Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk

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This Article examines the problems inherent in policing under laws criminalizing loitering for the purpose of prostitution ("LPP"). LPP laws rely on dated notions of appearance, gender expression, and sexual behavior that are weaponized against marginalized communities and individuals. New York's LPP law, enacted in 1976, has a rich history of discriminatory application on the basis of gender, race, class, and perceived sex worker status.

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* Assistant Professor of Clinical Law, Brooklyn Law School. From 2016 through 2019, and for many years of preparation before that, I was part of the legal team that brought the constitutional challenge to New York's Loitering for Prostitution law chronicled in this article. Although all sources cited and documents relied on here are part of the public record, reflecting on the case has reaffirmed my admiration for this indefatigable group of lawyers and the dedication and expertise of The Legal Aid Society and Cleary Gottlieb Steen & Hamilton LLP. I have particular gratitude to Jennifer Kroman for always being willing to walk into the fire with me. I also thank the Brooklyn Law School Summer Junior Faculty Workshop and Leigh Goodmark, my patron deity, for ideas and feedback. Most importantly, this Article recognizes the countless individuals the NYPD has targeted for arrest under the loitering law over the years, harassed and mistreated—individuals the courts disregard as a matter of course. True credit lies with the eight brave women who came forward in the litigation. They took the fight as far as humanly possible. As this Article shows, the outcome was disappointing. Yet, these plaintiffs persevered in demanding an inkling of reckoning in a system where the deck is unequivocally stacked against those arrested and prosecuted, particularly black and brown women. This Article honors their tenacity and resilience.

A lawsuit challenging the constitutionality of New York's LPP law and its enforcement by NYPD recently settled, leading to modest reforms in police procedure. This Article chronicles the effort to challenge the law, why that challenge fell short of its goal of eliminating harmful police practices, and the arrests that have continued to take place since the procedural reforms. Analyzing post-settlement LPP arrests where, for example, police allege as a basis for an arrest that an individual's "cervix area" was exposed, despite the physical and anatomical impossibility of such exposure, this Article points out how LPP arrests escape scrutiny in the courts.

Legal challenges fail to create adequate safeguards because LPP arrests are not ultimately about prostitution itself but instead reflect contestations over control of public space and women's bodies. In the end, the law will not fix the problems intrinsic in LPP laws and policing. This is not an area where tinkering with existing law or practice suffices. Rather, to truly prevent baseless and unjust policing requires a more radical vision. This Article advocates for an abolitionist approach to the policing of prostitution, which includes the direct repeal of LPP statutes altogether, arguing that the only solution is the removal of LPP laws as tools in the police arsenal.

INTRODUCTION

> Deponent states that at the above mentioned date, time and place of occurrence, he observed the defendant . . . holding her cell phone to her ear while dancing and shaking her butt towards the street.
>
> Deponent further states that he observed that the defendant was wearing a white shirt which was rolled up to her breast, exposing her stomach and spandex pants which were rolled down exposing her buttocks and *cervix area.*
>
> Deponent further states that he observed the defendant walking up and down Roosevelt Avenue and approach approximately 5 or 6 single males, grab each male by the arm and engage them in a conversation.[1]

Loitering laws that specifically criminalize being in public spaces for the purpose of engaging in prostitution have a rich history of discriminatory application on the basis of gender, race, class, and perceived sex worker status.[2] Enactment and enforcement of loitering for prostitution laws are premised on dated and limiting notions of appearance, gender expression, and sexual behavior[3] that are then weaponized against marginalized communities and individuals.[4] Yet, despite decades of American courts striking down vague criminal loitering laws,[5] prostitution loitering ordinances have survived,[6]

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[1] Criminal Court Complaint at 1–2, No. CR-041477-18QN (Crim. Ct. Queens Co., Dec. 12, 2018) [hereinafter Criminal Court Complaint, Dec. 12, 2018] (on file with author) (emphasis added).

[2] *See* Karen Struening, *Walking While Wearing a Dress: Prostitution Loitering Ordinances and the Policing of Christopher Street*, 3 STAN. J. CRIM. L. & POL'Y 16, 16–20 (2016).

[3] *See id.* at 29–30.

[4] *See* Ginia Bellafante, *Poor, Transgender and Dressed for Arrest*, N.Y. TIMES (Sept. 30, 2016), https://www.nytimes.com/2016/10/02/nyregion/poor-transgender-and-dressed-for-arrest.html.

[5] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 51, 64 (1999) ("[T]he ordinance enacted by the city of Chicago is unconstitutionally vague.").

[6] *See, e.g.*, D.H. v. City of New York, 309 F. Supp. 3d 52, 70–73 (S.D.N.Y. 2018) ("Plaintiffs have not plausibly alleged that section 240.37 is unconstitutionally vague.").

even though they are just as pernicious in application as other laws deemed impermissibly vague.

A paradigmatic example of such a law is New York State's loitering for the purpose of engaging in a prostitution offense ("LPP")—Penal Law section 240.37.[7] In 2019, a lawsuit challenging the constitutionality of Section 240.37, and its enforcement by the New York City Police Department (the "NYPD"), settled and led to only modest reforms in police arrest procedures.[8] Although unconstitutionally vague, courts sustain LPP laws because these laws sit at a distinct intersection of gender and the policing of public space. Factors that courts legitimize as objective, and therefore find to be safeguards,[9] are impossibly and inextricably gendered, racialized, and antiquated. Courts do not take issue with the kind of policing seen under LPP laws because heteronormative and misogynist reasoning insulates such policing from attack.

This Article chronicles the effort to challenge section 240.37, and why it fell short of its goal of eliminating harmful and entrenched police practice. It further examines the arrests police continue to make even after procedural reforms. Post-settlement LPP arrests in New York include instances, such as the one quoted above, where the police use as a basis for an arrest that an individual's "cervix area" was exposed—despite this physical and anatomical impossibility.[10] The persistence of LPP laws, and attendant arrests, demonstrate the interplay between gender and petty offense enforcement in ways that demand further consideration. Because LPP laws allow the policing of gender, appearance, and sexual behavior, LPP enforcement must be seen as gendered stop-and-frisk.[11]

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[7] N.Y. PENAL LAW § 240.37 (Consol. 2020).

[8] *See* Stipulation and Order of Dismissal with Prejudice, D.H. v. City of New York, No. 16-cv-07698-PKC-KNF (S.D.N.Y. Apr. 11, 2019) [hereinafter D.H. Stipulation and Order of Dismissal]; *see also* Matt Tracy, *NYPD Loosens Enforcement of Loitering Law*, GAY CITY NEWS (June 13, 2019), https://www.gaycitynews.nyc/stories/2019/13/loitering-law-enforcement-legal-aid-suit-2019-06-13-gcn.html.

[9] *See, e.g.*, *D.H.*, 309 F. Supp. 3d at 71–73.

[10] *See* Criminal Court Complaint, Dec. 12, 2018, *supra* note 1, at 2.

[11] Stop-and-frisk refers to police encounters on the street that allow a police officer to detain someone for questioning or conduct a physical frisk or pat-down under *Terry v. Ohio*, 392 U.S. 1, 30 (1968). *See also* People v. De Bour, 352

Part I of this Article looks at the litigation challenging New York's LPP statute and the years of advocacy that preceded the case. By examining the types of arrests and prosecutions that continue even after extensive litigation, this Article looks critically at the settlement of the litigation and the enforcement of the statute before, during, and after the settlement. LPP laws give the police unchecked discretion to use enforcement as a tool to serve myriad ends. This can result in arrests, for example, simply because someone has previously been arrested for sex work, arrests that further the investigation of unrelated or unsolved cases, and arrests that force the removal of people from public streets for economic or political reasons.[12] It can also result in arrests based only on someone's clothing or appearance.[13]

Part II argues that courts have not, and will not, protect against the abuses of policing under LPP laws. Either in response to broader constitutional challenges brought pursuant to impact litigation or in the adjudication of individual criminal cases, courts rely on a legal framework fixed on notions of gender and sexuality that preclude effective safeguards.[14] Legal challenges brought in courts fail

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N.E.2d 562, 564 (N.Y. 1976). When used with respect to the NYPD, "stop-and-frisk" is meant to refer to a specific policing strategy described in *infra* Part III. Of course, LPP policing, unlike the majority of police encounters under NYPD's stop-and-frisk regime, results in actual arrests and criminal court involvement, as opposed to unlawful police harassment that does not result in an arrest. *See* Adam Gabbatt, *Stop-and-Frisk: Only 3% of 2.4m Stops Result in Conviction, Report Finds*, GUARDIAN (Nov. 14, 2013, 1:18 PM), https://www.theguardian.com/world/2013/nov/14/stop-and-frisk-new-york-conviction-rate ("[A]round 6% of the 2.4m stops between 2009 and 2012 led to arrests – 150,000 in total."). Still, "gendered stop-and-frisk" is an appropriate term because of the parallels in the unlawfulness of police conduct that generally escapes scrutiny.

[12] *See, e.g.*, Struening, *supra* note 2, at 40–42 ("[R]eporters also speculated that the enactment of the state's new anti-loitering law was timed to coincide with the upcoming Democratic National Convention, to be held at Madison Square Garden.").

[13] *See, e.g.*, Ricardo Cortés, *An Arresting Gaze: How One New York Law Turns Women into Suspects*, VANITY FAIR (Aug. 3, 2017), https://www.vanityfair.com/culture/2017/08/nypd-prostitution-laws ("A woman may be surveilled, searched, and detained, in part because an officer takes issue with her clothing.").

[14] *See, e.g.*, People v. Smith, 378 N.E.2d 1032, 1036 (N.Y. 1978) ("[B]ased on particulars obvious to and discernible by any trained law enforcement officer, it would be a simple task to differentiate between casual street encounters and a series of acts of solicitation for prostitution.").

because LPP arrests are not ultimately about prostitution itself but about sexual behavior and who has the right to exist in public spaces.[15] Without question, LPP policing also makes up part of a broader tapestry of petty offense enforcement that is about social control and the resulting criminalization of poverty, race, and gender.[16]

Part III identifies the ways in which LPP laws remain problematic even if there are times when they are not regularly enforced. While such laws may have fallen out of favor in certain jurisdictions,[17] they can reemerge when opportune for the government and law enforcement.[18] The consistent threat of revived enforcement maintains the oppression of racialized and gendered policing. Part III also identifies the danger of other efforts to criminalize loitering for prostitution. Although it may be argued that the solution to the problems presented by LPP laws, as in so many other areas, simply lies in less policing and less enforcement, here, less isn't enough. Instead, the direct repeal of these problematic laws is necessary. Fortunately, as this Part highlights, a movement is building to do exactly that.

In the end, courts will not fix the problems intrinsic in LPP laws and policing. This is not an area where tinkering with existing law or practice suffices. Rather, to address discriminatory and unjust policing, a more radical vision and abolitionist approach to the policing of prostitution and public spaces is required. An abolitionist approach, as employed in this Article, refers to a commitment to less law and policing and would necessarily include the repeal of LPP statutes altogether to remove a powerful and harmful tool from the "arsenal of the police."[19]

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15 *See* Bellafante, *supra* note 4.

16 *See id.*

17 *See* Struening, *supra* note 2, at 34–40.

18 *See, e.g.*, Emma Whitford, *Surge in Prostitution Related Loitering Charges Affects Undocumented Immigrants*, DOCUMENTED (Dec. 19, 2018, 1:00 PM), https://documentedny.com/2018/12/19/surge-in-loitering-charges-may-affect-undocumented-immigrants/.

19 *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972).

PART I

Section 240.37 was enacted in 1976 and reads as follows:

> Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution as that term is defined in article two hundred thirty of this part, shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of section 230.00 of this part.[20]

Additional subsections of the statute also criminalize loitering for the purpose of promoting prostitution or patronizing a person for prostitution.[21]

Concerns with section 240.37 at the time of enactment are well documented.[22] The constitutionality of the statute was tested almost immediately upon its passage, a challenge which was successful at the trial court level but then reversed by the intermediate court and affirmed by the highest court.[23] New York's Court of Appeals

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[20] N.Y. PENAL LAW § 240.37(2.) (Consol. 2020).

[21] *See id.* §§ 240.37(1.)–(4.).

[22] *See, e.g.*, Struening, *supra* note 2, at 40–42; *see also* Amended Complaint and Demand for a Jury Trial at ¶ 5 & n.3, D.H. v. City of New York, No. 16-cv-07698-PKC-KNF (S.D.N.Y. Jan. 19, 2017) [hereinafter D.H. Amended Complaint] (quoting Letter from Harold Baer, Jr. to Hon. Judah Gribetz, Counsel to the Governor (June 15, 1976), which noted that while the "prostitution problem . . . has reached critical proportions," section 240.37 is "unconstitutional" and would invite arbitrary and discriminatory enforcement) (also quoting N.Y. State Bar Ass'n, Legislation Report, No. 84 (1976), which showed that section 240.37 has "deficiencies . . . so glaring as to require our disapproval without regard to questions of the efficacy and underlying policy," and observed that the law provided a "shortcut" for police because the "standards of probable cause" are "dropp[ed]" and "[w]omen who are suspected of being prostitutes are arrested on sight, not because they are committing any unlawful act but because they are considered 'undesirable'").

[23] *See* People v. Smith, 378 N.E.2d 1032, 1033–34 (N.Y. 1978).

upheld the law in 1978.[24] Unsurprisingly, more than four decades of section 240.37's enforcement have confirmed that the statute supports problematic policing practices, which has resulted in pronounced disparities in arrests.[25]

Contemporary arrests mirror those that took place when the law first went into effect. In 1976, Toni Smith was one of the first women charged under the newly enacted section 240.37.[26] The prosecution alleged that an officer observed her in the early morning hours on a public street in Manhattan at a location where there had been numerous previous arrests for prostitution.[27] During a brief period, the officer observed Ms. Smith approach three men.[28] With the third man, she entered a building at the location, came out several minutes later, and was arrested.[29] On February 3, 2016, officers from the 83rd Precinct in Brooklyn arrested Natasha Martin under section 240.37.[30] The prosecution alleged that an officer observed Ms. Martin in the early morning hours on a public street in Brooklyn at a location "frequented by people engaging in promoting prostitution."[31] During a brief period, the officer observed Ms. Martin approach three passersby, after which she was arrested.[32]

Women of color face disproportionate numbers of arrests under the law.[33] Transgender and gender non-conforming individuals are also frequently targeted for arrest,[34] so much so that the law has been characterized as a "Walking While Trans Ban."[35] Arrests are based

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[24] *Id.* at 1033.

[25] *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four U.S. Cities*, HUM. RTS. WATCH (July 19, 2012), https://www.hrw.org/report/2012/07/19/sex-workers-risk/condoms-evidence-prostitution-four-us-cities [hereinafter *Sex Workers at Risk*].

[26] *See Smith*, 378 N.E.2d at 1033.

[27] *Id.* at 1036–37.

[28] *Id.*

[29] *Id.* at 1037.

[30] D.H. Amended Complaint, *supra* note 22, ¶¶ 167–68, 171.

[31] *Id.* ¶ 171.

[32] *Id.*

[33] *Id.* ¶¶ 91–95.

[34] *Id.* ¶¶ 71–75.

[35] *See, e.g.*, Karina Piser, *The Walking While Trans Ban Is 'Stop and Frisk 2.0'*, NATION (Feb. 19, 2020), https://www.thenation.com/article/activism/walking-while-trans-repeal/; David Klepper, *Sex Workers Seek End of 'Walking While*

on the clothing people wear, how they look, the streets they stand on, and who they speak to, rather than any evidence of criminal conduct.[36] Men and white women engaging in similar conduct are not policed in the same way, if at all.[37]

Despite being a New York State statute, arrests under section 240.37 are overwhelmingly concentrated in the five New York City boroughs[38] (each of which comprises a separate county) and the NYPD uses section 240.37 overwhelmingly in neighborhoods where residents are people of color.[39] As a result, civil rights and community advocates have extensively chronicled the damage policing under section 240.37 causes in these largely marginalized communities.[40]

In September 2016, a group of women who had been arrested for LPP offenses in different counties in New York City brought a lawsuit against the NYPD in the Southern District of New York.[41] The plaintiffs in *D.H. v. City of New York* asserted numerous claims involving the statute's enforcement and their own arrests. Most critically, they alleged that section 240.37 was unconstitutionally vague and overly broad and that the NYPD intentionally discriminated on the basis of race, gender, and gender identity in making arrests under its guise.[42] They argued that they had been arrested because they were known to police because they had previously been arrested for

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Trans' Loitering Law, ASSOCIATED PRESS (May 7, 2019), https://apnews.com/2eb3876a208d48929db1c2dae769129f.

[36] *See, e.g.*, Piser, *supra* note 35.

[37] D.H. Amended Complaint, *supra* note 22, ¶ 98.

[38] *See* Press Release, Cleary Gottlieb & The Legal Aid Soc'y, The Legal Aid Soc'y & Cleary Gottlieb Challenge the Constitutionality of N.Y.'s Loitering for Prostitution Law: Demand an End to NYPD's Arbitrary and Discriminatory Enforcement of the Law Against Women of Color (Sept. 30, 2016) [hereinafter Cleary Gottlieb & Legal Aid Press Release], https://orgs.law.columbia.edu/qtpoc/sites/default/files/content/LAS-Cleary-Gottlieb-Challenge-the-Constitutionality-of-New-Yorks-Loitering-for-Prostitution-Law-Press-Release-9.30.16.pdf.

[39] D.H. Amended Complaint, *supra* note 22, ¶ 97.

[40] *See, e.g.*, MAKE THE RD. N.Y., TRANSGRESSIVE POLICING: POLICE ABUSE OF LGBTQ COMMUNITIES OF COLOR IN JACKSON HEIGHTS 6, 10–14 (2012), https://maketheroadny.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf.

[41] D.H. Amended Complaint, *supra* note 22, ¶¶ 1–2.

[42] *Id.* ¶¶ 1–10.

prostitution, were targeted simply for being transgender women, or that the police used a Section 240.37 arrest to extensively debrief them about unrelated activity or investigations.[43]

The plaintiffs exposed how NYPD engages in "sweeps," multiple arrests at the same time targeted at specific locations and specific groups of women.[44] The complaint also alleged that NYPD routinely arrests people under section 240.37 without probable cause, often specifically because of race, color, ethnicity, gender, gender identity, or appearance, constituting a "pattern and widespread practice of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of women of color, including transgender women, engaged in wholly innocent conduct, such as walking in public spaces or speaking with other pedestrians."[45]

In addition to the facial constitutional challenge to the statute itself, the complaint identified several elements of NYPD practice under section 240.37 that violated constitutional standards and infringed upon the putative class's liberty interests.[46] These included the category of arrests based merely on the fact that the police recognized that an individual had been arrested for prostitution before.[47] The D.H. plaintiffs identified this as a "self-perpetuating cycle" that "unlawfully prejudices any woman who has ever been arrested, even if the charges underlying her original arrest were dismissed."[48]

Similarly, officers rely on the fact that a location was "prostitution-prone" when making arrests under section 240.37.[49] The complaint pointed out that this, too was self-substantiating, rather than based in objective fact, as arrests were only indicative of where

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43 *Id.* ¶¶ 9–10.

44 *Id.* ¶ 9.

45 *Id.* ¶ 10.

46 *Id.* ¶¶ 9, 69–70.

47 *Id.* Plaintiff Sarah Marchando alleged that because of her "long history of prostitution-related arrests," police officers "kn[e]w [her] by face and last name" and "[b]ecause of her criminal record and previous proximity to the precinct, the police target[ed] [her] for arrest when they s[aw] her outside, and she [was] often arrested for loitering for the purpose of prostitution when engaged in wholly innocent conduct." *Id.* ¶ 220.

48 *Id.* ¶ 85.

49 *Id.* ¶ 88.

police choose to deploy resources rather than the actual prevalence of prostitution.[50]

The plaintiffs also emphasized the unlawfulness of arrests based solely on an individual's appearance.[51] Pre-printed affidavits used by the NYPD to document allegations against individuals arrested for LPP offenses include a box for officers to check that the individual was "dressed in provocative or revealing clothing."[52]

All of this taken together vividly demonstrated the problems with section 240.37 and its enforcement. Plaintiffs offered extensive evidence demonstrating that, under section 240.37, "women of color are subject to arrest for innocent conduct in a manner and with a frequency that others not belonging to this group are not."[53] Yet, as explored in more detail in Part II, the court dismissed the majority of plaintiffs' claims in January 2018.[54]

A few months later, in June 2018, with the dismissal decision stayed, the case entered mediation and the NYPD changed its procedures regarding LPP arrests.[55] The Department amended its patrol guide—the internal document governing arrest procedures—to require officers effectuating LPP arrests to provide additional details regarding the basis for each arrest.[56] This was to be a safeguard against problematic or baseless arrests.[57] D.H. reached a final settlement in April 2019.[58]

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[50] *Id.* ¶ 88.

[51] *Id.* ¶ 86.

[52] *Id.*; *see infra* Part II.

[53] D.H. Amended Complaint, *supra* note 22, ¶ 98.

[54] *See* D.H. v. City of New York, 309 F. Supp. 3d 52, 82 (S.D.N.Y. 2018).

[55] *See New York City Police Department Patrol Guide Timeline*, NYC, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/Update.pdf (last visited Mar. 31, 2020) (stating that § 208-45 was updated on June 11, 2018); *see also* Emma Whitford, *NYPD Amends Patrol Guide to Curb 'Walking While Trans' Arrests*, QUEENS DAILY EAGLE (June 6, 2019), https://queenseagle.com/all/loitering-law-transwomen-nypd-amended-profiling.

[56] *See generally* N.Y.C. POLICE DEP'T, PATROL GUIDE: PROCEDURE NO. 208-45—LOITERING FOR PURPOSES OF PROSTITUTION (2020) [hereinafter NYPD PATROL GUIDE 2020]; *New York City Police Department Patrol Guide Timeline*, *supra* note 55; *see also* Tracy, *supra* note 8.

[57] Explaining the patrol guide changes, the NYPD indicated its commitment to "providing clarity to our officers on loitering enforcement." Tracy, *supra* note 8.

[58] D.H. Stipulation and Order of Dismissal, *supra* note 8.

The patrol guide changes were not radical. The amendment to the section governing LPP arrests removed from the list of potential bases for arrest the language that that someone was a "known prostitute" or "consorts with known prostitutes or pimps."[59] Moving forward, officers making LPP arrests would be required to document more details of what they observed prior to making the arrests.[60] The most significant change was the addition of a directive that "[g]ender, gender identity, clothing, and location are not sufficient alone or together to establish probable cause."[61]

Surprisingly, in the months following the patrol guide change, LPP arrests across New York City began to rise.[62] Although arrests for LPP in New York State had declined significantly from 2010 to 2016, the number of arrests in New York City nearly tripled from 2017 to 2018, the majority of which occurred after the NYPD amended its patrol guide.[63]

In December 2018, several months after the patrol guide changes went into effect, police officers from the 115th Precinct in Queens made a section 240.37 arrest that was then prosecuted on the accusatory instrument excerpted above.[64] Notably, the complaint charged that one of the reasons arresting officers believed the woman they arrested was loitering with the purpose of prostitution was because she wore her clothes in such a way as to expose "her buttocks and cervix area."[65] A cervix is an internal organ, located on the lower part of one's uterus.[66] The cervix is not visible unless one

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[59] N.Y.C. POLICE DEP'T, PATROL GUIDE: PROCEDURE NO. 208-45—LOITERING FOR PURPOSES OF PROSTITUTION (2013).

[60] *See* Tracy, *supra* note 8.

[61] NYPD PATROL GUIDE 2020, *supra* note 56.

[62] *See* Whitford, *supra* note 18.

[63] Whereas in 2017, the NYPD made 50 arrests under section 240.37, that number increased to 139 in 2018. *See Top Charge PL 230, PL 240.37, ED 6512 Arrests by County, 2009–2018*, DIVISION CRIM. JUST. SERVICES, https://www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm (accessed Nov. 15, 2019) [hereinafter Top Arrest Charge].

[64] *See* Criminal Court Complaint, Dec. 12, 2018, *supra* note 1, at 1–2.

[65] *Id.* at 2.

[66] *See, e.g.*, WORLD HEALTH ORG., COMPREHENSIVE CERVICAL CANCER CONTROL: A GUIDE TO ESSENTIAL PRACTICE 32 (2d ed. 2014),

conducts an internal examination with a speculum.[67] A police officer could not observe one's cervix on the street, even if a person were wearing nothing below the waist.[68]

Nonetheless, these purported police observations led to an arrest for LPP.[69] A search incident to that arrest yielded a glass pipe with a small amount of cocaine residue, resulting in additional drug charges.[70] As the arrest made its way through the criminal legal system, a prosecutor drew up the accusatory instrument commencing the prosecution based on the police paperwork and included the allegation of the exposed cervix,[71] despite its factual impossibility.[72] Next, a local criminal court arraigned the arrested an individual on this accusatory instrument.[73] Ultimately, the prosecution of the misdemeanor Section 240.37 charges required over a dozen appearances in court and, most significantly for the individual arrested, also included a short period of incarceration.[74]

Putting aside issues of basic anatomy, this arrest and prosecution demonstrate several of the well-documented and widespread issues inherent in the policing of loitering for prostitution.[75] LPP laws center on the criminalization of appearance, gender expression, and perceived sexual behavior further complicated by unavoidable issues of race and class.[76] The notion that dancing, shaking a body part, or

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https://apps.who.int/iris/bitstream/handle/10665/144785/9789241548953_eng.pdf;jsessionid=3E18E8DDC37D2D317C3507E9BB3EBE91?sequence=1 ("The lower part of the cervix (ectocervix) lies within the vagina and is visible with a speculum; the upper two thirds of the cervix (endocervix) lies above the vagina and is not visible.").

67 *Id.*

68 *See id.*

69 *See* Criminal Court Complaint, Dec. 12, 2018, *supra* note 1, at 1–2.

70 *Id.*

71 *Id.*

72 *See* WORLD HEALTH ORG., *supra* note 66, at 32.

73 *See* Appearance History, No. CR-041477-18QN (Crim. Ct. Queens Co., Dec. 12, 2018) (on file with author).

74 *See id.*

75 *See, e.g.*, Cleary Gottlieb & Legal Aid Press Release, *supra* note 38; Melissa Gira Grant, *The NYPD Arrests Women for Who They Are and Where They Go — Now They're Fighting Back,* VILLAGE VOICE (Nov. 22, 2016), https://www.villagevoice.com/2016/11/22/the-nypd-arrests-women-for-who-they-are-and-where-they-go-now-theyre-fighting-back/.

76 *See* Cleary Gottlieb & Legal Aid Press Release, *supra* note 38.

attempting to talk to people of one gender on the street gives rise to probable cause for loitering with the purpose of prostitution is astounding. Yet, arrests are often premised on even fewer facts than those in the Queens accusatory instrument.[77]

An analysis of arrest data and court documents from nearly fifty LPP arrests in the four months immediately following NYPD's patrol guide amendment illustrates the concrete dangers of ongoing arrests and prosecutions under section 240.37.

Over half of the charging documents reference the arrested individual's clothing, even though the amended patrol guide specifically prohibits the consideration of clothing,[78] either together with other factors or alone, as probable cause that someone is loitering for the purpose of prostitution.[79] Among the clothing alleged to be probative of criminality, police officers noted a "black jacket, blue jeans, and grey boots,"[80] a "sleeveless black dress,"[81] or a "red and black mini dress and a beige cardigan" that the arresting officer deemed "provocative."[82]

In various cases, NYPD officers determined arrestees' purposes to be prostitution from the fact that they wore "black cowboy boots,

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[77] *See, e.g.*, Criminal Court Complaint at 1, No. CR-040816-18KN (N.Y. Crim. Ct. Sept. 7, 2018) [hereinafter Criminal Court Complaint, Sept. 7, 2018] (on file with author) (totality of facts alleging section 240.37 in accusatory instrument that on a "public street, in an industrial area, which is not in front of a bus stop or other places were [sic] people generally congregate, the [arresting officer] observed the defendant standing at said location for approximately ten minutes and further observed the defendant beckoning to passing motorists and observed the defendant approach three vehicles and moped [sic], of which the occupants were male").

[78] *See* NYPD PATROL GUIDE 2020, *supra* note 56.

[79] *See, e.g.*, *infra* notes 80–85 and accompanying text.

[80] Supporting Deposition at 1, No. CR-046252-18KN (N.Y. Crim. Ct. Oct. 18, 2018) (on file with author).

[81] Criminal Court Complaint at 2, No. CR-031724-18QN (N.Y. Crim. Ct. Sept. 8, 2018) [hereinafter Criminal Court Complaint, Sept. 8, 2018] (on file with author).

[82] Criminal Court Complaint at 1, No. CR-032015-18QN (N.Y. Crim. Ct. Sept. 12, 2018) [hereinafter Criminal Court Complaint, Sept. 12, 2018] (on file with author).

and black shorts,"[83] or "shorts and a tank top,"[84] or "a multi color short dress and sandals."[85] Equally as confounding as the fact that the clothing someone wears can be the basis for an arrest, however, is that clothing was cited in over half of the arrests looked at *after* the patrol guide was changed to make clear that clothing cannot be a factor in establishing probable cause for LPP.

The majority of LPP arrests during this period also rely on the perceived genders of the individuals observed or arrested.[86] Almost all note the fact that the arrestee, a female, interacted with only males during the period of the officer's observations.[87] Complaints refer to "lone males" and assert that the person arrested did not speak to any female passers-by during the observation period.[88]

Gender stereotypes form the backbone of allegations against individuals arrested for LPP.[89] Accordingly, accusatory instruments rely on several flawed premises to charge LPP—that only women sell sex, that only men buy sex, and that sex only occurs between men and women.[90] The accusatory framework is strictly heteronormative.[91] While this may have sufficed to justify arrests taking place in the 1970s, when looked at today it grossly misaligns with the understanding of gender, sexuality, and norms regarding behavior in public as they have evolved.

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[83] Criminal Court Complaint at 1, No. CR-026405-18QN (N.Y. Crim. Ct. July 21, 2018) [hereinafter Criminal Court Complaint, July 21, 2018] (on file with author).

[84] Criminal Court Complaint at 1, No. CR-026412-18QN (N.Y. Crim. Ct. July 22, 2018) (on file with author).

[85] Criminal Court Complaint at 1, No. CR-028516-18QN (N.Y. Crim. Ct. Aug. 22, 2018) (on file with author).

[86] *See, e.g.*, Criminal Court Complaint, Sept. 12, 2018, *supra* note 82, at 1–2; Criminal Court Complaint, July 21, 2018, *supra* note 83, at 1–2.

[87] *See, e.g.*, Criminal Court Complaint, Sept. 12, 2018, *supra* note 82, at 1–2; Criminal Court Complaint, Sept. 8, 2018, *supra* note 81, at 1; Criminal Court Complaint, July 21, 2018, *supra* note 83, at 1–2.

[88] *See, e.g.*, Criminal Court Complaint, Sept. 7, 2018, *supra* note 77, at 1; Criminal Court Complaint, Sept. 12, 2018, *supra* note 82, at 1.

[89] *See Legislative Memo: Loitering Repeal*, N.Y. C.L. UNION, https://www.nyclu.org/en/legislation/legislative-memo-loitering-repeal (last visited Apr. 9, 2020) ("But to make an LPP arrest under § 240.37, they have little to rely on besides race and gender stereotypes of what a 'prostitute' looks like.").

[90] *See id.*

[91] *See* Bellafante, *supra* note 4.

Further, even crediting that the purpose of an observed interaction may be sexual in nature, these allegations also take for granted that sex must be commercial—sexual conduct in exchange for a fee—rather than simply consensual non-commercial sex.[92] That gender and sexual norms could be utilized in this way stands out more as a relic than an appropriate basis for a criminal prosecution. Nevertheless, arrests continue.

The wide latitude afforded police officers under section 240.37 and other LPP statutes allows for abuse and targeting. For example, when police decide to crack down on narcotics activity in a specific area but fail to make any drug-related arrests, they can turn to the LPP statute.[93] Section 240.37 allows them to detain and question individuals without having to actually make an arrest for drug offenses, which would require that they recover drugs as physical evidence.[94]

Furthermore, as argued above, police flout even the minimal protections intended by any procedural reform.[95] In 2015, the New York State legislature took steps to limit problematic section 240.37 arrests, specifically with respect to police seizing condoms from arrested individuals and using the fact that the individual had condoms as evidence of LPP.[96] It amended the Criminal Procedure Law to provide that

> [e]vidence that a person was in possession of one or more condoms may not be admitted at any trial, hearing, or other proceeding in a prosecution for section 230.00 or section 240.37 of the penal law for the purpose of establishing probable cause for an arrest or proving any person's commission or attempted commission of such offense.[97]

Police and prosecutors used the fact of condom possession, almost exclusively against women, as a way to show intent to engage

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92 *See* Struening, *supra* note 2, at 29–30.

93 *See* Whitford, *supra* note 18.

94 *See id.*

95 *See, e.g.*, *supra* notes 77–81 and accompanying text.

96 *See* Susan Bryant, *2015 Legislative Review*, PUB. DEF. BACKUP CTR. REP., Jan.-Apr. 2016, at 8, 10–11.

97 N.Y. CRIM. PROC. LAW § 60.47 (Consol. 2020).

in prostitution.[98] Bearing this out to its logical conclusion, the inference put forward by the NYPD, and accepted by courts adjudicating LPP cases, was that there was simply no other reason why a woman would carry condoms unless she was engaging in prostitution.[99]

Yet, nearly 15% of the LPP cases analyzed in 2018 specifically alleged condom possession as a factor indicating the arrested individual's purpose was to engage in prostitution.[100] As a result of NYPD's practice, both before and after the legislative prohibition, women who find themselves frequently stopped by the police either carry fewer condoms or cease to carry condoms at all for fear it could lead to arrest.[101] That men can carry condoms without the same fear exposes gendered and deeply engrained notions of appropriate sexual behavior. Women are meant to be chaste.[102] Any sexual activity should take place inside the home, with a male spouse.[103]

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[98] *See Sex Workers at Risk*, *supra* note 25 (documenting widespread police practice of stopping individuals on the street, searching them for condoms and then arresting them for loitering for prostitution if condoms were found, and specifically noting that "[i]n New York, Washington, DC, and Los Angeles, many people, particularly members of the transgender community, told Human Rights Watch they were stopped and searched for condoms while walking home from school, going to the grocery store, and waiting for the bus"); *see also* Molly Crabapple, *New York Cops Will Arrest You for Carrying Condoms*, VICE (Mar. 5, 2013, 10:36 AM), https://www.vice.com/en_us/article/3b5mx9/new-york-cops-will-arrest-you-for-carrying-condoms.

[99] This practice was widely criticized as it jeopardized public health and created an increased risk of sexually transmitted infection. *See, e.g.*, *Sex Workers at Risk*, *supra* note 25.

[100] For example, in July 2018, another accusatory instrument supporting a prosecution under Section 240.37 alleged a factor leading arresting officers to conclude the individual arrested was loitering for the purpose of prostitution was that they recovered three condoms from her purse. *See* Criminal Court Complaint at 3, No. CR-025820-18QN (N.Y. Crim. Ct. July 24, 2018) (on file with author); *see also* Criminal Court Complaint, Sept. 12, 2018, *supra* note 82, at 2 (arresting officer noted that defendant had thirty-two condoms in her purse).

[101] *See, e.g.*, Adam Edelman, *Condom Conundrum: New York Sex Workers Said to Be Avoiding Condoms as They're Used More Frequently as Evidence of Prostitution*, N.Y. DAILY NEWS (Mar. 5, 2013, 7:55 PM), https://www.nydailynews.com/news/national/arrested-carrying-condoms-new-york-article-1.1280431.

[102] *See* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 66–67 (2002).

[103] *See id.* at 69.

Women who carry condoms with them outside the home are deviant, suspect, and worthy of arrest and prosecution.[104]

No degree of procedural reform will reduce the harm of LPP policing. Attempts at prohibiting certain evidence from being used against arrested individuals or amending the patrol guide to preclude certain factors as the basis for arrest have proven futile.[105] Years after both the condom prohibition and the patrol guide amendment, women still face arrest and prosecution under section 240.37 for simply standing in a public place and talking to other people.[106] Police documents that form the basis of a prosecution still contain places for officers to indicate provocative or revealing clothing and condom possession.[107] Statutes like section 240.37 serve to further legitimize and insulate discriminatory police practices.[108] As the next Section details, the unfettered discretion LPP laws bestow on the police is impervious to challenge in the courts.

PART II

LPP arrests in New York bear out the exact dangers foreshadowed by earlier cases invalidating loitering and vagrancy statutes. In 1972, four years before section 240.37 was enacted, the Supreme Court struck down a Jacksonville vagrancy ordinance which criminalized and "deemed vagrants":

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly

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104 *See* Edelman, *supra* note 101.

105 *See supra* notes 36–37, 56–57 and accompanying text.

106 Criminal Court Complaint at 1, No. CR-042933-19KN (N.Y. Crim. Ct. Dec. 6, 2019) (on file with author).

107 *See, e.g.*, Supporting Deposition – Loitering for Prostitution at 1–2, No. CR-042933-19KN (N.Y. Crim. Ct. Dec. 6, 2019) (on file with author).

108 *See* Crabapple, *supra* note 98.

> persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children.[109]

In doing so, the Court warned of making "criminal activities which by modern standards are normally innocent."[110]

On the other hand, the district court hearing the recent constitutional challenge to section 240.37 denied the plaintiffs' claim that the statute was unconstitutionally vague.[111] Rather, the D.H. court held that "it constrains police discretion by specifying certain conduct that an officer must observe—conduct which the statute requires to occur repeatedly—and by limiting its reach to conduct done for the *purpose of prostitution*."[112] This reasoning echoed the New York Court of Appeals decision from 1978, which found section 240.37 constitutional and not overly vague:

> [B]ased on particulars obvious to and discernible by any trained law enforcement officer, it would be a simple task to differentiate between casual street encounters and a series of acts of solicitation for prostitution, between the canvas of a female political activist and the maneuvers of a Times Square prostitute.[113]

These decisions stand in stark contrast to the long line of cases striking down ordinances and criminal laws for vagueness.[114] New

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[109] Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972).

[110] *Id.* at 163.

[111] D.H. v. City of New York, 309 F. Supp. 3d 52, 73 (S.D.N.Y. 2018).

[112] *Id.* at 72 (emphasis added).

[113] People v. Smith, 378 N.E.2d 1032, 1036 (N.Y. 1978); *see also* Carmen v. Carey, No. 78 Civ. 438, 1982 U.S. Dist. LEXIS 11104, at *5–6 (S.D.N.Y. Jan. 18, 1982) (granting dismissal for the reasons given in *People v. Smith*).

[114] *See, e.g.*, *Papachristou*, 405 U.S. at 162; City of Chicago v. Morales, 527 U.S. 41, 64 (1999). Courts have also been willing to invalidate laws for vagueness where they apply to individuals required to register as sex offenders, Valenti v. Hartford City, 225 F. Supp. 3d 770, 789–90 (N.D. Ind. 2016), or homeless

York's LPP statute has been distinguished because of its requirement that an arrest be limited to instances where one's purpose is to engage in an act of prostitution.[115] Frequently referred to as "loitering plus," it has passed constitutional muster because it has been taken for granted that the purpose required by the statute is objective and discernible.[116] Yet, the objectiveness that purportedly salvages laws like section 240.37 rests on gender, appearance, and behavior in public, none of which is an objective measure of whether someone's purpose is prostitution.

The NYPD's arrest practice and the experience of people arrested under section 240.37 undercut the finding that the statute has safeguards that are objective, specific, or clear.[117] In fact, several individual NYPD officer-defendants in D.H. testified that the language of section 240.37 is "arbitrary," "subjective," and not "clear-cut," and that there are no consistent standards governing what constitutes sufficient conduct for an arrest under the statute.[118]

The presumptions engendered in declaring the "purpose" requirement to be the statute's saving grace are eerily reminiscent of arguments the Supreme Court discredited when striking down the Jacksonville ordinance.[119] In *Papachristou,* Justice Douglas made clear that the notion that people who "look suspicious to the police are to become future criminals is too precarious for a rule of law."[120] The Court refused to uphold a law on the justification that "crime is being nipped in the bud" as that was simply "too extravagant to deserve extended treatment."[121]

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individuals, Desertrain v. City of Los Angeles, 754 F.3d 1147, 1149 (9th Cir. 2014). *See also* Guyora Binder & Brenner Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. 1527, 1563–66; Short v. City of Birmingham, 393 So. 2d 518, 522–23 (Ala. Crim. App. 1981); City of Akron v. Massey, 381 N.E.2d 1362, 1366 (Ohio Mun. Ct. 1978).

115 *See D.H.*, 309 F. Supp. 3d at 72–73.

116 *See Smith*, 378 N.E.2d at 1036; *D.H.*, 309 F. Supp. 3d at 72–73; *see also* Silvar v. Eighth Judicial Dist. Court *ex rel.* Cty. of Clark, 129 P.3d 682, 689 (Nev. 2006).

117 *See supra* Part I.

118 Request for Leave to Amend the Amended Complaint at 3, D.H. v. City of New York, No. 1:16-cv-07698-PKC-KNF (S.D.N.Y. Jan. 25, 2018).

119 *See Papachristou*, 405 U.S. at 171.

120 *Id.*

121 *Id.*

The Supreme Court again considered the constitutionality of an individual's purpose on the street, as ascertained by the police, as a basis for arrest when it invalidated Chicago's gang loitering ordinance in 1999.[122] The ordinance prohibited "criminal street gang members" from loitering and refusing to disperse after an officer's order.[123] Loitering was defined as "remain[ing] in any one place with no apparent purpose."[124]

Evaluating the Chicago ordinance in terms of the notice it afforded members of the public, the Court took specific issue with the notion that "apparent purpose" could be determined in a way that satisfied constitutional standards:

> It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?[125]

Against this backdrop, it is difficult to reconcile decisions finding that LPP statutes, and section 240.37 specifically, pass constitutional muster. Somehow, the skepticism regarding the vagueness of "purpose" and the difficulty of its determination falls away when courts evaluate LPP statutes.[126] Once prostitution becomes the stated and prohibited purpose, the ability to ascertain purpose is taken as scientific, infallible and, ultimately, constitutionally acceptable.[127]

When the purportedly objective elements are deconstructed, the distinction afforded LPP statutes is exposed as untenable. For example, looking at the impact of clothing as the basis for arrest, the D.H. court concluded that "[t]he 'obvious alternative explanation' for considering clothing . . . is that the experience of a reasonable police

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122 City of Chicago v. Morales, 527 U.S. 41, 45–47 (1999).

123 *Id.* at 45–47.

124 *Id.* at 47 (alteration in original).

125 *Id.* at 56–57.

126 *See, e.g.*, D.H. v. City of New York, 309 F. Supp. 3d 52, 71–73 (S.D.N.Y. 2018).

127 *See, e.g., id.*

officer may be that a person seeking to make known to passers-by their willingness to engage in an act of prostitution will wear certain types of clothing."[128]

The D.H. court accepted the notion that clothing could be dispositive of a willingness to engage in prostitution.[129] It did so despite evidence obtained in depositions that showed wide and unpredictable variation of interpretations of clothing among arresting officers.[130] The kind of clothing that officers testified to be indicative of a criminal "purpose" of prostitution ranged from brightly-colored clothing, to jeans with rips, to sweatpants.[131] As one defendant officer testified, "pretty much anything other than a nun's outfit" could be indicative of a section 240.37 violation to police officers on patrol.[132]

Thus, conferring a level of authority in the evidentiary value of clothing choice in this way defies common sense, actual practice, and conflicts with existing caselaw looking at, for example, laws banning cross-dressing.[133] For decades, courts have cast doubt on the practice of criminalizing certain clothing choices.[134] In striking down a cross-dressing ban in 1975, the Ohio Supreme Court cautioned:

> Modes of dress for both men and women are historically subject to changes in fashion. At the present time, clothing is sold for both sexes which is so similar in appearance that 'a person of ordinary intelligence' might not be able to identify it as male or female dress. In addition, it is not uncommon today for individuals to purposely, but innocently, wear apparel which is intended for wear by those of the opposite sex.[135]

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128 *Id.* at 76.

129 *Id.*

130 *See* Request for Leave to Amend the Amended Complaint, *supra* note 118, at 3 n.7.

131 *Id.*

132 *Id.* (citing Deposition of NYPD Lieutenant Dave Siev).

133 *See, e.g.*, City of Columbus v. Rogers, 324 N.E.2d 563, 565 (Ohio 1975).

134 *See id.*

135 *Id.*

Similarly, a local ordinance criminalizing clothing "not customarily worn" by one's sex "with the intent of committing any indecent or immoral act" failed to withstand constitutional scrutiny.[136] The Ohio court noted that the ordinance

> goes so far as to bring under suspect the woman who wears one of her husband's old shirts to paint lawn furniture, the trick or treater, the guests at a masquerade party, or the entertainer. Such a standard is purely subjective and materially fluctuates from person to person. Additionally, the element of an intent to commit an "indecent" or "immoral" act, while so dressed, represents an unascertainable standard.[137]

Despite these well-articulated concerns, clothing remains determinative and inevitable in section 240.37 arrests.[138] Allowing this police practice to continue in LPP policing effectively sanctions a "fashion police."[139] The problems inherent in allowing policing based on appearance and clothing are abundant—and then amplified for marginalized individuals without political power against whom police do not hesitate to enforce the law.[140]

A primary component of this is gender itself. If not for prostitution, why else would a woman speak to men, maybe men she did not know, on the street? Why else would a woman carry condoms or wear a short skirt? Courts sustain LPP laws and arrests based on an implicit analysis that certain women on certain streets at certain times wearing certain clothing talking to certain others could only be doing so for the purpose of prostitution.[141]

Of course, this analysis would be incomplete if it did not also rest on race and class. Why else would *this* woman be on *this* street if not to prostitute? This woman is almost always a woman of color and this street is always a community where residents are people of

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136 City of Cincinnati v. Adams, 330 N.E.2d 463, 464 (Ohio Mun. Ct. 1974).

137 *Id.* at 466.

138 *See* Ginia Bellafante, *Arrests by the Fashion Police*, N.Y. TIMES (Apr. 5, 2013), https://www.nytimes.com/2013/04/07/nyregion/arrests-by-the-fashion-police.html.

139 *Id.*; *see also* Cortés, *supra* note 13.

140 *See* Cortés, *supra* note 13.

141 *See, e.g.*, People v. Smith, 378 N.E.2d 1032, 1036–37 (N.Y. 1978).

color.[142] Because this analysis is implicit, it is not easily discerned or reflected within the four corners of court decisions or rulings.

Courts further feel comfortable dismissing arguments of discriminatory enforcement or unconstitutionality because they grant wide deference to police.[143] Courts urge us to rest assured that police will be objective in their enforcement of LPP laws because of officers' "training and experience . . . ."[144] Countless criminal court complaints contain this precise language.[145] Officers must *know* and understand gender expression, appearance, and sexual behavior. But police are not able to sort behavior meant to signal commercial sex from other innocent non-criminal expression, even with specific expertise.[146]

Why do LPP laws stand apart from other types of loitering, or even cross-dressing, laws that courts have invalidated? The only plausible hypothesis is the tacit acceptance that LPP laws will only be used in certain places against certain individuals and, therefore, do not run the danger that other statutes might. The objectivity courts read into LPP statutes is reinforced by constructs of privilege,

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[142] *See supra* notes 33–40 and accompanying text.

[143] *See, e.g.*, Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2043–44 (2017); *see also* People v. Martinez, 34 N.Y.S.3d 558, 559–60 (N.Y. App. Term. 2016) (accusatory instrument sufficient to allege section 240.37 where arresting officer concluded, "based upon his training and experience with regard to prostitution-related offenses that [the arrested individual] was loitering for the purpose of prostitution").

[144] People v. Farra S., No. 2004 CN 003119, WL 1258162, at *5 (N.Y. Crim. Ct. June 1, 2004).

[145] *See, e.g.*, Criminal Court Complaint, July 21, 2018, *supra* note 83, at 2. In fact, this language has been explicitly sanctioned by the New York Court of Appeals as it pertains to the validity of accusatory instruments. *See* People v. Dumas, 497 N.E.2d 686, 686 (N.Y. 1986) (complaint insufficient where "no allegation that the police officer is an expert in identifying marihuana"); *see also* People v. Nunn, 882 N.Y.S.2d 887, 889 (N.Y. Crim. Ct. 2009) (describing how after *People v. Dumas*, "all complaints filed in Criminal Court now contain what has come to be called the '*Dumas* language'—that is, a statement detailing the Police Officer's training and experience in the identification of controlled substances"). In the section 240.37 context, see, for example, *Farra S.*, WL 1258162, at *1, for a discussion of how an accusatory instrument alleging section 240.37 was sufficient where arresting officer was "experienced in the field of prostitution crimes." *See also* Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 345 (2005).

[146] *See* Struening, *supra* note 2, at 29–30.

misogyny, and whiteness.[147] Whereas courts may be concerned about wives painting lawn furniture or trick-or-treaters,[148] decades of LPP enforcement have assured that enforcement will not inadvertently fall on anyone but intended subjects.[149] Courts interpret vagueness challenges differently when they can foresee a statute's wrongful application in communities of privilege and wealth or communities they deem less plagued with undesirable behavior or simply undesirable people.[150]

This phenomenon plays out in the way the law looks at women who have previously been arrested for prostitution offenses. Police forms expressly invite officers to check a box indicating that an individual has previously been arrested for a prostitution offense, a basis for a section 240.37 arrest.[151] Notably, the form contemplates mere arrests for prostitution regardless of whether the arrest results in a finding of guilt.[152] Courts sanction this practice, even though evidence of prior bad acts or prior arrests seeking to prove someone's propensity to engage in certain conduct is generally inadmissible in other contexts.[153]

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[147] *See* Bellafante, *supra* note 4.

> The policing of female sexuality is something bourgeois women talk about often, with little understanding that what exists largely in the realm of metaphor for them remains, for poor women, a very literal and criminalizing surveillance of how they present themselves when they leave the house . . . .Just as it is unthinkable that the same strictures would apply to a black man drinking a tallboy on a sidewalk in East New York and a private equity investor having a glass of pinot noir on his stoop on East 93rd Street, it is inconceivable that a woman in Chelsea would be stopped by the police on her way to Barry's Bootcamp in cropped leggings and a sports bra.

Id.

[148] *See* City of Cincinnati v. Adams, 330 N.E.2d 463, 466 (Ohio Mun. Ct. 1974).

[149] *See* Bellafante, *supra* note 4.

[150] *See, e.g.*, *Adams*, 330 N.E.2d at 466.

[151] *See* Supporting Deposition – Loitering for Prostitution, *supra* note 107, at 2.

[152] *Id.*

[153] *See* People v. Molineux, 61 N.E. 286, 293–95 (N.Y. 1901) (evidence of a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only

Additionally, the *D.H.* court found that the plaintiffs did not have standing for injunctive relief because they had failed to prove the imminence of their injury.[154] The plaintiffs argued that it was likely they would be wrongfully arrested again under section 240.37 in three ways: (1) the NYPD used section 240.37 to arrest individuals with prior prostitution-related arrests merely on the basis of those prior arrests without additional probable cause; (2) several of the plaintiffs had experienced subsequent arrests and interactions with the police; and (3) the NYPD engaged in "sweeps" to arrest specific groups of people, like transgender women socializing in a particular area.[155]

Despite the fact that one of the police officer-defendants had explicitly warned a plaintiff that if he "saw girls like them outside after midnight" in the future he would arrest them, the court found the allegations too remote and attenuated from the "pivotal" question of imminent injury.[156] It is difficult to reconcile this, too, with the foreshadowing of *Papachristou*, where the Supreme Court warned that "[a]rresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality."[157]

On the question of discrimination on the basis of gender identity, several transgender plaintiffs described how the police misgendered them, referred to them as "he/she," and inappropriately asked questions about their sex organs.[158] In defending the police action, the City argued this did not sufficiently establish discriminatory animus. Instead, these "post-hoc gender references" were "rude" but not substantial enough to support a plausible inference that the decision to arrest any plaintiff was motivated by discriminatory animus.[159] The

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to demonstrate the defendant's propensity to commit the crime charged); *see also* People v. Rojas, 760 N.E.2d 1265, 1267 (N.Y. 2001) ("[A] criminal case should be tried on the facts and not on the basis of a defendant's propensity to commit the crime charged."); FED. R. EVID. 404(a)(1).

154 D.H. v. City of New York, 309 F. Supp. 3d 52, 66–67 (S.D.N.Y. 2018).

155 *Id.* at 64, 66.

156 *Id.* at 66–67.

157 Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

158 D.H. Amended Complaint, *supra* note 22, ¶¶ 132, 168, 185.

159 Defendants' Memorandum of Law in Support of Their Partial Motion to Dismiss the Amended Complaint at 19, D.H. v. City of New York, 309 F. Supp. 3d 52 (S.D.N.Y. 2017) (No. 1:16-cv-07698-PKC-KNF).

D.H. court agreed that these allegations did not support a plausible inference of targeting based on gender identity.[160]

The D.H. court also found that statistics showing arrest disparities based on race and gender were not enough to show intentional discrimination.[161] Accordingly, the court dismissed nearly all of the plaintiffs' claims.[162]

Constitutional challenges aside, one might assume that, if the policing is as lawless as described above, prosecutors or courts will offer some check on the practice. Certainly, there is a way in which problematic arrests could be identified, and addressed, post-arrest.[163] Of course, this would not obviate the harmful consequences of an arrest itself but could potentially provide some protection to individuals arrested unlawfully.

In theory, prosecutors could decline to prosecute NYPD's section 240.37 arrests. The first place one might expect a check on problematic policing is in prosecutors who, post-arrest, are responsible for commencing criminal actions and drawing up accusatory instruments.[164] Yet, as the cervix example demonstrates, prosecutors frequently offer minimal, if any, screening of cases or protection against bad arrests.[165] The tendency is simply to write up cases,

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[160] *D.H.*, 309 F. Supp. 3d at 75.

[161] *Id.* at 78–79. There are many reasons that it is difficult to prove intentional discrimination and racial profiling by the police. *See, e.g.*, Sonja B. Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, 2016 U. CHI. LEGAL F. 485, 492.

[162] *D.H.*, 309 F. Supp. 3d at 82.

[163] *See, e.g.*, Zeidman, *supra* note 145, at 315.

[164] *See* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 286, 306 (2014). It is worth noting here, as explored more in Part III, that at the time of writing, at least two elected prosecutors in New York City have demonstrated support for eradicating prosecution of LPP cases. *See* David Brand & Emma Whitford, *Brooklyn DA, Others Urge Albany to Repeal Loitering Law and Enable Record-Clearing for Trafficking Victims Before End of Session*, BROOKLYN DAILY EAGLE (June 19, 2019), https://brooklyneagle.com/articles/2019/06/19/brooklyn-da-others-urge-albany-to-repeal-loitering-law-and-enable-record-clearing-for-trafficking-victims-before-end-of-session/. This is significant, given that over the years arrests under section 240.37 have largely been constrained to five New York City precincts. *See* Cleary Gottlieb & Legal Aid Press Release, *supra* note 38.

[165] Zeidman, *supra* note 145, at 349.

initiate prosecutions, and let everything sort itself out in the adjudication process.[166]

Then, once a prosecution commences, adjudicating courts fail to provide safeguards against police abuse under section 240.37.[167] Although criminal court arraignments are meant to ensure that arrests, and resulting prosecutions, are premised on reasonable cause,[168] arraignments are largely pro forma and rarely involve examination of the underlying circumstances of an arrest.[169] Courts have the authority to dismiss accusatory instruments that fail to establish a criminal offense.[170] Courts could acquit individuals charged at trial.[171] But, the nature of misdemeanor criminal court practice is such that low-level criminal case adjudication actually precludes any safeguards against the type of policing described in Part I.[172]

As Issa Kohler-Hausmann persuasively argues, factual adjudication simply is not the function of misdemeanor courts in New York City.[173] Rather, under the managerial model of case processing, minor offenses are handled in such a way as to mark, sort, and monitor individuals arrested in order to set the stage for future

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166 *See generally* Anjali Pathmanathan, *The Myth of Preliminary Due Process for Misdemeanor Prosecutions in New York*, 42 HARBINGER 82, 85 (2018) ("Regrettably, however, the New York State Criminal Procedure Law (C.P.L.) fails to protect individuals accused of misdemeanors from unexamined and oftentimes unsupportable accusations.").

167 Zeidman, *supra* note 145, at 323.

168 N.Y. CRIM. PROC. LAW § 100.40 (Consol. 2020).

169 *See* Zeidman, *supra* note 145, at 345.

170 Criminal courts are empowered to do this as early as arraignment, the first court appearance on a criminal action. N.Y. CRIM. PROC. LAW § 140.45 (Consol. 2020). Section 140.45 of the Criminal Procedure Law requires a local criminal court to dismiss an accusatory instrument when it is facially insufficient and when "the court is satisfied that on basis of the available facts or evidence it would be impossible to draw and file an accusatory instrument which is sufficient on its face." *Id.*; *see also* People v. Machado, 698 N.Y.S.2d 416, 418 (N.Y. Crim. Ct. 1999).

171 Most subsections of P.L. 240.37 are Class B misdemeanors or violations that, when prosecuted within New York City, are tried without a jury pursuant to C.P.L. § 340.40. *See* N.Y. PENAL LAW § 240.37 (Consol. 2020); N.Y. CRIM. PROC. LAW § 340.40 (Consol. 2020).

172 *See, e.g.*, Zeidman, *supra* note 145, at 321.

173 *See* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 72–73 (2018).

contacts with the criminal legal system.[174] Rarely, if ever, are the merits of an arrest scrutinized or facts found in accordance with the burdens and standards due process requires.[175]

Yet, the D.H. court rested on the notion that reviewing courts would serve as a safeguard against "mistaken[]" arrests under section 240.37.[176] In upholding the statute, the court found it provided "'define[d] boundaries sufficiently distinct' for . . . juries, and appellate judges."[177] This reasoning contemplates a review of the validity of arrests that rarely, if ever, occurs in petty offense case adjudication.[178]

Even in the few instances where an arrested individual challenges the validity of their arrest and prosecution, outcomes vary.[179] Consider, for example, how criminal courts evaluate the sufficiency of accusatory instruments charging section 240.37.[180] Courts could rightfully take issue with the sparseness of allegations giving rise to LPP arrests considering the multiple innocent explanations for the conduct that forms the basis of a prosecution or the overall impossibility of establishing that someone's purpose was, in fact,

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[174] *Id.* at 79.

[175] *Id.*; *see also* LISA LINDSAY, CRIMINAL COURT OF THE CITY OF NEW YORK: ANNUAL REPORT 2017, at 25, 49 (Justin Barry ed., 2018), https://www.nycourts.gov/LegacyPDFs/COURTS/nyc/criminal/2017-Annual-Report.pdf (with nearly 200,000 misdemeanor arrests in New York City in 2017, there were only 645 trials on the merits, only 175 of which were jury trials).

[176] D.H. v. City of New York, 309 F. Supp. 3d 52, 72 (S.D.N.Y. 2018).

[177] *Id.* (quoting Grayned v. City of Rockford, 408 U.S. 104, 114 (1972)).

[178] *Id.*

[179] Zeidman, *supra* note 145, at 320.

[180] C.P.L. 170.35 authorizes courts to dismiss accusatory instruments that fail to comply with C.P.L. 100.40, the section that requires that accusatory instruments establish every element of, and provide reasonable cause to believe the defendant committed, the charged offense. *See* N.Y. CRIM. PROC. LAW § 170.35 (Consol. 2020); N.Y. CRIM. PROC. LAW § 100.40 (Consol. 2020).

prostitution.[181] Instead, courts grant wide deference to police in LPP arrests.[182] Appellate courts offer little additional protection.[183]

The long line of vagueness cases take notice of exactly this point.[184] The Supreme Court in *Papachristou* went back to 1876 to decry the danger of impermissibly vague statutes that allow police to catch the widest nets possible and then

> leave it to the courts to step inside and say who could rightfully be detained, and who should be set at large. . . . While that was a federal case, the due process implications are equally applicable to the States and to this vagrancy ordinance. Here the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police.[185]

Put simply, it is difficult to conceive of an instance where an accusatory instrument charging section 240.37 could sustain reasonable cause that someone has committed a criminal offense.[186] Yet,

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[181] *See* Struening, *supra* note 2, at 29–30.

[182] *See, e.g.*, Decision & Order at 2, People v. Guzman, No. 2018CK002552 (N.Y. Crim. Ct. Jan. 30, 2019) (accusatory instrument charging section 240.37 was sufficient where, inter alia, "the officer knows the location as a place where the New York City Police Department has made numerous arrests for prostitution related offenses" and "based on the officer's training and experience, he believes the defendant was loitering for the purpose of prostitution and not engaging in another activity, such as panhandling or squeegeeing").

[183] In a 2016 decision, the New York intermediate appellate court considered three consolidated cases—the individual charged had been arrested under section 240.37 by officers in the same precinct three times only weeks apart. People v. Martinez, 34 N.Y.S.3d 558, 560 (N.Y. App. Term. 2016). She pleaded guilty to each offense. *Id.* at 559–60. In assessing the challenges to the sufficiency of the complaints, the court vacated two convictions, but sustained the third, finding the allegations sufficient to support a conviction where police observed the arrested individual for a few minutes. *Id.* at 560. The accusatory instrument in the case established that she "'attempted to stop 3 male passersby and 3 male motorists'; that the arresting officer 'has seen the defendant . . . on other occasions engaging in the same conduct' and 'previously arrested defendant for a prostitution related offense.'" *Id.*

[184] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972).

[185] *Id.* (quoting United States v. Reese, 92 U.S. 214, 221 (1875)) (internal quotation marks omitted).

[186] *See* Struening, *supra* note 2, at 29–30.

cases are routinely prosecuted, and people face all the attendant consequences of even a low-level criminal prosecution.[187]

Additionally, since 2013, prostitution-related offenses in New York City and other parts of the state are diverted into diversion courts that further distance adjudication of the case from an evaluation of the circumstances of the arrest.[188] When cases are adjudicated in diversion courts, there is a strong incentive for prosecuted individuals to agree to program dispositions that preclude the possibility of a trial on the merits.[189] Individuals can avoid a criminal conviction or certain sentences if they participate in court-mandated programming.[190] As a result, since 2013, virtually no LPP cases proceeded to trial in New York.[191] Arresting officers do not have to justify the LPP arrests they make.[192] They are not held accountable as they do not have to testify as to the details of an arrest or explain the factors on which they rely.[193] Criminal courts rarely, if ever, explore the underlying circumstances of an arrest so as to offer any protection or oversight.[194] Section 240.37 arrests in New York remain insulated from review.[195]

Accordingly, whether in civil litigation or through the adjudication of individual criminal cases, courts do not provide adequate safeguards against the type of discriminatory policing facilitated by

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[187] *See, e.g.*, Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 818–19, 821–22 (2015); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 735 (2018).

[188] *See* Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1336 (2016); GLOB. HEALTH JUSTICE P'SHIP, UN-MEETABLE PROMISES: RHETORIC AND REALITY IN NEW YORK CITY'S HUMAN TRAFFICKING INTERVENTION COURTS 23, 25 (2018), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/un-meetable_promises_htic_report_ghjp_2018rev.pdf.

[189] Melissa Gira Grant, *Human Trafficking Courts Are Not a Criminal Justice "Innovation,"* NEW REPUBLIC (Jan. 7, 2020), https://newrepublic.com/article/156135/human-trafficking-courts-not-criminal-justice-innovation.

[190] Gruber et al., *supra* note 188, at 1366–67.

[191] *Id.* at 1364.

[192] *Cf. id.* at 1362.

[193] *Cf. id.*

[194] *See* Zeidman, *supra* note 145, at 320–21.

[195] *Id.*

LPP laws.[196] Where does that leave those in danger of subjective enforcement and wrongful arrest?

PART III

Over the last several years, the numbers of LPP arrests across New York State have generally decreased.[197] Some police precincts or departments have chosen non-enforcement and a few prosecutors have decided as a matter of policy not to prosecute LPP arrests.[198] Yet, the existence of the statutes themselves remain dangerous and problematic. As detailed above in Part II, arrest practice under section 240.37 can be revived at any time and for any purpose. The increase in arrests in 2018 noted above bears this out.[199]

As a new decade dawns, New York finds itself in a particular political and historical moment. Broken windows policing, the high-volume low-level offense policing strategy that dominated over two decades, has been declared over,[200] disavowed,[201] and even the subject of political apologies.[202] Civil rights advocates have fought

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196 *Id.*

197 *See* Top Arrest Charge, *supra* note 63.

198 *See, e.g.*, Cyrus Vance, Jr. (@ManhattanDA), TWITTER (June 19, 2019, 7:10 PM), https://twitter.com/ManhattanDA/status/1141483438337351682 ("We support vacating convictions for trafficking survivors and repealing the crime of 'Loitering for Prostitution,' which disproportionately impacts LGBTQ New Yorkers and does not make us safer. We have not charged this offense for several years. #CJreform #WalkingWhileTrans."); *see also* Brand & Whitford, *supra* note 164.

199 *See* Top Arrest Charge, *supra* note 63.

200 *See, e.g.*, Jacob Gershman, *Arrests for Low-Level Crimes Are Plummeting, and the Experts Are Flummoxed*, WALL STREET J. (Oct. 6, 2019, 5:30 AM), https://www.wsj.com/articles/arrests-for-low-level-crimes-are-plummeting-and-the-experts-are-flummoxed-11570354201?shareToken=st821b6493f33649b88804c41ce752149d; *see also* Greg Berman, *Why We Need to Rethink Misdemeanor Justice*, GOVERNING (Mar. 12, 2019), https://www.governing.com/gov-institute/voices/col-why-we-need-rethink-misdemeanor-justice.html.

201 C.J. Ciaramella, *George Kelling, Father of 'Broken Windows' Policing, Dies*, REASON (May 17, 2019, 2:00 PM), https://reason.com/2019/05/17/george-kelling-father-of-broken-windows-policing-dies/.

202 *See, e.g.*, Shane Goldmacher, *Michael Bloomberg Pushed 'Stop-and-Frisk' Policing. Now He's Apologizing*, N.Y. TIMES (Nov. 17, 2019),

relentlessly to eradicate the NYPD's unlawful stop-and-frisk practice and have made significant gains, including a court finding that the practice was unconstitutional,[203] federal court monitoring,[204] and a significant decrease in reported stops.[205] Although much work remains to undo the harm caused by years of these policing regimes, political discourse has unquestionably shifted.[206]

Against this backdrop, it is even more perplexing that section 240.37 is still allowed to threaten women of color and gender nonconforming individuals in New York City. In this post-broken-windows, post-stop-and-frisk era, LPP laws remain in place and sanction police abuse in street-based encounters.[207] LPP laws codify gender policing in petty offense enforcement and need to be understood for what they are—gendered stop-and-frisk.

Section 240.37 sanctions harmful police encounters that have purportedly fallen out of favor.[208] More alarming still are recent efforts in other places across the country to enact new LPP laws like section 240.37. For example, in June 2018, as the NYPD was making its patrol guide changes, the Chicago City Council passed a new

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https://www.nytimes.com/2019/11/17/us/politics/michael-bloomberg-speech.html.

[203] *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 625–46 (S.D.N.Y. 2013).

[204] *See, e.g.*, Al Baker, *Police Evaluations Should Focus on Lawfulness of Stops, Monitor Says*, N.Y. Times (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/nyregion/new-york-police-evaluations-stops-monitor.html.

[205] A 2019 report by the New York Civil Liberties Union establishes that the "number of reported NYPD stops has drastically declined since 2011, the height of stop-and-frisk in New York City." N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK IN THE DE BLASIO ERA 2 (2019), https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf. "In 2017, 11,629 stops were reported, marking a 98 percent decrease from the number reported in 2011." *Id.*

[206] *Id.*

[207] *See, e.g.*, ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 149 (2017); *see also* Julia Dahl, *You Say Loitering for Sex, I Say Just Hanging Out*, SALON (Aug. 30, 2010, 3:01 PM), https://www.salon.com/2010/08/30/prostitution_zone_constitutional/.

[208] *See* Brand & Whitford, *supra* note 164.

ordinance outlawing "prostitution-related loitering."[209] The ordinance was passed even though civil rights advocates condemned it because it "throws open the door to rampant racial profiling of Black women, women of color, queer and trans people, and anyone else whose presence in public spaces is presumed to signal an intent to trade sex."[210]

Similar patterns emerge everywhere LPP laws are enforced, from Phoenix, Arizona,[211] to Columbus, Georgia.[212] Across the country, transgender women, homeless women, and women who have previously been arrested for prostitution experience repeated arrests.[213] Police use LPP laws to arrest women who even turn down offers for sex for money and use resources for operations that net additional LPP arrests.[214] New Jersey's LPP law mirrors New York's almost to the letter as it criminalizes "wander[ing] . . . in a public place with the purpose of engaging in prostitution."[215] There,

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[209] CHI., ILL., MUNICIPAL CODE § 8-4-016 (2019); *see also* Jonah Newman & Nikki Baim, *Prostitution-Loitering Law Likely to Target Women of Color for Arrest*, CHI. REP. (July 24, 2018), https://www.chicagoreporter.com/prostitution-loitering-ordinance-likely-to-target-women-of-color-for-arrest/.

[210] Andrea J. Ritchie & Brit Schulte, *"Prostitution-Related" Loitering Ordinance Promotes Racial Profiling in Chicago*, TRUTHOUT (July 24, 2018), https://truthout.org/articles/anti-prostitution-ordinance-promotes-racial-profiling-in-chicago/ (noting that "[s]imilar laws in California, New York and Washington, DC, have also long been the subject of controversy and challenges claiming that they facilitate profiling and discriminatory and abusive enforcement.").

[211] *See, e.g.*, James Nichols, *Monica Jones, Transgender Woman, Convicted of 'Manifesting Prostitution'*, HUFFPOST (Apr. 16, 2014, 11:14 AM), https://www.huffpost.com/entry/monica-jones-transgender_n_5159638?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAJOxwvnrxgxck9_-l0ae7j1B6zUfurLulz5NEL-JUtlgpgPE8SCGTCiiidAaL1NgiH7RKEtNakcBndhtCO6lhsBd_NBqql-Zib6nP0YEfi7oRclFIAdeS0RPZM_-ZzR1sa_OQ4Z9f4TJAFw_cqrngbmEqSBEM_FJb9z0aZ-i_VzcHb.

[212] *See, e.g.*, Elizabeth Nolan Brown, *Profiling and Prostitution Pre-Crime in Georgia*, REASON (August 8, 2017), https://reason.com/2017/08/08/loitering-for-purpose-of-prostitution/.

[213] *See, e.g.*, RITCHIE, *supra* note 207, at 149; *see also* Dahl, *supra* note 207.

[214] *See* Brown, *supra* note 212.

[215] N.J. STAT. ANN. § 2C:34-1.1 (West 2019).

as in New York, "stereotypes are oftentimes the only way to enforce such a vague statute."[216]

Elected officials cling to LPP laws as they allow for easy and quick ways to clean up public streets in the face of complaints by constituents or, more commonly, constituent businesses.[217] It is so commonly accepted that LPP arrests can be made without probable cause that the incoming Milwaukee city prosecutor recently published an op-ed explaining how he would utilize Milwaukee's broad LPP statute.[218] He distinguished LPP enforcement from that targeting actual acts of prostitution or commercial sex, noting that "[a] police officer needs a clear indication that a person is offering a sexual act for a thing of value before he/ she can arrest someone for prostitution. However, that is not the case with the city ordinance, Loitering (Prostitution Related)."[219]

Fortunately, in the face of these ongoing and flagrant constitutional abuses, there is now a growing movement organizing against abusive LPP laws and their impact on specific communities.[220] Across the country, youth, trans advocates, and sex workers are putting pressure on lawmakers to reexamine LPP laws.[221]

A few weeks after the decision dismissing the majority of plaintiff's claims in *D.H.*, two New York legislators introduced a bill that would completely repeal section 240.37.[222] The bill's justification cited the *D.H.* plaintiffs' experience and claims, noting that

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[216] Derek J. Demeri, Opinion, *Transgender People Are Being Profiled as Sex Workers. AG's Directive Fails to Address the Issue*, NJ.COM (Dec. 17, 2019), https://www.nj.com/opinion/2019/12/transgender-people-are-being-profiled-as-sex-workers-ags-directive-fails-to-address-the-issue-opinion.html.

[217] *See* Struening, *supra* note 2, at 19–20.

[218] *See* Vince Bobot, *Human Trafficking: What Can the City Attorney Do About It?*, MILWAUKEE COURIER (Jan. 3, 2020), https://milwaukeecourieronline.com/index.php/2020/01/03/human-trafficking-what-can-the-city-attorney-do-about-it/.

[219] *Id.*

[220] *See, e.g.*, Klepper, *supra* note 35; Alanna Vagianos, *Civil Rights Groups Call out 'Archaic' N.Y. Loitering Law for Targeting Trans People*, HUFFPOST (June 12, 2019, 10:25 AM), https://www.huffpost.com/entry/civil-rights-groups-call-out-archaic-ny-loitering-law-for-targeting-trans-people_n_5d00067ae4b011df123c0fd1.

[221] *See, e.g.*, Ritchie & Schulte, *supra* note 210.

[222] *See* State Assemb. A09704A, 2018 Gen. Assemb., Reg. Sess. (N.Y. 2018).

> [a]rrests under Section 240.37 disproportionately impact women, particularly cisgender and transgender women of color and women who have previously been arrested for prostitution offenses. Eighty-five percent of the individuals arrested under Section 240.37 between 2012-2015 were Black or Latina. In particular, women of color have often been unlawfully targeted by officers under this statute during "sweeps" or "operations" where officers arrest large numbers of women in a given area at the same time.[223]

In the 2018 session, the bill did not reach a floor vote in either chamber, but in 2019 the effort to repeal section 240.37 coalesced into a broader movement.[224] An advocacy coalition centering the people most directly impacted by the law's enforcement catalyzed a groundswell of support.[225] The new movement has coined section 240.37 as the "Walking While Trans Ban,"[226] and emphasized that its repeal would be "life-saving" for trans communities.[227] On November 20, 2019, the Transgender Day of Remembrance, groups rallied to raise awareness of the importance of repealing section

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[223] *A09704 Memo: New York State Assembly Memorandum in Support of Legislation*, N.Y. ST. ASSEMBLY, https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A09704&term=2017&Memo=Y (last visited Apr. 8, 2020).

[224] In 2018, the Assembly Codes Committee voted favorably on A09704, but the bill did not reach a floor vote in the Assembly. *See A09704 Committee Votes and Floor Votes*, N.Y. ST. ASSEMBLY, https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A09704&term=2017&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y (last visited Apr. 8, 2020). The State Senate, still Republican-controlled at that time, took no action on the Senate version. *See S08107 Summary and Actions*, N.Y. ST. ASSEMBLY, https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=S08107&term=2017&Summary=Y&Actions=Y (last visited Apr. 8, 2020).

[225] *See* Klepper, *supra* note 35 ("More than 100 current and former sex workers rallied at New York's Capitol on Tuesday to encourage lawmakers to repeal a loitering law they say police use to harass people simply for their appearance.").

[226] *See id.*

[227] *See* Vagianos, *supra* note 220.

240.37.[228] Several transgender women who had been arrested under section 240.37 described "near-constant harassment from the NYPD based on their appearance as trans women of color."[229]

The repeal campaign's progress in the 2019 legislative session included the public support of two prominent elected District Attorneys, Cyrus Vance of New York County and Eric Gonzalez of Kings County.[230] The New York County District Attorney's Office had ceased prosecuting section 240.37 arrests a year earlier.[231] The Kings County District Attorney's Office has likewise demonstrated support for eradicating prosecution of LPP cases.[232]

The repeal effort also has the backing of major civil rights organizations, law professors, and grassroots organizations.[233] Advocates emphasize how long New Yorkers have suffered discriminatory, and unnecessary, enforcement under section 240.37.[234] Although it is always difficult to predict how legislatures will act on criminal law and policing issues, momentum is building and organizers are demanding change.[235]

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[228] Zoë Beery, *Transgender New Yorkers Rally to End 'Stop and Frisk for Trans Women,'* GOTHAMIST (Nov. 20, 2019, 10:48 AM), https://gothamist.com/news/transgender-new-yorkers-rally-end-stop-and-frisk-trans-women.

[229] *Id.*

[230] *See* Brand & Whitford, *supra* note 164.

[231] *See* Vance, *supra* note 198 ("We support vacating convictions for trafficking survivors and repealing the crime of 'Loitering for Prostitution,' which disproportionately impacts LGBTQ New Yorkers and does not make us safer. We have not charged this offense for several years. #CJreform #WalkingWhileTrans."); *see also* Press Release, N.Y. Cty. Dist. Attorney, D.A. Vance and 66 Criminal Justice Leaders Denounce U.S. Attorney General's Remarks About Local Prosecutors (Aug. 16, 2019), https://www.manhattanda.org/d-a-vance-and-66-criminal-justice-leaders-denounce-u-s-attorney-generals-remarks-about-local-prosecutors/.

[232] *See* Brand & Whitford, *supra* note 164.

[233] *See, e.g.*, Avery McNeil & Breanne Chappell, Opinion, *Repeal the New York Loitering Law*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/opinion/letters/new-york-state-loitering-law.html; Memorandum of Support for A00654/S02253 from Criminal Law Professors in N.Y. State (Apr. 2019) (on file with author); Memorandum of Support for A00654/S02253 from Human Rights Watch (Mar. 22, 2019) (on file with author).

[234] *See, e.g.*, McNeil & Chappell, *supra* note 233.

[235] *See, e.g.*, Ritchie & Schulte, *supra* note 210.

CONCLUSION

Although the renewed recent challenge to section 240.37 through litigation was unsuccessful, there are lessons to be gleaned from where we have landed over forty years after the law's passage. The vague provisions of the law have proved impervious to constitutional attack precisely because section 240.37 rests on archaic norms involving gender and sex.[236] Courts countenance sexism, racism, and classism so naturalized that it passes as objective.[237] In this way, courts adjudicating criminal cases or hearing constitutional challenges fortify harmful entrenched policing rather than act as a check on police practices.[238]

LPP arrests today look exactly like those of the 1970s, when the law was first passed, and like those of the 1990s and early 2000s, at the height of broken windows policing.[239] Enforcement of the statute has unfolded exactly as anticipated. Court challenges have failed to protect against discrimination and abuse.[240]

As part of a larger paradigm shift toward reducing the reach and impact of the criminal legal system, an abolitionist approach is necessary when it comes to LPP policing. Abolition does not mean less policing, decreased enforcement, or reform in arrest procedure itself. Instead, the solution lies in repeal of the law. Taking LPP laws like section 240.37 out of the police arsenal would work to eliminate policing based on gender, gender-identity, and the enforcement of misogynist gender norms.

Were section 240.37 to be repealed, many questions would remain. Without a doubt, there are battles left to fight against the over policing of women of color, sex workers, and trans and gender nonconforming individuals.[241] There are myriad other ways gender and gender expression are criminalized, particularly in conjunction with race and class.[242] If section 240.37 did not exist, would the policing simply shift elsewhere, utilizing another penal law section? Perhaps.

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236 *See, e.g.*, D.H. v. City of New York, 309 F. Supp. 3d 52, 70–71 (S.D.N.Y. 2018).

237 *See* Struening, *supra* note 2, at 34.

238 *See* Zeidman, *supra* note 145, at 320.

239 *See* Struening, *supra* note 2, at 17.

240 *See* Zeidman, *supra* note 145, at 320.

241 *See* Struening, *supra* note 2, at 18.

242 *See id.*

Would police find another tool to control public spaces and sexual behavior? It is possible. Yet, that threat alone should not preclude rational action now.

Repealing section 240.37 would unequivocally express that the harms caused by its enforcement far outweigh any benefit of its continued use. Taking the law off the books would show that the experience of those profiled, harassed, arrested, or criminalized under the vague statute is worthy of reparation. Police should no longer be empowered to arrest a woman because they claim her cervix was showing, nor should a nun's outfit be the only clothing a woman can wear that does not put her at risk of arrest. Repealing section 240.37 would be a first step in stopping police harassment of women and gender non-conforming individuals in public spaces and condemning what has proven to be gendered stop-and-frisk.