Official Indiscretions: Considering Sex Bargains with Government Informants

Susan S. Kuo[*]

TABLE OF CONTENTS

INTRODUCTION 1644
I. INFORMANT USE AND INTIMATE RELATIONSHIPS 1649
A. *Informant Use* 1649
B. *Litigation Involving the Use of Informants for Sex Tasks* 1653
II. INFORMANT TASKS 1659
A. *Typical Informant Tasks* 1659
B. *Sex Tasks Versus Typical Informant Tasks* 1662
III. LIMITS ON SEX BARGAINS 1667
A. *Constraints on Consent* 1668
B. *Safeguarding Consent* 1673
CONCLUSION: RECONSIDERING SEX BARGAINS 1680

[*] Associate Professor, Northern Illinois University College of Law; Vanderbilt University School of Law, J.D. (1994); Duke University, A.B. (1991). I would like to thank Mark Cordes, Lee Dryer, Cynthia Ho, Adele Morrison, LeRoy Pernell, Jason Richardson, Jon D. Richardson, Lawrence Schlam, Lorraine Schmall, and David Taylor for their comments on prior drafts of this Article. I also am indebted to Diana Law, Cathryn Streeter, and Dawn Weekly for their excellent research assistance. Finally, I would like to thank Robert T. Keen for generously providing copies of appellate briefs and supplementary materials.

INTRODUCTION

Something could be exchanged, we thought, some deal made, some tradeoff, we still had our bodies.[1]

In the ongoing war on crime, law enforcement officials draw on a considerable arsenal of combat techniques.[2] One new crime-fighting tactic is the explicit assignment of sex tasks to informants by their handlers.[3] With this new addition to their investigative weaponry, law enforcement officials appear to be waging a new kind of guerilla warfare on crime. This investigatory practice, however, is questionable in view of legal and ethical concerns discussed in this Article and may produce harmful consequences for informants.

An example of this practice, and court consideration of its use, is illustrated in the recent case of *Alexander v. DeAngelo*.[4] Facing two counts of conspiracy to deal cocaine, Amy Gepfert became a confidential informant for the City of Fort Wayne Police Department in the hopes of avoiding jail time.[5] Police handlers confirmed her acquaintance with Nathan D. Alexander, a city police officer who was the target of an investigation for suspected criminal dealings,[6] and informed her that she was facing forty years of imprisonment unless she agreed to help authorities trap him.[7] Discouraged from contacting an attorney, Gepfert decided to cooperate.[8] The investigators asked her to engage in a sexual act with Alexander for the purpose of enabling the officers to charge him with the crime of patronizing a prostitute.[9] Specifically, she was to

---

[1] MARGARET ATWOOD, THE HANDMAID'S TALE 4 (First Anchor Books 1998) (1986).

[2] *See* United States v. Ramirez, 710 F.2d 535, 541 (9th Cir. 1983) ("[T]he government may use artifice and stratagem to ferret out criminal activity.").

[3] For a description of this practice, see *infra* notes 4-10, 58-70 and accompanying text.

[4] 329 F.3d 912 (7th Cir. 2003).

[5] Memorandum of Decision and Order at 2-3, Alexander v. DeAngelo, Case No. 1:01-CV-137 (N.D. Ind. 2002) (on file with author) [hereinafter Memorandum]. A local drug task force investigating Gepfert and Gepfert's friend, Jennifer Silvers, for possible illicit drug activity dispatched an undercover agent who gave money to Gepfert to purchase cocaine for him. *Id.* at 2. In return for her efforts, Gepfert was to keep some of the money. She was unsuccessful in her attempt and returned the money to the officer. *Id.* at 3. Silvers also signed up as an informant. *Id.*

[6] *Id.* at 1-2. Internal Affairs officials suspected Alexander of participating in illegal drug sales, prostitution, and the selling of stolen merchandise. *Id.* at 2. Gepfert told the officers that she had previously been romantically involved with Alexander, but that the relationship had ended a month earlier. *Id.* at 3; *Alexander*, 329 F.3d at 914.

[7] *Alexander*, 329 F.3d at 914.

[8] Gepfert asked to speak with a lawyer, but the officers discouraged her from doing so, asserting that *they* were "the attorneys." *Id.* at 915.

[9] The officers asked Gepfert whether she had ever received money from Alexander on

attempt to engage in oral sex with Alexander, in return for money.[10]

Upon Gepfert's successful completion of her assignment,[11] Alexander was arrested and charged with various offenses, including soliciting a prostitute.[12] Gepfert was never charged with any offense.[13] Nevertheless, she filed suit against her handlers and the City of Fort Wayne, claiming a violation of her federal civil rights.[14]

The district court found no civil rights violation,[15] but the appellate court sided with Gepfert in finding that her allegations supported a claim of battery and were actionable pursuant to section 1983 for a violation of her due process rights.[16] In upholding Gepfert's constitutional claim, the court focused on the officers' threats to put her away for forty years if she refused to assist them. Because of factors such

---

days that she and Alexander had had sexual relations. Memorandum, *supra* note 5, at 4. In the alternative, the officers asked whether Gepfert and Alexander had ever talked about money on days that they had engaged in sex. Gepfert recalled that they may have talked about money — once for food, once for getting a manicure — on days that they had been sexually intimate. *Id.* She also recalled a particular occasion on which she and Alexander had had sexual relations and on which Alexander had given her money so that she could get a manicure, and recollected that Alexander owed her money for a manicure. Memorandum, *supra* note 5, at 4. The parties dispute whether this money was owed in return for sex. *Id.*

[10] Memorandum, *supra* note 5, at 4. Silvers also asserts that the officers asked her to engage in oral sex with Alexander, but that she refused the assignment because her relationship with Alexander was such that Alexander would become suspicious if she were to attempt such interaction. *Id.* at 3 n.7.

[11] The officers outfitted Gepfert with a recording device for the meeting with Alexander. *Id.* at 5. They also provided her with a napkin and instructed her to spit Alexander's semen into it to preserve physical evidence of the sexual encounter. *Id.*; *Alexander*, 329 F.3d at 915. Gepfert and Alexander met at a BP gas station, where Alexander was working security in his patrol car. The sexual contact occurred in Alexander's patrol car. Memorandum, *supra* note 5, at 5. Alexander gave Gepfert $17.00 — $7.00 before the sexual act and $10.00 afterwards. Gepfert asked for the money to get her nails done. Because the hour was late, Alexander asked where she was planning to get the manicure, and she answered that she needed the money for food and "stuff." *Id.*

[12] Memorandum, *supra* note 5, at 6. Alexander was also charged with perpetrating corrupt business influence, conspiracy to commit theft, obstruction of justice, and the unauthorized sale or distribution of cable TV devices. *Id.* The charges against Alexander were ultimately dropped. *Id.* Although the defendants contend that the charges were dropped because Gepfert and other of the state's witnesses refused to cooperate further, the plaintiffs maintain that the charges were dropped because they were fabricated. *Id.* at 6-7. Due to his arrest, Alexander lost his job as a Fort Wayne police officer. Brief for Appellant at 9, Alexander v. DeAngelo, Case No. 1:01-CV-137 (N.D. Ind. 2002) (No. 02-3124) (on file with author).

[13] *Alexander*, 329 F.3d at 915.

[14] Gepfert and Alexander jointly filed suit against Officers DeAngelo and Hannaford and the City of Fort Wayne. *Id.* at 914.

[15] Memorandum, *supra* note 5, at 21-28.

[16] *Alexander*, 329 F.3d at 916-18.

as the small quantity of cocaine at issue in the allegations against her and her lack of a criminal record, a potential charge against Gepfert carried at most a sentence of only ten years.[17] The court noted that "a false threat of lengthy imprisonment is a form of coercion that can vitiate consent to sex and turn the sex into battery."[18] Though the panel observed that the employment of trickery is an accepted law enforcement tool, the use of deceit becomes intolerable when it precludes a defendant from making a rational decision.[19] Finding that Gepfert was deliberately and grossly deceived about the costs of her refusal to engage in sex as part of the sting operation, the court determined that the fraudulent threats of excessive imprisonment rendered invalid her consent to the sexual acts. Accordingly, the court held that Gepfert's allegations supported a claim of rape under color of state law.[20]

Although the court held that Gepfert's civil rights had been violated, it commented that "inducing a confidential informant to engage in sex as part of a sting operation does not always give rise to a claim under section 1983."[21] That the conduct required of Gepfert differed from the more typical informant assignment, in which the informant buys or sells illegal drugs as part of a sting operation, was irrelevant.[22] Rather, the court intimated that sexual conduct was interchangeable with other types of informant assignments and that the proposal made by the police officers in the present case was objectionable solely because of the extreme use of deceit to procure Gepfert's consent.[23] Asserting that

---

[17] *Id.* at 917.

[18] *Id.* At most, Gepfert could have been found guilty of a class B felony under the Indiana criminal code, for which the maximum possible sentence is 10 years. Moreover, considering the mitigating circumstances present in this case, this sentence could have been reduced to six years of imprisonment. *Id.*

[19] *Id.* at 917-18 ("[A] law-enforcement agent may 'actively mislead' a defendant in order to obtain a confession, so long as a rational decision remains possible." (citing United States v. Rutledge, 900 F.2d 1127, 1131 (7th Cir. 1990))).

[20] *Id.* at 916-18. Nonetheless, although Gepfert won the battle, she lost the war: the court ultimately determined that the defendants were shielded by the doctrine of qualified immunity. *Id.* at 918-19. Accordingly, Gepfert was unable to collect any damage awards for her civil rights triumph.

[21] *Id.* at 918.

[22] *Id.*

[23] *Id.* ("The rub here is that Gepfert . . . was intentionally and indeed grossly deceived about the benefits and costs of the distasteful act in which she was asked to engage."). Having established this, however, the court went further to curtail even this limitation by qualifying "intentionally and indeed grossly deceived." Specifically, the court noted that law enforcement personnel would not be expected to be "experts in the intricacies of the nearly unfathomable federal sentencing guidelines or comparable intricacies in state sentencing regimes" and that mere misstatements about a potential sentence would not necessarily constitute actionable fraud. *Id.*

"confidential informants often agree to engage in risky undercover work in exchange for leniency," the court refused to create "a categorical prohibition" against the use of informants for sexual investigative tasks.[24]

This induction of individuals onto the informant rolls for the purpose of carrying out sex tasks raises both legal and moral concerns and warrants a closer look at these sex bargains. This is not to say, however, that sex bargains are per se illegal. To submit that adult individuals cannot consent to sexual matters concerning their own bodies seems needlessly paternalistic[25] and ignores the fact that many persons actively seek to become informants.[26] In addition, courts and legislatures have embraced government informant use in general, setting aside attacks on pacts made by suspects with law enforcement officials, such as informant agreements and plea bargains.[27] Consequently, this Article

---

[24] *Id.* (refusing to create "a categorical prohibition against the informant's incurring a cost that takes a different form from the usual risk of being beaten up or for that matter bumped off by a drug dealer with whom one is negotiating a purchase or sale of drugs in the hope of obtaining lenient treatment from the government").

[25] *Cf.* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) (defending use of contract law to implement distributional goals); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 766 (1983) ("Making an entitlement inalienable is a draconian, but sometimes efficient, way to protect its possessor against fraud or deception. . . ."); Eval Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229 (1998) (evaluating and explaining efficiency of paternalistic policies).

[26] *See infra* notes 147-52 and accompanying text.

[27] *See, e.g.*, United States v. Gladney, 563 F.2d 491 (1st Cir. 1977) (holding that informant's cooperation in return for promise of lenient treatment does not render consent involuntary); United States v. Hodge, 539 F.2d 898 (6th Cir. 1976) (same); United States v. Bonanno, 487 F.2d 654 (2d Cir. 1973) (same); United States v. Dowdy, 479 F.2d 213 (4th Cir. 1973) (same); United States v. Acavino, 467 F. Supp. 284 (D.C. Pa. 1979) (same); *see also Guilty Pleas*, 91 GEO. L.J. ANN. REV. CRIM. P. 362, 388 n.1289 (2003) (listing numerous cases in which courts have upheld pleas obtained through mental or psychological coercion of defendant). *But see* Commonwealth v. Clark, 502 A.2d 1375 (Pa. Super. 1985) (finding that informant's consent to wiretap was obtained following unfair bargain). *See also* Richard A. Epstein, *Are Values Incommensurable, or is Utility the Ruler of the World?*, 1995 UTAH. L. REV. 683, 693 (rejecting argument that incommensurability of exchanged goods does "violence to ordinary perceptions of how people think and relate to each other"); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999) (discussing court approval of free trade in constitutional and statutory rights that occurs in criminal litigation process); Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181, 1237 (1996) ("[I]n a criminal justice system in which plea bargaining is the dominant mode of adjudication, the chief significance of a much vaunted constitutional right may lie in its value as a bargaining chip . . . ."). *But see* Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987) (discussing incommensurability of exchanged goods as justifying inalienability); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (examining several traditional arguments for prohibiting alienation of constitutional rights — coercion, corruption, commodification, and distribution — and advocating distributive concerns as sound basis for doctrine of unconstitutional conditions).

contemplates sex bargains with government informants within this permissive environment created by legislatures and courts.

This Article addresses the practice of requiring an informant to engage in sex activities with another individual for the purpose of furthering criminal law enforcement goals. In particular, this Article considers official conduct in negotiating these agreements and when this conduct jeopardizes an informant's ability to give effective consent to a sex task. Part I supplies necessary background material for this discussion by describing the use of government informants in combating crime and providing an overview of cases discussing the assignment of sex tasks to informants. Part II determines whether sex bargains are different from other agreements made between informants and law enforcement officials by contrasting sexual assignments with more conventional informant responsibilities. This Part adopts an interdisciplinary approach by drawing on sociological studies of the commercial sex industry to facilitate a comparison of sex tasks and ordinary informant tasks.[28] Although Part II reveals that sex tasks and other informant tasks possess some similar traits, Part III questions an individual's ability to provide valid consent to a sex task given the coercive setting for brokering these agreements and the disparity in the bargaining strengths between an informant and her handler. Sexual interaction in the absence of consent can convert sex into the battery of rape;[29] a rape under color of state or federal law deprives the victim of liberty without due process of law.[30] Accordingly, this part espouses the need to place limits on these

---

In contrast, persuasive arguments for prohibiting informant agreements have been ignored. For example, the lack of legislatively delegated authority to the police to seek a reduction in charge or to refrain from arresting a suspect has failed to convince either branch to scrutinize informant agreements or official actions in negotiating these agreements. *See* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 543 (1960) (advocating that "an opportunity for review and appraisal of non-enforcement decisions is essential to the functioning of the rule of law" in our criminal justice system). Nor has criticism of the quality of police policy-making effected much change in informant-handler dynamics. *See* Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703 (1974) (calling for open policy-making on part of police).

[28] This section also concentrates primarily on female informants because existing case law indicates that informants performing sexual acts are primarily women, but is equally germane to the situations of male informants.

[29] *See* Alexander v. DeAngelo, 329 F.3d 912, 917 (7th Cir. 2003) (finding that coercion can turn sex into battery or rape).

[30] *See, e.g., id.* at 916 (holding that rape committed under color of state law is actionable under Due Process Clause of Fourteenth Amendment). A rape committed under color of federal law would be actionable under the Due Process Clause of the Fifth Amendment. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing cause of action against government officials for constitutional

types of indecent proposals and suggests ways to safeguard consent. In conclusion, this Article takes issue with the practice of sex bargaining and gives voice to moralistic concerns that call into question the use of informants for sexual tasks.

I. INFORMANT USE AND INTIMATE RELATIONSHIPS

I am a national resource.[31]

A. Informant Use

Law enforcement use of the confidential informant as an investigative tool "is as old as man."[32] Although secrecy shrouds specific details of informant use,[33] general information indicates that the practice is widespread in both federal and state law enforcement.[34] Informants are

---

violations).

[31] ATWOOD, *supra* note 1, at 65.

[32] MALACHI L. HARNEY & JOHN C. CROSS, THE INFORMER IN LAW ENFORCEMENT 18 (2d ed. 1968) (quoting J. Edgar Hoover). According to Hoover, "[T]he first recorded use of the confidential informant is found in the Old Testament." *Id.* The early English common law shows that informant use dates back to the development of the criminal justice system. *See* Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 152-67 (1994) (providing history of approver and informant use in England and introduction of English informer system in United States). *See generally* JACK MORRIS, POLICE INFORMANT MANAGEMENT § I, at 1 (1983) (describing how informant use dates back to earliest days of police); Larry E. Rissler, *The Informer's Identity at Trial*, 44 FBI L. ENFORCEMENT BULL. NO. 2, 21 (1975) (stating that police have utilized informants since earliest days of law enforcement history).

[33] A recent case explains the reasons for this lack of knowledge about informant activity:

> The most distinctive feature of an agent's relationship with a confidential informant . . . is its absolute secrecy. In the ordinary case, the benefits conferred on the informant are known only to the agency, and usually only to the contact agent and her supervisor. The informer's privilege shields the entire relationship, let alone its details, from public scrutiny.

United States v. Doe, No. 96 CR 749(JG), 1999 WL 243627, at *6 (E.D.N.Y. Apr. 1, 1999). The secrecy surrounding informant use is tied to the need to protect the identity of the informant so as to safeguard him from harm meted out by those he seeks to expose. McCray v. Illinois, 386 U.S. 300, 312-13 (1967) (rejecting notion that informant's identity must always be disclosed in preliminary hearing to determine probable cause for arrest or search); Roviaro v. United States, 353 U.S. 53, 59 (1957) (upholding government privilege with respect to withholding informant identity at trial).

[34] HARNEY & CROSS, *supra* note 32, at 14 (stating that "the informer is valuable to the police in practically every spectrum of crime"); Dennis G. Fitzgerald, *Inside the Informant File*, 22 MAY CHAMPION 14, 14 (1998). What is more, the practice is increasing. Mark Curriden, *Making Crime Pay*, 77 A.B.A. J. 42, 43 (1991) (discussing rise in use of confidential

considered to be vital in policing so-called "invisible offenses," crimes lacking specific victims or crimes in which victims rarely come forward to complain, such as prostitution, drug trafficking, and gambling.[35] Informants are also employed in investigating activities frequently linked to organized crime, such as protection rackets, loansharking, and extortion.[36]

Informants assist law enforcement in apprehending suspected criminals, halting ongoing criminal activity, and preventing crime.[37] They afford these benefits by providing or corroborating information and by carrying out tasks or engaging in activities that aid officers in detecting wrongdoing.[38] The information that they provide is often more accurate and comprehensive than information gathered from other sources and can jumpstart investigations.[39] Some informants are positioned so as to be able to introduce undercover agents to persons or into criminal organizations;[40] others aid by carrying out or enabling criminal transactions for the purpose of advancing law enforcement's continuing battle against crime.[41]

---

informants); Thomas A. Mauet, *Informant Disclosure and Production: A Second Look at Paid Informants*, 37 ARIZ. L. REV. 563, 563-64 (1995) (arguing that informant use is pervasive and increasing and citing *The Police Informant*, THE ANGOLITE, Dec. 1980, at 25).

[35] James R. Farris, *The Confidential Informant: Management and Control, in* CRITICAL ISSUES IN CRIMINAL INVESTIGATION 29 (Michael Palmiotto ed., 1984) ("Illicit drug operations, criminal conspiracies, organized criminal activity, business/corporation frauds, political crimes and a myriad of other crimes defy solution without the use of pro-active police tactics . . . . [including] the use of the confidential informant."); Evan Haglund, Note, *Impeaching the Underworld Informant*, 63 S. CAL. L. REV. 1405, 1411 (1990) (noting that informants are usually used in "so-called 'victimless' crimes — narcotics, gambling, prostitution, and tax-evasion"); Mark H. Moore, *Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement, in* ABASCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT 17, 21-23 (Gerald M. Caplan ed., 1983); *see also* United States v. Russell, 411 U.S. 423, 432 (1973) (noting that "in drug related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful . . . practices"); United States v. Twigg, 588 F.2d 373, 380 (3d Cir. 1978) ("Infiltration of criminal operations by informers and undercover agents is an accepted and necessary practice.").

[36] Moore, *supra* note 35, at 22. Victims of racketeering, loansharking, and extortion are often reluctant to report their injuries. *Id.*

[37] MICHAEL D. LYMAN, PRACTICAL DRUG ENFORCEMENT 132 (1989); MORRIS, *supra* note 32, § I, at 6. *See generally* Michael F. Brown, *Criminal Informants: Some Observations on Use, Abuse, and Control*, 13 J. POLICE SCI. & ADMIN. 251 (1985).

[38] LYMAN, *supra* note 37, at 132; MORRIS, *supra* note 32, § I, at 6.

[39] LYMAN, *supra* note 37, at 132; MORRIS, *supra* note 32, § I, at 6.

[40] *See, e.g.*, Hobson v. Wilson, 737 F.2d 1, 10, 21 (D.C. Cir. 1984) (addressing use of informants to infiltrate antiwar groups), *cert. denied sub nom.*, 470 U.S. 1084 (1985).

[41] *See, e.g.*, United States v. Brown, 635 F.2d 1207, 1213 (6th Cir. 1980) (discussing informant participation in criminal activity for purpose of gaining confidence of those involved in criminal enterprise). *See* Richard C. Donnelly, *Judicial Control of Informants,*

The pervasiveness of informant use and its attendant clandestine and deceptive nature have inevitably led to legal challenges.[42] For example, defendants have attacked the use of government informers as offensive to "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[43] Others have challenged the sufficiency of information supplied by anonymous informants as a basis for the reasonable suspicion required for a stop[44] and for the probable cause necessary to obtain a search warrant;[45] the inability to access informants whose identities are privileged;[46] and the practice of paying or otherwise rewarding informants for their assistance or cooperation.[47] Still others

---

Spies, Stool Pigeons, and Agent Provocateurs, 60 YALE L.J. 1091, 1092-93 (1951) (discussing various informant roles).

[42] Commentators have criticized the use of informants as well. *See, e.g.*, Dolores A. Donovan, *Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments*, 33 BUFF. L. REV. 333, 336 (1984); Goldstein, *supra* note 27, at 562-73; Haglund, *supra* note 35, at 1440-41; Robert L. Misner & John H. Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713, 716 (1977); Bruce D. Pringle, Comment, *Present and Suggested Limitations on the Use of Secret Agents and Informers in Law Enforcement*, 41 U. COLO. L. REV. 261, 279 (1969); Zimmerman, *supra* note 32, at 152-67; Note, *Judicial Control of Secret* Agents, 76 YALE L.J. 994, 1012-13 (1967). The historian Sir Erskine May adroitly sums the typical sentiments of detractors of informant practice:

> [T]o retain in government pay and to reward spies and informers, who consort with conspirators as their sworn accomplices and encourage while they betray them in their crimes, is a practice for which no plea can be offered. No government, indeed, can be supposed to have expressly instructed its spies to instigate the perpetration of crime; but to be unsuspected, every spy must be zealous in the cause which he pretends to have espoused; and his zeal in a criminal enterprise is a direct encouragement of crime. So odious is the character of a spy, that his ignominy is shared by his employers, against whom public feeling has never failed to pronounce itself, in proportion to the infamy of the agent and the complicity of those whom he served.

2 SIR THOMAS ERSKINE MAY, CONSTITUTIONAL HISTORY OF ENGLAND 277-78 (1882).

[43] Hoffa v. United States, 385 U.S. 293, 310-11 (1966).

[44] *See, e.g.*, People v. Polander, 41 P.3d 698, 703 (Colo. 2001) (allowing anonymous tip to support reasonable suspicion where information "contains, and the police corroborate, not easily obtained, predictive detail").

[45] *See, e.g.*, Florida v. J.L., 529 U.S. 266, 272 (2000) (holding that tip must be "reliable in its assertion of illegality"); Alabama v. White, 496 U.S. 325, 330 (1990) (holding that "quantity and quality" of anonymous information may be considered in examining totality standard); Illinois v. Gates, 462 U.S. 213, 230 (1983) (adopting "totality of the circumstances test" with respect to use of anonymous informants to justify searches and seizures).

[46] *See, e.g.*, Roviaro v. United States, 353 U.S. 53 (1953) (upholding governmental privilege to withhold identity of confidential informant).

[47] *See, e.g.*, McLawhorn v. North Carolina, 484 F.2d 1, 7 n.18 (4th Cir. 1973) (recognizing that economic self-interest of informants in arrest of defendant may result in actions that increase risk of entrapment); *see also* Thomas A. Mauet, *Informant Disclosure and Production:*

have raised claims of government entrapment and outrageous governmental conduct in conjunction with informant use.[48] Yet when faced with the importance of informants to the overall goals of law enforcement, courts have generally upheld government use of informants.[49] Furthermore, the United States Supreme Court has

---

A Second Look at Paid Informants, 37 ARIZ. L. REV. 563, 569-73 (1995) (explaining government's incentive to "lose track" of informants after arrest and before defendants can interview them for purpose of good faith defenses).

[48] The affirmative defense of entrapment and the claim of "outrageous governmental misconduct" are the major vehicles for contesting the conduct of law enforcement agents. *See* Barry Tarlow, *RICO Report*, 23 MAR. CHAMPION 35, 38-40 (1999); Andrea B. Daloia, Note, *Sexual Misconduct and the Government: Time to Take a Stand*, 48 CLEV. ST. L. REV. 793, 815-24 (2000); Penelope R. Glover, Note, *Re-Defining Friendship: Employment of Informants by Police*, 72 U. COLO. L. REV. 749, 759-61 (2001). The defenses are frequently raised together. Entrapment is a judicially created defense; the defense of outrageous conduct stems from the United States Constitution. *See* United States v. Borum, 584 F.2d 424, 427 (D.C. Cir. 1978) (describing defense of entrapment as judge-made defense); Catherine Baker Stetson, *Outrageous Conduct: A Fifth Amendment Due Process Defense*, 5 CRIM. JUST. J. 55, 67 (1981) (setting forth differences between outrageous conduct and entrapment). To show entrapment a defendant must demonstrate that the government used persuasion, trickery, or fraud to convince the defendant to commit the crime and that the criminal design originated not in the mind of the defendant, but in the minds of law enforcement. *See, e.g.*, Sherman v. United States, 356 U.S. 369, 376-78 (1958) (finding that defendant was entrapped by informant pretending to be recovering addict in great suffering to persuade defendant to obtain illegal narcotics for him). *But see* United States v. Russell, 411 U.S. 423, 431-32 (1973) (finding no entrapment where agent supplied chemicals and requested production of illegal drugs from ongoing operation). The outrageous government conduct claim must successfully establish that the government's actions were so outrageous as to violate the defendant's due process rights. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (noting that conduct at issue must "shock the conscience"); *see also* United States v. Twigg, 588 F.2d 373, 380-81 (3d Cir. 1978) (holding outrageous informant's actions in contacting defendants to set up illegal drug laboratory for which informant provided equipment, materials, and site, and in producing drug with minimal assistance from defendants); Greene v. United States, 454 F.2d 783, 786-87 (9th Cir. 1971) (holding outrageous government agent's conduct in pressuring defendants into re-establishing their bootlegging operation when agent was only customer in two-year operation). *But see, e.g.*, United States v. DeSapio, 435 F.2d 272 (2d Cir. 1970) (declining to find outrageous government's knowledge of informant's actions in extorting money to induce official action from defendant, which ultimately led to charges of corruption against defendant). Success in raising either defense warrants dismissal of the indictment against the defendant. Stephen Michael Everhart, *The Clinton Case and the "Exculpatory No" Bar to Prosecution?*, 108 PA. ST. L. REV. 727, 739-46 (2004).

[49] Reflecting on judicial sanction of informant use, Judge Learned Hand wrote: "Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because criminals will almost certainly proceed covertly." United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950), *aff'd*, 341 U.S. 863 (1951) (Hand, J.) (reviewing challenge to prosecutor's use of informant testimony at trial).

Notwithstanding the importance of informant use, the mishandling of informants and the misconduct attributed to informants are well documented. Informant use has

explicitly approved of the practice, holding that "the use of secret informers is not per se unconstitutional."[50]

B. Litigation Involving the Use of Informants for Sex Tasks

In recent years, the courts have seen an increase in claims challenging the use of sexual acts or romantic promises by informants in investigations and sting operations.[51] These sexual activities are primarily designed to encourage the investigatory target, presumably besot with amative feelings, to participate in unlawful activities or to acquire information to be used against the target in a future prosecution.[52] By and large, the persons objecting to this practice are the

---

resulted in various harms to innocent third parties, including: false arrests stemming from faulty information provided by informants, *see, e.g.*, Ted Rohrlich & Robert W. Stewart, *Jailhouse Snitches: Trading Lies for Freedom*, L.A. TIMES, Apr. 16, 1989, § 1, at 30 (jailhouse informant provided at least 12 false confessions to obtain rewards); prosecutions and convictions based on informant perjury, *see, e.g.*, Ted Rohrlich, *Jail Informant Owns Up to Perjury in a Dozen Cases*, L.A. TIMES, Jan. 4, 1990, at A24; and criminal activity carried out by informants with the knowledge and, occasionally, consent of law enforcement officers, *see, e.g.*, Bergman v. United States, 5651 F. Supp. 1353 (W.D. Mich. 1983) (informant participated in numerous crimes, including murder, shootings, attacks, and bombing of African-American Church that resulted in four deaths). At times, these abuses have resulted in litigation; at other times, internal investigations within law enforcement. Most often, these abuses go unaddressed. *See generally*, Zimmerman, *supra* note 32.

[50] Hoffa v. United States, 385 U.S. 293, 311 (1966) (addressing defendant's general attack on use of government informant as being "a shabby thing in any case"). In *Hoffa*, the Court determined that Hoffa's misplaced belief in the confidentiality of his conversations with his friend deserved no protection under the Fourth Amendment and, instead, was a risk "inherent in the conductions of human society." *Id.* at 303. Five years later, the Court extended this risk doctrine to encompass conversations between a defendant and a government informant that were overheard by federal agents by means of a concealed radio transmitter worn by the informer. United States v. White, 401 U.S. 745, 751-54 (1971).

[51] Tarlow, *supra* note 48, at 38. These cases have generated a number of student articles addressing defendants' due process rights in the face of sexual conduct by informants and agents. *See, e.g.*, Daloia, *supra* note 48; Richard Lawrence Daniels, Note and Comment, *United States v. Simpson: "Outrageousness!" What Does It Really Mean? —An Examination of the Outrageous Conduct Defense*, 18 SW. U. L. REV. 105 (1988); Earl N. Doucet, Note, United States v. Simpson *and the Due Process Challenge of Outrageous Conduct*, 10 GEO. MASON L. REV. 547 (1988); Glover, *supra* note 48; Karen Mausser Poole, Note, *When Use of the Entrapment Defense Is Barred: Is There a Viable Alternative Defense?* United States v. Simpson, *813 F.2d 1462 (9th Cir.), cert. denied, 108 S. Ct. 233 (1987)*, 5 COOLEY L. REV. 203 (1988); Rachael Urbansky, Note, *Seducing the Target: Sexual Intercourse as Outrageous Government Conduct*, 50 CASE W. RES. L. REV. 729 (2000).

[52] *See, e.g.*, United States v. Gamache, 156 F.3d 1 (1st Cir. 1998) (involving sexual conduct intended to elicit from defendant admissions and acts indicating desire to engage in sexual activities with agent's minor children); United States v. Nolan Cooper, 155 F.3d 221 (3d Cir. 1998) (involving sexual conduct intended to induce defendant to agree to perform money-laundering services); United States v. Cuervelo, 949 F.2d 559 (2d Cir. 1991) (involving sexual conduct intended to seduce defendant into acting as intermediary with

targets themselves.[53] Most courts addressing these claims have been reluctant to dismiss criminal indictments based on sexual conduct by government informants or undercover officers,[54] but some have held in favor of challenges to sexual behavior.[55]

---

associates involved in drug-trafficking).

[53] *See* Tarlow, *supra* note 48, at 38-40 (discussing cases in which defendants challenge sexual conduct of informants or undercover officers); *see also* law review articles cited *supra* note 51 and cases cited *infra* note 54.

[54] *See, e.g.*, Alexander v. DeAngelo, 329 F.3d 912 (7th Cir. 2003) (rejecting defendant's claims and disregarding government's complicity in sexual conduct that transpired between informant and defendant); *Nolan-Cooper*, 155 F.3d at 233-35 (rejecting defendant's claims of outrageous conduct based on single sexual encounter with agent); United States v. Miller, 891 F.2d 1265 (7th Cir. 1989) (rejecting defendant's claims of misconduct where officials employed defendant's former girlfriend as informant); United States v. Fadel, 844 F.2d 1425 (10th Cir. 1988) (implicitly affirming district court's rejection of defendant's outrageous conduct claim to informant's sexual conduct); United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987), *cert. denied*, 484 U.S. 898 (1987) (overturning district court's ruling that informant's use of sex to gain defendant's confidence was not so outrageous as to violate Due Process Clause); United States v. Shoffner, 826 F.2d 619 (7th Cir. 1987), *cert. denied*, 484 U.S. 958 (1987) (rejecting defendants' challenges to informant's sexual conduct); State v. Tookes, 699 P.2d 983 (Haw. 1985) (finding no constitutional violation arising from use of sex by informant); Ohio v. Doran, 1984 WL 5130 (Ohio Ct. App. June 6, 1984) (unpublished) (rejecting defendant's claims of outrageousness based on informant's sexual conduct); State v. Putnam, 639 P.2d 858 (Wash. App. 1982) (rejecting claims of entrapment and deprivation of due process arising from sexual acts of informant).

Courts are particularly disinclined to find in favor of claimants when the sexual conduct in dispute was neither requested nor encouraged by government officials. *See, e.g.*, *Miller*, 891 F.2d at 1286 (finding no evidence to indicate that officials "ever encouraged [the informant] to use sex as a weapon in their investigation of [the defendant's] drug activities"); *Simpson*, 813 F.2d at 1466-67 (establishing that government had played no role in challenged sexual conduct); *Shoffner*, 826 F.2d at 626 (noting that informant's sexual behavior was not attributable to government).

[55] *See, e.g.*, Washington v. Lively, 921 P.2d 1035 (Wash. 1996) (finding outrageous informant's actions in engaging in sexual relationship with defendant); People v. Hillary, 28 Cal. Rptr. 2d 415, 419 (Ct. App. 1994) (condemning "[p]olice inducements which play on 'base' emotions" but ruling against defendant's entrapment claim because defendant had testified that "when he saw [the agent], he no longer desired to have sex with her"); State v. Banks, No. 85-1715, 1986 Fla. App. LEXIS 11526, at *4 (Ct. App. 5th Dist. 1986) ("Sex is much too strong and effective an inducement to be used as bait to catch only those with a predisposition to engage in specific criminal activity."); *see also* Tarlow, *supra* note 48, at 39 ("The state courts . . . have taken a less forgiving approach to law enforcement agents, including confidential informers straying into forbidden sexual territory."). When the government bears direct responsibility for the sexual interaction courts appear disposed toward attributing culpability to the government actors. *See, e.g.*, *Cuervelo*, 949 F.2d at 567 (setting forth three factors to aid in determining extent of government culpability for officer's sexual conduct, including whether government consciously set out to accomplish sexual conduct and whether government initiated conduct); *Nolan-Cooper*, 155 F.3d at 233-34 (applying *Cuervelo* factors to defendant's challenge to officer's sexual conduct). But an exception to this exists: courts, by and large, have permitted the use of sex to gather information by government informants and officers when the crime under investigation is prostitution. *See, e.g.*, *Alexander*, 329 F.3d at 915 (allowing use of sex in prostitution sting);

Limited case law exists in which courts have examined challenges brought by informants objecting to offers of dropped or reduced charges in exchange for carrying out investigatory assignments that require sexual conduct.[56] Considering that, in most reported cases, the informant has acted on his or her own initiative in engaging in the sexual conduct at issue, the lack of case law may be unsurprising.[57] In addition to these cases, a few courts considering challenges brought by investigatory targets have also criticized the conduct of government officials toward their informants in assigning tasks that resulted in sexual behavior.

One case addressing an official request for sexual conduct by an informant is *Martin v. Covington, Kentucky*,[58] in which a minor informant brought a civil rights action against the City of Covington and Covington police contesting the actions of the officers in compelling him to engage in sexual solicitation on a city street.[59] The plaintiff was "in difficulties concerning drugs" and was forced into performing these activities.[60] His compulsory endeavors were part of a concentrated effort by law enforcement "to capture adult males who frequented that area for the purpose of purchasing homosexual acts from young boys."[61] Although no sexual interaction occurred between the plaintiff and the would-be johns, the plaintiff was required to conduct negotiations with various individuals and claimed to have sustained severe psychological damage as a result.[62] The court determined that the police actions in forcing the

---

Tookes, 699 P.2d at 985-86 (same); *Putnam*, 639 P.2d at 860, 862 (same).

[56] Most relevant scholarship and legal disputes are directed at abuse perpetrated by informants due to their own misconduct or to mishandling by their supervisors. Less attention has been given to abuse directed at informants by their handlers. For an examination of cases involving informant abuse, see Zimmerman, *supra* note 32, at 90-98 and Amanda J. Schreiber, Note, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with Its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 319-40 (2001).

[57] *See, e.g.*, *Fadel*, 844 F.2d at 1429, 1433 n.8 (involving informant who engaged in sexual conduct on own initiative); *Simpson*, 813 F.2d at 1466-67 (same); *Shoffner*, 826 F.2d at 626 (same). This would also seem to apply to government undercover officers who engage in sexual conduct independent of any governmental directive to do so. *See, e.g.*, *Nolan-Cooper*, 155 F.3d at 234 (finding that officer engaged in sexual conduct on own initiative); United States v. Cole, 807 F.2d 262, 265-66 (1st Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987) (same). In these situations, an informant or an officer is unlikely to mount a legal challenge against the government.

[58] 541 F. Supp. 803 (E.D. Ky. 1982).

[59] *Id.* at 803. The plaintiff was a 16-year-old suing by his mother and next friend. *Id.* These events occurred without the knowledge of his parents. *Id.*

[60] *Id.* at 803-04. The court opinion is unclear about how the plaintiff came to be under the control of the police, but the factual implications point to a situation that mirrors that of the informant in *Alexander v. DeAngelo*, 329 F.3d 912 (7th Cir. 2003).

[61] *Martin*, 541 F. Supp. at 803.

[62] *Id.* at 804. The plaintiff wore a wire and also provided court testimony in some of

plaintiff "to engage in homosexual solicitation against his will is an undoubted violation of his human dignity and constitutional right of privacy, and this is a deprivation of liberty."[63]

Conversely, in *Alexander v. DeAngelo*, the district court took a different tack, concluding that the informant's due process rights were not violated when law enforcement officers directed her to have sex with the suspect.[64] The court set forth three general principles applicable to cases involving sexual encounters between informants and investigatory targets: (1) "law enforcement may utilize artifice to ferret out crime and permissible law enforcement tactics are not exceeded merely because of the exploitation of an intimate relationship;" (2) "a confidential informant must engender the trust of the suspect and on occasion this may necessitate the creation of an emotional or physical bond;" and (3) "while morally offensive to some, a confidential informant can deceptively utilize sex in some circumstances."[65] Pursuant to these general principles, the court determined that it could not conclude that the officers had infringed upon the informant's constitutional rights.[66] Although the informant claimed that she was forced to become a confidential informant and to engage in sexual conduct with the target, the court found that she was "no more coerced than the bulk of confidential informants who cheerfully agree to work with the police in order to avoid (or lessen) jail time" and that she never told the officers that she was unwilling to participate in the sting.[67] On appeal, the circuit court reversed the lower court, finding that the officers had violated the informant's due process rights by the use of fraud in obtaining her consent.[68] The court refused, however, to proscribe the general use of informants for sexual tasks. Instead, it opined that these tasks do not significantly differ from other tasks assigned to informants.[69] Aside from

---

the ensuing cases brought against the customers. *Id.* at 803.

[63] *Id.* at 804. The case was before the court on the defendants' motion to dismiss for lack of jurisdiction. Specifically, the defendants contended that the plaintiff's complaint stated a negligence claim under state law and alleged no violation of his federal rights. *Id.*

[64] Memorandum, *supra* note 5, at 24-28.

[65] *Id.* at 26 (citing United States v. Simpson, 813 F.2d 1462 (9th Cir. 1986)).

[66] *Id.*

[67] *Id.* at 28. In her deposition, when asked whether she had refused or otherwise indicated her unwillingness to engage in sexual conduct with the target, the informant responded: "No. I felt that if I would have refused to do it that they would have arrested me and taken me to jail" and "I didn't think there was any way out." *Id.* at 27.

[68] Alexander v. DeAngelo, 329 F.3d 912 (7th Cir. 2003); *see also* discussion of this case *supra* notes 4-24 and accompanying text.

[69] *Alexander*, 329 F.3d at 918 (stating that "inducing a confidential informant to engage in sex as part of a sting operation does not always give rise to a claim under section 1983"

the prohibition of excessive fraud in acquiring consent, the court left the limits of this practice open to question.[70]

Some courts have also criticized official conduct toward informants when addressing challenges brought by targets to an informant's use of sex. For instance, in *People v. Brown*, a Michigan court found police behavior in employing a confidential informant who engaged in sexual intercourse with the investigatory target to be "truly reprehensible."[71] The court noted that the informant was in a particularly weak position to succumb to police requests because a prostitution charge was pending against her.[72] Her assignment was to help law enforcement officials arrest the investigatory target and "the cooperation expected of her was that she would gain access to the defendant's apartment, have sex with him, smoke marijuana, and they expected her to take her own syringes so that she could inject herself with cocaine."[73] Although the agents protested that they had advised the informant to avoid sexual interaction if she could, the court observed that the advice was palliative at best in that the "admonition ignore[d] reality."[74] The officers also defended their actions in recruiting and directing the informant by pointing out that the informant had previously been involved in a sexual relationship with the target. Even so, the court adamantly asserted that the informant's past actions did not excuse the police's conduct in promoting the contested sexual activity.[75] The court made plain its obvious disapproval of the government's conduct even while denying the target's claim, noting that the "reprehensibility concern[ed] the relationship between the police and the informant, not the relationship between the police/informant and the defendant."[76]

---

and finding no reason "for creating a categorical prohibition against the informant's incurring a cost that takes a different form from the usual risk [taken by informants in general]").

[70] *Id.* ("The rub here is that [the informant] . . . was intentionally and indeed grossly deceived about the benefits and costs of the distasteful act in which she was asked to engage.").

[71] People v. Brown, 413 N.W.2d 766, 767 (Mich. Ct. App. 1987); *see also id.* at 768 (noting that police had dealt "unfairly" with informant).

[72] *Id.* at 767. The informant was a known prostitute, heroin addict, and user of other illegal drugs. *Id.*

[73] *Id.* In exchange for her agreement to work for them, the police offered the informant a place to stay, food, spending money, transportation to visit her children, and enrollment in a drug rehabilitation program. *Id.*

[74] *Id.*

[75] *Id.* at 768 (recognizing that informant had been using illicit drugs and engaging in meretricious relationship with investigatory target).

[76] *Id.*

In *United States v. Simpson*,[77] the district court judge held a view similar to that of the *Brown* court regarding the government's conduct toward the informant. The informant, a known heroin addict, prostitute, and fugitive from Canadian drug charges, was recruited by the FBI to assist an investigation of a suspected heroin dealer. She befriended the investigatory target and, after a period of time, became sexually intimate with him.[78] Stating that the FBI had "manipulated" the woman into becoming an informant by promises to forgo investigations into her drug activities, the court found that, although the agency had not requested the sexual activity, it had expected that it would continue.[79] The court thus condemned the agency for failing to terminate her participation in the investigation and remarked that the "tragic figure" of the informant was due in part to the government's actions.[80] In upholding the target's challenge, the court concluded that the government's behavior toward the informant was so offensive that it violated the target's due process rights.[81]

---

[77] 813 F.2d 1462 (9th Cir. 1987), *cert. denied*, 484 U.S. 898 (1987).

[78] *Id.* at 1464. The informant and a co-informant, pretending to be travelers stranded at the Los Angeles International Airport, persuaded the defendant to give them a ride into the city. They went to the defendant's apartment, and, shortly thereafter, the informant and defendant became sexually involved. *Id.* The informant continued pretending to be a close personal friend of the defendant's for over five months. *Id.* at 1465. With her aid, the defendant and others were arrested and indicted on drug charges. *Id.* at 1464.

[79] *Id.* at 1467-69. The court's description of the government's actions as "manipulative" was apparently based on evidence presented at the hearing that the FBI promised to curtail its investigation into the informant's illicit drug activities in exchange for her services as an informant and that the government "made her continually dependent on them through their initial and continued concern and support for her, both monetarily and emotionally." *Id.* at 1468-69 (quoting Brief of Amicus Curiae, The American Civil Liberties Union). The circuit court, however, determined that the informant was "perfectly competent" to make the decision to serve as an informant in exchange for money and the opportunity to avoid drug charges. *Id.* at 1469 n.8.

[80] *Id.* at 1467-68. The court was "offended" by the "tragic figure" of the informant and remarked that "the Government has made her even more tragic" by "plac[ing] her in . . . a set of factual situations that would bring even more stress to bear [on her]." *Id.* at 1468.

[81] *Id.* at 1464. The district court dismissed the indictment against Simpson after an eight-day evidentiary hearing, concluding that the "Government cannot be permitted to stoop to these depths to investigate suspected criminal offenders" and that the government should be "den[ied] the fruits of its heinous acts." *Id.* (quoting lower court's Findings of Fact and Conclusions of Law Dismissing the Indictment on Due Process Grounds). The circuit court disagreed with the lower court and reinstated the indictment, finding "the government's passive tolerance here of a private informant's questionable conduct to be less egregious than the conscious direction of government agents typically present in outrageous conduct challenges." *Id.* at 1468. To support this conclusion, the court cited to *United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978). In *Prairie*, the Ninth Circuit found no due process violation of defendant's rights when, unbeknownst to the government, a paid informant and known prostitute used sex in carrying out her assignment. *Simpson*, 813

The paucity of case law concerning challenges brought by informants against government officials arising from sexual assignments leaves unresolved the extent of the restrictions on this practice, beyond the exorbitant use of fraud. Even when combined with court findings in cases like *Brown* and *Simpson*, in which both courts decried official manipulation of the informants, the limitations on sexual assignments remain uncertain. Hence, further study is required to ascertain when government conduct in negotiating these agreements renders these deals impermissible. Additionally, in cases in which informants have acted at the behest of law enforcement but did not challenge these official directives, it is unclear whether the informants became "volunteer" informants to avoid arrest or whether they registered as informants for other reasons, such as a desire to contribute to the public welfare and safety.[82] Knowing more about the particulars of an informant's situation would help to uncover any coercion inherent in or attendant to a sexual assignment and thus would be relevant to any challenges brought against this practice.[83]

II. INFORMANT TASKS

The difference between lie and lay. Lay is always passive.[84]

Whether sex tasks are properly classified with assignments more characteristic of informant work is a difficult question.[85] Although several courts have addressed the issue of sex as an investigative tactic, the Seventh Circuit appears to be the first court to consider whether sex tasks are comparable to other forms of informant labor. For this reason, an assessment of sex tasks versus non-sex tasks assigned to informants may prove instructive.

A. Typical Informant Tasks

In the strictest sense, the terms "informant" and "informer" refer to an individual who "informs" against others for a reward, financial or

---

F.2d at 1467.

[82] *See, e.g.*, State v. Tookes, 699 P.2d 983, 985 (Haw. 1985) (involving informant who was instructed to engage in sexual conduct); State v. Dupree, 992 P.2d 472, 478 (Or. Ct. App. 1999) (same); State v. Putnam, 639 P.2d 858, 860 (Wash. Ct. App. 1982) (same).

[83] *See infra* Part III.A.

[84] ATWOOD, *supra* note 1, at 37.

[85] This practice has been described as a "nontraditional" use of informants. *See* Tarlow, *supra* note 48, at 38.

otherwise.[86] More generically, the terms "denote a person who provides information, assistance, or some other benefit to a law enforcement agency in exchange for some benefit, whether immediate or in the future, tangible or intangible, personal or third party."[87] Beyond the provision of information, an informant may serve as a spy for the police, a stool pigeon, or an agent provocateur.[88] A spy seeks to join a criminal enterprise for the purpose of obtaining information for law enforcement; a stool pigeon acts as a catalyst for the commission of a crime by soliciting the illegal conduct; an agent provocateur infiltrates a criminal organization or network for the purpose of destroying it.[89]

To accomplish law enforcement objectives, informants may be assigned a variety of tasks. These tasks are often criminal in nature.[90] Some coordinate meetings with investigatory targets or encourage targets to transact with undercover government agents. Others directly interact with targets under government supervision and surveillance.[91] For example, some informants arrange or make purchases of narcotics or other illicit substances.[92] Others join suspected subversive groups, such

---

[86] Donnelly, *supra* note 41, at 1092. Informers were originally designated as "approvers." *Id.* at 1091. English medieval law recognized the practice of "approvement," pursuant to which an approver, upon being charged with treason or felony, could obtain a pardon in exchange for confession of his guilt and information necessary to convict other criminals. Successful conviction of the other criminals was necessary to assure the pardon. Acquittal nullified the deal and guaranteed the approver's death. *Id.* For more information about the practice of approvement, see 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW 633 (2d ed. 1968).

[87] Zimmerman, *supra* note 32, at 83.

[88] Donnelly, *supra* note 41, at 1092.

[89] *Id.* at 1092-93. Donnelly refers to the agent provocateur as "a specialized and sophisticated stool pigeon traditionally employed by the political police." *Id.* at 1092.

[90] Kentucky v. Long, 837 F.2d 727, 733 (6th Cir. 1988) ("Informants are people that generally are involved in criminal activities themselves or they are people who associate with people involved in criminal activities or some way knowledgeable of criminal activities." (quoting testimony of Unit Chief of FBI Criminal Informant and Witness Security Programs Unit)); JAMES Q. WILSON, THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS 64-65 (1978) ("[I]nformants are recruited from among persons who are themselves criminals or closely connected with criminals.").

[91] Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 457 (2002).

[92] *See, e.g.*, United States v. Quam, 367 F.3d 1006 (8th Cir. 2004) (informants made controlled drug buy from defendant); Johnson v. State, 872 So. 2d 961 (Fla. Ct. App. 2004) (informant made 20 controlled buys of marijuana and cocaine from defendant); People v. Stanfield, 7 A.D.3d 918 (N.Y. App. Div. 2004) (informant purchased crack cocaine from defendant in prearranged drug buy); State v. Gaines, No. 00-CA-008298, 2004 WL 1461524, at *1 (Ohio Ct. App. June 30, 2004) (informant made two controlled buys of cocaine from defendant); Commonwealth v. Nahavandian, 849 A.2d 1221 (Pa. Super. Ct. 2004) (informants made controlled buy of heroin from defendant). For more information regarding narcotics squad decisions to use informants, see Goldstein, *supra* note 27, at 565-

as the Ku Klux Klan and Muslim terrorist groups, and participate in conspiracies to commit violence and criminal acts.[93] Jailhouse informants work to elicit confessions of wrongdoing and incriminating statements from other inmates or detainees.[94]

Completion or attempted completion of many of these more typical examples of informant tasks pose a risk of physical harm to the informant.[95] This risk could arise from crime-related dangers (the occupational-hazard component of crime)[96] or from the harm-seeking personality traits of criminal cohorts.[97] In addition to the likely dangers attendant to any criminal enterprise, informants also suffer the constant fear of discovery and subsequent retaliation.[98] Concerns for an

---

67.

[93] *See, e.g.*, Bergman v. United States, 565 F. Supp. 1353 (W.D. Mich. 1983) (informant joined Ku Klux Klan and participated in numerous crimes); Burst v. State, 499 N.E.2d 1140 (Ind. Ct. App. 1986) (informant infiltrated criminal community); *see also* Roy v. United States, 38 Fed. Cl. 184 (1997) (informant infiltrated large drug rings); Ralph Blumenthal, *Tapes in Bombing Plot Show Informer and FBI at Odds*, N.Y. TIMES, Oct. 27, 1993, at A1 (informant infiltrated Muslim terrorist groups); Stephen Engelberg, *F.B.I. and Jackie Presser: Who Used Whom for What?*, N.Y. TIMES, Sept. 8, 1985, § 4, at 3 (informant became head of the Teamsters union)..

[94] *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1991) (jailhouse informant befriended defendant and offered protection in exchange for confession to murder); Moore v. Olson, 368 F.3d 757 (7th Cir. 2004) (jailhouse informant obtained confession from cellmate defendant); Stumpf v. Mitchell, 367 F.3d 594 (6th Cir. 2004) (jailhouse informant testimony used to establish that defendant was shooter); Ayers v. State, 844 A.2d 304 (Del. 2004) (jailhouse informant testimony used to convict defendant); *see also* Ted Rohrlich & Robert W. Stewart, *Jailhouse Snitches: Trading Lies for Freedom*, L.A. TIMES, Apr. 16, 1989, § 1, at 31 (describing use of jailhouse informants to gain murder confession from detained suspect). For general information regarding the use of jailhouse informants, see Robert M. Bloom, *Jailhouse Informants*, 18 CRIM. JUST. 20 (2003) and Jana Winograde, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 CAL. L. REV. 755 (1990).

[95] *See, e.g.*, United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (discussing "the often dangerous task of undercover investigation"); United States v. Reynoso-Ulloa, 548 F.2d 1329, 1338 n.19 (9th Cir. 1977) (describing informant's work as "a dangerous enterprise"); People v. Defendant X, 11 Cal. Rptr. 2d 628, 629 (Ct. App. 1992) (describing defendant's informant assignment as "perilous mission").

[96] MICHAEL NOVAK, CHARACTER AND CRIME: AN INQUIRY INTO THE CAUSES OF THE VIRTUE OF NATIONS 85 (1986) ("[I]n each human psyche, [there is] at least a primal awareness of a possible world of nightmarish violent anarchy . . . . sufficiently vivid in modern societies to permit many to sense that to commit a crime is to invite unforeseeable threats against their own survival.").

[97] Pierre Tremblay & Paul-Philippe Pare, *Crime and Destiny: Patterns in Serious Offenders' Mortality Rates*, 45 CAN. J. CRIMINOLOGY & CRIM. JUST. 299, 300 (2003) (suggesting that "individuals lacking self-control are more likely than others to engage in behaviour that is harmful both to others (crimes included) and to themselves (behaviour resulting in premature mortality included)").

[98] *See, e.g.*, McCray v. Illinois, 306 U.S. 300, 308 (1967) (noting that "informer will usually condition his cooperation on assurance of anonymity — to protect himself and his family from harm"); Hudson v. Hedgepeth, 92 F.3d 748, 751 (8th Cir. 1996) (stating that

informant's safety may even lead law enforcement officials to forgo the use of informants in favor of other investigatory methods, including a wire tap or other electronic recording device.[99]

B. Sex Tasks Versus Typical Informant Tasks

Determining whether sex tasks significantly differ from more mainstream informant tasks presents a challenge because these tasks, typical or not, involve a myriad of elements that are not easily subject to quantitative analysis. An informant's decision to accept an investigative assignment that calls for sexual conduct, however, may be analogized to an individual's decision to undertake commercial sex work. For this reason, arguments for and against the criminal prohibition of commercial sex work[100] present a helpful comparison for grappling with this subject.[101] Particularly informative are studies that openly compare commercial sex work and other forms of labor.

The debate as to whether commercial sex work should be "treated as any other profession" provides a useful framework for contemplating the topic of sex tasks.[102] Some scholars argue that commercial sex work entails the provision of a personal service that is indistinguishable from other professional services.[103] Others fall short of explicitly recognizing

---

prison officials may withhold information from prisoners to protect informants); McCollum v. Miller, 695 F.2d 1044, 1048 (7th Cir. 1982) (stating that "revealing the names of informants . . . could lead to their death or serious injury"); United States v. Allen, 289 F. Supp. 2d 230 (N.D.N.Y. 2003) (noting retaliatory violence sometimes directed against informants in drug cases).

[99] *See, e.g.*, 18 U.S.C. § 2518 (1)(c) (2000) (setting forth requirements for wiretap authorization including "a full and complete statement as to . . . why [other investigative procedures] reasonably appear . . . to be too dangerous"); United States v. Giovannelli, No. 01-CR-749, 2004 WL 48869, at *2 (S.D.N.Y. Jan. 9, 2004) (determining that probable cause existed for wiretap authorization based on, *inter alia*, evidence that physical risk to informants was substantial).

[100] Commercial sex is commonly referred to as prostitution. The term "commercial sex" is preferable to "prostitution" due to the negative connotations associated with the latter term. *See, e.g.*, MORRIS PLOSCOWE, SEX AND THE LAW 226 (rev. ed. 1962) (defining prostitution as "the indiscriminate offer by a female of her body for the purpose of sexual intercourse or other lewdness"); Merriam-Webster OnLine, *available at* http://m-w.com/cgi-bin/dictionary?book=Dictionary&va=prostitution (last visited Apr. 8, 2005) (defining prostitution as "the act or practice of indulging in promiscuous sexual relations especially for money").

[101] For a discussion and summary of the debate surrounding this issue, see Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 530-45 (2000).

[102] Tracy M. Clements, *Prostitution and the American Health Care System: Denying Access to a Group of Women in Need*, 11 BERKELEY WOMEN'S L.J. 49, 87 (1996).

[103] *See, e.g., id.* at 87 (discussing possibility of treating prostitution as legitimate job); David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the*

commercial sex work as work, yet advocate for proper working conditions and protection for sex workers from exploitation.[104] Still others assert that sex differs from "the physical and intellectual labor that are the bread and butter of the world of work."[105] Specifically, the contention is that, unlike other forms of labor, sex is an "essential attribute" that defines "the integrity and uniqueness of the self."[106]

Recently, Professor Martha Nussbaum compared sex work with other kinds of work and concluded that commercial sex work is similar in various ways to many types of employment held by working-class women that require bodily service.[107] To facilitate her inquiry, she focused on specific aspects of the work reviewed, including the pay, working conditions, control wielded by the worker over her particular activities, stigma, health risks, and risks of violence.[108] She considered jobs held by a factory worker who plucks feathers from chickens, a

---

Decriminalization of Prostitution, 127 U. PA. L. REV. 1195, 1259 (1979) ("It is impossible to see how sexual services can be distinguished from other cases."). Richards also argues that "autonomy gives to persons the capacity to call their lives their own" and is "fundamental to the concept of what it is to be a person." *Id.* at 1224-25; Susan E. Thompson, Note, *Prostitution — A Choice Ignored*, 21 WOMEN'S RTS. L. REP. 217, 244-47 (2000) (calling for decriminalization of prostitution and treatment of prostitution as legitimate profession).

[104] *See, e.g.*, DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 262 (1989) (arguing that partial decriminalization of commercial sex work would help reduce sexual objectification while offering "safeguards against entrepreneurial initiatives"); Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN'S L.J. 119, 120 (1999) (arguing that criminalization of commercial sex work perpetuates marginalization and stigmatization of commercial sex workers); Janie Chuang, Note, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 85-86 (1998) (asserting that normative debates over whether commercial sex work is inherently exploitative "tend to derail efforts to combat the forced or slavery-like conditions under which a prostitute may work").

[105] Law, *supra* note 101, at 538.

[106] Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699-1700 (1990); *see also* NICOLA LACEY, UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY 118 (1998) (arguing that "a crucial part of existence for all humans is our status as sexed and embodied beings"); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 117 (1998) ("Sexual encounters have purposes, effects, psychological preconditions, and emotional consequences that differ fundamentally from those of most economic transactions. Many of the differences suggest a need for more caution in regulating sexual behavior."); Martha Nussbaum, *Only Grey Matter?*, 59 U. CHI. L. REV. 1689, 1693 (1992) ("Sexuality is seen to lie beyond the world of reasons altogether, in a realm of blood and death, of mysterious spiritual union."); Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442, 1451 (1993) (arguing that self and sexual self cannot be separated).

[107] Martha C. Nussbaum, *"Whether from Reason or Prejudice": Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 701-12 (1998).

[108] *Id.*

domestic servant, a nightclub singer, a philosophy professor, and a skilled masseuse and found that, except for the position in academia, sex work ranks favorably when compared with the other jobs.[109] For example, both the sex worker and the factory worker face health risks. The sex worker, however, may have better working hours and conditions, as well as greater control over her activities than does the factory worker.[110] Sex workers and domestic servants possess relatively similar degrees of control over what they do and both risk "bad behavior" from their clients or employers.[111] Physical violence may be more common to sex work, but domestic service is likely to require worse hours and receive lower pay than many types of sex work.[112] With respect to the nightclub singer, many parallels exist. Both work to please their customers and exert similar amounts of autonomy over their activities. The variations in pay and quality of working conditions are also comparable.[113] Finally, Nussbaum noted that the efforts of sex worker and skilled masseuse bear many similarities — "[b]oth use a skill to produce bodily satisfaction in the client. . . . [and t]he bodily contact involved is rather intimate."[114]

In another recent study, Kimberly-Anne Ford matched a sample of street sex workers with a sample of hospital aides and orderlies for the purpose of contrasting their work experiences.[115] Extensive interviews identified many similarities between the professions and little to suggest that sex work was appreciably better or worse than the hospital work. On average, the sex workers had higher earnings than the hospital workers, whereas the hospital workers had more education than the sex workers.[116] Although the sex workers were more likely to have experienced sexual harassment, the hospital workers were more likely to have been subject to physical violence.[117] In addition, the experiences of sex workers and hospital workers were comparable with respect to

---

[109] *Id.* She also compares sex work to work done by a "colonoscopy artist" — a hypothetical professional whose job is to have her colon examined with colonoscopy instruments for the purpose of helping manufacturers test their latest equipment. *Id.* at 701.

[110] *Id.*

[111] *Id.* at 702.

[112] *Id.*

[113] *Id.* at 703.

[114] *Id.* at 705.

[115] Kimberly-Anne Ford, *Evaluating Prostitution as a Human Service Occupation*, *in* PROSTITUTION: ON WHORES, HUSTLERS, AND JOHNS 420 (James Elias et al., eds., 1998).

[116] *Id.* at 422, 428.

[117] *Id.* at 426-27.

perceived stress level and actual assault rates.[118]

Several other studies found commercial sex work preferable to many other low-skilled, labor intensive professions because it is well-paid vis-à-vis many other kinds of work.[119] For example, a study of mothers receiving welfare subsidies in the United States concluded that the most financially profitable side-income available to low-skilled women was commercial sex work.[120] Another study determined that, on average, street commercial sex workers in Los Angeles earned higher annual incomes despite possessing lower qualifications than other low-skilled service workers in the city.[121] Havelock Ellis observed that, even in the early twentieth century, "no practicable rise in the rate of wages paid to women in ordinary industries can possibly compete with the wages which fairly attractive women with quite ordinary ability can earn by prostitution."[122]

Despite many similarities, however, sex work possesses at least one unique feature. Nussbaum pinpoints this attribute when she remarks that the other forms of work considered in her study require no invasion of internal and private bodily space.[123] In this way, sex work is different. This distinction reverberates throughout her evaluation of sex work versus other types of labor: "The factory worker suffers no invasion of her internal private space. . . ."[124] Domestic service "involves no invasion

---

[118] *Id.* at 425-27.

[119] Even streetwalkers, typically the lowest paid commercial sex workers, earn more than individuals working at jobs with comparable skill requirements. Lena Edlund & Evelyn Korn, *A Theory of Prostitution*, 110 J. POL. ECON. 181, 182 (2002).

[120] KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 176-78 (1997).

[121] Lee A. Lillard et al., *The Market for Sex: Street Prostitution in Los Angeles* (1995) (draft on file with author). The average annual earnings of the probability sample of 1024 street sex workers in 1990-1991 was $23,845, compared with $20,197 for working women and $17,192 for female service workers. *Id.* With respect to work qualifications, 20% of the street sex workers had received some college education, compared with 46% and 40% of all female workers and female service workers, respectively. *Id.*

[122] HAVELOCK ELLIS, 4 STUDIES IN THE PSYCHOLOGY OF SEX: SEX IN RELATION TO SOCIETY 263 (1936). In a study of American commercial sex workers in the years between 1900-1918, Ruth Rosen concluded, "When I look closely at the life stories of poor women during the early years of this century, I am struck again and again by most prostitutes' view of their work as 'easier' and less oppressive than other survival strategies they might have chosen." RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918, at xvii (1982).

[123] Nussbaum, *supra* note 107, at 701-06. Nussbaum notes that this is a distinction raised often by her students. *Id.* at 713. She also makes the point that the other laborers did not suffer from the social stigma that surrounds those working in the commercial sex industry. *Id.*

[124] *Id.* at 702.

of intimate bodily space. . . ."[125] The sex worker "allows her bodily space to be invaded, as the singer does not."[126] "[T]he internal space of the masseuse is not invaded."[127] While, in many respects, sex work may be much like other work, other work does not require the worker to cede bodily privacy rights.

The bodily intrusive aspect of sex work sets sex tasks apart from other obligations and marks sex tasks as categorically different from other kinds of informant work. Exchanging information, arranging meetings, coordinating drug deals, gaining access to suspect criminal groups, or even participating in criminal activities — none of these assignments require informants to yield physical access to personal bodily space.

These distinguishing characteristics of sex work clearly play a role in Nussbaum's "implicit intuition that consent matters more in relation to sex work than it does in relation to [other forms of labor]."[128] Her sense that valid consent delineates the line between legitimate sex, on the one hand, and sexual harassment or rape, on the other, is shared by all participants in the debate about sexuality and commercial sex.[129] Although substantial disagreement exists as to whether and when an individual can consent to commercial sex work,[130] all commentators agree that "authentic consent is the sine qua non of legitimate sex."[131]

Correspondingly, the glaring issue in a case like *Alexander*, in which an informant is contesting the constitutionality of an assignment that required her to engage in sexual conduct, is the question of the informant's consent. Authentic consent is a prerequisite to a sex assignment. Without an informant's consent, a sex task can lead to the serious battery of rape;[132] moreover, a rape committed under color of

---

[125] *Id.*

[126] *Id.* at 703.

[127] *Id.* at 705.

[128] Law, *supra* note 101, at 588. In support of this assertion, Law observes that Nussbaum constantly describes the invasion of the sex worker's bodily space as a "consensual" invasion. *Id.* Nussbaum also argues that, as long as the invasion is consensual, this distinctive feature should not bar commercial sex work from classification with other kinds of labor. Nussbaum, *supra* note 107, at 713. Furthermore, she asserts that consensual invasions should be legally and morally acceptable. *Id.*

[129] *See* Law, *supra* note 101, at 534-42 (providing overview of feminist critique and defense of criminal prohibition of commercial sex).

[130] *Id.* at 542 (concluding that "fundamentally, feminists disagree about whether a woman can ever authentically consent to commercial sex, and whether it would exist in a just society"); *see also infra* notes 155-57 and accompanying text.

[131] Law, *supra* note 101, at 533.

[132] Alexander v. DeAngelo, 329 F.3d 912, 917-18 (7th Cir. 2003); *see also* United Nat'l Ins. Co. v. Waterfront New York Realty Corp., 994 F.2d 105, 108 (2d Cir. 1993) (holding that "rape is 'an undisputed assault and battery'"); Paul v. Montesino, 535 So. 2d 6, 7 (La. App.

state or federal law constitutes a deprivation of liberty without due process of law.[133] The facts in informant situations are unlike those found in more ordinary rape or sexual assault scenarios because the government did not commit the sexual act. However, the circumstances surrounding an assignment of a sexual task may, in appropriate cases, be analyzed under rape law as a "third party" rape case in which a third party causes an individual to rape another or creates a situation that significantly increases the risk of rape.[134] That the investigatory target would not be liable for raping or assaulting the informant should erect no barriers to finding blameworthy the government's behavior in causing the target to rape the informant.[135] Accordingly, the next step of our inquest appears to lie with the issue of consent — the desideratum of legitimate sex.

III. LIMITS ON SEX BARGAINS

> *Nor does rape cover it: nothing is going on here that I haven't signed up for. There wasn't a lot of choice but there was some, and this is what I chose.*[136]

Consent is an indispensable component of a sex bargain between government officials and informants. "[T]he dominant paradigm of sex says that individual, mutual, informed consent separates good from evil."[137] One way of conceiving this requirement of consent is to analogize it to the consent required of a patient undergoing medical treatment.[138] In the healthcare setting, the law demands that patients be informed of the risks and benefits of medical treatment or testing.[139] The

---

1988) (holding that "all rapes necessarily are batteries").

[133] *See, e.g.*, Rogers v. City of Little Rock, 152 F.3d 790 (8th Cir. 1998) (holding that rape by state actor violated victim's due process right to bodily integrity); Wudtke v. Davel, 128 F.3d 1057 (7th Cir. 1997) (same); Jones v. Wellham, 104 F.3d 620 (4th Cir. 1997) (same).

[134] *See* Gail M. Ballou, *Recourse for Rape Victims: Third Party Liability*, 4 HARV. WOMEN'S L.J. 105 (1981) (discussing cases in which rape victims successfully sued third parties, including landlords, business proprietors, and employers, for rapes perpetrated by others).

[135] *Alexander*, 329 F.3d at 917-18 (finding elements of serious battery of rape present in Gepfert's claims).

[136] ATWOOD, *supra* note 1, at 94.

[137] Law, *supra* note 101, at 589.

[138] In her study of sex work, Professor Nussbaum opens the door for this analogy by comparing sex work to the work of a hypothetical colonoscopy artist. *See* Nussbaum, *supra* note 109. She concludes that the consensual invasion of the sex worker's bodily space should be no more illegal than the consensual invasion of the colonoscopy artist's bodily space. Nussbaum, *supra* note 107, at 706.

[139] Sylvia Jung Earnshaw, *An Ounce of Prevention Where There Is No Cure: AIDS and*

protective policy undergirding the informed consent doctrine is to ensure patient autonomy regarding decisions that will affect bodily integrity.[140] In the famous words of Justice Benjamin Cardozo: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault. . . ."[141] In a similar vein, a law enforcement official who assigns a sex task to an informant without securing her consent commits an assault upon completion of the undercover mission.[142] Accordingly, "[c]onsent is key."[143]

A. Constraints on Consent

Nonetheless, a query lingers — given an informant's knowing and apparently willing participation in the sexual conduct, can she subsequently claim to be the victim of governmental misconduct? Courts are troubled by the use of sex by the government in furthering law enforcement goals,[144] and government involvement in directing or encouraging sexual conduct by informants with investigatory targets may constitute a violation of the targets' rights.[145] Investigatory targets bringing claims against the government under circumstances like these stand in different positions than do informants. Individuals caught up in sexual conduct with a confidential informant or undercover agent can conceivably argue that the government's deliberate cultivation of the sexual relationship violated their rights to privacy or that they were entrapped by the sexual conduct.[146] An informant, on the other hand, is aware that she is engaging in sexual conduct on behalf of the government and has presumably given her consent to engage in such conduct.

An informant's motivations in accepting a sexual assignment are pertinent to this inquiry into consent. Individuals who become

---

Public Health in Wyoming, 27 LAND & WATER L. REV. 471, 494 (1992).

[140] *Id.*

[141] Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914), *overruled on other grounds by* Bing v. Thinig, 143 N.E.2d 3 (N.Y. 1957).

[142] *See* Alexander v. DeAngelo, 329 F.3d 912, 917 (7th Cir. 2003) (finding that "a false threat of lengthy imprisonment is a form of coercion that can vitiate consent to sex and turn the sex into battery").

[143] Law, *supra* note 101, at 589.

[144] *See supra* note 55.

[145] *See supra* note 55.

[146] *See supra* note 48.

informants may be crime victims, witnesses, suspects, or other persons situated in positions that enable them to glean details about ongoing criminal activities.[147] A whole host of motivations may induce these individuals to become informants, including civic-mindedness, revenge, excitement, and payment.[148] For example, volunteer citizen informants may be neighbors, postal carriers, shopkeepers, or taxi drivers[149] who come forward out of a sense of obligation to their communities.[150] Other informers come forth in response to desires to eliminate competitors or punish enemies.[151] Some informants work for more tangible rewards, particularly monetary payment.[152]

Of particular relevance to this Article is the practice of diverting arrestees as informants in return for an opportunity to avoid a charge or to merit a reduced charge for criminal activity detected by law enforcement.[153] An arrestee informant may be someone under arrest and awaiting charges or an individual who becomes an informant to avoid an arrest. The motivations of arrestee informants are plain — to "bypass the criminal justice system in return for their agreement to do undercover work for the police."[154]

Whether any individual, informant or otherwise, can consent to sex work has drawn fire from scholarly corners. Indeed, some commentators argue that all commercial sex is nonconsensual and, thus,

---

[147] JAMES W. OSTERBURG & RICHARD H. WARD, CRIMINAL INVESTIGATION: A METHOD FOR RECONSTRUCTING THE PAST 248-49 (3d ed. 2000); PAUL B. WESTON & CHARLES LUSHBAUGH, CRIMINAL INVESTIGATION: BASIC PERSPECTIVES 94-98 (9th ed. 2003) (describing different types of informants).

[148] OSTERBURG & WARD, *supra* note 147, at 249-52; WESTON & LUSHBAUGH, *supra* note 147, at 94-98. Some individuals seek to become informants because of feelings of self-importance, vanity, ego, or superiority. HARNEY & CROSS, *supra* note 32, at 42-44; MORRIS, *supra* note 32, at § II, 2-4. Others may feel a need to repent. HARNEY & CROSS, *supra* note 32, at 44; LYMAN, *supra* note 37, at 135. Yet others become informants for the purpose of learning how to avoid arrest and prosecution in their own criminal endeavors. TONY ALVAREZ, UNDERCOVER OPERATIONS SURVIVAL IN NARCOTICS INVESTIGATIONS 58 (1993). Nonetheless, "[t]he informant, whatever his reasons, does serve the cause of justice in his community, and thus fulfills an important citizen's responsibility." Mary S. Mead, *Thoughts on the Use of Informants*, *in* WHOSE FBI? 267, 289 (Richard O. Wright ed., 1974).

[149] HARNEY & CROSS, *supra* note 32, at 31.

[150] ALVAREZ, *supra* note 148, at 55.

[151] GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 152 (1988).

[152] ALVAREZ, *supra* note 148, at 55-56. Remuneration amount is typically determined by factors such as the significance of the target, the risk of danger to the informer, and the anticipated value of any seizure of goods or monies. Fitzgerald, *supra* note 34, at 70; Mark Curriden, *The Informant Trap: Secret Threat to Justice*, NAT'L L.J. Feb. 20, 1995, at A1, A28. In 1993 the federal government paid an estimated $97 million to informants. *Id.*

[153] *See* MORRIS, *supra* note 32, § II, at 1; WILSON, *supra* note 90, at 65.

[154] Misner & Clough, *supra* note 42, at 714.

per se illegitimate. These individuals assert that free choice does not precede a decision to engage in sex work. Rather, sex workers enter the industry due to social conditions, such as a lack of money or employment, or due to the oppression of male supremacy.[155] Others argue that individuals may consent to work in the commercial sex industry. These scholars contend that commercial sex work can free women from oppressive and stereotypical images of the female body and present a viable economic alternative for women.[156] Still others maintain that, even assuming the presence of valid consent, commercial sex work should be illegal because it is inherently exploitative. Critics view the sale of sexual services as commodifying women's bodies and sexuality, perpetuating male dominance over women, or wreaking violence on women's bodies.[157]

---

[155] *See, e.g.*, VALERIE JENNESS, MAKING IT WORK: THE PROSTITUTES' RIGHTS MOVEMENT IN PERSPECTIVE 77 (1993) (identifying male supremacy as factor underlying decision to enter commercial sex industry and citing statement of newsletter editor for organization of former sex workers); Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, 10 HASTINGS WOMEN'S L.J. 37, 43, 47 (1999) (identifying poverty, educational deprivation, job discrimination, and male supremacy as factors underlying decision to enter commercial sex industry); Jane E. Larson, *Prostitution, Labor, and Human Rights*, 37 U.C. DAVIS L. REV. 673, 691 (2004) (identifying unjust working conditions and wages as factors underlying decision to enter commercial sex industry and identifying prostitution "as a structure of bondage specifically founded on sex and gender").

[156] *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 380 (1992) (stating that "[p]rostitution is itself a consensual activity"); International Committee for the Prostitutes' Rights, *World Charter and World Whores' Congress Statements*, *in* SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 305, 310 (Frederique Delacoste & Priscilla Alexander eds., 1987) (stating that it "affirms the right of all women to determine their own sexual behavior, including commercial exchange, without stigmatization or punishment"); Chuang, *supra* note 104, at 84 (stating that "too much attention to the normative question of whether a woman should be able to consent to trafficking and prostitution overlooks the empirical fact that women actually do consent to these practices"); Mary Jo Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Work)*, 105 HARV. L. REV. 1045, 1059 (1992) (stating that commercial sex appeals "to a sexualized femininity that is something other than a choice between criminalized and maternalized sex or a choice between terrorized and maternalized sex"); Ratna Kapur, *Post Colonial Economies of Desire: Legal Representations of the Sexual Subaltern*, 78 DEN. U. L. REV. 855, 882 (2001) (stating that "[w]omen from the Third World can and do consent to commercial sex, and thus challenge sexual and cultural normativity, as well as the imperialist representations of women in the Third World"); Nussbaum, *supra* note 107, at 720-21 (stating that, absent criminal coercion, women may choose to provide commercial sex services).

[157] *See, e.g.*, ANDREA DWORKIN, INTERCOURSE 137 (1987) (stating that "[i]ntercourse remains a means or the means of physiologically making a woman inferior"); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 174 (1989) (stating that "for women it is difficult to distinguish [rape from intercourse] under conditions of male dominance"); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 784 (1988) (stating that "[s]ex used for more external purposes, such as financial gain, prestige, or power, is regarded as exploitive and immoral, regardless of

Notwithstanding this unresolved controversy, those who join the informant rank-and-file for altruistic reasons or to satisfy self-seeking aims, such as vengeance or excitement, raise few, if any, concerns with respect to official misconduct regarding their voluntariness to engage in sex-based investigative practices. Likewise, while an individual who seeks out a sex assignment for monetary payment may trigger concerns regarding unfair social conditions that may have compelled her to ask for the job, these circumstances do not cast shadows on official conduct in procuring her services. Aside from the arguably morally troublesome decision on the part of government officials to effectively "pimp out" this informant, the inequities of her situation would seem best addressed by "altering [society's] cultural prejudices, the distribution of its resources, and its laws governing education and eligibility for good jobs."[158]

In contrast, an arrestee informant who accepts a sex task to avoid arrest or in exchange for a reduction of or dropped charges against her generates compelling concerns with respect to the quality of her consent and the motives of law enforcement officials in making the offer. Of paramount concern is the power differential between the informant and the officers, which colors any bargaining session as presumptively coercive.[159] This element of coercion may be an inevitable element of the relationship between an arrestee informant and her handler. In the context of a sex bargain, however, its presence calls into question the soundness of the informant's consent.[160] Although the traditional approach to analyzing consent in rape and sexual assault cases equates consent with a lack of physical force or threat of force,[161] a substantial

---

whether the parties have engaged voluntarily in the encounter"); Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 25-27 (1993) (stating that "most if not all prostitution is ringed with force in the most conventional sense"); Radin, *supra* note 27, at 1910 (stating that poor people who sell sexual services do not do so as result of free choice).

[158] SCHULHOFER, *supra* note 106, at 107.

[159] Gary T. Marx, *Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work*, 28 CRIME & DELINQ. 165, 180 (1982) (describing handler's power over informant as "a kind of institutionalized blackmail"); Zimmerman, *supra* note 32, at 145 (describing coercion in informant-handler relationships as "very real"). For a discussion of the official use of torture to compel prisoners to inform on innocent persons, see 2 SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 457-58 (4th ed. 1956).

[160] *See* SCHULHOFER, *supra* note 106, at 115 ("A person violates another person's autonomy — and therefore should be considered guilty of sexual abuse — whenever he attempts to engage in sexual intercourse with consent that was obtained by coercion.").

[161] *See, e.g.*, Goldberg v. State, 395 A.2d 1213, 1219-20 (Md. Ct. Spec. App. 1979) ("Without proof of force, actual or constructive, evidenced by words or conduct of the defendant . . . , sexual intercourse is not rape. This is so even though the intercourse may

minority of jurisdictions prohibit sexual intercourse or conduct obtained by non-physical forms of coercion, compulsion, extortion, or duress.[162] In addition, some commentators condemn as rape the attainment of sexual intercourse by fraud.[163] In Gepfert's case, the court identified fraud as the basis for the rape charge,[164] thereby recognizing that the "capacity for meaningful choice can . . . be impaired by deception."[165]

---

have occurred without the actual consent and against the actual will of the alleged victim."); *see also* Andrew E. Taslitz, *Patriarchal Stories: Culture Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 422-24, 448-53 (1996) (explaining that current rape law identifies sex as non-consensual only if obtained by use of significant measure of force). A statutory construction of rape law that excludes from its ambit all nonconsensual sexual intercourse except for that obtained by physical force or its threat would leave intact sexual acts required of informants by government officials.

[162] *See, e.g.*, FLA. STAT. ch. 794.011(1)(f), (4)(c) (Supp. 1998) (punishing defendants' use of threats to retaliate, including threat of retaliation by extortion); MICH. COMP. LAWS § 750.520b(1)(f)(iii), 750.520e(1)(b)(iii) (Supp. 1998) (same); N.D. CENT. CODE § 12.1-20-04(1) (1997) (prohibiting sexual act or contact "if the actor compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting"); N.H. REV. STAT. ANN. § 632-A:1 II, 632-A:2 I(d) (1996) (same and including threats to retaliate by mental torment or abuse or public humiliation or disgrace); N.M. STAT. ANN. § 30-9-10(A)(3) (Michie 1994) (same); 18 PA. CONS. STAT. §§ 3125(3), 3126(a)(3) (Supp. 1998) (prohibiting indecent assault "by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining forcible compulsion as "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied"); S.C. CODE ANN. § 16-3-655(3) (Law. Co-op. 1996) (same); UTAH CODE ANN. § 76-5-406(4) (Supp. 1998) (same). For a thorough description of these laws, see Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 119-25 (1998); *see also* SCHULHOFER, *supra* note 106, at 137-67 (discussing coercive sexual offers and relating ways in which economic and social power can undermine female sexual autonomy).

[163] *See, e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1120 (1986) (suggesting that rape law should "prohibit fraud to secure sex to same extent we prohibit fraud to secure money, and prohibit extortion to secure sex to the same extent we prohibit extortion to secure money"); H.W. Humble, *Seduction as a Crime*, 21 COLUM. L. REV. 144 (1921) (discussing rape by fraud).

[164] Alexander v. DeAngelo, 329 F.3d 912, 917 (7th Cir. 2003).

[165] SCHULHOFER, *supra* note 106, at 112. In the absence of consent, sex tasks become "assaultive" tasks — assignments pursuant to which the informant undergoes a physical attack to facilitate the arrest of her assailant for assault. Whereas a more traditional informant task may be accompanied by the risk of harm, the objective of the assignment is not to incur injury, but rather to gain information or contacts. In contrast, assaultive tasks would require the informant to incur physical injury. It is unclear whether an individual can provide valid consent to an assaultive task. *See* Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 249-56 (2001) (contrasting common law prohibition of even consensual violence with modern legislative limitation of consent to confines of sports arena). Consequently, the likelihood of these tasks passing constitutional muster is slim. Assuming, however, that tasks requiring violence and injury were legally permissible, close supervision and regulation of these agreements would be necessary to monitor the continued safety of the informant.

Meaningful choice may also be negatively impacted by an official threat of "meticulous enforcement" of the law.[166] Because offers may come interlaced with implicit threats to inflict harm upon rejection, in the context of an arrestee informant-handler relationship, a government officer may use his institutional power to command the informant's acquiescence to a sex assignment.[167] While a failure to arrest may constitute a dereliction of duty,[168] "the wrongful use of retaliatory power [to] prevent persons from having their considered principles determine their courses of action" is a form of extortion.[169] Evidence of extortionate behavior by a handler could elevate the coercion inherent to the informant-handler relationship to an impermissible, illegal level by negating consent.[170]

Considering that an arrestee informant's consent to a sex task may be fatally tainted by official misconduct, sex bargains warrant careful legal examination and response. Measures should be implemented to ensure valid consent.

B. Safeguarding Consent

Safeguards against official misconduct are especially crucial due to the discretionary nature of law enforcement work.[171] Police decisions not to invoke the criminal process, including decisions to divert suspects as informants, "are generally of extremely low visibility and consequently are seldom the subject of review."[172] Whereas our criminal justice system exposes the actions of other government officials to scrutiny and evaluation, law enforcement decisions not to invoke the law are often unseen and thus overlooked.[173] Particularly, whether to divert an

---

[166] SCHULHOFER, *supra* note 106, at 141-42.

[167] *Id.* at 141-42. In addition, Schulhofer makes the point that "'[o]ffers can conceal indirect threats even in situations that *require* zealous enforcement, without room for discretion." *Id.* at 141 (emphasis in original).

[168] Goldstein, *supra* note 27, at 557 ("Within the area of *full enforcement*, the police have not been delegated discretion not to invoke the criminal process."). Most jurisdictions mandate full enforcement of the criminal laws by law enforcement officers. *Id.* at 557-59.

[169] George E. Panichas, *Rape, Autonomy, and Consent*, 35 LAW & SOC'Y REV. 231, 263 (2001).

[170] *See supra* note 162 and accompanying text. Concededly, this kind of sexual abuse may be difficult to prove.

[171] *See generally* Davis, *supra* note 27 (discussing need for greater control of and more opportunities for reviewing police performance).

[172] Goldstein, *supra* note 27, at 543.

[173] For example, "A judge dismissing criminal charges without trial, upon his own motion, must record his reasons so that all may know why this great power was exercised, and such public declaration is indeed a purposeful restraint, lest magistral discretion sweep

arrestee as an informant is a judgment made by law enforcement officers and, when made prior to arrest, is a "relatively pure police decision not to invoke the criminal process."[174] Accompanying the low visibility of these decisions is the high discretion afforded to law enforcement in dispensing informant assignments. Once the informant-handler relationship is underway, guidelines regulating the venture provide few checks on the substantial discretion allotted to the individual officer and his supervisor.[175] "Further, the psychological risk to the prospective informant, the ethical soundness of the venture, the duration of the operation, [and] the handling of the informant . . . have not been primary, or at times even important, law enforcement considerations."[176]

Although many suggestions for reforming the informant-handler system have accompanied a rich history of informant mishandling and abuse,[177] few efforts have been directed at protecting informants from official misconduct. Rather, the bulk of attention has focused on the transgressions of informants and the poor supervision offered by their handlers.[178] This seeming lack of concern for informant well-being likely stems from the existence of protections generally available to combat official wrongdoing, such as Section 1983 and *Bivens* suits[179] and state tort

---

away the government of laws." People v. Winters, 342 P.2d 538, 542 (Cal. App. Dep't Super. Ct. 1959); *see also* Davis, *supra* note 27, at 704 (describing police policy as "almost completely exempt from the kind of limited judicial review deemed necessary for almost all other administrative agencies"); Goldstein, *supra* note 27, at 543.

[174] Goldstein, *supra* note 27, at 562. Dismissal or reduction of a charge requires at least minimal involvement by a prosecutor or judge. *Id.* at 564-65.

[175] Zimmerman, *supra* note 32, at 134. Zimmerman's research of federal and state government guidelines reveals that these regulations provide little oversight of informant handling. *See id.* at 134-36 n.321.

[176] *Id.* at 137.

[177] *See generally id.* (detailing history of informant abuses and suggestions for reform); Donnelly, *supra* note 41 (describing judicially imposed limitations on the use of informants); Schreiber, *supra* note 56 (examining FBI policies governing informants and informant abuses); Zimmerman, *supra* note 32, at 137 (detailing history of informant abuses and suggestions for reform).

[178] Critics have made many proposals for increasing control of informants and attributing responsibility to the government for informant misconduct and criminal activities. *See, e.g.*, FINAL REPORT ON THE SELECT COMM. TO STUDY LAW ENFORCEMENT UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEP'T OF JUSTICE, S. REP. NO. 97-682, at 347-96 (1983) (describing proposals of congressional committee for changing informant use, including entrapment legislation and indemnification of citizen victims); *see also* Zimmerman, *supra* note 32, at 137 (discussing state legislation and other reforms directed at redressing informant abuse).

[179] Section 1983 creates a cause of action for anyone whose federal rights have been abridged by a person acting under color of state law. *See* 42 U.S.C. § 1983 (2000). A *Bivens* claim can provide similar relief for actions of federal officials. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

claims, as well as the right to counsel afforded to criminal defendants.[180]

Moreover, unless physical coercion is involved, courts are disinclined to find misconduct on the part of government officials.[181] Instead, courts abide a variety of police practices that involve nonphysical forms of compulsion and manipulation, including trickery, deceit, Mutt & Jeff routines,[182] and false friend performances.[183] "Far from making the police a fiduciary of the suspect, the law permits the police to pressure and

---

[180] *See* King, *supra* note 27, at 121 (discussing provision of defense counsel and its impact on court approval of waivers of rights in plea bargaining process). For a rich history of the development of the right to counsel, see WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURT (1955).

[181] *See* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 787 (1997) (referring to general prohibition against physically coercive interrogation techniques).

[182] In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court described the good cop, bad cop investigative tactic:

> In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision.

Id. at 452.

[183] *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (allowing confession obtained after police falsely told suspect that his fingerprints had been discovered at scene of crime to stand); Michigan v. Mosley, 423 U.S. 96 (1975) (allowing admission into evidence of confession obtained after police falsely told suspect that accomplice had named him as shooter); Frazier v. Cupp, 394 U.S. 731 (1969) (finding that misrepresentation of accomplice's statements does not render confession involuntary); United States v. Ceballos, 302 F.2d 679, 695 (7th Cir. 2002) (stating that "law-enforcement agent may 'actively mislead' a defendant in order to obtain a confession, so long as a rational decision remains possible"); United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988) (stating that "[a]n interrogating agent's promise to inform the government prosecutor about a suspect's cooperation does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency or by speculation that cooperation will have a positive effect"); Martin v. Wainwright, 770 F.2d 918, 924-27 (11th Cir. 1985), modified, 781 F.2d 185 (11th Cir. 1986), *cert. denied*, 479 U.S. 909 (1986) (finding confession voluntary despite use of "good guy, bad guy" technique, false statements that codefendant had confessed, and other promises and misleading statements); United States v. Watson, 591 F.2d 1058, 1061 (5th Cir. 1979), *cert. denied*, 441 U.S. 965 (1979) (finding confession voluntary despite district attorney's promise to consider dropping state charges if defendant cooperated with FBI). *But see* Robinson v. Smith, 451 F. Supp. 1278, 1292-93 (W.D.N.Y. 1978) (upholding suppression of confession obtained after police told defendant that accomplice had accused him of shooting victim); State v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (upholding suppression of confession obtained after police manufactured false documents and scientific evidence showing defendant's responsibility for crime).

cajole, conceal material facts, and actively mislead,"[184] as long as the compulsion is free of physical force or threats of physical force and cannot be said to have completely overborne the suspect's will.[185] These practices, despite their acceptability in most informant-handler settings, are objectionable in the context of sex bargaining and may vitiate consent to a sex task.[186] Furthermore, when combined with the vast discretion delegated to law enforcement officers, especially with respect to arrestee informants, these investigative techniques can not only scupper a deal, but can also give rise to a constitutional claim for violation of the informant's due process entitlement to bodily integrity.[187]

Close supervision of sex bargains is necessary to protect against official misuse of the abundance of consent-vitiating stratagems that await the unwary informant. Along with fraud, law enforcement officers regularly employ deception, misrepresentation, and impersonation to achieve desired results such as cooperation, confessions, and plea bargains.[188] For instance, officers may exaggerate the crime, show fake sympathy for the suspect, or suggest that they possess evidence sufficient to convict a suspect when they do not.[189] They may mislead the suspect to believe an accomplice has confessed or that an eye-witness has identified her.[190] Police also make use of nonphysical forms of coercion, compulsion, extortion, and duress.[191] For example, officials may threaten to reindict a suspect pursuant to more severe or additional charges or refer the case to federal authorities.[192] They may threaten to prosecute

---

[184] United States v. Rutledge, 900 F.2d 1127, 1131 (7th Cir. 1990). For more information about police trickery and other investigative techniques, see generally Daniel W. Sasaki, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN L. REV. 1593 (1988); Slobogin, *supra* note 181; Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996).

[185] *See, e.g.*, People v. Isaacson, 378 N.E.2d 78, 83-84 (N.Y. 1978) (finding that physical coercion of informant to make drug deal with predisposed defendant violated state due process requirements).

[186] *See supra* Part III.A.

[187] *See, e.g.*, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 395-96 (1971) (recognizing cause of action against federal government officials for constitutional violations); Alexander v. DeAngelo, 329 F.3d 912, 916-18 (7th Cir. 2003) (finding that police use of excessive fraud in obtaining consent lead to due process violation).

[188] *See, e.g.*, cases cited *supra* notes 27, 183.

[189] FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 97-98, 106-18, 120-25, 131 (3d ed. 1986).

[190] *Id.* at 131-32.

[191] *See, e.g.*, cases cited *supra* notes 27, 183.

[192] *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978) (plea obtained by threat

the suspect's family members[193] or to remove a suspect from a protective program, such as the federal Witness Security Program.[194]

State statutes criminalizing the use of ploys, like deception and misrepresentation, to obtain sexual intercourse or sexual conduct throw into doubt the legality of these tried-and-true investigatory methods in the context of bargaining for sex tasks.[195] These statutes were enacted to punish the use of nonphysical forms of coercion to gain sexual compliance and are applicable to situations in which officials employ nonphysical forms of coercion to obtain an informant's consent to a sex task. For example, Tennessee criminalizes sexual penetration accomplished by fraud, which "includes but is not limited to, deceit, trickery, misrepresentation and subterfuge."[196] Alabama outlaws sexual conduct "obtained by the use of fraud or artifice;"[197] California prohibits the induction of sexual intercourse "procured by false or fraudulent representation or pretense that is made with the intent to create fear . . . and that would cause a reasonable person in like circumstances to act contrary to the person's free will."[198] Several states have also substantially incorporated into their criminal codes Model Penal Code provisions that deem consent to sexual intercourse ineffective when "induced by force, duress or deception,"[199] and that prohibit sexual intercourse obtained "by any threat that would prevent resistance by a woman of ordinary resolution."[200]

The phenomenon of "milking," the practice of exploiting a previous agreement for the purpose of receiving additional, non-negotiated-for cooperation by the informant, further complicates the case for allowing

---

to indict under statute with potential life sentence); Grabowski v. Jackson County Pub. Defender's Office, 47 F.3d 1386, 1389 (5th Cir. 1995) (plea obtained by threats to reindict as habitual offender), *aff'd en banc*, 79 F.3d 478 (5th Cir. 1996); United States v. Williams, 47 F.3d 658, 663 (4th Cir. 1995) (en banc) (plea and cooperation obtained by threats to refer case to federal authorities for more severe prosecution).

[193] *See, e.g.*, Bontkowski v. United States, 850 F.2d 306, 313 (7th Cir. 1988) (plea obtained by threats to prosecute pregnant wife to fullest extent of law when wife had already been indicted); United States v. Buckley, 847 F.2d 991, 1000 (1st Cir. 1988) (plea obtained by threats to prosecute brother); United States v. Diaz, 733 F.2d 371, 375 (5th Cir. 1984) (plea obtained by threats to prosecute brother and sister-in-law).

[194] *See, e.g.*, Doe v. United States, 51 F.3d 693 (7th Cir. 1995) (plea and cooperation obtained by threat to remove defendant from Witness Security Program).

[195] *See, e.g.*, statutes listed *supra* note 162 and *infra* notes 196-200 and accompanying text.

[196] TENN. CODE ANN. § 39-13-503(a)(4), (a)(13) (1997).

[197] ALA. CODE § 13A-6-65(a)(1) (1994).

[198] CA. PENAL CODE § 266c (West Supp. 1998).

[199] MODEL PENAL CODE § 2.11(3)(d) (1985).

[200] MODEL PENAL CODE § 213.1(2)(a) (1985). For a summary of states adopting these Model Penal Code provisions, see Falk, *supra* note 162, at 114-16, 121-22.

sex bargains to continue in such an unregulated climate. An informant's discovery upon completing her assigned task that more missions must be accomplished before officers will honor the agreement is not uncommon.[201] This sort of mistreatment, which is disquieting in the course of the usual informant-handler relationship, becomes abominable with respect to sex bargains and triggers constitutional concerns that stem not only from the lack of consent to the additional tasks, but also from the strictures of the Thirteenth Amendment.[202] What is more, informant agreements are typically highly confidential to protect both the informant and the integrity of the investigation. As such, they are not customarily recorded in writing.[203] The secret nature of these agreements makes difficult efforts not only to combat milking, but also to prove that it occurs.

Finally, in many situations, consummation of sexual activity is unnecessary to accomplish investigative goals. For example, in Gepfert's case, the police assigned her a sex task because they sought to arrest Alexander for "patronizing a prostitute" in violation of Indiana law.[204] Sexual intercourse or conduct, however, need not take place to justify an arrest under the state statute.[205] Whether the success of the sting hinged on Gepfert's performance of the sexual act is uncertain, but checks on informant handling would help to verify whether sexual conduct is essential to the success of an investigation.

Necessary oversight might take sundry shapes and forms. In particular, proposals for introducing due process safeguards into diversion proceedings may be effective at protecting individuals from

---

[201] Interview with Jon D. Richardson, career criminal defense attorney, in Toledo, Ohio (July 10, 2004).

[202] *See* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."); *see also* Misner & Clough, *supra* note 42 (arguing that diversion of arrestees as informants violates Thirteenth Amendment).

[203] United States v. Salemme, 91 F. Supp. 2d 141, 319 n.66 (D. Mass. 1991) (noting that writing requirement could discourage potential sources from assisting government).

[204] Alexander v. DeAngelo, 329 F.3d 912, 915 (7th Cir. 2003). For a more complete recitation of the facts of this case, see *supra* notes 4-24 and accompanying text.

[205] The Indiana statute criminalizing the patronization of a prostitute reads:

> A person who knowingly or intentionally pays, or offers or agrees to pay, money or other property to another person: (1) for having engaged in, or *on the understanding that the other person will engage in*, sexual intercourse or deviate sexual conduct with the person or with any other person; . . . commits patronizing a prostitute, a Class A misdemeanor.

IND. CODE ANN. § 35-45-4-3 (1998) (emphasis added).

potential official abuse or misconduct in sex bargain negotiations.[206] For example, an individual presented with a sex task could be given the right to counsel before agreeing to the assignment.[207] Such a right would prove especially important for individuals cooperating before formal charges are brought and thus before the Sixth Amendment right to counsel attaches.[208] A right to counsel may assist an individual in evaluating the risks of the diversionary task and would serve as a bulwark against official overreaching.[209] Another possible safety measure would be to conduct a hearing before an individual is diverted to ensure valid consent and to determine the suitability of the sex assignment.[210] Judicial control over the use of informants for sex tasks would offer protections similar to those provided by judicial control over plea bargaining — the guarantee that the informant's consent is given voluntarily and intelligently[211] and that the request for the sex task is reasonable and not oppressive.[212] Concededly, procedures such as these will encumber a system that was intended to operate quickly and quietly,[213] but due to the physically intrusive nature of sex bargains, the discrepancy in power between the bargaining parties, and the high potential for manipulation by law enforcement officials, there are

---

[206] Critics of another diversion program, pretrial drug diversion, have already suggested reforms for that process that would be useful for guiding the regulation of sex bargains. *See, e.g.*, Jamie S. Gorelick, Note, *Pretrial Diversion: The Threat of Expanding Social Control*, 10 HARV. C.R.-C.L. L. REV. 180 (1975); Kenneth W. Macke, Note, *Pretrial Diversion from the Criminal Process: Some Constitutional Considerations*, 50 IND. L.J. 783 (1975); Note, *Pretrial Diversion from the Criminal Process*, 83 YALE. L.J. 827 (1974).

[207] *See Hearings on H.R. 9007 and S. 798 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong. 141 (1974) (statement of Raymond T. Nimmer); Gorelick, *supra* note 206, at 210; *Pretrial Diversion from the Criminal Process*, *supra* note 206, at 840-43; Macke, *supra* note 206, at 800-02.

[208] *See* United States v. Gouveia, 467 U.S. 180, 188 (1984) (holding that right to counsel does not attach until formal charges have been brought).

[209] Prosecutors cannot be expected to oversee the informant-handler relationship. *See* Zimmerman, *supra* note 32, at 146 (noting that prosecutors possess "an inherent conflict of interest" and "fear discovery of constitutional violations by law enforcement").

[210] Gorelick, *supra* note 206, at 210-11; Macke, *supra* note 206, at 796-800; *Pretrial Diversion from the Criminal Process*, *supra* note 206, at 852.

[211] *See* Boykin v. Alabama, 395 U.S. 238, 242-44 (1969) (discussing standard for determining whether guilty plea is voluntarily made); *see also* King, *supra* note 27, at 131 ("A court should not enforce a waiver, negotiated or not, if the court lacks confidence in the defendant's understanding of what he is waiving or in his willingness to agree to the waiver.").

[212] *See* FED. R. CRIM. P. 11(b)(3) (2002) (requiring court to determine whether factual basis for plea exists).

[213] *See* Goldstein, *supra* note 27, at 565 (describing typical informant diversion proceeding following arrest).

compelling reasons for adding these safeguards to the process of negotiating sex bargains.

CONCLUSION: RECONSIDERING SEX BARGAINS

> *Better never means better for everyone. . . . It always means worse, for some.*[214]

In the final analysis, law enforcement use of informants for sexual investigative tasks merits further consideration. Close examination of sex tasks in relation to tasks commonly assigned to informants reveals fundamental differences that give rise to especial concerns about an informant's ability to provide effective consent to a sexual undertaking. The inclusion of due process measures in diversion proceedings would ameliorate these concerns by ensuring valid consent and guarding against official misconduct in brokering informant deals.

Beyond the issue of consent, endorsing these bargains risks a number of harmful repercussions. Conditioning a decision not to arrest or the dismissal or reduction of charges on a suspect's acceptance of a sex assignment could create a "de facto caste" of individuals with devalued sexual autonomy rights.[215] Plus, given the likelihood that more female than male informants would receive sex assignments,[216] sex tasks would objectify and sexualize the female body, vilipending women as mere "walking embodiments of men's projected needs"[217] and creating a "gendered lopsidedness" in the implementation of this practice.[218]

Chief among the negative fallout from sanctioning these agreements is the degrading effect to society that results from allowing individuals to

---

[214] ATWOOD, *supra* note 1, at 211.

[215] *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) (stating that "the violation of a woman's sexual autonomy conveys greater disrespect for her worth than do most other violations of her person"); Sullivan, *supra* note 27, at 1498 (describing "donor caste" created by "conditioning welfare benefits on contribution of body organs to public organ bank, or aid to mothers with dependent children on their service as surrogate mothers").

[216] Existing case law indicates that informants performing sexual acts are primarily women. *See* cases listed *supra* note 54 and Part I.B.

[217] Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS J. OF WOMEN IN CULTURE & SOC'Y 515, 534 (1982). Offered, the narrating and central character in Margaret Atwood's *The Handmaid's Tale* expresses a sentiment similar to this when she writes, "I avoid looking down at my body. . . . I don't want to look at something that determines me so completely." ATWOOD, *supra* note 1, at 63.

[218] *See* Frug, *supra* note 156, at 1052 (criticizing "gendered lopsidedness" of rules outlawing commercial sex, which target female commercial sex workers and not their male customers).

"work off" criminal charges by means of sexual activity. The punishment meted out by our criminal justice system possesses an expressive dimension that conveys the moral condemnation of the general public as well as its values.[219] Criminal penalties are thus "freighted with social meanings"[220] that embody the community's sensibilities as to condign punishment. Allowing persons accused or convicted of wrongdoing to repay their debts to society by serving as informants also imparts social meaning and value,[221] as do the activities they are required to perform. For this reason, to envisage filling law enforcement ranks with sex soldiers seems exploitative and immoral, regardless of the voluntariness of the informant. In the words of Justice Marshall, "A defendant's voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice."[222] Likewise, an armory of handmaids, however willing, can but speak to the ills of society and an ethos of social and moral decay.[223] Unless public outcry removes sex tasks from the informant bargaining table, law enforcement will continue to use these unsavory tactics. Until then, government pimps are here to stay.

---

[219] *See* Kahan, *supra* note 215, at 597-605 (examining expressive dimension of punishment with respect to alternative sanctions); 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (Macmillan 1883) (describing punishment as means by which "law gives definite expression and a solemn ratification . . . to the hatred which is excited by the commission of an offence").

[220] Kahan, *supra* note 215, at 610.

[221] The use of informants is considered to be essential "in order to apprehend those engaged in serious crime." United States v. Bogart, 783 F.2d 1428, 1438 (9th Cir. 1986), *vacated on other grounds with respect to one defendant sub nom.* United States v. Wingender, 790 F.2d 802 (9th Cir. 1986).

[222] Whitmore v. Arkansas, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting).

[223] *Cf.* William Butler Yeats, *The Second Coming*, *in* THE COLLEGE ANTHOLOGY OF BRITISH AND AMERICAN VERSE 486 (A. Kent Hieatt & William Park eds., 1964) ("Things fall apart, the centre cannot hold.").

***