The Government Menage 'a Trois: Unraveling the Government Sex Partner in Undercover Prostitution Stings

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They pull into a dimly lit cul-de-sac; he gently turns off the engine. They are completely alone. She has not seen him before, but he does not seem nervous. Still, when he asks her just how much it costs, she does not answer just yet. Slowly she begins to unzip his pants and begins to fondle his genitals. As she begins to lean down, he puts his hand on her shoulder and abruptly stops her.

The above scene may make some very uncomfortable: the vulnerability of the couple parked on a dark side street, the sexual subject matter, or nature of the transaction. Why did he stop? Two seconds after the story ended, he tells her he is a police officer and places her under arrest for prostitution. Now he can do up his pants. A marked police car rounds the bend and she is placed in the backseat in hand cuffs and brought to the local county jail.

I. Introduction

A recent news article offers a rare public exposé of a case where on multiple occasions during the course of a prostitution investigation a civilian volunteer, under the supervision of law enforcement, engaged in sexual intercourse with suspected sex workers. In Lehigh County, Pennsylvania, a civilian man volunteered to go undercover to investigate an

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1. Of note, this paper focuses on the stereotype of the female sex worker. While it is beyond the scope of the paper to address this issue, a discussion of the prevalence of sexual contact between law enforcement officers and male sex workers might enrich the analysis.

2. The implications of word choice are very important, especially in this context where certain words may have a long history of negative connotations or where word choice in itself serves as a way of framing arguments to serve an ultimate conclusion. For example, using the term "sex work" for some is inappropriate because it indicates that the activity is a trade or profession. Yet, alternatively, the term "prostitute" has a long history of negative connotations and creates an identity of "prostitute." Similarly, there is a question of which term is appropriate: "john," "client" or "customer." In this paper both the terms "sex worker" and "prostitute" will be used. In general "prostitute" or "prostitution" will be used in reference to the criminal laws and/or historical contexts where the term's connotations have a relevant expressive value.

3. See Debbie Garlicki, Police Work in Prostitution Sting Rubs Defense Attorney the Wrong Way, THE MORNING CALL, Sept. 18, 2007, at A1 (reporting about a case in which a civilian informant was allegedly paid by local law enforcement to have sex with suspected sex workers). The Defense filed a motion to have the case dismissed on the theory that law enforcement's undercover investigation tactic violated the Due Process Clause. Id. The Defense largely relied on an expert witness who testified about the emotional and psychological impacts of this type of investigatory tactic on sex workers. Id.
alleged sex parlor. During the course of the investigation the civilian agent paid for and engaged in sexual intercourse with multiple women who worked at the massage parlor. During these encounters the civilian agent consented to wear a wiretap in his pants. From a nearby location law enforcement officers were thus able to listen to these encounters as they unfolded. Although he volunteered for the task, the civilian agent was reportedly paid $40 by local law enforcement for each of his engagements. The women with whom he had sex were ultimately charged with prostitution.

Despite the deep and perplexing implications of when a government uses its power to engage in sexual relations in the context of undercover prostitution stings, the investigatory practice described above has gone largely unchallenged in academic literature—particularly in feminist legal circles. Yet in the last ten years, a plethora of news articles across the country have reported cases where sexual contact occurred during prostitution sting operations. This Note attempts to analyze the

4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.

10. A few scholars have previously written on related topics or have addressed this topic more generally. See generally, Susan S. Kuo, Official Indiscretions: Considering Sex Bargains With Government Informants, 38 U.C. DAVIS L. REV. 1643, 1648 (2005) (Kuo's Article "addresses the practice of requiring an informant to engage in sex activities with another individual for the purpose of furthering criminal law enforcement goals"); Gary T. Marx, Under-the-Covers Undercover Investigations: Some Reflections on the State's Use of Sex & Deception in Law Enforcement, 11 CRIM. JUST. ETHICS 13, 14-17 (1992) (discussing the use of sex in undercover prostitution sting operations). Marx argues that using deception to sell sex when investigating prostitution is not "ethically very disturbing." Id. at 15. However, Marx notes that when there is actual consummation of the acts then the government behavior becomes increasingly objectionable. Id. at 16.

11. See, e.g., Luke Turf, Glendale Prostitution Sting Has Fringe Benefits, WESTWARD NEWS (Denver, Colo.), Nov. 6, 2007, http://www.westword.com/2007-11-08/news/glendale-prostitution-sting-has-fringe-benefits/ (last visited Nov. 1, 2008) (describing a prostitution sting in which a police officer allowed a suspect to put a condom on his penis and then slap his penis before making an arrest). The case caused further controversy in that the police officer allegedly asked fellow officers to remove the reference "began oral stimulation" from their notes. Id.; Daniel Patrick Sheehan & Arlene Martinez, Must Sex Be a Part of Sex Stings, THE MORNING CALL, Sept. 23, 2007, at B1 (providing a sample of States where law enforcement officers are allowed to have sexual contact during prostitution stings); Scott Gutierrez, Seattle Vice: Going Too Far? When Undercover Officers Buy Lap Dances or Fondle Performers at Strip Clubs, Some Say They're 'Partying on the Public Dollar'—&
significance and implications of this sexual contact. Ultimately, the goal is not to propose a legal strategy or theory upon which to analyze this relationship, but rather to demand an accounting of and interrogation of this investigatory practice.

Admittedly this analysis is not complete. For one, there are certain Fourth Amendment issues that come into play. Additionally, there is a more pragmatic approach where one balances the cost benefits of government intrusion and crime prevention. This aspect is certainly important when one considers that some individuals are forced into prostitution. Each of these and other aspects requires a fuller discussion.

Perhaps Breaking the Law, THE SEATTLE POST-INTELLIGENCER, May 11, 2007, at A1 (reporting cases in which undercover officers at times touched women's breasts and butts while receiving lap dances). One officer even undid his belt and allowed his genitals to be fondled over his underwear. Id.; Tom Jackman, Spotsylvania Deputies Receive Sex Services in Prostitution Cases, WASH. POST., Feb. 13, 2006, at B01 (describing how on at least four occasions detectives received sexual services in exchange for money as part of a prostitution sting); Jennifer Sullivan & Christopher Schwarzen, Did Local Vice Cops Cross the Line?, THE SEATTLE-TIMES, October 7, 2005, at 1A (discussing an investigation where undercover officers were masturbated by suspects—intercourse was prohibited); Ian Demsky, Police Defend Prostitution Tactic, TENNESSEAN, Feb. 2, 2005, http://tennessean.com/local/archives/05/01/65061449.shtml (last visited April 11, 2008) ("[P]olice spent almost $120,000 over a three-year period to foster encounters, mostly skin-on-skin, between confidential informants and prostitutes in an effort to further Nashville's crackdown on the illicit sex trade.") (on file with Washington and Lee Journal of Civil Rights and Social Justice); Shannon Colavecchio-Van Sickler & Christopher Goffard, How Far is Too Far for the Sex Cops?, ST. PETERSBURG-TIMES, July 31, 2004, at 1A (reporting on a case where two sheriffs listened in from a nearby motel room while an informant received oral sex from a suspect). In the same County, only a month before, an officer testified in court that "[w]e don't penetrate. That's basically about it." Id; Jason Riley, Undercover Methods Draw Ridicule, Praise, THE COURIER-JOURNAL (Louisville, Ken.), July 4, 2004, at 4S (reporting that prior to 2002, when the prosecutor's office requested the practice end, Louisville police records indicated that sexual contact had occurred in 31 or 64 massage parlor arrests); Kim Smith, Sex Sting Went Too Far, EAST VALLEY TRIBUNE, June 15, 2004, http://www.eastvalleytribune.com/story/23162 (last visited Nov. 15, 2008) (reporting a case where the prosecutor's office declined to prosecute nearly 60 women charged with prostitution because the officers went too far—undressing, touching women's breasts and genitals, and even beginning oral sex) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

Many law enforcement agencies prohibit this type of sexual interaction or at least require that the physical contact be extremely minimal. See, e.g., Stan Oklobdzija, Sex Sting Snare Women: Five Prostitution Suspects Arrested as Officer Plays 'John,' SACRAMENTO BEE, Sept. 9, 2007, at G1 (quoting an undercover officer who states that physical contact with the suspect must be "brief and light so that the District Attorney won't have any qualms about going forward with the case"); Tom Jackman, Spotsylvania Deputies Receive Sex Services in Prostitution Cases, WASH. POST., Feb. 13, 2006, at B01 (quoting an Alexandria, Virginia police spokeswoman who stated that detectives were permitted to disrobe, but that the arrest would happen before the sex worker got to the agent's "personal area").
than the one provided here. The overall aim of this Note is to call for such discussions so that the described encounters are no longer merely an occasional headline in a newspaper that raises eyebrows, but rather something that has been scrutinized and considered.

Through this Note I hope to start this dialogue by positing that the police tactic described above should not be taken at its face value, but rather scrutinized as a broader reflection of the government’s policy towards treating sex workers. Indeed, the very existence of this police tactic requires the involvement of all three branches of government. Part II of this Note begins from this basis.

Part II begins by describing how each branch of government enables, participates in, or promotes law enforcement to engage in sexual acts with suspected sex workers. It begins by discussing the rationales for the criminalization of prostitution—emphasizing how gender, racial, ethnic, and national origin biases have influenced the criminalization of sex work. It then focuses on how the criminalization of prostitution implicitly requires that law enforcement becomes intertwined in the crime as part of its investigations, noting the inherent potential for abuse in law enforcement’s investigations of sex crimes and the disproportionate manner in which the law is enforced. Next, Part II asserts that the judiciary has totally failed to redress or even to adequately engage in a discussion about the serious implications of this type of investigatory tactic.

Part III then addresses the proper role of the government and considers that in this case the government has failed to check itself. This Part serves as a challenge for members of each branch of government to more fully consider its role not as an individual branch, but rather as part of a functioning unit. By not taking this broader approach, the three-government parts have thus far been able to avoid these more difficult questions. Finally, the Note concludes with an urging for commentators to move beyond a dialogue that only includes a victim-agency analysis. This type of analysis cannot result in a satisfactory answer on either count.

II. The Government Sex Trio

The three branches of government act in concert enabling the government to become the sexual partner of suspected sex workers. The work of three: (1) the Legislature forbids the woman from selling her sexual services; (2) law enforcement engages in sexual acts to investigate and enforce the legislated crime; and (3) a criminal court penalizes the
accused for offering his or her services to law enforcement. This Part addresses how each of these branches together creates the government as a sexual partner.

A. Legislature As A Sex Partner: The Government Does Not Ask What You Want, But Instead Tells You What You Cannot Do

The impetus for the creation of the government as a sex partner rests in the American legislatures' choice to confront prostitution through the criminal law. Criminalization sets apart sex for money from other forms of "legitimate" sex—such as sex within the confines of marriage. By delineating between legal and illegal forms of sex the government expresses a moral stance as to the legitimacy of certain sexual encounters. In doing so, the government begins its insertion into the sexual lives of Americans.

i. The Legislative Branch: The Historical Backdrop of the Crime of Prostitution

Prior to the Progressive Era, prostitution was rarely a separate criminal offense. The first laws criminalizing prostitution responded to a variety of concerns, but each of these concerns either directly or indirectly related to

12. See MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 146 (1995) ("In law, marriage traditionally has been designated as the only legitimate sexual relationship."); see also Mary Joe Frug, A Postmodern Feminist Legal Manifesto (An Unfinished Draft), 105 HARV. L. REV. 1045, 1058-059 (1992) ("[L]egal’ sexual autonomy is conventionally extended to women only by rules that locate sexuality in marriage or by rules that allow women decisional autonomy regarding reproductive issues . . . ."). The Supreme Court's ruling in Lawrence v. Texas, 539 U.S. 558 (2003) arguably expands some of these legal protections to outside a traditional marriage context. It is not, however, within the scope of the paper to fully address these implications.

13. See Ann M. Lucas, Race Class, Gender and Deviancy: The Criminalization of Prostitution, 10 BERK. W. L. J. 47, 51 (1995) ("By the Progressive Era, prostitution had come to be seen and treated as an independent criminal offense."). Prior to the Progressive Era, prostitutes were generally "tolerated," and if they were ever subject to criminal penalties it was not for a specific prostitution offense, but rather through laws against vagrancy, night walking or disturbing the peace. Id. at 50; see also BARBARA MEIL HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION 32–33 (rev. ed. 1990) (noting that in the nineteenth century, because prostitution itself was not specifically criminalized, if sex workers were arrested it was generally for violating a general public nuisance law).
the desire to regulate women's sexuality. The structure of the criminal statutes demonstrates legislatures' focus on women's sexuality. First, early statutes defined prostitution not only as sex for sale, but also sexual promiscuity without regard to whether the sexual acts were for monetary gain. For example, in 1908 in *United States v. Bitty*, the Supreme Court described prostitution as "women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men." As late as 1983, North Carolina's criminal statute defined prostitution as the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire.

Moreover, these laws were largely aimed exclusively at women. For example, the exclusion of men from the statutes, and the inclusion of simple

14. See Ann M. Lucas, supra note 13, at 51-58 (describing the factors that led to the criminalization of prostitution during the Progressive Era). Lucas points out four factors which led to the criminalization of prostitution. 1. The continued accepted view that a prostitute was a "fallen woman" capable of all sorts of criminal conduct. 2. The belief that prostitution embodied the very root evils of industrialization and capitalism. Capitalism was associated with reduced civic and sexual virtue; industrialization was associated with the breakdown of the family unit. 3. The growing spread of sexually transmitted diseases and their association with moral decay. 4. The association of deviancy with poverty. In particular working-class, immigrant and non-white women were associated with sexual deviancy. *Id.; see also* Charles H. Whitebread, "Us" and "Them" and the Nature of Moral Regulation, 74 S. CAL. L. REV. 361, 366-68 (1999) (describing how fears of the moral decay associated with urbanization and industrialization, combined with prejudices against a ethnically and racially diverse lower class, led to an organized movement to repress prostitution). A general belief carrying over from the Victorian era held that if a woman had crossed the line from chaste to unchaste, that not only would she be ostracized in society, but she had ruined her very self in that she had forever tainted her moral compass. Thus, it was imperative not only to protect but to prevent delicate women from losing their chastity. *See Barbara Meil Hobson, supra* note 13, at 110 (describing how a deviant sexual history was associated with a general criminal tendency).

15. See, e.g., State v. Richardson, 300 S.E.2d 379, 380 (1983) (quoting the statutory definition, noting that prostitution includes, "the offering or receiving of the body for indiscriminate sexual intercourse without hire"); State v. Poague, 72 N.W.2d 620, 623 (Minn. 1955) (discussing the meaning of the ordinance which defined prostitution as "indiscriminate sexual intercourse with men"); State v. Clark, 43 N.W. 273, 273 (Iowa 1889) ("[W]e think if a woman submits to indiscriminate sexual intercourse, which she invites or solicits by word or act, or any device, she is a prostitute."). Certainly pecuniary gain may serve as evidence of the indiscriminate nature of the sexual relations, but these statutes did not require that such compensation occurred or be a part of the encounter.

16. 208 U.S. 393 (1908).
17. *Id.* at 401.
19. Today such a gendered construction would not pass an Equal Protection challenge.
promiscuity, demonstrates that the early laws were geared specifically at controlling women's sexuality.\textsuperscript{20}

The criminalization of prostitution is intimately tied to notions of class, race, ethnicity, and national origin.\textsuperscript{21} Prejudices against women of color influenced the movement to criminalize prostitution in two related manners. First, at the turn of the nineteenth century women of color were thought to be inherently promiscuous.\textsuperscript{22} The growing urbanization and increased interactions of people of different races within cities was thought to pose a potential threat to whites.\textsuperscript{23} Second, at this same time, a growing number of Americans were becoming increasingly concerned that "white women" were being trafficked into sexual slavery.\textsuperscript{24} This led to the passage

\begin{itemize}
\item See, e.g., Plas v. State, 598 P.2d 966, 969 (1979) (holding that the exclusion of men in the definition of prostitution violated the Alaskan constitution's Equal Protection Clause).
\item See David A. Richards, \textit{Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution}, 127 U. PA. L. REV. 1195, 1204-06 ("[T]hese twin omissions [gender neutrality and commercial requirement] suggest that the traditional concern for prostitution was peculiarly associated with female sexuality—more particularly, with attitudes towards promiscuous unchastity in women—apart from any commercial aspects."); \textit{see also} Ann M. Lucas, supra note 13, at 58-59 (noting that during the Progressive Era some equated promiscuity even without the commercial aspect to prostitution and thus desired its criminalization to stigmatize those engaging in illicit sex generally).
\item See John D'Emilio & Estelle B. Freedman, \textit{Intimate Matters: A History of Sexuality in America} 86-87 (1988) (noting that people of color were considered inherently promiscuous thereby justifying the necessity of controlling their behavior so as not to pollute moral supremacy of the white's sexual customs). Not coincidentally, laws against prostitution were generally enforced more often against women of color. \textit{Id.} at 136-37 (describing this disproportionate arrest rate of black sex workers in the postbellum South).
\item See Whitebread, \textit{supra} note 14, at 366-68 (1999) (describing the related connection between urbanization and the fears of the degradation of the "respectable classes").
\end{itemize}
of a rash of laws in the early nineteenth century specifically directed towards ending "white slavery." Criminalizing prostitution could meet two ends: it could prevent the pollution of "American" values as well as prevent white women from being trafficked into prostitution. The criminalization of prostitution is tainted, if not wholly poisoned, with a history embedded with discrimination against women, particularly women from racial and ethnic minorities.

**ii. Contemporary Rationales for Criminalization**

Today laws criminalizing prostitution apply to both sexes and do not include the sexual conduct that does not have a commercial aspect. Thus, the phrase, "prostitution is the oldest profession in the world," makes more sense generally today because contemporary laws only criminalize sexual interactions that include a financial transaction. As the laws against sex work have evolved and changed, so to have the justifications for its criminalization.

One predominant rationalization for the criminalization of prostitution is that prostitution is not a valid type of work or labor. Generally, it is...
argued, that prostitution can be separated from other types of labor in two ways. First, some argue that sex is intimately linked to personhood and therefore ought to be market inalienable. Just as one cannot sell oneself, neither can a person sell his or her own sexual favors. Second, others argue that in a patriarchal society one cannot legitimately consent to enter into prostitution. Third, even if prostitution is seen as a form of labor, various reasons may exist as to why the work itself should not be treated as other types of work. These rationales are more generally concerned with the actual or perceived circumstances that surround prostitution, i.e., drug abuse, sexual violence, sexual trafficking and the spread of disease.


31. For example, some commentators vehemently argue that prostitution is no more a form of legitimate work than slavery itself. See, e.g., Berta E. Hernandez-Truyol & Jane E. Larson, Sexual Labor and Human Rights, 37 COLUM. HUM. RTS. L. REV. 391, 418 (2006) (noting that "classical liberal political thinkers consistently rejected the idea that one could sell oneself into slavery").

32. See Kuo, supra note 10, at 1669–70 (laying out some commentator’s arguments that commercial sex is illegitimate because it lacks consent). Many of these arguments are based in dominance theory. See NANCY LEVIT & ROBERT R.M. VERCHICK, A PRIMER: FEMINIST LEGAL THEORY 22–26 (N.Y. Univ. Press 2006) (summarizing the general premise of dominance theory). "[D]ominance theory [or radical feminism] focuses on the power relations between men and women. . . . This theory says that men are privileged and women are subordinated, and this male privilege receives support from most social institutions, as well as a complex system of cultural beliefs." Id. at 22–23. With this societal framework in mind it is easy to argue that prostitution would then necessarily involve subordination that limits the possibility for consent. See CATHERINE MACKINNON, WOMEN’S LIVES MEN’S LAWS 151 (2005). MacKinnon states:

Women in prostitution are denied every imaginable civil right in every imaginable and unimaginable way, [footnote omitted] such that it makes sense to understand prostitution as consisting of the denial of women’s humanity, no matter how humanity is defined. . . . Women are prostituted precisely in order to be degraded and subjected to cruel and brutal treatment without human limits.

Id.

33. Margret A. Baldwin, Split at the Root: Prostitution and Feminism, 5 YALE J.L. & FEMINISM 47, 97–99 (1992) (discussing the "conventional" justifications for criminalizing
iii. Embroiling the State

Once the legislature has criminalized prostitution, the next obvious consideration is how to enforce the laws. This poses a precarious question because on the one hand in criminalizing prostitution, the legislature is expressing that sex cannot be sold. On the other hand, given the private and intimate settings in which the crime occurs, one can logically assume that to enforce the crime, law enforcement ultimately must embroil itself in the crime. As one commentator noted, "... as long as these laws are on the books, the substance of the violation (and its consensual and secret structure) practically requires a degree of participation by the state." This requirement undercuts the very basis for criminalizing prostitution—the idea that sex is somehow sacred and must be protected.

B. Executive Investigation & Enforcement

"They enter the massage parlors as undercover detectives. They leave as satisfied customers." Having outlined the relevant concerns regarding the motivations behind the criminalization of prostitution, this section now turns to the equally troubling tactics used to enforce the laws criminalizing prostitution. The enforcement of the crime of prostitution is troubling for at least two reasons: (1) the enforcement creates a situation in which the investigation imparts the same "harm" as the crime; and (2) the same discriminatory motivations attendant to the criminalization of prostitution are often equally as present in the enforcement of the laws. Further, both these concerns

prostitution). Baldwin explains:

Those justifications include the control of venereal disease; the inhibition of other crimes related to prostitution, including theft, assault, and drug use; the protection of girls and women in prostitution; and the suppression of "public offense" caused by prostitution, taking either the form of neighborhood disruption or moral outrage.

Id. at 98.

34. See Radin, supra note 30, at 1699–700 (1990) (arguing that the commodification of sex services poses a threat to personhood).

35. Marx, supra note 10, at 15.

36. See id. ("In enforcing such statutes the government engages in moral partisanship regarding the disputed relationship between sex and friendship/love. It hypocritically combats the separation it opposes through enforcement means that appear to further it.").

ultimately lead to the overall diminished public trust in the legitimacy of law enforcement.

i. What a Legitimate Investigation Requires

Sexual contact should not be necessary in order for a police officer to make an arrest for prostitution. Criminal statutes technically bar solicitation to engage in prostitution. The mere offering to provide sexual services for a price constitutes a crime. For example, to violate the Massachusetts law against prostitution, one need only ". . . agree[] to engage, or offer[] to engage in sexual conduct with another person in return for a fee . . . whether such sexual conduct occurs or not." Physical contact is not necessary to commit the underlying offense.

Countering this argument, law enforcement often contends that suspects are generally suspicious that potential clients are undercover law enforcement. Thus, the prostitutes will often require that potential clients initiate physical contact before an agreement is made. Or alternatively, law enforcement may argue that physical contact is necessary in order to elevate the offense from a misdemeanor to a felony.

When law enforcement officers do engage in sexual contact serious legitimacy questions arise. First, there is a question about the relative balance of the government intrusion versus individual autonomy. The balance is especially skewed when considering the crime is generally only a misdemeanor and yet the investigation required for its enforcement

38. MASS. GEN. LAWS. ANN. CH. 272 § 53(a) (West 2009).
39. See, e.g., State v. Artishon, 2002 WL 172029 at *1 (Minn. App. 2002) (unpublished) (describing how the suspect refused to discuss a sexual bargain until the undercover officer touched her breasts to prove he was not a law enforcement officer).

When the officer pulled his car to the curb, Artishon opened the front passenger door and asked the officer if he was a 'cop.' The officer said that he was not a cop, and Artishon got into the vehicle. After they had gone a short distance, during which Artishon continued to look for police, Artishon asked the officer to prove he was not a police officer by touching her bare breasts. The officer complied, and Artishon offered to perform oral sex in exchange for $25.

Id.

40. This argument has been raised generally about the enforcement of "victimless crimes." See Kent Roach, Four Models of the Criminal Process, 89 J. CRIM. L. & CRIMINOLOGY 671, 680–81 (1999) (discussing how victimless crimes raise questions about the balance of the government intrusion and individual autonomy).

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involves serious intrusions into intimate personal matters. Second, by engaging in the sexual acts that the law prohibits, law enforcement officers are taking part in a crime that, but for their status, they could not legally commit. Law enforcement officers are literally engaging in financial transactions for sex. When law enforcement engages in this act, one of the societal harms that the legislature seeks to prevent—perversion of sexual activity—has already occurred. Third, a law enforcement officer's deception requires a betrayal of a suspect's body. The very nature of the type of investigation is ripe for abuse of powers.

ii. Abuse & Unequal Enforcement

Undercover operations provide law enforcement with increased opportunities and temptations to engage in unethical police conduct. Prostitution sting operations in particular provide law enforcement officers with tempting opportunities to abuse sex workers. The investigations are often secret; the sex worker and the undercover officer are generally the sole witnesses to the physical and verbal interactions. In these vulnerable and isolating circumstances, law enforcement officers, generally males,

42. Some, though, may not see this as engaging in a financial transaction so much as it is a "theft of services," because the sex worker is never paid for his or her service. See Marx, supra note 10, at 16 ("There is a theft of services and a terrible imbalance or lack of reciprocity that is not found with most undercover encounters.").

43. Id. ("Betrayal involving another's body adds an additional troubling element, beyond that occurring with the mere exchange of tangible objects or the failure to keep a promise.").

44. This risk is very powerful given the fact that the investigation is undercover. See Gary T. Marx, Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work, in ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT 65, 77-80 (The Police Found. 1983) (discussing the particular risks and heightened temptation for undercover law enforcement officers to abuse their position). Marx points out many factors that add to the pronounced pressures in undercover investigations, including: increased physical dangers; more autonomy in unpredictable situations; increased physical and financial risks for department and individual officers; increased exposure and personal relationships with criminals; isolation from professional peers; more opportunities for police corruption. Id. On the other hand, undercover investigations are often governed by internal agency guidelines. See Henry Hamilton & John Smykla, Undercover Guidelines, 11 JUSTICE QUARTERLY 1, Mar. 1994 (discussing law enforcement agencies guidelines regulating the use of undercover investigations).

45. This type of undercover investigation has long been associated with police corruption and misconduct. See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 328–31 (1968) (discussing the corruption and abuse in vice units using undercover officers and decoys to solicit prostitutes).
may have a more physically threatening presence. These opportunities may lead to situations in which law enforcement officers take advantage of the secret and intimate nature of their investigation and abuse their authority.

Moreover, the domineering culture and practices in some law enforcement agencies contribute, in part, to a culture where abuse of the situation is more likely to occur. In some sense, officers require this domineering presence in order to show their authority in often physically dangerous and vulnerable situations. However, officers are not simply associated with an authoritative and protecting presence; they are also associated with "hypermasculine" behavior. This "hypermasculine" behavior is a part of a culture that often emphasizes domination and subordination—the same culture often associated with officer misconduct.

The sexual encounter between a law enforcement officer and a suspected prostitute may serve as a manifestation of the domination of the officer over the subject. The very nature of the sexual context is one in which the sex worker is a "subject" and the officer represents the full power of the government.

These sexual encounters cannot simply be separated from this surrounding culture. The encounters do not occur in a vacuum, but rather take place within a culture where law enforcement is expected to be domineering and where sex workers are often regarded with little respect.

46. See Angela P. Harris, Gender Violence, Race and Criminal Justice, 52 STAN. L. REV. 777, 793 (describing the common association of law enforcement with "hypermasculinity"). Harris defines "hypermasculinity" as "a masculinity in which the strictures against femininity and homosexuality are especially intense and in which physical strength and aggressiveness are paramount." Id.


Studies of the police culture that perpetuates the paramilitary mythology of police work show that police misconduct is tightly linked to, if not directly caused by, stereotypic, aggressive, rampant masculinity—at its worst a naked celebration of the legal and physical power to subdue, subordinate, and dehumanize the people who become the targets of law enforcement.

Id.; see also, Harris, supra note 46, at 793–99 (describing the "hypermasculine" culture of law enforcement and how this relates to police brutality). Harris further notes that "[i]n a sense, the police officer is expected to be the mirror image of the paradigmatic criminal, the violent thug who threatens the lives and safety of innocent citizens." Id. at 793.

48. See Gale, supra note 47, at 698 (describing the potential for officer’s to use their authority and physical presence to subordinate suspects).

49. See Harris, supra note 46, at 796–97. (describing how police abuses are "not random," but rather they "follow[] the vectors of power established in the larger society in which white dominates nonwhite and rich dominates poor").
Given the circumstances surrounding the situation, it is not surprising then that there are many reports of cases in which a law enforcement officer has abused a sex worker during the course of a sting operation. 50 A "freebie," when an officer receives sexual service at no cost, is a typical way in which law enforcement might take advantage of a sex worker. 51

Additionally, certain groups or segments of the population are more regularly arrested for prostitution. 52 For example, "poor, minority women are disproportionately often the target of arrest and harsh treatment." 53 In 1992, approximately forty percent of those arrested for prostitution were African Americans; however, African Americans comprised only twelve percent of the population of female prostitutes. 54 This disproportionate

50. Evidence of this abuse comes from testimony from both sex workers and law enforcement officers. In some cases official investigations and formal charges have resulted. See, e.g., Carol Leigh, A First Hand Look at the San Francisco Task Force Report on Prostitution, 10 Hastings Women's L.J. 59, 81 n.63 (1999) (discussing the testimony of sex workers in San Francisco describing police abuse); Norma Jean Almodavor, For Their Own Good: The Results of Prostitution Laws as Enforced by Cops, Politicians, and Judges, 10 Hastings Women's L.J. 119, 120–21 (1999) (quoting an officer describing how law enforcement officers will sometimes get "freebies" from prostitutes in exchange for not arresting them); Josh Kovner, Officers Accused of Misconduct: Prostitutes' Allegations Prompt Investigation, Hartford Courant (Conn.), Oct. 1, 1998, at B1 (reporting an investigation into widespread Hartford police practices of assaulting and extorting sex from prostitutes); David Kocieniewski & John Sullivan, Newark Police Troubled: Out of Control at the Top, N.Y. Times, Dec. 23, 1995, at A1 (documenting police rape, robbery, and beating of prostitutes that went undisciplined). Additionally, at the annual American Economic Association two economists from the University of Chicago suggested that, based on the their study of prostitution in Chicago, 3% of sex worker's "tricks" are freebies performed for law enforcement in order to evade arrest. The authors conclude that "a prostitute is more likely to have sex with a police officer than to get arrested by one." Economists Let Some Light in on the Shady Market for Paid Sex, The Economist, Jan. 17, 2008 available at http://www.economist.com/finance/displaystory.cfm?story_id=10533877.

51. See supra note 50 and accompanying text (describing situation in which law enforcement received "freebies").


53. Id.

54. Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 181 (1992). While officer misconduct is always wrong, sexual misconduct directed towards African American women is additionally troubling in a larger systematic context in light of the American legal system's long unequal treatment of sex crimes against African American women. See, e.g., Jennifer Wriggens, Rape, Racism and the Law, 6 Harv. Women's L.J. 103, 106, 118 (1983) (discussing how rape of black women and men was legal after slavery was abolished and the institutionalized sexual access to black female slaves by white owners).
result is linked to law enforcement's selective targeting of streetwalkers.\textsuperscript{55} Streetwalkers, as the name implies, are the sex workers who generally solicit business from the streets.\textsuperscript{56} By contrast, call-girls often conduct their business in private locations far from law enforcement presence.\textsuperscript{57} Call-girls are often more educated and better paid than streetwalkers.\textsuperscript{58} In contrast to the stereotype, streetwalkers are estimated to comprise only ten to twenty percent of all sex workers.\textsuperscript{59} However, streetwalkers comprise the vast majority of arrests for prostitution.\textsuperscript{60} While law enforcement under its broad discretion may pose legitimate explanations for this discrepancy, the ultimate result is that "streetwalkers" will potentially have the most sexual contact with law enforcement.\textsuperscript{61} Call-girls whose services generally only the wealthy can afford will likely have far fewer encounters with police officers.

\textit{iii. Undermining Public Trust}

The police force risks losing its moral authority when its officers abuse sex workers.\textsuperscript{62} This can happen in at least three ways. First, there is the

\textsuperscript{55} See DeCou, supra note 52, at 439 (linking law enforcement targeting of streetwalkers to the disproportionate arrests rates of certain groups).

\textsuperscript{56} While each sex worker's situation is unique, observers have tried to create different groupings of sex workers based on such factors as the location of where they work, the identity of their clientele, the relative costs of their services, the type of remuneration received, education level and physical appearance. Streetwalkers generally work on the street in low-income neighborhoods and make less money than "call-girls." In a more recent anthropological study, Elizabeth Berstein creates categories of sex workers in San Francisco based on many of these factors. See generally, Elizabeth Bernstein, What's Wrong with Prostitution? What's Right with Sex Work? Comparing Markets in Female Sexual Labor, 10 Hastings Women's L.J. 91 (1999).

\textsuperscript{57} See Sylvia A. Law, Commercial Sex: Beyond Decriminalization, 73 S. Cal. L. Rev. 523, 529 (2000) (explaining the less public nature in which call-girls work as compared to other streetwalking prostitutes).

\textsuperscript{58} Id.

\textsuperscript{59} See id. ("Although streetwalkers are the most visible and familiar, they comprise only ten to twenty percent of all prostitutes.").

\textsuperscript{60} See id. ("[S]treetwalkers account for eighty-five to ninety percent of all prostitution arrests."); see also Lucas, supra note 13, at 49 ("Thus, although women working on the streets comprise a small minority of all prostitutes, they account for ninety percent of those arrested for prostitution.").

\textsuperscript{61} This notion directly contradicts one of the touted benefits of undercover investigations—the fact that they allow law enforcement to enforce laws against elite and privileged members of society who are often insulated from law enforcement scrutiny.

\textsuperscript{62} See Harris, supra note 46, at 799 ("[T]he moral authority of the state is endangered
general loss of public trust whenever there is abuse on the part of the police department. One prosecutor echoed these sentiments when he wrote to the county police department requesting that it cease to engage in sexual contact with suspected sex workers. He described the behavior as carrying "with it a certain amount of danger to the public trust in those instances where officers 'go too far' . . . ." Second, not only is the public trust undermined, but the police force is actually adding to the very behaviors which they aim to cabin. There is something paternal in the role of the law enforcement officer—the officer both protects and at times can punish in that pursuit. Yet, if law enforcement is paternal, then conventionally, paternal guardian and sexual partner is not an easy notion to grapple without implying a sort of incestuous relationship.

Finally, even beyond inherent illegitimacy, the unequal enforcement of the law is reminiscent of the discriminatory beliefs that contributed to the creation of the law against prostitution. The underlying basis for the criminalization and the unequal enforcement calls into question the legitimacy of the criminal justice system as a whole. This inequality has substantial costs: "The costs begin with the obstruction of law enforcement but ultimately extend much further, contributing to crime and deepening race and class divisions." 64

C. Judicial Enforcement

"A consents to sexual intercourse with B, in return for an agreed sum of money. B gives A a counterfeit bill, knowing that A does not know that the bill is counterfeit. B is not liable to A for battery." 65

Having laid out generally the concerns that arise from the actual enforcement of laws criminalizing prostitution, this Part looks at the court's role in regulating, or in this case not regulating, law enforcement conduct. Judicial oversight is especially important because law enforcement agencies themselves do not proactively regulate undercover operations. Instead the agencies rely largely on the courts for legal guidelines and the creation of

63. Jason Riley & James Adams, Officers Have Sexual Contact with Sex Workers, COURIER JOURNAL (Louisville, Ken.), July 11, 2004 (quoting a memo by Assistant County Prosecutor Matthew J. Golden written to the county police department in July 2002).
64. DAVID COLE, NO EQUAL JUSTICE 169 (1999).
65. RESTATEMENT (SECOND) OF TORTS § 892B cmt. g, illus. 9 (1979).
prophylactic measures. For its part, the courts generally look to whether the agency’s conduct violated Due Process or whether its behavior amounted to entrapment. Using this test, the courts have not found that allowing a police officer to pose as a "john" violates a defendant’s rights. More specifically, when addressing the situation when the undercover operation includes sexual contact, State courts have similarly found no legal bar to prosecution.


67. See id. at 115 n.40 (noting that, in general, defendants challenge law enforcement conduct during undercover investigations on entrapment grounds, and to some extent on the basis on a violation of Due Process). The most obvious potential legal bar to prosecution in the scenario relevant in this paper is a claim of "outrageous government misconduct," or more generally, a violation of Due Process. For example, in United States v. Russell, a case discussing entrapment, the Court noted that, "[w]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. 423, 431–42 (1973). In Hampton v. United States, 425 U.S. 484, 495 (1976), a plurality of justices again held out the possibility that a due process challenge of the government’s outrageous conduct might bar prosecution, though the Court remained uncertain where that line might be drawn. However, some jurisdictions do not acknowledge the outrageous government misconduct defense. See U.S. v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995) (holding that the outrageous government misconduct defense no longer exists in the 7th Circuit).

68. See Alexander v. DeAngelo, 329 F.3d 912, 915 (7th Cir. 2003) ("Nothing is more common in the investigation of victimless crimes such as prostitution than to pose a police officer (or, as here, a cooperating witness) as a prostitute. Such trickery does not violate any constitutional right of criminals."). In DeAngelo, the Court considered two § 1983 actions. The Plaintiffs were Alexander, who was arrested for soliciting a prostitute, and his former girlfriend, Gepfert, who police enlisted to act as an undercover prostitute. Id. at 914. Gephert, per law enforcement’s instructions performed oral sex on Plaintiff-Alexander, and also per instructions, she spit out Alexander’s semen into a napkin for law enforcement to use as evidence. Id. at 915. The prosecution did not go forward with charges against Plaintiff-Alexander.

69. See, e.g., State v. Tookes, 699 P.2d 983, 987 (Haw. 1985) (ruling that the use of sex by a civilian volunteer acting at the behest of a police during an investigation of a prostitution ring was not outrageous conduct); Anchorage v. Flanagan, 649 P.2d 957, 963 (Alaska Ct. App. 1982) (finding that the use of sex by an undercover officer in the investigation of prostitution was not outrageous); State v. Putnam, 639 P.2d 858, 862–63 (Wash. Ct. App.1982) (finding that the use of sex by a civilian working with police in an investigation of prostitution was permissible); State v. Crist, 281 N.W.2d 657, 658 (Minn. 1979) (finding that a plainclothes police officer did not violate due process when, in order to gain evidence sufficient to arrest the defendant for prostitution, he exposed himself before the defendant would negotiate a price); State v. Emerson, 517 P.2d 245, 249 (Wash. Ct. App. 1973) (finding that police conduct did not offend public policy where undercover officer engaged in sexual intercourse with prostitutes paid by money furnished by police
THE GOVERNMENT MÉNAGE À TROIS

i. The Unshockable Conscience of the State Courts

State courts have on multiple occasions addressed whether or not law enforcement during an undercover prostitution sting should be legally barred from engaging in sexual contact. These cases are not noteworthy for their application of any particular legal theory, but rather for what the courts do not discuss—deeper implications that are not so easily encapsulated in these narrow legal doctrines. Judges do not address the rationale behind the criminalization of prostitution or the inherent opportunities for abuse. Instead judges conclusively decide that such conduct is simply not outrageous and does not "shock the conscience."

Municipality of Anchorage v. Flanagan is a good representative case. In Flanagan an undercover police officer arranged a meeting over the phone with a dating service that advertised in the local paper. The officer arranged to have a "body massage" at a given location. The officer met Ms. Lynda Flanagan at that location where she reluctantly began discussing prices for various sexual acts. The undercover officer agreed to a price for sexual intercourse and fellatio. As laid out by the court, at this point Ms. Flanagan had already committed the crime of solicitation. Any further sexual contact was not necessary to complete the elements of the crime.


70. See Mun. of Anchorage v. Flanagan, 649 P.2d 957, 961 (Ala. Ct. App. 1982) (reversing dismissal of a prostitution case on grounds of entrapment). In Flanagan, an undercover officer performed a sting operation on a "dating service" to find whether or not they engaged in prostitution. Id. at 959. The crime of prostitution had already been committed when the officer continued with the transaction for some time. Id. Defendant claimed that "[the officer]'s willingness to engage in sexual contact with Flanagan before arresting her was unconscionable conduct, amounting to entrapment under Alaska law." Id. The appellate court disagreed, reasoning that there was no causal link between the police conduct and the commission of the crime. Id. at 960. Therefore, the court reversed the lower court's decision to dismiss the charge. Id. at 963.

71. Id. at 959.

72. Id.

73. This was not a case in which ambiguity existed as to whether the defendant had agreed to a financial sum in exchange for providing sexual services. Not only was there a price agreed upon, but the undercover officer also paid for the services: "[The undercover officer] told Flanagan that he wanted her to perform both fellatio and sexual intercourse, and he paid her sixty dollars." Id. at 959. Anchorage Municipal criminalizes the mere solicitation to
Despite having already witnessed Ms. Flanagan commit the elements of the criminal offense for which she was charged, the undercover officer nonetheless continued in the engagement with Ms. Flanagan. Next, the officer and Ms. Flanagan both undressed.\textsuperscript{74} Ms. Flanagan gave the officer a brief massage and then began stroking his penis. After a few seconds Ms. Flanagan went to perform fellatio at which point the undercover officer stopped her and arrested her for solicitation of prostitution, a misdemeanor offense.\textsuperscript{75}

Against this backdrop, the court easily disposes of the defendant's legal challenges to the officer's conduct. Ms. Flanagan alleged: (1) that the officer's conduct was unconscionable and therefore constituted entrapment under Alaska law; and (2) that the officer's conduct violated Due Process.\textsuperscript{76} The Court held that the officer's behavior neither shocked the conscious nor violated the concept of fundamental fairness. Rejecting the entrapment and due process arguments, the Court dismissively mused that the officer's "conduct toward Flanagan might be considered questionable" especially in light of the fact that she would only be charged with a misdemeanor offense.\textsuperscript{77}

In another case, Hawai'i v. Tookes,\textsuperscript{78} the Hawaiian Supreme Court upheld prostitution convictions against two women, both of whom had sex with a civilian undercover agent.\textsuperscript{79} In Tookes, Steven Fox, a civilian volunteer, worked with the Honolulu Police Department Vice Squad.\textsuperscript{80} The Police Department supplied Mr. Fox with money in order to arrange sexual contacts with suspected sex workers.\textsuperscript{81} In addition to arranging meetings,
Mr. Fox was also allowed to engage in sexual contact with the suspected sex workers in order to gather evidence for a conviction. In the case before the Court, Mr. Fox had sexual intercourse with both defendants in exchange for money. Based upon their engagements with Mr. Fox, both women were convicted of prostitution.

Both women in the case appealed arguing that law enforcement's conduct, in allowing a paid civilian agent to have sexual intercourse with them as a means of obtaining evidence, violated the due process clause of both the state and federal constitutions. In order to determine if a due process violation occurred, the Court looked at similar cases and noted other courts had conducted a simple balancing test of the policy considerations—crime detection versus fair treatment. Here, even weighing the treatment of the suspects against the detection of minor misdemeanor charges, the Court upheld the validity of the law enforcement conduct.

The Hawaii Supreme Court's facile treatment of admittedly unethical conduct is indicative of the judiciary's overall dismissive posture towards the claims of sex workers. The Court did express some reservations—acknowledging that law enforcement probably was not acting within the ethical standards that should govern law enforcement. The message is that law enforcement need not act ethically for a misdemeanor conviction to stand. A more cynical response might be that unethical treatment during investigations of misdemeanor crimes is acceptable if the subject is a "prostitute."

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82. See id. ("[Fox] was specifically instructed to engage in sexual intercourse if necessary to obtain evidence sufficient for a conviction.")
83. See id. at 985 (explaining that Fox paid defendant Tarkington $100 for a massage and sexual intercourse).
84. See id. ("Both women were convicted of prostitution as a result of acts of sexual intercourse with Steven Fox.").
85. See id. at 986 ("In particular, Tookes asserts that the police tactics used in this case constituted outrageous conduct in contravention of these due process guarantees.").
86. See id. at 986 ("[T]he due process "defense" involved a balancing of policy considerations in favor of crime detection and punishment against the policy of fair treatment." (quoting State v. Emerson, 517 P.2d 245 (Wash. 1973)).
87. See id. ("In the instant cases, the trial judges both evaluated the police practices at issue and found no due process violation. We cannot say that their conclusions were in error.").
88. See id. at 987 (noting also that the police "are not to be congratulated" for finding a loophole in the ethical code).
ii. A Dissenter Performs the Checking Function

Not all judges find prostitution cases so easy. In *Minnesota v. Thoreson*, Judge Randall's dissent set forth a lengthy, scathing critique of the investigatory tactics used by an undercover officer during a prostitution sting. "If the police are going to arrest a suspected prostitute, go ahead and make the arrest—but do not sport with her. That is all that happened here." Judge Randall addresses many of the same concerns presented in this Note.

Judge Randall asserts that removal of clothing is not an element of the crime of prostitution. In light of this, the dissent then goes on to implicitly question the motivations of the officer in requesting the suspect continue to undress during the course of the investigation. In rather blunt language, the Judge urges, "[t]hink about it. If [the suspect] is sitting in a car half naked from the waist down, and [has] at least touched the money to move it to the dashboard—if the officer does not have a case at that point, why does a case develop after she removes her shirt and is now completely naked?"

As noted in Part II, given the prevalence of misconduct surrounding this type of investigatory tactic, the judiciary should become increasingly suspicious when an investigation seemingly begins to go too far.

Not only does the dissent question the need for such conduct, but it also addresses the potential underlying sexism and stereotypes that are reinforced by allowing this type of conduct to occur. For example, the dissent notes that "[r]espondent argues that asking a strange woman to take off all her clothes and go naked in front of a strange man is a 'legitimate' police tactic. Respondent argues this is so because 'good girls won't do that but bad girls will.' "

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89. *See State v. Thoreson, No. A06-454, 2007 WL 1053205, at *4 (Minn. Ct. App. Apr. 10 2007)* (affirming a misdemeanor prostitution conviction by finding that an undercover police officer's request that a prostitution suspect remove her top was not substantially outrageous to amount to a violation of the defendant's constitutional due process rights).

90. *See id. at *11 (Randall, J., dissenting)* ("If the police are going to arrest a suspected prostitute, go ahead and make the arrest—but do not sport with her. That is all that happened here.").

91. *See id. at *6 (citing the elements of the crime and noting that in no way is undressing necessary to meet those elements).

92. *Id. at *8 (Randall, J., dissenting).

93. *Id. at *9 (Randall, J., dissenting). The judge also makes an argument that in the reverse situations—when the undercover officer is a female posing as a prostitute—the undercover officers do not have the male counterparts strip down after money has been
if the woman agrees to engage in a sexual encounter, and acts upon that, then the officer’s conduct is acceptable because she is already a "bad" woman; therefore, no harm is done. This very logic underlies the early justifications for criminalization of prostitution—the notion that there are good and bad women based on their sexual practices.

The dissent’s critique does not necessarily address or encapsulate the full breadth of all the relevant concerns, but this dissent offers an example of what a real consideration of the facts might entail. Ultimately, in this case, the dissent concludes that the conduct is "somewhat egregious," which does not meet the standard for dismissal under an outrageous government misconduct doctrine.94 However, the dissent goes on and asserts that in the context of a crime that is not even a "somewhat egregious crime" a "somewhat egregious" ethical violation should warrant a dismissal.95 Given that conduct would not meet the standard required for dismissal under the outrageous government misconduct doctrine, the dissent argues that the case should be dismissed "under the judiciary’s inherent power to dismiss a case in the furtherance of justice."96 This final call, a call to look into the meaning of justice captures the exact debate in which the judiciary should engage. Rather than merely looking at the law enforcement conduct in isolation, the judiciary should look to how the government action might undermine the legitimacy of the entire justice system.

D. Punting is Not Sufficient

Overall, the courts have generally left the regulation of undercover prostitution investigations to the remaining branches of government.97 The judiciary, through its reluctance to intervene, has enabled law enforcement to effectively use this type of investigatory tactic as a means of substantiating an arrest.98 Further, the judiciary’s mere discursive admonishments of the conduct may serve to exacerbate the potential for law enforcement abuse in these situations. Perhaps the most damaging is that exchanged. Id. at 11. This stripping down seems to be saved for the female sex workers.

94. Id. at *9 (Randall, J., dissenting).
95. Id.
96. Id. at 11.
97. In Both Tookes and Flanagan, the courts do express some misgivings about the law enforcement conduct, however, these ethical considerations carry no legal repercussions.
98. See, e.g., Tookes, 699 P.2d at 985 (validating the use of undercover police informants to arrest individuals for prostitution).
the judiciary’s acceptance of this behavior serves in some respects as its legitimization. The courts are telling society that it is fundamentally fair for a law enforcement officer to engage in sexual conduct with a suspected prostitute.

What can be drawn from the paucity of cases is the fact that the sex workers’ claims raise limited judicial responses. This limited attention is evidence of the fact that sex workers are not deemed as equal to all others.\textsuperscript{99} In a now oft cited maxim, the Supreme Court has resolved that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."\textsuperscript{100} Given that the legislatures have enacted many laws regulating or protecting sexual activity, it is a wonder that the State’s sexual conduct does not merit more consideration. Private biases have swept into the governance of undercover prostitution stings to the detriment of the sex worker. The sexual encounter would not so easily pass judicial muster if the sex workers were viewed as innocent claimants, divested from the imposition of the prostitute identity.\textsuperscript{101}

\textbf{III. The Ménage of Government}

This Part takes a holistic view of the three branches of governments’ collective response to and creation of this situation. It begins first by considering the broader function of the government as a teacher to the public. This Part asks whether or not the governmental actions here are those which we expect of a teacher with moral authority. The next Part looks at the combined overall practical effects of the governments’ collective action. The Part posits that the government has taken control over sex worker’s bodies, creating a monopoly for itself. Finally, the last section argues that this combined governmental action reinforces the divisive and dangerous victim/whore mythology.

99. See DeCou, \textit{supra} note 52, at 439 (discussing the unequal treatment between sex workers and other citizens).


101. See DeCou, \textit{supra} note 52, at 439 (highlighting the biases involved in sex worker arrests).
A. Government as Teacher

In one of his many famous quotes, Justice Brandeis describes the role of the government as "the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."102 If Justice Brandeis is right, that the government serves as a teacher and should lead by example, then the government should be beholden to a higher standard of conduct. As a teacher, for example, the government in allowing the conduct described in this Note raises some serious doubts about its ability to serve as a role-model.103 The three branches of government’s role in the cases addressed in this Note call into question just what type of behavior one expects of a teacher.

The following case illustrates just what the government accepts as a lesson on conduct:

On July 6, 1994, an undercover police officer from the Minneapolis Police Department entered "Nite-Lites," a reputed house of prostitution. Oanes greeted the officer at the door, informing him the cost was $100 and he should pick the woman with whom he would like to spend a "session." The officer selected Oanes.

Oanes brought the officer to a room with a bed and table. She suggested he remove his clothes . . . [t]he officer took off his clothes and sat on the bed. Oanes returned after approximately ten minutes and laid down on the bed. After making small talk, Oanes asked the officer to massage her. As he rubbed her shoulders, she raised her back and the straps of her halter top fell over her shoulders. The officer pulled the straps down exposing Oanes’ breasts, and moved his hands over them. When the officer asked if Oanes was going to massage him, she said she could not and told him to finish massaging her front. The officer continued rubbing Oanes’s stomach and then unbuttoned her shorts. When the officer asked for help in removing her clothes, Oanes lifted up her bottom. At the officer’s request, Oanes moved to the middle of the bed and spread her legs apart. After the officer placed his hands on Oanes’s inner thighs and his face close to her vaginal area, the officer stopped and arrested her.104

103. See Gary T. Marx, Under-the-Covers Undercover Investigations: Some Reflections on the State’s Use of Sex and Deception in Law Enforcement, 11 CRIM. JUST. ETHICS 13, 13 (1992) ("State sponsored-deception . . . also raises some issues that are unique to the state as the symbolic repository for societal values.").
104. See State v. Oanes, 543 N.W.2d 658, 660–61, 665 (discussing the various issues on appeal, including an entrapment defense, but ultimately upholding the conviction).
This fact pattern laid out by the court is telling because it is written explicitly; the court uses graphic terminology, without an indication of any reservations about what the court is describing. As this Note urged in the introduction, this scenario, while likely jarring for many readers, should not simply be dismissed or reviled based on visceral responses. A more measured analysis should take place. For this conduct to happen, the actions of the three branches of government are required—this scenario arose because sex work was criminalized; an officer investigated the crime; and a judge ruled that everything was legal (except the sex work).

Yet, in taking a longer look at the scenario, one should be cautious of jumping to conclusions. It would be easy to say that this conduct should be banned—period. This too raises its own set of concerns. There is a sense of paternalism in merely stating that this conduct should not happen—the sex workers in these instances have consented to the encounter. A mere statement that this should not occur offers an overly paternalistic analysis. The treatment of women as agency-less victims without choice only serves to reinforce their subordination and undermines their legal status. Banning the behavior overlooks the fact that the sex worker consented to the contact. However, this argument does not, therefore, mean that this encounter should be an accepted practice. The focus of this Note is on whether this situation is a legitimate use of the government’s authority.

Reading the details of these situations almost certainly makes the reader uncomfortable, but this discomfort should not stop anyone, especially judges, from taking the time to determine whether or not this behavior serves as a legitimate lesson plan for addressing prostitution. If the full power and arsenal of the government is befalling onto an accused, the three branches together should act in concert not to insulate one another from answering hard questions, but to challenge each other to find a more perfect definition of government. Legislatures should look once more at their laws criminalizing sex work. Law enforcement agencies should think

105. See Harris, supra note 46, at 799–800. As Harris succinctly states: "the language of protection and security provokes a feminist suspicion that a deal with patriarchy has been made somewhere." Id. at 799. Harris uses a quote from political theorist Wendy Brown to describe the situation:

In the first [part], the state guarantees each man exclusive rights to his woman; hence the familiar feminist charge that rape and adultery laws historically represent less a concern with violations of women's personhood than with individual men's propriety over the bodies of individual women. In the second, the state agrees not to interfere in a man's family (de facto, a woman's life) as long as he is presiding over it (de facto, her).

Id. at 800.
about the culture and conduct that is prevalent. And judges should be willing to consider what is in the interest of justice. The fact that this conduct is happening is a failure of the three branches of government to look at their collective conduct and ask what is their behavior is telling society.

B. Not Just Controlling, but Using Our Bodies

"[T]he association of the state's power with deception gives a double meaning to the notion of being screwed."^{106}

In stark contrast to the inherent checking function of the three branches of government, the three branches instead act to insulate each other and thereby maintain domination over the prohibited sex acts. This Note does not simply emphasize or point to the laws underlying sexism.^{107} Rather, the Note takes one step further and asserts that in this instance the three branches of government act together to transform and enhance the sexual domination that is inherent in the laws. In doing so, the government has created itself into a sexual partner that acts against its own moral code—its laws.

The justifications for the criminalization of prostitution pervert the very enforcement of those laws. Martha Nussbaum describes feminists' concerns over the taking of money or entering into contracts with regard to sexual or reproductive abilities:

The social meaning of these transactions is said to be both that these capacities are turned into objects for the use and control of men and also that the activities themselves are being turned into commodities and thereby robbed of the type of value they have at their best.^108

In a sense the government as a sexual partner during a prostitution sting does the analogous by turning a sexual relation into a something else—body of evidence. The enforcement of the laws criminalizing

107. Many scholars have noted the sexism in areas of law that deal with sex and gender. See, e.g., Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813 (1991). Estrich writes, "if there is one area of social behavior where sexism is entrenched in law—one realm where traditional male prerogatives are most protected, male power most jealously preserved, and female power most jealously limited—it is in the area of sex itself, even forced sex." Id. at 814–15.
prostitution calls into question the integrity of the entire criminal justice system.

C. Reinforcing Prostitute Mythology

Allowing law enforcement officers to engage in sexual contact with suspected prostitutes places sexual contact in the same context as other types of conduct during undercover investigations. Yet treating sexual contact the same as other undercover operations undermines the very justifications for the criminalization of sex work. The inconsistent treatment of this type of sexual encounter—as both deserving protection from the taints of commodification and treating a valid investigatory tactic—exposes an underlying validation of the victim/whore dichotomy. The laws keep sex sacred, but sex from the woman who sells herself deserves no such special privilege. Once the sex worker is defined as both a victim and wanton whore, law enforcement can justify engaging in the sexual encounter because the encounter will serve the noble purpose of saving the sex worker, but the sanctity of her sexual activity needs no protection because she is a whore. Mythologies and prejudices about the identity of a sex worker have no legitimate place in the law governing the interaction between law enforcement and suspected sex workers. Continued adherence to this mythology and continual disparate treatment and respect of peoples’ bodies calls into question the ability of the three-part government to adhere to its promise to deliver justice.

109. Prejudices amongst the classes and races may serve as the basis of the creation of these two opposing identities. See Ann M. Lucas, supra note 13, at 57–58. Lucas states:

Those who viewed prostitutes as victims of male seduction and guile typically portrayed such women as “white, native born, and middle-class in . . . manners and attitudes if not . . . background” and also “young, rural, and innocent.” Those who blamed prostitutes for their depravity tended to picture working-class women, usually non-white and/or immigrant, with deficient personal and cultural habits and characteristics.

Id. (citations omitted).

110. This sentiment is echoed in the dissent referenced in Part III.B. See State v. Thoreson, 2007 WL 1053205 at *9 (Minn. App. 2007) (“Respondent argues that asking a strange woman to take off all her clothes and go naked in front of a strange man is a ‘legitimate’ police tactic. Respondent argues this is so because ‘good girls won’t do that but bad girls will.’”).
IV. Conclusion

The Operationalization of Prostitution:  
Who Pays When the Government Inserts the Sexual Arm of the Law?

Legal scholars have produced a massive volume of academic literature addressing sex work, largely focusing on the validity of the justifications supporting or rejecting its criminalization. These debates have focused predominantly on either the State’s role in regulating morality, the nature of the sexual relation or the personhood of the sex worker. These debates have largely overlooked the means by which the State actually enforces or investigates prostitution. This Note shows that this discussion is very much needed because in fact the means of the investigation may very well create an immunized governmental agent who has a monopoly on legal sexual contact with suspected sex workers.111

An analysis of the power differentials and agency issues, while informative, cannot provide a completely satisfactory response to the concerns over the legitimacy of the investigatory tactic. Neither a total ban nor complete acceptance of the interaction will result in a perfect situation. The prohibition of sexual contact during prostitution stings will treat sex workers as exceptions to the generalized *laissez-faire* regulation of undercover investigations. This treatment will reinforce the victim stereotype and undermine the overall autonomy of the sex worker. Reinforcement of either disempowers the sex worker. Not only is she not allowed to legally commoditize her sexual favors, but also even her consent to be touched may be overridden. This further alienation of free will unnecessarily demotes the sex worker to a minor who is per se unable to engage in sexual activities.

However, while prohibiting sexual contact disempowers the sex worker, the converse serves an illusory empowerment. In this case the sexual contact is only valid because a court ordains it so. The law prohibits sex workers from engaging in prostitution—preventing them from legally engaging in certain forms of sexual conduct. Yet if the government is the partner the conduct is only illegal on her part. Only the government can be her legal sex partner in commercial transactions. Other potential partners are legally forbidden to touch her. The sexual activity on the part of law

111. See Harris, *supra* note 46, at 794. Harris argues that police officers have a monopoly over violence and moral authority. *Id.* This Note argues that the situation may be similar with the police also having a monopoly over sexual activity with sex workers.
enforcement is only valid because a court has distinguished it from participation in prostitution.

Allowing sexual contact may validate the sex worker's right to choose to engage in illegal conduct and accordingly to suffer equally the same punishment as all others who commit a crime. This validation, however, comes at the price of undermining the government's criminalization of prostitution. The government's acceptance of and participation in this investigatory tactic traps the sex worker in a detrimental mythology in which she cannot escape. It is time for the law to recognize "who she is" by no longer conflating her with her occupation. If sex is market inalienable, then surely dominion over that sexual activity should rest with the actor and not within governmental coffers of evidentiary material. A system that merely checks one branch and does not embrace a holistic view of its entities cannot provide a just government.

112. See Sylvia A. Law, supra note 57, at 525 ("Further, the term 'prostitute' conflates work and identity. Women who sell sex for money typically have other identities, that is, daughter, mother, athlete, musician, et cetera."). Further, sex workers' identities and experiences vary remarkably precluding the validity of simple generalization or essentialization. See Elizabeth Bernstein, What's Wrong with Prostitution? What's Right with Sex Work? Comparing Markets in Female Sexual Labor, 10 Hastings Women's L.J. 91, 102 (1999) ("[P]rostitutes have a diverse range of experiences... even within a ten-block radius of one city.").