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Case Note: Criminal Law - Due Process - Statute Proscribing Loitering for the Purpose of Prostitution Is Not Unconstitutionally Vague

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Criminal Law—Due Process—Statute Proscribing Loitering for the Purpose of Prostitution Is Not Unconstitutionally Vague. *People v. Smith,* 88 Misc. 2d 590, 388 N.Y.S.2d 221 (Crim. Ct. 1976), *rev'd* 393 N.Y.S.2d 229 (App. Div. 1st Dep't 1977).

At approximately 2:15 a.m. on July 12, 1976, a police officer observed[1] defendant female converse with two male passersby.[2] Soon thereafter, defendant conversed with a third male with whom she entered a building known to accomodate prostitutes and their clientele. The two left the building a short time later.[3] Defendant Smith was arrested and charged with violating section 240.37 of the New York Penal Law, which prohibits loitering for the purpose of prostitution.[4] Following Ms. Smith's arrest, the court determined after a preliminary hearing that there was reasonable cause to believe that she had violated section 240.37.[5]

After indictment but before trial, defendant moved for a dismissal of the charge. Ms. Smith asserted that the statute is vague, overbroad and inhibits free speech.[6] The Criminal Court of the City of New York agreed with all of the defendant's contentions and granted the motion to dismiss.[7] The court held that the statute, insofar as it sanctioned detention on the basis of suspicion, infringed upon defendant's Fourth Amendment protection against arrest except for probable cause.[8]

The appellate term reversed,[9] and upheld the constitutionality of the statute: "the language used in the statute is sufficiently plain

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1. People v. Smith, 88 Misc. 2d 590, 388 N.Y.S.2d 221, (Crim. Ct. N.Y. 1976), *rev'd,* 393 N.Y.S.2d 239 (App. Div. 1st Dep't 1977). Defendant was observed by the arresting officer and his partner for approximately twenty minutes. *Id.* at 591, 388 N.Y.S.2d at 222. The arresting officer knew that Ms. Smith had previously been arrested for prostitution. 393 N.Y.S.2d at 240. The incident occured on Eighth Avenue between 40th and 45th street in New York City. This area is notorious for its high incidence of prostitution. 88 Misc. 2d at 591, 388 N.Y.S.2d at 222.

2. Defendant was seen touching each man's arm, saying something to him and each continued on his way. 88 Misc. 2d at 591, 388 N.Y.S.2d at 222.

3. The arresting officer conversed with the third party and subsequently arrested the defendant for loitering for the purpose of prostitution. 393 N.Y.S.2d at 240.

4. N.Y. PENAL LAW §240.37 (McKinney Supp. 1976).

5. 393 N.Y.S.2d at 240.

6. 88 Misc. 2d at 591, 388 N.Y.S.2d at 222.

7. *Id.* at 601, 388 N.Y.S.2d at 228.

8. *Id.* 388 N.Y.S.2d at 227.

9. 393 N.Y.S.2d at 239.

as to enable persons of ordinary intelligence to understand precisely what acts are proscribed."[10] The court determined that under the statute, the arresting officer may not exercise unfettered discretion in determining the illegality of certain conduct.[11] Finally, the court dismissed defendant's argument that the statute violated the first amendment right to freedom of speech.[12]

Loitering statutes were originally conceived as a method to prevent unemployed laborers from wandering between towns and terrorizing travelers.[13] The modern rationale behind the statutes is the prevention of minor offenses in areas frequented by the public.[14] Section 240.37 of the New York Penal Law became effective on July 11, 1976, one day before the opening of the Democratic National Convention.[15] The section states:[16] "Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops . . . , [or] repeatedly attempts to engage passers-by in conversation . . . for the purpose of prostitution, or of patronising a prostitute . . . shall be guilty of a violation . . . ."[17]

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10. *Id.* at 240.

11. *Id.* at 240-41.

12. *Id.* at 243.

13. United States *ex rel* Newsome v. Malcolm, 492 F.2d 1166, 1171-72 (2d Cir. 1974), *aff'd*, 420 U.S. 283 (1975).

14. People v. Nowak, 46 App. Div.2d 469, 471, 363 N.Y.S.2d 142, 144 (4th Dep't 1975).

15. N.Y. PENAL LAW §240.37 (McKinney Supp. 1976) (Practice Commentary). Under §240.35 of the New York Penal Law, a person is guilty of loitering when he:

> "1. loiters . . . in a public place for the purpose of begging; or 2. loiters . . . in a public place for the purpose of gambling . . . ; or 3. loiters . . . in a public place for the purpose of engaging, or solicitating . . . deviate sexual intercourse . . . ; or 4. loiters [while] being masked or in any manner disguised . . . ; or 5. loiters . . . in or about a school, college or university, not having . . . any . . . specific, legitimate reason for being there . . . ; or 6. loiters . . . in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged . . . in crime, and, upon inquiry by a peace officer, refuses to identify himself . . . ; or 7. loiters . . . in any transportation facility . . . for the purpose of soliciting or engaging in any business, trade or commercial transaction . . . ; or 8. loiters . . . in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation of his presence . . ."

Section 240.36 of the New York Penal Law makes loitering for the purpose of unlawfully using or possessing a controlled substance a class B misdemeanor. N.Y. PENAL LAW §240.36 (McKinney, Supp. 1976).

16. N.Y. PENAL LAW §240.37(2) (McKinney Supp. 1976).

17. *Id.* Section 240.37(1) defines a "public place" as "any street, sidewalk, bridge, alley or alleyway . . . parking lot or transportation facility . . . ." Section 240.37(3) makes loitering for the purpose of promoting prostitution a class A misdemeanor. N.Y. PENAL LAW §240.37 (McKinney Supp. 1976).

The New York State Legislature found that "loitering for the purpose of prostitution . . . is disruptive of the public peace . . ." because it "interfere[s] with the use and enjoyment . . . of public places"[18] by others and with the individual's right to privacy. The legislation was based on the following goals: maintaining the use and enjoyment of public places and upgrading the community and commercial life of certain neighborhoods.[19]

Loitering statutes potentially suffer from several related constitutional infirmities. A loitering statute is often drafted in vague terminology.[20] If such a law is indefinite in specifying the condemned or proscribed act,[21] or if it fails to provide a guide as to what conduct must be done or avoided so that ordinary members of society can comply with its requirements, it will be declared void for vagueness.[22] In addition, a loitering statute may be drafted in such a way as to be overbroad, proscribing conduct otherwise constitutionally protected.[23]

Two notable Supreme Court cases illustrate these related doctrines. In *Papachristou* v. *City of Jacksonville,*[24] eight defendants were convicted[25] of violating that city's vagrancy ordinance.[26] The police had arrested several defendants because they stopped near a used car lot which had been previously burglarized.[27] Another defen-

18. N.Y. PENAL LAW §240.37 (Legislative Findings). The commentary that accompanies §240.37 illustrates the dissatisfaction that many civil libertarians feel toward the statute. It notes that "[I]ts obvious purpose was to inhibit prostitution activity around the convention site in Midtown Manhattan. After a week the convention delegates and visitors were gone but the statute lingers on . . . ."

19. 1976 N.Y. Laws ch. 344.

20. *E.g.* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied,* 414 U.S. 1093 (1973); People v. Diaz, 4 N.Y.2d 469, 151 N.E.2d 871, 176 N.Y.S.2d 313 (1958).

21. U.S. v. Harriss, 347 U.S. 612, 617 (1954); People v. Esteves, 85 Misc.2d 217, 378 N.Y.S.2d 920 (Crim. Ct. N.Y. 1976).

22. Papachristou v. City of Jacksonville, 405 U.S. at 162 n.20; Coates v. City of Cincinatti, 402 U.S. 611, 614 (1971); Palmer v. City of Euclid, 402 U.S. 544, 546 (1971).

23. 405 U.S. 156 (1972).

24. *Id.*

25. Four defendants were arrested and charged with vagrancy and prowling by auto. Two others were arrested for loitering and being common thieves. The last defendant was charged with vagrancy and disorderly loitering on the street. *Id.* at 158.

26. The Jacksonville city ordinance stated "Rogues and vagabonds, or dissolute persons who go about begging . . . persons wandering or strolling around from place to place without any lawful purpose or object . . . shall be deemed vagrants . . . . *Id.* at 156-57 n. 1.

27. *Id.* at 158-59.

dant was arrested because he walked on the same few streets several times while allegedly waiting for a friend.[28] The Supreme Court held that the ordinance denied defendants due process of law,[29] stating that the activities in question, *viz.* walking about and driving from place to place, "are historically part of the amenities of life as we have known them."[30]

The Jacksonville city ordinance was written in vague and archaic terms.[31] No standards governing the exercise of police discretion were delineated.[32] Thus the Court reasoned that the ordinance as applied, subjected the defendants to arbitrary arrest.[33]

Similarly, in *Palmer* v. *City of Euclid*,[34] defendant was convicted of violating Euclid's suspicious person ordinance.[35] Defendant stopped his car in a parking lot late at night. A female left the car and entered a nearby apartment house. Defendant then left the lot, parked his car on the street and used a two-way radio. He was subsequently arrested.[36] According to the United States Supreme Court, insofar as the record revealed, appellant's actions were quite visible.[37] There was no suggestion that his acts were unlawful.[38] The Court stated that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[39]

In determining the constitutionality of its loitering statutes, consistently with United States Supreme Court decisions, New York courts have applied these three doctrines of vagueness, overbreadth and protection against arrest except on probable cause. In the landmark case of *People* v. *Berck*,[40] the New York Court of Appeals

28. *Id.*
29. *Id.* at 162.
30. *Id.* at 164.
31. *See* note 26 *supra.*
32. 405 U.S. at 165.
33. *Id.* at 160.
34. 402 U.S. 544 (1971).
35. *Id.* The ordinance was similar to N.Y. Penal Law §240.35 (6) (McKinney 1967) which was declared unconstitutional in People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied*, 414 U.S. 1093 (1973).
36. 402 U.S. at 545.
37. *Id.* at 546.
38. *Id.*
39. *Id.*
40. 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied*, 414 U.S. 1093 (1973).

determined that the statute in issue represented a violation of due process because the statute was not sufficiently clear to give fair warning to a citizen.[41] The statute[42] declared that a person is guilty when he "loiters . . . in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged in a crime and upon inquiry by a police officer, refuses to identify himself."[43]

In *Berck*, the police knew that a certain residential building would be temporarily unoccupied. While on patrol, an officer saw defendant examining the residence. When questioned, defendant refused to identify himself or explain what he was doing.[44] The court of appeals, stating that this was arrest on suspicion alone,[45] held that the statute "is not informative on its face and utterly fails to give adequate notice of the behavior it forbids."[46] The statute did not condemn any identifiable acts or ommissions to act that would restrict its application to specific circumstances.

In another landmark case, *People* v. *Pagnotta*,[47] the New York Court of Appeals affirmed the constitutionality of section 240.36 of the New York Penal Law.[48] This section forbids loitering for the purpose of using any narcotic drug.[49] The arresting officer, knowing that defendant was a drug addict, observed him with two companions as the three were about to inject themselves hypodermically with a narcotic.[50] The court of appeals upheld the arrest and the statute, concluding that "the statute does not penalize mere loitering . . . but rather prohibits loitering for the purpose of committing the crime of unlawfully using or possessing narcotic drugs."[51]

In a later case, *People* v. *Willmott*,[52] a Suffolk County court further developed the distinction between mere loitering and loitering

41. 32 N.Y.2d at 569, 300 N.E.2d at 412, 347 N.Y.S.2d at 35.
42. N.Y. Penal Law §240.35 (6) (McKinney, 1962).
43. *Id.*
44. 32 N.Y.2d at 575, 300 N.E.2d at 416, 347 N.Y.S.2d at 41.
45. *Id.* at 572, 300 N.E.2d at 413, 347 N.Y.S.2d at 38.
46. *Id.* at 569, 300 N.E.2d at 413, 347 N.Y.S.2d at 36.
47. 25 N.Y.2d at 333, 305 N.Y.S.2d 484 (1969).
48. *Id.* at 338, 305 N.Y.S.2d at 488.
49. N.Y. Penal Law §240.36 (McKinney, 1976).
50. 25 N.Y.2d at 335, 305 N.Y.S.2d at 486.
51. *Id.* at 338, 305 N.Y.S.2d at 488.
52. 67 Misc.2d 709, 324 N.Y.S.2d 616 (Village J. Ct. 1971).
1971).

for a particular purpose. Defendant was convicted of loitering to solicit deviate sexual intercourse.[53] The court held that the statute was not unconstitutionally vague and overbroad stating:[54] "Whenever a conviction for loitering has been upheld, it is because the statute uses the term 'loiter' . . . to point up the prohibited act, either actual or threatened."[55] Loitering statutes have also been upheld when they are enforceable solely in an area which is notorious for illegal conduct.[56]

In the instant case,[57] the New York City Criminal Court held that, because section 240.37 fails to describe adequately the proscribed conduct,[58] the arresting officer lacks a statutory guide to follow in determining whether a "person who remains or wanders about" is in fact loitering for the purpose of prostitution.[59] Thus, the statute authorizes an arrest on suspicion rather than on probable cause. A person, especially a woman, lost and seeking directions can conceivably be arrested for violating the statute.[60]

The lower court held that defendant's first amendment right of freedom of speech had been violated.[61] Although the statute is not directed against speech, the prostitute must speak in order to accomplish the prohibited act.[62] The United States Supreme Court has held that the right of free speech is not an absolute and may be regulated when the words are of a lewd or obscene nature.[63] Justice Altman held that the language of the statute "forces the police officer to judge which language is obscene."[64] The officer also determines whether the action of the individual outweighs any reasonable possibility that the conversation is innocent. Thus, the judg-

53. *Id.* at 710, 324 N.Y.S.2d at 617.

54. *Id.* at 711, 324 N.Y.S.2d at 615-19.

55. *Id.* at 711, 324 N.Y.S.2d at 618.

56. *See* People v. Merolla, 9 N.Y.2d 62 (1961). Defendants was convicted of loitering in an area notorious at the time for a high incidence of illegal conduct: the waterfront.

57. 88 Misc. 2d 590, 388 N.Y.S.2d 221 (Crim. Ct. N.Y. 1976), *rev'd*, 393 N.Y.S.2d 239 (App. Div. 1st Dep't 1977).

58. *Id.* at 592, 388 N.Y.S.2d at 222-23, quoting N.Y. Penal Law §240.37(2) (McKinney Supp. 1976).

59. *Id.* at 600, 388 N.Y.S.2d at 227.

60. *Id.*, 388 N.Y.S.2d at 228.

61. *Id.* at 597, 601, 388 N.Y.S.2d at 226, 228.

62. *Id.* at 597, 388 N.Y.S.2d at 226.

63. *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1943).

64. 88 Misc. 2d at 597, 388 N.Y.S.2d at 226.

ment of the arresting officer becomes paramount.

The lower court compared the facts in *Smith* with the facts in *People* v. *Pagnotta*.[65] It stated that the statute[66] challenged in *Pagnotta* (loitering for the purpose of unlawfully using or possessing a narcotic drug) had definable limits that could withstand constitutional attack.[67] Further, the totality of the circumstances in *Pagnotta* clearly illustrated that the defendant was loitering for a particular purpose.[68] The implements for taking drugs were present and the arresting officer *saw* defendant preparing to use a narcotic.[69] In the instant case, the officer did not hear the content of the conversation between defendant Smith and the males.[70] He could only suppose that defendant's conversations were in regard to committing the proscribed act.[71] In short, section 240.37 engenders cases that upon their facts, would pose difficult questions as to whether certain conduct is criminal.

The appellate term[72] held that the challenged statute does not place unfettered discretion in the hands of the arresting officer.[73] "[T]he statute . . . does not define [the] guilt of the offense in terms of what is in the police officer's mind. To the contrary, it defines the crime in terms of the acts committed by the defendant, and her purpose in committing those acts as determined by the trier of fact."[74] The court reasoned that specific acts were prohibited by the statute: stopping and interfering with passersby and repeatedly beckoning. The trier of fact can determine whether these actions have occured.[75] Moreover, "[t]he law frequently imposes upon police officers the obligation of determining, at least *ab initio,* whether the offense is being committed, and whether conduct which might appear innocent to a layman is in fact criminal."[76]

The appellate court rejected the lower court's holding that section

65. 25 N.Y.2d 333, 300 N.E.2d 411, 305 N.Y.S.2d 484 (1973).
66. N.Y. PENAL LAW §240.35 (9) (McKinney 1976).
67. 88 Misc. 2d at 599, 388 N.Y.S.2d at 227.
68. *Id.*, 388 N.Y.2d at 227. *See also* notes 47-51 *supra.*
69. 88 Misc. 2d at 599, 388 N.Y.S.2d at 227.
70. *Id.* 388 N.Y.S.2d at 228.
71. *Id.*
72. *See* note 57 *supra.*
73. 393 N.Y.S.2d at 242.
74. *Id.* at 241.
75. *Id.* at 242.
76. *Id.*

240.37 inhibits freedom of speech and that a valid conviction under the statute is not possible.[77] "[S]ince section 240.37 prohibits only such communication which is 'for the purpose' of criminal activity it does not infringe on first amendment rights. . . ."[78] A valid conviction is possible under the statute as "[e]ven where evidence of guilt is wholly circumstantial such evidence will support a conviction where common human experience would lead a reasonable man, putting his mind to it, [to] reject or accept inferences asserted for the established fact."[79]

The appellate court's analysis followed closely the analysis[80] employed by two other jurisdictions in construing loitering for the purpose of prostitution statutes. In *Morgan* v. *City of Detroit*,[81] plaintiff was convicted of violating Detroit's "accosting and soliciting" ordinance. The statute made unlawful the act of any "person to accost, solicit or invite another in any public place . . . to commit . . . fornication . . . or prostitution . . . ."[82] Plaintiff challenged the ordinance on the grounds that it violated due process of law.[83] In ruling on plaintiff's contention that the ordinance was so vague and overbroad as to be violative of the due process clause, the court

77. *Id.* at 243.

78. *Id.*

79. *Id.*

80. Litigants in other jurisdictions have posed novel arguments in attempting to overturn the constitutionality of loitering statutes. In United States v. Moses, 339 A.2d 46 (D.C. Ct. App. 1975), defendant was charged with soliciting for prostitution in violation of a District of Columbia statute which provided, "[i]t shall not be lawful for any person to invite, entice [or] persuade . . . for the purpose of prostitution . . ." *Id.* at 48 n. 1. A District of Columbia trial court found that the statute was invalid as an unconstitutional invasion of defendant's right of privacy, stating that a woman has the right to "the use of [her] own body." 339 A.2d at 50. Defendant further contended that the statute violated her right to freedom of speech. The court held "prostitution per se is not unlawful . . . [and] that a prostitute's offer to engage in a commercial sexual act must be protected speech." *Id.* at 51.

The District of Columbia Court of Appeals reversed the trial court's holdings. It rejected the right of privacy argument since the right had only encompassed personal rights and the intimacies of the home. *Id.* at 50. Ruling on the first amendment claim, the court stated that "solicitation for prostitution is a unique type of speech . . . and can be reasonably regulated with the permissible exercise of the police power." *Id.* at 54.

81. 389 F. Supp. 922 (E.D. Mich. 1975).

82. *Id.* at 926.

83. *Id.* at 929. Plaintiff also contended that the statute violated her right of privacy. The District Court rejected the argument stating that the right of privacy "prohibits the state from proscribing activity conducted in private between consenting individuals . . ." 389 F. Supp. at 926. The crime of accosting and soliciting is not consensual "since the party accosted or solicited cannot by definition have yet consented. . . ." *Id.*

stated that [t]he terms 'accosting and soliciting,' 'prostitution' and 'fornication' are on their face precise and give fair notice of what conduct is forbidden."[84]

In *City of Seattle* v. *Jones*,[85] the Supreme Court of Washington held that an ordinance which made it unlawful for anyone to "loiter in or near any thoroughfare or place open to the public . . . under circumstances manifesting the purpose of inducing, enticing, soliciting . . . an act of prostitution.",[86] was not void for vagueness. In *Jones*,[87] the police observed appellant female conversing with unidentified males. As the police approached, appellant started to run. She was arrested for violating that city's loitering for the purpose of prostitution ordinance.[88]

Appellant contended that the ordinance was void because it was so vague and indefinite.[89] The court affirmed appellant's conviction stating that the language was clear and unambiguous. "The ordinance is sufficiently clear so that men of reasonable understanding are not required to guess at the meaning of the enactment."[90]

Loitering for the purpose of prostitution statutes can withstand constitutional attack if they are drafted in clear and concise terminology. New York Penal Law section 240.37 represents the Legislature's latest attempt to ameliorate the ongoing problem of prostitution. Notwithstanding its constitutionality, the social ramifications of enforcement may have created greater problems than those solved. As one commentator has stated: "Having labored mightily and brought forth only this simplistic attempt to deal with a complicated social problem, the Legislature can take little pride in its accomplishments. Whether or not is is [ultimately] declared unconstitutional by the courts, its early repeal would reflect more credit on the Legislature than did its passage."[91]

Sayde J. Markowitz

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84. *Id.* at 929.
85. 79 Wash.2d 626, 488 P.2d 750 (1971).
86. *Id.* at 626, 628, 488 P.2d at 751-52.
87. *Id.* at 626, 488 P.2d 750.
88. *Id.* at 626, 628, 488 P.2d at 751-52.
89. *Id.*, 488 P.2d at 750.
90. *Id.* at 626, 488 P.2d at 752.
91. N.Y. PENAL LAW §240.37 (McKinney Supp. 1976) (Practice Commentary).