

“Would a Cop Do This?”: Ending the Practice of Sexual Sampling in Prostitution Stings

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Introduction

Imagine a society that criminally punished “women who for hire or without hire offer their bodies to indiscriminate intercourse with men.”¹ Constitutional issues aside, one concern that immediately arises is how to enforce such a law. If these wicked women and the men (victims?) who liaise with them were sufficiently wily to hide their activities from prying eyes, and if the political will to eradicate this behavior existed, undercover sting operations might be the most viable solution. Of course, to put this scheme into action, the government would have to find police officers, or civilian agents, with enough civic pride to be willing to “accept” the indiscriminate offer of a woman’s body for sexual intercourse. Assuming the availability of such men, how much “accepting” would they have to do to prove the government’s case?

Alternatively, imagine a society with a narrower definition of prostitution, one which requires “engaging or offering or agreeing to engage for hire in sexual penetration or sexual contact.”² Furthermore, it might even punish clients of those engaged in prosti-

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1. *United States v. Bitty*, 208 U.S. 393, 401 (1908). The Court, per Justice Harlan, continues:

The lives and example of such persons are in hostility to “the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.”

Id. (quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)). Such a definition of prostitution, while seemingly archaic and unacceptable to a contemporary audience, is not confined to the distant past. For example, in 1979 the Supreme Court of Alaska struck down a statute defining prostitution as “the giving or receiving of the body by a female for sexual intercourse for hire” under the state constitution’s equal protection clause. *Plas v. State*, 598 P.2d 966, 967 (Alaska 1979). While gender neutral, North Carolina’s statutory definition of prostitution still includes “offering or receiving of the body for indiscriminate sexual intercourse without hire.” N.C. GEN. STAT. § 14-203 (2010).

2. MINN. STAT. § 609.321(9) (2010).

tution, in part because of a societal conclusion that people who sell sexual access to their bodies might be considered victims, or at least sympathetic. Towards whom should enforcement efforts be aimed, the seller or the buyer? Undercover tactics may still be necessary, but given this society's more equitable views on those who engage in prostitution, and women in general,³ "sexual sampling" (sexual contact between sex workers and law enforcement agents) becomes objectionable or even outrageous.

Prostitution has a peculiar place in criminal law. Belonging to the class of "victimless" crimes with, for example, illegal drug use,⁴ prostitution presents special challenges. Controversy over the very existence of the prohibition is one such difficulty. When "society at large" is the victim,⁵ the justification for the law is much more abstract than the justification for a prohibition on murder, which involves a definite victim and larger societal interests. This Article will focus on the challenges involved when sexual contact between an undercover government agent and a suspect aid in the discovery of criminal activity.

Because of the "consensual" nature of prostitution, enforcement mainly takes the form of undercover sting operations.⁶ Consequently, sex workers develop strategies to try to identify undercover police officers posing as clients; in particular, sex workers will often ask a potential client to engage in some sexual activity before naming the terms of hiring her services.⁷

3. *Bitty* predated much of the Women's Rights Movement, as it was decided twelve years before the Nineteenth Amendment to the U.S. Constitution, which guaranteed women the right to vote. U.S. CONST. amend. XIX; *Bitty*, 208 U.S. at 401.

4. See, e.g., *Alexander v. DeAngelo*, 329 F.3d 912, 915 (7th Cir. 2003) (theorizing that prostitution is a victimless crime); *United States v. Lopez*, 104 F.3d 1149, 1151 (9th Cir. 1997) (reasoning that drug trafficking and money laundering are victimless crimes).

5. *United States v. Nanthanseng*, 221 F.3d 1082, 1084 (9th Cir. 2000).

6. See Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976).

Consensual crimes are unusually difficult to detect, since the forbidden acts take place in private and none of the participants is likely to complain. To expose such crimes, police have had to resort to the use of informers and undercover officers. Often, these agents will solicit the commission of a criminal act for purposes of prosecution.

Id. at 164.

7. See, e.g., *State v. Crist*, 281 N.W.2d 657, 658 (Minn. 1979) (finding that a defendant asked an undercover officer to expose his penis to her as proof he was not a police officer); *State v. Artishon*, No. C6-01-910, 2002 Minn. App. LEXIS 177 at *2 (Minn. Ct. App. Feb. 5, 2002) (summarizing the testimony of a sex worker who demanded that an undercover officer touch her breast before proceeding); Park, *supra* note 6, at 228 (stating that women engaged in prostitution exploited police department policies by attempting to kiss clients and demanding clients set a price).

The rationale for this strategy is clear; sex workers assume that there are lines that police officers will not cross, even if the behavior involved is usually lawful. From a law enforcement standpoint, allowing such simple strategies to succeed by refusing to engage in sexual contact is unacceptable. Assuming the targets of undercover investigations would eventually exploit this loophole, the use of undercover operations to capture experienced criminals would be severely hampered.⁸ As a result, undercover police officers have been willing, to varying degrees, to engage in sexual conduct with sex workers in order to obtain evidence against them. This intersection of sex work and police work, officer misconduct and valid law enforcement policy, vulnerability and authority, is the main issue addressed by this Article.

Part I will provide a contemporary perspective on prostitution, with a particular emphasis on women who engage in street prostitution.⁹ As prostitution is criminalized largely because it offends society's moral sensibilities, it is important to examine evolving attitudes towards prostitution. Historically, it has been the women engaged in prostitution who were demonized, but in recent years they are increasingly viewed as "being more sinned against than sinning."¹⁰ There is broad diversity in the world of prostitution. On one end of the spectrum is the independent call girl who is college-educated, highly paid, and completely in control of her life. On the other end is the fifteen-year-old, heroin-addicted runaway who is pimped out by her drug dealer in exchange for drugs and shelter. Differences in

8. This is similar to the "Are you a cop?" test used by people, such as drug dealers and sex workers, who regularly engage in illegal activity with strangers and erroneously believe that undercover agents must identify themselves if asked. See, e.g., *State v. Morris*, 272 N.W.2d 35, 35 (Minn. 1978) ("[Morris] asked [the undercover police officer] if he was a police officer and [the undercover police officer] replied that he was not."); see also *Park*, *supra* note 6, at 226–29 (arguing against per se rules for police conduct in undercover operations).

9. This Article deals almost exclusively with female sex workers. Prostitution by males is prevalent and is also subject to sting operations by police. See, e.g., *Moreno v. State*, 860 S.W.2d 612 (Tex. Ct. App. 1993) (adjudicating the appellant's constitutional challenge to his arrest after soliciting a sex act from a male undercover police officer). However, most sex workers are female. Juline Koken et al., *Male and Female Escorts: A Comparative Analysis*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 205, 205 (Ronald Weitzer ed., 2d ed. 2010) [hereinafter *SEX FOR SALE*]; Julian Marlowe, *Thinking Outside the Box: Men in the Sex Industry*, in *PROSTITUTION AND PORNOGRAPHY: PHILOSOPHICAL DEBATE ABOUT THE SEX INDUSTRY* 349, 349 (Jessica Spector ed., 2006) [hereinafter *PROSTITUTION AND PORNOGRAPHY*]. The author was unable to find any cases in which a male defendant charged with prostitution alleged sexual misconduct on the part of the undercover police officer.

10. ROGER MATTHEWS, *PROSTITUTION, POLITICS AND POLICY* 43 (2008).

vulnerability among sex workers and changes in society's attitude towards them should have a major impact on law enforcement practices and courts' responses to police misconduct.

Part II will discuss the types of police misconduct taking place during prostitution stings and how the courts have responded. Police misconduct is a danger inherent in the nature of undercover operations, and while some of this behavior may be justifiable, it can also be truly appalling. When defendants have challenged this behavior, they often invoke due process defenses, claiming that the police behavior "shocks the conscience," as first stated in *Rochin v. California*.¹¹ Courts have been reluctant to apply this due process defense in general, and in prostitution stings in particular. However, *State v. Burkland*, a recent case from the Minnesota Court of Appeals, went against this tide when it reversed a defendant's conviction because "the investigating officer initiated and permitted the escalation of sexual contact that was unnecessary to any reasonable investigation"¹²

Part III of this Article analyzes prostitution enforcement policies. Current police practices in prostitution stings are unacceptable because they compromise law enforcement's moral authority and the main targets of the misconduct are members of the most marginalized and vulnerable segments of our society. The *Burkland* decision is a significant step in the right direction, but its definition of outrageous sexual misconduct is too narrow. Prostitution sting operations should be carried out without sexual contact between law enforcement personnel and sex workers. However, if law enforcement agencies find it truly unworkable to investigate sex workers under this limitation, then they should shift the focus of their efforts from the women engaged in prostitution to their clients.¹³

11. *Rochin v. California*, 342 U.S. 165, 172 (1952).

12. *State v. Burkland*, 775 N.W.2d 372, 376 (Minn. Ct. App. 2009).

13. While it is an important and relevant topic, it is beyond the scope of this Article to address the issue of whether prostitution should be legalized or decriminalized. This question has been the subject of lively debate. Those who oppose legalization often do so on the grounds that prostitution victimizes, objectifies, and generally degrades women. Those who support legalization frequently argue that the prohibition on the sale of sexual services unfairly restricts women's ability to participate in a free market economy, and that this prohibition is based on outdated attitudes about female sexual virtue. Ronald Weitzer called these two competing views the "oppression paradigm" and the "empowerment paradigm." Ronald Weitzer, *Sex Work: Paradigms and Policies*, in *SEX FOR SALE*, supra note 9, at 3-7. For more information on this debate, see LENORE KUO, *PROSTITUTION POLICY: REVOLUTIONIZING PRACTICE THROUGH A GENDERED PERSPECTIVE* (2002); Scott A. Anderson, *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, in *PROSTITUTION AND*

I. A Contemporary Perspective on Prostitution and Sex Workers

Prostitution discussions are often plagued by “myths” that “substitut[e] half-truths, platitudes and slogans for explanations”¹⁴ Some of these myths, such as the often-repeated assertion that prostitution is “the oldest profession,” encourage complacency and acceptance of the inequities endemic to some forms of prostitution.¹⁵ Other myths cut in the opposite direction, such as the assumption by many well-meaning activists that virtually all sex workers were victims of childhood sex abuse.¹⁶ These and similar assumptions impede a genuine understanding of the realities of prostitution. This Part will unravel some of the mystery surrounding prostitution, sex workers, and society’s attitude toward the subject for the purpose of clarifying the context in which law enforcement policy and judicial decisions are made.

A. What’s Wrong with “Prostitute”?

Sexuality is a defining characteristic in our culture.¹⁷ In this “sexually charged context,” it is difficult, if not impossible, to discuss prostitution and the women who engage in prostitution without using value-laden language.¹⁸ In the face of this difficulty, it is important to be aware of the implications of using certain terms.¹⁹

“Prostitute,” a term that ostensibly seems to provide detached and value-neutral nomenclature, dehumanizes women who engage in prostitution.²⁰ Dehumanization is particularly easy in

PORNOGRAPHY, *supra* note 9, at 358; Carole Pateman, *What’s Wrong with Prostitution?*, in PROSTITUTION AND PORNOGRAPHY, *supra* note 9, at 50; Debra Satz, *Markets in Women’s Sexual Labor*, in PROSTITUTION AND PORNOGRAPHY, *supra* note 9, at 394; Laurie Shrage, *Prostitution and the Case for Decriminalization*, in PROSTITUTION AND PORNOGRAPHY, *supra* note 9, at 240.

14. MATTHEWS, *supra* note 10, at 21.

15. *Id.* at 22–24.

16. See Weitzer, *supra* note 13, at 5 (“[T]he oppression paradigm describes *only* the worst examples of sex work and then treats them as representative.”). Weitzer notes that some writers believe the generalization that most or all sex workers have been victims of child abuse. *Id.*

17. KUO, *supra* note 13, at 36–38.

18. *Id.* at 36.

19. See Kelley Frances Stieler, *The Government Ménage à Trois: Unraveling the Government Sex Partner in Undercover Prostitution Stings*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 453, 454 n.2 (2009) (“[C]ertain words may have a long history of negative connotations or . . . serve[] as a way of framing arguments to serve an ultimate conclusion.”).

20. Despite its Latin roots, even “prostitution” is euphemistic and relies on assumptions about gender roles and sexuality. Relying on its Latin elements, *pro*

the context of prostitution because in the social construct of prostitution, "an inextricable connection to the character and nature of the actor is presumed to exist."²¹ The linguistic connection between "prostitution" and "prostitute" strengthens this presumption, and suggests that a "prostitute" is something you *are*, not something you *do*.²² Given the historical and contemporary inclusion of "indiscriminate" sexual activity without hire in the definition of prostitution,²³ "prostitute" can reasonably be understood as a polite alternative to "whore."²⁴

While "woman (or man, or child) engaged in prostitution" is a good alternative emphasizing personhood, not social labeling, this Article frequently uses the term "sex worker" as well. "Sex worker" is not as euphemistic as "prostitute" because it directly confronts the listener with the nature of the activity.²⁵ At the same time, the term drains some of the venom associated with "prostitute" and "whore."²⁶ However, the term is not without its critics. Chiefly, some anti-prostitution activists and commentators refuse to use "sex worker" because it normalizes prostitution as just another job and ignores the harmful effects prostitution has on women.²⁷ This Article takes the position that the term is neutral be-

and *statuere*, prostitution means to set up or expose publicly and does not explicitly apply to sex. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1822 (2002). Recall that until later in the twentieth century, only women could be "prostitutes," and the exchange of money was unnecessary. See *supra* note 1 and accompanying text. The implication is that women were identified with their sexuality, and women who engaged in prostitution were guilty of flaunting their sexuality instead of cloistering it away. In this way, early U.S. prostitution laws resemble Sharia laws in Islam requiring women to cover themselves in public in order to preserve sexual modesty. See QUR'AN 24:31.

21. KUO, *supra* note 13, at 57. Put another way, a sex worker is conceived as "a disembodied stereotype, a one-dimensional object without individual identity—'nothing but a prostitute.'" *Id.* at 60.

22. Cf. ALAIN CORBIN, WOMEN FOR HIRE: PROSTITUTION AND SEXUALITY IN FRANCE AFTER 1850, at 30 (1990) ("Registration [in compliance with nineteenth-century prostitution laws in France] indicated the adoption not of a profession, for prostitution could not be regarded as such, but of the *state of being*." (emphasis added)).

23. See *supra* note 1 and accompanying text.

24. Calling a woman engaged in prostitution a whore is to discard her as worthless, to place her on the lowest rung of the social ladder. See KUO, *supra* note 13, at 57. Perhaps as a way to show contempt for society's contempt, "whore" is sometimes reclaimed by sex workers and used with pride, as in the example of the First World Whores' Congress which was held in 1985 in Amsterdam. Tracy Quan, *The Name of the Pose: A Sex Worker by Any Other Name?*, in PROSTITUTION AND PORNOGRAPHY, *supra* note 9, at 346–47.

25. See Quan, *supra* note 24, at 344.

26. *Id.* ("It's hard to imagine a man calling his unfaithful wife a 'sex worker' in a moment of violence or anger.")

27. See MATTHEWS, *supra* note 10, at 33–35.

cause it treats women engaged in prostitution with more respect.

B. *Who Becomes a Sex Worker?*

Sex workers are an extremely diverse group as a whole, and there is not an easy or universal answer as to who becomes a sex worker.²⁸ In order to determine who becomes a sex worker, this analysis must first differentiate between the types of prostitution because these types coincide with significant differences in the conditions of the sex workers' lives and how they got there.²⁹ More attention will be given to street sex workers because law enforcement's attention is given to them as well. Researchers often divide sex workers into hierarchical levels.³⁰ Social critic Ronald Weitzer breaks prostitution into the following basic types, starting on the high end: call girls, escorts, brothel workers, massage parlor workers, bar or casino workers, and streetwalkers.³¹ Some commentators add a separate category for online prostitution,³² and indeed online advertisement for sexual services is skyrocketing, as shown by the meteoric rise and fall of Craigslist's "Adult Services" advertising category.³³ Individual sex workers may not fit neatly into just one of these categories, but they usually stay at the level at which they initially entered into prostitution.³⁴ Diversity within these categories does exist,³⁵ but

28. See, e.g., R. BARRI FLOWERS, SEX CRIMES, PREDATORS, PERPETRATORS, PROSTITUTES, AND VICTIMS: AN EXAMINATION OF SEXUAL CRIMINALITY AND VICTIMIZATION 150 (2001); KUO, *supra* note 13, at 69–79.

29. Weitzer, *supra* note 13, at 7–13; see also Judith Porter & Louis Bonilla, *The Ecology of Street Prostitution*, in SEX FOR SALE, *supra* note 9, at 163.

30. Weitzer, *supra* note 13, at 7.

31. *Id.* at 8. Weitzer considers the following factors in this hierarchy: business location, prices charged, exploitation by third parties, risk of violent victimization, public visibility, and impact on community. *Id.*

32. See FLOWERS, *supra* note 28, at 147.

33. The "Adult Services" category on Craigslist.org, a Website that provides online classified advertising space, featured ads that often explicitly involved prostitution. Though management at Craigslist maintained their legal right to provide this forum, the company removed the category in September 2010 following pressure from advocacy groups and state attorneys general. Claire Cain Miller, *Craigslist Says It Has Shut Its Section for Sex Ads*, N.Y. TIMES, Sept. 16, 2010, at B1. Revenue from the ads, before their removal from the site, was projected by some to reach \$44 million in 2010, up from an estimated \$12 million in 2009. See *id.*; Brad Stone, *Sex Ads on Craigslist Pay Off In More Revenue and Scrutiny*, N.Y. TIMES, Apr. 26, 2010, at B1.

34. Weitzer, *supra* note 13, at 7. What little mobility there is tends to be downward.

Occasionally, an upper or middle-tier worker whose life situation changes (e.g., because of aging, drug addiction) is no longer able to work in that stratum and gravitates to the street. But transitioning from street work to the escort or call girl echelon is quite rare, because most street workers

the quality of life trends downward as one progresses along the ladder, with the biggest difference being between "indoor" sex workers and street workers.³⁶

Street workers are the most visible type of sex worker, and the type most closely associated with the public perception of prostitution.³⁷ However, in reality, they only account for approximately one-fifth of sex workers.³⁸ Despite this fact, street workers make up eighty-five to ninety percent of all prostitution arrests.³⁹ Additionally, teenage runaways turning to prostitution are most likely to engage in street prostitution, and an estimated twenty percent of all street sex workers are nineteen years old or younger.⁴⁰ Street workers have a higher incidence of drug abuse

lack the education and skill set required for upscale indoor work.

Id.

35. See FLOWERS, *supra* note 28, at 148–49 (noting the varying circumstances of women who work as call girls); Weitzer, *supra* note 13, at 12 ("While middle range call girls earn \$200–\$500 an hour, top-tier workers charge between \$1000–\$6000 an hour . . .").

36. See Weitzer, *supra* note 13, at 9–13. "The prostitution market is *segmented* between the indoor and street sectors—marked by major differences in working conditions, risk of victimization, and job satisfaction and self-esteem." *Id.* at 13.

37. KUO, *supra* note 13, at 74; Anne M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 49 (1995); Weitzer, *supra* note 13, at 9.

38. Porter & Bonilla, *supra* note 29, at 163; Weitzer, *supra* note 13, at 9. Other estimates range from ten to fifteen percent. FLOWERS, *supra* note 28, at 148; KUO, *supra* note 13, at 74. By comparison, call girls are thought to represent twenty to twenty-five percent of the market in the United States. *Id.* at 149.

39. KUO, *supra* note 13, at 74; Lucas, *supra* note 37, at 49. Street prostitution's high visibility and pressure to make a visible impact on crime probably explain this disparity. *Id.* Another reason for this unequal enforcement may be that street prostitution causes more damage to the surrounding community. See MATTHEWS, *supra* note 10, at 28 (suggesting that women who live in high prostitution areas but do not themselves engage in prostitution are adversely affected because they are harassed on the streets); Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, in PROSTITUTION AND PORNOGRAPHY, *supra* note 9, at 20 (citing the same adverse effect, but in a racialized context); Weitzer, *supra* note 13, at 8 (noting that street prostitution has an adverse impact on community).

40. R. BARRI FLOWERS, RUNAWAY KIDS AND TEENAGE PROSTITUTION 88 (2001); see also David Finkelhor & Richard Ormrod, *Prostitution of Juveniles: Patterns from NIBRS*, JUV. JUST. BULL., June 2004, at 5, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/203946.pdf>. Roger Matthews notes the law's arbitrary distinctions based on age:

It is estimated that some 60 to 70 per cent of those adults who are currently engaged in street prostitution in the UK first became involved under the age of 18. Thus, many of these women would have qualified for victim status during their early years of involvement in prostitution but once they have passed their 18th birthday they surprisingly are no longer eligible. In some cases this may be because the period of time that they have been involved in prostitution has been extended as they have become trapped by a series of processes. Although many of these 'adults' will have had their childhoods taken away from them they are deemed at the age of

and addiction than other types of sex workers.⁴¹ While the conventional notion that all or most sex workers were victims of childhood sexual abuse is overstated, compared to the general population, a disproportionate number of women who engage in street prostitution report being victims of childhood sexual abuse.⁴² However, the incidence of childhood abuse in street workers may be so prevalent because it is a common reason for running away from home, and running away from home is strongly related to the likelihood of entering into prostitution.⁴³ Often cut off from any support system, street workers may engage in “survival sex,” taking money for sex in order to eat or support an out-of-control drug habit.⁴⁴ In short, women engaged in street prostitution are the main targets of anti-prostitution law enforcement efforts, yet are quite possibly the most vulnerable segment of U.S. society.⁴⁵

C. Living “the Life”

“Women engaged in prostitution face the most dangerous occupational environment in the United States.”⁴⁶ Daily living and working conditions for sex workers, sometimes called “the life,”⁴⁷ involve extreme threats to their physical and mental health.⁴⁸

Sex workers live under a constant threat of violence from their clients.⁴⁹ Often this violence is spontaneous, an eruption

18 to suddenly make informed choices.

MATTHEWS, *supra* note 10, at 53. Teenage prostitution is not limited to the streets, though. Members of a New York City organized crime family were recently charged with pimping teenage girls online. Stone, *supra* note 33, at B1.

41. See FLOWERS, *supra* note 40, at 88; MATTHEWS, *supra* note 10, at 74–75; Porter & Bonilla, *supra* note 29, at 168, 172. The connection between drug use and prostitution is not necessarily clear. Seventy-five percent of sex workers who use intravenous drugs were already doing so before entering prostitution. Ine Vanwesenbeeck, *Another Decade of Social Scientific Work on Sex Work*, 12 ANN. REV. SEX RES. 242, 261 (2001). While this supports the inference that supporting one or more drug addictions is a prime motivator for entering prostitution, Matthews rejects this argument because it is “too simplistic and exclude[s] the complex links between drug use and other processes which increase the likelihood of people becoming involved in prostitution.” MATTHEWS, *supra* note 10, at 74.

42. Figures on this topic vary widely. See MATTHEWS, *supra* note 10, at 65–66 (reporting figures ranging from forty-two to ninety percent).

43. See FLOWERS, *supra* note 40, at 89–90.

44. See Weitzer, *supra* note 13, at 9.

45. See KUO, *supra* note 13, at 74.

46. John J. Potterat et al., *Mortality in a Long-term Open Cohort of Prostitute Women*, 159 AM. J. EPIDEMIOLOGY 778, 784 (2004).

47. Quan, *supra* note 24, at 343.

48. TEELA SANDERS, *SEX WORK: A RISKY BUSINESS* 73 (2005).

49. *Id.*

from a dissatisfied or embarrassed client, but sometimes sex workers are specifically targeted for violence.⁵⁰ The large majority of them have been physically assaulted on the job.⁵¹ One Colorado study found that female sex workers were eighteen times more likely to be murdered than women who do not engage in prostitution.⁵² They are likely to be raped by their clients, perhaps even on a regular basis.⁵³ Sex workers understand this risk and adopt strategies to avoid violence.⁵⁴ One simple strategy is to try to appear overly positive and friendly in order to avoid upsetting the client.⁵⁵ Sex workers also typically do not allow the client to get into physically dominating sexual positions, because some clients "get on top of you and try and smother you."⁵⁶ Despite the frequency of violence, sex workers are reluctant to report incidences to the police, because they do not think the police will take their complaints seriously, and they worry about the legal ramifications.⁵⁷

Given these working conditions, it is hardly surprising that sex workers on the street suffer from severe emotional stress. "The emotional and psychological consequences of selling sex are a hazard equal to that of physical violence and health-related concerns."⁵⁸ One study of 826 sex workers across nine countries found that sixty-eight percent of sex workers in the United States

50. These two types of violence are called "situational violence" and "predatory violence," respectively. *Id.* at 74. Both are troubling, though for different reasons. Situational violence is based in "a belief that women should be controlled by physical mastery." *Id.* To some extent, women can avoid this violence by managing the interaction with the client. Predatory violence, however, is unpredictable and difficult to avoid. *Id.* at 74-75.

51. See KUO, *supra* note 13, at 76; Pateman, *supra* note 13, at 63.

52. Potterat et al., *supra* note 46, at 782. Sex workers are often the target of misogynist serial killers, who consider sex workers the most appropriate object of violence as the quintessential "bad" woman. KUO, *supra* note 13, at 60-61. As street workers often have sex in a client's car, parked in a remote place, they are extremely vulnerable to violence because no one will see or help them. *Id.* at 76. This fact, and perhaps police indifference, often cause homicides involving sex workers to go unsolved. *Id.* at 61.

53. FLOWERS, *supra* note 28, at 150 (estimating that seventy percent of all female sex workers are raped by clients, and on average are raped thirty-one times a year); see also MATTHEWS, *supra* note 10, at 47 (citing various studies of violence against women engaged in street prostitution that report figures ranging from twenty-seven to eighty percent).

54. SANDERS, *supra* note 48, at 76-77.

55. *Id.* at 77.

56. *Id.* at 76 ("I always make sure that my own arm is by my throat so at least I know I can use my other arm to force him off me.").

57. See MATTHEWS, *supra* note 10, at 46-48; see also KUO, *supra* note 13, at 102 ("Where 'blaming the victim' in physical and sexual assaults of women is painfully commonplace, it is far more common when the woman is a prostitute.").

58. SANDERS, *supra* note 48, at 45.

were diagnosable with post-traumatic stress disorder (PTSD).⁵⁹ The study also noted that the degree of PTSD among the participants was on average more severe than among Vietnam War veterans who requested treatment for PTSD.⁶⁰ This high rate of serious psychological stress is not solely attributable to the nature of the work, "but must be considered in the context of the social stigma attached to sex work."⁶¹ Besides being the targets of violence, when sex workers are assaulted, they expect to be told they deserved what they got.⁶² Because of the social stigma, sex workers also often attempt to hide what they do for a living and live double lives to avoid consequences such as having their children taken away, being rejected by family and friends, and ruining romantic relationships (even marriage).⁶³ Those who are known to be sex workers may also face harassment from neighbors and vigilante groups, as one British sex worker related:

I will be walking up the road with my daughter and [protesters] will stop me. I say to them at night when I am on my own and I am dressed in mini skirts then they have got a right to stop me but not at three o'clock in the afternoon, with my baby in the push chair with about six carrier bags.⁶⁴

Another woman noted that it was often the same men who harassed her during the day who picked her up at night.⁶⁵

II. The Wild World of Vice Cops and the Courts that Tolerate Them

Undercover investigation is very common in the enforcement

59. Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, in *PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS* 33, 44, 47 tbl.5 (Melissa Farley ed., 2003). The nine countries included in the survey were Canada, Colombia, Germany, Mexico, South Africa, Thailand, Turkey, the United States, and Zambia. The combined average prevalence of PTSD among all respondents was sixty-eight percent, with Mexico having the lowest rate (fifty-four percent) and Colombia having the highest rate (eighty-six percent). *Id.* Another study of street sex workers in Washington, D.C. found that forty-two percent were diagnosable with PTSD. Vanwesenbeeck, *supra* note 41, at 267.

60. Farley et al., *supra* note 59, at 48. Interestingly, this work found "no statistically significant differences between brothel/massage, street, and strip club prostitution with respect to PTSD severity." *Id.* at 49.

61. Vanwesenbeeck, *supra* note 41, at 267.

62. See JODY RAPHAEL, *LISTENING TO OLIVIA* 127–28 (2004); Vanwesenbeeck, *supra* note 41, at 267; see also *supra* note 57 and accompanying text.

63. See SANDERS, *supra* note 48, at 116–20 ("Secrecy is crucial because sex workers fear disapproval, rejection and shame if loved ones ever discover their involvement in prostitution."); Vanwesenbeeck, *supra* note 41, at 268 ("[S]tigma puts an enormous burden onto the social lives of sex workers . . .").

64. SANDERS, *supra* note 48, at 101.

65. *Id.*

of “victimless” crimes such as prostitution, because it is unlikely that any of the parties to the transaction are going to file a complaint with the police.⁶⁶ As police and sex workers try to outfox each other, they become accustomed to the other’s games and, as a result, police argue that it is sometimes necessary to engage in limited sexual contact with suspected sex workers to convince them that the undercover agents are not police.⁶⁷ With the combination of this “necessity” and the relatively private and unsupervised nature of undercover work, abuses are inevitable. Courts, while sometimes ambivalent about the use of sex in undercover operations in general, have almost uniformly allowed sexual contact during prostitution stings.⁶⁸ However, *State v. Burkland* is an exception to the “free hand” that courts usually give to officers or their agents in prostitution stings.⁶⁹

A. Right on the Line and Far Beyond

Behavior by undercover police officers towards women who engage in prostitution runs the gamut from admirable to abhorrent. The worst stories of police misconduct tend to come out in the news media.⁷⁰ There are many examples of sexual intercourse between the women and undercover officers.⁷¹ Another common example of misconduct is receiving naked massages from women even though sufficient evidence has already been collected to get a conviction.⁷² One interaction did not involve sexual conduct but is still disturbing, where an arresting officer walked into a hotel room and took naked photos of a sex worker while refusing to let

66. See Susan S. Kuo, *Official Indiscretions: Considering Sex Bargains with Government Informants*, 38 U.C. DAVIS L. REV. 1643, 1649–50 (2005) (stating that use of confidential informants is considered necessary to discover victimless crimes).

67. See Hailey Heinz, *How Far Can Vice Cops Go?: Undercover Officers’ ‘Naked Massage’ Criticized*, ALBUQUERQUE J., Sept. 11, 2009, at A1; see also *supra* notes 6–8 and accompanying text.

68. See *infra* notes 85–89 and accompanying text.

69. See *infra* Part II.C.

70. For examples of police sexual misconduct in the media, see Stieler, *supra* note 19, at 455 & n.11.

71. See, e.g., Dee Dixon, *Officer: Sex on Job No Cause for Firing*, BEAUMONT ENTERPRISE (Tex.), Feb. 5, 2009, at 9A (reporting that officers were engaging in sex acts with massage parlor sex workers); Tom Jackman, *Spotsylvania Deputies Receive Sex Services in Prostitution Cases*, WASH. POST, Feb. 13, 2006, at B1 (“[D]etectives allowed women to perform sexual acts on them on four occasions and once left a \$350 tip . . .”).

72. See, e.g., Heinz, *supra* note 67, at A1 (detective requested and received naked massage from woman even though she had already taken money and agreed to provide sexual services).

her get dressed.⁷³

The conduct that faces constitutional scrutiny in the contemporary courtroom, at least at the appellate level, is generally of a milder sort.⁷⁴ There are several possible explanations for why the appellate courts have not heard more outrageous misconduct cases. First, prosecutors may not pursue cases involving embarrassing police behavior because they know it will be hard to get a conviction from a jury.⁷⁵ Second, trial courts may dismiss charges on grounds of due process violations, and perhaps prosecutors are not appealing the decisions either from fear of restrictive precedent or because government officials do not want to draw attention to the misconduct.⁷⁶ Finally, police may simply be “testilying”⁷⁷ about the exact nature of the encounter or destroying evidence of outrageous conduct.⁷⁸ Whatever the reason, several criminal defense attorneys who frequently defend women charged with prostitution have suggested that the behavior is widespread and serious, not merely a handful of cases where the officer reluctantly engages in the minimal amount of sexual contact necessary to do his job.⁷⁹

B. Objectionable but Not Outrageous

Courts have been very reluctant to dismiss prostitution charges based on allegations of police misconduct in prostitution cases.⁸⁰ Much of this reluctance may be attributable to general judicial reluctance to give any traction to the outrageous conduct due process defense. However, it also appears to stem from the

73. Brian Rogers, *Woman Claims Vice Officers Took Nude Cell Phone Photos of Her*, HOUSTON CHRON., Aug. 5, 2010, at B2.

74. Compare *State v. Artishon*, 2002 Minn. App. LEXIS 177 at *2 (Minn. Ct. App. Feb. 5, 2002) (officer touched sex worker's breast at her invitation to prove he was not a cop), with *Municipality of Anchorage v. Flanagan*, 649 P.2d 957, 959 (Alaska Ct. App. 1982) (after agreeing on sexual services and paying money, officer let woman massage him and stroke his penis, stopping her only as she prepared to perform oral sex).

75. See Heinz, *supra* note 67, at A1 (“[A] case can be jeopardized if a jury finds the officer's behavior unacceptable.”).

76. See, e.g., *infra* notes 85–89 and accompanying text.

77. “Testilying” is slang used by police referring to police who lie about a case in order to establish probable cause. Alan Dershowitz, Op-Ed., *Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17.

78. See, e.g., Luke Turf, *Glendale Prostitution Sting Has Fringe Benefits*, DENVER WESTWORD, Nov. 8–14, 2007, at 10, 13, available at <http://www.westword.com/2007-11-08/news/glendale-prostitution-sting-has-fringe-benefits> (in the course of an investigation into police misconduct in a prostitution sting, police notes and audiotapes went missing and an undercover officer asked a fellow officer to remove the words “began oral stimulation” from the report).

79. Heinz, *supra* note 67, at A1.

80. See *infra* notes 85–89 and accompanying text.

assumption that police sexual conduct involving contact, and even misconduct, is less objectionable in the context of prostitution sting operations.

The outrageous conduct due process defense is one of the least loved of Supreme Court doctrines.⁸¹ This doctrine never gained momentum; indeed, Judge Richard A. Posner labeled it "stillborn."⁸² Several U.S. Courts of Appeals have done away with it entirely.⁸³ Others have merely been skeptical about parties' chances of succeeding on this particular due process defense.⁸⁴

Skepticism has been strong in prostitution cases where the defendant alleges police sexual misconduct that shocks the conscience. In *Municipality of Anchorage v. Flanagan*, a reserve police officer allowed the sex worker to stroke his penis and "prepare[] to engage in fellatio" before stopping the encounter and arresting the woman involved.⁸⁵ The court stated that the officer's conduct "might be considered questionable," but it did not rise to the level of outrageousness.⁸⁶ In *State v. Thoreson*, a Minneapolis police officer asked a sex worker to undress completely though she had already agreed to have sex for money; the court held that this was a legitimate investigative procedure and stated that he did not request the defendant to undress "for his own prurient interest."⁸⁷ Another Minnesota case held that where an officer exposed his penis to a suspected sex worker at her request, this conduct did

81. See *United States v. Santana*, 6 F.3d 1, 3 (1st Cir. 1993) ("The banner of outrageous misconduct is often raised but seldom saluted."). The doctrine has its origins in dicta from *United States v. Russell*, in which the Court rejected a defendant's entrapment claim where an undercover agent had supplied the defendant with an essential, albeit harmless and legal ingredient for manufacturing methamphetamines. *United States v. Russell*, 411 U.S. 423, 431-32 (1973). Writing for the majority, Justice Rehnquist nonetheless noted the possibility of a case where "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." *Id.* (citing *Rochin v. California*, 342 U.S. 165 (1952)).

82. *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995).

83. *Id.*; *United States v. Tucker*, 28 F.3d 1420, 1426-27 (6th Cir. 1994) ("[C]ontinued recognition of this 'defense' stands as an invitation to violate the constitutional separation of powers . . .").

84. See, e.g., *United States v. Jones*, 13 F.3d 100, 104 (4th Cir. 1993) ("At the outset, we note that a generalized claim of outrageous misconduct based on the Due Process Clause of the Fifth Amendment is difficult to make out."); *Santana*, 6 F.3d at 3.

85. *Municipality of Anchorage v. Flanagan*, 649 P.2d 957, 959 (Alaska Ct. App. 1982).

86. *Id.* at 963.

87. *State v. Thoreson*, No. A06-454, 2007 Minn. App. LEXIS 310, at *2-4 (Minn. Ct. App. Apr. 10, 2007).

not violate the woman's due process rights.⁸⁸ The common thread in these cases is that courts are reluctant to dismiss charges against a defendant when police conduct is "morally objectionable," but not outrageous.⁸⁹

Still, the due process defense has some life left in it. In fact, in *United States v. Cuervelo* the Second Circuit developed a test to aid in determining whether a sexual relationship between a suspect and a government agent is outrageous, and held that a defendant must show

(1) that the government consciously set out to use sex as a weapon in its investigatory arsenal, or acquiesced in such conduct for its own purposes upon learning that such a relationship existed; (2) that the government agent initiated a sexual relationship, or allowed it to continue to exist, to achieve governmental ends; and (3) that the sexual relationship took place during or close to the period covered by the indictment and was entwined with the events charged therein.⁹⁰

Applying the *Cuervelo* test to the government's use of a civilian agent in a prostitution sting, the Pennsylvania Superior Court in *Commonwealth v. Sun Cha Chon* held that the government's conduct was sufficiently outrageous to dismiss all charges where a confidential informant, at the behest of investigators, returned to a massage parlor four times to have sexual intercourse with women engaged in prostitution though this was unnecessary to the investigation.⁹¹ While the holding of *Sun Cha Chon* is significant, it does not provide the bright line necessary for effective oversight of the murky territory of undercover police operations and it is unclear whether it addresses sexual conduct short of intercourse.

C. Burkland: A Clear Line Emerges

In 2009, the Minnesota Court of Appeals decided *State v. Burkland*, in which the defendant appealed her conviction for prostitution on the grounds that the investigating officer's conduct was sufficiently outrageous to violate her due process rights.⁹² The

88. *State v. Morris*, 272 N.W.2d 35, 35–36 (Minn. 1978).

89. *Thoreson*, 2007 Minn. App. LEXIS 310, at *10.

90. *United States v. Cuervelo*, 949 F.2d 559, 567 (2d Cir. 1991); see also *United States v. Nolan-Cooper*, 155 F.3d 221, 233 (3d Cir. 1998) (adopting the *Cuervelo* test, but substituting a "knew or should have known" standard for the "consciously set out" standard in the first element of the *Cuervelo* test).

91. *Commonwealth v. Sun Cha Chon*, 983 A.2d 784, 789 (Pa. Super. Ct. 2009). But see *State v. Tookes*, 699 P.2d 983, 608 (Haw. 1985) (finding no merit in defendant's due process defense in a fact pattern similar to *Sun Cha Chon*).

92. *State v. Burkland*, 775 N.W.2d 372, 373 (Minn. Ct. App. 2009).

officer was working undercover as a client at a massage parlor; while discussing the possibility of including sexual services in the massage, the officer asked to fondle the defendant's breasts.⁹³ The court reversed the conviction because of the officer's conduct.⁹⁴

The court distinguished this case from similar Minnesota cases because in those cases "the officer's conduct was in response to the defendant's demand, and the demand was a means used by the defendant to avoid police detection."⁹⁵ The defendant in *Burkland* had made no effort to discern whether the officer was an undercover agent, and the officer's request to touch the defendant's breast was not necessary to the investigation.⁹⁶ The court held that a police officer's conduct in this situation is outrageous enough to violate due process rights when the officer initiates sexual contact that is unnecessary to proving the offense.⁹⁷

III. Rethinking Undercover Prostitution Enforcement

Courts have been permissive in allowing sexual conduct by government agents in the course of undercover prostitution investigations.⁹⁸ This may be explained by at least two justifications. Historically, customer involvement in the transaction was not even countenanced by prostitution laws and the culpability for the act fell squarely on so-called loose women.⁹⁹ A more modern justification is that because sexual conduct is so intrinsically intertwined with the nature of prostitution, it would be an unreasonable restriction on law enforcement agents to prohibit all sexual contact.¹⁰⁰ While the latter justification may seem a reasonable objection, it fails to take into consideration all relevant factors. It over-emphasizes the agency and free will of those who engage in

93. *Id.* at 373-74.

94. *Id.* at 376.

95. *Id.* at 374-75 (citing *State v. Crist*, 281 N.W.2d 657 (Minn. 1979) (officer exposed his penis on defendant's demand); *State v. Morris*, 272 N.W.2d 35, 35 (Minn. 1978) (officer stated that he was not a cop)).

96. *Id.* at 376.

97. *Id.*

98. See *supra* Part II.B.

99. See, e.g., *United States v. Bitty*, 208 U.S. 393, 401 (1908) (criminalizing women for the crime of prostitution, specifically women "who offer their bodies to indiscriminate intercourse with men").

100. See Gary T. Marx, *Under-the-Covers Undercover Investigations: Some Reflections on the State's Use of Sex & Deception in Law Enforcement*, CRIM. JUST. ETHICS, Winter/Spring 1992, at 13, 16 ("The prostitute chooses to convert sex into a marketable commodity. For law enforcement to use deception in the pretended, or real, purchase of sex is less morally questionable than to use deception in circumstances when it is not for sale . . .").

prostitution.¹⁰¹ It ignores imbalances in the way police conduct themselves relative to undercover investigation of other crimes.¹⁰² It also assumes the lack of any other method for enforcement of prostitution laws.¹⁰³

A. Prostitution is Not a Victimless Crime

Prostitution is commonly called a victimless crime in the legal world.¹⁰⁴ Under definitions of prostitution that did not necessarily have an economic element but instead punished “indiscriminate intercourse with men,”¹⁰⁵ prostitution, at least conceptually, was a victimless crime because it was the sexual conduct that offended, not the exchange of money.¹⁰⁶ But now that prostitution is generally thought of as an inherently economic activity that implicates both the seller and the buyer,¹⁰⁷ one must go beyond the moral character of the women involved and examine how necessity and imbalances of power conspire to trap women in a world fraught with danger and shame. In this world, it is often the women who engage in prostitution, particularly street prostitution, who are the victims.¹⁰⁸

Prostitution is often characterized by legalization and decriminalization proponents—who presumably do not view sex workers as victims—as “private behavior of consenting adults.”¹⁰⁹ The most obvious problem with this characterization is that many

101. Cf. Susan Kay Hunter, *Prostitution Is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 99 (1999).

102. Marx, *supra* note 100, at 16 (stating that sex acts are more personal and volatile).

103. *But see id.* (“There are undoubtedly better ways [than entrapment] to use police resources.”).

104. *See supra* notes 4–5 and accompanying text.

105. *See supra* note 1 and accompanying text.

106. *See supra* note 1 and accompanying text.

107. *See* David A. J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1261 (1979) (discussing prostitution as an economic activity).

108. As noted above, this Article is mainly concerned with street sex workers, as they are the primary focus of law enforcement efforts. *See supra* notes 37–45 and accompanying text. Labeling high-end call girls as victims is more problematic and paternalistic because these women usually come from better pre-prostitution situations and are in a better position to exercise free will. *See* Martin A. Monto, *Prostitutes’ Customers: Motives and Misconceptions*, in *SEX FOR SALE*, *supra* note 9, at 236; Vanwesenbeeck, *supra* note 41, at 259 (“When researchers have difficulty understanding rational, not to mention positive, reasons for choosing sex work and find it easier to think of prostitutes as victims, it is understandable that sex workers will rather stress their victim status and negative motivations for working.”).

109. *See* Monto, *supra* note 108, at 236.

sex workers are not adults.¹¹⁰ This is especially true of street sex workers, who tend to be, on average, significantly younger than those in other arenas.¹¹¹ A British study found that a large majority of women who engage in street prostitution began doing so while juveniles and nearly half began when they were fifteen years old or younger.¹¹²

If there is broad acceptance of the idea that a juvenile who sells sex on the streets is more victim than offender,¹¹³ it makes no sense to deny her that sympathy once she reaches adulthood.¹¹⁴ It is unlikely that years of exploitation, physical abuse, drug use, and mental trauma are going to produce a young adult who is able to extricate herself from a destructive lifestyle.¹¹⁵ Rather, as future prospects grow bleaker because of health problems, social isolation, and the daily struggle to satisfy immediate needs, young sex workers easily become mired in their current lifestyle.¹¹⁶

It should come as no surprise that money is the main reason that women engage in prostitution.¹¹⁷ Recalling the terrible conditions in which street workers operate,¹¹⁸ it is difficult to take seriously any argument that these women are on the streets simply because they are sexual deviants or degenerates.¹¹⁹ While any number of illegal activities are economically motivated, there is a world of difference between the sale of illegal drugs, for example, and the sale of intimate access to one's own body: the drug dealer

110. *See id.*

111. Catherine Benson & Roger Matthews, *Street Prostitution: Ten Facts in Search of a Policy*, 23 INT'L J. SOC. L. 395, 399 (1995) (stating that the average age of street sex workers in Britain is twenty-one, versus twenty-five-and-a-half for off-street workers and nearly thirty-two for sauna workers).

112. *Id.*

113. *See, e.g.,* Finkelhor & Ormrod, *supra* note 40, at 1 ("Clearly, these youth are being harmed emotionally and are in considerable physical danger. Accordingly, from both a child protective and law enforcement strategy, our goal should be the same—the eradication of the sexual exploitation of youth.").

114. MATTHEWS, *supra* note 10, at 53–54 ("[T]he implication is that once these girls pass the age of 18 their previous histories and experiences somehow evaporate or are no longer relevant.").

115. *See id.* ("The attribution of victim status . . . should be more closely tied to the competence of the women concerned as well as their age."); *see also* FLOWERS, *supra* note 40, at 90–91 ("[T]eens involved in street prostitution are twice as likely as other homeless kids to have mental problems.").

116. *Cf.* Farley et al., *supra* note 59, at 65 ("Instead of the question, 'Did she voluntarily consent to prostitution?' the more relevant question would be: 'Did she have real alternatives to prostitution for survival?'").

117. MATTHEWS, *supra* note 10, at 65. Matthews does go on to say, however, that financial need alone does not explain why women enter into prostitution because many poor and desperate women do not turn to prostitution. *Id.*

118. *See supra* Part I.C.

119. *See* Lucas, *supra* note 37, at 51.

loses nothing of himself in the sale, whereas a sex worker loses the luxury of calling her body her own.¹²⁰ Objectification of a woman's body is one of the main attractions of purchasing sex.¹²¹ One john described why he purchases sex: "I don't have to ask or think 'No, is that too dirty for her?' or—like I don't really have to be as respectful as if it was my girlfriend or my wife or partner."¹²² It is probably true that not all sex workers should be thought of as victims, but with many street sex workers living and working in dire circumstances and paying such a high personal cost for doing so, it is difficult not to characterize them as victims.¹²³

Even if society does not consider itself responsible for rescuing these women, it can at least prohibit law enforcement officials from participating in their victimization. When law enforcement agents go from observers of illegal activity to participants in inequitable sexual conduct, they further the woman's degradation at the hands of the clients they pretend to be.¹²⁴ The court in *Sun Cha Chon* summed it up well when it noted favorably the testimony of a psychologist on behalf of the defendant: "Dr. Layden criticized the police conduct in this case because 'each instance of

120. The euphemism "selling herself" is commonly used to describe the activity of prostitution, but the reality is that many sex workers psychologically dissociate from their body parts as a survival strategy, so that they are not selling themselves, but rather selling what used to be theirs. See Madeleine Coy, *The Consumer, the Consumed, and the Commodity: Women and Sex Buyers Talk About Objectification in Prostitution*, in DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION 181, 195 (Vanessa E. Munro & Marina Della Giusta eds., 2008). This strategy is not universal, and many sex workers identify themselves as commodities. As one former sex worker put it, "I was just a hole. I was nothing more than a body men paid to fuck. I was a prostitute." MATTHEWS, *supra* note 10, at 35.

121. One study found that the six most common reasons for paying for sexual services were:

1. "I like to be with a woman who likes to get nasty"
2. "I am excited by the idea of approaching a prostitute"
3. "I like to be in control when I'm having sex"
4. "I am shy and awkward when I am trying to meet a woman"
5. "I like to have a variety of sexual partners"
6. "I want a different kind of sex than my regular partner [wants]"

Monto, *supra* note 108, at 245–48. Reasons 1, 3, and 6 are especially telling because they assume that the woman's opinion in the matter can be circumvented by paying her money.

122. Coy, *supra* note 120, at 187. Another john put it more bluntly: "A prostitute is a piece of meat." *Id.*

123. See *supra* note 40–46 and accompanying text.

124. Cf. Stieler, *supra* note 19, at 480 ("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.").

being prostituted deepens the damage' and has an 'additive effect.' She stated that 'when police officers act as johns, and they traumatize an individual unnecessarily, it's outrageous.'¹²⁵ Yet, the *Burkland* standard allows any degree of sexual exploitation, so long as it is necessary to proving the offense.¹²⁶ Any standard that does not prohibit outright sexual conduct between law enforcement agents and sex workers allows for government victimization of an extremely marginalized group of women.

B. Undercover Police Practices Are Unnecessary and Merely Reflect Gender Inequality and Imbalances of Power

Sexual conduct in prostitution stings is largely justified by its defenders because of the supposed necessity in gathering evidence for prosecution of an inherently sexual crime.¹²⁷ The necessity argument breaks down, however, when police behavior in other undercover activities is compared with the behavior of male police officers investigating suspected female sex workers.¹²⁸ Rather than being a product of necessity, sexual conduct with sex workers is more likely born of the confluence of masculine police behavior and social disregard of women engaged in prostitution.

Narcotics buy operations are another type of undercover operation where the quarry is likely to be wary of officers in disguise.¹²⁹ Nevertheless, undercover narcotics officers are able to "evade illegal drug use while retaining credibility."¹³⁰ However, the concerns that prevent illegal drug use by police officers are different from those that fail to prevent officers from engaging in sexual conduct with sex workers.¹³¹ Narcotics use is illegal regardless

125. *Commonwealth v. Sun Cha Chon*, 983 A.2d 784, 791 (Pa. Super. Ct. 2009) (citations omitted).

126. *See State v. Burkland*, 775 N.W.2d 372, 376 (Minn. Ct. App. 2009).

127. Says one sheriff whose department was caught up in a prostitution sting scandal, "If I thought we could get the conviction without [sexual conduct], we wouldn't allow it. . . . If you want to make them, this has to be done." Jackman, *supra* note 71, at B1. From a legal standpoint, however, sexual contact is not required to convict a defendant of prostitution in many jurisdictions. Stieler, *supra* note 19, at 464 ("The mere offering to provide sexual services for a price constitutes a crime."). Laws prohibiting acts indirectly related to prostitution, such as "loitering with intent to participate in prostitution," certainly do not require any sexual consummation, and probably do not require undercover work at all. *See* MINN. STAT. § 609.3243 (2010); *see also* CAL. PENAL CODE § 653.22 (West 2010).

128. Police behavior in narcotics stings lacks the deep ethical problems found in prostitution stings. *See infra* notes 130–137 and accompanying text.

129. Park, *supra* note 6, at 228.

130. Sally Gross-Farina, *Fit for Duty? Cops, Choirpractice, and Another Chance for Healing*, 47 U. MIAMI L. REV. 1079, 1092 (1993).

131. *See infra* notes 134–136, and accompanying text.

of whether the user is a police officer.¹³²

Use of drugs by an officer during a drug investigation has also supported a successful entrapment defense by the defendant in at least one instance.¹³³ There are public policy concerns that the influence of drug (or alcohol) use would negatively impact the officer's conduct,¹³⁴ or at the least taint public perception of law enforcement officers.¹³⁵ Lastly, illegal drug use, even if "legitimately" undertaken during an undercover investigation, presents very serious health risks for officers.¹³⁶ Thus, when the chief concern is preservation of a police officer's physical and professional integrity rather than avoiding victimization of a woman engaged in prostitution, undercover police find ways to limit their participation in improper behavior even though it may make their job more difficult. It appears that vice squads have something to learn from their narcotics squad counterparts. The argument that it is necessary for undercover agents to have sexual contact with women engaged in prostitution is also inconsistent with police practices in other types of prostitution sting operations—specifically those where a female officer poses as a sex worker or where a male officer poses as either a sex worker or a client soliciting a same-sex encounter.¹³⁷ While anti-prostitution operations involving female officer decoys have become more common, there are no reports of these officers engaging in sexual conduct with suspected johns in order to gather evidence against them.¹³⁸ There are sever-

132. Statutes and regulations prohibiting alcohol and drug use by on-duty police officers may make limited exceptions for alcohol use by undercover police officers, but these exceptions do not extend to drug use. *See, e.g.*, NEV. REV. STAT. § 284.4062 (2008) (making an allowance for use of alcohol and possession of controlled substances if within the scope of the officer's duties); MINNEAPOLIS POLICE DEPT., POLICY AND PROCEDURE MANUAL 5-105(21) (2000) *available at* <http://www.ci.minneapolis.mn.us/mpdpolicy> (allowing alcohol use by undercover officers but prohibiting all drug use). Police departments may turn a blind eye to drug use by undercover officers when it is connected to their work. GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 165 (1988) ("Drug use is frequently linked to the covert role and life-style that the agent is affecting. Its use is at least informally justified.").

133. *See State v. Kamrud*, 611 P.2d 188, 192 (Mont. 1980) (holding that the defendant was entrapped where an undercover officer used marijuana in his presence).

134. DAVID L. CARTER & DARREL W. STEPHENS, DRUG ABUSE BY POLICE OFFICERS 48 (1988).

135. *Id.* at 24.

136. MARX, *supra* note 132, at 165–66 (relating instances of drug addiction resulting from undercover drug use, including one story of an undercover officer who showed his needle marks to a superior officer but was given only a short break before being sent back undercover).

137. Marx, *supra* note 100, at 17.

138. *Id.*; *see also State v. Thoreson*, No. A06-454, 2007 Minn. App. LEXIS 310, at

al possible explanations for this inconsistency. One is that, in a situation where the sex workers are expected to set the terms of the transaction in advance,¹³⁹ it is simply easier to dupe the buyer than the seller. In a similar vein, perhaps "men in principle might be much more vulnerable to sexual exploitation for undercover purposes than are women."¹⁴⁰

The most obvious explanation, however, is that the officers do not want to engage in sexual activity with suspected johns. Officers who pose as female sex workers often report feeling that the work is demeaning.¹⁴¹ This is not just because of the female officers' personal feelings about the behavior, but also because they are simultaneously striving for respect in a "hypermasculine" work environment¹⁴² and receiving orders which require them to take on the lowest of female roles.¹⁴³ Incidents involving sexual conduct between male suspects and male officers posing as gay clients or sex workers are "extremely rare."¹⁴⁴ This fact is also likely related to the hypermasculinity of police culture, in which being perceived as gay constitutes a serious threat to one's masculinity.¹⁴⁵

Given this culture, as well as the discrepancy in how stings involving female undercover officers and same-sex encounters are handled, the tendency for sexual conduct to occur in prostitution stings involving interactions between male officers and women engaged in prostitution may be better understood as an issue of power and gender rather than one of law enforcement necessity.¹⁴⁶

*31 (Minn. Ct. App. Apr. 10, 2007) (Randall, J., dissenting). Judge Randall argues: I have *never* come across any case, in any state, where, after the give and take of the preliminary negotiations, and the passing or attempted passing of the 'buy money,' the female undercover officer ever felt she had to get the man to strip completely naked in front of her before she had enough evidence to make an arrest!

Id.

139. SANDERS, *supra* note 48, at 76 (noting the importance for women engaged in prostitution to get the money from their clients before performing any sexual services).

140. Marx, *supra* note 100, at 17.

141. MARX, *supra* note 132, at 168. One officer reported dissociation similar to what sex workers experience, stating, "I just blanked out, went dead." *Id.*

142. See Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 793 (2000) (stating that law enforcement culture is "hypermasculine"—a combination of masculinity and violent aggression).

143. See *supra* note 24 and accompanying text.

144. Marx, *supra* note 100, at 17. Marx does relate one such incident involving "an untrained rookie officer who told his sergeant, 'I thought you were supposed to go all the way.'" *Id.*

145. See Harris, *supra* note 142, at 793 ("[In hypermasculine environments] the strictures against femininity and homosexuality are especially intense . . .").

146. Stieler, *supra* note 19, at 466 ("The encounters do not occur in a vacuum, but rather take place within a culture where law enforcement is expected to be

The power dynamic between male police officers and female sex workers is shown in much starker relief in the widespread reports of officers extorting sexual favors from the women in exchange for not arresting them, and even forcing the women to have sex with the officers and still arresting them.¹⁴⁷ Such abuses are of a different type than those discussed in this Article, but they are certainly relevant in that they give context to the environment in which other, less egregious, sexual misconduct is occurring. Any sexual conduct by police officers that is not genuinely necessary for law enforcement, but instead is grounded in hypermasculinity and oppressive gender roles, should not be protected by the courts.

C. Clients Are More Appropriate Targets for Anti-Prostitution Operations

Prostitution thrives on an imbalance of power.¹⁴⁸ Clients choose to pay sex workers for their services, but on the other end of the bargain, “prostitution is something that people turn to when they run out of choices.”¹⁴⁹ If law enforcement agencies are truly unable to enforce prostitution laws without resorting to sexual conduct with women who engage in prostitution,¹⁵⁰ then they should shift their efforts to arresting the clients, who, one could argue, are the more culpable party, or at least the less victimized party.¹⁵¹

Traditional conceptions of prostitution pair the natural “needs” of men—considered constant and beyond judgment—with the immoral acts of women capitalizing on this need.¹⁵² In reality, it is generally the women engaged in prostitution who are faced

domineering and where sex workers are often regarded with little respect.”); cf. Harris, *supra* note 142, at 797 (“[P]olice brutality is not random. It follows the vectors of power . . .”).

147. See KUO, *supra* note 13, at 75; RAPHAEL, *supra* note 62, at 133; Stieler, *supra* note 19, at 467.

148. See MATTHEWS, *supra* note 10, at 33. Matthews argues that

To begin to understand how choice is structured by gender, class and age it is worth reminding ourselves that adult men tend not [to] purchase sexual services so much from adult men but rather from ‘rent boys’, women do not routinely buy sexual services from other adult women, poor people do not buy sexual services from rich people and young people do not as a rule pay for the sexual services of older people.

Id.

149. *Id.* at 31.

150. *But see supra* Part III.B.

151. See SANDERS, *supra* note 48, at 99 (“Community policing that targets sex workers as the causes of disorder are [sic] contradictory as this group of women is one of the most vulnerable, victimized groups within the community requiring specific interventions to keep them free from harm.”).

152. MATTHEWS, *supra* note 10, at 24–26.

with needs, namely food, shelter, and often drugs; clients who buy sex are exploiting this need.¹⁵³ Feminist Carole Pateman put it this way: "Without a minimum of food (or water, or shelter) people die, but to my knowledge no one has ever died for want of an outlet for their sexual appetites."¹⁵⁴ It should come as no surprise that clients are generally better situated economically than women engaged in prostitution. They are more likely to be college educated than the average person,¹⁵⁵ and most of them are middle class.¹⁵⁶ When two people take part in an illicit transaction, but one party is doing so out of dire need despite the danger and degradation involved and the other party is exploiting the situation for the purpose of pleasure and gratification, the exploiting party can reasonably be considered more culpable for the transaction.

Despite the obvious inequity, law enforcement operations are aimed primarily at the more vulnerable party.¹⁵⁷ Until recent decades, purchasing sex was not even criminalized; now that it is, clients still constitute a very small portion of prostitution-related arrests.¹⁵⁸ However, the trend is moving toward client-focused enforcement, accompanied by the growth of "john schools" and other similar programs.¹⁵⁹ In addition to addressing the double standard that has long existed in prostitution enforcement, these programs might be contributing to extraordinarily low recidivism rates among arrested clients.¹⁶⁰

153. Pateman, *supra* note 13, at 61; see also Monto, *supra* note 108, at 233–34.

154. Pateman, *supra* note 13, at 61.

155. Martin A. Monto, Summary Report for National Institute of Justice Grant #97-IJ-CX-0033 "Focusing on the Clients of Street Prostitutes: A Creative Approach to Reducing Violence Against Women," (Oct. 30, 1999) (unpublished report), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/182859.pdf> [hereinafter Monto, Street Prostitutes]; see also Monto, *supra* note 108, at 238–39 ("Thirty-five percent [of clients interviewed] had completed a bachelor's or higher college degree, and [an additional] 36% reported some college work.").

156. Benson & Matthews, *supra* note 111, at 405–06.

157. Weitzer, *supra* note 13, at 30.

158. *Id.* ("[O]nly 9% of all prostitution-related arrests in Phoenix were of men, 12% in Boston, and 14% in Las Vegas.") This is not universal; in some cities clients are arrested more often than sex workers—seventy-two percent in Detroit, sixty-one percent in Kansas City, and seventy-five percent in San Francisco. *Id.*

159. *Id.* at 30–31.

160. Monto, Street Prostitutes, *supra* note 155, at 7–8. While recidivism rates among arrested clients are in the single digits, regardless of whether the client participates in any type of program, there is evidence that "john schools" are effectively reducing this rate anyway. See, e.g., ABT ASSOCIATES INC., NAT'L INST. OF JUSTICE, FINAL REPORT ON THE EVALUATION OF THE FIRST OFFENDER PROSTITUTION PROGRAM: REPORT SUMMARY, at v–vi (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/222451.pdf> (showing that recidivism rates in San Francisco and San Diego dropped in the decade following implementation of a first offender program, while rates in California as a whole remained stable).

Client-focused enforcement operations are not without drawbacks. The effect may not be a reduction in overall prostitution activity, but rather displacement to other, less visible arenas.¹⁶¹ Given that street prostitution is disproportionately targeted by law enforcement,¹⁶² one could argue that this is precisely what communities are trying to accomplish.¹⁶³ Also, focusing on clients could require more female police officers to work as decoys, a role which many officers may find demeaning.¹⁶⁴ Nevertheless, the justifications for such a shift in focus are sufficiently strong to overcome these drawbacks.

Concentrating undercover investigation efforts on sex customers makes sense from a policy perspective even without other justifications. In light of claims by undercover agents that they are unable to fully investigate suspected sex workers without resorting to sexual conduct, agencies should focus on alternative strategies. Accordingly, courts should disregard law enforcement claims that sexual conduct is necessary.

Conclusion

Public attitudes and social policies regarding prostitution have continually evolved over the last century. Once a vehicle for demonizing and punishing “immoral” women while disregarding the man’s role, prostitution policies have increasingly reflected the social complexities behind the practice. This evolution is not yet complete.

Police practices entrenched in entitlement regarding sexual contact with women engaged in prostitution are vestiges of a belief

161. Teela Sanders & Rosie Campbell, *Why Hate Men Who Pay for Sex: Exploring the Shift to ‘Tackling Demand’ in the UK*, in DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION, *supra* note 120, at 171. Sweden’s system punishes *only* the customer and not the sex worker, conceiving prostitution as “structural violence against women.” Sanders and Campbell criticize the Swedish law as “largely symbolic, designed to send a normative message about right and wrong types of sex,” and suggest that the system has resulted in an increase in online prostitution and sex tourism to other countries. *Id.* at 170–71.

162. See *supra* notes 38–39 and accompanying text.

163. See Benson & Matthews, *supra* note 111, at 407–08 (arguing that policing of street prostitution is low priority and largely done for appearances’ sake).

164. See *supra* notes 141–143 and accompanying text. One potential alternative to using female police officers as decoys would be to employ women who have engaged in prostitution to help collect evidence against clients in the same way that police have paid men to pose as clients. See *Commonwealth v. Sun Cha Chon*, 983 A.2d 784, 785–87 (Pa. Super. Ct. 2009) (describing the activities of a civilian agent who was paid forty to sixty dollars for each visit to a massage parlor during which he also had intercourse with sex workers).

that these women are contemptible and may be abused freely. Courts must check these practices, and if *Burkland* is any indicator, it appears that they are starting to do so. But they must go further. Given the level of need and the coercive effect of street prostitution, a standard that allows undercover police officers unfettered sexual contact with sex workers exploits the power imbalance and economic need of these women. The act of prostitution is inherently demeaning but this police conduct further demeans and victimizes women, and is not justified by the gravity of the crime. As Judge Randall stated in his dissent in *Thoreson*, "somewhat egregious police conduct should be reserved for at least 'somewhat egregious crimes' and criminals."¹⁶⁵ Allowing undercover police officers to have sexual contact with women engaged in prostitution is unjustifiable and should be prohibited outright.

165. *State v. Thoreson*, No. A06-454, 2007 Minn. App. LEXIS 310, at *25 (Minn. Ct. App. Apr. 10, 2007). Judge Randall goes on: "There is no allegation here that appellant was part of the Minneapolis-Moussaoui-911 conspiracy, and since she was sitting naked in a squad car, it is unlikely she was on her way to smuggle atomic secrets to North Korea." *Id.* at *25-26.