

The Legal Aid Society and Cleary Gottlieb Challenge the Constitutionality of New York’s Loitering for Prostitution Law: *Demand an End to NYPD’s Arbitrary and Discriminatory Enforcement of the Law Against Women of Color*

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September 30, 2016, New York, NY – Today, The Legal Aid Society of New York and Cleary Gottlieb Steen & Hamilton LLP is filing a civil rights class action against the City of New York and certain named officers of the New York City Police Department (NYPD) on behalf of women of color, many of whom are transgender, who have been wrongly arrested for innocent conduct under New York Penal Law Section 240.37. The plaintiffs challenge Section 240.37, loitering for the purpose of prostitution, because it is unconstitutional on its face and also because it is unlawfully enforced by NYPD officers who target women for arrest based on race, gender, ethnicity, gender identity, and/or appearance.

“When you look at who is arrested under 240.37, and the pattern since the law was enacted four decades ago, a clear picture of discrimination emerges,” said Tina Luongo, Attorney in Charge of the Criminal Defense Practice of The Legal Aid Society. “The statute must be struck down because it allows this injustice to go on.” According to the complaint filed in the Southern District of New York, data show that 85% of the individuals arrested under Section 240.37 are Black or Latina. Between 2012 and 2015, five precincts in New York City accounted for nearly 70% of all citywide Section 240.37 arrests. These precincts (Bushwick, Brooklyn; Belmont/Fordham Heights, Bronx; East New York, Brooklyn; Hunts Point, Bronx; and Brownsville, Brooklyn) are all in neighborhoods where the majority of residents are people of color.

Under Section 240.37, a woman can be improperly arrested and detained simply because an officer takes issue with her clothing or appearance and decides that her purpose is to engage in prostitution. The Legal Aid Society has represented women assumed to be loitering for prostitution because they were wearing a “short dress,” “a skirt and high heels,” “tight black pants,” or “a black dress.” An outfit considered appropriate elsewhere becomes the basis for an arrest when worn by a woman of color on Pennsylvania Avenue in Brooklyn or Jerome Avenue in the Bronx. As one plaintiff explains, NYPD practices make women like her “fearful” of arrest based on “what I have on.”

Kate Mogulescu, a Supervising Attorney in the Criminal Defense Practice at The Legal Aid Society has represented hundreds of women charged with loitering for prostitution over the last several years. “These arrests lack oversight and escape scrutiny,” Mogulescu explained. “It is not just defenders who take issue with the quality of arrests. Judges and prosecutors recognize that many arrests under Section 240.37 are unlawful and absurd. Yet, the practice continues and its crushing weight falls squarely on our clients – an already marginalized group who then suffer the permanent consequences of involvement in the criminal legal system and the stigma of a prostitution-related arrest.”

Despite claims that it has reformed its relationship with the transgender community, the NYPD utilizes Section 240.37’s unconstitutional provisions to engage in “sweeps” aimed at arresting transgender women of color in public places where they attempt to gather and socialize as a community and avoid the violence, hostility and discrimination directed at them in other parts of the City. Police arrest transgender

women for standing outside, speaking to one another, or walking from a subway or grocery store back to their house, and have expressly warned plaintiffs that “girls like them” would be arrested if they were merely seen outside after midnight. American Civil Liberties Union Staff Attorney Chase Strangio offered, “laws like Section 240.37 give too much discretion to police officers, encouraging biased policing against women of color, particularly transgender women of color, people living in poverty, and other members of the LGBT community.”

One plaintiff explained that this “unjust law has affected me, my sisters, friends and family. This lawsuit is important because it will change something that is disabling my community, putting us at even more risk than what we already have to endure and face on a day to day basis.” Another plaintiff noted that police profiling of transgender women for prostitution offenses is “a problem that persists around the world.” Seeing the constitutional challenge to Section 240.37 as a way to stop this discrimination, she added, “let’s start at Jerome Avenue in the Bronx. One voice is better than none.”

Despite widespread criticism of its stop and frisk practices, the NYPD allows its officers to use Section 240.37 to harass and repeatedly arrest women whom they have previously arrested for a prostitution offense, even when they do not observe the women engaging in any criminal behavior. Criminal court judges take issue with this widespread practice, emphasizing that when police arrest a woman and charge her with loitering for prostitution simply because she has previously been arrested for prostitution, it amounts to “emblazon[ing]” a “scarlet letter” upon her and thus violating core principles of a “free society.” For example, in one case, a woman was leaving a restaurant in a busy commercial area when officers who knew her from a previous arrest called her over to them by her name and arrested her without cause. She described how the NYPD uses Section 240.37 to unfairly target women: “They see women who they know that have a history of prostitution and they profile us. I should be able to walk wherever I want.” A plaintiff repeatedly arrested merely because of her prostitution record now feels as though she is not able to go outside in Brooklyn. “My record is bad, but it shouldn’t be that any time they see me it’s ‘let’s take a field trip to the precinct.’”

“Section 240.37 poses a serious threat to the civil and constitutional rights of women of color, who are too often unfairly targeted by the police, and the law fails to provide basic safeguards against abuses of discretion by law enforcement,” said Rishi Zutshi, Partner at Cleary Gottlieb Steen & Hamilton LLP. Although society has firmly rejected many of the flawed assumptions about gender, gender identity, sexuality, and appearance that prevailed 40 years ago, the NYPD continues to rely on these outdated and discriminatory notions to justify arrests under Section 240.37 without probable cause. The lawsuit filed today seeks to put an end to these unjust practices and to this unconstitutional law.

The Legal Aid Society is a private, not-for-profit legal services organization, the oldest and largest in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. It is dedicated to one simple but powerful belief: that no New Yorker should be denied access to justice because of poverty.

Cleary Gottlieb Steen & Hamilton LLP employs more than 1,200 lawyers in its 16 offices around the world. Since 1946 its lawyers and staff have worked across practices, industries, jurisdictions and continents to provide clients with simple, actionable approaches to their most complex legal and business challenges, whether domestic or international. Cleary lawyers and staff work for the benefit of those in need, dedicating a substantial amount of time and resources to pro bono legal work and other community activities.

Here's what our allies have to say about the significance of this litigation:

The Center for Constitutional Rights (CCR) applauds the Legal Aid Society and Cleary Gottlieb for taking this much-needed step to challenge Section 240.37 and the unconstitutional and discriminatory way the NYPD has enforced it here in New York City. CCR has previously documented the impact of law enforcement policies and practices targeting women of color and LGBTQ New Yorkers, including those who had been targeted by the police for prostitution-related arrests based merely on their perceived or actual gender presentation. The chilling effect of this targeting has caused women to fear leaving their homes and adopt protective survival measures, such as changing their daily walking routes, and how they dress, and how they present themselves. Others spoke to us about fear of further reprisal just for having condoms. This critical lawsuit, along with contemplated measures for reforming the NYPD's stop-and-frisk program and the legislative ban on bias-based profiling by the NYPD, are complementary and critical steps to ensure all New Yorkers are free from targeting and discrimination at the hands of the police.

Vince Warren, Executive Director, Center for Constitutional Rights

The unconstitutional and discriminatory policing by NYPD that targets some New Yorkers in public space continues despite rhetorical flourish about neighborhood policing. We need substantive cultural and policy changes that end this discriminatory policing through accountability, and thus far the NYPD continues to resist community demands for such changes. This leaves communities to seek other means, like the courts (as was also done to fight stop-and-frisk abuses). We applaud this legal effort to curb the abusive policing with a disproportionate impact on women and transgender New Yorkers of color that undermines safety.

Monifa Bandele, Communities United for Police Reform

Human Rights Watch applauds this legal challenge to a law that is so broadly drawn that it undermines the human right to liberty and security of the person and to be free from arbitrary arrest and detention. Human Rights Watch has documented the profiling of transgender women of color under this law as they are engaging in routine activities such as walking home, returning from school, and waiting for the bus, and consistently has called for its repeal.

Megan McLemore, Senior Heath Researcher, Human Rights Watch

These loitering for prostitution laws expose already vulnerable communities to more interactions with police officers, and that can be very dangerous for LGBT people. Thousands of LGBT people and people living with HIV responded to Lambda Legal's national community survey, Protected and Served?, and 25 percent of respondents who had recent police contact reported misconduct or harassment, such as being accused of an offense they did not commit, verbal mistreatment, sexual harassment, or physical assault--including sexual assault. These abuses contribute to mistrust, doubt and fear of the police in our communities--and ultimately make our city less safe.

Richard Saenz, Criminal Justice and Police Misconduct Program Strategist, Lambda Legal

As a Transgender woman, community organizer, and Queens resident, this class action lawsuit is very important to me because I have personally been a target of the police as are so many transgender women in Jackson Heights. I myself have been profiled, stopped and questioned by the police based on nothing more than my perceived gender and manner of dress. I know that my story is the story of so many others not only in Queens but across New York City. Make the Road New York stands with the women in this case and we support this fight!

Como mujer Transgénero, organizadora comunitaria, y residente de Queens, esta demanda es muy importante para mí porque yo personalmente he sido blanco de la policía como también han sido muchas mujeres Transgénero en Jackson Heights. Yo he sido perfilada, acosada por policías en la calle, y interrogada por la policía basado sólo en mi género percibido y mi manera de vestir. Yo sé que mi historia es la historia de muchos otrxs no solo en Queens pero por toda la ciudad de Nueva York. Se Hace Camino Nueva York apoya a las mujeres en este caso y apoyamos esta lucha!

Bianey Garcia, Make the Road NY

In our ongoing work to end discriminatory policing and criminalization of LGBTQ and HIV-affected people in New York City, we see again and again that transgender women of color are disproportionately profiled, stopped, and harassed by police, while simply going about their daily lives. This lawsuit is an important step toward righting a great wrong, and ending the targeting of women for arrest based on race, gender, ethnicity, gender identity, or appearance.

Beverly Tillery, Executive Director, New York City Anti-Violence Project

New York's law against loitering for the purposes of prostitution has been badly misused to target women of color, especially transgender women of color, often for completely legal activity. Any public safety statute that invites police harassment of vulnerable New Yorkers should be taken off the books.

Donna Lieberman, Executive Director, New York Civil Liberties Union

Each day Sanctuary for Families sees firsthand the harms endured by people exploited in prostitution-- the long term trauma and criminalization, which often has dire consequences for future employment and education. The implementation of this law disproportionately targets this uniquely vulnerable population, who are in need of services and opportunity, not criminal records and jail time.

Hon. Judy Harris Kluger, Executive Director, Sanctuary for Families

We at the Sylvia Rivera Law Project, both our members and staff, are incredibly pleased to see this lawsuit be filed. There is hardly a transgender woman of color who comes through our doors who has not been stopped by the police and questioned about her anatomy, who has not been humiliated in front of her friends and neighbors, who has not had her life placed on hold while she has to deal with the fall-out from these traumatizing practices. The long-term effects of these arrests on women who are immigrants, who are parenting or care-taking, or even simply looking for employment are horrendous. These arrests can keep someone from becoming a US citizen simply because the NYPD sexually objectifies all transgender women. Members have shared with us that they are afraid to leave their homes and that they take indirect and longer routes home to avoid being stopped simply for existing. It's time that the NYPD answers for this terrorizing behavior that has our communities living in fear.

Mik Kinkead, Director Prison Justice Project, Sylvia Rivera Law Project

At STEPS to End Family Violence, we provide clinical support to survivors of complex trauma who have been arrested. With each new arrest or encounter with police we see a marked regression in the healing of their trauma symptoms. This disrupted healing is more lasting when the police encounter is experienced as arbitrary and discriminatory. The Loitering for Prostitution law compromises the mental health and well-being of the people it targets.

**Anne Patterson, Division Director, STEPS to End Family Violence,
A division of Edwin Gould Services for Children and Families**

We applaud the work of The Legal Aid Society and Cleary Gottlieb Steen & Hamilton. The law is not only unconstitutional, but it systematically criminalizes young LGBT women of color just as they are beginning to learn who they are and how to authentically express themselves.

Laurie Parise, Esq. | Executive Director, Youth Represent