Notes

Buyers Without Remorse: Ending the Discriminatory Enforcement of Prostitution Laws*

During the Progressive Era, America seemed to wake up to the real threat of the "Social Evil." Prostitutes, who had hitherto been cast as unfortunate and naïve women who allowed themselves to be seduced and ruined, were now seen as dangerous carriers of frightening and incurable disease. The Federal Government reacted by passing the Mann Act in 1910. Within 15 years prostitution had been criminalized in every state.

Criminalization, however, only ever really affected the sellers of sex. The demand side of commercial sex—comprised of men who were given the common, judgment-free, and anonymous-sounding appellation "john"—continued to buy sex with near impunity. Over the course of the twentieth century, police departments perfected methods of finding and arresting prostitutes, including the use of street sweeps and male decoys. Few women who were charged with prostitution challenged these methods. The few who did came to court armed with statistics showing pervasive discriminatory enforcement of prostitution laws against prostitutes and even police testimony admitting the same. However, these women overwhelmingly saw their defenses thrown out. While a small and modestly growing number of enlightened judges have dismissed cases against women charged with prostitution on the grounds of discriminatory enforcement, the problem remains. According to recent FBI statistics, roughly two women are arrested for prostitution for every one man.

This Note urges more courts to recognize discriminatory enforcement as a defense to a prostitution charge when a defendant produces either statistical or testimonial evidence that supports the defense. This will necessitate three important changes in how courts currently assess discriminatory enforcement claims. First, courts will need to recognize that prostitutes and johns are similarly situated. By doing so, they will not be able to ignore statistics that show a large disparity in arrest rates between prostitutes and johns. Second, courts will need to lower the burden of proof for proving discriminatory intent. Third, courts will need to closely scrutinize the traditional justifications for

* I am grateful to Professor Cary Franklin for providing insight and encouragement long after her seminar had ended. I would also like to thank the Volume 92 Notes editors, Ryan Meltzer, Dina McKenney, and Brent Rubin for their hard work on this Note and for making my experience in the Notes Office so memorable. Finally I would like to thank my family—Mom, Molly, and Cassie—for their unwavering support and love.

selective enforcement, reflexively offered by police departments and prosecutors, and reject those excuses that are tainted by sexism. In so doing, courts will force police departments to treat prostitution as a crime inherently involving supply and demand and enforce antiprostitution statutes, laws prohibiting an ancient crime, in a modern manner.

I. Introduction

In 1920, an unusually enlightened New York judge wrote, "The court is aware that it has been the custom heretofore followed to arrest the women and let the men go; but the time has come when the custom cannot longer be permitted to continue."[1] The set of facts that elicited this particular judge's frustration would have been familiar to many judges who took on criminal cases. Two police officers, under the guise of delivering a telegram, pushed their way into a small apartment.[2] Inside they found two men and two women in a state of undress.[3] After the men admitted to having paid the women for "a good time," the police officers ordered the women to give the men a refund.[4] One officer then took the men aside, telling them, "I am going to arrest these women, and if you are interested in them, why you can appear as a witness in their behalf."[5] After both men politely declined, they were released and the women were tried and convicted of vagrancy.[6] This exchange, which elicited the frustration of the judge who reversed one of the women's convictions, was already typical by the early twentieth century.[7] Despite this judge's resolution that "the custom cannot longer be permitted to continue,"[8] continue it did, repeated in hotel rooms, cars stopped in parking lots, and darkened clubs.

This Note takes the position that enforcement of prostitution laws against the sellers of sex disproportionately harms women and that courts should act to end this practice by recognizing the defense of discriminatory enforcement of prostitution laws. Part II contains a short note on terminology. Part III provides the historical backdrop against which the current enforcement of prostitution laws is set. Part IV argues that the discriminatory enforcement of prostitution laws is an ongoing problem and provides statistical evidence to support this claim. Part V outlines the background and elements of the discriminatory-enforcement defense. Part VI urges courts to recognize this defense and to make it easier for defendants to prove by acknowledging that prostitutes and johns are

1. People v. Edwards, 180 N.Y.S. 631, 635 (Ct. Gen. Sess. 1920).
2. *Id.* at 632.
3. *Id.*
4. *Id.* at 632–33 (according to the police officer's testimony, the sum was $5 each).
5. *Id.* at 634.
6. *Id.* at 632, 634.
7. *See infra* Part III.
8. *Edwards*, 180 N.Y.S. at 635.

similarly situated, lowering the standard of proof needed to establish the defense, and discarding the traditional, sexist justifications for the continuation of discriminatory policies. Part VII briefly concludes.

II. A Note on Terminology

This Note focuses on female prostitutes and refers to them simply as "prostitutes" for two reasons.[9] First, this Note confines its analysis to prostitution as it currently exists. Evidence suggests that female prostitutes still greatly outnumber male prostitutes in all areas of sex work, including street prostitution, although exact numbers are unavailable.[10] Furthermore, female street prostitutes are also targeted for arrest in greater numbers, partly due to male police officers who pose as prospective johns.[11]

Second, both the historical and popular conceptions of prostitution are that it is a job done by women. The tie between the image of the prostitute and the idea of womanhood is ancient and enduring. Indeed, in *Ex parte Carey*,[12] a Progressive Era court expressly held that prostitution cannot be committed by a man.[13] Although society's understanding of prostitution has since evolved—courts generally admit that prostitution is something that can be done by a man[14]—prostitution still retains its traditional image as a woman's profession.[15]

---

9. This Note recognizes that male prostitution is a real phenomenon that has received growing recognition in recent years. It also recognizes that the ratio of male to female prostitutes cannot be estimated with any great accuracy and will almost certainly change over time. This Note also takes the position that male prostitution gives rise to unique issues that merit their own treatment.

10. *See* Jacqueline Cooke & Melissa L. Sontag, *Prostitution*, 6 GEO. J. GENDER & L. 459, 470 (2005) (citing an estimate that male prostitutes comprise at most one-third of prostitutes in urban centers and admitting that the actual "ratio of female to male prostitutes is unclear"); Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 291 & n.70 (2011) (providing examples of publications that state that the majority of prostitutes are women but give different estimates of the ratio of female to male prostitutes); Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 240 (2000) (observing that although female prostitution is the most common form of prostitution, male prostitution is increasing).

11. *See infra* Part IV.

12. 207 P. 271 (Cal. Dist. Ct. App. 1922).

13. *Id.* at 275 ("The words 'soliciting for prostitution' have a well-understood and distinct meaning. They are held to mean the act of a fallen woman in hailing passers-by . . . . They are so understood by police officers and all others who are called upon to labor with this class of people.").

14. *See, e.g.*, People v. Superior Court of Alameda Cnty., 562 P.2d 1315, 1322 (Cal. 1977); Blake v. State, 344 A.2d 260, 262 (Del. Super. Ct. 1975); State v. Gaither, 224 S.E.2d 378, 379 (Ga. 1976).

15. Feminist scholar Evelina Giobbe comments on the strength of the tie between prostitutes and womanhood: "The prostitute symbolizes the value of women in society. She is paradigmatic of women's social, sexual, and economic subordination in that her status is the basic unit by which all women's value is measured and to which all women can be reduced." CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 160 (2005).

Thus, the assumption that most prostitutes are women more or less accurately reflects reality, for better or for worse. However, many police departments, prosecutors, and courts make the additional assumption that prostitutes alone merit punishment. This assumption contributes to the perpetuation of police practices that result in the discriminatory enforcement of prostitution laws.

III. History of Prostitution in the United States

The history of prostitution in the United States is marked by swings between aggressive antiprostitution campaigns and grudging tolerance of its existence.[16] Throughout this schizophrenic history, three things have remained constant. First, the American people have almost universally refused to legalize and regulate prostitution.[17] Second, state prostitution laws have specifically targeted the sellers of sex for criminal sanctions.[18] Third, the American people have created stories about prostitutes that fit the exigencies of the time. Some of these stories matured into stereotypes, which in turn became the rationales underlying prostitution laws and their selective enforcement.[19] Part III of this Note will examine some of these prostitution narratives and how they have impacted the development of prostitution laws in the United States.

A. Prostitution in Early America: The Age of Relative Tolerance

In early America, prostitution was not a distinct criminal offense, although prostitutes themselves were "considered a disgrace."[20] In colonial America, men and women who committed chastity offenses were punished

16. BARBARA MEIL HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION 4 (1987).

17. *Id.*

18. *See id.* at 5 (observing that "[h]istorically, the main goal of the feminist attack on prostitution policy has been to achieve the equal application of the laws" and explaining that while "[f]eminists have sought stricter enforcement of laws against keepers and pimps, and most important, criminal penalties for men who buy prostitutes' services[,] . . . even when such laws were enacted they were never enforced").

19. For a discussion of the historical roots of discriminatory criminalization of prostitution, see Julie Lefler, Note, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 12–16 (1999). As Lefler observes:

> Much of the differential treatment of prostitutes and johns in the United States today can be traced to the sexual double standard present throughout this country's history. America's past is fraught with sympathy and excuses for the sexual appetites of men, yet condemnation of women for essentially the same behavior.

Id. at 12.

20. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 430 (1998).

under lewdness or nightwalking statutes.[21] Prosecutors and police enjoyed wide discretion, and they used this discretion to protect johns while punishing prostitutes. As a consequence, johns were never charged in equal proportion to prostitutes, and even when men were charged as customers, they were convicted at lower rates and received lighter sentences, usually fines, while women were imprisoned.[22]

Beginning in the 1830s, discourse on prostitution was dominated by the "fallen woman" narrative, in which an innocent girl from a humble background was seduced, ruined, and abandoned by a rich and powerful man.[23] This narrative was founded in Victorian logic, which envisioned a strict dichotomy between women who were "thoroughly depraved" and women who were "thoroughly virtuous."[24] A thoroughly virtuous woman's morality was governed by finely tuned intuition that, once set askew, could never be set right.[25] A passage by the Victorian writer William Acton paints a vivid picture of the fallen woman:

> She is a woman with half the woman gone, and that half containing all that elevates her nature, leaving her a mere instrument of impurity; degraded and fallen she extracts from the sin of others the means of living, corrupt and dependent on corruption, and therefore interested directly in the increase in immorality—a social pest carrying contamination and foulness of every quarter.[26]

Acton's association, shared by many others, of prostitutes with filth, disease, and social contamination would prove enduring and influential. However, during the 1800s prostitution itself was still not classified as a

---

21. HOBSON, *supra* note 16, at 32 (explaining that these laws effectively punished status rather than specific acts and required no proof of solicitation or sale).

22. *Id.* at 34 (citing statistics in which "22.4 percent of male chastity offenders (not including brothelkeepers) were sent to the house of correction in Boston, compared with 71 percent of women"). Indeed, an 1826 court docket from Boston suggests that courts were already concerned with protecting the privacy of gentlemen who used prostitutes. In two cases, the docket book does not list the names of the male defendants who were found guilty of chastity offenses and fined. *Id.* Other punishments included "flogging or embarrassment in public squares." DeCou, *supra* note 20.

23. *See* HOBSON, *supra* note 16, at 56 (explaining that these stories were widely circulated in journals like the *Friend of Virtue*).

24. *Id.* at 111.

25. *Id.* at 110.

26. *Id.* at 111 (quoting WILLIAM ACTON, PROSTITUTION CONSIDERED IN ITS MORAL, SOCIAL, AND SANITARY ASPECTS IN LONDON AND OTHER LARGE CITIES AND GARRISON TOWNS WITH PROPOSALS FOR THE CONTROL AND PREVENTION OF ITS ATTENDANT EVILS 166 (photo. reprint 1972) (2d ed. 1870)).

criminal offense.[27] Antiprostitution fervor took the form of unofficial harassment and "whorehouse riots," violent outbursts directed at brothels.[28]

Beginning in the 1800s, female reform societies also tried, with varying success, to shape the national discourse on prostitution. Women were active in moral-reform movements in the nineteenth century, which worked to make men share the blame for fallen women's loss of virtue, sometimes even naming and shaming high-status men.[29] Many groups of feminists during the Progressive Era advocated for an end to prostitution as a step toward the emancipation of women.[30] These feminists spoke of an "equal moral obligation," shared by men and women, regarding prostitution.[31] They viewed prostitution as one manifestation of the larger problem of male domination of political, economic, and social institutions.[32] Their ideas are shared by many feminists today.[33]

B. Prostitution During the Progressive Era: Criminalization

Reformers in the Progressive Era tweaked the fallen woman narrative to create the metaphor of "white slavery." Like the fallen woman, the victim of white slavery was a young, innocent girl who was tricked or physically coerced into prostitution.[34] White slavery was not the only cause of anxiety for Progressive Era Americans. Rapid urbanization and the expansion of capitalism resulted in a sense of a loss of control over young women and the accompanying fear that more young women would turn to prostitution.[35]

---

27. *See id.* at 32 ("Nightwalking, the offense most prostitutes were charged with, had been part of the general law . . . . No mention of solicitation by prostitutes appeared in the text. Prostitution in effect represented a deviant status and not a specific act." (footnote omitted)).

28. RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900–1918, at 4 (Johns Hopkins Paperbacks ed. 1983). Although after the Civil War prostitutes benefited from a period of relative tolerance, even this tolerance had its limits. St. Louis's attempt to legalize and regulate prostitution prompted widespread public outrage, which led to the defeat of the city's "social evil ordinance" in 1874. HOBSON, *supra* note 16, at 147.

29. HOBSON, *supra* note 16, at 51–52.

30. *Id.* at 150.

31. *Id.* at 151–52.

32. *Id.* at 152.

33. *See, e.g.*, Alexandra Bongard Stremler, Essay, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 U. FLA. J.L. & PUB. POL'Y 189, 191–92 (1994–1995) (situating the marginalization of feminist perspectives in the modern prostitution debate within the broader tendency to relegate feminist jurisprudence to the sidelines in favor of "universal" traditional male opinion).

34. *See* HOBSON, *supra* note 16, at 142 (describing typical white slave narratives featuring "men with hypodermic needles waiting to drug and abduct their prey in darkened movie theaters or subways"). In addition, the white slavery metaphor reflected growing anxiety with the rise of the pimp system and organized human trafficking. *Id.* at 142–43.

35. Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 51–52 (1995).

According to the fallen woman narrative, which still held sway during the Progressive Era, once a woman had turned to prostitution, she had not only permanently corrupted herself but had also become a source of contamination, a conduit for the spread of venereal disease.[36] The outbreak of World War I brought this concern to the forefront and the government reacted by instituting a policy of venereal-disease control that mandated the testing of suspected prostitutes.[37]

These sources of anxiety caused the American public to unite in an effort to stamp out the "Social Evil."[38] In 1910, Congress passed the Mann Act (also known as the White-Slave Traffic Act),[39] which criminalized, *inter alia*, the interstate transportation of women for the purpose of prostitution.[40] The Mann Act was followed by the Standard Vice Repression Law of 1919, which effectively criminalized all prostitution.[41]

C. Prostitution Today: State Prostitution Laws

While the passage of the Mann Act and the Standard Vice Repression Law marked an important development in federal antiprostitution law, the power to prohibit prostitution remained with the states.[42] By 1925 every state had passed some form of antiprostitution law.[43] Some of these states continued the tradition of primarily targeting prostitutes for punishment through facially discriminatory statutes that defined prostitution as a crime committed by women.[44] Attitudes about prostitution were slow to change;[45]

---

36. *See* HOBSON, *supra* note 16, at 110 (discussing the fallen-woman paradigm); Lucas, *supra* note 35, at 54–55 ("Progressives worried not only about . . . declining morality, but about the spread of disease as well.").

37. HOBSON, *supra* note 16, at 170.

38. ROSEN, *supra* note 28, at 38.

39. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)).

40. *Id.* In 1986, Congress amended the Mann Act to prohibit the interstate transportation of individuals, thereby expanding its protection to adult men. Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5(b)(1), (c), 100 Stat. 3510, 3511 (codified as amended at 18 U.S.C. §§ 2421–2424).

41. DeCou, *supra* note 20, at 432.

42. *See* Hoke v. United States, 227 U.S. 308, 317, 321, 323 (1913) (upholding the constitutionality of the Mann Act while noting that "[t]here is unquestionably a control in the States over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime"). States may regulate commercial sex under their police power. *Id.* at 321.

43. Whitebread, *supra* note 10, at 243.

44. *See, e.g.*, State v. Devall, 302 So. 2d 909, 910, 913 (La. 1974) (reversing a trial judgment that sustained a motion to quash Louisiana's prostitution statute on equal-protection grounds and observing that "[a]ccording to the terms of the statute, the crime it reprobates can only be committed by a woman"). While all of these early state laws targeted prostitutes, their methods differed. Some states criminalized solicitation, others criminalized the sex act, and still others created a class of "common nightwalkers," comprised of people with a history of prostitution. DeCou, *supra* note 20, at 433. This lack of uniformity carried on into the early 1970s. *Id.* at 434 (indicating that in 1973, forty-four states criminalized solicitation, thirty-eight criminalized

by 1973 at least seven states still had laws that facially discriminated against women by criminalizing only the sale of sex by females.[46] Today, most prostitution statutes define the crime of prostitution in gender-neutral language.[47]

Additionally, many state statutes did not criminalize the act of patronizing a prostitute until the latter part of the twentieth century.[48] Today, the act of patronizing a prostitute is not universally criminalized. Instead, some state statutes punish the prostitute but not the john, some punish both but impose harsher penalties on the prostitute, and some punish the prostitute and the john equally.[49]

State courts differed in their interpretations of state statutes, some holding that only women can be prostitutes and others holding that both genders are capable of committing the crime of prostitution. Early cases tend to reflect the Progressive Era view that prostitution was a crime that could not be committed by a man.[50] This view proved enduring; as late as 1972 the Indiana Supreme Court upheld the constitutionality of one of these

---

commercial sex acts, and thirteen criminalized the status of being a prostitute) (citing RICHARD SYMANSKI, THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES 86 (1981)).

45. In 1977, a New York family court noted that, although New York amended its penal law to define the crime of prostitution in gender-neutral language and criminalized the act of patronizing a prostitute in the 1960s, the "historical sex bias" of New York prostitution laws had endured. *In re* P., 400 N.Y.S.2d 455, 460 (N.Y. Fam. Ct. 1977).

46. DeCou, *supra* note 20, at 434 n.70 (listing Alaska, Indiana, Louisiana, North Dakota, Utah, Wisconsin, and Wyoming).

47. *See* Lefler, *supra* note 19, at 19 (observing in her note, published in 1999, that "most statutes are now gender neutral or at least provide some punishment for johns"). For examples of state prostitution statutes that employ gender-neutral language, see CAL. PENAL CODE § 647(b) (West Supp. 2014), stating, "A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage"; FLA. STAT. ANN. § 796.07(1)(a) (West Supp. 2014), defining prostitution as "the giving or receiving of the body for sexual activity for hire"; N.Y. PENAL LAW § 230.00 (McKinney 2008), declaring that "a person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee"; and VT. STAT. ANN. tit. 13, § 2631 (2009), defining prostitution as "the offering or receiving of the body for sexual intercourse for hire." The Mann Act itself was amended in 1986 to incorporate gender-neutral language. *See* Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5(b)(1), (c), 100 Stat. 3510, 3511 (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)) (replacing the terms "female" and "woman or girl" with "individual").

48. Lefler, *supra* note 19, at 16 & n.45.

49. *Id.* at 16–17.

50. *See, e.g.*, *Ex parte* Carey, 207 P. 271, 275 (Cal. Dist. Ct. App. 1922) ("But a man can no more commit the offense of soliciting for prostitution than that of carrying on the business of prostitution. . . . The words 'soliciting for prostitution' have a well-understood and distinct meaning. They are held to mean the act of a fallen woman in hailing passers-by . . . ."); State v. Gardner, 156 N.W. 747, 749 (Iowa 1916) ("[T]he statute in question does not contemplate that a man can be a prostitute or can practice prostitution . . . .").

facially discriminatory statutes.[51] Two dissenting judges in the South African case *State v. Jordan*,[52] decided in 2002, articulate the enduring and widespread belief that prostitutes alone bear the criminal stain of exchanging sex for money:

> The female prostitute has been the social outcast, the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter. . . . Thus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond the pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women.[53]

However, as the twentieth century progressed some state courts adopted a more equitable view. Some of these courts excised from their prostitution statutes discriminatory language that defined prostitution as a crime that can only be committed by a woman.[54] At least one other court held a facially discriminatory statute to be unconstitutionally vague and overbroad.[55] Unfortunately, the trend toward more inclusive prostitution statutes has been undercut by the manner in which these statutes are enforced, which ensures that prostitutes are still arrested at higher rates than johns.

IV. The Problem of Discriminatory Enforcement

The progress made by moving from facially discriminatory prostitution statutes to those that employ gender-neutral language is undercut by the discriminatory enforcement of the law by police and prosecutors. Statistics published by the Federal Bureau of Investigation (FBI) reveal that women are arrested at roughly twice the rate as men for

---

51. Wilson v. State, 278 N.E.2d 569, 570–71 (Ind. 1972). The statute in question defined a prostitute as "[a]ny female who frequents or lives in a house or houses of ill fame, knowing the same to be a house of ill fame, or who commits or offers to commit one or more acts of sexual intercourse or sodomy for hire." *Id.* at 571 (DeBruler, J., dissenting) (quoting IND. CODE § 35-30-1-1 (1971)).

52. 2002 (6) SA 642 (CC) (S. Afr.).

53. *Id.* at 667–68 para. 64 (O'Regan & Sachs, JJ., dissenting).

54. *See, e.g.*, Plas v. State, 598 P.2d 966, 967–69 (Alaska 1979) (striking the phrase "by a female" from an Alaska statute that defined prostitution as "the giving or receiving of the body by a female for sexual intercourse for hire").

55. *See, e.g.*, Holloway v. City of Birmingham, 317 So. 2d 535, 536, 540 (Ala. Crim. App. 1975) (finding a Birmingham ordinance, which stated, "No female shall prostitute herself or use any indecent or lascivious language, gestures or behavior to induce any other person to illicit sexual intercourse," to be vague and overbroad).

the crime of prostitution and commercialized vice.[56] In 2012,[57] women comprised 67.7% of those arrested for prostitution and commercialized vice.[58] This female-to-male ratio of arrestees appears to be typical; each year from 2004 until 2011 women represented between 64.2% and 69.6% of arrestees while men represented between 30.4% and 35.8%.[59] The ratio of two female arrestees for every one male arrestee reflects only a 10%–15% increase in arrest rates for males relative to females from 1970.[60]

The ratio of female to male arrestees also varies from state to state and from year to year. Some states have achieved a rough parity between male and female arrestees in some years[61] and other states have displayed

---

56. The FBI defines the offense of prostitution and commercialized vice as follows:

> The unlawful promotion of or participation in sexual activities for profit, including attempts. To solicit customers or transport persons for prostitution purposes; to own, manage, or operate a dwelling or other establishment for the purpose of providing a place where prostitution is performed; or to otherwise assist or promote prostitution.

FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2012: OFFENSE DEFINITIONS (2013).

57. The last year for which data was available at the time of publication.

58. *Crime in the United States 2012: Table 42*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/42tabledatadecoverviewpdf.

59. *See id.* (listing female arrestees at 67.7% of total arrestees and male arrestees at 32.3% of total arrestees); *Crime in the United States 2011: Table 42*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-42 (68.8% female and 31.2% male); *Crime in the United States 2010: Table 42*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl42.xls (68.7% female and 31.3% male); *Crime in the United States 2009: Table 42*, FED. BUREAU OF INVESTIGATION (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_42.html (69.6% female and 30.4% male); *Crime in the United States 2008: Table 42*, FED. BUREAU OF INVESTIGATION (Sept. 2009), http://www2.fbi.gov/ucr/cius2008/data/table_42.html (69.4% female and 30.6% male); *Crime in the United States 2007: Table 42*, FED. BUREAU OF INVESTIGATION (Sept. 2008), http://www2.fbi.gov/ucr/cius2007/data/table_42.html (68.1% female and 31.9% male); *Crime in the United States 2006: Table 42*, FED. BUREAU OF INVESTIGATION (Sept. 2007), http://www2.fbi.gov/ucr/cius2006/data/table_42.html (64.2% female and 35.8% male); *Crime in the United States 2005: Table 42*, FED. BUREAU OF INVESTIGATION (Sept. 2006), http://www2.fbi.gov/ucr/05cius/data/table_42.html (66.4% female and 33.6% male); *Crime in the United States 2004: Table 42*, FED. BUREAU OF INVESTIGATION (Feb. 2006), http://www2.fbi.gov/ucr/cius_04/persons_arrested/table_38-43.html#table42 (69.1% female and 30.9% male).

60. In 1970, 20.7% of arrestees were men. Lefler, *supra* note 19, at 19–20.

61. For example, the state of Wisconsin arrested more men than women for prostitution in 2011 and 2010. *See* WIS. OFFICE OF JUSTICE ASSISTANCE, ARRESTS IN WISCONSIN 2011, at 309 tbl.19 (2012), *available at* https://wilenet.org/html/justice-programs/programs/justice-stats/library/crime-and-arrest/2011-arrests-in-wisconsin.pdf (comparing 238 men arrested to 231 women arrested); WIS. OFFICE OF JUSTICE ASSISTANCE, ARRESTS IN WISCONSIN 2010, at 308 tbl.19 (2011), *available at* https://wilenet.org/html/justice-programs/programs/justice-stats/library/crime-and-arrest/2010-arrests-in-wisconsin.pdf (comparing 203 men arrested to 177 women arrested). However, in both 2008 and 2009 more women than men were arrested in the same state. *See* WIS. OFFICE OF JUSTICE ASSISTANCE, ARRESTS IN WISCONSIN 2009, at 276 tbl.19 (2010), *available at* https://wilenet.org/html/justice-programs/programs/justice-stats/library/crime-and-arrest/2009-arrests-in-wisconsin.pdf (comparing 228 women arrested to 148 men arrested); WIS. OFFICE OF

inequitable arrest rates for many years in a row.[62] Statistics cited by defendants on trial for prostitution show similar patterns of unequal enforcement. In *City of Yakima v. Johnson*,[63] the defendant offered statistical evidence showing that, for ten years, almost every person arrested for violating an ordinance prohibiting prostitution was a woman.[64] Similarly, in *In re Elizabeth G.*,[65] the defendant offered evidence that the percentage of people arrested for violating a solicitation statute who were men ranged between 1.8% (1974) and 27.3% (1975).[66] Lastly, one court in New York noted certain statistics showing that "the overwhelming number of people arrested for prostitution-related offenses in Buffalo are female (the number is at least 70% and probably closer to 90%)."[67]

Some police officers have provided surprisingly candid testimony that sheds light on one cause of the discrepancy between the numbers of male and female arrestees. In one case, a police detective testified that it was department policy not to arrest the man and that "[t]here hasn't been a male arrested . . . since we've been working on the prostitution area."[68] The detective further testified that even when a john was present and subject to arrest, such as when police stop a john's car after the prostitute gets in, it was the "general policy that you don't arrest the male."[69] The detective gave two reasons for the policy: the women were arrested because complaints from people in the area related "mainly [to] the girls" and because the women were known to the police.[70]

Another explanation for high female arrest rates is the openly acknowledged police strategy of using male decoys.[71] In a typical scenario,

---

JUSTICE ASSISTANCE, ARRESTS IN WISCONSIN 2008, at 270 tbl.19 (2009), *available at* https://wilenet.org/html/justice-programs/programs/justice-stats/library/crime-and-arrest/2008-arrests-in-wisconsin.pdf (comparing 430 women arrested to 257 men arrested).

62. For example, in California women comprised 67.4% of total arrestees in 2012, 72.3% of total arrestees in 2011, and 70.9% of total arrestees in 2010. *See* KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 2012, at 42 tbl.34 (2013), *available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd12/cd12.pdf?; KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 2011, at 42 tbl.34 (2012), *available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd11/cd11.pdf?; KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 2010, at 42 tbl.34 (2011), *available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd10/preface.pdf?.

63. 553 P.2d 1104 (Wash. Ct. App. 1976).

64. *Id.* at 1106 & n.3.

65. 126 Cal. Rptr. 118 (Cal. Ct. App. 1975).

66. *Id.* at 119–20.

67. People v. Burton, 432 N.Y.S.2d 312, 314 (Buffalo City Ct. 1980).

68. Commonwealth v. An Unnamed Defendant, 492 N.E.2d 1184, 1186 (Mass. App. Ct. 1986) (omission in original).

69. *Id.*

70. *Id.* (alteration in original).

71. The use of male decoys is widespread and can result in many female arrestees. *See* Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 YALE J.L. & FEMINISM 329, 334–35 (1992) (observing that "[t]he vast majority

an undercover police officer will wait until he is approached by a suspected prostitute, allow her to solicit him, and arrest her soon after.[72] By posing as johns, police officers ensure that only prostitutes are arrested. Courts have been generally receptive to police testimony that using officers as decoys is an effective means of combatting prostitution.[73] In contrast, courts have been quick to agree with police departments that the use of female decoys to arrest johns would not be feasible. In *United States v. Wilson*,[74] the court rejected a defense of discriminatory enforcement based in part on uncontroverted police testimony that the use of female decoys was "infeasible" because of the "entrapment aspect."[75]

By according police departments and prosecutors a high rate of deference in allocating scarce resources, many courts turn a blind eye to evidence of discriminatory enforcement. The court in *People v. Burton*[76] concluded that there was no discriminatory enforcement of New York's prostitution law, even though "the overwhelming number of people arrested for prostitution-related offenses in Buffalo are female," because "a comprehensive view satisfies this court that there are good and sufficient reasons . . . to justify the police on concentrating on the arrest of female prostitutes."[77] These reasons included a shortage of manpower and, tellingly, a dearth of women on the police force who could pose as prostitutes because "the police department is guilty of engaging in discriminatory hiring practices of women in the past."[78] Additionally, testimony from officers on the Buffalo Police Department Vice Squad indicated that female decoys were more expensive because they required additional manpower to protect them from prostitutes and from "panicky Johns."[79] The *Burton* court accepted these arguments but noted that they "will not suffice tomorrow when there are many more women available in the police ranks."[80] Other courts have similarly noted that prosecutors[81] and

---

of prostitution arrests are made through the use of police decoys" and noting that "[s]ince most of the police [decoys] are male, those arrested are generally women and a few male prostitutes").

72. *See* City of Minneapolis v. Buschette, 240 N.W.2d 500, 501–02 (Minn. 1976) (summarizing the testimony of officers on the Minneapolis morals squad describing a typical "decoy" operation).

73. *See, e.g.*, *id.* at 501–02, 504 (citing police testimony regarding the department's use of decoys in its "important duty" of prostitution enforcement and disagreeing with the defendant's assertion that "the all-male composition of the morals squad acting as plainclothes decoys or 'tricks' is per se discriminatory").

74. 342 A.2d 27 (D.C. 1975).

75. *Id.* at 29–31. According to an officer who testified at trial, street protocol dictated that the prostitute approach the john and ask if he is "sporting"; correspondingly, if a female decoy were to pose this question to a john, he could raise an entrapment defense. *Id.* at 29.

76. 432 N.Y.S.2d 312 (Buffalo City Ct. 1980).

77. *Id.* at 314–15.

78. *Id.* at 315.

79. *Id.* (internal quotation marks omitted).

80. *Id.*

police departments[82] have great discretion in deciding whom to prosecute. By dismissing evidence of discriminatory enforcement of prostitution statutes, these courts essentially grant police departments permission to continue to arrest more prostitutes than johns.

In conclusion, statistics and police testimony both provide persuasive evidence of pervasive, widespread, and continuing discriminatory enforcement of prostitution statutes. However, judicial deference to the practices of police departments and prosecutors often means that discriminatory practices, such as the exclusive use of male decoys, are held up in court. This is, unfortunately, the state of the law today.

V. The Discriminatory-Enforcement Defense

Before laying out this Note's proposal, a little background is in order. Subpart V(A) briefly describes the origin of the discriminatory-enforcement defense. Subpart V(B) outlines the positive change that would become possible if courts were to recognize a discriminatory-enforcement defense to prostitution charges. Lastly, subpart V(C) describes the three elements of a discriminatory-enforcement defense.

A. Background: Yick Wo v. Hopkins

In the landmark case *Yick Wo v. Hopkins*,[83] the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment[84] proscribes the discriminatory enforcement of a facially neutral law.[85] In a passage quoted by many courts a century later, the Court stated:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[86]

In summary, *Yick Wo* prohibits state actors from wielding a facially neutral law as if it were discriminatory on its face by selectively enforcing it

---

81. Young v. State, 446 N.E.2d 624, 626 (Ind. Ct. App. 1983); Commonwealth v. King, 372 N.E.2d 196, 205 (Mass. 1977); State v. Johnson, 246 N.W.2d 503, 506 (Wis. 1976).

82. United States v. Wilson, 342 A.2d 27, 30 (D.C. 1975).

83. 118 U.S. 356 (1886).

84. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). The Fifth Amendment's Due Process Clause applies these constraints to the federal government. *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (observing that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive" and holding that racial segregation in Washington, D.C. public schools violated the Fifth Amendment).

85. *Yick Wo*, 118 U.S. at 373–74.

86. *Id.*

against a certain class of people.[87] Without this prohibition, laws that criminalized gambling, for example, could be enforced in such a way as to only criminalize gambling by African-Americans.[88] Instead, *Yick Wo* instructs that state actors must treat similarly situated people alike.[89]

B. The Function and Effects of the Defense of Discriminatory Enforcement

While *Yick Wo* involved the narrower issue of the unequal application of two city ordinances,[90] the Equal Protection Clause of the Fourteenth Amendment applies to "every form of state action, whether legislative, executive, or judicial."[91] In line with this principle, the Supreme Court later indicated that discriminatory enforcement is also a defense to a criminal charge.[92] If the criminal defendant successfully establishes this defense, the court must dismiss the case.[93]

The severe consequence of raising this defense successfully is what makes the remedy so effective.[94] As the Minnesota Supreme Court noted,

---

87. *Id.*

88. This was the situation described in the California case *People v. Harris*, 5 Cal. Rptr. 852 (Cal. App. Dep't Super. Ct. 1960). Julie Lefler raises a similar point in the context of sex-based classifications, stating, "If there is no equality in enforcement it does not matter that laws are gender-neutral." Lefler, *supra* note 19, at 34.

89. For a discussion of who is similarly situated to whom in the context of prostitution cases, see *infra* subpart VI(A).

90. 118 U.S. at 357–58.

91. Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1105 (1961) [hereinafter *Nondiscriminatory Enforcement*]; *see also Ex Parte* Virginia, 100 U.S. 339, 347 (1880) ("A State acts by its legislative, its executive, or its judicial authorities. . . . The constitutional provision, therefore, must mean that no agency of the State, or of [its] officers or agents . . . , shall deny to any person within its jurisdiction the equal protection of the laws.").

92. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962) (rejecting a selective enforcement defense in a criminal case but leaving open the possibility that such a defense could be used if properly supported); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 583–84, 588–89 (1961) (affirming a lower court decision to deny an injunction restraining the enforcement of a Sunday closing law that was discriminatorily enforced because the plaintiff "may defend against any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination"); *Nondiscriminatory Enforcement*, *supra* note 91, at 1108 (discussing two cases where the Supreme Court has indicated that intentional and deliberate discriminatory state penal enforcement would violate the Equal Protection Clause).

93. *E.g.*, Commonwealth v. An Unnamed Defendant, 492 N.E.2d 1184, 1187–88 (Mass. App. Ct. 1986); State v. McCollum, 464 N.W.2d 44, 52 (Wis. Ct. App. 1990); *cf.* Andrew B. Weissman, *The Discriminatory Application of Penal Laws By State Judicial and Quasi-Judicial Officers: Playing the Shell Game of Rights and Remedies*, 69 NW. U. L. REV. 489, 497 (1974) (explaining that "the fundamental premise that lies at the root of any grant of relief to a culpable person [is] that those clearly guilty should nonetheless be permitted to avoid punishment when the prosecution results from illegal discrimination by law enforcement officials").

94. For sources recognizing the severe nature of this defense, see *City of Minneapolis v. Buschette*, 240 N.W.2d 500, 504 (Minn. 1976) and Weissman, *supra* note 93. As Weissman observes, "Arguments opposing such a grant of relief are simple and to the point: it is highly

"While dismissal may be an extreme remedy, especially when the guilt of certain defendants may seem clear, it is only by this means that the courts will put an end to the arrest and prosecution of persons based on intentional and purposeful discrimination."[95] The threat of having cases thrown out is, indeed, a powerful incentive to change the manner in which an arrest is made. In *United States v. Wilson*, a police lieutenant explained why the department had discontinued the use of female decoys to arrest johns: "[M]ales looking for prostitutes were arrested on the charge of soliciting for prostitution; but *the cases 'were all dismissed* because [of] the entrapment aspect. And [*the detective had*] *never had a conviction of a male subject for soliciting a policewoman that* [*he knew*] *of.'*"[96] It would appear that police officers will not waste their time and energy making arrests when the case against the arrestee will be subsequently thrown out.

That the dismissal of several cases has the potential to make such a noticeable impact on the practices of a police department holds important implications for the defense of discriminatory enforcement. It means that a successful defense has a real likelihood of achieving the larger purpose of acting as "one of the few means the individual citizen has to force public officials to do their job properly."[97] It represents, in effect, the results that are possible when courts work in tandem with the people to send a message to public officials. If courts were to throw out prostitution cases accompanied by evidence of discriminatory enforcement against women, the message to public officials would be clear: the lesson of *Yick Wo* still applies; the laws of the United States must be applied in an equal manner.

The importance of this defense is underscored in prostitution cases because prostitutes as a group—especially the street prostitutes who comprise the majority of defendants who attempt to bring this defense—do not, on average, have much political or economic power.[98] Street prostitutes may be battered by pimps; they may be teenage runaways; they may feel the shame heaped on them by a society that considers them to be

---

unusual to allow a known culprit to go free after an admitted violation of a valid criminal statute." Weissman, *supra* note 93.

95. *Buschette*, 240 N.W.2d at 504.

96. 342 A.2d 27, 29 (D.C. 1975) (emphasis added).

97. People v. Superior Court of Alameda Cnty., 562 P.2d 1315, 1325 (Cal. 1977) (Tobriner, C.J., dissenting) (quoting People v. Gray, 63 Cal. Rptr. 211, 217 (Cal. Ct. App. 1967)); *see also* Weissman, *supra* note 93, at 498 (stating that several courts in favor of judicial relief make an analogy to the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), on the basis that "allowing a defense of discriminatory enforcement is the only practical way to force public officials to undertake their responsibilities in a proper manner").

98. For a description of the many forms of violence suffered by prostitutes working both indoors and on the street, see Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRAC. 33, 34–37 (2003), and MacKinnon, *supra* note 10, at 282–88. Indeed, Farley et al. describe the alarming prevalence of rape, childhood sexual abuse, verbal abuse, stalking, battering, torture, intimate partner violence, and posttraumatic stress disorder reported by prostituted women. Farley et al., *supra*.

the embodiment of everything vile; they may have been trafficked; they may have lost the ability to insist on a condom, to insist on freedom from violence, or to choose whether to be a prostitute in the first place. But the defense of discriminatory enforcement remains open to them and gives them what may be their only and greatest opportunity to force the police officers who arrest them and the prosecutors who bring their cases into the courts to perform their jobs as representatives of the state with at least a basic level of fairness.[99]

While this Note takes the position that courts should recognize the defense of discriminatory enforcement in prostitution prosecutions, it also recognizes that courts have historically been reluctant to do so. Thus, it may be wise to make a bifurcated effort that focuses on police departments as well as courts. A recent report provided to the United States Department of Justice noted the effectiveness of interventions that focus on reducing the demand for commercial sex.[100] The report cites various demand-centered approaches that have been put into place by police departments, which include, *inter alia*, founding "john schools," instituting reverse stings, publicizing the identities of johns, sending "Dear John" letters, seizing automobiles used to solicit sex, and suspending driver's licenses.[101] These programs show that progressive police departments may be more receptive to focusing on johns. Activists may be able to use the fact that several police departments across the country have adopted this approach to persuade police departments in their area to consider adopting a similar approach.

However, judges must still be committed to the equal enforcement of prostitution laws and to equalizing punishment. In particular, judges should refrain from imposing a prison sentence on a prostitute while sending her

---

99. The low status of prostitution, which translates to a lack of political power, is one way in which discriminatory law enforcement against prostitutes becomes more similar to the situation in *Mapp*. For prostitutes, there very well may not be any other methods to combat discriminatory enforcement, beyond judicial relief, that comport better with our political process.

100. MICHAEL SHIVELY ET AL., ABT ASSOCIATES, INC., A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS, at v (2012), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf ("Evidence that anti-demand tactics . . . can effectively suppress commercial sex markets is slowly accumulating and is robust in relation to evidence of the effectiveness of other approaches.").

101. *Id.* at 21–24. "Dear John" letters are a method of deterrence in which "[l]etters are sent to addresses of registered car owners, alerting owners that their car was seen in [an] area known for prostitution, and warning them about legal and other consequences of engaging in prostitution." *Id.* at 22. Johns who are arrested for soliciting commercial sex may also be sent to "john schools," education programs that "cover a range of topics designed to persuade or deter men from buying sex." *Id.* at 61. Topics may include the legal and health consequences of engaging in commercial sex and the harm that prostitution inflicts on prostituted women and girls, and discussion may encompass "healthy relationships, anger management, sexual addiction, pimping and pandering, human trafficking, and johns' vulnerability to criminal victimization while engaged in commercial sex." *Id.* at 62.

client off to john school.[102] Doing so would only recall the gross disparities in sentencing between prostitutes and johns that marked the nineteenth and twentieth centuries.[103]

C. Elements of the Defense

Many state courts have endorsed the view that discriminatory enforcement can be a defense to a criminal charge for prostitution.[104] While there is some disagreement on when a claim of discriminatory enforcement may be raised, courts generally agree that the claim comprises three elements, all of which must be proven by the defendant.

First, the defendant must show that there was selectivity in enforcement. This normally entails a demonstration of the relevant population of violators—those similarly situated to the defendant—and proof that not all of the violators are prosecuted.[105] Defendants may normally establish this first element by direct evidence that other individual violators were not prosecuted or by statistical evidence indicating few or no prosecutions of other violators of the statute.[106]

Second, the defendant must show that the selectivity in enforcement was intentional and not simply due to mistake or laxity in enforcement.[107] Some courts phrase this element as requiring proof of intentional or purposeful discrimination.[108] This element is in direct tension with the idea

---

102. Indeed, this is what happened in *Salaiscooper v. Eighth Judicial District Court ex rel. County of Clark*, 34 P.3d 509 (Nev. 2001) (per curiam). In this case, the court upheld the constitutionality of the First Offender Program for Men in Las Vegas, a diversion program available to men, and ostensibly women, who were charged with buying sex. *Id.* at 512–13. The State admitted that "the vast majority of sellers of sex are females" and that buyers of sex are "statistically almost always male" but nonetheless argued that the program did not run afoul of the Constitution because it was not long enough or comprehensive enough to rehabilitate prostitutes. *Id.* at 513.

103. *See supra* Part III.

104. *See, e.g.*, People v. Superior Court of Alameda Cnty., 562 P.2d 1315, 1319–23 (Cal. 1977) (recognizing the defense of discriminatory enforcement but finding no constitutional infirmity in the police department's prostitution-arrest policies); State v. McCollum, 464 N.W.2d 44, 51–52 (Wis. Ct. App. 1990) (affirming the dismissal of prostitution charges on the ground of discriminatory enforcement). While many state courts in the 1970s encountered cases in which alleged prostitutes attempted to raise a defense of discriminatory enforcement, the rate at which the defense was raised declined during the 1980s and beyond. This Note attempts to cull representative language from the cases that exist and lay out the issues that were most common among the cases.

105. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 465 (1996) ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."); Ah Sin v. Wittman, 198 U.S. 500, 507–08 (1905) (requiring the defendant to establish that other violators of the law are not generally prosecuted).

106. Stefan H. Krieger, Comment, *Defense Access to Evidence of Discriminatory Prosecution*, 1974 U. ILL. L.F. 648, 654.

107. Weissman, *supra* note 93, at 502–05.

108. *See, e.g.*, Snowden v. Hughes, 321 U.S. 1, 8 (1944) ("The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are

that courts should afford police departments and prosecutors discretion in deciding whom to prosecute.[109]

Third, the defendant must show that the selective enforcement was based on an invidious or unjustifiable standard.[110] While certain criteria for enforcement are clearly invidious, such as race, other criteria, such as sex, are less so.[111] In cases in which the element of invidiousness is uncertain, as often occurs in cases of prostitution, the decision may be based upon the strength of the first two elements.[112]

VI. Barriers to a Finding of Discriminatory Enforcement

While the defendant already bears a heavy burden of proof on the elements of a discriminatory-enforcement defense, courts have set up two additional barriers to proving the defense of discriminatory enforcement. First, some courts take the position that prostitutes and johns are not similarly situated and thus the treatment of one cannot be compared to the treatment of the other. Second, some courts require a high standard of proof to establish discriminatory enforcement. This operates to make proving the second and third elements, which often collapse into each other, more difficult. Third, some courts adopt sexist justifications for the continued discriminatory enforcement of prostitution laws.

---

entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."). Many state courts follow this standard. *See, e.g.*, Blake v. State, 344 A.2d 260, 263 (Del. Super. Ct. 1975) (clarifying that, in order to establish "intentional and purposeful discrimination[,] . . . proof that only women have been prosecuted . . . shall not be enough"); State v. Olson, 297 N.W.2d 297, 298 (Minn. 1980) (holding that the defendant did not establish "conscious or purposeful intent to discriminate"); City of Spokane v. Hjort, 569 P.2d 1230, 1231 (Wash. Ct. App. 1977) (holding that the record did not establish "intentional, purposeful, or systematic discrimination against women").

109. Thus, mere failure to enforce the law against others is not enough to establish a claim of discriminatory enforcement. Oyler v. Boles, 368 U.S. 448, 456 (1962).

110. *E.g.*, People v. Superior Court of Alameda Cnty., 562 P.2d 1315, 1320 (Cal. 1977) ("To establish the defense, the defendant must prove: (1) that he has been deliberately singled out for prosecution on the basis of some invidious criterion . . . ." (internal quotation marks omitted)); State v. Devall, 302 So. 2d 909, 912–13 (La. 1974) ("[A]bsent a showing that distinctions involving prostitution are merely pretexts designed to effect an invidious discrimination against the members of one sex . . . , lawmakers are constitutionally free to exclude male prostitution from the coverage of legislation . . . ."); City of Minneapolis v. Buschette, 240 N.W.2d 500, 506 (Minn. 1976) (holding that the defendant had not met her burden of proof that the state's selective prosecution had been invidious).

111. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 914–15 (2002) ("The Court's grant of intermediate, rather than strict, scrutiny to sex is sometimes justified on the ground that there are 'real differences' between the sexes. Thus, unlike any two racial groups, men and women are deemed to be biologically different in ways that could justify their differential treatment." (footnotes omitted)).

112. *See, e.g.*, *Superior Court of Alameda Cnty.*, 562 P.2d at 1321 (referring to prostitutes in specifically gender-neutral language as "the prostitute, male or female" and "providers" and characterizing police focus on prostitutes as "a profiteer-oriented approach," thereby avoiding the conclusion that police had selectively enforced the law on the basis of the offender's sex, an invidious standard).

Part VI of this Note analyzes each of these hurdles in turn. Subpart VI(A) begins by examining the classification barrier, arguing that prostitutes and johns are indeed similarly situated. Next, subpart VI(B) urges courts to lower the standard of proof for discriminatory enforcement. Finally, subpart VI(C) argues that courts should discard justifications for the discriminatory enforcement of prostitution laws that are tainted with sexism.

A. Prostitutes and Johns Are Similarly Situated

Some courts that have refused to find discriminatory enforcement in particular cases have done so by taking the position that prostitutes and johns are not similarly situated.[113] This Note takes the position that prostitutes and johns are indeed similarly situated and that courts should compare the rates of arrest and prosecution for each in determining whether prostitution laws were enforced with "an unequal hand."[114] However, the process of determining whether two classes of people are similarly situated is a complicated one that deserves further analysis.

The similarly situated inquiry is an answer to the Equal Protection Clause paradox described in Joseph Tussman and Jacobus tenBroek's influential article *The Equal Protection of the Laws*.[115] This paradox arises from the tension between the states' right to enact laws that classify[116] and

113. *See infra* notes 137–39 and accompanying text.

114. Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

115. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949). The following discussion is indebted to this article, which, although written over sixty years ago, remains well respected and influential. *See* Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CALIF. L. REV. 315, 343 & n.78 (1998) ("The Tussman and tenBroek article, which ranks among the top 20 law review articles in number of times cited, articulates a conception of the Equal Protection Clause and the harm it is intended to proscribe which largely became the standard conception of the Clause and its motivating principle." (footnote omitted)); Gerald Gunther, *The Suprme Court, 1971 TermForeward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 n.28 (1972) (describing *The Equal Protection of the Laws* as the "classic" pre-Warren Court study of the state of equal-protection doctrine). However, Tussman and tenBroek's approach has not been universally accepted. *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1295–97 (1991) (arguing that the similarly situated analysis takes white men as its point of comparison and thus does not capture situations in which sex inequality is at its most extreme); Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 459–60 (1989) (describing the defects in the approach advocated by Tussman and tenBroek).

116. *See* Barbier v. Connolly, 113 U.S. 27, 31–32 (1885) ("Regulations [imposed to achieve general benefits under the state's police power] may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote . . . the general good."); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 129 (arguing that "classifications are the stuff of legislation; and legislation that classifies does not, solely by virtue of that fact, offend any sense of 'equality'").

the Equal Protection Clause's guarantee of equality before the law.[117] Justice White, writing in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*,[118] interpreted this guarantee as "essentially a direction that all persons similarly situated should be treated alike."[119] This guarantee is cabined by the recognition that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[120] The compromise is to allow laws that make reasonable classifications, defined as those that "include[] all persons who are similarly situated with respect to the purpose of the law."[121]

Therefore, the central inquiry in the similarly situated analysis is purpose-oriented: whether "the legislative classification bear[s] a close enough relationship to the purpose of the statute."[122] Under intermediate scrutiny, the legislative classification would have to be substantially related to the purpose of the statute.[123] Another way of phrasing this inquiry is to ask if there is such "a substantial difference between men and women that is relevant to the classification—that is, that the reason for burdening members of one sex does not apply with the same force to members of the other sex."[124] Since *Craig v. Boren*[125] recognized that sex-based classifications are subject to heightened scrutiny,[126] at least two courts that have addressed the issue have applied intermediate scrutiny,[127] and at least one court has applied strict scrutiny.[128] Other courts, in refusing to find

117. *Yick Wo*, 118 U.S. at 369 ("[T]he equal protection of the laws is a pledge of the protection of equal laws.").

118. 473 U.S. 432 (1985).

119. *Id.* at 439.

120. Tigner v. Texas, 310 U.S. 141, 147 (1940).

121. Tussman & tenBroek, *supra* note 115, at 346.

122. Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 588 & n.60 (2011); *see also* Romer v. Evans, 517 U.S. 620, 632 (1996) ("The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.").

123. Shay, *supra* note 122, at 616.

124. William R. Engles, Comment, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149, 151 (1985); *see also id.* at 153–54 (describing this approach as the "'similarly-situated' test").

125. 429 U.S. 190 (1976).

126. *See id.* at 197 ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

127. *See, e.g.*, State v. Tookes, 699 P.2d 983, 987–88 (Haw. 1985) (holding that Hawaii's prostitution law is gender-neutral and that "[e]ven if the prohibition were deemed to set up a gender-based classification, it would be invalid only if it did not serve important government objectives and was not substantially related to achieving those objectives"); State v. McCollum, 464 N.W.2d 44, 51 (Wis. Ct. App. 1990) ("When faced with a claim of an equal protection violation based on impermissible gender discrimination, courts must apply an intermediate level of scrutiny to the classification system at issue.").

128. *See, e.g.*, Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977).

discriminatory enforcement, are more oblique about what standard they are applying.[129]

While the above analysis concerns laws that classify on their face, the analysis applies with equal force to facially neutral laws that are enforced in a manner that burdens certain classes more than others.[130] In order to prove discriminatory enforcement, a defendant must first identify a control group of similarly situated persons who have not been prosecuted.[131] By doing so, the defendant "isolate[s] the factor allegedly subject to impermissible discrimination" and reduces the chance that other factors account for the discrepancy in arrest and prosecution rates.[132]

The problem that many prostitutes have encountered in establishing a discriminatory-enforcement defense is that courts often choose male prostitutes—and exclude johns—as the control group to be compared against female prostitutes.[133] With the control group so defined, these courts easily conclude that there has not been discriminatory enforcement.[134] In coming to this conclusion, several courts have observed that male and female prostitutes are treated identically.[135] The courts then explain away the fact that female prostitutes are arrested in greater numbers by observing that female prostitutes far outnumber male prostitutes.[136] By

129. *See, e.g.*, People v. Superior Court of Alameda Cnty., 562 P.2d 1315, 1319, 1321 (Cal. 1977) (noting that sex is an arbitrary classification but refusing to compare prostitutes and johns on the basis of sex, instead characterizing prostitutes as "profiteers" and johns as mere "customers"); Young v. State, 446 N.E.2d 624, 624–26 (Ind. Ct. App. 1983) (finding, because the defendant made no "showing of 'bad faith or evil design,'" no grounds for a discriminatory enforcement instruction and mentioning neither intermediate nor rational basis scrutiny (quoting Highland Sales Corp. v. Vance, 186 N.E.2d 682, 689 (Ind. 1962)).

130. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

131. United States v. Aguilar, 883 F.2d 662, 705–06 (9th Cir. 1989); *see also* Barbier v. Connolly, 113 U.S. 27, 31–32 (1885) ("Class legislation, discriminating against some and favoring others, is prohibited, but legislation which . . . affects alike all persons similarly situated, is not within the [Fourteenth] [A]mendment.").

132. *Aguilar*, 883 F.2d at 706.

133. *See, e.g.*, *Superior Court of Alameda Cnty.*, 562 P.2d at 1322; Blake v. State, 344 A.2d 260, 262 (Del. Super. Ct. 1975); State v. Gaither, 224 S.E.2d 378, 379 (Ga. 1976); *id.* at 380 (Hall, J., concurring specially).

134. *See, e.g.*, *Gaither*, 224 S.E.2d at 379.

135. *See Superior Court of Alameda Cnty.*, 562 P.2d at 1322 (stating that the "most obvious ground" for the conclusion that the practice of custodially arresting the prostitute while merely citing the customer is not discriminatory "is that male and female prostitutes are treated alike"); *Blake*, 344 A.2d at 262 (finding that a statute criminalizing only the sale of sex was not subject to strict scrutiny because the seller could be either male or female); People v. Burton, 432 N.Y.S.2d 312, 314 (Buffalo City Ct. 1980) (noting the testimony of a police officer and captain that "male prostitution is as vigorously prosecuted by the Buffalo Police Department and the District Attorney's Office as female prostitution").

136. *See, e.g.*, *Gaither*, 224 S.E.2d at 380 (Hall, J., concurring specially) ("Consequently, the clear fact which emerges from this record, that males are rarely if ever prosecuted for prostitution whereas females are prosecuted in great numbers, cannot be proof of discriminatory enforcement when there is no evidence in the record that male prostitutes exist in detectable numbers."); *Burton*, 432 N.Y.S.2d at 314 ("[T]here are fewer arrests of male prostitutes and their customers

defining the control group as male prostitutes, these courts effectively kill the similarly situated analysis before it can really begin.

Instead of following this track of reasoning, courts should ask whether there is a substantial difference between johns—who are overwhelmingly men—and prostitutes—who are overwhelmingly women—that is relevant to the classification.[137] Assuming that the purpose of prostitution laws is to eliminate prostitution, it seems unlikely that there is a "reason for burdening [prostitutes that] does not apply with the same force to [johns]."[138] However, various state courts have adopted a set of justifications for finding that prostitutes and johns are not similarly situated.

The question of whether prostitutes and johns are similarly situated divides courts, even courts within the same state. In one notable example, two New York courts examined statutes criminalizing prostitution and the act of patronizing a prostitute to determine whether prostitutes and johns were similarly situated. The court in *In re Dora P.*[139] concluded that prostitutes and johns are not similarly situated because they each commit a separate and discrete crime.[140] To support its conclusion, the court emphasized that "separate acts" are necessary to commit prostitution and the act of patronizing a prostitute.[141]

One year later, the court in *People v. Nelson*[142] expressly rejected the conclusion of *In re Dora P.* and concluded that "it is reasonable to combine [prostitutes and johns] in the category of 'others similarly situated.'"[143] In coming to this conclusion, the court stressed the similarity of the two crimes, stating that "the only significant difference in the proscribed behavior is that the prostitute sells sex and the patron buys it" and endorsing

---

simply because they are fewer in number than those individuals connected with female prostitution.").

137. Two judges, vigorously dissenting in a South African case, argued that there are only three, unimportant differences between prostitutes and johns:

> Prostitutes and their customers engage in sexual activity, which is one of the constitutive elements of the relationship between men and women in all societies. As partners in sexual intercourse, they both consent to and participate in the action which lies at the heart of the criminal prohibition. There are only three differences between them. The first is that the one pays and the other is paid. The second is that in general the one is female and the other is male. The third is that the one's actions are rendered criminal by [statute] but the other's actions are not. Moreover, the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping, which is itself in conflict with the principle of gender equality.

State v. Jordan 2002 (6) SA 642 (CC) at 666 para. 60 (O'Regan & Sachs, JJ., dissenting).

138. Engles, *supra* note 124, at 151.

139. 418 N.Y.S.2d 597 (App. Div. 1979).

140. *Id.* at 604.

141. *Id.*

142. 427 N.Y.S.2d 194 (Syracuse City Ct. 1980).

143. *Id.* at 197–98.

a characterization of the two crimes as "reciprocal offenses."[144] It also cited changes made to New York's Penal Law that equalized sanctions for the two crimes.[145] Lastly, it mentioned that "at a time when prostitution was a phase of the former vagrancy statute, the New York courts were divided on whether it embraced both the patron and the prostitute."[146] The court took this as historical evidence that "some courts have considered prostitution and patronage two facets of a single offense."[147]

The logic that led the *Nelson* court to conclude that prostitutes and johns are similarly situated can be applied beyond New York. As in the early cases in New York, courts in California[148] and Iowa[149] questioned whether prostitution statutes could be applied to men. While both courts concluded that prostitution could only be committed by a woman,[150] they both provide evidence that some people made the opposite argument in the early decades of the twentieth century. As the century progressed and attitudes about women evolved, more and more states amended their prostitution statutes, deleting discriminatory language and expressly criminalizing patronization of a prostitute.[151] This trend toward treating the two crimes equally represents a delayed recognition that they are, as the *Nelson* court stated, reciprocal offenses.

The specific fact patterns common to many cases also support the conclusion that prostitutes and clients are similarly situated. In one common scenario, police officers survey an area known to be frequented by prostitutes and their clients.[152] When they see a woman get into a car with a man and drive away, the officers follow the car, stop it, and ask the man what he is doing with the woman.[153] The man then admits that he had been offered sex for a fee and the officers arrest the woman.[154] In other cases, the officer may catch the prostitute and client engaged in the sex act and only arrest the woman.[155] A third type of case presents a slightly different fact pattern. In *State v. McCollum*,[156] four undercover police officers

144. *Id.* at 197.

145. *Id.*

146. *Id.* (citation omitted).

147. *Id.*

148. *Ex parte* Carey, 207 P. 271, 273–74 (Cal. Dist. Ct. App. 1922).

149. State v. Gardner, 156 N.W. 747, 749 (Iowa 1916).

150. *Carey*, 207 P. at 274; *Gardner*, 156 N.W. at 749–50.

151. *See* sources cited *supra* note 47.

152. *See* DeCou, *supra* note 20, at 436 ("The 'street sweep' has been a favorite method of temporarily clearing streets of prostitutes in a particular area.").

153. *E.g.*, People v. Burton, 432 N.Y.S.2d 312, 314 (Buffalo City Ct. 1980); People v. Nelson, 427 N.Y.S.2d 194, 195 (Syracuse City Ct. 1980).

154. *E.g.*, *Burton*, 432 N.Y.S.2d at 314; *Nelson*, 427 N.Y.S.2d at 195.

155. *E.g.*, Commonwealth v. An Unnamed Defendant, 492 N.E.2d 1184, 1186 (Mass. App. Ct. 1986).

156. 464 N.W.2d 44 (Wis. Ct. App. 1990).

attended a private party at a club and witnessed numerous male patrons "fondle[] the women performers and thrust money at them."[157] When the club closed, the officers arrested the female dancers and made no attempt to arrest any of the male patrons who were present.[158] In each of these fact patterns, the woman charged with prostitution and her client are similarly situated: they have agreed to an exchange of money for sex, or they are engaged in a sex act for which the man has paid or agreed to pay. They are committing statutorily similar crimes—indeed, in some states they are violating the same statute at the same time. When courts focus on female prostitutes to the exclusion of johns, they unnecessarily and harmfully restrict the control group, which in turn virtually ensures the failure of a discriminatory-enforcement defense. By looking for discriminatory enforcement in the wrong place, courts dismiss as nonexistent discrimination that is hiding in plain sight.

B. The Standard for Showing Discriminatory Intent Is Unduly High

While courts need to recognize that prostitutes and johns are similarly situated, that is only the first step. Courts that have found selective, but not discriminatory, enforcement have done so by setting the standard of proof for discriminatory enforcement so high that women attempting to raise the defense cannot hope to meet the standard.[159]

In order to successfully raise this defense, a defendant must show that the law has, indeed, been enforced in a discriminatory manner. This can be very difficult, partly because courts disagree on what kinds of activity constitute the type of discrimination that violates the Equal Protection Clause.[160] As Andrew B. Weissman comments:

> All jurisdictions would agree . . . that nonenforcement against others similarly situated is not *of itself* sufficient to taint the prosecution of any particular defendant. . . . Beyond this, even the presence of certain types of intent to discriminate may not be enough to create a defense. The legitimate role that intentional selectivity plays in the administration of criminal laws has never been questioned by the courts.[161]

---

157. *Id.* at 46–47.

158. *Id.* at 47.

159. Lefler also takes aim at the high standards some courts use to determine discrimination, arguing that courts should avoid "setting standards that are nearly impossible to attain" for proving discriminatory intent. Lefler, *supra* note 19, at 26.

160. *See* Weissman, *supra* note 93, at 502 ("In determining the kinds of activity that comprise a violation of the duty of non-discriminatory enforcement, unanimity exists up to a certain point.").

161. *Id.* at 502–03.

In *Oyler v. Boles*,[162] the Supreme Court provided relatively little guidance on the question, implying only that selection "*deliberately* based upon an unjustifiable standard such as race, religion, or other arbitrary classification" would be enough to prove discriminatory enforcement.[163] Afterward, many courts, including those dealing with discriminatory enforcement of prostitution laws, looked to the Supreme Court's decision in *Snowden v. Hughes*[164] to interpret this formulation of "deliberate" discrimination[165]:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of *intentional* or *purposeful* discrimination.[166]

The Court in *Snowden* went on to state that intentional or purposeful discrimination "may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself."[167]

Courts differ widely on their interpretations of the test for intentional or purposeful discrimination, resulting in a patchwork of tests that vary from state to state both in terms of their elements and in terms of the difficulty a defendant will have in meeting them. The difficulty of meeting these tests is often tied to whether or not the court believes that the selective enforcement was based on sex.

The court in *State v. McCollum* rejected a test laid out in a previous decision that made it very difficult to prove discriminatory enforcement of a prostitution statute.[168] That test would require a defendant to show that "the failure to prosecute was *selective, persistent, discriminatory and without justifiable prosecutorial discretion*."[169] Instead, the court adopted the standard articulated in *Wayte v. United States*,[170] under which the defendant must show that the prosecution had a discriminatory effect and that it was motivated by a discriminatory purpose.[171] The *McCollum* court interpreted the discriminatory-effect part of the standard as analogous to the first

---

162. 368 U.S. 448 (1962).

163. *Id.* at 456 (emphasis added).

164. 321 U.S. 1 (1944).

165. Weissman, *supra* note 93, at 503.

166. *Snowden*, 321 U.S. at 8 (emphasis added).

167. *Id.* (citations omitted).

168. 464 N.W.2d 44, 48–49 (Wis. Ct. App. 1990).

169. State v. Johnson, 246 N.W.2d 503, 507 (Wis. 1976), *quoted in McCollum*, 464 N.W.2d at 48.

170. 470 U.S. 598 (1985).

171. *McCollum*, 464 N.W.2d at 48 (citing *Wayte*, 470 U.S. at 608).

element a defendant must prove to establish discriminatory enforcement: that similarly situated people are treated differently.[172] The *McCollum* court then determined that johns and prostitutes were similarly situated, that only the women were arrested, and that, therefore, the "state's program of enforcement had a discriminatory effect."[173] Turning next to the discriminatory-purpose part of the standard, the *McCollum* court determined that a report made by a police sergeant stating that the only purpose of his investigation was to arrest women suspected of prostitution was enough to establish discriminatory purpose.[174] This relatively low standard is remarkable, especially given the fact that the same sergeant, through his deposition testimony, attempted to establish that he also had focused on the men.[175] The women charged with prostitution were thus able to meet the burden of proof and the charges against them were properly dropped.[176]

In contrast to the *McCollum* court, the court in *People v. Superior Court of Alameda County*[177] adopted a two-element formulation of the defense of discriminatory enforcement: that the defendant has been "deliberately singled out for prosecution on the basis of some invidious criterion"; and "that the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities."[178] The *Superior Court* standard collapses all three elements of discriminatory enforcement in the first part of its standard and adds a fourth: that but for the discriminatory purpose of the police officers, the defendant would not have been arrested. This exceptionally high standard was used to deny a finding of discriminatory enforcement even though the defendants presented statistical evidence of the discrepancy in arrest rates between prostitutes and johns, evidence that the Oakland Police Department employed primarily male decoys to arrest women, evidence of six specific cases in which the prostitute was arrested and the john set free, evidence that the customary practice of the Oakland Police Department was to custodially arrest the prostitute while merely citing the john, and evidence that prostitutes, but not johns, were quarantined.[179] The fact that the court refused to find discriminatory enforcement when faced with all of this

172. *Id.* at 49.

173. *Id.* at 50.

174. *Id.* at 50–51.

175. *See id.* at 51.

176. *See id.* at 52 (affirming the lower court's decision to dismiss the charges against the defendants).

177. 562 P.2d 1315 (Cal. 1977).

178. *Id.* at 1320 (internal quotation marks omitted).

179. *See id.* at 1320–23 (discussing this evidence finding no constitutional infirmity in the police department's actions).

evidence to the contrary begs the question: if this evidence is not enough, how much more will it take?

The court in *Commonwealth v. An Unnamed Defendant*[180] followed a third test in evaluating discriminatory-enforcement claims: "that a broader class of persons than those prosecuted has violated the law, that failure to prosecute was either *consistent or deliberate*, and that the decision not to prosecute was based on an impermissible classification such as . . . sex."[181] The defendant in this case submitted evidence of prostitution arrests by the Brockton police, her affidavit stating that the police arrested her and not the john on one occasion[182] and the testimony of a Brockton police detective regarding the department's policy on making prostitution arrests.[183] The court found that the defendant's evidence met the standard for discriminatory enforcement and the charges against her were properly dropped.[184]

In order to make the defense of discriminatory enforcement available to more defendants, courts should reject tests like the one espoused by the court in *Superior Court* that set the standard of proof too high. By doing so, these courts essentially take a defense off the table to which these defendants have a constitutional right. Instead, courts should adopt tests and standards of proof similar to those adopted by the *McCollum* and *Unnamed Defendant* courts. Specifically, courts should allow defendants to prove discriminatory intent with statistics that demonstrate disparities between the arrest and prosecution of prostitutes and johns; testimony from competent representatives of the police department as to discriminatory policies, including the exclusive use of male decoys, that result in higher numbers of arrests of prostitutes than johns, and testimony by the defendant herself that she was arrested on one or multiple occasions while the john was not. Indeed, one judge has gone one step further, refusing to hear cases against prostitutes when the police failed to arrest and prosecute the johns.[185]

---

180. 492 N.E.2d 1184 (Mass. App. Ct. 1986).

181. Commonwealth v. Franklin, 385 N.E.2d 227, 233–34 (Mass. 1978) (emphasis added) (citations omitted), *quoted in Unnamed Defendant*, 492 N.E.2d at 1188.

182. On this occasion, the defendant was performing a sex act with the male in a vehicle when she was arrested by the detective. *Unnamed Defendant*, 492 N.E.2d at 1186. The male was not arrested. *Id.*

183. The detective testified that "'ordinarily' the police do not arrest the driver of the vehicle, or 'radio ahead to another unit' to make an arrest. In cases where the vehicle is followed, and a 'sexual act is [found] going on,' only the female is arrested." *Id.* (alteration in original).

184. *Id.* at 1188.

185. Kandel, *supra* note 71, at 340.

C. Legitimate State Interests Do Not Sound in Sexism

The rationales that courts use to support their determinations that prostitutes and johns are not similarly situated are remarkably consistent across state lines and, indeed, are often the same rationales given by courts in other countries.[186] These rationales also double as support for holding that selective enforcement is, in fact, justified. Because these rationales carry such weight with so many courts, it is important that they be grounded in reality and not in sexism. Therefore, courts should scrutinize these justifications closely.

The first rationale has a long history and has been used by many courts across the country: police officers and prosecutors can legitimately focus their efforts on prostitutes because they are the "profiteers" in the transaction.[187] Judges who label all prostitutes "profiteers" make the mistake of attributing the experience of the call girl, who may truly be in control of what she does with whom, to all prostitutes. However, this reasoning completely ignores the prostitutes who do not keep all of the money they earn. Under this rationale, police officers should only focus on prostitutes in order to arrest the real profiteer in the transaction: the pimp.

These courts further mistakenly assume that identifying one party in the transaction as the profiteer renders that party more culpable and, therefore, deserving of punishment.[188] This reasoning ignores the real possibility that the john has an economic advantage over the prostitute. After all, he is the one with the disposable money to spend on commercial sex, while she may have resorted to prostitution out of necessity. In the case of prostitution, each party gives something to the other, and each gets something in return. Their acts are reciprocal, and in a broad sense, they are both profiting.

---

186. *See, e.g.*, Barbara Havelková, *Using Gender Equality Analysis to Improve the Wellbeing of Prostitutes*, 18 CARDOZO J.L. & GENDER 55, 76 (2011) (describing the South African case *State v. Jordan* 2002 (6) SA 642 (CC), in which a majority of the nation's Constitutional Court "found substantive differences between the prostitute and the client, which warranted making the prostitute the primary offender").

187. *See, e.g.*, *Ex parte* Carey, 207 P. 271, 274 (Cal. Dist. Ct. App. 1922) ("The fact that the fallen woman carries on the business of commercialized vice justifies whatever discriminations may be found in the statute.").

188. One court reasoned:

> The customer forms the base of the triangle; the prostitute, male or female, constitutes the largest class of profiteers; and at the apex are the pimp, the panderer, and the bar, restaurant, hotel and motel proprietors who knowingly derive profit from the vicious trade.
>
> In order to most efficiently utilize its limited resources, the vice control unit concentrates on the profit[]eers . . . with special emphasis on those at the apex of the illicit commerce.

People v. Superior Court of Alameda Cnty., 562 P.2d 1315, 1321 (Cal. 1977).

The second rationale for allowing the state to focus on the prostitute draws a parallel between the enforcement of prostitution laws and the enforcement of narcotics laws and gambling laws, all of which focus on the provider.[189] The supposed similarity between prostitution and the drug trade led one judge to write, "in many areas of unlawful activity, we concentrate upon the professionals engaging in the illegal business, rather than their customers; e.g., drugs and gambling. There is *no reason whatsoever* that compels prostitution to be treated differently."[190]

However, closer examination of prostitution as compared to drug transactions and gambling belies this claim. As Barbara Havelková points out, narcotics are highly addictive and pose significant dangers to the buyer,[191] risks in which the seller does not share. In direct contrast, the risks of prostitution are either distributed equally between seller and buyer (the risk of contracting a sexually transmitted disease), or the risks are mainly incurred by the seller (the risk of physical and sexual violence[192] and the risk that the client will refuse to wear a condom[193]). Some similarities between low-level drug sellers and street prostitutes may be drawn: both may be at the mercy of someone who has the authority to control their behavior, both may be addicted to one substance or many, and both may be poor. However, there are significant differences between those who buy drugs and those who buy sex. Clients in the drug trade are often addicts who may be disempowered themselves. The harms that they inflict are mostly suffered by the addicts themselves and their families. In contrast, johns are not necessarily powerless and have the clear ability to physically, emotionally, and sexually harm the prostitutes they hire. Many prostitutes

189. Blake v. State, 344 A.2d 260, 262 (Del. Super. Ct. 1975) ("The 'seller' is more strictly controlled and more severely punished in any number of criminal statutes."); United States v. Moses, 339 A.2d 46, 55 (D.C. 1975) ("It is not doubted that the major law enforcement efforts in enforcing the statute are directed against the sellers of sex—as is true in the enforcement of the narcotics laws, where sellers are the principal police targets."); State v. Gaither, 224 S.E.2d 378, 379 (Ga. 1976) (Hall, J., concurring specially) ("It does not violate equal protection guarantees for the legislature to criminalize the conduct of the seller but not the buyer of commercialized sex; the enforcement scheme is similar to that typically applied in liquor and drug statutes."); City of Minneapolis v. Buschette, 240 N.W.2d 500, 505 (Minn. 1976) (quoting approvingly the state's contention that "in many instances, the arrest of one seller will prevent more occurrences of [illegal] behavior . . . than the arrest of a number of buyers" and its comparison of narcotics enforcement and prostitution enforcement).

190. City of Columbus v. Leonard, No. 76AP-276, 1976 WL 190152, at *5 (Ohio Ct. App. Aug. 19, 1976) (Whiteside, J., concurring) (emphasis added).

191. Havelková, *supra* note 186, at 78.

192. *See id.* at 67 ("[T]he overwhelming majority of women in prostitution report repeated instances of verbal abuse, physical assault, and rape by both procurers and buyers. Cross-culturally, the prevalence of post-traumatic stress disorder ('PTSD') is at 78–80%, levels which are higher than those of Vietnam veterans . . . ." (footnote omitted)).

193. *See id.* at 78 (arguing that "[t]he only potential physical harm to the client from prostitution is that resulting from sexually transmitted diseases, and here, both sides of the transaction share the risk and the blame at least equally").

are hesitant to report instances of violence to the police because they fear arrest or, worse, abuse at the hands of the police officers themselves.[194] This enables johns to use a discriminatory system that favors the buyers of sex to brutalize prostitutes with near impunity. The result is that, for street prostitutes, violence becomes an expected part of the profession.[195]

The third rationale for limiting enforcement efforts to prostitutes, that prostitutes are the carriers of venereal disease, has a long and troubling pedigree. One case from 1922 exemplifies this logic and is atypical only for the raw sexism of its language:

> In truth, from the standpoint of public health they are sometimes referred to as pestilential and their places of abode as pest houses. . . . The fallen woman occupies a relation to society very analogous to that of the chronic typhoid carrier—a sort of clearing house for the very worst forms of disease. . . . That a woman carrying on the business denounced in the statute is a constant pathological danger no one would question. . . . [This] fact implies the right to seize the offender and detain her, not only for mere purposes of temporary quarantine, but for the laudable purpose of reclaiming her and destroying the probability of a subsequent renewal of the danger.[196]

One could explain this case away as an unfortunate artifact of the Progressive Era and the fervor for reform typical of that time period. However, more recent court decisions demonstrate that judges still deploy the logic, if not the language, of this rationale.[197] In *Reynolds v. McNichols*,[198] the court upheld a Denver "hold and treat" ordinance that authorized the detention in jail, examination, and treatment of one "reasonably suspected of having a venereal disease" due to that person's history of prior arrests for certain offenses, including prostitution.[199] In justifying the ordinance, the court explained, "the ordinance is aimed at the

194. Cooke & Sontag, *supra* note 10, at 471–72, 474.

195. *See id.* at 471–72 (describing several studies indicating that roughly 80% of female sex workers had experienced violence and several other studies showing that 20%–25% of female sex workers had reported violence at the hands of police).

196. *Ex parte* Carey, 207 P. 271, 274 (Cal. Dist. Ct. App. 1922).

197. In fact, fifty-five years after *Ex parte Carey*, the Supreme Court of California upheld the constitutionality of the practice of quarantining only women because "female prostitutes were more likely than their male customers to communicate venereal diseases." People v. Superior Court of Alameda Cnty., 562 P.2d 1315, 1323 (Cal. 1977).

198. 488 F.2d 1378 (10th Cir. 1973).

199. *Id.* at 1380, 1383.

primary source of venereal disease and the plaintiff, being the prostitute, was the potential source, not her would-be customer."[200] This logic ignores the fact that it is impossible for a prostitute, acting alone, to spread venereal disease. Furthermore, it ignores the greater culpability of the john who may go on to have sex with a woman—his wife or girlfriend—who has no notice that her partner may have recently contracted a disease. In contrast, a john who has sex with a prostitute—a stranger—would have notice of the heightened risk of contracting a disease and would be able to take necessary precautions.

VII. Conclusion

The discriminatory enforcement of laws targeting prostitution has a long pedigree that extends back to the period before prostitution was a distinct criminal offense.[201] Equally ancient are the justifications for bringing the force of the law down on prostitutes while letting the johns go free: prostitutes are fallen women, irredeemably lost, perpetrators of nocturnal vice, pest-house dwellers, profiteers, and outcasts.[202] Armed with these justifications, police officers get to work—conducting street sweeps; posing as johns in cars, clubs, and massage parlors; and offering actual johns, caught with their pants down, a deal: "testify against the girl and we'll forget all about you."[203]

The defense of discriminatory enforcement offers women charged with prostitution the important opportunity to force police departments to abandon these practices.[204] However, these women need the cooperation of the courts. A woman seeking dismissal of a prostitution charge on the ground of discriminatory enforcement already faces an uphill battle.[205] She must gather evidence of intentional and invidious selective enforcement, often through statistical evidence or police testimony.[206] This requires not only courage but also access to resources that women in this position, already disempowered and now facing a criminal prostitution charge, may not possess.[207]

Thus it is important that courts, given a defendant claiming discriminatory enforcement, seriously consider the evidence offered by the defendant and refuse to dismiss it or explain it away. By dropping prostitution charges against women who demonstrate discriminatory

200. *Id.* at 1383.
201. *See supra* subparts III(A)–(B).
202. *See supra* subpart VI(C).
203. *See supra* Part IV.
204. *See supra* subpart V(B).
205. *See supra* Part VI.
206. *See supra* subpart VI(B).
207. *See supra* note 98 and accompanying text.

enforcement, the courts have the opportunity to send a powerful message: that the laws of the United States are applied with an even hand, that prostitution is not just a woman's crime, and that johns, so long the silent and anonymous actor, are to be held equally accountable.

—Elizabeth M. Johnson