

2020

## Sexual Contact Between A Suspect and Police Officers: How Far Should Police Go to Prove Prostitution?

Paula Del Valle Torres

*American University Washington College of Law*

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/jgspl>



Part of the [Evidence Commons](#), [Law and Gender Commons](#), [Law Enforcement and Corrections Commons](#), and the [Sexuality and the Law Commons](#)

---

### Recommended Citation

Torres, Paula Del Valle (2020) "Sexual Contact Between A Suspect and Police Officers: How Far Should Police Go to Prove Prostitution?," *American University Journal of Gender, Social Policy & the Law*. Vol. 28 : Iss. 3 , Article 4.

Available at: <https://digitalcommons.wcl.american.edu/jgspl/vol28/iss3/4>

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Journal of Gender, Social Policy & the Law by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

# SEXUAL CONTACT BETWEEN A SUSPECT AND POLICE OFFICERS: HOW FAR SHOULD POLICE GO TO PROVE PROSTITUTION?

PAULA DEL VALLE TORRES\*

Introduction .....	472
I. Background .....	475
A. Defining “Sex Worker” and “Prostitute” .....	475
B. Consent and Prostitution .....	476
C. Vice Cops and Undercover Sting Operations.....	477
D. Minnesota’s Impact on the Legal Analysis of Sexual Contact Between Police Officers and Suspects.....	479
II. Analysis.....	481
A. The Cuervelo Test and the Burkland Analysis Do Not Protect Prostitutes Enough Because They Do Not Accurately Define “Outrageousness” .....	481
B. Sexual Contact with Prostitution Suspects Strips Them of Their Due Process Rights Because Such Contact Violates Their Right to Bodily Integrity.....	484
C. Current Elements of Prostitution Are Overly Broad Because They Do Not Require an Exchange of Money for Sexual Contact.....	487
III. Policy Recommendation.....	490
Conclusion .....	491

---

\* Paula Del Valle Torres is a Juris Doctor candidate at American University Washington College of Law. She graduated from Hood College in 2018 with degrees in both Political Science and Spanish. Paula would like to thank her parents in Maryland and the rest of her family in Puerto Rico for their unconditional love and constant support throughout her life. She also wants to thank her friends for continuously cheering her on during her writing process. Lastly, she wants to thank her faculty advisor, Macarena Saez, for giving her the initial idea for this article and for being an incredibly inspiring professor.

## INTRODUCTION

“He seemed like a completely regular customer until afterwards,” Rachel said of her experience with a police officer.<sup>1</sup> Rachel, an Alaskan prostitute, had posted an escort ad online and quickly received a reply from a man.<sup>2</sup> Unbeknownst to her at the time, Rachel was setting herself up with a police officer who was conducting an undercover sting operation on her.<sup>3</sup> After the sexual encounter was concluded, the man identified himself as a cop and attempted to arrest Rachel.<sup>4</sup> Thinking quickly, she stated that the sexual contact was not conducted for business but for pleasure, and she subsequently ran to her car leaving the money payment behind.<sup>5</sup> After the encounter, Rachel stated, “I felt violated. It was a horrible experience. It was like, because he had a badge, it was okay—he could just do it.”<sup>6</sup>

Unfortunately, Rachel’s story is not unique.<sup>7</sup> Sex work, specifically prostitution, is one of the lowest-level offenses in the criminal code, and yet prostitutes in the United States often face the most severe abuse and unjust treatment by police officers.<sup>8</sup> The legal definition of prostitution often sets an incredibly low standard for an arrest, where prostitutes are arrested merely by agreeing or implying to participate in a transaction without actually having any sort of sexual activity for payment.<sup>9</sup> This low bar for prostitution

---

1. See Sirian Kale, *Police Are Allegedly Sleeping with Sex Workers Before Arresting Them*, VICE (May 3, 2017), [https://www.vice.com/en\\_us/article/59mbkx/police-are-allegedly-sleeping-with-sex-workers-before-arresting-them](https://www.vice.com/en_us/article/59mbkx/police-are-allegedly-sleeping-with-sex-workers-before-arresting-them) (describing how a prostitute felt violated when discovering that her client was actually an undercover police officer).

2. See *id.* (describing how Rachel inadvertently contacted a police officer).

3. See *id.* (stating how Rachel answered a “hotel out-call” after she received a response on an online advertisement she posted).

4. See *id.* (explaining how the police officer told Rachel he was going to arrest her after they had sex to completion).

5. See *id.* (describing how Rachel tried to justify the sexual encounter with the police officer to avoid being arrested).

6. *Id.*

7. See Urban Justice Center, *Revolving Door: An Analysis of Street-Based Prostitution in New York City* (2003), <http://sexworkersproject.org/downloads/RevolvingDoor.pdf> (explaining that thirty percent of survey respondents said they had been threatened with violence by police officers and twenty-seven percent described police officer sexual harassment).

8. See MELISSA HOPE DITMORE, *PROSTITUTION AND SEX WORK*, at xxiii (2011) (explaining that prostitutes are very vulnerable in society because they often cannot seek help from the police since their form of employment is criminalized).

9. See N.Y. PENAL LAW § 230.00 (McKinney 1967) (stating that a mere agreement or offer to engage in sexual conduct with another person in return for a fee is considered

is harmful because it gives police officers the power to arrest suspects who have not engaged in the actual transaction of sexual activity for payment.<sup>10</sup>

The legal standard is not the only issue. Another significant problem is sexual contact between police officers and the prostitutes that they investigate.<sup>11</sup> Police officers face a significant hurdle when working prostitution stings because undercover police officers need to act like credible “johns.”<sup>12</sup> Many undercover police officers participate in sexual contact with prostitutes to deceive prostitutes into believing that they are legitimate clients, subsequently arrest them, and then utilize the sexual contact and exchange of money as evidence.<sup>13</sup> Not only is this practice invasive, but it also brings up significant issues of prostitutes’ due process rights.<sup>14</sup> The Constitution grants people the right to bodily integrity, and these investigatory procedures specifically violate a suspected prostitute’s right to bodily autonomy by attaining sexual contact through fraudulent means.<sup>15</sup>

This Comment argues that to accurately prove the crime of prostitution the law must require sexual contact in exchange of payment.<sup>16</sup> But in the context of undercover sting operations, an undercover police officer’s sexual contact with a prostitute violates the prostitute’s, or suspected prostitute’s, due process rights.<sup>17</sup> This paradox calls for the prohibition of undercover sting

---

prostitution).

10. *See id.* (asserting that the physical act of sex in exchange for payment is not necessary to prove prostitution).

11. *See* Kelley Frances Stieler, *The Government Ménage à Trois: Unraveling the Government Sex Partner in Undercover Prostitution Stings*, 15 WASH. & LEE J. C.R. & SOC. JUST. 453, 455 (2009) (quoting “news articles across the country have reported cases where sexual contact occurred during prostitution sting operations”).

12. *See* Phillip Walters, *Would a Cop Do This: Ending the Practice of Sexual Sampling in Prostitution Stings*, 29 Law & Ineq. 451, 453 (2011) (stating that officers engage in sexual conduct with prostitutes to avoid being uncovered as police officers).

13. *See id.* (explaining how undercover police officers have been willing to engage in sexual conduct with prostitutes in order to obtain evidence against them).

14. *See* Commonwealth v. Sun Cha Chon, 983 A.2d 784, 785 (Pa. Super. Ct. 2009) (positing whether the police and their confidential informant’s engagement in sexual acts with plaintiff four times were outrageous enough to violate the plaintiff’s right to due process).

15. *See* Washington v. Glucksberg, 521 U.S. 702, 705 (1997) (stating that the Constitution places limits on a state’s right to interfere with a person’s decisions about bodily integrity).

16. *See infra* Part II (C) (asserting that requiring an exchange of payment for sexual contact more accurately represents the crime of prostitution).

17. *See infra* Part II (B) (explaining that the invasiveness of sexual contact directly

operations when used to uncover prostitution because there is no efficient or effective means of utilizing an undercover prostitution sting to arrest suspected prostitutes without violating the suspect's due process right to bodily integrity.<sup>18</sup> Part I will provide a legal definition of prostitution and the elements necessary to prove the crime.<sup>19</sup> Part I will also discuss how consent is affected when police officers lie to suspects about their identities.<sup>20</sup> Lastly, Part I will compare different prostitution laws and cases dealing directly with sexual contact to demonstrate the pervasiveness of this police practice.<sup>21</sup> Part II will analyze the different jurisprudential approaches to sexual contact between police officers and prostitutes, specifically the tests utilized by the courts to understand police officers' role in investigating prostitution.<sup>22</sup> The analysis will focus on the legal standard for prostitution and explain that the standard is too expansive because it unfairly targets people who have not actually committed the act that the law is trying to eliminate.<sup>23</sup> Part III will propose a new, heightened standard which narrows the legal elements of prostitution to the actual exchange of payment for sexual activity.<sup>24</sup> Additionally, Part III will discuss a possible solution to the vexing problem of sexual contact during prostitution investigation: the elimination of undercover prostitution stings.<sup>25</sup> Part IV will summarize the importance of actual sexual contact in exchange for payment to prove prostitution while reiterating that undercover police officers should not use this standard to initiate sexual contact with prostitutes because it is a

---

involves bodily integrity).

18. *See infra* Part III (concluding that sexual contact between an undercover police officer and a suspect is a violation of the suspect's due process right to bodily integrity).

19. *See infra* Part I (A) (discussing the legal definition of prostitution and the elements needed to prove the crime).

20. *See infra* Part I (B) (posing the complex problem of consent within the context of sexual contact between police officers and the suspected prostitutes that they investigate).

21. *See infra* Part I (C) (citing different instances and cases where police officers have participated in sexual contact with suspected prostitutes).

22. *See infra* Part II (A) (focusing on the *Cuervelo* three-part Test to determine government outrageousness and the *Burkland* outrageousness analysis).

23. *See infra* Part II (C) (stating that having such a low legal standard to establish the crime of prostitution allows police officers to arrest without the exchange of payment for sexual activity).

24. *See infra* Part III (stating that a new definition should require an actual exchange of payment for sexual contact or services).

25. *See infra* Part III (explaining that eliminating undercover stings for prostitution would be an effective way of solving the problem of sexual contact between police officers and suspected prostitutes).

violation of a suspected prostitute's due process rights.<sup>26</sup>

## I. BACKGROUND

### A. Defining "Sex Worker" and "Prostitute"

The contemporary term "sex work" casts a wide umbrella that covers a variety of different activities. It is necessary to define it to be able to accurately and effectively discuss its legal impact.<sup>27</sup> The term sex work refers to adults who "exchange sexual services for money which necessarily, but not exclusively, include direct physical sexual contact with clients."<sup>28</sup> Sex work can include prostitution, stripping, pornography, phone sex, escort services, and erotic masseurs.<sup>29</sup>

This Comment will focus specifically on the crime of prostitution, one form of sex work.<sup>30</sup> Although modern sex workers' rights groups prefer the term "sex worker," this Comment will use the term "prostitute" to differentiate from other forms of sex work.<sup>31</sup> State and local laws in forty-nine states, as well as four Nevada counties, prohibit prostitution.<sup>32</sup> The legal consequences for prostitution vary by jurisdiction, but generally prostitution is considered a misdemeanor and the punishment ranges from a fine to imprisonment for up to two years.<sup>33</sup>

Many jurisdictions now require an exchange of money and an offer for sexual activity to prove prostitution—no sexual contact is necessary.<sup>34</sup>

---

26. See *infra* Part IV (concluding that sexual contact by undercover police officers during prostitution stings should be considered outrageous behavior and banned).

27. See DITMORE, *supra* note 8, at xviii-xix (explaining how sex work can encompass a variety of different types of professions, such as street prostitution, stripping, or escorting services).

28. See *Sex Work 101*, PEERS VICTORIA RESOURCES SOCIETY (Sep. 30, 2019), <https://www.safersexwork.ca/sex-work-101/> (explaining the contemporary definition of sex work).

29. See *id.* (explaining that those who exchange sexual services for money include a variety of different professions).

30. See *id.* (listing different types of sex work).

31. See DITMORE, *supra* note 8, at xviii-xix (clarifying that the term "prostitution" is more accurate for academic and historical purposes).

32. See *Prostitution, Definitions of Prostitution*, JUSTIA (Sep. 30, 2019), <https://www.justia.com/criminal/offenses/sex-crimes/prostitution> (stating that prostitution is banned throughout the United States, except in twelve of Nevada's sixteen counties).

33. See 18 PA. STAT. AND CONS. STAT. ANN. § 5902 (West 2012) (defining prostitution in the first, second, and third degree as misdemeanor crimes).

34. See MINN. STAT. ANN. § 609.321 (West 2011) (asserting that "prostitution"

Although the courts have held that contact is unnecessary to prove prostitution, officers still use sexual contact to gather more evidence to prove the crime beyond a reasonable doubt, and avoiding “cop checking.”<sup>35</sup> Most states have outlawed actual intercourse in undercover sting operations, but courts have not set many boundaries regarding other types of sexual contact in undercover prostitution sting operations.<sup>36</sup>

### B. Consent and Prostitution

It is necessary to understand the role of consent when police officers investigate prostitution.<sup>37</sup> When discussing sex and intercourse, the majority of states have agreed that a person can withdraw consent.<sup>38</sup> In many cases, consent can be key in analyzing whether there has been a violation of due process rights.<sup>39</sup> Since consent is revocable, it is possible that a prostitute agrees to have sex in exchange for money, but revokes consent before the sexual act can occur.<sup>40</sup> In this scenario, a suspect has not engaged in an exchange of money for a sexual act, removing the reason for an arrest.<sup>41</sup> It

---

means being hired, offering to be hired, or agreeing to be hired by another individual to engage in sexual penetration or sexual contact).

35. See Sam Eifling, *Above the Law, Under the Sheets*, THE NEW REPUBLIC (Jan. 28, 2015), <https://newrepublic.com/article/120879/can-police-legally-have-sex-prostitutes-only-michigan> (defining “cop-checking” as when a prostitute initiates sexual contact to determine whether the person is a client or a cop).

36. See Dylan Sagelbaum, ‘*At What Point do They Stop?*’ *Tactics in Prostitution Stings Raise Questions in Pa.*, YORK DAILY RECORD (May 6, 2019), <https://www.ydr.com/story/news/watchdog/2019/05/06/investigation-undercover-prostitution-sting-cases-pennsylvania-police/3344293002/> (discussing how the lack of policies and standards have created a lack of boundaries for police departments).

37. See CAL. PENAL CODE § 261.6 (West 2019) (stating that consent requires the person to act voluntarily and have knowledge of the nature of the act or transaction involved); see also Rachael Urbansky, *Seducing the Target: Sexual Intercourse as Outrageous Government Conduct*, 50 CASE W. RES. L. REV. 729, 740, 752 (2000) (stating that “consent obtained through fraud or misrepresentation can be viewed as non-consent in some circumstances”).

38. See § 609.321 (stating that consent must be freely given to perform a sexual act).

39. See generally *Rochin v. California*, 342 U.S. 165, 172 (1952) (discussing that police officers must not use methods that offend the Due Process Clause).

40. See § 261.6 (explaining that consent can be revocable at any time since consent must be voluntary).

41. See *Commonwealth v. DeStefanis*, 658 A.2d 416, 420 (Pa. Super. Ct. 1995) (asserting that the “mere offer” is dispositive to prove prostitution, and that no touching needs to occur); see also *People v. Costello*, 395 N.Y.S.2d 139, 141 (Sup. Ct. 1977) (stating that a person can be guilty of prostitution when they agree or offer to engage in sexual conduct in return for payment).

is also important to analyze whether consent is possible when an undercover police officer misrepresents himself to attain a prostitute's consent, then engaging in sexual contact.<sup>42</sup> Consent obtained through fraudulent means and misrepresentations can hardly count as actual consent; a prostitute is unaware that the person they are having sexual contact with will subsequently arrest them.<sup>43</sup>

### C. *Vice Cops and Undercover Sting Operations*

To fully understand the complicated and amorphous legal history of prostitution and criminal law, we must understand the investigatory context of prostitution and police officers.<sup>44</sup> Attempting to police prostitution has proved more difficult than other crimes.<sup>45</sup> A significant issue arising from attempts to police prostitution is the fact that it tends to be a consensual act between two adults.<sup>46</sup> Additionally, the transaction of sex or sexual contact is usually done in private.<sup>47</sup> To combat this difficulty, police officers have set up “undercover stings” to break up prostitution rings and make arrests.<sup>48</sup> In these undercover stings, police officers will pose as “johns” and solicit sex in exchange for money from the suspects to prove they are in fact engaging in prostitution.<sup>49</sup>

In these situations, many prostitutes have the erroneous belief that undercover police officers will not participate or engage in sexual contact with them.<sup>50</sup> Prostitutes have therefore begun asking potential “johns” to

---

42. *See State v. Kelso-Christy*, 911 N.W.2d 663, 664 (Iowa 2018) (holding that if a person's consent to engage in a sexual encounter was obtained through the other actor's fraudulent misrepresentations that he is someone else there is no consent).

43. *See id.* at 673 (concluding that the identity of a sexual partner is significant because people must be free to decide who their sexual partners will be).

44. *See generally* Stielor, *supra* note 11, at 463 (explaining how law enforcement can be problematic in its enforcement of prostitution bans).

45. *See* Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 164 (1976) (explaining that police have had to utilize undercover police officers to expose acts of prostitution).

46. *See id.* (asserting that consensual prostitution is hard to detect since the crime usually occurs in private).

47. *See id.* (stating that prostitution is difficult to detect because none of the participants are likely to complain).

48. *See* Walters, *supra* note 12, at 453 (stating that undercover police officers are willing to engage in sexual contact with prostitutes in order to obtain evidence against them).

49. *See id.* at 462 (arguing that some police officers believe it is necessary to engage in sexual contact with suspected prostitutes to dispel suspicion).

50. *See State v. Crist*, 281 N.W.2d 657, 658 (Minn. 1979) (finding that a defendant

engage in some type of sexual contact to prove whether or not they are undercover police officers.<sup>51</sup> Prostitutes believe that an officer will refuse this contact, but in reality, law enforcement agencies and courts frequently allow undercover police officers to engage in sexual contact in order to prove the crime of prostitution.<sup>52</sup>

Police departments rarely write policies to ensure that prostitution investigations are conducted properly or to explain the extent to which police officers must go in order to pose as “credible customers to prostitutes.”<sup>53</sup> A York Daily Record/Sunday News investigation into police behavior during undercover prostitution stings in Pennsylvania found several recent cases raising questions about police behavior concerning their conduct of arresting prostitutes to “successfully prove the crime beyond a reasonable doubt.”<sup>54</sup> The investigation demonstrated that the lack of written policies in police departments and the investigative scope that police officers have attained within these investigations have created the potential for abuse of prostitutes.<sup>55</sup> Ultimately, this sexual contact is tantamount to a violation of the suspect’s due process rights.<sup>56</sup> In federal court, if the government violates a protected right of the defendant because of outrageous government conduct, due process principles bar the government from invoking the judicial process to obtain a conviction.<sup>57</sup> The concept of due process refers to fundamental fairness and, although not easily defined, one can infer due process to mean that a person under suspicion of a crime is entitled to a just process of investigation.<sup>58</sup> Although lower courts have used the principle of

---

asked an undercover officer to expose his penis to her as proof he was not a police officer).

51. See Stielor, *supra* note 11, at 464 n.3939 (describing an instance of “cop-checking” when an undercover police officer convinced a prostitute he was not a cop by touching her breast).

52. See Kale, *supra* note 1 (explaining that it is not specifically illegal for police officers in many states to have sexual contact with prostitutes during sting operations).

53. See Sagelbaum, *supra* note 36 (stating that police departments often do not outline what conduct is prohibited in an undercover prostitution sting).

54. See *id.* (investigating cases where undercover police officers have engaged in sexual contact with suspects).

55. See *id.* (stating that the lack of policies allow police officers to victimize suspects when investigating prostitution).

56. See *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that the officers’ behavior was so shocking that it violated the Constitution).

57. See *United States v. Cuervelo*, 949 F.2d 559, 565 (2d Cir. 1991) (asserting that if police officers utilize methods that violate a suspect’s due process rights, the courts can ban the government from convicting the suspect of the crime).

58. See *Sherman v. United States*, 356 U.S. 369, 383 (1958) (Frankfurter, J.,

“outrageousness,” the Supreme Court has been wary to define what would be considered “outrageous” enough to violate a suspect’s due process rights.<sup>59</sup> Additionally, courts have been reluctant to hear due process arguments in the case of prostitution and sexual contact.<sup>60</sup> It is necessary to understand that when police officers utilize sexual contact when investigating prostitutes, they are violating the suspected prostitutes’ due process rights and depriving them of their bodily integrity by participating in contact that is ultimately not necessary to prove the crime.<sup>61</sup>

*D. Minnesota’s Impact on the Legal Analysis of Sexual Contact Between Police Officers and Suspects*

Notwithstanding that violations have occurred across the states, Minnesota is notorious for the impropriety of its police officers when investigating prostitution.<sup>62</sup> Several cases demonstrate that police officers in Minnesota often use sexual contact as an investigative tool during undercover operations.<sup>63</sup> Minnesota is often discussed within the context of sexual contact during undercover prostitution stings because the cases *United States v. Cuervelo* and *State v. Burkland* helped establish one of the few jurisprudential standards regarding acceptable sexual behavior between police officers and suspects.<sup>64</sup>

In *Cuervelo*, the Second Circuit developed a test to determine whether sexual contact between a police officer and a suspect is appropriate or

---

concurring) (stating that police conduct used to ensnare suspects into committing crime is not to be tolerated).

59. *See State v. Morris*, 272 N.W.2d 35, 36 (Minn. 1978) (explaining that the Supreme Court has never defined what constitutes a violation of due process under the outrageousness standard).

60. *See United States v. Jones*, 13 F.3d 100, 104 (4th Cir. 1993) (stating that courts have ubiquitously rejected the application of the outrageous conduct defense).

61. *See Does v. District of Columbia*, 374 F. Supp. 2d 107, 118 (D.D.C. 2005) (holding that the right to bodily integrity is of “constitutional magnitude”).

62. *See Walters*, *supra* note 12, at 464-66 (discussing prominent Minnesota cases that deal with prostitutes and sexual contact between prostitutes and law enforcement).

63. *See United States v. Cuervelo*, 949 F.2d 559, 567 (2d Cir. 1991) (establishing a test to determine whether a sexual relationship between a suspect and a government agent is outrageous); *see also State v. Burkland*, 775 N.W.2d 372, 374 (Minn. Ct. App. 2009) (describing how an officer initiated sexual contact by touching a prostitute’s breast).

64. *See Cuervelo*, 949 F.2d at 567 (establishing a three-part test to determine if sexual contact by government agents is outrageous); *see also Burkland*, 775 N.W.2d at 374 (establishing analyses that focuses on the outrageousness of the government conduct).

“outrageous.”<sup>65</sup> The court stated that police officers engaged in outrageous behavior when utilizing sexual contact during investigations if: (1) the government consciously set out to use sex as a weapon in its investigatory arsenal, or acquiesced in such conduct for its own purposes upon learning that such a relationship existed; (2) the government agent initiated a sexual relationship, or allowed it to continue to exist, to achieve governmental ends; and (3) the sexual relationship took place during or close to the period covered by the indictment and was entwined with the events charged therein.<sup>66</sup>

The *Burkland* court used parts of the *Cuervelo* Test in its reasoning, and ultimately ruled that a police officer’s conduct in the investigation, of which included sexual contact with a suspected prostitute, was outrageous enough to violate the suspect’s due process rights.<sup>67</sup> The *Burkland* court mainly utilized part (2) of the *Cuervelo* Test in its reasoning, stating that the police officer’s conduct was outrageous because he initiated the sexual contact with the suspected prostitute when it was not required or necessary in the investigation.<sup>68</sup>

In *Burkland*, the court defined the incident at hand as “outrageous” conduct but ultimately did not provide an exhaustive list.<sup>69</sup> The court held in favor of the suspect and stated that the officer’s behavior was a violation of the suspect’s due process rights, but the ruling was very limited.<sup>70</sup> The only reason that the court held that the officer violated the suspect’s due process rights was because he initiated sexual contact, not because of the officer engaging in sexual contact in and of itself.<sup>71</sup> In fact, in *Burkland*, the

---

65. See *Cuervelo*, 949 F.2d at 567 (explaining the test for outrageous government conduct in regard to sexual contact with suspects).

66. See *id.* (elaborating on the three different components that the court determined were key elements to analyzing government behavior).

67. See U.S. CONST. amend. XIV, § 1 (stating, “nor shall any State deprive any person of life, liberty, or property, without due process of law); see also *Burkland*, 775 N.W.2d at 376 (holding that there was no evidence that “*Burkland*’s conduct was necessary to dispel a suspicion that he was a police officer,” and there is no evidence that it was necessary for the collection of evidence to initiate sexual contact).

68. See *Burkland*, 775 N.W.2d at 376 (utilizing part 3 of the *Cuervelo* outrageousness Test by identifying that the police officer initiated sexual contact for his own pleasure).

69. See generally *id.* at 372 (refusing to give examples of other types of conduct that would fall under the “outrageous” category).

70. See *id.* at 376 (holding that the outrageous behavior in this case was limited to when the investigating officer initiated and permitted the escalation of sexual contact that was unnecessary to any reasonable investigation).

71. See *id.* (concluding that when a police officer’s conduct in a prostitution

officer did engage in other sexual contact, but the court found it permissible because the suspect initiated the contact and not the officer.<sup>72</sup> Ultimately, the ruling in *Burkland* is not enough because the issue of sexual contact is still present.<sup>73</sup>

## II. ANALYSIS

### A. *The Cuervelo Test and the Burkland Analysis Do Not Protect Prostitutes Enough Because They Do Not Accurately Define “Outrageousness”*

The test established by *Cuervelo* and subsequently partly used in *Burkland* does not protect prostitutes’ Constitutional rights because it does not define “outrageousness” effectively.<sup>74</sup> While the *Cuervelo* Test and the *Burkland* Analysis led to a significant victory in some cases, the “bright line” rule necessary for effective oversight of the murky territory of undercover police operations is not defined, and it is unclear whether it addresses sexual conduct short of intercourse.<sup>75</sup> While analyzing *Cuervelo*, the district court stated that the standard for dismissal of a case based on outrageous conduct is strict, but it failed to see the legal implications of sexual contact.<sup>76</sup> By implementing a strict interpretation of outrageousness and only providing nonspecific factors to evaluate the outrageousness defense, the courts give police officers a blank check to operate with relative impunity.<sup>77</sup>

---

investigation involves the initiation of sexual contact that is not required for the collection of evidence, the conduct is a violation of due process).

72. *See id.* (holding that the first initial hour-long massage which *Burkland* offered to perform toless for an additional \$30 was not considered “outrageous”).

73. *See id.* (reversing appellant’s conviction only because the police officer initiated and permitted the escalation of sexual contact that was unnecessary).

74. *See United States v. Cuervelo*, 949 F.2d 559, 565 (2d Cir. 1991) (holding that due process principles may bar the government from obtaining a conviction only if the government’s conduct “reach[ed] a demonstrable level of outrageousness”); *see also Burkland*, 775 N.W.2d at 376 (holding that the police officer’s conduct was sufficiently outrageous to violate the “concept of fundamental fairness” in the guarantee of due process).

75. *See Commonwealth v. Chon*, 983 A.2d 784, 789 (Pa. Super. Ct. 2009) (holding that the government’s conduct was “sufficiently outrageous” to dismiss charges where a confidential informant was suspected to have had sexual intercourse four times with suspected prostitute).

76. *See Cuervelo*, 949 F.2d at 563 (citing the district court’s reasoning that there is a very strict standard for the dismissal of an indictment based on outrageous conduct).

77. *See id.* (stating that the bar for a suspect to successfully assert an outrageous government conduct defense is high).

In *Burkland*, the court faces the issue of vagueness that was present in *Cuervelo*.<sup>78</sup> The court in *Burkland* recognized a violation of the suspect's due process rights.<sup>79</sup> Ultimately, the *Burkland* court did not specify a threshold demarcating outrageous conduct.<sup>80</sup> Instead, the *Burkland* court determined that the officer initiated unnecessary sexual contact.<sup>81</sup> However the court did not analyze the actual contact, did not determine what type of conduct is or is not violative, and simply provided a general notion of what it considered outrageous conduct.<sup>82</sup> Instead of utilizing the test set out in *Cuervelo*, albeit general, the *Burkland* court only underscores the necessity of due process protection and reiterates the notions of fundamental fairness necessary when conducting undercover operations.<sup>83</sup>

In *Burkland*, the court compares a prostitution investigation with a controlled-substance investigation.<sup>84</sup> The court explains that the nature of a controlled-substance investigation differs from a prostitution investigation because an illegal drug sale is similar to an ordinary commercial transaction, except that it involves an illegal substance, while a sex-for-money exchange involves intimate activities between the buyer and seller.<sup>85</sup> This was a successful first step in the court's analysis because it differentiates physical and sexual contact from other forms of investigative tools and methods.<sup>86</sup> By

---

78. See *Burkland*, 775 N.W.2d at 374 (holding that due process protection prevents a conviction if police conduct reaches a demonstrable level of outrageousness).

79. See *id.* at 376 (holding that the government engaged in outrageous conduct in violation of the guarantees of due process when the investigating officer initiated the escalation of sexual contact with the suspect).

80. See *id.* (holding that "outrageous" government conduct occurs when the methods violate the "concept of fundamental fairness inherent" of due process).

81. See *id.* (stating that government conduct is sufficiently outrageous when a police officer in a prostitution investigation initiates sexual contact that is not required for the collection of evidence).

82. See generally *id.* at 376 (Minn. Ct. App. 2009) (reaffirming the belief in fundamental fairness but ultimately not delineating an exhaustive list of violative instances of government conduct).

83. See *id.* at 374 (explaining the concept of fundamental fairness inherent in the due process).

84. See *id.* at 375 (stating that a "sex-for-money" exchange involves intimacy and is quite different than other vice operations where police officers participate in illegal activities).

85. See *id.* (explaining why the court declines to use an "outrageousness" test established in a previous illegal substance case because the core issues are fundamentally different).

86. See *id.* (explaining that the court views sexual contact between police and suspects different from narcotics stings and therefore refused to utilize the same analysis established in previous cases).

stating that there is something inherently different in sexual contact, the court acknowledges that investigative procedures vary and must reflect the nature of the investigation.<sup>87</sup> The court in *Burkland*, however, only stated that outrageousness depends on whether the police themselves engaged in criminal or improper conduct that was repugnant to a sense of justice.<sup>88</sup> The court did not define the outrageousness factor or what constitutes excessive government overinvolvement in the crime, but only acknowledged that there was a violation in the case at hand.<sup>89</sup> This framework is necessary in all cases regarding sexual contact between an undercover police officer and a suspect because it is critical to understand the role of bodily integrity vis-à-vis invasive government tactics and their impact on due process procedures.<sup>90</sup> The invasiveness of sexual contact between police officers and prostitutes reflects key issues of bodily integrity because undercover police officers use a suspect's body and sexual actions to gather evidence by controlling the suspect's body to incriminate the suspect.<sup>91</sup> A suspect, regardless of the crime they are being investigated for, is entitled to inviolability and the right of self-determination for their bodies.<sup>92</sup> By concealing their identities as police officers, undercover officers are stripping away a suspect's right to consent because suspected prostitutes are unaware that they are being sexually utilized for their own prosecution and conviction.<sup>93</sup>

The ambiguity of the outrageousness test enables police officers to engage in sexual contact with suspected prostitutes on a discretionary basis,

---

87. *See id.* (reiterating that stings involving sexual contact should be evaluated differently than other vice stings).

88. *See id.* at 376 n.2. (explaining that although the factors used in undercover illegal drug cases are inapplicable in the prostitution context, the question of “whether the police engaged in criminal or improper conduct repugnant to a sense of justice” supports the court’s conclusion that outrageous government occurred in this case).

89. *See id.* at 374 (stating that when government conduct is sufficiently outrageous that it is repugnant to the criminal justice system and shocking to a universal sense of justice, it violates the right to due process).

90. *See id.* at 375 (reiterating how the courts view sexual contact between police and suspects in a prostitution sting differently than a narcotics sting or any other vice sting).

91. *See id.* (implying that some sexual contact is justified by the need to gather evidence sufficient to arrest the target of the investigation for the offense).

92. *See Does v. District of Columbia*, 374 F. Supp. 2d 107, 118 (D.D.C. 2005) (holding that the right to bodily integrity is of “constitutional magnitude,” and intruding upon that right requires a showing of overriding justification and medical appropriateness).

93. *See State v. Kelso-Christy*, 911 N.W.2d 663, 664 (Iowa 2018) (holding that if one person’s consent to engage in a sexual encounter with another was obtained through the other actor’s fraudulent misrepresentations that he is someone else, there is no consent).

regardless of whether that evidence is needed, so long as officers provide some pretextual reason that justifies the contact.<sup>94</sup> Although the *Burkland* case can be seen as a step forward, the court refused to sufficiently define the range of conduct that is considered outrageous.<sup>95</sup> This oversight has led to confusion and inconsistency for cases of suspected prostitutes discovered through undercover prostitution stings.<sup>96</sup>

*B. Sexual Contact with Prostitution Suspects Strips Them of Their Due Process Rights Because Such Contact Violates Their Right to Bodily Integrity.*

Sexual contact between police officers and prostitutes strips prostitutes of their due process rights because such contact violates their right to bodily integrity.<sup>97</sup> The practice of sexual contact between officers and prostitutes invokes a serious power imbalance between the authorities and suspects.<sup>98</sup> This imbalance can lead to a violation of due process specifically because consent is so unclear.<sup>99</sup> A lack of affirmative consent in a prostitution sting operation can provide police officers with opportunities to abuse prostitutes because investigations are often secret and the prostitutes and undercover officers are usually the sole witnesses to the probative interactions.<sup>100</sup> By lacking the clarity of consent, undercover police officers are wandering into dangerous territory where there is a strong potential for constitutional

---

94. See *State v. Morris*, 272 N.W.2d 35, 36 (Minn. 1978) (stating that it did not consider a police officer exposing his penis to a suspect as “outrageous conduct” because the police officer claimed that it was necessary to maintain his cover).

95. See *Burkland*, 775 N.W.2d at 376 (mentioning that unnecessary participation in sexual contact is outrageous); see also *Commonwealth v. Sun Cha Chon*, 983 A.2d 784, 789 (Pa. Super. Ct. 2009) (holding that excessive and gratuitous sexual contact between a police informant and a suspected prostitute was outrageous).

96. See Sagelbaum, *supra* note 36 (providing examples of different cases where courts applied inconsistent analyses creating varying results).

97. See Stielor, *supra* note 11, at 454 (stating that, in sexual contact between police and prostitutes, there is a theft of services and an imbalance or lack of reciprocity).

98. See *Burkland*, 775 N.W.2d at 376 (stating that where an officer’s behavior is so shocking and inappropriate that it is considered outrageous by the courts, it violates the Constitution).

99. See Stielor, *supra* note 11, at 467 (discussing cases in which police officers abused prostitutes during the course of a sting operation); see also Urbansky, *supra* note 37, at 752 (stating that consent obtained through misrepresentation can be viewed as non-consent and that such conduct should not be tolerated by the government).

100. See Stielor, *supra* note 11, at 465 (describing how the situational context can provide a setting where officers can abuse the suspects that they are investigating).

abuse.<sup>101</sup> Sexual contact between undercover police officers and their suspects is a physical and legal violation of due process because the sexual encounter can serve as an exhibition of the officer's dominance over the suspect.<sup>102</sup> The nature of the sexual contact puts the prostitute in the position of a suspect while the officer represents government authority.<sup>103</sup> This dynamic is problematic because these sexual relationships are criminalized in other contexts, but are considered lawful if the government can justify that the contact was necessary.<sup>104</sup>

Prostitutes often claim violations of due process post-arrest, after undercover investigations that involve sexual contact with police officers is concluded.<sup>105</sup> Sexual contact between police officers and prostitutes inherently violates prostitutes' due process rights because the police officers are attaining evidence in a manner that is inappropriate and invasive.<sup>106</sup> As a person, a prostitute is entitled to bodily autonomy and integrity. When an undercover police officer participates in sexual contact with a suspected prostitute, the officer strips her of the Constitutional rights to a fair investigation and proceedings.<sup>107</sup> Everyone, including suspects, have the right to refuse consent to sexual contact or intercourse.<sup>108</sup> When an undercover police officer misrepresents his identity as a "john" to convince a suspect to have sexual contact with him, he denies the suspect the right to bodily autonomy because he is obtaining consent through misrepresentation

---

101. *See id.* (asserting how undercover stings often allow for potential abuse because of the intimacy of the encounter).

102. *See id.* at 466 (explaining how police officers can use their physical presence to intimidate or coerce suspects into submission).

103. *See id.* at 466 (asserting that a sexual encounter between a police officer and a suspect may lead to an unfair power dynamic where the suspect might not receive their due process or fair investigation).

104. *See State v. Burkland*, 775 N.W.2d 372, 376 (Minn. Ct. App. 2009) (stating that sexual contact is permissible when intended to gain evidence of a crime).

105. *See Walters, supra* note 12, at 464 (explaining that defendants have challenged sexual contact between suspects and police officers, often utilizing the due process defense).

106. *See Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that the conviction was obtained by methods that offended the Due Process Clause and that the officers' behavior was so shocking that it violated the Constitution).

107. *See U.S. CONST. AMEN. XIV, § 1.* (stating that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

108. *See State v. Kelso-Christy*, 911 N.W.2d 663, 665 (Iowa 2018) (finding no consent when the defendant used deception to pose as another person to whom the victim did consent to having sexual relations).

and fraud.<sup>109</sup> When sexual contact occurs between a police officer and his suspect, there is a potential for the undercover officer to use his “authority and physical presence to subordinate the suspect”.<sup>110</sup> When a police officer utilizes sex deceptively to apprehend a suspect, not only is the police officer committing a serious intrusion on a suspect’s bodily autonomy, but he is establishing a dangerous precedent for unlimited police discretion when conducting undercover investigations involving prostitution.<sup>111</sup>

The *Cuervelo* Test, despite establishing a rule, is lacking and misguided because the test permits sexual contact between undercover police officers and prostitutes.<sup>112</sup> Because of the inherent nature of prostitution, undercover officers are inciting and enabling prostitutes to participate in an exchange of sex for money while depriving them of due process.<sup>113</sup> Courts have become increasingly resistant of the due process argument in prostitution cases.<sup>114</sup> Referring back to the *Cuervelo* Test, the Fourth Circuit acknowledged that a “generalized claim of outrageous misconduct based on the Due Process Clause of the Fifth Amendment is difficult to make out.”<sup>115</sup> Additionally, the Supreme Court has not articulated any useful standards for the application of the outrageousness defense.<sup>116</sup> Courts are often hesitant to dismiss charges because of due process violations involving police conduct

---

109. *See id.* at 664 (holding that if one person’s consent to engage in a sexual encounter with another was obtained through the other’s misrepresentation that he is someone else, there is no consent).

110. *See Stielor, supra* note 11, at 466 (citing Mary Ellen Gale, *Calling in the Girl Scouts: Feminist Legal Theory and Police Misconduct*, 34 LOY. L.A. L. REV. 691, 698 (2001)) (stating that there is high potential for officers to use their authority and physical presence to subordinate and intimidate suspects, stripping suspects of their due process protection).

111. *See id.* (explaining police misconduct is linked to stereotypic and aggressive masculinity which focuses “on the legal and physical power to subdue, subordinate, and dehumanize the people who become the targets of law enforcement”).

112. *See Walters, supra* note 12, at 470 (stating that the court in *Burkland* permits sexual contact and that any standard without an omnibus prohibition against sexual contact enables the victimization of prostitutes by law enforcement agents).

113. *See id.* at 476 (stating that a standard that allows undercover police officers unfettered sexual contact with prostitutes creates a significant power imbalance).

114. *See id.* at 454 (explaining that courts are reluctant to hear due process claims involving allegations of outrageous behavior).

115. *See United States v. Jones*, 13 F.3d 100, 104 (4th Cir. 1993) (stating that the outrageous conduct based on due process doctrine is “moribund” and that courts have rejected its application constantly).

116. *See State v. Morris*, 272 N.W.2d 35, 36 (Minn. 1978) (explaining that the Supreme Court has never defined what constitutes a violation of due process under circumstances that implicate the outrageousness defense).

that is morally questionable but not “outrageous.”<sup>117</sup> The act of sexual intercourse and sexual contact, in general, is unlike any other police officer practice because the profession of prostitution involves a person’s body and the intimacy of the subjects engaging in the act.<sup>118</sup> Sexual acts are more personal than other types of transactions, and utilizing sexual contact as a means of evidence gathering breaks the molds of typical undercover operations.<sup>119</sup> Utilizing sexual contact as an investigative tool means abusing an individual’s rights due to the invasiveness of police officer’s investigation.<sup>120</sup>

The courts often reject the due process argument and are dismissive of claims of outrageous government conduct because they view a prostitute’s behavior as “overwhelming evidence of guilt.”<sup>121</sup> In practice, a court could refuse to convict a defendant because the law enforcement methods to bring about the conviction directly implicate a suspect’s due process right to bodily integrity.<sup>122</sup> If the government utilizes sexual contact as a method of gathering evidence to subsequently arrest a prostitute, the courts must dismiss the charges, as sexual contact is inherently invasive in nature and cannot be valid evidence in a case.<sup>123</sup>

### C. *Current Elements of Prostitution Are Overly Broad Because They Do*

---

117. See Walters, *supra* note 12, at 465 (asserting that courts are reluctant to dismiss charges against a defendant when police conduct is “morally objectionable,” but not outrageous).

118. See Urbansky, *supra* note 37, at 745 (asserting that physical contact and intimacy between an undercover agent and their suspect becomes outrageous as a matter of constitutional law); see also Walters, *supra* note 12, at 467 (stating that sex acts are more personal and volatile).

119. Walters, *supra* note 12, at 466 (explaining that the justifications for sexual contact between police officers and suspects over-emphasize the agency and free will of those who engage in this type of contact).

120. See Stielor, *supra* note 11, at 465 (explaining that fraud involving another’s body adds a troubling element, beyond that occurring with the mere exchange of tangible objects).

121. See Urbansky, *supra* note 37, at 740 (stating that ignoring the tactics utilized by police officers to obtain evidence because a defendant was “clearly guilty” denies due process protection).

122. See *Sherman v. United States*, 356 U.S. 369, 380 (1958) (holding that courts may refuse to convict a defendant because, the methods employed on behalf of the government to bring about conviction are morally wrong, ethically controversial, and violative of due process, even if the defendant is guilty).

123. See *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that the conviction was obtained by methods that offended the Due Process Clause and that the officers’ behavior was so shocking that it violated the Constitution).

*Not Require an Exchange of Money for Sexual Contact*

It is necessary to raise the standard for the crime of prostitution because the current legal definition is too broad and expansive.<sup>124</sup> Because such a low threshold is required to establish the crime of prostitution, courts are unable to develop accurate and effective jurisprudential theories regarding the criminality of prostitution.<sup>125</sup> The *Cuervelo* Test and the *Burkland* Analysis are ineffective legal tests because they only address the superficial issues of sexual contact in undercover prostitution stings.<sup>126</sup> The courts in *Cuervelo* and *Burkland* ignore the reality that prostitution's current definition allows police officers to violate a suspected prostitute's due process rights to bodily autonomy and privacy. The current definition of prostitution creates a legal framework where an individual is suspected of prostitution for simply agreeing to engage in prostitution, without either actually having sexual contact for money or is in a position where she is defrauded into participating in sexual contact with a police officer.<sup>127</sup> The outrageousness tests enable police officers to go further and engage in sexual contact with suspects to gather additional evidence and possibly entrap those who otherwise might have revoked their consent.<sup>128</sup> The outrageousness tests also allows courts to sideline the due process issues by creating a general premise of what does and does not violate due process, unlike a bright line rule which is necessary.

The current definition of prostitution should not be maintained. Police officers are wasting a substantial amount of resources to investigate and arrest prostitutes that have not even committed the actual exchange of sexual activity for money.<sup>129</sup> Further, the definition creates confusion within the

---

124. See Stielor, *supra* note 11, at 474 (citing *State v. Thoreson*, No. A06-454, 2007 WL 1053205, at \*4 (Minn. Ct. App. Apr. 10 2007) (Randall, J., dissenting) (discussing that sexual contact is not necessary if the elements of the crime have been presented within the course of the investigation).

125. See *id.* (explaining that the mere offering to provide sexual services for a price constitutes a crime).

126. See generally *United States v. Cuervelo*, 949 F.2d 559, 567 (2d Cir. 1991) (focusing only on the sexual contact between the government agent and the suspect).

127. See MINN. STAT. ANN. § 609.321 (West 2011) (asserting that "prostitution" means being hired, offering to be hired, or agreeing to be hired by another individual to engage in sexual penetration or sexual contact).

128. See generally *State v. Burkland*, 775 N.W.2d 372, 376 (Minn. Ct. App. 2009) (stating that officers are allowed to participate in sexual contact if they believe it is necessary to gather evidence).

129. See Julie Pearl, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, 38 HASTINGS L. J. 4, 769-770 (1987) (explaining that police in sixteen of the nation's largest cities will likely continue spending increased amounts of

courts because outrageousness is not outlined or defined.<sup>130</sup> A new definition requiring an actual exchange of payment for sexual contact or services more fairly represents the conduct being targeted and establishes a bright line rule that would be better suited for the courts.<sup>131</sup> By providing a new definition of prostitution, and delineating a new bright line rule for fairly evaluating probative conduct, courts would more consistently analyze allegations of prostitution.<sup>132</sup>

This new standard would have a significant impact on undercover prostitution stings and drastically change the legal procedure of these types of operations in the future.<sup>133</sup> With this new standard, the only way that undercover police officers could “bust” a prostitute would be to participate in sexual contact with the suspect in exchange for payment to actually prove the crime of prostitution.<sup>134</sup> If it were merely an offer, suggestion, or implication of sexual activity in exchange for payment, a suspect could always revoke her consent, claim that she changed her mind, or otherwise renounce the verbal exchange.<sup>135</sup> By actually engaging in sexual contact, undercover officers could prove the crime of prostitution by demonstrating a transaction based on sexual activity.<sup>136</sup> Although this new standard seems like it would solve the ambiguity and abstruseness of arresting and prosecuting prostitutes, in actuality, it encourages a violation of prostitutes’ due process rights because it denies them the right to bodily integrity.<sup>137</sup>

---

time making prostitution arrests, taking time away from more serious offenses). *See id.* at 769 (stating that highly skilled vice officers dedicate thousands of weekly hours devoted to prostitution stings representing tremendous opportunity costs).

130. *See Walters*, *supra* note 12, at 465.

131. *Id.*

132. *Id.* at 465 (explaining that a bright line rule is necessary for effective oversight and legal analysis in the context of prostitution cases).

133. *See Pearl*, *supra* note 129, at 790 (stating that an efficient way to lower the cost of prostitution investigation is to eliminate or cut the undercover preparation needed to make an arrest).

134. *See Burkland*, 775 N.W.2d at 376 (holding that although sexual contact was permitted as long as it was not considered “outrageous,” sexual contact was not necessary).

135. *See Stieler*, *supra* note 11, at 463 (quoting a commentator who stated “[a]s long as these laws are on the books, the substance of the violation, and its consensual and secret structure, practically requires a degree of participation by the state”).

136. *See id.* (explaining that to enforce prostitution laws, law enforcement must embroil themselves in the crime).

137. *See Washington v. Glucksberg*, 521 U.S. 702, 705 (1997) (stating that the Constitution places limits on a State’s right to interfere with a person’s decisions about bodily integrity); *see also Burkland*, 775 N.W.2d at 376 (overturning a conviction where

## III. POLICY RECOMMENDATION

American society has determined that prostitution is morally wrong and has implemented laws to attempt to curb the practice. It is clear that undercover prostitution stings pose a unique problem on law enforcement and the courts.<sup>138</sup> Undercover prostitution stings involve a police officer going undercover as a “john” and attempting to “catch” a suspect engaging in prostitution.<sup>139</sup> The problem with this scenario is that the laws prescribing the legal elements of prostitution are so ambiguous that they allow police officers to arrest a suspected prostitute without evidence of payment in exchange for sexual contact. Laws permitting an undercover officer to arrest a prostitute simply based on an agreement to engage in sexual contact alone are ineffective, and allows for the subjugation of a vulnerable class of people without the suspects ever actually committing the crime that the law targets.<sup>140</sup>

If, as argued above, the legal standard for the crime of prostitution is raised and the elements to prove the crime of prostitution are narrowed, police officers conducting undercover prostitution stings would need to engage in sexual contact with the suspects to prove the crime of prostitution. But if this change is implemented and undercover police officers are required by law to engage in sexual contact with suspects to prove the crime of prostitution, an immediate violation of the suspect’s due process rights occurs. Sexual contact between an undercover police officer and a suspect is a violation of the suspect’s right to bodily integrity because the undercover police officer uses the suspect’s body as a tool against the suspect by engaging in an intimate sexual encounter to gather evidence for the suspect’s own prosecution.<sup>141</sup>

The law of prostitution cannot be narrowed to only refer to the actual exchange of payment for sexual contact without enabling police officers in

---

the evidence was “obtained by methods that offended the Due Process Clause”).

138. See Park, *supra* note 45, at 164 (asserting that consensual prostitution is hard to detect since the crime usually occurs in private and none of the participants are likely to complain).

139. See Walters, *supra* note 12, at 453 (stating that undercover officers engage in sexual conduct with prostitutes in order to continue to investigate them without being uncovered as a police officer).

140. See *supra* Part III (C) (stating that having such a low legal standard to establish the crime of prostitution allows police officers to arrest without the exchange of payment for sexual activity).

141. See *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that the conviction was obtained by methods that offended the Due Process Clause and that the officers’ behavior was so shocking that it violated the Constitution).

undercover prostitution stings to have sexual contact with suspects with impunity. For the foregoing reasons, undercover prostitution stings should be banned. Under a narrower definition of prostitution where sexual contact in exchange for payment is required, it would be nearly impossible for an undercover police officer to prove the crime of prostitution without implicating themselves in the same crime and violating a suspect's due process rights. Therefore, undercover stings should be reserved for vice operations when the evidence required for a conviction does not implicate the sexual and bodily integrity of a suspect.

#### CONCLUSION

Sexual contact between undercover police officers and prostitutes is a violation of the prostitute's due process right to bodily integrity.<sup>142</sup> By masquerading as "johns," police officers deceive suspected prostitutes and trick them into participating in sexual contact, raising the question of whether prostitutes are able to freely give consent in this context.<sup>143</sup>

Courts are ill-prepared and unwilling to address the constitutional argument that sexual contact between an undercover police officer and a prostitute is a violation of the prostitute's due process right to bodily integrity.<sup>144</sup> The *Cuervelo* Test and subsequent *Burkland* Analysis do not set a bright-line rule defining outrageous government behavior.<sup>145</sup> Ultimately the current elements of the crime of prostitution are overbroad and unjust because they allow police officers to arrest based only on the possibility of sexual activity in exchange of money and not the actual act.<sup>146</sup>

It is necessary to raise the standard for the crime of prostitution and narrow the elements required to prove it.<sup>147</sup> The legal definition of prostitution

---

142. *See id.* (asserting that the government should be barred from pursuing convictions in instances when evidence is obtained through outrageous or invasive methods because the suspect's due process rights have been violated).

143. *See Urbansky, supra* note 37, at 752 (stating that consent obtained through fraud or misrepresentation can be viewed as non-consent in some circumstances).

144. *See United States v. Jones*, 13 F.3d 100, 104 (4th Cir. 1993) (stating that courts have consistently rejected the application of the outrageous conduct defense).

145. *See United States v. Cuervelo*, 949 F.2d 559, 565 (2d Cir. 1991) (holding that due process principles may bar the government from obtaining a conviction only if the government's conduct "reach[ed] a demonstrable level of outrageousness").

146. *See Stieler, supra* note 11, at 471 (concluding that sexual contact should not be necessary for a police officer to make an arrest for prostitution).

147. *See* MINN. STAT. ANN. § 609.321 (West 2011) (asserting that "prostitution" means being hired, offering to be hired, or agreeing to be hired by another to engage in sexual contact).

492 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 28:3

should be limited to an actual exchange of money or payment for sexual activity.<sup>148</sup> A prostitute should therefore only be charged after the payment is received and the sexual act completed.<sup>149</sup> But by adopting such a standard, undercover cops would need to have sexual contact with prostitutes to gather the evidence necessary to arrest them.<sup>150</sup> This would undoubtedly lead to due process violations because the sexual contact between undercover police officers and suspected prostitutes would inherently violate the suspect's due process rights by virtue of the police officer obtaining evidence in an outrageous and invasive manner.<sup>151</sup> This poses a dilemma, leading to only one conclusion: Sexual contact by undercover police officers during prostitution investigations should be considered outrageous behavior in violation of a prostitute's due process rights, and should therefore be banned.<sup>152</sup>

---

148. See Stielor, *supra* note 11, at 474 (citing *State v. Thoreson*, No. A06-454, 2007 WL 1053205, at \*4 (Minn. Ct. App. Apr. 10 2007) (Randall, J., dissenting) (discussing that there is no need for sexual contact if the elements of the crime have already been presented within the course of the investigation).

149. See *State v. Burkland*, 775 N.W.2d 372, 373 (Minn. Ct. App. 2009) (stating that sexual contact is permissible if it was intended to gain evidence of a crime).

150. See *id.* (asserting that sexual contact would be permissible if it was necessary for the purposes of the investigation).

151. See *Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that the conviction was "obtained by methods that offended the Due Process Clause and that the officers' behavior was so shocking that it violated the Constitution").

152. See *id.* at 173-174 (stating that the government should not be allowed to utilize investigative means that violate due process rights).