11/1964

COMMENTS ON PROPOSED PENAL LAW, ARTICLES 145 - 150 - 155

Section 145 through 145.40 has been thoroughly read and compared with the present sections dealing with burglary and criminal trespass and the following matters are submitted for your perusal.

A) Scope of Crime

The element of the unlawful breaking and/or entering or breaking out of has been deleted from the new sections so that a crime is committed upon the entrance or remaining unlawfully in a building, dwelling or other defined public or private place. It is the undersigned's opinion that this deletion is a step in the right direction since regardless of whether a door or window is open when a person enters the building under circumstances not with permission of the owner or occupant, this should be tantamount to some criminal act, and the fact that a door might be open either constructively or actually, should not be a defense to the element of breaking.

It would appear to the undersigned that the sections set forth for criminal trespass can be cut from three to two in that I do not believe that there should be any differential between §145.10 and §145.15 regardless of whether it is a building, dwelling or fenced-in area. The punishment, therefore, should be the same and the classification should be the same.

B) Punishment

Again I feel that the attempt on the part of the law makers to divide the burglary crime into four degrees and setting forth four punishments thereunder, is cutting the pie too fine. It would seem to me that §145.20 and §145.25, burglary fourth and burglary third, although there is a difference as to a building and a residence, I believe they can both be placed under a Class D felony, depending on the facts of the case.

I have no suggestions nor corrections as to §145.40. It would be my recommendation that the sections under burglary are succinct and my only feeling is that some thought should be given to the ambiguity and some times

difficulty of proof as to the definition of night, subdivision 4 of §145. My feeling is that it might be better to set a set time such as 8:00 P.M. and 6:00 A.M., rather than setting thirty minutes after sunset and thirty minutes before sunrise.

Sections 150 through 150.10 have been thoroughly read and compared with the present sections dealing with criminal mischief, and the following matters are submitted for your perusal.

A) Scope of Crime

In an attempt to eliminate duplicity and a hodge-podge collection of many offenses dealing with the unlawful and wanton damage to property both personal and real, the drafters of the new Penal Law have omitted, in the opinion of the undersigned, several important areas, which, if covered, are done so by ambiguity.

Firstly, I do not believe that the three sections cover the turning in of a false alarm for fire as provided under §1424, nor has there been a covering of §1424-a, a party line emergency situation.

I am also concerned with the damage to property by explosion which I shall deal with further in the punishment paragraph.

For the most part, the generalization of causing damage to property of another without cause is sufficient to cover the old malicious mischief sections.

B) Punishment

The only question that I would raise as to the punishment and classification of criminal mischief as Class A misdemeanors and Class D and E felonies is the situation covered under §1420, whereby a person with the use of explosives, in the event that human life or safety is endangered, could, under the new section, be punished by a maximum of not more than seven years. I feel that this is inadequate and not realistic. Further, it is my feeling that the mere use of explosives for the destruction of private property should be more than a mere Class B felony.

Sections 155 through 155.20 have been thoroughly read and compared with the present sections dealing with arson. These, along with the Commission Staff Notes, have caused the undersigned a great deal of concern. The Commission has apparently changed the emphasis of the crime of arson without the concern as to the proof necessary by a prosecutor in establishing a prima facie case in what is considered by the undersigned as the third most heinous crime in the Penal Law.

A) Scope of Crime

In an apparent attempt to simplify the present arson statutes, the five sections dealing with arson have been shortened, have deleted the use of night time as being an element separating the severity of the crime.

Taking the sections in order with comments, I would say that the definition as included in §155.00 is an improvement; however, I do not believe that the words "night time" should be deleted and I think it would be unfortunate to say that one who burns a dwelling during the day commits as dastardly an act as one who burns a dwelling in the night time when human beings quite likely would be asleep. It would be my feeling that night time should be included with my suggestions concerning the definition of night time as provided hereinbefore under the sections dealing with burglary and should also be included at this point.

Going from the most severe to the less severe, in my analysis, §155.15, arson in the first degree, completely changes the concept and the burdens and I believe incorrectly places additional burdens in an area where burdens can not be borne. A prosecution for arson is, under the best circumstances, a difficult venture, but to request additionally that the prosecutor prove an intent to destroy or damage a building when a defendant starts a fire or an explosion, stretches the imagination of the undersigned.

It would be my recommendation that §155.15 read as follows: A person who willfully burns or sets on fire (night time may be inserted here) a building as defined herein when a) another person is present in such building at the time, and b) the actor is either aware of that fact and the circumstances are such as to render the presence of a person therein a reasonable possibility.

Section 155.10

It completely appalls me that persons who write a penal law or proposed penal law can feel that prosecutions for crimes and convictions of the criminals perpetrating these crimes can be had when the whole point of view of a section in the Penal Law is fraught with difficulties for the prosecution and defenses for the defendant.

The first part of this section should be revised to reflect the comments made in the previous paragraph suggested as follows: A person is guilty of arson in the second degree when he commits an act of burning, which if committed with the requisite elements, would be arson in the first degree.

I am completely at a loss to understand how a person who enters a building can have an affirmative defense to prosectuion for arson if he has not notified the proper law enforcement officials of his intent to burn the building, and obtained their permission. The addition of paragraph 2 in this section is completely uncalled for, unwanted, and offers defenses where intellectually none should exist. If a person's sole intent was to destroy a building for a lawful purpose, no crime would be charged since all law enforcement officers would know of such intent. It would be suggested by the undersigned that §222 of the Penal Law should be kept alive and adapted to the new definitions primarily pointed toward a willful burning where human life is not involved.

Section 155.05

I have no quarrel with this section except that I do not believe that the affirmative defense need be placed here since I reiterate as above, that a person who has the sole proprietary interest in the building without the requisite intent of his act would not be committing a crime since knowledge would be given to the proper law enforcement officials before the act of burning by the defendant.

I can not agree generally with the placing of the word "explosion" in the three sections since I believe that damage to property by explosion should not fit under arson which necessarily connotes burning and one can have an explosion without burning. My only comment on §155.20 is again the feeling that explosion should not be a part and parcel of this section.

As to punishment, my feeling is that the arson in the first degree where human life is involved in the night time should be a Class A felony. Without the night time factor under some circumstances it still is a Class A felony in my mind but I would not be averse to accepting it as a Class B felony if the individuals involved as victims of the fire have an opportunity, e.g.; not invalids, sick persons, persons confined to hospitals or institutions, to escape the act of the defendant.

I do not agree that arson in the second degree should be a Class C felony and arson in the third degree a Class E felony. It is my feeling that each should be upgraded one class so that the punishment will carry with it the stigma and public contempt for such a damnable act.

Respectfully submitted,

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