Double Inchoate Crimes

Ira P Robbins

Available at: http://works.bepress.com/ira_robbins/45/
American criminal law treats the inchoate crimes of attempt, conspiracy, and solicitation as substantive offenses punishable by criminal sanctions. The legal system criminalizes the types of behavior that constitute these offenses to intervene before an actor completes the intended illegal act. Some jurisdictions now recognize the concept of double inchoate crimes, punishing inchoate offenses that are the immediate objects of other inchoate offenses.

In this Article, Professor Robbins examines the concept of double inchoate crimes, first by tracing the evolution of inchoate offenses and then by reviewing the judicial development of double inchoate crimes. Arguing that double inchoate crimes are needed to fill gaps and criminalize behaviors not covered by existing statutes, the Article then examines the case law upholding double inchoate constructions. The Article goes on to evaluate cases that reject and criticize this concept and advocates a policy-based approach. Finally, Professor Robbins recommends retaining certain double inchoate crimes, proposes model statutes for inchoate offenses, and urges a certain degree of judicial discretion in using these constructions.

Contents

Introduction .............................................. 3
I. The Concept of Inchoate Crimes ...................... 6
   A. Attempt ........................................ 9
   B. Crimes in the Nature of Attempt ................. 16
      1. Assault ...................................... 16
      2. Burglary .................................... 19
      3. Constituent-Element Crimes .................... 22
   C. Conspiracy ...................................... 25
   D. Solicitation ..................................... 29
II. The Perceived Need for Double Inchoate Crimes ...... 34
   A. Attempt to Attempt ................................ 36
      1. Attempt to Assault ......................... 38
         a. Assault as attempted battery ............... 40
         b. Assault as attempt, coupled with present ability, to injure another violently .......... 41
         c. Assault as intentional frightening .......... 42

* Copyright © Ira P. Robbins, 1989. All rights reserved.
** Barnard T. Welsh Scholar and Professor of Law and Justice, The American University, Washington College of Law. A.B. University of Pennsylvania, 1970; J.D. Harvard University, 1973. The author is grateful to David Sumner for his excellent research assistance; to Wayne Ault, Lisa Viar, and Maureen Williams for their painstaking help in the final stages of article preparation; and to former Dean Frederick R. Anderson for providing generous support from The American University Law School Research Fund.
2. Attempted Sexual Assault of Minors 44
3. Attempted Burglary 47
4. Attempted Possession of Proscribed Materials 48
5. Crimes in Which the Attempt Is Subsumed Within the Definition of the Completed Crime 50
B. Attempt to Conspire 54
C. Conspiracy to Attempt 58

III. Criticism of Double Inchoate Crimes 62
A. The Logical Absurdity of Double Inchoate Crimes 63
1. The Origins of the Logical-Absurdity Approach 63
2. The Move Away from Logical Absurdity 67
3. Analysis of the Logical-Absurdity Approach 70
B. The Problems of Notice to Offenders and Manifested Legislative Intent 73
1. The Role of Due Process in Inchoate Liability 73
2. The Manifested-Legislative-Intent Approach 76
C. The Cumbersome Nature of and Lack of Need for Double Inchoate Crimes 79
1. Attempt to Conspire 80
2. Conspiracy to Attempt 83
3. Policy-Based Analysis 84

IV. Recommendations for Revision of Inchoate-Crime Statutes to Minimize the Need for Double Inchoate Offenses 88
A. Practical Limitations on Statutory Revision 88
1. Conspiracy to Attempt (or Solicit) 89
2. Attempt to Conspire 91
3. Attempt to Commit Crimes in the Nature of Attempt 94
   a. Constituent-element approaches applied to burglary 95
   b. Proscription of constituent acts 97
   c. Possession offenses 99
   d. The applications of attempt to constituent-element offenses and other crimes in the nature of attempt 101
4. Attempt to Assault 103
B. Proposed Inchoate-Crime Statutes 105
1. Attempt 106
2. Conspiracy 111
3. Solicitation 113
Conclusion 115
The refinement and metaphysical acumen that can see a tangible idea in the words an attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity.\(^1\)

Perhaps philosophers or metaphysicians can intend to attempt to act, but ordinary people intend to act, not to attempt to act.\(^2\)

### INTRODUCTION

The inchoate crimes\(^3\) of attempt, conspiracy, and solicitation are well established in the American legal system. "Inchoate" offenses allow punishment of an actor even though he has not consummated the crime that is the object of his efforts.\(^4\) Indeed, the main purpose of punishing inchoate crimes is to allow the judicial system to intervene before an actor completes the object crime.\(^5\)

Most American jurisdictions treat inchoate offenses as substantive crimes,\(^6\) distinct and divorced from the completed crimes toward which they tend. Accordingly, attempt, conspiracy, and solicitation are defined broadly to encompass acts lead-

---

\(^3\) For purposes of this Article, an "inchoate" crime is a prohibited act performed in anticipation of committing a "completed" crime. A "completed" crime is an act that itself achieves a harmful consequence prohibited by statute. Murder is the prime example of a completed crime, in that the prohibited act results in the intended harmful consequence, rather than in a realization of a stage of preparation in anticipation of another harmful consequence.
\(^4\) Failure to consummate the ultimate crime, however, is not essential to conviction for an inchoate offense. In most jurisdictions, no rule of merger exists for conspiracy and several states allow prosecution for an attempted crime even when the defendant has realized the ultimate crime. See infra notes 102-103 and accompanying text (conspiracy cases); infra notes 30-31 and accompanying text (attempt statutes).
\(^5\) This is the main premise of the Model Penal Code's provisions for inchoate offenses. See MODEL PENAL CODE art. 5 commentary at 294 (Proposed Official Draft 1985).
\(^6\) For purposes of this Article, a "substantive" crime is one that is defined by statute or common law to prohibit a specific act or category of acts. Thus, the term "substantive" clearly encompasses completed crimes, such as murder. The broad application of inchoate offenses, however, makes it unclear whether they are substantive crimes or instead are general doctrinal categories that give courts discretion to extend criminal liability to acts that tend toward completed offenses. The latter position suggests that crimes in the nature of attempt, although they are applicable to a narrower category of acts than attempt, are not substantive crimes. One can argue that assault is not a substantive offense when it is defined as an attempt to commit a battery. Similarly, burglary can be viewed as a species of attempt limited by the means (illegal entry) and setting (an enclosed structure). In addition, possession offenses, although narrowly defined, punish acts preparatory to traditional completed offenses.
ing to the commission of any completed crime. Rather than try
to enumerate every act to which inchoate liability attaches,
however, legislatures have enacted relatively short statutes con-
taining abstract conceptual terms with universal application.
The Model Penal Code's provision for attempt liability, for ex-
ample, represents a middle-ground approach to this problem. It
prohibits an act that constitutes a "substantial step" toward the
completed offense. The Code then fleshes out the abstract term
"substantial step" by listing several nonexclusive examples that
have application to numerous completed crimes. It has fallen
to the courts to elaborate on the scope of inchoate offenses and
decide when to administer them.

Thus, the concept of substantive inchoate crimes, by requiring
a high degree of judicial interpretation, has vested great discre-

tion in the judiciary. This discretion is similar to that of earlier
courts in creating common-law offenses. In both circumstances,
the court analyzes the policies underlying the criminal law and
decides whether those policies require courts to punish certain
acts.

My thesis is that, in inchoate offenses, courts should adopt a
two-part analysis, asking: (1) whether the policy of the criminal
law indicates that an individual's acts are sufficiently dangerous
to society to warrant judicial intervention and punishment; and
(2) whether the definition of attempt, conspiracy, or solicitation
allows a court to punish those acts. The development of inchoate
offenses in different jurisdictions has often resulted in a diver-
gence in the answers to these two queries.

To punish a dangerous act not covered by established inchoate
concepts, courts have two options. First, they may ignore prec-
edent, extend statutory language, and change the definitions of
concepts contained in inchoate offenses. For example, A de-
cides to kill B, but wants the aid of another. A approaches C to
ask him to help in the murder. C feigns agreement, and later
informs the police.

The government indicts A for conspiracy to commit murder.
The prosecution's success depends on how the court, within the
guidelines set by the jurisdiction's conspiracy statute, defines
the central term "agreement." Does it require that both parties
intend to commit the object crime of murder, or that only one

\footnotesize{Nevertheless, every American jurisdiction treats burglary, possession offenses, and
at least some forms of assault as substantive crimes. Indeed, the prevalent view is that
attempt, conspiracy, and solicitation are substantive offenses in that they proscribe a
specific category of acts.}

\footnotesize{\textit{Model Penal Code} § 5.01 (Proposed Official Draft 1985).}
act with such intent? In many American jurisdictions, the indictment for conspiracy would fail because there was no agreement. Nevertheless, most commentators agree that criminal liability should attach to A's actions.

The second option, however, is that the court could allow the prosecutor to bring an indictment for the double inchoate crime of attempt to conspire to commit murder. Over the past century and a quarter, prosecutors have brought indictments making an inchoate offense the immediate object of another inchoate offense, with a completed crime as the ultimate object. This approach allows courts to extend liability to actions such as those of A, above, without distorting the concepts inherent in established inchoate offenses. But the courts faced with such indictments have divided over the validity of double inchoate offenses.8

Judicial inquiry into the validity of double inchoate offenses has focused on the question of whether an inchoate offense can have as its object another inchoate offense.9 Treating attempt, conspiracy, and solicitation as the general inchoate offenses, the issue to be discussed in this Article—the validity of double inchoate offenses—must be distinguished from the issue of the validity of multiple convictions for discrete inchoate crimes that are designed to culminate in the same offense. Double inchoate offenses are characterized by the use of two inchoate offenses within a single count of an indictment. Prosecutors generally use double inchoate constructions, such as attempt to attempt and attempt to conspire, to circumvent the normal proximity requirements of inchoate offenses. At present, only three states explicitly prohibit by statute the use of such constructions. See infra note 153.

By contrast, the term "multiple convictions for inchoate crimes" refers to convictions for two or more inchoate crimes arising out of the same course of conduct toward a single substantive offense.

For example, A conspires with B to kill C. B, the hit man, is apprehended just as he is about to detonate a bomb that he has planted in C's car, which C is driving. The prosecutor brings charges against B for both the attempt to commit murder and the conspiracy to murder.

Another example: A solicits B to kill A's wife. B refuses, so A solicits C to perform the same crime. Is A guilty of two counts of solicitation or only one? Many American jurisdictions prohibit conviction for more than one statutory inchoate crime for conduct designed to culminate in the same completed offense. See, e.g., ALASKA STAT. § 11.31.140(b) (1983); HAW. REV. STAT. § 705-531 (1985); IND. CODE ANN. § 35-41-5-3(a) (West 1986); KY. REV. STAT. ANN. § 506.110(3) (Baldwin 1984); 18 PA. CONS. STAT. ANN. § 906 (Purdon 1983 & Cum. Supp. 1987); see also MODEL PENAL CODE § 5.05(3) (Proposed Official Draft 1985): "A person may not be convicted of more than one offense defined by [Model Penal Code art. 5, defining all inchoate offenses] for conduct designed to commit or to culminate in the commission of the same crime." Id.

For a more extended discussion of limitations on indictments for multiple offenses and the distinction between double inchoate crimes and multiple convictions for inchoate crimes, see generally I P. ROBINSON, CRIMINAL LAW DEFENSES § 84(c) (1984).

In addition, courts have questioned whether they have the authority to create double inchoate crimes. This argument suggests that double inchoate crimes are analogous to ex post facto laws or, more aptly, common-law conspiracy, which allowed courts the discretion to convict a party for committing a lawful act by unlawful means. Modern conspiracy statutes limit this discretion by making only criminal acts the proper objects of conspiracy. See infra notes 100, 110 and accompanying text.
this inquiry can extend to attempts to attempt, attempts to conspire, attempts to solicit, conspiracies to attempt, conspiracies to conspire, conspiracies to solicit, solicitations to attempt, solicitations to conspire, and solicitations to solicit. Analysis of the issue has arisen most frequently, however, with respect to three of these constructions—attempt to attempt, attempt to conspire, and conspiracy to attempt.

By surveying and analyzing the case law regarding these three constructions, this Article seeks both to establish the proper approach for assessing the validity of double inchoate offenses and to delineate the limits of judicial discretion to "create" such crimes. This Article argues that, although some double inchoate crimes are unnecessary, others do serve important purposes of the criminal law. This approach presupposes that the proper criterion for deciding the validity of double inchoate constructions is the need to fill gaps in the definitions of single inchoate crimes. To the extent that single inchoate crime statutes are refined, therefore, the need for judicially created inchoate crimes will diminish.

In Part I, the Article considers the crimes of attempt, conspiracy, and solicitation, and discusses certain crimes in the nature of attempt, such as assault, burglary, and possessory offenses. Part II surveys and analyzes the case law upholding double inchoate constructions. This section elaborates on the rationales provided by the courts—as well as those not explicitly stated—for use of these constructions. Part III examines the case law that rejects and criticizes reliance on double inchoate constructions. This section also compares the analytical approaches used by courts to examine critically double inchoate formulations and concludes that a policy-based approach is the most appropriate. Part IV applies this policy-based analysis to determine which inchoate constructions are necessary to the effective functioning of the criminal law. This section also delineates the limits of judicial discretion by formulating model statutes for inchoate offenses. The Article concludes, however, that a degree of judicial discretion is necessary to ensure that liability attaches to those actions that, in tending toward completed crimes, pose a significant danger to society.

I. THE CONCEPT OF INCHOATE CRIMES

Inchoate—or anticipatory or relational—crimes allow the judicial system to impose criminal liability on conduct designed
to culminate in the commission of a substantive offense.\textsuperscript{10} The inchoate offenses of attempt and solicitation, for example, provide the legal basis for courts to punish the actor who has performed every act necessary to effect his criminal design, but has failed to achieve the prohibited result due to an intervening fortuity.\textsuperscript{11} More importantly, however, attempt and other inchoate offenses allow law-enforcement officials to prevent the consummation of substantive offenses by permitting intervention once an individual’s actions, though not criminal in themselves, have sufficiently manifested an intent to commit a criminal act.\textsuperscript{12}

Like a completed offense, an inchoate offense requires both a mens rea and an actus reus.\textsuperscript{13} Unlike the actus reus in a completed offense, however, the proscribed act in an anticipatory crime is not prohibited because of its harmful effect, but because it demonstrates a firm purpose on the part of an indi-

\textsuperscript{10} \textsc{model penal code} art. 5 commentary at 293 (proposed official draft 1985). the code’s drafters suggest that inchoate crimes all share the characteristic that the conduct they make criminal “is designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so or has not yet achieved its culmination because there is something that the actor or another still must do.” \textit{id.} this basic rule, however, does not apply wholly to conspiracy. because conspiracy is designed not only as an inchoate crime but also as a means of punishing illegal group activity, the completion of a substantive offense generally does not preclude conviction for both the completed offense and the conspiracy. see infra notes 102–103 and accompanying text.

because inchoate crimes are defined not only as discrete substantive offenses but also in terms of the ultimate offenses at which they aim or to which they relate, they are also called “relational” crimes. e.g., j. hall, \textsc{general principles of criminal law} 575 (2d ed. 1960).

\textsuperscript{11} \textsc{model penal code} art. 5 commentary at 294 (proposed official draft 1985); see also w. lafaive & a. scott, \textsc{criminal law} 498–99 (2d ed. 1986) (noting that the original purpose behind punishing attempts was to prevent crime). see generally robbins, attempting the impossible: the emerging consensus, 23 harv. j. on legis. 377, passim (1986).

\textsuperscript{12} \textsc{model penal code} art. 5 commentary at 294 (proposed official draft 1985); great britain law commission, \textsc{inchoate offenses: conspiracy, attempt and incitement} ¶ 73 (working paper no. 50, 1973); see also meehan, attempt—some rational thoughts on its rationale, 19 crim. l.q. 215 (1977).

the law of attempt permits the authorities to intervene before the crime is consummated. the english law commission urges extensions of the law by arguing that “one of the main reasons for a law of attempt is to allow the authorities to intervene at a sufficiently early stage to prevent a real danger of the substantial offence being committed . . . .” the distinguishing factor here, as with impossible attempts, is that no actual harm is prevented by intervention on the part of the authorities, for by definition, it was impossible to achieve the harm intended. nevertheless, potential harm can be prevented, as the person’s dangerousness has been manifested—the unsuccessful poisoner who uses sugar may next hit with rat poison.

\textit{id.} at 236 (emphasis in original; footnote omitted). for further discussion of the predictive and preventive capacities of attempt liability, see infra notes 32–36 and accompanying text.

\textsuperscript{13} see r. perkins & r. boyce, \textsc{criminal law} 605 (3d ed. 1982).
individual to act in furtherance of a criminal intent. The mens rea for inchoate crimes, therefore, is the specific intent to commit a particular completed offense, or target or object crime. A central premise of Anglo-American criminal jurisprudence is that a court may not punish a bad intent that is not accompanied by a bad act. Nevertheless, inchoate crimes focus on the mens

14 The term "harmful" in this statement refers to actual harm to person or property. Most legal commentators, however, use the term in a broader context to refer to an increase in the potential risk to these legally protected interests. See, e.g., Meehan, _supra_ note 12, at 237–39 (arguing that a person who creates risk causes harm even if the intended consequences do not occur); _see also_ Robbins, _supra_ note 11, at 383–419 (discussing objective and subjective harm in attempt crimes).

For purposes of this Article, the term "harmful" is a concept of harm independent of particular laws defining crimes and specifying punishments. The terms "harm" or "ultimate harm" describe the kind of damage or injury to a legally protected interest that is ordinarily compensable in a civil action. This concept of harm includes not only damages or injury to a specific individual, but also injury to the interests of the collectivity—e.g., failure to pay taxes, pollution of the environment, or some other verifiable social disutility.

The term "statutory harm" refers to any consequence of conduct constituting a necessary element of a specific offense as defined by law. Although ultimate and statutory harms may overlap, as with the death necessary to a murder, some consequences that are proscribed by the criminal law fall short of a meaningful injury to a legally protected interest. For example, the criminal law attributes significance to the act of agreement in a conspiracy and the act of breaking and entering in a burglary, although the consequences of either act alone are not sufficiently important to be considered an ultimate harm. The ultimate harm that is associated with conspiracy and burglary is the intent to commit some other crime.

Furthermore, not all crimes have a statutory harm. For example, criminal attempt is defined as a certain kind of conduct, without regard to its actual consequences, and the offense does not require proof that a particular harm actually occurred. See Schulhofer, _Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law_, 122 U. PA. L. REV. 1497, 1505–06 (1974). _But see_ J. HALL, _supra_ note 10, at 219–20 (suggesting that inchoate crimes cause ultimate and statutory or potential harm in that the proscribed conduct impairs the quality of daily life by increasing apprehension in the community and creating a higher probability of actual injury to members of the community).

15 As used here, the term "specific intent" refers to a special mental element required above and beyond any required to commit the actus reus of the specific inchoate offense. For inchoate crimes, that special mental element is an intent to effect the consequences or ultimate harm that is proscribed by the completed object crime, even if the object crime requires no such intent. See, e.g., W. LAFAVE & A. SCOTT, _supra_ note 11, at 224–25. For example, although an actor may commit murder without an intent to kill, he cannot normally commit attempted murder without such an intent. Merritt v. Commonwealth, 164 Va. 653, 660, 180 S.E. 395, 398 (1935).

16 Most crimes that the law punishes are individual or social harms. This emphasis on the results of conduct necessarily requires some kind of act as a basis for penal sanction. Although the intent behind conduct takes on legal significance when that conduct results in certain proscribed consequences, criminal intent that remains within the mind of the individual or manifests itself only in conversation causes no demonstrable social harm.

Furthermore, common experience indicates that nearly everyone entertains some criminal intent during his lifetime. A criminal-justice system that punishes only those who allow such thoughts to rule their conduct is both more fair and more efficient than one that punishes individuals who are either careless or foolish enough to speak of intentions on which they may never act. R. PERKINS & R. BOYCE, _supra_ note 13, at 605; _see_ G. WILLIAMS, _Criminal Law: The General Part_ 2, 33 (2d ed. 1961).
rea and render ancillary the actus reus to realize the predictive and preventive purposes of the criminal law. 17

The three main formulations of inchoate liability are attempt, conspiracy, and solicitation. The treatment of these concepts as substantive offenses, distinct from the completed offenses that are their objects, is of comparatively late origin. Each of the three had its beginning in the authority of common-law courts to create offenses.18 Despite the independent origins and development of the three offenses, conspiracy and solicitation can be viewed as early stages of an attempt to commit a completed offense.19 Further, specific substantive crimes such as assault and burglary have inchoate aspects and can therefore be viewed as crimes in the nature of attempt.20

A. Attempt

Although the law of attempt has roots in the early English law,21 its formulation as a general substantive offense is a rela-

---

17 In inchoate offenses, the proscribed conduct is ancillary to the mens rea, in the sense that it only serves to determine the likelihood that the actor would have done everything necessary to realize his criminal intent. It is not ancillary, however, in the sense that most jurisdictions punish conduct that fails to culminate in a particular crime less severely than successful conduct, even though the intent informing both is identical. Emphasis on actual harm in determining the degree of penal sanction is a vestige of the criminal law's early role as an instrument of official retribution. Actual damage or injury was once a prerequisite to the existence of a crime. The doctrines of attempt, conspiracy, and solicitation have developed based on the theory that conduct that is proximate to an ultimate harm is itself a harm, albeit a lesser one. J. HALL, supra note 10, at 584; Schulhofer, supra note 14, at 1498–1501; see G. Williams, TEXTBOOK OF CRIMINAL LAW 404–06 (1983) (stating that comparative leniency for attempt reflects a crude retaliation theory, in which the degree of punishment is a function of the amount of damage done rather than the intent of the actor).

18 For a discussion of the historical origin of attempt, conspiracy, and solicitation, see infra notes 21–22 (attempt), 99 (conspiracy), 126 (solicitation) and accompanying text.

19 See Robbins, Solicitation, in ENCYCLOPEDIA OF CRIME AND JUSTICE 1502, 1505 (S. Kadish et al. eds. 1983) (conceptualizing conspiracy and solicitation as steps in the direction of crime on a continuum of preparatory acts, rather than as distinct crimes).

20 W. LAFAYE & A. SCOTT, supra note 11, at 497.

21 Although the early English law only punished conduct that resulted in actual harm, in rare instances several fourteenth-century courts convicted individuals of certain heinous felonies even though they had only unsuccessfully attempted to commit those felonies. These solitary convictions rested on the doctrine of voluntas reputabitur pro facto—the intention is to be taken for the deed. It is apparent from the reports, however, that these courts did not penalize intent alone. Rather, the defendant must have manifested his intent by some deed tending toward the execution of the completed felony. J. HALL, supra note 10, at 560–65; W. LAFAYE & A. SCOTT, supra note 11, at 495–96; Sayre, Criminal Attempts, 41 HARV. L. REV. 821, 822–27 (1928).

The sixteenth-century Court of the Star Chamber, instituted partly to correct the defects of the common-law courts, entertained cases involving conduct now categorized as attempt as part of a trend of dealing with antisocial conduct theretofore unrecognized
tively recent development. Generally, the elements of attempt are: (1) the intent to commit the completed crime; (2) the performance of some step, usually a substantial one, toward its commission; and (3) the failure to consummate the substantive crime. Many American jurisdictions now make specific provisions for the punishment of attempts to commit certain offenses, and almost all cover the rest of the field with a general attempt statute. With few exceptions, these general statutes cover attempts to commit any felony or misdemeanor.

as criminal because of its lack of direct harm. J. HALL, supra note 10 at 563–67. In a prosecution, in 1615, Francis Bacon, the Attorney General, urged the Star Chamber to adopt a doctrine of criminal attempt. Bacon successfully argued that the court should punish as a high misdemeanor any combination or practice tending to a capital offense or felony, “though it took no effect.” Id. at 568. Due to political abuses, the Star Chamber was abolished in 1640. Sayre, supra, at 828. See J. HALL, supra note 10, at 571–73; W. LAFAYE & A. SCOTT, supra note 11, at 495–96; Sayre, supra note 21, at 836. The modern doctrine of attempt has its origin in the case of Rex v. Scofield, Cald. Mag. Rep. 397 (1784). In Scofield, the court indicted the defendant on a charge of placing a lighted candle and combustible material on another's house with intent to set fire to it, even though the house did not burn. Id. at 400. Such conduct clearly would constitute an attempt to commit arson in modern law. Prior to Scofield, however, the courts imposed attempt liability only for two categories of offenses: attempted treason and attempts to subvert justice, such as subornation of perjury and attempted bribery of the King's officials. Sayre, supra note 21, at 834–35. The court in Scofield established the premises that a criminal intent may make criminal an act that was otherwise innocent in itself, and, conversely, that the completion of an act, criminal in itself, was not necessary to constitute a crime. Scofield, Cald. Mag. Rep. at 400.

Rex v. Higgins, 102 Eng. Rep. 269 (1801), extended the decision in Scofield. In Higgins, the authorities indicted the defendant for soliciting a servant to steal his master's goods. There was no allegation or proof that the servant acted on the solicitation. The court ruled that it could indict a person for any act or attempt that tended "to the prejudice of the community." Id. at 275; see Robbins, supra note 19, at 1503.


See generally Robbins, supra note 11, at 419–42 (discussing attempt statutes in the context of the defense of impossibility).

Among modern American jurisdictions, some statutes provide that failure is an element of the offense.\textsuperscript{27} Further, the rule of merger operates only to the extent that a defendant cannot be convicted of both a completed offense and an attempt to commit it.\textsuperscript{28} All jurisdictions treat attempt as a lesser included offense of the completed crime.\textsuperscript{29} Moreover, many jurisdictions have held that a defendant may be convicted of the attempt if the state proves the completed crime,\textsuperscript{30} and several states so provide by statute.\textsuperscript{31}

The distinction in attempt law between attempt and preparation reflects the notion that the act on which liability is based must sufficiently manifest criminal intent.\textsuperscript{32} The standards de-
developed by courts and criminal-law experts to determine the sufficiency of an act for attempt liability reflect the developing rationales that are unique to anticipatory crimes. The principal purpose behind punishing an attempt, unlike that of a completed crime, is not deterrence. The threat posed by the sanction for an attempt is unlikely to deter a person willing to risk the penalty for the object crime. Instead, the primary function of the crime of attempt is to provide a basis for law-enforcement officers to intervene before an individual can commit a completed offense. A secondary function is to punish those who have carried out their criminal scheme but have failed to effect the harmful result due to the intervention of external physical circumstances, including on-the-spot prevention.

Id. at 309–10; see also W. LAFAVE & A. SCOTT, supra note 11, at 504–09 (discussing distinction between "preparation" and "attempt").

Courts occasionally cloud the distinction between preparation and attempt by holding that preparatory acts satisfy attempt's actus reus requirement under certain circumstances. Id. at 431–32; see Bell v. State, 118 Ga. App. 291, 293, 163 S.E.2d 323, 325 (1968) (because the act was dangerous to people and property, proof that the actor brought dynamite to certain premises was sufficient to establish the crime of attempt to destroy those premises by dynamite).

For a particularly cogent survey of the judicial tests that are used to distinguish preparation from attempt, see generally P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW 131–37 (1986) [hereinafter LOW].

M. MODEL PENAL CODE art. 5 commentary at 293–94 (Proposed Official Draft 1985). The commentary states:

Since these offenses always presuppose a purpose to commit another crime, it is doubtful that the threat of punishment for their commission can significantly add to the deterrent efficacy of the sanction—which the actor by hypothesis ignores—that is threatened for the crime that is his objective. There may be cases where this does occur, as when the actor thinks the chance of apprehension low if he should succeed but high if he should fail in his attempt, or when reflection is promoted at an early stage that otherwise would be postponed until too late, which may be true in some conspiracies. These are, however, special situations. General deterrence is at most a minor function to be served in fashioning provisions of the penal law addressed to these inchoate crimes; that burden is discharged upon the whole by the law dealing with the substantive offenses.

Id. at 498–99. For a discussion of the various rationales behind attempt liability, see, e.g., Meehan, supra note 12 (emphasizing the importance of attempt liability in predicting and preventing social danger).

For a discussion of balancing the danger to society with individual freedom in the context of a criminal law policy that aims at distinguishing dangerous offenders, see M. MOORE, S. ESTRICH, D. MCGILLIS & W. SPELMAN, DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE (1984) [hereinafter DANGEROUS OFFENDERS].

W. LAFAVE & A. SCOTT, supra note 11, at 499.
The first case to distinguish attempt and preparation, *Regina v. Eagleton*,38 introduced a “last proximate act” standard for determining the actus reus of attempt.39 Under this approach, an actor is not liable for attempt unless he has done all that he intends to do to accomplish the target crime.40 For example, a would-be murderer commits the last proximate act when he shoots at his intended victim.41 Courts since *Eagleton* uniformly have rejected the last-proximate-act standard in favor of standards that give police a margin of safety by allowing them to intervene after an actor’s criminal intent becomes sufficiently apparent.42

The two basic standards developed since *Eagleton* reflect different rationales behind criminalizing attempt. The first, a “proximity” standard, focuses on the dangerousness of the actor’s conduct and emphasizes what steps remain for him to take to complete the object crime.43 The second, and more recent

---

39 Id. at 836.
40 Low, supra note 33, at 132.
41 Id.
43 Id. at 321–26 (Proposed Official Draft 1985). The drafters of the Model Penal Code criticized this approach on the ground that it does not give law-enforcement authorities legal basis to intervene “until the actor ha[s] the power, or at least the apparent power, to complete the crime forthwith.” Id. at 322. They argued that the vagueness of the standard provides little guidance in answering the question of how close is close enough for preventive arrest. Id.

The tests that have been developed under the proximity standard are premised on the notion that the primary purpose of the criminal law is to punish dangerous conduct. Low, supra note 33, at 133. Courts employing proximity tests have suggested that punishment of the actor is only justified if preparatory conduct comes dangerously close to accomplishing the harmful result that is proscribed by the completed offense. Id. at 133–34.

The courts have developed three tests reflecting the proximity rationale: (1) the “physical proximity” test; (2) the “indispensable element” test; and (3) the “dangerous proximity” test. MODEL PENAL CODE § 5.01 commentary at 321–24 (Proposed Official Draft 1985); Low, supra note 33, at 132–33. The physical-proximity test requires that the actor come “very near to the accomplishment of the crime.” People v. Rizzo, 246 N.Y. 334, 338, 158 N.E. 888, 889 (1927); see State v. Dumas, 118 Minn. 77, 84, 136 N.W. 311, 314 (1912) (noting that the test requires “something more than mere preparation, remote from the time and place of the intended crime”). The test measures proximity in terms of necessary steps not taken, time, and geographical distance. MODEL PENAL CODE § 5.01 commentary at 321–22 (Proposed Official Draft 1985); Low, supra note 33, at 132.

The indispensable-element test requires that the actor acquire control over every element that is indispensable to his criminal objective. See MODEL PENAL CODE § 5.01 commentary at 323–24 (Proposed Official Draft 1985); Low, supra note 33, at 133. The rationale behind this test is that, until the defendant has gained control of those aspects of his criminal scheme that the court identifies as indispensable, he remains insufficiently proximate to success. W. LAFAVE & A. SCOTT, supra note 11, at 505. In cases in which the actor has failed to gain control of an indispensable element, the courts using this test have refused to find that he has committed an attempt. See, e.g., People v. Orndorff,
development, an “equivocality” standard, focuses on the dangerousness of the actor himself and emphasizes what the actor has already done in imputing criminal intent to his actions.\textsuperscript{44}
The Model Penal Code has incorporated the equivocality standard in its definition of an attempt as "an act or omission constituting a substantial step in a course of conduct planned to culminate in commission of the crime." The Code goes on to define certain preparatory acts as substantial steps that may be "strongly corroborative of an actor's criminal purpose." Because it does not consider proximity to the actus reus of the object crime, the Model Penal Code's approach effectively draws the line between attempt and preparation further back in the continuum of preparatory acts leading to culmination of the object offense. The Code's subjective approach also comes
desist or perform acts that he realizes would incriminate him if all external
facts were known, then in all probability a firmer state of mind exists.


The drafters of the Model Penal Code looked more favorably on the rationale behind
the equivocality approach—i.e., that the essential purpose of the criminal law is to
restrain dangerous persons rather than to deter dangerous or potentially dangerous
conduct. Id. § 5.01 commentary at 331. Nevertheless, the drafters rejected the "res ipsa
loquitur" or "unequivocality" test devised by Justice Salmond of New Zealand. As he

An act done with intent to commit a crime is not a criminal attempt unless it
is of such a nature as to be in itself sufficient evidence of the criminal intent
with which it is done. A criminal attempt is an act which shows criminal intent
on the face of it. The case must be one in which res ipsa loquitur.

Id. at 874 (Salmond, J.). For another early expression of support for the res ipsa loquitur
test, see, e.g., J. SALMOND, JURISPRUDENCE 388–89 (G. Williams 10th ed. 1947). Under
this test, the actus reus serves as the only proof of the intent and can have no purpose
other than the commission of the specific object crime. Id.

The drafters of the Model Penal Code criticized this test on the ground that it did not
consider other evidence of purpose, such as the actor's confession or another's testi-
mony about the actor's representations of intent. Because few instances of conduct are
so unequivocal as to manifest purpose, the drafters reasoned that such a rigid standard
might exclude from liability externally equivocal acts guided by an unequivocal purpose
that prosecutors could corroborate using other means. MODEL PENAL CODE § 5.01

The Model Penal Code proposes three alternative subsections under which attempt liability can be im-
posed. Id. § 5.01(1). Subsection (a) covers cases in which the defendant mistakenly
believes that he has satisfied the actus reus of the substantive offense. Subsection (b)
punishes a defendant who believes that he has done everything necessary to cause the
prohibited result. Subsection (c) imposes liability on a defendant who believes that he
has taken a substantial step toward committing the object crime. Id.

If the defendant believes that he has completed the offense (subsection (a)), or has
done everything necessary to cause the prohibited result (subsection (b)), then he
necessarily has taken a substantial step toward committing the object crime. Thus, the
substantial-step requirement includes the other cases. On the proper relationship among
the three subsections, see Robbins, supra note 11, at 422–30.

The drafters criticized proximity tests as vague and one-dimensional, emphasizing
physical and temporal proximity with insufficient regard to the dangerousness of the
actor's personality, as demonstrated only partially by the dangerousness of his actions.
MODEL PENAL CODE § 5.01 commentary at 321–24 (Proposed Official Draft 1985). The
drafters noted several cases in which criminal purpose was clear, but in which the
defendant's actions were classified as preparatory only. Id. at 328.
closer to punishing evil intent alone, but seeks to mitigate this criticism by defining substantial step—the actus reus—in terms of acts that constitute necessary elements of specific offenses. The acts from which the Code allows factfinders to infer wrongful intent and a resolute purpose to realize that intent, however, include acts not necessarily unlawful in themselves.

B. Crimes in the Nature of Attempt

Prosecution for the substantive crime of attempt is just one means by which the criminal law can reach conduct that merely tends toward the commission of a completed offense. Several other substantive crimes also have major inchoate elements. These include assault and burglary, which originally dealt with the most common forms of attempt prior to recognition of attempt as a discrete substantive offense, and the category of offenses prohibiting possession of materials that the actor would be likely to use to commit a crime.

1. Assault

At common law, a criminal assault was defined as an attempt, combined with present ability, to commit a battery. Any crim-
nal assault was a misdemeanor.\textsuperscript{53} Because the law of assault crystallized before the law of attempt, the element of present ability requires an act with closer proximity to the completed act—the causing of bodily injury contemplated by battery—than does an attempt.\textsuperscript{54} Nevertheless, many courts\textsuperscript{55} and commentators\textsuperscript{56} have contended that, because assault is itself

28 (1889) (pointing an unloaded gun at another is not assault if assault is defined as attempted battery, coupled with present ability) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)); Smith v. State, 32 Tex. 593, 593 (1870) (defendant was not guilty of assault because he did not have the ability to commit battery even though he manifested his intention to do so by threatening gestures and accompanying words).

As evinced by the decisions above, actual present ability or the defendant’s belief that he possessed present ability was required. In most jurisdictions, however, apparent present ability is sufficient. See, e.g., Wells v. State, 108 Ark. 312, 314–15, 157 S.W. 389, 390 (1913) (defendant who advanced with a knife toward a fleeing party was guilty of assault because assault required apparent rather than actual ability); Macon v. State, 295 So. 2d 742, 745 (Miss. 1974) (if the defendant resists arrest with an unloaded gun, he is guilty of assault with a deadly weapon because he effectively can resist arrest or may cause the sheriff to shoot him, regardless of whether the gun is loaded); State v. Machmuller, 196 Neb. 734, 738–39, 246 N.W.2d 69, 72 (1976) (a person who points an unloaded weapon at another is guilty of assault if the person aimed at does not know whether the gun is loaded but has no reason to believe that it is unloaded); State v. Curtis, 14 Wash. App. 735, 736, 544 P.2d 768, 769 (1976) (one may commit second-degree assault with an apparently loaded gun that is in fact unloaded because it is apparent rather than actual present ability which gives effect to attempt); State v. Thompson, 13 Wash. App. 1, 3, 533 P.2d 395, 397 (1975) (apparent power is the only prerequisite of a statute punishing assault with a weapon likely to produce bodily harm).

\textsuperscript{53} MODEL PENAL CODE \textsection 211.1 commentary at 174–80 (Proposed Official Draft 1980).

At common law, assault was but an attempt to commit a battery. Battery was a misdemeanor that punished any unlawful application of force to another willfully or in anger. There was no common-law offense of aggravated battery. Attacks resulting in injuries short of mayhem—intentional disfigurement of a disabling character—were treated as ordinary batteries. Thus, all assaults were misdemeanors at common law.

The penalty at common law for a misdemeanor, however, was theoretically unlimited. Thus, the common law punished assaults and attempts with relative severity even though they were classified as misdemeanors. G. WILLIAMS, supra note 16, at 606–07.

\textsuperscript{54} See, e.g., State v. Davis, 23 N.C. 125, 127 (1840) (an actor does not commit an assault until he begins to execute violence); Fox v. State, 34 Ohio St. 377, 380 (1878) (assault is an act done toward the commission of a battery only if the next act would appear to complete the battery); State v. Mortensen, 95 Utah 541, 550–51, 83 P.2d 261, 265–66 (1938) (Hansen, J., dissenting) (to prove an attempted rape, the prosecution may prove an overt act that falls short of assault).


\textsuperscript{56} E.g., 1 W. BURDICK, LAW OF CRIME \textsection 135, at 176–77 (1940) ("Thus embracery is an attempt to bribe a juror, an assault an attempt to commit battery, and there can be no attempt to commit these offenses."); W. CLARK & W. MARSHALL, CRIMES 246 (7th ed. 1967) ("There can be no such offense as an 'attempt to attempt' a crime. Since a simple assault is nothing more than an attempt to commit a battery, and aggravated assaults are nothing more than attempts to commit murder, rape, or robbery, an attempt to commit an assault, whether simple or aggravated, is not a crime."); 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 227 (1883) ("It is singular, but it is
an attempt to commit a battery, the crime of attempted assault cannot exist.

Currently, a few American jurisdictions define assault as an attempt to commit a battery or to produce bodily harm, while several more add to this definition the requirement that the actor have a present ability to commit the battery. A majority of states have weakened the inchoate aspect of assault by defining it in the alternative as an unlawful act that places another in reasonable apprehension of an immediate battery. This ad-junctive definition not only broadens the concept of criminal assault to include aspects of assault's definition in tort, but also treats assault as a substantive offense with a different mental element than battery—an intent to put another in apprehension of a battery, rather than an intent to commit a battery. In addition, an increasing number of states, following the Model Penal Code, have entirely eliminated the inchoate aspect of assault by redefining assault to constitute the completed offense of battery.

also true, that there are a large number of crimes which it is impossible to attempt to commit. . . . [A] man could hardly attempt to commit perjury, or riot, or libel, or to offer bad money, or to commit an assault, for an attempt to strike is an actual assault.


See People v. Gardner, 402 Mich. 460, 479, 265 N.W.2d 1, 7 (1978) (defining simple assault as either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of an immediate battery); CAL. PENAL CODE § 240 (West 1988); IDAHO CODE § 18-901(a) (1987); KAN. STAT. ANN. § 21-3408 (1981) ("apparent ability" requires an "immediate apprehension of bodily harm"); S.D. CODIFIED LAWS ANN. § 22-18-1(1) (1988); WYO. STAT. § 6-2-501(a) (1988).


For discussion of the incorporation of the tort concept of assault into the criminal law, see generally R. PERKINS & R. BOYCE, supra note 13, at 161-63; Perkins, An Analysis of Assault and Attempts to Assault, 47 MINN. L. REV. 71, 74-76 (1962).

For a listing of states that have adopted this approach and a discussion of the Model Penal Code provision from which it derives, see infra note 538.
All of the states retaining the traditional definitions of assault have expanded the concept statutorily by codifying so-called "aggravated assaults" as distinct felony offenses. The aggravating circumstance that justifies the more serious punishment usually includes a grievous intent in the mind of the assailant, such as in assault with intent to kill, or suggests a dangerous means of perpetration, such as in assault with a deadly weapon. Some states have also enacted general aggravated-assault statutes that penalize an assault to commit any felony not otherwise provided for by statute. Consequently, an assault with intent to commit a particular crime is the same as an attempt to commit that crime, except that the former requires a greater degree of proximity.

2. Burglary

At common law, burglary was defined as the breaking and entering into the dwelling house of another at night with the intent to commit a felony therein. The common law classified burglary, with arson, as a crime against habitation rather than as a crime against property. The distinction reflected the greater likelihood of violence incident to burglary, and justified

---

62 See, e.g., CAL. PENAL CODE § 220 (West 1988) (with intent to commit rape, mayhem, sodomy, or oral copulation); GA. CODE ANN. § 16-5-21(a)(1) (1984 & Cum. Supp. 1987) (with intent to murder, rape, or rob); MASS. ANN. LAWS ch. 265, §§ 15 (with intent to murder or maim), 18 (with intent to rob, being armed), 18A (with intent to commit felony during burglary), 20 (with intent to rob, not being armed) (Law. Co-op. 1980 & Cum. Supp. 1987); TENN. CODE ANN. §§ 39-2-102 (with intent to commit felony), 39-2-103 (with intent to murder), -104 (with intent to rob) (1982); VA. CODE §§ 18.2-51 (1982) (shooting, stabbing, etc., with intent to maim, kill, etc.).

63 See, e.g., CAL. PENAL CODE §§ 244 (with caustic chemical), 245 (with deadly weapon) (West 1988); MASS. ANN. LAWS ch. 265 § 15B(b) (Law. Co-op. 1980 & Cum. Supp. 1987) (using dangerous weapon); MICH. COMP. LAWS ANN. § 750.82 (West 1968) (with dangerous weapon); N.M. STAT. ANN. § 30-3-2(a) (1978) (with deadly weapon); N.C. GEN. STAT. § 14-34.2 (1986 & Supp. 1987) (with dangerous weapon on police officer, fireman, or emergency medical-services personnel); OKLA. STAT. ANN. tit. 21, § 645 (West 1983) (with dangerous weapon).


65 R. PERKINS & R. BOYCE, supra note 13, at 172.

66 Id. at 246; cf. Comment, Breaking as an Element in Burglary, 23 YALE L.J. 451, 466 (1914) (noting early statutes that eliminated the distinction between dwellings and other structures and conveyances).

treating the offense as a felony. Likewise, the importance the common-law courts accorded the security of the home and the increased chance of violence to the dwelling's inhabitants, as well as the undeveloped state of attempt law, justified imposing liability on an actor before he completed the intended felony.

Burglary at common law was but a form of attempt, in which the required elements merely constituted a step taken toward the commission of some other offense. Statutory revision of the elements of burglary, however, has resulted in an offense even more similar to attempt. Burglary is no longer limited to dwellings, but in most jurisdictions embraces any structure, including uninhabited buildings, tents, boats, cars, and even motorcycles. Most jurisdictions have abolished the requirements of breaking and of committing the offense under cover

68 W. LAFAVE & A. SCOTT, supra note 11, at 800; Note, Rationale of the Law of Burglary, 51 COLUM. L. REV. 1009, 1022-23 (1951); Note, supra note 67, at 411.
69 W. LAFAVE & A. SCOTT, supra note 11, at 800; Note, supra note 91, at 1020.
70 Model Penal Code § 221.1 commentary at 62–63 (Proposed Official Draft 1980). The Code’s commentators contended that burglary developed due to the common law’s strict proximity requirement for attempt, rather than as a substitute for the as yet undeveloped attempt law. Id.
71 See Note, supra note 67, at 433–40 (noting effacement of the distinction between elements of attempt and burglary and decrying fact that they are inconsistently punished).
72 See, e.g., ALASKA STAT. § 11.46.310 (1983) (any building for second-degree burglary); CONN. GEN. STAT. ANN. § 53a-103 (West 1985) (buildings); MD. ANN. CODE art. 27, §§ 31B–33 (1982); N.Y. PENAL LAW §§ 140.20, -25 (McKinney 1987); 18 PA. CONS. STAT. ANN. § 3502(a) (Purdon 1983) (limited to occupied structures).

Most state statutes, however, treat burglary of a dwelling or inhabited building as a higher degree of the offense. See, e.g., FLA. STAT. ANN. § 810.023 (West 1976 & Supp. 1988) (upgrading burglary if "there is a human being in the structure or conveyance at the time the offender entered or remained in the structure or conveyance"); HAW. REV. STAT. § 708-810(1)(c) (1985) (enhancing sentence for offender who "recklessly disregards a risk that a building is the dwelling of another, and the building is such a dwelling"); LA. REV. STAT. ANN. § 14:60 (West 1986) (includes any structure or conveyance in which a person is present if the defendant is armed with a dangerous weapon or commits a battery while committing the burglary); Mo. ANN. STAT. § 569.160(1)(3) (Vernon 1979) (if "[i]there is present in the structure another person who is not a participant in the crime"); S.C. PENAL CODE ANN. § 16-11-310 to -311 (Law. Co-op. 1985 & Cum. Supp. 1987).


of the night. Also, most jurisdictions have diluted the specific-intent requirement by expanding the scope of the object offense to include all crimes, rather than only felonies. The modern law of burglary thus aims to protect not only persons in their dwellings, but also people and property within any structure.

Burglary is distinguished from attempt in that it is not subject to the rule of merger. An actor who makes an unprivileged entry into a structure and commits a crime therein is criminally liable for both the completed offense and the burglary. Thus,
the crime of burglary allows punishment for the offense committed and also for the attempt to commit it in a particular manner—by making an unprivileged entry.\textsuperscript{79} Compounded liability is imposed to punish both aspects of intent in burglary: (1) the intent to make an unlawful entry; and (2) the added mental element of intent to commit another offense within the violated structure.\textsuperscript{80}

3. Constituent-Element Crimes

Many modern criminal codes include offenses defined in terms of conduct in itself arguably harmless, but still penalized because it very likely constitutes a step towards the harm punished by a completed offense. These crimes include the possessor offenses—such as possession of burglars’ tools,\textsuperscript{81} possession of People v. White, 115 Cal. App. 2d 828, 829–30, 253 P.2d 108, 109 (1953) (upholding convictions and consecutive sentences for burglary, robbery, and assault with a deadly weapon arising from failed theft from store) (superseded by statute as stated in People v. Burns, 157 Cal. App. 3d 185, 203 Cal. Rptr. 594 (1984)); Jenkins v. State, 240 A.2d 146, 148–49 (Del. 1968) (upholding convictions for burglary and felony murder arising from same unauthorized entry), aff’d sub nom. Jenkins v. Delaware, 395 U.S. 213 (1969).

\textsuperscript{79} \textit{See} State v. Benton, 161 Conn. 404, 411, 288 A.2d 411, 414 (1971) (crime of breaking and entering is a distinct offense that is complete without actual larceny).

\textsuperscript{80} \textit{See} Mead v. State, 489 P.2d 738, 742 (Alaska 1971) (allowing merger “would ignore the law’s traditional view that breaking and entering is itself a serious offense”). \textit{But see} MODEL PENAL CODE § 211.1 commentary at 61–66 (Proposed Official Draft 1980); Comment, Burglary: Punishment Without Justification, 1970 U. ILL. L.F. 391. The expanded, modern definition of burglary has become increasingly subject to criticism. With the expansion of the concept of “dwelling” to include almost any structure and the relaxation of the requirement of “night,” the chance that the structure will be inhabited during the unlawful entry is greatly reduced. Consequently, the greater possibility of danger over other trespasses that the earlier concept of burglary aimed to deter is no longer a consideration in the offense’s rationale.

Furthermore, by relaxing the specific-intent requirement to include almost any completed offense and imputing from the mere fact of entry the intent to commit a crime therein, courts punish burglary far more severely than most of the offenses that the defendant might commit within the structure. Combined with the possibility of punishment for both the burglary and the completed offense committed within the structure—a practice allowed in almost all jurisdictions—modern burglary statutes create an unjustifiable disparity: a defendant who attempts to commit a crime within a structure can be punished far more severely than if he completed the offense a few feet away. It is difficult to see that a crime necessarily entails more harm when it is committed in a building or a car, so as to justify the imposition of additional punishment. \textit{Note, supra} note 68, at 1024–25.

a forged instrument with intent to issue or use it,82 possession of narcotics with intent to distribute them,83 possession of an instrument adapted for the use of narcotics by subcutaneous injection,84 possession of a weapon with intent to use it against another unlawfully,85 and possession of explosives with intent to use them in committing an offense.86

The rationale behind punishing these offenses is that it is improbable that an individual would possess such materials unless he intended to use them to commit a specific crime.87 To a large extent, the law imputes an intent to commit a completed crime to the mere act of possession.88 For example, most stat-


87 See J. HALL, supra note 10, at 384-85.

88 See Model Penal Code § 5.01 commentary at 342-43 (Proposed Official Draft 1985) (possession of incriminating materials is a "substantial step" toward commission of the completed offense). The Code's drafters noted:
utes penalizing possession of narcotics with intent to distribute erect a legal presumption that the added mental element exists if the defendant was holding a certain controlled substance or more than a specified quantity of the controlled substance.9

Also, in some jurisdictions, the possession of a controlled firearm such as a sawed-off shotgun or an automatic weapon raises a presumption that the possessor intended to use it for an unlawful purpose.90

In addition to possessory crimes, some jurisdictions punish conduct that constitutes only part of the conduct required by a specific completed offense.91 These substantive offenses are defined in terms of using certain items for a particular purpose,92 offering to perform an illegal act,93 attracting an intended victim,94 or being in a certain place for a bad purpose.95 This
category of offenses shares with the Model Penal Code's definition of attempt the underlying purpose of punishing an actor for those acts that he has already committed, rather than the proximity of his acts to a completed offense. As with the Code's definition of attempt, "these statutes reach conduct that is merely preparatory" as measured by traditional proximity standards and, therefore, "is not encompassed within most jurisdictions' general law of attempts."

C. Conspiracy

The modern concept of conspiracy as a separate substantive crime originated in the seventeenth-century English courts. The common law defined conspiracy as a combination of two or more persons to perform an unlawful act or a lawful act by unlawful means. Like burglary, the mental element of conspiracy has a dual aspect: (1) an intent to agree to commit an offense; and (2) the added mental element of an intent to commit a specific target crime. Also as with burglary, the common law does not generally merge the conspiracy into the target

in prostitution). But cf. OR. REV. STAT. § 167.222 (1987) (prohibiting persons from "frequenting a place where controlled substances are used").

96 See supra notes 45–49 and accompanying text (discussing Model Penal Code definition of attempt). An early example of the constituent-act approach is the Waltham Black Act of 1722, 9 Geo. 1, ch. 22. The Act punished persons who went about armed and disguised, or merely disguised. The original intent of the Act was to curb depredations by masked bandits, particularly in Waltham, Hampshire, where the followers of Robin Hood committed their deeds with their faces blackened. The scope of the Act's prohibition against acts of violence, however, allowed more widespread use. On several occasions, it was used to punish undisguised individuals who shot at others. I. Radzinowicz, A History of English Criminal Law 49-56 (1948).


98 W. LaFave & A. Scott, supra note 11, at 497–98.


100 See Rex v. Jones, 110 Eng. Rep. 485, 487 (1832) (conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means"); Rex v. Journeymen Taylors of Cambridge, 88 Eng. Rep. 9, 10 (1721) ("a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it").

offense if both are successfully completed. Rather, both the common and statutory law of conspiracy allow the compounding of penalties for conspiracy and its realized object offense. Statutory revision of the offense produced a hierarchy of penalties comparable in relative magnitude to the object crimes. Although some statutes require only the act of agreement, most jurisdictions require an overt act in furtherance of the conspiracy. The common law and many modern statutes require the agreement of two or more parties to constitute the actus reus of conspiracy.

---

102 See Pinkerton v. United States, 328 U.S. 640, 641, 643 (1946) (crime of tax fraud did not merge with distinct crime of conspiring to commit tax fraud); Johl v. United States, 370 F.2d 174, 177 (9th Cir. 1966) (because it is possible to make a false statement to immigration agency without conspiring, the crime of conspiring to marry for the sole purpose of upgrading immigration status did not merge with the completed offense); People v. Ormsby, 310 Mich. 291, 297, 17 N.W.2d 187, 189-90 (1945) (court can convict defendant of conspiracy to violate gambling laws even if it does not find substantive offense); People v. Cadle, 202 Misc. 415, 417-19, 114 N.Y.S.2d 451, 452-55 (N.Y. Sup. Ct. 1952) (crime of conspiracy to conduct a lottery constituted a distinct offense for which indictment was proper, even though the prosecution had also charged the completed offense).


106 The Model Penal Code considers the seriousness of the target crime to determine whether an overt act in furtherance of the agreement is required. MODEL PENAL CODE § 5.03(5) (Proposed Official Draft 1985) ("No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.").

The Model Penal Code and many jurisdictions, however, have adopted the notion of unilateral conspiracy. This concept limits the defense of impossibility to agree by holding liable any party who believes he has consummated an agreement, even though the other party is incapable of committing the crime, immune to prosecution for it, or only pretending to go along with the importuning party's scheme.

Like burglary, the purpose behind the substantive offense of conspiracy is twofold: (1) preventing a completed offense; and (2) punishing a special danger. While burglary focuses on the violence incident to breach of the dwelling, conspiracy focuses on the additional dangers inherent in group activity. In theory, once an individual reaches an agreement with one or more persons to perform an unlawful act, it becomes more likely that the individual will feel a greater commitment to carry out his original intent, providing a heightened group danger.
As an inchoate crime, conspiracy allows law-enforcement officials to intervene at a stage far earlier than attempt does. To obtain an attempt conviction, the prosecutor must prove that the actor performed an act beyond mere preparation or took a substantial step toward committing a completed crime. To obtain a conspiracy conviction, however, the prosecutor need only prove that the conspirators agreed to undertake a criminal ability to arrest its development if he decides to abandon it. In complex criminal schemes that require the involvement of two or more actors, the division of labor made possible by combined efforts increases the probability of success. W. LAFAVE & A. SCOTT, supra note 11, at 531. This group-danger rationale provides an explanation, inter alia, for compounding the sentences for conspiracy and its realized object, imposing vicarious liability on co-conspirators for one conspirator's acts, and allowing a concomitant exception to the hearsay rule for co-conspirators' statements. MODEL PENAL CODE § 5.03 commentary at 389 (Proposed Official Draft 1985).

The relaxation of procedural and substantive safeguards in conspiracy prosecutions has made the offense a favorite weapon of prosecutors, but also has made it an object of judicial and academic criticism. See generally Krulewitch v. United States, 336 U.S. 440, 452-53 (1949) (Jackson, J., concurring) (arguing that relaxation of procedural safeguards in conspiracy trials infringes on defendants' rights); Goldstein, The Krulewitch Warning: Guilt by Association, 54 GEO. L.J. 133 (1965); Klein, Conspiracy—The Prosecutor's Darling, 24 BROOKLYN L. REV. 1 (1957); Developments in the Law—Criminal Conspiracy, supra.

Criticism arises from the dangers of prejudice to individual defendants inherent in the prosecution of criminal organizations—the primary danger being that a defendant will be tarred by the same brush used to mark the guilt of a codefendant. The past use of conspiracy law against labor organizers and political protestors has also emphasized the conflict of conspiracy law's reliance on the group-danger rationale with the freedoms of speech and association guaranteed by the first amendment. See generally Nathanson, Freedom of Association and the Quest for Internal Security: Conspiracy from Dennis to Dr. Spock, 65 NW. U.L. REV. 153 (1970).

Indeed, critics of the Model Penal Code's unilateral-conspiracy approach rely on the premises of the group-danger rationale. One commentator argued that

[the so-called unilateral approach does make some sense. As the supporters say, the unsuccessful conspirator did try to conspire so his state of mind is clearly a criminal one. True enough, but did he enter into a conspiracy? After all, the conspiracy charge subjects a defendant to criminal liability at a stage earlier than any other inchoate offense and may raise grave procedural problems at the time of trial. And, the reason for such results is that there is a special, added danger, resulting from group planning. Yet, in the unilateral situation there is no conspiracy, no added group danger, for the fact remains that there was not an agreement between two persons. The defendant may have wanted to agree, may have intended to agree, and may have even believed he had agreed; but there was no agreement, no true planning by two or more persons, no meeting of the minds between the parties.

P. MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES § 2.04, at 2-11 to 2-12 (1988) (footnotes omitted).]  

[MODEL PENAL CODE § 5.03 commentary at 387–88 (Proposed Official Draft 1985).]
scheme or, at most, that they took an overt step in pursuance of the conspiracy.116 Even an insignificant act may suffice.117

D. Solicitation

Solicitation, or incitement,118 is the act of trying to persuade another to commit a crime that the solicitor desires and intends to have committed.119 The mens rea of solicitation is a specific intent to have someone commit a completed crime.120 As in common-law conspiracy, disclosure of the criminal scheme to another party constitutes a part of the actus reus of solicitation.121 But, while the actus reus of a conspiracy is an agreement

116 Id. at 387. Because most conspiracies are secret, the prosecution can rarely present direct evidence of the agreement. Thus, prosecutors frequently must "rely on inferences drawn from the course of conduct of the alleged conspirators." Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939); see also W. LaFave & A. Scott, supra note 11, at 530, 531 (discussing element of agreement).


An act by a conspirator is sufficient to implicate all parties to the conspiracy. See, e.g., Blumenthal v. United States, 332 U.S. 539, 556–57, 559 (1947); United States v. Rabinowich, 238 U.S. 78, 86 (1915); Bannon v. United States, 156 U.S. 464, 468 (1895).

The special-danger rationale modifies the standards defining attempt by treating the act of engaging another in a criminal scheme as an act unequivocally manifesting the actor's criminal intent:

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

Model Penal Code § 5.03 commentary at 388 (Proposed Official Draft 1985). Conspiracy law's focus on the agreement as the harmful act, however, reflects a policy that seeks to minimize the danger of attaching liability to equivocal acts that only appear to further a substantive offense. Id.

118 See generally Robbins, supra note 19, at 1502 (noting that among the terms used with solicitation are: advising, attempting to persuade another, counseling, encouraging, enticing, entreating, hiring, importuning, inciting, instigating, procuring, requesting, stimulating, and urging).

119 W. LaFave & A. Scott, supra note 11, at 486; Robbins, supra note 19, at 1502.

120 W. LaFave & A. Scott, supra note 11, at 489–90; see 18 U.S.C. § 373 (Supp. IV 1986).

121 Model Penal Code § 5.02 explanatory note at 365; id. commentary at 368–69 (Proposed Official Draft 1985).
with another to commit a specific completed offense, the actus reus of a solicitation includes an attempt to persuade another to commit a specific offense. A necessary element of solicitation is the solicitant’s rejection of the solicitor’s request. Thus, solicitation can be viewed as an attempt to conspire.

The view that the judicial system should punish one who unsuccessfully solicits another by reason of the solicitation itself

---

122 See Rex v. Sterling, 83 Eng. Rep. 331 (1663) (all but one judge held that no overt act was needed; the remaining judge held the unlawful gathering or combination to be the act required); see also Hyde v. United States, 225 U.S. 347, 359 (1912) (“at common law it was not necessary to aver or prove an unlawful act”).

123 See, e.g., People v. Burt, 45 Cal. 2d 311, 314, 288 P.2d 503, 505 (1955) (it is immaterial that the actor neither consummated nor took any steps toward consummating the object of solicitation, because the offense of solicitation is complete when the actor solicits another to commit a crime); People v. Haley, 102 Cal. App. 2d 159, 164–65, 277 P.2d 48, 51 (1951) (person who solicits another to commit or to join in committing an offense is guilty even though the offense solicited is never committed and the other person rejects the importunity); State v. Hampton, 210 N.C. 283, 285, 186 S.E. 251, 252 (1936) (rejecting defendant’s contention that interposition of a resisting will between his bare solicitation and the proposed act afforded him the opportunity to withdraw the solicitation, because solicitation was complete before the resisting will refused to assent or cooperate).

The Model Penal Code’s drafters explained the rationale behind punishing solicitation:

Purposeful solicitation presents dangers calling for preventive intervention and is sufficiently indicative of a disposition towards criminal activity to call for liability. Moreover, the fortuity that the person solicited does not agree to commit or attempt to commit the incited crime plainly should not relieve the solicitor of liability, when otherwise he would be a conspirator or an accomplice.

MODEL PENAL CODE § 5.02 commentary at 366 (Proposed Official Draft 1985). Thus, to allow a solicitor to defend on the ground that the solicitant refused to commit the object offense effectively would nullify the crime of solicitation. Illustrating this principle, one commentator explained that,

[i]f the solicitant agrees to commit the crime, both he and the solicitor are liable for conspiracy; if the solicitant attempts to commit the crime, both are liable for attempt; if the solicitant actually completes the crime, the solicitor is liable, under principles of accomplice liability, for being either an accessory before the fact or a principal in the crime that he solicited. Only when the solicitant rejects the request is the solicitor liable for the crime of solicitation. Robbins, supra note 19, at 1502.

124 R. PERKINS & R. BOYCE, supra note 13, at 649–52. If the party solicited acts on the solicitor’s suggestion and goes far enough to incur guilt for a more serious offense, then the solicitor is also guilty of the more serious offense, rather than the solicitation. See State v. Jones, 83 N.C. 605, 607 (1881) (woman who advised or procured rape was guilty as principal). If the party solicited goes far enough to incur liability for attempt, then the solicitor is also guilty of attempt. Id. at 606–07; Uhl v. Commonwealth, 47 Va. 706, 709–11 (1849). If the solicited party consummates the object crime, then both he and the solicitor are guilty of the completed crime. People v. Harper, 25 Cal. 2d 862, 877, 156 P.2d 249, 257–58 (1945); State v. Primus, 226 N.C. 671, 674–75, 40 S.E.2d 113, 115 (1946).

Double Inchoate Crimes

is a recent development in criminal jurisprudence. Viewed solely as an inchoate offense, solicitation appears to impose criminal liability on an act that presents no significant social danger, and approaches punishing evil intent alone. Penalties for solicitation allow the judiciary to punish conduct far back on the continuum of acts leading to a completed crime—conduct that constitutes “mere preparation” by attempt standards.

The rationale for the substantive offense of solicitation is that, like conspiracy, it treats the special hazards posed by potential concerted criminal activity. As with conspiracy, the special-danger rationale modifies the standards of attempt to place liability at a far earlier stage than in an attempt. The act of revealing the criminal scheme to another extends beyond mere preparation because the act is so unequivocal as to make evident the solicitor’s criminal intent.

Solicitation developed as a common-law notion, but American jurisdictions increasingly have defined the offense statuto-

---


127 See 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 370 (1970) (“[D]espite the earnestness of the solicitation, the actor is merely engaging in talk which may never be taken seriously.”). By placing an independent actor between the potential crime and himself, the solicitor has both reduced the likelihood of success in the ultimate criminal object and manifested an unwillingness to commit the crime himself. See State v. Davis, 319 Mo. 1222, 1236, 6 S.W.2d 609, 615 (1928) (White, J., concurring) (solicitor is not significant menace since he has manifested his reluctance to commit the crime himself); People v. Werblow, 241 N.Y. 55, 64-65, 148 N.E. 786, 790 (1925) (solicitor is not dangerous because he has placed the will of an independent moral agent between him and the commission of the offense).


129 MODEL PENAL CODE § 5.02 commentary at 365–66 (Proposed Official Draft 1985). The Code’s drafters reasoned that a solicitation is, if anything, more dangerous than a direct attempt, because it may give rise to the special hazard of cooperation among criminals . . . . Moreover, the solicitor, working his will through one or more agents, manifests an approach to crime more intelligent and masterful than the efforts of his hireling.

Id.

130 See 1 J. TURNER, RUSSELL ON CRIME 201–02 (12th ed. 1964).


132 See, e.g., Meyer v. State, 47 Md. App. 679, 686 n.5, 425 A.2d 664, 668 n.5 (solicitation is a common-law offense in Maryland, but it is unclear whether it is limited to felonies), cert. denied, 454 U.S. 865 (1981); State v. Furr, 292 N.C. 711, 720, 235 S.E.2d 193, 199 (solicitation of another to commit a felony is an indictable offense under
Unlike the common law, which generally and vaguely described the object crimes that solicitation covered as those that breached the public peace, current state statutes define the offense’s coverage to restrict judicial discretion. Most states impose penalties for soliciting the commission of any crime, but some states and the federal government apply solicitation only to felonies. Others specifically enumerate the particular object felonies subject to solicitation charges.

The Model Penal Code’s solicitation provisions broaden the scope of solicitation statutes to reach more behavior, in three common law in North Carolina, cert. denied, 434 U.S. 924 (1977); see also United States v. MacCloskey, 682 F.2d 468, 474 n.12 (4th Cir. 1982) (noting North Carolina’s recognition of solicitation of felony as a common-law offense).


Some statutes punish the attempt to solicit. See HAW. REV. STAT. § 705-510(2) (1985); see also 18 U.S.C. § 373 (Supp. IV 1986) (punishing one who solicits another to commit a felony in violation of federal statutes that have as an element the use or attempted or threatened use of physical force against the person or property of another).

For discussion of the common-law scope of solicitation, see W. LAFAVE & A. SCOTT, supra note 11, at 486; R. PERKINS & R. BOYCE, supra note 13, at 649–54. For examples of the scope of solicitation in American jurisdictions, see infra notes 135–137 and accompanying text.

In both England and the United States, solicitation of another to commit a felony or a misdemeanor that would breach the peace, obstruct justice, or otherwise disturb the public welfare was a misdemeanor at common law. See, e.g., State v. Avery, 7 Conn. 266, 270–71 (1828); Commonwealth v. Flagg, 135 Mass. 545, 549 (1883); State v. Hampton, 210 N.C. 283, 284–85, 186 S.E. 251, 252 (1936); State v. Blechman, 135 N.J.L. 99, 101, 50 A.2d 152, 153–54 (1946); Regina v. Gregory, 10 Cox Crim. Cas. 459, 461–62 (1867). In the United States, there is no reported decision that holds that solicitation of any misdemeanor is a common-law offense. W. LAFAVE & A. SCOTT, supra note 11, at 487.


See, e.g., COLO. REV. STAT. § 18-2-301 (1986); GA. CODE ANN. § 16-4-7 (1988); IOWA CODE ANN. § 705.1 (West 1979) (also aggravated misdemeanors); LA. REV. STAT. ANN. § 14:28 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 153 (1983) (only crimes with maximum penalties exceeding five years); VA. CODE ANN. § 18.2-29 (1988).


Whatever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against the person or property of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, [shall be guilty of a crime].


ways. First, the Code imposes liability for the solicitation of any crime. Second, the Code incorporates the double inchoate offense of attempt to solicit by making the solicitor’s failure to communicate the criminal scheme immaterial as long as he acted on his intent to effect such communication. Third, the Code defines the actus reus of solicitation as acting “with the purpose of promoting or facilitating” the commission of a crime. This language incorporates the crime of facilitation into the solicitation provision. Facilitation, viewed as both a lower level of complicity and as an inchoate crime, punishes the individual who knowingly provides assistance to another who intends to commit a crime.

The Code’s solicitation provisions appear to have influenced some states to penalize solicitation as harshly or almost as harshly as the completed object crime. The common-law courts traditionally treated solicitation as a less serious offense than the object crime or an attempt to commit it. Most states with solicitation statutes continue this pattern by providing penalties either less stringent than those for attempt or one grade lower than the range of sanctions for the object crime. Several states, however, following the Model Penal Code, have enacted

---

139 Id. § 5.02(1).
140 Id. § 5.02(2). For one example of such a situation, see Regina v. Banks, 12 Cox Crim. Cas. 393 (Wor. Sp. Assizes 1873), in which the defendant was convicted of attempted solicitation where he had mailed an inciting letter to a prospective solicitee but the letter was never received. A modern-day analog might be leaving a soliciting message on the prospective solicitee’s telephone-answering machine but the tape is intercepted, or the solicitee never hears it, or the machine malfunctions and the recording is never made.

Another possible double inchoate construction with regard to solicitation is soliciting a solicitation. See State v. Davis, 319 Mo. 1222, 6 S.W.2d 609 (1928) (A solicited B to solicit C to commit a killing; court suggested that defendants would be guilty of solicitation); see also Regina v. Bodin and Bodin, [1979] Crim. L.R. 176 (dismissing incitement prosecution in similar situation).

141 MODEL PENAL CODE § 5.02(1) (Proposed Official Draft 1985). Thus, the Code establishes liability for a solicitant’s conduct under a complicity approach as well as under an inchoate-crime approach. See also id. § 2.06(3)(a) (parallel language in Code’s complicity provision).

142 Id. § 5.02(1). The Code also uses this language in its conspiracy provision. Id. § 5.03(1).

143 For further discussion of facilitation, see infra note 578 and accompanying text.

144 See infra notes 146–147 and accompanying text (discussing state statutory penalties for solicitation).

145 See supra note 132 and accompanying text (discussing cases that held that soliciting a felony was only a common-law misdemeanor).

II. The Perceived Need for Double Inchoate Crimes

In the last century, the balance in substantive criminal law has tilted toward subjective criminality. The movement to penalties for solicitation that correspond to the most serious offense solicited.


The Model Penal Code departs from this pattern of corresponding sanctions only in its treatment of solicitation of a first-degree felony, which solicitation it treats as a second-degree felony. Model Penal Code § 5.05(1) (Proposed Official Draft 1985). The Code, however, does allow some judicial discretion in reducing the degree of the offense. Id. § 5.05(2).

148 G. Fletcher, Rethinking Criminal Law 115–22, 166–74 (1978). Professor Fletcher contends that much of contemporary American criminal law reflects a tension between two contrasting theories of liability—the manifest and the subjective. The pattern of manifest criminality requires that the commission of a crime be objectively discernible at the time that it occurs. Thus, in the objective analysis, the criminal law punishes those acts that the community deems dangerous, and looks to the actor’s intent only to determine if he understands the likely result of and the circumstances surrounding his act. The prohibited act is the focus of the law, and the intent informing the act is a subsidiary issue. The law functions by means of behavioral standards preannounced by statute or decisional law, and interpreted and applied in particular cases.

By contrast, the theory of subjective criminality focuses on the individual’s intention to violate a legally protected interest. As applied to inchoate offenses, the subjective theory establishes no preannounced standards for acts that violate the law of attempts. Although the subjective theory does not dispense with the requirement of an act toward execution of the completed offense, acts not incriminating in themselves are sufficient to satisfy the requirement. The primary function of the act is to demonstrate the firmness, rather than the content, of the actor’s intent. Intent is proven not only by the act, but also by evidence such as confessions, admissions against interest, and testimony concerning the actor’s prior and subsequent conduct.

Under the objective theory, only those acts toward the commission of a crime that are so unequivocal as to arouse apprehension among witnesses—i.e., acts usually in close proximity to consummation of the crime—invoke liability. The subjective approach, however, allows imposition of punishment for acts that are more remote from completion. Although Professor Fletcher criticizes the objective approach’s heavy reliance on community standards of behavior to determine the dangerousness, and thus the punishability, of certain acts, he is more critical of the subjective approach’s focus on dangerous persons rather than on dangerous acts.

Admitting that the confinement of dangerous persons is a valid goal of the criminal-
define inchoate liability in subjective terms reflects the more general movement toward legislatively defining criminal law and the quest for earlier points of intervention.\textsuperscript{149} The trend toward subjectively defining attempts and other inchoate offenses permits earlier intervention and thus enhances the preventive work of the police.\textsuperscript{150} Proponents of the subjective approach, including the drafters of the Model Penal Code, stress that the great value of their approach is the emphasis on identifying and convicting dangerous persons, rather than on preventing dangerous acts.\textsuperscript{151}

Against the backdrop of a theory of inchoate liability that focuses on an actor’s criminal intent, some courts have expanded the range of acts that incur liability and thus permit intervention, and have authorized indictments and convictions for double inchoate offenses. The inchoate acts of attempt, conspiracy, and solicitation are relational in nature, as they exist in relation to object offenses, most usually completed crimes.\textsuperscript{152} Modern criminal codes, however, rarely address the question of whether one inchoate crime can be the object of another.\textsuperscript{153}

\textsuperscript{149} See G. FLETCHER, supra note 148, at 115–22, 166–74.

\textsuperscript{150} MODEL PENAL CODE § 5.01 commentary at 329–31 (Proposed Official Draft 1985).

\textsuperscript{151} Id. at 298. The Code’s drafters stated:

\begin{quote}

The literature and the decisions dealing with the definition of a criminal attempt reflect ambivalence as to how far the governing criterion should focus on the dangerousness of the actor’s conduct, measured by objective standards, and how far it should focus on the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime. Both criteria may lead, of course, to the same disposition of a concrete case. When they do not, the proper focus of attention is the actor’s disposition.
\end{quote}

\textsuperscript{152} See generally Robbins, supra note 11, \textit{passim}.

\textsuperscript{153} Contra ME. Rev. Stat. Ann. tit. 17-A, § 154(1) (1983) (“It shall not be a crime to conspire to commit, or to attempt, or solicit, any crime set forth in this chapter [concerning inchoate crimes].”); Tex. Penal Code Ann. § 15.05 (Vernon 1974) (“Attempt or conspiracy to commit, or solicitation of, a preparatory offense defined in this chapter is not an offense.”); see also LA. Rev. Stat. Ann. § 14:27 (West 1986). The Practice Commentary accompanying Louisiana’s general attempt provision asserts that, “if the definition of another crime includes the attempt to do something, this section cannot be employed, for then a defendant would be charged with an attempt to attempt to do an illegal act.” Id. commentary at 138.
This statutory void in defining inchoate-crime concepts has allowed courts to "pyramid" inchoate crimes to fill the gaps left in penal codes. Such gaps may include, for example, the omission of solicitation as a statutory offense or the lack of a unilateral-conspiracy provision. A statute also may create lacunae if it narrowly defines a crime with a substantive inchoate element such as burglary and the various forms of assault.

In creating double inchoate crimes, the courts exercise an authority, analogous to that of earlier courts that created common-law crimes, to extend liability to actors whose criminal intent the courts consider sufficiently dangerous or heinous to warrant judicial intervention. Although the pyramiding of the three traditional inchoate offenses could theoretically result in nine double inchoate offenses, only three categories have been the subject of extensive criminal litigation: (1) attempt to attempt; (2) attempt to conspire; and (3) conspiracy to attempt. Each of these three formulations will be discussed in turn.

A. Attempt to Attempt

The inchoate crime of attempt exists only in relation to the substantive crime attempted. When the object of an attempt is a substantive offense that does not itself contain an attempt provision, a court will apply its jurisdiction's general attempt provision to impose liability for the defendant's acts. Defendants have not successfully challenged this procedure when trial courts have applied it to "completed" offenses, such as murder. Some defendants, however, have successfully raised the issue of whether the law can punish an attempt to commit an offense

---

154 See Note, Common Law Crimes in the United States, 47 COLUM. L. REV. 1332, 1336-37 (1947) (arguing that the advantages of codifying the entire field of criminal law outweigh the advantages of retaining the common-law system of misdemeanors as a substratum to statutory coverage); cf. Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 YALE L.J. 53, 74-76 (1930) (the common-law offense of attempt allowed courts to fill gaps left in a criminal code without distorting the language of the completed offense involved).

155 See supra note 10 and accompanying text (conceptualizing inchoate offenses as "relational" crimes); supra notes 15 and accompanying text (discussing specific intent required to prove attempt).

156 See W. LAFAYE & A. SCOTT, supra note 11, at 497 (with few exceptions, general attempt statutes in American jurisdictions cover attempts to commit any felony or misdemeanor); see also supra note 25 (listing general attempt statutes).
with substantial inchoate elements, such as assault. Courts are involved in a fundamental debate: whether an attempt to attempt can exist.

Viewed as an abstract principle, the construction of attempt to attempt presents the possibility of regression *ad infinitum,* with the concomitant distortion of the attempt concept’s protections against punishment for equivocal behavior. An indictment for the attempt to attempt a substantive crime would ask a court to punish the defendant for acts that would not qualify under the jurisdiction’s definition of attempt. No American court, however, has faced the issue raised by such an indictment.

Instead, the courts have considered challenges to indictments for and convictions of attempts to commit substantive crimes that contain major inchoate elements. Some, such as assault and burglary, are defined as attempts to commit other, more serious, offenses. Others, such as possession of proscribed materials, are defined in terms of acts indicating that the possessor is likely to commit more serious offenses. Crimes such as subornation of perjury punish the act whether or not the actor achieves his desired result. Although “incomplete” in some sense, all of these crimes are complete in that they involve discernible harms that the law seeks to prevent.

---


158 See *Wilson v. State*, 53 Ga. 205, 206 (1874) (considering the concept of attempt to attempt “is like conceiving of the beginning of eternity or the starting place of infinity”).


161 But cf. infra notes 259–269 and accompanying text (discussing reversal of Florida trial court that gave attempt instructions for crimes that already included attempt provisions).

162 See infra notes 250–258 and accompanying text (discussing offenses of this type, such as uttering a forged instrument, embracery (influencing or attempting to influence a juror), bribery, solicitation of a bribe, and extortion).

163 J. HALL, supra note 10, at 586. Hall, who contended that attempts represent a harm distinct from the ultimate crimes at which they aim, stated:

On the premise that criminal attempts are not harms, it would seem necessary to hold likewise regarding many other crimes: e.g., the possession of burglars’ tools, counterfeit dies or money, solicitation, the conspiracies, burglary, reckless driving, bribery, subornation, and other offenses which “tend toward” the commission of various ultimate crimes. Indeed, since there is nothing in nature
Thus, by including such crimes within the statutory definition of attempt, a court can punish an individual for actions that are not in themselves substantive offenses. Absent manifested legislative intent either to limit explicitly those substantive offenses that an individual can attempt or to prohibit judicial use of double inchoate offenses, the judiciary must make the policy decision of whether to punish preparatory acts done toward the commission of a crime.

The debate over the validity of the “attempt to attempt” construction has developed almost exclusively at the state level. Until recently, no case in federal court had raised the issue. Most state courts continue to reject the attempt-to-attempt construction because it is either a logical absurdity or contrary to legislative intent. Many courts, however, have begun to look beyond the debate engendered by the semantical abstraction of attempting to attempt and have imposed liability for acts tending toward the commission of crimes with substantial inchoate elements.

1. Attempt to Assault

The question of whether courts can punish an attempt to attempt has arisen primarily in the context of prosecutions for

---

164 Arnold, supra note 154, at 76.
165 See infra notes 369–398 and accompanying text (discussing cases that decline to recognize double inchoate crimes despite the absence of an explicit legislative prohibition).
166 Although the United States Code does not contain a general attempt statute, it does include several attempt provisions related to specific substantive crimes. See, e.g., 18 U.S.C. §§ 546 (smuggling goods into foreign countries), 594 (intimidation of voters), 1113 (homicide within federal maritime and territorial jurisdiction), 1657 (corrupting a seaman to confederate with pirates), 1751 (assassinating or kidnapping President or presidential staff person) (1982).


167 See infra notes 313–368 and accompanying text.
168 See infra notes 369–398 and accompanying text.
attempted assault. Although no jurisdiction recognizes the crime of attempted simple assault, an increasing number of state courts have convicted defendants of attempted aggravated assaults.

The rationales for punishing attempted assault vary with the definitions of assault that the states employ. The types of assault statutes include those that define the offense as: (1) an attempt to injure another violently (or, more simply, an attempt to commit a battery); (2) an attempt, coupled with present ability, to injure another violently; and (3) an unlawful threat by word or deed to do violence to another, coupled with an apparent present ability, that creates a reasonable apprehension of imminent violence in that other person. Almost every American jurisdiction today combines category (3) with either category (1) or (2), or with a redefined assault offense that, like the Model Penal Code, merges traditional battery and assault. The following discussion, therefore, applies only to those states that do not redefine assault as battery.

169 See, e.g., Wilson v. State, 53 Ga. 205, 206 (1874); People v. Patskan, 29 Mich. App. 354, 357, 185 N.W.2d 398, 400–01 (1971) (attempted assault is not a crime because assault itself is an attempt), rev’d on other grounds, 387 Mich. 701, 199 N.W.2d 458 (1972); State v. Wilson, 218 Or. 575, 585–86, 346 P.2d 115, 120 (1959) (crime of attempted assault exists because assault is not merely an attempted battery but also is a distinct harm) (superseded by statute as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)).


172 See supra notes 57–60 and accompanying text (discussing different states’ approaches to defining assault).
a. **Assault as attempted battery.** The first category—assault as attempted battery—poses the most obvious conceptual problems for courts seeking to attach attempt liability to assault. Given this definition, a charge of attempted assault can be characterized as an attempt to attempt to commit a battery. Nevertheless, since 1891, some courts have recognized the crime of attempted assault by reasoning that an effort to commit a battery that goes beyond preparation, but which lacks the proximity to completion to constitute an assault, is punishable as an attempt to commit an assault.

A New York intermediate appellate court first stated this principle in *People v. O'Connell.* In *O'Connell,* the defendant attacked and wounded his victim with an ax. Charged with assault in the first and second degrees, the defendant pled guilty to attempted assault in the first degree, which the statute defined as assault with a deadly weapon with an intent to kill the person assaulted. Subsequently, the defendant challenged his conviction on the ground that no such crime as attempted assault existed.

Rather than uphold O'Connell's conviction by arguing that he was estopped by his guilty plea from later challenging his conviction on a technical point of law, as the concurring judge suggested, the majority in *O'Connell* sought to establish the existence of the crime of attempted assault. The court framed its analysis in terms of spatial and temporal proximity, ruling that the crime of assault imposes liability only if the actor struck at a victim within reaching distance. The court concluded that an actor who approached his victim with a weapon that he intended to use, but who was intercepted before reaching the victim or failed to come within reaching distance because the victim fled after becoming aware of the imminent attack, was guilty of an attempted assault with a deadly weapon.

The *O'Connell* court's reasoning provided the basis for subsequent convictions by other state courts—not only for assaults

---

174 Id. at 110, 112–13, 14 N.Y.S. at 485, 487.
175 Id. at 110, 14 N.Y.S. at 487 (Lawrence, J., concurring).
176 Id. at 110, 113, 14 N.Y.S. at 485, 487.
177 Id.
178 Id. at 110–15, 14 N.Y.S. at 486–88.
1989] Double Inchoate Crimes 41

with deadly weapons, but also for other forms of aggravated assault.

b. Assault as attempt, coupled with present ability, to injure another violently. Extensions of attempt liability to the second category of assault—assault as an attempt, coupled with present ability, to injure another violently—provides a lesser conceptual difficulty. Courts have found attempts to assault in those cases in which the defendant attempted to commit a battery, but lacked present ability. Although liability may not attach under the present-ability requirement unless the actor is sufficiently proximate to his intended victim, as in the hypothetical raised in O'Connell, the concept of present ability is still broader than that of proximity.

Both the breadth of the concept of present ability and the courts' increasing reliance on subjective intent to expand attempt liability are illustrated in United States v. Locke, a 1983

---


180 See McQuirter v. State, 36 Ala. App. 707, 709, 63 So. 2d 388, 389–90 (1953) (in attempted assault with intent to rape, defendant came no closer than two or three feet from intended victim); Morris v. State, 32 Ala. App. 278, 280, 25 So. 2d 54, 55 (1946) (in attempted assault with intent to rape, defendant chased prosecutrix but never got closer than five feet); Burton v. State, 8 Ala. App. 295, 299, 62 So. 394, 395–96 (1913) (in attempted assault with intent to rape, defendant chased intended victim for 100 yards, but never got close enough to touch her); see also Young v. State, 353 S.E.2d 82, 83 (Ga. App. 1987) (attempted aggravated assault with intent to rape); State v. Weinberger, 671 P.2d 567, 569, 578 (Or. App. 1983) (recognizing attempted aggravated assault as proper predicate felony for crime of felony murder, but finding insufficient evidence to establish attempted aggravated assault).

181 State v. Wilson, 218 Or. 575, 590, 346 P.2d 115, 122 (1959) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)). The court in Wilson grounded its upholding of a conviction for attempted assault with a deadly weapon on the defendant's clearly expressed intent to shoot his wife, coupled with his lack of access to her in a locked office. Id. at 578–79, 588–90, 346 P.2d at 117, 121–22. Thus, Wilson demonstrates the idea of proximity as a component of present ability.

182 See text accompanying supra note 178 (discussing proximity as it relates to present-ability requirement).

case from the United States Army Court of Military Review. The defendant, during a struggle with military police, attempted to remove a loaded revolver from an officer’s holster.\textsuperscript{184} As the defendant attempted to seize the weapon, he exclaimed, “If I get that gun I will kill you all”—or words to that effect.\textsuperscript{185} Relying heavily on this verbal expression of intent combined with the attempt to seize the gun, the court applied the general attempt statute of the Uniform Code of Military Justice\textsuperscript{186} to its aggravated assault statute,\textsuperscript{187} and upheld the defendant’s conviction for attempted aggravated assault.\textsuperscript{188}

The court recognized that the defendant lacked present ability because he had never even obtained the weapon necessary to commit the charged assault with a deadly weapon.\textsuperscript{189} Nevertheless, the court held that the charge of attempted assault was valid because the defendant’s act toward a battery against the officers went beyond preparation.\textsuperscript{190} The decision gave greater emphasis to the serious consequences of the defendant’s expressed intent than to the proximity of his acts to the completed crime.

Some courts will attach attempt liability to this second category of assault, therefore, in those cases in which the defendant’s acts were insufficiently proximate to a completed battery.\textsuperscript{191}

c. Assault as intentional frightening. The third category—assault as intentional frightening—poses the fewest conceptual problems for courts seeking to attach attempt liability to assault. This form of assault punishes intentional frightening rather than an attempt to injure a victim physically; it clearly establishes an

\textsuperscript{184} Id. at 764.
\textsuperscript{185} Id.
\textsuperscript{186} 10 U.S.C. § 880 (1982). Subsection (a) of the statute provides: “An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.” Id. § 880(a).
\textsuperscript{187} Id. § 928.
\textsuperscript{189} Id. at 765.
\textsuperscript{190} Id.
\textsuperscript{191} See State v. Wilson, 218 Or. 575, 590, 346 P.2d 115, 122 (1959) (defendant was guilty of attempted aggravated assault on his wife even though he did not have the present ability to injure her because she was barricaded in a room) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)).
independent substantive offense and not an inchoate offense with a specified object.192

Most jurisdictions punish this form of assault by statute.193 In addition, courts in jurisdictions that do not explicitly punish intentional frightening have interpreted statutes defining assault as an "attempt or offer" to injure another physically to include the tort concept of intentional menacing.194 Those courts, however, have attached attempt liability only to those assaults that threaten serious bodily harm.195

The addition of intentional frightening expands the range of acts defined as assault by eliminating the strict proximity and present-ability requirements of the older categories.196 The requirement of apprehension by the victim, however, creates a new problem, which the courts have sought to mitigate by the use of attempt liability. If the victim is unaware of the imminent attack upon him, then no liability for assault attaches—even if the attacker nearly succeeds in committing the completed battery.

In State v. White,197 for example, the defendant threw a large glass jug at a police officer, striking him in the back of the head and neck. The officer was unaware of the attack prior to absorbing the blow, and therefore was not placed in apprehension of imminent violence by the defendant.198 Although Florida's assault statute did not define the elements of the offense,199 the court defined the prohibited act as the creation of "the victim's well-founded fear that violence is imminent."200 Consequently, the court used the state's general attempt statute to extend

193 See supra note 59 (listing statutes).
194 United States v. Locke, 16 M.J. 763, 765 (A.C.M.R. 1983); see State v. Wilson, 218 Or. 575, 582–84, 346 P.2d 115, 119–20 (1959) (treating assault as intentional frightening despite case law that defined assault as attempted battery) (superseded by statute, as stated in State v. Garza, 296 Or. 688, 695 P.2d 1354 (1984)). But see R. Perkins & R. Boyce, supra note 13, at 163; Perkins, An Analysis of Assault and Attempts to Assault, 47 Minn. L. Rev. 71, 75–76 (1962) (criticizing this approach because the term "to offer," as originally used, meant no more than "to attempt").
195 See supra notes 170–171 and accompanying text (discussing cases).
196 See supra notes 183–190 and accompanying text (discussing United States v. Locke, 16 M.J. 763 (A.C.M.R. 1983), in which the court used intentional-frightening theory to attach liability to a crime that would go unpunished under the common-law definition of assault).
197 324 So. 2d 630 (Fla. 1975).
198 Id. at 631.
200 State v. White, 324 So. 2d 630, 631 (Fla. 1975).
liability to the defendant's actions. Implicit in the ruling was the assumption that the court would have found the defendant guilty of attempted assault even if his weapon had missed its mark.

The expanding law of attempted assault signals a trend by courts and legislatures to treat assault as a separate substantive crime, rather than as an attempted battery, to avoid the conceptual difficulties of double inchoate constructions. As several commentators have suggested, this approach is valid because aggravated assaults were unknown at common law. Thus, it is unnecessary to define these forms of assault in relation to the common-law notion of assault as attempted battery.

2. Attempted Sexual Assault of Minors

Courts have found it easier to attach derivative attempt liability to statutes proscribing sexual assault or enticement of minors. The statutes involved in these cases have treated sexual enticement of minors as a completed substantive offense, and have avoided the language of attempt found in

201 Id.
202 See id. (dictum) (general attempt statute applies to persons who unsuccessfully attempt to injure violently persons who are unaware of the attack). The court stated:

The State argues for a definition of assault which does not include victim awareness, on the ground that "bushwackers" and "backstabbers" would escape punishment if they were unsuccessful in their attempt to inflict injury. The Legislature did not intend to allow such acts to go unpunished, however. The general "attempt" statute will reach those situations.

203 Id.
204 See supra note 62 (providing citations). But cf. J. HALL, supra note 10, at 573 (contending that development of the "consummated" crime of aggravated assault in the period immediately prior to cases recognizing attempt as a substantive offense retarded development of the doctrine of criminal intent).
205 See Donovan v. State, 47 Ala. App. 18, 20, 249 So. 2d 635, 636 (1971) (upholding conviction for attempt to entice a child under 16 years of age to enter a place to commit sodomy); People v. Martinez, 42 Colo. App. 257, 257, 592 P.2d 1358, 1359 (1979) (crime of attempt to commit sexual assault on a child existed because, unlike an ordinary assault statute, the statute at issue defined sexual assault on a child as a substantive offense rather than as an attempted battery); Huebner v. State, 33 Wis. 2d 505, 513, 147 N.W.2d 646, 650 (1967) (legislature's placement of the crime of attempt to entice or persuade a child under 18 years of age into a place with intent to commit a crime against sexual morality among substantive rather than inchoate crimes evinced its intent that the general attempt statute apply to such a crime). Compare People v. Martinez, 42 Colo. App. 257, 257, 592 P.2d 1358, 1359 (1979) (allowing the offense of attempted sexual assault on a child) with People v. Gordon, 178 Colo. 406, 407-08, 498 P.2d 341, 342 (1972) (the crime of attempted assault did not exist where assault was defined as an unlawful attempt to commit violent injury) and Allen v. People, 175 Colo. 113, 115-18, 485 P.2d 886, 887-89 (1971) (same).
many ordinary assault statutes. It is likely, however, that the repulsion that such crimes arouse gives a court a sense that there is greater leeway to punish an actor based on revealed intent even if the acts have not progressed so far as to meet the requirements of the substantive offense.

In *Huebner v. State*, for example, the defendant challenged his conviction for “attempt to entice a child under the age of 18 years into an automobile for immoral purposes.” The defendant contended that the law against enticement was itself an attempt statute, and that to combine this statute with the state’s general attempt statute was to charge the defendant with an attempt to attempt a crime against sexual morality. Although the enticement statute defined the crime’s mens rea as an intent to commit a “crime against sexual morality,” it did not define the actus reus in terms of sexual activity. Instead, it defined sexual assault of a minor in terms of a component part of the ultimate harm. The actus reus was the persuading or enticing of any child under 18 “into any vehicle, building, room or secluded place.”

The defendant, a male, had invited a seventeen-year-old boy into his car for a ride. When the boy declined the offer, the defendant “in unmistakable layman’s language asked [the boy] to commit sodomy” and offered him money and drink in con-

---

206 See People v. Martinez, 42 Colo. App. 257, 257, 592 P.2d 1358, 1359 (1979) (the crime of attempt to commit sexual assault on a child exists because, unlike an ordinary assault statute, the statute at issue defined sexual assault on a child as a substantive offense, rather than as attempted battery).

207 Both the Alabama and Wisconsin sexual-assault statutes at issue reflect the objective theory of liability. See Donovan v. State, 47 Ala. App. 18, 20, 249 So. 2d 635, 635–36 (1971) (quoting Act No. 387, 1967 Ala. Acts (now codified at Ala. Code § 13A-6-69 (1982))); Huebner v. State, 33 Wis. 2d 505, 512 n.1, 147 N.W.2d 646, 650 n.1 (1967) (quoting Wis. Stat. § 944.12, amended by § 948.07 (Supp. 1988)). In both statutes, enticing or persuading a minor to enter a secluded place suffices to meet the act requirement. The defendant need not tell his intended victim the purpose of the assignment. The imposition of liability on acts earlier in the preparatory continuum than those that are prohibited by the enticement statutes, however, requires the court to focus more narrowly on the actor’s intent. For a discussion of the objective and subjective theories of liability, see supra notes 148–151 and accompanying text.

208 Id. at 512, 147 N.W.2d at 649–50. This issue was only one of six raised on appeal.

209 Id. at 513, 147 N.W.2d at 650.

210 Id. at 513, 147 N.W.2d at 650.

211 Id. But see People v. Martinez, 42 Colo. App. 257, 258, 592 P.2d 1358, 1359 (1979) (quoting Colo. Rev. Stat. § 18-3-405 (1979), which requires “sexual contact” between a child under 15 years of age and a defendant at least four years his or her senior).


213 Huebner v. State, 33 Wis. 2d 505, 513, 147 N.W.2d 646, 649 (1967).
The victim fled and notified the police. Because the victim had not entered the defendant’s car, the defendant did not meet the act requirement of the enticement statute. The Wisconsin Supreme Court, however, upheld the application of the state’s general attempt statute to the enticement statute and affirmed the defendant’s conviction.

Noting that Wisconsin had abolished common-law crimes, the court focused on the legislative intent behind the applicable statutes. The court concluded that the legislature evidenced its intent by including the enticement statute among those offenses denoted as “completed” rather than “inchoate” offenses. Moreover, the court contended that the gravamen of the enticement statute was the successful persuasion of a child into one of the listed enclosures. Thus, the victim’s entry into a secluded place completed the crime of enticement if the defendant had the intent to engage in sexual activity therein. The court reasoned that “the attempt of this crime is completed when the defendant with the necessary intent tries to persuade or entice the child to get into the vehicle or secluded place.”

Underlying the court’s discussion of legislative intent, however, was its concern with protecting society from persons who commit dangerous sex crimes and providing treatment for the dangerous sex offender. The existence of the state’s “sex deviate law,” affording specialized treatment to sex offenders, attests

---

214 Id.
215 Id.
216 See id., 147 N.W.2d at 650 (gravamen of the substantive offense is in succeeding in getting a minor to enter a vehicle, building, or other secluded place); see also Donovan v. State, 47 Ala. App. 18, 20, 249 So. 2d 635, 636 (1974) (jurisdiction defined sexual assault of a minor as enticing or persuading a minor to enter a secluded place to propose the act of sodomy; the court held that the defendant did not commit a substantive offense because the intended victim resisted the defendant’s importunings to enter the defendant’s car).
217 Huebner, 33 Wis. 2d at 513, 519, 147 N.W.2d at 649, 653–54.
218 Id. at 514, 147 N.W.2d at 650.
219 Id.
220 Id. at 513, 147 N.W.2d at 650 (emphasis added).
221 Id.
222 Id. at 513–14, 147 N.W.2d at 650 (emphasis added). The court ruled in dicta that no constitutional prohibition forbade the legislature from creating a crime of an attempt to attempt a substantive offense. Id. Nevertheless, the court held that the enticement statute was not an attempt statute. Id.; cf. People v. Martinez, 42 Colo. App. 257, 258, 592 P.2d 1358, 1359 (1979) (noting that, where assault is defined in terms of “attempt,” attempted assault is “an attempt to attempt to act,” a construction that is too indefinite for a specific-intent crime).
223 See Huebner v. State, 33 Wis. 2d 505, 521, 147 N.W.2d 646, 654 (1967). For a discussion of the provisions of Wisconsin’s Sex Crimes Act, also known as the “sex deviate law,” see generally Note, Criminal Law—Wisconsin Sexual Deviate Act, 1954 Wis. L. Rev. 324.
to the grave concerns that sexual crimes arouse. Furthermore, the statute may have made it simpler for the court to focus on the defendant’s criminal intent in order to commit him to administrative, rather than penal, processes.\textsuperscript{224}

Although other courts that have affirmed the validity of attempted sexual assault against minors have not discussed administrative treatment of the offender, the cases suggest that the seriousness with which society views the substantive crime of sexual assault of minors induces courts to focus on the intent that the defendant displayed rather than on the limitation of the doctrine that every criminal should have fair warning of what the law prohibits.

3. Attempted Burglary

Although the courts remain divided over the existence of the offense of attempt to assault,\textsuperscript{225} no court has ever reversed a conviction of attempted burglary on the ground that such a convictionpunishes an attempt to attempt. Every jurisdiction continues to define burglary as an act—usually an unauthorized entry—with intent to commit some other crime.\textsuperscript{226} Nevertheless, the courts have treated burglary as a separate substantive crime rather than as an anticipatory offense.

In \textit{DeGidio v. State},\textsuperscript{227} for example, the defendant contended, among other things, that, because the applicable statute defined burglary in terms of doing an act with the intent to commit some other crime, the offense was a specific form of attempt.\textsuperscript{228} Relying on the comments to the Model Penal Code’s section on attempt, the court responded that courts traditionally have

\textsuperscript{224} See Huebner \textit{v. State}, 33 Wis. 2d 505, 521, 147 N.W.2d 646, 654 (1967) (discussing operation of Wisconsin’s Sex Crimes Act). After convicting the defendant of attempted sexual assault, the trial court, within the discretion accorded to it by the Wisconsin Sex Crimes Act, had ordered the defendant to undergo presentencing tests by the State Department of Public Welfare, to determine if, as a sex offender, he was a continuing danger to society. \textit{Id.} The state agency, exercising its authority under the Act, determined that the defendant was a dangerous offender and committed him to its “sex deviate facility,” instead of sending him back to the court for criminal sentencing. \textit{Id.} at 522–24, 147 N.W.2d at 655. For a discussion of the confusion of administrative and penal procedures that is inherent in the subjective theory of liability, see G. Fletcher, \textit{supra} note 148, at 170–74.

\textsuperscript{225} For a survey of cases addressing the issue of whether the crime of attempted assault exists, see \textit{supra} note 171.

\textsuperscript{226} For a discussion of current burglary statutes, see \textit{supra} notes 71–75 and accompanying text.

\textsuperscript{227} 289 N.W.2d 135 (Minn. 1980).

\textsuperscript{228} \textit{Id.} at 136.
treated burglary as a separate substantive offense to which attempt liability attaches.\textsuperscript{229} The Code’s drafters noted other “substantive offenses” that contain more pronounced inchoate elements than burglary, but to which courts nevertheless have applied attempt liability.\textsuperscript{230} Moreover, the commentary suggests that questions of attempt liability are better decided on the basis of a policy decision regarding where to draw the line in punishing preliminary acts rather than an abstract argument over whether an individual can attempt to attempt a crime.\textsuperscript{231}

The \textit{DeGidio} court noted that the state legislature treated burglary as a separate substantive offense instead of as an inchoate crime, and did not explicitly limit the offenses to which the general attempt statute could apply.\textsuperscript{232} Consequently, the court invoked the doctrine of implied legislative intent to hold that the legislature intended the general attempt statute to apply to the crime of burglary.\textsuperscript{233} Other decisions upholding convictions for attempted burglary have not discussed the double inchoate issue.\textsuperscript{234}

4. Attempted Possession of Proscribed Materials

The primary function of attempt law is to allow authorities to intervene and convict before the consummation of a crime.\textsuperscript{235} Society’s need to protect itself, however, is offset by the need

\textsuperscript{229} Id. at 136–37.

\textsuperscript{230} \textit{MODEL PENAL CODE} § 5.01 commentary at 75 (Tent. Draft No. 10, 1960). The court quoted the following passage from the comments to the Model Penal Code:

[T]here has been no difficulty in sustaining charges of attempted burglary. Nor has there been difficulty generally in finding attempt liability where the “substantive offense” is even more clearly an attempt: possessing burglar’s tools with intent to commit burglary; conveying tools into prison with intent to facilitate an escape; offering a bribe; exploding a substance with intent to cause personal injury; employing a drug or instrument with intent to procure a miscarriage; procuring a noxious drug with intent to supply it to another for use in committing abortion. In each case attempt liability has been sustained. Id. (footnotes omitted); see \textit{DeGidio} v. \textit{State}, 289 N.W.2d 135, 137 (Minn. 1980).

\textsuperscript{231} \textit{MODEL PENAL CODE} § 5.01 commentary at 363–64 (Proposed Official Draft 1985);


\textsuperscript{232} 289 N.W.2d at 137.

\textsuperscript{233} \textit{Id.}


\textsuperscript{235} \textit{See supra} notes 34–36 and accompanying text (discussing principle).
to protect individuals from prosecution for equivocal acts—i.e., acts as likely informed by a lawful intent as by an unlawful one.

An alternative to the use of attempt law to facilitate intervention is to break crimes down into constituent acts and separately prohibit those acts. Crimes that proscribe possession of materials presumably used to commit completed crimes exemplify this approach. The rationale for these crimes is the positivist contention that experience has shown that an individual would not possess such materials unless he intended to use them as tools or means of a specific crime. Because the possessor of certain materials is likely to use them for illegal ends, intervention is justified at least to force their possessor to explain why he has them. This rationale is not far removed from the objective theory of criminality, which requires that an act unequivocally manifest its criminality.

The most heavily legislated proscription of this kind is the possession of burglary tools. The *DeGidio* decision makes it clear that attempted burglary and possession of burglary tools are separate substantive offenses. Indeed, the decision and the Model Penal Code commentary on which it relied suggest that attempt liability can attach even to the possession of burglary tools. The single state supreme court to address this contention has rejected it following its brief espousal by an intermediate appellate court.

Generally, courts have not addressed this issue with regard to other possessory offenses—e.g., possession of explosives, unlawful weapons, or forged instruments. Some courts, how-

236 See *supra* notes 81–98 and accompanying text (discussing constituent-element approach).
237 See G. Fletcher, *supra* note 148, at 204–05. See generally Robbins, *supra* note 11, at 398–419 (discussing differences between the objective and subjective approaches to criminality, in the context of the impossibility defense to attempt crimes).
238 For a listing of state statutes prohibiting possession of burglary tools, see *supra* note 81.
239 *DeGidio* v. State, 289 N.W.2d 135, 137 (Minn. 1980).
240 See *supra* notes 229–231 and accompanying text (discussing Model Penal Code comments, approvingly quoted in *DeGidio*, that advocated attaching attempt liability to the crime of possession of burglary tools).
241 Thomas v. State, 362 So. 2d 1348 (Fla. 1978), *rev'd* 351 So. 2d 77, (Fla. Dist. Ct. App. 1977). The Florida Supreme Court stated:
Although it may be possible for a person to be convicted of an attempt to possess items which are contraband per se, burglary tools are not contraband per se, and it is only the actual possession of burglary tools along with a criminal intent or usage that constitutes a punishable offense. Possession of otherwise "innocent" items, coupled with a use or intended use of such tools in a burglary, is unlawful.
ever, have held that the crime of attempted possession of narcotics does exist. But narcotics possession is distinguishable from other possessory offenses in that many drugs have no lawful uses at all, and the remainder have only medicinal purposes. In addition, narcotics addicts are likely to commit other crimes to support their habits.

5. Crimes in Which the Attempt Is Subsumed Within the Definition of the Completed Crime

Within this category of crimes possessing substantial inchoate elements exist three subcategories: (1) statutory offenses defined as constituent acts within completed crimes; (2) long-recognized offenses in which attainment of the criminal intent is unimportant to liability; and (3) statutory provisions that punish the attempt as well as the completed offense.

The primary examples of the first subcategory of offenses are abortion statutes phrased in terms of supplying or administering any substance or instrument to a woman with the intent to produce a miscarriage. In a California decision, People v. Berger, the court upheld a conviction for an attempt to commit an offense thus defined. Police had arrested one of the defendants while she was sterilizing the instruments for an abortion, but before she had begun the surgical procedure on the investigating agent ostensibly seeking the abortion.

The court found no indication that the state legislature intended to exclude the offense of abortion, despite its inchoate nature as defined, from the scope of the state’s general attempt statute. Instead, the court focused on the issue of whether

243 For a listing of such statutes, see supra note 92.
245 But see Commonwealth v. Willard, 179 Pa. Super. 368, 369–70, 116 A.2d 751, 752 (1955) (reversing conviction for attempt to administer instruments or drugs with intent to induce a miscarriage, even though the defendant had prepared the instruments).
246 People v. Berger, 131 Cal. App. 2d 127, 129, 280 P.2d 136, 137 (1955). The court also noted that other state courts had recognized the crime of attempt to commit abortion as defined by California statute. Id. at 129–31, 280 P.2d at 137–39; see People v. Gallardo, 41 Cal. 2d 57, 66, 257 P.2d 29, 35 (1953) (arranging for abortions and accepting money for those operations is not sufficient to establish an attempt to commit abortion); People v. Buffum, 40 Cal. 2d 709, 718, 256 P.2d 317, 321–22 (1953) (arranging abortions in Mexico and transporting patients to Mexico for that purpose are merely acts of preparation); People v. Reed, 128 Cal. App. 2d 499, 502, 275 P.2d 633, 635 (1954) (rinsing speculum in cold water after boiling it was a sufficient act toward commission of the offense, even though the patient was still fully clothed).
the acts of the defendants were sufficient to establish an attempt.\textsuperscript{247} Reasoning that the acts of sterilizing the instruments and instructing the patient to disrobe belonged to a small class of cases in which the acts of preparation unambiguously indicated the defendant's intent,\textsuperscript{248} the court ruled that these acts also satisfied the requirement of a direct movement toward the commission of the substantive offense—the application of the instruments used to induce a miscarriage.\textsuperscript{249}

The second subcategory of constituent-act offenses includes such crimes as bribery, perjury, subornation of perjury, embracery, extortion, making a false report of a crime, and uttering a forged instrument. These are crimes in which the courts traditionally have treated the attempt to commit the crime the same as the realized crime itself. For example, most bribery statutes punish a party who offers a bribe to a public official regardless of whether he is successful in soliciting a public officer to do his bidding.\textsuperscript{250} Courts have generally held that attempt liability

\textsuperscript{247} People v. Berger, 131 Cal. App. 2d 127, 130–31, 280 P.2d 136, 138–39 (1955). The court in Commonwealth v. Willard, 179 Pa. Super. 368, 116 A.2d 751 (1955), also focused on the question of whether the defendant's acts went beyond mere preparation. Although the defendant had begun to approach the patient with the prepared instruments when she was apprehended, the court in Willard held that these acts merely constituted preparation. \textit{Id.} at 372, 116 A.2d at 753. The Pennsylvania court's categorization of its abortion statute as one prohibiting the attempt to commit an abortion, however, determined this result. \textit{Id.} at 374, 116 A.2d at 754. \textit{Contra} State v. Goddard, 74 Wash. 2d 848, 851–52, 447 P.2d 180, 182–83 (1969) (preparing abortifacient and examining the police agent were sufficient overt acts to sustain a conviction for attempt to administer drugs or instruments to produce a miscarriage).

\textsuperscript{248} People v. Berger, 131 Cal. App. 2d 127, 130–31, 280 P.2d 136, 138–39 (1955). The court in Willard, however, ruled that, although Willard's actions manifested an unequivocal intent, she was not guilty of attempting to procure an abortion because her acts did not move directly toward consummation of the offense. Commonwealth v. Willard, 179 Pa. Super. 368, 372–73, 116 A.2d 751, 753 (1955). Note that, although the court in Berger used the language of both objective and subjective theories of criminality, it conceded that there are few attempts in which the act speaks for itself, thus emphasizing the subjective approach.

\textsuperscript{249} People v. Berger, 131 Cal. App. 2d 127, 132, 280 P.2d 136, 139 (1955). The court viewed its holding as an extension of that in People v. Reed, 128 Cal. App. 2d 499, 275 P.2d 633 (1954), in which the defendant had picked up the already-sterilized instrument. \textit{See also} Greenwood v. United States, 225 A.2d 878 (D.C. 1967). In Greenwood, the court upheld a conviction for attempted unauthorized use of a motor vehicle despite the defendant's claim that such an offense was, in effect, an attempt to attempt to commit larceny. \textit{Id.} at 279–80. The court, however, viewed the unauthorized-use statute not as a lesser included offense of car theft, but rather as a separate substantive offense. \textit{Id.} at 880. Consequently, the unauthorized-use statute can be viewed as prohibiting a component act of car theft—the unauthorized taking of another's car—but not requiring the more serious offense's specific intent—the intent to deprive the owner of his property permanently or for an unreasonable amount of time.

\textsuperscript{250} \textit{See} United States v. Rosner, 485 F.2d 1213, 1229 (2d Cir. 1973) (upholding conviction under federal bribery statute, even though the defendant did not attain object of bribe because the offeree was undercover agent), \textit{cert. denied}, 417 U.S. 950 (1974). \textit{See}
does not attach to these crimes because they are proved as fully
by evidence of attempt to commit them as by evidence that they
were accomplished.\textsuperscript{251}

This proposition, however, is an over-generalization as it ap-
plies to those crimes in which the communication of a solicita-
tion or a threat is an essential element. In \textit{State v. Hansford},\textsuperscript{252}
for example, a Washington court upheld a conviction for at-
tempts extortion.\textsuperscript{253} Based on a tip, the defendant had been
apprehended while breaking into his intended victim’s home
with gloves and a sawed-off shotgun.\textsuperscript{254} The court imposed at-
tempt liability on the defendant, reasoning that a note in his
pocket instructing a family member to pay $350,000 to ensure
the family’s safety established the defendant’s intent and the
burglary established the requisite overt act for attempt liabil-
ity.\textsuperscript{255} The court observed, however, that the defendant was not
guilty of the substantive crime of extortion, because he never
communicated his threat to his victim.\textsuperscript{256} Liability for the sub-
stantive offense would nevertheless have attached if the defen-
dant had communicated his threat but received no money.\textsuperscript{257}
Similarly, attempt liability also could attach to bribery or sub-
bornation of perjury under the same theory as an attempt to
solicit.\textsuperscript{258}

\begin{flushright}
\textit{generally} R. PERKINS \& R. BOYCE, \textit{supra} note 13, at 534–35 (the common law punished
soliciting or offering a bribe even if the importuned party promptly rejected the offer).
\end{flushright}

For judicial treatment of attempted perjury, compare Adams v. Murphy, 394 So. 2d
411, 415 (Fla. 1981) (crime of perjury is fully proven by “attempt” to commit the crime),
cert. denied, 455 U.S. 920 (1982) with id. (Alderman, J., dissenting) (attempted perjury
is possible where there is an intent to commit perjury and there is an overt act of falsely
testifying, but the crime is not completed because an essential element, such as mate-
riality, is lacking). Cf. E. MEEHAN, \textit{supra} note 160, at 199–200 (noting that various
Commonwealth courts have attached attempt liability to the crimes of extortion, per-
verting justice, and suborning perjury).

\footnotetext[251]{251}{See Pagano v. State, 387 So. 2d 349, 350 (Fla. 1980) (corruption by threat against
a public servant); Achin v. State, 387 So. 2d 375, 376 (Fla. Dist. Ct. App. 1980)
(extortion), \textit{aff’d}, 436 So. 2d 30 (Fla. 1982); King v. State, 317 So. 2d 852, 853 (Fla.
Dist. Ct. App. 1975) (uttering of a forged instrument), \textit{aff’d}, 339 So. 2d 172 (Fla. 1976);
1976). For a discussion of the problem that Florida courts have considered in dealing
with attempt liability, see \textit{infra} notes 259–269 and accompanying text.}

\footnotetext[252]{252}{22 Wash. App. 725, 591 P.2d 482 (1979).}

\footnotetext[253]{253}{\textit{Id.} at 729, 591 P.2d at 484.}

\footnotetext[254]{254}{\textit{Id.}}

\footnotetext[255]{255}{\textit{Id.} at 727, 729, 591 P.2d at 483–84.}

\footnotetext[256]{256}{\textit{Id.}}

\footnotetext[257]{257}{\textit{See} WASH. REV. CODE ANN. §§ 9A.56.110–120 (1977) (extortion).}

\footnotetext[258]{258}{For a discussion of the double inchoate offense of attempt to solicit, see \textit{supra}
ote 140.
The third subcategory of offenses that include the attempt within the definition of the completed crime is exemplified in Florida's penal code. Florida's legislature effectively has merged the completed offense and the attempt in its statutes prohibiting theft, dealing in stolen goods, escape from a penal institution, and resisting arrest with violence. Although the practice of directly linking the attempt to the completed crime appears to answer the question of whether attempt liability applies, this practice has created a serious, unexpected problem in the Florida courts.

Florida's rules of criminal procedure require trial judges to grant a defendant's proper request for a jury instruction on attempt if the indictment contains an offense of attempt to commit the substantive crime charged and there is evidence to support such attempt. Indeed, failure to do so is reversible error. If, however, the substantive offense contains the attempt, then conviction for an attempt to commit the substantive offense constitutes conviction of a nonexistent offense. Seeking to comply with the state's procedural rules, several trial judges...

---


262 McAbee v. State, 391 So. 2d 373, 374 (Fla. Dist. Ct. App. 1980); see FLA. STAT. ANN. § 843.01 (West 1976 & Cum. Supp. 1988) ("[w]hoever knowingly and willfully resists, obstructs, or opposes any . . . municipal police officer . . . in the lawful execution of any legal duty, by offering . . . or doing violence to the person of such officer") (emphasis added).

263 FLA. R. CRIM. P. 3.510.


The Florida Supreme Court partially corrected this situation with its 1983 decision in \textit{State v. Sykes}.\footnote{397 So. 2d at 994 (citations omitted; emphasis in original).} The holding in \textit{Sykes} allows appellate courts to remand a case for retrial rather than discharge a defendant who was convicted in a trial in which the judge improperly instructed the jury on the nonexistent crime as a lesser included offense.\footnote{434 So. 2d 325 (Fla. 1983).} But the decision failed to clarify when an attempt instruction is appropriate. The Florida legislature's efforts to resolve the controversy concerning double inchoate liability by defining attempt liability more precisely has paradoxically raised the very issues that it sought to resolve.

**B. Attempt to Conspire**

Unlike the attempt-to-attempt construction, the attempt-to-conspire construction has raised little argument. Only a few courts have had to deal with indictments for attempted conspir-
The only federal appellate court to address such a conviction dismissed the concept. Most of the state appellate courts that have considered the existence of attempted conspiracy have rejected it.

Nevertheless, the crime of attempted conspiracy may be useful in two situations. First, it would allow courts to find a lesser included offense of conspiracy where the required elements of...
that crime cannot be proved. Many states have not adopted the Model Penal Code's unilateral approach to conspiracy, retaining the traditional bilateral formulation. 273 Thus, their statutes may require the agreement of two or more parties to commit a substantive offense. Liability for conspiracy would not attach under those statutes if an actor requested another's participation in a conspiracy, but, for example, the other party only feigned agreement.

Ironically, the only state court to adopt the attempted-conspiracy approach sits in a state that has adopted the Model Penal Code's unilateral-conspiracy approach. 274 In People v. DiDominick, 275 a New York court upheld a conviction for attempted conspiracy to commit murder. 276 The defendant, a policeman on limited assignment who was restricted from carrying a gun, offered to murder for hire two people named by a person with whom he had conversed on several occasions. 277 Unbeknownst to the defendant, his "business" partner was actually an undercover police officer. 278 After the defendant had obtained a pistol and informed the undercover agent that he was ready to commit the two murders that day, the police arrested him. 279 The court cited the unilateral-conspiracy provision to demonstrate that it was unnecessary for both parties to have the required mental state for one to be guilty of conspiracy. 280 Nevertheless, the court relied on the state's attempt statute to treat the defendant's actions as a lesser included offense of conspiracy. 281

Liability also may attach under the attempt-to-conspire construction in those situations in which one party requests another's participation in a conspiracy, but the second party refuses.

273 For a discussion of the unilateral-conspiracy approach, see Model Penal Code §§ 5.03(1)(a), 5.04(1)(b) (Proposed Official Draft 1985); supra notes 107-109 and accompanying text. For a listing of several states that have adopted that approach, see supra note 108.


276 Id. at 393, 406 N.Y.S.2d at 421.

277 Id.

278 Id.

279 Id.

280 Id. at 394-95, 406 N.Y.S.2d at 422.

Attempts to conspire are partially covered in the solicitation statutes of some states. Those few remaining states that do not have such a statute and do not recognize the common-law offense of solicitation, however, would find the attempted-conspiracy construction useful. But none of the appellate courts in those states has approved the construction.

The second general use of the attempted-conspiracy construction occurs in plea bargaining. In People v. Toliver, for example, the defendant pled guilty to attempted conspiracy to sell narcotics as part of a plea-bargaining arrangement arrived at during the selection of jurors for his trial. Subsequently, he sought to withdraw his plea on the ground that he was not guilty of conspiring to sell narcotics.

The court refused to accept the withdrawal, ruling that he had voluntarily entered into the plea bargain with the full understanding that it was negotiated in compromise of pending charges. The court stated:

[T]he practice of accepting pleas to lesser crimes is generally intended as a compromise in situations where conviction is uncertain of the crime charged. The judgment entered on the plea in such situation may be based upon no objective state of facts. It is often a hypothetical crime, and the procedure—authorized by statute—is justified for the reason that it is in substitution for a charge of crime of a more serious nature which has been charged but perhaps cannot be proved. . . . [H]is plea may relate to a hypothetical situation without objective basis.

Moreover, by comparing the charge of attempted conspiracy to that of attempted manslaughter, the court implied that the

---

282 For a listing of several state solicitation statutes, see supra note 133.
283 But see State v. Sexton, 232 Kan. 539, 540, 542–44, 657 P.2d 43, 44, 46–47 (1983). In Sexton, the court refused a conviction for attempted conspiracy because the state legislature had not manifested any intent to punish such actions. The state legislature, however, enacted a solicitation statute in 1982, after the acts in Sexton had been committed. Id. at 543, 657 P.2d at 46–47. The court conceded that the defendant's solicitation of an undercover policeman would have fallen within this statute's ambit. Id. at 543–44, 657 P.2d at 47.
285 Id. at 211, 287 N.Y.S.2d at 736.
286 Id. at 211–12, 287 N.Y.S.2d at 737. Id.
287 Id.
289 Id., 287 N.Y.S.2d at 738 (citing People v. Foster, 19 N.Y.2d 150, 154, 225 N.E.2d 200, 202, 278 N.Y.S.2d 603, 606 (1967)).
attempted-conspiracy construction is also logically inconsistent. Nevertheless, the court recognized it for plea-bargaining purposes.290

C. Conspiracy to Attempt

Unlike the attempt-to-conspire and attempt-to-attempt constructions, almost the entire body of case law concerning conspiracy to attempt is at the federal, rather than the state, level.291 This situation results from the language of the federal criminal code’s general conspiracy statute:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.292

Thus, if a separate federal statute expressly proscribes attempt, it is an “offense against the United States,” and therefore is an appropriate object of the conspiracy statute.293

290 Id.; cf. People v. LeBlanc, 120 Mich. App. 343, 327 N.W.2d 471 (1982) (holding that guilty plea to nonexistent crime of attempted felonious assault was not error requiring reversal). See also A. DERSHOWITZ, THE BEST DEFENSE 115 (1982) (discussing impossible-attempt case, settled by plea of guilty to attempted manslaughter); Robbins, supra note 11, at 432-33 n.287 (discussing plea of guilty to nonexistent crime).

291 The only state cases to discuss conspiracy to attempt are People v. Teitelbaum, 163 Cal. App. 2d 184, 329 P.2d 157 (holding conspiracy to attempt grand theft to be a lesser included offense of conspiracy to commit grand theft), cert. denied, 359 U.S. 206 (1958), and People v. Travis, 171 Cal. App. 2d 842, 341 P.2d 851 (1959) (holding conspiracy to attempt petty larceny to be a lesser included offense of conspiracy to commit petty larceny).


293 See United States v. Clay, 495 F.2d 700, 710 (7th Cir.) (attempted bank robbery is an appropriate object of a conspiracy charge, as proscribed by 18 U.S.C. § 2113(a)), cert. denied, 419 U.S. 937 (1974).

At first glance, it appears that the language of the federal conspiracy statute, 18 U.S.C. § 371 (1982), also allows a conspiracy-to-solicit construction. Indeed, several federal-court decisions have upheld or alluded to convictions for conspiracy to solicit bribes by government officials or trustees of government-regulated pension funds, or conspiracy to solicit perjury. See, e.g., United States v. Borders, 693 F.2d 1318, 1319 (11th Cir. 1982) (upholding convictions both for the substantive offense of soliciting a person who was materially connected with a judicial proceeding, 18 U.S.C. § 1503, and for conspiracy to solicit bribes by government officials or trustees of government-regulated pension funds, or conspiracy to solicit perjury, 18 U.S.C. § 371 (11th Cir. 1982)); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982) (upholding a conviction for conspiracy to solicit a bribe from a person who was materially connected with a judicial proceeding, 18 U.S.C. § 1503, and for conspiracy to solicit bribes by government officials or trustees of government-regulated pension funds, or conspiracy to solicit perjury, 18 U.S.C. § 371 (11th Cir. 1982)); United States v. Dorfman, 470 F.2d 246, 247 (2d Cir. 1972) (upholding a conviction for conspiracy to commit a violation of 18 U.S.C. § 1954, which prohibits an offer to, acceptance of, or solicitation to influence the operation of an employee-benefit plan by a person who is materially related to the plan), cert. denied,
Although conspiracy statutes reach back further in the continuum of preparatory acts to impose liability than do attempt

411 U.S. 923 (1973); Wilson v. United States, 230 F.2d 521, 522 (4th Cir.) (upholding a conviction for conspiracy to solicit a bribe by an officer or employee of the federal government), cert. denied, 351 U.S. 931 (1956); United States v. Hood, 200 F.2d 639, 640–43 (5th Cir.) (reversing the district court's dismissal of a charge alleging conspiracy to violate a federal statute that proscribed soliciting or receiving money in consideration of a promise, support, or use of influence to obtain for any person any federal appointive office), cert. denied, 345 U.S. 941 (1953); see also Cline v. Brussett, 661 F.2d 108, 112 (9th Cir. 1981) (remanding to the district court a prisoner's two actions alleging that state officials conspired to convict him of groundless charges and denied him right of fair trial in his conviction of conspiring to solicit perjury); United States v. Sposato, 446 F.2d 779, 780 (2d Cir. 1971) (upholding a conviction for perjury against a challenge based on the defendant's inability to impeach chief witness against him, who was subsequently charged with, but not convicted of, conspiracy to solicit a bribe); United States v. Hart, 344 F. Supp. 522, 523–24 (E.D.N.Y. 1971) (declaring a mistrial in the trial of two federal narcotics agents charged with conspiracy to solicit a bribe, where the principal government witness had stated during testimony that he had taken a lie-detection test).

United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978), cert. denied, 439 U.S. 1069 (1979), exemplifies the class of offenses that use the conspiracy-to-solicit construction and helps to illustrate why they are not double inchoate crimes. In Arroyo, Fernandez had applied for a Small Business Administration (SBA) guaranteed loan through a local model-cities program. Subsequently, Sanchez, a business counselor at the local agency, told Fernandez that, although the bank had approved the loan, the SBA had not yet guaranteed it. Sanchez instructed Fernandez to see Arroyo, a loan officer at the SBA, for help in processing the loan. Id. at 651.

Fernandez met with Arroyo, who suggested that the application was pending before him. Arroyo, however, had already recommended authorization of an SBA guarantee. Id. at 654. Nevertheless, Fernandez, believing that Arroyo held the power of decision over the loan, asked Arroyo how much Arroyo's approval would cost. Id. at 651. Arroyo told Fernandez to talk to Sanchez. Sanchez informed Fernandez that he should pay Arroyo $800.

The SBA, which unbeknownst to Fernandez had processed the loan, finally disbursed it more than five months after his meetings with Sanchez and Arroyo. Shortly thereafter, Sanchez and Arroyo contacted Fernandez to arrange for Arroyo to pick up the $800. Fernandez informed the FBI, which staked out Fernandez's business and arrested Arroyo when he came to collect the bribe. Id. at 651–52.

The district court convicted Arroyo of the substantive offense of corruptly soliciting or receiving a bribe, in violation of 18 U.S.C. § 201(c)(1) (1976), and convicted both Arroyo and Sanchez of conspiracy to commit the substantive offense, in violation of 18 U.S.C. § 371 (1976). Id. at 650. Both appealed on the ground that Arroyo had solicited a gratuity, in violation of 18 U.S.C. § 201(g) (1976), rather than a bribe, because he had approved the loan prior to the solicitation, and thus no longer had authority to influence its disposition. Id. at 653. A divided appellate court rejected the defendants' contention and upheld their convictions. Id.

Significantly, none of the defendants in these cases challenged his conspiracy conviction on the ground that it constituted an impermissible double inchoate offense. The reason is that the crimes of soliciting a bribe and soliciting perjury are long-recognized forms of the substantive offenses of bribery and subornation of perjury. See R. Perkins & R. Boyce, supra note 13, at 524–26 (subornation of perjury), 534–35 (solicitation of bribe). Historically, the treatment of solicitation as a general inchoate offense developed from those crimes affecting the administration of government functions. See supra note 126 (discussing early English cases from which the substantive crime of solicitation developed). None of the conspiracy charges brought in the cases above made a general solicitation statute its object, nor could they have, as the federal criminal law has no such statute. Accordingly, it is incorrect to view these conspiracies as double inchoate crimes.
statutes, the federal courts' use of the conspiracy-to-attempt construction has not resulted in an extension of liability to more remote acts. Instead, the courts have applied it in instances in which the conspiracy failed to realize an object offense for which the statutory definition of the crime prohibited both the attempt and the substantive crime.

The conspiracy-to-attempt formulation is used most frequently in conjunction with the federal statute prohibiting bank robbery or the attempt to commit it. In *United States v. Dearmore,* for example, an informant, knowing that the defendants had been planning to rob a bank, introduced them to federal agents who pretended to be potential accomplices. The agents assisted the defendants in organizing the crime and accompanied them to the bank on the morning of the planned robbery. The agents arrested the defendants as they entered the bank. Relying on prior federal case law, the United States Court of Appeals for the Ninth Circuit rejected the defendants' contention that the general conspiracy statute did not apply to an attempted bank robbery or any other attempt: "While we think it a poor practice to indict for conspiracy to commit the attempt instead of indicting for conspiracy to commit the substantive offense which is the real object of the perpetrators, we cannot say that the former cannot constitute an indictable offense."

Courts also have applied the conspiracy law to statutes that prohibit the attempt to violate the union members' "bill of

---

294 For a discussion of conspiracy as an inchoate crime that imposes liability at an earlier stage than does attempt, see *supra* notes 115–117 and accompanying text.

295 *See* United States v. Dearmore, 672 F.2d 738, 739 (9th Cir. 1982) (conspiracy to attempt bank robbery); United States v. Mowad, 641 F.2d 1067, 1068 (2d Cir.) (conspiracy to attempt to export firearms without a license), *cert. denied,* 454 U.S. 817 (1981); United States v. Williams, 624 F.2d 75, 75 (9th Cir. 1980) (conspiracy to attempt to use violence to intimidate a union member from exercising his right to free speech guaranteed by the Labor Management Reporting and Disclosure Act ("Landrum-Griffin" Act)); United States v. Clay, 495 F.2d 700, 703 (7th Cir.) (conspiracy to attempt bank robbery), *cert. denied,* 419 U.S. 937 (1974); United States v. Baum, 435 F.2d 1197 (7th Cir. 1970) (conspiracy to attempt to evade federal income taxes); United States v. Chambers, 515 F. Supp. 1, 3 (N.D. Ohio 1981) (conspiracy to attempt to maliciously destroy property by explosion).


297 672 F.2d 738 (9th Cir. 1982).

298 Id. at 739.

299 *See* United States v. Clay, 495 F.2d 700, 710 (7th Cir.) (rejecting the contention that conspiracy to attempt to rob a bank is not a crime), *cert. denied,* 419 U.S. 937 (1974); United States v. Chambers, 515 F. Supp. 1, 3 (N.D. Ohio 1981) (holding that conspiracy can have as its object crime the attempt to maliciously destroy property).

300 672 F.2d at 740 (Kennedy, J.).
to maliciously destroy property by explosion, and to evade federal income taxes. One court has applied the conspiracy statute to a Treasury Department regulation that expanded the scope of a substantive statute proscribing the export of firearms without a license by making the attempt to do so a violation. Another court has upheld the application of conspiracy to a statute prohibiting a form of burglary—the breaking and entering of a post office.

The only decision to reject a conspiracy to attempt implicitly strengthened the principle that the inchoate "offense against the United States" to which the conspiracy statute can apply must be a separate, specific statute. In United States v. Meacham, the United States Court of Appeals for the Fifth Circuit reversed conspiracy-to-attempt convictions based on conspiracy and attempt provisions that were contained in the same statute. Because federal narcotics laws contain their own conspiracy provisions, the general conspiracy statute is inapposite. Thus, federal prosecutors sought to bring the conspiracy-to-attempt charges based on the two narcotics statutes, both of which read:

---

303 See United States v. Baum, 435 F.2d 1197, 1200–01 (7th Cir. 1970) (upholding application of 18 U.S.C. § 371 to 26 U.S.C. § 7201), cert. denied, 402 U.S. 907 (1971). The meaning of "attempt" under the tax code, however, is different from that which has traditionally been used in the criminal law. The elements of attempted tax evasion are the same as those for tax evasion itself, combined only with the fact that the actor was caught. The statute provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title ... be guilty of a felony ..." 26 U.S.C. § 7201 (1982). For other cases upholding the validity of conspiracy to attempt to evade taxes, see, e.g., Forman v. United States, 361 U.S. 416, 417–18 (1960), overruled on other grounds, Burks v. United States, 437 U.S. 1 (1978); United States v. Wenger, 455 F.2d 308, 310 (2d Cir.), cert. denied, 407 U.S. 920 (1972); Giordano v. United States, 257 F.2d 109, 111–12 (8th Cir.), cert. denied, 357 U.S. 944 (1958); Yoffe v. United States, 153 F.2d 570, 571, 576 (1st Cir. 1946).
Although it is probable that the "conspiracy to attempt" charge against Mowad was the result of careless indictment drafting and not innovative legal reasoning, the Government's charge contains all elements necessary to prosecute a conspiracy: a provision making the act of conspiring a crime and a provision making the object of the conspiracy a crime.

Id. at 1074.
306 626 F.2d 503 (5th Cir. 1980), cert. denied, 459 U.S. 1040 (1982).
"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable..." The court overturned the convictions not on the ground that a conspiracy to attempt is a "conceptually bizarre crime," but rather on its reading of congressional intent that the statute be used only to charge either an attempt or a conspiracy.

Despite criticisms of the statutory construction, federal law clearly makes valid the double inchoate crime of a conspiracy to attempt.

III. CRITICISM OF DOUBLE INCHOATE CRIMES

Despite the use of double inchoate concepts by many federal and state courts, the majority of jurisdictions have not adopted this practice. Decisions of the nineteenth and early twentieth centuries that criticize convictions for attempts to attempt as "logical absurdities" remain influential, as evidenced by many courts' citation of them, with and without further analysis.

The abstract and semantical nature of the logical-absurdity argument, however, has come under criticism in recent years by scholars and jurists. Consequently, some recent decisions declining to recognize double inchoate offenses have referred to the absence of express legislative intent to allow courts the essentially common-law authority to create crimes by combining statutory inchoate offenses. This argument implies a violation of due process caused by lack of notice to the defendant. In addition, several recent decisions and commentaries have criticized the use of double inchoate crimes as cumbersome and unnecessary.

309 626 F.2d at 509. The court observed that "it would be the height of absurdity to conspire to commit an attempt, an inchoate offense, and simultaneously conspire to fail at the effort." Id. at 509 n.7; see also supra note 271 (quoting court's comments on attempt to conspire). The court continued:

... Congress is as much aware as we are of the venerable maxim that penal statutes are to be strictly construed.

310 626 F.2d at 508-09.
311 See infra notes 422-428 and accompanying text (noting judicial criticism of the conspiracy-to-attempt construction).
In summary, the case law generally reflects a progression from a conceptual approach, which concentrates on the use of abstract concepts and their analysis by pure logic, to a functional approach, which emphasizes the purposes of the law. Although the logical-absurdity approach appears to offer greater predictability and certainty, it may fail to achieve the social policies that the legislatures intended to further through inchoate liability. Both the manifested-legislative-intent approach and the evaluation of the necessity for specific double inchoate crimes reflect a more functional, policy-based approach. The former, however, emphasizes notions of separation of powers and individual freedom from criminal process, and thus still partakes of a conceptual approach. The latter, along with those decisions that accept double inchoate offenses, represents a truly functional approach.

A. The Logical Absurdity of Double Inchoate Crimes

1. The Origins of the Logical-Absurdity Approach

Perhaps the most influential decision to denigrate the concept of double inchoate offenses is Wilson v. State, decided by the Georgia Supreme Court in 1874. Wilson, which involved a conviction for "an attempt to make an assault," is the most often cited and quoted decision regarding double inchoate crimes. Despite criticism of the court's analysis in Wilson, several subsequent decisions have invalidated double inchoate convictions by condensing its sweeping rhetoric into the shorthand premise, "logical absurdity."

---

312 Meehan, supra note 12, at 218.
313 53 Ga. 205 (1874).
314 Id. at 206. The state had indicted Wilson for assault with intent to murder, but the jury found Wilson guilty of what it believed to be a lesser included offense. Id.
315 Arnold, supra note 154, at 64–65; Perkins, supra note 194, at 81–87; see R. Perkins & R. Boyce, supra note 13, at 159–73 (noting modern courts' tendency to move away from Wilson's logical-absurdity argument); Model Penal Code § 5.01 commentary at 363–64 (Proposed Official Draft 1985) (suggesting that courts should decide whether attempt liability attaches to particular behavior based on public policy, rather than on semantic niceties).
In *Wilson*, the defendant had used a gun to threaten a person who sought to enter the defendant's premises. The defendant, however, made clear that he would shoot only if the other party attempted to enter his house. (The court noted that the intended victim appeared to have no right to enter the defendant's house.) On this evidence, the defendant was convicted of attempted assault with intent to murder.

The Georgia Supreme Court used the logical-absurdity argument when it reversed the conviction. Noting that the state code defined an assault as "an attempt to commit a violent injury on the person of another," the court stated:

As an assault is itself an attempt to commit a crime, an attempt to make an assault can only be an attempt to attempt to do it, or to state the matter more definitely, it is to do any act towards doing an act towards the commission of the offense. This is simply absurd. As soon as any act is done towards committing a violent injury on the person of another, the party doing the act is guilty of an assault, and he is not guilty until he has done the act. Yet it is claimed that he may be guilty of an attempt to make an assault, when, under the law, he must do an act before the attempt is complete. The refinement and metaphysical acumen that can see a tangible idea in the words an attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity.

This analysis presents two bases for criticism of attempt to attempt as a logical absurdity. First, the court suggested that the attempt-to-attempt concept would give courts unlimited discretion to punish acts further removed from a completed offense than an attempt statute does. As the attempt statute did in *Wilson*, general attempt statutes require an overt act done with the intent to commit a completed crime. The act must go

---

317 53 Ga. at 206. The court doubted, based on the conditional nature of Wilson's threat and his right to protect his abode, whether the evidence was sufficient to establish "even an assault." *Id.*

318 *Id.*

319 *Id.*

320 *Id.*

321 *Id.*

322 *Id.*

323 *See supra* notes 32-49 and accompanying text (discussing actus reus of attempt).
beyond mere preparation, but may fall short of consummation of the completed offense. Consequently, the court in Wilson viewed an attempted attempt as "the doing of an act towards the doing of an act" toward completing an offense defining a tangible harm.\footnote{53 Ga. at 206.} The court indicated that allowing a conviction for attempt to attempt would be impractical at best and might lead to the judicial use of further regressions.\footnote{Id.} This practice would impart criminal liability to acts so removed from the ultimate offense as to qualify as mere preparation—that is, acts to which a court cannot impute a fully formed intent.\footnote{This implication in the Wilson analysis is elaborated on in the dissent in People v. Schwimmer, 66 A.D.2d 91, 105, 411 N.Y.S.2d 922, 931–32 (N.Y. App. Div. 1978) (Titone, J., dissenting), aff'd, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (1979), which criticized an indictment that the state claimed set out a charge of attempted conspiracy as a lesser included offense of conspiracy. The dissent argued as follows:} Second, the court in Wilson suggested that individuals do not attempt to attempt a crime, but instead attempt to commit a completed offense.\footnote{53 Ga. at 206.} Even if an inchoate crime can have as its object another inchoate crime, the second inchoate crime must have as its object some completed substantive offense meeting a statutory test of liability.\footnote{This implication in the Wilson analysis is elaborated on in the dissent in People v. Schwimmer, 66 A.D.2d 91, 105, 411 N.Y.S.2d 922, 931–32 (N.Y. App. Div. 1978) (Titone, J., dissenting), aff'd, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (1979), which criticized an indictment that the state claimed set out a charge of attempted conspiracy as a lesser included offense of conspiracy. The dissent argued as follows:} In most states, failure to consummate the completed offense is an element of attempt.\footnote{Model Penal Code § 5.01 commentary at 363 (Proposed Official Draft 1985).} Thus, in those jurisdictions, attempt to attempt suggests within the same construction both an attempt to commit some ultimate offense and an attempt to fail at that same offense.\footnote{See supra notes 23–27 and accompanying text (listing the elements of attempt).}
Several other roughly contemporaneous decisions concerning convictions for attempt to commit a crime that is itself in the nature of attempt buttressed the rationale of Wilson.331 These decisions, however, merely held without analysis that the crime of an attempt to commit an assault did not exist332 or that the state could not indict a person for an attempt to commit a crime that is itself in the nature of an attempt.333

In State v. Hewett,334 for example, the North Carolina Supreme Court rejected a conviction for a felonious “attempt to ravish and carnally know” the victim.335 The court held that the indictment made out a charge of assault with intent to rape. The court treated this crime as a lesser included offense of rape, holding that no such crime as attempt to commit rape existed.336

The Hewett court then stated the general proposition that “one cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt,”337 citing as authority the decision in People v. Thomas,338 a case that had overturned a conviction for attempted subornation of perjury.339 Several other cases involving attempt to commit embracery stated the proposition in the same way.340

As previously discussed, however, the nature of subornation of perjury and embracery as forms of attempt are different from that of assault.341 In embracery and subornation, the attempt establishes the crime; it is irrelevant whether the actor realizes his intent—i.e., solicits another to do his bidding. In assault,
however, guilt or innocence depends on how close the defendant comes to realizing his intent. Accordingly, the extension of a principle of some validity for embracery and subornation of perjury to assault without further analysis merits closer attention.

2. The Move Away from Logical Absurdity

The appeal of the logical-absurdity argument as the most valid criticism of attempts to attempt diminished with the publication of an article by Thurman Arnold in 1930.\textsuperscript{342} Arnold implicitly criticized Wilson's broad generalization by attacking the overemphasis on abstract concepts in substantive inchoate crimes:

One way of treating cases arising under [criminal attempt] statutes is to determine whether the policy of the statute can be said to include the conduct of the defendant and whether the penalty seems appropriate to the offense. If we do this we can confine our attention to the particular prohibition under discussion, and decide to what conduct we wish to extend it. Another method is to forget the particular statute which the defendant is alleged to have violated or the particular crime which he has almost consummated, and put our emphasis on words in the statute such as "assault" and "attempt." When we do this every other statute, no matter how different in policy or penalty, and attempts at every other crime no matter how dissimilar immediately become relevant. We are thereupon forced to create numerous fine distinctions and abstract concepts.\textsuperscript{345}

Using the concept of attempt to assault, from which most of the discussion of attempt to attempt has arisen, Arnold illustrated the validity of policy-based distinctions. He noted that, although the courts had not punished attempts at ordinary assault, two courts had made attempts at aggravated assault punishable.\textsuperscript{344} He believed that this distinction, based on the relative seriousness of the completed offenses, made good common sense, although it appeared incorrect when analyzed in terms

\textsuperscript{342} Arnold, supra note 154.
\textsuperscript{343} Id. at 62.
\textsuperscript{344} Id. at 65 (citing Burton v. State, 8 Ala. App. 295, 62 So. 394 (1913) (attempted assault with intent to commit rape), and State v. Herron, 12 Mont. 230, 29 P. 819 (1892) (attempted assault with a deadly weapon)).
Arnold concluded that "the generalization that there can be no attempt at a crime in the nature of attempt tells us nothing and tends merely to divert the court's mind from the real issue." Arnold's criticisms of the logical-absurdity approach make a valid point: By focusing on the definitions of attempt in modern general attempt statutes, courts that fail to recognize attempts to commit crimes in the nature of attempt have obscured the of the applicable statutes' definitions. Arnold stated: The court is confronted with the alternative of either discharging the accused or modifying the penalty to make it more nearly fit his conduct. An easy way to accomplish this is by making attempts at aggravated assaults punishable, and this is frequently done. It is academic to call such cases "wrong" because assault is in the nature of an attempt and hence cannot be attempted, particularly when a common sense result is reached.

Id. (footnote omitted).

Id.; accord MODEL PENAL CODE § 5.01 commentary at 363-64 (Proposed Official Draft 1985). The Code's drafters reasoned that:

One of the questions frequently litigated is whether there can be an attempt to attempt. As an abstract proposition of law the construction has been condemned by the majority of cases considering the issue, and it seems as a matter of sound analysis that the construction is not necessary. An attempt to attempt can always be considered a more remote attempt to commit the same substantive crime, provided, of course, that the conduct is sufficient to meet the basic test of liability. Thus, if an attempt is an attempt to commit a battery, an attempt to assault can more properly be charged as itself an attempt to commit a battery and its sufficiency determined on that basis. In any case, convictions have been sustained for attempts to assault.

The situation is somewhat different when the attempt is not described as such, but is defined as an act done with intent to commit some other crime. Among the traditional offenses burglary is such an attempt—a breaking and entering under certain circumstances with intent to commit a felony. But there has been no difficulty in sustaining charges of attempted burglary. Nor has there been difficulty generally in finding attempt liability when the "substantive offense" is even more clearly an attempt: possessing burglar's tools with intent to commit burglary; conveying tools into prison with intent to facilitate an escape; offering a bribe; exploding a substance with intent to cause personal injury; employing a drug or instrument with intent to procure a miscarriage; procuring a noxious drug with intent to supply it to another for the use in committing abortion. For each attempt liability has been sustained. It would be possible to treat each of these acts as an attempt to commit the more remote substantive crime, but this is unduly cumbersome; the existing approach seems preferable. If a preliminary act is prominent enough to serve as the basis of substantive liability, it should also provide a sufficient foundation for attempt liability . . . .

Id. (citations omitted).

In addition, several courts have noted two short scholarly works on attempt to assault as influential in eroding the unquestioning acceptance of the proposition that one cannot attempt an offense in the nature of an attempt. See, e.g., In re M., 9 Cal. 3d 517, 521, 510 P.2d 53, 53, 108 Cal. Rptr. 89, 91 (1973) (citing Perkins, supra note 194); Hutchinson v. State, 315 So. 2d 546, 548 (Fla. Dist. Ct. App. 1975) (citing Annotation, Attempt to Commit Assault as Criminal Offense, 79 A.L.R.2d 597 (1961)), overruled on other grounds, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), aff'd, 437 So. 2d 1097 (Fla. 1983); People v. Banks, 51 Mich. App. 685, 689 n.6, 216 N.W.2d 461, 463 n.6 (1974) (citing the same Annotation as Hutchinson).
necessary relationship between an attempt and an object crime. In *Allen v. People*, for example, the Colorado Supreme Court reversed a conviction for attempt to commit an assault with a deadly weapon, holding that the crime of attempted assault did not exist under the laws of Colorado. Two police officers had stopped the defendant’s car because it displayed an expired temporary permit. When one of the officers approached the car and asked for his driver’s license, the defendant pulled a gun out of his right rear pocket. Although the defendant actually dropped the gun as he drew, his arm came across as if he intended to point the gun at the officer. The defendant tried to pick up the gun, but was dissuaded by the officer, who had trained his gun on the defendant.

The court’s analysis focused exclusively on the statutory definitions of attempt and assault, the latter of which it characterized as an attempt with present ability to commit a battery. Ironically, the court noted the importance behind policy considerations:

> When a person is charged with an assault, it is clear that “present ability” must be construed in the light of the particular situation. The policy behind criminal statutes is to safeguard the public from harm from individuals. In construing the criminal assault statute, therefore, factors such as the gravity of the potential harm and the uncertainty of the result are to be included in appraising the actor’s “present ability.”

In the sentence that immediately followed, however, the court concluded: “In view of our determination that the offense with which the defendant was charged is non-existent in Colorado, the judgment of the trial court must be reversed . . . .”

---

347 The approach of some courts validating attempts to assault, however, is also open to criticism. One court has found the construction valid by simply declaring that assault is a “separate substantive crime,” even though assault was defined statutorily as attempted battery. *State v. Wilson*, 218 Or. 575, 581–90, 346 P.2d 115, 118–22 (1959) (superseded by statute, as stated in *State v. Garcias*, 296 Or. 688, 679 P.2d 1354 (1984)). Other decisions have broadened traditional definitions of assault by reading into them the requirement that the necessary act be one that instills a fear of imminent bodily harm in the victim. *See, e.g.*, *United States v. Locke*, 16 M.J. 763, 765 (A.C.M.R. 1983); *State v. White*, 324 So. 2d 630, 631 (Fla. 1975). This interpretation serves to make assault a substantive offense, rather than an attempted battery.


349 *Id.* at 115, 485 P.2d at 887.

350 *Id.* at 116, 485 P.2d at 888.

351 *Id.* at 117–18, 485 P.2d at 888 (citation omitted).

352 *Id.* at 118, 485 P.2d at 888–89.
The idea of making a general attempt statute the object of another general attempt statute is logically absurd. General attempt statutes, because of their broad applicability to various types and degrees of crimes, must rely on such abstract concepts as “proximity,” “preparation,” or “substantial step” as general rules to define in specific instances the preparatory acts that create culpability. A continuing regression of “general attempt” to commit a “general attempt” to commit a crime would circumvent the measures, however vaguely defined, with which legislatures draw the line for attempt liability.

Crimes in the nature of attempt, however, are not merely abstract attempts. Rather, they are substantive offenses combining elements of a completed offense with the attempt to commit that specific offense. Consequently, courts can evaluate the danger posed by preparatory acts and decide whether the danger warrants punishment, albeit of a lesser severity than that for the completed object offense. The application of attempt liability to serious offenses such as burglary, aggravated

---

3 Arnold, supra note 154, at 65–66.
3 See supra notes 162–163 and accompanying text (discussing crimes in the nature of attempt). Even assault, which stirs the greatest controversy as the object of an attempt, is usually defined as an unlawful attempt coupled with the present ability to commit a violent injury. Thus, assault seems to be an attempt plus another element. Arnold, supra note 154, at 65. This reasoning is even stronger in cases of assault with a deadly weapon and assault with intent to commit another crime. Accordingly, this argument is used to justify the treatment of aggravated assault as a separate substantive crime. Burton v. State, 8 Ala. App. 295, 298–99, 62 So. 394, 395–96 (1913); State v. Wilson, 218 Or. 575, 585, 346 P.2d 115, 120 (1959) (superseded by statute, as stated in State v. Garcia, 296 Or. 688, 679 P.2d 1354 (1984)); see also Perkins, supra note 194, at 87 (because the crime of assault with a deadly weapon was unknown at common law, “it [is] a separate substantive offense and not an uncommitted battery”).
4 Arnold, supra note 154, at 75:

The law of criminal attempts . . . [c]onsidered apart from any particular crime . . . simply means that courts are permitted to fill in the gaps which a set of definitions inevitably leave when applied to human conduct. The power to interpret statutes performs a similar function, but the rules of statutory interpretation of criminal statutes are never considered as definitions of crimes. The power to punish for criminal attempts gives the court power to extend a criminal statute without distorting its language. It is necessary to our criminal system. To treat this power as the definition of a substantive crime is either to destroy it or hopelessly to confuse it.

Id.
5 See supra notes 225–234 and accompanying text (discussing attempted-burglary constructions).
assault, and sexual assault of minors indicates growing acceptance of a policy-based analysis.

Nevertheless, several recent decisions have characterized double inchoate constructions as invalid without further analysis or as logical absurdities. These courts have not only rejected convictions for attempts to commit crimes in the nature of attempt—most notably assaults—but also have re-

357 See supra notes 169–224 and accompanying text (discussing the debate over the attempt-to-assault construction).
358 See supra notes 192–224 and accompanying text (noting the modern courts' characterization of assault as a substantive offense, to justify attempt liability).

An analogous case is State v. Davis, 108 N.H. 158, 229 A.2d 842 (1967). In Davis, the court upheld a conviction for attempted statutory rape against the defendant's contention that such a charge is, in essence, an attempted assault with intent to rape. Id. at 162, 229 A.2d at 845. The court, while conceding that there could be no crime of an attempt to attempt, rejected the argument, holding that attempted rape is a lesser included offense of rape. Id. The court supported this proposition by citing cases rejecting attempts to commit embracery and to induce prostitution. Id.

Offenses such as embracery and inducing prostitution punish the attempt as the completed offense. Thus, the general proposition that there is no offense of attempt to attempt a crime has greater validity for them than it does for attempt to assault. For cases that reject the attempt-to-attempt construction for crimes that punish the attempt as the completed offense, see Pagano v. State, 387 So. 2d 349, 350 (Fla. 1980) (corruption of a public servant by threat); Silvestri v. State, 332 So. 2d 351, 354 (Fla. Dist. Ct. App.) (making a false report of a crime), aff'd, 340 So. 2d 928 (Fla. 1976); King v. State, 317 So. 2d 852, 853 (Fla. Dist. Ct. App. 1975) (uttering a forged instrument), aff'd in relevant part, 339 So. 2d 172 (Fla. 1976).

Several courts, particularly those in Florida, have discussed this general proposition in those cases in which the legislature has included the attempt with the completed offense in a single statute punishing both with the same penalty. See, e.g., State v. Eames, 365 So. 2d 1361, 1363–64 (La. 1978) (reversing a conviction for attempt to incite a riot, because the offense was defined as "endeavor by any person to incite or procure any other person to create or participate in a riot"); supra notes 263–266 (listing Florida cases that discuss the principle).

jected convictions for attempt to conspire and criticized the use of conspiracy to attempt.

In their functions as inchoate crimes, both conspiracy and solicitation are offenses that punish acts further removed from the completed offense than attempt does. Consequently, courts can analyze constructions such as conspiracy to attempt and solicitation to attempt as forms of attempt to attempt. These constructions raise the most valid criticism inherent in the logical-absurdity approach—defendants do not conspire or solicit another to attempt to commit a crime; rather, they act with the intention of committing the completed offense itself.

These constructions also raise the possibility of regression of liability to merely preparatory acts. As previously demonstrated, however, the federal courts consistently have recognized the crime of conspiracy to attempt. This construction has raised no regression problem because the courts have applied it only to conspiracies to commit completed crimes that have failed.

By contrast, it appears that double inchoate constructions such as attempt to conspire or attempt to solicit raise less of a logical-absurdity problem than does conspiracy to attempt. In

---


363 See United States v. Dearmore, 672 F.2d 738, 740 (9th Cir. 1982) (noting that it is a poor practice to indict for conspiracy to attempt, because the real object of perpetrators is to commit the substantive offense); Allen v. People, 175 Colo. 113, 115, 485 P.2d 886, 888 (1971) ("Perhaps philosophers or metaphysicians can intend to attempt to act, but ordinary people intend to act, not attempt to act.").


A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime . . . .

Id. (emphasis added).

365 See supra notes 291-311 and accompanying text (listing cases discussing the principle).

366 See supra note 295 (listing cases).
such constructions, the additional harm of potential group activity toward an ultimate offense makes it difficult to analyze conspiracy and solicitation as merely forms of attempt. Nevertheless, most courts have rejected attempt to conspire, several on the ground that it is a logical absurdity.

B. The Problems of Notice to Offenders and Manifested Legislative Intent

1. The Role of Due Process in Inchoate Liability

The development of the due process concept of notice has resulted in the increasing codification of the criminal law. Notice requires not only that the legislature explicitly make an act resulting in certain consequences a crime, but also that the scope and penalty of the criminal statute be phrased in explicit terms. Most states have abolished the common law of

367 For discussion of the non-inchoate elements of conspiracy and solicitation, see supra notes 115–117, 129–131 and accompanying text.
368 See supra notes 270–272 and accompanying text (discussing cases that have rejected attempt-to-conspire constructions). For cases referring to the attempt-to-conspire construction as a logical absurdity, see, e.g., United States v. Meacham, 626 F.2d 503, 509 n.7 (5th Cir. 1980), cert. denied, 459 U.S. 1040 (1982); Hutchinson v. State, 315 So. 2d 546, 549 (Fla. Dist. Ct. App. 1975), overruled on other grounds, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1983), aff'd, 437 So. 2d 1097 (Fla. 1983).
370 See Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (invalidating a municipal vagrancy ordinance as "void for vagueness," because the ordinance failed to give a person of ordinary intelligence fair notice that the statute forbade his contemplated behavior and encouraged arbitrary and erratic arrests and convictions). For cases on which the Papachristou Court relied, see United States v. Harriss, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453, 458 (1939); United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921).


In addition, the courts have recognized that a scienter requirement may mitigate a statute's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed. See Colautti v. Franklin, 439 U.S. 379, 390–96 (1979) (invalidating "viability determination" provision of Pennsylvania's Abortion Control Act); United States v. Curcio, 712 F.2d 1532, 1543–44 (2d Cir. 1983) (upholding a federal statute prohibiting the extortionate extension of credit, even though it did not use the terms "knowingly" or "wilfully").
Consequently, judicial discretion to punish crimes is circumscribed by legislative intent to proscribe an act as manifested by a statute. But the comparatively recent separation of inchoate crimes into substantive statutes requires judicial discretion in the application of general principles to specific instances of conduct. In particular, the crime of attempt has permitted courts to fill a gap in a definition of criminal conduct by giving them the authority to extend a statute punishing a completed crime without distorting the legislative intent expressed by the statute’s language.

The use of double inchoate concepts allows courts to exercise an even more extensive common-law type of discretion to punish acts that are not covered by general inchoate statutes. The doctrine of “no punishment without a statute” generally requires an explicit legislative directive or manifested legislative intent to punish conduct. The doctrine of manifested legislative intent is a variation of the constitutional prohibition against legislative enactment of ex post facto laws. One can view judicial “creation” of double inchoate crimes as judicial enactment of

---


---


372 Most states abolishing common-law crimes make no explicit provision for judicial interpretation of common-law terms within penal statutes. But cf. KAN. STAT. ANN. § 21-3102(1) (1981). The statute provides:

No conduct constitutes a crime against the state of Kansas unless it is made criminal in this code or in another statute of this state, but where a crime is denounced by any statute of this state, but not defined, the definition of such crime at common law shall be applied.

*Id.*

373 W. LAFAVE & A. SCOTT, *supra* note 11, at 61–62. Many states rejecting common law crimes, for example, establish inchoate crimes defining the offense or its elements in common-law terms, necessitating resort to the common law for guidance. See *supra* note 372 (discussing Kansas statute that directs courts to apply the common-law definition of crime in the absence of a statutory definition).

374 Arnold, *supra* note 154, at 65.

criminal law to fit an act already committed. Thus, a court's use of a double inchoate offense raises a significant question of due process.

The application of due process analysis to the criminal law requires an assessment of the proper purposes of the criminal law. Today, a major purpose of the criminal law is the prevention of harmful conduct. This is particularly true for inchoate offenses. The judicial system seeks to prevent crime not only through intervention, but also through the secondary purposes of retribution, deterrence, rehabilitation, and incapacitation.

Due process analysis also requires a determination of whether the means chosen to implement such purposes are related to the ends sought in a constitutionally permissible way. Under due process means-ends analysis, a court must decide whether a given set of facts justifies a finding of criminality and the imposition of a criminal sanction in light of the proper purposes of the criminal law.

One can argue that the use of double inchoate crimes is inconsistent with the principles of retribution and deterrence. Both concepts are based on the notion of culpability—that is, that an individual has the choice of doing good or committing a harmful act. The element of choice, however, is effaced if the individual cannot determine whether an intended act is criminal. Although it is by no means certain that an actor would realize the criminality of his act even with reference to a written statute, the argument in favor of explicit notice is buttressed by the nature of the criminal sanction.

Because the imposition of a criminal sanction results in an individual's involuntary loss of liberty and in stigmatization, substantial procedural protections are required to surround the process by which criminality is determined in the individual case. Thus, in the absence of a statute explicitly punishing a defendant's conduct, a court must resolve in the defendant's

---

376 See supra note 154 and accompanying text (discussing the effect that the doctrine of common-law crimes has on judicial power to create and define crimes).
379 Angel, supra note 377, at 79–80. It would not be incorrect to add to this list public education, although the term is somewhat more nebulous than the others. See Robbins, Book Review, 94 HARV. L. REV. 918 (1981) (reviewing J. Gorecki, A THEORY OF CRIMINAL JUSTICE (1979)).
381 Id.
favor the issue of whether he knew or should have known of the criminality of his actions.\textsuperscript{382}

2. The Manifested-Legislative-Intent Approach

Courts that have sanctioned double inchoate offenses necessarily have assumed that courts can construe a state's criminal code so that one inchoate crime is the object of another inchoate crime unless the legislature specifically manifests a contrary intent.\textsuperscript{383} This doctrine of manifested legislative intent is too narrowly positivistic. Common-law jurisdictions have never taken the rigid position that the criminal law is purely the command of the sovereign. Instead, courts have had greater or lesser discretion in distinguishing criminal from noncriminal conduct. Because the statutory language of inchoate offenses relies heavily on common-law concepts, inchoate liability is still an area in which substantial judicial discretion is proper.\textsuperscript{384}

By contrast, several states explicitly preclude judicial discretion to create double inchoate offenses.\textsuperscript{385} In addition, several state courts have exercised judicial restraint by citing a lack of manifested legislative intent to allow judicial pyramiding of inchoate offenses.\textsuperscript{386} The California Supreme Court, for example,
has held that attempted assault is not a crime in that state. In *In re M.*, a minor had been charged with assaulting a police officer with a deadly weapon after hurling an unidentified projectile that missed the officer. The juvenile court declined to find the defendant guilty of the aggravated assault because he had missed his target. Instead of finding the minor guilty of the lesser included offense of simple assault, however, the court convicted him of attempted aggravated assault.

The supreme court, after noting the division of opinion over the validity of attempt to assault, conceded the effacement of the logical-absurdity argument:

> Whether or not the foregoing theories are entirely tenable, it is apparent that the abstract concept of an attempted assault is not necessarily a logical absurdity. Yet to concede, in an academic sense, the possibility that there can be an attempted assault is not the equivalent of declaring it to be a punishable offense under the laws of this state.

Noting that the penal code had abolished common-law crimes, the court acknowledged that the legislature statutorily defined assault as an attempt to commit a battery with present ability. The court also noted that no such crime as attempt to assault was recognized at the time the legislature adopted its definition of assault. Accordingly, the court ruled that the legislature’s omission of attempt to assault from the penal code demonstrated its intent not to punish such an offense, whether characterized as an attempted assault or as an attempt to commit a battery without present ability.

The same criticism applies to the lack-of-legislative-intent approach as to the logical-absurdity approach: By focusing on the legislative definitions of general inchoate offenses, a court fails

---

387 *Cal. 3d* at 519–20, 510 P.2d at 34, 108 Cal. Rptr. at 90.  
388 *Id.* at 521, 510 P.2d at 35, 108 Cal. Rptr. at 91.  
389 *Id.* at 521–22, 510 P.2d at 35, 108 Cal. Rptr. at 91; see *supra* notes 52–65, 169–180 and accompanying text (discussing definitions of assault and their applications).  
391 *Id.* at 522, 510 P.2d at 35, 108 Cal. Rptr. at 91–92.
to engage in valuable policy analysis concerning how far back courts should extend liability for attempts to commit specific crimes.\textsuperscript{393} The court's reliance in \textit{In re M.} on a reworked version of the logical-absurdity argument demonstrates the superficiality of its analysis.\textsuperscript{394}

The lack-of-legislative-intent approach, however, raises two valid policy criticisms of double inchoate offenses. First, because the common law creates double inchoate crimes, the case-by-case nature of their development will likely result in inconsistent and arbitrary results.\textsuperscript{395} Decisions may vary within jurisdictions concerning how far back in the preparation/perpetration continuum a court will impose liability for the same offense.\textsuperscript{396} Second, a factfinder may improperly base its finding of guilt on its subjective belief about an individual actor's dangerousness, rather than on the seriousness of the defendant's intended crime or his actions toward it. This inclusion of subjective elements in the determination of liability makes it more difficult to establish settled rules of law.

These notions, combined with the infrequent use of double inchoate crimes, also lessen the deterrent value of double inchoate crimes, also lessen the deterrent value of double inchoate...
choate concepts. It is unclear whether general inchoate crimes provide any deterrent effect beyond that which is provided by the object crime. The Model Penal Code's commentary suggests that inchoate-crime statutes do little to deter crimes, because most individuals base their calculations, if any, on whether to commit a crime on the penalty for the successful, rather than the failed, commission of that crime. The manifested-legislative-intent approach, however, implies that notice is the essential basis of deterrence and assumes some deterrent value in statutory inchoate crimes. Consequently, the approach emphasizes the danger in degrading whatever quantum of additional deterrence general inchoate offenses provide.

The importance of the predictive and preventive policies behind inchoate liability, however, has received short shrift in the manifested-legislative-intent approach. Requiring acts on the part of the accused before inchoate liability will attach satisfies the interests of individual liberty. The statutory harm of these acts not only justifies punishment for what the accused has actually done, but also for what he intended to do had he not been prevented.

C. The Cumbersome Nature of and Lack of Need for Double Inchoate Crimes

Despite the partial validity of the constitutional and policy-based arguments in the manifested-legislative-intent doctrine, an expanding number of American courts have found that other policy considerations outweigh those arguments. At the same time, American jurisdictions increasingly have codified inchoate offenses in a manner similar to that suggested by the Model

---

397 See supra notes 34–37 and accompanying text (discussing rationales behind imposing attempt liability).

398 The rationale behind the approach of nullum pene sine crimen is that, although potential criminals are unlikely to peruse penal codes in deciding whether to commit a crime, it is even less likely that they will look to court decisions establishing the common law of a crime. Thus, it is assumed that the framing of a criminal offense in a statute is a much more effective means of making the public aware of prohibited acts and their penal consequences. See McBoyle v. United States, 283 U.S. 25, 27 (1931); see also United States v. Dotterweich, 320 U.S. 277, 292–93 (1943) (Murphy, J., dissenting).


400 For discussion of legal or statutory harm, see supra note 14 and accompanying text.
Consequently, substantive inchoate provisions now cover more acts that tend toward commission of a completed crime. This trend is reflected by several recent decisions holding that indictments for double inchoate offenses are unnecessary.

I. Attempt to Conspire

Some of these cases have arisen in the context of indictments for attempt to conspire. Prosecutors have charged attempted conspiracies in two situations: (1) where the actus reus requires the actual agreement of another party and the importuned party has no intent to act on the agreement but pretends that he does; and (2) where the importuned party simply refuses to join the conspiracy.

The first type of attempt-to-conspire construction usually arises when a party discusses a proposed crime with an undercover police agent. It also includes situations in which the party seeks the aid of another private citizen who subsequently becomes a police informant, or in which a person is incapable of carrying out the agreement due to some incapacity unspoken of to the solicitor.

---

401 See supra notes 104–109 (listing attempt statutes); supra notes 107–109 (listing conspiracy statutes); supra note 133 (listing solicitation statutes).
403 See People v. DiDominick, 94 Misc. 2d 392, 393–94, 406 N.Y.S.2d 420, 421 (N.Y. Sup. Ct. 1978) (murder); supra note 273 and accompanying text (suggesting that the attempt-to-conspire construction is more useful in states that have not adopted the unilateral approach to conspiracy).
404 See supra note 283 and accompanying text (discussing Kansas' rejection of indictment for attempted conspiracy).
406 See Hutchinson v. State, 315 So. 2d 546, 547 (Fla. Dist. Ct. App. 1975) (involving a solicitor who reported to police the defendant's offer to pay to have someone killed), overruled on other grounds, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), aff'd, 437 So. 2d 1097 (Fla. 1983).
407 But see People v. Berkowitz, 50 N.Y.2d 333, 342–43, 406 N.E.2d 783, 788, 428 N.Y.S.2d 927, 932 (1980) (holding that the unilateral theory of conspiracy allowed the court to convict the defendant of conspiracy even though all of the other parties to the illicit agreement were not criminally liable due to their minority or similar incapacity).
In the past, prosecutions for conspiracy in these circumstances were overturned due to the doctrine of impossibility. The Model Penal Code’s unilateral-conspiracy approach, however, removes impossibility as a defense in conspiracy prosecutions. In *People v. Lanni*, for instance, a New York appellate court upheld a conspiracy conviction against such a challenge. The defendant had approached another party to commit a crime (unspecified by the court), and the other had feigned agreement and become a police informant. The defendant, but not the informer, committed overt acts in furtherance of the conspiracy, as required by the statute. The court held that criminal liability for conspiracy attaches regardless of the culpability of the importuned party because New York’s conspiracy statute adopted the Model Penal Code’s unilateral approach to conspiracy. In so holding, the court criticized the attempt-to-conspire construction that other state courts had used to uphold conspiracy indictments.

---

408 See, e.g., King v. State, 104 So. 2d 730, 733 (Fla. 1957) (police officers who agreed with an undercover agent that he pay them in return for protection of his phony bookmaking operation were not guilty of conspiracy); Archbold v. State, 397 N.E.2d 1071, 1073 (Ind. 1979) (defendant was not guilty of conspiracy because the named co-conspirator was an undercover officer acting within scope of his duties and feigning participation in the criminal enterprise); People v. Atley, 392 Mich. 298, 303, 220 N.W.2d 465, 467 (1974) (feigned agreement of a police informant was not considered admissible as proof of conspiracy); Delaney v. State, 164 Tenn. 432, 433–35, 51 S.W.2d 485, 486–87 (1932) (because the co-conspirator in a murder scheme merely feigned agreement and later informed police of the scheme, there was no conspiracy); see also Robbins, *supra* note 11, at 411–12 n.189 (discussing the relationship between conspiracy and the impossibility defense).

409 See *supra* notes 107–109 and accompanying text (discussing unilateral approach to conspiracy and listing states that have adopted approach).


411 Id. at 5–6, 406 N.Y.S.2d at 1011.

412 Id.

413 Id. at 12–17, 406 N.Y.S.2d at 1016–19.


415 95 Misc. 2d at 17, 406 N.Y.S.2d at 1019. The court noted that since the advent of our present Penal Law, it would appear that habit, not necessarily logic, has fashioned an unremitting dogma in its insistence that change in our law has brought no change. It has bound down a functionally appropriate approach, as it deals with individual dispositions to criminality, in the iron grip of outdated precedents and, at times, ill-traced legal genealogies. It has restrained our acceptance of the modern unilateral aspect of conspiracy as directed and defined in [the new conspiracy statute], which provisions are supportive of social interests and address individual criminal responsibility.
Similarly, a court in Florida overturned a conviction for attempt to conspire because the court found that the legislature did not intend to punish that offense, and that the state’s law of solicitation covered the indicted behavior. In *Hutchinson v. State*,\(^4\) the defendant asked another to find someone to murder a bothersome union business agent. The solicitant requested a few days to think over the proposition, but never actually agreed to it. Instead, he informed the police of the defendant’s re-

*Id.* The court particularly criticized the reasoning of another New York state court in *People v. DiDominick*. *Id.* (citing *People v. DiDominick*, 94 Misc. 2d 392, 406 N.Y.S.2d 420 (N.Y. Sup. Ct. 1978)). In *DiDominick*, the court held that the general attempt statute applied to the crime of conspiracy. 94 Misc. 2d at 394, 406 N.Y.S.2d at 421. Therefore, the court reasoned that a grand jury could indict the defendant for attempted conspiracy even though the “co-conspirator” (an undercover police officer who did not intend to execute the planned crime) was not criminally culpable. *Id.* The court in *Lanni*, however, held that because New York had adopted the unilateral approach to conspiracy, a grand jury could indict someone for conspiracy without regard to the criminal culpability of the person with whom the actor intended to conspire. 95 Misc. 2d at 6, 406 N.Y.S.2d at 1012.

*Lanni* thus imposed liability on the unsuccessful conspirator by construing the definition of conspiracy to include situations in which the importuned party does not intend to act on the agreement. *Id.* at 12–17, 406 N.Y.S.2d at 1016–19. The court in *DiDominick*, however, avoided resolving the issue of whether the impossibility defense applied to the crime of conspiracy by deciding that, even if a conspiracy does not exist unless both actors have the necessary mens rea, a grand jury still could indict an unsuccessful conspirator for attempted conspiracy. *People v. DiDominick*, 94 Misc. 2d 392, 394, 406 N.Y.S.2d 420, 421 (N.Y. Sup. Ct. 1978). Because the court in *Lanni* believed that the reasoning in *DiDominick* “begs our question,” it criticized the manner in which the court in *DiDominick* resolved this issue. *Lanni*, 95 Misc. 2d at 17, 406 N.Y.S.2d at 1019.


A subsequent New Jersey appellate decision criticized the lower court’s holding in *Lavary*. In *State v. Mazur*, 158 N.J. Super. 89, 385 A.2d 878 (N.J. Super. Ct. App. Div. 1978), the court stated that *Moretti* held only that, even though the object of a criminal conspiracy is unattainable, this form of factual impossibility provides no defense to those who have agreed to commit the crime. *Id.* at 99, 385 A.2d at 883. Thus, the court argued, *Moretti* emphasized, rather than downplayed, the need for concerted intent. *Id.* 437 So. 2d 1072 (Fla. Dist. Ct. App. 1982), aff’d, 437 So. 2d 1097 (Fla. 1985).
Having noted that the state legislature had not manifested an intent to punish attempted conspiracy, the court reasoned that the prosecutor should have indicted the defendant for the common-law crime of solicitation.

The double inchoate crime of attempt to solicit is unnecessary in those states that have adopted a solicitation provision similar to that of the Model Penal Code. Such statutes punish the attempt to solicit to the same degree that they punish the completed solicitation. Thus, a failure to communicate the request for criminal activity to the intended solicitant is no bar to prosecution for solicitation.

2. Conspiracy to Attempt

In contrast to the diminishing need to use the attempted-conspiracy construction, the crime of conspiracy to attempt is not and has never been necessary. Because the crux of a conspiracy is the agreement to commit a crime, liability for conspiracy attaches regardless of whether the actor completed the object crime.

In People v. Travis, a California appellate court emphasized these points in a challenge to a conviction for attempted theft. The defendants had been indicted for conspiracy to commit theft, but the court found them guilty of attempted theft instead. The appellate court reversed the convictions, holding that at...
tempted theft is a lesser included offense of theft, but not of conspiracy to commit theft.\footnote{Id. at 843–44, 341 P.2d at 852–53.}

In dicta, the court also suggested that there is no such crime as conspiracy to attempt theft:

Conspiracy imports an agreement to commit a crime and it seems doubtful, to say the least, that persons would agree to merely attempt to commit a crime as distinguished from agreeing to commit it. Moreover, if persons conspire to commit a particular crime, they would be guilty of the conspiracy regardless of whether the substantive crime was actually consummated or not.\footnote{Id. at 846 n.1, 341 P.2d at 853–54 n.1 (emphasis in original).}

Although the federal courts continue to recognize the offense,\footnote{See supra notes 291–311 and accompanying text (discussing federal cases that uphold the conspiracy-to-attempt construction).} one court has noted the unwieldy nature of the charge and suggested that it is “a poor practice to indict for conspiracy to commit the attempt instead of indicting for conspiracy to commit the substantive offense which is the real objective of the perpetrators.”\footnote{United States v. Dearmore, 672 F.2d 738, 740 (9th Cir. 1982). Nevertheless, the court concluded that the conspiracy-to-attempt indictment was valid. Id.}

The manner in which the courts have considered conspiracy to attempt illustrates that it is unnecessary. Rather than as a means to fill gaps in the criminal code by extending attempt liability, the courts have employed the construction merely as a means of categorizing the criminal action based on an after-the-fact assessment of the defendant’s success or failure in completing the object crime.\footnote{For discussion of the limited nature of the conspiracy-to-attempt construction in the federal law, see supra notes 294–295 and accompanying text.} The success or failure of the object crime, however, is irrelevant in determining conspiracy liability.\footnote{See supra notes 115–117 and accompanying text (discussing actus reus of conspiracy).} Instead, it should serve only to determine an actor’s liability for the completed crime.\footnote{For discussion of the lack of merger in conspiracy, see supra notes 102–103 and accompanying text.}

3. Policy-Based Analysis

Recent developments in the criminal law have demonstrated the lack of necessity for double inchoate crimes such as con-
sparcity to attempt and, to a lesser degree, attempt to conspire. Courts instead should analyze double inchoate crimes in terms of their necessity for realizing the policies of the criminal law, rather than in terms of logical absurdity or manifested legislative intent. Although the modern trend in criminal law is toward restricting the discretion of courts to punish individuals for actions that are not specifically covered by criminal codes, the need remains for limited judicial discretion to extend liability for unsuccessfully attempting to complete a crime through the use of inchoate offenses.

The balancing tests of policy analysis provide no easy answers regarding whether attempts to commit inchoate crimes are necessary. Courts have avoided significant consideration of this issue by relying on logical-absurdity and manifested-legislative-intent analyses. The arguments that assault can be treated as a substantive offense or that present ability can be redefined in light of the seriousness of the intended consequences ignore the unique development of assault law and its received legal tradition—a collection of concepts that is not easily altered by efforts to impose a uniform approach.

Courts that criticize the validity of double inchoate offenses generally have framed the issue in terms of whether an inchoate offense can have as its object another inchoate offense. This conceptual approach has resulted in resort to the intellectually

412 For analysis and criticism of the logical-absurdity approach, see supra notes 313–368 and accompanying text.
413 For analysis and criticism of the manifested-legislative-intent approach, see supra notes 383–400 and accompanying text.
416 See, e.g., id. at 116–17, 485 P.2d at 888 (stating that “as to [certain crimes] it is true as argued by defendant that ‘there can be no crime of an attempt to commit an attempt’”) (quoting State v. Davis, 108 N.H. 158, 162, 229 A.2d 842, 845 (1967)); Milazzo v. State, 359 So. 2d 923, 924–25 (Fla. Dist. Ct. App. 1978) (reversing conviction for attempted sale of cocaine because the crime of “attempt to attempt to transfer for consideration” does not exist), aff’d in relevant part, 377 So. 2d 1161 (Fla. 1979); State v. Eames, 365 So. 2d 1361, 1363 (La. 1978) (holding that the attempt statute does not apply to a crime that is itself an attempt because the resulting indictment would charge the defendant with attempting to attempt to do illegal act); State v. Taylor, 345 Mo. 325, 334, 133 S.W.2d 336, 341 (1939) (“to convict defendant of attempting to attempt to corrupt the alleged juror” would allow the state “to sort of ‘pyramid’ attempts”) (emphasis in original); State v. Currence, 14 N.C. App. 263, 266, 188 S.E.2d 10, 12 (1972) (reversing conviction for attempted aggravated assault because the effect of such a verdict was to find the defendant guilty of attempt to attempt); Commonwealth v. Willard, 179 Pa. Super. 368, 373, 116 A.2d 751, 754 (1955) (the attempt-to-attempt construction impermissibly allows a prosecutor to indict for acts that are not sufficiently proximate to the completed crime to hold the defendant criminally responsible).
ardid doctrines of logical absurdity and manifested legislative intent.\textsuperscript{437} Although sometimes logically awkward, double inchoate constructions have provided a flexible mechanism for courts to use in filling the gaps left in necessarily general inchoate statutes.\textsuperscript{438} Indeed, double inchoate constructions have allowed courts to retain a consistent approach to inchoate culpability. Courts have used these constructions rather than stretch or distort the established definitions of single inchoate offenses and their elements.\textsuperscript{439}

Despite efforts to codify all-encompassing substantive inchoate offenses, double inchoate concepts such as attempted assault are of value to courts in their efforts to elaborate on and rationalize inchoate statutes. This argument assumes a substantial role for the judiciary in interpreting not only the specific provisions of the criminal law, but also the policies behind it.\textsuperscript{440}

This proposition is particularly valid for statutory inchoate offenses that leave many issues of interpretation unresolved because they are necessarily defined in general terms. Consequently, the courts must "collaborate with the legislature in

\textsuperscript{437} See supra notes 313-400 and accompanying text (discussing approaches).

\textsuperscript{438} For survey and analysis of useful double inchoate constructions, see supra notes 155-203 and accompanying text (attempt to commit crimes in the nature of attempt); supra notes 270-290 and accompanying text (attempt to conspire in the absence of a unilateral-conspiracy or solicitation statute).

\textsuperscript{439} A comparison of two cases with nearly identical facts illustrates this point. In United States v. Locke, 16 M.J. 763 (A.C.M.R. 1983), the defendant, while fighting with a military police officer, verbally threatened to kill him and unsuccessfully attempted to remove the officer's gun from his holster. Id. at 764. The court held that, although the defendant lacked the present ability to commit a battery on the officer, he nevertheless was guilty of an attempt to commit aggravated assault. Contrastingly, in People v. Gordon, 178 Colo. 406, 498 P.2d 341 (1972), the court found, under almost identical facts, that the defendant was guilty of assault and specifically ruled that he had not committed only an attempted assault. Id. at 408, 498 P.2d at 342. Relying on the earlier decision of Allen v. People, 175 Colo. 113, 485 P.2d 886 (1971), the court held that the crime of attempted assault did not exist in Colorado. The court cited Allen for the proposition that courts must construe the concept of present ability in light of "the gravity of the potential harm and the uncertainty of the result." Id. Accepting the police officer's testimony that the defendant had gotten both of his hands on the gun, the court ruled that the gun, though still in its holster, could have fired and hit the officer in the leg. Id. Thus, the court found that the defendant was guilty of assault because he possessed the present ability to commit a battery. Id.

\textsuperscript{440} Hart, supra note 375, at 429. Hart posited that
courts look both backward and forward in the application of law. They look backward to the relevant general directions of the Constitution and the statutes, as interpreted and applied in prior judicial decisions. They look backward to the historical facts of the litigation. But when the facts raise issues with respect to which the existing general directions are indeterminate, they are bound to look forward to the ends which the law seeks to serve and to resolve the issues as best they can in a way which will serve them.

Id.
discerning and expressing the unifying principles and aims of the criminal law,” particularly inchoate offenses.

As Professor Hart noted, few American courts have recognized, much less exercised, this obligation to shape their legislature’s criminal code into a rational and coherent body of law. If courts do not interpret the criminal code according to “principles and policies rationally related to the ultimate purposes of the social order,” it will become “a wasteland of arbitrary distinctions and meaningless detail.” Certainly, this criticism applies to those courts that have applied only logical-absurdity and manifested-legislative-intent analyses to double inchoate constructions.

In accepting the role for the judiciary suggested by Professor Hart, it follows that a court faced with a question of double inchoate liability first should ask whether the defendant’s acts are sufficiently dangerous to society to warrant judicial intervention and punishment. Only then should the court decide whether a double inchoate construction is necessary because taken alone, the jurisdiction’s attempt, conspiracy, or solicitation statutes do not already cover those acts.

With the advent of the legal-realist movement, the judiciary has enjoyed more freedom to interpret legislation according to its social purpose and policy. Although constitutional doctrine requires courts to interpret criminal laws more strictly than other laws, the vagueness and abstraction of inchoate offenses require a judicial balancing of policies.

In this context, the courts that have declined to adopt double inchoate concepts in the absence of manifested legislative intent have emphasized the conceptual argument of separation of powers over the policy argument regarding protection of individual freedom. The decisions that have rejected or criticized double inchoate crimes as unnecessary, however, have examined in more depth the function of inchoate offenses.

---

41 Id. at 435–36.
42 Id. at 435.
43 See Arnold, supra note 154, at 62; supra notes 353–358 and accompanying text (applying this principle to attempt).
44 Meehan, supra note 12, at 218.
IV. RECOMMENDATIONS FOR REVISION OF INCHOATE-CRIME STATUTES TO MINIMIZE THE NEED FOR DOUBLE INCHOATE OFFENSES

The proper criterion for determining the validity of a double inchoate offense is whether it is necessary to fulfill the policies underlying inchoate liability—the prevention of the socially harmful acts that are proscribed by the substantive criminal law.445 The failure of courts that have relied on the logical-absurdity and legislative-intent arguments is that they have neglected the threshold inquiry of whether the acts before them warranted punishment.446 Instead, they have begun with an analysis of whether their jurisdictions' substantive inchoate statutes allowed punishment for these acts.447

Some of the courts that have accepted the validity of double inchoate crimes, however, have done so without adequate analysis of their necessity in light of extant attempt, conspiracy, and solicitation statutes. Although there are areas in which double inchoate crimes are a useful judicial tool, there are others in which they are unnecessary.448

A. Practical Limitations on Statutory Revision

Wherever possible, legislatures should expand existing inchoate concepts rather than cause prosecutors to resort by de-

445 See supra note 12 and accompanying text (discussing the rationale behind imposing liability for inchoate crimes).
446 Cf. supra notes 376–379 and accompanying text (noting the due process considerations that are present when a judge "creates" double inchoate crimes).
448 For a discussion of the complete lack of need for the offense of conspiracy to attempt, see supra notes 422–431 and accompanying text. For discussion of the need for the crime of attempted conspiracy only in those jurisdictions that do not have solicitation or unilateral-conspiracy statutes, see supra notes 402–419 and accompanying text.
fault to indictments for double inchoate offenses. Despite an increasing judicial and scholarly acceptance of double inchoate constructions, significant obstacles to their widespread use remain. Most jurisdictions do not employ double inchoate offenses either because they have not considered their use or because they have considered it and rejected the idea. Furthermore, the cumbersomeness of these constructions draws attention, and thus makes double inchoate convictions more readily subject to appellate challenge. Consequently, courts uncomfortable with the conceptual oddity of the double inchoate constructions are likely to continue to reject them.

1. Conspiracy to Attempt (or Solicit)

The double inchoate crime of conspiracy to attempt is unnecessary. The essence of conspiracy is the communication of a criminal scheme by one party to another to gain the other's support. The success or failure of the target crime is irrelevant in determining conspiratorial liability. Although the federal courts have upheld convictions for conspiracy to attempt, the increasing criticism of this construction suggests that at least some courts are likely to reject it in the future.

---

449 See supra notes 148–312 and accompanying text (discussing cases that adopt the double inchoate construction).
450 See supra notes 342–346 and accompanying text (discussing commentary that advocates a policy-based approach to determining whether to attach inchoate liability to particular behavior).
451 In the following jurisdictions, neither the legislature nor the appellate courts have addressed explicitly the validity of double inchoate crimes: Alaska, Arizona, Arkansas, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming.
453 See supra notes 401–436 and accompanying text (noting judicial criticism of double inchoate constructions).
455 See supra notes 102–103 and accompanying text (listing cases and statutes that state the principle).
456 For a survey of the federal-court decisions approving the use of conspiracy to attempt, see supra notes 291–311 and accompanying text.
457 See supra note 311.
As evidenced by the fact that only one state court has upheld its use, states apparently have recognized the lack of need for the conspiracy-to-attempt construction. In most states, however, the language of the conspiracy statute leaves it unclear whether a conspiracy can have an inchoate crime as its object. These state legislatures should ensure that conspiracy cannot have another inchoate offense as its object by adding the following commentary:

The legislature intends that the offense of conspiracy, defined above in [enumerated code section(s)], will apply only to completed criminal offenses, and not to attempts or solicitations to perform such completed offenses.

This language would manifest legislative intent adequately without requiring the legislature to amend inchoate statutory provisions in an unnecessarily restrictive manner.

The general federal conspiracy statute, making any "offense against the United States" a proper object of conspiracy, has allowed the needless use of conspiracy-to-attempt indictments in the federal courts. Because congressional intent is derived from lengthy and complicated legislative history rather than from relatively short commentaries by state legislative drafting committees, clear expression of intent requires statutory revision. Thus, the conspiracy statute should be amended to exclude attempts and solicitations as applicable object offenses. The amended statute might read:

If two or more persons conspire either to commit any completed offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for

458 People v. Teitelbaum, 163 Cal. App. 2d 184, 220, 329 P.2d 157, 180 (Cal. Dist. Ct. App. 1958), cert. denied and appeal dismissed, 359 U.S. 206 (1959). The court reasoned that "[a] conspiracy to commit grand theft is inherently one to attempt that crime. If the conspirators are successful in accomplishing the object of the conspiracy, they have committed grand theft. If they are not successful, they have committed the crime of attempted grand theft." Id. Contra People v. Travis, 171 Cal. App. 2d 842, 846 n.1, 341 P.2d 851, 852-53 n.1 (Cal. Dist. Ct. App. 1959) (dictum) (suggesting the lack of need for a charge of conspiracy to attempt to commit theft).

459 See supra note 104 (listing conspiracy statutes). Except for the conspiracy statutes of Louisiana, Maine, and Texas, none of the statutes listed in footnote 104 expressly indicates whether conspiracy can have an inchoate crime as its object.

460 For quotation and analysis of the general federal conspiracy statute, see supra notes 292–293 and accompanying text.

461 See supra note 428 (discussing a federal case that criticizes a conspiracy-to-attempt indictment due to a lack of need for it).

462 This proposed amendment does not address the desirability of punishing unilateral conspiracy. For a model conspiracy statute that addresses both the double inchoate and unilateral-conspiracy issues, see infra notes 572–579 and accompanying text.
any purpose, and one or more of such persons do any act to
effect the object of the conspiracy, each shall be fined not more
than $10,000 or imprisoned not more than five years, or both.
This provision shall not apply to any attempt or solicitation to
commit any completed offense, except the attempt to evade taxes
[26 U.S.C. § 7201].

2. Attempt to Conspire

The double inchoate offense of attempt to conspire is unnec-
essary in those jurisdictions that have adopted either a solicita-
tion statute, a conspiracy statute that embodies the unilateral
theory of conspiracy, or both. Although only thirty-three states
punish solicitation as a statutory offense, several others rec-
ognize it as a common-law crime. Thus, solicitation—a form
of attempt to conspire—is a well-established offense in Ameri-
can criminal law. Its statutory enactment in the remaining Amer-
ican jurisdictions would allow states to avoid problems like that
faced by Kansas in State v. Sexton.

In Sexton, local police had received a tip that the defendant
was seeking someone to kill his estranged wife. Armed with this
information, two undercover federal agents made contact with
the defendant. Over the course of several meetings between the
defendant and the agents, the defendant offered a price for the
murder and outlined a plan for its commission based on his
knowledge of his wife's whereabouts.

The prosecutor charged the defendant with attempt to con-
spire to commit the murder of his wife. The prosecutor did not
bring charges of either attempted murder or conspiracy to com-
mit murder because of the state-law definitions of attempt and
conspiracy. The trial court dismissed the charge of attempted
conspiracy, holding that the defendant's actions—essentially a
solicitation—did not constitute a crime at state law.

Although the Kansas Supreme Court found these facts "mor-
ally reprehensible," it upheld the lower court's dismissal. The

---

conspiracy statute). For a discussion of the exception for tax cases, see supra note 303.
464 For a listing of states that have solicitation statutes, see supra note 133.
465 For a listing of states that punish solicitation as a common-law offense, see supra
note 132.
467 Id. at 539-40, 657 P.2d at 44.
468 Id. at 541, 657 P.2d at 44.
469 Id. at 544, 657 P.2d at 47.
court ruled that the crimes of conspiracy and attempt, categorized in the state’s penal code as “anticipatory crimes,” could not “be stacked or added to another anticipatory crime in order to arrive at a new crime.” The court declined to recognize solicitation as a common-law offense because the penal code had abolished common-law crimes. Ironically, the court relied on the legislature’s enactment of a solicitation statute subsequent to defendant’s arrest to demonstrate legislative intent not to punish solicitation at the time defendant sought to hire someone to murder his wife.

Fewer states have adopted unilateral-conspiracy statutes than have adopted solicitation statutes. This may reflect the fact that unilateral conspiracy is a more recent development in Anglo-American jurisprudence than is solicitation. The states that have adopted the unilateral-conspiracy approach have done so since the publication of the Model Penal Code’s provisions on inchoate offenses. The rationale for this approach is sound, because the communication of a criminal scheme to another is a substantial manifestation of a firm intent to commit that crime.

Adoption of a unilateral-conspiracy statute alone, however, does not ensure that courts will permit a conspiracy charge in cases in which the actor believes that he has formed a conspiracy, but the importuned party either cannot or does not intend to complete the object crime. People v. Foster demonstrates the need for firm indicia of legislative intent that a unilateral theory apply. In Foster, a party approached by the defendant to aid in a robbery feigned agreement and informed the police of the impending crime. Despite the Illinois conspiracy statute

---

470 Id. at 541, 657 P.2d at 45.
471 Id.
472 For a listing of states that have enacted unilateral-conspiracy statutes, see supra note 108.
473 Anglo-American courts have recognized solicitation as a separate offense since the early nineteenth century. See supra note 126 and accompanying text (tracing the history of the common-law crime of solicitation). By contrast, the notion of unilateral conspiracy first attracted wide notice with the publication of the Model Penal Code’s tentative draft on inchoate offenses. See MODEL PENAL CODE art. 5 (Tent. Draft No. 10, 1960).
474 For discussion of the influence of the Model Penal Code’s conspiracy provision on subsequently promulgated state provisions, see Burgman, Unilateral Conspiracy: Three Critical Perspectives, 29 De Paul L. Rev. 75, 75–76 n.3 (1979).
475 MODEL PENAL CODE § 5.03 commentary at 388 (Proposed Official Draft 1985).
being patterned after the Model Penal Code provision, an appellate court reversed the conviction of conspiracy to commit robbery, interpreting the state conspiracy statute to require an actual agreement between at least two persons. The state supreme court sustained the reversal.

477 Compare ILL. ANN. STAT. ch. 38, para. 8-2(a) (Smith-Hurd 1972) ("[a] person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense") (emphasis added) with MODEL PENAL CODE § 5.03(1)(a) (Proposed Official Draft 1985):

[a] person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime . . . .

Id. (emphasis added). The Illinois legislature also adopted a provision eliminating the impossibility defense for conspiracy, which provision was similar to the Model Penal Code provision. Compare ILL. ANN. STAT. ch. 38, para. 8-2(b) (Smith-Hurd 1972) with MODEL PENAL CODE § 5.04 (Proposed Official Draft 1962).

In Foster, the Illinois Attorney General argued that the fact that the state statute's language amended previous language that required "two or more persons" to "conspire or agree together" evinced the legislature's intent to adopt the unilateral-conspiracy approach. 99 Ill. 2d at 51, 457 N.E.2d at 407. Compare ILL. REV. STAT. ch. 38, para. 139 (1961) (requiring "two or more persons" to "conspire or agree together") with ILL. ANN. STAT. ch. 38, para. 8-2(a) (Smith-Hurd 1972) (imposing liability for conspiracy if only "[a] person . . . agrees" to commit a crime). He supported his position with the committee comments to the conspiracy statute that demonstrated the legislators' awareness of the new Model Penal Code provisions. Foster, 99 Ill. 2d at 52, 457 N.E.2d at 407; see ILL. ANN. STAT. ch. 38, para. 8-2, Committee Comments, at 458-60 (Smith-Hurd 1972) (citing Model Penal Code provisions and commentary).

478 Foster, 99 Ill. 2d at 52-53, 457 N.E.2d at 407. The court stated:

While impressed with the logic of the state's interpretation of section 8-2(a), we are troubled by the committee's failure to explain the reason for deleting the words "two or more persons" from the statute. The committee comments to section 8-2 detail the several changes in the law of conspiracy that were intended by the 1961 amendment. The comments simply do not address the unilateral/bilateral issue. The state suggests that the new language was so clear on its face that it did not warrant additional discussion. We doubt, however, that the drafters could have intended what represents a rather profound change in the law of conspiracy without mentioning it in the comments to section 8-2.

Id. The court also dismissed the state's argument that section 8-2(b)'s elimination of the impossibility defense supported a unilateral interpretation. Id. at 54, 457 N.E.2d at 408. In conclusion, the court relied on the legislature's failure to amend the statute after intermediate appellate decisions had held for a bilateral interpretation as persuasive evidence that the legislature intended a bilateral-conspiracy provision. Id. at 54-55, 457 N.E.2d at 408 (citing People v. Hill, 108 Ill. App. 3d 716, 439 N.E.2d 549 (1982), and People v. Ambrose, 28 Ill. App. 3d 627, 329 N.E.2d 11 (1975)). But see Garcia v. State, 271 Ind. 510, 516-17, 394 N.E.2d 106, 110 (1979) (upholding a unilateral interpretation of the Indiana conspiracy statute even though committee comments accompanying the proposed final draft stated that the legislature did not seek to change the prior conspiracy statute with its amendment adopting the Model Penal Code's language). The Garcia court commented:

We are unable to determine with certainty what the commission intended by this comment, i.e. whether the enactment would merely restate the definition, without changing the result, or whether the law relative to the offense, except for the elimination of enumerated defenses, would remain unchanged. If the former were intended by the commentor, it can only be viewed as a mental
To avoid this situation, legislatures should ensure that commentary accompanying the statute make its purpose clear. The commentary accompanying Delaware’s statute eliminating the impossibility defense for conspiracy provides an appropriate example:

[This section] takes what the Model Penal Code calls a “unilateral approach.” That is, attention is focused on each individual’s culpability. He has no defense which rests solely on another party’s incapacity, irresponsibility, or obedience to law. Thus, if he solicits a person to commit an offense, his crime is complete at that point, and it is irrelevant to his own liability that the person solicited does not commit the offense because of some legal incapacity or irresponsibility, or because he did not know that the conduct solicited was criminal.479

3. Attempt to Commit Crimes in the Nature of Attempt

In contrast to conspiracy to attempt (or solicit) and attempt to conspire, complete elimination of the attempt-to-attempt construction is not desirable. American jurisdictions have recognized the validity of offenses such as attempted burglary,480 attempt to entice minors with intent to commit sexual assault,481 and, to an increasing extent in those states with traditionally
defined assault, attempted aggravated assault.\textsuperscript{482} To minimize the inchoate nature of these object offenses, legislatures have narrowly defined them as substantive offenses.\textsuperscript{483} The two constituent-element approaches used are proscription of constituent acts toward the object offense and proscription of means (pos-
session) offenses.

\textbf{a. Constituent-element approaches applied to burglary.} Crimes that are derived from the long-established offense of burglary follow both approaches.\textsuperscript{484} In its modern phase, burglary generally has been defined as the unauthorized entry of a structure with the intent to commit a crime therein.\textsuperscript{485} In addition, most jurisdictions treat both criminal trespass\textsuperscript{486} and possession of burglary tools as substantive offenses.\textsuperscript{487}

Criminal trespass can be viewed as burglary rendered free of its inchoate element, the intent to commit another crime.\textsuperscript{488} This substantive offense serves at least two functions. First, it allows the courts to punish illegal entry without proving an intent to commit another crime.\textsuperscript{489} The basis of punishment, however, is not only that the illegal entry represents a harm, but also that

\textsuperscript{482} See supra notes 169–203 and accompanying text (discussing the judicial debate over the validity of the attempted-assault construction).

\textsuperscript{483} For discussion of statutes employing an essential-element approach, see supra notes 81–98 and accompanying text. The rationale behind this approach is similar to that of the unequivocality approach to attempt. See supra note 44 (explaining the standard).

\textsuperscript{484} For discussion of the common-law origins of burglary, see supra notes 66–69 and accompanying text.

\textsuperscript{485} For discussion of the modern definition of burglary, see supra notes 71–75 and accompanying text.

\textsuperscript{486} Cf. MODEL PENAL CODE § 221.2 (Proposed Official Draft 1980). The Model Penal Code section that most state criminal-trespass statutes follow provides that one who knowingly enters or remains in a building without license or privilege, or who enters or remains in a place as to which notice against trespass is given, is guilty of the substantive offense of criminal trespass. \textit{Id.}

\textsuperscript{487} For a listing of statutes prohibiting the possession of burglary tools, see supra note 81.

\textsuperscript{488} In modern criminal codes, illegal entry frequently is included as a subsection of a criminal-trespass statute. \textit{E.g.,} N.Y. PENAL LAW §§ 140.05–17 (McKinney 1987); 18 PA. CONS. STAT. ANN. § 3503(a)(1) (Purdon 1983). Criminal-trespass statutes have a broader purpose than the prevention of burglary. Many are intended to apply to tenants who refuse to move after notice of eviction, itinerants who occupy private buildings for shelter, and estranged spouses who defy court orders to stay away from their spouses' premises.

\textsuperscript{489} See MODEL PENAL CODE § 221.2(1) (Proposed Official Draft 1980) (punishing knowing trespass in a building or occupied structure); see also MODEL PENAL CODE § 221.2 commentary at 92 (Proposed Official Draft 1980) (noting that such conduct, in effect a lesser included offense of burglary, is properly treated as the most serious form of criminal trespass because the fear or apprehension may still remain).
the perpetrator likely had another criminal purpose for his entry. Second, the offense of criminal trespass allows the courts, in jurisdictions that define burglary as breaking and entering with the intent to commit a felony, to punish those who perform an illegal entry to commit a misdemeanor.

Criminal sanctions for possession of burglary tools exemplify the proscription-of-means approach. Like criminal trespass, such sanctions punish the commission of an essential element of the parent crime. Possession of burglary tools, however, is an act that is clearly more preparatory than illegal entry, which at least constitutes an element of the offense of burglary. Viewed as the gathering of the means to effect an illegal entry to commit another crime, possession of burglary tools can be conceived as representing an attempt to commit larceny, robbery, murder, or some other ultimate offense.

Nevertheless, the rationale behind treating both criminal trespass and possession of burglary tools as separate substantive offenses is sound. In either case, it is highly probable that the actor intends to commit a burglary. This conclusion reflects

---

490 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW, WORKING PAPERS 899 (1970) (noting that an intruder's presence may cause a property holder to fear for the safety of his person or property even though the intruder cannot be shown to have intended anything more than the illegal entry).

491 For a list of burglary statutes that apply only to felonies and specific misdemeanors, see supra note 75.

492 The possession of burglary tools is not strictly essential, in that many entries can be made and burglaries consummated without the use of special tools. Most entries of commercial properties that are wired with alarms, however, require special equipment. DANGEROUS OFFENDERS, supra note 36, at 27.

493 Possessional offenses usually merely evince a preparatory status that the law designates as a substantive offense rather than as an actual harm in itself. Possessional prohibitions have been justified by one court as "the practical necessity of punishing in certain circumstances a person against whom nothing can be proved except possession." Regina v. Grant, [1975] 2 N.Z.L.R. 165, 179 n.3.

494 Hall, Criminal Attempt—A Study of Foundations of Criminal Liability, 49 YALE L.J. 789, 816 (1940). In discussing possession of burglary tools as an example of essential-element offenses, Professor Hall stated:

Certain harmful consequences do not appear in the inchoate crimes, but it is plain that the existence of the anti-social situation greatly increases the probability of their occurring. Inchoate crimes are not a lesser degree of the relevant major harms; possession of burglar's tools is not a lesser degree of burglary. Nor is the relationship causal; it depends rather upon insight into social phenomena. If we know the harm which it is sought to effect, we recognize the inchoate crime as representing the necessary, preliminary pattern of behavior; hence we segregate such specific fact-clusters and penalize the doer. Such an anti-social situation regardless of how it may be distinguished sociologically from "ultimate" harmful consequences is, of course, independently criminal, legally.

Id. (emphasis in original).
judicial and other observation of human behavior; it is so commonly held as to merit the description “common sense.”

Thus, the basis for liability is experiential rather than merely positivist. Illegal entry and possession of burglary tools are crimes not only because the state has made them crimes, but also because common experience has indicated that they are preparatory acts that frequently lead to burglaries. Thus, they fulfill a major purpose of the criminal law—the prevention of social harm. The prohibited acts are sufficiently dangerous to justify intervention and to shift the burden to the actor to justify his behavior as legally permissible. Any perceived unfairness in the imposition of liability can be addressed by adjusting the sentence within the range of punishment prescribed for the crime.

b. Proscription of constituent acts. Other examples of the proscription-of-constituent-acts approach include sanctions against the use of instruments or other means to induce a

495 But see Benton v. United States, 232 F.2d 341, 344–45 (D.C. Cir. 1956) (overturning a statute that punished possession of burglary tools because it lacked a mens rea requirement); G. Fletcher, supra note 148, at 198 (warning that possession offenses that require only possession and knowledge raise the possibility that courts could convict without proof that the individual intended to harm anyone with the materials that he possessed).

496 Compare Regina v. Grant, [1975] 2 N.Z.L.R. 165, 179 n.3 (characterizing possession offense as an attempt-like prohibition attributable to the “practical necessity of punishing in certain circumstances a person against whom nothing can be proved except possession”) with G. Fletcher, supra note 148, at 197–202 (categorizing possession crimes without mens rea requirements as positivist, because they reflect policy decisions that are based on the concept of fair warning).

497 See Dawkins, Attempting to Have in Possession, 5 Otago L. Rev. 172, 176–77 (1981) (possessionary offenses are directed at incipient or inchoate criminality).

499 The outer limit of this approach is exemplified by the Model Penal Code’s loitering provision, which makes it a crime if one “loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity.” Model Penal Code § 250.6 (Proposed Official Draft 1980). Compare, e.g., Kolender v. Lawson, 461 U.S. 352, 358– 62 (1983) (holding unconstitutionally vague a loitering statute that required a suspect to provide “credible and reliable identification” to satisfy an inquiring police officer) with Porta v. Mayor, City of Omaha, 593 F. Supp. 863, 866–70 (D. Neb. 1984) (distinguishing the statute in Kolender from Omaha, Nebraska ordinance based on the Model Penal Code provision, and upholding the Omaha ordinance because it gave less discretion to police officers). The ordinance in Porta allowed a suspect to identify and explain himself to an inquiring police officer, and allowed the explanation to serve as a basis for dismissal of criminal prosecution if the court found the explanation sufficient to dispel the officer’s concerns for nearby persons or property. But see Fields v. City of Omaha, 810 F.2d 830, 834 (8th Cir. 1987) (holding same ordinance as that at issue in Porta unconstitutionally vague because ambiguity of provision for suspect identification and lack of guidelines for police officer’s assessment of suspect’s explanation would not prevent arbitrary law enforcement).
miscarriage\textsuperscript{500} and the enticement of minors into a structure to engage in sexual activity.\textsuperscript{501} Although the criminalization of abortion is controversial, sexual assault of minors draws both universal public condemnation and a growing concern.\textsuperscript{502} The Wisconsin enticement statute that was relied on in \textit{Huebner v. State}\textsuperscript{503} illustrates the constituent-act approach: "Any person 18 years of age or over, who, with intent to commit a crime against sexual morality, persuades or entices any child under 18 years of age into any vehicle, building, room or secluded place is guilty of a class C felony."\textsuperscript{504} This statute defines the prohibited act in terms not of sexual activity but of persuading a minor to enter a vehicle or structure with the intent to use the child sexually.\textsuperscript{505} Because such an act must occur in a secluded place, the enticement of the minor to such a place is an essential act toward the culmination of a sexual assault.\textsuperscript{506}

In recent years, state legislatures have applied this approach to a variety of traditional completed crimes, such as auto theft,\textsuperscript{507}

\begin{itemize}
\item \textsuperscript{500} For a listing of statutes punishing abortion in terms of the use of instruments or drugs to induce a miscarriage, see \textit{supra} note 92.
\item \textsuperscript{501} For a listing of statutes punishing the sexual enticement of minors, see \textit{supra} note 94. For discussion of constituent-element crimes, see \textit{supra} notes 91–98 and accompanying text.
\item \textsuperscript{502} See, e.g., \textit{ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 405–18} (1986) (discussing legal developments aimed at halting child pornography); \textit{ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 102–07} (1984) (presenting recommendations for state legislative action to protect children from sexual abuse, including extended statutes of limitations in cases of sexual assault of minors and increased public access to arrest and conviction records of those charged with sex offenses against children); S. Goldstein, \textit{THE SEXUAL EXPLOITATION OF CHILDREN 1–14, 31–33} (1987) (outlining difficulties faced by law-enforcement agencies in investigating sexual exploitation of children and noting that, although underreported, sexual abuse is alarmingly common); \textit{Chaze, Now, Nationwide Drive to Cure Child Abuse, U.S. News & World Rep.}, Oct. 1, 1984, at 73–74.
\item \textsuperscript{503} \textit{Id.} at 513–14, 147 N.W.2d at 650. For discussion of \textit{Huebner v. State}, see \textit{supra} notes 208–224 and accompanying text.
\item \textsuperscript{504} \textit{Id.} at 513–14, 147 N.W.2d at 650. For discussion of \textit{Huebner v. State}, see \textit{supra} notes 208–224 and accompanying text.
\item \textsuperscript{505} For statutes that punish the unauthorized use of a motor vehicle, see, e.g., \textit{CAL. PENAL CODE} § 499b (West 1988); \textit{NEB. REV. STAT.} § 28-516 (1985); \textit{N.Y. PENAL LAW §§ 165.05–.06, .08} (McKinney 1987); \textit{TEX. PENAL CODE ANN.} § 31.07 (Vernon 1974); \textit{WASH. REV. CODE ANN.} § 9A.56.070 (1988).
\item \textsuperscript{506} For statutes that punish people who obscure the identity of a vehicle, see, e.g., \textit{ALA. CODE} § 13A-8-22 (1985); \textit{N.J. STAT. ANN.} § 2C:17-6 (West Cum. Supp. 1988); \textit{OKLA. STAT. ANN.} tit 21, § 1841 (West 1983) (farm machinery); \textit{WASH. REV. CODE ANN.} § 9A.56.180 (1988).
\item \textsuperscript{507} For statutes that punish the unlawful failure to return rented property, see, e.g., \textit{Ariz. REV. STAT. ANN.} § 13-1806 (1978 & Cum. Supp. 1988); \textit{CONN. GEN. STAT. ANN.} § 53a-129 (West 1985) (property covered under this section may be rented or borrowed; the property is protected against both failure to return and encumbrance); \textit{N.H. REV. STAT. ANN.} § 637:9 (1986); \textit{S.C. CODE ANN.} § 16-13-420 (Law. Co-op. 1985); \textit{S.D. CODIFIED LAWS ANN.} § 22-30A-13 (1988). Program.
larceny,\textsuperscript{508} and shoplifting.\textsuperscript{509} The increasingly used constituent-act approach parallels the Model Penal Code's substantial-step approach, which allows a court to punish behavior in its list of illustrative actions through use of a general attempt statute.\textsuperscript{510}

c. Possession offenses. Possession offenses are more widely used than are constituent-element statutes. Along with possession of burglary tools, American legislatures most frequently punish possession of: illegal firearms (such as automatic weapons and sawed-off shotguns),\textsuperscript{511} explosives,\textsuperscript{512} forged and counterfeit articles and devices for making them,\textsuperscript{513} gambling devices and records,\textsuperscript{514} obscene materials with intent to distribute,\textsuperscript{515} devices for theft of telecommunications services,\textsuperscript{516} bootleg sound recordngs with intent to sell,\textsuperscript{517} eavesdropping devices,\textsuperscript{518}

\textsuperscript{508} For statutes that punish the removal or altering of identification numbers, see, e.g., ALASKA STAT. § 11.46.260 (1983); COLO. REV. STAT. § 18-5-305 (1986); FLA. STAT. ANN. § 817.235 (West 1976); MASS. ANN. LAWS ch. 269, § 11c (Law. Co-op. 1980); NEB. REV. STAT. § 28-616 (1985).

\textsuperscript{509} For statutes that punish the concealment of merchandise, see, e.g., IDAHO CODE § 18-4626 (1987); MISS. CODE ANN. § 97-23-49 (1972); N.M. STAT. ANN. § 30-16-20(A)(2) (1988); UTAH CODE ANN. § 76-6-602(1) (Cum. Supp. 1988); VA. CODE § 18.2-103 (1988).

\textsuperscript{510} For the text of the Model Penal Code's illustrative listings of substantial steps, see supra note 46.

\textsuperscript{511} See supra note 85 (listing statutes).

\textsuperscript{512} See supra note 86 (listing statutes).

\textsuperscript{513} See supra note 82 (listing statutes).


\textsuperscript{516} For statutes that punish possession of lottery tickets, see, e.g., DEL. CODE ANN. tit. 11, § 1401 (1987); IOWA CODE ANN. § 725.12 (West 1979); MICH. COMP. LAWS ANN. § 750.373 (1968); N.J. STAT. ANN. § 2C:37-6 (West 1982); W. VA. CODE § 61-10-11b (1984).


\textsuperscript{520} See, e.g., ARIZ. REV. STAT. ANN. § 13-3008 (1978); CAL. PENAL CODE § 635 (West 1988); FLA. STAT. ANN. § 934.04 (West 1985); IDAHO CODE § 18-6703 (1987); N.Y. PENAL LAW § 250.10 (McKinney 1987).
and goods with altered or removed identifications.519 Other jurisdictions have made more creative use of the possession offense by criminalizing, for example, possession of "stink bombs," cockfighting implements, and medical prescription blanks.520

By most standards of proximity, none of these offenses would constitute an attempt to commit a specific completed crime.521 The act of obtaining one of these instruments comes at least a step prior to the act of using it to commit a crime.522 Nevertheless, there is a great likelihood that the holder of these materials will use them in the commission of a completed crime, even if he does not manifest a specific intent to commit a crime such as murder, bank robbery, or extortion.523

As with the constituent-acts approach, however, there are limitations to the proper use of possession offenses. Only a few materials have unequivocally criminal uses.524 Statutes regulating the possession of firearms and explosives take into account the legal uses of these articles by requiring that those who purchase them register the purpose for which they will be used.525 Thus, the presumption behind punishment of unauthorized possession is that a person who fails to follow regulatory


521 For a discussion of the various proximity standards, see supra note 43 and accompanying text.

522 Some of these offenses, however, such as possession of goods with altered identification, raise a presumption that the possessor has completed a crime, although the authorities cannot prove all of the elements of the completed crime.

523 For a recent discussion of the validity of criminalizing the attempt to possess prohibited articles, see Dawkins, supra note 497. The article, however, generalizes from New Zealand cases concerning attempts to possess illegal narcotics.

524 A legislature can create an offense regarding an object with equivocal uses by adding an extra condition that is indicative of criminal intent. See, e.g., N.D. CENT. CODE § 12.1-23-08.4 (1985) (forbidding duplication of keys that are marked with legends such as "do not duplicate" but preserving the affirmative defense that such duplication was authorized). See generally Robbins, supra note 11, at 398–419 (discussing the importance of an objective check on subjective intent to avoid convictions for equivocal, ambiguous, or neutral acts).

channels to obtain dangerous materials intends to use them for an illegal purpose.\textsuperscript{526}

In the context of fully operational weapons, this presumption is sound. A related offense, such as possession of unassembled bomb paraphernalia, however, would criminalize a more equivocal act. Many of the materials used to construct bombs have other legal purposes. Consequently, the government does not regulate their sale. Unless these materials have little or no other use except in explosive devices, judicial intervention is not justified. It is as likely, or almost as likely, that their possessor had a legitimate use for them as an illegitimate one. Although proscribing the possession of unassembled bomb paraphernalia could aid in preventing completed crimes, a broadly drawn statute might infringe too greatly on the rights of innocent individuals.\textsuperscript{527}

d. \textit{The applications of attempt to constituent-element offenses and other crimes in the nature of attempt}. The constituent-act and proscription-of-means statutes have substantial inchoate elements, as compared with the completed crimes from which they are derived. Thus, prosecutors' attachment of inchoate liability to them has resulted in appellate challenge as attempts to attempt.\textsuperscript{528} The Model Penal Code's drafters sought to resolve

\textsuperscript{526} See N.Y. PENAL LAW § 265.15(4) (McKinney 1987) (establishing a presumption of unlawful intent if weapons or explosives are not registered).

\textsuperscript{527} Nevertheless, South Dakota and Texas specifically punish the unauthorized possession of components for explosive or destructive devices. \textit{Compare} S.D. CODIFIED LAWS ANN. § 22-14A-13 (1988) ("Any person who possesses any substance, material, or any combination of substances or materials, with the intent to make a destructive device without first obtaining a permit from the Department of Public Safety to make such device, is guilty of a class 5 felony.") \textit{with} TEX. PENAL CODE ANN. § 46.10(a) (Vernon Cum. Supp. 1988) ("A person commits an offense if the person knowingly possesses components of an explosive weapon with the intent to combine the components into an explosive weapon for use in a criminal endeavor."). Although both statutes include a mens rea requirement, it is questionable whether these requirements clarify what materials the statute proscribes. Furthermore, the intent requirement merely makes the statutes' construction circular, because the intent to make an explosive device is inferred from possession of materials that remain undefined.

this problem by arguing that an act is a proper object of inchoate liability if it is of sufficient gravity to constitute a substantive offense.\textsuperscript{529} Yet, jurisdictions have declined to recognize the crimes of attempted possession of burglary tools\textsuperscript{530} and attempted use of medical instruments to induce a miscarriage.\textsuperscript{531}

The rule stated by the Code's drafters is an over-generalization. The varying natures and potential harms of the constituent-act and possession offenses require separate determinations of whether inchoate liability should attach to them. This is an area of the criminal law in which judicial discretion is necessary to effectuate the public policies underlying inchoate liability.

Legislatures, however, should provide guidance to the courts by indicating which of the essential-element offenses are properly the objects of attempt liability. Legislatures can best provide this guidance by including attempt provisions within the statute that punishes the substantive constituent-act or possession offense.\textsuperscript{532} To avoid the situation that plagued the Florida courts in the late 1970's,\textsuperscript{533} legislatures should adopt a statutory provision similar to that of Alaska:

\begin{quote}
[A] person may not be charged under [the general attempt provision] if the crime allegedly attempted by the defendant is defined in such a way that an attempt to engage in the proscribed conduct constitutes commission of the crime itself.\textsuperscript{534}
\end{quote}

At the same time, however, the legislature should not preclude application of the general attempt statute to the remaining essential-element statutes. This approach would retain some dis-

\begin{footnotesize}
\textsuperscript{529} See supra note 230 (quoting commentary to the Model Penal Code).
\textsuperscript{530} Thomas v. State, 362 So. 2d 1348, 1349 (Fla. 1978); Vogel v. State, 365 So. 2d 1079, 1080 (Fla. Dist. Ct. App. 1979).
\textsuperscript{531} E.g., Commonwealth v. Willard, 179 Pa. Super. 368, 369, 374-75, 116 A.2d 751, 752, 754 (1955) (holding that the general attempt statute did not apply to a provision that forbade the use of an instrument to procure an abortion, because that provision itself dealt with an attempt).
\textsuperscript{532} See, e.g., ALA. CODE § 13A-6-69 (1985) (sexual enticement). The provision states: "It shall be unlawful for any person with lascivious intent to entice, allure, persuade or invite, or attempt to entice, allure, persuade or invite, any child under 16 years of age to enter any vehicle, room, house, office or other place for the purpose of [sexually abusing the child]." Id. (emphasis added).
\textsuperscript{533} For a review of Florida's problem, occasioned by the inclusion of attempt liability in some criminal statutes, see supra notes 259-269 and accompanying text.
\textsuperscript{534} ALASKA STAT. § 11.31.150(1) (1983).
\end{footnotesize}
cretion in the judiciary to extend liability to reflect changes in public policy.535

4. Attempt to Assault

Attempt to assault, the subcategory of double inchoate crimes that has engendered the most analysis and controversy, merits separate consideration. Simply to treat the crimes of assault or aggravated assault as separate substantive offenses fails to resolve the controversy.536 Such an approach merely glosses over the fact that, even for aggravated assaults, the definition of assault as an attempt to commit a battery lies at the core of the offense.537 Almost half of the states, however, have eliminated the double inchoate dilemma by redefining assault as battery, and eliminating the latter offense.538

Several states, however, retain traditional definitions of assault. Despite the logical awkwardness of the attempted-assault construction, the treatment of aggravated assaults as substantive offenses presents the least burdensome means to extend crimi-

535 Certainly, attempt liability should not be attached to such offenses as frequenting or residing in a house of prostitution. Not only do these offenses lack sufficient seriousness, as many contend about the offense of simple assault, but they are merely forms of attempt to commit prostitution. For a discussion of the benefits of circumscribing judicial discretion to create double inchoate crimes, see supra notes 440–444 and accompanying text.

536 See State v. Wilson, 218 Or. 575, 584–85, 346 P.2d 115, 120 (1959) (treating assault with a deadly weapon as a separate substantive offense, even though the definition of assault at common law was attempted battery with present ability) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)).

537 See Perkins, supra note 194, at 84, 87 (criticizing the approach taken in State v. Wilson, in which the court treated assault as a substantive offense). But see United States v. Locke, 16 M.J. 763, 765 (A.C.M.R. 1983) (treating assault as a substantive crime by redefining it to include intentional threatening).


These provisions are based on the Model Penal Code’s assault provision. See MODEL PENAL CODE § 211.1 (Proposed Official Draft 1980). The section defines simple assault—a misdemeanor offense—to include: attempts to cause, or knowingly or recklessly causing, injury; negligently causing injury with a deadly weapon; and attempts to cause fear of injury by physical menace. The section defines aggravated assault—a felony offense—to include: attempts to cause, or knowingly or recklessly causing, serious bodily injury under circumstances manifesting extreme indifference to the value of human life; and attempts to cause or knowingly causing bodily injury with a deadly weapon. Among the twenty-three states that have merged assault and battery into a single assault offense, fifteen have eliminated traditional assault from its definition. These states are Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Kentucky, Maine, Montana, Nebraska, New York, North Dakota, Oregon, and Texas. This approach reflects a policy decision to treat the new crime of assault like the old crime of battery and to treat the attempt to commit assault as the old crime of assault.
nal liability to those acts that present the greatest potential harm to the public. The other approach—the redefinition of "present ability" or "proximity" in relation to the danger inherent in an actor's intention and the nature of his acts in the individual case—presents too great a potential for distortion of these concepts and, consequently, inconsistent decisions.

The redefinition of assault as intentional frightening also fails to resolve the attempted-assault problem adequately. This definition imposes liability on an actor only if he causes his victim to fear bodily harm. Thus, as in the Florida case of *State v. White*, many acts that were formerly punished as attempts to commit battery are now punished as attempted assaults, because the victim is unaware of the threat to his person. This approach resolves the question of whether assault is a substantive crime by removing its inchoate elements. The approach results, however, in the treatment of acts that were formerly categorized as assault as the lesser included offense of attempt to assault. Thus, the definition of assault as intentional frightening should serve only as an adjunct to the traditional definitions.

---

539 See supra note 435 and accompanying text (discussing a Colorado Supreme Court case that suggests this approach).
540 See supra note 439 and accompanying text (discussing a case in which the court distorted the concept of present ability to impose assault liability on the defendant).
541 FLA. STAT. ANN. § 784.011 (West 1976). The section provides: "An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Id. Florida is currently the only American jurisdiction to define assault solely in terms of intentional threatening.
542 324 So. 2d 630 (Fla. 1975). For discussion of *State v. White*, see supra notes 197–202 and accompanying text.
543 See 324 So. 2d at 631 (stating that it is unnecessary to expand the definition of assault to include attempts to injure victims who are unaware of attack, because the general attempt statute will reach those situations). Under the Florida statute's definition of assault, for example, a sniper who misses his intended victim would be guilty not of assault, but of attempted assault. Id.
544 See United States v. Locke, 16 M.J. 763, 765 (A.C.M.R. 1983) (holding that the general attempt statute applies to assault because the definition of assault includes the concept of intentional frightening); *State v. White*, 324 So. 2d 630, 631 (Fla. 1975) (holding that the general attempt statute applied to the aggravated-assault statute, which was defined in terms of intentional frightening, because the legislature did not intend to exempt "bushwackers" from punishment).
545 See *White*, 324 So. 2d at 631 (reversing a conviction under the aggravated-assault statute, which was defined in terms of intentional frightening, and holding that the defendant was guilty only of attempted aggravated assault because his victim was unaware of his attack).
546 For a listing of states that punish intentional frightening, see supra note 59. Another useful adjunct to generalized assault statutes is the constituent-act approach. The most common example of this approach is a statute punishing one who points a firearm at
As with other attempts to commit crimes in the nature of attempt, legislatures should denote those forms of assault to which attempt liability should attach by including the attempt in the definition of the substantive offense. Again, the reason for this approach is to provide the courts with guidance concerning public policy without eliminating judicial discretion.

To the extent that a limitation on judicial discretion in this area is necessary, legislatures can provide that simple assault is an improper object of attempt liability. Although it may appear to be inconsistent with the treatment of aggravated assaults as substantive offenses, this approach has sound policy bases. Opening simple assault to attempt liability, particularly where assault is defined as intentional frightening, would burden the criminal-law courts, since prosecutors would charge persons whose acts do not constitute a substantial danger to the public. Because the different levels of the criminal-justice system would dispose of many of these cases before they got to trial (because they were not worth the time and effort), those that did reach trial would place an undue burden on their defendants, and punishment would take on an arbitrary aspect.

B. Proposed Inchoate-Crime Statutes

To a great extent, the attempt, conspiracy, and solicitation statutes proposed in the American Law Institute’s Model Penal Code Committee's Model Penal Code include provision included within the assault statute. Another. E.g., GA. CODE ANN. § 16-11-102 (1988); IDAHO CODE § 18-3304 (1987); N.C. GEN. STAT. § 14-34 (1986); OKLA. STAT. ANN. tit. 21, § 1289.16 (West 1983).

If a legislature eliminates attempt language from the assault statute, it will require courts to apply a general attempt statute to punish one who purposely attempts to cause another bodily injury. Cf. State v. Laurie, 56 Haw. 664, 673–74 & n.5, 548 P.2d 271, 278 & n.5 (1976) (holding that, although the defendant may not have violated the assault statute that required him to cause “serious bodily injury” because the victim’s injuries were not major, he nevertheless was guilty of attempted assault). This approach eliminates the possibility that courts will apply a general inchoate statute to an attempt provision included within the assault statute.

See Arnold, supra note 154, at 65 (asserting that it is unwise to “punish attempts at ordinary assaults which carry light penalties”). See Perkins, supra note 194, at 86 (arguing that, if criminal assault were defined as intentional threatening, the offense “would include any number of futile attempts to frighten or startle that are too insignificant to be added to the category of crime”). It is unlikely, however, that such convictions are constitutionally suspect. Because convictions would stem from assault and attempt statutes, a defendant probably could not successfully challenge these statutes on void-for-vagueness grounds. Although the general language of most attempt and assault statutes gives courts broad discretion to decide whether they will punish particular behavior, both types of statutes give courts some guidance concerning the limits of their discretion and give notice to potential offenders.
Code mitigated the need to use double inchoate constructions. The attempt statute’s extension of liability to acts earlier in the preparatory continuum, the conspiracy statute’s adoption of the unilateral approach, and the inclusion of a solicitation statute removed many of the gaps that were left by previous and some existing codifications of inchoate crimes in American jurisdictions.

The Code provisions still need some refinement, however. The definitional provisions are unnecessarily verbose or overly complex, or both. This over-written quality detracts from the salient policy considerations of each inchoate crime. Accordingly, the final section of this Article surveys the strengths and weaknesses of the Code’s three major inchoate provisions and recommends revisions of those provisions.

1. Attempt

The central source of disagreement over what constitutes an acceptable definition of attempt focuses not so much on the mens rea, or guilty mind, but on the actus reus, or overt act:

The mens rea of an attempt is the same as that of the substantive crime, but the actus reus of an attempt has not been defined with the same precision; there is merely a general principle that an actus reus is constituted when steps have been taken toward the commission of the substantive crime which are “sufficiently proximate.”

The acts tending toward commission of different completed crimes will vary as the nature of the crimes differs. Even within a single category of completed crimes, actors will employ different means to achieve their ends. Hence, the argument that courts should treat attempt as an adjunct of each completed crime rather than as an overly refined rule with general application has a great deal of merit. Most American jurisdictions have accepted this premise not by attaching an attempt provision to each completed crime statute, but instead by adopting

---

552 See supra note 355 (discussing the need for judicial flexibility to extend crimes).
Double Inchoate Crimes

constituent-element offenses that criminalize preparatory acts toward a broad range of specific crimes.\textsuperscript{553}

Nevertheless, every criminal code needs a general attempt statute. Such statutes give the courts discretion to apply the principles of attempt liability where the legislature has failed, through oversight or lack of foresight, to provide a basis for intervention and punishment of preparatory acts that manifest potential societal harm.\textsuperscript{554} Such statutes can also set the necessary limits on judicial discretion.

Accordingly, a general attempt statute must balance two conflicting factors: (1) the community’s need for effective crime prevention; and (2) the need to draft criminal statutes that eliminate or, at least, minimize interference with innocent, neutral, or ambiguous conduct.\textsuperscript{555} The Model Penal Code’s attempt provision takes a different approach from most previous attempt formulations in that it shifts emphasis from the second factor to the first.\textsuperscript{556}

The drafters suggested that the primary difference between the Model Penal Code formulation and that of previous attempt formulations was its definition of the required act as “an act or omission constituting a substantial step in a course of conduct planned to culminate in [the] commission of the crime.”\textsuperscript{557} They contended that the substantial-step formulation “shifts the emphasis from what remains to be done, the chief concern of the proximity tests, to what the actor has already done. That further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial.”\textsuperscript{558}

The term “substantial step” alone adds little precision to an attempt definition. Courts in states that have adopted the substantial-step language often continue to rely on pre-existing com-

\textsuperscript{553} For discussion of the increasing use of possession offenses and constituent-act offenses, see supra notes 81–95, 487–535 and accompanying text. See also MODEL PENAL CODE § 5.06 (Proposed Official Draft 1985) (proscribing possession of instruments of crime, such as weapons); id. § 5.07 (prohibiting offensive weapons).

\textsuperscript{554} See supra note 355 (quoting Thurman Arnold’s view that the law of attempt is necessary to give courts the discretion to extend crimes, without distorting statutory language, to the myriad of factual situations they confront).


\textsuperscript{556} See supra notes 45–49 and accompanying text (discussing the Model Penal Code’s attempt provision).

\textsuperscript{557} MODEL PENAL CODE § 5.01 commentary at 329–31 (Proposed Official Draft 1985).

\textsuperscript{558} Id. at 329 (emphasis added).
mon-law formulations of proximity. In this respect, the Model Penal Code language is no more precise than that of New York's attempt statute, which provides for the punishment of a person who, with intent to commit a crime, "engages in conduct which tends to effect the commission of such crime."

The crux of the Model Penal Code's attempt statute is its nonexhaustive list of instances of conduct exemplifying a substantial step. The denoted acts serve as an objective basis for discovering something about a person's intentions and character. The listing suggests that the basis of attempt liability is a probability estimate that an observed mode of conduct will more often than not lead to completed criminality.

Consequently, the inclusion of the list of examples is essential to the definition of attempt. Not only does it make clear that this definition of attempt encompasses acts theretofore treated as mere preparation, but it also provides, through practical example, an objective basis for finding attempt liability. The statement that "[c]onduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's crim-

---

559 See, e.g., State v. Fish, 621 P.2d 1072, 1077 (Mont. 1980) ("It is a well-established principle that an attempt must consist of more than mere preparation and that there must be some overt act in furtherance of the offense charged."). Conversely, at least two courts have adopted the Model Penal Code formulation even though the relevant statute used a common-law definition. United States v. Jackson, 560 F.2d 112, 117-20 (2d Cir.), cert. denied, 434 U.S. 941 (1977); State v. Woods, 48 Ohio St. 2d 127, 132, 357 N.E.2d 1059, 1063 (1976), vacated on other grounds, 438 U.S. 910 (1978).

560 N.Y. PENAL LAW § 105.00 (McKinney 1987); see ARIZ. REV. STAT. ANN. § 13-1001 (1978) (dropping the word "substantial" from the "substantial step" requirement); R. PERKINS & R. BOYCE, supra note 13, at 611 (defining criminal attempt as a "step towards a criminal offense with specific intent to commit that particular crime"). Indeed, the drafters of the Code stated that "[w]hether a particular act is a substantial step is obviously a matter of degree. To this extent, the Code retains the element of imprecision found in most of the other approaches to the preparation-attempt problem." MODEL PENAL CODE § 5.01 commentary at 329 (Proposed Official Draft 1985); see Robbins, supra note 11, at 419-39 (comparing New York and Model Penal Code formulations).

561 MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1985); see supra note 46 (discussing § 5.01(2)).

562 DANGEROUS OFFENDERS, supra note 36, at 29.


564 See Note, Attempt, Solicitation, and Conspiracy Under the Proposed California Criminal Code, 19 UCLA L. REV. 603, 609-10 (1972) (arguing that omission of the substantial-step examples would have served to retain much of the existing body of case law and would have done little to alleviate problems that the common-law approach created).
inal purpose" may appear to be tautological to some.\textsuperscript{565} It is unclear whether the drafters of the Code thought it unwise to make more explicit the experiential basis of their approach. Also, the commentators' insistence on the importance of the substantiability and corroboration requirements in the definition\textsuperscript{566} has led most states to adopt only the general parts of the definition.\textsuperscript{567} However, there is no real harm in retaining the substantial-step language, if only to emphasize the need to protect individuals from liability for equivocal conduct.\textsuperscript{568}

As argued earlier, the Code's tripartite definition of attempt is unnecessary because the clause containing the substantial-step language is sufficiently inclusive.\textsuperscript{569} Thus, the definition of attempt should read as follows:

(1) (a) A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he purposely does or omits to do anything that, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.\textsuperscript{570}

\textsuperscript{565} Katz, supra note 563, at 5 n.6. Katz stated: The [Model Penal Code] formulation requires that the act be "a substantial step in a course of conduct" and be "strongly corroborative" of criminal purpose. I cannot see how this formulation avoids tautology. If the act (taken as a unit) is a substantial step in a course of conduct which is clearly criminal, it is necessarily strongly corroborative of a criminal purpose. If an act is strongly corroborative then it is, by definition, a substantial step. The all-important criminal purpose is established by inference from conduct which is a substantial step, \textit{i.e.}, conduct which is strongly corroborative. Thus the [Code's] formulation, while appearing to be defining two distinct elements which are established by independent data, really only requires a single element: conduct which is relatively unambiguous in its relation to completed criminality. Lack of ambiguity entails the conclusion that the conduct is a substantial step, and clears the way for an inference of criminal purpose. \textit{Id.}

\textsuperscript{566} Model Penal Code § 5.01 commentary at 329–31 (Proposed Official Draft 1985).


\textsuperscript{568} Further, the strongly-corroborative language is also necessary to support a recommended view of the impossibility defense. See Robbins, supra note 11, at 419–43.

\textsuperscript{569} See supra note 46; see also Robbins, supra note 11, at 441–42 (recommended attempt statute).

\textsuperscript{570} Cf. Model Penal Code § 5.01(1) (Proposed Official Draft 1985). For reasons that I argue elsewhere, see Robbins, supra note 11, at 419–43, the Model Penal Code provisions for the impossibility defense to crimes of attempt are flawed, and should be replaced by the following provision:
The advantage of the substantial-step reification over a formula that punishes an act that "tends to effect" or "tends toward" a completed crime is in its amenability to further definition. Thus, the definition should continue:

(2) Conduct shall not be held to constitute a substantial step under this section unless it is strongly corroborative of the actor's criminal purpose.

(3) Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:
   (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 that are specially designed for such unlawful use or that can serve no lawful purpose of the actor in 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, if such possession, collection, or fabrication serves no lawful purpose of the actor in the circumstances;
   (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.\textsuperscript{571}

Those jurisdictions that have codified a broad spectrum of possession offenses might opt to exclude subsections (e) and (f). Their inclusion, however, might prove to be beneficial in closing statutory gaps.

2. Conspiracy

Although it has been widely criticized, the unilateral theory of conspiracy embodied in the Model Penal Code provision is a valid approach in a penal law that emphasizes the prevention of crime. The theory is prefigured in the Code’s attempt provision, which treats the solicitation of an innocent agent as a substantial step toward commission of a crime. The act of soliciting another to aid in commission of a crime is sufficiently dangerous to justify judicial intervention. In addition, the Code’s inclusion of an overt-act provision ensures the need for extrinsic corroboration. More important to the discussion of double inchoate crimes, the unilateral theory of conspiracy eliminates much of the need for charges of attempt to conspire.

The language of the Model Penal Code’s conspiracy provision, however, inadvertently opens itself to use in other double inchoate constructions. The provision suggests that one is guilty of conspiracy if he agrees with his co-conspirators to “engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime.” The thrust of this section is that one may be found guilty of conspiracy even if the object crime is not completed. The imprecision of the language, however, suggests the appropriateness of the constructions of conspiracy to attempt and conspiracy to solicit. A charge of conspiracy to commit the completed crime is logically preferable to either of these constructions.

Furthermore, the incorporation of the language of facilitation in the conspiracy statute broadens the scope of conspiracy lia-
ability to people who lack the specific intent to participate in the conspiracy.\footnote{Facilitation addresses the kind of accessorial conduct in which the actor aids the commission of a crime with knowledge that he is doing so, but without any specific intent to participate therein or to benefit therefrom. \textit{Model Penal Code} § 2.04(3) commentary at 30 (Tent. Draft No. 1, 1953). The drafters of the Model Penal Code used as an example the defendants in \textit{United States v. Falcone}, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940). In \textit{Falcone}, a group of sugar and yeast merchants sold their products over a period of time to persons engaged in the manufacture of moonshine liquor. \textit{Id.} at 580. On the basis of the merchants' probable knowledge of their products' illegal use, the government unsuccessfully sought to prove the merchants' complicity in a conspiracy. \textit{Id.} at 581--82. Thus, the original draft of the Model Penal Code sought to punish both those who performed an act tending toward the commission of a crime, but who did not specifically intend to assist in its commission, and those who acted with a specific intent. The drafters stated:}

Conduct which knowingly facilitates the commission of a crime is by hypothesis a proper object of preventive effort by the penal law unless, of course, it is affirmatively justifiable. It is important in that effort to safeguard the innocent but the requirement of guilty knowledge serves that end—knowledge that there is a purpose to commit the crime and that one's behavior renders aid. \textit{Model Penal Code} § 2.04(3) commentary at 30 (Tent. Draft No. 1, 1953).


A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such a person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime. \textit{Kentucky Rev. Stat. Ann.} § 506.080 (Michie/Bobbs-Merrill 1985). For a discussion of the New York statute, which punishes one who, "believing it probable that he is rendering aid," facilitates a crime, see Sobel, \textit{The Anticipatory Offenses in the New Penal Law: Solicitation, Conspiracy, Attempt and Facilitation}, 32 \textit{Brooklyn L. Rev.} 257, 269--73 (1966).

Facilitation is generally regarded as a lesser included offense of an accomplice statute, but not of statutes punishing substantive offenses, even where the defendant is prosecuted as an accomplice. \textit{See State v. Polite}, 136 \textit{Ariz.} 117, 121, 664 P.2d 661, 665 (1982); \textit{People v. Glover}, 57 \textit{N.Y.2d} 61, 64--65, 439 N.E.2d 376, 377--78, 453 N.Y.S.2d 660, 661--62 (1982). \textit{But see Luttrell v. Commonwealth}, 554 S.W.2d 75, 79 (Ky. 1977) (on remand, defendant was held to be entitled to instructions on criminal facilitation of attempted murder and assault in the second degree); \textit{Recent Decision, Facilitation: Should It Be Regarded As a Lesser Included Substantive Offense When Prosecution Is Based on the Defendant's Complicity?}, 25 \textit{Arizona L. Rev.} 1047, 1051, 1054--56 (1983) (arguing that it should). Several commentators have noted the importance of the crime for plea-bargaining purposes. Sobel, \textit{supra}, at 271; \textit{Comment, A New Crime: Criminal Facilitation}, 18 \textit{Loy. L. Rev.} 103, 114 (1971); \textit{Recent Decision, supra}, at 1055--56.
in a separate statute. Consequently, the Model Penal Code's definition of conspiracy should be amended to read as follows:

A person is guilty of conspiracy with another person or persons to commit a crime if he agrees with such other person or persons that they or one or more of them will engage in a course of conduct that constitutes such crime or is planned to culminate in the commission of the crime.\(^{579}\)

The "course of conduct" language, derived from the attempt provision, serves the same purpose as the "attempt or solicitation" language without creating its attendant confusion.

3. Solicitation

The language of the Code's solicitation provision, like that of its conspiracy provision, is overly complicated. The solicitation statute punishes one who "with the purpose of promoting or facilitating [the commission of a crime] commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission."\(^{580}\) This language raises the possibility of a solicitation-to-attempt construction. As with conspiracy to attempt, one does not solicit another to attempt to commit a crime.\(^{581}\) Indeed, the relevance of the attempt's failure or success to the solicitation is even less than is its relevance to a conspiracy charge: in a solicitation, the importuned party is not required to perform any act toward the object crime.\(^{582}\) Thus, the attempt language is superfluous.

\(^{579}\) Cf. *Model Penal Code* § 5.03(1) (Proposed Official Draft 1985). Other features of a conspiracy statute, such as scope of the conspiracy, multiple objectives, joinder, venue, renunciation of criminal purpose, and duration of the conspiracy, see id. §§ 5.03(2)-(7), are beyond the scope of this Article.

\(^{580}\) Id. § 5.02(1) (emphasis added); see also 18 U.S.C. § 373 (Supp. IV 1986), quoted in supra note 137.

\(^{581}\) See supra note 363 and accompanying text (suggesting that people conspire or solicit to commit the ultimate offense and do not conspire or solicit to attempt to do so).

\(^{582}\) The intent of the Code's drafters is made somewhat clearer by the accompanying commentary:

It ordinarily should not be necessary to charge an actor with soliciting another to attempt to commit a crime, since a rational solicitation would seek not an unsuccessful effort but the completed crime; the charge, therefore, should be one of solicitation to commit the completed crime. But in some cases the actor may solicit conduct that he and the party solicited believe would constitute the completed crime, but that, for reasons discussed in connection with the defense of impossibility in attempts, does not in fact constitute the crime. Such conduct
Further, as with the conspiracy provision, the solicitation provision incorporates the language of facilitation.\textsuperscript{583} Again, this language should be eliminated. The statute should read as follows:

\begin{quote}
\begin{enumerate}
\item A person is guilty of solicitation to commit a crime if he commands, encourages, or requests another person to engage in a course of conduct designed to culminate in the commission of the crime or that would establish his complicity in its commission.\textsuperscript{584}
\end{enumerate}
\end{quote}

In addition, the second subsection of the Code’s solicitation provision should be adopted:

\begin{quote}
\begin{enumerate}
\item It is immaterial under [the first section] that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.\textsuperscript{585}
\end{enumerate}
\end{quote}

This paragraph incorporates the double inchoate crime of attempt to solicit within the definition of solicitation. Although only two states currently prohibit such actions by statute,\textsuperscript{586} this practice is consistent with a subjective theory of inchoate criminality. The attempt to communicate a solicitation manifests a criminal intent as surely as does a communicated solicitation.\textsuperscript{587}

In addition, it permits intervention prior to the completion of

by the person solicited would constitute an attempt . . . , and the actor would therefore be liable . . . for having solicited conduct that would constitute an attempt if performed.

\textbf{MODEL PENAL CODE} § 5.02 commentary at 373–74 (Proposed Official Draft 1985) (footnotes omitted). The reasoning of the Code’s drafters is fallacious. If the act solicited is not a crime, then the solicitant is not guilty of an attempt, nor is the solicitor guilty of criminal solicitation.

\textsuperscript{583} For a discussion of facilitation, see \textit{supra} note 578 and accompanying text.

\textsuperscript{584} \textit{Cf.} \textbf{MODEL PENAL CODE} § 5.02(1) (Proposed Official Draft 1985).

\textsuperscript{585} \textit{Id.} § 5.02(2). Other features of the crime of solicitation, such as renunciation of criminal purpose, see \textit{id.} § 5.02(3), are beyond the scope of this Article.

\textsuperscript{586} \textbf{HAW. REV. STAT.} § 705-510(2) (1985); \textbf{KAN. STAT. ANN.} § 21-3303(b) (Vernon Cum. Supp. 1987).

\textsuperscript{587} \textbf{MODEL PENAL CODE} § 5.02 commentary at 381–82 (Proposed Official Draft 1985). The commentary states:

[T]he last proximate act to effect communication with the party whom the actor intends to solicit should be required before liability attaches on this ground. Conduct falling short of the last act should be excluded because it is too remote from the completed crime to manifest sufficient firmness of purpose by the actor. The crucial manifestation of dangerousness lies in the endeavor to communicate the incriminating message to another person, it being wholly fortuitous whether the message was actually received. Liability should attach, therefore, even though the message is not received by the contemplated recipient, and should also attach even though further conduct might be required on the solicitor’s part before the party solicited could proceed to the crime.

\textit{Id.}
the object offense in the event that an uncommunicated solicitation is intercepted before it is presented to a willing sollicitant.

**Conclusion**

Criminal attempt, conspiracy, and solicitation punish inchoate criminality—conduct falling short of the completed object offense. Because the inchoate offenses are aimed at actors who specifically intend to commit another offense and who, by hypothesis, ignore the sanction for the object offense, they provide no significant general deterrence. They do, however, permit law-enforcement personnel to intervene and prevent the intended harm. Moreover, inchoate crimes perform other important penological functions by permitting punishment of those who demonstrate a disposition toward criminality before they do any real harm—particularly when the failure to complete the offense is fortuitous, as when the bullet misses its intended victim.

Most American jurisdictions punish inchoate offenses on the basis of relatively short attempt, conspiracy, and solicitation statutes that contain abstract conceptual terms with universal application. This practice confronts courts with the task of determining, in each of the infinite number of fact situations that may arise, the precise point at which inchoate liability attaches. Because general inchoate statutes are abstract and vague, courts in the past have used a rigid conceptual approach to analyze those offenses’ abstract concepts logically.

Not only has this conceptual approach failed to achieve the predictability and certainty of result that is ostensibly its greatest value, it has also failed to promote the purposes and policies behind inchoate liability, principally the prevention of social harm. Thus, courts in recent years have taken a more functional, policy-oriented approach to inchoate liability. These courts look first to whether the policy of the criminal law indicates that an individual’s acts are sufficiently dangerous to society to warrant judicial intervention and punishment. Only then do they address the issue that the conceptual approach takes up first—whether the particular jurisdiction’s definition of attempt, conspiracy, or solicitation allows a court to punish those acts. One result of this functional approach is that an increasing number of courts have created double inchoate crimes during the last hundred years.
Critics of this approach suggest that these courts have, in
effect, created common-law crimes, an authority denied them
by statute in most states. A strong argument can be made that
the due process concept of notice outweighs the necessity for
courts to prevent harm to society through double inchoate
crimes. But inchoate crimes, despite their recent treatment as
separate, generalized categories, are very different from sub-
stantive crimes. Their abstract nature requires a higher degree
of judicial interpretation and discretion than substantive offens-
es do. The court that fails to analyze a double inchoate indict-
ment in terms of the predictive and preventive purposes of
inchoate liability shirks its duty to shape its legislature’s criminal
code into a rational and coherent body of law.

This Article is not a call for untrammeled judicial discretion
in the area of inchoate liability. Indeed, with the above historical
survey and model statutes, it suggests an integrated legislative
policy toward inchoate liability that would eliminate the need
for conspiracy-to-attempt and attempted-conspiracy formula-
tions. This proposal entails the adoption of unilateral-conspiracy
and solicitation statutes similar to those of the Model Penal
Code.

The Article demonstrates, however, that there is no simple
formulation that will eliminate entirely the need for indictments
for attempts to commit crimes in the nature of attempt. Partial
solutions that have already been accepted in some jurisdictions
include the adoption of various constituent-element offenses and
redefined assault provisions that merge assault and battery. But
the need still remains for courts to decide in individual cases
whether the predictive and preventive purposes of attempt lia-
bility require their application to substantive offenses with sig-
nificant inchoate elements. For a realistic rationalization of this
area of the law, I submit that they do.