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# NOTES

## Effects of the New Illinois Criminal Code on Prosecutions for Inchoate Crimes

[I]n the field of penal law above all others—since that is the law to which people look for the protection of their deepest interests, and where inadequacies and arbitrariness can be most destructive of those interests—periodical, systematic, critical re-examination and revision is of utmost importance to every community as a matter of affirmative overall policy.<sup>1</sup>

The Illinois Criminal Code of 1961 is the fourth attempt in recent years to codify substantive criminal law in systematic fashion. Codes in Louisiana and Wisconsin and the American Law Institute's Model Penal Code preceded the Illinois Code and were, in varying degrees, relied on by its drafters. The purpose of this note is to compare, section by section,<sup>2</sup> the provisions of the Illinois Code that define inchoate offenses—solicitation, conspiracy and attempt—with the parallel provisions of the Louisiana, Wisconsin and Model Penal Codes. Because inchoate offenses consist of acts performed only in anticipation of further criminal conduct, some unusual problems of definition arise. The first is that underlying philosophical attitudes about the degree of culpability that conduct should evince to be called criminal vary considerably. The second is that limitations on the capacity of words to convey precise ideas make describing how close the conduct must come to accomplishing its goal difficult. Finally the first two problems must be resolved in the light of police demands for weapons appropriate to prevent the commission of crime instead of merely to apprehend violators after they commit substantive offenses. Particular attention will be paid to the ways in which these problems have been resolved.

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1. Letter from Professor George H. Dession to Hon. Jose Trias Monge, Mar. 28, 1953, on file in the Yale Law Library, as quoted in 71 YALE L.J. 1050 (1962).

2. ILL. REV. STAT. ch. 38, §§ 8-1 to -6 (1961). § 8-1 (Solicitation); § 8-2 (Conspiracy); § 8-3 (Defense); § 8-4 (Attempt); § 8-5 (Multiple Convictions). § 8-6 provides this definition of "offense":

For the purposes of this Article, "offense" shall include conduct which if performed in another State would be criminal by the laws of that State and which conduct if performed in this State would be an offense under the laws of this State.

This provision makes it clear that a conspiracy, for example, in Illinois to perform acts in another state may be punished in Illinois if the intended acts constitute punishable acts in both Illinois and the other states. § 1-5 of the Code confers jurisdiction to prosecute the inchoate crime in Illinois in such an instance.

*Rationale*

Intentional conduct which causes direct injury to a person or thing should ordinarily be classified as criminal and hence punishable. But difficulties arise in the case of inchoate offenses, which do not necessarily cause harm. The determination that such conduct is so socially harmful as to be punishable was a product of years of legal evolution, during which consideration was given to the relative weight of freedom of individual conduct as compared with the need for effective crime prevention. Today, inchoate offenses are clearly recognized as a proper subject of criminal legislation.<sup>3</sup>

The usual rationale for punishment of criminal conduct is, for the most part, based on the deterrent effect punishment will have upon future conduct.<sup>4</sup> The reasoning of the drafters of the Model Penal Code is that the deterrence rationale is not readily applicable to inchoate offenses. As they necessarily involve intentions to commit a substantive offense, punishment of the inchoate offense could scarcely add to the deterrent effect of punishment for the substantive crime.<sup>5</sup> If that reasoning is correct, other bases must be found for the inclusion of inchoate offenses in a criminal code. It is immediately apparent that the conduct inherent in solicitation, conspiracy and attempt demonstrates an intention to perform further proscribed acts, that punishment of the inchoate offense is warranted by the necessity of enabling law enforcement officials to intervene at that point and so prevent the consummation of the intended crime. Moreover, by contemporary standards it would be absurd to suggest that actual harm is needed before police may intervene and almost as absurd to allow exculpation if the accused fortuitously failed to complete his intended crime,<sup>6</sup> whether due to his own failing (as when the bullet misses the intended victim), or the failure of a party consorted with (as when the person solicited fails to perform the requested crime), or the conduct of a third party when one intervenes.

Also worthy of consideration is the fact that the inchoate conduct suggests that the actor would be disposed toward criminal activities on other occasions, thus presenting a special danger calling for treatment.<sup>7</sup>

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3. See generally PERKINS, CRIMINAL LAW 476, 506-07, 528 (1957) and authorities cited therein.

4. See ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT (1954), especially pp. 27-33.

5. MODEL PENAL CODE, Art. 5, comment at 24 (Tent. Draft No. 10, 1960).

6. *Id.* at 25.

7. *Ibid.*

*Solicitation*

It has been suggested that solicitation should not be an offense because the solicitor is not socially dangerous until the substantive crime is committed, resulting then in the imposition of liability upon the solicitor as an accomplice.<sup>8</sup> But such thinking misses the purpose of the inchoate offense. A comment to the Model Penal Code sets out this rationale:

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 the incited crime plainly should not relieve the solicitor of liability, when otherwise he would be a conspirator or an accomplice.<sup>9</sup>

Apparently recognizing the soundness of such reasoning, the Illinois legislature included a solicitation provision in the new code.

Before enactment of the new code, solicitation was not a statutory offense in Illinois, but it had early been recognized as a common law offense.<sup>10</sup> In *Cox v. People*,<sup>11</sup> the court both limited the offense to solicitation of conduct which might cause a breach of the peace, and also held that a mere solicitation could not be punished as an attempt.<sup>12</sup> However, in spite of this early limitation to conduct causing a breach of the peace, and in spite of the limitation of the offense in the other two recent codes to solicitations of a felony,<sup>13</sup> the Illinois Code follows the Model Penal Code<sup>14</sup> in imposing penalties for solicitations of any statutory offense. This blanket coverage seems preferable, for it is hard to conceive a reason, in principle, why one should be allowed to solicit the commission of any crime, regardless of how "trivial" it may appear to be.<sup>15</sup>

In section 8-3 the Code provides that it is a defense to a charge of solicitation "that if the criminal object were achieved the *accused* [solicitor] would not be guilty of an offense."<sup>16</sup> This defense is applicable to those persons whom the legislature has relieved of liability

8. Comment, *Proposed Revisions in the Illinois Criminal Code*, 48 Nw. U.L. REV. 198, 211 (1953).

9. MODEL PENAL CODE § 5.02, comment at 82 (Tent. Draft No. 10, 1960).

10. *Walsh v. People*, 65 Ill. 58 (1872).

11. 82 Ill. 191 (1876).

12. It appears from the report of the case that the defendant solicited a relative to commit incest. According to PERKINS, CRIMINAL LAW 510 (1957), a solicitation of immediate action requiring the cooperation or submission of the party solicited might be regarded and punished as an attempt.

13. LA. REV. STAT. ANN. § 14:27 (1950); WIS. STAT. ANN. § 939.30 (1957).

14. MODEL PENAL CODE § 5.02(1) (Proposed Official Draft 1962).

15. See MODEL PENAL CODE § 5.02, comment at 83-86 (Tent. Draft No. 10, 1960).

16. *Accord*, MODEL PENAL CODE § 5.04(2) (Proposed Official Draft 1962). (Emphasis added.)

because of some incapacity or particular position, for example where the party is underage or is a victim of an abortion.<sup>17</sup> But it should be noted that, by the principle of exclusion, it is no defense to a charge of solicitation that the *party solicited* is immune from prosecution for the substantive offense, because of some incapacity or some legislative policy.<sup>18</sup>

In accordance with the general common law rule,<sup>19</sup> section 8-5 of the Code provides that a defendant cannot be convicted of both solicitation and the substantive crime. But the merger is not total. The defendant may still be charged with and prosecuted for both solicitation and the intended crime, but he may be convicted of only one of the two charges.<sup>20</sup> This rule will be an aid to prosecutors when it is clear at the start of the trial that the defendant did solicit an offense, but some doubt remains whether the offense was in fact committed. And it seems logical that the fact that there is a reasonable doubt concerning the commission of the substantive offense should be no bar to a conviction for a clear infraction of the inchoate provision.

### *Conspiracy*

The theory upon which conspiracy prosecutions have rested has been that such a greater danger of success of the criminal goal is created by the plurality of actors that punishment of the initial organization is warranted.<sup>21</sup> This premise is supported by such considerations as that it would be more difficult for an individual within the group to withdraw from the criminal objective, and that the division of labor increases the efficiency of the scheme and thus the likelihood of its success, which seem especially pertinent to the present-day need for combating organized crime.

There seems to be a recent trend toward bringing the rationale of

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17. ILL. REV. CRIM. CODE of 1961, at 207 (Tent. Final Draft 1960). In other words, by statute in most states a woman who is the victim of an abortion cannot be convicted of the crime of abortion, and for that reason she likewise cannot be convicted of soliciting an abortion. Similarly, if a minor, because of his age, cannot be convicted of a substantive offense, he cannot be convicted of soliciting that offense.

18. *Ibid.* Under the Model Penal Code a solicitation is punishable if the solicitor *believes* that either he or the party solicited has the necessary capacity to commit the crime. MODEL PENAL CODE § 5.04(1) (a) (Proposed Official Draft 1962). "This rule accords with the general principle in the Draft provisions governing inchoate crimes that the defendant's culpability is to be measured by the circumstances as he believes them to be." MODEL PENAL CODE § 5.04(1) (a), comment at 171 (Tent. Draft No. 10, 1960).

19. See PERKINS, CRIMINAL LAW 507 (1957).

20. ILL. REV. CRIM. CODE of 1961, at 213 (Tent. Final Draft 1960).

21. PERKINS, CRIMINAL LAW 535 (1957).

conspiracy closer to that of attempt, in that it is used as a means of dealing with crimes in their incipiency after there has been an unambiguous manifestation of intent.<sup>22</sup> However, it is difficult to determine yet whether this will be only an additional rationale or will entirely replace the traditional rationale of greater risk by plurality. In an attempt, intent is evidenced by the overt conduct of the actor, whereas in a conspiracy, it is manifested by the agreement and planning and, as required by the more recent codes, some preparatory overt act.

The old Illinois Criminal Code contained three separate provisions for the crime of conspiracy: Section 138, Conspiracy to indict; Section 139, Conspiracy to do illegal act; Section 140, Conspiracy against the state.<sup>23</sup> Most of the cases arose under Section 139, which, it was held,<sup>24</sup> did not abrogate, but rather included, the common law offense of conspiracy. Hence, in accordance with the common law definition of conspiracy, one could be punished for conspiring to commit an act which was not in violation of any statute, but one which was merely "unlawful."<sup>25</sup> This vague definition was criticized by several writers for its failure to inform the accused of the nature of his alleged offense.<sup>26</sup> In section 8-2(a) the drafters of the new Illinois Code limited the scope of this inchoate crime, as was done earlier in the Wisconsin,<sup>27</sup> Louisiana<sup>28</sup> and Model Penal Codes,<sup>29</sup> to conspiracies to commit criminal offenses:

Consistent with the abolition by the Code of common law crimes (§1-3), and the general policy throughout the Code of eliminating from criminal sanctions strictly tortious or private wrongs for which adequate redress is available in civil actions, the Committee decided in favor of restricting conspiracy to agreements to commit "an offense," which, by definition in Section 2-12 means a violation of any penal statute of this State.<sup>30</sup>

Another change made by section 8-2(a) is the requirement of an

22. MODEL PENAL CODE § 5.03, comment at 96-97 (Tent. Draft No. 10, 1960).

23. 3 Statutes of Ill. 124 (Gross 1874) (conspiracy to indict); Ill. Laws 1947 at 799 (conspiracy to do illegal act); Ill. Laws 1919 at 426 (conspiracy against the state).

24. *People v. Tilton*, 357 Ill. 47, 191 N.E. 257 (1934); *People v. Roth*, 22 Ill. App. 2d 8, 159 N.E.2d 51 (1959).

25. *People v. Tilton*, *supra* note 24.

26. 28 ILL. B.J. 211; Comment, *supra* note 8, at 206-07.

27. WIS. STAT. ANN. § 939.31 (1957).

28. LA. REV. STAT. ANN. § 14:26 (1950).

29. MODEL PENAL CODE § 5.03(1) (Proposed Official Draft 1962). The drafters, however, acknowledged the fact that some conduct, otherwise not criminal, might become so if engaged in by a group, but they recommended that such situations be dealt with by the legislature in separate sections as deemed necessary. MODEL PENAL CODE § 5.03(1), comment at 103-04 (Tent. Draft No. 10, 1960).

30. ILL. REV. CRIM. CODE of 1961, at 207-08 (Tent. Final Draft 1960).

overt act.<sup>31</sup> As pointed out by the drafters,<sup>32</sup> this change may be more formal than substantive since no prior cases have been found in which the agreement alone constituted the evidence of conspiracy. There has been some debate whether the required overt act is only a necessary bit of evidence or is an element of the offense itself. The Supreme Court has held, with a dissent by Holmes, J., that it is the latter.<sup>33</sup> This problem is not as academic as it may appear at first glance, for upon its answer may depend such matters as venue, jurisdiction and statute of limitations.<sup>34</sup> At any rate, the nature of the overt act need be only that of preparation as opposed to an actual attempt.<sup>35</sup>

Section 8-2(b) prohibits the use of certain enumerated defenses to a charge of conspiracy. This section contains probably the most radical and controversial changes to be found in this part of the Code:

It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

(1) *Has not been prosecuted or convicted, . . .*

The drafters stated that this subsection is “merely a codification of the existing law in Illinois,”<sup>36</sup> probably relying both upon the case of *People v. Dewey*,<sup>37</sup> in which the court held that a “judgment of conviction may be pronounced against one [conspirator] before the trial of the others,”<sup>38</sup> and upon the general law of most states.<sup>39</sup> The *Dewey* case held that the disposition of the conspiracy charge as to other named conspirators was immaterial since the indictment had charged the defendant with having conspired with “divers other persons whose names are to the said Grand Jurors unknown,”<sup>40</sup> and that under such an indictment, one person may be found guilty of conspiracy.<sup>41</sup> In so holding, the court rejected *Casper v. State*,<sup>42</sup> a Wisconsin case which held that upon separate trials of co-conspirators a court may not proceed to final judgment, but rather must only allow the finding of

31. No overt act was required under the general conspiracy provision of the old code. *People v. Drury*, 335 Ill. 539, 167 N.E. 823 (1929). But the provision concerning conspiracies against the state did require an “act to effect the object.” Ill. Laws 1919, at 426.

32. ILL. REV. CRIM. CODE of 1961, at 208 (Tent. Final Draft 1960).

33. *Hyde v. United States*, 225 U.S. 347 (1912).

34. PERKINS, CRIMINAL LAW 532 (1957).

35. *Id.* at 533.

36. ILL. REV. CRIM. CODE of 1961, at 209 (Tent. Final Draft 1960).

37. 259 Ill. App. 330 (1930).

38. *Id.* at 334.

39. See *Kleihege v. State*, 206 Ind. 206, 177 N.E. 60, *superseded*, 188 N.E. 786 (1931), and *People v. Richards*, 67 Cal. 412, 7 Pac. 828 (1885).

40. *People v. Dewey*, 259 Ill. App. 330, 332 (1930).

41. *Id.* at 334.

42. 47 Wis. 535, 2 N.W. 1117 (1879).

guilty to stand pending the subsequent trial and a similar finding as to the other accused. However, nine years later, another Illinois Appellate Court, in *People v. Levy*,<sup>43</sup> explicitly followed the rule in *Casper* without mentioning *Dewey*. The most recent case on this point<sup>44</sup> added to the confusion by failing to refer to the *Levy* case and citing not only *Dewey*, but also *People v. Bryant*,<sup>45</sup> which held that "before a defendant can be convicted of conspiracy the evidence in the cause *on trial* must show that there were two or more persons guilty of such conspiracy."<sup>46</sup> So, although section 8-2(b)(1) may not necessarily change the Illinois law regarding the conviction of one conspirator before trial of the other(s), it will certainly clarify it.

(2) *Has been convicted of a different offense, . . .*

This subsection merely codifies earlier Illinois law.<sup>47</sup> The conviction of the other conspirator of a more substantive offense based on evidence peculiar to his trial, should be no bar to a showing of his guilt of the conspiracy for the purpose of convicting the accused.

(3) *Is not amenable to justice, . . .*

This rule, having apparently been established in Illinois for quite some time,<sup>48</sup> is the result of the fact that evidence of the conspiracy is often almost inaccessible without the information or testimony of one of the conspirators. In order to obtain such testimony it is a common practice to grant the witness immunity from prosecution. As explained in *People v. Bryant*,<sup>49</sup>

The propriety of granting immunity in such cases arises out of the fact that by candidly and fully disclosing the circumstances attending the transaction such defendant has not only revealed the guilt of his accomplice but has also acknowledged his own guilt of the crime charged. The effect of granting immunity to such defendant is not to exculpate or acquit him of guilt but to remit the punishment which would otherwise follow his disclosures at the trial.<sup>50</sup>

Regardless of whether one approves of such rationale, the fact remains that the practice of granting such immunity is widely thought to be necessary.

43. 299 Ill. App. 453, 20 N.E.2d 171 (1939).

44. *People v. Estep*, 346 Ill. App. 132, 104 N.E.2d 562 (1952).

45. 409 Ill. 467, 100 N.E.2d 598 (1951).

46. *Id.* at 469, 100 N.E.2d at 600. (Emphasis added.)

47. ILL. REV. CRIM. CODE of 1961, at 209 (Tent. Final Draft 1960).

48. See *People v. Bryant*, 409 Ill. 467, 100 N.E.2d 598 (1951) and *People v. Dewey*, 259 Ill. App. 330 (1930). *Accord*, MODEL PENAL CODE § 5.04(1)(b) (Proposed Official Draft 1962).

49. 409 Ill. 467, 100 N.E.2d 598 (1951).

50. *Id.* at 471, 100 N.E.2d at 601.



This section would also seem to include instances in which the accused's co-conspirator has fled the jurisdiction or has died before prosecution.

(4) *Has been acquitted, . . .*

Prior to enactment of the new code, Illinois had followed the almost universally accepted rule that an acquittal on the conspiracy charge of one of two conspirators precluded a conviction of the other.<sup>51</sup> The obvious basis of this rule was that the crime of conspiracy, by definition, requires two or more guilty parties, as one can not conspire with himself.<sup>52</sup> In reversing the prior rule, the new code is in accord with the general treatment given by the Model Penal Code.<sup>53</sup> But the drafters of the latter took no position with respect to the problems of an inconsistent verdict in a joint trial and the admissibility of a judgment of acquittal in a subsequent trial of a co-conspirator.<sup>54</sup> The new Illinois Code, however, would seem to permit the conviction of one of two conspirators in a joint trial and the acquittal of the other. This result hardly seems congruous with the nature of the crime of conspiracy. Furthermore, the reasons given by the drafters for abrogating the defense of acquittal, as expressed in the following passage, are not applicable to joint trials:

However, this rationale [the necessity of two guilty parties] is rejected as being too technical and overlooking the realities of trials which involve differences in juries, contingent availability of witnesses, the varying ability of different prosecutors and defense attorneys, etc. The defendant obtains a full and fair trial; what happened to another defendant at another time and place in another trial before a different judge and jury should not be a bar to trial here.<sup>55</sup>

51. *People v. Bryant*, 409 Ill. 467, 100 N.E.2d 598 (1951). See *People v. Estep*, 346 Ill. App. 132, 104 N.E.2d 562 (1952), in which the court acknowledged the rule but avoided the question of whether a husband and wife were to be legally regarded as one or two persons for purposes of a conspiracy charge, since, in the particular case, the indictment had included others "unknown" in the conspiracy count.

52. See *United States v. Santa Rita Store Co.*, 16 N.M. 3, 113 Pac. 620 (1911), in which the court held that two corporations cannot be guilty of a conspiracy because of the activities of only one man, even though he was duly authorized to act as the agent of both.

53. Section 5.03, comment 105-06 (Tent. Draft No. 10, 1960). The Model Penal Code has no specific section which negates acquittal as a defense; instead, the drafters state that this defense is abrogated by the Code's definition of conspiracy, which excludes the usual requirement of "two or more," regarding only individual culpability. *Id.* at 104.

But the Wisconsin legislature, WIS. STAT. ANN. § 939.31 (1957), apparently did not change the rule in that state that an acquittal of all conspirators except the accused necessitates an acquittal of the accused. *Casper v. State*, 47 Wis. 1117 (1879).

54. MODEL PENAL CODE § 5.03, comment at 106 (Tent. Draft. No. 10, 1960).

55. ILL. REV. CRIM. CODE of 1961, at 209 (Tent. Final Draft 1960).

Even if this section should be construed to apply only to separate, and not to joint, trials, however, the quoted comment of the drafters might still disturb those who adhere to the theory that justice should not vary according to the time, place, judge, jury, or ability of the opposing attorneys. On the other hand, it has been said that, as a result of requiring a reversal of a prior finding of guilt because of a subsequent acquittal in a separate trial of a co-conspirator, the first accused is allowed the benefit of two trials; the verdict of the second jury prevails over that of the first; the prosecutor must, in effect, prove his case to twenty-four jurors; and during the process much time and money are expended.<sup>56</sup> However, by definition, a conspiracy must still consist of at least two parties, and acquittal of one of them can mean nothing less, to defense attorneys at least, than that the convicted defendant has conspired with himself.

(5) *Lacked the capacity to commit the offense.*

As stated by the drafters,<sup>57</sup> this subsection is in accord with the general rule that a defendant is denied defenses which are available to his accomplice because of some trait or position peculiar to the latter.<sup>58</sup> With regard to conspiracy and the defense of acquittal, however, this rule, in conjunction with subsection (4), may alter prior Illinois law in that it will enable the conviction of one conspirator to stand even though his only co-conspirator has been acquitted because of some legal incapacity.

The sections discussed above have enumerated those matters which are *not* defenses to a charge of conspiracy. Section 8-3 provides that it is a defense to the charge of conspiracy that the accused would not be guilty of the substantive offense if it were achieved.<sup>59</sup> However, the fact that the accused lacks the capacity to commit the substantive offense *by himself* does not necessarily bring him within the protection of this defense.

For example, a layman lacks the capacity to commit barratry, but if he and an attorney plan a course of action which leads to the commission of barratry by the latter, the layman can be convicted of that substantive offense as an accomplice. Thus, in any case when *one member* of a conspiracy has the capacity to commit the substantive offense no other member who could be convicted thereof as an accomplice can avail himself of the section 8-3 defense.<sup>60</sup>

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56. Note, 37 ILL. L. REV. 370, 371 (1943).

57. ILL. REV. CRIM. CODE of 1961, at 209 (Tent. Final Draft 1960).

58. *People v. Armstrong*, 299 Ill. 349, 132 N.E. 547 (1921).

59. See MODEL PENAL CODE § 5.04(2) (Proposed Official Draft 1962).

60. See *id.* at § 5.04(1)(b). Under present Illinois law a person who would be a principal in the second degree or an accessory before the fact at common law is

As pointed out by the Model Penal Code, that it is a defense that the accused would not be guilty of the substantive crime is intended primarily to cover two circumstances.<sup>61</sup> The first is the situation in which the accused is the victim of a second party,<sup>62</sup> for example, the parent who pays ransom to a kidnapper. To hold the victim of a crime guilty of conspiring to commit it would confound legislative purpose.<sup>63</sup> The second instance is that in which "the behavior of more than one person is 'inevitably incident' " to the commission of the substantive offense.<sup>64</sup> It becomes necessary here to consider the so-called "Wharton rule."

This rule is usually stated in terms similar to the following: Where a concert of agents is necessary to the commission of the substantive offense, a charge of conspiracy against only those parties necessary to that concert will not lie. The rationale given is that the essence of the crime of conspiracy is the greater danger presented by a plurality of agents, and since the danger of a crime to the commission of which a plurality is necessary is not increased by the preliminary planning of those necessary agents, such planning may not be punished as a conspiracy.<sup>65</sup> In 1940 an Illinois Appellate Court followed this rule in *People v. Purcell*,<sup>66</sup> in which two defendants were indicted for conspiring to gamble by playing cards. One commentator lauded the case, saying that to hold otherwise would erase the traditional distinctions between conspiracy and attempt.<sup>67</sup> However, another observer criticized the case, contending that where a concert of agents is necessary to the commission of the substantive offense the conspiracy becomes more like an attempt, so that the Wharton rule should only apply where the offense has been consummated, so as to prevent multiple conviction.<sup>68</sup> The drafters of the Illinois code eliminated the Wharton rule as a defense by defining conspiracy to include a conspiracy to commit *any* offense, saying that the Wharton rule "fails to take into account the preventive aspect of prosecuting conspiracies."<sup>69</sup> The Model Penal Code has the same effect. The drafters of that code reasoned that, because the accused's only defense to a conspiracy

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now guilty as a principal in the first degree. See ILL. REV. CRIM. CODE of 1961, at 162 (Tent. Final Draft 1960).

61. MODEL PENAL CODE § 5.04(2), comment at 172-74 (Tent. Draft No. 10, 1960).

62. See MODEL PENAL CODE § 2.04(5), comment at 35-38 (Tent. Draft No. 1, 1953).

63. *Id.* at 35.

64. MODEL PENAL CODE § 5.04(2), comment at 172 (Tent. Draft No. 10, 1960).

65. 2 WHARTON, CRIMINAL LAW § 1604 (12th ed. 1932).

66. 304 Ill. App. 215, 26 N.E.2d 153 (1940).

67. 8 U. CHI. L. REV. 138 (1940).

68. 29 ILL. B.J. 185 (1941).

69. ILL. REV. CRIM. CODE of 1961, at 210 (Tent. Final Draft 1960).

charge under the Model Code is that he would not be guilty of the substantive offense, the Wharton defense is eliminated by implication, and the fact that the substantive offense requires more than one party for its commission will not excuse the accused of the conspiracy charge if he would be guilty of the substantive offense.<sup>70</sup> But if the legislative intent in providing for punishment of the substantive offense showed that only one of two necessary parties was to be guilty thereof,<sup>71</sup> as, for example, in abortion, the other party, whose conduct is "inevitably incident" to the commission of the offense, may not be convicted of a conspiracy.

Under section 8-5 a conspiracy defendant may now be convicted of the conspiracy *or* of the substantive offense, but not of both. This is an important change from prior Illinois law which, following the rule of most states, held that the defendant could be convicted of both charges<sup>72</sup> for the reason that conspiracy, unlike attempt, was not a lesser included offense, but rather was a separate offense punishable in itself. The cases holding this view had apparently overruled such earlier decisions as *Hoyt v. People*,<sup>73</sup> which followed the common law rule that a conspiracy, as a misdemeanor, merged into a felonious substantive offense. By eliminating defenses traditionally available to conspiracy charges, the drafters have, to some extent, transformed the basis of conspiracy from aggravation of danger by plurality to something more akin to the prevention of crime in its incipiency, as in the law of attempt. It seems wise, then, that the drafters have also brought conspiracy (and solicitation) prosecutions into line with the practice in attempt cases of avoiding multiple convictions.<sup>74</sup>

### *Attempt*

One apparent purpose of the inchoate offense of attempt is to enable law enforcement officers to prevent the consummation of the particular substantive offense. In determining how this purpose may be best effectuated, two conflicting factors must be balanced: the need of the community for effective crime prevention and the requirement that criminal statutes be so drafted as to eliminate or at least

70. MODEL PENAL CODE § 5.04(2), comment at 173 (Tent. Draft No. 10, 1960).

71. See *Gebardi v. United States*, 287 U.S. 112 (1932).

72. *People v. Moshiek*, 346 Ill. 154, 178 N.E. 337 (1931); *People v. Dorman*, 347 Ill. App. 317, 106 N.E.2d 842 (1952).

73. 140 Ill. 588, 30 N.E. 315 (1892) (citing 2 WHARTON, PRECEDENTS OF INDICTMENTS AND PLEAS 94-97 (3rd ed. 1871) as authority). *But cf.* *People v. Poindexter*, 243 Ill. 68, 90 N.E. 261 (1909) and *Regent v. People*, 96 Ill. App. 189 (1901), which holds that a conspiracy to commit a felony did not merge in the completed felony where the felony was completed in another state.

74. See MODEL PENAL CODE § 5.03, comment at 98-100 (Tent. Draft No. 10, 1960), which suggests that the conspiracy and substantive offense should "merge" in some instances but not in others.

minimize interference with innocent conduct. Imposition of sanctions for attempts also provides a means for dealing with persons who thus demonstrate a danger to society.<sup>75</sup>

The attempt provision (section 8-4) requires an intent to commit an offense plus a substantial step toward that commission. This is a change from the wording of the earlier statute which read, "Whoever attempts to commit any offense . . . and does *any* act towards it but fails . . ."<sup>76</sup> Other modern codes have likewise searched for language sufficiently explicit to give the courts a definite criterion by which to determine just how far the defendant must proceed in order for his conduct to constitute an attempt. Louisiana requires an intent plus an act "tending directly toward the accomplishing" of the criminal object,<sup>77</sup> whereas Wisconsin demands that the act unequivocally demonstrate the intent.<sup>78</sup> The Model Penal Code<sup>79</sup> requires both that the act be a substantial step and that it be strongly corroborative of the purpose, listing several factors to be used in determining such corroboration.<sup>80</sup> Whether these different statutes have succeeded in imposing more definite standards is the subject of some question. Doubtful also is the likelihood that the new definition will change the prior Illinois law of attempts. For example, in the recent case of

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75. *Id.* at 25.

76. Ill. Rev. Stat. 1874, ch. 38, § 273, at 393. (Emphasis added.)

77. LA. REV. STAT. ANN. § 14:27 (1950).

78. WIS. STAT. ANN. § 939.32 (1957).

79. Section 5.01 (Proposed Official Draft 1962).

80. The factors listed in MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1962) are as follows:

Conduct shall not be held to constitute a substantial step under Subsection (1) (c) of this Section unless it is strongly corroborative of the actor's criminal purpose. 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, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

For a discussion of the various efforts at drawing a distinction between a mere preparation and an attempt see MODEL PENAL CODE § 5.01(1) (c), comment at 48-49 (Tent. Draft No. 10, 1960).

*People v. Woods*,<sup>81</sup> decided immediately after the new code went into effect but based on common law attempt as codified in the old statute,<sup>82</sup> the court used language identical to that of the new code in determining whether the conduct had gone far enough to be an attempt. The drafters, merely trying to enact more understandable language, were aware that it probably would not change the decisions in particular cases. "Whether we describe the required act as a substantial step toward commission, or as in dangerous proximity to the principal offense, the courts must still make the determination based on the facts of each case."<sup>83</sup>

Under the old Illinois Code, failure of the attempt was a necessary element of that offense.<sup>84</sup> This rule was based on the common law idea of absolute merger of a misdemeanor into a felony.<sup>85</sup> The new code has, in line with the urgings of most modern writers,<sup>86</sup> eliminated failure as an element of the offense. However, section 8-5 does provide that the defendant may not be convicted of both the attempt and the substantive crime.

The general attempt section (8-4) is applicable to attempts to commit all offenses, thus eliminating the need for the special attempt provisions of the old code, such as attempted arson, attempted bribery and attempted burglary.<sup>87</sup>

The area of the law of attempts which raises perhaps the most complex problems is that concerning impossibility as a defense. Section 8-4(b) deals with the matter as follows:

It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

The drafting committee simply states that, in accordance with the general rule, this provision eliminates both factual and legal impossibility as a defense, leaving as the sole defense what they call "inherent" impossibility.<sup>88</sup> Prior Illinois law had refused to recognize factual impossibility as a defense.<sup>89</sup> But a New York case, *People v.*

81. 24 Ill. 2d 154, 180 N.E.2d 475 (1962).

82. *Supra* n. 67.

83. ILL. REV. CRIM. CODE of 1961, at 212 (Tent. Final Draft 1960).

84. See *People v. Lardner*, 300 Ill. 264, 266, 133 N.E. 375, 376 (1921): "A failure to consummate the crime is as much an essential element of an attempt as the intent and the performance of an overt act toward its consummation."

85. For a thorough discussion of this matter see PERKINS, CRIMINAL LAW 477-81 (1957).

86. *Id.* at 477.

87. ILL. REV. CRIM. CODE of 1961, at 212-13 (Tent. Final Draft 1960).

88. *Id.* at 212 (citing witchcraft as an example of inherent impossibility).

89. See *People v. Dogoda*, 9 Ill. 2d 198, 137 N.E.2d 386 (1956) (not necessary that store contain personal property for charge of attempted burglary), and *People v. Huff*, 339 Ill. 323, 171 N.E. 261 (1930) (not necessary that victim of abortion be pregnant for charge of attempted abortion). *But cf.* *People v. Purcell*, 269 Ill. 467, 109 N.E. 1007 (1915), in which the court, while recognizing

*Jaffee*,<sup>90</sup> held that a legal impossibility (the fact that the goods in question were not stolen goods) prevented conviction on a charge of attempt to receive stolen property. Unless the defense of inherent impossibility is liberally construed, subsection (b) may net more defendants than was intended. For example, a man might be convicted of attempting to steal his own umbrella if he thought that it belonged to someone else. It is suggested that although such a person may indeed evidence a mind and conduct so socially dangerous as to deserve liability, such an extension of the area of conduct prohibited by criminal law should be made explicit, at least by reference to the commentary of the draftsman, rather than merely implied by broad statutory language.<sup>91</sup>

Illinois, however, is not the only modern code to eliminate all legal impossibilities as defenses. Louisiana provides that "it shall be immaterial whether under the circumstances he would have actually accomplished his purpose."<sup>92</sup> The Model Penal Code<sup>93</sup> discards impossibility as a defense, but permits dismissal in extreme cases.<sup>94</sup> The latter code also makes guilty of an attempt any person who "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be";<sup>95</sup> so, here too, one could be convicted of attempting to steal his own property.

### *Conclusion*

Some of the new Illinois Code provisions on inchoate crimes have not changed pre-existing law, but have organized that law into a more understandable code. Other provisions did change the law. Generally, the drafters had to weigh two conflicting policies—the long-standing rule that an intent alone cannot be punished, and the increasing demand for crime prevention (as opposed to punishment). It seems that the Illinois provisions, like other modern codes, have given greater emphasis to the latter policy than has been given in the past.

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the general rule that factual impossibility is no defense to attempt, held that where the offense charged, whether grand or petit larceny, depends on the value of the property attempted to be stolen, the fact that there was no such property precludes a conviction for attempt.

90. 185 N.Y. 497, 78 N.E. 169 (1906).

91. Attempting to do what is not a crime is not attempting to commit a crime. . . .

Theoretical discussions of the purpose of punishment and other problems of penal philosophy are quite appropriate in legislative debate over proposed changes in the law, but should not be employed to create a criminal attempt out of what was not so at the time. PERKINS, CRIMINAL LAW 494 (1957).

92. LA. REV. STAT. ANN. § 14:27 (1950).

93. MODEL PENAL CODE § 5.01 (Proposed Official Draft 1962).

94. *Id.* at § 5.05.

95. *Id.* at § 5.01(1) (a).

This is not to say that sacrifices of individual freedom should be condoned in deference to the need for crime control in our more complex society. Rather it is suggested that the changes will necessarily give prosecutors a wider latitude to initiate proceedings against inchoate offenders, but, at the same time, will retain for the courts sufficient power to prevent infringement of individual freedoms.