"Perceived to be Deviant": Social Norms, Social Change, and New York State's "Walking While Trans" Ban

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Section 240.37 of the New York State Penal Code, colloquially known as the "Walking While Trans" Ban, is an example of our nation's commitment to its identity—defining the boundaries between what is deviant and non-deviant, what is normative and non-normative. This Note seeks to understand the intersection between criminalization, gender identity, social norms, and the powers that push decision-makers to exercise their ability to craft a more inclusive society. Rather than solely focus on doctrine, this Note examines the middle ground between law and society to understand how both arenas inform each other to create a zeitgeist that values and, simultaneously, demonizes "undesirable" people to create a national identity. I argue that Section 240.37 and similar statutes are emblematic of our society's wedding to a normative structure and are examples of how lawmakers wield power to draw borders around who and what is deemed to be desirable and deserving of full citizenship and humanity.

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INTRODUCTION

"Women who are perceived to be gender nonconforming, even if they're not and don't identify as gender nonconforming, are perceived to be deviant."[1] This perception is intentional. It is the result of and required to maintain our nation's norms and foundational systems, particularly those that define the nation's identity. One example of this is Section 240.37 of the New York Penal Code, colloquially known as the "Walking While Trans" Ban.[2] Prior to being overturned in February 2021,[3] Section 240.37 or, as it is officially known, "loitering for the purpose of engaging in a prostitution offense," was passed with the intention of protecting the public from the "proliferation of prostitution" and other social "maladies."[4] As written, the law's intent was to protect and maintain public areas for the "use and enjoyment" of the public.[5] However, in its nearly forty years of operation, Section 240.37 was weaponized against the public existence of transgender women, particularly transgender women of color, and became a tool of harassment and social removal.[6]

This Note analyzes the intersection between criminalization, gender identity—the forces that push state actors to pass legislation like Section 240.37—and the community forces that work to craft a more inclusive society. Rather than focus solely on doctrine, this Note examines how law and society converge to produce a zeitgeist that simultaneously values and demonizes "undesirable" people. I argue that Section 240.37 and similar statutes are

1. German Lopez, *"Walking While Trans": How Transgender Women of Color Are Profiled*, VOX (July 21, 2015), https://www.vox.com/2015/7/21/9010093/walking-while-transgender [https://perma.cc/A2FC-B2D5].

2. *Id.*

3. N.Y. PENAL LAW § 240.37 (2016) (repealed as amended by L. 2021, c. 23, § 1 (Feb. 2, 2021).

4. Memorandum, A.B. A654, 2019 State Assemb., Reg. Sess. (N.Y. 2019), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00654&term=2019&Summary=Y&Memo=Y [https://perma.cc/H84D-8ZLR].

5. Memorandum, S.B. S1351, State S., Reg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/S1351 [https://perma.cc/9ZWM-GWUB].

6. "Arrests under Section 240.37 disproportionately impact women, particularly cisgender and transgender women of color and women who have previously been arrested for prostitution offenses." *Id.*

emblematic of the legal structures that work to create and maintain a national identity centered around cis-heteronormativity by constructing borders around who deserves full citizenship and humanity. Specifically, the United States is committed to maintaining a cis-heteronormative national identity that is established and reified by the twin apparatuses of the law and social expectations.[7]

The removal of Section 240.37 and similar laws is not the last step toward eradicating the everyday violence enacted upon Black and Brown trans women. Although changing the law on the books is important, racist, transphobic, and homophobic norms are entrenched in the social, political, and legal foundations of the United States.[8] Even affirmatively passing antidiscrimination laws to

7. By "cis-heteronormative" and "cis-heteronormativity" I am referring to two joined concepts: cisnormativity and heteronormativity. Cisnormativity is a "system of oppression that values and privileges cisgender individuals (those whose gender identity aligns with the sex they were assigned at birth)" over those who are transgender (individuals whose gender identity does not align with the gender they were assigned at birth) or non-binary (an individual whose gender identity does not fit within the "masculine/feminine" gender binary). Cisnormative systems uphold the gender binary as the norm and "marginalize, oppress, and make invisible the lives and experiences of transgender and nonbinary people." *Terms, Definitions & Labels*, AMHERST COLL., https://www.amherst.edu/campuslife/our-community/queer-resource-center/terms-definitions [https://perma.cc/78P5-GZNZ]. *See also Frequently Asked Questions about Transgender People*, NAT'L CTR. TRANSGENDER EQUAL. (Jul. 9, 2016), https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people [https://perma.cc/LQX7-9UP4]. Heteronormativity is the idea that heterosexual identity is the "only normal and natural expression of sexuality." Kristen Cochrane, *Why Heteronormativity Is a Bad Thing*, TEEN VOGUE (Sep. 1, 2016), https://www.teenvogue.com/story/heteronormativity-gender-identity-sexual-orientation [https://perma.cc/M569-3NHU]. "Cis-heteronormativity" is the idea that both systems work together to privilege cisgender, heterosexual identity over non-cis, non-straight identities. By "gender binary," I am relying on the definition advanced by Susan Stryker in her book, Transgender History, which refers to "[t]he idea that there are only two social genders—man and woman—based on two and only two sexes—male and female." SUSAN STRYKER, TRANSGENDER HISTORY: THE ROOTS OF TODAY'S REVOLUTION 12 (2d. ed. 2017).

By "gender-nonconforming" and "nonbinary" I am referring to "people who do not conform to binary notions of the alignment of sex, gender, gender identity, gender role, gender expression, or gender presentation. . . . In practice, these terms usually refer to people who reject the terms transgender and transsexual for themselves, because they think the terms . . . too conceptually enmeshed in the gender binary." *Id.* at 25.

By "queer," I am referring to the reclaimed derogatory term often used as "a synonym for gay or lesbian" first used by people attempting to find "a way to talk about their opposition to heterosexist social norms." *Id.* at 30. As defined by Susan Stryker, to "the people who first reappropriated the term," "queer was less a sexual orientation than it was a political one, what the 'queer theorists' of the day called being 'antiheteronormative.'" *Id.* at 30.

By "transgender," I am referring to those who change their gender to one that is different from the one that they were assigned at birth, whether binaried or non-binary. By the same token, "trans" is an abbreviation, meaning to convey "that sense of expansiveness and breadth given that contemporary connotations of transgender are often more limited." *See id.* at 37–38.

8. This implies a greater failure of the legal system and of rights rhetoric. For more on this, see DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (2015). For more on the failure of rights, see generally TOMIKO BROWN–NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011) (emphasizing the importance of local, grassroots activists in Atlanta for civil rights and noting how their

protect trans women will not eradicate harm. Rather, these efforts legitimatize the criminal justice system and other state apparatuses that exist to maintain our nation's interest in preserving Whiteness and cis-heteronormativity.[9]

This Note proceeds in four parts. Part I summarizes how laws and social norms are the foundation of the United States' commitment to creating and maintaining the White, cisgender, heterosexual attributes that comprise the controlling national identity. Part II examines the legislative and social history of the criminalization of people of color, the policing of gender identity, and how they work in tandem to create a property interest in maintaining a specific national identity. Part III explores how New York's "Walking While Trans" Ban creates normative boundaries and considers the effort to overturn the bill. Finally, Part IV argues that overturning the Ban is merely a small step toward creating an equitable nation, and that these violent norms will persist until the state gives those it deems to be deviant priority in controlling and imagining how to remap the nation's normative boundaries.

I.
BUILDING A CIS-HETERO NATION: NORM AND SOCIAL BORDER FORMATION

Nations, communities, and social identities are intentional projects. They are deliberately constructed to define who and what is valuable, and who and what should form the face of the nation. Political scientist and historian Benedict Anderson defined the nation as "an imagined political community—and imagined as both inherently limited and sovereign."[10] Nations are imagined

goals differed substantially from those of large legal civil rights organizations like the NAACP); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR (1991) (using personal narratives and stories to construct a critical analysis of the shortcomings of the legal system in addressing systemic racism).

9. *See* SPADE, *supra* note 8, at 9; Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's "Masculinity as Prison"*, CALIF. L. REV. ONLINE (Dec. 18, 2012), https://www.californialawreview.org/the-only-way-to-end-racialized-gender-violence-in-prisons-is-to-end-prisons-a-response-to-russell-robinsons-masculinity-as-prison/ [https://perma.cc/UZT2-VJKP] ("Critics argue that hate crimes laws not only fail to prevent violence against queer and trans people, they also build the arsenal of the criminal punishment system, which is the most significant perpetrator of violence against queer and trans people."); *see also* Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2176 (2013) (presenting a critique of a rights-based system in providing legitimacy for the status quo that continues to disadvantage and disparately target low-income people). There is also the broader critique of anti-discrimination law writ large, which is nicely articulated by Malcolm X: "[I]f the White people really passed meaningful laws, it would not be necessary to pass anymore laws. There are already enough laws on the law books to protect an American citizen. You only need additional laws when you're dealing with someone who is not regarded as an American citizen. . . . If [Black people] were real citizens, you'd need no more laws, you'd need no civil rights legislation. When you have civil rights, you have citizenship. It's automatic." John Leggett & Herman Blake, *Malcolm X – Interview at Berkeley (1963)*, YOUTUBE 10:00–10:47, (June 11, 2018), https://www.youtube.com/watch?v=FZMrti8QcPA&ab_channel=reelblack [https://perma.cc/F7PA-N2CM].

10. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (1983).

because it is impossible for all of a nation's members to know each other, thus they create narratives and frameworks through which members connect.[11] Nations distinguish themselves through artificial borders crafted not by their falsity or genuineness, but by the style in which "they are connected to people they have never seen, but these ties were once imagined particularistically—as indefinitely stretchable nets of kinship and clientship."[12] In other words, nations are an erective project, crafted by ideas of perceived difference and similarity which dictate who is and is not a part of the national identity. However, the flexibility of our nation's identity, and therefore, its potential for change, is limited by the most socially dominant groups who use their control to concoct laws and social expectations to preserve their own power. One of the key ways they do so is by rigidizing the national identity, thereby locking out those who do not match the ruling cohort. In the United States, a White cis-heteronormative identity has been created and cast as the national identity. However, this creation is fragile, and the security of the national identity is dependent on the exclusion of identities who have been designated as other. These deviant identities, namely people of color and non-cis-heteronormative people, are viewed as a threat to the longevity, stability, and safety of the nation.

A. White Property and Foundational Principles

Within the United States, racial discrimination is a cornerstone of society. According to Derrick Bell, "society as we know it exists only because of its foundation in racially based slavery, and it thrives only because racial discrimination continues."[13] Slavery, and the social and legal apparatus of racial discrimination that exists in its wake, rests on the enduring centrality of Whiteness and related property interests.[14] I define "property interests" in the same way as Cheryl Harris, who has argued that as a racial category, Whiteness is "treasured property" that grants those perceived to be White with an array of "public and private privileges that materially and permanently guarantee[] basic subsistence needs and . . . survival."[15] Whiteness, therefore, causes people to rely

11. *Id.* at 6 ("It is imagined because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.").

12. *Id.*

13. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 10 (1992). Even though Bell focused on slavery as his inception point, it is worth acknowledging the centrality of the genocide of Indigenous people to the creation of the United States and its national identity.

14. *See generally* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (tracing how Whiteness has evolved into a form of property in America, through this country's long history of slavery, conquest, and domination over Black and Native American peoples).

15. *Id.* at 1713.

on and expect these benefits, and the law has evolved to affirm and protect these expectations.[16]

Maintaining the centrality of Whiteness, as a social identity and as property, has required the otherization of all non-White identities. Those in power demonize Blackness by casting Black Americans, and those in proximity, as non-normative and inherently dangerous.[17] As summarized by Khalil Gibran Muhammad, "the racial project of making [B]lacks 'the thing against which normality, Whiteness, and functionality have been defined,' was foundational to the making of modern urban America."[18] But constraining Whiteness and our nation's commitment to it as being a strictly racial question ignores the full structure of social, religious, and gender markers that underlie White property interests foundational to our national norms.

B. The Body as a Site of Norm Maintenance

By virtue of existing within the nation's boundaries, the body is a site of norm-building and a central location where national identity is reinforced. Gender studies and queer theory scholars have argued that the nation is organized through the lens of the gender binary,[19] and through the creation of heterosexuality[20] and heteronormativity.[21] Sociologist and queer historian Clare Sears described this binarized effort as producing "problem bodies" or "bodies that local government officials defined as social problems and targeted for intervention."[22] When weighed in opposition to what disability studies has dubbed the "normative body," "fashioned and materialized through cultural,

16. *Id.*

17. KHALIL GIBRAN MUHAMMAD, CONDEMNATION OF BLACKNESS 5 (2010). Specifically, Muhammad argued that at the start of the twentieth century, Blackness solidified into a "more stable racial category in opposition to [W]hiteness" as Blackness and criminality became inextricably intertwined. This, he argued, allowed previously accepted understandings of ethnic criminality to fade into the background to be replaced by Blackness to be understood as criminal.

18. *Id.* at 7.

19. JUDITH LORBER, *'Night to His Day": The Social Construction of Gender*, *in* PARADOXES OF GENDER 13, 15 (1994) ("As a social institution, gender is one of the major ways that human beings organize their lives. Human society depends on a predictable division of labor, a designated allocation of scarce goods, assigned responsibility for children and others who cannot care for themselves, common values and their systematic transmission to new members, legitimate leadership, music, art, stories, games, and other symbolic productions. One way of choosing people for the different tasks of society is on the basis . . . of gender, race, ethnicity—ascribed membership in a category of people.").

20. JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY 58 (1995) ("[T]he concept of heterosexuality is only one particular historical way of perceiving, categorizing, and imagining the social relations of the sexes.").

21. *Id.*

22. CLARE SEARS, ARRESTING DRESS: CROSS-DRESSING, LAW, AND FASCINATION IN NINETEENTH-CENTURY SAN FRANCISCO 10 (2014).

political, social conditions" and norms, the problem body is inherently antagonistic.[23]

The problem body is one that is hyper-visible, and as argued by sociologist and disability studies scholar Dan Goodley, "appears as an object of fear and curiosity—[and] is therefore considered an opportunity to think through values, ethics and politics that congregate around such bodies."[24] The practice of thinking through the "values, ethics, and politics" that surround problem bodies allows normative groups to determine how a nation's populace is organized.[25] This exercise allows those in power to ensure that their property interests are protected. Trans studies and queer studies scholars have articulated the specific ways transgender and gender non-conforming people carry a specific set of normative threats.[26] By drawing upon myriad critical analyses and social contexts, trans scholarship localizes the specific context of trans lived experiences and trans existence "between the definition of biological sex, culturally constructed gender, and normative or nonnormative sexual desires."[27] Under this framework, transgender and gender non-conforming people threaten our national norms as people who do not fit within the constraints of the gender binary, and who blur established boundaries.[28] Critical disability studies scholars similarly argue that as physical reminders of the non-normative body, disabled people become a site of oppression as they are "judged" by their failure to "match up to the ideal [or normative] individual."[29] Often, this failure has framed trans and disabled people not only as non-normative, but as a "threat[] to dominant cultural ideals."[30] In both contexts, trans and disabled people are considered to

23. *See* Dan Goodley, *Dis/entangling Critical Disability Studies*, 28 DISABILITY & SOC'Y 631, 636 (2013). For a general overview of the field of critical disability studies, see Dan Goodley, Rebecca Lawthom, Kirsty Liddiard & Katherine Runswick-Cole, *Provocations for Critical Disability Studies*, 34 DISABILITY & SOC'Y 972 (2019). Goodley et. al defined critical disability studies as "a location populated by people who advocate building upon the foundational perspectives of disability studies whilst integrating new and transformative agendas associated with postcolonial, queer and feminist theories." *Id.* at 974. Trans women, particularly trans women of color, have historically been excluded from disability studies, particularly feminist disability studies and scholarship. *See, e.g.*, Niamh Timmons, *Towards a Trans Feminist Disability Studies*, 17 J. FEMINIST SCHOLARSHIP 46, 48–49 (2020) ("[D]isability studies scholars have refused to address transness—trans people also have an ongoing legacy of rejecting potential associations with disability. . . . [T]rans and disability scholars and activists need to similarly examine [their] tension with Whiteness, an issue that also exists within trans studies.").

24. *Id.*

25. *Id.*

26. *See e.g.*, Susan Stryker & Paisley Currah, *Introduction*, TRANSGENDER STUDS. Q. 1 (May 2014) ("The term transgender, then, carries its own antinomies: Does it help make or undermine gender identities and expressions? Is it a way of being gendered or a way of doing gender? Is it an identification or a method? A promise or a threat?").

27. YOLANDA MARTINEZ-SAN MIGUEL & SARAH TOBIAS, *Thinking Beyond Hetero/Homo Normativities*, *in* TRANS STUDIES: THE CHALLENGE TO HETERO/HOMO NORMATIVITIES 7 (2016).

28. Stryker & Currah, *supra* note 26, at 1.

29. *See* Goodley, *supra* note 23, at 639.

30. Ashley Mog & Amanda Lock Starr, *Threads of Commonality in Transgender and Disability Studies*, 28 DISABILITIES STUDS. Q. (2008), https://dsq-sds.org/article/view/152/152 [https://perma.cc/H58Y-NL2U].

be problems—either as something to be "fixed" or something to be removed.[31] Therefore, non-normative people and non-normative bodies are disruptive, revealing the inherent fragility of a national identity that fails to account for everybody.

Up to this point, I have attempted to describe the ways that non-White, particularly Black and Brown people, and queer people have been criminalized. While each of these identities exposes individuals to heightened scrutiny and suspicion, those who experience multiple levels of subordination are particularly vulnerable to the violence of the normative body politic and the state.[32]

C. The Apparatus of White Property Interests

Examining the evolution of Whiteness through Cheryl Harris's historical and cultural lens reveals a vested property interest in the intersection between Whiteness and cis-heterosexual identity. At its inception, the United States' identity existed in a particular tension: both as a reflection of the White, Christian England from whence the first colonizers came, and in opposition to the Brown, non-Christian, Indigenous people that they encountered upon their arrival.[33] Describing the initial boundary drawing that created the United States, Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock argued that

> Policing and punishment of sexual and gender "deviance" have existed for centuries in what is now known as the United States. From the first point of contact with European colonizers—long before modern lesbian, gay, bisexual, transgender, or queer identities were formed and vilified—Indigenous peoples, enslaved Africans, and immigrants, particularly immigrants of color, were systematically policed and punished based on actual or projected "deviant" sexualities and gender

31. *Id.* ("The issue is not that . . . people with disabilities, or trans people are not 'natural'; the issue is that these people and their bodies are seen as threatening to dominant cultural ideals. Medical systems focused on 'fixing' what is 'wrong' with non-normative bodies have existed for so long that binary assumptions take precedence over the realities of human variation. Because of bodily difference, these differences are seen as a medical condition that can be 'fixed' or altered in order to normalize bodies." (internal citations omitted)).

32. It has been argued that that racialized bodies can also be considered to be gender deviant. For example, trans feminist activist Che Gossett has described Blackness as "gender trouble" in that the "etymology of cisgender itself presumes a correspondence between assigned sex and gender, which fails to account for Blackness." George Yancy, *Black Trans Feminist Thought Can Set Us Free*, TRUTHOUT (Dec. 9, 2020), https://truthout.org/articles/black-trans-feminist-thought-can-set-us-free/ [https://perma.cc/85WJ-P8RS]. Put simply, Gossett argued that Blackness is both unaccounted for and unknowable by our gender binarized norms, casting all Black people as inherently gender and racially aberrant and as inherent problem bodies.

33. Zsea Bowmani, *Queer Refuge: The Impacts of Homoantagonism and Racism in U.S. Asylum Law*, 18 GEO. J. GENDER L. 1, 6 (2017) ("By colonizing America, Europeans sought to (re)create a nation in direct opposition to the ones they encountered—one that was White, heterosexual, Judeo-Christian, and with a strict male-dominated gender binary."). *See also* JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, SETTING THE HISTORICAL STAGE, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 1 (2011).

> expressions, as an integral part of colonization, genocide, and enslavement.[34]

The assigned deviance functioned as a justification for European colonial domination and as a mechanism to equate deviance with the threat of danger. Normative groups achieved order by dominating power structures and removing deviant groups. As a result, society and our legal system were crafted to protect Whiteness, which in turn maintains the social and economic needs of the imagined nation.[35]

In his examination of homoantagonism—or hostility toward queer people—in U.S. asylum law, Zsea Bowmani expanded the focus of colonial-era national identity beyond race and religion towards sexuality and gender. He wrote that "from the very beginning, sexuality and gender were intertwined with race and cultural identity and used to determine who would be allowed to become members of the newly constructed society and share the full benefits of legal and human rights—and who would not."[36] These determinations were essential to the creation of the United States as a cohesive body politic. European settlers violently imposed the colonizer and colonized distinction by instituting a patriarchal gender binarized system on Indigenous people and on enslaved Africans, upending the "range of gender identities and expressions" which were common in these societies.[37] These machinations drew borders around the population: granting full citizenship and humanity to the settlers and denying both to those colonized and enslaved. This created a deviant other and, thus, established a system under which a limited, normative few can benefit from resources and wealth.

This division relied on the creation of specific norms to (re)produce the idea and image of the nation. In his examination of trans and gender non-conforming lives and the administrative state, scholar and activist Dean Spade argued that norms play an essential role in "producing the idea of the national body as ever-threatened" and perform the dual role of excluding disfavored groups from state resources while simultaneously "targeting" these same groups for imprisonment and violence.[38] The national identity reaffirms itself through racial and gender norms, controlling the narrative arc of the nation. Spade argued that

> the circulation of norms creates an idea that undergirds conditions of

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34. MOGUL ET AL., *supra* note 33, at 1.

35. For a summary of colonial and chattel slavery era control of Black and Indigenous people, see *id.* at 1–19.

36. Bowmani, *supra* note 33 at 6.

37. MOGUL, ET AL., *supra* note 33, at 3 ("The imposition of the gender binary was also essential to the formation of the U.S. nation state on Indigenous land. . . . In order to colonize a people whose society was not hierarchical, colonizers must first naturalize hierarchy through instituting patriarchy. Although Indigenous societies are widely reported to have allowed for a range of gender identities and expressions, colonization required the violent suppression of gender fluidity in order to facilitate the establishment of hierarchal relations between two rigidly defined genders, and, by extension, between colonizer and colonized.").

38. SPADE, *supra* note 8, at 5.

> violence, exploitation, and poverty that social movements have resisted--the idea that the national population (constructed as those who meet racial, gender, sexual, ability, national origins, and other norms) must be protected from those 'others' (those outside of such norms) who are portrayed again and again in new iterations at various historical moments as 'threats' or 'drains'.[39]

As Spade pointed out, norms are a method of control—one that extends its reach to each part of the nation in pursuit of maintaining its imagined identity. Norms are how states makes value judgments—determining what and who is good and deserving of protection and what and who is dangerous and unfit to participate in the nation. They are also the mechanism by which non-normative groups are singled out for violence, individually or by the hands of the state, which is justified by the fact of their difference. These determinations allow for the maintenance of the nation and serve to prevent the constructed national identity from purported collapse brought on by the existence of non-normative groups. Norms, then, are also boundaries, operating to keep certain deviant individuals and ideas out while containing non-deviant individuals and ideas in.

These borrowed frameworks from trans and disability studies make clear the inherent violence of norm-building.[40] Those dedicated to maintaining a constructed national identity must constantly reinforce its fragile boundaries. The state casts people who have non-normative bodies as aberrant. Thus, people considered aberrant are demonized and removed from public view by those considered to be normative. Rather than gaining access to the privileges of full citizenship, non-normative people are instead subjected to state violence, particularly as it manifests through the criminal justice system.

As a result, the United States erected a border between what the imagined nation considers to be "normal" and "deviant." By maintaining a division between Whiteness and non-Whiteness, cis-heterosexuality and queerness, the state makes a value judgment—determining what and who is good and deserving of protection and what and who is dangerous and unfit to participate in the nation.

The existence of these particular divisions points to the state's anxiety and fear toward those who were cast as other. Consequently, the deviant were and continue to be viewed as a threat. Their prescribed deviance allows for the state to formally designate these groups as threats: threats to the new nation, to the family structure, to racial order, and to the continuance and survival of the nation. In designating people as deviant, the state can justify enacting violence against them and formally excluding these groups from the nation.

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39. *Id.*

40. Of course, this is not limited to the United States. These norms are pervasive and controlling throughout Western society and, by virtue of colonialism, Western imperialism, and cultural hegemony, throughout the rest of the world.

II.
CRIMINALIZATION OF IDENTITY

Criminal law is an enforcement mechanism, a key site for the enforcement of the nation's norms and for defining the nation's borders. The criminal justice system is a system of removal, control, and extraction; from the everyday interactions with police officers to the disproportionate incarceration of Black people, it restricts the movement, the freedom, the expression, the resources, and the visibility of people cast as non-normative.[41] Mass incarceration and the paths that lead to incarceration are "deeply rooted in the history and maintenance of racial power relations"[42] and, to extrapolate further, by the maintenance of gendered norms. Labeling non-normative groups as "criminal" casts their exclusion as legal, granting a veneer of legitimacy to their removal and supposed deviance.

Throughout U.S. history, criminality has been ascribed to people who do not fit the prescribed norms. As Ruth Wilson Gilmore argued, "[l]aws change, depending on what, in a social order, counts as stability, and who, in a social order, needs to be controlled."[43] Those considered to need "control" are those who exist in opposition to normative Whiteness and cisgender, heterosexual identity.[44] There are many examples of this in our legislative and judicial history: the "ugly laws"[45] designed to criminalize the public presence of disabled people, the Reconstruction-era Black Codes which criminalized Black Americans' engagement with and access to public life,[46] and anti-sodomy laws.[47] And the

41. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007) at 12 ("[T]he justification for putting people behind bars rests on the premise that as a consequence of certain actions, some people should lose all freedom (which we can define in this instance as control over one's bodily habits, pastimes, relationships, and mobility.").

42. MOGUL ET AL., *supra* note 33, at xii.

43. GILMORE, *supra* note 41, at 12. *See also* MOGUL ET AL., *supra* note 33, at xvi ("The very definition of crime is socially constructed, the result of inherently political processes that reflect consensus only among those who control or wield significant influence.").

44. *See* MOGUL ET AL., *supra* note 33, at xvi (defining crime as "socially constructed, the result of inherently political processes that reflect consensus only among those who control or wield significant influence.").

45. *See generally* SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC (2009) (detailing the history of ugly laws and how they were used to discriminate against the poor and persons with disabilities); Javier Ortiz, Matthew Dick & Sara Rankin, *The Wrong Side of History: A Comparison of Modern and Historical Criminalization Laws*, HOMELESS RTS. ADVOC. PROJECT 7, 9–11 (2015) https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1003&context=hrap [https://perma.cc/25G7-KM5W] (providing an overview of ugly laws nationwide).

46. *See e.g.*, MOGUL ET AL., *supra* note 33, at xvi ("[F]ormer slaveholding states produced new sets of laws, known collectively as the Black Codes, which criminalized Black people for engaging in a host of ordinary actions that were legal for White people. Upon conviction, thousands of African-descended people were imprisoned and required to perform forced labor for [W]hite business owners.").

47. *See, e.g.*, Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 688 (2001) ("The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants. Admittedly certain individuals namely those who are certified with various levels of state authority, are more directly linked to the extension of

question of what helped to make the "modern . . . America" is an interrogation into what and who has and has not been allowed to continue to exist within the boundaries of the nation. Black culture has been criminalized,[48] and Black people have been cast as antithetical to that which is good and safe.[49]

Similarly, queerness has been subjected to criminalization by casting those who are queer as having problem bodies.[50] Indeed, the criminalization and otherization of queerness in any form can be traced back to the birth of ideas of sexual deviance.[51] One such example is the cross-dressing bans of the late nineteenth century. These laws were essential in forming our public understanding of non-normative gender expression. As described by Clare Sears, cross-dressing laws are a "central mechanism for policing a whole series of 'belongings', not only the items of clothing that 'belonged' to a specific sex but also the types of people that 'belonged' in public spaces and the types of bodies that 'belonged' in the categories of man and woman."[52] For the law to be operational, neighbors reported instances of cross-dressing to the authorities, opening the door for the arrest and incarceration of gender non-conforming individuals.[53] But as the cross-dressing laws criminalize the *action* and not the identity, these laws criminalize any type of deviant behavior, regardless of sexual orientation or gender expression.[54]

Cross-dressing bans were essential to crafting our current conceptions of gender (ab)normality and were a method by which the state reinforced its definition of a normative gender and subsequently justified excluding gender

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law's power. Yet the social effects of sodomy laws are not tied to these specialized agents alone. On the ground level, private individuals also perform roles of policing and controlling lesbian and gay lives in a mimetic relation to the modes of justice itself.").

48. MUHAMMAD, *supra* note 17, at 9 (discussing early Twentieth century ideas of Black criminality and the contrast between understandings of Black criminality against the criminality of White immigrants). "The statistical evidence of [B]lack criminality remained rooted in the concept of [B]lack inferiority or [B]lack pathology despite a shift in the social scientific discourse on the origins of race and crime. The shift from a racial biological frame to a racial cultural frame kept *race* at the heart of the discourse. Although racist notions of (permanent) biological inferiority gave way to liberal notions of (temporary) cultural inferiority, racial liberals continued to distinguish [B]lack criminality from White and ethnic criminality. In effect, they incriminated [B]lack culture." *Id.*

49. *See id.* at 7–9; *see also* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1442 (2016) ("The law often reinforces [W]hite supremacy without explicitly mentioning race."). *Id.* at 1455 ("Polls suggest that the majority of [W]hite people think that [B]lacks are violent. Another study found that [W]hite people imagined men with stereotypically [B]lack names that 'Jamal' or 'Darnell' to be larger, more dangerous, and violent than men with stereotypically [W]hite names like 'Connor' or 'Wyatt'.").

50. *See* SEARS, *supra* note 22, at 10.

51. *See* Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 681 (2017).

52. SEARS, *supra* note 22, at 6.

53. *Id.*

54. MOGUL ET AL., *supra* note 33, at 24 ("It is important to recognize that queer criminalizing scripts have never focused exclusively on the policing and punishment of LGBT people. As political scientist Cathy J. Cohen points out in her groundbreaking essay *Punks, Bulldaggers, and Welfare Queens*, gender conforming heterosexuals can also be policed and punished for exhibiting behaviors or indulging sexual desires that run contrary to the vast array of punitive rules, norms, practices, and institutions that "legitimize and privilege heterosexuality.").

deviant individuals from public life.[55] Despite being largely overruled, these cross-dressing bans have a legacy. Indeed, echoes of the bans' underlying goal of drawing a strict line between masculine and feminine can be found in the regulation of queer bars in the 1950s and 60s,[56] the current moral panic surrounding the presence of trans athletes in high school and college athletics,[57] and Walking While Trans bans themselves.

Trans women of color are treated as a key site of norm maintenance as they exist at the intersection of multiple highly visible axes of oppression.[58] As non-men, as non-White, and as visibly non-conforming to gender norms, the public existence of trans women of color is a visible reminder of the fragility of the property interest in White cis-heteronormativity. As such, the existence of trans women is excessively regulated and hyper criminalized to remove their threat from public view. Being Black or adjacent to Blackness casts trans women of color as non-normative "gender troubled" problem bodies.[59] In this context, the assumption of criminality and deviance attaches to people who sit at multiple junctions of marginalization. Thus, Black and Brown trans women have been labeled as inherently and particularly criminal.

55. SEARS, *supra* note 22 at 6. Cross dressing bans "represented a specific strategy of government that constructed normative gender, reinforced inequalities and generated new modes of exclusion from public life."

56. *See* ANNA LVOVSKY, VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL 24–63 (2021).

57. *See, e.g.*, David W. Chen, *Transgender Athletes Face Bans From Girls' Sports in 10 U.S. States*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/article/transgender-athlete-ban.html [https://perma.cc/7RC4-HB2V]; Alphonso David, *Why the Latest Republican Assault on L.G.B.T.Q. Rights is Different,* N. Y. TIMES (June 7, 2021), https://www.nytimes.com/2021/06/07/opinion/anti-lgbtq-laws-us.html?smid=tw-nytimes&smtyp=cur [https://perma.cc/3X76-7WQZ].

58. To echo attorney and trans rights activist Chase Strangio "the bodies of trans women of color are the site of multiple forms of deeply historical oppression." Lopez, *supra* note 1.

59. SEARS, *supra* note 22, at 10.

In criminal law, this removal effort has manifested in the twin issues of law enforcement neglect[60] and police profiling.[61] Profiling, or the "target[ing] of specific . . . groups as suspects in criminal activities based on the assumption that certain . . . groups are predisposed to commit certain crimes"[62] has manifested in default assumptions of criminality of specific groups, particularly when these groups act in ways that would not lead to the assumption of criminality in normative groups.[63] Default assumptions of criminality in non-normative groups have led to the development of terms like "Driving While Black"[64] or the related

60. Carolyn Calhoun, "*Bullseye on Their Back": Police Profiling and Abuse of Trans and Gender Non-Conforming Individuals and Solutions Beyond the Department of Justice Guidelines*, 8 ALA. C.R-C.L L. REV. 127, 128 (2017) ("[B]ias leads police to treat trans and non-binary people, especially people of color, poorly when they do respond to a call."); *see also* Rod K. Brunson, *Protests Focus on Over-policing, but Under-policing Is Also Deadly*, WASH. POST (June 12, 2020), https://www.washingtonpost.com/outlook/underpolicing-cities-violent-crime/2020/06/12/b5d1fd26-ac0c-11ea-9063-e69bd6520940_story.html [https://perma.cc/J7D8-9EJP] (discussing under-policing in Black and Brown "urban" communities: "Residents of distressed urban neighborhoods have complained about ineffective policing for centuries, including officers' rudeness, slow response times and lack of empathy for crime victims. Some residents of high-crime neighborhoods have long concluded that police are either incapable of keeping them safe or unwilling to do so. . . ."); Kirsten Wier, *Policing in Black & White*, 47 MONITOR ON PSYCH., AM. PSYCH. ASS'N, (Dec. 2016), https://www.apa.org/monitor/2016/12/cover-policing [https://perma.cc/NA4F-TF4K] (discussing psychological research on police and implicit bias: "Similar to community participants, officers showed evidence of bias in their reaction times, more quickly reacting to armed [B]lack targets and unarmed [W]hite targets—in other words, targets that aligned with racial stereotypes. But those biases evident in their reaction times did not translate to their ultimate decision to shoot or not shoot.").

61. *See* Calhoun, *supra* note 60, at 133. *See also* Aya Gruber, *The LGBT Piece of the Underenforcement-Overenforcement Puzzle*, JOTWELL (Oct. 11, 2016), https://crim.jotwell.com/the-lgbt-piece-of-the-underenforcement-overenforcement-puzzle/ [https://perma.cc/DM5E-PJ2M] ("Individuals who belong to marginalized groups, such as racial and sexual minorities, disproportionately bear the brunt of crime *and* law enforcement.").

62. Calhoun, *supra* note 60, at 133 (citing April Walker, *Racial Profiling—Separate and Unequal Keeping the Minorities in Line—The Role of Law Enforcement in America*, 23 ST. THOMAS. L. REV. 576, 591 (2011)); *see also* Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM & M. J. WOMEN L., 5, 9 (2017) ("[W]hen transgender women experience violence at the hands of private actors, they often cannot count on law enforcement to protect them. . . . Transgender victims of domestic violence report that calling the police frequently results in the transgender victim being arrested, violence from the police, or a total failure to respond to the situation.").

63. For an overview of the connections between walking while trans and walking while Black, see Carpenter & Marshall, *supra* note 62, at 17–23.

64. *See, e.g.*, DAVID A. HARRIS, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999), https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways [https://perma.cc/TDH5-LWX9] (discussing the deliberate creation of racially-biased profiling in pretextual police stops); Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html [https://perma.cc/NK3T-F2XK] (describing the disproportionate number of police stops of Black drivers in Greensboro, North Carolina: "Officers pulled over African-American drivers for traffic violations at a rate far out of proportion with their share of the local driving population. They used their discretion to search [B]lack drivers or their cars more than twice as often as [W]hite motorists — even though they found drugs and weapons significantly more often when the driver was [W]hite. Officers were more likely to stop [B]lack drivers for no discernible reason. And they were more likely to use force if the driver was [B]lack, even when they did not encounter physical resistance.").

"Walking While Black"[65] to describe the experience of living under heightened scrutiny as a result of one's presumed criminality. This same apparatus has been applied to other contexts, spawning other, similar terms such as "Walking While Trans."[66] As defined by trans activist Monica Jones, "Walking While Trans" is a way to

> refer to the excessive harassment and targeting that we as trans people experience on a daily basis . . . 'Walking while trans' is a way to talk about the overlapping biases against trans people — trans women specifically — and against sex workers. It's a known experience . . . of being routinely and regularly harassed and facing the threat of violence or arrest because we are trans and therefore often assumed to be sex workers.[67]

In effect, trans women, particularly trans women of color, are subjected to the twin circumstances of over-policing and under-policing. Indeed, laws that appear to be facially neutral such as vagrancy laws[68] and disorderly conduct laws have disproportionately been enforced against marginalized people.[69] These laws bring the rest of the nation in on the effort—co-signing and validating social methods of exclusion.[70] The casting and subsequent criminalization of non-

65. *See, e.g.*, Topher Sanders, Kate Rabinowitz & Benjamin Conarck, *Walking While Black*, PROPUBLICA (Nov. 16, 2017), https://features.propublica.org/walking-while-black/jacksonville-pedestrian-violations-racial-profiling/ [https://perma.cc/GAA7-W5UT] (reporting an analysis of the racial disparity Black people in Jacksonville, Florida in terms of receiving tickets for pedestrian jaywalking violations); Kate Rabinowitz & Topher Sanders, *How We Calculated the Risks of Walking While Black*, PROPUBLICA (Nov. 16, 2017), https://www.propublica.org/article/how-we-calculated-the-risks-of-walking-while-black [https://perma.cc/8RYT-5X7S].

66. Carpenter & Marshall, *supra* note 62, at 18.

67. Chase Strangio, *Arrested for Walking While Trans: An Interview with Monica Jones*, ACLU (Apr. 2, 2014), https://www.aclu.org/blog/criminal-law-reform/arrested-walking-while-trans-interview-monica-jones [https://perma.cc/UW6T-5X6E].

68. *See generally* RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016) (detailing how the breadth and flexibility of vagrancy laws in the 1960s allowed the police to arrest anyone considered socially out of place, such as sex workers, sexual and racial minorities, and civil rights activists). To be clear, I am not—nor are most Trans organizations—advocating for an increased police presence or enforcement in historically neglected communities. Police abolitionists and the movement to defund the police have made it clear that the police and policing is inherently violent and abusive toward the marginalized and instead functions to protect norms. The point here is not to advocate for more aggressive policing. It has been well documented and well argued that more policing does not and cannot make marginalized people safer. Instead, an arm of the normative state, more aggressive policing methods will do nothing more than aid in the removal of the non-normative from public life. *See, e.g.*, Derecka Purnell, *How I Became a Police Abolitionist*, ATLANTIC (July 6, 2020), https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540/ [https://perma.cc/7F9E-HBWY].

69. *See generally* Jamelia Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637 (2021) (discussing how disorderly conduct laws disproportionately target historically marginalized groups and reinforce racist and sexist conceptions about what behaviors are disorderly).

70. This echoes Justice Kennedy's majority opinion in *Lawrence v. Texas*, 539 U.S. 558, 575–78 (2003) in which he drew the connection between the criminalization of consensual private conduct and social stigma: "When homosexual conduct is made criminal by the law of the State, that declaration

normative people has sanctioned their removal from society and their bar from the nation. Specifically, the criminalization of identity and behavior often leads to incarceration, creating a direct pathway to forced social removal which results in a type of social "cleansing."[71] And the statistics support this point: a 2015 survey reports that people of color are "more than twice as likely (46.8%) than their White counterparts (18.3%) to report being 'arrested for being trans.'"[72] The preservation of White and cis-heteronormative norms has resulted in the exclusion of those who do not fit within these imagined boundaries, drawing borders around who does and does not belong within the nation. This effort is essential at maintaining the relevance and power of the nation's normative image. This "social cleansing" did not occur in a vacuum; it is the result of a deliberate centuries-long effort[73] to maintain and justify the property interests that the national norms protect.

III.
THE HISTORY, ENFORCEMENT, AND FALL OF SECTION 240.37

The "Walking While Trans" Ban (New York Penal Code Section 240.37) and similar laws sanction the removal and harassment of "non-normative" individuals. This allows the state and law enforcement system to constantly remind such individuals that they do not belong in society. Though recently overturned,[74] Section 240.37 is an example of both the law's recognition of the

in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres" and "[t]he State cannot demean their existence or control . . . destiny by making . . . private sexual conduct a crime." *Id.*

71. Ruth Wilson Gilmore specifically referenced the "racial cleansing" role that prisons provide ("A key set of arguments charges racial cleansing: prisons grow in order to get rid of people of color, especially young Black men, accomplishing the goal through new lawmaking, patterns of policing, and selective prosecution."). GILMORE, *supra* note 41, at 20. Prisons provide the same function (referring to incapacitation: "Incapacitation doesn't pretend to change anything about people except where they are. It is in a simple-minded way . . . a geographical solution that purports to solve social problems by extensively and repeatedly removing people from disordered, deindustrialized milieus and depositing them somewhere else."). *Id.* at 14.

72. ERIN FITZGERALD, SARAH ELSPETH & CHERNO BIKO, MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE 5 (2015), http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf [https://perma.cc/XMC3-2WXL].

73. *See generally* MUHAMMAD, *supra* note 17 (chronicling the emergence of deeply embedded national norms that mark Black people as a threat to modern, urban, White society); *see also* STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1980) (critiquing assumptions of biological determinism that assigns particularly traits, such as intelligence, on particular groups over others); LEE D. BAKER, FROM SAVAGE TO NEGRO: ANTHROPOLOGY AND THE CONSTRUCTION OF THE RACE, 1896-1954 (1998) (detailing how the law codified racial categories over time, e.g., the separate but equal doctrine and public school desegregation).

74. Jesse McKinley & Luis Ferré-Sardurní, *N.Y. Repeals Law That Critics Say Criminalized 'Walking While Trans',* N.Y. TIMES (Feb. 3, 2021), https://www.nytimes.com/2021/02/03/nyregion/walking-while-trans-ban.html [https://perma.cc/875G-XV63]; Press Release, *Governor Cuomo Signs Legislation Repealing the 'Walking While Trans' Ban*, New York State (Feb. 24, 2021), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-repealing-walking-while-trans-ban [https://perma.cc/875G-XV63].

inherent fragility of our nation's norms and of the banality of the violence used to preserve these norms.

A. Section 240.37: An Overview

Section 240.37 was codified in 1976 under the title "Loitering for the Purpose of Engaging in a Prostitution Offense."[75] The New York legislature passed the section under the rhetoric that it would curtail prostitution and other general "maladies," particularly in downtown Manhattan.[76] Underlying this primary rationale were two broader reasons: the legislature sought to protect the public's "use and enjoyment" of public areas and to revitalize New York City's downtown Manhattan business area.[77] The legislature passed Section 240.37 during a period of revitalization in New York City. Section 240.37 was a public nuisance regulation, as were similar laws such as California's Section 653.22,[78] Ohio's Section 533.095,[79] and New Jersey's Section 2C:34-1.1.[80] Specifically, the legislative history reveals that Section 240.37 was passed as a response to complaints by "unwilling victims" about increased incidents of prostitution solicitation.[81] The law sought to prevent "'harassing' conduct that 'interfered

75. S.B. S1351, 2021-22 State S, Reg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/S1351 [https://perma.cc/9ZWM-GWUB].

76. *Id.*; N.Y. CITY BAR, REPEAL THE "WALKING WHILE TRANS" BAN 2 (2021), https://s3.amazonaws.com/documents.nycbar.org/files/2020630-RepealWalkingWhileTrans_FINAL_2.3.20.pdf [https://perma.cc/T3QF-U48H] ("The legislature enacted § 240.37 to target individuals 'aggressively engaging in promoting, patronizing or soliciting for the purposes of prostitution' in Times Square and Midtown West and East." (citing L.1976, c. 344, § 1)); *see also* Karen Struening, *Walking While Wearing a Dress: Prostitution Loitering Ordinances and the Policing of Christopher Street*, 3 STAN. J. CRIM. L. & POL'Y 16, 16 (2016) ("§ 240.37 of the New York State Penal Code . . . was passed in 1976 to clean up 'aggressive street solicitation' in Times Square and Midtown West and East.").

77. N.Y. S.B. S1351.

78. CAL. PENAL CODE § 653.22(a)(2) (2017) ("[I]t is unlawful for any person to loiter in any public place with the intent to commit prostitution. This intent is evidenced by acting in a manner and under circumstances that openly demonstrate the purpose of inducing, enticing, or soliciting prostitution, or procuring another to commit prostitution.").

79. OHIO REV. CODE § 2907.241(a)(1)–(5) (2021) ("No person, with purpose to solicit another to engage in sexual activity for hire and while in or near a public place, shall do any of the following: (1) Beckon to, stop, or attempt to stop another; (2) Engage or attempt to engage another in conversation; (3) Stop or attempt to stop the operator of a vehicle or approach a stationary vehicle; (4) If the offender is the operator of or a passenger in a vehicle, stop, attempt to stop, beckon to, or entice another to approach or enter the vehicle of which the offender is the operator or in which the offender is the passenger; (5) Interfere with the free passenger of another.").

80. N.J. STAT. § 2C:34-1.1 (2021) ("Loitering for the purpose of engaging in prostitution. a. As used in this section, "public place" means any place to which the public has access, including but not limited to any public street, sidewalk, bridge, alley, plaza, park, boardwalk, driveway, parking lot or transportation facility, public library or the doorways and entrance ways to any building which fronts on any of the aforesaid places, or a motor vehicle in or on any such place.").

81. N.Y. CITY BAR, *supra* note 76, at 2 ("Lawmakers specifically intended to address the concerns of 'unwilling victims' of solicitation and business owners in those neighborhoods who had complained that 'in recent years the incidence of such conduct in public places has increased significantly.'" (citing L.1976, c. 344, § 1)).

with the use and enjoyment by other persons of such public place thereby causing a danger to the public health and safety.'"[82]

As a public nuisance regulation, Section 240.37 drew a deliberate boundary between normative individuals and deviant individuals, casting violators of the section not as human, but instead as a "danger" to public health and safety.[83]

1. Section 240.37's Ambiguity and Breadth

Section 240.37's language was remarkable in its breadth and ambiguity. To start, the definitions of "prohibited conduct" and "relevant areas" were vague, leaving room for variance in what and who is specifically criminalized and how.[84] Section 240.37's wording allowed for the criminalization of nearly anyone and everything. It criminalized everyday activities and left much of the code's enforcement power in the hands of police officers and prosecutors. For example, the bill criminalized "[l]oitering for the purpose of engaging in a prostitution offense."[85] A "public place" was defined as basically anywhere: "any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways and entrance ways to any building which fronts on any of the aforesaid places, or a motor vehicle in or on any such place."[86]

Section 240.37's definition of prohibited conduct was just as broad, criminalizing free movement and preventing violators from accessing public space. It read:

> 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. . . .[87]

The statute failed to mark the parameters of the "purpose" of prostitution, leaving the scope of the prohibited conduct to any individual officer's discretion.[88]

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82. N.Y. S.B. S1351.

83. *See id.*

84. N.Y. PENAL LAW § 240.37 (2016). Relatedly, Section 240.37 was arguably unconstitutionally overbroad. *See* Complaint & Demand for Jury Trial at ¶¶ 64–68, D.H. v. City of New York, 309 F. Supp. 3d 52 (S.D.N.Y. 2018) (No. 16–7698).

85. N.Y. PENAL § 240.37.

86. N.Y. PENAL § 240.37(1).

87. *Id.* § 240.37(2).

88. Complaint & Demand for Jury Trial at ¶¶ 51–52, *D.H.*, 309 F. Supp. 3d (No. 16–7698) ("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

Additionally, the term "other persons" performed double duty: drawing a distinction between the criminal and the innocent, the desirable and the undesirable, the nuisance and the non-nuisance. The law created two classes of people—sex workers and non-sex workers—as if they are immutable categories in which sex workers infringe upon the lived experience of "other persons" and inhibit their daily life, quality of life, and general safety. Moreover, the law performed even more insidious work by drawing distinctions between the bothered and the nuisance, seen as others infringing upon the lives and general enjoyment of others.

The connection between the law's ambiguity and the public nuisance is important. Together they allowed police officers to subjectively determine whether the conduct or presentation in question could be found as bothersome to them. The law is not neutral and law enforcement does not "merely objectively enforce" it.[89] As argued in *Queer (In)Justice*, police and other law enforcement officials are "lawmakers in their own right" given

> considerable latitude in deciding which laws to enforce, how to enforce them, and which people to target for enforcement. And they often consciously and unconsciously exercise that broad discretion in ways that are anything but neutral. Far from being passive players just doing a job, law enforcement agents play a crucial role in manufacturing, acting on, and enforcing criminalizing archetypes.[90]

When the law is particularly vague, police and other law enforcement officials simultaneously create the law and execute it based on their own biases and prejudices. As the key goal of law enforcement and the criminal justice system is to protect the privileges associated with the enduring dominance of Whiteness and cis-hetero identity, Whiteness, gender, and sexuality were used as proxies for the enforcement of this law. Law enforcement disproportionately targeted cisgender women of color,[91] LGBTQ people (particularly LGBTQ youth),[92] trans women (particularly trans women of color),[93] and immigrant women under the law.[94] This also extended to the metrics police used to determine which conduct was prohibited. Clothing was particularly criminalized, as was the race and gender of the person wearing the clothing. The New York Police Department

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statute, may be deemed for the 'purpose' of prostitution, and to conform her behavior accordingly. . . . 'Purpose,' unlike 'criminal intent,' is not defined in New York's Penal Law, affording the NYPD immense discretion to assume an individual's 'purpose' . . . . 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.").

89. MOGUL ET AL., *supra* note 33, at 48.

90. *Id.*

91. *See* N.Y. CITY BAR, *supra* note 76, at 4.

92. *See id.* at 3, 4–5.

93. *See id.* at 3.

94. *See id.* at 6 (discussing the disproportionate impact Section 240.37 enforcement has on immigrant women, due to the broad discretion it grants to police to profile individuals based on perceived ethnicity, national origin, and immigration status).

(NYPD) garnered a reputation for enforcing a particular dress code against women of color, particularly trans women of color. The department profiled trans women of color for wearing tight or "revealing"[95] clothing. This often manifested in the "difference between 'innocent' and 'criminal' behavior" boiling down to "how a person looks."[96]

2. Section 240.37's Role in Remaking New York City

In practice, Section 240.37 likely played a key role in reformatting the image of New York City. In situating Section 240.37 within the broader context of quality-of-life policing,[97] Karen Struening characterized Section 240.37 as existing in two waves: the first in the immediate aftermath of the law's enactment where it was used to "clean up" wealthy Midtown Manhattan and the second in the 1990s when Section 240.37 was "redeployed" to remove the LGBTQ community from a rapidly gentrifying West Village.[98] In both instances, the law was used to reshape the image and identity of New York City. Contemporaneous media reports speculated that Democrats passed Section 240.37 not to mitigate sex work, but instead, to coincide with Democratic National Convention being hosted in New York City.[99] Commentators speculated that the law was a way to give law enforcement a tool to forcibly remove "undesirable" people from what was then considered a crumbling city in order to ultimately change the perception of New York City on a national stage.[100] The common thread between these two periods is the way that the New York City government used Section 240.37 as a tool to draw boundaries and as a tool of removal. In both eras, Section 240.37 gave law enforcement the greenlight to remove from social view people that appeared to be deviant.

To this day, the NYPD has insisted that they did not, and currently do not, target transgender people for arrest, but instead, base their arrests on "community complaints pertaining to allegations of prostitution."[101] But even this assertion reveals the same community policing and social boundary drawing mechanisms at play in early cross-dressing bans.[102] That people submit police complaints

95. What is deemed to be "revealing" is largely arbitrary. Arrest records reveal that people have been arrested for wearing tight clothing. Complaint & Demand for Jury Trial at ¶¶ 138, 153, D.H. v. City of New York, 309 F. Supp. 3d 52 (S.D.N.Y. 2018) (No. 16–7698).

96. Strangio, *supra* note 67.

97. As defined by Struening, quality-of-life policing is policing "based on the idea that an orderly neighborhood discourages crime while a disorderly neighborhood attracts it. . . . Crime is believed to increase in [disorderly] neighborhoods because lawless, disorderly people believe that it will be tolerated. But if disorder and low-level crimes can be caught in time and stopped, so the theory goes, more serious forms of crime can be avoided." Struening, *supra* note 76, at 18.

98. *See* Struening, *supra* note 76, at 41.

99. *Id.*

100. *See id.* at 44–53.

101. Jo Yurcaba, *New York Repeals 'Walking While Trans' Law After Years of Activism*, NBC NEWS (Feb. 4, 2021), https://www.nbcnews.com/feature/nbc-out/new-york-repeals-walking-while-trans-law-after-years-activism-n1256736 [https://perma.cc/8VVH-QD96].

102. *See supra* notes 45–53.

about the presence of trans women of color reveals an inherent public discomfort with the existence of trans women. Further, it implies a public fear of transness, revealing that normative individuals considered public space as their own, an ownership interest threatened by the physical presence of non-normative trans women of color.[103]

The combination of public expectations and police discretion led to Section 240.37, and laws like it, falling into the category of a "Walking While Trans" ban. Section 240.37 is a part of a family of bills nationwide that, through a combination of the vagueness of its language and methods of enforcement, has come to criminalize the very existence of trans women, particularly trans women of color.[104]

This fact is not a secret. From the statute's first introduction in the 1970s, people voiced concerns about Section 240.37's potential for abuse.[105] Legal practice guides warned that Section 240.37 required "a knowledgeable and restrained attitude on the part of law enforcement officers, lest unwary or unsophisticated innocent citizens be subjected to arrest and prosecution."[106] Police disproportionately singled out women of color, particularly trans women, when enforcing Section 240.37. The inherent vagueness of the statute has resulted in police making arbitrary, biased decisions, for example arresting women "simply because an officer takes issue with her clothing or appearance and decides that her purpose is to engage in prostitution."[107] Police regularly relied on condom possession as a pretext for engaging in prostitution despite a 2015 amendment to Section 240.37 making evidence of condom possession inadmissible as a factor indicating intention to engage in prostitution.[108] These

103. *Cf.* Goodman, *supra* note 47, at 688 ("The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants. Admittedly certain individuals, namely those who are certified with various levels of state authority, are more directly linked to the extension of law's power. Yet the social effects of sodomy laws are not tied to these specialized agents alone. On the ground level, private individuals also perform roles of policing and controlling lesbian and gay lives in a mimetic relation to the modes of justice itself.").

104. *See supra* notes 91–93.

105. Complaint & Demand for Jury Trial at ¶¶ 55–57, D.H. v. City of New York, 309 F. Supp. 3d 52 (S.D.N.Y. 2018) (No. 16–7698).

106. Arnold D. Hechtman, *Practice Commentary to Penal Law § 240.37*, *in* MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, ANNOTATED 330 (1980) ("[F]air and reasonable evaluation of such conduct as beckoning to or engaging passersby in conversation, requires a knowledgeable and restrained attitude on the part of law enforcement officers, lest unwary or unsophisticated innocent citizens be subjected to arrest and prosecution hereunder.").

107. Press Release, Legal Aid Society & Clearly Gottlieb, *Challenge the Constitutionality of New York's Loitering for Prostitution Law* (Sept. 30, 2016), https://orgs.law.columbia.edu/qtpoc/sites/default/files/content/LAS-Cleary-Gottlieb-Challenge-the-Constitutionality-of-New-Yorks-Loitering-for-Prostitution-Law-Press-Release-9.30.16.pdf [https://perma.cc/9MFT-SPHK]; *see also* Yurcaba, *supra* note 101 ("[Section 240.37] allowed people to be arrested for being outside in public, talking to other people while having an intention of engaging in prostitution . . . . Of course, it's not really possible to know why somebody is out on the street and talking to people.").

108. Kate Mogulescu, *Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk*, 74 U. MIAMI L. REV. 68, 84 (2020).

decisions were inherently based on gendered, racialized, and heteronormative stereotypes. Kate Mogulescu argued that the "accusatory instruments" that police officers relied on under Section 240.37 and other similar statutes give police officers license to rely on stereotypical understandings of "gender, sexuality, and norms regarding behavior in public. . . ."[109] A recent lawsuit filed by the Legal Aid Society alleged that between 2012 and 2015, 85 percent of all arrests made under the statute were Black or Latine.[110] Other lawsuits challenging the constitutionality of the statute recognized Section 240.37's disparate impact on women[111] and the harm that the combination of the law's vagueness and liberal police discretion caused.[112]

Such disparate impact is deliberate. The Legal Aid lawsuit alleged that the NYPD adhered to "intentionally discriminatory" practices and customs[113] and effectively turned communities where people live, work, and play into surveillance zones.[114] The department labeled neighborhoods with large populations of trans women of color as "prostitution-prone" and regularly patrolled and disrupted these neighborhoods. These allegations reveal the NYPD's commitment to enforcing the nation's normative boundaries. The Legal Aid complaint highlights this tension well, noting that the NYPD regularly made arrests after observing people engaging in lawful conduct.[115] The plaintiffs reported targeted police harassment, stating: "if you look like you might be trans, you are going to jail."[116]

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109. *Id.* at 82.

110. Complaint & Demand for Jury Trial at ¶ 91 n.16, *D.H.*, 309 F. Supp. 3d (No. 16–7698). For a comprehensive overview of the history of the efforts to overturn Section 240.37, see generally Mogulescu, *supra* note 108, at 74–85.

111. People v. Burton, 432 N.Y.S.2d 312, 315 (N.Y. City Ct. 1980) (dictum) ("[C]ircumstances of the [female] defendant's arrest and fact that almost all the people arrested in [the city] for prostitution-related offenses are women would seem to suggest that defendant and other women were victims of bias . . . .").

112. People v. Smith, 378 N.E.2d 1032, 1032 (N.Y. 1978) (dictum).

113. Complaint & Demand for Jury Trial at ¶ 12, *D.H.*, 309 F. Supp. 3d (No. 16–7698); Emma Whitford, *When Walking While Trans Is a Crime*, CUT (Jan. 31, 2018), https://www.thecut.com/2018/01/when-walking-while-trans-is-a-crime.html [https://perma.cc/TGN5-NKFJ] ("According to the Civilian Complaint Review Board, between 2010 and 2015, 856 complaints filed by LGBTQ New Yorkers included allegations that officers used slurs including 'f[****]t,' 'q[***]r,' 'h[**]o,' and 't[****]y.' The NYPD revised it patrol guide in 2012 to explicitly prohibit disrespectful remarks about gender expression—but a November 2017 report by the Department of Investigation found that between 2012 and 2016, officers at just six of the city's seventy-seven precincts received the mandatory training.").

114. Complaint & Demand for Jury Trial at ¶ 94, *D.H.*, 309 F. Supp. 3d (No. 16–7698); *see also* Mogulescu, supra note 108, at 85 ("Years after both the condom prohibition and the patrol guide amendment, women still face arrest and prosecution under section 240.37 for simply standing in a public place and talking to other people.").

115. Complaint & Demand for Jury Trial at ¶ 90, *D.H.*, 309 F. Supp. 3d (No. 16–7698) ("NYPD officers frequently make arrests after observing Plaintiffs engage in lawful conduct for very brief periods of time.").

116. Whitford, *supra* note 113.

B. Challenges to Section 240.37

Throughout the nearly fifty years of the statute's existence, multiple lawsuits challenged the constitutionality of Section 240.37.[117] One of the most recent and high-profile lawsuits was the Legal Aid lawsuit, which challenged the law for violating the First and Fourth Amendments. The complaint detailed specific instances of the law's disparate impact on trans women of color and the myriad restrictions that Section 240.37 placed on their freedom of movement and association. However, the case did not survive a motion to dismiss.[118] Although the court found that the class had suffered an injury due to the discriminatory application of the statute, it also found that the statute was not unconstitutionally vague.[119]

But efforts to overturn the statute were not strictly cabined to the judiciary. Community groups and organizers attempted to leverage public support to overturn Section 240.37. In 2019, as a result of a broader push to decriminalize sex work,[120] state legislators introduced Assembly Bill A3355[121] to formally overturn Section 240.37.[122] The bill was explicit in its purpose: it sought to repeal Section 240.37 due to its "arbitrary and discriminatory enforcement by targeting women from marginalized groups that are at high risk for sex trafficking and other exploitation and abuse."[123] A3355 struck much of the vague language from

117. *See, e.g.*, *Smith*, 378 N.E.2d at 1036 (holding that Section 240.37 is not unconstitutionally vague as the statute does not grant officers "an impermissible measure of discretion"); *D.H.*, 309 F. Supp. 3d; People v. Martinez, 34 N.Y.S. 3d 558 (N.Y. App. Div. 2016); People v. Butler, 443 N.Y.S.2d 40, 42 (N.Y. City Ct. 1981) (finding that the language of the statute was too ambiguous to be constitutional as Section 240.37 gave police "sole discretion in determining who is or who is not to be arrested . . ."), *rev'd,* People v. Uplinger, 449 N.Y.S. 2d 916 (N.Y. Cnty. Ct. 1982); People v. Burton, 432 N.Y.S.2d 312, 315 (N.Y. City Ct. 1980) (denying to find Section 240.37 in violation of the equal protection clause of the Fourteenth Amendment as there are "good and sufficient reasons" for why police focus on arresting female sex workers rather than male johns).

118. *D.H.*, 309 F. Supp. 3d at 70–74.

119. *Id.*

120. *See, e.g.*, Jessica Ramos & Julia Salazar, *Decriminalize Sex Work in New York*, N.Y. DAILY NEWS (Feb. 25, 2019), https://www.nydailynews.com/opinion/ny-oped-decriminalize-sex-work-in-ny-20190221-story.html [https://perma.cc/8KEY-TET5]; *see also* FITZGERALD ET AL., *supra* note 72, at 4 ("The criminalizing and stigmatizing of sex work in the United States can worsen the discrimination and marginalization that transgender people already face in society. Trans sex workers experience harassment and violence, often at the hands of police, and these experiences are heightened for transgender people of color, especially women.").

121. A parallel bill, Bill S1351, was also introduced in the Senate. As the language between the two bills is the same, I will be referring to the bill by its assembly name. *See* S.B. S1351, State S., Reg. Sess. (N.Y. 2021), available at https://www.nysenate.gov/legislation/bills/2021/s1351 [https://perma.cc/9ZWM-GWUB].

122. David Klepper, *Sex Workers Seek End of 'Walking While Trans' Loitering Law*, ASSOCIATED PRESS (May 7, 2019), https://apnews.com/article/2eb3876a208d48929db1c2dae769129f [https://perma.cc/4YRK-2MLL].

123. Memorandum, A.B. A3355, 2021 State Assemb., Reg. Sess. (N.Y. 2021), https://nyassembly.gov/leg/?Actions=Y&Memo=Y&Summary=Y&Text=Y&Votes=Y&bn=A03355&term [https://perma.cc/5BXG-U8MJ]. The memorandum lists "concerns about the law's

Section 240.37, eliminating "loitering for the purpose of engaging in a prostitution offense" and narrowing the scope of the provision to specifically address and protect sexually exploited youth.[124]

A3355 was one of many attempts to overturn Section 240.37. An earlier version of the bill was introduced in 2016 but made no progress in the New York Senate.[125] By the end of 2020, the New York City Council passed a series of resolutions to repeal Section 240.37.[126] Although the resolutions carried only symbolic rather than legal effect, they placed additional pressure on the state senate to act. And they were successful.

On February 2, 2021, then-New York Governor Andrew Cuomo signed legislation to overrule Section 240.37.[127] Asserting that the law's "extremely broad definition of loitering" led to its disparate impact on trans women of color and commending the advocacy of community organizers, Governor Cuomo proclaimed that the "'walking while trans' policy is one example of the ugly undercurrents of injustices that transgender New Yorkers—especially those of color—face for simply walking down the street."[128]

IV.
THE LASTING LEGACY OF SECTION 240.37

Section 240.37's longevity and the endurance of similar bans nationwide are a consequence of the role that these statutes play in the national norm-making effort. These bans solidified the boundaries around who and what is acceptable, and in doing so, played a critical role in upholding the cis-heteronormative national identity. Traditional civil rights discourse, particularly the idea that full justice and equality can be reached through the same systems that have been deployed to deny deviant groups full humanity, would suggest that overturning Section 240.37 should have brought an end to the state's abuse and bias against

constitutionality" as a key reason for the overturn of Section 240.37. The memorandum specifically mentions Section 240.37's disparate impact on transgender and cisgender women of color.

124. A.B. A3355, 2021 State Assemb., Reg. Sess. (N.Y. 2021), https://nyassembly.gov/leg/?Actions=Y&Memo=Y&Summary=Y&Text=Y&Votes=Y&bn=A03355&term [https://perma.cc/5BXG-U8MJ]. "Sexually exploited youth" are defined as "persons under the age of 18 who have been subjected to sexual exploitation because they are (a) are the victim of a crime of sex trafficking . . . ; (b) engage in any act as defined in section 230.00 of the penal law; (c) are a victim of the crime of compelling prostitution as defined in section 230.33 of the penal law; (d) are a victim of the crime of sex trafficking of a child as defined in section 230.34-a of the penal law; or (e) engage in acts or conduct described in two hundred sixty-three of the penal law." A3355(d).

125. *Id.*

126. Matt Tracy, *City Council Passes Walking While Trans Repeal Resolutions*, GAY CITY NEWS (Dec. 10, 2020), https://www.gaycitynews.com/city-council-passes-walking-while-trans-repeal-resolutions/ [https://perma.cc/23T6-3H89].

127. *Supra* note 74.

128. *Id.*

trans women of color and other impacted marginalized groups.[129] Further, multiple advocacy and civil rights groups called for the statute's overturning as part of the movement to decriminalize sex work.[130] And this activism ultimately led to Section 240.37's repeal,[131] which, on its face, seems to be sufficient to end the fight against Section 240.37's harms.

However, given the nation's interest in cis-heteronormativity and White supremacy, Section 240.37's underlying goals cannot be fully eradicated, because the national identity is not so easily removed. Though Section 240.37 has been overturned, its removal does not solve the wider structural issue of law enforcement employing the same discriminatory, norm-based judgments and stigmas to make arrests.[132] The criminal justice system, the legal system, and by extension, the prison industrial complex,[133] function as a form of regular violence and systemic removal of non-normative individuals. As long as these systems exist and the same normative framework persists, trans women of color will always be seen as aberrant. As stated by one Legal Aid attorney, even "[a]s we continue to chip away at [those] undeserving of arrest . . . trans women will always fall in the criminalized and vilified category."[134]

While overruling the "Walking While Trans" Ban and decriminalizing sex work more broadly will have immediate and positive effects on the lives of the people that it victimized,[135] the Ban was only part of the broader national system crafted to maintain the division between normative and non-normative and to define our body politic. Thus, that the New York legislature has overturned

129. *See* Memorandum, A.B. A654, 2019 State Assemb., Reg. Sess. (N.Y. 2019), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00654&term=2019&Summary=Y&Memo=Y [https://perma.cc/H84D-8ZLR].

130. *See* DECRIM NY, https://www.decrimny.org/ [https://perma.cc/82MS-MRX7]; FITZGERALD ET AL., *supra* note 72, at 26–29.

131. Governor Cuomo, other New York legislators, and activists all cited to the work of grassroots advocates, largely trans women of color, who played an essential role in building support and awareness about Section 240.37. *See, e.g.*, Press Release, Carl E. Heastie, *Assembly Passes Repeal of the Walking While Trans Ban* (Feb. 2, 2021), https://nyassembly.gov/Press/?sec=story&story=95254 [https://perma.cc/6KZZ-DBHG] ("We thank grassroots advocates, led by the Repeal Walking While Trans coalition, for their strong advocacy on this bill and we look forward to the day when the repeal takes effect."); Office of Children and Family Services, *Legislation Repeals the 'Walking While Trans' Ban* (Feb. 2, 2021), https://ocfs.ny.gov/main/news/article.php?idx=2200 [https://perma.cc/JY6S-A4KB] ("[W]e thank all the advocates, led by Black and [B]rown trans women, for all the sweat equity, dedication, passion, pain, and work we put into this campaign.").

132. Consider, for example, the fact that the NYPD continued to use condoms as a pretext to arrest people suspected of violating 240.37 even after the statute was amended to forbid this. *See* Mogulescu, *supra* note 108, at 84.

133. SPADE, *supra* note 8, at 3 ("'Prison industrial complex' suggests that multiple, connected processes and forces determine how certain populations get labeled as 'criminal,' how certain behaviors and actions come to be classified as crimes, how racist ideas are mobilized to justify an expansion of imprisonment systems, how various financial interests are implicated in motivating law enforcement expansion, and how criminalization and imprisonment filter through every aspect of how we live and understand ourselves and the world.").

134. Whitford, *supra* note 113.

135. *See* DECRIM NY, https://www.decrimny.org/ [https://perma.cc/82MS-MRX7]; FITZGERALD ET AL., *supra* note 72.

Section 240.37 is only a small fraction of the necessary progress. There is still an entire apparatus—legal and otherwise—that exists to marginalize, remove, and aberrate trans people, particularly trans people of color.[136] And as shown in the preceding Parts, Section 240.37 is just a part of a long legacy of norm-enforcing laws; laws that depended not just on the police and criminal justice system to enforce, but also on community participation to make and reaffirm these norms as real.[137] To undo the damage and unravel the nation's property interest in the maintenance of normative identity, community-based efforts need to play just as central of a role in efforts to eradicate harmful norms.

In her examination of the Movement for Black Lives organizational platform, Amna Akbar described the Black-led movement's animating question as "what if law reform was not targeted towards seeing what kind of improvements we can make to the current system, but was instead geared toward building a state governed by different logics . . . ?"[138] Here, I am posing a similar question: what if reform was not targeted toward seeing what kind of improvements we can make to the current system, but was instead geared toward building a non-bordered state, free from normative governance?

A. The Maintenance of Harms

Even in a climate where a law has been overturned, harm towards those deemed deviant persists. As Amna Akbar stated: "law is not fair, it does not treat people equally, and its violence is lethal and routine."[139] Law scholar and sociologist Ryan Goodman explained the symbiotic relationship between law and society, writing that "laws arise from a culture" and culture from laws.[140] In his comparative analysis of sodomy laws in the United States and South Africa,

136. States across the nation continue to pass legislation to remove trans people from public life. In just the past four months, at least thirteen bills have introduced seeking to create a felony ban on providing gender-affirming treatment for trans youth. *See* Chase Strangio's tracker of anti-trans legislation, Chase Strangio (@chasestrangio), TWITTER (Nov. 12, 2020, 7:35 AM), https://twitter.com/chasestrangio/status/1326911594215989248?s=20 [https://perma.cc/V3NE-FFG4]; *see, e.g.*, H.B. 1, 2021 H.R., Reg. Sess. (Ala. 2021), http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021RS/PrintFiles/HB1-int.pdf [https://perma.cc/4H48-WB4G]; S.B. 331, 58th Leg., 1st Sess. (Okla. 2021), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20INT/SB/SB331%20INT.PDF [https://perma.cc/8YNW-QALM]. In addition to these harms, many of these bills also force the unconstitutional disclosure to the parents of trans youth who are seeking medical care or to otherwise participate in public life. *See, e.g.*, S. B. 2171, 2021 Leg., Reg. Sess. (Miss. 2021) http://billstatus.ls.state.ms.us/documents/2021/pdf/SB/2100-2199/SB2171IN.pdf [https://perma.cc/D58J-BQ4S].

137. *See supra* Part III.

138. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 479 (2018).

139. Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 355 (2015).

140. Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring) (cited in john a. powell, *Law and the Significance of* Plessy, 7 RUSSELL SAGE FOUND. J. SOC. SCI. 20, 26).

Goodman argued that sodomy laws, even when unenforced, are "an expression of public sentiment (without recognizing that the laws, in fact, also help to generate that sentiment) [which] obscures the complexity of law's dynamic relationship with society and systems of social control."[141] Relying on empirical evidence, Goodman asserted that "even in a climate of nonenforcement, considerable harm still results."[142] In short, what our society has come to view as acceptable and aberrant is, in large part, due to the laws that dominant political forces have passed. Yet, though these historical laws have long been overturned, their damage remains. While Goodman's research engaged with history "only insofar as [it] inform[s] individuals' current sensibilities," as argued in Part I, theoretical frameworks all emphasize the inherent importance of history as an essential norm-building platform.[143]

Take, for example, john a. powell's examination of the historical and current legacy of *Plessy v. Ferguson*. Powell argued that though *Plessy* has been long overturned, the question of how to delineate public state action and private activity—*Plessy*'s central tension—has never been clearly resolved.[144] Powell charted this anxiety through *Plessy*'s desegregation progeny, arguing that *Plessy* is a "continuing stain" through which our current jurisprudence shields "de facto segregation from a mandatory constitutional remedy."[145] *Plessy*'s legacy has lived on well past *Brown* through the War on Drugs, Jim Crow, police brutality, mass incarceration, and redlining to name a few examples. As a result, despite the impact of *Brown* and other cases, Black Americans are still excluded from full citizenship and White Americans continue to reserve state privileges for their own benefit and thus preserve their property interests.[146]

Just as powell drew a line from the long-overturned *Plessy* to continued, present-day segregation, it is possible to draw a through line from older laws weaponized against trans and gender non-conforming people to the rampant social stigmatization and every day violence endured by trans women of color. Like powell pointed out with *Plessy*, though Section 240.37 has been overturned, the continuing stain of the underlying history and stigma that accompany the law will persist. Once formed, a normative concept has its own inertia and only through multiple forces can the stigmas that have been embedded in our social fabric be erased.

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141. Goodman, *supra* note 47, at 663.

142. *Id.* at 664.

143. *See generally* SPADE, *supra* note 8.

144. Powell, *supra* note 140, at 26. Powell continues "[I]n fact the sharp distinction has been rejected by some leading jurists." In effect, this is still an open question and a continual tension in civil rights and anti-discrimination law.

145. *Id.* at 30, 27.

146. *Id.* at 26–27.

The lasting stigma[147] that these bans have placed on trans women of color is a key example of one such concept. The very existence of the laws has created and reaffirmed the notion that trans women of color are aberrant and that their very existence is non-normative. Each part of the foundational structure of the United States—our laws, how violence and injustice are meted out and rectified, our social ordering—has been constructed to maintain the nation's foundation and to preserve the norms and interests that are embedded within it.

Even without Section 240.37 and its kin, trans women—particularly trans women of color—experience higher levels of discrimination than the broader U.S. population. The 2015 United States Transgender Survey reported that trans people of color were "more than three times as likely as the U.S. population (12%) to be living in poverty" and that the unemployment rate for trans people of color was four times higher than that of the general population.[148] These statistics are a direct result of the normative goals of the United States.

However, despite the feedback loop of laws and the normative national identity, the work that community-based organizations do outside of the law provides insight into how norms can be challenged by the collective power of those considered deviant. The story of the push to overturn Section 240.37 is a key example of trans women of color organizing to chip away at the normative boundaries that actively harm them. Organizations like the Movement for Black Lives and actions like Brooklyn's June 2020 March for Black Trans Lives, which was organized by trans women of color and their allies specifically to spread awareness about the everyday violence and police brutality faced by trans women of color, are prime examples of this work.[149] With over fifteen thousand people in attendance, the "Brooklyn Liberation" march was one of the largest organized marches in New York history.[150] Organized by trans women of color and allies, the march was a type of calling-in, asking the nation to recognize all the ways that society has harmed trans people.[151] Described by its organizers as a "'new, grander version' of the power of community that queer and trans people of color have always had," the June 2020 march was a visible challenge to community commitment to the maintenance of normative borders.[152] Rather than attempting to shift the normative national identity, these movements push against the idea that those perceived to be deviant must be rendered invisible from public

147. For a discussion of stigma and (de)criminalization, see Julia Hughes, *Perfectly Legal, but Still Bad: Lessons for Sex Work from the Decriminalization of Abortion*, 68 U. NEW BRUNSWICK L.J. 232, 234 (2017) ("Destigmatization may follow decriminalization . . . or precede it.").

148. SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, EXECUTIVE SUMMARY OF THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 6 (2016).

149. Anushka Patil, *How a March for Black Trans Lives Became a Huge Event*, N.Y. TIMES (June 15, 2020), https://www.nytimes.com/2020/06/15/nyregion/brooklyn-black-trans-parade.htm [https://perma.cc/NZL3-WV9T].

150. *Id.*

151. *Id.*

152. *Id.*

space. Instead, they propose a new logic: reimagining how assigned deviance, though still antithetical to normative national identity, can and should exist in public space.

In effect, the June 2020 march is only one example of decades of work, both legal and otherwise, done by trans activists—particularly trans women of color— to push against our nation's normative borders.[153] The march is but one in a long legacy of public resistance. Each instance is an example of imagining how our nation could reorient itself in building a non-bordered state, free from normative governance. But to make this reimagination complete, power and property interests need to be reoriented—ceded from the "normative" to those categorized as deviant. It requires a wider dismantling of categories and allowing those who have been dispossessed to reorient the national image.

CONCLUSION

In his critique of the liberatory potential of the administrative state, Dean Spade argued that the only way to understand the relationship between power and "transphobic harm" is to shift attention away from traditional framings of individual rights and instead to consider "how gender categories are enforced on all people in ways that have particularly dangerous outcomes for trans people."[154] The same refocusing must continue to be employed here. To overrule Section 240.37 is not enough to eradicate the harmful divisions between normative and deviant that have stigmatized queer and trans women of color.

The goal of this Note is to articulate the fact that the United States and the systems it has crafted will not—by reason of self-preservation—be able to act in the best interest of all the people who are present within the nation's physical borders. As a result, changing the law on the books is not sufficient and will likely not do enough to reimagine the divisions between normative and deviant. However, despite our nation's normative borders, radical community-centered work led by those perceived to be deviant pushes against state forces of social removal. This work affirms that those that who are perceived to be deviant still exist and belong within the national image.

153. I am thinking particularly of pioneering trans activists such as Sylvia Rivera and Marsha P. Johnson who were both seminal figures in the queer and trans rights movements. *See, e.g.*, Tourmaline, *Sylvia Rivera and Marsha P. Johnson's Fight to Free Incarcerated Trans Women of Color is Far From Over*, VOGUE (June 29, 2019), https://www.vogue.com/article/tourmaline-trans-day-of-action-op-ed [https://perma.cc/99XM-R48F]; Jason Wu, *Look to Queer and Trans Leaders to Reclaim Revolutionary Possibilities*, THIRTEEN (Oct. 26, 2021), https://www.thirteen.org/blog-post/queer-trans-leaders-reclaim-revolutionary-possibilities/ [https://perma.cc/GJ5W-AURJ].

154. SPADE, *supra* note 8, at 9.