

**Spring 2018**  
**Course Reader – Volume 3**  
**Gender Justice – WMST GU4506**  
**Professor Katherine Franke**



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NEW YORK

# The NYPD Arrests Women for Who They Are and Where They Go — Now They're Fighting Back

by MELISSA GIRA GRANT  
NOVEMBER 22, 2016



**Sarah Marchando was arrested seven times for loitering. "I can't get stable if every time I turn around I am in jail again."**  
CELESTE SLOWAN

**When two officers of the New York Police Department came for her, Sarah Marchando was on a moving bus.**

It was May 7, 2015, around 7:30 in the morning. Marchando, who was 27 at the time, had just boarded the B6 in East New York after seeing her boyfriend. He watched her get on the bus. She swiped her MetroCard and took her seat with the morning commuters. "Then, five minutes later, I get a phone call," Marchando told the *Voice*. It was her boyfriend, "telling me, 'You know you have got a detective car behind the bus?'"

Moments later, "they cut the bus off," Marchando says. "It wasn't like the bus was at a stop." Two officers in plainclothes rushed on. They wouldn't tell her why they were there when she asked, according to a recent lawsuit detailing her arrest. When Marchando didn't immediately go with them, Officer Joseph Nicosia grabbed her and pulled her down the stairs. She tried to stop him from grabbing her arm, the suit says, and one of the officers put her in a chokehold. Six officers ended up involved in the scene. Officer Michael Doyle, the suit states, remarked to the others, "She's back," and "we got her."

"It was just a complete struggle," Marchando said. Cops had wrestled her to the ground. Passersby recorded her arrest as she told police she couldn't breathe.





hospital because I can't breathe and I am throwing up on top of that and I am still sitting in the cell with handcuffs on. I sat in the cell for two and a half hours with handcuffs on before they went and found a female officer." The arrest left her with a sprained wrist, she said, and nerve damage in her right arm.

Marchando was charged with violating a vaguely worded New York law prohibiting "Loitering for the Purpose of Engaging in a Prostitution Offense," a misdemeanor she had been arrested for seven times between 2013 and 2015 in that same precinct. In one loitering case in 2012, she served 45 days on Rikers Island.

"It has been to a point where I have come home from Rikers Island and caught a case less than two days later," she said. "I felt like I was being watched."

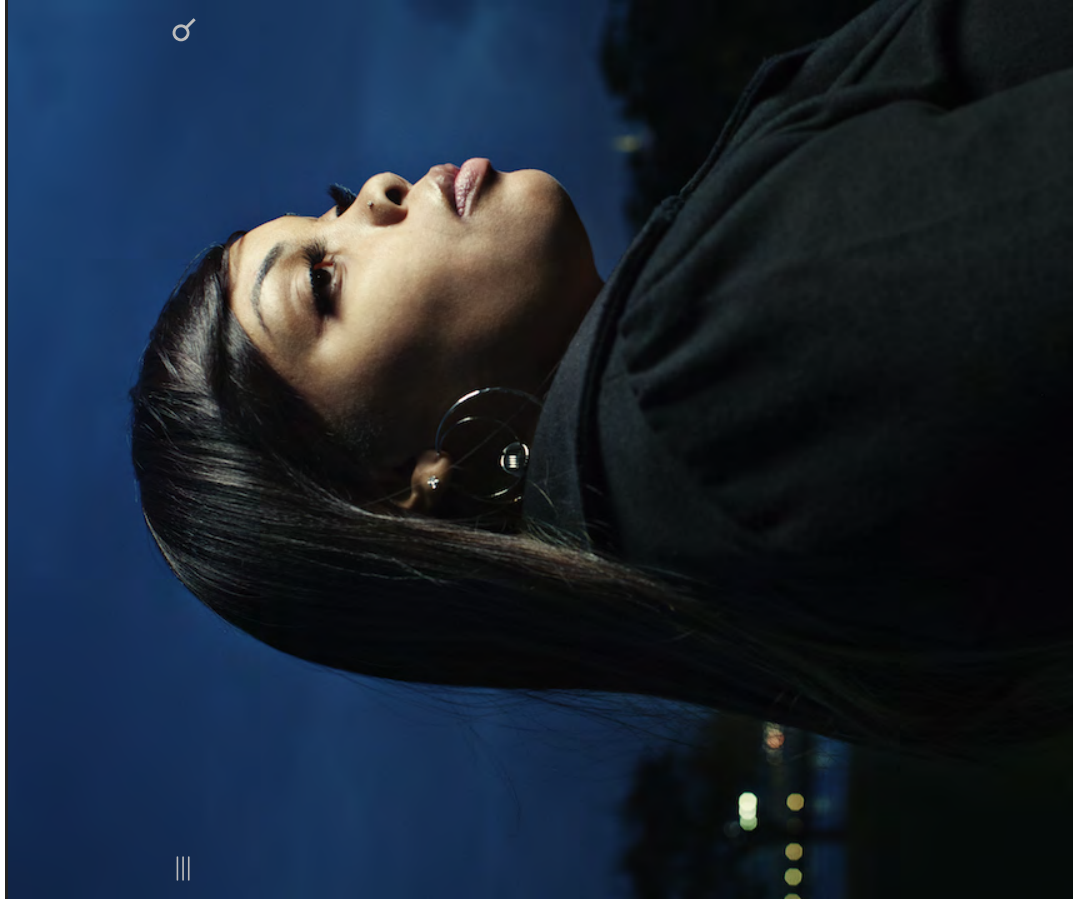
Sarah Marchando had lived in a few places in the 75th. For a short time, she was in hotels around an area police told her — after an arrest — was "the Combat Zone." That's the same nickname the police in Cambridge, Massachusetts, where she grew up, used for the old red-light area in Downtown Boston. "Then I moved to Rochester, started messing with the bad boys. Started getting in trouble." She said Massachusetts was boring, though, and so she came to New York. But now she's had to leave Brooklyn, too.

"It is enough for me to know this is not a safe situation. This is not an OK situation," Marchando said. "I can't continue to be intimidated to come outside, to know that even at seven o'clock in the morning, I am still a target and a priority."

These targeted and repeated arrests are part of a much larger pattern within the NYPD. From 2012 through 2015, nearly 1,500 individuals were arrested in New York City and charged with loitering for the purposes of prostitution. The vast majority are women. Such arrests are not the result of stings, in which undercover officers attempt to solicit sex for money. Neither are they the result of investigations that produce evidence — emails, text messages, online ads — that the women had intended to sell sex. With a loitering arrest, a woman's crime need only exist in the arresting officer's head.

Whether or not she was engaging in prostitution in that moment, or in the past, Marchando still has constitutional rights. So she, along with seven other plaintiffs backed by the Legal Aid Society of New York (which has represented them in loitering cases), filed a class-action civil rights suit this past September, challenging the constitutionality of New York's law on loitering for the purposes of prostitution. Enforcement of the statute, they state, is "based solely on a police officer's subjective determination that the activity was 'for the purpose' of prostitution." That is, if police believe a woman's "purpose" is to sell sex, they will arrest her.

That's because she was. Officers in the 75th Precinct knew Sarah Marchando, who is Latina and cisgender, from prior arrests. According to a sworn court complaint, Officer Kelly Quinn said police had observed her for forty minutes that morning before they arrested her, and claimed they saw her "beckon to multiple vehicles passing by with male drivers," "approach a vehicle," and "engage in conversation with a male inside of said vehicle." This was all supposed to be evidence of her "purpose" to commit a prostitution offense. Marchando and her attorneys contest this. She was waiting for a



“This is a law that is four decades old,” said Kate Mogulescu, a supervising attorney in the Legal Aid Society’s Criminal Defense Practice, adding that enforcement is “arbitrary and targeted and abusive.” Asked about its enforcement of the loitering statute, the NYPD referred the *Voice* to the Law Department, which is defending against the Legal Aid suit. “We are not discussing any aspect of this matter while litigation is pending,” Law Department spokesman Nick Paolucci said.

Community and legal advocates have likened the ways police enforce laws against loitering for the purposes of prostitution to stop-and-frisk. But the consequences under the loitering law are steeper. Under stop-and-frisk, Mogulescu said, “many of the police interactions did not lead to an arrest. So although harmful, and a violation of the Constitution and the law, people weren’t being swept, necessarily, into the criminal legal system.

“But with the loitering law,” she continued, “we have arrests. And we have people who are marked then in the criminal legal system.” Overwhelmingly, those people are women of color, cisgender and transgender alike.



Anti-loitering policing is highly concentrated in five precincts, according to arrest data from Legal Aid and the New York State Division of Criminal Justice Services’ arrest statistics. Between 2012 and 2015, the majority of the arrests — 68.5 percent — were made in Bushwick, Belmont/Fordham Heights, East New York, Hunts Point, and Brownsville, neighborhoods where residents are predominantly people of color. In a Brooklyn court where prostitution cases end up, 94 percent of the defendants facing charges of loitering for the purposes of prostitution were black, according to a court monitoring project conducted by the Red Umbrella Project in 2013 and 2014. Overall, according to the State Division of Criminal Justice Services, 85 percent of those arrested for loitering for prostitution between 2012 and 2015 were black or Latina.

Police say these neighborhoods are “prostitution prone.” Mogulescu believes that designation is “a self-fulfilling cycle. They make an arrest in a place, therefore that place becomes ‘prostitution prone’ — and they can make more arrests in that place, because they have already identified it as prostitution-prone.” Loitering arrests don’t reveal the places sex work happens in the city, only the places where women are most likely to be arrested, whether they are engaged in sex work or not.

Police also cite the women’s clothing as evidence of their “purpose” to engage in prostitution: Is it “revealing” or “provocative” clothing? How tight are their leggings? Can you see their cleavage? Officers document this on preprinted supporting depositions, which also ask: How many people was a suspect “engaged in conversation” with? How much currency did she have at the time of arrest? How many condoms? On sworn depositions provided to the *Voice* by Legal Aid, officers itemized the following attire as evidence:



women do not often fight these charges. Of the close to 1,300 loitering cases between 2012 and 2015, according to Legal Aid, “nearly 400 of the arrests did not lead to convictions.” This could mean charges were never filed, or a case was dismissed, or the accused was acquitted. But, as Sarah Marchando and others point out, even if their record is sealed, police do not expunge from their memory the face of a woman they have previously arrested. As a result, they say, they are unable to go out in public without fear of another arrest.

Which is why the Legal Aid suit contends that the city of New York “chooses to enforce” the loitering law “in an unconstitutional manner by using it to police expressions of gender identity and sexuality based on outdated and paternalistic notions of what clothing NYPD officers deem ‘revealing’ or ‘provocative,’ with a disproportionate impact on women of color.”

“When you have factors like an article of clothing, or the fact that you are one gender and you are talking to people of another gender,” Mogulescu said, “you have to expand your view and ask, where is this happening that’s *not* being policed? And our answer with the loitering case is, *everywhere*, except these places when the police decide these are the arrests they are going to make.”

PO Telesca, September 14, 2016, said the woman he arrested was wearing “tight black leggings”;

Lieutenant Dave Sieve, March 10, 2016, said a woman he arrested was wearing a “pink + blue sweater hoodie”;

PO Figaro said on August 23, 2015, he arrested a woman wearing “mini dress, bra strap showing”;

and PO Sieger, in another August 2015 arrest, said the woman was wearing “tight jeans and tight tank showing cleavage [*sic*].”





**Tiffany Grissom first saw jail for prostitution arrests more than a decade ago in the West Village.** “That was the beginning stages of the cleanup,” she told the *Vice* in October. Her long dark hair was pulled back, her smooth leather purse on her lap. We were in the Lower Manhattan offices of Legal Aid, not far from where the piers on the city’s West Side once stood.

“It was still pretty rough out there. There was no Gansevoort there,” Grissom added dryly, referring to the luxury hotel that opened in 2004. As she was growing up in the Village as a young, transgender black woman, the neighborhood she hung out and worked in gentrified around her. “Half the stuff that was out there when I was out there is no longer there. The pizza shops are gone; the sex shops are gone. It is all gone. The bars are gone and going. If they are not gone yet, they are going.”

In those days in the Village, Grissom said, it was different: You would make enough money that sitting in jail for a night wasn’t the worst thing. “Initially, it was routine. It was kind of like paying your dues.” She would plead guilty to the prostitution or loitering charges, get time served or community service, go home, and be back out. “I was just like, ‘Oh, in jail again,’” she added with a sigh. “I had a girl who got arrested every single Friday. Every single Friday! It was literally like we knew them by name, they knew us by

Bronx would never be my ideal choice of places to move to. It was just convenient. Then I kind of got stuck in the Bronx.” Her boyfriend was there, she said, pausing before going on a highlight-reel recollection of those times. “Living stuff started going up/down. All this ridiculousness.”

Her record from the Village remained with her. But between Fordham and Kingsbridge roads, for about a three- or four-block radius, she said, she could go out, maybe pick someone up, see what happened, make some money. “When you go to the area,” she said, “it is kind of like the Village outside of the Village.

“It is like you go out there and you don’t have to be closeted,” she continued. “The girls that are trans don’t have to live their closeted trans life. ...In those places, you can be free. ... You don’t have to bite your tongue.”

Grissom added, “The men that come there...they appreciate trans women. ...Sometimes they have money, sometimes they don’t have money.” She wouldn’t always go out to work; it could be just to hang out, and some of the people she was hanging out with could be working, too.

For a while, Grissom felt like police left her alone, or maybe they just didn’t know her



arrest somebody.”

One night in October 2013, she was leaving the Twin Donut on Fordham Road, “where everybody goes...one of the only places you can just go in and sit down when you don’t have money.” She walked for a while, speaking with a man along the way. After about 30 or 45 minutes, they went their separate ways. It was then that an unmarked police car pulled up alongside her. Officers Bryan Pocalyko and Christopher Savarese demanded she stop and placed her under arrest.

Only after Grissom was arrested and loaded into a police van with another woman who had been arrested that night did she learn that she was charged with loitering for the purpose of prostitution, though she says that at no time had she tried to solicit money for sex.

According to the lawsuit, when Grissom was brought to the 52nd Precinct, Officer Pocalyko refused to believe she was a woman.

“[Officer] Pocalyko unlawfully ordered Ms. Grissom to be strip-searched by a female police officer even though she was not suspected of possessing any drugs or contraband,” the suit reads. “The female officer took Ms. Grissom into a bathroom and ordered her to lift her shirt, shake out her bra, and pull her shorts down. This search was for the purpose of confirming whether or not she was female, as her identification indicated.”

Later in court, the Legal Aid suit says, one of the officers “alleged that Ms. Grissom’s purpose was prostitution because she was observed at a location ‘frequented by people engaged in prostitution’ and was wearing ‘tight short shorts [and a] tight tank top.’”



If Tiffany Grissom had been doing the same thing, in the same outfit, but in, say, Times Square, would she have been arrested? It depends: In what decade?

New York's law criminalizing loitering for the purpose of engaging in a prostitution offense only dates to 1976. Before the law was passed, the NYPD would use the existing, general anti-loitering laws to target women it wanted to keep off the streets. In one infamous six-month wave of sweeps in 1967 and 1968, police arrested more than three thousand women who either were or were profiled as sex workers, mostly centering on Times Square, driven by panic about street crime. Police said they would charge the women with loitering or disorderly conduct offenses because it was easier than trying to prove they were engaged in prostitution. The Legal Aid Society along with the New York Civil Liberties Union intervened to have some of the loitering cases dismissed.

This crackdown came as the NYPD began to pressure the state to add loitering for the purposes of prostitution to the penal code. "The actions of these individuals have always had a deleterious effect on the business and social life of the community," wrote the department in a 1967 memo. But at the time, civil rights attorneys were testing loitering statutes in the courts. In 1972, the U.S. Supreme Court ruled that a law prohibiting loitering, "vagrancy," and "nightwalking" was unconstitutionally vague. It was after all this that loitering for the purpose of prostitution was added to the New York State penal code. To this day, the NYPD continues to make a few thousand prostitution arrests each

"manifesting prostitution" after accepting a ride one night from a man who turned out to be an undercover cop, she launched a national campaign against the law. She and her supporters described it as making a crime out of "walking while trans" — very similar to how women describe the NYPD's enforcement of the loitering law. Jones's conviction was overturned on appeal, but the law in Phoenix still stands.



ILLUSTRATION BY WE BUY YOUR KIDS

Eight days after she was pulled off the bus in East New York, Sarah Marchando was



Marchando said she would have to plan ahead about when to go out just to try to avoid arrest. "You have to keep in the back of your mind that, 'OK, what is the day?' Because if it is that type of day, like on Friday nights or Saturday mornings, they are doing prostitution sweeps."

According to Tiffany Grissom, "The only thing that you can do to avoid it is just not go outside."

But she would have to leave the house for court appearances, and a lot of them. At one





was like Tuesdays and Wednesdays it would be Brooklyn. Then, get up on Wednesdays and Thursdays and go to the Bronx. It would be excessive.”

“We were always in court,” longtime community advocate Lorena Borjas told me. She’s the founder of the Lorena Borjas Community Fund, a legal fund for transgender New Yorkers in immigrant communities, which has offered assistance to trans women in Queens targeted in loitering arrests. “I can say that four years ago we were having arrests about every fourteen days,” she recalled. “They were specifically focused on the trans community that crosses the Jackson Heights area. Especially with all of the trans girls that this was happening to who were undocumented, they were, of course, running the risk of being deported. When people had to appear in court, they would say, ‘Well, I saw you out here last Friday, so now this Friday I am going to arrest you.’”

Borjas explains that what makes Jackson Heights different from East New York or the Bronx is that there, the women most likely to be targeted in anti-loitering policing, members of the Latina trans community, were visible and organized. Borjas did street outreach, sharing “Know Your Rights” cards so they knew how to protect themselves during police encounters. Groups like Make the Road New York have documented the policing of Jackson Heights’ LGBTQ Latinx community, highlighting the use of anti-loitering laws to sweep trans Latinas off the street.

“The police were saying a while ago that they wanted to change the face of Jackson Heights,” Borjas said. “They wanted to stop drug sales, they wanted to stop people from selling tacos and food in public.” All this came at the same time as crackdowns on trans women. “They were saying, ‘The face of Jackson Heights is something we are going to change.’ According to them, the mentality was that they were going to do this by arresting the whole world.”



As in the West Village when Tiffany Grissom worked and hung out there, police used anti-loitering laws to “change the face” of neighborhoods. “This kind of policing is very much tied into the gentrification and sort of economic shift in certain areas,” said Legal Aid’s Mogulescu. “The call for a kind of ‘cleanup’ of the streets that accompanies that — this is not the only law that’s used to do that, but it’s a pretty striking example. And because the law allows for such abuse — it’s part of the law itself — there’s no check on that. So it becomes a very useful tool for getting people off the street.” Mogulescu’s voice softened. “And we have to think about who those people are.”

**After all her arrests, Sarah Marchando ended up leaving Brooklyn.** She told me she’s still trying to keep a steady place to live, still trying to find work. “It wasn’t like I could just say, ‘Hey, let me go get a job,’ because I am not stable. I can’t get stable if every time I turn around I am in jail again.”

Tiffany Grissom left the Bronx, too. She estimates that of all her arrests for loitering, about 80 percent of the time, she wasn’t even out doing sex work. “Whether you are ‘hoing or not ‘hoing,’” she said, “even if you look like you might be trans, you are going to jail.”

What she remembers from all the arrests is, “They always give you this whole speech of ‘high prostitution-prone area.’” After a while, it was like police thought that was just anywhere she was. “It is a stigma that comes with being trans. You are automatically a



In Jackson Heights, the loitering crackdowns on the community, in some ways, made it all the more determined, said Borjas. “Two years ago we started to do protests and to become more visible so that we could tell the police and the neighborhood, ‘We are here. We are not going anywhere. We are your neighbors and your friends. We are your clients. We are the ones that come to buy a cup of coffee in the morning. We go to the supermarket and we, too, need protection, just like you.’”

Tiffany Grissom didn't have that. After she got arrested twice in the same week, she said, police scolded her. “They were like, ‘You are just not getting it through your head.’ It is not that I am not getting it through my head; it is, regardless of however many times I get arrested, I still need to eat. This is my livelihood.” So she kept working. As a result of one prostitution arrest, she ended up at Rikers. “It was the day before Thanksgiving that I got out. I had on a minidress. It was ridiculous. A minidress, no money....When I had gotten there, I had just shut down. I didn't pee; I didn't eat. I didn't do anything for four days.”

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After years of this, both women told me, they were done with pleading guilty. They were done with Rikers. They signed on to be plaintiffs in the case challenging the law itself.

“It took a lot to get here,” Marchando told me. “A lot of cases.” For one, she needed support to fight her charges. But now, as part of the legal challenge, if they are successful, this could mean the end of so many women ending up in the system in the first place. “I was just going to jail and there were no questions asked,” Marchando said. “It needs to change. It is a targeting thing that has to stop, and if nobody says nothing, it is not going to be dealt with.”

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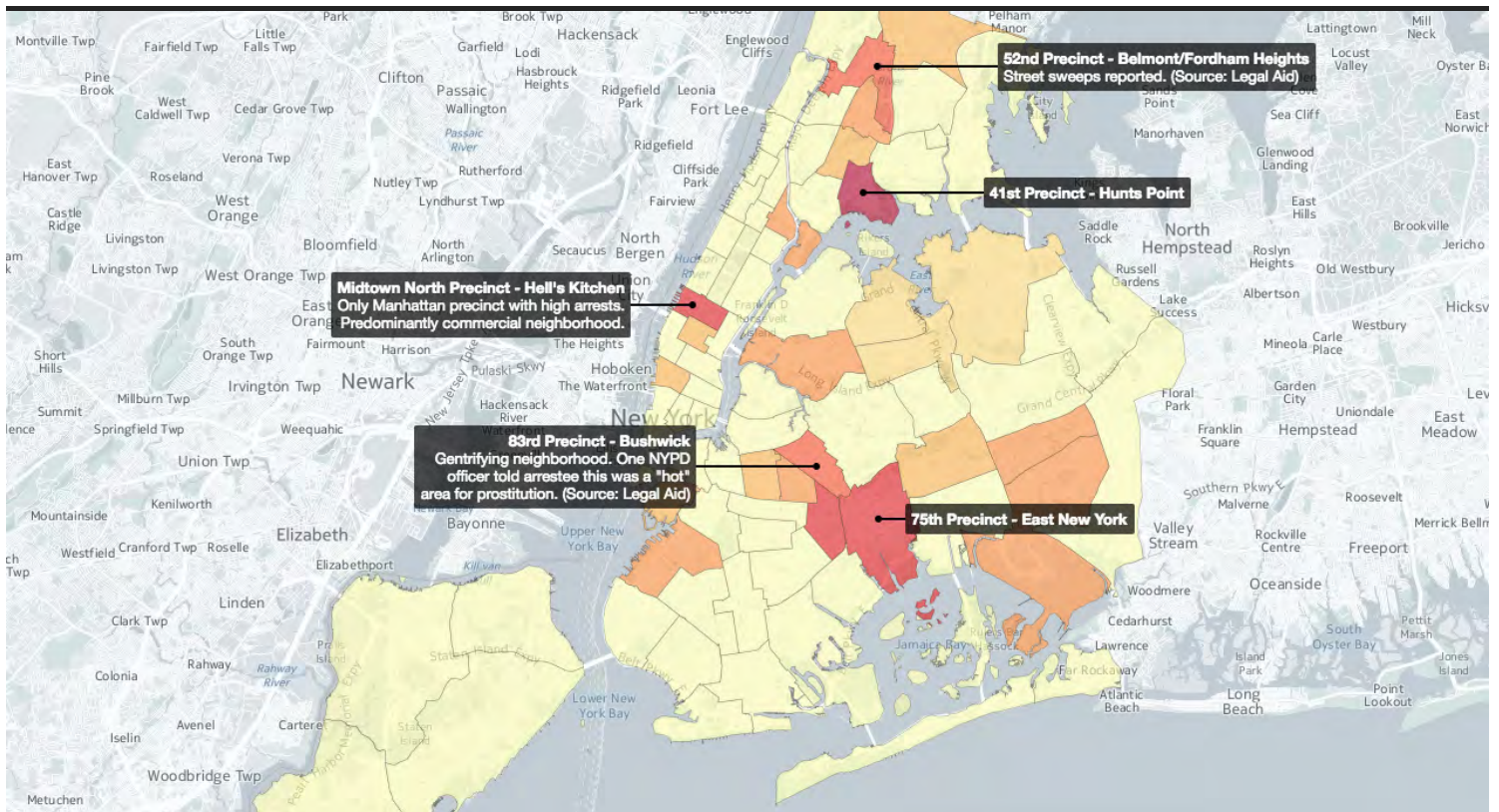
NEW YORK

# Interactive Map: See Where the NYPD Arrests Women Who Are Black, Latina, Trans, and/or Wearing Jeans

by MELISSA GIRA GRANT

NOVEMBER 22, 2016



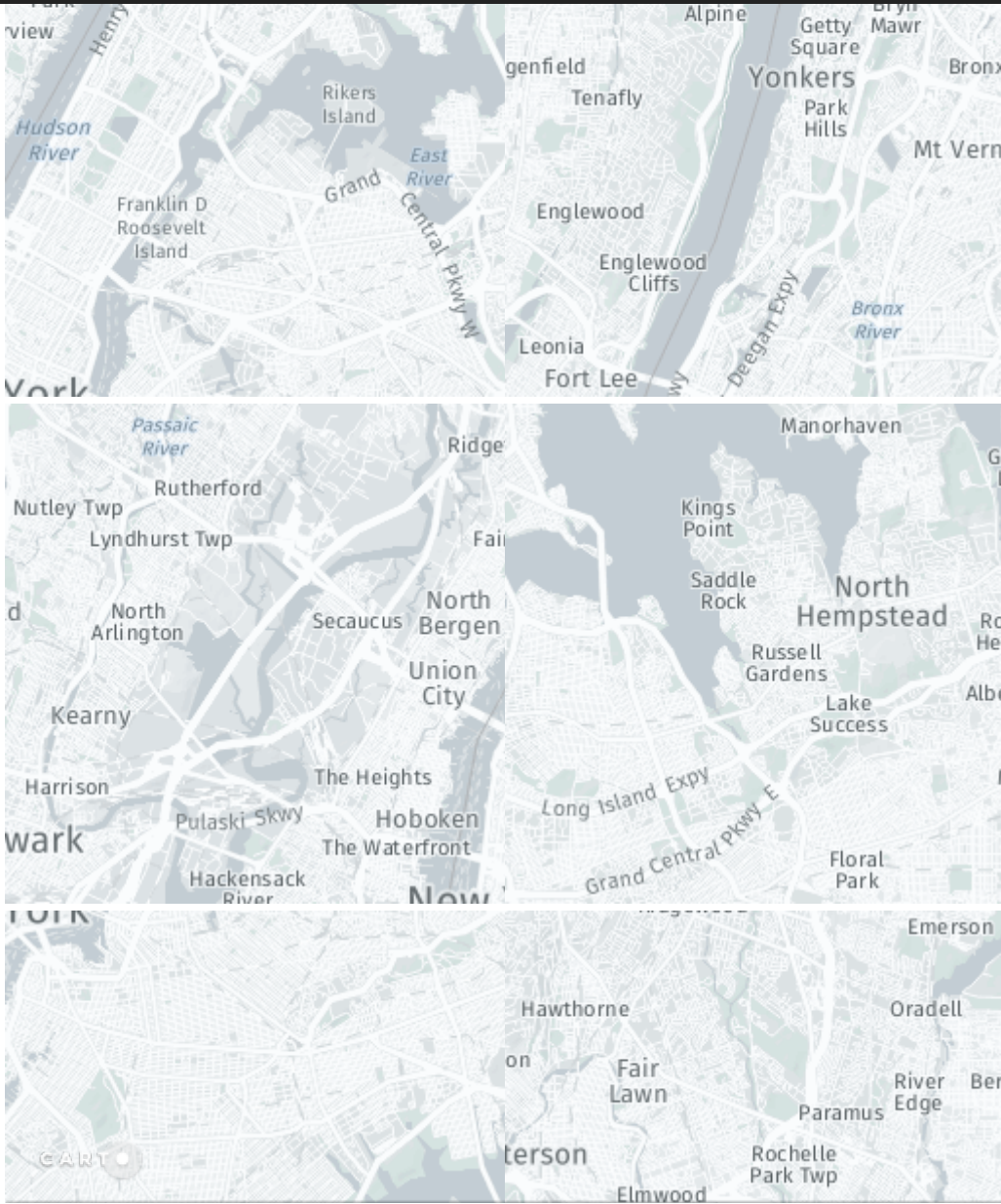



**Check out the interactive map below.**

Since 1976, it's been a crime to "loiter for the purposes of engaging in a prostitution offense" in New York City. That might sound like the kind of thing that went out of fashion along with XXX marquees in Times Square. But between 2012 and 2015, the NYPD arrested and charged 1,300 people with this misdemeanor.

The Voice obtained arrest data from Legal Aid and the New York State Division of Criminal Justice Services Arrest Statistics for the past three years. This data was then mapped by John Keefe.





Map created by  [jkeefe](#)

The vast majority of those charged with this offense (81%) are women. Overall, according to New York State Division of Criminal Justice Services Arrest Statistics, 85% of those arrested for loitering for prostitution between 2012 and 2015 were black or Latina.





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How exactly do police think they can tell when women are doing something “for the purposes of” prostitution? The law gives the NYPD very wide discretion. From the supporting depositions officers file with each arrest, police list as evidence such wholly innocent behaviors as waving at passers-by, having conversations with someone of a different gender, or wearing tight jeans or baring cleavage.

This September, eight women of color, including cisgender and transgender women, filed a civil rights suit with the support of The Legal Aid Society of New York, challenging the constitutionality of the loitering law. They describe a pattern of targeted and yet arbitrary policing, sweeping women of color from their neighborhoods into jails,





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But loitering arrests don't reveal the places sex work happens in the city, only the places where women are most likely to be policed based on their presence alone, whether they are engaged in sex work or not. Between 2012 and 2015, 68.5% of arrests for loitering for the purposes of prostitution were made in just five neighborhoods: Bushwick (83rd Precinct), Belmont/Fordham Heights (52nd Precinct), East New York (75th Precinct), Hunts Point (41st Precinct), and Brownsville (73rd Precinct), neighborhoods where residents are predominantly people of color.

Police say these neighborhoods are "prostitution prone," but as Kate Mogulescu, a supervising attorney in the Legal Aid Society's Criminal Defense Practice, points out, "this is based on a self-fulfilling cycle. They make an arrest in a place, therefore that place becomes 'prostitution prone' – and they can make more arrests in that place, because they have already identified it as prostitution prone."

"It is easier to prove somebody is guilty when it is already on their record," said Sarah Marchando, one of the women suing over the loitering law. "There is really no fight," You can't say, 'Hey, I wasn't doing this!' if you are dressed a certain way."

"The only thing that you can do to avoid it," Tiffany Grissom, another plaintiff on the suit told me, "is just not go outside."





JUDGE CASTRO

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

16 CV 7698

D.H., N.H., K.H. *Et/a* J.H., Natasha Martin,  
Tiffany Grissom, R.G., A.B. and Sarah  
Marchando, individually and on behalf of a  
class of all others similarly situated;

Plaintiffs,

-against-

THE CITY OF NEW YORK, SEAN  
KINANE, JOSEPH MCKENNA, KAYAN  
DAWKINS, THOMAS KEANE, MARIA  
IMBURGIA, KEVIN MALONEY, JOEL  
ALLEN, DAVE SIEV, BRYAN POCALYKO,  
CHRISTOPHER SAVARESE, THOMAS  
DIGGS, JOEL GOMEZ, KEITH BEDDOWS,  
CHRISTIÁN SALAZAR, HENRY  
DAVERIN, JOSEPH NICOSIA, KELLY  
QUINN, ALEXIS YANEZ, MICHAEL  
DOYLE, JOHN/JANE DOE NYPD POLICE  
OFFICERS #1-14;

Defendants.

COMPLAINT AND  
DEMAND FOR A JURY TRIAL

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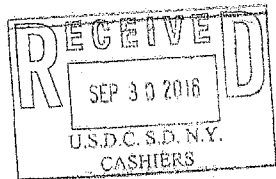


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## PRELIMINARY STATEMENT

1. Plaintiffs D.H., N.H., K.H., f/k/a J.H.,<sup>1</sup> Natasha Martin, Tiffany Grissom, R.C., A.B. and Sarah Marchando (“Named Plaintiffs”) bring this civil rights action on behalf of themselves and a class of similarly situated women of color, some of whom are transgender, who have been and may in the future be subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained under New York Penal Law Section 240.37 (“Section 240.37”) (the “Plaintiff Class,” and together with Named Plaintiffs, “Plaintiffs”), and allege the following on information and belief:
  2. This is a civil rights class action that challenges the constitutionality of Section 240.37, Loitering for the Purpose of Engaging in a Prostitution Offense, under which New York City Police Department (“NYPD”) officers target and arrest women—primarily women of color, including transgender women—engaged in wholly innocent conduct based on their race, color, ethnicity, gender, gender identity and/or appearance.
  3. Since 1976, New York has criminalized loitering in a public place by persons whom the police selectively and subjectively determine are present for the purpose of prostitution.
  4. New York enacted Section 240.37, along with several other anti-loitering laws, at a time when street crime was rampant, in order to provide police officers with a “tool to curtail the proliferation of prostitution” and other “maladies” throughout New York.<sup>2</sup>

<sup>1</sup> K.H. is in the process of legally changing her name from J.H.

<sup>2</sup> Letter from N.Y.C. Office of the Mayor to Hon. Hugh L. Carey (June 10, 1976) [hereinafter Letter from N.Y.C. Office of the Mayor to Hon. Hugh L. Carey]; see Murray Schumach, *Mayor Drive on Illicit Sex is Being Drafted by City*, N.Y. Times (Sept. 1, 1975), <http://www.nytimes.com/1975/09/01/archives/major-drive-or-illicit-sex-is-being-drafted-by-city-is.html>; see also Tom Goldstein, *Experts Say 21 Laws Proposed to Clean Up Times Square Face Constitutional Problems*, N.Y. Times (Nov. 3, 1975), <http://www.nytimes.com/1975/11/03/archives/experts-say-21-laws-proposed-to-clean-up-times-square-face.html>.

5. Many of these loitering statutes have since been struck down as unconstitutional. Section 240.37 remains in force, and the pattern of unlawful arrests under this statute demonstrates that the fears and doubts expressed at the time of its passage about its unconstitutionality and potential for abuse were entirely warranted.<sup>3</sup>
6. Section 240.37 provides in relevant part:

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, or of patronizing a prostitute as those terms are defined in article two hundred thirty of the penal law, shall be guilty of a violation.
7. On its face, Section 240.37 is unconstitutionally overbroad. It criminalizes many forms of constitutionally protected expressive activity, such as attempting “to engage passers-by in conversation,” based solely on a police officer’s subjective determination that the activity was “for the purpose” of prostitution.
8. The statute is also void for vagueness because it lacks objective criteria and guidelines for determining what conduct is “for the purpose of prostitution.” It therefore fails to provide adequate notice of the conduct that will be deemed criminal and gives police officers unfettered discretion to arrest individuals based on subjective determinations of an individual’s “purpose,” leading to inconsistent and arbitrary enforcement. Consequently, a person of

<sup>3</sup> See, e.g., Letter from Harold Baer, Jr. to Hon. Judah Gribetz, Counsel to the Governor (June 15, 1976) [hereinafter Letter from Harold Baer, Jr. to Hon. Judah Gribetz] (writing on behalf of the State Legislation Committee of the New York State Bar Association and the New York County Lawyers’ Association, and noting that although the “prostitution problem . . . has reached critical proportions,” Section 240.37 is “unconstitutional” and would invite arbitrary and discriminatory enforcement); N.Y. State Bar Ass’n, *Legislation Report, No. 84 (1976)* [hereinafter N.Y. State Bar Legislation Report] (demonstrating that Section 240.37 has “deficiencies . . . so glaring as to require our disapproval without regard to questions of the efficacy and underlying policy,” and declaring that the law provides a “shortcut” for police, whereby 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’”).

ordinary intelligence cannot know if, for example, by speaking to acquaintances on the street or engaging in similarly innocent activity, she risks arrest under Section 240.37.

9. Further, the City of New York (or the "City," and together with all other named individual and Doe defendants ("Individual Defendants"), "Defendants"), through the NYPD, enforces Section 240.37 in a way that impermissibly targets Plaintiffs because of their race, color, ethnicity, gender, gender identity and/or appearance. Specifically, the City has adopted numerous policies, widespread practices and/or customs that result in arbitrary and discriminatory enforcement of Section 240.37 in violation of Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8, 11 and 12 of the New York Constitution, including by:

- Deploying groups of NYPD officers to arrest multiple Plaintiffs under Section 240.37 in "sweeps" that target certain public areas where women of color, and in particular transgender women, are known to gather and socialize;
- Arresting Plaintiffs under Section 240.37 without probable cause, including based merely on the fact that a Plaintiff has been arrested in the past for a prostitution-related offense (even if the charge was dismissed) or that the Plaintiff was present in an area that the NYPD has designated as "prostitution-prone";
- Arresting women of color under Section 240.37 at a higher rate than men or white women because of their race, color, ethnicity, gender, gender identity and/or appearance; and
- Failing to adequately train, monitor, supervise or discipline NYPD officers involved in the enforcement of Section 240.37 to prevent or mitigate these abuses and constitutional violations.

10. Defendants' conduct results in 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.

11. The overwhelming majority of arrests under Section 240.37 are of women of color, including significant numbers of transgender women. In many instances, charges are eventually dismissed, but the injurious legal, financial, emotional and physical effects of the arrests on Plaintiffs' lives remain.

12. Defendants implement the NYPD's policies, widespread practices and/or customs in an intentionally discriminatory and race-based manner by focusing their enforcement efforts on communities of color. Defendants also discriminatorily acquiesce in, ratify and fail to monitor or rectify these unlawful practices because the victims are transgender and/or women of color.

13. The enforcement of Section 240.37 intimidates, threatens and interferes with Named Plaintiffs' enjoyment of their homes and neighborhoods and their right to associate freely with others. The enforcement is so arbitrary and discriminatory that many Named Plaintiffs are afraid to leave their homes, particularly at night.

14. As examples, on June 6, 2015, Named Plaintiff D.H., an African-American woman who is transgender, was arrested walking in her neighborhood in the Bronx while trying to hail a cab to get home. D.H. is deaf and communicates primarily through typing and sign language. During her walk, she did not interact with anyone or engage in any behavior related to the solicitation of prostitution or other unlawful conduct. She was nevertheless stopped, harassed, arrested and detained by the police as part of a "sweep" of transgender women in the area, and eventually charged with loitering for the purpose of prostitution.

15. Similarly, on June 6, 2015, Named Plaintiff N.H., an African-American woman who is transgender, was arrested in her neighborhood on her way home from buying food and cigarettes at a nearby store. Like D.H., N.H. was arrested as part of a sweep of transgender

women, and one of the arresting officers told those women that if they saw “girls like them”—meaning transgender women—outside after midnight, they would arrest them.

16. On June 13, 2015, Named Plaintiff K.H., an African-American woman who is transgender, was walking home to her apartment when she met another transgender woman. As they walked together, NYPD officers jumped out of an unmarked police car and accosted them. The officers arrested both women on the spot without probable cause.

17. Section 240.37 is unconstitutional, and, as evidenced by the experience of these and the other Named Plaintiffs, including as set forth more fully below, Defendants’ policies, widespread practices and/or customs in enforcing it have violated and continue to violate Plaintiffs’ rights secured by the constitutions and laws of the United States and the State and City of New York.

18. Plaintiffs seek declaratory relief striking Section 240.37 as unconstitutionally vague and overbroad and declaring that the City’s policies, widespread practices and customs in enforcing Section 240.37 in an arbitrary and discriminatory manner violate Plaintiffs’ constitutional and statutory rights under federal, state and local law. Plaintiffs also seek injunctive relief prohibiting future enforcement of Section 240.37. In addition, Named Plaintiffs seek compensatory and punitive damages, an award of attorneys’ fees and costs and such other relief as this Court deems equitable and just.

#### JURISDICTION

19. Jurisdiction is conferred upon this Court under 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4), as this is a civil action arising under 42 U.S.C. § 1983 and the United States Constitution.

20. Plaintiffs’ claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202.

21. This Court has jurisdiction over the supplemental claims arising under the laws of the State and City of New York pursuant to 28 U.S.C. § 1367(a), as they are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy.

22. This case is brought to vindicate the public interest, and the resolution of this case will directly affect the rights of all New Yorkers, particularly women of color. Therefore, to the extent that the notice of claim requirement of N.Y. Gen. Mun. Law §§ 50-e and 50-i would otherwise apply to any of the claims stated below, no such notice is required because this case falls within the public interest exception to that requirement.

#### VENUE

23. Venue is proper in the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1391(b), because a substantial part of the events that gave rise to the claims alleged in this complaint occurred in the Counties of Bronx and New York. In addition, Defendants conduct business and maintain their principal place of business in the Counties of Bronx and New York. The NYPD maintains its headquarters at 1 Police Plaza, New York, NY 10007, where many of its policies are created.

#### PARTIES

##### I. PLAINTIFFS

24. The Plaintiff Class comprises women of color, some of whom are transgender, who have been or will be subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained pursuant to Section 240.37, including based on their race, color, ethnicity, gender, gender identity and/or appearance.

25. Named Plaintiff D.H. is a 26-year-old deaf African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.
26. Named Plaintiff N.H. is a 36-year-old African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.
27. Named Plaintiff K.H. is a 32-year-old African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.
28. Named Plaintiff Natasha Martin is a 38-year-old African-American woman who is transgender and at all relevant times was a resident of Brooklyn, New York.
29. Named Plaintiff Tiffany Crissom is a 30-year-old African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.
30. Named Plaintiff R.G. is a 59-year-old Latina woman and at all relevant times was a resident of Bronx, New York.
31. Named Plaintiff A.B. is a 44-year-old African-American woman and at all relevant times was a resident of Brooklyn, New York.
32. Named Plaintiff Sarah Marchando is a 28-year-old Latina woman and at all relevant times was a resident of Queens, New York.

## II. DEFENDANTS

33. The City is a municipal entity created and authorized under the laws of the State of New York to maintain, operate and govern a police department, the NYPD, which acts as its agent in the area of law enforcement and for which the City is ultimately responsible. The City assumes the risks incidental to the maintenance of a police force and the employment of police officers. The law enforcement activities of the NYPD are supported, in part, by federal funds.

34. At all relevant times, all Individual Defendants were members of the NYPD, acting in the capacity of agents, servants and employees of the City, and within the scope of their employment as such. At all relevant times, Defendants JOSEPH MCKENNA, KEVIN MALONEY, DAVE SIEV, BRYAN POCALYKO, HENRY DAVERIN, KEITH BEDDOWS, MICHAEL DOYLE and Doe NYPD Officer #13, and potentially one or more of Defendants Doe NYPD Officers #1-12, were sergeants, lieutenants, captains and other high-ranking officials of the NYPD with training, supervisory and policy-making roles.

35. Defendants JOSEPH MCKENNA, KEVIN MALONEY and DAVE SIEV (collectively, the “Sweep Supervisor Defendants”) participated in planning, ordering, staffing, supervising and/or approving<sup>4</sup> the sweeps described below which resulted in the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions of D.H., N.H, K.H. and/or Natasha Martin, and failed to monitor or reprimand officers involved in those sweeps. Defendants SEAN KINANE, KAYAN DAWKINS, THOMAS KEANE, MARIA IMBURGIA, JOEL ALLEN, DAVE SIEV and Doe NYPD Officers #1-7 (collectively, the “Sweep Officer Defendants”) were involved in the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions of D.H., N.H, K.H. and/or Natasha Martin as part of a sanctioned sweep, as described in greater detail below. The Sweep Supervisor Defendants and Sweep Officer Defendants are sued in their individual, official and supervisory capacities.

36. Defendants BRYAN POCALYKO, HENRY DAVERIN, KEITH BEDDOWS, MICHAEL DOYLE and Doe NYPD Officer #13 (collectively, the “Non-Sweep Supervisor

<sup>4</sup> Per the 2015 edition of the NYPD Patrol Guide, to approve an arrest, the arrest paperwork and supporting deposition must be reviewed for completeness and accuracy by the desk officer. NYPD Patrol Guide, Arrests – General Processing, Desk Officer, PG 208-03, ¶¶ 26-34 (2015-A Ed.) [hereinafter NYPD Patrol Guide].

Defendants”) participated in planning, ordering, staffing, supervising and/or approving the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions of Tiffany Grissom, R.G, A.B. and Sarah Marchando, and failed to monitor or reprimand the officers involved. Defendants CHRISTOPHER SAVARESE, THOMAS DIGGS, JOEL GOMEZ, BRYAN POCALYKO, CHRISTIAN SALAZAR, JOSEPH NICOSIA, KELLY QUINN, MICHAEL DOYLE, ALEXIS YANEZ, and Doe NYPD Officers #8-13 (collectively, the “Non-Sweep Officer Defendants”) were involved in the unlawful surveillance stops, questioning, frisks, searches, seizures and/or arrests and detentions of Tiffany Grissom, R.G, A.B. and Sarah Marchando. The Non-Sweep Supervisor Defendants and Non-Sweep Officer Defendants are sued in their individual, official and supervisory capacities.

37. At all relevant times, Defendant Doe NYPD Officer #14 was an officer in the 52<sup>nd</sup> precinct. Defendant Doe NYPD Officer #14 was involved in the refusal to provide D.H. with a sign language interpreter in violation of her rights under the Americans with Disabilities Act, New York State Human Rights Law and New York City Human Rights Law.

38. At all relevant times, Individual Defendants were acting under color of state law, including under color of the statutes, ordinances, regulations, policies, customs and/or usages of the City and State of New York.

#### **CLASS ACTION ALLEGATIONS**

39. Named Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Federal Rule of Civil Procedure 23.

40. Named Plaintiffs are D.H., N.H., K.H., Natasha Martin, Tiffany Grissom, R.G., A.B. and Sarah Marchando.

41. This action is properly maintainable as a class action because the requirements of Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure are satisfied, as shown below.

42. The class is so numerous that joinder of all members is impracticable. From 2012 through 2015, nearly 1,300 individuals were arrested in New York City under Section 240.37.<sup>5</sup> During those same years, nearly 400 of those arrests did not lead to convictions. In some cases, charges were never filed; in others, charges were dismissed; and in others, the accused was acquitted.

43. Joinder is also impracticable because many members of the Plaintiff Class are not aware that their constitutional and statutory rights have been violated and that they have the right to seek redress in court. Further, many Plaintiff Class members cannot be joined individually because they have been unlawfully surveilled, stopped, questioned, frisked, searched and/or seized by NYPD officers but ultimately were not arrested and detained, and are therefore unknown. There is no appropriate avenue for the protection of these Plaintiff Class members’ constitutional and statutory rights other than by means of a class action.

44. The claims alleged on behalf of Named Plaintiffs as Plaintiff Class representatives raise questions of law or fact common to all Plaintiffs, and these questions predominate over individual questions. These common questions include, but are not limited to:

- Whether Section 240.37 is void for vagueness as a result of its failure to provide adequate notice to individuals of objective conduct that would subject them to arrest under the statute and/or guidance to officers;
- Whether Section 240.37 is unconstitutionally overbroad, impermissibly infringing Plaintiffs’ rights under the First, Fourth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 8, 11 and 12 of the New York Constitution;

<sup>5</sup> See N.Y. State Div. of Criminal Justice Servs., New York City Arrests by Precinct for Loitering for Prostitution: PL 240.37 (2012-2015) (unpublished spreadsheet) [hereinafter DCJS Arrest Statistics 2012-2015].

Plaintiff Class will rely. In addition, the harm suffered by Named Plaintiffs is typical of the harm suffered by absent Plaintiff Class members.

47. Named Plaintiffs have the requisite personal interest in the outcome of this action and will fairly and adequately protect the interests of other Plaintiff Class members. Counsel for Named Plaintiffs includes attorneys from The Legal Aid Society and the law firm Cleary Gottlieb Steen & Hamilton LLP who are experienced in federal class action litigation, including constitutional and civil rights litigation, and have the resources necessary to pursue this litigation. Counsel for Named Plaintiffs knows of no conflicts among Plaintiff Class members.

48. This action is properly maintainable as a class action under Rule 23(b)(1) of the Federal Rules of Civil Procedure because prosecuting separate actions by individual Plaintiff Class members would create a risk of adjudications with respect to individual Plaintiff Class members that (a) would be inconsistent or varying, and thus establish incompatible standards of conduct for the parties opposing the Plaintiff Class, and/or (b) as a practical matter, would be dispositive of the interests of non-parties or would substantially impair or impede non-parties' ability to protect their interests.

49. This action is properly maintainable as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure because Defendants have acted and/or refused to act on grounds generally applicable to the Plaintiff Class, thereby rendering final declaratory relief and corresponding injunctive relief appropriate with respect to Named Plaintiffs and the Plaintiff Class as a whole. Plaintiffs are entitled to injunctive relief to end Defendants' policies, widespread practices and/or customs of surveilling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs for loitering for the purpose of prostitution under Section 240.37, including, and especially, based on impermissible and/or insufficient grounds.

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• Whether the City engages in arbitrary and discriminatory enforcement of Section 240.37 in violation of Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 8, 11 and 12 of the New York Constitution;

• Whether the City has violated Plaintiffs' rights to free speech by consciously choosing to enforce Section 240.37 based in large part on protected conduct, including conversations in public and/or Plaintiffs' expression of gender or gender identity;

• Whether the City has consciously chosen to enforce Section 240.37 in violation of Plaintiffs' right to be free from unreasonable searches and seizures by unlawfully surveilling, stopping, questioning, frisking, searching, seizing, and/or arresting and detaining Plaintiffs without reasonable suspicion or probable cause;

• Whether the City has consciously chosen to enforce Section 240.37 in a discriminatory manner based on the race, color, ethnicity, gender, gender identity and/or appearance of Plaintiffs in violation of the New York State Civil Rights Law, the New York State Human Rights Law (the "NYHRL"), the New York City Bias-Based Profiling Law and the New York City Human Rights Law (the "NYCHRL");

• Whether the City knew or should have known that, as a direct and proximate result of such policies, widespread practices and/or customs, the constitutional rights of Plaintiffs would be violated; and

• Whether the City acted with deliberate indifference to Plaintiffs' constitutional rights in failing to rectify such arbitrary and discriminatory enforcement policies, widespread practices and/or customs, including by failing to adequately train, monitor, supervise or discipline officers engaged in the enforcement of Section 240.37.

45. The claims of Named Plaintiffs are typical of the Plaintiff Class they seek to represent, as each Named Plaintiff alleges violations of her federal and state constitutional and statutory rights in connection with law enforcement actions undertaken by NYPD officers pursuant to Section 240.37.

46. The Named Plaintiffs are adequate Plaintiff Class representatives. The violations of law that Named Plaintiffs allege stem from the same course of conduct by Defendants that violated and continues to violate the rights of Plaintiff Class members, and the legal theories under which Named Plaintiffs seek relief are the same as or similar to those on which the

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## FACTUAL ALLEGATIONS

### I. SECTION 240.37 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, WHICH LEADS TO ARRESTS FOR CONSTITUTIONALLY PROTECTED BEHAVIOR

#### A. Section 240.37 Is Void for Vagueness

50. Section 240.37 is unconstitutionally vague under the Due Process clause of the Fourteenth Amendment because it is a criminal statute that fails to give citizens notice of the specific conduct it prohibits. Furthermore, Section 240.37 fails to provide law enforcement with clear guidelines or standards to prevent arbitrary policing.

51. Section 240.37 fails to provide any objective criteria to determine what conduct is for the “purpose” of prostitution. Absent objective criteria, such determinations are based entirely on a police officer’s subjective views, making it all but impossible for an individual to know when “beckon[ing] to” or “engag[ing] passersby in conversation,” or other commonplace, innocent conduct enumerated in the statute, may be deemed for the “purpose” of prostitution, and to conform her behavior accordingly.

52. Section 240.37 also gives police officers unfettered discretion in determining whether conduct—otherwise innocent and/or constitutionally protected—is carried out for the “purpose” of prostitution. “Purpose,” unlike “criminal intent,” is not defined in New York’s Penal Law, affording the NYPD immense discretion to assume an individual’s “purpose” without ever having to prove a *mens rea* element. Thus, Plaintiffs are subjected to the whims of police officers who may determine that their conduct is for the “purpose” of prostitution for any of a substantial number of reasons not enumerated in the statute and unascertainable by Plaintiffs.

53. By allowing officers’ subjective views to be determinative of whether a person’s actions demonstrate a specific intent to engage in prostitution, Section 240.37 fails to provide

individuals with the notice required under the Due Process Clause to tailor their conduct to the confines of the law and avoid arrest.

54. Furthermore, the purported guidance provided in the NYPD Patrol Guide is equally vague and otherwise flawed, thereby increasing arbitrary enforcement. For instance, the NYPD Patrol Guide instructs officers that an arrestee’s “clothing” is “pertinent” to the probable cause inquiry. At the same time, the NYPD Patrol Guide does not provide any objective criteria regarding what types of attire may or may not have probative value for purposes of establishing probable cause, thus encouraging officers to make arrests based on individual, subjective opinions regarding what clothing someone who might be “loitering for the purpose of prostitution” would wear. In pre-printed affidavits provided by prosecutors (also referred to as supporting depositions), which prompt the arresting officer to describe “revealing” or “provocative” clothing, officers often respond by citing a wide range of innocuous attire, such as “jeans,” a “black pea coat” or a pair of leggings.

#### 1. Legislative History and Previous Legal Challenges to Section 240.37

55. The broad discretion afforded to police officers in effecting arrests under Section 240.37 has given rise to substantial constitutional concerns and controversy since the law’s adoption. Section 240.37 was enacted by the New York Legislature in 1976 as a means of eradicating what were then high rates of prostitution by making it easier for police to arrest potential prostitutes.<sup>6</sup>

56. At the time Section 240.37 was first proposed, numerous commentators, including politicians, bar and other legal associations and advocacy groups expressed grave concerns that

<sup>6</sup>Letter from N.Y.C. Office of the Mayor to Hon. Hugh L. Carey, *supra* note 2; Schumach, *supra* note 2; Goldstein, *supra* note 2.

the statute would be unconstitutional. See, e.g., Thomas Poster, Fears About Police Abuses Keep Prostitute Bill on Hook, N.Y. Daily News, Mar. 18, 1976, at 41 (reporting that New York senators “have raised serious civil liberty questions” about a proposed draft of Section 240.37 and expressed concerns that the law “contains police powers that are too sweeping”); Schumacher, supra note 2 (quoting executive director of NYCLU’s concern that Section 240.37 would enable police to “set up a dragnet of the streets”); N.Y. Civil Liberties Union, 1976 Legislative Memorandum 20-A (arguing Section 240.37 is “far too vague and thus susceptible of arbitrary and selective enforcement”); N.Y. State Bar Legislation Report, supra note 3 (“By giving the police discretion to arrest anyone whom they think manifests such intent [to engage in prostitution] the bill attempts to make it a crime to be ‘undesirable’ . . . . It thus oversteps several constitutional bounds at once.”); Letter from Harold Baer, Jr. to Hon. Judah Gribetz, supra note 3 (writing on behalf of the State Legislation Committee of the New York State Bar Association and the New York County Lawyers’ Association that Section 240.37 is “unconstitutional” and would be “difficult to enforce”); see also Hechtman, Practice Commentaries, N.Y. Penal Law § 240.37 (McKinney Supp. 1978) (“Critics have argued that the proscribed conduct, such as beckoning to, stopping or engaging passersby in conversation, is a trap into which unwary innocent persons, particularly women, may fall.”); Letter from Michael R. Juviler, New York Office of Court Administration, to Hon. Judah Gribetz, Counsel to the Governor (May 20, 1976) (expressing concern that the term “for the purpose of” in Section 240.37 is “not a defined culpable mental state”).

57. Shortly after Section 240.37 was enacted, its constitutionality was challenged on the limited grounds that it “encourag[ed] police to use unfettered discretion in making arrests based solely on circumstantial evidence [and] require[d] them to infer criminality from wholly

innocent or ambiguous activity in which free citizens must necessarily engage to lead normal lives.” People v. Smith, 44 N.Y.2d 613, 619 (1978) (internal quotation marks omitted). While the New York Court of Appeals ultimately rejected that challenge, it made clear that it was not addressing a due process claim for lack of notice. Nor was it possible for the Court of Appeals to evaluate the subsequent four decades of evidence demonstrating arbitrary and discriminatory enforcement of the statute.

2. *Constitutional Developments Since Section 240.37 Was Last Challenged*

58. In the intervening four decades since Smith, several of New York’s “loitering-plus” statutes,<sup>7</sup> even those purporting to “detail[] the prohibited conduct and limit[] [themselves] to one crime,” id. at 620, have been declared unconstitutional. See, e.g., Davis v. City of New York, 902 F. Supp. 2d 405, 421-22 (S.D.N.Y. 2012) (striking down as unconstitutionally vague a public housing rule prohibiting loitering by residents in the lobby, roof, hallway or stairs because it “prohibits a vast swath of conduct that is inherently innocent, and it fails to give [public housing] residents notice of what precise conduct is prohibited, and it places complete discretion in the hands of the police to determine whom they will arrest” (quoting People v. Bright, 71 N.Y.2d 376, 383 (1988))); Loper v. N.Y.C. Police Dep’t, 802 F. Supp. 1029, 1048 (S.D.N.Y. 1992) (holding that a statute that prohibited loitering, remaining or wandering in public for the purpose of begging impermissibly chills a person’s First Amendment rights); Bright, 71 N.Y.2d at 382 (striking down as unconstitutionally vague a statute prohibiting

<sup>7</sup>In 1972, the Supreme Court struck down as unconstitutionally vague a law prohibiting loitering, holding that the ordinance “makes criminal activities which by modern standards are normally innocent,” such as “nightwalking,” “loafing,” or “wandering or strolling from place to place.” Papachristou v. Jacksonville, 405 U.S. 156, 162-64 (1972). Shortly thereafter, the New York State Legislature passed a series of “loitering-plus” laws, including Section 240.37, nicknamed as such because they included additional elements beyond simple loitering in order to avoid the constitutional deficiencies identified in Papachristou.

loitering “in any transportation facility, or . . . sleeping therein” for failure to provide notice or sufficient police enforcement guidelines).

59. Further, courts in six other states (Florida, Nevada, Alaska, Oklahoma, Missouri and Virginia) have held that statutes nearly identical to Section 240.37, proscribing loitering for the purpose of prostitution, are unconstitutionally vague and/or overbroad. For example, in striking Alaska’s loitering-plus statute, the Supreme Court of Alaska wrote that, given the statute’s “excessive discretion, inviting by its inexactitude arbitrary enforcement and uneven application,” the court could “think of no construction which will save the statute from this infirmity.” Brown v. Municipality of Anchorage, 584 P.2d 35, 38 (Alaska 1978). See also Silver v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 129 P.3d 682, 684 (Nev. 2006); Wyche v. State, 619 So.2d 231, 234 (Fla. 1993); West Palm Beach v. Chatman, 112 So.3d 723, 725 (Fla. Dist. Ct. App. 2013); Coleman v. City of Richmond, 364 S.E.2d 239 (Va. Ct. App. 1988); Christian v. Kansas City, 710 S.W.2d 11 (Mo. Ct. App. 1986); Profit v. City of Tulsa, 617 P.2d 250 (Okla. Crim. App. 1980).

3. *New York Courts Have Been Unable to Remedy Violations of Plaintiffs’ Constitutional Rights Attributable to Section 240.37’s Infringements*

60. When processing Section 240.37 arrests, officers and prosecutors rely on a pre-printed affidavit in which officers simply “check the boxes” that apply, indicating whether: the arrest location is known for prostitution; the defendant was on the street; the defendant was in close proximity to stores or restaurants (either open or closed); the defendant stopped motorists who were not livery, taxi or bus drivers; the defendant was standing somewhere other than a bus stop or taxi stand; the officer has previously seen the defendant in the same location engaged in the same conduct; and/or the officer has previously arrested the defendant for prostitution-related offenses.

61. The pre-printed affidavits filled out by arresting officers typically fail to articulate allegations sufficient to conclude that a female defendant was in fact loitering for the purpose of prostitution. None of the choices on the pre-printed affidavit from which an arresting officer can select reflects any criminal activity, much less activity that is indicative of prostitution. New York courts have expressed exasperation at the NYPD’s “slavish reliance” on this “pre-printed, check-off-type supporting deposition to expedite the processing” of a Section 240.37 accusatory instrument, which often “render[s] the accusatory instrument a legal nullity.” People v. Perry, Dkt. No. 2014CN003368, at \*1 (N.Y. Crim. Ct. 2014) (quoting People v. McGinnis, 972 N.Y.S.2d 882 (N.Y. Crim. Ct. 2013)).<sup>8</sup>

62. Courts have also emphasized that the government’s reliance on the fact that a defendant has previously been arrested for prostitution amounts to “emblazon[ing]” a “scarlet letter” on the defendant, thus violating core principles of a “free society.”

63. Despite these decisions by courts expressing concern about the NYPD’s arrests under Section 240.37, the NYPD has not reformed its policing practices with respect to Section 240.37, and the statute continues to give rise to improper and unconstitutional policing of women of color.

#### **B. Section 240.37 Is Unconstitutionally Overbroad**

64. The right to speak freely with others—whether the speaker be wealthy or poor, the listener a man or woman, and the conversation in a classroom or on a street corner—is a fundamental freedom in this country. So too is the freedom to express one’s gender identity

<sup>8</sup> Additionally, check-box forms “[facilitate] post-hoc justifications for stops where none may have existed at the time of the stop . . . . [T]he overwhelming belief of experts [is] that a narrative field in which the officers describe the circumstances for each stop would be the best way to gather information that will be used to analyze reasonable suspicion” and, relatedly, “prevent[] racially biased policing.” Floyd v. City of New York, 959 F. Supp. 2d 668, 681 (S.D.N.Y. 2013) (quoting Susan Hutson, Independent Police Monitor, Review of the New Orleans Police Department’s Field Interview Policies, Practices and Data: Final Report 45 (Mar. 12, 2013)).

through her attire, without fear of police surveillance or arrest. Section 240.37 interferes with Plaintiffs' exercise of these fundamental freedoms through the statute's overbroad criminalization of constitutionally protected expression.

65. By its plain terms, Section 240.37 criminalizes protected expressive activity by prohibiting individuals from repeatedly "attempt[ing] to engage passers-by in conversation." While courts have interpreted the prohibitions on "conversation" to be limited to those conversations that are "for the purpose of prostitution," the vagueness of that phrase, see supra Section I.A., renders it meaningless and ineffective as a limiting construction. The lack of objective criteria as to what constitutes activity "for the purpose of prostitution" effectively sweeps *all* conversations that occur in a public place as falling within the ambit of the statute. Because an officer may determine that a conversation is "for the purpose of prostitution" for any one of countless reasons having nothing to do with the content of the conversation—such as the neighborhood in which it takes place or the speaker's attire or gender, among others—merely talking to others in public becomes an activity in which Plaintiffs no longer feel free to engage, fearing that doing so may put them at risk of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained.

66. A sampling of supporting depositions filled out by NYPD officers following arrests of Named Plaintiffs under Section 240.37 validates these concerns. As grounds justifying the arrests, many of the supporting depositions include allegations that the defendant engaged in conversation with male passersby—yet *none* lists any information regarding the content of those conversations. Plainly then, *any* conversation may be used to justify an arrest, making it all but certain that a substantial number of arrests involve conversations wholly unrelated to prostitution. Moreover, the simple fact that Plaintiffs *can* be arrested under Section 240.37 for

conversations unrelated to prostitution based on other attendant circumstances, including those over which Plaintiffs have no control (such as the neighborhood or time of day), serves to chill protected expressive activity by Plaintiffs.

67. The expression of Plaintiffs' gender identity through their choice of dress and hair style is similarly chilled by Section 240.37. Plaintiffs have a liberty interest in their personal appearance, including in deciding what clothes to wear and how to style their hair, nails and other physical attributes. Yet, Plaintiffs' clothing choices, and officers' subjective interpretation of those choices, have been and continue to be the basis for arrests under Section 240.37. Transgender Plaintiffs in particular have a constitutionally protected interest in communicating their gender identity to the public, including through grooming and clothing decisions that send a message to the world that they are female regardless of the sex they were assigned at birth. By choosing to dress and present themselves in a manner that expresses their gender identity as women, transgender Plaintiffs are engaging in expressive conduct protected by the First Amendment. The NYPD's decision to enforce Section 240.37 by arresting transgender Plaintiffs on the basis of these choices impermissibly infringes on and chills transgender Plaintiffs' protected First Amendment conduct. As the New York Times succinctly put it: "If you are a 35-year-old biological woman wearing the \$715 metallic platform peep-toe pumps you just bought at Barneys to lunch at Café Boulud, you are well-dressed; if you were born Joaquin, have changed your name to Marisol and put yourself together with a similar verve, you are a prostitute."<sup>9</sup>

<sup>9</sup> Gina Bellafante, *Arrests by the Fashion Police*, N.Y. Times (Apr. 5, 2013), <http://www.nytimes.com/2013/04/07/nyregion/arrests-by-the-fashion-police.html>.

68. Further, Section 240.37 is overbroad for the additional reason that any legitimate application of the statute is merely duplicative of preexisting criminal prohibitions. New York separately prohibits prostitution and, under various provisions of New York Penal Law, officers may arrest individuals for solicitation of prostitution (P.L. § 230.00) and for attempted prostitution (P.L. § 110.00). Rather than addressing independent, additional criminal activity, Section 240.37 serves only to chill constitutionally protected expressive conduct.

## II. THE CITY HAS POLICIES, WIDESPREAD PRACTICES, AND/OR CUSTOMS OF DISCRIMINATORY AND ARBITRARY ENFORCEMENT OF SECTION 240.37

69. The City consciously chooses to enforce Section 240.37 and to do so in an unconstitutional manner by using it to police expressions of gender identity and sexuality based on outdated and paternalistic notions of what clothing NYPD officers deem “revealing” or “provocative,” with a disproportionate impact on women of color. The City’s unconstitutional enforcement of Section 240.37 in this manner takes many forms. For example, the City uses unconstitutional sweeps to enforce Section 240.37; unlawfully surveils, stops, questions, frisks, searches, seizes and/or arrests and detains Plaintiffs for constitutionally protected conduct; routinely engages in unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs without reasonable suspicion or probable cause and discriminates against protected classes in its enforcement of Section 240.37.

70. Furthermore, the City has failed to curtail policies, widespread practices and/or customs that contribute to the constitutional violations, such as maintaining performance goals and arrest quotas for officers and sanctioning arrest sweeps in minority neighborhoods. It has also failed to take corrective action in the hiring, retention or supervision of its officers despite notice of their routine violations of individuals’ constitutional rights. The City has also failed to

adequately train, audit, monitor, supervise and discipline police officers engaged in law enforcement actions pursuant to Section 240.37 to prevent constitutional violations and discriminatory enforcement.

### A. The City Engages in Discriminatory Enforcement Practices Against Transgender Women of Color, Including by Using “Sweeps,” Performance Goals and Arrest Quotas to Unlawfully Target Transgender Women of Color for Arrest Under Section 240.37

71. Transgender individuals experience high levels of discrimination in places of public accommodation. Studies show that over half of transgender individuals nationwide report being verbally harassed and disrespected in public, with 22% of African-American respondents reporting having been a victim of physical assault.<sup>10</sup> Transgender women of color are often unlawfully subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained pursuant to Section 240.37 under circumstances in which men, white women and cis-gender women are not subjected to such law enforcement actions.

72. As a result of this ongoing discrimination, many transgender individuals live, work and/or socialize near one another. The communities they create are safe spaces in which they can socialize with minimal harassment and discrimination. One such community exists in the catchment of the 52<sup>nd</sup> precinct in the Bronx, in the neighborhood surrounding the intersection of 192<sup>nd</sup> Street and Davidson Avenue, which borders Monroe College. The NYPD is aware that this area is inhabited and/or frequented by many transgender individuals.

73. The City has a policy, widespread practice and/or custom whereby its officers conduct “sweeps” in which a particular precinct deploys a group of officers to a particular

<sup>10</sup> Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 5, 124 (2011).

location to arrest as many women as possible—in particular, women of color and transgender women—for Section 240.37 offenses.

74. Two such sweeps were conducted in the 52<sup>nd</sup> precinct on June 6-7 and 13-14, 2015. In a span of just over two hours on June 6, 2015, Defendants Keane, Dawkins, Kinane and Doe NYPD Officers #1-3 arrested at least eight transgender women, including D.H. and N.H. Defendant McKenna approved the arrests of D.H. and N.H. At the precinct, one of the arresting officers told the women that they had been conducting a sweep to let “girls like them” and their friends know that if the police saw them outside after midnight, they would arrest them.

75. One week later, in the same location, on the night of June 13, 2015, Defendants Imburgia, Doe NYPD Officer #4, Doe NYPD Officer #5 and non-party Officer Monge arrested at least six transgender women in a span of 25 minutes, including Plaintiff K.H. At least seven similar sweeps—and potentially many more—have been conducted by NYPD officers in the past three years in Brooklyn, the Bronx and Queens as a result of the City’s policies, widespread practices and/or customs.

76. The City further has a policy, widespread practice and/or custom of enforcing performance goals and arrest quotas that cause officers to arrest Plaintiffs under Section 240.37 without probable cause.

77. The use of performance goals and quotas pushes officers to aggressively, and often unlawfully, undertake law enforcement activity in order to be considered for promotions and other career incentives. Indeed, the City imposes requirements that officers issue, make or fill out a certain number of summonses, arrests and stop forms within specified time periods.<sup>11</sup>

<sup>11</sup> See Floyd, 959 F. Supp. 2d at 599-600.

78. These policies lead to disproportionate enforcement of Section 240.37 against marginalized groups such as Plaintiffs. As described by a former NYPD officer, these policies impact “the most vulnerable . . . [members of the] LGBT community, . . . the black community, . . . those people that have no vote, that have no power.”<sup>12</sup> As another officer explained, “when you put pressure on cops to come up with numbers . . . it’s the black, it’s the Hispanic, it’s the LGBT community. We go for the most vulnerable.”<sup>13</sup>

79. Officers are warned that failure to comply with numerical activity standards will result in adverse employment actions.<sup>14</sup>

80. Once arrested, transgender women of color endure further discriminatory and unlawful treatment at the hands of the NYPD, including verbal abuse by officers and other detainees. Moreover, once these women have been arrested under Section 240.37, they are subject to a higher risk of re-arrest, as shown below.

81. Plaintiffs have repeatedly been victims of this practice. They experience heightened police surveillance and activity, false arrests and discrimination. Many transgender Plaintiffs fear leaving their homes, particularly at night, due to the City’s policy, widespread practice and/or custom of targeting them for arrest under Section 240.37.

<sup>12</sup> Sarah Wallace, *I Team: NYPD Lieutenant Latest Cop to Sex-Department Enforces Quota*, NBC News (Apr. 1, 2016), second video at 2:16-2:24, <http://www.nbcnewyork.com/investigations/NYPD-Lieutenant-Says-Here-Are-Quotas-I-Team-Wallace-37430721.html>. See also Am. Compl., *Raymond v. City of New York*, No. 15-CV-6885(LTS) (S.D.N.Y. filed Aug. 31, 2015), ECF No. 31.

<sup>13</sup> Allison Fox, *Edwin Raymond, NYPD officer: Department quotas dangerous*, AM N.Y. (Mar. 1, 2016), <http://www.amny.com/news/edwin-raymond-nypd-officer-department-quotas-dangerous-1.11527625>.

<sup>14</sup> Floyd, 959 F. Supp. 2d at 599-600.

**B. The City Has a Policy, Widespread Practice and/or Custom of Unlawfully Arresting Plaintiffs Under Section 240.37 Without Probable Cause**

82. In addition to targeting transgender Plaintiffs for arrest under Section 240.37 without probable cause in sweeps, the City has a policy, widespread practice and/or custom whereby its officers unlawfully arrest Plaintiffs without probable cause by, inter alia, (1) arresting individuals based on a prior arrest under Section 240.37 and P.L. § 230.00 (prostitution), regardless of the outcome of the prior charge; (2) arresting individuals for being present in areas the police arbitrarily designate as “prostitution-prone”; and (3) arresting Plaintiffs after observing them for short periods of time and while Plaintiffs are engaged in innocent conduct.

83. The NYPD Patrol Guide instructs officers effecting arrests under Section 240.37 to “[i]nform [the] assistant district attorney of actions or any additional pertinent information,” including whether the defendant is a “known prostitute” or “[c]onsorts with known prostitutes or pimps.”<sup>15</sup> By including an arrestee’s status as a “known prostitute” among the categories of “pertinent information” showing an intent to engage in prostitution, the NYPD has unlawfully created a policy, widespread practice and/or custom of arresting individuals for loitering for the purpose of prostitution merely because they have previously been arrested for the same offense or another prostitution-related offense, *even if charges were ultimately dismissed*. As a result of this perverse practice, Plaintiffs who have been wrongfully arrested under Section 240.37 in the past are more vulnerable to additional unlawful arrests in the future, despite the fact that “all official records and papers . . . relating to the arrest” in connection with a dismissed charge are to

<sup>15</sup> NYPD Patrol Guide, supra note 4, at PG 208-45, ¶ 3.

be “sealed and not made available to any person or public or private agency” under Criminal Procedure Law § 160.50.

84. NYPD officers recognize Plaintiffs whom they have previously arrested for prostitution-related charges and arrest those women again without probable cause based merely on the prior arrest, in violation of Plaintiffs’ right to be free of unreasonable seizures.

85. Additionally, NYPD officers typically approach women, and in particular women of color, including transgender women, while they are lawfully present in public and request their identification. The officers then use the NYPD database to determine if a woman has previously been arrested for a prostitution-related offense. If she has, the officer will arrest the woman based on the arrest history alone, without any facts suggesting that she was loitering with the intent to engage in prostitution. This self-perpetuating cycle unlawfully prejudices any woman who has ever been arrested, even if the charges underlying her original arrest were dismissed.

86. NYPD officers also make unlawful arrests under Section 240.37 based on Plaintiffs’ appearance. For example, when filling out pre-printed affidavits after arrests, officers frequently check the box that the arrestee was “dressed in provocative or revealing clothing . . . .” But often, officers’ reliance on a woman’s clothing for probable cause is entirely pretextual. NYPD officers cite countless types of clothing in their supporting depositions to justify arrests, many of which are far from “provocative” or “revealing.” For instance, descriptions of such “provocative” or “revealing” clothing have included jeans, a black pea coat, a white jacket and a blue and white jump suit.

87. Moreover, in today’s cultural and legal landscape, which has changed significantly from that in which the New York Court of Appeals decided Smith, and in which

people freely and frequently express their identity through clothing and appearance, so-called “revealing” clothing has little, if any, probative value. The NYPD’s enforcement practices with respect to Section 240.37 highlight this fact: even if an arrestee’s clothing actually were “revealing,” this type of “dress code” is not policed against men or white women. Only women of color are systematically arrested for wearing clothing that emphasizes their femininity, making clear that “revealing” clothing is used simply as a pretextual justification for arrests without probable cause based on race, color, ethnicity, gender, gender identity and/or appearance. See *infra* Section II.C.

88. NYPD officers similarly make unlawful arrests under Section 240.37 on the basis of arbitrary designations that an area is “prostitution-prone,” even though that designation is based on the NYPD’s own dedication of resources to make high numbers of arrests in that area, not how much crime or prostitution actually occurs in that area as compared to another.

89. As a result, the areas where police have previously made prostitution arrests become the same areas that police then characterize as “prostitution-prone” to justify future arrests.

90. Finally, NYPD officers frequently make arrests after observing Plaintiffs engage in lawful conduct for very brief periods of time. For example, Defendant Keane observed N.H. for only five minutes before arresting her. During such brief observation periods, officers cannot establish probable cause to conclude that an individual is loitering, much less to determine whether that individual’s conduct is “for the purpose” of engaging in prostitution.

**C. The City Has a Policy, Widespread Practice and/or Custom of Discriminating Against Women of Color**

91. The City has a policy, widespread practice and/or custom whereby women of color are arrested under Section 240.37 at a much higher rate than men or white women.<sup>16</sup> Women of color are commonly unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 under circumstances in which men and white women are not subjected to such law enforcement activity, such as for merely engaging in conversation with individuals of the opposite gender. Moreover, the unconstitutional policing practices described above occur almost exclusively in low income communities of color.

92. Defendants utilize Section 240.37 to unlawfully effect arrests based on gender. While Section 240.37 is gender- and race-neutral on its face, the discriminatory manner in which it is enforced leads to a significantly disproportionate impact on women of color. Even more telling, women of color are commonly arrested under Section 240.37 based on allegations that they were repeatedly beckoning to, stopping or attempting to stop or engaging in conversation with male passersby. Men engaged in similar behavior are not arrested under the statute. Men commonly attempt to speak to women passing by, attempt to engage those women in conversation and even make comments related to sexual conduct. However, NYPD officers discriminate based on gender by concluding that women engaged in such conduct are seeking to offer sex in exchange for money, and therefore are subject to arrest, while men doing so are merely paying a compliment.

93. Women’s liberty interest in making choices about their personal appearance is also disproportionately impacted by the NYPD’s enforcement of Section 240.37 as compared to

<sup>16</sup> NYPD identified 85% of the arrestees under Section 240.37 as Black or Latina. DCJS Arrest Statistics 2012-2015, *supra* note 5.



that of men. While the NYPD commonly arrests women under Section 240.37 for wearing clothing that highlights their femininity, no arrests are made of men for wearing clothing that highlights their masculinity, or based on any aspects of their personal appearance at all.

94. Women of color are disproportionately subject to arrests based on so-called “revealing” clothing as compared to white women who are similarly attired. Indeed, disproportionately arresting women of color for wearing “revealing” clothing is merely one of a number of discriminatory practices by the NYPD, along with labeling heavily minority neighborhoods as “prostitution-prone,” that causes Section 240.37 to be used to unlawfully effect arrests based on race.

95. The NYPD’s disproportionate targeting of people of color was thoroughly documented in the court’s findings in Floyd v. City of New York.<sup>17</sup> In Floyd, the court made numerous findings demonstrating the NYPD’s practice of discriminating on the basis of race when implementing its stop-and-frisk policy. First, the court found that the NYPD carried out more stops in areas with a higher percentage of African-American and Hispanic residents.<sup>18</sup> Second, even controlling for the racial composition of the area, African-Americans and Hispanics were more likely to be stopped than whites.<sup>19</sup> Third, African-Americans were more likely to be arrested after a stop for the same suspected crime.<sup>20</sup> Fourth, African-Americans and Hispanics were more likely than whites to be subjected to the use of force.<sup>21</sup>

<sup>17</sup> Floyd, 959 F. Supp. 2d 540.

<sup>18</sup> Id. at 589.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

96. In addition to these findings, the court in Floyd also found that the most common reason given for a stop was that it was in a “high crime area.”<sup>22</sup> The court recognized that this was a weak indicator of criminal activity, noting that stops were *more* likely to result in arrest where “high crime area” was *not* given as a reason for the stop.<sup>23</sup> As shown above, the City employs substantially the same tactic in designating areas as “prostitution-prone.” This practice contributes to the discriminatory enforcement of Section 240.37 in communities of color which have traditionally experienced higher concentrations of law enforcement than other communities.

97. Further illustrating this point, Section 240.37 arrests in New York City are clustered in several particular neighborhoods whose residents are largely people of color. For example, the five NYPD precincts with the most Section 240.37 arrests between 2012 and 2015, accounting for 68.5% of all Section 240.37 arrests during that period, are Bushwick, Brooklyn; Belmont/Fordham Heights, Bronx; East New York, Brooklyn; Hunts Point, Bronx; and Brownsville, Brooklyn, neighborhoods where residents are predominantly people of color.<sup>24</sup>

98. The result of this unlawful enforcement of Section 240.37 is that 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. Specifically, men engaging in the same conduct are much less likely to face unlawful arrest and prosecution under Section 240.37, as are white women. This unequal and discriminatory enforcement violates Plaintiffs’ right to equal protection of the laws under the Fourteenth Amendment.

<sup>22</sup> Id. at 574-75.

<sup>23</sup> Id. at 575.

<sup>24</sup> The 41<sup>st</sup>, 52<sup>nd</sup>, 73<sup>rd</sup>, 75<sup>th</sup>, and 83<sup>rd</sup> precincts largely encompass the above-mentioned neighborhoods. DCIS Arrest Statistics 2012-2015, *supra* note 5. Cf. Sharing NYC Police Precinct Data, johnkeefe.net (Apr. 29, 2011), <http://johnkeefe.net/nyc-police-precinct-and-census-data>.

**D. The City Knew or Should Have Known of the Need for Corrective Action to Prevent Constitutional Violations of Plaintiffs' Rights to Free Speech, Equal Protection of the Laws and Freedom from Unreasonable Seizures and False Arrests, and Failed to Take Corrective Action to Prevent Such Violations, Including by Failing to Adequately Train, Monitor, Supervise or Discipline Responsible Officers**

99. The City has a policy, widespread practice and/or custom whereby it provides guidance that lacks any objective basis for determining whether conduct is "for the purpose" of prostitution. It affords officers extraordinary discretion in making such determinations that unconstitutionally infringe on Plaintiffs' First, Fourth and Fourteenth Amendment rights without sufficient training, guidelines, monitoring, supervision and accountability to ensure that officers do not abuse their discretion. Further, it is obvious that the failure to take such action will result in such violations of Plaintiffs' rights, especially in light of the "performance goal" and quota policies encouraging aggressive law enforcement activities.

100. As to certain Individual Defendants, prior to the unlawful conduct alleged in the present action, the City had notice that many of these Individual Defendants had engaged in misconduct while carrying out surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of various individuals. For example, Defendants Imburgia, Diggs, Gomez, Nicosia and Yanez, allegedly abused their discretion while carrying out surveillance, stops, questioning, frisks, searches and/or arrests and detention of other individuals, prior to the unlawful surveillance, stops, questioning, frisks, searches, seizures, and/or arrests and detention of Named Plaintiffs K.H., R.G. and Sarah Marchando in the present action.<sup>25</sup>

<sup>25</sup>For example, Defendant Imburgia is a named defendant in *Conz v. City of New York*, No. 0302146-2015, 2015 WL 3383188 (Sup. Ct. Bronx Cy. May 13, 2015) (false arrest and assault); Defendants Diggs and Gomez are named defendants in *Amunizata v. City of New York*, No. 13-cv-05610-RMB-GWG, at 16-32 (S.D.N.Y. Aug. 12, 2013) (unlawful stop, search, harassment and assault) and a class action, *Quinones v. City of New York*, No. 16-cv-04275-KBF (S.D.N.Y. June 8, 2016) (false arrest and imprisonment, malicious prosecution, fabrication of evidence, conspiracy to violate civil rights and failure to intercede); Defendant Diggs is additionally a named defendant in *Paniagua v. City of New York*, No. 0309159-2011, 2011 WL 5186247 (Sup. Ct. Bronx Cy. 2011) (Trial Pleading)

101. Additionally, the City was aware through multiple lawsuits filed against it that NYPD officers falsely arrested and maliciously prosecuted multiple persons for loitering for the purpose of prostitution with less than probable cause.<sup>26</sup>

102. The City nonetheless failed to adequately train, monitor and supervise NYPD officers making arrests under Section 240.37 or to discipline officers enforcing Section 240.37 in an arbitrary and/or discriminatory manner in violation of Plaintiffs' rights. Instead, the City allowed, and continues to allow, officers to abuse their discretion, resulting in the unlawful and discriminatory targeting of Plaintiffs for law enforcement action on the basis of Plaintiffs' speech or other protected conduct or Plaintiffs' race, color, ethnicity, gender, gender identity and/or appearance, and unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs without reasonable suspicion or probable cause under Section 240.37 in violation of Plaintiffs' rights.

103. For instance, Defendant Imburgia's paperwork regarding the arrests she made in connection with the sweeps conducted by the 52<sup>nd</sup> precinct on June 13-14, 2015 places her at

(false arrest, settled in exchange for the payment of \$40,000); Defendant Gomez is additionally a named defendant in *Haynes v. City of New York*, No. 11-CV-4347 (DLC) (S.D.N.Y. June 27, 2011) (false arrest, settled in exchange for the payment of \$7,500) and *Rodriguez v. City of New York*, No. 0302229-2013, 2013 WL 1655517 (Sup. Ct. Bronx, Cy. 2013) (false arrest), and a criminal court judge also granted suppression when Defendant Gomez unlawfully stopped and seized the accused in *People v. Pinckney*, 32 Misc. 3d 1240(A) (Sup. Ct. Bronx Cy. 2011) (crediting Defendant Gomez's testimony only on cross-examination); Defendant Nicosia is a named defendant in *Chavez v. City of New York*, No. 15-cv-01232-SJ-VMS (S.D.N.Y. Mar. 10, 2015) (unlawful force, search and false arrest), *Lebron v. City of New York*, 15CV 05008(MKB/PK) (S.D.N.Y. Feb. 26, 2016) (unlawful seizure and false arrest), and *Anderson v. City of New York*, 16-cv-00150-ERK-LB (unlawful seizure and entry); and Defendant Yanez is also a named defendant in *Anderson*.

<sup>26</sup> See *Jones v. City of New York*, No. 11-cv-05735-PGG (S.D.N.Y. Feb. 3, 2012) (transgender woman falsely arrested under Section 240.37 on November 4, 2010 by 52<sup>nd</sup> precinct officers after leaving a restaurant); *Gonzalez v. City of New York*, 08-CV 2699 (JBW)(CLP) (E.D.N.Y. Dec. 4, 2008) (woman falsely arrested under Section 240.37 on November 18, 2007 by 7<sup>th</sup> precinct white walking to the hospital by officers who falsely stated plaintiff had previous loitering arrest); *Gomez v. City of New York*, No. 11-cv-00298-RRM-MDG (E.D.N.Y. Jan. 20, 2011) (woman falsely arrested under Section 240.37 on August 29, 2010 while walking in the vicinity of her home in the 73<sup>rd</sup> precinct).

different locations at the same time. By her own accounts, Defendant Imburgia was arresting an individual at one location at a certain time while simultaneously observing K.H. in a wholly separate location. Nonetheless, Defendant Maloney approved K.H.'s arrest. Similarly, non-party Officer Monge's sworn statement in one case from the same sweep indicates he observed an individual he believed to be loitering from 2:40 a.m. through 3:10 a.m., while arrest paperwork from another case shows that during that same time period, he effectuated the arrests of two other women. With appropriate monitoring and supervision, such abuses could be identified and discouraged by means of appropriate discipline for the officers responsible.

104. The City is also aware—because, among other reasons, it maintains law enforcement activity statistics and records—that transgender women of color are targeted for arrest under Section 240.37 and are systematically discriminated against and mistreated by NYPD officers.

105. Indeed, the City amended the NYPD Patrol Guide in June 2012 “follow[ing] years of complaints about police mistreatment [of transgender women].”<sup>27</sup> However, these amendments have proven insufficient and, in the years since, widespread police abuse and mistreatment of transgender women has continued largely unabated. Plaintiffs have suffered, and continue to suffer, from the deprivation of rights that flows from being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37.

106. Despite its own knowledge of unlawful law enforcement actions under, and discriminatory enforcement of, Section 240.37, the City has failed to take sufficient corrective action to rectify these violations of Plaintiffs' rights, including by: failing to sufficiently train

<sup>27</sup> Noah Remnick, *Activists Say Police Abuse of Transgender People Persists Despite Reforms*, N.Y. Times (Sep. 6, 2015), <http://www.nytimes.com/2015/09/07/nyregion/activists-say-police-abuse-of-transgender-people-persists-despite-reforms.html>.

officers in enforcing Section 240.37 in a non-discriminatory manner and in making arrests under Section 240.37 only where there is probable cause; failing to monitor, supervise and, when appropriate, take disciplinary and/or remedial action against officers who make arrests under Section 240.37 without probable cause on the basis of past arrests or after insufficient periods of observation, or who disproportionately arrest women of color, including transgender women of color engaging in protected First Amendment activity under Section 240.37 or otherwise violate Plaintiffs' rights to free speech, free association or equal protection of the laws; failing to audit arrests under Section 240.37 to determine whether they are made in violation of Plaintiffs' rights to free speech, free association, equal protection of the laws or freedom from unreasonable searches and seizures; and failing to adequately monitor officers who are the subject of multiple civilian complaints.

107. The City's deliberate indifference in failing to take such corrective action was and continues to be a direct and proximate cause of past and ongoing violations of Plaintiffs' rights to free speech, free association and equal protection of the laws, and freedom from unreasonable searches and seizures.

### **III. NAMED PLAINTIFFS HAVE BEEN TARGETED FOR UNLAWFUL SURVEILLANCE, STOPS, QUESTIONING, FRISKS, SEARCHES, SEIZURES, AND/OR ARREST AND DETENTION UNDER SECTION 240.37**

#### **A. Named Plaintiffs Arrested During Sweeps Targeting Transgender Women of Color**

##### **1. Named Plaintiff D.H.**

108. D.H. is a 26-year-old African-American woman who currently resides in the Bronx. D.H. is deaf and communicates through sign language, writing or texting on her phone.

109. D.H. is a transgender woman. D.H. communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

110. In the early morning on June 6, 2015, D.H. was walking near the corner of Fordham Road and Jerome Avenue and trying to hail a cab to get home. At the time, she was living with her sister in the neighborhood. She was walking with her phone in her hand when she saw an unmarked police car pull up next to her.

111. At no time on June 6, 2015 did D.H. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

112. Defendants Kinane, Doe NYPD Officer #1 and Doe NYPD Officer #2 exited the vehicle and approached D.H. She pointed to her ear to indicate that she was deaf and tried to also tell the officers by typing in her phone that she was deaf. Without reading what D.H. had typed on her phone, the officers grabbed her bag and began searching its contents. D.H. could not understand what the officers were saying to her and did not consent to the search.

113. As they took her bag, the officers also took D.H.'s phone and cuffed her hands behind her back. In so doing, the officers made it impossible for D.H. to communicate with them. She did not understand why she was being arrested. D.H.'s arresting officers did not appear to care that D.H. was unable to communicate, and laughed at her.

114. D.H. was placed in the unmarked police car and driven a few blocks to a police van. There were three other transgender women in the van who had already been arrested. D.H. had seen the women in the community and recognized them as transgender women.

115. During this ordeal, D.H. began to experience very sharp pain in her shoulder due to the manner in which her hands were cuffed behind her back. D.H. was screaming in pain, but without any means of communication, she was unable to articulate what was wrong. The officers ignored her screams.

116. D.H. and the three other transgender women were taken to the 52<sup>nd</sup> precinct, where D.H. spent the remainder of the night in a holding cell with the other women. D.H. attempted to get the attention of numerous officers to obtain a sign language interpreter, but was repeatedly ignored. At one point, Defendant Doe NYPD Officer #14 gave D.H. a pen and paper and she wrote that she needed a sign language interpreter. Despite receiving D.H.'s request for an interpreter in writing, Defendant Doe NYPD Officer #14 and the other officers in the 52<sup>nd</sup> precinct failed to provide a sign language interpreter to communicate with D.H. as they processed her arrest.

117. In the morning, D.H. was transferred to central booking to await arraignment. D.H. was finally provided with a sign language interpreter and only then did she learn the reason for her arrest and the nature of the charges against her. She was arraigned in the evening on June 6, 2015, and then released.

118. D.H. was devastated by her arrest. After her arrest, she worried about being unlawfully arrested again so she stopped going out at night. D.H. moved out of her neighborhood in July 2015. Since she moved, D.H. has started going out again, but she avoids returning to the area of her arrest, which means she is rarely able to visit her sister or friends.

119. After her arrest, D.H. feels that she can no longer contact the police if she is in need of help because she will be unable to communicate with them and because she fears that they will be hostile toward her. D.H. was shocked by the acts of Defendants Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, Doe NYPD Officer #14 and McKenna, and felt violated by their actions.

120. D.H. continued to experience pain in her shoulder for weeks after her arrest.

121. In the supporting deposition accompanying the criminal court complaint charging D.H. with violating Section 240.37, Defendant Kinane falsely alleged that on June 6, 2015, he observed D.H. for 15 minutes “during which time [D.H.] beckoned to passing traffic and stopped or attempted to stop 2 male passersby and 1 male motorist” from “the middle of the street.” He also alleged that D.H.’s purpose was prostitution based on her presence at a location “frequented by people engaged in prostitution” and because she was wearing a “short skirt.”

122. Defendant McKenna failed to properly review, monitor and supervise Defendant Kinane’s, Defendant Doe NYPD Officer #1’s and Defendant Doe NYPD Officer #2’s unlawful stop, questioning, search and seizure of D.H., and approved D.H.’s arrest.

123. After her initial court appearance, D.H. was forced to return to court three additional times, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against D.H. were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on October 29, 2015. The charges were dismissed and sealed on April 28, 2016.

124. By the actions described above, Defendants Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and McKenna targeted and/or sanctioned the targeting of D.H. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

125. The actions of Defendants Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, Doe NYPD Officer #14 and McKenna deprived D.H. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

2. **Named Plaintiff N.H.**

126. N.H. is a 36-year-old African-American woman who currently resides in the Bronx.

127. N.H. is a transgender woman. N.H. communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

128. In the early morning of June 6, 2015, N.H. went to a store on Davidson Avenue near her apartment. After purchasing food and cigarettes, N.H. began to walk home. She had walked only a few blocks when Defendants Dawkins, Keane and Doe NYPD Officer #3 pulled up in a marked police patrol car, jumped out and approached her. They ordered N.H. to put her hands behind her back and then handcuffed her.

129. At no time on June 6, 2015 did N.H. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

130. When N.H. asked why she was being arrested, the officers refused to explain and simply said, “you know.” Defendants Dawkins, Keane, and Doe NYPD Officer #3 placed her in the patrol car and drove around with her for over one hour, and then arrested a Latina woman who was also transgender and put her in the car with N.H. N.H. learned from this woman that she had been arrested for loitering for the purpose of prostitution.

131. At the 52<sup>nd</sup> precinct, Defendant Dawkins cut off the hood of N.H.’s sweatshirt and attempted to cut the laces out of her boots, permanently destroying both items of clothing and forcing her to remain in socks the entire time she was detained at the precinct. Defendant Dawkins also forcefully pulled N.H.’s earrings out of her ears and attempted to remove N.H.’s wig. Because the wig was attached to N.H.’s own hair, Defendant Dawkins pulled N.H.’s hair, causing her severe pain.

132. Throughout the booking process, Defendant Dawkins and other non-party officers referred to N.H. as a man. N.H. directed the officers to her identification, which identifies her as

female, but the officers, including Defendant Dawkins, persisted in referring to her as a boy or man.

133. N.H. was kept in handcuffs throughout the booking process—a period of approximately one hour—until she was placed in a holding cell with approximately ten other transgender women who had also been arrested for loitering for the purpose of prostitution. The officers continued to refer to N.H. and the other transgender women in the cell as “boys” and “men.”

134. One of N.H.’s arresting officers told the women that the police had been conducting a sweep and that if they saw “girls like them” outside after midnight, they would arrest them. When N.H. stated that she lives in the area, the officer told her that she should not go out on Jerome Avenue.

135. At the time of her arrest, N.H. had approximately \$60 in her purse. Although the NYPD Patrol Guide requires arresting officers to return to arrestees all currency less than \$100, N.H.’s arresting officers did not return these funds to her. Instead, she was forced to go through the arrest process without any money in violation of the arrest procedures established in the NYPD Patrol Guide.

136. N.H. was taken into custody at 2:15 a.m. on June 6, 2015. She was detained for approximately 40 hours before she was arraigned on the evening of June 7. The court set bail at \$50, which N.H. would have been able to post immediately had her arresting officers not denied her the return of her funds. As a result, she was forced to spend over 24 hours in detention at the Vernon C. Bain Correctional Center, a New York City Department of Correction facility for adult men. She was finally released in the early morning of June 9, 2015, three days after her arrest.

137. Upon her release, N.H. went to the 52<sup>nd</sup> precinct to retrieve her personal property, including the keys to her apartment. At the precinct, she was told that the officer responsible for the property was not present and that she would need to return in the morning. Locked out of her own home, N.H. was forced to find another place to sleep that night. The next day, after returning to the precinct without her property, she learned that her keys had been there the whole time. Her jewelry and other personal possessions were never returned.

138. In the supporting deposition accompanying the criminal court complaint charging N.H. with violating Section 240.37, Defendant Keane falsely alleged that, on June 6, 2015, he observed N.H. for five minutes, “during which time [N.H.] beckoned to passing traffic and stopped or attempted to stop 3 male passersby.” He further alleged that N.H.’s purpose was prostitution because she was observed previously at a location “frequented by people engaged in prostitution” and was wearing a “blonde wig, tight pants and shirt.” Defendant Keane also alleged that he knew that “other officers have previously arrested [N.H.] for prostitution-related offense(s).”

139. Defendant McKenna failed to properly review, monitor and supervise Defendant Keane’s, Defendant Dawkins’s and Defendant Doe NYPD Officer #3’s unlawful stop and seizure of N.H., and approved N.H.’s arrest.

140. After her initial court appearance, N.H. was forced to return to court four additional times over nearly five months, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against N.H. were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on October 29, 2015. The charges were dismissed and sealed on April 28, 2016.

141. Since her arrest, N.H. has tried to avoid going out late at night because the officers told her explicitly that she would be arrested if she did so. She usually reserves for daylight hours even simple errands, such as going to a store, in order to reduce the risk that she will be improperly arrested. As such, the acts of Defendants Dawkins, Keane, Doe NYPD Officer #3 and McKenna intimidated and threatened N.H.

142. By the actions described above, Defendants Dawkins, Keane, Doe NYPD Officer #3 and McKenna targeted and/or sanctioned the targeting of N.H. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

143. The actions of Defendants Dawkins, Keane, Doe NYPD Officer #3 and McKenna deprived N.H. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

3. **Named Plaintiff K.H.**

144. K.H. is a 32-year-old African-American woman who currently resides in Florida. At the time of her unlawful arrest under Section 240.37, she resided in the Bronx.

145. K.H. is a transgender woman. K.H. communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

146. In the early morning of June 13, 2015, K.H. was walking home to her apartment when she met another transgender woman and started a conversation. As they walked together, K.H. and her friend spoke to only one other person, a woman. As K.H. and her friend continued to walk, Defendants Imburgia, Doe NYPD Officer #4 and Doe NYPD Officer #5 jumped out of an unmarked police car and accosted them. The officers arrested both women on the spot.

147. At no time on June 13, 2015 did K.H. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

148. K.H. and her friend were placed in a van with two other women. Over the course of the next five minutes, more women were arrested and loaded into the van. The officers then brought all of the detained women to the 52<sup>nd</sup> precinct. Throughout this ordeal, the handcuffs around K.H.'s wrists were pulled so tightly that they left indentation marks on her wrists and caused her pain. Defendants Imburgia, Doe NYPD Officer #4 and Doe NYPD Officer #5 ignored K.H.'s repeated requests to loosen the handcuffs.

149. At the precinct, K.H. was placed in a holding cell. Once inside the cell, she and the other women with whom she was held were not permitted to use the bathroom. Having no other choice, several women urinated on the floor or in bottles that had been left in the cell.

150. At approximately 7 a.m., K.H. was taken to central booking for her arraignment. She was released at approximately 3 p.m.

151. At the time of her arrest, K.H. had expensive make-up (primers, lipsticks and pencils) and other personal items in her purse. When she returned to the precinct to recover her belongings, her personal items, including the make-up, were no longer in her purse.

152. After her arrest, K.H. became estranged from her transgender friends, whom she believes are now afraid to associate with her because they perceive her to be under scrutiny by the police. Fearing another false arrest, she also avoided leaving her house alone and went outside only with her husband. K.H.'s false arrest was a motivating factor in her decision to move to Florida, as she worried about being unlawfully arrested again in another sweep if she

stayed in the Bronx and wished to end "living in fear." Even after moving, she still believes that she cannot trust the police.

153. In the supporting deposition accompanying the criminal court complaint charging K.H. with violating Section 240.37, Defendant Imburgia falsely alleged that, on June 13, 2015, she observed K.H. for a half hour "during which time [K.H.] beckoned to passing traffic and stopped or attempted to stop three male passersby and two male motorists." She further alleged that K.H.'s purpose was prostitution because she was at a location "frequented by people engaged in prostitution" and was wearing a "tight short black dress."

154. Defendant Maloney failed to properly review, monitor and supervise Defendant Imburgia's, Defendant Doe NYPD Officer #4's and Defendant Doe NYPD Officer #5's unlawful stop and seizure of K.H., and approved K.H.'s arrest.

155. After her initial court appearance, K.H. was forced to return to court five additional times, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against K.H. were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on November 12, 2015 and dismissed and sealed on May 11, 2016.

156. By the actions described above, Defendants Imburgia, Doe NYPD Officer #4, Doe NYPD Officer #5 and Maloney targeted and/or sanctioned the targeting of K.H. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

157. The actions of Defendants Imburgia, Doe NYPD Officer #4, Doe NYPD Officer #5 and Maloney intimidated and threatened K.H., deprived her of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

#### 4. Named Plaintiff Natasha Martin

158. Natasha Martin is a 38-year-old African-American woman who currently resides in Brooklyn.

159. Ms. Martin is a transgender woman. Ms. Martin communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

160. The night of February 2, 2016, Ms. Martin had visited a friend who lives in Brooklyn. She stayed at her friend's house that evening.

161. The next morning, February 3, 2016, Ms. Martin left her friend's house at approximately 6:30 a.m. She left at the same time as her friend, who had to be at work by 7:00 or 7:30 a.m.

162. Ms. Martin said goodbye to her friend and then walked on the sidewalk for about two blocks before stopping at the corner of Bushwick Avenue and Woodbine Street to smoke a cigarette. She did not encounter or speak to anyone during that time.

163. At no time on February 3, 2016 did Ms. Martin solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

164. Ten minutes later, a marked police van pulled up next to her. Three officers jumped out: two male officers, Defendant Joel Allen and Defendant Doe NYPD Officer #6, both in plainclothes, and a female officer, Defendant Doe NYPD Officer #7, who was wearing a blue uniform.

165. Defendant Doe NYPD Officer #6 asked Ms. Martin what she was doing, and she responded that she was "minding her own business." After the officer told her that her answer



"wasn't good enough," Ms. Martin responded that she was coming from a friend's house.

166. Defendant Doe NYPD Officer #6 then told Ms. Martin that his supervisor, Defendant Dave Siev, had instructed him to arrest her and that the area in which she was standing was a "hot" area for prostitution. Ms. Martin asked him how she was supposed to know that and further asked, "Is it a crime to be on the corner?" Defendant Doe NYPD Officer #6 then asked for her name. When Ms. Martin responded that her name is Natasha, he asked whether that was her "real name." She responded "yes" and gave the officer her driver's license, which says "Natasha Martin" and "female" on it.

167. The officers arrested Ms. Martin and placed her in handcuffs about five minutes after they had first pulled up to her. Ms. Martin's arrest was one of several that were part of a sweep of the neighborhood.

168. As they drove her to the 83<sup>rd</sup> precinct, Defendant Allen made derogatory comments such as, "which one of you is going to process the he/she?"

169. When they arrived at the precinct, the officers put her in a cell with another woman. There was a third woman in the men's cell nearby. Ms. Martin learned from these women that they had also been arrested in the same sweep for loitering for the purpose of prostitution.

170. Ms. Martin was kept at the precinct for about four hours. Along with the other two women, she was released from the precinct with a desk appearance ticket.

171. In the supporting deposition accompanying the criminal court complaint charging Ms. Martin with violating Section 240.37, Defendant Siev falsely alleged that on February 3, 2016, he "observed [Ms. Martin] . . . remain or wander about in a public place for a period of . . . 8 minutes, during which [Ms. Martin] repeatedly beckoned to passers-by and stopped 3

passers-by, engaging in conversation with those passers-by." Ms. Martin did not in fact encounter or speak to anyone after saying goodbye to her friend until she was confronted by Defendants Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7. Defendant Siev further alleged that Ms. Martin's purpose was prostitution because she was at a location "frequented by people engaging in promoting prostitution, patronizing a prostitute, and/or loitering for the purpose of prostitution," was wearing a "white jacket with blue and white jump suit, tight," and because he recovered "8 condoms" from her person.

172. Defendant Siev also noted that his determination that Ms. Martin's purpose was to engage in prostitution was based on the fact that he was "aware that [Ms. Martin] has previously been arrested for violating Penal Law Section 240.37, 230.00, and/or 230.03." However, there are no public records of any previous arrests related to those charges.

173. Defendant Siev failed to properly review, monitor and supervise Defendant Allen's, Defendant Doe NYPD Officer #6's and Defendant Doe NYPD Officer #7's unlawful stop, questioning and seizure of Ms. Martin, and approved Ms. Martin's arrest.

174. Since her arrest, Ms. Martin has been very nervous about going back to the location of her arrest and fears that the police could "jump out at her" at any time. She recalls that the whole experience felt like an "abduction." As such, the acts of Defendants Siev, Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7 intimidated and threatened Ms. Martin, and left her traumatized.

175. After her arrest, Ms. Martin was forced to return to court five additional times under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against Ms. Martin were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on June 1, 2016. The charges are calendared to be dismissed and sealed on December 1, 2016.

176. By the actions described above, Defendants Siev, Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7 targeted and/or sanctioned the targeting of Ms. Martin for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

177. The actions of Defendants Siev, Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7 deprived Ms. Martin of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

**B. Named Plaintiffs Targeted for Arrest Under Other Circumstances**

178. Defendants have also wrongfully arrested Plaintiffs as part of a general pattern and practice of arbitrary and discriminatory enforcement of Section 240.37. These women were similarly engaging in constitutionally-protected activities or otherwise exercising their rights and not engaging in any prostitution-related activity at the time of their arrests.

**5. Named Plaintiff Tiffany Grissom**

179. Tiffany Grissom is a 30-year-old African-American woman who currently resides in New York City.

180. Ms. Grissom is a transgender woman. Ms. Grissom communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

181. Ms. Grissom has been repeatedly followed, stopped, questioned, arrested and detained for loitering for the purpose of prostitution. The majority of her arrests have occurred in the West Village in Manhattan, primarily in the 6<sup>th</sup> precinct, and often by the same officers. Ms. Grissom has also been arrested in the 52<sup>nd</sup> precinct.

182. On the night of October 3, 2013, Ms. Grissom was walking from Twin Donut on Fordham Road. As she was walking, she spoke with a man for about 30 to 45 minutes, including

near the corner of West 192<sup>nd</sup> Street and Grand Avenue. Ms. Grissom and the man then walked in opposite directions. Shortly thereafter, an unmarked police car stopped beside her and Defendants Pocalyko and Savarese exited the car, ordered Ms. Grissom to stop and immediately placed her under arrest. Defendants Pocalyko and Savarese did not stop the man with whom Ms. Grissom had spoken and allowed him to leave the scene without questioning him.

183. At no time on October 3, 2013 did Ms. Grissom solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

184. Ms. Grissom was handcuffed and taken to a police van where she was detained for approximately 30 minutes to an hour until the police arrived with another woman who—as Ms. Grissom later learned—had also been arrested for loitering for the purpose of prostitution.

185. At the 52<sup>nd</sup> precinct, Defendant Pocalyko repeatedly probed Ms. Grissom with questions relating to her gender and her sex organs. When Ms. Grissom answered Defendant Pocalyko's questions by maintaining that she was a woman, Defendant Pocalyko unlawfully ordered Ms. Grissom to be strip-searched by a female police officer even though she was not suspected of possessing any drugs or contraband. The female officer took Ms. Grissom into a bathroom and ordered her to lift her shirt, shake out her bra and pull her shorts down. This search was for the purpose of confirming whether or not she was female, as her identification indicated. She was then put in a holding cell with three other women, including the woman from the police van. She was detained at the precinct for an additional three to five hours.

186. Ms. Grissom provided her address to the officers processing her arrest, making them aware that she was a resident of the neighborhood and lived about 10 blocks from where she was arrested.

187. In the supporting deposition accompanying the criminal court complaint charging Ms. Grissom with violating Section 240.37, Defendant Pocalyko falsely alleged that, on October 3, 2013, he observed Ms. Grissom for twenty minutes “during which time [Ms. Grissom] beckoned to passing traffic and stopped or attempted to stop . . . 3 male motorists” from “the middle of the street.” Pocalyko further alleged that Ms. Grissom’s purpose was prostitution because she was observed at a location “frequented by people engaged in prostitution” and was wearing “tight short shorts [and a] tight tank top.” Additionally, the complaint corresponding to Ms. Grissom’s arrest indicated that Defendant Pocalyko believed Ms. Grissom’s purpose was prostitution because she had been convicted of loitering for the purpose of prostitution five years earlier, although nothing in the supporting deposition suggests that Defendant Pocalyko knew this at the time of the arrest.

188. Defendant Pocalyko failed to properly review, monitor and supervise Defendant Savarese’s unlawful stop and seizure of Ms. Grissom, and approved Ms. Grissom’s arrest.

189. Ms. Grissom believes that the police targeted her because she is a transgender woman. She believes the police have imposed a “dress code” for her to be out in public. In addition to her arrests, she is frequently followed and/or stopped and questioned by police when walking or sitting in public areas. As a result of this harassment and her arrests, Ms. Grissom believes she must constantly be on “high alert” for any police presence and avoid the police. As a result of her arrest and after learning of the sweeps conducted by the police in June 2015, she became scared about socializing in her neighborhood with friends—mostly other transgender women of color—and left her house less often. When she did leave her house, she came home early out of fear that she would be arrested again. Ms. Grissom ultimately moved out of the neighborhood, even after moving, however, Ms. Grissom remains anxious about engaging in

conversation in public for more than brief periods of time and avoids speaking to men in the area of the 52<sup>nd</sup> precinct and other neighborhoods where women of color and transgender women are targeted by the police for arrest under Section 240.37. As such, the acts of Defendants Pocalyko and Savarese caused Ms. Grissom to feel extremely anxious and powerless.

190. Ms. Grissom contested the Section 240.37 charge in Bronx Criminal Court and was forced to return to court at least six additional times under the threat of having the judge issue a bench warrant for her arrest. On August 13, 2015, the Section 240.37 charge against Ms. Grissom was dismissed on motion of the Bronx District Attorney’s Office and sealed.

191. By the actions described above, Defendants Pocalyko and Savarese targeted and/or sanctioned the targeting of Ms. Grissom for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

192. The actions of Defendants Pocalyko and Savarese deprived Ms. Grissom of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

6. **Named Plaintiff R.G.**

193. R.G. is a 59-year-old Puerto Rican-American woman who lives in the Bronx. R.G. lives with and cares for her 28-year-old daughter, who is disabled and unable to live or travel by herself. R.G. has previously been employed as a secretary in a variety of industries, including for a police department in Florida and most recently for a large insurance company in New York.

194. R.G. had never been arrested for any offense before she was unlawfully arrested for loitering for the purpose of prostitution on March 28, 2014.

195. During the afternoon of March 28, 2014, at approximately 2:00 p.m., R.G. was taking a walk less than one mile from her home, which is located in the 41<sup>st</sup> precinct. As she walked on the sidewalk, smoking a cigarette, an unmarked police car passed her, slowed down to make a U-turn, and pulled up alongside her. Defendants Diggs and Gomez asked her where she was going. They said that they knew what she was doing and that they had seen her stop five cars. R.G. explained to the officers that she was taking a walk and had not stopped any cars. Defendant Diggs told her that if she denied attempting prostitution, he would arrest her for lying. Defendants Diggs and Gomez then asked R.G. whether she had any drugs, and when she replied that she did not, they frisked her and searched her pockets. They then seized R.G.'s purse and began to search its contents without her consent. At the time of the search, R.G. had in her purse some condoms that she had recently obtained for free at her doctor's office. After seeing the condoms, Defendants Diggs and Gomez handcuffed R.G. and placed her under arrest.

196. At no time on March 28, 2014 did R.G. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

197. Also during the arrest, and while still on the street, Defendants Diggs and Gomez asked R.G. for her address, which she provided. R.G.'s apartment building is known to the police as a location for illegal narcotics activity. As soon as Defendants Diggs and Gomez learned her address, they began pressuring her for information about drug sales in her building. When R.G. declined, the officers put her in the patrol car and drove to the 41<sup>st</sup> precinct.

Defendants Diggs and Gomez continued to press R.G. to provide information about narcotics activity in her building while she was in the police car and later detained at the precinct. At one point, Defendants Diggs and Gomez even offered to release her and pay her for information

about crime in her building. R.G. declined and told the officers that she feared for her safety if she were to inform on anyone in her building.

198. At the 41<sup>st</sup> precinct, R.G. was put on a bench directly next to a men's holding cell and handcuffed to the bench for approximately seven hours. During that time, five or six men inside the cell harassed and taunted R.G. with lewd comments. R.G. did not receive any food or water. She was allowed to use the bathroom only once—under the supervision of an officer who stood in the bathroom stall with her and watched her urinate. R.G. was humiliated and embarrassed by this experience.

199. While processing R.G., Defendants Diggs and Gomez again attempted to solicit information about drug activity in her building. She again refused. In response, Defendant Diggs made offensive comments about her appearance.

200. In the sworn criminal court complaint charging R.G. with violating Section 240.37, Defendant Gomez falsely alleged that, on March 28, 2014, he observed R.G. "beckon to passing motorists and attempt[] to stop five male motorists" and "approach a male motorist, lean her face into said motorist's vehicle and begin speaking to said motorist." Defendant Gomez also falsely alleged that R.G. was wearing "a tight low cut shirt and mini skirt." She was in fact wearing long pants and a long-sleeve blouse. Defendant Gomez did not allege that he observed R.G. for any period of time before arresting her. He further alleged that R.G.'s purpose was prostitution because she was at a location "frequented by people engaged in prostitution."

201. Defendant Beddows failed to properly review, monitor and supervise Defendant Diggs and Defendant Gomez's unlawful stop, questioning, search and seizure of R.G., and approved R.G.'s arrest.

202. R.G. was eventually released from the precinct with a desk appearance ticket. Her period of unlawful detention left her demoralized, disoriented and worried about her disabled daughter. She could not believe what had happened and thought that it felt like a nightmare. R.G. was distraught and embarrassed by her experience. The arrest had a very harmful impact on her: she suffered depression, anxiety and humiliation that left her feeling helpless, with no energy to find work or even to leave her house much in the weeks after her arrest. Since she was arrested so close to her home, she has also been afraid to leave her home. Approximately one year after her arrest, after the Section 240.37 charge against her stemming from the arrest was dismissed, R.G. saw Defendant Gomez, who indicated that he recognized her and was watching her. R.G. no longer feels like she can trust the police or depend on them for help. As such, the acts of Defendants Beddows, Diggs and Gomez intimidated and threatened R.G.

203. As a result of her arrest, R.G. had to appear in Bronx Criminal Court five times over the course of six months. Each time she was required to be in court, her anxiety and depression around the incident were exacerbated. On November 6, 2014, over seven months after her arrest and after numerous court appearances, the accusatory instrument charging R.G. under Section 240.37 was finally dismissed as facially insufficient pursuant to C.P.L. §§ 100.15(3) and 100.40(1)(c), and R.G.'s case was sealed.

204. By the actions described above, Defendants Beddows, Diggs and Gomez targeted and/or sanctioned the targeting of R.G. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

205. The actions of Defendants Beddows, Diggs and Gomez deprived R.G. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

7. **Named Plaintiff A.B.**

206. A.B. is a 44-year-old African-American woman who currently resides in Brooklyn.

207. On August 13, 2015, an acquaintance of A.B.'s picked her up at around 1:30 a.m. to attend a dance party. The two drove to a local store to buy drinks to take to the party.

Afterwards, they got back in the car and resumed driving. Shortly afterward, an unmarked police car pulled them over and three uniformed police officers, Defendants Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9, approached the car in which A.B. was a passenger.

208. The officers opened the passenger door to the car and forcefully removed A.B. from the vehicle by her arm. They asked A.B. how she knew the man with her, and she replied that the man was her acquaintance. The officers apparently did not believe A.B. and told her that he could arrest her for prostitution.

209. The officers asked A.B. if she had ever been arrested. When she replied that she had, the officers returned to their car, apparently to enter A.B.'s name into their computer. While the officers waited for the results, they began questioning A.B.'s acquaintance. He confirmed that A.B. was his acquaintance and that they were going to a party. The officers accused him of being A.B.'s pimp, but they did not arrest him. Instead, they removed A.B.'s belongings from his car without her consent and placed them on the trunk of the police car. A.B. asked the officers to look at the text messages in her phone, which would confirm that she and her acquaintance were planning to go to a party, but the officers ignored her.

210. While A.B. was detained, the officers verbally abused her by using racial slurs and calling her a “prostitute” and a “hooker.” A.B. felt emotionally battered, and she informed the officers of her intention to file an official complaint against them. They continued to taunt her.

211. At that point, A.B. asked for the names and shield numbers of Defendants Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9. They laughed at her. The officers then handcuffed her, put her in the unmarked police car, and took her to the 75<sup>th</sup> precinct for further processing.

212. At no time on August 13, 2015 did A.B. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

213. In the supporting deposition accompanying the criminal court complaint charging A.B. with violating Section 240.37, Defendant Christian Salazar falsely alleged that, on August 13, 2015, he observed A.B. at the corner of Flatlands Avenue and Alabama Avenue “[stopping] only male passers-by.” He further alleged A.B.’s purpose was prostitution because she was at an “industrial location” and that he was “aware that the [NYPD] has made numerous arrests for violations of Penal Law Sections 240.37, 230.00 and/or 230.03 at [that] location.”

214. Defendant Daverin failed to properly review, monitor and supervise Defendant Salazar’s, Defendant Doe NYPD Officer #8’s and Defendant Doe NYPD Officer #9’s unlawful arrest of A.B.

215. After her initial court appearance, A.B. was forced to return to court two additional times under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against A.B. were dismissed and sealed on September 16, 2015.

216. Since her arrest, A.B. has stopped walking alone in East New York because she fears that she will be wrongfully arrested again. She becomes very anxious whenever she sees police and will often cross to the other side of the street to avoid any contact with them. As such, the acts of Defendants Daverin, Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9 intimidated and threatened A.B.

217. By the actions described above, Defendants Daverin, Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9 targeted and/or sanctioned the targeting of A.B. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

218. The actions of Defendants Daverin, Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9 deprived A.B. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

8. **Named Plaintiff Sarah Marchando**

219. Sarah Marchando is a 28-year-old Latina woman who currently resides in Queens, New York.

220. Ms. Marchando has a long history of prostitution-related arrests, primarily in the East New York neighborhood in Brooklyn. Because of her arrest record, police officers assigned to the 75<sup>th</sup> precinct, and the related satellite precinct of Police Service Area (“PSA”) 2, know Ms. Marchando by face and last name. Because of her criminal record and previous proximity to the precinct, the police target Ms. Marchando for arrest when they see her outside, and she is often arrested for loitering for the purpose of prostitution when engaged in wholly innocent conduct.

**May 7, 2015 Arrest**

221. For example, on the morning of May 7, 2015, Ms. Marchando met her boyfriend, who was coming home from work, at the BP car wash located on the corner of Flatlands Avenue between Pennsylvania Avenue and Sheffield Avenue. She was wearing a dress that stopped about an inch above her knee-high flat boots. Ms. Marchando and her boyfriend arrived at approximately 7:20 or 7:25 a.m. From there, Ms. Marchando's boyfriend left to run some errands and Ms. Marchando planned to take the bus back to his apartment.

222. At around 7:30 a.m., Ms. Marchando boarded the B6 bus at the corner of Alabama Avenue and Cozine Avenue. Ms. Marchando remained on the bus for five or six stops until it arrived at Wortman Avenue and Ashford Street, approximately 11 blocks from where she had boarded. There, Defendants Nicosia and Doe NYPD Officer #10, dressed in plainclothes, rushed onto the bus. They ordered Ms. Marchando to put her hands behind her back and disembark. Ms. Marchando asked the officers what was happening. They did not answer. After a few seconds, Defendant Nicosia grabbed her by the arm and pulled her down the bus stairs. Ms. Marchando kept asking why she was being arrested but never got a response.

223. At no time on May 7, 2015 did Ms. Marchando solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

224. Once Defendant Nicosia dragged her off the bus, she tried to stop him from pulling on her arm. Defendants Nicosia and Doe NYPD Officer #10 restrained her. One of them put her in a chokehold, which exacerbated her asthma and caused her to vomit. Ms. Marchando repeatedly told the officers that she could not breathe, but they did not release her until two

bystanders who were watching the incident intervened. After she was finally released from the chokehold, her bra was ripped, and she was having trouble breathing and was in substantial pain.

225. Additional police officers arrived at the scene. In total, there were at least six officers involved in Ms. Marchando's arrest, including Defendants Nicosia and Doe NYPD Officer #10 in plainclothes, Defendants Quinn, Doe NYPD Officer #11 and Doe NYPD Officer #12 in uniform, and their supervisor Defendant Doyle, who was dressed in plainclothes. Without telling Ms. Marchando why she was being arrested, the officers placed her in handcuffs and searched her purse. Ms. Marchando requested medical attention, but the officers refused to get her help. Instead Defendant Doyle remarked, "She's back" and "We got her."

226. The officers brought Ms. Marchando to the 75<sup>th</sup> precinct around 7:45 a.m. where an officer performed a pocket search of Ms. Marchando. She was kept in handcuffs and placed in a holding cell. Still having difficulty breathing, Ms. Marchando asked for her asthma inhaler, but the officers refused to give it to her. At approximately 2:45 or 3:00 p.m., an officer returned and told Ms. Marchando for the first time that she had been arrested for loitering for the purpose of prostitution. She was arraigned around midnight and was finally released after spending approximately 16 hours in custody.

227. After her arrest, Ms. Marchando suffered from ongoing breathing difficulties and pain and swelling in her arm and knee. In addition, the arrest caused Ms. Marchando emotional suffering in that she felt humiliated and unfairly treated. She worried that she would not be able to walk anywhere or utilize public transportation in that neighborhood without facing arrest. Her fears were and are justified, as officers from the 75<sup>th</sup> precinct arrested her again eight days after this incident, similarly without probable cause or justification.

228. In the sworn criminal court complaint charging Ms. Marchando with violating Section 240.37 on May 7, 2015, Defendant Quinn falsely alleged that he observed Ms. Marchando for 40 minutes, during which time she “beckon[ed] to multiple vehicles passing by with male drivers[.] . . . approach[ed] a vehicle and . . . engage[d] in conversation with a male inside of said vehicle.”

229. Defendant Doyle failed to properly review, monitor and supervise Defendant Quinn’s, Defendant Nicosia’s, Defendant Doe NYPD Officer # 10’s, Defendant Doe NYPD Officer #11’s and Defendant Doe NYPD Officer #12’s unlawful stop, seizure and assault of Ms. Marchando, and approved Ms. Marchando’s arrest.

*May 15, 2015 Arrest*

230. In the early morning of May 15, 2015, Ms. Marchando was on Flatlands Avenue between Pennsylvania Avenue and Sheffield Avenue. She had purchased juice from a nearby store and was listening to music, texting and playing a game on her phone. Defendants Yanez and supervising Doe NYPD Officer #13 approached her and immediately asked if she had ever been arrested for prostitution. When she responded affirmatively, they handcuffed and arrested her.

231. At no time on May 15, 2015 did Ms. Marchando solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

232. Defendants Yanez and Doe NYPD Officer #13 placed Ms. Marchando in a van with six male arrestees. Ms. Marchando was the only female arrestee in the van and remained handcuffed. She was kept in the van for over one hour.

233. At the 75<sup>th</sup> precinct, Ms. Marchando was searched by a male officer and put in a holding cell. She remained handcuffed in the cell for approximately two hours. During that time, Ms. Marchando asked three different male police officers to remove her handcuffs because she had lost feeling in her right arm. They told her that the handcuffs were necessary because there was no female officer available to search her, even though a male officer had already searched her when she arrived. Approximately one hour after Ms. Marchando’s request, a female officer came into the holding cell. She seemed surprised that Ms. Marchando was still handcuffed and performed a search. Ms. Marchando was finally arraigned and released around 11:30 p.m., after spending approximately 18 hours in custody.

234. In the supporting deposition accompanying the criminal court complaint charging Ms. Marchando with violating Section 240.37 on May 15, 2015, Defendant Yanez falsely alleged that he observed Ms. Marchando for 120 minutes “during which time [Ms. Marchando] repeatedly beckoned to passers-by and stopped five-passers-by, engaging in conversation with said passers-by” and that she was “standing in the middle of the road.” Yanez further alleged that Ms. Marchando’s purpose was prostitution because “the above area is an industrial location” “frequented by people engaging in promoting prostitution” and that he is “aware that [Ms. Marchando] has previously been arrested for violating Penal Law 240.37, 230.00 and/or 230.03” and because he recovered “10 unused condoms” from her person.

235. Defendant Doe NYPD Officer #13 failed to properly review, monitor and supervise Defendant Yanez’s unlawful stop and seizure of Ms. Marchando, and approved Ms. Marchando’s arrest.

236. After her arrest, Ms. Marchando continued to suffer pain and discomfort in her right arm and emotional harm. As a result of the May 7 and May 15, 2015 arrests,



Ms. Marchando was afraid to go outside in Brooklyn and when there, tried to stay inside her boyfriend's apartment as much as possible to avoid arrest. Ms. Marchando suffers from an anxiety disorder, and her arrests exacerbated her condition. As a result of the harassment by Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 and other members of the 75<sup>th</sup> precinct, Ms. Marchando temporarily left New York City in September 2015. When she returned to New York in December 2015, she moved to Queens out of fear that she would be targeted for arrest by officers in the 75<sup>th</sup> precinct. As such, the acts of Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 intimidated and threatened Ms. Marchando.

237. After her arrests on May 7 and May 15, 2015, Ms. Marchando was forced to return to court two additional times, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against Ms. Marchando stemming from the two arrests were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on June 10, 2015. Both cases were dismissed and sealed on December 9, 2015.

238. By the actions described above, Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 targeted and/or sanctioned the targeting of Ms. Marchando for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

239. The actions of Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 deprived

Ms. Marchando of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

## CLAIMS FOR RELIEF

### I. CLASS CLAIMS

#### First Claim for Relief

Section 240.37 Is Unconstitutionally Void for Vagueness in Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution<sup>23</sup>

240. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

241. Section 240.37 does not provide citizens with adequate notice as to what type of behavior they must avoid in order to avoid arrest under the statute.

242. Plaintiffs have been and continue to be unlawfully subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained for engaging in innocent activities such as walking down the street, sitting on a bench, riding on a public bus and speaking to other individuals on a public street.

243. Section 240.37 lacks adequate guidelines for police, leading to inconsistent and arbitrary enforcement. Neither New York State courts, the City, nor the NYPD have provided adequate guidance to officers as to what type of behavior is criminal under Section 240.37.

244. Section 240.37 is unconstitutionally void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment as applied to Plaintiffs because it provides insufficient notice to citizens of what constitutes illegal behavior under the statute and provides

<sup>23</sup> A copy of this Complaint & Demand for Jury Trial has been served on the New York State Attorney General's Office.

insufficient guidance to law enforcement, resulting in discriminatory and arbitrary enforcement of the statute at the discretion of individual officers.

**Second Claim for Relief**

Section 240.37 is Unconstitutional Because It Is Overly Broad, Infringing on the Right to Freedom of Expression Under the First Amendment to the United States Constitution and Article I, § 8 of the New York Constitution, the Right to Due Process Under the Fourteenth Amendment to the United States Constitution and the Right Against Unreasonable Searches and Seizures Under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution

245. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

246. A substantial number of law enforcement activities undertaken pursuant to

Section 240.37, including surveillance, stops, questioning, frisks, searches, seizures and arrests and detention under Section 240.37 are unconstitutional.

247. Plaintiffs maintain a liberty interest in self-expression and bodily integrity and privacy.

248. Plaintiffs exercise free speech, including the expression of gender identity through choice of clothing, free movement and free association with other citizens.

249. As a result of the unconstitutionally overbroad provisions of Section 240.37 that implicate a substantial amount of constitutionally protected speech and other protected activity, Plaintiffs are forced to live with a heightened risk of law enforcement encounters and experience a real and substantial deterrent to the exercise of these freedoms.

250. Plaintiffs have been deterred from exercising their rights under the First, Fourth and Fourteenth Amendments by restricting their expression through clothing choices, restricting their movement through public spaces and restricting their associations with other people out of fear of future arrest.

251. The substantial unconstitutional applications of Section 240.37 in unlawfully surveilling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs who are engaged in constitutionally protected speech and other protected activity outweigh any public policy goals of Section 240.37, which are already met through other provisions of New York's Penal Law.

**Third Claim for Relief**

Municipal Liability for Violations of Plaintiffs' Due Process Rights Under the Fourteenth Amendment to the United States Constitution  
(Against the City)

252. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

253. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies and widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner in violation of Plaintiffs' liberty interests in self-expression, bodily integrity and privacy. By unlawfully surveilling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs, including Named Plaintiffs, under Section 240.37 based in large part on Plaintiffs' appearance and their presence in public areas, Defendants, who are state actors, infringed on Plaintiffs' fundamental freedoms.

254. The City has acted with deliberate indifference to Plaintiffs' Due Process rights under the Fourteenth Amendment in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, leading to unlawful infringement of Plaintiffs' liberty interests in self-expression, bodily integrity and privacy.

255. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 if they engage in constitutionally protected conduct in public areas, and their ability to self-determine their personal appearance in public continues to be chilled.

**Fourth Claim for Relief**

Municipal Liability for Violations of Plaintiffs' Right to Freedom of Speech Under the First Amendment to the United States Constitution and Article I, § 8 of the New York Constitution (Against the City)

256. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

257. Plaintiffs have a constitutionally protected interest in the exercise of free speech, including the expression of gender identity through choice of clothing, conversations with individuals of any gender and gender identity, free movement and free association with other citizens.

258. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies and widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner in violation of the First Amendment to the United States Constitution and Article I, § 8 of the New York Constitution by unlawfully surveilling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs for Section 240.37 violations based in large part on protected conduct, *i.e.* their clothing, presence in public areas, conversations with others and/or other First Amendment activity, causing constitutional injury and chilling their First Amendment speech, expressive conduct and ability to freely utilize public space.

259. The City has acted with deliberate indifference to Plaintiffs' rights under the First Amendment and Article I, § 8 of the New York Constitution in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, leading to the unlawful infringement of Plaintiffs' right to engage in free speech and other protected First Amendment activity.

260. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 if they engage in constitutionally protected speech in public areas, and their speech continues to be chilled.

**Fifth Claim for Relief**

Municipal Liability for Violations of Plaintiffs' Right to Equal Protection of the Laws Under the Fourteenth Amendment to the United States Constitution and Article I, § 11 of the New York Constitution (Against the City)

261. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

262. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies, widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner against women of color, some of whom are transgender, based on the race, color, ethnicity, gender, gender identity and/or appearance of Plaintiffs under circumstances in which Section 240.37 is not enforced against men or white women, causing constitutional injury by depriving Plaintiffs of equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, § 11

of the New York Constitution. The City has no legitimate interest in enforcing Section 240.37 in this manner.

263. The City has acted with deliberate indifference to Plaintiffs' right to equal protection of the laws under the Fourteenth Amendment and Article I, § 11 of the New York Constitution in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, causing constitutional injury to Plaintiffs in that they have been, and continue to be, unlawfully subjected to law enforcement activities, including surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention based on race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities, in violation of the Fourteenth Amendment to the United States Constitution and Article I, § 11 of the New York Constitution.

264. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 on the basis of race, color, ethnicity, gender, gender identity and/or appearance.

**Sixth Claim for Relief**

Municipal Liability for Unlawful Discrimination Under 42 U.S.C. § 1981  
(Against the City)

265. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

266. Pursuant to certain enforcement policies, widespread practices and/or customs, the City has chosen to enforce Section 240.37 in a discriminatory manner, denying Plaintiffs the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by

white citizens of the United States, and subjecting them to disparate forms of punishment, pains, penalties and exactions as compared to white citizens, in violation of 42 U.S.C. § 1981.

267. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs have suffered constitutional injury.

**Seventh Claim for Relief**

Municipal Liability for Violation of Plaintiffs' Right Against Unreasonable Search and Seizures  
Under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New  
York Constitution  
(Against the City)

268. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

269. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies, widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner, seizing persons in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution. These actions have resulted in constitutional injury in that Plaintiffs have been unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 without the requisite reasonable suspicion or probable cause to believe that a criminal offense has been or is being committed.

270. The City has acted with deliberate indifference to Plaintiffs' right to be free from unreasonable searches and seizures in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, causing Plaintiffs to be unlawfully subjected to surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention under Section 240.37 without reasonable suspicion or

probable cause in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

271. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

#### Eighth Claim for Relief

Claims Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.  
(Against the City)

272. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

273. The law enforcement services described in this complaint have been funded, in part, with federal funds.

274. Plaintiffs were intended beneficiaries of these law enforcement services.

275. Discrimination based on race in the law enforcement services and conduct described in this complaint is prohibited under 42 U.S.C. § 2000d et seq. The acts and conduct complained of herein by the Defendants were motivated by racial animus and were intended to discriminate on the basis of race, particularly against Blacks and Latinos.

276. As a direct and proximate result of the above-mentioned acts, Plaintiffs have suffered injuries and damages and have been deprived of their rights under the civil rights laws. Without appropriate injunctive relief, these violations will continue to occur.

#### Ninth Claim for Relief

Respondent Superior Claim Under New York Common Law  
(Against the City)

277. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

278. The conduct of Individual Defendants occurred while they were on duty, acting under the color of law, in and during the course and scope of their duties and functions as NYPD officers and while they were acting as agents and employees of the City.

279. As a result, the City is liable to Plaintiffs for the claims against Individual Defendants under the doctrine of respondeat superior.

#### Tenth Claim for Relief

Conspiracy to Violate Plaintiffs' Civil Rights Under 42 U.S.C. § 1985  
(Against All Defendants)

280. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

281. Defendants from the 52<sup>nd</sup> precinct agreed to violate certain Plaintiffs' rights by planning and performing sweeps, see *supra* ¶ 73, during which they planned to arrest certain Plaintiffs for their status as transgender women and deprive them of equal protection under the law. Defendants planned to arrest these Plaintiffs without probable cause to believe they committed a crime, in violation of their First, Fourth and Fourteenth Amendment rights.

Defendants from the 52<sup>nd</sup> precinct took action in furtherance of violating certain Plaintiffs' rights by actually arresting multiple Named Plaintiffs and Plaintiff Class members, as described above, on June 6, 2015 and June 13, 2015, under Section 240.37, and telling them that they were arrested because they were transgender women out in public at night. In taking these actions,

Defendants from the 52<sup>nd</sup> precinct were motivated by their discriminatory attitudes towards and unlawful bias against transgender women.

282. Unknown high-ranking officers in the NYPD and/or other supervising officers and police officers of other precincts have similar policies, widespread practices and/or customs motivated by discriminatory attitudes and unlawful bias against transgender women of planning and performing sweeps to effectuate Section 240.37 arrests pursuant to which they have agreed to violate transgender Plaintiffs' rights under the First, Fourth and Fourteenth Amendments due to the fact that they are transgender women.

283. As a result of these arrests, Plaintiff Class Members and Named Plaintiffs suffered constitutional injury, were harmed and suffered emotional and psychological distress, deprivation of liberty, embarrassment and shame.

**Eleventh Claim for Relief**

Violation of the N.Y. Civ. Rights Law §§ 40-c, 40-d and 79-n  
(Against All Defendants)

284. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

285. Defendants' prior and continuing acts of discrimination against Plaintiffs, including Defendants' unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37, and/or the sanctioning of those law enforcement acts, were carried out on the basis of Plaintiffs' race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities, and therefore subjected Plaintiffs to discrimination in violation of their civil rights, including their right to equal protection of the laws, in violation of New York State Civil Rights Law §§ 40-c and 40-d.

286. Further, Defendants' prior and continuing acts of discrimination against Plaintiffs, including Defendants' unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37, and/or the sanctioning of those law enforcement acts, constituted the intentional selection of Plaintiffs for harm in whole or substantial part because of Defendants' beliefs or perceptions regarding Plaintiffs' gender, including their actual or perceived sex, gender identity or expression, race and color, in violation of New York State Civil Rights Law § 79-n. Further, Defendants' sanctioning or acts of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37 constituted intimidation of Plaintiffs on the basis of their gender, including their actual or perceived sex, gender identity or expression, race and color.

287. In addition, Defendants have aided and incited others to unlawfully surveil, stop, question, frisk, search, seize and/or arrest and detain Plaintiffs under Section 240.37 on the basis of Plaintiffs' race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities, in violation of New York State Civil Rights Law §§ 40-c, 40-d and 79-n. Defendants' violations of Plaintiffs' civil rights under the New York State Civil Rights Law are the actual, direct and proximate cause of injuries suffered by Plaintiffs, as alleged herein, and Plaintiffs continue to be harmed by Defendants' violations of the New York State Civil Rights Law.

288. Plaintiffs have complied with the procedural requirements of New York State Civil Rights Law § 40-d by serving notice upon the state Attorney General at or before the commencement of the action.

**Twelfth Claim for Relief**

Violation of the New York State Human Rights Law, New York State Rules and Regulations and New York City Human Rights Law Through Discriminatory Refusal, Withholding and Denial of Public Accommodations, Disparate Impact and Aiding and Abetting Unlawful Discriminatory Practices

N.Y. Exec. Law §§ 296(2), 296(6), 297(9)

N.Y. Comp. Codes R. & Regs. Tit. 9, § 466.13

N.Y.C. Admin. Code §§ 8-107(4)(a), 8-107(6), 8-107(17), 8-502(a)

(Against All Defendants)

289. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

290. The NYPD is a place or provider of public accommodation because it provides services, facilities, accommodations, advantages and privileges through acting in its investigative and custodial capacities, including the supervision and execution of surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention pursuant to Section 240.37.

The New York City Commission on Human Rights has not granted the NYPD an exemption to § 8-107(4) based on bona fide considerations of public policy.

291. By sanctioning and/or engaging in sweeps and targeting Plaintiffs for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention pursuant to Section 240.37 on the basis of Plaintiffs' actual and/or perceived race, color, ethnicity and/or gender, including their gender identity, self-image, appearance, behavior, expression and/or transgender status, and/or by aiding, abetting, inciting or compelling such conduct, Defendants have refused, denied and withheld from Plaintiffs the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services. Therefore, the acts of Defendants, who are owners, proprietors, managers, superintendents, agents and/or employees of the NYPD and the City, violated Plaintiffs' rights under the NYHRL, N.Y. Exec. Law §§ 296(2) and

296(6), the N.Y. Comp. Codes R. & Regs. Tit. 9, § 466.13 and the NYCHRL, N.Y.C. Admin. Code §§ 8-107(4)(a) and 8-107(6).

292. Defendants have also violated the NYCHRL, N.Y.C. Admin. Code §§ 8-107(17), because their actions, policies, practices or customs, or a group thereof, have a disparate impact on women of color, including transgender women of color, who are protected under the NYCHRL. By targeting Plaintiffs for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 on the basis of Plaintiffs' actual or perceived race, color, ethnicity, gender and/or gender identity, including self-image, appearance, behavior, expression and/or transgender status, Defendants' actions, policies, practices or customs, or a group thereof, result in the refusal, denial and withholding from Plaintiffs of the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services on the same terms as non-transgender, male and/or white individuals. Therefore, women of color, including transgender women, are disparately impacted to their detriment by Defendants' actions, policies, practices or customs, or a group thereof.

293. The disparate impact of Defendants' actions, policies, practices or customs, or a group thereof, which bear no relationship to a significant business objective of the NYPD, exceeds the mere existence of a statistical imbalance between women of color and transgender women, and the general population.

294. Plaintiffs have not filed a complaint with the New York City Commission on Human Rights, the State Division on Human Rights, any other court of competent jurisdiction, or any other administrative agency based upon the unlawful discriminatory practices alleged herein.

295. Defendants' violations of Plaintiffs' rights under the NYHRL and NYCHRL are the actual, direct and proximate cause of injuries suffered by Plaintiffs, as alleged herein, and Plaintiffs continue to be harmed by Defendants' violations of the NYHRL and NYCHRL.

296. Plaintiffs have served a copy of the complaint upon the authorized representatives of the New York City Commission on Human Rights and Corporation Counsel.

**Thirteenth Claim for Relief**

Violation of the New York City Bias-Based Profiling Law, N.Y.C. Admin. Code § 14-151  
(Against All Defendants)

297. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

298. The City and Individual Defendants who are members of the NYPD police force have engaged, are engaging and continue to engage in bias-based profiling by initiating law enforcement actions against Plaintiffs, including the sanctioning and/or execution of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37, on the basis of and in reliance on Plaintiffs' actual or perceived race, color, gender and/or gender identity as the determinative factor. Therefore, Defendants have engaged and continue to engage in the above-described intentional bias-based profiling of Plaintiffs, in violation of the New York City Bias-Based Profiling Law, N.Y.C. Admin. Code § 14-151.

299. Defendants have intentionally engaged in the above-described bias-based profiling of Plaintiffs. Such bias-based profiling is not justified by factors unrelated to unlawful discrimination, and is instead based on Plaintiffs' actual or perceived race, color, gender and/or gender identity. Defendants' above-described bias-based profiling is neither necessary to

achieve a compelling governmental interest nor narrowly tailored to achieve any compelling governmental interest.

300. In addition, Defendants' actions, policies, practices, or customs, or a group thereof, which result in the above-described bias-based profiling of Plaintiffs by Defendants, have a disparate impact on Plaintiffs, based on Plaintiffs' actual or perceived race, color and/or gender.

301. Further, the disparate impact of Defendants' actions, policies, practices or customs, or a group thereof, exceed the mere existence of a statistical imbalance between women of color and transgender women, and the general population. Defendants' actions, policies, practices or customs, or a group thereof, bear no significant relationship to advancing a significant law enforcement objective.

302. Defendants' violations of Plaintiffs' rights under the New York City Bias-Based Profiling Law are the actual, direct and proximate cause of injuries suffered by Plaintiffs, as alleged herein, and Plaintiffs continue to be harmed by Defendants' violations of the New York City Bias-Based Profiling Law.

**II. CLAIMS BY NAMED PLAINTIFFS**

303. With respect to each of the following claims, the conduct of Individual Defendants constituted outrageous and reckless conduct and demonstrated a callous indifference to and willful disregard of Named Plaintiffs' federal and state constitutional rights. Their conduct caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.



**Fourteenth Claim for Relief**

Violations of Plaintiffs' Due Process Rights Under the Fourteenth Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983  
(Against Individual Defendants)

304. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

305. Individual Defendants unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained Named Plaintiffs in violation of their Due Process rights under the Fourteenth Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983. Individual Defendants arrested Named Plaintiffs in violation of their constitutionally protected liberty interest in self-expression and bodily integrity and privacy.

306. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

**Fifteenth Claim for Relief**

Violations of Plaintiffs' Right to Freedom of Speech Under the First Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983  
(Against Individual Defendants)

307. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

308. The Individual Defendants unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained Named Plaintiffs in violation of their rights under the First Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983. The Individual Defendants arrested Named Plaintiffs for engaging in constitutionally protected expressive conduct, including communicating with others

in public and/or expressing their gender identity in a public place through their choice of clothing.

309. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

**Sixteenth Claim for Relief**

Violation of Plaintiffs' Right to Equal Protection of the Laws Under the Fourteenth Amendment to the United States Constitution, Article I, § 11 of the New York Constitution and 42 U.S.C. § 1983  
(Against Individual Defendants)

310. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

311. Acting under color of state law, Individual Defendants targeted and/or sanctioned the targeting of Named Plaintiffs for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on their race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities. The Individual Defendants had no legitimate interest in targeting Named Plaintiffs in this manner.

312. As a direct and proximate result of such Individual Defendants' law enforcement actions, such Named Plaintiffs have been deprived of their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, § 11 of the New York Constitution in violation of 42 U.S.C. § 1983.

313. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

**Seventeenth Claim for Relief**

Violation of Plaintiffs' Right Against Unreasonable Search and Seizures Under the Fourth Amendment to the United States Constitution, Article I, § 12 of the New York Constitution and 42 U.S.C. § 1983  
(Against Individual Defendants)

314. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

315. The Individual Defendants intentionally and under color of state law have unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained Named Plaintiffs under Section 240.37 without reasonable suspicion or probable cause in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

316. As a direct and proximate result of the acts and omissions of Individual Defendants, Named Plaintiffs have been unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained, and deprived of their rights under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution in violation of 42 U.S.C. § 1983.

317. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

**Eighteenth Claim for Relief**

Unlawful Discrimination Under 42 U.S.C. § 1981  
(Against Individual Defendants)

318. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

319. By their above-described actions pertaining to the sanctioning and/or execution of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention of

Plaintiffs under Section 240.37, Individual Defendants denied Named Plaintiffs the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens of the United States, and subjected them to disparate forms of punishment, pains, penalties and exactions as compared to white citizens, in violation of 42 U.S.C. § 1981.

**Nineteenth Claim for Relief**

Violation of the Americans with Disabilities Act, the New York State Human Rights Law and the New York City Human Rights Law Through Unlawful Discriminatory Practices on the Basis of Disability, 42 U.S.C. § 12132.

N.Y. Exec. Law §§ 296(2), 296(6), 297(9),

N.Y.C. Admin. Code §§ 8-107(4)(a), 8-107(6), 8-107(15)(a), 8-502(a)

(D.H. Against Defendants Kinane, McKenna, Doe NYPD Officer #1, Doe NYPD Officer # 2, Doe NYPD Officer #14 and the City)

320. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

321. As stated in paragraphs 290-291 above, the NYPD provides services, facilities, accommodations, advantages and privileges by acting in its investigative and custodial capacities. Defendants are managers, proprietors, superintendents, agents and/or employees of the City and the NYPD, a department of local government and a place and provider of public accommodation. As such, Defendants are prohibited from discriminating on the basis of disability under 42 U.S.C. § 12132, N.Y. Exec. Law §§ 296(2)(a), 296(6), 297(9), and N.Y.C. Admin. Code § 8-107(4)(a), 8-107(6), 8-107(15)(a) and 8-502(a).

322. The New York City Commission on Human Rights has not granted Defendants an exemption based on bona fide considerations of public policy.

323. Plaintiff D.H. has not filed a complaint with the New York City Commission on Human Rights, the State Division on Human Rights, any other court of competent jurisdiction, or any other administrative agency based upon the unlawful discriminatory practices alleged herein.

324. D.H., who is deaf and communicates by sign language, writing or text message on her phone, suffers from a physical and medical impairment that substantially limits one or more major life activities, including her ability to hear, and therefore qualifies as a disability.

325. The City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, and Doe NYPD Officer #14 were therefore required to make a reasonable accommodation to enable D.H. to enjoy the rights or privileges of access to the investigative and custodial services provided by the NYPD during D.H.'s arrest.

326. The City and Defendants McKenna, Kinane, Doe NYPD Officer #1 and Doe NYPD Officer #2 knew or should have known that D.H. was deaf at the time of her arrest, based in part on the fact that D.H. gestured to indicate that she was deaf when Defendants Kinane, Doe NYPD Officer #1 and Doe NYPD Officer #2 approached her during her arrest. Defendant Doe NYPD Officer #14 knew or should have known that D.H. was deaf during her pre-arraignment detention based on the fact that D.H. stated in writing that she needed a sign language interpreter.

327. The City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, and Doe NYPD Officer #14, at the time of D.H.'s arrest and throughout her pre-arraignment detention, intentionally and/or with deliberate indifference failed to provide D.H. with a reasonable accommodation, reasonable modification and/or auxiliary aid and service for communicating, insofar as the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, and Doe NYPD Officer #14 denied D.H. a sign language interpreter, denied D.H. the ability to communicate through a writing or texting instrument and prevented D.H. from communicating with her hands by cuffing them behind her back. As a result of her inability to communicate, D.H. was not able to learn of the reason for her arrest until the day after her arrest, when she was brought to central booking. By intentionally denying D.H. any

means of communication during her arrest and detention, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, and Doe NYPD Officer #14 intentionally and/or with deliberate indifference, discriminated against D.H. on the basis of her disability and denied her the benefit of the services, programs or activities of the NYPD.

328. In addition, by denying D.H. a reasonable accommodation, reasonable modification and/or auxiliary aid and service for communicating with the police during her arrest, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, and Doe NYPD Officer #14 denied, refused and withheld from D.H. access to the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services on the same terms as individuals without disabilities.

329. By denying D.H. a reasonable accommodation, reasonable modification and/or auxiliary aid and service for communicating with the police during her arrest, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, and Doe NYPD Officer #14 refused, denied and withheld from D.H. her right to the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services under N.Y.C. Admin. Code § 8-107(4)(a) and N.Y. Exec. Law §§ 296(2), as well as D.H.'s right to a reasonable accommodation, reasonable modification and/or auxiliary aid and service under N.Y.C. Admin. Code §§ 8-107(15)(a) and N.Y. Exec. Law §§ 296(2). The City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, and Doe NYPD Officer #14 have also violated N.Y.C. Admin. Code § 8-107(6) and N.Y. Exec. Law § 296(6) by aiding, abetting and inciting others' acts of denying D.H. a reasonable accommodation, reasonable modification and/or auxiliary aid for communicating with police during her arrest, and of

denying, refusing and withholding from D.H. access to the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services.

330. By their above-described actions, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 also violated D.H.'s right to the benefit of the services, programs or activities of the NYPD, as well as her right to be free from discrimination by Defendants on the basis of disability under 42 U.S.C. § 12132.

331. The City, as the employer of McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 is also liable for those individual Defendants' unlawful discriminatory practices under 42 U.S.C. § 12132, N.Y. Exec. Law §§ 296(2) and 296(6) and N.Y.C. Admin. Code §§ 8-107(4)(a), 8-107(6) and 8-107(15)(a), as alleged herein.

332. The City and Defendant McKenna's, Defendant Kinane's, Defendant Doe NYPD Officer #1's, Defendant Doe NYPD Officer #2's and Defendant Doe NYPD Officer #14's violations of D.H.'s rights under the NYHRL, NYCHRL and 42 U.S.C. § 12132 are the actual, direct and proximate cause of injuries suffered by D.H., as alleged herein.

333. Plaintiffs have served a copy of the complaint upon the authorized representatives of the New York City Commission on Human Rights and Corporation Counsel.

**Twentieth Claim for Relief**

Violation of the Right to Be Free from the Use of Excessive Force Under the Fourth Amendment to the United States Constitution, Article I, § 12 of the New York Constitution and 42 U.S.C. § 1983

(N.H. against Defendant Dawkins)

334. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

335. By pulling N.H.'s earrings and jewelry off of her person, forcibly pulling on her wig and verbally abusing her, Defendant Dawkins used excessive force against Plaintiff N.H.

and deprived her of her rights, remedies, privileges and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. §1983, including, but not limited to rights guaranteed by the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

336. In so doing, Defendant Dawkins acted intentionally and under color of state law.

337. The conduct of Defendant Dawkins caused N.H. pain and suffering, as well as psychological and emotional harm.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

338. Certify this action as a class action on behalf of the proposed Plaintiff Class pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure: all women of color who have been and/or will be surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained pursuant to Section 240.37 between September 30, 2013 and the present and the date on which the City is enjoined from or otherwise ceases to enforce Section 240.37.

339. Declare that Defendants' acts, practices, policies, customs and/or omissions have deprived Plaintiffs of their rights under the First, Fourth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. §§ 1983, 1981; Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132; the Constitution of the State of New York; the New York State Civil Rights Law; the New York State Human Rights Law; the New York City Bias-Based Profiling Law and the New York City Human Rights Law.

340. Declare that Section 240.37 violates the United States Constitution and the New York Constitution on its face and as applied;

341. Issue preliminary and permanent injunctions restraining the City and its employees, agents and successors from enforcing Section 240.37;

342. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to D.H. in an amount to be determined at trial against the City and Defendants Kinane, McKenna, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 jointly and severally, together with interest and costs;

343. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to N.H. in an amount to be determined at trial against the City and Defendants Dawkins, Keane, McKenna and Doe NYPD Officer #3, jointly and severally, together with interest and costs;

344. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to K.H. in an amount to be determined at trial against the City and Defendants Imburgia, Maloney, Doe NYPD Officer #4 and Doe NYPD Officer #5, jointly and severally, together with interest and costs;

345. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to Natasha Martin in an amount to be determined at trial against the City and Defendants Allen, Siev, Doe NYPD Officer #6 and Doe NYPD Officer #7, jointly and severally, together with interest and costs;

346. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to Tiffany Grissom in an amount to be determined at trial against the City and Defendants Savarese and Pocalyko jointly and severally, together with interest and costs;

347. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to R.G. in an amount to be determined at trial against the City and Defendants Diggs, Gomez and Beddows, jointly and severally, together with interest and costs;

348. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to A.B. in an amount to be determined at trial against the City and Defendants Salazar, Daverin, Doe NYPD Officer #8 and Doe NYPD Officer #9, jointly and severally, together with interest and costs;

349. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to Sarah Marchando in an amount to be determined at trial against the City and Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13, jointly and severally, together with interest and costs;

350. Award punitive damages to D.H. in an amount to be determined at trial against Defendants Kinane, McKenna, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of D.H.'s rights as set forth above;

351. Award punitive damages to N.H. in an amount to be determined at trial against Defendants Dawkins, Keane, McKenna and Doe NYPD Officer #3, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of N.H.'s rights as set forth above;

352. Award punitive damages to K.H. in an amount to be determined at trial against Defendants Imburgia, Maloney, Doe NYPD Officer #4 and Doe NYPD Officer #5, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of K.H.'s rights as set forth above;

353. Award punitive damages to Natasha Martin in an amount to be determined at trial against Defendants Allen, Siev, Doe NYPD Officer #6 and Doe NYPD Officer #7, whose

actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of Ms. Martin's rights as set forth above;

354. Award punitive damages to Tiffany Grissom in an amount to be determined at trial against Defendants Savarese and Pocalyko, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of Ms. Grissom's rights as set forth above;

355. Award punitive damages to R.G. in an amount to be determined at trial against Defendants Diggs, Gomez and Beddows, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of R.G.'s rights as set forth above;

356. Award punitive damages to A.B. in an amount to be determined at trial against Defendants Salazar, Daverin, Doe NYPD Officer #8 and Doe NYPD Officer #9, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of A.B.'s rights as set forth above;

357. Award punitive damages to Sarah Marchando in an amount to be determined at trial against Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of Ms. Marchando's rights as set forth above;

358. Order reasonable attorneys' fees and costs to be paid by Defendants pursuant to 28 U.S.C. § 2414; 42 U.S.C. § 1988; the Americans with Disabilities Act, 42 U.S.C. § 12133; the N.Y. Civ. Rights Law § 79-m(4); the New York City Bias-Based Profiling Law, N.Y.C. Admin.

Code § 14-151(d)(3) and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-502(g); and

359. Grant such other and further relief as the Court deems just and equitable.

Dated: New York, New York  
September 30, 2016

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

D.H., N.H., K.H. f/k/a J.H., Natasha Martin, Tiffany Grissom, Rosa Gonzalez, Adrienne Bankston, and Sarah Marchando, individually and on behalf of a class of all others similarly situated;

16 Civ. 7698 (PKC)(KNF)

Plaintiffs,

-against-

**ORAL ARGUMENT  
REQUESTED**

The City Of New York, Sean Kinane, Joseph Mckenna, Kayan Dawkins, Thomas Keane, Maria Imburgia, Kevin Maloney, Joel Allen, Dave Siev, Bryan Pocalyko, Christopher Savarese, Thomas Diggs, Joel Gomez, Keith Beddows, Christian Salazar, Henry Daverin, Joseph Nicosia, Kelly Quinn, Alexis Yanez, Michael Doyle, John/Jane Doe NYPD Police Officers #1-14,

Defendants.

----- x

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT  
OF THEIR PARTIAL MOTION TO DISMISS THE  
AMENDED COMPLAINT PURSUANT TO FEDERAL  
RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)**

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## **STATEMENT OF FACTS**

Eight named plaintiffs bring this action pursuant to 42 U.S.C. § 1983 and New York State law alleging twenty claims for relief relating to the stopping, summoning, and arresting of individuals pursuant to N.Y. Penal Law § 240.37, loitering for the purposes of prostitution. Plaintiffs sue on behalf of themselves and “a class of similarly situated women of color, some of whom are transgender, who have been and may in the future be subjected to surveillance, stopped, frisked, searched, and/or arrested and detained under New York Penal Law Section 240.37.” Amended Complaint, Annexed to the Declaration of Suzanna Mettham dated March 3, 2017 (“Mettham Dec.”) as Exhibit A, at ¶1. Plaintiffs filed the initial complaint on September 30, 2016 and an Amended Complaint on January 19, 2017. The Amended Complaint identifies certain previously-anonymous plaintiffs by name; but in all other respects, the complaints are the same. Plaintiffs N.H., K.H., D.H., Adrienne Bankston, Rosa Gonzalez, and Tiffaney Grissom allege a single unconstitutional encounter each, which they claim occurred between October 3, 2013 and February 3, 2016, while plaintiff Sarah Marchando alleges two unconstitutional encounters that occurred between May 7<sup>th</sup> and May 15<sup>th</sup>, 2015. Plaintiffs seek relief pursuant to Fed. R. Civ. P. 23(b)(2) as well as damages for the individually named class representatives.

As discussed more fully below, defendants City, Sean Kinane, Joseph McKenna, Kayan Dawkins, Thomas Keane, Maria Imburgia, Kevin Maloney, Joel Allen, Dave Siev, Bryan Pocalyko, Christopher Savarese, Thomas Diggs, Joel Gomez, Keith Beddows, Christian Salazar, Henry Daverin, Joseph Nicosia, Kelly Quinn, Alexis Yanez, Michael Doyle (collectively “defendants”) move for partial dismissal of the Amended Complaint pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure for failing to plead factual allegations sufficient to state a claim that is plausible on its face, and because plaintiffs lack standing to pursue injunctive and declaratory relief either on behalf of themselves or a class.

**ARGUMENT**

**POINT I**

**N.Y. PENAL LAW § 240.37 IS NEITHER VOID  
FOR VAGUENESS NOR OVERBROAD**

Plaintiffs bring vagueness and overbreadth challenges against N.Y. Penal Law § 240.37, arguing that: (i) the statute is void for vagueness because it fails to provide adequate notice to citizens as to what behavior is proscribed by the statute and provides officers with too much discretion in determining how to enforce the statute, Ex. A at ¶¶ 241-43; and (ii) the statute is overbroad because it “. . . implicate[s] a substantial amount of constitutionally protected speech and other protected activity.” Ex. A at ¶ 249. As discussed *infra* at Point II, plaintiffs lack standing to challenge the statute. Even assuming, *arguendo*, that plaintiffs did have standing, their arguments still fail as a matter of law because the statute proscribes limited, clearly defined conduct carried out with a specific criminal intent. Section 240.37 reads, in relevant part:

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.

N.Y. Pen. Law § 240.37(2) (emphasis added). Importantly, the statutory scheme proscribes specific conduct *only where it is engaged in with a specific criminal intent*.

Where, as here, a statutory scheme bans conduct carried out with a specific intent to engage in certain criminal activity, courts have generally found that the statute is not vague. *See, e.g., Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) (“a scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed”); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979)

(“the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*”); *United States v. Stewart*, 590 F.3d 93, 116-18 (2d Cir. 2009) (*mens rea* element provided adequate notice of the proscribed conduct and “the heightened scienter requirement . . . constrains prosecutorial discretion, and ameliorates concerns of arbitrary and discriminatory enforcement”).

Similarly, a specific intent element saves a statute from an overbreadth challenge, where, as here, it only prohibits conduct engaged in for the specific purpose of criminal activity. *People v. Smith*, 44 N.Y.2d 613, 620 (N.Y. 1978) (rejecting challenge to 240.37 because “the statute, by its terms, is limited to conduct ‘for the purpose of prostitution, or of patronizing a prostitute’—behavior which has never been a form of constitutionally protected free speech”); *see also United States v. Williams*, 553 U.S. 285, 297 (2008) (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection”).

While plaintiffs argue that the statute does not include a *mens rea* element, Ex. A at ¶ 52, the statute was upheld by the New York State Court of Appeals against vagueness and overbreadth challenges in large part because it “explicitly limits its reach to loitering . . . for the purpose of committing a specific offense.” *Smith*, 44 N.Y.2d at 620. The Court of Appeals explained, “[t]he section does not authorize an arrest or conviction based on simple loitering by a known prostitute or anyone else; rather, it requires loitering *plus additional objective conduct evincing that the observed activities are for the purpose of prostitution.*” *Id.* at 621 (emphasis added). Plaintiffs also complain that the statute allows “the NYPD immense discretion to assume an individual’s ‘purpose.’” Ex. A at ¶ 52. Yet, the Court of Appeals in *Smith* rejected a nearly identical argument, explaining that an officer must still have probable cause to believe that an individual was acting with the specific intent to commit a prostitution-related offense before he

or she could effect an arrest pursuant to the statute, nor could a person be convicted under the statute absent proof beyond a reasonable doubt that the individual acted for the purpose of committing one of the enumerated crimes. *See Smith*, 44 N.Y.2d at 621. The Court of Appeals explained that “[t]here is also a remote possibility that a person involved in innocent conversation, such as a pollster or one seeking directions, might be arrested, but that is not envisioned by the statute and the mere fact that an officer in a particular case did not have probable cause to arrest that defendant would not warrant the invalidation of the statute.” *Id.* (citing *Roth v. United States*, 354 U.S. 476, 491-92 (1957)).

Moreover, while plaintiffs argue that “for the purpose of” is impermissibly vague, they offer no alternative for what this could possibly mean other than proscribing conduct engaged in with the intent to commit one of the enumerated prostitution-related offenses. *See* Ex. A at ¶¶ 51-52. Indeed, the court in *Silvar v. Eighth Judicial Dist. Court* noted that “most of the prostitution loitering ordinances that have been upheld clearly require a specific intent element. Those ordinances criminalized loitering . . . ‘for the purpose of engaging in, soliciting, or procuring sexual activity for hire’ . . . or variations thereof.” 129 P.3d 682, 689 (Nev. 2006).

Plaintiffs also fault the statute for failing to “provide any objective criteria to determine what conduct is for the ‘purpose’ of prostitution.” Ex. A at ¶ 51. Ironically, similar attempts to bootstrap a *mens rea* element by allowing an officer to *per se* infer intent through observation of certain enumerated objective criteria have led to invalidation of many of the statutes cited by plaintiff. For example, Anchorage Municipal Ordinance 8.14.110 promulgated that “[n]o person will loiter in or near a thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of, inducing, enticing, soliciting or procuring another to participate in an act of prostitution.” *Brown v. Anchorage*, 584 P.2d 35, 36 (Alaska 1978)

(internal quotations omitted). The ordinance also provided that “[a]mong the circumstances which may be considered in determining whether such purpose is manifested are that such person: is a known prostitute or panderer; repeatedly beckons to, stops, attempts to stop, or engages males passersby in conversation . . . .” *Id.* In striking down the statute, the court noted that “[a]pplying a dictionary definition of the word ‘loiter,’ one could conclude that the ordinance makes it a crime for a previously convicted prostitute to ‘spend time idly;’ to ‘linger in an aimless way;’ or ‘to walk or move slowly and indolently, with frequent stop and pauses.’” *Id.* at 36; *see also Coleman v. Richmond*, 5 Va. App. 459, 463-65 (1988) (“[T]he ordinance provides that among the circumstances which may be considered in determining whether the person loitering manifests that intent are three specific circumstances. The role of these enumerated circumstances is central to our decision. . . . It is not clear, however, whether the inclusion of the three particular circumstances was intended to prove that the presence of one or more of those circumstances would sufficiently manifest the intent . . . .”).

The “similar” statutes cited by plaintiffs, Ex. A at ¶ 59, were struck down because they either allowed officers to *per se* infer specific intent from enumerated criteria such as being a known prostitute or waving at cars, *see Brown*, 584 P.2d 36-38; *Coleman*, 364 S.E.2d at 242-43; *Christian v. Kan. City*, 710 S.W.2d 11, 13 (Mo. Ct. App. 1986); *Profit v. City of Tulsa*, 617 P.2d 250, 251 (OK 1980), or because the statute was construed by the court to not include any actual specific intent requirement subject to the probable cause requirements of the Fourth Amendment. *See City of W. Palm Beach v. Chatman*, 112 So. 3d 723, 727 (Fla. Dist. Cit. App. 2013); *Silvar*, 129 P.3d at 688-89; *Wych v. State*, 619 So. 2d 231, 235 (Fla. 1993). Section 240.37 does not suffer from these infirmities, and indeed, most closely resembles the ordinance at issue in *Cleveland v. Howard*, which “was patterned after guidelines found in the American Law



Institute’s Model Penal Code” and which withstood vagueness and overbreadth challenges. 532 N.E.2d 1325, 1326 (Ohio 1987) (“The ordinance sets forth clear and definite criteria whereby both the citizen and the arresting officer can judge whether the particular loitering involved is unlawful.”). Accordingly, Section 240.37 is neither void for vagueness nor unconstitutionally overbroad and, as a result, plaintiffs’ First and Second Claims for Relief must be dismissed.

**POINT II**

**PLAINTIFFS LACK STANDING TO PURSUE  
INJUNCTIVE OR DECLARATORY RELIEF**

The named plaintiffs lack standing under Fed. R. Civ. P. 12(b)(1) to pursue injunctive relief on behalf of themselves or the putative class they seek to represent because they failed to plead a sufficient likelihood of future harm from and the existence of an official policy or its equivalent regarding the NYPD’s enforcement of Sec. 240.37. Accordingly, plaintiffs’ “Class Claims” under their First through Fourteenth Causes of Action, and their individual claims seeking injunctive and/or declaratory relief must be dismissed.

A court’s jurisdiction to hear a vagueness challenge is limited to an actual case or controversy. *See* U.S. Const., art. III, § 2. “The doctrine of standing gives meaning to these constitutional limits.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). “An objection to standing is properly made on a Rule 12(b)(1) motion.” *Williams v. City of New York*, 34 F. Supp. 3d 292, 294 (S.D.N.Y. 2014) (quoting *Tasini v. New York Times Corp., Inc.*, 184 F. Supp. 2d 350, 354 (S.D.N.Y. 2002)). In fact, “[s]tanding for an equitable claim must appear on the face of the complaint in order to survive a motion to dismiss.” *Aiken v. Nixon*, 236 F. Supp. 2d 211, 221 (N.D.N.Y. 2002) (citing *O’Shea v. Littleton*, 414 U.S. 488 (1974)). Moreover, “[f]or each form of relief sought, a plaintiff ‘must demonstrate standing separately.’” *Nicosia v. Amazon.com, Inc.*, No. 15-423-CV, 2016 U.S. App. LEXIS 15656, at \*36 (2d Cir. Aug. 25,

2016) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). Additionally, plaintiffs “must allege that they personally have been injured, not that injury has been suffered by other, unidentified members of the class.” *MacNamara v. City of New York*, 275 F.R.D. 125, 140 (S.D.N.Y. 2011) (citing *Lewis v. Casey*, 518 U.S. 343, 357 (1996)).

“In order to establish standing, a plaintiff must prove: (1) injury-in-fact, or a concrete and particularized harm to a legally protected interest; (2) causation, or a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury will be redressed by a favorable decision.” *Williams*, 34 F. Supp. 3d at 295 (citing *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche, LLP*, 549 F.3d 100, 106-07 (2d Cir. 2008); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). For the reasons cited *infra*, plaintiffs have not met their burden to prove a non-speculative threat of future injury, or redressability.

#### **A. The Prospect Of Future Harm Is Merely Speculative**

##### ***1. Past Injuries Do Not Confer Standing for Injunctive Relief***

Although past injuries may provide a basis for standing to seek money damages, they do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way. *See, e.g., Marcavage v. The City of New York*, 689 F.3d 98, 103 (2d Cir. 2012); *Harty v. Simon Property Group, L.P.*, 428 Fed. App’x. 69, 71 (2d Cir. 2011). “Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.” *O’Shea*, 414 U.S. at 495-96. “In other words, [a plaintiff] asserting an injunction . . . must allege the probability of a future encounter with the defendant which is likely to lead to a similar violation of some protected right.” *Curry v. City of New York*, No. 10-CV-5847

(SLT)(LB), 2010 U.S. Dist. LEXIS 135461, at \*8 (E.D.N.Y. Dec. 22, 2010) (internal citation omitted). “[T]he injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004) (quoting *O’Shea*, 414 U.S. at 494).

## **2. The Likelihood of Future Harm Is Too Speculative**

“[I]n order to demonstrate that they have standing to pursue claims for injunctive relief, plaintiffs must show a real and immediate threat of repeated injury.” *Henry v. Lucky Strike Entertainment*, 10 CV 3682 (RRM), 2013 U.S. Dist. LEXIS 124939, at \*42 (E.D.N.Y. Sept. 1, 2013). This possibility of future injury must be particular and concrete. *See O’Shea*, 414 U.S. at 496-97. An “abstract injury is not enough.” *Shain*, 356 F.3d at 215.

The seminal case in this regard, *City of L.A. v. Lyons*, 461 U.S. 95 (1983), “occupies much of the territory” related to a citizen’s standing to seek an injunction against police practices surrounding arrests. *Williams*, 34 F. Supp.3d at 296 (citing *Shain*, 356 F.3d at 215). In *Lyons*, the plaintiff alleged that he feared again being subjected to an illegal chokehold, and given the extensive use of chokeholds by the Los Angeles police, that he should be afforded standing to seek injunctive relief. *See generally Lyons*, 461 U.S. 95. However, the United States Supreme Court held that the risk that plaintiff himself would come into contact with the police *and* suffer a subsequent unlawful chokehold was speculative in nature and insufficient to confer equitable standing. *Id.* at 109. Courts in this Circuit have repeatedly confirmed that the likelihood of future unconstitutional treatment by the police in the course of an arrest is too speculative to confer standing. *See, e.g., MacIsaac v. Town of Poughkeepsie*, 770 F. Supp. 2d 587, 601 (S.D.N.Y. 2011) (plaintiff’s claim that he would be stopped, arrested and subjected to a Taser gun again was speculative, and injunctive relief therefore denied); *McLennon v. City of New York*, 171 F. Supp. 3d 69, 74-76 (E.D.N.Y. 2016) (plaintiffs alleging suspicionless searches and seizures at *de*

*facto* vehicle checkpoints denied standing for injunctive relief where likelihood of similar alleged constitutional harm by NYPD in future was too speculative); *Williams*, 34 F. Supp. 3d at 294 (plaintiff lacked standing for injunctive relief under the ADA requiring the NYPD to provide accommodations to hearing-impaired persons upon arrest and incarceration because likelihood of future arrest by NYPD too speculative); *MacNamara*, 275 F.R.D. at 140-141 (plaintiffs denied class certification, as they could make only a speculative showing of future harm from alleged NYPD mass protest arrest practices in question).

Notably, even where plaintiffs have expressed an intention to engage in future, similar activities to those which they allege caused them to be subjected to past harm, courts have denied standing for injunctive relief under Rule 23(b)(2), deeming allegations of future similar harm still too speculative to sustain class certification.<sup>1</sup> For example, in *MacNamara*, class certification under Rule 23(b)(2) was denied due to lack of standing on the grounds that plaintiffs, arrested during the 2004 RNC convention protests, and who sought to enjoin certain allegedly “unconstitutional” practices employed by the NYPD in effecting mass arrests during protests, could make only a speculative showing of future harm from the practices in question. *MacNamara*, 275 F.R.D. at 140-141. This was in spite of the fact that, “[t]o support their assertion of likely future harm, plaintiffs cite[d] the depositions of [putative class members] who have indeterminate future plans to participate in New York City protests,” which would presumably bring them into contact with the NYPD and the complained-of practices in the future. There, the court found that plaintiffs’ alleged future harm – that they faced potential arrest since several class representatives planned to attend demonstrations in New York in the future –

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<sup>1</sup> Plaintiffs admit that plaintiff K.H. moved to Florida following her arrest, where she still resides. Ex. A at ¶152. K.H. has not alleged an intention to return to New York City, but even if she had, it would be insufficient to confer standing since she is not “necessarily or even likely have any contact with the police in the future.” *Williams*, 34 F. Supp. 3d at 297.

was “too speculative and conjectural to supply a predicate for prospective injunctive relief.” *Id.* at 141 (internal citations and quotations omitted); *see also Liu v. The New York City Campaign Finance Board*, 14 Civ. 1687 (RJS), 2016 U.S. Dist. LEXIS 135687 (S.D.N.Y. Sept. 29, 2016) (plaintiff’s statement that he “may run for elective office in New York City in the future” deemed too speculative and lacking the requisite imminence of future harm to support standing to challenge campaign finance provision); *Shain*, 356 F.3d at 216 (denying claim for prospective relief predicated on “an accumulation of inferences” that were “simply too speculative and conjectural” to show “sufficient likelihood of future [injury]”).

The speculative future arrests theorized by plaintiffs fail to rise to the level of “certainly impending” and are the very essence of “conjectural or hypothetical.” *See, e.g., Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 800 (2d Cir. 2015) (“The Supreme Court has ‘repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact,’ and that ‘[a]llegations of *possible* future injury are not sufficient.’”) (alteration in original) (quoting *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013)); *Atik v. Welch Foods, Inc.*, No. 15-CB-5405 (MKB)(VMS), 2016 U.S. Dist. LEXIS 136056, at \*19-20 (E.D.N.Y. Sept. 30, 2016).

### **3. *One to Two Prior Incidents Are Insufficient to Confer Standing***

Where a stop has occurred only once or twice in several years, a plaintiff lacks standing to pursue injunctive relief because it is unlikely that she will be stopped again. *See, e.g., Lyons*, 461 U.S. at 101-02 (one past incident involving a plaintiff and the police was insufficient to confer standing); *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (motorists stopped by Border Patrol once in ten years had no standing); *Alvarez v. City of Chi.*, 649 F. Supp. 43, 45 (N.D. Ill. 1986) (no injunction for only two incidents of police misconduct in six years). The *D.H.* plaintiffs fall far short of the standard of showing “certainly impending” future injury,

particularly as seven named plaintiffs allege only one unconstitutional arrest pursuant to Sec. 240.37, and only one named plaintiff alleges two unconstitutional arrests in a five year period.

**B. Plaintiffs Have Not Alleged The Existence Of An Official Policy Or Its Equivalent**

The Second Circuit in *Shain v. Ellison* established a two prong test by which a “plaintiff seeking injunctive relief must demonstrate *both* a likelihood of future harm *and* the existence of an official policy or its equivalent.” *Shain*, 356 F.3d at 216 (emphasis added). For the reasons stated *supra*, plaintiffs cannot meet the first prong of the test; but even if they could, plaintiffs also cannot meet the second prong, and therefore lack standing to seek injunctive relief.

In *DeShawn E. ex rel. Charlotte E. v. Safir*, 156 F.3d 340, 344-45 (2d Cir. 1998), “the Second Circuit distinguished the facts of that case from *Lyons*, noting that in *Lyons*, there was no proof of a pattern of illegality because the police had discretion to decide if they were going to apply a choke hold, and there was no formal policy which sanctioned the application of the choke hold. In contrast, the challenged interrogation methods in *DeShawn* were officially endorsed policies; as a result, there was a likelihood of recurring injury because the police activities are authorized by a written memorandum of understanding between the Corporation Counsel and the Police Commissioner.” *Burns v. Warwick Valley Cent. Sch. Dist.*, 166 F. Supp. 2d 881, 888-889 (S.D.N.Y. 2001). The facts in *D.H.* are more similar to those alleged in *Lyons*, as plaintiffs allege that officers’ discretion is improperly applied, and not that the officers are enforcing an unconstitutional official policy.

**1. Plaintiffs Do Not Allege an Official Policy**

The Amended Complaint does not allege that plaintiffs were arrested or that their rights were violated pursuant to an official policy. Instead, plaintiffs allege “a pattern and widespread practice.” Ex. A at ¶10. In fact, the thrust of plaintiffs’ claims are that “Section 240.37 fails to provide law enforcement with clear guidelines” and that “the Plaintiffs are subjected to the

whims of police officers who may determine that their conduct is for the ‘purpose’ of prostitution.” Ex. A at ¶¶50, 52. The closest plaintiffs get to alleging an official policy is by arguing that the “NYPD Patrol Guide is equally vague and otherwise flawed,” but do not allege that the Patrol Guide orders officers to conduct unconstitutional acts. Ex. A at ¶54.

## **2. *Plaintiffs Do Not Plead Deliberate Indifference***

Unable to identify an official policy, plaintiffs instead point only to a few complaints in other lawsuits for their conclusion that the NYPD has an actionable municipal “custom or usage.”<sup>2</sup> Ex. A, ¶ 101. This is insufficient to confer standing. Although courts can “take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991); *Walker v. City of New York*, No. 14 Civ. 808 (ER), 2015 U.S. Dist. LEXIS 91410 at \*24-25 (S.D.N.Y. July 14, 2015) (“[it] is not within this Court’s purview to assess the veracity of either the claims of outside plaintiffs, or the defenses presented against them in cases that have settled or are pending before other judges.”) (quoting *Kramer*).

The fact that none of the three lawsuits cited by plaintiffs resulted in a finding that the NYPD officers violated the plaintiffs’ rights is fatal to plaintiffs’ deliberate indifference claim. *See An v. City of New York*, No. 16 Civ. 5381 (LGS), 2017 U.S. Dist. LEXIS 14857, \*10-11 (S.D.N.Y. Feb. 2, 2017) (citing *Calderon v. City of New York*, 138 F. Supp. 3d 593, 612-613 (S.D.N.Y. 2015); *Tieman v. City of Newburgh*, No. 13 Civ. 4178, 2015 WL 1379652, at \*17 (S.D.N.Y. Mar. 26, 2015)). Simply put, plaintiffs’ allegation of an actionable municipal “custom or usage” by citing to three other lawsuits filed in the last ten years cannot confer standing in this

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<sup>2</sup> For municipal liability to lie under such a theory, plaintiff must establish the existence of an unlawful practice by subordinate officials so permanent and well settled to constitute a “custom or usage,” with proof that this practice was so manifest as to imply the acquiescence of policy-making officials. *Prapromnik*, 485 U.S. at 127-30.

case.<sup>3</sup> In fact, of the three other lawsuits cited by plaintiffs, one voluntarily withdrew the case only two months after bringing it in the first place. *See* Notice of Voluntary Withdrawal, annexed to Mettham Dec. as Ex. B. The other two were settled without admissions of liability by any defendant. *See* Stipulations of Settlements, annexed to Mettham Dec. as Ex. C and Ex. D.

Further, the Amended Complaint has failed to allege sufficiently “that the City, once on notice, failed to take corrective action required to show deliberate indifference.” *An*, 2017 U.S. Dist. LEXIS 14857 at \*10-11. In fact, plaintiffs admit that the City amended the Patrol Guide in 2012, even though they claim that the amendments “proved insufficient.” Ex. A at ¶105. This is hardly sufficient to plead official acquiescence to unlawful behavior by subordinates, as required by *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127-30 (1985) (plurality opinion).

**C. The Claimed Injuries Would Not Be Prevented By the Equitable Relief Sought**

According to the Amended Complaint, the defendants lied about what they observed. As such, according to plaintiffs, it is not that the officers were unclear about what 240.37 permitted and unconstitutionally enforced the statue based on gender identity, race, or First Amendment factors, but rather simply manufactured allegations. Ex. A at ¶¶121, 138, 153, 171, 187, 200, 213, 228, 234 (defendants “falsely alleged” facts in each criminal complaint). Thus, it is unclear how equitable relief regarding the change in the prosecution of 240.37 would have prevented the injuries alleged. For example, plaintiff Gonzalez denies that she stopped and spoke to anyone on the date of incident; however, plaintiffs allege that defendant Gomez falsely swore in a criminal complaint that she stopped five male motorists. Ex. A at ¶¶ 195, 200. To the extent plaintiffs claim that officers lied under oath regarding their observations, the statutory construction of

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<sup>3</sup> Nor can alleging a handful of lawsuits and a newspaper article satisfy the “plausibility” requirement of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* As seen, complaints from other lawsuits and newspaper articles are not evidence of municipal wrongdoing. Thus, plaintiff’s complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), as well.



240.37 is irrelevant. Moreover, alleged deficient training regarding the correct constitutional interpretation of 240.37 would not remedy the “isolated misconduct” or “negligent or intentional disregard of their training” that is alleged by plaintiffs. *See, e.g., Stelling v. City of New York, et al.*, 15-CV-0035 (ILG), 2017 U.S. Dist. LEXIS 3566 \*\*5-8 (E.D.N.Y. Jan. 10, 2017) (citing *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 130 (2d Cir. 2004)). For this reason, plaintiffs have not pleaded that injury would be prevented by the equitable relief sought.

### **POINT III**

#### **PLAINTIFFS FAIL TO PLEAD A VIABLE 42 U.S.C. § 1985(3) CONSPIRACY CLAIM**

Plaintiffs’ attempt to plead a conspiracy claim against “[d]efendants from the 52<sup>nd</sup> Precinct” pursuant to 42 U.S. C. § 1985(3) in their Tenth Claim for Relief fails as a matter of law. Ex. A at ¶ 281. In order to plead a viable conspiracy claim pursuant to either § 1983 or § 1985(3), a plaintiff must plead sufficient factual allegations to plausibly establish that there was “a meeting of the minds, such as defendants entered into an agreement, express or tacit, to achieve [an] unlawful end.” *Romer v. Morgenthau*, 119 F. Supp. 2d 346, 363 (S.D.N.Y. 2000). Where plaintiffs fail to plausibly allege such a meeting of the minds, their conspiracy claim must be dismissed. *See, e.g., Ciambriello v. County of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002); *Leon v. Murphy*, 988 F.2d 303, 311 (2d Cir. 1993); *Corsini v. Bloomberg*, 12 Civ. 8058 (LTS)(MHD), 2014 U.S. Dist. LEXIS 67020, at \*36-\*37 (S.D.N.Y. May 14, 2014).

Here, plaintiffs’ conspiracy claim relates specifically to alleged actions taken by the 52<sup>nd</sup> Precinct defendants during so-called “sweeps” on June 6, 2015 and June 13, 2015. Ex. A at ¶ 281. Plaintiffs’ only factual support for their conspiracy claim appears to be that “[o]ne of N.H.’s arresting officers told the women that the police had been conducting a sweep *and that if they saw ‘girls like them’ outside after midnight, they would arrest them.*” Ex. A at ¶ 134 (emphasis

added); *see also*, Ex. A at ¶ 74. As an initial matter, the factual allegations regarding a single exchange with one police officer fall far short of plausibly establishing a “meeting of the minds” sufficient to support a viable conspiracy claim. Moreover, it is clear that the allegation that the police were conducting a sweep for a specific purpose is nothing more than a conclusory inference drawn by plaintiffs from a single alleged exchange.

In addition, plaintiffs’ reference to the alleged statement “girls like you” fails to plausibly establish that sweeps were targeted at transgender women. Even assuming the statement was made, the more likely explanation is that the officer was referring to prostitutes—not transgender women. That inference is bolstered by the fact that other individuals arrested in the same location were also arrested for prostitution-related offenses and that officers allegedly responded to N.H.’s query about the charges by simply stating “you know.” *See* Ex. A at ¶ 130. Accordingly, this statement, standing alone, cannot plausibly establish that there was a meeting of the minds to “send a message” to transgender women because there is a more likely explanation for the meaning behind the statement (i.e., that the officers were cracking down on illegal street prostitution). *See Iqbal*, 556 at 681 (although defendants’ actions were not inconsistent with plaintiff’s alleged improper purpose, there was a more likely explanation for the conduct, and thus plaintiff failed to plausibly establish the improper purpose).

Finally, under the intra-corporate conspiracy doctrine, even if the Amended Complaint plausibly established elements of an otherwise viable conspiracy claim, the claim would still be barred because it alleges a conspiracy within the NYPD itself. *See, e.g., Farbstein v. Hicksville Pub. Library*, 254 Fed. Appx. 50, 51 (2d Cir. 2007) (citing *Herrman v. Moore*, 57 F.2d 453, 459 (2d Cir. 1978)). Accordingly, plaintiffs’ § 1985(3) conspiracy claim must be dismissed.<sup>4</sup>

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<sup>4</sup> Even assuming, *arguendo*, that plaintiffs had plausibly established a meeting of the minds between defendants and their conspiracy claim was not otherwise barred by the intra-corporate conspiracy doctrine, to state a viable claim

**POINT IV****PLAINTIFFS' EQUAL PROTECTION CLAIMS SHOULD BE DISMISSED**

The Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburn Living Ctr.*, 473 U.S. 432, 439 (1985). “Proof that discriminatory intent was a motivating factor is required to show a violation of the Equal Protection Clause.” *Okin v. Village of Cornwall-on-Hudson Police Dept.*, 577 F.3d 415, 438 (2d Cir. 2009) (citing *Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977)). To allege a denial of equal protection, plaintiffs must show “(1) that [they were] treated differently from other similarly situated individuals, and (2) that such differential treatment was based on impermissible considerations . . . .” *De Santis v. City of New York*, 2011 U.S. Dist. LEXIS 99126, at \*27 (S.D.N.Y. Aug. 29, 2011) (citing *Harlen Assocs. v. Inc. Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001)). They also must show that the disparity in treatment cannot survive the appropriate level of judicial scrutiny. *See Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005). For the reasons stated herein, plaintiffs’ Equal Protection causes of action under their Fifth and Sixteenth Claims for Relief must be dismissed.

**A. Claims of Selective Enforcement/Treatment Must Plead the Existence of Similarly Situated Individuals**

Selective enforcement or selective treatment claims “arise when plaintiffs claim that they were treated differently based on impermissible considerations.” *Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 815 F. Supp. 2d 679, 693 (S.D.N.Y. 2011) (citing *Tasadfor v. Ruggiero*, 265 F. Supp. 2d 542, 551 (S.D.N.Y. 2002)). The Second Circuit has held that “a plaintiff alleging

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for § 1985(3) conspiracy “a plaintiff must plead ‘some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” *Blount v. New York Unified Court Sys.*, 03-CV-0023 (JS)(ETB), 2005 U.S. Dist. LEXIS 44013, at \*14 (E.D.N.Y. March 17, 2005) (quoting *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999) (internal quotations omitted)). As discussed *infra* at Point IV, plaintiffs have failed to plausibly allege this element of the claim as well.

a claim of selective *prosecution* ... must plead and establish the existence of similarly situated individuals who were not prosecuted.” *Pyke v. Cuomo*, 258 F.3d 107, 108-09 (2d Cir. 2001) (emphasis in original) (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996)). Plaintiffs’ Equal Protection claims are premised on a theory of selective enforcement/treatment, in that “Defendants targeted and/or sanctioned the targeting of Named Plaintiffs for unlawful surveillance, stops, questions, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on their race, color, ethnicity, gender, gender identity and/or appearance, under the circumstances in which white men or white women are not subjected to such law enforcement activities.” Ex. A at ¶ 78.

**B. Plaintiffs Fail to Allege Facts Sufficient to Establish Differential Treatment**

A selective enforcement claim requires, as a threshold matter, a showing that the plaintiff was treated differently compared to others similarly situated. *See Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 210 (2d Cir. 2004); *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994) (“To establish such intentional or purposeful discrimination, it is axiomatic that a plaintiff must allege that similarly situated persons have been treated differently.”). To plead the existence of similarly-situated others, plaintiffs must “compare themselves to individuals [who] are similarly situated in all material respects . . . [and] identify comparators whom a prudent person would think were roughly equivalent.” *Best v. New York City Dep’t of Corr.*, 14 F. Supp. 3d 341, 352 (S.D.N.Y. 2014) (quoting *Mosdos Chofetz Chaim, Inc.*). Accordingly, because plaintiffs have not set forth facts sufficient to show the existence of similarly situated individuals, their equal protection claims must be dismissed. *See, e.g., Kerik*, 356 F.3d at 211 (denial of a permit did not constitute differential treatment where plaintiff failed to allege any other group who was granted a permit under similar circumstances); *Gagliardi*, 18 F.3d at 193 (affirming dismissal where plaintiff failed to allege that the municipality would have

enforced the zoning code at the request of a resident similarly-situated to plaintiff); *Best*, 14 F. Supp. 3d at 352-54 (dismissing claim in absence of “facts that suggest [plaintiff] was treated differently than were any other similarly-situated individuals”).

**C. Plaintiffs Fail to Allege Intentional Discrimination**

Plaintiffs also fail to adequately plead discriminatory intent based on race, gender, and gender identity. *See Okin*, 577 F.3d at 437 (“Proof that discriminatory intent was a motivating factor is required to show a violation of the Equal Protection Clause.”); *Troy v. City of New York*, 2014 U.S. Dist. LEXIS 136339, at \*23-\*27 (S.D.N.Y. Sept. 25, 2014) (granting dismissal where plaintiff did not allege that differential treatment by police was based on impermissible considerations), *aff’d*, 614 Fed. Appx. 32 (2d Cir. 2015).

First, plaintiffs conclusorily allege that defendants enforce Section 240.37 in a discriminatory manner based on race. Plaintiffs, however, do not allege any specific facts that defendants were motivated by racial animus. Of the eight named plaintiffs in this case, only plaintiff Bankston alleges that “officers abused her by using racial slurs.” Ex. A at ¶55. However, plaintiff Bankston does not state what “racial slurs” were said and which officer made such statement. This allegation is vague, speculative, and does not give rise to a plausible inference of purposeful discrimination. *Brodv v. City of New York*, 4 F. Supp. 3d 562, 568-569 (S.D.N.Y. 2014) (“plaintiff’s feelings and perceptions of being discriminated against are not evidence of discrimination,” even where the conduct alleged is “rude and derogatory”).

Second, plaintiffs make conclusory assertions that defendants enforce Section 240.37 in a discriminatory manner based on gender; however, they do not allege any facts or attribute any statements to defendants that plausibly imply that defendants were motivated by gender animus.

Third, plaintiffs made conclusory assertions that defendants have chosen to enforce Section 240.37 in a discriminatory manner based on gender identity. Plaintiff N.H. alleges that

after she was arrested, defendant Dawkins and other police officers continually referred to her as a boy or a man. Ex. A at ¶39. Plaintiff N.H, however, makes no allegations that police officers she encountered made such references in a mocking or dismissive manner. Plaintiff Martin alleges that Defendant Allen made derogatory comments such as, “which one of you is going to process the he/she?” Ex. A at ¶45. These post-hoc gender references, while rude, are not sufficient to nudge her claim of purposeful discrimination from conceivable to plausible and do not give rise to a plausible inference that the decision to arrest any plaintiff was motivated by discriminatory animus regarding that plaintiff’s transgender status. *See Brodt v. City of New York*, 4 F. Supp. 3d 562, 569-572 (S.D.N.Y. 2014) (Conduct that is merely “rude and derogatory” does give rise to discrimination in violation of the equal protection clause).

Plaintiff Grissom alleges that a female officer, upon defendant’s Pocalyko’s order, strip-search her “for the purpose of confirming whether or not she was a female, as her identification indicated.” Ex. A at ¶48. However, she merely alleges that defendant Pocalyko asked her questions relating to her gender and sex organs and then ordered a female police officer to strip search her. *Id.* While these comments certainly suggest some degree of confusion on the part of the officer, they are far too vague to give rise to a plausible inference that the search was conducted for the “sole” purpose of assigning plaintiff a gender based on anatomical features.<sup>5</sup>

For the abovementioned reasons, since the plaintiffs have not plausibly pled intentional discrimination, their equal protection claims thus fail as a matter of law.

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<sup>5</sup> While Plaintiff Grissom may sincerely believe that the search was conducted to assign her a gender, those beliefs standing alone are not sufficient to prove animus. *See Williams v. Wellness Med. Care, P.C.*, 2013 U.S. Dist. LEXIS 139626, at \*18 (S.D.N.Y. Sept. 27, 2013) (“without sufficient facts, even the most sincerely held beliefs [of animus] do not comprise a sufficient basis for withstanding a 12(b)(6) attack.”).

**D. Defendants Are Entitled to Qualified Immunity**

The doctrine of qualified immunity saves public officials from the burden of civil discovery and trial unless they have violated “a statutory or constitutional right that was clearly established at the time of the challenged conduct.” *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). Even assuming, *arguendo*, that plaintiffs could establish a constitutional violation on the facts alleged, the plaintiffs’ rights must be “clearly established” at the time of the alleged incident. *Saucier v. Katz*, 533 U.S. 194, 202 (June 18, 2001). The “clearly established” inquiry requires that “if the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” *Id.* For purposes of qualified immunity, in order to be considered “clearly established” the “contours of the right” must be “sufficiently clear” at the time of the challenged conduct so that every reasonable official would have understood that he or she was violating the right. *Terebesi v. Torres*, 764 F.3d 217 (2d Cir. 2014) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)). “To date, neither the Supreme Court nor the Second Circuit has held that transgender plaintiffs are members of a protected or suspect class whose equal protection claims are entitled to heightened scrutiny. . . . Nor has the Second Circuit held . . . that discrimination against transgender individuals constitutes sex-based discrimination.” *White v. City of New York*, 2016 U.S. Dist. LEXIS 123140, at \*22-\*23 (S.D.N.Y. Sept. 12, 2016) (internal citation omitted).

Because at the time of the conduct at issue, neither the Supreme Court nor the Second Circuit had held that transgender people were a suspect class under the Equal Protection Clause, the named defendants are entitled to qualified immunity on claims of constitutional violations based on the named plaintiffs’ identities as transwomen.

**POINT V**

**PLAINTIFFS' 42 U.S.C. §§ 1981, 2000D, AND  
N.Y. CIV. RIGHTS LAW §§ 40-C, 40-D, 79-N  
CLAIMS SHOULD BE DISMISSED**

To establish claims under 42 U.S.C. §§ 1981 and 2000d, a plaintiff must plead, *inter alia*, “that the defendant discriminated against him on the basis of race, that the discrimination was intentional, and that the discrimination was a substantial or motivating factor for the defendant's actions.” *Tolbert v. Queens College*, 242 F.3d 58, 69 (2d Cir. 2001) (internal quotations and citations omitted). New York Civil Rights Law provides, in pertinent part, that “[n]o person shall, because of race, creed color, national origin, sex, marital status, sexual orientation or disability... be subjected to any discrimination of his or her civil rights ....” N.Y. Civ. Rights Law § 40-c. New York Civil Rights Law also imposes liability on “[a]ny person who intentionally selects a person or property for harm ... in whole or in substantial party because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age disability or sexual orientation of a person.” N.Y. Civ. Rights Law § 79-n. As discussed in Point IV, *supra*, plaintiffs failed to plausibly allege intentional discrimination or that defendants were motivated by discriminatory animus. Since plaintiffs have not plausibly pled intentional discrimination, these claims under their Sixth, Eighth, Eleventh, and Eighteenth Claims for Relief thus fail as a matter of law.

**POINT VI**

**PLAINTIFFS' CLASS CLAIM PURSUANT TO  
N.Y. EXEC. LAW §§ 296(2), 296(6), 297(9) AND  
N.Y.C. ADMIN. CODE §§ 8-107(4)(A), 8-107(6),  
8-107(17), 8-502(A) SHOULD BE DISMISSED**

Under New York State Executive Law and New York City Administrative Code, plaintiffs may only oppose a discriminatory practice by “a place or provider of public



accommodation.” *See* N.Y.C. Admin. Code 8-107(4)(a), N.Y. Exec. Law §296(2). Plaintiffs’ Twelfth Claim for Relief alleges that “the NYPD is a place or provider of public accommodation because it provides services, facilities, accommodations, advantages and privileges through acting in its investigative and custodial capacities.” Ex. A ¶ 73. However, plaintiffs’ allegations incorrectly expand the definition of “place of public accommodation.”<sup>6</sup> Plaintiffs specifically state that the NYPD is a place or provider of public accommodation during the “supervision and execution of surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention pursuant to Section 240.37.” *Id.* This allegation implies that the NYPD provides a public accommodation to individuals suspected of committing a crime pursuant to Section 240.37. With respect to the enforcement of Section 240.37, the NYPD certainly does not provide a public accommodation to those suspected individuals, as the term is defined in either the Executive Law or Administrative Code. Unlike victims who are reporting crimes, such suspected individuals are not being provided conveniences and services by the NYPD. *See Cahill v. Rosa*, 89 N.Y.2d 14, 21 (1996). Here, plaintiffs are not claiming that they were seeking public services or accommodations of any kind when they were targeted by the NYPD acting in its investigative capacity. Thus, public accommodation laws are inapplicable to plaintiffs’ allegations.

Because plaintiffs are improperly expanding the definition of “place or provider of public accommodation,” this class claim should be dismissed.

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<sup>6</sup> N.Y.C. Admin. Code states that “[t]he term ‘place or provider of public accommodation’ shall include providers ... of goods, services, facilities, accommodations, advantages or privileges of any kind, and places ... where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available.” N.Y.C. Admin. Code 8-102(9); N.Y. Exec. Law §292(9).

**POINT VII**

**PLAINTIFFS' INDIVIDUAL STATE LAW  
CLAIMS FOR MONEY DAMAGES MUST BE  
DISMISSED FOR FAILURE TO COMPLY  
WITH N.Y. GEN. MUN. LAW**

Plaintiffs' state law claims, seeking money damages on behalf of named plaintiffs, must be dismissed due to their failure to comply with New York State notice of claim requirements.

“[I]n a federal court, state notice-of-claim statutes apply to state-law claims.” *Hyde v. Arresting Officer Caputo*, 98 Civ. 6722, 2001 U.S. Dist. LEXIS 6253, at \*13 (E.D.N.Y. May 11, 2001). Thus, a plaintiff can proceed in federal court with state law claims only upon compliance with the New York State notice of claim requirements. *See Warner v. Village of Goshen Police Dep't.*, 256 F. Supp.2d 171, 175 (S.D.N.Y. 2003). Under New York state law, a timely notice of claim is a condition precedent to filing an action against a municipal entity. *See Jean-Laurent v. Wilkerson*, 461 Fed. Appx. 18, 24 n.3 (2d Cir. 2012), Pursuant to N.Y. Gen. Mun. Law § 50-i, a plaintiff must affirmatively plead in the complaint that the notice of claim was served. *See Canzoneri v. Inc. Vill. of Rockville Ctr.*, 986 F. Supp.2d 194, 206 (E.D.N.Y. 2013). Plaintiffs bear the burden of pleading and proving compliance with the notice of claim provisions of the General Municipal Law when commencing an action against a municipal actor. *See Davidson v. Bronx Municipal Hospital*, 64 N.Y.2d 59, 61-62 (N.Y. 1984); *O'Connell v. Onondaga County*, 5:09-CV-364, 2012 U.S. Dist. LEXIS 194831, at \*39 (N.D.N.Y. Feb. 9, 2012).

Here, plaintiffs tacitly acknowledge that they did not serve a notice of claim upon the City. *See* Ex. A at ¶22. Instead, plaintiffs claim that they should be excused from such a requirement, because, they allege, they are bringing this action to benefit “all New Yorkers,” “particularly women of color,” and thus they fall within the public interest exception. *Id.*

An exception to the requirement that a notice of claim be filed as a condition precedent to a suit against a municipal actor is made for cases seeking vindication of a public interest. *See Mills v. Monroe Cnty.*, 464 N.Y.S.2d 709, 711 (1983). To merit the exception, the action must be “brought to protect an important right” and “seek relief for a similarly situated class of the public” and the resolution must “directly affect the rights of that class or group.” *See id.* This exception is applicable where plaintiffs seek monetary relief, if at all, “only as an incident of prospective declaratory and injunctive relief.” *S.W. v. Warren*, 528 F. Supp.2d 282, 300 (S.D.N.Y. 2007); *see also Brooklyn Sch. for Special Children v. Crew*, 96 Civ. 5014, 1997 U.S. Dist. LEXIS 12974, at \*1-2, 50-51 (S.D.N.Y. Aug. 28, 1997). Conversely, where a plaintiff seeks money damages to redress her individual injuries, the vindication of public right exception does not apply, even where the lawsuit implicates an important right, with impact on a larger class. Thus, in *Atkins v. County of Orange*, 251 F. Supp.2d 1225 (S.D.N.Y. 2003), a group of mentally disabled prisoners brought suit alleging serious problems with their provided psychiatric treatment. Plaintiffs, who did not file a notice of claim, argued that their state law cause of action should not be dismissed because they sought to vindicate a public interest, “namely, challenging the inhumane mental health treatment at the Jail.” *Id.* at 1234. The Court disagreed. While admitting that a victory for plaintiffs may result in changes in the mental health conditions in the prison, the Court found that the relief plaintiffs sought was for their individual injuries. *Id.* at 1235. Therefore, the public right exception did not apply, and, because plaintiffs had not filed a timely notice of claim, their state law claim was dismissed. *Id.* at 1234-35; *see also Mills*, 464 N.Y.S.2d at 711; *O’Connell*, 2012 U.S. Dist. LEXIS 194831.

Plaintiffs’ myriad state law claims seek money damages redounding to their benefit only, rather than as a source of “relief for a similarly situated class of the public,” as required if the

public interest exception applied. *See Mills*, 464 N.Y.S.2d at 711. Plaintiffs have not sought to certify a damages class pursuant to Fed. R. Civ. P. 23(b)(3); the only injuries for which they seek monetary compensation are their own. Accordingly, plaintiffs' state law claims do not vindicate a public interest, and the failure to file a notice of claim is thus fatal to their state law claims.

**POINT VIII**

**THE SUPERVISORY DEFENDANTS  
SHOULD BE DISMISSED FOR LACK OF  
PERSONAL INVOLVEMENT**

Plaintiffs allege supervisory liability claims against "Supervisor Defendants" McKenna, Maloney, Daverin and Beddows. However, besides alleging that these individuals "failed to properly review, monitor and supervise" other defendants in the section involving the specific incidents, Ex. A at ¶¶ 139, 154, 201, 214, plaintiffs fail to articulate specific actions undertaken by any of them. Instead, plaintiffs assert in a conclusory manner that the supervisory defendants "participated in planning, ordering, staffing, supervising and/or approving the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions." Ex. A at ¶¶ 35-36. Without more than vague allegations that they should be responsible for their subordinates, plaintiffs cannot maintain an action against any of the supervisory defendants. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) ("personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.").


**CONCLUSION**

**WHEREFORE**, for the reasons set forth above, defendants respectfully request that the Court grant their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) together with such costs, fees and further relief as the Court deems just and proper.

Dated: New York, New York  
March 3, 2017

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TAKE ACTION

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August 11, 2015

## **POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT, AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS (INTERNATIONAL BOARD)**

### SHARE



*The International Council*

REQUESTS the International Board to adopt a policy that seeks attainment of the highest possible protection of the human rights of sex workers, through measures that include the decriminalization of sex work, taking into account:

1. The starting point of preventing and redressing human rights violations against sex workers, and in particular the need for states to not only review and repeal laws that make sex workers vulnerable to human rights violations, but also refrain from enacting such laws.
2. Amnesty International's overarching commitment to advancing gender equality and women's rights.
3. The obligation of states to protect every individual in their jurisdiction from discriminatory policies, laws and practices, given that the status and experience of being discriminated against are often key factors in what leads people to engage in sex work, as well as in increasing vulnerability to human rights violations while engaged in sex work and in limiting options for voluntarily ceasing involvement in sex work.
4. The harm reduction principle.
5. States have the obligation to prevent and combat trafficking for the purposes of sexual exploitation and to protect the human rights of victims of trafficking.
6. States have an obligation to ensure that sex workers are protected from exploitation and can use criminal law to address acts of exploitation.
7. Any act related to the sexual exploitation of a child must be criminalized. Recognizing that a child involved in a commercial sex act is a victim of sexual exploitation, entitled to support, reparations, and remedies, in line with



international human rights law, and that states must take all appropriate measures to prevent sexual exploitation and abuse of children.

8. Evidence that sex workers often engage in sex work due to marginalization and limited choices, and that therefore Amnesty International will urge states to take appropriate measures to realize the economic, social and cultural rights of all people so that no person enters sex work against their will or is compelled to rely on it as their only means of survival, and to ensure that people are able to stop sex work if and when they choose.
9. Ensuring that the policy seeks to maximize protection of the full range of human rights – in addition to gender equality, women’s rights, and non-discrimination – related to sex work, in particular security of the person, the rights of children, access to justice, the right to health, the rights of Indigenous peoples and the right to a livelihood.
10. Recognizing and respecting the agency of sex workers to articulate their own experiences and define the most appropriate solutions to ensure their own welfare and safety, while also complying with broader, relevant international human rights principles regarding participation in decision-making, such as the principle of Free, Prior, and Informed Consent with respect to Indigenous peoples.
11. The evidence from Amnesty International’s and external research on the lived experiences of sex workers, and on the human rights impact of various criminal law and regulatory approaches to sex work.
12. The policy will be fully consistent with Amnesty International’s positions with respect to consent to sexual activity, including in contexts that involve abuse of power or positions of authority.
13. Amnesty international does not take a position on whether sex work should be formally recognized as work for the purposes of regulation. States can impose legitimate restrictions on the sale of sexual services, provided that such restrictions comply with international human rights law, in particular in that they must be for a legitimate purpose, provided by law, necessary for and proportionate to the legitimate aim sought to be achieved, and not discriminatory.

The policy will be capable of flexible and responsive application across and within different jurisdictions, recognizing that Amnesty entities may undertake work on different aspects of this policy and can take an incremental approach to this work (in accordance with and within the limits of this policy) based on assessments of specific legal and policy contexts.

The International Board will ensure that, following the release of the final research report, Sections and structures have an opportunity to review and give feedback on the final draft policy before it is adopted.



WE SUED DONALD TRUMP OVER HIS TRANSGENDER MILITARY BAN. [Fund our fight!](#)

BLOG

## LGBT Rights Organizations Join Amnesty International in Call to Decriminalize Sex Work

By **Lambda Legal**  
AUGUST 20, 2015

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### Comments

Today, several LGBT rights organizations across the country issued the following joint statement in support of [Amnesty International's August 11th resolution supporting sex worker human rights](#).

#### *Joint Statement in Support of Amnesty International Resolution:*

As LGBT rights organizations in the United States, we join to applaud and support Amnesty International's recent resolution to protect the human rights of sex workers by calling for decriminalization of sex work, while simultaneously holding states accountable in preventing and combatting sex trafficking, ensuring that sex workers are protected from exploitation, and enforcing laws against the sexual exploitation of children.

For many LGBT people, participation in street economies is often critical to survival, particularly for LGBT youth and transgender women of color who face all-too-common family rejection and vastly disproportionate rates of violence, homelessness, and discrimination in employment, housing, and education.

Transgender people engage in sex work at a rate ten times that of cisgender women, and 13% of transgender people who experience family rejection have done sex work ([source](#)). Whether or not they participate in sex work, LGBT people are regularly profiled, harassed, and criminalized based on the presumption that they are sex workers, contributing to the high rates of incarceration and police brutality experienced by these communities. As Amnesty International has clearly set forth, its resolution takes into account the negative impact of criminalization on the safety of sex workers, and furthermore, states remain obligated to protect the human rights of victims of trafficking and can use criminal law to address exploitation ([source](#) and [source](#)).

When LGBT people are prosecuted for sex work, they face alarmingly high rates of harassment and physical and sexual abuse behind bars. One study found that 59% of transgender people in California men's prisons report having experienced sexual assault while in custody ([source](#)). Alternative diversion program alternatives are frequently based on moral judgment, sending the message that there is something wrong with people who are just trying to survive, and do nothing to address the actual needs of sex workers, including those sex workers who might prefer to be doing other kinds of work.

Laws criminalizing sexual exchange—whether by the seller or the buyer—impede sex workers' ability to negotiate condom use and other boundaries, and force many to work in hidden or remote places where they are more vulnerable to violence. Research and experience have shown that these laws serve only to drive the industry further underground, make workers less able to negotiate with customers on their own terms, and put those who engage in criminalized sex work at higher risk for abduction and sex trafficking. And as UNAIDS and the World Health Organization have recognized, criminalization also seriously hampers efforts to prevent and treat HIV/AIDS—efforts in which people involved in the sex trades are crucial partners.

We look forward to working together, with sex workers and sex workers' rights advocates, and with Amnesty International, to replace laws that criminalize sex work with public policies that address sex workers' real economic and safety needs.

In solidarity,

Transgender Law Center

Gay & Lesbian Advocates & Defenders (GLAD)

Lambda Legal

National Center for Lesbian Rights

National Center for Transgender Equality

SEE ALSO: [AMNESTY INTERNATIONAL, SEX WORK](#)





Opinion | OP-ED CONTRIBUTOR

## Buying Sex Should Not Be Legal

By RACHEL MORAN AUG. 28, 2015

DUBLIN — HERE in my city, earlier this month, Amnesty International’s international council endorsed a new policy calling for the decriminalization of the global sex trade. Its proponents argue that decriminalizing prostitution is the best way of protecting “the human rights of sex workers,” though the policy would apply equally to pimps, brothel-keepers and johns.

Amnesty’s stated aim is to remove the stigma from prostituted women, so that they will be less vulnerable to abuse by criminals operating in the shadows. The group is also calling on governments “to ensure that sex workers enjoy full and equal legal protection from exploitation, trafficking and violence.”

The Amnesty vote comes in the context of a prolonged international debate about how to deal with prostitution and protect the interests of so-called sex workers. It is a debate in which I have a personal stake — and I believe Amnesty is making a historic mistake.

I entered the sex trade — as most do — before I was even a woman. At age 14, I was placed in the care of the state after my father committed suicide and because my mother suffered from mental illness.

Within a year, I was on the streets with no home, education or job skills. All I had was my body. At 15, I met a young man who thought it would be a good idea for me to prostitute myself. As “fresh meat,” I was a commodity in high demand.

For seven years, I was bought and sold. On the streets, that could be 10 times in a night. It’s hard to describe the full effect of the psychological coercion, and how deeply it eroded my confidence. By my late teens, I was using cocaine to dull the pain.

I cringe when I hear the words “sex work.” Selling my body wasn’t a livelihood. There was no resemblance to ordinary employment in the ritual degradation of strangers’ using my body to satiate their urges. I was doubly exploited — by those who pimped me and those who bought me.

I know there are some advocates who argue that women in prostitution sell sex as consenting adults. But those who do are a relatively privileged minority — primarily white, middle-class, Western women in escort agencies — not remotely representative of the global majority. Their right to sell doesn’t trump my right and others’ *not* to be sold in a trade that preys on women already marginalized by class and race.

The effort to decriminalize the sex trade worldwide is not a progressive movement. Implementing this policy will simply calcify into law men’s entitlement to buy sex, while decriminalizing pimping will protect no one but the pimps.

In the United States, prostitution is thought to be worth at least \$14 billion a year. Most of that money doesn’t go to girls like my teenage self. Worldwide, human trafficking is the second largest enterprise of organized crime, behind drug cartels but on a par with gunrunning.

In countries that have decriminalized the sex trade, legal has attracted illegal. With popular support, the authorities in Amsterdam have closed down much of the city’s famous red light district — because it had become a magnet for criminal activity.

In Germany, where prostitution was legalized in 2002, the industry has exploded. It is estimated that one million men pay to use 450,000 girls and women every day. Sex tourists are pouring in, supporting “mega-brothels” up to 12 stories high.

6

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for those who want to get out of it. These women are trapped.

There is an alternative: an approach, which originated in Sweden, that has now been adopted by other countries such as Norway, Iceland and Canada and is sometimes called the “Nordic model.”

The concept is simple: Make selling sex legal but buying it illegal — so that women can get help without being arrested, harassed or worse, and the criminal law is used to deter the buyers, because they fuel the market. There are numerous techniques, including hotel sting operations, placing fake ads to inhibit johns, and mailing court summonses to home addresses, where accused men’s spouses can see them.

Since Sweden passed its law, the number of men who say they have bought sex has plummeted. (At 7.5 percent, it’s roughly half the rate reported by American men.) In contrast, after neighboring Denmark decriminalized prostitution outright, the trade increased by 40 percent within a seven-year period.

Contrary to stereotype, the average john is not a loner or a loser. In America, a significant proportion of buyers who purchase sex frequently have an annual income above \$120,000 and are married. Most have college degrees, and many have children. Why not let fines from these privileged men pay for young women’s counseling, education and housing? It is they who have credit cards and choices, not the prostituted women and girls.

Amnesty International proposes a sex trade free from “force, fraud or coercion,” but I know from what I’ve lived and witnessed that prostitution cannot be disentangled from coercion. I believe the majority of Amnesty delegates who voted in Dublin wished to help women and girls in prostitution and mistakenly allowed themselves to be sold the notion that decriminalizing pimps and johns would somehow achieve that aim. But in the name of human rights, what they voted for was to decriminalize *violations* of those rights, on a global scale.

The recommendation goes before the board for a final decision this autumn. Many of Amnesty’s leaders and members realize that their organization’s credibility and integrity are on the line. It’s not too late to stop this disastrous policy before it harms women and children worldwide.

Rachel Moran is the founder of Space International, which advocates the abolition of the sex trade, and the author of the memoir “Paid For: My Journey Through Prostitution.”

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A version of this op-ed appears in print on August 29, 2015, on Page A19 of the New York edition with the headline: Buying Sex Should Not Be Legal.

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## The antiblackness of 'modern-day slavery' abolitionism

TRYON P. WOODS [10 October 2014](#)

*Antiblack racism underwrites the contemporary movement against "modern-day slavery." The anti-slavery movement is haunted by the specter of racial slavery even while it feeds off it parasitically.*

The contemporary movement against 'modern-day slavery' makes a grave analytical and political error that, unfortunately, is all too common in our antiblack world. By 'antiblack world,' I refer to how blackness continues to represent danger and sexual savagery. It is the mark of the least desirable, the position against which all other oppressed subjects calibrate their humanity—as in, *as hard as my life may be, at least I am not black.*

Black people collectively generate no respect, honor, or value, let alone 'rights' or power—not because they are poor, live under corrupt governments, or live during a time of population explosion (all leading explanations for the emergence of 'modern-day slavery'), but rather simply because of their existence as such. As much as blackness is the mark of the non-human, it is also the negation of 'womanhood' and 'manhood.' Long after anti-colonial movements the world over have permanently discredited white supremacy, the principle of antiblackness remains stubbornly intact: it is best to be white; but if that proves beyond reach, *at least do not be black.*

Antiblackness is the product of racial slavery. The enduring effect of this is that the slave is both paradigmatically black *and* construed in terms of a bestial and openly vulnerable sexuality. This spectre of blackness, understood as sexual savagery, is present whenever the discourse of 'slavery' is evoked, even when the subjects are racialized as non-black or white. The essential failure of organizations fighting against 'modern-day slavery' to recognize even the basic features of the relationship between antiblackness and slavery produces a

number of serious consequences.

First, the movement against 'modern-day slavery' deploys non-racial language to define the racialized realities that it addresses, an approach that solidifies the existing racial regime. If we situate our analysis within the archive of the black social movement, we learn that the best way to preserve the racial *status quo* is to simply re-present it in non-racial terms. An abundance of empirical evidence reveals that twenty-first century American society is as racially hierarchical as it has ever been. Several recent books demonstrate this well, such as *Racism without racists: Colorblind racism and the persistence of inequality in the United States* by Bonilla-Silva or *The shame of the nation: The restoration of apartheid schooling in America* by Jonathan Kozol. Whites are the single most segregated racial group, and wealth, health, education, and employment disparities have increased rather than diminished in the post-civil rights era.



*Flagellation of a Female Samboe Slave* (1796) by William Blake. Wikimedia/Public domain.

Yet this evidence remains unpersuasive in the face of the prevailing non-racial logic, which maintains any remaining inequities are due to something other than racism.

The non-racial language of the 'modern-day slavery' discourse is particularly deceptive when it comes to the power relations in which the violent carnality of 'race' is simultaneously the normative process by which 'sex' is conferred.

Given western civilization's basis in the sexual plunder of slavery and colonialism, it is unsurprising that today's anti-slavery movement is inordinately preoccupied with women's sexual victimization. For instance, the focus on white women from eastern Europe working in commercial sex recalls the fight by British and US feminists against trafficking in prostitutes in the late nineteenth and early twentieth century, and what they termed at the time the 'white slave trade.' In both the earlier period and the contemporary one, the name of 'slave' marks these women as socially dangerous because of the implied proximity to blackness. It also labels them as victims undeserving of their plight, all the better to broaden the scope of state surveillance of sexuality.

Second, the anti-slavery movement is ahistorical. Again, black history is a corrective. Abolitionism against racial slavery showed us how 'rescue' movements are always self-referential: they aim at the salvation of the rescuer, not the rescued. White abolitionists frequently argued that slavery was an abomination because it made whites lazy and morally weak. W.E.B. DuBois reminds us that the American Civil War began as a war to *preserve* slavery, to keep it *in* the Union, not to abolish it; and it only *became* a war to end slavery as a result of the self-activity of the enslaved Africans themselves who stole away their labors from the South and forced the issue of abolition on the North. Anti-slavery does not necessarily mean anti-racist, and 'rescue' missions must be politically suspect.

Third, the moral authority that anti-slavery mobilizes today partly stems from the memory of black liberation that it implicitly draws upon—all the while explicitly distancing itself from black historical struggle. The movement often contrasts the 'facts' of 'modern-day slavery' with those of the 'old' (racial) slavery in order to emphasize how much worse the situation is today. The moral imperative of abolitionism today, therefore, rests not simply in objections to human oppression. It is also tied to white people's unconscious memories as the

perpetrators of racial slavery. Anti-slavery today seeks to exorcise this history. As such, it is anything but non-racial, despite its language.

Fourth, while slavery is evoked to cloak contemporary abolitionism with a political saliency and emotional urgency that only memory of *the* foundational institution of the modern world can sustain, there is a decided absence of solidarity with actual black suffering today.

Part of this problem lies with an incorrect understanding of slavery itself. Racial slavery was never simply supreme labor exploitation, or even being held captive. It was foremost about the accumulation and usefulness of black bodies for all manner of desire, whim, fantasy, or need of white society. Racial slavery was primarily a symbolic economy, an arrangement of meanings about who was human, which bodies had integrity, who could deploy violence with impunity, and the interdependence of 'freedom' and slavery.

As the political economy has changed with time, the symbolic economy of antiblackness persists. The ubiquitous spectacle today of the police killing unarmed black people in [the street](#), in their homes, and in [stores](#) reiterates the *ongoing* power relations of slavery.

Where is the anti-slavery movement when black people are being gunned down today by both state and civil society? Where are the abolitionists now when the black community endures all manner of premature death? Where is agitation over 'modern-day slavery' when [black schools are degraded and then closed](#) altogether?

I suggest that the invisibility of black struggle today highlights how the current anti-slavery movement hinges on assertions of Africans' culpability in both racial slavery and its 'modern-day' version. In this narrative, African agents foist slavery upon an unwilling west and Africa is construed, again, as the locus of criminality and barbarism. In short, the current abolitionists are prosecuting their cause using the original terms of racial slavery, many centuries later.

The primary corrective for the problems of the anti-slavery movement is the same as for the problem of the antiblack world generally: solidarity with black historical struggle. For instance, lessons from black history that are relevant to the 'modern-day slavery' question include: 1) law is not a viable avenue for social redress: reform ends up extending, rather than ameliorating, black suffering; 2) work will not set you free: black people's hard labor had little bearing on black self-efficacy, to the point where now, given the rates of black unemployment and incarceration, black people are more valuable to the economy idled and quarantined in ghettos or prisons; 3) self-defense is a prerequisite for self-determination: the unrelenting public spectacles of black vulnerability at the hands of the law and the unceasing reiteration of black pathology are meant to disqualify any expression of black self-possession.

These lessons directly confront the anti-slavery movement's priority on human rights as the privileged vector for justice; they address the movement's arbitrary distinction between 'slavery' conditions and all other conditions of 'work' under capitalism, including labor that has been rendered surplus altogether from the global economy; and they call into question the implicit requirement that the legitimate subjects of 'modern-day slavery' are passive victims, rather than people engaged in various modes of self-authored activity, including armed resistance.

Ultimately, what is called into question is the very conception of justice on which this movement trades. As a result of *racial* slavery the very existence of the modern era is unjust. The search for justice within an unjust paradigm, therefore, is premature at best, since we have yet to adequately explain the paradigm. Before we can conceive of justice, then, we must focus on *ethics*, on accurately explaining relations of power, including those in which the movement to end 'modern-day slavery' arises.



FEMINISM 19 OCTOBER 2015

## The difference between decriminalisation and legalisation of sex work

There is a crucial distinction between these two terms that is frequently blurred in the debate around the different models.

SUBMIT

By Frankie Mullin

Sex work divides feminist opinion like few others issues. The ideological clash – prostitution as violence against women vs simply a job – may never be resolved but where debate coalesces, around proposed legal systems, ideas become concrete and can be logically hashed out.

Largely, both sides agree that criminal sanctions against sex workers themselves should be lifted. At present, while selling sex is legal in the UK, women who work together for safety can be prosecuted for brothel-keeping and thousands end up with criminal records for loitering and soliciting.

Some claim, however, that people (usually men) buying sex should be criminalised, as is the case in Sweden. Others argue that this endangers sex workers, forcing them to work in secluded, dangerous conditions so that clients can go undetected.

Tension is escalating as the English Collective of Prostitutes (ECP) prepares to hold an evidence-gathering symposium in Parliament on 3 November, heralding a campaign for full decriminalisation. The ECP campaign mirrors that of MSP Jean Urquhart who, backed by sex worker organisations and health charities, is calling for sex work to be decriminalised in Scotland. In the other corner will be the End Demand campaign, which wants the government to follow Sweden by implementing a Sex Buyer Law.

So let the battle commence, but let it do so on clearly-defined terms. The ECP and Urquhart are campaigning for *decriminalisation*. This is not – as has been suggested in countless media reports – *legalisation*.

Insisting on clarification isn't petty quibbling. The models are so distinct that when York Union last week changed the title of its debate to "This House believes the legalisation of prostitution would be a disaster", both sides thought they were arguing in favour of the motion. Sex worker and activist Laura Lee, who was up against outspoken abolitionist Julie Bindel at the debate, had to "tear up her notes" when it emerged that York Union actually meant "decriminalisation", something Lee wholeheartedly supports.

The York mix-up wasn't unique. Since Amnesty released its draft proposal for the decriminalisation of sex work, countless articles have conflated the terms, inaccurately holding up Germany and the Netherlands as examples of "decriminalisation gone wrong".

Some clarification: under *legalisation*, sex work is controlled by the government and is legal only under certain state-specified conditions. *Decriminalisation* involves the removal of all prostitution-specific laws, although sex workers and sex work businesses must still operate within the laws of the land, as must any businesses.



"10x Better Than Social Security Checks" Must Stake Claim by Mar 1

**Banyan Hill**

Clear examples of a legalised system in Europe come from the Netherlands and Austria; a murkier example from Germany. In the Netherlands, brothels have been legal since 2000, but only if they comply with specific requirements and, in some cases, undergo regular visits from the police. Street workers must operate in designated areas, outside which they will be committing a criminal offence.

In Austria, most regions require sex workers to register, either directly with the police or, via a brothel owner. A national agreement stipulates that every sex worker must undergo a weekly health check, evidence of which must be provided in a compulsory booklet. Both of these measures, says Amnesty International, are human rights violations.

The situation is more confusing in Germany as federal states implement wildly different approaches, ranging from de facto forced registration in Bavaria to Munich's almost city-wide no-prostitution zones. Elsewhere, licensing requirements support the much-publicised "mega brothels" at the expense of smaller operations which don't have the resources to comply. The German government is currently debating bringing in compulsory medical examinations.

For some sex workers, these models of legalisation have brought benefits, including access to the welfare state and better negotiating rights with bosses. For others – and, in particular, those who are already marginalised – life has got harder. State-imposed regulations have created a two-tier system, so that the undocumented or those who use drugs now work in clandestine, almost invariably less safe, conditions. These systems increase the power of managers, who know that women have few options for where they can work.

Accurate trafficking statistics are notoriously hard to come by and definitions can be slippery. In the Netherlands, coercion is more likely to take place outside the regulated spaces, although the Dutch government states: "It also happens that prostitutes who are exploited according to Dutch standards do not see themselves as a victim of exploitation." In Germany, the most reliable figures come from by the Federal Criminal Police Office, which suggests that, since the Prostitution Act, the number of victims has declined. According to Eurostat's latest report, the German per-capita rate of trafficking between 2010 and 2012 was lower than that of Sweden.

But here's the thing: these are not the models that human rights and sex worker-led organisations across the world are advocating. The only country to have fully decriminalised sex work is New Zealand. According to research, both street-based and indoor sex workers there report better relationships with the police and say they feel safer. Indoor workers are protected by employment



laws and can take employers to court. Contrary to fears, decriminalisation has not led to overall growth of the industry and trafficking has not increased.

This, then, is what sex worker-led organisations are calling for. Simply for prostitution-specific criminal law to be dropped and sex work treated as any other business. No one is demanding that the industry be allowed operate in legal grey area. Just as sex workers would be protected by labour, health and safety, human trafficking and other relevant law, so they would have to abide by it.

Crucially, legal systems shape public perception. While any element of an industry is criminalised, stigma is fuelled. One study suggests that men who see prostitution as just another sector of work are less likely to be violent. The ripple effect of legislation becomes “even more” significant in the global south, says Dr Prabha Kotiswaran, Senior Lecturer in Criminal Law at King's College, London.

“Stigma surrounding sexual labour is so strong in an Indian context and the criminal law adds to the stigma,” Kotiswaran says. “There’s a huge gap between what the law claims to do and what it actually does; how it’s used socially if not legally. Criminal law is frequently used to threaten a whole range of marginalised groups: transgender people, young people, gay people, sex workers.”

In their warring hearts, those in both camps share concern for the safety of sex workers. What differs is belief on how this can be brought about. It is right that debate should happen – much is at stake – but without clarity as to what each side is calling for, the conversation is nothing but farce. It is decriminalisation, not legalisation, for which sex workers around the world are fighting.

*Editor's note, 21 October: this article originally referred to the wrong host for the debate at York. This has been corrected.*



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## Boots next to the Bed

### *Getting Caught in Marriage's Web*

One evening in late March 1892 Sam Means was spotted entering the home of Frances Slaton, a single woman who lived on the edge of town in Oxford, Georgia, just east of Atlanta. Means was immediately arrested and then tried for violating Georgia's criminal fornication law: "voluntary sexual intercourse by an unmarried person with another person." Frances Slaton was never arrested for "keeping company" with Sam Means, even though she was equally guilty of violating the fornication law. Census data tells us that Means was a sixty-two-year-old black man, a blacksmith by profession, and a father of a twenty-three-year-old son named Frank. Neither Sam nor his son could read or write. Slaton was likely in her mid-forties, worked as a domestic servant, was also illiterate, and was identified by some census agents as white and by others as mulatto.

Who was watching Means and Slaton and then ratted them out to the local police? Why would anyone care that they were keeping each other's company? Turns out it was William Landers, a forty-one-year-old local white man who was the acting town marshal at the time. He'd been spying on Frances Slaton for a couple of months before he turned her and Means into the local sheriff. Called as the state's first witness in Means's fornication prosecution, he told the jury, a panel of twelve white men, "About February or March of 1892 I saw Sam Means enter Mrs. Slaton's house two or three times with a bucket on his arm, he would stay a few minutes and come out." Then he got to the heart of the matter: "About the last of March 1892 I think it was I was watching her house one night and about nine o'clock. I saw Sam Means enter the front door and go

in," Landers testified. "Soon after I went up to the front door and asked to be let in, Mrs. Slaton refused to let me in," he continued, referring to Slaton as "Mrs." as he did throughout the trial, perhaps as a term of respect for an adult woman or because she was a widow. Two hours later, around 11:00 p.m., Landers returned to Slaton's home, accompanied by Rigdon McCoy McIntosh, a fifty-six-year-old white professor in the music department of nearby Emory College who was well known for writing and publishing Sunday school tunes and religious hymnals. "The lights were out in the house, and I broke the front door down and went in the front room of the house. . . . Mrs. Slayton was standing in the middle of the room in her night clothes," testified Landers. "There was but one bed in the house. . . . the bed looked like someone had been sleeping in it. There were two pillows and it seemed like both of them had been used," he continued. When Professor McIntosh was called as a witness for the prosecution he told the court, "The bed looked like two persons had been sleeping in it. Both of the pillows were pressed as if a person's head had been lying on them. . . . There were the prints of two bodies that had lain lengthwise of the bed. I saw a pair of boots near the bed and also a pair of pants." Landers testified that he saw Sam Means running out the back door of Mrs. Slaton's house when he and Professor McIntosh entered through the front door, and with that the prosecution rested its case.<sup>1</sup>

Sam Means's lawyer, Elijah "Elijah" Flournoy Edwards, stood up and began his defense. Edwards was one of the most prominent lawyers in the county. He had fought for the Confederacy with the famous Troup Artillery and had been one of the founders of the Newton County Confederate Veterans Association. He later went on to serve a term as the town mayor, as a judge in the Newton County Court of Ordinary (probate court), and as a state senator.<sup>2</sup> How he came to represent a poor black man arrested for violating the state's fornication law is a mystery. Edwards offered a smart, though ultimately unsuccessful defense on Means's behalf. He presented a witness who offered an alibi for the boots, putting on the stand George Robinson, a black man, who claimed

that "Sam Means had sold them [the boots] to me several days before this, for what he owed me for work I had done for him." Robinson then had to explain why the boots were in Mrs. Slaton's house: "I was doing some ditching for Mrs. Slaton and some other work around her lot at the time these men came down there at night and I had left my boots in her house that night and had worn my shoes home. . . . I know nothing about the pants."

Edwards made no attempt to discredit the identification of Means at Frances Slaton's home that night—although it was dark and the suspect was seen only from the back as he fled out the rear of the house. Maybe he felt that in Newton County a black man charged with this kind of crime was assumed to have done it, and trying to convince a white jury otherwise was a waste of time. Instead of trying to win on the facts, Edwards's strategy was to attack the prosecutor's case on the law. The bulk of his defense turned on a legal technicality: since the crime of fornication was defined as voluntary intercourse between an unmarried person and another person, Sam could not be found guilty, Edwards argued, if he were married. (Of course if he were successful with this defense Means might be guilty of adultery, but that is not what he was charged with. So too, Georgia's miscegenation law only criminalized a black person marrying a white person, not a black person having sex with a white person.) Thus Edwards focused his defense strategy on proving that Means was married to Ellen Johnson at the time he was charged with having sex with Frances Slaton. He introduced evidence showing that Sam Means and Ellen Johnson were living together as a couple in March 1866. This date was key because Georgia, like many other states reentering the Union after the end of the Civil War, enacted a law in the immediate postwar period that automatically married freed men and women who were living together as husband and wife on the effective date of the law; in this case, March 1866. Several black members of the community testified to Sam and Ellen's cohabitation and marriage, as did the son of Means's former owner, who had known Sam his entire life. If they had been automatically married by law in 1866, then it

would have been technically impossible for him to commit fornication some twenty-six years later. The prosecution countered this strategy by offering other witnesses who testified that Sam was known to have lived with Louisa Stone, that Louisa often went by "Louisa Means," and that she had passed away seven or eight years earlier. The prosecution argued that if Sam had cohabitated with two different women and had not formally elected one of them as his wife, then he was legally unmarried and would be in violation of the fornication law when he was found in, or at least near, Frances Slaton's bed.

The 1870 and 1880 census records from the county (the 1890 records had been destroyed in a fire so are unavailable) would have sunk Sam's case had they been introduced as evidence. The 1870 census recorded Sam as living with Louisa, a thirty-eight-year-old illiterate black woman who was "keeping house." In 1880 and 1900 he told the census taker that he was widowed.

Even though the census data wasn't introduced at trial the jury didn't go for Sam's defense and returned a verdict of "guilty" after deliberating only two and a half hours. Judge George Gober not only accepted the jury's verdict, he also ordered Sam to pay the costs of the state's attorney's fees, something he surely couldn't afford (recall his friend George Robinson's testimony that Sam didn't have enough cash to pay him for work he'd done, compensating him instead with his leather boots). Inability to pay the court fees would almost certainly result in an extension of his sentence while he worked off those fees on a chain gang. Elijah Edwards appealed Means's conviction to the Georgia Supreme Court on the theory that he was married at the time he was charged with fornication, but the high court took little interest in the case despite the notoriety of the lawyer handling it and issued a two-word opinion: "Judgment affirmed."

For Sam Means marriage played a pivotal role in his struggle to navigate the complex demands of freedom in the late-nineteenth-century South. Means probably wasn't aware of the Georgia law passed in 1866 automatically marrying ex-slaves who had lived together "as husband

and wife" when he moved in with Ellen Ferguson or when he told the census taker in 1870 that he was living with Louisa Stone. Ignorance of the legal consequences of their domestic living arrangements got quite a few freed men and women into trouble when they left those relationships and took up with other partners. In Means's case, however, marriage law provided his lawyer with a clever defense—maybe too clever for a Georgia jury. But his case does illustrate the incredibly complex way in which marriage laws regulated the lives and freedom of black people in the post-Civil War South.



Marriage, it turns out, is one way a society signals new acceptance of a previously outcast group—whether it be formally enslaved people in the nineteenth century or same-sex couples today. Marriage was and remains a curious vehicle through which newly freed or equal people can elaborate their freer and more equal selves, since marriage comes with a passel of non-negotiable terms and conditions. Getting married means that your relationship is no longer a private affair since a marriage license converts it into a contract with three parties: two spouses and the state. Once you're in it you have to get the permission of a judge to let you out. And what you learn when you seek judicial permission to end a marriage is that it's a lot easier to get married than it is to get divorced.

Freed people in the nineteenth century encountered the beneficial and burdensome consequences of marriage through their lived experience with the law. While many of them correctly saw the inability to marry as one of the most important ways the society treated enslaved people as less than human, few understood that marriage laws would govern their lives so uncompromisingly and harshly. This chapter tells the story of how they discovered that the freedom to marry did not mean the freedom to organize their intimate lives as they saw fit. Instead, granting the right to marry to former slaves gave white people a wide range of new ways to meddle in the lives of newly freed people:

coercing them to marry in many cases, punishing them if they didn't, and bringing the criminal law to bear when they didn't follow the rules that being married entailed.

In 1862, John Eaton was appointed by General Ulysses S. Grant to set up "contraband camps" for black refugees in Tennessee and northern Mississippi (rather than call them "refugees" the Yankees called them "contrabands," still treating enslaved people as the enemy's illegal property instead of persons fleeing enslavement). Edward Pierce, a young lawyer from Boston who had been assigned the task of overseeing the first contraband camp at Fortress Monroe, Virginia in 1861, was met by his charges with disbelief that they were still being treated like chattel. When they learned that they were being held in contraband camps they asked Pierce "Why d'ye call us that for?"<sup>3</sup>

Eaton, a Presbyterian minister born in New Hampshire in 1829, described in his memoir his first encounters with the fleeing slaves in Mississippi: "Imagine, if you will, a slave population, springing from antecedent barbarism, rising up and leaving its ancient bondage . . . coming garbed in rags or in silks, with feet shot or bleeding, individually or in families and larger groups . . . a blind terror stung them, an equally blind hope allured them, and to us they came." He continued: "Their condition was appalling. There were men, women, and children in every stage of disease and decrepitude, often nearly naked, with flesh torn by the terrible experiences of their escapes."<sup>4</sup>

The destitution, disease, and need of people freed by law or circumstance were overwhelming. Henry Rowntree, a civilian missionary who had come south to help address the needs of indigent black people with the Contraband Relief Society of Cincinnati, described the living conditions of the people he found living on Jefferson Davis's plantation in Vicksburg, Mississippi, after Davis had been driven away by Northern troops:

I called at a cattle shed without any siding, there huddled together were 35 poor wretchedly helpless negros, one man who had lost one eye entirely, and the sight of the other fast going, he could do nothing.

Five women all Mothers, and the residue of 29 children, all small and under 12 years of age. One of the Women had the small pox, her face a perfect mass of Scabs, her children were left uncared for except for what they incidentally [received]. Another woman was nursing a little boy about 7 whose earthly life was fast ebbing away, she could pay but little attention to the rest of her family. Another was scarcely able to crawl about.

They had no bedding. Two old quilts and a soldiers old worn out blanket comprised the whole for 35 human beings. I enquired how they slept, they collect together to keep one another warm and then throw the quilts over them. There is no wood for them nearer than half a mile which these poor children have to toat as they could carry, hence they have a poor supply and the same with water, this has [to] be carried the same distance and the only vessel they had to carry it in was a heavy 2 gallon stone jug, a load for a child when empty.

They owned One Pan, and one Iron kettle amongst them, they had no tin cup, no crockery of any kind, no knives or forks, and certainly were the poorest off, of any I have met with being literally and truthfully destitute in every sense of the word.

All of them were homeless, and most of them had almost no possessions and were sick, hungry and had no means of work.<sup>5</sup>

Given the desperation, illness, and injury that drove the slaves to seek refuge with Union troops, it may come as a surprise what the Northern officials who were charged with their care prioritized as among the fleeing slaves' most pressing needs: the rites of marriage.

In its reports to the secretary of war, the American Freedmen's Inquiry Commission reflected the view dominant among whites that black people were uncivilized, undisciplined, and lived in wholly "unchristian" ways. Their solution: the rule of law as well as patient guidance

from whites would tame and civilize them. The commission observed that “[t]he law, in the shape of military rule, takes for him the place of his master, with this difference—that he submits to it more heartily and cheerfully, without any sense of degradation.”<sup>6</sup> Urging an active role for the federal government in the moral cultivation of black character, the commission’s final report concluded on an optimistic note: “[T]hey will learn much and gain much from us. They will gain in force of character, in mental cultivation, in self-reliance, in enterprise, in breadth of views and habits of generalization. Our influence over them, if we treat them well, will be powerful for good.” In support of this argument, the commission referred to a Canadian high school principal who maintained that proximity to whites could even “whiten” black people’s “unattractive” physical features: “[c]olored people brought up among whites look better than others. Their rougher, harsher features disappear. I think that colored children brought up among white people look better than their parents.”<sup>7</sup>

In March 1864, the secretary of war made Eaton’s regulation official United States policy, and ordered Freedmen’s Bureau<sup>8</sup> agents to “solemnize the rite of marriage among Freedmen.” Thereafter, superintendents of the contraband camps uniformly reported that “the introduction of the rite of christian marriage and requiring its strict observance, exerted a most wholesome influence upon the order of the camps and the conduct of the people.”<sup>9</sup> The necessary relationship between morality and citizenship framed the approach that federal officers took to managing black peoples’ transition from slavery to safety.

So important was marriage to the overall humanitarian and civilizing mission of the Northerners who came to the aid of the slaves who flocked to hastily set up contraband camps that some officials insisted that the couples marry as a condition of entry into certain camps. John Eaton boasted that “all entering our camps who have been living or desire to live together as husband and wife are required to be married in the proper manner. . . . This regulation has done much to promote the good order of the camp.”<sup>10</sup> In his instructions to the officials running the

contraband camps he ordered: “Among the things to be done, to fit the freed people for a life of happiness and usefulness, it was obvious that the inculcation of right principles and practices in regard to the social relations ought to find a place.”<sup>11</sup>

In hearings before the American Freedmen’s Inquiry Commission—the federal commission created in 1863 to suggest methods for dealing with the emancipated slaves—one of Eaton’s chief administrators, keeping on message, testified that

[o]ne great defect in the management of the negroes down there was, as I judged, the ignoring of the family relationship. . . . My judgement is that one of the first things to be done with these people, to qualify them for citizenship, for self-protection and self-support, is to impress upon them the family obligations.<sup>12</sup>

Federal officials acted as the guardians and supervisors of the moral practices of black people in order to qualify them for freedom and citizenship. The enforcement of marriage laws was widely regarded as the most useful lever to accomplish these ends as it was seen as the perfect “remedy for the widespread immorality and promiscuity that whites believed to prevail among blacks.”<sup>13</sup>

The desperate physical state of the enslaved people when they reached the gates of the contraband camps renders it all the more shocking that the officials running the camps highlighted the moral degradation of their charges and prioritized marriage over basic human needs like shelter, clothing, water, food, and medical care. To the extent that the freed people were described as living in a subhuman state, the reports filed by federal officials noted their failure to adhere to marriage norms, rather than starvation, illness, and a lack of basic sanitation as the cause of their desperate circumstances.

Much of the rhetoric by key actors working with the newly freed men and women related to the need to civilize them. White officials informed the freed people that “[t]he loose ideas which have prevailed among you

on this subject must cease," and that "no race of mankind can be expected to become exalted in the scale of humanity, whose sexes, without any binding obligation, cohabit promiscuously together."<sup>14</sup> The refugees' hunger, illness, and wounds from years suffering the whip were not enough to justify aid from Northern troops and other "agents of benevolence." Rather, the refugees also had to prove that they were morally deserving of help. Today it is taken as a given that all humans, by virtue of their humanity, are entitled to a basic level of care and safety. Yet for the ex-slaves it was almost as if their humanity needed to be proven through a social institution such as marriage before they would be regarded as deserving aid.



Once the war was over the federal government established an agency that fanned out through the South to attend to the needs of newly freed people. The Bureau of Refugees, Freedmen, and Abandoned Lands, more commonly referred to as the Freedmen's Bureau, set up district offices in all eleven of the rebel states as well as Washington, D.C., and the border states of Maryland, Kentucky, and West Virginia. The Bureau fed millions of people, built hospitals, set up schools, negotiated labor contracts for ex-slaves, and settled labor disputes. Bureau agents were charged with looking after the welfare of the former slaves and many saw themselves as stewards of the freedmen's physical and moral well being.

The violence that formerly enslaved people suffered at the hands of Southern white planters did not cease when the war ended; in fact for many it got worse. The Ku Klux Klan was founded during the period ostensibly to keep the peace in a period of enormous social chaos, but instead devoted itself to terrorizing the newly freed black members of Southern society with the aim of "keeping them in their place." In the months immediately following the end of the war, civilian Freedmen's Bureau agents had their hands full dealing with the pervasive violence suffered by the freed people, including lynchings, rapes, beatings, and other brutal assaults—"outrages," as they called them at the time. Across

the South there was overwhelming white resistance to the idea that black people should and could demand a wage for their labor, and much of the Freedmen's Bureau's work involved getting the plantation owners and farmers to honor labor contracts with their former slaves.

Faced with the overwhelming violence of white resistance to black freedom it may seem surprising that Freedmen's Bureau officers would have had time to worry about much else. But just like their military counterparts during the war, the postwar civilian staff voiced inordinate concern about the freed people's reticence to conform to the strict rules of marriage. Their weekly and monthly reports to Washington were replete with exasperation regarding the manner in which freed men and women were flouting the institution of marriage. Agents complained that the freed men and women persisted in "the disgusting practice of living together as man and wife without proper marriage," "living together and calling themselves man and wife as long as it conveniently suits them," and maintaining bigamous or adulterous relationships.<sup>15</sup> In "many instances," wrote one agent, "where after being legally and lawfully married they live together but a short time. Separate and marry again or live together without any obligation at all."<sup>16</sup> Time and again, the agents complained that blacks continued to "act as they did in time of slavery,"<sup>17</sup> clinging to "old habits of an immoral character."<sup>18</sup> "It is no uncommon thing for the husband and wife to [illegible] and live in adultery on the same plantation," one wrote. "[T]he planters say they do not sanction it but they are powerless to remedy the evil. Some severe laws will have to be passed and [illegible] executed before these conditions in this respect will be improved."<sup>19</sup> They were particularly outraged by the habit of a couple "taking up,"<sup>20</sup> and then separating when they tired of one another.<sup>21</sup> "It would appear to be more difficult to change their ideas in this matter than on any other affecting their welfare," wrote Alvan Gillem, commander of U.S. troops in Mississippi in the postwar period.<sup>22</sup>

Gillem was perhaps the most strident critic of the freed people's tendency to flout the "marriage relation." In fact it might be said it was

his obsession. Not a minister or missionary, as was the case with many of the men who assumed posts with the Freedmen's Bureau after the war, Alvan Cullem Gillem was a native of Tennessee, a graduate of West Point, staunchly loyal to the Union, and served valiantly in the war commanding the 10th Tennessee Volunteer Infantry. After the war ended he commanded the U.S. troops in Mississippi and served as a Bureau agent in the state starting in 1867, only to be relieved of his command and sent to Texas in 1868 on account of his vocal criticism of the Radical Republicans in Congress, who he felt were too lenient toward the former confederates.

Gillem's obsession with the freed people's family lives comes through loud and clear in his monthly reports to Washington in which he righteously expressed increasing frustration at their refusal to take marriage seriously. In June 1867 he wrote,

It seems almost impossible to make the more ignorant class of freedpeople understand their Marriage relations—Husbands leave their wives and wives leave their husbands . . . they marry and afterwards abandon one another without the least cause, especially in the rural districts.<sup>23</sup>

Gillem noted some progress, however, when he "had some of them arrested and after explaining to them their duties and obligations in this respect induced them to return to their homes and live together amicably."<sup>24</sup>

Every one of Gillem's monthly reports to Washington displayed similar exasperation. In July 1867 he wrote, "[T]he greatest immorality exists in the vicinity of the larger towns where the freedpeople congregated during or immediately at the conclusion of the war."<sup>25</sup> Then in August 1867: "No improvement has been reported or observed [with respect to marital relations]. Instances where men change their wives just as their pleasure or convenience prompts them and women their husbands are frequently reported."<sup>26</sup>

Many Bureau agents felt that moral suasion was insufficient to gain freed peoples' compliance with marriage laws and determined that the law should step in to impose discipline. Gillem was chief among the advocates of bringing local law enforcement officials into the project of addressing the freed people's "immoral" ways: "It is no uncommon thing for the husband and wife to . . . live in adultery on the same plantation," he wrote in one of his reports to headquarters. "Some severe laws will have to be passed and . . . executed before these conditions in this respect will be improved . . . laws are required to remedy this evil."<sup>27</sup> His frustration led him to observe that Bureau agents' efforts "to suppress immorality among the freedpeople would be greatly assisted by the civil authorities if they enforced the State laws on this subject." As part of this effort, he turned adulterers, bigamists, and fornicators over to the local authorities for prosecution under local criminal laws. Agent Gillem informed the Washington Bureau office that "I have caused the proper steps to be taken to bring this matter before the Civil Courts and shall urge that offenders be brought to trial and punished." He continued, "It is to be hoped that the civil authorities of the State will soon recognize the necessity of taking action in a matter in which all good citizens should feel an interest and by a few proper examples exert a salutary effect upon the masses." "The courts alone can establish a radical cure," wrote Gillem.<sup>28</sup>

Southern legislatures stepped into this cause as well. Shortly after the end of the war Southern states acted quickly to amend their constitutions or enact statutes validating marriages begun under slavery. Quite often laws were passed that simply legitimized "slave marriages" if the couple was cohabiting as husband and wife when the law went into effect. Mississippi's 1865 civil rights law was typical: "All freedmen, free negroes and mulattoes, who do now and have heretofore lived and cohabited together as husband and wife shall be taken and held in law as legally married."<sup>29</sup> Georgia, North Carolina, South Carolina, and Virginia passed similar laws during this period.<sup>30</sup>



Some states, such as Florida, took a different approach to the marriage of former slaves, giving "all colored inhabitants of this State claiming to be living together in the relation of husband and wife . . . and who shall mutually desire to continue in that relation" nine months to formally marry one another before a minister or civil authority.<sup>31</sup> These laws further required a newly married couple to file a marriage license with the county circuit court, a bureaucratic detail that carried a prohibitively high price for many freed people.<sup>32</sup> In every state with such laws, failure to comply with these requirements while continuing to cohabit would render the offenders subject to criminal prosecution for adultery and fornication.<sup>33</sup> North Carolina gave the freed people just under six months to register their marriages with the county clerk. Each month they failed to do so constituted a distinct and separately prosecutable criminal offense.<sup>34</sup>

Agent Gillem's campaign to persuade the freed people to observe the sanctity of the marriage relation was greatly aided by these new laws. In Tupelo, Mississippi, George Hall's wife went to the local Bureau agent and reported that her husband had been cohabiting with another woman. The agent turned him over to the local justice of the peace, who had him arrested. Law enforcement officials explained to him "the evils of such a course of conduct and the punishment that would be visited on him by law if he still persisted in such actions." He was released from custody only after he promised to return to his wife and conduct himself in a proper manner.<sup>35</sup>

As cultural background we should remember that the tendency to have multiple wives or husbands was in no small measure the product of slavery itself. It was not uncommon for an enslaved man and woman to marry one another, only to experience the eventual sale of one spouse to another planter. Subsequently, they would marry other people, believing, reasonably, that they would never see their first spouse again. James Massie, a British minister and abolitionist, visited Mississippi in 1863 and observed, "The laws of most of the slave states withhold all legal protection to the chastity of female slaves, and authorize masters to sell

husbands and wives, parents and children from each other; and when a husband or a wife is sold, a second marriage may take place while the parties are all living."<sup>36</sup>

Christianna Poole testified to exactly this set of circumstances in her war widow pension application: "My first husband and I went together in the days of slavery, both being slaves, there was no marriage ceremony, and him being sold away, it is impossible for me or anyone else to say anything about him."<sup>37</sup> After emancipation, when formerly enslaved people struggled to reunify relationships shattered by slavery, the first husband might reappear and expect his wife to live with him as his spouse. Thus many formerly enslaved people found themselves with two or more spouses at the end of the war. In some cases women who emerged from slavery with more than one husband would choose a legal husband based upon factors such as the man's wealth or his willingness to provide for all of her children, even those fathered by other men. Other women chose to reunite with their first husbands to whom they felt a special moral connection because their marriages had ended due only to their forced separation. Ex-slave Jane Ferguson chose her first husband, Martin Barnwell, even though she had married a man named Ferguson after her owner had sold Barnwell away: "I told [Ferguson] I never 'pects Martin could come back, but if he did he would be my husband above all others."<sup>38</sup>

After the war, marriage started to permeate the public and private lives of freed men and women in ways they never would have anticipated. Given that bigamy and fornication were crimes in every state, persons with multiple spouses were forced to choose one and only one legal spouse and to cease intimate relations and/or cohabitation with others. The Georgia legislature tried to put a stop to what they perceived to be widespread bigamous practices in the black community in an 1866 law relating to "persons of color":

[P]ersons of color, now living together as husband and wife, are hereby declared to sustain that legal relation to each other, unless a man shall

have two or more reputed wives, or a woman two or more reputed husbands. In such an event, the man, immediately after the passage of this Act by the General Assembly, shall select one of his reputed wives, with her consent; or the woman one of her reputed husbands, with his consent; and the ceremony of marriage between these two shall be performed.<sup>39</sup>

The statute then warned that persons who failed or refused to comply with these requirements would be prosecuted for fornication, adultery, or both. South Carolina imposed a similar statutory duty to choose one and only one spouse.<sup>40</sup>

Even though some state's laws were silent on the question of multiple spouses, state and federal officials saw it as their job to force freed men and women to choose one and only one spouse as a matter of practice. In some cases where a freed man or woman was unwilling or unable to choose, Bureau agents felt free to do so for them. An agent in North Carolina reported that "[w]henver a negro appears before me with two or three wives who have equal claim upon him . . . I marry him to the woman who had the greatest number of helpless children who otherwise would become a charge on the Bureau."<sup>41</sup>

Although reluctant at first, state law enforcement officials did, after a time, heed the pleas of Gillem and others to prosecute and jail freed men and women who persisted in maintaining "deplorable" extramarital relationships. However, the new marriage laws' automatic legalization of slave marriages was a double-edged sword for many freed men and women. Because the laws did not require them to "remarry" one another or register their existing marriages with the state, the freedmen were able to have their relationships automatically sanctioned and legitimized without the additional expense of a wedding or licensing fees. This savings was not trivial, as many of them were unable to afford the \$4 marriage license fee charged in states such as Mississippi. One Bureau agent observed: "Many of the colored people are, as your Excellency need not be told, very poor; and they can ill afford to pay four dollars for a marriage license. I am not aware whether this is the sum charged in all the

counties, but it is in Vicksburg."<sup>42</sup> In Mississippi as in many parts of the South, freedmen were paid at the end of the growing season, earning a proportional share of the profits from the sale of the crops (typically a quarter share). As a result, for most of the year they were cash poor, since at best they had an equitable share in the crops they worked, and planters were notorious for failing to make good on paying their workers at the end of the season the share they had been promised in their labor contracts.

The full implications of being automatically married were quite devastating for many black people. More than a few of them found they bore the responsibilities that accompanied marriage without enjoying many of the rights that came with it (such as being able to protect their children from being seized by white planters under the apprenticeship system, which I discuss in chapter 4). The provisions in many states' automatic marriage statutes requiring the choice of one and only one spouse produced tragic circumstances for many ex-slaves as the reunion of fractured families often left people married to more than one person. If a man, for instance, failed to make such a selection and continued to cohabit with two women he would be considered married to neither, while at the same time vulnerable to a fornication prosecution. This is exactly what happened to Sam Means, whose story opened this chapter. A Georgia jury convicted him of fornication upon a finding that Means, "a negro man, was living with two women as his reputed wives, and had never selected either and made her his lawful wife, as required by the [1866] act."<sup>43</sup>

The automaticity of the marriage laws meant that many couples found themselves legally married when they had never intended to be; many were unaware at all that they were legally wed. Gillem acknowledged this problem in his correspondence to Washington in 1868:

This act was doubtless based upon the best of motives. Its effect was to enforce matrimony between tens of thousands of freedpeople who were ignorant of the passage of the act. A large proportion of them is today

still ignorant of the purport of that law. It is safe to say that one half of the adult freedmen of this state are by this law married to those with whom they cohabit on the 25th of November, 1865, and are ignorant of their legal marital relations.<sup>44</sup>

An Alabama judge echoed this observation when he wrote the “the only witness [to the alleged wedding] was an ignorant negro woman, who probably was unable to understand the meaning of what was actually said and done.”<sup>45</sup>

Southern judges stepped in after a period to rectify this unhappy situation, and, as the following cases demonstrate, the technical requirements of marriage laws were enforced uncompromisingly against black people regardless of whether they understood how the new laws worked “on them.” In *Williams v. Georgia*, the male defendant, whose first name is never mentioned by the court, was married to Elizabeth Williams when they were both enslaved. They were separated by their master and sold to different owners but were reunited sometime near the end of the war—they couldn’t exactly state when. A witness testified at trial that he remembered the couple’s reunion was two months after Sherman’s army occupied Savannah, and the court noted that the army of General Sherman came to Savannah on December 21, 1864. (It was not uncommon in this era for enslaved people to date events by reference to important personal or cultural events. Time and dates in general, were something enslaved people were unable to keep account of; they certainly did not have watches, and many did not know their own ages because they had been separated from their parents when very young—their births were rarely recorded anywhere.) After her reunion with Mr. Williams, Elizabeth “associated immorally with another, and the defendant quit her and married another woman.” Since Williams had reunited with Elizabeth before March 9, 1866 (the effective date of the act legitimizing pre-existing slave marriages), and did not “quit” her until after that date, the court found that he was legally married to Elizabeth when he married

his second wife. The judge rejected the defendant’s argument that he did not intend his cohabitation with Elizabeth in 1866 to amount to a legal marriage. Instead the court ruled that the 1866 act married the couple and that “[h]is wife was unfaithful; he got mad and married again without divorce. Being a free citizen, he must act like one, carrying the burdens, if he so considers them, as well as enjoying the privileges of his new condition.”<sup>46</sup>

Allen Melton met a similar fate in North Carolina, where he was criminally prosecuted for bigamy. The trial court found that Mr. Melton had been married to Harriett Melton when both of them were enslaved and that they had continued to cohabit as husband and wife after emancipation. By operation of North Carolina’s 1866 marriage law, they were “ipso facto married and no acknowledgment before an officer was essential.”<sup>47</sup> Melton subsequently married Delia Ann Teel in 1894 without having divorced his first wife. Most likely he did not know that he was legally married to Harriett when he married Delia. On these facts, Melton was convicted of bigamy.<sup>48</sup>

Stephen King was a bit luckier. As with Melton, a local prosecutor went out after King for violating the Georgia criminal bigamy law. Seems that before the war while they were enslaved King had represented to the community that Nancy Moreland was his wife. At the end of the war he left her, but returned in January 1866 for a year during which they lived together and had “sexual relations”—facts that convinced the local prosecutor that under Georgia law they had become automatically married. In 1868, while still “married” to Nancy he married Henrietta Grubbs, thus triggering the bigamy prosecution. At trial he argued that he did not know that he could be punished if he married a second time without divorcing Nancy. The trial court didn’t buy this argument and convicted him. On appeal, however, he found a more friendly audience. The Georgia Supreme Court reversed King’s conviction, ruling that while enslaved persons might have called their relationships “marriages,” they may not have comprehended the sacredness of the marriage tie:

[T]here were also a large number of cases among slaves where the marriage tie was very loose. It had not the sanction of law; and circumstances, inevitable in in [*sic*] their character, made it liable to many interruptions, and when freedom was cast suddenly upon the race, it is not strange that for some time both men and women should cohabit under circumstances where it was very doubtful what was the true relation which they proposed to occupy to each other. They might be man and wife, they might be living together immorally.<sup>49</sup>

Ignorance of the law served as no defense for a black man named Kirk who was convicted of bigamy under almost the exact same scenario as Stephen King. The court found that Kirk had lived with Tiney Burke from December 1865 until sometime in 1879 when he married another woman. Since the Georgia automatic marriage statute “operated to make them married people” in 1866, his second marriage was found to be bigamous. The Georgia Supreme Court was unwilling to reverse his conviction as it had with Stephen King, finding instead that “even if a marriage between persons of color in December, 1865, was illegal, which is by no means apparent, yet if they were living together as man and wife at the date of the act of 1866, the marriage relation was thereby established, and bigamy could be predicated thereon.”<sup>50</sup>

In the Williams, Melton, King, and Kirk cases, newly freed men got into trouble when the laws “operated to make them married people” without their affirmative consent or knowledge. In these cases newly freed men had no idea that they were married in the eyes of the law, and had even less of an idea of what being married obliged them to: monogamy, financial support of their wives and children, and formal legal divorce proceedings to end the marriage. The way they mistakenly figured it, if the law could automatically marry them because they were cohabitating “as husband and wife” then the law could automatically unmarry them when they stopped living together. Many black people found themselves ensnared in “marriage traps” that resulted in prosecu-

tions for bigamy, adultery, or fornication when they thought they could get out of their marriages as easily as they had gotten into them.

In 1867, Celia McConico married David Hartwell. After two and a half years of marriage, they “mutually agreed to separate and did then separate from each other as husband and wife.” A year later McConico married Edom Jacobs and was thereafter prosecuted for bigamy. At trial McConico argued that since Alabama’s 1867 law automatically solemnized pre-existing slave marriages without legal formalities, she reasonably assumed she was able to dissolve her marriage without legal formality. A jury convicted her of bigamy and the court sentenced her to two years in the state penitentiary. Her conviction and sentence were affirmed by the Alabama Supreme Court.<sup>51</sup>

Freedmen’s Bureau agents, like the judge in the McConico case, held little sway with freed people who ignored the requirements of divorce law, even when they were fully aware of its technical demands. A local agent in Tupelo, Mississippi, wrote in his monthly report to Washington in August 1867 that he would

hear of men leaving their wives and running away with other women to parts unknown and some women leaving their husbands, taking up with other men. I feel confident these acts are not done through ignorance of the law in such cases, but more from the want of a will to comply with the law. I have explained the law to them with reference to adultery etc. but without much avail.

He picked this issue up again in a report to Washington three months later: “There is much need of a reform with reference to the marriage relations of the freed people in this Sub District, they either do not understand the law in this particular, or disregard its teachings. I am inclined to think the latter.”<sup>52</sup>

Thus freed people who “took up” or were “sweethearts” but who failed to formalize their relationships in accordance with the law were

prosecuted for adultery, fornication, or both. Others who neglected or chose not to comply with the technical requirements for obtaining a divorce and began a sexual relationship with another person not their lawful spouse were prosecuted for adultery, bigamy, or both.

Marital infidelity or immorality also formed the basis for the denial of pension benefits for black war widows who had lawfully married after 1866 but behaved in what was considered an unseemly manner after the death of their husbands. When Congress amended the pension laws in 1866, it included a provision denying pension rights to a widow who was shown to have engaged in "immoral conduct." The 1882 amendments required the termination of a widow's pension where she was shown to live in an "open and notorious adulterous cohabitation." Mary Johnson fell victim to these provisions when her pension claim was rejected because she was found to have "cohabitated with other men from within two or three months after the death of her husband." Similarly, Elizabeth Johnson lost her claim for a pension when the investigator concluded that "for more than twenty years she was mistress of one of the most disreputable houses of prostitution" in New Orleans.<sup>53</sup>

It is easy to understand how freed people may have misunderstood or underappreciated the legal consequences of having their relationships solemnized by the laws of marriage. Yet even those who were aware that their marriages could be legally dissolved only by complying with the formal rules of divorce may have opted to end their marriages less formally. Not only did a divorce require hiring a lawyer and paying court fees—expenses that most freed people could not afford—but divorces were much more difficult to obtain in the nineteenth century than they are today. Unlike modern no-fault divorce rules that make it possible for a couple to end a marriage without having to prove the fault of one of the parties, in the mid-nineteenth century marriage was a much more durable bond. A divorce could not be granted unless you could prove, for example, your spouse's adultery, impotency, abandonment, cruel treatment, or drunkenness. North Carolina would allow a divorce only in extreme circumstances: adultery together with abandonment by either party,

adultery on the part of the wife, or impotence. If a spouse could show abandonment and extreme cruelty she could get divorce only from "bed and board"—meaning that the couple would be legally separated but not fully divorced, and thus unable to remarry. South Carolina had the most conservative divorce laws in the country. Having completely barred divorce in the antebellum period, the state's 1868 constitution included a clause allowing divorce in very limited circumstances. The state repealed all its divorce laws again in 1878, and in the ten years between 1868 and 1878 not one divorce was granted by the South Carolina courts. Interestingly enough, the state's marriage laws formally prohibited adultery, yet at the same time its inheritance laws anticipated and provided for the widespread practice of concubinage, permitting a husband to leave up to one quarter of his estate to his mistress. (Not surprisingly, wives were not similarly allowed the power to leave some of their estates to their partners.) South Carolina's laws of divorce during this period applied only to white people, while black people sought the assistance of black church courts to dissolve their marriages and handle their domestic affairs.<sup>54</sup>

The Freedmen's Bureau, working in tandem with local law enforcement authorities, undertook an aggressive campaign to force freed men and women to comply with the requirements of local marriage laws. Freedmen thus found themselves locked into matrimony with few options available to them should they want a way out of those marriages. As such, the "right to marry," so celebrated in many quarters, was experienced by many freed people of this era as an unwelcome and punitive responsibility that resulted in the incarceration of many people—particularly men.

I have a strong suspicion that black men were prosecuted for bigamy, fornication, and adultery—serious crimes, often felonies, in many states in the postbellum period—in part to achieve their disenfranchisement. This was accomplished either explicitly through statutes or constitutional provisions that denied the vote to certain convicted criminals, or implicitly by binding convicted black men to work in circumstances that made voting a practical impossibility.

In this regard, it also seems clear that the prosecution of black men for these crimes was related to the evolution of "a labor-market cartel among white employers" in the postbellum period. In an effort to maintain the viability of the plantation system in the absence of slave labor, Southern planters enlisted the aid of local governments to accomplish what race prejudice could no longer pull off on its own. Many post-war Southern legislatures resisted the full emancipation of former slaves by enacting laws that intentionally denied their basic civil rights in a range of ways. Called "Black Codes," these laws criminalized vagrancy, poverty, disrespect for white people, and a wide array of other racially inflected conduct. Black men were selectively and falsely prosecuted under these laws and their incarceration made their labor available to private employers at cut-rate prices through the use of convict leasing and criminal surety policies.<sup>55</sup> These policies assured an abundant and cheap source of labor in the postbellum era in a manner that perpetuated a new kind of pseudo-slave labor for black men.

Under the convict lease system, which was particularly popular in Southern states in the 1880s, convicted criminals were leased from the state by private employers to work at extremely low wages and under working conditions that exceeded those of the antebellum slave system in their barbarism. Criminal surety laws worked a similar expropriation of labor. Under these laws, a person convicted of a crime for which a financial penalty was assessed could enter into a peonage contract with a bondsman who would pay the convict's fine in exchange for allowing the surety to hire him out until he had worked off his debt. In Mississippi, for instance, the law provided that any black person who failed to pay within five days all fines or costs levied in connection with the conviction of a misdemeanor "shall be hired out by the sheriff or other officer, at public outcry, to any white person who will pay said fine and all costs."<sup>56</sup>

The working conditions of criminal surety peons were even worse than those of leased criminals, and both were often worse than the working conditions of slaves. The mortality rate among convict-workers was

extremely high because the system created incentives for the leaseholder to work the people he had leased to death. The person leasing the convict "had no interest in keeping the convicts alive past the end of their sentence or contract period, since the convict has no 'scrap' or 'resale' value" — "a slaveholder receives the full capitalized value of the slave's output for his entire working life, [so] he has an incentive to maintain the slave's health." In some cases the death rate on chain gangs was as high as 45%.<sup>57</sup>

In 1919, Alabama governor Thomas E. Kilby declared his state's chain gangs and convict lease system "a relic of barbarism [and] a form of human slavery." Mississippi abandoned the convict lease system in 1890, Tennessee in 1895, Georgia in 1908, Florida in 1924, and North Carolina in 1933. In 1914, the United States Supreme Court invalidated criminal surety systems as violations of the Thirteenth Amendment's prohibition of slavery and involuntary servitude, but convict leasing programs remained in effect up to and through the turn of the twentieth century in Virginia, Georgia, Florida, Tennessee, Alabama, and Louisiana. Although these laws were racially neutral on their faces, virtually "all the convicts caught in this lethal system were blacks."<sup>58</sup>

Thus the aggressive enforcement of bigamy, fornication, and adultery laws against black people played an important role in serving the needs of white planters to restaff the plantations with cheap, fungible labor while at the same time denying these newly enfranchised citizens the right or opportunity to vote.

Many newly freed people made a big error when it came to understanding what it meant to gain the right to marry: they naïvely thought that the freedom to marry meant the freedom to organize their family and intimate lives on their own, free from governmental intrusion. "The men contended that they had a right to have as many women as they could support, cohabitation without marriage is quite common," wrote a Freedmen's Bureau agent in Greenville, Mississippi, in September 1867.<sup>59</sup> For a group of people who had just emerged from the tyranny of having every aspect of their lives subject to upheaval, disruption, and rule by

white people, many of them reasonably expected that the freedom to marry as freed people meant that whites would no longer have any say about how to organize their family lives. "Living together in a state of concubinage they have come to look upon as a privilege, in fact, a right which no one has a right to interfere with," observed a Bureau agent.<sup>60</sup>

They couldn't have been more mistaken. The historical record shows that once they were able to legally marry they were forced to do so by the white people who came south to offer them aid and comfort. Whether it was at the gates of contraband or refugee camps as a condition of entry, or by military and Freedmen's Bureau officers who would pick a spouse for you if you were unwilling to settle on just one, the freed people of the South found marriage to be as much a compulsion as a right. Being able to legally marry quickly collapsed into a requirement that they do so, either by automatic operation of law or by other more obviously coercive means.

Marriage was experienced by freed people as a curious right indeed. Imagine having a right to free speech that entailed a requirement that you exercise that right by saying something, or desegregating lunch counters and then requiring that you eat at them, or winning the right to vote and then jailing those who didn't show up to cast a ballot. Hard to imagine, since in the U.S. we cherish the liberty right to keep the government out of our business as fiercely as the equality right to be treated fairly. Yet with marriage, winning the right transformed immediately into a state-sponsored demand that freed people exercise the right, or worse, that the right be exercised "on them" automatically.

Once married, many freed people learned the hard way that marriage had rules, and that breaking those rules could be very costly, if not deadly. They learned how the law of wedlock created a set of trip wires that could easily set off arrest by local sheriffs and criminal prosecution by local prosecutors. To fully understand how marriage figured in the lives of newly freed people we have to appreciate the way in which it gave white law enforcement officials a new way to regulate and harass

black people. It became a very effective vehicle to limit what it meant to be black and freed in the postwar South.

Unlike other contexts that have provided the setting for important civil rights struggles, such as lunch counters or public transportation, marriage is a particularly value-laden institution within which to lodge claims for full citizenship. The same might be said of military service and even equal educational opportunity. But for present purposes, when claims for full citizenship are articulated through a demand for marriage rights, the disenfranchised group's interest in equality and freedom must contend with the values of dignity, discipline, respectability, and security, which are entailed in the institution of marriage itself. Surely, exclusion from the institution of marriage inflicts a subordinating harm on those excluded. Yet a demand that the exclusion be lifted in the name of equality and freedom must take account of the fact that marriage has its own well-entrenched agenda that can sometimes become a bitter foe of new rights holders. In this sense, marriage can quickly become a tragic way to be free since it is at once a place of love, comfort, intimacy, and kin, and fraught with danger, discipline, and even death.



What can gay and lesbian people today learn from the experiences of newly freed people at the end of the Civil War when it comes to elaborating free and more equal selves through the institution of marriage? Do we risk being automatically married just as were newly emancipated people? Is it crazy to worry that lesbian and gay people risk criminal prosecution as a consequence of being married? Are there ways in which the right to marry might collapse into a compulsion to do so today, as it did 150 years ago?

Yes to all these questions. In fact it's already happening. In the enthusiasm to recognize the marriage rights of same-sex couples, some states are marrying them automatically without their knowledge and without their consent. As a result, these new "beneficiaries" of a civil

rights revolution find themselves unwittingly bound up in legal twine for which they never signed up, which has left them in legal knots very similar to those of African Americans who were automatically married in the nineteenth century.

The evolution of marriage rights for same-sex couples in California presents the most interesting example. Starting in 1999, the state began to create a set of rights for same-sex couples under a domestic partnership registry. At first it included only hospital visitation rights and health benefits for the partners of state employees. Subsequent amendments to the domestic partnership law expanded these rights to include the ability to make medical decisions for one another, and stepparent adoption rights. Yet even as California enlarged the rights and responsibilities included in domestic partnerships, this legal status never included the broad range of financial and other rights that marriage entailed. Most importantly, entering a domestic partnership did not include the merger of two people's financial lives, nor did it create marital kinds of rights to financial support, such as an equitable share of the couple's assets or alimony after divorce. To end a domestic partnership all you needed to do was either send your partner a termination letter ("I'm breaking up with you and ending our partnership"), or stop living together and file a form with the state indicating that the partnership had ended. That was it—no court proceeding, no "grounds" for divorce, no alimony, and no complicated entanglements that a judge or a set of rules would govern.

In a sense, domestic partnership remained a legal status that signaled to others a kind of commitment between two parties to one another and a set of reciprocal rights *during* the relationship, but entailed very little in terms of obligations once the relationship ended. It included a bundle of rights one could assert against third parties, but did not entail any obligations owed to one another, particularly in the event that the partnership ended. This made domestic partnership a very different legal status from marriage. For better or for worse.

For better: some gay and lesbian couples thought of domestic partnership as a positive alternative to marriage, a way of gaining some of

the benefits of being in a committed relationship without necessarily assuming all of the rules or obligations of marriage or having the state set the terms of the relationship. In this sense, domestic partnership offered a kind of freedom to queer couples who did not want to conform to traditional marriage norms. They entered into domestic partnerships precisely because it didn't look exactly like marriage.

For worse: other gay and lesbian people yearned for a legal status with their partners equivalent to marriage, and regarded domestic partnership as a kind of second-class consolation prize provided to same-sex couples in lieu of marriage. Some worried that the more economically powerful person in the couple could just walk away from the relationship with no legally enforceable obligation to provide financial support of any kind to their former partner. In this sense, some members of the gay community looked to marriage laws as a way to create economic security for the less affluent person in the couple, just as women in heterosexual relationships had fought for decades to reform the laws of divorce.

In 2003 the California legislature changed everything by radically overhauling the domestic partnership law. With the California Domestic Partner Rights and Responsibilities Act of 2003, domestic partnership was declared the functional equivalent of marriage: "Registered domestic partners shall have the same rights . . . and . . . responsibilities . . . as . . . spouses."<sup>61</sup> This included all the rights of state law while married *and* the requirement that the couple go through a formal divorce proceeding when they broke up, including the division of the couple's marital assets according to community property rules and a duty to provide ongoing support after the marriage had ended. Widely regarded as a huge victory for the gay community, the authors of the bill were faced with a difficult decision: What effect would the change in the law have on people who had entered into domestic partnerships before 2003? Would the law apply retroactively? Would it, in effect, automatically marry them?

The answer was yes. The new law not only "upgraded" the status of domestic partnerships prospectively, but it also converted all existing



domestic partnerships into marriages retroactively and abolished the legal status of “domestic partnership” as something different from marriage, thus substantially changing the nature of the rights and responsibilities of people who had become domestic partners under the old rules. The only way to avoid having one’s domestic partnership turned into a marriage was to terminate the domestic partnership before the law went into effect, which was a year from the date it was signed by the governor. In that year’s time the state was required to send out three notices to all people in domestic partnerships giving them notice of the impending change in the law and instructing them the only way to opt out of the change was to terminate their domestic partnership before January 1, 2005. The notice told them: “If you do not terminate your domestic partnership before January 1, 2005 . . . you will be subject to these new rights and responsibilities and . . . you will only be able to terminate your domestic partnership, other than as a result of your domestic partner’s death, by the filing of a court action [aka a legal divorce action].”<sup>62</sup>

In the book’s last chapter I’ll plumb further the meaning of the decision to sweep all existing domestic partnerships into the rules of marriage, particularly attending to the ways in which the underlying hetero-gender norms and assumptions of marriage map onto same-sex couples. But for now I want to stress the similarities between what happened in the nineteenth century when it was thought to be a good thing from a civil rights standpoint to automatically marry African Americans, and the impulse to do the same with same-sex couples in California in 2005.

In both instances it was assumed that cohabitating couples that couldn’t wed would surely want to marry when given the chance to do so. For newly freed black people in the nineteenth century this presumption resulted in a kind of domestic evulsion whereby couples were unwittingly swept up into the regulatory grasp of marriage. California’s changes to the domestic partnership law in 2003 did the same thing, impelling into marriage all couples that had entered domestic partnerships on the assumption that if they didn’t want to upgrade their relationships

they would terminate their partnerships before the effective date of the law. Of course, California could have adopted an “opt in” rather than an “opt out” regime, leaving on the books the status of “domestic partnership” as something different from marriage, and then giving people in domestic partnerships the option to upgrade the legal status of their relationship. If domestic partners didn’t opt in, they would remain governed by the law in place at the time they entered the partnership. In fact, this option was considered (“allow these already-registered domestic partners to simply re-register without terminating their partnership, at a reduced registration fee”)<sup>63</sup> but was rejected in favor of an opt-out approach. Same-sex couples in California were offered a more stark choice: marriage or nothing. The opt-out regime was defended by the bill’s drafters as sensitive to the less educated, less affluent, or less sophisticated partner, whose interests were supposed to be better protected by marriage than by the “inferior” rules of domestic partnership. Yet if the opt-out approach to the change was designed to protect domestic partners with fewer assets or education, it turns out that the rules of automatic marriage may have made them more, not less, vulnerable.

The consequences of the automatic marriage of domestic partners are legally and economically both wide reaching and very complex. The new status meant that your domestic partner’s income would be taken into account when calculating eligibility for some public assistance, thus raising the possibility of being rendered ineligible for state Medicaid and food stamps, educational grants and scholarships, and other needs-based benefits; you would assume full legal responsibility for your partner’s debts, thus rendering you and your assets vulnerable to seizure by your partner’s creditors; your assets would come under community property laws, subject to equitable distribution upon divorce; and if you willfully abandoned your partner in a destitute condition or neglected or refused to provide your partner with necessary food, clothing, shelter, or medical attention you could be found guilty of a misdemeanor. It should come as no surprise that the California automatic marriage regime siphoned into marriage some couples that had not received any

of the notices about the change in law, received the notices but ignored them, or were otherwise oblivious of the ways in which the law acted upon them without their affirmative consent. The legal consequences of automatic marriage in California have arisen most frequently when a couple in a domestic partnership breaks up—one partner assuming he or she can walk away under the old rules and the other asserting rights to court-supervised divorce, division of their assets under community property rules, and alimony. Most often this problem arises in one of the following scenarios:

- The couple broke up and stopped living together before the effective date of the automatic marriage law but forgot to or weren't aware that they needed to file the official "termination of domestic partnership" form with the state.
- The couple broke up and stopped living together before the effective date of the automatic marriage law but one partner (perhaps the one who didn't really want to break up) lied to the other about having filed the official "termination of domestic partnership" form with the state.
- The couple broke up after their domestic partnership had been automatically converted into a marriage but were unaware of the change in the law governing their relationship (perhaps they had moved and never received the notices in the mail, or simply disregarded them) and mistakenly followed the "old law" rules to terminate their domestic partnership.

Lawyers in California who handle family law cases in the gay community have encountered all of these scenarios, and they raise thorny problems of what courts should do. Is it fair, indeed is it constitutional, to retroactively alter the legal terms of a domestic partnership without the couple's actual consent? Some scholars have argued that it isn't, that automatically granting one partner rights to the other partner's assets while also collectivizing their individual debt amounts to a denial of due process and a taking of property without due process of law.<sup>64</sup>

The retroactive effect of the California law has created a mess for many couples. Consider a lesbian couple that lived in Oakland and entered a registered domestic partnership in August 2001. One of them got a job in Chicago and they moved in July 2002. Three notices from the California secretary of state required by law were mailed to their Oakland address, alerting them that their relationship was now governed by the laws of marriage, but they never received them. When they broke up in 2006 the less affluent woman consulted a lawyer who advised her to file for divorce in California and to ask for half of her partner's assets as well as alimony. Her partner consulted her own attorney, who urged her to challenge the constitutionality of the retroactive application of the law, automatically marrying them without their knowledge. She considered this option, but was hesitant: Did she want to be the person who was known for invalidating a law that many people in the lesbian and gay community regarded as a huge step forward in advancing the rights and recognition of same-sex relationships? A kind of evil twin sister of Edie Windsor? Surely, she thought, her name would appear in all the gay community papers as someone who was not only unwilling to support her partner but would take the law down with her, threatening the security of hundreds of other couples. What is more, the cost of bringing a constitutional challenge to the law, including appeals, would be in the hundreds of thousands of dollars. She might as well settle out of court with her partner and put this all behind her. And so she did.

No one has yet brought a lawsuit to challenge the constitutionality of the retroactive application of the law of marriage to couples in domestic partnerships. For the same-sex couples today that were married without their knowledge or consent the likely impact of automatic marriage will be largely economic in nature. Some may be saddled with their partner's debts and find themselves sued by creditors to discharge those debts with assets that they thought were "their own" funds, separate from their partner's. Others may find themselves suddenly ineligible for public benefits otherwise available on account of HIV disease, or student

loans, or food stamps. In almost every case, breaking up will be more costly to the richer partner in the couple than it would have been under the old rules.

For same-sex couples in registered domestic partnerships in California the consequences of being swept up into the law of marriage will less likely result in an encounter with the criminal law. But it's not unthinkable. Consider a scenario that hasn't yet taken place but certainly could in the not-too-distant future: Bob and Steve, two men who live in a small town in southeastern Massachusetts and have been together for over ten years, decide to get married to express their love for one another and to better protect their finances. Luckily for them, Massachusetts is one of the states that allows same-sex couples to marry. Unluckily for them, Massachusetts is one of the states that still criminalizes adultery; in fact it's a felony, though not subject to the state's sex offender registration law.<sup>65</sup> Bob and Steve have agreed to have an open relationship, meaning that they consider each other their primary partner, are committed to each other for the long run, but are okay with each other having sex with other men, so long as it doesn't turn into a "serious thing." Let's say Bob and Steve's arrangement worked well for them for almost a decade and they considered it would still be their "deal" after they were married. A year later Bob confessed to Steve that he had been sleeping with another man for a few months and was in love with him. When they file for divorce, Bob might admit the affair in court and the judge, who could easily be a social conservative and had never supported the idea of same-sex marriage, could have him arrested for adultery. He might tell Bob: "If you people want the right to marry you better live by its rules. I don't care what 'deal' you had with Steve, when you said 'I do' you agreed to 'forsake all others.' Period."

If Bob were to challenge the Massachusetts adultery statute as unconstitutional he would probably lose. The court would likely point to the 2003 state high court decision finding that it was unconstitutional to deny same-sex couples the right to marry, noting that in that decision the court had referred three times to its own 1983 decision upholding the criminal adultery law. You want marriage, we'll give you marriage.

People who are married have affairs all the time. Many do so publicly. South Carolina governor Mark Sanford, New York governor Elliot Spitzer, and presidential candidate Newt Gingrich all admitted to having affairs while married in states that criminalized adultery. In June 2010 former vice president Al Gore and his wife, Tipper, announced that they had decided to separate, but not divorce. Mr. Gore began openly dating other women, even though adultery is a serious crime in Tennessee, his home state. Bear in mind that the state can bring charges even if the cuckolded spouse doesn't press for them, yet not one of these adulterers has been prosecuted.<sup>66</sup> Adultery is a crime in twenty-five states, a felony in five of those and a misdemeanor in the other twenty-one. It's easy to say that the adultery laws are outdated, rarely prosecuted, and the state legislatures simply aren't getting around to repealing them. While this is likely true in many states, it isn't true in all of them.

In fact, the campaign for marriage rights for same-sex couples has fueled efforts to reinvigorate adultery and bigamy laws. In several states conservative legislators have rejected efforts to repeal existing adultery laws and have advocated far stronger laws in reaction to the notion that same-sex couples were marrying and might undermine the sanctity of the marriage relation. For instance, for several years in the 2010s the New Hampshire House of Representatives passed a bill that would repeal its 200-year-old criminal adultery law, but the Senate could not muster the votes to do as well, responding, in part, to pressure from Cornerstone Action, a local conservative organization that sees same-sex couples marrying as one step on a slippery slope toward the total erosion of the institution of marriage. (Oddly enough, married same-sex couples may be exempt from the state's criminal adultery law. In 2003 the New Hampshire Supreme Court decided that the state's adultery law does not cover a married person who has an affair with another person of the same sex, reading the state statute's requirement of "sexual intercourse" to mean heterosexual intercourse.<sup>67</sup>) Finally, in the spring of 2014 both houses of the New Hampshire legislature passed the bill repealing the state's misdemeanor adultery law, but only after a competing

measure intended to expand the definition of intercourse in the adultery law to include acts between adults of the same sex was defeated.<sup>68</sup> The same kind of repeal efforts in other states have similarly failed to garner enough votes.<sup>69</sup>

Gay men and lesbians have long been accustomed to having otherwise ignored laws applied to them on account of their homosexuality. In 1991, when sodomy was still a felony in Georgia, Robin Shahar lost her job as a lawyer in the state attorney general's office when her boss found out that she had planned a commitment ceremony with her female partner. The attorney general argued that it was unethical for him to employ an assistant attorney general who had admitted to being a lesbian when it was the job of lawyers in his office to enforce the state's sodomy law. Of course, the attorney general's office didn't refuse to employ people who had cheated on their wives and husbands, even though adultery was also a crime in Georgia. Everyone understood that Shahar's treatment was about the kind of sexual crime she was accused of, not a neutral policy that disfavored unconvicted criminals working for the state.

Ironically, the attorney general himself, Michael Bowers, later confessed that at the time that he revoked the job offer to Robin Shahar he had been conducting an adulterous affair with a female employee for ten years, thereby admitting to hundreds of criminal acts since adultery was a misdemeanor in Georgia and each sexual act likely amounted to a separate violation of the law.<sup>70</sup> Given this history, it is possible that in states where gays and lesbians are able to legally marry, adultery and fornication laws might be enforced against them both directly and indirectly with greater vigor than they are against heterosexual people. Ample historical evidence justifies some level of concern. Studies have shown that same-sex couples, especially male couples, are more tolerant, if not welcoming, of non-mogamy in their long-term relationships than are heterosexual couples, and that open relationships are more common in same-sex relationships.<sup>71</sup>

Adultery laws are enforced not only through the criminal law but also as part of the law of divorce. Extramarital sex has already come up

in cases where same-sex couples are divorcing and one spouse raises to the judge the other spouse's infidelity as a ground to undercut a claim for post-marriage financial support ("He fooled around during the marriage, therefore I shouldn't have to support him financially after the marriage is over"), or as a ground to award joint custody or visitation ("Her sexual immorality during the marriage makes her a less fit parent").

This kind of sexual moralism within the framework of marriage extends beyond adultery to other kinds of sexual conduct that might be legal but could be considered immoral. One attorney told me that he had a client who sought to deny his spouse equal access to their child after their divorce. When they drew a religiously conservative judge for their case the client informed the judge that his spouse often watched gay porn movies at night and that this rendered him a bad parent (even though he always waited until after their son had gone to sleep to turn on the "dirty movies"). The argument worked, as the non-dirty-movie-watching father gained custody of the boy and the other father was punished with limited visitation rights.

So even if we may not see a marked uptick in the enforcement of adultery or fornication laws against same-sex couples in the same way that we witnessed the criminal laws related to marriage used to discipline newly freed people in the nineteenth century, angry divorcing spouses may gain a strategic advantage when their marriages are unwinding by making charges against their spouses of adultery or other forms of sexual (mis)conduct. These appeals have already found a sympathetic ear among family court judges who are either unfamiliar with same-sex relationships or hostile to the notion that they are of the same moral fiber as different-sex relationships.

On the other hand, it is equally possible that same-sex couples' gaining the right to marry is part of a trend toward the liberalization of marriage more generally. In this sense, the conservatives who fear that traditional marriage is under threat may be right, though it may not be same-sex couples who are causing this change, but rather larger social trends that favor the relaxation of rigid, narrow notions of marriage.

In this sense, permitting same-sex couples to marry may be more of a symptom than a cause of this evolution. Time will tell, but same-sex couples who marry and later have sex outside their marriages would be well advised to keep an eye out for local sheriffs or judges who are not so sympathetic to their newly won right to marry or to the broader modernization of marriage.

Other concerns are less speculative. In the early summer of 2011, on the day the New York state legislature voted to allow same-sex couples to marry, an op-ed that I wrote appeared in the *New York Times* in which I voiced the view that the gay community's celebration of the right to marry ought to include some awareness of how we might be rushed to the altar by those who worship marriage—including people in the gay community.<sup>72</sup> I got a lot of e-mails in response to that piece, but one was particularly interesting. A female doctor in Connecticut who had entered into a civil union with her female partner in Vermont wrote me:

Thank you, for writing the Opinion piece and describing something that most celebrating the New York legislature's recent vote don't fully understand. Marriage is a wholly different animal. I have been struggling with where to turn. . . . I was never married yet I've had to divorce. . . . I purposely did NOT get a civil union in Connecticut when they recognized civil unions, and didn't even know that my Vermont civil union turned into a marriage when Connecticut then recognized those civil unions as marriages. The VT CU was largely to support the general movement. I knew it expressly did not mean anything in Connecticut.

This lesbian doctor was appalled that her civil union got swept into a marriage when Connecticut amended its law in 2008 allowing same-sex couples to marry. She was right that the Connecticut legislature specifically intended that the law would convert all civil unions into marriages—whether or not the affected couples intended to or even knew that they would be automatically married. She was wrong, however, that her Vermont civil union would become a marriage in the state

of Connecticut because the automatic marriage provision of the Connecticut law applied only to civil unions entered into in Connecticut—thus her Vermont civil union wasn't affected when same-sex couples could marry in her home state of Connecticut.

But truth be told, our Connecticut doctor's problems are bigger than she suspects. She somehow misunderstood the meaning of her Vermont civil union, believing that it committed her to much less than would a marriage. In fact, civil unions in Vermont fall into the category of what gay rights advocates call “everything but marriage,” meaning that the law was intended to provide all the rights, benefits, and responsibilities of marriage, just under a different legal name. As a result, when she got civil unioned to her partner she was married in Vermont for all intents and purposes. To get out of her civil union she'd have to go through a legal divorce proceeding, just like any married person. Here's the rub: Vermont makes it much easier to get into a civil union than to get out. Out-of-staters can drive up to Vermont and get civil unioned, then drive home that night. Getting civil disunioned or divorced can't be done as easily because Vermont, like many states, has a residency requirement for divorce. This means that a person must have been living in Vermont for at least six months at the time of filing for divorce, and for at least a year before the divorce can be granted. To end a civil union, out-of-staters must either move to Vermont temporarily or convince a court in their home state to recognize their union—at least long enough to dissolve it. In fact, town clerks in Vermont are required to provide civil union applicants with information to advise them “that Vermont residency may be required for dissolution of a civil union in Vermont.”<sup>73</sup>

Connecticut courts have been clear that they do not have the power to dissolve civil unions entered into in Vermont.<sup>74</sup> The doctor who wrote me would have better luck in either Massachusetts or New York, where courts have been increasingly willing to dissolve civil unions entered into in Vermont, but she'd be no better off since she would still have to move to either of those states for a year in order to meet their residency requirements for divorce.<sup>75</sup> (The reason Nevada gained such a

well-known reputation for “quickie” divorces was because it has a short, twenty-day residency requirement to dissolve a marriage entered into in another state.)

The Connecticut doctor has a problem that is not uncommon for many same-sex couples that have been civil unioned or married in the states that allow it: while it was easy to get hitched, it’s almost impossible to get unhitched. They can fly to New York for the weekend to get married, but they’ll have to move back to New York for a year before they can get themselves divorced. As a practical matter, the “lock” part of wedlock is no joke for them.<sup>76</sup>

Same-sex couples face another context where being swept into marriage without their knowledge resembles the plight of freed people in the nineteenth century. In 2000, the American Law Institute (a body of legal experts who draft new codes that serve as models for state legislatures to consider in order to clarify, modernize, and otherwise improve the law) adopted new principles relating to the formation and dissolution of domestic partnerships, whether involving same- or different-sex couples. They took the view that if your relationship looks a lot like a marriage, but you haven’t actually gotten married, the law should treat you as if you have. They set their sights on “two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.”<sup>77</sup>

The ALI Principles of the Law of Family Dissolution recommend that courts adopt a default rule recognizing a domestic partnership if two persons have lived together in a joint household for a certain period of time, say two or three years. When such a couple breaks up, the ALI recommends that the rules of divorce should apply to how their relationship is dissolved and their property divided. To escape the presumption in favor of a domestic partnership, the couple must have made an enforceable contract explicitly opting out. Thus the law opts them into a marriage-like regime whether or not they reached a mutual and explicit agreement that they desired or intended to do so; instead it requires that they explicitly opt out to avoid the matrimonialization of

their relationship. The form of the relationship, not the parties’ intent, is fundamental here.<sup>78</sup>

These principles, largely applauded by the lesbian, gay, and progressive legal communities,<sup>79</sup> though with some notable exceptions,<sup>80</sup> risk a wholesale transformation of thousands of relationships into a marital form unbeknownst to the couples themselves. The assumption underlying this support is that couples that form relationships that share many similarities to a marriage either wish to have their relationships treated like a marriage or should want them to. If they become law the ALI principles will completely transform what it means to “just” live together, and will surely serve as a disincentive to doing so. What is more, such laws will frustrate, if not render impossible, the formation of economic, emotional, and sexual attachments and intimacies that are not like marriage and have no aim to be. The requirement that couples are automatically opted into the marriage-like regime unless they explicitly opt out runs contrary to common sense in many respects; it would be hard for many couples to sit down and agree that they’ve reached a point where they’d each like to have their relationship considered like a marriage, but surely it would be even more difficult to have that conversation with the aim of not committing to marriage’s obligations. This was exactly what my correspondent from Connecticut was most worried about.

A more interesting proposal, though not one likely to be adopted any time soon, would be to require married couples to renew their vows periodically, and if they fail to do so their marriages will lapse or expire. This rule would force a conversation about expectations and disappointments, and would allow both parties to renegotiate and clarify the deal, rather than saying “I do” once and forever.

Besides these settings in which the law may marry people without their knowing or consenting to it, we’ve seen more explicit ways in which important institutional actors have gotten into the “marriage promotion business,” strong-arming same-sex couples to marry, echoing the experiences of freed people when they were told that they had to marry in order to get basic humanitarian aid. For those who have

for years received employment-related benefits coverage for domestic partners, they are now being told that if they don't marry, their partners will be dropped from the benefits plans. For example, since 1997 both same-sex and different-sex couples have been able to register their relationships as domestic partnerships with the City of New York. The law was designed "to recognize the diversity of family configurations, including lesbian, gay, and other non-traditional couples." To qualify, the couple has to have "a close and committed personal relationship, live together, and have been living together on a continuous basis."<sup>81</sup> The consequences of registering one's relationship as a domestic partnership are not the same as being married—what is involved is a mere "registry" that serves to publicly signal a committed relationship and does not specify anything about what the couple has agreed to in terms of monogamy, longevity, financial interdependence, etc. Perhaps most importantly, domestic partnership laws were not passed as a kind of consolation prize for same-sex couples who could not marry, but rather were designed to enable the recognition of a larger class of relationships than those encompassing people who could or wanted to marry. The use of the term "non-traditional couple" in the law was not meant to be a euphemism for same-sex couples, but rather meant what it said: couples who by intent or circumstance had created relationships that were not marital in form.

New York City provided health and other benefits to the registered domestic partners of city employees (both same-sex and different-sex partners), and other private employers used domestic partnership registration as a way to make benefits available to the non-spousal partners of their employees. But not all employers have required actual registration with the city in order to add a domestic partner to the company's benefit plan. At Columbia University, employees in same-sex partnerships could add a partner to the benefits plan by filling out a form saying they lived in the same household. Yet employees in different-sex partnerships had to marry their partners to get them on the health plan. A male graduate student I know, informed he'd have to marry his longtime

girlfriend in order for her to get benefits, was told by a person in the Columbia benefits office: "Too bad your girlfriend isn't a man—it would be so much easier!" They ended up getting married, though they were politically and personally uninterested in doing so.

I was concerned that when same-sex couples gained the right to marry in New York State, Columbia University would require us to marry our domestic partners in order to keep them on the university-sponsored benefits plan. Just as the ink was drying on the wedding invitations same-sex couples had printed up when New York State legalized marriage for same-sex couples, major U.S. corporations were adjusting their personnel policies to recognize these new rights. As the *New York Times* reported the issue: "Corning, I.B.M. and Raytheon all provide domestic partner benefits to employees with same-sex partners in states where they cannot marry. But now that they can legally wed in New York, five other states and the District of Columbia, they will be required to do so if they want their partner to be covered for a routine checkup or a root canal."<sup>82</sup> The right to marry was collapsing into a compulsion to marry.

What's wrong with that? some might ask. All these policies do is put same-sex couples on an equal footing with heterosexual couples—they have always had to marry to get their partners/spouses on their employer-sponsored health plans. Surely employers may have an interest in minimizing their benefits-related expenses by using some criterion with which they decide who is eligible for the group plan, but that criterion shouldn't violate anti-discrimination laws. After all, a third or more of one's compensation comes in the form of benefits, and in the era when same-sex couples couldn't marry, limiting dependent coverage only to those who were married amounted to a kind of sexual orientation-based discrimination. To address this inequity, some employers provided domestic partner coverage as an enlightened way of addressing that gap in compensation for those barred by law from marrying. (Although discrimination against same-sex couples can't be entirely avoided because under federal law employees who put their domestic partners on their

health plan must pay taxes on that coverage as “income” whereas heterosexuals who put their legal spouses on their plans do not.)

But when same-sex couples gained the right to marry, some employers, including Columbia, announced a change in policy, giving all employees whose same-sex domestic partners were covered under the benefits plan one year to marry their partners or they’d be dropped from the plan.<sup>83</sup> Faculty and staff advocated strongly against this change after it was announced, pointing out that New York City still allowed the registration of both same- and different-sex partnerships, even though same-sex couples could now marry, and that Columbia University had no business promoting marriage, or worse, coercing its employees to marry—especially when it had used a suitable administrative process for recognizing domestic partnerships for years. What is more, we argued, the new benefits eligibility policy now discriminated against employees on the basis of marital status—those who married were compensated considerably higher than those who didn’t. The policy change, in effect, converted sexual orientation–based discrimination into marital status–based discrimination. We urged Columbia not only to reinstate domestic partner benefits for the same-sex partners of employees but to expand the policy to include different-sex partners, so as to mirror New York City’s domestic partnership law. Reinstating same-sex benefits alone, we urged the provost, would merely result in reviving a policy that discriminated against heterosexual employees since they had to marry to get their partners on the plan, while employees in same-sex partnerships had the option of marrying or registering as domestic partners.<sup>84</sup>

In the end Columbia revised its policy, giving us half a loaf. It reinstated domestic partnership benefits for same-sex couples only, setting up a system that discriminates against employees in different-sex domestic partnerships, who must still marry to gain coverage for their partners.

To avoid the Scylla and Charybdis of marital status– and sexual orientation–based discrimination in their benefits plans, some companies have adopted an “each one pick one” policy of allocating

employment-related benefits. Rather than limiting policies to legal spouses, allow each employee to choose another person to put on the group plan; it could be your brother the musician who does not have insurance, your sister who lost her coverage when she was divorced, your mother who has expenses that exceed her Medicare coverage, or your spouse who is not otherwise insured.

It seems so natural and normal that dependent benefits coverage be rationed through the use of marriage or its proxy, domestic partnership. But if we step back for a moment, it really makes no sense, other than as a means of limiting employer expenses or as a subsidy for the nuclear family. Originally, the notion of employment-based health care and dependent coverage was designed to subsidize the family wage; the husband would work while the wife stayed home with the kids and received health insurance derivatively from *his* employment. Of course this left the wife and their children in a very vulnerable place, dependent not only on the husband’s wage for their support but also on his employment for coverage of their health care needs. Many divorced women today find themselves without health insurance coverage or having to buy individual coverage on the private market at very high prices for inferior policies. The Obama administration’s Patient Protection and Affordable Care Act was designed to address some of this need, particularly for divorced women, but it does not relieve married women’s dependency on their husbands’ employment-related health benefits since the Affordable Care Act presupposes an ongoing robust employment-related health insurance scheme. Some argue that only a single-payer system would resolve all of these problems, taking the primary source of health insurance away from employment and making it a right for everyone, regardless of whether they have a job that includes health benefits or are married to someone who has one.



In a range of ways—some predictable, others less so—marriage has been a thorny lever by which both formerly enslaved people and lesbian and



gay people might be elevated up from their subordinate status. Marriage, then as now, has been a complicated vehicle through which to address the injustice of racism and homophobia. Too often the freedom to marry risks collapsing into a compulsion to marry, squeezing out marriage as a freely given choice and substituting in its place a form of government oversight, regulation, discipline, and punishment that is hard to reconcile with a vigorous notion of freedom. So too, gaining marriage equality may entail the overshadowing of other forms of intimate, family, or sexual relationships as viable, socially acceptable alternatives to marriage.

## CHAPTER 3. BOOTS NEXT TO THE BED

- 1 *Means v. State*, 99 Ga. 205 (1896), Record Number A-20270, Georgia State Archives.
- 2 Obituary of E.F. Edwards, *Georgia Enterprise*, May 30, 1902, available at <http://files.usgarchives.net/ga/newton/obits/e/edwards21050b.txt>; Edwards House, Historic Architecture of Georgia, [http://dbs.galib.uga.edu/cgi-bin/meta.cgi?userid=galileo&dbs=larc&ini=larc\\_galileo.ini&action=retrieve&id=hb00324&format=c](http://dbs.galib.uga.edu/cgi-bin/meta.cgi?userid=galileo&dbs=larc&ini=larc_galileo.ini&action=retrieve&id=hb00324&format=c) contact; Brief History of the Troup Artillery, <http://www.jackmasters.net/troup/roste.html>.
- 3 Edward L. Pierce, "The Contrabands at Fortress Monroe," *Atlantic Monthly*, Nov. 1861.
- 4 John Eaton, *Grant, Lincoln and the Freedmen: Reminiscences of the Civil War* (New York: Longmans, Green, and Co., 1907), p. 2.
- 5 Letter from Henry Rowntree to Contraband Relief Commission, Jefferson Davis Mansion, Apr. 13, 1864, RG 105, Entry 2150, p. 10-11, NA. Rowntree's work documenting the state of the freed men and women is notable as he was employed both by the Contraband Relief Society of Cincinnati and the Society of Friends—private relief and missionary organizations that worked hand in hand with the nascent public relief agencies to rebuild the South after the war. See also James E. Yeatman, Western Sanitary Commission, "A Report on the Condition of the Freedmen of the Mississippi" (1864) (containing a report dated Dec. 17, 1863, describing the destitute conditions of freedmen throughout Mississippi).
- 6 Preliminary Report, p. 12.
- 7 American Freedmen's Inquiry Commission, "Final Report of the American Freedmen's Inquiry Commission to the Secretary of War," May 15, 1864, S. Exec. Doc. No. 38-53, 107 n.1 (1st Sess. 1864) (hereinafter Final Report).
- 8 The Bureau of Refugees, Freedmen, and Abandoned Lands, more commonly referred to as the Freedmen's Bureau, was a federal agency established in March 1865 to coordinate the relief effort that aided the transition of formerly enslaved people to freedom.
- 9 Report by Chaplain Warren, May 18, 1864, in Report of John Eaton, General Superintendent of Freedmen, Department of Tennessee, Apr. 29, 1863, RG 94, M 619, roll 200, at p. 89-90, NA (hereinafter Eaton Report).
- 10 Eaton Report, pp. 89-90. Gutman reports that "the earliest 'contraband marriage' for which a record exists occurred during the first week of September in 1861." Gutman, *Black Family in Slavery and Freedom*, p. 412.
- 11 Eaton Report, pp. 89-90.
- 12 Pile Testimony.
- 13 Michael Grossberg, *Governing the Hearth: Law and the Family in the Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985), p. 133.
- 14 Laura Edwards, "The Marriage Covenant Is at the Foundation of All Our Rights: The Politics of Slave Marriages in North Carolina after Emancipation," *Law and*

- History Review* 14 (1996), p. 93 (quoting Alfred M. Waddell, a Confederate army officer and newspaper editor, and a member of the commission that designed the North Carolina Black Codes). See also Stamp, *The Peculiar Institution*, p. 12.
- 15 Regarding the "possession of several wives and also several husbands," see Report for the Month of September, 1867, for the Sub District of Greenville, Mississippi, Sept. 30, 1867, RG 105, M 826, roll 30, frame 455, NA; Report of the Sub District for Montgomery, Alabama, for the Month ending Aug. 31, 1865, Sept. 1, 1865, RG 105, M 809, roll 18, frames 566-67, NA.
- 16 Report for the month of August 1867, from Lt. George Waller, Sub Assistant Commissioner (Aug. 31, 1867), RG 105, M 826, roll 30, frame 225, NA.
- 17 Report of the Condition of the Sub Division, Woodville, Mississippi, Oct. 31, 1867, RG 105, M 826, roll 30, NA. See also Report of Events Pertaining to Bureau of Refugees, Freedmen, and Abandoned Lands, Sub District of Wordville, Mississippi, for the Month ending Sept., 1867, RG 105, M 826, roll 30, frame 486, NA; Report for the Month of Aug., 1867 from Lieutenant George Waller, Sub Assistant Commissioner, Aug. 31, 1867, *ibid.*, frame 225.
- 18 Report of the Condition of the Freedpeople and Operations of the Bureau throughout the District for the Month of Jan., 1868, Jan. 31, 1868, RG 105, M 1027, roll 27, frames 323-24, NA.
- 19 Narrative Report for the Month of Aug., 1867, for the Sub District of Grenada, Mississippi, RG 105, M 826, roll 30, frame 232, NA.
- 20 Report from the Sub District of East Pascagoula, Mississippi, for the Month of Aug., 1867, Aug. 31, 1867, RG 105, M 823, roll 30, NA. See also Report for the Sub District of Rosedale, Mississippi, for the Month of Oct., 1867, Nov. 14, 1867, RG 105, M 826, roll 30, frame 1002, NA; Narrative Report for the Month of Oct., 1867 for the Sub District of Yazoo City, Mississippi, RG 105, M 826, roll 30, frames 784-85, NA; Report of the Condition of the Sub Division, Woodville, Mississippi, Oct. 31, 1867, RG 105, M 826, roll 30, NA; Narrative Report for the Sub District of Tupelo, Mississippi, for the month ending Aug., 1867, Aug. 31, 1867, RG 105, M 826, roll 30, frame 221, NA; Report of the Sub District for Montgomery, Alabama, for the Month ending Aug. 31, 1865, Sept. 1, 1865, RG 105, M 809, roll 18, frames 566-67, NA; Testimony taken in Kentucky, Tennessee, and Missouri before the American Freedman's Inquiry Commission, Nov. and Dec. 1863, RG 94, M 619-201, frame 140.
- 21 See Report of Events Pertaining to Bureau of Refugees, Freedmen, and Abandoned Lands, Sub District of Wordville, Mississippi, for the Month ending Sept., 1867, RG 105, M 826, roll 30, frame 486, NA.
- 22 Report upon the Conduct of Affairs Concerning Freedmen in Mississippi for the Quarter Ending Sept. 30, 1868, Oct. 14, 1868, RG 105, M 826, roll 3, frame 1077, NA.
- 23 Brevet Major General Alvan C. Gillem to Major General O.O. Howard, July 15, 1867, RG 105, M 826, roll 30, NA.

- 24 *Ibid.*
- 25 *Ibid.*
- 26 *Ibid.*
- 27 Narrative Report for the Sub District of Grenada, Mississippi, for the Month of August 1867, RG 105, M 826, roll 30, frame 232, NA; Narrative Report for the Sub District of Grenada, Mississippi for the Month of Sept., 1867, Sept. 30, 1867, RG 105, M 826, roll 30, frame 426, NA.
- 28 Report of the Operations of the Bureau of Refugees, Freedmen and Abandoned Lands for the State of Mississippi for Month of Oct. 1867, Nov. 28, 1867, RG 105, M 826, roll 3, frames 17-18, NA. See also Preliminary Report, Report of the Operations of the Bureau in the State of Mississippi for the Quarter ending June 30, 1868, July 14, 1868, p. 10, RG 105, M 826, roll 3, frames 959-60, NA.
- 29 Civil Rights Act of Nov. 25, 1865, ch. 4, § 2, 1865 Miss. Laws 82, 82.
- 30 See, e.g., Act of Mar. 9, 1866, tit. 31, § 5, 1866 Ga. Laws 239, 240 (prescribing and regulating the relation of husband and wife between persons of color); Act of Mar. 10, 1866, ch. 40, §§ 1-5, 1866 N.C. Sess. Laws 99-101 (concerning negroes and persons of color or of mixed blood); Act of 1865, 1865 S.C. Acts 291, 292 (establishing and regulating the domestic relations of persons of color, and amending the law in relation to paupers and vagrancy); Act of Feb. 27, 1865, ch. 18, § 2, 1865 Va. Acts 85 (legalizing marriages of colored persons now cohabiting as husband and wife), in June Purcell Guild, *Black Laws of Virginia: A Summary of the Legislative Acts of Virginia Concerning Negroes from Earliest Times to the Present* (Westminster, MD: Willow Bend Books, 1996), p. 33. See also *Laws Relating to Freedmen*, Compiled by Command of Major General O.O. Howard, Commissioner; Bureau of Refugees, Freedmen and Abandoned Lands; S. Exec. Doc. No. 39-6, 179 (a collection of Black Codes assembled by the head of the Freedman's Bureau and submitted to Congress in 1866-67).
- 31 Act of Jan. 11, 1866, ch. 1469, § 1, 1865 Fla. Laws. 31.
- 32 North Carolina entitled the county clerk to charge the newlyweds a fee of 25¢ for the task of filing a certificate of marriage. See Act of Mar. 10, 1866, ch. 40, § 5, 1866 N.C. Sess. Laws 101. In 1866, 25¢ was an amount of money that put nuptial legitimacy well outside the reach of most African Americans. Recall that war widows were expected to support themselves and their children on \$8 a month.
- 33 See, e.g., Act of Dec. 14, 1866, ch. 1552, § 1, 1866 Fla. Laws 22.
- 34 See Act of Mar. 10, 1866, ch. 40, § 6, 1866 N.C. Sess. Laws 101.
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**TOWARD  
A FEMINIST THEORY  
OF THE STATE**

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and who is not in the habit of obeying anyone else.<sup>47</sup> Men are the group that has had the authority to make law, embodying H. L. A. Hart's "rule of recognition" that, in his conception, makes law authoritative.<sup>48</sup> Distinctively male values (and men) constitute the authoritative interpretive community that makes law distinctively lawlike to the likes of Ronald Dworkin.<sup>49</sup> If one combines "a realistic conception of the state with a revolutionary theory of society,"<sup>50</sup> the place of gender in state power is not limited to government, nor is the rule of law limited to police and courts. The rule of law and the rule of men are one thing, indivisible, at once official and unofficial—officially circumscribed, unofficially not. State power, embodied in law, exists throughout society as male power at the same time as the power of men over women throughout society is organized as the power of the state.

Perhaps the failure to consider gender as a determinant of state behavior has made the state's behavior appear indeterminate. Perhaps the objectivity of the liberal state has made it appear autonomous of class. Including, but beyond, the bourgeois in liberal legalism, lies what is male about it. However autonomous of class the liberal state may appear, it is not autonomous of sex. Male power is systemic. Coercive, legitimated, and epistemic, it is the regime.

## 9 Rape: On Coercion and Consent

Negotiations for sex are not carried on like those for the rent of a house. There is often no definite state on which it can be said that the two have agreed to sexual intercourse. They proceed by touching, feeling, fumbling, by signs and words which are not generally in the form of a Roman stipulation.

—Honoré, twentieth-century British legal scholar and philosopher

Rape is an extension of sexism in some ways, and that's an extension of dealing with a woman as an object . . . Stinky [her rapist] seemed to me as though he were only a step further away, a step away from the guys who sought me on the streets, who insist, my mother could have died, I could be walking down the street and if I don't answer their rap, they got to go get angry and get all hostile and stuff as though I walk down the street as a . . . that my whole being is there to please men in the streets. But Stinky only seemed like someone who had taken it a step further . . . he felt like an extension, he felt so common, he felt so ordinary, he felt so familiar, and it was maybe that what frightened me the most was that how similar to other men he seemed. They don't come from Mars, folks.

—Carolyn Craven, reporter

If you're living with a man, what are you doing running around the streets getting raped?

—Edward Harrington, defense attorney in New Bedford gang rape case



To have it is to have it taken away. This may explain the male incomprehension that, once a woman has had sex, she loses anything when subsequently raped. To them women have nothing to lose. It is true that dignity harms, because nonmaterial, are ephemeral to the legal mind. But women's loss through rape is not only less tangible; it is seen as unreal. It is difficult to avoid the conclusion that penetration itself is considered a violation from the male point of view, which is both why it is the centerpiece of sex and why women's sexuality, women's gender definition, is stigmatic. The question for social explanation becomes not why some women tolerate rape but how any women manage to resent it.

Rape cases finding insufficient evidence of force reveal that acceptable sex, in the legal perspective, can entail a lot of force. This is both a result of the way specific facts are perceived and interpreted within the legal system and the way the injury is defined by law. The level of acceptable force is adjudicated starting just above the level set by what is seen as normal male sexual behavior, including the normal level of force, rather than at the victim's, or women's, point of violation.<sup>4</sup> In this context, to seek to define rape as violent not sexual is as understandable as it is futile. Some feminists have reinterpreted rape as an act of violence, not sexuality, the threat of which intimidates all women.<sup>5</sup> Others see rape, including its violence, as an expression of male sexuality, the social imperatives of which define as well as threaten all women.<sup>6</sup> The first, epistemologically in the liberal tradition, comprehends rape as a displacement of power based on physical force onto sexuality, a preexisting natural sphere to which domination is alien. Susan Brownmiller, for example, examines rape in riots, wars, pogroms, and revolutions; rape by police, parents, prison guards; and rape motivated by racism. Rape in normal circumstances, in everyday life, in ordinary relationships, by men as men, is barely mentioned.<sup>7</sup> Women are raped by guns, age, white supremacy, the state—only derivatively by the penis. The view that derives most directly from victims' experiences, rather than from their denial, construes sexuality as a social sphere of male power to which forced sex is paradigmatic. Rape is not less sexual for being violent. To the extent that coercion has become integral to male sexuality, rape may even be sexual to the degree that, and because, it is violent.

The point of defining rape as "violence not sex" has been to claim an ungendered and nonsexual ground for affirming sex (heterosexu-

If sexuality is central to women's definition and forced exceptional, to women's social condition. In feminist analysis, a rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systemic context of group subjection, like lynching. The fact that the state calls rape a crime opens an inquiry into the state's treatment of rape as an index to its stance on the status of the sexes.

Under law, rape is a sex crime that is not regarded as a crime when it looks like sex. The law, speaking generally, defines rape as intercourse with force or coercion and without consent.<sup>1</sup> Like sexuality under male supremacy, this definition assumes the sadomasochistic definition of sex: intercourse with force or coercion can be or become consensual. It assumes pornography's positive-outcome-rape scenario: dominance plus submission is force plus consent. This equals sex, not rape. Under male supremacy, this is too often the reality. In a critique of male supremacy, the elements "with force and without consent" appear redundant. Force is present because consent is absent.

Like heterosexuality, male supremacy's paradigm of sex, the crime of rape centers on penetration.<sup>2</sup> The law to protect women's sexuality from forcible violation and expropriation defines that protection in male genital terms. Women do resent forced penetration. But penile invasion of the vagina may be less pivotal to women's sexuality, pleasure or violation, than it is to male sexuality. This definitive element of rape centers upon a male-defined loss. It also centers upon one way men define loss of exclusive access. In this light, rape, as legally defined, appears more a crime against female monogamy (exclusive access by one man) than against women's sexual dignity or intimate integrity. Analysis of rape in terms of concepts of property, often invoked in marxian analysis to criticize this disparity, fail to encompass the realities of rape.<sup>3</sup> Women's sexuality is, socially, a thing to be stolen, sold, bought, battered, or exchanged by others. But women never own or possess it, and men never treat it, in law or in life, with the solicitude with which they treat property. To be property would be an improvement. The moment women "have" it—"have sex" in the dual gender/sexuality sense—it is lost as theirs.

ality) while rejecting violence (rape). The problem remains what it has always been: telling the difference. The convergence of sexuality with violence, long used at law to deny the reality of women's violation, is recognized by rape survivors with a difference: where the legal system has seen the intercourse in rape, victims see the rape in intercourse. The uncoerced context for sexual expression becomes as elusive as the physical acts come to feel indistinguishable. Instead of asking what is the violation of rape, their experience suggests that the more relevant question is, what is the nonviolation of intercourse? To know what is wrong with rape, know what is right about sex. If this, in turn, proves difficult, the difficulty is as instructive as the difficulty men have in telling the difference when women see one. Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse,<sup>8</sup> while for women it is difficult to distinguish the two under conditions of male dominance.

In the name of the distinction between sex and violence, reform of rape statutes has sought to redefine rape as sexual assault.<sup>9</sup> Usually, assault is not consented to in law; either it cannot be consented to, or consensual assault remains assault.<sup>10</sup> Yet sexual assault consented to is intercourse, no matter how much force was used. The substantive reference point implicit in existing legal standards is the sexually normative level of force. Until this norm is confronted as such, no distinction between violence and sexuality will prohibit more instances of women's experienced violation than does the existing definition. Conviction rates have not increased under the reform statutes.<sup>11</sup> The question remains what is seen as force, hence as violence, in the sexual arena.<sup>12</sup> Most rapes, as women live them, will not be seen to violate women until sex and violence are confronted as mutually definitive rather than as mutually exclusive. It is not only men convicted of rape who believe that the only thing they did that was different from what men do all the time is get caught.

Consent is supposed to be women's form of control over intercourse, different from but equal to the custom of male initiative. Man proposes, woman disposes. Even the ideal it is not mutual. Apart from the disparate consequences of refusal, this model does not envision a situation the woman controls being placed in, or choices she frames. Yet the consequences are attributed to her as if the sexes began at arm's length, on equal terrain, as in the contract fiction. Ambiguous cases of

consent in law are archetypically referred to as "half won arguments in parked cars."<sup>13</sup> Why not half lost? Why isn't half enough? Why is it an argument? Why do men still want "it," feel entitled to "it," when women do not want them? The law of rape presents consent as free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity. Fundamentally, desirability to men is supposed a woman's form of power because she can both arouse it and deny its fulfillment. To woman is attributed both the cause of man's initiative and the denial of his satisfaction. This rationalizes force. Consent in this model becomes more a metaphysical quality of a woman's being than a choice she makes and communicates. Exercise of women's so-called power presupposes more fundamental social powerlessness.<sup>14</sup>

The law of rape divides women into spheres of consent according to indices of relationship to men. Which category of presumed consent a woman is in depends upon who she is relative to a man who wants her, not what she says or does. These categories tell men whom they can legally fuck, who is open season and who is off limits, not how to listen to women. The paradigm categories are the virginal daughter and other young girls, with whom all sex is proscribed, and the whorelike wives and prostitutes, with whom no sex is proscribed. Daughters may not consent; wives and prostitutes are assumed to, and cannot but.<sup>15</sup> Actual consent or nonconsent, far less actual desire, is comparatively irrelevant. If rape laws existed to enforce women's control over access to their sexuality, as the consent defense implies, no would mean no, marital rape would not be a widespread exception,<sup>16</sup> and it would not be effectively legal to rape a prostitute.

All women are divided into parallel provinces, their actual consent counting to the degree that they diverge from the paradigm case in their category. Virtuous women, like young girls, are unconsenting, virginal, rapable. Unvirtuous women, like wives and prostitutes, are consenting, whores, unrapable. The age line under which girls are presumed disabled from consenting to sex, whatever they say, rationalizes a condition of sexual coercion which women never outgrow. One day they cannot say yes, and the next day they cannot say no. The law takes the most aggravated case for female powerlessness based on gender and age combined and, by formally prohibiting all sex as rape, makes consent irrelevant on the basis of an assumption of powerlessness. This defines those above the age line as powerful,

whether they actually have power to consent or not. The vulnerability girls share with boys—age—dissipates with time. The vulnerability girls share with women—gender—does not. As with protective labor laws for women only, dividing and protecting the most vulnerable becomes a device for not protecting everyone who needs it, and also may function to target those singled out for special protection for special abuse. Such protection has not prevented high rates of sexual abuse of children and may contribute to eroticizing young girls as forbidden.

As to adult women, to the extent an accused knows a woman and they have sex, her consent is inferred. The exemption for rape in marriage is consistent with the assumption underlying most adjudications of forcible rape: to the extent the parties relate, it was not really rape, it was personal.<sup>17</sup> As marital exemptions erode, preclusions for cohabitants and voluntary social companions may expand. As a matter of fact, for this purpose one can be acquainted with an accused by friendship or by meeting him for the first time at a bar or a party or by hitchhiking. In this light, the partial erosion of the marital rape exemption looks less like a change in the equation between women's experience of sexual violation and men's experience of intimacy, and more like a legal adjustment to the social fact that acceptable heterosexual sex is increasingly not limited to the legal family. So although the rape law may not now always assume that the woman consented simply because the parties are legally one, indices of closeness, of relationship ranging from nodding acquaintance to living together, still contraindicate rape. In marital rape cases, courts look for even greater atrocities than usual to undermine their assumption that if sex happened, she wanted it.<sup>18</sup>

This approach reflects men's experience that women they know do meaningfully consent to sex with them. *That* cannot be rape; rape must be by someone else, someone unknown. They do not rape women they know. Men and women are unequally socially situated with regard to the experience of rape. Men are a good deal more likely to rape than to be raped. This forms their experience, the material conditions of their epistemological position. Almost half of all women, by contrast, are raped or victims of attempted rape at least once in their lives. Almost 40 percent are victims of sexual abuse in childhood.<sup>19</sup> Women are more likely to be raped than to rape and are most often raped by men whom they know.<sup>20</sup>

Men often say that it is less awful for a woman to be raped by someone she is close to: "The emotional trauma suffered by a person victimized by an individual with whom sexual intimacy is shared as a normal part of an ongoing marital relationship is not nearly as severe as that suffered by a person who is victimized by one with whom that intimacy is not shared."<sup>21</sup> Women often feel as or more traumatized from being raped by someone known or trusted, someone with whom at least an illusion of mutuality has been shared, than by some stranger. In whose interest is it to believe that it is not so bad to be raped by someone who has fucked you before as by someone who has not? Disallowing charges of rape in marriage may, depending upon one's view of normalcy, "remove a substantial obstacle to the resumption of normal marital relationships."<sup>22</sup> Note that the obstacle is not the rape but the law against it. Apparently someone besides feminists finds sexual victimization and sexual intimacy not all that contradictory under current conditions. Sometimes it seems as though women and men live in different cultures.

Having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex in specific cases. The adjudicated line between rape and intercourse commonly centers on some assessment of the woman's "will." But how should the law or the accused know a woman's will? The answer combines aspects of force with aspects of nonconsent with elements of resistance, still effective in some states.<sup>23</sup> Even when nonconsent is not a legal element of the offense, juries tend to infer rape from evidence of force or resistance. In Michigan, under its reform rape law, consent was judicially held to be a defense even though it was not included in the statute.<sup>24</sup>

The deeper problem is that women are socialized to passive receptivity; may have or perceive no alternative to acquiescence; may prefer it to the escalated risk of injury and the humiliation of a lost fight; submit to survive. Also, force and desire are not mutually exclusive under male supremacy. So long as dominance is eroticized, they never will be. Some women eroticize dominance and submission; it beats feeling forced. Sexual intercourse may be deeply unwanted, the woman would never have initiated it, yet no force may be present. So much force may have been used that the woman never risked saying no. Force may be used, yet the woman may prefer the sex—to avoid more force or because she, too, eroticizes dominance. Women and men

two, with gender a social outcome, such that the acted upon is feminized, is the "girl" regardless of sex, the actor correspondingly masculinized. Whenever women are victimized, regardless of the biology of the perpetrator, this system is at work. But it is equally true that whenever powerlessness and ascribed inferiority are sexually exploited or enjoyed—based on age, race, physical stature or appearance or ability, or socially reviled or stigmatized status—the system is at work.

Battery thus appears sexual on a deeper level. Stated in boldest terms, sexuality is violent, so perhaps violence is sexual. Violence against women is sexual on both counts, doubly sexy. If this is so, wives are beaten, as well as raped, as women—as the acted upon, as gender, meaning sexual, objects. It further follows that acts by anyone which treat a woman according to her object label, woman, are in a sense sexual acts. The extent to which sexual acts are acts of objectification remains a question of one's account of women's freedom to live their own meanings as other than illusions, of individuals' ability to resist or escape, even momentarily, prescribed social meanings short of political change. Clearly, centering sexuality upon genitality distinguishes battery from rape at exactly the juncture that both existing law, and seeing rape as violence not sex, do.

Most women get the message that the law against rape is virtually unenforceable as applied to them. Women's experience is more often delegitimated by this than the law is. Women, as realists, distinguish between rape and experiences of sexual violation by concluding that they have not "really" been raped if they have ever seen or dated or slept with or been married to the man, if they were fashionably dressed or not provably virgin, if they are prostitutes, if they put up with it or tried to get it over with, if they were force-fucked for years. The implicit social standard becomes: if a woman probably could not prove it in court, it was not rape.

The distance between most intimate violations of women and the legally perfect rape measures the imposition of an alien definition. From women's point of view, rape is not prohibited; it is regulated. Even women who know they have been raped do not believe that the legal system will see it the way they do. Often they are not wrong. Rather than deterring or avenging rape, the state, in many victims' experiences, perpetuates it. Women who charge rape say they were raped twice, the second time in court. Under a male state, the

know this. Considering rape as violence not sex evades, at the moment it most seems to confront, the issue of who controls women's sexuality and the dominance/submission dynamic that has defined it. When sex is violent, women may have lost control over what is done to them, but absence of force does not ensure the presence of that control. Nor, under conditions of male dominance, does the presence of force make an interaction nonsexual. If sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept.<sup>25</sup>

To explain women's gender status on a rape theory, Susan Brownmiller argues that the threat of rape benefits all men.<sup>26</sup> How is un-specified. Perhaps it benefits them sexually, hence as a gender: male initiatives toward women carry the fear of rape as support for persuading compliance, the resulting appearance of which has been considered seduction and termed consent. Here the victims' perspective grasps what liberalism applied to women denies: that forced sex as sexuality is not exceptional in relations between the sexes but constitutes the social meaning of gender. "Rape is a man's act, whether it is a male or a female man and whether it is a man relatively permanently or relatively temporarily; and being raped is a woman's experience, whether it is a female or a male woman and whether it is a woman relatively permanently or relatively temporarily."<sup>27</sup> To be rapable, a position that is social not biological, defines what a woman is.

Marital rape and battery of wives have been separated by law. A feminist analysis suggests that assault by a man's fist is not so different from assault by a penis, not because both are violent but because both are sexual. Battery is often precipitated by women's noncompliance with gender requirements.<sup>28</sup> Nearly all incidents occur in the home, most in the kitchen or bedroom. Most murdered women are killed by their husbands or boyfriends, usually in the bedroom. The battery cycle accords with the rhythms of heterosexual sex.<sup>29</sup> The rhythm of lesbian sadomasochism is the same.<sup>30</sup> Perhaps violent interchanges, especially between genders, make sense in sexual terms.

The larger issue raised by sexual aggression for the interpretation of the relation between sexuality and gender is: what is heterosexuality? If it is the eroticization of dominance and submission, altering the participants' gender does not eliminate the sexual, or even gendered, content of aggression. If heterosexuality is males over females, gender matters independently. Arguably, heterosexuality is a fusion of the

boundary violation, humiliation, and indignity of being a public sexual spectacle makes this more than a figure of speech.<sup>31</sup>

Rape, like many other crimes, requires that the accused possess a criminal mind (*mens rea*) for his acts to be criminal. The man's mental state refers to what he actually understood at the time or to what a reasonable man should have understood under the circumstances. The problem is that the injury of rape lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant. Rape is only an injury from women's point of view. It is only a crime from the male point of view, explicitly including that of the accused.

The crime of rape is defined and adjudicated from the male standpoint, presuming that forced sex is sex and that consent to a man is freely given by a woman. Under male supremacist standards, of course, they are. Doctrinally, this means that the man's perceptions of the woman's desires determine whether she is deemed violated. This might be like other crimes of subjective intent if rape were like other crimes. With rape, because sexuality defines gender norms, the only difference between assault and what is socially defined as a noninjury is the meaning of the encounter to the woman. Interpreted this way, the legal problem has been to determine whose view of that meaning constitutes what really happened, as if what happened objectively exists to be objectively determined. This task has been assumed to be separable from the gender of the participants and the gendered nature of their exchange, when the objective norms and the assailant's perspective are identical.

As a result, although the rape law oscillates between subjective tests and objective standards invoking social reasonableness, it uniformly presumes a single underlying reality, rather than a reality split by the divergent meanings inequality produces. Many women are raped by men who know the meaning of their acts to their victims perfectly well and proceed anyway.<sup>32</sup> But women are also violated every day by men who have no idea of the meaning of their acts to the women. To them it is sex. Therefore, to the law it is sex. That becomes the single reality of what happened. When a rape prosecution is lost because a woman fails to prove that she did not consent, she is not considered to have been injured at all. It is as if a robbery victim, finding himself unable to prove he was not engaged in philanthropy, is told he still has his money. Hermeneutically unpacked, the law assumes that, because the

rapist did not perceive that the woman did not want him, she was not violated. She had sex. Sex itself cannot be an injury. Women have sex every day. Sex makes a woman a woman. Sex is what women are for.

Men set sexual mores ideologically and behaviorally, define rape as they imagine women to be sexually violated through distinguishing that from their image of what they normally do, and sit in judgment in most accusations of sex crimes.<sup>33</sup> So rape comes to mean a strange (read Black) man who does not know his victim but does know she does not want sex with him, going ahead anyway. But men are systematically conditioned not even to notice what women want. Especially if they consume pornography, they may have not a glimmer of women's indifference or revulsion, including when women say no explicitly. Rapists typically believe the woman loved it. "Probably the single most used cry of rapist to victim is 'You bitch . . . slut . . . you know you want it. You all want it' and afterward, 'there now, you really enjoyed it, didn't you?'"<sup>33</sup> Women, as a survival strategy, must ignore or devalue or mute desires, particularly lack of them, to convey the impression that the man will get what he wants regardless of what they want. In this context, to measure the genuineness of consent from the individual assailant's point of view is to adopt as law the point of view which creates the problem. Measuring consent from the socially reasonable, meaning objective man's, point of view reproduces the same problem under a more elevated label.<sup>34</sup>

Men's pervasive belief that women fabricate rape charges after consenting to sex makes sense in this light. To them, the accusations are false because, to them, the facts describe sex. To interpret such events as rapes distorts their experience. Since they seldom consider that their experience of the real is anything other than reality, they can only explain the woman's version as maliciously invented. Similarly, the male anxiety that rape is easy to charge and difficult to disprove, also widely believed in the face of overwhelming evidence to the contrary, arises because rape accusations express one thing men cannot seem to control: the meaning to women of sexual encounters.

Thus do legal doctrines, incoherent or puzzling as syllogistic logic, become coherent as ideology. For example, when an accused wrongly but sincerely believes that a woman he sexually forced consented, he may have a defense of mistaken belief in consent or fail to satisfy the mental requirement of knowingly proceeding against her will.<sup>35</sup> Sometimes his knowing disregard is measured by what a reasonable

man would disregard. This is considered an objective test. Sometimes the disregard need not be reasonable so long as it is sincere. This is considered a subjective test. A feminist inquiry into the distinction between rape and intercourse, by contrast, would inquire into the meaning of the act from women's point of view, which is neither. What is wrong with rape in this view is that it is an act of subordination of women to men. It expresses and reinforces women's inequality to men. Rape with legal impunity makes women second-class citizens.

This analysis reveals the way the social conception of rape is shaped to interpret particular encounters and the way the legal conception of rape authoritatively shapes that social conception. When perspective is bound up with situation, and situation is unequal, whether or not a contested interaction is authoritatively considered rape comes down to whose meaning wins. If sexuality is relational, specifically if it is a power relation of gender, consent is a communication under conditions of inequality. It transpires somewhere between what the woman actually wanted, what she was able to express about what she wanted, and what the man comprehended she wanted.

Discussing the conceptually similar issue of revocation of prior consent, on the issue of the conditions under which women are allowed to control access to their sexuality from one penetration to the next, one commentator notes: "Even where a woman revokes prior consent, such is the male ego that, seized of an exaggerated assessment of his sexual prowess, a man might genuinely believe her still to be consenting; resistance may be misinterpreted as enthusiastic cooperation; protestations of pain or disinclination, a spur to more sophisticated or more ardent love-making; a clear statement to stop, taken as referring to a particular intimacy rather than the entire performance."<sup>36</sup> This vividly captures common male readings of women's indications of disinclination under many circumstances<sup>37</sup> and the perceptions that determine whether a rape occurred. The specific defense of mistaken belief in consent merely carries this to its logical apex. From whose standpoint, and in whose interest, is a law that allows one person's conditioned unconsciousness to contraindicate another's violation? In conceiving a cognizable injury from the viewpoint of the reasonable rapist, the rape law affirmatively rewards men with acquittals for not comprehending women's point of view on sexual encounters.

Whether the law calls this coerced consent or defense of mistaken belief in consent, the more the sexual violation of women is routine, the more pornography exists in the world the more legitimately, the more beliefs equating sexuality with violation become reasonable, and the more honestly women can be defined in terms of their fuckability. It would be comparatively simple if the legal problem were limited to avoiding retroactive falsification of the accused's state of mind. Surely there are incentives to lie. The deeper problem is the rape law's assumption that a single, objective state of affairs existed, one that merely needs to be determined by evidence, when so many rapes involve honest men and violated women. When the reality is split, is the woman raped but not by a rapist? Under these conditions, the law is designed to conclude that a rape did not occur. To attempt to solve this problem by adopting reasonable belief as a standard without asking, on a substantive social basis, to whom the belief is reasonable and why—meaning, what conditions make it reasonable—is one-sided: male-sided.<sup>38</sup> What is it reasonable for a man to believe concerning a woman's desire for sex when heterosexuality is compulsory? What is it reasonable for a man (accused or juror) to believe concerning a woman's consent when he has been viewing positive-outcome-rape pornography?<sup>39</sup> The one whose subjectivity becomes the objectivity of "what happened" is a matter of social meaning, that is, a matter of sexual politics. One-sidedly erasing women's violation or dissolving presumptions into the subjectivity of either side are the alternatives dictated by the terms of the object/subject split, respectively. These alternatives will only retrace that split to women's detriment until its terms are confronted as gendered to the ground.

## 9. Rape: On Coercion and Consent

1. W. LaFave and A. Scott, *Substantive Criminal Law* (St. Paul: West, 1986), sec. 5.11 (pp. 688-689); R. M. Perkins and R. N. Boyce, *Criminal Law* (Mineola, N.Y.: Foundation Press, 1980), p. 210.
2. One component of Sec. 213.0 of the Model Penal Code (Philadelphia: American Law Institute, 1980) defines rape as sexual intercourse with a female not the wife of the perpetrator, "with some penetration however slight." Most states follow. New York requires penetration (sec. 130.00 [1]). Michigan's gender-neutral sexual assault statute includes penetration by objects (sec. 750.520 a[h]; 720.520[b]). The 1980 Annotation to Model Penal Code (Official Draft and Revised Comments, sec. 213.1[d]) questions and discusses the penetration requirement at 346-348. For illustrative case law, see *Lipthroth v. State*, 335 So.2d 683 (Ala. Crim. App. 1976), *cert. denied* 429 U.S. 963 (1976); *State v. Kidwell*, 556 P.2d 20, 27 Ariz. App. 466 (Ariz. Ct. App. 1976); *People v. O'Neal*, 50 Ill. App. 3d 900, 365 N.E. 2d 1333 (Ill. App. Ct. 1977); *Commonwealth v. Usher*, 371 A.2d 995 (Pa. Super. Ct. 1977); *Commonwealth v. Grassmyer*, 237 Pa. Super. 394, 352 A.2d 178 (Pa. Super. Ct. 1975) (statutory rape conviction reversed because defendant's claim that five-year-old child's vaginal wound was inflicted with a broomstick could not be disproved and Commonwealth could therefore not prove requisite penetration; indecent assault conviction sustained). Impotence is sometimes a defense and can support laws that prevent charging underage boys with rape or attempted rape; *Foster v. Commonwealth*, 31 S.E. 503, 96 Va. 306 (1896) (boy under fourteen cannot be guilty of attempt to commit offense that he is legally assumed physically impotent to perpetrate).
3. In the manner of many socialist-feminist adaptations of marxian categories to women's situation, to analyze sexuality as property short-circuits analysis of rape as male sexuality and presumes rather than develops links between sex and class. Concepts of property need to be rethought in light of sexuality as a form of objectification. In some ways, for women legally to be considered property would be an improvement, although it is not recommended.
4. For contrast between the perspectives of the victims and the courts, see *Rusk v. State*, 43 Md. App. 476, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (*en banc*), *rev'd*, 289 Md. 230, 424 A.2d 720 (1981); *Gonzales v. State*, 516 P.2d 592 (1973).
5. Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Simon and Schuster, 1975), p. 15.
6. Diana E. H. Russell, *The Politics of Rape: The Victim's Perspective* (New York: Stein & Day, 1977); Andrea Medea and Kathleen Thompson, *Against Rape* (New York: Farrar, Straus and Giroux, 1974); Lorene M. G. Clark and Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977); Susan Griffin, "Rape: The All-American Crime," *Ramparts*, September 1971, pp. 26-35. Ti-Grace Atkinson connects rape with "the institution of sexual intercourse," *Amazon Odyssey: The First Collection of Writings by the Political*

40. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), overruled the previous rejection of minimum wage laws for women (*Adkins v. Children's Hospital*, 261 U.S. 525 [1923]), finding a minimum wage for women reasonable because the state has a special interest in protecting women from exploitive work contracts because the health of women "becomes an object of public interest and care in order to preserve the strength and vigor of the race" (p. 394). It is thought that this opened the door for later upholding of the Fair Labor Standards Act under constitutional attack in *U.S. v. Darby*, 312 U.S. 100 (1940). *West Coast Hotel* was also used to uphold state constitutional amendments that make it unlawful to deny employment on the basis of union membership. *American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538 (1949). See also *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525, 536 (1948) ("that wages and hours can be fixed by law is no longer doubted since *West Coast Hotel*").
41. For an excellent discussion of this history, see Mary E. Becker, "From Muller v. Oregon to Fetal Vulnerability Policies," 63 *University of Chicago Law Review* 1219 (1986).
42. See, in a different key, Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982): "The idealist metaphysic, for all its moral and political advantage, cedes too much to the transcendent, and in positing a noumenal realm wins for justice its primacy at the cost of denying it its human situation" (p. 13).
43. Johnnie Tillmon, "Welfare Is a Women's Issue," *Liberation News Service*, February 26, 1972; reprinted in Rosalyn Baxandall, Linda Gordon, and Susan Reverby, eds., *America's Working Women* (New York: Random House, 1976), pp. 355-358.
44. Sexual harassment, designed in pursuit of the jurisprudential approach argued here, is an exception. So is a recent decision by the Ninth Circuit, *Watkins v. Army*, 837 F.2d 1429 (9th Cir. 1988), which holds that to deprive gays of military employment on the basis of homosexual status is a violation of the Equal Protection Clause.
45. Chapter 12 provides citations and fuller discussion of this argument.
46. Charles Tilly, ed. "Western State-Making and Theories of Political Transformation," in *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975), p. 638.
47. John L. Austin, *The Province of Jurisprudence Determined* (New York: Noonday Press, 1954).
48. H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961).
49. Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986). The task of this work is to justify the coercive power of the state through an account of authoritative interpretation which disposes of disagreements on the meaning of laws. The proposed solution is "law as integrity," which is "about principle" (p. 221).
50. This is how Bobbio describes Marx's particular originality; "Is There a Marxist Theory of the State?" p. 15.

- Pioneer of the Women's Movement* (New York: Links Books, 1974), pp. 13-23. Kalamu ya Salaam, "Rape: A Radical Analysis from the African-American Perspective," in *Our Women Keep Our Skies from Falling* (New Orleans: Nkombo, 1980), pp. 25-40.
7. Racism is clearly everyday life. Racism in the United States, by singling out Black men for allegations of rape of white women, has helped obscure the fact that it is men who rape women, disproportionately women of color.
  8. Pamela Foa, "What's Wrong with Rape?" in *Feminism and Philosophy*, ed. Mary Vetterling-Braggin, Frederick A. Elliston, and Jane English (Torowa, N.J.: Littlefield, Adams, 1977), pp. 347-359; Michael Davis, "What's So Bad about Rape?" (Paper presented at the annual meeting of the Academy of Criminal Justice Sciences, Louisville, Ky., March 1982). "Since we would not want to say that there is anything morally wrong with sexual intercourse per se, we conclude that the wrongness of rape rests with the matter of the woman's consent"; Carolyn M. Shafer and Marilyn Frye, "Rape and Respect," in *Vetterling-Braggin, Elliston, and English, Feminism and Philosophy*, p. 334. "Sexual contact is not inherently harmful, insulting or provoking. Indeed, ordinarily it is something of which we are quite fond. The difference is [that] ordinary sexual intercourse is more or less consented to while rape is not"; Davis, "What's So Bad?" p. 12.
  9. Liegh Bienen, "Rape III—National Developments in Rape Reform Legislation," 6 *Women's Rights Law Reporter* 170 (1980). See also Camille LeGrande, "Rape and Rape Laws: Sexism in Society and Law," 61 *California Law Review* 919 (May 1973).
  10. People v. Samuels, 58 Cal. Rptr. 439, 447 (1967).
  11. Julia R. Schwendinger and Herman Schwendinger, *Rape and Inequality* (Berkeley: Sage Library of Social Research, 1983), p. 44; K. Polk, "Rape Reform and Criminal Justice Processing," *Crime and Delinquency* 31 (April 1985): 191-205. "What can be concluded about the achievement of the underlying goals of the rape reform movement? . . . If a major goal is to increase the probability of convictions, then the results are slight at best . . . or even negligible" (p. 199) (California data). See also P. Bart and P. O'Brien, *Stopping Rape: Successful Survival Strategies* (Elmsford, N.Y.: Pergamon, 1985), pp. 129-131.
  12. See State v. Alston, 310 N.C. 399, 312 S.E.2d 470 (1984) and discussion in Susan Estrich, *Real Rape* (Cambridge: Harvard University Press, 1987), pp. 60-62.
  13. Note, "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," 62 *Yale Law Journal* 55 (1952).
  14. A similar analysis of sexual harassment suggests that women have such "power" only so long as they behave according to male definitions of female desirability, that is, only so long as they accede to the definition of their sexuality (hence, themselves, as gender female) on male terms. Women have this power, in other words, only so long as they remain powerless.
  15. See Comment, "Rape and Battery between Husband and Wife," 6 *Stanford Law Review* 719 (1954). On rape of prostitutes, see, e.g., *People v. McClure*, 42 Ill. App. 952, 356 N.E. 2d 899 (1st Dist. 3d Div. 1976) (on indictment for rape and armed robbery of prostitute where sex was admitted to have occurred, defendant acquitted of rape but "guilty of robbing her while armed with a knife"); *Magnum v. State*, 1 Tenn. Crim. App. 155, 432 S.W.2d 497 (Tenn. Crim. App. 1968) (no conviction for rape; conviction for sexual violation of age of consent overturned on ground that failure to instruct jury to determine if complainant was "a bawd, lewd or kept female" was reversible error; "A bawd female is a female who keeps a house of prostitution, and conducts illicit intercourse. A lewd female is one given to unlawful indulgence of lust, either for sexual indulgence or profit . . . A kept female is one who is supported and kept by a man for his own illicit intercourse"; complainant "frequented the Blue Moon Tavern; she had been there the night before . . . she kept company with . . . a married man separated from his wife . . . There is some proof of her bad reputation for truth and veracity"). *Johnson v. State*, 598 S.W. 2d 803 (Tenn. Crim. App. 1979) (unsuccessful defense to charge of rape that "even [if] technically a prostitute can be raped . . . the act of the rape itself was no trauma whatever to this type of unchaste woman"); *People v. Gonzales*, 96 Misc. 2d 639, 409 N.Y.S. 2d 497 (Crim. Ct. N.Y. City 1978) (prostitute can be raped if "it can be proven beyond a reasonable doubt that she revoked her consent prior to sexual intercourse because the defendant . . . used the coercive force of a pistol).
  16. *People v. Liberta*, 64 N.Y. 2d 152, 474 N.E.2d 567, 485 N.Y.S. 2d 207 (1984) (marital rape recognized, contrary precedents discussed). For a summary of the current state of the marital exemption, see Joanne Schulman, "State-by-State Information on Marital Rape Exemption Laws," in Diana E. H. Russell, *Rape in Marriage* (New York: Macmillan, 1982), pp. 375-381; Patricia Searles and Ronald Berger, "The Current Status of Rape Reform Legislation: An Examination of State Statutes," 10 *Women's Rights Law Reporter* 25 (1987).
  17. On "social interaction as an element of consent" in a voluntary social companion context, see Model Penal Code, sec. 213.1. "The prior social interaction is an indicator of consent in addition to actor's and victim's behavioral interaction during the commission of the offense"; Wallace Loh, "Q: What Has Reform of Rape Legislation Wrought? A: Truth in Criminal Labeling," *Journal of Social Issues* 37, no. 4 (1981): 47.
  18. E.g., *People v. Burnham*, 176 Cal. App. 3d 1134, 222 Cal. Rptr. 630 (Cal. App. 1986).
  19. Diana E. H. Russell and Nancy Howell, "The Prevalence of Rape in the United States Revisited," *Signs: Journal of Women in Culture and Society* 8 (Summer 1983): 668-695; and D. Russell, *The Secret Trauma: Incidents Abuse of Women and Girls* (New York: Basic Books, 1986).
  20. Pauline Bart found that women were more likely to be raped—that is, less able to stop a rape in progress—when they knew their assailant, particularly when they had a prior or current sexual relationship; "A Study of Women Who Both



Were Raped and Avoided Rape," *Journal of Social Issues* 37 (1981): 132. See also Linda Belden, "Why Women Do Not Report Sexual Assault" (Portland, Ore.: City of Portland Public Service Employment Program, Portland Women's Crisis Line, March 1979); Menachem Amir, *Patterns in Forcible Rape* (Chicago: University of Chicago Press, 1971), pp. 229-252.

21. Answer Brief for Plaintiff-Appellee, *People v. Brown*, Sup. Ct. Colo., Case No. 81SA102 (1981): 10.
22. Note, "Forcible and Statutory Rape," p. 55.
23. La. Rev. Stat. 14:42. Delaware law requires that the victim resist, but "only to the extent that it is reasonably necessary to make the victim's refusal to consent known to the defendant"; 11 Del. Code 761(g). See also Sue Bessmer, *The Laws of Rape* (New York: Praeger, 1984).
24. See *People v. Thompson*, 117 Mich. App. 522, 524, 324 N.W. 2d 22, 24 (Mich. App. 1982); *People v. Hearn*, 100 Mich. App. 749, 300 N.W. 2d 396 (Mich. App. 1980).
25. See Carol Pateman, "Women and Consent," *Political Theory* 8 (May 1980): 149-168: "Consent as ideology cannot be distinguished from habitual acquiescence, assent, silent dissent, submission, or even enforced submission. Unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of 'consent' in any genuine sense . . . Women exemplify the individuals whom consent theorists declared are incapable of consenting. Yet, simultaneously, women have been presented as always consenting, and their explicit non-consent has been treated as irrelevant or has been reinterpreted as 'consent'" (p. 150).
26. Brownmiller, *Against Our Will*, p. 5.
27. Shafer and Frye, "Rape and Respect," p. 334.
28. See R. Emerson Dobash and Russell Dobash, *Violence against Women: A Case against the Patriarchy* (New York: Free Press, 1979), pp. 14-21.
29. On the cycle of battering, see Lenore Walker, *The Battered Woman* (New York: Harper & Row, 1979).
30. Samois, *Coming to Power* (Palo Alto, Calif.: Alyson Publications, 1983).
31. If accounts of sexual violation are a form of sex, as argued in Chapter 11, victim testimony in rape cases is a form of live oral pornography.
32. This is apparently true of undetected as well as convicted rapists. Samuel David Smuthyman's sample, composed largely of the former, contained self-selected respondents to his ad, which read: "Are you a rapist? Researchers interviewing Anonymously by Phone to Protect Your Identity. Call . . ." Presumably those who chose to call defined their acts as rapes, at least at the time of responding; "The Undetected Rapist" (Ph.D. diss., Claremont Graduate School, 1978), pp. 54-60, 63-76, 80-90, 97-107.
33. Nancy Gager and Cathleen Schurr, *Sexual Assault: Confronting Rape in America* (New York: Grosset & Dunlap, 1976), p. 244.
34. Susan Estrich proposes this; *Real Rape*, pp. 102-103. Her lack of inquiry into social determinants of perspective (such as pornography) may explain her faith in reasonableness as a legally workable standard for raped women.

35. See Director of Public Prosecutions v. Morgan, 2 All E.R.H.L. 347 (1975) [England]; Pappajohn v. The Queen, 111 D.L.R. 3d 1 (1980) [Canada]; *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975).
  36. Richard H. S. Tur, "Rape: Reasonableness and Time," 3 *Oxford Journal of Legal Studies* 432, 441 (Winter 1981). Tur, in the context of the *Morgan* and *Pappajohn* cases, says the "law ought not to be astute to equate wickedness and wishful, albeit mistaken, thinking" (p. 437). Rape victims are typically less concerned with wickedness than with injury.
  37. See Silke Vogelmann-Sine, Ellen D. Ervin, Reenie Christensen, Carolyn H. Warmsun, and Leonard P. Ullmann, "Sex Differences in Feelings Attributed to a Woman in Situations Involving Coercion and Sexual Advances," *Journal of Personality* 47 (September 1979): 429-430.
  38. Estrich has this problem in *Real Rape*.
  39. E. Donnerstein, "Pornography: Its Effect on Violence against Women," in *Pornography and Sexual Aggression*, ed. N. Malamuth and E. Donnerstein (Orlando, Fla.: Academic Press, 1984), pp. 65-70. Readers who worry that this could become an argument for defending accused rapists should understand that the reality to which it points already provides a basis for defending accused rapists. The solution is to attack the pornography directly, not to be silent about its exonerating effects, legal or social, potential or actual.
10. *Abortion: On Public and Private*
1. See, e.g., D. H. Regan, "Rewriting *Roe v. Wade*," 77 *Michigan Law Review* 1569 (1979), in which the Good Samaritan happens upon the fetus.
  2. As of 1973, ten states that had made abortion a crime had exceptions for rape and incest; at least three had exceptions for rape only. Many of these exceptions were based on Model Penal Code 230.3 (Proposed Official Draft 1962), quoted in *Doe v. Bolton*, 410 U.S. 179, 205-207, App. B (1973). References to states with incest and rape exceptions can be found in *Roe v. Wade*, 410 U.S. 113 n. 37 (1973). Some versions of the Hyde Amendment, which prohibits use of public money to fund abortions, have contained exceptions for cases of rape or incest. All require immediate reporting of the incident.
  3. See Kristin Luker, *Taking Chances: Abortion and the Decision Not to Contracept* (Berkeley: University of California Press, 1975).
  4. *Roe v. Wade*, 410 U.S. 113 (1973).
  5. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
  6. *H. L. v. Matheson*, 450 U.S. 398, 435 (1981) (Marshall, J., dissenting).
  7. *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("a woman's decision whether or not to terminate her pregnancy"); *Harris v. McRae*, 448 U.S. 297 (1980) (referring to *Maier v. Roe*, 432 U.S. 464, 474 [1976], on no state responsibility to remove non-state-controlled obstacles).
  8. *Deshaney v. Winnebago County Dep't of Social Services*, 109 S. Ct. 988



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# The St. Paul's Rape Case Shows Why Sexual-Assault Laws Must Change

By EMILY BAZELON AUG. 26, 2015

In the rape trial of Owen Labrie, unfolding this month in a county courtroom in Concord, N.H., this much is settled: When Labrie was an 18-year-old senior at the boarding school St. Paul's, he competed with other male students over who could “score with” or “slay” the most girls. In the days before his graduation in June 2014, Labrie invited a girl, then 15, via email to join him for a “senior salute,” which could involve anything from kissing to sex. He had a key, passed around by students, to a mechanical room at the school, and the girl went there with him.

The girl testified last week that she and Labrie had sex, though she “said no three times.” Labrie, who testified today, denies this. “It wouldn't have been a good move to have sex with this girl,” he said. The dispute is a familiar-enough scenario for a rape case. But the fact that it has gone to court is also relatively unusual for a reason that may seem surprising: Labrie's guilt or innocence hinges on the question of consent. This is much less common than you might assume — in fact, in many states, Labrie probably would not face felony charges of sexual assault at all.

The message that “no means no” has been central to the movement to reduce sexual assault on college campuses. “If she doesn't consent, or if she can't consent, it's rape. It's assault,” the actor Benicio Del Toro declares in a

video released last year by the White House, and featuring President Obama and Vice President Joe Biden. Some schools, in an effort to make rape easier to prove and punish, have shifted the standard of consent to require a showing of active agreement — “yes means yes” as a substitution for “no means no.”

But this message often doesn't line up with legal reality. A majority of states still erect a far higher barrier to prosecution and conviction by relying “on the concept of force in defining rape,” as the Northwestern University law professor Deborah Tuerkheimer writes in a forthcoming article in *The Emory Law Journal*. Tuerkheimer finds that in more than half of the 50 states, a judge or jury must find that a person used force to find him or her guilty of rape. The Model Penal Code, created by the American Law Institute in 1962 to influence and standardize criminal lawmaking, also continues to include a force requirement in its definition of rape.

Beginning in the 1970s, reformers pushed states to stop making victims prove that they physically resisted for a rapist to be convicted. But the idea that rape necessarily includes force has persisted — even though it is “woefully out of step with modern conceptions of sex,” Tuerkheimer argues. This idea is changing, but slowly. “The trend is in the direction of removing force requirements, and defining sexual assault in reference to a lack of consent, but there are a lot of laggards,” she told me.

New Hampshire is among the minority of states that do *not* require showing force was involved to prove rape. In 1995, the state adopted language providing that a person is guilty of sexual assault if he or she sexually penetrates another person when “the victim indicates by speech or conduct that there is not freely given consent.” This explains how the case against Labrie has proceeded — it's the source of the central felony charge against him. And so Labrie's lawyer is trying to convince the jury that the girl did not make her lack of consent clear enough. (The jury also has the option of finding Labrie guilty of the lesser charge of having sex with a 15-year-old, even if she consented, when he was 18. But this is a misdemeanor rather than a felony.)

On cross-examination, the alleged victim conceded that she lifted up her arms so Labrie could take her shirt off and raised her hips so he could pull off her shorts. She also told the police, when they interviewed her soon after the incident, that “other than me saying no to the first part, I don’t think he would have known for a fact that I would not want to do that.” At trial, she explained, “I wanted to not cause a conflict,” and “I felt like I was frozen.” Labrie testified, “I thought she was having a great time.” He also admitted to wearing a condom, and his former classmates testified earlier this week that he told them he did have sex with the girl. (“I wanted to look good,” Labrie said by way of explanation in his own testimony.)

So the crucial question for the jury may well be: Did Labrie know, or should he have known, that the girl did not freely consent? That seems like the right question to ask.

And yet in many cases, consent is still not the test at all. In her article, Tuerkheimer describes a number of such cases around the country. A recent one in Oregon involved a 12-year-old girl who was raped by her father. The girl — who was living with her mother at the time — was visiting her father in his mobile home when he called her into his bedroom, where he was waiting naked, according to the state court of appeals’ account. He proceeded to have sex with her, even though she told him that she “didn’t want to do it.” She also said she did not “put up a fight” because she thought “he would just fight right back.”

The father — who sexually abused his daughter several years earlier, too, according to the appeals court — was convicted of rape under an Oregon law that required a showing of “forcible compulsion,” which could include “a threat, express or implied, that places a person in fear of immediate or future death or physical injury.” But the appeals court reversed his conviction, finding that “nothing in the record suggests that defendant engaged in any force.” The court upheld two related convictions the father also appealed, and recognized the history of sexual abuse, saying it “compelled her to submit,” but

still found this did not qualify, legally speaking, as a threat.

This is chilling and retrograde. And it shows the gap between the definition of rape in many states and the “culture of consent” at universities, Tuerkheimer argues. As she puts it, “On campus, this is rape; off campus, it often is not.” The discrepancy, she argues, diminishes the violation of victims outside universities, even though studies show they are actually more vulnerable to sexual assault than college students.

Tuerkheimer and others are pushing to reform state rape laws and the Model Penal Code. As the American Law Institute re-examines the code’s sexual-assault provision for the first time since 1962, a heated debate is taking place over how to replace the old language. Should the code follow states like New Hampshire, or go further and adopt the standard of affirmative consent? States including New York are weighing the same question. It’s a hard one. Eliminating the force requirement for rape, on the other hand, is a no-brainer.

***Correction: August 26, 2015***

*An earlier version of a summary that appeared with this article on the home page of NYTimes.com misstated who would, in many states, likely not face felony charges of sexual assault. It is the St. Paul’s student accused of rape, Owen Labrie, not the accuser.*

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MODEL PENAL CODE

ARTICLE 213

I. PROPOSED SECTIONS 213.0 TO 213.7

1 SECTION 213.0. DEFINITIONS

2 In this Article, unless a different definition is plainly required:

3 (1) The definitions given in Section 210.0 apply;

4 (2) “Commercial sex act” means any act of sexual intercourse or sexual contact in  
5 exchange for which any money, property, or services are given to or received by any  
6 person.

7 (3) “Consent” means a person’s positive agreement, communicated by either words  
8 or actions, to engage in sexual intercourse or sexual contact.

9 (4) “Nonconsent” means a person’s refusal to consent to sexual intercourse or sexual  
10 contact, communicated by either words or actions; a verbally expressed refusal establishes  
11 nonconsent in the absence of subsequent words or actions indicating positive agreement.

12 (5) “Recklessly” shall carry only the meaning designated in Model Penal Code  
13 § 2.02(2)(c); the provisions of Model Penal Code § 2.08(2) shall not apply to this Article.

14 (6) “Sexual contact” means . . . . [*reserved*].

15 (7) “Sexual intercourse” means:

16 (a) any act involving penetration, however slight, of the anus or vagina by  
17 any object or body part, unless done for bona fide medical, hygienic, or law-  
18 enforcement purposes; or

19 (b) direct contact between the mouth or tongue of one person and the anus,  
20 penis, or vagina of another person.

21  
22 SECTION 213.1. RAPE AND RELATED OFFENSES

23 (1) An actor is guilty of rape, a felony of the second degree, if he or she knowingly or  
24 recklessly:

25 (a) uses physical force, physical restraint, or an implied or express threat of  
26 physical force, bodily injury, or physical restraint to cause another person to engage  
27 in an act of sexual intercourse with anyone; or

28 (b) causes another person to engage in an act of sexual intercourse by  
29 threatening to inflict bodily injury on someone other than such person or by  
30 threatening to commit any other crime of violence; or

31 (c) has, or enables another person to have, sexual intercourse with a person  
32 who, at the time of such act of sexual intercourse:

1 (i) is less than 12 years old; or

2 (ii) is sleeping, unconscious, or physically unable to express  
3 nonconsent to engage in such act of sexual intercourse; or

4 (iii) lacks the capacity to express nonconsent to engage in such act of  
5 sexual intercourse, because of mental disorder or disability, whether  
6 temporary or permanent; or

7 (iv) lacks substantial capacity to appraise or control his or her  
8 conduct because of drugs, alcohol, or other intoxicating or consciousness-  
9 altering substances that the actor administered or caused to be administered,  
10 without the knowledge of such other person, for the purpose of impairing  
11 such other person's capacity to express nonconsent to such act of sexual  
12 intercourse.

13 (2) An actor is guilty of aggravated rape, a felony of the first degree, if he or she  
14 violates subsection (1) of this Section and:

15 (a) uses a deadly weapon to cause the other person to engage in such act of  
16 sexual intercourse; or

17 (b) acts with the active participation or assistance of one or more other  
18 persons who are present at the time of the act of sexual intercourse; or

19 (c) knowingly or recklessly causes serious bodily injury to the other person or  
20 to anyone else for the purpose of causing such other person to engage in the act of  
21 sexual intercourse; or

22 (d) the act of sexual intercourse in violation of subsection (2) of this Section is  
23 a commercial sex act.

24  
25 **SECTION 213.2. SEXUAL INTERCOURSE BY COERCION OR IMPOSITION.**

26 (1) An actor is guilty of sexual intercourse by coercion, a felony of the third degree,  
27 if he or she:

28 (a) knowingly or recklessly has, or enables another person to have, sexual  
29 intercourse with a person who at the time of the act of sexual intercourse:

30 (i) has by words or conduct expressly indicated nonconsent to such act  
31 of sexual intercourse; or

32 (ii) is undressed or is in the process of undressing for the purpose of  
33 receiving nonsexual professional services from the actor, and has not given  
34 consent to sexual activity; or

35 (b) obtains the other person's consent by threatening to:

36 (i) accuse anyone of a criminal offense or of a failure to comply with  
37 immigration regulations; or

38 (ii) expose any information tending to impair the credit or business  
39 repute of any person; or

1                   (iii) take or withhold action in an official capacity, whether public or  
2 private, or cause another person to take or withhold action in an official  
3 capacity, whether public or private; or

4                   (iv) inflict any substantial economic or financial harm that would not  
5 benefit the actor; or

6                   (c) knows or recklessly disregards the risk that the other person:

7                   (i) is less than 18 years old and the actor is a parent, foster parent,  
8 guardian, teacher, educational or religious counselor, school administrator,  
9 extracurricular instructor, or coach of such person; or

10                  (ii) is on probation or parole and that the actor holds any position of  
11 authority or supervision with respect to such person's probation or parole;  
12 or

13                  (iii) is detained in a hospital, prison, or other custodial institution, and  
14 that the actor holds any position of authority at such facility.

15                  (2) An actor is guilty of aggravated sexual intercourse by coercion, a felony of the  
16 second degree, if he or she violates subsection (1)(b) or (1)(c) of this Section and in doing so  
17 causes a person to engage in a commercial sex act involving sexual intercourse.

18                  (3) An actor is guilty of sexual intercourse by imposition, a felony of the third  
19 degree, if he or she knowingly or recklessly has, or enables another person to have, sexual  
20 intercourse with a person who, at the time of the act of sexual intercourse:

21                   (a) lacks the capacity to express nonconsent to such act of sexual intercourse,  
22 because of intoxication, whether voluntary or involuntary, and regardless of the  
23 identity of the person who administered such intoxicants; or

24                   (b) is less than 16 years old and the actor is more than four years older than  
25 such person; or

26                   (c) is mentally disabled, developmentally disabled, or mentally incapacitated,  
27 whether temporarily or permanently, to the extent that such person is incapable of  
28 understanding the physiological nature of sexual intercourse, its potential for  
29 causing pregnancy, or its potential for transmitting disease; or

30                   (d) is mentally or developmentally disabled to the extent that such person's  
31 social or intellectual capacities are no greater than that of a person who is less than  
32 12 years old.

33                  (4) An actor is guilty of aggravated sexual intercourse by imposition, a felony of the  
34 second degree, if he or she violates subsection (3) of this Section and in doing so causes a  
35 person to engage in a commercial sex act involving sexual intercourse.

36  
37 **SECTION 213.3. SEXUAL INTERCOURSE BY EXPLOITATION**

38                  An actor is guilty of sexual intercourse by exploitation, a felony of the fourth degree,  
39 if he or she has sexual intercourse with another person and:



1           **(1) is engaged in providing professional treatment, assessment, or counseling for a**  
2 **mental or emotional illness, symptom, or condition of such person over a period concurrent**  
3 **with or substantially contemporaneous with the time when the act of sexual intercourse**  
4 **occurs, regardless of the location where such act of sexual intercourse occurs and**  
5 **regardless of whether the actor is formally licensed to provide such treatment; or**

6           **(2) represents that the act of sexual intercourse is for purposes of medical treatment**  
7 **or that such person is in danger of physical injury or illness which the act of sexual**  
8 **intercourse may serve to mitigate or prevent; or**

9           **(3) knowingly leads such person to believe falsely that he or she is someone with**  
10 **whom such person has been sexually intimate.**

11  
12 **SECTION 213.4. SEXUAL INTERCOURSE WITHOUT CONSENT.**

13           **An actor is guilty of sexual intercourse without consent, a misdemeanor, if the actor**  
14 **knowingly or recklessly has, or enables another person to have, sexual intercourse with a**  
15 **person who at the time of the act of sexual intercourse has not given consent to that act.**

16  
17 **SECTION 213.5. CRIMINAL SEXUAL CONTACT**

18           ***[Reserved]***

19  
20 **SECTION 213.6. SEXUAL OFFENSES INVOLVING SPOUSES AND OTHER INTIMATE PARTNERS**

21           ***[Reserved]***

22  
23 **SECTION 213.7. PROCEDURAL AND EVIDENTIARY PRINCIPLES APPLICABLE TO**  
24 **ARTICLE 213**

25  
26 **(1) *Sexual Activity of the Complainant.***

27           ***(a) General Rule***

28           **(i) In a prosecution under this Article, notwithstanding any other provision of**  
29 **law, reputation or opinion evidence about the sexual activity of the**  
30 **complainant is not admissible, unless constitutionally required.**

31           **(ii) Evidence of specific instances of sexual activity of the complainant, other**  
32 **than sexual activity with the accused, shall be inadmissible, except as**  
33 **provided in subsection (b), or when its admissibility is constitutionally**  
34 **required. If the proffered sexual activity alleges a prior instance of false**  
35 **accusation of a sexual offense, such evidence is further inadmissible unless**  
36 **the falsehood of the prior accusation is established by a preponderance of**  
37 **evidence, with proof beyond mere evidence that the complaint was judged**  
38 **unfounded or was otherwise not pursued.**

# The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform

Ilene Seidman & Susan Vickers<sup>†</sup>

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## I. INTRODUCTION

In the past thirty years there has been a movement in the law seeking gender equality in sex and sexual relations. The treatment of crimes specifically targeting women, sexual assault and domestic violence, has been at the core of this gender equality movement. The rape reform movement has succeeded in lobbying for significant revisions in antiquated and gender-biased rape statutes. Specifically, state and federal legislatures have enacted rape shield laws, provided for privileged protection of rape counseling records, repealed marital rape exceptions, eliminated evidentiary corroboration requirements and cautionary instructions regarding the absence of corroboration, and abolished the statutory “reasonable mistake of fact” defense.<sup>1</sup>

Although these reforms represent significant steps towards an appropriate response to rape, many of these statutory reforms, which focus primarily on rape victims’ existence within the criminal justice system, have been a profound disappointment.<sup>2</sup> Few commentators can point to any data suggesting that criminal rape reform laws have deterred the commission of rape, increased

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1. See generally Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN’S L.J. 127 (1996).

2. See David P. Bryden, *Forum on the Law of Rape*, 3 BUFF. CRIM. L. REV. 317, 320-21 (2000); Hunter, *supra* note 1, at 134, 140, 155-56; Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 128-30 (1999).

its prosecution, or increased conviction rates.<sup>3</sup> In short, the “outcomes” of the criminal justice system—arrest, indictment, and conviction—have remained fairly constant.

Why have these reforms failed to produce changed outcomes? Scholars point to the fact that societal attitudes, including those of many key decision-makers in the criminal justice system, have not kept pace with statutory reform.<sup>4</sup> While laws about rape have changed, attitudes about sexual autonomy and gender roles in sexual relations have not. The vast majority of people—including law enforcement personnel, judges and potential jurors—remain conflicted about what constitutes “consensual” sex.<sup>5</sup> They are ambivalent about placing criminal sanctions on “non-violent” sexual assault or, for that matter, anything short of violent penetration that results in physical injuries.<sup>6</sup> Jurors, prosecutors and police are confused about the boundary line between sex and rape.<sup>7</sup>

The result of our society’s ambivalence and confusion about sexual autonomy and gender roles in sex is that rape victims, especially acquaintance rape victims, continue to encounter the same hurdles that they did thirty years ago.<sup>8</sup> These hurdles include the centralizing of the victim’s dress, behavior and state of mind,<sup>9</sup> the brutalizing attack on her privacy by the threat of public use

3. See CASSIA SPOHN & JULIA HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT, 77-104 (1992) (finding no change in number of reports, indictments, and convictions in majority of jurisdictions studied); Stacy Futter & Walter R. Mebane Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN’S L.J. 72, 83-85 (2001) (discussing various empirical studies of rape law reform impact).

4. See SPOHN & HORNEY, *supra* note 3 at 173.

5. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 2 (1998).

6. *Id.*

7. *Id.* at 95-98.

8. Rape victims will encounter additional difficulties when the defense’s theory is based on one of consent, which constitutes the vast majority of cases. Seventy-eight percent of rape victims are assaulted by someone they know, and the most common defense in these cases is consent. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, A PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2, 5 (Nov. 1998), available at <http://www.ncjrs.org/pdffiles1/nij/183781.pdf>.

9. See SUSAN ESTRICH, REAL RAPE 45-46 (1987); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1196 (1997) (noting “officials deny justice to women who have engaged in nonmarital sex, or other ‘improper’ activities such as heavy drinking or hitchhiking”); Gary D. LaFree et al., *Jurors’ Responses to Victims’ Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 401 (1985) (stating jurors with conservative notions regarding appropriate female behavior tend to find defendant not guilty if the victim allegedly violated conservative notions of ‘proper’ female behavior, such as drinking or committing adultery). Estrich cites *Barker v. Commonwealth*, 95 S.E.2d 135, 137 (Va. 1956), a case in which a woman accepted a ride from two male strangers at a bus station instead of waiting for the bus. ESTRICH, *supra*, at 45-46. The men later hit her and forced her to have intercourse. *Id.* She later paid for additional gas and did not complain until a friend asked her why she was not on the bus. *Id.* The court was troubled not only by the woman’s delay in complaining, but also by her acceptance of the ride in the first place, stating:

[I]t is improbable and contrary to human experience for an innocent and chaste woman to permit two

of rape crisis, medical, and therapy records,<sup>10</sup> the continuing ability of the defense to litigate the character, conduct and mental health of the victim in an effort to prove consent or motive to lie,<sup>11</sup> and the continuing view that victims should demonstrate a set of behaviors consistent with someone who has really suffered the trauma of assault.<sup>12</sup> Jurors still expect evidence of fresh complaints by victims with accompanying hysteria and torn clothes, as well as other indicia of resistance even when resistance is not a statutory element.<sup>13</sup>

This Article proposes an agenda for the next thirty years of rape law reform. Part I briefly reviews the first wave of rape law reform. In Part II, this Article proposes the establishment of the right to independent civil representation for rape victims. Part III of this Article recommends the reconceptualization of the legal response to rape, focusing on a victim's most basic human needs in the first few months after assault. Part III further addresses the core areas of civil legal needs that are crucial to a victim's healing, safety and well-being immediately following an assault. Part IV proposes the establishment of an affirmative standard for consent and the elimination of force as a necessary element to the crime. Finally, Part V advocates the establishment of a national database to track criminal justice outcomes in sexual assault cases to enable future reforms based on reliable data.

## II. THE FIRST WAVE OF RAPE REFORM (1970-2000)

In the wake of demands for equal rights for women under the law and tighter criminal justice controls during the 1970s, reform of rape laws became a legislative priority.<sup>14</sup> As a result, over the next thirty years, every state in the

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strange men to introduce themselves to her in a public place and after one of them had hugged her and felt her legs to voluntarily ride with them as far as she did.

*Id.*

10. Anna Y. Joo, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 284 (1995) (discussing that "[i]t was likely that sexual assault survivors viewed foregoing legal action as a tradeoff for receiving effective counseling treatment").

11. Bryden & Lengnick, *supra* note 9, at 1367 (stating defendants seek to portray victims as troubled to discredit victim's testimony and reinforce their fabricated charge); Joo, *supra* note 10, at 2, 25, 38.

12. SCHULHOFER, *supra* note 5, at 4.

13. See Bryden & Lengnick, *supra* note 9, at 1196 (declaring juries often conform to system norms by blaming victims and acquitting defendant rapists).

14. See Futter & Mebane, *supra* note 3, at 75. Before the first wave of reform, the traditional common-law approach to rape had persisted for hundreds of years. Rape was primarily seen as a crime of theft of a father or husband's property, thus rendering it impossible for a father or husband to rape his daughter or wife under the law. *Id.* at 74. The traditional definition of rape, "unlawful carnal knowledge of woman by force and against her will," remained widespread until the beginning of the rape reform movement in the early 1970s. *Id.* at 75. Most, if not all, jurisdictions placed additional burdens on victims to demonstrate that they resisted to the utmost, demonstrated active and forceful lack of consent, that their prior sexual conduct could not have reasonably suggested consent to the defendant, and that physical evidence corroborated their claims.

The introduction of the Model Penal Code in 1962 was the first attempt to modernize rape law. MODEL PENAL CODE § 3.1 (1962). The Model Penal Code defined rape as follows: "A male who has sexual intercourse with a female not his wife is guilty of rape if . . . he compels her to submit by force, or by threat of

country and the District of Columbia redrafted their rape statutes in some way.<sup>15</sup> Though the reforms were not identical, they each focused almost exclusively on the victim's role within the criminal justice system.<sup>16</sup> These criminal justice reforms fell into four categories: (1) redefinition of the offense (repealing spousal exemptions and abolishing specific gender roles for the accuser and accused); (2) evidentiary reforms (elimination of corroboration requirements, enactment of rape shield statutes); (3) reforms in statutory age requirements; and (4) reforms in statutory structures (grading of offenses according to severity of force and resulting injuries).<sup>17</sup>

The intent of this massive legal reform was both symbolic and substantive. On a symbolic level, the overarching goal was to alleviate the rape victim's second class status within the criminal justice system in order to make the treatment of rape victims, the overwhelming majority of whom are female, more consistent with that of other victim-witnesses in the system.<sup>18</sup> The substantive goals were to deter occurrence, increase the likelihood that victims will report the crime and cooperate with law enforcement, reduce the intense credibility attacks on victims during investigation and at trial, and increase rates of prosecution and conviction.<sup>19</sup>

Sadly, it now appears that by any available measure, the reforms have had no significant substantive impact. No major scholar in the area of rape law and rape reform has argued that these reforms have produced significant results.<sup>20</sup> Perhaps most disheartening is that trial, appellate and state supreme courts are still arguing over the same old ground: the meaning of consent, degrees of force, the victim's role as an active or passive participant in the event, and the victim's privacy.<sup>21</sup>

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imminent death, serious bodily injury, extreme pain or kidnapping to be inflicted on anyone." *Id.* While the Model Penal Code specifically sought to shift the focus from the victim to the accused, resistance remained an implicit requirement, and the code remained focused on non-consent. *Id.* Force was not defined, but the threat of force had to be lethal or extremely serious. *Id.* The Model Penal Code also contained a corroboration requirement. *Id.* § 213.1. The Code retained the centuries-old notion that in matters of sex (if not others), women were or could be vengeful liars, and the code therefore required the presence of "fresh complaints." See Futter & Mebane, *supra* note 3, at 3.

15. Futter & Mebane, *supra* note 3, at 79.

16. Futter & Mebane, *supra* note 3, at 79.

17. Futter & Mebane, *supra* note 3, at 3.

18. Spohn, *supra* note 2, at 121.

19. Spohn, *supra* note 2, at 121.

20. Futter & Meban, *supra* note 3, at 81.

Although their reasoning differs, legal scholars generally agree that the reforms have not been successful. Three of the most prominent legal scholars in the area of rape reform law are Catherine Mackinnon, Susan Estrich, and Lynne Henderson [all of whom conclude that rape reforms to this point have largely failed].

*Id.*

21. See Bryden & Lengnick, *supra* note 9, at 1196 (arguing "men who control the justice system are irrationally obsessed with the dangers of false rape accusations"); see also ESTRICH, *supra* note 9, at 42-43 (suggesting "the underlying theme [in the criminal justice system surrounding rape] is distrust of women").

Given that significant statutory reforms have failed to produce significant changes in rape outcomes within the criminal justice process, should we give up on the law as an instrument for addressing social attitudes about rape? Are social and cultural prejudices about the devious at worst and ambivalent at best nature of female sexuality and the deeply held, unstated belief that men are inherently aggressive and violent in expressions of their own sexuality too tenacious to legislate against?<sup>22</sup> Should lawyers get out of the way and leave the “real” work to therapists, educators, and sociologists? If we have faith that the law can be used as a tool for healing victims of sexual assault, we must answer no to these questions.

The reforms of the past thirty years have reached the limits of their success, and a second wave of reform is badly needed. The agenda suggested in this Article arises from our study of rape laws, and rape law reform, and from our experience representing or supervising the representation of over 600 sexual assault victims in Massachusetts. We believe our work with rape survivors provides a clear and distinctive roadmap to the work that is crucial to their healing, safety, and well-being that has national applicability and is strongly supported by social science research.

### III. CHANGE THE DOMINANT PARADIGM OF RESPONSE TO RAPE BY RECONCEPTUALIZING THE RIGHTS AND REMEDIES AVAILABLE TO RAPE VICTIMS OUTSIDE THE CRIMINAL JUSTICE SYSTEM

The failure of rape law reform is in part the result of an almost exclusive focus on the criminal justice process. Rape victims deserve more from the legal system than just a prosecution.<sup>23</sup> Rape causes a tidal wave effect on a victim’s life. The profound emotional, physical, economic, and social harm to the victim affects a broad range of life activities impacted by civil law. The goal of refocusing the legal response to rape should be to prevent the acute trauma of rape from triggering a long-term, downward economic and social

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22. Perhaps our disappointment in the results of reform lies in the mistaken belief that the reforms of the past thirty years would produce radical, rather than incremental, changes in social attitudes as well as in the application of law. One notable exception is rape shield laws which have had impact in deterring the irrelevant introduction of prior sexual history now routinely upheld by judges, but nonetheless subject to debate again as a result of the Kobe Bryant case. For instance, Massachusetts’ rape shield law governs the admissibility of evidence of a victim’s sexual conduct, and requires that certain evidence shall not be admissible in criminal proceedings. MASS. GEN. LAWS ch. 233, § 21B (2004). Evidence of the victim’s reputation for promiscuity or sexual conduct is not admissible under the statute, however, the statute is subject to certain exceptions including the victim’s sexual history with the accused and evidence of specific sexual conduct with someone other than the accused when it is relevant to explain the presence of “any physical feature, characteristic, or condition of the victim.” *Id.*

23. Even if outcomes were successful, because over half of all rape prosecutions are either dismissed before trial or result in an acquittal, focusing legal remedies exclusively on the criminal justice system is not adequate. MAJORITY STAFF OF THE SENATE JUDICIARY COMMITTEE, VIOLENCE AGAINST WOMEN: THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE (May 1993), available at <http://www.mith2.umd.edu/WomensStudies/GenderIssues/Violence+Women/ResponsetoRape/full-text>.

spiral for the victim, and to preserve the integrity of the victim's privacy and social relations.

The most obvious place where the criminal justice process is inextricably tied to civil remedies is the area of victim's compensation. Most victim compensation statutes require some form of involvement with the criminal justice system in order for the victim to pursue a compensation claim.<sup>24</sup> Placing the availability of civil remedies in the hands of the criminal justice process causes real harm to victims and is terrible social policy for at least three reasons.

First, rape is the least reported, least indicted, and least convicted non-property felony in America.<sup>25</sup> Second, the criminal justice process is too slow and poorly equipped to protect against the immediate devastating consequences of assault.<sup>26</sup> Third, many victims simply do not view the criminal justice system as one that will provide them with protection.<sup>27</sup> These victims will forego the criminal process and will unwittingly deprive themselves of civil remedies that should be available to them to stabilize their daily lives, protect their privacy, and ensure their emotional and physical safety.

#### *A. Hierarchy of Rape Victims' Legal Needs*

Abraham Maslow's hierarchy of human needs provides a vantage point from which to reconceptualize the legal system's response to rape. Maslow's theory suggests that unsatisfied needs exist in a predictable, sequential and universal hierarchy that motivate humans to act.<sup>28</sup> The most primal needs cited by Maslow are physiological: air, food, drink, shelter, warmth, sex, and sleep.<sup>29</sup> The second level of needs include safety and security, protection from elements, order, law, limits and stability.<sup>30</sup> The third level includes

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24. For example, in Michigan, the commission operating the Victim's Compensation Fund notifies the prosecuting attorney of the county in which the crime occurred upon receipt of the claim. MICH. COMP. LAWS §§ 18.351-18.368 (2004). The commission defers the proceedings until the criminal prosecution has concluded. *Id.*

25. TIMOTHY C. HART & CALLIE RENNISON, U.S. DEP'T OF JUSTICE, REPORTING CRIME TO THE POLICE 5 (Mar. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rcp00.pdf>. Between 1992 and 2000, only 31% of rapes or sexual assaults were brought to the attention of the police compared with 57% of robberies and 55% of aggravated assaults. *Id.*

26. In Massachusetts, for example, it can take two or more years for a case to move from indictment to trial alone. This figure does not account for pre-indictment investigation, or post-conviction appeals, which can add years to the process. VICTIM RIGHTS LAW CENTER, BEYOND THE CRIMINAL JUSTICE SYSTEM: TRANSFORMING OUR NATION'S RESPONSE TO RAPE: A PRACTICAL GUIDE TO REPRESENTING SEXUAL ASSAULT VICTIMS ch. 9 at 16 (2003).

27. See *Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System*, 8 GA. ST. U. L. REV. 539, 622 (1992) (noting how many victims find themselves forced to "reveal intimate, painful details [of their assault] to different prosecutors and different judges").

28. ABRAHAM MASLOW, MOTIVATION AND PERSONALITY 15 (1954).

29. *Id.*

30. *Id.* at 18.

belongingness, love, work group, family, affection and relationships.<sup>31</sup> The fourth includes social esteem, self-esteem, achievement, mastery, independence, status, dominance, prestige and managerial responsibility.<sup>32</sup> The fifth and highest level of need in the hierarchy is self-actualization, which includes realization of personal potential, self-fulfillment and the seeking of justice and personal growth.<sup>33</sup>

Maslow's conceptual framework articulates perfectly what we have seen in practice. The vast majority of rape victims' basic need for economic stability, emotional security, and physical safety take precedence over criminal justice remedies, which offer deeper meaning, vindication, and self-actualization. In our experience representing sexual assault victims, this appears to be especially true during the first six months after the assault.<sup>34</sup>

What the legal system offers victims should, therefore, be designed to meet their most immediate needs: preventing the traumatic economic and psychological downward spiral that frequently begins within the first six months after assault. As Maslow's theory suggests, what little the criminal justice process actually offers victims does not meet their primary needs at the time it is offered, and does not protect them from the most traumatic and devastating consequences to their well-being after the assault. We have identified eight core areas of civil legal needs that affect the well-being and recovery of rape victims. These needs are consistent with our experience representing victims and with Maslow's hierarchy of needs.

### 1. Privacy

For most sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot. Privacy imperatives begin with the very fact of the assault, and in small, enclosed communities, the privacy imperative is even more acute. For example, on high

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31. *Id.* at 20.

32. MASLOW, *supra* note 28, at 21.

33. MASLOW, *supra* note 28, at 22.

34. In the current dominant legal paradigm, however, such "basic" needs of victims are at best placed at the periphery of our legal response to rape, and, at worst, such needs are conceptualized as a "personal" rather than "legal" problem. We hypothesize that this acute disjuncture between what victims are seeking and what the criminal justice system is offering somewhat accounts for failure of rape law reform over the last thirty years. In 1996, more than two-thirds of rape/sexual assaults committed in the United States remained unreported. CHERYL RINGEL, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1996: CHANGES 1995-96 WITH TRENDS 1993-96, at 3 (Nov. 1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv96.pdf>. Because the criminal justice system offers remedies to victims (vindication, meaning, and sense of justice) consistent with "higher" level needs, and fails to offer solutions for any more basic needs, it makes sense that many victims do not engage the criminal justice system immediately after an assault. See generally Pearl Goldman & Leslie Larkin Cooney, *Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventative Law Into Law School Curriculum*, 5 PSYCHOL. PUB. POL'Y & L. 1123 (1999) (describing victims' use of criminal justice system).



school and college campuses it is exceedingly difficult to contain the gossip that is usually generated by an allegation of rape. University rape victims are painfully aware of the devastating impact of gossip that accompanies the reporting of a sexual assault. As a result, university students have an extraordinarily low reporting rate.<sup>35</sup> Approximately 5% of university students who experience a sexual assault report it to campus or non-campus police.<sup>36</sup> Victims understand that they have much to lose in making public disclosures. This was recently confirmed when Harvard University acknowledged that their existing way of handling peer-on-peer rape complaints often caused more harm than good to the victim.<sup>37</sup> The social division, resulting in harassment and isolation caused by public disclosure, particularly in peer-on-peer assault, can cause irreparable educational harm.

Once rape is reported, the victim's privacy is vulnerable in sadly familiar ways. Protection of medical, psychiatric, and rape crisis center records is crucial from the minute the victim seeks medical care and counseling. Outside of the criminal justice process, privacy violations may easily occur in relation to employment, education, housing, and financial compensation.<sup>38</sup> Further, there is a complex interaction between the criminal justice and civil systems that must be taken into account.<sup>39</sup> For example, in a suspected drugging case, victims often do not recall whether sexual penetration occurred and therefore toxicology testing can be vital to determining what happened.<sup>40</sup> Comprehensive toxicology testing, however, will detect the presence of all substances, medications and drugs both illegal and legal.<sup>41</sup> If a victim regularly takes an anti-depressant, uses marijuana, cocaine, or prescription drugs, these substances will appear in the analysis and expose the victim in ways unintended by the toxicology analysis.<sup>42</sup>

Protecting privacy in the criminal, civil, and educational realms should be at the center of all representation of sexual assault victims. The next wave of rape law reform should focus on meaningful privacy protections that can be invoked

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35. BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000), available at <http://www.ncjrs.org/pdffiles1/nij/182369.pdf>.

36. *Id.*

37. See David White, *Harvard's New Sex Harassment Policy: Brilliance at Last*, YALE DAILY NEWS (New Haven, Conn.), Sept. 17, 2002. In 2002, Harvard University changed its sexual assault policy to require students filing complaints to bring to the school's disciplinary board sufficient corroborating evidence of misconduct before it will investigate. White, *supra*.

38. See Family Education Rights and Privacy Act, 20 U.S.C. § 1232g (2001). For example, if the victim is involved in an education-related case, the Family Education Rights and Privacy Act and individual school regulations may require parties involved in disciplinary matters to keep material confidential. *Id.*

39. *Id.*

40. See KRISTIN LITTLE, U.S. DEP'T OF JUSTICE, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS ADULTS/ADOLESCENTS 99-104 (Sept. 2004), available at <http://www.ncjrs.org/pdffiles1/ovw/206554.pdf>.

41. *Id.*

42. *Id.*

both within and outside of the criminal justice process.

## 2. *Immigration Status*

Immigration status is a gate keeping issue for rape victims. Immigrant victims face greater actual and perceived barriers to obtaining the civil remedies that assist in recovery (safety protections, medical assistance, counseling, housing, and employment benefits) particularly if the victim does not have legal status.<sup>43</sup> Fear and misinformation prevent many non-citizen victims from applying for and receiving the public benefits they are qualified to receive as a result of a sexual assault.<sup>44</sup> This problem arises particularly because of non-citizen victims' fear of the "public charge" grounds for inadmissibility.<sup>45</sup>

A sexual assault and its attendant consequences can disrupt or alter a victim's immigration status. For example, if the victim is in the country on a student visa and she drops out of school as a result of the assault, she may lose her legal status and be forced to leave the country. Similarly, a victim's immigration status may be linked to her employment status. Immigrants with employment-based visas are at risk of being deported or losing legal status if they miss work as a result of an assault. If a victim is in danger of losing her employment as a result of a sexual assault, she may also be in jeopardy of losing her immigration status.<sup>46</sup> Maintaining immigration status is of primary

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43. Leslye E. Orloff et al., *With No Place To Turn: Improving Legal Advocacy For Battered Immigrant Women*, 29 FAM. L.Q. 313, 315 (1995).

44. *Id.* Despite perception and information to the contrary, some public services are available to individuals without any status qualification, meaning that providers should not inquire into a client's immigration status or require a social security number in order to provide services. Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 C.F.R. §§ 3613-3616 (2001). According to the Attorney General, available services include: free emergency Medicaid and mental health, disability, or substance abuse treatment necessary to protect life or safety; free crisis and counseling services; free violence and abuse prevention/protection services; free emergency shelter and transitional housing assistance; victim compensation; and other services provided by non-profit charitable organizations. *Id.*

45. See Immigration and Nationality Act, 8 U.S.C. § 1182 (2003). The United States may prohibit non-citizens currently applying for green cards (permanent resident status), or Green Card holders who have traveled abroad for six months or longer from entering the United States if they fail to meet the admissibility criteria set out in the Immigration and Nationality Act, which includes the likelihood of becoming a "Public Charge." *Id.* The Department of Homeland Security uses a "prospective test" when determining whether a non-citizen will become a public charge, taking into consideration all circumstances, including age, health, family status, assets, education, and skills. 8 U.S.C. § 212(a)(4)(B)(i) (2001). If a victim uses benefits on a temporary basis only, it is unlikely that she will be denied admission based on the "public charge" criteria. 8 U.S.C. §§ 1641-1642 (2004). More detailed information on public benefits can be found at the National Immigration Law Center's website at [www.nilc.org](http://www.nilc.org) (last visited Feb. 14, 2005).

46. VICTIM RIGHTS LAW CENTER, *supra* note 26, ch. 8 at 6. There are new adjunctive immigration status possibilities for victims of sexual assault related to their involvement with the criminal justice system. See Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). The federal government has created a new visa specifically for victims of sexual abuse, trafficking, and many other crimes. *Id.* Under the Victims of Trafficking and Violence Prevention Act of 2000, the U-Visa is available to

concern to immigrant rape victims. Law reform should focus on creating avenues for immigrant assault victims to petition for change of status or to maintain status, despite the life-altering consequences of assault.

### 3. *Access to Medical and Counseling Benefits that Preserves Privacy and Financial Welfare*

Sexual assault causes profound medical and emotional harm to victims, resulting in significant financial cost.<sup>47</sup> Costs of basic necessary medical care after an assault can be as high as four thousand dollars.<sup>48</sup> Counseling and prescription drugs such as anti-depressants, and drugs for prophylactic HIV treatment and prevention of sexually transmitted disease are costly. Further, accessing medical insurance for HIV prophylaxis, or treatment of depression and Post Traumatic Stress Disorder can lead to long-term disqualification for life insurance and other insurances. In order to ease the financial burden that a rape victim will incur, civil attorneys must provide the victim with referrals to confidential, free medical and counseling care, as well as medical and disability coverage through employer benefit plans, government benefits such as unemployment compensation, victim's compensation, school health plan compensation and tuition remission, and state and federal disability benefits.

### 4. *Access to Protective Orders*

Within the criminal justice process, the courts may issue stay-away orders at the time of arrest or arraignment. Rape victims may also use civil protective orders to insulate themselves from many of the negative social and economic impacts of rape, as well as to provide for limited restitution of direct costs associated with rape. In addition, their speed and limited scope make stay-away orders less burdensome for victims to secure and, therefore, more likely to be sought.<sup>49</sup>

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victims who report the crime to law enforcement officials and cooperate in criminal investigations. *Id.* Victims who have "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity," including "sexual assault, abusive sexual contact, and felonious assault," are eligible for the three year visa and can receive work authorization. *Id.*; see also National Lawyer's Guild, *National Immigration Project Training Materials*, at <http://www.nationalimmigrationproject.org> (last visited Feb. 21, 2005) (providing additional information on visas and sample forms).

47. See generally JUDITH HERMAN, *TRAUMA AND RECOVERY* (1997).

48. Lori A. Post et al., *The Rape Tax: Tangible and Intangible Costs of Sexual Violence*, 17 J. INTERPERSONAL VIOLENCE 773, 778 (2002).

49. See *Frizado v. Frizado*, 651 N.E.2d 1206, 1211 (Mass. 1995) (describing legislative purpose in creating layman friendly procedures). Protective order hearings in particular may be speedier and more victim-friendly than other avenues for holding the accused accountable. They tend to be resolved within two weeks, instead of the one to two years of a criminal prosecution or the two to four months of a school or employment disciplinary process. Filing procedures, court personnel, and hearings for protective orders are often more victim-friendly than criminal procedures and other types of protection orders because the legislature drafted Massachusetts General Laws chapter 209A with victims (albeit domestic violence victims) in mind, and also because the rules of evidence are applied with flexibility to allow plaintiff/victims, and defendants, to speak

Unfortunately, most civil restraining order statutes across the country<sup>50</sup> require a degree of relationship (marriage, substantial dating relationship, blood relative) that makes such orders not readily available or strategically advisable for stranger or acquaintance rape victims.<sup>51</sup> As a result, many victims are left without remedies that are designed to be easily secured on a pro se basis, because they do not have a substantive ongoing relationship with their assailant.<sup>52</sup>

A key area for legislative reform should be the enactment of statutes creating civil sexual assault restraining orders. Currently, a few states have enacted statutes specifically designed to provide civil protective orders to sexual assault victims in the absence of a substantive relationship with the alleged perpetrator.<sup>53</sup> The absence of such statutes leaves victims with inadequate alternatives. In Massachusetts, for example, a sexual assault victim may seek injunctive relief in Superior Court.<sup>54</sup> Similar injunctive remedies are available

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freely. In Massachusetts, for example, there is no right to a jury trial in Chapter 209A proceedings, and while there is a general right to cross-examination, the judge may limit cross-examination for good cause. *See id.* at 1210-11.

50. For example, the Alaska statute pertaining to civil restraining orders protects household members, including "adults or minors who live together or have lived together . . . who are dating or have dated . . . who are engaged in or have engaged in a sexual relationship . . . who are related to each other up to the fourth degree of consanguinity." ALASKA STAT. § 18.66.990 (Michie 2004).

51. *See* MASS. GEN. LAWS ch. 209A, § 1 (2004) (requiring familial or intimate relationship). Under chapter 209A, household and family members include

persons who: 1) are or were married to one another; 2) are or were residing together in the same household; 3) are or were related by blood or marriage; 4) having a child in common . . . ; or 5) are or have been in a substantive dating or engagement relationship.

*Id.*

52. The National Women's Study found that 22% of rape victims were assaulted by someone they had never seen before or did not know well, and an additional 29% were assaulted by non-relatives, such as friends and neighbors. D. KILPATRICK ET AL., NATIONAL VICTIM CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 25 (Apr. 1992).

53. *See* CAL. CIV. PROC. CODE § 527.6 (West 2004) (allowing person who suffered harassment to seek temporary restraining order and injunction prohibiting harassment); *see also* FLA. STAT. ch. 784.046 (2004). The Florida statute states that a victim of sexual violence or the parent or legal guardian of a minor child who is living at home and who is the victim of sexual violence has standing in the circuit court to file a sworn petition for an injunction for protection against sexual violence on his or her own behalf or on behalf of the minor child. FLA. STAT. ch. 784.046(2)(a).

54. MASS. R. CIV. P. 65(a) (describing procedural process). The standard for an *ex parte* temporary restraining order (TRO) is:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if it clearly appears from specific facts shown by an affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.

*Id.* The next level, a preliminary injunction, requires more from the requesting party before the court will issue the order. *Id.* R. 65(b)(1). A court will not issue a preliminary injunction without weighing the moving party's claim and their chance of success on the merits. *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 550 N.E.2d 1361, 1370 (Mass. 1990) (recognizing public interest weighed by court as fourth factor); *Packaging Indus. Group, Inc. v. Cheney*, 405 N.E.2d 106, 111-12 (Mass. 1980); *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22, 31 (Mass. App. Ct. 1986).

in every state in the nation.<sup>55</sup> Enforcement mechanisms, however, are cumbersome for the victim and offer significantly less protection in case of a violation than the abuse prevention orders available to domestic violence victims.<sup>56</sup>

### 5. Access to Safe Housing

In our experience, we have found that many sexual assaults take place in or near the victim's home. As a result, many victims feel the need to vacate their homes, move to different dorms, or relocate to different housing projects. Yet, for the most part, rape victims are not specifically protected from lease termination actions, nor do they have specific emergency transfer or admission rights in public housing.<sup>57</sup> Although the domestic violence movement has made significant strides in this arena for victims of domestic violence, sexual assault victims with housing crises have minimal legal options and protections.<sup>58</sup> Therefore, housing access and relocation is a crucial area for legislative reform to provide sexual assault victims with, at least, the protections that have been afforded victims of domestic violence.

### 6. Education

The incidence of sexual assault is disturbingly high in both universities and high schools, and results in a massive barrier to equal access to education.<sup>59</sup> The United States Department of Justice estimates that thirty-five out of every 1,000 undergraduate females are sexually assaulted every year.<sup>60</sup> In Boston alone, that translates into an estimated 3,500 college victims yearly based on the current student population of approximately 100,000 female students.<sup>61</sup>

55. See, e.g., ALA. CODE § 30-5-1 (2004); ALASKA STAT. § 18.66.990; CAL. FAM. CODE § 6211 (West 2004); GA. CODE ANN. § 19-13-1 (2004).

56. The requirements for preliminary injunctive relief are: 1) the likelihood of success on the merits; 2) the risk of irreparable harm to the plaintiff if the injunction is not issued; and 3) the absence of irreparable harm to the defendant if the injunction is granted. *Alexander & Alexander*, 488 N.E.2d at 26. For example, in Massachusetts, if the defendant violates the preliminary injunction, the plaintiff has two remedies: civil enforcement or criminal enforcement. Violation of a preliminary injunction is contempt of court. The procedures for civil contempt are described in detail in the Massachusetts Rules of Civil Procedure 65.3. A finding of civil contempt must be based on a "clear and undoubted disobedience of a clear and unequivocal command." *Peggy Lawton Kitchens, Inc. v. Hogan*, 532 N.E.2d 54, 55 (Mass. 1989).

57. See CODE OF MASS. REGS. tit. 760 § 5.09 (2002) (stating priorities for receiving Massachusetts public housing).

58. Eliza Hurst, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and Other Housing Protection for Victims of Domestic Violence*, 10 GEO. J. ON POVERTY L. & POL'Y 131, 148 (2003) (stating "throughout the country, lawyers, policymakers and social workers are beginning to make safe housing more accessible to victims of domestic violence").

59. See FISCHER, *supra* note 35, at 11.

60. See FISCHER, *supra* note 35, at 11.

61. U.S. CENSUS BUREAU, 2002 AMERICAN COMMUNITY SURVEY PROFILE: POPULATION AND HOUSING PROFILE: BOSTON, MA (2002), available at <http://www.census.gov/acs/www/Products/Profiles/Single/2002/ACS/Narrative/385/NP38500US11221120.htm> (estimating 213,000 enrolled in college in Boston,

The figures are no less staggering for high school students. One in ten high school students in Boston report being victims of sexual assault every year.<sup>62</sup> Forty-seven percent of the sexual assault reports received by the Boston Police Sexual Assault Unit involve victims aged seventeen and younger.<sup>63</sup>

Pursuant to Title IX of the Civil Rights Act,<sup>64</sup> the Jeanne Clery Campus Safety Act,<sup>65</sup> and the Family Education Rights and Privacy Act,<sup>66</sup> educational institutions have specific duties regarding the prevention of and response to on campus sexual assault.<sup>67</sup> Further, using third party liability theories, colleges and universities may be held civilly liable for intentional torts committed on their campuses, by or against their students.<sup>68</sup>

In our experience, we have found that physical safety, privacy protections, maintenance of some semblance of educational stability, housing as it pertains to both victim and perpetrator, class and exam schedules, employment and work-study maintenance, tuition-loss prevention, and financial aid loss are all immediate issues student rape victims face.

A peer sexual assault causes an especially severe threat to the victim's education. Educational institutions must be accountable for protecting victims' educational stability, privacy, and right to receive special education services.<sup>69</sup> The alarming rate of assault on high school and college campuses, and the resulting loss of educational stability for victims, creates the need for enforcement and expansion of the educational rights of rape victims, including the aggressive application of Title IX to institutions that turn a blind eye to campus conditions in which peer-on-peer rape and gang rape thrive.

### 7. Obtaining and Maintaining Employment

A rape victim's employment is likely to suffer major disruptions after a sexual assault. Absenteeism may sky rocket, and productivity often plummets.<sup>70</sup> An assault by a co-worker or at a work location will usually

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approximately half female).

62. MASS. DEP'T OF PUBLIC EDUC., YOUTH RISK BEHAVIOR SURVEY (2001), available at <http://www.doe.mass.edu/lss/yrbs99/toc.html>.

63. SEXUAL ASSAULT UNIT, BOSTON POLICE DEP'T, AGE OF SEXUAL ASSAULT VICTIMS IN BOSTON IN 2001, available at <http://www.ci.boston.ma.us/police/pdfs/VAge2001.pdf>.

64. 20 U.S.C. § 1681 (2004).

65. 20 U.S.C. § 1092 (1998).

66. 20 U.S.C. § 1232g (2001).

67. *E.g.*, 20 U.S.C. § 1092(f) (2002) (codifying Cleary Act campus security policy and campus crime statistics disclosure requirement).

68. *See Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 337 (Mass. 1983). Colleges must act "'to use reasonable care to prevent injury' to their students 'by third persons whether their acts were accidental, negligent, or intentional.'" *Id.* at 337 (quoting *Carey v. New Yorker of Worcester, Inc.*, 245 N.E.2d 420, 422 (1969)).

69. *See* 20 U.S.C. § 1232g.

70. *See generally* Rebecca Smith et al., *Unemployment Insurance and Domestic Violence: Learning From Our Experiences*, 1 SEATTLE J. FOR SOC. JUST. 503 (Fall/Winter 2002).

trigger an even more acute employment crisis that, without legal intervention, will likely result in resignation or termination of the victim.<sup>71</sup> For those victims who were assaulted by assailants unrelated to work, the medical and psychological impact of rape often trigger less acute, but nevertheless employment threatening crises, with employers subjecting the employee to warnings and often dismissal.<sup>72</sup>

Legal interventions are critical to protect the victim's privacy rights and insure continued employment. One remedy currently available entitles a victim, who needs time off from work to seek medical attention, to job-protected leave under the federal Family and Medical Leave Act or similar state laws.<sup>73</sup> Furthermore, disabilities caused by rape or sexual assault may qualify victims for protection from discrimination, as well as reasonable accommodation in the workplace under the Americans with Disabilities Act.<sup>74</sup> Some victims may also qualify for unemployment compensation.<sup>75</sup>

Victims who have lost wages or employment as a direct result of an assault may apply for victim compensation in many states.<sup>76</sup> Victim compensation, however, usually requires cooperation with law enforcement and often becomes a fund of last resort. For example, if compensation for lost wages is available through some other source, such as worker's compensation or unemployment insurance, the victim will be deemed ineligible for victim's compensation.<sup>77</sup>

If the assault is directly related to employment (i.e., when the assailant is a co-worker or the assault takes place at work), a victim may need and be entitled to more protection in her work environment. Sexual assault at work, and an employer's failure to remedy or protect against that assault, may constitute sexual harassment in violation of federal and state law prohibiting

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71. See generally *id.*

72. See generally *id.*

73. See 29 C.F.R. § 825.114 (2004); Robin R. Runge et al., *Domestic Violence as a Barrier to Employment*, 34 CLEARINGHOUSE REV. 552, 554 (2001).

74. 42 U.S.C. § 12112 (2004). A disability is defined as any impairment that "substantially limits a major life activity," such as walking, standing, thinking, lifting, or taking care of one's self. *Id.* § 12102. Victims are also protected under the Americans with Disabilities Act even if they are only *perceived* as being disabled, regardless of whether they have some actual disability. *Id.* The Americans with Disabilities Act requires that the employer provide reasonable accommodations to the victim, so long as she is able to perform the essential function of her job. *Id.* § 12112. A modified work schedule, transfer to a different location, and changes in the workspace or equipment all qualify as reasonable accommodation. *Id.* Employers cannot discriminate against qualified employees who request such accommodations. *Id.*

75. See MASS. GEN. LAWS ch. 151A, § 25(e) (2004). In Massachusetts, for example, an employee who leaves work or is discharged from her job because of domestic violence is eligible for unemployment compensation. *Id.* Although the statute is intended to benefit battered women, the definition of "domestic violence" is broad enough to include many victims of sexual assault. See *id.* § 1 (g 1/2) (defining domestic violence as "abuse committed against an employee"). The statute specifically provides benefits to victims who have been in a "dating or engagement relationship" with the assailant. *Id.* The statute also defines "abuse" as "(1) attempting to cause or causing physical harm; (2) placing another in fear of imminent serious physical harm; (3) causing another to engage involuntarily in sexual relations by force, threat or duress." *Id.*

76. See CAL. GOV'T. CODE § 13950-67 (West 2004).

77. *Id.*

sex discrimination in the workplace.

#### 8. *Financial stability*

The loss of wages, cost of health care and counseling, loss of tuition, expenses of moving, and the loss of financial support if the assailant is a spouse are among the staggering economic consequences of rape. Advocacy for the victim to prevent these losses may include insurance claims against third parties, application for disability, unemployment, other public benefits or insurance programs, actions for child support, applications under victim compensation statutes, as well as tort claims against assailants, employers, hosts, landlords, universities and others.<sup>78</sup>

The simplest financial remedy could be a claim under a state victim compensation fund if the requirements of the compensation statute have been met. State victim compensation schemes cover medical, dental and counseling expenses; lost wages; lost homemaker services; and lost financial support for dependants of victims of homicide.<sup>79</sup> Most compensation schemes do not cover lost tuition, relocation and housing expenses, and lost work due to non-physical injuries, such as mental health harms.<sup>80</sup> While victim's compensation statutes can offer much needed temporary financial relief immediately after an assault, their almost exclusive tie to the criminal justice process renders them useless to many victims. Legislative reform should untie these remedies and provide an alternate route for victims to obtain such compensation.

#### IV. ESTABLISHMENT OF A VICTIM'S RIGHT TO INDEPENDENT LEGAL COUNSEL WITHIN THE CRIMINAL JUSTICE SYSTEM AND FOR THEIR CIVIL LEGAL NEEDS

Rape victims need counsel to represent their civil legal needs within the criminal justice system and in the educational disciplinary process. In the first six months following an assault, the victim's cognitive, behavioral and physical faculties are under extreme stress and the rape often triggers acute medical

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78. See Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1428 (1999) (describing comparative apportionment approach to assigning fault in civil rape actions). Civil tort actions against assailants are based on theories of assault and battery, rape, sexual harassment, infliction of emotional distress, and other torts as defined by law. Remedies in such actions can include compensatory damages, including medical expenses, lost wages and earning capacity, pain and suffering, and equitable relief. In some cases punitive damages, are allowed. See MASS. GEN. LAWS ch. 151B, § 9. Victims also have a right of action against third parties who owe them a duty of care and who failed, by their negligence, to prevent the assault. Such cases are generally referred to as negligent security or premises liability cases. Bublick, *supra*, at 1428. A court may impose liability on owners or operators of convenience stores, universities and colleges, commercial landlords, bus stations, hospitals, high schools, restaurants, bars, parking lots, hotels, and other third parties if the victim can establish that a legal duty existed to protect individuals from foreseeable violent acts.

79. See CAL. GOV'T CODE § 13950-67.

80. *Id.*



conditions.<sup>81</sup> During the acute physiological stress time (zero to six months), the victim's most vital legal interests are at stake.

Managing the complex array of civil and criminal issues that impact a victim after an assault challenges even the most experienced attorney. In the case of a physically and emotionally compromised victim, the task becomes virtually impossible. This is particularly true for the vast majority of victims who are younger than twenty-four at the time of the assault and often lack independent resources.<sup>82</sup> Moreover, it is precisely the physiological symptoms associated with rape—memory impairment, depression, use of alcohol, panic attacks, and avoidance of rape related stimuli—that make rape victims less credible in the eyes of decision makers and impair their ability to sustain themselves in any judicial process.<sup>83</sup>

The victim's role in the criminal justice process is the subject of increasing legislation and debate. Thousands of relatively recent legislative enactments provide victims with various rights pertaining to restitution, privacy, the right to be informed in matters of trial and sentencing, and the right to make statements of victim impact at sentencing.<sup>84</sup> Thirty-two states have enacted victim's rights amendments to their Constitutions, and a Victims Rights Constitutional Amendment has been proposed in the United States Congress.<sup>85</sup>

If victims are going to succeed in enforcing their current rights under existing law, they need legal representation.<sup>86</sup> Navigating the criminal justice system is a difficult and complex task for any layperson. Moreover, victims' interests in the process cannot be left to prosecutors, because prosecutors' interests lie solely in successfully prosecuting the case on behalf of the state.<sup>87</sup>

The potential conflict between victims and prosecutors is most profoundly apparent in the realm of privacy rights. Courts across the country have

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81. HERMAN, *supra* note 47, at 57-58. Mental health symptoms directly caused by both violent and non-violent rape include: post-traumatic stress disorder, depression, insomnia, panic attacks, increased use of drugs and alcohol, and increased suicidal ideation. *Id.* Medical harms/conditions directly associated with rape in the weeks and months following an assault can include treatment for pregnancy and sexually transmitted diseases. *Id.*

82. VICTIM RIGHTS LAW CENTER, *supra* note 27, ch. 1 at 3. We urge that empirical social science research be undertaken with a control group to assess whether or not having legal counsel makes a long term difference in the social and economic life expectancy of the victim. Empirical information is critical to the next wave of law reform—that is also why we call for a national database on criminal justice outcomes on rape complaints.

83. HERMAN, *supra* note 47, at 68-69.

84. John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victims Rights in the Courts*, 33 MCGEORGE L. REV. 689, 690 (2002) (explaining trends supporting criminal victim's rights).

85. *Id.*

86. See generally Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999).

87. See Gillis & Beloof, *supra* note 84, at 695 (discussing adequacy of prosecutorial enforcement). "[B]ecause conflicts between victims and prosecutors are commonplace, prosecutorial enforcement alone is inadequate." *Id.*

acknowledged that the state's interests often conflict with the victim's privacy interests, and this conflict may arise for several reasons.<sup>88</sup> In some instances, the prosecution may want evidence from the victim's personal life to strengthen their case, while the victim wishes to keep her personal life private, despite the impact on prosecution.

The more common conflict is a practical one. In order to adequately protect a rape victim's privacy rights, an attorney must take a full inventory of the "negative facts" about the victim. Negative facts routinely include sensitive information about the victim's mental health treatment, drug or alcohol history, and sexual history.

Pursuant to the holding in *Brady v. Maryland*,<sup>89</sup> prosecutors who complete an inventory of the victim's history are required to provide the defense with exculpatory information learned from the victim during the process.<sup>90</sup> While it is possible for a prosecutor to complete such an inventory, the fate of the case as well as the victim's privacy is at risk.<sup>91</sup> Given that prosecutors are compromised in their ability to represent rape victims' privacy rights, non-lawyer rape crisis advocates have been struggling alone for years to protect rape victims once the criminal process begins.<sup>92</sup> While non-lawyer rape advocates have played the largest and most vital role in protecting these rights, their role is obviously limited.<sup>93</sup> Therefore, it is critical that victims' lawyers are present in the courtroom at the preliminary stages of the process, if privacy protections have any meaning for rape victims.<sup>94</sup> Further, when viewed in the larger context of the victim's entire "negative fact" picture, the issue of psychiatric and rape crisis counseling records is often only one front where the battle for the victim's privacy is waged.

Although each victim's recovery follows a distinct path, we have found that a majority of victims experience the most acute trauma related symptoms in the first three months following the assault, followed by stabilization in the next three months. Furthermore, sexual assault victims make a clear distinction between "defensive" legal actions that help to stabilize their personal lives and

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88. *Commonwealth v. Oliviera*, 780 N.E.2d 453, 457 (Mass. 2002); *Commonwealth v. Neumyer*, 731 N.E.2d 1053, 1058 (Mass. 2000).

89. *Brady v. Maryland*, 373 U.S. 83 (1963).

90. *Id.* at 87.

91. *Id.*

92. See generally Lois Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253 (2005).

93. See generally *id.*

94. Ensuring compliance with the *Bishop-Fuller* protocol is an essential element in protecting the victim's privacy in Massachusetts. The protocol involves five stages: (1) privilege determination; (2) relevancy determination; (3) access to relevant material; (4) disclosure of relevant communications; and (5) trial. *Commonwealth v. Bishop*, 416 Mass. 169, 181-83 (1993) (identifying five stage process for release of privileged records created by court); *Commonwealth v. Fuller*, 423 Mass. 216, 226-27 (1996) (modifying stage two and requiring *Bishop* protocol to apply to defendant's request for access to any privileged records including rape counselor records).

“offensive” legal actions that seek to hold the perpetrator accountable. Often, in the initial crisis stage after the assault, victims take the necessary steps to protect their safety, privacy, immigration status, education, housing, and employment, and to preserve their financial stability. Victims are far less likely to file police reports, follow through on a criminal complaint process, seek university disciplinary action, or initiate a tort suit.<sup>95</sup> Therefore, legal efforts to stabilize the victim should be focused on what the victim actually needs, and not merely what the legal system currently offers. Representation in these victim focused areas requires independent counsel exclusively committed to the interests of the victim.

#### V. DEFINE CONSENT

Elimination of force as a statutory element of rape is essential to the reformation of rape laws. After thirty years of law reform, society still expects rape to be a horrifically violent crime. If the limited report, arrest, indictment, prosecution, and conviction rates serve as a benchmark, despite the redrafting of virtually every rape law in the nation, rape by anything other than physical violence with attendant physical harm still appears to be tolerated by law enforcement. While efforts to stratify rape into aggravated and lesser offenses began this process, further steps are needed towards codifying degrees of offenses that are more nuanced and eliminating the requirement of physical force entirely.

Stephen Schulhofer, in his book *Unwanted Sex: The Culture of Intimidation and the Failure of the Law*, first articulated the concept that interference with sexual autonomy, whether enabled by force, threats, abuse of trust, exploitation of psychological or physical incapacity, intoxication, or exploitation of psychological or economic power or authority should be illegal, and should be codified and incorporated into the statutory framework.<sup>96</sup> Reform minded legislators have largely failed to incorporate into reform statutes the concept that bodily integrity, or sexual autonomy, is not measured by “freedom from fists,” but rather by a continuum of conduct in which physical force is one extreme example.<sup>97</sup> The crime of sexual coercion may in fact be less egregious than one in which an invasion of sexual autonomy is accompanied by fists, but the invasion of an individual’s physical integrity by coercion should be recognized as an assault, just as coercion is recognized as a factor in other crimes, such as obtaining property by fraud and indecent assault and battery.

Further, it is crucial that silence be eliminated as an indicator of consent, and that consent be defined, as it is in other areas of the law in which consent is an

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95. See RINGEL, *supra* note 35, at 8 (stating more than two-thirds of rape/sexual assaults committed in United States remain unreported).

96. SCHULHOFER, *supra* note 5, at 99-113.

97. SCHULHOFER, *supra* note 5, at 99-113.

element. "Consent is the defense most likely to result in an acquittal, and it is the defense most commonly used in acquaintance rape cases."<sup>98</sup> Yet most state legislatures have still failed to define consent.<sup>99</sup> Indeed, the victim's behavior (drinking alcohol), dress (wearing tight clothes), and conduct (voluntarily entering a room with the defendant and permitting the door to be closed) will remain at the center of a criminal trial as long as juries are allowed to consider an undefined consent or implied consent standard.

The failure of current consent standards, at the root of the failure of criminal justice rape reforms, perpetuates the most vexatious issue in rape law for both victims and defendants: the distinction between seduction and assault.<sup>100</sup> The difference is not as complicated as the past thirty years suggest. First, consent ought to be verbal and in the affirmative, eliminating the defense of implied consent altogether. The law should not assume that women are or must be coy about sex. Women cannot be viewed as consenting merely by their conduct, appearance, reaction, or silence. Women must directly and explicitly express their sexual desire or agreement to have intercourse in a given situation, and men must respond accordingly. Instead of assuming that a woman's sexual ambivalence indicates consent, the law should assume that sexual ambivalence means no. Let us legislate the right of women to express sexual desire, by making the direct verbal expression of desire or agreement to sex necessary to establish affirmative consent, and by defining a lack of verbal expression of affirmative desire or agreement to sex as a dispositive lack of consent.<sup>101</sup>

The presence of alcohol in large numbers of acquaintance rape cases exacerbates the problem. The majority of sexual assaults on college campuses involve alcohol or drugs.<sup>102</sup> In a study of college gang rapes, researchers found that every case involved the use of alcohol.<sup>103</sup> Not surprisingly, courts consider a victim's intoxication differently than intoxication by accused assailants. Courts view women who drink, especially those who drank with their assailants, as more likely to be sexually available and contributorily negligent in the subsequent assault.<sup>104</sup> Society believes that men who drink suffer from impaired judgment, which may legitimately cause them to misread social cues from a woman.

The law does not clarify the confusion between rape that occurs under the influence of alcohol and consensual encounters between intoxicated

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98. Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 128 (1994).

99. SCHULHOFER, *supra* note 5, at 31-32.

100. SCHULHOFER, *supra* note 5, at 31-32.

101. See generally Kramer, *supra* note 98, at 149 (proposing modified version of consent legislation already adopted in Canada); Lani Ann Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103 (1993) (advocating requirement of verbal consent).

102. Kramer, *supra* note 98, at 116.

103. Kramer, *supra* note 98, at 116.

104. Kramer, *supra* note 98, at 121-22.

participants. As one commentator states, "If you pour liquor on it, it's not a crime."<sup>105</sup> The victim is alleged to be either sober enough to have resisted if consent really was not present, or too drunk to remember what actually happened.

There is no bright line test that defines precisely how much alcohol or drugs result in a person's inability to consent to sex. Every jurisdiction in the country except Massachusetts, Georgia, and the Uniform Code of Military Justice, however, has attempted some statutory reform on the issue of consent and intoxication.<sup>106</sup> Many universities recognize the ubiquitous presence of alcohol in campus acquaintance assaults and have amended their codes of conduct to deem consent as presumptively absent in the presence of alcohol.<sup>107</sup> The Model Penal Code (MPC) states that actual consent is not legal consent if "it is given by a person who by reason of youth, mental disease or defect, or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature of harmfulness of the conduct."<sup>108</sup> The MPC requires, however, that the alleged assailant administered the intoxicant for no consent to be presumed.<sup>109</sup> Some states have adopted the MPC language but eliminated the requirement that the defendant administered the intoxicant.<sup>110</sup> Louisiana, for instance, draws a distinction between cases where the intoxication was independent of the assailant ("simple rape") and where assailant administered the intoxication ("forcible rape").<sup>111</sup>

While there is no bright line test for determining how much alcohol or drugs inhibits a person's ability to consent, there must be a bottom line. If implied consent is eliminated as a defense and mere submission without affirmative permission is no longer adequate to demonstrate consent, what standard is reasonable in the presence of intoxication? We propose that if alcohol is present, non-consent must be presumed unless the woman makes an explicit

105. Kramer, *supra* note 98, at 124.

106. Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 156-57 (2002) (evaluating statutes by jurisdiction).

107. See NORTHEASTERN UNIVERSITY, CODE OF STUDENT CONDUCT LEVEL I GRIEVOUS VIOLATIONS, Violation 5 (2002). The Code as amended in July 2002, states:

[R]ape . . . is defined as the oral, anal or vaginal penetration by an inanimate object, penis, or other bodily part, without consent. 'Consent' means a voluntary agreement to engage in sexual activity proposed by another . . . . 'Consent' requires mutually understandable and communicated words and/or actions demonstrating agreement to participate in proposed sexual activity. 'Without consent' may be communicated by words and/or actions demonstrating unwillingness to engage in proposed sexual activity. For instance, the act of penetration will be considered without consent if the victim was unable to give consent because of a condition of which the offending student was or should have been aware, such as drug and/or alcohol intoxication, coercion, and/or verbal or physical threats, including being threatened with future harm.

*Id.*

108. MODEL PENAL CODE § 2.11(3)(b) (defining ineffective consent).

109. *Id.*

110. See LA. REV. STAT. ANN. §§ 14:42.1, 14.43 (West 2004).

111. *Id.*

verbal statement that she wishes to engage in sexual intimacy that includes penetration. Women do not have to be cold sober to engage in consensual sexual intimacy, but they ought to be sober enough to say yes. If a woman is not sober enough to say yes, then no consent should be presumed.

These concepts of consent in sexual assault are not unique, and other areas of the law in which consent plays a central role are instructive. The law of search and seizure requires consent to be explicit and affirmative, and consent cannot be implied from the circumstances or conduct of the subject.<sup>112</sup> In order to obtain consent for a search, police must specifically request it from the individual or the court.<sup>113</sup> Even when consent is affirmatively given, the court may determine that the police obtained consent through coercion based on age, education, lack of understanding of rights, or by wearing down the subject in a repetitive or psychologically coercive manner.<sup>114</sup> The law suggests that the power differential between law enforcement and the subject require extensive precautions to protect the subject from the state's exertion of such power, which necessitates a knowing and explicit agreement by the subject to be searched. Silence and ambivalence do not constitute consent under the Fourth Amendment.<sup>115</sup>

Consent to police interrogation pursuant to the Fifth Amendment and under *Miranda* similarly requires an explicit and affirmative statement of consent by the subject.<sup>116</sup> Consent cannot be implicit and cannot be indicated by silence to meet the requirements of the Fifth Amendment.<sup>117</sup> Circumstantial evidence indicating that the subject was aware of his right to refuse interrogation cannot be used to demonstrate consent, and consent cannot be based on the subject's behavior.<sup>118</sup> While some commentators criticize the *Miranda* approach to consent to sex as impractical, these commentators have taken too broad a view of the analogy.<sup>119</sup> Likening an entire date to a police interrogation, Schulhofer rejects the approach because it does not permit a woman to change her mind during the course of the date.<sup>120</sup> A seemingly more appropriate analogy to interrogation is the initiation of intercourse, when issues of physical and psychological power and the possibility of coercion become significantly

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112. SCHULHOFER, *supra* note 5, at 72. During a police interrogation, a suspect's consent to talk about the crime is considered involuntary if he first says "no" but changes his mind because police cajolery or questioning persuaded him to speak. *Id.*

113. See Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, 11 WIS. WOMEN'S L.J. 37, 70-72 (1996) (discussing consent to searches under Fourth Amendment).

114. *Id.*

115. *Id.*

116. *Id.* at 72.

117. Kasubhai, *supra* note 113, at 72.

118. Kasubhai, *supra* note 113, at 72.

119. SCHULHOFER, *supra* note 5, at 72-74 (comparing use of *Miranda* in police interrogation to consent in sexual assault cases); Bryden, *supra* note 2, at 391-92 (evaluating need for reform in rape law).

120. SCHULHOFER, *supra* note 5, at 72-74 (criticizing application of *Miranda* rules to sexual interactions).

present. Silence and ambivalence do not constitute consent under the Fifth Amendment.

As Susan Estrich has discussed, in other areas of criminal law, submission does not equate with consent.<sup>121</sup> For example, consent in the form of passive submission fails as a defense to robbery, unless the owner of the property actively participates in the theft.<sup>122</sup> Similarly, criminals can commit trespass and battery against submissive victims.<sup>123</sup> As Estrich points out, the frequently claimed excuse that consensual sex constitutes part of everyday life and therefore cannot be subjected to such nuanced scrutiny does not explain the disparity in the law that permits submission to pass for consent in the rape context but not in other contexts.<sup>124</sup> Other everyday events include visiting (trespass with consent), philanthropy (robbery with consent), and surgery (battery with consent).<sup>125</sup> The fact that women are expected to be sexually submissive permits the violation of their sexual and physical integrity, while the law protects their more highly prized wallets and homes by holding that silence and ambivalence do not constitute consent to robbery, trespass, invasion of property or battery.

In contract law, passive submission ordinarily does not constitute acceptance of an offer.<sup>126</sup> Usually, only where the parties had a prior contractual relationship, will acceptance be inferred from silence or submission.<sup>127</sup> Otherwise, words, either written or oral, provide the indicia of the existence of the contract.<sup>128</sup> While cultural resistance impedes the notion of sexual intimacy as a contractual relationship, the public widely understands and accepts the idea of contractual offer and acceptance as a two party affirmative communication. Silence and ambivalence do not constitute consent to enter into a contract.

Consent to medical treatment is another area of the law where, unlike rape law, consent and the conditions of consent have been relatively well-defined.<sup>129</sup> This area of law has developed on the premise that medical treatment without consent constitutes a form of battery, an unwanted physical invasion of personal physical autonomy.<sup>130</sup> The doctrine provides a bright line test for consent, requiring affirmation by more than mere silence or deduction from

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121. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1126 (1986) (noting unique burden on rape victim to prove nonconsent).

122. *Id.*

123. *Id.*

124. *Id.*

125. Estrich, *supra* note 121, at 1126.

126. See RESTATEMENT (SECOND) OF CONTRACTS § 69 (2004).

127. *Id.*

128. See RESTATEMENT (SECOND) OF CONTRACTS § 30; Katherine E. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 688-89 (1999) (noting words necessary to manifest consent in contract context).

129. Kasubhai, *supra* note 113, at 68-70.

130. Kasubhai, *supra* note 113, at 68.

circumstances or behavior.<sup>131</sup> Further, prior consent to treatment does not impute current consent, requiring an affirmative statement of consent for every incident of treatment.<sup>132</sup> Silence and ambivalence do not constitute consent to medical treatment.

These analogies confirm that silence and ambivalence may only substitute for consent in the area of rape, where the absence of non-consent is a proxy for actual consent. This derives from the centuries old idea, certainly once true, that women cannot affirmatively consent to sex outside of marriage without fear of being labeled whores. Our cultural norm no longer endorses this idea. Many, if not most women are free to have sex outside of marriage if they choose to do so. Once we acknowledge that women can choose sex, we can acknowledge that they can also reject it. Consent under the law then must be defined in a way that potential victims and defendants can easily understand and interpret.

We propose that for “legally safe sex” to take place, consent must take the form of an affirmative and unequivocal verbal “yes” to sexual intercourse. Critics have maligned this proposition and deemed it unworkable in the context of sexual behavior on the theory that sexual intimacy is a runaway train that can be stopped for nothing as rational as a yes.<sup>133</sup> We disagree and point to the highly visible and largely successful public health campaign to promote condom use as a result of the AIDS epidemic.<sup>134</sup> Getting people about to engage in intercourse to stop and think about safe sex was once thought to be impossible. The concept and practice of safe sex has become part of the everyday landscape of sex. Getting an affirmative “yes” before engaging in sexual intercourse is no more an imposition on sexual expression than condom use, and the same public health strategies used to normalize the concept of safe sex can be employed to establish the principle that sex without an affirmative yes is unwanted, and therefore, illegal.

In 1996, Antioch College issued a sexual offense prevention policy that attempted to define nonconsensual sexual conduct.<sup>135</sup> Consent to sex is defined

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131. Kasubhai, *supra* note 113, at 68.

132. Kasubhai, *supra* note 113, at 69-70.

133. SCHULHOFER, *supra* note 5, 272-73.

134. See generally Lesley Stone & Lawrence O. Gostin, *Using Human Rights to Combat the HIV/AIDS Pandemic*, 31 HUM. RTS. MAG. 2 (2004), available at <http://www.abanet.org/irr/hr/fall04/pandemic.htm>.

135. SEXUAL OFFENSE PREVENTION & SURVIVOR'S ADVOCACY PROGRAM, ANTIOCH COLLEGE, ANTIOCH COLLEGE SURVIVAL GUIDE, available at [http://www.antioch-college.edu/Community/survival\\_guide/campus\\_resources/sopsap.htm](http://www.antioch-college.edu/Community/survival_guide/campus_resources/sopsap.htm) (last visited Feb. 15, 2005) (identifying and discussing Antioch College's Sexual Offense Prevention Policy). Antioch College's Sexual Offense Prevention Policy states that:

- All sexual contact and conduct between any two (or more!) people must be consensual;
- Consent must be obtained verbally before there is any sexual contact or conduct;
- Silence is never interpreted as consent;
- If the level of sexual intimacy increases during an interaction (i.e., if two people move from kissing while fully clothed, which is one level, to undressing for direct physical contact, which is another level), the people involved need to express their clear verbal consent before



as “the act of willingly and verbally agreeing to engage in specific sexual behavior.”<sup>136</sup> The policy emphasizes the use of explicit verbal communication in request for and acceptance of an offer of sex, while it expressly prohibits silence as a form of consent.<sup>137</sup> In addition, the policy states that such requests for and assent to intimacy must be renewed at every stage as intimacy increases.<sup>138</sup> While the policy has been maligned as unworkable in the contemporary sexual environment, we agree with the fundamental principle of the policy: to be consensual, intimacy must be accompanied by an affirmative and verbal assent. We disagree, however, with the apparent equality of all acts of sexual touching or contact as set forth in the Antioch policy. We propose, instead, that to be consensual, affirmative verbal consent must be obtained immediately prior to an act of penetration, which eliminates the most maligned part of Antioch’s policy as well as the possibility that one party is acting on prior given consent that has since been withdrawn.

#### VI. ESTABLISHMENT OF A NATIONAL DATABASE FOR MANDATORY STATE REPORT, ARREST, PROSECUTION AND CONVICTION FIGURES

The first multi-state empirical study of the impact of rape reforms was performed in 1985.<sup>139</sup> In the few studies that have been conducted since then, researchers have concluded that these reforms have not had a significant or relevant impact on any reports, prosecutions, or convictions.<sup>140</sup> In fact, only one study has found statistically significant increases in arrests and reduction in the variability of arrest outcomes.<sup>141</sup> The failure of law enforcement and other agencies, including universities, to accurately disclose reports and outcomes

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moving to that new level;

- If one person wants to initiate moving to a different level of sexual intimacy in an interaction, that person is responsible for getting the consent of the other person(s) involved before moving to that level;
- If you have a particular level of sexual intimacy before with someone, you must still be sure there is consent each and every time;
- If you have a sexually transmitted disease, you must disclose this fact to a potential partner before engaging sexually;
- If anyone asks you to stop a particular kind of sexual attention or behavior, you must stop it immediately no matter what your intentions are with the attention.
- Don’t ever make assumptions about consent; assumptions can hurt someone and get you in trouble. Consent must be clear and verbal (i.e., saying, “Yes, I want to kiss you, too.”).

*Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. See Futter & Mebane, *supra* note 3, at 83-85.

140. See *supra* note 2 and accompanying text.

141. Futter & Mebane, *supra* note 3, at 111. This study found that “defining sex crimes on a single continuum, subjecting spouses and cohabitants to prosecution, limiting the admissibility at trial about the victim’s past sexual history with the defendant . . . and denying a mistake of incapacity defense all led to an increase of ‘actual’ rapes” that were investigated by the police. *Id.*

and to make this information available to the public, however, significantly hampers our ability to understand the actual results of past reforms, and the likely success of those proposed in the future. Therefore, we propose the institution of a national sexual assault database, similar to the Hate Crimes Statistics Act, in which states must report yearly numbers of actual reports, arrests, prosecutions and conviction rates for all sexual assault crimes.<sup>142</sup>

## VII. CONCLUSION

The past thirty years have seen a sea of change in sexual assault laws, but the promise of these initiatives has been largely unfulfilled. As long as the impact of legislative change is virtually unknown by the public, our ability to move forward with creative solutions to century old problems will continue to be impeded. To correct this, law enforcement efforts in the area of sexual assault must be accurately reported and subject to public scrutiny and analysis. In addition, sexual attitudes that have damaged the implementation of progressive rape law reform, particularly as to the concepts of consent and implied consent, must be challenged and refuted. The crimes encompassed by sexual assault should be redefined for an era when woman can take responsibility for their sexual choices, and where affirmative verbal consent to sex is a realistic and clear alternative to unclear and gender stereotyped guessing. The ubiquitous presence of alcohol in sexual assault must also be addressed definitively and in a manner that is free from double standards and gender bias. Finally, sexual assault victims should be understood as suffering from a myriad of brutal consequences that impact their civil wellbeing and may be remedied by the civil law, as well as put them at risk of re-victimization by the criminal justice process. Lawyers must step forward and take up their struggle.

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142. 18 U.S.C. §§ 241, 245, 247 (2004); 42 U.S.C. § 3631 (2004) (giving FBI jurisdiction pertaining to hate crimes). Congress enacted the Hate Crimes Statistics Act of 1990 to mandate the gathering of statistics about crimes motivated by bias against a person's race, religion, sexual orientation, or origin. See UNIFORM CRIME REPORTING PROGRAM, FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS OF 1999, available at <http://www.fbi.gov/ucr/99hate.pdf>.



DECEMBER 15, 2014

# THE TROUBLE WITH TEACHING RAPE LAW

BY JEANNIE SUK

*Members of the audience hold signs during a board of visitors meeting about sexual assault at the University of Virginia.*

PHOTOGRAPH BY RYAN M. KELLY/THE DAILY PROGRESS/AP



Imagine a medical student who is training to be a surgeon but who fears that he'll become distressed if he sees or handles blood. What should his

instructors do? Criminal-law teachers face a similar question with law students who are afraid to study rape law.

Thirty years ago, their reluctance would not have posed a problem. Until the mid-nineteen-eighties, rape law was not taught in law schools, because it wasn't considered important or suited to the rational pedagogy of law-school classrooms. The victims of rape, most often women, were seen as emotionally involved witnesses, making it difficult to ascertain what really happened in a private encounter. This skepticism toward the victim was reflected in the traditional law of rape, which required a woman to "resist to the utmost" the physical force used to make her have intercourse. Trials often included inquiries into a woman's sexual history, because of the notion that a woman who wasn't virginal must have been complicit in any sex that occurred. Hard-fought feminist reforms attacked the sexism in rape law, and eventually the topic became a major part of most law schools' mandatory criminal-law course. Today, nobody doubts its importance to law and society.

But my experience at Harvard over the past couple of years tells me that the environment for teaching rape law and other subjects involving gender and violence is changing. Students seem more anxious about classroom discussion, and about approaching the law of sexual violence in particular, than they have ever been in my eight years as a law professor. Student organizations representing women's interests now routinely advise students that they should not feel pressured to attend or participate in class sessions that focus on the law of sexual violence, and which might therefore be traumatic. These organizations also ask criminal-law teachers to warn their classes that the rape-law unit might "trigger" traumatic memories. Individual students often ask teachers not to include the law of rape on exams for fear that the material would cause them to perform less well. One teacher I know was recently asked by a student not to use the word "violate" in class

—as in “Does this conduct violate the law?”—because the word was triggering. Some students have even suggested that rape law should not be taught because of its potential to cause distress.

When I teach rape law, I don't dwell on cases in which everyone will agree that the defendant is guilty. Instead, I focus on cases that test the limits of the rules, and that fall near the rapidly shifting line separating criminal conduct from legal sex. These cases involve people who previously knew each other and who perhaps even previously had sex. They cover situations in which the meaning of each party's actions, signals, and desires may have been ambiguous to the other, or misapprehended by one or both sides. We ask questions like: How should consent or non-consent be communicated? Should it matter whether the accused realized that the complainant felt coerced? What information about the accused and the complainant is relevant to whether or not they should be believed? How does social inequality inform how we evaluate whether a particular incident was a crime? I often assign students roles in which they have to argue a side—defense or prosecution—with which they might disagree.

These pedagogical tactics are common to almost every law-school topic and classroom. But asking students to challenge each other in discussions of rape law has become so difficult that teachers are starting to give up on the subject. About a dozen new teachers of criminal law at multiple institutions have told me that they are not including rape law in their courses, arguing that it's not worth the risk of complaints of discomfort by students. Even seasoned teachers of criminal law, at law schools across the country, have confided that they are seriously considering dropping rape law and other topics related to sex and gender violence. Both men and women teachers seem frightened of discussion, because they are afraid of injuring others or being injured themselves. What has made everyone so newly nervous about discussing sexual-assault law in the classroom?

In the nineteen-seventies and eighties, feminist reformers developed the idea that the disrespectful treatment of rape complainants in the criminal process—including cross-examinations meant to show that complainants were promiscuous—made the courtroom the scene of a “second rape.” An influential book with that title by the psychologists Lee Madigan and Nancy Gamble, published in 1991, characterized the “second rape” as “more devastating and despoiling than the first.” Evidence laws were reformed to limit cross-examination about a rape complainant's sexual history and reputation. Disbelieving a complainant's account, questioning her role in the interaction, and not vindicating her claim also all came to be seen as potential re-victimizations. On college campuses, the notion that a complainant should not have to see the accused, because it would inflict further trauma, is now commonplace.

Something similar to the “second rape” concept now appears to be influencing the way we think about the classroom. I first encountered this more than a year ago, when I showed “Capturing the Friedmans,” an acclaimed documentary about a criminal-sex-

abuse investigation, to my law students. Some students complained that I should have given them a “trigger warning” beforehand; others suggested that I shouldn’t have shown the film at all. For at least some students, the classroom has become a potentially traumatic environment, and they have begun to anticipate the emotional injuries they could suffer or inflict in classroom conversation. They are also more inclined to insist that teachers protect them from causing or experiencing discomfort—and teachers, in turn, are more willing to oblige, because it would be considered injurious for them not to acknowledge a student’s trauma or potential trauma.

We are currently in the middle of a national effort to reform how sexual violence is addressed on college campuses. This effort is critical, given the apparent prevalence of sexual violence among students. But it’s not clear that measures taken to protect victims always serve their best interests. At Harvard, twenty-eight law professors, myself included, have publicly objected to a new sexual-harassment policy on the grounds that, in an effort to protect victims, the university now provides an unfair process for the accused. This unfairness hurts the cause of taking sexual violence and its redress seriously. Similarly, when *Rolling Stone* published an account of an alleged gang rape at the University of Virginia without seeking out the accused, and likely got the story wrong, it arguably damaged the credibility of sexual-assault victims on that campus and elsewhere. These events are unfortunately of a piece with a growing rape exceptionalism, which allows fears of inflicting or re-inflicting trauma to justify foregoing usual procedures and practices of truth-seeking.

Now more than ever, it is critical that law students develop the ability to engage productively and analytically in conversations about sexual assault. Instead, though, many students and teachers appear to be absorbing a cultural signal that real and challenging discussion of sexual misconduct is too risky to undertake—and that the risk is of a traumatic injury analogous to sexual assault itself. This is, to say the least, a perverse and unintended side effect of the intense public attention given to sexual violence in recent years. If the topic of sexual assault were to leave the law-school classroom, it would be a tremendous loss—above all to victims of sexual assault.

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# Women and Black Lives Matter: An Interview with Marcia Chatelain

[Marcia Chatelain and Kaavya Asoka](#) ■ [Summer 2015](#)

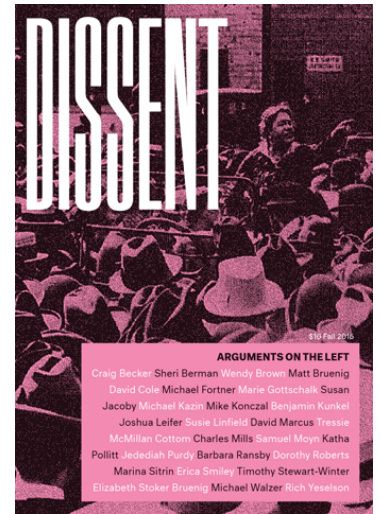


At the Millions March in Oakland, December 13, 2014 (Daniel Arauz via Flickr)

In recent months, the deaths of Michael Brown, Eric Garner, Freddie Gray, and others have mobilized an unprecedented mass movement against police brutality and racism that we now know as Black Lives Matter.

So far, the movement’s attention primarily to the experiences of black men has shaped our understanding of what constitutes police brutality, where it occurs, and how to address it. But black women—like Rekia Boyd, Michelle Cusseaux, Tanisha Anderson, Shelly Frey, Yvette Smith, Eleanor Bumpurs, and others—have also been killed, assaulted, and victimized by the police. Often, women are targeted in exactly the same ways as men—shootings, police stops, racial profiling. They also experience police violence in distinctly gendered ways, such as sexual harassment and sexual assault. Yet such cases have failed to mold our analysis of the broader picture of police violence; nor have they drawn equal public attention or outrage.

A growing number of Black Lives Matter activists—including the women behind the original hashtag—have been refocusing attention on how police brutality impacts black women and others on the margins of today’s national conversation about race, such as poor, elderly, gay, and trans people. They are not only highlighting the impact of police violence on these communities, but articulating why a movement for racial justice must necessarily be inclusive. Say Her Name, for example, an initiative launched in May, documents and analyzes black women’s experiences of police violence and explains what we lose when we ignore them. We not only miss half the facts, we fundamentally fail to grasp how the laws, policies, and the culture that underpin gender inequalities are reinforced by America’s racial divide.



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How are black women affected by police brutality? And how are they shaping the concerns, strategies, and future of Black Lives Matter? Marcia Chatelain, professor of history at Georgetown University, creator of the #FergusonSyllabus, and author of *South Side Girls: Growing Up in the Great Migration*, shares her insights on the role of black women in today's vibrant and necessary movement for racial justice.



Kaavya Asoka: In addition to your historical work, you're the creator of a valuable resource for educators—the #FergusonSyllabus—which crowdsourced reading materials from Twitter and elsewhere to help teachers discuss Ferguson and race in their classrooms. Could you begin by telling us about your own relationship to Black Lives Matter?

Marcia Chatelain: As a black woman in America, this movement is fundamentally about my life and the lives of those I love. I've participated in student-led actions—like die-ins and social media campaigns—and I consider myself a student of all these amazing activists. I am a beloved observer and a participant to the extent that I incorporate the movement in my teaching and encourage my students to get involved.

Asoka: "Black Lives Matter" was created by three black women, Alicia Garza, Patrisse Cullors, and Opal Tometi, after George Zimmerman's acquittal for Trayvon Martin's death. Women have been organizing marches, die-ins, protests, and otherwise leading various responses to police brutality. Why are women playing such a key role in today's movement?

Chatelain: Women across the generations are participating in this movement, but I think we've had a wonderful opportunity to see especially young, queer women play a central role. It's important to recognize that while they are organizing on behalf of victims of police brutality and cruelty broadly, they have to constantly remind the larger public that women are among those victims too. So, although these women are putting their bodies on the line for the movement, they also have to articulate that they are fighting for all lives, including their own.

Asoka: We know that there is currently no comprehensive national data on police killings. But the information we have shows that black women are targeted in similar ways to black men—police killings, stops, and racial profiling; targeting of poor, disabled, or trans women; deaths in custody. In some cases, they're also targeted at similar rates—research released by the African American Policy Forum and Columbia University showed that in New York in 2013, 53.4 percent of all women stopped by the police were black, while 55.7 percent of all men stopped were black. Women also face gender-specific risks from police encounters—sexual harassment, assault, strip-searching, and endangerment of children in their care. How prominently is the impact of police brutality on women featuring in today's movement?

Chatelain: I think *any* conversation about police brutality must include black women. Even if women are not the majority of the victims of homicide, the way they are profiled and targeted by police is incredibly gendered. There are now renewed conversations about how sexual violence and sexual intimidation are part of how black women experience racist policing. You don't have to dig deep to see how police brutality is a women's issue—whether it's the terrifying way that Oklahoma City police officer Daniel Holtzclaw preyed on black women in low-income sections of the city, or the murder of seven-year-old Aiyana Stanley-Jones inside her Detroit home. We know that girls and women of color are also dying. The question is: does anyone care?

We also have to consider that sexual harassment, exploitation, and assault not only



happen on the streets, they also occur in the home and in the detention center. In other words, black women are often targets of violence inside homes and in private spaces where people cannot easily see them or galvanize around them. When we consider how and where people organize, it's important to remember these victims of brutality too, even if we can't gather at their specific sites of victimization. I think the most important part of all this is that black women are fighting for their names to be known as part of this issue—there is a real desire to complicate the notion that it is only young, black men who are living in fear for their lives.

When we look at this issue historically, women activists were often targeted by police, and the sexual violence that civil rights activists experienced in places like Mississippi's Parchman Farm raised the consciousness of other activists about the need for prison reform. Women like Fannie Lou Hamer were abused behind the walls of a detention center. So for black women and black female activists, police brutality is a very real concern.

Asoka: We tend to see violence and racism against black men as a barometer of racism against the black population at large, whereas violence against black women is often invisible. We're all familiar with the names Michael Brown, Eric Garner, and Freddie Gray, but Rekia Boyd is one of the few names of black women that we've heard. Why haven't the killings of women of color received the same attention as those of men?

Chatelain: Yes, I agree with Dani McClain, Melinda Anderson, and Kali Gross, among others, who are calling out the fact that the conversation about police violence is mostly framed around the endangerment of men of color. Kimberlé Crenshaw has criticized the silence around women's victimization, as well as initiatives like *My Brother's Keeper*, which excludes girls and young women. Sexism is a factor, but so are market forces—an industry built on saving, rehabilitating, and disciplining men of color has emerged, which has attracted state funding and enriched some leaders of color and their organizations. Since the 1980s, private and public dollars have been devoted to solving the problems of boys and young men of color in ways that they haven't for girls. This reinforces the notion that in times of scarcity, girls and young women are a low priority. So the fact that the killings of women of color do not galvanize people—whether we are talking about state actors or progressive organizers—doesn't surprise me. But I'm heartened that there are activists and collectives that have been critical of the unchecked sexism in this fight.

Asoka: You mention Dani McClain. Last August she argued in the *Nation* that the killing of black men is a reproductive justice issue for women, who have a right to see their children live in safety. Are there others who are articulating this fight for racial justice in explicitly feminist terms?

Chatelain: Black Lives Matter is feminist in its interrogation of state power and its critique of structural inequality. It is also forcing a conversation about gender and racial politics that we need to have—women at the forefront of this movement are articulating that “black lives” does not only mean men's lives or cisgender lives or respectable lives or the lives that are legitimated by state power or privilege.

Historically, movements for racial justice have often framed the question of equality as one that could be answered by men. From the abolitionist movement to the civil rights movement, many of the key issues were framed around concerns that racial injustice harmed masculinity. I think that today's movement has this in mind when calling for the names of women and girls to be included among those who inspire the

fight. No community wants to see its daughters die, or for women to be unable to support their families because of the death of their partners or other family members. I think the reproductive justice issue inherent in all of this is that violence undermines the ability to keep families and communities strong. The stress of violence and intimidation affects child protection and child development. The anxiety of parenting a child of color in a world where they are often targets can certainly shape one's decision to have children and one's approach to parenting.

Asoka: What are the challenges of trying to address issues like domestic violence against black women (a leading cause of death) when we know that calling the police seldom spells safety for either black men or women?

Chatelain: I think the tension between demanding attention to police violence and developing strategies to ensure the safety of black women and children is very real right now. When black women weigh whether they can trust law enforcement, it's a dilemma, given the reality of mass incarceration.

The next step in this movement is to consider alternatives to the current approach to policing, which relies all too often on a labor force that does not come from a particular community or alienates communities in the name of public safety. One group that supports this is Project NIA, which encourages alternatives to calling the police on youth. Another model from Chicago is the Cure Violence project (featured in the documentary film *The Interrupters*) in which respected citizens intervene in heated situations. We're now seeing organizers developing community leadership and community-based models of accountability to ensure the safety and well-being of people, while continuing to challenge the ways in which patriarchy reinforces racism and oppression.

Asoka: Many Black Lives Matter activists are using the momentum behind this movement against police brutality to also raise other issues, like economic inequality and discrimination against black LGBT people. Why is this intersectional approach to activism important?

Chatelain: Gendered police violence against cisgender and trans women, and the criminalization of poor black women and how that affects their families and communities are both key issues, although I don't know if they've been adequately captured in the protests. Protests often have to deliver a sliver of a larger message in order to prompt a deeper conversation. But the protests have also opened up a space for discussing specific structural issues—the state of our schools, unemployment, access to public spaces—and shown how police violence is one of many issues that communities have to contend with.

I am proud of Black Lives Matter's attention to intersectionality. These women and other young organizers are consciously resisting the mistakes of previous movements, especially the classism and sexism that all too often shaped the direction of older civil rights and feminist struggles. What we see now is a result of what these organizers have learned from each other about the pitfalls of narrow focus and exclusivity. This movement's openness to other movements—like the battles against mass incarceration and mass deportation—allows us to see how deeply these issues resonate across different communities.

In the early days of Ferguson, we heard messages from a wide swath of the organizing sector lending their support. From the Dream Defenders to the undocumented youth movement to the various queer organizing communities to Amnesty International, you saw a wide array of groups—along a political spectrum

from relatively mainstream to radical—moved to speak out against police violence. “Black Lives Matter” became a rallying cry to identify the places in which black life is cut short, whether it is in highly publicized instances of police brutality or through the slow suffocation of black communities facing poverty and economic inequality.

The movement’s reliance on community strength rather than dependence on a single establishment voice, and the fact that throughout we’ve seen shifts in protest strategies—from vigils, to die-ins, to shutting down highways—reveals its creativity and flexibility. Ferguson, Staten Island, Chicago, and Baltimore are different, and different leaders emerged to organize those communities. But Black Lives Matter was able to collectivize the will of communities in each of these places where a critique of policing was severely needed.

Black Lives Matter activists come as they are—there is no management or slick manipulation of the image of the movement by anyone. It was wonderful how young activists resisted the performance surrounding December’s Justice For All march because they believed that the movement they had literally put their lives on the line for was not being respected. The confrontation between a young movement and establishment groups like the National Action Network and the Urban League is deeply necessary, and I see it as another iteration of the youth driven SNCC’s struggle with Martin Luther King’s more established SCLC, and other moments when seemingly like-minded constituents have challenged each other.

Asoka: Like Occupy, Black Lives Matter is a bottom-up, collaboratively organized movement. Yet people often call it “leaderless.” Could you put this lack of recognition of women’s leadership and political participation in a historical context for us?

Chatelain: I hate it when I hear people call Black Lives Matter leaderless. If there are no leaders, then who is getting the word out? Who is getting the young people on buses and cars to appear before state houses and to lie down in train stations? Who is sending out the calls for protests? Who is managing the social media presence? Leaders, that’s who. I think women are leading without suggesting they are the only leaders or that there is only one way to lead. Some of the criticism of Black Lives Matter as “leaderless” is generational. It isn’t a coincidence that a movement that brings together the talents of black women—many of them queer—for the purpose of liberation is considered leaderless, since black women have so often been rendered invisible.

Across history, any time a movement has had black women at its helm or in its leadership—from Ida B. Wells and the Niagara movement to Ella Baker in the civil rights movement—there have been sexist and racist attempts to undermine them. The most damaging impact of the sanitized and oversimplified version of the civil rights story is that it has convinced many people that single, charismatic male leaders are a prerequisite for social movements. This is simply untrue.

Asoka: Women have historically been (and continue to be) perceived as the cultural and moral anchors of their communities. This has allowed societies to police women’s behavior, their reproductive choices, and their sexual autonomy, while arguing that it’s for their own “protection.” Can you talk about this in the context of your book, *South Side Girls*?

Chatelain: In *South Side Girls* I examine the experiences of black girls and young women during the Great Migration, a period in which black people also confronted challenges in housing discrimination, hyperpolicing, and racist violence. These girls were part of a massive movement in black life, and they were often looked to as the

models of black success or failure; they in fact shouldered many aspirations and hopes for a community that did not always treat them like their lives mattered. The rigid ways that black community leaders viewed black girls was fascinating to me because they were in an impossible position—too young, too female, and too black to be heard. Yet despite this, I found moments in which they were given—or simply took—opportunities to discuss what mattered to them. I found some interviews with pregnant teenage girls in the 1920s and 1930s—they were the most marginalized of the marginalized. But in these interviews, I argue, they make it clear that they are citizens and that the state, families, and institutions have failed them. Some of the girls I include in my book resist blaming themselves; instead, they make it clear that they, as citizens, have rights, which are not being respected.

I think about these girls often as I watch today's movement unfold—where young women, some still teenagers and others barely older, are making it known that they will not tolerate state failure, or the failure of their communities to recognize the value of their lives or their leadership. The women involved in Black Lives Matter are not concerned about representing the race in any particular light or bending to the demands of respectability politics. Rather, they are carving out the space for black women to fight for justice—from the trans woman who is dying for it, to the woman in elective office, to the attorney representing protestors, to the little girl holding up a sign for Rekia Boyd, to the sorority member holding vigil in front of a police station, to the college women wearing Black Lives Matter T-shirts on campus. I'm looking forward to seeing what influence Black Lives Matter will have on the national presidential race in 2016—front and center, I hope, will be the black women who started this movement and a legion of even more behind them.

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Marcia Chatelain is assistant professor of history at Georgetown University. Her book *South Side Girls: Growing Up in the Great Migration* is just out from Duke University Press.

Kaavya Asoka is an associate editor at *Dissent*.

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# **Black Women and Black Lives Matter: Fighting Police Misconduct in Domestic Violence and Sexual Assault Cases** <sup>[1]</sup>

## **Author(s):**

Sandra Park

In the year since Ferguson, we have been reminded that police misconduct and brutality don't discriminate, at least not based on gender. We know that Black women, like Sandra Bland and others before her, aren't spared from police violence. Several commentators, including [Charles Blow](#) <sup>[2]</sup>, [Lisalyn Jacobs](#) <sup>[3]</sup>, and [Roxane Gay](#) <sup>[4]</sup>, have authored profound pieces about Black women's experiences and the cloak of invisibility that too often surrounds them, particularly when the discussion turns to violence, police misconduct, and holding law enforcement accountable.

Fortunately, that is changing. #SayHerName has elevated and honored Black women's experiences and the dynamic #BlackLivesMatter social justice movement has broadened the conversation to highlight the many ways in which all Black people are affected by violence, police misconduct, and injustice.

But the lens must expand even further. When we speak of the reality of Black women's lives and efforts to reform the criminal justice system, we must continue to also speak about gender bias in policing and how it results in improper, and often illegal, police responses to domestic violence and sexual assault cases.

The reality is domestic violence-related calls constitute the single largest category <sup>[5]</sup> of calls received by the police. Over one million women are sexually assaulted each year, and more than a third of women are subjected to rape, physical violence and/or stalking by an intimate partner in their lifetime. And have no doubt: Black women and other women of color are disproportionately impacted <sup>[6]</sup>.

Here are just a handful of stories about police misconduct in domestic violence and sexual assault cases that acknowledge the experiences of women at the intersection of racial and gender biased policing:

- In [Detroit](#) <sup>[7]</sup>, researchers documented how stereotyping of sexual assault victims – a significant percentage of whom were African-American – led to poor criminal investigations and failure by police to submit thousands of sexual assault kits for testing.
- In [Oklahoma](#) <sup>[8]</sup>, 13 women reported that a police officer sexually molested them while

he was on duty; that officer now faces 36 charges including felony rape, forcible oral sodomy and sexual battery.

- In *Puerto Rico* [9], the police department systematically underreported rape crimes and rarely took action when their own officers committed domestic violence, allowing 84 officers who had been arrested two or more times for domestic violence to remain active.
- In *Norristown, PA* [10], Lakisha Briggs, an African-American woman, faced eviction because police concluded that acts of domestic violence perpetrated against her – including a stabbing that required her to be taken by helicopter to a trauma center – should be considered nuisances under a local ordinance.

There are countless [11] stories just like these and even more that are untold or forgotten. These types of discriminatory police practices – abuses committed by officers, refusal to enforce established laws, misclassification or dismissal of domestic violence or sexual assault complaints – are deeply harmful and violate victims’ civil rights. They jeopardize women’s lives and safety, undermine efforts to end domestic violence and sexual assault, reduce confidence in the criminal justice system, and further the perpetuation of violence by discouraging victims from coming forward and allowing abusers to continue to commit crimes with impunity.

In spite of these troubling patterns, systemic discrimination by law enforcement is receiving attention due to the critical dialogue sparked by the Black Lives Matter movement. Indeed, The U.S. Department of Justice [12] has highlighted and investigated gender-biased policing. And just last month the ACLU took lead in drafting a letter signed by 88 national organizations and 98 state and local groups asking [13] DOJ to issue guidance to law enforcement agencies about how to ensure that their policies and practices are free of gender bias. These harmful and violative practices will not disappear on their own. We hope DOJ will act soon.

Until then, we will keep fighting.

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[4] <http://www.nytimes.com/2015/07/25/opinion/on-the-death-of-sandra-bland-and-our-vulnerable-bodies.html>

[5] <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf>

[6] [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf)

[7] <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf>

[8] <http://www.buzzfeed.com/jtes/daniel-holtzclaw-alleged-sexual-assault-oklahoma-city#.xawKOWOJ4G>

[9] <https://www.aclu.org/failure-police-crimes-domestic-violence-and-sexual-assault-puerto-rico>

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[12] <https://www.aclu.org/blog/justice-department-police-misconduct-responding-domestic-and-sexual-violence-can-violate>

[13] [https://www.aclu.org/sites/default/files/field\\_document/policing-coalition\\_letter\\_to\\_ag\\_lynch-doj-re\\_guidance\\_on\\_gender-biased\\_policing-final-7-6-15.pdf](https://www.aclu.org/sites/default/files/field_document/policing-coalition_letter_to_ag_lynch-doj-re_guidance_on_gender-biased_policing-final-7-6-15.pdf)



# SAY HER NAME

**RESISTING POLICE  
BRUTALITY AGAINST  
BLACK WOMEN**

*There is no such thing as a colorblind police officer. There is only a police officer who is white.*

JULY 2015 UPDATE

## SAY HER NAME

RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN

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# SAY HER NAME

## RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN

The August 9th police killing of 18-year-old Michael Brown sparked a smoldering nationwide movement against police violence, and, more broadly, against anti-Black racism. As Mike Brown, Eric Garner, and Tamir Rice have become household names and faces, their stories have become an impetus for public policy debates on the future of policing in America.

However, 2014 also marked the unjust police killings of a number of Black women,<sup>1</sup> including Gabriella Nevarez, Aura Rosser, Michelle Cusseau, and Tanisha Anderson. The body count of Black women killed by the police continued to rise in 2015 with the killings of Alexia Christian, Meagan Hockaday, Mya Hall, Janisha Fonville, and Natasha McKenna.

The lack of meaningful accountability for the deaths of unarmed Black men also extended to deaths of unarmed Black women and girls in 2015. Just as the officers who killed Mike Brown and Eric Garner escaped punishment for these homicides, officers who killed Black women and girls were not held accountable for their actions. Joseph Weekley, who killed a sleeping, seven-year-old Aiyana Stanley-Jones, escaped prosecution after a jury failed to convict him in his second trial. Dante Servin, an off-duty officer who shot Rekia Boyd in the back of the head, was cleared by a judge of all charges. Other officers faced no charges whatsoever, such as those who killed Mya Hall, a Black transgender woman.

None of these killings of Black women, nor the lack of accountability for them, have been widely elevated as exemplars of the systemic police brutality that is currently the focal point of mass protest and policy reform efforts. The failure to highlight and demand accountability for the countless Black women killed by police over the past two decades, including Eleanor Bumpurs, Tyisha Miller, LaTanya Haggerty, Margaret Mitchell, Kayla Moore, and Tarika Wilson, to name just a few among scores, leaves Black women unnamed and thus underprotected in the face of their continued vulnerability to racialized police violence.

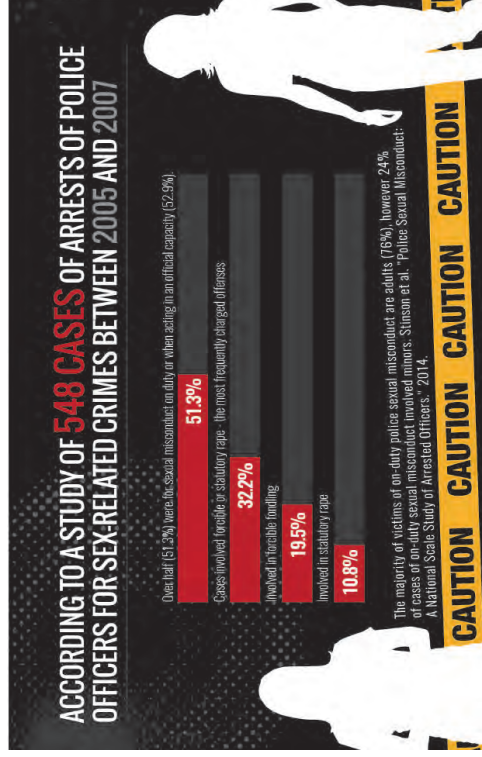
The resurgent racial justice movement in the United States has developed a clear frame to understand the police killings of Black men and boys, theorizing the ways in which they are systematically criminalized and feared across disparate class backgrounds and irrespective of circumstance. Yet Black women who are profiled, beaten, sexually assaulted, and killed by law enforcement officials are conspicuously absent from this frame even when their experiences are identical. When their experiences with police violence are distinct—uniquely informed by race, gender, gender identity, and sexual orientation—Black women remain invisible.

Say Her Name sheds light on Black women's experiences of police violence in an effort to support a gender inclusive approach to racial justice that centers all Black lives equally.

Despite their marginalization in contemporary efforts to challenge anti-Black racism and police brutality, Black women and girls continue to lose their lives to racially motivated violence. The nation has been left reeling in the wake of the June 17th shooting in which a white gunman murdered nine Black parishioners at a historically Black church in Charleston in an explicit act of racial terror. Six of the nine people killed were women—the oldest, Susie Jackson, was an 87-year-old grandmother—demonstrating clearly that Black women also face the lethal risk of white supremacist violence.<sup>2</sup>

Black women and girls' vulnerability to state violence has likewise been exposed in shocking footage that has surfaced in recent months. Viewers were stunned to see Marlene Pinnock pummeled in the face by a California Highway Patrol Officer and Keyarika Diggles beaten in a Texas police precinct. And on June 6, 2015, as this report was being updated for printing, a video emerged showing a police officer in McKinney, Texas pulling out his gun, pinning down Dejerria Bection, an unarmed Black teenage girl at a pool party, as she sobbed and asked for her mother.<sup>3</sup> In the context of the constantly evolving conversation around anti-Black police violence unfolding in this country, these images of police abuse demonstrate concretely that Black women and girls are, like Black men and boys, subject to police abuse that runs the gamut from profiling to excessive force to murder.

Say Her Name sheds light on Black women's experiences of police violence in an effort to support a gender-inclusive approach to racial justice that centers all Black lives equally. It is our hope that this document will serve as a tool for the resurgent racial justice movement to mobilize around the stories of Black women who have lost their lives to police violence.





## BACKGROUND AND PURPOSE

**BUILDING ON THE WORK OF SCHOLARS AND ACTIVISTS WHO HAVE, OVER THE PAST TWO DECADES, CALLED FOR INCREASED ATTENTION TO BLACK WOMEN'S EXPERIENCES OF POLICING,<sup>4</sup> SAY HER NAME OFFERS A NUMBER OF STORIES THAT REVEAL THE WAYS GENDER, RACE, AND SEXUALITY CAN OPERATE TOGETHER TO INFORM POLICE ABUSE OF BLACK WOMEN.<sup>5</sup>**

Our goal is not to offer a comprehensive catalog of police violence against Black women—indeed, it would be impossible to do so as there is currently no accurate data collection on police killings nationwide, no readily available database compiling a complete list of Black women's lives lost at the hands of police, and no data collection on sexual or other forms of gender- and sexuality-based police violence. Moreover, the media's exclusive focus on police violence against Black men makes finding information about Black women of all gender identities and sexualities much more difficult. Given these limitations, our goal is simply to illustrate the reality that Black women are killed and violated by police with alarming regularity. Equally important, our hope is to call attention to the ways in which this reality is erased from our demonstrations, our discourse, and our demands to broaden our vision of social justice.

As a result of the paucity of data, the stories of police violence included in this document are essentially either gathered through online research or cases that have come to the attention of the report's authors. Many cases have never seen the light of day, and even those that have surfaced momentarily have received little sustained national or local attention. Significantly more women who have been killed by the police are missing from these pages, but their lives are certainly no less valuable.

The erasure of Black women is not purely a matter of missing facts. Even where women and girls are present in the data, narratives framing police profiling and lethal force as exclusively male experiences lead researchers, the media, and advocates to exclude them. For example, although racial profiling data are rarely, if ever, disaggregated by gender and race, when race and gender are considered together, researchers find that "for both men and women there is an identical pattern of stops by race/ethnicity"<sup>6</sup> in New York City—one of the jurisdictions with the most extensive data collection on police stops—the rate of racial disparities in stops, frisks, and arrests are identical for Black men and Black women.<sup>7</sup> However, the media, researchers, and advocates tend to focus only on how profiling impacts Black men.



Similarly, a 2012 Malcolm X Grassroots Movement (MXGM) report, *Operation Ghetto Storm*, revealed that police, security guards, and vigilantes killed 313 Black people that year, which represents a Black person being killed every 28 hours.<sup>9</sup> The cases cited in *Operation Ghetto Storm* explicitly include Black people of all genders, but the report is often cited to support the premise that a Black man is killed every 28 hours, thereby erasing the killings of Black women.<sup>9</sup>

Our hope is that this document will honor the intention of the #BlackLivesMatter movement to lift up the intrinsic value of all Black lives by serving as a resource to answer the increasingly persistent call for attention to Black women killed by police.<sup>10</sup> This document offers preliminary information about police killings of Black women that have not galvanized national attention or driven our discourse.

The information presented here is organized around two themes. First, we seek to highlight the fact that many killings of Black women could be understood within the existing frames surrounding racial profiling and the use of lethal force. The solution to their absence is not complex; Black women can be lifted up across the movement through a collective commitment to recognize what is right in front of us. Second, we present cases that highlight the forms of police violence against Black women that are invisible within the current focus on police killings and excessive force. The challenge here is to expand the existing frames so that this violence too is legible to activists, policy makers and the media.

Addressing Black women's experience of police violence requires a broadening of the public conversation, informed by robust research, analysis, and advocacy. Toward this end, we will offer a more detailed analysis of Black women's experiences of policing in a forthcoming research report. In the meantime, we hope that this document will be used by the media and policymakers, advocates and organizers, to begin to break the silence around Black women's experiences of police violence. But the first step in breaking this silence is within reach now. We need only answer the simple call to #SayHerName.



## WHY WE MUST SAY HER NAME: THE URGENT NEED FOR A GENDER INCLUSIVE MOVEMENT TO END STATE VIOLENCE

### THERE ARE SEVERAL REASONS WHY THE RESURGENT RACIAL JUSTICE MOVEMENT MUST PRIORITIZE THE DEVELOPMENT OF A GENDER INCLUSIVE LENS.

First, including Black women and girls in the narrative broadens the scope of the debate, enhancing our overall understanding of the structural relationship between Black communities and law enforcement agencies. In order to comprehend the root causes and full scope of state violence against Black communities, we must consider and illuminate all the ways in which Black people in the US are routinely targeted for state violence. Acknowledging and analyzing the connections between anti-Black violence against Black men, women, transgender, and gender-nonconforming people reveals systemic realities that go unnoticed when the focus is limited exclusively to cases involving Black non-transgender men.<sup>12</sup>

Second, both the incidents and consequences of state violence against Black women are often informed by their roles as primary caretakers of people of all ages in their communities. As a result, violence against them has ripple effects throughout families and neighborhoods. Black women are positioned at the center of the domestic sphere and of community life. Yet their marginal position with respect to economic and social power relations creates the isolating and vulnerable context in which their struggle against police violence, mass incarceration, and economic marginalization occurs. In order to ensure safe and healthy Black communities, we must address police violence against Black women with equal outrage and commitment.

Third, centering the lives of all segments of our communities will permit us to step away from the idea that to address police violence we must "fix" individual Black men and bad police officers. Moving beyond these narrow concepts is critical if we are to embrace a framework that focuses on the complex structural dimensions that are actually at play. Through inclusion it becomes clear that the problem is not a matter of whether a young man's hands were held up over his head, whether he had a mentor, or whether the police officers in question were wearing cameras or had been exposed to implicit bias trainings. A comprehensive approach reveals that the epidemic of police violence across the country is about how police relations reinforce the structural marginality of all members of Black communities in myriad ways.

Fourth, including Black women and girls in this discourse sends the powerful message that, indeed, all Black lives do matter. If our collective outrage is meant to warn the state that its agents cannot kill Black men and boys with impunity, then our silence around the killing of Black women and girls sends the message that their deaths are acceptable and do not merit repercussions.

Our failure to rally around Black women's stories represents a broader failure to demand accountability for all Black lives targeted by the state. Families who lose Black women to police violence are not regularly invited to speak at rallies and do not receive the same level of community support or media and political attention as families who lose Black men. This leaves the families of Black women killed by the police to suffer not only the loss of their loved ones but also to confront the fact that no one seems to care. Yet the killings of Black women and girls are no less troubling than the killings of their male counterparts. Their families mourn no less for their lost loved ones, and they should not be left to suffer in solitude and silence.

Black women have consistently played a leadership role in struggles against state violence—from the Underground Railroad to the anti-lynching movement to the Civil Rights and Black Power movements to the current Black Lives Matter movement—yet the forms of victimization they face at the hands of police are consistently left out of social movement demands. Black women leaders are often asked to speak only about their fears of losing their sons, brothers, partners, and comrades. Yet as the tragedies that have befallen many Black women who have died at the hands of the police reveal, Black women and girls also face real risks of lethal police violence, which must be contested along with those facing Black men and boys.



## RE-FRAMING STATE VIOLENCE: PATTERNS OF POLICE KILLINGS AGAINST BLACK WOMEN

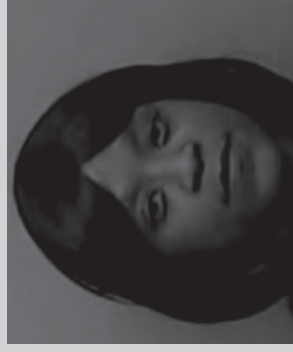
What follows are several brief frames that highlight Black women's experiences within commonly understood narratives of racial profiling and police violence, and illuminate Black women's unique experiences of police violence in gender- and sexuality-specific contexts and forms. Each is illustrated by several cases intended to demonstrate how race, gender, gender identity, sexual orientation, and class can work in conjunction with racial stereotypes to inform violent responses to Black women from law enforcement officials. While in many cases Black women killed by police were alleged to be armed or dangerous, witness accounts often dispute officers' versions of the facts, and suggest that less lethal force could have been employed—particularly in cases where Black women were experiencing mental health crises, or in the context of responses to domestic disputes. Yet perceptions of Black women as menacing and their bodies as “superhuman”—and, therefore, not susceptible to pain or shame—inform police interactions with them in much the same way as they do those with Black men. These fears are often perceived to be reasonable no matter how vulnerable or in need of assistance these women might be. That so many of these cases have been justified by official government representatives reflects unique forms of discrimination faced by women who are Black. All too often problematic perceptions are further amplified and reinforced when the Black woman in question is poor, transgender, gender-nonconforming, or alleged to be engaged in criminalized activity.

# DRIVING WHILE BLACK

All Black people experience racial profiling while driving. Black women as well as men are commonly stopped as minor traffic violations serve as a pretext for criminal investigations. In the worst-case scenarios, the perception or reality of more serious traffic violations—speeding, failing to pull over, or driving a stolen car—can turn deadly when race-based perceptions of Black drivers as inherently dangerous lead the police to use unwarranted lethal force. Victims of such deadly encounters are typically imagined to be men, but Black women also pay the ultimate penalty for driving offenses committed while Black.

## Alexia Christian

April 30, 2015 / Atlanta, Georgia



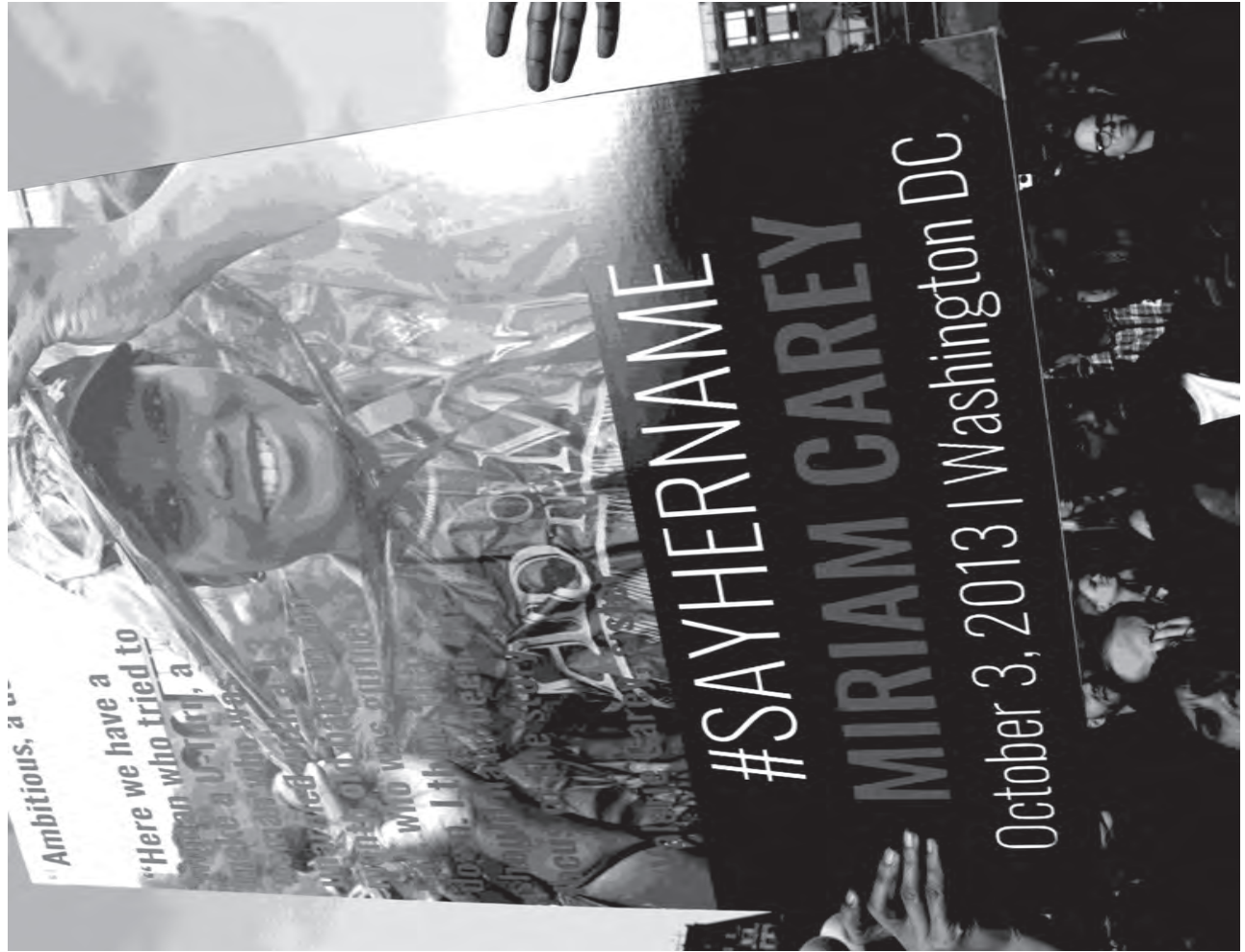
The details of this case are still emerging. However, what is known is that police officers in Atlanta were investigating a stolen vehicle call and found 26-year-old Alexia Christian inside the vehicle. The officers arrested Christian and placed her in the back seat of their patrol car. At some point they fatally shot her in the car. They claim that she escaped from her handcuffs and shot at the officers with a stolen gun. The officers report that they failed to fully search her while putting her in the car.<sup>13</sup>

## Mya Hall

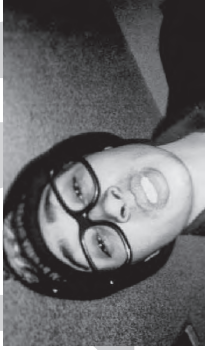
March 30, 2015 / Baltimore, Maryland



Mya Hall was a Black transgender woman killed by National Security Agency (NSA) police just weeks before Freddie Gray's case garnered national headlines. Alleged to be driving a stolen car, she took a wrong turn onto NSA property and was shot to death by officers after the car crashed into the security gate and a police cruiser. No effort to use non-lethal force was made even though there was no threat to the facility, and no one in the vehicle was armed. Friends remembered Hall as a kind and caring woman struggling to make ends meet in the face of entrenched structural discrimination against Black transgender women.<sup>14</sup>



**Gabriella Nevarez**  
March 2, 2014 / Sacramento, California



Police killed 22-year-old Gabriella Nevarez after her grandmother called the police because Nevarez had taken her car after an argument. Officers at the scene claimed that after they tried to apprehend her, she led them on a high-speed chase and attempted to ram her car into their vehicle. The officers claimed they opened fire in self-defense, but passengers reported that Nevarez lost control of the car and crashed after she was shot. Since her death many have questioned why the police failed to use nonlethal force to subdue her.<sup>15</sup>

**Miriam Carey**  
October 3, 2013 / Washington D.C.



Federal agents killed Miriam Carey, a 34-year-old dental hygienist and suburban mother, after she allegedly sped away from a White House checkpoint. Secret Service officers claimed that they approached her and told her to stop at the checkpoint site and that she refused to do so. Valarie Carey, Miriam's sister, and her attorney, Eric Sanders, claim that the official report of the incident shows that the altercation actually started when an undercover agent moved a large object into Carey's path, and she swerved to avoid him, hitting a barricade instead. They say that Carey likely tried to drive off from the scene out of fear, and became increasingly frantic as officers chased and shot at her from behind.<sup>16</sup> Officers fired several shots as they pursued her, and they continued to fire even after her car had stopped. She was hit in the back of her head, three times in the back and once on her left arm. Her one-year-old baby

was in the car with her. Carey's lawyer claims that the narrative presented by the police is false, and that the media's failure to interrogate official accounts of the incident helped to justify her senseless killing. No charges have been filed against the officers.<sup>17</sup>

**Shantel Davis**  
June 14, 2012 / Brooklyn, New York



Phillip Atkins, a plainclothes detective, fatally shot Shantel Davis, an unarmed 23-year-old woman, in East Flatbush, Brooklyn. Police say they noticed her driving erratically and followed her. The car chase came to a halt when she collided with a minivan. Atkins then fatally shot Davis in the chest. Atkins later claimed that he had accidentally fired his gun as he struggled with her to shift the car into "park." Witnesses contradicted his statements. Davis was pronounced dead at the hospital following the incident.<sup>18</sup>

**Malissa Williams**  
November 29, 2012 / Cleveland, Ohio



30-year-old Malissa Williams was a passenger in the front seat of Timothy Russell's car when he refused to pull over for police after Russell's car backfired, and the officers mistook the sound for a gunshot. The police followed Russell's car in a high-speed chase across Cleveland, which ended with police opening fire on the car. Williams and Russell were killed when Officer Michael Brelo climbed up onto the hood of the car and fired several rounds at them. Neither Russell nor Williams were armed. Brelo's use of deadly force has been

widely criticized by civil rights groups.<sup>19</sup> Michael Brelo was charged with manslaughter but was acquitted on May 23, 2015 when the judge ruled that he “acted reasonably” in climbing onto the hood of the car because it was “Brelo’s perception of a threat that matters.”<sup>20</sup>

### Sharmel Edwards

April 21, 2012 / Las Vegas, Nevada  
Police followed Sharmel Edwards on the suspicion that she was driving a stolen car. They claimed that when she finally stopped driving and exited the car, she pointed a gun at them, and they opened fire in self-defense.<sup>21</sup> At least three witnesses disputed the account that she pointed a gun at the officers, and two claimed that Edwards had no weapon.<sup>22</sup> The Clark County District Attorney’s Office disregarded this eyewitness testimony and ruled that the officers who had killed Edwards had acted reasonably and lawfully.<sup>23</sup>

### Kendra James

May 5, 2003 / Portland, Oregon



Three police officers stopped the car Kendra James was riding in and removed the driver after they found he had an outstanding warrant. After her friend was arrested, James moved up to the driver’s seat. Although James was not under arrest herself, Officer Scott McCollister began struggling with James to remove her from the vehicle. He later claimed that he tried to use nonlethal methods to subdue James, including pepper spray, but that these methods had failed to work. At some point McCollister held a gun to James’ head and fired a single, fatal shot. Subsequently, he claimed he shot James in self-defense because the vehicle was moving while his body was partially inside the car. He was cleared of all charges related to her death by a federal grand jury but found liable in the civil case James’ family filed against him.<sup>24</sup>

### LaTanya Haggerty

June 4, 1999 / Chicago, Illinois



LaTanya Haggerty was shot by Chicago Police Officer Serena Daniels after the car in which she was a passenger failed to stop when police asked the driver to pull over. The officer claimed she thought Haggerty pulled a gun, but no weapon was found at the scene. The young computer analyst was speaking on her cell phone at the time she was gunned down. Three of the officers were fired, one was suspended, and the family was awarded \$18 million in a settlement by the City of Chicago.<sup>25</sup>

### Sandra Bland

July 13, 2015 / Waller County, Texas



On July 10, 28-year-old Sandra Bland was pulled over for failing to signal a lane change, and, as a video of her arrest shows, was pinned to the ground and surrounded by police officers. Bland was heard questioning the officers about why they had slammed her head to the ground, and complaining that should could not hear. Officers charged her with assault and held her in the Waller County Jail. Bland was found dead in her cell three days later. Bland had recently driven from suburban Chicago to Texas to begin a new job at her alma mater, Texas Prairie View A & M. Officials maintain that her death was a suicide, but Bland’s friends and family members adamantly reject this explanation and suspect foul play.<sup>26</sup>

# POLICING POVERTY: POLICE BRUTALITY AT THE INTERSECTIONS OF GENDER, RACE AND CLASS

Black women’s encounters with police often take place against a backdrop of disproportionate poverty. Overall, Black women are poorer than Black men and white women, and many confront desperate conditions while attempting to keep themselves and their families afloat. Black women continue to face grave socioeconomic disparities even in the face of the economic recovery that others in America have enjoyed. They are the only group whose unemployment rate failed to decrease in 2014.<sup>27</sup> Many Black women who are abused and killed by police are among the low-income and homeless people increasingly targeted by the policing of poverty and “broken windows”<sup>28</sup> policing practices. The criminalization of poor people, when coupled with negative stereotypes about Black women, may result not only in police harassment but also in police killings.

### Shelly Frey

December 6, 2012 / Houston, Texas



Louis Campbell, an off-duty sheriff and Houston area minister, shot and killed Shelly Frey in an attempt to apprehend her friend whom

he suspected to be shoplifting from a Walmart store. After Campbell failed to stop the group from leaving the store, Frey and her friend got into a car and attempted to drive away. Campbell fired shots into the car, hitting Frey twice in the neck.<sup>29</sup> He later claimed that he fired shots in self-defense because the driver had attempted to run him over. Sharon Wilkerson, Frey’s mother, explained that after her daughter was shot, neither the driver nor the police sought medical attention for Frey. Her body was left in the car for eight hours.<sup>30</sup>



## CASUALTIES OF THE WAR ON DRUGS: BLACK WOMEN AS DRUG “MULES”

Some are familiar with the impact of the war on drugs on Black women through stories such as those of Kemba Smith and Dorothy Gaines—women who were given long prison sentences under mandatory minimum guidelines despite their peripheral involvement in the drug trade.<sup>37</sup> Yet there has been relatively little attention to the law enforcement interactions that drive these phenomena—interactions informed by perceptions of Black women’s bodies as vessels for drugs ingested, swallowed, or concealed—or of their homes as drug factories or dens of danger and violence. These perceptions have fueled interactions that have taken the lives of Black girls as young as 7 and Black women as old as 92.

### Kathryn Johnston

November 21, 2006 / Atlanta, Georgia



Undercover police shot and killed 92-year-old Kathryn Johnston in her home during a botched drug raid. When officers arrived unannounced at her home and attempted to enter Johnston fired a shot in self-defense. It went through the screen door but it hit no one. In response, the police opened fire and released 39 bullets, several of which hit Johnston. Afterward, the three Atlanta police officers tried to cover up the fact that the incident was based on an inaccurate report of drug activity in Johnston’s home. One officer planted marijuana in Johnston’s house and cocaine in the evidence file. All three officers were sentenced to prison terms ranging from 5 to 10 years for conspiracy to violate civil rights resulting in death. Two of the officers were further charged with voluntary manslaughter and making false statements. The city of Atlanta paid a \$4.8 million settlement to Johnston’s family.<sup>38</sup>

### Alberta Spruill

May 16, 2003 / Harlem, New York

Fifty-seven-year-old Alberta Spruill, described by her niece Cynthia Howell as a devout, long-

time city worker, died of a heart attack after the police broke down her door and threw a concussion grenade into her apartment. The police were acting on misinformation about drugs and guns inside her apartment. Spruill’s family filed a wrongful death lawsuit, which the city ultimately settled for \$1.6 million.<sup>39</sup>

### Danette Daniels

June 8, 1997 / Newark, New Jersey

Danette Daniels, a pregnant Black woman, was arrested for dealing drugs by New Jersey police officers. Daniels was then fatally shot in the neck by a police officer as she sat in the police squad car after an alleged “scuffle.” Witnesses deny that Daniels was involved in any drug transaction at the time of her death.<sup>40</sup>

### Frankie Ann Perkins

March 22, 1997 / Chicago, Illinois

Frankie Ann Perkins, the mother of three daughters, aged 4, 6, and 16, was walking home one evening when the police stopped her. They claimed they observed her swallowing drugs and tried to get her to spit the drugs out. Witnesses state that the officers strangled her to death, a claim consistent with the medical examiner’s findings and autopsy photos that showed bruises on her face and rib cage, and eyes that were swollen shut. No drugs were ever found. Perkins’ mother reported that police subsequently harassed young men in the neighborhood to prevent them from speaking out about her case. The police Office of Professional Standards found “no criminal wrongdoing” by the officers. The City of Chicago settled a lawsuit with the family for \$637,000.<sup>41</sup>

### Eleanor Bumpurs

October 29, 1984 / Bronx, New York



Police arrived at the Bronx home of Eleanor Bumpurs, a 66-year-old grandmother, in response to a city-ordered eviction notice. She was four months behind on her monthly rent of \$98.65. When she refused to open the door for the police, the officers broke into her apartment. In the struggle to subdue her, an officer fatally shot Bumpurs twice with a 12-gauge shotgun. In March 1990, the city of New York, as part of a settlement agreement, agreed to pay \$200,000 to Bumpurs’ estate.<sup>36</sup> Bumpurs was one of the first Black women whose death prompted protests, but her case never served to drive our collective analysis of the causes and contexts of police violence.

### Margaret LaVerne Mitchell

May 21, 1999 / Los Angeles, California



Described by Amnesty International as “a frail, mentally ill homeless African American woman in her 50s,” Margaret LaVerne Mitchell was shot dead by an LAPD police officer on the streets where she lived.<sup>31</sup> Mitchell was well known in the area, and local residents, who affectionately called her “Mom,” described her as sweet and harmless.<sup>32</sup> Based on eyewitness accounts, officers stopped Mitchell as she was pushing a shopping cart down the street.<sup>33</sup> When an eyewitness sought to intervene to protect her from police harassment, Mitchell walked away from the officers, who then shot her in the back.<sup>34</sup> The officers later claimed that Mitchell—who was 54 years old, weighed 102 pounds, and was a diminutive five foot one—lunged at them with a screwdriver, causing them to fear for their lives.<sup>35</sup> The shooting was found to have violated LAPD rules, but the officer who shot Mitchell was acquitted of all criminal charges.

# VIOLENCE INSTEAD OF TREATMENT: POLICE KILLINGS OF BLACK WOMEN IN MENTAL HEALTH CRISIS

In the absence of adequate mental health resources for the vast majority of Black communities, law enforcement officers often serve as the first and only responders to mental health crises experienced by Black women. Police officers, however, are not mental health professionals, and often lack the skills and training necessary to handle these situations. This lack of training, compounded with a take-charge-at-all-costs attitude on the part of some officers, has led to the loss of life of those whom the police were called to serve. In several tragic instances, police officers have perceived Black women who are experiencing mental health crises as dangerous or as individuals who possess "superhuman" strength no matter how vulnerable, fragile, or in distress they might be. Instead of offering the compassionate support these women needed, police criminalized them and responded with deadly force.

## Tanisha Anderson

November 13, 2014 / Cleveland, Ohio



The family of 37-year-old Tanisha Anderson reached out for assistance to calm their daughter during a mental health crisis. Anderson grew increasingly agitated when the police separated her from her family and attempted to place her in the confined space of the police vehicle. During the struggle, a police officer performed a "takedown" move on her, slamming her against the concrete sidewalk. He placed his knee on her back and handcuffed her as she lay face-down on the pavement. The officers refused to allow Anderson's family to comfort her as she lay dying and exposed on the snow-covered street. She was pronounced dead upon arrival at the hospital. The Cuyahoga County medical examiner ruled her death a homicide.<sup>42</sup> Anderson's family has filed a wrongful death lawsuit against the City of Cleveland and two of its police officers. Anderson suffered from bipolar disorder, but her mother, Cassandra Johnson, explained that as long as she was on her medication, "you

wouldn't know anything was wrong with her."<sup>43</sup> Johnson indicated that despite media narratives, Anderson was not violent, and that it was the behavior of the police in isolating her from her family that made her panic.

## Michelle Cusseaux

August 13, 2014 / Phoenix, Arizona



Police shot Michelle Cusseaux to death in her home while they were attempting to take her to a mental health facility. Cusseaux refused to let the police in her home, prompting Officer Percy Dupra to break through the screen door to gain entry. Dupra encountered Cusseaux holding a hammer and shot her in the heart. Dupra claimed that although Cusseaux said nothing to threaten him, "she had that anger in her face like she was going to hit someone with that hammer." Cusseaux's mother, Frances Garrett, wondered, "What did the police officer see when he pried open the door? A Black woman? A lesbian?"<sup>44</sup> Cusseaux's mother further explained





that Cusseau was changing the lock on the door when the police arrived, and that was why she had tools out.<sup>45</sup> Moreover, the police knew when they arrived at her home that Cusseau suffered from mental illness, but they were ill-prepared to manage the situation and ended her life instead of protecting it.<sup>46</sup> In February 2015, Cusseau's mother filed a lawsuit against the City of Phoenix, arguing that the police sergeant either ignored Michelle's condition, or was inadequately trained to respond to it.

### Pearlie Golden

May 7, 2014 / Hearne, Texas



Police officer Stephen Stem fatally shot Pearlie Golden, a 93-year-old woman, after her nephew called to report that she was waving a gun. Her nephew said that Golden was upset because he had taken her car keys after she failed a driving test. When Stem saw the elderly woman waving the gun around, he fired 4-5 rounds at her, hitting her at least twice. Four days later, he was fired from the police department. A grand jury failed to indict him for Golden's killing.<sup>47</sup>

### Kayla Moore

February 12, 2013 / Berkeley, California



Kayla Moore, a Black transgender woman, was killed by Berkeley police who came to her home in response to a call for help from her roommate because Kayla was experiencing a mental health crisis. Instead of escorting Kayla to a medical facility as requested, the officers attempted to arrest her on a warrant for a man 20 years her senior, who had the same name Kayla was given at birth. Several officers overpowered Kayla in her own bedroom, suffocating her to death in the process. Afterward, officers delayed monitoring her vital signs, referred to her using transgender slurs, and failed to administer adequate life-saving treatment. Kayla's body was also exposed during and af-

ter the police assault. Activists in Berkeley have organized to publicize her case, and her family has filed a lawsuit against the Berkeley police officers responsible for her death.<sup>48</sup>

### Shereese Francis

March 15, 2012 / Queens, New York



Shereese Francis' family called for an ambulance after she became emotionally distraught following an argument with her mother. Francis was schizophrenic and at the time was not taking her medication. Four police officers arrived at their home in Queens and tried to convince Francis to go to the hospital, but she refused. The officers reported that she was uncooperative and that she lunged at them. In response, all four officers pinned her down and attempted to handcuff her. Francis stopped breathing during this altercation, and the hospital pronounced her dead shortly afterward. The coroner's report concluded Francis had died due to the "compression of [her] trunk during agitated violent behavior." Her family has filed a wrongful-death lawsuit, and the police department has yet to release its records in response to a Freedom of Information Act request.<sup>49</sup>

### Tyisha Miller

December 28, 1998 / Riverside, California



Three days after Christmas, police officers fatally shot 19-year-old Tyisha Miller after finding her unconscious in a car that had broken down. A gun rested on Tyisha's lap, as she lay unconscious. Friends said the gun was likely displayed for protection because a man had been harassing her when they left to get help. Police arrived and broke a side window of the car, rousing Miller. As she regained consciousness, officers fired 24 shots at her, striking her with 12 bullets. Following the shooting the officers were placed on administrative leave, but no one was charged with the shooting.<sup>50</sup>

## DEATH IN CUSTODY: BLACK WOMEN AS "SUPERHUMAN" AND INCAPABLE OF FEELING PAIN

A 2014 study in *Social Psychological and Personality Science* found that white people were more likely to "implicitly and explicitly superhumanize" Black people.<sup>51</sup> In the context of law enforcement interactions, this "superhuman" trope can lead Black women to be treated punitively, denied help, and left to suffer in unbearable circumstances while in police custody. This cruelty that would be difficult to imagine were a middle-class white woman involved is no doubt informed by narratives that frame Black women as somehow "superhuman" and, therefore, incapable of feeling pain in the same ways as their white counterparts.<sup>52</sup>

### Natasha McKenna

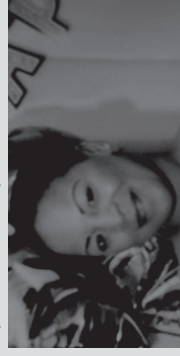
February 8, 2015 / Fairfax County, Virginia



37-year-old Natasha McKenna died in the hospital several days after she was Tased by officers in the Fairfax County Jail. McKenna, who weighed 130 pounds, was already restrained with handcuffs behind her back, leg shackles, and a hood when a sheriff's deputy shocked her four times. She suffered from mental illness and officers used a Taser on her even though its use is not recommended on people in mental health crisis. Officers claimed she was being uncooperative, which led them to restrain and then Tase her. Within minutes of being Tased McKenna stopped breathing. When her mother visited her in the hospital her body was covered in bruises, both of her eyes were blackened, and one of her fingers was missing. She died a few days later.<sup>53</sup>

### Kyam Livingston

July 24, 2013 / Brooklyn, New York

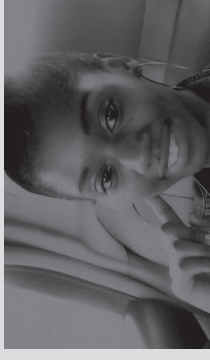


NYPD officers left Kyam Livingston in a holding cell after they arrested her for fighting with her grandmother. While in custody, Livingston

complained of cramps and diarrhea, but officers ignored her pleas for help, and those of people held in the cell with her for hours. After Livingston spent 20 hours in the cell, police finally called for medical assistance when they claimed to notice that she was suffering from "apparent seizures." She was pronounced dead upon arrival at the hospital. A medical examiner found that the cause of death was an alcohol-induced seizure. She was 37 years old and a mother of two.<sup>54</sup> In 2013, Livingston's family filed a wrongful death lawsuit in Brooklyn Federal Court.

### Sheneque Proctor

November 1, 2014 / Bessemer, Alabama



Eighteen-year-old Sheneque Proctor was arrested for disorderly conduct, and was taken to the Bessemer City Jail. When Proctor—who suffered from asthma—called her mother from the jail she indicated that the police had treated her roughly. She had informed the police that she was ill, but they had ignored her requests for medical attention. She was found dead in her cell the next morning. Her cell was videotaped during this entire period, but the police department has refused to release the footage to her family. The family's lawyer, Hank Sherrard, told *The Guardian* "this young woman was denied medical treatment while being recorded on videotape right before police eyes. The fact that they won't hand the film over makes us wonder what they have to hide."<sup>55</sup> Proctor was the mother of an infant boy.



# GUILT BY ASSOCIATION: BLACK WOMEN AS “COLLATERAL DAMAGE”

In the age of mass incarceration and the “war on drugs,” Black women are often killed even when they are not the main targets of police. The notion of collateral damage, which frames virtually all police violence against Black women as the product of simply being next to the “real target”—Black men—is by no means the only or even primary way in which Black women experience state-sanctioned violence. Nevertheless, the vulnerability of Black women and girls to being killed alongside Black men no matter what they were doing at the time is a damning indicator of the impacts of the distribution of deadly police force in Black communities.

## Rekia Boyd

March 21, 2012 / Chicago, Illinois



Off-duty Chicago police detective Dante Servin fatally shot 22-year-old Rekia Boyd as she was standing in an alley with friends. When Servin told them to quiet down words were exchanged with one of Boyd’s friends, and Servin, seated in his car, then fired five rounds from his gun into the group, whose backs were turned to him at the time, hitting Boyd in the back of the head. A friend who rushed to hold and comfort the bleeding young woman was threatened with arrest and forced to step away from the mortally wounded Boyd as she lay in the street. Boyd was removed from life support two days later. Servin continued to work for the Chicago Police Department until he was officially charged with involuntary manslaughter and the reckless discharge of a firearm.<sup>56</sup> His trial was held in April 2015, and the judge issued a directed verdict effectively clearing Servin of all charges. The legal reasoning for the judge’s decision – that Servin’s actions were intentional rather than reckless, and, therefore, he could not be convicted of involuntary manslaughter – has been critiqued by legal scholars on all sides of the bar. In 2013, the City of Chicago awarded Boyd’s family a \$4.5 million wrongful death settlement.<sup>57</sup>

## Aiyana Stanley-Jones

May 16, 2010 / Detroit, Michigan



Detroit police officer Joseph Weekley shot and killed seven-year-old Aiyana Stanley-Jones in her sleep during a raid on her grandmother’s home. Weekley claimed that he pulled the trigger accidentally during a struggle with the girl’s grandmother, Merrilla Jones. Jones claimed that she was reaching out to protect her granddaughter and another officer testified that there was no struggle over the weapon.<sup>58</sup> Weekley was tried twice and cleared of all charges, most recently in January 2015. He returned to work in April 2015.<sup>59</sup>

## Tarika Wilson



January 4, 2008 / Lima, Ohio  
Police conducted a SWAT Team raid of 26-year-old Tarika Wilson’s home in search of Wilson’s boyfriend—a suspected drug dealer. Moments after entering her home a police officer opened fire on Wilson and her 14-month-old son, killing her and wounding her baby. Wilson was not involved in the illicit drug trade. Sergeant Joe Chavalia, who killed Wilson, was acquitted of two misdemeanors: negligent homicide and negligent assault. Wilson’s family received a \$2.5 million wrongful death settlement.<sup>60</sup>



## EXPANDING THE FRAME: GENDER SPECIFIC FORMS AND CONTEXTS OF POLICE VIOLENCE

As the frames and cases described above demonstrate, Black women are killed by police in ways and situations that are very similar to those in which Black men are killed. Yet Black women are also killed in gender-specific contexts—such as responses to domestic disturbances. Black women are also less likely to be protected by police when they are being murdered, beaten, and/or abused by their partners and community members. A fuller exploration of the nonresponse to violence against Black women is beyond the scope of this report, but it is clear that police involvement in the death of Black women involves not only action but also inaction.

Expanding the analysis of police violence beyond lethal and excessive force to include sexual harassment and assault, policing of gender and sexuality, and profiling and targeted enforcement in the context of prostitution-related offenses brings the breadth of Black women's interactions with law enforcement into sharper focus. In order to conceptualize and act on Black women's experiences of policing and achieve accountability for all forms of state violence, our attention must turn to police violence that takes gender-specific forms or occurs in gender-specific contexts.

## POLICE KILLINGS IN THE CONTEXT OF RESPONSES TO VIOLENCE

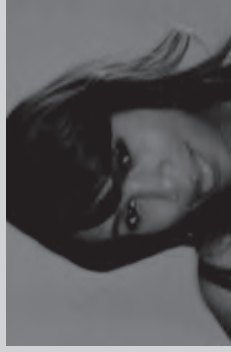
Black women are disproportionately at risk for domestic violence, sexual abuse, and death at the hands of family members, partners, and people they know. A 2014 *Time* magazine article revealed that they are almost three times more likely to experience death as a result of domestic violence than are white women. While they comprise only 7 percent of the population, they make up 22 percent of domestic violence homicides.<sup>61</sup> In fact, a leading cause of death of African American women ages 15-34 is homicide at the hands of a current or former intimate partner.<sup>62</sup>

Even when Black women do turn to the police for support, they often fail to secure safety from their abusive partners. More disturbingly, an alarming number of police killings of Black women take place in the context of police responses to domestic violence situations.<sup>63</sup> Similarly, Black women's experiences of sexual or homophobic and transphobic violence—leading to the death of at least 10 transgender women nationally in the first few months 2015 alone and a total of at least 12 deaths in 2014—have failed to result in protection or prevention.<sup>64</sup>

The reflexive criminalization of Black women seems at times to heighten the perception that they are threatening, foreclosing the possibility in police officers' minds that they are simply survivors of violence. Black women survivors of violence—and particularly poor, lesbian, gender-nonconforming, and transgender Black women—find that police responses to violence all too often result in further, and sometimes deadly, violence against them.

### Meagan Hockaday

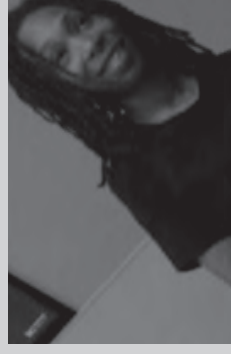
March 28, 2015 / Oxnard, California



A police officer fatally shot 26-year-old mother Meagan Hockaday when responding to a domestic dispute. Within 20 seconds of entering her home, the officer fatally shot Hockaday, who he claimed was advancing toward him with a knife drawn. Hockaday had three young children who were all in the house when the incident occurred. The official investigation into this case is ongoing.<sup>65</sup>

### Janisha Fonville

February 18, 2015 / Charlotte, North Carolina



Janisha Fonville was a Black woman who was shot to death by a Charlotte police officer who was responding to a domestic violence complaint involving Fonville and her girlfriend. The officer, who had previously been involved in questionable shootings, claimed that Fonville lunged at him with a knife.<sup>66</sup> Her girlfriend, the only other person on the scene, maintains that Fonville was over six feet away from officers, and stood a mere five feet tall, posing no direct

# POLICE KILLINGS IN GAY BARRIAGES

threat to the officer who shot her. Neighbors questioned why officers could not have used nonlethal force to subdue her.<sup>67</sup>

**Aura Rosser**  
November 9, 2014 / Ann Arbor, Michigan



When Aura Rosser's boyfriend called the police to his apartment over a domestic dispute, Rosser was fatally shot upon their arrival. Police later claimed she had attacked them with a knife, compelling them to use deadly force. Her boyfriend contradicted them, telling reporters, "It doesn't make any sense ... me and her, we had an argument. Glass was being broke, so I called the police to escort her out ... the police said 'police,' so I stopped. She walked towards them. They said 'freeze' and the next thing I know I heard [gunshots]." One officer shot Rosser while the other attempted to use a taser to subdue her. Rosser suffered from addiction and mental health issues, but her sister disputes that she was a threat to the police.

"She would have fainted at the sight of the gun being drawn on her. She would have been extremely docile, no aggression whatsoever towards police." The officer who shot Rosser was not charged with her death, but her family is moving forward with a civil suit.<sup>68</sup>

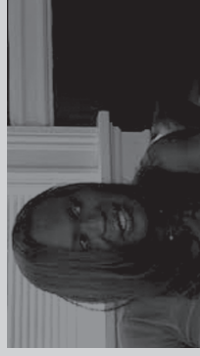
**Yvette Smith**  
February 16, 2014 / Bastrop County, Texas  
Police officers arrived at 47-year-old Yvette Smith's home in response to a domestic dis-



turbance complaint between two men in the household. Smith, a single mother of two, opened the door for the officers and was shot almost immediately in the head and the stomach. The officers first alleged that Smith had a gun, but that claim was retracted the next day. Deputy Daniel Willis, who fatally shot Smith, has been indicted for murder.<sup>69</sup>



**Duanna Johnson**  
February 12, 2008 / Memphis, Tennessee



Duanna Johnson was a Black woman living in Memphis who had been turned away from jobs, drug treatment, and every shelter in the city because she was transgen-

## GENDER AND SEXUALITY POLICING

Along with cisgender and heterosexual Black women, lesbian, bisexual, transgender, and gender-nonconforming Black women have been largely absent from the discourse around racist state violence. The overlap of sexism, racism, homophobia, and transphobia place Black, LGBTQ and gender-nonconforming people in a precarious position at the intersection of constructs around gender, race, and sexuality, fueling police violence against them.<sup>70</sup>

For instance, police often punish actual or perceived sexual or gender nonconformity with physical and sexual violence. These acts are sometimes accompanied by homophobic, transphobic, and/or misogynist slurs like "dyke ass bitch," or assertions that if they want to "act like a man" they will be "treated like a man," or threats to "rape them straight."<sup>71</sup> In one particularly egregious case, a Black lesbian in Atlanta reported being raped by a police officer who told her that the world needed "one less dyke."<sup>72</sup> Profiling of Black transgender women, along with Black non-transgender women for prostitution-related offenses is rampant, sometimes based on the mere presence or possession of a condom.<sup>73</sup> Black transgender women and gender-nonconforming women are also routinely subjected to transphobic verbal harassment and abuse, unlawful and degrading searches to assign gender based on anatomical features, and dangerous placement in police custody. According to the National Transgender Discrimination Survey, 38 percent of Black transgender people who had interactions with police reported harassment, 14 percent reported physical assault, and 6 percent reported sexual assault.<sup>74</sup>

der. Johnson was profiled and arrested for prostitution as she walked down the street one night, even though there was no alleged client and no documented exchange of money for sex. Booking Officer Bridges McRae called her "faggot" and "he-she". When she refused to answer to the slurs, McRae put on gloves, wrapped a pair of handcuffs around his knuckles and savagely beat her about the face and head while Officer James Swain held her down. McRae then pepper-sprayed her, pushed her to the floor and handcuffed her. Security video captured the entire incident.<sup>75</sup> McRae was federally prosecuted, pled to a single count of violating Johnson's civil rights after a mistrial, and sentenced to two years in prison for both Johnson's beating and tax evasion.<sup>76</sup> Johnson was later found dead, shot execution style, the third Black transgender woman to be killed in Memphis in two years.<sup>77</sup> Her killing remains unsolved.<sup>78</sup>

# GENDER AND RACE

## Nizah Morris

December 24, 2002 / Philadelphia, Pennsylvania



Nizah Morris, a Black transgender woman, was found injured and unconscious a few minutes after three Philadelphia police officers gave her a ride home. One of the officers, Thomas Berry, returned to the scene where she was reported to be bleeding and unconscious. Instead of helping her or reporting that a crime had taken place, he covered "her face while she was still alive."<sup>79</sup> She was left at the scene of the crime for 40 minutes, before finally being taken to a hospital where she died two days later of a severe head injury. The police claimed they had no idea what happened. Their disclaimer remains highly suspect given that Morris had been beaten with the butt of a gun, and the officers were the last ones to see her prior to the incident. Her death remains unsolved.

## New Jersey 7

August 18, 2006 / New York, New York



The New Jersey 7 are a group of 7 Black lesbian and gender-nonconforming women who were physically assaulted and threatened with rape by a man because they were lesbians, only to be arrested and charged by responding police officers with "gang assault," when they defended themselves—an outcome which would be unimaginable were they a group of straight, gender-conforming, wealthy white women.<sup>80</sup> Four of the women went to trial in the midst of a media circus characterizing them as a "seething sapphire septet" and "lesbian wolfpack." The man who had ripped a handful of dreadlocks out of one woman's head, burned another with a cigarette, and choked a third claimed to be a victim of a "heterosexual hate crime." They were found guilty and sentenced to up to 11 years in prison until a campaign for justice won an acquittal, new trials, and shorter sentences.



# UNSEEN AND UNSUPPORTED: BLACK WOMEN AS TARGETS OF SEXUAL ASSAULT

An entirely hidden dimension of police violence against Black women is reflected in victim reports of sexual abuse perpetrated by officers. The CATO Institute's 2010 Annual Report on police misconduct found that: "Sexual misconduct was the second most common form of reported police misconduct [after excessive force] reported throughout 2010 with 618 officers involved in sexual misconduct complaints during that period. 354 complaints involved forcible non-consensual sexual activity such as sexual assault or sexual battery."<sup>81</sup> When the existing—though limited—data on police sexual assault are compared to FBI crime statistics, the results indicate that "sexual assault rates are significantly higher for police when compared to the general population."<sup>82</sup>

The uneven power dynamic between an officer and his victim, combined with the officer's possible belief that since he is the law, he is above the law, have been hypothesized as root causes of this type of police abuse.<sup>83</sup> Black women are particularly vulnerable to sexual assault by police due to historically entrenched presumptions of promiscuity and sexual availability. Historically, the American legal system has not protected Black women from sexual assault, thereby creating opportunities for law enforcement officials to sexually abuse them with the knowledge that they are unlikely to suffer any penalties for their actions.

Unfortunately, there is no official data on how often police officers commit these crimes. Existing studies are largely based on media coverage, criminal convictions, and civil cases. The lack of data collection by police departments and civilian oversight bodies is compounded by the underreporting of sexual assaults in general. Victims are even less likely to report the crime if the assailant is a police officer. "The women are terrified," says Penny Harrington, the former police chief of Portland, Oregon. "Who are they going to call? It's the police who are abusing them."<sup>84</sup>

Sexual harassment and assault have been reported to be particularly pervasive during traffic stops and interactions with minors.<sup>85</sup> It is also reported to take place with alarming frequency in the context of responses to requests for assistance or investigation of domestic violence or sexual assault.<sup>86</sup>

## Daniel Holtzclaw

Perpetrator

In Oklahoma, officer Daniel Holtzclaw stopped a 57-year-old grandmother on her way home from a game of dominoes with friends. He publicly strip-searched her, ostensibly looking for drugs, and then forced her to perform oral sex, prompting her to file a complaint. Further investigation uncovered allegations that he had raped and/or sexually assaulted at least 12 other Black women over a period of several years, often in the context of traffic stops. Holtzclaw generally preyed on women with criminal records or those who were caught with drug paraphernalia, which inhibited them from coming forward. A Facebook group in his defense has garnered hundreds of "likes," revealing how the widespread defense of abusive police officers

has converged with skepticism toward rape victims to generate sympathy for Holtzclaw instead of his many victims.<sup>87</sup> His trial is set for October 2015.

## Ernest Marsalis

Perpetrator

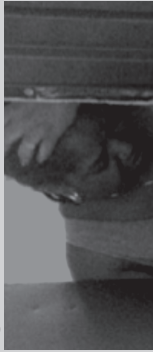
Ernest Marsalis' abhorrent record of abusing women while serving as a Chicago police officer was known before he was accused of kidnapping and raping a 19-year-old African American woman during an arrest. Marsalis had previously been accused of violent or threatening behavior in more than 20 cases. Most of the charges were lodged by women, and two involved rape. Despite these multiple complaints, Marsalis was never prosecuted. He resigned after 16 months on the force.<sup>88</sup>

# THE USE OF EXCESSIVE FORCE AGAINST BLACK MOTHERS AND THEIR CHILDREN

The presence of children does not, necessarily prompt the police to proceed with caution where pregnant and mothering Black women are involved—even those holding their babies. This lack of concern is consistent with a longstanding historic pattern of devaluing Black motherhood and the loving bonds that tie mothers and children together. Damaging stereotypes that cast Black women as criminal and unfit mothers share a common genealogy with practices that deprive Black women of protections typically associated with motherhood during police encounters, sometimes leading to the use of lethal force.

## Denise Stewart

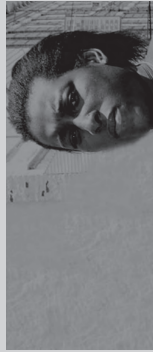
August 1, 2014 / Brooklyn, New York



Denise Stewart, a 47-year-old grandmother, answered when the police knocked on the door of the wrong apartment in response to an allegation that a child was being harmed. She informed them that they had the wrong apartment and that she had just come out of the shower. Nonetheless, New York City police officers dragged her half naked, out of her towel and into a hallway, as she begged for her inhaler and later collapsed. Her neighbors protested and videotaped the behavior of the officers, to no avail. Police dragged Stewart's four children out into the hall and handcuffed them as well. Minutes passed as an officer held her naked in the hallway of her apartment building in utter disregard for her rights and dignity. Officers ultimately proceeded to the correct apartment and threw a towel over her.<sup>89</sup>

## Rosann Miller

July 26, 2014 / Brooklyn, New York



Just weeks after NYPD officers choked Eric Garner to death on camera, Rosann Miller, a Black woman who was seven months pregnant, was placed in a chokehold by officers who initially approached her to tell her she could not barbecue in front of her house. Community activists and politicians expressed outrage at the use of a prohibited chokehold on a visibly pregnant Black woman. Although the case received some attention, the officers involved have not been charged.<sup>90</sup>

## Alesia Thomas

July 22, 2012 / Los Angeles, California



Mother of two Alesia Thomas dropped off her children—ages 3 and 12—at a Los Angeles Police Station because she felt she was unable to care for them. In response, LAPD officers came to Thomas' apartment to arrest her for child abandonment. Officer Mary O'Callaghan was caught on tape repeatedly kicking Thomas as she attempted to arrest her and move her into the police vehicle. Thomas lost consciousness in the back of the police vehicle, went into cardiac arrest, and was pronounced dead at the hospital shortly afterward.<sup>91</sup> Officer O'Callaghan was charged with assault under color of authority and was convicted on June 5, 2015.<sup>92</sup>

## Sonji Taylor

December 16, 1993 / Los Angeles, California

Police officers shot 27-year old Sonji Taylor in a rooftop parking lot where she had parked her car. Taylor was a college graduate and church choir member. She was returning from Christmas shopping with her three-year-old son. The officers claimed that she was holding her son hostage with a kitchen knife while repeating the words "the blood of Jesus." The officers charged Taylor, shooting her with pepper spray, and tearing her son away from her. They reported that they shot Taylor in self-defense after she "lunged" at them. According to her family, the officers surrounded Taylor for half an hour before she was killed. Her family stated that the knife was a Christmas present, her son was never harmed, and "the blood of Jesus" was a phrase Taylor had learned from her Pentecostal upbringing to repeat when in danger. The autopsy revealed that she was shot twice in the chest and several times in the back while lying face-down on the ground.<sup>93</sup> No officers were prosecuted for the shooting. In 1997, the city agreed to a \$2.45 million settlement.<sup>94</sup>



# NO SYMPATHY: POLICE TERRORIZE BLACK WOMEN WHO DEMAND JUSTICE FOR FAMILY MEMBERS

When Black women advocate for Black family members targeted by police, the police sometimes treat them inhumanely. They may, for instance, be subjected to violence themselves or subjected to brutal interrogations. The police have treated grieving women with little empathy and have offered no services to support them in the traumatic aftermath of the loss of a loved one.

## Patricia Hartley and Constance Graham

February 2, 2012 / Bronx, New York



Shortly after her unarmed grandson, Ramarley Graham, was shot to death by police in front of her, an officer threatened to shoot his grandmother, Patricia Hartley, when she asked why the officer had killed Graham. She was then taken to the police precinct and interrogated without an attorney for 7 hours. Constance Malcolm—Graham's mother and Hartley's daughter—went to the precinct to find Hartley. As she tried to ensure that Hartley was not questioned without counsel present, Malcolm was violently pushed to the ground by police officers and insensitively informed of her son's death.<sup>58</sup> In 2015, the family received a \$3.9 million settlement. Two grand juries failed to indict the officers responsible and the family is calling for an investigation by the Department of Justice.

## Tajai Rice, Sister of Tamir Rice

November 22, 2014 / Cleveland, Ohio



In January 2015, Cleveland officials released extended video footage of the fatal shooting of 12-year-old

# CONCLUSION

Our efforts to combat police violence must expand to address the experiences of all Black people. An intersectional, Black feminist perspective—one that recognizes that categories such as race, gender, gender identity, and sexual orientation are not mutually exclusive—demands the inclusion of Black women and girls, transgender and not transgender, lesbian, bisexual, and heterosexual in the dominant discourse around police violence. When the lives of marginalized Black women are centered, a clearer picture of structural oppressions emerges. No analysis of state violence against Black bodies can be complete without including all Black bodies within its frame.

Until we say the names and tell the stories of the entire Black community, we cannot truly claim to fight for all Black lives.

## Recommendations: Building a Gender-Inclusive Agenda for Addressing Anti-Black State Violence

The frameworks and stories presented in *Say Her Name* point to specific actions community organizers, policy makers, researchers, and the media can take to build a comprehensive approach to fighting state-sanctioned violence—one that is inclusive of non-transgender, transgender, and gender-nonconforming Black women.

What follows are some initial recommendations for those involved in various aspects of the work to make all Black lives matter.

### Recommendations:

- At protests, demonstrations, and other actions calling attention to state violence, include the faces, names, and stories of Black women alongside those of Black men.
- Local and national organizations and social movements must find ways to support all families who have lost a loved one to police violence and all surviving victims of state violence.
- Policy platforms should be developed using an intersectional gender and racial lens to ensure that comprehensive solutions to state violence are being built and that the myriad ways in which it impacts the lives of all Black people are addressed.
- Spaces must be created to discuss the ways in which patriarchy, homophobia, and transphobia impact Black communities as a whole, and to hold individuals and organizations accountable for addressing how our communities sometimes recreate systems of oppression.
- Skills to talk about the multiplicity of ways in which state violence affects all Black women and girls should be continuously developed. In so doing, stakeholders can move beyond a frame that highlights only killing. All Black women—transgender, non-transgender, and gender-nonconforming—must be included in this reconceptualization.
- As domestic violence is a leading cause of death for Black women aged 15-34, there is a need to acknowledge that both public and private forms of violence are devastating the lives of Black women and girls.

## Tasha Thomas, Girlfriend of John Crawford III

August 5, 2014 / Beavercreek, Ohio



The police harshly interrogated Tasha Thomas on the same day they fatally shot and killed her boyfriend, John Crawford III, in an Ohio Walmart.<sup>59</sup> Crawford was talking to Thomas on the phone as police shot him while holding one of the store's BB guns. Thomas was then taken into custody for questioning. The video of the interrogation shows that the officers first accused her of being under the influence of drugs and threatened her. Not until the "interview" had gone on for 90 minutes did the police inform Tasha that her boyfriend was dead. At that point, one of the officers curtly remarked that, "as a result of his actions, he is gone."<sup>60</sup> Thomas will never see justice for the emotional injuries senselessly inflicted on her that day. She was killed in a car accident on New Year's Day, 2015.

### Some examples of gender-specific and inclusive policy demands to address Black women's experiences of policing;<sup>99</sup>

1. Calling for passage of the End Racial Profiling Act of 2015, which for the first time includes a ban on racial profiling based on gender, gender identity, and sexual orientation, and urging local police departments to adopt and enforce gender and sexuality-inclusive racial profiling bans;
2. Calling for enactment and enforcement of "zero-tolerance" policies toward sexual harassment and assault of members of the public by police officers;
3. Calling for a comprehensive ban on confiscation, use, or mere possession or presence of condoms as evidence of any prostitution-related offense;
4. Calling for adoption and enforcement of police department policies explicitly banning officers from searching people to assign gender-based on anatomical features, and requiring officers to respect gender identity and expression in all police interactions, searches, and placement in police custody;
5. Calling for use-of-force policies to prohibit the use of Tasers or excessive force on pregnant women or children.

### RESOURCES:

#### Say Her Name: Sample Questions for a Community Conversation

Building a gender-inclusive frame for addressing state-sanctioned violence requires that communities come together with the purpose of focusing on this issue.

The following questions can serve as a starting place for communities interested in taking action.

1. *Say Her Name* articulated several frames to expand our analysis of state violence to include Black women and gender-nonconforming Black people. What frames and/or individual stories from *Say Her Name* stood out most to you and why?
2. What forms of state violence against women do we see playing out in our own community?
3. What forms of private violence do we see playing out in our community?
4. What can we do to draw attention and concern to the state and private violence Black women face?
5. How do we see a patriarchal mentality play out in our community organizing and within the media?
6. What impact would expanding our frame of state violence to include women and gender-nonconforming people have locally and nationally?
7. As we go about our daily work and conversations, what can each of us do to expand the frame on state violence to include Black women and girls?
8. Does anyone here want to share an experience they have had with police violence personally or through a loved one? Why is sharing these stories so important?<sup>1</sup>
9. How can we come together to support the families and surviving victims of state violence of all genders?
10. What steps can we take to pressure local law enforcement officials to collect data on police violence that are gender- and race-specific? And what about data on sexual assault and rape by law enforcement officials?
11. What concrete actions can we take to increase awareness around the issues raised in this discussion? Who is willing to commit to specific actions to further the concerns we raised? And, for those willing to make such a commitment, what will those actions be?

<sup>1</sup> Once this door is opened, those holding the conversation need to be prepared for what comes up, which is often deep trauma, including sexual violence. If this question is to be included in the dialogue, a trained professional should be on hand and prepared to offer survivors emotional supports and referrals to trauma care.





**RESOURCES:**

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*Invisible Betrayal: Police Violence and the Rapes of Black Women in the United States.* By Black Women's Blueprint. 2014. (available at: <http://www.ushnetwork.org/sites/ushnetwork.org/files/36-police-wabb.pdf>)

*Arrested Justice: Black Women, Violence, and America's Prison Nation.* By Beth Richie. New York: New York University Press. 2012.

*Law Enforcement Violence against Women of Color & Trans People of Color. An Organizer's Resource & Tool Kit.* By Incite! Women of Color Against Violence (available at: [http://www.incite-national.org/sites/default/files/incite\\_files/resource\\_docs/3696\\_toolkit-final.pdf](http://www.incite-national.org/sites/default/files/incite_files/resource_docs/3696_toolkit-final.pdf))

*Queer (In)Justice: The Criminalization of LGBT People in the United States.* By Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock. Boston: Beacon Press. 2011.

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"From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control," by Kimberlé Williams Crenshaw, in *Overpoliced and Underprotected: Women, Race, and Criminalization*, 59 UCLA L. Rev. 1418. 2012. (available at: <http://www.uclalawreview.org/from-private-violence-to-mass-incarceration-thinking-intersectionally-about-women-race-and-social-control/>)

*Caught in the Net: The Impact of Drug Policies on Women and Families.* By American Civil Liberties Union, Break the Chains, and Brennan Center for Justice at NYU. 2005. (available at: [https://www.aclu.org/files/images/asset\\_upload\\_file431\\_23513.pdf](https://www.aclu.org/files/images/asset_upload_file431_23513.pdf))

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<sup>2</sup> David Lohr, "Charleston Church Shooting Victims Identified," *Huffington Post*, June 18, 2015, available at [http://www.huffingtonpost.com/2015/06/18/charleston-church-shooting-victims-identified\\_n\\_7611838.html](http://www.huffingtonpost.com/2015/06/18/charleston-church-shooting-victims-identified_n_7611838.html).

<sup>3</sup> Scott Neuman, "Video Shows Texas Police Officer Pulling Gun on Teens at Pool Party," *NPR*, June 7, 2015, available at <http://www.npr.org/sections/thetwo-way/2015/06/07/412708943/video-shows-texas->

police-officer-pulling-gun-on-teens-at-pool-party; Brittney Cooper, "America's War on Black Girls: Why McKinney Police Violence Isn't About One Bad Apple," *Salon*, June 10, 2015, available at [http://www.salon.com/2015/06/10/americas\\_war\\_on\\_black\\_girls\\_why\\_mckinney\\_police\\_violence\\_isnt\\_about\\_one\\_bad\\_apple/](http://www.salon.com/2015/06/10/americas_war_on_black_girls_why_mckinney_police_violence_isnt_about_one_bad_apple/). The video reveals multiple levels of aggression. In addition to shoving Becton's face into the ground and pushing his knee into her back, the officer sits on her buttocks, straddling her small body as she weeps. When two black teenage boys attempt to defend her, the officer pulls out his gun and aims it at them, forcing them to literally run for their lives.

<sup>4</sup> See, e.g., INCITE!, *Law Enforcement Violence Against Women of Color and Transgender People of Color: A Critical Intersection of Gender and State Violence - An Organizer's Toolkit* (Burbank, CA: INCITE!, 2008), available at: [http://www.incite-national.org/sites/default/files/incite\\_files/resource\\_docs/3696\\_toolkit-final.pdf](http://www.incite-national.org/sites/default/files/incite_files/resource_docs/3696_toolkit-final.pdf); Andrea J. Ritchie, "Law Enforcement Violence Against Women of Color," in *Color of Violence: The INCITE! Anthology*, ed. INCITE! Women of Color Against Violence (Boston, MA: South End Press, 2006); Kimberlé Williams Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory And Antiracist Politics," *U. Chi. Legal F.* 139, (1989); Kimberlé Williams Crenshaw, "From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control," in *Overpoliced and Underprotected: Women, Race, and Criminalization*, by Kimberlé Williams Crenshaw, in *Overpoliced and Underprotected: Women, Race, and Criminalization*, 59 UCLA L. Rev. 1418, (2012), available at <http://www.uclalawreview.org/from-private-violence-to-mass-incarceration-thinking-intersectionally-about-women-race-and-social-control/>; Lenora Lapidus, Namita Luthra, Anjali Verma, Deborah Small, Patricia Allard, and Kirsten Livingston / American Civil Liberties Union, *Break the Chains, Brennan Center for Justice at NYU, Caught in the Net: The Impact of Drug Policies on Women and Families* (New York: American Civil Liberties Union, Break the Chains: Communities of Color and the War on Drugs, Brennan Center for Justice at New York University, 2005), available at [https://www.aclu.org/files/images/asset\\_upload\\_file431\\_23513.pdf](https://www.aclu.org/files/images/asset_upload_file431_23513.pdf); Anannya Bhattacharjee, *Whose Safety? Women of Color and the Violence of Law Enforcement* (Philadelphia: American Friends Service Committee, (2001), available at: <http://www.afsc.org/document/whose-safety>; Dayo F. Gore, Damayo, Tamara Jones & Joo-Hyun Kang, "Organizing at the Intersections: A Roundtable Discussion of Police Brutality Through the Lens of Race, Class, and Sexual Identities," in *Zero Tolerance: Quality of Life and the New Police Brutality in New York City*, ed. Andrea McArdle and Tanya Erzen (New York: NYU Press, 2001), 251 *Organizing at the Intersections, Zero Tolerance: Quality of Life and the New Police Brutality in New York City*, McCordle and Erzen, eds. (NYU Press 2001); Angela Davis, *Violence Against Women and the Ongoing Challenge to Racism* (Latham: Kitchen Table Press, 1984); Angela Davis, *The Angela Y. Davis Reader*, ed. 308, *Joy James*, ed. (Malden, MA: Blackwell, 1998), 308; Joy James, *Resisting State Violence: Radicalism, Gender, and Race in U.S. Culture* (Minneapolis: University of Minnesota, 1996).

<sup>5</sup> A concept that many use to understand and explain the complex experiences of Black girls and women as they encounter state violence is "intersectionality," which addresses the dynamic relationship race, gender, class, sexuality, age, nationality, ability and other social variables. See, Kimberlé Williams Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory And Antiracist Politics," *U. Chi. Legal F.* 139, (1989).

<sup>6</sup> R. Lundman and R. Kaufman, "Driving While Black: Effects of Race, Ethnicity and Gender on Citizen Reports of Traffic Stops and Police Action," *Criminology* 41 (2003): 195.

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<sup>8</sup> Arlene Eisen, *Operation Ghetto Storm: 2012 Annual Report on the Extrajudicial Killing of 313 Black People by Police Security Guards, and Vigilantes* (New York: Malcolm X Grassroots Movement, April 2013); 3, available at [http://www.operationghettostorm.org/uploads/1/9/1/7/1910795/operation\\_ghetto\\_storm.pdf](http://www.operationghettostorm.org/uploads/1/9/1/7/1910795/operation_ghetto_storm.pdf).

<sup>9</sup> For instance, in 2013, AlterNet published an article titled, "1 Black Man Is Killed Every 28 Hours by Police" based on this study, A dam Hudson, "1 Black Man Is Killed Every 28 Hours by Police or Vigilantes: America Is Perpetually at War with Its Own People," *AlterNet*, May 28, 2013.

<sup>10</sup> Alicia Garza, "A Herstory of the #BlackLivesMatter Movement," *Black Lives Matter*, December 6, 2014 available at <http://blacklivesmatter.com/a-herstory-of-the-blacklivesmatter-movement/>; Alicia Garza, Patrice Cullers and Opal Tometi, who self-identify as Black queer women, created #BlackLivesMatter and spearhead the multimedia grassroots movement. In her analysis, Garza challenges the way women of color, particularly LGBTQ women of color, have been erased both from the history of the movement and from the national discourse about state violence.

<sup>11</sup> The word trans or transgender refers to people whose gender identity and/or gender expression are different from the sex assigned to them at birth. The word cis or cisgender is used to refer to people whose gender identity and expression matches the gender they were assigned at birth. In other words, transgender is a term used to describe people whose way of understanding their own gender, or whose way of expressing their gender (clothing, hairstyle, etc.), is different from what society expects based on the gender they were assigned when they were born. This term includes a wide range of people with different experiences — those who change from one gender to another as well as those who sometimes express different gender characteristics or whose gender expression is not clearly definable as masculine or feminine. When speaking about transgender people, always refer to their current gender as they describe it — which may include not identifying with any gender.

<sup>12</sup> When using the term "Black men" in this document, we are referring to non-transgender Black men. We recognize that Black transgender men are often targeted in ways that are both similar to non-transgender Black men and unique to their transgender experience, and address these experiences when referring to those of Black transgender people.

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<sup>14</sup> Peter Hermann, "Baltimore's Transgender Community Mourns One of Their Own, Slain by Police," *Washington Post*, April 3, 2015; Justin Moyer, "NSA Attacker Identified as Transgender Homeless Sex Worker," *Washington Post*, April 2, 2015; Peter Hermann, Sari Horwitz, and Ellen Nakashima, "A Fatal Wrong Turn Suspected at NSA," *Washington Post*, March 30, 2015.

<sup>15</sup> Carlos Saucedo, "High-speed Chase Ends with Officers Killing Woman," *ABC News 10*, March 3, 2014.

<sup>16</sup> Valarie Carey (Sister of Miriam Carey) and Eric Sanders (Family Attorney of Miriam Carey), interview by Rachel Gilmer and Rachel Anspach, May 6, 2015.

<sup>17</sup> Steve Almasy, "Woman Killed during D.C. Chase Was Shot Five Times from Behind, Autopsy Shows," *CNN*, April 10, 2014.

<sup>18</sup> "Shantel Davis, Unarmed Alleged Car Thief, Shot and Killed by NYPD Cop in Brooklyn," *Huffington Post*, June 15, 2012.

<sup>19</sup> Thomas Sheeran, "Timothy Russell, Malissa Williams Shooting: Cleveland Community Wonders Why 137 Rounds Fired," *Associated Press*, December 17, 2012.

<sup>20</sup> Mitch Smith and Ashley Southall, "Cleveland Police Officer Acquitted of Manslaughter in 2012 Deaths," *New York Times*, May 23, 2015; Kimbrell Kelly and Wesley Lowery, "Cleveland Officer Acquitted in Killing of Unarmed Pair amid Barrage of Gunfire," *Washington Post*, May 23, 2015.

<sup>21</sup> Matt Guillermo, "Vegas Woman Shot by Police Identified," *Fox 5*, April 23, 2012.

<sup>22</sup> Mike Blasky, "Friends: Woman Killed by Police Was Nonviolent," *Las Vegas Review-Journal*, April 27, 2012.

<sup>23</sup> Nicole Lucht, "DA Releases Review of April Police Shooting," *News Now Las Vegas*, November 20, 2012.

<sup>24</sup> Portland Copwatch, "Police Shooting of Young Women Draws Intense Community Criticism: The Death of Kendra James, 21, Prompts New Calls for Accountability," *The People's Police Report* 30, August, 2003.

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<sup>26</sup> Chuck Goudie, Christine Tressel, Ross Weidner, Barb Markoff and Ann Pistone, "Road Trip for Suburban Woman Ends in Jailhouse Death," *ABC7 Chicago*, July 15, 2015.

<sup>27</sup> Laura Bassett, "Black Women Are the Only Demographic Not Gaining Jobs," *Huffington Post*, September 5, 2014.

<sup>28</sup> James Q. Wilson and George L. Kelling, Broken Windows: The Police and Neighborhood Safety, *Atlantic Monthly*, March 1982, 29; Bernard E. Harcourt *Illusion of Order: The False Promise of Broken Windows Policing*. (Cambridge, MA: Harvard University Press, 2009); Zero Tolerance: *Quality of Life and the New Police Brutality in New York City*, Andrea McCordle and Tanya Erzen, eds. (NYU Press 2001).

<sup>29</sup> Laura Beck, "Woman Shot Dead by Walmart Security Guard on Suspicion of Shoplifting," *Jezebel*, December 10, 2012; "Family: Mother Suspected of Shoplifting at Walmart Didn't Deserve to Die," *KHOU*, December 7, 2012.

<sup>30</sup> Sharon Wilkerson, interview by authors, May 18, 2015.

<sup>31</sup> Amnesty International, *USA: Race, Rights, and Police Brutality*, AMR 51/147/99 18 (Washington, DC:

Amnesty International, 1999), 18.

<sup>32</sup> The Stolen Lives Project, *Stolen Lives: Killed by Law Enforcement*, 2nd ed. (New York: The Stolen Lives Project, October 22nd Coalition, Anthony Baez Foundation, National Lawyers Guild, 1999), 41; Earl Ofari Hutchinson, "New Menace to Society? Police Shootings of Black Women Are the Deadly Consequence of Stereotypes," *Christian Science Monitor*, June 8, 1999, 11 available at <http://www.csmonitor.com/1999/0608/p11s1.html>. A motorist who witnessed the police encounter with Ms. Mitchell said that when police stopped and harassed Ms. Mitchell, she was doing nothing more than pushing her cart down the street.

<sup>33</sup> Hutchinson, "New Menace to Society? Police Shootings of Black Women Are the Deadly Consequence of Stereotypes," 11.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Selwyn Raab, "State Judge Dismisses Indictment of Officer in the Bumpurs Killing," *New York Times*, April 13, 1985.

<sup>37</sup> Lenora Lapidus, Namita Luthra, Anjuli Verma, Deborah Small, Patricia Allard, and Kirsten Livingston, *Caught in the Net: The Impact of Drug Policies on Women and Families* (New York: American Civil Liberties Union, Break the Chains: Communities of Color and the War on Drugs, Brennan Center for Justice at New York University, 2005), available at [https://www.aclu.org/files/images/asset\\_upload\\_file431\\_23513.pdf](https://www.aclu.org/files/images/asset_upload_file431_23513.pdf).

<sup>38</sup> "Ex-Atlanta Officers Get Prison Time for Cover-up in Deadly Raid," *CNN*, February 24, 2009.

<sup>39</sup> William K. Rashbaum, "Woman Dies After Police Mistakenly Raid Her Apartment," *New York Times*, May 17, 2003.

<sup>40</sup> Ronald Smothers, "Newark Officer Is Cleared in Shooting During Arrest," *New York Times*, September 5, 1997.

<sup>41</sup> Gary Washburn, "City Settles 1997 Police Brutality Suit: \$500,000 to Be Paid in West Side Death," *Chicago Tribune*, July 7, 1999.

<sup>42</sup> Brandon Blackwell, "Daughter of Mentally Ill Cleveland Woman Who Died in Custody Hopes for Change," *Cleveland Plain Dealer*, November 13, 2014.

<sup>43</sup> Cassandra Johnson and Sarah Gideon, "Interview on Tanisha Anderson," interview by authors, May 18, 2015.

<sup>44</sup> Frances Garrett, "Interview on Michelle Cusseau," interview by authors, May 17, 2015.

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<sup>46</sup> Editorial Board, "Did Michelle Cusseau Have to Die?" *The Arizona Republic*, August 22, 2014.

<sup>47</sup> Associated Press, "Elderly Woman Shot by Police: Pearlie Golden, 93, Killed After Allegedly Brandishing

A Gun," *Huffington Post*, May 8, 2014.

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<sup>49</sup> Nick Pinto, "Family Sues to Learn Why Shereese Francis Was Suffocated in Her Home by Police," *Village Voice*, June 26, 2012.

<sup>50</sup> David Rosenzweig, "No Charges in Killing of Tyisha Miller," *Los Angeles Times*, December 13, 2002.

<sup>51</sup> Jesse Singal, "White People Think Black People Are Magical," *New York Magazine*, November 14, 2014; Adam Wartz, Kelly Marie Hoffman, and Sophie Trawalter, "A Superhumanization Bias in Whites' Perceptions of Blacks," *Social Psychological and Personality Science* (2014), doi:10.1177/1948550614553642.

<sup>52</sup> Julie K. Brown and Mary Ellen Klas, "Inmate Reports Threats by Guard, Turns Up Dead," *Miami Herald*, October 7, 2014. State violence in prisons fall outside the scope of this brief, but Latandra Ellington's case represents a critical example of deadly state violence against incarcerated Black women. In September 2014, Latandra Ellington was just seven months away from getting out of the Lowell Correctional Institution in Florida when she wrote a letter to her aunt saying she feared for her life because a corrections officer had threatened to beat her to death. Ten days later she was found dead. She was 36-years-old, the mother of four children. No concrete evidence exists to determine who killed her, but her autopsy revealed that she suffered blunt force trauma to her abdomen consistent with a beating. The family has hired a lawyer and the case is ongoing. In the meantime, the Florida Department of Corrections has refused to release information about whether or not the sergeant suspected of killing Ellington has been disciplined in any way.

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<sup>58</sup> Charlie LeDuff, "What Killed Aiyana Stanley-Jones?," *Mother Jones*, November/December 2010.

<sup>59</sup> Associated Press, "Final Charge Dropped Against Detroit Cop in Fatal Raid," *New York Times*, January 30, 2015; George Hunter, "Cop in Aiyana Stanley-Jones Shooting Back on Job," *The Detroit News*, April 17, 2015.

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<sup>62</sup> Feminista Jones, "Why Black Women Struggle More With Domestic Violence," *TIME*, September 2014; Selwyn Crawford, "Black Women at Greater Risk of Becoming Victims of Homicidal Domestic Violence," *The Dallas Morning News*, September 21, 2013.

<sup>63</sup> Andrea J. Ritchie, "Law Enforcement Violence Against Women of Color," in *Color of Violence: The INCITE! Anthology*, ed. INCITE! Women of Color Against Violence (Boston, MA: South End Press 2006).

<sup>64</sup> National LGBTQ Task Force, *Stop Trans Murders* (New York: National LGBTQ Task Force, June 2015), available at <http://www.thetaskforce.org/stop-trans-murders/>.

<sup>65</sup> Wendy Leung, "Oxnard Woman Killed by Police after Domestic Dispute Call," *Ventura County Star*, March 28, 2015.

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<sup>67</sup> Fred Clasen-Kelly, "Witness: Officer Didn't Have to Shoot," *Charlotte Observer*, February 20, 2015; Mark Becker, "Girlfriend of Victim in Deadly Police Shooting Speaks Out," *WSOCTV*, February 20, 2015.

<sup>68</sup> Kate Abbey-Lambertz, "No Charges for Officer Who Killed Mentally Ill Woman Who 'Confronted' Police with a Knife," *Huffington Post*, February 3, 2015.

<sup>69</sup> Cailly Bien, "Family of Woman Shot, Killed by Bastrop County Sheriff's Deputy Seeks Damages," *KXAN*, August 22, 2014.

<sup>70</sup> Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston, MA: Beacon Press 2011).

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<sup>74</sup> National Black Justice Coalition, *Injustice at Every Turn: A Look at Black Respondents to the Transgender Discrimination Survey* (Washington, DC: National Black Justice Coalition, National Center for Transgender Equality, National Gay and Lesbian Task Force, 2011) available at: [http://endtransdiscrimination.org/PDFs/BlackTransFactSheetFINAL\\_090811.pdf](http://endtransdiscrimination.org/PDFs/BlackTransFactSheetFINAL_090811.pdf).

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<sup>81</sup> The Cato Institute's National Police Misconduct Reporting Project, *2010 Annual Report*, (Washington, DC: Cato Institute, 2010), available at <http://www.policemisconduct.net/statistics/2010-annual-report/>.

<sup>82</sup> *Ibid.*

<sup>83</sup> A 2014 study from Bowling Green State University found that in known cases, 99.1 percent of law enforcement officers who commit sexual assault are men, and 92.1 percent of victims are women. For more information, see: Philip Matthew Stinson, John Liederbach, Steven L. Brewer, and Brooke E. Mathna, "Police Sexual Misconduct: A National Scale Study of Arrested Officers," *Criminal Justice Policy Review* (2014), doi 0887403414526231.

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<sup>87</sup> Jessica Testa, "How Police Caught the Cop Who Allegedly Sexually Abused 8 Black Women," *BuzzFeed News*, September 5, 2014.

<sup>88</sup> While outside the scope of this brief, Dorothea Reynolds' case is also illustrative of the sexual assault Black women face at the hands of the state. Dorothea Reynolds was sent to the Ohio Reformatory for Women for arson. In prison a white guard began making sexual advances toward her. Reynolds reported that the officer forced her to perform oral sex on him and the prison authorities gave her various lie-detecter tests -- all of which she passed. But, rather than acting in the interest of her safety, prison officials sent her back to her cell and told her to get more evidence and to report it again if anything else happened which she did in fact do, if she did so. The guard was moved to another prison but not prosecuted. As of now, the DA's office has refused to litigate Reynolds' case even though she was assaulted three times. See Reynolds v. Smith et al. No. 22011cv00277 - Document 34 (S.D. Ohio 2012).

<sup>89</sup> John Marzulli, Laura Dimon, and Ginger Adams Otis, "'Naked Brooklyn Woman Dragged From Apartment, Left Topless in Hallway For Minutes by NYPD Officers Who Say She Beat 12-Year Old Daughter," *New York Daily News*, August 1, 2014, available at: <http://www.nydailynews.com/new-york/brooklyn/nypd-officers-drag-naked-brooklyn-woman-apartment-video-article-11889292>

<sup>90</sup> Emily Thomas, "Pregnant Woman Allegedly Put in Chokehold by NYPD Officer," *Huffington Post*, July 28, 2014.

<sup>91</sup> Tami Abollah, "LAPD Officer Mary O'Callaghan Charged in Arrest That Turned Fatal," *Huffington Post*, October 11, 2013.

<sup>92</sup> Marisa Gerber and Brittny Mejia, "Jury Convicts LAPD Officer for Kicking Woman in Groin," *Los Angeles Times*, June 5, 2015.

<sup>93</sup> Ritchie, "Law Enforcement Violence Against Women of Color"; Dianne Klein and Jim Newton, "LAPD Shooting Leaves Anguish and Questions," *Los Angeles Times*, February 13, 1994.

<sup>94</sup> Matt Lait, "Council OKs Settlements in Police Suits," *Los Angeles Times*, July 23, 1997.

<sup>95</sup> Personal communication with Constance Graham, mother of Ramarley Graham, September 2014.  
<sup>96</sup> Lauren Gambino, "Tamir Rice Shooting: Cleveland Police Handcuffed Sister as 12-year-old Lay Dying," *The Guardian*, January 8, 2015.

<sup>97</sup> Tom McKay, "Watch Cops Viciously Interrogate a Woman After Shooting Her Boyfriend Dead," *News/Mc*, December 15, 2014, available at <http://mic.com/articles/106482/watch-police-viciously-interrogate-girlfriend-of-an-unarmed-black-man-police-shot-dead>.

<sup>98</sup> *Ibid*.

<sup>99</sup> For more information on these and other policy recommendations to address women's experiences of policing, see the President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* (Washington, DC: Office of Community Oriented Policing Services, 2015), available at [http://www.cops.usdoj.gov/pdf/taskforce/TaskForce\\_FinalReport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf), adopting several key recommendations that over 75 individuals, women's, racial justice, and LGBT organizations offered in *Policy and Oversight: Women of Color's Experience of Policing* (January 28 2015) available at <http://changenewyork.org/sites/default/files/docs/Women%27s%20Sign%20Letter%20on%20to%20Presidential%20Task%20Force%20-%20Policy%20and%20Oversight%20-%20FINAL.pdf>.





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