CHAPTER FIFTEEN: CRIMES AGAINST PUBLIC ORDER AND MORALITY

INTRODUCTION

Many offenses against public order and morality are found in the Penal Law, and several have been addressed in the textbook. In this chapter, the focus will be on criminal nuisance and criminal interference with health care services and religious worship offenses in Article 240. Case law examples will accompany a discussion of these offenses. In addition, this chapter will discuss prostitution, which is found in Article 230, and focus on sections involving patronizing and promoting.

OFFENSES AGAINST PUBLIC ORDER

Article 240 was created in order to organize the vast number of minor offenses found in three different statutes in both the Penal Law and Code of Criminal Procedure prior to 1965. These crimes generally involved conduct that created public disorder, offensive conditions, and petty annoyances to individuals. The specific conduct proscribed by law included fighting, shouting, begging, gambling in public places, jostling people in public places, and loitering for sexual and offensive purposes.

The new article consolidates these offenses in one location. The current article includes three offense categories: disorderly conduct, harassment, and loitering. These offenses are categorized according to offenses that threaten individuals and those that threaten the public, which the textbook describes as offenses that threaten the neighborhood.

Section 240.20, Disorderly conduct, criminalizes behavior that has a genuine tendency to cause public order and alarm, such as fighting in public, making loud noise, using abusive language, disturbing a lawful assembly, obstructing traffic, refusing to disburse on order of police, and creating a hazardous condition with no legitimate purpose. Disorderly conduct is a violation.

Sections 240.15 (Harassment in the first degree), 240.26 (Harassment in the second degree), 240.30 (Aggravated harassment in the second degree), 240.31 (Harassment in the first degree), and 240.32 (Aggravated harassment of an employee by an inmate) encompass a variety of conduct of a public or semi-public nature that annoys or harasses individuals rather than the public in general, such as jostling, making phony telephone calls, and following a person in public places.

Sections 240.35 (Loitering), 240.36 (Loitering in the first degree), and 240.37 (Loitering for the purpose of engaging in a prostitution offense) require no intent to cause public or individual harm, but rather collate a group of activities deemed generally unsavory from a social viewpoint, such as begging, gambling in public, soliciting sex, and hanging around schools under suspicious conditions.

Other offenses covered by Article 240 are riot, falsely reporting an incident, disseminating a false registered sex offender notice, placing a false bomb, unlawful prevention of public access to records, and a few others.

Section 240.00 (Definitions of terms) in part defines the physical spaces associated with public order offenses.

Subsection (1) defines a "public place" as "a place to which the public or a substantial group of persons has access." Examples of public places include highways, transportation facilities, schools, places of amusement such as parks and playgrounds, hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

Subsection (2) defines a "transportation facility" as any conveyance, premises, or place used for public passenger transportation by air, railroad, motor vehicle, etc. Examples include aircraft, watercraft, railroad cars, buses, school buses, and air, boat, railroad, and bus terminals and stations.

In **Subsection (3)**, "school grounds" are in, on, or within any building, structure, school bus, athletic playing field, or playground. The school can be either a public or private elementary, parochial, intermediate, junior high, vocational, or high school. This definition does not include postsecondary schools.

Criminal Nuisance

Criminal nuisance is divided into two degrees. Under the former Penal Law, criminal nuisance was referred to as a public nuisance. The current statute does not specifically define "nuisance," but the term is defined indirectly by the elements of the respective statute. Criminal nuisance in the first degree refers specifically to maintaining premises to engage in the sale of controlled substances.

Section 240.45 defines Criminal nuisance in the second degree as:

A person is guilty of criminal nuisance in the second degree when:

1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or

2. He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.

Criminal nuisance in the second degree is a class B misdemeanor with up to three months of incarceration.

Section 240.46 defines Criminal nuisance in the first degree:

A person is guilty of criminal nuisance in the first degree when he knowingly conducts or maintains any premises, place or resort where persons come or gather for purposes of engaging in the unlawful sale of controlled substances in violation of section 220.39, 220.41, or 220.43 of this chapter, and thereby derives the benefit from such unlawful conduct.

Criminal nuisance in the first degree is a class E felony, punishable by up to four years in prison.

In *People v. Monday*,[1] on two separate occasions, detectives visited a residence in Chenango County to purchase drugs. On each occasion, the residents went next door to a trailer occupied by defendant and her boyfriend and returned with a quantity of cocaine. The residents and defendant and her boyfriend were subsequently arrested. At trial, defendant was convicted of criminal nuisance in the first degree and conspiracy in the fourth degree and sentence one to three years.

Among other appeals, defendant argued that the evidence was legally insufficient for a conviction of criminal nuisance in the first degree. The Supreme Court, Appellate Division, Third Department disagreed. It stated, "[D]efendant's admission to [Detective] Ogborn that drugs had been distributed out of her trailer for '[a]pproximately two months'…[together with her neighbor's testimony] that he and [his wife] purchased cocaine from defendant's trailer two or three times a week between August and October 2001. [His wife] also testified that she made 10 to 15 cocaine purchases from defendant's trailer and that '[t]here were people in and out of [defendant's trailer] all the time….[T]his evidence demonstrated that defendant knowingly acquiesced in the trailer's use…where persons [came] or gather[ed] for purposes of engaging in the unlawful sale of controlled

substances"…We find that defendant's guilt of criminal nuisance in the first degree was established beyond a reasonable doubt.

In *People v. Cuthrell*,[2] defendant appealed from a conviction of criminal sale of a controlled substance in the second degree and criminal nuisance in the first degree after a nonjury trial. He appealed both judgments. The Supreme Court, Appellate Division, Fourth Department, affirmed the Genesee County Court's conviction. "One of the People's witnesses testified that she had purchased cocaine at defendant's residence two weeks before the [undercover] transaction, and that defendant received some of her cocaine for allowing her to conduct the transaction in his residence. Defendant also admitted to allowing drug transactions in his residence in the past in exchange for money or drugs, but denied that he still engaged in that practice." The court thus saw no reason to reverse the lower court's decision.

Criminal Interference with Health Care Services or Religious Worship

The sections of Criminal Interference with Health Care Services or Religious Worship include §§240.70 second degree and 240.71 first degree. Criminal interference with health care services or religious worship resulted from the obstruction and terrorism campaigns aimed at closing facilities providing reproductive services and intimidating those who either work or seek the services from these facilities. This legislation was designed to supplement the 1994 federal Freedom of Access to Clinic Entrances Act (FACE) that makes it a federal crime to deny access to or vandalize health care facilities and places of religious worship. The state sections were intended to empower state and local officials to assist in addressing violence and acts of vandalism. It is therefore a crime to, by force or threat of force or by physical obstruction, intentionally injure, intimidate, or interfere with another person seeking to obtain, provide, or assist in the provision of reproductive health services or exercise the right of religious freedom.

In the following statutes, italics were added to emphasize some of the elemental differences among the subsections. Also, second degree criminal interference rises to a first degree crime when the offender has been previously arrested for criminal interference of a health care service or religious worship in either the first or second degree.

Section 240.70, Criminal interference with health care services or religious worship in the second degree, states:

1. A person is guilty of criminal interference with health services or religious worship in the second degree when:

    (a) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person *because such other person was or is obtaining or providing reproductive health services*; or

    (b) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person *in order to discourage such other person or any other person or persons from obtaining or providing reproductive health services*; or

    (c) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person *because such person was or is seeking to exercise the right of religious freedom at a place of religious worship*; or

(d) he or she intentionally *damages the property of a health care facility*, or attempts to do so, because such facility provides reproductive health services, or intentionally damages the property of a place of religious worship.

2. A parent or legal guardian of a minor shall not be subject to prosecution for conduct otherwise prohibited by paragraph (a) or (b) of subdivision one of this section which is directed exclusively at such minor.

Criminal interference with health care services or religious worship in the second degree is a class A misdemeanor not to exceed one year of imprisonment.

Section 240.71, Criminal interference with health care services or religious worship in the first degree states:

A person is guilty of criminal interference with health care services or religious worship in the first degree when he or she commits the crime of criminal interference with health care services or religious worship in the second degree and has been previously convicted of the crime of criminal interference with health care services or religious worship in the first or second degree.

Criminal interference with health care services or religious worship in the first degree is a class E felony punishable by up to four years in prison.

The following case, *People v. Kraeger, Kraeger, Kraeger, and Syverson*, was argued as a civil case in federal court in the Northern District of New York which covers the Utica and Syracuse areas.

People, By Eliot Spitzer, Attorney General of The State of New York v. Joseph A. Kraeger; Victoria Kraeger; Sheri Kraeger; And Vicki Jo Syverson
01-Cv-249
United States District Court For The Northern District Of New York
160 F. Supp. 2d 360 (2001)

Opinion By: Hurd, J.

The issue in the case concerns whether the defendants committed a public nuisance through their interferences at various reproductive health clinics.

Defendants are Joseph Kraeger, his wife Victoria Kraeger, and daughters Sheri Kraeger and Vicki Jo Syverson. The facts are extensive, but a smattering of the acts of each defendant is enumerated as follows.

- At a Utica clinic that provides reproductive health care for services related to birth control, pregnancy, and abortion, the three women would run up to women they perceived to be actual or potential patients, stand very close to them while walking on either side of them, or directly on their heels, or just in front of them and try to push literature in their hands as part of their "counseling" service.
- When a patient tries to walk around them, they impede her progress and try to intimidate her. In one example, Victoria Kraeger would match the steps of the patient and bump into her as she exited the clinic. Defendant also pushed the patient into the road and yelled that she "was going to be punished by God."

- Joseph Kraeger chained himself to a stairwell leading to the entrance of the office of one of the clinic's doctors who performed abortions. Defendant also went into the doctor's office and locked himself in an examination room.
- Victoria Kraeger would follow one of the employees of the clinic, an African-American man, while he escorted patients away from the clinic. She would call him an "Uncle Tom" and say that he was a disgrace to his race.
- On another occasion, both Joseph and Victoria Kraeger left a package wrapped in duct tape at the receptionist's window of another doctor at the clinic. The receptionist, fearing the package was a bomb, walked it outside next to Joseph and opened it. The package contained family planning pamphlets.
- At St. Mary of Mt. Carmel Church in Utica, one of the doctors from the clinic was going to attend an interfaith antiviolence service. Joseph Kraeger yelled to her, "You are not going in my church Margaret." He then stepped directly in front of her and pushed her with his body to prevent her from walking forward toward the church.

The federal district court reasoned that FACE authorizes the Attorney General of a state to commence a suit in the name of the state. Additionally, the New York State Clinic Access Act provides that when the attorney general has reasonable cause to believe that a person is violating section 240.70 or 240.71 of the Penal Law, the attorney general may bring an action to permanently prohibit such violation.

In this case, the court decided that, "it is true that the defendants conduct (sic) interferes with the public's right to access to medical care, and in some cases, the right to obtain an abortion. However, the People have failed to show that a considerable number of people have been affected by the defendants conduct (sic). Nor has it shown that, other than [one patient and one doctor], such people have been subject to substantial annoyance, discomfort, or interference. Further, the defendants in this case did not engage in egregious blockades of reproductive health care clinics…Finally, the evidence does not show that vehicular traffic was significantly slowed down. Therefore, the People have failed to demonstrate that the defendants' conduct rises to the level of a public nuisance." The court's major consideration in this case was in balancing the protection of reproductive health facilities and their patients and staff against the First Amendment right of protestors to express themselves freely.

The court however, did acknowledge that defendants "have crossed over that line [separating lawful and unlawful behavior] too many times to allow such conduct to go unaddressed…As a result, the defendants must be penalized and their activities curbed."

The public nuisance claim was dismissed, but the defendants were in total penalized $80,000 as a result of damages resulting from their violations of FACE.

PROSTITUTION OFFENSES

Offenses related to prostitution are found in Article 230. This article substantially changes the statute since prostitution was previously dealt with in the Code of Criminal Procedure as a form of vagrancy. Several of the current statutes were created with the 1965 Penal Law revision, and in 1978, some of these statutes were revised or added anew.

The basic prostitution offense is found in **Section 230.00**, Prostitution, which states:

> A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.

Prostitution is a class B Misdemeanor punishable by up to three months of imprisonment.

Patronizing a prostitute is defined in §230.02, Patronizing a prostitute in the fourth degree, and occurs when a person either previously agrees or currently solicits another person to have sex in return for a fee. The statutes on patronizing prostitutes imply that the patronizer is agreeing with or soliciting the person patronized without coercion, even though the person who is patronized may be a minor.

Patronizing offenses were included in the Penal Law after an urging that criminal sanctions against the patron as well as the prostitute should aid in the curtailment of prostitution, and that penalizing the prostitute but not the equally culpable patron was unjust.

Patronizing a Prostitute

The basic offense of Patronizing a prostitute in the fourth degree, is stated in **Section 230.03**:

> A person is guilty of patronizing a prostitute in the fourth degree when he patronizes a prostitute. Patronizing a prostitute in the fourth degree is a class B misdemeanor.

The offense levels of patronizing increase when the age of the person patronized decreases.

> **Section 230.04** is a third degree offense when the person patronizing is over 21 years old and the person patronized is less than 17. This is a class A misdemeanor.

> **Section 230.05** is a second degree offense when the person patronizing is over 18 years old and the person patronized is less than 14. This is a class E felony.

Section 230.05 was challenged in *People v. Bronski*[3] when defendant Bronski was found guilty for soliciting an undercover police officer for sexual intercourse. He alleged that he should not have been convicted since the statute is titled "Patronizing a *prostitute* in the second degree" (emphasis added). The court disagreed. It relied on the definition of prostitution in §230.00 and stated, "While entitled 'patronizing a prostitute,' the body of the section clearly states that the conduct intended to be proscribed is conduct directed to 'another person.' It is well established that the character of a statute is to be determined by its provisions and not by its title…The statute here is aimed at a person who seeks out sexual activity for a fee with any 'other person.' This 'other person' is not required to be of any particular class of individual nor even of the opposite sex, for it is the conduct of the solicitor, and not the solicited, which is proscribed." The defendant's conviction was upheld.

If the court in *Bronsky* had ruled in favor of the defendant, its ramifications would have likely hindered undercover police work.

Section 230.06 of patronizing a prostitute is a first degree offense when the person seeking the prostitution service is any age but the person patronized is less than 11. This is a class D felony punishable by up to seven years of imprisonment.

Section 230.10 provides a "no defense" provision that makes it clear that both the prostitution and patronizing offenses apply not only to situations where the female is hired by the male, but also those where a male is hired by a male, a female by a female, and a male by a female.

According to **Section 230.10**, Prostitution and patronizing a prostitute, no defense states:

> In any prosecution for prostitution or patronizing a prostitute, the sex of the two parties or parties to the sexual conduct engaged in, contemplated or solicited is immaterial, and it is no defense that:
>
> 1. Such persons were of the same sex; or

2. The person who received, agreed to receive or solicited a fee was a male and the person who paid or agreed or offered to pay such fee was a female.

Promoting Prostitution

Whereas patronizing a prostitute encompasses the behavior of agreement or solicitation of services in exchange for a fee, promoting prostitution involves the active solicitation of patrons in order to advance prostitution and fiscally profit from it. **Section 230.15**, defines two key concepts for the promoting prostitution statute.

Subsection (1) defines "advancing prostitution" when a person, who is neither the prostitute nor the patron of a prostitute, "knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution."

Under **subsection (2)**, a person "profits from prostitution" when acting other than as a prostitute receiving personal compensation, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity."

Section 230.20 defines basic promoting prostitution in the fourth degree:

A person is guilty of promoting prostitution in the fourth degree when he knowingly advances or profits from prostitution.

Promoting prostitution in the fourth degree is a class A misdemeanor.

An example of promoting prostitution in the fourth degree is found in *People v. Rollova*.[4] Defendant was a self-proclaimed exotic dancer who agreed, for $450, to dance and provide another woman for the purpose of prostitution to four undercover officers who were posing as business executives having a party at a local motel. The two women met one of the officers at the designated motel where the officer paid the agreed upon fee. The parties then went to a room where defendant danced and ultimately removed all of her clothing. At the same time, the other woman visited with the men. The pair of women was arrested when the other woman entered an adjoining room with one of the officers to have sex. Defendant was convicted.

As with patronizing a prostitute offenses, promoting prostitution offense levels of severity increase with the aggravating factor of the decreasing age of the person from whom the profit is made. An additional aggravating factor is the use of force or intimidation to advance prostitution.

The following case deals with the definition of "sexual conduct" under §230.00 as well as another example of fourth degree promotion of prostitution (§230.20).

People v. Hinzmann And Thompson
People v. Jackson
Criminal Court of the City of New York, Bronx County
677 N.Y.S. 2d 440 (1998)

Opinion By: Sonberg, J.

The defendants in this case moved to dismiss the charges against them on the basis of facial insufficiency.

An undercover police officer entered a premises at 611 East 133rd Street in the Bronx when he was approached by defendants Hinzmann and Thompson who offered to engage in sexual contact with him in exchange for money. Defendants agreed to allow the officer to touch their naked breasts and buttocks by agreeing to perform a lap dance. Defendant Jackson was managing the premises and possessed the keys to the premises.

Defendants Hinzmann and Thompson were charged with commission of prostitution (§230.00) and defendant Jackson was charged with promoting prostitution in the fourth degree.

In its analysis of §230.00, the court considered the definition of "sexual conduct." According to the court, "Article 230 was enacted to prohibit the commercial exploitation of sexual gratification. 'The sexual conduct need not in fact be consummated; the offer or agreement to trade the sexual conduct with another person for a fee may be sufficient.'" The court thus more expansively defined sexual conduct than previous case law. In previous case law, the "touching of breasts and buttocks was not prohibited by article 230." However, "[t]he acts of the defendants agreeing to sit on the officer's lap and 'move around'…were suggestive of conduct done to satisfy a sexual desire. This was not merely nude dancing, which generally is protected as expressive conduct under the First Amendment…[T]here are sufficient allegations the defendants agreed to perform these acts in exchange for money. That is the essence of prostitution…It is the combination of 'lap dancing' with the touching of naked breasts and buttocks which this court finds to be encompassed within the meaning of 'sexual conduct.'"

As to defendant Jackson's charge of promoting prostitution, the court analyzed the two elements of the offense. "The first element which must be found is that the activity which defendant is alleged to have promoted constitutes prostitution. Having determined that the acts of defendants Hinzmann and Thompson were prostitution, this element is satisfied as to promoting prostitution."

"The court finds sufficient factual allegations to support the charge of promoting prostitution against defendant Jackson" who "was observed managing the premises where the activity…occurred and admitted to the officer that he was the manager there and was in possession of keys to the premises…[I]t is reasonable to believe defendant Jackson knew what was going on and advanced and profited from the activity."

Section 230.25, Promoting prostitution in the third degree, states:

A person is guilty of promoting prostitution in the third degree when he knowingly:

1. Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes; or

2. Advances or profits from prostitution of a person less than nineteen years old.

Promoting prostitution in the third degree is a class D felony punishable by up to seven years of imprisonment.

Section 230.30, Promoting prostitution in the second degree, states:

A person is guilty of promoting prostitution in the second degree when he knowingly:

1. Advances prostitution by compelling a person by force or intimidation to engage in prostitution, or profits from such coercive conduct by another; or

2. Advances or profits from prostitution of a person less than sixteen years old.

Promoting prostitution in the second degree is a class C felony punishable by up to 15 years of imprisonment.

In *People v. Falzone* and *People v. Ricks*,[5] defendants were convicted of promoting prostitution in the second degree and endangering the welfare of a child. Their conviction arises from their coercion of a 14-year old girl to engage in prostitution. The victim (complaining witness) had run away from a succession of foster homes and lived with friends in an abandoned building in the Bronx. She then stayed with friends in a welfare hotel in the Times Square area. Eventually, she moved in with the mother of a friend in the Bronx and baby-sat for defendants who lived in another apartment in the building. When the victim began having problems with the friend's mother, she moved in with defendants. After several months, they told her that they needed more money to pay their bills and coerced her into working as a prostitute. Defendants dressed her provocatively, gave her instructions on how to behave with customers, and took her to the Hunts Point Market area in the Bronx where they forced her to work for as many as six nights per week. The victim would then give the money to the defendants. After being arrested twice for prostitution, the victim returned to the welfare hotel and told her story to a social service worker.

Section 230.32, Promoting prostitution in the first degree, states:

A person is guilty of promoting prostitution in the first degree when he knowingly advances or profits from prostitution of a person less than eleven years old.
Promoting prostitution in the first degree is a class B felony punishable by up to 25 years of imprisonment.

REVIEW QUESTIONS

1. Which aggravating factor raises criminal nuisance from a second to first degree offense?

    A. the unlawful sale of, and benefit from, controlled substances
    B. the physical injury of a nonparticipating individual
    C. the reduction in age of the victim to less than 16 years old
    D. a previous conviction for second degree criminal nuisance

2. Criminal interference with health care services or religious worship in the second degree prohibits which conduct?

    A. participation in cults
    B. abortion
    C. destruction of property at a church
    D. holding up signs at an abortion clinic that say "baby killer"

3. Promoting prostitution does **not** involve which of the following?

    A. coercing a teen into prostitution
    B. profiting from prostitution
    C. soliciting patrons
    D. seeking a prostitute for sex

4. Disorderly conduct is what type of offense?

    A. class A misdemeanor

B. violation
C. class B misdemeanor
D. class E felony

5. A _____ can patronize a _____ for prostitution.

A. man, woman
B. man, man
C. woman, man
D. all of the above

REFERENCES

[1] 765 N.Y.S.2d 705 (2003)
[2] 787 N.Y.S.2d 579 (2004)
[3] 351 N.Y.S. 2d 73 (1973)
[4] 508 N.Y.S.2d 653 (1986)
[5] 541 N.Y.S.2d 415 (1989)

ANSWERS

1. A; 2.