

NOTES AND COMMENTS ON "TITLE G"  
OF THE PROPOSED PENAL LAW

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Under the descriptive title "Anticipatory and Accessorial Offenses," are a group of crimes consisting of behavior which contributes to the commission of a crime by another, but does not approach participation in that crime closely enough to render the actor an accomplice. Despite superficial similarities and occasional borrowing of a word or phrase, these Title G offenses do not amount to the procuring and counseling or aiding and abetting which, under Section 2 of the present Penal Law, constitute the actor a principal. To understand fully the difference between the new set of crimes and the traditional concept of accomplice, Title G must be read with and against proposed Article 50. Under Article 50, accessorial conduct, so termed, renders the actor criminally liable for the offense of another only if the accessory acts with the "mental culpability required for" the commission of the crime. In other words, one who "solicits, counsels, encourages or intentionally aids or causes" another to engage in criminal conduct is liable as a principal (although the term is not used) for a crime actually committed if he himself intends the commission of the crime. Under the five articles of Title G, either the crime need not be actually committed, or the defendant need not have directly intended its commission, or its commission has occurred before the defendant enters the picture.

Article 100 - Criminal Solicitation

The utility of this crime is limited. It holds culpable the person who "requests, commands, encourages or importunes" another person to commit a crime. The crime is complete with the solicitation and the degree is determined by the crime solicited. It is, in effect, a lesser included crime under conspiracy or Article 50. For if the person solicited agrees and any overt act is done in furtherance of the object, the offense becomes conspiracy. And if the person solicited actually commits the crime, the solicitor shares equally the guilt of the principal under Article 50. Of course if the solicitation is itself part of a crime, as in bribery, then as explicitly provided under Section 100.20, the solicitor is guilty of the main crime.

Although it occurred to me, I rejected the thought that Article 100 is entirely superfluous since solicitation is nothing more than an attempted (i.e., a substantial step toward) violation of §50.00 of the proposed law. This would have made the unsuccessful solicitor guilty in the same degree as the frustrated felon who tries and fails at the underlying crime itself: a rather harsh view. I discarded this interpretation, however, because an attempted violation of §50.00 would probably occur only where a successful solicitation results in an attempted crime by the solicitee. This is as it should be, though I am not sure it is manifest.

The so-called definition section is standard and is incorporated also in §105.00 relating to conspiracy, and §115.00(1), criminal facilitation. Analyzing it, it is not a definition at all, and is less than helpful. The first

half states in effect that the terms "crime," "felony," and "misdemeanor," referring to conduct, means conduct which constitutes a crime, felony or misdemeanor. This is simply a tautology. If it is intended to mean that those terms refer to conduct rather than legal conclusions, this is self-evident and needs no statement. The second half of the definition means only that the solicitor of conduct is guilty regardless of whether the solicitee is criminally responsible himself. This notion would be better stated in a section titled "No defense" and phrased in terms similar to those employed, for example, in Section 100.15.

Somewhat inappropriate to this crime is the inclusion of the renunciation defense, Section 100.20, subd.2, which appears in several articles of Title G. For it is difficult to see how a solicitor with a change of heart can dissuade the solicitee from committing the crime when the solicitee has, by definition, not yet agreed to carry it out.

#### Article 105 : Conspiracy

This article contains no definition of "conspire" on the theory, apparently, that the term is familiar and well defined by long usage. This may be so. The definition section, 105.00, as noted above, is not particularly useful except insofar as it states a "no defense" principle, which is sound.

Conspiracy is divided into four degrees ranging from a class D felony to a class B misdemeanor depending on the degree of crime the parties conspire to commit. In 1959,

certain conspiracies were made felonies whereas theretofore all conspiracies were misdemeanors. No punishment was fixed in the 1959 law so the maximum term was seven years, which exactly corresponds to the term under the proposed law for first degree conspiracy. Some ameliorization is contained in the new section since it reserves such punishment for conspiracies to commit murder or kidnapping only, whereas the 1959 amendment included robbery 1st degree, selling drugs, arson and extortion. These latter crimes, under the proposed law, would be class B, C, D or E felonies, depending on degree. Thus conspiracy to commit them in their more serious forms would be second degree conspiracy, a class E felony punishable by a maximum of four years. This reduction in terms is offset by the inclusion of many other class B or C felonies under the felonious conspiracy second degree section. Among those which are presently misdemeanor conspiracies and would under the proposed law be punishable by terms up to four years are: conspiracies to commit first degree assault, first degree rape, first or second degree burglary, first degree grand larceny, and first degree possession of drugs.

To me, the change has great merit. The reduction of term of prison is of far less significance than the erasure of the arbitrary exclusion of offenses in the present law.

The present necessity of an overt act is retained, with the added requirement of pleading it. Presumably, though not explicitly, only one need be alleged, and others may be proven.

The jurisdiction and venue section is a welcome codification of present law awarding the case to any forum in which the agreement was formed or an overt act was performed.

With respect to interstate conspiracies to commit crimes, there is a particular provision necessary to the peculiar nature of conspiracies.

There is also a renunciation defense identical to that provided in cases of solicitation.

An important change in the proposed conspiracy section greatly simplifies the law of conspiracy by proscribing conspiracies to commit crimes in place of the present law which details other conduct, presumably non-criminal, which it becomes criminal to conspire to do. The last category includes such things as "cheating," preventing another from engaging in a lawful calling, etc. These actions are for the most part criminal and hence embraced by the proposed law, or else they are vague and should not form the basis of the crime of conspiracy.

Conspiracy to obstruct justice, as such, has been dropped. But the substance of this important crime is probably incorporated in other sections, principally the new Article 120 under this title.

Article 110 : Attempt

The proposed article reduces punishment for an attempted crime by one "class" rather than, as presently, by one-half of maximum term of imprisonment. In computation of years, this is no major change, since classes progress by roughly doubling maximum punishments: 4, 7, 15, 25, life.

The definition of an attempt has been altered, but probably not significantly. Section 2 of the Penal Law, inter alia, defines an attempt as an act done with intent to commit a crime and "tending but failing to effect its commission." The revision retains the intent element but regards an attempt as a "substantial step" toward execution. While on its face a substantial step appears a higher standard than an act "tending" towards a crime, the difference is largely illusory. Case law has quite clearly required the attempt to carry the project forward within, dangerous proximity of completion. One element of the present attempt has been dropped and that is failure of completion. Under the proposal, if the substantial step can be proven, it is immaterial whether there is proof of frustration. Probably, however, the attempt would merge with the crime if completed.

Section 110.10 is an interesting addition, codifying the old problem of impossibility. Impossibility is now generally divided into legal and factual, the former constituting a defense and the latter not. This vital distinction has had an annoying tendency to grow fuzzy when applied and its logical basis is obscure. The proposed law sensibly eliminates the quandary by providing explicitly that neither sort of impossibility is a defense.

Again, the renunciation defense is made available to encourage would-be criminals to aid in crime prevention. Here, as elsewhere, however, only pure motives and not practical considerations entitle the would-be criminal to exemption from responsibility on these grounds. The pure in heart

are hard to find and prevention of crime by an insider is a worthy goal. So perhaps, at least in the case of a conspiracy, virtue should not be prerequisite. Of course, with an attempt, things have necessarily progressed far closer to consummation than with conspiracy. So perhaps the defense should not be available to the armed robbers who abandon the project when they arrive at the bank and find police waiting for them.

Article 115 : Criminal facilitation

Of the several new crimes carved in this Title, facilitation is, for me, the most interesting. Owing perhaps to the novelty of the concept, I did not at once perceive the special area of conduct to which it is applicable. I therefore believe that the face of the provision should more clearly delineate the crime, distinguishing this reduced form of culpability from the familiar "aiding and abetting," which would be covered in proposed Article 50 as it is now in Section 2.

The significant feature of this new crime is that it omits the element of intent to commit the ultimate crime. These are the crimes by those whose moral culpability consists in the passive connivance in a known criminal enterprise, without the desire to see the end accomplished. The punishment for these crimes reflects the notion that culpability is less, owing to the absence of intent, yet those who knowingly assist materially in a crime are not altogether blameless and should be held guilty in proportion to the gravity of the crime facilitated.

The principal difficulty with the category relates to a necessarily fine slicing of the rather vague concept of intent. Intent is defined by Section 45 of the proposed law as having a conscious object to cause a particular result or to engage in certain conduct. This is, it can be seen, something more than a legal inference flowing from the doing of an act itself. The natural result of behavior, under this definition, is not necessarily intended. "Intentional" is differentiated from "knowingly," the latter being defined as awareness that conduct will almost certainly cause a particular result.

Perhaps the best way in which to understand the area dealt with by Article 115 is by example. This article apparently proposes to punish the gun salesman who sells a gun to another, knowing that his customer proposes to use it in the commission of a particular crime. Surely the salesman is not morally blameless, nor should he be criminally exempt, and yet it is quite clear that he has no intent with respect to the crime which his customer proposes to commit. It is evident, then, that the crime of facilitation requires a definition of intent which would effectively distinguish a crime from that of an accomplice. The only reference to intent appears in Section 115.00, where it is noted that guilt attaches regardless of the actor's "specific intent." This phrase does more toward confusion than enlightenment. Specific intent has a well established meaning, quite apart from the notion of diminished intent, which the framers apparently intend.

Facilitation may be of present or future crimes. The defendant must know of the crime in progress or contemplated and aid or advance its commission. A crime must be committed by the person aided, though it need not be the particular crime originally intended, and the defendant's conduct must in fact "materially" assist. The degrees of facilitation are set forth with greater precision here than for similar accessorial crimes elsewhere. Both the crime the defendant thinks he is aiding and the crime actually committed are relevant to judge the degree.

True to the old accomplice rule, the facilitator cannot be convicted on the solicitee's testimony without other evidence "tending to connect him with the crime."

It is also provided that victims cannot be held to have facilitated crimes upon themselves.

Interestingly, this article, since it requires an actual completed crime, specifically does not require prosecution or conviction of the perpetrator. Even acquittal of the perpetrator does not bar prosecution of the facilitator.

Sections 120.00 to 120.20 :  
Accessory after the fact

This article boasts the most extensive description of the conduct which, achieved or attempted, constitutes "rendering criminal assistance" to a criminal. It includes harboring him, warning him, financing, arming, or transporting him, providing disguises, hindering those who seek him,

destroying concealed records of tangible items which  
might be considered evidence, and aiding in the profiting from  
the crime. This is an excellent bill but it omits the in-  
timidation and concealment of witnesses who might otherwise  
assist in apprehending and convicting offenders.

It is an act after the fact is deemed less  
blameworthy than before the fact. Soliciting or conspiring  
to commit a class C felony is a class E felony, but harbor-  
ing a class C felon is a class A misdemeanor.

CONCLUSION

Generally, I approve heartily of the Title. It  
clarifies numerous shady areas of present law in a logical  
and reasonable pattern of offenses. The specific offenses  
are well considered and the degrees of punishment attaching  
thereto are sensible. I would hope, however, that the draft-  
ing of certain sections can be improved, principally to sup-  
plant unnecessary definition with more meaningful description  
of unfamiliar categories of culpable behavior.

HRU:fw

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