

# Walking While Trans: Policing Women’s Sexuality

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*Response to Kate Mogulescu’s article, “Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop and Frisk.”*

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## INTRODUCTION

Professor Kate Mogulescu’s article, “Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop and Frisk,” discusses the manner in which petty offense laws—particularly laws that criminalize loitering for the purpose of prostitution (“LPP”)—have had a disproportionate impact on vulnerable communities.<sup>1</sup> This Essay intends to expand on that analysis by examining the unique impact that these laws have had on trans women while examining this issue within a human rights framework.

“Petty offense” laws are overly broad or vague criminal laws that provide law enforcement broad discretion to enforce a particular

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<sup>1</sup> Kate Mogulescu, *Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop and Frisk*, 74 MIA. L. REV. 68, 68–69 (2020), [https://law-review.law.miami.edu/wp-content/uploads/2020/05/Your-Cervix-is-Showing\\_Page-Proof\\_FINAL.pdf](https://law-review.law.miami.edu/wp-content/uploads/2020/05/Your-Cervix-is-Showing_Page-Proof_FINAL.pdf).

vision of normative social standards.<sup>2</sup> This discretion has historically served as the basis for discrimination against vulnerable populations such as women, poor people, and LGBT+ individuals.<sup>3</sup> Although petty offense laws originated as early as the sixteenth century, they were most utilized by governments during the colonial era, where those laws served the colonial state's "civilizing mission" and provided the state with a legal justification for enacting institutionalized violence upon native populations.<sup>4</sup> The British Vagrancy Act of 1824, which became the template for colonial social control, distinguished between particular classifications of undesirable populations through a "tripartite distinction" that differentiated between "'idle and disorderly persons,' repeat offenders who [were] 'rogues and vagabonds,' and 'incorrigible rogues.'"<sup>5</sup>

Although many developed nations have taken steps toward repealing and decriminalizing the most well-known examples of petty offense laws, such as laws against being a rogue or vagabond, their progeny continue to proliferate. Laws like section 240.37 of New York's penal code, which criminalizes LPP,<sup>6</sup> are intentionally ambiguous so as to address underlying social anxieties, such as female sexual expression, while maintaining the veneer of being a legitimate use of the state's police powers.<sup>7</sup>

## I. WALKING WHILE TRANS

"Walking while trans" is an offshoot of the more well-known phrase "walking while black," but in either instance, the phrase describes the difficulties that minority communities—trans and black respectively—face while navigating public spaces.<sup>8</sup> For trans

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<sup>2</sup> JONATHAN EGERTON-PETERS ET AL., INJUSTICE EXPOSED: THE CRIMINALISATION OF TRANSGENDER PEOPLE AND ITS IMPACTS, 8–9, 34–37 (2019).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 32–33.

<sup>6</sup> N.Y. PENAL LAW § 240.37 (Consol. 2020).

<sup>7</sup> See Mogulescu, *supra* note 1, at 85.

<sup>8</sup> German Lopez, "Walking While Trans": How Transgender Women of Color are Profiled, VOX (July 21, 2015, 2:20 PM), <https://www.vox.com/2015/7/21/9010093/walking-while-transgender>.

women, particularly trans women of color, these difficulties can include harassment, catcalling, threats of violence, actual violence, and increased scrutiny from law enforcement.<sup>9</sup>

Imagine walking down a crowded street and having all these eyes on you and you are trapped in a state of paranoia trying to figure out what about you it is that is making people so uncomfortable. Is it my jawline? My forehead? Do people think I look like a man? It's such a complex feeling as someone who wants to feel included in society.<sup>10</sup>

Recently, section 240.37 of the New York penal code has renewed discussion regarding the mistreatment of trans women by law enforcement. Section 240.37 allows police to arrest people for allegedly loitering “for the purpose of engaging in prostitution.”<sup>11</sup> The purported legislative intent of the law was to curb harassment by “brazen” sex workers that would grab at men as they walked by.<sup>12</sup> To establish that particular conduct falls within the statute, the state must demonstrate “loitering plus additional objective conduct evincing that the observed activities are for the purpose of prostitution.”<sup>13</sup> That being said, the statute is silent as to the specific criteria for determining whether a woman has sufficiently manifested her intent to engage in prostitution, leaving that determination at the discretion of law enforcement.<sup>14</sup> However, whether an officer believes that a woman *looks* like a sex worker is often informed by biases based on race, gender, socioeconomic status, and sexuality.<sup>15</sup>

For trans women, societal biases rooted in pornography and the pathologizing of trans identity as a fetishistic mental disorder has

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<sup>9</sup> *Id.*

<sup>10</sup> MIC, *Walking While Trans*, YOUTUBE (Dec. 29, 2017), <https://youtu.be/IS-3ZqdtPvw>.

<sup>11</sup> § 240.37.

<sup>12</sup> *People v. McGinnis*, 972 N.Y.S. 2d 882, 886 (N.Y. Crim. Ct. Oct. 15, 2013).

<sup>13</sup> *Id.* at 888 (citing *People v. Smith*, 378 N.E. 2d 1032, 1036 (N.Y. 1978)).

<sup>14</sup> *See* § 240.37.

<sup>15</sup> U.S. DEP'T. OF JUST., IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE, 3, 7–8 (2015), <https://www.justice.gov/opa/file/799366/download>.

created a cultural logic that frames trans women as inherently hypersexual in the United States.<sup>16</sup> In 2005, Amnesty International documented that “subjective and prejudiced perceptions of transgender women as sex workers often play a significant role in officers’ decisions to stop and arrest transgender women.”<sup>17</sup>

For decades, the general public, and especially the media, have had a lurid fascination with trans people’s bodies and sexualities. From talk shows like Jerry Springer, to reality shows like *There’s Something About Miriam*, novels like *Myra Breckinridge*, and the countless movies that portray trans women almost exclusively as either sex workers, sexual predators and sexual deviants. This hypersexualization of transgenderism predominantly targets trans women and others on the trans feminine spectrum - because in a world where women are routinely objectified, and where a woman’s worth is often judged based on her sexual appeal, it is no surprise that many people presume that those of us who were assigned a male sex at birth, but who identify as women and/or dress in a feminine manner, must do so for primarily sexual reasons.<sup>18</sup>

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<sup>16</sup> Nihils Rev & Fiona Maeve Geist, *Staging the Trans Sex Worker*, *TRANSGENDER STUD. Q.*, 112, 115 (2017); see also JULIA SERANO, *WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY* 134 (2007) (“[The] most popular images and impressions of trans women revolve around sexuality: from ‘she-male’ and ‘chicks with dicks’ pornography to media portrayals of us as sexual deceivers, prostitutes, and sex workers. And of course, there are the recurring themes of trans women who transition in order either to gain the sexual attention of men or to fulfill some kind of bizarre sex fantasy (both of which appear regularly in the media, and also in [J. Michael] Bailey and [Ray] Blanchard’s model of MTF transgenderism).”).

<sup>17</sup> AMNESTY INT’L USA, *STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S.*, 22, 25 (2005), <https://www.amnesty.org/download/Documents/84000/amr511222005en.pdf>.

<sup>18</sup> Julia Serano, *Stop Sexualizing Us!*, *JULIA SERANO: TRANSGENDER PSYCH., DIAGNOSES, THEORIES, & HEALTHCARE* (May 18, 2009), <http://www.juliaserano.com/TSetiology.html#APAprtest09>.

In New York, that means that trans women like Raquel, a 23-year-old college student, can find themselves arrested and loaded into an unmarked police vehicle as they walk home after turning down the advances of an unknown man.<sup>19</sup> Arrests like this are not isolated incidents; they fall within a larger pattern of “sweeps” that target poor communities of color and result in the police arresting dozens of trans women within a matter of months.<sup>20</sup> However, even these disproportionately high estimates may be underreporting the true impact on the trans community given that police often misgender trans arrestees, making statistical analysis difficult.<sup>21</sup>

What is a manifestation charge? That’s basically criminalizing everyday action [based on] what area of town you’re in, what you’re wearing, talking to [passersby], hailing a taxi, having condoms on you, asking someone if they are a cop. What these laws do is basically criminalize everyday action, and so it disproportionately targets women of color and trans women of color.<sup>22</sup>

Equally disturbing is that the standard of conduct that constitutes probable cause for arrest when the “perpetrator” is female is not equal to the standard applied to men. By way of example, Bustle, an online American women’s magazine, published a story about a homeless man, named “Joe,” who approaches dozens of random women on the streets of New York City and flirts with them in order to get quick sex and a place to sleep.<sup>23</sup> However, the article does not frame Joe as a sex worker despite the fact that his conduct is a quintessential encapsulation of the type prohibited under section 240.37 of the New York penal code.<sup>24</sup> Joe is not alone. Many online resources encourage men to publicly approach women at random and

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<sup>19</sup> Emma Whitford, *When Walking While Trans Is a Crime*, THE CUT (Jan. 31, 2018), <https://www.thecut.com/2018/01/when-walking-while-trans-is-a-crime.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> LAURA FLANDERS SHOW, *Walking While Trans: Interview with Activist Monica Jones*, YOUTUBE (June 1, 2015), <https://youtu.be/P1VGlvML7x4>.

<sup>23</sup> BUSTLE, *Homeless Millennial Survives by Picking Up Women Every Night [Insights]*, YOUTUBE (Sept. 15, 2014), <https://youtu.be/bmav517MQJc>.

<sup>24</sup> *See id.*; N.Y. PENAL LAW § 240.37 (Consol. 2020).

flirt or even express their sexual expectations in hopes of sexual conquest.<sup>25</sup> Because the overt, even aggressive, expression of male sexual desire is a normalized feature of our society, this conduct is viewed as—at worst—“sleazy,” but not criminal.<sup>26</sup>

Conversely, section 240.37 of the New York penal code and laws of its ilk seem to express a particular vision of womanhood that presupposes the nonexistence or invisibility of female sexuality.<sup>27</sup> Indeed, it is this assumption that makes the existence of trans identity so transgressive, given its inherent connection with sex and sexuality in the cultural imagination. For trans women, one does not need to dress provocatively. For trans women, merely occupying and existing in a public space is a provocative act.

## II. HUMAN RIGHTS PRINCIPLES

Human rights principles are intended to articulate an interwoven set of rights that the international organizations such as the U.N. consider essential to the preservation of human dignity.<sup>28</sup> The repeated and targeted harassment that trans women have experienced by law enforcement constitutes a violation of numerous human rights principles, including (1) the right to liberty and security of person and (2) freedom of movement.<sup>29</sup> These rights are enshrined in numerous international documents, including the Universal Declaration of Human Rights (“UDHR”), which the international community generally considers the foundation of international human

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<sup>25</sup> See, e.g., *How to Get Laid in New York City – Where to Pick Up and Date Girls*, HOOKUP TRAVELS, [https://hookuptravels.com/wiki/New\\_York\\_City](https://hookuptravels.com/wiki/New_York_City) (last updated Aug. 27, 2020, 8:15 PM).

<sup>26</sup> Heather Hlavka, *Normalizing Sexual Violence: Young Women Account for Harassment and Abuse*, 28 GENDER & SOC’Y 337, 339–40 (2014) (“[N]ormative heterosexuality’ involves a ‘presumption that men have a special and overwhelming “urge” or “drive” toward heterosexual intercourse.’”).

<sup>27</sup> See, e.g., § 240.37.

<sup>28</sup> *What are Human Rights?*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> (last visited Oct. 16, 2020).

<sup>29</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 3, 13 (Dec. 10, 1948) [hereinafter UDHR].

rights law.<sup>30</sup> Notably, Eleanor Roosevelt’s influence in drafting the UDHR arguably means that many of the human rights principles it articulates are a reflection of American constitutional principles.<sup>31</sup> Therefore, although human rights principles have no direct enforcement mechanism at law in the United States, its common ancestry with American constitutional law offers a unique lens with which to consider issues that implicate human dignity.<sup>32</sup>

Arrests on the basis of discriminatory biases toward trans women are, by definition, an arbitrary interference with the liberty and security of trans women. The UDHR states that “everyone has the right to liberty and security of person”<sup>33</sup> and further safeguards this right with the requirement under Article 9 that “[n]o one shall be subjected to arbitrary arrest, detention or exile.”<sup>34</sup> Indeed, the U.N. considers this requirement “of crucial importance, for most of the other rights enumerated in the [UDHR] cannot be enjoyed or exercised if a person is not free.”<sup>35</sup> Notably, the “arbitrariness” of a given arrest is not cured by the existence of a statute that permits such arrests; rather, those statutes were intended to more broadly safeguard against “elements of inappropriateness, injustice, [and] lack of predictability . . . .”<sup>36</sup>

In *Edwards v. California*, the Supreme Court seemed to echo the international principles articulated in the right to freedom of movement and liberty and security of person; however, it cited neither

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<sup>30</sup> *Id.*; see *The Foundation of International Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited Oct. 16, 2020).

<sup>31</sup> See *Women Who Shaped the Universal Declaration*, UNITED NATIONS, <https://www.un.org/en/observances/human-rights-day/women-who-shaped-the-universal-declaration> (last visited Oct. 16, 2020).

<sup>32</sup> *How Has the United States Handled Human Rights Issues in the Past & Today?*, ADVOC. HUM. RTS., [https://www.theadvocatesforhumanrights.org/human\\_rights\\_and\\_the\\_united\\_states#US%20Constitution%20and%20UDHR](https://www.theadvocatesforhumanrights.org/human_rights_and_the_united_states#US%20Constitution%20and%20UDHR) (last visited Oct. 16, 2020).

<sup>33</sup> UDHR, *supra* note 29, art. 3.

<sup>34</sup> *Id.* art. 9.

<sup>35</sup> UN DEP’T OF ECON. & SOC. AFFAIRS, STUDY OF THE RIGHT OF EVERYONE TO BE FREE FROM ARBITRARY ARREST, DETENTION AND EXILE, at 38, U.N. Doc. E/CN.4/826 (1962).

<sup>36</sup> Hum. Rts Comm., General Comment No. 35: Article 9 (Liberty and security of person), ¶ 12, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

principle directly.<sup>37</sup> In *Edwards*, the Supreme Court considered a challenge to a California statute that made it illegal to bring an “indigent person” into the state.<sup>38</sup> The Court concluded that the California statute is “not a valid exercise of the police power of California, [and] it imposes an unconstitutional burden upon interstate commerce.”<sup>39</sup> Importantly, the Court noted that it does “not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a ‘moral pestilence.’”<sup>40</sup>

Furthermore, restricting the movement of an individual on the basis of that person’s identity or status constitutes a violation of international human rights law. Under the UDHR, “[e]veryone has the right to freedom of movement and residence within the borders of each State.”<sup>41</sup> “To deny any one, not lawfully imprisoned, the right to travel the highways, to buy goods, to eat bread, to attend divine worship, and the like, simply because he or she happens, for the time being, to belong to an unfortunate class, is an unwarranted use of the police power.”<sup>42</sup>

The “right of free access” within and among the states was among the few fundamental rights that the Supreme Court originally identified as guaranteed by federal citizenship.<sup>43</sup> However, the arbitrary detention and arrest of trans women, which law enforcement *perceive* to be sex workers (a perception that is inextricably linked

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<sup>37</sup> See generally *Edwards v. California*, 314 U.S. 160 (1941).

<sup>38</sup> *Id.* at 171.

<sup>39</sup> *Id.* at 177.

<sup>40</sup> *Id.*; see also Robin Yeamans, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 788 (1968) (citing *Fenster v. Leary*, 229 N.E.2d 426, 430 (N.Y. 1967)) (highlighting that Court of Appeals of New York has held that “vagrancy laws ‘were never intended to be an may not be used as an administrative short cut to avoid the requirements of constitutional due process in the administration of criminal justice.’”).

<sup>41</sup> UDHR, *supra* note 29, art. 13.

<sup>42</sup> RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 152 (2016) (citation and internal quotation omitted). Additionally, the International Covenant on Civil and Political Rights emphasizes that “[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” International Covenant on Civil and Political Rights art. 12, ¶ 4, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>43</sup> See *Slaughter-House Cases*, 83 U.S. 36, 79–80 (1872).



to cultural stereotypes about trans women born from disinformation and animus), necessarily impinges on the rights of these women to navigate public spaces freely and without fear of unwarranted interference or arrest. Indeed, many trans women are stopped and harassed while commuting to and from home or otherwise engaging in the mundane daily minutia that most people take for granted.

#### CONCLUSION

Laws like section 240.37 of the New York penal code invite abuse. They empower law enforcement to detain and arrest women that they believe *look* like sex workers and leave those decisions to officers' imagination and discretion. Courts have readily accepted how a woman is dressed, to whom she is speaking, where she lives, and whether she had been previously arrested for prostitution as sufficient indicia to warrant arrest for intending to commit prostitution.<sup>44</sup> Nowhere in that analysis do courts require that law enforcement establish that a commercial transaction took place or was likely to take place. This underscores the fundamental inequality of LPP laws that, although facially neutral, express a particular standard of womanhood and impose criminal sanctions on those who deviate from that standard.

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<sup>44</sup> See generally *People v. McGinnis*, 42 Misc. 3d 183, 189–92 (N.Y. Crim. Ct. Oct. 15, 2013) (finding arrest of woman for loitering for purposes of prostitution because she was wearing tight pants and a pea coat in an area frequented by prostitutes was insufficient and warranted dismissal, and stating that evidence regarding location of arrest, prior criminal history, manner of dress, and interactions with men are sufficient to form probable cause in other circumstances).