COMMENT

OUTRAGEOUS GOVERNMENT (MIS)CONDUCT: DUE PROCESS AS A DEFENSE IN PAID-SEX STING OPERATIONS

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INTRODUCTION

A man visited a spa in Montgomery County, Pennsylvania, four different
times in the summer of 2006.¹ Each time, he paid to receive and perform
sexual acts with spa employees.² As a result of this conduct, police officers
executed a search warrant of the spa, and ultimately charged a female
employee, Sun Cha Chon, with prostitution and promoting prostitution.³

² Id.
³ Id. Because of the degrading history of the term “prostitution,” I confine my use of the word
to two scenarios: when it is used in a direct quotation, and when I am referring to the laws themselves
that are so titled. See Victoria Taylor, Campaign Urges AP Stylebook to Replace Use of ‘Prostitute’ with
(describing an online campaign by sex workers’ rights advocates “urging the editors of the AP
stylebook . . . to use the term ‘sex worker’ instead of ‘prostitute’”); STELLA, LANGUAGE MATTERS:
StellaInfoSheetLanguageMatters.pdf [https://perma.cc/VGB9-WDFV] (describing the word
“prostitute” as “deep-rooted negative and legalistic”). Some contemporary scholars also take issue
with the term “sex work” in legal and policy discourse, because of its ambiguity. See Anita Bernstein,
Essay, Working Sex Words, 24 MICH. J. GENDER & L. 221, 232-34 (2017) (noting that although the
After paying for sex, the man was not charged with prostitution or solicitation: in fact, he was not charged at all. On the contrary, police paid him a total of $180 for the time he spent receiving oral stimulation and engaging in sexual intercourse with the female employees. The man discussed the sexual encounters with police, who laughed and joked with him on multiple occasions about the acts.

Despite having paid for and received sex, the man faced no charges because he was acting under the government’s direction. The man was approached by the police earlier that summer after he visited the spa on his own accord and was unable to afford the cost of manual sexual stimulation. The police asked him to act as an informant to facilitate the arrests of the women working in the spa. In this way, a customer of the spa was able to purchase sex on numerous occasions, paid for entirely by the police, and receive additional financial compensation, without any fear of criminal prosecution.

Luckily, Ms. Chon had a defense available to her. In July 2007, she filed a motion to dismiss, arguing that the government’s action was so outrageous that it violated her constitutional due process rights. Her motion was based on a little-known defense rooted in the Due Process Clause called “outrageous
government conduct" that is recognized in Pennsylvania. The trial court granted her motion to dismiss, and the State appealed. In 2009, the Pennsylvania Superior Court affirmed the dismissal, agreeing that the government’s actions were so shocking that they violated Ms. Chon’s constitutional right to due process of law.

The outcome of Ms. Chon’s case was not guaranteed: notably, today, the Outrageous Government Conduct defense is only recognized in a few jurisdictions. The Supreme Court has never invalidated a government action based on this defense, and even where it is available, the threshold is often described as extremely high to the point of being nearly insurmountable. Despite being a constitutional test, defendants face very different outcomes depending on their jurisdiction, and some may not have the defense available to them at all.

This Comment argues that courts should make the Outrageous Government Conduct defense available to defendants in circumstances similar to Ms. Chon’s. Although the defense can be and has been applied in numerous situations, I argue that it is both useful and easy to apply in one particular circumstance: cases of sexual relations between government agents and targets of investigations, where the government’s purpose is obtaining a prostitution or prostitution-related conviction.

Part I lays out the history and background of the Outrageous Government Conduct defense by explaining its origins, current status in different circuits and states, and distinction from the related defense of entrapment. Part I also explains the types of cases in which the defense is currently used, in both state and federal courts across the country.

Part II advances an argument that the Outrageous Government Conduct defense should be available to targets of paid-sex sting operations when police engage in sexual conduct or enlist confidential informants to engage in sexual conduct. The Supreme Court has never addressed a case with this fact

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8 Although some sources refer to the defense as “outrageous governmental conduct,” I will refer to it only as I do above, for the sake of consistency.
10 Chon, 983 A.2d at 786.
11 Id. at 791.
12 See United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993) (“[T]he doctrine [of Outrageous Government Conduct] is moribund; in practice, courts have rejected its application with almost monotonous regularity.”); Michael Tompkins, Public Corruption, 56 AM. CRIM. L. REV. 1269, 1282 (2019) (noting that the Outrageous Government Conduct defense, as a due process violation, is not recognized by most circuits).
13 See, e.g., United States v. Therrien, 847 F.3d 9, 14 (1st Cir. 2017) (“A defendant’s claim of outrageous government misconduct faces a demanding standard, permitting the dismissal of criminal charges ‘only in . . . very rare instances’ . . . .”); United States v. Garza-Juarez, 992 F.2d 896, 904 (9th Cir. 1993) (describing the standard as “extremely high” (quoting United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991))).
pattern, nor has any circuit court addressed paid-sex sting operations as they relate to this defense. I argue that police engaging in sex, or enlisting confidential informants to do so, with the purpose of obtaining a prostitution or prostitution-related conviction “shocks the conscience,” making it a violation of due process. I further explain why entrapment, as it stands, is an inadequate defense to protect victims of these operations. I outline one jurisdiction's test for Outrageous Government Conduct in the context of sexual relationships between police and investigative targets, and I explain why this test undoubtedly holds that paid-sex sting operations are a violation of due process. Finally, I discuss the practical implications of extending Outrageous Government Conduct defenses to all cases of law enforcement engaging in sexual relationships with targets of paid-sex stings, by arguing that the Supreme Court should either adopt a bright line rule that this conduct is outrageous or adopt a test that will ensure it will be.

I. WHAT IS THE BACKGROUND OF THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE?

Throughout the twentieth century, the Supreme Court discussed Outrageous Government Conduct as a defense to conviction based in the Due Process Clauses of the Fifth and Fourteenth Amendments. However, the Court has not explicitly relied on this test to overturn a conviction since the early 1950s, instead alluding to it only in hypotheticals.

The Outrageous Government Conduct defense is often conflated with entrapment, but there are important distinctions. In particular, if the prosecution can show that a defendant was predisposed to commit the crime at issue, the dominant formulation of the entrapment defense is entirely


15 See Russell, 441 U.S. at 431-32 (“While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . the instant case is distinctly not of that breed.” (citation omitted)).

16 See United States v. Al-Cholan, 610 F.3d 945, 949-50 (6th Cir. 2010) (distinguishing between the entrapment and Outrageous Government Conduct defenses due to the defendant’s confusion and conflation of them); United States v. Dyess, 293 F. Supp. 2d 675, 683 n.12 (S.D. W. Va. 2003) (“While conflated in their origins, the doctrines of entrapment and outrageous government conduct are different and distinguishable.”); see also John David Buretta, Note, Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines, 84 GEO. L.J. 1945, 1965 (1996) (“The outrageous government conduct doctrine is a young branch on the tangled tree of the entrapment doctrine—ill-defined and oozing with ambiguity. It developed out of lower courts’ misapplication of the entrapment doctrine . . . .’”).
unavailable, regardless of the extent of law enforcement inducement.\textsuperscript{17} The Outrageous Government Conduct defense, on the other hand, is not defeated by a showing of predisposition.\textsuperscript{18}

The availability of the Outrageous Government Conduct defense varies widely from circuit to circuit.\textsuperscript{19} The defense is invoked frequently in relation to controlled substance sting operations, both when law enforcement officers purchase drugs and arrest the seller, and when individuals are convicted for their involvement in drug labs run by government agents.\textsuperscript{20} The defense has also been invoked when government agents have engaged in sexual relations with investigative targets, leading both states and a few circuits to fashion tests determining when this conduct crosses the line into Outrageous Government Conduct.\textsuperscript{21}

### A. What Are the Origins of the Defense?

The Outrageous Government Conduct defense was first recognized by the Supreme Court in \textit{Rochin v. California}.\textsuperscript{22} In 1949, three deputy sheriffs entered Antonio Rochin’s home without consent.\textsuperscript{23} They forced open the door to Mr. Rochin’s room, where he was partially dressed and in bed with his wife.\textsuperscript{24} When the officers pointed at two capsules on the nightstand beside Rochin’s bed and asked whose they were, Mr. Rochin swallowed both capsules.\textsuperscript{25} The officers leapt onto Rochin and tried to force the capsules out of his throat, but failed, instead handcuffing him and transporting him to the hospital.\textsuperscript{26} Against Mr. Rochin’s will, the officers directed a doctor to force a tube down Mr. Rochin’s throat and pump his stomach, making him vomit up the capsules, which were found later to contain morphine.\textsuperscript{27} Mr. Rochin was charged and convicted for possession of morphine.\textsuperscript{28}

\textsuperscript{18} See infra note 81.
\textsuperscript{19} See infra notes 90–96.
\textsuperscript{20} See, e.g., Greene v. United States, 454 F.2d 783, 783 (9th Cir. 1971) (finding that the Outrageous Government Conduct defense barred defendant’s conviction for selling bootleg whiskey to an undercover agent); United States v. Twigg, 588 F.2d 373, 380-82 (3d. Cir. 1978) (holding police action in setting up a methamphetamine production site then arresting defendants for their miniscule involvement violated the Due Process Clause).
\textsuperscript{21} See infra Section I.C.
\textsuperscript{22} 342 U.S. 165 (1952).
\textsuperscript{23} Id. at 166.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
On appeal, the California appellate court found that the officers were guilty of “unlawfully breaking into and entering defendant’s room . . . unlawfully assaulting and battering defendant while in the room . . . [and] unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital.” Even so, the court affirmed Mr. Rochin’s conviction, arguing that they were bound by Supreme Court precedent despite a “shocking series of violations of constitutional rights.” The Supreme Court of California denied the petition for a hearing without opinion.

At the Supreme Court, Justice Frankfurter penned an opinion condemning the police officers’ actions as unconstitutional. He did not have, however, a clear constitutional sticking point—a clause that proscribed these state actions. Instead, he turned to the “least specific and most comprehensive protection of liberties, the Due Process Clause.” Acknowledging that the clause is “vague,” and the definition of due process itself is “not final and fixed,” Frankfurter nonetheless insisted that the Court had a duty in this case to evaluate a conviction brought about by these police actions in the context of the clause’s limitations. And in exercising that duty, he held that the police action in this case violated the Constitution and the Due Process Clause because the law enforcement actions were “conduct that shocks the conscience.” Forcible stomach pumping to attain inculpatory evidence “is bound to offend even hardened sensibilities,” because it is “too close to the rack and the screw to permit of constitutional differentiation.” In essence, Justice Frankfurter held that police violated the Due Process Clause because they acted outrageously.

Reading Rochin today, the police conduct looks initially like a Fourth Amendment question. But because it was decided before the Fourth

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29 Id. at 167.
30 Id. at 166–67.
31 Id. at 167.
32 Id. at 166, 168, 172, 174.
33 See Jane R. Bambauer & Toni M. Massaro, Outrageous and Irrational, 100 MINN. L. REV. 281, 290 (2015) (describing the Rochin holding as the “tentative judicial testing afforded by the vague promises of due process”).
34 Rochin, 342 U.S. at 170.
35 See id. at 170–71 (“The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.”).
36 Id. at 172, 174.
37 Id. at 172.
38 See Bambauer & Massaro, supra note 33, at 289–90 (“After all, today the facts of Rochin would easily qualify for a Fourth Amendment challenge, and the evidence used against Rochin would be excluded on that basis.”).
Amendment’s incorporation, the Court found that the police conduct violated the Due Process Clause itself. Frankfurter’s holding relied on his and other judges’ instinctive reaction to the officers’ actions, rather than on any prior legal rule or definition.

Once Mapp incorporated the Fourth Amendment, the Rochin test fell into disuse. But the Supreme Court revisited Rochin’s rhetoric around twenty years later. In United States v. Russell, the Court cited Rochin when alluding to a hypothetical situation where due process would preclude a conviction because of outrageous actions by law enforcement. In Russell, an undercover agent, posing as a representative for an organization interested in the distribution of methamphetamine, offered to provide the defendant an ingredient for the manufacture of the drug in exchange for a portion of the produced drug. The agent saw the laboratory where the defendant and others manufactured meth, and in accordance with their agreement, provided the extremely rare ingredient in exchange for narcotics. The defendant was ultimately arrested and convicted for manufacturing the drugs, and the jury rejected the entrapment defense. The court of appeals, however, found that because the agent had supplied an exceptionally scarce ingredient, without which the manufacture of the drug would have been impossible, the defendant had been entrapped. At the Supreme Court, the defendant argued that because the agent’s involvement in the drug’s manufacture was so

39 See Mapp v. Ohio, 367 U.S. 643, 655 (1961) (“We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”). This was not the only right that the Supreme Court invoked through the Due Process Clause prior to Bill of Rights’ incorporation. For a discussion about the enforcement of the rights against self-incrimination and coerced confessions through the Fourteenth Amendment prior to the incorporation of the Fifth Amendment, see Bambauer & Massaro, supra note 33, at 190.

40 The Supreme Court has since recognized this explicitly, stating that today Rochin “would be treated under the Fourth Amendment, albeit with the same result.” Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849 n.9 (1998). The facts of Rochin today would likely fall under Schmerber, which noted that even drawing blood can be a Fourth Amendment violation without probable cause. Schmerber v. California, 384 U.S. 757, 768-70 (1966). However, it is worth noting that Schmerber cited to “that sense of justice” Rochin established. Id. at 759-60 (internal quotation marks omitted).

41 See Rochin, 342 U.S. at 169 (“Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . .”).

42 See Bambauer & Massaro, supra note 33, at 289 (describing how “[t]he Rochin test has taken a beating” since its creation).


44 Id.

45 Id. at 425.

46 Id. at 425-26.

47 Id. at 423. For a definition of the standard entrapment defense and further discussion of the defense’s distinction from the Outrageous Government Conduct defense, see infra Section I.B.

48 Russell, 411 U.S. at 427.
pivotal, a conviction on the basis of the drug production should be deemed a violation of due process, thus making entrapment a constitutional claim based only on the egregious nature of the law enforcement conduct.49

The Court said that the defendant misunderstood entrapment, the purpose of which is not to enable the court to sanction or restrain “overzealous law enforcement,” but rather to acquit defendants who only violated the law because they were induced to do so.50 Although the Court held that entrapment is not a constitutional defense, it did not preclude the possibility of a constitutionally rooted defense based on overzealous law enforcement conduct. In addressing this hypothetical future, the Court cited to Rochin, noting, “[w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed.”51

Soon after, the Court was presented with another claim of Outrageous Government Conduct. In Hampton v. United States, an informant for the Drug Enforcement Administration (DEA) arranged a heroin sale between DEA agents and the defendant.52 The defendant gave undercover agents a total of around $650 worth of heroin, on two separate occasions, and was arrested.53 The defendant argued that the informant had given him the narcotics, and that at the time, he believed it to be counterfeit heroin.54 He said that he was entrapped by the informant and agents, who misled him into unknowingly selling heroin and ultimately arrested and charged him with the crime.55 He was found guilty, his conviction was affirmed by the court of appeals, and the Supreme Court granted certiorari.56 At the Court, he argued that his conviction was a violation of the Due Process Clause based on the language in Russell.57

In Hampton, the Court firmly rejected the constitutional claim.58 While admitting that the government played a larger role in Mr. Hampton’s conviction than in Mr. Russell’s, the Court held that there was no due process violation because the Government did not violate any protected right of the

49 Id. at 430.
50 Id. at 435.
51 Id. at 433-32.
53 Id.
54 Id. at 486-87.
55 See id. at 487-88 (indicating that Mr. Hampton asserted he was “the victim of entrapment” in a proposed jury instruction).
56 Id. at 484, 489.
57 Id. at 489.
58 See id. (“In urging that this case involves a violation of his due process rights, petitioner misapprehends the meaning of the quoted language in Russell.”).
defendant. Justice Rehnquist asserted that “[t]he remedy of the criminal
defendant with respect to the acts of Government agents, which, far from
being resisted, are encouraged by him, lies solely in the defense of
entrapment." However, Justice Rehnquist made this assertion representing
only three Justices—a plurality, but not a majority. Five Justices,
representing both a concurrence and the dissent, found that there could be an
Outrageous Government Conduct defense founded in the Due Process
Clause, even in circumstances where entrapment did not exist. Therefore, a
majority of Justices in Hampton recognized the availability of an Outrageous
Government Conduct defense as conceived in Rochin and Russell.

B. How Is the Defense Distinct from Entrapment?

The entrapment defense developed as a common-law doctrine through
state courts early in the twentieth century, eventually making its way into
federal courts. Entrapment was officially recognized by the Supreme Court
in 1932, in the landmark case Sorrells v. United States. The defendant in
Sorrells was charged with and convicted of possessing and selling alcohol
during prohibition. The defendant did sell a half gallon of whiskey to a
government agent, but he did so only after the agent asked on three separate
occasions, and the first two times the defendant refused. The trial court
refused to submit the issue of entrapment to the jury, holding that
entrapment failed as a matter of law. The Supreme Court reversed the lower
court’s judgment, holding that the issue of entrapment should have been

59 Id. at 489-91.
60 Id. at 490. This conclusion seems rather at odds with Justice Rehnquist’s own dicta in Russell. See Russell, 411 U.S. at 432 ("[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ."). This contradiction has been described by a lower court judge as Justice Rehnquist “trying to put back in the bottle the genie he had loosed.” United States v. Dyke, 715 F.3d 1282, 1285 (9th Cir. 2013).
61 See id. at 495 (Powell, J., concurring) (“I therefore am unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition.”); id. at 499 (Brennan, J., dissenting) (agreeing with Justice Powell that entrapment “is only one possible defense . . . in cases where the Government’s conduct is as egregious as in this case,” and noting due process as an alternate defense).
63 Id. at 435. 452 (1932).
64 Id. at 458.
65 Id. at 439.
66 Id. at 438.
submitted for the jury to decide.68 Anticipating likely criticism for usurping legislative power by deriving an entirely new criminal defense, the Court insisted that its decision was a matter of statutory interpretation—a duty to avoid “[l]iteral interpretation[s] of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice.”69 The Court found that reading the statute literally to allow police inducement would violate “the highest public policy in the maintenance of the integrity of administration,” which the legislature could not possibly have intended.70

The Court in *Sorrells* set the stage not only for entrapment as a federally recognized defense but also for continuing controversy over the relevance of a defendant’s “predisposition” to commit the crime. The majority opinion by Justice Hughes asserted that a defendant’s predisposition is necessarily relevant to any claim of entrapment, saying that a defendant who “seeks acquittal by reason of entrapment . . . cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.”71 If the inquiry into a defendant’s predisposition harms him, said Justice Hughes, “he has brought it upon himself.”72

In a famous concurrence, Justice Roberts agreed with the necessity for an entrapment defense but pushed back against lack-of-predisposition as an element. When a crime is committed because of inducement by a government agent, Justice Roberts argued, the defendant’s prior bad acts should not come in at all, because “[w]hatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors.”73

The arguments set forth on either side of *Sorrells* are now expressed as the two distinct views of entrapment: the approach of the majority, often called the “subjective approach” or the *Sherman–Sorrells* doctrine,74 and the approach of the concurrence, known as the “objective approach” or the Roberts–Frankfurter approach.75

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68 *Id.* at 452.
69 *Id.* at 446; see also Jessica A. Roth, *The Anomaly of Entrapment*, 91 WASH. U. L. REV. 979, 993-94 (2014) (noting that, by relying on canons of statutory interpretation, the Court avoided the “dilemma” of overstepping its bounds into executive or legislative arenas to develop the defense of entrapment).
70 *Sorrells*, 287 U.S. at 448-49.
71 *Id.* at 451.
72 *Id.* at 452.
73 *Id.* at 458-59.
74 This name reflects that a number of years later, another famous Supreme Court case embodied the same division of opinion on entrapment as *Sorrells*. In *Sherman v. United States*, Justice Warren held that when a defense of entrapment is asserted, a defendant “will be subjected to an appropriate and searching inquiry into his own conduct and predisposition as bearing on his claim of innocence.” *Sherman v. United States*, 356 U.S. 369, 373 (1958) (internal quotation marks omitted).
75 LAFAIVE, supra note 17, § 5.2(b). The “Roberts-Frankfurter approach” designation refers to the famous concurring opinions of Justice Roberts in *Sorrells* and Justice Frankfurter in *Sherman*. See id. § 5.2(b).
Federal courts and approximately two-thirds of the states take the subjective approach.\textsuperscript{76} To prevail under the subjective approach, a defendant must show first that the crime was the product of government inducement, and second, that the defendant was not predisposed to commit this type of offense.\textsuperscript{77}

The Model Penal Code,\textsuperscript{78} as well as about one third of the states,\textsuperscript{79} have adopted the objective approach. The objective approach removes the bar of defendant predisposition. Instead, it provides for a defense of entrapment any time a crime was induced by government agents “employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.”\textsuperscript{80} Under this formulation, even a predisposed defendant can bring an entrapment defense.

The Outrageous Government Conduct defense is similar to the objective approach to entrapment because it is not barred by predisposition.\textsuperscript{81} Even the name of the defense—Outrageous Government Conduct—underscores a singular focus on the conduct of government agents instead of on the target of the investigation. But the Outrageous Government Conduct defense does have distinctions from the objective approach to entrapment—most notably, in the basis and timing of the defense.

The Outrageous Government Conduct defense is rooted in the Fifth and Fourteenth Amendment Due Process Clauses of the Constitution.\textsuperscript{82} Whether government conduct is outrageous to the point of violating the Fifth Amendment is a question of law that must be raised and ruled on in a pretrial motion, or else it is waived under Federal Rule of Criminal Procedure

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\textsuperscript{76} LaFave, supra note 17, § 5.2(a).  
\textsuperscript{77} Id.  
\textsuperscript{78} Model Penal Code § 2.13 (Am. L. Inst. 1985).  
\textsuperscript{79} LaFave, supra note 17, § 5.2(b) n.30.  
\textsuperscript{80} Model Penal Code § 2.13(b) (Am. L. Inst. 1985).  
\textsuperscript{81} See United States v. Mosley, 965 F.2d. 906, 909 (10th Cir. 1992) (“The defense of outrageous conduct is distinct from the defense of entrapment in that the entrapment defense looks to the state of mind of the defendant to determine whether he was predisposed to commit the crime. . . . The outrageous conduct defense, in contrast, looks at the government’s behavior.”).  
\textsuperscript{82} U.S. CONST, amend. V; id. amend. XIV; see also Richard Lawrence Daniels, Note, United States v. Simpson: “Outrageousness!” What Does It Really Mean?—An Examination of the Outrageous Conduct Defense, 18 SW. U. L. REV. 105, 105 (1988) (“The ‘outrageous conduct’ defense is based on the due process rights guaranteed by the Constitution.”).
\end{flushleft}
12(b)(1)-(2) and analogous rules of state criminal procedure.\textsuperscript{83} Entrapment, on the other hand, whether subjective or objective, is typically a question of fact that is considered by the jury.\textsuperscript{84}

Entrapment is not based in the Due Process Clause, nor any part of the Constitution. As a criminal defense it is unique, because unlike other standard criminal defenses it is also not based in history or English common law.\textsuperscript{85} Rather, the entrapment defense is a product of the twentieth-century United States: during prohibition, widespread concern about government agents inducing violations by setting up alcohol operations led to the creation of the common-law entrapment defense.\textsuperscript{86} Now all states have an entrapment defense, primarily through common law.\textsuperscript{87}

Because the entrapment defense is not constitutionally based, states have the freedom to define it more flexibly, which is part of why there are multiple distinct formulations of entrapment. The Supreme Court does not have the power to dictate the test for entrapment, or to overrule state formulations.

C. \textit{What Is the State of the Defense Today?}

Although the Supreme Court attempted to clarify its entrapment and Fifth Amendment jurisprudence in \textit{Hampton}, the confusing outcome left little guidance for lower courts when adjudicating police inducement and the Supreme Court has not addressed it since.\textsuperscript{88} As a result, the Outrageous Government Conduct defense primarily plays out in lower courts, and to vastly different outcomes.\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{83} See, e.g., United States v. Henderson-Durand, 985 F.2d 970, 973 & n.5 (8th Cir. 1993); United States v. Duncan, 896 F.2d 271, 274 (7th Cir. 1990); United States v. Nunez-Rios, 623 F.2d 1093, 1099 (2d Cir. 1980).
\item Zelinger, infra note 191, at 160.
\item See Paul Marcus, Interview, \textit{The Entrapment Defense}, 30 OHIO N.U. L. REV. 211, 216 (2004) ("[T]raditional defenses, such as self-defense, defense of others, necessity, and the insanity defense—that sort of claim in our system comes from the early English common law . . . That is not true with the entrapment defense.").
\item Marcus, supra note 85, at 216.
\item See Stephen A. Miller, Comment, \textit{The Case for Preserving the Outrageous Government Conduct Defense}, 91 NW. U. L. REV. 305, 315 (1991) ("The Supreme Court, seeing the confusion wrought by [Russell], sought to clarify the defense in \textit{Hampton v. United States}. Yet, the Court's fractured opinion only further muddied the waters in the course of confirming the viability of the defense.").
\item Id. at 319 (explaining how the Supreme Court avoided explaining Outrageous Government Conduct, thereby "leaving lower courts to develop the contours of the defense.").
\end{itemize}
1. In Federal Court?

Both the availability and the formulation of the Outrageous Government Conduct defense vary widely from circuit to circuit. On one end of the spectrum are the circuits that have declared the doctrine dead, entirely blocking defendants who cannot invoke entrapment from making inducement arguments.\(^90\) Next on the spectrum are circuits that recognize the doctrine, but maintain an extremely high threshold to trigger it.\(^91\) Finally, there are circuits who maintain the doctrine is “not entirely mummified,”\(^92\) but have so far declined to extend it, calling themselves in one case “the never say never camp—or at least the don’t-say-never-if-you-don’t-have-to camp.”\(^93\) On the whole, among the circuit courts, the doctrine is recognized as “often raised but seldom saluted.”\(^94\) In spite of the uphill path to success, most of the circuits have at the very least recognized the defense as viable.\(^95\)

Although it is a high burden to prove, the defense has nonetheless been successful in numerous federal cases, most frequently in drug sales and drug manufacturing cases. Often the defense is invoked in so-called “reverse-sting

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\(^90\) Included in circuits that refuse to recognize the defense are the Sixth and Seventh Circuits. See, e.g., United States v. Tucker, 28 F.3d 1420, 1426-27 (6th Cir. 1994) (refusing to recognize a due process defense for outrageous police misconduct); United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995) (explicitly rejecting Outrageous Government Conduct as a defense); United States v. Smith, 792 F.3d 760 (7th Cir. 2015) (“We repeatedly have reaffirmed our decision not to recognize the defense.”).

\(^91\) See, e.g., United States v. LeRoux, 738 F.2d 943, 948 (8th Cir. 1984) (holding that an undercover agent’s substantial participation in an illegal enterprise did not violate the Constitution because it was not “so outrageous and shocking that it exceeded the bounds of fundamental fairness”); United States v. Stinson, 647 F.3d 196, 1209 (9th Cir. 2011) (requiring a defendant to show that police action was “so grossly shocking and so outrageous as to violate the universal sense of justice” to show a due process violation, and noting the defense is “limited to extreme cases”); United States v. Nolan-Cooper, 155 F.3d 221, 230 (3rd Cir. 1998) (recognizing the defense while conceding that its viability is “hanging by a thread”); United States v. Osborne, 935 F.3d 32, 36 (4th Cir. 1993) (affirming that the Outrageous Government Conduct defense requires an extremely “high shock threshold,” and canvassing disturbing cases where “[t]he court’s conscience remained undisturbed”); United States v. Rodriguez, 603 F. App’x 306, 312 (5th Cir. 2015) (“It is well-established in this circuit that a due process violation will be found only in the rarest and most outrageous circumstances.” (quoting United States v. Tobias, 662 F.2d 381, 386 (5th Cir. 1981)));

\(^92\) United States v. Santana, 6 F.3d 1, 12 (1st Cir. 1993).

\(^93\) United States v. Dyke, 718 F.3d 1282, 1287 (10th Cir. 2013). For additional circuits that tentatively recognize the defense but avoid applying it, see Santana, 6 F.3d at 4 (“The historical record makes it clear, therefore, that the outrageous misconduct defense is almost never successful.”); United States v. Ciszkowski, 492 F.3d 1264, 1272 (11th Cir. 2007) (Carnes, C.J., concurring) (noting that while the 11th Circuit recognizes the defense of Outrageous Government Conduct, it is rooted “in... speculative dicta,” and “[t]his Court has not ever reversed a conviction or vacated a sentence” on its basis)

\(^94\) Santana, 6 F.3d at 4.

\(^95\) Only two Circuits—the Sixth and Seventh—have explicitly refused to recognize the defense. See Tucker, 28 F.3d at 1426-27; Boyd, 55 F.3d at 241; see also United States v. Moseley, 965 F.3d 906, 909 (10th Cir. 1992) (“Notwithstanding the lack of a clear holding on outrageous conduct by the Supreme Court, most of the circuits, including this one, have recognized the viability of the outrageous conduct defense.”).
operations,” when law enforcement officers sell drugs to an investigative target and arrest the purchasers.96 For example, the Ninth Circuit found a violation of due process when a special investigator posed as a member of a gang selling bootleg whiskey; it called the government’s actions “wholly impermissible participation” and reversed the convictions of both defendants.97

Another formulation of the defense occurs in cases where individuals are convicted for their involvement in drug laboratories that were set up and run by undercover government agents. In one such case, United States v. Twigg, the defendant, Neville, was approached by a confidential informant acting on DEA agent orders about setting up a laboratory to produce methamphetamine.98 They planned to divide the work, with the informant assuming all responsibility for acquiring equipment, ingredients, and a location for the laboratory.99 The informant did obtain glassware, chemicals, and a location, receiving substantial financial and logistical assistance from the DEA.100 At this point, the second defendant, Twigg, who owed a debt to Neville, was introduced to the informant.101 The laboratory ran for one week, which resulted in about six pounds of methamphetamine being produced.102 During that time, the laboratory was run completely by the confidential informant; Neville and Twigg completed only specific and small tasks as directed by the informant, which included running errands and buying coffee or groceries.103 Both defendants were arrested after Neville was stopped leaving with the drugs on his person.104

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96 “Reverse-sting” typically describes a set-up where law enforcement officers pose as drug sellers, distinguishable from so-called “buy and busts,” in which officers pose as drug buyers. See Gail M. Greaney, Note, Crossing the Constitutional Line: Due Process and the Law Enforcement Justification, 67 NOTRE DAME L. REV. 745, 757 (1992). The term has also been used when officers set up a fake “stash-house” or another location to be targets of robbery, and then arrest those who attempt to rob them. See, e.g., Shayna Jacobs, 10 Years. 179 Arrests. No White Defendants. DEA Tactics Face Scrutiny in New York, WASH. POST (Dec. 14, 2019, 8:05 PM), https://www.washingtonpost.com/national-security/10-years-179-arrests-no-white-defendants-dea-tactics-face-scrutiny-in-new-york/2019/12/14/f54f62242-12ce-1fae-b662-eadd5d5f5f5f_story.html [https://perma.cc/WfQC-HJPE] (using “reverse sting” to describe federal agents waiting to intercept seven defendants for attempting to rob “what they believed was a Harlem stash house holding around $800,000 worth of heroin and cocaine”).

97 Greene v. United States, 454 F.2d 783, 784-85 (9th Cir. 1971). But see United States v. Haas, No. 96-10530, 96-10533, 1998 WL 88590, at *1 (9th Cir. 1998) (expressing hesitation to follow Greene in other cases, noting in an unpublished opinion that Greene “may be an entrapment rather than an outrageous government conduct case”).

98 588 F.2d 373, 375 (3d Cir. 1978).
99 Id.
100 Id. at 375-76.
101 Id. at 376.
102 Id.
103 Id.
104 Id.
The Third Circuit noted that entrapment was not an issue on appeal for either defendant because Twigg was not brought into the criminal enterprise by a government agent and because Neville was predisposed.\(^\text{105}\) Presented with two cases of government inducement, neither of which allowed for a defense of entrapment, the court held that the police conduct was outrageous to the point of violating the Due Process Clause.\(^\text{106}\) The court pointed to the government’s involvement in supplying the necessary ingredients and the location, at cost only to the government, and to the informant’s role as supervisor in the laboratory.\(^\text{107}\) In spite of Neville’s predisposition, the court held that upholding the conviction was disallowed by principles of fundamental fairness.\(^\text{108}\) The Outrageous Government Conduct defense was granted for both defendants, and both convictions were reversed.\(^\text{109}\)

A final category in which the defense is often presented, and of the greatest importance to this comment, is when sexual relations occur between government agents or confidential informants and investigative targets. These cases typically address situations where undercover agents or informants have sexual relationships with targets but not to secure a sex-based conviction: for example, to develop trust, or as a result of a past relationship.\(^\text{110}\) In response to cases along these lines, a few circuit courts have developed tests to “identify the point at which physical contact and emotional intimacy between an undercover agent and his or her target suspect becomes outrageous . . . .”\(^\text{111}\)

In the Second Circuit, one case involving sexual relationships between government agents and targets inspired the court to develop a test for this specific circumstance. In *United States v. Cuervelo*, the defendant Gomez-Galvis was charged as a coconspirator in the importation of cocaine from Panama into the United States.\(^\text{112}\) Gomez-Galvis alleged that an undercover

\(^\text{105}\) *Id.*

\(^\text{106}\) *Id.* at 380-81.

\(^\text{107}\) *Id.*

\(^\text{108}\) *Id.* at 381.

\(^\text{109}\) *Id.* at 381-82.

\(^\text{110}\) *See, e.g.*, United States v. Nolan-Cooper, 155 F.3d 221, 234 (3d Cir. 1998) (holding that the Outrageous Government Conduct defense is not implicated by “a one-time sexual encounter [between an agent and a target] that served no investigatory purpose occurring near the end of an investigation . . . .”); United States v. Miller, 891 F.2d 1265, 1266, 1268 (7th Cir. 1989) (finding no due process violation when an undercover agent had previously been sexually intimate with the target of a drug investigation); United States v. Fadel, 844 F.2d 1425, 1429 (10th Cir. 1988) (referring to the lower court decision that an agent instigating a sexual relationship while investigating a target did not constitute Outrageous Government Conduct). For an argument why the Outrageous Government Conduct defense should apply when undercover officers induce criminal activity or assistance in an investigation through sex and romance, see Andrea B. Daloia, Note, *Sexual Misconduct and the Government: Time to Take a Stand*, 48 CLEV. ST. L. REV. 793 (2000).

\(^\text{111}\) Nolan-Cooper, 155 F.3d at 232.

\(^\text{112}\) 949 F.2d 559, 563 (2d. Cir. 1991).
DEA agent seduced her, wrote her love letters, and ultimately had sex with her approximately fifteen times.113 Based on their romantic and sexual relationship, Gomez-Galvis agreed to help the agent find a drug supplier in Colombia.114 Ultimately, Gomez-Galvis arranged a meeting for the agent with a drug dealer in Colombia, whom she had never before helped to sell drugs.115 She explained that she acted only as a go-between, passing messages between the two men, but argued that the government’s actions violated due process purely because of her romantic and sexual relationship with the undercover agent.116 Gomez-Galvis described this conduct as “sexual entrapment,” and argued that the government’s actions were a violation of due process because “[l]egitimate undercover operations can be conducted without federal agents acting like modern day Mata Haris.”117

In Cuervelo, rather than determining whether or not the government’s conduct was outrageous, the court established a three-part test that set forth the minimum for unconstitutional conduct and remanded the case to the lower court for additional fact finding on whether the standard was met.118 Under Cuervelo, to succeed on a due process claim pertaining to a sexual relationship between the defendant and a government agent, the defendant must show

(1) that the government consciously set out to use sex as a weapon in its investigatory arsenal, or acquiesced in such conduct for its own purposes upon learning that such a relationship existed;

(2) that the government agent initiated a sexual relationship, or allowed it to continue to exist, to achieve governmental ends; and

(3) that the sexual relationship took place during or close to the period covered by the indictment and was entwined with the events charged therein.119

The same test was adapted by the Third Circuit in United States v. Nolan-Cooper, with a variation: part one requires only that the defendant show that

113 Id.
114 Id. at 564.
115 Id.
116 Id.
117 Id. Mata Hari was a suspected German spy in World War I who was accused of sharing information with the military officers she seduced. Rachel Siegel, ‘I Am Ready’: Mata Hari Faced a Firing Squad for Spying—and Refused a Blindfold., WASH. POST (Oct. 15, 2017, 3:00 AM), https://www.washingtonpost.com/news/retropolis/wp/2017/10/15/i-am-ready-mata-hari-faced-a-firing-squad-for-spying-and-refused-a-blindfold [https://perma.cc/LY3R-KVA6]. Recent accounts have suggested she may have been entirely innocent of spying and was selling sex because she was living in poverty after leaving an abusive relationship. Id.
118 Cuervelo, 949 F.2d at 567.
119 Id.
“the government consciously set out to use sex as a weapon in its investigatory arsenal or acquiesced in such conduct for its own purposes once it knew or should have known that such a relationship existed.”

2. In State Court?

Defendants have raised the Outrageous Government Conduct defense in state courts with similar results as in federal courts. Notably, unlike in federal court, state courts have specifically discussed due process as a defense in paid-sex sting operations many times over the past fifty years. In the 1970s and 1980s, a number of state courts analyzed the constitutionality of paid-sex sting operations involving sexual contact, but overwhelmingly found no due process violation.

More recently, however, state courts faced with the same issue have found that sexual misconduct between undercover agents and investigative targets does cross a constitutional line. In State v. Burkland, a case eerily similar to Commonwealth v. Sun Cha Chon, an undercover officer in Minneapolis posed as a customer at a tanning salon suspected of selling sex. The officer bargained for, paid for, and engaged in sexual contact with an employee, who was then found guilty of prostitution based on the interaction. The court held that

when a police officer’s conduct in a Prostitution investigation involves the initiation of sexual contact that is not required for the collection of evidence to establish the elements of the offense, this conduct, initiated by the investigating officer, is sufficiently outrageous to violate the “concept of fundamental fairness inherent” in the guarantee of due process.

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120 155 F.3d 221, 233 (3d Cir. 1998).
121 See, e.g., State v. Williams, 623 So.2d 462, 464-66 (Fla. 1993) (finding law enforcement conduct a violation of due process when a chemist for a local Sheriff’s office manufactured crack cocaine using powdered cocaine that had been seized to sell in a reverse-sting operation that resulted in defendant’s being arrested and prosecuted).
122 See, e.g., State v. Tookes, 699 P.2d 983, 987 (Haw. 1985) (“While we question whether the actions of . . . the police in this case comport with the ethical standards which law enforcement officials should be guided by, we cannot say that they constituted outrageous conduct in the constitutional sense.”); State v. Emerson, 517 P.2d 245, 249 (Wash. Ct. App. 1973) (“Although our opinion should not be misconstrued as a moral endorsement of the means employed to obtain the evidence . . . we cannot say the trial court erred in using the police agent’s evidence in convicting the defendant.”); Anchorage v. Planagan, 649 P.2d 957, 963 (Alaska Ct. App. 1982) (“Although [the officer’s] conduct . . . might be considered questionable, we do not think that this conduct—even in the context of an investigation involving a relatively minor misdemeanor charge—can accurately be characterized as outrageous.”).
124 Id. at 374.
125 Id. at 376.
The Minnesota appellate court found that the officer violated due process by initiating sexual contact and allowing the contact to escalate, because the escalation was “unnecessary to any reasonable investigation and offensive to due process.”

In summary, the Outrageous Government Conduct defense is recognized by a number of jurisdictions, both state and federal, but succeeds relatively rarely. I argue that, in line with the Minnesota appellate court’s opinion in *Burkland*, any sexual contact in paid-sex sting operations, performed either by undercover police officers or confidential informants, should be sufficient for a defendant to prevail on the defense.

II. PAID-SEX STING OPERATIONS THAT USE SEXUAL CONTACT BY LAW ENFORCEMENT OR CONFIDENTIAL INFORMANTS CONSTITUTE OUTRAGEOUS GOVERNMENT CONDUCT THAT VIOLATES DUE PROCESS

The Supreme Court should hold that sting operations where law enforcement officers or informants engage in sexual activity to enable prostitution arrests constitute Outrageous Government Conduct and therefore are violations of due process. Because of the intimate nature of sexual conduct, the uniquely vulnerable population targeted by paid-sex sting operations, and the government’s comparatively minor interest in enacting these operations, these kinds of paid-sex sting operations clearly “shock the conscience” and violate the Due Process Clause.

The Court need not reinvent the wheel to hold sexual activity in paid sting operations violates due process: in fact, the *Cuervelo* and *Nolan-Cooper* tests that govern this question in the Second and Third Circuits clearly show that sexual activity for paid-sex sting operations is Outrageous Government Conduct. Therefore, the Supreme Court need only adopt these lower-court tests to ensure no convictions stem from police or informant sexual relations with investigative targets in prostitution crimes. Alternatively, the Supreme Court can issue a bright-line rule that it violates the Due Process Clause for a government agent or informant to engage in sexual contact for the purposes of securing a prostitution or solicitation conviction.

A. Sexual Contact During Paid-Sex Sting Operations “Shocks the Conscience”

Due process in the Fifth and Fourteenth Amendments guarantees those rights that are fundamental, implicit in the concept of ordered liberty, and

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126 *Id.*

127 *The Cuervelo and Nolan-Cooper tests are set forth in Section II.C, infra.*
deeply rooted in our history and tradition.\textsuperscript{128} \textit{Rochin} and its progeny held that law enforcement conduct to obtain convictions may violate due process on its own, when the law enforcement action in question “shocks the conscience” or exceeds the bounds of fundamental fairness.\textsuperscript{129}

Law enforcement engaging in undercover paid sex or encouraging informants to do so in order to secure a prostitution or prostitution-related conviction exceeds the bounds of fundamental fairness because of the degrading nature of the intrusion, the limited ends of securing conviction, and because the police action is unnecessary to further those limited ends. It shocks the conscience because it targets vulnerable populations for the pleasure of police officers, and because the sexual contact subverts any reasonable basis for seeking paid-sex convictions in the first place.

1. Deceptive Sex Is a Unique Intrusion on Privacy, Bodily Integrity, and Autonomy Over Intimate Relationships

Twentieth-century Supreme Court jurisprudence makes it abundantly clear that sex is a uniquely personal and intimate function, and governmental regulation of it must be scrutinized extremely carefully.\textsuperscript{130} In the case of paid-sex sting operations, the government is not only regulating but directly engaging in sexual contact in order to charge individuals with the crime of prostitution.\textsuperscript{131} This should be scrutinized particularly closely because law enforcement is intruding on privacy to obtain evidence to be used in a criminal conviction, which amounts to the greatest possible restriction on liberty.\textsuperscript{132}

\textsuperscript{129} Rochin v. California, 342 U.S. 165, 172 (1952).
\textsuperscript{130} See, e.g., Lawrence v. Texas, 539 U.S. 558, 571-72 (2000) (noting that our country’s “laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (noting that the decisions relating to procreation are “the most intimate and personal choices a person may make in a lifetime”); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that regulation of contraceptives violated the Constitution by intruding on the “sacred precincts of marital bedrooms”).
\textsuperscript{131} For an argument that sexual contact with sex workers for the purpose of securing prostitution convictions violates sex workers’ due process right to bodily integrity, see Paula Del Valle Torres, Comment, \textit{Sexual Contact Between A Suspect and Police Officers: How Far Should Police Go to Prove Prostitution?}, 28 AM. U. J. GENDER SOC. POL’Y & L. 471, 484-87 (2020).
\textsuperscript{132} See Mesarosh v. United States, 352 U.S. 1, 14 (1956) (noting the Court’s duty is “to see that the waters of justice are not polluted,” because when they are, “[t]he government of a strong and free nation does not need [such] convictions”).
Unlike a typical substantive due process claim, paid sex is currently illegal. The government may consequently claim that the intrusion is justified by law enforcement need to ferret out illegal conduct, just like in the case of confidential informants buying drugs. But intrusions of privacy for the sake of law enforcement must be scrutinized as carefully as those for other reasons. In the words of Justice Brandeis,

it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.\footnote{Olmstead v. United States, 277 U.S. 438, 479 (1928).}

Sting operations that involve government operatives engaging in crime in order to prevent and punish crime are suspect from the outset. Even more ubiquitous sting operations, like buy and bust drug operations, have been criticized for causing serious third-party harms.\footnote{See e.g., Elizabeth E. Joh & Thomas W. Joo, Sting Victims: Third-Party Harms in Undercover Police Operations, 88 S. CAL. L. REV. 1309, 1311 (2015) (“Law enforcement agencies can structure undercover operations to control for potential harms, but not all harms can be prevented. Innocent third parties may be inadvertently victimized. For example, a street “buy and bust” gone wrong might lead to an exchange of gunfire and an injured innocent bystander.”).} Such operations may be undertaken to benefit police departments and government agencies by increasing conviction numbers even when they do not benefit public safety.\footnote{Id. at 1337-38.}

And it can be difficult to distinguish between sting operations that "reveal the criminal design" by ferreting out individuals that theoretically would have committed the crime in question with or without the sting, and those that target individuals who would not do so but for the operation.\footnote{See Bruce Hay, Sting Operations, Undercover Agents, and Entrapment, 70 MO. L. REV. 387, 402-11 (2005) (deriving a mathematical approach to determining how likely the target of a sting operation would have been to commit the crime in question without law enforcement inducement).}

Courts emphasize that the purpose of sting operations must be the former: “The function of the enforcement officials is to investigate, not instigate, crime; to discover, not to promote, crime.”\footnote{Patty v. Bd. of Med. Exam’rs, 508 P.2d 1121, 1126-27 (Cal. 1973).} But in reality, distinguishing between the two kinds of conduct can be impossible, and sting operations may both target and charge individuals who would not have committed the crime otherwise.\footnote{See, e.g., 486: Valentine’s Day: 21 Chump Street, THIS AM. LIFE, at 25-32 (Feb. 8, 2013), https://www.thisamericanlife.org/486/valentines-day/act-two-5 [https://perma.cc/MU5F-LzHS] (telling the story of a boy charged with a felony after procuring marijuana for a girl he had a crush on, who turned out to be an undercover police officer posing as a student).}
What’s more, the dangerous power dynamics when law enforcement intervenes in criminal enterprises can have far-reaching consequences.\(^{139}\)

Even accepting the premise that sting operations should be permissible in a classic drug “buy and bust” scenario, purchasing and engaging in sex is fundamentally distinct from buying drugs, most importantly because of the intent of the agent. An agent who receives drugs, unlike a civilian who receives drugs, has no intention to use those drugs for any personal benefit through use or sale. There would certainly be a problem with a police officer who engaged in a drug bust and then sold the drugs or pocketed them for his own use.\(^{140}\)

Although possession of a controlled substance is technically a crime,\(^{141}\) and an officer or confidential informant does possess that substance, it seems intuitive that the purpose of laws prohibiting possession is based ultimately in the use or distribution of controlled substances. An agent or confidential informant who receives drugs theoretically turns them into the police department immediately. Once again, if they did not do so, they would most certainly be subject to criminal prosecution. A paid-sex sting operation is significantly different, because by engaging in sex, agents are committing the very crime the statute prohibits for their own gain.

2. The Government Has Limited Interest in Using Paid-Sex Sting Operations to Enable Prostitution Prosecutions

When analyzing Outrageous Government Conduct, particularly in regard to sting operations, courts should consider the limited government interest in preventing the crime in question. Although government interest is not an explicit factor in the Supreme Court majority’s test for Outrageous Government Conduct, Outrageous Government Conduct is a constitutional

\(^{139}\) See Joh & Joo, supra note 134. Additionally, the Federal Bureau of Investigations has a history of planting undercover agents to take down organized crime rings, and the results have often looked more like the FBI promoting mob operations than curtailing them. See Patrick Radden Keefe, Assets and Liabilities: The Mobster Whitey Bulger Secretly Worked for the F.B.I. Or Was it the Other Way Around?, NEW YORKER (Sept. 14, 2015), https://www.newyorker.com/magazine/2015/09/21/assets-and-liabilities/amp [https://perma.cc/J4YC-HDK7] ("[The FBI] disclosed that in the prior year it had authorized informants to break the law on 5,939 occasions.").

\(^{140}\) Not that it doesn’t happen. See, e.g., Jeremy Roebuck, Former Philly Officer Sentenced to 9 Years for Selling Drugs Stolen by Corrupt Baltimore Police Squad, PHILA. INQUIRER (Apr. 29, 2019), https://www.inquirer.com/news/eric-snell-philly-police-corruption-gun-trace-task-force-baltimore-20190429.html [https://perma.cc/59DV-7P96] ("A former Philadelphia police officer was sentenced to nine years in prison Friday for conspiring with officers in Baltimore to sell cocaine and heroin seized from that city’s streets."). But police officers and undercover agents who break the law are hypothetically held to the same standard as ordinary citizens. Contra Heien v. North Carolina, 574 U.S. 54, 67 (2014) (holding that, although an ordinary citizen cannot avoid criminal liability because they misunderstand the law, police officers can justify investigatory stops based on misunderstandings of the law).

\(^{141}\) See, e.g., 21 U.S.C. § 844.
protection, and constitutional protections (particularly the most nebulous ones) frequently involve analyzing the importance of the government interest, even when the court is not explicit that it is doing so.\textsuperscript{142} Justice Powell, in his \textit{Hampton} concurrence, hinted that government interest is important in a due process determination, by arguing that the serious danger of drug rings warranted more latitude for police undercover operations into them.\textsuperscript{143} Additionally, circuit courts have stated that the nature of the crime and therefore necessity of the sting operation are important factors in an Outrageous Government Conduct analysis.\textsuperscript{144}

An analysis of the government interests at play clarifies a number of important factors that weigh against paid-sex sting operations where officers engage in sexual contact with the target. First, engaging in sexual intercourse during sting operations is utterly unnecessary to secure a conviction.\textsuperscript{145} Second, allowing for sexual contact in paid-sex sting operations creates dangerous incentives in a culture where police sexual violence is already a tremendous problem.\textsuperscript{146} And finally, paid-sex sting operations do nothing to advance protection for the vulnerable victims whose protection is touted as the reason for criminalizing paid sex in the first place.\textsuperscript{147}

a. Engaging in Sexual Contact Is Unnecessary to Secure a Prostitution Conviction

Courts have considered “the need for the investigative technique that was used in light of the challenges of investigating and prosecuting the type of crime being investigated.”\textsuperscript{148} Sexual contact occurring in paid-sex sting operations is not needed to limit paid sex.

First, engaging in sexual contact or encouraging engagement in sexual conduct is absolutely unnecessary to secure a prostitution conviction. The laws are \textit{built} for prostitution arrests absent sexual conduct, because typically

\begin{itemize}
  \item \textsuperscript{142} See Stephen E. Gottlieb, \textit{The Paradox of Balancing Significant Interests}, 45 HASTINGS L.J. 817, 826 (1993) (“[I]nterests find their way into virtually every theory of constitutional law. The failure to identify their presence only serves to protect their power.”).
  \item \textsuperscript{143} \textit{Hampton v. United States}, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring) (“One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic . . . which is one of the major contributing causes of escalating crime in our cities. . . . Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity.”).
  \item \textsuperscript{144} See, e.g., United States v. Black, 733 F.3d 294, 303 (9th Cir. 2013) (listing factors in Outrageous Government Conduct analysis, including “the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue”); United States v. Twigg, 588 F.3d 373, 378 n.6 (3d Cir. 1978) (“[T]he court must consider the nature of the crime and the tools available to law enforcement agencies to combat it.”).
  \item \textsuperscript{145} See infra sub-subsection II.A.2.a.
  \item \textsuperscript{146} See infra sub-subsection II.A.2.b.
  \item \textsuperscript{147} See infra sub-subsection II.A.2.c.
  \item \textsuperscript{148} \textit{Black}, 733 F.3d at 309.
\end{itemize}
prostitution and its parallel offense, solicitation, allow officers to charge individuals either when they are engaging in paid sexual intercourse or offering to do so. 149 There is no argument for committing an undisputed crime at the expense of an investigation's target when the same conviction can be secured without it. "If the police are going to arrest a suspected prostitute, go ahead and make the arrest—but do not sport with her." 150

Second, if the law enforcement goal is strictly reduction of the sale of sex, the police can instead engage in no-contact sting operations targeting men who are buying sex instead of people who are selling it. Studies have shown that arresting so-called “Johns” instead of sex workers was significantly more effective in reducing sex sales. 151 This approach is less likely to target low-income women of color, and trans and gender-nonconforming people of color, which paid-sex sting operations and policing in general does. 152

b. Agents or Informants Who Engage in Sexual Contact for Purposes of Paid-Sex Stings Have Inappropriate and Dangerous Incentives

Paid-sex sting operations enable a power dynamic conducive to law enforcement abuse. In Commonwealth v. Sun Cha Chon, the informant intended

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149 See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-14 (West 2012) (defining Prostitution in Illinois law as “knowingly perform[ing], offer[ing] or agree[ing] to perform any act of sexual penetration”); ME. REV. STAT. ANN. tit. 17-A, § 851(1) (West 2019) (“Prostitution’ means engaging in, or agreeing to engage in, or offering to engage in a sexual act or sexual contact.”); N.Y. PENAL LAW § 230.00 (Consol. 2020) (“A person is guilty of Prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.”); N.C. GEN. STAT. § 14-203(5) (2019) (defining prostitution under North Carolina law as “[t]he performance of, offer of, or agreement to perform” sexual acts for payment); TEX. PENAL CODE ANN. § 43.02(a) (West 2019) (describing prostitution as “knowingly offer[ing] or agree[ing] to receive a fee from another to engage in sexual conduct”); WASH. REV. CODE § 9A.88.030 (2020) (defining prostitution as “engag[ing] or agree[ing] or offer[ing] to engage in sexual conduct with another person in return for a fee”). When the statute is not explicit that agreement to perform prostitution is sufficient for conviction, state courts most often have found it to be so. See, e.g., Commonwealth v. Potts, 460 A.2d 1127, 1135 (Pa. Super. Ct. 1983) (holding that even though the Pennsylvania statute defining Prostitution is not explicit, Prostitution clearly “encompasses an agreement to perform” sexual acts for hire). For further discussion of the variation among state Prostitution laws, see Prostitution and Sex Workers, 8 GEO. J. GENDER & L. 355, 356-60 (2007).


to pay for sex even prior to agreeing to participate in the sting operation.\(^\text{153}\) And even if officers or confidential informants do not set out to pay for sex, when they do anyway, they are fundamentally benefiting from sexual pleasure in the interaction. In cases like *Chon*, undercover agents benefit twice: they engage in sexual activity, and they receive payment. But even without overt payment, police and agents who stand to gain at the expense of investigation targets should be included in Outrageous Government Conduct when it is fundamentally unnecessary for the investigation, because it creates dangerous incentives.

In addition to the sexual benefit, the power dynamic between officers and investigative targets in a sexual transaction is inappropriate and dangerous. It is all too easy to imagine the abuses of power that could (and do) occur: officers have the incentive to selectively target women they want to have sexual intercourse with and to extort or force sex.\(^\text{154}\) State-sanctioned sexual activity between police and those who are targets of their investigation—particularly those who are women, people of color, and LGBTQ+—is a recipe for state-sanctioned egregious misconduct.\(^\text{155}\) It is also worth noting that when officers engage in undercover sting operations intended to target “Johns” rather than sex workers, incidents involving sexual contact are “extremely rare,”\(^\text{156}\) suggesting that sexual contact is more related to officer preference than necessity.\(^\text{157}\)


\(^{155}\) See RACHEL SWANER, MELISSA LABRIOLA, MICHAEL REMPIL, ALYXON WALKER & JOSEPH SPADAFORE, *YOUTH INVOLVEMENT IN THE SEX TRADE: A NATIONAL STUDY 6* (2016), https://www.courtinnovation.org/sites/default/files/documents/Youth%20Involvement%20in%20the%20Sex%20Trade_3.pdf [https://perma.cc/3BD-VYYK] (finding that in 2009, around 80% of nationwide arrestees for prostitution were women, and 55% of arrests of under-18-year-olds, and 43% of arrests between 18 and 24-year-olds, were black); id. at xi (“Trans females (37%) were significantly more likely than cis males (12%) or cis females (17%) to report a prior prostitution arrest and at least three times more likely to report a prostitution arrest in the past year (30% v. 9% v. 10%).”); David E. Kanouse, Sandra H. Berry & Naihua Duan, *Drawing a Probability Sample of Female Street Prostitutes in Los Angeles County*, 37 J. SEX RESCH. 45, 49 (1999) (finding only 17% of sex worker respondents in a probability sample of female sex workers were white).

\(^{156}\) GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* 17 (1988).

\(^{157}\) See Phillip Walters, *Would a Cop Do This: Ending the Practice of Sexual Sampling in Prostitution Stings*, 29 LAW & INEQ. 451, 472 (2011) (arguing that “the discrepancy in how stings involving female undercover officers and same-sex encounters are handled” may be attributable to the homophobic hypermasculine police culture and to the fact that “officers do not want to engage in sexual activity with suspected Johns”).
These scenarios are not hypothetical: even outside of paid-sex sting operations, law enforcement sexual assault is already far too common.158 When the Department of Justice investigated the Baltimore Police Department, one report found that sexual misconduct was the second most common form of reported police misconduct.159 In 2016, the Department of Justice reported that multiple Baltimore officers targeted people involved in the sex trade “to coerce sexual favors . . . in exchange for avoiding arrest, or for cash or narcotics.”160 Officers in numerous other states have also been convicted of extorting sex from women in exchange for dropping charges, often specifically targeting women of color and sex workers.161 In addition, officers who are charged with sexual violence have disturbingly high rates of recidivism.162 The well-documented “cult of masculinity” in policing that encourages and enables law enforcement sexual violence suggests that this behavior will continue.163 And even apart from police culture or individual officer motivations, police work is inherently rife with opportunities for police sexual violence: from the vulnerability of the citizens they engage with,

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158 See id. (quoting an expert who explained that “[t]he reality of some police having sex with sex workers during the course of undercover operations has been in existence as long as selling sex has been a criminal offense”).


161 See, e.g., Sean Murphy, Ex-Oklahoma Officer Gets 263 Years for Rapes, Sex Assaults, ASSOC. PRESS (Jan. 21, 2016), https://apnews.com/4bc0e001c2604c2e9570d83f244e08e/ex-oklahoma-officer-be-sentenced-rape-sex-crimes [https://perma.cc/F755-8MTC] (telling the story of a police officer who raped and sexually victimized Black women who he suspected of being addicted to drugs or working in the sex trade); Matt Hamilton, Two LAPD Officers Plead No Contest to Sexually Assaulting Women While on Duty, Receive 25-Year Prison Terms, L.A. TIMES (Feb. 26, 2018, 4:35 PM), https://www.latimes.com/local/lanow/la-me-ln-lapd-officers-rape-plea-20180226-story.html [https://perma.cc/PUJ4-P5Y5] (describing how two LAPD officers pled no contest to allegations of extorting sex from women arrested or serving as informants related to drug crime); Kelly Mena, Ex-Cops Once Accused of Rape Sentenced to 5 Years Probation, BROOKLYN DAILY EAGLE (Oct. 10, 2019), https://brooklyneagle.com/articles/2019/10/10/ex-cops-once-accused-of-rape-sentenced-to-5-years-probation [https://perma.cc/TUS8-RLFR] (describing how two Brooklyn police officers were sentenced to five years’ probation after they had sex with a 19-year-old in custody for marijuana possession).

162 See Cara E. Rabe-Hemp & Jeremy Braithwaite, An Exploration of Recidivism and the Officer Shuffle in Police Sexual Violence, 16 POLICE Q. 127 (2012) (finding that 41% of police sexual violence cases were committed by officers who had prior accusations of sexual violence, and that those recidivist officers had on average four victims each).

163 See Peter B. Kraska & Victor E. Kappeler, To Serve and Pursue: Exploring Police Sexual Violence Against Women, 12 JUST. Q. 83, 91 (1995) (discussing research into sexism in police culture and comparing law enforcement to other male-dominated organizations); Walters, supra note 157 (“[T]he tendency for sexual conduct to occur in prostitution stings involving interactions between male officers and women engaged in prostitution may be better understood as an issue of power and gender rather than one of law enforcement necessity.”).
to the coercive power of an officer’s ability to arrest and charge, to the lack of immediate on-the-job oversight. Giving officers the power to engage in sexual contact in paid-sex sting operations only serves as state-sanctioned police sexual violence, and creates an environment where it is even more difficult for victims of law enforcement rape and sexual misconduct to seek a remedy. The government’s interest should be in eliminating law enforcement sexual violence, rather than creating situations in which it can thrive.

**c. Paid-Sex Sting Operations are Unsupported by Predominant Arguments for Criminalization of Paid Sex**

Paid-sex sting operations do not further the goals that supposedly justified criminalizing paid sex in the first place. When laws criminalizing paid sex were initially passed over a century ago, they were based in religious views of “morality”¹⁶⁵ and utilized morality-centric language. Over time the language of social morality was removed,¹⁶⁶ but instead pro-criminalization arguments today focus entirely on the need to protect vulnerable women in the sex trade.¹⁶⁷ Rather than attacking sex sellers, the movement against

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¹⁶⁵ See Prostitution and Sex Workers, 8 GEO. J. GENDER & L. 355–56 (noting that morality concerns among religious groups and women’s societies in the late nineteenth century contributed to some states regulating and eventually banning prostitution).

¹⁶⁶ For example, the stated purpose of the 1910 White Slave Traffic Act, more commonly known as the Mann Act, was to combat forced prostitution, but it was utilized (and upheld by the Supreme Court) to prosecute all measures of immoral sexual behavior, even consensual sex. See Eric Weiner, The Long, Colorful History of the Mann Act, NPR (Mar. 11, 2008, 2:00 PM), https://www.npr.org/templates/story/story.php?storyId=88104308 (https://perma.cc/UCM8-W62F); Caminetti v. United States, 242 U.S. 470, 485-86 (1917) (stating that the Mann Act prohibits the transportation of women through interstate commerce for the purpose of engaging in immoral practices and implying that consensual sex qualifies as such a practice); Ariela R. Dubler, Immoral Purposes: Marriage and the Genus of illicit Sex, 115 YALE L.J. 756, 793 (2006) (explaining how Caminetti found that the language of the Mann Act “clearly included this broader swath of immoral sexual behavior”). The Act resulted from widespread “moral panic” around the imaginary crisis of white slavery, which was based on “sensationalized stories of innocent girls kidnapped off the streets by foreigners, drugged, smuggled across the country and forced to work in brothels.” Weiner, supra.

Initially the Mann Act was explicit in its moral underpinnings, making it illegal to transport women interstate “for the purpose of prostitution or debauchery, or for any other immoral purpose.” 36 Stat. 85, 825 (1910) (codified at 18 U.S.C. § 2421). In 1986, Congress amended the Mann Act to eliminate the language of “debauchery” and “immoral purpose,” so that instead the law forbade interstate transport with intent to engage in “prostitution, or in any sexual activity for which any person can be charged with a criminal offense.” Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5(b), 100 Stat. 3511 (1986).

decriminalization points to incidents of sex trafficking and violence,¹⁶⁸ and equivocates paid sex with rape or sexual assault because of the power dynamic between seller and purchaser.¹⁶⁹ This language comes from politicians, authors, activists, and opponents to decriminalization on both the political left and the right.¹⁷⁰

With this rationale for maintaining laws criminalizing paid sex, both advocates and opponents of decriminalization should condemn paid-sex sting operations that involve sexual contact. For law enforcement to engage in sex in order to secure criminal convictions inflicts the very social ill that advocates for criminalization claim to oppose. The debate around prostitution laws is


¹⁷⁰ Progressive and feminist thinkers like Andrea Dworkin and Catharine McKinnon oppose paid sex as the ultimate tool of oppression of women. See Catharine A. MacKinnon, Prostitution and Civil Rights, 1 MICH. J. GENDER & L. 13, 13 (1993) (“Women are prostituted precisely in order to be degraded and subjected to cruel and brutal treatment without human limits . . . .”); Andrea Dworkin, Pornography and the New Puritans, N.Y. TIMES (May 3, 1992), https://archive.nytimes.com/www.nytimes.com/books/97/06/15/lifeetimes/2588q.html [https://perma.cc/ZU6F-WT9Z] (using the imagery of a “woman latched naked on a tree, or restrained with ropes and a ball gag in her mouth” to describe Dworkin’s view of the confines of prostitution). Since the early 1990s Republican lawmakers have relied on narratives of vulnerable women forced into sex slavery to pass legislation that ultimately served only to arrest and charge those women themselves. See Hallie Lieberman, Why Laws to Fight Sex Trafficking Often Backfire, WASH. POST (Mar. 4, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/03/04/why-laws-fight-sex-trafficking-often-backfire [https://perma.cc/4ZTE-S38P] (noting that the Mann Act was passed in 1910 to “protect women from being forced into prostitution,” but in the first four years 71% of the convictions it brought were of sex workers). A modern law, the Fight Online Sex Trafficking Act (FOSTA) of 2017, has been analogized to the Mann Act because advocates on both sides of the political aisle argued that it would protect vulnerable women; once passed, it has been criticized for “directly endanger[ing] individuals who perform commercial sexual services.” Lura Chamberlain, FOSTA: A Hostile Law With a Human Cost, 87 FORDHAM L. REV. 1271, 2203-04 (2019); see also Lieberman, supra, at 3 (arguing that “FOSTA’s development has been eerily similar to the Mann Act’s” because both are based in racism and carry a tremendous cost to the purported victims they claim to protect).
intensely divisive and does not fall along traditional party lines. But given the widespread agreement on both sides that policy and legislation surrounding paid sex should focus on supporting and protecting those on the selling side, no advocate of decriminalization or criminalization should support the police tactics at issue in this piece.

3. State Court Decisions Denying Defendants’ Outrageous Government Conduct Claims in Transactional Sex Sting Operations Must be Reexamined in Light of Changing Societal Circumstances

The “shocks the conscience” test—and substantive due process as a concept—depends on the collective conscience and the normative views of society at the time. Therefore, what shocks the conscience “is bound to fall differently at different times” as it evolves. Consequently, change in societal views may necessitate revisiting the application of the Due Process Clause.

Opponents of an Outrageous Government Conduct defense in paid-sex sting operations have plenty of state court decisions to bolster their arguments. Most of these decisions are at least thirty years old, however, and are noticeably antiquated in their arguments and holdings. For example, State v. Emerson is a case out of Washington State in which the court held that a paid-sex sting operation involving sexual intercourse did not violate the Due Process Clause. The defendant in Emerson was convicted under a law that forbade acting as a “common prostitute.” The law defined “common prostitute” as “a woman who offered her body for indiscriminate sexual intercourse with more than one man,” regardless of whether she received payment. To determine whether a woman was a “common prostitute” by law, juries were to “consider [a woman’s] general conduct and all other circumstances... tending to show...

172 Although this argument assumes that criminalization advocates make victimization arguments in good faith, it does not require it. Insidious motivations such as racism, homophobia, and transphobia certainly underlie a great deal of the sex work debate, but this animus cannot justify a government interest in maintaining paid-sex sting operations, implicitly or explicitly.
173 See Rochin v. California, 342 U.S. 165, 170-71 (1952) (“To believe that this judicial exercise of judgment could be avoided by freezing ‘due process of law’ at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges...”).
174 See supra note 122.
175 Id.
177 State v. Zaunich, 593 P.2d 1314, 1321 (Wash. 1979) (Stafford, J., dissenting) (emphasis omitted).
whether or not she so holds herself out to the public." The court in *Emerson* cited to a prior ruling that expanded further, saying: "[i]f a woman by words or acts or by any device invites and solicits and submits to indiscriminate intercourse, she is a common prostitute."  

Importantly, many of the laws, like those in *Emerson*, that dictated those antiquated and blatantly sexist views have changed, as has enforcement of those laws. State courts in the 1960s and 1970s were operating in a world with a very different set of moral, legal, and ethical assumptions than state court judges are today. And even while mired in those antiquated attitudes, more often than not these courts still did not approve of police engaging in sex during sting operations, even while saying these actions were technically constitutional.

Because of the drastic changes in societal views on paid sex and police tactics, these state court decisions need not inform our views today about what constitutes Outrageous Government Conduct. Instead, more recent court decisions like *Chon* and *Burkland* should be foregrounded. I do not argue that we should pick and choose state court decisions based on whether or not they come out in favor of the Outrageous Government Conduct defense: rather, that we should follow the Supreme Court’s exact prescriptions about how to apply the Due Process Clause.

In *Rochin*, Justice Frankfurter called the Due Process Clause “the least specific and most comprehensive protection of liberties." Unlike other fixed constitutional protections, the Due Process Clause requires judges to make decisions that are based on “interests of society,” that are not “final and fixed,” and that are “bound to fall differently at different times." Essentially, the Due Process Clause allows for flexibility over time—and what’s more, it may actually require it. *Chon* and *Burkland* represent court decisions made in the

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178 *Emerson*, 517 P.2d at 247 (citing State v. Thuna, 59 Wash. 689, 690 (Wash. 1910)).
179 *Thuna*, 109 P. at 331.
180 The law defining and criminalizing acting as a "common prostitute" has been repealed. WASH. REV. CODE § 9.70.060 (1973). Washington's new Prostitution laws instead criminalize only "engag[ing] or agree[ing] or offer[ing] to engage in sexual conduct with another person in return for a fee." WASH. REV. CODE § 9A.88.030 (2020).
182 See, e.g., State v. Tookes, 699 P.2d 983, 987 (Haw. 1985) (noting that despite the constitutionality of police engaging in sex during a Prostitution sting operation, "we question whether the actions of . . . the police in this case comport with the ethical standards which law enforcement officials should be guided by"); *Emerson*, 517 P.2d at 249 ("[O]ur opinion should not be misconstrued as a moral endorsement of the means employed to obtain the evidence used . . . .").
184 Id. at 170-71.
185 See generally, Lawrence Rosenthal, Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets, 60 OKLA. L. REV. 1, 2 (2007) (arguing that the
Due Process Clause cannot be viewed with an originalist interpretation and must therefore be viewed as a delegation of authority to courts to define and apply “due process” as a concept.

186 Prostitution is a misdemeanor under Washington law, which carries a potential penalty of ninety days in jail and a fine of $1,000. See WASH. REV. CODE § 9A.20.010 (2020) (“Any crime punishable by a fine of not more than one thousand dollars, or by imprisonment in a county jail for not more than ninety days, or by both such fine and imprisonment is a misdemeanor.”); id. § 9A.88.030 (“Prostitution is a misdemeanor.”).


twenty-first century, in light of society’s evolving normative standards in regard to due process. The drastic changes in attitudes towards criminalization and responses to the sex trade merit reexamining the question of Outrageous Government Conduct.

These changing attitudes have already taken root in policy changes. In Washington State, for example, although prostitution remains a crime, the Seattle police department has stopped arresting people suspected of sex sales and instead drives them to counseling. Powerful organizations like Amnesty International have supported completely decriminalizing paid sex, as have high-profile political candidates and the current Vice President. Recent polls show that a majority of Americans favor decriminalization, and that support is highest among voters between the ages of eighteen and forty-four, across all political identifications, suggesting that “[a]ge may be an even stronger predictor of support for decriminalizing sex work than political party.” This data shows that attitudes about paid sex have changed significantly since the 1960s and 1970s. The courts’ definition of due process can and must change along with it. Even without decriminalization, the mere fact that a majority of Americans do not support arrest or conviction for the
crime of prostitution fatally undermines police justifications for elaborate sting operations to target paid sex.

B. Entrapment Is an Inadequate Substitute for the Outrageous Government Conduct Defense

The defense of subjective entrapment as it currently stands is no substitute for the Outrageous Government Conduct defense in paid-sex sting operations because, in the majority of jurisdictions, a finding of predisposition defeats any entrapment claim.\textsuperscript{190} Therefore, when an individual is targeted by law enforcement, evidence of predisposition can render an entrapment defense impossible \textit{no matter the egregiousness of officer misconduct}.\textsuperscript{191} Some have called Outrageous Government Conduct cases “extreme entrapment” because both involve police conduct that goes overboard.\textsuperscript{192} But entrapment’s predisposition element undermines one of the defense’s purported goals: deterring outrageous conduct.\textsuperscript{193} The entrapment defense seems, in part, based on the idea that inducing someone to commit a crime is \textit{itself} wrong. But predisposition muddies this idea by focusing the defense on the actions and prior record of the criminal defendant, rather than the law enforcement officer.\textsuperscript{194} If Outrageous Government Conduct as a defense was, in fact, an outgrowth of entrapment, the same problem might occur. But unlike entrapment, Outrageous Government Conduct is a test based in the Bill of Rights, and a question of due process must focus on the behavior of government agents.\textsuperscript{195} Even in a case where a defendant was undoubtedly predisposed, the Constitution cannot allow courts to turn their

\textsuperscript{190} See \textit{e.g.}, United States \textit{v.} Russell, 411 U.S. 423, 436 (1973) (“Respondent’s concession … that the jury finding as to predisposition was supported by the evidence is, therefore, fatal to his claim of entrapment.”).


\textsuperscript{193} See T. Ward Frampton, \textit{Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine}, 103 J. CRIM. L. & CRIMINOLOGY 111, 113 (2013) (noting that under predisposition, “[f]actors like the nature or size of the inducement, the complexity of the government artifice, or the independent capacity of the defendant to commit the crime are largely irrelevant . . . rather, the controlling question is whether the defendant is a person otherwise innocent . . .” (internal quotation marks omitted)).

\textsuperscript{194} See Andrew Carlon, \textit{Note, Entrapment, Punishment, and the Sadistic State}, 93 VA. L. REV. 1081, 1088 (2007) (describing how the entrapment test allows the court to explore “the defendant’s character, prior bad acts, and other otherwise traditionally irrelevant and prejudicial evidence”).

\textsuperscript{195} See Michael O. Zabriskie, \textit{If the Postman Always ‘Stings’ Twice, Who Is the Next Target?—An Examination of the Entrapment Theory}, 19 J. CONTEMP. L. 217, 225-27 (1993) (describing that the conduct of law enforcement agents can be evaluated under a due process analysis).
backs on egregious police misconduct. The Rochin court did not mention Antonio Rochin’s undeniably illegal actions, or the potential danger of the crime.\textsuperscript{196} Instead, it faced horrific law enforcement overreach and said: this shall not stand.\textsuperscript{197} Subjective entrapment in its current form cannot do that, which makes it an inadequate substitute for an Outrageous Government Conduct defense in paid-sex sting operations.

Objective-approach entrapment could theoretically solve this problem by presenting an entrapment defense without a predisposition requirement. But because entrapment has no basis in the Constitution, it cannot protect individuals in subjective-approach jurisdictions from outrageous government action without a due process defense. As a federal constitutional defense recognized by the Supreme Court, Outrageous Government Conduct would protect all defendants who are targeted by outrageous misconduct by government agents. Defendants who are not able to put forward an entrapment claim could still successfully argue their due process rights were violated by Outrageous Government Conduct.\textsuperscript{198}

C. The Cuervelo and Nolan–Cooper Tests Currently in Effect Clearly Prohibit Sexual Contact by Law Enforcement for the Purposes of Inducing a Crime of Prostitution

Some commentators have advocated for a bright-line rule that a government agent engaging in sex with the target of an investigation is Outrageous Government Conduct.\textsuperscript{199} However, courts across the country have rejected this view, finding that there are instances when a government agent or informant engages in sexual relations with a target that do not violate the target’s due process rights.\textsuperscript{200} Those cases focus primarily on a different kind of sexual inducement, best illustrated by the case of United States v. Cuervelo.\textsuperscript{201}

\textsuperscript{196} See generally Rochin v. California, 342 U.S. 165, 172 (1952) (focusing discussion on law enforcement conduct rather than on the defendant’s conduct).

\textsuperscript{197} See id. at 172 (“[W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.”).

\textsuperscript{198} United States v. Cuervelo, 949 F.2d 559, 565 (2d Cir. 1991).

\textsuperscript{199} See Urbansky, supra note 192, at 732 (calling for “a new rule that any sexual relationship between a government agent and the target of an investigation which advances to the point of sexual intercourse is a per se violation of the target’s due process rights”).

\textsuperscript{200} See, e.g., United States v. Simpson, 813 F.2d 1462, 1466 (9th Cir. 1987) (“[T]he deceptive creation and/or exploitation of an intimate relationship does not exceed the boundary of permissible law enforcement tactics.”); United States v. Nolan-Cooper, 155 F.3d 221, 245 (3d Cir. 1998) (concluding that a one-time sexual intercourse between a government agent and the defendant was not a violation of due process); United States v. Miller, 891 F.2d 1265, 1268 (7th Cir. 1989) (finding that a sexually intimate relationship between a government informant and the target of a drug investigation did not constitute truly Outrageous Government Conduct).

\textsuperscript{201} For an in-depth discussion of the Cuervelo case and test, see supra Section II.C.
Under the Cuervelo test, sexual contact in a paid-sex sting operation clearly violates the Due Process Clause. In fact, any case where law enforcement engages in sexual relations—or induces a confidential informant to engage in sexual relations—for the purpose of securing a prostitution conviction fits squarely in the realm of illegal conduct under Cuervelo.

The first requirement of Cuervelo is “that the government consciously set out to use sex as a weapon in its investigatory arsenal or acquiesced in such conduct for its own purposes upon learning that such a relationship existed.”202 When the government engages in sexual relations with an investigative target and the end goal is to secure a charge of prostitution, there is no doubt that the sex is being used as a weapon to achieve that goal. The only potential leeway here is Cuervelo’s language that government agents “acquiesced in such conduct for its own purposes upon learning that such a relationship existed”;203 in a hypothetical case involving a confidential informant, perhaps the government could claim not to know the encounter crossed into a sexual relationship. But under Nolan–Cooper, the Third Circuit adapts this test to include any conduct the government knew or should have known was occurring.204 This adaptation closes the loophole somewhat, essentially requiring that the police brief confidential informants that they are not permitted to engage in sexual conduct and take steps to ensure that this will not occur. And in cases like Chon, where police instructed the informant to “go ahead and have sex,” there is no doubt that the first prong is met.205

The second prong, that the government agent initiated a sexual relationship, or allowed it to continue to exist, to achieve governmental ends, is also clearly met.206 When government agents engage in a sexual relationship to obtain a conviction, they achieve the government ends of law enforcement and securing convictions for illegal acts. When they permit a confidential informant to do so, the same conclusion proceeds.

The final prong of Cuervelo is that the sexual relationship took place during or close to the period covered by the indictment and was entwined with the events charged therein.207 This is perhaps the clearest of all. When the indictment itself charges sexual conduct, the sexual conduct charged is without a doubt covered by the indictment.

Under the Cuervelo and Nolan–Cooper tests, the government action in Chon is outrageous. And although both the trial and appellate courts cited some of the more egregious, horrifying facts from the case—for example, that the police

202 Cuervelo, 949 F.2d at 567.
203 Id.
204 Nolan–Cooper, 155 F.3d at 233.
206 Cuervelo, 949 F.2d at 567.
207 Id.
officers laughed and joked with the informant about the sex, and that the informant claimed to be “offended” by the acts and then happily went through with them anyway— the test clearly prohibits any case of police or undercover informants engaging in sexual contact for the purpose of charging prostitution.

D. The Supreme Court Should Either Issue a Bright-Line Rule that This Conduct Is Outrageous or Adopt the Cuervelo/Nolan–Cooper Limits that Ensure it Will Be

As it stands now, numerous jurisdictions have no bar on police engaging in sexual acts or inducing informants to do so for the purpose of obtaining prostitution charges. If entrapment is unavailable because of predisposition, and the jurisdiction either does not recognize an Outrageous Government Conduct claim or has a prohibitively high bar to doing so, vulnerable people who will be targeted by these actions are placed at risk of conviction and due process violations based on egregious law enforcement tactics.

Courts have options to make clear that this conduct is unacceptable and protect the public from convictions based on outrageous government conduct. First, they can issue a bright-line rule: when a government agent or informant has sexual contact for the purposes of securing a prostitution or solicitation conviction, that is the outrageous government action contemplated by Hampton and Sherman. Second, they can adopt the test laid out in Cuervelo and Nolan–Cooper to define the scope of permissible sexual conduct between government agents and investigative targets. Finally, they can put forth any new definition of Outrageous Government Conduct that ensures law enforcement is prohibited from engaging in paid sex to secure a prostitution or prostitution-related conviction.

III. WITHOUT THE DEFENSE, WHAT ARE OUR OPTIONS?

Without Supreme Court guidance, advocates in states can push for local legislation that will criminalize this action. For example, in jurisdictions that currently operate without an Outrageous Government Conduct defense, or where it is prohibitively difficult to prove, local lawmakers and organizers have worked to supplement or replace it.

One option is criminalizing specific law enforcement activity, so that even if criminal defendants are unable to invoke the Outrageous Government Conduct defense, police can be prosecuted. It is worth noting that these solutions can work in tandem: even in a jurisdiction where the Outrageous Government Conduct defense is accessible, it could still be valuable to have

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208 Chon, 983 A.2d at 790.
209 See infra notes 210–212.
an option to prosecute law enforcement. However, even with prosecution of police officers, targets of investigation could potentially still be prosecuted and face jail time, even if the officer goes on to be charged as well.

In Pennsylvania, for example, there is currently no criminal ban on law enforcement officers having sexual contact with a person in their custody, and an officer accused of sexual assault can claim consent as a full legal defense. Legislation has been introduced in both Pennsylvania legislative houses to criminalize all sexual contact between an officer and an individual in custody. The legislation, entitled “No Consent in Custody,” was introduced in the Pennsylvania Senate by Senator Katie Muth, who argued that because of the power imbalance between an officer and the person in their custody, “there cannot be consent when you are in the custody of law enforcement.”

Notably, however, the proposed legislation and its successful counterparts in other states would not protect a target of a paid-sex sting operation, who would not be in the custody of police when the sexual act occurred. Shea Rhodes, a Pennsylvania attorney, and advocate for victims of commercial sexual exploitation, advocates instead for a more comprehensive statute entitled “sexual assault by peace officer” that would apply not only to people in custody, but to anyone being investigated by the peace officer at the time.

Under a statute of this kind, the state would be able to prosecute an officer who engaged in sexual acts with a person who was the target of a prostitution sting, and face jail time, even if the officer goes on to be charged as well. However, even with prosecution of law enforcement officers, targets of investigation could potentially still be prosecuted and face jail time, even if the officer goes on to be charged as well.

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211 Currently, Pennsylvania law criminalizes “institutional rape,” which is defined as sexual contact between a corrections officer or mental health professional and an inmate, detainee, patient, or resident. 18 PA. CONS. STAT. § 3124.2. The introduced bills would amend this provision to add “peace officers” to the list of potential perpetrators of institutional rape. See 2019 Pa. Laws 1164.


213 Telephone Interview with Shea Rhodes, Esq., Director and Co-Founder of the Villanova Law Institute to Address Commercial Sexual Exploitation (Jan. 30, 2020).
CONCLUSION

The Pennsylvania Superior Court put an important check on outrageous government action in Commonwealth v. Sun Cha Chon.214 But the actions taken by police in cases like it continue.215 Particularly when officers investigate crimes like prostitution, and disproportionately target low-income, nonwhite, and female, trans, and nonbinary people, government resources must not be utilized to engage in sexual contact to secure convictions. Not only is it inappropriate and unnecessary for convictions, continuous reports of police sexual violence prove that this power cannot and must not be trusted to law enforcement. The Due Process Clause enables us to curb the tremendous power at the government’s disposal when it “shocks the conscience,”216 and protect vulnerable citizens from outrageous abuse at the hands of law enforcement.
