ANALYSIS OF PROPOSED PENAL LAW, ARTICLES 235 & 240

Article 235 of the Proposed Penal Law, entitled, "Prostitution and Related Offenses", deals with the crime of prostitution and the related offenses of promoting prostitution and permitting prostitution.

Under the existing law, the various crimes encompassed by this Article are found in various scattered statutes contained within the Penal Law and the Code of Criminal Procedure.

Prostitution itself is now treated as a form of vagrancy under Section 887 of the Code of Criminal Procedure, and the Penal Law provisions in respect to compulsory prostitution and the promotion of prostitution are treated in Section 2460 of the Penal Law, which section is entitled, "Prostitution of Women". There are various other sections of the Penal Law which pertain to use of premises for prostitution, and other types of promotional activity.

Other than grouping the various types of proscribed behavior under one Article, the changes to be effected by the Proposed Penal Law are as follows:

Under Section 887, Subdivision 4, of the Code of Criminal Procedure, committing or offering to commit a sexual act in return for a fee or compensation was the gravamen of the crime. Under the proposed section, the person is guilty of prostitution not only if he commits or offers to commit a sexual act in return for a fee, but also if he submits or offers to submit to any such act.

The other important change is that while it is not

entirely clear under the present law whether compensated homosexual acts or acts which would be considered those of deviate sexual behavior are punishable, the proposed Section 235 expressly includes such behavior within the definition of prostitution, by the following language:

> " ... whether of a different or of the same sex in return for a fee or compensation ... "

The present Penal Law, Section 2460, dealing with "Prostitution of Women", is expanded upon by Sections 235.05 - 235.20, by specifically defining the terms "advance prostitution", "profit from prostitution" and "promoting prostitution", and establishing a degree structure for these offenses, depending upon the type of promotional conduct involved in the exploitation of a prostitute, and depending upon the age of the prostitute involved, and whether or not the prostitution is compulsory.

It would seem that this Article is generally an improvement over the existing sections in that more accurate definitions are used, and in that clear distinctions are made between various types of promotional activity, and that the most aggravated form compelling a person by force or intimidation or advancing or profiting from prostitution of a person less than seventeen years old is treated as a more serious offense than profiting from prostitution in the absence of either of those factors.

The present statute, Section 2460 of the Penal Law, does not make this distinction.

The inclusion of homosexual or deviate sexual behavior as part of the behavior prohibited by this section seems to be a sensible approach to the various social and legal problems involved.

However, we question the definition of prostitution in that it includes submission as an element of the crime without establishing a definition of the term and without providing safeguards by establishing the necessity of a specific intent or providing exceptions where the submission may be compulsory.

We also question the fact that what is now Subdivision 9 of Section 2460 of the Penal Law has apparently been dropped from the Code, and, in our opinion, this is an important subdivision. It provides that no conviction shall be had under this section upon the testimony of a female unless supported by other evidence.

It would seem that some such provision should be included in regard to the sections on promoting prostitution, especially in regard to the sections relating to second and third degree promotion where the question of infancy or compulsion is not involved.

Article 240 of the Proposed Penal Law, dealing with obscenity and related offenses, replaces a number of sections of the existing Penal Law, and deals with two distinct problems, obscenity generally and the specific problem of the dissemination of indecent material to minors.

The definition of obscenity is substantially the same as that adopted by the model Penal Code, and sets forth generally the Federal standards of "appeal to prurient interests" as set forth by the United States Supreme Court in Roth v. United States, 354 U.S. 476. This definition of obscenity appears to be a more flexible one than that adopted by the New York Court of Appeals in its interpretation of existing Penal Law, Section 1141, in

People v. Richmond County News, Inc., 9 N.Y. 2d 578, where the test applied was "hard-core pornography".

The language in Section 240.00 --

> "Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audiences." --

has the effect of establishing an easier test than the hard-core pornography test set forth in the various recent 4-3 decisions of the Court of Appeals on this subject.

The proposed Article accomplishes the placing of crimes of the same general nature under the same heading, and adopts generally the material previously contained in various sections of the Penal Law. However, Section 240.10, Subdivision 1, sets up a presumption which is not found in the present law and which we submit is a welcome addition:

> "A person who promotes obscene material or possesses the same with intent to promote it, in the course of his business, is presumed to do so with knowledge of its contents and character."

Section 240.15 establishes defenses which are new and provide that it is an affirmative defense if the audience to an allegedly obscene performance consists of persons or institutions having scientific, educational, governmental or other jurisdiction for possessing or viewing the same, and also establishes as a defense that the persons to whom allegedly obscene material is disseminated are personal associates of the defendant and that dissemination is not commercial in character.

We would question the second definition, in that the language used tends to be too broad, and may give rise to the use

of this defense to thwart the real thrust of the statute.

We also note that the bookseller is still given the burden of responsibility for the books and magazines which he holds for sale. In People v. Finkelstein, 156 N.Y.S. 2d 104, the Court, at Page 110, stated:

> "It is submitted that the legislature should give serious consideration to implement Section 542 with a provision requiring the publisher to make known to his distributor that matter sold by it is not intended for ultimate sale to minors under eighteen (18). This would be placing the burden on the one who has the most intimate knowledge of the contents of the matter and the one who is in the best position to know whether its sale would violation Section 542 of the Penal Law. Such a provision would greatly assist in the promotion of the purposes behind the statute. The ultimate vendors are by and large law abiding citizens, and would no doubt take heed when put on actual notice that a sale of the matter to a minor might constitute a violation of law. Such a provision would serve the more important purpose of making the prohibition effective at the source, of which there are but a limited number, rather than confining the prohibition to the countless number of ultimate vendors."

It is not our contention that the retail vendor be absolved of responsibility in this regard, but rather our contention is that this responsibility should also be carried by the people who, in the first instance, are responsible for putting obscene and filthy material on its way to the general public.

The sections on comic-book publication are precisely the same as the present sections which were adopted in 1963 after a study by a State Joint Legislative Committee, and have not been changed by the proposed law.

MICHAEL F. DILLON
District Attorney of Erie County
201 Erie County Hall
Buffalo, New York 14202