propriate accommodations as to costs and risks. The involuntary termination of the career, however, often leads to even further estrangement, for as Lemert has suggested, ". . . (when) the exconvict advances economically to the point where better positions become open to him, he may be rejected because of inability to obtain a bond or because his past criminal record comes to light. If the man's aspirational roles are low, he may adjust successfully as, say, a laborer or casual worker; otherwise, he nearly always shows the marks of his difficult struggle."[26]

The careerist thus eventually returns to his former milieu after the career is ended, whether he leaves it voluntarily or is forced to relinquish it by being caught and confined. In the latter instance, however, the stigmatic burden of the identified criminal makes it extremely difficult for him ever to lift himself above his circle:

> I did a lot of time for a few robberies. I'm not complaining, I shoulda known better . . . when you come out you're right back where you started only worse, nobody knows you and times have changed. So you knuckle under—you can make it—but you sure have to change your way of thinking. You can't be afraid of carrying a lunch bucket—if you don't you're sunk or you go back to capering and the same old shit starts over again.

The brief triumph leads to defeat or accommodation that must ultimately involve a reorganization of the self toward acceptance of a modified role as an actor on the social stage.

[26] Lemert, *Social Pathology,* p. 331.

POLITICS AND CRIMINAL LAW: REVISION OF THE NEW YORK STATE PENAL LAW ON PROSTITUTION*

PAMELA A. ROBY
New York University

Persons are not "criminals" unless a law defines their behavior as "crime." The purpose of this paper is to examine the political process through which certain behavior is defined as criminal and other behavior as noncriminal. What groups and persons influence the decisions through which penal laws are created? When groups have conflicting interests, which interests are written into law? Under what conditions are groups or individuals able to shape the law in the manner in which they intend?

Durkheim early in his career stressed the apolitical nature of law, ". . . once we grant that there is a determinate order in social existence, we necessarily reduce the role of the lawgiver. For if social institutions follow from the nature of things, they do not depend upon the will of any citizen or citizens."[1] Marx, on the other hand,

* The writer is grateful to Peter J. McQuillan, Judge Amos Basel, Mrs. Joan Cox and members of the American Civil Liberties Union who assisted her in tracing the history of the law and to Richard Quinney and Dennis Wrong who made many useful suggestions on an earlier draft of the paper.

[1] E. Durkheim, *Montesquieu and Rousseau,* 40 (1965).

maintained that law makers along with the state were the "arm of the bourgeois class" and that although the groups which ruled changed over time, they always belonged to the bourgeoisie. Domestic legislation was for the ruling class and against the proletariat.[2]

More recently, Schur in discussing the relationship between law and the social order has argued that a legal system "represents an institutionalization of conflict, for it provides social means of resolving the specified disputes and in some sense reconciling the more general conflicts of interests and values within a society."[3] In this view, the formulation of law is a political process, i.e. a process in which individuals and groups attempt "to gain, limit, escape, or resist power."[4]

The essence or definition of power has been the source of considerable debate within the social sciences. Gerth and Mills and Blau stress the asymmetry of power relations.[5] Wrong has maintained that power is *not* completely asymmetrical, for intercursive power is characterized by a division of scopes between parties. Thus "one actor controls the other with respect to particular situations or scopes . . . while the other is dominant in other areas of situated activity."[6]

Over the sum of scopes some are "less equal than others," but except in those cases of physical violence when the person is no longer treated as a human being, all exercise some degree of power or reciprocal influence. In the formulation of law, one group may obtain its interests in the writing of a particular article while another may do so with respect to another section of the law. Groups which are unable to shape the enacted law according to their interests may be able to affect the enforcement of the law or to amend the law at a later date.

Given these diverse characterizations of the nature of law and of power, we turned to the Revised Penal Law of New York State in an effort to gain a clearer understanding of the relationship between law and the exercise of power within society. The recent revision of the Penal Law which became effective September 1, 1967 and the efforts of various groups to amend certain of the revised articles provide sociologists with a unique opportunity to study the social processes through which behaviors come to be defined as criminal or noncriminal. The 1965 Penal Law represents a complete reorganization of the 1864 New York State Field Commission Revised Code of Criminal Procedure which became effective in 1881 and was amended in 1909.[7] The recent revision redefined certain previously noncriminal acts as criminal and previously criminal acts as noncriminal, placed related crimes together under logically related titles, transferred many provisions from the 1909 Code of Criminal Procedure and

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[2] K. Marx and F. Engels, *The German Ideology* (1947), pp. 23-46.

[3] E. Schur, *Law and Society,* 139 (1968). Cf. Quinney, "Crime in political perspective," *8 Am. Behavioral Scientist* (1964).

[4] D. Wrong, "Some problems in defining social power," 73, *American Journal of Sociology* (1968), pp. 675-6. In this paper we will use Wrong's definition of power, "the production of intended effects by some men upon the behavior of other men."

[5] H. Gerth and C. W. Mills, *Character and Social Structure,* 193 (1953); P. Blau, *Exchange and Power in Social Life,* 118 (1964).

[6] Wrong, *op. cit.,* 673.

[7] N. Y. L. 1965, c. 1030, c. 1030.

Penal Law to other more appropriate State laws, clarified previously ambiguous definitions and provisions, and prescribed new sentencing schemes.

METHOD

Of the approximately 520 sections in the 1965 New York State Penal Law, we will examine article 230 which represents a "deviant" case. Most articles of the Law were not debated outside of the Penal Law and Criminal Code Revision (PLCCR) Commission either before or after their enactment. Article 230 was one of a small number of articles debated during the Public Hearings held in November 1964 on the Proposed Revised Penal Law and one of the very few articles which was revised by the Commission in accordance with sentiments expressed in the Public Hearings.[8] The article was not debated by the legislature before its passage, but it was the center of much controversy after it became effective September 1, 1967.[9]

Sections 230.00, 230.05, and 230.10 of the 1965 New York State Penal Law read as follows:

§ 230.00 Prostitution

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.

Prostitution is a violation. L. 1965, c. 1030, eff. Sept. 1, 1967.

§ 230.05 Patronizing a prostitute

A person is guilty of patronizing a prostitute when:

1. Pursuant to a prior understanding, he pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him; or

2. He pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person or a third person will engage in sexual conduct with him; or

3. He solicits or requests another person to engage in sexual conduct with him in return for a fee.

Patronizing a prostitute is a violation. L. 1965, c. 1030, eff. September 1, 1967.

§ 230.10 Prostitution and patronizing a prostitute; no defense

In any prosecution for prostitution or patronizing a prostitute, the sex of the two parties or prospective parties to the sexual conduct engaged in, contemplated, or solicited is immaterial, and it is no defense that:

1. Such persons were of the same sex; or

2. The person who received, agreed to receive or solicited a fee was a male and the person who paid or agreed or offered to pay such fee was a female. L. 1965, c. 1030, eff. Sept. 1, 1967.

We chose to study this "deviant," i.e. controversial, article so that we could analyze the political processes which were a part of the formulation of the law.[10] The choice of a controversial article was necessary because secrecy veiled most of the PLCCR Commission debates (except for supporting arguments which were published with the law). Minutes of the

[8] Public Hearings on Proposed New York Penal Law (N.Y. Senate Int. 3918, N.Y. Assembly Int. 5376) (1964).

[9] *N. Y. Times,* March 17, 1965: 35: 3. Articles exempting from criminal liability deviant sexual intercourse between consenting adults and eliminating adultery as a crime created the most controversy when the Proposed Revised Penal Law appeared before the State Legislature. After the 1965 Penal Law became effective, the provisions dealing with the authority of policemen to shoot to kill when confronting criminals and suspects, with abortion and with prostitution appeared to have created the most public controversy. Cf. *N. Y. Times,* Dec. 17, 1967, 1: 1.

[10] For a discussion of "deviant case analysis," see R. Merton, *Social Theory and Social Structure* (1949), pp. 194-5, and Kendall and Wolf, "The Analysis of Deviant Cases in Communications Research," in P. Lazarsfeld and F. Stanton (eds.), *Communications Research 1948-9* (1949), pp. 152-79.

Commission meetings were available only to Commission members and Commission staff. The Assistant Counsel to the Commission explained that what went on in the Commission was "confidential so that it wouldn't become political." By analysing an article which was publicly debated, we were able to infer many of the factors influencing the Commission's decisions. In making generalizations from the history of article 230, we must remember, however, that most articles were passed without public notice and that the politics involved in their formulation were confined to the room of the Penal Law Revision Commission.[11]

Data were collected for the study by means of interviews;[12] summary analyses of the prostitution cases reported in the "Docket Sheets" of the Criminal Court of New York City and of data on arraignments and dispositions of prostitution, disorderly conduct and loitering cases contained in the Statistics Office of the Criminal Court; and examination of the transcript of the Public Hearings held by the PLCCR Commission on the Proposed Penal Law, law review articles and books which suggested means of dealing with prostitution in New York state, and clippings gathered by the Albany New Clipping Service which were contained in the Chief Assistant Counsel of the PLCCR Commission's file on "Prostitution and Article 230."[13]

FINDINGS

The development of article 230 may be divided into five phases: 1) the Penal Law and Criminal Code Revision Commission's writing of the "Proposed New York Penal Law," article 235 (1962-1964); 2) introduction of the "Proposed Penal Law" as a study bill in the New York State Assembly and Senate (1964), public hearings on the proposed law (November 1964), and the Commission's subsequent rewriting of the law relating to prostitution (retitled article 230); 3) enactment of the 1965 Penal Law by the New York State Senate and Assembly (March 1965); 4) enforcement of and public reactions to the 1965 Penal Law following September 1, 1967, the date it became effective; 5) proposed amendments to article 230, *1965 New York Penal Law*.[14]

[11] For the purposes of the present study we intentionally selected a section of the Penal Law which had been the focus of much controversy. We believe, however, that if we were to trace the history of less controversial sections of the law back in time, we would find that they too were wrought, at some point in their development, from political struggles among groups who were concerned with what the law should be and who had differing self-interests.

[12] The writer interviewed members of the PLCCR Commission, judges, plain-clothes policemen; legal aid lawyers; representatives of the New York City Police Legal Bureau and the Bureau of Public Morals; members of the Mayor's Committee on Criminal Justice and the Mayor's Committee on Prostitution, New York City; the New York City Mayor's Counsel; the director of and attorneys for the New York Civil Liberties Union; and the Counsel to the State Senate's Committee on Codes.

[13] The last set of clippings are important for they represent the majority of articles read by Peter J. McQuillan and Richard G. Denzer, the staff members who prepared article 230 for the Commission's consideration and wrote the practice commentary on the article in the Penal Law.

[14] We followed the development of the Penal Law in relation to prostitution through May 1968 and the conclusion of the 1968 State legislative session. Since many groups remain dissatisfied with article 230, it is likely that new amendments will be filed for the 1969 legislature. Therefore the story of the political processes surrounding article 230 is as yet unfinished. (On

The Proposed Penal Law

The 1909 Code of Criminal Procedure which was still in effect in 1961 represented the PLCCR Commission's point of departure for the drafting of the 1965 Penal Law.[15] In the 1909 CCP, prostitution was defined as a form of vagrancy and subject to a penalty of up to three years in a reformatory or one year in jail.

Between 1909 and 1965, the Code of Criminal Procedure was amended piecemeal, and shaped and reshaped by judge-made decisions. Prostitution, as described in the 1909 CCP, § 887(4), was originally interpreted as an act which could be committed only by females.[16] This interpretation was later reversed, and in 1960 prostitution was held to include homosexual as well as heterosexual situations.[17]

Section 887.4(f), a 1919 amendment to § 887.4, was also subject to much controversy.[18] It extended the vagrancy provision to include any person "who in any way, aids or abets or participates in the doing of any of the acts" of prostitution. Many lawyers were of the opinion that subdivision (f) extended the vagrancy provision to the customer of the prostitute, but no judge actually ruled that a patron was "guilty."[19] In 1936 Judge Rudich held that the Legislature in enacting the clause "intended to reach . . . the porters, the maids, the many other henchmen, assistants, and lieutenants to procurers, prostitutes, and madames, all aiding, abetting, and participating in the business of prostitution and making their living therefrom . . . and not the male customer of the prostitute."[20]

By 1961 most of the Penal Law and Code of Criminal Procedure, like the section relating to prostitution, had become unwieldy and outdated. Consequently, Governor Nelson Rockefeller recommended that a commission be appointed to study these laws. Of the nine original Commission members, three were appointed by the Governor, three by the Temporary President of the Senate, and three by the Speaker of the Assembly.[21] The Commission was later expanded to include twelve members in addition to the chairman. All of the Commission's members belonged to the New York Bar Association.[22]

The Commission was given no time limit in which to complete its work. Therefore, it was possible for the

March 29, 1969, while this article was in press, the New York State Senate and Assembly amended Section 230.00 to read as follows: "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. Prostitution is a *class B Misdemeanor.*" This act will take effect September 1, 1969. *Laws of New York 1969,* Chapter 169.)

[15] 1909, N.Y.S., C.C.P., § 887(4), § 891-a.

[16] People v. Gould, 111 N.Y.S.2d 742 (1952).

[17] People v. Gould, 111 N.Y.S.2d 742 (1952) reversed on other grounds: 306 NY 352; People v. Hale, 8 NY2d 1962 (1960).

[18] N.Y. Laws 1919, c. 502; People v. Edwards, 180 N.Y.S. 631 (1920).

[19] D. Clarke, "It Takes Two—But the Customer is Always Guiltless," Public Hearings, *op. cit.*

[20] People v. Anonymous, 292 N.Y.S. 282 (1936).

[21] *NY Penal Law 1965* x (McKinney, 1965).

[22] One wonders if some of the provisions of the new law might have been different had sociologists, psychologists, or other professionals been included on the Revision Commission. Although in many respects the Commission's membership was representative of many diverse legal groups, District Attorneys' offices appeared to be heavily represented.

Commission members, in one of their early meetings, to decide to overhaul rather than to simply amend the outdated and technically unwieldy 1909 Penal Law and the Code of Criminal Procedure.[23]

The actual process of overhauling the law proceeded step by step. The staff first drafted an area of law and presented it at a Commission meeting. Then the Commission discussed it and voted on the draft. Many of the Commission debates were heated. A few articles passed practically without change; most involved several revisions, and some were redrafted twenty or more times. In debates concerning most areas of law, the members considered their own experience with the law; the Model Penal Code and the sociological, psychological and peneological remarks included in its commentary; the recently revised Illinois and Wisconsin Penal Laws; and the advice of persons outside of the Commission whom they considered expert with respect to the practical (i.e. nonlegal) or legal implications of a given article (generally the Commission staff sent drafts of articles to and sought the advice of the organizations whom it thought might be interested in the matter contained in the articles); the existing structure of the New York courts; and the advice of the *ex-officio* members, assemblymen and senators on what they thought the legislature would pass.[24]

When initially considering 1909 CCP § 887.4, the existing law concerning prostitution, the Commission staff turned to Chief Justice John M. Murtagh, formerly Chief Magistrate of New York City. For over a decade, Murtagh had vigorously campaigned for reform in prostitution and other laws. Between 1950 and 1964, Murtagh's position statements had been quoted nearly yearly by the *New York Times*.[25] In addition to urging the abolishment of the New York City Police Department Vice Squad and the Women's Court which had become a spectacle for sightseers, Murtagh repeatedly asked that the police efforts in the area of prostitution be directed at prevention rather than arrest.[26] In a 1955 report to Mayor Magner, Murtagh wrote:

> Is it the responsibility of government to change the public's morals? Can this be done? Manifestly, there is a point beyond which morality must be left to religion, the home, and the school . . . I believe the concern of the police and the courts should be (1) to prevent scandal by the open and notorious activities of prostitutes; and (2) to rehabilitate those who are emotionally disturbed and socially maladjusted and who are still capable of rehabilitation. We must still look primarily to the church, the home, and the schools to discharge the responsibility for teaching morality.[27]

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[23] A. Hechtman, Assistant Counsel, N.Y. Penal Law and Criminal Code Revision Commission, Oct. 23, 1967.

[24] The legislatures' advice may have been a conservative influence on the Commission's decision-making. On the other hand, the Commission's thinking appeared generally to be ahead of that of the people of New York State and the legislatures' counsel may have shown the Commission the degree to which it had to compromise its ideals so as to prevent the Proposed Penal Law from being rejected in its entirety. A staff member pointed out, "An example of the level of New York thinking is provided by the fact that the deletion of the adultery article did not pass the legislature even though no one had been arrested under it since 1874."

[25] *N. Y. Times,* March 21, 1950, 54: 5; July 27, 1951, 20: 2; Jan. 19, 1954, 28: 1; Feb. 20, 1956, 25: 3.

[26] *N. Y. Times,* June 3, 1957, 29: 2; May 8, 1962, 49: 2.

[27] From a report on the Women's Court and the problem of prostitution by Chief

Two years later Judge Murtagh and Sara Harris published a moving and well-documented book intended to arouse the public to reform the practices dealing with prostitution. They pointed out that "periodically we engage in 'vice crackdowns' which never have accomplished anything and doubtless never will. And yet after the women are arrested, virtually our only answer is a period of confinement in a penal institution calculated to make more certain their further degradation."[28]

The Commission members also read Great Britain's *Wolfenden Report.* The Report, compiled by a committee of clergymen, doctors, sociologists, psychiatrists, and lawyers, was presented to the Parliament in 1956. Its basic conclusions were that the law should make no effort to interfere in the purely private relations of adults where the element of seduction or duress was absent and that, though prostitution should not itself be made illegal, legislation should be passed to "drive it off the streets" on the ground that public solicitation was a nuisance.[29]

The American Bar Association's Model Penal Code and the 1961 Illinois Criminal Code were also used as models by the New York Commission. The 1959 draft of the Model Penal Code defined prostitution as a petty misdemeanor and patronizing a prostitute as a violation.[30] Under the 1961 Illinois Criminal Code the penalty for prostitution and for patronizing a prostitute was a fine up to $200 or sentence to a penal institution other than the state penetentiary not to exceed one year, or both.[31]

After nearly four years of work, the Commission published the *Proposed Penal Law.* This was introduced as a study bill at the 1964 Legislative Session.[32] The bill was not to be voted upon, but was a means of eliciting the Senators' and Assemblymen's as well as the general public's opinions regarding the Commission's proposals. This was the law's first large preview. The only section pertaining directly to the 1965 P.L. SS 230.00, 230.05, 230.10 read as follows:

> §§ 235.00 Prostitution
>
> A person is guilty of prostitution when he or she commits or submits to, or offers to commit or to submit to, any sexual act with or upon another person, whether of a different or of the same sex, in return for a fee or compensation.
>
> Prostitution is a violation.[33]

The proposed article, unlike the 1959 Model Penal Code and the 1961 Illinois Criminal Code, did not make patrons guilty. According to staff members, the New York PLCCR Commission's first inclination was to leave the law concerning prostitutes' customers unclear. Later the Commission decided it was best to strive for clarity and to follow existing practice by excluding

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City Magistrate John M. Murtagh to the Honorable Robert F. Wagner, Mayor of the City of New York, Feb. 14, 1955, quoted in J. Murtagh and S. Harris, *Cast the First Stone* (1957).

28 J. Murtagh and S. Harris, *Cast the First Stone,* preface (1957).

29 HM Stat. Off. Cmmd. 247, chap. 8 (1957) reprinted in America as the *Wolfenden Report* (1963). Cf. Murtagh, Book Review, *Saturday Review,* 31 (1963).

30 Model Penal Code § 207.12 (Tent. Draft No. 9, 1959). Cf. L. Schwartz, "Morals offenses and the model penal code," 63 *Colum. L. Rev.* 682 (1963).

31 1961 Ill. C.C. 38.

32 1964 N.Y. Senate Int. 3918, N.Y. Assembly Int. 5376.

33 Proposed N.Y. Penal Law § 235.00 (1964).

any reference to prostitutes' patrons from the Proposed Penal Law.[34]

By stating in the proposed article that "a person is guilty of prostitution when *he or she* . . ." the Commission eliminated any question as to the generality of prostitution. This decision was in keeping with the 1960 decision of *People v. Hale*, discussed above, where prostitution was held to include homosexual as well as heterosexual situations. It was also in accord with the United Nations Declaration on the Rights of Women and expressed the same intent as the terminology used in the Model Penal Code (1959 Draft) and in the statutes of Illinois, New Jersey, and Hawaii.[35]

The proposed article also made prostitution a "violation" rather than a crime, the maximum sentence for a violation being fifteen days rather than a year in jail or three years in a reformatory.

Arnold Hechtman, Assistant Counsel to the Commission, explained the Commission's decision to make prostitution a violation by saying that since there is no health program in New York for prostitutes, the Commission could not write a law to treat prostitutes clinically. Because of sentiment in New York State, the Commission members felt that they had to keep prostitution" on the books." Therefore, they resorted to "the next best action and whittled the punishment for prostitution down as far as they felt they could—down to a 'violation'." Hechtman defended this change as in keeping with existing practice by adding that even under the old law, in New York City prostitutes were generally given only five to thirty days, and the latter only when they were uncooperative.[36] In Upstate New York, however, prostitutes were generally given longer sentences.

Public Hearings and Revision of the Proposed Penal Law

In November 1964 the Commission held public hearings throughout the state on the Proposed Penal Law. What was the purpose of these hearings? One Commission staff member remarked, "Public hearings are hog wash." He explained the meaning of his statement by saying that the public seldom knows what goes on in the legislature. Therefore, only organized interest groups, which have generally already made their wishes known to the Commission at the Commission's closed meetings or by letters, appear at the public hearings. A few of the same groups, such as the societies concerned with humanity to animals, spoke at the public hearings in all four cities. He added that the public hearings are politically useful because they satisfy the public's wish to be heard. If the Commission makes changes following the hearings, he claimed, it is generally not because of the public's statements, but because the Commission is continually rethinking the law. If the Commission rejects groups' opinions, the groups can go to their legislatures, he added. In summary, this staff member believed that interested, organized groups possessing sufficient power would eventually obtain their wishes with or without public hearings and that the general public would remain ignorant of the legal changes.

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[34] Cf. People v. Anonymous, 292 NYS 282 (1936).

[35] B. George, "Legal, Medical and Psychiatric Considerations in the Control of Prostitution," 60 *Mich. L. Rev.* (1962).

[36] A. Hechtman, Interview, Oct. 23, 1967.

Article 235 of the Proposed Penal Law was one of the few articles which was rewritten, prior to being presented to the legislature, in accordance with the wishes which groups expressed at the public hearings. In its final form, the article was numbered two-hundred and thirty and the section defining prostitution finally read as given above.

Few changes were made in the definition of prostitution. Only the words "or compensation" were deleted from the clause of the Proposed Penal Law which defined prostitution as sexual conduct "in return for a fee *or compensation.*"[37] The clause defining the generality of the act was placed in a separate section, 230.10, as noted above.

The main issue in the development of the law on prostitution offenses and the main source of controversy after the law's enactment was whether "patronizing a prostitute" should be classified as an "offense". It will be remembered that in the Proposed Penal Law "patronizing a prostitute" was not classified as an offense.

During the public hearings, three persons forcefully expressed their views on the act of "patronizing a prostitute." Mr. Furst, president of the American Social Health Association, appeared first, and his statement attracted the most news coverage.[38] Mr. Furst submitted an amendment to the Proposed Penal Law which would make "Patronizing Prostitutes" a violation. Arguing that both the patron and the prostitute are "culpable in the spreading of disease," the A.S.H.A. representative disagreed with the position debated by the American Law Institute and held by Judge Murtagh that prostitution is a private matter. The Association therefore recommended that both patrons and prostitutes be guilty of committing a violation.[39]

Others in New York City argued against including a "patron" clause on the basis that doing so would make prostitution convictions more difficult. Traditionally, New York City police used customers to testify against prostitutes. Furst contended that this argument was invalid because difficult in conviction should not override "customer guilt," and because this situation was peculiar to New York City. In smaller towns without the anonymity of New York City, he argued, customers would not consider testifying because their doing so would make their activities with prostitutes general knowledge.

In her written testimony, Dorris Clarke, Attorney and retired Chief Probation Officer of the N.Y.C. Magistrates Court, also concluded that "patronizing a prostitute" as well as "prostitution" should be classified as a violation. However, her arguments for this reform differed from those of Furst. Miss Clarke maintained that prostitution should be dealt with under the Public Health Law rather than under the Penal Law but that as long as prostitution was included under the

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[37] During the public hearings Dr. Biegel stated that he believed the words, "or compensation," should be deleted from the article because "if a young man takes a girl . . . . to a theatre, (and) afterward she allows him liberties, she gives him a compensation." He added, ". . . the whole concept of the male-female relationship in our culture . . . is based on compensation." Evidently the Commission also agreed that the definition of prostitution needed to be made more specific. Biegel, N.Y. Public Hearings, *op. cit.,* 514.

[38] *N. Y. Times,* Nov. 24, 1964; *National Council on Crime and Delinquency News,* Jan. 1965.

[39] Mr. Furst, Public Hearings, *op. cit.*

Penal Law, the exclusion of "patronizing a prostitute" from the Penal Law represented unequal treatment, "a fantastically unbelievable piece of legal hocus-pocus and philosophical hair-splitting." In her testimony she stressed:

> . . . few jurisdictions place any blame upon the customer; and where there *are* such laws, *enforcement* is sporadic or non-existent. YET, WITHOUT CUSTOMERS, THERE WOULD BE NO PROSTITUTES.

She pointed out further that although judges and police were careful to preserve the anonymity of customers, distinguished or otherwise, the same kindness had never been extended to the prostitute. Citing examples from the 'sixties, she observed:

> . . . the papers are having a heyday with exposés of "suburban housewives" offering "sex for sale" . . . When arrests are made, there is no hesitancy in publishing the names and addresses of the females. Even their husbands are not immune from publicity, but the "customers," while usually referred to as "well-to-do businessmen," or "upper class" remain cloaked in anonymity.

In debating Mr. Atlas of the Commission who suggested that sending "customers" to prison would hurt their families, Miss Clarke suggested that only some customers—perhaps those who had brutually treated a prostitute —might be sentenced to prison; others would be given other treatments. She outlined the following proposals:

1. . . . that the customer be arrested, arraigned and tried, equally with the female; that his name and address be as much a part of the record and available to publicity as is hers. Widespread knowledge that this should happen would cause him (the patron) to at least pause. . . .
2. . . . subject him to a venereal examination—*immediately upon arrest,* as is presently done with the arrested prostitute.[40]
3. . . . upon conviction . . . require a complete investigation be made and a report submitted to the court by the Probation Department—not only of the girl, but of her paying partner as well.
4. . . . the purpose of a probation report on the customer would be the same as for any offender—to assist the court in imposing sentence. For some, a suspended sentence might serve the purpose; physical examination, court appearance, conviction and investigation might be sufficient to discourage him from further patronage. For others, a heavy fine might impress upon him the fact that "purchased pleasure" can become too costly; and in other cases, . . . probation supervision under a competent, trained caseworker would be socially and personally constructive. . . . *some* customers would . . . be as deserving of incarceration (as prostitutes) . . .[41]

Dr. Grabinska, the third person to testify, presented a lengthy written statement in which she argued that because the "customer" and the "prostitute" are equally guilty, they should be given equal treatment. Dr. Grabinska, who had a Polish law degree and who had long followed cases concerning women's rights, represented no organization but spoke as an "interested citizen."

Following the public hearings, the PLCCR Commission added § 230.05 concerning patrons. The section as passed by the legislature is given above.

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[40] July 1, 1967 the N.Y.C. Health Department closed the Criminal Court clinic where accused women were examined for venereal diseases. "The women are now asked to pledge to have an exam by their own doctor or at a city clinic within 48 hours." The purpose of the change was "to end the charge of discrimination against women charged with prostitution," according to the *N. Y. Times. N. Y. Times,* July 1, 1967, 20: 2.

[41] Clarke, *op. cit.,* pp. 170-174.

In its comments on article 230., the Commission termed the addition of the new offense, "Patronizing a Prostitute," the most important change in the article. In explaining the change, the Commission wrote:

> Though not presently an offense in New York, such "patronizing" conduct is proscribed in various forms by the penal codes of several other jurisdictions, including the recently revised codes of Illinois and Wisconsin and it is included as an offense in the American Law Institute's Model Penal Code.
>
> At the public hearings held by the Commission with respect to the proposed Penal Law, and in conferences and correspondence with the Commission and its staff, a number of persons and organizations have strongly urged the inclusion of a "patronizing" offense. The reasons most vigorously advanced are: (1) that criminal sanctions against the patron as well as the prostitute should aid in the curtailment of prostitution; and (2) that to penalize the prostitute and exempt the equally culpable patron is inherently unjust.
>
> After consideration of these contentions, the Commission decided to include the indicated patronizing offense in the new bill as a proper corollary to prostitution.[42]

Enactment and Enforcement of the Law

In 1965, the new sections passed the legislature without comment. The *New York Times* merely noted, "In another revision the commission recommended that the customer of a prostitute, as well as the prostitute herself, be made subject to prosecution. Mr. Bartlett (chairman) said he was "persuaded that there is no moral or ethical reason to exclude the customer from criminal liability in a sex-for-hire situation."[43]

The new law radically changed the legal status of prostitutes' patrons and modified the status of prostitutes. In addition, the law prevented police from using customers as witnesses in prosecutions, and *technically* prohibited plainclothesmen from obtaining solicitations from and subsequently testifying against prostitutes. The one legal basis for arresting prostitutes and patrons was for plainclothesmen to observe a couple while the patron offered and the prostitute accepted a fee for sexual conduct.[44] As the time for the new law to become effective approached, one wondered whether the police would attempt to enforce the legal changes, follow traditional practice, or attempt to amend the law.

In May, 1967, the police ended their practice of having patrolmen who made arrests act as prosecutors in Women's Court.[45] During the early summer months, the police relaxed their prostitution pickups.[46] This relaxation may have been in anticipation of the Revised Penal Law or a consequence of the Police Department's energies being diverted by racial unrest. Whatever the cause, an alleged influx of prostitutes began to descend upon Manhattan and the Times Square area.[47] Some persons say that a rumor went around among prostitutes that prostitution was legal.[48] According to

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[42] N. Y. Penal Law, Comments § 230.05 (McKinney 1965).

[43] *N. Y. Times,* March 17, 1965, 35: 3.

[44] The latter was Judge Amos Basel's interpretation of the law. Interview, Dec. 8, 1967.

[45] *N. Y. Times,* May 10, 1967, 49: 4. Sept. 15, 1967 Part 9 of the Criminal Court, City Magistrates' Court, commonly called the "Women's Court" was discontinued. Thereafter sexual offenses by women were handled in Part 1C.

[46] Basel, *op. cit.*

[47] *N. Y. Times,* Nov. 9, 1967, 33: 4; *N. Y. News,* May 18, 1967.

[48] Judge Basel, *op. cit.* The *N. Y. News* also reported, ". . . the city is suffering an influx of out-of-town prostitutes and their

these sources, prostitutes came to New York from around the nation and around the world; others came out of retirement; and some women entered the business for the first time.

The dimensions of the "invasion," and whether the invasion actually took place, are unknown. The amount of prostitution which exists at any one time cannot, as many sociologists and other writers have pointed out, be measured by arrest rates. Arrest rates, particularly for prostitution, go up and down more as a result of pressures from the political and police system than as a consequence of the actual rate of prostitution.[49] New York politicians, businessmen, and police may have begun to talk about an influx of prostitutes and the need for a "clean-up" because they were dissatisfied with the law becoming "soft" on prostitutes. Also representatives of the Police Department appeared to speak periodically to newsmen about "increases in prostitution." Only a year before the alleged '67 influx, S. V. Killorin, Commander of the Third Division, had stated, "For some reason, many prostitutes seem to be coming from out of town."[50]

Members of the PLCCR Commission staff who naturally felt some need to protect the new law, questioned whether the actual rate of prostitution had risen at all.[51] Whatever the dimensions of the alleged "influx," in August the police reportedly were pressured by politicians, Midtown businessmen, and City Hall to "clean-up" the Times Square area.[52] The New York Hotel Association complained especially bitterly about the influx.[53]

August 20th, the first day of the Times Square "clean-up," marked the start of a fiery checker-board game between the police and the district attorney's office on the one hand, and the Civil Liberties Union, the Legal Aid Society, and certain judges on the other. Because of the speed and political complexity of the moves, we will outline them chronologically:

August 20, 1967:

> The New York City police began their drive against prostitution by arresting 121 alleged prostitutes. Deputy Police Commissioner Nevard said that the drive had been planned for some time but that it had been held up until this date because of manpower needs in

male associates as the joyful word spreads through the V-grapevine that Fun City is becoming Sin City. The invasion was inspired by the recent announcement by Police Commissioner Leary that the police intended to abandon their 57-year old role as prosecutors of the girls." *N.Y. News,* May 18, 1967.

[49] Murtagh and Harris document New York City trends in pressures for "clean-ups" and subsequent rises in prostitution arrest rates. Murtagh and Harris, *op. cit.* J. Skolnick, *Justice Without Trial* (1966); S. Wheeler, "Criminal Statistics," 58, *J. of Criminal L., Criminology and Police Science* (1967).

[50] *N. Y. Times,* Nov. 17, 1966.

[51] World-wide rumor transmission among prostitutes that prostitution had been legalized in New York City may be questioned on the basis of previous sociological findings. For instance, Clinard and Quinney note that because prostitution is, by its very nature, competitive, prostitutes seldom develop a high degree of organization within their profession and have a "limited argot or special language." Professional organization or cohesion would be necessary for large-scale rumor transmission. M. Clinard and Quinney, *Criminal Behavior Systems,* 256 (1967). Cf. Mauer, "Prostitutes and criminal argots," 44, *American Journal of Sociology* (1939), pp. 546-550. On the other hand, many and perhaps most prostitutes are tied in with the organized underworld.

[52] Zion, "Prostitution: The midtown roundup," *N. Y. Times,* Oct. 1, 1967.

[53] Basel, *op. cit.*

areas of racial tensions.[54] He added, "We hope to keep the Times Square area clean."[55]

August 22, 1967:

On the nights of August 20th and 21st the police "successfully pulled in" many prostitutes. Then the prostitutes "got smart" and left the streets. The police continued to be told to bring prostitutes in, and, being unable to arrest streetwalkers, "they started bringing in legitimate women who were standing on the street." According to Judge Basel, "The police also began to make deals with the "Johns" so as to get the prostitutes."[56]

September 1, 1967:

The Revised Penal Law became effective.

September 8, 1967:

The cases of the defendants who had been arrested on "loitering" charges began to come before the court. The women had been arrested by plainclothesmen who had simply seen them standing in hotel doorways nodding to men who entered. The plainclothesmen testified that they knew the women were prostitutes because they knew they had been arrested before. After dismissing the cases because there was not enough evidence to hold the defendants, Judge Basel said the arrests had been made to "harass" the women and get them off the streets. He said he felt the patrolmen knew there could not be convictions in these cases.[57]

September 22, 1967:

In a press release, the New York Civil Liberties Union protested police practices in the "Times Square cleanup campaign." The NYCLU reported, "Literally hundreds of women have been arrested and charged with disorderly conduct during the summer months, and the situation still continues." ". . . there is a conspiracy on the part of the police to deprive these women of their civil rights by arresting them on insubstantial charges." ". . . women are being arrested in a dragnet and charged with disorderly conduct and loitering in order to raise the number of arrests." ". . . many innocent girls are undoubtedly being caught in the net and the entire practice is an outrageous perversion of the judicial process. Furthermore, women who refuse to submit to the unlawful practices of the police have been manhandled."[58]

The Union reported Judge Basel saying, "I don't doubt that most of them are prostitutes, but it is a violation of the civil liberties of these girls. Even streetwalkers are entitled to their Constitutional rights. The District Attorney moved in all these cases to have the charges thrown out, but in every case the girls were arrested after it was too late for night court, so they were kept over night with no substantial charges pending against them."[59]

August 20-September 23, 1967:

1,300 prostitution arrests made: most were on charges of disorderly conduct or loitering rather than prositution.[60] In explaining the move to arrest prostitutes under disorderly conduct or loitering rather than under prostitution, Jacques Nevard, press spokesman for the Police Department, said: "It's unprofitable and uneconomical to make solicitation arrests required to substantiate a prostitution charge."[61] Throughout this period, the District Attorney's office had dismissed nearly all of the complaints of disorderly conduct and loitering.

September 23, 1967:

The Police Department appeared to be embarrassed by the District Attorney's repeated dismissals of the cases, by the NYCLU's protests, and by Judge Basel's denunciation of its activities. Therefore, the *New York Times* reported "informed legal sources" as revealing, the Police De-

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54 *N. Y. Times,* Oct. 21, 1967, 16: 4.

55 *N. Y. Times,* Aug. 22, 1967.

56 Basel, *op. cit.* Persons working throughout the Court building generally agreed that these two actions occurred.

57 *N. Y. Times,* Sept. 9, 1967, 33: 4.

58 N. Y. Civil Liberties Union Press Release, Sept. 22, 1967.

59 *Ibid.*

60 *N. Y. Times,* Sept. 26, 1967.

61 *Ibid.*

partment prevailed upon D.A. Frank S. Hogan's office to begin prosecuting the cases.[62] Hogan's office suggested that the police arrest the women on loitering charges.[63]

September 25, 1967:

The District Attorney's office requested Judge Basel to hold the next cases over for trial. Basel reluctantly held 30 women over for trial for loitering, most of them being released on low bail—around $25; and described the dragnet as a "disgrace."[64] The D.A.'s office spiritedly defended the legality of arrests of *suspected* prostitutes for loitering.[65]

September 26, 1967:

Gerald Kearney, an attorney for the Legal Aid Society, according to the *New York Times,* moved to dismiss the loitering cases "on the ground that the loitering statute requires that the person arrested be suspected of committing a crime." Since prostitution is a violation and not a misdemeanor or a felony, Mr. Kearney argued that it was not a crime under the penal law.[66] Kearney, in an interview, later said that he had moved to dismiss the cases on the ground that 1967 NYPL § 240. 35 was in violation of the Fourth and Fourteenth Amendments of the Constitution of the U.S.[67] Kearney also claimed that approximately half of his cases were innocent, had never before been arrested for prostitution, and were shocked to find themselves inside a courtroom.

Following Kearney's move, Peter Schweitzer, an assistant district attorney, argued that the complaint was legal. When Judge Basel said that prostitution was not a crime, Schweitzer said, "Maybe the law has been amended." "I think I have the latest edition of the penal law," Judge Basel countered. After a short recess, Mr. Schweitzer moved to dismiss each of the remaining loitering cases saying, "The people move to dismiss on the grounds that the case cannot be proved beyond a reasonable doubt."[68] Judge Basel later said that he had intended to dismiss the case anyway. The Judge also dismissed disorderly conduct charges against two defendants, but he did not dismiss any of the straight prostitution cases.

That day, the *New York Times* reported, Police Chief Leary also met with his top commanders concerning the strategy which the department should pursue with regard to prostitution. Their decisions, Leary said would not be made public. However, there was a change in the arrest pattern: 30 out of 43 defendants were charged with prostitution as a result of solicitation of policemen.[69]

September 27, 1967:

The Police Department presumably put new pressure on the District Attorney's office.[70]

The NYCLU indicated that it would file a suit in the Federal court the following week seeking an injunction against the arrests. Mr. Aryeh Neier, executive director of the CLU criticized the "rapid fire switches" of the D.A.'s office saying: "When the law enforcement agencies adopt their procedures to the political order of the day, they are not only in derogation of the Constitution, but they make a burlesque of it." During the following days, the NYCLU did draw up a complaint seeking action for "an injunction to prevent the further deliberate deprivation of the defendants of rights, privileges and immunities secured by New York State law, and the Constitution of the U.S. and the State of New York." The Union was unable to pursue the complaint because the plaintiffs, three alleged prostitutes, ran away.[71]

September 28, 1967:

Assistant D.A., L. Goldman, asked Judge Basel to uphold the legality of the loitering charges. Basel paroled

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62 *N. Y. Times,* Oct. 1, 1967.

63 *N. Y. Times,* Sept. 27, 1967, 48: 1.

64 *N. Y. Times,* Jan. 1, 1967.

65 *N. Y. Times,* Sept. 27, 1967, 48: 1.

66 *Ibid.*

67 Gerald Kearney, attorney for Legal Aid Society, interview, Jan. 4, 1968.

68 *N. Y. Times,* Sept. 27, 1967, 48: 1.

69 *Ibid.*

70 *N. Y. Times,* Oct. 1, 1967.

71 Aryeh Neier, executive director, Civil Liberties Union, Jan. 3, 1968, interview.

four women charged with loitering until he reached a decision on the legality of the practice. Legal briefs were to be submitted by the District Attorney's office and the Legal Aid Society by November 9th.[72]

August 20-September 30, 1967:
Police made 2,400 arrests in the prostitution "clean-up." This was only 200 less in six *weeks* than the number of prostitution arrests during the first six *months* of the year.[73]

October 1, 1967:
The *New York Times* stated, "unless and until an injunction is granted, the police will be under no serious pressure to stop (the unconstitutional arrests) and indeed the pressure will more than likely be in the other direction."[74]

November 9, 1967:
Judge Basel dismissed loitering charges against 41 women. "The arrests," he said, "were illegal and made in violation of the clear mandate of the loitering statute and in violation of the rights of all the defendants." The ruling, made in a test case with the consent of District Attorney Hogan, will "terminate" the crackdown, Basel said. Mr. Hogan agreed that "crime" means "a misdemeanor or a felony" and therefore the charges could not stand.[75]

During the rapid changes in prostitution cleanup procedures, how was the new "patron" law being enforced? We observed that the newspapers contained no reports or stories on arrests of "Johns."[76] Because the papers generally contain monthly or bi-monthly reports on prostitution arrests, and frequently include public interest stories about prostitutes, we asked the Criminal Court Statistics Office to show us their record on the arraignments and dispositions of persons charged with "patronizing prostitutes." Table 1 contains summary statistics of the arraignments and dispositions of cases under §§ 230.00, 230.05 for September 1967 through February 1968. In comparing the figures for "prostitution" and "patronizing a prostitute," we should remember that in addition to the 1,159 prostitution arrests under § 230.00 during the months of September and October, over 2,000 women were arrested for loitering or disorderly conduct.[77]

Of the *new* prostitution and patronizing cases, only six percent were for patronizing a prostitute during the months of September and October. Of the 508 *convicted* dispositions, only 0.8 percent were for patronizing a prostitute.[78] Between November and February an average of 14 patrons were arrested monthly as compared with an average of 35 during September and October; only one of these cases was convicted. The high number of prostitution arrests during October and November (monthly average 738) returned to normal (400-500 a month) between December and February.

Three observations may be made from these statistics. First, since the only legal basis for arresting prostitutes was for plainclothesmen to observe a couple while the patron offered and the prostitute accepted a fee for sexual conduct, the enforcement of the law was not consistent with the provisions of the new law. Second, since 72 persons had been arrested on patronizing charges during September and October, the newspapers by not reporting

[72] *N. Y. Times,* Sept. 29, 1967, 63: 4.
[73] *N. Y. Times,* Oct. 1, 1967.
[74] *Ibid.*
[75] *N. Y. Times,* Nov. 10, 1967.
[76] Albany News Service and *N. Y. Times Index.*
[77] 1965 NYS Penal Law § 240.20.
[78] In October, 17 of the arrests under 1965 NYS Penal Law § 230.00 were male prostitutes. Docket sheets, Criminal Court, New York City.

TABLE 1

CITY WIDE ARRAIGNMENTS AND DISPOSITIONS: §§ 230.00, AND 230.05, PROSTITUTION AND PATRONIZING*

Court Offense and Month:	New Cases	Dispositions											
		Total Dispos.	Disch.	Unable to Locate	Trans'd other Courts	Convicted: Plea Guilty	Convicted: After Trial	Finded	Fine and Imp.	Str. Sent.	Release: Uncond.	Release: Cond.	Prob.
Sept. 1967:													
Patron.	37	17	14	—	—	3	—	—	—	1	2	—	—
Prostitution	413	403	143	40	—	191	29	3	—	183	24	10	—
October 1967:													
Patron.	35	25	22	—	2	1	—	—	—	1	—	—	—
Prostitution	746	467	159	5	9	288	6	3	4	214	50	23	—
November 1967:													
Patron.	27	26	25	—	—	1	—	—	—	1	—	—	—
Prostitution	731	450	187	4	3	241	15	7	—	226	11	11	—
December 1967:													
Patron.	8	12	12	—	—	—	—	—	—	—	—	—	—
Prostitution	412	292	143	2	—	142	5	3	—	117	17	10	—
January 1967:													
Patron.	15	—	19	2	—	—	—	—	—	—	—	—	—
Prostitution	467	490	218	9	2	234	27	2	—	217	21	21	—
February 1967:													
Patron.	5	10	9	—	1	—	—	—	—	—	—	—	—
Prostitution	588	—	312	8	2	237	28	57	—	167	28	10	—
Total September-February:													
Patron.	127	90	101	2	3	5	—	—	—	3	2	—	—
Prostitution	3,357	2,102	1,162	68	16	1,333	110	75	—	1,124	151	85	—

* New York City, Criminal Court Statistics Office, statistical worksheet. These figures do not include prostitutes who were arrested under sections of the law other than prostitution, i.e. loitering or disorderly conduct.

on any of the patronizing cases were obviously extending a courtesy to patrons which they do not extend to prostitutes. Third, the decline in the number of prostitution arrests between December and February indicates either that the prostitutes who "swarmed to New York City" during October left quickly after the police clampdown, or that the increase in prostitution arrests was an artifact of political pressures.

Not only patrons but high priced call-girls were ignored by the police during the "clean up" period. The large number of arrests of Times Square "street-walkers" and the small number of arrests of call-girls may be interpreted in two ways: First, in enforcement practices, there may be decreasing moralistic concern with the private actions of individuals. Second, street-walkers and their customers rank lowest in prestige among those who participate in prostitution or patronizing prostitutes. Call-girls serve "upper class," sometimes famous, patrons for high fees. One madame, described as well-known among New York's upper classes, publishes a book on her girls. The "class A" girls frequently accompany corporation customers to dinner and the theatre as well as engage in sexual conduct with them.[79] Because such behavior is generally not regarded as offensive, political groups do not exert pressure upon the police and City Hall to "clean it up."

We have seen that in its enforcement practice, the Police Department reacted initially to § 230.00 and prostitution by unconstitutionally "sweeping" the streets of prostitutes under the cloak of legality provided by the sections on loitering and disorderly conduct. The Department reacted to the new "violation" of patronizing prostitutes by making a small number of token arrests of patrons and by letting most "Johns" go. In turn, the New York Civil Liberties Union, the Legal Aid Society and certain judges reacted to the police actions by defending the women's rights.

In what other ways did the community react to the new provisions? The Hotel Association and businessmen in the Times Square area vociferously complained to the police and City Hall about the influx of prostitutes. The New York Commission on the United Nations Secretariat allegedly complained about the arrest of businessmen and other visitors from foreign countries who did not realize that "patronizing prostitutes" was an offense. The hotel managers felt that not only did the prostitutes inconvenience persons staying at their hotels but that sex was used as a come-on for many ancillary crimes such as muggings, petty larceny, extortion, and breaking and entering.

In addition to the "clean-up," City Hall reacted to the political pressure exerted by the hotels and businessmen by creating the Mayor's Committee on Prostitution. Mr. Daniel C. Hickey, President of the New York City Hotel Association, was appointed to the fifteen man committee.[80] In November, Mayor Lindsay sat in on the committee's first session and was reported by the press as "deeply concerned" with the problem.[81]

At its first meeting, the Committee set up three sub-committees, which, in

[79] *N. Y. Times,* Jan. 20, 1960, 71: 1, 2.

[80] The New York Hotel Association represents the wealthier hotels; most inexpensive hotels which cater largely to prostitutes and their patrons are not included in its membership.

[81] *N. Y. Times,* Nov. 1, 1967.

effect, represented the various interests in the controversy:

1) Penal Law Revision: Chairman, Judge Amos Basel, Criminal Court.
2) Rehabilitation of Prostitutes in Correction Facilities: Chairman, Mary K. Lindsay, Former Superintendent of the Women's House of Detention.
3) Study Group to Determine Non-Criminal Approaches to the Problem of Prostitution: Chairman, Dr. Alfred Freedman, Department of Psychiatry, New York Medical College.

Queens District Attorney Thomas Mackell was appointed chairman of the overall Committee. In May 1967 Mackell had written to Governor Rockefeller "repeating a suggestion that he said he made 'long ago' that 'prostitution be dealt with by a specially qualified social agency rather than an already overburdened criminal justice machinery."[82] Mackell had made similar proposals to Mayor Lindsay and legislative leaders as well as expressing them publicly in the *New York Law Journal*.[83]

Mrs. Joan Cox, an attorney for the Legal Aid Society who worked in the Women's Court for seven years, also served on the Committee. She agreed with Mackell that prostitution should not be punished except as a public nuisance. However, she said she was not opposed to fines, because, "after all, prostitutes pay no income taxes!"[84] The Vera Institute of Justice has also recommended a "halfway house" in which prostitutes would be offered a full battery of services from psychiatrists, psychologists, social workers, and vocational guidance experts.[85]

In a formal statement, Judge Basel, Chairman of the Subcommittee on Penal Law, said he feared that the state penal code would make "Fun City" the vice capital of the world. He added, "I think that until a method is devised for effectively treating them as social problems—and such a method has not yet been found—we should leave the old law on the books."[86] In an interview, Basel said that he thought it would be very worthwhile for a Foundation to give a group of psychiatrists and other professionals money to devise an experimental demonstration center or clinic for rehabilitating prostitutes. He pointed out, that to his knowledge, no such experiment had been tried.[87]

Proposed Amendments

The Police Department, along with the hotel association, most vigorously opposed the law.[88] In September 1967, the Department prefiled draft amendments to the Penal Law for the 1968 legislature. One amendment, if passed would have extended the loitering section (240.35.3) to include "loitering for the purpose of . . . prostitution."[89]

82 *N. Y. L. J.*, May 23, 1967.

83 Mackell, "Prostitution," *N.Y.L.J.*, Oct. 27, 1967.

84 Mrs. Joan Cox, Attorney, Legal Aid Society and member, Mayor's Commission on Prostitution, interview, Dec. 12, 1967.

85 *N. Y. Times*, Editorial, Aug. 15, 1967.

86 Basel quoted in *Syracuse Post Standard*, Aug. 23, 1967.

87 Basel, interview, Oct. 26, 1967.

88 In an interview with Captain Behan, Commanding Officer, Bureau of Public Morals, Police Department, the writer was told that because the Police Department is a semi-military organization, neither the Captain nor the Police Legal Bureau had the authority to speak about or distribute copies of its draft amendments.

89 New York City Police Department, "An Act to Amend the Penal Law, In Re-

In support of this proposed amendment, the Department wrote:

> The inclusion of this provision within the 'loitering' section of the Penal Law would be of great assistance to law enforcement officials in combating prostitution. The actions of these individuals have always had a deleterious effect on the business and social life of the community. This proposal should prove instrumental in eradicating or substantially decreasing the problem of street walkers.
>
> Furthermore, it is the opinion that such amendment would result in a decrease in the incidence of venereal disease and in the number of muggings, assaults, and robberies which are often a by-product of this type of activity.[90]

Two other proposed amendments prefiled by the Department would: 1) extend the loitering provisions to include loitering for the purpose of engaging in an offense (rather than only loitering for the purpose of engaging in a crime: § 240.35(6)), and 2) make prostitution a class *B* misdemeanor (a crime) rather than a violation (230.00.).[91] If prostitution were made a class B misdemeanor, prostitutes could be sentenced to a maximum of 91 days, still considerably less than the 3 year maximum reformatory sentence provided under 1909 § 891 (a). In support of the first provision, the Department stated:

> This additional authority would be of great assistance to law enforcement officials in combating prostitution as the prostitutes who are observed approaching different people at various intervals would have to give a reasonably credible account of such actions.[92]

The Police Department argued that prostitution should be made a class B misdemeanor on the basis that:

> Though other provisions of Article 230 (i.e. those for the promotion of prostitution) of the Revised Penal Law are directed primarily at organized vice and those who knowingly advance or profit from prostitution such activities are impossible in the main without the prostitute and her services. To designate 'prostitution' as a violation with a penalty of a term not to exceed 15 days is highly unrealistic. Such a penalty is tantamount to 'licensing' prostitutes and results in turnstile justice and an increase in such activities.[93]

To the writer's knowledge, the Police Department prefiled no amendment to eliminate the "patronizing" clause from the Penal Law. Perhaps the Department did not do so because it could effectively evade enforcing the law or because it believed it could not defeat the political pressure which was shown to support the "patronizing provision" during the Penal Law public hearings.

The Buffalo area police and legislators were also against the new law's provisions pertaining to prostitution. Assemblyman Albert J. Hausbeck of Buffalo's 114th District said that the new Penal Law was too lenient on convicted prostitutes and that he in-

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lation to Persons Loitering for the Purpose of Committing Prostitution," prefiled for the 1968 N.Y.S. Legislature.

[90] New York City Police Dept., Draft of memorandum in support of "An Act to amend the penal law, in relation to persons loitering for the purpose of committing prostitution" (1967).

[91] New York City Police Department, "An Act to amend the penal law in relation to persons loitering for the purpose of committing an unlawful act," and "An Act to amend the penal law, in relation to the punishment for engaging in prostitution," prefiled for the 1968 New York State Legislature.

[92] N. Y. C. Police Dept., "An Act to amend the penal law in relation to persons loitering for the purpose of committing an unlawful act" (1967).

[93] N. Y. C. Police Dept., Draft of Memorandum in Support of "An Act to amend the penal law, in relation to the punishment for engaging in prostitution" (1967).

tended to prefile three amendments to the new State Penal Code.[94] Captain Kenneth Kennedy, commander of the Buffalo Vice Enforcement Bureau, speaking before the Rotary Club, asked, "If the legislators want open prostitution, why don't they just say so?" He predicted that disease, broken homes, and involvement of organized crime in prostitution would follow the "condonation" of it under the new law, and he blamed "do-gooders" for the changes in the law saying they have perpetrated "frauds" on legislators and the public to support unfounded theories that prostitution does not harm.[95]

In January the Mayor's Committee on Prostitution recommended that the offense of prostitution be reclassified from a violation to a class A misdemeanor, effective September 1, 1968. The recommendation was submitted to the State Senate in the form of an amendment to the Penal Law.[96] The amendment, if passed, would have increased the maximum penalty for the offense from fifteen days to one year imprisonment.

At the same meeting, the Committee disapproved several pending bills, including that submitted by the Police Department, on prostitution. One would have made prostitution a Class B misdemeanor. It was disapproved on the ground that the three month sentence would not allow sufficient time for rehabilitation. Several bills extending the loitering statutes to include "offenses" (i.e. prostitution under the Revised Penal Law) were disapproved on the grounds of doubtful constitutionality.

In a memo in support of the amendment to make prostitution a Class A misdemeanor, Judge Basel wrote:[97]

> The subcommittee felt that the reclassification of prostitution from a violation to a class A misdemeanor would aid rehabilitative efforts and provide more effective law enforcement. This reclassification will put New York law in line with the majority of the other states, where the maximum penalties for prostitution are generally either six months or one year imprisonment. The subcommittee felt that until a social solution to the problem of prostitution was found the penal sanctions should be changed in order to afford effective law enforcement. The fifteen day maximum penalty, it was felt, defeated both rehabilitative and preventive objectives.
>
> The change in the law would allow the courts to place first-time offenders and others on probation for up to three years so that they could be given guidance and an opportunity to restructure their lives. Under the present law, convicted prostitutes cannot be placed on probation since probation is available only for those convicted for misdemeanors and felonies, whereas prostitution is an offense. Moreover, the reclassification would give the courts the opportunity to sentence the offender to a term in a halfway house or a similar institution, should they be established, so that she could receive close supervision and concerted rehabilitative efforts.
>
> The present law has greatly accelerated the turnstile justice associated with the punishment of prostitutes. Since the Penal Law took effect in September 1967, the average sentence for prostitution has been a mere five days.
>
> Streetwalkers in New York City pose a serious problem in that, particularly in the midtown area, they offend public sensibilities as they almost openly ply their trade. This disturbs local business-

[94] *Buffalo Evening News,* Oct. 9, 1967; *Buffalo Courier Express,* Oct. 9, 1967.

[95] *Buffalo Evening News,* Oct. 27, 1967; *Buffalo Courier Express,* Oct. 5, 1967.

[96] An Act to Amend the Penal Law, in relation to *prostitution,* Introduced by Mr. Griffin to the Senate (890), State of New York, Jan. 3, 1968.

[97] Memo from Judge Basel, Chairman, Subcommittee on the Penal Law to Hon. Thomas Mackell, Chairman, Mayor's Committee on Prostitution.

men, theatre-goers, tourists and others. The lenient sentence prescribed by the new law has compounded the problem by attracting out-of-town prostitutes to New York. Police reports indicate that since the summer of 1967 there has been a tremendous influx of prostitutes from other states.

Moreover, it should be realized that there is a serious correlation between prostitution and other criminal activity. Police statistics and hotel reports indicate that prostitutes are frequently involved in robberies and larcenies from their prospective clients.

In April the Senate committed the bill to amend the Penal Law to the Committee on Codes. The Committee debated the bill and voted *not* to send it back to the Senate for a vote. This action meant that the sections of the Penal Law concerning prostitution would remain unchanged for at least another year.

Why, when so many seemingly politically influential groups were pressuring for a higher prostitution penalty, did the Committee vote "no"? In an interview, Mr. Martin Schaum, Counsel to the Committee on Codes, gave three reasons for the "no" vote.[98] First, the Committee believed that the Penal Law Commission's decision to make prostitution a violation had been well considered and that the Law had been in effect too short a time for any group to be able to evaluate its effectiveness. Second, the Committee feared that giving prostitutes one year sentences would overcrowd the jails. Third, the senators on the committee did not believe that the act of prostitution warranted a one year jail sentence.

Scanning the occupations and affiliations of the committee members, we noted two additional factors which may have influenced the Committee's decision. First, all of the sixteen committee members were lawyers.[99] The New York Bar Association, and lawyers generally, respected and supported the Penal Law Commission (which is also composed entirely of lawyers) and its decisions. Had businessmen or the police, particularly those of New York City or Buffalo, been represented on the committee, the decision might well have been in support of the amendment. At least vigorous opposition would have been expressed toward voting down the amendment. Second, John Dunne, a member of the Committee, was also a member of the PLCCR Commission. Although we cannot be certain of Dunne's position since the Committee did not release minutes of its meetings, we imagine that he supported leaving the Penal Law unchanged.

Summary and Conclusions

This study suggests that law-making and law-enforcement cannot be understood as apolitical, technical, value-free processes. Theories of law must include a knowledge of the political processes.[100] Further study will be required to adequately characterize the relationship between law and the exercise of power in society. The findings of this study could provide a framework for such research.

Throughout the development of the New York State Penal Law, Section 230, numerous interest groups and individuals worked diligently in an effort to have the law written or enforced in the manner they desired.[101]

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98 M. Schaum, Counsel to the Committee on Codes, N. Y. Senate, June 4, 1968, telephone interview.

99 Eighty percent of the N. Y. Senators were also lawyers in 1968.

100 Cf. R. Quinney, *op. cit.*, 19.

101 For discussions of the techniques and strategies used by other interest groups see

CHART 1

SUMMARY, FOR EACH STAGE IN THE HISTORY OF 1965 NYSPL, SS 230.00, 230.05, THE GROUPS AND PERSONS WHO WERE ACTIVELY INVOLVED, THE GROUPS WHICH OBTAINED THEIR INTERESTS THROUGH THE ACTIONS TAKEN, AND THE CONDITIONS OF THEIR POWER

Stage in History of 1965 NYSPL 230	Groups Involved	Conditions of Power	Action Taken	Group Obtaining Interest
Writing of Proposed Law	PLCCR Commission	Appointment to Commission by Governor and State Legislature based on legal education and reputed expertise.	1. Penalty for prostitution reduced from maximum of 1 yr. in jail or 3 yrs. in reformatory to 15 days in jail.	Judge Murtagh and supporters
	Ex-officio members Judge Murtagh who constantly campaigned for reform in ineffective moralistic laws. No businessmen, police, social workers or other non-legal professionals who worked with prostitutes.	Elected Legislators Judicial position and public reputation: access to press and civic groups; writing ability; a "man of action."	2. "Patronizing a prostitute" clearly stated to not be an offense.	Lawyers desiring clarity of law
Public Hearings and rewriting of Section	American Social Health Assoc. represented by Mr. Furst Dorris Clarke, Attorney & Retired Chief Probation Officer, NYC Magistrates Court. Dr. Grabinska, lawyer, interested citizen	Organization representing numbers of N.Y.S. voters. Knowledge of and recognition of interest in proposed changed; lack of knowledge or action on the part of those who were to eventually oppose "patron clause."	1. Penalty for prostitution left unchanged. 2. Patron made "equally guilty," subject to same offense and penalty as prostitute.	Am. Social Health Assoc.; Clarke and Grabinska partially obtained their wishes.

CHART 1 (*Continued*)

Stage in History of 1965 NYSPL 230	Groups Involved	Conditions of Power	Action Taken	Group Obtaining Interest
		Legal knowledge: ability to write proposed alternative to PLCCR Commission's Proposed section	3. Police therefore could not use patrons as witnesses against prostitutes.	
Enactment of Law	Legislature	Elected office	Passed above proposals with no debate.	Am. Social Health Assoc.; Clarke and Grabinska partially obtained their wishes.
Enforcement of and Reactions to Law	N.Y. Hotel Assoc.	Financial Resources + own numbers + support of NYC businessmen = access to City Hall	Many complaints to City Hall and politicians	Hotels and businessmen
	City Hall and politicians	Informal power to withhold cooperation from police	Pressured police to "clean streets" of prostitutes	Hotels and businessmen
	Police: Plainclothesmen	Position: power to arrest prostitutes	"Clean-up" arrests	Hotels and businessmen
	Representatives of Police Dept.	Access to press and to prostitution statistics	News releases about increases in prostitution arouse public concern, sympathy	Hotels, police
	Judges	Power of office and education; power to dismiss cases	Dismissal of cases of women charged with loitering and disorderly conduct	Civil Liberties groups

CHART 1 (*Continued*)

Stage in History of 1965 NYSPL 230	Groups Involved	Conditions of Power	Action Taken	Group Obtaining Interest
	N.Y. Civil Liberties Union	Access to press	Publicly condemned police and City Hall actions	Civil Liberties groups
Enforcement of and Reactions to Law (cont'd)	Police Dept. Representative	Access to press	Publicly supported police actions	Police
	Police	Informal power to support or withhold support	Pressured District Attorney's office to prosecute arrested cases	Police
	District Attorney's offices	Legal knowledge and office	Requested judge to hold cases over rather than to dismiss them; judge did so Defended legality of arrests	Police
	Legal Aid Attorneys	Legal knowledge	Moved to dismiss cases of women arrested for loitering; move upheld D.A. agreed	Civil Liberties groups
	Police Dept.	Informal power to be cooperative or uncooperative	New pressure on D.A.'s office	Police, hotels
	District Attorney	Legal knowledge	Filed briefs supporting the legality of loitering charge	Police, hotels
	Legal Aid Society	Legal knowledge	Filed brief denying legality of loitering arrests	Civil Liberties groups
	Judge	Legal knowledge and office	Denied legality of loitering arrests by dismissing cases D.A. publicly agreed that loitering arrests were unconstitutional. Police could no longer use loitering charges.	Civil Liberties groups

CHART 1 (*Continued*)

	N.Y. Hotel Assoc.	Financial resources + own numbers + support of other businessmen, access to City Hall.	Continued pressure on City Hall for Mayor and politicians to clean up Times Square.	
	N.Y. City Hall, Mayor's Office	Office, personal charisma of Mayor	Appointed Committee on Prostitution including Pres. of NYC Hotel Assoc. and representatives of all interests concerned with prostitution which had exerted pressure on the office Mayor attended first meeting of Committee and expressed concern with problem	Mayor's office relieved of pressure by discontented interest groups
Proposed Amendments to Law	NYC Mayor's Committee on Prostitution.	Office: appointed due to ability to exert political pressure or to recognized professional expertise in the community.	Submitted amendment to NYS Legislature to make prostitution a Class A misdemeanor.	Hotels, businessmen.
	NYS Senate Committee on Codes	Office; freedom of majority of members (senators from outside NYC) from pressures exerted by NYC Hotel Assoc. and businessmen	Voted to kill bill, i.e. to leave section 230, NYSPL unchanged.	Groups who felt the act of prostitution did not warrant more than 15 day sentence.

The results of their efforts clearly illustrate the limited comprehensiveness of power suggested by Wrong.[102] During the five stages in the formulation and enforcement of the Penal Law concerning prostitution, power shifted from first one interested group to another. One group frequently exercised power with respect to one section of the law while another did so with respect to another section. In the final stage of the law's history, civil liberties and welfare groups dominated over businessmen and the police with respect to the clause making prostitution a violation subject to a maximum fifteen day sentence while the police and businessmen dominated over the civil liberties and welfare groups with respect to the nonenforcement of the "patron" clause.

Under what conditions were certain individuals or groups able to shape the law in the manner in which they intended? Chart 1 summarizes the groups which were involved in each stage of the law's formulation, the groups who obtained their interests through the actions taken, and the conditions of their power. A small number of organizations and individuals, represented by the president of the American Social Health Association and a retired chief probation officer of the N.Y.C. Magistrates Court, were able to insert the "patron" clause into the Law. These groups possessed legal knowledge, were aware of the PLCCR Commission's pending actions and that their own interests would be affected by these actions, and recognized that by acting they could probably affect the law. Because of these factors and because groups with opposing views slept, the groups favoring the patron clause were able to make the clause part of the law. The groups opposing the patron clause, however, appeared to represent a larger proportion of the public and were able to later resist enforcing the new law.[103] Consequently, the only lasting effect of

Stedman, "Pressure groups and the American tradition," 319 *Annals Am. Acad. Pol. and Social Sci.* (1958), pp. 123-9; V. O. Key, Jr., *Politics, Parties, and Pressure Groups* (1958); H. Turner, "How Pressure Groups Operate," 319 *Annals Am. Acad. Pol. and Social Sci.* (1958), pp. 63-72; D. Truman, *The Governmental Process* (1951); L. Rainwater and W. Yancey, *The Moynihan Report and the Politics of Controversy* (1967).

[102] Cf. Wrong, *op. cit.*, 673. The "comprehensiveness" of power refers to the number of scopes in which actors exercise power.

[103] The power of forces opposing the "patron's" penalty was discussed by Flexner in the twenties: "The professional prostitute being a social outcaste may be periodically punished without disturbing the usual course of society. . . . The man, however, is something more than a partner in an immoral act; he discharges important social and business relations, is a father or brother responsible for the maintenance of others, has commercial or industrial duties to meet. He cannot be imprisoned without damaging society (i.e. those with influence in society)." Over thirty years later, Davis wrote, "Although the service is illegitimate, the citizen cannot ordinarily be held guilty, for it is inadvisable to punish a large portion of the populace for a crime . . . that has no political significance. Each such citizen participates in the basic activities of the society, in business, government, the home, the church, etc. To disrupt all of these by throwing him in jail for a mere vice would cause more social disruption and inefficiency than correcting the alleged crime would be worth." In 1968 in New York State, contrary to Davis' expectations, the patron *can* be held guilty, but the theory upon which Davis based his expectations remains true for the law is seldom enforced. A. Flexner, *Prostitution in Europe* (1920), 108; Davis, "Sexual Behavior," in R. Merton and R. Nisbet, *Contemporary Social Problems* (1966), 358. Material in parentheses added by writer.

the "patron clause" was to prohibit the police from using patrons as witnesses against prostitutes.

The formulation and enforcement of the law for arresting and penalizing prostitutes was more complex than that for patrons. Power shifted rapidly from group to group (see Chart 1). Largely under the influence of Judge Murtagh who had actively campaigned for reform in moralistic laws and was widely respected, the PLCCR Commission reduced the penalty for prostitution from a maximum of one year to 15 days imprisonment. After this change was enacted into law, it was assailed by hotel owners, businessmen, the police and a few legislators. Their pressure led to a police "clean-up" of prostitution in Manhattan. Civil liberties and welfare groups condemned the "clean-up," and after much controversy the legal bases for many of the arrests were held to be unconstitutional. Once it was no longer possible to arrest prostitutes in mass, the police and other groups submitted amendments to the New York State Legislature to make prostitution a Class A misdemeanor subject to a maximum penalty of one year imprisonment and to extend the loitering section to include "loitering for the purpose of prostitution." Nearly ten months after the 1965 NYS Penal Law became effective, the NYS Senate Committee on Codes killed these amendments leaving the new law concerning prostitution at least temporarily unchanged.

The conditions for groups' power, as shown in Chart 1, also varied from stage to stage in the history of the controversy.[104] The primary bases for groups obtaining power appeared to be 1) their awareness of the various actions taken and to be taken in the formulation or enforcement of the law; 2) their recognition of the importance of these actions to their interests; 3) their professional (especially legal) knowledge or expertise; 4) their public (scattered and unorganized) support gained through their expertise and conscious appeals to the community; 5) their political and financial support by organized groups; 6) their personal charisma; and 7) their means to informally withhold needed support or cooperation from the significant actor.

In summary, this study suggests that behaviors are not "automatically" defined as criminal. The formulation and enforcement of the 1965 NYS Penal Law on prostitution were *political* processes, processes involving numerous efforts on the part of a relatively small number of interested groups to obtain the means to affect the behavior of other men. During these processes, the groups which exercised power with respect to any particular section of the law changed over time, and at most instances in time different groups exercised power over different sections of the law.

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[104] For other discussions of conditions or sources of power see R. Bierstedt, "An analysis of social power," 15 *American Sociological Review* (1950); and R. Dahl, *Who Governs?* (1961).

[Footnotes]

[4] **Some Problems in Defining Social Power**
Dennis H. Wrong
The American Journal of Sociology, Vol. 73, No. 6. (May, 1968), pp. 673-681.
Stable URL:
http://links.jstor.org/sici?sici=0002-9602%28196805%2973%3A6%3C673%3ASPIDSP%3E2.0.CO%3B2-%23

[6] **Some Problems in Defining Social Power**
Dennis H. Wrong
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[104] **An Analysis of Social Power**
Robert Bierstedt
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