The Devil's Advocate

On March 6, 1977, a fourteen-year-old girl accosted a man on the streets of New York City and offered to perform an act of sodomy for $10. Subsequently, with three others, the girl allegedly stole $30 from the complaining witness. In Family Court the girl was charged with juvenile delinquency on the basis that her conduct if performed by an adult constituted the crimes of prostitution, deviate sexual intercourse, robbery in the second degree, and assault in the second degree.

The complaining witness, or "John," was not charged but could have been charged with the offenses of statutory rape, endangering the welfare of a minor, and patronizing a prostitute.

In January, 1978, a recently appointed female Family Court judge held that the prostitution and deviate sexual intercourse statutes of New York were unconstitutional; hence Lolita could not be charged with delinquency on that basis. Immediately thereafter, a hue and cry arose from various religious and social work groups to the effect that the judge in question should be impeached or removed from office, since her decision was detrimental to the welfare of the fourteen-year-old girl.

The decision of the court, which to date appears only in 179 N.Y. Law Journal, No. 15, pp. 11-12 (Jan. 23, 1978), should be of interest to psychiatrists, lawyers and sociologists. Both the prostitution statute and the deviant sexual intercourse statute in New York's Penal Law were held to violate the equal protection clause of the state constitution, which, the court concluded, may have a wider ambit of coverage than its federal counterpart.

The court reasoned that equal protection of the laws was denied due to selective and discriminatory enforcement, because prostitutes could be imprisoned up to ninety days but their patrons up to only fifteen days, and because in practice female prostitutes, rather than male prostitutes, were arrested. It also was pointed out that enforcement was racially discriminatory because the vast number of the prostitutes arrested were non-white streetwalkers, while their customers were predominantly white males. The typical "John" was described as a middle-class white male between the ages of 30 and 60. The court also found that the police methods used contributed to the selective enforcement; *e.g.*, officers posed as patrons to entrap streetwalkers, but did not pose as streetwalkers to entrap patrons.

From her vantage point, the judge said she could find no real difference between the conduct of the prostitute and that of the patron, who engaged in what she termed "commercial recreational sex." *Viva la* indifference. Perhaps the judge had less humility than Mr. Justice Stewart, who once admitted that he could not define "hard core" pornography but claimed that he knew it when he saw it. In addition, the Family Court judge opined that to the extent to which prostitution may cause a public nuisance, such

nuisance was caused by prostitute and patron alike, and that the law must be enforced against both or neither.

With regard to the count on deviate sexual intercourse, which under New York law is *not* an offense when indulged in by married persons, but is unlawful for single persons, regardless of consent or whereabouts, the court found that the distinction was unconstitutional. Unmarried persons, said the court, are entitled to the same privacy as married persons, since the right to privacy does not attach to the marriage relationship but to individuals. Moreover, citing the 1973 action by the American Psychiatric Association in changing its nomenclature regarding homosexuality, as well as popular author Morton Hunt and the Kinsey Reports, the court concluded that there was no proof that consensual sodomy was harmful or unnatural, or caused participants to deviate from fundamental human nature. "There is no empirical evidence," the court said, "that so-called 'deviate' sex, an activity that has been engaged in for centuries, has been a factor of any significance affecting the stability of marriage and the family." The court also concluded that prostitution was no threat to the institution of marriage. The burden of proof to the contrary was placed upon the prosecution, and ultimately upon wives.

In sum, the new civil liberty is the right to engage in what the judge called "non-procreative recreational sex." And who did what to whom was privileged privacy.

Prostitutes also were given a clean bill of health because studies had reported that they accounted for less than five per cent of venereal disease and less than three per cent of syphilis cases. Although admitting that the state may have an interest in eradicating even so small a percentage of such disease, the court nonetheless concluded that it was unreasonable to prohibit all prostitution for the sake of eradicating five per cent of VD. Thus, the court corrected a hormonal imbalance.

The court also rejected the claim that prostitution leads to the proliferation of other crimes, despite the facts in the very case before it, and concluded that such offenses (*e.g.*, assault and robbery) were a "by-product of the environment to which society consigns prostitution." Shades of Officer Krupke! Discounting any French connection between prostitution and organized crime, the court offered the opinion that massage parlors were more apt to be so related. Waxing jurisprudential, the court also said, "Conduct which does not interfere with the rights and interests of others may not be regulated by the state." The validity of this generalization, however, may depend upon the definitions a court gives to "rights," "interference," and "interests." It was suggested that paternalism may prompt legislatures to protect women by proscribing prostitution, but that such a "motive is ill served by the prostitution laws since women are not protected, but rather they are penally punished." Police might dispute that conclusion on the basis that the usual fine is more like a license fee.

The only concession granted to police power in the opinion was that the community might have a legitimate interest in controlling public solicitation, which was described as "a method of advertising the business of commercial sex." In that connection, it was noted that the public might be better protected if patrons, landlords, pimps, etc., were the focal point for law

enforcement efforts in the name of public decency. In a footnote the court approved the thesis that underlying the harsh treatment of prostitutes was a legislative assumption that a woman's place is in the home rather than in a house that is not a home, and that women are chattels or the property of one male and have no right to be promiscuous in bestowing their sexual favors. As a clincher, the court claimed that it cost the taxpayers $1,705 to process one charge of prostitution and $1,250 to incarcerate a prostitute for thirty days.

Before one reacts to the court's decision with specific comment, it is relevant to note that the delinquency charges against the fourteen-year-old girl were not dismissed as to the assault and robbery charges and hence she remains subject to the court's jurisdiction. Further, if there were no assault or robbery charges, her commercialized "recreational sex" provides the basis for processing her in the Family Court as a Person in Need of Supervision, or PINS case, even if we accept the court's rationale and conclusion as to the unconstitutionality of the adult offenses of prostitution and deviant sexual intercourse. Hence, the critics of the decision are in error when they assume that the fourteen-year-old girl was freed to walk the streets and protective services would not be provided for her. The court was in error when it assumed that delinquents always are punished.

The court's assumption that selective law enforcement, which in practice works unfairly or unevenly as between sexes, races or economic classes, constitutes a denial of equal protection, is a most questionable one. That approach may have some validity to the capital punishment issue, but not generally, and it should be noted that cruel and unusual punishment, not equal protection, is the focal point when the death penalty is challenged on constitutional grounds. Are all the homicide, robbery, larceny and assault statutes unconstitutional because law enforcement concentrates on the commission of such offenses outside of the ghetto? Are bribery and corruption statutes unconstitutional because the bribe-taker more often is prosecuted than the bribe-giver?

The truth is that the criminal process has a tremendous amount of built-in discretions all the way down the line from the arresting officer to the sentencing judge. And abuse of discretion is commonplace. Does that fact invalidate our penal code? Is it any defense to a traffic ticket that many others violate the law and don't get caught or have to pay the piper? Surely the desuetude of a law, or its uneven enforcement, does not make it unconstitutional *per se*, and the proper response is either to repeal the statute or to beef up law enforcement.

On another level, the court's decision may be another example of overreaction to the moral activism of the hey-day of police power legislation in the name of public morality.

Historically, our legislatures and courts have found that the temptation to legislate against sin or to go on record against immorality is well nigh irresistible. It is assumed that the constituency will back you up. On the other hand, ordinarily the legislative decision, wise or unwise, should control the formulation of such public policy. It may properly be said that in the instant case the particular judge substituted her notions of sound public policy for those of the legislature and of persons responsible for law

enforcement.

Moreover, the court's selective citation of a meagre portion of the literature on prostitution and homosexuality is as egregious as the selective law enforcement she charges. Her choice denies equal rights to be heard by those who disagree with the limited studies she cites. A little knowledge is a dangerous thing, especially when justice is blindfolded. As we know, we dare not rely upon the proverbial blind men to give an accurate description of an elephant.

The psychological and sociological implications of the decision are left to the reader. In substance, did the court throw out the baby with the bath water? Was a queen of tarts prosecuted on trumped-up charges? Has the oldest profession come of age? If so, in addition to the right to privacy, do confidentiality and privilege attach to such professional status? If solicitation is professional "advertising," is it constitutionally protected the same as lawyers' advertising? What about social security and unemployment compensation? Such are among the many questions that vex a relaxed Devil's Advocate of emeritus vintage who hasn't even been solicited for at least five years. Make that two years. Damn it! One should grow old gratefully.

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