpose]."³⁹ In a later case, one involving the offense of attempted rape, the Court restated this standard of measurement in more precise terms:

It is not enough that accused intended to use force to accomplish his purpose but he must do some overt act connected with his intent tending and fairly designed to effectuate the commission of the crime, so if actually accomplished, a rape would have been committed. *The evidence must show acts and conduct by the accused as leave no reasonable doubt of his intention to commit rape.*⁴⁰

As established by these two cases, the point at which conviction of a prospective offender becomes appropriate is the point at which his intention to commit a crime is left without reasonable doubt. And, judging from the language of the Court, it seems that the decision as to whether that point is reached in a particular case is left for the jury, with no attempt being made to identify the type of act sufficient for a conviction of attempt.

Criminal statutes that have been revised in recent years have taken several approaches in defining criminal attempt. The most inadequate is that reflected by statutes adopted in New York⁴¹ and Illinois⁴² and proposed for Michigan.⁴³ Basically, this approach provides that there must be an intention and an overt act, the latter element having significance independent of the former. The relationship of the two was explained as follows in the commentary to the Illinois statute:

... [O]ne of the most troublesome problems in attempts is to determine when preparation to commit an offense ceases and perpetration of the offense begins. Obviously, this is a matter of degree and depends upon the special circumstances of each case. There must be something more than an intention to commit an offense, there must be an act, and the act

³⁹ *Id.* at 159, 232 S.W. at 633.

⁴⁰ *Muncie v. Commonwealth*, 308 Ky. 157, 159-60, 213 S.W.2d 1019, 1022 (1948) (emphasis added).

⁴¹ NEW YORK PENAL LAW § 110.00 (McKinney 1967).

⁴² ILLINOIS CRIMINAL CODE of 1961 § 8-4(a) (Smith-Hurd 1964).

⁴³ PROPOSED MICHIGAN REVISED CRIMINAL CODE § 1001 (Special Committee of the Michigan State Bar for Revision of the Criminal Code, 1967).

must not be too far removed in time and space from the conduct which constitutes the principal offense.⁴⁴

Except on rare occasions, this is the approach that has been used in Kentucky. A different type of approach to the problem was offered by the drafters of the Model Penal Code.⁴⁵ In this document, the act requirement for criminal attempt is not satisfied unless the defendant's conduct is found to have constituted a "substantial step" in a course of behavior designed to culminate in the commission of a crime. And to constitute such a step, conduct must be "strongly corroborative of the actor's criminal purpose."⁴⁶ Along with this general standard of measurement, the Code lists a number of specific situations which serve as a matter of law to create a jury issue as to the sufficiency of an actor's conduct.⁴⁷ Of the jurisdictions recently adopting or proposing criminal codes, none has borrowed from this latter part of the Model Penal Code's treatment of attempt.

A third approach to the definition of criminal attempt is reflected in the Proposed Delaware Code.⁴⁸ After borrowing the Model Penal Code's "substantial step" requirement, this revision defines such a step as one which "leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting."⁴⁹ This approach, quite similar to the one used by the Kentucky Court of Appeals in *Commonwealth*

⁴⁴ ILLINOIS CRIMINAL CODE of 1961 § 8-4, Comments 357 (1961).

⁴⁵ See MODEL PENAL CODE § 5.01 (1962).

⁴⁶ *Id.*

⁴⁷ MODEL PENAL CODE § 5.01 (1962):

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
- (e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
- (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
- (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

⁴⁸ PROPOSED DELAWARE CRIMINAL CODE § 310 (Governor's Committee for Revision of the Criminal Law, 1967).

⁴⁹ *Id.* § 310.

v. Riley,⁵⁰ would improve the existing law in at least two respects: (1) it would serve to emphasize that the "principal" purpose of requiring an overt act for criminal attempt is to establish the existence and firmness of a defendant's criminal intention; and (2) it would acknowledge, at least implicitly, that a major portion of the responsibility for determining when a defendant has gone far enough for imposition of criminal liability must be left for the jury.

D. *Sanctions For Criminal Attempt*

The existing Kentucky law of criminal attempt has its greatest shortcoming in the sanctions that are provided for the various attempt offenses. This shortcoming has been caused in part by the piecemeal amendments to criminal statutes that have been so prominent in this state. But its principal cause has been the total absence of any consistent theoretical basis for establishing sanctions for inchoate offenses. Without such a basis, it is not surprising that several different types of sentencing provisions for attempt crimes have emerged. Some statutes provide the same penalty for the inchoate offense of attempt that is provided for the substantive offense attempted.⁵¹ This appears to have resulted as an incident to the practice of defining attempt offenses and completed offenses simultaneously. A second type of sentencing provision that can be found in Kentucky statutes provides somewhat lower penalties for attempt than for a completed offense.⁵² The difference between external consequences of an inchoate offense and those of a completed offense is the apparent rationale for this type of provision. Finally, there exists the sentencing provision in the general attempt statute. As stated above, it provides misdemeanor penalties for all attempt offenses not having a specific statutory penalty.⁵³

The need for revision of this aspect of criminal attempt may be demonstrated by use of the case of *Gibson v. Common-*

⁵⁰ 192 Ky. 155, 232 S.W. 630 (1921).

⁵¹ *E.g.*, KRS § 433.130 (1946) (Burglary of bank or safe); KRS § 433.140 (1966) (Armed robbery or burglary of a bank or safe); KRS § 432.495 (1958) (Trafficking with prison inmates).

⁵² *E.g.*, KRS § 435.080(2) (1946) (Attempted rape); KRS § 435.170(1) (1946) (Malicious shooting with intent to kill); KRS § 435.170(2) (1946) (Malicious cutting with intent to kill); KRS § 433.050 (1946) (Maliciously attempting to burn property).

⁵³ KRS § 431.065 (1968).

wealth.⁵⁴ In this case, the defendant's ex-wife found in her mail box a package which contained two sticks of dynamite. Upon discovering its contents she removed the package from her house and called the police. Before they arrived the dynamite exploded, killed two dogs and extensively damaged her house. Several items of evidence pointed to the defendant as the offender, including prior threats against the life of his ex-wife. Despite the extreme dangerousness of character indicated by this conduct, it was necessary to prosecute the defendant for common law attempted murder, a misdemeanor carrying a maximum jail sentence of twelve months. Had the bomb exploded inside the house with a homicide resulting, the defendant could have been prosecuted for murder and punished to the extent of life imprisonment or death. Had this attempt to kill involved the use of a gun or knife, the defendant could have been prosecuted under a "special" attempted murder statute with a maximum penalty of twenty-one years imprisonment.⁵⁵ The problem that is reflected by this case exists throughout the criminal statutes of this state. Those contained in the law of burglary are typical. Attempted burglary of a bank is punishable under a specific statute by imprisonment for up to twenty years,⁵⁶ while attempted burglary of something other than a bank (e.g., a storehouse or a residence) is punishable only under the general attempt provision, with a maximum jail term of twelve months.⁵⁷ At the same time, possession of burglary tools with intent to commit burglary is punishable under a special statute having a maximum penalty of ten years in prison.⁵⁸ As this indicates, criminal attempt, as a category of crime, has been engulfed with distinctions as to disposition of offenders that have no principled rationale. The category is replete with differences in sanctions that have no correlation to relevant differences in criminal conduct. A major objective of revision must be the elimination of this problem.

In almost all of the recent revisions, the problem has been solved by gearing the penalty for criminal attempt to the penalty provided for the crime attempted. With this solution, two

⁵⁴ 290 S.W.2d 603 (Ky. 1956).

⁵⁵ KRS § 435.170 (1946).

⁵⁶ KRS § 433.130 (1946).

⁵⁷ KRS § 431.065 (1968).

⁵⁸ KRS § 433.120 (1946).

rational alternatives are available. The first would involve no difference in the sanction for an attempt to commit a particular crime and the sanction for that crime when completed. This type of penalty structure reflects the notion that, in terms of respective degrees of dangerousness, no distinction exists between an individual who has committed an offense and one who has unsuccessfully attempted to commit that same offense. A structure of this type is contained in the Model Penal Code⁵⁹ and was proposed for the Delaware Criminal Code.⁶⁰ The second alternative would involve a systematic treatment of criminal attempts as lesser offenses than the particular crimes attempted. This method is used in the New York Penal Law, with criminal attempts always classified one degree lower than the classification of the crime attempted.⁶¹ The judgment reflected in this approach is that an attempt causes much less actual harm than a completed offense, and this difference should be considered in the disposition of an offender. In choosing between these two alternatives, a practical consideration becomes significant. It is doubtful that decision makers, especially if jury sentencing is retained, would be willing to impose sanctions for inchoate offenses equivalent to those imposed for completed offenses. While the offense of murder has resulted in the death of another, the offense of attempted murder may have resulted in nothing more than a missed shot from a deadly weapon. If the sanction to be imposed for the latter is life imprisonment or death, a conviction for the latter would be extremely difficult to obtain.

II. CRIMINAL CONSPIRACY

A. *Introduction*

Criminal conspiracy has usually been defined as "a combination between two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means."⁶² Absent statutory alterations, the crime is completed as soon as the combination or agreement is formed and the con-

⁵⁹ MODEL PENAL CODE § 5.05(1) (1962).

⁶⁰ PROPOSED DELAWARE CRIMINAL CODE § 309 (Governor's Committee for Revision of the Criminal Code, 1967).

⁶¹ NEW YORK PENAL LAW § 110.05 (McKinney 1967).

⁶² PERKINS 528 (1957).

spirators have as a conscious objective the commission of a prohibited act.⁶³ There is no requirement that the prohibited act ever occur, or, for that matter, that any external act in furtherance of the conspiracy be committed.⁶⁴ Except where changed by statute, the offense is a misdemeanor, and carries the relatively minor sanctions imposed upon that classification of crime.⁶⁵

Under existing Kentucky law, there are two ways in which the offense of conspiracy may be committed. The first is statutory:

(1) No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a public offense from lawful custody with the view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act.

(2) No two or more persons shall confederate or band themselves together and go forth for the purpose of molesting, damaging or destroying any property of another person, whether the property is molested, damaged or destroyed or not.⁶⁶

Although the statutory offense is very broad in its coverage, the Court of Appeals has declared that the common law of conspiracy has not been completely displaced.⁶⁷ The offense may be committed in a second way if each element of the following definition is shown to exist:

A conspiracy is a corrupt or *unlawful* combination or agreement between two or more persons to do by concerted action an unlawful act, or to do a lawful act by unlawful means.⁶⁸

The problems that have existed in this state are not very different from those that have existed with the law of conspiracy in other jurisdictions. The most significant and difficult ones are

⁶³ *E.g.*, *Martin v. State*, 197 Miss. 96, 19 So. 2d 488 (1944); *State v. Smith*, 197 Tenn. 350, 273 S.W.2d 143 (1954).

⁶⁴ *E.g.*, *Hyde v. United States*, 225 U.S. 347 (1912); *Commonwealth v. Barnett*, 196 Ky. 731, 245 S.W. 874 (1922).

⁶⁵ PERKINS 613 (1969).

⁶⁶ KRS § 437.110 (1962).

⁶⁷ *Decker v. Russell*, 357 S.W.2d 886 (Ky. 1962); *Baker v. Commonwealth*, 204 Ky. 420, 264 S.W. 1069 (1924).

⁶⁸ *McDonald v. Goodman*, 239 S.W.2d 97, 100 (Ky. 1951) (emphasis added).

the following: (a) what should be prohibited as objectives of a conspiratorial relationship; (b) what are the *mens rea* requirements with regard to the agreement and the unlawful objectives of the agreement; (c) beyond the fact of agreement, what must conspirators do, if anything, before criminal sanctions are justifiable; (d) to what extent, if any, should the liability of one conspirator be made to depend upon the criminal liability or responsibility of a co-conspirator; (e) to what extent should one conspirator be held responsible for the conduct of a co-conspirator; and (f) to what extent should sanctions for a conspiracy offense duplicate sanctions for an offense committed pursuant to a conspiratorial agreement?

Essential to an appropriate consideration of these problems, at least from the viewpoint of revision, is a reference to the role of conspiracy in a criminal code. The drafters of the Model Penal Code described its basic objectives as follows:

It is worthwhile to note preliminarily that conspiracy as an offense has two different aspects, reflecting different functions it serves in the legal system. In the first place, it is an inchoate crime, complementing the provisions dealing with attempt and solicitation in reaching preparatory conduct before it has matured into commission of a substantive offense. Secondly, it is a means of striking against the special danger incident to group activity, facilitating prosecution of the group and yielding a basis for imposing added penalties when combination is involved.⁶⁹

B. *Prohibited Objectives of Conspiratorial Relationship*

As indicated above, common law conspiracy is committed through an agreement to do either an unlawful act or lawful act by an unlawful means. An "unlawful act," as used here, is one for which an individual may be convicted of a crime. A "lawful act accomplished by unlawful means" is broader and much more troublesome. Its difficulty may be reflected by this question: Is conspiracy committed "by an agreement to accomplish an object by means which are unlawful, but not criminal?"⁷⁰ A negative answer to this question would have eliminated a large

⁶⁹ MODEL PENAL CODE § 5.03, Comment 96 (Tent. Draft No. 10, 1960).

⁷⁰ GORDON 186 (1967).

part of the difficulty surrounding this offense, but an affirmative answer has been given by most courts. As a consequence, agreements to engage in such conduct as the following have been held sufficient for convictions: (a) to ruin the business of another,⁷¹ (b) to coerce the dismissal of public officers through false charges,⁷² and (c) to file false statements for purposes of qualifying stock for sale to the public.⁷³ As could be expected, this type of conspiracy has been subjected to frequent constitutional attack because of its vagueness. Nevertheless, it has been embodied in numerous statutory provisions. The federal statute, for example, describes conspiracy as an agreement "either to commit an offense against the United States, or to *defraud the United States . . . in any manner or for any purpose.*"⁷⁴ Similarly, the Michigan statute provides criminal liability for persons who conspire "to commit an offense prohibited by law, or to commit a legal act in an illegal manner."⁷⁵

A description of the Kentucky approach to this problem should begin with the following statement of the Court of Appeals:

. . . [T]he objects of the conspiracy need not be an offense against the criminal law for which an individual could be indicted or convicted, but it is sufficient if the purpose be unlawful.⁷⁶

This principle is contained in the oft-cited opinion of *Commonwealth v. Donoghue*.⁷⁷ In that case, the defendants had been charged with conspiring to lend money to disadvantaged persons at excessive, exorbitant, and usurious rates of interest. The prosecution conceded that the objectives of the agreement, if committed without concerted action, would not have been criminal. In ruling that the defendants' conduct could nevertheless constitute the subject matter of conspiracy, the Court of Appeals established a very broad standard by which to measure the criminality of conspiratorial activity:

⁷¹ See *State v. Huegin*, 110 Wis. 189, 85 N.W. 1046 (1901).

⁷² See *State v. McFeely*, 52 A.2d 823 (N.J. 1947).

⁷³ See *People v. Glassberg*, 326 Ill. 379, 158 N.E. 103 (1927).

⁷⁴ 18 U.S.C. § 371 (1964) (emphasis added).

⁷⁵ MICH. COMPILED LAWS ANN. § 750.157(a) (1968).

⁷⁶ *Commonwealth v. Donoghue*, 250 Ky. 343, 348, 63 S.W.2d 3, 5 (1933).

⁷⁷ *Id.*

So it may be said that within the contemplation of the offense of criminal conspiracy are the acts which by reason of the combination *have a tendency to injure the public, to violate public policy, or to injure, oppress, or wrongfully prejudice individuals collectively or the public generally.*⁷⁸

To satisfy due process requirements, it is essential that the definition of a crime provide adequate guidance to persons desiring to abide by the law and fair notice to persons charged with violation.⁷⁹ It is inconceivable that the *Donoghue* definition of conspiracy could be said to satisfy these requirements. As stated by a dissenting judge in that case: "The decision not only presents a strained application of the conspiracy doctrine, but . . . for all time to come it will be the basis for the creation of new crimes never dreamed of by the people."⁸⁰ Fortunately, the fears expressed in this opinion have not been realized. Only on rare occasions has common law conspiracy been used to impose sanctions upon an agreement to perform an act not otherwise criminal.⁸¹

The constitutional uncertainty that exists in common law conspiracy also exists in Kentucky's statutory conspiracy. Commission of the latter may occur under an agreement to do any of the following: (a) intimidate, alarm, disturb or injure any person; (b) take any person from lawful custody to punish him or prevent his prosecution; (c) commit any felonious act; and (d) molest, damage, or destroy any property of another person.⁸² Parts of the conspiracy statute, namely those punishing an agreement to do the acts prohibited by (b) and (c), sufficiently delineate the proscribed conspiratorial objectives to satisfy constitutional requirements. At least one other part has already been condemned as unconstitutional:

This statute makes it a crime for two or more persons to go forth together for the purpose of 'disturbing another' person.

⁷⁸ *Id.* at 350, 63 S.W.2d at 6 (emphasis added).

⁷⁹ See e.g., *Musser v. Utah*, 333 U.S. 95 (1948).

⁸⁰ *Commonwealth v. Donoghue*, 250 Ky. 343, 359, 63 S.W.2d 3, 9 (1933).

⁸¹ E.g., *Frick v. Commonwealth*, 313 Ky. 163, 230 S.W.2d 634 (1950). In this case, the defendants were tried and convicted of conspiracy to obstruct justice. They had agreed to fabricate a story concerning a homicide. Before the investigation was completed, however, one of the conspirators told the true story. The Court of Appeals upheld the conviction for conspiracy despite the fact that what was done by the individual conspirators would not have constituted a crime.

⁸² KRS § 437.110 (1962).

It is not limited in its application to violent conduct on the part of the offender. It appears written as embracive of terms of expression and is susceptible of being read to include such functions as peaceable assembly.⁸³

The statute is also susceptible to another constitutional attack. Like common law conspiracy in Kentucky, part of it would not appear to be sufficiently free of vagueness to satisfy due process requirements.

The solution to this problem has not been difficult. In defining the prohibited objectives of criminal conspiracy, all of the modern codes have started with a notion that punitive sanctions should not be imposed upon conduct unless *specifically* designated as criminal. On the basis of this judgment, the offense has been defined so that a conspiratorial agreement, in order to be criminal, must have as its objective the commission of a criminal offense.⁸⁴ Specifically eliminated as a possible conspiratorial objective is *a lawful act achieved by unlawful means which are not themselves made criminal*. An adoption of this definition would eliminate the constitutional questions that presently hinder application of the existing conspiracy law.

C. "Mens Rea" and "Act" Requirements

The mental state required for criminal conspiracy, common law as well as statutory, consists of two distinct parts. There must be an *intention to combine*, or *to agree*, and an intention by the conspirators to commit an unlawful act or a lawful act by unlawful means.⁸⁵ The Model Penal Code⁸⁶ and other modern codes⁸⁷ incorporate into their definitions of conspiracy both of these elements. Essentials of the offense are an *intention to promote or facilitate the commission of a crime* and an *agreement* either to engage in conduct constituting a crime or to aid in the

⁸³ Baker v. Binder, 274 F.Supp. 658, 661 (W.D. Ky. 1967).

⁸⁴ E.g. NEW YORK PENAL LAW §§ 105.00-105.15 (McKinney 1967); MODEL PENAL CODE § 5.03 (1962).

⁸⁵ PERKINS 629 (1969).

⁸⁶ See MODEL PENAL CODE § 5.03(1) (1962).

⁸⁷ See PROPOSED MICHIGAN REVISED CRIMINAL CODE § 1015 (Special Committee of the Michigan State Bar for Revision of the Criminal Code, 1967); PROPOSED DELAWARE CRIMINAL CODE §§ 303-305 (Governor's Committee for Revision of the Criminal Law, 1967); ILLINOIS CRIMINAL CODE of 1961 § 8-2 (Smith-Hurd 1964); NEW YORK PENAL LAW §§ 105.00-105.15 (McKinney 1967).

planning or commission of a crime.⁸⁸ Two points are made clear by the requirement that these two elements coincide: (a) That association with, or membership in an organization or group whose general purpose is to engage in criminal activity is not sufficient for the offense of conspiracy, and (b) that mere knowledge of a conspiratorial agreement plus a relationship to that agreement not characterized by an intention to advance the criminal end is not sufficient for the offense.

The treatment accorded the mental elements of conspiracy by the Kentucky Court of Appeals is not significantly different. A summary of this treatment is contained in the following statement:

The mere knowledge, acquiescence, or approval of the criminal act, without co-operation or agreement to co-operate in its commission, is not enough to constitute one a party to a conspiracy to commit the crime. There must be *intentional participation* in the transaction, or some portion of it, *with a view to the furtherance of the common criminal purpose or design*.⁸⁹

In other words, if the illegal design or purpose rests only in intention, no crime is committed.⁹⁰ Similarly, if there exists no design or purpose to do an unlawful act, a banding together is not criminal.⁹¹ This does not mean, however, that the requisite agreement must be formal or definite. It does not mean that the agreement must be shown by direct evidence. Nor does it mean that the existence of an agreement cannot be implied from circumstances. It means only that the offense is not committed unless two separate and distinct states of mind coincide. On this part of the law of conspiracy, no change in existing law is necessary. An adoption of the language used in the Model Penal Code would provide some clarification.

In considering the mental element for this offense, one matter deserves special attention. It involves this question: Is it possible to conspire to commit an offense that is based upon a cul-

⁸⁸ *Id.*

⁸⁹ Baird v. Commonwealth, 241 Ky. 795, 798, 45 S.W.2d 466, 468 (1932) (emphasis added).

⁹⁰ See e.g., Commonwealth v. Walters, 206 Ky. 162, 266 S.W. 1066 (1924).

⁹¹ See e.g., Slaven v. Commonwealth, 197 Ky. 790, 248 S.W. 214 (1923).

pable mental state other than "intention"? To state the question in a slightly different way: Can there be a conspiracy to commit an offense that is based in part upon "recklessness" or "criminal negligence"? A simple hypothetical situation can be used for purposes of elaboration: *D-1* and *D-2*, without intention to cause death or injury, agree to shoot into a building known to be occupied. If this act should be completed and someone killed as a consequence, *D-1* and *D-2* could be convicted of murder, the shooter as a principal and the other as an accomplice.⁹² A conviction for assault and battery would follow if someone should be merely injured as a consequence of the act.⁹³ If the act should be completed and no one is killed or injured as a result, the two offenders could be convicted of reckless endangerment, reckless use of firearms, or some other similarly labeled offense. What would be the legal consequences to the offenders if apprehended prior to execution of the agreement? More specifically, would it be possible to convict them of conspiracy to commit a crime? Since murder proscribes the death of another person as an essential element, they could not be convicted of conspiracy to commit murder. Neither of the two intended to promote or facilitate the death of another. The same is true of assault and battery, since there would be no intent to cause injury to another. On the other hand, the offenders could be convicted of conspiracy to commit reckless endangerment or reckless use of firearm. These offenses proscribe a death-endangering type of conduct and *D-1* and *D-2* intended to promote or facilitate that conduct. The rationale for this distinction was stated as follows by the drafters of the Model Penal Code:

. . . [W]here recklessness or negligence suffices for the actor's culpability with respect to a *result element of a substantive crime*—where, for example, homicide through negligence is made criminal—there could not be a conspiracy to commit that crime. This should be distinguished, however, from a crime defined in terms of *conduct that creates a risk of harm*, such as reckless driving or driving above a speed limit. In this situation the conduct rather than any result it

⁹² See LAWSON, *Criminal Law Revision in Kentucky: Part I—Homicide and Assault*, 58 Ky. L.J. 242, 249-51 (1970).

⁹³ *Id.* at 264-67.

may produce is the element of the crime, and it would suffice for guilt of conspiracy that the actor's purpose is to promote or facilitate such conduct—for example, if he urged the driver of the car to go faster and faster.⁹⁴

The drafting problems suggested in this paragraph are not difficult to solve if the drafters thoughtfully distinguish between offenses seeking to proscribe a harmful "result" and offenses seeking to proscribe potentially harmful "conduct."

With conspiracy, as with criminal attempt, the law has experienced difficulty with the "physical act" element of the offense. The difficulty has revolved around this question: Once the *mens rea* requirements are shown to exist, what kind of external activity by the conspirators, if any, is essential to commission of the offense? At early common law, the offense was complete once the unlawful combination was formed.⁹⁵ No external activity was required. The Kentucky law, as it relates to common law conspiracy, is consistent:

Overt acts are not necessary to the consummation of the offense. The conspiracy, and its consummation, are distinct offenses, and if overt acts be charged, as seems to be the case in this indictment, they are to be regarded merely as matters of aggravation, and not necessary to the consummation of the crime.⁹⁶

Statutory conspiracy, as originally created, could also be committed without external activity on the part of the conspirators.⁹⁷ As presently constituted, however, the offense cannot be committed without an overt act.⁹⁸ The statute itself provides that after confederating or banding together, the conspirators must "go forth" in pursuit of their criminal objective.

Modern criminal codes are like the Kentucky law in their treatment of the physical element of criminal conspiracy, i.e., they are split on the requirement. Some follow the common law

⁹⁴ MODEL PENAL CODE § 5.03, Comment 110 (Tent. Draft No. 10, 1960) (emphasis added).

⁹⁵ See e.g., *Hyde v. United States*, 225 U.S. 347 (1912).

⁹⁶ *Commonwealth v. Ward*, 92 Ky. 158, 161, 17 S.W. 282, 283 (1891); *Accord*, *Commonwealth v. Barnett*, 196 Ky. 731, 245 S.W. 874 (1922).

⁹⁷ See *Commonwealth v. Barnett*, 196 Ky. 731, 245 S.W. 874 (1922).

⁹⁸ See *Davis v. Commonwealth*, 311 Ky. 249, 223 S.W.2d 893 (1949).

approach and require no overt act.⁹⁹ Others require for every type of conspiracy external activity of some sort in furtherance of the conspiratorial objective.¹⁰⁰ Still others take a compromise approach and require external activity for only certain kinds of conspiracy offenses.¹⁰¹ The reason for requiring a physical act is not at all based upon a notion that injustice would follow the imposition of penal sanctions upon a mere agreement, the implementation of which is frustrated by immediate apprehension of the actors. Rather it is based upon a fear that, without a showing of external activity, equivocal behavior that is entirely innocent might be misconstrued. As stated in the commentary of one of the recent revisions, "such a requirement is the best possible proof of a settled intention to promote or facilitate commission of the crime."¹⁰² The need to confirm the existence of criminal design before imposing penalties makes this approach the preferable one.

The type of external activity that should be required for conviction of conspiracy can best be described by reference to the "act" requirement for criminal attempt. As described above, the law of attempt requires for conviction of that offense an act which constitutes a "substantial step" toward the commission of an offense. The Model Penal Code, and most other modern codes, require for the offense of conspiracy only what is labeled an "overt act." Their intent in using this phrase is to convey the idea that less activity is required for conspiracy than attempt. Since the requirement of external activity serves the same basic purpose for both offenses, namely assuring the existence and firmness of criminal purpose, what is the reason for the difference in degree? The drafters of the Model Penal Code reasoned as follows:

The act of agreeing with another to commit a crime, like the act of soliciting, is concrete and unambiguous; it does not present the infinite degrees and variations possible in the general category of attempts. The danger that truly equivocal behavior may be misinterpreted as preparation to commit a

⁹⁹ *E.g.*, PROPOSED MICHIGAN REVISED CRIMINAL CODE § 1015 (Special Committee of the Michigan State Bar for Revision of the Criminal Code, 1967).

¹⁰⁰ *E.g.*, ILLINOIS CRIMINAL CODE of 1961 § 8-2(a) (Smith-Hurd 1964); NEW YORK PENAL LAW § 105.20 (McKinney 1967).

¹⁰¹ *E.g.*, MODEL PENAL CODE § 5.03(5) (1962).

¹⁰² PROPOSED DELAWARE CRIMINAL CODE § 303, Commentary 156 (Governor's Committee for Revision of the Criminal Code, 1967).

crime is minimized; purpose must be relatively firm before the commitment involved in agreement is assumed.¹⁰³

In other words, the danger of misconstruing intention is not as great with conspiracy as with attempt, and the need for the protection afforded by the external activity requirement is not as great.

D. "Bilateral" Versus "Unilateral" Liability

With the traditional definition of conspiracy as an agreement or combination involving two or more persons, the offense has generally been viewed as one that involves a bilateral or multi-lateral relationship.¹⁰⁴ As a consequence of this view, a number of questions have arisen concerning the extent to which the criminal liability of a defendant is dependent upon the liability of a co-conspirator. For example, can there be a criminal conspiracy if one of the "alleged" conspirators is shown to be irresponsible or innocent? It can be said as a matter of logic that under this circumstance there can be no "agreement to commit a crime" since one of the agreeing parties is unaware of the criminal nature of the planned conduct or not legally competent to agree. Occasionally this result is so indicated.¹⁰⁵ Other authorities have held that under this circumstance the criminal character of the responsible or guilty conspirator has been manifested and that sanctions against him are justifiable and desirable.¹⁰⁶ Underlying the latter is the slightly more fundamental notion that criminal sanctions should be imposed upon an individual who seeks to accomplish his unlawful objective through the use of an innocent person.

Additional and more difficult questions have arisen concerning the extent to which active participants in a conspiratorial relationship can be treated differently under the criminal law. For example, what is the effect on the trial of a conspirator that his co-conspirator has not been apprehended or has been apprehended but not tried? In answer to this question, most courts have held that the first conspirator may still be convicted of the

¹⁰³ MODEL PENAL CODE § 5.03, Comment 97 (Tent. Draft No. 10, 1960).

¹⁰⁴ PERKINS 622 (1969).

¹⁰⁵ See e.g., *Nigro v. United States*, 117 F.2d 624 (8th Cir. 1941); PERKINS 622 (1969).

¹⁰⁶ See e.g., *Farnsworth v. Zerbst*, 98 F.2d 541 (5th Cir. 1938).

offense.¹⁰⁷ An opposite conclusion has generally been reached, however, where one of two conspirators has been tried and acquitted.¹⁰⁸ This result has followed as a direct consequence of the treatment of conspiracy as a bilateral relationship.

Like most jurisdictions, Kentucky views conspiracy as a bilateral offense that requires two guilty parties for conviction. Only rarely, however, has the Court of Appeals expressly acknowledged the existence of this approach:

From the very nature of the crime, a conspiracy cannot be committed by one person alone, but must be committed by two or more persons. For this reason, it is the general rule that one defendant charged with the crime of conspiracy cannot be convicted where the disposition of the case against all of his alleged co-conspirators is such that the basis of the charge of conspiracy is removed.¹⁰⁹

The two types of problems discussed above have accompanied this approach. The first one, involving irresponsibility or innocence of a co-conspirator, was presented to the Court of Appeals in *Rutland v. Commonwealth*.¹¹⁰ In that case, the defendant was charged with conspiring to falsely accuse an individual of a crime. On appeal he asserted that the indictment against him should have been dismissed because of its failure to allege that his co-conspirator had knowledge of the falsity of the accusation. The Court of Appeals ruled that this fact did not have to be alleged in the indictment. But in doing so the Court clearly indicated that unawareness by a co-conspirator of the unlawful nature of the conspiratorial objective could serve as a defense. The second type, involving the effect of a dismissal or acquittal of a co-conspirator, was presented in *Green v. Commonwealth*.¹¹¹ The defendant in this case was charged with conspiring to intimidate and injure another. Her co-conspirators were a daughter and a sister. The charge against the daughter was dismissed because of her legal immaturity; the charge against the sister ended with a verdict of acquittal. On appeal the defendant

¹⁰⁷ *E.g.*, *Worthington v. United States*, 64 F.2d 936 (7th Cir. 1933); *Commonwealth v. Salerno*, 179 Pa. Super. 13, 116 A.2d 87 (1955).

¹⁰⁸ *E.g.*, *United States v. Fox*, 120 F.2d 56 (3rd Cir. 1942); *Sherman v. State*, 113 Neb. 173, 202 N.W. 413 (1925).

¹⁰⁹ *Green v. Commonwealth*, 264 Ky. 725, 727, 95 S.W.2d 561, —(1936).

¹¹⁰ 160 Ky. 77, 169 S.W. 584 (1914).

¹¹¹ 264 Ky. 725, 95 S.W.2d 561 (1936).

asserted that her conviction should be set aside because of the disposition without conviction of the charges against her co-conspirators. In ruling on this assertion, the Court of Appeals established the principle that a defendant cannot be convicted of conspiracy if her co-conspirators are "acquitted or discharged under circumstances amounting to an acquittal."¹¹²

The resolution that is provided for these problems in *Rutland* and *Green* is simply not sound. Nor is it consistent with the principal rationale for inchoate offenses, namely, exposing potential offenders to the rehabilitative processes of the law as soon as the dangerousness of their character is manifested. To satisfy this objective with the offense of conspiracy, factors that are related to the criminal culpability of one conspirator must be considered totally insignificant to the criminal liability of another. All of the modern codes reflect this judgment in their treatment of conspiracy. The offense is not viewed as one involving a bilateral relationship. Rather it is defined in terms "of the conduct which suffices to establish the liability of any given actor, rather than the conduct of a group of which he is charged to be a part."¹¹³ In addition, most of the modern statutes have expressly repudiated defenses that are based upon the innocence or irresponsibility of a co-conspirator, as well as those that are based upon the disposition of conspiracy charges against a co-conspirator.¹¹⁴ The rationale for this change in approach is indicated in this statement:

... [I]t recognizes that inequalities in the administration of the law are, to some extent, inevitable, that they may reflect unavoidable differences in proof, and that, in any event, they are lesser evil than granting immunity to one criminal because justice may have miscarried in dealing with another.¹¹⁵

An individual who manifests a desire to accomplish a criminal end is no less dangerous because of the fact that his effort consists of joining an innocent or irresponsible person to achieve his desired objective.

¹¹² *Id.* at 727, 95 S.W.2d at 562.

¹¹³ MODEL PENAL CODE, § 5.03, Comment 104 (Tent. Draft No. 10, 1960).

¹¹⁴ *E.g.*, ILLINOIS CRIMINAL CODE of 1961 § 8-2(b) (Smith-Hurd 1964); NEW YORK PENAL LAW § 105.30 (McKinney 1967).

¹¹⁵ MODEL PENAL CODE § 5.03, Comment 106 (Tent. Draft No. 10, 1960).

E. *Vicarious Responsibility of Co-Conspirators*

One of the major problems that presently exists in the area of imputed criminal liability is the extent to which an offense committed by one conspirator should be imputed to a co-conspirator. If the offense that is committed was a specific objective of the conspiratorial agreement, no difficulty has been encountered in holding all the conspirators responsible.¹¹⁶ However, if one of several conspirators, in committing an offense, varies from the scope of the unlawful agreement, or if the conspiracy involves the commission of several offenses, to some of which a particular conspirator makes no contribution, the problem of imputing liability from one participant to another is more difficult. Generally, it is said that all participants in a conspiracy are liable for the substantive crimes committed by each in furtherance of the conspiracy.¹¹⁷ In applying this principle, however, courts have usually required more than the mere existence of a conspiracy before imputing liability to co-conspirators. Evidence that the defendant counseled, advised, aided, or had knowledge of the particular offense has usually been a prerequisite to liability.¹¹⁸ With this requirement, the general principle has been restated as follows:

. . . [P]articipation in a conspiracy may be evidence, even very good evidence, of complicity as an aider or abettor in a substantive offense committed in furtherance of the conspiracy.¹¹⁹

The position of the Kentucky Court of Appeals on this matter begins with the principle that "[m]ere acquiescence in, or approval of, the criminal act, without cooperation or agreement to cooperate in its commission, is not sufficient to constitute one an [accomplice]."¹²⁰ A clear implication of this principle is that liability may be imputed to an accomplice only if he acts purposely and with a conscious objective of promoting the offense that is to be committed. Strictly applied, this principle would

¹¹⁶ *Paoli v. United States*, 352 U.S. 232 (1957); *United States v. Battaglia*, 394 F.2d 304 (7th Cir. 1968).

¹¹⁷ See e.g., *Finkerton v. United States*, 328 U.S. 640 (1946); *Combs v. Commonwealth*, 15 Ky. Rep. 620, 25 S.W. 276 (1894).

¹¹⁸ See MODEL PENAL CODE § 2.04(3), Comment 22-23 (Tent. Draft No. 1, 1953).

¹¹⁹ L. WEINREB, CRIMINAL LAW 403 (1969).

¹²⁰ *Moore v. Commonwealth*, 282 S.W.2d 613, 614 (Ky. 1955).

limit imputed liability to what might be termed "intentional" complicity. It has not been so limited. At least in the area of conspiracy, the principle has been extended to allow for criminal sanctions against an "accomplice" who did not contemplate commission of the offense actually committed. If one conspirator commits an offense not contemplated by the conspiratorial agreement, liability of other conspirators is governed by this standard:

. . . [W]hen individuals associate themselves in an unlawful enterprise, an act done by one in pursuance of a conspiracy is the act of all and extends to such results as are the *natural and probable consequences of such act*, even though such consequences were not specifically intended as a part of the original plan.¹²¹

In an effort to further clarify the circumstances under which liability may be imputed from one conspirator to another the Court of Appeals has said that "natural and probable consequences" are those which "should have been necessarily and reasonably anticipated" in completion of the conspiratorial objective.¹²²

In dealing with the problem of vicarious liability among conspirators, most modern statutes have adopted a starting point different from the traditional one. The question to be faced initially by the decision makers, before imputing liability through a conspiracy, is not whether the defendant was a party to that conspiracy. Rather it is whether he aided, counseled, agreed to aid, or attempted to aid in the planning or commission of the offense committed.¹²³ Justification for this approach was put this way in the Model Penal Code:

Conspiracy may prove command, encouragement, assistance or agreement to assist, etc.; it is evidentially important and may be sufficient for that purpose. But whether it suffices ought to be decided by the jury; they should not be told that it establishes complicity as a matter of law.¹²⁴

¹²¹ *Simmons v. Commonwealth*, 263 Ky. 171, 176, 92 S.W.2d 68, 71 (1936) (emphasis added).

¹²² *Commonwealth v. Walters*, 206 Ky. 162, 266 S.W. 1066 (1924).

¹²³ E.g., ILLINOIS CRIMINAL CODE of 1961 § 5-2(d) (Smith-Hurd 1964); NEW YORK PENAL LAW § 20.00 (McKinney 1967); PROPOSED DELAWARE CRIMINAL CODE § 130 (Governor's Committee for Revision of the Criminal Law, 1967); PROPOSED MICHIGAN REVISED CRIMINAL CODE § 415 (Special Committee of the Michigan State Bar for Revision of the Criminal Code, 1967).

¹²⁴ MODEL PENAL CODE § 2.04(3), Comment 23 (Tent. Draft No. 1, 1953).

With this starting point, it seems clear that liability may not be imputed to a conspirator for an offense committed by a co-conspirator, unless the former intended to promote or facilitate the commission of that offense. It is not possible to "aid," "counsel," "agree to aid" or "attempt to aid" the commission or planning of an offense *unintentionally*. Yet, many of the modern codes provide in some way for imputed liability for offenses which occur during the course of conspiratorial activity but not pursuant to the agreement. To achieve this result, a defendant must be held to have intended to promote or facilitate the commission of an unforeseen end result.¹²⁵ To illustrate, suppose that *D*, for purposes of defrauding an insurance company, conspires with *X* to burn a building, with the latter to do the burning. In the course of the burning, a third person is killed. A conviction of *D* for homicide can result only from an obviously strained construction of the principle described above. Yet, the need for imposing criminal responsibility upon *D* is apparent.

Since one can hardly intend to promote a harm that is not contemplated, a better avenue to this result would be through a special principle to provide for imputed liability without a requirement that the accused must have intended to promote or facilitate commission of the harm which actually occurred. The Model Penal Code contains such a principle.¹²⁶ With conspiracy eliminated as an independent basis of complicity liability under the Code the issue of imputed liability to one conspirator for an unforeseen consequence of an act of a co-conspirator is made to depend upon two questions: (a) did the defendant *cause* the conduct which resulted in the harm through solicitation, aiding, counseling, agreeing to aid, or attempting to aid another in planning or engaging in that conduct; and (b) did the defendant have a culpable mental state in respect to the harm caused by his co-conspirator?¹²⁷ Most of the cases that have involved this problem in Kentucky have been concerned with imputing liability for murder to all participants of a conspiracy which had as its objective the commission of another felony,

¹²⁵ See PROPOSED MICHIGAN REVISED CRIMINAL CODE § 415, Commentary 47 (Special Committee of the Michigan State Bar for Revision of the Criminal Code, 1967).

¹²⁶ MODEL PENAL CODE § 2.06(4) (1962).

¹²⁷ *Id.*

usually robbery, or burglary. The Model Penal Code's approach to this problem may be illustrated by use of such a case. Suppose that *D* agrees with another to commit a robbery, and that during the course of that robbery a third person is killed by *D*'s cohort. If the conspirators had agreed, as a part of the conspiracy, to kill anyone interfering with their endeavor, *D* could be convicted of intentional murder since his intention was to facilitate or promote that harm. In the absence of such an agreement, his liability must depend upon what the decision makers find his state of mind to have been with regard to the resulting death. If, from all of the circumstances, they find that he acted with recklessness manifesting extreme indifference to human life, he should be convicted of murder; if they find that he acted with recklessness manifesting no such indifference, he should be convicted of a lower homicide offense. On the other hand, if they find that he had no culpable mental state as relates to the death, he should be acquitted of any charge involving homicide. This approach of the Model Penal Code is a more direct one. It should also be less difficult to apply and understand than the existing law. And, since it seeks to focus upon a defendant's individual culpability with respect to a harmful result, rather than upon group culpability, it is sounder from a criminological standpoint.

F. *Sanctions for Criminal Conspiracy*

As indicated above, the penalty for criminal conspiracy is relatively minor. Statutory conspiracy is punishable by "a fine not exceeding five thousand dollars or imprisonment not exceeding one year or both."¹²⁸ The word "imprisonment" in this provision has been construed by the Court of Appeals to mean "confinement in the county jail, rather than in the penitentiary."¹²⁹ This serves to classify the offense as a misdemeanor. Common law conspiracy, like all common law offenses for which no penalty is provided by statute, is punishable as a misdemeanor.¹³⁰ The major fault with the sanctions presently applied to this offense, statutory as well as common law, is the absence of any consideration for the sanction that is applied to the offense form-

¹²⁸ KRS § 437.110 (1962).

¹²⁹ *James v. Commonwealth*, 259 S.W.2d 76, 77 (Ky. 1953).

¹³⁰ KRS § 431.075 (1950).

ing the objective of the conspiratorial agreement. As a consequence, conspiracy to commit murder bears the same potential sanction as conspiracy to commit larceny.

In remedy of this defect, three courses of action are possible. The first would establish the same sanction for conspiracy that is established for the offense that forms the subject matter of the conspiratorial agreement. The notion underlying this approach is that an individual who will conspire to commit an offense is no more or no less dangerous than an individual who commits that offense. A number of the modern statutes have taken this approach.¹³¹ Others have rejected it because of the notion that criminal sanctions should take into account the extent of actual harm resulting from conduct. The second possibility would establish a penalty structure for conspiracy that is identical to the one that is used for criminal attempt. As indicated previously, this would mean that the inchoate offense would be classified one degree lower than the underlying completed offense. The weakness in this approach is that it fails to recognize the difference that exists between the external activity involved in conspiracy and that which is involved in attempt. For conspiracy, there need be only an "overt act;" for attempt, an offender must take a "substantial step" toward completion of the offense. Thus, the third course of action would seem to be preferable. Accommodation is provided for the weaknesses of the two approaches described in this paragraph as well as the shortcoming of the existing penalty structure. Basically, this third approach would establish sanctions that are less than those imposed for the offenses underlying conspiracy, less than those imposed for criminal attempts, but substantially more than is presently imposed for criminal conspiracy.¹³²

As it relates to the matter of sanctions, special consideration should be given to one final question: To what extent, if any, should the penalty for conspiracy be permitted to duplicate the penalty for an offense committed pursuant to a conspiratorial

¹³¹ ILLINOIS CRIMINAL CODE of 1961 § 8-2 (Smith-Hurd 1964); MODEL PENAL CODE § 5.05(1) (1962); PROPOSED MICHIGAN REVISED CRIMINAL CODE § 1015(6) (Special Committee of the Michigan State Bar for Revision of the Criminal Code, 1967).

¹³² See NEW YORK PENAL LAW §§ 105.00-105.15 (McKinney 1967); PROPOSED DELAWARE CRIMINAL CODE §§ 303-05 (Governor's Committee for Revision of the Criminal Law, 1967).

agreement? The treatment of this problem under existing law is governed almost exclusively by a concept that was known at common law as "merger." Its origin was an early procedural prohibition against the prosecution of a felony and a misdemeanor in a single trial.¹³³ From this prohibition emerged a principle that "if an act resulted in both a misdemeanor and a felony the former was so completely merged in the latter as to be unrecognizable for any legal purposes."¹³⁴ If the two offenses resulting from the same act were misdemeanors, or if both were felonies, the principle was inapplicable. Since conspiracy at common law has always been classified as a misdemeanor, if the objective of a conspiratorial relationship is a felony which is consummated, the conspiracy merges into the completed offense and a multiple conviction is precluded. However, if the offense committed pursuant to the conspiracy is a misdemeanor, there is no merger. Likewise, if the conspiracy is a felony by virtue of statutory alteration and if the consummated offense is a felony, there is no merger.

The Kentucky law on this point has been controlled totally by the doctrine of merger. Since conspiracy is a misdemeanor, application of the doctrine results in the conspiracy being merged into the consummated offense if the latter is of a higher degree than misdemeanor.¹³⁵ However, as indicated by the following statement, multiple convictions are possible if both offenses are misdemeanors:

... [I]f, after forming this conspiracy, they actually engaged in the illicit traffic and thereby consummated the object of their conspiracy, the misdemeanor committed when the conspiracy was formed was not merged into the misdemeanor committed when the traffic was engaged in.¹³⁶

In the above quoted case, the defendants had been tried and acquitted of the "completed" offense and were being tried for conspiracy. The Court of Appeals ruled that since the two offenses were distinct the first acquittal did not serve to bar the conspiracy prosecution.

¹³³ PERKINS 618 (1969).

¹³⁴ PERKINS 480-81 (1957).

¹³⁵ *York v. Commonwealth*, 285 Ky. 492, 148 S.W.2d 337 (1941); *Commonwealth v. Barnett*, 196 Ky. 731, 45 S.W. 874 (1922).

¹³⁶ *Myers v. Commonwealth*, 210 Ky. 373, 374-5, 275 S.W. 883, 884 (1925).

The solution of this problem by a technical application of the doctrine of merger has resulted in a failure to properly consider the need or desire for multiple convictions in the area of criminal conspiracy. Without hesitation the influence of the doctrine of merger should be eliminated and a more rational basis for dealing with this problem adopted. Several different approaches are possible. At one end of a spectrum is an approach that treats consummation of an offense committed pursuant to a conspiratorial agreement as an absolute defense to a charge of conspiracy. At the other end is one that treats conspiracy and its underlying substantive crime as distinct offenses and provides that conviction for one will not affect or bar conviction for the other. Both of these approaches can be found in modern codes.¹³⁷ A better solution to the problem is provided in the Model Penal Code.¹³⁸ Under its provisions, multiple convictions for conspiracy and a consummated offense are appropriate if the circumstances surrounding the conspiracy contain some special or additional danger. The special or additional danger contemplated by the Code exists when the conspiratorial agreement has more than one offense as its objective. This circumstance involves "a distinct danger additional to that involved in the actual commission of any specific offense."¹³⁹

III. CRIMINAL SOLICITATION

For quite some time, there has been some authority for the proposition that a mere solicitation of another to commit a criminal offense constitutes a crime.¹⁴⁰ Under such authority the crime is completed as soon as the words of solicitation are uttered, and the fact of acceptance or rejection by the solicitee is insignificant to the criminality of the solicitor. The justification for treating such conduct as criminal can best be demonstrated by comparing it with similar types of conduct for which criminal liability is provided. Suppose, for example, that *D* seeks out *X* for the purpose of employing him to rob *V*. If *X* accepts the employment and successfully achieves his objective, *D*, as an acces-

¹³⁷ See ILLINOIS CRIMINAL CODE of 1961 § 8-3 (Smith-Hurd 1964); PROPOSED DELAWARE CRIMINAL CODE § 10 (Governor's Committee for Revision of the Criminal Law, 1967).

¹³⁸ MODEL PENAL CODE § 1.07(1) (1962).

¹³⁹ MODEL PENAL CODE § 1.08, Comment 32 (Tent. Draft No. 5, 1956).

¹⁴⁰ See PERKINS 506 (1957).

sory before the fact, may be convicted of robbery. If *X* attempts unsuccessfully to achieve his objective, *D* may be convicted of the offense of attempted robbery, again as an accessory before the fact. If *D* and *X* enter into an agreement to commit the robbery of *V*, but are apprehended before any attempt is made to fulfill the agreement, *D* may be convicted of criminal conspiracy to rob. The offense of criminal solicitation seeks to deal with the situation where *X*, the solicitee, immediately rejects the proposal of *D*, the solicitor. Under this circumstance, the criminal culpability of the solicitor is as great as it would be if his proposal should be accepted and the underlying offense completed. The dangerousness of his character is as great as that of the offender in a criminal attempt situation and nearly as great as that of a criminal conspirator.

The *mens rea* for this offense should be the same as that which is required for the offense of criminal attempt. With his solicitation, an offender must intend to promote or facilitate the commission of a particular criminal offense. And, as with criminal attempt, an individual should never be able to criminally solicit the commission of an offense by acting "recklessly" or with "criminal negligence." In addition to the mental element, a defendant, to be liable for this offense, must perform a physical act of solicitation, request, command, or encouragement. The combination of these two elements constitutes the offense even though the person solicited does nothing toward commission of the underlying crime.

The state of existing law concerning criminal solicitation is not clear. There is no statutory provision for such an offense. However, a few cases suggest that it exists as a common law crime. The strongest indication is contained in this statement of the Court of Appeals:

It is an offense at common law for one person to attempt to bribe, solicit, persuade, encourage, or propose to another person to murder any other person. If the solicited offense is actually committed, he becomes an accessory before the fact, and is punishable like the principal; but, if the crime is not carried out, he is guilty of a misdemeanor only.¹⁴¹

¹⁴¹ Begley v. Commonwealth, 22 Ky. L. Rep. 1546, 1548, 60 S.W. 847, 849 (1901).

In a subsequent case, this one involving an issue of civil defamation, the Court of Appeals once again acknowledged existence of the offense: "[T]he overt act of one in attempting to hire another to commit murder, which is a felony, is a solicitation to commit a crime, constituting a misdemeanor at the common law punishable by fine or imprisonment, or both."¹⁴² Despite unequivocal assertions in these two opinions, no Kentucky case can be found in which a defendant had actually been convicted of solicitation of an offense that was never consummated. Thus, for all practical purposes, the offense, as one having general application, is non-existent under present law. It is existent, however, in the form of special statutory offenses having very limited application. The following would be fairly representative:

1. KRS § 432.430—Attempting to induce a convict to escape from a penitentiary.
2. KRS § 432.490—Encouragement of another to escape from a state mental institution.
3. KRS § 433.050—Attempt to procure the burning of a building.
4. KRS § 436.040(2)—Encouraging a female to become an inmate of a house of prostitution.
5. KRS § 436.075—Solicitation of any person for the purpose of prostitution.

Revision of this offense should seek to remove the uncertainty that exists with regard to the general applicability of solicitation as a crime. Its application should be as broad as that of criminal attempt and criminal conspiracy. In addition, careful consideration should be given to the penalty structure for the offense. At common law, it was punishable as a misdemeanor without regard to the nature of the crime solicited.¹⁴³ As a consequence, criminal solicitation of murder had the same potential sanction as criminal solicitation of larceny. In revising the offense, no question can really exist as to the need to change the common law sanction and to relate the sanction to the seriousness of the crime solicited. In establishing this relationship, a choice must be made between a penalty structure that provides the same penalty for solicitation as is provided for the offense solicited and

¹⁴² Lee v. Stanfill, 171 Ky. 71, 75, 186 S.W. 1196, 1197 (1916).

¹⁴³ PERKINS, *supra* note 140.

one that provides a lower penalty for solicitation in view of the fact that the intended harm is never consummated. The Model Penal Code provides a penalty structure of the first type.¹⁴⁴ Other modern codes, in adopting a structure of the second type, have classified criminal solicitation slightly lower than criminal attempt to commit the crime solicited.¹⁴⁵ This classification reflects a judgment that conduct constituting solicitation does not indicate as much "dangerousness" of character as conduct constituting criminal attempt. That judgment is certainly subject to question.

¹⁴⁴ MODEL PENAL CODE § 5.05 (1962).

¹⁴⁵ ILLINOIS CRIMINAL CODE of 1961 § 8-1 (Smith-Hurd 1964); NEW YORK PENAL LAW §§ 100.00-100.10 (McKinney 1967); PROPOSED DELAWARE CRIMINAL CODE §§ 300-302 (Governor's Commission for Revision of the Criminal Law, 1967).