February 1934

Solicitation to Crimes

James B. Blackburn

University of Pittsburgh

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Criminal Law Commons

Recommended Citation

Available at: https://researchrepository.wvu.edu/wvlr/vol40/iss2/3

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
SOLICITATION TO CRIMES

JAMES B. BLACKBURN*

It is a matter of conjecture as to when jurists first conceived
the idea of holding liable criminally one who took no part
physically in the commission of a crime. In England this no doubt
took place some time after the advent of Christianity, after the
element of intent became of importance; when crime became a
breach of the peace, when society became interested and assumed
control and sought to regulate the punishment of crimes, thus
superseding the former notion of self help, kin interference and
the purchase of immunity.

Since recognizing the possibilities of committing crimes by
having them perpetrated through an agent, the law has sought
means of preventing criminal acts caused in such a manner and
has done so by providing punishment for the one thus participating
by his persuasive efforts, threats, commands and inducements. One
means used for this purpose was to punish an accessory or one
who aided another in the commission of a crime. With the end
in view of arresting a criminal act at its inception and thus pre-
venting the planning of a crime, the crime of conspiracy originated.
An attempt to commit certain crimes has long been held to be a
crime in itself. One form of attempt is an endeavor to have a
crime committed through the agency or by means of another or
others, and by holding one criminally responsible for such at-
tempt we have come to punish one who solicits another to commit
a crime.

This crime as it originally developed was concerned with the
punishing of one who by his persuasion, threats, bribes, or in any
other manner instigated another or others to commit a specific
crime; and it was soon decided that a crime need not result to
make the one persuading liable to punishment.1

There was still some doubt as to the nature of the crime of
solicitation in the early days of American independence, but the
courts soon realized the principle as one of the common law.2 To

---

1 Queen v. Daniel, 6 Mod. 99 (1703); King v. Schofield, 1 Cald. 397 (1784); 
King v. Vaughan, 4 Burr. 2494 (1769); King v. Plympton, 2 Law. Raym. 1377
(1724); King v. Johnson, 2 Show. 1 (1661). In none of these cases is
solicitation considered as a substantive crime.

2 Commonwealth v. Harrington, 3 Pick. 26 (Mass. 1825); U. S. v. Lyles,
26 Fed., Case No. 15,646 (C. C. D. C. 1834); People v. Bush, 4 Hill 133 (N.
Y. 1843).
the defense that the English common law was not in force in this country the answer was very much like Mark Twain's comment on the Baconian controversy,— that Shakespeare did not write the works accredited to him but that it was someone else by that name; that is, even if the common law were not in force, we had a common law quite similar which was in force. 8

1. Extent of Solicitation

Solicitation is an extremely variable element of crime. It can be the all-important matter for consideration, or so slight as to be almost negligible. One soliciting may on this account be convicted as principal of the resulting crime, or incur no criminal responsibility whatever. From the importance it is possible for it to assume, solicitation has not on the part of text writers on criminal law received the consideration it would seem to demand. While they often consider it in discussing specific crimes, there has been very little space devoted to it independently as a form of attempt, or as of itself a substantive crime.

A person who incites in any way another to commit a crime or a lawful act in a criminal manner with the intention of causing the commission of a crime, is guilty of solicitation, and this solicitation may be so closely connected with the crime committed that the solicitor would be guilty as principal of the crime, if committed. A enlarges upon injuries which he has suffered at the hands of B for the purpose of inciting C to avenge them. Or a person knowing that B is about to have a private meeting with C's wife for some perfectly innocent object suggests to C that there will be a criminal meeting between them, in the hope of causing C to commit violence upon B. In either case the person soliciting will be guilty of the crime which results from the solicitation, and it makes no difference that he does not in terms suggest that any unlawful act be committed, or even that he affects to dissuade him from it.

For example, A, having wagered a large sum on the outcome of a ball game, believes that the umpire assigned to that particular game will discriminate against his team, and hires B, a former criminal, to assault the umpire. In the assault following, the umpire is killed. A would be guilty of murder. Suppose, however, that B commits an assault. In this case A would be also guilty of the assault. Let us assume that B is thwarted and interfered with when he is about to assault the umpire. In this case, A would

8 State v. Avery, 7 Conn. 266 (1828).
be guilty with B of an attempt. Now, let us suppose that A is unsuccessful in his efforts to employ B to attack the umpire; in this case A is guilty of attempt by soliciting. As a final example, let us imagine A as an ordinary spectator at a ball game. A decision at a crucial point in the game is made by the umpire, of which A disapproves. As is often the case, he shouts, "Kill the ump!" Here there is no criminal liability on A's part, even though for the instant he might desire the death of the umpire. Thus we can see that on the circumstances surrounding the crime, a solicitor may be guilty as principal of the crime committed, of an attempt to commit a crime, or not liable.  

Fraud or subterfuge will not excuse a person from the responsibility. Where A procures B by payment of money to commit a crime, both A and B are guilty, but if B is under some legal disability such as age, or is mentally deficient, A alone is guilty; or if A overcomes the will of B by force; likewise if A has B do a lawful act which results in a crime, provided A intended the particular result, A alone would be guilty.  

The solicitation is complete where the solicitor has attempted to persuade another to commit a crime, whether the latter consents or not, or whether having consented he makes any effort to commit the crime solicited. The persuasion must be of a person who has not already formed the intent to commit the crime solicited. If a person by suggesting to another a particular crime simply arouses the criminal propensities of that other, the solicitor would not be responsible if those criminal propensities go in a different direction from that suggested. If A incites B to gamble, he is not liable if B steals or commits breach of trust to supply himself with funds; or if A inciting B to kill X or to break into and rob the house of Y, and B, falling in with the general idea goes and kills Z or breaks into his house. But on the other hand, if the one solicited in substance complies with the solicitation and

---

4 United States v. Stephens, 12 Fed. 52 (C. C. D. Ore. 1882). This was an indictment for soliciting an order in San Francisco for liquor to be delivered on the Alaskan border, with the intent on the part of the defendant to transport the same into Alaska, against the statute. The court held that this was merely solicitation to a preparatory act, was not an attempt, and that the defendant could not be held liable.

5 Commonwealth v. Flagg, 135 Mass. 545 (1883). Defendant endeavored to procure A to set fire to the barn of B by offering money. B never tried to set fire to the barn. Defendant was found guilty and the court gave judgment on the verdict, holding that "solicitation to commit a felony, even though of no effect and the crime counseled not committed, is indictable at common law."

6 1 HALE F. C. 617.
varies only in matter of time or place or in the manner of execution, in such a case the solicitor would be a principal to the crime committed, as if A commands B to poison C and B shoots C. Likewise if A incites B to burn the house of X and an inmate of the house is burned in it, or the fire spread to other houses, A will be liable as principal. That is, a solicitor is held liable for a solicitation to what is reasonably supposed it would effect, or again, what is likely in the course of events to follow the doing of the criminal acts solicited.

2. Analysis of the Crime

a. Intent

Solicitation is the endeavor on the part of one person to have a crime committed through the agency of another or other persons. There must be on the part of the solicitor an intent to have the crime committed and the purpose of communicating this intent to another or others. It must be the starting point of a series of acts which, but for the interference of some circumstances beyond the control of the solicitor, will result in the commission of a crime intended by the solicitor.

b. Intervening Will Which Must Be Overcome

In order to have a real solicitation, the solicitor must overcome the will of an intervening party, or make an effort in this direction with the intention to persuade. Should the persuasion be successful and the one solicited assume the same intent as the solicitor, there would be a conspiracy.

In this respect it is necessary to consider by what standard we shall judge this intervening will. The objective standard furnishes no criterion, as we must assume at the outset that an ordinarily reasonable prudent man would not be susceptible to persuasive efforts to have him commit a crime.

Therefore the subjective standard is the one that must be applied — that is, would the efforts at persuasion be such as would likely succeed with the particular person or persons solicited? In cases where a particular person or persons are solicited, this could be determined by the actual fact as to whether they had been persuaded. Where an indefinite or unknown group are persuaded, we would have the question as to whether individuals forming

\[^{7}1\) Hale P. C. c. 29, § 22.\]
such a group would be influenced to the point of committing crime at the instigation of the solicitor.

c. Proximate or Remote Possibility

Another question that presents itself is whether a solicitor should be punished when the means employed could under no circumstances effect the crime intended, even though the intent to commit the crime, and the belief that the crime could be accomplished in such a way, existed. For example, A solicited B to put a curse on C, A and B both believing that by means of the curse C would be killed. We do not think that in such a case A and B would be guilty of any crime, for the only necessary element of a crime present in such a case is the criminal intent, and the law does not punish mere intent. In a moral sense, no doubt it is wrong to harbor an intent to commit a crime, but with such the law can have nothing to do. It is too speculative for judicial tribunals to act upon. A solicitation to be punishable must extend far enough toward the commission of the desired result as to amount to its commencement.

d. Limitation

Standing as it does on the border of crime, solicitation and its consequences should be clearly understood. It would never do to state a rule so vague that it could not be understood by the general intelligence of the community. Preparatory acts must be carefully distinguished from attempts. An act or a solicitation to be punishable must be such that in the ordinary course of events it would result in a crime. The efforts of a solicitor must be such that a series of acts have been started and have gone so far beyond his control that he could not prevent their criminal effect. For example, A has persuaded B to commit a crime. A repents but it is impossible to communicate this repentance to B. In the meantime B has changed his mind and decided to do nothing further in regard to the crime, and nothing is done. Nevertheless A would be guilty of solicitation. The purchase of a gun with intent to commit murder does not constitute an indictable offense,

*Ex parte Lloyd, 7 Cal. App. 588, 95 Pac. 175 (1908). Defendant gave an order to have tickets printed, representing himself as agent for A. Printer did not intend to fill the order. The court held this was not an attempt and defendant could not be held.

State v. Hayes, 78 Mo. 307 (1883). Defendant solicited another to commit arson, aided in the preparation, went to get a match, never returned, and the crime was not committed. Defendant was held guilty of attempt.
and when the solicitation is so far removed from the fact of the crime that it is only an act of preparation, it is not an indictable offense.

3. Solicitation as Attempt

Solicitation is frequently treated by courts and text writers as a form of attempt, and this, we submit, is the proper view. The use of the term "attempt" implies "to try", "to endeavor to do something and fail". It has this meaning in criminal law, that is, the unsuccessful effort to commit a particular crime. When one chooses another for the carrying out of the particular purpose, he is attempting to execute that purpose to the same extent as though he had chosen an inanimate object as the means to be used.

Another view is that solicitation is a distinct offense. It is true that solicitation is not an attempt in the sense that one has made a physical effort to accomplish a certain result and failed, and it is on this point that the authorities disagree; that is, in the last analysis upon the meaning of "overt act". Authorities on both sides of this question use the much referred to case of Rex v. Higgins. In examining this case, one can see a basis for both views but we do not thinks that any of the opinions, rendered seriatim, carried any conception of solicitation as a substantive offense. The judges were concerned with affirming a conviction, and the whole theory of the case was to the effect that solicitation was an indictable offense. They did not try to distinguish between solicitation as a form of attempt and as a sub-

---

2 East 5 (1801), SAYRE, CASES ON CRIMINAL LAW (1927) 340. The defendant was indicted for soliciting and inciting a servant to steal his master's chattels. There was no proof of any overt act towards carrying the intent into execution and it was argued in behalf of the prisoner that the solicitation was a mere fruitless ineffectual temptation, a mere wish or desire.

It was held by all the judges that the soliciting was a misdemeanor though the indictment contained no charge that the servant stole the goods nor that any other act was done except the soliciting.

Lord Kenyon said that the solicitation was an act and it would be a slander upon the law to suppose that such an offense was not indictable.

Grose, J., said that an attempt to commit a misdemeanor was in itself a misdemeanor. The gist of the offense is the indictment.

Lawrence, J., said: "All offenses of a public nature, that is, all such acts or attempts as tend to the prejudice of the community are indictable" and that the mere soliciting the servant to steal was an attempt or endeavor to commit a crime.

LeBlanc, J., said that the inciting of another, by whatever means it is attempted, is an act done, and if the act is done with a criminal intent it is punishable by indictment.
stantive offense. Text writers have divided on this question, Bishop considering it a form of attempt, and Wharton considering it as a substantive offense. The more modern text writers have been inclined to follow Wharton's view.

Could we say that, in persuading a person who would not be punished for committing the crime solicited, the solicitor is guilty of an attempt should the commission of the crime fail, and at the same time say that had the solicitor endeavored to carry out his purpose through one liable for his acts, that in such case he (the solicitor) had not attempted? This would be to say that an effort to commit a crime by overcoming an intervening will is not an attempt, while persuading one whom the law says has no will is an attempt. The difference is that in the first case we have as guilty of the crime the one persuaded, while in the latter case the one persuading. Is it reasonable to say that one has not attempted a crime because he has endeavored to persuade a legally

19 BISHOP, CRIMINAL LAW (8th ed. 1892) § 767: "A common form of attempt is the soliciting of another to commit a crime, the act which is a necessary ingredient in every offense consisting in the solicitation."

1 McLANE ON CRIMINAL LAW, § 220: "The form of intent which perhaps involves the least degree of criminality is that of solicitation of another to do an act which, if done, would constitute a crime, and such solicitation is generally held to be punishable as a misdemeanor although the offense solicited is never committed. There is probably no real difference in criminality between a solicitation and an attempt."

People v. Bueh, 4 Hill 133 (N. Y. 1843). Solicitation to burn a building was held an attempt even though the solicitor was absent and the one solicited never intended to act.

The artificiality of the distinction is made clear in a recent article in which stress is laid upon the idea that in every attempt the emphasis should be laid upon the particular crime contemplated and thus that one can generalize on the subject of attempts only with reference to a particular crime. Arnold, Criminal Attempts (1930) 40 Yale L. J. 58, 67, n. 37.

11 WHARTON, CRIMINAL LAW (10th ed. 1896) 172, (In speaking of solicitations as distinct or of themselves substantial offenses): "They certainly are, as has been seen, when they in themselves involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public justice; as where a resistance to the execution of a judicial writ is counselled; or perjury is advised; or the escape of a prisoner is encouraged; or the corruption of a public officer or a witness is sought, or invited by the officer himself. They are indictable, also, when they are in themselves offenses against public decency, . . . . and they are indictable, also, when they constitute accessoryship before the fact. . . . . And the better opinion is that, where the solicitation is not in itself a substantive offense, or where there has been no progress made toward the consummation of the independent offense attempted, the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative." It is hard to understand the author when he speaks of solicitations which in themselves involve a breach of the peace. As a solicitation of itself could never involve a breach of the peace, he must, therefore, mean solicitation to offenses which involve a breach of the peace.

CLARK & MARSHALL (2d ed.) § 125: "and a better opinion is that solicita-
responsible person to commit an act, and at the same time to say he has attempted when he has set an innocent agent to accomplish his ends? Those authorities who claim solicitation is a substantive offense must show that it is not an attempt, and this, in our opinion, they fail to do. Solicitation is the act of trying to influence another to do something which is a crime the solicitor wishes and intends to have committed. We cannot see where this differs from attempt and how it can be considered a substantive offense. The fact that it is further removed from the crime intended and that the chances of succeeding may be less, does not in any way tend to show that it is not an endeavor, in fact an attempt, to have the crime committed.

In considering solicitation as an attempt, indictments could be better drawn. It would not then be necessary to include a count for solicitation. The count for attempt would be adequate. A most important question to be considered here is that of punishment. As a general rule a conviction for attempt carries with it a more severe penalty than a conviction for the substantive crime of solicitation in jurisdictions recognizing solicitation as a substantive crime. But this is not a necessary consideration. If, as we believe, solicitation is an attempt, it would seem from the cases read that the courts in considering solicitation as a substantive offense have used it as a means for imposing a light sentence in cases where they did not wish to go to the extent of imposing the sentence necessary for an attempt, and yet at the same time thought the accused deserving of some punishment.

By considering solicitation as an attempt, we would include

> Walsh v. People, 65 III. 58 (1872) (Offer to receive a bribe deemed not an attempt and not indictable as a solicitation); McDade v. People, 29 Mich. 50 (1874) (Solicitation held not an overt act to constitute attempt according to the statute; "overt act" meant physical act); Stabler v. Commonwealth, 95 Pa. 318 (1880) (An indictment containing counts for attempt and for solicitation was held good as to the latter but bad as to the former, reliance being placed upon WHARTON and Rex v. Higgins; Cox v. People, 83 Ill. 101 (1876) held that a solicitation to incest was not an indictable offense since there was no overt act to make it an attempt); State v. Harney, 101 Mo. 470, 14 S. W. 657 (1890) (In an indictment for statutory rape, solicitation was held not an overt act. This case can be distinguished, however, on the ground that the solicitor tried to persuade and gain the consent of one whom the law holds cannot give consent). See also State v. Lampe, 131 Minn. 65, 154 N. W. 737 (1915); State v. Bowers, 35 S. C. 262, 14 S. E. 488 (1891).

One may, of course, be punishable under a statute forbidding the "inciting" or "procuring" others to commit crimes without reference to the common notions of the elements of attempts. See State v. Hudon, 103 Vt. 17, 151 Atl. 564 (1930).
in all statutory crimes where provision is made for attempt, a
means of punishment for solicitation without having to specify the
same independently.

a. The Solicitation to What Crimes Should Be Punished

Although, following the case of *Rex v. Higgins*, the courts are
agreed that solicitation is an indictable offense, whether as a sub-
stantive crime or as a form of attempt, there has been no settled
rule as to what crimes must be solicited to make the solicitor
guilty of an indictable offense. It has been generally held that
the solicitation to any crime which at the time was a felony at
common law or by statute is indictable and the distinction be-
tween felonies and misdemeanors has been used as a basis to de-
termine those crimes a solicitation to which would be an indictable
offense.22 Such a classification is governed by no fixed or definite
principle, but is purely arbitrary, depending on the will of the
legislature from time to time; it rests on no substantial basis and
affords no just criterion for determining to what crimes solicitation
should be an indictable offense. Under such a test the most ridi-
culous line would be drawn. A would be punished for solicit-
ing B to commit the theft of a chattel of little or no value, but
could inveigle to the destruction by fire of a modern city business
block and yet not be guilty of an indictable offense. Under such a
test A would be guilty if he solicited B, a bank clerk, to steal a
penny from the cash drawer, but might not be guilty should he
persuade C, the cashier, to embezzle millions.

Another distinction that has been suggested is to hold that
penny from the cash drawer, but might not be guilty should he
indictable.23 Courts have held that the solicitation to crimes
which promote a breach of the public peace,24 or to those crimes

22 **Clark & Marshall** (2d ed.) § 191: "'The decided weight of authority
both in England and the United States is in favor of the doctrine that it
is a misdemeanor merely to solicit another to commit a crime, if the crime
be a felony, though nothing further is done toward carrying out the unlaw-
ful purpose. The solicitation, without more, is regarded as a sufficient act
to take the case out of the sphere of mere intent.

'Whether solicitation to commit a misdemeanor is indictable is not so
clear. Some courts differentiate between solicitation to commit felony and
misdemeanor.'"

See Commonwealth v. Willard, 22 Pick. 476 (Mass. 1839); Commonwealth

23 Commonwealth v. Hutchinson, 6 Pa. Super. Ct. 405 (1897); People v.
Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509 (1902).

SOLICITATION TO CRIMES

which tend to defeat the administration of justice\textsuperscript{26} or to those that are against public society and the safety of individuals\textsuperscript{27} should be punishable. Such distinctions are subject to the same objection as the first one mentioned. It would afford no basis for differentiating, and to follow it would be very difficult, vague, and accomplish nothing beyond confusion.

As to whether solicitation to sexual crimes is an indictable offense the authorities are in conflict. In Connecticut, solicitation to adultery was held an indictable offense, while in Pennsylvania it was held not to be an indictable offense, distinguished from the Connecticut case on the grounds that adultery was a felony in Connecticut while only a misdemeanor in Pennsylvania.\textsuperscript{28} The Pennsylvania courts have, if not overruled, confined the decision to very narrow limits so that this case is of little, if any, effect. Another distinction brought out in these cases is that adultery is, while a crime, nevertheless one tending to secret morality and not one involving a breach of the peace. The English courts have referred to sexual crimes as spiritual crimes and within the province of the ecclesiastical courts rather than the common law courts.\textsuperscript{29}

Chief Justice Wheeler in a comparatively recent case,\textsuperscript{30} has suggested the best basis to distinguish those crimes, the solicitation to which would be indictable, by holding that solicitation to a crime should be a crime in every instance where the attempt to commit the same offense would be a crime. This would be more clearly understood and would be a better deterrent. As we have shown, the evil to be prevented is the putting in the mind of another, usually a weaker intellect, the criminal intent. A solicitation is often more dangerous to society than an attempt by the solicitor alone and unaided to commit the crime solicited. For example, A wishing to have B murdered, hires C, an expert marksman, to shoot B. It is far more dangerous to society, and to B in particular, than if A, inexperienced in the use of a revolver, should attempt to shoot B by his own hand.

\textsuperscript{26} State v. Keyes, 8 Vt. 57 (1836); State v. Baller, 26 W. Va. 90 (1885); State v. Ames, 64 Me. 385 (1875).
\textsuperscript{27} Commonwealth v. Harrington, 3 Pick. 26 (Mass. 1825); State v. Avery, supra n. 3; Smith v. Commonwealth, 54 Pa. 209 (1866).
\textsuperscript{28} Queen v. Pierson, 1 Salk. 282 (1705).
4. Classification of Solicitation

a. Special

By special solicitation we mean those cases in which the solicitor endeavors to persuade definite, ascertained, known persons to commit a particular crime or crimes. It is this class of cases which we have heretofore discussed. As society became more complex, the criminal law in regard to solicitation, just as our law in many other branches, has had to enlarge and grow to meet different circumstances. As originally provided, solicitation was intended to mean those which we have chosen to call solicitations of a special class. It became necessary to provide a means of punishing those who advocated crime in a wholesale manner, without direct contact with those to be persuaded. Persons able to reach great numbers with their arguments should certainly not be permitted to advocate crime; so that solicitation was by judicial reasoning enlarged to cover the new circumstances, which is but another example of the ability of our common law to expand and cover situations not in contemplation at the formation of the law. Statutes covering such cases, have been enacted from time to time but often are deemed simply declaratory of the common law.²⁰

b. General

This class of general solicitations comprises those solicitations wherein the solicitor does not know definitely whom he will incite or persuade or to just what crimes or attempts the persuasion will lead. The first group of this class is that type dealing with orators inciting their audiences to criminal acts, or cases where a mob leader verbally directs or counsels an excited group to the

²⁰ N. J. COMP. STAT. (1910) p. 1744: "Any person who shall, in public or private, by speech, writing, printing or by any other mode or means advocate, encourage, justify praise or incite the unlawful burning or destruction of public or private property, or advocate, encourage, justify, praise or incite assaults upon the army of the United States, the national guard, or the police force of this or any other state or of any municipality, or the killing or injuring of any class or body of persons, or of any individual shall be guilty of a high misdemeanor." In construing this statute the court, in State v. Quinlan, 86 N. J. L. 120, 91 Atl. 111 (1914), held that it was merely declaratory of the common law.

Ill. Rev. Stat. (Smith-Hurd, 1929) c. 38, § 531: "Whoever attempts to commit any offense prohibited by law, and does any act towards it but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished ...." In construing this statute the court held, in Cox v. People, 85 Ill. 191 (1876), that it meant a physical act as contradistinguished from a verbal declaration, that is, a step in the direction, not a mere effort by persuasion to produce the condition of mind essential to the commission of the offense.
commission of illegal acts. It has been argued that solicitation was not an offense unless the persuasion of a definite, known person was attempted, and that it was not an indictable offense to solicit generally.\(^2\)

An endeavor to persuade is none the less so because the person endeavoring to persuade does not in the particular act personally address the one or more persons whom the address which contains the persuasion or the endeavor to persuade reaches. An orator, speaking to a large number of people, does not address his remarks to any one individual among that number. He addresses the number. He is trying to persuade the whole audience or a large proportion of it, and if a particular individual among that number is persuaded, the speaker must be taken to address his persuasion to those whom he knows hears, will understand in a particular way, do understand in that way, and act upon it. Convictions for solicitation of this type have generally been affirmed.\(^3\)

The second group of this general class comprises those cases in which crimes are incited or instigated by means of published articles in newspapers or elsewhere, advocating and advising the commission of crimes. Solicitations of this type are more dangerous than solicitations of a special kind, for here solicitation is to a great number. There is greater chance of success, and many more are likely to be incited to crime than would be aroused by special solicitation.\(^3\)

The third and last group of general solicitation includes those cases in which rewards are offered or advertised in such a way that they incite or instigate the commission of crimes. Quite early it was held an indictable offense to advertise for witnesses.\(^4\) If one invites the public to come and give perjured evidence, that is as much a criminal act as to request an individual to do so. It

\(^2\) State v. Schleifer, supra n. 19.

\(^3\) Debs v. United States, 249 U. S. 211, 39 S. Ct. 252 (1919) (Affirming conviction of defendant for conspiring to solicit citizens to refuse to register under the Selective Draft Law).

\(^3\) United States v. Galleanni, supra n. 14 (Indictment held sufficient which alleged that defendants conspired and by newspaper articles endeavored to persuade persons subject to the Selective Draft Law not to register thereunder, although it did not appear that the solicitations had in any case been successful).

\(^4\) Pool v. Sacheverel, 1 P. Wms. 675 (1720). "It is equally criminal when the offer is to any, for to any is to any particular person. This advertisement will come to all persons, to rogues as well as honest men: and it is a strange way of arguing to say, that offering a reward to one witness is criminal, but that offering it to more than one is not so: surely it is more criminal, as it may corrupt more."
is just as criminal to publish to the whole world that the author rejoices in regicide and recommends others to follow his example and trusts that the time is not long distant when once a month kings may fall.25

The better rule to adopt in cases of this type is to hold that the advertiser whose advertisement solicits or instigates a crime, if the tendency or endeavor of the advertisement would be to have crimes committed for the sake of the reward, is guilty of solicitation. Cases of this type usually arise from a reward offered for the killing of criminals or persons engaged in criminal acts. A killing to gain a reward would not be justifiable and the advertiser should be guilty of solicitation.26

5. Defenses to the Charge of Solicitation

a. Justification for the Purpose of Entrapment

There is no doubt that solicitation to the commission of a crime is justifiable under certain circumstances, namely, where a police officer acting within the scope of his duties could encourage a plan of a criminal, provided this plan is in the process of fulfillment, and the idea of committing the crime did not originate with the officer. A police officer would also be justified in soliciting to a crime a person he had reasonable grounds to believe was engaged in a criminal career. He would likewise be justified in soliciting for the purpose of detecting a crime which had been perpetrated. He is not, however, justified in causing the commission of the crime which would result directly from his suggestion, provided the one solicited had not entertained any criminal intent, except for and until the suggestion by the officer.

Disregard for the law has been on the increase. This is no doubt due to many causes. An unpopular law is very difficult to enforce, and naturally renders those trying to enforce it so unpopular that they never receive the support or cooperation of the public. It is also a fact that those who, in enforcing the law, render themselves unpopular, cause a certain amount of disrespect for the law they endeavor to enforce. A great number of our people consider those enforcing the law as the personification of the law, and regard it accordingly, so that when we have police officers employing methods arousing resentment, and an attitude of antagonism, rather than of cooperation, we have discovered

25 Queen v. Most, 7 Q. B. D. 244 (1881).
26 Note (1929) 6 Tex. L. Rev. 184.
one cause for this growing disregard of the law. It is very difficult to create a proper respect for law if its representatives have to suggest crimes, advise and persuade their victims to commit them for the sole purpose of adding convictions in our records, and inmates to our penal institutions.

This is very well brought out by the court in *Love v. People*:

"Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil when financially embarrassed and impoverished. A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself, but they must not aid, encourage or solicit him that they may seek to punish."

The object of our criminal laws and their enforcement should not be to ascertain how many of our citizens can be persuaded to commit crimes, nor is it a proving ground for the theory that every man has his price.\[24]

b. Statutory Crimes Protecting Certain Class

There is another class of cases where the ones soliciting would not be held liable because the law under which they would be convicted has been enacted for their special protection. We here refer to the solicitations by girls under the statutory age. To hold them for solicitation would be to hold them for attempting to commit a crime which the law says they are incapable of committing.

c. Statutory Crimes, the Policy of Which Is to Exempt

In this class of cases, while the law is not protecting a particular class, it is said that that class shall not be guilty of the statutory crimes. Thus in criminal statutes in regard to intoxicating

\[24\] 160 Ill. 501, at 508, 43 N. E. 710 (1896).

liquor the policy of the law is that the buyer shall not be held liable.

d. **Locus poenitentiæ**

To a charge of solicitation the defense of repentance is of the same effect as it would be in any other crime, with this exception, that in order to make repentance a good defense the solicitor must dissuade the one solicited from carrying out his original purpose.\(^3\)

If, however, the solicitor is unable to dissuade the one solicited from continuing in his execution of the crime, an interesting question arises. While the solicitor could show that he had given up his criminal intent, at the same time the prosecution could argue that the one solicited would never have attempted the crime but for the solicitation. Whether the court would then consider the one solicited as acting under the influence of the solicitor or not would be a question that would have to be decided by the surrounding circumstances: A is so successful in the solicitation to have B commit a crime that B becomes so furious that he cannot be dissuaded, and consequently commits the crime originally suggested by A. It would seem to us that A would be guilty of solicitation, contrary to the result which has been reached in such a case.\(^2\)

6. **Advantages of Enlarging the Scope of This Form of Attempt**

With the exception of offering to receive a bribe,\(^a\) we have no cases in this country where one has been held liable who has offered for consideration to commit a crime. Our law on solicitation should be enlarged to cover this type of cases. It would make it more difficult for the buyer of criminal services and the seller of the same to get together. A person knowing that he was liable to punishment for his offer to commit a crime would be very careful in making such offers, just as at present a person purchasing crime knows that he is liable for his attempt to purchase.

Foreign codes have provisions in regard to solicitation which take this feature into consideration. The German penal code

---

\(^3\) In Commonwealth v. Peaslee, 177 Mass. 267, 259 N. E. 55 (1901), defendant solicited and made preparations to fire his building to collect insurance. Before anything further was done, he repented and told the one whom he had solicited. The indictment was not sustained, the court holding that he had repented in time.

\(^a\) 1 HALE P. C. 618.

\(^a\) Walsh v. People, *supra* n. 11.
punishes one who has purposely solicited or instigated another person to commit a punishable act by means of gifts, promises, threats, abuse of power, or by purposely causing another to act through mistake or by any other means, and also provides a punishment for one who offers to commit a crime or offers assistance in the commission of a crime. The French penal code and the Italian code have similar provisions.

It is interesting to note that a code prepared by lawyers familiar with the common law destined for a distant people, where the provisions of the law must be explicit, capable of being understood and at the same time certain of enforcement, was very definite in its provisions for punishment for solicitation, which shows the real necessity for providing for solicitation.

CONCLUSION

Thus we have seen solicitation, as other branches of our law, grow and enlarge from the time when it only covered an effort on the part of one to persuade, arouse, or incite another to commit a definite crime, to the point where it covers a persuasive effort on the part of anyone to arouse any other to commit a crime, whether the parties are known to each other or whether a specific crime is planned and advocated. Of the two views as to the nature of this crime, the better one is that it is a form of attempt. This view is more logical. It conduces to clarity and certainty in the law and tends to simplify criminal procedure.

It would be a distinct improvement to include under the crime of solicitation those cases involving offers for renumeration to commit or to assist in the commission of a crime.