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Building a Fair and Just New York: Decriminalize Transactional Sex

Frankie Herrmann

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Building a Fair and Just New York: Decriminalize Transactional Sex

FRANKIE HERRMANN[†]

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Introduction

The criminalization of transactional sex work¹ in New York is inequitable, irrational, and unconstitutional—this is not unique to the state, and we as a society do not have to continue to accept it. While it would be difficult to fully undo the harm that criminalization has caused in so many lives, we can decide to discontinue creating those harms. In New York, Prostitution² is a criminal act that can lead to both fines and time in jail or even prison.³ The history of systemic repression of sex work in New York goes back at least to the eighteen hundreds, and in some ways, even earlier.⁴ Criminalizing sex work in New York was the result of the ‘moralist’ panic of an out of touch wealthy and influential few, not of rational public policies set forth by persons well informed about sex work, sex workers, and the justice system.⁵ These influential few targeted the most

1. The terms “sex work,” and “transactional sex;” as well as “sex worker,” “person in the sex trades,” and “person engaging in transactional sex” are generally the preferred terms in public discourse among persons who work with and/or are sex workers or persons engaging in transactional sex. When non-sex workers discuss sex work or sex trades, they should use those terms rather than prostitution, prostitute, hooker, or whore due to the stigma and deeply internalized, dehumanizing, and essentializing notions associated with the latter terms. Using the term “sex work(er)” also reinforces the notion that sex work is, in fact, a job. This work doesn’t speak to the inherent worth or values of a person performing it any more than any service industry, alternative health care provider, or modeling job. The phrases “person in the sex trades” and “person engaging in transactional sex” or “transactional sex worker” are meant to reflect that sexual acts in exchange for currency are not the only resources in exchange – other resources include a place to sleep, food, drugs, airfare, cab fare, clothing, and more. Note that “sex work” describes the act(s) while “sex worker,” “person in the sex trades,” or “person engaging in transactional sex” describes the person. “Sex work” can be used as an umbrella term indicating a wide variety of work and/or acts performed, including but not limited to: stripping, professional domination/submission, pornographic acting or modeling, escorting, cuddling, sensual massage, and oral, anal, or vaginal penetration or stimulation. A “person engaging in transactional sex” or a “sex worker” is a person performing those acts, and while not all people engaging in transactional sex identify as sex workers; the latter will be the term used throughout this paper. Where the terms Prostitution and Loitering are used, here these refer to specific *acts* covered under New York Penal Law §230.00 and §240.37, respectively (described in detail in Section I.B and beyond). Because this article focuses on Prostitution and Loitering, the terms “sex work,” and “Prostitution” are used interchangeably. Both instances specifically refer to oral, anal, and/or vaginal services in exchange for resources such as a fee.

2. In this article, “Prostitution” refers specifically and exclusively to the legal definition as codified in New York Penal Law §230.00; where as “prostitution” refers to the stigmatized common or lay person’s usage. N.Y. PENAL LAW §230.00 (McKinney 2014). However, where the term is quoted from an original source, the original approach is preserved.

3. N.Y. PENAL LAW §230.00 (McKinney 2014).

4. *See infra* Section I.

5. *See infra* Section I.

economically and socially historically marginalized communities—women,⁶ people of color, poor and working classes, immigrants, and persons of historically oppressed sexual and/or gender identities, to name a few. These communities, already facing great systemic challenges, are put in further jeopardy through criminalizing sex work; and further, are placed in positions that undermine confidence in New York’s justice and policing systems. And though these communities continue to bear the brunt of criminalization’s most harmful effects,⁷ *all civilians* are paying the price. Everyone is subject to these laws. All people experience a chilling of their First Amendment rights due to the Loitering⁸ law in New York.⁹ All people experience a reduction in options for economic survival, sustenance, and success when loss of children, freedom, housing, reputation, health, access to justice, and even loss of life are the risks created by the stroke of a legislative pen.¹⁰

Further, criminalization has failed. Because eradicating sex work as a means of subsistence is one of the primary goals of the criminalization advocates,¹¹ the most evident failure of criminalization is that sex work is still a thriving practice in New York.¹² It has additionally failed in that it falsely divides sex workers into categories of “victims” and “criminals”; within these categories it applies State forces to either “help” or “punish” sex workers in an attempt to eradicate the work itself. Either version of State coercion harms both “victims” and “criminals” and fails to provide

6. For the purposes of this article, “woman” means anyone who identifies as a woman or is subject to discrimination based on being perceived as a woman – whether the individual is cis-, trans-, or trans*. Ciswomen are women who were assigned “female” at birth and who identify with that assignation. Transwomen are women who were assigned “male” at birth, and whom identify as female – regardless of whether these women engage in gender affirming medical care or “pass” as female to a cisnormative gaze. Trans* and transdiverse are umbrella terms that include both transpersons and those who do not fully identify with the label on their birth certificate, but also may not fully identify with the binary “opposite” of that label; some common identities under this category include nonbinary, genderqueer, and gender fluid.

7. See, e.g., ERIN FITZGERALD, SARAH ELSPETH, & DARBY HICKEY WITH CHERNO BIKO & HARPER JEAN TOBIN, *MEANINGFUL WORK*: (2015) available at: <http://bit.ly/1PVc8M2>.

8. In this article, “Loitering” refers specifically and exclusively to the legal definition as codified in New York Penal Law §230.00; where as “loitering” refers to the stigmatized common or lay person’s usage. N.Y. PENAL LAW §240.37 (McKinney 2014).

9. See *infra* Section IV.

10. See, e.g., FITZGERALD, ELSPETH, & HICKEY WITH BIKO & TOBIN, *supra* note 7.

11. See *infra* Section I.

12. The New York City Police Department makes about 2,500 prostitution arrests per year. While arrests are not convictions, it is reasonable to assume that due to the clandestine nature of sex work the number of sex work acts far outweighs the number of arrests. David Klepper, *Bill Would Prohibit Condoms from Being Proof of Prostitution in New York*, HUFFINGTON POST (Apr. 28, 2014 12:59 PM EDT), <http://huff.to/1i6wAG0>.

meaningful change for the parties involved, while simultaneously violating both the United States Constitution and the intent of the New York Legislature.¹³

Educated and informed thinkers have advocated for a public policy based on harm reduction and centering the voices of sex workers has been advocated for nearly two centuries.¹⁴ The current public policy structure, based on the “morals” agendas of a vocal and powerful few, cannot, has not, and will not eradicate sex work from society. Lastly, these systems fail because they disproportionately punish and harm already marginalized groups such as people of color, LGBTQI+¹⁵ persons, ciswomen,¹⁶ and the poor and working classes.¹⁷ In a nation that values a fair and just legal system, these effects are not incidental—they are failures.

It is time to put the ill-informed, ill-suited criminalization policy to rest in favor of a rational approach that relies on facts over rhetoric and promotes the New York interests of a healthy and safe populace with confidence and trust in the judicial system, policing powers, and rule of law.

Section I, “How Did We Get Here? Legal & Judicial Systems in New York” explains how New York shifted from a public policy of tolerance toward sex workers, who had prestige in some places, to a failed policy of attempting to eradicate sex work, arresting sex workers, and falsely dividing workers into categories of either “victims” or “criminals.” Section II, “Social Arguments for Decriminalization,” articulates how full decriminalization is consistent with the State interests of Human Trafficking Intervention Courts (HTICs); while the current system undermines public confidence in the judicial system and police forces, restricts sex workers’ ability to engage in legal work if they so choose, does not reduce trafficking, and reinforces the marginalized status of a population that is already vulnerable to abuse from police, ‘pimps,’ and customers. The current approach must be replaced with a voluntary, extrajudicial system offering free medical, social, legal, financial, and peer support services. Section III, “Case Study: The Loitering Statute is Repugnant to Traditional Notions of Fairness and Justice” describes in detail the ways in which the Loitering statute disproportionately impacts already marginalized communities in New York and is counter to the values

13. *See infra* Sections II and IV.

14. *See infra* Section I.

15. Gender and sexuality are so diverse that an acronym cannot hope to capture all identities, hence the “+”.

16. Ciswomen are those women who were assigned a “female” marker on their birth certificates, and who identify with that label.

17. *See infra* Sections I and II.

and aspirations of a fair and just legal system. The Section concludes that these injustices are unavoidable - the statute must be stricken from the penal code. Section IV, “Legal Arguments Against Criminalization” explains the structure of a First Amendment constitutional analysis, outlines and critiques jurisprudence on the statute in New York, and shows how under both a Time-Place-Manner (TPM) and Overbreadth analysis, the Loitering law is contrary to the very founding document of our nation. As local law is subordinate to the United States Constitution, the Loitering statute must be eliminated. Section V offers two short term reforms, but concludes that the entire statutory scheme criminalizing sex work is inequitable, harmful to all but especially to our most vulnerable, is utterly impotent in arresting sex work, and is not rationally related to purported State interests. Full decriminalization is the best option and should be enacted immediately.

I. How Did We Get Here? Legal and Judicial Systems in New York

A. Why Is Sex Work Criminalized in New York?

Who benefits from criminalizing Prostitution in New York? Sexual acts for money on-camera (porn) or in front of paying crowds (stripping) might be taboo, but those acts aren’t criminalized.¹⁸ Rather, New York lawmakers decided to criminalize sexual acts for money between consenting adults that are (typically) off-camera and in private. Today, Prostitution is thought of in New York as not only “taboo” or as against mainstream social conventions, but as an inherently *criminal* behavior.¹⁹ Notably, the very concept of “crime” is itself a human invention. No human action is inherently criminal. Acts become criminal when lawmakers get together and agree to forbid them in society, and then enforce their decisions through powerful State mechanisms such as the police, the judicial system, and systems of incarceration. This process embodies a concept called “criminalization.” Legislators criminalize human behavior

18. See, e.g. William C. Donnino, Practice Commentary: Prostitution, *Editors’ Notes on N.Y. PENAL LAW §230.00* (McKinney 2015) (citing *People v. Greene*, 441 N.Y.S.2d 636 (Criminal Court, N.Y. County, 1981) (explaining that the “[s]exual conduct ‘with another person’ requirement has been held to exclude autoerotic performance by the defendant for another person [or persons] which does not contemplate or include ‘physical contact between the accused and another person.’”).

19. See e.g. Gillian Abel and Taina Bien-Aimé, *Should Prostitution Be a Crime?* N.Y. TIMES (Aug. 26, 2015) available at <http://www.nytimes.com/roomfordebate/2015/08/26/should-prostitution-be-a-crime>.

for a variety of reasons, but often a strong impetus to do so comes from a theory that criminalizing an act will eradicate the undesirable behavior from society.²⁰ But how did sex work become a behavior so undesirable that laws and State powers were invoked to eradicate it?

Prostitution as associated with “breaking the law” or “criminal activity” is a fairly recent phenomenon. The first law against “bawdy houses” was passed in 1672;²¹ however, the act of Prostitution itself did not become a misdemeanor in New York until 1969.²² The path towards criminalization was largely a top-down approach, commanded by the privileged elite in society and coming not from a place of rational public policy, but from conservative religious and moralist panic that focused especially on controlling and criminalizing poor and marginalized sex workers. Further, much of this focus remains in effect today. Then, as now, there were voices of dissent, asking for the same as the voices of dissent are demanding today. It is time to act on nearly two hundred years of advocacy for harm reducing, sound public policies. It is time to decriminalize sex work in New York.

To arrive at this conclusion, Part A of this Section will first examine the roots of criminalization and specialized courts in New York, beginning with colonial America and ending with a reflection that criminalization has largely been an inept deterrent. Part B lays out the modern laws, legislations, and specialized courts and includes a detailed analysis of the most recent pre-Human Trafficking Intervention Court, the Manhattan Midtown Community Court. Part C follows with an intimate look at the intent and workings of the modern Human Trafficking Intervention Courts (HTICs), including findings from a recent report by a sex worker centered nonprofit. Part D concludes with the observation that while HTICs are a welcome step in the right direction, they remain deeply flawed and are unsuccessful at attaining the goals outlined by the Court.

1. Prostitution has Its Roots in Inequities and a History of Harm Reduction

20. For further analysis, see Saby Ghoshray, *America the Prison Nation: Melding Humanistic Jurisprudence with a Value-Centric Incarceration Model*, 34 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 313 (2008).

21. Simowitz, *supra* note 21, at 423. “prostitution was not particularly widespread in colonial America [because] the colonies had a shortage of women and a need for domestic labor [thus] a high demand for women to enter family life kept the supply of women for sex work low.”

22. Mae C. Quinn, *Revisiting Anna Moscowitz Kross’s Critique of New York City’s Women’s Court: The Continued Problem of Solving the “Problem” of Prostitution with Specialized Criminal Courts*, FORDHAM URB. L.J. 665, at 695 (2006).

Prostitution is a means of subsistence, and has not always been a criminal act. Like other forms of immediately available work requiring minimal or no formal modes of access, sex work has historically been connected to deep societal inequities in resources.²³ Gender inequities are important to note—“[f]or a long period in history, women only had a small number of options for economic survival, including getting married, becoming a nun (earlier a priestess), or becoming a prostitute [sic].”²⁴

Sex work was a relatively common way to earn a living in the nineteenth century, with between five and ten percent of women in New York City engaging in Prostitution—unsurprising, given that sex work was one of the better paying occupations available to women, especially for doubly marginalized women such as Black Americans, immigrants and the poor.²⁵ Throughout the late eighteenth hundreds, up until the “morals” driven Progressive Movement brought harsh penalties for Prostitution for the first time in 1910, corralling sex work into red light districts was the most

23. Around the thirteenth century, the spinning wheel was invented; allowing a single person to produce enough thread to survive on their own. This opened up another option for independent economic survival that is also stigmatized to this day—becoming a spinster. In the pre-Industrial Revolution era, Prostitution was not a criminal act, and in some places sex workers even held a position of relative privilege. Priscilla Alexander, *Prostitution: Still a Difficult Issue for Feminists*, in *SEX WORK: WRITINGS BY WOMEN IN THE INDUSTRY*, 184-190 (Frédérique Delacostepp & Asa Akira, eds.) (1998). Because colonies had both a shortage of women and a high demand for domestic labor, there was a low supply of women in the sex trades, especially on American “frontiers” and mining towns. Simowitz, *supra* note 21, at 432. In these places and under these circumstances, “prostitutes [sic] had high status and could move freely in the community.” The post-Industrial Revolution era marks a significant shift in both sex trades and other labor available to women. As economies shifted communities from centering around more rural, agricultural means of subsistence to a mass migration into urban centers, women tried to obtain more factory jobs. Frequently, they were unable to do so, and when they did, they experienced severe sexual harassment and low wages. Given these conditions, and that these women were already perceived as intrinsically immoral for having left home to find any work at all, many women turned to sex work to survive. *Id.* at 184-190. In fact, most sex workers had been previously employed, but had “left their former trades because they could find employment only at the most menial tasks and typically were paid ‘one third less, sometimes half as men, without any inferiority of skill being alleged.’” Simowitz, *supra* note 21, 426 (citing WILLIAM W. SINGER, *HISTORY OF PROSTITUTION* 529) (1858). Inequities in access to resources drive the choice to engage in sex work in modern society as well—unsurprisingly, “money” is cited as the number one reason sex workers engage in the work. *Id.* at 184-190.

24. *Id.* at 187-188.

25. Note that this figure does not differentiate between ciswomen and transwomen. Ida Bastiaens, *Is Selling Sex Good Business?: Prostitution in the Nineteenth Century in New York City*, 3 UNDERGRADUATE ECONOMIC REVIEW 1, 4-8 (2007) available at <http://tinyurl.com/hjdh27a>.

common form of “regulation.”²⁶ Within these districts, however, brothels tended to be unregulated and unsupervised and by mid-century brothels were openly public trade throughout Manhattan.²⁷ Public policy largely tolerated sex work and workers, with more marginalized populations predictably at greater risk of police harassment. Elite brothels were relatively undisturbed, while “streetwalkers” working in predominantly immigrant areas were arrested as “vagrants” and less elite brothels were periodically raided (even though Prostitution itself was not illegal).²⁸

The culture war between those advocating a “morality” based approach to sex work and those advocating for a harm reduction approach was largely won by the harm reductionists throughout the century. Most anti-sex work organizing came from private organizations, and the unsupported and failed few attempts at government regulation or criminalization were principally aimed at poor “streetwalkers” and excluded the relatively wealthier indoor workers, such as those operating in brothels.²⁹ Early public policy commenters on Prostitution took a rational, harm reduction approach to the social issue, with one researcher stating, “[i]f history proves that prostitution cannot be suppressed, it also demonstrates that it [can] be directed into channels where its most injurious results can be encountered, and its dangerous tendencies either entirely arrested or materially weakened. This is the policy to which civilized communities are tending ...”³⁰

2. *Criminalization Came from the Advocacy of a Wealthy Few*

After decades of a culture war between “morality” and a more tolerant or medical response to public policy around sex work, the twentieth century saw the politic of “morality” backed by a few very powerful and wealthy figures advocating for criminalization and blaming sex workers for a range of social ills.³¹

26. Simowitz, *supra* note 21, at 430–434.

27. These ranged from tenant-slums to larger and more expensive entertainment red light districts that were enmeshed with other entertainment businesses such as department stores, theatres, restaurants, hotels, and saloons. Bastiaens, *supra* note 24, at 4–10.

28. *Id.* at 11.

29. For example, 1855, Fernando Woods became the first New York chief executive to attempt to criminalize sex work; and in 1867 the New York State legislature debated a bill to regulate Prostitution; but these did not materialize into a penal code scheme. For a more detailed discussion, see Simowitz, *supra* note 21, at 430, FN 76.

30. Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 74 (1998).

31. Specifically, a small but highly influential “moral reform” group known as “The

In 1911 the Vice Commissioner of Chicago published a pro-criminalization, anti-woman report titled “The Social Evil in Chicago” that marked a turning point in state Prostitution laws across the nation.³² Shortly after, two investigations took place in New York City, resulting in a widely published book with many of the same recommendations. One investigation was a special grand jury investigation of Prostitution initiated by John D. Rockefeller, Jr. (son of the wealthiest man in the United States in the nineteenth century),³³ while a parallel investigation was conducted by the same influential individual who had chaired the Chicago Vice Commission.³⁴

The “moralists” flex of wealth and power appears to have been successful—from 1911 through the 1930s, the former practice of ‘regulating’ sex trades through designated open red light districts faded as these areas were closed across the nation.³⁵ In New York, the prohibitionist policies did not end sex work, rather the work shifted from sex trades in open parlor houses into underground, institutionalized forms that perpetuated widespread corruption of police and other governmental agents.³⁶ This push into underground economies reflected a national pattern

Committee of Fourteen” focused on eradicating “Social Evil” (Prostitution and liquor) in New York, conducting investigations to ‘assist’ and influence both State and local authorities “to secure the *proper interpretation* of the law and its better enforcement.” The Committee’s own report highlights the lack of State or local interest in the Committee’s agenda. Nonetheless, the Committee was able to secure an amendment to a licensing law that automatically made one-half of a certain type of brothel illegal in 1906. See Report of the Committee of Fourteen in New York City (1912) available at <http://tinyurl.com/zpzw4so> (last visited Feb. 5, 2016 at 5:08 PM). Further, they influenced the creation of a Specialized Night Court, established in 1907 within the City’s Magistrate Court system. Under accusations of corruption, that Court was replaced in 1910 by the Women’s Night Court. This court split sex workers into “innocent victims” capable of reformation and worthy of mercy, versus “criminals” deserving of the new punishments; further, the old system of issuing fines was replaced with penalties such as long-term placement in reformatories and jail sentences of up to six months. Quinn, *supra* note 22, at 671–676.

32. The report blamed Prostitution (and sex workers themselves) for “scattering misery broadcast, and leaving in its wake sterility, insanity, paralysis, the blinded eyes of little babies, the twisted limbs of deformed children, degradation, physical rot and moral decay” and stated that “there must be constant repression of this curse on human society.” The report further recommended that “a state must specify that a person is free of venereal disease before issuing a marriage license, that prostitution fines be replaced with imprisonment or probation, and that no woman without a male escort should be permitted in a saloon.” See Simowitz, *supra* note 21, at 425, 432–434.

33. John D. Rockefeller, Sr. founded Standard Oil, becoming the wealthiest man in the United States in the nineteenth century. Bio., *Nelson Rockefeller Biography*, BIO. available at <http://tinyurl.com/jqnwcd0> (last visited Feb. 5, 2016).

34. Simowitz, *supra* note 21, at 433.

35. Simowitz, *supra* note 21, at 434.

36. For example, the massive enterprise of Charles “Lucky Luciano” Lucania described

of “moralist” reforms. In 1910, U.S. Congress passed the Mann Act, prohibiting the transportation of a woman from one state to another for “immoral purposes.”³⁷ Many states passed laws prohibiting living off of the earnings of sex workers, making pandering a criminal offense for the first time.³⁸ As criminalization took hold, the Women’s Night Court also became a public spectacle where fashionable men and women watched proceedings for entertainment value.³⁹ Further, the constructed categorizations of that Court (“victims” versus “criminals”) remain in the legal structure today,⁴⁰ as does a sense that these courts are available for public entertainment consumption.⁴¹

3. *The New York Women’s Night Court*

The New York Women’s Night Court (the Women’s Court) opened in 1910 and operated for nearly sixty years, but due to a combination of an understaffed Manhattan District Attorney’s office and Police Department prosecutors refusing to take the cases, the Women’s Court was abolished in 1967 and cases were moved to the Criminal Courts.⁴²

In the interim, the Women’s Court was not without its critics – one prominent voice advocating for a rational, harm reduction approach was a highly respected attorney and person of faith who provided free counsel to women in the Court, Anna Moscowitz Kross.⁴³ Moscowitz Kross was not a radical—she believed Prostitution had a tendency to degrade women, contributed to the spread of disease, gave “moral” offense to many citizens, and must be addressed by public policy.⁴⁴ But she also believed that dragging sex workers through the court systems as either “criminals” or “victims” was not appropriate; she condemned undercover law enforcement methods as well as the courtroom and sentencing practices as harmful and ineffective. She argued for public policy that respected agency and choice

in Simowitz, Simowitz, *supra* note 21, at 434–436.

37. Bingham, *supra* note 30, at 75–76.

38. *Id.* at 76.

39. Quinn, *supra* note 22, at 671–673.

40. *See infra* Section I.

41. *See infra* Introduction.

42. Quinn, *supra* note 22, at 671–673.

43. Anna Moscowitz Kross’ credibility is extensive - she was one of the first licensed attorneys to graduate from New York University of Law, Chair of Legal Committee of the Forum of the Church of Ascension, and was appointed Assistant Corporate Counsel for New York City in 1919, and Magistrate Court Judge in 1933. Quinn, *supra* note 22, at 667, 669, 682, 685.

44. *Id.* at 670–687.

of those involved in the sex trades.⁴⁵

Despite this rational approach from a professional well-positioned to educate the legislature on best practices, the Women's Court operated on "morals" based criminalization approach for fifty-plus years; finally closing for other reasons. Yet even with the considerable power of the State and two dedicated Courts, the pointed efforts of powerful and wealthy social forces, the Committee of Fourteen and John D. Rockefeller, Jr., failed. Sex work remains.

4. *Manhattan's Midtown Community Court*

This history appears to have been forgotten; as Prostitution remains criminalized, the 'morality' arguments continue, and specialized Courts continue to operate in ways that undermine their stated goals.⁴⁶ In 1969, Prostitution, which had been classified as a violation (a civil breach), was reclassified as a class B misdemeanor (a criminal breach); thus officially making the act (and profession) a criminalized activity.⁴⁷ But in the decades since, a slight recognition of the oddity of criminalizing consensual sex might be detected in the shifting judicial response to the work. In 1993, twenty years after the official advent of criminalization and the failure of the Night Courts, the Midtown Community Court in Manhattan opened as 'problem solving court' "to offer an alternative adjudication process for quality-of-life offenses."⁴⁸ According to the New York Department of Justice Center for Court Innovation (the Center),

Problem-solving [courts attempt] to replace traditional law enforcement's focus on responding to individual offenses with a focus on identifying and addressing patterns of crime, ameliorating the underlying conditions that fuel crime, and engaging the community as an active partner . . . [a]t their core was the idea that it was no longer enough to just arrest, process, and adjudicate an offender, but law enforcement officers, prosecutors, judges, and probation officers also needed to try to reduce recidivism, improve public confidence in justice, and

45. Specifically, she argued for a system based on cooperation and voluntariness, where a doctor, psychiatrist, lawyer, and the client could work together to 'diagnose' the appropriate medical treatment and programming for a client who desired it. Quinn, *supra* note 22, at 685–688.

46. See *infra* Section I.

47. Note that violations are not a criminal offense, rather, they are a civil offense. Misdemeanors, however, are criminal offenses. Donnino, *supra*, note 18.

48. NYC DEP'T OF CITYWIDE ADMIN. SERVICES, *Midtown Community Court*, NYC.GOV (Dec. 5, 2015), <http://tinyurl.com/gumtgk>.

prevent crime down the road.⁴⁹

Further, the Center states that, “[c]ommunity courts, with their complementary goals of reducing crime and incarceration while improving public trust in justice, differ from traditional criminal courts in that they see low-level crimes as opportunities to offer help to defendants rather than as isolated incidents best treated with a short-term jail sentence.”⁵⁰ Thus, in addition to other ‘innovative’ approaches to so-called ‘quality of life’ offenses, the Court is intended to go further than the standard criminal courts by ‘helping’ sex workers out of the sex trades. To do so, the Court “offers” compulsory social services – including participation in “an on-site evidence-based, psychoeducational program.”⁵¹ However, incarceration is still valued and within the power of the Court, and when the Community Court does impose sentences, they are typically harsher than the criminal courts.⁵² The Midtown Community Court only handles guilty pleas and arraignments,⁵³ and the Center for Court Innovations’ Principles of Problem-Solving Justice emphasizes that sanctions and punishment for “minor, quality-of-life crime,” such as Prostitution, has consequences that can include “letters of apology, curfews, increased frequency of reporting, even short-term jail.”⁵⁴

In developing The Midtown Community Court, the State allows a Community Advisory Board of “law abiding citizens” to influence the Court’s planning and development through “[serving] as the Court’s eyes and ears, identifying neighborhood trouble spots and proposing new community service projects.”⁵⁵ In theory, this plan could have served the community well; empowering ordinary civilians to directly influence their local interactions with State resources. Unfortunately, the founding board members were not representative of the Midtown area—which was majority working and middle class persons at the time—but instead was composed

49. ROBERT V. WOLF, CTR. FOR COURT INNOVATION, DEP’T OF JUSTICE, BEST PRACTICES: PRINCIPLES OF PROBLEM-SOLVING JUSTICE 1 (2007) *available at* <http://www.courtinnovation.org/sites/default/files/Principles.pdf>.

50. KATIE CRANK, CTR. FOR COURT INNOVATION, DEP’T OF JUSTICE, COMMUNITY COURTS, SPECIALIZED DOCKETS, AND OTHER APPROACHES TO ADDRESS SEX TRAFFICKING 1 (Dec. 5, 2015) *available at* <http://tinyurl.com/h6pktnt>.

51. *Id.* at 2.

52. Quinn, *supra* note 22, at 671–673. *Id.* at 703.

53. *Id.* at 671–673.

54. WOLF, *supra* note 49, at 7–8.

55. JOHN FEINBLATT ET AL., CTR. FOR COURT INNOVATION, DEP’T OF JUSTICE, THINK PIECE: NEIGHBORHOOD JUSTICE, LESSONS FROM THE MIDTOWN COMMUNITY COURT 3, (1998) *available at* <http://tinyurl.com/jrbph4e>.

of eight influential individuals associated with business or government.⁵⁶ To its credit, the Court did seek assistance from “community leaders” in creating its agenda in the jurisdiction. Unfortunately, the “leaders” the Court looked to included individuals with agendas that were at odds with the “innovative” approaches to criminalized acts that the Court was designed to facilitate. One such member was the president and founding member of Residents Against Street Prostitution (RASP).⁵⁷ Barbara Feldt believed that the criminal courts then handling Prostitution offenses were, in fact, too lenient.⁵⁸ Not only did she find the Courts too lenient, she also spoke out against the actions of social workers from Dr. Wallace’s Foundation for Research on Sexually Transmitted Diseases, believing that their work validated the sex workers presence in her neighborhood.⁵⁹ The offending activity—the social workers were patrolling the City in a well-equipped van and offering hot meals, showers, condoms, food coupons, and health testing.⁶⁰ Feldt also asserted that her life was directly at stake due to the presence of street sex workers.⁶¹ However, one might question the veracity of her claim; as she herself undermined this assertion in a 1993 interview, stating, “the main thing is the yelling, you would not know they were there if they would just shut up.”⁶² If this non-life threatening activity is actually her main concern, it is tempting to speculate that she may have inflated the actual danger she perceived in an attempt to reach her anti-street Prostitution goals. It is interesting to note that her goal was not to eradicate Prostitution per se, but specifically *street* Prostitution, thus repeating a historical pattern of targeting the poorest and most marginalized sex workers.

Midtown Community Court, like its predecessors, “highly encouraged” the public to observe the Court in action—even publishing a newsletter that described the Court as “fascinating to watch.”⁶³ The Court claims that the intent was not to publicly shame those sentenced, but to

56. Quinn, *supra* note 22, at 701.

57. *Id.* at 700.

58. *Id.* at 671–673.

59. Charles S. Clark, *Prostitution: Will Neighborhood Crackdowns Curb the Sex Trade?* CQ RESEARCHER Vol. 3, Issue 22 (June 11, 1993) available at: <http://tinyurl.com/gpl3pah>.

60. *Id.*

61. Quinn, *supra* note 22, at 671–673.

62. Clark, *supra* note 59. (quoting Feldt in the *Manhattan Spirit*, June 2, 1992 (original source could not be located)).

63. The Court promised that offenders would not merely be sentenced to ‘time served,’ as was often the case in the criminal court system. Rather, offenders are frequently sentenced to community service, commenced immediately after sentencing to performing public outdoor acts such as painting over graffiti or sweeping the streets—all while forced to wear a blue vest with the Court’s name on it. Quinn, *supra* note 22, at 665, 702.

“honor the idea of community by making justice restorative and accountable to neighborhood stakeholders” so as to “stem the widespread crime and disorder that *demoralize* law-abiding residents” in Midtown—an area the Center describes as “teeming with quality-of-life crime.”⁶⁴

On the surface, these efforts appear to have had some impact. According to the Center, within the first two years neighborhood Prostitution arrests dropped sixty-three percent.⁶⁵ In 1997, Feldt declared that “street prostitution was no longer a problem in the neighborhood”⁶⁶ and disbanded RASP. However, although these events suggest that the Midtown Community Court was successful in preventing or reducing so-called “quality-of-life” offenses, the workers (like their predecessors) in actuality merely shifted tactics and methods of work; including moving to other, possibly more dangerous neighborhoods and boroughs, and shifting to other illegal activities (e.g., shoplifting, drug dealing) to replace lost income.⁶⁷ Indeed, researcher Robert R. Weidner, who studied sex worker behavior after the Midtown Community Court opened, confirmed that “displacement of prostitutes [sic] to other boroughs has been ‘prevalent.’”⁶⁸ The Center appears to agree with this assessment, stating that sex workers “began to change how they conducted business” and that some altered their work hours or moved indoors—listing dead last that “[o]thers took advantage of court-based services to help them get out of the business.”⁶⁹ Author Mae C. Quinn points out,

[T]he Midtown Community Court has developed (a unique program) where social workers partner with officers to use a carrot-and-stick approach to forcefully encourage sex workers to avail themselves of services . . . [t]he involvement of police officers to push sex workers into accepting services because the Court thinks they need them is, however, highly paternalistic and fails to respect individual sex workers’ autonomy. The reality is, for good or for bad, some individuals do not wish to leave the sex

64. Feinblatt, *supra* note 55, at 3.

65. *Id.* at 5.

66. Quinn, *supra* note 22, at 702.

67. JUHU THURKRAL, ESQ. ET AL, SEX WORKERS PROJECT AT THE URBAN JUSTICE CENTER, *REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 15* (2003) [hereinafter Thurkal, *Revolving Door*] (citing MICHELE SVIRIDOFF ET AL., *DISPENSING JUSTICE LOCALLY* 150–152, 154–155 (Amsterdam: Harwood Academic Publishers, 2000)).

68. Quinn, *supra* note 22, at 708 (citing Robert R. Weidner, *I Won’t Do Manhattan: Causes and Consequences of a Decline in Street Prostitution* 88 (Marilyn McShand & Frank P. Williams, III eds., 2001)).

69. Feinblatt, *supra* note 55, at 5.

trade and are not interested in being ‘rescued.’⁷⁰

B. Codified: New York Sex Work Law Today

1. *On Prostitution and Loitering*

Article 230.00 of New York Penal Law (Prostitution) states that, “A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct⁷¹ with another person in return for a fee. Prostitution is a class B Misdemeanor.”⁷² “Misdemeanor” means an offense⁷³ for which a sentence to a term of imprisonment up to one year may be imposed.⁷⁴ A class B misdemeanor is less severe than a class A, with no minimum term of incarceration, but up to 90 days in county or city jail.⁷⁵

In 1976, Article 240.37, “Loitering for the Purposes of Engaging in a Prostitution Offense” (Loitering) was added.⁷⁶ The text of the statute forbids a person to remain or wander in a public place while conducting acts such as repeatedly beckoning or stopping cars or passers-by or attempting to engage passers-by in conversation, for the purpose of engaging in acts covered under Article 230.00 (Prostitution).⁷⁷ A person

70. Quinn, *supra* note 22, at 717–718.

71. “Sexual conduct is not defined within the statute. This essentially grants courts the discretion to decide what amounts to sexual conduct on a case-by-case basis. Most recent decisions cite *People v. Costello*, where the court found that the purpose of NYPL Section 230.00 was to ‘prohibit commercial exploitation of sexual gratification.’ The court in *Costello* reasoned that the ‘common understanding of prostitution’[sic] comprises three specific prongs: sexual intercourse, deviate sexual intercourse and masturbation. Although the ruling in *Costello* has not been overturned, other courts, as in *People v. Hinzman*, have expanded and furthered its definition to include, ‘conduct done to satisfy desire.’ A more recent decision in *People v. Medina* opted for a less restrictive definition: ‘inasmuch as the *Costello* court derived its definition of ‘sexual conduct’ not from the statute but from ‘common understanding’ which is subject to change, this court is not persuaded that it should accept the categories of activity offered there.’ The court based its decision on a present-day ‘common understanding’ of sexual conduct, again allowing for case-specific determinations of what constitutes sexual conduct for the purpose of prostitution.” JHU THURKRAL, ESQ. ET AL, SEX WORKERS PROJECT AT THE URBAN JUSTICE CENTER, BEHIND CLOSED DOORS: AN ANALYSIS OF INDOOR SEX WORK IN NEW YORK CITY 26 (2005), [hereinafter Thurkral, Behind Closed Doors] available at <http://tinyurl.com/zckmf5y>.

72. N.Y. PENAL LAW §230.00 (McKinney 2014).

73. Other than a traffic infraction. N.Y. PENAL LAW §230.00 (McKinney 2014).

74. YPDCRIME, *New York State Felony Classes and Sentences*, http://ypdcrime.com/penal.law/felony_sentences.htm (last visited Dec. 20, 2014).

75. *Id.*

76. N.Y. PENAL LAW §240.37 (McKinney 2014).

77. N.Y. PENAL LAW §240.37 (McKinney 2014).

who violates §240.37 (Loitering) is guilty of a violation, with convictions and associated penalties increasing for persons previously convicted of Prostitution or Loitering.⁷⁸ The statute was held constitutional in face of claims of void-for-vagueness in 1978,⁷⁹ but according to one former Penal Law Practice commentator, “fair and reasonable evaluation of such conduct as beckoning to or engaging passersby in conversation, requires a knowledgeable and restrained attitude on the part of law enforcement officers, less unwary or unsophisticated innocent citizens be subjected to arrest and prosecution hereunder.”⁸⁰ As will be demonstrated in Section II, there are significant reasons to doubt fair restraint is being exercised in New York. Further, significant constitutionality questions remain. Section III will address a few of these, using the Loitering statute as a case study.

2. *On Trafficking*

To understand the legal and judicial system in New York requires an understanding of the creation of trafficking laws and the courts that address them. The modern twist on centuries old efforts at ending sex work through black letter law is a slew of legislation aimed at punishing sex traffickers and protecting sex trafficking survivors.⁸¹ Perhaps a late-comer extension of the Mann Act, sex trafficking became a class B felony in New York in 2007, meaning it warrants a much more severe punishment than Prostitution itself.⁸² Violating Article 230.34, “Sex Trafficking,” is punishable by five to twenty-five years in prison, or perhaps more if other crimes or previous convictions are involved.⁸³ This law is reflective of a national focus on sex trafficking, as demonstrated by acts of the national Congress such as the Trafficking Victims Protection Act of 2000 (Congress’ ‘holistic approach’ to combat trafficking in the United States and abroad, seeking to prevent trafficking through measures that are meant

78. Penalties also increase for previous convictions of §230.05, but that is beyond the scope of this paper. N.Y. PENAL LAW §240.37 (McKinney 2014).

79. *See People v. Smith*, 378 N.E.2d 1032 (1978).

80. Hechtman, Practice Commentary to Penal Law §240.37 (McKinney 1980).

81. While most legislation and many resources uses the term ‘victim,’ I choose to use the term survivor here; intended to better reflect holistic personhood on the part of the individuals who have experienced or are experiencing sex trafficking rather than essentialized subjugation. However, where the term ‘victim’ is used in the original, it has been preserved.

82. N.Y. PENAL LAW §230.34 (McKinney 2014).

83. *Id.*

to punish the trafficker and protect the survivor).⁸⁴ New York's legislature reflected national trends aimed at "saving" sex trafficking survivors in passing the Anti-Human Trafficking Act of 2007 (criminalizing sex and labor trafficking⁸⁵ while encouraging investigations, better identifying the survivors, and establishing services such as health care, job training, food, clothing, and shelter that are available only to law-enforcement "confirmed" survivors)⁸⁶ and the Safe Harbor for Exploited Children Act of 2008 (first introduced in 2005,⁸⁷ the Act treats anyone under eighteen who is arrested for Prostitution as a "sexually exploited child"⁸⁸ and waives the requirement that a minor be law-enforcement "confirmed" prior to being mandated into a short-term "safe house" with twenty-four hour crisis intervention, medical care, and other supportive services).⁸⁹ While forced or coerced sex acts are clearly not something public policy should tolerate, the focus on trafficking and systems responding to that focus leave much to be desired.⁹⁰

Sex trafficking survivors are also allowed a process that will vacate related Prostitution and Loitering convictions from their records through a post-judgment motion.⁹¹

While this vacating convictions option is clearly a step in the right direction for those whose circumstances fit under the law, the actual process

84. Hon. Toko Serita, *In Our Own Backyards: The Need for a Coordinated Judicial Response to Human Trafficking*, N.Y.U. REV. L. & SOC. CHANGE 635, 645 (2012).

85. William Rashbaum, *With Special Courts, State Aims to Steer Women Away from Sex Trade*, NYTIMES.COM (Sept. 25, 2013), <http://www.nytimes.com/2013/09/26/nyregion/special-courts-for-human-trafficking-and-prostitution-cases-are-planned-in-new-york.html>.

86. SUZANNAH PHILLIPS ET AL., INT'L WOMEN'S HUMAN RIGHTS CLINIC AT CITY UNIV. SCHOOL OF LAW, *CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS* 12 (Cynthia Soohoo, ed., 2013).

87. Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, YALE L. & POL'Y REV. 1, 46 (2011).

88. Rashbaum, *supra* note 85.

89. Phillips et al., *supra* note 86, at 12.

90. Specifically, New York Criminal Procedure Law 440.10(i) states in part that, where "The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or 230.00 (Prostitution) of the penal law, and the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided that (i) a motion under this paragraph shall be made with due diligence, after the defendant has ceased to be a victim of such trafficking or has sought services for victims of such trafficking . . . and official documentation of the defendant's status as a victim . . . shall create a presumption [in favor of vacating] . . . but shall not be required to grant the motion." N.Y. CRIMINAL PROCEDURE LAW §440.10 (McKinney 2014). See also, e.g., Anne Elizabeth Moore, *Special Report: Money and Lies in Anti-Human Trafficking NGOs*, TRUTHOUT, (Jan. 27, 2015) available at <http://tinyurl.com/onwe7zx>.

91. Rashbaum, *supra* note 85.

to access this option is rather time consuming and cumbersome and may be difficult or impossible for anyone without an attorney (or at least some legal education)⁹² to navigate and successfully complete.⁹³ For example, the language in the statute is somewhat obtuse, and requires cross-referencing state and national laws and procedures to determine if the defendant even qualifies for relief. The procedural difficulty in accessing this law undermines its spot-on public policy intent. According to the presiding Judge over the Queens Human Trafficking Intervention Court, Judge Toko Serita, the legislative intent and “underlying rationale” for the motion to vacate law was

concern about the damaging effects of criminal convictions on the lives of trafficking victims . . . saddled with criminal records. They are blocked from decent jobs and other prospects for rebuilding their lives. Even after they escape from sex trafficking, the criminal record victimizes them for life.⁹⁴

C. Judicial Systems: Human Trafficking Intervention Courts

1. *The Purpose of the Courts*

The use of specialized courts in New York to offer a “carrot or stick” choice between either court-mandated services or incarceration has only increased since Quinn’s comparative critique in 2006. According to State of New York Chief Judge Jonathon Lippman, Judge Fernando Camacho started the first Human Trafficking Intervention Court (HTIC) in 2004.⁹⁵ Judge Camacho formerly presided over a Domestic Violence Court, where he “perceived that the majority of the young women appearing before him were victims of exploitation . . . not hardened criminals”⁹⁶ and that “most of those charged with prostitution-related offenses were . . . victims of human trafficking.”⁹⁷ This construction of the “victim” versus the “criminal” almost exactly echoes the language of the failed Women’s Night Court discussed previously. After creating three pilot projects,⁹⁸ in

92. Note that “legal education” includes self-education, lived experience, and/or formal education.

93. From personal knowledge gained while working on vacating convictions as a legal intern at the Sex Workers Project in New York in 2015.

94. Hon. Toko Serita, *supra* note 84, at 650.

95. Hon. Jonathan Lippman, *Voiceless Cargo: Human Trafficking and Sex Slavery in the Modern Era*, ALB. GOV’T L. REV. VII, VII (2014).

96. Hon. Jonathan Lippman, *New York’s Efforts to Combat Human Trafficking in the Modern Era*, ALB. GOV’T L. REV. VII, VII (2014).

97. *Id.*

98. Rashbaum, *supra* note 85.

September 2013 New York launched the first statewide system in the United States to deal with human trafficking, developing eleven “problem-solving” courts across the state.⁹⁹ While the Courts were initially started to deal particularly with sexually exploited youth,¹⁰⁰ since its first New York State trafficking conviction in Queens in 2010, the HTIC handles cases involving adults trafficking other adults as well.¹⁰¹ This, perhaps, is because the problem of sexually exploited youth is actually fairly minimal (while of course very serious for the individuals who do experience exploitation), despite much media and government hype to the contrary.¹⁰² The HTIC initially partnered solely with Girls Educational Mentoring Services (GEMS), an organization that serves only ciswomen¹⁰³ and girls ages twenty-one and younger,¹⁰⁴ but by 2012, according to Judge Toko Serita (presiding Judge in the Queens HTIC), “[t]oday, the HTIC handles most of the prostitution cases in Queens County”¹⁰⁵ with a “dynamic collaboration between the court, the District Attorney’s office, the defense bar, and several trafficking victim service providers.”¹⁰⁶

Judge Serita states that, “the underlying premise of the court is that [sexually trafficked individuals] arrested on prostitution charges should not be treated as criminals, but as victims and survivors of commercial sexual exploitation and trafficking.”¹⁰⁷ Publicly stated goals further include, “to promote a just and compassionate resolution to those charged with prostitution – treating these defendants as trafficking victims, likely to be in dire need of medical treatment and other critical services.”¹⁰⁸ Judge Serita has also stated, “while the prosecution of sex traffickers may be an important goal, in New York it should not come at the expense of helping trafficking victims.”¹⁰⁹ Lastly, Chief Judge Lippman states that over the past few years, HTICs have “helped victims of human trafficking begin to break the vicious cycle of exploitation and arrest and be restored to law-

99. *Id.*

100. Hon. Toko Serita, *supra* note 84, at 637.

101. *Id.* at 639.

102. For a more nuanced discussion, see Amanda Hess, *Most of What You Think You Know About Sex Trafficking Isn't True*, SLATE (Apr. 23, 2014) available at <http://tinyurl.com/mm3lva>.

103. Ciswomen are those women who were assigned a “female” marker on their birth certificates, and who identify with that label.

104. Hon. Toko Serita, *supra* note 84, at 652.

105. *Id.*

106. *Id.*

107. *Id.* at 653.

108. AUDACIA RAY & EMMA CATARINE, RED UMBRELLA PROJECT, CRIMINAL, VICTIM, OR WORKER? 3 (Rachel Aimee, ed., 2014).

109. Hon. Toko Serita, *supra* note 84, at 657.

abiding lives.”¹¹⁰ While this sounds like a step in the right direction, critics point out that to access these “critical services” requires arrest; and no other charges involving a “victim” (in which a person is being exploited or harmed, such as in domestic violence, kidnapping, labor exploitation, or sexual assault) require the “victim” to first be arrested.¹¹¹

2. *How the Judiciary Describes Court Operations*

According to Chief Judge Lippman, “Each Human Trafficking Court has a presiding judge trained and knowledgeable in the dynamics of sex trafficking and the support systems available to victims,”¹¹² while Judge Serita highlights there is also a “dedicated . . . prosecutor, two dedicated defense attorneys, and a variety of service providers”¹¹³ who offer information to the Court through written updates about the client’s compliance.¹¹⁴ HTICs typically meet once a week, only hear Prostitution or Loitering charges,¹¹⁵ handle all post-arraignment Prostitution cases,¹¹⁶ and address nearly 95% of all those charged with Prostitution and related offenses in New York.¹¹⁷ If the judge, defendant, and prosecution agree, the defendant will be referred to services such as immigration assistance, shelter, drug treatment, job training,¹¹⁸ medical assistance, or mental health treatment.¹¹⁹

Defendants are eligible for eventual dismissal of charges of their first arrest when they: 1) complete five or six sessions of the agreed upon rehabilitation program, and 2) do not get rearrested within the subsequent six months.¹²⁰ Defendants with previous arrests may be offered a plea requiring additional court-mandated sessions or they may plea to a higher charge.¹²¹ Individuals with several cases open before the court may be required to complete ten to fifteen program sessions.¹²² According to Judge Serita, “there is great diversity among the defendants . . . and it is imperative to match defendants with culturally sensitive and language-

110. Hon. Jonathan Lippman, *supra* note 96, at vii.

111. Ray & Catarine, *supra* note 108, at 5.

112. Hon. Jonathan Lippman, *supra* note 96, at viii.

113. Hon. Toko Serita, *supra* note 84, at 653.

114. *Id.*

115. *Id.*

116. Rashbaum, *supra* note 85.

117. Hon. Jonathan Lippman, *supra* note 96, at ix.

118. Rashbaum, *supra* note 85.

119. Hon. Toko Serita, *supra* note 84, at 653.

120. *Id.*

121. *Id.*

122. *Id.*

specific services.”¹²³ Available services include those directed at ciswomen and “girls” aged twenty one or younger; cis-, trans-, trans*, or queer¹²⁴ foreign born Latinas aged twenty one or over; and defendants of Asian descent.¹²⁵

Judge Serita also notes that, “if a defendant is not interested in services, her case will be sent to an all-purpose criminal court.”¹²⁶

3. *How People in the Sex Trades Describe Court Operations*

In the fall of 2014, the Red Umbrella Project, a peer-led Brooklyn based nonprofit that “amplifies voices of people in the sex trades to take greater control of our lives and livelihoods” monitored media coverage and conducted HTICs observations in Queens and Kings Counties from December 2013 through August 2014.¹²⁷ They believe it’s important for sex workers to turn the tables and report for themselves on how the system affects their community, so they decided to write their own report about the Courts.¹²⁸ The report illustrates the HTIC process in detail. The process starts with an arrest for either Prostitution or, more commonly, Loitering.¹²⁹ The defendant’s court date will typically be two to five weeks after the arrest and normally the defendant is not incarcerated during this time.¹³⁰ The District Attorney then makes an offer at court for adjournment in contemplation of dismissal (ACD) upon participating in mandated program.¹³¹ An ACD is not an admission of guilt, rather it is a deal the defendant makes with the Court whereby if the defendant honors their agreements with the Court, the case will be dismissed. In HTICs, the deal is to complete the Court-appointed sessions and avoid arrest for six months, as described above.¹³² The Court has great success in encouraging defendants to take these sessions (94% in Queens and 97% in Brooklyn).¹³³ The

123. *Id.* at 654.

124. Cis- and trans* refer to gender identity; where ciswomen are those women who were assigned a “female” marker on their birth certificates, and who identify with that label. Transwomen are women who were assigned a “male” marker on their birth certificate, and who identify as women. Trans* is meant to cover all gender identities that are not cis. Here, queer is in reference to sexuality, and is an umbrella term to describe all sexualities that are not hetero.

125. Hon. Toko Serita, *supra* note 84, at 653.

126. *Id.*

127. Ray & Catarine, *supra* note 108, at 4.

128. *Id.*

129. *Id.* at 11.

130. Ray & Catarine, *supra* note 108, at 11.

131. *Id.*

132. *Id.*

133. *Id.* at 12.

defendant is assigned to a nonprofit provider or to a program run by the District Attorney's office.¹³⁴ Capacity and language are considered in assigning the defendant a particular program.¹³⁵ The defendant receives the program contact information, start date, and follow up court date before leaving Court that day.¹³⁶ They are expected to complete sessions at a rate of about one per week.¹³⁷ Upon completion, the ACD will be set up for the next court date.¹³⁸ Actual length of completion time varied in the two boroughs (about two to four months in Queens versus one and a half to three months in Brooklyn).¹³⁹ The judge may increase the number of sessions or transfer the defendant to a different program if the defendant is not "making progress," (either not attending sessions or rearrested).¹⁴⁰ If the defendant does not show up for Court, typically the judge will issue a warrant for their arrest unless the defendant had been in touch with their lawyer or provider.¹⁴¹

Defendants may also plea to a lesser charge or plead guilty.¹⁴² Defendants who reject the offer of mandated services are strongly encouraged by the judge to reconsider, often by setting a follow up court date.¹⁴³ The RedUP study found that in Queens, seven defendants offered to plea to disorderly conduct instead.¹⁴⁴ In these cases, disorderly conduct is a violation (not a crime) warranting a \$120 fine, with no record and no time served.¹⁴⁵ In Brooklyn two defendants pled guilty to misdemeanor Prostitution and served thirty days in jail.¹⁴⁶ Only one person attempted to pursue a trial.¹⁴⁷

The Red Umbrella Project found a number of disturbing, if predictable, racial implications in the system, which are discussed in Sections II and III of this article. In terms of Court process, they found that interpreter services are insufficient and that there are no publicly established standards for the mandated social services.¹⁴⁸ In Brooklyn nineteen percent of defendants require an interpreter whereas in Queens sixty-seven percent

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Ray & Catarine, *supra* note 108, at 11.

145. *Id.* at 12.

146. *Id.* at 11.

147. *Id.*

148. *Id.* at 7.

do (with forty-six percent speaking Mandarin).¹⁴⁹ The lack of interpreters doubles the amount of time these defendants are in the system compared to English speakers.¹⁵⁰ Though the right to have an interpreter is guaranteed by New York law,¹⁵¹ the law does not provide a clear source for recourse if the right is denied or infringed upon in HTIC.¹⁵² Red Umbrella Project recommends that recourse should be available.¹⁵³

There are no publicly established standards for social services mandated. Brooklyn requires six sessions while Queens requires five.¹⁵⁴ The judge and the capacity of the providers available determine services; these include one-on-one trauma therapy, group therapy, art therapy, life skills workshops, and yoga.¹⁵⁵ Red Umbrella Project comments that these might be helpful if desired but they do not systemically address the root causes or pervasive issues defendants face.¹⁵⁶ Red Umbrella Project recommends that HTICs and programs must be held accountable to the communities they purport to serve by establishing standards, examining how useful the programs are from the perspective of recipients (as opposed to uplifting only the perspectives of the Courts or program managers), and making culturally competent services available in appropriate languages so as to not slow or hinder defendants' access to justice.¹⁵⁷ They further stipulate that better services would come from sex worker peer advocacy and other support from people experienced in sex trades so the people in the system experience a more supportive environment and have a better understanding of what's happening in court room.¹⁵⁸

D. A Step Forward, But Remains Deeply Flawed

In comparison to fines, jail, and prison, mandated social services are an improvement in the modern legal approach to Prostitution. Some of these coerced services might even be enjoyable or objectively beneficial for the defendant. However, these responses still place a locus of blame on the individual choices of the workers; asking the workers themselves to change

149. *Id.* at 15.

150. *Id.* at 7.

151. A full Constitutional analysis of the right to interpretation in criminal proceedings is beyond the scope of this article, but for an overview of the rights involved, see *People v. Pelegrin*, 39 Misc. 3d 788, 788–798 (2013).

152. *Ray & Catarine*, *supra* note 108, at 7.

153. *Id.*

154. *Id.* at 8.

155. *Id.* at 7.

156. *Id.*

157. *Ray & Catarine*, *supra* note 108, at 7.

158. *Id.*

rather than looking at any structural lack of opportunity to gain resources through legal means and then seeking broader societal change to provide those opportunities. Some services seem irrelevant to the Court’s purpose or the workers’ needs—for example, it is unclear how yoga would assist a defendant in paying bills, securing housing, obtaining food, or manifesting other life requirements. Further, the HTICs continue to either vilify the workers as “criminals” or demand that they publicly and legally identify as “victims” in order to access services and a clear record. In this way, the system is coercive and takes away the agency of the workers to decide for themselves what is best for their own lives. Lastly, the system continues to accept the questionable “moral” premise that Prostitution is in itself an evil which demands the resources and power of the State, and which can actually be eradicated through this approach. Thus, while clearly better than pure criminalization, this system remains deeply flawed and much work remains to be done.

II. Building a Better Society Requires Decriminalization

A. A Note on Decriminalization versus Legalization

It is important to understand the difference between full decriminalization and full legalization. Full decriminalization is an elimination of all current laws that create criminal and civil punishments for and restrictions on Prostitution and other sex work. This does not imply that sex workers would be beholden to no laws. Under decriminalization, sex workers could do their jobs just like other independent business owners or service employees without interference from the State;¹⁵⁹ provided, of course, that they did not violate any other laws (e.g., anti-slavery laws, statutory rape laws, disturbing the peace or nuisance laws, tax laws, etc.). However, decriminalization means that if a worker did break another law in the course of their¹⁶⁰ work, they could be prosecuted only for that law; not

159. As used here, “State” or “the State” implies the collection of governmental and quasi-governmental bodies from the judicial, legislative, executive, and administrative branches; versus “state” or “the state,” which refers to any one of the fifty states in the United States.

160. The possessive pronoun set “they/their” rather than “he/his” or “she/her” refers to an individual whose gender identity is nonbinary, unknown, or unspecified. Because gender

doubly prosecuted for breaking that law as a worker. For example, if a thirty-year-old sex worker earned income from serving a twelve-year-old client, that worker could be independently prosecuted under statutory rape laws and any other laws applicable sexual acts or business transactions with minors. Legal schemes already in place would take care of the public policy concerns that arise out of such a situation.

Full legalization, on the other hand, involves an explicit sex work regulatory scheme as outlined by the State—the creation of a multitude of additional laws designed to govern the sex work industries. As the name indicates, this scheme would center on Prostitution as a legal and legitimate business enterprise or job. Such a scheme might create regulations such as sex worker business registration requirements, licensing fees, and might conditioning licensing on meeting health requirements or the like.

Implementing and maintaining regulatory schemes would take at least some state resources. One solution might be to require sex workers to register and pay a special licensing fee that covered the new costs, or even generated some income for the state. This may seem a reasonable or desirable system on the surface. It would be difficult to argue that the health and safety of the populace is not within the interests of the State. Further, many types of businesses and professionals are required to obtain conditional licensing or permits, and to submit detailed records to a state department.¹⁶¹ However, treating sex work exactly like other businesses undermines public safety.¹⁶² It is not difficult to speculate that even if Prostitution were legalized, cultural attitudes towards sex workers would likely take a long time to change. Sex workers have distinguishing safety concerns such as fear of harassment, stalking, public shaming, assault, lethal threats, and more, that are not generally shared by non-sex work businesses.¹⁶³ Anti-sex sentiments, sex work opposition, and harmful obsessions with sex workers are deeply embedded¹⁶⁴ and unlikely to

identities exist on a spectrum that goes further than a dualistic “his or her,” applying this binary linguistic tradition is inappropriate, inaccurate, and potentially harmful.

161. See, e.g. *Business Licenses – Start a Business in New York State*, LICENSECENTER.NY.GOV, <http://licensecenter.ny.gov/business-licenses> (last visited Jan. 18, 2015).

162. Public safety is often cited as a reason for criminalizing Prostitution, as though sex workers themselves are separate and distinct from ‘the public.’ They are not. Any policy or legislation addressing public safety must include the safety needs of sex workers.

163. See, e.g., J. LEWIS & F. SHAVER, *SEX TRADE ADVOCACY AND RESEARCH ET AL., SAFETY, SECURITY, AND THE WELL BEING OF SEX WORKERS*, 21–31 (2005) available at <http://bit.ly/1KnXTLl> (discussing various and diverse safety needs of sex workers).

164. See, e.g., Nancy L. Cohen, *How the Sexual Revolution Changed America Forever*, ALTERNET.ORG (Feb. 5, 2012), <http://bit.ly/1SZUppA> (describing the extreme resistance to and effect of the sexual revolution on politics in the United States and concluding that “many people interpreted sexual self-determination, economic self-sufficiency, and political power

disappear as “quickly” as a new law may be enacted. Persons possessing these worldviews may be dangerous to sex workers, who will have good reason to keep their legal names and addresses away from the public. A registration or licensing system potentially puts everyone so registered at unnecessary risk. At this time in history, an individual or organization gaining improper access to a database full of sex workers’ private data may require nothing more than cheap computer hardware and hacking skills. Certainly the news is full of examples of known and unknown individuals accessing massive databases for their own ends.¹⁶⁵ It is unclear what possible State interest could outweigh risk of life, limb, and, presuming prejudices remain, future employment or other life opportunities. Given these realities, State interests in safety and preservation of life outweigh the State interests in a registration or licensing requirement.

The State may also have an interest in collecting a fee from these workers, but it is not necessary to place them in a separate, licensed category to do so. The State already has comprehensive mechanisms in place to collect federal and state revenue on income. Sex workers can file taxes in the same manner as any other employee or self-employed person. Legalization is not required for this to be true. Sex workers should already be filing taxes even under criminalization. However, like many persons who participate in underground economies,¹⁶⁶ it is likely that many workers do not file any taxes at all; while some may avoid this responsibility because the work is largely a cash industry and thus more difficult for the government to enforce tax law, certainly some must fail to pay taxes out of an uncertainty of how to account for their income—in other words, from a fear of State attention or investigation. Thus, decriminalization may increase tax revenue for the State while lowering the sex worker fears and risks associated with both legalization and criminalization.

for living women as a lethal attack on the American way.”); *see also, e.g.*, Lara Risco, *Silenced in a Sex Obsessed Culture*, RH REALITY CHECK, (Mar. 25, 2008, 8:56 AM), <http://bit.ly/1nukctS> (pointing out the chasm between “our rhetoric and what we actually do” on the subject of sex).

165. *See, e.g.* Anthony Zucher, *Strippers Sue to Prevent Identity Disclosure*, BBC.COM (Nov. 7, 2014), <http://www.bbc.com/news/blogs-echochambers-29946114> (citing two cases in which individual men applied for access to Washington State’s nude dancer licensing records – one of whom was “arrested for stalking and convicted of intimidating a judge,” obtaining nearly 100 records before “a stripper-initiated lawsuit ended his requests.”); *see also, e.g.*, Kim Zetter, *Answers to Your Burning Questions on the Ashley Madison Hack*, WIRED.COM (Aug. 21, 2015, 4:43 PM) *available at* <http://bit.ly/1h1Zo9N> (discussing a failure in cybersecurity and leaked files of a site designed to facilitate married individuals to cheat on their spouses).

166. *See* CASH INTENSIVE BUSINESSES AUDIT TECHNIQUES GUIDE – CHAPTER 8 THE UNDERGROUND ECONOMY, IRS.GOV (April 2010), <http://1.usa.gov/1ZxxUrZ>.

But perhaps the most poignant rational argument in favor of decriminalizing sex work rather than implementing a new legal scheme is this—if criminalization, with its attendant and severe legal and social consequences has failed to end a myriad of underground sex work activities, there is no clear reason to believe that regulating Prostitution through a licensure scheme would have that effect.

B. Full Decriminalization is Consistent with the Aims and Values of HTICs

1. *Stated Interests and Undercurrents*

Every Court in the United States bears not-always-articulated State interests such as fostering notions of justice and fairness and building trust in the system, as well as administering criminal deterrence, punishment, and/or rehabilitation. As discussed above, presiding HTIC judges have stated that the intent of the HTICs is to assist people whom the Courts define as “victims” deserving of mercy, through social services and programs designed to help them become independent individuals, working in some legal trade. The logic seems to be that these individuals do not have agency, and do not have opportunity to work in a legal trade, but if they did, they would not be doing sex work. These aims are more strongly connected to a value of deterrence than to that of punishment or rehabilitation.

The judges do not frame HTICs as “moral” Courts, although the history of specialized courts in New York certainly suggests this may be a strong undercurrent. As discussed above, “moral” goals include condemning, shaming, and punishing sex workers and ridding the earth of sex work, or workers, entirely. Also writhing in that undercurrent is Broken Windows Theory, in which minor criminal offenses must be heavily policed in order to prevent major criminal issues. A Court which arises from a history of condemning sex workers (discussed above) and yet seeks to ‘save’ those very same sex workers seems a contradiction doomed to undermine itself. But perhaps, rather than merely another detail in a long history of inevitably failed criminalization efforts, the HTICs offer an opportunity.

In speaking about trafficking survivors, who are committing the exact type of low-level criminal acts proponents of Broken Windows Theory advocate against, New York State Chief Justice Lippmann has said, “courts must play a critical role in re-orienting the justice system to more ably identify and assist victims, address public safety concerns, and respond

to social ills.”¹⁶⁷ He also stated, “For most of our history, trafficking victims were characterized as criminals, addicts, delinquents, profit-driven, and morally degenerate. But our society’s understanding of this difficult problem has evolved over time [due to a new] generation of enlightened criminal justice thinkers...”¹⁶⁸ By implementing an opportunity to vacate, even though through mandated “culturally sensitive” social programs, the HTICs have shown recognition that “due to challenges that a criminal record poses for finding lawful work, lack of work authorization, and the stigma attached to sex work, trafficking survivors may be compelled to engage in illegal activity to survive – including returning to commercial sex work – after escaping their traffickers.”¹⁶⁹ Perhaps this new generation of “enlightened criminal justice thinkers” (or the next, if not this one) will eventually align with practical deterrence goals that are more fully in favor of public safety and welfare than they are with “moral” punishment and rehabilitation. That generation might be able to recognize that sex workers who do not qualify (or attempt to qualify) for vacatur relief based on a trafficked status face many of the very same challenges. That generation might also accept that it cannot identify and assist persons being trafficked while simultaneously criminalizing all Prostitution. That generation might further recognize the harms of arresting persons who engage, or are accused of engaging in Prostitution and/ or Loitering.

2. *Arrests are Traumatic and Undermine Trust in Law Enforcement*

Currently, there are no effective means by which to quickly identify a person who is being trafficked versus who is a non-trafficked sex worker. In order to be “helped” by HTIC, individuals suspected of being sex trafficking survivors are first brought into the system via arrest as criminal suspects.¹⁷⁰ Arrestees often experience further abuse by the police, and even under the best of circumstances, merely being arrested is a traumatic experience that in itself creates distrust of law enforcement and legal systems.¹⁷¹ Reform groups have stated that federal and state governments must work to change both laws and policies to ensure that survivors of

167. Hon. Jonathan Lippman, *supra* note 96, at IX.

168. *Id.*

169. Phillips et al., *supra* note 86, at 16.

170. Robin Richardson, *New York Times, Letter: Court for Prostitution Cases, Opinion*, NYTIMES.COM (Sept. 26, 2013), <http://www.nytimes.com/2013/09/28/opinion/court-for-prostitution-cases.html>.

171. *Id.*

trafficking are not arrested and have access to adequate and appropriate services.¹⁷² Even Judge Serita has stated that “identifying trafficking victims is extremely difficult,”¹⁷³ recognized that “taboos surrounding prostitution remain incredibly strong,” and admitted that it is important “on an institutional level, to provide the training and education necessary to change these attitudes.”¹⁷⁴ She recommends developing a coordinated judicial response whereby “prostitutes [sic] must be viewed as potential sex trafficking victims,”¹⁷⁵ thus continuing the mindset of splitting people into categories of those deserving punishment (“prostitutes/ criminals”) and those deserving mercy (“victims”).

A judicial response as such implies that individuals must still first be arrested, then “recognized” as “victims” at some point while being dragged through a cumbersome and potentially humiliating and harmful legal process. The New York Court of Appeals has recognized the “horrific conditions of central booking facilities where ‘detainees are consigned, often in chains, to chronically overcrowded and squalid holding facilities where they will likely be subjected to extraordinary physical and emotional strain.’”¹⁷⁶ In *Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims*, Suzanne Phillips wrote, “Individuals arrested for prostitution are often subjected to inappropriate comments or language from police officers, and may be forced to remain unclothed for long periods of time in front of other officers and arrestees. Transgender individuals are generally not recognized by their preferred gender, and are therefore placed in particularly abusive, exploitative, and violating conditions.”¹⁷⁷ The same report pointed out that both circumstances of arrest and the overtaxed court system create tremendous pressure to plead guilty—even where a defendant may not be.¹⁷⁸ In cases where a person under arrest for Prostitution or Loitering eventually makes it to an HTIC and may opt for services over incarceration, the path to those services has already done great harm.

3. Arrests Harm Sex Workers’ Capacity to Engage in Legal Work

While not all sex workers wish to pursue legal work, arrest records impair their ability to do this if they so choose. In this way, criminalization

172. E.g., Phillips et al., *supra* note 86, at 2.

173. Hon. Toko Serita, *supra* note 84, at 658.

174. *Id.*

175. *Id.*

176. Phillips et al., *supra* note 86, at 18.

177. *Id.*

178. *Id.*

is not in alignment with HTIC deterrence goals. In addition to other groups, the Human Rights and Gender Justice¹⁷⁹ at City University of New York School of Law has recognized that, “prostitution and related convictions continue to haunt trafficking survivors long after they have escaped the trafficking situation, posing a serious hurdle to their ability to secure employment, safe housing, and other factors that are key to rebuilding their lives. In this way, criminal convictions often act as a significant barrier to recovery and reintegration for survivors of trafficking.”¹⁸⁰

Sex workers face similar issues. Specifically, “open cases limit a person’s ability to obtain employment outside of the sex trade, receive public benefits, and maintain custody of children.”¹⁸¹ In one report, sixty-seven percent of indoor sex workers became involved with sex work because they were working poor and unable to find living wage work.¹⁸² An arrest record may further deter many from applying for jobs or training, for fear of having to discuss past convictions.¹⁸³ The Red Umbrella Project asks, “Is this a desirable outcome?”¹⁸⁴

4. *Even Feminists Who Hate Sex Work Agree Decriminalization is Best*

Feminists do not agree on the nature of sex work. One significant polarization occurs along the “Prostitution-as-work” and “Prostitution-as-exploitation” perspective, yet according to Nicole Bingham, *Yale Journal of Law and Feminism* author of *Nevada Sex Trade: A Gamble for the Workers*, “both those advocating the Prostitution-as-work position and those advocating the Prostitution-as-exploitation position agree that decriminalization, rather than legalization, is for the most part the correct approach.”¹⁸⁵ Bingham states that decriminalization would prevent violence, reduce stigma, and help sex workers both gain control over their work and advocate for their rights.¹⁸⁶ She cautions that “a regulatory system such as Nevada’s provides the state with a controlled means to sell women’s sexual services and eradicates choices for prostitutes themselves, rather than providing a way . . . to gain a degree of control over their lives.”¹⁸⁷ She further notes “state and local governments have spent

179. Formerly the International Women’s Human Rights Clinic.

180. Phillips et al., *supra* note 86, at 2.

181. Ray & Catarine, *supra* note 108, at 14.

182. Thirkral, *Behind Closed Doors*, *supra* note 71, at 1.

183. Phillips et al., *supra* note 86, at 23–24.

184. Ray & Catarine, *supra* note 108, at 14.

185. Bingham, *supra* note 30, at 90–91.

186. *Id.*

187. *Id.* at 83.

thousands of tax-payer dollars to eradicate [Prostitution] with little success.”¹⁸⁸

In context of discussing different feminist perspectives on adult, ciswomen, heterosexual, voluntary sex work, Belkys Garcia writes over a decade later, “people on both sides of the debate understand that working in prostitution leaves women vulnerable to violence from police, pimps, and customers without any health services, legal protection, or recourse. Prostitution-as-criminal conduct therefore maintains subjugation of women who are already marginalized by their status as poor, immigrant, or minority women.”¹⁸⁹

C. Criminalization is Ineffective: No Deterrent Has Stopped Sex Work

1. *New York History Shows Criminalization to be a Failed Policy Approach*

Criminalization has proven itself an ineffective means of deterrence. This is not news. Some form of Prostitution “has existed in every society for which there are written records.”¹⁹⁰ New York is no exception, though the State has made pointed, supported, funded efforts to eradicate the work for generations.¹⁹¹ A century of criminalization resulting in public shaming, fines, forced programming, and incarceration (and many other less obvious collateral damage deterrents¹⁹²), fueled by those with wealth and political power, has not ceased sex work.

As early as the 1850s, William Sanger, the first systemic researcher on sex work in New York wrote, “[W]e have passed laws intended to crush out prostitution; have made vigorous protests (on paper) against its existence; and there our labors have ended. The experience acquired in this course of legislation only demonstrates that such laws cannot be enforced so as to produce the desired effect.”¹⁹³

Sex worker communities, researchers, and advocates have been saying it for hundreds of years: criminalizing sex work does not actually deter sex work. As effective and just social policy theory must center the voices of those most affected by a policy, it is time to listen to sex workers, respect their perspectives, and act on their wisdoms. When they state, as an

188. *Id.* at 91.

189. Belkys Garcia, *Reimagining the Right to Commercial Sex: the Impact of Lawrence v. Texas on Prostitution Statutes*, 9 N.Y. CITY L. REV. 161, 163 (2005).

190. Alexander, *supra* note 23, at 188.

191. *See infra* Section I.

192. *See, e.g.*, Chelsea Breakstone, “*I Don’t Really Sleep: Street-Based Sex Work, Public Housing Rights, and Harm Reduction*,” 18 CUNY L. REV. 337 (2015) (discussing the interrelationship between criminalized sex work and housing).

193. Simowitz, *supra* note 21, at 425, 432.

overwhelming majority did in one recent study of indoor sex work by the Sex Worker's Project at the Urban Justice Center, that "sex workers would be in a better position to organize and assist each other to live in better conditions or leave the industry . . . if people did not have to operate under the threat of arrest,"¹⁹⁴ we must simply believe them. One participant in the study even thought that decriminalization would be a more effective deterrent than criminalization has been, because part of the sale is the thrill of an illicit activity.¹⁹⁵

But the numbers are telling as well. In a recent study of outdoor sex workers, although *ninety-three percent* of the workers had been arrested in the past twelve months, *they were still working and did not regard the arrest as a deterrent*.¹⁹⁶ In 2010, police arrested nearly three thousand people for Prostitution or Loitering¹⁹⁷ in New York City alone. In a borough that has targeted, pushed out, and "helped" workers under multiple criminalization Courts, campaigns, and legal schemes for over a hundred years, seven people undergo the stress and consequences of arrest every single day. Surely these are just a fraction of the sex work exchanges that happen in the city—sex work remains part of our society. As has been suggested by studies and researchers in earlier decades discussed elsewhere in this paper, the workers simply employed methods they thought might help them avoid police harassment and arrest, such as changing their schedules, dress, or locations of work.¹⁹⁸ Researchers from the Sex Worker Project commented, "City administration, police, and residents in some neighborhoods continue to target the control of sex work. Unfortunately, the chosen methods consume police, court, and other resources but fail to create any appropriate long-term resolution."¹⁹⁹

2. *Criminalizing Sex Work Doesn't Reduce Trafficking, Rather It Harms Both Groups*

According to authors at the School of International and Public Affairs at Columbia University and the Sex Workers Project, "there is no indication that increased criminalization of sex work decreases instances of trafficking into sex work."²⁰⁰ Researchers at the Human Rights and Clinic

194. Thurkral, *Behind Closed Doors*, *supra* note 71, at 60.

195. *Id.* at 61.

196. Thurkral, *Revolving Door*, *supra* note 67, at 38.

197. PROS NETWORK & LEIGH TOMPERT OF THE SEX WORKERS PROJECT, PUBLIC HEALTH CRISIS: THE IMPACT OF USING CONDOMS AS EVIDENCE OF PROSTITUTION IN NEW YORK CITY 11 (Apr. 2012) (citing the Center for Court Innovation (2010)).

198. *Id.* at 42.

199. Thurkral, *Behind Closed Doors*, *supra* note 71, at 14.

200. LISA DIANE SCHRETER ET AL., SCHOOL OF INT'L AND PUBLIC AFFAIRS AT COLUMBIA

at City University of New York School of Law agree, emphasizing that arrests do very little to actually curb the sex trade, and “policing strategies that emphasize arrests for misdemeanors like prostitution can be detrimental to efforts to prevent and prosecute traffickers.”²⁰¹ They point out that in 2012 in New York State, 2,962 individuals were arrested for Prostitution or Loitering, but only 34 individuals were prosecuted statewide for human trafficking offenses of any kind.²⁰²

Further, the conflation of sex workers and trafficked persons can be harmful to both groups. Not all sex workers or persons in HTICs are trafficked, but in the past decade or so there has been an increasing shift from labeling all sex workers as “criminals” to labeling all sex workers as “victims.” According to sex workers at the Red Umbrella Project, this shift “greys the line between consent and coercion, making it more difficult for people in the sex trades who are victimized—by clients, pimps, police, and courts—to seek justice and move forward with our lives in ways that we determine.”²⁰³ Schreter et al. write, “While there has been no empirical support sustaining this belief (that permitting prostitution leads to more trafficking), it is clear that criminalization harms those engaged in the profession.”²⁰⁴

The consequences include erasing the voices of sex workers, worsening the conditions of sex workers, and warping discussions of trafficking;²⁰⁵ as well as imposing barriers to health care, social services (ironically), and safe sex materials; perpetuating poverty and oppression; promoting underground and stigmatized work; creating economic burden for workers related to cyclical arrests and lack of bargaining power; and an inability to advocate for occupational health, safety, or human rights.²⁰⁶

D. Appropriate Alternatives to Criminalization and Arrests

Many sex workers enter and work in the sex industry because sex work often times serves as a better paying and more flexible alternative to domestic work, waitressing, or retail positions.²⁰⁷ Like most workers, many sex workers use their earnings to pay for school, family necessities, or

UNIV. & SEX WORKERS PROJECT AT URBAN JUSTICE CENTER, THE DANGER OF CONFLATING TRAFFICKING AND SEX WORK: A POSITION PAPER OF THE SEX WORKERS PROJECT AND THE URBAN JUSTICE CENTER 9 (Stephan Sastrawidjaja et al., eds., 2007).

201. Phillips et al., *supra* note 86, at 7.

202. *Id.* at 14.

203. Ray & Catarine, *supra* note 108, at 4.

204. Schreter et al., *supra* note 200, at 11.

205. Schreter et al., *supra* note 200, at 5.

206. *Id.* at 11–12.

207. *Id.* at 4.

future businesses.²⁰⁸

Research by the Sex Workers Project suggests that sex workers are a ready and willing population to receive services and that arrest is not required to help people reach economic self-sufficiency.²⁰⁹ The availability of services for those who want them is a position that has long been favorably argued by sex workers, researchers, and advocates.²¹⁰

Rather than using tax-payer dollars to force sex workers into taking mandated services that may or may not be useful or helpful (and that do not eradicate sex work or the inequities that lead some workers to risk an illegal occupation), resources could be better spent on outreach and community building. Advocates have specifically identified the following services as the most useful or desired: legal services, assistance with navigating criminal and/or immigration issues, mental health assistance, peer support, networking opportunities, help with economic issues such as financial management and filing taxes, and healthcare.²¹¹

Decriminalization “would allow prostitutes [sic] to form stronger support networks, unionize, access private health insurance, and access public benefits such as social security, disability insurance, and worker’s compensation.”²¹² Recently, researchers have noted that the vast majority of sex workers strive for fair working conditions including safe and healthy environments with access to living wages, medical, and dental benefits.²¹³ Decriminalization would assist with seemingly simple tasks such as finding an apartment—for example, it is difficult to find a willing lessor with no verifiable employment.²¹⁴ In a report released in the fall of 2014, the Red Umbrella Project stressed that arrest and court involvement do not end any victimization that may be taking place and that these tactics do not address economic injustice.²¹⁵ Like previous organizations, the Red Umbrella Project found that the real issues faced by sex workers are a lack of access to employment outside of the sex industry, lack of stable housing, and a lack of access to non-judgmental healthcare.²¹⁶ The current system of

208. *Id.*

209. Thurkral, *Behind Closed Doors*, *supra* note 71, at 14.

210. These suggestions are remarkably similar to those proposed by Anna Moscovitz Kross a century ago. She recommend against taking sex workers to court, but instead wished to replace the existing punitive and repressive system with one based on cooperation and voluntary involvement in free treatment. She advocated for a medical-social method with a doctor, psychiatrist, and lawyer to ensure appropriate social services, medical treatment, and other programs. Quinn, *supra* note 22, at 688.

211. Thurkral, *Behind Closed Doors*, *supra* note 71, at 64–69.

212. Garcia, *supra* note 189, at 167.

213. Schreter et al., *supra* note 200, at 4.

214. Thurkral, *Behind Closed Doors*, *supra* note 71, at 64–69.

215. Ray & Catarine, *supra* note 108, at 5.

216. *Id.*

“rescuing” “victims” through arrest and mandated services operates to “re-victimize” trafficked individuals and, importantly, does not deter sex workers.²¹⁷

III. Case Study: The Loitering Statute is Repugnant to Traditional Notions of Fairness and Justice

While Section II argues broadly for overall decriminalization, this Section examines one compelling example of how criminalization is repugnant to traditional notions of fairness and justice, and shows a small but deeply impactful and important step we as a society can take towards creating a more just and fair society for all—repealing the Loitering statute. The statute disproportionately impacts people of color, particularly Black women, as well as LGBTQI+ communities and trans* individuals. It further gives police broad discretion in determining who may be arrested under the law, and studies show racial and gender biases in these arrests. Worse, many sex workers and people presumed to be sex workers report verbal and physical abuse at the hands of police, including forced and coerced sexual acts in exchange for their freedom. Applying the law in an uneven manner and using police powers to gain sexual control over civilian bodies is repugnant to traditional notions of fairness and justice. Overall decriminalization is the best option, but if that is politically untenable, a strong and necessary first step is to repeal Article §240.37 (Loitering).

A. Case Study: Loitering (NYPL §240.37)

1. *Broad Discretionary Policing Allows for Selective Stops*

New York Penal Law, Article 240.37, “Loitering for Purposes of Engaging in Prostitution” (Loitering) is the most common sex work related charge in New York.²¹⁸ This is hardly surprising, given the broad discretionary power that the standards articulated in the statute grant to police, particularly as further exacerbated by the “quality of life” policing policies initiated by Mayor Giuliani in the 1990s.²¹⁹ For many years, police

217. *Id.*

218. Ray & Catarine, *supra* note 108, at 11.

219. MAKE THE ROAD NEW YORK, TRANSGRESSIVE POLICING: POLICE ABUSE OF LGBTQ COMMUNITIES OF COLOR IN JACKSON HEIGHTS 10 (2012) *available at*

were actively encouraged to stop, frisk, question, and arrest civilians for only minor offenses (known as “stop and frisk”).²²⁰ There is little evidence that stop and frisk actually reduced crime and substantial evidence that stops were not based on reasonable suspicion but rather on racial and other profiling and discriminatory policing.²²¹ Abuse and harassment frequently accompanied these “selective” stop and frisks.²²² Contrary to making communities safer, these practices served to further alienate and deepen mistrust of law enforcement in communities of color.²²³

Loitering for the purposes of Prostitution is a particularly subjective charge that is widely susceptible to similar selective stops. The bar for proof of Loitering (violating NYPL §240.37) is much lower than for Prostitution (violating NYPL §230.00). No exchange of money is required and the evidence is entirely based on the officer’s perception and word.²²⁴

A report put out by the Red Umbrella Project in the fall of 2014 offers detailed insight into these stops, worth highlighting to demonstrate the depth of discretion the officers actually possess. The NYPD looks at the knowledge of the officer, the previous behavior of the officer, the physical characteristics of the location, and defendant behavior. Knowledge and previous behavior of the officer includes “officer has professional training as a police officer in the detection of individuals loitering for the purpose of prostitution,” “officer is aware that NYPD has made numerous arrests of 240.37 at the above locations,” and “officer has previously made arrests for loitering for the purpose of prostitution.”²²⁵ Physical characteristics of the location include, “location of arrest is not a bus stop, open commercial establishment, or house of worship,” “the above area is either a commercial location or industrial location;” and “there was

<http://tinyurl.com/zz65rpq>.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Noah Berlatsky, *Black Women Profiled as Prostitutes in NYC*, REASON.COM (Oct. 1, 2014), <http://reason.com/archives/2014/10/01/nypd-profiles-sex-workers-too>.

225. Officer knowledge and previous behavior: “Officer has professional training as a police officer in detection of individuals loitering for purpose of prostitution; Officer has previously made arrests for loitering for purpose of prostitution; Location of arrest is not a bus stop, nor an open commercial establishment, nor a house of worship; The above area is either a commercial location or an industrial location; There was sexual type debris nearby (condom wrappers, used condoms); Officer is aware that NYPD has made numerous arrests for §240.37 (Loitering) and/or §230.00 (Prostitution) at the above locations; Officer is aware that the location is frequented by people engaging in promoting prostitution, patronizing a prostitute [sic], and/or loitering for the purpose of prostitution; Officer is aware the defendant has previously been (arrested for, convicted of, or both) violating prostitution laws.” Ray & Catarine, *supra* note 108, at 18–20.

sexual type debris nearby (condom wrappers, used condoms).”²²⁶ Defendant behavior includes, “standing with other individuals whom I am aware have previously been arrested for prostitution-related activities” and “dressed in provocative or revealing clothing, specifically, (describe).”²²⁷ Provocative or revealing clothing has included, “black sleeveless top” and “low hanging sweatpants.”²²⁸

While some of these pieces of evidence seem as though they might be reasonably related to the criminalized activity, it is clear that the documentation required to demonstrate an appropriate stop both allows for selective stopping and discriminates against behavior that may be entirely innocent.

2. (Perceived) Race Based Impact is Unavoidable

Whether through selective stopping or racially identifiable economic disparities, that §240.37 will generate race-based impact is unavoidable at this time and for the foreseeable future. The Red Umbrella Project report provides some recent and disturbing statistics. In Brooklyn, Black people are present in the HTIC and face Prostitution related charges at disproportionately high rates.²²⁹ Black civilians face 69% of all HTIC charges, 94% of Loitering charges, and 88% of defendants facing three or more charges are Black.²³⁰ In Queens, Mandarin speakers make up 46% of HTIC defendants and resolution of charges takes five to six months compared to only two to four months for English speaking defendants.²³¹ Red Umbrella Project asks, is the high number of Black defendants in Brooklyn and East Asian defendants in Queens result of police profiling?²³² Is the high number of defendants in Queens who speak Mandarin or Korean

226. Ray & Catarine, *supra* note 108, at 4.

227. Defendant behavior documented by NYPD: Remain to wander about in a public place for a period of minutes, during which defendant repeatedly beckoned to passer-by and stopped passerby, engaging in conversation with passer-by; Stops only male passers-by and defendant did not beckon so or converse with female passers-by who passed by during the same period, thus stopping only passers-by of one gender; None of the vehicles stopped were taxis, livery cabs, or emergency vehicles; Standing in the middle of the road while beckoning to motorists; Dressed in provocative or revealing clothing, specifically (describe); Standing with other individuals whom I am aware have previously been arrested for prostitution related activities. Ray & Catarine, *supra* note 108, at 18–20.

228. NYPD officers document outfits as evidence: “Black sleeveless top, very short pants with butt cheeks exposed; Short blue skirt/dress; Tight pink cut off shirt, revealing midsection, and low hanging sweat pants. and Wearing short dress” *Id.*

229. Ray & Catarine, *supra* note 108, at 6.

230. *Id.*

231. *Id.*

232. *Id.* at 16.

a result of police seeking out potential victims in workplaces they believe traffic migrant Asian women?²³³

Women of color represent a disproportionate percentage of street based sex workers, who are the most visible targets for police.²³⁴ In *Reimagining the Right to Commercial Sex: The Impact of Lawrence v. Texas on Prostitution Statutes*, author Belkys Garcia highlights the theory that “women of color are more likely to be socioeconomically disadvantaged than their white counterparts . . . [they] turn to street prostitution for immediate economic relief.”²³⁵ Further, stop and frisk police activity is exceedingly common in communities with significant populations of people of color²³⁶ and even in our relatively new “post” stop and frisk era, there is a high presence of police in communities of color, with frequent profiling of men of color in particular.²³⁷ In fact, Blacks and Latinxs²³⁸ represented a full ninety percent of citywide stop and frisks in 2011.²³⁹

Whether through systemic selective stops or by virtue of economic disparities, the racial impact of Loitering charges is unavoidable and the statute should be eliminated.

3. (Perceived) Gender and Sexuality Based Impact is Unavoidable

Within communities of color, LGBTQ+ people of color are particularly targeted by police.²⁴⁰ The Red Umbrella Report documented more than twice the number of transwomen defendants in Queens HTIC than in Brooklyn HTIC; Red Umbrella asks: is this due to police profiling of translatinas in Jackson Heights as documented in Make the Road New

233. *Id.*

234. Garcia, *supra* note 189, at 166.

235. *Id.*

236. Make the Road New York, *supra* note 219, at 10.

237. Make the Road New York, *supra* note 219, at 15.

238. “The letter ‘x,’ instead of say an ‘o’ or an ‘a,’ is not a typo. The ‘x’ makes Latino, a masculine identifier, gender-neutral. It also moves beyond Latin@ – which has been used in the past to include both masculine and feminine identities – to encompass genders outside of that limiting man-woman binary. Latinx, pronounced ‘La-teen-ex,’ includes the numerous people of Latin American descent whose gender identities fluctuate along different points of the spectrum, from agender or nonbinary to gender nonconforming, genderqueer and genderfluid.” Raquel Reichard, *Why We Say Latinx: Trans and Gender Non-Conforming People Explain*, LATINA.COM (Aug. 29, 2015) available at <http://www.latina.com/lifestyle/our-issues/why-we-say-latinx-trans-gender-non-conforming-people-explain> (last visited Mar. 26, 2016).

239. Make the Road New York, *supra* note 219, at 15.

240. *Id.*

York's report, *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights?*

The Make the Road report produced data that showed a disturbing and systemic pattern of police harassment and violence, and that selective enforcement of low-level crimes, false arrests for Prostitution-related offenses, and harassment around gender identification (including “gender checks” —searches conducted ‘to assign someone a gender’) are common for individuals of color who are perceived to be LGBTQ.²⁴¹ Many transgender individuals were profiled as sex workers when conducting routine daily tasks in the neighborhood, frequently with verbal or physical abuse in addition to the trauma of being profiled.²⁴² The data collected in the Make the Road report bore out transgender individuals’ perceptions of being profiled by the police. Reports of physical or verbal harassment of transgender individuals were nearly twice as high as those who identified as not LGBTQ, and reports of physical abuse were nearly a fifth higher.²⁴³

There were also a number of reports of sexual assault by the police, including being forced to perform sexual acts under threat of arrest.²⁴⁴ Make the Road commented that the pattern of misconduct is in part a reflection of local demographics and tensions, but pervasive police profiling, harassment, and brutality towards LGBTQ individual and especially trans* individuals mirrors reported incidences throughout New York City and other cities in the United States.²⁴⁵ In fact, in the United States trans* people of color are more than three times as likely to experience hate violence as compared to the general population.²⁴⁶ Like other cities, New York City has long history of police misconduct and abuse of LGBTQ communities; including profiling, harassment, homophobic and transphobic abuse, unconstitutional searches, false arrests under vague or unconstitutional laws, sexual harassment and assault, and physical abuse by police documented across the city; especially including gender checks and profiling transwomen as sex workers.²⁴⁷ In one case, a transwoman named JaLea Lamot successfully sued police for false arrest for Loitering as she walked to her job as a janitor in Manhattan. During the false arrest, police unlawfully conducted a “gender check,” and dangerously placed her with men while she was in NYPD custody.²⁴⁸

Profiling transwomen as sex workers is so common that it has

241. *Id.*

242. *Id.* at 14.

243. Make the Road New York, *supra* note 219, at 15.

244. *Id.* at 4–5.

245. *Id.* at 6.

246. *Id.* at 11.

247. *Id.*

248. *Id.* at 12.

earned the phrase, “walking while trans” and has been widely documented by groups such as Amnesty International.²⁴⁹

In June of 2012 NYPD issued new guidelines that mandate NYPD officers address people using their preferred names and gender pronouns, as well as process, search, and house people in NYPD custody based on their gender identity.²⁵⁰ Disrespectful comments regarding gender expression or sexual orientation and searches to “determine a person’s gender” are expressly prohibited.²⁵¹ However, as Amnesty International remarked, “the capacity to document abuses against LGBT people in the US remains extremely limited, which results in little or no ability to accurately assess this problem in most communities in the US.”²⁵² Make the Road New York remarked, “Despite these efforts, the results of our study reveal that significant officer education, legislation and policy reform, and new officer protocols are still needed to address persisting homophobic and transphobic attitudes among police officers and to prevent harassment and abuse of LGBTQ community members.”²⁵³ Perhaps the most telling statistic around HTICs and (perceived) gender and sexuality is simply this: as of October 2013, one hundred percent of individuals granted relief under New York’s vacatur law have been cisgender females.²⁵⁴

4. *Violence at the Hands of the Police*

Police threaten and physically and sexually assault sex workers.²⁵⁵ In a study of outdoor sex workers, 30% reported being threatened with violence (including murder) by police officers, 27% had experienced physical violence (including chasing, kicking, and beating to the point of hospitalization) from police.²⁵⁶ Workers also reported police using arrest as a threat to receive fellatio and feel workers’ breasts, and one person stated they were raped.²⁵⁷ Eliminating the Loitering statute may reduce the amount of contact with police sex workers have, and diminish the coercive power police hold over these workers when they do interact.

B. Discriminatory Laws Are Unacceptable

249. *Id.*

250. *Id.*

251. *Id.*

252. Make the Road New York, *supra* note 219, at 12.

253. *Id.*

254. Phillips et al., *supra* note 86, at 18.

255. Thurkral, Behind Closed Doors, *supra* note 71, at 36.

256. *Id.* at 37.

257. *Id.*

New York has a long history of criminalizing sex work, yet no efforts have proven successful in deterring sex work. Despite hundreds of years of anti-sex work law, sex work has not been eliminated. Sex work is here to stay. Recent efforts to change attitudes towards individuals who have experienced or are experiencing sex trafficking are both problematic in their implementation and a hopeful sign of political shifts in eventual favor of a long argued point: decriminalization is the best and safest way to approach sex work in the law.

We should decriminalize because the harms outweigh the benefits and decriminalization is consistent with the values espoused in creating the HTICs. If political pressures do not allow full decriminalization at this time, then we at least should eliminate some of the most harmful parts of the discriminatory statutes, such as the Loitering statute, to reduce or eliminate the harms outlined above.

IV. The United States Constitution and Jurisprudence Require Decriminalization

When a law impermissibly infringes on the rights contained in the First Amendment “freedom of speech”²⁵⁸ clause, it negatively impacts everyone subject to its jurisdiction. New York Penal Law Section 240.37 (Loitering)²⁵⁹ is such a law. This Section lays out at least two manners in which every New Yorker (or visitor) is being denied rights guaranteed under the United States Constitution—regardless of their affiliation (or lack thereof) with Prostitution, or sex workers.

The Section aims to move the dialogue around the eradication of this unjust and unconstitutional law forward, while holding space for the many other Constitutional approaches that are possible. Here, Part A begins with an overview of the black letter law and how it works—including an explanation and analysis of both the bases for arrest and significant legal precedent. Part B gives a general overview of how a First Amendment analysis works. Part C lays out the mechanics of a Time-Place-Manner (TPM) argument and applies it to § 240.37. Part D continues the conversation by focusing on overbreadth—outlining how the doctrine works and applying the doctrine through an in depth comparison to precedent. Finally, Part E wraps up with a brief conclusion.

A. Loitering (NYPL §240.37): the Law, the Arrests, the Jurisprudence

258. U.S. CONST. amend. I (McKinney 2014).

259. N.Y. PENAL LAW § 240.37 (Consol. 2015).

1. *Black Letter Law: NYPL §240.37*

To violate the §240.37 Loitering for the purpose of engaging in a prostitution statute (the Loitering statute), an individual must meet four elements: 1) to remain or wander about; and 2) in a public place (as defined by the statute itself); and 3) repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons; and 4) for the purpose of promoting Prostitution.²⁶⁰

In New York, a person is guilty of Prostitution when “such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.”²⁶¹ The criminalized behavior in the Loitering statute is not the act of solicitation itself nor is it any “sexual conduct.”²⁶² These acts are separately criminalized via Section 230.00 of New York Penal Law

260. The statute in full:

“1. For the purposes of this section, “public place” means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways and entrance ways to any building which fronts on any of the aforesaid places, or a motor vehicle in or on any such place.

“2. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute [sic] as those terms are defined in article two hundred thirty of the penal law, shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of sections 230.00 or 230.05 of the penal law.

“3. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of promoting prostitution as defined in article two hundred thirty of the penal law is guilty of a class A misdemeanor. Prostitution is a class B misdemeanor.”

N.Y. PENAL LAW § 240.37 (Consol. 2015).

261. N.Y. PENAL LAW § 240.37 (McKinney 2015). As of January 7, 2015, the statute has been proposed to be amended to be titled “Criminal Prostitution” rather than “Prostitution” and to read, “A person is guilty of criminal prostitution when, being seventeen years old or more, such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.” S. 112, 238th Leg. (N.Y. 2015). This, and other proposed changes, are largely centered on redefining “sexual exploitation of children.” This change does not affect the arguments here.

262. See Donnino, *supra* note 18 (explaining that while the term ‘sexual conduct’ is not defined in the applicable statutes, it has been held to include at least sexual intercourse, oral or anal sexual conduct, and masturbation. At least once it has included “lap dancing” and “autoerotic performance by the defendant for another person” which does not contemplate or include “physical contact between the accused and one other person”).

(Section 230.00 or the Prostitution statute). The acts described in Section 247.30 (wandering, beckoning, stopping passersby, etc.) are in themselves legal in most cases, and where they are not (for example, blocking traffic or harassing passersby), there are other public order statutes in place criminalizing such behavior.²⁶³

The crime here is a thought crime. It is not sex work itself, nor the offer of sex work; and it's not the wandering and beckoning and talking to people on the street. Rather, the criminalized offense under the loitering statute is the combination of specific, observable, legal acts plus *thinking about* acts forbidden under the Prostitution statute. Given that not talking to police is constitutionally protected behavior,²⁶⁴ a reasonable person might ask how an officer could reliably determine what the individual they're observing is *thinking about* at the time of their actions. The Loitering statute gives no assistance in how officers are to determine these thoughts.

2. *The Police: Basis of Arrests*

The New York Police Department appears to have developed some standards where the statute is lacking. As detailed in Section III, the "Basis of Conclusion that Defendant was Loitering for the Purpose of Prostitution" includes both physical characteristics of the area, and the knowledge and previous behavior of the officer.²⁶⁵

Physical characteristics of the area that are used to determine the thoughts of civilians are: "the location of the arrest is not a bus stop, nor an open commercial establishment, nor a house of worship;" and "the above area is either a commercial location or an industrial location;" as well as, "there was sexual type debris nearby (condom wrappers, used condoms)."²⁶⁶ Knowledge of the officer includes, "officer has professional training as a police officer in the detection of individuals loitering for the purpose of prostitution; officer is aware that NYPD has made numerous arrests of 240.37, 230.00, and/or 230.03 at the above locations," and "officer is aware the defendant has previously been (arrested for, convicted of, or both) violating prostitution laws."²⁶⁷ Previous behavior of the officer

263. See, e.g. Disorderly conduct, "A person is guilty of disorderly conduct when, with intent to cause public disturbance, annoyance, or alarm, or recklessly creating a risk there of: He makes unreasonable noise; or He obstructs vehicular or pedestrian traffic; or He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose." N.Y. PENAL LAW § 240.20 (McKinney 2015).

264. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (explicitly stating that "prior to any questioning, the person must be warned that he has the right to remain silent").

265. *Ray & Catarine*, *supra* note 108, at 18.

266. *Id.*

267. *Id.*

includes “officer has previously made arrests for loitering for the purpose of prostitution.”²⁶⁸ Note that arrests are not convictions; theoretically an officer could use their own previous arrests, even if the arrest was unsubstantiated and later dismissed by the Court, as a bases for future arrests. Note also that, as has been amply demonstrated elsewhere, many arrestees opt to plead out rather than fight their charges due to a variety of systemic forces having little to do with actual guilt or lack thereof.²⁶⁹

Officers also look at “Defendant Behavior.”²⁷⁰ Some of the language in these descriptions is paralleled in the Loitering statute, while other pieces are not. The “behavior” includes observable acts as well as officer knowledge and judgment. The acts the officers document include: “remain to wander about in a public place for a period of minutes, during which defendant repeatedly beckoned to passer-by and stopped passer-by, engaging in conversation with passer-by;” “stop only male passers-by and defendant did not beckon so or converse with female passers-by who passed by during the same period, thus stopping only passers-by of one gender;” “standing in the middle of the road while beckoning to motorists;” and “none of the vehicles stopped were taxis, livery cabs, or emergency vehicles.”²⁷¹ Officer knowledge includes, “standing with other individuals whom I am aware have previously been arrested for prostitution-related activities.”²⁷² Officer judgment includes, “dressed in provocative or revealing clothing, specifically (describe).”²⁷³ Officers have described the following articles of clothing as provocative or revealing: “black sleeveless top, very short pants with butt cheeks exposed, short blue skirt/dress, tight pink cut off shirt, revealing midsection, and low hanging sweat pants, wearing short dress.”²⁷⁴

It seems that wearing the “wrong” clothes, standing near the “wrong” people, being in the “wrong” zoning district, or even standing near the “wrong” type of litter while waving, beckoning, etc., creates suspicion or even proof that civilians are *thinking about* solicitation or Prostitution.

268. Ray & Catarine, *supra* note 108, at 18.

269. See, e.g., Russel Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133 (2013) (describing why factually innocent parties are *more* likely to plead guilty where police misconduct has occurred); see also John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014) (articulating that factually innocent defendants are more likely to plead guilty in low level offenses where a plea guarantees freedom, where defendants prevail on appeal and are offered a plea bargain that assures imminent or immediate release, and where defendants are threatened with harsh alternative punishments if they do not plead guilty).

270. Ray & Catarine, *supra* note 108, at 20.

271. *Id.*

272. *Id.*

273. *Id.*

274. Ray & Catarine, *supra* note 108, at 20.

3. People v. Smith

It seems incredible that the law has survived in its current form for nearly four decades.²⁷⁵ One reason for this may be that there is some discouraging precedent in a New York Court of Appeals case that, upon first read, appears to negate First Amendment claims. Yet, on close examination, there is breathing room in this case, opportunities for distinction, and the advantage of forty years of interim public policy advocacy by and for those engaged in the sex trades. A court might take a different position today than it did when that case was decided—a mere two years after the Loitering statute was passed.

In 1978, the defense in *People v. Smith* unsuccessfully challenged the loitering statute on both overbreadth²⁷⁶ and void for vagueness grounds.²⁷⁷ That case was largely dependent on the testimony of the arresting officer, as the defendant could not be located.²⁷⁸ The officer stated that the defendant was at an address where there had been numerous arrests for Prostitution at two in the morning, and she briefly spoke with two men before a third joined her inside a nearby building for some five or six minutes.²⁷⁹ “The officer asked the man what he was doing inside, and, as a result of that conversation and defendant’s actions, she was placed under arrest.”²⁸⁰ The defense argued that, “[t]he statute vests unfettered discretion in the police in the arrest of violators and, therefore, is void for vagueness”²⁸¹ and “the statute is overbroad in that it inhibits the free exercise of protected rights.”²⁸² The court chose some rather defensive language in its discussion of the merits of these claims. Specifically, the court stated the “defendant’s *attack* is upon the accusatory instrument, she has not been tried or convicted...”²⁸³ and, “[w]e reject the *attack* and uphold the legislation”²⁸⁴ (emphasis added). One may ponder whether the court’s opinion presents typical language given that the defendant was making what is more typically labeled a “challenge”—merely a respectful legal argument in an adversarial system—rather than an “attack.”

As part of its response, the court outlines the State interest in

275. The law was initially passed in 1976. N.Y. PENAL LAW § 240.37 (McKinney 2015).

276. The idea that the statute is overly broad, discussed further in Part D of this Section.

277. *People v. Smith*, 44 N.Y.2d 613 (1978).

278. *Id.* at 617.

279. *Id.* at 622.

280. *Id.*

281. *Id.* at 616.

282. *Id.*

283. *Id.* at 617.

284. *Id.* at 616.

Section 240.37 quite clearly, even directly quoting the Legislature:

Because prostitution normally involves two willing participants and complaints by those implicated are rare indeed, section 230.00 is insufficient to meet public needs in light of the profligate spread of the world's oldest profession and its attendant evils in our central cities. Accordingly, the Legislature added section 240.37 to the Penal Law in 1976 under findings which recited:

“The legislature hereby finds and declares that loitering for the purpose of prostitution . . . is disruptive of public peace in that certain persons engaged in such conduct in public places harass and interfere with the use and enjoyment by other persons of such public places thereby constituting a danger to the public health and safety.

The legislature further finds that in recent years the incidence of such conduct in public places has increased significantly in that persons aggressively engaging in promoting, patronizing, or soliciting for the purposes of prostitution have, by their course of conduct in public places, caused citizens who venture into such public places to be the unwilling victims of repeated harassment, interference and assault upon their individual privacy, as a result of which public places have become unsafe and commercial life of certain neighborhoods has been disrupted and has deteriorated.”²⁸⁵

Both the court and the legislature seem to be either ignoring or dismissing several important components here. The concept that the Loitering law is the only way to “meet public needs” (arrest sex workers) because the Prostitution section of the statutory scheme is insufficient due to mutually “willing participants” ignores the content of that section. Specifically, the Prostitution section covers a person who “engages or agrees or offers to engage.”²⁸⁶ The passer-by being approached by a person engaged in sex trades need not be a “willing participant,” and, in many cases, may be quite disinterested in the solicitation. In fact, in *People v. Smith*, the officer testified that the first two men the defendant approached did not enter the building and one of them “was seen to shake his head, as if to indicate a negative response.”²⁸⁷

285. *People v. Smith*, 44 N.Y.2d 617-18 (1978).

286. N.Y. PENAL LAW § 230.00 (McKinney 2015).

287. *People v. Smith*, 44 N.Y.2d 622 (1978).

As to the “attendant evils,” there are already laws in place to provide protection against the specific concerns of harassment and assault.²⁸⁸ Further, both the court and legislature fully ignore the other legitimate State interests that fall under the categories of “public health and safety” that are best served when sex work can be conducted without fear of arrest.²⁸⁹ Surely, the very naming of the activity as “the world’s oldest profession” goes to the point that sex work has been vilified for millennia, yet remains with us. It seems a stretch to declare this statute as an effective means of deterrence (in fact, the court seems to suggest that it might be the *only* means of deterrence available—a position that is clearly untrue).²⁹⁰ The case here also causes one to question whether all “innocent” behavior be criminalized because “certain persons” abuse the right in limited locations.²⁹¹

As to the First Amendment argument in the case, the court declared,

We reject the claim that the scope of section 240.37 has a chilling effect on the exercise of First Amendment freedoms. Clearly, any criminal statute penalizes conduct and may, in the abstract, be said to impinge on speech or association in some fashion. But the protections are not absolute and the statute at issue here does not impermissibly sweep ‘within its prohibitions what may not be punished under the First and Fourteenth Amendments.’ That defendant may have employed language and the public streets to ply her trade does not imbue her conduct with the full panoply of First Amendment protections. On the contrary, that statute, by its terms, is limited to conduct ‘for the purpose of prostitution, or of patronizing a prostitute’[sic] —behavior which has never been a form of constitutionally protected speech. Accordingly, the order of the Appellate Term should be affirmed.²⁹²

288. See Part D of this paper for a more detailed treatment of this argument.

289. See, e.g., Anna Forbes & Sarah Elspeth Patterson, *The Evidence Is In: Decriminalizing Sex Work is Critical to Public Health*, RH REALITY CHECK (Aug. 13, 2014), <http://rhrealitycheck.org/article/2014/08/13/evidence-decriminalizing-sex-work-critical-public-health/> (summarizing a number of studies about decriminalizing sex work that show this course of action is the most effective from a public health interest).

290. See *supra* Sections II and III.

291. By “abuse the right,” I do not mean to say that engaging in sex trades is an abuse of rights or that waving, beckoning, etc. is an abuse of rights; I mean to say that *assaulting and harassing people* (in that context or in any other public interaction) may be an abuse of rights.

292. *People v. Smith*, 44 N.Y.2d 623 (1978).

The order of the Appellate Term was, “Finally, since section 240.37 prohibits only such communication which is ‘for the purpose’ of criminal activity, it does not infringe upon First Amendment rights (see *People v. Sprowal*, 49 Misc 2d 806, affd 17 NY2d 884, app dsmd 385 U.S. 649).”²⁹³ However, the court’s analogy to the referenced case is not particularly strong, and may even touch upon an unrelated First Amendment doctrine. *People v. Sprowal* was about a non-student civilian continuing to hand out literature at a high school after an officer told him both to stop and not to block students leaving the building.²⁹⁴ While the defendant’s claim in *People v. Smith* is “overbreadth,” which will be discussed further in Part D of this Section, the claim in *People v. Sprowal* was one of “prior restraint,” a doctrine now typically more associated with issues pertinent to the freedom of the press clause than issues pertinent to the freedom of speech clause.²⁹⁵

Thus, while *People v. Smith* is certainly a hurdle, it is not necessarily insurmountable. The decision was not based on strong jurisprudence, contains questionable logic, and, as will be demonstrated, misconstrues the legal arguments. It is not a particularly sound case. Further, as discussed below, other courts have ruled differently in analogous situations. Lastly, and importantly, the Supreme Court has never ruled on the constitutionality of the New York Loitering statute or similar statutes in other states.²⁹⁶ Thus, First Amendment arguments are certainly still available in challenging the constitutionality of the Loitering statute. Below, part B explains the process of a First Amendment analysis. Next are two new First Amendment arguments; part C presents the time-place-manner (TPM) argument and part D presents a new overbreadth argument relying on jurisprudence that was not addressed in *People v. Smith*. Part E concludes with the observation that the Loitering statute is unconstitutional on at least two grounds—and that the political tenor of the court may have shifted enough since *People v. Smith* to admit this.

B. Overview of a First Amendment Analysis

1. Structure of a First Amendment Analysis

293. *People v. Smith*, 89 Misc.2d 754, 761 (1977).

294. *People v. Sprowal*, 17 N.Y.2d 884 (1966).

295. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971).

296. Although it should be noted that they have dismissed claims involving loitering for the purpose of Prostitution for want of a federal question in both New York; see *D. v. Juvenile Dep’t of Multnomah County*, 434 U.S. 914 (1977) and in an Oregon case where the defendant “admitted she was a prostitute [sic],” *In re D.*, 27 Ore. App. 861, 863 (1976).

The First Amendment²⁹⁷ fully applies to the States, as it has been “incorporated intact into the Fourteenth Amendment Due Process Clause.”²⁹⁸ As the court correctly stated in *People v. Smith*, despite the seemingly clear and robust language of the text, First Amendment rights are not absolute.²⁹⁹ Regarding the “freedom of speech” clause, one first needs to define the word “speech.” According to United States Supreme Court Cases and Comments, “The concept of speech includes activities that convey ideas . . . If activity is intended as a means of communicating ideas, then it qualifies as ‘speech.’ The issue is then whether the First Amendment allows public regulation of the particular communication in the circumstances under which it was made.”³⁰⁰

In other words, we have freedom of speech, just not at all times or in all manners.³⁰¹ There is, generally speaking, a hierarchy of speech from the most protected (political speech) to intermediately protected (commercial speech) to the fewest protections, including speech lacking any protections (obscenity).³⁰² Like all constitutional protections, invoking them requires state action.³⁰³ After this threshold issue is established, the next inquiry is whether it is speech, and if so, what type of speech is at issue.³⁰⁴ Types of speech include pure speech (just words), symbolic speech (images, flags, symbols), regulation of expressive conduct (gestures, acts, parades, burning things, wearing armbands, dressing as the military), expressive but categorically excluded speech (obscenity, fighting words, ‘clear and present danger,’ and ‘not mere lies’), as well as mixed speech and nonspeech.³⁰⁵

The type of speech at issue informs which doctrines, tests, and

297. The First Amendment declares, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I (McKinney 2014).

298. 1-5A United States Supreme Court Cases and Comments Ch. 5A.03 Freedom of Speech. (LexisNexis).

299. *People v. Smith*, 44 N.Y.2d 613 at 623.

300. United States Supreme Court Cases and Comments at 5A.03[1][a][i].

301. Ruthann Robson, *FIRST AMENDMENT: CASES, CONTROVERSIES, AND CONTEXTS*, 56 (2016) available at <http://www.cali.org/books/first-amendment-cases-controversies-and-contexts> (last visited Mar. 26, 2016) citing *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942).

302. Robson, *supra* note 300, at 118 citing *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

303. For a discussion of state action, see *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

304. See, e.g., Robson, *supra* note 300, at 66 citing *Hess v. Indiana*, 414 U.S. 105 (1973).

305. Kevin Francis O’Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 226 (2000).

precedent to apply.³⁰⁶ For example, regulation of mere conduct (non-expressive conduct) will not give rise to a First Amendment free speech clause claim, but expressive conduct (even lacking any ‘pure speech’) may.³⁰⁷ Although conduct “may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments,”³⁰⁸ there must also be both an “intent to convey a particularized message” and a great likelihood that “the message would be understood by those who viewed it” (known as the Spence Test)³⁰⁹ In an analysis of regulation of expressive conduct, the type of rules to apply depend upon whether the regulation is directed at speech that is content/viewpoint based, content neutral, or aimed at secondary effects of the speech at issue.³¹⁰

In the case of “mixed speech and nonspeech” expressive conduct, a very specific test has developed, known as “the O’Brien test.” The test states the rules for when “speech” and “nonspeech” elements are combined in the same course of conduct.³¹¹ Summarized, the test is as follows: government regulation of “mixed speech and nonspeech conduct” is constitutional where 1) the government has the power to regulate (it is otherwise constitutional); 2) it “furthers a substantial or important government interest;” 3) the “governmental interest in regulating the conduct is unrelated to suppression of speech;” and 4) the restriction (the means chosen) on speech is both incidental and “no greater than is essential to the furtherance of that interest.”³¹²

2. *Applying First Amendment Analyses to Loitering*

To understand what kind of speech is regulated by the statute itself, it is helpful to analyze each element of the statute. As a reminder, the Loitering statute contains four elements: 1) to remain or wander about; and 2) in a public place (as defined by the statute itself); and 3) repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free

306. *Id.*

307. *United States v. O’Brien*, 391 U.S. 367, 376-377 (1968) (Rejecting “the view that an apparently limitless variety of conduct can be labeled as ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”).

308. *Spence v. Wash.*, 418 U.S. 405, 409 (1974).

309. *Id.* at 410-411.

310. William M. Howard, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum*, 70 A.L.R. 6th 513 (2015).

311. *United States v. O’Brien*, 391 U.S. at 376-377.

312. *Id.*

passage of other persons; and 4) for the purpose of promoting Prostitution.³¹³

As to element four, “for the purposes of promoting prostitution,”³¹⁴ the Spence test articulates that thought alone is not enough to command First Amendment protections. However, in combination with conduct that in great likelihood would be understood as conveying a message, this element may still play a role in a speech regulation analysis.

The third element is multifaceted: “repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons”³¹⁵ All of these save “repeatedly interferes with the free passage of other persons” are facially expressive conduct, independent of the rest of the statute. A person being beckoned-to will generally understand that this means “come here,” while a person (or vehicle) stopped will generally understand that this means “I want to engage with you about something.” So long as this is also the intent, the Spence test is met (“intent to convey” plus “likelihood of being understood”). Repeatedly interfering with the free passage of other persons is a little less clear. While it is conduct, it could mean a variety of things (e.g., the person enjoys bothering other people, the person needs something, the person doesn’t have similar cultural norms as those around them and doesn’t realize they’re interfering, etc.) and therefore may be nonexpressive conduct. Nonetheless, because the statute does not require each of the named behaviors, but merely one of them, the statute *as a whole* regulates expressive conduct.

Elements one and two can be combined into “remains or wanders about in a public place.” This is conduct, but the question is remains whether it is expressive conduct. It is not. Without more, it is difficult to see a message that would “be understood by those who viewed it” in the acts of “remaining and wandering about.” Perhaps some argument could be made as to the implications of a person remaining and wandering about,³¹⁶ but it is unlikely to be “understood by those who viewed it” without more context. Because this is so, the statute *as a whole* also regulates “mixed speech and nonspeech” conduct.

The “more context” sought here, however, is exactly what the officers use as their bases for arrest, i.e., “dressed in provocative or

313. N.Y. PENAL LAW § 240.37 (Consol. 2015).

314. *Id.*

315. *Id.*

316. For example, one might hazard a guess that they may not have a more pressing place to be (though this would not necessarily be true).

revealing clothing, specifically (describe).”³¹⁷ For example, if a person “remains and wanders about” in clothing styles generally marketed as having sex appeal, the conduct may become expressive in that for some people, wearing “sexy” clothing while “wandering about” is an intentional appeal to their own or another’s sex interests.³¹⁸ If a person were looking to engage in casual sex, they may engage in exactly this behavior while wearing “sexy” clothing. They may have another intent entirely; perhaps the clothing merely expresses their comfort with that style and is not sexually motivated. Whatever the expression, when the New York regulates such expression (e.g., using it as a basis for charging a violation of a statute and as evidence of that violation), the state is engaging in content-based regulation of expressive speech.³¹⁹ Because the state is looking at the type of speech (in this case, the type of expressive clothing), the regulation is not content neutral.³²⁰ This observation is key to a Time, Place, Manner (TPM) First Amendment Doctrinal analysis.

C. Time, Place, Manner (TPM)

1. *Structure of a TPM Analysis*

Time, Place and Manner (TPM) Doctrine is about the power of the State to regulate public places.³²¹ The Loitering statute itself states, “For the purposes of this section, ‘public place’ means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways and entrance ways to any building which fronts on any of the aforesaid places, or a motor vehicle in or on any such place.”³²²

This is the language of the traditional public forum. In the traditional public forum, other doctrines are used to support the First Amendment analysis (e.g., overbreadth).³²³ The traditional public forum

317. Ray & Catarine, *supra* note 108, at 18.

318. Clearly, it is not accurate to assume this to be true for all or even most people wearing clothing marketed as ‘sexy’ in mainstream culture. But it is likely true for some.

319. O’Neill, *supra* note 304 at 235.

320. *Id.*

321. The basic structure of the argument is to analyze 1) whether the space in question is government/public property (therefore the subject to the First Amendment); 2) what type of forum it is if so; and 3) based on the type of forum, the level of scrutiny or doctrinal standards that apply. Under a TPM analysis, the forum can fall into several categories: traditional public forum, designated or limited public forum, nonpublic or closed forum, or not a public forum at all. O’Neill, *supra* note 304 at 238.

322. N.Y. PENAL LAW § 230.00 (McKinney 2015).

323. O’Neill, *supra* note 304 at 284.

holds a special place in American Jurisprudence, and restricting expressive activity in such a forum is strictly limited.³²⁴ This type of forum is defined as a place with “the physical characteristics of a public thoroughfare” that has “historically and traditionally” been used for activities compatible with expressive conduct.³²⁵ Examples of such traditional public forums include, “streets, sidewalks, parks, and other public spaces that have been used for purposes of assembly.”³²⁶ The Loitering statute names these exact spaces as the intended location for state regulation—thus the regulation in question here is about that which has been, from time immemorial,³²⁷ a traditional public forum. Further, the courts have established that “the sidewalks of the City of New York fall into the category of public property traditionally held open to the public for expressive activity.”³²⁸

Where the government is trying to prohibit communicative activity in a traditional public forum, strict limits apply. Specifically, when regulating such a forum, “the State may . . . enforce regulations of the *time, place, and manner* of expression which are *content-neutral*, are *narrowly tailored* to serve a significant government interest, and leave open *ample* alternative channels of communication.”³²⁹ (Emphases added.)

In contrast, content-based regulations are presumptively invalid, and the burden rests with the State to prove otherwise.³³⁰ “For the State to enforce a *content-based* exclusion it must show that its regulation is *necessary* to serve a *compelling* state interest and that it is narrowly drawn to achieve that end”³³¹ through the “*least restrictive means*.”³³² (Emphases added.)

The party arguing to keep a regulation as is (typically the defendant/government) will attempt to demonstrate that the regulation is content-neutral so that regulation is subject to a lower level of scrutiny. As mentioned previously, content-neutral restrictions are those that are justified without reference to the content of the regulated speech.³³³ Further, in determining if a restriction is content-neutral, it is the government’s purpose

324. Howard, *supra* note 309.

325. *Id.*

326. *Id.*

327. Streets and parks “have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

328. *Loper v. N.Y. City Police Dep’t*, 999 F.2d 699, 704 (1993).

329. *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983).

330. Howard, *supra* note 309.

331. *Id.*

332. *Id.*

333. *Id.*

that controls.³³⁴ Inversely, challenging the government on a regulation is more likely to be successful under the content-based scrutiny level.

2. *Loper v. NYPD*

Here, because the government is not merely looking at conduct, but is instead looking at the content of that conduct, the regulation is inescapably content-based. “Where the government regulates speech based on its perception that the speech will spark fear among or disturb its audience, such regulation is, by definition, based on speech content.”³³⁵ In the Appellate Court opinion in *People v. Smith*, which the Court of Appeals affirmed, the court wrote,

The State Legislature’s aim in passing this statute was obviously twofold. First, it sought to prevent prostitutes [sic] from soliciting and annoying citizens and passersby as customers . . . Newspaper articles and television news coverage continuously point out how citizens are being embarrassed, annoyed . . . and . . . [i]t is the right of a citizen to go about the streets without affront to his or her sense of decency.³³⁶

In fact, one of the very principles underlying the First Amendment is that a government may not prohibit the expression of an idea merely for being offensive or disagreeable, rather the public must “tolerate insulting, and even outrageous speech,” such are the protections of the First Amendment.³³⁷

This is not to say that all speech is given protection. In the case of content-based regulations, however, the government must pass strict scrutiny examination. The first question is as to the State interest. Here, there are at least three State interests. They aim to enforce public ‘morality,’ enforce laws already in existence, and to address urban planning. They enforce morality by preventing “innocent” passersby from being exposed to solicitation, to “attempt to protect its citizenry and limit an illegal activity—prostitution.”³³⁸ They seek to enforce laws already in existence when they state an intent “to make soliciting by prostitutes [sic]

334. *Id.*

335. *Id.*

336. *People v. Smith*, 88 Misc.2d at 596.

337. Howard, *supra* note 309.

338. *Id.*

tougher,”³³⁹ reducing harassment and assault of ‘ordinary citizens.’³⁴⁰ They also seek to address urban planning by seeking to reduce the “intensely aggravating problem in the City of New York” of “the general flow of pedestrian traffic,”³⁴¹ to address a “danger to the public health and safety,”³⁴² and to restore “ordinary community and commercial life of certain neighborhoods.”³⁴³

The government’s burden here is to demonstrate that not only are these interests compelling, but that plausible, less restrictive alternatives to the Loitering law will be ineffective to achieve its goals.³⁴⁴ *Loper v. New York City Police Department*, a more recent case (relative to *People v. Smith*) may provide a useful analogy. That case discussed regulating loitering for the purpose of limiting begging.³⁴⁵ Begging was determined to be content-based regulation of free speech, and was struck down on both TPM and O’Brien grounds in a manner highly applicable to New York’s loitering for purposes of Prostitution statute.³⁴⁶ The language of the government argument may sound familiar, and is worth quoting at length for the full effect:

The City Police regard the challenged statute as an essential tool to address *the evils associated* with begging on the streets of New York City. They assert that beggars tend to congregate in certain areas and become more *aggressive* as they do so.

Panhandlers are said to station themselves in front of banks, bus stops, automated teller machines and parking lots and frequently engage in *conduct described as ‘intimidating’ and ‘coercive.’* Panhandlers have been known to *block the sidewalk, follow people down the street and threaten those who do not give them money . . .* The City Police . . . contend that it is vital to . . . have the statute available for the officers on the ‘beat’ to deal with those who *threaten and harass the citizenry* through begging.

The City Police advance the theory that panhandlers, unless stopped, *tend to increase their aggressiveness and ultimately commit more serious crimes.* According to this theory, what starts out as peaceful begging *inevitably leads to the ruination of a neighborhood.* It appears from the contentions of the City Police

339. *People v. Smith*, 88 Misc.2d at 596.

340. *See id.* at 756.

341. *Id.*

342. *Id.* at 756.

343. *People v. Smith*, 8988 Misc. 2d at 756.

344. Howard, *supra* note 309.

345. *See Loper v. N.Y. City Police Dep’t*, 999 F.2d 699.

346. *See id.*

that only the challenged statute stands between safe streets and rampant crime in the city.³⁴⁷ (Emphases added.)

Notice parallel themes of “evils,” “blocking sidewalks,” “harassment,” and “ruining” neighborhoods. But the court is not impressed with these assertions, and responds with similarly applicable counter-arguments; describing the above rationale as “ludicrous” and demonstrating that the means chosen were not the ‘the least restrictive,’ thus failing the narrowly tailored prong of the analysis.³⁴⁸

While this case is from 1993, the criminal code in New York today already proscribes solicitation of money in exchange for sex in the city streets,³⁴⁹ retains an entire scheme of “Offenses Against the Public Order”³⁵⁰ that proscribe harassment,³⁵¹ blocking vehicular or pedestrian traffic,³⁵² engaging in violent or threatening behavior,³⁵³ and more. Further, there is an entire statutory scheme, “Assault and Related Offenses,” devoted to assault.³⁵⁴

Thus, on this basis alone, Section 240.37 of the Offenses Against the Public Order New York Penal Code fails strict scrutiny; and is therefore Constitutionally unenforceable.

There are other bases as well; for example, “less than an inclusive enforcement of a law suggests that the government's supposedly vital interest is not really compelling and can also show that the law is not

347. *Id.* at 701.

348. The court explained, “It is ludicrous, of course, to say that a statute that prohibits only loitering for the purpose of begging provides the only authority that is available to prevent and punish all the socially undesirable conduct incident to begging described by the City Police. There are, in fact, a number of New York statutes that proscribe conduct of the type that may accompany individual solicitations for money in the city streets. For example, the crime of harassment in the first degree is committed by one who follows another person in or about a public place or places or repeatedly commits acts that place the other person in reasonable fear of physical injury. N.Y. Penal Law § 240.25 (McKinney Supp. 1993). If a panhandler, with intent to cause public inconvenience, annoyance or alarm, uses obscene or abusive language or obstructs pedestrian or vehicular traffic, he or she is guilty of disorderly conduct. N.Y. Penal Law §§ 240.20(3), (5) (McKinney 1989). A beggar who accosts a person in a public place with intent to defraud that person of money is guilty of fraudulent accosting. *Id.* § 165.30(1). The crime of menacing in the third degree is committed by a panhandler who, by physical menace, intentionally places or attempts to place another person in fear of physical injury. N.Y. Penal Law § 120.15 (McKinney Supp. 1993).” *Loper v. N.Y. City Police Dep’t*, 999 F.2d at 701–702.

349. N.Y. PENAL LAW § 230.00 (Consol. 2015).

350. N.Y. PENAL LAW §§ 240.00–240.71 (Consol. 2015).

351. N.Y. PENAL LAW §§ 240.25–240.31 (Consol. 2015).

352. N.Y. PENAL LAW § 240.20 (5) (Consol. 2015).

353. N.Y. PENAL LAW § 240.20 (1) (Consol. 2015).

354. N.Y. PENAL LAW §§ 120.00–120.70 (Consol. 2015).

narrowly tailored.”³⁵⁵ The law here is easily demonstrated to be “less than inclusive.” For example, where the State interest is “danger to the public health and safety,” the legislature fails to take into account the attendant health and safety risks of forcing sex trades underground. These risks include an increase in HIV transmission and an unlikelihood to the point of inability to report sexual or physical assault – including that perpetrated by police officers themselves.³⁵⁶ Sex workers are members of the public; a State interest in “public health and safety” that excludes them demonstrates that the means chosen to address this ‘vital interest’ is not narrowly tailored.

The prohibited acts (beckoning, stopping, engaging passers-by in conversation) are also “less than inclusive.” For example, what if a person “remained or wandered about a public place” while dancing provocatively for the purposes of promoting Prostitution? What if this person said nothing, stopped no one, did not beckon, and did not even make eye contact? This person would not seem to violate the letter of the law, yet surely the legislature did not intend to exclude this, or any behavior, that might ease “soliciting by prostitutes [sic].”

These few examples demonstrate that the statute is not narrowly tailored, not using least restrictive means to serve a compelling State interest. As such the statute is constitutionally unenforceable and must be struck down.

D. Overbreadth

1. *Structure of an Overbreadth Argument*

At some point while considering the Loitering statute, one might ask the question—what if someone was engaging in “innocent” behavior that the police interpreted as a violation of Section 240.37? For example, there is no law in New York prohibiting casual sex among strangers when there is no fee given for the act(s). Short of behavior that might violate harassment or other city ordinance statutes, what is to stop an officer from mistaking someone *hitting on* a stranger from someone *thinking about soliciting* a stranger?

Overbreadth doctrine addresses just such conundrums. As discussed above, speech is subject to reasonable time, place, and manner restrictions. However these restrictions, in addition to surviving the applicable levels of scrutiny, must not “delegate overly broad discretion to a

355. Howard, *supra* note 309.

356. See Human Rights Watch, *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities* (2012) available at <http://tinyurl.com/z9jbwme>.

government official.”³⁵⁷ Overbreadth doctrine is “a device to invalidate legislation, particularly a criminal statute that moves the state into areas of regulation in which, in the view of the courts, it does not belong.”³⁵⁸ In the context of the First Amendment, overbreadth “allows persons to attack legislation on its face as violative of the freedom speech, press, or assembly, even though it has not yet been invoked against them,” thus bypassing “the usual requirement of standing.”³⁵⁹

2. *Loper* and *Johnson v. Carson*

As shown in the Part C of this Section, the *Loper* court discusses a highly analogous statute with a similarly analogous doctrinal analysis. The same analogies are easily extended to overbreadth doctrine. In fact, the court in *Loper* stated,

The statute that prohibits loitering for the purpose of begging must be considered as providing a restriction greater than is essential to further the government interests listed by the City Police, for it sweeps within its overbroad purview the expressive conduct and speech that the government should have no interest in stifling.³⁶⁰

The court further discussed conflating ‘innocent’ activities with those criminalized. The court stated,

We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one.³⁶¹

357. Howard, *supra* note 309.

358. United States Supreme Court Cases and Comments at 5A.03[1][c][i]. “For example, a city was not allowed to apply an ordinance prohibiting a person from appearing in a public place in dress not ‘belonging to his or her sex, with intent to conceal his or her true sex,’ to [‘pre-operative’ transwomen] and who, on the advice of their psychiatrists, were wearing ‘female clothing and adopting a female life-style.’ (*sic*) Although the statute was not invalid on its face, its application to the particular individuals amounted to an overbroad government regulation of conduct.”

359. United States Supreme Court Cases and Comments at 5A.03[1][c][i].

360. *Loper v. N.Y. City Police Dep’t*, 999 F.2d at 705–706.

361. *Id.* at 704.

The court in *People v. Smith* specifically argued against applying overbreadth to section 240.37. The court there pinned its argument around the idea that “conduct for the purpose of prostitution” “has never been a form of constitutionally protected free speech.”³⁶² While that specific statement may have been true when the case was decided in 1978, as demonstrated above the state is in fact impermissibly regulating content-based speech, not mere conduct. The *Smith* court further gives the hypothetical that, “based on particulars obvious to and discernible by any trained law enforcement officer, it would be a simple task to differentiate between casual street encounters and a series of acts of solicitation for prostitution, between the canvas of a female political activist and the maneuvers of a Times Square prostitute [sic].”³⁶³ However, the *Loper* court might have found little difference between the ‘maneuvers of a Times Square prostitute’ [sic] and those of a person seeking casual sex with a stranger. Both are designed to solicit sex from a stranger—and until the actual ask occurs (which, as stated many times, is not a violation of § 240.37 but is rather a violation of § 230.00), would be virtually indistinguishable. Further, the assertion that a police officer can readily tell the difference even between someone ‘maneuvering’ and someone walking home from a night club or even simply going to the grocery store has repeatedly been shown to be false in New York City, particularly as applied to marginalized populations.³⁶⁴ Lastly, “maneuvering” alone is not the issue—the issue is maneuvering while holding specific *thoughts*. That the statute impermissibly “sweeps within its overbroad purview the expressive conduct and speech that the government should have no interest in stifling” is the exact heart of overbreadth doctrine.

The conclusions in *People v. Smith* are not necessarily echoed nationwide. In 1983, a “Loitering for the Purpose of Prostitution” municipal ordinance enacted in the City of Jacksonville, Florida, was found unconstitutional on its face as overly broad prohibition of constitutionally protected as well as unprotected conduct in *Johnson v. Carson*.³⁶⁵ While that ordinance had some differences from the loitering statute currently in effect in New York, (for example, the ordinance allowed a person “an opportunity to explain his conduct” prior to arrest),³⁶⁶ much of the language is now familiar to the reader. In part, Section 330.107 read:

362. *People v. Smith*, 44 N.Y.2d at 623.

363. *Id.* at 621.

364. *See, e.g.* Berlatsky, *supra* note 224; *see also* Make the Road New York, *supra* note 219, at 4–15.

365. *Johnson v. Carson*, 569 F.Supp. 974, 975 (1983).

366. *Id.* The court of course rejected this proposition as it violates the right to remain silent. *See* *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

(a) It shall be unlawful . . . for any person to loiter in or near any thoroughfare, street, highway, or place open to the public in a manner and under circumstances manifesting the purpose of inducing, enticing, or procuring another to commit an act of prostitution [sic], lewdness, or assignation.

(b) Among the circumstances with may be considered in determining whether the purpose is manifested are that such person (1) is a known prostitute [sic], pimp, or sodomist; (2) repeatedly beckons to, stops or attempts to stop or engages passers-by in conversation; or (3) repeatedly stops or attempts to stop motor vehicle operators by hailing, waiving of arms or any bodily gesture.³⁶⁷

The *Carson* court made a number of points relevant to the New York statute in their decision against upholding the Florida ordinance. The court pointed out that, “associating on the street corner is constitutionally protected,”³⁶⁸ and “loitering, loafing, and habitually wandering at night are also constitutionally protected.”³⁶⁹ The *Carson* court applied the First Amendment to the ordinance because it prohibits these constitutionally protected activities in certain instances.³⁷⁰ The court further stated, “although speech incident to soliciting for prostitution is not protected by the first amendment, [the ordinance] does not appear to stop at prohibiting such speech. In fact, to violate [the ordinance], a person need not actually solicit or speak to anyone.”³⁷¹ As detailed above, the same is true of the Loitering statute in New York.

The District court also noted that, due to the language of, “a known prostitute [sic],” “a person convicted of a related crime within the previous year can be arrested for merely loitering in a public place.”³⁷² The same is true of the law in New York. Although the statute does not contain language about “known prostitutes [sic],” the standards the New York Police Department have developed to give cause to arrest and those accepted as evidence in New York courts certainly do (see Part A above). The court went on to describe a number of incidences in which “innocent”

367. *Johnson v. Carson*, 569 F.Supp. 974, 976 (1983).

368. *Id.* at 976 *citing* *Aladdin’s Castle v. City of Mesquite*, 630 F.2d 1029, 1041-42 (1982).

369. *Id.* at 976 *citing* *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

370. *Id.* at 976.

371. *Johnson v. Carson*, 569 F.Supp. 974, 976 (1983).

372. *Id.* at 978.

behavior was mistaken for a violation of the ordinance³⁷³ and found that “the circumstances enumerated in [the ordinance] forces persons to either curb their freedom of expression and association or face the risk of arrest.”³⁷⁴ Whereas the *Smith* court in New York determined that this was not of particular concern because the person falsely arrested was unlikely to be falsely convicted due to standards of evidence (a questionable and potentially naïve proposition that warrants a closer examination in itself),³⁷⁵ the *Carson* court in Florida saw the *possibility* of arrest as an overbroad sweep of regulation and a violation of Constitutional rights.³⁷⁶ The court quoth, “it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.”³⁷⁷ The court then offered a slew of legislation that each support the same concept: where there are numerous ways to penalize actual sex work and any so-called “attendant evils,” the Constitution demands the state rely on those ways alone and not on “short-cuts” that chill First Amendment speech.³⁷⁸

The factual and doctrinal analogies are so apparent here that they hardly need mentioning. The reader by now will have observed that the stricken Florida statute contains elements analogous to or exactly the same as the four elements required to violate the New York Loitering law. In New York, the first two elements are “to remain or wander about in a public place,”³⁷⁹ with “public place” specifically defined as “any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways and entrance ways to any building which fronts on any of the aforesaid place.”³⁸⁰ In Florida, those two elements are present in the form of, “any person to loiter in or near any thoroughfare, street, highway, or place open to the public.”³⁸¹ The third New York element adds, “repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons,”³⁸² while the Florida language read, “repeatedly beckons to, stops or attempts to stop or

373. *Id.*

374. *Id.*

375. *People v. Smith*, 44 N.Y.2d at 621.

376. *Johnson v. Carson*, 569 F.Supp. 974, 977-979.

377. *Id.* citing *United States v. Reese*, 92 U.S. 214, 221 (1875).

378. *Id.* at 979-980.

379. N.Y. PENAL LAW § 240.37 (Consol. 2015).

380. *Id.*

381. *Johnson v. Carson*, 569 F.Supp. 974, 976 (1983).

382. N.Y. PENAL LAW § 240.37 (Consol. 2015).

engages passers-by in conversation; or . . . repeatedly stops or attempts to stop motor vehicles by hailing, waving of arms, or any bodily gesture.”³⁸³ The last element in New York is that of “for the purposes of promoting [sic].”³⁸⁴ In Florida, this too fulfills the violation requirements when combined with the first three mentioned here; specifically if the acts above are “in a manner and under circumstances manifesting the purpose of inducing, or procuring another to commit an act of prostitution [sic], lewdness, or assignation.”³⁸⁵

Given the extraordinary similarity of the Florida ordinance to the New York statute, were a court today to apply the constitutional jurisprudence from the *Carson* court to New York Penal Law Section 240.37, it would also fail on overbreadth grounds.

E. §240.37 is Unconstitutional

The New York Loitering statute is unconstitutional on multiple time-place-manner and overbreadth grounds. The 1978 case in favor of the law is poorly constructed, and other jurisprudence strongly supports a different outcome.

Today, elimination of the New York statute is not without its proponents in the court system. In a case from 1995 in which a defendant unsuccessfully challenged the New York statute by arguing that “the underlying accusatory instrument was facially insufficient,”³⁸⁶ Judge Glen wrote a dissent many times longer than the opinion, in which she pointed out many of the Constitutional and other concerns.³⁸⁷ She artfully summarized her in-depth arguments as such:

When the cost of enforcing a particular law is the accepted and routine violation of law by police and prosecutors with the tacit concurrence of the courts, it is time to reassess that law and society’s interest in its continued enforcement. This is the situation with Penal Law Section 240.37

...This case presents yet another such example. Accordingly, I dissent, not only because I believe that the accusatory instrument in this case was facially insufficient, but because I believe that the statute, even if arguably constitutional on its face, has been and is consistently applied in an unconstitutional manner, violating both

383. *Johnson v. Carson*, 569 F.Supp. 974, 976 (1983).

384. N.Y. PENAL LAW § 240.37 (Consol. 2015).

385. *Johnson v. Carson*, 569 F.Supp. 974, 976 (1983).

386. *See People v. Bernice Byrd*, 1995 N.Y. Misc. LEXIS 746 (1995).

387. *Id.*

due process and the First Amendment guarantees of freedom of speech, communication, and association.³⁸⁸

With proponents like this in the court room, it is not impossible that a case could be brought with results like *Loper*, or *Carson*. Perhaps this overbroad, impermissibly dismissive, and discriminatory statute will not make it yet another decade.

V. Conclusion

A. Two Interim Reforms

1. *Eliminate the “No Arrests Within Six Months” Mandate for Court-Ordered Services*

In order for a defendant with an adjournment in contemplation of dismissal (ACD) to receive the actual dismissal, they must do two things: 1) complete the court mandated sessions and, 2) after completion, they must not be *arrested for any charge* within six months of completion.³⁸⁹ To the privileged in our society, managing not to be arrested for six months may seem like an easy enough task to accomplish. Many people go their entire lives without a single arrest. However, as we know from the selective stops discussed above, as well as from the Red Umbrella Project report, there are broad groups of people in our society who face disproportionately high risk of repeated encounters with the police, whether or not they are committing any crime. Therefore, some people granted ACD risk police encounters and even arrest just by existing. For example, one of the reasons for arrest cited in the Red Umbrella Project study is whether a police officer is “aware the defendant has previously been (arrested for, convicted of, or both) violating prostitution laws.”³⁹⁰ If a sex worker or someone accused of sex work is re-arrested within those six months (even on such unjust and flimsy grounds as having previously been arrested), the *arrest itself* could violate the terms of the ACD and could result in more court dates, increased session requirements, fines, or time in jail.

Creating rules that ask a defendant to obey a code of conduct where

388. *Id.*

389. Ray & Catarine, *supra* note 108, at 11.

390. *Id.* at 19.

the rules can be violated through no conduct on the part of the defendant could reintroduce sex workers or those accused of sex work into the system over and over through no fault of their own. This “punishment based on arrest alone” seems to violate the spirit of due process, at the very least. This type of cyclical presence in the system further reduces the ability of the defendant to cease sex work, if that is the defendant’s goal. It certainly is the State’s goal. For all these reasons, New York should eliminate the “no arrests within six months” mandate. If this is unacceptable, the standard should at a very minimum be changed to “no *convictions* or *guilty pleas* within six months.”

2. *Eliminate the Prostitution and Loitering Statutes, and Vacate All Convictions Thereof*

As discussed within this article and agreed upon by many stakeholders, criminal convictions make getting jobs outside of an underground economy, as well as accessing housing, health care, and services difficult or impossible; thus ‘haunting’ the individual long after the “low-level” criminalized act is over and even where the individual no longer does or wishes to engage in sex work. Eliminating Prostitution and Loitering statutes and vacating all such convictions is consistent with both the intent and ‘moral’ goals of the HTICs. Continuing to arrest based on these statutes and maintaining these convictions on record serves to encourage individuals to continue in the underground economy, including sex work.

B. Eliminate the Entire Statutory Scheme

For all reasons outlined here, the entire law and punishment scheme around sex work must be eliminated. The few harms contemplated within that scheme that public policy should not tolerate are better addressed through other parts of the law. Because sex work is work, because it is not possible to eradicate it through the law, because the law is rooted in inequity, and because modern criminalization causes great harm to all, but especially to already marginalized and struggling persons, the most rational, just, and fair approach to sex work is full decriminalization.