The Devil's Advocate

A few columns ago, we reported on the Manhattan "teeny bopper" who induced Judge Margaret Taylor to rule that the local prostitution law was unconstitutional because it (1) invaded privacy and (2) discriminated against Jills and in favor of Johns, due to the uneven enforcement of the related prostitution and patronizing statutes. We were critical of Judge Taylor's reasoning, so now in the spirit of "I told you so" we report that Judge Taylor was reversed upon appeal. (See *In re Dora P,* 182 NYLJ No. 5, July 9, 1979, p. 1, col. 6.)

The intermediate appellate court held that there was no privacy to protect when Dora solicited ($10.00 fee) on the streets of Fun City. With regard to uneven enforcement of sex laws by New York's finest, the court in anatomical vernacular rejected the argument saying that for such an attack to be compelling "both the 'unequal hand' and 'evil eye' requirements must be proven —to wit, there must be not only a showing that the law was not applied to others similarly situated but also that selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification."

With a straight face, the court then said the contention was that selective application of the law "was bottomed on sex," a suspect category. But to reach that end, Judge Taylor had lumped together two separate crimes to obtain a favorable statistical base. To the all-male bench, solicitation and patronization were "discrete crimes," even if it takes two to tango. The court said that, in order to establish a denial of equal protection, "What is required is a showing that the law is enforced consciously and deliberately against some and that, with knowledge that the crime has been committed by others, there is an intentional and premeditated abstention from enforcing it against others."

Dora, who originally told the police that she was sixteen but later turned out to be only fourteen, was remanded to Family Court for further proceedings to determine whether she was delinquent, a PINS, or merely neglected. She faces the prospect of institutionalization until her sixteenth birthday and may end up serving more time than her elder sisters in the trade who are caught in the revolving door routine. Fortunately, ordinarily it is no crime for a female to lie about her age.

A defense based upon an alleged unconstitutional invasion of privacy also was involved in *People v. Jose* [181 NYLJ No. 121, June 22, 1979, p. 7, cols. 5-6]. Judge Gartenstein, who is a rabbi as well as a judge, had access to both higher and lower law for the resolution of Jose's problem. The scene of the alleged crime was the East Village at 1:45 in the morning. A squad car noticed a "commercial van" parked at an "odd angle" with its rear wheels over the curb. Standing on their tiptoes in order to peer through the rear window

of the van, they saw a female performing fellatio on Jose. They arrested both, charging the female with prostitution (class B misdemeanor, up to 3 months), and Jose with consensual sodomy (class A misdemeanor, up to one year), thus disproving the statistical base of Judge Taylor. Jose could have been charged with patronizing (class B misdemeanor), or the officers could have handed out a traffic ticket for illegal curbing of the van instead of prosecuting Jose for failure to curb his appetites.

Jose claimed that singles were entitled to enjoy the same sexual freedom as marrieds and that the legislature had violated equal protection principles by arbitrarily making sodomy a crime for singles while exempting such activity between married persons. He also claimed that his privacy had been invaded. Judge Gartenstein was unimpressed and held that "an essential prerequisite for the constitutional protection of such acts is that they be performed in private." A van on the streets, even in the East Village, was not Jose's castle. Presumably, it would have been a closer question if the event had occurred in a trailer parked in a parking lot. But where the private act occurs in public, it is subject to regulation under the police power of the state. Thus, it would seem, Jose blew his cover.

Still another recent New York case involved what might be termed premature osculation. Michael Kittles [181 NYLJ No. 114, June 13, 1979, p. 16, col. 3] was charged in separate counts with sexual abuse and attempted sexual abuse for having given his female victim an unwelcome French kiss and at the same time forcing her hand against his zippered genitals. Mike apparently had no fear of flying. The court acquitted him on the sexual abuse charge involving the French kiss but convicted him of attempted sexual abuse involving the forced feel.

Of course, all this is nonsense to anyone who is not a lawyer. Sexual abuse, said the court, is committed under the statute when a person subjects another person to sexual contact by forcible compulsion. There must be a sexual contact and a touching of the "sexual or other intimate parts of another person for sexual gratification." Perhaps with tongue in cheek, the court said that as to the first charge it had to determine whether or not a French kiss was a "touching," and next whether the mouth was an "intimate" part of the body. The court answered "no" to both of its self-serving questions.

On the quality of the touch issue, the court concluded that there was a touching only where there is "a digital manipulation or manual handling or fondling," thus ignoring the literature on frontage. As to what was "intimate" the court paid lip service to prior decisions holding that breasts and buttocks were intimate parts of the body but held that the mouth was not. Said the court, "a person's mouth is not kept concealed and is generally not touched or fondled with the hands for the purpose of sexual gratification." With missionary zeal, however, the court triumphantly held that forcing the victim to touch his genitals, even though he was not exposed, constituted attempted sexual abuse.

In passing, it should be noted that Mike's legal troubles may not be over and that unless he is judgment proof he may be sued for the tort of battery, which surely will embrace the French kiss. The civil law regards any offensive unpermitted touching as actionable without any need to prove

actual harm or damage.

On the basis of these selected cases the reader may conclude that the law has an undue preoccupation with human anatomy. The above anatomical bombs, however, raised few eyebrows in blasé New York. The "unequal hand" and "evil eye" requirements of Dora's case saved the constitutionality of the statute making body-selling a crime. One might say that Jose lost his head. And it was a poor kittle of fish for Mike Kittles when the law adopted a hands-off policy. *O tempora! O mores!*

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