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Loiter Ban Ruled Invalid By Criminal Court Judge

By LESLEY OELSNER

A state statute prohibiting loitering, used by the police to arrest persons they suspect of criminal behavior or of plans for criminal behavior, has been declared unconstitutional by a Criminal Court judge here.

The statute, said Judge Alfred H. Kleiman, is a "subterfuge" by which the police can arrest and search people without probable cause.

"Suspicious acts observed by officers, may be as consistent with innocence as with guilt," the judge said in a decision announced yesterday.

The statute—a subdivision actually of the State Penal Code's provision against loitering—allows the arrests of a person who "loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to be engaged in crime."

If a suspect refuses to identify himself or "fails to give a reasonably credible account of his conduct and purposes," the law says, he is guilty of loitering.

Specificity Essential

Statutes curbing loitering have been upheld by the courts when they prohibit it for a particular purpose — gambling, for instance, or selling drugs. But, as Judge Kleiman noted in his decision, no particular purpose is spelled out in the state law at issue.

Laws must be "sufficiently definite, clear and positive," the judge ruled, to warn people of prohibited conduct. The state law, he said, met none of these criteria.

Under the state law, he went on, "how does a person, innocently standing around, protect himself from the suspicion of officers?"

Although Judge Kleiman did not mention the fact in his ruling, the provision against loitering has been used extensively in New York City in police roundups of prostitutes. But many judges, dubious of the law's constitutionality, have merely dismissed the charges against the women brought before them. The result in some courtrooms is a daily ritual: The same women are taken before the judge for arraignment and then released with a warning.

Police policy toward prostitutes, in fact, has gone through

numerous changes in the three years since the law against loitering has been in effect. At first, in an attempt to rid the midtown area of the problem, the New York City police made large-scale roundups of prostitutes and charged them with disorderly conduct.

Many judges just dismissed the charges, though, because they suspected that the women were being arrested without due regard to such constitutional requirements as probable cause. Then Manhattan District Attorney Frank S. Hogan suggested that the prostitutes be charged with the newly passed loitering offense; he changed his policy a few days later, having his young assistants suggest to the judges that they dismiss such cases, only to contradict himself a few days later.

Subsequently his office eased its stand and now, according to court personnel, his office will drop charges whenever the defendant's lawyer raises the question of constitutionality. And in the meantime, police have begun to arrest women on both prostitution and loitering charges.

Often the District Attorney in the arraignment room realizes that there is insufficient evidence of solicitation to sustain the prostitution charge; he will then offer a plea "bargain" in which the defendant pleads guilty to the loitering charge—punishable by 15 days in jail or a \$250 fine—and is relieved of the other charge, punishable by 90 days.

What happens then, according to criminal lawyers, depends on the judge and on the criminal record of the defendant.

"Often they just throw it out," says Martin Potter of the Legal Aid Society, which argued the winning side in yesterday's decision. "Sometimes, the girl pleads and the judge gives her credit for time served in jail pending a hearing."

The law had not been overturned previously by a court, lawyers say, because District Attorneys will drop charges rather than press the issue—as Mr. Potter put it, "it's a good law to have on the books for when police want to make a round-up." The District Attorney's office had not contested the Legal Aid Society on the issue of constitutionality, in fact; it left the task to the State Attorney General.