Nov 5, 1964

October 28, 1964

October 6-7, 1964 Meetings of New York State District Attorneys' Association Executive and Legislative Committees--Consideration of Proposed New Penal Law.

On October 6th and 7th of this year, the Executive and Legislative Committees of the New York State District Attorneys' Association met at the offices of the Queens County District Attorney, Frank O'Connor.

One of the purposes of the meeting was to report on and discuss the proposed New York Penal Law which has been drafted and recommended by the New York State Commission on Revision of the Penal Law and Criminal Code. In addition to the Association's committee members, Mr. Richard G. Denzer, counsel to the Commission, was also present. The following outline represents the results and conclusions of the two-day meeting, as pertains to the proposed Penal Law.

In November, legislative hearings will be held before the Commission. It is anticipated that the District Attorney of Suffolk County, Bernard Smith, will testify at these hearings on behalf of the State District Attorneys' Association, and will express this Association's views as specified at the early October meetings.

from Elsedore Dollinger

TITLE D EXEMPTIONS FROM CRIMINAL LIABILITY

Article 55 -- Affirmative Defense

Section 55.00 (2). It was suggested that the words "...unless otherwise so provided herein" should be added to this section to provide for those affirmative defenses where the burden of proof shifts to the defendant, who must prove his defense by a preponderance of the evidence. This suggestion was received with tentative approval by Mr. Denzer.

Article 60 -- Lack of Criminal Responsibility

Section 60.00 - Infancy

This section was approved as it is written. Although the thought was advanced that the age of criminal responsibility should be lowered to fourteen years, for certain specified crimes, this proposal was rejected by the Association.

Section 60.05 - Mental disease or defect

This section is being considered by a special sub-committee of the Association which is working with the Commission; therefore no suggestions or criticisms were offered at this meeting.

Article 65 -- Justification

Mr. Denzer reported that the Commission is now revising and simplifying this section and so it was not discussed extensively. The Association voiced opposition to the section as it is written, noting in particular the kind of language used in Section 65.00 (2), which would justify conduct otherwise criminal if "such conduct is necessary to avoid a public or private injury or evil greater than that sought to be prevented by the law defining the offense charged". (e.g. Applicability to cases involving sit-ins, anti-segregation riots, etc.) Further criticism of this section was not engaged in by the Association because of Mr. Denzer's statement that basic changes were being made.

Article 70 -- Immunity

The Association had no suggestions or criticisms of this section. Although the authorities authorized to confer immunity, and the twenty-four hour period of notice they must give the appropriate district attorney before conferring immunity, remain unchanged, the scope of the immunity statute has been broadened so that immunity may now be conferred in any criminal proceeding. Extending this power to include all crimes should be of aid to all law enforcement agencies, and was favored by the Association.

Article 75 -- Other exemptions and defenses

Section 75.00 - Duress

This Association is strongly opposed to this section as written. However, if the burden of proof were shifted to the defendant to prove duress by a preponderance of the evidence the Association would then have no opposition to the section.

Section 75.05 - Entrapment

As proposed, this section would greatly hamper law enforcement in many areas and would give rise to much confusion as to what law enforcement techniques would be proper. The Association expressed strong opposition to the section as it now stands. It was suggested that if certain crimes were expressly exempted from this section (e.g., narcotics violations, prostitution, sale of obscene matter, etc.), and if the burden of proof were shifted to the defense (as was suggested for "duress"), then a section dealing with the defense of entrapment would be acceptable to the Association.

Section 75.10 - Previous prosecution

It was felt that this section, dealing with "double jeopardy" should be eliminated and, instead of attempting to codify the law in this area, it would be better to allow the case law to control. The Association is opposed to the inclusion of this section.

TITLE G. ANTICIPATORY AND ACCESSORIAL OFFENSES

Article 100 -- Criminal Solicitation

Section 100.05

This section, creating a new crime that is less than acting in concert or an attempt to commit a crime, is being revised by the commission. The Association favored the concept and was in accord with Mr. Denzer that this section, in a revised form, would be desirable to cover certain anti-social and dangerous conduct not now designated as criminal.

Article 105 -- Conspiracy

Section 105.25

It is strongly urged that the provision of the present section 583 P. L. be retained making it conspiracy as a misdemeanor to conspire to commit the crimes of arson, burglary, or a felony upon the person of another, although no overt act be committed in furtherance of the conspiracy. As the proposed section 105.25 now reads no person may be convicted of conspiracy to commit any crime unless an overt act is proved to have been committed. The Association is opposed to this section in that form.

Section 105.35 - Conspiracy; defense

The Association feels that this is a necessary and desirable provision but it is urged, inasmuch as this defense involves the subjective state of mind of the defendant, the burden of proving this defense by a preponderance of the evidence should be on the defendant, and that the People should not be obligated to disprove such a defense beyond a reasonable doubt.

Article 110 -- Attempt

Section 110.10 - Attempt to commit a crime; no defense.

This section would make it no defense to a charge of an attempt to commit a crime that the crime charged "...was, under the attendant circumstances, factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as . . . (the defendant) . . . believed them to be", which, of course, is a desirable change in the present law.

Section 110.15 - Attempt to commit a crime; defense

It is likewise urged that here, as in Article 105.35, the obligation should lie with the defendant to prove by a preponderance of the evidence that he abandoned his effort to commit a crime.

Article 115 -- Criminal facilitation

As in the proposed section 100 dealing with solicitation, this section creates a new crime, that of facilitation, where one facilitates the commission of a crime without actually participating in it. Mr. Denzer indicated that this section is undergoing revision by the commission. Although a final draft is not now available, the Association generally approved the concept and indicated support of a revised statute in this area.

Article 120 -- Accessory after the fact

The Association indicated general approval of this Article although it was suggested that some provision be included to specifically make it a crime to interfere, or tamper with, witnesses to a crime.

TITLE H. OFFENSES AGAINST THE PERSON INVOLVING PHYSICAL INJURY, SEXUAL CONDUCT, RESTRAINT AND INTIMIDATION.

Article 125 -- Assault and related offenses

Under the proposed statute, the complete crime of assault would not exist unless the defendant's actions cause actual physical injury. (e.g. firing a gun at a person, and missing, is an attempted assault). The new crime of "Menacing" is created by section 125.15 whereby it is a class B misdemeanor when one "...intentionally places or attempts to place another person in fear of imminent serious physical injury".

General approval was given to this section with one exception. It was strongly urged that the felony of assault on a police officer, while he is in the performance of his duties, be retained (present Section 242(5)). Under the proposed law there is no distinction made between an assault on an officer and an assault on any other person.

Article 130 -- Homicide, Abortion and Related Offenses.

Section 130.20 - Manslaughter in the first degree.

Objection was raised to subdivision (2) of this section which defines a manslaughter as a homicidal act "...committed under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse". This language is intended to replace the now familiar and judicially defined phrase: "heat of passion". It was felt that the new language would encourage and propagate psychiatric defenses. It was strongly urged that the present wording "heat of passion" be retained as that expression has acquired a legal meaning and there is nothing gained in the way of clarity or meaning by the new language which is bound to cause much confusion in interpreting it.

Section 130.25 - Murder

Subdivision 3 of this section deals with Felony Murder and certain defenses thereto. Objection was made to the language which provides that the death of a person, during the commission or furtherance of the felony, or flight therefrom, must be caused by "...an act inherently dangerous to human life...". This would not cover a host of situations whereby one of the perpetrators, during the commission of the felony, causes the death of some person, and, under present law, would be held accountable. (e.g. a felon, fleeing from a bank robbery, trips and falls, causing a gun he is holding to discharge and kill a bank guard.) It is urged that the phrase "...an act inherently dangerous to human life..." be eliminated.

Also included in this section are four conditions which would, if all four are present, constitute an affirmative defense to a charge of felony murder although the person charged was an active participant in the underlying felony. The Association was in agreement that, if the conditions listed were present, the felon should not be liable for murder. However, it is strongly urged that the burden of proving this affirmative defense, by a preponderance of the evidence, should be on the defendant. This is of particular importance inasmuch as two of the four elements constituting the defense, (c) and (d), deal with the subjective operation of the defendant's mind.

Although this article uses the terms "criminally negligent" and "recklessly causes death" without defining them, it was recognized that the difficulty of defining such conduct for the purposes of a statute is such that no all inclusive definition is possible, and the use of this language, as such, met with no criticism from the Association.

Some objection was raised over the omission of the charge of misdemeanor manslaughter. Mr. Denzer, with some agreement from some of those present, argued that the conduct which comprises the basis for a misdemeanor manslaughter charge will be covered by section 130.10, entitled "criminally negligent homicide". The counter argument was advanced that wherever the death of a person was caused by a violation of law, the one violating that law should be held to answer for the death caused by his unlawful actions. No complete agreement was reached on this issue.

Article 135 -- Sex Offenses

The primary objection to this article is to the requirement of corroboration, by section 135.15, of all offenses therein defined. This includes those offenses involving children where the requirement of the kind of "full corroboration" necessary, for example, to sustain a charge of forcible rape on an adult, would make it virtually impossible to successfully prosecute crimes where a child is the victim of a sexual assault. It was suggested that either the provisions governing sexual offenses against children be removed to Article 265 relating to children and incompetents, or some provision made in Article 135 to deal with crimes involving children on a separate basis.

Section 135.10 - Sex offenses; defenses and exceptions.

It is suggested that, under subdivision (1), language be included so that if the attendant circumstances are such that the defendant should have been aware of the victim's incapacity to consent because of some physical or mental infirmity, then the allegation that the defendant did not know of this infirmity is no defense.

Section 135.60

The Association believes that this language is vague and its scope so broad that it will cover comparatively innocuous behavior which hardly rises to the level of criminal activity. For example, where the slightly over amorous boyfriend presses his affections, and meets with rejection, he may also find he has committed a class A misdemeanor.

This section also appears to be inadequate to cover conduct whereby women are molested on subways, in theatres or in other public places. At the present time those cases are prosecuted as assaults. Under the proposed legislation, if no physical injury occurs, the assault section would not apply. The requirement of corroboration under the proposed section 135.60 would make prosecution of these cases virtually impossible.

TITLE I. OFFENSES INVOLVING DAMAGE TO AND INTRUSION UPON PROPERTY

Article 145 -- Burglary and Related Offenses

It was suggested that too fine a distinction is drawn between burglary in the fourth degree and burglary in the third degree and that these two charges should be incorporated as one.

It was noted with approval that the element of "breaking" has been omitted from the proposed statute and it will only be necessary to prove the defendant entered with intent to commit a crime to make out a charge of burglary.

Article 150 -- Criminal Mischief

It was felt that this section inadequately covered the unlawful use of explosives. Although, as Mr. Denzer pointed out, an explosion is technically a fire and is dealt with under the Arson section, those sections are concerned with "...intent to destroy or damage a building..." so that other use of explosives would not be covered specifically.

Article 155 -- Arson

The requirement of proving that the defendant started the fire "...with intent to destroy or damage a building..." appears to be an unnecessary addition to those elements required to make out a charge of arson.

TITLE J. OFFENSES INVOLVING THEFT

Article 160 -- Larceny

Section 160.05 - Larceny; defined

2. (d) By false promise

This section would make it a larceny to obtain property by making a false promise to engage in some future conduct. It was feared that this provision might burden the criminal courts with a rash of cases, essentially civil in nature, so that perhaps the present standard, of proving the misrepresentation of an existing fact, shall be retained.

Section 160.20 - Larceny; pleading and proof

2. It was suggested that the words "upon the trial" be inserted in this section, subdivision 2, after the phrase "...supported by proof..." to avoid the interpretation that the necessary proof to support the indictment must physically be set forth in the indictment.

Article 165 - Robbery

No additions, changes or deletions were suggested for this article.

Article 170 -- Other Offenses Relating to Theft

Section 170.10 - Unauthorized use of a propelled vehicle

This section would replace the so called "joyride" statute. However, under the proposed law all "unauthorized use" would be a misdemeanor. It was suggested that, in accordance with the present section 1293a P.L., this conduct should constitute a larceny and so the value of the property involved should be determinative of whether the charge is a misdemeanor or a felony.

Sections 170.40, 45, 50 - Criminal possession of stolen property.

The phrase "with the intent to deprive the true owner of the use thereof" should be added to these sections to make conduct, involving a malicious withholding, criminal. As the proposed section now reads, unless it can be proved that there is an intent to benefit from the possession of the property, the possession of another's property, without his consent, would not be criminal.

Section 195.15 - Issuing a bad check; defenses.

1. This section would make it a defense to a prosecution for issuing a bad check if the defendant "...made good the amount of the check within ten days after dishonor...". It is urged that in place of the words "made good", the phrase "satisfies the payee" should be inserted. Too, instead of making this a defense it should be provided that a prosecution under the section shall abate if the payee is satisfied within ten days after dishonor. Providing for satisfying the payee would avoid the situation where a defendant, within ten days after his check has been dishonored, deposits the amount of the check in the account to avoid prosecution but then withdraws it again before the payee can be satisfied in the amount of the check.

Providing for an abatement of the prosecution should avoid having the complainant run the risk of a false arrest suit if he has the defendant arrested before the ten day period has run, as an alternative to waiting ten days, at the end of which time, the defendant's whereabouts may not be known.

Article 210 -- Escape and Other Offenses Relating to Custody

Section 210.05 - Escape in the third degree.

4. It was strongly urged that where "...a public servant having duties relating to custody, ...knowingly permits another to escape unlawfully from custody," should be more than a misdemeanor inasmuch as this section is intended to cover police officers, department of correction guards, etc.

Section 210.20 - Harboring an escapee.

The provision that the person charged had knowledge that the one he is "harboring" is an escapee should be added to this section.

Section 210.00

It was suggested that this section be revised to include unlawful communications to a prisoner.

Section 210.35 - Promoting prison contraband.

Although this section, together with section 210.00, provides in general terms for the prosecution of those engaged in bringing contraband into prisons, it was suggested that the smuggling and promoting of narcotics be specifically listed and provided for.

Section 210.55 - Bail-jumping

In order to avoid numerous unnecessary prosecutions under this section it is suggested that the present thirty day waiting period, before instituting a prosecution, should be retained. This should provide for those cases where a defendant inadvertently misses a court appearance without intention of fleeing the jurisdiction. The question of the validity of the "lawful excuse" should be one on which the defendant has the burden of proof.

TITLE M. OFFENSES AGAINST PUBLIC HEALTH AND MORALS

Article 225 -- Narcotics Offenses

Mr. Denzer reports that this section is now undergoing revision and will include provision for the unlawful possession of amphetamine, barbiturates and hypodermic needles. It had been planned to remove the provisions governing these items to appropriate sections of the public health law but upon reconsideration, because of their great utility, the commission has decided to retain these provisions in the penal law.

Mr. Denzer also indicated that forging a doctor's prescription will be included in the forgery section and will be a felony under the proposed law.

Article 230 -- Gambling Offenses

Section 230.00 - Definition of terms

Mr. Denzer indicated that this section is being extensively revised so that the definitions of what constitutes "bookmaking" and "bookmaking records" will more realistically conform to actual practice.

Section 230.10 - Feloniously promoting gambling

This section would make it a felony for one to receive in any one day more than five bets totaling more than five thousand dollars. It was suggested that this section be amended so that possession of such bets shall be presumptive evidence that such bets were accepted in one day.

Article 235:-- Prostitution and related offenses

This proposed statute would eliminate the requirement of corroboration to make out a charge under this article. It was felt that this is unwise and a provision, such as that in the present penal law, §2460-9, should be added so that no conviction would lie on the uncorroborated testimony of the alleged victim.

Article 240 -- Obscenity and Related Offenses

It was felt that this Article is entirely inadequate and needs massive rewording. Section 484-h of the penal law, the present counterpart of the proposed section 240.20 has already been declared unconstitutional. Section

240.00, subdivision (1), which attempts to define obscenity, raises grave questions as to whether or not its constitutionality would be upheld. Although the proposed definition appears to adopt the language of the U.S. Supreme Court in formulating a definition of obscenity, the language of the statute has fallen short of the language used by the Court and is not as all inclusive.

Article 245 -- Riot, Unlawful Assembly and Criminal Anarchy

Section 245.00 - Riot

It was suggested that the present section 2090 P. L. is preferable to this proposed section in that language of the present section more accurately reflects the type of conduct this provision is intended to cover. It was also felt that some language, similar to that in the present section 2091 Penal Law, should be included to cover those who, although not personally present, promote or instigate others to riot. It is suggested this language be specifically included in this section even though the provisions under Article 100, "Solicitation", might also apply.

Section 245.10 - Criminal Anarchy

The Association felt that a crime as serious as advocating the overthrow of the government by violence should be more than a Class E felony as it would be under this proposed section, and urges that the degree of this crime be raised.

Article 255 - Offenses Against Privacy of Communications

Section 255.20 Divulging an eavesdropping order

It was urged that this section be expanded to include divulgence of not only the order but also the location of the eavesdropping device or any of the information obtained from such a device. The wording of this additional provision should be such so that it covers those who learn of the order, location, or information obtained from the device, in their official capacity so as to include law enforcement officers and telephone company employees.

It is also suggested that a violation of this section be raised to the status of a class E felony instead of a class B misdemeanor as is now proposed.

Article 270 -- Firearms and Other Dangerous Weapons

This proposed statute is basically a rewrite of the present statutes governing firearms. Inasmuch as this area is presently being considered by the Berkowitz committee, the Association took no position on the proposed legislation until the recommendations of that body are available.

However, objection was raised to the omission of the provisions of the present sections 1944 of the Penal Law which increases the permissible sentence where a felony is committed while armed or with an automobile. This section also prohibits the imposition of a suspended sentence in such situations. Mr. Denzer indicated that in view of the fact that being armed

usually increases the degree of the crime, and the permissible sentence, the Commission felt that this provision was unnecessary. The Commission also felt that because of the almost universal use of the automobile today imposition of an additional penalty here was a somewhat outmoded view.

TITLE V. SEIZURE AND DESTRUCTION OF CONTRABAND

Article 400 -- In Relation to Gambling

Section 400.65 - Gambling implements to be destroyed or delivered to district attorney.

It was suggested that some notice to the district attorney be required before any of the described implements be ordered destroyed.

Section 400.10 - Gambling implements to be destroyed upon conviction.

This section should be amended to provide for destruction of gambling implements only after a final appeal from a judgment of conviction has been decided so that the implements would be available in the event a new trial is necessary.

TITLE X. CIVIL PROVISIONS

Article 430 -- In Relation to Gambling

Section 430.40 - Property offered for disposal in lotteries, forfeited.

This section, taken together with section 430.45, makes it incumbent upon the district attorney to recover, by civil suit, all prizes in lotteries. The question was raised as to whether or not the legislature would really intend the consequences of a statute which would impose a duty upon the district attorney to sue, civilly, churches and other charitable organizations who conduct fund raising lotteries. If that is not the true intent of this section, then it should be deleted from the proposed law.

NOTE: Because time did not permit, Title B of the proposed statute, entitled "Offenses and Sentences", was not discussed at this meeting. It is planned that this section will be dealt with in a separate meeting of the executive and legislative committees of the Association, to be held later this year.

(This summary prepared by New York County Assistant District Attorney Nicholas Scoppetta.)