WALKING WHILE WEARING A DRESS: PROSTITUTION LOITERING ORDINANCES AND THE POLICING OF CHRISTOPHER STREET

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INTRODUCTION

New York's prostitution loitering ordinance, § 240.37 of the New York State Penal Code (NYSPC), was passed in 1976 to clean up "aggressive street solicitation" in Times Square and Midtown West and East.[1] A year later 9,565 prostitution loitering arrests were made by the police.[2] The extensive redevelopment of Times Square, the movement of sex work to indoor venues, and the policing efforts of the Giuliani administration eventually led to a decline in the public visibility of prostitution.[3] Additionally, the Internet began to replace "strolling" as a method for attracting customers.[4] However, § 240.37 did not become obsolete. New York's prostitution loitering ordinance was redeployed in the 1990s to target lesbian, gay, bisexual, transgender, and queer (hereinafter LGBTQ) youth of color and to discourage their presence in the gentrifying

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[1] *See* Ronald Smothers, *Prostitution Loitering Bill Passes Albany Legislature*, N.Y. TIMES, June 11, 1976, at 48; Steven R. Weisman, *Senate in Albany Votes a Loitering Bill Aimed at Curbing Rise in Prostitution*, N.Y. TIMES, May 20, 1976, at 39; Tom Goldstein, *New York Appeals Court Upholds Law to Reduce Street Prostitution*, N.Y. TIMES, June 16, 1978, at A1.

[2] Goldstein, *supra* note 1, at A19.

[3] On the many efforts to "clean up" and develop Times Square, *see generally* MARC ELIOT, DOWN 42ND STREET: SEX, MONEY, CULTURE AND POLITICS AT THE CROSSROADS OF THE WORLD (2001); JAMES TRAUB, THE DEVIL'S PLAYGROUND: A CENTURY OF PLEASURE AND PROFIT IN TIMES SQUARE (2005). On the policing of prostitution in New York City, *see generally* ALEX S. VITALE, CITY OF DISORDER: HOW THE QUALITY OF LIFE CAMPAIGN TRANSFORMED NEW YORK POLITICS (2008).

[4] Kit R. Roane, *Prostitutes on Wane in New York Streets But Take to Internet*, N.Y. TIMES, Feb. 23, 1998, at A1.

West Village.[5] The policing of Christopher Street is an example of what Justice Douglas feared in 1972 when he led the Supreme Court in striking down an anti-vagrancy ordinance in *Papachristou v. City of Jacksonville*: vague laws give police officers the power to "round up so-called undesirables."[6]

Prostitution loitering ordinances authorize the arrest of individuals for loitering with the intent to engage in prostitution. Specific circumstances are described in the ordinance to delineate the behavior deemed to be suggestive of "the intent to commit prostitution."[7] Despite national efforts to reform prostitution loitering ordinances following *Papachristou*, these laws remain vague and overbroad.[8] As my review of nineteen prostitution loitering cases shows, courts around the country are divided on whether they are constitutional.[9] By analyzing these cases, I show that prostitution loitering laws have not overcome the constitutional deficiencies endemic to vague laws identified in *Papachristou.*

While the total number of prostitution loitering arrests is currently small,[10] the continued use of this ordinance is significant because it reveals the continuity between the policing practices at issue in *Papachristou* and those in use today. Instead of disappearing, the practice of arresting undesirable individuals for loitering has been absorbed into quality-of-life policing.[11] Closely associated with broken windows theory, quality-of-life

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[5] AMNESTY INTERNATIONAL, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. (Sept. 21, 2005), www.amnesty.org/en/library/info/AMR51/122/2005/en; Duncan Osborne, *Queer Youth of Color Complain of West Village Stop and Frisk*, GAY CITY NEWS, May 23, 2012, http://gaycitynews.com/queer-youth-of-color-complain-of-west-village-stop-and-frisk; Andrea Ritchie, *Unfinished Business: Community Safety Act Needed to End Discriminatory Policing of LGBT New Yorkers*, GAY CITY NEWS, October 22, 2012, http://gaycitynews.nyc/unfinished-business-community-safety-act-needed-to-end-discriminatory-policing-of-lgbt-new-yorkers.

[6] 405 U.S. 156, 171 (1972).

[7] N.Y. PENAL LAW, ch. 40, tit. N, art. 240, § 240.37 (McKinney 2016).

[8] William Trosch, Comment, *The Third Generation of Loitering Laws Goes to Court: Do Laws That Criminalize 'Loitering with the Intent to Sell Drugs' Pass Constitutional Muster?*, 71 N.C. L. REV. 513, 517 (1993).

[9] *See infra* Table 1.

[10] There were 314 arrests for prostitution loitering in New York City in 2013. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVICES, ARRESTS FOR SELECTED PROSTITUTION-TRAFFICKING OFFENSES (as of Apr. 22, 2014) (on file with author).

[11] For an analysis of quality-of-life policing in New York City, *see* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of*

policing is based on the idea that an orderly neighborhood discourages crime while a disorderly neighborhood attracts it.[12] According to its advocates, orderly neighborhoods communicate to lawless, disorderly people that crime will not be tolerated here. In contrast, disorderly neighborhoods, where windows are broken, graffiti is everywhere, and broken bottles and condoms lie on the street, communicate that "no one cares" about this neighborhood. Crime is believed to increase in these neighborhoods because lawless, disorderly people believe that it will be tolerated. But if disorder and low-level crimes can be caught in time and stopped, so the theory goes, more serious forms of crime can be avoided.[13]

Critics of quality-of-life policing argue that it is frequently parasitic on negative stereotypes connecting subordinate members of society with disorder and crime.[14] Laws that give police broad discretion for selecting individuals to stop, search and arrest can be used to target and harass "undesirables."[15] Prostitution loitering ordinances are one example of a larger arsenal of laws that provide police with the tools to disrupt and disperse groups of young people. A complex bundle of associations—race and crime, "deviant" sexuality and vice, women of color and "loose" sexuality, transgendered women and sex work—continues to burden gender nonconforming youth of color with the heavy weight of stigma, turning them into "undesirables." The enforcement of prostitution loitering ordinances requires police to distinguish between prostitutes and individuals who are just out to have a good time. When police officers make this distinction they often draw on emotionally-charged stereotypes that link

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Deterrence, the Broken Windows Theory, and Order Maintenance Policing New York Style, 97 MICH. L. REV. 291, 301-02 (1998); *see also* VITALE, *supra* note 3, at 28-41.

[12] Broken windows theory was first articulated by James Q. Wilson and George L. Kelling in *Broken Windows*, ATLANTIC MONTHLY, Mar. 28, 1982, http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

[13] Loitering laws and quality-of-life policing are similar in that they are both based on the assumption, in the words of Justice Douglas, that "crime is being nipped in the bud." However, Douglas rejected this defense of loitering laws in *Papachristou*, 405 U.S. at 171.

[14] BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 127-35 (2001); Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 803 (1999).

[15] In New York City, one quality-of-life tactic, the "Stop-and-Frisk" policy, was found to be "an indirect form of racial profiling" by United States District Court Judge Shira Scheindlin in *Floyd v. City of New York*. *See* 959 F. Supp. 2d 540, 603 (S.D.N.Y. 2013); *see also* Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 12, 2013, http://nyti.ms/17Vi5XI.

race, youth, gender expression and sexual orientation with crime.[16] Criminal law may no longer target white, professional gay men as it once did, but it continues to place poor, homeless lesbians and gay youth, and in particular transgendered women of color, in jeopardy of arrest.[17]

To illustrate how § 240.37 has been absorbed into quality-of-life policing, I provide an account of how police have tried to decrease the visibility of LGBTQ youth of color in the West Village. Central to the formation of a gay community in New York City in the 1970s and 1980s, the West Village became a meeting ground for LGBTQ youth of color in the early 1990s.[18] As gentrification reshaped the West Village, bringing in profitable businesses and affluent families, hostility grew toward the young people who came to the Christopher Street pier to socialize.[19] In response to pressure from business and community groups, Mayor Giuliani and his police commissioner William Bratton tested their new zero-tolerance policing policy on the West Village, employing a variety of charges, including loitering with the purpose of engaging in prostitution, to arrest

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[16] Several important books expose the extent to which some members of the transgender, gay and lesbian communities remain a primary target of the criminal justice system. *See* JOEY L. MOGUL, ANDREA J. RITCHIE, & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 45-68 (2011); DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 49-69 (2011); ERIC A. STANLEY & NAT SMITH, CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX (2011).

[17] A recent high-profile case of "walking while transgender" has brought needed attention to prostitution loitering ordinances and to the targeting of transgender women of color. Activist and student, Monica Jones, was arrested under an Arizona law that makes it a crime to manifest the purpose to solicit prostitution. Ms. Jones, a black, transgender woman, is an activist with Sex Workers Outreach Project (SWOP). She went to trial and was convicted on April 11, 2014 in the Phoenix Municipal Court. Ms. Jones appealed her case to the Superior Court of Arizona. On January 22, 2015, the Maricopa County Superior Court overturned her original conviction but did not rule that prostitution loitering ordinances are unconstitutional. *See* Arizona v. Jones, LC2014-000424-001 DT (Ariz. Super. Ct. Jan. 22, 2015), https://www.aclu.org/sites/default/files/assets/monica_jones_conviction_reversed.pdf; Elizabeth Nolan Brown, *Prostitution Precrime? Monica Jones and 'Manifesting an Intent' to Prostitute in America*, REASON.COM (Apr. 16, 2014), reason.com/archives/2014/04/16/prostitution-thought-crimes-monica-jones; Chase Stangio, *Walking While Trans: An Interview with Monica Jones*, ACLU (Apr. 2, 2014), https://www.aclu.org/blog/lgbt-rights-criminal-law-reform-hiv-aids-reproductive-freedom-womens-rights/arrested-walking.

[18] Kenyon Farrow, *Making Change: A House of Our Own*, CITY LIMITS (Mar. 15, 2003), http://citylimits.org/2003/03/15/making-change-a-house-of-our-own.

[19] Denny Lee, *Street Fight*, N.Y. TIMES, Mar. 31, 2002, at CY1; Robert F. Worth, *Tolerance in Village Wears Thin*, N.Y. TIMES, Jan. 19, 2002, at B1.

young people and discourage their presence.[20] Subsequent administrations have maintained this policy.[21] The struggle of LGBTQ youth to maintain a presence in the West Village continues to this day, led by youth organizations such as Streetwise and Safe[22] and Fabulous Independent Educated Radicals For Community Empowerment (hereinafter FIERCE).[23]

This Article is organized in the following manner. I look first at the grandfather of modern loitering cases, *Papachristou* v. *Jacksonville*, in which a Jacksonville, Florida vagrancy ordinance was struck down on the grounds of vagueness. After *Papachristou*, state and municipal governments reformed loitering ordinances to bring them in line with that decision.[24] However, I argue that despite efforts to reform such statutes, post-*Papachristou* loitering ordinances remain vague and should be considered unconstitutional. To provide evidence for my assertion, I review a selection of nineteen cases drawn from all over the United States and show that courts are sharply divided on whether prostitution loitering laws are constitutional. I then turn to New York's loitering law, NYSPC § 240.37, and review the New York Court of Appeals case, *People v. Smith*, that declared it constitutional. The final section of this Article uses the policing of Christopher Street to show how a vague law was integrated into recent efforts to "round up undesirables."

I. *PAPACHRISTOU V. CITY OF JACKSONVILLE* AND THE REFORM OF LOITERING LAWS

The Jacksonville ordinance at issue in *Papachristou* was directed at controlling a wide variety of undesirables. Modeled on English vagrancy

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[20] Clifford Krauss, *Efforts on Quality of Life in Village a Success, the Police Say*, N.Y. TIMES, June 24, 1994, at B1.

[21] Rickke Mananzala, *The FIERCE Fight for Power and the Preservation of Public Space in the West Village*, S & F ONLINE (2012), sfonline.barnard.edu/a-new-queer-agenda/the-fierce-fight-for-power-and-the-preservation-of-public-space-in-the-west-village; Osborne, *supra* note 5.

[22] Streetwise and Safe (SAS) builds leadership skills among LGBTQ youth of color who experience gender-based violence and discriminatory policing. *Mission, Vision & Values*, STREETWISE & SAFE, http://streetwiseandsafe.org/who-we-are/mission-vision-values (last visited May 15, 2016).

[23] FIERCE is a membership-based organization building the leadership and power of LGBTQ youth of color in New York City. *About FIERCE*, FIERCE, http://www.fiercenyc.org/index.php?s=84 (last visited May 15, 2016).

[24] Trosch, *supra* note 8, at 517-18.

law, it provided colorful descriptions of the activities and identities that could trigger an arrest:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton, and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children . . . .[25]

Papachristou began when nine individuals were arrested for a variety of so-called crimes, all falling under Jacksonville Ordinance Code § 26-57: (1) "prowling by auto" (two interracial couples on their way to a nightclub), (2) being "vagabonds," (3) being "common thie[ves]" (neither of the individuals arrested for being a common thief was charged with stealing), and (4) "disorderly loitering on street." After a municipal court convicted all nine persons, the cases were combined and reviewed by the Florida Circuit Court, which affirmed the lower court's conviction. The Florida District Court of Appeal refused to hear the case, which the U.S. Supreme Court then accepted for review.[26]

The Court ruled that the Jacksonville ordinance was void for vagueness.[27] Vagueness is a constitutional doctrine drawn from the Due Process Clauses of the Fifth and Fourteenth Amendments. In *Kolender v. Lawson*, Justice Sandra Day O'Connor provides the following description of the principle of vagueness: "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[28] The vagueness doctrine has two parts: the first is directed at individuals who could be arrested and the second is

[25] *Papachristou*, 405 U.S. at 156-57 n.1.
[26] *Id.* at 157-58.
[27] *Id.* at 162.
[28] 461 U.S. 352, 357 (1983).

directed at officers of the law. The Supreme Court suggested in *Kolender* that individuals have a right to fair warning regarding the kind of activities that will lead to an arrest.[29] For example, in *People v. Bright*, the New York Court of Appeals considered an ordinance that prohibited loitering in a transportation facility without a reasonable cause.[30] The court explained that modern train stations, with their stores and restaurants, invite individuals to stroll around and enjoy themselves.[31] According to the court, "Since both transportation facilities at issue here are, in reality, 'public places,' the statute, as applied, does not satisfy due process, since it fails to give unequivocal notice to the unwary that an activity as innocuous as mere loitering is prohibited."[32]

The second part of a vagueness ruling is that the law or ordinance at issue must supply police officers with clear guidelines as to what kinds of conduct establish probable cause for arrest.[33] Facing a large number of individuals engaged in the same type of behavior, such as individuals standing and walking around a train station, police who lack proper guidelines are especially likely to base arrests on their own biases and beliefs. If police officers are not provided with clear instructions, they are at liberty to apply the ordinance to whomever they wish.[34]

The Court in *Papachristou* ruled the Jacksonville ordinance unconstitutionally vague because it failed to give individuals fair notice of prohibited conduct and it failed to provide police officers with adequate guidelines. However, Justice Douglas's opinion goes beyond asserting the importance of precisely and narrowly written laws. Douglas found that many of the activities and amusements prohibited by the ordinance are important liberty interests:

> The difficulty is that these activities are historically part of the *amenities of life* as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These

[29] *Id.* at 357-58.
[30] 520 N.E.2d 1355, 1356 (N.Y. 1988).
[31] *Id.* at 1361.
[32] *Id.* at 1361.
[33] *Kolender*, 461 U.S. at 358.
[34] *Id.*

> amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.[35]

The Jacksonville ordinance is unconstitutional, in part, because it amounts to a baseless restriction on liberties. To be idle, to hang out, to wander by night or by day, to be boisterous, and to drink are no doubt to make a nuisance of yourself to the sober, busy people who pass you by on their way to work or family responsibilities. But individuals cannot be deprived of the amenities of life unless we want to limit basic liberties and undermine the independence of character on which a pluralist democracy thrives.[36]

Douglas viewed the anti-vagrancy ordinance as a mechanism of social control targeting the poor and the powerless. Indeed, in his view, it acts to impose the moral preferences of the majority on the minority:[37]

> Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure. It results in a regime in which the poor and the unpopular are permitted to stand on a public sidewalk . . . only at the whim of any police officer.[38]

Moreover, Douglas denies that the Jacksonville ordinance can be justified as a mechanism for preventing crime. It may make the work of police officers easier, but only by undermining the rule of law, equality, and justice:

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[35] *Papachristou*, 405 U.S. at 164 (emphasis added).

[36] For a description of liberal democracy that places a high value on nonconformity and "the right to defy submissiveness" discussed by Justice Douglas, *id.* at 164, *see generally* GEORGE KATEB, THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE (1992); *see also* JOHN STUART MILL, ON LIBERTY (1859).

[37] For the classic argument that the role of the U.S. Constitution is to protect minorities from the majority, *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[38] *Papachristou*, 405 U.S. at 170 (internal citations omitted).

> The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.[39]

According to Douglas, a vaguely-worded law allows the midday country-club-goer to pursue his idea of pleasure (golf and martinis), while the midday tavern-goer, intent on pursuing his own amusements (cards and beer), is at risk of arrest. In a democracy, the principle of equality is supposed to protect different visions of the amenities of life.[40] A democratic government is not supposed to judge how an individual amuses him or herself unless the amusement causes harm to others.[41] But without due process, a series of checks on law enforcement compelling the police and the government to treat all individuals in a similar manner, equality evaporates. The lesson of *Papachristou* is that vague laws allow the police to suspend the liberties and equal treatment of groups that lack power.

In the 1960s and 1970s, courts struck down broad vagrancy and loitering laws like the Jacksonville ordinance.[42] Newly written loitering laws were supposed to be free of the constitutional infirmities that Justice Douglas identified in *Papachristou*. However, as I show in the next section, judges differ on whether the new generation of prostitution loitering ordinances is constitutional.

II. MODERN PROSTITUTION LOITERING CASES

Historically, arrests based on prostitution loitering laws have been rarely challenged in court.[43] Indeed, observers charge that the arrest of

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[39] *Id.* at 171.

[40] *See generally* DWORKIN, *supra* note 37.

[41] *See generally* MILL, *supra* note 36.

[42] *See* Trosch, *supra* note 8, at 517.

[43] Recently, legal approaches to prostitution have been reshaped by growing concern about human trafficking. In 2009, the New York State Legislature established a law that

prostitutes simply creates a "revolving door," in which sex workers are arrested, held overnight, given time served or a fine by a judge, and released only to be rearrested again.[44] The cases I have compiled represent the rare instances when individuals arrested for prostitution loitering questioned the constitutionality of the statute.

The cases listed in the following chart were found through a LexisNexis search using the following keywords: prostitution, loitering, and prostitution loitering ordinances. In addition, cases cited in prostitution loitering opinions were added to the list. Each case addresses whether a municipal or state ordinance is constitutional: in ten cases prostitution loitering ordinances were upheld and in nine they were struck down. All of these cases began at the municipal or county level. In two cases, the ordinance was upheld in municipal courts and not appealed. Cases were appealed to the state's court of appeals in nine cases; five of them were upheld and four were struck down. At the state supreme court level, three courts upheld prostitution loitering laws and four struck them down. One case was heard via a habeas corpus petition in a federal district court, where the relevant statute was struck down. This review, spanning thirty-five years

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allows judges to refer individuals arrested on prostitution charges to services if they can show they were coerced into the sex trade. In 2013, special courts called Human Trafficking Intervention Courts were established in all five boroughs of New York City to handle such cases. *See* William H. Rashbaum, *With Special Courts, State Aims to Steer Women Away from Sex Trade*, N.Y. TIMES, Sept. 26, 2013, at A22. Under the new human trafficking law, The Legal Aid Society's Criminal Practice Trafficking Victims Advocacy Project works to vacate the records of individuals arrested for prostitution related offenses who have been victimized by sex traffickers. *See Legal Aid Expands Program for Trafficking Victims*, LEGAL AID SOCIETY (Mar. 22, 2013), http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/legalaidexpandsprogramfortraffickingvictims.aspx. Youth 17 and under arrested for prostitution are supposed to be treated as trafficking victims under the Safe Harbour for Exploited Children Act (N.Y. SOC. SERV. LAW, ch. 55, art. 6, tit 8-a, § 447a-b (McKinney 2016)), first passed in 2008 and revised in 2013. Youth are still arrested for prostitution offenses but they undergo People in Need of Supervision (PINS) proceedings instead of juvenile delinquency proceedings, and are provided with services as opposed to punishment. It should be noted that this new legislation does not alter the policing and arrest of individuals suspected of having engaged in a prostitution offense, including prostitution loitering.

[44] Providers and Resources Offering Services to Sex Workers (PROS Network) & Sex Workers Project at the Urban Justice Center, *Public Health Crisis: The Impact of Using Condoms as Evidence of Prostitution in New York City*, URBAN JUSTICE CENTER (Apr. 2010), 10, http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf; Juhu Thukral & Melissa Ditmore, *Revolving Door: An Analysis of Street-Based Prostitution in New York City*, URBAN JUSTICE CENTER (2003), 5, https://swp.urbanjustice.org/sites/default/files/RevolvingDoorES.pdf.

(1971 to 2006) includes states from all over the U.S.; it demonstrates that no judicial consensus exists on whether prostitution loitering ordinances are constitutional.

Case	**Court**	**Year**	**Ordinance**	**Ruling**
City of Seattle v. Jones 488 P.2d 750	Supreme Court of Washington	1971	Seattle City Code § 12.49.010(g)	Upheld
In re. D 557 P.2d 687	Court of Appeals of Oregon	1976	Portland City Code § 14.24.050	Upheld
City of Akron v. Massey 381 N.E.2d 1362	Municipal Court of Akron, Ohio	1978	Akron City Code § 648.01	Upheld
People v. Smith 378 N.E.2d 1032	Court of Appeals of New York	1978	New York State Penal Law § 240.37	Upheld
Brown v. Municipality of Anchorage 584 P.2d 35	Supreme Court of Alaska	1978	Anchorage Municipal Ordinance § 8.14.110	Struck down
City of Milwaukee v. Wilson 291 N.W.2d 452	Supreme Court of Wisconsin	1980	Milwaukee Municipal Code § 106.31(1)(g)	Upheld
Profit v. City of Tulsa 617 P.2d 250	Court of Criminal Appeals of Oklahoma	1980	Tulsa Revised Ordinances tit. 27, ch. 6, § 154(c)	Struck down
Short v. City of Birmingham 393 So. 2d 518	Court of Criminal Appeals of Alabama	1981	Birmingham General Code § 11-7-33(b)	Upheld
City of South Bend v. Bowman 434 N.E.2d 104	Court of Appeals of Indiana	1982	South Bend Municipal Code ch. 13, art. 4, § 13-55.1	Upheld
City of Toledo v. Kerr 1982 Ohio App. LEXIS 15724	Court of Appeals of Ohio	1982	Toledo Municipal Code § 17-10-112 (II)(a)(5)	Upheld

Case	Court	Year	Ordinance	Ruling
Johnson v. Carson 569 F. Supp. 974	U.S. District Court for the Middle District of Florida	1983	Jacksonville Municipal Ordinance § 330.107	Struck down
Christian v. Kansas City 710 S.W.2d 11	Court of Appeals of Missouri	1986	Kansas City Revised Ordinances § 26.161(c)	Struck down
City of Cleveland v. Howard 532 N.E.2d 1325	Municipal Court of Cleveland, Ohio	1987	Cleveland Codified Ordinance § 619.11	Upheld
Coleman v. City of Richmond 364 S.E.2d 239	Court of Appeals of Virginia	1988	Richmond City Code § 20-83	Struck down
Wyche v. Florida 619 So. 2d 231	Supreme Court of Florida	1993	Tampa City Code § 24-61	Struck down
People v. Pulliam 73 Cal. Rptr. 2d 371	Court of Appeal of California	1998	California Penal Code § 653.22	Upheld
City of Cleveland v. Mathis 735 N.E.2d 949	Court of Appeals of Ohio	1999	Cleveland Codified Ordinance § 619.11	Struck down
City of Spokane v. Neff 93 P.3d 158	Supreme Court of Washington	2004	Spokane Municipal Code § 10.06.030	Struck down
Silvar v. Eighth Jud. Dist. Ct. 129 P.3d 682	Supreme Court of Nevada	2006	Clark County Ordinance § 12.08.030	Struck down

Loitering laws are found unconstitutional for two reasons: vagueness and overbreadth. This Article discussed vagueness above. Overbreadth doctrine refers to ordinances and laws that chill the First Amendment freedoms of expression and association because they are too broad in coverage to provide law-enforcement officials and ordinary citizens with guidance about what conduct is criminal and what is not; they may identify clearly some conduct that is criminal, but they reach beyond that category to include conduct that is not criminal. The purpose of a loitering ordinance may be to prevent the commitment of an illegal activity, such as prostitution or drug use. However, in attempting to prevent an illegal act it may also prohibit constitutionally protected activity, such as that falling within freedom of speech or assembly. In *Thornhill v. Alabama*, the Supreme Court argued that a law that restricted loitering or picketing

outside a place of business, with the purpose of interfering with that business, restricted freedom of expression. According to the Court:

> (The penal statute) in question here . . . does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that, in ordinary circumstances, constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.[45]

Like vagueness, overbreadth doctrine aims to limit the excessive discretion of police and prevent prosecuting officials from selecting out "particular groups deemed to merit their displeasure."[46]

Overbreadth doctrine reflects the theory that freedom of speech is necessary in a democratic society and deserves special protection. As a result, it is not just ordinances or laws that explicitly prohibit freedom of speech that are constitutionally suspect, but also those that cause individuals to be cautious or to refrain from free speech because they fear running afoul of the law. Because of this desire to avoid chilling speech, the doctrine of overbreadth disregards regular restrictions on standing. Third parties are allowed to bring facial challenges to statutes on the basis of overbreadth because of the special nature of First Amendment rights.[47]

In the early 1970s, legislators began to rewrite prostitution loitering laws that would avoid the constitutional infirmities defined and targeted by *Papachristou*. Loitering ordinances that target prostitution were among the first to be enacted after general loitering laws were struck down because of the difficulty of gathering the evidence to make an arrest for an act of prostitution.[48] To avoid having their work struck down because of vagueness, lawmakers had to write laws that specified a criminal intent, gave individuals fair warning of what kind of conduct was prohibited, and helped officers to identify the circumstances that characterized a specific

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[45] Thornhill v. Alabama, 310 U.S. 88, 98 (1940).

[46] *See Papachristou*, 405 U.S. at 170 (citing *Thornhill*, 310 U.S. at 98).

[47] *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863 (1991).

[48] Trosch, *supra* note 8, at 517-18.

criminal intent.[49]

The New York statute provides police officers with three kinds of conduct or circumstances which manifest the purpose of soliciting prostitution: (1) stopping passersby repeatedly, (2) engaging in conversations with passersby repeatedly, or (3) hailing or beckoning drivers repeatedly.[50] It is important to note that, although the above behaviors are sufficient to establish criminal intent, most courts have ruled that they are non-exclusive. This means that an officer can take additional types of conduct into consideration.[51] Additional factors playing an important role in arrests include whether officers know that the individual in question has been convicted of engaging in prostitution or prostitution loitering in the past, clothing, gender presentation,[52] and the possession of condoms.[53]

Courts differ on how well the circumstances described above manifest the intent of engaging in a prostitution offense. After all, hailing drivers, beckoning individuals, and stopping passersby are also activities fundamental to free speech and association. Additionally, hailing,

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[49] *Papachristou*, 405 U.S. at 162.

[50] N.Y. PENAL LAW, ch. 40, tit. N, art. 240, § 240.37 (McKinney 2016).

[51] *See* Coleman v. City of Richmond, 364 S.E.2d 239, 243 (Va. Ct. App. 1988).

[52] Out of nineteen cases included in Table 1, *supra*, two defendants could be described as transgendered women. In *Coleman*, 364 S.E.2d at 240, Coleman was described as "dressed in 'female type clothing'" and wearing "a wig and makeup." In *Short v. City of Birmingham*, 393 So. 2d 518, 519 (Ala. Crim. App. 1981), Short was described as "dressed in female clothing."

[53] A wide variety of organizations, united together under the banner "No Condoms as Evidence Coalition," have worked to prohibit the use of condoms as evidence in prostitution-related offenses in the State of New York. Activists point out that police policy directly contradicts the actions of New York State, which hands out for free 39 million male condoms and 2 million female condoms each year to prevent sexually transmitted diseases. Sex workers and individuals who fear they may be stopped by police often refrain from carrying condoms because they realize that if they are stopped with condoms on them it could lead to arrest. On June 20, 2013, the New York State Assembly passed a bill, A2736, that would prevent police and district attorneys from using condoms as evidence. Unfortunately, the Senate has yet to pass the companion bill, S1379. In another development, Police Commissioner William Bratton has announced that the police will no longer confiscate condoms when arresting individuals for prostitution-related arrests. However, the coalition claims that this policy does not go far enough because the police can still confiscate condoms as evidence when they are investigating the promotion or trafficking of sex workers. *See End the Use of Condoms as Evidence*, www.nocondomsasevidence.org (last visited May 15, 2016); *see also* PROS Network & Sex Workers Project, *supra* note 44; HUMAN RIGHTS WATCH, SEX WORKERS AT RISK: CONDOMS AS EVIDENCE OF PROSTITUTION IN FOUR CITIES (July 19, 2012), http://www.hrw.org/reports/2012/07/19/sex-workers-risk.

beckoning, stopping, and conversing are all activities fairly typical of late night sociability in areas of town where individuals congregate to have fun and where drinking, cavorting, and fooling around are common. In other words, although these behaviors may manifest the intent to commit a prostitution offense, they also may constitute innocent behavior. Moreover, even if someone is intent on a sexual exchange, there is no way to know if he or she wants to exchange sexual services for money or would like to engage in sexual activities without receiving payment. Dress, gender presentation, and whether someone is a "known prostitute" are not reliable indicators of intent. Carrying condoms is an action that a variety of individuals engage in and does not indicate that someone is a sex worker.

An analysis of a selected number of cases included in the above chart allows us to see how judges at various levels of the court system and in a variety of states have evaluated the constitutionality of prostitution loitering ordinances. These cases demonstrate that despite the similarity of prostitution loitering statutes and the fact patterns under scrutiny, judges from around the country differ on whether the circumstances delineated to indicate intent establish that an individual is engaged in sex work.

A. Cases in Which Prostitution Loitering Laws Were Upheld

1. City of Seattle v. Jones

In September 1971, before *Papachristou* was decided, the Supreme Court of Washington heard a challenge to Seattle's prostitution loitering ordinance, City Code § 12.49.010(g).[54] Seattle's ordinance prohibited loitering "in or near any thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution."[55] The Washington court provided a brief overview of the facts: "On July 22, 1969, the appellant was observed by police officers engaging unidentified males in conversation on at least three different occasions between 10:15 p.m. and 10:50 p.m. The last gentleman approached by the defendant told

[54] City of Seattle v. Jones, 488 P.2d 750 (Wash. 1971) (en banc). Seattle City Code § 12.49.010 was subsequently amended for "grammatical reasons" in 1973. The resulting ordinance, Seattle Municipal Code § 12A.10.020, was challenged in 1989 on grounds of overbreadth and vagueness. The Supreme Court of Washington also upheld SMC § 12A.10.020. City of Seattle v. Slack, 784 P.2d 494 (Wash. 1989) (en banc).

[55] *Jones*, 488 P.2d at 751 (citing Seattle City Code § 12.49.010(g)).

the officers she had inquired whether he was 'dating.'"[56] Seattle's ordinance allowed the arresting officers to consider Ms. Jones's status as a "known prostitute."[57] Convicted by two lower courts, Ms. Jones appealed her case to the Supreme Court of Washington, arguing that Seattle's prostitution loitering ordinance should be struck down because it did not provide a reasonable person with a clear understanding of what kind of conduct the ordinance prohibited. The court did not agree with this assertion. It pointed out that Seattle had recently redrawn an earlier loitering law called the "Abroad at Night Ordinance" after the court found an earlier version void for vagueness in *City of Seattle v. Drew*.[58] The Washington court claimed that the new ordinance, which was based on the proposed official draft of the ALI's Model Penal Code, § 250.6, linked loitering to an illegal act and provided nonexclusive examples of the kinds of evidence (the person under suspicion was a known prostitute and that he or she was stopping passersby, conversing with passersby, or beckoning to drivers) that could be used to prove that someone was "manifesting the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution."[59] The court called the language of the new prostitution loitering ordinance "clear and unambiguous" and explained that the dictionary defined purpose to mean intent.[60] In response to the appellant's assertion that the ordinance does not require proof of intent, the court replied: "Loitering is an overt act. Intent may be inferred therefrom by conduct when it is plainly indicated as a matter of logical probability."[61] In other words, the ordinance is not vague because there is a logical relationship between beckoning to drivers, etc., and the intent to engage in an act of prostitution.

2. City of Milwaukee v. Wilson

In the Wisconsin case, *City of Milwaukee v. Wilson*, the defendant Gwendolyn Wilson was convicted of loitering and fined $200 under § 106.31(1)(g) of the Milwaukee Municipal Code, which used the same language as that found in Seattle's prostitution loitering ordinance.[62] The

[56] *Id.* at 751.
[57] *Id.*
[58] *Id.* at 752 (citing City of Seattle v. Drew, 423 P.2d 522 (Wash. 1967) (en banc)).
[59] *Jones*, 488 P.2d at 752.
[60] *Id.* at 752-53.
[61] *Id.* at 753 (citing State v. Davis, 438 P.2d 185, 195 (Wash. 1968)).
[62] City of Milwaukee v. Wilson, 291 N.W.2d 452, 454-55 (Wis. 1980).

defendant was arrested after being watched for thirty-five minutes by two policemen. They observed her having brief conversations with both drivers of vehicles and passersby. In each case, the police testified, the defendant had initiated the conversations. However, the police acknowledged that they were not able to hear the discussions that occurred. The officers described Ms. Wilson as a known prostitute, who had been arrested before for prostitution loitering.[63] Ms. Wilson appealed her case to the Supreme Court of Wisconsin in 1980, arguing that the Milwaukee ordinance was both vague and overbroad.

The court stated that a loitering statute including a specific intent requirement cannot be held void for vagueness. The intent limits the ordinance, giving it the certainty and definiteness that a loitering law requires: "This language sufficiently defines the conduct which the city seeks to proscribe such as that one inclined to obey the ordinance would be able to understand what is and is not allowed."[64] In this case, the Milwaukee court, like the Seattle court, based its ruling on the claim that the loitering ordinance under review was constructed correctly. It does not make any and all loitering illegal, just loitering with the intent to commit prostitution. The court's argument is accurate but does not go far enough. Individuals may well understand that they can be arrested if they are caught loitering while manifesting the purpose of inducing another to engage in an act of prostitution; what they may not understand is that common, everyday actions such as beckoning to drivers and speaking to passersby can be interpreted by officers of the law, prosecutors and judges as providing clear evidence that they intend to commit an act of prostitution. For example, the judge who dissented in the decision did not believe there was enough evidence to show probable cause. She argued that the police were not able to prove whether the plaintiff beckoned to men or passersby beckoned to the plaintiff.[65]

3. Short v. City of Birmingham

In one of two cases involving a transgendered woman, described in the court records as Oscar Short, police officers observed an individual as she walked late at night in an area of Birmingham, Alabama, known to be

[63] *Id.* at 456.
[64] *Id.* at 457.
[65] *Id.* at 460 (Abrahamson, J., dissenting).

frequented by prostitutes. The police reported that they witnessed the suspect hailing several cars and speaking to a driver. Short was arrested under § 11-7-33(b) of the General Code of the City of Birmingham, a prostitution loitering law with language similar to those referenced above. Found guilty by a nonjury Circuit Court, she was sentenced to sixty days of hard labor in 1981. Short appealed to the Court of Criminal Appeals of Alabama.[66] Citing several other cases, including New York's *People v. Smith*, the court upheld the lower court's decision, arguing that loitering ordinances require "proof of intent, which may be inferred from conduct."[67] Short's due process rights were not violated because Birmingham's prostitution loitering ordinance "does not permit arrests to be made arbitrarily and only at the whim of a police officer."[68] The appellate court held that the behaviors detailed in the ordinance (beckoning, conversing, and hailing) provided sufficient proof of intent, along with the officer's testimony that Short had been seen more than once in the same area dressed in female clothing.[69] In this case, the court appears to assume that all biological males who present themselves to the world as females can be considered prostitutes.

4. People v. Pulliam

Dress also was held to be relevant in a case ultimately decided in the Court of Appeals, San Diego County, California, in 1998. At trial, a jury found defendant Sherrie Lynn Pulliam guilty of loitering in a public place with intent to commit an act of prostitution in violation of California Penal Code § 653.22. Ms. Pulliam was described by the arresting officer as "wearing a black tight-fitting miniskirt and a jacket partially unzipped to reveal the inner portions of her breasts."[70] She was waving and yelling at cars in an area known for prostitution. After observing her for twenty to thirty seconds, the arresting officer asked her what she was doing there. Ms. Pulliam immediately confessed and was arrested. Found guilty in Superior Court, the defendant appealed her case to the California Court of Appeals.

The appellant argued that the ordinance at issue was unconstitutional

[66] Short v. City of Birmingham, 393 So. 2d 518, 519 (Ala. Crim. App. 1981).
[67] *Id.* at 522.
[68] *Id.*
[69] *Id.* at 523.
[70] People v. Pulliam, 73 Cal Rptr. 2d 371, 372 (Cal. Ct. App. 1998).

because the guidelines used to indicate intent—repeatedly beckoning to drivers—could be interpreted to signal a variety of purposes. For example, students holding a car wash might engage in beckoning behavior and so might a politician. In response, the court stated that "a statute's 'potential vagueness may be ameliorated by the express enumeration of observable behavior which can serve to guide police discretion [and] . . . if observed, give rise to a legitimate inference of the prohibited intent.'"[71] This response, however, does not provide a direct answer to the question. The plaintiff did not claim there were no guidelines; instead she argued that her overt conduct (e.g., stopping passersby, beckoning to drivers) was subject to more than one meaning. The ordinance was vague, in the plaintiff's eyes, because the circumstances or guidelines did not accomplish their goal. They might give rise to an inference, but how valid was the inference if the same conduct could have several different explanations?

In the cases reviewed above, all of the courts argued that loitering must be attached to a criminal purpose or intent and that, in turn, criminal purpose could be indicated by nonexclusive circumstances. However, in all cases, either clothing, gender expression or the status of being a "known prostitute" contributed to probable cause. Should any of these additional factors be considered as evidence of the intent to commit prostitution? More important, none of these rulings turned a critical eye on the forms of conduct that were said to indicate criminal intent. None of them asked whether beckoning, hailing, and talking to passersby may be common, even typical, forms of conduct in areas of town known for boisterous social scenes. Ultimately, the question of whether prostitution loitering laws are vague turns on whether this form of conduct provides strong evidence that a person intends to engage in prostitution. To answer this question we must ask: Could there possibly be circumstances under which this form of conduct is innocent? Is it possible that a person might beckon or hail drivers or talk to passersby without the intent to engage in prostitution?

B. Cases in Which Prostitution Loitering Ordinances Were Struck Down

1. Johnson v. Carson

In 1983, the City of Jacksonville once again was the site of a

[71] *Id.* at 375 (quoting People v. Superior Court (Caswell), 758 P.2d 1046, 1056-57 (Cal. 1988)).

conflict over loitering. The U.S. District Court for the Middle District of Florida, sitting in Jacksonville, was asked to hear a habeas corpus petition from Anita Johnson, who claimed that she was wrongly incarcerated under Jacksonville's Municipal Ordinance § 330.107. The petitioner claimed that the City of Jacksonville's prostitution loitering ordinance violated the First and Fourteenth Amendments to the United States Constitution.[72] The U.S. District Court conducted a *de novo* review of the entire record and affirmed the U.S. magistrate's decision finding the ordinance overbroad and unconstitutional on its face. The court found that under § 330.107, individuals had been arrested for hitchhiking, getting into a car with another person, walking up to a van, and waving at passing vehicles.[73]

The district court rejected the link between the circumstances specified in prostitution loitering ordinances and the intent to engage in prostitution. Instead, the judge defined these behaviors as First Amendment conduct protected by the Constitution. Citing a number of cases, the district court argued that the freedom of expression, the freedom of movement, and the freedom to associate on a street corner were all threatened by the Jacksonville ordinance. Like Justice Douglas in *Papachristou*, the district court found that the Jacksonville ordinance threatened the "amenities of life," or activities essential to individual liberty. The district judge wrote: "Thus the circumstances enumerated in the Jacksonville ordinance which permit the finding that a loitering individual is manifesting the prohibited conduct forces persons to either curb their freedom of expression and association or face the risk of arrest."[74] Presenting a hypothetical composed entirely of innocent conduct that he believed could lead to arrest under the prostitution loitering ordinance, the district judge claimed: "anyone standing on the street corner repeatedly talking to passersby, even if they are old friends, could be violating the ordinance. Even if the person does not say one word regarding solicitation, such a purpose can be found from the circumstances in § 330.107(b)."[75] Although declining to provide an evaluation of the case on the grounds of vagueness, the U.S. District Court also argued that prostitution loitering ordinances such as Jacksonville's are a "shortcut" and that the legitimate state goal of criminalizing prostitution

[72] Johnson v. Carson, 569 F. Supp. 974, 975 (M.D. Fla. 1983).
[73] *Id.* at 978.
[74] *Id.*
[75] *Id.*

could be achieved through more narrowly constructed laws.[76]

2. Coleman v. City of Richmond

In *Coleman v. City of Richmond*, the Court of Appeals of Virginia reversed a defendant's conviction after a jury found her guilty of loitering for the purpose of prostitution in violation of Richmond City Code § 20-83.[77] The defendant, described as a male dressed in female clothing, a wig, and make-up, had approached seven cars, entered into short conversations with each of the drivers, and gotten into the seventh car, which then drove off. Officers from the vice squad followed and arrested both parties in the car. The driver testified when under questioning by the prosecution that the defendant asked him if he was dating and unbuckled the driver's pants belt. Under questioning by the defense lawyer, the driver said that the defendant asked him for a ride home. The defendant appealed her case, arguing that the ordinance was vague and overbroad and that there was not sufficient evidence to lead to a conviction.

The Appeals Court determined that there was sufficient evidence to sustain a conviction for prostitution in Coleman's case. However, the court was not convinced that the ordinance itself was constitutional. Comparing Coleman to a defendant named Dickerson in another case, who had raised suspicion by wearing female clothes, the court claimed that Dickerson's conduct did not provide probable cause.[78]

The Court of Appeals explained that to determine whether the ordinance was vague or overbroad, it would focus on the circumstances and whether officers of the law could deduce intent from them. In *Coleman*, the circumstances were: (1) whether the defendant was a known prostitute or panderer, (2) whether the defendant engaged in beckoning behavior, and (3) whether the defendant held conversations with passersby or drivers. The court argued that if the three circumstances were sufficient for a conviction, then the ordinance must be ruled unconstitutional because it was overbroad.[79] Innocent conduct, such as being a "known prostitute" while window shopping, or a hitchhiker beckoning to cars, could lead to an arrest. Due to the real possibility of having their conduct misinterpreted, people

[76] *Id.* at 979 (quoting Farber v. Rochford, 407 F. Supp. 529, 534 (N.D. Ill. 1975)).
[77] Coleman v. City of Richmond, 364 S.E.2d 239, 244 (Va. Ct. App. 1988).
[78] *Id.* at 241.
[79] *Id.* at 243.

would be forced to "curb their freedom of expression and association or risk arrest."[80] That a person who did not intend to engage in prostitution might eventually be found innocent did not convince the court that First Amendment rights were safe. "Even if the hitchhiker or former prostitute were acquitted due to lack of evidence of intent, an arrest would be justified under the statute, and the arrest itself chills First Amendment rights."[81]

The court added that the ordinance had problems beyond chilling First Amendment rights. If the circumstances were non-exclusive and therefore were not necessary to prove intent, than the ordinance would have to be considered vague: "If the particular circumstances were included in the ordinance only as suggestions for what kinds of conduct might manifest an intent to engage in prostitution, but are not by themselves sufficient to prove intent, then the circumstances are not relevant to the constitutional inquiry as they have no force of law. . . . Under this construction, the ordinance must also fail, though the defect now is vagueness."[82] Without limiting circumstances "the statute essentially proscribes loitering with an unlawful intent; since loitering is not unlawful, the statute proscribes no illegal conduct."[83]

Like the magistrate in *Johnson v. Carson*, the *Coleman* court argued that anti-loitering law is a flawed policy for addressing prostitution. The court explains: "There are already in place statutes and ordinances prohibiting solicitation for prostitution as well as harassment, disorderly conduct, and breaching the peace. In this case, and in virtually every case where the city could establish the intent element of the ordinance in question, it is likely the city could establish the elements of solicitation."[84] The court concluded that Coleman could have been convicted under the anti-prostitution ordinance, so in her case there was no need for an anti-loitering ordinance. On the other hand, Dickerson could not be convicted of anything because there was not enough evidence to reveal what she intended to do. Dickerson, who was arrested but not convicted, was deprived of her constitutional freedoms of speech and association. The court made clear that the bar for a prostitution arrest must be higher than what is

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 244.
[84] *Id.*

required for loitering with the intent to commit a prostitution offense. Thus, like the U.S. District Court in *Johnson*, the court in *Coleman* viewed prostitution loitering laws as "shortcuts."

3. Silvar v. Eighth Judicial District Court

The last case reviewed here took place in Nevada in 2006. Lani Lisa Silvar entered an unmarked police car and asked the driver if he was dating. When he said yes, she said to forget it and tried to leave the car. The driver identified himself as an officer of the law, and, following the protocol of Clark County's prostitution loitering ordinance, CCO § 12.08.030, asked Ms. Silvar to explain her behavior. She confessed that she was seeking to exchange sex for money but had become nervous when she recognized the police officer from a previous arrest. The officer then arrested Ms. Silvar for manifesting the purpose to solicit prostitution.[85] The Las Vegas Justice Court, which first heard the case, declared CCO § 12.08.030 to be void on grounds of vagueness and overbreadth. The State of Nevada appealed the case to the district court, which reversed the trial court's decision. The Supreme Court of Nevada was then asked to determine whether CCO § 12.08.030 was constitutional in *Silvar v. Eighth Judicial District Court*.[86]

The Supreme Court of Nevada found the wording of Clark County's prostitution loitering ordinance "unduly open-ended."[87] The ordinance stated: "It is unlawful for any person to loiter in or near any public place or thoroughfare in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting for or procuring another to commit an act of prostitution."[88] The Nevada Supreme Court was especially unhappy with the phrase "manifesting the purpose." According to the court, the ordinance failed to provide fair notice because an intelligent person would not know what kinds of conduct could "manifest" the intent to engage in an illegal act.[89] The court was concerned that, "absent adequate guidelines, a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to 'pursue their personal predilections.'"[90] The court further claimed that, even though the statute did identify beckoning and

[85] Silvar v. Eighth Jud. Dist. Ct., 129 P.3d 682, 684 (Nev. 2006).
[86] *Id.*
[87] *Id.* at 685.
[88] *Id.* at 684.
[89] *Id.* at 685.
[90] *Id.* (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

stopping passersby in the street as behavior that manifests the purpose of soliciting prostitution, the ordinance did not enumerate every type of activity that could give rise to an arrest. "Thus, the enforcing officer has discretion over deciding whether a particular unenumerated circumstance supplies the necessary probable cause for arrest. This standard could shift from officer to officer or circumstance to circumstance because the ordinance lacks definitive guidelines."[91] Although guidelines exist (beckoning, stopping passersby, conversation), they are not exhaustive. A police officer could choose to arrest someone based on other kinds of conduct.

The Nevada Supreme Court also found that the ordinance chilled First Amendment activity and was therefore overbroad. Commenting on the activities of hailing, beckoning, and conversing, the court explained, "[T]hese actions, in and of themselves, are constitutionally protected activities that may be performed without any regard to prostitution whatsoever. A person performing these actions may simply be hailing a cab or a friend, chatting on a public street, or strolling aimlessly about. CCO § 12.08.030 chills this constitutionally protected conduct because people would otherwise risk arrest."[92] Like the Virginia Court of Appeals in *Coleman* and the U.S. District Court for the Northern District of Florida in *Johnson*, the Nevada Supreme Court found it difficult to accept that hailing, beckoning, and conversing with passersby and drivers is a clear indication of intent.

The Nevada Supreme Court did not claim that all prostitution loitering ordinances are unconstitutional. They cited New York's relevant statute as having the appropriate type of statutory language.[93] According to the Nevada court, "manifesting a criminal intent" is clearly different from "having a criminal intent." The Nevada Supreme Court explained that "acting under circumstances manifesting a purpose to do something is a far cry from specifically intending to do something. For example, a carpenter carrying a tool belt and ladder down a dark street late at night may well be manifesting the purpose to burglarize a home. This evidence, however, certainly does not show that he or she specifically intends to commit

[91] *Id.* at 686.
[92] *Id.* at 688.
[93] *Id.* at 689 n.39.

burglary."[94] The Nevada court argued that striking "manifesting a purpose" and replacing it with "having a purpose" would provide the ordinance with a definition of specific intent. However, this solution does not fit well with the rest of the court's argument. If circumstances such as beckoning, hailing, and conversing are as difficult to interpret as the court states, how would changing the language from "manifesting" to "having" strengthen the guidelines given to police and prevent what the Nevada court called "arbitrary and discriminatory enforcement?"[95]

The preceding review of cases highlights serious questions about the constitutionality of prostitution loitering ordinances. Courts have divided over whether such circumstances as beckoning, hailing, and conversing provide evidence of intent. Some judges are confident that a trained officer will be able to identify individuals who "manifest" or "have" the purpose of "soliciting" or "engaging in" a prostitution offense. However, other judges dismiss the idea that the described circumstances clearly indicate criminal intent. The circumstances described in prostitution loitering ordinances are common and ordinary, failing to indicate a criminal purpose. Indeed, they are expressive activities that are protected by the First Amendment. To the extent that guidelines are vague and liberties that fall under the First Amendment are unprotected, the new loitering laws do not differ significantly from the Jacksonville ordinance struck down in *Papachristou*. The problem remains that laws that are vague and overbroad give police the power to pick out the "undesirables" and subject them to stops and arrest. Indeed, while the construction and language of prostitution loitering laws are relevant to determining whether they are constitutional, a consideration of how they are actually deployed may be of even greater importance in understanding how they affect the lives of individuals targeted by the police as prostitutes. I will consider this topic after providing an overview of the judicial decisions on New York State's prostitution loitering law.

III. THE NEW YORK CONTEXT: *PEOPLE V. SMITH*

In 1976, the State of New York passed Penal Law § 240.37 (outlawing "loitering for the purpose of engaging in a prostitution offense")

[94] *Id.* at 689 (quoting City of Akron v. Rowland, 618 N.E.2d 138, 144 (Ohio 1993)).
[95] *Id.* at 686.

as part of an effort to decrease prostitution in Midtown West and East, especially Times Square.[96] In passing the law, the New York State Legislature found that prostitutes "harass and interfere with the use and enjoyment by other persons of . . . public places thereby constituting a danger to the public health and safety."[97] It further found that, because of prostitution, "public places have become unsafe and the ordinary community and commercial life of certain neighborhoods has been disrupted and has deteriorated."[98] According to news reports, the new law was a response to public outcry against the quantity of prostitutes patrolling the streets. However, reporters also speculated that the enactment of the state's new anti-loitering law was timed to coincide with the upcoming Democratic National Convention, to be held at Madison Square Garden.[99] The new loitering law was popular with the police. By 1977, twice as many arrests were made for loitering for the purpose of engaging in a prostitution offense as were made for actual prostitution.[100]

The day after it went into effect, Toni Smith challenged New York's new ordinance. Officers of the law observed Ms. Smith for about twenty minutes on Eighth Avenue near 42nd Street. During that time, she stopped and spoke to two men, and then disappeared with a third man into a hotel known to the officers to be used by prostitutes. Ms. Smith emerged from the hotel with her companion after six minutes. The police immediately arrested her.[101] Before the case went to trial, Ms. Smith filed a motion asking Judge Benjamin Altman, a criminal court judge, to strike down § 240.37 on the grounds that it violated the Fourth and Fourteenth Amendments of the United States Constitution as well as the New York Constitution. Ms. Smith claimed that § 240.37 was vague and encouraged arbitrary enforcement by police officers. Judge Altman granted Ms. Smith's motion and dismissed all charges against her because New York's prostitution loitering ordinance

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[96] *See* Smothers, *supra* note 1; Weisman, *supra* note 1; Goldstein, *supra* note 1.

[97] *See* People v. Smith, 393 N.Y.S.2d 239, 240 (N.Y. App. Term 1977).

[98] *See id.*

[99] *See* Weisman, *supra* note 1. A special event can be the trigger for the enactment of a loitering ordinance or an increase in its use. For instance, a New York loitering law applying to transportation facilities was reformed to make it more effective in time for the 1939 World's Fair. *See* People v. Bright, 520 N.E.2d 1355, 1357 (N.Y. 1988).

[100] Goldstein, *supra* note 1.

[101] *Smith*, 393 N.Y.S.2d at 240.

was "vague, overbroad and inhibits free speech."[102]

The criminal court judge wrote a blistering critique of New York's prostitution loitering ordinance. According to Altman, merely adding an intent requirement to loitering laws did not bring them into compliance with *Papachristou*. Like other judges opposed to prostitution loitering ordinances, Altman asserted that under such laws whether a crime has been committed or not is in the eye of the beholder. As he put it, "it is the judgment of the officer which classifies the activity of the defendant that constitutes the crime."[103] Justice Altman found that the conduct officers were told to look for—beckoning, hailing, stopping, and conversing—did not necessarily indicate the intent to engage in a prostitution offense. According to Altman, such activity was open to subjective interpretation and did not provide police officers with the guidelines needed to determine whether it indicated criminal intent. Citing Justice Douglas writing on vague laws in the *Yale Law Journal*, Altman stated, "When the law seeks to operate in this manner, 'suspicion is the foundation of the conviction; the presumption of innocence is thrown out the window.'"[104] Finally, Judge Altman argued that § 240.37 made a mockery of the criminal justice system:

> This statute is one in which arrests are made of those suspected of criminal activity and with respect to whom the police lack sufficient probable cause to effect a proper arrest as to the crime suspected. This statute cannot be considered a viable, valid one or our penal system will have to have been deemed severely restructured.[105]

Altman's position resembled that taken by the Virginia Court of Appeals in *Coleman*. Altman doubted that a constitutional prostitution loitering law could be written. Indeed, he argued that Penal Law § 240.37 was a "suspicious persons" law similar to the Jacksonville ordinance struck down in *Papachristou*.[106]

The Appellate Division reversed Judge Altman's decision and New

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[102] People v. Smith, 388 N.Y.S.2d 221, 228 (N.Y. Crim. Ct. 1976).
[103] *Id.* at 227.
[104] *Id.* (quoting William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 11 (1960)).
[105] *Id.* at 227.
[106] *Id.*

York's Court of Appeals, the highest court in the state, agreed to hear a further appeal. Toni Smith, the appellant, had disappeared, but her lawyer and the state of New York both requested a final review of the law's constitutionality. The court explained that, although a review without an appellant was unusual, two civil suits had been filed against § 240.37 in federal court, and the controversy over New York's prostitution loitering law needed to be resolved.[107]

The New York Court of Appeals addressed appellant's assertion that § 240.37 was unconstitutional by distinguishing between loitering laws that do not contain a specific conduct requirement and those, like New York's prostitution loitering ordinance, that pinpoint either purpose or place. The Court lingered over *Papachristou* as the archetypical example of an ordinance empowering the police to make arrests on a whim. In contrast to the Jacksonville vagrancy ordinance, the Court held, § 240.37 was much more like loitering ordinances that had been upheld: § 240.37 "is not invalid for vagueness because it details the prohibited conduct and limits itself to one crime."[108] The Court of Appeals admitted that marginal cases could arise in which a police officer might make a faulty judgment:

> There is also a remote possibility that a person involved in innocent conversation, such as a pollster or one seeking directions, might be arrested, but that is not envisioned by the statute and the mere fact that an officer in a particular case did not have probable cause to arrest that defendant would not warrant the invalidation of the statute.[109]

According to the Court of Appeals, in rare cases, police officers might well make mistakes, but that possibility did not require the scrapping of prostitution loitering ordinances.[110]

The position taken by the Court of Appeals contrasts sharply with

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[107] People v. Smith, 378 N.E.2d 1032, 1033 (N.Y. 1978).

[108] *Id.* at 1036.

[109] *Id.*

[110] In fact, mistakes were made as soon as the ordinance went into effect. Two women filed suits in federal court against the state and the city, claiming false arrest under § 240.37. One claimed that she had been dragged by the hair into an unmarked car as she walked home in an area (Lexington and 28th) frequented by prostitutes. In these two cases, police expertise did not prevent wrongful arrests from being made. *See Woman Seeks $30,000 Over Arrest as Prostitute: Graduate of Radcliffe*, N.Y. TIMES, July 27, 1978, at B2.

that taken by those judges who struck down prostitution loitering laws. In the latter cases, the concern was not that mistakes would be made, but that all police officers have too much discretion under the statute in question. Justice Breyer expressed this concern in an opinion on an anti-gang loitering law: "The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case."[111] Under any statute, it is possible that a police officer will make an arrest that can be successfully challenged as lacking probable cause. The problem as identified by anti-loitering law judges is rather whether the language of the law is sufficiently precise or provides all police officers with the opportunity to make arrests based on subjective judgments.

By analyzing the opinions of judges who struck down prostitution loitering ordinances on the basis of vagueness and overbreadth, I have shown that there are serious questions about the constitutionality of such statutes. The problem with imprecisely worded laws is how someone empowered to enforce the law compensates for their imprecision. As courts have warned since *Papachristou*, vague laws allow enforcers to consciously or unconsciously rely on stereotypes and negative images to determine whom they will stop and arrest.

IV. WALKING WHILE WEARING A DRESS

Christopher Street, west of Seventh Avenue and down to the Christopher Street Pier, was once a safe haven for members of the LGBTQ communities.[112] One observer recalls what it was like in the 1980s:

> The piers were attractive to youth in particular because they were free public spaces where people could meet dates, dish the dirt, network and practice new stunts. They were also far removed

[111] *City of Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring). This is the most recent loitering case heard by the U.S. Supreme Court. At issue in *Morales* was a gang loitering ordinance forbidding individuals from loitering with no apparent purpose if at least one of the loitering individuals was a known gang member. Officers were empowered to ask loiterers to move on and were allowed to arrest them if they refused to disperse. The Court struck down the Chicago ordinance on the grounds that it was void for vagueness. Although Chicago's gang ordinance differed significantly from prostitution loitering ordinances, *Morales* nonetheless shows that a majority of the 1999 Supreme Court showed great concern about police discretion.

[112] Farrow, *supra* note 18.

> from the sometimes homophobic eyes of parents and, not insignificantly, a relatively safe place to sleep if you were homeless. Identifiably queer homeless youth, particularly transgender ones, were often more comfortable there than in city shelters.[113]

Over the past twenty-five years, gentrification has transformed the West Village, bringing in increasing numbers of homeowners and businesspeople who desire greater order and quiet in an area known for its party atmosphere.[114] While many relatively affluent, white gay men have migrated to nearby Chelsea,[115] LGBTQ youth of color, including large numbers of homeless youth,[116] have continued to come to Christopher Street from all over the metropolitan area. According to the young people who come from neighborhoods like Bedford-Stuyvesant, Brownsville and Harlem, they travel to Christopher Street because it is a place where they can be out and safe.[117] However, there is an ongoing struggle over who belongs in the West Village. Community groups, such as the Christopher Street Patrol, formed in 1990, and Residents in Distress (RID), formed in 2002, see LGBTQ youth of color as outsiders who cause trouble. As one of the founders of the Christopher Street Patrol told the *Times*: "It was getting dangerous. . . . There were tons of kids on the street. And we had no police presence."[118] Residents and business owners, as well as organized groups like RID and the Christopher Street Patrol have demanded that the police and city government address quality-of-life crimes, such as noise, public urination, drug selling, and prostitution.[119]

The police have responded to public pressure by implementing periodic initiatives that allow them to use low-level charges such as disorderly conduct, loitering for the purpose of drug use, public urination, trespassing, prostitution loitering, and prostitution, to stop, frisk and arrest

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[113] *Id.*

[114] Lee, *supra* note 19; Worth, *supra* note 19.

[115] Lee, *supra* note 19.

[116] *See* Lynette Holloway, *Young, Restless and Homeless on the Piers*, N.Y. TIMES, July 18, 1989, at B1; Andrew Jacobs, *For Young Gays on the Streets, Survival Comes Before Pride; Few Beds for Growing Class of Homeless*, N.Y. TIMES, June 27, 2004, http://nyti.ms/1jnnrAJ; NICHOLAS RAY, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS (2006).

[117] *See* Joseph Huff-Hannon, *At a Pier to be Redone, Gay Youth Seek a Haven*, N.Y. TIMES, Mar. 15, 2009, at CY6; Lee, *supra* note 19, at CY1; Farrow, *supra* note 18.

[118] Lee, *supra* note 19, at 9.

[119] Lee, *supra* note 19.

LGBTQ youth of color.[120] While prostitution loitering accounts for a small portion of the arrests made in the Village, it is emblematic of the vague laws that allow police to target and stop gay youth of color.[121] And while the number of incidents is small, in the West Village, most individuals arrested on prostitution-related charges are LGBTQ young people and adults. In 2004, an NYPD official told Amnesty International that all prostitutes arrested in the 6th Precinct, which contains the West Village, are transgendered individuals.[122] The constant harassment they experience by police has led youth to claim that they are being driven out of a place that has strong historic ties to the gay and lesbian community.[123] Transgender youth and young gays and lesbians of color argue that they are being pushed out, in part, because of their race and ethnicity, as well as because most are poor and many are homeless.[124] In a recent study of youth who have survival sex, including LGBTQ youth, young men who have sex with men (YMSM), and young women who have sex with women (YWSW), conducted by the Urban Institute and the youth organization Streetwise and Safe in New York City, 49% of youth believed that they were stopped by the police because of profiling based on race, sexual orientation and/or gender expression.[125]

In many cases, the complaints of residents are legitimate—boisterous young people partying late into the morning are annoying to

[120] *See generally* Osborne, *supra* note 5 (discussing the rise of stop-and-frisk and the NYPD's view of the program as "a necessary anti-crime strategy that has contributed to New York City's low crime rates."). According to an Urban Institute and Streetwise and Safe study of 300 LGBTQ youth living in New York City who are or have been engaged in survival sex, 70% had been arrested by the police at least once. *See* Meredith Dank et al., *Locked In: Interactions with the Criminal Justice and Child Welfare Systems for LGBTQ Youth, YMSM, YWSW Who Engage in Survival Sex*, URBAN INSTITUTE & STREETWISE & SAFE, 33 (Sept. 29, 2015), http://www.urban.org/research/publication/locked-interactions-criminal-justice-and-child-welfare-systems-lgbtq-youth-ymsm-and-ywsw-who-engage-survival-sex/view/full_report.

[121] In Manhattan, there were 415 arrests for prostitution loitering in 2006; this number declined to 325 in 2008, hit 202 in 2010 and shrank to 41 in 2013. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVICES, *supra* note 10.

[122] AMNESTY INTERNATIONAL, *supra* note 5, at 22.

[123] *See* Press Release, FIERCE, LGBTQ Youth of Color Organization—*FIERCE*—Demands Immediate End to the Targeting and Harassment of LGBTQ Youth in West Village (June 3, 2011), http://www.fiercenyc.org/sites/default/files/releases/632011_FIERCE_EndQualityofLife_PressRelease.pdf.

[124] *See* Mananzala, *supra* note 21.

[125] Dank et al., *supra* note 120, at 20.

those who want to sleep, and some young people do engage in offensive and illegal behavior.[126] But the question is how should those complaints be addressed? Quality-of-life policing relies on laws, such as the prostitution loitering ordinance, that allow police to stop young people for poorly defined offenses. As we saw in previous sections, vague laws often portend the violation of constitutional rights. And all too often it seems their purpose is to discourage socially marginal individuals from enjoying public spaces. Is a criminal justice response the right way to respond to young people coming together to socialize and create community?

A. Policing Christopher Street

The Giuliani administration's early experiments with quality-of-life policing began in the West Village in March of 1994. The policing initiative included greater numbers of police patrolling the streets and emphasized giving out summonses for minor offenses that were then locally tracked by computer at the Sixth Precinct. In 1994, three times as many summonses were given out as in 1993.[127] But while this experiment was dubbed a success by city government, and later expanded to include all five boroughs, residents of the fast gentrifying neighborhood continued to complain about disorder and crime.

Renovation of the West Side piers by the Hudson River Park Trust, a joint city and state agency tasked with developing the waterfront into a park, has been a key component of West Village development. The Christopher Street pier, the focal gathering point for LGBTQ youth of color, was shut down for renovations in the late 1990s. This was a serious loss for black and Latino LGBTQ youth, who saw it as part of a larger effort to drive them out of the West Village.[128] When the Christopher Street pier reopened in 2003, a 1:00 AM curfew led to young people congregating on Christopher Street late at night, and contributed to tensions with local residents. One year earlier, in 2002, Residents In Distress (RID) was created

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[126] *See, e.g.*, Lee *supra* note 19, at 9 (explaining one resident's "quality-of-life" frustrations on Christopher Street: "Night after night, transvestite prostitutes and drug dealers use her sidewalk as a pick-up bar, Champagne-drinking room and outhouse.").

[127] Krauss, *supra* note 20, at B2. Krauss asserts that Mayor David Dinkins's community policing initiative began the use of many of the policing techniques later used by the Giuliani administration, a claim supported by Alex Vitale in CITY OF DISORDER. VITALE, *supra* note 3.

[128] *See* David Bahr, *As Piers Close, Gay Protesters See a Paradise Lost*, N.Y. TIMES, Sept. 14, 1997, at CY6; Mananzala, *supra* note 21.

and pressured the police to institute a "'zero-tolerance corridor' running from Washington Square Park to the Christopher Street piers."[129] In 2009, a new police initiative put into place "light towers at two key intersections, a mobile command post at Greenwich and Christopher Streets and a unit of mounted police on weekends to provide 'omnipresence.'"[130] City Council Speaker Christine Quinn attempted to broker a deal in 2006 that would have combined increasing the police patrolling the pier and offering social services to youth,[131] but it failed to come to fruition.

A report by the *New York Times* in 2002 describes the kind of behavior engaged in by young people of color who hang out on Christopher Street. Featuring a 19-year old from Bedford-Stuyvesant named Darnell, the article describes a scene in which Darnell and a number of his friends are sitting around smoking and talking.[132] A driver in a red Nissan stops to speak with the group and, in a few minutes, increasingly loud and jovial banter takes place: "They traded knowing barbs, each one louder and more cutting than the last, until they spotted a blue and white police van. Without a word, the bawdy late-night posse scattered."[133] At no point during this scene did the teens solicit passersby or drivers of cars for prostitution purposes. However, the mere presence of a police car caused the young people to disperse, illustrating the fear that prostitution loitering ordinances can chill freedoms of expression and association.

LGBTQ youth of color have mobilized and fought back against discriminatory policing.[134] Founded in 2000, the youth-led organization FIERCE issued a press statement in 2011 urging that "NYPD's 'Quality of Life initiative' and efforts to 'clean up' Christopher Street are not safe for lesbian, gay, bisexual, transgender and queer youth." The press statement explains that LGBTQ youth feel targeted by an oversized police presence:

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[129] Lee, *supra* note 19, at 9.

[130] Lincoln Anderson, *Gay Bars and Neighbors Say, 'Anything Goes' Has Got to Go*, THE VILLAGER, June 24, 2009.

[131] Steven Kurutz, *The Kids of Christopher Street*, N.Y. TIMES, Oct. 1, 2006, at CY1.

[132] Lee, *supra* note 19, at CY1.

[133] *Id.*

[134] *See, e.g.*, Ritchie, *supra* note 5 (discussing role of LGBTQ youth of color in arguing for passage of the Community Safety Act to fill gaps in policing reforms); Mananzala, *supra* note 21 (describing the creation and success of FIERCE, a group of primarily LGBTQ youth of color involved in West Village politics); Mike Lavers, *Gay Youth Oppose Police in Village*, NEW YORK BLADE, Oct. 22, 2014, at 7 (describing FIERCE protests and responses).

> The NYPD initiative, which is being implemented through excessive measures such as increased police sweeps, stop-and-frisk practices, checkpoints, subway monitoring, and street floodlights and security towers, is targeting and intimidating LGBTQ youth, particularly youth of color, trans women of color and homeless youth.[135]

Opposition to stop-and-frisk policing tactics culminated in an historic march on June 17, 2012, when 60 LGBTQ groups joined with civil rights organizations and leaders.[136] Just days before the march, New York City issued a number of important changes to its Patrol Guide aimed at improving police interactions with transgender and gender-nonconforming individuals.[137] Following years of advocacy by transgender organizations and individuals, the new patrol guidelines prohibited searches solely for the purpose of identifying an individual's "real sex." In addition, officers are required to address and treat individuals according to their gender identity and expression, regardless of the gender they were assigned at birth. An additional victory was won when in August 2013, the New York City Council, overriding Major Bloomberg's veto, passed the Community Safety Act to reduce the discretionary power of the NYPD. The law (1) provides for an inspector general with subpoena power who will be able to make policy recommendations to the NYPD and (2) expands the categories of people who can sue the NYPD for discrimination in state court by adding sexual orientation, gender expression, age and homelessness as

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[135] Press Release, FIERCE, *supra* note 123.

[136] On June 5, 2012, the National Action Network, NAACP, Local 1199 of the Service Employees International Union, and the United Federation of Teachers pledged to work with Human Rights Campaign, the National Gay and Lesbian Task Force, the Empire State Pride Agenda, the New York City Anti-Violence Project, Lambda Legal, the Transgender Legal Defense and Education Fund and other groups to voice opposition to stop-and-frisk policing tactics. These organizations and many others participated in a Father's Day March to End Stop-and-Frisk on June 17, 2012. *See* Paul Schindler, *Why Stop and Frisk Is a Queer Issue*, GAY CITY NEWS (June 6, 2012), http://gaycitynews.nyc/why-stop-and-frisk-is-a-queer-issue; Andy Humm, *Tens of Thousands Silently Protest Excesses of Stop and Frisk*, GAY CITY NEWS (June 21, 2012), http://gaycitynews.nyc/tens-of-thousands-silently-protest-excesses-of-stop-and-frisk.

[137] Paul Schindler, *NYPD Announces New Policies on Interactions with Trans New Yorkers*, GAY CITY NEWS (July 12, 2012), http://gaycitynews.com/nypd-announces-new-policies-on-interactions-with-trans-new-yorkers.

impermissible bases for profiling, in addition to race.[138]

B. LGBTQ Youth of Color: Homeless, Harassed, and Abused

Homophobia and transphobia, as well as the multilayered ways in which poverty and racial discrimination intersect, leave many young people without supportive, caring adults in their lives. Rejection by family members and lack of assistance from school personnel and child welfare workers can lead to homelessness. According to scholars:

> LGBT youth in general experience chronic stress that is inflicted by peers and family members in the form of verbal and physical abuse. However, this verbal and physical abuse is associated not only with increased substance abuse by LGBT youth but also with negative outcomes including school-related problems, running away from home, conflict with the law, prostitution and suicide.[139]

Some young people conceal their identities from their parent or parents and are able to live in their family homes. Those who come out to unaccepting parents may eventually end up in the foster care system or become runaways. Unfortunately, the foster care system is not equipped to help queer youth. Experts claim that foster care service providers do not provide a safe and supportive environment:

> LGBTQ youth in care face multiple layers of discrimination and stigmatization, the psychosocial stress from which may place them at increased risk for substance abuse, sex work, and other activities related to daily survival and may make the quest for an integrated identity and sense of home difficult to fulfill.[140]

Additionally, the likelihood that gender-nonconforming youth will experience discrimination within the foster care system places them at greater risk for living on the street.[141]

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[138] J. David Goodman, *Council Reverses Bloomberg Veto of Policing Bills*, N.Y. TIMES, Aug. 22, 2013, http://nyti.ms/26NGSYv.

[139] RAY, *supra* note 116, at 49.

[140] Sarah Mountz, *Revolving Doors: LGBTQ Youth at the Interface of the Child Welfare and Juvenile Justice Systems*, 1 LGBTQ POL'Y J. HARV. KENNEDY SCH. 29, 31 (2011).

[141] *Id.*

Queer and transgender youth are disproportionately represented among homeless youth. According to the National Gay and Lesbian Task Force Policy Institute and the National Coalition for the Homeless, between 20% to 40% of homeless youth self-identify as part of the LGBTQ community.[142] In a national study of 6,450 transgendered persons conducted by the National Gay and Lesbian Task Force and the National Center for Transgender Equality, the authors found that 19% of respondents experienced homelessness in the course of their lives.[143] As homeless youth without education or skills, frequently facing discrimination in the employment sector, a lack of well-paying jobs, high-priced housing and a paucity of shelter beds, some young people turn to sex in exchange for money or a place to sleep.

Disturbingly, when police interact with LGBTQ youth of color, the latter are frequently subject to harassment and abuse. According to a 2005 national survey conducted by Amnesty International:

> [L]aw enforcement "profile" LGBT individuals, in particular transgender and gender variant individuals and LGBT individuals of color, as potential criminals in a number of different contexts, and selectively enforce "morals regulations," statutes and regulations governing bars and social gatherings, demonstrations and quality of life statutes. Transgender women, in particular transgender women of color, for example, have been profiled as criminal suspects while going about everyday business.[144]

Echoing the conclusions reached by Amnesty International, researchers argue that transgender youth are often targeted by the police: "Transgender youth who are homeless, like all homeless youth, are at high risk for arrest. . . . [P]olice often target and arrest transgender homeless youth for prostitution and other quality of life crimes (e.g., loitering, trespassing) even when they are not engaging in these activities."[145] The long-term

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[142] RAY, *supra* note 116, at 1.

[143] JAIME M. GRANT, LISA A. MOTTET, & JUSTIN TANIS, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 4 (2011).

[144] AMNESTY INTERNATIONAL, *supra* note 5, at 17.

[145] Jody Marksamer, *And by the Way, Do You Know He Thinks He's a Girl? The*

repercussions of the disproportionately high arrests of LGBTQ youth include "sex offender registration, preclusion from public housing, ineligibility for student loans or military service, and limited educational and employment opportunities."[146]

LGBT individuals are also at serious risk of police mistreatment and violence.[147] Police abuse ranges from derogatory remarks to unnecessary and illegal searches of transgender youth to identify biological sex, punching and hitting, and sexual abuse. A study by the Equity Project found that almost 70% of survey respondents indicated that police mistreatment was a "very serious" or "somewhat serious" problem for LGBTQ youth.[148] Additionally, according to the National Center for Lesbian Rights and the Transgender Law Center, one in four transgender persons reported having suffered discrimination by the police in San Francisco in 2003.[149] Another study found that 38% of black transgendered individuals have been harassed, 15% have been physically assaulted, and 7% have been sexually assaulted by the police.[150] For Latinos and Latinas, the survey found that police have harassed 23%, physically assaulted 9%, and sexually assaulted 8%.[151] This level of abuse surely shows both that the police routinely target LGBTQ youth of color and that many officers have conscious or unconscious prejudices against poor, homeless gender and sexuality non-conforming youth of color.

Police have many tools to use against youth congregating in Greenwich Village, and they are sure to replace § 240.37 with another quality-of-life ordinance if that provision is ruled unconstitutional. Nonetheless, striking down the ordinance would send a strong message that

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Failures of Law, Policy, and Legal Representation for Transgender Youth in Juvenile Delinquency Courts, 5 SEXUALITY RES. & SOC. POL'Y 72, 73-74 (2008).

[146] *Id.* at 75-76.

[147] *See* Kristina B. Wolff & Carrie L. Cokely, *"To Protect and to Serve?": An Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual, and Transgender Community*, 11 SEX CULT 1, 16-19 (2007).

[148] KATAYOON MAJD, JODY MARKSAMER, & CAROLYN REYES, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 61 (2009).

[149] SHANNON MINTER & CHRISTOPHER DALEY, TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES (2003).

[150] GRANT, MOTTET, & TANIS, *supra* note 143, at 6.

[151] *Id.*

the Fourteenth Amendment's Due Process and Equal Protection Clauses do not allow laws that give police broad discretion to arrest unpopular individuals. As we saw in Part II, many judges have found that prostitution loitering ordinances give police the discretion to interpret guidelines subjectively and selectively. As I have indicated above, beckoning drivers, like stopping and talking to passersby, is unlikely to provide probable cause that a person is about to engage in a prostitution offense. These activities are common in an area such as the West Village that historically has been the site of public partying. In addition, as multiple reports reviewed above have shown, the police are prone to profile transgender women of color as sex workers. Penal Law § 240.37 is both overbroad and vague. It is time to rule it unconstitutional and stop the profiling of low-income and sometimes homeless LGBTQ youth of color.

CONCLUSION

By surveying the best arguments put forth in the case law, this Article makes the case that prostitution loitering ordinances are unconstitutional on the grounds of vagueness and overbreadth. As I have shown, despite efforts to reform loitering laws, prostitution loitering ordinances display flaws similar to those criticized by Justice Douglas in *Papachristou*. The circumstances that such statutes specify for determining probable cause cast a wide net, allowing police officers to target unpopular groups. In nine out of the nineteen prostitution loitering cases that I reviewed, judges found prostitution loitering ordinances unconstitutional. These judges found that the wording of the ordinances was vague and gave police officers too much discretionary power. Many also argued that beckoning to drivers, as well as stopping and conversing with passersby, are ordinary, everyday activities protected by the First Amendment. These judges concluded that the standard of probable cause could not be met because the circumstances specified in the ordinances were open to such a range of interpretations. Finally, Judge Altman and the judges in *Coleman* argued that loitering laws are simply not a sensible way to address prostitution offenses.

The policing of Christopher Street offers a striking example of just what Justice Douglas feared when he led the Court in striking down the Jacksonville ordinance at issue in *Papachristou*: that vague laws will give

police officers the power to stop, search, and arrest individuals who are members of unpopular groups. Douglas's opinion for the Court argues that the foundation of democracy is equal treatment for all. In democracies, checks are placed on law enforcement out of concern that unpopular groups will not receive equal treatment. The claim here is that police officers are the larger society's overseers, the eyes and ears of mainstream culture, and therefore the enforcers of majoritarian values. For these reasons, vague laws that can be used to profile specific groups and chill their First Amendment rights—such as the prostitution loitering ordinances that are the focus of the Article—must be eliminated.