Rounding Up the Undesirables: The Making of a Prostitution-Targeted Loitering Law in New York City

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> "We're trying to *sweep the streets* so that people can walk without being assaulted by these brazen women, and it's more effective to arrest them for disorderly conduct."
> —Deputy Commissioner Jacques Nevard of the NYPD speaking to a *New York Times* reporter
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> "If we could go back to the old style of police work, when men on the beat could enforce standards of public decency and order, we could clean up Times Square in no time."
> —Police officer interviewed by James Traub (2004)

The New York City Police Department (NYPD) objected loudly when New York's 179-year-old vagrancy law was struck down in *Fenster v. Leary*[1] in 1967 (Madden 1967). The vagrancy law considered prostitutes a kind of vagrant and had made it easy to round them up quickly. In the same year that New York's vagrancy law was struck down, a new antiprostitution law, section 230 of the New York State Penal Law, went into effect (Roby 1969). However, from the NYPD's perspective, this law only made rounding up prostitutes harder. It required vice officers to hang around street corners in plain clothes and wait for women to ask if they would like to exchange money for sexual services. Under intense pressure from local businesses and community groups in Times Square to take prostitutes off the streets, the NYPD turned to a suspicious-persons loitering law to make their arrests, but this did not prove to be a long-term

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solution. Caught up in the same civil libertarian law reform effort that had invalidated New York's vagrancy law, the suspicious-persons loitering law was struck down in *People v. Berck*[2] in 1973 (Montgomery 1973). The *Fenster* and *Berck* decisions appeared to be a win for civil liberties and a loss for the NYPD and the community groups and businesses that wanted prostitutes off the streets. However, three years after *Berck* was decided, the New York state legislature passed section 240.37 of the Penal Law, a loitering law that specifically targeted prostitutes. Now who was the winner?

This article is about the making of a loitering law in New York that specifically targeted prostitutes in 1976, after vagrancy and broadly written loitering laws were rejected by both the US Supreme Court and the New York State Court of Appeals, the highest state court in New York. Unlike catchall loitering laws, which apply to all persons engaged in suspicious behavior, targeted loitering laws are limited to purpose or place. After vagrancy and catchall loitering laws were struck down, many states passed loitering laws targeted at prostitution and drug use (Struening 2016, Trosch 1993).

My examination of a prostitution-targeted loitering law will show that there is substantial continuity between what Risa Golubuff (2016) calls the vagrancy regime and the new era of order-maintenance policing (Beckett & Herbert 2009). The end of the vagrancy regime was a great victory for due process and civil liberties. However, the legal community's absorption of civil liberties discourse had little impact on community and business groups (Chevigny 1969, Vitale 2008). After vagrancy and loitering laws were struck down by the courts, these groups continued to complain about prostitution in Times Square and the police continued to use roundups to arrest prostitutes in large numbers. My case of a loitering law targeted at prostitutes reveals that the defeat of the vagrancy regime was incomplete.

In her authoritative book *Vagrant Nation*, Goluboff (2016) uses the term vagrancy regime to capture a law and enforcement regime that gave the police the authority to control and contain socially marginal people. Carried to the colonies from England, the vagrancy regime continued in the United States for almost three-quarters of the twentieth century. Its mission was to maintain order in communities by expelling vagrants or containing them in specific neighborhoods (Hubbard 2012). Its mechanism consisted of vague, broad laws that empowered the police to stop and arrest individuals without evidence that they had committed actual crimes. The targets of the vagrancy regime were diverse but included prostitutes, alcoholics, drug users, poor people, men and women of Color, gay men, lesbians, and transgender women and men. As a strong civil liberties discourse took hold of the legal

community in the 1960s, the Supreme Court began to make decisions that protected the accused against agents of enforcement. By 1971 and 1972, the nation's highest court struck down vagrancy and broadly worded loitering laws in *Palmer v. City of Euclid* (1971),[3] *Coates v. City of Cincinnati* (1971),[4] and *Papachristou v. City of Jacksonville* (1972).[5] The kind of discretion police enjoyed under the vagrancy regime was thought to have ended.

But had it? By the 1990s, a new form of order-maintenance policing began to take shape. It was referred to as *new* to distinguish it from the old vagrancy regime, which was thought to have died after *Papachristou*. It was also called new to suggest a clean break with the civil liberties and rehabilitative discourses that prevailed through the 1960s and 1970s (Garland 2001), resulting in the quality-of-life and broken windows discourses that justified the more punitive and aggressive forms of policing enacted in the 1990s that continue into the present (Beckett & Herbert 2009, Harcourt 2001).

The theoretical basis of the new order-maintenance policing regime, termed the broken windows theory, is often traced to an article by James Wilson and George Kelling published in *The Atlantic* in 1982. Broken windows theory is based on the idea that if low-level violations and misdemeanors are not strictly enforced in communities, more serious crime will follow. Wilson and Kelling (1982) locate the link between disorder (e.g., toleration of violations and misdemeanors) and serious crime in the message that disorderly communities send to criminals: no one cares about this neighborhood; you are free to operate here. Enhanced criminal activity soon follows, and the neighborhood deteriorates further. To avoid this scenario, Wilson and Kelling argue, police officers need to return to the role they played under the vagrancy regime—that of night watchmen and peacekeepers in charge of maintaining community standards. Writing a decade after the Supreme Court found vagrancy and loitering laws unconstitutional, Wilson and Kelling praise the form policing took under the vagrancy regime. However, they offer a new justification for containing and controlling socially marginal people: they are the agents of disorder and will bring more serious crime to the neighborhoods they inhabit.

Several scholars have contributed to a critical perspective on order-maintenance policing (Beckett & Herbert 2008, 2009, 2010; Harcourt 2001; Roberts 1999; Smith 2001; Vitale 2008; Wacquant 2009). Neil Smith (2001) argues that the origin of the new form of order-maintenance policing can be traced to globalization and the growth of global cities as concentrated sites of capital. Cities around the world, in competition for corporate headquarters and investment, have attempted to create pleasant urban environments to

serve as playgrounds for globe-trotting technocrats and individuals employed by transnational corporations. Global cities, and the increased inequalities that come with globalization, have exacerbated instabilities in the labor force, decreased affordable housing, and led to large cuts in social programs. This, in turn, has created greater disorder. The response of the neoliberal order is to displace loiterers, people drinking publicly, prostitutes, and homeless individuals. Punitive policing of low-level offenses is needed to clear the streets of these undesirables. Wacquant (2009) argues that this turn to a more punitive form of policing allows the neoliberal state to legitimize itself. No longer committed to its social welfare function, the state tells its productive citizens that it will keep them safe.

An early critic of broken windows theory, Bernard Harcourt (2001) argues that the emphasis it places on the order/disorder dichotomy leads to the social construction of agents of disorder, including young men and women of Color, LGBTQ youth of Color, homeless individuals, prostitutes, and drug users. These groups find themselves the targets of aggressive forms of policing, such as stop-and-frisk. Dorothy Roberts (1999) claims that the order/disorder distinction is parasitic on cultural representations of marginal groups. The police, arriving in a community and needing a way to separate the orderly from the disorderly, are likely to rely on negative stereotypes that portray, for example, young Black men as dangerous and prone to crime.

Alex Vitale (2008), writing about New York City, argues that white middle-class communities felt abandoned by liberal politicians who they believed were either not willing or not able to stop the rise of disorder in the 1970s and 1980s. Frustrated with the failure of underfunded social programs to get transients and panhandlers off the streets, these individuals organized and formed community groups that placed pressure on city officials and the police to clean up the city and restore New Yorkers' quality of life. Vitale explains that Giuliani's rise to power in 1993 was fueled by New Yorkers' sense that their city was out of control. Many residents of New York welcomed an aggressive policy toward the agents of disorder, even if it meant the sacrifice of civil liberties in a famously liberal city.

Beckett and Herbert (2008) claim that the creation of new techniques of urban social control are an unanticipated consequence of the end of the vagrancy regime. As we will see below, the police need new tools of enforcement if their old ones are taken away. Deprived of the vagrancy and catchall loitering laws that were used to maintain order in the past, states have had to invent new enforcement tools. These include "off-limits orders, and the creation of zones of exclusion, park exclusion laws and new

applications of trespassing law" (Beckett & Herbert 2009). In Seattle and other cities, individuals convicted (and in some cases merely accused) of drug or prostitution offenses can be given SOAP (Stay Out of Areas of Prostitution) or SODA (Stay Out of Drug Areas) orders as conditions of parole or probation. Beckett and Herbert (2009) refer to SOAP and SODA orders as a new form of banishment, designed to keep marginal individuals out of gentrifying parts of the city. In addition to exclusion laws, laws have been passed or enforced more aggressively and selectively to drive individuals without homes out of gentrified city space. These include laws that make it illegal to: 1) sleep, sit, camp, or maintain personal belongings in public spaces; 2) loiter or trespass; and 3) ask for money (The National Law Center on Homelessness & Poverty and The National Coalition for the Homeless 2009, 23–24).

The rise of order-maintenance policing shows us that the effort to control and contain socially marginal individuals through enforcement practices lives on despite the end of the vagrancy regime. The scholars examined above agree that the new form of order-maintenance policing violates civil liberties—just as the vagrancy regime did. In the words of Ronald Dworkin (1977), socially marginal individuals are not receiving equal concern and respect from their government. However, this is not simply a matter of ignoring these individuals' rights and well-being. People who need help are being harassed, told to move on, arrested, and given the burden of a criminal record. Such police practices are worsening their already extraordinarily difficult lives.

By examining the case of prostitution policing in Times Square in the 1970s, I intend to show that there was no hard break between the vagrancy regime and the new era of order-maintenance policing. Although civil libertarian forces were able to end some of the worst due process abuses of the vagrancy regime, their efforts were undermined by the public's demand that Times Square be cleaned up (Vitale 2008). It is important to understand that, in this case, "the public" was composed of heterogeneous interests, and the forces aimed at eliminating prostitution in Times Square were not simply residential groups and local small businesses. There were large businesses involved, as well, such as the Hotel Association of New York City and the Shubert Organization. Additionally, as I explain in more detail later, the pressure that successive administrations placed on the police to clean up Times Square was driven, in part, by the desire of real estate interests and developers to make money.

Politicians responded to this demand by producing a prostitution-targeted loitering law. In their defense of the targeted loitering law—a defense that

was complicated by their liberal profiles—lawmakers developed a new justification for the aggressive policing of low-level crimes. This justification was later adopted by the supporters of order-maintenance policing. Thus, we can see that the making of a loitering law targeted at prostitutes both allowed police to continue the practices (roundups) that they used under the vagrancy regime and created a discourse that contributed to the rise of the new order-maintenance policing regime.

This article proceeds by providing a brief synopsis of the vagrancy regime, and how the liberal legal community fought against what it called victimless crimes. The following section, Rethinking Prostitution, examines how civil libertarians, feminists, and sex workers redefined prostitutes as free agents, victims of male domination, and workers with the right to unionize. The purpose of this discussion is to show that there were positive constructions of prostitutes in the 1970s. In section three, The Making of a Targeted Loitering Law, I explain how the police were caught between the public, who insisted that something be done about Times Square prostitution, and the liberal legal community, including prosecutors, judges, Democratic lawmakers, and civil libertarian organizations, who continued to take tools of enforcement away from the police. I argue that despite resistance from the liberal legal community, feminists, and sex workers, it was ultimately the public, and the NYPD, who won the debate over the need for a prostitution-targeted loitering law. In section four, I show how liberal lawmakers restigmatized prostitutes to justify their vote in favor of the loitering law. In doing so, they created an argument that the defenders of the new practice of order-maintenance policing then picked up and developed.

Vagrancy and Loitering Laws

The United States adopted British vagrancy and catchall loitering laws at its founding and these laws were employed on a regular basis by police throughout the country until the Supreme Court declared them unconstitutional in *Papachristou v. City of Jacksonville* in 1972. Oftentimes vagrancy laws were used to arrest individuals not on the basis of their actions but because of the type of person the police perceived them to be (e.g., vagrant, common thief, drunkard, common prostitute). Arrests were also made based on an individual's past actions or arrest record. People of Color and poor people were especially vulnerable to arrest for vagrancy (Goluboff 2016).

Vagrancy laws were originally aimed at idle or unemployed persons who were unable to show that they could support themselves; loitering

laws focused on people who looked suspicious to the police and who could not give a good account of why they were hanging out in a public place. However, both types of laws were put to a large variety of purposes. After the Reconstruction era, vagrancy laws were used to control the mobility and labor of freedmen and freedwomen (Blackmon 2008). They also served as a tool for ejecting outsiders from communities and punishing resident alcoholics (Foote 1956), arresting hoboes and unsheltered people (Hopper 2003), persecuting gay men (Chauncey 1991), and suppressing political speech and civil rights, especially during the 1960s and 1970s (Goluboff 2016).

In *Vagrant Nation*, Goluboff (2016) describes the creation of a legal reform movement aimed at vagrancy and loitering laws and led by a loose network of civil libertarian lawyers involved in 1960s social movements. According to Goluboff, these lawyers gradually came to realize that vagrancy and loitering laws were being used against antiwar activists, civil rights leaders, and nonconformists such as beats and hippies, as well as prostitutes, gay men and lesbians, the poor, and racial minorities. Beginning as early as 1949, lawyers began filing antivagrancy cases, hoping that state courts or the Supreme Court could be persuaded to find them unconstitutional (Goluboff 2016).

The key criticism of vagrancy and loitering laws is that they give police officers unfettered discretionary power. The broad and vague language of these laws allows police officers significant leeway in deciding to whom they should apply. The 1965 President's Commission on Law Enforcement and Administration of Justice concluded that vagrancy and loitering laws were used "by the police to clean the street of undesirables, to harass persons believed to be engaged in crime and to investigate uncleared offenses" (Kadish 1968, 31). Excessive police discretion, in turn, facilitated unequal treatment under the law. Vagrancy and loitering laws were most often used by police officers to stop, interrogate, and arrest individuals they perceived to be violating community norms. Race often played a pivotal role in determining who was stopped (Goluboff 2016, Muhammad 2010, Roberts 1999).

By the late 1960s and early 1970s, many liberal politicians, lawyers, prosecutors, and judges in New York opposed vagrancy and loitering laws and their use in the arrest of prostitutes. Criminal Court Judge Amos Basel complained in 1967 that the police indiscriminately rounded up women they believed to be prostitutes under the state's suspicious-persons loitering law. Basel went on to argue that the police who made these arrests were well aware that all charges would be dropped by prosecutors.[6] Five years later, a report based on a New York state legislative hearing on victimless crimes concluded that "society's present approach to 'victimless crimes', (identified

as public drunkenness, prostitution, gambling, homosexuality, marijuana offenses and pornography) is almost totally without merit and should be changed radically" (Olivieri & Finkelstein 1972-1973, 78).

The two authors of the victimless crime report, Antonio Olivieri and Irwin Finkelstein (1972-1973), condemned New York state loitering laws, arguing that they were unconstitutional according to recent US Supreme Court decisions. New York's suspicious-persons loitering law, section 240.35 of the Penal Law, gave police officers too much discretion and defined criminal activity imprecisely, leaving open the possibility that innocent people would be arrested. Moreover, the report went beyond rejecting catchall loitering laws. Olivieri and Finkelstein also held that it would be impossible to write a loitering law specifically targeted at prostitution. They state, "A statute which speaks in terms of the 'purpose' of the loitering will be difficult or impossible to enforce because the only way to prove purpose is through the testimony of passersby and 'Johns,' who inevitably will refuse to testify" (Olivieri & Finkelstein 1972-1973, 88). Delineating objective circumstances "that would indicate to an officer that a person intends to engage in a prostitution offense" would also prove exceptionally difficult. According to the authors, "there is little in the way of objective circumstances which effectively distinguish between prostitutes and anyone else standing on a corner…" (ibid., 88). To these two civil libertarian lawyers (Olivieri was also a member of the New York State Legislature), roundups were unconstitutional and prostitution was a victimless crime.

Rethinking Prostitutes: From Vagrants to Free Agents, Sex Workers, and Victims

In the 1960s and 1970s, civil liberties advocates, including the authors of the victimless crime report, argued in favor of taking a new approach to prostitution. Olivieri and Finkelstein (1972-1973, 92) outline three alternatives to the criminalization of prostitution: 1) establish an antisolicitation law that is enforceable in public places but decriminalize commercial sexual exchanges conducted in private; 2) regulate or license prostitution; and 3) comprehensive decriminalization. They write that comprehensive decriminalization would be best from a civil libertarian and practical point of view. However, it was important to consider individuals who found the sight of prostitution offensive. The second alternative of regulation, according to which commercial sex would be limited to specific parts of the city and prostitutes would be licensed, was rejected because it violated

civil liberties, treating the sex worker "as a commodity to be licensed and regulated" (ibid., 92). Therefore, Olivieri and Finkelstein ultimately recommend alternative one, which calls for decriminalizing the exchange of sex for money in private but requires an antisolicitation law to protect the interests of individuals who find public displays of prostitution offensive. The purpose of an antisolicitation law would be "to decrease the visibility of prostitution by providing an alternative to streetwalking and its related visual and verbal assaults on passersby" (ibid., 89). The authors concede that antisolicitation laws are difficult to enforce because pedestrians who are the victims of this injury are unlikely to be sufficiently motivated to make a complaint. They also argue that an alternative to jail should be available to individuals convicted of solicitation, such as an experimental residential program that would treat the underlying causes of prostitution and provide prostitutes with job training (ibid., 92–93).

The civil libertarian conception of prostitution rejects the idea that the state should uphold conventional sexual morality and protect its weaker members from being tempted into sin by depraved women. Instead, the problem with prostitution is clearly defined as the *presence or visibility of prostitutes*. Herbert L. Packer, author of *The Limits of Criminal Sanction,* explains, "prostitution, like obscenity and like other sexual offenses, should be viewed as a nuisance offense whose gravamen is not the act itself, or even the accompanying commercial transaction, but rather its status as a public indecency" (Packer 1968, cited in Nelson 1993, 283). In a society that is questioning moral prohibitions on sexuality, engaging in sex for a fee should not be considered a crime. At the same time, pedestrians should be able to walk through the city without being exposed to streetwalkers.

Civil libertarians were not the only actors seeking to redefine prostitutes and prostitution in the 1970s; they were joined by prostitutes' rights groups and feminists. The best-known prostitutes' rights group, Call Off Your Old Tired Ethics or COYOTE, was founded by Margo St. James in San Francisco in 1973. New York had its own organization, Prostitutes of New York or PONY. COYOTE and PONY defined the provision of sexual services as a legitimate form of work and called their members sex workers. They argued that the criminalization of prostitution only served to reinforce class and race hierarchies within the sex trade. The police ignored upscale white call girls and focused their attention on the less affluent street walkers, who were often women of Color (Chateauvert 2013). Through protests, public education, and media coverage, sex workers argued that far from being sexual deviants, criminals, or victims, prostitutes were workers and, like all

workers, deserved to have their rights protected. Unionization was the best way for sex workers to improve their working conditions and to undermine the power of pimps (Majic 2014).

COYOTE and PONY also argued that the criminalization of prostitution put prostitutes at risk. Criminalization allows organized crime, pimps, customers, and the police to exploit and control individuals involved in selling sexual services. As long as prostitution remained illegal, sex workers would be reluctant to go to the police if they were the victims of violence or exploitation. Sex workers also strongly objected to the regulation or licensing of prostitution. They argued that regulations, such as required health checks, were often enforced without adequate concern for the civil liberties of sex workers. Moreover, there was a sex bias in health regulations, which required prostitutes but not customers to be subjected to medical examinations (Jenness 1990). Additionally, sex workers' rights organizations argued that regulation would prevent sex workers from being self-determining agents, who could make their own choices about where and when they worked. Like civil libertarians, sex workers claimed both that the enforcement of antiprostitution laws was a waste of criminal justice dollars and that disorderly conduct and loitering laws were unconstitutional.

The developing women's liberation movement was key to revealing the many sex biases embedded in both the policing of prostitution and the sex trade. Feminists asked why prostitutes were demonized and shamed, when the demand for commercial sexual activity came largely from men. Wasn't this just another example of a double standard that punished women for sexual activity, while simultaneously protecting the rights of men to women's bodies? Didn't women go into prostitution because of the restriction on women's employment opportunities and the low wages paid to women workers? Gender inequality and male domination were responsible for prostitution, according to many feminists. Consequently, prostitutes were the true victims of the sex trade.

The reconceiving of prostitution and prostitutes was important because it opened up the possibility that prostitution was a benign exchange between a seller of sexual services and a client, or that procurers, pimps, and customers were as guilty as or guiltier than prostitutes. With public offense replacing social evil, prostitution was at least partly detached from the heavy baggage of immorality, disease, and death that it historically carried (Gilman 1990). However, as I will argue, these efforts to redefine prostitution and prostitutes were ultimately unsuccessful. Even those politicians committed to civil lib-

ertarian principles eventually began to argue that prostitution, although not a moral issue, needed to be controlled and contained by law enforcement.

The Making of a Targeted Loitering Law

The concentration of prostitutes in Times Square in the 1960s and 1970s was, in part, the unanticipated effect of Mayor Lindsay's efforts to commercially upzone and redevelop Midtown West. Zoning laws from a decade earlier had made it difficult to build on the West Side of Manhattan and caused property values to stagnate. However, Times Square's negative reputation repelled developers. The investment that Lindsay had hoped to spur did not materialize for over twenty years. The failure to attract new investment throughout the 1970s and 1980s meant that Times Square would remain a haven for pornography, prostitution, drugs, and crime. Once Lindsay rezoned, real estate owners anticipated selling their land and the buildings that sat on it to developers who would in turn raze the existing buildings and replace them with towers. As they waited to be offered an attractive deal by developers, real estate owners declined to upgrade their buildings and instead rented them to sex business owners, who paid high rents and did not push for repairs (Eliot 2001).

Additionally, according to sociologist Pamela Roby (1972), the number of prostitutes in Times Square may have increased after riots in Harlem in 1964 discouraged white customers from seeking sexual services uptown. In search of customers, women involved in the sex trade relocated to Midtown. Yet another explanation for the increase in prostitutes in Times Square was that the antiprostitution law (section 230) implemented in 1967 to replace the vagrancy law reduced the punishment for prostitution from six months to fifteen days. This law, which required police to act as decoys and catch sex workers offering to exchange money for sexual services, may have attracted prostitutes from outside of New York to sell their services in Times Square because of the substantially reduced jail times. The minimized penalty reflected the influence of civil libertarians who believed commercial sex was a victimless crime. Whatever the explanation, the perceived increase in Times Square prostitutes set off a mini sex panic among Midtowners who felt they were facing a so-called epidemic of prostitutes (Roby 1969). It should be noted, however, that not everyone reacted in this way (Delany 1999).

In response to the epidemic, residents and small businesses formed vocal networks of community groups and demanded that the Mayor's Office and the NYPD do something about prostitution in Times Square (Schumach

1976a,b). These groups were joined by powerful economic interests that included the Hotel Association of New York City (Roby 1972), the Shubert Organization, and Times Square real estate owners and developers (Eliot 2001). In response, New York mayors, beginning with John Lindsay, were constantly reaching out to investors in the hope of developing Times Square.

The NYPD's response to the sex panic was to continue rounding up large groups of women, even though it was not clear whether their actions were legal. In 1967, section 230 of the Penal Law went into effect. For the first time, police were required to have evidence of a conversation in which two individuals agree to exchange sexual services for money in order to make an arrest. In another first, the antiprostitution law included a patron section, which made agreeing to pay for sexual services illegal. As mentioned in the introduction, the police were opposed to the new law. The argument given publicly by the NYPD was that police officers would no longer be able to rely on customer testimony against prostitutes if customers were now subject to arrest (Roby 1969). However, it is far more likely that the NYPD's true objection to the law was that it provided no legal cover for the police to engage in street sweeps (Chevigny 1969). Commenting on a 1971 vice initiative in Times Square, a journalist reported on why police officers used a suspicious-persons loitering law to make arrests: "They said that large-scale arrests did not allow the use of undercover patrolmen, who pose as clients and make arrests for prostitution, so the easily proved loitering charge was used instead" (Gansberg 1971). New York Civil Liberties Union (NYCLU) lawyer Paul Chevigny (1969, 230) makes a similar claim: "It was impossible to have a massive 'drive' against the women without using uniformed men and dragnet arrests." Only broadly and imprecisely worded loitering laws facilitated the use of sweeps or roundups and made arresting prostitutes easy (Gansberg 1971, Zion 1967). From 1967 to 1976, the NYPD arrested prostitutes for disorderly conduct, suspicious loitering with the purpose of engaging in a crime, and, after 1973, loitering with the purpose of engaging in a sexually deviant act. Whether under the cover of law or not, the police refused to give up their traditional tactics for getting prostitutes off the streets (Arnold 1971, Gansberg 1971, Goldstein 1976, Zion 1967).

The use of disorderly conduct charges against prostitutes led to considerable tension between the NYPD and the District Attorney's Office. Fearing that these arrests were unconstitutional, prosecutors dismissed charges against alleged prostitutes. This stalemate came to an end when the District Attorney's Office reluctantly agreed to prosecute prostitutes under New York's suspicious-persons loitering law (Chevigny 1969). Sec-

tion 240.35 (subdivision 6) read, "A person is guilty of loitering when he loiters, remains or wanders in or about a place without apparent reason and under circumstances justifying suspicion that he may be engaged or about to engage in a crime." However, this temporary cease-fire between police and the District Attorney's Office had its own troubles in court. The NYCLU attempted to have roundups condemned in a case concerning 41 women, who had collectively been arrested a total of 2,100 times. The criminal court judge, Amos Basel, was highly critical of policing practices and accused the police of knowingly making arrests that would be dismissed because of lack of evidence. Basel argued that this led to so-called revolving door justice, in which the police arrested alleged prostitutes under loitering or disorderly conduct charges, held them overnight, and dismissed their cases the next morning, putting them back on the streets by that afternoon. Though he was sympathetic to the pressures the police were under and understood that gathering evidence to show probable cause for prostitution was painstaking, Basel argued that roundups could not be considered constitutional. However, Judge Basel did not take the opportunity the NYCLU had given him to strike down the suspicious-persons loitering law. Instead, he pointed out that, according to section 230, prostitution was a mere *violation* and that the loitering law was limited to persons who were suspected of engaging in a *crime*.[7]

Responding to critics who felt that the New York State Legislature had made the punishment for prostitution too light in its antiprostitution law (section 230), the state upgraded prostitution from a violation to a Class B misdemeanor and raised the maximum amount of days that could be served by those found guilty from 15 to 91 days in 1969 (Burks 1969, Roby 1972). However, making the punishment for the exchange of sexual services for money more severe did not help the NYPD solve its problem. Indeed, their job only became harder in 1973, when the New York Court of Appeals struck down New York's suspicious-persons loitering law on grounds of vagueness.[8] To make efficient arrests, the NYPD was now limited to two options: they could arrest prostitutes for disorderly conduct—a practice rejected by the District Attorney's Office—or for loitering with the intent to engage in deviant sexual conduct. The latter law had been used to arrest gay men for loitering with the purpose of engaging in same-sex sexual activity. Arguing that all sex outside of marriage is deviant, the NYPD began to use this loitering law to round up women it suspected of being prostitutes (Montgomery 1973).

Two years after New York's suspicious-persons loitering law was struck down, pressure continued to build on the Mayor's Office and the police to address prostitution in Times Square. Reporting on a meeting to combat prostitution, a *New York Times* journalist wrote that it included civic associations "from an area from 30th street to 60th street and from the East River to the Hudson," and that the business interests "represented at the meeting account for more than $9 billion in land" (Schumach 1976b). United in their opposition to prostitution, these groups rallied around a new loitering law, proposed by city officials, that would facilitate the use of street sweeps. Seattle had recently passed such a law and it had survived legal challenge (Schumach 1976b). With no requirement for proof of a commercial exchange, the new loitering law would allow for unfettered police discretion. It seemed as if the NYPD's quest for an enforcement tool that would allow them to sweep the streets had finally come to an end.

However, supporters of the new loitering law faced one last challenge: Would any of the Democratic lawmakers who represented Manhattan in the state legislature agree to sponsor the new law? As devoted civil libertarians, Democratic lawmakers were more likely to favor the legalization or decriminalization of prostitution than to support a new loitering bill. However, as public support for the loitering bill continued to increase, liberal representatives from Midtown and the West Side began to reverse their positions (Schumach 1976a). Manfred Ohrenstein, a state senator from the Upper West Side, and the Senate minority leader in Albany, eventually agreed to sponsor the new loitering bill (Schumach 1976a, Weissman 1976).

What became known as the Ohrenstein Bill was reviewed for its constitutionality by the District Attorney's Office, civil libertarian groups, and other city lawyers. The District Attorney's Office added objective circumstances that it believed would protect the bill from the challenge of vagueness. In contrast to the authors of the "Report on 'Victimless Crimes' in New York State" (Olivieri & Finkelstein 1972-1973), the District Attorney's Office claimed that specific objective circumstances could be delineated that would enable police officers to distinguish between prostitutes and innocent loiterers. The new law stipulated that the police could arrest an individual who "repeatedly beckons, stops or talks with passersby." According to the bill's supporters, "beckoning behavior" could provide probable cause that an individual possessed "the purpose of engaging in prostitution" (Weissman 1976).

Organized pressure from their constituents eventually convinced most Democratic legislators to reverse course and vote in favor of the bill. In the Assembly, Abe Blumenthal agreed to cosponsor the bill, although he insisted

that he would have preferred legalization (Goldstein 1976). State lawmakers also may have been influenced by the selection of New York City as the site of the Democratic National Convention in the summer of 1976. With press attention focused on their city, and pressure from a Democratic mayor (Abe Beame), Democrats wished to provide an attractive picture to the rest of the United States and the world (ibid.). Despite the controversy surrounding it, the new loitering law passed by lopsided margins, in the Assembly by 100 to 20 (Smothers 1976) and in the Senate by 54 to 5 (Weissman 1976).

The Legal Aid Society, calling the new loitering law unconstitutional on grounds of vagueness, brought suit one day after it was passed (Carroll 1976). Initially their case was successful. Judge Altman of the Manhattan Criminal Court issued a withering opinion striking down the new loitering law. He claimed it was the kind of law that police took out of their toolbox when they had no real evidence with which to arrest a person. Raising the same objections to the prostitution-targeted loitering law that had been used against catchall loitering laws, Altman argued that it was overbroad—it failed to distinguish between illegal and innocent conduct. Additionally, the actions listed in the law indicative of the intent to engage in prostitution—repeatedly beckoning, waving and speaking to passersby and drivers—were not illegal. Prostitutes may engage in this behavior, but so do many other people. This made the law vague; it failed to alert individuals to the kinds of conduct that would place them at risk for arrest and it failed to provide police officers with circumstances that would allow them to distinguish between prostitutes and nonprostitutes.[9]

An intermediate appeals court reversed Judge Altman's opinion in 1977 and the case was then taken to the Court of Appeals, New York State's highest court, which upheld the loitering law in *People v. Smith* (1978).[10] In contrast to Altman, the Court of Appeals claimed that section 240.37 avoided the vagueness that characterized the city of Jacksonville's vagrancy law in *Papachristou*. Unlike the Jacksonville ordinance, which cobbled together an array of prohibited statuses and actions, section 240.37 had "a specific purpose" of a "demonstrably harmful sort." Equally important, the prostitution-targeted loitering law "details the prohibited conduct," by which the Court of Appeals meant that the loitering law contained objective circumstances that would allow police officers to distinguish between individuals who held the intention of engaging in prostitution and those who did not.[11] The court emphasized that "based on particulars obvious to and discernible by any trained enforcement officer, it would be a simple task to differentiate between casual street encounters and a series of acts

of solicitation for prostitution."[12] In other words, due to their training, the police were able to tell the difference between prostitutes and nonprostitutes and could be trusted to use their discretion fairly.

The differences between catchall and targeted loitering laws are significant. As the Court of Appeals stated, New York's suspicious-persons loitering law was not limited by place or purpose and it made no attempt to provide objective circumstances that would allow police to make the distinction between suspicious and unsuspicious loitering. Additionally, beckoning behavior is more precise than suspicious behavior. However, although targeted laws are an improvement on catchall laws, that does not ensure that they place adequate limitations on police discretion or that the objective circumstances they provide allow for the distinction between an innocent and a criminal purpose. Does beckoning behavior, whether supplemented or not with other factors (such as clothes, location, etc.), establish probable cause for the intent to engage in prostitution? Several courts have said no. Five state supreme courts, three state appellate courts, and one federal district court have struck down prostitution-targeted loitering laws very similar to New York's on grounds of vagueness and overbreadth. In contrast, three state supreme courts (including New York's) and five state appellate courts have upheld prostitution loitering laws (Struening 2016). Judges, and therefore states, have taken different positions on the constitutionality of targeted loitering laws.

It is also important to consider whether switching from a catchall loitering law to a targeted one changes police tactics. Here, the answer is a clear no. As we have seen, under vagrancy law, police engaged in sweeps. After 1967, with an antiprostitution law on the books and opposition to sweeps from the District Attorney's Office, the police continued to use disorderly conduct and loitering laws to conduct sweeps. In 1973, after the suspicious-persons loitering law was struck down, the police turned to the deviant sex loitering law and continued to engage in sweeps. From the perspective of the police, the practice of rounding up prostitutes never changed; it was simply a matter of finding an enforcement tool that could withstand legal challenge. Large-scale sweeps increased after 1976. One year after the prostitution-targeted loitering law was passed, nearly 10,000 arrests were made for loitering with the purpose of engaging in prostitution, and just under 5,000 were made for prostitution proper (Goldstein 1976).

The making of a new loitering law in 1976 seems out of step with the federal and state court decisions finding vagrancy and catchall loitering laws unconstitutional. At the same time, many residents wanted to curb

the "anything goes" spirit of Times Square, some local businesses believed prostitution was bad for business, and developers and city officials wanted to draw investment dollars to the West Side. Another factor, emphasized throughout this article, is that the NYPD did not see an alternative to roundups. They needed an enforcement tool that did not require a high standard of evidence and loitering laws fulfilled that requirement. The making of a prostitution-targeted loitering law signals that although the vagrancy regime had been dismantled out of concern for civil liberties and due process, new enforcement tools would be necessary to sweep away drug users, prostitutes, and unsheltered individuals. In the following section, I will show how a rationale for police practices that became very popular in the 1990s got its start when Democratic lawmakers were called upon to defend their vote for the prostitution-targeted loitering law in 1976.

Restigmatizing Prostitutes

Bernard Harcourt (2001) explains in *Illusions of Disorder* that the criminalization of prostitution, gambling, and drinking could be logically defended under the doctrine of moral legalism. According to moral legalism, the law's purpose is to uphold the majority's moral code. However, after the demise of moral legalism (Nelson 2001) and the rise of civil libertarianism, it became more difficult to justify why the act of prostitution was a crime. Civil libertarians pointed out that moral crimes had no victim, asking, "so where is the crime?" They also argued that many moral crimes failed to violate John Stuart Mill's harm principle. According to Mill (1991/1859), the only legitimate reason for prohibiting or regulating activity is if it causes harm to others. Based on this principle, prostitution, because it occurs between two consenting adults and does not cause harm to others, should not be regulated by the law. Indeed, when government interferes with the relationship between prostitute and customer, it is denying both individuals their personal liberty. However, Harcourt (2001) shows that defenders of laws against prostitution adroitly reversed the harm principle, so that instead of protecting the relationship between prostitute and customer, it protected the pedestrian from being exposed to the sights and sounds of prostitutes.

Reversing Mill's harm argument was exactly what the liberal lawmakers who voted in favor of the prostitution-targeted loitering law did. They defended their support for the loitering law by restigmatizing prostitutes, who had most recently been redefined as workers, freely contracting agents, and the true victims of the sex trade. When a state legislator opposed to sec-

tion 240.37 claimed that it would violate the rights of sex workers, Senator Ohrenstein shot back that "brazen prostitutes" violate "the rights of other individuals to be able to use the streets without being subjected to those who traffic in this pernicious trade" (Weissman 1976). Asked by reporters to explain their support for the antiprostitution loitering law, state lawmakers repeatedly referred to the prostitutes of Times Square as "aggressive" and "brazen" (Schumach 1975). At a news conference praising the passage of section 240.37, Mayor Beame called Times Square prostitutes "unruly and violent" (Maitland 1977). Only recently portrayed as the true victims of the sex trade by radical feminists, prostitutes were now being described as violent. Interestingly, although feminists had made progress bringing attention to Johns and pimps, the reversal of the harm principle laid all the blame on prostitutes themselves. If aggressive prostitutes are the problem, as put forward by this portrayal, customers and pimps are not party to the harm caused to others.

By representing prostitutes as aggressive and threatening, elected officials created a new victim—the pedestrian who simply wants to enjoy walking down the street. As part of its findings, the New York State Legislature stated that pedestrians passing through Times Square were the "unwilling victims of repeated harassment, interference and assault upon their individual privacy."[13] The use of the term assault is misleading because although the lawmakers meant *verbal assault*, the word assault is suggestive of *physical violence*. Moreover, the contrast between the aggressive prostitute and the innocent pedestrian is deceptive because many of the men walking through Times Square were there because they desired to purchase sexual services. Alternatively, the innocent pedestrian might be in Times Square to buy pornography, watch a peep show, visit an adult store, or attend an adult movie.

By defining the problem of prostitution as a clash between prostitutes as aggressors and passersby as victims, elected officials were able to justify the new loitering law in a period of sexual liberalization and civil libertarian reform. This new definition of the harm caused by prostitution did not depend on the moral judgment that exchanging sex for money is wrong. Instead, it held that the offer of sexual services was the problem and not the consensual commercial sex that followed from it. The beauty of this new definition was its consistency with the liberal principle that law should not regulate private morality but that it could (and should) protect members of the public from offensive sights and sounds. The Wolfenden Report articulated this public/private distinction in 1957, and in response England

deregulated private commercial sex exchanges but outlawed solicitation on the street in 1967 (Watney 1996).

Conclusion

The end of the vagrancy regime created, according to Risa Goluboff (2016, 337), "a new cultural baseline." The sweeping vagueness, lack of due process, and wide police discretion embedded in vagrancy and catchall loitering laws had finally been rejected by the US Supreme Court. However, the making of a prostitution-targeted loitering law suggests that due process victories won in the courts were not well-received on the ground. The public continued to demand that the police round up prostitutes in Times Square. The end of the vagrancy regime was supposed to end a kind of policing that gave police officers broad discretion to pick out troublemakers and out-of-place people. It was supposed to end a kind of policing that demonized and punished socially marginal groups. However, it did not. Instead, sustained public pressure on the police and city hall led to a targeted loitering law taking its place.

The idea that disorderly individuals cause harm to pedestrians and community residents was articulated when Democratic lawmakers had to explain why a loitering law targeted at prostitutes was necessary. This notion that individuals deserve pleasant surroundings when they are out in public spaces grew and developed in the 1990s and has continued into the twenty-first century. Prostitutes were tagged as aggressive and harmful to pedestrians in the 1970s. In the 1990s, this same argument was used to defend police initiatives against homeless individuals (Harcourt 2001, Vitale 2008). Eventually the disorderly-person-as-threat idea morphed into the conviction that productive citizens and affluent consumers deserve attractive urban environments free from individuals who might make them feel uncomfortable or anxious. This, in turn, became one more justification for the new practice of order-maintenance policing. Begun after moral crimes had turned into victimless crimes, this argument defends a vision of urban neighborhoods cleansed of poor people.

I have claimed that there is substantial continuity between the vagrancy regime and the new era of order-maintenance policing. This claim is supported by how police practices aimed at prostitutes stayed the same in New York even after state and federal courts found vagrancy and a catchall loitering law unconstitutional. Although challenged by judges, the District Attorney's Office, and civil liberties organizations, the police continued

to act as if the vagrancy and loitering laws were still constitutional. Pressured by the public, the legislature created a prostitution-targeted loitering law three years after the New York State Court of Appeals struck down a catchall loitering law. This action made clear that, despite civil libertarian discourse, the public and the police wanted the roundups to continue. Additionally, I've shown how Democratic lawmakers stumbled into a defense of the loitering law that was taken up by the supporters of the new form of order-maintenance policing. However, the greatest similarity between the vagrancy regime, targeted loitering laws, and order-maintenance policing is the way that socially marginal individuals are constructed. Under each form of law and enforcement, the individuals targeted are not seen as bearers of rights or women who deserve their government's respect, concern, and care.

NOTES

1. *Fenster v. Leary,* 20 N.Y. 2d 309 (1967).
2. *People v. Berck,* 32 N.Y. 2d 567 (1973).
3. *Palmer v. City of Euclid,* 402 U.S. 544 (1971).
4. *Coates v. City of Cincinnati,* 402 U.S. 611 (1971).
5. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).
6. *People v. Williams,* 20 N.Y. 2d 388 (1967).
7. *Williams*, 20 N.Y. 2d 388.
8. *Berck*, 32 N.Y. 2d 567.
9. *People v. Smith*, 88 Misc. 2d 590 (1976).
10. *People v. Smith,* 44 N.Y. 2d 613 (1978).
11. *Smith*, 44 N.Y. 2d at 620.
12. *Smith*, 44 N.Y. 2d at 621.
13. *Smith*, 88 Misc. 2d 590 ch. 344.

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Abstracts

In the Sites of Operation Condor: Memory and Afterlives of Clandestine Detention Centers

Michael Welch

In the aftermath of the 1973 coup, Chilean intelligence agents moved to develop a security network by recruiting other nations, including the United States. In what would become known as Operation Condor, several dictatorships in the Southern Cone contributed to a centralized computerized system and data bank designed to navigate abductions, detention, torture, and ultimately assassinations. The use of clandestine detention centers became an important tool for interrogation and extermination by both Condor operatives as well as agents involved in related dirty wars. Since the early 2000s, many of those sites have been recovered by human rights groups, which have converted them into memorial spaces. This research examines the afterlives and spatial transitions of numerous such sites located in Buenos Aires (Argentina), Santiago (Chile), Asunción (Paraguay), and Montevideo (Uruguay). By doing so, interpretive commentary considers complex matters of memorialization as well as forgetting, amnesia, and denial.

Rounding Up the Undesirables: The Making of a Prostitution-Targeted Loitering Law in New York City

Karen Struening

Criminal justice scholars have noted the connection between contemporary quality-of-life policing and the high level of discretion enjoyed by police under vagrancy and catchall loitering laws. This article uses a case history of the policing of prostitution in 1970s New York to analyze the transition from vagrancy law to targeted loitering law to 1990s quality-of-life policing. I find that throughout this transition, and despite important civil liberties victories in the courts, policing practices do not change. Over the objections of the NYC Attorney General's Office and judges, the NYPD continued to utilize legally dubious "round ups" and "sweeps" to get prostitutes off the streets. In addition, the civil liberties victories that led to the elimination of vagrancy and catchall loitering laws were undermined by the creation of targeted loitering laws and the arguments used to justify them. My conclusion is that targeted loitering laws act as a bridge between an older form of order maintenance policing and the quality-of-life policing so evident today.