



Legislative Affairs  
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## 2019 – 2020 Legislative Memorandum

**Subject: AN ACT to repeal section 240.37 of the penal law, relating to loitering for the purpose of engaging in a prostitution offense S.2253 (Hoylman) / A.654 (Paulin)**

**Position: SUPPORT**

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Talking to another person or simply being in a public place is not a crime. In fact, such conduct is protected by First Amendment guarantees of the rights to free speech and free association. When people try to get others' attention on the street at night, they may do so for many reasons: to ask for directions, hail a cab, get a light for a cigarette, promote an event, call out to a friend, do outreach for an organization, advertise a product, give out free condoms or safer sex information, proselytize a religion, campaign for a political candidate, find help with an emergency, or even make a romantic or sexual connection. Our state and federal constitutions protect it all.

However, since Penal Law § 240.37 was enacted in 1976, its enforcement has relied upon profiling and false arrests of cisgender and transgender women of color, as well as feminine gender nonconforming people of color.<sup>1</sup> This statute makes it a violation – and sometimes a crime<sup>2</sup> – for anyone appearing in public to repeatedly “beckon” to, stop, or attempt to stop passers-by; to attempt to engage them in conversation; or to signal to motor vehicles “for the purpose of prostitution,” “patronizing a person for prostitution,” or “promoting prostitution.”<sup>3</sup> Pursuant to this ambiguous language, arrests are made.

S.2253/A.654 would repeal New York’s archaic, unfairly-applied statute on loitering for the purpose of engaging in prostitution (LPP). **The New York Civil Liberties Union proudly supports this legislation and urges lawmakers to pass it promptly.**

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<sup>1</sup> See Compl. ¶ 3, *D.H. v. City of New York*, 309 F.Supp.3d 52 (S.D.N.Y. Jan. 9, 2018).

<sup>2</sup> The same conduct becomes a misdemeanor if a person has previously been convicted under the same section, or certain other sections of the penal code.

<sup>3</sup> N.Y. Pen. L. § 240.37. The ACLU publicly supports decriminalization of sex work nationwide. See Chase Strangio, *Since When Are Consensual Sexual Relationships a Threat to National Security?* (Sept. 1, 2015), <https://www.aclu.org/blog/lgbt-rights/lgbt-nondiscrimination-protections/when-are-consensual-sexual-relationships-threat>; K Shannon, Global Epidemiology of HIV Among Female Sex Workers: Influence of Structural Determinants (*Lancet*, doi: 10.1016/S0140-6736(14)60931-4, Jul. 22, 2014) (finding decriminalization of sex work would decrease spread of HIV by 33 to 46% among sex workers and clients over a decade). However, one need not support legalizing sex work to support this proposal; S.2253/A.654 would leave in place all other sections of the penal law addressing commercial sex trades.

Current LPP enforcement gives rise to serious problems. Crucially, police rely on, and courts too often accept, stereotyped notions of gender and race to determine who has a “purpose of engaging in prostitution.” To arrest someone under this statute, police must fundamentally discern whether people are trying to converse for any number of lawful and constitutionally protected purposes, or instead, for the purpose of trading sex. When they actually hear a conversation in which someone offers an exchange of sex for money, officers typically make an arrest under the “prostitution” statute, Penal Law § 230.00. 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.

This means that police overwhelmingly arrest people under § 240.37 simply for displaying a form of femininity that is not seen as “respectable.” Officers look for people wearing clothing they perceive as both feminine and immodest; for those they perceive as transgender or gender nonconforming; for those they perceive as lesbian, gay, or bisexual youth of color; and for those they perceive as women of color out late at night in the “wrong” neighborhood.<sup>4</sup>

The courts have done no better. For example, a court approved charges against a woman because the arresting officer said that she was wearing “tight black leather pants, shoes with chrome tipped stiletto heels, and a V-cut shirt that revealed the sides of her breasts.”<sup>5</sup> In another case, a court authorized an LPP arrest because the officer described the person arrested as a “male” wearing “a black skirt and a black bra.”<sup>6</sup> It is impossible to imagine, and in fact there is no record of, police charging someone under § 240.37 for being a male wearing running shorts and no shirt—a considerably more revealing outfit than a skirt and bra. And as legal scholar Andrea Ritchie explains, “Drive by the clubs on the city’s Lower East Side on any given night and you’ll see plenty of white women similarly attired, but arrest stats clearly demonstrate that they are not being policed in the same ways.”<sup>7</sup> Relatively recently, courts have also ruled that women signaling men rather than other women can and should be used as evidence of violating § 240.37.<sup>8</sup>

Such laws continue a long and ugly history of criminalizing transgender and gender nonconforming existence. According to Amnesty International, in 2004 an official at New York City’s 6<sup>th</sup> precinct said that the *only* people arrested for “prostitution-related” offenses in the 6<sup>th</sup> precinct were transgender.<sup>9</sup> It is well documented that NYPD engages in targeted sweeps of communities with large populations of

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<sup>4</sup> Audacia Ray & Emma Caterine, *Criminal, Victim, or Worker? The Effects of New York’s Human Trafficking Intervention Courts on Adults Charged with Prostitution-Related Offenses at 19-20* (Red Umbrella Project Oct. 1, 2014) <https://redumbrellaproject.org/wp-content/uploads/2017/12/HTR-interiorFINALOUTLINEDweb.pdf>.

<sup>5</sup> *People v. Farra S.*, 787 N.Y.S.2d 679 (N.Y. Crim. Ct. 2004).

<sup>6</sup> *People v. Koss*, 580 N.Y.S.2d 629, 630 (N.Y. Crim. Ct. 1992), citing *People v. Jones*, N.Y.L.J. Sept. 20, 1989, Col. 2, (N.Y. App. Term 1st Dept).

<sup>7</sup> Andrea Ritchie, *Invisible No More: Police Violence Against Black Women and Women of Color* at 150 (2017).

<sup>8</sup> *People v. Barker*, 987 N.Y.S.2d 790, 790 (N.Y. App. Term 2014).

<sup>9</sup> Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* 22 (2005).

transgender New Yorkers.<sup>10</sup> A 2012 report quotes a Latina transgender woman in Queens who stated, “I was just buying tacos. They grabbed me and handcuffed me. They found condoms in my bra and said I was doing sex work. After handcuffing me they asked me to kneel down and they took my wig off. They arrested me and took me away.”<sup>11</sup>

This targeting has an extreme demoralizing effect on transgender women of color, instilling fear that they could be picked up for anything or nothing, at any time. Viviana Hernandez, a Latina transgender woman and community leader, explained in 2005 that “they used to arrest transgender women for wearing women’s clothing; now they arrest transgender women for loitering with intent to solicit.”<sup>12</sup> Some transgender women of color report that they have become too afraid to call the police, apply for jobs, or even walk outside their homes.

Unfortunately, LPP enforcement doesn’t just unfairly place vulnerable New Yorkers under constant threat of being policed as sex workers – it also increases the likelihood of violence and harm for others who are, in fact, engaged in sex work.<sup>13</sup> Where conversation on the street is itself deemed suspicious, sex workers must rush negotiations with prospective clients to avoid arrest.<sup>14</sup> This reduces sex workers’ ability to screen out violent clients and negotiate for safer sexual contact, and it makes them more likely to rely on potentially exploitative intermediaries, which increases their vulnerability to trafficking. Similarly, LPP enforcement even discourages many service organizations from doing outreach to those who may be trafficked, for fear that their own workers will come under suspicion. Taken together, such concerns suggest that LPP enforcement is itself an obstacle to addressing human trafficking.

It is long past time for New York lawmakers to repeal Penal Law § 240.37. This outdated and over-reaching law criminalizes conduct that the average New Yorker engages in several times per week. It unfairly targets women of color, especially transgender and gender nonconforming women. It also undermines public health, endangers sex workers, and interferes with efforts to end human trafficking.

**The NYCLU urges lawmakers to pass S.2253/A.654 before finishing their work in Albany this session.**

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<sup>10</sup> See Compl., *supra* note 1, at ¶ 69.

<sup>11</sup> Make the Road New York, *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights 4* (2012).

<sup>12</sup> Stonewalled, *supra* note 9, at 20.

<sup>13</sup> See Kate Shannon et al., *Social and Structural Violence and Power Relations in Mitigating HIV risk of Drug-Using Women in Survival Sex Work*, 66 Soc. Sci. & Med. 4 (Feb. 2008).

<sup>14</sup> See Kate Shannon et al., *Structural and Environmental Barriers to Condom Use Negotiation with Clients Among Female Sex Workers: Implications for HIV-Prevention Strategies and Policy*, 99 Am. J. Pub. Health 4 (April 2009).