



NEW YORK
CITY BAR

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REPORT ON LEGISLATION BY THE COMMITTEE ON AIDS¹

**A.2736
S.1379**

**M. of A. Clark
Sen. Montgomery**

AN ACT to amend the civil practice law and rules, the criminal procedure law and the executive law, in relation to the use in evidence of the fact of possession of a condom

THIS BILL IS APPROVED

The New York City Bar Association respectfully submits this report in support of A.2736/S.1379, which would prohibit police and prosecutors from introducing condoms as evidence of prostitution-related offenses in criminal proceedings. Amendment of the existing law is essential to promoting both public health and human rights.

Since its founding in 1870, the City Bar has grown to over 24,000 members who work to promote the public good and advocate for legal reform when needed. The membership of the Committee on AIDS includes experts with comprehensive knowledge of HIV-related law and policy issues.

There is mounting evidence that the practice of police seizure of condoms as evidence of prostitution-related offenses, and introduction of condoms as evidence of prostitution-related offenses in criminal proceedings undermines New York's important efforts to fight HIV and AIDS, as documented by the New York City Department of Health and Mental Hygiene,² the PROS Network (a coalition of organizations engaged in outreach and services to people in the sex trades),³ the Open Society Foundations,⁴ and Human Rights Watch.⁵ In New York City, an

¹ This report has been reviewed and endorsed by the City Bar's Committee on Criminal Law, Committee on Lesbian, Gay, Bisexual and Transgender Rights, and Committee on Sex and Law.

² New York City Department of Health and Mental Hygiene, *A Report to the New York City Commissioner of Health*, prepared by Paul Kobrak, December 8, 2010 (on file with Human Rights Watch).

³ PROS Network and Urban Justice Center Sex Workers Project, *Public Health Crisis: the Impact of Using Condoms As Evidence in New York City*, April 2012, available at <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf> (last visited April 8, 2013).

⁴ Open Society Foundations, *Criminalizing Condoms: How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, and the United States, and Zimbabwe*. New York: Open Society Foundations, July 2012, available at <http://www.opensocietyfoundations.org/reports/criminalizing-condoms> (last visited April 8, 2013).

epicenter of the AIDS epidemic, police officers routinely confiscate and enter condoms as evidence in prostitution-related cases, and prosecutors routinely cite seized condoms as evidence of a prostitution-related offense in criminal court complaints. In fact, the Kings County District Attorney's Office has created a form for supporting depositions in prostitution-related cases that asks officers to record how many and where condoms were found on individuals at the time of arrest.⁶

Public health and criminal justice officials nationwide have expressed concern about such law enforcement practices undermining efforts to address HIV/AIDS.⁷ Indeed, some are calling for a public health approach to the criminalization of condoms. In October 2012, Nassau County District Attorney Kathleen Rice issued a policy directive to all prosecutors in her office prohibiting the use of condoms as evidence of prostitution.⁸ And, the San Francisco Police Department and District Attorney recently announced that they will stop using condoms as evidence in prostitution cases for a trial period of ninety days, to be followed by an evaluation beginning in January 2013.⁹

People who are or are likely to be profiled as involved in the sex trades, including LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer) youth, are aware of this practice and consequently fear carrying condoms, either for use with clients or with other sexual partners. Their fear leads them to carry fewer condoms, and to engage in sex work without the protection of condoms. LGBTQ youth and others who are involved in the sex trades are among populations targeted for HIV prevention efforts due to high infection rates. In the age of HIV, discouraging the use of condoms, particularly among high-risk and vulnerable groups, can have disastrous public health consequences. A 2011 study in New York City among people who exchange sex for money or other goods found that 14% of the men and 10% of the women were HIV-positive,¹⁰ as compared to a 1.4% HIV prevalence in New York City generally and a 0.6% prevalence in the United States overall.¹¹ We must ensure that this vulnerable community is not deterred from using condoms.

⁵ Human Rights Watch, *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities*. New York: Human Rights Watch, July 2012, available at <http://www.hrw.org/reports/2012/07/19/sex-workers-risk-0> (last visited April 8, 2013).

⁶ *Ibid.*, pp.91-100

⁷ Office of National AIDS Policy, *National HIV/AIDS Strategy for the United States*, July 2010, p. 37, available at <http://www.whitehouse.gov/administration/eop/onap/nhas> (last visited April 8, 2013).

⁸ Kathleen Rice, District Attorney, Nassau County, "A Prosecutors Long Game: When the Public's Health Becomes the Greater Good," *Huffington Post*, October 10, 2012, available at http://www.huffingtonpost.com/kathleen-rice/a-prosecutors-long-game_b_1955572.html?utm_hp_ref=new-york (last visited April 8, 2013).

⁹ George Gascón, District Attorney, City and County of San Francisco, Letter to Theresa Sparks, October 31, 2012. (On file with New York City Bar Association.)

¹⁰ Samuel M. Jenness et al., "Patterns of Exchange Sex and HIV Infection in High-Risk Heterosexual Men and Women," *Journal of Urban Health*, vol. 88, no. 2 (2011), pp. 329-341.

¹¹ New York City HIV/AIDS Surveillance Slide Sets. New York: New York City Department of Health and Mental Hygiene, 2011, updated February 2013, available at <http://www.nyc.gov/html/doh/html/data/epi-surveillance.shtml> (last visited April 8, 2013).

Moreover, vouchering condoms as arrest evidence, listing the number of condoms found on individuals in criminal complaints against them, and introducing condoms as evidence of intent to engage in prostitution-related offenses at trial, deters a broad range of people from carrying condoms; anyone who is stopped and searched on suspicion of prostitution-related activities may be inhibited, including men who have sex with men, LGBTQ people, women of color, HIV/AIDS outreach workers and others who regularly fear harassment or arrest by the police.⁵

Transgender women in particular experience a high rate of profiling for prostitution-related offenses by the police, a practice so widespread in New York City that it was the subject of a 2005 campaign by Amnesty International.⁶ Transgender women interviewed by Human Rights Watch routinely said that they have had condoms confiscated by the police. LGBTQ youth, and particularly homeless youth, and LGBTQ youth of color, report that police assume that they intend to engage in prostitution-related offenses or “lewd conduct” if they find condoms on them during stops, frisks, or consent searches.¹² According to these groups who are frequently targeted by the police, the seizure and use of condom possession as evidence deters them from carrying condoms.

The recent directives by the Nassau County and San Francisco District Attorneys demonstrate an effort by law enforcement officials to balance public health and criminal law obligations. However, state-wide legislation is necessary because District Attorneys’ policies and their implementation can change over time. San Francisco’s history demonstrates the importance of state legislation to comprehensively address the use of condoms as evidence. In 1994, the San Francisco District Attorney adopted a policy stating that condoms should not be used as evidence of prostitution. Unfortunately, that policy was not followed by subsequent District Attorneys and was only recently reinstated.¹³ A state law is needed to promote an environment where no one is afraid to carry condoms over the long term.

We urge passage of legislation to prohibit the use of condoms as evidence of prostitution-related crimes. New York City has distributed millions of condoms to its citizens in an admirable campaign to protect the public health. Police and prosecution policies that deter people from using these condoms, particularly members of groups at high risk for sexually transmitted disease, undermine statewide HIV prevention efforts, waste tax dollars, and invite increased rates of HIV and other infections.

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¹² PROS Network and Urban Justice Center Sex Workers Project, *Public Health Crisis: the Impact of Using Condoms As Evidence in New York City*, April 2012, available at <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf> (last visited April 8, 2013).

¹³ At present, the San Francisco District Attorney’s office has implemented a moratorium on the use of condoms as evidence of prostitution.