

ACLU-VT testimony on S. 267 attempt proposal  
April 17, 2018

The ACLU of Vermont has serious concerns regarding proposed language of S. 267 redefining “attempt.” While we recognize the good intention behind this effort, the proposed change raises significant constitutional problems and would be a setback in the progress Vermont has made towards improving its criminal justice system. We believe there are better ways to address the legitimate concerns that motivated this bill.

First, we share the Defender General’s concerns regarding this proposal, especially with regard to lowering the standard for the offense so dramatically such that it could have wider application than intended. Additionally, it would punish some “attempted” crimes as harshly as committed acts, and this change would be applied inconsistently, with this lower “attempt” standard for some crimes but not others. Vermont would become an outlier in all of these regards.

In addition to these due process concerns, there are major First Amendment problems with the proposed definition. Treating speech, such as a journal entry, as a ‘substantial step’ because it corroborates the actor’s intent would contravene well-established free speech principles. The US Supreme Court has taken care to set a high bar for incitement or true threats, but under this proposed definition, the government could charge a defendant with attempt for anything they wrote that was strongly corroborative of the actor’s intent. Our constitution does not allow someone to be convicted of attempted murder for something written in a private diary, a blog post, a violent song, or in the course of other activity protected by the First Amendment. By expanding the definition of attempt to cover all firm expressions of criminal intent, the law threatens to punish a large amount of constitutionally protected expression and expressive conduct, as well as make criminals out of people who may express an intent to do something unlawful but are either not really serious or change their minds before anything is really under way.

If the committee is committed to changing the attempt language notwithstanding all of these problems, it should at least set a higher bar. For example, at a minimum we would propose the following additional language: “A “substantial step” is conduct which is strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense and which is more than mere preparation.” This could help diminish some of these concerns, but would not dismiss them.



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